Le 'fiqh francisé'?:
Muslim personal status law reform and women's litigation in colonial Algeria (1870-1930)

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Abstract

This thesis examines Muslim personal status law reform and family litigation in colonial Algeria from the advent of the French Third Republic until the centenary of the colonial presence (1870-1930). By focusing on this largely overlooked era in Algerian history, and through the use of untapped judicial archives, this dissertation dislodges a number of assumptions about the consolidation and operation of French colonial power after 1870 that have been projected in both French and Algerian memory. This study revises our understanding of the deployment of colonial law as a field of knowledge and power by, first, framing the evolution of "Muslim personal status law" within a wider Muslim Mediterranean sphere of influence, and second, by bringing to light the experiences of non-elite Algerian women and their impact on these processes. Though I examine the elaboration of colonial Algeria's heterogeneous legal system as it emerged through a triangular relationship between French administrators, Islamic legal modernizers, and colonized subjects, my analysis is mainly guided by the experiences and perspectives of the latter. This argument follows two streams: the first uses legal, political, and intellectual historical methodologies to demonstrate how the "Muslim family" was produced as an object of knowledge and governance through the construction of "Muslim personal status" law under the colonial legal regime. The second uses social historical approaches to analyze the ways in which colonized subjects navigated these encounters between French, customary, and Islamic legal regimes and discourses as they descended "from above," and highlights their influence on colonial law "from below." This study thus elucidates the interplay that took place between the wider forces of "family" law reform and the interests and arguments of Muslim litigants, particularly women, as they were mediated by colonial courtrooms.

Résumé

Cette thèse examine la réforme de la loi sur le statut personnel musulman et les contentieux familiaux dans l'Algérie coloniale de l'avènement de la Troisième République française jusqu'au centenaire de la présence coloniale (1870-1930). En se concentrant sur cette époque largement négligée dans l'histoire algérienne, et grâce à l'utilisation d'archives judiciaires inexploitées, cette thèse remet en question un certain nombre de présupposés qui ont été projetés dans la mémoire collective française et algérienne au sujet de la consolidation et du fonctionnement de la puissance coloniale française après 1870. Cette étude révise notre compréhension du déploiement du droit colonial comme un champ de savoir et de pouvoir, en recadrant, d'une part, l'évolution de la « loi sur le statut personnel musulman » au sein d'une plus large sphère d'influence musulmane en Méditerranée. D'autre part, elle met en lumière les expériences des femmes algériennes qui n'appartiennent pas à l'élite ainsi que l'impact, indûment oublié, qu'elles ont eu sur ces processus. Bien que j'examine l'élaboration du système juridique hétérogène colonial de l'Algérie, issu d'une relation triangulaire entre administrateurs français, modernisateurs juridiques islamiques, et sujets colonisés, mon analyse sera principalement guidée par les expériences et les points de vue de ces derniers. Le premier argument défendu dans cette étude emprunte aux méthodes historiques juridiques, politiques et intellectuelles pour démontrer comment la « famille musulmane » a été produite comme un objet de connaissance et de gouvernance à travers la construction de la loi dite du « statut personnel musulman » sous le régime juridique colonial. Le second argument se base sur des approches socio-historiques afin d'éclairer la manière par laquelle les sujets colonisés ont pu faire l'expérience des divers points de rencontre entre le droit français, le droit coutumier, ainsi que les régimes et les discours juridiques islamiques venant « d'en haut ». Ce second argument met également en évidence

l’influence venant « d'en bas » qu’ont eu ces derniers sur le droit colonial. Cette étude élucide ainsi l'interaction entre les forces qui plaidaient pour une réforme de la loi de la « famille » et les intérêts et arguments des justiciables, en particulier les femmes musulmanes, telle qu’ils étaient rapportés dans les tribunaux coloniaux.

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Note on the Spelling of Foreign Terms

Most words in foreign languages are indicated in italics, such as *qadi*, in Arabic, or *indigène*, in French. The only foreign terms that have not been italicized are official bodies and positions, such as Conseil supérieur or Procureur général. For Arabic words, I have generally followed a simplified version of the system used by the Institute of Islamic Studies at McGill, which does not use diacritical marks or distinguish between long and short vowels (except in the Glossary of Terms on pages 10-11). However, there are some Arabic words, such as *mahakma* (maḥkama) and *douar* (dawār) where I have employed the French spelling ("ou" instead of "w" and "ch" instead of "sh") to reflect their appearance in the archives, since these also functioned as French administrative terms.

List of Abbreviations

ANOM	Archives nationales d'outre-mer (Aix-en-Provence)
ANA	Archives nationales d'Algérie (Algiers)
AWA	Archives de la wilaya d'Alger (Algiers)
JO	*Journal officiel de la République française - Débats parlementaires*
AG-SMDNA	Archives générales de la société des Sœurs Missionnaires de Notre-Dame d'Afrique (Rome)
A-SMA	Archives de la société des Missionnaires d'Afrique (Rome)
RA*	*Revue algérienne, tunisienne et marocaine de législation et de jurisprudence*

*For the RA, citations are formatted as follows: "RA Year: Part number, Page number." For example, a ruling published the 1922 issue, in Part Two (Jurisprudence), on page 303 will appear as: RA 1922: II, 303.

Glossary of Terms

French administrative and judiciary terms

arrondissement – second order administrative unit; below département and above commune

commune de pleine exercise – local administrative unit with sizeable European colonial population, run by settler-dominated municipal council though settler population was usually far exceeded by indigenous population.

commune mixte – local administrative unit controlled by government appointed functionary, overwhelmingly Muslim in population; the number of these units were drastically expanded after 1870.

Garde des Sceaux – Minister of Justice in Paris; literally "keeper of the seals"

Parquet général – Public prosecutor's office adjacent to the Supreme Court (Cour d'appel); in Algeria, the Parquet also oversaw the prosecution and referral to cassation of Muslim personal status cases (see: Procureur général).

Procureur général – Equivalent to the Attorney General in English system; chief official of the Ministry of Justice for all of Algeria; head of the Parquet and all Procureurs de la république (district prosecutors) stationed locally.

Juge de paix – local judge of the civil tribunal; this magistrate's powers were considerably wider in Algeria compared with their counterpart in France.

Islamic legal terms

ʿādil (Fr. adel) – notary, assistant to the qadi

ʿālim (pl. ʿulamāʾ) – religious scholar; sometimes used loosely to refer to Muslim notables

ʿaūn (Fr. aoun) – secretary of the court, summons officer

bash ʿādil (Fr. bachadel) - deputy qadi

dār ʾadl – literally "house of a virtuous person"; a uniquely Maliki prescription for the protection of battered wives, creating pathway to divorce at the husband's fault

faqīh (pl. fuqahāʾ) – expert in fiqh; legist or jurisprudent

fiqh – Islamic jurisprudence

ḥiḍāna / ḥaḍāna – child custody after divorce, with implications for alimentary upkeep provided to the spouse who retains guardianship

ḥubus (Mashriq: waqf) – pious endowment; inalienable property whose revenue serves a charitable foundation

khulʿ – judicial divorce initiated by the wife, who thus forfeits the dower to her husband

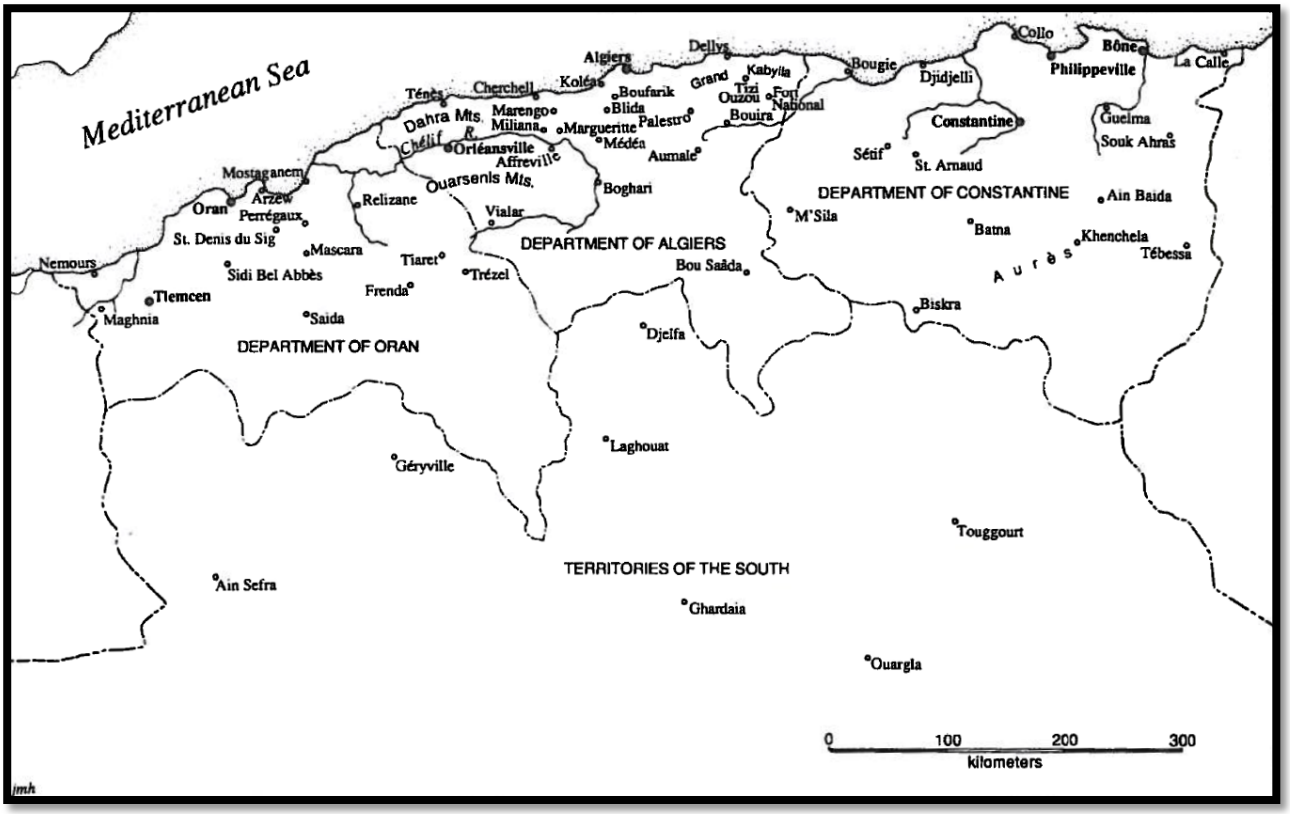
madhhab (pl. madhāhib) – "school" of Islamic law; literally "course" or "manner"; four Sunni "orthodox" schools include the Ḥanafi, Shāfiʿi, Ḥanbali, Māliki, with the latter being the dominant school followed in North Africa, though Ḥanafiyya was also practiced in Algiers and other urban centres where the descendants of the former Turkish ruling class still lived.

maḥkama (Fr. mahakma, pl. maḥākim) – court of Muslim law

muftī – religious scholar authorized to give opinions (fatwās) on points of law
mukhtaṣar – general: abridged handbook; legal: compendium of fiqh
qāḍī – Muslim judge or magistrate; often rendered ‘cadi’ in French
qānūn – state law, as opposed to divine law (see: sharīʿa); called “kanoun” by French jurists and scholars in reference to customary law (see: ʿurf)
sharīʿa – Islamic law, derived in principal from the Qurʾān and ḥadīth (Traditions)
ṭalāq – unilateral divorce by the husband, who thus forfeits the dower to his wife
ʿurf – customary law; also called ʿāda
wakīl (Fr. oukil judiciaire) – authorized legal spokesperson; in Algeria, court appointed or privately retained Muslim legal counsel

Other terms

dawār (Fr. douar) – tribal fraction; small village or encampment; administrative unit of importance to the pre-1870 colonial regime
jamāʿa (Fr. djemaa) – representative village council
kātib – scribe or secretary
khuja (Fr. khodja) – secretary, especially to the government official
madrasa (Fr. médersa) – school; in colonial Algeria, most were brought under French control and diverted from Arabic and Islamic legal education to include French language training.
majlis – judicial assembly; made by the French into a council of appeal in 1892
qa’id (Fr. caïd or caid) – chief or leader; tribal or provincial governor
shaykh – elder, chief, head of tribe; master of a sufi order
ṭarīqa – sufi order; literally “path” or “method”
ṭālib – student or educated person; could refer to a freelance scribe or notary
wilaya – prefecture; administrative unit introduced in 1957
zāwiya (Fr. zaouia)– religious building enclosing a saint’s tomb; sufi centre including a mosque, hospice, and educational facilities



Map 1: Colonial Algeria (Source: Ruedy, *Modern Algeria: The Origins and Development of a Nation*)

Introduction

On 31 July 1933, Bengueroudja Zohra bint Ahmed brought a suit against her former husband, Abdel Mohammed ben Bamalem, before the Muslim court (*mahakma*) of Medéa, an oasis town in the colonial *département* of Algiers. Zohra's legal counsel presented the following chronology of events: his client had been married to the defendant for under a year, and was four-months pregnant with their first child when she went to visit her parents in the city of Blida, about 40km north of Médea. During this routine visit to her family, however, her husband went to the *mahakma* without her knowledge to file a unilateral divorce against her. Word that she was no longer married reached Zohra in Blida, and she found herself giving birth five months later and then seeking the support due to her as a wrongly-spurned wife and mother. Thus, her lawyer submitted that Zohra's ex-husband owed her 600 francs per month since the divorce, as well as 2,000 francs in consolation and damages, as per recent jurisprudence from the highest court of appeals in Algiers designated to review Muslim personal status cases (Chambre de révision musulmane près de la Cour d'appel d'Alger).

Abdel Mohammed's lawyer presented a different version of the termination of his marriage. By his account, they had lived happily together, despite the occasional quarrel. This all changed when her grandmother came from Blida to visit Zohra and "learned what passed between her and her husband." It was then, "at her grandmother's instigation" that Zohra allegedly fled the "*domicile conjugal*" without her husband's knowledge or permission – an act that was not only grounds for his withholding any alimentary allowance while she absented herself in defiance of his authority, but was even declared a criminal offence by the

colonial state in 1924. Abdel Mohammed was apparently so enraged by the discovery of his missing wife that he went directly to the court to file a unilateral divorce. He further alleged that her family prevented him from taking a lucrative job in the colonial Department of Water and Forests, which, together with her willfulness and her family's relative wealth and status, absolved him of any responsibility for her maintenance. Moreover, everyone knew that the standard of living was higher in Blida than Médea, and the alimony payments should reflect the life they would have had in Médea, not the considerably more expensive living she would now have to forge in Blida. But his lawyer did not stop there, and continued to inveigh against Zohra, her unrealistic demands, and her selfish character. Her dower had been a veritable king's ransom – 17,000 francs (suggesting, as her counsel would counter-argue, that Abdel Mohammed was also a man of some means); their wedding was opulent and their lives comfortable. "Does she then have the right to demand so much from him?" his lawyer asked. "Does she have that right when she, while pregnant, destroyed their conjugal foyer?? A woman such as this deserves to be punished by the law; and any maintenance she is allotted must be evaluated at the lowest rate!"[1]

The *qadi* (Muslim judge) of Médea was persuaded that indeed Zohra had effectively forfeited her legal rights. The claimant, in his estimation, was due no more than a meagre 125 francs per month, to cover only the five months of her pregnancy since her departure, and no consolation fee whatsoever. In his ruling, he cited several sources of Islamic jurisprudence, including the authoritative compendia (*Mukhtasar*) of fourteenth-century Maliki jurist Sidi Khalil Ibn Ishaq al-Jundi, and his commentators. He also cited articles from a more controversial source: Marcel Morand's *Avant-projet de code du droit musulmane algérienne*

[1] Archives de la wilaya d'Alger (AWA) – Justice 1T 417. Dossier d'appel, 9 Sept 1933. Emphases in original.

(*Draft Code of Muslim Algerian Law*, 1916), commissioned by the colonial government, and written by a committee of Muslim and French law experts, predominantly colonial Orientalists, between 1906 and 1916.[2] The case would not end there, however, and Zohra subsequently filed an appeal of the *qadi*'s decision. The chain of judicial command and division of labour meant that the appeal would be heard next before a French magistrate in the Tribunal of the Peace in Blida, though there exists, at least at the present time, no record of what transpired there.

The record of this divorce case gives us a glimpse into the beginning and end of a union between two individuals, and through it, insights into their routines, resources, personal desires, and the fabric of life under French colonial occupation. Yet, if the courtroom was a theatre in which their drama unfolded, we can also detect a wider cast of characters and interests busy at work behind the scenes and between the lines. Entangled in this suit were not only the husband and wife at the centre, but their respective families, each with a stake in the outcome. The lawyers speaking for each side were hired to present the facts in their respective client's favour while appealing to the judge's sense of justice and fairness. Yet, effective litigation needed to go a step beyond this as well. Their arguments were prescribed by a particular syntax of social order; to be effective – to win, as Abdel Mohammed's side did – one had to tap into a repertoire of colonial jurisprudence, enabled by a studied knowledge of the French regulatory edifice surrounding the Muslim family. If we step back further, then, we see the French jurists who wrote the *Draft Code of Muslim Algerian Law* quoted in the ruling, which had been produced in an attempt to "respect" the religious family laws of colonized Muslim subjects while also giving these same subjects the benefit of "modernization" taking

[2] Marcel Morand, *Avant-Projet de code, présenté à la Commission de codification du droit musulman algérien* (Algiers: Adolphe Jourdan, 1916).

place elsewhere in the Sunni Muslim world. We see the *qadi*s, political representatives, and other Muslim interlocutors who sometimes rejected and sometimes welcomed these imposed efforts to "reform" their laws. On both sides of these debates were attempts to harness the heuristic power of "the status of the Muslim woman," in whose name Islamic law should either be protected, made more "humane," or eradicated in the colony, depending on who was speaking. Yet, the symbolic Muslim Woman was often at odds with actual women in colonial Algeria whose lives were materially affected by these debates, as revealed by their actions in court. The social and political processes with which these two litigants had to contend thus extended well beyond the walls of the *mahakma* of Médea, itself at once a colonial fabrication and besieged site of resistance to assimilation. The confluent history of these wider processes and their navigation by colonial subjects is the subject of this dissertation.

This thesis is about Muslim personal status law reform and family litigation in colonial Algeria during the period roughly bookended by the advent of the French Third Republic (1870) and the centenary of the colonial presence (1930). This is a period of colonial history that has received little attention compared with the first decades (of military rule and resistance) and final eight years (the war of independence).[3] By focusing on this surprisingly neglected era in Algerian history, and through the use of untapped judicial archives, this dissertation dislodges a number of assumptions about the consolidation and operation of French colonial power after 1870 that have been projected in both French and Algerian memory. My aim is to revise our understanding of the operations of colonial law as a field of knowledge and power by, first, framing the evolution of "Muslim personal status law" within

[3] John Ruedy noted that, though the period of 1871-1919 was the "high-water mark of colonialism in Algeria" it has nonetheless "attracted less attention from scholars than before or since, due to the "self-absorption of colonialist scholarship" – though I would add that the excess of archival material on the earlier period and reports from the military communes might have contributed to this as well. John Ruedy, *Modern Algeria: The Origins and Development of a Nation* (Bloomington: Indiana University Press, 1992): 265.

a wider Muslim Mediterranean sphere of influence, and second, to bring to light the experiences of non-elite Algerian laywomen and their unduly forgotten impact on these processes. To paraphrase historian Allan Christelow, Algeria was not an isolated backwater in French, Mediterranean, or Islamic-world history. Rather, during the colonial period and for centuries before it, Algeria was a crossroads of these civilizations and thus hosted a dizzying array of cultural confrontations, accommodations, and convergences.[4]

The collapse of the French Second Empire in 1870 heralded not only a permanent transition to civilian colonial government in Algeria, but the beginning of a new and highly intricate apparatus for the knowledge and management of colonial justice for Muslim subjects. As I will show, the next sixty years witnessed dramatic changes to both French and Islamic legal cultures, and it was in the crosshairs of these regulatory regimes that the "indigenous" Algerian subject found herself whenever she ventured into a colonial courtroom for the resolution of her disputes.[5] Though I examine the elaboration of colonial Algeria's heterogeneous legal system as it emerged through a triangular relationship between French administrators, Islamic legal modernizers, and colonized subjects, my analysis is mainly guided by the experiences and perspectives of the latter. This thesis is thus animated by the following questions: What did family law "reform" mean and how did it materialize at the intersection of French Republican, Islamic revivalist, and broader Mediterranean cultures of modernization and codification? What did this era of "reform" mean in particular for Muslim women in Algeria, as a subaltern group that also bore important symbolic meaning for the

[4] Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton, N.J.: Princeton University Press, 1985): 224-225.

[5] During the period of concern here, the term "*indigène*" as it was applied to Muslim (and, until 1870, Jewish) Algerians was a pejorative meant to class these subjects as part of the "ruled" and conquered population. I use this term throughout this study with this proviso, and in where it helps demonstrate the logic and vernacular of colonial power. That said, it also bears remembering that the eventual complication of this term allowed it to form the basis of originary claims to sovereignty and independence. See, for instance: C. Benhabylès, *L'Algérie française vue par un indigène* (Alger: Fontana, 1914).

colonial project and civilizing mission? What were their experiences as litigants, and did reform always move in a uni-directional (top-down) fashion?

In order to answer these questions, my argument follows two streams: the first uses legal, political, and intellectual historical methodologies to demonstrate how the "Muslim family" was produced as an object of knowledge and governance through the construction of "Muslim personal status" law under the colonial legal regime. By and large, the "non-interference" of the colonial government into the domestic lives and "*foyers*" of Algerian Muslims subjects was an important principle upon which the segregationist policy of native disenfranchisement was erected. The exclusion of the Algerian Muslim majority from the French body politic was grounded in their adherence to religious and customary laws governing familial obligations and disputes (discussed further below). Yet, at the same time, Muslim personal status law underwent radical substantive changes in this period, not only because of the devastation of financial, institutional, and educational infrastructures upon which pre-colonial state law had been built, but efforts to fill the subsequent vacuum with French codes, standards, and institutions. I contend that understanding this era of intrusion requires going further than the usual depiction of these developments as products of a shift in "assimilationist" policy. While not discounting these factors, I will show how the operations of colonial rule were informed by anxieties about the Muslim "family" – its composition, formation, and disruption – as a matter of "public order." In the name of this public interest, every aspect of Muslim conjugality and family relations – on consent, marriage, divorce, and its aftermath – were made the subject of a panoply of colonial laws. This argument runs especially through the first part of this dissertation, which traces the evolution of two signal colonial projects: it begins with the État civil des indigènes, which initiated the colonial

state's occupation with both crafting and rationalizing the "Muslim family," and then traces the deferral of this anxiety to the École de droit d'Alger, the institutional hub of knowledge-production and training in Muslim personal status law, and cradle of Marcel Morand's code of Muslim law. Importantly, though the juridical "Muslim family" was the creation of French epistemologies of Islamic law, it was enabled through a circulation of Islamic modernist knowledge, translation, and training throughout the Mediterranean world. The colonial embrace of pluralism as consistent with the ideals of the republic was largely founded upon the flattering image of rationality and civilization that French reformers saw in the mirror of Ottoman and Egyptian family law codes, which they then refracted back onto the Algerian legal regime.

The second stream of argumentation deals with the ways in which colonized subjects navigated these encounters between French and Islamic legal regimes and discourses as they descended "from above," and highlights their influence on colonial law "from below." The study of both law (especially Islamic law) and colonialism have often been susceptible to a narrowed focus on prescriptive texts and state-centred ideologies, which, though yielding important insights, are nonetheless abstracted from the "on the ground" everyday realities of the subjects they were concerned with. By contrast, this study, especially its second half, emphasizes the role of litigation, adjudication, and jurisprudence in the elaboration of colonial law. These chapters thus explore the interplay that took place between the wider forces described above and the interests and arguments of Muslim litigants, especially women, as they were mediated by colonial courtrooms. I aim, as well, to contextualize the legal actions of Algerian disputants – and the very decision to use a colonial court to advance one's interests – within a complex and contingent array of social and economic variables that

exceed the framework of a strictly legalist point of view. All of the case studies presented below involve the resolution of disputes over the obligations owed, at their most rudimentary level, between husbands and wives. They compel our attention because they help us understand the discrepancies – and occasional convergences – between the needs of the symbolic "Muslim Woman" in whose name colonial law reforms were almost always advanced, and the actual wives, mothers, and daughters who used colonial courts. I argue that, though Muslim subjects, especially women, had lost access to many of the pre-colonial legal strategies once available to them, they developed others around the colonial appellate process and the plurality and ambiguity of colonial law, and in this way formed an important third contingent, along with French Orientalists and Islamic modernizers, in the shaping of Algerian colonial law.

Historiography and Methodology

1870-1930: The "Age of Reform"

Though this study focuses on the period after 1870, when military rule came to a permanent end and was replaced by a civilian government with stronger ties to the French metropole, the story of the colonial legal regime begins in the earliest years of the conquest of the lands that would become "Algeria," after 1830, and is predicated in many ways upon several crucial pieces of French policy issued under the Second Empire (1851-70). Perhaps the most significant colonial policy, about which much has been written, was the *senatus-consulte* of 1865, which declared all Muslim Algerians French nationals, but barred them from French citizenship. The law stipulated that in order to acquire citizenship, colonized subjects must forfeit their access to what is called "personal status" law – that is, religious law

matters such as marriage, divorce, custody of children, and family obligations in general (including certain forms of inheritance) – and live under the Code civil.[6] This policy remained in place from 1865 until 1944, during which only a small fraction of Algeria's Muslim subjects became "naturalized" French citizens.[7] The vast majority were left with only restricted civil and political rights, despite the administrative absorption of Algeria into France in 1848 and the full exercise of French sovereignty upon the Algerian territories and people. Thus, while the Muslim majority faced conscription into the French military and pauperizing taxation, especially at the local level, they received none of the benefits, above all the franchise and political representation, enjoyed by the minority population of settler citizens. Furthermore, in the years after the "*rattachement*" policies of the 1880s, the exclusion of Muslims was enhanced by a growing array of "special laws" and exceptional measures such as their penalization for crimes under the Code de l'indigènat (1881) in addition to those of the regular Code pénal. Whether or not this policy of territorial integration and political exclusion represented a "paradox" of republican universalism or its ineluctable underbelly has been the subject of ongoing debate, discussed further below.

This systemized inequality was not simply the price of preserving one's traditions and retaining social cohesion; rather, as the following chapters will explore, while the system of segregation and exception remained firmly in place, the ostensible reason behind it – "respect for local customs" – soon lost all meaning. The object was to "correct" the judicial "anarchy" into which Muslim justice had been plunged since the eradication of the various institutions –

[6] Algerian Jews were exempt from this requirement after 1870, when the Crémieux decree put an end to rabbinical law in the colony and forcefully assigned French citizenship to all "Israelites," as the French called them. Algerian Jews henceforth occupied a poorly-defined liminal space between indigenous subjectivity (seen as collaborators with the French occupiers by indigenous Muslims) and French citizens (never accepted by the largely anti-Semitic European *colons*). See: Ethan Katz, "Between Emancipation and Persecution: Algerian Jewish Memory in The longue durée (1930–1970)," *The Journal of North African Studies* (2012, 17.5): 793-820.
[7] For instance, between 1,557 Muslims applied for and were granted citizenship between 1865 and 1813 – and hundreds more were rejected on the vague grounds of "unworthiness." Ruedy, *Modern Algeria*: 86.

the schools and public trusts – upon which the centralized administration of Islamic justice had previously been built. This process of resurrecting the Muslim justice system as a parallel plank of the French colonial legal regime reached its height from the 1880s until the outbreak of the First World War, with a resurgence of reformist vigor around the 1930 colonial centenary.

Scholar of Maghreb history Edmund Burke III has argued that the *belle époque* (roughly 1870 until WWI) was marked by a "crisis of Orientalism": a "moment of openness" during which the European intellectual tradition surrounding the history and civilization of the colonized Arab or Muslim "Other" shed some of its sensational content and dominating purpose and moved momentarily "outside the governing paradigm."[8] Though acknowledging this shift, this study takes a perhaps somewhat dimmer view of the liberalism of this era. After all, as we have just seen, this same period fell under "the high point of assimilationist practice," a policy directive which, though it had waxed and waned in popularity since the conquest of Algiers in 1830, was inclined toward the eradication of native culture and institutions in favour of their replacement with French civilization.[9] And the very same knowledge industry about "Islam" that fed Orientalist scholarship also provided the ethnographic and legal expertise that informed colonial governance. This begs the question: how did these seemingly oppositional discourses intersect, and how did they inform colonial legal policy?

The answers lie partly in the relationship between French colonial policymakers and native Algerian interlocutors, partly in cultural and political developments in the metropole,

[8] Edmund Burke III, The First Crisis of Orientalism, 1890-1914, in Jean-Claude Vatin (ed.), *Connaissances du Maghreb: Sciences Sociales et Colonisation* (Aix-en-Provence; Paris: CNRS, 1984): 213-226.
[9] Todd Shepard, *The invention of decolonization: the Algerian War and the remaking of France* (Ithaca, N.Y.: Cornell University Press, 2006): 28.

and partly in parallel developments in the wider Sunni Muslim world. Indeed, any telling of the history of Algeria in the nineteenth and early-twentieth centuries is also necessarily a story about France and about Islam in the modern period. Let us turn now to these three contexts and their respective literatures with which this project engages: first, Islamic modernization and law reform in the nineteenth and twentieth centuries; second, Algeria as seen (if darkly) from French history and historiography; and third, Algerian history "proper" and the agency of women in colonial court.

"Modernity" and "Tradition" in the Muslim Mediterranean

While the French context has garnered greater attention, I hope to enrich this analysis by also framing Algerian history within wider Mediterranean legal and political developments. The processes of secularization, the codification of family laws, and the privatization of religion that marked this period elsewhere in the Muslim Mediterranean world did not pass Algeria by, though they emerged not indigenously at first, but through a complex circulation of knowledge about Islam, law, and modernity.[10]

The age of "modernization and reform" in the Middle East is the subject of a rich and diverse literature. Scholars have been particularly fascinated with the examples of Iran, as well as the late Ottoman Empire / early Turkish republic – entities that maintained their independence from formal European rule, and where authoritarian regimes struggled against and eventually suppressed (or in the case of Turkey, bureaucratized) competing religious

[10] This is not to say, however, that an indigenous modernizing intelligentsia, with its own set of concerns and debates, was absent in Algeria, but it did not appear as an organized movement until the 1920s. See: Alan Christelow, "Bashir Ibrahimi and the Islamic encounter with European secular and religious faiths," *The Maghreb Review* 29.1-4 (2004): 99-122; Amal Ghazal, *Islamic reform and Arab nationalism: expanding the crescent from the Mediterranean to the Indian Ocean (1880s-1930s)* (London: Routledge, 2010); Ruedy, *Modern Algeria:* 133-136; Leonard Wood, "Shari'ah Revivalist thought in the first years of the Shari'ah Lawyers' Bar Association Journal, 1929-31," *The Maghreb Review* 32.2-3 (2007): 196-217; Ali Merad, *Le réformisme musulman en Algérie de 1925 à 1940; essai d'histoire religieuse et sociale* (Paris: Mouton & Co., 1967).

establishments, eventually aligning secularity with citizenship and national belonging.[11] As far as the historiography goes, the textbook case remains Egypt, which represented, in a certain sense, the *avant-garde* of the indigenous drive to modernization under the guidance of its celebrated leader, Muhammed Ali Pasha (1769-1849), the man attributed with founding the modern Egyptian state, much as Napoleon Bonaparte (born in the same year) is thought to have done for France.[12] This historiographical interest extends into Egypt's subsequent decades, after formal colonial annexation by Britain in 1882, perhaps as a result of both the proliferation of reformist opinions in Egypt's vibrant print culture, as well as the origins of the influential Salafist brand of Islamic revivalism in Cairo's Al-Azhar University.[13] At one point there existed something of a scholarly consensus about the reign of Muhammed Ali Pasha as an era of accelerated development and prosperity, faltering only slightly under Khedive Isma'il, then interrupted by European incursions on Egypt's political and financial sovereignty. This understanding has since been problematized by the revisionist work of Peter

[11] The work of Bernard Lewis was particularly important for setting a research agenda on Middle East history informed by development theory and stages of civilizational "progress." See, for example: Bernard Lewis, *The emergence of modern Turkey* (London: Oxford University Press, 1961). On shift away from this teleological model, see: Donald Quataert, "Ottoman History Writing and Changing Attitudes Towards the Notion of 'Decline,'" *History Compass* 1.1 (Jan-Dec 2003). See also: Keith Watenpaugh, *Being modern in the Middle East: revolution, nationalism, colonialism, and the Arab middle class*. Princeton: Princeton University Press, 2006. Elsewhere, such as the Ottoman provinces of Egypt and the *bilad al-sham* (postwar Mandate Palestine, Syria, Lebanon, Transjordan), a similar augmentation of secular authority at the expense of the religious juristic class was complicated but not altogether stifled by a European colonial presence. See for instance: Judith Tucker, *In the house of law: gender and Islamic law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998). On the gender politics of citizenship in the post-war period, see: Elizabeth Thompson, *Colonial citizens: republican rights, paternal privilege, and gender in French Syria and Lebanon* (New York: Columbia University Press, 2000).

[12] For foundational texts in this genre, see: Arthur Goldschmidt, *Modern Egypt: the formation of a nation-state* (Boulder, Colo: Westview Press, 1988); Afaf Lutfi Sayyid-Marsot, *A short history of modern Egypt* (Cambridge: Cambridge University Press, 1985); P. J. Vatikiotis, *The history of modern Egypt: from Muhammad Ali to Mubarak* (Baltimore: Johns Hopkins University Press, 1991).

[13] The term "salafiyya" refers to the first generation of Muslims and the model they provided for a good society. As a legal movement, it resists easy definition and periodization, but is most often associated with the revivalism of the famous Egyptian jurist and scholar Muhammed Abduh (d. 1905), as well as Jamal al-Din al-Afghani (d. 1897), and Rashid Rida (d. 1935). For a critique of the historiographical emphasis on Abduh, see: Indira Falk Gesink, *Islamic reform and conservatism Al-Azhar and the evolution of modern Sunni Islam* (London: Tauris, 2010). For other re-appraisals of Abduh and the role of al-Azhar, see: Samira Haj, *Reconfiguring Islamic tradition: reform, rationality, and modernity* (Stanford, Calif: Stanford University Press, 2009).

Gran, Khaled Fahmy, and Timothy Mitchell.[14] Most relevant to this discussion, Mitchell and Fahmy have each shed light on the apparatuses of panoptic surveillance and disciplinary techniques imported into Egypt as part of Muhammed Ali Pasha's, and then Khedive Isma'il's, ambitious state-building projects, thus paving the way for European invasion, which was continuous with, rather than disruptive of, these developments.[15] Above all, perhaps the most important contribution of these authors was to challenge notions of "the modern" and its signification against what was designated "traditional," "backwards," and "Oriental." Namely, "modernity" was both questioned and expanded to denote not only centralized state institutions, infrastructures, and technology, but also new codes of dress and conduct, more coercive relations of power between subjects and the state, and reformulations of class and gender identity in the Eastern Mediterranean.

Algeria, of course, stands out from all of the examples listed here, having been subjected to both the longest stretch of colonial occupation (1830-1962), and the most violent and invasive form of settler dominance.[16] Yet, as I will argue, the Egyptian and Ottoman cases are relevant to understanding Algerian colonial legal history. This is because the models offered by Egyptian and Ottoman reforms, which were themselves heavily informed by French republican *étatisation*, would be recycled as inspiration for French colonial jurists as

[14] Gran stepped back in time, into the eighteenth century, to show how Muhammed Ali Pasha's reforms watered rather than planted the seeds of capitalist production sown by the religious classes in the previous century. Peter Gran, *Islamic Roots of Capitalism: Egypt, 1760-1840* (Austin: University of Texas Press, 1979).
[15] Khaled Fahmy, *All the pasha's men: Mehmed Ali, his army, and the making of modern Egypt* (Cambridge: Cambridge University Press, 1997); Timothy Mitchell, *Colonising Egypt* (Berkeley: University of California Press, 1988).
[16] On the violence of French conquest and "pacification" in the Sahara, see: Benjamin Claude Brower, *A desert named peace the violence of France's empire in the Algerian Sahara, 1844-1902* (New York: Columbia University Press, 2009). On structural violence and the colonial discourses that sustained it, see: David Prochaska, *Making Algeria French: colonialism in Bône, 1870-1920* (Cambridge: Cambridge University Press, 1990).

their oversight of Muslim personal status law was enlarged through the *fin-de-siècle* and beyond.

I postulate that, in Algeria, as in elsewhere in the Muslim Mediterranean, this period was characterized by the elaboration of the juridical, scholarly, and semantic field of Muslim "family law" itself. The legibility of something called the "Muslim family" in the colonial juristic imagination was a result of the privatization and bureaucratization of Islamic law (*shariʿa*).[17] As Saba Mahmood writes, Muslim "family law" did not exist in the pre-modern Middle East: it had to be invented through the slow erosion of religious authority in the "public sphere" (matters, especially, of commerce, property, public works, criminal justice, and so on), leaving to religious authorities a rump domain of now-sanctified oversight: the "private" sphere.[18] This process is further clarified by recalling Talal Asad's helpful reading of secularization in nineteenth-century Egypt: for Asad, secularization should not be taken to mean the severing of deontological concerns from worldly governance, but, rather, their intimate intertwining. What remained of customary or religious legal authority in matters of personal status and family law were not simply remnants of "tradition" left intact as a result of either indigenous resistance or colonial compromise (though both did occur). Rather, in Asad's much-quoted words, "the *shariʿa* thus defined [was] precisely a secular formula for privatizing 'religion'" and thereby securing the distinction between public and private spheres upon which political secularism depended.[19] Mahmood takes this insight one step further

[17] As scholars have noted, the distinction between state and religious authority in the region, and the power of the former to enforce "secular" laws (called *qanun*), was not purely a novelty of the nineteenth century; what was novel, and indeed seismic in its effects, was the dramatic expansion of this authority and codification of laws both "public" and "private." See introductory chapter in: Muhammad Khalid Masud, Rudolph Peters, and David Powers (eds.), *Dispensing justice in Islam: Qadis and their judgements* (Leiden: Brill, 2006).
[18] Saba Mahmood, "Sectarian conflict and family law in contemporary Egypt," *American Ethnologist.* 39.1 (2012): 54-62.
[19] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, Calif: Stanford University Press, 2003): 228.

when she notes that, "[p]aradoxically, even as the family was assigned to the domain of the private sphere in the 19th century, it also became a key site of intervention for projects of social reform undertaken by the state."[20] Likewise, this practice of power was deployed by the colonial state in Algeria – a self-reference to French civilization enabled by the Egyptian process of becoming "modern" over the previous half-century. As I discuss further below, this very "paradox" that Mahmoud describes, by which the "family" was increasingly regulated even as it was privatized, also helped to perpetuate the segregationist policies that undergirded the colonial regime.

This brings us to another key set of issues with which this thesis is concerned: the gender politics of modernizing law reform projects. The role of women in these processes and the impacts of law "reform" and rationalization on their lives are subjects dealt with at length in the third section, below. For now, this discussion turns to the discourse of Muslim gender (dis)order and sexual deviance and the work these tropes performed for the colonial legal regime in Algeria. Edward Said's *Orientalism* remains the dominant framework for understanding the sexual and gendered discourses of Oriental, especially Muslim, difference.[21] For Algeria under colonial rule, Malek Alloula, Julia Clancy-Smith, and Marnia Lazreg, respectively, have written foundational historical studies on the instrumentalization of "the status of the Muslim woman" in colonial ethnography and literature, while also

[20] Mahmood, "Sectarian conflict": 58.
[21] Edward W. Said, *Orientalism* (New York: Vintage Books, 1979). See also: Meyda Yeğenoğlu, *Colonial fantasies: towards a feminist reading of Orientalism* (Cambridge, U.K.: Cambridge University Press, 1998). Feminist scholarship that has picked up on Said's cues, though critiquing and refining his arguments, include: Lila Abu-Lughod, "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others," *American Anthropologist.* 104.3 (2002): 783-790; Leila Ahmed, *Women and gender in Islam: historical roots of a modern debate* (New Haven: Yale University Press, 1992); Fatima Mernissi, *The veil and the male elite: a feminist interpretation of women's rights in Islam* (Reading, Mass: Addison-Wesley, 1991).

debunking these representations through archival research into women's lived realities under colonial rule.[22]

While this debunking has important implications, the psychoanalytics of Orientalism takes us only so far in understanding the construction difference as a basis of colonial governance. In her critique of Said's thesis, Lamia ben Youssef Zayzafoon interrogates the category of the "Muslim woman," whose coherence Said more or less accepts even as he deconstructs its uses and representations in the Western literary cannon. For Zayzafoon, the "Muslim woman" is invented rather than represented, and "produced according to the law of supply and demand to serve various political and ideological ends."[23] I would like to extend this framework of *invention*, rather than representation, to the present study of the "Muslim family" as a category of knowledge and regulation in Algeria's "modernized" legal system. The deployment of this invention as a devise of colonial legal management enabled, to follow Asad, the construction of a rationalized secular legal regime and, as Mahmood adds, the surveillance and governance of the Muslim "private" sphere. But in Algeria, this logic did something more: as it widened the degree of state authority in the "private" sphere from which the "public" was supposedly distinguished, it also helped signify and reinforce the racial difference of "indigenous" Muslims that defined them outside of the French body politic.

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[22] See: Malek Alloula, *The Colonial Harem* (Minneapolis: University of Minnesota Press, 1986); Julia Clancy-Smith, "Islam, gender, and identities in the making of French Algeria, 1830-1962" in Clancy-Smith and Frances Gouda (eds.), *Domesticating the empire: Race, gender, and family life in French and Dutch colonialism* (Charlottesville, VA: University Press of Virginia, 1998); Julia Clancy-Smith, "The 'Passionate Nomad' Reconsidered: A European Woman in L'Algérie française (Isabelle Eberhardt, 1877-1904)," in Nupur and Strobel (eds.), *Western Women and Imperialism: Complicity and Resistance* (Bloomington: Indiana University Press, 1992); Marnia Lazreg, *The eloquence of silence: Algerian women in question* (New York: Routledge, 1994).

[23] Lamia Ben Youssef Zayzafoon, *The Production of the Muslim Woman: Negotiating Text, History, and Ideology* (Lanham, Md: Lexington Books, 2005): 1-2.

The ways in which this sexual logic of racial difference undergirded colonial legal and social power structures is clarified by the work of Ann Laura Stoler, who alerted historians to the intimate politics of (French and Dutch) colonial society, and official colonial preoccupation with sexuality and reproduction in the juridical construction of whiteness and white bodies.[24] Stoler's analysis applies in particular to those historical contexts where *métissage* produced moral panic, even as inter-racial sexual liaisons formed the unspoken bedrock of colonial economy and society.[25] In those contexts, however, where racial mixing was less common and more taboo, such as the European-occupied regions of the Middle East and Maghreb, her insights may seem less relevant.[26] Indeed, indigenous Algerians were famously protective against the marrying of Muslim women in particular to European men (though that does not mean such unions did not sometimes occur). I nonetheless contend that Stoler's observations are essential to understanding colonial policy around family law in Algeria and the dissemination of European bourgeois anxieties around the conjugal couple and their children. Specifically, Stoler's work offers an entry-point into thinking about the

[24] Ann Laura Stoler, *Race and the education of desire: Foucault's History of sexuality and the colonial order of things* (Durham: Duke University Press, 1995); Ann Laura Stoler, *Carnal knowledge and imperial power: Race and the intimate in colonial rule* (Berkeley: University of California Press, 2002).

[25] These contexts include French and British North America, French Indochina, British India, and British Australia, to name a few. See, respectively: Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871* (Toronto: University of Toronto Press, 2001) and Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society in Western Canada, 1670-1870* (Winnipeg: Watson & Dwywer, 1998); Emmanuelle Saada, *Empire's children: race, filiation, and citizenship in the French colonies* (Chicago: The University of Chicago Press, 2012); Durba Ghosh, *Sex and the Family in Colonial India: The Making of Empire* (Cambridge, UK: Cambridge University Press, 2006) and Nancy Paxton, *Writing Under the Raj: Gender, Race, and Rape in the British Colonial Imagination, 1830-1947* (New Brunswick, NJ: Rutgers University Press, 1999); Lisa Chilton, *Agents of Empire: British Female Migration to Canada and Australia, 1860s-1930* (Toronto: University of Toronto Press, 2007), among others. See also: Antoinette M. Burton, *Gender, sexuality and colonial modernities* (London: Routledge, 1999); Tony Ballantyne and Antoinette M. Burton, *Bodies in contact: rethinking colonial encounters in world history* (Durham, N.C.: Duke University Press, 2005).

[26] To my knowledge, there are only two works that straddle both sub-genres and bring the study of sexuality and its policing in the Muslim Mediterranean into the same field of study as colonial encounters elsewhere. These are: *Domesticating the Empire*, op cit., and Diane Robinson-Dunn, *The harem, slavery and British imperial culture: Anglo-Muslim relations in the late nineteenth century* (Manchester: Manchester University Press, 2006).

sexual politics of what Uday S. Mehta calls "liberal strategies of exclusion."[27] If, in Algeria and throughout the French Empire, tacit racial or explicit religious constructions formed the constitutive outside of French citizenship, they were signalled through gendered idioms and invested with sexual meaning.

Indeed, scholars of Middle East gender studies have looked at the ways in which indigenous modernists and reformers, especially in Egypt, Turkey, and Iran, internalized orientalist visions of Muslim sexual deviance and staged their candidacy for inclusion in the realm of civilized nations – deserving of autonomy and self-government – by directing reforms inward, toward the family. They suppressed concubinage and prostitution, promoted monogamy and companionate marriage, and re-invented maternity through pedagogical publications instructing young "mothers of the nation" in the virtues of moral and physical hygiene.[28] In this way, we may detect a pattern emerging across contexts in which a "cultural literacy" premised on sexual and reproductive criteria marked the boundary not only between Self and Other, but between citizens and subjects, those with rights and those without. On this basis, and others discussed below, we can begin to consider the wider implications of one of Stoler's central claims that, "[w]hat is striking when we look to identify the contours and composition of any particular colonial community is the extent to which control over sexuality and reproduction was at the core of defining colonial privilege and its boundaries."[29] Though race-mixing was not one of Algeria's administrative "problems," I am persuaded that

[27] See: Uday S. Mehta, "Liberal strategies of exclusion," in Frederick Cooper and Ann Laura Stoler, *Tensions of empire: colonial cultures in a bourgeois world* (Berkeley, Calif: University of California Press, 1997).
[28] On the literary and cultural interpellation of women into nationalist subjectivities through their refashioning as companionate wives and mothers within a nuclear family context, see: Lila Abu-Lughod, *Remaking women: feminism and modernity in the Middle East* (Princeton, N.J.: Princeton University Press, 1998).
[29] Stoler, *Carnal Knowledge*: 39. To give another formulation of this comment: "If liberalism and colonial racism were both dependent on identifying those with the proper social credentials, they were also joined by the fact that regulating the intimate and 'policing the family' were the reformist practices by which those strategies of governance were secured and worked out." Stoler, ibid.: 17-18.

this observation carries significant analytic possibilities for understanding Muslim exception. This is because the racialization of sexual deviance provided the ideological scaffolding for both segregationist pluralism and interventionist law reform projects in the name of "public order."

Viewing Algeria from France

Broadly speaking, historians of the French colonial experience in Algeria have largely been obliged to contend with two defining debates: The first is on the role of "assimilationism" and "associationism" as guiding principle of colonial policy under "direct rule" in the late French empire.[30] The second and more pressing debate, often underlined by the first, is on Algerian Muslim exclusion from the French polity, how this either was or was not consistent with the civilizing mission, and what this policy in turn "meant" for republicanism and its equalizing universalist promise.

Writing on the tension between "assimilationist" and "associationist" colonial policy in the Second Empire and Third Republic, Todd Shepard has identified two phases of assimilationist policy with regard to Muslim personal status law: from 1865 until 1889, during which Muslims were required to forfeit their Muslim personal status to become "naturalized" French citizens; and from 1889 until 1944, when a decree enabled French common law to essentially trump Muslim personal status law in any civil suit, thus giving non-citizen Muslim subjects access to the Code civil.[31] For Shepard, the 1889 decree, which I discuss at length in

[30] By "direct rule," I mean the replication of metropolitan administrative hierarchies and policies in the colonies, a more expensive form of colonial governance that has been (fairly or unfairly) associated with French-style imperialism. "Indirect rule," a term first coined by British colonialist Frederick Lugard, favoured the minimization of colonial official personnel on the ground, who were instead grafted onto existing hierarchies through the recruitment of local elites. Under the French rubric, "assimilationism" is generally associated with the former type of colonial governance and "associationism" with the latter.

[31] By "common law" in this and the following chapters, I am referring to law that governs relations between private subjects, as opposed to law governing offenses against the state or crown (punishable under the penal system). This should not be confused with the difference between the French "civil" legal system, primarily

Chapter 2, signalled the failure of the assimilationist citizenship policy (between 1865 and 1870 only 141 Muslims became French citizens) and marked the return to an "associationist" legal policy by which the civilizing mission was once again re-directed toward Algerian Muslims as a "people" rather than as individuals. While there is utility to this periodization, I disagree with several points of Shepard's assessment. First, while the 1889 decree indeed marked a significant policy shift, which Shepard is right to highlight, it is best understood as continuous with an extensive series of laws, decrees, circulars, and ordinances that enlarged French judicial authority over Muslim "private" space even as Muslim access to citizenship was foreclosed. Second, as both Emmanuelle Saada and Osama Abi Mershed have pointed out, the difference between "assimilationism" and "associationism" is often harder to parse out than the historiography tends to presume.[32] As Abi Mershed writes, both associationism and assimilationism were drawn from the same ideological stock, and "aimed above all to legitimize colonial hegemony."[33] It may be more analytically useful and more accurate to say that there were in fact two definitions of "assimilation" that often operated at a cross-purpose: the assimilation of Algerian territory as a fully integrated administrative unit of continental France, and the assimilation of indigenous Muslims into the French body politic.[34] The former simply could not tolerate the latter, not least because of settler rejection of policies seen as "Arabo-" or "Islamophile." The growth and political empowerment of the settler population

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prescribed by codes and interpreted but not prescribed through judicial review, and the British "common" legal system, based on case law and precedents.

[32] Saada, building on an argument presented by Laure Blévis, suggests that an initial concept of "assimilation," based on the extension of metropolitan norms to the colonies, would by mid-century give way to a more "impossible assimilation," based on individual recruitment through the demonstration of internalized "cultural competence" (in Algeria, Muslims performed "evolution" to file for candidacy). This was a model of citizenship through civilization, in other words, rather than the other way around (discussed in more detail in Chapter 2). See: Saada, *Empire's Children*: 109-110; Osama Abi-Mershed, *Apostles of Modernity Saint-Simonians and the Civilizing Mission in Algeria* (Stanford, Calif: Stanford University Press, 2010); Laure Blévis, *Sociologie d'un droit colonial: Citoyenneté et nationalité en Algérie (1865-1947): une exception républicaine?* (PhD Dissertation, Aix-en-Provence: Institut d'Études Politiques, 2004): 289-312.

[33] Abi Mershed, *Apostles of Modernity*: 9.

[34] Saada, *Empire's Children*: 109-110.

after 1870 explains the rejection of so many proposals to extend the franchise to Algerian Muslims, and, to some extent, various attempts to fully rid Algeria of all but French law codes and bodies. But it is only a partial explanation for why, at the same time, the Muslim family came under intensified juridical scrutiny, why the intimate details of Muslim conjugality became a pivotal matter of "colonial public order."[35] Through mechanisms and institutions like the École de droit d'Alger (1880), the État civil des indigènes (1882), and the Chambre de révision musulmane (1892), among others, the Muslim family became much more than simply an object of orientalist fantasy; it was a central category of regulation at the heart of the colonial regime.

Shepard's larger point, however, is directed toward the second debate: the nature of republicanism in the French overseas territories, and the question of whether the legalized segregation of Algerian Muslims was an aberration or a defining facet of French republicanism.[36] Patrick Weil described Muslim personal status as a "denatured" or meaningless type of nationality, while Dominique Schnapper describes the legal exception of Muslims as a juridical "monstrosity" in language passed down from colonial jurist Émile Larcher and later picked up by Orientalist legal scholar Joseph Schacht.[37] Saada argues that despite the "race-blind" nature of French colonial and international private law, the politics of

[35] On the "colonial public order", see Saada, *Empire's Children*: 128-129. This was concept devised in 1927 by Henry Solus which demarcated those aspects of indigenous "customs" that should be made available to colonial regulation and, if needed, suppression, if it served the "public interest." While Solus had not envisioned its use in Algeria, as we will see, the "colonial public order" was invoked regularly by Algerian legislators to advance its Muslim family reform agenda. Henry Solus, *Traité de la condition des indigènes en droit privé; colonies et pays de protectorat (non compris l'Afrique du Nord) et pays sous mandat* (Paris: Recueil Sirey, 1927).

[36] Michael Brett, "Legislating for Inequality in Algeria: The Senatus-Consulte of 14 July 1865," *Bulletin of the School of Oriental and African Studies, University of London.* 51.3 (1988): 440-461; Patrick Weil, *Qu'est-ce qu'un Français?: histoire de la nationalité française depuis la Révolution* (Paris: Grasset, 2002). Though he diverges from Saada, Shepard makes clear his position: "Against Weil's presumption, I emphasize the crucial role that building an overseas empire had in structuring republican institutions in France." *Decolonization*: 35

[37] Weil, *Qu'est-ce qu'un Français?;* Dominique Schnapper, *La Communauté des citoyens: Sur L'idée moderne de nation* (Paris: Gallimard, 1994); Émile Larcher, *Traité élémentaire de législation algérienne* (Paris: Rousseau, 1923): T II, 451; Joseph Schacht, *An Introduction to Islamic Law*. Oxford: Clarendon Press, 1964): 98.

republican inclusion and exclusion were worked out through the juridical inscription of racial categories. For Saada, the achievement of egalitarian citizenship was indeed only made possible through the adjacent process of delimiting its tacitly racial (if explicitly "cultural") exclusionary boundaries. (Indeed, French colonialism more generally seems to be the absent referent which secures the cohesion of the French national narrative.[38]) Shepard finds Saada's interpretation more convincing than Weil's, but argues for a theoretical framework particular to Algeria, since, "[t]here was never a widely-embraced principle – on the model of sexual difference [as with Frenchwomen] or respect for local cultures [as with West Africans] – to explain the situation of dramatic inequality in Algeria."[39] This is superficially true, but neither claim holds up upon a deeper archival investigation into the ontology of Muslim difference underpinning indigenous exception. As such, I find Saada's careful tracing of citizenship laws outside the metropole to bring helpful clarity to the Algerian case, insofar as race, gender, and sexuality were mutually-constituting juridical logics.

This discussion was significantly advanced by Laure Blévis's recent dissertation on the "sociology of exception" in the governance of Algeria in the late nineteenth- and early twentieth-centuries.[40] Benefiting from the insights of Italian philosopher Giorgio Agamben, Blévis frames the embrace of a legal pluralist model in Algeria as a product of the state of exception of Algerian Muslims. Indeed, if Algeria was the "exception" to the colonial rule as Shepard suggests, it is because it was governed by exceptional laws thought to befit Algeria's

[38] It bears noting that this debate within the French historiography is still quite limited, as French scholarship continues to suffer from "a stubborn colonial aphasia" regarding Algeria, as Stoler has observed of French Vietnam. Indeed, as recently as 2005 French scholarship maintained that family law reforms imposed by the colonial state brought uncontested improvement to the lives of Algerian women. See, for example: Diane Sambrone, "L'évolution du statut juridique de la femme musulmane à l'époque coloniale, " in *La Justice en Algérie, 1830-1962* (Paris : AFHJ): 123-142.
[39] Shepard, *Decolonization*: 33.
[40] Blévis, *Sociologie d'un droit colonial*: 7-16.

dual position as both internal and external to France.[41] Though the "*rattachements*" between Algerian and French government ministries and personnel connected the European legal regime in Algeria to the Ministry of Justice in Paris, "*Justice musulmane*" remained under the purview of the Ministry of War (*Affaires Musulmanes*), and functionaries training at the Algiers law school and other colonial institutions were instructed in the administration of Algerian "exceptional law."[42] This elaborate system of exceptional law was symbolized perhaps most potently by the 1881 Code de l'indigénat, which punished Muslims for 34 crimes in excess of the Code pénal, as well as the "repressive" courts (est. 1902), so called for their intended function in "repressing" rebellions, where these offenses were tried not by judges within the normal judicial system but administrators who operated in an ill-defined legal space beyond it.[43] Though approaching this from a different angle (Blévis focuses on the careers and debates of this colonial bureaucracy), this dissertation supports the view that it was out of this institutional fusion between the French territories north and south of the Mediterranean that Algeria's "strategies of liberal exclusion" were devised and implemented.[44]

[41] Shepard writes: "French governments, from the 1880s until independence, dealt with the relationship between people in Algeria and the nation mainly through laws that affected all of France. These laws redefined French nationality and citizenship and also codified the marginalization of Algerians with civil status." *Decolonization*: 29.
[42] Léon Charpentier, *Analyse du cours de législation algérienne* (Alger : Adolphe Jourdan, 1885): 7.
[43] It should not be forgotten that the Code de l'indigénat was preceded by the Code Noir, which applied to slaves and free Blacks (as well as placing restrictions on Jews) in the French West Indies during seventeenth and eighteenth centuries. Native penal codes modeled on the Algerian precedent would appear elsewhere in the late French Empire. Indeed, in the colonies, exception was the rule, making its sustained use in Algeria all the more notable, even to contemporary observers.
[44] In a similar vein, Fatima Zohra Saï has recently examined the gendered implications of these processes, focusing mainly on the immediate pre- and post-colonial periods. Nonetheless, by foregrounding statutes and decrees, and thus diminishing the role of litigation, adjudication, and jurisprudence, Saï risk reinforcing the erasure of colonized women in state archives, thereby rehearsing the very narratives she criticizes. Fatima Zohra Saï, *Le statut politique et le statut familial des femmes en Algérie*. Doctoral thesis: Public Law, l'Université d'Oran es-Senia (2007).

Legal scholar Nasser Hussain, writing on British India, has also engaged compellingly with Agamben's work in order to trace the racial logics of emergency as a form of governance. Nasser's extension of Agamben's arguments is enabled by what Partha Chatterjee calls "rule of colonial difference," that is, the construction of a racial/religious difference that is intolerable to liberal-positivist regimes of sameness upon which legal equality can be erected.[45] As Hussain puts it:

> Colonialism makes explicit the connection between racial and cultural conditions and forms of rule in general – and in doing so […] also makes explicit the relation between a rule of law and emergency, a relation that is as intimate as it is anxious.[46]

If, following Agamben, exception is in fact constitutive of sovereignty, if the rule of law and emergency are not conflicting but complimentary systems of order, then the legal status of Algerian Muslims under French rule must be understood as *both* a "monstrosity" *and* indispensable to the articulation of French citizenship and "normal" political rights. The more pressing question then becomes, not whether the republican model was race-based, but how race and racial categories were deployed, in a proliferation of dynamic and protean forms, to help establish a received and transcendent "French" republican subject.

Building on these arguments, this study is particularly concerned with the play of gender construction and sexuality in these processes, as they shaped the colonial Orientalist imagination – and administration – of Muslim "family" law. As I see it, the more compelling "paradox" is that, as territorial and administrative assimilation steadily advanced, so too did French reformist attention to the Muslim household, especially the conjugal couple. Throughout this period, though "Muslim personal status" maintained the definitional

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[45] Partha Chatterjee, *The Nation and its Fragments. Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993): 14. See also: Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, N.J: Princeton University Press, 1995), especially Chapter 6.

[46] Nasser Hussain, "Towards a Jurisprudence of Emergency: Colonialism and the Rule of Law," *Law and Critique* 10.2 (1999): 103.

boundary between the polity and its others, the *substance* of Muslim personal status law became a matter of intensified debate and intervention.[47] That an elaborate knowledge industry surrounding the personal status of Muslims emerged precisely as Paris issued a severe and differentiated punitive regime for native Algerians is not a coincidence.[48] Indeed, following Asad's thesis, the relegation of religious law to personal status and the investment of the secular bureaucracy with disciplinary prerogatives were mutually-sustaining processes. A key premise of my intervention is, therefore, that the alignment of legal exception, deviant sexuality, and liberal ontologies of difference is deserving of more sustained study.

Algerian Women between Legal Regimes

This brings us, finally, to the local context and the most central questions raised by this project: What were the impacts of these policies, ideologies, and knowledge industries on lived realities of their most symbolically and discursively generative subjects – Algerian women? Conversely, this question may also be put: How was the "Algerian woman" herself produced at the intersection of these competing ideologies and a host of local and imposed gender, class, and racial orders? And how can we, looking back upon these histories, try to use the records available in a way that is both imaginative and critical to trace the web of power relations that at once bounded these subjects to, and distanced them from, the colonial state? If the previous two contexts – broader histories of Islamic modernization and French republican politics – rely on political, legal, and intellectual historical methodologies to

[47] Judith Surkis makes a similar argument in "Propriété, polygamie et statut personnel en Algérie coloniale, 1830-1873," *Revue d'histoire du XIXe siècle* 41.2 (2010): 27-48. But while she is interested in what constituted "Muslim personal status" at the moment of its designation outside of French civil status in 1865, I am concerned with how this category was then revisited and reshaped, even as its nature was declared sacrosanct and immutable, through the subsequent decades.

[48] One year after the promulgation of the Code de l'indigénat in 1881, the École de droit d'Alger was founded. Its founder and first dean, Marie-Robert Estoublon, set the wheels in motion for Marcel Morand's *Draft code of Muslim Algerian Law* (1905-1916), discussed in Chapter 2.

elucidate questions of structure, then this third context shifts our attention, in turn, to agency, negotiation, and social history.

Litigants who filed suit in Muslim jurisdictions across the Mediterranean world in the mid- late-nineteenth century were faced with what legal historians have described as an "epistemological break," which I have begun to outline above. These included: first, the expansion of non-religious state authority over domains deemed "public"; and second, the bureaucratization of the religious legal class and the standardization and codification of the domain of "family" law that remained. This study joins the conversation created by feminist historians of the Middle East and North Africa concerned with understanding this transition from pre-modern legal regimes marked by a degree of flexibility and maneuverability to more rigid modern institutions, and the responses of subjects who experienced these transformations as litigants.[49] Yet, it also stands apart in certain respects, given the imposition of these changes upon Algerian subject living under a foreign occupying power, the explicit assimilationist bent of colonial policy, and the sometimes inadvertent effects of mapping Islamic legal principles onto French structure and process.

As such, Elizabeth Thompson's recent overview of the social construction of gendered private and public space in the modern Middle East and North Africa is especially relevant here, as is her concern that an outright "rejection of universal categories in favor of localist

[49] See especially: Judith Tucker, *Women in Nineteenth-Century Egypt* (Cambridge: Cambridge University Press, 1985); Amira El Azhary Sonbol (ed.), *Women, the Family, and Divorce Laws in Islamic History* (Syracuse, N.Y.: Syracuse University Press, 1996); Beshara Doumani, *Family History in the Middle East Household, Property, and Gender* (Albany: State University of New York Press, 2003); Margaret Meriwether and Judith Tucker (eds.), *Social History of Women and Gender in the Modern Middle East* (Boulder, Colo: Westview Press, 1999); Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law : Iran and Morocco Compared* (London: I.B. Tauris, 1993). See also: Judith Tucker's indispensable synthesis and analysis of modernization, gender inequality, and Islamic law in *Women, Family, and Gender in Islamic Law* (Cambridge, UK: Cambridge University Press, 2008): Introduction. It is worth mentioning the recent work of Leslie Peirce here, for its methodological utility, though her subject pre-dates these histories by some four hundred years. Leslie Peirce, *Morality Tales Law and Gender in the Ottoman Court of Aintab* (Berkeley: UC Press, 2003).

terminology may encourage the cultural exceptionalism and essentialism that revisionist and feminist historians have sought to combat."[50] Indeed, a central aim of this project is to uncover the ways in which colonial encounters "combined with older repertoires [of Islamic and customary law] to create a volatile and complex reality" for the women caught in the cross-hairs of these regimes.[51] This methodology avoids falling into searching for a transcendent or "transcultural notion of patriarchy," as Judith Butler warns, since it does not presume to uncover such a notion, but is, to the contrary, committed to tracing the processes of its construction.[52] Consider the case described above. When Abdel Mohammed ben Bamalem's lawyer argued his client's case against the claims to upkeep presented by his opponent and former wife, he painted her as a willful and rebellious woman, encouraged to defy her husband's authority by a meddling grandmother, thus marshalling an image of womanly "disobedience" that had purchase in both French and Islamic legal traditions and was by that point codified as a common prescriptive norm. The second half of this thesis explores the ways in which the penalization of "rebellious" women was naturalized through the process of rendering Islamic legal concepts of marital authority legible to French jurists.

Generally speaking, archival research on North African legal history in the colonial period has yielded a relatively small number of concentrated studies that hardly compare, for instance, with the breadth of such scholarly work on other formerly colonized regions, such as South Asia under British rule or even French West Africa.[53] Historians of colonial Africa in

[50] Elizabeth Thompson, "Public and Private in Middle Eastern Women's History" *Journal of Women's History,* 15.1 (2003): 52.
[51] Thompson, ibid.: 53.
[52] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990): 46.
[53] This no doubt owes in part to the existence of a breathtaking variety of localized "customary" laws in these historical contexts, though the role and importance of customary law in the Maghreb should not be overlooked, as Chapter 3, below, will demonstrate. On South Asia, a sample of such studies includes: Indrani Chatterjee, *Gender, Slavery, and Law in Colonial India* (New Delhi: Oxford University Press, 1999); Durba Ghosh, *Sex and the Family*; Preeti Nijhar, *Law and Imperialism: Criminality and Constitution in Colonial India and Victorian*

general have produced a rich and extensive literature, thanks to relatively accessible and voluminous archival resources, which have placed them, along with South-Asianists, at the forefront of both historical and anthropological discussions of legal pluralism as both/either a mechanism of colonial rule and/or a weapon in the limited arsenal of colonized resistance.[54] This discussion has also been shaped by a debate on the "invention of tradition" through the colonial administration of orally-transmitted "customary" laws and how this process worked to the benefit of a small group of local elites and to the particular detriment of subjects gendered female under these regimes.[55]

England (London: Pickering & Chatto, 2009); Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998). On the French Soudan and AOF, see: Emily Burrill, Richard L. Roberts, and Elizabeth Thornberry (eds.), *Domestic violence and the law in colonial and postcolonial Africa* (Athens, Ohio: Ohio University Press (2010); Richard L. Roberts, *Litigants and Households: African Disputes and Colonial Courts in the French Soudan, 1895-1912* (Portsmouth, NH: Heinemann, 2005); Marie Rodet, "Genre, coutumes et droit colonial au Soudan français (1918-1939)," *Cahiers D'Études Africaines* 47.187/188 (2007): 583-602; Kristin Mann and Richard L. Roberts (eds.), *Law in Colonial Africa* (Portsmouth, NH: Heinemann Educational Books, 1991). On courts and the codification of customary law in Africa: Elsje Bonthuys and Natasha Erlank, "The interaction between civil and customary family law rules: Implications for African women' 2004 *Journal of South African Law* 59 68-72; Martin Chanock, *The Making of South African Legal Culture, 1902-1936 Fear, Favour, and Prejudice* (Cambridge: Cambridge University Press, 2001); Susan F. Hirsch, *Pronouncing & Persevering: Gender and the Discourses of Disputing in an African Islamic Court*. (Chicago: University of Chicago Press, 1998).

[54] Though the question of "natural law" has existed in anthropological and ethnological inquiry in the colonies since, arguably, the 1920s, in many ways the debate as it currently exists was initiated by M.B. Hooker with his 1975 monograph, *Legal pluralism: an introduction to colonial and neo-colonial laws* (Oxford: Clarendon Press). Many scholars have since built on Hooker's work to consider the operations of legal plurality beyond that authorized by the state. These include: Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22.5 (1988): 869-896; Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field As an Appropriate Subject of Study," *Law & Society Review*. 7.4 (1973): 719-746. For a complete list see: Mitra Sharafi, "Justice in Many Rooms since Galanter," *Law and Contemporary Problems* 71.139 (Spring 2008). Although, as Sharafi notes, the literature on "*ethnologie juridique*" in Francophone scholarship predates the Anglophone wave of interest on this topic, Catherine Coquery-Vidrovitch has found that studies devoted to the gender operations of law in the colonies have enjoyed greater strides within the Anglophone academy. See: Sharafi, ibid.: 140; and Coquery-Vidrovitch, "Genre et justice. Les recherches avancées en langue anglaise," *Cahiers D'Etudes Africaines* (Jan 2007): 461-494. Finally, colonial legal pluralism as essential not only to "domestic" colonial governance but the elaboration of a transnational private law regime, beginning in the early-modern Mediterranean and Atlantic worlds, has been proposed by Lauren Benton in *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge, UK: Cambridge University Press, 2002).

[55] Eric Hobsbawm and T. O. Ranger. *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

The contribution of historians of colonial Algeria to these conversations is almost entirely limited to the important work of Allan Christelow.[56] Indeed, this present study is deeply indebted to Christelow's groundbreaking monograph, *Muslim Law Courts and the French Colonial State in Algeria* – the first to illuminate the elaboration of the French colonial legal regime in Algeria in the nineteenth and early twentieth centuries.[57] Christelow's book falls under the rubric of post-Marxian political history, according to which his primary aim is to understand the choices and careers of urban Muslim notables and the leaders of the rural clans in their efforts to preserve Muslim dignity and the integrity of personal status law while also accommodating and innovating reformist positions. He traces these processes through to the end of the events and policies known as the "war on the *qadi*s," the assimilationist assault on the infrastructure of Islamic state law that culminated in the 1880s, and then largely disregards subsequent developments as though the decline of the *qadi*s and other notables signaled the end of indigenous involvement in the shaping of personal status law. By virtue of this, as well as archival limitations particular to research in Algeria, Christelow's study prioritizes the experiences and perspectives of prominent actors who engaged, to varying degrees of cooperation, with the French colonial state. The effect, therefore, is to privilege elite subject positions and state-directed colonial power, even if wielded by native agents.

Before Christelow's classic study, there was the work of French historian Jean-Paul Charnay, which, like this dissertation, was more interested in what might be learned by

[56] This does not include work dealing with the pre-colonial and early-modern "Barbary coast" and its place in a diverse and tumultuous Mediterranean world. See especially: Lauren Benton, *Law and Colonial Cultures*, and Julia Clancy-Smith, *Mediterraneans: North Africa and Europe in an Age of Migration, C. 1800-1900* (Berkeley: University of California Press, 2011): 199-246.
[57] Christelow, *Muslim Law Courts.*

examining the encounters between local laywomen and colonial courtrooms.[58] Charnay's writings on the lives of Algerian women in the early nineteenth-century, based almost totally on published jurisprudence, are still heavily cited despite having been published very shortly after the French retreat from Algeria. In my effort to draw both social and gender history from court records, this study in some ways follows Charnay's lead more evidently than Christelow's. That said, Charnay's arguments, presented some fifty years ago, undoubtedly suffered from a number of limitations. As Charnay himself admits, the body of cases upon which he draws came only from Algeria's highest courts, and thus provides little information on the preceding jurisprudence of each dispute, much less that of the *qadi*s of the lowest jurisdictions. Nor do they contain much information on other social circumstances of interest, such as the professions and origins of litigants, the involvement of their families, or the arguments presented by hired legal counsel. Thanks to the gradual opening of local Algerian judicial records (discussed below), I have been able to locate records that fill in the portrait of colonized litigants and their social worlds that Charnay could only partially reconstruct.

Perhaps the most glaring limitation of Charnay's work, however, is his faith in the transparency of the published record of colonial judicial review to reveal the intimate workings of the Muslim family, and even the secret motives of Algerian girls and women.[59] This thesis benefits from time, distance, a wider array of sources, and various critical "turns," some of which were mentioned above, that re-shaped the field of colonial studies, as well as the historian's relationship with archives more generally. In light of this, Arlette Farge has cautioned social historians working with court records to bear in mind that judicial archives

[58] Jean-Paul Charnay, *La vie musulmane en Algérie, d'après la jurisprudence de la première moitié du XXe siècle* (Paris: Presses Universitaires de France, 1965).
[59] This is despite the more nuanced tones and series of caveats included in Jacques Berque's preface to Charnay's book (vii-xvi).

"only exist because some practice of power has caused them to be born."[60] In this case, colonial court records of Muslim personal status exist because indigenous litigants seeking the resolution of interpersonal disputes of a "private" nature often had little other choice than to try to seek redress in a colonial courtroom, whether presided by a *qadi* or a French justice of the peace. While this very act, especially on the part of women, tells us something about the lengths they were willing to go to ameliorate dire situations, we cannot simply wish the colonial presence out of these interactions. To the contrary, as our first case study illustrated, the colonial state created these very spaces and permeated them entirely in overt and more subtle ways that are themselves deserving of study.

The task of writing colonial social history therefore calls for alertness to both disciplinary power and its negotiation by subaltern subjects. For instance, in his study of the birth of the Egyptian police force through the nineteenth century, which grew alongside Muhammed Ali Pasha's modern criminal justice system and expanded disciplinary and carcerial apparatus, Khaled Fahmy was also careful to draw his readers' attention to the ways in which these systems and institutions created the conditions for their own subversion.[61] Likewise, while this study attempts to trace the colonial state's interest in and construction of the Muslim "family" as a site of regulation, it is also attuned to contingency, context, and the possibilities of influence from below. It explores the ways in which, to use Susan Hirsch's words, "law [paradoxically] 'genders' individuals in ways that define their positions both in society and in legal contexts, while also affording space for contesting those positions."[62] As I have just argued in the previous two sections, colonial legal pluralism was a mode of state

[60] Arlette Farge, *La vie fragile: violence, pouvoirs et solidarité à Paris au XVIIIe siècle* (Paris: Hachette, 1986): 11.
[61] Khaled Fahmy, "The Police and the People in Nineteenth-Century Egypt," *Die Welt des Islams* 39.3 (1999): 340-377.
[62] Hirsch, *Pronouncing and Persevering*: 20.

governance deployed to reinforce Muslim racial difference and to facilitate the surveillance of indigenous subjects. Yet, the plurality of legal venues and conflicting codes and norms, both pre-existing and state-imposed, enabled a wide degree of forum shopping and "selective recourse to [and manipulation of] a variety of discourses" by indigenous litigants.[63] In colonial Algeria, while the colonial-assimilationist erosion of the Islamic juristic class, and the rationalization of institutions and personnel for administering Muslim personal status law closed off certain avenues and strategies for women litigants, they quickly discovered others. These included: appealing an unjust ruling, hiring European lawyers, writing letters of complaint to French administrators and the governor general, and enlisting the expertise or financial assistance of local missionaries – all of which, among others, we will observe in the pages that follow.

This study therefore makes a number of claims regarding women's agency as colonial subjects and litigants in Islamic courts in the modern period. Historians of women and gender have made significant contributions to our understanding of modernity and state-building in the modern Middle East and North Africa – indeed, far too much to cover adequately here. Insofar as this scholarship has followed feminist scholarly trends in Western contexts, this subfield was, at least initially, largely concerned with identifying Eastern women as agents of historical and political change. As leaders and proponents of nationalist and religious movements to advance such causes as women's education and the end of gendered seclusion, "Oriental" women were hardly passive recipients of reform, and many were engaged in discourses broadly identified as "feminist."[64] Though colonial Algeria produced no such

[63] Tucker, *Women, Family, and Gender*: 11.
[64] On Middle Eastern feminist movements – the Egyptian movement again taking up much of the literature – and their relation to nationalist independence movements, see for example: Margot Badran and miriam cooke (eds.), *Opening the Gates: An Anthology of Arab Feminist Writing* (Bloomington: Indiana University Press, 2004);

organized feminist movement, a certain number of notable women – on both sides of the colonial divide – did shape the colonial political landscape. Lazreg and Clancy-Smith have each shown not only the causality between the colonial presence and indigenous women's gendered suffering, but have insisted on the agency of Algerian women, framed mainly as "resistance" to the colonial state.[65]

For social and legal historians, however, the "resistance" model of agency that suits the study of "women worthies" of history poses a number of limitations.[66] Building on the thesis of "situated" agency advanced by Saba Mahmood, Judith Tucker has suggested that attention to the myriad ways in which women not only subverted or consolidated patriarchal norms, but also "performed, inhabited, and experienced" them as legal subjects, may be a more "useful way to explore how most Muslim women have acted as agents within the legal tradition."[67] In the case of Algerian women litigants, however, the colonial presence complicated this scenario even further by presenting them with a "double-bind" in which "resistance" to one system (their own natal or marital families) often meant "complicity" with another (the colonial state), and vice versa. As such, though both Mahmood's and Tucker's points are well taken, I find that the model of agency presented by Durba Ghosh, writing on Indian women who used British colonial courts, of greater utility. In an argument not unlike that posed by feminist legal theorist Catherine MacKinnon, Ghosh insists that women in such

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Margot Badran, *Feminists, Islam, and Nation: Gender and the Making of Modern Egypt* (Princeton, N.J.: Princeton University Press, 1995); Beth Baron, *Egypt As a Woman Nationalism, Gender, and Politics* (Berkeley: University of California Press, 2005); Beth Baron, *The Women's Awakening in Egypt: Culture, Society, and the Press* (New Haven: Yale University Press, 1994); Cynthia Nelson, *Doria Shafik, Egyptian Feminist: A Woman Apart* (Gainesville, Fla: University Press of Florida, 1996); Hudá Sha'rāwī and Margot Badran (trans.), *Harem Years: The Memoirs of an Egyptian Feminist (1879-1924)*, (London: Virago, 1986).

[65] Julia Clancy-Smith, op cit. – fn 22, 56, above. See also: Julia Clancy Smith, "A Woman Without her Distaff," in Meriwether and Tucker (eds.), *Social history of women and gender in the modern Middle East* (Boulder, Colo: Westview Press, 1999).

[66] The notion of "women worthies" of history comes from Meriwether and Tucker, Introduction, in Meriwether and Tucker (eds.), ibid.: 3-4.

[67] Tucker, *Women, Family, and Gender*: 34.

contexts were not faced with a choice between complicity or resistance, but with surviving or not.[68] That they struggled to survive, using any and all means at their disposal, earned them a place in the archive, which itself marks them as historical agents. To return once again to the opening case of Zohra bint Ahmed, though she lost to her opponent in the *qadi* court of Blida, we know that she appealed and petitioned to have the case heard at a higher jurisdiction before a French judge. In fact, the very reason a record of this case exists is because she fought it, and her appeal was subsequently filed with that higher tribunal.

Moreover, Algerian women's suits and appearances in courts not only served their own personal or familial interests but, through the colonial judicial review system designed for the purpose of assimilation, these women also worked to "shift [legal] discourse to their advantage."[69] An appeal to a French court, such as that of Zohra bint Ahmed, brought with it the possibility of a third level of review at the highest jurisdiction, the Chambre de révision musulmane, a state-appointed body of French and Muslim jurists assigned to assess both the Islamic "orthodoxy" of appeal decisions and their conformity to French standards and principles – a rather heavy, indeed convoluted, task. The rulings of this council did not set precedents *per se*, but were nonetheless highly influential. They formed the basis for a host of special laws and circulars directed toward the Muslim subject population and, like Morand's code, were often cited in support of lower court decisions, as we saw in the case above. In this way, Algerian subjects, including a significant number of women, navigated the colonial court system and made their presence felt in the shaping of colonial family law. Thus, the case studies presented especially in Chapters 3 and 4 demonstrate how the the convoluted process of crafting Algeria's colonial pluralism and family law regime was one of constant

[68] Ghosh, *Sex and the Family in Colonial India*: 21-22; MacKinnon, Catharine A. *Toward a Feminist Theory of the State* (Cambridge, Mass: Harvard University Press, 1989).
[69] Tucker, *Women, Family, and Gender*: 34.

negotiation between European men making laws to meet what they perceived as the needs of "public order" and familial stability, and colonized women reacting to and also instigating reforms even as the juridical ground on which they stood was shifting beneath their feet. Tracing their trajectories shows how, as the work of Natalie Zemon Davis reminds us, studying history from the margins gives us a clearer vantage point of the centre.[70] In this case, by studying women whose struggles also imprinted their lives upon the archives, we accompany them as they maneuver regulatory structures, develop new strategies as quickly as previous possibilities are foreclosed, and sometimes, on rare but meaningful occasions, emerge victorious.

Structure of the Chapters

Part I

As I have discussed above, as segregation and exceptional law maintained the stability of the colonial state, the "indigenous family" also came under the scrutiny of French reformists within the expanding juristic class, who took their cues from similar developments in neighbouring Muslim jurisdictions. The two most ambitious manifestations of this intrusive impulse were the État civil des indigènes (1882) and Marcel Morand's *Avant-Projet de Code du Droit Musulman Algérien* (1916), which I explore in Chapters 1 and 2, respectively. It bears noting that these expansive and costly enterprises were also both abysmal failures. Yet their reverberations and indirect effects are as worthy of attention, I would submit, as their failure to fulfill their initial respective purposes, especially when it came to personal status litigation.

[70] Natalie Zemon Davis, *Women on the Margins: Three Seventeenth-Century Lives* (Cambridge, Mass: Harvard University Press, 1995).

First, the establishment of the État civil for "indigenous" subjects in Algeria involved an array of new laws obliging all Algerian Muslims to take Gallicized names and register their births, deaths, marriages, and divorces with a public notary. In the process of rendering visible the details of the Muslim life cycle the French state undertook the construction of the Muslim "population" of Algeria, and a fabricated Muslim "family" as the basic unit of society, through cataloguing and mapping. Moreover, as the État civil des indigènes enabled the collection and publication of new census data in the early 1890s, statistics for the colony began to reveal an apparent divorce rate in Algeria that was staggering (40-45%) compared with that in France (2%). This shocked demographers and administrators, who regarded this as a sign of familial anarchy, social stagnation, and rationale for further French intervention. Eventually, a display of compliance with the civil status registry became an important element of Muslim personal status litigation, as birth records were required to prove the age, and thus consent, of brides, and divorce records became vital to women's judicial annulment and alimony suits.

Second, Marcel Morand's *Draft Code of Muslim Algerian Law* may well be understood as a product of this combined sense of scandal and newfound appetite for intimate knowledge of Muslim Algerians. This ambitious codification project was commissioned by the colonial government to "correct" the "disorder" of Islamic law and facilitate its administration in the colony by simplifying and organizing it in a manner similar to the French Code civil. It was published in segments over the ten-year course of its drafting, and then in whole in 1916. Though it was never officially implemented, the 'Code Morand' (as it was called) became a touchstone procedural guideline for French judges unfamiliar with the Muslim laws they were meant to apply. In order to frame and better understand how the Code Morand would later

effect Algerian women's litigation, especially in appeal, this chapter deals with the institutional edifices and debates on pluralism, citizenship, and colonial "law and order" in which Morand's project took shape. This chapter also traces the circuits of expertise on "Islamic modernization" and interpretation that connected Paris to Algiers via Cairo and Istanbul through the writings and careers of the men who engineered the study and epistemology of "*fiqh francisé*."[71]

These grand schemes were accompanied by other halting and less ostentatious, but arguably as effective, structural and procedural changes: the formalization of the courtroom space; the integration of *qadi*s and their courts into the appeals circuit; and in many places – most notably in the predominantly Berber region of Kabylia – the replacement of *qadi*s with French magistrates. Though Christelow, and to a lesser extent Charles-Robert Ageron, have given accounts of these process before, some of these episodes (like the decree of 17 April 1889) deserve to be revisited and contextualized in terms of what would come later.

Part II

The next two chapters turn from questions of structure and legal-political concerns to the role of litigation, adjudication, and jurisprudence. Though they follow chronologically from the first two chapters, they are also organized thematically and geographically. As these two chapters illustrate, the sweeping changes described in Part I were not only structural and procedural, but conceptual as well. We see this, for instance, in the redefinition of evidence, and the shift from orality to literacy as the measure of credible testimony and competent litigation.

[71] The term "*usul al-fiqh*" refers to the science of interpreting and discerning divine law, while the colonial term "*francisé*" could indicate the assimilation or "evolution" of a native person or object. I am using the term "*fiqh francisé"* following the phrase '*al-fiqh al-fransawi'* coined by Omar ben Brihmat, a graduate of the École de Droit d'Alger, who went on to teach law at a *médersa* in Algiers, in his book, *Kitab an-nihaj es-sawey fi 'l-fiqh 'l-fransawi* (Alger: Fontana, 1908).

Chapter 3 turns to the question of pre-existing legal pluralism and the indeterminacy of Kabyle "customary" laws. It focuses on the north-east coastal region of the Kabyle mountains, which stood apart from the rest of colonial Algeria, both administratively and juridically. This chapter is also organized around the theme of "consent," since this was the most salient issue driving the French efforts to reform Kabyle customary laws, which were uncodified and orally-transmitted. The passive nature of consent in both French and Islamic law, and the ambiguities of governance surrounding Kabyle custom, gave rise to jurisprudential anomalies, including the awarding of French civil divorces to Kabyle women, as well as experiments in the criminal conviction of an offense tantamount to "marital rape," which had no precedents in either Islamic or French law. This chapter also shows how Kabyle women's litigation and the particular formula for "assimilation" that was applied to Kabyle peoples eventually led to Marcel Morand's next major law reform project: The "Centenary Laws" of 1930, which attempted to codify a modicum of consent in Kabyle marriage, though guarding that this latitude was granted at the masculine protectionist pleasure of the state.

Chapter 4, which is organized around the theme of divorce, relies primarily on Algerian court records to trace litigation in a series of lower common law and *qadi* courts in the "*pays arabes*" of the *département* of Algiers. In particular, it is focused on the first instance court of Blida, which also served as a court of Muslim appeals in the arrondissement of the same name, and the subsidiary courts under its jurisdiction. For Algerian women in the late-nineteenth and early-twentieth centuries, escaping unwanted or abusive marriages obliged them to encounter the colonial legal system: While Muslim men could repudiate their wives unilaterally, women were required under Islamic law to seek judicial annulments. In such cases, litigants went to court to dispute which party was at fault for marital dissolution, since

that determined who would be financially penalized. Harm was a crucial criteria for women's divorce, since mechanisms for releasing women from abusive marriages without fault existed both in pre-colonial local custom and in the Maliki school of Islamic law (the main school of Sunni *fiqh* followed in North Africa). This chapter therefore looks, first, at how these arguments were presented by women litigants, and second, how at this crucial juncture the colonial state radically reshaped the terms upon which such arguments were made. This chapter shows how, in the early twentieth century, women's judicial annulment suits underwent a significant transformation, largely against their interests, through the imposed sanctification of the so-called "*domicile conjugal*," as well as the arrival of the colonial medical establishment and with it new claims of authority upon indigenous women's bodies. In the process of rendering certain concepts in Islamic jurisprudence intelligible to colonial jurists, French and Islamic legal notions of marital authority, wifely obedience, and private space were functionally assimilated into each other.

Though the women in these two jurisdictions shared many of the same concerns that brought them to court – entering a good marriage or leaving a bad one – in many ways these two jurisdictions could not have been more different: the courts administering Kabyle "customary law" were entirely presided by French magistrates, and were sites of an on-going contest between legal assimilationists, Kabyle protectionists, and proponents of the "Islamization" of Kabyle law. Yet, women in these two regions also shared notably common strategies. Kabyle women, both in Kabylia and beyond it, took advantage of precisely these ambiguities of jurisdiction and competence in their personal status suits. In the arrondissement of Blida, colonial legal pluralism materialized both in the various venues to which litigants had recourse and discursive repertoires they might have invoked in each. As mentioned, by

this time the system of *qadi* courts were ruled over – and potentially over-ruled – by courts of French common law. Disputants moved between these two levels with notable dexterity, and capitalized on legal assimilationist laws that tried to blur the lines between them.

Note on Sources

This dissertation is based on an assortment of archival and published primary sources, which were accessed at various research cites in Algiers, Oran, Paris, Aix-en-Provence, and Rome. The most quantitatively important archives for this project were the colonial records of the Fonds Ministériels (Ministère de l'Intérieur and Ministère des affaires algériennes) and the records of the Algerian Governor General's office in Aix-en-Provence, France. However, the archives which, though not copious, were the most pivotal in shaping this project were the records of court procedures and appeals that I accessed in Algiers, Algeria. This study also relies heavily on two legal journals: the *Journal de la jurisprudence de la Cour impériale d'Alger* and the *Revue algérienne et tunisienne de législation et de jurisprudence* (RA).[72]

The records of the civil and criminal procedures that came under the jurisdiction of the Blida appeal circuit are now housed in the *wilaya* archives in Algiers, where I accessed them in the spring and summer of 2011. Access to these files is restricted, but I was permitted access to more than two dozen cartons, containing approximately one third of the nearly 300 files contained in this archive. Thus the suits presented in the case studies here are not exhaustive but comprise, rather, a representative sample. In 67 of these files, women were named as either the lead defendant or lead plaintiff. These untapped archives provide illuminating detail on courtroom theatre and cultures of adjudication during the colonial

[72] This annual journal, published by the École de droit d'Alger, became the *Revue Algérienne, Tunisienne, et Marocaine de la législation et jurisprudence* in 1913.

period. These closely-framed narratives are further enriched when set against the somewhat wider canvas of French archives and published case law, which provide the perspectives of administrative, judicial, and bureaucratic actors.

Files in these records vary in length from a dozen pages to several sizeable folders, and include both personal status and property disputes. Despite the level of relative detail provided in the Algerian *wilaya* archives, they also require a certain degree of 'reading against' (and 'reading along') the grain.[73] Firstly, they exist because an appeal was filed with the Blida civil court to reverse an unsatisfying outcome at one of the lower (*qadi*) courts. At their most basic, these files contain summaries of the initial arguments, persons present at each hearing, evidence and witnesses presented, other relevant facts of the case, and the judge's decision and legal grounds and references upon which it was based. Any additional information provided is that which the appellant thought necessary and persuasive to support their side of the case. Sometimes this was very little, especially if the litigant was poor and could not afford the translation of too many documents; other times their appeal dossier, especially if compiled by their legal counsel, filled several folders. Second, the statements and arguments presented by lawyers, litigants, and witnesses are heavily mediated by translation and transcription. Statements by witnesses in colloquial Algerian Arabic or Tamazigh (Berber) were transcribed into a more formal and literary Arabic by the court secretary. They are accompanied by a third level of translation, completed after the fact for the purposes of appeal, into French. Moreover, many of the women who populate these records did not present their own arguments, but were represented by a male relative or – if distance was an issue – a private lawyer or court-appointed *oukil judiciaire* (Muslim legal representative) who

[73] Ann Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, NJ: Princeton University Press, 2009).

spoke in her interest.[74] Except in those (not uncommon) instances in which litigants attempted to plead their case by sending a letter to the court, or on those (somewhat more rare) instances in which they spoke *viva voce* on their own behalf, the 'voices' of these litigants are inevitably muffled, thereby adding to the challenge of 'listening' to these documents for moments of hesitation, desperation, assertiveness, or objection – though it does not mean these moments are entirely lost. Indeed, the emotive and affective quality of some divorce arguments are in fact magnified, particularly those based on harm or neglect in which the pathos demonstrated by the women involved had to be convincingly communicated via their representative. Finally, it must be born in mind that these represent only cases that reached the courts: the use of other venues, such as sufi *zawiya*s or village councils for the resolution of disputes, occurred outside the mechanisms of the colonial state and its laws, and therefore also beyond its archives.

[74] That said, this fact should not be taken to dismiss the agency of these women or the legitimacy of their grievances, as representation by a senior male member of one's family was standard, regardless of the sex of the disputant. This is particularly true of divorce cases, in which husbands and wives were equally likely to appear in court themselves, or have their case presented by a third party.

Chapter 1: The Birth of the État civil des indigènes in Algeria (1882)

Introduction

The archives of even the earliest years of French expansion into Algeria show that the domestic life of the Muslims and Jews who populated the lands under French control was of concern to colonial military personnel, as well as civilian observers. General Thomas-Robert Bugeaud, architect of the bloody French advance into the Algerian interior, euphemistically called Saharan "Pacification," pronounced that despite the systemic razing of villages and slaughter of thousands, "the Arabs elude us because they conceal their women from our gaze."[1] Beginning with the decorated general and sometime ethnographer Eugène Daumas, the officers of the Bureaux arabes expressed anxiety over the impenetrable inner realm of Muslim family life and gender organization.[2] So obscured was the "Arab family" to these observers that it came to be dismissed as barely existent – not a family, properly speaking, but a system of enslavement and coercion hidden behind high walls, from which women were released only by humiliating repudiation – even as its sanctity was established as a cornerstone of colonial policy.[3]

As a matter of legal governance, this policy of "non-interference" and "respect for local custom" especially concerned the application and execution of "personal status" law and the

[1] As quoted in Hubertine Auclert, *Les femme arabes en Algérie* (Paris : Société d'éditions littéraires, 1900): 146.
[2] In particular, among his many publications: *Le Sahara algérien* (Paris : Fortin, Masson et cie, 1845), *Le Grand Désert* (Paris : Imprimerie et librairie centrales de N. Chaix, 1848), and *Moeurs et coutumes de l'Algérie: Tell, Kabylie, Sahara* (Paris : Hachette et cie, 1855), and finally a curious text published posthumously entitled *La Femme Arabe* (Alger : A. Jourdan, 1912). The justification for publishing this last work over forty years after his death was provided in the premise written by Augustine Bernard: because "the indigenous [Algerian] family is still for us a closed sanctuary, forbidden to the gaze and investigation of the nonbeliever." Augustine Bernard, *Revue Africaine* 56 (1912): VI.
[3] Julia Clancy-Smith, "Islam, Gender, and Identities in the making of French Algeria, 1830-1962," in Clancy-Smith and Gouda (eds.) *Domesticating the empire: Race, gender, and family life in French and Dutch colonialism*. (Charlottesville, VA: University Press of Virginia): 155.

promise to preserve indigenous sovereignty over civil matters and inter-personal dispute resolution. Following the transition to civil government in 1870, this official aversion to tampering with indigenous family laws endured as an important rationale for maintaining the political segregation of Algerian Muslims and withholding most "normal" rights of French nationality. At the same time, reforms instituted in Paris, as well as Cairo and Istanbul, empowered the colonial legislator to become more interventionist than at any time previously.

This chapter investigates one of the first and arguably most ambitious of these interventionist reform projects, which initiated this era of enhanced state intrusion coupled with hardened measures of racial exclusion: The État civil des indigènes. This was the centralized public registry where life events, including birth, death, marriage, and (in the case of Muslims) divorce were collected and archived by officers of the state. By transplanting this Republican institution to North Africa, French reformers initiated two processes that would typify this period: the bureaucratization of marriage and the privatization of religion. The failure of the État civil to take hold in Algeria until after decolonization is explained by the colonial state's enduring inability to put the former into effect without inadvertently stumbling into the latter – that is, claiming authority over Muslim marriage without making it French, and, by that token, "secular."

This chapter begins by tracing early proposals and rationales for initiating a native registry in Algeria, starting in the 1850s, through to the Third Republic, Governor General Gueydon's "Native Policy," and the "reform" of Algerian property law in 1873, which abolished public pious endowments in order to facilitate private land acquisition and ownership. At that point, the twin policy objectives of native dispossession and the naming and cataloguing of land-holding indigenous families were naturalized into a broader mandate to assign legible identities

to every Algerian Muslim. This new drive to "constitute the individual and the family," as one lawmaker put it, culminated in the 1882 law authorizing the creation of the État civil des indigènes. These first sections show how throughout the thirty years leading up to (and indeed following) the promulgation of this law, confusion over what, precisely, constituted the "Muslim marriage" itself was an on-going source of debate and frustration in the undertaking, and then enforcement, of the État civil des indigènes. Subsequently, the next section of this chapter looks at how the census data produced by the native registry was studied by experts in the new field of demography – the study of "populations" – to describe, and thereby produce, the Muslim family as an object of governance as they theorized on its putative "fertility" or else "decline." Finally, I consider the responses of Muslim subjects not only to the new obligations, fees, and confessional demands of the État civil, but also the imposition of Gallicized surnames, both of which contributed to the generally dismal state of compliance with the registry.

What sparked this new surge of interest in rendering visible the details of the indigenous life cycle and familial status of each Muslim subject? Metropolitan developments explain it to an extent: the implementation of a civil registry and collection of census data for indigenous non-citizen subjects coincided with accelerated *étatisation* in the metropole, during which French citizenship was both enhanced and its exclusionary borders further defined.[4] These mechanisms facilitated the extension of new modes of centralization and modernization that various French historians, most famously Eugen Weber, have posited as the drivers of modern state-formation in the Third Republic.[5] Meanwhile, historians of the French Empire like Emmanuelle Saada and

[4] The two classic studies that document these developments are: Patrick Weil, Q*u'est-ce qu'un Francais? Histoire de la nationalite francaise depuis la Revolution* (Paris: Grasset, 2002). Gérard Noiriel, *Le creuset français: histoire de l'immigration, XIXe-XXe siècles* (Paris: Seuil, 1988).
[5] Eugen Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870-1914*. (Stanford, Calif: Stanford University Press, 1976). Patrick Weil, Q*u'est-ce qu'un Francais? Histoire de la nationalite francaise depuis la Révolution* (Paris: Grasset , 2002).

Ann Laura Stoler have identified how epistemologies and regulatory frameworks surrounding "the family" formed an essential *fin-de-siècle* principle of colonial governance, through which intimate relations were made central to the construction and maintenance of racial orders.[6] This chapter's examination of the État civil des indigènes in Algeria builds on this scholarship, thereby also bridging the historiographical gap between colonial and metropolitan state-building. Seen as a costly (and largely failed) experiment, the civil registry of Algerian Muslims has received only scant attention from both Maghreb and late colonial historians, despite the voluminous archive of its development and its implications for the management of the colony.[7]

From one perspective, the bureaucratization of marriage and privatization of religion might be regarded as twin aspects of a "deployment of alliance" that prefigured the eventual "deployment of sexuality," and its recoding as law, which brought regulatory attention, in the case of Algeria, to polygamous and child marriage through civil and criminal justice regimes.[8] By contrast, historian Frederick Cooper, in his study on the État civil des indigènes in French West Africa (A.O.F.) in the post-war period, insists that, "[w]e need not get stuck with a Foucauldian illusion that 'colonial modernity' or 'colonial governmentality' necessarily implies a state concerned with surveillance and identification."[9] The "more interesting and more puzzling question," he suggests, is why the colonial government, "upon realizing the utility of studying populations, was so bad at applying it." West Africans, he finds, seldom registered with the État

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[6] Emmanuelle Saada, *Empire's children : race, filiation, and citizenship in the French colonies*. (Chicago: University of Chicago Press, 2012). See also: Ann Laura Stoler, *Carnal knowledge and imperial power: Race and the intimate in colonial rule* (Berkeley: University of California Press, 2002).

[7] Other than the eight pages Charles-Robert Ageron devotes to the native État civil and the 1882 law that promulgated it in *Les Algériens musulmans et la France (1871-1919)*, I have found surprisingly little mention of the État civil des indigènes in the secondary literature, and no studies whatsoever that examine its history in any depth. Charles Robert Ageron, *Les Algériens musulmans et la France (1871-1919)*, (Paris: Presses universitaires de France, 1968), Tome I, 176-184.

[8] Michel Foucault, *The History of Sexuality*, v. 1 (Vintage: NY, 1990): 103-144.

[9] Frederick Cooper, "Voting, Welfare, and Registration: The Strange Fate of the État-Civil in French Africa, 1945-1960," (Forthcoming): 3. (My thanks to Professor Cooper for sharing an early version of his article with me).

civil, and did so only to access benefits like state pensions. These strategies notwithstanding, Cooper does observe that colonial law-makers were invested in the nature of the African family, and were highly attentive to polygamy and the potential of reforming Africans with *statut civil de droit commun* toward monogamy and nuclear family structures, seen as more advantageous to building a durable wage-earning labour class.[10] Importantly, in the histories Cooper explores, the État civil was proposed for West Africans as preparation for the franchise – something not even considered for Algerians when this institution was imposed upon them some seventy years earlier. Thus, his remark on the effect of the État civil on West Africa is doubly true of Algeria: "[A] notion of identification and surveillance that in France was meant to define the unity of a national population had the effect in French Africa of differentiating people."[11] Even as administrators devised approaches for culturally assimilating the non-European populations of Algeria, the markers of racial, social, and sexual difference were only deepened by the imperative to collect data on colonial subjects and taxonomize their conjugal patterns. This was not, therefore, the kind of "racism of expansion" that attended to the bourgeois body described in *The History of Sexuality*, but one of rigid exclusion based on evolutionary notions of civilization.

That said, Cooper's dismissals – at least in the Algerian case – beg refinement. We should care about the État civil des indigène not because it "worked" (or did not work) as a public register of the life events of Muslims, but because of its central place within a constellation of new laws at the outset of the new civilian administration in Algeria – what Todd Shepard describes as the "high point of assimilation"[12] – for producing both "religion" (Islam) as

[10] This latter observation does not detract from Cooper's overall point, since Foucault dismisses outright the imperative to mould productive labouring bodies as a motor of the incitement to discourse. Foucault, *History of Sexuality*: 121-22.
[11] Cooper, "Voting, Welfare, and Registration" : 20.
[12] Todd Shepard, *The Invention of Decolonization: The Algerian War and the Remaking of France*. (Ithaca, N.Y: Cornell University Press, 2006): 29.

a "generic problem" of secular governance and "the Muslim family" as an object of public interest.[13] As the following pages demonstrate, the law of 1882 which instituted the État civil for Muslims had implications well beyond the physical registry that failed to materialize.

For one, insofar as it served the purposes of native land dispossession, the État civil demanded the mapping of indigenous Muslims, their movements and ties of kinship, and a systematized standardization of names (or, more accurately, the forced assignment of names) in Latin script and French orthography. While the dismantling of indigenous family property is a process accounted for in most histories of colonial North Africa, what I proposed to trace is the indelible path from the law of July 1873, which finally brought all immovable property under French jurisdiction, and the promulgation of the État civil des indigènes. As I will show, these landmark pieces of colonial legislation were linked by their shared goals of re-constituting the indigenous family in a manner legible to the colonial state, primarily through surnames and census data. Significantly, this will to know the interior lives of Muslims was not secondary or coincidental to the expansion of private property law but indeed predated it; prior to 1873, many "civilizing" justifications for the État civil des indigènes were invoked, from moral education to taxation, but the need to supplant collective holdings and public pious trusts (Arabic: *waqf/habous*) with a private property regime was never among them. Once this exigency emerged in the 1870s, it was quickly and easily naturalized into arguments for the État civil of Muslim subjects. The État civil des indigènes also made possible several landmark censuses (however flawed) of the Muslim population, bringing the new field of demography to the colony, and with it an inversion of the fertility panics that accompanied its rise in France. However negligible the impact of the native registry in the A.O.F., it did serve to bring the new science of

[13] Gil Anidjar, "Secularism," *Critical Inquiry* 33 (Autumn 2006): 65. See also: Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993): 189.

demography and theories of population control to Algeria, at a time of a heightened self-consciousness over French fecundity.

In this schema, the ubiquitous "status of the Muslim woman" was instrumentalized to justify the expansion of modes of surveillance over the Muslim population. Yet, as discussed in later chapters, the failures (and measured successes) of the État civil des indigènes ushered in a plethora of legislative reforms on their behalf, and the metaphors of colonial rescue would generate real juridical consequences for family litigation.[14] In the earliest days of this process, lawmakers imagined that "legitimate" families could be fashioned out of seeming anarchy in the Muslim domestic sphere, as "clandestine" wives and "natural" children gained recognition by entering the public domain. This agenda did not entail releasing women from their veils (a concern of French feminist introduced somewhat later) but giving the state greater access to the routine business of their lives. The État civil des indigènes thus also set into motion the processes that would drastically reshape the relationship of litigants to *qadi* courts, bridging (while at the same time distancing) one to other by a certain threshold of paperwork. The intended – and unforeseen – effects of this new set of relations are discussed in greater detail in Chapters 3 to 4, while the remainder of this and the following chapter frame the initial "top-down" aspects of reform.

Locating Legitimate Wives: Marius de Gimon's Algerian Excursion

In the early 1850s, Marius de Gimon, the former chief administrator of the État Civil in Marseille, arrived in Algiers with a mission, commissioned by the imperial government, to observe the state of Muslim marriage in Algeria. In his reports to the Ministry of Justice, in

[14] In Marnia Lazreg's estimation, "[t]hese laws were passed to make the administration of Algeria more efficient, and help in litigations among Algerians that were brought to French colonial courts." The process of *how* these laws affected dispute resolution between Algerians is the subject of my third and fourth chapters. Marnia Lazreg, *The Eloquence of Silence: Algerian Women in Question* (New York: Routeledge, 1994): 88.

March of 1855, Gimon described the many obstacles thwarting his efforts to study and survey Muslim women and the Muslim family – primarily, his difficulty discerning between true and false wives, since, he declared, no documentation existed to prove the validity of Muslim unions. In turn, he devoted the bulk of his report to assessing the possibility of replicating the French État civil in the North African territories and to thereby institute the registration of indigenous families in public records.[15]

In France, a decentralized bureaucracy for registering Christian and family names had been unevenly instituted by the Catholic Church since the twelfth century, which by the sixteenth century began also recording births, baptisms, deaths, and finally marriages. This was done mainly to assess the moral state of the congregation and to regulate bigamy and "*concubinage*" (taking a mistress). By Church policy, unregistered marriages were not publicly recognized and children born from unregistered unions were considered illegitimate and had no inheritance rights – a policy later maintained by the state.

The first centralized effort at secularizing registration was Louis XIV's ordinance of 1667, which also definitively substituted witness testimony with written proof in matters of identity and justice. Following the revolution of 1789, the decree of 20 September 1792 gave responsibility for civil registry entirely to municipal governments, thereby erecting the first version of the État civil républicain.[16] Still, it would take many decades to quell rural and non-Catholic resistance to registration. Historian of republican assimilation Gérard Noirel has shown that by 1820, widespread bribery, irregularities, and falsification; mistrust of the state; the

[15] Archives nationales d'outre-mer (ANOM) Fonds Ministèriels - Serie F80/1722. Marius de Gimon, Communication, 15 Mar 1855.
[16] By 1820, however, it was decided that this responsibility should transfer instead to the office of the Justice of the Peace, more beholden to Paris than to local patrons and families, who preferred to avoid registration for fear of conscription and loss of inheritance, among other reasons. Gérard Noiriel, "L'identification des citoyens. Naissance de l'état civil républicain," *Genèses* 13 (1993): 25.

persistence of non-Parisien dialects and Hebrew; and a general failure to comprehend the utility of the entire enterprise (and accompanying new taxes and conscription) were among many barriers to the "public order" envisioned by Paris that would render knowable individuals from threateningly anonymous masses. The modern État civil, elevated by the First Republic as both a marker and duty of citizenship and Frenchness itself (even a secular ritual that replaced baptism), was later reframed in the Code civil as a tedious but obligatory formality; its putative, if symbolic, benefits were diminished, even as the irruption of the state into private life was accelerated.[17] Noiriel alludes to official concern among the early-nineteenth century framers of the État civil for the depraved condition of "the family" among rural and illiterate "savages" in the French countryside. In Algeria, this attitude was amplified; the seemingly backward state of the family and society was the dominant theme of all official discussions on centralized state registration.

Gimon's report from Algeria was not the first time such a scheme had been proposed for the colony, and small-scale record keeping, mainly of deaths, had been in place in the northern urban centres since the earliest years of French occupation.[18] Indeed, he had arrived just in time to witness the first major decree, of 8 August 1854, which required the registration of births, deaths, and household composition in the civil cantons (local administrative units).

Nonetheless, Gimon complained that many educated indigenous city-dwellers forwent the registration of births, deaths, and marriages with the local notary. Even more stunning: many so-called "naturalized" Muslims, who acquired French civil status by attaining high ranks in the French army, were discovered to have been married in an Islamic ceremony, and on some

[17] One official likened it to "a solemn and public act to prevent all secrecy [*clandestinité*]." As Noirel elaborates, the indication of an 'act' signals both an 'action' and a written document, while the word 'public' evokes a group of citizen-spectators who attest to its validity. Noiriel, "L'identification des citoyens" : 6.
[18] L. Perrilier, "Le Statut Personnel : Une investigation dans la région du cheliff," *Questions Nord Africains*, 1939 : 111.

occasions had more than one wife.[19] According to Gimon, the institution of an "État civil des indigènes" (sometimes called "État civil des musulmans") throughout Algeria would curb these social problems and others. Employing a standard assimilationist argument, Gimon insisted that the restriction of polygamy in Algeria would not constitute a violation of promises to safeguard the free practice of Islam, since the taking of multiple wives was not required but only condoned in the Quran; moreover, the *surat* (Quranic verses) proscribing the taking of four wives was meant to restrict polygamy, which had been a limitless male right prior to the prophetic revelations. In no other way, Gimon argued, had either the social or private lives of Muslims been disrupted under French rule. But the right "to hold their raped and captive women," as he put it, "this is the internal detail that no-one has yet the right or inclination to disturb."[20] Gimon was almost certainly referring to the rule of the commandants, especially the officers of the Bureaux arabes, who, with Arabophile backing under Napoleon III (r. 1852-1870), were notoriously reluctant to enforce any measures considered intrusive into Muslim private life.[21]

To support his proposal of a civil registry for indigenous Muslims, Gimon recommended in a second report, two years later, that the Code civil become the law of all subjects with regard to marriage, including and above all the prohibition of polygamy.[22] This would be achieved in large part through the same method employed in France: official non-recognition of any children

[19] ANOM F80/1722. The same file in the ANOM that contains Gimon's reports also holds a number of files on the pensions of Muslim soldiers (made "naturalized" French citizens after 1865) who had contracted "irregular marriages." This revealed a lacuna of the 1865 Senatus-consulte: what to do about the Muslim (religious) marriages of naturalized citizens? Investigations revealed that many of the men charged with polygamy had in fact annulled their Muslim marriage in order to re-marry and thereby "legitimate" their wives through a notary office.
[20] ANOM F80/1722. Marius de Gimon, Communication: Observations sur les mariages musulmanes en Algérie, 6 Sept 1858.
[21] There were, however, some notable exceptions at the higher echelons, including General Faidherbe (later founder of the Senegalese Tirailleurs) who wanted to make marriage before a *qadi* necessary, and General Lapasset, a strong influence on Napoleon III's Arab policy, who believed that "the interests of the family, even our own, command […] the creation of an institution that will replace or recall our état-civil." Ageron, *Les Algériens Musulmans*: 178.
[22] ANOM F80/1722. Marius de Gimon, Communication: 6 Sept 1858.

born of un-registered marriages; such children were deemed illegitimate and barred from inheritance.

The interests of indigenous women, however, served a more pressing purpose. Gimon was writing only a few years after the official annexation of Algeria (1848), and subsequent creation of three *départements* and granting of electoral representation to Frenchmen residing in Algeria in the Chambre des députés. This raised the uncomfortable and enduring problem of managing Algeria both as a colony and a part of France, and sparked a new – settler-driven – polemical literature against accommodation. Gimon, for his part, wondered how Algeria's Muslims remained governed by the "empire of Islamic law" on what was officially "French soil." Though he felt there might be some resistance at first, the "natives" would soon come around to the benefits of state documentation and the whole project would "not be as difficult as one might think."[23] He noted a major precedent: the Grand Sanhédrin of 1808, which effectively ended Mosaic (Jewish) Law in France by subjecting all rabbinical acts of marriage and divorce to French civil law and forbade polygamy.[24] At the time of the Grand Sanhédrin, Gimon wrote, "our Israelite compatriots" were "not much more advanced than Arabs today," but quickly adjusted to secular civilizing. Gimon's protests well captured the assimilationist imperative to regard Algeria as France, which overrode any treaties of conquest that promised non-intervention. Gimon's comparison here is also apt, perhaps unintentionally, since whereas marriage is a sacrament in Catholic cannon law, marriage in both Jewish and Muslim law is defined as a contract. That France's Jewish population was able to accept a dual meaning of

[23] ANOM F80/1722. Marius de Gimon, Communication, 15 Mar 1855.
[24] It is notable that Gimon was writing well before Algerian Jews had been brought into the republican fold – forced to abandon Mosaic law and acquire "naturalized" citizenship – after the Crémieux decree of 1870. For more on the Grand Sanhedrin as a popular precedent for Algeria, see: Judith Surkis, "Propriété, polygamie et statut personnel en Algérie coloniale, 1830-1873." *Revue d'histoire du XIXe siècle* 41.2 (2010) : 27-48.

marriage as both a public institution and private contract boded well, in Gimon's view, for a similar evolution among Algeria's Muslims.

His report typified the anxiety of many colonial administrators that legal pluralism, a veritable necessity of colonial rule, tested the strength of the French nation:

> This situation is […] in flagrant contradiction with that essential principle, the only one which has remained standing among those proclaimed in 1789: *unity in the government of the nation and in its law*.[25]

He cited Jean-Étienne-Marie Portalis, one of the main authors of the Code civil, and famed champion of the ideal that legal unity produced the national community. Indeed, Portalis described the Code as a force for unifying the "diverse nations" that had composed the *ancien régime* and thereby building a "common homeland."[26] As such, it would be fatal, in Gimon's estimation, for Algeria to maintain any vestige of its precolonial legal system. He compared Algeria to Corsica, writing:

> Like the latter, Algeria, by her position and her proximity to the continent, cannot remain in a colonial state; [and, like Corsica,] she is destined to become, sooner or later, an integral part of the Metropole. The same regime will be applicable, little by little…[27]

Gimon's use of both Corsica and French Jewry were, however, imperfect examples of successful assimilation to the national body. Corsica was one of the last *départements* to accept the État civil, and only with great difficulty. The incorporation of Jews into the polity was touted during and after the revolution as a means of rightfully according them citizenship, thereby averting Catholic hegemony. But French Jews largely ignored the État civil, and when they did, rarely signed their names in French or adjusted to the Gallicization of surnames (required by the law of 11 Germinal, year XI [1802]). Indeed, by 1808, it was determined that Jews should register with

[25] ANOM F80/1722. Marius de Gimon, Communication, 15 Mar 1855. Emphasis in original.
[26] Saada, *Empire's Children* : 96.
[27] ANOM F80/1722. Marius de Gimon, Communication: 15 Mar 1855.

a separate registry on the basis of their difference (later echoed by the "indigène" or "Musulman" qualifier in the name of Algeria's État civil for non-citizens). Noiriel contends that, contrary to affording a measure of inclusivity, the state registration only emphasized Jewish exclusion, even as their newfound "inclusion" obliged taxation and military service. Overall, "thousands of individuals," he writes, "were brutally confronted with a logic of naming and identification" far removed from any they had previously known.[28] This observation undoubtedly extends to millions more in Algeria and elsewhere in France d'outre-mer. For Algerians, this paradox of exclusion through inclusion took on a further dimension, that of being accorded the duties of *statut civil* without any civil or political rights.

While it is tempting to regard Gimon's line of reasoning (and, as we will see, those who echoed him in later years) as a mere laundry list of colonialist apologia, it contained an ethical exigency in assimilationist discourse that is often overlooked: that legal unity must surpass colonial pluralism as a basis for equality – though Gimon did not use this language, and though the definition of French citizenship was, at this time, far from certain.[29] Gimon was writing some ten years before the 1865 Senatus-Consulte that would premise Muslim Algerians' access to the rights of French citizenship on the forfeiture of their personal status, yet his letter anticipated with startling prescience the state of exception that underpinned the colonial legal regime until the end of the Third Republic. As he argued:

> … regarding their [Algerians'] public and social life, as with the French, good public order, moral health, and equity demand that they be subject to the same laws which are followed by those who would become their compatriots; and that they not be […] excluded from the latter in matters of security, that their crimes be punished under [our] penal laws, including being sent to the *bagnes* or [the penal camps in] Cayenne.[30]

[28] Noiriel, "L'identification des citoyens" : 13-14.
[29] Patrick Weil, *Qu'est-ce qu'un Français?* See also: *Empire's Children*: 97-101. Peter Sahlins, *Unnaturally French: Foreign Citizens and the Old Regime and After* (Ithaca, NY: Cornell University Press, 2004), chapter 8.
[30] ANOM F80/1722. Marius de Gimon, Communication: 15 Mar 1855.

The segregationist legal regime that developed from the Senatus-Consulte of 1865 until its abrogation in 1944 was upheld by a notion of pluralism that encompassed both "respect for local custom" and an evolutionary view of legal history. This second aspect of pluralism justified exclusion from the polity based on the perceived regressive state of most Muslim Algerians in the late-imperial teleology of civilizations, and which also later gave rise, in 1881, to the Code de l'indigénat. This codification of several decades' worth of so-called "Native law" laid out a set of 34 violations for which only Muslims could be punished (reduced to 21 in 1890), and subjected them to harsher punishments than *colons* for the same offenses. Though clearly marked by his wholehearted subscription to the *mission civilisatrice*, Gimon's recommendations represent, for our purposes, a kind of blueprint for the genre of assimilationist thought, later developed most prominently by colonial legal theorists Émile Larcher (see: Chapter 2), that was both hegemonic in its expansionist orientation and humanitarian in its rejection of differentiated disciplinary regimes.

Second Empire precedents to the État civil des indigènes: 1854 and 1868

Just prior to Gimon's expedition, a decree of 8 August 1854 had mandated the registration of Muslim births, deaths, and the composition of households in the civil territories. The next decree of this nature, of 18 August 1868, placed the responsibility to record native births, deaths, and members of households upon the president of the *djemaa* (Arabic: *jamaa*, local council) rather than the *caïd* (Arabic: *qa'id*, tribal leader). In neither decree was there any mention of marriage, divorce, or surnames as items of state interest. Subsequent reports on these relatively modest decrees showed an outpouring of local hostility to both – the source of which, however, remained elusive. Consequently, municipal officials were also skeptical when asked

about the possibility of introducing marriage and divorce to the items requiring registration. These reports anticipated issues that would haunt the État civil des indigènes for many decades to come, including, among others: assigning jurisdiction and responsibility of notarization to *qadi*s or public officers; demanding the registration of marriage and divorce along with birth and death; and whether and how to punish non-compliance.

1854

In July of 1856, the prefect of Constantine reported that the implementation of the 1854 decree has been, in contrast to Gimon's optimistic estimation, "long, difficult, and of a nature as to perhaps arouse the suspicions of the *indigènes*."[31] The circular had instructed sub-prefects to collect declarations of births and deaths "from the lips" of each "*chef de tente*" (head of household, often including an extended kingroup), thus allowing declarations of dependents to be made by proxy instead of in person. The prefect reported, however, that the personnel of the various *mairies* (municipal offices) did not "sufficiently know the Arab, and cannot gain enough authority over him to carry out this operation promptly," and the registration of 6000 households in his jurisdiction was only achieved with the help of the local Bureau arabe.[32] As a result, the records were riddled with errors and omissions. Moreover, the prefect added that, "the Arabs have an extreme repugnance toward pronouncing the names of their wives and mothers in public; it is a thing at once shameful and forbidden."[33] Examples of some "absurd declarations" collected as a result of these barriers included a seven-year-old girl reported married; a girl aged twelve declaring a child aged 20; and a 70 year-old woman declaring two children ages two and

[31] ANOM Fonds du gouvernement général (GGA) – Série 12H (Affaires indigènes – réformes en faveur des indigènes) 51. Prefect of Constantine, "Rapport sur le travail de la Constitution de l'État Civil dans la banlieue de Constantine," 2 July 1856.
[32] ANOM GGA 12H51, ibid.
[33] Ibid. It bears noting that in some parts of the Arab world it is considered impolite to ask a man about his wife (*zowja*) in conversation. It is more proper to ask about one's family, which is understood to include one's wife, children, and other female family members.

three. In such cases it was necessary, contrary to their original instructions, to have these women brought in for inspection – "a measure, it might be added, which invoked no resistance."[34]

Later in the same report, the prefect shifted direction, and posited instead that the failure to collect accurate information about women and girls sprang not from shame but apathy: "The indifference of the Arabs for their women, from the point of view of their status in the house, is so great that most of them, after having declared the persons and children in their households, truly believe it is useless to declare their women."[35] He supported this theory with a story not of Arabs but Berbers:

> A Kabyle, after having given his wife's name with great difficulty, was much calmer in asking if they needed the number and ages of his cows. The poor fellow [*pauvre homme*] no doubt remembered last year when we took a census of animals, and could reason that from a fiscal point of view, the *beylik* [formerly the Ottoman administration] might take an interest in the number and perhaps age of his livestock; but as for his wife, he could not be brought to understand the object of these declarations.[36]

Finally, the prefect shifted to yet another source of reticence, grounded this time not in disinterest but extreme possessiveness: suspicion in the villages that the French intend to "take their women" and "conscript their boys by force for the *guerre d'Orient*."[37] Here he is perhaps closest to identifying the actual reason for indigenous reluctance. Since the first years of conquest, rumours abounded that the French had designs to seize and marry Muslim virgins.[38]

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[34] ANOM GGA 12H51, ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid. The prefect was likely talking about the Crimean War, the first war in which North African "zouave" forces saw combat outside Algeria.
[38] In 1858, Allan Christelow notes, rumours were flying out of Constantine that the French had plans to "parade two giant men from tribe to tribe, bridled and harnessed in the fashion of stallions, and the natives would be forced to let their wives be fecundated by them, in order to improve the race of the country…, and that since the French wanted to leave nothing unproductive, widows would be fecundated by robust Negroes, and the best-looking children would be taken to serve as soldiers." Christelow suspects that these rumours were a perhaps not-far-fetched composite of various French policies: the issuing of stallions to tribes to improve the equine stock, the recruitment of the Tirailleurs indigènes, and the regulation of marriage. Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton, N.J.: Princeton University Press, 1985): 131-32.

Conscription, moreover, was at that point the most common path to becoming a "naturalized" Frenchman; why else would the state take an interest in individuals if not to turn them into French soldiers? Officers tried to respond to these hesitations with the assurance "that in all her acts, the administration has no interest in penetrating the interior of the family."[39]

As for the benefits of the registry, the prefect saw two. First, registration would facilitate a surveillance of Muslim emigration from military to civil territories, something "favourable to the interests of European settlement [*la culture Europeénne*] which lacks manpower [*manque de bras*], and which, in the current state, can hardly do without the addition of Arabs." Second, and perhaps most ironically for reasons we will see below, he was satisfied that once the Arabs understood the benefits of registration for securing their inheritance rights, they would acquiesce to the registration law.[40]

1868

More than ten years later, the *arrêté* of 1868 brought renewed attention to the family in the civil prefects, and sparked new investigations into expanding the registry in the civil communes of the pre-Sahara region (the coastal "Tell" and high plateau) to include declarations of marriage and divorce. For this duty, responsibility remained within the secretary of the *djemaa*, but the office of the state-appointed *qadi* came into view as having a critical role to play in registration, particularly of marriage and divorce. In those *douars* (tribal fractions) with French schools for *indigènes*, the *maitre-adjoint* was to fulfill this function without pay.

It is notable that the registration of divorce was proposed *only* for Muslims: the Code civil provided only for the registration of birth, marriage, and death at that time (until the

[39] ANOM GGA 12H51, Prefect of Constantine, "Rapport sur le travail de la Constitution de l'État Civil dans la banlieue de Constantine," 2 July 1856.
[40] ANOM GGA 12H51, ibid.

legalization of civil divorce in France in 1884). The necessity or appropriateness of procuring from Muslim non-citizens information not required of French citizens was no-where directly addressed and rarely questioned, yet was always included in proposals and opinions on the État civil for Muslims, as though their predilection for divorce was by now administrative wisdom. It is also likely that, because divorce (at least women's divorce) was the only point in the course of a Muslim marriage where the French perceived the opportunity for judicial intervention, divorce offered an entry point for enforcing this intervention as standard.

Subsequently, in the winter of 1869, military personnel were solicited by the Governor General's office for their opinions on the utility and feasibility of extending État civil operations throughout all French-controlled regions to the fullest extent provided by relevant chapters and articles of the Code civil. While almost all agreed with the practical utility of such a project, particularly for taxation and statistical data collection, some were weary of potential conflicts arising from "Arab customs" around naming newborns and immediate burial after death (giving doctors and other experts no time to verify the identity of the deceased). Each deemed that many articles of the Code civil could be applied with minor modifications for the colony.

On the matter of marriage specifically, the Governor General's circular noted that:

> Until the present moment, *qadis* are the sole authorities charged with the celebration of marriage; as they are not officers of the state [*officiers de l'état civil*], there is no basis on which to oblige them to send to the president of the *djemaa* of constituent *douar*s a certified copy [*extrait*] of acts of marriage with regard to the civil status of the spouses.[41]

The question of proper authorities was contentious. Should the *qadi* or president of the *djemaa* be made responsible for collecting and submitting registers, analogous to this duty for judges and notaries in France? Some *commandants* advised that *qadi*s should only have to requisition their

[41] ANOM GGA 12H51. Bou-Saada, Subdivision of Setif, 27 Jan 1869.

acts of marriage and divorce and that the president of the *djemaa* should hold the notary office in their respective *douars*, while others held that these indigenous leaders were usually illiterate and could not be trusted.[42]

One effect of this debate, and the most important for our purposes, was its impact on the office of the *qadi*, who would have to report to both the administrative and judicial branches of the colonial government, and was increasingly invested with new capacities for "moral education," as many officers put it: curtailing the practice of child betrothal, polygamy, capricious divorce, and unfounded disinheritance. In particular, through this project, French reformers were first alerted to the possibility not only of monitoring child marriage through the registration of births, but controlling divorce by insisting on its judicial documentation.

These reports demonstrate the extent of official uncertainty on the nature of Muslim unions, with some officers asserting that marriage was a contract already fastidiously documented by *qadi*s, who should only be required to furnish the public office with duplicate records, others observing that certified documentation is an elite urban practice that should only be extended to the whole Muslim population, and yet others remarking on how breezily one can both marry and divorce, without a drop of ink spilt for either event.[43]

Besides offering solutions to technical issues, these reports also contained concerns about how the État civil des indigènes could bring friction to marriage and divorce practices. A letter written on 11 February 1869 from the General commandant of Bone (*département* of Constantine), observed, for what seems to be the first time, that a major obstacle to the registration of divorce lay in the extra-judicial nature of men's divorce, which allowed them to

[42] ANOM GGA 12H51. The commandant at Bozof-ben-Arreroif, for instance, wrote in favour of the *djemaa*'s authority in this matter on 5 Feb 1869, while the commandant at Bone wrote against it, preferring the *qadi*, on 11 Feb 1869.
[43] ANOM GGA 12H51. The commandant of Constantine provided the first opinion (10 February, Constantine, 1869), while the commandant of Batna provided the second (9 February, Batna, 1869).

"repudiate" (Arabic: *talaq*) their wives without the intervention of a judge. By this token, he decided, Muslim unions were nearly ungovernable by French family law; they resembled, rather, a "temporary contract […] renewable over the course of one's life," and should be regarded and regulated as such.[44] Still, while many elements of French law could not currently be transplanted, he recommended that, "in order to prepare for future progress," French authorities should continue to pressure the indigenous population to conduct all acts of marriage before a *qadi* and no other religious or tribal authority, and that *qadi*s, in their turn, be pressured to submit copies of these acts to their respective *douars*.[45]

A lengthy report by the commandant of Batna, written on 9 February 1869, noted both the ethical and practical imperative of the État civil: first, to "confirm" an individual by marking the signal moments of their life (birth, marriage, and death), and by providing the state with critical information for tax and census purposes. After some conventional platitudes on the modernizing power of the colonial state, which would one day bring the État civil into full effect, the commandant warned of immediate barriers, including differences between Islamic and French law in notions of majority and legitimacy of children. This threatened conflicts wherever "a child, of majority in the eyes of one [law] is a minor in the eyes of the other [or] legitimate according to the first [is] natural according to the second."[46] Nonetheless, if restricted to births and deaths only, he contended, the registry would lose all of its importance.

The commandant also noted that unlike men's unilateral repudiation, a form of women's divorce existed (*khul'*) which required a *qadi*'s authorization, thus hinting at a possible avenue

[44] ANOM GGA 12H51. On the same premise, the Batna report encouraged a distinction between the Act of Marriage (registered by the notary) and the Marriage contract (issued by the *qadi*), which were currently one and the same.
[45] ANOM GGA 12H51. Report from commandant of Bone, 11 February 1869.
[46] ANOM GGA 12H51. Report from the commandant of Batna (Dept of Constantine), 9 Feb 1869.

by which to formalize state intervention.[47] Though attractive, this option inevitably led to an impasse between replicating France in Algeria wherever possible and refraining from giving marriage any appearance of a secular institution. As the commandant put it:

> Without thus taking account of the state of ignorance in which the natives are immersed, we would allow ourselves to be carried away by a tendency to copy the metropole, and arrive at proposing that marriages be held before the president of the djemaa. For a long time still, we must leave marriages to the *qadi* [who would act] as notary, but when enlightenment [*les lumières de l'instruction*] has penetrated the masses, it will be necessary to designate the direction of marriage acts to public officers.[48]

Thus, he wrote, the requirement that *qadi*s report their marriage and divorce records to a public office would at first seem to produce a redundancy of such registry, but would eventually help to "prepare for the separation of the act of marriage and the contract of marriage which, in the current state, is issued simultaneously by the *qadi*."[49] By this time, as Allan Christelow has demonstrated, the office of the *qadi* had already been enhanced under the French regime, which brought Muslim judges under its payroll and formalized the courtroom space (*mahakma*) under the auspices of the colonial state.[50] In this instance, the *qadi*'s role would be augmented to further counteract rivaling non-state tribal and maraboutic spiritual authority.[51]

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[47] ANOM GGA 12H51. Ibid. On divorce for women, he wrote: "On knows that in effect there are three kinds of divorce, and if the *qadi*s of Algeria, too inclined to submit to the influence of Berber ideas, do not pronounce it except in the case of khollah [sic], divorce by which a woman ransoms herself, it is no less true that the dispositions of Muslim law, [being] full of indulgences [*mansuetude*] for the woman, offers her every means of assuring herself an honourable liberty of action and guarantees against the brutality and injustice of men."

[48] ANOM GGA 12H51. Ibid.

[49] ANOM GGA 12H51. Ibid.

[50] GGA 12H51. Letter from the sous-prefecture of Mascara, Dépt of Oran, 21 Sept 1875. See: Christelow, *Muslim Law Courts*, especially chapters 5-8.

[51] A *murābiṭ*, generally transliterated as "marabout" in French, was a holy person, living or dead, revered for their special relationship with God and ability to transmit divine blessing to their community. A thorough engagement with the role of non-state religious figures and organs, like these saintly figures and sufi brotherhoods (*tariqa*s) in matters of dispute-resolution and arbitration (usually between clan-groups and families) is beyond the scope of this project, although chapter 4 looks at the medico-legal authority of women healers (*qabla*s) whose practice and status was informed as much by their skills as their *baraka* (blessing, grace). On the political power wielded by such actors, particularly in Eastern Algeria and Tunisia, and their relationships with the colonial state, see: Julia Ann Clancy-Smith, *Rebel and Saint Muslim Notables, Populist Protest, Colonial Encounters (Algeria and Tunisia, 1800-1904)*. (Berkeley: University of California Press, 1994). On the role of sufi orders and leaders in arbitration – and

These reports and their speculations and solutions aside, what was the actual state of record-keeping in pre-colonial Algeria? From what we know of better-documented cases, such as in seventeenth-eighteenth century Damascus, Aleppo, and Cairo, in mainstream Islamic legal traditions the Muslim marriage contract (*nikah*) had a long and important status by which women could exert their interests over the betrothal conditions and the marriage itself (such as the well-known condition of immediate divorce in case one's husband takes a second wife).[52] However, these contracts did not always involve the supervision of a *qadi* or other official and therefore seldom entered the public record. This seems to have been true of Algeria, where the formal drawing out of a *qadi*'s marriage contract was not common outside the main urban centres, or when not involving wealthy families.[53] This type of marriage was called "*bel fatiha*," or marriage "in the open." Though the specific rituals varied from region to region, and could be no less extravagant than "regular" marriages, they generally required only the presence of two witnesses and the betrothal and marriage agreements could be set to paper by any lettered person. The predominant form of divorce was achieved with even less formality: men could unilaterally divorce their wives through *talaq*, a pre-Islamic practice with extensive conditions that could not be reversed unless the wife was married to another man in the interval. Women could also avail themselves of various legal means to end their marriage, all of which, however, required the intervention of a *qadi*. As foreshadowed by the letter from the commandant of Batna, it was this latter form of divorce that French law-makers tried to make standard, and thereby supplant – if

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their occasional use of French courts – see: Jean Paul Charnay, *La vie musulmane en Algérie, d'après la jurisprudence de la première moitié du XXe siècle*. (Paris: Presses universitaires de France, 1965): 245

[52] See: Sonbol (ed.), *Women, the Family, and Divorce Laws in Islamic History.* Madeline Zilfi, *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era* (Leiden: Brill, 1997). On an earlier era, see: Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2005).

[53] Kamel Kateb, *La fin du mariage traditionnel en Algérie? 1876-1998: Une exigence d'égalité des sexes* (Bouchène, 2001): 23. Lazreg, *Eloquence*: 104.

not outlaw – men's extra-judicial divorce until and throughout the inter-war period (discussed in the next chapter).

Third Republic and 1871 Insurrection: the État civil picks up speed

Despite the measured skepticism of these officers and sub-prefects, and local resistance even to these limited efforts, the expansion of the État civil des indigènes marched on with remarkable momentum. A universal and comprehensive program would have to wait until the establishment of a civilian government general in Algeria, following the so-called "Kabyle insurrection" of 1871 and the advent of the Third Republic, laying a path for the eventual law of 23 March 1882, which obliged universal registration throughout Algeria's *communes de pleine exercise* and *communes mixtes*.[54]

Governor General Henri de Gueydon's "Native Policy"

In the wake of the so-called "Kabyle uprising" of 1870-71 – itself a response to both violent settler agitation for greater autonomy and the impending downfall of the Arabophile Napoleon III, anxiety over the Algerian question in France was high. Just as the crisis of uprising settlers seemed calmed, the leaders of several important indigenous clans, sensing the sea change and demise of the indirect rule system, had joined in arms with the powerful Rahmaniyya *tariqa* in a bid for greater autonomy and leverage against the new settler administration. The uprising

[54] The '*communes mixtes'* were units of administrative organization instituted during the Second Empire and greatly expanded after 1870. They were created in any territories with a settler population, however small their number. By the 1890s, a defining feature of the *commune mixte* was the predominance of French over Islamic law; in many of these communes, for example (and in *all* of the *communes mixtes* in Kabylia) French judges were appointed to interpret and administer Muslim personal status law when needed. In these communes, administrative functionaries had extended powers far greater than their metropolitan counterparts. The mayor, in particular, was in charge of the judiciary police and, between 1902 and 1927, also presided over the repressive courts.

spread quickly across much of eastern Algeria and into the southern territories before it was put down brutally and punishments meted out to all who were even peripherally involved.[55]

In the wake of these events, and addressing any tensions that lingered within the now settler-dominated political atmosphere, the new governor general of the colony, Admiral Henri de Gueydon (r. 1871-73), wrote to the president of the republic laying out his mandate for the dominance of French law and administration in Algeria and the shape of things to come.[56] Gueydon, though officially Algeria's first civilian governor general, had been an admiral in the French Navy, and his letters to President Adolphe Thiers (r. 1871-1873) at the outset of his administration gives a portrait of the new "civil" outlook for Algeria, whose "dogma" would be "the absolute predominance of French law in all its points of contact with Muslim law." The recent uprising, he reasoned, was a symptom of resentment against overt French force in the region. The new government would therefore eschew coercive methods and "penetrate Muslim society without violence, through individual will, by sure and daily invisible action." He went on to elaborate,

> In as much as [natives] live amongst and between themselves, I will leave their society to freely exercise their mores. I will not approach these customs through any general enterprise, nor by any sudden revolution. But wherever a Frenchman's feet may land, so too goes his law. *If he buys land*, he cannot be but the uncontested proprietor, having completed the formalities and payment of the agreed price. [Likewise,] neither do I accept that a Frenchwoman who marries a Muslim according to French law would by the will of her husband be exposed to divorce, as it sometimes happens today; nor that Islamic law would prevent the inheritance of a French son from his Muslim father.[57]

In these hypothetical cases, Gueydon invoked and connected each of the foundational justifications for the supremacy of French law: property, conjugality, and inheritance.

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[55] John Ruedy, *Modern Algeria: The Origins and Development of a Nation* (Bloomington: Indiana University Press, 1992): 76-79.
[56] ANOM GGA 12H51. Extrait d'un Rapport adressé par le Gouverneur général civil de l'Algérie à Mr le Chef du Pouvoir Exécutif de la République française, 22 Aug 1871.
[57] Ibid. My emphasis.

Throughout the letter, he returned to these delicate points at which Islamic/customary and French laws might converge and conflict, namely, through the interactions of French citizens and colonial subjects in property transactions, inheritance, and marriage. These three objects of state interest unified the politics of intimacy with concepts of sovereignty and nation-making. Though the marriage of Frenchwomen to non-naturalized Muslim subjects was practically non-existent at that time and indeed throughout the colonial period, Gueydon expressed grave concern about the perils of divorce or disinheritance to which Frenchwomen might be "exposed" by their non-French husbands, a potential feminine humiliation that should extend to and pique the honour any self-respecting French legislator.[58]

Upon taking office, Gueydon ordered a special commission to the Conseil supérieur to consider the applicability of French law, and especially the État civil, in Algeria. The report opened pithily:

> Until 1867, various attempts were made to bring the État civil to the natives. These attempts remain futile due to nearly insurmountable difficulties, resulting of the bad faith of the natives, dictated by the natural defiance of a people opposed to all innovation and who do not understand that the état civil is the primary safeguard of the family. Perhaps a few indigenous notables appreciate the utility of the institution and do not object. The exercise [of justice] will be made simpler in many cases by a regularly established état civil.[59]

The report noted the importance, as later discovered through the 1875-6 circulars of Gueydon's successor, Chanzy, of applying French law without changing the character of Muslim marriage

[58] This being said, during WWI and the inter-war period, when tens of thousands of Algerians moved to France to provide crucial manufacturing and agricultural labour, marriages between Algerian men and French women became more common. As if telegraphing Gueydon's fears, French lawmakers were scandalized by the news that French women had been "cruelly wronged" when they learned that their husbands already had wives back in Algeria. J. Mazard, "La loi du 2 avril 1930 sur l'état civil des indigènes musulmans en Algérie. Étude critique de législation," RA 1934: I, 73.

[59] ANOM GGA 12H51. Note sur les essais faits pour arriver à la constatation de l'état civil chez les Indigènes. Bureau Politique, July 1871.

from a religious to civil act. Gueydon's letter, summarizing the commission's conclusions, added:

> Like many members of the Commission, I do not believe that one must attach great importance to objections that might arise regarding the capitulation of Algiers [the treaty of 1830 protecting all "local customs and traditions" from French involvement]. It is not difficult to declare that Muslim law will be respected, as the commandant-in-chief of the French army may have simply meant religion itself, which is to say, the religious practices for which respect would be assured, outside of which *various civil laws may be found mingled with precepts of the Quran*. [Otherwise] this will be the first time that the Conqueror […] would be thus engaged toward the civil laws of the vanquished; and such an interpretation of capitulation, which would mean the negotiation of French sovereignty in this country, would go as far as opposing the application, as was done in 1841, of the French penal code to natives in the civil territories.[60]

Here, Gueydon's remarks most strongly echo those voiced by Gimon – expressing incredulity over expending French (conquering) energy to preserve the laws of Muslim subjects on "French land," and using the penal code as an example of equal footing on which all those subject to French sovereignty must stand. Indeed, it was the very essence of sovereignty. Yet Gueydon's outlook differed from Gimon's in one key way: Though he subscribed to the imperative to intercede in Muslim justice and, consequently, domestic life, he was also a believer, and indeed an engineer, of exceptional laws for Muslim subjects. Indeed, it was Gueydon who drafted a code of native penal law that would eventually become the Code de l'indigénat of 1881.

This language of change without change, of expanding the techniques of government without offending sensibilities, of "bringing order" to the Muslim family without disrupting it, came to characterize nearly all administrative treatment of this issue for the next thirty years. At the same time, the administration was hardly unified in its views on the applicability of the État civil among Algeria's Muslims. In contrast to Gueydon, his successor at the head of the

[60] ANOM GGA 12H51. Extrait d'un Rapport adressé par le Gouverneur général civil de l'Algérie à Mr le Chef du Pouvoir Exécutif de la République française, 22 Aug 1871. My emphasis. Gueydon neglected to mention the considerable amount of energy spent by British colonizers in India to assemble and apply codes of Hindu and Muslim law.

government general, Alfred Chanzy (r. 1873-1879), was not convinced of the scheme to impose family names [*noms patronymiques*], while his replacement, Albert Grévy (r. 1879-1881), was a whole-hearted partisan of the registry's comprehensive application. Meanwhile, the Garde des Sceaux related to his colleagues at the Ministry of the Interior (Indigenous Affairs) his opinion that, "our laws prohibiting divorce and polygamy, though they are essentially relevant to the public order, are nonetheless inapplicable to Muslims."[61] Lower down the chain of judicial command, both the Algerian Attorney General and Chief Justice of the Court of Appeals in Algiers were equally concerned with the establishment of a colonial "public order," but nonetheless shared a general skepticism at the possibility of imposing the État civil in whole cloth upon the indigenous population. But throughout the judiciary were committed assimilationists like Camille Sabatier, a former judge in the Kabyle town of Tizi Ouzou who, as a member of the Conseil Superieur, expressed his fond hope that the État civil would "prepare the fusion" of the races, beginning with the gallicization of Kabyle names and the wedding of Kabyle women to French settlers.[62]

The Warnier Act (1873)

Under Gueydon and his successors, the concerns first laid out by Gimon to justify the importation of this republican institution to Algeria – the status of Muslim women and the fate of a unified France – grew yet more urgent. Meanwhile, as with reluctant metropolitan French subjects before them, Muslims had little faith in the state's motives and evaded registration,

[61] ANOM F80/1275. "Justice musulman." Versailles, 29 Sept 1873. This came from a series of correspondence between the Ministry of Justice and Indigenous Affairs throughout the early 1870s gauging the plausibility of legislation that punished failure to register marriages and divorces.
[62] Ageron, *Les Algériens musulmans*:183. Sabatier's influence on colonial legal assimilation is taken up again in Chapter 3, below.

which they saw as a pretext to conscription, taxation, and land requisition. Each of these suspicions would eventually be proven founded.[63]

Whatever the colonial state's previous rhetoric on "correcting" the family, and regardless of all previous failures, the most compelling impetus for establishing a comprehensive civil registry was provided by the Warnier Act of 26 July 1873. This law, arguably one of the most devastating pieces of colonial legislation to affect the colonized populations of Algeria, consolidated decades of land devaluation and expropriation policies that left many families penniless.[64] As David Powers argued, the 1873 law was the conclusion of both Orientalist-juridical and administrative debate on the legality of Islamic endowments (in Arabic, *hubus* in the Maghrib, *waqf* in the Mashriq), which was used more commonly than Islamic inheritance law for the distribution of property.[65] Traditionally, endowments were of two types: *waqf khayri*, a pious act of transferring one's property to a public or religious trust upon one's death, and *waqf ahli*, or family endowments, which committed some revenue from the land to a charity (mosque, school, or sufi centre), but was primarily used to prevent the alienation of family lands. These landholdings were not so much "collective" as they were designed to prevent the disintegration and awkward parceling of land that can result through Islamic inheritance law. The effect of this in Algeria had been to retain much of the most valuable land in religious or family trusts. At the beginning of the nineteenth century, up to one-half of all land in Algeria had been transferred to endowment land.[66] As Powers has shown, a major contention of Orientalist debate was over the legality of the *waqf*, and a number of prominent French jurists of Islamic law argued that *awqaf* (plural of *waqf*) were not governed by inheritance law, and were therefore beyond the perimeters

[63] Ibid.
[64] Lazreg, *Eloquence*: 45.
[65] David S. Powers, "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India." *Comparative Studies in Society and History*, 31.3 (1989): 535-571.
[66] Körpülü, cited in Powers, ibid.: 537.

of the ever-shrinking realm of Muslim personal status. Some, like pre-eminent French scholar of Islamic law Ernest Zeys, even insisted that it was a form of *bida'* (innovation), that is, an unsanctioned deviation from Islamic law. If *awqaf* were un-Islamic, these scholars reasoned, or at least beyond the purview of inheritance law, they should therefore fall under French control as property law.[67]

On the administrative side, French officials regarded *waqf/hubus* as a kind of monopolizing barrier to economic development that withheld large property holdings, especially arable land, from the free market – and more particularly, from settler *colons*. This posed a serious problem in the wake of dramatic increases in the settler population, following the displacement of many thousands from Alsace-Lorraine following French defeat in the Franco-Prussian war in 1870. In this period, marked by an increasingly powerful settler lobby and the acceleration of "*mise en valeur*" policies, the need to bypass the hold on wealth and property through *awqaf* was pressing. This was accomplished with the law of 1873, which reduced the threshold on inheritance in personal status law to moveable property. From then on, all transactions involving immovable property between *colons* and Algerians, and a large proportion of transactions between Algerians themselves, were governed by French property law. While public trusts were suppressed after 1873, private family trusts remained, but new loopholes were created to enable their alienation.[68]

Contained within the Warnier Act was another vital component of the property law regime: its seventeenth article required that all indigenous subjects bear family names discernible to the administration. This was set in very limited terms initially: applied only to land-holding Muslims in *communes de pleine exercise* and excluding those native Algerians with

[67] Powers, "Orientalism, Colonialism, and Legal History."
[68] In 1889, small claims valuing less than 200 francs were allowed back under the *qadi*'s competence, discussed in Chapter 2, below.

administrative or notary titles. By contrast, the 1882 law authorizing the creation of the État civil des indigènes would undo this modest application and make patronymic names a universal obligation.

The catastrophic effects of the 1873 Warnier Act on indigenous Algerians have been well accounted for by historians.[69] Yet, far less attention has been paid to the centrality of the subsequent law on the État civil for dismantling land endowments and establishing personal property. Administrators quickly realized that a regime of contract law to manage private property was meaningless and unenforceable without predictable and standardized categories of "family," "relation," and "lineage" upon which these regimes were based in Europe. This brought unprecedented administrative and scholarly scrutiny to this nexus of the colonial public interest and the indigenous familial order. Out of this new set of policy interests came new plans to effect what one opposing senator would later derisively call the "*mise-en-carte*" of the native population.[70] This declaration came in the midst of a discussion on the viability of identity cards to be issued to all Muslims, but the senator's play on words clarifies the significance of mapping, spatially delineating, and naming one's newly-acquired possessions (including persons) to both domestic and overseas state-making.

Projets de Décret (1874-76)

On the heels of the passage of the Warnier Act, and subsequent to a *voeu* (recommendation) by the Conseil supérieur du gouvernement, a *projet d'arrêté* (draft order) was launched in 1874 and had graduated into a *projet de décret* (bill) a few months later. The État-Major and Procureur général spent the next two years volleying revised versions of a new decree

[69] For a sample, see : Ageron, *Les Algériens musulmans*: 67-102. Ruedy, *Modern Algeria*: 81-98. Jean Claude Vatin, *L'Algérie politique: histoire et sociéte* (Paris: Fondation nationale des sciences politiques, 1974): 142-152.
[70] *Journal Officiel; Débats et Documents*. Sénat, Session Ordinaire, 9 February1882.

for the establishment of what was variously called the "État civil des indigènes," "État civil des musulmans," and "État civil musulman." The initial draft submitted by the État-major had only 5 articles and did not explicitly mention marriage and divorce, only birth and death, and outlined measures to punish non-compliance. A substantially revised version circulated by the Attorney General (in August, 1875) was much longer, with 20 articles, and included all of birth, death, marriage, divorce, and the taking of last names, as new items to be registered by the Muslim population. It included articles detailing the punishment of violations in the civil territories as breaches of the rules governing the "*indigénat*," and in military territories through "disciplinary proceedings." Corrective action could be taken against anyone who refused to comply, including public officers and *qadi*s.[71] This version was brought to discussion on several occasions by two successive commissions of inquiry and the Conseil supérieur.

The Conseil, in their sessions held to discuss these drafts of the eventual law, and in light of the circulars, inquiries, and reports of the previous years, issued their findings and recommended a draft version of the new law in 1876.[72] Their report summarized what the council saw as the four major difficulties facing the new enterprise: the "ignorance and prejudice" of the indigenous Muslims, coupled with irrational fear of all innovation; the frequent displacement and unsettled nature of life "beneath the tent," defying definitive and traceable

[71] ANOM GGA 12H51. Projet de decret sur l'État Civil des Musulmans, Article 3. In second version (from the Proureur Général, hand-written) punishments are in article 20.

[72] ANOM GGA 12H51. Extrait des Proces-Verbaux du Conseil de Gouvernement, Séance de 6 Avril 1876. Throughout these deliberations, the Conseil was hardly in consensus. During a meeting held on April 6, 1876, a councillor identified only as "one member" in the official record (though an original copy of this meeting indicates that it was none other than the Arch-Bishop of Algiers, Charles-Martal Lavigerie) argued that an état civil for the indigenous population "exceeds the prescriptions of the law of July 1873, without apparent cause, [and] would throw into the Arab populations a new fit of trouble, yet more grave as it touches on the most delicate points of custom founded on religious and historical tradition, born of respect for paternal authority, which is to say one of the sentiments nearest to the heart and moral authority [*des sentiments les plus profonds du Coeur et de la loi morale*…] calls its execution difficult and perhaps dangerous. The new governor general, Alfred Chanzy, was likewise uncertain, stating that the proposed project "does not respond to any legal prescriptions," and wished that it would be extended only gradually throughout the civil territory, if at all. Conseilleurs who favoured the project argued that with the passage of the Warnier Act, the need to universalize the system of *noms patronymiques* was pressing, without which Muslims could have as many times as they had parcels of land.

location; a lack of competent personnel; and finally, no systemized standard for the transcription and orthography of Arabic names into French.[73]

To alleviate these challenges, the Conseil sponsored a separate commission of inquiry to propose a *contre-projet*, this time including the input of two trusted informants: Ali Cherif, a former captain of the Spahis troops of the French African army, and Hasan Ben Brihmat, an Islamic modernizer from an old and respected Algiers family, formerly the Bureau arabe-appointed *qadi* of Blida, and director of the Algiers *médersa*.[74] The four meetings of this commission were the only official meetings sponsored by the colonial administration in which the opinions of any Muslim Algerians were heard. They gave their approval to the taking of patronymic names (as not "against Islam") but, appealing to the demands of "public order," were adamant that the registration of marriages and divorces should be done voluntarily by the parents of marrying parties and only before a *qadi*; the colonial government should concern itself simply with births and deaths if anything.[75] So botched had been the initial attempt to impose names on indigenous subjects that even a man of Ali Cherif's stature had been assigned no less than three names in three different jurisdictions where he owned property.[76] Some of their recommendations, namely regarding the orthography of names, were absorbed in some measure – for instance, the prefixes "ben" and "al" (connoting lineage, clan, and/or origin) remained

[73] ANOM GGA 12H51. Rapport au Conseil : Constitution de l'État civil des indigènes musulmans. (This report is the product of the above-cited meeting.)
[74] Christelow, *Muslim Law Courts*: 112.
[75] ANOM GGA 12H51. Constitution de l'État Civil pour les Indigènes Musulmans. Séance, 11 March 1876. Surprisingly, it is not clear whether Cherif and Ben Brihmat understood the full implications of this law for native land dispossession, much less the wider institutional and educational consequences of abolishing public *awqaf* – or, if they did, why this point was not raised.
[76] ANOM GGA 12H51. A point raised by one conseilleur during the meeting of 23 December, 1879. Session extraordinaire : 414.

recognized by the French authority at their urging – but their alternative decree came to nothing.[77]

It is in the course of these meetings of the Conseil supérieur that we see the already-established question of "chaos" in the Muslim domestic sphere and the status of the Muslim woman suddenly aligned with the imperative to complete the goals of the 1873 law: native land dispossession and the establishment of a private property legal regime. These seemingly disparate goals were linked most clearly by the taking of surnames, which had become discursively equated with "the family," and without which the latter was deemed simply non-existent. The Warnier Act would only "receive satisfaction if a surname was given to all the indigenous people whose property it applied to," but since non-propertied Muslims might form alliances with propertied Muslims, universal application was now deemed necessary. This end would be achieved as a "consequence" of the civil status of families:

> The constitution of the family, through the recognition of its civil status, must precede the attribution of a surname, as, before connecting them, we must recognize the different units therein.[78]

Thus was the market imperative of individual property made to cohere with the moral imperative of familial stability. In similar fashion, an 1876 brief from the Director of Civil and Financial Affairs provided language for the preamble of the État civil draft legislation that moved seamlessly between individualizing property and the moral decay of indigenous society. It noted that, "the principal goal of the law of 26 July 1873 was to make immovable property transactions possible," but operations of this nature "were difficult to guarantee unless the personality of the proprietor could be easily established with certainty."[79] The article requiring only landed

[77] ANOM GGA 12H51. Rapport au Conseil : Constitution de l'État civil des indigènes musulmans.
[78] ANOM GGA 12H51. Rapport au Conseil, Constitution de l'État-civil des indigènes musulmans"
[79] ANOM GGA 12H51. Exposé des Motifs du Projet de loi relatif à l'institution de l'État Civil chez les Indigènes Musulmans de l'Algérie, 10 May 1876.

Algerians to take a surname gave rise to an imperfect, plodding, *ad hoc* system, which would be corrected by more systematic, standardized, and universal classification. In France, such a system was created through the regular declaration of births, deaths, and marriages, but in Algeria, he wrote,

> [t]he natives get married by consent alone, and men can separate through repudiation, which they can declare without accountability except to their own wills. Polygamy is authorized with religious law. One can cite even notables of high regard in Algiers who have successively married 12 or 15 women, of which several, after their repudiation, were allowed to remarry. In such matters, [their] social mores are of a suspicious morality. [But] one knows not how to attempt to modify them without affecting their faith.[80]

The brief therefore advised, as with others before, against "imposing an act which could resemble civil marriage," but to instead expand and rely on the recognition of the *qadi* for supplying certifications of legitimate marriage.

By this point, in sum, the upper colonial administration was now facing directly a problem insinuated by lower bureaucrats and military officers in previous years: How to impose civil registration in a definitive manner without, as a consequence, declaring all non-registered marriages unlawful and thus void?[81] This problem was not solved with the promulgation of the 1882 law, and jurisprudence from Algiers for years later would attempt to fill the gap between legislation and ordinary life.

Alfred Chanzy's circulars (1875-76)

While this decree-in-progress would eventually amount to the 1882 law issued by the legislator in Paris, three more precedents would herald its promulgation: these were the 1875-76 circulars of the second governor general, Alfred Chanzy, who had spent his career thus far in the

[80] ANOM GGA 12H51. Ibid.
[81] It is not surprising that this later possibility raised some alarm; following the passage of the 1865 Senatus Consulte, French law-makers found themselves having to declare the marriages of "naturalized" Muslim citizens lawful or unlawful by the standards of the civil code, sometimes forcibly nullifying them as such.

Bureaux arabes. Ageron tells us that Chanzy remained unconvinced on various aspects of these *projets de décret* on the État civil des indigènes – most obviously the taking of surnames and less obviously, I suggest, the registration of life events – and that his circulars represented a compromise with more adamant partisans of registration.[82] Such as this may be, Chanzy seemed less conflicted about the imperative to record marriages and even divorces, included in each of his circulars.[83]

The first, issued on 29 May 1875, universalized the 1868 decree to all *communes mixtes*, *communes de plein exercise*, and *communes de tribus* – recently-minted administrative units that facilitated the expansion of the civil bureaucracy and taxation of adjacent indigenous communities.[84] The second circular (26 July, 1875) clarified that the objective of the État civil was not to reform marriage as a civil institution, as had been the case in France: "This was not the reform that I had in mind," Chanzy directed, "for this a law would be necessary. I simply intended to impose a measure of consistent order in registration throughout each section of the commune, and on a special register, all the marriages contracted according to Muslim law or local custom."[85] A marriage act from a *qadi* did not signify a civil institution, since he remained the direct authority while the *djemaa* only received a declaration of the former's completion; likewise, should a couple present themselves for registration before a *khodja* (secretary) of the *djemaa*, only proof of marriage in the form of a marriage contract would be accepted. (An

[82] Ageron, *Les Algériens musulmans* :179.
[83] ANOM GGA 12H51. Note to the Directeur Général des Affaires Civiles et Financières, from the État-Major General; Alger, 12 August, 1875. In a letter asking prefects for their opinions on a draft of the projet de décret, he asked for observations on the inclusion of marriage, given the "emotion" aroused by his circulars, but did nowhere voice his own rejection, as far as I can tell.
[84] ANOM GGA 12H51. Note to Sautayra, Counsellor, Cour d'appel d'Alger, from the Director General, Affaires civiles et financières, 23 May 1873. Includes attached: Rapport du Commission spécial chargée d'étudier la question relative à l'organisation du service de l'État Civil dans les communes Indigènes des Circonscription Cantonale.
[85] ANOM GGA 12H51. Chanzy, Lettre au sujet des mariages Musulmans, 26 July 1875, Notably, the archive contains at least two field reports on his initial circular, both of which blamed its failure on the lack of punishment for non-registration. These are: Note to the Director General of Civil and Financial Affairs, Algiers, 7 Oct 1875; Letter to the Prefect of Oran, 22 July 1875.

exception to this was in Kabylie, where only an "advertisement of the union and its public knowledge" [*notorieté publique*] was sufficient.)

A third circular in July 1876 responded to reports that indigenous Algerians were refusing to comply with previous measures by ordering prefects to impose for the first time fines and infractions for natives who failed or delayed in registering their marriages and divorces, as was already the case for the registration of births and deaths. Prefects were nonetheless warned, as usual, not to arouse hostility of Muslims: "If it is important not to leave our authorities disarmed in the face of violations inspired by bad faith [*mauvais vouloir*] or fanaticism, it is just as important to avoid provoking the *indigènes* with intense zeal or exaggerated rigour." [86] In his letter to prefects of the three departments, Chanzy noted that the "unexpected emotion" emitted by locals and "difficulties" encountered in response to the new obligation to record marriages was due simply to an "improper application" by mayors of his orders and their failure to "manage the susceptibility of the *indigène*."[87]

Fabricating the Muslim family (1880-1882)

Official debate in the National Assembly in Paris on the Algerian État civil des Indigènes began in 1880 and continued for two years. The new Governor General, Albert Grévy (brother of newly-elected French president Jules Grévy [r. 1878-1887]) put the État civil des Indigènes at the top of his agenda, making it his first *projet de loi*.[88] On 12 February 1881, Rémy Jacques, the deputy from Oran, member of the *Union républicaine*, and chair of a commission investigating the implementation of the civil registry in the colony, laid out the findings of a new commission

[86] ANOM GGA 12H51. Copy of original circular sent to the prefect of Oran. Oran, 22 July1876.
[87] ANOM GGA 12H51. Note pour M. le Directeur Général des Affaires Civiles et Financiers, État-Major General, 12 August 1875. Plus accompanying copy of Chanzy's note: "Circulaire a MM les Generaux Commandant des divisions et Prefets des Dept de l'Algerie, Copie," 7 Aug 1875. He also noted an obstacle posed by jurisdictions like Kabylie, where *qadi*s did not typically issue marriage certificates.
[88] Ageron, *Les Algériens musulmans*:179.

of inquiry and what had by this time become the moral education enshrined in the eradication of *awqaf*:

> Sirs, the establishment of a regular état civil, observing all of the transformations of the family, is a measure of public order to be found in all civilized nations. The family is not truly or seriously constituted until all members who compose it share the same name, proceeded by one or several first names which provide a distinction between them, and until their births, deaths, marriages, and divorces, in as much as they exist, are exactly inscribed in the public register.[89]

Jacques's speech and other published material from this lawmaking process reveal a new strain within French rhetoric on Muslim sexual difference: while the conduct of indigenous private life remained an obstruction to the public order, it was reframed as not merely deviant and in need of correction but indeed non-existent. As he would go on to elaborate, the État civil was not only of utmost importance for the maintenance of the colony, but it must not stop at the registration of births and deaths; it was both crucial and feasible to record marriages and divorces. In promotion of more sweeping measures, Jacques outlined the steps taken over the preceding thirty years to thus bring the Muslim family from a pre-modern obscurity into civilized realization. His claim was supported with excerpts of reports for the 1854, 1868, and 1875 circulars, and the *projets de décret* of 1875. Above all, the census data collected through these efforts had also revealed a scandalous divorce rate of up to 45% among Algerian Muslims (discussed further below). Also cited were verses from French translations of the Quran and authoritative commentaries by respected Muslim jurists (mainly from the fourteenth and fifteenth centuries), which acknowledged the *qadi* as a legitimate adjudicator in matters of marriage and divorce.

Each argument in support of a universal and comprehensive registry was aligned with the imperative to complete the work left undone by the 1873 property law. As Jacques's commission reported to the Conseil supérieur,

[89] *JO.* Chambre des Députés, Débats, 12 Feb 1881.

> The collectivity of property by the natives has long been considered the most serious obstacle to the development of colonization. One may say with certitude that our civilizing effect on the natives will not be realized until after the definitive individual repartition of land between those who now hold it collectively. […] The designation of the individual in our society [is] derived from family names, the property of which is established by the état civil.[90]

The establishment of individual property in Algeria had thus far been frustrated by the unforeseen but much more complicated issue of native nomenclature and ethnographically obscured tribal and kinship networks. This obstacle, and its alarming effects, was described with revealing clarity by a commission report presented to the National Assembly in March of 1880.[91] Here, blame for the anarchy of the Muslim family lay, at least partially, in French action:

> [The proposed law] would act today as the corollary of the law on property […]. The Law of 26 July 1873, issued prior to the constitution of the indigenous état civil and attributing surnames only to proprietors of land […] presents a veritable danger as regards the state of persons, since, *in the process of bringing order to property, it results in throwing the family into disorder*, as it creates categories between its members, attributes a name to one and refuses it to another, such that within a few years it will be nearly impossible, in the midst of this confusion of appellation, to find the traces of genealogies which the law itself contributed to erasing.[92]

The correct "ordering" of public and private spheres is here articulated in terms of their relation to each other: persons must be categorized in totalities to avoid their splintering into discordant and even conflicting private and public selves.[93] How to prevent this looming disaster? The solution, the commission insisted, lay in the proposal before them:

> [I]s it not obvious that in order to constitute individual property in a durable manner, it is indispensable to first constitute the individual? This is precisely the proposal of this legislation. What is its goal? To establish order in the Arab family through the constitution of the état civil and surnames; [and] to perpetuate this order through the establishment and conservation of acts which attest to modifications to this family.[94]

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[90] ANOM GGA 12H51. Conseil Supérieur de Gouvernement, État Civil des Indigènes-Musulmans de l'Algérie, Projet présenté par le Gouverneur Général.
[91] *JO.* Débats et Documents. Chambre de Députés, Session de 1880 – Projet de Loi sur l'état civil des indigènes musulmans de l'Algérie. Annexe de procès-verbal de la séance du 18 mars 1880.
[92] Ibid.
[93] This mapping of private and public "spheres" onto Muslim social and familial life is a central theme that will be developed in greater detail in chapter 4.
[94] Ibid.

This report demonstrates in perhaps the frankest terms the logic that connected the creation of a regime of individual property and the urgency of "constituting" the family as a category of state knowledge and regulation. Ageron notes that many critics of the 1882 law, both within legislature and without, had described it as a merely a sham for the dispossession of Muslim property-holders and a "clumsy assimilation."[95] Though the "mobilization of indigenous property," as optimistic parliamentarians on the Left put it, was a clear motive of the law, I would suggest, rather, that the concomitant moral objective surrounding Muslim family life was not an empty appeal or distraction from the less savoury aspects of colonization; rather, the two ends were seen by lawmakers as mutually-dependent.

The "Marriage registration" debate resolved

Once again, the nagging detail persisted of what exactly should be recorded, how, and by whom, in the process of "constituting" an individual. Could the law, the framers wondered, be applied in Algeria to the fullest extent of the civil and penal codes? The two versions of the law previously drafted by the État-Major and Procureur général, respectively, were presented to the special commission tasked with evaluating the merits and defects of this project: the *Projet du Gouvernement*, which did not oblige the declaration of native marriage and divorce, but did require *qadi*s to submit copies of their acts on a regular basis; and the *Projet de la Conseil supérieur*, which made the declaration of marriage and divorce obligatory, but which, conversely, did not require a *qadi*'s intervention for their validity. These were each also presented in the first and only reading of the bill in the lower house. While each required a degree of intrusion into erstwhile wholly private contracts, the question officials struggled over

[95] This point of contention was especially prominent during the Senate debate. See: Ageron, *Les Algériens musulmans:* 180, fn. 3, as well as *Bulletin de la Société de protection des indigènes*, 1882, no. 1: 69, which claimed that the law had but one goal: dispossessing the *indigènes* of their land.

was: which did so with less perceived "disturbance"? The former was the more reserved of the two, and ostensibly preserved the religious nature of marriage, though it would have made *qadi*s beholden to both judicial and administrative bureaucracies.

Jacques, however, pressed for the latter. One of the reports to which he referred his colleagues in Paris was a letter from the sub-prefect of Mascara to the prefect of Oran on 21 September 1875, in which the author described the most pressing French imperative regarding indigenous society as "the regularization of the act of marriage, and the adoption of surnames. Here is where, in our opinion, progress is blocked." In line with similar arguments posed by various commandants (discussed in previous sections) the sub-prefect argued that while Muslim marriages were currently "irregular," it would only take a slight push to make them "valid." This was also the opinion of the Procureur général and the Chief Justice of the Court of Appeals of Algiers.[96]

The reason behind the choice, ultimately, of declarations before a functionary rather than a Muslim judge is illuminated by a meeting of the special council tasked with studying the question of the État civil, held on 22 September 1879, to review the report of the commission of inquiry. The transcription shows a lengthy debate between these proponents of marriage and divorce registration, including of course Jacques, its head, as well as the Grévy, and those opposed. Alexandre Bellemare (a former close colleague of Thomas Ismail Urbain's in Algerian Affairs, and biographer of Emir Abd el-Qadir) and a few others who had served longer tenures in the Algerian colonial field preferred to restrict registration to birth and death, citing primarily the objections raised by Ben Brihmat and Ali Cherif in sessions to discuss the contre-projet (discussed above). On the opposing side, both the Governor General and the Chief Justice of the

[96] ANOM GGA 12H51. La commission institué par arrêté de 30 aout 1879 a l'effet d'étudier la question de la constitution de l'état civil musulman, 22 Sept 1879.

Court of Appeals in Algiers wanted colonial subjects to report their marriages to a functionary of the État civil. On the question of whether the *qadi*'s records would suffice, the intervention of district attorney Piette was crucial, as he pointed out that the Court of Appeals had passed down recent jurisprudence that declared only marriages before a *qadi* valid. The matter was taken to a vote and passed six to three. Divorce was only subsequently included as an afterthought.[97]

This debate nonetheless carried over to the next meeting of the Conseil Superieur – many of whose members overlapped with the aforementioned special commission – upon reviewing the commission's recommendations. Though the version of the law had until this point included only the requisition of *extraits* from *qadi*s (article 19), the commission was persuaded that Muslim indifference to a *qadi*'s marriage act ("the distinction between legitimacy and illegitimacy of affiliation does not exist in Muslim law") was useless and potentially even dangerous; they sought to replace this requirement with mandatory declarations to officers of the état civil.

Once again, confusion over the nature of Muslim marriage, which failed to conform to French legal categories that separated people and property, raised a heated discussion among the conseilleurs; without the intervention of a *qadi* marriage struck attorney general Robe as simply a "contract of consent," with no sacred properties, and which therefore fell under state purview as a function of property distribution.[98] In rebuttal, the Chief Justice observed the ambiguities involved in the "delicate" question of "whether the marriage of *indigènes* touches property law [*statut réel*] or personal status law [*statut personnel*]." He argued thus in favour of the "market forces" of the courts over legislative intervention: "Leave it to judicial review [*laissez-faire la jurisprudence*] with its everyday wisdom; it perhaps does not move quickly, but does advance

[97] ANOM GGA 12H51. La commission institué par arrêté de 30 aout 1879 a l'effet d'étudier la question de la constitution de l'état civil musulman, 22 Sept 1879.
[98] ANOM GGA 12H51. Séance du 23 Dec 1879, Session Extraordinaire: 425-26.

surely. Let us for now do, for the verification of marriages, that which is possible to do and leave aside that which takes place beyond the cadis [sic]."[99] The conseilleur Poivre joined Robe in rejoinder to the Chief Justice, this time revealing the moral imperative at the heart of the practical matter:

> Why fear the registration of private contracts? […] it is not that the moment has yet come to preoccupy ourselves with the conditions of marriage between *indigènes*, but it must be considered one day or another, and an end put to this traffic in children of which the brutal passions of some respect not even age and which we are asked to consecrate by a legislative disposition.

To this Grévy added that, "we must push for the regularization of marriages. Morality, politics, and administration here all share an equal interest." In his invocation of trafficked children and "brutal passions," Grévy was alluding to the young, sometimes pre-pubescent, brides who would be saved from unwanted marriages were their ages properly and accurately recorded (discussed at length in Chapter 3). He cited Ali Cherif's comments in support, though completely reversed the position that the latter actually took in the *contre-projet* commission.[100] Grévy's only disagreement with the moralistic contingent was in his preference for gradual rather than immediate universal application. When Robe and Poivre's proposals were at last put to a vote, they were soundly rejected, and criteria for determining the validity of Muslim marriages was deferred to the "everyday wisdom" of judicial review.

With this draft, Jacques won the day in the lower house; with a declaration of urgency, the version of the bill proposed by his commission was passed without discussion. A sub-clause to article 19 stated that

> Acts of marriage and divorce are established by a simple declaration made within three days to the mayor or administrator who fills his function by the husband and wife or by the husband and legal representative of the wife, according to the terms of Muslim law.

[99] Ibid,: 426.
[100] Ibid.: 431.

Failure to comply would result in punishment laid out by the French Penal Code. Muslim marriage was thereby held to two conflicting standards, neither of which fully resolved the initial tension at the heart of these deliberations: judicial review held a *qadi*'s declaration to be the sole acceptable validation, while the law of 1882 demanded a secular declaration but accepted the presence of two witnesses.

Fertility and the Fictional Family: the État civil and demography

Despite the degree of indigenous resistance that seemed to plague all efforts to survey the subject population, on the eve of this novel colonial foray into the private lives of Algerian Muslims, their census data was recorded in civil jurisdictions, then published in three major census reports between 1876 and 1898. The État civil remained the main source for census information on Muslims until decolonization. According to the census of 1876, data was collected on 145 *communes de pleine-exercise*, counting not less than 1.1 million inhabitants, which comprised 45 per cent of the Muslim population. For the years 1876-77 and 1878, 19 623 indigenous marriages and 8 881 divorces were registered with the state. This suggested a staggering rate of 45.3 divorces per 100 marriages, a figure not lost on French reformers and jurists.[101] This data confirmed in hard numbers what had until then been only a suspicion of colonial administrators: that Muslim marriage and "the Muslim family" were in a crisis only they were equipped to resolve.

The non-existence of the Muslim family was a notion held not only by administrators and parliamentarians, but shared by an emerging class of experts located in a complementary colonial bureaucracy based in the emerging "science" of demography. No sooner had officials begun collecting census data on non-Europeans in Algeria but a statistical bureau was created and set

[101] Kateb, *La fin du mariage traditionnel*: 32

with the task of analysis. Thus, for the field of law the État civil des indigènes produced the individual as a stable category of state knowledge, while for demography it produced a new category: populations. Even as demography was fueling fears of national degeneration at home, in North Africa, this science nurtured anxiety over the hyper-fecundity of the Algerian population – at seeming odds with a residing suspicion that Muslim Algerians were on their way to extinction.

Of course, the actual figures produced in this period may be dubious for any number of reasons, as demographic specialist Kamel Kateb has found, not least of which is the effect of this surveillance on the thinking and behaviour of its subjects. Nicholas Dirks reminds us that, "ethnographic science ultimately achieved its apotheosis in the colonial census, both because of the massive scientific and administrative apparatus that the census represented and because of the way the census had unprecedented effects on the social realities it claimed merely to represent."[102] Likewise, Kateb questions whether "the obligation to register, which opened for indigenous Algerians a new field of relations with the state apparatus, had an influence over the years on the shape of marriage and rupture of the matrimonial bond."[103]

Algeria's first chief statistician, Réné Ricoux, was the first to use scientific methods to present his thesis that the Algerian population was doomed to "regular and rapid" disappearance, having decreased from about 3 million at the outset of French invasion to just over 2.1 million inhabitants in 1872.[104] He blamed this "swift and inevitable disappearance" on "the Arab people [who] die of their vices and deprivations."[105] In his study, for instance, of infant mortality rates,

[102] Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India.* (Princeton: Princeton University Press, 2001): p 196.
[103] Kateb, *La fin du mariage traditionnel*: 25.
[104] René Ricoux, Louis-Adolphe Bertillon. *La démographie figurée de l'Algérie: étude statistique des populations européennes qui habitent l'Algérie*. (Paris: G. Masson, 1880): 260.
[105] Ricoux, ibid.

Ricoux drew comparisons across the European (French, Italian, Spanish, Maltese), Jewish, and Muslim populations in Oran and Phillipville, with the metropolitan French mortality rates serving as baseline. Ricoux determined that the high mortality rates of illegitimate infants among the Spanish of Oran was due to the size of the city, which was moreover a "true Spanish colony" that did not benefit from French influence.[106] The high mortality rate of "illegitimate girls" among the Jewish population was a result of their "way of life, filthy dwellings, [and] faulty hygiene." But for Muslims, this trend was reversed and "legitimate" children died at greater rates than "illegitimate children."[107] This trend might be easily explained. Kamel Kateb tells us that polygamy and divorce at this time were the means by which Algerians curbed sterility and assured reproduction; divorce was the preferred method, since it released the husband of financial responsibility for the first wife, but inasmuch as large households with multiple dependents were a marker of wealth and status, men might maintain the first marriage and take a second wife.[108] "What the legislator regarded as 'familial anarchy'," Kateb writes, "was a marriage market designed to maximize fecundity."[109] Therefore, infants from second marriages likely lived precisely to correct those lost in the first marriage. Ricoux for his part concluded that this surprising inversion of the metropolitan trend was not an indicator of Muslim "morality" (rampant sex outside of marriage), but due rather to the fact that "the Muslim family barely exists," and that "marriage, with polygamy and easy divorce, is not differentiated from legally reputable unions, and the distinction between natural and legitimate children is not easily made," thus admitting that his own categories were confounded.

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[106] "Vraie colonie" was a term that indicated a settlement colony, usually dating to the early-modern period, that remained either an autonomous satellite or a friendly trading partner to its original metropole, the most successful example being United States for Britain.
[107] On the colonial politics of racial hygiene, see Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest*. (New York: Routledge, 1995).
[108] Kateb, *La fin du mariage traditionnel*: 46.
[109] Kateb, Ibid.: 59.

This brought Ricoux to the much more vast and urgent question on which he had based his career: "Is the Muslim population rising or is it condemned to disappear?" Ricoux's work mobilized the "decline thesis" of native populations, which had been used to both explain and justify the extermination of Indigenous peoples of North America and Australia – something that French republicans claimed to abhor, and to which they posed assimilation as the "humanitarian" alternative. Ricoux could hardly believe that the indigenous population was growing at the rates indicated by census data despite the trials of the recent famine (1867-68), cholera and typhus epidemics, and the insurrection of 1871. Instead, he claimed, what appeared as an increase was rather a result of the enduring failure to compel natives to take family names. In effect, administrators of communes were "inventing individuals" out of a mess of synonymous names; what appeared on paper as several people was just one. They were doing this intentionally, moreover, to receive more subsidies and boost their budgets, based on the numbers of Europeans and natives (who counted, in budgetary terms, as one eighth of a European) inhabiting the commune. "In my discerning opinion," he concluded, "far from increasing, the natives are constantly decreasing, so that we can predict their complete disappearance within one or more centuries."[110]

He added a final note on the distinction between Kabyles and Arabs in this regard. Assimilationists had developed a preference for Kabyles (ethnic 'Berbers' of the Kabyle mountains) as superior to Arabs, due to their ostensibly more advanced (democratic) social and (monogamous) private lives, and even a mythic "Gallic" ancestry, which rationalized French settlement.[111] Yet the proverbial Kabyle woman was often depicted as both a handmaiden in

[110] Ricoux, "Recherches sur la mortalité de la première enfance en Algérie," *Annales de démographie internationale : recueil trimestriel de travaux originaux et de documents statistiques et bulletin bibliographique spécial* (1882): 13.
[111] On the "Kabyle Myth" see: Patricia Lorcin, *Imperial Identities: Stereotyping, Prejudice and Race in Colonial Algeria* (London: I.B. Tauris, 1999).

waiting of French acculturation, and a victim in need of uplift (discussed further in Chapter 3). Ricoux warned that Kabyle women were known by local missionaries to "practice abortion at a vast scale." If this "homicidal practice is widespread," he concluded ominously, "it would be difficult to accept for Kabyles a resistance [to depopulation] greater than that of Arabs."[112]

Ricoux's contention that the Muslim population was in decline would be disputed ten years later by Arsène Dumont, a celebrated anti-clerical and socialist-leaning demographer of his generation, who utilized data collected in Algeria over the next ten years to argue that, rather, the Muslim population was steadily increasing. To Dumont this was a puzzle. His predecessor (incidentally, Ricoux' mentor) Jacques Bertillon had popularized the thesis that "the most ignorant countries are also the most fecund" in his demographic study that prophesied the demise of the French nation, due, ironically, to its superiority.[113] Despite the presence in Algeria of all of the factors that might indicate a less advanced society and therefore a higher fecundity rate, such as "widespread ignorance" and "collective property," Dumont calculated the approximate fecundity of Muslims at only about 2 children per couple, which was even (to his evident relief) less than France at the time.[114]

As for divorce rates, the census of 1888-90 had counted 111 317 marriages and 44 748 divorces by Muslim subjects, which represents a divorce rate of 40. 2%. The next census, of

[112] Ricoux, Ibid.: 13. The remainder of the report turns to the matter of increasing the European population, noting that infant mortality outside of marriage is much lower among the settler population than in Europe, owing, he argues, to the laxity of social conventions, which in the metropole cast unwed mothers to the social margins. Whereas it was popular in Europe to regard such infant mortality as a physiological fault of the mother, Ricoux insisted, along with his mentor and a father of modern demography, Jacques Bertillon, that this was a social and hygienic problem. In Algeria, therefore, welfare programs and orphanages should provide support for this important population, which would "protect such an important part of our population, since it is our future and the future of the French race in Africa." Ricoux, ibid.: 24.

[113] Jacques Bertillon, *La dépopulation de la France, ses conséquences, ses causes, mesures à prendre pour la combattre*. (Paris: F. Alcan, 1911): 130. For his part, Dumont had argued, in the wider context of France and her empire: "Those who absorb no part of civilization, like the poor in France and barbarians worldwide, conserve their high birthrates, while those who absorb much of civilization ultimately die as a result." *Dépopulation et civilisation*: 241.

[114] Arsène Dumont, "Note sur la démographie des musulmans en Algérie," *Bulletin de la Société d'Anthropologie de Paris* (IVe Série, T 6, 1895): 702-717.

1891-3, showed a rate of 37.8% (37 874 divorces for 99 684 marriages), signaling the stability of this trend. Divorce in Algeria was thus about ten times more frequent than in France at the time (about 4.8%).[115] Dumont's observations on divorce and fecundity in France led him to conclude that individualism and decreasing paternal and marital authority (within the proverbial 'anti-Malthusian' couple) had propelled divorce rates in the most advanced societies. At the same time, he determined, divorce was also extremely frequent among the least advanced societies for the opposite reasons: severe patriarchy and supreme authority of the male head of household, who discards his wives "like a slave who ceased to please him."[116]

The startling discrepancy Dumont detected between a "stagnant civilization" and its high divorce and low birthrate called for an exhaustive study into the minutest detail of Muslim sexual habits:

> This phenomenon demands a closer examination. […] From the point of view of descriptive demography, [extensive study would] give us more precise notions on the habits which regulate the sexual union of the Muslim element in Algeria, and they open the door to research that French science has the obligation to follow, extend, and further refine. Insofar as France has taken up by conquest the task of presiding over the destiny of Muslims of North Africa, her duty is to manage [the colony] not only with the benevolence of strict justice, but with full knowledge of the facts.[117]

Many more demographic studies of Algeria's population would follow; however, Dumont's colleagues seemed unconvinced that Muslim fecundity was as low as it appeared from census data. They felt it more likely that the meager number of births reflected simply a continued reluctance to register with the État civil, as evidenced by the abundance of newborn boys reported to the state, whose births appeared between 20 and 50% more often than newborn girls on the public register. His suspicions were confirmed a year later by a circular which

[115] Kateb, *La fin du mariage traditionnel*: 58.
[116] Dumont, Ibid.: p 710.
[117] Dumont, Ibid.

revealed, following a verification operation in several communes, that approximately only one-quarter to one-fifth of births were being declared.[118]

Ironies of Enforcement

Whatever Marius de Gimon's initial optimism that the self-evident utility of registration would be convincing to indigenous subjects, the full apparatus of the État civil took ten years to take full effect, by the end of which 3,069,268 *indigènes* were registered, costing 1,034,000 francs (more than doubling the original estimate of 300,000 francs).[119] Yet, the struggle to implement it persisted well into twentieth century.

One problem, already mentioned, was with the lack of enforceable penalties. Eventually, articles for punishing falsifications and omissions were included in the Code de l'indigénat in 1888, but Paris later had these articles stricken from the native code on the rationale that such punishments were already contained in the French penal code, and were thus redundant. However, the penal code only punished failure to declare birth and death, not marriage and divorce, and so failure to declare the latter was not explicitly punishable until a half-century later, when lawmakers, invigorated by the colonial centenary, issued a law (2 April 1930) that applied steep fines for husbands who failed to report marriages, and parents who failed to report births (discussed in Chapter 3). Even then, however, this remained difficult to enforce, since the indemnity for omission or falsification was, in any case, scarcely greater than the basic fees to

[118] Ageron (*Les Algériens musulmans*: 181) claims as well that the birth of girls was under-reported compared with that of boys, which seems to contradict with earlier complaints by the commandants that natives were hiding the birth of boys for fear of their conscription.
[119] Ageron, *Les Algériens musulmans :* 181-182.

register one's birth and marriage. Risking punishment was thus well worth evading the state's grasp to begin with.[120]

If Algerian Muslims casually neglected the registration of life events, they were openly hostile to the new naming regime. The archive is replete with formal complaints about the sometimes ridiculous names that bureaucrats of the État civil had bestowed upon members of their communes, including the French names for animals.[121] Ageron writes that many officials in these low-esteem positions may have been Arabists, but they were, first and foremost, racists. Many Muslim subjects, in turn, chose to give the French not their full names by lineage (*kunia* or *leqma*) but local sobriquets, and continued to use their proper Arabic names only amongst themselves, thereby creating a "doubled identity."[122]

This discrepancy proved seriously disadvantageous for the adjudication of private property disputes between Muslims, a problem raised by native elites at various intervals. For instance, in 1897, a large group of notables sent a petition to the Parquet général expressing their desire to include their "*noms primitifs*" on the new identity cards and other official documentation, and not only, as the laws governing the civil registry demanded, their newly-invented "*noms patronymiques*." The reason for this request was, ironically enough, the confusion the new naming regime had caused in tracing genealogies for the assessment of Muslim successions. "In a word," they concluded, "many natives have lost their goods."[123] This request was rejected in short order on the grounds that the law of 1882 ordered not the changing

[120] See: Florence Renucci, *Le statut personnel des Indigènes: Comparaison entre les politiques juridiques française et italienne en Algérie et en Libye (1919-1943).* Thesis, Université Paul Cézanne Aix-Marseille (Aix-en-Provence, 2006): 176-77.
[121] ANOM GGA 12H50: This sizeable carton contains the bulk of these complaints and the processing of corrections.
[122] Ageron, *Les Algériens musulmans*: 182.
[123] ANOM GGA 17H58, Petition (undated) and response of the Parquet Général (16 Feb 1898).

but merely the registration of these names, and so there "cannot be […] any confusion in this regard."[124]

Ironies and entanglements surrounding État civil registration were not restricted to non-citizen Muslims; Algerian Jews forced to accept citizenship en masse in 1870 were also caught in the État civil's bureaucratic web. To give one example: In 1924, a Jewish woman from outside Béjaïa named Hadjali M'Barka contracted a Hebrew wedding ("*more judaico*") before a rabbi, instead of a civil union before a Justice of the Peace, even though, as a Jew, she was a French citizen and thus beholden to the obligations of civil law. When local administrators discovered this, they immediately declared her marriage illegitimate and nullified. M'Barka's father tried to explain that she had no choice. Since her birth had never been registered, no French judges would agree to marry her, as her age, and thus consent, could never be lawfully established. Nonetheless, the Procureur général declared that, "a French citizen cannot unite himself in [native] marriage and thereby break the bonds that tie them to the code civil."[125] In M'Barka's case, access to the privilege of French citizenship entailed the imposition of new bureaucratic barriers around her life's trajectory and restrictions that she tried, but failed, to reject.

Finally, the État civil was forever tarnished by its association with naturalization, exclusionary citizenship laws, perceived secularization, and the gendered politics of subjection to colonial rule. One French-educated Muslim notable was reported to have explained why this was so:

> We will never become naturalized because we do not want our daughters to be married before the French officer de l'état civil. It is not in our custom, and the obligation to produce our daughters and wives in public ways will always be an obstacle to our acceptance of marriage as it is regulated by the Code Civil.[126]

[124] Ibid.
[125] Archives nationales d'Algérie (ANA). Parquet to Procureur général près la Cour d'Appel d'Alger, No. 1709. 5 Mar 1924:
[126] Quoted in Christelow: 132.

No wonder, then, that even by 1929, the attorney general was complaining that the number of omissions of registered births was "in the thousands in certain *douars*," making it "practically impossible to satisfy the prescriptions of articles 99 and subsequent of the civil code." Another jurist would lament, ten years later, that, "[t]he consequences of these omissions are grave. Operations of conscription are complicated [and] the marriage of impubescent girls is facilitated" – both of which require records confirming not only a person's existence but whether they were of majority. Over "fifty years after the passage of the law of 1882," he continued, "we are no closer to obtaining the declaration of all births with the officers of the état civil," which could be blamed, first and foremost, on the "bad faith of the natives, their mistrust of all measures of census-taking," followed by the "guilty negligence" of native officials entrusted to enforce the law.[127] Indeed, precisely the same debates and anxieties of the 1870s would be raised again over the coming decades, first to support the drafting of an official code of Muslim law (see Chapter 2), and then, once again, in the lead-up to the "Centenary Laws" of 1930-31 (see Chapter 3). The assurance that "the obligation to declare marriages before the officer of the état civil… does not have for its objective the existence of a marriage, nor its validity, only its reporting," became a predictable refrain among colonial officials and jurists, even as they heaped burdens of official and indirect punishment upon those who failed report one's marriage, or their child's birth.[128] By that time, however, the creation of a private property regime had slipped into the background, almost forgotten, while the moralist and civilizing motifs that had born it along through the debates of the 1870s moved once again to the fore.

[127] L. Perrilier, « Le Statut Personnel : Une investigation dans la région du cheliff, » *Questions Nord Africains* (1939) : 111-112.
[128] Direction des affaires indigènes, "Note du gouvernement general de l'Algérie sur la validité et les effets des marriages contractés suivant la loi française par les indigènes musulmans d'Algérie non-naturalizés francçais, Alger, vers 1918." Quoted in Renucci: 177.

Conclusion

This chapter has traced the process of the creation of the État civil des indigènes, one of the most ambitious assimilationist projects directed toward Muslim Algerians undertaken by the colonial civilian government in the Third Republican period. Because of its real and perceived failures to achieve its objectives and secure the compliance of Algerian subjects, the État civil des indigènes has received – unfairly, I argue – relatively little historiographic attention.

Early proposals for importing this republican institution to the colony, such as those advanced by Marius de Gimon in the 1850s, presented it as a means of preparing Algerian Muslims for citizenship, by attending to supposed "chaos" within the Muslim family. By the time of the passage of the Warnier Act (1873), the constitution of the "individual" through Gallicized naming, the "correction" of the anarchic Muslim family, and the seizure of native lands held in trust were rhetorically aligned as one and the same civilizing cause. Throughout these debates, polemics, and a seemingly endless succession of laws and measures, French reformers attempted to resolve what was, for them, the frustrating ambiguity of Muslim marriage. As the section on demography demonstrated, the power of these schemes for identifying, cataloguing, and mapping Algerian Muslims was in their construction of knowable subjects and the imposition of categories they purported merely to describe.[129] Despite widespread noncompliance, the effects of the État civil des indigènes reverberated throughout the next half-century. As the next chapter will show, its unrequited exertions upon the "Muslim family" were passed on to the scholars and jurists of the École de droit d'Alger.

[129] Ian Hacking, "The Looping Effects in Human Kinds," in Dan Sperber, David Premack, and Ann James Premack. *Causal Cognition: A Multidisciplinary Debate* (Oxford: Clarendon Press, 1996): 351-83.

Chapter 2: Le 'Fiqh Francisé'?: Modernity and the Management of Difference (1880-1927)

Introduction

In 1892, the literary and political magazine *Revue Bleue* printed the story of a young Kabyle woman entitled, "Fatima et la Politique Francaise en Algérie." The titular heroine was introduced with a list of her successes: after the death of her mother, she was raised in a secular institution, where she learned to "speak our language with irreproachable purity," developed admirable "manners and reserve" and overall conformity to French habits, and went on to gain a teaching position in a state school for boys in the commune of Fort-National (Tizi Ouzou).[1] But Fatima's fate was very nearly derailed. When she was just eleven years old her father had "sold" her into marriage – a misfortune mitigated by the fact that her betrothed was a naturalized Kabyle Frenchmen, whose rights would have been extended to her. No sooner had the union been formalized but another man appeared and brought Fatima's father to court, claiming that Fatima was already promised to him. Tragically, the deputy judge ruled in favour of this claimant, described in the story as Fatima's usurping "legal rapist."

How, the author wondered, could the colonial policy of "respect for local customs" be maintained in the face of such injustice?

[1] M.P. Foncin, "Le cas de Fatime et la politique francaise en Algerie." *Reveu Bleue: La Revue politique et littéraire* (Jan 1982 No. 1): 182-85. The story was also taken up by French feminist Hubertine Auclert in a chapter entitled "Muslim marriage is child rape," in Auclert, Hubertine. *Les femmes arabes en Algérie.* (Paris: Harmattan, 2010), discussed further in Chapter 3.

> What is this disguised form of slavery that the deputy justice of the peace presumes to respect in Kabylia? Selling one's daughter, as one would sell a cow or a calf, is this not a trade in slaves? Is it not, after all, a violation of conscience and of Law?[2]

In the end, however, French justice did not fail Fatima entirely. Her intended husband successfully appealed the first decision, which was overturned; the story closes on their companionate state of matrimony and mutual respect.

With the rapid assertion of judicial institutions and personnel in Kabylia, numerous such cases were being heard before French justices. That Fatima's particular story should make headlines at this juncture, in 1892, is not incidental. Jules Ferry and his senatorial delegation had just completed their fact-finding mission to Algeria and published a report promoting French education and law reform as an antidote to settler excesses since the "*système de rattachements*" (1881-1896) and the deprivations the indigenous population had suffered at their hands.[3] Pierre Foncin, the author who took it upon himself to recount Fatima's story to the readers of the *Revue Bleue,* was also the inspecteur général de l'enseignement secondaire and co-founder of the *Alliance française* – a nationalist organization committed to the spread of French culture and republican rejuvenation through colonial expansion. Fatima's trajectory, as told here, illustrates the dangers of an incomplete or reticent civilizing mission: though French schooling played an important role in fashioning this veritable "regenerated" native woman, she might still have fallen victim to the laws of a culture she had all but abandoned – most shockingly at the hands of a French judge, thus making her loss all the more tragic. Indeed, anxiety over the dispensing of such injustice to Kabyle and other Muslim women in French courts was frequently touted as the prime impetus for a series of major family law reforms engineered by the government general in

[2] Ibid.: 184.
[3] Jules Ferry, *Le gouvernement de l'Algérie, rapport sur l'organisation et les attributions du gouverneur général de l'Algérie, fait au nom de la commission sénatoriale d'étude des questions algériennes.* (Paris : A. Colin, 1892).

Algeria between 1880 and 1914. The main debates, actors, and events driving this reformist impulse are the subject of this chapter.

From one perspective, we might view the developments described in this chapter as compatible with the consolidationist spirit of the 1880s-1890s and the fusion of Algerian institutions to their respective ministries in Paris.[4] This helps explain some of the juridical solutions that were applied to the largely foreign-born settler population (particularly the automatic naturalization by *jus soli* of 1889), while the famous Cremieux Decree of 1870 would determine in short order the civil status of Algeria's Jews.[5] Yet, in the contested domains of law and order, crime and punishment (not to mention labour and education), the Muslim majority remained the constitutive outside to republican citizenship, even while being gradually and always contentiously incorporated into French positivist legal culture. The policy of non-interference in Muslim "private" life was integral to maintaining a position of *difference* by which Muslims were denied civil or political rights even as Algeria was becoming, institutionally and administratively, more French. This chapter thus attempts to answer the following question: How was the colonial policy of segregation reconciled with increasing interventionism in this period? In the age of reform, a change occurred in the relationship between segregation and pluralism that somehow did not disrupt the need for indigenous Muslim disenfranchisement to uphold and manage the colonial regime. To refine my initial question, then, what changed in the nature of the relationship between these mutually-sustaining policies in the age of *fiqh francisé*?

[4] On these and other administrative assimilationist and consolidationist reforms in the immediate aftermath of the 1870 governmental transition, see: Ageron, *Modern Algeria*: 53-57.

[5] Threatened on two occasions: once during the anti-Semitic crisis of 1898, when colons, resentful of the Jewish vote, rioted for greater autonomy; a second time during the Second World War, when their citizenship was stripped until the fall of the Vichy regime (1940-1944). On the process surrounding the designation of French civil status to Algerian Jews, see: Judith Surkis, "Propriété, polygamie et statut personnel en Algérie colonial, 1830-1873," *Revue d'histoire du XIXe siècle* 41 (2010): 27-48.

This chapter begins with an overview of the restructuring of the system of *justice musulmane*, which Ageron, and in turn Christelow, have described as the "war against the *qadi*s." Another front in this war, as we saw in the previous chapter, was the abolition of the public *waqf* system, which had sustained Islamic legal education. The structure of Islamic state law thus undermined, and the era of military rule (and with it the Bureaux arabes) brought to an end, the task of administering "Muslim personal status" law now fell upon the civil government, which filled the administrative and judicial gap through two institutions, the École de droit d'Alger (1880) and the Chambre de révision musulmane (1892), that were at once complementary and locked in confrontation. While the doyens of the École preferred to instill "humane" reforms and French principles into Islamic law through a universal code of Muslim family law that replicated the standards of the Code civil, the Chambre was designed for more gradual and case-specific assimilation through judicial review – a conflict most saliently represented by the enduring debate between Marcel Morand and his colleague Émile Larcher. Next, this chapter looks more closely at the ideological impetus that drove Morand's codification project, and traces the source of the Code's inspiration to Ottoman and Egyptian family law reforms and codes, via the figure of the retired Ottoman minister Ioannas Sawas Pacha. This section engages with Wael Hallaq's criticism of the emphasis on "debts and borrowings" in the "Orientalist construction of Islamic law," by tracing the roots of this epistemology to a generation of Orientalist scholars that came before Joseph Schacht, the main object of Hallaq's censure.[6] Finally, I turn to a discussion of the momentary revival of interest in Morand's Code, which, though highly influential, was never officially promulgated. This chapter will thus demonstrate, first, the deferral of anxiety over the intimate details of the "indigenous family"

[6] Wael Hallaq, "The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse," *UCLA Journal of Islamic and Middle Eastern Law*, vol. 2, no. 1 (2003-2003): 1-22.

from the État civil des indigènes onto a series of new institutions and governing bodies preoccupied with the management of Muslim family law, and second, the importance of "modernization" and "reform" movements elsewhere in the Muslim Mediterranean world for resolving, at least administratively, the tension between republican universalism and codified difference and exception.

The most compelling artifact of this era was the seminal personal law draft code, the *Avant-Projet de code du droit musulman Algérien*.[7] In 1905, Marcel Morand was commissioned by the Governor-General to oversee this monumental task, which took over ten years to complete. The result was a collection of some 781 articles covering personal status matters, including marriage, divorce, inheritance, moveable property, and evidence. Though the "Code Morand," as it was called, was never officially implemented, it was nonetheless highly influential and was consulted by jurists well after independence.[8] Morand himself went on to write numerous monographs and polemical articles arguing the virtues of codification. He has been described as

> a key figure at a time when a quiet and emancipatory evolution in colonialism still seemed possible. If the non-promulgation of the Code Morand seems an indisputable failure of colonial policy, this text was nonetheless almost as fundamental as the Senatus-Consult of 1865.[9]

The inclusion, in this quote, of both Morand's code and the Senatus-Consulte of 1865 as parallel – if supposedly oppositional – pillars of colonial policy contains a key insight for our own analysis. The French reform projects of the late-nineteenth and early twentieth-century represented, on the one hand, a distinct divergence from a previous policy of "non-intervention"

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[7] Marcel Morand, *Avant-Projet de Code du droit musulman Algérien, Présenté à la Commission du Codification* (Alger : Adolphe Jourdan, 1916).
[8] J.R. Henry and F. Balique, *La Doctrine Coloniale du Droit Musulman Algérien, Bibliographie Systématique et Introduction critique*. (C.R.E.S.M.: Aix-en-Provence, 1980) : 48.
[9] Laure Blévis, "Marcel Morand," in François Pouillon, *Dictionnaire des orientalistes de langue française* (Paris: IlSMM, 2008).

and accommodation of native customs, while at the same time entrenching and advancing the regime of exceptional law and political exclusion represented by the 1865 law that underpinned colonial Algeria's legal pluralism *cum* political segregation.

The hybrid legal and judicial system developed during these decades by French Orientalist scholars was dubbed '*droit musulman algérien*,' and the historiography has largely accepted Joseph Schacht's description of this "juridical monstrosity" as a French corollary of "Anglo-Muhammaden" law in British India.[10] Though they share some similarities, this characterization posits an undue symmetry between French and British objectives and methodology that fails to fully capture the assimilationist orientation and particular logics used to formulate colonial Islamic law in Algeria. For this reason, though *droit musulman algérien* was the accepted term in both colonial academic and political discourse, I propose the term '*fiqh francisé'* – to borrow, with some modification, the Algerian *instituteur* Omar ben Brihmat's phrase – to point specifically to the overt and surreptitious modes by which Muslims would be "regenerated" through the assimilation of Islamic law, despite the understood impossibility of their civil or political equality.[11] Indeed, the two are importantly distinguished by the English attempt to apply codified penal laws according to local Hindu and Muslim laws, whereas the French in Algeria simply transplanted their own penal codes, enforced by provisionary courts. It also marks an important break in terms of periodization: whereas Anglo-Muhammadan law was a creature of early-modern processes and would form the terrain of modern and late-colonial contests, it was, rather, upon this very terrain that a *fiqh francisé* was elaborated. This requires

[10] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964). See: chapter 13: Anglo-Muhammadan law and Droit Musulman Algerien. The phrase "juridical monstrosity" comes not from Schacht, but Émile Larcher – a colonial legal expert discussed further below – and is also useful for illustrating not only the provisional, but also uncannily familiar and unsettling creature that emerged through this fusion.

[11] I am using the term "*fiqh francisé"* following the phrase '*al-fiqh al-fransawi'* coined by Omar ben Brihmat, a graduate of the École de Droit d'Alger, who went on to teach law at a *médersa* in Algiers, in his book, *Kitab an-nihaj es-sawey fi 'l-fiqh 'l-fransawi* (Alger: Fontana, 1908).

attention, therefore, to the contexts of wider Islamic revivalist and modernization schemes across the Sunni heartlands of the Eastern Mediterranean.

Background: Changes to judicial structure and personnel, 1859-1889

By the turn of the twentieth century, some seventy years after the French conquest of Algiers and thirty years after the last remaining enclaves of armed resistance were decidedly repressed, the work of erecting in Algeria a legal system symmetrical to the metropole was well under way. This reformist vigour would recede somewhat after WWI, then re-emerge in the years leading up to the colonial centenary in 1930. To the French jurist Edmond Norès, writing in honour of the centenary, when the French had first arrived in Algeria they discovered that they had inherited, in his view, a most "primitive system," lacking judicial review, an appeals process, territorial jurisdictions, or even written record of proceedings and judgments.[12] French progress in each of these areas was commendable, but the work was far from over: after one hundred years of dominance, "the *indigène* remained difficult both to know and to govern."[13]

Beginning shortly after French arrival, Algerian legal culture underwent considerable restructuring as the authority of *qadis* and customary spaces and methods for dispute resolution were gradually absorbed into the civil law regimes. This was accompanied by the dismantling of their competence, in the sense of both of those Muslim matters designated for their adjudication and the institutional and budgetary support provided for their formal training. This wanton destruction of Muslim institutions did not escape the notice of its earliest observers, most notably

[12] The perception that judgments in Islamic legal regimes are irreversible is one that still has purchase today. For an argument asserting the existence of informal and quasi-appellate systems in Islamic legal theory, see: David Powers, "On Judicial Review in Islamic Law," *Law and Society* 26.2 (1992).
[13] Edmond Norès, *L'ouevre de la France en Algérie: La Justice* (Paris: Félix Alcan, 1931): 87.

the political philosopher, and "reluctant colonialist," Alexis de Tocqueville, who reported to parliament in 1847:

> Everywhere we have laid our hands on revenues [from pious endowments], largely diverting them from their original purpose. We have cut down the number of charities, let schools fall to ruin, closed colleges. Around us the lights have gone out, the recruitment of men of religion and men of the law has ceased. We have, in other words, made Muslim society far more miserable, disorganized, ignorant, and barbarous than ever it was before it knew us.[14]

Christelow describes this ongoing process, first of bureaucratizing the juristic class in the 1840s, then eroding their powers, as the "war on the *qadi*s," following Ageron.[15] By 1859, *qadi* courts (*mahkama*s, or "*mahakma*s" in French) were brought under the *tutelle* of French appeal courts, giving the French magistrates a strong degree of official purview over the adjudication of Muslim personal status law, after French primacy had already been established in the realms of penal, property, and commercial law.[16] Their powers, as well as their numbers, had also shrunk dramatically with the institution of the *communes mixtes* in the 1870s, and under the watch of Admiral de Gueydon, Algeria's first "civilian" governor general, who declared: "[t]he Muslim judge must make way for the French judge […] We are the conqueror, let us be so."[17] As the previous chapter detailed, family land held in religious trusts came under French control through the Warnier Law of 26 July, 1873, which also had the effect of finally relegating religious law to what remained of the personal status domain – namely, marriage, divorce, guardianship, and certain forms of inheritance.[18] By 1890, the number of *mahakma*s in Algeria had been reduced

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[14] Quoted in Charles Robert Ageron, and Michael Brett (trans.). *Modern Algeria: a history from 1830 to the present*. (London: Hurst & Co, 1991): 21.

[15] Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton, NJ: Princeton University Press, 1985). Christelow's book deals in substantive detail with the histories described in an only cursory way in this paragraph. See also Ageron, *Les Algériens musulmans et la France (1871-1919).* (Paris: Presses universitaires de France.) : T. 1, 209-217.

[16] "Rapport à l'empereur sur le décret qui organise la justice musulmane (31 décembre 1859)," Robert Estoublon and Adolphe Lefebure, *Code de l'Algerie*, Tome 1 (Alger: Adolphe-Jourdan ,1896) : 231.

[17] Quoted in Ageron, *Modern Algeria:* 70.

[18] David Powers, "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in

from 184 to 61.[19] The eviction of *qadis* from all property disputes (between Muslims and between Muslims and non-Muslims) was completed by a decree of 10 September 1886, a principle later gradually amended to give them competence in small claims between Muslims.[20]

However, the spirit of the 1886 law would survive when replaced, three years later, by the landmark decree of 17 April 1889 on "the organization of Muslim justice in Algeria" – the nail in the coffin of the *qadi*s authority in the civil territories of the Algerian *départements*.[21] First, this decree confirmed the *qadi*s reduced capacities. Second, it reframed the *qadi* in the subordinate position of a provisional or exceptional authority in relation to the French Justice of the Peace, thereby elevating the latter to a veritable "judge of the common law of Muslim affairs."[22] Third, though it re-stated that those non-naturalized Muslims residing in Algeria would remain governed by their "laws and customs in that which concerns their personal status and successions," it created for them the option of deferring instead to French law. Fourth, and lastly, it instructed French justices, in their deliberation of Muslim personal status matters, to abide by the principles of French law, the Code Civil, and "their own conscience." The decree of 1889 was thus the most aggressive piece of colonial legislation to advance the annihilation of Islamic law and adjudication in Algeria, and it prompted a considerable backlash from indigenous elites and intelligentsia (however diminished).[23] Its successor was the 1892 creation of the Chambre de révision musulmane, discussed below.

Algeria and India," *Comparative Studies in Society and History*, Vol. 31, No. 3 (Jul., 1989), pp. 535-571.

[19] Ageron, *Modern Algeria*: 70.

[20] This is only a brief description of the evolution of both the office of the *qadi* and Muslim courts, which, in this linear presentation, does not include the numerous changes, sudden reversals and renewals of policies and positions surrounding the court, driven by tensions between the *colons*, the military administration, and Paris. For more details, see: Ageron, *Modern Algeria* : 33-44.

[21] Estoublon and Lefébure, *Code annoté de l'Algérie* (Alger : A. Jourdan): 81.

[22] Said Benabdellah, *La Justice en Algérie, des origines à nos jours* (Oran : Dar El Gharb, 2005.): 207.

[23] Christelow, *Muslim Law Courts*: 241 and 244-246.

Not to stop there, the low budgetary priority given to maintaining "*justice musulmane*" meant that those *qadis* who remained were afforded only meager salaries. In 1894, an inquiry into the possibility of charging a standard tax on *qadi-notaires* in Kabylia revealed that these functionaries were already living in penurious conditions. Unlike Arab *qadi*s, Muslim judges in Kabylia had been reduced in 1874 to the status of notaries rather than magistrates, and by the mid-1880s their role, and that of local judicial councils (*djemaa*) for adjudicating customary law, had been totally usurped by French justices. The attorney general advised that, "over the past twelve years, their means have been seriously restricted. Kabyle *qadis* do not even make 5,000 francs a year, many earning around 3,000 francs." He added that their "habitations, like those of the Arab *qadi*s, are generally miserable. Many lodge in the mosques."[24] The inadequate training of not only *qadis* but all of the "*petits personnels*" who staffed the *mahakma*s, such as Muslim legal spokespersons (*oukils judiciaires*), court interpreters, and summons officers (*aouns*), was also a subject of native elite frustration. For instance, when some tertiary powers of the *qadi* were restored in 1897, a large group of notables wrote a "petition… addressed to the appropriate authorities" approving this salutary modification, but taking the opportunity to express their displeasure with the state of Islamic education for juristic personnel and demanding, among other requests, the abrogation of the 1889 decree.[25]

The office of the *qadi* nonetheless fared better in this period than other traditional members of the juristic class. In an effort at continuity with Ottoman practices, the colonial regime of the Bureaux arabes had established state-regulated consultative bodies of learned *'ulama* (the assembly of juridical experts) by which to monitor and control the issuing of *fatwa*s (legal opinions or recommendations) and institutional training in the science of Islamic

[24] Archives nationales d'outre mer (ANOM) Fonds du gouvernement général (GGA) 17H58. Correspondence, Gouverneur général to Procureur général, Algiers, 13 April 1894.
[25] ANOM GGA 17H58, Petition (undated) and response of the Parquet général, 16 Feb 1898.

jurisprudence (*usul al-fiqh*). In the pre-colonial period, the *'ulama* had been notably autonomous from the state – not answering, for instance, to the *dey* of the Algiers regency – and though the provincial *qadi*s were state-appointed, they enjoyed independence in rulings and competence, as the '*ulama* did in formulating jurisprudence. Indeed, the integrity of the system of religious endowments (*waqf*) was a central to sustaining this independence, and, according to David Powers, their disintegration had greatly contributed to the co-optation and eventual erosion or the Algerian '*ulama*.[26] It was this decentralization, maintained under the previous regime, and the autonomy and discretion of the juristic class that the French had mistaken for disorder.

By the 1890s, then, native judicial structure had been soundly incorporated into the French appellate system, and Muslim judicial personnel were fully in the employ of the colonial state and required to undergo training exclusively through its approved channels. Through the period of the *rattachements*, however, some vestige of Islamic law, located largely in the domain of substantive law, had survived a barrage of legislation aimed at its assimilation, if not total eradication. This is necessarily because, as this thesis contends, the *actual* eradication of Islamic law remained outside the sphere of possibility for a colonial regime predicated on the ontological difference of indigenous subjects with Muslim personal status. These legislative measures, designed to meet administrative and political needs as much as any judicial objectives, heralded a transition from previous knowledge industries surrounding the foreign governance of Muslims to a new era in the objectification of *fiqh* as an object of *connaissance*. Those vestiges of Islamic and customary law that did persist did so largely in the realm of doctrine and substantive law, which remained opaque to the French magistrates now tasked with its interpretation and application.

[26] Powers, "Orientalism, Colonialism, and Legal History": 538.

Tocqueville observed that the "chaos" witnessed upon French arrival was evidently a French creation – something that seems to have been forgotten by the time of Norès's writing eighty years later, amidst the fervor and ostentation of the centenary's celebration. Norès's depiction, not uncommon for its time, also ignored that in their endeavours to right Algerian judicial disorder through a marriage of French process, customary practices, and Islamic legal principles (or their colonial simulacrum), the French regime had produced an erratic and unpredictable personal status court culture. The paradoxes of this arrangement did not escape the notice of many colonial reformers; as the following section details, the new colonial juristic bureaucracy that emerged to serve the needs of this new order also proposed solutions to overcome both the anarchy of Algerian justice and the double-exclusion of Muslims both from civic belonging and access to their own laws and customs.

"Droit musulman algérien"

From their creation in 1844 until their slow dissolution as a result of the definitive end of military government in Algeria in 1870, the responsibility for collecting and transferring knowledge about the "native" population had largely fallen upon the Bureaux arabes. Their monopoly can be summed up by their self-styling as the true *makhazniyya* (government men) of Algeria, especially during their heyday under General Randon (1852-1858), and by the pronouncement, by one commandant, that "the Muslim requires deep examination and specialized preliminary study to be known and judged [*pour être connu et jugé*]."[27] While these commandants were occupied in their own way with a "crisis" affecting the cohesion of the Muslim family, they differed in the factors they blamed for this crisis, as well as how best to

[27] The reference to *makhzaniyya* (men of the central government or *makhzan*) is from Ageron, *Les Algériens musulmans*: 31. The commandant's quote is from Capitaine Duvaux, "La mentalité indigène en Algérie," *Bulletin de la Societé de Géographie d'Oran* (1903): 225.

forestall it. For the Bureaux arabes, instability in the Muslim family resulted from undue French interventions that risked violating delicate alliances with the rural *grands chefs*, which were in any case weakened or destroyed after 1870.

When the task of "knowing and judging" Muslims shifted from the military to civil authorities, the need for a "deep, demanding, and specialized study" nonetheless remained, and gave rise to the formation of a new learned class of scholars and jurists. Their home was the École de Droit d'Alger, which opened in 1880 and was the first institution to offer training in colonial law as such. The Algiers School of Law (which became the Faculty of Law of Algiers University in 1910) engaged in a very different kind of knowledge production, under a different kind of mandate, than their predecessors and peers in the Arab bureaux. Jean-Claude Vatin has described this transition as the passage from a '*droit-réglement*' (decrees and statutes, "le droit-produit") to a '*droit-enseignement*', that is, a hegemonic "*science juridique*" developed in the service of settlement, of a market economy, and "supervision and control."[28] This characterization, though not untrue, merits qualification. The devolution of the Arab bureaux and ascendance of the Law School of Algiers marks, perhaps more accurately, a transition in colonial exceptional law: namely, a shift from its "natural" setting in military command and emergency to a less obvious and, indeed, presumably hostile setting in peacetime civil governance, firmly under the auspices of the Third Republic. The science of this special law, *droit colonial*, and the study of Islamic law under French tutelage, *droit musulman algérien*, together formed the niche that the École de Droit d'Alger had carved for itself in the French university system.[29]

[28] Jean-Claude Vatin, "Exotisme et Rationalité: A l'origine de l'enseignement du droit en Algérie (1879-1909)," in Jean-Claude Vatin (ed.), *Connaissances du Maghreb: Sciences Sociales et Colonisation* (C.R.E.S.M.: Aix-en-Provence, 1984): 163

[29] For a comprehensive study of the school and its "sociology" see: Laure Blévis, "Une université française en terre coloniale: Naissance et reconversion de la Faculté de droit d'Alger (1879-1962)," *Politix,* (2004, 4 vol. 76): 53-73.

The special place of the Algiers School of Law began under the direction of its founder and first dean, Marie-Robert Estoublon (1844-1905), who imagined and eventually realized the school as an institution for both the training of jurists, functionaries, and administrators to be posted in Algeria, as well as the centre of an industry of specialized knowledge on colonial legal management.[30] The École attempted, with debatable success, to evade the gravitational pull of the Parisian universities, even maintaining only loose ties with their counterparts in the Levant.[31] The expertise cultivated at the Law school centred on an empirical, coherent, and knowable "official Islam" that could be controlled and deployed – or suppressed, as the case may be. Students of the faculty also studied the non-religious or "customary" law of Algeria's Berber populations. The colonial administration had a strong interest in distinguishing Berbers from Arabs ethnically, linguistically, and politically, and they were the earliest targets of French assimilationist aspirations.[32] However, both Berbers and Arabs held Muslim personal status, while juristically, the Kabyles of Kabylia, the Shawia (*chaouia*) of the Aurès mountains and the Ibaḍis of the Mzab valley, as well as those Berber minorities in Arab-majority urban settings, were distinguished by customary laws that were informed by "mainstream" Sunni traditions and jurisprudence, but diverged from them in various key respects (discussed below).[33] At the École, Berber customary laws were treated as secular and more malleable "kanoun," which were

[30] Laure Blévis, " Marie-Robert Estoublon," in Pouillon, *Dictionnaire*.
[31] Henry and Balique, *La Doctrine Coloniale*: 13. Laure Blévis, meanwhile, argues that the school had only meager success building its reputation as a colonial rather than a provincial institution, and that from the metropolitan point of view, asserting independence from the Parisian academy was perceived as an exertion of settler separatism. While many faculty members came from Paris, few graduates of the Algiers law school went on to careers in the metropole. Blévis, "Une université française en terre coloniale."
[32] Patricia Lorcin, *Imperial identities: stereotyping, prejudice and race in colonial Algeria* (London: I.B. Tauris, 1999).
[33] The Ibāḍītes or Ibāḍīyya were a schismatic sect in the Khārajite tradition, who at the time, and still today, lived mainly in the southern Mzab region of the Sahara.

thereby also more violable than "orthodox" Islamic law.[34] And, though Kabyle women were widely thought to exercise greater personal freedom than Arab women (eschewing veiling, for instance), French reformers sought juridical remedies for Kabyle women's oppression in the realms of divorce and inheritance by "Islamizing" customary justice in Kabylia.

Beginning in 1882, a certificate from the École de Droit became obligatory for anyone applying for positions as functionaries, notaries, justices of the peace, and a host of other posts in justice and administration in the *communes mixtes*.[35] In 1885, the École became the first learned institution in Algeria to award diplomas, and in 1910 began awarding doctorates. Estoublon's other major achievement was a scholarly journal, the *Revue algérienne et tunisienne de législation et de jurisprudence*, by which he has been credited with initiating "*le droit musulman algérien*" as a new discipline.[36] As for the assembly of decrees, circulars, senatus-consultes, and other "special" legislation applied to Algeria since the conquest, Estoublon and his co-editor Adolphe Lefébure, collected them for the first time into one volume, the *Code de l'Algérie annoté* (1896). Considered his greatest achievement, it was updated each year until independence.

Perhaps just as importantly, Estoublon was an early and respected advocate for a definitive code of Islamic law of personal status, as a way of building greater predictability and rationality into the emerging new legal order – though the laws of the *indigènes*, and not French interventions, were to blame:

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[34] The French and other European powers mistakenly referred to customary law as "kanoun," possibly by virtue of what they deemed its 'lay' or 'earthly' nature, thus likening it to *qanun* proper as exercised by non-religious rulers in the Ottoman Empire whenever they invoked Turkic custom to override religious authority. In Islamic legal tradition, customary law is called *'urf*, and its incorporation into the more 'mainstream' texts and interpretations of law is commonly called *'amal*. The role and histories of *'amal* seem to have largely, until much later, eluded the French Orientalists of Algeria, and had to be learned "on the ground" by French justices.

[35] Prior to this, the only qualification for these posts was knowledge of Arabic. Blévis, "Une université française en terre coloniale": 58-59.

[36] Schacht, *Introduction* : 96-98.

> Muslim law and the Kabyle 'kanoun,' with their enigmatic precepts, and their contradictions and uncertainties, leave *too wide a field for interpretation*. Therefore, we should take a greater interest in creating fixed rules. […] There is but one quick and effective way this can be achieved: an official codification of Muslim laws and customs.[37]

As another French jurist would later put it, a "European mind, friend of clarity and precision, would be embarrassed to discover some kind of clear law in the diffuse and changeable [*ondoyante*] cluster of such an obscure legislation."[38] This depiction of Islamic law as both inscrutable and haphazard was *de rigeur* argumentation for partisans of codification. Their opponents, meanwhile, claimed the direct opposite: Islamic law, like the religion, and like the calcified minds of its practitioners, was utterly immutable and had remained fixed over the centuries, freezing in turn the progress of its civilization; to interfere in this would stir dissent and rebellion. Whether Islamic law was anarchic and overly discretionary, or ossified and dogmatic, became one of the central battles in the debate over the merits of a Code of Maliki jurisprudence in Algeria.

Estoublon's campaign for a government-issued Code reached the ear of Charles Jonnart, at that time still a French deputy, who included consideration of such a broad codification project in his 1895 report to the Budget Committee assessing legislative re-organization in Algeria.[39] It was around this same time, however, in 1892, that the Chambre de révision musulmane près de la cour d'appel d'Algèr was instituted by decree and tasked with "assuring unity of jurisprudence in Muslim matters." Like similar organs that came before it, the Chambre de révision musulmane was a judicial council of state-appointed Muslim clerics tasked with reviewing the proceedings and judgments coming out of Muslim courts and French tribunals. However, unlike its

[37] Marie-Robert Estoublon, *Revue algérienne et tunisienne de législation et de jurisprudence* (RA) 1892: I, 21. My emphasis.
[38] Alfred Bel, "La Codification du Droit Musulman en Algérie," *Revue de l'Histoire des religions* (1927) : 175-192.
[39] Bel, ibid.: 178.

predecessors, the Chambre did not issue *fatwa*s in anticipation of potential scenarios,[40] but rather responded to variations and incongruities in judgments they detected between similar cases.[41] Moreover, it was given the somewhat convoluted task of reviewing the jurisprudence used to decide a given case for adherence to *both* "orthodox" Islamic law *and* French legal principles. The function of the Chambre was also novel in that its cassations became an indirect source of law in the colony. Reviews were not filed by litigants themselves seeking another hearing of their case, but by the attorney general, and, the matters thus resolved, these decisions would form the basis of circulars issued to magistrates to clarify points of law for future reference.

The administrative rather than purely judicial purpose of the Chambre de révision musulmane was illustrated by a key early episode in its history. Sometime in the winter of 1900, a woman named Fathma Chikiken, resident of Algiers, wrote to the Governor General complaining that justice had been miscarried in a dramatic case involving her brother and his former wife, Kheira bent Mohammed Bourkaib. According to Fathma, Kheira had been divorced unilaterally by her husband and left the "domicile conjugal" in 1892, but not before taking the keys to his safe, which contained the family's heirloom jewelry, worth some 60,000 francs. Fathma sued Kheira for the return of the keys, but the latter claimed this sum was her dowry. The case dragged on for years until, in 1895, Kheira's former husband (Fathma's brother) died, and the dispute took on a new dimension: Kheira now claimed the jewelry was her rightful inheritance. According to Fathma, on a Friday, the Muslim day of prayer, when no judgments are to be passed, Kheira went to the house of the deceased with a *qadi* of Hanafi law, a locksmith,

[40] This has been one important role of *mufti*s within Islamic legal traditions, though *fatwa*s are usually solicited "from below," by individuals ahead of trials to help support their case, rather than "from above," by the state, as a source of law. See: "Fatwā." Encyclopaedia of Islam, Second Edition. Bearman, Bianquis, Bosworth, van Donzel, and Heinrichs (eds.). Brill Online, 2014.

[41] Morand, *Avant-Project*: 2-3. Morand includes here a long list of discordant and contradicting judgments regarding marriage and inheritance.

and two armed guards. Finding only a servant in the house, they entered, and the locksmith opened the safe – only to find it empty. (It is unclear why she hired a locksmith, unless she had lost the key in the years since her divorce.) Now, added to the accusations of alienation, Kheira charged her former in-laws with theft and deceit before a French justice of the peace – and won. Not only had Fathma's family lost 60,000 francs worth of their estate to the opposing party, but were also forced to pay her that same sum in damages, reducing Fathma's mother to poverty and her esteemed family to ruin. This grave injustice was caused, first, by "a false application of the law." As the letter explained:

> The Muslim natives are most respectful of the decisions of French Justice, but only insofar as it injures neither their religious sentiments nor their mores and customs, and in the present case, these laws, mores, and customs were violated by the magistrates, obviously very honorable and versed in the knowledge of French laws, but unfamiliar with Arab norms.[42]

This travesty was then compounded severely by the new system of appeals and the mandate of the Chambre de révision musulmane. When her case came up for review, the attorney general had decided that, as a property dispute, it no longer constituted a matter of "personal status," and was thus not subject to the authority of the Muslim appeals council. Subsequently,

> [Fathma Chikiken] has not been able to repair this judge's error through the higher jurisdiction, which in the present time is the Chambre de révision musulmane près la cour d'appel d'Algèr, because access to this higher jurisdiction is not open but depends upon the pleasure of the Parquet Général of the season, [where] the attorney general in 1895 did not believe it necessary to submit this question to the Chambre de révision, and as a consequence has been terrible for this plaintiff.[43]

It is likely that Fathma was assisted by a lawyer in the composition of this letter, given, for instance, that it transitions from the first-person to the third-person when referring to its author. However, that a woman of the house provided the sentiments of this letter, instigated and signed

[42] ANOM GGA 17H58. Letter addressed to the Governor General by la dame Fathma Chikiken, wife of M. Kaddour Madani.
[43] ANOM GGA 17H58. Ibid.

her name to it, is significant on several levels. At points, the letter invoked the worst stereotypes of the "natives [who] repudiate their women with the greatest ease," before describing the hardships to which she and her mother have been exposed, and appealing directly to the Governor General – "you, Mr. Governor General, natural protector of the weak in general, and us native women in particular" – to champion her cause.[44]

The recipient of her plea, as it would happen, was Jonnart, in the first of three terms he would serve at the head of Algeria's government.[45] He was indeed moved to forward her letter to the attorney general, inquiring about the possibility of permitting the filing of appeals at the highest level to the most vulnerable of colonial subjects. The Parquet's reply outlined in no uncertain terms the impossibility of allowing this to happen, and summarized for the governor the function of the Chambre de révision musulmane, which

> was constituted to maintain the unity of jurisprudence in Muslim matters, and not to permit litigants to prolong the duration of their process. The *indigènes*, whose obstinacy is equal to their ignorance, do not accept defeat until a way is opened to them. It is worth observing, besides, that a large number of lawyer's touts [*agents d'affaires*] provoke them to address all the jurisdictions, even when their cases are a lost cause. It would be imprudent to encourage this tendency among the *indigènes*, and to thereby propagate the abuses delivered upon them by some in the legal profession [*une partie du Barreau*].[46]

The possibility that the system of organizing and applying Islamic law was in any sense meant to serve the interests of disenfranchised Muslim members of society seeking redress was here discounted as folly; colonial law, particularly under the new regime, was above all an instrument for enforcing order, not justice. It is notable but not surprising, given the direct appeal of a Muslim woman to French benevolence and masculine reason, that this case did not attract greater attention, while the case of young Kabyle brides became a *cause célèbre*. Perhaps the act of

[44] ANOM GGA 17H58. Ibid.
[45] Jonnart served at the head of the colonial government in1900-1901, 1903-1911, and 1918-1919.
[46] ANOM GGA 17H58. Letter, 16 June, 1900. The role of European lawyers is discussed in detail in Chapter 4.

hiring a lawyer and speaking on her own behalf paradoxically served to undermine the feminine helplessness Fathma Chikiken had performed for her French audience. And, as a case involving property and inheritance, it crossed too many sensitive boundaries between moral repugnance at Muslim family order and the pressing market exigencies of secularizing property law. In any event, the images that Fathma and her lawyers invoked surrounding the plight of Muslim women would become archetypical in the debate over codification and assimilation that raged over the next twenty years.

Given his prior opinion on the operation of *justice musulmane* in Algeria, Jonnart was perhaps predisposed to lend Fathma a sympathetic ear. In his report to the Budget Committee seven years earlier, then-Deputy Jonnart had declared that the Chambre de révision musulmane only compounded the problems of incoherence and irrationality that arose from the complexity of Islamic jurisprudence. The Court of Appeals could not anticipate but only react to cases as they arose, and even then its decisions were of a limited and non-prescriptive nature; they lacked, therefore, the "force of law" offered by a code.[47] To demonstrate the benefits of a codification project, and the favourable reception it would receive among native Muslims, Jonnart cited a controversial divorce case in Tizi-Ouzou a year earlier (1892) over the legality of a Kabyle marriage. Initially, a union between two primary school teachers had been declared illegitimate by the justice of the peace at Fort National and the young woman was forced into marriage with an earlier suitor because he claimed in court that she was already promised to him. Not only was she sent to live with him, but he was also awarded 200 francs in damages for a claimed "depreciation in [her] value." However, she and her first husband appealed the decision at the tribunal in Tizi-Ouzou and won. The case was taken up widely in the colonial press, with many

[47] Norès, *L' œuvre de la France* : 654.

outraged that the colonial state was forcing women into unwanted marriages. In Estoublon's assessment, the initial suitor may have had a right to damages, but nothing in customary Kabyle law gave him the right to break up the second marriage. Despite the happy outcome, the initial confusion and miscarriage of justice provided a strong public argument for the organization of a set of clear guidelines. Though anonymous in official documents, this almost certainly the very same 'Fatima' whose story, as it appeared in one pro-colonial review, we saw at the beginning of this chapter.

Colonial law in the liberal age: Sawas Pacha, Marcel Morand, and Émile Larcher

Morand joined the school of law in 1894, after receiving his law degree in Paris. He was later promoted to chair of *Droit musulman et coutumes indigènes* in 1896. In 1905, the year he began his work on the Code Morand, he was also promoted, finally, to dean of the École de droit d'Alger. Under Morand, the school of law took a more definitive direction as a distinctly colonial institution, indispensable to the colony's functioning. Like Morand, most members of the law faculty came to Algiers from Paris, steeped in the principled in positive law and juridical equality as pillars of modern state-building, and upon arrival accepted and sometimes even embraced legal pluralism and relativism.[48] Like his predecessor Estoublon, Morand sought out ways to correct the defeatist effects of the French presence, which had, in his view, brought order but not law to the colony. Though these Orientalist scholars and jurists generally agreed on the superiority of French over local laws and lamented the failings of assimilation policy, they hardly agreed on how to resolve this enduring problem for the colonial state.

[48] Henry and Balique, *La doctrine coloniale* : 13

The period of interest here encompasses a historical moment described by Edmund Burke III as "the first crisis of Orientalism," from 1890 to 1914, when European students of Islam and Muslim societies stepped momentarily "outside the governing paradigm, [to] write 'otherly'," often in collaboration with liberal Muslim counterparts.[49] Burke's assertion aligns with Laure Blévis's claim that Morand's Draft Code appeared at "a time when a quiet and emancipatory evolution in colonialism still seemed possible."[50] These statements, however, prompt us to question the ways in which this "crisis of Orientalism" occasioned a crisis of liberalism. That is to say, was this ostensibly more experimental and open historical moment, characterized by willingness to transgress religious boundaries erected by scholarly and geo-political interests, the backdrop to new conversations and doubts on the management of difference in liberal governance? To be sure, liberalism, as envisioned by its classical theorists (most notably, in the French case, the republican liberalism of Rousseau) was always already in crisis in just about any colonial setting, as Nasser Hussein and Uday S. Metha have shown us.[51] In this instance, however, the debate over colonial legal management was put on vibrant and vociferous display, its edges marked by an acute tension between pluralism as a guise for the state of exception of Muslim subjects, and as a strategy to rescue liberalism from its colonial paradoxes. This moment of crisis, and, ultimately, impasse, found expression in the opposition that unfolded between the two polarizing legal-Orientalist figures of their day, Marcel Morand and Émile Larcher.

For the first camp, championed by its most prominent spokesman, Morand, the object of French law in Algeria was to aid in the "evolution" of Islamic law on its own terms, through a

[49] Edmund Burke III, "The First Crisis of Orientalism, 1890-1914," in Vatin (ed.), *Connaissances du Maghreb*: 215.
[50] Blévis, "Marcel Morand," in Pouillon, ibid.
[51] Nasser Hussein, *The jurisprudence of emergency colonialism and the rule of law* (Ann Arbor: University of Michigan Press, 2003). Uday S. Mehta, "Liberal Strategies of Exclusion" in Frederick Cooper and Ann Laura Stoler (eds.) *Tensions of Empire: Colonial Cultures in a Bourgeois World* (Berkeley, Calif: University of California Press, 1997).

kind of rationalist tutelage. This view produced an Orientalist brand of Islamic revivalism, claiming to help promote an equitable Islam from early days of first caliphs, while suppressing inhumane "heretical" practices, such as could be found in regressive customary regimes. Their approach to reform was aimed at helping vulnerable subjects, particularly women, by enlivening a spirit of equity "initiated by the Prophet Mohammed for calming the insatiable lusts of Arabs."[52] Morand's case for codification was based largely on his contention that Islamic law was not as immutable as other Orientalists were generally prone to believe. He countered the widely-held idea that the religious nature of law in Muslim societies determined their fixed nature in two major polemical works that book-ended the publication of his code: *La Famille Musulmane* (1903) and *Études de droit Musulman et de droit coutumier Berbére* (1931). In both works he advanced the argument that while the Muslim family had undergone no evolution in 600 years, it was a mistake to presume this was a reflection of Islamic law. Channeling an older and somewhat rudimentary brand of republican thought, Morand proposed that stagnation in Islamic law and civilization was, rather, a result of stagnation in the relationship between the state and the individual, which remained mediated by the family, still the primary unit of social life in Muslim lands. Law, to the contrary, was adaptable to local situations, tempered by a relatively narrow degree of religious prohibitions. It might appear counterintuitive that this argument should be marshaled to support codification. For Morand, as we shall see, a Code of Maliki jurisprudence in Algeria would help propel Muslims into an intermediary stage of social evolution by disrupting paternal authority. Once this was achieved, but not before, Algerians would be eligible for political inclusion and French citizenship.

[52] Norès *L' œuvre de la France* : 159.

The impulse to codify had its share of precedents. As early as 1866, decrees were issued, to apparently little effect, mandating certain guarantees to Muslim justices "for a more sure interpretation of their law in matters directly affecting the family and religion."[53] French jurists also produced volumes for general guidance on the Maliki school, including Seignette's *Code Musulman* (1878) and Ernest Zeys' *Le droit Musulman Algérien* (1884).[54] By Morand's account, administrative opinion followed scholarly precedents and abandoned policies "restricting the application of indigenous laws and customs" in the early 1890s. "We turned instead to correcting what was in our view the effect of jurisprudence" – that is, the disorder imposed from below by ill-equipped or biased judges, and from above by the Muslim appeals council.[55]

Besides the opinions of the Chambre de révision musulmane, the other main source of law for French and French-appointed *qadis* was a fourteenth century text, the *Mukhtasar* (compendium) of Sidi Khalil ibn Ishaq al-Jundi, a highly-regarded Andalucían scholar of Maliki jurisprudence. It was translated from Arabic into French by the medical doctor and Arabist Nicolas Perron, along with anonymous "Arabic commentaries" in Egypt, in 1848, and totaled some 3900 pages plus notes. Khalil Ibn Ishaq's compendium was the culmination of many preceding generations of compendia on Maliki jurisprudence and constitutes a work of doctrine rather than substantive law. Not surprisingly, French jurists complained frequently of the text's density and inscrutability. Nonetheless, the "*Mukhtaṣar* of Khalil" became such an important tool for administering Muslim justice in Algeria that Nigerian Governor General Frederick

[53] Morand, *Études de droit Musulman et de droit coutumier Berbére* (Algèr: Ancienne Maison Bastide-Jourdan, 1931): 175.
[54] The term "*madhhab*" derives from the Arabic root denoting "course" or "way" and in legal terms refers to one of the four "schools" of doctrine in Sunni Islamic jurisprudence: Hanafi, Shafiʿi, Hanbali, and Maliki, the latter being the most common in the Maghreb, though Hanafiyya was also practiced in Algiers and other urban centres where the descendants of the former Turkish ruling class still lived. Some scholars consider the Shiʿi branch of Islam to signify its own school. See: Wael Hallaq. *An Introduction to Islamic Law* (Cambridge, UK: Cambridge University Press, 2009).
[55] Morand, *Études*: 164.

Lugard commissioned an English translation of Perron's French version for use by British officials in Nigeria. The English translator reduced Perron's version to 400 "handy and readable" pages.[56] In Algeria, the use of Khalil Ibn Ishaq's *Mukhtasar* was another point of controversy among French jurists, and Morand often wrote critically of what he felt was a crippling over-reliance on this proverbial 'time capsule,' by which colonial jurists had held Algerians back five hundred years.[57]

Many of Morand's ideas on codification and the rapport between Islamic and European civilizations came from an unlikely source: an Ottoman statesman named Ioannas Sawas Pacha (1832-1905), better known simply as Sawas Pacha (sometimes also written, in French, as "Jean Sawas Pacha," and elsewhere "Ioannas Sabbas" and "Savvas Pacha"). The man known by these various titles spent most of his life as a high-ranking Greek Christian official in the service of Ottoman Sultan Abdülhamid II (r.1876-1908), and he appears under these names in French, British, Turkish, and American archival and published records. Sawas Pacha first entered the Ottoman royal service in the late 1860s, as the first rector of the Lycée Impérial Ottoman de Galata-Sérai (in Turkish: *Galatasaray Mekteb-i Sultanisi*) in Istanbul.[58] The Lycée Impérial was created following a visit paid by Sultan Abdülaziz I (r. 1861–76) to Napoleon III in 1867, during which he was impressed by the French education system. The purpose of the Lycée Impérial "was to educate promising young men from all over the Empire in a modern way and teach them

[56] F.H. Ruxton, *Maliki Law: being a Summary from French Translations of the Muthtasar of Sidi Khalil, with notes and bibliography.* Published by order of Sir F.D. Lugard, Governor General of Nigeria (London: Luzac and Co., 1916). The description of Ruxton's work comes from a review, which also recommended that, "every officer [should] have a copy constantly at hand for ready reference," in order to, as Ruxton hopes, "steer clear of blunders when dealing with the Native Courts." *Journal of the Royal African Society*, Vol 15, no.60 (July 1916): 391-394.
[57] See Oussama Arabi's discussion of the French juristic anxieties over the *Mukhtasar* in "Orienting the Gaze: Marcel Morand and the Codification of the Droit Musulman Algerien," *Journal of Islamic Studies* 11.1 (2000): 54-57. The issue of women was again crucial here, as, the *Mukhtaṣar* made no requirements regarding the marriage contract (*nikah*) and made no intervention into male unilateral divorce, or 'repudiation' (*ṭalaq*).
[58] Antonio Carlo Napoleone Gallenga, *Two Years of the Eastern Question* (London: S. Tinsley, 1877): 180. In this source Sawas Pacha is described as an "Albanian physician educated in Italy."

French," then the language of diplomacy.[59] Eventually, Sawas Pacha served as the *vali* (governor) of Rhodes from 1877-78, and then as the *vali* of Crete from 1885-1887, where he again gained international prominence for playing a notable role in the Ottoman attempt to curb the import of African slaves.[60] He also occupied various ministerial posts, including as Minister of Foreign Affairs and of Public Works (1878-?).[61] In the latter capacity, he seems to have also acted as an intermediary between "Europe" and "Islam," sometimes representing the Sultan in meetings with European delegates concerning inter-religious relations, especially the legal and commercial status of the Empire's Christian minorities.[62]

At the end of his career, Sawas Pacha chose to retire in France, and there he published two books: *Étude sur la théorie du droit musulman*, in 1892, and, four years later, *Le droit musulman expliqué: réponse a une article de M. Ignace Goldziher, professeur de langues sémitiques à l'Université de Budapest*.[63] The first was a guide, based on his decades of experience, on the function and origins of Islamic law, and how any "Christian Empire" (such as the Dutch in Indonesia, the British in India, and of course, the French in North and West Africa) ought to manage the religious laws of their millions Muslim of subjects in most effective way.[64]

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[59] As described on the website of the Turkish ministry of education: "Half a Millenium of History," http://mebk12.meb.gov.tr/meb_iys_dosyalar/34/05/159258/icerikler/school-profile_149547.html. Last accessed: July 30, 2014.

[60] British House of Commons, Parliamentary Papers. 1883 [C.3590] Slave trade. No. 2 (1883). (Turkey.) Declaration between Great Britain and Turkey amending the convention of the 25th January, 1880, between Her Majesty and the Sultan for the suppression of the slave trade. Signed at Constantinople, March 3, 1883.

[61] British House of Commons, Parliamentary Papers. 1877 [C.1738] Turkey. No. 15 (1877).

[62] *Further Correspondence Respecting the Affairs of Turkey Presented to Both Houses of Parliament by Command of Her Majesty; 1878* (London: Harrison, 1878): 106-107.

[63] Jean Sawas-Pacha, *Étude sur la théorie du droit musulman* (Paris: Marchal et Billard, 1892). Jean Sawas Pacha, *Le Droit musulman expliqué, réponse à un article de M. Ignace Goldziher, professeur de langues sémitiques à l'Université de Budapest* (Paris: Marchal et Billard, 1896).

[64] Though this advice was, he believed, of interest to these three empires, he developed it specifically for an address he was invited to give on 28 Janvier 1892 to the Societé coloniale de France, of which he had "the honour to be a member." Jean Sawas Pacha, *Le droit musulman et son application par les autorités chrétiennes, conférence faite à la Société des études coloniales et maritimes, le 28 janvier 1892* (Paris: au siège de la Société, 1892).

Sawas Pacha's thesis contained some novel, and controversial, arguments on the nature of Islamic law, its many "analogies" with Western law – each being heirs, to various degrees, of Roman law – and the possibility for "rapprochement" between these legal regimes.[65] Based on these analogies and points of commonality, the creation and use of European-styled Islamic law codes in the colonies was not only possible but preferable. The five essential recommendations put forward in Sawas's first book, each one more radical than the last, are as follows: First, Islamic jurisdictions should be clear and inviolable by Christian interference – and here he specifically included matters of inheritance and the age of majority – unless it involved a French subject or matters "of interest to society, that is, the public order."[66] Second, the structure of Islamic adjudication should be re-established, including traditional personnel, as well as (to follow Ottoman practice) a council of learned scholars to dispense *fatwa*s, and another to revise misapplied rulings. Third, civil and commercial matters between Muslims should also be restored to their sole authority – likewise, fourthly, for criminal law. Fifth, and most importantly, he advocated for the "Islamization of modern law" (*l'islamisation du droit moderne*), to ensure just and predictable legal outcomes for Muslim litigants. He went on to explain,

> I have just pronounced a new word, *islamize*. What does this mean? To "islamize" means to make a legal disposition conform to the juridical truth [*vérité juridique*] of Islam, thus demonstrating, on the one hand, that it is not contrary to the fundamental principles of Islamic law; and, on the other hand, that its introduction in the Code [of Islamic law] is necessitated by the needs of the present time. As the Prophet said, the laws cannot be altered but by the needs that time presents. […] To *Islamize* therefore signifies making Islamically acceptable [*islamiquement acceptable*] a law, a rule, an institution, using Islamically correct procedures.[67]

[65] Indeed, though the Orientalist establishment greeted his proposals with contempt, his emphasis on the shared heritage of Western and Islamic legal traditions, and the possibilities held therein for reforming and modernizing the latter, were themes that would appear reappear in force in subsequent generations of Orientalist scholarship. See: Hallaq, "The Quest for Origins or Doctrine?"
[66] Sawas Pacha, *Conférence.*
[67] Sawas Pacha, C*onférence.*

This first treatise was met with contempt bordering on derision in Europe, as a host of the most respected *islamisantes* (as French Orientalist legal scholars were sometimes called) clamored to attack Sawas Pacha's ideas. These public rebuttals came from figures like Snouck Hurgronje, the venerable Dutch Orientalist who had spent two years in Mecca, among other exploits of clandestine ethnology, and was the leading advisor to the colonial government in the Dutch East Indies.[68] The great political thinker Ernest Renan also added his skepticism of Sawas Pacha's high esteem for Islamic law and its compatibility with modern science, much less any evidence it betrayed of the "semitic genius," which for Renan was markedly inferior. But none were more vociferous than the Hungarian professor and founding figure of Orientalist legal studies, Ignace Goldziher, who published several articles refuting Sawas Pacha's claims in the German scholarly review, *Byzantinische Zeitschrift*.[69] Sawas Pacha's second book, as the title suggests, was a rejoinder to these critics, Goldziher above all, whose reaction to the former's knowledge and qualifications were clearly coloured by rage over what he saw as an Islamophilic, nearly treasonous, apologia. In his response, Sawas Pacha corrected his detractor's finer points of historical and doctrinal contention, such as Goldziher's misreading of certain authoritative *fuqahā'*, wrongful use of basic terminology, and mistakes in his chronology of the Hanafi school. Yet, in Goldziher's broader assertion, his "capital point," over the philosophy of natural law guiding the ontology of divine law in Islamic civilization, the highly personal nature of their dispute came out. Goldziher had concluded that a "fondness for his subject was not lacking in this author, but the author himself lacked many qualities indispensable for thinkers who propose to resolve the questions that occupy Savvas Pacha," musing finally, that "a large part of [Sawas

[68] When asked specifically about the French ambitions to draw up a Code, in the manner advocated by Sawas Pacha, he dismissed it as nearly comical, saying "Obedience to this law by the Muslims would prove only that their laws could have as easily been replaced by any other," *Revue du monde musulman,* (June 1911) : 441.
[69] Goldziher, *Byzantinische Zeitschrift* II.2 (1893): 317-325. See also: Bel, ibid, which details their debate.

Pacha's] faults must be attributed to his Oriental quality [*qualité d'Oriental*]." Sawas Pacha returned this slight, to the effect that he had "turned Turk," by insisting that *he* was, in fact, "Aryan," while "Mr. Goldziher, as Germanic as one can be by name, must not forget completely that, by his Eurasian origin [*origine eurasienne*], he conserves in his veins some drops of Mongol blood."[70] As for the accusation of infatuation with Islamic civilization that compromised his scholarly outlook, he retorted that "I have never in my life ceded to enthusiasm, but neither have I ever closed the eyes of my mind and refused to see the great importance of a sociological phenomenon because it was not produced in a Christian milieu."[71]

These theoretical debates did not take place merely in the abstract, but had consequences for the practical business of colonial governance. Though his opponents in the European intelligentsia were many and his ideas roundly and hotly contested, Sawas Pacha's thesis did gain the degree of purchase among French colonial policy-makers that he had hoped for. Indeed, in their defense of an Algerian code of Islamic law, Estoublon, Morand, and like-minded colleagues who drew upon Sawas Pacha's proposals were in many ways attesting to its perfectibility. Though they subscribed vigorously to the civilizing mission, they also developed a (perhaps inadvertent) commitment to Islamic law's own internal ontology of justice, and the logical conclusion of their argument threatened the very necessity of colonialism and its claims to progress. For their opponents, therefore, it was important to deny such a history. This meant insisting that that Islamic law, being naturally inert, could only evolve through judicial review dispensed by colonial tutelage – in other words, the resolution of conflicts between norms by shifting them slowly and delicately 'West'-ward until indigenous justice in Algeria ceased to exist.

[70] Sawas Pacha, *Droit musulman expliqué* : 26-28.
[71] Ibid. : 21-22.

Opposition to an official code of Islamic law was embodied in the figure of Émile Larcher, who arrived in Algeria 1896, working in the courts before joining the Law School of Algiers, whereupon he became formidable critic of Morand's codification project. The basis of his argument stemmed from one paramount question: What was Algeria? Was it a colony or an integral part of France? The answer, for Larcher, was clear: The official absorption of the Algerian *départements* into metropolitan France, not to mention its Mediterranean climate, products, and livestock, all marked France's possession, despite the "large presence of a race other than our own," distanced from the Europeans by an "enormous difference in values, religion, and civilization," which might lead one to believe it was a colony.[72]

Larcher claimed that embracing a pluralistic system by standardizing personal status laws was dangerous and defeatist; instead, French law should be applied in all areas and customary and Islamic laws eradicated. To this end, judicial review and the dissemination of statutes through the Chambre de révision musulmane was, for the time being, the preferred method of administering personal status law. In an argument that evoked but reversed the position held by Estoubon and Morand, Larcher argued that, "Muslim law, by its variances and uncertainties, allows for a great deal of *influence* through jurisprudence [emphasis added]," which the French should not suppress but instead exploit. "Were it codified," he argued, "it would [become normative], and the evolution toward French principles, as pursued in tribunals, would cease. He asserted that Islamic law, by the "plethoric abundance of its texts" and "absence of a methodical code" leaves open answers to the "most serious questions." Moreover, it has

> few principles that do not lend themselves to discussion, few rules without numerous exceptions, and few institutions that do not merit critique.[73]

[72] Émile Larcher, *Traité Élémentaire de Législation Algérienne*, Second edition (Alger: Adolphe Jourdan; Paris: Arthur Rousseau, 1911): 157, 408.
[73] Larcher, *Traité*: 155.

Larcher's position somewhat extended the argument we first saw presented by Marius de Gimon in his reports on Muslim marriage in the 1850s – namely, that France had no business administering Islamic justice for a defeated people, who should instead acquiesce to the law of the governing power. Larcher's argument certainly rings, therefore, with calls for a kind of cultural extermination. Like Gimon, however, Larcher was deeply critical of the arbitrary and exceptional nature of penal law for Muslim subjects. As a member of the *Ligue des droits de l'homme*, Larcher crusaded most vocally against the Code de l'indigènat, against the repressive courts, and against administrative and military, rather than judicial, oversight of criminal trials for Muslim Algerians. As such, he contended, the repressive and assimilationist objectives of France in Algeria were operating at cross-purpose; the codification of personal status law would only exacerbate this futility.[74] Perhaps most importantly, and certainly most radically, Larcher opposed the policy of withholding civil and political rights from Algerian subjects with Muslim personal status. Assimilation should be achieved by the automatic acquisition of civil rights and political equality, rather than the other way around. As Florence Renucci has found, Larcher was punished for his opinions, having been censored as well as passed up four times for *agrégation* at the École de Droit d'Alger before his appointment as a criminal law specialist in 1902.

It would seem, therefore, that underlying their debate on the merits of a code of Muslim personal status was this distinction in their approaches to the deployment of a liberal order in the overseas territories. As Renucci writes, "Larcher rejected the concept of indigenous [subjects] whose rights were amputated in the name of security or repression," whereas for Morand "civil equality should not be sacrificed for political equality."[75] Indeed, Morand had actively opposed a

[74] Florence Renucci, "La doctrine coloniale en République. L'exemple de deux jurisconsultes algériens: Marcel Morand et Emile Larcher," in Stora-Lamarre (ed.), *La République et son droit (1870-1930)*. (Besançon: Presses Universitaires de Franche-Comté, 2011): 461-478.
[75] Ibid.: 475.

proposal to grant citizenship to subjects with Muslim personal status in 1897.[76] This impasse bears historical witness to Wendy Brown's observation that,

> […] liberal equality's conceptual opposite is not inequality but difference: while inequality is the problem to which equality as sameness is the solution, *difference is the problem to which equality as sameness does not apply*. In liberalism, injustice occurs when those considered the same are treated differently; but ontological difference is a problem outside the purview of justice.[77]

While Morand accepted the inevitability of difference, and with it the state of exception for Muslim subjects, Larcher's prescription for the injustice of inequality was sameness.

The contours of this debate over Islamic law in colonial governance, represented by the conflict between Morand and Larcher, reflected not only the opposition between the thesis presented by Sawas Pacha and rejected by Ignace Goldziher, but also, on another plane of analysis, a crucial tension between shifting meanings of "assimilation" at this historical juncture. While "assimilation" was the putative goal to which each of these opposing actors had pledged their allegiance, they were not in accord about *who* was to be assimilated, nor even to *what*. Assimilation of Muslims was by this time clearly irreconcilable with the assimilation of the settlers and their governing institutions; indeed, the latter precluded the possibility of the former. If Larcher subscribed to an older understanding assimilation, rooted in faith in republican sameness as a guarantor of legal equality and civil and political rights, then Morand's conception of assimilation hewed to the new regime in which "race" became both more pronounced and synonymized with "civilization."[78] Put another way, sameness was no longer the vehicle through which equality was attained (as Larcher would have had it), but the goal that was eventually achieved through demonstrable, pedagogical adhesion to the national ideal. Universalism was no

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[76] Ibid.: 464.
[77] Wendy Brown, *States of injury: power and freedom in late modernity* (Princeton, N.J.: Princeton University Press, 1995): 153. My emphasis.
[78] Emmanuelle Saada, *Empire's children: race, filiation, and citizenship in the French colonies* (Chicago: The University of Chicago Press): 109.

longer the pathway, in other words, but the promise. However, without a legal language of race in the republican tradition, Morand's position was rendered meaningful through a discourse of sexual deviance and degeneracy, served by the objectification of Muslim "family law." As we will see in the following section, the high tide of Islamic modernization and reformism was a crucial bulwark for Morand's assimilationist ideology: it enabled thinkers like he and Estoublon to maintain difference as a principle of colonial governance while also claiming to uphold French civilization and the most sacrosanct values of the republic.

Le fiqh francisé?

On 22 March 1905, the proposal for which Jonnart had campaigned for years was approved. A codification committee was subsequently formed, consisting of sixteen members, and headed by Morand, with the following objective: "the composition of a summary of simple rules, in short articles that are easy to interpret, forming a veritable code from the principles of Muslim law."[79] Eleven members were French, including the attorney general, ministers of various branches, and directors of *médersa*s (schools), while just five were Muslim Algerian representatives from each civil *département*, including several prominent *qadi*s and political representatives.[80] The commission began by soliciting advice from a range of local and international experts and government officials, whose opinions were presented in two parts: favourable and unfavourable. French *Islamisants*, Muslim notables, both French and Muslim judges, directors and teachers of *médersa*s, and magistrates, were canvassed.[81]

[79] Cited in Norès, *L'œuvre*: 655.
[80] The Code was initially not to be applied to the southern territories, but questions would later arise over whether or not it should at least apply to southern Arabs, if not the Tuaregs, Mzabites, and other non-Maliki Muslim communities.
[81] These letters can be found in ANOM 17H57/17(4): Promulgation du Code Musulman, Morand. Transcriptions of many of them are included in the text, *Projet de codification du droit musulman* (Alger, Fontana 1906).

The advice of Sawas Pacha was introduced to the members of the commission through lengthy quotations from the report of the Isaac Senatorial Commission. Subsequent to the decree of 1886 on the reorganization of Muslim Justice in Algeria, amidst a wave of Muslim protest and petitions, a scandal broke out involving a *qadi* from Miliana, where a corrupt mayor had targeted the *qadi* and other Muslims in his jurisdiction for the sequestration of their land. This highly publicized case, and the image it fortified for Parisian liberals of rapacious colonists and their indigenous victims, has been extensively detailed by Ageron.[82] Rather than reiterate his points, it is more useful here to follow the trail that led from Senator Isaac's report to Morand's code. Beyond the basic inquiry at hand, the Isaac report also contained a series of extensive musings on the commonalities between French and Islamic laws and customs, which, he determined, far exceeded any differences. These included how each set of laws had in the past dealt with paternal and marital authority, the economic exchanges involved in marriage, and even slavery and polygamy. Going further he suggested that,

> [i]n certain matters, it is we who approach the Muslims. Like them, we now have divorce. We have recently augmented the inheritance rights of widows, which is of primary importance to the Muslims. We tend more and more to restrict the incapacity of the married woman, who, in their laws, conserves the fullness of her rights. Laws of guardianship, of minority, and interdiction are roughly the same on both sides.[83]

Subsequently, the Isaac report was quoted heavily in the collection of "favourable" opinions on the proposed codification project, and these excerpts themselves contained numerous

[82] Ageron, *Les Algériens musulmans* : 209-217 and 443-445.
[83] Alexandre Isaac, *Rapport fait au nom de la Commission chargée d'examiner les modifications à introduire dans la législation et dans l'organisation des divers services de l'Algérie (Justice française et musulmane) (Police et sécurité).* 28 Feb 1895. (Paris : P. Mouillot,): 202. The divorce law Isaac referred to was the Naquet Law of 1884, which bypassed Church authority on marriage and its annulment by allowing limited divorce by mutual consent. A previous but short-lived allowance for civil divorce had existed under the Revolutionary government, but was abrogated with the "*Concordat*" between Bonaparte and the Catholic Church in 1804. See: Theresa McBride, "Divorce and the Republican Family," in Elinor Ann Accampo et al. (eds.), *Gender and the politics of social reform in France, 1870-1914* (Baltimore: Johns Hopkins University Press, 1995).

references to the recent work of Sawas Pacha. Most notably, the latter's thesis on the "analogy" between French and Islamic laws were visibly influential on the senator's arguments.

Jonnart had also taken Sawas Pacha's notions of "analogy," as well as "islamicization," to heart. In his above-mentioned budget report, also reproduced for the codification committee's review, he quoted at length the five essential recommendations for "islamicization" put forward in Sawas's first book. "The man who expressed these ideas was a Christian," wrote Jonnart, "and was a minister of Constantinople, which proves, in passing, that the Muslims are not as intolerant as is often said."[84] Jonnart had also corresponded personally with Sawas Pacha, who provided a detailed plan on the process by which the colonial government should assemble their Code. This included two committees, one composed of some Frenchmen but predominantly respected Muslims, and another entirely of learned Muslim scholars. Most significantly, Sawas Pacha's letter to Jonnart included the precise methodology by which this *islamicization* should be achieved: "… following the rules of the legislative method (Oussoul [sic]), one will find certainly in the [main sources] of Islamic law perfectly orthodox bases on which these [reforms] may be mounted."[85] It is clear that of the sum total of these suggestions, only a select (ie. convenient) few were ever tangibly put into practice by the French colonial government—not to mention the very codification commission, containing only five Muslim representatives, who had assembled to judge its merits. Reform-minded though Jonnart was, he reasoned that in some of these proposals, Sawas Pacha could not have had in mind "the situation in our Algeria."[86]

Further confirmation that codification, far from offending Muslim sensibilities, would indeed be welcomed, came in 1902, when one Octave Houdas, inspector general of *médersa*s,

[84] Jonnart, Budget Report, reprinted in *Projet de codification du droit musulman*. Gouvernement générale de l'Algérie (1906) : 15.
[85] Ibid.: 16.
[86] Ibid.

made this very point in two reports on the general sentiment of indigenous interlocutors on the prospect of a codification project. Offering a somewhat less ambitious and comprehensive program, he assured the Governor General that Algerian Muslims would not regard such a project as contrary to the treaties and agreements that limited French intervention, so long as a certain number of Muslim jurists participate in the process and that no "Quranic principles" were violated. Houdas also raised the specific use of the Ottoman and Egyptian examples as roadmaps for Algerian reform rooted in Islamic scholarship and tradition.[87]

Yet, there was reason to doubt Houdas's optimistic reports, not least some of the many dozens of letters that poured in responding to the Attorney General's call for opinions on early drafts of the Code's first chapters. Though some two thirds of the responses were favourable to codification, later assessments held that too much stock had been placed in them, since, "most favourable opinions were uninformed on the issue," and "most of those consulted were, besides, functionaries and others who thought it wise to share the Governor General's opinion, even thought it was not their own."[88] Meanwhile, many, though not all, of the *qadis* consulted on the feasibility of the project wrote back expressing their disapproval.[89] Even one member of the draft committee members, Henni Ben Sayah, a *qadi* and politician of some stature, predicted that the whole exercise would be a waste of time.[90] One of the more cautious letters came from the *qadi* of Tlemcen, a revered centre of Islamic theology and jurisprudence in North Africa, who warned that Algerians had not asked for the code, and with the scant inclusion of Muslims on its drafting committee, and none of them reputed jurists, the Code would be met with hostility. Ignoring these warnings, and armed with Sawas Pacha's guiding insights, the committee proceeded and

[87] Norès. *L'œuvre*: 655-656.
[88] Bel, "La codification": 178.
[89] Norès *L'œuvre*: 657-658.
[90] Christelow, *Muslim Law courts*: 254.

pursued their objective, "with the deepest juridical science, but also with the idea to search through the various *madhhahib* for solutions nearest to modern ideas."[91]

Though Sawas Pacha does not credit his ideas to the Muslim intellectuals and reformist scholars he may have heard of or even come into contact with during his years as an Ottoman minister, it would be a mistake to presume that he formed his proposals independent of them. Indeed, if his thesis was so uniformly rejected in Europe, it is perhaps because it resembled less as a solution for European empires ruling over Muslim subjects than the response of Muslim states facing European domination. A number of historians have argued that the personal status law codes and other large-scale modernizing projects undertaken by the Ottoman Empire, Egypt, as well as the more or less independent neighbouring countries of Tunisia and Morocco, were crucial moments within much longer histories by which the state established its dominance at the expense of the religious classes and their competing legitimacy.[92] But by the mid-late nineteenth century, these reforms were driven by the pressing need to resist European encroachment through "defensive modernization."[93]

For Morand, these measures were not defensive, but rather aggressive. In these civil codes drafted and implemented by Muslim secular authorities, he saw the range of French license in Algeria. Indeed, in his writings he referred frequently to these codes, as well as recent examples in Tunisia and Morocco, claiming that the French acted with a modicum of respect for

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[91] Bel, ibid.: 178.
[92] See, for example: Iris Agmon, *Family & Court: Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse, N.Y.: Syracuse University Press, 2006); Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (The Hague: Kluwer Law International, 2001): chapter 1; Masud, Muhammad Khalid, Rudolph Peters, and David Stephan Powers (eds.), *Dispensing Justice in Islam: Qadis and Their Judgements* (Leiden: Brill, 2006): chapter 1.
[93] Lila Abu-Lughod, Introduction, in Abu-Lughod (ed.), *Remaking Women*. See also: Richard S. Horowitz, "International Law and State Transformation in China, Siam, and the Ottoman Empire During the Nineteenth Century," *Journal of World History* 15 (2004): 445–86.

religion "not demonstrated by the governments of Oriental countries, such that, if France has engaged in the secularization of legislation and jurisdictions, she was only following their examples," and did so with "extreme moderation."[94] Moreover, he contended, they hadn't gone as far as the Ottomans in fully eradicating religious authority from personal law upon adopting European codes for commercial, criminal, and civil law, including the landmark 1917 Ottoman Law of Family Rights.[95] Still, I would add, it is no small irony that precisely as the Ottomans were importing French and Swiss law codes in its last years as an empire, the French were looking to Ottoman reforms for models for an Islamic law code in Algeria.

If the 'Code Morand' was driven by colonial exigencies, and its model was provided by the Ottoman Empire, as well as Egypt, delivered via the recommendations of Sawas Pacha, then its methodology was provided primarily by the reformist "Salafist" movement emanating at that time from Egypt.[96] Such social and legal reform movements were sometimes referred to in French as '*Islahist*', after the Arabic word for reform/repair, *islah*.[97] In Egypt, the case for legal reform was also advanced in the name of women and equity by luminaries like Muhammed ʿAbduh, his pupil Rashid Rida, and perhaps even more famously by the French-educated lawyer and secular liberal (andʿAbduh's friend), Qasim Amin, author of two seminal books on the role of women in the modernization of Egypt.[98]

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[94] Morand, *Études*: 177 and 181.
[95] For a full discussion of this Ottoman law see: Judith E. Tucker, "Revisiting Reform: Women and the Ottoman Law of Family Rights, 1917," *The Arab Studies Journal*, Vol. 4, No. 2 (Fall 1996): 4-17.
[96] See discussion of "Salafisim" in Introductory chapter, fn 13, above.
[97] See: "Iṣlāḥ." Encyclopaedia of Islam, Second Edition. Bearman, Bianquis, Bosworth, van Donzel, and Heinrichs (eds.). Brill Online, 2014.
[98] Qasim Amin *Taḥrīral-marʾa* (The emancipation of women) and *al-Marʾaal- ḏjadīda* (The new woman) were published in Cairo at the turn of the twentieth century. For more details on Amin's work and feminist responses, see: Beth Baron, *The Women's Awakening in Egypt: Culture, Society, and the Press* (New Haven: Yale University Press, 1994). For important critiques of Amin's work, see Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992): chaps 5-6. For a helpful study of this period in Egyptian history with specific regards to women, motherhood, nationalism, and the campaign for monogamy, see: Omnia Shakry, "Schooled Mothers and Structured Play: Child Rearing in Turn-of-the-Century Egypt," in Abu-Lughod, Lila (ed.), *Remaking Women: Feminism and Modernity in the Middle East*. (Princeton N.J.: Princeton

As we have seen, where his opponents accused him of crystallizing *shari'a* through codification, Morand retorted that it was rather they who risked ossification of Islamic law by a continued reliance on outmoded texts and inchoate rulings.[99] He referred to his colleagues as "archeologists" rather than jurists, and argued that the Code reflected not rigidity, but rather the fluidity and plurality of Islamic law.[100] Indeed, we may regard the debate between the pro- and anti-codification camps at the École de droit d'Alger as reflecting the French encounter with and understanding of *ijtihad.* The term *ijtihad* in Islamic jurisprudence signifies the use of independent reasoning to interpret the law, as exercised both by *mufti*s and `*ulama* in forming doctrine and by *qadis* in administering justice. It is part of a range of techniques for discerning law which include, among others: *taqlid* (borrowing), *qiyas* (analogical reasoning), *ijma'* (consensus), and *talfiq* (synchretism).[101]

Oussama Arabi has provided a knowledgeable discussion of Morand's use of both *ijtihad* and *taqlid*. In constructing the code, Morand capitalized on liberal juristic interpretations, often directly citing the Ottoman and Egyptian codes, and through meticulous reasoning and selective 'borrowing' from the other Sunni schools – especially Hanafi – as well as portions of Khalil Ibn Ishaq's *Mukhtasar*. Most importantly, he drew heavily from the orginary sources of Islamic law, the Quran and Sunnah (Prophetic sayings and traditions).[102] Arabi suggests that, just as 'Abduh criticized a dusty Egyptian *'ulama* for failing to update and engage actively in the formation of

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University Press, 1998). See also: Beth Baron, *Egypt as a Woman Nationalism, Gender, and Politics*. (Berkeley: University of California Press, 2005). Hanan Kholoussy, *For Better, for Worse The Marriage Crisis That Made Modern Egypt* (Stanford, Calif: Stanford University Press, 2010.)

[99] Morand, *Études* 213.

[100] Morand, *Études* 286.

[101] For details see: Calder, N.. "Uṣūl al-Fiḳh." Encyclopaedia of Islam, Second Edition. Bearman, Bianqui, Bosworth, van Donzel, and Heinrichs (eds.). Brill Online, 2014.

[102] For late twentieth-century effects of codification and reform, see: Bettina Dennerlein, "'Legalizing the family: disputes about marriage, paternity, and divorce in Algerian courts (1963-1990)," *Continuity and Change* 16.2 (2001): 243-261. Ann Elizabeth Mayer, "Reforms of Personal Status Laws in North Africa: A Problem of Islamic or Mediterranean Laws?" *Middle East Journal* 49.3 (Summer, 1995): 433-437.

jurisprudence, Morand similarly fought the forces of mechanical and repetitive *taqlid* as he "inveighed against the narrow-minded implementation of fourteenth century Maliki legal structures on contemporary Algerians."[103] For instance, Arabi compares his deft approach to the matter of written versus oral testimony in divorce proceedings with ʿAbduh's 1903 Transvaal fatwa, which advanced a new theory of evidence taken directly from the Quran, thus bypassing established doctrine. As such, Morand and ʿAbduh may appear as compatriots in the struggle for the independent reasoning represented by *ijtihad* against the forces of 'mindless repetition' and regressive tendencies represented by *taqlid* and the conservative *'ulama*.

Algeria, however, was very different from Egypt in a number of key ways that Arabi does not take into account. Marnia Lazreg has pointed some of these out, particularly in her comparison of ʿAbduh with Algeria's leading *'alim* at the time, Sheikh Abd-el-Hamid Ben Badis (b. 1889—d. 1940). The latter was the most prominent member of the *'Ulama* group – not an "official *'ulama*," like ʿAbduh, but a collective of young nationalist and reformist scholars, schooled primarily in Arabic, who called themselves by that name. As Lazreg writes, the French were much fonder of ʿAbduh than ordinary Algerians. She gives the example of his visit to Algiers, in 1903, when he gave a lecture that urged Muslim Algerians to avoid political resistance to France, and authorized them to eat unclean (non-*halal*) meats and wear French hats.[104] ʿAbduh's apparent "lack of awareness of the significance of the colonial factor in Algerian people's lives led the *'Ulama* [of Ben Badis] to file a complaint with religious authorities at Cairo's Al Azhar University, which came close to firing him."[105] While the

[103] Oussama Arabi, "Orienting the Gaze: Marcel Morand and the Codification of Droit Musulman Algerien." *Journal of Islamic Studies*, 11. 1 (2000): 72.
[104] In fact, this was the express recommendation of the "Transvaal fatwa" that Arabi praised for its vision, mentioned immediately above. "Salafiyy," Encyclopaedia of Islam, Second Edition. P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs (eds.). Brill Online, 2014.
[105] Marnia Lazreg, *The Eloquence of Silence: Algerian Women in Question* (New York: Routeledge, 1994): 81.

Salafists of Egypt were experimenting with reformist adaptation and interpretation as strategies to negotiate British power and enhance Egyptian sovereignty, the Algerians whose culture was at the colonists' mercy could ill-afford such luxuries. In contrast to their Egyptian counterparts, Ben Badis and his comrades in the *'Ulama* rejected reformist interpretations of divine law as contributing to the deterioration of Algerian identity. As with Egyptians, these Algerian scholars idealized an Islamic "golden era," and preached that failure to live by it was a factor in their oppression and loss of identity; however, for the Algerian *'Ulama* this past was not a reservoir from which to draw answers to modern-day problems, but was a place of reprieve and renewed strength from which to reject the poisoned "modernity" offered by their French masters. This included the innovative interpretations of their religious laws which the French undertook on their behalf.

Moreover, criticism of Morand's choice of codification as the vehicle by which to initiate these reforms came quickly from many early-twentieth-century Muslim reformers. Even prominent modernizers called into question the supposed 'progress' that would arise from the deployment of state apparatuses and codification programs, including Rashid Rida, Tunisian proto-'Islamic feminist' al-Ṭahir al- Ḥaddad, and later, Fazlur Rahman.[106] They saw reason to be wary of the effects of these reforms, ostensibly carried out in the name of gender equity and justice for women, but by which the modern state, "took control of the rump Islamic judicial system, to centralize, standardize, and otherwise assert full authority over all judicial processes."[107] Further to this point, in response to Arabi's arguments, the early twentieth-century rehabilitation of *ijtihad* also worth closer examination. Scholarship by Hallaq and others has largely disproven the nearly axiomatic Orientalist thesis that the so-called "gates of *ijtihad*" had

[106] See: Fazlur Rahman, "A Survey of Modernization of Muslim Family Law," International Journal of Middle East Studies 11,4 (1980):451. See also: Tucker, *Gender in Islamic Law*: 21.
[107] Tucker, *Women, Gender, and Family*: 20.

closed in the ninth century, thus terminating independent thought and critical reasoning in Islamic jurisprudence.[108] In addition, Mohammed Fadel has argued that this view "suffers from an idealist approach to law," still informed by the Weberian condemnation of sociological stagnation and irrationalism in Islamic societies. According to Fadel, *taqlid* in fact arose in order to build uniformity and predictability and stave off chaos and unlearned opinions. In other words, it satisfies a rationalist desire for 'rule of law.' As such, the Maliki compendia of Sidi Khalil and his predecessors, "may best be described as codified common law," somewhere between English common law and Continental code law.[109]

Ten years after the commission began its work, the final version of the Code Morand was published in 1916 in French and Arabic. Their search for the straight-forward "analogies" that Sawas Pacha had promised had yielded a monument of procrustean exertion. For, if French laws and *shari'a* shared certain principles, the latter was resistant to the categorization and *ratiocinant* impulses of the former. Henry and Balique ascribe the challenge of legal conflicts between French and Islamic systems to incompatible categories of law. Whereas in French law, all legal subjects are divided by categories – persons, property, and obligations – in Islamic jurisprudence there are no such divisions. As they write, "questions pertaining to personal status therefore appear in virtually every chapter of an Islamic legal text."[110] Consequently, the simple act of mapping Muslim justice onto French categories of private and social law demanded far more than the equation of relative values. In the translation of concepts across languages and

[108] Hallaq, Wael B. *Authority, Continuity, and Change in Islamic Law* (Cambridge, UK: Cambridge University Press, 2001). This thesis was not singular Western Orientalists, and has been prominent within Islamic thought as well. See discussion in Mohammed Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhtasar," *Islamic Law and Society* 3.2 (1996), p 195.
[109] Fadel does note, however, that Khalil's prescriptions for judicial review would only correct mistakes, not provide a source of law. Fadel, ibid. : 193-233.
[110] Henri and Balique, *La doctrine coloniale*: 15-16

epistemologies, the "Islamicization of modern law" brought about a process that rather resembled the assimilation of each set of principles into each other.

The Code Morand, as well as later colonial legislation and codification projects in the same vein, had certain crucial material effects on Algerian women's rights as heirs and as parties to a marriage contract. The pertinent clauses, as well as their application and effects on litigation and jurisprudence, will be analyzed in detail in the remaining two chapters, and so will be only briefly summarized here: The first section of the Code defined marriage as invalid without: the condition of puberty of both parties; the "manifestation of their consent"; the absence of interdiction (such as mental incapacity or incest); the constitution of a dower; and the observation of the prescribed formalities. Puberty, however, was set at age 18 for men and 15 for women, exactly as in the Napoleonic code, but justified on the basis of the Egyptian code of personal status (see: Chapter 3). The "manifestation" of the bride's consent was defined as her signing of a marriage contract before a *qadi* and two witnesses. Articles 33, 52, 53 and 143 mandated contracts issued and registered by *qadis* as the only legitimate evidence of marriage and divorce. More radically, articles 34 and 35 demanded the *verbal consent* of marriage parties themselves, rather than their guardians. Morand could not make polygamy illegal outright, but strengthened measures designed to enhance preventative and exit strategies for unwilling brides. Finally, the Section I.II and articles 138 and 139 mitigated the severe effects of repudiation.[111]

At the same time, the Code did not make any attempts to curb marital or parental authority over women and girls, respectively, and in some instances increased it. The second section of the Code contained mainly articles preserving the husband's control over his wife's whereabouts, living arrangements, visits to and from her natal family, ability to work, etc., as

[111] Marcel Morand, *Avant-Projet de Code du Droit Musulman Algérien, Présenté à la Commission du Codification* (Alger : Adolphe Jourdan, 1916) : 3, 42-43, 81-83.

well as introducing (Art 80) a wife's duty of obedience (see: Chapter 4).[112] He even set the age of majority at 25, citing the Code civil, until which point guardianship remained in effect.[113] On divorce, meanwhile, Morand seems not to have availed himself of the various *shari ʿa*-based options for increasing equity among parties and enabling justice for women. In the age of reform in Egypt and the Ottoman Empire, jurists worked to suppress the potential for extra-judicial, male-controlled divorce, and instead enhanced women's rights under and access to forms of mutually-consensual divorce, such as *khulʿ* and *faskh*, divorce by which women repay the dower and/or other compensation, or, arguably more beneficial, *tafrīq*, divorce through judicial annulment, with written records. The Code Morand stopped short of reinforcing these forms of women's divorce and applied a standard rule of written proof in any and all cases, without which divorce was considered unlawful and non-binding.[114]

The Code Revived?

Why was the Code Morand abandoned and never promulgated? Christelow has suggested that the Code fell victim to bad timing, due for abrogation at the height of the First World War, and a moment of tectonic changes to French rule in Algeria that rendered the Code almost instantly obsolete.[115] No doubt, Houdas's 1902 reports had overestimated the warm reception the code would receive amongst Algeria's magistrates. When an initial draft of the code in French and Arabic was circulated to various jurisdictions, many French judges complained that the code

[112] Ibid.: 54.
[113] This is also striking given that the age of parental consent was lowered to 21 for both parties in 1907, and that *actes respectueux* (by which parental consent was attained) were also reduced to a simple notice requirement rather than a condition for the validity of marriage. Mary Ann Glendon, *The transformation of family law: state, law, and family in the United States and western Europe* (Chicago: University of Chicago Press, 1989): 41-42.
[114] In doing this, Morand may arguably have laid some ground for reformers in Muslim lands who followed suit in the second half of the twentieth century. See: Judith Tucker, *Women, family, and gender in Islamic law* (Cambridge, U.K.: Cambridge University Press, 2008): 111-130.
[115] Christelow, *Muslim Law Courts*: 254. Specifically, he writes, that the code was a "relic of an age gone by. Postwar electoral reforms ironically gave the conservative rural elite, ever more depended upon by the administration, a more powerful influence."

was not faithful enough to French standards; many *qadi*s, meanwhile, expressed resentment over the further erosion of their discretion, while others balked at the departure from Maliki jurisprudence to borrow, as they saw, excessively from Hanafi norms.[116] There also seemed to be widespread confusion about the authority and finality of the code – could decisions based on the code be appealed, for instance? The answer from Morand was "yes." Should the Code be used in courts at all levels or only for appeals – that is, was it only for the use of the civil magistrates, or were *qadi*s also held to it? Morand again answered: the Code was to be applied at all levels. Judges in Kabylia wrote in wondering whether the code even applied in their jurisdictions. Morand's answer to this was naturally – resoundingly – yes. He was after all very keen that, for the sake of women's legal rights, customary laws be wiped out and replaced by the orthodox "universal codes" of Islam.[117]

Moreover, there were also many within the colonial legal bureaucracy who had not yet given up on judicial review as an alternative to codification, and were supported by a new head of government, Governor General Charles Lutaud, who reversed many of Jonnart's policies and was a surprisingly vehement objector to native enfranchisement and vocal ally to the settlers. For instance, just before Morand's Draft Code was due for release, Lutaud issued a *projet de loi*, based on a recent decision by the Chambre de révision musulmane on a case involving a Kabyle couple, which reaffirmed the law of 1882 declaring unlawful any divorce not verified by an official record. In the standard procedure, simple circulars with adjudication instructions were issued from the Parquet, but Lutaud seems to have wished to put a finer point on it. In an apparent, if subtle, act of sabotage, he recommended bringing this decision to the attention of

[116] ANOM GGA 17H57/17(4). Codification du Droit Musulman / 'Code Morand.' 25e Séance. 15 May, 1914.
[117] ANOM GGA 17H57/17(4). Letter from Judge from Djelfa (Dept Alger).

judges and *qadis* ahead of the Code's release and ordered them to defer to the court's decisions in such matters.[118]

In 1927, an inquiry was called to revisit the Code Morand and assess the possibility of editing and reviving it. The sub-committee charged with the inquiry was this time composed entirely of Muslim judges and experts, without French input. The subsequent report seemed to largely vindicate Morand by deeming valid the heavy use of Hanafi doctrine as among the "orthodox" schools of jurisprudence. They rejected the assertion that codification would result in crystallization, since the code could undergo regular revision (though by whom is not clear). Primarily, however, they determined that not the code as a whole, but rather a certain handful of articles was the true source of problems, which they identified as those dealing specifically with the rights of parents to choose their children's marriage partners ("droit de *djebr*," as it was called in French; discussed in greater detail in the next chapter). The sub-committee concluded that the primary issue was not, in fact, a religious matter pertaining to the code's orthodox credentials or lack thereof and that no valid *shari'a*-based arguments could be leveled against these reforms. Rather, they asserted, the backlash stemmed from the perceived assault on paternal authority. To quell this source of resistance, they suggested a number of minor modifications to the articles in question.[119] Thus far, the archives have not revealed why this second attempt to revive the code was also abandoned, but it seems that the same issues of application that dogged it the first time remained to be resolved. And, as Christelow has suggest, the Code Morand was in many ways the idiosyncratic creature of a particular political and intellectual moment, which faded along with Morand's grand vision. When the return of Algerian men who had fought for France during the Great War pushed mass enfranchisement to

[118] ANOM GGA 17H52/17(4). Justice Musulman: Mariage, GG Lutaud to PG Robe. 31 Oct 1916.
[119] ANOM GGA 17H57/17(4). Enquête sur le Promulgation du Code Morand, Rapport au M. Mirante, Directeur des Affaires Indigènes. 27 Jan 1927.

the front of the colonial political agenda, the question of such a Code must have appeared outdated and irrelevant. In any event, there must have been a kernel of truth to the second commission's assessment, since immediately after (and even in the midst of) decolonization, codes of Muslim family law shed their controversy and were even welcomed by many segments of Algerian society.

Conclusion

This chapter has looked at the evolution of *fiqh francisé* during the era of "reform" and modernization as it took shape in Algeria. These histories bear witness to Hallaq's assertion that the study of Islamic law was "so vital that it lay at the heart of the European colonialist enterprise."[120] But more than this, the study of the origins of Islamic legal history, and revivalism of the late-nineteenth and early-twentieth centuries, shaped the contours of the debate on colonial law and the management of difference. For French colonial jurists like Morand and Estoublon, modernization and codification in Egypt and the Ottoman Empire, as well as Islamic reformist discourses and movements, emanating especially from Egypt, demonstrated how a colonial regime of difference could co-exist with republican institutions and ideals of sameness. Indeed, for these legal scholars, the former – far from a regrettable "monstrosity" – was indispensable to the latter. This was the deeper political and intellectual undercurrent of the "crisis of Orientalism" that Burke III described.

Though racial ideologies no doubt coloured these debates, they were expressed and made meaningful through a discourse of sexual difference and deviance. As the opening story illustrates, the "status of women" question was the most effectively deployed device in the repertoire of colonial domination at this time. The push for intervention and codification was

[120] Hallaq, "The Quest for Origins": 1.

partially rooted in the failures of the État civil des indigènes – in particular, an urgent demand for land and resources that created a new set of relations between the colonial state and the Muslim "family" as an object of *connaissance*. As such, many of the same arguments and ideologies introduced in the first chapter appeared (and continue to re-appear) again with new objectives and fresh urgency. And, as the next chapter will take up in greater depth, the question of consensual marriage, particularly for very young brides, entered a new phase in the years leading up to the Code's commission, forming a central component of the argument in its favour. Years later, the question of consent provided the basis for Morand's next major law reform project: The "Centenary Laws" on the status of Kabyle women.

Chapter 3:
Negotiating Consent in Kabylia (1892-1931)

Introduction

In the fall of 1913, a Kabyle woman named Bouhalassi El Hamsa, aged 21, ran away from home on the day of her wedding. Her intended husband, Chemami Belgacem, had paid the customary dower to her father, Bouhalassi Youcef, and all the arrangements had been made so that the three of them would conclude the union that day before the local *qadi*. Instead, El Hamsa fled to the home of the man she loved – "the fiancé of her choice," as the court record would later describe him – where she remained for the next year and insisted on referring to him as her true husband. (Though unclear, it seems they had been formally married in some fashion.) Her father brought a suit against her to the *qadi* court of first instance at Ain-Beida, where she was condemned to return to him, as per his paternal rights. She then appealed at the Tribunal of Guelma, which overturned the previous ruling, declaring the first marriage null and void. It was at that point, on 25 May 1914, that the Parquet général filed her case for judicial review with the Chambre de révision musulmane près la cour d'appel d'Algèr, on the basis that the Guelma court had "misapplied the right of *djebr*, in violation of the principles of Islamic law."[1] The highest jurisdiction in colonial Algeria then considered the sequence of events and merits of each side and rejected the Parquet's appeal. "This young and nubile woman," their decision read, "may ask the French Tribunal, insofar as it applies Muslim laws, to bend the rights of matrimonial

[1] *Journal de la jurisprudence de la Cour impériale d'Alger* 1915 : 98.

constraint which are so contrary to the principles of natural law." The full exercise of the rights of paternal power ("*djebr*" transliterated in French; *ijbar* in Arabic) ran counter to the "interests of the child," it continued, subjecting her to "a sort of *legal rape*, in the view of [the man] to whom she declares herself married."[2] The Parquet's referral of her case for amendment was thus rejected, and El Hamsa escaped the grasp of both her father and claiming husband.

The circumstances surrounding this potential "legal rape," as the jurists put it in 1915, share certain elements with the "legal rape" to which, as we saw at the start of the previous chapter, the Kabyle woman "Fatima" was nearly subjected in the pages of an 1892 literary and political review. The most obvious parallel is of course the rhetorical repertoire of a sexual violation of Muslim women that received the blessing of the French colonial state – particularly those jurists and administrators too timid to enforce assimilationist legal policies. That this phrase – "legal rape" – circulated between semi-fictive polemic and legal discourse is notable in itself, demonstrating the various continuities between them. But these two women's cases were separated by nearly 25 years, during which time the entire structure and politics of colonial legal pluralism had changed drastically – most notably by the creation of the Chambre de révision musulmane, and the commission and publication of Marcel Morand's draft code of Islamic law. This chapter considers the longevity of the "legal rapist" as a problem for colonial public order, and asks how legal strategies to address it were developed through a dialogue staged in colonial courts between the colonial legislator and Algerian women litigants.

As seen in the first chapter on the État civil des indigènes, as the composition of the Muslim family became of political importance to the functioning of a private property regime, the particular gendered vulnerabilities of Algerian women were slowly transformed from a

[2] Ibid,: 99. Emphasis added.

private matter of "customs" to a subject of public interest and intervention. In the previous chapter's discussion on the debate between Marcel Morand and Emile Larcher, I summarized their opposing views on managing colonial legal difference under a republican banner using Wendy Brown's observation that "while inequality is the problem to which equality as sameness is the solution, *difference is the problem to which equality as sameness does not apply*."[3] Though Brown was in fact describing the "ontological difference" of women in liberal governance, this argument has resonance with and can be applied, for our purposes, to the *sexual difference* of Muslims in colonial Algeria. Leila Ahmed coined the term "colonial feminism" to describe this instrumental use of the proverbial "oppressed native woman" in the service of colonial occupation, while Gayatri Spivak wrote of "white men saving brown women from brown men."[4] Whatever the particular iteration of this strategy, it nearly always operated by scripting sexual difference as racial difference, which in the case of Algeria sustained both intervention into personal status law and the Muslim state of exception.

This chapter turns its attentions to focus on the Kabyle mountains of north-eastern Algeria, which stood apart both juridically and politically from the rest of the Algerian territories throughout the colonial period, including after 1870. In the wake of the Code Morand's arrival upon the desks of Algeria's French magistrates and Muslim *qadi*s, new questions emerged around the enduring tensions generated by Algeria's existing – and not only its imposed – legal pluralism. The case of Kabylia invites our particular attention, as the energies that had been expended since the 1880s on assimilating Islamic and customary laws throughout the Algerian territories were in many ways diverted to Kabylia and concentrated particularly upon Kabyle women. The duration and scale of these projects led Algerian legal historian Zohra Saï to

[3] Brown, "Liberalism's Family Values," in *States of Injury*: 153. My emphasis.
[4] Ahmed, *Women and Gender*. Gayatri Spivak, "Can the subaltern speak?" in Bill Ashcroft, Gareth Griffiths, and Helen Tiffin. *The post-colonial studies reader* (London: Routledge, 1995).

describe Kabylia as "the first laboratory for the codification of family law" in the early twentieth century.[5] The particular challenges, as well as opportunities, posed by Kabyle customary law made it especially attractive to a cast of unconventional reformists from all stripes – including Catholic missionaries and anti-clerical administrators – guided by a belief in the Gallic ancestry of Kabyles known famously as the "Kabyle Myth." The singular trajectory of colonial policy in Kabylia thus positioned it ideally, I argue, to host the debates and reforms surrounding marital consent in colonial law, which culminated in the "Centenary Laws" of 1930-31.

At the same time, the ambiguities and administrative uncertainty surrounding customary law and existing pluralism also proved productive for those litigious Kabyle women who made use of the French civil courts that had replaced previous bodies of dispute resolution. In Kabylia, more than anywhere else in Algeria at this time, colonial law was judge-made, first because of the absence of a formal code, and second because only French judges were authorized to dispense justice (at the expense of both *qadi*s and village councils). While the French code system, strictly speaking, precludes the prescription of law through judicial precedents, as we saw in the previous chapter, Muslim personal status law was largely interpreted and dispensed through a body of judicial review, the Chambre de révision musulmane in Algiers. The cassation decisions of this council did not themselves *create* colonial law, but they frequently provided the materials and justification for memoranda issued by the Governor General and circulars from the Parquet général. In this way, cases brought by Algerian women to French courts (whether initially or in appeal) shaped the agenda of personal status law reform.

This chapter is thematically organized around the problem of consent, since this was most prominent issue during and leading up to Morand's codification commission, though divorce and

[5] Fatima Zohra Saï, *Le statut politique et le statut familial des femmes en Algérie*, Thèse pour le Doctorat d'État, Droit public, Université d'Oran es-Senia, Faculté de Droit et des Sciences Politiques (2007): 89.

consent were very often intertwined matters.[6] The definition and precise location of the Muslim bride's "consent" in the marital contract turned out to be remarkably elusive for French reformers, who struggled to sift it out from amidst overlapping and conflicting legal regimes and statuses. The very passivity of consent in both French civil law and Sunni *fiqh* made it an essentially unquantifiable measure by which to set hard and fast legal standards. As this chapter will show, eventually, in the colonial application of personal status law in Kabylia, the notion of sexual maturity became the primary distinguishing feature of marital consent. As such, colonial reformist attention to unwilling brides was increasingly narrowed to the unhappy (and often dangerous) lives of "*impubères*" who were married off to men sometimes much older than themselves. In the French colonial imagination in which indigenous women were habitually infantilized, the horrific experiences of these underage brides were often framed as endemic to all unions among the *indigènes*. The failures, first of the État civil des indigènes and then of the civil courts, to curb this problem finally culminated a turn to criminal law, and the inauguration, for the first time in either colonial or metropolitan French law, of a tentative concept of "marital rape."

To speak of a "dialogue staged in colonial courts," as I do above, is not meant to imply an equal exchange between parties of symmetrical power. Nor is it meant to elide the colonial grammars according to which this dialogue was performed, and the array of rules and procedures that made up the choreography of the colonial courtroom in which the native confessed and the colonist judged. Yet the social marginalization of Kabyle women also served, conversely, to augment their symbolic importance for the colonial project insofar as it was fueled and sustained by a sexual politics of racial identity and difference. And so, when Kabyle women went to court,

[6] Christelow makes a similar observation when describing an early meeting of the codification committee. *Muslim Law Courts*: 255.

they found without looking a receptive audience of assimilationist French jurists. These, then, were the terms of this dialogue: in its efforts to legislate consent in the native marriage contract, the colonial regime came to infantilize native women while synonymizing indigenous men with sexually degenerate rapists; in turn, Kabyle (and other Muslim) women devised strategies that capitalized on, and to a certain extent informed, this perception by filing suits against the men who had raped them in the context of marriage.

We here come to the problem of writing about the historical agency of colonized women. This is a history that can, and often does, lend itself to one of two possible interpretations: The first suggests that because some Muslim women learned how to benefit from the French presence, colonialism expanded their range of choices and was thus a net-positive force in their lives. The other option is that by engaging with these inherently oppressive foreign institutions, Algerian women were merely complicit with colonial domination. If the first interpretation reinforces colonial rescue discourses, the second serves to police colonized women by accusing them of "race betrayal," while also rescripting them as passive victims. This chapter – and larger dissertation – attempts to avoid either pitfall, for which the insights of Durba Ghosh are helpful. Writing on similar histories in British family courts in colonial India, she writes that "[n]ative women were not 'complicit' in colonialism; rather colonial regimes drew women into various confirmations in ways that ultimately consolidated and reaffirmed colonial authority."[7] We may never know precisely which range of options were foreclosed as a new set of strategies were opened to Kabyle women when the French legal system came to disrupt and sometimes replace customary judicial councils and other sites of dispute-resolution in their lives. But the archives tell us that for many of these women, understanding and, if possible, manipulating these new

[7] Durba Ghosh, *Sex and the Family in Colonial India: The Making of Empire* (Cambridge, UK: Cambridge University Press, 2006): 21.

configurations was crucial to surviving the social upheavals that brought them. As Catharine MacKinnon reminds us, the choice between "complicity" and "resistance" is often false for women for whom the choice is truly between surviving or not.[8] It is this survival, to return to Ghosh, and the way in which it earned them a place in the archive that marks them as historical agents.

Visions of consent in colonial law

The 1830 convention between the French army and the conquered Algerians promised the "liberty" not only "of Algerians of all classes, their religion, their property, commerce, and industry," but also assured that "their women will be respected."[9] This guarantee was undoubtedly the most cited of any agreement in colonial juristic writing over the next 150 years, and was never forgotten by indigenous leadership. It always appeared, for instance, in the petitions of Algerian statesmen and representatives when they lobbied against any especially aggressive new French laws. Thus colonial jurist Edmond Norès warned that "[t]he question of the civil responsibility of the Muslim father is the most delicate [of any] from a juridical point of view."[10] Likewise, in the *lendemain* of decolonization, Jean-Paul Charney would reflect on the "torrent of ink" spilled over the 1830 convention, having marked "since the first day of colonization, the strongest bastions of resistance to westernization: religion and the woman."[11]

The caution around this treaty counselled by jurists like Norès did not mean keeping a respectful distance, but rather employing agility and sophistication while enacting reforms. The

[8] Catharine MacKinnon, *Toward a Feminist Theory of the State*. (Cambridge, Mass: Harvard University Press, 1989).
[9] Cited in Morand, *Études*: 170.
[10] Edmond Norès, *Essai de codification du droit musulman algérien (statut personnel)*. (Alger: A. Jourdan, 1909): 326, n. 514.
[11] Jean Paul Charnay, *Le Rôle du juge français dans l'élaboration du droit musulman algérien*. (Agen: Imprimerie moderne,1963): 705.

first step in mounting a project as deeply invasive to Muslim private life as the Code Morand therefore required circumventing the obligations of the 1830 convention, which Morand did by claiming that it was merely a capitulation, and thus not binding. In fact, he argued, French intervention performed an indispensable service by upholding Islam in its purest form. A range of "heretical" and "unorthodox" practices had seeped into Muslim justice in Algeria through tribal and "maraboutic" authority – the "popular" Islam of the Sufi orders (who maintained a role in arbitration between and within families[12]), as well as highly localized customary laws.[13]

The polemic on these issues carried certain discursive continuities with previous debates on women's slavery and the overlapping nature of these two statuses in French juristic writing on women. Indeed, it is nearly impossible to find a book or article on Muslim women from this period that does not make one or many references to Arab and Berber women as "*objets*" and "*choses vendues*."[14] This approximation of marriage to slavery no doubt contributed to the general reading of Muslim marriage as, for girls and women but sometimes also for boys, a contract of sale between non-consenting parties.[15] As seen in the first chapter, this notion derived mainly from the monetary exchange agreements involved in dower practices (unique to Jewish and Muslim law, unlike the Christian marriage sacrament), as well as the particular vulnerabilities women experienced before, during, and after marriage. A passage in the

[12] Lazreg, *Eloquence*: 85.
[13] See footnote 34 in chapter 2, above, on *'urf* and *'amal.*
[14] An early reference, perhaps setting this tone, was that of Hanoteau and Letourneaux, in their description of the "Kabyle woman" in particular as a "*chose humaine*" in *La Kabylie et les coutumes Kabyles* (Paris: Augustin Challamel,1893), t II, p 148. To give another example, one L. Déroulède, a judge in Kerrata and faculty member of the École de Droit d'Alger, published a lengthy report in the 1898 explaining in detail how "the Kabyle woman is nothing more than a piece of merchandise by which her father and husband attempt to extract profit," citing a long list of recent cases involving unwed pregnant women trying to escape the avarice of their husbands or families. "La filiation en droit Kabyle," RA 1899: I, 147-171.
[15] Recent scholarship has indeed found common roots between forms of patriarchal domination and personal possession (Arabic: *milk*) over wives and slaves in early Islamic juridical traditions. Kecia Ali has argued that this textual tradition perpetuated an enduring texture of uneven gender relations and paternal authority in Sunni jurisprudence. Kecia Ali, *Marriage and slavery in early Islam* (Cambridge, Harvard University Press, 2010).

Mukhtasar of Sidi Khalil Ibn Ishaq, in which he describes the nuptial gift as analogous to a price of sale, was no doubt also a factor in this perception.[16]

Emile Larcher perhaps summarized the conceptual linkages best when he wrote,

> Those [practices] which shock us the most in the Muslim marriage, which appear to us as absolutely contrary to public order, but which nonetheless subsist as a result of the respect assured to the law and religion of the natives, are precisely the consequences of this idea of *sale*. It is from this [idea] that conflicts arise not only with our civil law, but also with our penal law. From this comes polygamy, the question of the repression of adultery, the right of *djebr* [forced marriage by fatherly right], the marriage of young girls [*impubères*], and the facility and frequency of the rupture of marriages.[17]

Elaborating on the question of penal law, he went on to point out that in case of the death of an underage spouse due to "the consummation of such a marriage," her husband could only be charged, under colonial law at the time, with homicide by imprudence or even simply involuntary injury.

Condemnation aside, colonial jurists were quick to apply the "contract of sale" analogy in French legal terms. In his summary of consent in the Muslim marriage contract, Norès asserted that Muslim marriage is validated at the moment of consent rather than consummation, just as, "in our [common] law, 'a sale is performed by its parties, and a property is lawfully acquired by the buyer, at the moment when a price is agreed upon, regardless of whether the object has been delivered or the price paid.'"[18]

What was the nature of consent in the mainstream schools of Sunni Islamic jurisprudence? In fact, *ijbar* has no basis in originary texts, but was rather a product of early jurisprudence. In all

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[16] Nicholas Perron, *Précis du Droit Musulman* (Troisiéme édition). (Paris; Bar-sur-Aube, 1883) : T II , 427. Cited by Morand, *La famille musulmane*. (Algiers: Adolphe Jourdan, 1903) : 58.

[17] Larcher, *Traité*, T II: 411.

[18] Norès, "Essai de codification du droit musulman Algérien (1)," RA 1903 : I, 192. Here, Norès is citing article 1583 in the Code civil. It bears mentioning that Napoleon is known to have declared, upon issuing his famous code: "Women ought to obey us. Nature has made women our slaves!" Mary Ann Glendon, *The Transformation of Family Law* (Chicago: University of Chicago Press, 1989): p 89.

but one *madhahib* (the Shafi'i school) consent was an essential component, along with the dower, consummation, and the presence of two witnesses, of the legality of a wedding contract, and without which it could be annulled. Many classical juridical scholars poured over the substance and meaning of a bride's consent, which was, in any case, conceptualized as quite passive. Al-Marghinani determined that laughter, a smile, or even silence could signify consent to a proposal of marriage, as discerned by the *wali* (guardian), while refusal could be gleaned by loud crying or derisive laughter.[19] This applied mainly to children in their legal majority and for non-virgin women (*thayyib*). Children who had not reached puberty, most jurists agreed, were under the total control of their legal guardians and could be forced into marriage. However, at least in the Maliki and Hanafi schools, delivery of the bride to her husband *must* await puberty; moreover, children who were married had the right to reject the arrangement upon reaching puberty. In any event, scholars today agree that textual sources on *ijbar* are less important than the role of local customs for understanding its historical functioning.[20]

What, then, was the concept of consent that colonial reformists hoped to endow upon Algerian women and girls? This question loomed large in Estoublon's reasons for codification, wondering (with good reason) how silence could be interpreted as consent, and how the delivery of child-brides to the homes of adult spouses could be prevented, even if their marriages could not be.[21] Larcher would have had the legislator intervene and simply abolish the *djebr* rights of parents.[22] This was perhaps to the more extreme end of the majority opinion among French jurists and administrators, who generally found nothing inherently offensive about parental authority over unmarried children or even spousal authority over wives, only the excessive

[19] Judith Tucker, *Women, Family, and Gender in Islamic Law*: 42.
[20] M.K. Masud, "The sources of the Maliki doctrine of Ijbar." *Islamic Studies* 24.2 (1985).
[21] Estoublon, quoted in Gouvernement Général de l'Algérie (GGA), *Projet de codification de droit musulman* (Alger, 1906): 11.
[22] Larcher, *Traité* : T II, no. 605.

degree to which Islamic law took these common norms. The total replacement of Muslim parental authority laws with their French equivalents, however, might have opened more questions than it solved. Though the minimum age for marriage in the *Code civil* was 18 for men and 15 for women, parental consent was required for the marriage of all men under the age of 25 and all women under 21 years of age.[23] As one administrator complained, Islamic law ended parental authority too abruptly for his taste – that is, upon reaching puberty, at which point "men and women passed without transition from a state of total restraint to one of absolute liberty […] without obligation to gain the consent of their parents."[24] On-going attempts to reconcile these norms produced suggestions for reform like that of Norès, who proposed that proof of a bride's consent could result, tautologically, "from the simple fact of the consummation of the marriage" so long as it was not fraudulent or violent – that is, consummation minus rape equals consent.[25]

Like his colleagues Morand subscribed to the idea that "Muslim marriage [was] not a contract of association between the spouses […], but an act of sale placing the woman in a state of complete dependence on her husband."[26] His campaign for codification had rested largely on the premise, discussed in the previous chapter, that the development of the Muslim family had been retarded by social and political stagnation rather than the immutability of Islamic law. Moreover, the ascendance of the state and the recuperation of Islamic law were not competing but rather complementary objectives. As he wrote,

> In Algeria today, as it was six hundred years ago, one can marry their children without their consent; one can even marry them before they are pubescent! It is also the case that proof of marriage is just as imprecise as it was six hundred years ago […]. These are results, ultimately, of the uncertainty and imprecision of the applicable laws, which even now in Algeria means that […] even the most honest litigant can never be certain of the

[23] Hamel, "De la naturalisation des Indigènes Musulmans de l'Algérie: Mariage." RA 1886 : I, 19-22.
[24] Hamel, Ibid. : 20.
[25] Norès, "Essai de codification" (1903): 194.
[26] Morand, *Études* : 135.

outcome of their [judicial] process.[27]

In Morand's view, the solution to this problem could be found by observing the evolution of more advanced societies, where the family had receded into the private, and had "cease[d] to exist, in a manner of speaking, from a political point of view."[28] This, he argued, could be achieved in Algeria, as the colonial state gained centralized organizing power and effectively undermined, if not replaced, the supreme rule of chiefs and patriarchs. The family would thus acquire a "purely internal" existence, evacuated of its bearing on the individual, which would thereby also supersede it as the primary unit of social life. To do this in the colonies required the application of a more pure form of Islamic law by extracting irregularities caused by the infiltration of customary norms and centuries of false and out-dated juristic interpretations.

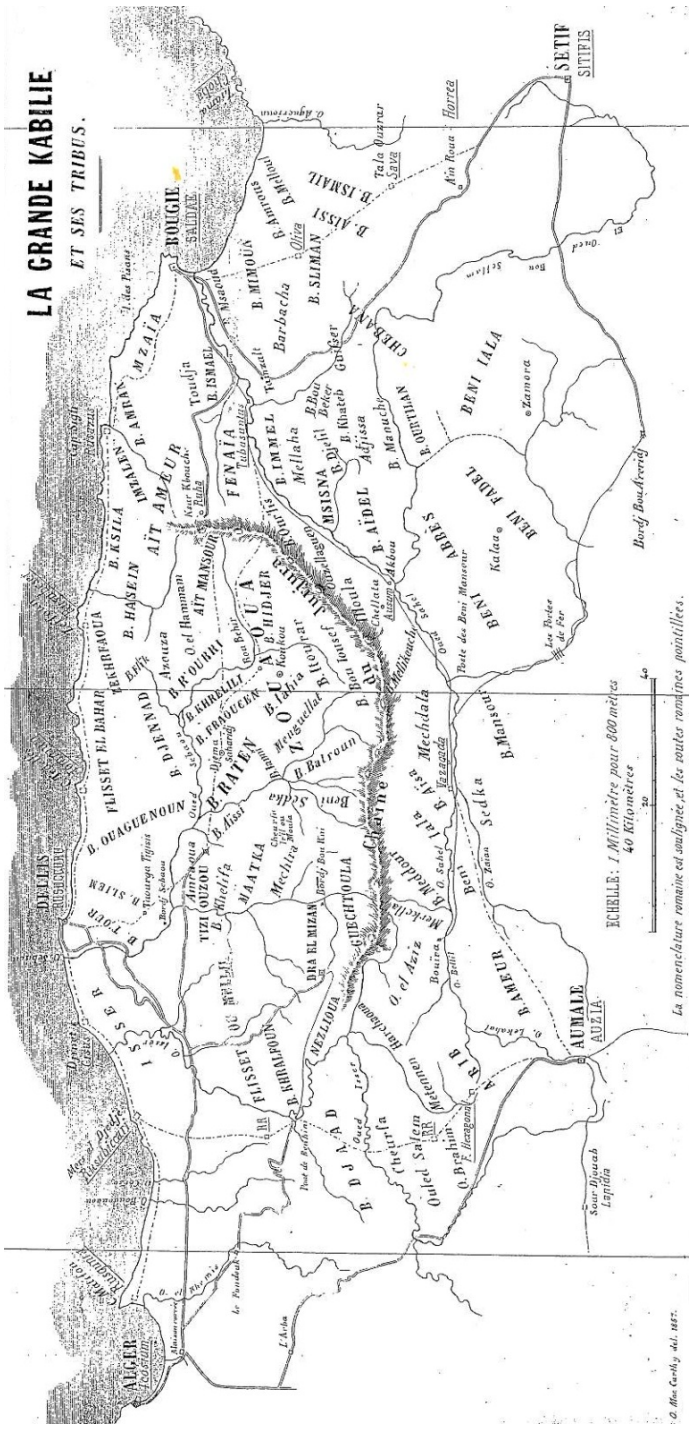
This exalted new vision of the state would have important implications for Morand's codification project and its formula for consensual marriage. During the initial surveys and meetings to assess feasibility, bridal consent was the first and most urgent issue raised. While the commission's Muslim and French politicians and jurists sparred over what were truly the most common and reliable determinants of consent, both in practice and in Islamic doctrinal commentaries, Morand proposed an initial clause that would have required the presence, unveiled, of the intended bride in court. This proposal was met with opposition, particularly by certain Muslim statesmen among the commission, and did not appear in the final version of the Code.[29] Instead, the first five clauses of the Code identified the essential components of a licit marriage as: the consent of both parties, their having reached the age of puberty (set at 18 for men and 15 for women, as in the Napoleonic Code), their sound mental state at the time of the

[27] ANOM Fonds ministériels – Affaires Politiques (F80/1710) "Note de M. Morand, doyen de la Faculté de Droit d'Alger, Alger, 1919."
[28] Morand, *La Famille Musulman*: 7
[29] ANOM ALG GGA 17H55. *Projet de codification, procès verbaux des séancse*. Algiers, 18 June 1907 : 88-100.

marriage, and the authorization of their parents. Later, articles 33-39 further elaborated that only a *qadi* could issue a valid marriage certificate, thus reinforcing the mechanisms that the État civil des indigènes had put in place. This could be done at the bride's or groom's home, but the vocal consent of both parties – and not their legal guardians – must be expressed.[30]

Thus, the litmus test of consent was located in the mediation of the nuptial agreement by the state, via an approved religious figure, without which a marriage may be considered invalid. While the Code Morand would have confirmed the need for an official intermediary in the nuptial process, it did not, conversely, make any attempts to curb parental or marital authority over women and girls. Indeed, it would have even reinforced them by importing some French principles, such as by setting the age of majority at 25, citing the Code civil, until which point guardianship remained in effect.[31] Contrary to Morand's own thesis, then, these clauses suggest that state intervention in the marriage contract did not in fact bring about in an effective withdrawal of parental or marital authority over women and girls. As well, in the formulation of consent offered by the Code Morand, though women and girls would have been invested with certain modest abilities to refuse an unwanted marriage, this capacity was directed through the state, to turn away or annul unlawful marriages. In this way, the Code Morand, and later legislation, merely invited women and girls to validate the colonial state's monopoly over the sites of legitimate Muslim marriage and divorce. Though his code was never promulgated, as we shall see, Morand would nonetheless have the last (or at least most widely disseminated) word on the issue.

[30] Morand, *Avant-Projet de code*: 35. Though no Maliki *fiqh* upheld this principle, the Code Morand specified here that the Hanafi interpretation was preferred.
[31] This is especially striking given that the age of parental consent in France was lowered to 21 for both parties in 1907, and that *actes respectueux* (by which parental consent was attained) were also reduced to a simple notice requirement rather than a condition for the validity of marriage. Glendon : 41-42.



Map 2: Carte de la Grande Kabylie et ses tribus
(Source : A. Berbrugger, *Les époques militaires de la Grande Kabylie*, 1857)

The Case of Kabylia

At the outset of Morand's codification project, in 1905, it was widely believed that "the Kabyle mentality appears generally less hostile to a codification of their kanouns" than other indigenous subjects.[32] Evidence of Kabyle openness to French-directed reforms even came from the *qadi*-notary of Tizi Ouzou in Kabylia, who provided one of the most whole-hearted endorsements of any that were sent in from across the *mahakma*s and tribunals of the Algerian colony reporting on the viability of Morand's project.[33] He even insisted that the Code could be applied across a range of legal and religious rites and jurisdictions, whether Maliki or Hanafi, or those following any of the Berber customary laws. While this assertion was vigorously disputed by Larcher, it was in perfect tune with Morand's program, for which the "Islamicization" of modern law included the eradication of "unorthodox" local customs, chiefly those of the Berber tribes of Kabylia.

Though the broad term "Kabylia" often refers, in fact, to two mountainous territories, Grande (Djurdjura) and Petite (Babors) Kabylie, found along Algeria's northern border to the east of Algiers, most of the history and reforms described here were specific to Grande Kabylie (see: Map 2). Following the Arab conquests of North Africa in the seventh century, these regions remained Berber strongholds, and despite their conversion to Islam, they remained defiantly committed to their own local customary laws.[34] Similarly, in the nineteenth century, Kabylia remained the final stronghold of military resistance to French incursion, and was not definitively

[32] Norès, *Essai de codification* (1909) : fn 414.
[33] GGA, *Projet de codification* :108.
[34] Ageron, *Les Algériens musulmans*: 268-269. These terms, it should be noted, were entirely imposed and not self-chosen. "Kabyle" was the French term derived from the Arabic "*qba'il*," the origin of which remains open to speculation. The term "Berber" is also of European origin, rooted in the term "Barbary," as North Africa was known to Europe for much of the early modern period. More typically, North African Berbers self-identify as *Imazighen* (sing. Amazigh), speakers of the ancient Tamazight languages. See also: Alain Mahé, *Histoire de la Grande Kabylie: XIXe-XXe siècles : anthropologie historique du lien social dans les communautés villageoises*. (Saint-Denis: Bouchène, 2001).

subdued until 1850-7. Once French command was achieved, however, it was asserted with an unrelenting force seen almost no-where else in the colonized territories. If the upheaval of legal, kinship, and social structures was redoubled in Kabylia compared with elsewhere, so too was the economic devastation. For their participation in the "Kabyle uprising" of 1871, itself sparked in response to the settler revolt and French regime change of that same year, any Kabyle families with even the most tenuous involvement in anti-colonial resistance were punished with the requisition of their land and impossibly heavy fines. Under the sway of the invigorated settler lobby, Governor General Gueydon's collective punishment of the native inhabitants of Kabylia unleashed years of misery and starvation upon the population.

Yet, paradoxically, colonial policy in Kabylia was also guided by a favourable outlook on Berbers, who were seen as more amenable than Arabs for assimilation. This notion has come to be known, famously, as the "Kabyle Myth."[35] Two of the most adamant "kabylophiles" were also intractable rivals: the long-time administrator in charge of Kabylia, Camille Sabatier (b.1851-d.1919), and the indomitable Archbishop of Algiers, Cardinal Charles Martal Lavigerie (b.1825-d.1892). Each competed to advance his own vision for a political manifestation of the Kabyle Myth that would bring about the full integration of these communities into the French body politic, believing in the special promise of the Kabyles of Algeria to fulfill their own, if opposing, programs.

Camille Sabatier had been a colonial administrator of the Kabyle communes, then a French judge in Tizi Ouzou, before being elected to the Senate as the representative for Oran. Through these various capacities, and as the author of several books and a number of articles and addresses, he, and a sizeable contingent of like-minded colleagues, campaigned tirelessly for

[35] On the ethnography and politics of the "Kabyle Myth" see: Lorcin, *Imperial Identities* (1999).

specialized French interest in the Kabyle population as providing not only an economic or even moral, but indeed an anthropological basis for colonization.[36] This, in turn, would later inform his legal policies. In the racial hierarchies of the late-Victorian period – extemporized most famously in France by sociologist Ernest Renan – Sabatier presented his theories to both political and anthropological audiences, arguing that, unlike the Arabs, the "mountain Kabyles" who had remained largely isolated from Arab culture for centuries had also remained untarnished by the latter's Semitic language and physiognomy.[37] Indeed, the Kabyles were a "sister race" to the Galls, as evidenced by their inherently democratic institutions, sedentary settlement patterns, and generally monogamous, and thus less decadent, family life. Their "kanouns" (as the French called localized customary laws) were the most obvious display of this. As he wrote,

> [T]he unknown Lycurgus who dictated the Kabyle kanouns was neither of the family of Mohammed nor of Moses, but that of Montesquieu and Condorcet. More than the skull shape of the mountain Kabyles, this work bore the seal of the French race.[38]

By virtue of these factors, though they were confessionally Muslim, Sabatier concluded that Kabyles were "essentially anticlerical." All of these factors not only made them ripe for assimilation, but even gave colonization an air of irredentist reunification with long-lost racial cousins. The *pied noir* polemicists Louis Bertrand would later develop this idea, in combination with Cardinal Charles Lavigerie's missionary ideology (discussed below), to argue that the settlers were on the hostile frontlines of that very mission, reclaiming Latin Carthage from the usurping Arabs and restoring Roman (Catholic) sovereignty after a hiatus of seven centuries.

The evolutionary race theory that underpinned the Kabyle Myth was also signified through gendered and sexualized idioms of advancement versus stagnation. As seen in the quote

[36] Though the deployment of anthropological techniques was introduced by Sabatier, other less "scientific" iterations of the Myth had been in circulation since as early as General Bugeaud's reports of the 1840s. Lorcin, ibid.
[37] Lorcin, *Imperial Identities*: 159-162.
[38] Quoted in Lorcin, Ibid.:159; also in Ageron, *Les Algériens*: 275.

above, Kabyle family life was thought for some time to accord more closely with a French bourgeois ideal. Kabyle women, in particular, literally displayed and embodied behaviours seen as more "liberal" to the French eye – they typically did not veil, and they could often be seen in public unaccompanied by a male chaperon. Moreover, as mentioned, their men were less prone to polygamous marriages.[39] Based on these observations, Sabatier believed that the "fertile wombs of Kabyle girls" would "ensure the perpetuation of our race," and attempted to engineer unions between French men and Kabyle women through a series of policies designed to increase the latter's attractiveness, including the gallicization of their names and forbidding the facial tattooing that was common throughout rural Algeria.[40]

The exalted status of the Kabyle woman underwent a certain change, however, in the 1880s, at the height both of Sabatier's social experiments in Kabylia and of the region's institutional and economic devastation in the wake of a series of new pro-settler reforms. Since the 1860s, Kabylia had already undergone the "most spectacular" structural changes to affect any region of Algeria.[41] These began with the invention of the office of the *qadi* (by the *Bureaux arabes* in 1855) to replace the more democratic village councils (*jamaa*s or *djemaa*s in French) in the arbitration of disputes between and within families. But no sooner were these *qadi*s installed in Kabylia than their role was limited to notaries attached to the French justices who began arriving shortly after the transition to civilian government.[42] By 1885, French judges had been assigned to every "indigenous" tribunal throughout Kabylia. They were charged with administering Islamic and customary law, despite an 1874 decree assuring the integrity of

[39] Lorcin, Ibid. : 64–67.
[40] Lazreg, *Eloquence* : 49.
[41] Ageron, *Les Algériens* : 285.
[42] By decree of 21 Sept 1880 suppressing the *djemaa*s; decree of 8 April 1882 modifying article 11 of the 1874 decree.

Kabyle customary law.[43] As with the rest of the "native" population, Kabyles were subject to the laws of 1882 on the État civil des indigènes, and the 1889 law extending French competence in personal status matters, both of which would bring these magistrates into intimate relations with the Kabyle family. Under new-found colonial scrutiny, the daily realities of colonial rule destabilized certain cherished myths of Kabyle family life.

For Kabyle women, these administrators discovered, a particular set of difficulties arose due to communal legislation reportedly dated to 1748, which had restricted women's inheritance to prevent the dispersion of family and clan properties.[44] This lack of financial security extended to inheritance laws by which widows were lumped in with other goods passed onto male successors.[45] Similarly, contrary to orthodox Sunni legal norms, the dower (*mahr* or *sadaq* in Arabic; *thamamth* in Kabyle) went to the father of the bride (a right sometimes also claimed by brothers) and not to the bride herself as a form of personal security.[46] Divorce for Kabyle women also diverged sharply from the Islamic norm; while traditional judicial "women's divorce" was available to them (*lefdi* in Kabyle), their husbands could also counter this by declaring their wives in a state of "insurrection," which forbade them to either divorce or remarry, thereby holding them in state of perpetual insecurity.

As chief administrator of Kabylia during this time, Camille Sabatier was given an especially wide degree of freedom by which to enact his vision upon the Kabyle *communes*, and both his policies and their enforcement were clearly influenced by his experience as a tribunal judge. With law reform in his sights, Sabatier's commitment to the absorption of Kabyles into

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[43] Bousquet, "Law and Customary Law in French North Africa," *Journal of Comparative Legislation and International Law* (1950): 63–65.
[44] Adolphe Hanoteau and Aristide Letourneux, *La Kabylie et les coutumes kabyles* (Paris : Impr. Nationale, 1872) : T II, 2283-2318.
[45] Morand discusses these practices at length in *Études*: 140-143. His information is mainly drawn from the much-cited study of Kabyle law and women by Hanoteau and Letourneux, ibid.
[46] Morand, *Études*: 148-152.

French civilization nonetheless followed a methodology of "respect for [Kabyle] qanouns, even those which are immoral."[47] The problem of child betrothals caught his attention early, and, in 1882, he initiated a series of comprehensive referenda, working closely with tribal leaders, to bring about a reform of Kabyle custom, one village at a time. This project seems to have in fact been quite successful, and within five months, seventeen villages agreed to set the minimum betrothal age for girls at 13 or 14 years, and to restrict the rights of parents to "sell" their daughters, allowing them instead "to sell themselves freely" (presumably, this also meant directly receiving the dower). With this grassroots groundwork set, Sabatier hoped next to attain institutional ratification from Governor General Tirman (r. 1881-1891). However, thanks to the "*rattachement*" legislation, which had fused colonial bureaucracies with metropolitan ministries in response to settler demands, the governor general had only recently been stripped of his ability to unilaterally issue such legislation, particularly legislation as "*indigènophile*" as that which Sabatier was proposing.[48]

The rights of parents, especially fathers, over their children's sexuality and marriage choices constituted a challenge for which functionaries enforcing civil registration were not prepared. For example, in 1895, a Kabyle man tried to register his marriage to a nine-year old girl with the *état civil* of Tizi Ouzou. In response to a request for instructions, the prefect of Algiers advised that, as this matter was not explicitly addressed by the law of 1882 on the État civil des indigènes, the marriage should be "simply and purely" registered without intervention of any kind. When asked for his opinion, the Attorney General responded by noting that Islamic law has fairly straight-forward conventions on the necessity of puberty for the legality of marriage, but that Kabyle custom often permitted betrothed parties ("*pseudo-conjoints*"),

[47] Ageron, *Les Algériens*: 287.
[48] Ageron, ibid. These powers were restored in 1896.

including pre-pubescent girls, to live with their intended husbands prior to the actual celebration of marriage, something which "engenders dangerous and odious promiscuities." Though some circulars had advised that 15 should be considered the appropriate minimum age of consent for marriage, no colonial laws to this effect had been issued, and the Attorney General therefore advised that, however regrettable, such marriages must be acknowledged and recorded; refusal to do so would be considered "arbitrary."[49]

In actual fact, many of these unsavoury practices were relatively new to Kabyle society, or had increased in their rate of occurrence as a result of economic depression and land dispossession. Indeed, throughout Algeria, since the earliest years of the French presence, impoverished families turned to desperate measures, including the "sale" of daughters into marriage at increasingly young ages.[50] Whatever the frequency or reasons behind these betrothal and marriage contracts, their *consummation* usually took place against both the child's and their parent's wishes, and, as we will see, became the subject of many legal battles filed in Kabylia's colonial tribunals. The upturn in frequency of such unions coincided, ironically, with their codification. The multi-volume tome by two military administrators stationed in Kabylie, Adolphe Hanoteau and Aristide Letourneaux, entitled *La Kabylie et les coutumes Kabyles* (1893), has until this day been one of the most cited works on the inhabitants of the Kabyle mountains. In their role as part-time ethnographers, Hanoteau and Letourneaux collected the "codes" of each Kabyle village from the oral traditions, mostly memorized by village elders, and then reassembled them in the order of the Napoleonic Code. The work they produced thus also served as an indispensable reference for the French magistrates, who were encouraged to use it to adjudicate in inter-Kabyle disputes. Many of the practices codified through Hanoteau and

[49] ANOM ALG GGA 12H53. Sub-Prefect of Tizi-Ouzou to Prefect, 1 July 1895. Prefect forwards info to GG, 6 July 1895. GG forwards problem to PG, 24 July 1895. PG responds to GG, 21 Sept 1895.
[50] Lazreg, *Eloquence*: Chapters 1-3.

Letourneaux's work were not necessarily in wide currency, or were recent case law which they took for timeless standards[51], and later colonial jurists like Henri Bousquet would mock what they saw as the magistrates' obsequious adhesion to this "Kabyle Bible."[52] This "invention of tradition" was further entrenched by French judges who embedded the practices they were presumed merely to regulate.[53]

Whatever Sabatier's success at negotiating reforms from within Kabyle communities, his policies did nothing to address the more fundamental problems of poverty that had been imposed upon the region.[54] The marriage market represented both a source of relief in the absence of any state assistance, and entrusting one's child to the care of another adult, though they often turned out less trustworthy than expected. Moreover, as the following section will detail, the arrival of Catholic missionaries would only introduce a new clientele and influx of capital into the marriage market that their mission had putatively set out to eradicate.

In sum, as the nineteenth century progressed, the gender politics of the Kabyle Myth were notably characterized by various productive tensions. As Lorcin comments, belief in Kabyle assimilability began to fall slowly out of fashion after the insurrection of 1871, though it did not fade completely.[55] Its residues, I would add, are especially visible in the reformist attention to women. The proverbial Kabyle Woman inhabited a reformulation of the Kabyle Myth by which her assimilability and oppression were coterminous rather than contradictory. As the 1892 story of "Fatima" at the start of the previous chapter illustrates, rather than disrupt the Kabyle myth, the suffering endured by Kabyle women through customary laws and a more severe gender

[51] Judith Scheele, "A Taste for Law: Rule-Making in Kabylia (Algeria)," *Comparative Studies in Society and History* 50, no. 4 (2008): 895-919.
[52] Henri Bousquet, "Un culte a détruire: l'adoration de Hanoteau et Letourneaux," *Revue de la Méditerranée* 8 (1950) : 441-454. Ageron would later agree, calling its use "antique legislation. Ageron, *Les Algériens*: 284.
[53] Ageron, ibid: 281-284.
[54] Ageron, ibid: 290.
[55] Patricia Lorcin, *Imperial Identities*: 176-177.

hierarchy only heightened the urgency of state interventionism. At a closer proximity, the reframing of Kabyle women as more downtrodden than Arab women only enhanced their candidacy for assimilation, compared with either their men or Arabs of either sex.

This new perspective on Kabyle law is why, when Morand's codification project came under consideration, it was hoped that its effects would be especially felt by Kabyles – even if it began with those living in Maliki-majority urban milieus. Sabatier's reform project, though of limited success, demonstrated the mutability of Kabyle law for reformers like Morand who came later. Executive orders were issued based on this perception, such as the decree of 1 August 1902 regulating guardianship of minors and disabled persons, whereby the absence of "precise provisions" allowed the "intermittent application of French law."[56] By 1929, Kabyle women were permitted to file for naturalization independent of their husbands. It is not enough, however, to simply state these laws as evidence of the Kabyle Myth at work. To understand them, we must expose the reactions and strategies devised around them by colonized subjects, especially the Kabyle women and girls, who were their objects.

Consent by Conversion: Lavigerie's Missionaries in Kabylia

Though Sabatier was an ardent evangelist for the assimilability of Kabyles, using not the gospel but anthropology and race theory to advance his claims, his competition in this zeal was a renowned giant of Catholic expansion in the African continent. Charles Martal Lavigerie, the archbishop of Algiers and great Christianizer of Africa, was the first to bring administrative attention, beginning with Admiral de Gueydon, to the potential for a French foothold offered by the "mountain Kabyles."[57] Though they shared certain views when it came to reform, Lavigerie and the radical and anti-clerical Sabatier butted heads on numerous occasions, sometimes

[56] This law effectively reversed a decision by the Court of Appeals in Algiers of 1887, which determined that in case of the father's death, the right to custody should be refused to the mother. 12 Dec 1887, RA 1888: II, 87.
[57] Ageron, *Les Algériens*: 273.

pleading with each other's superiors for the other's removal. For Lavigerie, the attraction of Kabyles sprang not from a supposed intrinsic "anti-clericalism," but a long-suppressed Christianity, buried in the memory of these "nominal" Muslims, that had never been fully extinguished by Arab domination. Though Lavigerie would not live to see his vision reach fruition in Kabylia, as it had elsewhere throughout the continent, the two missionary orders he established, the Missionnaires d'Afrique and the Soeurs missionnaires de Notre-Dame d'Afrique – better known as the 'White Fathers' and 'White Sisters,' respectively – would eventually see his objectives through, leaving an inedible mark on the region. To this effect, the work of the White Sisters in particular helps elucidate the sexual politics of the *mission civilisatrice* and its production, following J.P. Daughton's argument, through an uneasy but necessary partnership between anti-secular missionaries and republican administrators.[58] Their history also provides an important angle on the strategies – legal and otherwise – that Kabyle women and girls developed in response to the upheavals happening around them.

Even as Catholic outreach in Kabylia hinged on its fabled Christian heritage, the newly apparent suffering endured by Kabyle women only gave credence to Catholic renewal. Buoyed by reports from the mission field that Muslim women displayed none of the "fanaticism" of their men, possessing not a written Islamic tradition, but more local spirituality and "superstitions," Lavigerie had established a women's order in 1868 to complement the work of the White Fathers. Within a few years, however, the Fathers would come to rely so heavily on their female counterparts that Lavigerie pronounced the salvation of Africa entirely dependent on women.[59]

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[58] J. P. Daughton, *An Empire Divided Religion, Republicanism, and the Making of French Colonialism, 1880-1914*. (Oxford: Oxford University Press, 2006): 15-17.

[59] Archives générales de la société des Soeurs Missionnaires de Notre-Dame d'Afrique (AG-SMDNA). Rome. Letter to the Association of Mary Immaculate for the conversion of pagan women, Oct 1886. See also: Colonel de l'Éprevier, *La Révérende Mère Marie Salomé, Supérieure Générale des Sœurs Missionnaires de N.-D. d'Afrique,* (Paris: Gabriel Beauchesne, 1935) : 71–72.

Echoing the humanitarian, "regenerative" style of colonizing popular during the Third Republic, their primary goal was frequently summarized in Church literature as "the regeneration of the Muslim woman, and through her the family and society."[60] His enterprise thus mirrored, and put into action, the view expressed by Sabatier that "it is through women that we can get hold of the soul of a people."[61]

Initially, the White Sisters in Algeria were charged primarily with "penetrating the harem," usually by offering on-site medical assistance.[62] But with time, they took on an increasing number of duties, chief among them running the girls' schools, offering training in skilled work, and staffing the "orphanages" through which the better part of their proselytization was achieved, though direct conversion was officially forbidden by the colonial state.[63]

Most notably, for our purposes, these missionary orders, both the Fathers and Sisters, also arranged Christian marriages for and between their young converts who had reached adulthood. In a few cases they had assembled enough of these *ménages chrétiens* to create fully-fledged "Christian settlements," consisting of several families, each of whom received a small dwelling, a parcel of land, tools, and some livestock. The *ménage chrétien* rested on one virtue above all: monogamy. For the missionaries, this domestic ideal carried emancipatory meaning, particularly as an antidote to polygamy, concubinage, and other "immoral practices associated with female slavery."[64] Though the formation of Christian households was a standard practice of nineteenth-

[60] Kittler, Glenn. *The White Fathers* (New York: Doubleday, 1957): 10.
[61] Ageron, ibid.: 288.
[62] As one White Father put it: "In Arab missions the help of missionary sisters is especially valuable, because Muslim women are entirely cut off from the world outside purdah [sic]; but the Sisters, being women, can always gain admission." Quoted in J. Bouniol, *The White Fathers and Their Missions* (London: Sands, 1929): 108.
[63] The adoption of orphans began during the famines of 1867-68 that utterly ravaged the Algerian countryside, leaving many children abandoned. That said, archival research shows that many of the children entrusted to the missionaries' care had one and sometimes two living parents, who simply could not afford to keep their children, and were left with few other options.
[64] Aylward Shorter, *Cross and Flag in Africa: The 'White Fathers' during the Colonial Scramble (1892–1914).* (Maryknoll NY: Orbis, 2006): 76. One can only speculate as to *why* and *how* the missionaries came to describe the

century Catholic and Protestant missionaries the world over, the White Fathers and Sisters were unique for the continuity they envisioned between their abolitionist activities in sub-Saharan African and the tactic they had begun to employ of *rédemption* or "ransoming" of Kabyle women for Christian marriage. (See Appendix: Figures 1-3 for images from the mission stations in Kabylia.)

Before his passing in 1892, Lavigerie had been eager to see the White Sisters settled in Kabylia, and they found particularly firm footing there. They arrived at Ouadhia, in the commune of Fort National (Tizi Ouzou) in Grande Kabylie, in 1887, founding their own post adjacent to that of the Fathers. A year later the missionaries were celebrating their first Christian union, as the Fathers detailed,

> Further joys await us, as soon we will have the first Christian Kabyle marriage. We are already preparing the house for our dear initiate [and] the Sisters are preparing his wife for him, giving her instruction every day, in order that she might be baptized before her wedding, as desired by her intended.[65]

Ouadhia was also home to the oldest Catholic school for girls in Kabylie, founded in 1868 by the Sisters of the Christian Doctrine, and made secular in 1886.[66] By 1895, the Ouadhia station counted not less than a dozen families, making it the second largest of the White Fathers'

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young women they rescued from unwanted or precocious marriages as having been "ransomed," which may indeed be traced to any number of factors. For one, in sub-Saharan Africa and the Saharan oases, marriage very often *was* used as a crude disguise for forms of bondage, and the presence of missionaries could provide a path out of slavery for women if colonial state assistance was not forthcoming. Second, missionaries interpreted the Muslim dower and other African bridewealth systems as tantamount to the sale of women which reduced them to commodities exchanged between men. Furthermore, they may have seen their activities as commensurate with the form of woman-initiated divorce in Islamic law called *khul*', literally meaning to "ransom" oneself by forfeiting any claim to the dower. Finally, the sum of these experiences may have been collapsed all too easily into the Catholic legacy of redemptive orders in the era of Corsair piracy and captivity, in which the missionaries were well versed.

[65] Archives de la société des Missionnaires d'Afrique (A-SMA). Rome. Ouadhia Mission Log, 24 June 1888 : 34.

[66] Subsequently, thirty-six "notable persons" from Fort National petitioned to maintain religious control of the institution, since, having been there for twenty years, they had "gained the sympathies of a good part of the population." *Dépêche Algérienne*, August 4, 1887.

Christian settlements, just behind the older El Attaf orphanages.[67] Yet, if this rapid success seemed to live up to Lavigerie's predictions, archival research suggests a political-economic, and even at times exploitative, set of factors behind the Ouadhia station's growth. Indeed, the ways in which missionary, secular-administrative, and judicial fixation on Kabyle women and girls both informed each other and ran into conflict deserves closer attention.[68]

The White Sisters' schools in Kabylia were habitually better attended than the Fathers' school, giving the Fathers hope that, "if we can convert the women, how quickly the others will come!"[69] Yet whatever the capacity of White Sisters to more easily approach Muslim women, in Kabylie the missionaries were frequently stymied by a shortage of convert or catechumen women to marry their converts. Potential wives thus had to be sought through other means – eventually, by engaging in the very modes of "purchasing" women that the White Fathers claimed to combat.[70] Most commonly, the Fathers brokered these arrangements on behalf of male converts; a Kabyle convert would inquire about a potential bride with her guardian, and then ask the missionaries for help with the dower.[71] It thus seems likely that many men were attracted to the missionaries to facilitate their betrothals in the absence of other financial means. Indeed, the

[67] It was to Ouadhia that noted memoirist Fadhma Amrouche was first brought by her mother, but she left shortly afterward because of cruel treatment. She includes descriptions of the dire conditions that brought some "orphans" to the station. Fadhma Amrouche, *Histoire de ma vie* (Paris: La Découverte, 2000) : 27–28.

[68] Karima Direche-Slimani, for instance, takes up the study of Kabyle converts (*m'tournis*) and the impact of the White Fathers in the region in unprecedented and incisive detail, though her inquiry does not extend to women's recruitment to Christian wifehood and motherhood. Karima Direche-Slimani, *Chrétiens de Kabylie, 1873–1954: Une action missionnaire dans l'Algérie coloniale*, Saint-Denis: Bouchène, 2004) : 48.

[69] A-SMA , Ouadhia, May 1903, p 160.

[70] According to Direche-Slimani (Ibid.: 104), at the Beni-Yenni station, the prospective groom paid the missionaries one hundred francs, which became the property of the bride in case of divorce. By insisting on "mainstream" Muslim dower practice, the Beni-Yenni Fathers may have avoided falling into the "vente odieux" of women, but this was not regionally uniform. Given that the *rachat* of Algerian women was publicized as far as the mission quarterlies in Quebec, in which funds for these redemptions were also solicited from faithful readers, it may be assumed that the situation at Ouadhia was more typical. As documented in *Visite de Notre-Dame d'Afrique aux Foyers Canadiens* (1912) : 97–106.

[71] The missionaries readily adapted to local practice – such young men tended to marry within their kin-group, often a cousin.

White Sisters and Fathers arrived in Kabylie precisely in time to capitalize on the state-imposed economic turmoil in the region which created the ideal conditions for their redemptive interventions. By 1890, the Fathers' activities had gained colonial state attention, after some parents complained to the authorities that the missionaries were kidnapping Kabyle children.[72] Although Governor General Tirman regarded their activities as an "abuse" of Kabyle families in desperate need, no action was taken to stop them, since, it was decided, they had never acted in violation of local customary laws.[73] In this way, the missionaries enlisted for their own cause the "fertile wombs of Kabyle girls" in which Sabatier had placed such high hopes.

Perhaps the most celebrated Kabyle convert, Fadhma Amrouche, gives us a rare personal account from the bride's perspective on how the marriage of converts was arranged and executed. In her case, the missionaries paid the dower owed to Amrouche's family because, though the groom was wealthy, he was marrying without the consent of his family. Amrouche describes the process by which her dower was handed over: "My brother stopped me in the street and asked after the dower: one hundred francs. I found Mother Saint-Jean who gave me the sum, and Lâmara left, hardly satisfied, as he felt I was worth more!"[74]

As with elsewhere in the colonial mission field (most notably in the French Soudan[75]) where these missionaries had involved themselves in the local matrimonial economy, they were also often obligated to defend their converts, and their interests, in court. For instance, in a crucial turn of events in the spring of 1892, a local Kabyle man removed his daughter from the White Sisters, claiming that she had already been married when the Fathers "bought" her. The

[72] ANOM ALG GGA 16H/144. Correspondence from subprefect of Cheliff to Prefecture of Algiers. 7 July 1893.
[73] ANOM ALG GGA 16H/144. "Jeunes filles Kabyles et Soeurs Blanches." Letter from GG to the Prefect of Alger. No. 2784, 17 April 1890.
[74] Amrouche, *Ma vie*: 87.
[75] Martin Klein and Richard Roberts, "Gender and emancipation in French West Africa." In Pamela Scully and Diana Paton (eds.), *Gender and Slave Emancipation in the Atlantic World* (Durham: Duke University Press, 2005): 171.

dispute was taken to court, very likely in Tizi Ouzou, but the Fathers were sure they would win the day. As the Fathers predicted, the justice of the peace ruled in their favour, even threatening the girl's father with an exorbitant penalty of 3000 francs should he make any further attempts to have her married. This decision left a strong impression on the villagers and emboldened the missionaries to continue with redemption in Kabylia unimpeded.[76]

The Fathers continued to do well by colonial justice in Kabylia. In 1898, for instance, a young resident named Smina went to court accompanied by her parents to "ask the judge to deliver her from the power of the man to whom she was sold too young." He "granted her liberation" and permitted her to "live with the White Sisters and study the Christian religion."[77] When a complaint similar to the first case, above, was addressed to the attorney general in 1904, the Fathers responded with confidence that "Kabyle custom is on our side." The matter was quickly dropped.[78]

It is perhaps little wonder that the White Fathers and Sisters litigated with such success in Kabylia. By this time they had become experts in their own right, not only in Islamic law and in its colonial variations and hybrids, but also in assessing and manipulating local dynamics and customs to meet their objectives. By the last decade of the nineteenth century, they had developed a veritable specialized wing of career scholars and consultants in these domains. In this respect, the White Fathers and Sisters seemed especially interested and even invested in the program for colonial legal management espoused by Marcel Morand. Informed by his ideas, they crafted a position on law reform that both promoted assimilationist "progress" and accepted some degree of pluralism as a condition of colonial rule.

[76] A-SMA . Ouadhia,, Mar–April: 48-49.
[77] Ibid., Oct. 1898: 103.
[78] Ibid., June 1904: 183.

Perhaps the most prominent of these White Fathers was André Bonnichon, who, in 1931, wrote a doctoral thesis on the legal status of converts to Christianity in Algeria, giving special attention to Kabyle converts.[79] To the Church's frustration, converts to Christianity remained subsumed under Muslim personal status, while the conversion of French citizens to Islam affected neither their civil status nor their political rights.[80] The White Fathers and Sisters were strong voices in a chorus of lay and church advocacy for the automatic "naturalization" of all native converts to Christianity.

One of Bonnichon's most important personal mentors in the study of colonial law was none other than Marcel Morand. Though Bonnichon's thesis was devoted to the plight of converts, he buffered his argument with elaborations on the suffering of Algerian and especially Kabyle women, particularly in matters of inheritance, consent in marriage, and men's unilateral divorce. After rejecting various techniques for resolving legal conflicts and injustices, especially those to women, Bonnichon advocated for a "colonial public order," building on the thesis of Henry Solus, which would bring Islamic and customary laws in closer alignment with French justice.[81] While Morand was guiding Bonnichon's work, he himself submitted a draft decree to increase converts' procedural access to French civil justice, including innovative articles

[79] Bonnichon would later go on to advocate for marriage law reform in French West Africa, described in a dispatch from Ouagadougou (Burkina Faso) on the "total subjection of women […] their lack of liberty in questions of marriage, and, consequently, the near impossibility of their conversion" – problems which called for a "juridical solution" and further "intervention in Dakar, in Paris, and in Rome." *Rapports Annuels, Missionnaires d'Afrique* (1932, no. 27) : 223.

[80] Larcher, RA 1910 : I, 375.

[81] André Bonnichon, *La Conversion au Christianisme de l'indigène Musulman Algérien et ses effets juridiques* (Paris: Sirey, 1931): 132-152. Though Bonnichon saw judicial review as a viable source of colonial law along with law codes and decrees, he warned that one "should not be deceived by the virtues of *jurisprudence*," and cited its adverse affects on Kabyle women specifically (pp 136). See also: Solus, Henry. *Traité de la condition des indigènes en droit privé; colonies et pays de protectorat (non compris l'Afrique du Nord) et pays sous mandat* (Paris: Recueil Sirey, 1927).

allowing women married to Catholic converts to apply for French status in civil matters, whether or not they had themselves converted.[82]

Another missionary-scholar who was influenced at least intellectually, if not personally, by Marcel Morand, was the White Sister Marie-André du Sacré-Cœur. Holder of a PhD in Law from Lille University, Sister Marie-André wrote prolifically in the 1930s and 1940s and produced, among other things, an ethnographic study on West-African women. This study, which cited heavily from Morand's work on Islamic law and the Muslim family, concluded that the Islamization of Africa had enshrined polygamy into law and had reduced marriage to "an act by which a man buys a woman."[83] She later served as an important interlocutor on a series of reforms to marriage law in the French Soudan and A.O.F., but her attentions were also turned on many occasions to the plight of Algerian women. In 1931, Sister Marie-André gave an address to the Académie des sciences coloniales on Kabyle women in light of the recent "Centenary Laws" (discussed below). There she repeated various gendered underpinnings of the Kabyle myth and the status of women in Kabyle society, but proceeded to stress more insidious barbaric practices, namely, the "selling" of daughters into early marriage and the ease of repudiation. Marie-André of course cited these practices as evidence of a distorted concept of family "totally different from our own."[84] It is less clear whether or not she realized the ways in which these distinguishing features of the Kabyle dower had directly informed the particular kind of "redemption" the White Fathers' and Sisters had come to employ there.

What about the women on whose behalf these missionaries were speaking and writing so vigorously? Though they appear only passively, often in the background, in the White Fathers'

[82] Bonnicon, ibid.. : 139–142.
[83] Sœur Marie-André du Sacré-Cœur, *La Femme noire en Afrique Occidentale* (Paris: Payot, 193): 210.
[84] A-SMA . Marie-André du S-Coeur, "Communication faite à l'Académie des Sciences Coloniales le 18 février 1931: Situation Juridique et Relèvement de la Femme dans l'Afrique du Nord."

mission logs, from the records of the White Sisters we get a better sense of who these young women were and what brought them to the mission schools and orphanages. For those women who had been "redeemed" and married to one of the Kabyle converts, and even for many of the younger girls who had been raised in one of the orphanages, their relationship with their natal family and village was never fully severed. On more than one occasion, when their arranged Christian marriage proved burdensome, and in some instances abusive, they did not hesitate to leave the station to resume living with nearby parents or other relatives.[85] To give one example, in the spring of 1900, a young woman christened Virginie, married to a convert only some months earlier, left the Christian village claiming spousal ill-treatment and threatening to revert to Islam. The Fathers blamed her change of heart on her mother, who was not a devout Muslim, but far worse – a witch.[86] Specifically, the Fathers felt they had been taken advantage of, and that Virginie's mother was scheming to profit from her daughter by "selling" her multiple times.

By this same token, just as male converts and their families may have seen the missionaries as a convenient source of capital in the contracting of their betrothals, we may view missionary interventions on behalf of female "*rachats*" as one in a constellation of new actors and instruments that Kabyle women were engaging with. Just as the White Fathers and Sisters capitalized shrewdly on local socio-economic and legal dynamics in Kabylia, so too did many Kabyle women, girls, and their families develop strategies around the appearance of state and non-state actors and instruments in this period of immense transition. Given the succession of fees and procedures required to file a civil suit (discussed in the next chapter), these and other missionary orders may have been a vital source both of funds and practical know-how for women who turned to colonial courts for recourse. The White Fathers may have represented

[85] Such as a woman christened "Pauline," who fled in December, 1907. A-SMA . Ouadhia*:* 243.
[86] Ibid., May 1900: 117.

these women in court as though they were their legal guardians, but we should not presume their unique motivation or design of these cases simply because it is their records, reflecting their perspectives, through which these episodes have been recounted. Indeed, the public battles over "consensual" marriage and divorce rights that the White Fathers and Sisters were staging in the name of their mission were also being played out in the very same courtrooms by Kabyle women representing themselves. It is to such cases that this chapter now turns.

Hamama Bint Mohamed ou Amar's landmark divorce (1899)

When the young woman who appears in the diaries of the White Fathers simply as "Smina" appealed to French justice in 1898 for permission to live with the missionaries rather than marry a stranger against her will, she and the station Father who went with her very likely had their case heard in Tizi Ouzou, the nearest tribunal to the Ouadhia station, and in whose jurisdiction they lived. Just one year later, in January, 1899, the Justice of the Peace at Tizi Ouzou would issue landmark jurisprudence that radically changed the legal terrain of marriage and divorce law in Kabylia and the Algerian colony as a whole. In colonial Kabylia, as in the metropole, the secularization of divorce laws and its relative benefits to women and "the family" were tested as they had never been.

The case of Hamama bint Mohamed ou Amar (Hamama hereafter), presents a number of points for analysis, some of which we will deal with here, and others that will be discussed in more detail as this and the following chapter unfold. We will turn our attention, for the present discussion, to the precedent set by her case regarding Kabyle women's consent and divorce rights, and the victory it symbolized for legal unification and the expanded authority of the civil courts.

In November, 1898, Hamama, age fifteen, had fled the home of her husband, Bouzid Mohamed ben Abdelaziz, age twenty-seven, to return to her natal family. He pursued her in court and demanded that she either be forced to return to his home, or that she be declared in a state of "insurrection."[87] The case came before Justice Gaston Ricci, originally from Blida and descended from an established *colon* family. He was known among his colleagues to espouse the position that customary law was inadequate to address many of the problems facing Algerian, and especially Kabyle, women, and should not be reformed or codified, but eradicated. Hamama's defence, and request to be divorced instead of held perpetually in insurrection, rested on two factors: first, her husband's mistreatment, and, second, her inability to "sustain intimate relations with him, to which her husband obliges her to submit, the latter being too robust for her." She alleged, therefore, that "her health has already been gravely compromised by the troubles occasioned by the advances of her husband." Though he denied any abuse, and though no witnesses could verify Hamama's claims, his violent temperament had already been demonstrated by a conviction two years prior in the repressive tribunal of Tizi Ouzou to six months in prison plus damages for injuries inflicted with an "unknown savagery" upon his first wife.[88]

As for her other allegation, both parties had "submitted voluntarily" to a forensic exam by a local doctor, who reported that "there exists a real disproportion between the [respective] volume of the genital organs of the husband and wife," and that the latter "suffers from an intense and chronic vaginal inflammation." (The matter of medical and forensic evidence in such cases is discussed at length in the next chapter.) As stated in the ruling, all of these factors together were sufficient to explain why "the young woman exhibits a sort of horror" in relation

[87] RA 1911: II, 519.
[88] Ibid.

to her husband and the possibility of returning to his home. Abdelaziz was unwilling to consent to an Islamic judicial divorce, even though the dower would have been returned to him. This seemed to have left Hamama with no options, except that two highly controversial pieces of legislation created a certain, if thinly justified, solution: the 1884 Divorce Act that withdrew divorce from Church authority in the metropole, and the 1889 decree on the supremacy of French judicial principles and access to French law by "non-naturalized" Muslim subjects (discussed in the previous chapter).

Ricci's ruling acknowledged that local laws and customs were protected from French interference in general, and in Kabylie in particular through the 1874 treaty. But the Act of 17 April 1889 allowed him to sidestep this minor point, having instructed French authorities to defer to French legal norms, and which he further described as protecting French judges from "remaining enslaved to sometimes barbaric and monstrous customs." This law was particularly relevant, Ricci added, in cases involving Kabyle women, known to suffer acutely as "human objects" of their men.[89] Moreover, given the doctor's report, to return her to her husband's use would be a violation of the "laws of nature." Knowing his "exceptionally robust constitution," Abdelaziz had been mistaken to "take a child of fourteen years for his wife."[90] Ricci also determined that the clause of the 1889 decree that permitted non-"naturalized" Muslim plaintiffs access to French justice in matters of personal status was both applicable and necessary in this case. Thus, an Algerian woman attained a French civil divorce even as the legality and morality of divorce continued to fuel controversy in the metropole and many women struggled to do the same in French courts.

[89] M. Ricci, Judgment. RA 1899 : II, 521-23.
[90] RA 1911 : I, 520.

Ricci's 1899 decision sparked considerable controversy among the juristic class, and was cited henceforth as an example of audacious adjudication in the service of French hegemony. He followed this ruling a few years later with a similar outcome at Fort-National in 1902.[91] For assimilationists, a blueprint was finally presented for how to enforce French law and end the scourge of "legal rape" that colonial justice had until then been helpless to staunch. For others, Ricci's daring, though admirable, decision went too far in tempting native elite backlash. Two divorce suits were pronounced – one in Tizi Ouzou (1902) and the other in Guelma (1907) – against the women who brought them in the name of upholding French commitments to preserving customary law.[92] Nonetheless, by using the 1889 decree to apply prior metropolitan legislation (the 1884 Divorce Act), Ricci shifted the institutional centre of gravity in such matters from the more purely administrative concerns of the État civil des indigènes over to the courts and jurisprudence, where it would more or less remain for another three decades. The same strategy was used, for instance, in the case of Bouhalassi El Hamsa (1915) that opened this chapter. During this period, Kabylia would remain the testing ground for this cavalier style of adjudication, which would also come to include Kabyles living in "Arab" jurisdictions.

Aït Messaoud Guenima's divorce and Roumane Belkacem's voeu (1922)

If Kabyle women came to increasingly use the courts to bring about judicial reforms, elite Kabyle men had the means to address the colonial state more directly through the Délégation financière indigène, created in 1898 to counter the disproportionate representation that settler politicians used to influence budgetary decisions. As early as 1902, Kabyle members of the Délégation issued a *voeu* (policy recommendation) on the need to recognize recent adaptations to Kabyle customary laws in various villages, by which women were demanding divorces on new

[91] *Journal des tribunaux algériens et des Travaux publics. Législation, doctrine, jurisprudence* (1903): 120.
[92] RA 1931: II, 285.

grounds, especially harm and abandonment. One among various *voeux* of the Délégation eventually brought about, in 1903, an end to the Kabyle custom of including widows as the part of a deceased man's inheritance. On several occasions the Kabyle delegates demanded more comprehensive reforms, likely as part of their own agenda to maintain a distinct social and legal identity from the Arab majority, all of which were rejected or received no response.[93] It is notable that these efforts have gained more scholarly attention in the secondary literature than the initial suits that instigated them.

Notwithstanding these efforts, after Ricci's 1899 decision, the question of women's marital consent and divorce options in Kabylia lay dormant for over twenty years, during which the Parquet refrained from ratifying Ricci's decision. This period also witnessed the First World War, which brought many Algerian men to European warfronts, often leaving their wives and family alone with little or no means for years, sometimes never to return. In the interim, Marcel Morand's Code had been distributed to magistrates and *qadi*s across Algeria, and included an article stipulating that in "Arab jurisdictions" personal status cases of Kabyles and other Berbers must accord with Maliki jurisprudence, though never applied. Although Morand had also insisted on the applicability of his Code in Kabyle jurisdictions, the Chambre de révision musulmane in Algiers remained the only authoritative source on the proper application of Kabyle custom, and a reliance on the law of 1889 to "Frenchify" rather than "Islamize" Kabyle law was the preferred avenue for reform.

Ricci's adjudicatory manoeuvre was only officially endorsed in 1922, when the Chambre de révision musulmane intervened in the case of Lhocine Naït Messaoud (Mohand Boudjema ben Ali) vs. Aït Messaoud Guenima. A previous decision issued by the correctional tribunal of

[93] As a response from the parquet explained in 1907: "The Kabyle section [of the delegation] is not qualified to solicit a reform of such importance," adding, moreover, that, "having promised to respect the qanouns and customs [France] cannot touch [this question]." Quoted in Mahé, ibid.: 284.

Tizi Ouzou in October, 1921, had sentenced Lhocine to 100 francs in fines and one month in prison for the beating and injury of his wife, Aït Messaoud Guenima. His wife appealed this decision, not because she objected to his sentence, but because she was not also granted the main objective of her suit: a divorce from her husband. Upon this appeal, the following January, the civil court at Michelet sentenced him to a fine of 1000 francs. This was highly significant, given that similar sentences often incurred penalties as little as 5 francs or a few days in prison, but while Lhocine's actions were seen fit to criminalize and punish severely, they still did not warrant the divorce Guenima sought. It was this decision that Lhocine tried to have reversed, claiming that it violated Kabyle laws allowing husbands complete liberty to batter or even mutilate their wives, and so he may have owed civil reparations but insisted that the criminal charges should be dropped. When this case was referred, finally, to the Chambre de révision musulmane, it occasioned a profound reflection on the exceptionalism of Kabyle law and the agency of Kabyle women. Accordingly, the decision noted that,

> … [T]he simple fact that a Kabyle woman risks taking legal action against her husband for the dissolution of her marriage due to brutality and violence, contrary to ancestral customs, demonstrates that something has changed in her mentality; that she intends to protest […] and it is fitting [*il y a lieu*] to help her and encourage her on this path.[94]

The referral of Guenima's case by the Parquet was itself brought about by a series of requests from the state prosecutor at Tizi Ouzou, complaining that

> for many years, numerous justices of the peace in the arrondissement of Tizi Ouzou have presided over divorce requests introduced by Kabyle women, [some] based on the long absence of their husbands […] while other divorce requests based on the terrible treatment exercised by husbands over their wives have been brought to the Tribunal at Tizi Ouzou […], and even various decisions by the Justice at Fort National have admitted divorce in the case of ill-treatment.[95]

[94] RA 1922: II, 83.
[95] Ibid.: 85.

This decision, and the memoranda it produced changed the existing law in two important ways: First, it declared with a certain confidence that

> If Kabyle law forbids a brutalized wife from demanding a divorce, the time for a new and more humane conception of the rights of woman has arrived. The evolution of this idea has achieved sufficient progress to constitute a new custom to replace the old one, and the moment has come for the tribunals to recognize and consecrate it.[96]

Second, it held that men convicted of such brutality would be subject to the "double sanction" of both penal law and civil reparations. This second aspect would have considerable impact not only on cases of abuse, but also those in which the bride's consent to be married, because of her age or otherwise, was in question.

This decision also acknowledged a *voeu* of the Kabyle contingent of the Délégation financière indigène, proposed on 22 June, 1922, by delegate Roumane Belkacem. It seems Belkacem's proposal was inspired by Guenima's case and others like it, as it pressed for recognition of the "barbarous" treatment endured by Kabyle women and demanded, *inter alia*, their right to a judicial divorce. Yet Belkacem's bold call for reform harboured a preservationist impulse: he insisted that these specific aspects of Kabyle law were outmoded and in urgent need of renovation, but that a broader program for the codification of Kabyle custom was not desirable. To his particular consternation, in 1920, the Procureur général had drawn up a plan to have Kabyle custom fully replaced by Islamic law, as administered throughout the rest of the colony.[97] Belkacem's reformist proposals are therefore best understood as bearing the hallmarks of "defensive modernization," rather than a concession to the kind of assimilation *Kabylophiles* might have discerned, though Governor General Théodore Steeg (r.1921-1925) did not take it

[96] Ibid. This notion and its language seems to have come in part from Marcel Morand, who wrote a long note explaining the recent renewal of interest in reforming Kabyle laws, which was appended to the decision as published in *RA*.
[97] *Délégations financièrs algeriènnes*, Séance de 22 Juin 1922 : 899.

this way. In response to the *voeu*, he took satisfaction in the fact that "though France has left her adopted Muslim children in Algeria total freedom in their traditions [she] has nonetheless been able to penetrate the mountains with the warm and generous clarity of her light, liberty, and justice."[98]

Within three years of Belkacem's *voeu*, Steeg would put this sentiment into action by striking a committee for the improvement of the legal and social status of Kabyle women. It was directly inspired by Roumane Belkacem's exhortations, but no less driven by the somewhat more remote and mediated wishes of the Kabyle women who continued to bring divorce suits to civil tribunals. Though Steeg's term as Governor General ended that same year (1925), his successor Maurice Viollette (r. 1925-1927) stood the course, and in 1925, Steeg, Roumane Belkacem, and Marcel Morand would assemble, among others, to attempt the most radical law reform since Morand's doomed code of Muslim law.

Against "Islamization" (1926)

Even as this commission, consisting of nine European and four Kabyle members, gathered to begin this work, an episode took place which left no doubt in official minds that the "Islamicization" of Kabyle customary law carried political risks that outweighed its benefits. Yet it also showed how, even as French officials debated over the organization and management of Algeria's existing legal pluralism, Kabyle women were also forum-shopping and developing strategies within these very spaces of ambiguity.

On 23 May 1923, Chelli Mohammed divorced his wife, Belhamlat Taous, whom he had married just over two years earlier. During the divorce hearing, she accused her husband of having chased her from their home after a recent still-birth, which he denied, alleging instead

[98] Ibid. : 903.

that she fled the conjugal domicile of her own accord. Though both were originally from Kabylia, they were now living in Algiers, and both the marriage and divorce act had been issued by an Arab *qadi* there. After the divorce was pronounced, Belhamlat Taous filed a suit against her former husband, demanding alimentary upkeep (*nafaqa*) in the period after divorce (*ʿidda*), and the right to keep their newborn, as per orthodox Islamic law. Her husband countered by citing the *qadi*'s incompetence in such cases, restating article 7 of the 1889 law, which held that only the authority of the French magistrate is recognized in such cases. But the Alger Tribunal's decision had been based on an *arrêt* of June, 1920, by which the Chambre de révision musulmane had determined that Kabyles could renounce customary law in favour of Islamic law, and on this same basis the Chambre rejected Chelli's appeal. Their having married and divorced in a *qadi* court was taken as evidence enough that they had renounced their access to a Kabyle customary process. During the subsequent inquiry, the chair of the court of appeals maintained the correctness of the decision, quoting both Morand and Larcher – the first who advocated in favour of applying Malekite law to Kabyles "*en pays arabe*," and the second who recognized the benefits of gradually reshaping existing laws through judicial review.[99]

This outcome sparked a dramatic outcry from Kabyle notables, who wrote a severely-worded petition to their representatives in the Délégation financière indigène, explaining the "grave error" the higher court had made, which "consecrated a manifest violation of the rules governing public order: personal status." Their letter, as the reference to "public order" indicates, invoked many of the axioms of colonial legal administration and liberal governance to support their case. Technically, their arguments rested primarily on the point that the law of 1889 did not

[99] ANOM ALG GGA 17H58: "Justice Musulman - interessant la situation juridique des Kabyles en pays Arabe." Letter from the Court d'Appel d'Alger: the president of the court's opinion on the judgement of the Chambre des appels musulmans du Tribunal civil d'Alger issued 4 Feb 1926. (The citation of Morand ccomes from an excerpt of the *Avant-Projet de Code* in RA 1917: I, 163).

permit non-citizen Algerian Muslims to relinquish their current personal status for any other, but specifically confined them to the choice only of French law (article 3).[100] Thus, the delegate Roumane Belkacem seemed to have indeed been in touch with his constituency. On numerous instances, Kabyle men, or at least those of the literate class, expressed a strong preference for French law when given the option between that or mainstream Islamic law. Kabyle separatism may have played some part, since a strong prejudice against their Arab coreligionists has long been observed. But we may likewise deduce that by virtue of their positionality within the colonial racial and gender order, Kabyle women like Belhamlat Taous who went to court to protect their financial interests, family honour, or rights to their children, displayed no such hardened fealty.[101] This was despite the social stigma that was known to follow, even rendering a woman unmarriageable in the eyes of the community thereafter.

The Centenary Laws and the "Marital Rape" Question (1928-1931)

The events of 1922-1926 amply demonstrated the long-held belief that Kabyle law and the "Kabyle mentality" were disposed toward Frenchification among colonial jurists and political figures. First, the suits filed by Kabyle women like Hamama bint Mohamed ou Amar and Aït Messaoud Guenima showed that Kabyle women were not only litigious, but seemed to place a degree of confidence in the outcomes of these trials to protect their interests, whatever social stigma they might suffer in their communities as a result. And, at the same time, literate and politically-active Kabyle notables showed their displeasure at the erosion of customary laws in favour of mainstream Islamic law.

[100] ANOM ALG GGA 17H58. "Pétition faite par les indigènes algériens et adresse a l'autorité compétente."
[101] As we will see in the next chapter (and as we already saw in the case of Fatma Chikiken in chapter 2), such "forum shopping" was a strategy employed by Kabyle women both in the French civil courts of Kabylia and in the *qadi* and French courts "*hors Kabylie*."

In light of these developments, reforms to "the status of the Kabyle woman," particularly the granting of divorce rights, seemed poised for promulgation, midwifed by Steeg's commission of 1925. Meanwhile, another set of factors, somewhat external to the world of Kabyle justice, helped energize this effort. The colonial centenary was approaching, to be commemorated in spectacular style during the Paris Colonial Exposition of 1931, among other celebratory events and publications. If a Kabyle willingness to entertain divorce rights for women opened a door for reform, colonial concern for consent in marriage had also re-emerged as a crucial matter of colonial public order. The new Minister of Indigenous Affairs, Henri Bénêt, was especially committed to stamping out underage marriages, which had left, in his view, the most glaring blemish on France's civilizing record in Algeria. Benet urged law-makers to turn their attention once more to the État civil des indigènes, hoping to resurrect it as the primary means by which age of consent and marriage laws were to be enforced, when statute after statute failed to bring about universal compliance.[102]

A renewed push for the enforcement of the État civil des indigènes came from other corners of the colonial legal regime as well. As we saw in the previous chapter, a 1916 decision of the Chambre de révision musulmane, and subsequent memoranda from the Governor General (issued the same year as the Code Morand), had reinforced, contrary to the original 1882 law, the requirement that Muslim subjects report life events to the office of the *qadi*.[103] This decision formed the basis of a law that would be passed on 2 April 1930, modifying articles 16, 17, and 18 of the 1882 law authorizing the État civil of indigenous subjects, and punishing husbands, as

[102] Roussier, "L'état civil en Algérie, Traite théorétique et pratique de la constitution de l'état civil des indigènes algériens, par Henri Benêt, préface de Louis Milliot," RA 1936 : I, 57.
[103] ANOM ALG GGA 17H52. This was the subject of a long exchange between the GG Lutaud and PG Robe (October 1916 to February 1917), on the question of whether the inadvertent "nullification" of non-registered Muslim marriages might result from the law, and other questions also raised throughout the lead-up to the initial 1882 law. The intervention of a *qadi* was made into law in March 1918.

well as *qadi*s and *qadi-notaires* with fines for failure to report marriages – a measure, it should be noted, without precedent in the Code civil, and to which no European settler was also subjected.[104] The question of whether and how to apply these regulations to Kabylia was also raised at this time, and the effort to enforce État civil compliance in the region was carried into the agenda, as we will see, of the "Centenary Laws."[105]

On the wider international stage, the publication of Katherine Mayo's infamous book, *Mother India*, in 1927, sparked a heated debate on the role and responsibility of colonial governments with respect to native sexuality. In it, Mayo detailed a number of Indian social problems related to the family, and concluded that Indians were unfit for self-rule due to their sexual degeneracy, which made them prone to excessive masturbation, homosexuality, rape, venereal disease, and above all sex with children. Though decried in India, Mayo's assessment was well received by British audiences, and on its heels the Child Marriage Restraint Act was passed, in 1929. As Mrinalini Sinha has found, the law did little to actually punish or prevent those who would take part in the marriage of children, and more to demonstrate British benevolence and further vilify Indian men.[106] Algerian women's issues had not crossed the Atlantic in such dramatic fashion, but French feminists had taken notice of the plight of their "Muslim sisters." In the 1890s, suffragist Hubertine Auclert, who lived in Algeria with her husband, a colonial functionary, was the first to bring metropolitan feminist attention to the lives of Muslim women, though she was critical of the colonial government and its settler-friendly policies of the time. In *Les femmes arabes en Algerie*, published in 1900, she stated flatly that

[104] Circulaire du procureur général, no. 2169, 9 Oct 1930. RA1931: III, 8-9. Failure to report was punished with fines between 16 and 300 francs.
[105] ANOM ALG GGA 17H52. "Lettre du gouvernement général au procureur général près la Cour d'appel d'Alger," 19 June 1918.
[106] Sinha, Mrinalini. *Specters of Mother India: The Global Restructuring of an Empire* (Durham: Duke University Press, 2006).

"Arab marriage is child rape," due to the "sale" of girls as objects. To advance this claim, she relied heavily on the "adventure of Fathima," the same young *institutrice* ("Fatima," by that account) who, as we saw in the last chapter, was nearly condemned to remain with her "legal rapist" until metropolitan uproar pressured the judge at Tizi Ouzou to reverse a previous ruling.[107]

In Algeria, a turning point in the jurisprudence and sentencing of child marriage cases came in 1928, in Bougie (Béjaïa), when for the first time a Kabyle man was tried criminally for marital relations with a child bride:

> A Muslim of the canton of Guergour (Lafayette) had received in marriage from his parents, his cousin, a child then nine years of age. The consummation was not to have taken place until the moment the young wife was nubile. However, some time afterwards, the husband, accompanied by four friends, went in search of the young child and brought her, with her mother, to his home where a celebration was held.
>
> After the departure of the mother, the husband, despite the cries, pleading, and resistance of the little girl, violently and brutally consummated the marriage. This affair, brought to the competent civil authorities, was then introduced before the repressive tribunal of Lafayette under the qualification of "injury by clumsiness or imprudence" (article 320 of the Penal Code).[108]

The perpetrator in this case subsequently appealed this conviction, and it was sent to the correctional tribunal, where on 16 March 1927, the French judge declared his incompetence to rule in the case, as a matter of personal status. One jurist later commented that the subsequent memoranda of 27 March 1928 "endorsed [*a sanctionné*] this rape by a moderate application of the law."[109] Since neither Islamic, French, nor customary law contained any concept of "marital rape," it is significant that this case was referred to the repressive courts to begin with. Sites of

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[107] Hubertine Auclert,, *Les femmes arabes en Algérie.* Société d'éditions littéraires (Paris, 1900): 24-26.
[108] Fernand Dulout, *Traité de droit musulman et algérien: doctrine--coutumes--jurisprudence et législation*. (Alger : La maison de livres, 1947). 42-46.
[109] Dulout, ibid. Incidentally, this same year the Parquet issued a memorandum acknowledging the right of minor and non-nubile young women to file personal status suits if they are represented by a *oukil judiciaire*. This was based on a dispute between a father and his daughter, who had married without his consent, in the Guelma Court. No. 447 (30 June 1928). *Journal de la jurisprudence de la Cour impériale d'Alger* 1930: 165.

exceptional law *par excellence*, and the subject of controversy throughout the late colonial period, in this instance their marking of a space "outside the law" was the key factor in introducing this highly unorthodox legal remedy. In any event, even had the court relied fully on the French Penal Code, there was little French jurisprudence to support the allegation. Though sex with minors (under age 15) was illegal in France, the question of whether rape was even possible in the context of marriage had been debated since at least as early as 1817, and there was as yet no precedent on which to charge a husband with raping his wife.[110]

The resurgence of reformist vigour leading up to the hundred-year anniversary of French colonization in Algeria, combined with unconventional new jurisprudence of the previous ten years, culminated in a package of legislative orders dubbed the "Centenary Laws," in 1930-1931. As mentioned, Marcel Morand had led the commission that drafted them, joined by a number of French jurists and Muslim functionaries from Kabylia (overwhelmingly, employees of the court at Tizi Ouzou), as well as members of the Court of Appeals, and the Kabyle representatives Roumane Belkacem and Ameur Tahar. And, not to be left out, Gaston Ricci reasserted his interest in the condition of Kabyle women exactly thirty years after his initial ruling which had set these wheels in motion. Now an elected delegate for Blida and member of the Conseil général, Ricci furnished a report to the Chamber of deputies to advocate for the ratification of the law setting a minimum age of fifteen for non-naturalized Kabyles.[111] This final package of laws was Morand's last major interventionist project before his death in 1932.

During their first meeting, though the numerous *voeux* and sequence of jurisprudence leading to the commission were recounted, the prosecutor for Tizi Ouzou, Raymond Cura, took a moment to remark that "over the past four years," since taking up his position, he had noticed

[110] Chauveau F. Helie et Villy, T IV, no 1879, R. Garraud, Traite 2, ad. T, Vn 1817.
[111] Gaston Ricci, "Mariage kabyle." *Les Annales coloniales*, 24 April 1930. For his service to the colonial state, and particularly as a conseilleur and magistrate, Ricci was named to the Legion of Honour in 1935.

that "Kabyle women are addressing, more and more, the French judicial authorities, whether demanding that measures be taken to regulate their marital situation, or to obtain alimentary pensions. A certain change," he concluded, "can thus be detected in the Kabyle mentality."[112] Indeed, by the time this commission convened, there had been an observable decrease in the number of unions involving children, and so these trials, as well as the Centenary Laws, seem to have been a matter of legislation catching up with social reality, and not the other way around.[113]

When one member asked directly whether the job of the commission was to follow French or Islamic law, the Kabyle members replied in no uncertain terms: "We must," Ameur Tahar insisted, "frenchify and not arabize the Kabyle."[114] Only one Mr. Cherchali, the *qadi-notaire* of Tizi-Ouzou, expressed any scepticism at the success of their endeavour. As the record stated,

> His experience as cadi-notaire did not permit him to affirm that the Kabyle masses are ready to accept a reform of their 'kanouns,' so limited are they. He fears that representatives Roumane and Ameur Tahar, who belong to the elite, mistake their desires for reality. He noted, among others, the difficulties he has encountered and continues to encounter at every instance in the execution of the judgments of the French tribunal, pronouncing divorces in favour of Kabyle women. […] In fact, these judgments remain dead letters: the woman, legally divorced by the French judge, continues, in practice, to live under the domination of her family and she is unable to remarry. Customs and traditions are, in this case, stronger than public force.[115]

These reservations, however, seem to have had little effect, and the commission went forward, awash in the glow of Roumane's optimism – to the latter's own chagrin, as it turned out. By the time of their next meeting, following the report of a sub-commission and presentation of the various *projets de lois* and *decrets* that would eventually make up the Centenary Laws, Roumane was alarmed to discover the gauntlet of bureaucratic and documentary requirements

[112] "La Statut de la Femme Kabyle et la Réforme des coutumes berbères," *Revue des études Islamiques,* 1927: 53.
[113] Ibid.: 55.
[114] Ibid.: 57.
[115] Ibid.: 58.

that his French colleagues were planning to implant into the Kabyle marriage to render it "regular." He feared the new requirements were too complicated, that they would deter compliance, and had "exceeded his recommendations to the Délégation financières."[116] The debates of the 1870s surrounding the État civil des indigènes were for a moment revived, as he and the French representatives argued over whether this gave local authorities undue control over Kabyle marriages, the latter insisting, as did their predecessors, that reporting a marriage did not alter its sacred or secular nature – even if the state had the power to annul any that went undeclared.

On the matter of women's divorce, another debate ensued over the meaning of "mistreatment" (*sevices*) as grounds for women's divorce. Some counsellors, including Norès, thought the original text was too limiting, as it only included "mistreatment, abandonment lasting more than 5 years, or insufficient maintenance." In line with mainstream Islamic law, he suggested impotence, for instance, as grounds for divorce.[117] Others thought this wording was rather too generous. Cura asserted that the law should "protect the woman not only from her husband, but from herself. The suggestions presented by Norès [and others] could present, if they were entirely adopted, a certain danger […]." He later added that "[t]he woman will be tempted to request divorce without any plausible reason and will obtain it too easily."[118] Though the final wording of this clause was maintained more or less in its original form, Cura's almost instinctual reaction against feminine excesses is indicative of the infantilizing and paternalistic tone of the entire enterprise, and the careful balance these lawmakers tried to maintain throughout these proceedings between self-satisfied benevolence and masculine protectionism.

[116] Ibid.: 77.
[117] See next chapter for a detailed discussion of impotence in divorce suits.
[118] "La Statut de la Femme Kabyle": 81-83.

In their final version, among other sweeping changes, the Centenary Laws consisted of two laws (2 May and 2 April 1930) and a decree (19 May 1931), which together effectively outlawed men's unilateral divorce by mandating judicial divorce in all cases, instituted standard practices for women's judicial divorce, and reformed inheritance laws that excluded women.[119] Ultimately, the age of consent for Kabyle marriage was set at 13 for girls. The promulgation of this act nullified the age of consent of age ten set by the Chambre de révision musulmane (as long as consummation was deferred until puberty)[120] -- an example of the "extreme timidity" with which Morand accused the Chambre when it came to regulating Kabyle customary law.[121]

As part of this package, the law of 2 April 1930 reinforcing the État civil was also applied to Kabylia. As such, the *qadi-notaires* of Kabylia, in their role as notaries public, were charged with issuing the only authorized documentation of birth (to assess age) and legal marriage. Anyone declaring an engagement was required to present an identity card, though the actual presence of the parties (namely, the bride) was not required. Moreover, the indemnities for failing to report applied only to husbands and their legal guardians, while the guardians of brides and brides themselves were under no obligations. Widespread non-compliance with the État civil des indigènes made it impossible to ascertain the exact age of a bride in question, and without this vital piece of evidence, it would be difficult to apply this law with any rigour. Thus the partial and ineffectual means of enforcement provided by the law of 2 April 1930 stood in stark contrast to the aggressive aims of the legislation itself. This fact caught the attention of observers

[119] "Arrête du Gouvernement Général précisant les détails d'application et réglant les mesures d'exécution de la loi du 2 mai 1930 sur la déclaration des fiançailles et l'âge du mariage des Kabyles," *Code de l'Algérie Annoté : Supplément 1931-32*. See also : and Louis Milliot. *L'état civil en Algérie, Traité théorique et pratique de la constitution de L'état civil des indigènes Algériens*. Alger: Minerva, 1937 : ch 7 (Les kabyles ; la loi du 2 mai 1930) : 278-311.

[120] "Il suffit, dit la Chambre de révision, que l'épouse ait plus de dix ans pour que le mariage soit valable, pourvu que sa consommation soit différée jusqu'à la puberté et que l'acte de mariage précise qu'il en sera ainsi." (Alger, 30 Nov 1936). *Journal de la Jurisprudence de la Cour d'Appel d'Alger* 1937 : 116.

[121] Preamble to meeting minutes in *Revue des Etudes Islamiques* 1927: 47.

at the time. As one jurist put it, "[h]ere is a solution so strange that we cannot correct it but by searching for acts of complicity."[122] It seems, therefore, that like the Child Marriage Restraint Act passed in India a year earlier, the Centenary Laws of Kabylia had more bark than bite, and prioritized the public performance of benevolent "civilizing" over the provision of meaningful legal strategies to Kabyle women.

Temglid Houria's "Wrongful Consummation" Case (1925-1930)

Even as the Centenary Laws were being drawn up, a controversial divorce case was circulating through the courts that would put their applicability to the test. In attempting to leave her marriage, a fourteen-year old Kabyle girl named Temglit Houria provoked a remarkable confrontation between the Chambre de révision musulmane and its opponents, this time represented by the framers of the statutes of 1930.

Temglit Houria's marriage to Laghoueb Mohammed had been arranged by her uncle and legal guardian, Temglit Mohamad, in 1925, when she was twelve years old. The two men agreed that she would be delivered to him immediately, though under the explicit condition that the marriage not be consummated until she was of a "nubile age." After two years had passed, Laghoueb was drafted to the French armed service. When he returned six months later, he discovered that Temglit had run away. She had escaped to her uncle's home and Laghoueb was unable to force her to return. He therefore brought his complaint before the justice of the peace of north Algiers, and lost; only the first part of the marriage (*imlak* in Kabyle) was decided, but the contract was apparently never finalized, and Houria was not bound to Laghoueb. His appeal the following year at the tribunal of Algiers was rejected and the first decision maintained.

[122] J. Mazard, "La loi du 2 avril 1930 sur L'état civil des indigènes musulmans en Algérie. Etude critique de législation," RA 1934: I, 73-77.

Over the course of these proceedings, Houria accused Laghoueb of forcing sex on her before she was of age, contrary to the terms of the marriage agreement. As a court summary recounts, Laghoueb assaulted Houria "despite her resistance and after having tied her hands."[123] To prove this, she underwent a number of court-ordered medical exams, all of which corroborated her accusations. The judge in the Algiers tribunal agreed that Laghoueb had violated the conditions of his marriage contract, but added that he had committed an act "of such violence and such immorality" that it warranted the divorce she demanded, plus 1000 francs in damages (noticeably, twice the initial dower) to be paid by the claimant to her uncle. Since there were no known grounds for a Kabyle divorce, a civil divorce was ordered based on the precedent set by Ricci in 1899. But, instead of marking the end of Houria's encounter with Laghoueb, this was only the beginning.

Following the failure of Laghoueb's appeal, the case was referred to the Chambre de révision musulmane. The Chambre responded by soundly rejecting the reasoning of the previous decisions. The marriage was not only completely valid and finalized by the standards of Kabyle custom, it ruled, but consummation of the marriage before Houria had fully matured could not be considered a violation of that contract. It confirmed unreservedly that "in Kabyle custom, marriage is a sale […]. Its validity is not subordinate to the will of the bride." Moreover, nothing in Islamic law admits the possibility of conditional marriages. And neither Islamic nor French law provided for leaving a marriage under such conditions. The previous judgements were overturned, Houria was condemned to conjugal reintegration, and she and her guardian were to be charged 20 francs for each day that she did not return.[124]

[123] RA 1930: II, 167-170. RA 1931: II, 279-285.
[124] RA 1930: II, 167-170.

Strangely, the Chambre conceded that Laghoueb's attacks *could*, however, expose him a judicial inquiry and criminal process, and this is precisely what happened. He briefly appeared before a repressive tribunal, but the case was dropped ("*ordonnance de non-lieu pour charges insuffisantes*"), as the judge, just as in the 1928 case in Bougie, was reluctant to deal in criminal court with what could be considered a personal status matter.

While Laghoueb faced the possibility of a criminal conviction, Houria and her uncle asked for a stay of sentence at the tribunal of Algiers. In this interim, Morand's Centenary Laws were passed, creating the possibility of re-opening of Houria's case. In fact, this was the first case upon which the new laws were to be applied. The rationale was as follows: That Laghoueb's criminal process had been abandoned had no bearing on the civil jurisdiction, which could hear the same evidence. Moreover, new laws such as the decrees of 1930 could be applied retroactively. Any Kabyle woman who had previously applied but failed to obtain a divorce could now try again under the new regulations. In particular, the law of 2 May gave Houria access to a civil divorce on the basis of the "grave disservice" she was subjected to by her husband. As for the claimant, the civil court reviewed the same – somewhat puzzling – defence that Laghoueb had prepared for his criminal trial. There, he had presented the usual documentary evidence: a marriage contract issued by the *qadi* of Port-Gueydon in which "consummation of marriage" was defined as sexual relations rather than cohabitation with his wife (though the fact that they had cohabited was not in dispute). More surprising was that before the repressive court, Laghoueb had also professed that he was impotent – an almost unheard of admission – thereby insinuating that Houria had been raped by someone else. The court was not convinced, especially since, as the following chapter will detail, impotence was a standard cause for women's divorce (his attempt to shield himself from a rape accusation only opened him to another breach of the

marriage contract). As such, based on the law of 19 May, 1930, Houria and Laghoueb were pronounced judicially divorced, and the 1000 franc penalty on the latter was reinstated.[125]

In subsequent juridical writing on Kabyle divorce, French analysts frequently contrasted Houria's victory with a similar case whose outcome was not as fortunate. In February 1931, Mousli Zebida, age 15, from El Kseur, in the Kabyle arrondissement of Bougie (Béjaïa), brought a request for annulment to the local French magistrate. When she was eleven years old, she had been married by her widowed mother to a boy of eight, with the delivery of the bride to be delayed until they were both of nubile age. Now old enough to exercise her right of refusal (in Islamic law), she demanded a divorce, as, given that her "husband" was just thirteen, the marriage had never been consummated and the initial contract was therefore unfulfilled. Her opponent refuted this, and so, as with all such cases, Zebida was examined by a doctor. His report stated that she was still a virgin, but instead of granting her divorce, the judge ordered her to return to the conjugal home and gave the defendant another year to consummate the union. A few months later, her appeal was heard in the tribunal at Bougie, but again the court failed to nullify her marriage. Instead, delivery to her husband would be delayed until she was sixteen. A lawyer commenting on the case later wondered how the right of marital constraint (right of refusal) was overlooked in appeals, and suspected that this was "tacitly ratified" by her legal counsel who failed to insist upon the point.[126]

Despite some obvious differences between these cases, French "humanitarian" commentators questioned why the appeal of Temglit Houria eventually succeeded while that of Mousli Zebida failed. Why were the precedents of 1899 and 1922, and the Centenary Laws of 1930, invoked to extract Temglit from her marriage, they wondered, while Zebida was locked

[125] RA 1931: II, 279-285.
[126] Ferdnand Dulout, "Le mariage des impubères dans le droit musulman et les coutumes kabyles," RA 1939 : I, 66-71.

into an agreement made without her knowledge or control, based on a principle (*djebr*) which the French judicial bureaucracy had committed to combat? Though Zebida had not endured the same horrors as Houria, both young women would have had access to the same laws protecting them from underage, if not unwanted, marriage. And, conversely, both suits were initially dismissed on the same grounds that viewed things from the husband's perspective: as a party to a contract by which he was owed certain dues. I would suggest that what separated Zebida's case from Houria's, outside the violence the latter experienced, was the existence within the colonial juridical discourse of sentiments represented by jurists like Cura, who, as we saw above, was willing to go only so far in the name of Kabyle women's divorce rights – only to the point of rescuing a victim in obvious need, but not daring to countenance the rights or autonomy of a young indigenous woman. This was all the more so, given that these rights – the right of option for children of nubile age – were granted in Islamic law, but found no equivalent in either French law or Kabyle customs, and were thus anathema to both by this time.

Conclusion

> The Kabyle woman knows that she has rights which the French have given her. She dares to demand them from the judge, who decrees them to her. But when it comes to enforcing the judgment in the village the difficulty is immense and sometimes it is impossible. Shots are sometimes exchanged and eventually a compromise is arrived at in which the French judgment is only one element. All of this is extremely interesting as showing how a new principle of law begins to find its way into the moral feelings of the people.[127]

This assessment by a French colonial legal expert, G.H. Bousquet, written nearly twenty years after the passage of the Centenary Laws, relays commentary similar to that of his predecessors who also took note of the litigiousness of Kabyle women. But it also contains a sentiment expressed by the Kabyle *qadi-notaire* Cherchali who warned his colleagues on the

[127] Bousquet, "Islamic law and customary law": 65.

Centenary Laws commission that French edicts "remain a dead letter," and that "[c]ustoms and traditions are, in this case, stronger than public force." It speaks, in short, to the occasional distance between judicial cause and social effect. Yet, the fact that Kabyle women continued to use French courts is surely evidence of their efficacy or at least utility to these disputants. If the Centenary Laws hardly lived up to their ambition, the rulings that women obtained from French courts nonetheless represented one among many possible tools they mobilized to advance their interests in the context of family and marital obligations. Notably, however, Bousquet in the quote above imagined a cause-effect dynamic that passed from the court to the social world around it, and not the other way around – as he put it, the way in which "a new principle of law [finds] its way into the moral feelings of the people." He did not consider how the reverse also transpired: that is, how the suits filed and facts presented by Kabyle girls and women forced colonial jurists and legislators to devise judicial means to meet these subjects' demands. Indeed, it was only through women's own litigation that the colonial legislator was compelled to draft laws enabling women and girls to leave their husbands on the basis of non-consensual sex, framed ultimately as a breach of the betrothal contract.

This chapter has traced the operation of assimilationist law reform in Kabylia in the early twentieth century, and has attempted to demonstrate how Kabyle women's litigation was a key element in the development of the family law reform policies that took shape in this region. First, Kabyle women and girls entered colonial courtrooms both as subjects and as symbols, and gendered idioms of the "Kabyle Myth" shaped the court's interpretation of their actions and arguments, which some women also learned to manipulate. Second, the ambiguities of colonial law and relative power of the French magistrate in Kabylia were factors that worked to women's advantage, though they also produced unconventional remedies, such as the use of repressive

courts in marital rape cases. Notably, criminal justice did not provide Kabyle women with any new strategies; indeed, the women whose husbands were convicted of raping them frequently had to maintain their wifely duty of cohabitation. This brings us to the third point: that the colonial legislator acted upon two equally strong impulses: civilizing benevolence and masculine protectionism. This is to say, while French jurists and their indigenous interlocutors in the Muslim intelligentsia jostled and fumbled over defining consent in manner that served each of their objectives, indigenous women mobilized the indeterminacy of consent in Islamic, customary, and colonial legal cannons to forge legislation that served their interests.

As the next chapter will show, outside of Kabylia, variations on these same dynamics also shaped colonial jurisprudence and statutes regarding Muslim personal status law. Women both in Kabylia and beyond demonstrated considerable agility in their maneuvering between venues and discourses of law and in their engagement with non-state colonial actors who might help them. Where women in Kabylia turned to local missionaries for guidance through the colonial legal system, in the "Arab lands" of the Algérois, Muslim women hired European lawyers. Finally, as in Kabylia, criminal convictions for violent husbands rarely provided an exit strategy for wives attempting to quit their abusive marriages. Indeed, to the degree that French and Islamic law were in seeming agreement in matters of marital authority and "private" space, criminal law was rather detrimental to women's divorce suits.

Chapter 4: Marriage on Trial in the Arrondissement of Blida (1900-1933)

Introduction: Blida

The town of Blida lies 45km south-west of Algiers, on the fertile edges of the Mitidja plains, at the base of the Tell Atlas. Its name in Arabic hints at its position to Algiers, the "small city" that occupied an idyllic "countryside" apart from the coastal cosmopolitan hub. It was founded in the mid-sixteenth century by Sidi El-Kebir, who is still buried there. Fed by the waters of the Chiffa gorge, and well irrigated via the Oued el-Kebir river, Blida was known for its citrus harvest and was surrounded for much of its history by hundreds of acres of orchards and gardens. Its various nicknames, "Queen of the Mitidja," and the "City of Roses," give a further sense of the tranquility and beauty for which the city was known. Yet, Blida was not spared its share of horrors in the nineteenth century. Shortly before the French arrival, in 1825, it was leveled by a cataclysmic earthquake said to have killed half of its 7,000 inhabitants.[1] Still, French defeat of the Beni Salah and Beni Messaoud, the main tribes of the area, was halting, and Blida was not formally annexed until 1838. From then on, this city held a significant place in the geography of colonial conquest, occupying a central location in the pre-Sahara where the French settlement policies and institutional upheavals began early and aggressively under military and then civil rule. Algeria's first railway line, the most potent symbol of the *mission civilisatrice*, was built to connect Blida with Algiers, and opened in August, 1862. From Blida, one branch of the railway would eventually extend

[1] Louis Piesse, *Itinéraire historique et descriptif de l'Algérie, comprenant le Tell et le Sahara* (Paris: Hachette, 1862): 95.

past the massif and into the dessert as far as Djelfa, while the other would continue west until the port city of Oran.

Even before the completion of the railway, the attraction of Blida's land and climate brought settlers in droves, and their orchards, factories, churches, and corn and wheat flour mills dramatically altered the landscape of the town and its surroundings. The city's demographic shifts indicate its reconstruction in a European image: it was reported that in 1847, Blida was inhabited by 3985 Europeans and 3502 *indigènes* (here counting both Muslims and Jews)[2]; by 1853, there were 4204 Europeans and 4415 *indigènes*.[3] Throughout the period studied here, Blida's population growth and industrialization continued apace. In 1906, the city counted a total population of 16, 866. By 1930, it had reached 36,687 inhabitants, among them 10,577 settlers and not less than 26,000 Muslims.[4]

Blida's rapid growth and prosperity came at the expense of the native inhabitants.[5] More tragedies would strike the city in quick succession between 1866 and 1868: first an infestation of grasshoppers that destroyed crops, then the famines that ravaged much of North Africa, followed by a cholera epidemic that took 550 lives in the city. In the midst of these regional crises came the devastating earthquake of 1867, marking it in local memory as the "terrible year." Yet, while the colonist population rallied quickly, it would take the government six months to establish any assistance for the indigenous population.[6] A local recounted how, as one catastrophe gave way to the next,

> [e]ach day, we found on our doorsteps men, women, and children dead from starvation, Arabs but God's creatures like ourselves. Each day, we saw these

[2] E. Carette Rozet, J. J. Marcel, Hoefer, and Louis Frank. *Algérie* (Paris: Firmin Didot, 1850).
[3] E. Pellissier de Reynaud, *Annales Algériennes*, T. 1 (1854) :438.
[4] *Guide Bleu - Algérie* (1930).
[5] As Marnia Lazreg recounts, women were especially targeted for land dispossession by colonial policies, as well as miscreant business agents and money lenders.Lazreg, *Eloquence*: 46-47.
[6] A. Challiel, "L'année terrible," *Le Tell* (December 1867).

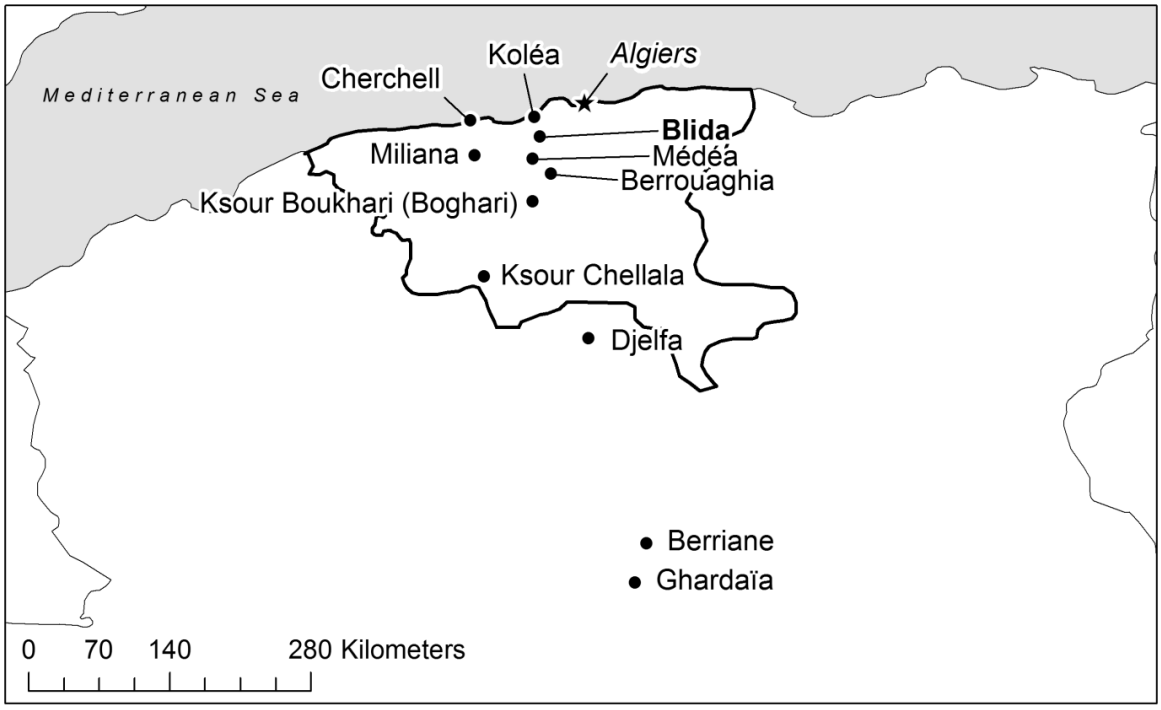
> unfortunate natives, haggard and emaciated, naked, at the point of expiring, tossed this way and that at Bizot Square, waiting for a morsel of bread, sometimes dying before it came.[7]

Blida was also at the forefront of Algeria's judicial reconstruction. Shortly after the first imperial court was created in Algiers in 1842, the first civil tribunal (not under military jurisdiction) outside of the capital was established in Blida two years later to serve the European inhabitants. Subsequent to the reorganization of Muslim justice in the 1860s (see: Chapter 2) the office of the *qadi* was folded into the French court system, with these Muslim magistrates now reporting to their European counterparts, and Muslim appeals henceforth directed to the French courts of first instance. A decree of 1875 expanded this system to bring the number of Algeria's courts of first instance (common law tribunals of appeal) to twelve. The three created for the *département* of Algiers were: the tribunal of Algiers to serve the capital, the tribunal of Tizi Ouzou to serve (as we saw in the previous chapter) the Kabyle mountains, and the tribunal at Blida for all that remained, including the "*territoires du sud*" as they were slowly brought under civil jurisdiction. It is this tribunal of appeal, and the *qadi* courts of the arrondissement whose rulings it supervised, that provide the setting for the central case studies informing this chapter (see: Map 3).

This chapter uses a series of closely-framed snap-shots from the Blida tribunal and its subsidiary courts to uncover how they functioned to mediate the encounter between Muslim women and the colonial state throughout the era of intensified "reform" and "regeneration" of Muslim personal status law. Each case study offers significant information in itself, shedding light both on the litigants – their occupations, the tenor, methods, and rationale of their pleas – and jurisprudence – especially that of the Muslim judges, which has been only opaquely understood until now. But these individual cases and the micro-histories they contain also

[7] Ibid.

refract back out to illuminate their wider contexts, and clarify the logics and operations of colonial power.[8] Through these records we may trace the emergence of institutions and sites of knowledge-production that drew Muslim subjects into the colonial legal order, and thereby also deepen our understanding of the social, political, and economic forces that shaped their lives and decisions.



Map 3: Blida and its subsidiary Muslim courts (excluding Algiers), c. 1920.
(Carl Hughes 2014)

Divorce: Semantics of Domesticity in Colonial Law

Expanding on the claims of the previous chapter, my interest here is in uncovering, in particular, how women's divorce suits were both argued and adjudicated in these various settings. For Algerian women in the late-nineteenth and early-twentieth centuries, escaping

[8] On judicial records and the value of the micro-histories they contain, see: Agmon, ibid.

unwanted, unlawful, or abusive marriages necessarily obliged them to engage with the colonial legal system, and as such, divorce constituted a crucial nexus of the state-subject encounter. As seen in Chapter 1, through census data taken in the 1890s through the *état civil des indigènes*, statistics for the colony began to reveal a staggering divorce rate in Algeria (40-45%) compared with that in France (2%).[9] This shocked demographers and administrators, who regarded this as a sign of familial anarchy, social stagnation, and provided rationale for French tutelage. French reformers had attributed the steep divorce rate to capricious Muslim husbands; however, given that these figures were in large part supplied by *qadi*s in their role as notaries of the *état civil*, we might expect that a significant proportion of these divorces were filed by women. As discussed above, almost all recorded divorce suits were by definition suits brought by women claimants, since male unilateral divorce was extra-legal; therefore, the latter type of divorce tends to appear in the archives only when its after-effects (namely child custody and alimentary support) were in dispute. In response to a woman's divorce request, the *qadi* would determine whether the request was warranted and a divorce lawful. Through the judicial annulment called *khul*‘ a woman would pay her husband an agreed amount, usually a return of the dower (*mahr* or *sadaq*) or forfeiture of a deferred dower (*mu'akhar*), to be released from the obligations of marriage. However, Maliki doctrine held that under certain conditions the wife could ask the court to sever the union without requiring a return of the dower. To obtain a divorce without any penalties she had to convince the *qadi* that her husband was at fault, due to one of the following: failure to provide food,

[9] The reasons for these results and flaws of these censuses are analyzed in Kateb, *La fin du mariage traditionnel?* : 25-29.

shelter, or clothing; failure to consummate the marriage; affliction with a communicable disease; or particularly harsh treatment such as excessive beating.[10]

The previous chapter discussed Kabyle women's civil divorce suits based on harm and wrongful consummation of marriage (that is, of pre-pubescent brides). This chapter will build on these themes by examining two other bases upon which Algerian women outside Kabylia filed for court-ordered divorce: first, those based on marital abuse and/or neglect, including a brief discussion of after-effects of divorce and suits over alimony payments, disputed goods and property, and custody of children (*hadana*); and second, those based on impotence, that is, failure to consummate the marriage.

As seen in Chapter 3, harm was the predominant basis for divorce used by women living in Kabylia at this time. Yet, to enable them to access this legal strategy, French reformers and their male Kabyle interlocutors worked to strike an acceptable balance around defining harm – one which could be used liberally by the courts to include marital rape, but which did not cede too much to women's own interpretations of this concept. Meanwhile, in the predominantly Arab *communes mixtes*, this conflict and, by turns, cooperation was staged rather more directly between French and Maliki principles, the latter of which had a robust pre-colonial tradition for enabling women to escape from abusive marriages. However, as the first part of this chapter will show, the integration of marital authority in the Islamic legal tradition into the French concept of private space resulted in the severe restriction of women's access to pre-colonial remedies. Indeed, by the first decade of the twentieth century, in suits in which a female claimant petitioned the court for a divorce based on grounds of abuse or neglect, the defendant (her husband) could predictably respond by demanding what statutes

[10] Tucker, *Women, Family, and Gender*: 105-111. The specificity surrounding this last criteria, harm, in the Maliki school is discussed below.

had agreed was his right: return of a "rebellious" wife to the "conjugal domicile" (*réintégration au domicile conjugal*, as rendered in French). Indeed, the "*domicile conjugal*" was a uniquely adaptable category that seemed to map seamlessly from metropole to colony, and was applied with apparent coherence across Western and Islamic jurisdictions. However, though masculine authority over the movements, assets, and decisions of women appears in Islamic legal concepts like *wilaya* (guardianship), the *maskan shari'i* (legal dwelling), or even the *beyt al-zawjiyya* (residence of marriage), these notions bear a skewed symmetry with the gendered division of private and public space in Western legal traditions.[11] And if they were taken as harmonious with French principles it may well be due to the diffusion of the latter into Islamic jurisprudence in places like Egypt and the Ottoman Empire.[12] This line of inquiry is directed through a discussion of the "*Abandon de Famille*" (family desertion) law that descended upon Algerian jurisdictions in 1924. Like marital rape, family desertion transgressed the boundaries between personal status and criminal justice, giving us special insight into the set of tensions that underpinned the colonial legal pluralist system, namely between the privacy of the domicile and the interests of "public order."

The adjudication and legislation of impotence-based divorce cases follows a similar trajectory. Here again, the existing procedures for advancing a credible case for divorce was radically altered in the interventionist age. Women seeking judicial divorce based on failure to consummate the marriage had to learn new criteria for competent litigation, a new vocabulary of argumentation, and a shift in definitions of evidence from orality to literacy as the measure of credible testimony. This was further complicated by the burgeoning medical

[11] Judith Tucker (Ibid.: 28) writes that Islamic jurisprudence does not delineate a space outside the law; indeed, "[t]here is very little 'private' in Islamic law in the western legal sense of a realm of intimacy that is off limits for the state and its legal institutions."
[12] Kenneth Cuno, "Disobedient Wives and Neglectful Husbands," in Cuno and Desai (eds.), *Family, Gender, and Law in a Globalizing Middle East and South Asia* (Syracuse, N.Y: Syracuse University Press, 2009): 3-4.

establishment, which brought with it the new science of forensic medicine. Indeed, in a range of marital disputes we are witness as well to the implicit struggle for authority between French and Muslim experts laying claim to knowledge of the "indigenous" woman's body. Thus, the second part of this chapter traces the struggle between traditional healers and colonial medical professionals in the court of Muslim personal status, both of which gave way, ultimately, to deference to the privacy of the bedroom and self-assessment of any husband whose virility was in question.

The cases explored in this chapter suggest that our analytic and methodological approaches must also consider intervention as a function of an apparent *absence* of law. Just as important, I argue, as the ways in which the colonial state invited itself into the Muslim marital contract are those spaces from which the law was seemingly evacuated in the republican tradition of negative freedom from regulatory impediments, enshrined in the sanctity of the domicile.[13] It was, furthermore, no coincidence that new categories like the "domicile conjugal" and protectionist remedies for impotence-based divorce suits should appear on the colonial legal landscape at the veritable height of the reformist age. As Chapter 2 demonstrated, this period of colonial lawmaking was defined by a preference for pluralism over unification, and the "Islamization" of modern law by identifying and then codifying the "analogies" that united them. This search for analogy, however, necessitated two acts of translation: first, translation in a conventional sense of conveying meaning across languages (in this case Arabic to French), and second, the performative iteration that proceeds from this first process. In other words, in rendering certain concepts in the Islamic legal tradition

[13] Put another way, a Weberian "deregulation in the name of freedom" meant leaving "the realm abandoned by the law to be governed by the play of private power relations." Mary Ann Glendon, *The transformation of family law: state, law, and family in the United States and western Europe* (Chicago: University of Chicago Press, 1989): 145.

intelligible to French jurists, these two sets of concepts were functionally assimilated into each other, often, as we will see, to the detriment of colonized Algerian women. To be clear, my aim is not to reconstruct a "chain of transmission" that informed a coherent colonial directive; rather, this chapter applies a "sustained focus on the same archival densities and absences, […] hauntingly similar quotes, and a repeated underscoring of certain tensions and tactics" to reveal the emergence of an epistemology of the "private sphere" that severely restricted Algerian women's divorce options.[14]

Going to Court in the Arrondissement of Blida

Before delving into these cases, it is important to bear in mind that the colonized subject's encounter with these broad and somewhat abstracted forces and institutions was indirect, and heavily mediated by a ponderous bureaucracy that included but also went beyond the personnel of the court itself. If a Muslim litigant was unhappy with the initial outcome of their case in a *qadi* court, they may have had access to French judicial process and even common law, but their pathway to appeal was far from straightforward, as the senatorial commission of inquiry led by Alexandre Isaac discovered. In the 1890s, the cost of filing suit in a *mahakma* was around 7 francs, including the executive order of the decision, which was important if one wanted to keep a record of the outcome. From there, the costs mounted sharply. To appeal before the French Justice of the Peace cost another 7 francs, not including the executive order (the *colons* paid only 5 francs for the same service). One had to pay extra for the private services of a translator when filing an appeal, and the standard rate for translation, at the time of the report, was 2 francs per role of 25 lines per page and 15 syllables

[14] Stoler, *Carnal Knowledge*: 7.

per line.[15] For these expenses, indigenous subjects in financial need were not entitled to legal aid or subsidies of any kind. Additionally, a number of much heavier extra costs could include: filing with the registry, retaining a lawyer, transportation fees, or hiring the services of a *taleb* (student, but also indicated literate person), as was often done, to put on paper the facts of the case from their perspective. Each official encounter – with the registry bailiff, court interpreter, lawyer's assistant, and so on – marked another toll one had to pay to move forward in the process.

These costs would have been especially burdensome for litigants in the arrondissement of Blida, which served a population spread over a considerable distance. The most southern regions in fact had a long relationship with the cities of the Tell, which for centuries had followed seasonal commercial trading patterns. Court schedules and summons, however, followed no such rhythm, so disputants to a case relied especially by this time on mail, telegrams, and new modes of transportation to file and argue appeals. A number of the Blida files contain, for instance, letters sent by both male and female litigants for whom cost and distance made their personal appearance in court too difficult. No wonder, reported the Isaac commission, that despite frequent accusations of corruption against the *qadi*s, Algerian Muslims were unimpressed with the "efficiency" of the French system and longed for what had been before. The costs of filing suit often outweighed any potential benefits:

> An unfortunate debtor of 2 francs saw his debt rise to 30fr as a result of the fees; a process regarding a quantity of grains valued at 920fr occasioned 1,890fr of fees, while the same process would have been judged by the cadi [sic] for 27fr.25.[16]

[15] ANOM F80 1725. Alexandre Isaac, *Rapport fait au nom de la Commission chargée d'examiner les modifications à introduire dans la législation et dans l'organisation des divers services de l'Algérie* (Paris, 1895): 207-208.
[16] ANOM F80 1725. Isaac Report: 208-9.

But the onerous costs were nothing compared to the tedium of the process. As one statement deposited with the commission recounted:

> The cadi listens to the parties, reads the titles which have been submitted, and adjudicates without delay. If he adjourns for an inquiry, it is done quickly and an audience follows. In the time it takes him to process three cases, the French judge has scarcely heard a single one; oral testimony of the plaintiff, translation by the interpreter, commentary of the defense, responses of the parties, their translation, production of an official act, adjournment to have it translated, production of the translation, new commentaries by each party, repetition of interpretations, ordering of an inquiry, adjournment to hear the witnesses, summoning of the witnesses, disqualifications, reproaches, their translation, etc. The assistance of council never abridges the debates; one pleads at length without clarifying anything, and it always comes back to securities and inquiries.[17]

Additionally, since the number of *mahakim* (plural of *mahakma*) was dramatically reduced after 1886 (see: Chapter 2), the colonial courts and tribunals were beset by an unending backlog of Muslim personal status cases. To give an example, on a particular day, 31 August 1891, thirty-four Muslim personal status cases passed before Algeria's *mahakim*, while at the same time 241 such cases were tried by the colony's French magistrates.[18] Thus, by the time a Muslim litigant finally got their day in court, they could expect to be wheeled hastily through a revolving door of colonial justice administered by an exhausted foreign judge with only a cursory, often begrudged, familiarity with Muslim and customary laws.

This being the case, what factors compelled Muslim litigants to patronize these courts? In the case of property disputes they had little choice, since cases that touched on "*droit immobilier*" that exceeded 200 francs were withdrawn from the *qadi*'s competence after 1889. As for matters more strictly governed by the Muslim personal status regime, Jean-Paul Charney observed distinct tendencies among urban and rural settings: He suggested that women fared better in urban *qadi* courts in matters of repudiation, and that they were also

[17] Ibid.: 210-211.
[18] Ibid.: 209-210.

preferred by both men and women for divorce and custody matters. French courts, on the other hand, were used by rural litigants for dealing with land issues, and used especially by women seeking payments of dowry and child support.[19] While there is a certain element of truth to this broad observation, it bears qualification, since it was based on published sources, which, he admits, account only for the higher courts. The more limited but precise image painted by the Blida records suggests that a significant proportion of positive outcomes for women, particularly those in which a divorce or pension was requested, were passed down in the *qadi* courts of smaller cities (such as Cherchell) and villages (like Berrouaghia or Boghari), as well as the *mahakma* of Blida itself, where litigants from elsewhere sometimes insisted on having their trial heard. When such outcomes were appealed and subsequently diverted to the Justice of the Peace, a significant proportion of those appeals were filed by the husbands who had initially lost their case (see: Table 1).[20]

[19] Charnay, *La vie musulmane*: 317-319. Charnay is not, however, blind to the fact that French courts very often supported or even overturned the first ruling, to the detriment of women appellants. "There are also instances of women who appealed to French courts to help them leave polygamous marriages but were either forced into them or charged damages for 'defaulting on domestic chores and failing to carry out their conjugal duty.'" (Charnay, ibid: 44)

[20] This table shows the number and type of appeals filed contained in the Fonds de Justice at the Wilaya Archives of Algiers, and demonstrate the much higher proportion of personal status and related cases brought to the *qadi* courts (299 cases total). Access to these files was restricted at the time of research, but I was permitted access to more than two dozen cartons, containing one third of the total files contained in this archive. In 67 of these files, female disputes were named as either the lead complainant or lead defendant. Thus, the suits presented in the case studies here are not exhaustive but comprise, rather, a representative sample.

Table 1: Muslim Appeals Filed in the Arrondissement of Blida: Types of Suits and Jurisdiction of Appealed Decision

Period	1894-1914			1915-1925			1926-1933		
	Jurisdiction			**Jurisdiction**			**Jurisdiction**		
Object of Suit	Juge de Paix	Qadi	Total	Juge de Paix	Qadi	Total	Juge de Paix	Qadi	Total
Hadana	1	5	6	1	7	8	0	6	6
Hobous	0	5	5	2	10	12	0	5	5
Successions	2	15	15	5	24	29	20	38	58
Personal Status*	3	32	35	0	64	64	0	56	56
Total	6	57	61	8	105	113	20	105	125

*Personal Status here indicates any matter related to the terms of a divorce or marriage contract and their violation by one of the parties or their respective families.

Source: Hafid Grine, *Repertoire du Fonds "Justice" des Archives Regionales d'Alger*. Wilaya Archives of Algiers.

These records do not always include the grounds upon which the initial decisions were passed, but in those instances where this information is available, Muslim magistrates usually quoted the Quran, Hadith, or passages from Sidi Khalil Ibn Ishaq al-Jundi's *Mukhtasar fi al-fiqh `al· madhhab al-Imam Malik ibn Anas* in their rulings. As this chapter will show, in cases where this variety of Islamic justice failed married men, it often proved worthwhile to try their luck with "*droit musulman algérien*." (See Appendix: Figures 4-7 for samples of documents from appeal dossiers.)

Recourse to the tribunal of first instance in Blida by Muslims, both men and women, sustained a cottage industry of European lawyers who specialized in guiding these litigants through the French system. The most prominent names to appear on appeal declarations deposed with the Blida tribunal are those of Edouard Weill, Raymond Klein, Benjamin-Gabriel Texier, and Gaston Ricci – indeed, the very same Gaston Ricci of the 1899 divorce ruling in Kabylia, who at some point returned to Blida and his original trade as a barrister

before being elected the city's mayor in 1929. Thus, a small group of never more than a dozen men wielded considerable influence in the shaping of Muslim justice in the arrondissement of Blida, insofar as they plotted tactical routes through colonial statutes and jurisprudence by which their clients might reverse their judicial fortunes.

What informed the indigenous subject's use of this system and its adjacent wing of professionals? That is to say, how did Muslim litigants, particularly women and girls who were disproportionately illiterate, see and understand colonial law and the system governing it? How did they learn of new colonial "reforms" and determine the help or hindrance new laws might present in their own lives? We know from the petitions of Muslim notables that the official publication *Mobacher* was the most important source of print information to reach the colonized population on the recent laws, decrees, and memoranda issued by the colonial government. We also know that many cases involving younger women and girls were often filed on their behalf by a guardian – a parent or older sibling. Sometimes such cases transpired without their recorded involvement, but the occurrence of this has been overestimated in the colonial juristic literature and subsequent historiography. On many occasions, the women involved were summoned or appeared in court themselves to give a statement. From here, knowledge of the workings of the legal regime, or at least the best practices for making use of it, would have easily been relayed across the formal and informal networks that connected women to each other – the same networks and social gatherings, we may presume, in which they exchanged the secrets of magical cures, honed their poetic craft, or took mutual comfort in popular religious worship.[21]

[21] See: Lazreg, *Eloquence*: 106-116. See also: Makilam, and Camille Lacoste-Dujardin, *Signes et rituels magiques des femmes kabyles* (Paris: Karthala, 2011).

I: The "Domicile Conjugal"

Case Study 1: Dār ʾadl, or "Honourable Arbiters" Principle

The Blida files that I was able to access contain not less than twelve cases (1907-1933) in which either the marital or paternal authority (ten by husbands, two by brothers/fathers) was explicitly invoked to counter the claims of a wife or daughter seeking release from said authority.[22] Of these, three involve a wife's claim of domestic abuse as grounds for leaving and/or demanding compensation from her husband.[23] The following case – one of these three – offers a starting point, in order to situate marital abuse cases in the existing legal framework for such disputes.

On 10 June, 1907, "Boulik" Cherifa bint el Hadj Mohammed ben Taieb (Boulik hereafter) from the *commune mixte* of Boghari (Ksour Boukhari) went to the *mahakma* of Berrouaghia to request a divorce from her former husband, "Chergui" Lakehal bin Chourak (Chergui hereafter), also of Boghari. As the facts exposed at the first trial go, Boulik had been forced unwillingly to marry her first husband ten years prior, and in that time had lived in a rural and remote dwelling outside the village,

> in grief and sadness [*dans le chagrin et la tristesse*]; she lacks food and clothing; she is injured, beaten and abandoned. The defendant lives every month in Boghari where he stays sometimes 20 days or 25 days or more in a village [with] a concubine on whom he has spent all that his father left him, being around eight thousand francs.[24]

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[22] It bears noting that paternal authority (*wilaya*) was sometimes invoked in direct opposition to another man's claims based on maternal authority, such as if the father or brother disapproved of his daughter's choice of husband, or if she sought the assistance of her natal family to leave an unhappy or violent marriage. However, in at least one case, the daughter (defendant) simply wanted to live apart from her tyrannical brother.

[2323] Wilaya Archive of Algiers (AWA): Justice: 1T 315, 1T 317, 1T 367, 1T 399, and 1T413. Of those involving allegations of abuse, one was dealt with by a JP and the other two by *qadi*s; the JP case was a property dispute in which abuse was material to the wife's case but still only of secondary concern, having already been dealt with in criminal court (detailed below). In nearly all of the other divorce cases, however, including those which did not involve allegations of abuse, wives also requested residence with an honourable neighbour, as well as alimentary considerations, as a condition to remain "under marital authority." Three such cases are discussed further below.

[24] AWA: Justice 1T 315. Dossier d'appel, 10 June 1909.

The summary of the case goes on to explain how Boulik and another young woman, her uncle's daughter (it is unclear if she is also a wife of Chergui or his sister) had been left to fend for themselves at length, and were harassed by local men with the intention to "engage them in misconduct [*les engager a se mal conduire*]."

According to the first judgment, to reach a resolution, the two spouses were ordered, according to the Maliki legal principle of *dār ʾadl* ("house of a virtuous person") to re-locate to the home of a trusted and honourable neighbour on whom they both agreed, in order to be observed. In the end, they chose a respected local man who also happened to live next door to the *ʾadel* (assistant to the *qadi*) of the Boghari *mahakma*. There they stayed for just under a month, but throughout this time, her husband's behaviour was unchanged, "often beating her, then threatening to kill her the moment they returned to his residence" because she was the cause of their being monitored by the officers of the court. Chergui engaged her in quarrels "without cause," the arbiter reported. Consequently, at the end of this period, the arbiter recommended that Chergui's marital powers be suspended and, as such, Boulik would no longer be obligated to live with him ("*disant qu'elle ne retournerait plus avec son mari en aucune façon*").

Other than acknowledging the court order, Chergui denied all the other facts of the case. For her part, Boulik produced several documents: written testimony by a number of residents of Boghari attesting to Chergui's long absences and frequent drunkenness; a declaration by "honourable" residents of Boghari vouching for the trustworthiness of the first character witnesses; and a declaration by the host assigned to pass observations on their marriage confirming that Chergui had beaten her in his home and that his neighbours heard her cries. Finally, the ʾadel who lived adjacent to the home of her observer testified that on

one particular night when her screams could be heard by all the neighbours, she ran outside and, seeing him, ran to him to tell her that Chergui had beaten her and kicked her in the chest, causing her to faint from the pain. Chergui's only attempted to discredit these witnesses with a note from the judicial minister of Boghari stating that they "availed themselves of the drink."[25]

The facts could not be clearer. The number and credibility of Boulik's witnesses far outweighed those of Chergui. Citing the commentaries of Sidi Khalil Ibn Ishaq on women's divorce, and given the certainty that Chergui would fulfill his promise to kill his wife should she be forced to return, the *bachadel* (deputy *qadi; bash ādil* in Arabic) declared her divorced. Subsequently, on 10 October 1910, Chergui's lawyer Edouard Weill filed an appeal of this decision with the tribunal of first instance at Blida.[26] Unfortunately, there is no record of the adjudication or outcome of this appeal. However, the motivation behind his appeal is no mystery, since it was typical: Men fought such divorces not out of marital devotion, but because if the wife's accusations of ill-treatment were accepted, she would retain the right to her dower, rather than forfeit it in the standard *khul'* divorce.[27]

We can see from this case the importance of witness credibility and fortifying claims by furnishing documents that established honour and sobriety. Witness testimony retained its value in the *mahakim* of the arrondissement, even as Islamic prescriptions for assessing witness credibility converged with a French predilection for documentation to produce much longer paper trails. In a case such as this, however, proving physical abuse was one thing, but

[25] Ibid.
[26] Ibid.
[27] Christelow, *Muslim Law Courts*: 90. In at least one other case (Boudahri Fatma bent Mohammed vs. Ahmed ben Youcef, Mahakma of Marengo, 30 August 1933) the wife accused her husband of neglect due to his preoccupation with another woman, in this instance a local prostitute for whom he eventually left her. He countered that he had repudiated his first wife and remarried because she had left the "*foyer conjugal* without reason." She won her case for financial compensation and *hadana* after wrongful divorce, which he subsequently appealed at before the magistrate at Blida. AWA 1T399. Dossier d'appel, 30 Aug 1933.

proving that it was grounds for divorce was quite another. As this case and others show, the abuse in question needed to pass a certain threshold of cruelty and sustained suffering to be considered valid grounds for divorce (by both Islamic and French standards). The "motives" for a husband's turn to physical violence were important, and it had to be demonstrated that beatings came "for no reason." This meant that much depended on the pathos of the women themselves, or, if they were not present, the convincing communication of such by their lawyers or male representatives.

Most important for the discussion at hand is the way in which the whole community was called upon to corroborate each side's story. The "two arbiters" principle, though rooted in a Quranic prescription on divorce and reconciliation, was administered in a way distinct to North Africa, starting as early as the 9th century. Maliki jurisprudence contains a remedy for spousal abuse unique among the Sunni schools called *dār 'adl*, which was originally intended to provide women with protection and a credible witness to their abuse.[28] While verse 4:34 of the Quran permits a husband to use physical discipline to "correct" his wife's disobedience, within limits and as a last resort, the next verse seems to counterbalance this further by counseling that, should a husband and wife become estranged, two arbiters (called *hakaman* – people of wisdom and discernment) should be chosen, one from her family and one from his, to observe them and help effect a reconciliation. Islamic jurists through the centuries have since disagreed about nature of this estrangement, the selection process of the two arbiters, and extent of latter's powers (for instance, who decides – the arbiters or the *qadi* – if the couple's differences are irreconcilable?). Most divergently, as Mirabel Fierro notes, of the

[28] Sometimes also called *dār al-thiqa* and *dār amin*.

four Islamic schools, only in the Maliki school were these verses interpreted to allow a wife to request a judicial divorce on the grounds of harm (*darar*).[29]

According to Mirabelle Fierro, the first recorded instance in which arbitration was used to establish harm as grounds for divorce was in 9th century Cordova. Recourse to the *dār ʾadl* for battered women is also enshrined in the 14th century *Mukhtasar* of Sidi Khalil, particularly in cases where there is no clear evidence of ill-treatment. The practice of this principle varied with time and context in the early-modern period, requiring that the couple relocate either near the *dār ʾadl* or move into the same dwelling place. Fierro theorizes on the origins of this institution in the Maliki school and argues, in opposition to Aharon Layish, that it was not a matter of Islamizing local custom but rather the opposite. She traces its genesis to the Western Atlas mountains and the Berber customary practice of *jīrān ṣāliḥīn* (honourable neighbours), which in some versions allowed a woman to divorce her husband simply by finding refuge in the tent of a trusted neighbour. She credits the migration of this institution into Islamic law to ninth-century Berber jurist Yaḥyā b. Yaḥyā al-Laythī (d. 234/848). Both Layish and Fierro (among others) agree, however, that while the ostensible object of this principle was to ascertain the fault for marital discord in the absence of clear evidence, in practice it was predominantly requested by women whose objective was divorce. [30]

While the origins of this concept in the Maliki school are debated, several scholars have commented on its transmutation in the modern Maghreb. Ziba Mir-Hosseini writes that

> [T]he grafting of Maliki law onto a modern legal system in Morocco has created a situation in which the patriarchal elements of the *shari'a* are reinforced, while the classical leeways are reduced. The *dar al-thiqa* is a case in point. Once a custom

[29] Mirabelle Fierro, "Ill-treated women seeking divorce: The Qur'anic Two Arbiters and Judicial Practice among the Malikis in al-Andalus and North Africa," in David S. Powers et al. (eds.), *Dispensing Justice in Islam*: 323.
[30] Fierro, ibid.

> helpful to women, its long-term incorporation into Islamic law eventually led to its transformation into a place for the control and seclusion of women.[31]

Dalenda Larguèche has devoted several studies to investigating how the *dar al-thiqa* (as *dār ʾadl* was called in Tunisia) was transformed into a much more oppressive institution, the *dar juwad* (house of a noble person), over the course of the 19th century, both before French annexation in 1882 and under colonial rule. She documents the passage of the *dar al-thiqa* in Tunis from a house in which both spouses were placed under observation to a "house of arrest and correction, where rebellious and recalcitrant women were confined so as to 'bring them around' to the prescribed norms of conduct and morality."[32] In these correctional facilities, a "noble" woman (*amina*) was entrusted by the court and by the accused husband (who also paid her) to confine, deprive, and admonish rebellious wives until they succumbed and returned to the marital domicile.

While the *dār ʾadl* may not have undergone a transformation in Algeria like that of its neighbours, there is evidence that prescriptions for the adjudication of domestic violence were read by colonial reformers as discursively compatible with principles in French law governing domestic disputes and marital authority. Ultimately, the assimilation of Islamic legal principles into French norms and language had a similar effect as that described by Larguèche in Tunis: the availability of the *dār ʾadl* as a resource for women seeking escape from violent abuse became eclipsed by the sovereign rights of husbands afforded by their authority over the *domicile conjugal*. Moreover, police force and incarceration were seen as acceptable means of safeguarding those rights.

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[31] Ziba Mir-Hosseini, *Marriage on Trial: Islamic Family Law in Iran and Morocco* (London: I.B. Tauris, 2000): 198.

[32] Dalenda Larguèche, "Confined, battered, and repudiated women in Tunis since the eighteenth century," in Sonbol (ed.), *Women, the Family, and Divorce Laws in Islamic History*. Dalenda Larguèche, "Women, Family Affairs, and Justice: Tunisia in the 19th Century," *The History of the Family* 16, no. 2 (2011): 142-151.

El-Makki Ben Badis and the "House of Arrest"

The first indication we have that the colonial government had taken notice of the particular operations of the *dār 'adl* came in 1886. In their effort to understand this institution which had suddenly and forcefully come under the purview of the French magistrates, the Parquet turned to el-Makki Ben Badis (1820-1890), the esteemed Constantinois *qadi* and legal expert, and father of the nationalist leader Sheikh Abd-el-Hamid Ben Badis (1889-1940). The Senior Ben Badis had been called upon many times over the previous twenty years to clarify questions of Islamic law for the colonial government. In his own rulings as a *qadi* of Constantine, as well as in his capacity on various government-appointed councils, his opinion was especially sought out in matters relating to women and Muslim personal status.[33] In his essay to the Parquet, which would form the basis of a circular to be distributed to the colony's magistrates, Ben Badis explained that there was a particular set of cases in which a woman "must be sequestered" with the *mufti*, or else with a "trusted man," the intention being to prevent "murders or other accidents." These included cases in which: a battered wife needed protection; a woman had remarried while still in the waiting period after divorce (*'idda*); an orphaned girl was abandoned; a father feared his daughter had been seduced or kidnapped; a married woman had fled, potentially with her lover, and was suspected of adultery.[34] Since, in Ben Badis's view, the *mufti* or, failing that, the *qadi* was responsible for women's confinement, he took the opportunity to insist that the colonial state must shoulder the associated costs. Indeed, this seemed to be the primary object of his writing. He cited the

[33] Christelow (*Muslim Law Courts*: 90-92) illustrates through various episodes in Ben Badis Sr.'s career the ways in which he applied "liberal" interpretations of the law in favour of women seeking divorce, but also harboured certain conservative views on women's place in the public sphere.
[34] ANOM ALG GGA 17H58. Dissertation sur la question du dépot des femmes chez le Mufti. 4 June 1886. (Perhaps residence with the local *mufti* was particular to Constantine or eastern Algeria, since this option appears in no other Algerian records that I have found.)

example of two *mufti*s from Constantine who operated at a loss until 1876, when they convinced the government to augment their daily allowance for sequestered women. He also hastened to point out that this principle was to be applied only in cases in which the woman in question was not otherwise under the authority of a parent or brother, who would in that event be responsible for taking her in.

Though Ben Badis was fluent in French, it seems he chose to issue this piece in Arabic, since it was translated for the circular by French jurist Ernest Mercier. It is interesting to note that in the copy issued by the Parquet, the institution in question was entitled the "house of arrest" (*maison d'arrêt*), and that his recommendations include an "order to incarcerate" women meeting each of the listed criteria. Without the Arabic original, we cannot know the terminology that eventually ordered *qadi*s to "arrest" battered women, among others, but we know that he was undoubtedly describing the function of the *dār ʾadl*, and principle of arbitration, in Muslim personal status law. As it was received by the French juristic class, Ben Badis's recommendations fit perfectly in line with two clauses in the Napoleonic Code which held that a woman found guilty of adultery should be judicially divorced and held in a "house of correction" ("*maison de correction*") for two months to three years (I.IV.298 and I.V.308).[35]

Ben Badis's note concluded with a final warning that should "the State rid itself [of this responsibility], the result […] will be a violation of the respect with which women must

[35] After the legalization of no-fault civil divorce in France after 1884, these clauses were nullified. However, the punishment of adultery under criminal law was maintained by the Code pénal (Book III, II.I.I.IV.337). Adulterous husbands paid a fine, while only wives (and their accomplices) could be punished with imprisonment upon the husband's request. This created a degree of jurisprudential and jurisdictional uncertainty throughout the nineteenth century, though courts largely maintained that a wife's adultery remained a crime against society and morality, and not simply against another private individual. René André, *La puissance maritale envisagée quant aux droits du mari sur la personne de sa femme*. Thèse en droit (Digon, 1909): 90-111.

be enrobed, or else they will be pushed toward licentiousness."[36] The tone of his letter, calling upon the state to "respect" women, who are otherwise easily prone to promiscuity, invoked a certain shared understanding of the threat posed to social order by women living independently, while also upholding a narrative of the state's paternalistic and patriarchal duties that would have been recognizable to its French readers. Thus the incarceration of "rebellious" Muslim women was quietly interpolated into colonial law.

To Protect and Obey: Marital Authority in the Code Morand

In the ensuing years, as reform-by-analogy rose to methodological prominence among the colonial juristic class, the "*maison d' arrêt*," sometimes also referred to as the "*contrainte par corps*" of women in violation of their marital obligations, seeped into reformist discourse, arousing none of the moral panic generated by social problems like polygamy or child marriage. This is because the physical restraint of "rebellious" women was not totally unfamiliar to colonial jurists; indeed, it was commensurate with certain uncontroversial French "family values." The wifely duties of fidelity, obedience, and cohabitation were enshrined in the Code civil (articles 298, 213, and 216, respectively). Marcel Morand's *Avant-projet de code du droit musulman Algérien* (1916) provides some insight to the logic of this colonial mapping, particularly if we read it to trace the sourcing and molding of legislation and procedural codes from across the Muslim world into a form resembling the Code civil. The relevant articles from Morand's code include: articles 61-81 and 97 from chapter 2 on "The Effects of Marriage," and 164 and 171-72 from chapter 3 on "The Dissolution of Marriage."

[36] Ibid.

On the effects of marriage, chapter 2 of the Code Morand is striking for the ways it would have enshrined the marital rights of a husband with regard to his wife's duties, living arrangement, and restrictions on mobility. On the specific question of physical marital discipline, the Code Morand would have put limits on battery, though recognizing it as within the rights of marital authority in cases of "disobedience and insubordination." Section II.I.64, regarding the disciplining of one's wife, is notable in that it departed from Maliki jurisprudence on corporal punishment for disobedient wives to borrow, instead, from the Hanafi jurists, who were much stricter in this regard, even applying indemnities for husbands found guilty of excessive brutality. In this, the Code Morand would have forbidden physical punishment "even for plausible motives."[37]

A few pages later, however, another article (II.I.71) opted for the more severe Islamic interpretation on the wife's forfeiture of maintenance should she absent herself from the home of her spouse. Though there is no consensus among the Maliki *fuqaha* on whether a wife in this case is owed daily living expenses, only the cost of rent, or neither, Morand took the hardline approach that a woman who refused to reintegrate into the conjugal home was due no upkeep (French, *pension alimentaire*; Arabic, *nafaqa*) whatsoever.[38] In so doing, Morand was also conforming to a severe interpretation of the *Code civil* regarding punishment for absentee wives that had come down from courts in the French metropole. Though the Napoleonic Code made cohabitation obligatory, it did not provide for exactly how a wife would be made to return to her husband's residence, and so later rulings recognized various ways in which this could be achieved, namely: the husband's withholding support to a wife living apart from him

[37] Morand, *Avant-projet de Code*: 47-48.
[38] Morand, ibid.: 45-56.

to compel her to return, the court's seizure of her assets, and, as we will see below, forced reintegration.[39]

Perhaps most notably, article 80 of chapter 2, on the mutual obligations of marriage, simply replicated article 213 of the French Code Civil on the same question: The husband owes his wife protection while she owes him obedience.[40] Remarkably, this principle imported from Paris arrived in Algiers via Cairo: Morand cited the Egyptian Family Code of 1897, which had itself absorbed this French principle as part of the Egyptian juristic effort at "defensive modernization" – that is, to demonstrate openness to "modernity" in order deflect unfair treaties imposed by Western powers.[41] It shows a certain ingenuity, if also a little cunning, on the part of the drafters of the Code Morand to have capitalized on the recycling of this French principle through an Islamic juristic framework in order to justify its application in Algeria. More significant still, this newly-introduced concept of marital mutual-obligation produced a curious hybrid in Egyptian law: the *beyt al- ta'a,* or "house of obedience," which encompassed the right of husbands to not only withhold support for wives who left the marital home, but have these "*nashiza*" (disobedient) women forcefully returned to "correction" (obligatory cohabitation and resumption of wifely duties).[42] Here again, jurisprudence from the French metropole is instructive. As a south-western French court ruled in 1863,

> A woman who has abandoned the marital domicile can be restrained *manu militari* for her reintegration if she has no legitimate motive to refuse. [*La femme qui a abandonné le domicile conjugal peut être contrainte* manu militari *à le réintegrer, alors d'ailleurs qu'elle n'a aucun motif légitime de s'y refuser*…].[43]

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[39] André cites a number of these decisions (Colmar, 10 July 1833; Seine, 21 Oct 1830; Dijon, 4 Feb 1888) in *La Puissance Maritale*: 116-117. See also : Gaston Griolet, Charles Vergé, M. Koehler, Louis Robinet, and St. de Lanzac de Laborie, and Victor Dalloz. *Répertoire pratique de législation, de doctrine et de jurisprudence* (Paris: Dalloz, 1910).
[40] Morand, ibid.: 54.
[41] Cuno, "Disobedient Wives": 4.
[42] Ibid.
[43] André, *La puissance maritale* : 112, quoting a ruling from the Court of Pau on 11 March 1863. This was a dominant interpretation shared by a number of other courts: Paris, 29 May 1808; Pau, 12 April 1810; Cassation,

In chapter 3 of the Code Morand, articles 171 and 172 address the dissolution of marriage and recognized reasons and methods, including the recourse to observation under two trusted arbiters. Morand declared them responsible for assessing fault, while the *qadi* simply executes the sentence. For these sections, Morand relied primarily on Perron's translation of the Mukhtasar of Sidi Khalil Ibn Ishaq. It is worth probing why, on some occasions, Morand preferred Seignette's translation while in others he turned more conventionally to Perron, particularly as no-where in the passages Morand cites does Perron in fact use the phrase "*domicile conjugal*," while Morand applies it liberally in his code. Instead, Perron described a more abstract "marital authority and power," and only used phrases like "ils remettront le mari avec la femme" (as opposed to "réintegrer le domicile conjugal") in cases where the arbitrator finds her at fault and she must return to her husband.[44] While this might seem like mere semantics, it is instructive that Perron, who was concerned with fidelity to Sidi Khalil's original Arabic text and not a controversial political project of the magnitude of Morand's codification scheme, did not mobilize the language of the Napoleonic Code though it was certainly available to him.

Combined, the effect of severely curtailing women's financial maneuverability vis-à-vis their husbands would surely negate any protections against domestic violence the Code Morand purported to offer. Indeed, the Blida archive contains a number of cases of spouses fighting bitterly over goods and immovable property both during divorce disputes and long

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19 August 1826; Dijon, 25 July 1840. The resort to force gave way somewhat toward the end of the century in favour of methods of financial coercion, as seen above, but was revived again in 1924, as I will discuss below.

[44] Nicolas Perron, *Précis du Droit Musulman*, 3rd ed. (Paris: Bar-sur-Aube, 1883): 512. The *Mukhtasar* of Sidi Khalil Ibn Ishaq is an incredibly dense text written in an antiquated high scholarly language, so any modern French translation would have necessarily mobilized concepts foreign to the text itself to render it meaningful to contemporary French readers. The point remains that Perron's concern with fidelity and Seignette's (and Morand's) concern with administrative utility produced notably discrepant interpretations.

after nullification. That women left their most precious goods behind was an important indicator that they had not left in a fit of spite, but, crucially, had been "chased" out suddenly and without reason, thus placing the blame for the marital rupture on their husbands. In turn, numerous married men, at least in the Algérois, showed their determination to extend their control over their wives, or punish them for their insolence, by refusing to relinquish rightfully-owed property or monthly alimentary payments. Such was the case, for instance, of one Rebehi Lamri Belgacem, a farmer from Berroughia, who in April 1931 was taken before the local French judge by his wife, a property owner named Oumhani bent Miloud, over of some 2,000fr worth of goods, jewelry, and livestock that she was forced to leave in his possession following her flight from his home. Though Rebehi had been convicted in a criminal tribunal of excessively beating his wife, for which he was fined 25fr plus 100fr in damages, he nonetheless countered his wife's property claims on the basis of marital authority. Oumhani had taken the step (in vain, it seems) of complaining formally to the Governor General. Accompanied in court by her lawyer Marcel-François Luccioni, Oumhani presented the written testimony of a plethora of witnesses who confirmed that the goods and livestock in question were hers originally. On this basis, the French judge condemned the defendant to return said goods, as well as to further fees and damages.[45]

Amina bint el-Hadj Mosthafa Moulin (Casablanca 1918)

When Boulik bint el-Hadj Mohammed successfully sued for divorce in Blida 1907, the Code Morand was only just being released in piecemeal excerpts. A decade hence, subsequent to the publication of Morand's Code in 1916, a major precedent-setting case not in Algeria, but in Morocco, gives some indication of the kind of hearing women seeking harm-based

[45] AWA Justice 1T 399. Dossier d'appel. 6 June 1931.

divorce could now expect to receive in colonial courts. By this point, though the Algerian *départements* and the Moroccan and Tunisian protectorates were ostensibly distinct jurisdictions, Tunisian appeals were directed to the Chambre de révision musulmane in Algiers. Moreover, a shared colonial legal culture for the administration of *droit musulman* was facilitated by the publication of various law journals for use throughout the North African colonies, above all the *Revue algérienne, tunisienne et marocaine de législation et de jurisprudence* published out of the École de droit d'Alger.

The reversal of the original ruling in the dispute between Amina bint el-Hadj Mosthafa Moulin (Amina hereafter) and her husband, El-Hadj Mohammed bin Al-Hadj Bou Cha'ib ben Houmman (Mohammed hereafter) in Casablanca in 1918 is particularly revealing of the confrontation between the Islamic recognition of harm as a grounds for divorce and the emergent masculine prerogatives endowed by the *domicile conjugal,* with the ascendance of the latter occurring at the expense of the former. In the original trial, each party presented what were by now arguments familiar to the courts: Subsequent to "violent and excessive beating […] without motive," Amina had left his home, and demanded upkeep dated from the day of her departure. Her opponent, Mohammed, claimed that he never beat her and that she had "left the domicile conjugal without authorization," as the French translation stated ("*nushuz*" in the Arabic original). The *qadi* in first instance had Amina's body examined by two midwives, who verified the existence of numerous bruises and other signs that she had been subjected to a severe beating. However, since the provenance of these marks could not be established, the next course of action was to have the two parties placed under observation in the home of an honourable arbiter. The *qadi* also ruled that Amina was due the upkeep she

demanded for the two months she had lived apart from her husband, since she could only be denied it, according to Maliki *fiqh*, if she had left his home "without reason."[46]

In cassation, this ruling was deemed erroneous for the following reasons. First, though her injuries were undisputed, the higher court was less concerned with their source (recall: this was the point of uncertainty that necessitated the *dār ʾadl* solution) and more concerned that "it was not established whether the husband applied them *without reason*" (emphasis added). To verify this point, wrote these jurists, the *qadi* should have interviewed the neighbours to gauge whether the husband was in the habit of abusing his wife (again) "without motive." It was also incumbent upon the *qadi* to determine whether this was an isolated incident or part of a larger pattern; in other words, the abuse needed to pass a threshold not only of severity but also frequency. Perhaps most remarkably, however, on the matter of battery, this decision concluded that regardless of the severity or frequency of the beatings, the wife would in any event be obligated to "return to the conjugal home," and this information should be used, rather, to decide whether to apply any punitive measures upon the husband, namely prison. Thus, exactly as in the case of marital rape of underage brides, though jurisprudence ultimately *did* allow for the possibility of a prison sentence for any husband found to have displayed inordinate "brutality" toward his wife, the victim was nonetheless obligated to resume living with him.

Second, regarding the living expenses she was owed, it was determined based on various commentaries on Khalil's *Mukhtasar* that a wife who leaves her husband's home without permission has the right to a basic allowance but not to rent. By parsing *nafaqa* (maintenance) into two categories, the Muslim appeals council of Morocco set an important

[46] Louis Milliot, *Recueil de jurisprudence chérifienne. Tribunal du ministre chérifien de la justice et Conseil supérieur d'ouléma (Medjlès al-istinâf)* (Paris: Éditions E. Leroux, 1920): 26.

anti-woman precedent. Yet more telling is Milliot's translation of the Arabic original, and the transmission of a legal culture of deference to the private space it signified. In fact, the husband's accusation of "*nushuz*" (disobedience) on the part of his wife in the original record of the decision was rendered as "*départ non autorisé [du] domicile conjugal,*" and its remedy described as "*mise en surveillance du ménage*," in the French published version.[47]

Fierro includes this case in her genealogy of the *dār ʾadl* in the Maghreb, and its transformation from an exit strategy for battered women into a veritable prison. However, her assessment of the significance of this case does not account for any effect the French colonial presence might have had. I would suggest, rather, that the dissemination of French legal precepts and their absorption into Islamic adjudication is indeed a key factor in the shaping of these decisions. Meanwhile, as we will see, punitive frameworks for protecting "the family" in the interest of "public order" also circulated from metropolitan to colonial jurisdictions and back again.

From "Arbitration" to "Abandonment" (Cherchell 1926)

As mentioned above, of the ten cases in which women's flight or requests for divorce were countered by their husband's demand for their reintegration, all but one were heard before a *qadi*. The case of "Boulik" in 1907 is the only record which contains the outcome of the couple's residency with the trusted arbiter(s). The rest show only that women in the arrondissement of Blida continued to rely on this strategy in *qadi* courts as a way to avoid reintegration, or support their rights to upkeep in the interim.[48] Two cases that took place in

[47] Milliot, ibid.: 24-24.
[48] For instance, in 1912 two women, one whose case was heard by the *qadi* in Blida, and the other who went before the *qadi* of Berrouaghia, were both ordered to "reintegrate into the conjugal home." The ruling by the *qadi* of Blida stipulated that, as part of her "reintegration," both spouses must reside with a trusted arbitrator of their mutual choosing. As for the other case, the *qadi* judged that the point of contention was not between the

1926 are worthy of note, as they were both filed by Kabyle women who sued their respective husbands in the *mahakma* of Cherchell.

Azzaz Halima bent Mohammed had initially lost her case in the Tribunal of the Peace in Cherchell, and was ordered by the French judge to reintegrate into the conjugal home, without rights to any compensation in damages or alimony for the time she was separated from her husband since he threw her and two of their six children out of his home. This case was then referred to the *qadi* of Chercell for enforcement, where Azzaz Halima pleaded for the upkeep she believed she was due under "orthodox" Islamic law. In the first trial, her husband had successfully argued that she was owed no such compensation, since she had left "without reason" and was thus in a state of "insurrection," according to Kabyle law. However, the *qadi* of Cherchell accepted Azzaz Halima's argument and added a caveat to the sentence passed down by his French colleague: until her husband could provide an adequate living arrangement with a trusted neighbour, he would owe Azzaz Halima a monthly allowance. For good measure, the *qadi* even absolved her of the cost of the legal process.[49]

A few months earlier, another Kabyle woman named Hassaïne Fatma bent Djelloul Louahlia had brought a similar case before the same *qadi*. She and her husband, Seddaoui Abdelkader, had been married for thirty years, and together had nine children. Then, in 1922, he had sent her from his home without support. In November 1923, Hassaïne Fatma's brother sued her husband for upkeep, but this was rejected. They appealed this decision but lost again, and were ordered to pay 5 francs per day until she was reintegrated into the *domicile conjugal*. Even as their case was making its way around the courts of the arrondissement, Seddaoui took a second wife in 1925. Subsequently, by her third attempt Hassaïne Fatma was granted the

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married parties, but between the husband and his brother in law, and thus the latter was fined 5fr per day until her return. AWA 1T 317 Justice. Both filed for appeal in the Tribunal of Blida on 12 Dec 1913.

[49] AWA 1T 367 Justice. Dossier d'appel. 20 Aug 1926.

right to seek lodging with "honorable persons," an order with which Seddaoui Abdelkader was slow and evidently loathed to comply. This ruling was confirmed a year later by the *qadi* of Cherchell, who cited verses in the Quran advising believers to take only as many wives as could be treated fairly and equally. He also gave Hassaïne Fatma the option of divorcing him if he continued to flout the order.[50]

These are undoubtedly complex cases and if the procedures guiding them appear especially opaque to contemporary eyes, it gives us a sense of the labyrinth of regulatory channels these litigants were willing to go through to attain what they believed was a just outcome. As seen in the previous chapter, the ambiguities of Kabyle status and debates around the limits of French interference meant that Kabyle women living outside Kabylia had a somewhat wider range of venues and codes they could access for the adjudication of their personal status cases. To determine which held the best chance of gaining satisfaction, European legal counsel was clearly indispensable. It is interesting to note both of these Kabyle women hired the services of Edouard Weill, whose reputation as a litigator in this particular type of suit must have been solidly in place by this point. Did these two Kabyle women from Cherchell know each other? Did advice pass between them or their families on how to use the colonial court system to their best advantage, on which European lawyer was equipped to help them win, and which Muslim judge would most likely lend them a sympathetic ear? Though we catch only a brief glimpse of their lives through these records, the many parallels between them strongly suggest a connection. These cases also give us an indication of coastal urban *qadi* jurisprudence in matters of this variety – who seemed, in

[50] AWA 1T 367 Justice. Dossier d'appel. 20 April 1926. This very notion of a daily indemnity seems itself also directly sourced from French jurisprudence (Bourges 17 May 1808; Gueldre, 6 June 1849; Cassation, 26 June 1878). André, *La puissance maritale*: 122.

accordance with Charnay's previous observations, on the whole inclined toward liberal interpretations of religious laws surrounding marital strife and wifely flight.

How, then, were these cases subsequently dealt with in appeal? While the archives do not reveal the final outcome for Azzaz Halima, Hassaïne Fatma, Boulik Cherifa, or the other women who sued for arbitration in the arrondissement of Blida and elsewhere, the colonial archive and published sources do tell us how higher courts understood and adjudicated in such cases. Importantly, when Azzaz Halima's opponent took his appeal to the French court, his lawyer, Benjamin-Gabriel Texier, carefully constructed a case against her based on the assertion that she had "abandoned the domicile conjugal." The language of lawyers is deliberate and methodical, and Texier's choice of the terminology of "abandonment" of a husband and four children was certainly meant to cast a harsher, more disparaging light on Azzaz Halima's actions. This is because within the previous two years, abandonment of the conjugal home had been officially criminalized in Algeria. What had been an offence against the private foyer was now a crime against the state and the public interest.

Criminalizing Family Desertion (1924-1930)

On 7 February 1924, Paris issued new legislation criminalizing the desertion of the family (*abandon de famille*) in France. A simple law of only a few clauses, it applied to both "mothers and fathers" and punished them with a short period in prison (three months to one year), as well as the "loss of paternal authority (*puissance paternelle*) and civil rights (*droits civiques*)" in the event that they should be brought to justice for failing to provide "for their spouse, minor children, or ascendants."[51]

[51] JO- *Chambre des députés*. 9 July 1923.

A demand for such a law had been initiated ten years prior, by a report by Albert Tissier, professor at the Paris Faculty of Law, to the Society of Prisons in December, 1913.[52] This report pointed to the alarming number of abandoned and uneducated children left in the wake of the legalization of no-fault divorce (1884) and the 1907 law giving wives full control over their earnings. Subsequent to these landmark pieces of liberal legislation came reactionary moral panic, observed by socio-cultural historians of the Third Republic, of which this report was typical: "With the number of divorces growing each day, more children are left destitute," more single women left exposed to "misbehaviour," and more orphans ripe for "vagabondage" and lives of crime.[53] In turn, the report explained, as more young women clung "to their moral and material independence," the inevitable unfolds: "depopulation, debauchery, infant mortality," and so on.[54] But this crisis could provide its own expedient solution, Tissier insisted: instead of these hungry masses falling upon the mercy of public assistance, those "*égoïste*" individuals who had reduced them to such penury should be held responsible. They should be brought to justice in order to provide support, and failing that, they would be jailed – or, better still, placed in a workhouse.

Tissier's report, and subsequent *vœu* produced by the Society of Prisons, eventually supplied the language and reasoning that conservative representative Louis Marin would later use to draft and promote the family desertion law. Though, according to Tissier and later Marin, French women were the ostensible beneficiaries of this policy, feminist advocates seemed less convinced, and objections were raised by the *Union fraternelle de la femme* who

[52] Maurice Latreille, *Le Délit d'Abandon de Famille*. Thèse pour doctorat, Faculté de droit de Toulouse (Toulouse : Saint-Cyprien, 1926) : 37-44.
[53] Albert Tissier, "Rapport," as quoted in J. Levinec, *Du délit d'abandon de famille (Loi du 7 Feb 1924)*. Thèse pour doctorat en Sciences juridiques, Faculté de droit de Rennes (1927): 27. On the conservative backlash to the 1884 Naquet Law authorizing civil divorce in France, see: Theresa McBride, "Divorce and the Republican Family," in Accampo et al. (eds.), *Gender and the Politics of Social Reform in France*: 59-81.
[54] Levinec, *Du délit d'abandon de famille* : 26.

argued that the law was designed to primarily benefit men and only children born in wedlock.[55] Perhaps this should have come as no surprise given that, though the law was not gender specific, it very much resurrected the anxieties and legal methods of the previous century regarding wifely rebellion and a husband's recourse to public force or incarceration.[56]

The French desertion law of 1924 is also striking for the way it in fact seemed to mirror legislation already in effect in French West Africa (A.O.F.). As historian Marie Rodet has found, the rate at which West African women in the cercle of Kayes (in present-day Mali) were deserting their marital households had apparently reached a rate disconcerting to the colonial state, and by 1910 it was deemed a "customary offence."[57] In 1914, this "crime" on the part of unwilling wives became punishable by imprisonment, resulting in the incarceration of scores of West African women. Aside from foreshadowing the French family desertion law, the physical imprisonment of "obstinate" African women who refused to return to the conjugal home, using police force if necessary, is notably resonant with the emergence of the *dar juwad* that Larguèche describes in colonial Tunis. The "correction" of rebellious Tunisian and Moroccan wives, moreover, echoes the provision in the Egyptian Family Law Code (1897) that compelled "*nashiza*" women to repent their willfulness and return to "correction"

[55] Ibid.: 41.

[56] The 1924 law reflected not only the older "house of correction" remedy for adultery, but the 1863 Pau decision quoted above: "A woman who has abandoned the marital domicile can be restrained *manu militari* for her reintegration if she has no legitimate motif to refuse." André, *La puissance maritale*: 112.

[57] Rodet, Marie. 2009. "Le délit d'abandon de domicile conjugal; ou l'invasion du pénal colonial dans les jugements des tribunaux indigènes au Soudan français, 1900-1947." *French Colonial History 10* (1) : p 160. According to Rodet, these women threatened not only the perceived "sanctity" of the "indigenous family" in the view of French administrators working within a late-nineteenth-century bourgeois frame of reference, but might upset the whole social order upon which colonial domination rested. By formalizing this reason for seeking divorce as official "customary law" punishable through the criminal justice regime, the French administration of the A.O.F. effectively engaged in "the invention of tradition," grafting their authority onto that of the existing patriarchal social structure.

under their husbands' authority, itself inspired by marital mutual-obligation in the French Code civil (discussed above).

With family desertion now a criminal offence not only in the metropole and a significant swath of French territory in Africa, but also Muslim jurisdictions outside the French empire (Egypt), it is little wonder that colonial officials also began to contemplate its potential utility in Algeria. In April, 1924, mere months after the family desertion law was passed in France, the Algerian Attorney General Eugène Robe wrote to the Governor General suggesting that this law should be urgently considered for application in Algeria as well. His reason for its necessity: "family desertion concerns not only private interest, but also the public order."[58] The series of correspondence regarding this potential new law affirm that Robe's priority was its applicability to the native population through the channels of criminal justice. However, only later was a more tangible need provided by military commander at the southern region of Touggourt: "in order to remedy the disadvantages posed by the exodus of natives from the region of Tolga [an oasis town southwest of Biskra]." That month, desertion of the family became punishable in Algeria just as in metropolitan France. Whereas decrees that might appear to interfere in Muslim personal status matters would typically require a more lengthy consultation process, because this was ostensibly restricted to criminal justice, and did not require an amendment to the penal code, only the expert opinion of the attorney general was sufficient to justify issuing this circular.

A subsequent circular was issued on 4 November 1927 regarding "the execution of judgments ordering the reintegration of wives into the conjugal home," in which the target of the abandonment law was made more explicit. This circular specific to women was issued in response to complaints by a number of Muslim husbands who had obtained court orders for

[58] Algerian National Archives (ANA). Beaux Arts 1004: Affaires diverses relatives a l'état civil.

the reintegration of their wives but who found these decision to be a "dead letter when faced with the wife's refusal to the agent of execution [of her forced reintegration]." As one woman defiantly told her husband, "not even the police commissioner will make me return to you."[59] Even if they did comply, many fled again promptly after the executing officers departed the scene.[60]

One such woman, for instance, was Khedidja bent Mohammed, who, in the fall of 1930, was sued in the court in Boghari (Ksour Boukhari) by her husband, Aissa ben Mohammed, for having fled the conjugal home after he threatened to kill her while brandishing a pistol. Aissa ben Mohammed claimed both that Khedidja was being held against her will by her conniving brothers *and* that she had "tricked him" by deftly escaping his home after the first time he had had her forcibly returned. The *qadi* of Boghari ordered her reintegration, which she subsequently appealed.[61] This question of the measure of an escaped wife's true intention would be addressed in judicial review in the landmark case of Hamza Mimi in the tribunal of Algiers (discussed in the final part of this section).[62]

It would not take long before the Algerian prosecutor general saw fit to reconsider the family desertion law in Algeria, as it was found to "present at times certain serious disadvantages." In general, much of the published judicial review of such cases described in only abstract terms the unseemly scenarios these laws had produced, provoking many "a scandalous scene that gravely disturbs the public order."[63] In fact, these "scandals" occurred when men frustrated by the futility of court orders began to take matters into their own hands

[59] Quoted in Charnay, *La vie musulmane*: 47.
[60] Dulout, Fernand. *Traité de droit musulman et algérien: (doctrine--coutumes--jurisprudence et législation)*. 1947: pp 155-156.
[61] AWA Justice 1T 399. Dossier d'appel.
[62] Khedidja's appeal took place subsequent to the precedent set by Hamza's case, and there is unfortunately no way at this point to ascertain the former's outcome.
[63] RA 1939: II, 148-150.

and in a number of cases had killed either their wives or else their wives' parents if it was they who refused to cooperate.[64] Consequently, the attorney general took an informal step back from the objectives of the 1927 circular; without retracting any of the language, he imparted to Algeria's judicial personnel that the circular would remain "in principle" but that each case would have to be examined as they arose and public force employed only if "a public scandal, being scenes of violence" could be avoided. Moreover, native agents, "*gardes champêtres*" or cavaliers, were preferable to the *gendarmes* in such cases. Algerian justices subsequently turned to French jurisprudence that preferred financial rather than physical means of coercion (based on II.I.71 of the Code Morand), though this came with its own set of difficulties for the women involved.[65]

Another case from Blida shows the extent to which a woman's request for honourable arbitration had become tied up with a husband's right to her incarceration by this time. In the winter of 1932, Khelfi Fatma Zohra bent Ahmed petitioned the *qadi* of Blida to enforce a previous order that her husband, Bouchaab ben Abdelkader, arrange her residence with a trusted neighbour. This Bouchaab promptly did – with the local police chief. She rejected this arrangement, however, on the grounds that the police chief was "not honorable" for reasons that included, perhaps surprisingly, his polygamous marriage to several women. The *qadi* ruled in her favour and granted her a judicial divorce at the fault of the husband, who was ordered to cover her monthly upkeep since the initial decision, plus damages. Bouchaab, in turn, filed an appeal with the civil court of Blida, arguing, *inter alia*, that the amount of

[64] Ibid.
[65] RA 1927: I, 63.

money involved classified this case as a property rather than personal status dispute and that the *qadi* was thus ruling outside his competence.[66]

Hamza's Defence (1931)

When French jurist Ferdnand Dulout wrote his *Traité* on Muslim law in Algeria in 1940, he determined that family desertion law had by that time been reduced to a toothless document, and accredited its demise to the long and turbulent divorce case of Hamza Mimi bint el Hadj Mohamed. For nearly five years, from September, 1926 until April, 1931, Hamza fought repeatedly in court for a divorce from Amine Youcef ben Kaddour (Amine hereafter). She left his residence in Kouba in the summer of 1926 to return to the home of her brothers in Saint Eugène (Bologhine, a district of Algiers). When Amine subsequently brought his complaint to the local *qadi* court in order to have her reintegrated into the domicile conjugal, Hamza refused, and in January 1927, she was granted a divorce. Twice Amine appealed the divorce decision, and twice Hamza fought for and re-confirmed the initial divorce, each time having to demonstrate to an investigating unit the merits of her case, based on Amine's violent abuse. In the midst of these battles, Hamza also endured the public spectacle of forced removal from her brothers' home to be dragged back to that of Amine. The courts that condemned her to return also fined her ten thousand francs in damages and maintenance, being the wealthier of the two spouses, according to the family desertion law. In anticipation of the forthcoming (and final) appeal decision, Hamza took an unusual but courageous step to give credence to her case. Recognizing that, by speaking through intermediaries and representatives, the French justices would be inclined to presume that she, like all Algerian

[66] AWA 1T 410. With the help of a lawyer named Delahaye, Bouchaab's appeal cited not Morand's Code but another similar – and similarly authoritative – text by French jurists and scholars of Muslim and Jewish law, Édouard Sautayra and Eugène Cherbonneau, in which a wife's right to the return of her dower was deemed to "constitute a simple financial claim of the wife over her husband." Sautayra and Cherbonneau, *Droit musulman. Du statut personnel et des successions* (Paris: Maisonneuve et cie, 1873) : T. 1, no. 81.

women, was merely a hapless pawn of her male relatives, she provided testimony in person, declaring,

> It is of my own free will [*de ma propre volonté*] that I have left the home of my husband… I am of the age of majority, master of my affairs [*maitresse de mes droits*] and I want nothing more to do with my husband, whom I can no longer support… My only wish is to obtain a divorce. I do not understand what possesses my husband to pursue my reintegration into the conjugal domicile, since he knows perfectly my sentiments in this regard… The sole cause that propels him is to try to take hold of my fortune.[67]

Thus, on 30 April 1931, Hamza won a decisive divorce. Notwithstanding the usual caveats of mediation that such archives demand, the relative directness represented by this testimony is almost unheard-of. Given her deployment of various republican idioms – invoking "free will" and "mastery" of her affairs – it is very likely that this young, educated woman of means spoke to the judges in their own language, leaving no room for misunderstanding. Hamza quite simply needed, necessarily, to address the bench herself, as insisting on her autonomy through intermediaries was, for obvious reasons, self-defeating. Though the Orientalist inclinations of the jurists were still unmoved (they judged it necessary for French tribunals to "reconcile the interests of the Muslim woman with the imperious exigencies of Muslim law") in the opinion of later French jurists, her testimony and subsequent positive outcome did effectively reverse previous jurisprudence on the forcible return of "disobedient" women to the conjugal dwelling.[68]

After Divorce: Property and Child custody

Our exploration of divorce in the *qadi* courts of the arrondissement of Blida would not be complete without a discussion of the personal status suits filed in the aftermath. Many of

[67] RA 1933 : II, 20.
[68] Dulout, *Traité*: 156-158.

the cases described above certainly fit this description, but two further observations bear mentioning. First, as the above case of Khelfi Fatma Zohra bent Ahmed vs. Bouchaab ben Abdelkader demonstrates, litigants often used the plurality of jurisdictions and unclear divisions of labour between them to their advantage. Post-marital property disputes seldom fit neatly into either "personal status" or "property" law, strictly speaking, and such cases were often volleyed between the jurisdictions of French and Muslim magistrates. Such was the case for instance, in the suit between Oumelkheir bent Lakhdar and her husband Bou Maza Mohamed ben Ahmed, which began in the *mahakma* of Djelfa in April 1926. Initially, Bou Maza had sued his wife for a number of possessions, including jewelry, livestock, carpets, and other housewares, as well as custody of their two daughters, following a court ordered divorce whose terms were settled between him and his wife's father. Oumelkheir asserted that the claimed possessions had been hers going into the marriage, that the divorce was in fact extra-judicial, and as such her children should remain in her custody and her husband should provide for their food and shelter. Through testimony from a series of honourable witnesses she proved each of these points; even Bou Maza's witnesses supported his opponent's version of events – and the *qadi* pronounced in her favour. When Bou Maza appealed to the Tribunal of Blida, he was represented by none other than Gaston Ricci, erstwhile champion of Kabyle women in Tizi Ouzou. In fact, at least initially, Ricci's name appeared on both of their appeals, though the conflict of interest must have caught the judge's attention, since in subsequent files she was represented by Raymond Klein. For his part, Bou Maza's appeal was based largely on the misapplication of the *qadi*'s competence in a matter that was both "*personnel et mobilier*," involving a great enough value that it belonged under French purview.[69]

[69] AWA 1T 367. Dossier d'appel, Blida, 6 July 1926. The matter of the children seemed to be a secondary

There is no record of the outcome of Bou Maza's appeal, but it appears the *qadi*'s initial ruling was thrown out. We know this because of a remarkable document that accompanies this appeal file: a letter from Oumelkheir to the French magistrate at Blida. Written in the same halting French as the handful of other personal letters and petitions contained in these records, it was likely written from her dictation by an acquaintance or neighbour with some French education (see Appendix: Figure 7). It begins with the usual politesses of all official letters, expressing gratitude at having "the honour" to beg the reader's "great benevolence" in the appraisal of her situation. The letter then went on to explain both the background to her case and the evidence to support her side that "will be found in [her] file," which she invited the judge to re-examine, as well as the number of witnesses she would be happy to present if asked. Toward the end of the letter, the desperation that no doubt drove her to write it in the first place became more apparent:

> Besides, sir, the *indigène* [her husband] took all of my goods. And he wanted to kill me. I can even present to you all of my witnesses. […] Since my lawyer has informed me that my judgment [by the *qadi*] has been overturned, I will appeal it. I hope you will judge our case.[70]

This letter shows at once Oumelkheir's resilience in the pursuit of her rights under Islamic law and the incomprehensibility of the system that had denied them to her. Patiently, Oumelkheir explained the strength of her case to the colonial magistrate, assuming not ill-will but perhaps some carelessness. Employing techniques we saw, for instance, in the letter of Fatma Chikiken to the Governor general (in Chapter 2), Oumelkheir emphasized the charity and intelligence of her reader, the judge, her best hope against "the *indigène*" who had

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question for Bou Maza, and it is likely that he included their custody in his claim simply to avoid child support payments. This is not to say it was typical of fathers in such cases, and elsewhere in the Blida files, we find instances in which parental and grandparental devotion was the main motivator behind child custody disputes.

[70] AWA 1T 367, ibid. As this passage appears in her letter : "Dautre par Monsieur, cette Indigène mapris tous mes bien. Et il voulé mêm me tués. Je peut mêm vous présent tous ses témoins que je vous cette au tribunal […] Puisque mon avocat mainformé que mon jugement et cassi, dans ses condition je ferrait appèl. J'espère que vous jugi notre affaire."

wronged her. Unfortunately, we do not know whether or not the appeal she had promised was ever heard, much less successful.

The second observation on the after-effects of divorce regards the impact of the État civil des indigènes. Records of marriage and divorce became an essential component of personal status litigation in the wake of the État civil des indigènes, and documentation – or lack thereof – was frequently the crux of personal status court decisions. We know of cases in which this worked to the advantage of some women, who in fact claimed that they were nothing more than their husband's "concubines," since their marriages had never been registered. On this basis, one husband's demand for reintegration into the conjugal domicile was often thrown out and the conjugal line between them declared null.[71] But documentation was a tangled web, and could just as often work against divorced wives in such cases. For instance, in December of 1912, Gacem Messaouda bint Mohamed, of Mouzaiaville, demanded upkeep from her husband, Gacem Rabah ben El-Hadj Ahmed, who owned a café in the same town, following a repudiation in her absence. They had been married seven years prior before the *jamaa* (village council), and though she had born him five children (none of whom survived), he argued before the *qadi* of Blida that she was a concubine and he owed her nothing.[72] Yet, though the marriage was never registered, the divorce was. The *qadi* of Blida thus ruled that an official repudiation could not exist in the absence of conjugal ties, and then and there declared the two married, by virtue of which the wife was owed the upkeep she demanded until their marital strife was resolved. Where her evasion of the État civil might have proved her demise in this case, Messaouda turned instead to a series of trusted and "expert" witnesses, including the captain of the native guards, the Guard of the tribunal itself,

[71] Lazreg, *Eloquence* (104), citing Charnay, *La vie musulmane*: 37.
[72] AWA Justice: 1T317. Dossier d'appel, 6 Mar 1913. Note that Weill filed her husband's subsequent appeal.

and another important figure: Hasana, the local midwife, who had assisted with the birth of their children and attested to the paternity of the father. The remainder of this chapter turns to this critical matter of evidence and the role of women healers and contested "medical" knowledges in women's divorce cases.

II: Colonial Medicine in Divorce Court

Case study: Rekia bent el-Hadj Belgacem's dubious divorce (1912)

On 17 August, 1912, Rekia bent el-Hadj Belgacem went to court in the mahakma of Ksour Chellala, a small town some 300 kilometers south of Blida, to demand compensation following an unlawful repudiation. She was represented by a court-appointed *oukil judiciaire* (legal representative), Bahmed ben Aissa, who spoke on her behalf against her ex-husband, a farmer named Belkacem ben il-Hadj Othmane. Her suit rested on the claim that Belkacem was impotent and that for two years since she began living with him their marriage was never consummated. Through her *oukil*, she testified that they had agreed on a *khul'* divorce, not a unilateral repudiation. Moreover, since he was incapable of performing the sexual duties of husband, and there was nothing that she could have done to save the marriage, the fault lay with him and it was unfair to demand from her the entire sum of her dower – a relatively modest, but not insubstantial, sum of 250 francs and several pieces of jewelry valued at 50 francs each. She asked, therefore, that he return the jewelry and abandon his claims to the money.

Her opponent, Belkacem, rejected the allegation of impotence, asserting that the marriage had been consummated, and gave a very different account of the circumstances of their divorce:

> I consummated the marriage with her; what the claimant says is a lie on her part. She had been ill [so] last year, I brought her here to get better. She then refused to return with me to my home. A judgment [divorce act] was passed between us and she never made her current accusations until today, which is to say, when she realized the payment was due.[73]

Yet, promptly afterward, Belkacem conceded that this divorce was done not only outside her presence but without her knowledge, and was concluded instead in an agreement with her brother. It was not Rekia, therefore, but rather himself and her brother who agreed that, the contract annulled, the dower and other goods should be returned to him.

Upon being asked by the deputy *qadi* to support her claims with proof, Rekia said that the plaintiff had had the jewelry removed from his home to avoid returning them to her, but that she had no witnesses to corroborate this. Absent any eye-witnesses, Rekia's only piece of evidence was a medical certificate from the French doctor in Ksour Chellela. This document relayed the doctor's professional opinion that Rekia was still a virgin – that the marriage was thus never consummated – the lynchpin of her entire case.

But Belkacem had brought his own piece of documentary evidence: a divorce act issued by the *bachadel* of the court in Ksour Chellela (the very man who was adjudicating their current dispute) on May 10th of that year, which stated, first, that the *khul'* divorce was finalized by agreement between Belkacem and Rekia's brother, without her knowledge or presence, and, second, that the marriage had been consummated. The *qadi* examined both documents on which each litigant's claim rested, the doctor's exam and the court-issued divorce act, and pronounced in favour of Belkacem. Though he determined that the medical certificate "is sincere" (was not a forgery) he cared more she had never before complained of impotence. He cited, moreover, a passage from the *Mukhtasar* of Sidi Khalil Ibn Ishaq al-

[73] AWA Justice: Statut personnel 1T 317. Dossier d'appel, 12 Dec 1913.

Jundi, which stated that *khul'* divorce was valid without judicial intervention or even the wife's knowledge.[74]

There is no indication as to why Rekia's brother, who had supposedly colluded with her husband in her dubious divorce and impoverishment, did not dispute this allegation on her behalf. But Rekia did fight this decision, in which an element of cronyism seems to have been a factor in her loss. Indeed, in her subsequent appeal to the tribunal at Blida, after the line naming the *bachadel* was written, "It is from him that we beg to be rescued!"[75]

In the case of Rekia v. Belkacem, both parties clearly felt the need to lend legitimacy to their claims through state-approved materials and to demonstrate their adherence to a modern preference for written over oral evidence and 'expertise' over superstition. For Belkacem, a notarized divorce agreement conformed to standards that French administrators had been pressing for years through the État civil des indigènes. For Rekia, her credibility accrued from an expert's reckoning of the history of her body. An essential component of her case was the intervention of the French doctor in Ksour Chellala – the only medical professional for miles in any direction who could have provided the certificate Rekia sought. That even this was not enough to win her case would almost certainly have vexed this colonial expert, whose authority in such matters was hard-won.

Rekia's appeal for divorce, and many others like it, shows how Algerian women approaching the colonial justice system had to do so via the burgeoning state-sponsored medical establishment. As seen in this case, as well as those of several Kabyle women discussed in the previous chapter, the certified medical report was a tool frequently used by Algerian women in the early twentieth century to obtain a court-ordered divorce. More

[74] Ibid.
[75] Ibid.

specifically, throughout this period, French doctors were increasingly called in to testify to the physical traumas endured by young brides claiming wrongful consummation, as well as mature women demanding a release from marriages that had, they claimed, never been consummated. Therefore, in order to escape unwanted marriages without incurring the loss of their goods and property, Algerian women were often required to present and order their anatomy in ways intelligible to colonial magistrates and other officials.

That expert witnesses were called upon in such cases is not in itself surprising. In fact, the assessment of impotence through expert examination, particularly by midwives, stretches back centuries in both French and Islamic legal history.[76] In Algeria, Islamic jurisprudence and local traditions made provisions for inspection by trusted local women healers or *qabla*s (Arabic: *qābla*), whose prestige derived as much from their blessed status (*baraka*) as their role as assistants to childbirth, both of which were passed down through the maternal line. However, in the late-nineteenth-century, their authority was disrupted by the appearance of a phalanx of colonial experts, formalized as *l'Assistance médicale aux indigènes* in 1903, occupied with bringing modern medical practice first to the settlers and later "natives" of Algeria. Yet, even as they worked to suppress the power of the *qabla*s, European health practitioners of all stripes hoped to appropriate and channel the influence held by these healers to bolster their own proselytizing efforts directed at women – whether in the name of religious conversion or prophylactic healthcare. Cases such as Rekia's divorce thus took place in the midst of a confrontation between existing and imported epistemologies of the body, disease, and healing, and the courtroom was an important space in which this contest was performed – and its winners ultimately decided. To understand this history, this section

[76] On impotence in French legal history, see: Darmon, Pierre. *Trial by Impotence: Virility and Marriage in Pre-Revolutionary France* (London: Chatto & Windus, 1985).

attempts to uncover the genealogy of medical expertise in impotence-based cases, bookended by the first and last recorded cases in which professional medical opinion was considered valid.

Modern Medicine and the Construction of Virginity

The judicial precedent that formally sanctioned the professional medical exam as evidence in impotence-based divorce cases took place in the fall of 1878. The Court of Appeals in Algiers reviewed the case of a woman named Hania bent el-Bahloul who had sought a divorce from her husband, Ahmed ben Abdelkader, on the grounds that he had failed to perform his conjugal duties. Ahmed refuted this, and demanded that his wife's claims be dismissed "until a medical visit can demonstrate that she is no longer in a state which is that of a married woman." The judge agreed and upheld the first decision. However, he allowed Hania to bring her case once more before a *qadi*, upon "producing a report from a *medical doctor or certified midwife* confirming that the appellant is still in a state of virginity."[77]

In essence, this decision set a new threshold of trust and believability, removing it utterly from previous mechanisms firmly entrenched in women's homosocial worlds of healing practices and secret knowledge. Until that point, in nearly all jurisdictions and periods that we know of, impotence cases hinged on the statements of local female healers, midwives, and other trusted women in the community, such as a village headman's wife, who could report on the physical state of a given female litigant. Indeed, the midwife was the lone exception to the norm in Islamic jurisprudence that devalued women's competence as witnesses: whereas one man's testimony was normally worth that of two women, in cases

[77] "Arrête d'Alger du 28 Oct 1878," *Bulletin judiciaire algérien* 1879 : 157. Emphasis added. See also: M. L. Armanet, *Manuel pratique et sommaire de la justice musulmane en Algérie... accompagné d'une étude sur le régime législatif de l'Algérie et d'une esquisse de jurisprudence sur les justices de paix à compétence étendue* (Paris: F. Pichon, 1885): 210.

involving the intimate physical examination of a woman claimant, a female authority's statement had equal value to any man's.[78]

The Algerian 1878 decision is interesting for the way in which it seems to mirror an earlier piece of Egyptian legislation, itself the outcome of several decades of medical modernization in Egypt not yet experienced in Algeria. Khaled Fahmy's work has brought our attention to the various schemes orchestrated by the French doctor, Antoine Barthelemy Clot, to modernize and professionalize the medical care of Mehmet Ali Pacha's army, including the establishment of a corps of female medical practitioners who attended exclusively to women, called "*hakimas*." Clot Bey (as he was called) hoped that the *hakima*s would eventually supplant village *qabla*s as the main practitioners of childbirth, but they instead rose to prominence in police stations as forensic experts in rape cases.[79] Liat Kozma's work on the relationship between *hakima*s and traditional midwives reveals the limits of Clot Bey's scheme. *Qabla*s not only performed births, but were trusted confidants, "the keepers of women's secrets," in instances when abortions or the concealment of illegitimate pregnancies was needed. By contrast, *hakima*s would have instead extended the state's policing imperative by exposing such deviant acts. As such, Kozma finds, many decades would pass before *qabla*s were totally replaced by medical professionals in childbirth.[80] Kozma attributes the eventual ascendance of the *hakima*s as expert witnesses at the expense of the *qabla*s to a decree issued in 1864 by the Egyptian Khedivial office sanctioning the testimony of *hakima*s and declaring illegitimate that of midwives. This decree was passed subsequent to a case in

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[78] Ron Shaham, *The Expert Witness in Islamic Courts: Medicine and Crafts in the Service of Law*. (Chicago: University of Chicago Press, 2010): chap 3. Marghīnānī, 'Alī ibn Abī Bakr, Charles Hamilton, and Standish Grove Grady. *The Hedaya, or Guide a commentary on the Mussulman laws* (London: Allen & Co, 1870).
[79] Khaled Fahmy, "Women, Medicine, and Power in Nineteenth-Century Egypt," in Abu-Lughod (ed.), *Remaking Women*: 35-72.
[80] Liat Kozma, *Policing Egyptian Women Sex, Law, and Medicine in Khedival Egypt*. (Syracuse, N.Y.: Syracuse University Press, 2011): 28.

which a *hakima* reported that a woman's allegations of miscarriage after having been beaten, initially corroborated by a midwife, were actually false. So important became the *hakima*'s forensic expertise that her medical report soon "outweighed the testimony of the women [she] examined."[81]

Unlike Egypt, the nineteenth century came and went before Algeria ever had a formal corps of native female informants resembling that of the *hakima*s. Kozma's description of the Egyptian village *qabla* as confidante holds true in Algerian accounts as well. Indeed so renowned was their ability to prevent or terminate unwanted pregnancies that even European women were known to procure their services.[82] In any event, when it came to testimony in court, after 1878, only the report of a medical doctor or certified midwife was permissible as evidence in divorce cases where a physical examination was needed. This drastically shifted the terrain upon which a divorce case could be erected. For one, the colonial medical corps was infamously short on French midwives outside of the main city-centres. By 1904, there were only eight women's clinics operating in villages outside Algiers, Oran, and Constantine. Despite efforts to open a school of midwifery in Algeria since the 1840s, and various tentative proposals to recruit indigenous women to the medical corps since the 1850s, at the time of this ruling, no Algerian women that we know of were certified by modern French standards for midwifery.[83] Indeed, technically speaking, no European women were certified to meet the court's standards either: the harmonization of Algerian midwifery training with French certification standards was not passed into law until 1896. The 1878 decision had the significant effect, therefore, of validating a kind of rarified expertise made all the rarer by the

[81] Kozma, ibid.: 37.
[82] Abel Lévi-Bram, *De l'assistance médicale des indigènes d'Algérie, particulièrement assistance médicale des femmes et des enfants*. Thèse de médecine (Paris, 1907): 95-96.
[83] Claire, Fredj, "Encadrer la naissance dans l'Algérie colonial (XIXe – début Xe siècle)," *Annales de démographie historique (*2011 vol. 2.122) : 171, 175.

lack of available practitioners. This meant that, in order to obtain a medical exam that would be authoritative in the court's view, most Algerian women would have had to either travel considerable distances to find a certified midwife in the nearest urban metropolis, or else, as we saw in the case of Rekia, above, get examined by a male French doctor.[84]

These interveners, more than the women themselves, were trusted to decipher the history of a claimant's body and recode their anatomy into a language of legal reference. The very category of the "virgin" was constituted within a medical discourse that diverged from and was sometimes even at odds with both Islamic jurisprudence and customary knowledges. Even until the early twentieth-century, in most majority-Muslim countries, the condition of a person's hymen was by no means considered the only or most conclusive indication of her sexual history in court proceedings. Attention to hymenal integrity was a resolutely modern medical fixation.[85]

The invasive and even somewhat distasteful nature of pelvic exams for public consumption (whether in the public space of courtrooms or later in published juristic volumes) did not escape the notice of French reformers. Indeed, in the chapter of his draft code outlining new regulations for the age of consent and age of majority, Marcel Morand reasoned that such legal fixtures would help women "avoid expertise [and] exams [of a] nature to offend her modesty [and] compromise her dignity."[86] He was almost certainly referring to the particularly public referral of women and girls to the scrutiny of male medical experts.

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[84] A few years earlier, it might have been possible for Rekia to have sought out a woman doctor in Blida, if not in Ksour Chellala. One doctor Kamensky had set up an infirmary there from June 1904 until January 1905, where she had seen about 1400 patients. Hélène Abadie-Feyguine, *De l'Assistance médicale des femmes indigènes en Algérie.* Thèse de médecine (Montpellier, 1905): 53.
[85] Kozma, ibid.: 28.
[86] Morand, *Avant-projet de Code*: 23 (Art 4.1).

Contested Knowledge Between the Clinic and the Courtroom

If the 1878 ruling legitimized specific medical expertise in impotence-based cases that few Algerian women could access, then it also helped instigate a demand for such knowledge; it created a vacuum, in other words, that French doctors and missionaries rushed to fill. To the consternation of many in the colonial medical corps, the dismal state of health provision for Algerian women and young children in general was largely due to the colonial government's unwillingness to offend the "customs and traditions" of Muslim men, supposedly too jealous and domineering to let their women be handled by foreign doctors, resulting in countless unnecessary deaths in rural and remote places. Another source of frustration lay with the "irrational honourability" vested in maraboutic and other spiritual authorities who doubled as healers, especially the village *qabla*s. For many colonial doctors, it was incumbent on the civilizing mission to bring "social hygiene," a popular concept of the period, to what they saw as remote backwards communities.

Writing in 1907, colonial physician Abel Lévi-Bram described one of the most regrettable effects of the authority of *qablas* occurring on those occasions when their statements were used by *qadi*s to verify the age of potential brides. Because of their ignorance, many under-age women were held to be old enough – or at least physically ready – for marriage to men who were frequently much older. Rather than perform full physical exams, he asserted, they only observed the young women for signs of puberty like the pitch of their voice, signs of menstruation, or sometimes pubic hair. Worse still, *qabla*s could be bribed by the girl's father or intended husband to give a false testimony.[87]

The ideal solution for many medical modernizers lay with recruiting and training more women for the colonial medical service, whether European or indigenous. Unfortunately,

[87] Lévi-Bram.: 84.

especially given the colonial government's hesitation, this would take many years to accomplish, and for the time being, Lévi-Brahm insisted, male doctors were not so off-putting to the indigenous sense of privacy as the administration was led to believe. In his view:

> The supposedly invincible repugnance that prevents indigenous women from receiving care from male doctors cannot, especially at the present time, be considered absolute. All colonial doctors have, to lesser or greater degrees, offered their services to indigenous women, even in those cases, admittedly rare, where the patient had an infection that required an examination of the genital organs (vaginal touching, exploration with a speculum). Once he is able to demonstrate the necessity of these sorts of exams to a husband or a father, in most cases their trust in the doctor is strong enough that the patient does not make too great a fuss at being seriously examined.[88]

Lévi-Brahm was not alone in this contention. Moreover, his and other arguments in this vein by male French doctors evinced a tone of pride at having "conquered" a hidden world and carried the banner of civilization into territory as yet unknown to European men, sometimes facing mild resistance but always less than might be expected. Each pelvic exam in the North African colonies carried the mark of a certain accomplishment for modern medicine. Another physician, named François Gomma, working in Tunisia, remarked that:

> Personally, I have had the occasion to offer my care to several Arab women. I was even able to perform two complete genital exams. On the other hand, Viehn [another colleague in Tunisia], counts 140 women among the 366 indigenous patients he has treated in several months at Bargou. He has practiced as many as six complete genital exams, of which he has written: 'Men voluntarily bring their women and girls to see a doctor every time they are ill. They have never made it difficult for us to auscultate [listen with a stethoscope], percuss [tap], and explore externally. Only vaginal touching and internal exploration disconcerts them.' However, once [the doctor] demonstrates the utility, they generally consent, and let us practice [the exam].[89]

[88] Ibid.: 62-63.
[89] François Gomma, *L'assistance médicale en Tunisie*, Thèse de médecine (Toulouse, 1904): 74-75. Notably, the "they" to whom the doctor is referring in the last sentence as "generally consenting" to the exam is not the woman or girl he is treating but the father or husband who brought her to be examined. Circulaire du gouvernement général aux préfets, 5 Dec 1904.

This enthusiasm for male exploration is notably subdued in the writings of European women, who claimed this territory for themselves. French doctor Hélène Abadie-Feyguine reported her colleague's opinion that the "Arab woman is always unwilling to let herself be examined by a male doctor. Examination with a speculum, even operated by a woman, requires the absence of all spectators. The patient draws the shutters and even then it is after much hesitation that she consents to be examined."[90] Another female doctor, Dorothée Chellier-Castelli, contended that, "no man outside to the family can enter the gynoecium; and the [male] doctor, despite the quasi-sacred character he is attributed, is not exempt from this rule."[91]

Though the civilizing benefits of training and recruiting more women as medical practitioners was not lost on the colonial government, French women were only moderately successful at convincing the administration to fund their enterprises in this regard. Chellier-Castelli was herself frustrated on several occasions in her attempts to convince the colonial administration to divert resources to her operations in Kabylia in order to displace the missionary dispensaries of the "White Sisters" (discussed in Chapter 3) already installed there, whose knowledge of the local language and provision of healthcare through house-calls earned them the favour of local women.[92] Indeed, at one of their mission clinics in Kabylia, Victorine Paquellet, a colon raised in Algiers, was at that time training twelve Kabyle women in modern European birthing practices. By 1904, four of them had become officially certified midwives.[93]

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[90] Abadie-Feyguine, ibid.: p 58.
[91] Dorothée Chellier-Castelli, *L'Assistance médicale féminine chez les Musulmanes. Ses débuts* (Algiers: Imprimerie agricole et commerciale, 1906): 31.
[92] Chellier-Castelli, ibid.:11.
[93] At around the same time, a secular doctor named Françoise Legey had recruited a former *qabla* to join her dispensary in the Algiers Kasbah as a French-trained midwife. Lévi-Bram: 117. Until the Second World War, the

If in Algeria French women – both lay and missionary doctors, as well as even some Muslim Algerian women – laboured to carve out a niche for their gender-specific skillset, the nascent science of forensic medicine provided a new domain for exclusively male mastery and special knowledge, as well as a medical discourse of indigenous criminality. As Fabien Gouriou explains, forensic science provided European men of learning like Adolphe Kocher with a new language to explain the deviant sexuality of Algerian men in particular. In Kocher's 1884 manual *cum* treaties on identifying sexual crimes on the bodies of indigenous victims, the descriptions of "women" and "children" frequently overlapped, and nearly all sex between married couples was described as rape.[94] As the twentieth century progressed, and as forensic science proved a steadfastly male reserve, court records examined in this and the previous chapter show the witness testimonies of both *qabla*s and midwives receding as doctors' exams ascended to authoritative prominence.

Lévi-Bram, as we saw, had faith that this erosion of the *qabla'*s authority and their replacement with French medical practitioners – female if possible, but male just as well – would have the inevitable effect of rescuing underage indigenous girls from violation at the hands of their husbands. Yet there is reason to believe that in fact the opposite occurred. In the view of medical professionals, the question of pre-pubescent marriage was answered by determining whether or not it affected, first, the physical condition of child-brides and, in turn, their ability to give birth to healthy babies. Doctors who performed pelvic exams on girls alleging unlawful consummation often reported instances of severe pain and irreparable

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religious orders remained the most successful at training European and indigenous women as midwives and nurses specific to the care of native women and children. Fredj: p 178.

[94] Fabien Gouriou, "Le sexe des indigènes: Adolphe Kocher et la médecine légale en Algérie," *Droit et cultures* vol.60, no. 2 (2010) : 59-72.

damage.[95] But opinions differed, and some colonial doctors maintained that no detrimental health effects could be observed in child-brides or in their pregnancies.[96] A study, for instance, on the region of Chleff recounted an episode in which a twelve-year-old girl, who had been married at the age of eight, submitted to a series of medical exams in hopes of obtaining a court-ordered divorce. Though the doctor found evidence of severe and continuous injury, the criminal court in which this evidence was heard did not concede that the damage had been caused by her husband.[97]

The Case of Bouacida Baya bint Brahim (1909)

What, then, was the measure of an authoritative medical exam? What happened when the testimony of a physician contradicted that of a midwife or native woman healer? The case of Bouacida Baya bint Brahim's divorce process is a compelling example of how the courts "shopped" for experts over the course of appeals processes. Like the opening case of Rekia's appeal, Bouacida's long struggle to obtain her divorce reveals with each stage of argumentation and adjudication how the interests of "public order," religious jurisprudence, and the medical profession converged in contest and sometimes in harmony upon the evidence presented by her body.

In September 1909, Bouacida married one Messabhia ben Mohammed, and had brought a divorce suit against him a little over one year later to the *qadi* at Ain-Beida, a northeastern municipality not far from Constantine. She argued that he was incapable of consummating the marriage and that she remained a virgin, as she had been before the marriage was contracted.

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[95] Dr. Louis Lataillade, *Coutumes et superstitions obstétricales en Afrique du Nord*, Thèse de médecine (Alger: G. Charry, 1936).
[96] Lévi-Bram, ibid.. : 92.
[97] L. Perrilier, "Le Statut Personnel : Une investigation dans la région du cheliff, " *Questions Nord-Africaines : Revue des problèmes sociaux de l'Algerie, de la Tunisie, et du Maroc.* 1939.

Messabhia counter-argued that he had consummated the marriage but had lately been unable to cohabitate and sleep with his wife due to illness. So, as stipulated by the 1879 precedent, the *qadi* ordered that Bouacida be medically examined by the local French midwife, who submitted a certified report that not only was Bouacida no longer a virgin but that she had had frequent sexual relations. She was therefore condemned to "reintegrate into the conjugal home."

Bouacida appealed the decision and appeared in court again, this time at the audience for Muslim Affairs in the Tribunal of Guelma, the following March. An expert statement was once again in order, but this time the Guelma court sent *both* parties to be examined by the local colonial doctor, who was asked to provide a full medico-legal report. His findings were as follows: Messabhia presented no signs of impotence. He did, however, have syphilis, as well as a common urinal tract infection. This led the doctor to believe that the defendant had performed coitus fairly recently. As for Bouacida, she displayed no signs of either infectious disease, but the report did state that "her hymen offers an anatomical form so peculiar that one cannot affirm whether this woman has been deflowered or not; in any case she could not have had normal sexual relations, given the dimension and dilatability of the hymenal orifice."[98] With the expert opinion related in this report, the French judge upheld the first decision: the husband was not impotent, and nor was the wife definitively proven a virgin. Indeed, the claimant's anatomy seems to have undermined the very category of virginity by defying it. As for Messabhia, though Islamic law did identify serious disease as grounds for divorce, this did not, in the judge's opinion, include either syphilis or urinary tract infections. Bouacida was once again obliged to remain married to her husband. It was at this point that her case was chosen for review by the highest jurisdiction in Algiers.

[98] RA 1911: II, 256-259.

The Chambre de révision musulmane at the Court of Algiers considered the evidence presented in the previous two cases and inferred significant information about this requested divorce that had previously been overlooked: In the re-hearing at Guelma, it was discovered that Messabhia Tayeb was afflicted with sexually-transmitted infections that were not passed to his wife, yet in the first hearing at Ain-Beida, he admitted that he became too ill to have intercourse or live with her only after they had been married. This strongly indicated infidelity on his part, which was grounds for divorce according to passages from the *Mukhtasar* of Sidi Khalil Ibn Ishaq, verses of the Quran, and article 174 of Marcel Morand's Draft Code of Muslim Law (placing indemnities on the party found at fault for marital rupture). There was perhaps one questionable element of the court of appeal's decision: it was based on infidelity when Bouacida had initially charged Messabhia with impotence. Here, a dose of French juristic principle was in order: higher courts could correct the oversights of lower courts to fulfill the initial objective (divorce) by other reasonable means, so long as they did no change the nature of the original intent. These criteria satisfied, Bouacida's appeal was won and she was finally, three years later, released from her marriage.

Just as we saw in Rekia's final outcome, then, the testimony of a doctor did nothing to advance Bouacida's case, and while the presence of nearby midwives allowed the courts a certain degree of latitude in which experts it chose to believe, the defendant herself had no such liberties. We have no way of knowing if *qabla*s did better by women in this respect, before the former's banishment from the courts, but if these outcomes yielded by the most authoritative experts in impotence-based divorce cases are any indication, it is possible that the imprecision Lévi-Brahm derided may have, in certain instances, been more favourable.[99]

[99] I should emphasize that this observation is specific to impotence-based divorce cases, and not other divorce cases requiring a medical exam, namely wrongful consummation of unions with child brides. The medical

In any case, within just twenty-five years of these two divorce cases, medical experts would find themselves invited out of impotence-based divorce cases with as little notice and ceremony as when they supplanted *qabla*s in this role a generation earlier.

The Case of Kebbous Lamria (1932)

On 28 November 1932, the divorce request of Kebbous Lamria was decisively thrown out when the Chamber of Muslim Appeals found in favour of her husband, Bellout Brahim ben Saci. After seven months of marriage, Kebbous left Bellout's home, accusing him not only of impotence but also violent abuse, on which grounds she demanded an annulment. To prove her virginity, she produced the by-now-requisite medical exam, certified by a French doctor. In response, Bellout, surprisingly, confessed to both of the wrongs of which he was accused, but explained them thus: He had not consummated the marriage because Kebbous had consistently repelled his advances and did not permit him to sleep with her; when he beat her it was only to apply the conventional "light correction" deployed in case of wifely disobedience. What's more, the court of first instance – as well as appeal and revision – accepted as valid his sworn statement, by which he asserted: "I swear that I am not impotent as alleged by the defendant, my wife." This was based on a commentary on Sidi Khalil's *Mukhtasar* (evidently undiscovered or little appreciated until that point) by which a husband should be granted a year to consummate the marriage and that his sworn statement that the "conjugal act" was completed should be believed. Of perhaps greatest significance, the Procureur général, who had the final word in this case, concluded that even if a married woman's virginity was conclusively demonstrated, this did not prove that her husband was

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establishment played a related but distinct role in such matters, which I deal with elsewhere in the larger thesis project.

impotent.[100] In his assessment of this ruling, Paul Charnay has questioned whether the "French judge was perhaps unconsciously influenced by masculine authority."[101] Which is to say, impotence cases under the jurisdiction of Muslim personal status may have finally offended French masculine sensibilities too deeply, and threw the doors of the conjugal bedroom too wide open even for the comfort of these colonial observers, who had otherwise and until that point made the private inner workings of the Muslim family a concern of the highest order for the colonial state. If the threshold of believability and gravity of trust in such matters had shifted from *qabla*s, then briefly and haltingly onto midwives, and finally onto male French doctors, they had come full circle, to settle once more upon male heads of households. Indeed, the outcome arrived at in Kebbous's case turns out not to be too different from that of Rekia, with whom we began, even if the judges took different routes to get there: in the end, the husband's word was literally law.

Conclusion

This chapter has presented the trajectories of various legal principles surrounding marital authority and wifely duty as factors affecting the litigation of women's judicial divorce in early twentieth-century colonial Algeria. Previous studies, based heavily on sources that privilege the colonial state's perspective, have tended to overstate the stability of colonial law and judicial institutions, as well as the top-down direction of reform. Instead, this chapter has placed the experiences of litigants at the centre of analysis, through the use of untapped Algerian archives and by concentrating on jurisprudence rather than legislation. From this perspective, the enforcement of Muslim personal status law under the aegis of the colonial

[100] RA 1937: II, 130.
[101] Charnay, *La vie musulmane*: 41-44.

state appears less a coherent body of regulatory practices, and rather the product of the continuous and contingent processes of negotiation between competing actors.

As seen in the first case study from the Blida court archives (1907), Islamic law, particularly the Maliki school of jurisprudence, contained unique prescriptions and remedies for battered wives seeking escape from unhappy marriages. By the time of the 1918 cassation judgment in Casablanca, and the appeals filed by two Kabyle women in the Blida tribunal (1926), the absorption of the "domicile conjugal" into the adjudication of Muslim personal status cases in the North African colonies (via, among other sources, the Egyptian Family Code of 1897) was working to cut women off from these strategies and affirm the sanctity of the "family" as a bedrock of social cohesion and "public order." Indeed, by 1924, the threat posed to social order by the flight of willful and disobedient wives required taking a step further than withholding maintenance: their offenses against the household became a crime against the state, to be stopped by public force if necessary. Algerian women, however, did not passively accept this new condition, as demonstrated both by the veritable crisis (upsetting this same "public order") that they aroused in their refusal to comply, as well as Hamza Mimi's eloquent rejection of her husband's claims. Yet, if Hamza's victory set the precedent that eventually condemned family desertion to a mere formality in the colony, it does not seem that the traditional principle of *dār ʾadl* (two arbiters) was ever restored as an exit strategy for victims of spousal abuse. Investigating what if anything took its place is, for now, beyond the scope of the present study.

The second set of cases focused on a particular kind of personal status suit – women's divorce based on impotence and failure to consummate the marriage – in order to demonstrate the vested interest of the colonial medical establishment in Muslim personal status legal

processes and the induction of new criteria for evidence based on expert knowledge and imported epistemologies of the body. Though we have a more suggestive rather than comprehensive set of case studies by which to understand this phenomenon, our analysis suggests that women had no reason to hope for greater satisfaction by way of these new expert witnesses. At the same time, the eventual and perhaps surprising demise of the medical expert in impotence-based divorce cases also shows a certain element of continuity that belied this period of rapid and extraordinary change: encoding sensitivity to masculine pride by consolidating the supremacy of marital authority in matters of the bedroom.

Conclusion

This thesis has examined the "era of reform" and the codification of Muslim personal status law in colonial Algeria from 1870 until 1930, foregrounding the perspectives of Algerian women who experienced these dramatic changes as litigants. I have attempted to reveal the important impacts, first, of Islamic modernization and reform movements in the wider Mediterranean theatre, and second, the litigation of women in *qadi* courts and French tribunals of appeal, in the organization and management of the Algerian system of colonial law and legal pluralism. By bringing these contexts to the centre of analysis, this study has demonstrated the anxious and contentious processes by which colonial lawmakers and judges interpreted and applied "legal assimilation," not only in legislation but in jurisprudence, as well as the agency that women litigants exercised in their use of courts and the appeals process.

As shown in the first half of this study, the birth of the État civil des indigènes helped to render the "Muslim family" knowable and governable to colonial administrators, first in the service of a personal property regime, and later as an object of intensified scrutiny and regulation through the influence of the École de droit d'Alger on the colonial government and magistrature. In short, the invention of the "Muslim family" and the increased interventionism of the colonial state were mutually-sustaining processes. At the same time, Muslim segregation and disenfranchisement was only reinforced as a result. This is because codification elsewhere in the Sunni Muslim world provided a blueprint by which to rationalize and standardize Muslim family law, thus upholding republican universalist ideals, without also disrupting the essentialized and insurmountable difference – most saliently expressed as *sexual* difference – of Muslims that undergirded the entire colonial project. One of the central elements of this

blueprint was the Orientalist fixation on the shared Roman heritage that united Islamic and Western legal cultures and the "analogies" that could thus bridge them. The second half of this thesis has thus sought to uncover the impacts of this reform program on the Algerian women whom colonial reformers claimed to rescue from the patriarchal indigenous household and sexually degenerate Muslim men. Perhaps unsurprisingly, both the codification of substantive law and the rationalization of the judicial process had negative consequences for women – especially poor and rural women – seeking to file suits against their husbands and male relatives. Moreover, where the much-vaunted "analogies" between French and Islamic law existed, and where others were invented, the effect was to cut women off from the local and customary pre-colonial legal strategies once available to them. Yet, litigious Algerian women and girls also displayed remarkable resourcefulness. These women, like other disputants (often their opponents) learned how to navigate and take advantage of the multiplicity of legal venues and discourses at their disposal. Indeed, the very same system of colonial legal pluralism that sustained racist political segregation policies in colonial Algeria was frequently subverted and its ambiguities exploited by women litigants pursuing their interests. Most notably, by appealing to the French tribunals of first instance, their cases were then also subject to review at the highest jurisdiction of Muslim appeals. According to the French Civil law system, the decisions of this council did not prescribe the law. However, the vagaries of colonial law and the objectives of assimilationist policy gave this body of judicial review a notable degree of influence, and their rulings formed the basis of a significant number of statutes and decrees on the proper administration of Muslim personal status in the colony. In this way, Algerian women made their concerns known to the colonial legislator and sometimes played an indirect but notable part in the shaping of Muslim personal status law.

The implications of these arguments and findings are many, but I would like to close by considering one in particular. The literature on women in Algeria in the years since decolonization (1962) has been dominated by analysis of the Family Code (*Qanun al-usra*) of 1984, its devastating impact on women, and their attempts to maneuver around it.[1] The Family Code was the product of collusion between conservative elements in the ruling Front de Libération Nationale (FLN) party and the rising tide of Islamic fundamentalist agitators. As the Family Code was being drafted behind closed doors in the early 1980s, it was fought vigorously by the Algerian feminist movement, including many former combatants in the war of independence who risked their lives again to resist oppression, this time from their fellow countrymen. For these women, as well as the many intellectuals, journalists, and artists who were either assassinated or threatened with assassination throughout that decade and into the 1990s, the Family Code was a major step backwards in the fledgling country's efforts to rebuild after a century and a half of colonization.[2] For the Family Code's proponents, on the other hand, it represented a reaffirmation of the famous slogan of religious scholar and anti-colonial nationalist Sheikh Abdelhamid ben Badis (1889-1940) that "Islam is my religion, Arabic is my language, and Algeria is my country."[3] Righting the colonial assault on Islamic law was, for them, an essential element of their overall project of ejecting all "foreign" elements from the culture and restoring Algeria's "authentic" Islamic identity. While Algerian women's rights advocates argued that the Family Code violated their citizenship and equality rights, which they

[1] See, for example: Mounira Charrad, *States and Women's Rights The Making of Postcolonial Tunisia, Algeria, and Morocco* (Berkeley: University of California Press, 2001). Marnia Lazreg, "Citizenship and Gender in Algeria," in Joseph, Suad. *Gender and Citizenship in the Middle East* (Syracuse, N.Y.: Syracuse University Press, 2000). Zahia Smail Salhi, "Algerian Women, Citizenship, and the 'Family Code'." *Gender and Development* 11, no. 3 (2003): 27-35. Fatima Sadiqi and Moha Ennaji. *Women in the Middle East and North Africa: Agents of Change* (Milton Park, Abingdon, Oxon: Routledge, 2011).
[2] Karima Bennoune, "Between betrayal and betrayal: Fundamentalism, family law, and feminist struggle in Algeria," *Arab Studies Quarterly* 17.1-2 (1995).
[3] M. Evans, and J. Phillips, *Algeria: Anger of the dispossessed* (New Haven: Yale University Press, 2007): 44.

had earned in blood, no less, on the front lines and in the prisons and torture chambers of the French enemy, fundamentalists painted women who dared to protest the code as westernized traitors disloyal to their religion and family. In that crucial historical moment, the real question was, as Karima Bennoune put it, "[w]hose interpretations of the Algerian cultural heritage were to be considered authentic?"[4]

While it seems the Islamists won the day with the passage of the Family Code (despite some revisions in 2005), when put in terms of Bennoune's incisive question, the answer is not so simple. In both the methodology of its drafting and the content of the code itself, it seems that in fact a distinctly colonial interpretation of Islamic "authenticity" prevailed. Within the code itself were articles that built on Quranic principles but were just as reminiscent of French legal doctrines imported through reformist projects. These include such concepts as: the requirement to register one's marriage with the civil status office (article 21); the wifely duty of obedience to her husband (article 39); and masculine economic rights over the couple's joint property, even after divorce.[5] In its articles dealing with the consent of each party to the marriage contract, including a minimum age of marriage (21 for men and 18 for women) the Family Code also incorporated French standards rather than wade into more ambiguous Islamic jurisprudence on these questions. The very articulation of spousal rights and duties was framed in terms of "private" and "public" spheres that were previously foreign concepts, freshly rebranded as Algeria's buried Islamic heritage. Indeed, this fixation on regulating the "family" was a pitch-perfect echo of colonial policy. When the Algerian Minister of Justice tried to dismiss the fears

[4] Bennoune, "Betrayal": 53.
[5] This meant, namely, that subsequent to a unilateral divorce, the couple's home legally belonged to the husband, while the wife and their children were made homeless.

of Algerian feminists, he declared, without a hint of irony, that "the Family Code should not be thought of as a code for women, but rather as a law for the whole family."[6]

Needless to say, religious authority was not restored in any other domain of post-colonial law in Algeria – only that of the "family" and the private sphere, in continuity with colonial history and Islamic modernization in neighbouring countries.[7] The very act of codification itself was resolutely modern; rather than rely on more established Islamic methods of interpreting divine law, which resembles case-based Common law issued primarily by judges and scholars, not legislators, the Islamists preferred the very legal devises handed down to them by their erstwhile occupiers. To quote Judith Tucker's broader observation,

> [T]hese Islamization programs, from the legal point of view, are less a restoration than an innovation. For the state to make 'Islamic' rules and then use modern means of repression to apply them to its population as part of a legitimating process does not, in terms of substance and procedure, find much support in traditional Islamic legal thinking.[8]

In this way, to regard women's disenfranchisement in post-colonial Algeria as an outcome of the resilience or resurgence of "tradition" and the "private" at the expense of the state and "public" interest, as does Lahouari Addi, would be a gross over-simplification.[9] Rather, as a number of scholars of Middle-East women's studies have argued, "gender inequality may on the contrary be the result of modernization and law reform itself."[10] What the 1984 Family Code therefore calls on us to consider and critique is the effect of the institutional

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[6] Quoted in Bennoune: 59.
[7] Though a 1959 ordinance renewed various reformist standards just before decolonization, between 1962 and 1984, without any institution for regular judicial review, family law in Algerian courts was largely judge-made and thus decentralized.
[8] Tucker, Women, Gender, and the Family: 23.
[9] Lahouari Addi, *Les mutations de la societe algerienne: famille et lien social dans l'Algerie contemporaine* (Paris, 1999).
[10] Bettina Dennerlein, "'Legalizing' the family: disputes about marriage, paternity, and divorce in Algerian courts (1963)" Continuity and Change 16.2 (2001), p 244. See also: Mervat Hatem, Modernization, the state, and the family in Middle East women's studies, in Meriwether, M. L., & Tucker, J. E. (1999). *Social history of women and gender in the modern Middle East*. Boulder, Colo: Westview Press. Sonbol, A. E. A. ed (1996). *Women, the family, and divorce laws in Islamic history*. Syracuse, N.Y: Syracuse University Press.

memory and colonial legacies inherited by its drafters and later embraced by its "conservative" proponents. I hope that the research presented here may contribute to these political debates, among others, wherein a way forward in the search for justice may be found by identifying and denaturalizing the enduring legacies of the colonial past in both France and Algeria.

Appendix: Figures 1-7

Figure 1: Beni Menguellat Femmes, Kabylia

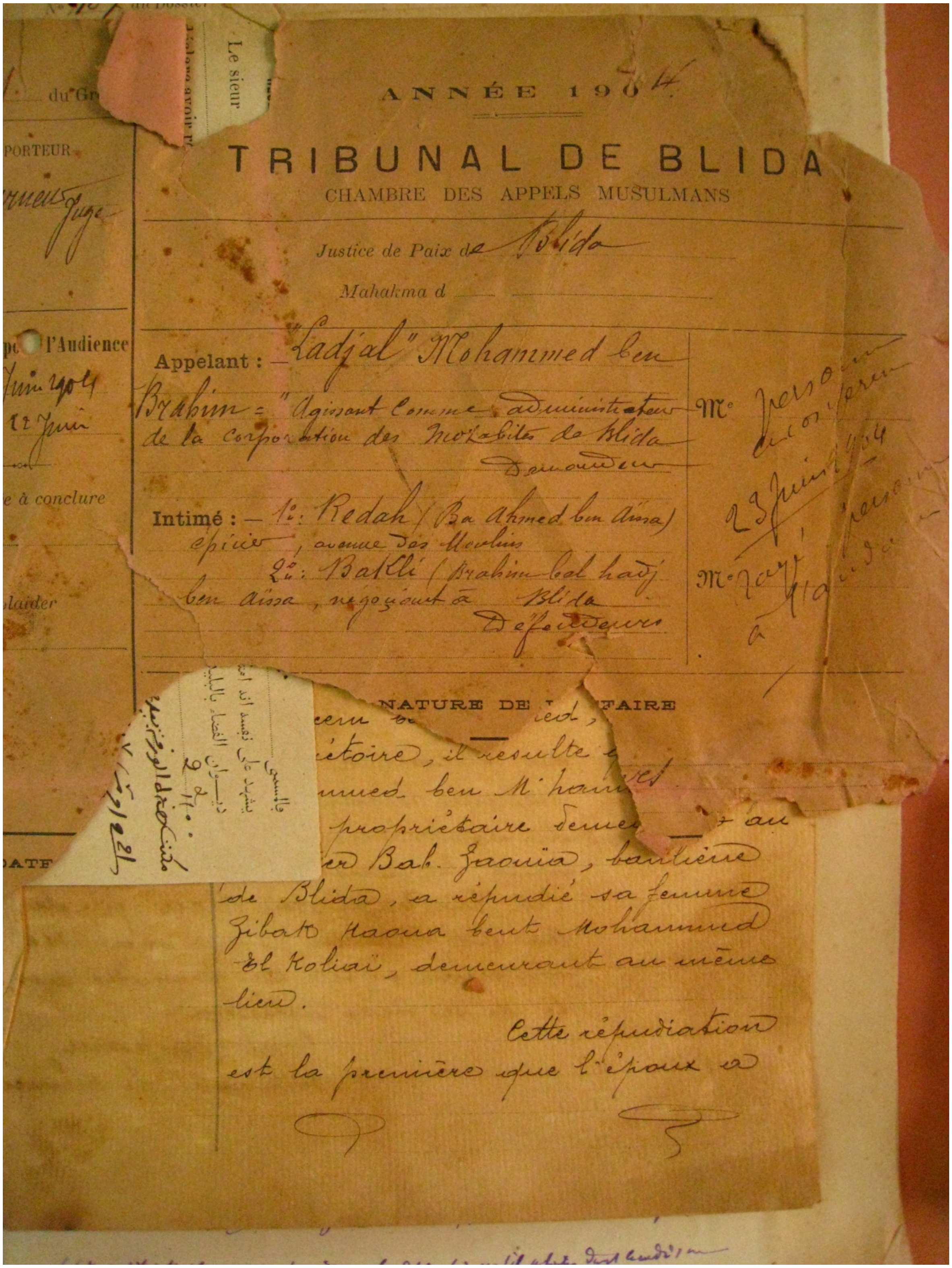
(Source : Archives de la société des Missionnaires d'Afrique, Rome)

Figure 2 : Beni Yenni Couple, Kabylia

(Source : Archives de la société des Missionnaires d'Afrique, Rome)

Figure 3 : Kabylie : Deux ménages chrétiens

(Source : Archives de la société des Missionnaires d'Afrique, Rome)



ANNÉE 1904

TRIBUNAL DE BLIDA

CHAMBRE DES APPELS MUSULMANS

Justice de Paix de Blida

Mahakma d

Appelant : — "Ladjal" Mohammed ben Brahim = "Agissant comme administrateur de la corporation des Mozabites de Blida Demandeur

Intimé : — 1°: Redah (Ba Ahmed ben Aïssa) épicier, avenue des Moulins
2°: Baklli (Brahim bel hadj ben Aïssa, négociant à Blida Défendeurs

NATURE DE L'AFFAIRE

... étoire, il résulte ... mmed ben M'hammed ... propriétaire demeurant au ... Bab Zaouïa, banlieue de Blida, a répudié sa femme Zibab Haoua bent Mohammed El Koliaï, demeurant au même lieu.

Cette répudiation est la première que l'époux a

Figure 4 : Sample Dossier d'appel, Cover Letter

(Source : AWA 1T304)

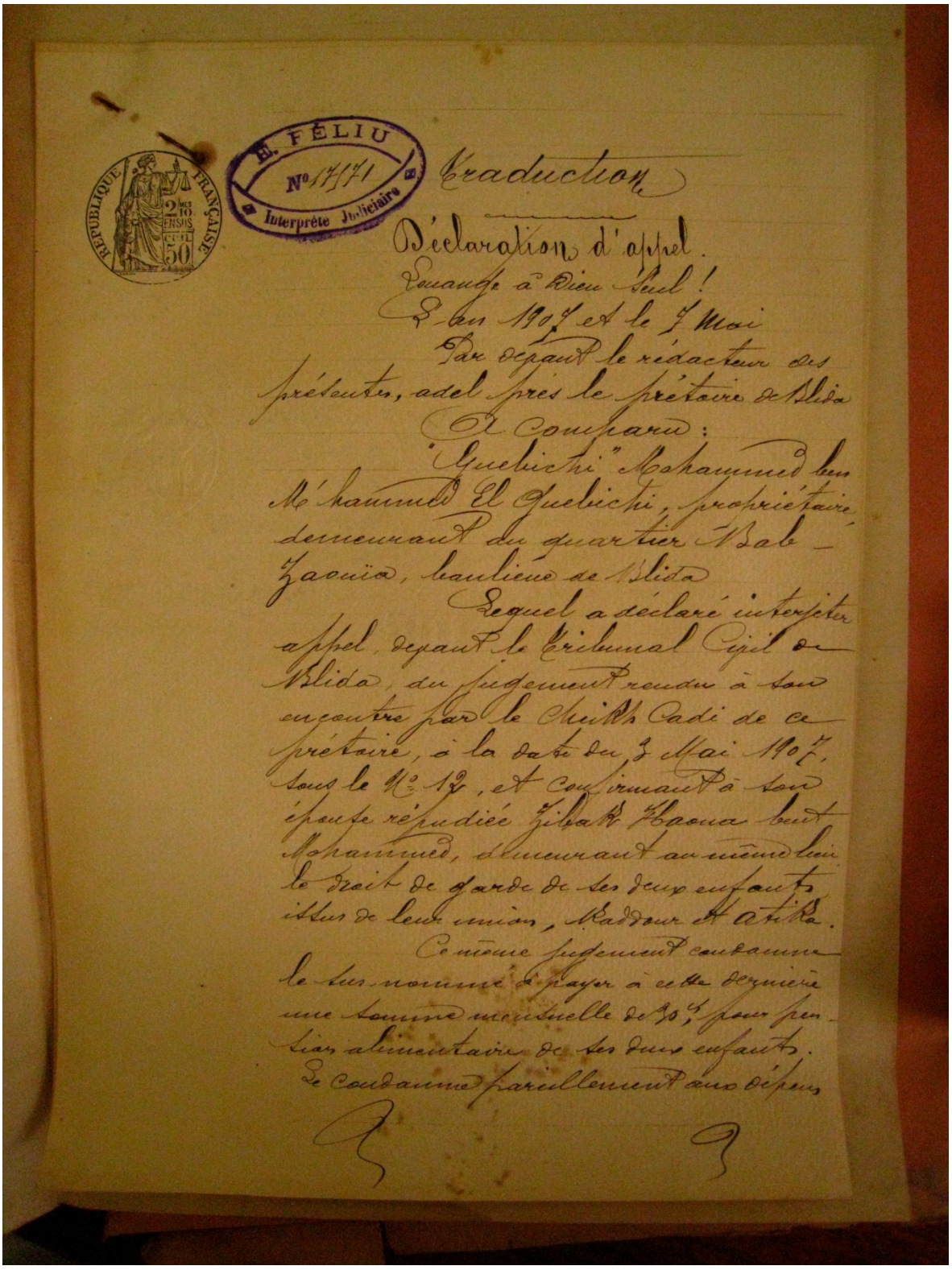


Figure 5 : Sample *Extrait* of ruling (first page)

(Source : AWA 1T304)

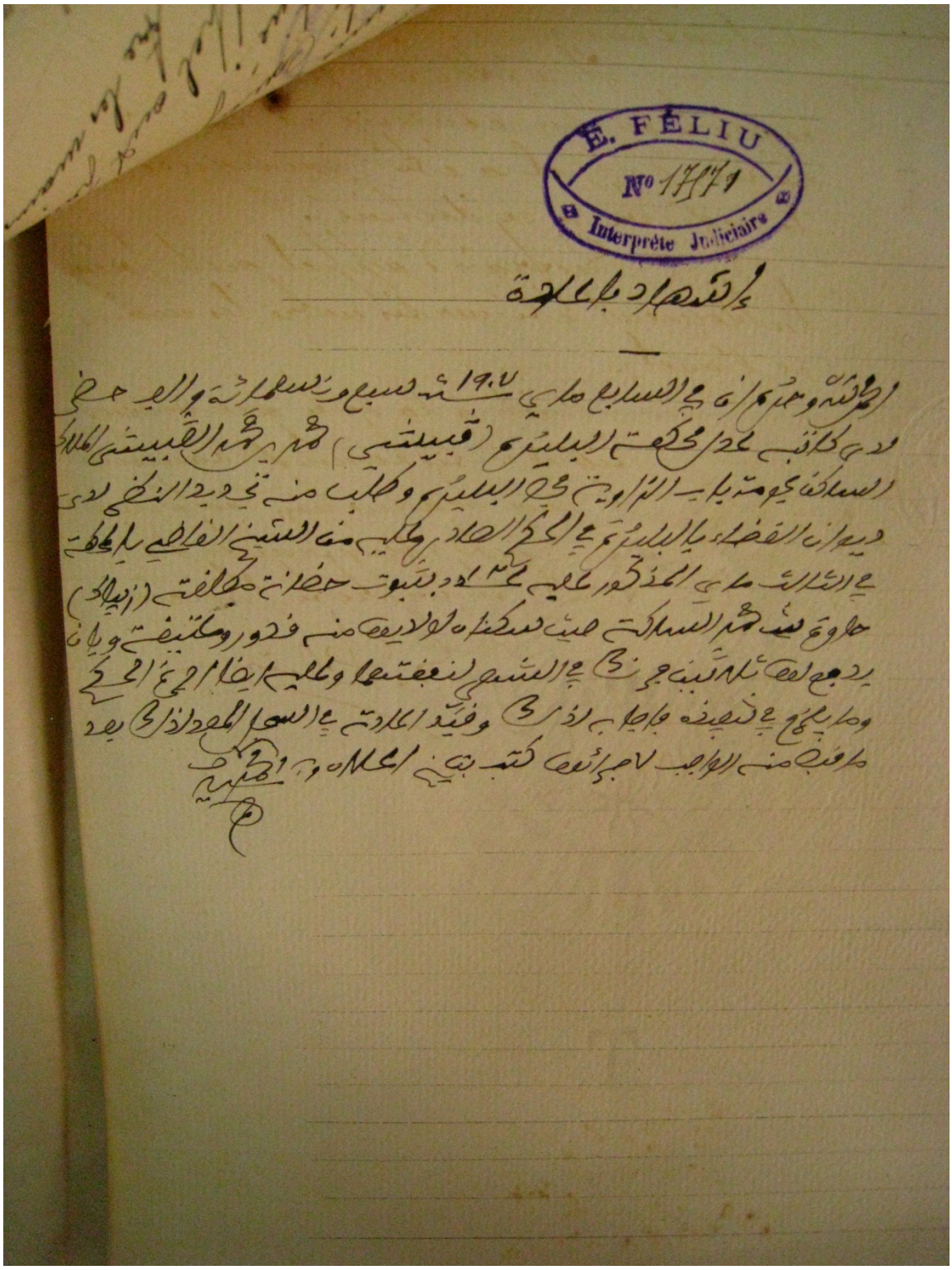


Figure 6 : Sample, original ruling

(Source : AWA 1T304)

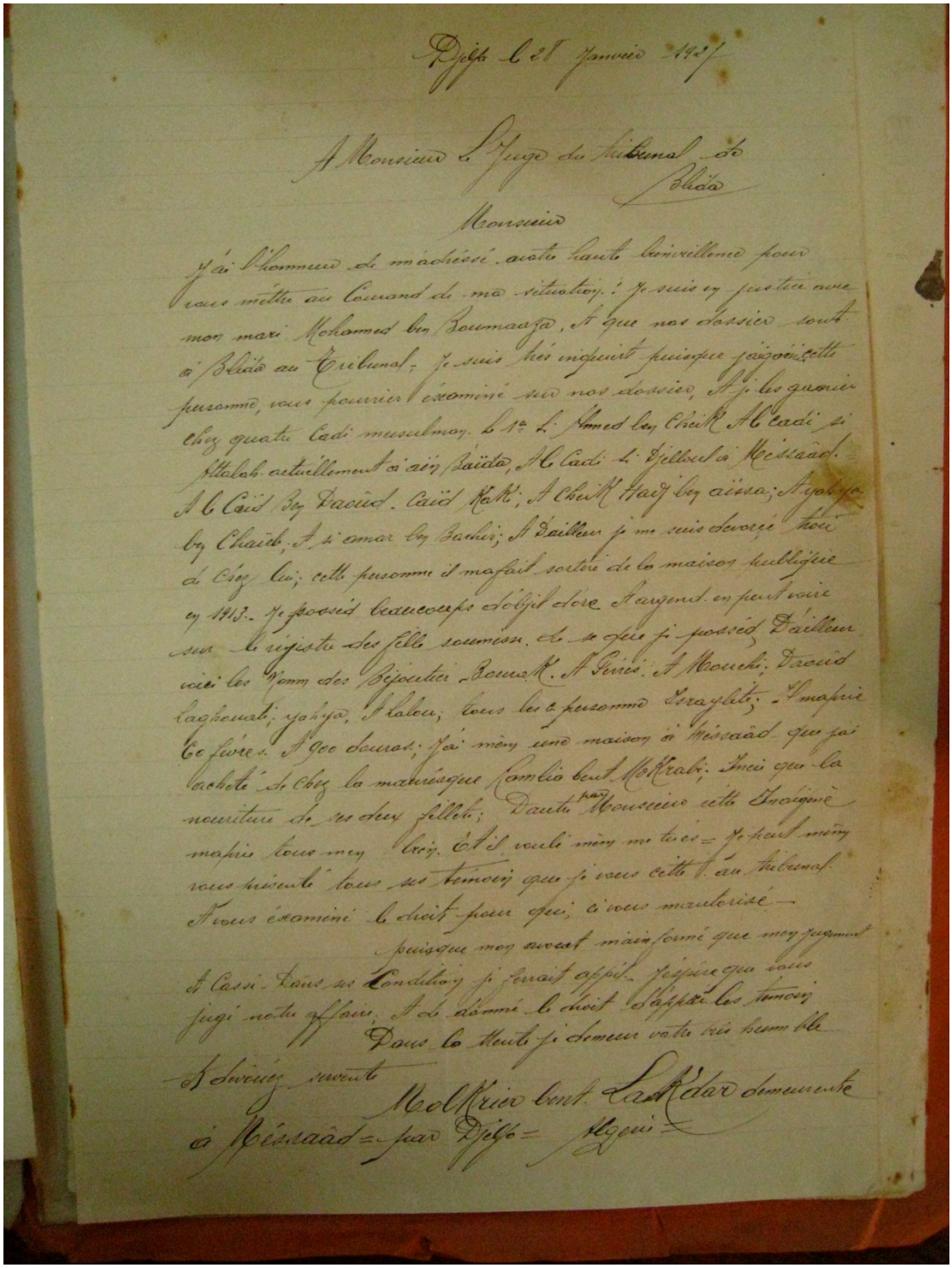


Figure 7 : Oumelkheir bent Lakhdar's Letter to the Justice de Paix at Blida

(Source: AWA 1T367)

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