THE MARITAL STATE: PERSONAL STATUS LAWS, DISCOURSES OF REFORM, AND SECULARISM IN LEBANON

by

RAJA ABILLAMA

A dissertation submitted to the Graduate Faculty in Anthropology in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

2012

This manuscript has been read and accepted for the Graduate Faculty in Anthropology in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

Dr. Talal Asad

_____ _____

Date Chair of Examining Committee

Dr. Gerald Creed

_____ _____

Date Executive Officer

Dr. Vincent Crapanzano
Dr. Mandana Limbert
Dr. Gil Anidjar

_____

Supervisory Committee

THE CITY UNIVERSITY OF NEW YORK

Abstract

THE MARITAL STATE: PERSONAL STATUS LAWS, DISCOURSES OF REFORM, AND SECULARISM IN LEBANON

by

Raja Abillama

Advisor: Professor Talal Asad

An important aspect of the modern Lebanese state is the arrangement of personal status laws, which consigns matters of marriage and its consequences to the several Islamic, Christian, and Jewish religious authorities. With the absence of civil jurisdictions, some individuals choose to get married under the civil laws of countries, such as France, Cyprus, and Turkey. Recurrent attempts to make civil marriage in Lebanon legal have proven to be controversial and ended ultimately in failure. The problem of marriage has accompanied the system of personal status since the formation of the Lebanese state under French Mandate after the collapse of the Ottoman Empire. This dissertation aims to offer an account of what is at stake in marriage. Based on ethnographic and archival research in Lebanon, it analyzes the terms of the controversies over legal reform, opinions about civil marriage, as well as the decisions of the Maronite Catholic, Sunni Islamic, and civil courts in matters of personal status. It argues that at stake in marriage is the very assumption upon which the modern Lebanese state rests, namely, that Lebanon consists essentially of a variety of religious communities each possessing a distinctive personal status. The formal articulation of that status is the several religious personal status jurisdictions that oversee marriage. This assumption gives rise to a specific configuration whereby marriage, religious communities, and the state, are interconnected. Rather than adopt a perspective that sees in the problem of marriage an

opposition between secularism and religion, this study seeks its conditions in tensions internal to the secular itself, in the ambiguities between moral autonomy and religious belonging, freedom and equality, religion and law.

Acknowledgments

I would like to extend my gratitude throughout this long undertaking to the following:

My supervisor, professor Talal Asad, my committee members, professors Mandana Limbert and Vincent Crapanzano, and my external reader, professor Gil Anidjar for their support and encouragement;

The Department of Anthropology at the Graduate Center—faculty, students, and administration—especially Ms. Ellen DeRiso, whose skill at making things happen are magical; the Middle East and Middle Eastern American Center and its restless associate director Dr. Anny Bakalian for a much needed interdisciplinary environment to discuss what is otherwise a specialized piece of research;

The individuals, judges, lawyers, librarians, and court employees without whose generous time and effort this whole project would not have been possible. I would like to mention in particular Dr. Ogarit Younan, Mr. Hassan al-Muhib, the head of the documentation unit at the Lebanese National Archives, Mr. Nizar Saghieh, and Mr. Nagi Yacoub;

The members of the Mellon seminars on the Sacred and the Secular, and on Religion and Violence, as well as The Committee for the Study of Religion and its director professor Bryan S. Turner for their immensely valuable engagement with a work that was frustratingly always in progress;

Friends and occasional readers: Anny Bakalian (without the title this time), Abou Farman, Samer Frangieh, Alya Karami, Maya Karanouh, Mazen Labban, Zeina Maasri, Stanton McManus, Lena Merhej, Nada Moumtaz, Ceren Ozgul, Sarah Pursley, Laura Schneider, Devrim Yavuz, and countless others;

My parents, my sister Rania and her husband Paul, my niece Tatiana (whose insisting anticipation to seeing her name in here was a peculiar source of motivation), my nephew Nicolai, my brother Fouad, his wife Yizhou, and my niece, Amina Ifan.

Finally, Shea McManus.

Table of Contents

INTRODUCTION

The Story of Civil Marriage in Lebanon

In recent years, more and more stories have been told about Lebanese citizens flying to Cyprus, Turkey, France or other countries for the express purpose of getting married. The newlyweds make the return flight back, sometimes with a clamor, as the local media relays news of their civil marriage to the public. The countries adopted as alternative marital jurisdictions have in common what self-proclaimed secularists and advocates of legal reform construe as lacking in Lebanon, namely, civil marriage laws. While it may be the case that marriage concerns the private lives and marital decisions of ordinary citizens, the controversies over civil marriage in Lebanon suggest otherwise.

Although beyond the purview of Lebanese civil jurisdictions, marriage and what results from it, such as divorce, annulment, custody, support, and inheritance, are consigned to the several Islamic, Christian, and Jewish religious authorities.[1] Sunnis, Shi'is, Druze, Catholics (Eastern and Western), Greek Orthodox, Armenian Orthodox, Syriac Orthodox, Assyrians, and Evangelicals fall exclusively under the jurisdiction of their respective personal status laws.[2] Conversion between religious jurisdictions is legal. In principle, all personal status jurisdictions fall under the regulatory supervision of the state. Their codes must pass the scrutiny of public authorities before they are granted force of law, and their decisions are open to revision by civil courts. To pass that scrutiny and avoid invalidation a jurisdiction

[1] The exception is inheritance, which for non-Muslims is regulated by the Law of Succession for Non-Muslims applied in civil courts.

[2] The taxonomy of "religious *tawa'if* (s. *ta'ifa*, confession, sect)" is as follows: Sunnis, Shi'is, Druze, 'Alawis, and Isma'ilis (Muslims); Maronites, Melkites, Latins, Chaldeans, Armenians, Syriacs, Copts (Christians, Catholics); Greeks, Armenians, Syriac, Assyrian, Copts (Christians, Orthodox); Evangelicals (Christians, Protestants); Jews.

must not conflict with another (when, for instance, an Islamic and Christian or an Orthodox and Catholic court, for whatever reason, issue contradictory decisions in the same case), and must not violate public order and morality. In cases of civil marriages contracted abroad, and if the need to adjudicate arises, the Lebanese civil judiciary applies the respective foreign code.

This arrangement has been the target of criticism since it was first set up under French Mandate in the 1920s and 30s. Indeed, in its current form, it is an outcome of contestation among various Islamic, Christian, and secular forces, the latter including both French governors and local elites. In a secularizing perspective, it has appeared as a limit to sovereignty and has been attributed a causal role in the persistence of so-called sectarianism. Whatever the imputed negative consequences of the "system of personal status laws" in Lebanon, at the root of them is the judgment that it falls short of that foundational requirement of all modern states, namely, the separation of church and state. In late 1997, when the president of the republic proposed a draft "optional civil marriage law," a polemic followed involving the president, prime minister, speaker of the house, ministers and politicians of all sorts, the official and unofficial representatives of the main *tawa'if*—Sunni, Shi'i, Druze, and Maronite—political parties, social activists, and ordinary citizens. Four months later, the proposal was withdrawn.

Since then, civil marriage has become part of a widening arc of initiatives for human rights, civil liberties, gender equality, and the rule of law—a long list of demands placed under the general title of *al-'almaniya*, *laïcité*, or secularism.[3] It has been construed as a

[3] See, for instance, the Lebanese Laïque Pride movement at https://www.facebook.com/LaiquePride (accessed March 27, 2012).

necessary stepping stone in the ineluctable march "*nahwa al-muwatana* (towards citizenship)" in which the stakes claimed are nothing less than "*al-'insaniyya* (humanity)."[4]

The Stakes in Marriage

The *problem* of marriage in Lebanon is the starting point of this dissertation, which asks: What does it mean to associate marriage and humanity? What does marriage have to do with humanity in the first place? What *is* at stake in marriage, really? The problem is as follows: On the one hand, the Lebanese who travel abroad to marry before civil authorities are few and far between. Those who do so have their marriages recognized by the Lebanese state and are entitled to adjudication by the civil judiciary. They are seldom criticized in public, and when they are, they are criticized on moral, religious, and legally non-binding, grounds. This state of affairs did not arise *de facto*, the cumulative result of a malpractice as it were; it is a consequence of the legal requirement of regulating the marriages of non-nationals in national jurisdictions. One of the few legal arguments against the practice is rather restricted stressing the burdens it places on the civil judiciary, which must constantly confront a multiplicity of foreign laws. In other words, people who wish to contract civil marriages outside the country may do so legally unobstructed. On the other hand, the demands for legal reforms are limited in scope, for they rarely express the radical aspiration to abolish religious jurisdictions altogether. They argue that since the state recognizes civil marriage, and since there exists already a civil judiciary that handles them, why not simply draft a unified code and solve both the citizen's and the judiciary's problems? Given this assessment, an optional civil marriage law like the one the president proposed in 1997 hardly seems an urgent matter, and

[4] Dr. Ogarit Younan, social activist and advocate of civil marriage, personal communication.

the reactions to it—and the historical adamant refusal of state interference in personal status laws—may appear largely exaggerated.

For the purpose of this dissertation, the "problem of marriage" refers neither to the putative difficulties individuals must overcome on their way to marry under civil laws, nor to the obstacles facing the prospect of a long-needed legal reform to alleviate them. Rather, it designates the enigmatic incommensurability between two legal arrangements—one existing, another postulated—on the one hand, and the anxieties and enthusiasms that surround them on the other. It consists in an inquiry into various articulations of marriage aimed at providing an account of what the stakes are in marriage in Lebanon. This dissertation is such an account. It argues that if established, an optional civil jurisdiction would not simply be a neutral addition to the already existing Christian, Islamic, and Jewish jurisdictions. Rather, it would carve out an altogether new space not only for individual agency and moral autonomy with regard to marriage, but also for the formation, through that marital agency, of alternative identities. In other words, the civil jurisdiction an optional civil marriage law entails would reconfigure, through marriage, the identities and the relations among them upon which the modern Lebanese state rests. In sum, this dissertation argues that at stake in marriage is one of the constitutive assumptions of the modern Lebanese state, namely, that society (alternatively, the population) in Lebanon is essentially comprised of several religious communities marked by a distinctive personal status consisting in a peculiar articulation of marriage and its consequences. The formal expression of that assumption is the arrangement of personal status laws with its multiple "religious" jurisdictions.

It is worth noting that the challenge of civil marriage to the existing order of personal status is not external to that order. In other words, although the polemics over civil marriage

are sometimes structured in terms of an opposition between religion and secularism, the problem of marriage is nevertheless an effect of the tensions of secularism and its inconsistent partitioning of the secular and the religious. Marriage—civil and religious—is an articulation of these tensions.

Civil Marriage as a Discourse of Legal Reform

As mentioned above, one of the two aspects of the problem of marriage in Lebanon is legal reform. Besides being an individual, private practice that often passes without much public commentary, civil marriage involves demands for the enactment of a civil marriage law and the expansion of the civil judiciary's powers. Moreover, both the secular and religious arguments about civil marriage articulate the conditions set by the legal formation characterizing the modern Lebanese state, which is, in part at least, the result of earlier attempts at legal reform. While civil marriage brings into play the discourse of legal reform in the Middle East and the Arab world in general, it is also a particular inflection of that discourse and carries its assumptions. The review of the literature below outlines some of its prominent features. (Al-Azri 2010; Welchmann 2007; Abu-Odeh 2004; Buskens 2003; Moors 2003; Welchmann 2003; Würth 2003; Rahman 1980; Anderson 1959)

Early commentaries on reform focused on the Islamic *shari'a*. Such comparisons presupposed law as a general category applicable to both *shari'a* and modern state laws, but assimilated the former into an immutable essence called "Islamic law," a distinctive subspecies of "religious" or "Divine" law. (Anderson 1959: 2) Having done so, the question that needed to be answered was whether the *shari'a* could resist the forces of secularization, and, if so, to what extent it could do so without losing its essence. Superimposed on this

story was another set of assumptions that considered law a reflection of a people's mentality, and the state of their law a sign of their "social progress … and national development." (18) In accordance with the script of the secularization thesis, legal reforms were taken to constitute a single unified process that would inevitably lead to the demise of the *shari'a*. In the first phase, the Ottoman reforms of the 19th century would bring forth the restriction of the scope of the *shari'a* to the sphere of the family and inheritance. In that sphere was assumed to reside the "specifically Islamic" (23) character of the *shari'a* and was a significant marker of a people's progress. In the second phase, the insistence of "progressive elements" in the emerging nation-states to change the conditions of Muslim wives led to attempts to reform this "Islamic core." The latter reforms were seen to be incomplete in almost all cases except Turkey, which abolished the *shari'a* altogether, and even in those states in which the *shari'a* constituted the law of the land, such as Saudi Arabia and Northern Nigeria, the prognosis was that it was slowly disintegrating due to the forces of modernization. (26)

Legal reforms have been linked to projects of social transformation and the improvement of the conditions and status of women. (Rahman 1980) These hold a different view of the *shari'a*, acknowledging the limits but not the impossibility of change. (451) Attitudes towards the family are ascribed to society and traditional values rather than Islam, and could be transformed by other factors such as development, education, and employment. (452, 454) The problem of reform is articulated not in terms of an opposition between religious and secular laws, but rather of different conceptions of *shari'a*. The opposition shifts to one between traditional and modern societies, conservative and liberal Muslims, classical, legal and modern, moral interpretations. (452) The question becomes one of seeking the

possibilities of reform from within the *shari'a* for the purpose of social change. Certain areas, such as the marriage of minors, marriage between Muslims and non-Muslims, and polygamy, are identified as particularly problematic. (455)

Some commentators have adopted a historical perspective in which to analyze critically contemporary legal reforms in the Arab world. They characterize successive periods by the conditions, terms, and agents of reform. (Moors 2003) During the "period of decolonization and nation-state building," legal reforms involved "state officials and reformist Muslim thinkers" such as Muhammad 'Abduh and Rashid Rida. Things change in the 1970s, with "Islamist activists argu[ing] for the need to preserve the Islamic character of family law." The relative "political liberalization" of the 1990s "allowed for a greater publicness of these debates as well as for the involvement of a more varied field of participants with competing political agendas." (2) Although family law is the singular object of reforms, these analyses draw attention to the latter's specificity and contradictions in different countries. (Würth 2003) In Palestine, "state officials," "members of the *shari'a* establishment," "women's rights activists," and "Islamists," each with particular interests, sensibilities, and interpretations of the *shari'a* discuss not only "matters of legal substance," but also "the right to participate in [the] debates …" (1; cf. Welchman 2003: 34) Thus, another turn in the story of reform ties it to a distinctive inflection of the political. Discussions of the *Mudawwana*, the Moroccan family law, for instance, are seen to involve debates about the relationship between the public and private spheres, their respective contents, and the relative distribution of rights in each. (Buskens 2000: 71; cf. Salvatore 1998) However, that view proposes also that "in order to understand Islamic family law, we should analyze it as a political phenomenon." (Buskens 2000: 71) Inevitably, it rests on assumptions about "the modern

Muslim world," where "family law and gender are powerful political symbols." (71) This argument flounders when, to support its assumption, it claims that "it is impossible to speak about family law except in terms of Islam[,]" and that "many people understand the legal status of women as a sign of the direction that society at-large should take." (71)

Recent studies on reform have stressed more profound transformations affecting not only the rules, but the methods and categories of *shari'a*. (Hallaq 2009; Asad 2003) Also, some scholars have taken a more critical approach towards legal reform in general. (Abu-Lughod and Rao 2011) They go beyond the dichotomies to analyze carefully the contradictory and contingent effects of legal reforms in broader colonial and postcolonial, historical and ethnographic contexts. Importantly, they are concerned with conceptual ambiguities and their practical consequences, such as the relationship between notions of consent and women's agency (Agnes 2011), and the inadvertent collusion of right-based discourses on the status and conditions of women. (Aquino Siapno 2011)

In Lebanon, debates on "civil marriage" as well as the current legal order in the country belong to a genealogy of reform—Ottoman, French colonial, and postcolonial—characterized by a distinctive set of conditions and problems. First, unlike other Arab and Middle Eastern states, the Lebanese state is not linked to a single majority religion. Second, religion does not constitute a source of law—personal status law notwithstanding—and the state judiciary applies state law only. Matters of personal status are consigned to the separate and autonomous religious jurisdictions of the various *tawa'if* which, as moral persons enjoy certain powers. Third, the possibility of conversion—and, therefore, individual access to different religious personal status jurisdictions—is left open. Civil marriage as a particular

figure of reform, connects this field of relationships with some of the assumptions of legal reform in general on the one hand, and specific notions of marriage on the other.

Marriage, the Separation of Religion and State, Sectarianism

Marriage occupies a distinctive space in the modern state by virtue of personal status laws. The latter in modern Arab and Middle Eastern states have been accompanied by a discourse on legal reform that has been predominantly concerned with the character of the state and the legal arrangements judged to be appropriate for specific forms of life in it. Thus, the discourse of reform draws marriage into a complex web of concepts, practices, and sensibilities that exceeds the straightforward normative distinction between religion and secularism that discourse often presupposes. In Lebanon, legal reform confronts a distinctive set of problems arising from the fact that Christians and Muslims articulate different notions of marriage linked to distinct genealogies of reform. (Weiss 2010; Kanafani-Zahar 2006; Méouchy 2006; Thompson 2000) One problem is the relationship between individual and group rights. Elizabeth Thompson (2005) notes that the Lebanese constitution of 1926 "guaranteed respect for each sect's personal status laws and religious schools." (51) While she remarks that these provisions "severely limited the state's power … while augmenting that of religious patriarchs," (51) she forgets to mention that the same constitution guarantees "absolute freedom of conscience."[5] Among the implications of this clause is that the

[5] "Article 9 [Conscience, Belief]. There shall be absolute freedom of conscience. The state, in rendering homage to the Most High, shall respect all religions and creeds and guarantees, under its protection, the free exercise of all religious rites provided that public order is not disturbed. It also guarantees that the personal status and religious interests of the population, to whatever religious [confession] they belong, is respected." It makes no mention of law. An English translation is available at: http://www.presidency.gov.lb/English/LebaneseSystem/Documents/Lebanese%20Constitution.pdf (last retrieved: January 12, 2012).

individual may convert freely, disturbing the legal order that the system of personal status laws constitutes. In practice, this offers possibilities for marriage, and carries consequences for all—citizens, the state, and the religious *tawa'if*—leading to situations that require judicial intervention.

Another problem is historiographical, whether this "[d]ualism in legal authority" is "rooted in" or constitutes a break from the Ottoman order. (114) While the analogy between the "sultans[']decree[ing] a body of civil law [the *kanun*] alongside the Islamic law" (114) and the French civil legal order is arguable—the problematic translation of *kanun* as civil law and *shari'a* as Islamic law notwithstanding—it is not entirely clear whether the French and Ottoman reforms belong to the same tradition of reform, or whether the conditions, objectives, and consequence of reform were identical in both periods. Moreover, whatever institutional continuity may or may not exist between them, it is the case that Ottoman and French reforms—indeed, the Ottoman Empire and the French Mandate—do not have the same meanings to different groups of people in Lebanon today.

A third set of questions concerns the assumption that law is a source of right only, and the notion that marriage is such a right—be it civil or human—that follows from it. For certain Muslims and Christians, marriage may mean something else, in addition to being a right. This is consistent with the claim that law is "a means by which the terms of citizens' participation in the civic order are set" by "establish[ing] political, civil, and social rights." (113) Moreover, even if it is the case that "legal authority is split between" the state and "religious" authority, that split is certainly not reducible to the former exercising "jurisdiction over civil law," while the latter "supervis[ing] … religious law." (113) The "dual system" of personal status remains, after all, a particular instance of modern law, and

to say that law is a means by which the terms of citizens' participation are set surely implies that it is the means by which the conditions of speech and action are set as well. In other words, whether designated as "civil" or "religious," personal status laws are means by which legal subjects are constituted.

In addition to questions about the institutional and legal relationship between "the religious" and the "civil," some have considered the links between "personal status laws" and "sectarianism." In his efforts to understand the "premises, practices, and historical processes of becoming sectarian in twentieth-century Lebanon," Weiss (2010: 3) thinks that the "establishment of new jurisdictions of Shi'i 'personal status'" (3) contributes to "constructions of Shi'i sectarian identity." (11) The "institutionalization of Shi'i law" (30) involves the formation of "an integrated network of … courts," "bureaucratized and standardized norms of legal procedure," and "diverse levels of codification" (29), that make possible new "collective Shi'i solidarity and identity." (30) However, at the level of legal institutions, in what the relationship between the latter and sectarian identities consists is not so self-evident, the step from one to another being equivocal. As Weiss's account seems to suggest implicitly, these identities are constituted together with legal subjects through regularized procedures and categories constitutive of personal status jurisdictions *qua* jurisdictions common to all "sects." In other words, the law differentiates and homogenizes at the same time, "sectarian" identities being possible insofar as they are legally meaningful.

On another level, some activists in Lebanon have conceptualized personal status laws instrumentally in biological and cultural terms that link marriage to the state. These argue that, civil marriage makes possible "inter-sectarian" couples to marry, breed and raise a progeny that would transcend and surpass "sectarian" differences. The legal category of

personal status draws marriage into a wider set of more complex problems than the claims of separation of religion and the state, and so-called sectarianism, both suggest. Shifting the focus of analysis from institutions to articulations of marriage renders more complex the interconnections between "the religious" and "the secular" on the one hand, and among different "religions" on the other. Marriage becomes a point of convergence to a number of questions: Is it a matter of freedom of conscience, or of belonging to a *ta'ifa*? Is belonging to a *ta'ifa* a matter of belief or marriage? Is membership to a *ta'ifa* the same thing as being religious? Does one signify the other, and is "marriage" a *sign* of this membership? Or, does one imply the other? What are the relationships between marriage, religion, and conversion? What would their implications be for the relationships among religious confessions? What are the conditions of speaking about marriage in the first place? These questions are important because they tell us something about the stakes in marriage and its relationship with the state.

Marriage and Secularism

This dissertation examines five articulations of marriage in different discursive contexts. Chapter one presents the public polemics and debates on civil marriage against the background of changing sensibilities in Lebanon towards certain legal forms of marriage. It highlights the role of the media as a technology of the public sphere that enable and constrain discourses of marriage, and structure binary oppositions between "the religious" and "the secular." The first part of the chapter introduces a television talk show between a Sunni Muslim mufti and a Sunni Muslim bride married to a Christian man under foreign civil law. The interchange between the two involves conflicting assumptions about the body and

morality, authority, freedom, and ownership of the self, and the meaning of religion. The second part analyzes a major national polemic erupting at the end of 1997 in reaction to the Lebanese president's proposal of an optional civil marriage law. It delineates the different positions of Islamic and Christian authorities and their performance of national unity in the face of the perceived onslaught on religious values and the character of the Lebanese state. Such incidents expose an unsettled and unsettling domain of interrogation about sovereignty and power, the meaning and status of religion in the modern state, the relations among a diversity of incongruent notions of religion, moral and legal autonomy, and modern subjectivity.

Debates on civil marriage are not recent, or, rather, they are the most recent episode in a long genealogy of efforts to configure and reform the system of personal status in Lebanon since the French Mandate. French attempts to do away with religious jurisdictions altogether in the 1920s and 30s was confronted by the refusal of Islamic and Christian authorities. Ten years after the proclamation of Lebanon's independence from France in 1943, the Bar Association staged strikes against religious personal status laws. In the last two decades, civil marriage has come to symbolize the perceived shortcomings of the system of religious personal status laws to which it is opposed. Chapter three sketches out the general conditions of the French Mandate in Syria and Lebanon, and proceeds to delineate some of the conflicting aims and strategies of the civil and religious authorities involved in the formation of a system of personal status law comprising several Islamic, Christian, and Jewish jurisdictions. Apart from its institutional form, the functioning of the latter rests on two concepts constitutive of the new Lebanese modern state: "Freedom of conscience" and "the personal status of religious confessions." Each claims a distinctive set of rights, and implies,

therefore, distinct powers held by natural persons—citizens—and a multiplicity of moral persons—religious confessions or sects—the relationship between which marriage disrupts and regulates.

The three subsequent chapters examine marriage in three jurisdictions: Sunni Muslim *shar'i*, Maronite Catholic ecclesiastical, and civil courts, based on transcripts of judicial decisions in each. In chapter four, marriage is a point of access to adjudicating cases of custody and support, but also to cases that exceed the limits of the court's competence. It focuses on the particular problem the *shar'i* judiciary faces of maintaining the distinction between *al-qanun* (law) and *shari'a* and of reconciling their respective demands. The distinction hinges on a positivist conception of law as a set of rules on the one hand, and the *shari'a* as the tradition by which both the individual Muslim and the *shar'i* judge are to conduct themselves, on the other. Here marriage recedes into the background as the necessary condition of the web of family relationships within which Islam is lived, learned and transmitted, and which the *shar'i* courts secure.

Marriage assumes a central place in Catholic doctrine, as the cases of annulment in Maronite ecclesiastical courts make evident. Chapter four traces the shift in the Catholic conception of marriage at Vatican II. As an interpersonal relationship, marriage psycho-physiological capacities that enable the person to issue a valid consent and bear the requirements of married life. Annulling a marital bond requires retrospective assessment of a person's capacities, which must be determined to be impaired, opening the way for medico-legal expertise. This procedure dovetails with the Lebanese state's requirement for a health certificate prior to marriage, and makes it possible to secure the *forum internum* of both

judges and subjects from being exposed to doubt, coinciding neatly with the state's guarantee of freedom of conscience.

An implication of this guarantee is that, in principle, individuals may convert and marry freely across *tawa'if*, for in the modern state conversion is removed from the purview of religious rules and enforcement. However, with the existence of fifteen religious jurisdictions of personal status, free conversion entails the possibility to marry in any one of them, or, if one is already married, to change one's marital status. Two consequences follow from this: first, conversion shifts, sometimes unjustly, the configuration of rights that constitutes a particular family, and, second, it may lead to conflicts of competence between jurisdictions. To avoid such situations, the conversion of married individuals is regulated by law, and, if need be, by the Lebanese Court of Cassation. The last chapter describes the Court's approach to deciding cases of "ambiguous" conversion. It argues that the articulation of marriage, personal status, and conversion gives rise to an unanswerable question, namely, is conversion "religious" or "secular," and in what does each consist?

Methodological Notes

Field research for this dissertation was conducted over a period of fourteen months between 2006 and 2008. It included two areas, civil marriage and personal status laws. The first involved individual initiatives to marry under civil jurisdictions outside Lebanese territories, and the public debates about civil marriage that accompanied this practice. Data about civil marriages was collected through formal interviews and conversations with people I am acquainted with personally or met through them, or in social networking sites that advocate

and organize for civil marriage and secularism in Lebanon.[6] Newspapers and newspaper archives both online and at the library of *Université Saint Joseph* was my main source of data about the debates on civil marriage and legal reform in the last ten years. Research on personal status law involved several methods. Formal interviews with lawyers and judges, as well as observation in Sunni court of appeals and Shi'i courts (Maronite ecclesiastical courts are inaccessible) laid the groundwork for further documentary and archival work. Access to court archives varied. Maronite court archives were strictly out of bounds for the ordinary person. My request to have access to Sunni court archives was rejected, and I did not insist, nor did I attempt to find another way to gain access to them. The Shi'i first instance court archives were the most accessible, while access to the archives of the court of appeals was not allowed, employees selecting, photocopying, and delivering documents at their discretion. All legislative acts are published in the Official Gazette, and codes and other bodies of law are commonly available in bookstores. I found the overwhelming majority of court cases—besides the Shi'i decisions, which I did not use in this dissertation—published in several legal periodicals. These are of two kinds, public and private. The major public periodical, *al-Nashra al-Qada'iyya* (The Judicial Review), is issued by the Ministry of Justice. Private publications include the Beirut Bar Association's *al-'Adl*, *al-Sharq al-!Adna: Dirasat fi al-Qanun* (The Near East: Studies in Law) published by the *Université Saint Joseph*, *al-Qararat al-Kubra fi al-Ijtihad al-Lubnani wa al-Muqaran*, and *al-Huquq al-Lubnaniyya w al-'Arabiyya*. These journals are available at university libraries, particularly

[6] Two mainly: https://www.facebook.com/Civil.Marriage.in.Lebanon?ref=ts and https://www.facebook.com/laiquepride

the *Université Saint Joseph* and the Lebanese University. In addition, the Lebanese University's online legal database provides access to Lebanon's *corpus juris*.[7]

[7] www.legallaw.ul.edu.lb/luonline/Security/Homepage.aspx

CHAPTER I
Civil and Religious Marriage in Lebanon

Civil Marriage

A popular talk show on one of Lebanon's many private cable networks hosted a Sunni mufti and a newlywed couple some time in 2011, to debate their marriage.[1] *Al-'ustadh* (mister, also teacher) Malek, notepad and pen in hand, mediated the discussion, the mufti to his right and the couple to his left—both in their wedding attire—the four surrounded by the audience. A few minutes later, during which they debated a range of topics, the mufti, refusing to "sit among such a society (in colloquial Arabic, *'ana ma be''od bi heik mujtama'*), wished them all peace ("*al-salam 'alaykum*") and stormed out of the studio to the audience's applause and the host's reluctant affectation to hold him. Apparently, that the marriage was "mixed"—she was Sunni Muslim, he was Christian—and contracted abroad under foreign civil law qualified it for primetime television. White Arabic typescript in the lower right corner of the screen announced the title of the episode, "*wa tazawwaja madaniyyan* (literally, and they married civilly)." That was not the first or only public evocation of marriage in Lebanon. In the last months of 1997 a rumor that the president of the republic intended to propose a draft "law for an optional civil marriage (*qanun al-zawaj al-madani al-'ikhtiyari*)" began to diffuse to the public. The law, a code stipulating the rules of marriage, divorce, custody, support and the like, would be applied in civil courts. When the president's intentions were later confirmed, the mild stir the rumors had caused swelled gradually into a polemic for and

[1] "Mufti el-Mays about civil marriage: I do not belong to this corrupt society" at http://www.youtube.com/watch?v=d6ffGKUgjUI&list=PLDFF9D3C34FF296CC&context=C454f50dADvjVQa1PpcFOu9WMaGguUV332N03vOa0j-xqJTYNyJeE%3D (last retrieved on March 27, 2012). The five-minute clip of the show was uploaded on YouTube on June 2, 2011. By March 27, 2012, it had received 1,188,269 hits.

against optional civil marriage between various "spiritual guides or leaders (*al-ru'asa' al-ruhiyyun*)" of the various *tawa'if*—including the Sunni mufti of the republic and the Maronite patriarch and Catholic cardinal—on the one hand, and self-proclaimed secularists or reformists on the other. Four months later, the project was silently withdrawn from public circulation.

This chapter is an account of two events in which different notions of marriage are debated. The setting for the first is a talk show on one of the major cable networks in Lebanon in 2002; the other is a controversy unfolding in the public sphere in late 1997 and early 1998. The "public" here is not a preexisting medium, but belongs to, and is formed together with, the discourse of civil marriage. The talk show frames a debate between a Sunni Muslim mufti and a couple—a Sunni woman and a Christian man. The couple appears in their wedding attire, as if just arrived on a plane from Cyprus, the mufti in his official garb—white turban and grey cloak. The theme of the evening's discussion was their civil marriage. The second event is wider in scope, encompassing the state and the major religious leaders in the country in a debate over a draft optional civil marriage law proposed by the president of the republic. The two take place in a situation in which marriage is governed by the current system of personal status laws. Inserted between them are the views of two women about their civil marriage. The first is based on questions asked over email, and is, therefore, more formal than the second, which emerges in the context of a conversation. They offer alternative contexts to the public, mediatized ones in which the two events take place, and make it possible to distinguish different ways of speaking about "civil marriage."

The Mufti and the Bride: Marriage, Secularism, Spectacle

The clip of the talk show opens with the host eliciting the mufti's response in particular, by introducing "… a young woman, a Sunni Muslim," who "took that initiative and married a person she loves." His description puts forward an autonomous subject authorizing her own decisions. However, that self-ascribed authority is insufficient by itself and is completed by love. Love, it seems, is a powerful motive, making it possible for one to transcend religious or confessional (sectarian) identities and remain religious nonetheless. This tension between "religion" and "religious identity" is implicit in the host's hesitation between "a young woman" and "a Sunni Muslim." Yet, it is a constitutive tension, for if she were merely the former, the marriage, and consequently the show, would not deserve the attention. It is crucial that she be Sunni Muslim for it is as such that her choice seems important. Doing so, however, he simplifies the situation—and it is an important aspect of certain constructions of secularism that the situation be so simplified—since he excludes the husband from the decision-making process (if there were one). Moreover, he reduces the conditions of the decision to a vague initiative, and reconstitutes superficially its consequences, which have no place in the show.

In the decision to contract civil marriage the status of both authority and identity are at stake. This is what provokes the mufti, who, by asking "But who is she!?" interrogates the authority to which the woman lays claim by her decision, because "it is God who makes Law (*el bi sharri' allah*), not her!" This is not only a question of divine right, but also of the limits of human desire. To illustrate, he invokes incest. "If someone loves his sister," he asks, "would he marry her? What sort of talk is this? Is love alone sufficient (*al-hub wahdu kafi*)?," concluding, in a seemingly conciliatory tone, that "it is insufficient, *ya 'ayni* (my dear, literally, my eye) …"

The discussion then turns to authority and truth. When the bride, expressing her "respect [for] *samahat al-mufti*'s words," nevertheless ascertained her disagreement with him ("*ma bwefiq ma'o*"), he interjected, "Your agreement is not necessary! I'm not waiting for your agreement! It is God who agrees, not me!" As evidence of her disagreement with the mufti, the bride furnishes the fact of her civil marriage, which, at the same time, asserts her authority. "If I didn't approve I wouldn't have married in this manner," she tells the *mufti*, eliciting his reiteration of the earlier question denying her any authority to agree or disagree with what is, for him, not a matter of discussion, but of *shar'*. Opposed to his questions, "Who are you to approve or not? Who are you to approve or not?," was her affirmation, "I've contracted a civil marriage … I've contracted a civil marriage …"

The legal fact of civil marriage, constituted by a legally authorized act, is deployed as an expression of the civil power that makes it possible for an individual to stand autonomously beyond the scope of the *shar'i* authority the mufti is at pains to articulate. The mufti and the bride do not share the same assumptions, and they both find themselves compelled to speak in a common public space that presupposes a common language. The mufti recognizes this irretrievable discursive disjunction and expresses it clearly: "You are no longer Muslim," he tells the bride, "and you have no right to speak!" All four, simultaneously,

> Host: "Wow! Wow! Wow! (*'uff*)"
> Groom: "A human being (*'insana*) … [she's] a human being."
> Mufti: "A human being, fine, a human being …"
> Bride: "A human being, and our Lord (*rabbna*) was present when we married."
> Host: "She's no longer Muslim!?"

Faced with this prospect, bride and groom counter with an appeal to her humanity, which seems self-evident to the mufti. There is a significant difference between the two attitudes. For groom and bride, her being human is a value in itself—it transcends religious

differences, it is the source of her autonomy, it legitimizes her actions—whereas for the mufti it is a fact, and as such is inconsequential to the validity of their marriage. He stops short of declaring her an apostate however, asserting instead, "when she dies she wouldn't be buried in the cemeteries of Muslims and would not be prayed upon (*la yusalla 'alayha*)."

Host: "An apostate (*murtadda*) that is?
Mufti: "I'm telling you she's no longer Muslim."
Host: "Wow!
Mufti: "What do you mean wow!?"

At this point, the bride shifts the discourse to God, Religion, and religions, drawing in a woman from the audience. The latter attempts to explain the origin of religions, managing to insert a few words before the mufti interrupts her.

Woman: "… First of all, the source of all religions (*al-'adyan*) is a single God (*'ilah wahad*). Judaism (*al-yahudiyya*) …"
Mufti: "Leave religions (*al-'adyan*) to me, please … don't legislate (*ma tsharr'i inti*)."
Bride: [Inaudible]
Host: [Inaudible]
Woman: "I heard you … I heard you … I'm saying my opinion (*'am 'ul ra'yi*) …"
Mufti: "No, no, no, no, no … don't talk about what you don't know of …"
Woman: "… Those three religions … and they all recognize Him … they say …"
Mufti: "*Ya 'akhi* I recognize that a Christian is a Christian (*al-masihi*), and that's it (*w khalas*) …"
Groom: "Leave our choices to us …"
Woman: "… He is a Single God who revealed those three messages (*al-rasa'il*) at different times …"
Mufti: "Look at that, look at that … she's here to legislate (*jeyeh tsharri'*) … she's crossed the line … she's crossed the red line [in reference to the show's title] … she's crossed all lines …"
Woman: "…"

Host: "Let's hear what Nadine [the bride] has to say …"
Bride: "First of all, I thank him for all he said, even though some words were disrespectful of our choice … but despite this, I respect his convictions (*qana'at*) … certainly …"
Mufti [interrupting]: "These are not my convictions *ya 'ukhti* (sister), this is *shar'*, it's not I who's speaking (*mish 'ana 'am 'ihki*) …"
Bride: "Okay, this is *shar'* and I respect it … but I am a human being (*'inseneh*) and there are many others, not just in this country but throughout the world, who believe in

our Lord (*rabbna*) in their own way (*'a tari'itun al-khassa*, also private, personal) …"

All four, simultaneously,

Mufti [interrupting, getting animated again]: "What do you mean in their own special way? What does this mean? Where from do you get this religion (*al-din*), where from do you get it?"
Bride: "… they exist … they exist … they exist …"
Groom: "It's in no one's position to decide …"

Bride: "I consider our Lord (*rabbna*) to have been present at our wedding … our Lord was present …"
Mufti [interrupting]: "If you knew about the present God (*allah al-mawjud*, also existing) He wouldn't have allowed you to get married …"
Host: "Wow! Wow! …"

A member of the audience—apparently a relative of the groom's—exercising his right to offer his opinion, complains about the word *nikah*, and the expression "*nikah fasid* [invalid marriage; the word *fasid* may mean corrupt also]."

Man: "There are atheists out there, and if they want to get married, we can't say 'this is a *nikah fasid*' … we all know what that means, *nikah fasid* …"
Mufti: "*Ya akhi* marry (*tzawwaj*) but don't expect me to consider it *shar'i* … don't expect me to consider it *shar'i*."
Bride [addressing the mufti]: "*Samahat al-mufti*, *al-zawaj* is not simply *nikah*, it is a much stronger bond (*rabit*) than this."
Groom: …
Mufti: "What is *nikah* after all? Is it only about him sleeping with her, is that what *al-zawaj* is? [Note the mufti switching between the two]. Who said that? Who said that? … No, no, no, no, no … He who created you is He who *yusharri'* for you (*al-ladhi khalaqaki huwa al-ladhi yusharri' laki*). You do not own yourself (*'inti mish milik nafsik*)."
Groom: "She owns herself one hundred per cent!"

At this point the mufti storms out of the studio, to the audience's whistles and applause.

Bride: "I, with all respect to the mufti—he did not respect our convictions, choices, and thoughts at all—I, respecting his presence—and I hope he gets to know this eventually—put on this thing [removing a shawl covering her bare shoulders]—and I am not convinced—because this [pointing to her bare shoulders and chest] is part of my body (*jiz' min jesmeh*), and I am free to reveal it or not, and it does not violate morality [*ma bi*

khill bi al-akhle'], nor does it reveal me in any inappropriate way. I can now remove it." [Applause]

Marriage, Secular Values, and the Body

The question why the couple preferred civil to religious marriage was not asked during the five-minute clip. When I inquired, rather too bluntly, about the reason why someone would marry abroad, I received an email with the following reply in English:

> "My husband and I are both registered in the same Church (same sect) but we share the same values with regards to how social statuses should be managed. To us, the state should be responsible of/for all the citizens. We are not followers. We are citizens and it is absolutely ridiculous to us (and incomprehensible) that Lebanese people are not governed by the same laws!! What kind of a government is that?"

The answer makes it clear at the very beginning that this marriage was not between two people from different religious or confessional backgrounds. They belonged to the same Church, which she equates with "sects" and distinguishes from both "religion" and "values." Being a member of a Church/sect is seen to be a matter of registration—an administrative procedure one may not avoid—marriage a matter of social status, and law a technique of management.

This points to a more general ambiguity at the root of the debates on marriage, the source of which is Lebanese law. The law defines a *religious ta'ifa* as a moral person consisting of a multitude of individual citizens whose membership in it is contractual, and an outcome of which is subjection to its limited jurisdiction.[2] Arguments for civil marriage such as the one put forth in my informant's reply assume this as a premise, but do not draw its full

[2] C.f. Decree (*arrêté*) No. 60 L.R., issued March 13, 1936, "the System of *Tawa'if*" in *The Laws and Decrees of Personal Status for the Christian* Tawa'if *in Lebanon*, A.Z. al-Zein (ed.). 2003. Beirut: al-Halabi Legal Publishers. (Also published in the accompanying volume entitled *The Laws and Decrees of Personal Status for the Islamic* Tawa'if *in Lebanon*, by the same editor and publishing house.) See Chapter III for a discussion of that text.

implication, namely, that their normative view of marriage, which they posit in opposition to what they consider to exist, conforms to the law in the first place. In her words, that marriage is, by her values, a matter of "social status" that ought to be "managed" by "the state" is already the case. But, at the same time, the same law recognizes that religious *tawa'if* are organizations of religious institutions, hierarchies, and doctrines, membership to which is acquired by birth, marriage, baptism, conversion, and so on. Thus, *tawa'if* are both secular moral persons and "Churches," and marriage is both a legal transaction and a religious act.

The statement about value in the informant's reply—"we share the same values"— plays the role of positioning the speaker within an already existing legal configuration along with other like them. Thus, "We have friends who share our values and who got married in Lebanon anyway because it was easier for their families and friends." Yet, the values they share conflict with others they do not, such as the consequences of their actions on families and friends and the course of action one takes accordingly. Their friends chose to marry in Lebanon under religious law, despite their values regarding how social statuses ought to be managed, because of other considerations. These entanglements of marriage, gender, religion, values, families and friends and their implications for marriage have been noted by recent ethnographies on Lebanon. (Cf. Drieskens 2008; Weber 2008) The embedded complexity of marriage offers possibilities for choice among a diversity of positions, preferring religious marriage despite one's values. At the same time, however, that possibility of a choice is unstable, for one is sometimes compelled—by one's own very values—to act in certain ways and not others. In the case of my informant and her husband, they "could not do it [marry in Lebanon] because this was our only chance to take a stand …

and … to be honest with ourselves." Marriage is redefined as an occasion to make a "stand" and announce it.

> "How can we teach our children to believe in those values if we ourselves cannot even make some sacrifices for these values? We did sacrifice. We didn't have family or friends with us. But so what? Marriage is exactly that: a marriage. The wedding ceremony is just one day. We chose to be true to our values and believes [*sic*] even if it meant losing this one day.
>
> "It was important for us to make a stand. And when we went to the Lebanese embassy in Cyprus to give them the documents so they can officially send them to Lebanon and our marriage would be registered; the lady who took the documents looked at us like we were nuts and asked: 'do you know you are allowed to get married in Lebanon?'"

A régime of mutually reinforcing sentiments that encompasses heroism, hope, defiance, resignation, regret, loss, and resentment accompanies the "[wish] … [to] have shared this important moment with our relatives and friends in our own beloved country." The affective, moral, and legal scope of marriage is widened, because "our public servants did not leave us any choice, [for] [t]hey forced us to overpass [*sic*] them (and their responsibilities) and go abide by another country's law!" Public servants are reproached not for their responsibility of the couple's fate, but rather their shirk. Thus,

> "All we ask is that they offer Civil Marriage as a CHOICE AT THE VERY LEAST. We are not asking them to take charge of what should be theirs in the first place, we are not asking for a revolution (just now) but at least offer their citizens a CHOICE so we don't have to go and abide by other public servants' laws!"

My informant ties personal freedom to civil laws in general, not just to the option of a civil marriage. Seen in the perspective of the existing legal arrangement, individuals are free in principle to choose from fifteen jurisdictions. Yet, one gathers from her words that this does not constitute a condition of freedom because one would still be bound to "religious" laws. The reason why public servants resist the enactment of a civil marriage law is that they are "probably scared."

> "If we truly become a democratic country that allows for personal freedom, the freedom to get married under civil laws, then maybe everyone would finally see how better these laws are and everyone would finally adopt secular laws rather than religious ones. At least for their social status. At a personal level, individuals are free to do and worship as they please.

Another ambiguity marks her words in this passage, in which marriage slides between personal freedom and social status, and freedom slides between marriage and worship. She articulates two notions of freedom, as do many supporters of civil marriage in Lebanon: one consisting in "free choice" the other inhering in "secularism" itself, which she affirms at the end of the first part of her answer, "I am a SECULAR LEBANESE CITIZEN. And my most basic rights are violated." To the question about how long she had been considering civil marriage, she replied that it was a self-evident choice for her because "this is how I was brought up." She grew up in France, "mother of secularism," she continued, "so these values have been mine since as long as I can remember." This is one reason why consensus over these values is important for her. In her own words, "But it is also very important to mention my parents share the same values. We all believe in the separation of religion and the state despite the fact that we all believe in God." Consensus is particularly significant within the family, because it is seen as one of its necessary conditions, as it is of the relationship between two people prior to marriage.

> "It is important to note that it is not mere chance that my husband believes in these same principles. When a person dates, they look for similar ways of thinking in their partners; otherwise how could they build a life together? Respecting the others' values is important, but it is also important to know whether you can accept your children will be brought up in those values. If not, then you certainly cannot build a life let alone marry and have a family with someone who disagrees with your values."

Consensus becomes more complicated in the context of social relationships other than marriage. While "to [her], these particular secular principles are not up for consideration or

negotiation[,]" and while she "believe[s] they are the only solution for a stronger, better, healthier nation that we can all belong to. One Lebanon[,]" they do not prevent her from "hav[ing] religious friends (even some who would not marry outside their sects) …"

> "… [A]nd we socialize, we see each other, we debate, we argue sometimes and I do love them. But I would never be able to marry them. And neither could they marry me. I had a friend who practiced her religious 'duties' and who got engaged to a man who couldn't care less. They ended up breaking up, because although he was from the same religion, he could not accept she would 'force' his children to pray and fast. They are both wonderful people. They are just incompatible because some compromises are impossible."

Regarding religion specifically, she emphasized the distinction between belief in God on the one hand and "man-made institutions in the name of God." She "was brought up by parents" who subscribed to the former. "[R]eligions," therefore, "are more of philosophical expressions of values, principles, ethics and way of life (what is bad, what is wrong, how to make choices, etc.)[, and] … it is really up to individuals to assess these values and adopt what they deem as being right/ethical." The difference between religion and secular philosophies is the premise an individual selects, and "if one believes in God, one would assume that one's choices will be judged by God at a certain point in time (whether during their lifetime or in the afterlife) and one would expect retributions or rewards."

A sequence of propositions follows. She "personally believe[s] in a higher power[,]" but is skeptical of its agency and consequences for her. "I cannot know for sure if this power will judge me one day or not, but I can only assume that something did start this universe. Something bigger than me, bigger than men. How we call it, what we call it, is irrelevant." While this scheme provides her with an answer to the question of origins, the source of knowledge about her life and conduct lies elsewhere, namely, in an "education" of a certain kind.

> "But I do believe that education is more important than religion. Understanding 'good' and 'bad' and instilling values and ethics at an early age is crucial for children to grow up to be well-rounded individuals. I do not believe that one should 'do good' just because one is afraid of punishment. Of course, as with children, some 'training' is required at first to teach that actions have consequences. But the whole 'heaven' and 'hell' approach is not the key goal here. The key goal is ethics and responsible human beings making choices, accepting their responsibility in those choices and assuming their choices' consequences (positive or negative). If religious believes [*sic*] like heaven and hell can help make people better human being, then fine."

However, she does not find that the careful distinctions she draws between religion as belief, individual doubt, and moral education apply in Lebanon, where "religion has transgressed its spiritual limits [and] … is now not only a tool to control masses but also to control power and political life."

> "Which is why Civil Marriage is still not even an option in Lebanon. Legalizing CM in Lebanon would mean accepting that all Lebanese people are equal under the same law of a Lebanese state. That would break the political and financial powers the various religious leaders are keen to maintain. A civil society would not only eliminate religious leaders' power in the political arena but would also mean a huge loss of profits. Financial profits.
>
> To sum it up, I do believe in God/Allah/BiggerForce and I pray and talk to God without a third party and any time and whichever way I want; because I do not believe in man-made religious institutions that in my humble opinion, abuse religion and insult their God."

In contrast to that account, the following is a transcript of a friend's explanation of her decision to marry abroad. Her comments occur in an informal conversation and are admittedly brief, but they show the embodied, intimate, and visceral aspect of civil marriage.

> "R's very first statement explaining why she chose to travel to get married under civil law was that she 'did not believe in the institutional and clerical baggage of religion.' We were having a casual conversation a few days after I had arrived in Beirut for research. Being a friend of mine, she knew what was the purpose of my visit, and the reasons behind my question. R did not express unbelief in God—in fact, she did not mention God at all. Her comments focused on something else. She thought it was 'too complicated and burdensome' to marry in Lebanon, almost 'suffocating with its ritual and paraphernalia, its conspicuous celebrations and dress codes.' Under some pressure from her parents, and only after some time had passed since the wedding, she reluctantly conceded to their wish

to throw a cocktail party at their house for family and friends. Moreover, being a Catholic—which she did not mention—she was subject to Pastoral Care, which requires the couple to hold meetings with the parish priest prior to the wedding.[3] At first I interpreted her suspicion of what she saw as the increased control and monitoring of marriage by the clergy as a natural anticlericalism probably cultivated during the years of her youth as a student of one of the many *laïc* schools in the country. But then I noticed something else: whenever she mentioned the spiritual examinations and the wedding ceremonies, she grimaced with disgust, folded her body, tensed her limbs, and feigned a shudder …"

Marriage and the State of Religious Minorities[4]

Conflicts over the system of personal status laws in Lebanon are not new. They are constitutive of the modern Lebanese state since its creation under French Mandate in the 1920s. French efforts at secularizing personal status laws were initially resisted by both Islamic and Christian authorities, and in the 1950s, the decade following the proclamation of independence in 1943, lawyers staged protests against the system. In the late 1990s a proposal for an "optional civil marriage law (*qanun al-zawaj al-madani al-'ikhtiyari*)" initiated a controversy that lasted four months. Criticism of the legal system and the demands to reform it have continued in the decade and a half since then, recently becoming included in campaigns for human rights, civil liberties, gender equality, and a stronger rule of law.

Proposed by the president of the republic in 1997, the draft law was presented as a solution for couples such as the ones I mention above. If enacted, they would no longer have to travel abroad to marry. Also, the civil judiciary would be spared having to deal with a

[3] "Pastoral Care and Those Things That Must Precede the Celebration of Marriage", chapter VII, art. 1, can. 783, Sec. 1, "Pastors of souls are obliged to see to it that the Christian faithful are prepared to the matrimonial state: 1° by preaching and catechesis… 2° by personal preparation of the parties for the marriage…"; Can. 786, "All the Christian faithful are obliged to reveal any impediments they are aware of to the pastor or the local hierarch before the celebration of the marriage." The 1990 Code of Canons of Oriental Churches: http://www.jgray.org/codes/cceo90eng.html, downloaded on 10/17/2008.

[4] Unless otherwise noted, all citations in this section are taken from the two major newspapers in Lebanon, Annahar and Assafir, between December 1997 and March 1998.

multiplicity of foreign laws. The new code, which encompasses marriage, divorce, custody, and support, would be applied in civil courts, turning them into a sixteenth jurisdiction of personal status, alongside the already existing fifteen religious ones. The speaker of the house complicated matters further by introducing another issue, the abolishment of "political confessionalism (or sectarianism, *al-ta'ifiyya al-siyasiyya*)," which amounts to a complete reform of the political system. This opened up a whole new controversy over the relationship between the political and the legal. The proposal's legislative trajectory would have seen it voted on in the cabinet of ministers, which would have then passed it on to parliament. The tensions ran high enough to cause a split in the cabinet, between those ministers who supported the president and those who stood by the prime minister against the proposal on the other. Its detractors accused the president of holding ulterior political motives, while he insisted that his intentions surpassed the merely political. He aimed instead at secularism, consolidating the civil state, promoting freedom, national unity, and so on. His supporters, partisans of civil marriage, asserted that they were not atheists, that "secularists are believers (*mu'minun*)," and that their aim was a "unified society." These reasons stressed one aspect of the law, which concerns the citizen, overlooking the significance of the fact that it expanded the state's reach into areas so far inaccessible to it—or, rather, accessible only through the mediation of religious authorities.

The proposal for a civil marriage law did not take place in a legal vacuum, however. Civil marriage enjoys statutory recognition, but a code for it was never legislated, leaving matters of personal status to the exclusive jurisdiction of religious authorities. On one level, the president's proposal may be seen to simply fill that gap. However, it was open to two distinct and equally valid interpretations. While reforming personal status law by legislating for civil

marriage is construed as a means to enhance individual freedom, which the constitution guarantees, it conflicts with another constitutional principle, namely, the protection of the personal status of the religious *tawa'if* of which Lebanon consists. The proposal fell between two sorts of claim: individual rights and group rights. It was the latter that the different religious authorities articulated, and, indeed, one argument some secularists put forward was that they be recognized as a nineteenth *ta'ifa*. In controversies over civil marriage in Lebanon resides a question not yet resolved namely, what is the relationship between individual and groups rights, and what are their respective limits? Marriage ties together the citizen, the state, and the various religious *tawa'if*, and the claims of right each puts forward in support of or against a proposal for a legal change is supported by a diversity of conflicting notions of marriage.

The Sunni Muslim mufti of the republic, the patriarch of the Maronite Church—a cardinal of the Catholic Church—the Shi'i *Ja'fari* mufti, and the Druze *shaykh al-'aql*, all issued statements, and were accompanied by lay politicians, officials, and other supporters. The first urged "Muslims [to] reject [the proposal] in its entirety," because "it impinges on our religious (*diniyya*) and Islamic creed (*al-'aqida*)." So did the Higher Shi'i Islamic Council and its Chairman in a public statement in which they "oppos[ed] and reject[ed] civil marriage." The Druze Spiritual (*ruhiyya*) Committee declared that "the Druze *ta'ifa* … holds onto its personal status law," while the acting Druze *sheikh al-'aql* questioned the insistence on civil marriage despite the "overwhelming opposition of religious authorities (*al-maraji' al-diniyya*) and turban-bearers (*'ashab al-'ama'im*)." The Maronite patriarch first dismissed it wearily as an "old-new subject … proposed already once around forty years ago," stating that "the Patriarchate" neither objects nor agrees to civil marriage.

The initial impulse for the Sunni response to the rumor was the fear that the optional civil marriage law would lead to "suppressing the *shari'a* courts," and that was "absolutely not open for discussion." The mufti warned that it "better be withdrawn once and for all" and "forever," as there were only two outcomes, "being or not being." The Muslims remembered their rejections of similar attempts to abolish the tribunals "more than fifty years ago" and "at different occasions." They saw the courts as "an institution deeply rooted in our Lebanese and Arab history (*tarikh*)." They were "established during Ottoman rule in Lebanon," and "are part of our heritage (*turath*)." Any proposal that would "separate us from our heritage, history and civilization" would be rejected. The *shari'a* courts thus gave sensible form to the relations that tied Lebanon, the Arab world and the Ottoman sultanate. They secured a temporal and spatial continuity between the three, without which the whole configuration would fall apart. In the Sunni discourse the *shari'a* courts found their role as an existential knot whereby the justification of contemporary Lebanon was its Ottoman memory and Arab extensions. Thus, when a suggestion to submit the civil marriage law proposal to a referendum, the Sunni representatives threatened to do the same for "great issues, such as [the country's] independence, finality [as a state] and its regime of government …" What was supposed to be a mere reform measure concerning the private right of marriage was linked, through the mediation of the *shari'a* courts, to the very existence of the Lebanese state. The *shari'a* courts are part of the state judiciary. Their judges are state employees, but rather than being specialized in civil law, they are scholars (*'ulama*) specialized in "*shar'iyya* jurisprudence and its rules." The *shari'a* courts as "an institution are in their being (*kayan*) part of [the state's (*dawla*)] being and its institutions," and "are complementary" rather than opposed to the civil (*madaniyya*) courts.

The twin imports of "Western societies," secularization (*al-'almana*) and secularism (*al-'almaniyya*), signaled that threat.[5] Civil marriage was a "calling (*da'wa*)" for secularization, identical to the one which pushed "states with an Islamic majority like Turkey" to adopt it. It was imposed on Turkey by "foreign states" with the express purpose of "detaching it from its religion (*din*) and its Islamic milieu (*muhit*)." The president's initiative, as an expression of that calling, was a threat to the unity and continuity of the Muslims, just as it was for Turkey. Lebanon occupied a special place in this geography of secularization, as the beachhead from which "civil marriage and secularism" would "spread." "Lebanon will be neither a place for damaging religions and morals" nor "a springboard for corrupting its Arab milieu and mounting an aggression against its eternal inheritances (*mawarith*)." The Sunni discourse made sure to point out that secularism was not only opposed to Islam, but to "religion," and secularization was aimed to distance people from their religion, whatever that religion was. "[S]ecularism, atheism and materialism" were placed under the marks of immorality and non-religion that have characterized "Western societies," which had relinquished "the values of religion and morals …"

That anxiety was coded in terms of a generic "religious sentiment" overcoming the Sunni Muslim "crowd (*jumhur*, also, the public)." Civil marriage, in addition to offending Islamic religious creed and faith, "challenged religious sentiments," which could be excited and induce action; if intensified, they might flare up in the streets. Religious sentiments were undifferentiated, moving across a population at large, and if those in charge kept insisting on civil marriage, it might prove "impossible to control the crowds' (*jamahir*) emotions." For this reason, it was necessary to "advise calm and caution on security and stability in

[5] For more about the problematic translation of these two words into Arabic, see Asad 2003, 206-207.

Lebanon," and to reassert "our commitment … not to take the matter in the direction of street demonstrations." Although "the faithful uprising (*al-'intifada al-'imaniyya*) … expressed the depth of [people's] commitment to … religion" and was appreciated, "we do not handle our affairs in the streets … [but] in our institutions." Action on the street was not necessary, because "we must be reasonable (*''uqala'*), we must be wise (*hukama'*), and if we say that we are reasonable and wise, this means that we are strong." Sentiments and their uncontrolled extension into street action were distinct from reason and its institutional mediations, such as the mufti and the *shar'i* Council. However, it was not a choice between sentiments and reason that was presented, but the reasonable modulation of emotions, their mobilization into meaningful action. Sentiments, in a sense, motivated reason; if it were not for the swell of emotions, reasonable action in institutions would be meaningless. The aim was to keep them within the bounds of institutions. But, it was also recognized that the latters' capacity to do so was limited. Moreover, sentiments, and in particular religious sentiments, were presupposed to transcend religious differences. Such a thing as "Islamic sentiments" distinguished them from *ta'ifi*, or sectarian, sentiments.

The Sunni official discourse recognized other religions along with Islam, which, despite their differences of creed, were grounded in a common sentiment. It also remained within the framework that defined the religious, and the covenant that defined the Lebanese polity. Its distinction between religion and its corresponding sentiments, which Islam is only one expression, was that of the Lebanese Constitution. Religion was outlined in the Sunni discourse by faith (*'iman*), creed (*'aqida*) and *shari'a*, but what was meant by each of these terms was undisclosed. The fact that explaining these terms was not perceived to be necessary was significant. The discourse unfolded as part of a public controversy, and there

was no reason to believe that the general audience did not understand what the terms meant. After all, in Lebanon these terms defined any religion, and signified categories already recognized by Lebanese law. Learning what they were, however, took place elsewhere, in spaces designated for this purpose such as mosques, schools and the family, spaces considered to belong to the private domain of religion, and to a different kind of activity altogether. An optional civil marriage law anticipated the "destruction of [that] family (*al-'usra*)" and "led to undermining the elements of civil society." The two were related by the view that individual members of society are formed in the family, and in the family they are taught "Islam's creed and values." As the constituting foundation of society, the family must be strengthened by "the values (*qiyam*) of Islam, its magnanimous morals (*'akhlaq*) and vast mercy (*rahma*)," which are the "founding substance (*al-madda*) …" This substance does not act by itself, however, but by means of human agency, a crucial component of "faith in Islam." Faith is "inseparable [not only] from morality [but also from the act of] consolidating it in the souls (*nufus*) of people, the youth and the generations." It is the task of "fathers and mothers." The family outlined in the Sunni discourse is an "Islamic family (*al-'usra al-'islamiyya*)" as well as a national one, which all the Lebanese are willing to protect. "Who, among the Lebanese" it was asked, "is ready to destroy his family, and the family of his children and generations?" The draft proposal would "[undermine] the moral, psychic (*al-nafsiyya*), religious and social (*al-'ijtima'iyya*) foundations of Lebanese society," not just of Muslims. It was "religious education" rather, that would "[reinforce] our country, and any country in the world."

The state (*al-dawla*) was "called upon … to seek projects that truly unify society [instead], by balanced development, inclusive justice, full equality, sound administration,

national … agreement, and to interest itself in the people's lasting interest, progress and flourishing." All the religious authorities agreed that there was still much more to do for public authorities a civil marriage law. Separating Muslims from Islam, which the president's proposal was doing, was *fitna* According to *al-Qamus al-Muhit*, *fitna* also meant misguidance (*dalal*), blasphemy (*kufr*), suffering, madness.[6] The *shar'i* Council warned of the "illusions (*al-'awham*) enveloped by the call for civil marriage." Speaking in a special occasion, the mufti cited the *imam* Ali citing a *hadith*, in which the Prophet, when asked "what is the way out of *fitna*?" replied, "God's book …" The mufti saw that a civil marriage law would cause "the sedition of Muslims from their religion (*din*)." Contrary to the arguments that saw in the optional applicability of the draft proposal something that made it more benign than it would have been had it been obligatory, the *Shar'i* Council saw the problem differently. In line with the Qur'anic injunction "no compulsion in religion," the Council agreed that "in obligation there is compulsion (*'ikrah*)." However, it continued stating that, on the other hand, "in optionality (*al-takhyir*) there is *fitna* and misguidance (*idlal*)." Against this image stood the president's proposal, a bearer of *fitna*, which was also discord, sedition and civil strife. The Council of Muftis urged the Lebanese "officials and public opinion to … prevent a *fitna* that would bear on national stability …" The mufti of Tripoli explained that "we, the faithful (*al-mu'minun*) in this country, do not oppose the state, do not threaten stability and do not instigate *fitna*; we do not call for [anyone] to stand against the regime (*nidham*) …" The president's proposal thus had social and political

[6] Compiled by Al-Fairuzabadi between 1368 and 1392 C.E., available at http://www.al-eman.com/Islamlib/viewchp.asp?BID=142&CID=609. For the meanings of *fitna*, http://www.al-eman.com/Islamlib/viewchp.asp?BID=142&CID=629#s1 (downloaded Feb. 13, 2009). Significantly, this is one of the references of Islamic scholars and jurists, together with *Lisan al-'Arab* by Ibn Manzur (d. 1311).

repercussions, the immediate effect of which was, as the Sunni authorities did not fail to repeat, the tensions that he was causing in society and people's souls. They insisted that "Lebanon … needs [what] unifies (*tuwahhid*) and not what separates (*tufarriq*) … which is the duty (*wajib*) of each and every Lebanese aspiring [to see] his country (*al-watan*)" thrive. "The state (*al-dawla*)" was reminded to "search for projects that truly unify society by balanced development, inclusive justice, full equality, sound administration, national … agreement, and to concern itself in the people's lasting interest, progress and flourishing." The aim of state and religion was a "country [that would be] a place of good, virtue and forgiveness, instead of … antagonisms, the stoking of hatreds and instincts, and the excitement of souls and emotions."

The Maronite patriarch summed up the Maronite Catholic Church's position in a series of dispersed statements that outlined the different aspects of the Church's attitude towards law and politics, and their respective relationship to religion. One of his earliest statements was limited to noting that civil marriage law was an "old-new subject," and that it was once accompanied by "a general strike by the lawyers …" He made a similar remark in one of his Sunday mass sermons almost a month later, in which he mentioned the "secondary matters [that] were invoked last week …" He saw that proposals to reform personal status laws and introduce civil marriage "obscured other fateful issues that ought to have attracted the interest of those in charge …" Despite his dismissal of the issue, and while drawing attention to what he considered more urgent matters, he nevertheless expressed the perspective of the patriarchate, which "does not object" to civil marriage but "does not agree either." The lines that follow suggest that this disjunction is a peculiarly Maronite articulation of the religious, legal and political, and of the necessary and contingent. What was so necessary for the

Church was "freedom of belief" as a right. "We accept freedom and freedom of belief (*al-mu'taqad*)," the patriarch declared. Moreover, since "civil marriage is requested by those who do *not* believe in the Church or the Qur'an or Islam" and since "those who want to exercise this right are not believers," the Church does not object. The patriarch asserts the two principles constitutive of the Lebanese state: freedom of conscience and the equality of all religious confessions. Consistently with the premise of freedom of conscience, which includes both belief and unbelief, the patriarch did not to object to civil marriage, but his concern with the "equality before the law … requires [the Church to stand] by our brethren the Muslims" and, therefore, to abstain from accepting the president's proposal.

The concern with equality before the law, was qualified, or rather does not extend to those who wish to see themselves married in civil jurisdictions. Given that they do not constitute a "confession" their claims are for individual rights, which makes it possible to exclude them as a multitude of individuals. The civil marriage proposal would have opened up, within the existing legal framework, an additional sphere for those who did, or wished, not to belong to any of the religious confessions to still be able to marry and manage their legal affairs, and hence the argument of some of its supporters that it would widen the scope of equality before the law, and the ensuing complaint that the rejection of the president's proposal was identical to placing limits on that equality. The patriarch was clear and categorical in his appeal to equality, stating directly that "either the Lebanese are equal in everything or [they are] not, and [distinctions] before the law must not [exist], nor [are they] right." This statement may is indeed a reaffirmation of the constitutional principle that "all

Lebanese are equal before the law,"[7] but "the Lebanese" are only those who belong officially to "religious confessions."

The equality the patriarch was promoting included Muslims and Christians in a state of religious minorities that required a particular moral and political theology. "National commitment is not any less important than religious commitment even if there were separation between religion and the state," he asserted in one commentary on the civil marriage. Reversibly, he continued, "separating them does not mean that the state may free itself from all moral obligations and natural constraints." This discursive move opens up a space for the Church to play a role in the formation of the state, by working on "desires (*al-'ahwa'*) … to suppress and regulate them within the limits of reason and will." He linked "[the] Ten Commandments, [which] regulate natural human desires," through the figure of "Christ [who] did not come … to refute them but rather to extend and sum them up in one word, which is 'love' …" to the citizen and the country (*al-watan*). Saint Paul's interpretation of Christ's message, the patriarch exhorted, "is worthwhile for citizens to commit to, to crystallize and uphold, to defend and sacrifice for," because it implies the virtues of citizenship. A good Christian is thus a virtuous citizen, courageous and willing to die for his country, which "[is] not [made] of the tears of cowards, but of the blood of martyrs …" This heroic Christianity in the name of love carries practical consequences, and a universal meaning. It compels "Man (*al-'insan*)" to bear "self-responsibility" and to accept "the choice [that God has laid on him] to shape his destiny." This destiny is actualized by the "legitimate (*shar'iyya*) authorities in the nation (*'umma*)," in "rights … obligations, fairness,

[7] The Lebanese Constitution: "Article 7 [Equality]: All Lebanese are equal before the law. They equally enjoy civil and political rights and equally are bound by public obligations and duties without any distinction." Available online at http://www.servat.unibe.ch/icl/le00t___.html (retrieved February 05, 2010)

equality and justice," which the state "must make sure that all groups (*jama'at*) and individuals enjoy." Immediately after that statement, however, the patriarch made sure to remind people of the virtue of humility by striking at the vanity of the "rulers"—and, by allusion, of the president of the republic whose proposal triggered the controversy in the first place—who are, after all, "citizens performing public service," and who "must do their best to walk a straight path." It is at this point that coincide religion and the state, without either absorbing the other into itself; the two remain distinct, but are articulated by the sacrament of marriage, one of the entry points to the Church and a foundation of public order. Opposed to it stands "civil marriage," which "departs (*khuruj*) from Church teaching," as the patriarch explained in one of his Sunday sermons. The consequences of civil marriage extend beyond the doctrinal and religious, to include the very existence of "one aspect of social life," namely, the family. While the patriarch recognized the freedom to choose civil marriage—and it was on this basis that he did not reject the president's proposal—he nevertheless warned, "whomever contracts [a civil marriage would be] prohibited from accepting the sacraments, and the divorced that remarry [would not be] allowed to share the Eucharist." As the patriarch put it, "there are no half-believers in Christianity …"[8]

The exhortations the mufti and patriarch launched at politicians were not only verbal, but also enacted in an impeccable performance of national unity—and religious solidarity—among Sunni, Shi'i, Druze and Maronites. A joint public statement was issued by the Sunni mufti and the Shi'i chair of the Supreme Shi'i Islamic Council, "[reminding people of] the unified and fixed stance taken by all religious authorities (*maraji' diniyya*) in Lebanon … on the basis that any proposal that impinges on any doctrine emanating from each *ta'ifa*'s

[8] See *supra*, n. 15.

religious faith … impinges on all the *tawa'if* which Lebanese society includes …" Amidst public demonstrations and meetings at *Dar al-Fatwa*, the Sunni mufti made a telephone call to the Maronite patriarch and announced to the crowd that "His eminence told him that his position forbidding (*tahrim*) civil marriage was clear since the beginning, and his sermon today confirms [it] …"[9] A few days earlier he had already mentioned that "we will work with all the *tawa'if* … to unify the efforts against this dangerous matter." The solidary alignment of discourses was used to show—not only to say—that it is possible for the individual *tawa'if* to work in concert, thus placing under the spotlight of *public opinion* the sources of national problems. From the Sunni official perspective, these were neither the *tawa'if* nor marriage; neither were they religious authorities and religion. They did not fail to point out that the country's problems were to be found specifically in politicians whose concern was less the welfare of society than their own personal interests; and the two were certainly related. This collaborative spirit, so to speak, among *tawa'if* inevitably led towards confirming the constituents of the state. By reasserting each *ta'ifa*'s identity on one hand, and exhibiting their solidarity on another, the *tawa'if* accomplished several things. What is called *ta'ifiyya* ("sectarianism") in Lebanon is perceived as constituting the core organizational logic of the state. It is also often seen as the source of the state's—and society's—dysfunction. It is impossible, so the argument goes, for individual *tawa'if* to stress their identities *and* avoid conflict simultaneously. In fact, these two propositions are not only contradictory, some argue, but the former proposition is the cause of civil strife. The solution proposed to all Lebanon's problems is, therefore, to abolish *ta'ifiyya*. A Constitutional amendment from 1991 includes a provision for efforts to be made precisely to that effect.

[9] Ibid. Mar. 23, 1998, p. 5.

Needless to say, opinions about this are subject to *ta'ifi* considerations: abolishing *ta'ifiyya* is perceived to be a Muslim demand, while civil marriage a Christian one. It was not surprising, therefore, to bring up the issue of abolishing *ta'ifiyya* in a polemic on civil marriage. Obviously, the only consensus possible has been, so far at least, on refusing to link them, and on rejecting them both. The religious authorities never ceased to repeat this. In a speech given in one of the major mosques in the capital, a copy of which was distributed to the press, the mufti told the crowd that "we do not accept regarding our Christian (*masihiyyin*, not *nasara* or *'ahl al-kitab*, significantly) companions in the home country (*shuraka' fi al-watan*), and in equal measure, what we do not accept regarding ourselves …" This is why "no connection must be (*la yajuz*) made between civil marriage and the abolishing of political *ta'ifiyya* …" The latter was a "matter of agreement (*mas'ala wifaqiyya*, not *'ijma'*, significantly) that is not accomplished merely by a decree (*qarar*) at a certain moment in time, but is a process (*masar*); it is not ruled by the logic of numbers, but that of agreement and persuasion…" In the end, rather than concern themselves with such divisive and private matters as personal status laws, politicians were requested to attend to what ought to be their concern. The *Shar'i* Council "called on the state (*al-dawla*) to search for projects that truly unify society, by balanced development, inclusive justice, full equality, sound administration, national and not *ta'ifi* ("sectarian") agreement, and to interest itself in the people's lasting interest, progress and flourishing".

Conclusion

The discourses and practices of civil marriage in Lebanon take place under the particular conditions defined by the legal arrangement that consigns it to a variety of Islamic and

Christian jurisdictions. However, that arrangement also makes civil marriage under foreign law possible, and while it also makes available in principle civil marriage in Lebanon, a code to that effect is not available yet. In the meantime, some couples are choosing to travel abroad to marry, at the same time as demands are made for an optional civil marriage law to be legislated. Both give rise to controversies about the validity of civil marriage that involve a reconfiguration of the "the religious" and "the secular" that rest on a variety of shifting assumptions. The television talk show highlights a number of interrelated themes, but also structures them *a priori* in terms of a binary opposition between "the secular" and "the religious": individual autonomy and *shari'a* authority, the sufficiency of love and the terror of incest, the power of positive law as constitutive of factual truth and the authority of *shari'a* as divine truth, being human and being Muslim, self-possession and submission to God, the revealed and the veiled body. The opposition between the religious and the secular is sometimes due to the conditions under which certain terms are used and understood, such as "*nikah fasid*." Moreover, the assertion of the distinctiveness of "civil marriage" is accompanied by a need to define "the religious." Opinions about *R*eligion and the origin of religion*s* imply different assumptions regarding the constitution of knowledge about God and "the religious," and in what that knowledge consists.

A particular notion of religion is also evoked in the email interview, in which "belief" articulates the distinction between the religious and the secular. Thus, it is possible to have both religious and secular beliefs, but whereas the former remain private and ought not to determine one's choices, the latter entail certain forms of action and behavior that define the citizen of a secular state. The latter is the space within which such values are to be expressed, which in Lebanon is lacking because the state is dominated by "religion." This view of

religion presupposes a normative relationship between belief and action such that the latter ought to follow consistently from the former. Marriage and education play an important role in this, for they secure the transmission of these values, which, being non-negotiable, must be shared with one's spouse, but not with one's friends and other members of one's family. In this discourse emerge ambiguous attitudes towards marriage, as an occasion to make a moral and political stand, as an insignificant legal transaction, and an event worth sharing with family and friends. The body figures on the margins of these discourses occasionally as a marker of the difference between "the religious" and "the secular." In both the first and the third case—the informal conversation—while it is exhibited as an expression of that difference, it is so only in the absence of the mufti in the former—whose own aversions induce him to storm out of the studio—and as a source of distancing of the clergy, ceremony, and examination (for example, pastoral care) in the former.

The secular and religious are articulated differently by Islamic and Christian representatives during the controversy over the civil marriage law proposal, both declaring their rejection of the proposal with varying degrees of intensity. The Muslims official position saw the legalization of civil marriage as a threat to a broader domain that joins together the individual Muslim, the family, the *shari'a* judiciary, the tenets of Islam, society, the Lebanese state, an Arab and Islamic geography, and an Islamic civilization. An affective appeal to a particular memory linked the present to the Ottoman past on the one hand, and to universal religious sentiments that brought Muslims and Christians together into a single cause on the other. For the Maronite Catholic patriarch civil marriage is a choice individuals make that carries consequences for their belonging to the Church. But, at the same time, marriage in general is seen as a means to temper and discipline desire. He emphasizes instead

the Lebanese state's constitutional principles of equality that compels the Christians to stand by Muslims on the one hand, and a political theology that stressed the moral strength and courage necessary to run the state on the other. Controversies over marriage in Lebanon are an aspect of that state's peculiar legal arrangement, the formation of which at the wake of the Ottoman Empire's demise is the subject of the following chapter.

CHAPTER II
A Genealogy of Reform: Marriage, Personal Status, Religious *Tawa'if*

Civil Marriage as Means and End of Secularism

Individual initiatives to marry abroad under civil laws, proposals for an optional civil marriage law, social activism advocating civil marriage, or debates over civil marriage on national television all share an underlying discontent with the existing Lebanese legal order. Discourses and practices of civil marriage often vocalize the imperative of "separation of church and state" as a necessary means of acquiring certain goods. But, "civil marriage," as discourse and practice, has recently turned also into an end in itself, a potent symbol of freedom, equality, progress, modernity, citizenship, and even true religion. For secular activists, all this is seen to be lacking or incomplete in Lebanon because the only personal status laws available in the country belong to "religious" jurisdictions. The association of "civil marriage" and "secularism as a political doctrine" to put forward against the state claims of rights and, therefore, justify legal reform has become explicit only in the past few years. However, it belongs to a genealogy of reform that links it to the French Mandate's attempts to install a "system of personal status laws" in the twentieth century and the Ottoman Empire's *Tanzimat* in the nineteenth.

The three articulations have in common the objective of constituting a modern state, but their respective visions of what that state is to consist in, as well as the conditions, scope, and methods of realizing it, differ. The Ottomans were pressed by an urgent sense of relative decline with respect to the increased economic, technical, and military capacities of European powers, and the latter's meddling in the empire's internal affairs. For both the Ottomans and French, reforming the law was only one component of a vast program that

encompassed the state's administrative, political, military, and economic domains. Moreover, the Ottoman reforms involved two distinct sorts of measure: legal reforms, which encroached on the *shari'a*, on the one hand, and the granting of privileges to non-Muslims on the other. The French Mandate, in contrast, encompassed both Muslims and non-Muslims within a single organizational scheme. For proponents of civil marriage in Lebanon today, it is the "religious" domination of personal status that represents the last obstacle to proper citizenship and individual rights, but what they wish to accomplish is the addition of an alternative civil jurisdiction alongside the existing religious ones.

The preceding chapter has described some aspects of the practice and discourse of civil marriage in Lebanon today, and the controversies to which the demands for legal reform give rise. It has stressed the relationship between diverse sensibilities towards marriage—such as pastoral care, or individual choice—political opinions about the state, religion, and government, and proposals for an optional civil marriage law. The already existing legal arrangement, which consigns marriage to several religious jurisdictions, enables and constrains what is desired and said about the former in particular contexts, and determines—to a certain extent at least—the terms of current controversies. It is distinct from the discourse of civil marriage, involving normative assumptions about the Lebanese state and what it means to be a Lebanese citizen, and constitutes the conditions of "marriage"—including civil marriage. This chapter is an account of the emergence of these conditions under the mandate regime in the 1920s and 1930s. The charge of the French Mandate over the territories formerly under Ottoman rule was the formation of the modern states of Syria and Lebanon. In the French vision, two features defined the Lebanese republic: the guarantee of the freedom of conscience and the equality of religious minorities. The latter included

Muslims, Christians, and Jews, and the multiplicity of groups—the various "*rites*"—into which each was subdivided, and if religious minorities did not exist, they would have to be made.

The Ottomans had already restricted the scope of the *shari'a* to family affairs and preserved the millets' autonomy in matters of marriage, death, and succession, and although they had recognized religious freedom and the equality of all subjects before the law, these principles did not figure as criteria of reform measures. Besides, religious freedom is neither identical to freedom of conscience, nor equality of all subjects before the law implies the equality of all religious minorities—and citizens for that matter. Furthermore, the Ottomans did not attempt to systematize all the various millets, but rather kept them apart, dealing with each unilaterally. (Masters 2005; Braude and Lewis 1982) In sharp contrast, the centrality of freedom of conscience and religious minorities on the one hand, and a neutrality towards "the religious" already implicit in the presumption of "the religious" on the other, defined the French holistic approach to legal reform, leading to conflicts and several failures. However, as the account below will show, that neutrality was severely compromised, not only by the exigencies of colonial politics, which required the French to rely on religious figures, but also because of the very impossibility of neutrality when the formation of religious minorities on the basis of "equality" implied the active reconfiguration of the relationships between Muslims, Christians, Jews—and their many rites—and the state.

Moreover, the objectives of the mandate were ambiguous, for while the Mandate Charter stipulated respect for the "personal status of the religious confessions," what that meant was unclear, and limiting it by the requirements of "public order and morality" did not suffice to make it any more legible. Indeed, linking the two together was a constitutive gesture, for

between one and the other laid a vague space of possibilities in which the contours of both may be defined—and transformed. Second, the French oscillated between an understanding of secularization that involved the guaranteeing of freedom of conscience and the distribution of judicial competence in equal measure on all religious *tawa'if* on the one hand, and one that entailed the complete surrender of that competence to the civil judiciary on the other. Moreover, apart from the ends of reforms, the very assumptions upon which they rested and the means by which they were pursued entangled together in a complex of contradictory relationships several religious *tawa'if*, their representatives, a variety of secular groups, and the state. Nevertheless, these relationships were determined by the language of secular colonial, and eventually, postcolonial power, which provided the vocabulary in terms of which claims were made, heard, and enforced: equality, freedom, competence, jurisdiction, private, public, civil, personal status, religious confession, and so on.

In this scheme, marriage undergoes a shift. Inscribed in a multiplicity of identical and equally valid jurisdictions that authorize it on behalf of the state, it becomes a universally valid legal act regardless of the particular law that authorizes it on the one hand, and turns into a technique of regulation and transgression of judicial competences on the other. The former is manifest in the distinction between religious and civil marriages introduced in 1936 as legal alternatives—one is legally married whether one chooses any of the many Islamic, Christian, or civil marriages available. This implies an alteration of the meaning of conversion, the status of which is problematized due to the reconfiguration of its ties with marriage in legal terms. One may convert in order to marry, and conversion may be an outcome of marriage, the two distinct from a religious conversion emanating from the spontaneous experiences or the deliberations of a free conscience. Indeed, in a juridical state

of equal religious minorities and autonomous citizens, specific circumstances emerge in which it becomes possible to ask whether one's conversion is religious or legal, that is, intended to transfer one's legal status from a jurisdiction to another.

The first section of this chapter is a brief account of Ottoman reforms. Its purpose is twofold: first, to point out some of the differences in range, objectives and methods between their reforms and the subsequent efforts of the French Mandate to transform the legal order. The second is to draw the outlines of what remained after the empire collapsed, namely, the *shari'a* family courts and the millets' autonomous jurisdictions. The second, third, and fourth sections focuses on the Mandate, the general conditions in the territories under its charge, the conflicts over legal reforms, and the various proposals of reform the French put forward, respectively. The last section analyzes a key organic legal text issued during that period and still in effect in Lebanon today.

A Quick Look at Ottoman Reforms

Ottoman reforms consisted of a series of measures the aim of which was the making of a modern centralized state. Known as "*Tanzimat* (literally meaning 'ordering')," they constituted a regimenting practice, and reflected highly modern notions of discipline, law, inspection and incarceration." (Hallaq 2009: 98) The *Tanzimat* extended over slightly less than a century, and encompassed administrative, military, judiciary, and fiscal institutions. An informal reform measure was first taken earlier than the Gülhane Decree, in 1826, when "for the first time in Islamic history," the administration of *waqf*s, or pious endowments, was "placed under the control of a new Imperial Ministry of Endowments." (Hallaq 2009: 95) Officially, however, the *Tanzimat* were first announced in 1839 with the Gülhane Decree,

which was followed in 1856 by the Humayun Decree. (Örücü 1992: 44; Davison 1963) Unlike its predecessor, "which was complied by Ottoman senior statesmen," the latter "was drafted after intensive consultation with the French, British, and Austrian ambassadors." (Hallaq 2009: 99) Both decrees recognized the equality of all subjects "irrespective of their religion," (Hallaq 2009: 94; Hanioglu 2008: 72; Örücü 1992: 45) but the 1856 decree supplemented the first by "openly guarantee[ing]" equality (Örücü 1992: 48) and by granting "non-Muslim[s] … formal rights …" in the empire. (Hallaq 2009: 99)

The Ottomans employed a strategy of codification of new bodies of law distinct from the *shari'a*, and the concomitant erection of a centralized court system in which the codes were to be applied. (Hallaq 2009: 98; Örücü 1992: 44, 46; Anderson 1976) A series of codes were promulgated between 1839 and 1880, one of the earliest being a "modern-style penal code" in 1849 that was nevertheless still "grounded in Islamic criminal precepts …" (Hallaq 2009: 97) A commercial code, which "can be seen as the first formal recognition in the Empire of a system of law and of judicature independent of the religious scholars (*ulema*) and dealing with matters outside the *Sheriat*," (Örücü 1992: 47) was promulgated in 1850. (Hallaq 2009: 98) Another penal code, "defining, with more specific details, the jurisdictional boundaries between the Shari'a courts and the new criminal courts," followed in 1851 and in 1854, a criminal code "show[ing] the greatest dependence yet [on foreign models], this time on the penal code of 1910" was promulgated. (98) In 1858 a Penal Code and Land Law were adopted, as well as a code of penal procedure in 1866. (Örücü 1992: 46) The codification of "*Majallat al-Ahkam al-'Adliyya*" in the 1870s, "dealing with civil law and procedure to the exclusion of marriage and divorce," virtually sealed the *shari'a*'s "transpos[ition] … from the fairly independent and informal terrain of the jurists to that of the highly formalized and

centralized agency of the state." (Hallaq 2009: 101; Örücü 1992: 48) In 1880, the Code of Civil Procedure was promulgated "modeled, again, after the French example." (Hallaq 2009: 102)

The adoption of new codes was accompanied by the elaboration of a centralized and hierarchical court system separate from the *shari'a* judiciary. At its top stood the Nizamiyye Courts, "which produced new courts, new laws, a new judicial process and—by the end of the century—a new legal culture …" (98) Its predecessor, the "so-called Supreme Council of Judicial Ordinances," created in 1838, a year before the first reform Decree, already "signaled the removal of the judiciary from the Shari'a domain to that of the state … as the highest court in the land." (97) At the provincial level, the *qadi*s were now joined by "elected members of the civil service," "civil officers and technocrats," at the same time as they were "install[ed] … in the New Courts …" (101) Commercial courts had already been established in 1840, and with penal procedure, modern criminal courts and "the concept of the public prosecutor entered the Ottoman Empire." (Örücü 1992: 47) Other measures to transform the judiciary included salaries, which rendered a newly emerging legal profession—now subject to qualifying exams prior to appointment—dependent on "monthly salaries paid directly by a salaried imperial comptroller." This marked a break with the typical Ottoman practice whereby judges gained their livelihood from collecting court fees, "dues on inheritance division" and the "issuing [of] court documents." (97)

The existence of a separate legal domain alongside *shari'a* was certainly not new in the Ottoman Empire. However, while the *qanun*, as that domain was called, did articulate the sultan's will in matters of *siyasa shar'iyya* (administration and government), it did not establish the supremacy of his authority over the *shari'a*, the latter remaining the sole source

of authority. (Hallaq 2009: 72-79) This changed with the reforms, when "for the first time in the history of the Empire (and of Islam as a whole), [the sultan] placed himself as well as his bureaucratic legislative council above the Shari'a[,]" and "[h]is power to legislate the *qanun*s …, which had complemented and supplemented, but had never overridden the Shari'a and its law, now became overarching and universal." (98) While the reforms did not cross the boundary of family and personal laws so far, nevertheless, one of the last measures was taken a few years before the Empire's demise, namely the Law of Family Rights of 1917, which applied with special provisions to Muslims, Christians, and Jews, and is still applied exclusively in Sunni *shari'a* courts in Lebanon today.

When the League of Nations granted France charge of the territories formerly under Ottoman rule in 1920, what judicial institutions remained were the *shari'a* courts, reduced to dealing with family affairs, and the non-Muslim millets, whose privileged status in the empire had secured them limited fiscal and judicial autonomy, including in matters of marriage, death, and succession. (Méouchy 2007: 362; Örücü 1992: 48; Braude and Lewis 1982: 1) It was this constellation of spaces in which the authority of diverse normative traditions was in part exercised, that the French Mandate aspired later to systematize under a single organization of equal personal status jurisdictions.

Regarding the term millet, it is worth pointing out that it occurred in the Lebanese constitution of 1926, drafted during the French Mandate, in reference to all the "religious confessions," Muslims, Jews, and Christians. Under the Ottomans it referred to "non-Muslims" subjects as opposed to Muslims, a meaning it had acquired only with the reforms in the nineteenth century. However, prior to that it "denote[d] the community of Muslims in contradistinction to *dhimmis*," the *shari'a* term for the protected communities of Christians,

Jews, and Zoroastrians. (Braude 1982: 70) The term "millet" comes to refer to a "non-Muslim protected community" in the nineteenth century. A more common term to refer to non-Muslims before that period was "*taife* (group, people, class, body of men, tribe) and less commonly *cemaat* (congregation, religious community)." (72) In the Arab parts of the empire, *ta'ifa* (s.) or *tawa'if* (pl.) were used "both as a general collective noun for Christians, or to denote one of the various categories within Christianity (Frankish, Greek Orthodox, etc.)." (Cohen 1982: 8)

The Conditions of the French Mandate in Lebanon

At the end of the first World War, the League of Nations placed "colonies and territories" no longer "under the sovereignty of the states that had governed them" at the end of the first World War under mandate supervision, for their inhabitants were "not yet capable of managing their affairs (*se diriger*) in conditions particularly difficult in the modern world." (Mandate Charter, art. 22, cited in Takla 2004: 72) The purpose was their "well-being and development," measured in terms of their subsequent success in self-government. The mandate was "a sacred civilizing mission (*une mission sacré de civilization*)," (73) to "the good ending" of which the French high commissioner urged his delegate, the acting governor of "*Grand Liban*." (Weygand 1923) In his introduction to the Act of the French Mandate for Syria and Lebanon, the "Constitutional Law" by which the French governed the territories, the commissioner drew the governor's attention to the "honor" the League had given France in its task to ensure the "good of the countries included under the mandate." The French role was to "advise, help and guide the populations in [the] administration" of their territories (League of Nations [henceforth L.N. 1922: Introduction) and to "take the measures relevant

to [their] progressive development as independent states." (L.N.: art. 1) This included "drafting a *statut organique*," "restoring public security," and "establishing a new judicial system, all with the help of indigenous authorities." (L.N.: arts. 1, 2 and 6, respectively).

The jurisdiction of the French Mandate in Syria and Lebanon extended over a heterogeneity of Muslims and "privileged communities" of non-Muslims: Sunni, Shi'is, Druze, 'Alawis, Maronites, Greek, Syrian and Armenian Orthodox, Greek, Syrian, and Armenian Catholics, as well as "Chaldean Christians from Iraq, Roman Catholics, and Protestants …" (Thompson 2000: 81) The French counted this population in the 1932 census, twelve years after the beginning of the mandate, to discover that Lebanon's "population of 792,396" is "50.1 percent Christian and 48.6 percent Muslim," (82) an appropriate proportion for a state projected to be constituted of religious minorities.[1]

The beginning of the French Mandate was characterized by three conditions that are worth pointing out because they help clarify some aspects of the controversies around civil marriage and the reform of personal status laws, such as the significance of the emphasis on consensus over institutional arrangements as a necessary condition of the existence of the Lebanese state. First of all, the inhabitants of the territories falling under French mandate had different aspirations. Muslims in both Syria and Lebanon in general looked forward to a "Syria-Arab kingdom" under the leadership of Prince Faysal Son of Hussein, whose troops, alongside the French and English, "entered Damascus … and Beirut" in 1918. "Most Christians of Mount Lebanon," on the other hand, "looked toward the founding of a separate state." (39) Linked to it was the fact that the European powers granted France "mandatory

[1] These numbers are so sensitive an issue in Lebanon today that no official census has been conducted since. (Maktabi 1999)

rule" against majority popular opinion, and after "expell[ing] Faysal [and] defeating his army" in 1920. Finally, the French Mandate's task of "preparing the people for self-government" rested on the necessity of consolidating its own rule, which meant the deployment of a combination of statecraft and violence.

As General Gouraud, the first high commissioner in Syria and Lebanon put it in a "speech praising the Lebanese for their loyalty[,]" (39)

> "France has always found pleasure in this gift, to see marching by her side her adopted children like her own children. Who could believe that these Moroccans and Senegalese, after having spilled their blood for four years on the battlefield, would sacrifice themselves again yesterday, if France were not a true mother to them?" (Gouraud in Thompson 2000: 40)

In return, the Lebanese received a country, "Greater Lebanon[,] and a new flag" consisting of the *pavillon tricolore* stamped in its center with a Lebanese cedar. (Thompson 2000: 40) In contrast, Syrian rebelliousness cost them dearly. "I did not make war last month on the inhabitants of Damascus" he told the crowd, "I made war on bad government" (Gouraud, 40) the outcome of which was the punishment of "most leaders of populist republican and nationalist groups [who] were handed death sentences." (Thompson 2000: 42)

Besides violence, the French attempted to consolidate their rule by relying on religious figures, institutions, and practices for "influence over common people's sentiments." (54) The day after his speech "Gouraud attended a Catholic mass by the Vatican's delegate to the Levant and visited the Umayyad mosque" in Damascus. Apparently, the two events marked the asymmetrical presumptions of French *laïque* sensibilities—or ironies—when, during his visit to the mosque, "he promised freedom and tolerance of religion to the assembled Muslim clerics." (42) This constitutive impossibility of secularism was symbolized dramatically during the proclamation of Greater Lebanon on September 1, 1920, when "Gouraud stood …

under the portico of his official residence with the Maronite patriarch and the mufti of Beirut [thenceforth, of the Lebanese Republic] seated beside him." (42)

The French subsidized religious schools and charities, made "routine … state visits to religious leaders," and invited them to "official functions." (54) In some cases, the involvement was more explicit politically, as in 1926 "during the [Syrian] revolt [when] top Muslim officials were invited at the Ministry of Foreign Affairs' expense to attend the inauguration of a new mosque in Paris." (54) An important role fulfilled by French missionaries—besides the spiritual and civilizational—was to "fill the [Mandate's] budget gap … with funds collected in parishes throughout Europe, which the [French] foreign ministry supplemented with subsidies." (54) Indeed, a significant part of the state's education and health care requirements was secured by missionary work and already existing religious institutions. (60-62; 78-90)

To a certain extent, the Mandate's attitudes towards religion fluctuated occasionally according to the shifting ideological orientation of the French electorate and the differing temperaments of successive high commissioners. The first of them, General Gouraud, "based his power on close ties to the Maronite Church, whose delegate had supported the mandate at the Versailles peace conference," whereas Generals Weygand and Sarrail "sought to shift French policy from its dependence on" local clerical mediators. (44) Thus, while Weygand, for instance, "removed the Maronite Church from direct involvement in decision making, in favor of a more even-handed policy," Sarrail "fail[ed] to attend the [religious] ceremonial occasions that his predecessors had" and "discouraged delegations of religious [authorities] 'to avoid giving them the weight they don't deserve …" (45)

Constructions of local memory, presuppositions about Islam, Christian-Muslim relations fed into the ideological and pragmatic shifts of colonial government. Reactions to Sarrail's measures issued from different sources. Missionaries "feared that [he] might expel them and close their schools." While "Pope Pius XI proposed to beatify eight priests and three Maronite killed in the 1860 massacres in Damascus," the "Vatican representative in Beirut protested … [that] the Syrians and Lebanese were not ready for a republican regime." He polemicized against the French, accusing them of "attempting, it seems, to transform into victims the massacrers of Christians, who are the object of their savagery not only because of Muslims' atavistic fanaticism, but also … because of the infidels' implacable hatred for the Mandatory Power." (Cited in Thompson 2000: 45)

Making Personal Status Laws In Syria and Lebanon

The system of personal status laws emerges in these conditions. The French "high commission's inspector general of *wakf*" summed up the legal situation in Syria and Lebanon as follows: "Ottoman law, founded on Muslim canonic law (*droit canonique*), placed under a regime of exception the Christian churches of all rites and the Jewish communities (*communautés israélites*). The dissident rites of Islam: Shi'a, Ansarieh, Isma'ili etc., were subject (*soumis*) to the laws regulating Sunni Islam." (Cited in Méouchy 2007: 361) The *shari'a* courts' competence extended to "marriage, filiation, minority, guardianship, interdiction, testament, succession, and *wakf*," while privileged non-Muslims were granted jurisdiction over marriage and succession. With the Empire's demise, both non-Muslims and "dissidents of Islam," as the inspector general reported, asked "to be excluded from the

competence of Islamic courts in all that concerns matters of personal status and of *wakf*." (362)

The French reforms aimed at maintaining continuity with the arrangement inherited from the Ottoman Empire, but they also referred to the Turkish example, as well as the Persian, Palestinian, Iraqi, and Egyptian reforms. (363) Philippe Gennardi, the French captain in charge of the reform, observed that the second "has consecrated the absolute separation of the Muslim and non-Muslim churches and the state," while in the rest the "reform of personal status has been accomplished or undertaken by the secularization or amelioration, consolidation or regulation of the previous system." (363)

The reforms were met with resistance from both Christians and Muslims, their religious leaders pressing moral claims against secularization. (Thompson 2000: 149) The mandate was an occasion to reconfigure the whole legal order by everyone, conflicts over personal status law developing not simply along a "religious" versus "secular" opposition, much less one between Muslims and Christians. When some Lebanese Sunni Muslims "petitioned" the French to be "exempt[ed]" from the Ottoman Family Law of 1917 because one of the articles "required state-appointed arbitrators in divorce cases to protect wives from husbands' abuse," their demand was denied by the "Lebanese government … with the consent of the Beirut *qadi* and *mufti*." Or, when a Christian Maronite politician "proposed to permit Lebanese civil courts to handle marriage and divorce cases," the proposal was opposed by Christian authorities. (151)

Various concerned parties held different priorities. Legal and political considerations of equality between Muslims and non-Muslims were intertwined with "religious" concerns, such as the "uniformity in marriage practices and protection from the influence of Islamic

law in matters such as inheritance" sought by both the Vatican and local Christians. (152) To these may be added more openly nationalist, racialist and secularist pronouncements, such as the ones made by a "hitherto unknown Beirut group … named the Association for the Defense of the Race," which "called for uniform marriage laws, including a single minimum age, as a means of promoting marriages and population growth." (152)

In Lebanon in particular, the politics of legal reform implied the constitution of a state of minorities and a corresponding minority politics. This made it possible to acknowledge differences of competence between Muslims and Christians. An already existing law, "Decree-law No. 6" dating from 1930, recognized "the Sunni, Shi'i, and Druze *shari'a* tribunals full competence over their members, [but] fixe[d] … the competence of the jurisdictions of non-Muslim churches to matters of marriage and filiation." (Méouchy 2007: 368) It granted "religious leaders powers of voluntary jurisdiction" and civil courts "competence in all other matters of personal status [e.g., inheritance] regarding non-Muslims." (368) Other communities were recognized as "religious confessions," such as the Shi'a in 1926 (Weiss 2010: 29) and the Protestant community in 1938, "which had a *qadi madhhab* in Beirut since 1931," and which argued for "historical claims" based on the "status granted it by the Sultan [that] made it … equal with other Christian communities." (Méouchy 2007: 369) The latter "demand[ed] the equalization of their courts' juridical competence with those of the Sunnis" whereas the "so-called communities dissident from Islam … demanded the same jurisdictional privileges as the Christians and equality with the Sunnis." (369)

Putting forward arguments backed by the Mandate Charter, the demands of Christian religious authorities encompassed two areas of privilege they had "acquired *ab antiquo*," in

other words since Ottoman times, and which they wished to see "increase[ed] … in the name of the protection of minorities." They also wished to "manage autonomously their human and material patrimony," which included marriage, tutelage, succession, testaments, and pious endowments or *waqf*s. The other set included judicial and fiscal privileges for the clergy, such as "exemptions from taxes on ecclesiastical property … and customs." (370) One of their complaints was the greater competence given the Islamic and Druze *shari'a* jurisdictions. Another source of difference between Christian authorities and civil power was a view that construed "each community [to be] a society … over which the Church exercise[d] a threefold power: legislative, judicial, and executive," with "the law of personal status [being both] law and right that plays the role of a constitution for this society." Some Christian authorities rejected Decision No. 60 because it facilitates conversion, which carried "economic repercussions." (370)

The groups formerly unrecognized by the Ottomans, such as the Shi'a, Druze, 'Alawi, 'Isma'ilis, and even the Yezidis in Syria had different concerns. Theirs was a desire for "emancipation in matters of personal status and religious autonomy" with respect to the Sunni Muslims. While these demands were difficult to satisfy in Syria where the latter were the majority, in Lebanon on the other hand, the Lebanese Constitution of 1926 facilitated them because "the political regime favors the recognition of the organic status of the communities, notably the eighteen religious communities recognized by the decision of 1936." (371) On their part, "Sunni religious authorities oppose the juridical and therefore organic separation of so-called dissident communities from Islam … consider[ing] France to be interfering" in their affairs. (372-373)

Several Reform Attempts

Two attempts at reform were made in 1924 and 1926, both of which were rejected "unanimously" by Christian and Muslim leaders. (Méouchy 2007: 364) The first was aimed at establishing "jurisdictional equality by reducing the competences of confessional tribunals" over "matrimonial status," but granting them "in matters of succession and testament a right of voluntary jurisdiction (*juridiction gracieuse*)." The second attempt involved "the first codification" issued as Decision No. 261. It kept marriage under confessional jurisdiction, but "transfer[red]" matters of personal status—the "effects" of marriage—to civil courts. Petitions and protests succeeded in suspending the reforms in 1927 until the 1930s, during which period the French placed "the question of the jurisdiction of religious communities … under study." The French high commission's view on the failure of reform during that period conceded explicitly,

> "[T]he experience of secularization (*sécularization*) has failed in the states under our mandate … We can therefore conclude that this method, applicable in independent states where the national sense (*sens*) may be easily developed, is impracticable in the state under mandate or protectorate.'" (Quoted in Méouchy 2007: 364)

The second phase of reform in the 1930s was guided by four broad principles Gennardi developed in a "note from June 1934." (365) These rested on inconsistent secular assumptions that distinguished "confessional minorities, including the Shi'a, Druze, Alaoui, and Isma'ili," from the perceived Sunni majority," but, at the same time, considered these minorities to be "subject (*assujetties*) to this day according to the fundamental principles of Islamic law … to a regime of exception and flagrant inequality." (Gennardi, 365) An effect of this is to turn them all into minorities among minorities by "allow[ing] … each community to acquire … its legal recognition" and "each individual to be subjected to a

confessional law in matters related to his personal status." While the reform "must guarantee the equal treatment of individuals (*particuliers*) and communities" it aimed "especially to protect the rights of confessional minorities." (Gennardi, 365) Another assumption was the idea of the "religious power … of the Churches," the latter term used in a general sense to designate Islamic and Christian "religious" authority. Religious authority was to be restricted to "spiritual and moral" affairs and distinguished from "political and fiscal privileges and immunities." (Gennardi, 366)

It is important to note the extent to which the secularizing reforms were informed by Christian, particularly Catholic, assumptions about religions. The fourth and last reform principle Gennardi mentions is that the measures must "secularize (*laïciser*), to an extent compatible with the stipulations of the canon law (*loi canonique*) of each community, the institutions and legislation in matter of personal status." (366)

The outcome of these principles was Decision No. 60 L.R., decreed in 1936. This text established the conditions of a system of religious confessions delineating the criteria required for their formal recognition, the limits of their jurisdictions and competences, and the status of their individual members. It affirmed the confessions' "legal autonomy and requir[ed] everyone to follow the laws of his or her community." (Thompson 2005: 152) But, it also granted individuals rights to "disavow any religious affiliation, wherein their personal status would be determined solely by civil law." (152) It also "required citizens to follow civil law (rather than Islamic, as done since the Ottoman era) in matters not explicitly stated in the laws of their religious community," and "imposed a stricter requirement to register marriage with the state." Overall, Decision No. 60 consolidates the sovereignty of the state, turning religious confessions into formations of juridical and regulatory power, constituting a

distinctive formation of relationships between the state, religious confessions, and the citizen. In the words of high commissioner Gabriel Puaux, the Decision

> "regulate[d], on a civil level, the conflicts among religious laws and … permit[ted] a unified national life based on the essential equality of personal rights. For too long Islamic law has been arbitrarily imposed on non-Muslims, creating a deep crevice that divides the nation." (Quoted in Thompson 2005: 152)

While Christian religious leaders backed the proposal because it guaranteed equality (152), Muslims rejected it because it allowed conversion, it "downgraded Islam's status," and because they saw marriage registration as "tantamount to civil marriage, which would permit Muslim women to marry non-Muslims …" (153) The question of conversion was particularly sensitive, because what "is at stake [is] the religion of the children: the apostate's children must be taken away from him, for the will of the father is insufficient to extract the children from the *'umma*" (Méouchy 2007: 367)

Muslims protested the Decision in "every Lebanese and Syrian city" and the "Society of 'Ulama … sent a telegram with 223 signatures to Puaux demanding repeal of the law" because "Muslim law is a divine law that cannot be modified." (Quoted in Thompson 2005: 153) The involvement of the "secularist [Syrian] National Bloc" in the protests against Decision No. 60 exemplified both the difficulties of separating the religious from the legal and the political on the one hand, and of drawing national boundaries between Syria and Lebanon that had to confront the continuity of the communities between the two new states. The Bloc "had won the 1936 Syrian elections because it had pushed the French to negotiate an independent treaty." (153) However, the government it headed had received a "serious blow" when "in December 1938 the French parliament refused to ratify it." (153) Having lost popular support as a result, it "decided to resign as a sign of solidarity with the Muslim

protesters[,] … even though [it] had supported the 1938 decree and even published it in the official register." (153) Faced with "massive protests and increasing violence [high commissioner] Puaux concluded that all reform of personal status law was doomed to failure," and in "March, he publicly retracted the decree in a radio broadcast." (153)

The system of personal status that emerged eventually constituted the legal framework that formalized the various religious *tawa'if*, and regulated their relationships as well as those among their individual members. This system was not devoid of tensions, two of which are particularly salient. First, the individual members of each *ta'ifa* were also citizens of the Lebanese state. The French articulated this difference in terms of the habitual colonial distinction between "civil" and "personal" status, which in its African colonies subsumed the native subject under the latter category, leaving the former for the citizen colon. In the Lebanese case things were ambiguous for the individual held both a civil and personal status. The postcolonial state in the 1950s did away with the duality by consolidating personal status, which now encompasses the criteria that previously defined one's civil status. The second source of tension is the notion of "religious *tawa'if*," which on the one hand presupposes identical units of Muslims, Christians, and Jews, and, on the other hand, recognizes their right to articulate their differences. This tension is exemplified by the Muslims' refusal of being classed as a religious *ta'ifa* in the 1930s when the French Mandate decreed its Decision No. 60 L.R. "for the organization of religious *tawa'if*" arguing that they were Muslims not a *ta'ifa* among others.

The overall scheme that resulted was twofold. First, a population was subdivided into several demographic entities each consisting of a multitude of individual members. Second, each entity was granted the status of juridical person holding jurisdiction over some aspects

of its members' life. At the intersection of the two stood marriage, which acquired political, legal, moral, and religious dimensions. This formation figures today in some arguments for civil marriage. Some advocates and activists consider religious marriage, which bars "interfaith" marriages, to be an obstacle to the unification of the population. The idea is that civil marriage would make it possible to marry across religions, with the subsequent interfaith generation constituting the biological and cultural bases of a future, non-*ta'ifi*, society.

Freedom of Conscience, Personal Status, Religious *tawa'if*

Article nine of the Lebanese Constitution of 1926 stipulated the following:

> "*Article 9: La liberté de conscience est absolue. En rendant hommage au Très-Haut, l'Etat respecte toutes les confessions et en garantit et protège le libre exercice à condition qu'il ne soit pas porté atteinte à l'ordre public. Il garantit également aux populations, à quelque rite qu'elles appartiennent, le respect de leur statut personnel et de leurs intérêts religieux*."
>
> "Article 9: There shall be absolute freedom of conscience. The state in rendering homage to the God Almighty shall respect all religions and creeds and shall guarantees, under its protection the free exercise of all religious rites provided that public order is not disturbed. It shall also guarantees that the personal status and religious interests of the population, to whatever religious sect they belong, shall be respected."

In the Arabic version still in effect today, *hurriyyat al-mu'taqad* (freedom of belief or conscience), *al-'ahwal al-shakhsiyya* (personal status), and *al-milal* (for *confessions* or sects) occur. The first thing to note is their ambiguity. French and English translations of the Constitution use "*conscience*" for "*mu'taqad*," which may also mean belief, conscience being translated to "*damir*." The Arabic text refers to "*nidham al-ahwal al-shakhsiyya*"—the system of personal status—an attribute absent in both English and French translations. "*Milal*," (s. *millah*) stands for the French "*rite*" and the English "religious sect." Moreover,

the same article mentions "*al-'adyan w al-madhahib*," unified in French by the single term "*confessions*," but kept apart in English as "religions and creeds." "*Très-Haut*" in French is "God Almighty" in English, and "*allah ta'alah*" in Arabic.

The meaning of the expression "personal status of the religious confessions" is formalized in Decision No. 60 L.R., the Arabic title of which is "*nidham al-tawa'if al-diniyya*," which I translate as the "system of religious *tawa'if*." Decision No. 60 was promulgated in 1936 by the high commissioner of the French Republic based on article 6 of the Mandate Charter, on the two decrees passed by the French president in 1920 and 1933, on the Lebanese and Syrian constitutions, and on the bill of rights of the governments of Lattakia and *Jabal al-Druze*. It consists of three parts and an appendix listing the recognized Jewish, Islamic, and Christian confessions and their subdivisions. The first part considers confessions that possess a "*nidham shakhsi* (personal status)," a distinct category from the ones "following ordinary law (*al-tabi'a lil qanun al-'adi*)," the subject of the second part. Both are eligible for "official recognition (*al-'i'tiraf al-shar'i*)" (art. 2) if they satisfied specific conditions.

Two different sets of criteria, each sufficient by itself, determine the recognition of religious *tawa'if* with a personal status. The first set requires an "official document (*saq tashri'i*)" that defines a confession's "organization, courts, and laws (*shara'i'*)." (Art. 1) If these are not available "at the time this decision is announced," any *ta'ifa* that enjoys "privileges and immunities in virtue of imperial orders (*'awamir saniyya*), the decisions of the high commissioner, or the decisions of the governments of Syria and Lebanon" is eligible for recognition, as is a *ta'ifa* whose "current status [is a result] of traditions that [date] longer than a century." (Art. 3) Regardless of the type of criteria, any *ta'ifa* is required to draft and

present to the government a "system (*nidham*) derived from texts according to which the *ta'ifa* is administered." (Art. 4) This system is required to specify the internal organization of each religious confession, which must include "the hierarchy of their spiritual leaders and religious employees," as well as the "manner in which they are assigned and their competences," (art. 4.1) the way their "synods, courts, councils, committees etc." are formed and their respective "competences," (art. 4.2) "the competences and procedures of their courts," (art. 4.3) "their personal status laws concerning everything that relates to laws (*shara'i*) of the religious *ta'ifa*," (art. 4.4) "the administration of the *ta'ifa*'s properties," (art. 4.5) and its "religious teachings and the ethical obligations of its members." (Art. 4.6)

State recognition of a *ta'ifa* converts it into a "moral person" (art. 7) whose "religious leader (*ra'isuha al-dini*) represents it in its relations with public power (*al-sulutat al-'umumiyya*)" (art. 9) and "grants [its texts] force of law … appli[cable] under the protection of the law and the supervision (*muraqabah*) of public power." (Art. 2) It is granted after its system is "ratified … by a legislative resolution (*qarar tashri'i*)" issued by executive power, "on condition that it does not include a text that violates public order and morality, state and *ta'ifi* constitutions (*dasatir al-duwal wa al-tawa'if*), and the stipulations of this decision." (Art. 5) Two consequences of recognition marking the distinctiveness of *tawa'if* in the modern Lebanese state bear both on them and, importantly, marriage. In virtue of sovereign power, they are themselves constituted as formations of power, constitutive of law and, through the regulation of marriage and its results, of the legal subject. Second, by submitting to the conditions of sovereign recognition, they are compelled to self-fashioning according to a language legible to the modern state and meaningful in it. As the controversies over civil

marriage have shown, "marriage" articulates that language by which the "religion *tawa'if*" address not only the state but each other as well.

The second type of *ta'ifa* may "organize and administer freely its affairs within the limits of civil law." (Art. 14) It is defined neither historically in terms of traditions nor legally, but must hold a "sufficient number" of adherents and the necessary conditions of its "existence" that "justify granting it that characteristic (*al-miza*)." (Art. 15) Like the former, however, *tawa'if* subject to civil law must make sure that their "religious teachings and moral principles" do not violate public order and morality, or states and other *tawa'if*. This type, whose members fall under civil law in matters of personal status, while contrasting sharply with the former, nevertheless shares with them an ethico-religious feature manifest in the Decision's "doctrinal" clauses.

Decision No. 60 is not only concerned with defining *tawa'if* and organizing their internal affairs. Through recognition and representation, it standardizes each *ta'ifa*'s relationship with the state and other *tawa'if*, but it also regulates the relations individuals are to have with it by means of "personal status," a category that includes marriage and its consequences. Thus, in matters of personal status, those who "belong to the recognized *tawa'if* with personal status are subject (*yakhda'*) to their *ta'ifa*'s legal [*shar'i*] system in matters related to personal status and to the stipulations of civil law in matters not subject to [it]." On the other hand, those who "belong to a *ta'ifa* that follows ordinary right (*al-haq al-'adi*)" and those who "do not belong to any religious *ta'ifa*" at all are subject to "civil law in matters of personal status." (Art. 10) Finally, "whosoever has attained the age of majority and enjoys full mental capacities (*qiwah al-'aqliyyah*) may leave or adopt (*ya'taniq*) a *ta'ifa* possessing a recognized personal system, which leaving or adopting will have its civil effect …" (Art. 11)

The link between marriage, religions *tawa'if*, and membership in the latter on the one hand, and the consequences of marriage—family, inheritance, divorce/annulment, etc.—on rights over persons and properties on the other, require that conversion be regulated. The Decision's third part, "General Provisions (*'ahkam 'amma*)," focuses on the regulation of the marriage and conversion of members of the first type of religious *tawa'if*, those with a personal system. If both spouses convert "or one of them does the children follow the status of their father …" (Art. 12) If both spouses do, "their marriage as well as the documents and obligations pertaining to personal status" would be transferred to the new jurisdiction. If only one of them converts, the "marriage and documents … remain subject to the law (*al-qanun*) according to which the marriage was celebrated or the documents drawn up." Whatever the case might be, "the legitimate quality of the children cannot be removed" as a consequence of their parents' conversion. (Art. 23) A document (*saq*) attesting to their marriage is to be drawn up "immediately after the celebration … in the language used usually in that *ta'ifa*." Then, the "religious servant (*al-khadim al-dini*) informs the personal status registrar (*ma'mur al-'ahwal al-shakhsiyya*) in the couple's locality of residence by means of a certificate drafted in the Arabic language … within five days after the wedding." (Art. 22)

A marriage contracted or celebrated "according to a law to which neither of the parties is subject is considered null," (art. 24) which nullification would be lifted "if" the spouses "modified their respective records at the personal status registry and became subject to the law according to which their marriage was celebrated or … contracted …" (Art. 24) This clause is ambiguous and reveals some of the inconsistencies of the system. A marriage contracted or celebrated according to a law to which neither of the parties is subject, is a marriage authorized by the personal status law of a religious *ta'ifa* to which the parties do not

belong, from which follows that modifying their records after the marriage was already sealed in order to validate it means changing their religious *ta'ifa*. Would this mean that they are to convert? And what would conversion mean in this case? Would it mean that one may remain Christian, say, and be registered as Muslim? Would saying that one *is* Christian yet registered as Muslim (or vice versa) imply that one's beliefs are Christian, but is merely married in an Islamic jurisdiction? Is being married in an Islamic jurisdiction not identical to being married according to *shari'a*? Is being Muslim or Christian a matter of belief or conscience, or one of practice—such as marriage—and law/*shari'a*? What if the spouses bear a child and do not convert, would the child be considered illegitimate? These questions are irrelevant to the state, for they are matters of conscience, left for the individual to ponder. However, other sorts of problems relevant to the state arise from the system drawn up in Decision No. 60, which establishes a space for them to be answered authoritatively in its penultimate article: "There shall be in each state [Syria and Lebanon] a high judicial court (*mahkama qada'iyya 'ulya*) assigned to address the conflicts between personal status courts, or between these courts and ordinary [civil] courts." (Art. 20) Some of these conflicts arise in specific cases of conversion, as analyzed in the last chapter of this dissertation.

Finally, two articles open the way for the recognition of civil marriages, under two conditions. A marriage contracted legally in a foreign country, would be recognized (art. 25), and, if "the system of personal status to which the husband is subject does not accept the form and consequences of the marriage," in case he married under another system, it "would be subject to in Syria and Lebanon to the civil law." (Art. 25)

A glance at the respective codes applied in the Sunni and Maronite courts today suffices to give a sense of the differences among the jurisdictions. The Maronites are a Catholic *ta'ifa*

which are subdivided into Western and Eastern churches. The Eastern Catholics include: the Maronite Patriarchate, the Melkite Catholic Patriarchate, the Armenian Catholic Patriarchate, the Syriac or Syriac Catholic Patriarchate, and the Chaldean Patriarchate. The Latin Church is "western." In addition to the Catholic are the Greek (*rum*) Orthodox Patriarchate, the Armenian Gregorian Patriarchate (Orthodox), the Syriac Orthodox Patriarchate, the Eastern Nestorian *ta'ifa*, the Protestant *ta'ifa*, and the Coptic Orthodox Church.

The "Personal Status and Procedural Law for Catholic *tawa'if*" applies, as the title indicates, to Catholics in general. The Eastern Catholics have the Code of Canons for the Eastern Churches, and also their own "Procedural Law in the Tribunals of the Eastern Catholic Church." The Western Catholics, or the "Latin Lebanese" follow their own "Marriage Law" and the "Law of Procedure in the Tribunals of the Lebanese Latin *ta'ifa*." These laws do not cover matters of succession, which fall under the "Succession Law for Non-Muslims" issued by the state on the 23rd of June 1959. It applies to Jews, Christians, and, if they were recognized, to those who do not belong to any of the recognized religions or to none at all.

Five Islamic *tawa'if* are officially recognized: Sunni, Shi'i, Druze, 'Alawi, and 'Isma'ili. A single "Law of Endowments" issued on the tenth of March 1947 is common to all Muslims. Some codes apply to both the Sunni and Shi'i *madhhab*, most importantly the "Law of *Shari'a* Tribunals 16/7/1962." The two differ with respect to other aspects of "personal status." The main codes for the Sunni *madhhab* is the Ottoman "Law of Family Rights" issued on the 25th of October 1917. Two sets of rules regarding wills (*al-wasiyya*) and inheritance, respectively, "according to the Hanafi *madhhab*," extracted from "*kitab al-'ahkam al-shar'iyya fi al-'ahwal al-shakhsiyya 'ala mdhhab al-'imam 'abi hanifa al-*

nu'man," otherwise known as the "Law of Qadri Basha."[2] Also, the Sunni have their own rules of guardianship over persons (*al-hajr*) "according to the *Majallat al-'Ahkam al-'Adliyya* – fifth edition 1388 H. – 1968 A.D.[,] p. 184 et passim."

The system of "religious" personal status was consolidate in 1951, less than ten years after the proclamation of independence, with the promulgation of "The Law of Personal Status (*al-'ahwal al-shakhsiyya*)," (Bakkar 1987: 328) which replaced Decision No. 2851 of 1924 concerning civil status. (219)

Conclusion

This chapter argued that the discourses and practices of civil marriage and legal reform discusses in the preceding chapter, and the current legal order and its supporters, all share the same genealogy of reform that includes the Ottoman reforms of the nineteenth century and the French Mandate's constitution of a Lebanese state of law. In the first part, a sketch of Ottoman reforms served as an introduction to the discussion of the French Mandate in Syria and Lebanon. Ottoman reforms, aimed towards the reconfiguration of the state along modern lines, proceeded to establish a centralized legal domain consisting of new codes and judicial system dependent on the state. This meant that the scope of the *shari'a* was gradually restricted to family courts, but the Ottomans stopped short of intervening in the latter until a few years before the empire's collapse. At the same time, the privileged status of non-Muslim millets, which included autonomy in matters of marriage and succession, was

[2] "Muhammad Qadri Basha undertook in the late nineteenth century to codify privately several areas of Islamic law. This resulted in codes of family law, *al-Ahkam al-Shar'iyya fil-Ahwal ash-Shakhsiyya*, Alexandria 1875; of *waqf* law, *Qanun al-'Adl wasl-Insaf fil-Qada' 'ala Mushkilat al-Awqaf*, Cairo, 1896; and most relevant to the Civil Code, *Murshid al-Hayran ila Ma'rifat Ahwal al-Insan fil-Mu'amalat ash-Shar'iyya*, Cairo, 1891." (Mallat 2003: 224 n. 6)

preserved. While the Ottomans recognized the freedom of religion and the equality of all subjects before the law as part of the reforms, these principles, the measure of legal reform, and the status of the millets remained distinct. The French Mandate's vision of a Lebanese republic of religious minorities and freedom of conscience directed their attempts at legal reform that consisted in the organization of Muslims, Christians, and Jews together within a single system of religious *tawa'if* and their jurisdictions. A peculiar effect of French reforms was that personal status law becomes a point of convergence and conflict among the various groups. Another peculiarity was the effect of the reform on marriage, keeping it under religious jurisdiction and constituting it as an individual right, severing it from and linking it with conversion, at the same time. Yet, while the system of personal status laws turns various normative traditions into equally valid state jurisdictions, it does not foreclose the varieties of marriage. The preceding chapter addressed civil marriage, the following two chapters will focus on religious marriages and their consequences in two different courts, the Sunni Muslim *shar'i* and the Maronite Catholic ecclesiastical courts, respectively.

CHAPTER III
Piety, Shari'a, Law: On Being a Muslim Subject of a Modern State

Modes of Being Muslim: Shari'a, Law, Modernity

Several members of the same family stood together before the judges, the siblings in disagreement about the value of their mother's support. Three judges sat behind the bench, a chief judge (*qadi shar'i*) in the center, and a consultant judge (*mustashar*) on each side. To their left sat a representative of the public prosecutor representing the Lebanese Republic, to their right the court reporter. Around this raised circumference stood the state's armed security guards and other courtroom employees. The room remained silent until the judge announced the decision, when a complaint was heard from one of the defendants. The judge immediately checked it, asserting firmly that the verdict had already been read, and that, therefore, no more complaints could be heard. Instead of retreating back into silence, the murmur modulated into a discourse in an accelerating crescendo conveying neither anger nor threat, but rather a timid and reverential appeal. His repeated attempts having failed to silence the subject, the judge stood up frowning, and banging his hand on the table below him, yelled at the man, "Shut up! You are talking to the law!" Seeing that the defendant did not—could not—contain himself, the Public Prosecutor threatened the man with incarceration, as two of the guards moved towards him. This, together with his siblings' urgings managed finally to silence him and bring the session to its end.

The encounters between Muslims and modernity have been thoroughly explored. Histories have been written about the *Tanzimat,* the reforms undertaken by the Ottoman Empire in the 19th century, and the *'islahat* (s. *'islah*) of the modern Arab states in the 20th. (Hallaq 2009; Asad 2003; Makdisi 2000; Messick 1993; Anderson 1975; Davison 1963;

Hourani 1962; Anderson 1959) These articulate different levels of response to the economic, political, legal, and moral formations of modern power. The Ottoman judicial system was rearranged after the *Gülhane* Decree, giving rise to "new courts, new laws, a new judicial process and—by the end of the century—a new legal culture." (Hallaq 2009: 98) As a result of these transformations, by the beginning of the 20th century, the *shari'a* "had been reduced in scope of application to the area of personal status," (115) incurring "structural and fundamental changes that ultimately resulted in its being severed from both the substance of classical religious law and the methodology by which this law had operated." (116)

Beyond the legal, or jurisprudential, and institutional domain, anthropologists have been studying contemporary transformations of Islam, what has been called "the Islamic revival" (Hirsckind 2006: 2), in ethical terms. (Clarke 2012; Agrama 2010) These have offered ethnographic accounts of embodied practices of self-fashioning in Islamic piety movements (Mahmood 2005), the cultivation of distinctive ethical sensibilities through modern technologies of listening such as cassette sermons (Hirschkind 2006), and the "ethical dimension" of Muslims' acceptance of the authority of fatwas. (Agrama 2010: 2)

Agrama's research in Egypt's personal status courts and the Fatwa Council at *Al-azhar* brought a "paradox" to his attention. (4) He remarks, "Although" fatwas and the courts' judgments "are ostensibly derived from the Islamic Sharia," in sharp contrast to the latter, "fatwas exercise significant authority even through they are not officially binding." (4) To answer the puzzle of the fatwa's authority, he suggests that "the practice of the fatwa be understood as a mode of the care of the self, as a practice by which selves, in the multiplicity of their affairs, are maintained and advanced as part of Islamic tradition." (13) Clarke (2012) on the other hand, "wary of too radical a divorce between … ethics and … law," (106) seeks

their articulation by the *shari'a* judge. Drawing on ethnographic work on judicial ethics in Lebanese *shari'a* courts he observes "a tension between the identities of the [*shari'a*] judges presiding as shaykhs, that is, Islamic religious specialists, and the legal and bureaucratic constraints imposed on them as court officials and state functionaries." (107)

This dissertation opened with a polemic over "civil marriage" as a growing practice and a legal proposition in Lebanon. It pointed out that many Muslims reject it, and argued that at stake are not an opposition to secularism, but rather a notion of marriage that is constitutive of the sensibilities required by being Muslim in the modern state. In other words, marriage, as a practice that conforms to *shari'a,* articulates distinctive notions of being Muslim. Moreover, marriage is also the precondition of the establishment of an "Islamic family (*al-'usra al-'islamiyya*)," a locus of practicing and transmitting Islamic sensibilities, as the mufti of the republic stated clearly in the polemic of 1997. The *shari'a* courts—and they are generally so called in Lebanon, rather than "personal status courts," which is reserved usually for Christian jurisdictions—figure prominently in this scheme as the institutional expression of the historical link between the individual Muslim, marriage, family, *shari'a*, and law. Thus, Agrama's "paradox" and Clarke's "complex dilemma" appear as two figures of a relationship constitutive of a distinctive mode of being Muslim in the modern state, an exigency of which being the ability to distinguish between *shari'a* and law. If the courts are necessary for securing that mode when marriage has been dissolved, marriage is a necessary condition in its reproduction. As the chief *shari'a* judge declared in the polemics around civil marriage in 1997, the *shari'a* and civil courts are "complementary."

The Court, the Judge, and the Procedure

The Islamic tribunals are a state institution attached to the prime minister's office—a conventionally Sunni office—rather than the ministry of justice, its judiciary is on the state's payroll, and its laws as promulgated in parliament and the cabinet. The Sunni *shar'iyya* courts are located behind a mosque, and both share the same building. Their entrance falls diametrically opposite the latter's courtyard on the other side of the block. They are almost as open as the mosque is. I entered through a wide doorway leading up a staircase into the main hall, stopping at the inevitable thresholds of state security forces—the courts are state institutions, after all. My access to the mosque was unhampered, in contrast, the imam's solitary curiosity notwithstanding. At any rate, I did not note any reminder of the state in the mosque—except, perhaps, its absence. I found the courts as eventful as any state administration, and it took me as much effort to find signs of religion inside its halls as it did at, say, the offices of social security, or to find signs of the state inside the mosque. Men sat poised behind desks dispersed in various corners. If it were not for the white turban placed discretely at a table next to him, and the drab official cloak hanging against the wall, I would have mistaken the *shar'i* judge for one of those characters that often loaf in the Lebanese state's public institutions. I expected to find courtrooms, but instead learned that first instance proceedings take place in the privacy of the judge's office. Each judge specializes in a type of case: divorce, inheritance, custody and so on, convoked as a *majlis 'a'ili*, or family council.

I visited the courts again a year later. The offices-courtrooms were being refurbished with glass partitions, whose dark tint still allowed visual access of the silhouettes inside, but were now equipped with blinds that secured an enclosure whenever the need may arise. It was as if the demand for more privacy increased from one year to the next. Unlike the offices,

however, the only obstacle I encountered while entering the second instance court—also called the Higher *Shar'iyya* Court—was the conspicuous double-leafed door behind which it was solemnly hidden. Its subdued ornamentation contrasted with the functional austerity of the rest of the building, while its imposing scale did not prevent the easy access it offered me into the courtroom. Qur'anic verses inscribed in golden calligraphy—and the distinctive attire of Sunni judges—were the only signs of religion I saw.

The courts rule according to the procedural Law of the Shar'i Judiciary, issued in July 16th, 1962. The first part (Book I) delineates the general judicial structure and procedure, the second part (Book II) outlines the organization of the judicial body, the appointment of judges, their degrees, promotion, immunity, discipline, uniform, and so on.

Articles 1-15 define the "*Shar'i* judiciary," its general structure and competence, and the main duties of its judges. The "*Ja'fari* [Shi'i] and *Sunni*" *Shar'i* judiciary are considered "part of the state's judicial system." (Art. 1) Each consists of "first instance (*bida'iyya*) tribunals and a Higher *Shar'iyya* Tribunal" (Art. 2), the latter, headed by a president (*ra'is*) and two advisors, are located in Beirut; first instance tribunals are headed by a single *shar'i* judge." (Art. 3) The jurisdiction of each of the Sunni and Shi'i tribunals extends only over the respective members of their *madhhab*, and concerns both "lawsuits (*da'awa*) and transactions (*mu'amalat*)." (Art. 6) The judge's duty is to "accomplish justice (*'ihqaq al-haqq*)," which implies that he is "not to (*la yajuz*) abstain from ruling under the pretext that the law is obscure or lacking … [or] delay judgment." The *shar'i* judge must also "resolve all the issues litigants present and justify (*u'allil*) his rulings and decisions by demonstrating (*bayan*) the reasons …" (Art. 7) The judges' competence to rule is limited by litigant demands, with the exception of "applying the laws concerning public order." (Art. 9) The

relationship between the civil and *shar'i* judiciary may be discerned in the following articles, which set the rules to handle the absence of *shar'i* judges, or the failure to convene the Higher Tribunals. Thus, if the latter fails to convene altogether or if the majority (i.e., two) of its judges are absent, civil judges "members of the respective *madhhab*s may be delegated" to replace them. (Art. 13) Moreover, "a civil or administrative judge of their respective *madhhab* fulfills the role of public prosecutor (*al-mudda'i al-'am*) in both Higher Tribunals." (Art. 14) The prosecutor's right of intervention is limited to matters related to "public order (*nidham 'am*)" and may challenge the tribunal's rulings, otherwise he is entitled only to "offer an opinion." (Art. 32-33)

The competence (*'ikhtisas*) of first instance s*har'i* tribunals encompasses the "*da'awi* and *mu'amalat*" concerning five domains of life: marriage (*al-nikah*), kinship (*al-nasab*), personal status, succession, and endowments (*al-waqf*). The text enumerates them in a continuous series as follows: engagement and its gift (*khitbat al-nikah wa hadiyyatuha*), marriage, divorce and separation, dowry (*al-mahr wa al-jihaz*), alimony and custody, kinship (*al-nasab*), guardianship (*al-wilaya wa al-wisaya wa al-qaimuma*), adulthood and the determination of majority (*al-bulugh wa 'ithbat al-rushd*), holds [on persons and properties] (*al-hajr*), the missing (*al-mafqud*), the will (*al-wasiyya*), determining death, succession, and designating shares (*'ithbat al-wafat wa 'inhisar al-'irth wa ta'yin al-hisas al-'irthiyya*), and so on. (Arts. 16-23) The Higher Tribunal functions as a last instance of appeals. (Art. 24)

The subject of the law is the "natural or moral person (*al-shakhs al-tabi'i aw al-ma'nawi*)" who possesses the "right (*al-haq*)" to refer to the *shar'i* judiciary to claim and protect his rights. The primary motive of any claim must be "interest (*maslaha*)" without "bad faith (*su' niyya*) or intention to inflict harm (*darar*)" on a potential defendant. (Arts. 25-

27) Of course, the person must be "qualified," in other words be sane, adult, free, and so on, according to the criteria of "his law of personal status." (Arts. 28-30)

The law distinguishes two types of *shar'i* competence: absolute and relative. The question of absolute *shar'i* competence arises when the persons involved in a case belong to two *madhhab*s. In other words, it refers to the competence of the tribunal of a *madhhab* over the members of that *madhhab* and not others. Thus, in cases of inheritance, wills, and endowments, absolute competence is due the tribunal of the *madhhab* of the deceased or endower (Art. 60), whereas for "granting permission for marriage (*nikah*)," the husband's *madhhab* tribunal is absolutely competent. (Art. 61) While absolute *shar'i* competence is aimed to protect the "rights of the family" by keeping it under the jurisdiction of the *madhhab* to which the husband belongs, relative *shar'i* competence secures the protection of individual litigants or persons—the individual members of the *madhhab*—by granting them access to the judges and courts of their place of residence in cases of litigation or conflict, when the *madhhab* is already determined. Relative competence involves, in addition to the aforementioned, cases of dowry, custody, and alimony, and is determined in terms of the defendant's residence (*maqam*).[1] (Art. 63)

The law also stipulates the rules of evidence that must "*yadullu 'ala al-haq* (indicate the truth/the right)." The sources of evidence are "oral and written pronouncement, witnessing (*al-shahada*), oath, proof, expert reports, and the judge's investigation." (Art. 91) Oral and written pronouncement in cases of "marriage, divorce, and kinship" is predicated upon the condition that the pronouncer be "*'aqilan*, *balighan*, *mukhtaran, ghayr mahjur 'alayh* (reasonable, of legal age, able to choose, and not under anyone's charge)." (Art. 92) Cases of

[1] See Lebanese Law of Procedure for the same distinction: the "natural judge" doctrine.

denial, retraction, or suspicion of fraud (e.g., of signatures, fingerprint, or handwriting) are addressed according to the Lebanese laws of civil and criminal procedure. (Arts. 96 and 97)

Piety, *Shari'a*, and the Law

A man complained before a Sunni judge against his daughter-in-law, requesting that she hand him his grandchildren (*taslim al-awlad*), and that the court drop the maintenance (*al-nafaqa*) it forced him to pay the mother for the children's support.[2] Apparently, their father—his son—had disappeared and left the children with their mother. A few days earlier, the same court had issued a decision obliging the grandfather to pay maintenance "for their food, clothing, dwelling and the rest of their necessary needs … as an indictment of their father …" (F.I.S.J. 1986: 39) The plaintiff argued in the current case that he had rights over the children "since the children had exceeded the age of custody (*hadana*)," and since "he is more capable of taking care of them." To the judge's inquiry about the source of money the woman had available to cover the remaining part of the children's required maintenance, her reply was that "she was poor and owned nothing …" (38) During the trial, they both declared that they had agreed that she could keep the children with her under the condition that she accept a seventy five percent reduction of the support money. The grandfather approached the court with a demand to ratify the agreement. Instead, the court threw out his request and confirmed its earlier decision, namely, that he pay full maintenance.

According to Hanafi rules, the parent's right to custody is determined by the age and sex of the children. In cases of what is strictly called *hadana*, boys are to stay with their mother

[2] First Instance *Shar'i* Judge in Tripoli (F.I.S.J.), decision no. 659, Dec. 18, 1986, in *al-Huquq al-lubnaniyya w al-'arabiyya*, (H.L.A.), Hanna, Badawi (ed.), parts 1, 2, 3 and 4, n.d., 38-41 (part 1).

or female charge until the age of seven, girls until the age of nine. They are to be handed over to their closest "agnate (*'asaba*)" as soon as they reach their respective *shar'i* age, priority for guardianship decreasing the further is an agnate from the child's paternal line of descent; this is called *'imsak* ("seizure"). The child's closest *shar'i* guardian (*wali*)—in this case, the grandfather—"does not have the right to surrender (*la-yamluk al-tanazul*) his right [to guardianship]." Given that the children must be handed over to the grandfather's custody, how does the court justify its decision to keep the child with the mother? (40)

"By returning to the *madhhab* books" the court writes, "we see that both the right to the child's *hadana* and *'imsak*, are aimed at [the child's] *maslaha* (benefit) such that he must be wherever his *maslaha* may be secured." (39) The genealogy of *maslaha* in Islamic *fiqh* goes back at least to the earliest systematic attempt to define it by the jurist Abu Hamid Muhammad al-Ghazali in the 11th century C.E. For al-Ghazali "*maslaha* was God's purpose … in revealing the divine law." (Opwis 2005: 188) It consisted in whatever ensured "the five elements of [human] well-being, namely, their religion, life, intellect, offspring and property." In the late 19th and the 20th centuries, the modern Islamic reformers redefined *malsaha* to respond to the challenges of the secular state. Being God's wisdom behind the *shari'a*, so they reasoned, *malsaha* could be taken as the criterion "in deciding cases [that] correspond to the spirit of [*shari'a*]" if a clear provision were not immediately available in the sources. (198-199)

According to the court, considerations of *maslaha* "are ascertained by a text [that] we [shall] mention to realize the extent of the vast authority (*al-sulta*) granted the judge …" (F.I.S.J. 1986: 39) The child's *maslaha* imposed on the judge the obligation of a proper interpretation of texts, which must be guided by the exigencies of justice ("*tahmiluhu 'ala*

fahmi al-nususi fahman yasiru fi 'ittijahi tahqiqi al-'adala"). In the present case, the realization of justice meant making sure the child's *maslaha* is secured.

The judge's indication of *maslaha* as the aim of the case implied a wide margin of judiciary discretion. That discretion was an obligation, but demanded specific qualities on the part of the judge in order not to stray away from the exigencies of justice. The judge recognized that his "conscience (*al-damir*) may be swayed" and that he might make the wrong decision. According to the judge, the decision depends on his conscience, and his conscientiousness determines the quality of decision he makes. An unjust decision follows when "the heart weakens and piety is lacking," a relationship evident in his attitude towards texts and their interpretation. When piety is lacking the desire to "vanquish the clarity of texts (*wa yuradu al-taghallubi 'ala dhahir al-nusus*)" by means of "subterfuges (*al-hiyal*)" takes over the judge. For this reason, both judge and parties must remember that the judge's conscience is placed under "divine censorship (*al-raqaba al-rabbaniyya*)." This ensures that we act "[to guard] the law (*al-qanun*)," protected not just by its "guards"—the judges—but by "pure hearts (*al-qulub al-tahira*) in whose depths settles the fear of God."[3] Ethical conduct, which implies that we act to protect *al-qanun* (the law), rests on the Muslim's piety, the conditions of which are not the law, but Islam and its *shari'a*. Being pious, therefore, does not contradict being a good citizen or subject of law; on the contrary, it sustains it.

The relationship between the two, however, is not self-evident; it hinges on the ability to discern *maslaha*—the benefit of the child in this case—and this requires work of

[3] Note that the relationship with God is not thought of to be a matter of "belief." The word *al-'iman*, sometimes translated as "belief," is defined in *al-qamus al-muhit* as "*al-thiqa* (confidence, trut), *'idhhar al-khudu'* (the manifestation of submission), *qubul al-shari'a* (the acceptance of *shari'a*)." At http://www.al-eman.com/IslamLib/viewchp.asp?BID=142&CID=610&SW=%C7%E3%E4#SR1 (accessed Apr. 11, 2009). For an account of the relations between "belief", law and ethics in Islam, cf. Johansen 1999: 20. Johansen translates *'iman* as belief.

interpretation. Interpretation attains its just ends in the consideration of specific cases, and rests on the capacity to cleanse one's heart. The piety the judge speaks about consists in an applied ethics that involves one's relationship to God, self and text, and their implications for everyday, lived situations. The texts to be interpreted are not only the *shari'a*, but the law as well. A pious person is also a person who knows the laws, is aware of the clarity of their provisions and, therefore, accepts them to the letter. The judge articulates what is required of him in the current case at the very beginning, after stating the textual principles according to which he would decide and before the examination of the case. He not only presents a model of piety for himself and others to follow—a necessary aspect of his moral and judicial authority—but performs that model himself in the courtroom. Indeed, if the parties had lived up to that model they would not be at court in the first place. Having clarified what it required to rule justly, the judge proceeds to determine how the principles of *maslaha* apply to the case at hand.

How is the child's *maslaha* to be defined? The judge's role is central, for *maslaha* depends on his knowledge of the child's environment. This does not mean, however, that the judge is entirely free in evaluating this, but receives his guidance from the *fiqh*. For this reason he calls on the parties to "reread with Ibn 'Abidin what he literally (*ma harfiyyatihi*)" had to say about *hadana*. The passage from Ibn 'Abidin begins by identifying the agent of decision, namely, the authority hearing the case. "The mufti must have the insight (*al-basira*)" Ibn 'Abidin writes, "to consider what is *'aslah* for the child …" The knowledge the judge must acquire about the child's environment rests on insight and moral discernment of the people with whom the child will eventually be. A "close relative (*qarib*) might hate him and wish his death, while his mother's husband [on the other hand, might] be compassionate

…" This knowledge is a sort of social knowledge, whereby the judge is acquainted with the people surrounding the child: his "relative [who] might want to take [the child] in order to hurt him or her, or to live off his maintenance," his relative's "wife who might hurt him far more than would his mother's foreign (*'ajnabi*) husband," or the relative's "children in whose company the girl might be exposed to *fitna* (seduction)." The judge's decision rests on this knowledge, "so that if [he] knows of any of this, he shall not allow (*la yahull*) the child to be taken from its mother because the focus of *hadana* is the child's benefit (*naf'*)." For the judge to do so, however, it is not sufficient for him to be pious and possess knowledge. The right decision he will eventually make does not follow from his individual insight or from his personal relationship with God, but is authorized by the fact that he belongs to a tradition. The judge thus summons Ibn 'Abidin to be with "us" in the present, a present that belongs, together with Ibn 'Abidin, to a tradition of *fiqh* within which the decision in the present makes sense.

The judge's choice of Ibn 'Abidin is not haphazard. Born in Damascus in 1198/1784 and died in 1252/1836, Muhammad Amin Ibn 'Abidin stood at the threshold of the 19th century "modernizing" reforms of the Ottoman Empire. (Gerber 1999: 20) His work "earned him the undisputed title of being the last great traditional jurist of the Hanafite school." Ibn 'Abidin relied in his *fatwa*s on a chain of authoritative texts that go as far back as the 6th/12th century, a substantial number of them being those of Ottoman *mufti*s. (26, 61) The judge in the *hadana* case, just as the mufti of the republic during the controversy over civil marriage in 1998, locates himself in that tradition. Ibn 'Abidin advises the judge to be perspicacious enough to identify conditions in the potential guardian and among the child's kin. More specifically, he places equal emphasis on the sentiments these people might—and ought to—

have towards the child as he does on their relations to her: if they hate or love her, whether they are cruel or compassionate, envious or generous, and so on. Knowledge of these sentiments may be available to the judge directly if he knows the persons, or indirectly by hearsay or from witnesses. They are accessible to his senses and are relational, for they are embedded in the relations among the people involved and, therefore, may be concretely discerned in them. Moreover, the harm that may be inflicted on the child is material, concerning the material conditions of her existence. These are linked to two necessary characteristics the eventual guardian must possess: he or she must have the "capability (*al-qudra*) and trustworthiness (*'amana*)" to take charge of the child. (F.I.S.J. 1986: 40) The two qualities imply different sorts of virtues, the first concerning the guardian's relationship with himself, such as health, wealth, and will, the second his relationship with others.

Moreover, "it seems," notes the judge, continuing his citation of Ibn 'Abidin, "that [the child] is to be kept with the caretaker (*al-hadina*) until the judge [finds another guardian] if no agnate were available. Now, in the current lawsuit, an agnate is available—the grandfather—and the possibility that he be incapable and untrustworthy does not mean that he is not available; second, the court record mentions no evidence that the grandfather harbors any bad sentiments against the child. If the rules were to be followed to the letter, he would end up with the grandfather. However, the judge extends the scope of capability and trustworthiness by including in the first "protection from contagious and complicated diseases," which are "no doubt … [its] branches (*shu'ub*) …" (40) The question of "trustworthiness," on the other hand, turns on the agreement between the two litigants. First of all, the grandfather, being the *shar'i* and legal guardian, may not surrender "his right" of guardianship, which is precisely what the grandfather attempted to do by his agreement with

the child's mother. The agreement is thus defective in some of its "fundamental conditions," which gives the judge the right to reject it in order to prevent "wrong and [achieve] justice (*daf'an li al-haif wa tahqiqan li al-'adl*), in the interests of the minors, and [in accordance with] articles twenty three and thirty one of the Law of the *Shar'i* Judiciary." Second, the judge sees that the mother was under "*'ikrah ma'nawi* (emotional duress)" when entering the agreement, because she wanted to keep the children. The grandfather, on the other hand, is concerned only with avoiding the maintenance "imposed by a binding court ruling." Third, if implemented, the agreement would take away from the children the "necessities of livelihood … such as food, clothing, shelter, education, and medical care." Fourth, the agreement would also require the mother to "extend her hand (*madd yadaha*)" in order to provide for the children, which might expose the children "to ethical harm (*darar adabi*)." Finally, the agreement implies that the plaintiff "surrender his demand to join his grandchildren to him," which contradicts his initial demand in the first lawsuit. (41) This "convinced" the court that he was "untrustworthy (*ghair ma'mun*)" to keep them, because "he only expressed his readiness [to do so] when their mother asked him for their maintenance and … after a decision regarding their maintenance was issued against him."

Given these facts, the court saw the grandfather to be untrustworthy because his sole intention was to avoid paying maintenance. This placed him at the opposite pole to the mother, whose genuine concern for her children was manipulated by her father-in-law's designs to avoid paying money. "What motivated (*dafa'a*) him was nothing but his concern to avoid paying [the children's] maintenance." In civil legal language, the grandfather acted in "bad faith," which invalidated one of the necessary conditions of the agreement. His intentions were inferred from a sequence of contradictory acts: he had already filed a lawsuit

before the same court and lost it; he was made to pay the mother for the children's maintenance; he then approached the court again—thirteen days later—demanding custody and a relief from paying maintenance; at the same time, he had already reached an agreement with the mother to reduce the amount of money for keeping the children; since the children had already come of age, he should have, according to the *shar'i* and legal texts, taken the children without bargaining … In addition, according to the grandfather's own statements, the court established that his capacity to keep the children was further curtailed by his physical illness and the fact that he was under continuous medical treatment. The grandfather's indisposition towards his grandchildren was indicated by his moral and physical indisposition, which supplemented the conviction that he was incapable and untrustworthy to have the children. "It is not necessary … to know the kind of illness or the kind of treatment" he was under, "for it is likewise if treatment were of a physical internal or external illness … from a mental, psychological or moral illness …" The grandfather's body, mind and morality were all under suspicion, and all equally marked by the singular sign of disease.

In light of all this, the court decided that it "should not compel (*'adam jawaz 'ilzam*) the plaintiff to take charge of his grandchildren because he lacks the two conditions of capability and trustworthiness," and that "the children must remain with their mother the defendant until the qualified charge appears and demands to have them …" What supported this decision was that the woman's "concern about them was proven by the fact that she had accepted the aforementioned agreement," which she did only because "she did not want to let go of her children even if that required her to solicit the charity of others."

The first case involved of *hadana* or custody, for which the *shari'a* provides clear rules. However, Islamic jurists such as Ibn 'Abidin recognize that the child's *maslaha* is the ultimate purpose of *hadana*, which thus grants the judge discretionary authority to decide the child's fate. At the same time, *maslaha* depends on the environment in which the child will be raised, and more specifically on the people with whom she will live. The question for the judge is, therefore, whether the people involved are qualified to raise the child. According to Ibn 'Abidin, this implies knowledge about them, which the judge in the case above sums up in terms of capability and trustworthiness.

At the center of the case, therefore, stand facing each other judge and claimant. The judge is presented as a figure of being Muslim as both the precondition and benchmark of judgment. In other words, the judges offers a model of being Muslims that authorizes and enables individuals to judge—others as well as themselves. In this case, possessing a specific set of attributes: conscientiousness, fear of God, purity of heart, interpretive honesty, abiding by the law and *shari'a* and so on—implies being trustworthy and capable of taking charge of a child. That moral standard, however, is relational, or, rather, inferred not by reference to transcendental norms, but from a set of practical relationships. The individual Muslim is evaluated in a web of relations: between him and the child, between him and the mother, between the mother and the child, between him and the texts—legal and *shar'i*—and so on. These relations would function properly if the moral attributes were present, yet the objects of judgment are not conscience, heart, and intentions, but observable actions and behaviors they entail. In other words, the judge does not formulate a judgment on "the person," and when he pronounces on the grandfather's pathological conditions, the judge is not making any inferences about the grandfather's inner state, but is condemning his treatment of the

mother and child, and his relationship to the law and *shari'a*. Thus, external actions and behaviors are not signs of a hidden meaning or intention, nor do they give rise to a semiotics to decipher that meaning. The judge juxtaposes the individual's internal and external worlds, yet leaves the question of their relationship open to interpretation.

The condition of interpreting legal and *shar'i* texts in a way conducive to justice is *al-taqwa*. The relationship between intention and action does not depend on the individual's free reasoning, but is mediated by the text and, by implication, of the judge or mufti. The latter possess the hermeneutic knowledge to approach the texts in the right way and with as minimal interpretation as possible. The individual who loses the case at court is someone whose conduct is not proper, whose virtues are lacking, not because she or he is essentially evil, but because his or her ignorance. Those who know the text, yet nevertheless decide to twist its meaning towards their own interest are not intrinsically evil either, but rather have strayed away from God—they no longer fear Him and, therefore, no longer feel Him in their hearts. This articulation is not sequential, nor are its elements subject to causal relations such that, for instance, misreading the law/*shari'a* "causes" or "leads to" misconduct. It is, rather, an articulation of a mode of being, a way of life, a religiosity that consists in mutually reinforcing piety, proper conduct towards self and others, virtues, moral and aesthetic sensibilities, and conformity to specific conceptions of marriage and the family.

The emphasis is placed on relations between individuals rather than their intrinsic qualities. In the words of the mufti of the republic, "Islam based [marriage] on inner tranquility (*al-sakan al-nafsiyy*), complementarity (*al-takamul*), affection (*al-mawadda*) and compassion (*al-rahmah*) between man and woman …" This ambiance is where children are raised, and "as [they] grow up … a relationship develops between them and their parents," a

relationship which "Islam based on reverence (*'ikram*), good treatment (*'ihsan al-mu'amala*), manners (*al-'adab*) … kindness (*al-birr*), loyalty (*al-wafa'*) and charity (*al-'ihsan*) …"[4] The relations between the individuals constituting a charge's family are a crucial indicator of the environment necessary for a child's *maslaha* to be secured. They also offer guidelines for the judge to determine among whom right (*al-haqq*) resides in other kinds of case as well, such as the following case involving a dispute over the distribution of inheritance.

Marriage and Family

Other aspects of the relationship between piety, ethics, and judicial authority are highlighted in the second case. Here, the court stresses the requirements of family life and, more specifically, the knowledge of these requirements, in addition to the virtues of trustworthiness and capability. It also reveals the disciplinary function of Islamic courts that regulate the individual's relationship with the law through proper procedure. The individual's ability to follow procedure and his knowledge of his obligations towards his family are both signs and consequences of his overall conduct. As in the preceding case, the individual's capability and trustworthiness are assessed by his actions, but also by his awareness of what the child's welfare requires. This case also reveals the court's own assumptions of what family and family life are as conditions of the cultivation of piety and, therefore, of proper conduct.

A man approaches the court with a claim of custody over his daughter, countering his wife's claim for an increase in the amount of her maintenance. He had apparently left both child and wife for a few years, without providing either of them with any support. The judge

[4] Personal communication, May 15, 2007.

threw out his claim and granted the wife the increase she requested. (F.I.S.J. 1985: 43)[5] As in the preceding case, and also according to Ibn 'Abidin, the judge pointed out the child's *maslaha* and the guardian's capacity and trustworthiness as criteria for his decision. In this case also, the rules of *hadana* gave the father rights over the children, but the judge decided otherwise, since the husband "turned his back" on his daughter, refused to pay her maintenance, and neglected his *shar'i* and legal duties. Even his claim failed to conform to procedure (because it was filed before a decision was issued in the wife's maintenance lawsuit) and would have been thrown out had the wife used that fact as a defense. (44) More importantly, "it did not cross his mind (*ghaba 'an dhahnihi*) that the place to keep a child is the household (*bayt al-zawjiyya*)," which did not exist given that he left his wife. A letter from the husband's family (*al-'usra*) signed by a coroner and a *shar'i* judge made their view clear to the court that "the daughter's *maslaha* requires that she stay with [her mother]." The court saw that this letter, in which the family favored the wife over their own son—and over any other agnate—made it obvious that they wanted to "save this girl and keep her away from problems, drifting, and loss."

In contrast to the husband, the wife was "borrowing [money] to spend on herself and daughter, [for the latter's] private schooling and her [medical expenses]." She "consented to remain under his *'isma* [right to initiate divorce] while still young," and did not seek "separation" even though he was absent all that time. All this went to show that she was "a good (*saliha*) mother, a loyal and reasonable (*'aqila*) wife from whom we must not take away the child." The alternative, which the court did not see fit, would have the child placed "in the hands of an insensitive (*mutalabbid al-hiss*) father, in the custody (*hudn*) of her

[5] First Instance *Shar'i* Judge in Tripoli (F.I.S.J.), dec, no. 275, Jun. 13, 1985, in H.L.A. 43.

stepmother (*durratin li walidatiha*, the second wife) in a foreign country which [threatens] her conduct and creed." In the end, the court declared, in a remark addressed to the husband, "the Islamic legislator (*al-shari' al-'islami*) … decide[s] a right for a human being (*haqqan li 'insan*) [only] in return of an obligation (*wajib*) he imposes on him." In other words, the husband cannot simply ask for his right of *'imsak* without performing his obligation to pay maintenance, or to conduct himself according to the law and *shari'a*. Moreover, taking charge of a child implies, in addition to the child's benefit, aspiring to "charity (*al-birr*) and piety (*al-taqwa*)," and averting "evil (*al-'ithm*) and enmity (*al-'idwan*)." (F.I.S.J. 1992: 53)[6]

The third case involves Maysa, whose husband Saleh divorced her after she had given birth to several children. (F.I.S.J. 1994: 28)[7] During the same year, he married Manal who gave birth to three children before he was struck by a disease that affected his brain and lungs. He then divorced Manal, his second wife through his *wakil* (agent), his son from his first wife Maysa, whom he remarried. (29) All in all, Saleh married once, divorced, married again, divorced, and married the woman he was first married to—three marriages, two divorces, two women.

Now, Saleh had approached the court with a request to confirm his divorce from his second wife Manal when he died. Later, some of his heirs approached the court with a request to settle his inheritance. Their demands were contradictory, since they asked that Manal be counted among the heirs, but only "in order to confirm [Saleh's] repudiation of her." (26) Two of Saleh's children accepted that request, under the condition that their mother Maysa, Saleh's first and last wife, also be included. On her part, the second wife

[6] F.I.S.J., dec. no. 649, Nov. 10, 1992, in H.L.A., 53.
[7] F.I.S.J., dec. no. 18, Jan. 20, 1994, in HLA no. 7, part 13-15, Oct. 1994, 26-32 (part 13).

Manal demanded that the first wife Maysa be included in the case in order to annul her, Maysa's, marriage. She argued the following: first, Saleh divorced her, Manal, under duress (*al-'ikrah*) on the part of his children; second, when Saleh divorced her he did not have the competence (*al-'ahliyya*) to do so; third, that Saleh divorced her while he was in a state of "death sickness" (*marad al-mawt*).[8] Her objective was to claim herself as the sole wife to inherit, and prevent the first wife, Maysa, from having a share in Saleh's inheritance.

The court decided to confirm Saleh's divorce from his second wife Manal, but contrary to the heirs' wishes, did not exclude her from participating in his inheritance. The court also rejected Manal's request to annul Saleh's marriage with Maysa. Finally, the court decided that both Maysa and Manal deserved an equal share of Saleh's inheritance, and distributed the rest among the children according to the rules. (31) How did the judge justify his decision that Manal, whose repudiation by Salah he confirmed, could inherit? On what basis did the judge decide not to annul Maysa's marriage, contrary to what Manal had requested? The judge proceeded by laying out the "*shar'i* principles, rules and bases" of inheritance and marriage.

A consensus (*'ijma'*) existed among the Hanafi *madhhab* jurists that if a man repudiates his wife irrevocably (*talaq bi al-baynuna*) "in order to evade" the obligation of leaving her a share in the inheritance, "she would still inherit." (27) However, two conditions must be satisfied: first, that he repudiate her "without her request or consent while in a state of death sickness," and second, "as long as she is still in her waiting period (*al-'idda*)" during the

[8] "The illness which it is generally feared will lead to death and which is connected to the fact of death." (Abu Zahra in Khadduri and Liebesny 1955: 162). See also Yanagihashi 1998.

process.[9] In such a case the "legislator (*al-shari'*)," the judge explained, "treated [the husband] contrary to his intentions as long as the effects of marriage remained." According to the judge, death sickness implied that the person "is incapable of conducting his immediate affairs outside the house, such as going to the mosque, to his store," that "his condition does not worsen during a year or more, and that there is no risk of him imminently dying despite his sickness being linked to death."

The second set of *shar'i* principles laid down the definitions of marriage. "The concept (*mafhum*) of the marriage contract among the school's jurists (*fuqaha' al-madhhab*)" wrote the court, was "inaccurately defined in regards its most important purposes and functions." (27) According to those jurists, marriage is a contract that "permits (*yahul*)" mutual enjoyment and pleasure (*mut'a*).[10] "No doubt" the judge added, "that they forgot … other higher purposes, among which procreation and preservation of the human kind …" In addition to its biological function, marriage had additional emotional and spiritual attributes, such as "finding … in the partner spiritual companionship (*al-'uns al-ruhi*) …" After citing a verse from the Qur'an, the judge continued by invoking "*al-fuqaha' al-mu'asirun* (contemporary jurists)," such as Mohammad Abu Zahrah, "who noticed this lack among the predecessors (*al-fariq al-salaf*)."[11] Abu Zahra defined marriage as "a contract" that allowed "association (*'ishra*) between a man and a woman in what accomplishes what human nature requires … their cooperation throughout life, and assigns to each rights and obligations."

[9] The *'idda* is equivalent to three menstrual cycles during which a woman may not remarry after having been repudiated by her husband or after the latter's death.
[10] The two definitions are cited in the court transcript without reference to title or author, except for the enigmatic "according to *sahib al-kanz*". I was unable to find this reference.
[11] Mohammad Abu Zahra (1898-1974): "Professor of Islamic Law at the University of Cairo, Egypt, and author of several works in Arabic on Islamic Jurisprudence" (Khadduri and Liebesny 1955:xvii).

(27)[12] The judge also cited the first article of the Syrian Law of Personal Status, which defines marriage as "a contract between a man and a woman … for the purpose of founding the bond of common life and procreation (*nasl*)." (28)

The third and final set of rules addressed the problem of the validity of the marriage contract. Again, returning to the *madhhab*, the judge distinguished three different conditions: validity (*sihha*), executability (*nafadh*), and commitment (*luzum*). (28) Among the conditions of the contract's executability are "coming of age and reason (*an yakuna al-'aqidu balighan 'aqila*)" as measuring rods not of the individual's "personal behavior (*al-tasarrufat al-shakhsiyya*)," but his "financial behavior (*al-tasarrufat al-maliyya*)." Since Saleh's financial behavior was sound, and since it was his personal ethics that were in doubt, his marriage with Maysa was not void, as Manal had argued. Moreover, since inheritance would be forbidden only in an "invalid (*fasid*) marriage," there was no reason for Maysa to inherit.

In sum, the judge first proved that Saleh's repudiation of Manal did not entail her exclusion from partaking in the inheritance. He then showed that it was Saleh's attitude towards marriage, rather than his financial behavior, that were questionable. Finally, and as a consequence of the latter, he rejected the request to declare Maysa's marriage void. The end result was that both women would inherit. What the judge then urged to figure out was the intent of that "masquerade (*masrahiyya*)" and the "wisdom (*al-hikma*)" that lay behind it. (29) None too lacking in irony, he asked, "Did he, Saleh, divorce his second wife and remarry his first [a few weeks] before he died in order to satisfy a sexual impulse (*al-watar al-jinsi*)," or for "the sake of having children?" Was it a "desire and yearning to start a new

[12] Cited in the court's transcript without further information about the source.

page of companionship, friendship and peace … or a wish that his divorcee of yesterday become his mermaid in the other world?!" (30)

In his overview of the facts, the judge raised some difficult questions about the deceased's conduct. "Rather than be placed on the right path (*al-sirat al-mustaqim*) as he gets ready to leave on the path to the other life, to prepare better his meeting with his Lord (*rabbihi*)," Saleh chose instead to make things worse by first "divorcing his wife during his death sickness in order to exclude her from his inheritance," and "married his divorcee to replace her." (29) Moreover, his marriage was "based on a suspect power of attorney" and a "medical report confirming his capacity to marry" ten days before he died. The judge did not question the deceased man's piety as such, but rather his conduct. The man died "having completed his religious duties (*wajibatihi al-diniyya*)," but what was in question was his conduct, judged in relation to a specifically modern notion of marriage.

The judge returned to the tradition for that articulation but, while confirming its authority, corrected its views in light of later jurists and contemporary definitions. The predecessors (*al-salaf*) had viewed marriage in terms of pleasure and enjoyment, and contracting it according to the rules set by the *shari'a* was required. The latter jurists' sensibilities—including the judge's—added "higher" ends to marriage, not just companionship, but the biological purpose of preserving the human species (*al-jins*). The judge banished with derision pleasure and enjoyment from marriage as frivolous, or superficial, in favor of more serious procreative functions. However, at the same time, pleasure and enjoyment are sexualized and centered on the sensations individual men and women experience. The judge in the inheritance case recognized pleasure and enjoyment as his predecessors did, but he was more timid, ambiguously associated marriage, through their mediation, with sex,

prostitution and bride wealth. Bride wealth, as the judge at the court of appeals explained in another case, "is not selling and buying, nor is it a remuneration for a woman in exchange of sexual favors," nor is it a source of "amusement … for the man and woman to enjoy and benefit from …" (HSCB 1992: 50)[13] These pronouncements on bride wealth develop into moral proclamations on the value of "the human being (*al-'insan*)" who "cannot be sold or bought," whose "humanity is invaluable and his freedom sacred in Islam." This provides bride wealth with a specific meaning, as "a gift from God to women imposed on men as a duty," aimed "to secure the wife's [immediate] needs," and when "deferred … secures her needs after divorce or upon her husband's death." Bride wealth is, therefore, a gift that is not subject to the rules of exchange, or to "compensation, fraud … usury … which are forbidden (*haram*) by *shari'a*." The gift, as the material aspect of the marriage contract, is an articulation of the special relationship between God, man and woman.

That relationship is crucial, and precedes all others. It must, therefore, be protected by whichever means available. The notion of *'islah dhat al-bayn* carries the full force of that exigency. The Arabic word *al-bayn* literally means "the in-between," and implies separation and connection.[14] *Dhat al-bayn* refers to a state of dissent and discord (*fitna*) "among the members of the same family, which is a greater harm [and] should be avoided by [a] lesser one …" (F.I.S.J. 1992: 45)[15] The demands of the doctrine of *'islah dhat al-bayn* and the preeminence of the marriage contract are such that even deception is allowed in order to protect the family and avoid discord. Whereas Islamic morals (*al-'akhlaq al-islamiyyah*) stress honesty and loyalty (*wafa'*) and shun deception, these are permitted (*masmuh*) only on

[13] Higher Sunni Court in Beirut (HSCB), dec. no. 169, 9 Jan. 1992, in HK, p. 50.
[14] *Lissan al-'arab* by Ibn Manzur (d. 1311 C.E.).
[15] F.I.S.J., dec. no. 83/92, July 7, 1992 in H.L.K. part 1, p.p. 43-45.

one condition, namely, that of *'islah dhat al-bayn*. One implication of this is that deception is permitted if telling the truth threatened to disunite the family.[16]

An intimate relationship joins the individual, marriage and the family, and Islam. Marriage involves pleasure and enjoyment, but is also a primary sociological and biological act. The family, both as a social unit and as the precondition of the biological continuity of the human species, is also the site of the individual Muslim's ethical formation.[17] The child's interest and the protection of the family are, therefore, two sides of the same coin, and taking marriage lightly implies a misunderstanding of its urgency and consequences. It is also a sign of misconduct and ethical inadequacy, as the judge read it in Saleh's inheritance case above. In addition to being a sign of an individual's ethics and his relationship to himself and to marriage, such misconduct also carries effects or consequences on the individuals involved. Someone's actions may cause someone else *darar*, or harm, a notion already mentioned in the custody case above. Also, a state of affairs gone awry may also be a source of *darar*. Whereas in the custody the harm inflicted on a child came from a potentially incompetent charge, in this case it ensues from "discord (*al-shiqaq*)" and "bad association (*su' al-'ishra*)" between the spouses. (F.I.S.J. 1992: 55)[18]

The Law of Islamic *Shar'i* Judiciary has reinterpreted what the Ottoman Law of Family Rights had stipulated about *darar*, considering it a "direct reason for a claim of separation" between the spouses, although the judge is supposed to "seek their reconciliation after harm had been proven." *Darar* as a cause behind the request for separation or as a justification for

[16] The public prosecutor at the Sunni court of appeals in Beirut, personal communication, May 29, 2007.
[17] See the Mufti's polemic against an "optional civil marriage law" proposal in 1997, chapter II. For an account of the reformulation of *shari'a*, ethics and the family in conjunction with the consolidation of the state and personal status, see Asad 2003: 227-235.
[18] F.I.S.J., dec. no. 459, 1992, in H.L.K. part 1, 55-58.

granting it is further specified by the aforementioned law. *Darar* must be "noticeable … on both or one" of the spouses. The Ottoman Law was less rigorous, allowing "mere discord and conflict between the spouses" to be a "direct reason to demand separation and a justification for granting it." The law does not define what the nature of *darar* must be for a claim of separation to be heard by the court, and it does not have to be "material harm." (56) According to the judge, "any *darar* inflicted by one of the spouses upon the other is a reason for the latter to demand separation, be that *darar maddi* or *darar adabi*." Indeed, for some "sensitive souls, emotional harm is worse than material harm." The words "*maddi*" and "*adabi*" may be translated as "material" and "disciplinary," although in light of the judges' subsequent elaboration, the latter could also assume the meaning of "emotional harm." Yet, depending on the relationship with the former, there is a difference between the two. If the distinction were taken to be between material and emotional harm, it would give the impression of two opposed and qualitatively different sort of harm. However, in the case of disciplinary harm, which, as the lines below suggest, refer to the effects of the husband's disciplining of his wife, then the difference between *darar maddi* and *darar adabi* is a matter of degrees. Of course, in this case, disciplining does not have to be physical at all, "disciplinary" and "emotional" harm coinciding. The judge's interpretation leans towards the latter.

Citing verses from the Qur'an to explain what he means by *darar adabi*, he admits that he cannot "assess" the different sensitivities of each individual to certain kinds of disciplining—and, therefore, the inflicted harm—in any objective way. While the cited verses include physical punishment, they also include limitations. The judge asserts that the Qur'an grants the husband "the right to discipline his wife." However, it also places

limitations on the means and extent to which he can do so. Exceeding those limits, according to the judge, constitutes "an assault (*'idwan*), and assault is forbidden in any area of life and among all people." Interestingly, the cited verses describe, enumerate and delimit the disciplinary measures in terms of the observable actions by which they are administered and the physical effects they cause. The judge, on the other hand, speaks about them from the point of view of the disciplined as their *subject*, "in light of his examination of each of the spouses character (*dirasatihi li nafsiyyati*)." However, that does not prevent him from empathizing with the complainant, from formulating a knowledge of their sensibilities and, therefore, from issuing a judgment. He does not deny that knowledge of the harm inflicted is possible, but points out, rather, that it is a particular kind of knowledge that requires particular conditions of knowing, namely, empathy. What makes empathy possible is the judge's sharing with the claimant certain qualities and virtues. An "honest and inspired (*nazih wa mulham*)" judge could tell what constituted *darar adabi*. However, he must also enjoy certain qualities: "a living conscience (*damirihi al-hayy*), radiant sentiments (*wijdanihi al-muta'alliq*), fine sensibilities, and feelings of divine supervision over him." This enables the judge and as well as other to distinguish two kinds of discipline: "physical punishment (*darb*) and abstinence from conjugal company (*al-mu'ashara al-zawjiyya*)," which "are forbidden (*al-manhi 'anhu*)," and other kinds of apparently verbal disciplinary measures, which are at the root of the current case. He presents himself as an interpretive, empathetic subject, opening up an inter-subjective space between individuals, and between the parties and himself. "The interpreters (*al-mufassirun*)," the judge says, "have interpreted the aforementioned noble verse (*al-'aya al-karima*) to refer implicitly (*dimnan*) to the differences of temperaments and moods …"

The judge's authority rests on his knowledge of jurisprudence, on his morals and piety, but also on a subjective quality, which is neither a basis for applying a rule—which must follow from a methodology he will soon explain—nor opposed to that methodology. Rather, empathy informs the judge's methodology, in keeping with the conception that *maslaha* is the "wisdom" behind the *shari'a*—a corollary of which being that the *shari'a* could not contain rules that inflict harm. (57) This does not mean arbitrariness in applying the rules, as indicated by the judge's references to "the principles of jurisprudence (*'usul al-fiqh*)" that direct him in solving two related problems: determining the *darar* that would help justify separating the spouses and, issuing a rule in accordance with the available legal and *shar'i* texts. The texts that contain references to a case of separation are the Ottoman Law of Family Rights and the Law of the *Shar'i* Judiciary, and the judge must decide in such a way that reconciles his "subjective" assessment of *darar* with the "objectivity" of the texts. This is how he proceeds. First, he tells us that "the Judiciary Law did not define the reasons to demand separation … but only indicated a few [examples] …" The judge does not cite the clause, which states that "both spouses may demand separation due to *darar* emerging from discord and bad association, such as beating, cursing, and coercing to do something forbidden." (Art. 337) Second, he states the principle, which he cites from the Ottoman Law of 1917, that "any violence (*'adha*) from one of the spouses that inflicts harm (*darar*) on the other and leads to discord, conflict or bad association between them, is a good (*yaslahu*) reason (*sabab*) to demand separation …" The former virtually reverses the latter. The Ottoman Law enumerates a causal series that begins with the actions of one spouse against the other, causing harm to the other and leading to discord in conjugal life. The Judiciary Law, on the other hand, begins with the actions that lead to disruption in conjugal life from

which follows the harm. Thus, whereas the Ottoman Law compels the judge to assess the conjugal condition or *al-shiqaq*, the Judiciary Law attends to *al-darar*.

Third, in order to choose which of the two to apply, the judge states the general principle that "the object of a *shar'i* rule is understanding not encumbrance (*manat al-hukm al-shar'i fitna la min'a*)," which elicits his intuitiveness towards the most self-evidently reasonable rule. He then distinguishes between "the cause (*al-'illa*)" that effectively enables the analogical extension of a *shari'a* rule on the one hand, and the "wisdom (*al-hikma*)" behind it on the other. The *'illa* in the particular case ought to be "clear, defined (*mundabit*), adequate and not restricted to the general rule (*al-'asl*; i.e., it is present in both the general and the particular). By identifying discord (*al-shiqaq*), the judge tells us, the Ottoman Law is "more accurate [in its] understand[ing] of the spirit of the Qur'anic text (*aswab fi fahm ruh al-nass al-qur'ani*)," and in "distinguishing between *'illa* and *hikma*." It is so because its rule accords with the provision stating *shiqaq* explicitly in the Qur'an: "if you fear discord (*shiqaq*) between them …" The Ottoman Law thus adopts a general rule that "satisfies the conditions of causality (*'illa*)" and enables, therefore, the extension of that rule to the given case. In contrast, the Judiciary Law, by identifying *darar*, relies on a "hidden [and] undefined" *'illa* or, in other words, on the "wisdom" behind it, a good enough reason for the judge to dismiss it in favor of the Ottoman Law.

Conclusion

The above cases were all heard by the first instance court and are all subject to appeal before the Higher Sunni *Shar'iyya* Court. It is the public prosecutor at the aforementioned court (*al-na'ib al-'am lada al-mahkama al-shar'iyya al-sunniyya al-'ulya*) who decides whether a

case is to be appealed or not. The public prosecutor examines a demand to appeal a case and offer an opinion about it before transferring it to the Higher Court if it fulfills the conditions. The public prosecutor's role is regulatory, having "the sole objective of preventing faulty interpretations (*'ijtihad khati'*)" on the part of lower instance judges, and to make sure that they "apply the texts correctly." (PP 1994: 157)[19]

"Regularity (*'istiqrar*)" in the application of texts "serves the general interest (*maslahat al-muslimin al-'amma*) of Muslims." The public prosecutor's function is explicitly to regulate the boundaries between the general and the particular, law and *shari'a*, and Islam and the state. Textual regularity implies Islamic general interest because irregularities entail a conflict with the state and other jurisdictions (e.g., ecclesiastical tribunals), and thus lead to having the *shar'i* judge's decisions quashed by the Court of Cassation. There is a specific configuration of authority, text and interpretation that secures the general interest of all Muslims. The difference between the public prosecutor exercising that power and the Cassation Court is in the disciplining agency. Although the prosecutor's rejection of the first instance ruling "practically aims to compel the Higher Court to give its opinion," both the problem and the solution remain within the limits of the Islamic jurisdiction. Protecting the integrity of that jurisdiction is an aspect of Islamic general interest that supersedes the interests of particular Muslim.

The prosecutor explicitly distinguishes the former from "personal interest (*al-maslaha al-shakhsiyya*)," and emphasizes that his function is to "guarantee the proper application of *shari'a* and legal rules in order to achieve the Islamic general interest (*al-maslaha al-'amma*

[19] The Public Prosecutor at the Higher Sunni *Shar'iyya* Court (P.P.), dec. no. 423/94, Mar. 3, 1994, in *al-qararat al-kubra fi al-'ijtihad al-lubnani wa al-muqaran* (QK; *Les grands arrêts de la jurisprudence libanaise et comparée*), Abou Eid, Elias (ed.), no. 36, 156-159.

al-'islamiyya) [rather than] anyone's personal interest." With the public prosecutor we encounter again the concept of *maslaha*, which the lower courts have taken as a basis of their decisions, and which Islamic reformists in the 19th and early 20th centuries have conceptualized as the wisdom behind the *shari'a*. In the custody case above the child's *maslaha* was predicated on the social and moral conditions within which the child would be reared. Clearly, Islamic general interest gains the upper hand over personal interest in case of conflict, and the ideal would be to avoid such conflicts. It is the ethical role of the family—prior to the court or the public prosecutor—to secure the harmonious link, by cultivating what the cases articulated above: the ideal figure of a pious and ethical Muslim subject of the modern state. The next chapter shifts the focus to an entirely different articulation of these relationships in another "religious" jurisdiction, the Maronite Catholic ecclesiastical courts.

CHAPTER IV
The Sacrament of Holy Matrimony, Medico-legal Expertise and Ecclesiastical Authority

Holy Matrimony, Ecclesiastical Courts

Maronite Catholic ecclesiastical courts in Lebanon annul marriages for various reasons. Some marriages are nullified because the wife is found to be "mentally defective (*'indaha khalal fi 'aqliha*) … unlike other sane (*'aqilin*, also reasonable) people,"[1] (M.U.F.I.C. 1980: 378) or due to "psychological incapacity linked to natural incompatibility between the spouses' characters, making it impossible to undertake the burdens of marital life."[2] (M.U.F.I.C. 1993: 13) The wife may also be found to have been "incap[able]," at the time she consented, "to assume the essential duties and obligations of matrimony."[3] (M.U.F.I.C. 1988: 93) Sometimes the court declares the marital bond null and void "on grounds of extreme fear borne by the husband," or his "incapability to assume the burdens of marital life." In some cases, the court's decision to annul a marriage is followed by an injunction, "prohibit[ing]" the faulty spouse "from marrying again before the competent ecclesiastical authority allows [him or her] to do so, based on the opinion of a psychiatrist (*tabib nafsani*),"[4] (M.U.F.I.C. 1988: 35) or "before receiving the parish priest's authorization, granted on the basis of a medical report showing that [she or he] is capable" to do so. (M.U.F.I.C. 1988: 93) Although the reasons vary, they may be grouped into two broad categories, both of which are symptoms of a person's "capacity": some of them arise from

[1] Maronite Unified First Instance Court (M.U.F.I.C.), decision No. 44/77, issued on March 4, 1980.
[2] M.U.F.I.C., decision number 5/39, November 17, 1993 in *al-Qararat al-Kubra fi al-Ijtihad al-lubnani wa al-muqaran* (Q.K.) n.d., no. 41, 2-153.
[3] M.U.F.I.C. decision issued August 05, 1988, in Q.K. no. 7, 53-93.
[4] M.U.F.I.C. dec. no. 50, February 10, 1988 in Q.K. no. 8, 1-35.

observed particular "internal"—mental, psychological, characterological—conditions, others from "external" causes, such as anatomical and physiological defects.

Catholic marriage is a Holy Sacrament of the Church. As an act, it rests on assumptions about personhood, which consists of soul, mind, and body. The validity of the marriage is determined by two sets of criteria. First, it must be performed according to certain rules—for example, consent to the marriage must be declared publicly, before two witnesses, and so on. The second set of criteria derives from the state of mind and body at the time of, or prior to, the consent given. A valid consent presupposes necessarily a sound body and mind. Thus, Maronite (Catholic) marriage rests on a particular notion of personhood, which includes normative assumptions about actions, their conditions (or causes), and consequences. To annul a marriage is a matter of inversing this scheme. Unlike divorce, or the dissolution of the contract, which is non-existent in the Catholic Church, an annulled marriage means that it never existed due to a defective consent. If a valid consent follows from a normal state of body and mind, then an invalid one implies an abnormal state. It is this state that the cases below depict.

The technique of examining a person's mind and body is the one applied sometimes in criminal courts, namely, medico-legal expertise—a petition for marriage annulment is analogous to an insanity plea. In itself however, medico-legal expertise does not constitute evidence. It requires the insight, knowledge, and authority of ecclesiastical judgment, which subjects its discourse to other, truer, considerations. A historical relationship exists between medico-legal expertise and the Catholic notion of marriage just summarized. More specifically, it follows from a shift in Catholic marriage via "love" and the notion of "interpersonal relationships," which Vatican II in the mid-1960s endorsed. Interpersonal

relationships is understood as a capacity residing in the person's physical and psychic constituents, the defectiveness of which explains certain person's incapacity for such relations and their demands. Enter medico-legal expertise, which carries with it a few consequences. It facilitates annulment, or, rather, it widens the scope of interpretation of the causes and conditions that justify annulment. Second, it secures the consciences of principals and judges: the former because they are not guilty of any wrongdoing, the latter because they avoid passing judgment. In that regard, medico-legal expertise is not unlike trials by ordeal in medieval Europe. (Whitman 2008) Third, it shifts the conditions that constitute ecclesiastical/judicial authority. It is now confronted with a "science," but a science whose ambiguous status exposes it to an ecclesiastical counter-interpretation guided by Catholic psychology and moral theology. Fourth, it sharpens, with the assistance of "scientific" authority, the normative psychosexual profile of a gendered Catholic subjectivity.

This chapter adopts the same approach to Maronite ecclesiastical jurisdictions as the preceding one did to the *shari'a* courts. It focuses on their textual products, namely transcripts of marriage annulment cases. It attempts to trace out the Catholic notion of marriage, the normative assumptions it rests on, the practices those assumptions make possible, and their consequences for judicial practice and marriage itself. It starts with a brief presentation of some of the features characterizing the published cases of marriage annulment, followed by an overview of the redefined notion of marriage under Vatican II. The rest consists of a detailed account of three cases, each focusing on a particular problem. The first involves psychological incapacity and natural incompatibility, the second psychic incapacity, and finally, pathological anatomy and physiology, and psychology.

The Cases of Marriage Annulment

The overwhelming majority of the published decisions I found involve marriage annulment cases, in addition to a few that either follows or fall short of annulment, such as inheritance and cohabitation, what the court designates as the "civil consequences" of a marriage. (M.U.F.I.C. 1988: 56)[5] Most of them were heard by the Maronite ecclesiastical court of first instance and were, therefore, not final; they could be repealed by the Maronite court of appeals and, ultimately, by the Sacred Roman Rota. The annulment lawsuits may be classified into subcategories, or types, according to subject matter as follows: simulation of consent, conditional consent, medical impediment, error in the person, incompatibility of faith, extreme fear, psychological incapacity, proper matrimonial act and so on. These headings correspond to the reasons for nullification, and in many cases two or more reasons may be present in a single lawsuit. The decisions are long, detailed and identical in form. Each case includes the parties' claims, the court's deliberations, and the Canonical sources and precedents upon which the decision was based. They indicate the reasoning behind the decision, and prove that the right of defense was secured. Every case articulates the distinctions, visible in the text's structure, between facts (occurrences or events, pl. *al-waqa'i',* sing. *al-waqi'a*), law (*al-qanun*) and argument (or "in fact", sing. *al-waqi'*). The facts are organized in a sequence of occurrences that constitute a narrative account of the parties' journey to court. Based on this account, the ecclesiastical court asks its questions—or "*'iriyabat* (suspicions, doubts)"—required to decide whether or not the marriage is to be annulled. These questions also provide the framework for the supporting sources and the subsequent investigation. The final section of a case, "the argument," details the

[5] M.U.F.I.C. decision issued August 05, 1988, in Q.K. no. 7, 53-93.

ecclesiastical court's investigation and ends with the verdict. The purpose of this part is to answer the questions posed in the preceding one, which means identifying the causes that justify annulling a marriage. The investigation consists in the examination of witnesses, which may include the principals in the case, immediate and extended family members, friends and acquaintances, as well as expert reports.

Three features are particularly salient in these cases: the intimacy of the descriptions, the dramatic staging of cases, and the space occupied by medical expertise. The use of personal names to refer to those involved as a measure of securing anonymity has the paradoxical effect of making the description more personal. It is as if the name accentuates personalities as it conceals identities. This effect is amplified by the ubiquitous presence of—not just reference to—figures such as the mother and father, the sister and brother, the aunts and uncles, cousins, in-laws and neighbors. Each individual is asked to tell details about the other to construct a world where each is exposed to the glimpses, glances and gazes of all. Not only surface behaviors and external actions are subject to examination, but emotions and thoughts are inferred from them. This dualism structures the family as well, such that the inner secrets of conjugal life are explored, analyzed and exposed. The secret enclosure of the ecclesiastical court is hence a space where boundaries no longer hold; yet, the court's own boundaries are also subject to public scrutiny.

Virtually every case weaves a drama involving passion, violence, greed, wealth, envy, deception, attempted suicides, lust, psychological and physical disability, as well as other

sorts of grief and "suffering."[6] This drama is the first and most immediate expression of a pathological state the conditions of which are already present in the Church's definition of marriage. It is results from—and indicates—the grotesque transmutation of desire, love, fidelity—and the burden of conjugal life recognized by the Church. These dramas do not have a happy ending—in fact, they are always already tragically ended, and the annulment decision is a religious, legal and moral confirmation of that end. Each case, and by implication the whole ecclesiastical judicial field, is traversed by intertwined flows of sentiments, anxieties and sensibilities that connect the innermost regions of an individual's soul and the most intimate areas of her body to the state's public order. Intentions, desires, and organs articulate a field of power that ties together religion and the state.

Schematically, each case is a distinctive effort on the part of the ecclesiastical court to identify, clarify and assert understandings of the normal, the pathological, and their relations. (Canguilhem 1966) Medical experts diagnose the pathological points along physiological, anatomical and psychological interconnections, while witnesses assist in the diagnosing of souls by providing the material for a moral semiotics. Medical expertise and witness accounts are crucial for the court to demonstrate the causes that would justify its decision to annul a marriage: the former offers science, the latter articulate signs—behaviors, actions, words. The hermeneutic responsibility—and privilege—is borne by the ecclesiastical court, which interprets the findings of medical science and moral semiotics, and dissolves the morbid junction—the marital bond—that ties the person to public order. As the court stated it in one of its cases, the judge claims the right "to play his role in selecting, refusing or

[6] "*mu'ana*" in Arabic, the word the bishop-judge used to justify his refusal to grant me access to the court's archives, which contained, according to him, "people's suffering," which must remain concealed from public exposure.

modifying the opinions of experts, but always by recourse to knowledge (*'ilm*) and the law, and what appears to be truly and unambiguously congruent with the reality of everyday life."[7] (M.U.F.I.C. 1993: 103)

The practice is common to Catholic tribunals elsewhere, including the Roman Rota.[8] (Noonan 1972) The difference for the ecclesiastical courts in Lebanon is that, as the sole jurisdictions for the application of personal status laws, they fulfill a state function, just like their *shar'i* counterparts. There is therefore more than analogy between the cases that appear before ecclesiastical courts and "the cases which come before a physician" as "specimens of a pathology." (Noonan 1972: x) This religious-scientific configuration articulates with the institutional-juridical arrangement described above on the one hand, and the state's moral-political presuppositions regarding the family on the other. As an institution tied to public order, the family falls under the state's regulatory mechanisms, a function the ecclesiastical court performs under its supervision.[9] If the serenity provided by the distinction between the private and public spheres is disturbed for a just a moment, what appears is a vast apparatus of knowledge constituted by the convergence of religion, state and medicine to construct the citizen-subject. If that knowledge is produced by medical practices and moral discernment, it

[7] Maronite Unified First Instance Court (M.U.F.I.C.), decision number 5/39, November 17, 1993 in Q.K. n.d., no. 41, 2-153.
[8] Cf. http://www.cormacburke.or.ke/Rotal_Decisions?from=0 (retrieved, 1/1/10).
[9] "Marriage being an institution of public order entails that the spouses cannot by their own will establish a union different than that organized by law," Encyclopédie Dalloz, V° *Mariage*, p. 373, cited by the First Instance Court of Beirut, third civil chamber, in its preparatory decision of November 27, 1970 in *al-'Adl*, 1971, 345-348. "… [T]he notion of public order differs from one country to another with respect to the degree of commitment to moral and religious values, and to differing traditions, social customs and notions … in Lebanon and eastern countries in general society still holds on to its religious values and conserves to a large extent its moral principles and social traditions, in particular within the family, which is considered the basic foundation in the building of a society. These notions and ideas settled in Lebanon as a result of applying the personal status laws of the respective *tawa'if*, which aim primarily at protecting the rights of the legitimate child, and consequently, at keeping the legitimate family from weakening and breaking apart." First Instance Court of Mount Lebanon (F.I.C.M.L.), decision of January 29, 1991, in *al-'Adl*, 1991, 176.

is the function of ecclesiastical court to apply, authorize, publicize, and constitute it as the state's standard of normality.

On Marriage, Vatican II, and Interpersonal Relations

Four "constitutions" issued from the Second Vatican Council that convened between 1962 and 1965, one of which was The Pastoral Constitution on the Church in the Modern World. Entitled *Gaudium et Spes* and promulgated by Pope Paul VI on December 7, 1965, the document announced a "crisis."[10] (§4, §77, and §82) The crisis loomed in "the joys and the hopes, the griefs and the anxieties of the men of this age," (§1) it crisis affected "the whole human family … that world which is the theater of man's history," (§2) and consisted in questions concerning "the current trend of the world … and … the ultimate destiny of reality and of humanity." (§3) It was a "crisis of growth," the council declared: to the extent that "man extends his power" over, and "prob[ity]" into, the world, society and himself, he "appears more unsure of himself" and loses orientation. (§4) "[T]he human race is involved in a new stage of history," marked by "profound and rapid changes … [t]riggered by [man's] intelligence and [his] creative energies." The Council reminded the world of its original state, when man had "fallen … into the bondage of sin" and was "emancipated … by Christ … so that the world may be fashioned anew according to God's design and reach its fulfillment." (§2) While the world "is the theater of man's history" encompassing "the whole human family," Christianity was the perspective of "the Christian" who "sees" the "world … as—rather than believes it to be—"created and sustained by its Maker's love …" (§2) "[T]he

[10] Henceforth *G.S.* See http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html (retrieved on March 18, 2011).

human person deserves to be preserved," stated the Council, " [and] human society deserves to be renewed." (§3) But, how could the Church know that a crisis existed? By "scrutinizing the signs of the time" and "interpreting them in the light of the Gospel …" (§4) They were listed in Chapter I of Part II of *Gaudium et Spes* on "Fostering the Nobility of Marriage and the Family," as follows: "polygamy, the plague of divorce … free love … excessive self-love, the worship of pleasure … illicit practices against human generation … modern economic conditions … influences at once social and psychological … the demands of civil society," and "in certain parts of the world … population growth." (§47) All this indicated an imminent threat to marriage and the family, and while it "produced anxiety of conscience," it was also revealing "the power and strength of [these] institution[s]." Deciding to "set forth the dignity of the human person," (§46) the Council highlighted "marriage and the family" among several "universal concerns." It stressed the "well-being of the individual person and of human and Christian society is intimately linked to the healthy condition of that community produced by marriage and family" on the other. (§47)

The Roman Church strove to counter the crisis by redefining some aspects of Holy Matrimony.[11] It introduced a vocabulary that highlighted attributes of marriage that did not figure in the effective Canon Law of 1917 still effective at the time. (LaDue 1974) The Council redefined marriage as a "community of love," (§47) "an intimate partnership of married life and love." (§48) The "compact of conjugal love" by which a man and a woman became "one flesh" was still grounded in irrevocable consent, but it was now "a covenant" rather than a mere contract. (LaDue 1974: 37) Consent implied that the "spouses mutually bestow and accept each other," giving rise to a "relationship" between them. (*GS* 1965: §48)

[11] The measures recommended by *Gaudium et Spes* encompassed more than just Holy Matrimony.

The union of the flesh was extended beyond the act of procreation as it was in the old Code, and included the whole person. Being one flesh involved "mutual help and service to each other through an intimate union of their persons and of their actions." The Roman Church's concern with the human race was tempered by an interest in the "personal development … of the individual members of a family." Marriage was no longer realized only in the mutual renunciation of the body for the unity of the flesh, but involved the whole person—self and body—and exceeded the earlier conception. It was "a gift of two persons" and a way for the spouses to "experience the meaning of their oneness."

Gaudium et Spes did not spell out what or who the person was, but the preceding lines offered a clue. Having moved marriage away from the functionally restricted sexual act of procreation, as in the old Code, the Council "set forth" (§46) the person as one of its ends. Whereas in the old Code the person was concealed behind the right over the body, *Gaudium et Spes* articulated the person in terms of self, experience, and meaning. (Housset 2007; Carrithers, Collins, and Lukes 1985; Heelas and Lock 1981; Mauss 1938) The person emerges as a subject of interpretation experiencing marriage meaningfully, rather than being its mere instrument. In what way does the Christian person differ, then, from the secular phenomenological, person who is immediately present in a given body and world? The Christian person's world is qualified by the exhortations and recommendations of the Pastoral Constitution. He is encircled, as it were, by *Gaudium et Spes*, which mediates his relationship with the world by carefully selecting what is desirable about it, thus providing the context of his meaningful experiences. *Gaudium et Spes*—and, by extension, the Roman Catholic Church—articulates mutually the person and the world in authoritative

configurations appropriate for the person's life in an eminently historical, and therefore, interpretable, world.

A disposition of the person was love, actualized in the marriage covenant as "authentic conjugal love," opposed to "mere erotic inclination." (§49) Conjugal love was permanent and oriented towards an external other, whereas the latter was "selfishly pursued" and "soon enough fades wretchedly away." Erotic inclination was thus opposed to the expressive power and active force by which the self would be surpassed. Conjugal love, in contrast, "fortified" the "Christian spouses," "suffuse[d] their … lives with faith, hope and charity," and enabled them to "energetically acquit themselves of" their duties. (§48) Love was "consistently identified [in *Gaudium et Spes*] … as the animating energy … which reveals itself through various signs and expressions" of affection (LaDue 1974: 41) "through the appropriate enterprise of matrimony." (§49) In addition to being "eminently human," because it was dispensed by the "affection of the will" rather than desire, love possessed divine, Christological, and ecclesiastical attributes. "Christ the Lord abundantly blessed" it; it "well[ed] up … from the fountain of divine love and [was] structured … on the model of His union with His Church"; it "is caught up into divine love and is governed and enriched by Christ's redeeming power and the saving activity of the Church …" The normative matrimonial framework through which love is appropriately expressed in part depends on that love for its continuity. In other words, love became a necessary element of Christian marriage. Now, the Council's construction of love as a disposition invites a question: what kind of disposition is it? *Gaudium et Spes* seemed to suggest that it was a human essence, or a natural disposition. But what does "natural" mean? These questions are crucial in judicial settings, when a decision must be reached to annul a marriage. When *Gaudium et Spes* was

issued in 1965, the 1917 Code of Canons was still current. The pastoral message carried jurisprudential consequences, and gave rise to debates over its judicial uses. Two interrelated problems were salient: first, the "real canonical significance" (LaDue 1974: 36) of the pastoral message for ecclesiastical tribunals and, second, "the problem of incorporating the findings of modern psychology and psychiatry into a legal system." (Donahue 1977: 994) The two problems were interrelated; *Gaudium et Spes* was eventually made legally relevant, first in terms of the free act of consent, and second, by an appeal to psychological interpretations of the person and love that assigned to each of them a "psy-function." (Foucault 2006: 85) For this function to become legally meaningful, however, an additional step was required, namely, the specification of conditions necessary for a valid consent. This connecting step between consent and the psy-function will not be made until almost twenty year later in the 1983 Code of Canon Law.[12]

The 1983[13] Code of Canon Law confirmed marriage as a covenant, "by which a man and a woman establish between themselves a partnership [instead of society] of the whole life …" and inscribed "the good of the spouses" into it, alongside "the procreation and education of offspring …" (CCL 1983: nC1055) The act of consent remains an act of will, but its object shifts from renunciation of the body, to the mutual donation of the self. (Donahue 1977: 999) "Matrimonial consent is an act of the will by which a man and a woman mutually give and accept each other …" (nC1057, §2) A valid consent still depends on several conditions

[12] Cf. *Dignitas Connubii*, at http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html (retreived April 08, 2011).

[13] The Code was promulgated on January 25, 1983 and came into force ten months later on November 27. In the meantime, incidentally, the Lebanese government issued Legislative Decree No. 78, on September 9, "imposing a pre-marital medical certificate," which "includes the results of clinical, microscopic, and radiological tests defined by a decision issued from the minister of public health …" (Al-Zein 2003b: 61-62)

already present in the earlier code, such as non-ignorance of the essence of marriage and its ends, (nC1096, §1) knowledge concerning the person, (nC1097) and the conformity between the "internal consent of the mind" and "the words and signs used in celebrating marriage." (nC1101, §1) The 1990 Code of canons of Oriental Churches concerning consent is virtually identical to the 1983 Code, but underscores the covenant issued from the act as "irrevocable." While the two differ in their "expression" of the "fundamental nature of marriage" (Connolly 2001: 127), "both legislations contain a more personalistic approach than the preceding legislations, [viz. the 1917 Code and the 1949 Catholic Oriental], and have common elements." (128)

With the reconfiguration of marriage as a "covenant based on an inter-personal relationship instead of a [contract based] on a merely physical one, the door is opened to the possibility that one of the parties is unable, for psychological or other relevant reasons, to undertake to form that relationship." (Stuart 1994: 79) However, the door does not open directly from the pastoral domain into the law. Interpersonal relationships pose a problem, for if marriage is based on a relationship, it is at least likely that the cause—and there must be a cause—of its failure reside in that relationship. Therefore, the grounds of its annulment must be sought in a relationship between two people, which is incompatible with the former's juridical character; annulment by ecclesiastical authority demands an individual person to whom causes for annulment may be ascribed. The Code of Canon Law anticipates this loss of its legal subject by positing persons with capabilities for interpersonal relationships. In the new Code, the availability of specific capacities in the consenting person is necessary. These capacities are codified negatively as it were, in a list of persons "incapable of contracting marriage": "those who lack sufficient use of reason," "those who

suffer from a grave defect of discretion of judgment concerning matrimonial rights and duties," and "those who are not able to assume the essential obligations of marriage for causes of a psychic nature." (nC1095) Proving any of these in an ecclesiastical tribunal is sufficient to render the marriage void.

A new configuration becomes possible with the promulgation of the 1983 Code of Canon Laws (and the 1990 Code of Canons of Oriental Churches). Marriage annulment could now be addressed in relation to the notion of "interpersonal relationships" and "capacities" for such relationships. Consent remains the target, but it is no longer its preconditions only that are questioned. What may be questioned now is an element of its object—marriage—understood as an "interpersonal relationship." Someone might have the preconditions of consent—will and cognition—but be incapable of entering and/or sustaining an interpersonal relationship. The new Code stipulated three incapacities: insufficient use of reason, a grave defect of discretion of judgment, and psychic disturbances. Now, the first two categories may arguably be reduced to matters of cognition and will, and be treated in the same manner as that of the previous case. It may therefore be said that the real innovation brought forth by the new Code is the third category, psychic causes. This, together with the notion of interpersonal relationships, raises a number of questions for ecclesiastical judicial practice. In what do interpersonal relationships consist? How is the use of reason determined to be sufficient? When is a defect of discretion grave? What are psychic causes, and do all kinds of psychic causes bear on consent? What is the relationship between the three categories of incapacity? Do psychic causes, for instance, always undermine reason and judgment, in some cases only, or are they unrelated? It will be up to the ecclesiastical tribunals to provide an answer.

Psychological Incapacity, Natural Incompatibility, Individual Character

The court record summarizes the "facts" as follows. Georges and Katia were married on the first of March 1987, after a period of "mutual liking (*'i'jab mutabadal*) lasting around one year and a half prior to the wedding." (2) Six years had passed between the latter and the current lawsuit, making the couple's initial acquaintance seven and half years earlier. The record describes the husband's request that his betrothed quit a job she had had and take up another, and that he "felt relieved" by her consent. However, he apparently ignored his friends' and relatives' "warnings of the negative consequences of his marrying a girl characterized by an authoritarian impulse." Their concern was that the couple was incompatible, because of her "masculine tendency to take initiative." They also saw that a woman that has thus "surrendered her femininity" would be difficult to live with for a man "known not to forfeit his masculinity so easily." (3)

The court continues, pointing out that until "two weeks prior to the wedding, the husband did not notice anything worthwhile," at which time, and after an event referred to in the transcript as "something strange [and] worthy of interest," he confronted his fiancée. He placed before her the choice of either accepting him as "the man of the house… in which case we continue our journey," or to "think about it for a week [and then decide]." The wife, apparently, had chosen the latter path, but changed her mind and consented to the marriage conforming to her mother's wish. According to the husband, "the mother interfered," after which the wife conceded, "declaring, whatever you [i.e., the husband] say." The marriage was destined for failure. The reason, according to the court, was that "neither the man could surrender his role in his quality of man and head of household, nor could the woman forego

her authoritarian and independent impulse (*naz'a*)." Moreover, the "interfering (*al-mutadakhkhilun*) relatives," who attempted to "reconcile both parties did not succeed in [making them face their] common responsibility to save this marriage." (3)

After "identifying (*haddadat*) the subject (*mawdu'*) of the conflict," and after conducting "a psychological examination," the court raises the following two questions or, literally, "suspicions (*'irtiyabat*)." The first question concerns Canon law and addresses the conditions of marriage, while the second interrogates the psychological compatibility of the spouses; both determine the court's choice of which canonical statutes and precedents to refer to. The questions are the following: a) "was the marriage void (*batil*) … due to simulation of consent, or permanence of the bond, on behalf of the wife before the marriage?" and, b) "was the marriage void due to psychological incapacity linked to natural incompatibility between the spouses' temperaments (*tiba'*), making it impossible to carry out the burdens of conjugal life?" (4) The court then states the relevant Canons and general psychological principles that frame its investigation.

To prove that simulation has taken place the court requires the simulant's own confession, which discloses his or her "motivations (*dawafi'*, s. *dafi'*)," since simulation is either "a lacking action (*fi'l*)" or an "act (*'amal*) of lying," and no one "lies gratuitously." Consent, therefore, is not a simple formality, but follows from the person's intentions (*niyya*), the ultimate target of the court's investigation.[14] If the simulant is not available for examination, the court then inquires about his or her "qualities" as a person, as well as her "psychological states, specifically regarding the commitments and mutual responsibilities of

[14] "… the exchange of reciprocal consent considered a single unified action unifying the respective intention of both [spouses]." (6) Cf. also, "…[T]here was a substance to marital consent beyond the ceremonial words of acceptance." (Noolan 1972: 82)

interpersonal communion." (5) The court cites precedents that authorize its recourse to psychiatry, and the investigation that follows proceeds to explore the respondent's state of mind prior to marriage. The psychiatric problem is clearly defined by citing the relevant canons. The court refers to canon 818, section 3: "They are incapable of contracting a marriage … who are not capable of assuming the essential obligations of matrimony due to causes of a psychic nature." (5-6) The court adopts an argument from the Roman Rota, whereby the roots of the psychic causes that would invalidate a marriage must have existed prior to the marriage, a condition that hold even if the symptoms appeared afterwards and the disability were reversible.[15] (6) Here the court's language becomes prescriptive, as if it were judging in hindsight the conditions of consent and setting a standard for future practice.[16] "It is not enough," the court record states, "that the marital contract be accomplished in circumstance adequate only in appearance" (between parentheses it adds, "marriage as a contractual fact, *Matrimonium in facto esse*"). Citing a battery of rotal precedents, the court enumerates the constituents of a "qualified marriage," namely "coexistence according to its primary object (*mawdu'*) to achieve the spouses' good, to bear and raise children, and to continue for a life time this very important project." (5)

[15] Cf. M.U.F.I.C. dec. no. 61/90, July 9, 1991 in Q.K. no. 38, 9, and M.U.F.I.C. dec. no. 5/93 in Q.K. no. 41, 103.

[16] It is also at this point that the judicial hermeneutic of souls interlocks with the extrajudicial pastoral case that must precede the marriage (even though pastoral care remains external to the judicial domain. The Code of Canon Law has this to say about pastoral care:

> "Art. I. Pastoral Care and Those Things That Must Precede the Celebration of Marriage.
> "Canon 783 - §1. Pastors of souls are obliged to see to it that the Christian faithful are prepared for the matrimonial state:
> 1° be preaching and catechesis adapted to youths and adults, by which the Christian faithful are instructed concerning the meaning of Christian marriage and the obligations of spouses to each other and the primary right and obligation which parents have of doing all in their power to see to do the physical, religious, moral, social and cultural upbringing of their children;
> 2° by personal preparation of the parties of the marriage, by which they may be predisposed to that new state."

At the root of the psychological causes preventing the parties from continuing this project was their "incompatible temperaments (*tanafur al-tib'*)," which means that the "reciprocal characters [of the spouses] have nothing in common." (6) And, since they do not, the mutual consent they were required to exchange, "considered a single act unifying their intention" and a necessary condition of the validity of marriage, is invalid.[17] For this to be established, the incompatibility of their temperaments must be determined. To do so, the ecclesiastical court relies on two sources, witness accounts and psychiatric evaluation, each constituting a technique targeting an aspect of the person. Witness accounts are a series of remarks concerning the defendant's actions, words and conduct.

The court begins the work of interpreting these signs in order to answer the first question, whether simulation had taken place. The whole process rests on "remarking," "noting" or "noticing"—*lahadha*—signs, an expression recurrent throughout. The court first "notes the following" remarks, mentioned by the witnesses. The husband, for example, "noticed, just two weeks before the wedding, the wife's authoritarian tendency," while his parents "noticed [during their] first visit to the wife's parents' that [she] was very strong and controlling of men, just like her mother, [and that] her father was silent and did not say a word." The husband's coworker also "noticed, as others had, that '[the wife] was everything, and that she was the first to initiate conversation …'" She even "drew his attention to" these observations, just as other witnesses had "warned him of the consequences of marrying a woman whose conduct indicates her authoritarianism and her incompatibility with him." (8) Against this

[17] The court quotes the following rotal reasoning, which I translate in full from the French citation: "Their consent does not correspond to a criteria of validity … nullity can be legally recognized … from the fact that at the moment of exchanging consent, each spouse did not conscious of the intentions and tendencies of the other, and that they were not capable of reciprocal adaptation due to the abnormality of their characters."

surface reading stands certainty. The husband's coworker, while noticing some aspects of the wife's conduct, "knew well [the husband's] unique qualities." His sister "said of him that 'he is of superior morals, gentleness and conscience …'" The former also "knew that he was not of weak character."

These recollected suspicions towards the wife are confirmed by the problems between the spouses after the marriage and, more importantly, by a psychiatric evaluation.[18] The court recognizes that the preceding accounts identified signs of incompatibility between the spouses, but they have nothing to say about the wife's intentions prior to the wedding, which is necessary to conclude that simulation had taken place. To do so, the wife's congenitally abnormal temperament must be established. Psychiatry, employed to uncover the wife's "intention—at least implicitly and within herself—regarding her commitment to a marriage lasting a lifetime," assists in accomplishing the task. It is important to note here that the role psychiatry plays is limited to the formulation of "scientific" statements concerning the spouses' characters. It is up to the court to provide the links between a person's intrinsic character, intentions and motives.

According to the case record, the psychiatric evaluation was based on the examination of the husband and "pondering (*tama'un*) his and the witnesses' accounts." The conclusion, which the court cites in Arabic as well as the French original, provides an explanation of what has already been remarked about the spouses' relationship: "Misunderstanding due to a virile character inherent to [the wife's] personality." (9) Her intentions are obvious from the

[18] The doctor's full report is apparently attached to the case record, but is not published. In the Arabic text, no distinction between "psychology" and "psychiatry" is made, the word "*nafsi*" used to refer to a class of scientific diagnosis of the "inner world" of individuals. However, the specificity of the discourse may be inferred from the case.

facts: fully aware of the meaning of a "Christian or Maronite marriage," she refused one of its necessary conditions ("harmonious existence with her husband"). The court infers this from her initial decision to postpone the marriage, away from which her mother's insistence has swayed her. The link between the respondent's intentions and her personality is an unconscious "motive (*dafi'*) attached to (*mutalazim*)" to the latter. (9) The implication of this is that the wife could not have acted otherwise, despite her awareness of the meaning of marriage. She had not only "implicitly" intended not to continue with the marriage, but by her very "psychological constitution (*takwiniha al-nafsi*)" could not do so. This psychological determinism is necessary for the court to ascertain that simulation of consent has indeed taken place, thus answering the first of its questions. (9)

The second question—"Was the marriage void due to psychological incapacity linked to natural incompatibility between the spouses' temperaments (*tiba'*), making it impossible to carry out the burdens of conjugal life …?"—is addressed in the second part of the third section. The same method is pursued, whereby witnesses are examined to provide clues about the spouses' relationship. The investigation follows along three sequences of accounts: the petitioner's, the witnesses' and the psychologist's. The husband's account may be said to be a narrative of violence and isolation, in which the wife's hostility gradually intensifies, at the same time as the spouses' life becomes more and more introverted. The starting point is the wedding, when the wife refused to allow the husband's aunt to attend, and his attempt to convince her otherwise only led to her "losing her temper … yelling and screaming." (9) In the following months, their relationship deteriorated further, due to the wife's "authoritarianism and stubborn impulses" and her "refusal to concede any of her convictions." The breakdown reaches its climax internally, when the wife turns away "even

from preparing food … and other household work," and with their "complete disconnection from any social relationship with the outside." When things reached this point, they both "agreed to put an end to this tragic situation." The witnesses—all of whom were from the petitioner's side—confirmed that state of affairs, focusing mostly on the wife's independence, authoritarianism and obstinacy. (10-11) Their conclusions were inferred from the wife's conduct (*tasarruf*): "she behaved obsessively and with intolerance," observed the husband's father; his sister noted that the wife "was independent in her conduct"; the wife "could not perform any role contrary to her basic authoritarian and selfish character," accused the colleague; the brother-in-law "noticed immediately that the atmosphere was not right" after she only "greeted him and stayed in her room." (11)

According to one witness, the wife made explicit her desire to end the marriage, threatening to "throw herself out the balcony" if any member of her family intervened to mediate between her and her husband. What all the witnesses also emphasized was the total breakdown in the familial and, more generally, the social relationships as a result. Due to the wife's conduct, the social and moral order was falling apart, and it was doing so violently. Indeed, many of the accounts complained of the violence of the situation, such as the bother-in-law's statement that "he found both in a state of revolt (*thawra*)," or the preceding remarks on the part of the husband describing her yelling. The sense of collapse was also expressed in the two figures of the police and alcoholic, as if existing at the two extreme poles of state power and individual inebriation—two faces of the irrational. The husband described the wife's conduct as being "similar to the gestures of a traffic policeman," which some witnesses confirmed. His father invoked an historical image of the 19th century ruler of the mountains of Lebanon, whose tyranny she exceeded. In his description of her obsessive

conduct, the father likened her to someone who had had "a couple of bottles of *'arak* to drink." In contrast to the wife, who "ought to have changed her independent conduct and consider the interest of her family," a trait she had acquired from "her mother and aunts," her father is "a well-intentioned and forgiving man, and is an employee …" (27)

The problem the ecclesiastical court has to face is not only how to maintain or preserve the sacrament of marriage, but also how to prevent the social order from violently breaking down: the religious and social orders are intertwined. So far, the case record offers an image of social disorder, signified by a flawed marriage; but it also delineates the conditions of a successful one, namely, a "normal" psychological state and moral character. The former consists in a person's living according to her assigned gender role and a particular order of relations between the sexes. What constitutes the foundations of that order? The third sequence, construed by the psychologist's evaluation, lays out its features. The "doctor's" report "described in detail the upbringing of both spouses" based on interviews—"including a scientific ability test"—with the petitioner (i.e., the husband), and taking into consideration witness statements. (12) According to the doctor's report, the husband was a "womanly man indulging (*al-nuzwa*) rapidly in domination and in attaining [Platonic] (*'udhri*) goals," while the wife was a "manly woman." The doctor ascribes this outcome to the respective families each grew up in. The husband was raised as an only child among sisters, and "received the affection of his mother who knew how circumvent the interference of his father in his conduct." In contrast, the wife grew up in a household in which her mother had the last word. (12)

The doctor's conclusions were that the two characters were incompatible, that "each personality evolved in a family milieu that reinforced its independence," that each was

"structurally different from the other … and cannot meet and understand each other," and that "following from their emotional immaturity turning into psychological incapacity in accepting the other as is, it was impossible for them to undertake the burdens of a settled and stable marital life, which requires constant exchange …"(12) The court is not satisfied with these conclusions, but adds its own interpretation as a final step before issuing a decision. The court interprets the preceding conclusions as implying that "it was impossible for the husband to surrender his role as head of the family, with the persistence of his impulse to satisfy his desires as he got used to in his relationship with his mother," while the wife "more than the husband, held onto her role and her peculiar character, i.e., the manly woman, and her stubborn authoritarianism …" (13)

Finally, after finding a "perfect resemblance" (*halatuha mushabiha tamaman*) between this case and a rotalian precedent, the court declares the marriage void due to "simulation" and "psychological incapacity linked to natural incompatibility between the spouses' characters, making it impossible to undertake the burdens of marital life …" (13)

What remain unarticulated in this case are the presuppositions about sex and gender upon which the whole investigation rests. In fact, the whole of public order rests on sexual and gender normativity derived from a naturalism that designates the respective position of men and women. Witness accounts as well as the psychiatric evaluation is determined by these assumptions, which enable both to observe the wife's conduct, her relationship with her husband, discern what appears to be "strange" and enunciate it at court in a manner that seems natural, or taken for granted. What undermines this order—and this is the court's strategy to enforce the naturalness of that order—is a defect of nature rather than an individual's intention. The intention is acknowledged; however, its effects are denied, or

bypassed, in favor of the causal force provided by an unconscious motivation "attached" to a psychological essence. The wife was not to blame for her error, because she was misled by a motive of which she was not aware, and the discovery of which must await the ecclesiastical court.

Psychic Incapacity

Salwa and John met and became friends while members of an apostolic movement.[19] Their friendship developed into mutual love that culminated in marriage. (M.U.F.I.C. 1988: 2) Salwa was intent on building a successful Christian family, which involved commitment to Christianity and attention to her husband's health. (3) However, a year before the wedding, the latter had collapsed, after which he suffered from stomachaches. The gastrointestinal specialist who examined John suspected that the source of his problem might be neurological and, accordingly, deferred him to a neurologist. With the test results conducted by the latter being negative, the couple did not see any impediment to the marriage, which was "crowned by the child Richard." However, the husband's pain continued to undermine the "peace of common life," ending it with a "permanent separation" two years after the wedding had taken place.

The ecclesiastical tribunal poses four questions in order to proceed with the case. First, "Is the nullity of the marriage proven in this case due to the husband's dangerous (*khatir*) mental illness that disables him from bearing the serious (*khatira*) responsibilities of marriage? Or is it so due to an error in [the person's] essential attribute?" Second, "Was the marriage … void due unfulfilled conditional consent on the husband's part?" The tribunal

[19] M.U.F.I.C. dec. no. 50, February 10, 1988 in Q.K. no. 8, 1-35.

added a fourth question to the three raised by the plaintiff: "Was the marriage … void due to the husband's psychological inability to bear the fundamental burdens of married life?" (5) It justified its adding of this question by reference to a rotal precedent which argued that "psychological incapacity … is sufficient reason to nullify a marriage." After laying out the legal principles that would frame its investigation, the tribunal then proceeds to examine the "facts" concerning: the husband's dangerous mental illness, the quality of the person at the time of consent, whether consent was conditional, and the husband's psychological incapacity and its effects.

The first step in the process is to hear what the "medical experts (*al-'atibba' al-'ikhtisasiyyin*)" have to say, as "their opinion … [offers] the venerable judges the basic assistance to understand the nature of the ascribed ailment …" (16) However, it is the tribunal's task to determine whether the "ascribed phenomenon constitutes the legally appropriate reason" for the marriage to be annulled. The ecclesiastical tribunal is thus an articulation of medical and psychiatric knowledge, legal principle, and the moral and religious doctrine upon which the latter is based. While the ecclesiastical tribunal authorizes medical expertise by the way it uses its knowledge, it derives its authority from that expertise as well. When the tribunal states that "the doctor … declar[ed] … to the couple … that there is no objection to contract the marriage" the tribunal gives weight to the doctor's opinion on marriage, its conditions and implications. Moral instrumentality increases the value of the medical expert's knowledge of health and disease.

At this point in the case, the defendant already turned into a patient. Despite the tribunal's care not to draw any conclusions about the state of his health and its relationship to the marriage, he is already constituted as a silent patient, as a mute medical subject. The only

voices echoing between the lines of the case are those of the medical experts and the tribunal. "He succumbed to a sudden nervous stroke," "he suffered from gastric pain," the doctor … tried to treat him," he had an "electroencephalogram," and so on. The tribunal delves into more details by citing excerpts of the report. Organs and parts of organs replace "him," "wave points in the [not his] left temporal lobe," "electro-clinical crisis" or "convulsions of the head and upper limbs." Significantly, all pronouns that may offer a trace of the husband are dropped in the cited report. Despite all this, however, the doctor found him "sound (*salim*)." A few lines later he emerges transfigured in the text explicitly as "the afflicted." (17) Although it is "difficult to conclude that he is epileptic," he is characterized by "symptoms (*'awarid*)" that witnesses could "describe," such as "a violent tendency." That tendency justified "subjecting him to psychiatric expertise to determine its apparently psychological source." Having thus "failed" the medical exams, the husband-patient is now transferred to psychiatric examination. The tribunal "presented (*'aradat*; also, exhibited, exposed) Mr. John to [the] doctors …"

Based on "two styles (*'uslubayn*) of psychiatric expertise, the more important of which being the psychologist Herman Rorschach," the expert concluded that John was normal. Any reference to John disappears again in the conclusions the tribunal cites: "It is difficult to determine a well defined psychological illness." Nevertheless, there was something to be said about the patient, which the tribunal states by citing a passage of the report in French: "the salient features show a neurotic mental 'organization' of the obsessive type … certain indications emerge in favor of a character with paranoid inclinations concomitant with the basic mental structure …" The tribunal interprets this in terms of a distinction between "mental appearance (*al-madhhar al-fikri*)" and "capacity to reason (*al-qudra al-'qaliya*)" to

issue a concealed judgment about "the man," whose figure reappears in the following lines. The tribunal found that "the man's mental appearance with respect to his capacity to reason was preserved." However, some "'lacunae' remained, which it is appropriate (*yaslah*) to attribute to troubled (*'idtirabiya*) reactions toward varying degrees of responsibilities …" The text does not offer the possibility to conclude categorically whether it was the tribunal or the expert opinion that articulated "scientific" categories into moral ones in this manner. That the passage was not a citation and was in Arabic rather than French seems to suggest that it was the tribunal's.

Whatever the case may be, the statement makes clear the articulation of medical expertise and moral authority for the purpose of judgment. In fact, a sharp distinction may be drawn between the two paragraphs. In the first, "scientific" paragraph, any reference to a subject is absent, the text being limited to observed objects—features, signs, indices—that "show (*montrent*)" an "organization," a "structure," a "type," a "character" and so on. These signs and indices "pose themselves (*se posent*)" to the view of the distant gaze of the expert. The report is a mere transcription of the latter's observations. The second paragraph describes "appearances" versus "capacities," and "lacunae" versus what is likely to be completeness. These terms make sense only in relation to "the man" that stands at their center, a man who "reacts" towards "responsibilities." The descriptive positivism of the former paragraph is replaced by a normative dualism of judgment in the latter.

The same uncertainties characterize the discourse of emotions—and it is equally difficult to distinguish between the tribunal and the expert. "It appeared from the tests," the tribunal states, but it does not specify to whom it appears so, leaving the reader wondering about the identity of the agent of interpretation. It appeared, then, that "the man tends towards

introversion, and that a 'restrictive logic (*al-mantiq al-hasri*)' dominates his relationships with others …" Another aspect of the person is revealed in this analysis, as an entity characterized by an interiority that receives, processes and adapts to external impulses. An abnormal—or introverted—person, such as the defendant, "is characterized by a relative difficulty accommodating (*al-'insijam*) a sudden external shock, be it psychological or physical."

Neither the report nor the tribunal explains what the interiority and exteriority of the person consist in, and from the preceding statement it seems that both psychological and physiological impulses are taken to be external. As already stated above, consent consists in an internal act, but that act is the result of neither psychological nor physiological causes, but a presupposed will. Consent is the declaration of this will, its realization in an active form, although it may still be undermined by psychological or physiological disabilities. The expert's psychiatric discourse may be thus easily transcribed, or recoded in terms of the tribunal's moral theology.

The discourse—both clinical and juridical, for at some points the judge as speaker is not easily distinguishable from the expert—moves in a series in which neurological, psychiatric, psychological and moral statements are linked by means of ambiguous connectors such as, "reveals," "there are indications," "parallel," "appropriate to ascribe," "is inclined to" and so on. The ecclesiastical tribunal leaps, for instance, from the observation that the man experiences anxiety to the prediction that it "might (*qad*) hinder deep human relations." (18) Similarly, the man's "attentive[ness] to neatness, obligations and cleanliness …" is interpreted as "aspects that reveal the man's personality."

It is worth pointing out in passing that the tribunals uses the Arabic word *al-rajul* in such a way that it could mean any man, the particular man in question, and universal Man, which complicates further the efforts to delineate clearly the discourse's level of generality. It is sufficiently clear, however, that the tribunal is careful to distinguish between "the man" or "the patient"—the subject of medical expertise—and "the husband" or "defendant" as a juridical person. The two are non-identical and make their appearance in different passages: "the man" figures in medical tests, whereas the husband is the tribunal's target of interpretation and judgment. In neither case is the subject a speaking subject, and the connection between the two subjectivities, that which turns the man of medicine into the person of religion, morality and law, is the tribunal and its hermeneutic skill—the tribunal enunciates both.

When the man does speak, the tribunal sees a "direct admission (*'i'tiraf*, also confession), while he is in a state of psychological relaxation (*wa huwa fi halat 'istirkha'in nafsaniyyin ma'a hadha al-'akhissa'i*)." The man is thus not a speaking subject, but is induced to speaking due to the inducement of an expert's technique, and that is what bestows credibility to his words. The sentence articulates accurately the psychiatric and legal domains: "The man's direct admission … is worth attention and belief. And we shall return to the husband's sayings later." Interestingly, the tribunal takes the man's "state of psychological relaxation," mediated after all by the expert, to be "direct." Whereas the sincerity of consent, which is the condition of marriage, resides in the free will of the one who consents, in the psychiatric discourse the man speaks the truth exactly when his will is absent. It is the same condition that converts his speech into "sayings," into floating words the tribunal would eventually examine as the medical expert would examine organs, lobes, tissues and functions.

After noting a slight concern about the man's capacity for "profound human relations" and some "sexual problems" he had complained about, the psychiatrist concludes that the man is after all "not disabled." The tribunal then cites the doctor's summary of the "results": first, any psychological and neurological illness "must be ruled out." However, this "does not prevent saying that John suffers from problems with his environment—especially with his wife—because of his 'obsessive personality' and strict upbringing." John was summed up as having "behavioral problems (*troubles du comportement*) … a sentiment of inferiority," and as being "neurotic … obsessive … slightly paranoid …" However, the report articulates these with a scientific terminology, such that his behavior and sentiments are tied to a "psychic structure," his obsession and neurosis are a "type" of structure, his paranoia also a type indicated by "'accessory' traits … (sthenicity, suspicion, psycho-rigidity, aggressiveness)." The report continues, "the 'crises' belong to the frame of acute neurotic reactions, or 'hysterico-anxious' … always 'reactive' acts of violence, because of an increased internal psychic tension due to latent anxiety …" The doctor interprets this as a "mode of self-defense to regain what he has lost or what he thinks he has lost." (19)

The doctor is not restricted to diagnosis, but is asked to formulate a prognosis of the man's state *and* the future of his marriage. Upon the tribunal's questioning, he noted that despite the "difficulties regarding intimate relations between the spouses … Mr. John … is qualified to take on the responsibilities of marriage …" Those difficulties were not "proof that either party is unqualified, but an inevitable result of a marriage in which both parties unconsciously imagined to find through it solutions to their hidden psychological problems."

After John has been analyzed by a series of clinical tests into organs, symptoms, types, structures and so on, the tribunal picks up the fragments to constitute an image. That

imaginary construction of the defendant-patient-husband is necessary, because without it a judgment, and therefore a decision, cannot be made. That clinical image is juxtaposed to—or overlaid on—a presupposed moral-theological one, and it is through their difference that judgment passes. The tribunal presents the clinical image "objectively" to itself; the judges were asked to "picture objectively the nature of the psychological state in the defendant's person." However, that picture can only be pictured as an alternative—and altered—person. The very possibility of judgment and decision depends on this presupposed alterity that gave rise to the tribunal proceedings in the first place. Without that alterity—presupposed in the Sacrament of Matrimony itself—the tribunal would not have met. The tribunal has always been, so to speak, the horizon of the Sacrament, inhabited by its other, constantly undermined by it, and constantly pushed by it towards its paradoxical self-annihilation—annulment.

Despite the tribunal's efforts to present the clinical image "objectively" as the experts have drawn it up, the fact is that it was the tribunal's interpretation. The expert's reports occur in the case record as interpretation, as isolated statements selected, transcribed and sometimes translated into Arabic by the tribunal. The clinical and moral-theological persons are, therefore, mutually constituted in tribunal, rather than already given entities that happen to collide in tribunal. The presumed objective presentation is thus a pretext for judgment and decision, for evaluation and valuation, the culmination of the whole ordeal ("people's suffering") that acquires its sole meaning in the termination of that ordeal. Based on that image, the tribunal "will say whether [John's psychological state] is just a difficulty—even if major—or is in fact a chronic condition (*hala mustamirra*) that would decide the man's incapacity, at least regarding marriage, to carry the burdens of family life …" The tribunal's

concern in its attention to the possibility of a chronic ailment is not medical but legal, for a marriage would be void only if that condition determined the nature of consent. In other words, it must have existed prior and continued at the moment of consent. The possibility of an event, or in other words of a sudden psychological crisis coinciding with the act of consent, is more difficult to prove.

Significantly, it is the judge's task to establish this constancy of John's psychological state, hence subjecting the clinical reports to further interpretation. The tribunal distinguishes between "a difficulty—even if major," on the one hand, and "a chronic state" on the other, and links the latter to the moral notion of "capacity to undertake the burdens of family life." How does the tribunal do so? "The venerable judges tend to say," the case record writes, "that John is not afflicted by a clear illness." However, the doctors "agreed … that the man … is afflicted by a defect in his psychological constitution of the central nervous and anxious type …" (19) The "signs" of this clinical discourse "appear … in 'intimate' relations as well as in family life, and especially with the wife, with whom these negative relations appear more easily." The relationship between the discourse and the signs that carry it is obscure, as are all the relations between the clinical discourses and their moral-legal implications the tribunal labors to articulate.

For instance, the report concludes that the husband's aggressive reactions were that of a "type of personality" characterized by "relative intolerance towards external stress, be it psychological or physiological. The tribunal rearticulates this conclusion in order to enable itself to make a link with its own notion of person. The tribunal's interpretation was that "the reactions towards the psychological or corporeal (*al-jasadi*) event, as [the] doctor … said is all psychological and corporeal at the same time," which converts the physiological stress the

report mentions into a corporeal cause—and effect—and thus inscribes the clinical view in its Christian metaphysical dualism of personhood. The reactions are "all psychological and corporeal at the same time," "their source is, rather, 'psychological,'" "or they bear directly on the man's psychology." The tribunal's effort to link the psychological and corporeal is normative, aimed to emphasize the "profound and constitutive unity of the person's human forces and his qualities (*al-wihda al-'amiqa w al-takwiniyya li qiwa al-shakhs al-bashari wa sifatihi*)." These qualities and forces are "reason, will, body, soul, heart and conscience," the unity of which is necessary to validate the marital bond, and which stands opposed to the disunity that would justify its nullification.

The tribunal is at pains to make the link between the clinical conclusions and the annulment decision, for John has been considered so far clinically normal. Yet, the tribunal sees a causal relationship between his symptoms (*'awarid*) and the failure of the marriage: "different symptoms … constitute a real disability in the defendant … [which] appeared before the marriage … and led (*'addat*) after a while … to the marriage's ultimate failure." (21) What "led" meant, and how that assumed disability leads to the failure of the marriage is not yet clear, but "it is up to the judge to base himself on science and psychiatric expertise, in order to surpass [the difficulty to define the defendant's ailment] and decide what he sees to be applicable to the law (*al-qanun*) and the facts."

After ruling out the plaintiff's claims regarding her husband's severe mental illness, error in the qualities of the person, and conditional consent, the examination proceeded to investigate the relationship between "psychological incapacity and its effects on common marital life." (27) This statement sums up the ecclesiastical tribunal's view of medical and psychiatric discourses in general, and on health and pathology more specifically. The

conclusions of expert reports in themselves are meaningless for the tribunal, and whatever illness they indicate is pathological only in relation to life. Unlike the positivist view of phenomena as quantitative facts, the tribunal conceives of pathology to be essentially meaningful, and hence its winding interpretive efforts of expert reports in every case. What is pathological for the tribunal is so only in as much as it relates to the specificities of a concrete mode of life, in this case marital life. This relativist view of pathology carries, paradoxically, absolute consequences, for it dos not accommodate variations and alternative possibilities of marital life and, therefore, excludes difference. In other words, it draws an opposition between a normal marital life and an abnormal—impossible—one.

The value of clinical tests and their conclusions—and there lies crucial difference in the tribunal's view of pathology, namely, that it is inseparable from qualitative value—is brought to view in relation to the circumstances of a lived marital life. The remaining part of the case is dedicated to that purpose. The tribunal highlights two aspects of Salwa and John's life together: his crises, and their "intimate relation[s]." (32) If the tribunal could show that John's "psychological incapacity" is negatively affecting either or both aspects, then it would have sufficiently good reasons to annul their marriage. Regarding the first aspect, John's crises and their effects on their marital life, the problem facing the tribunal was to determine the relationship between the conclusions about his psychological state and his actions.

Now, according to clinical reports, John was "mentally sound (*salim al-'aql*), and therefore his awareness was sufficient to contract a correct marriage [in terms of consent] …" (27) However, the tribunal distinguished between the "human act" and the "commitments following from" the state the act gives rise to. There was not doubt about the soundness of John's consent; however, his commitments to the marriage began to break

down gradually until the couple could no longer live together. The doctor "ascertained Mr. John's … mental capacities … 'but [he wrote in his report] that we do not consider him responsible for the consequences of his negative behaviors during his nervous breakdowns (*nawbatuhu al-'asabiyya*).'" (28) This opinion raises a number of questions concerning the consequences of actions, responsibility, and the relationship between science and morality; what is relevant here, however, is the way the tribunal interpreted this statement. "If the defendant," wrote the tribunal, "loses control over his decision to employ violence … even if initially he does not intend to cause direct harm … he remains susceptible to commit an explicit criminal act, as the limit between criminality (*al-'ijram*) and non-criminality is lost between the moment of sufficient consciousness and its absence." The defendant is thus innocent of a crime, for he is in control of his initial decision and is clear about his intentions. The consequences of that decision, however, are unpredictable not because of some external accident, but rather because he himself might commit a crime inadvertently if he loses "sufficient awareness." That potential for losing awareness during an act resulting from a conscious decision is "a psychological disability that makes the marriage void," according to rotal precedent.

Here is revealed another ecclesiastical assumption, namely, that the person is essentially rational, capable of making decisions, and whose actions are intentional and follow from an act of will. The tribunal takes this as an incontrovertible given, and directs its efforts to seek those external causes and conditions that undermine it, causes it restricts to what medical and psychiatric practices could diagnose.

Having identified the object of investigation to be John's actions and behavior during his breakdowns, the tribunal proceeded to examine witness accounts, including John's. (28-30)

The witnesses offered descriptions of John's behaviors and actions, whereas John's descriptions of himself during what the tribunal and the experts called breakdowns consisted of sentiments and sensations. He told the tribunal that he "was exposed to aches in his stomach," (30) that he "felt like he was suffocating" (literally, " as if a tightness of breath lay on my chest"), "accompanied by sweat on my brow." (31) The tribunal cited a passage from the report in which John described his breakdowns to the doctor: "Following an increased internal tension of an emotional or other origin, I feel like a muscular spasm and trembling through the body, a feeling of suffocation [and] faintness, followed by a total loss of my forces, without loss of consciousness. I become flabby, incapable of talking, but I still hear what happens around me."

However, the problem for the tribunal are John's actions, which bear on marital life—not even his behavior was important to the case, except as a source of signs about his mental and psychological conditions. More specifically, it was not his intentions behind the action that was relevant—despite his declaration of what his intentions were—but their unintended consequences on marital life. Interestingly, despite John's physical experiences as he described them, he still could relate his intentions during the breakdown to his interlocutors. This brings to light the significance of citing John's description of his physical experiences, for they allow the tribunal to identify a sequence of physical stimuli, originating in John's body and ending in a possible murder of his wife, over which John has no control despite being fully conscious.

This "materialism" guided the tribunal's interrogation of the second aspect of John and Salwa's marriage, besides his breakdowns, namely, their "intimate relations." (32) The tribunal associated intimate relations with "emotional maturity, which often leads to human

maturity (*nudj bashari*)." This formulation did not make any explicit reference to sexuality and sexual intercourse. However, in the statement that immediately followed, the tribunal introduced "the sexual side (*al-nahiya al-jinsiyya*)" through the mediation of "experts (*al-akhissa'iyyin*)." Both of the consulted experts "noticed a sexual lack in the man," despite what the couple claimed in their respective depositions. The wife had stated "that sexual relations were 'normal (*tabi'iyya*, also natural) as far as she knew," and the husband "agreed in his first interrogation (*'istijwab*)." He then changed his mind apparently, claiming that "marital relations were not up to the level of harmony (*'insijam*) about which could be said that the couple became one body (*jasadan wahidan*)." This complete carnal union, which is one of the aspirations of the mutual consent at the core of the Sacrament of Holy Matrimony, was not reached, according to John, because of "a lack that made both of them uncomfortable with the physical relationship …" (33)

The expert explained the "couple's situation (*ma kana 'alayhi al-zawjan min al-nahiya al-hamima*)." According to him, "the wife is frigid, and her husband says that he never felt her to have reached the climax of comfort (*dhurwat al-'irtiyah*), whereas the wife accused him of being 'quick' and admitted (*'i'tarafat*) that she did not always reach what the point that was supposed to be reached in this situation (*lam takun tatawassal da'iman ila ma huwa mafrud fi hadhihi al-hala*)." The tribunal interpreted that state of affairs as a "lack in the means of expressing mutual marital love, as Pope John Paul II had taught in his letter … '*Familiaris Consortio*' …"[20] However, that relationship between the spouses is not to be reduced to its carnality, for it plays "an fundamental role in cultivating the spouses'

[20] The letter is available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html (retrieved August 9, 2010).

personality and their vivacity together to assume their common duty towards their children and their children's education."

Based on the above, the tribunal decided, "in the name of God the Almighty," that "Salwa … and John's marriage is null due to the husband's incapability to assume the burdens of marital life in this case," and that he is "prohibited from marrying again before the competent ecclesiastical authority allows him to do so, based on the opinion of a psychiatrist (*tabib nafsani*) declaring (*yusarrih*) John's capacity to assume the burdens of marital life." (35) Importantly, the tribunal ends the decision with the injunction, "must be appealed."

Pathological Anatomy, Pathological Physiology, Psychology

The final case to be analyzed is almost symmetrical to the preceding one. It involves the wife as defendant, and whereas the man's psychological and physiological functions were examined there, in this one, it was the woman's anatomical features, in addition to her psychological capabilities, that were the suspected causes of the problem. The couple's problems had appeared "during the period" when they were still getting "acquainted" with each other ("*'athna' fatarat al-ta'aruf*").[21] (M.U.F.I.C. 1988: 54) The husband discovered "that his future wife was reluctant towards an explicit physical relationship," and "immediately took her to [a] doctor … a specialist in this matter (*al-mawdu'*)." Afterwards, they visited a "specialist in psychiatric medicine" who, after listening to "Miss Eleanor's condition was not enthusiastic about [their] marriage (*lam yakun mushajji'an 'ala al-zawaj*)."

[21] M.U.F.I.C. decision issued August 05, 1988, in Q.K. no. 7, 53-93.

Indeed, the marriage did not "succeed," the wife having "kept rejecting a relationship with her husband, despite her previous promises … to control her reservations and anxieties (*makhawifaha*)." This state of affairs "being as it is," the couple consulted a "gynecological surgeon … to carry out a 'vaginal widening' operation …" in order to "end the organic (*al-'adwiyya*) tensions and facilitate the swift physical relation (*al-'ilaqa al-jasadiyya al-sari'a*)." However, the problem remained, and kept degenerating until she reached a point at which she could no longer live with her husband "under the same roof … making sure that a third or more person" were present. More medical attention was brought to bear on the Eleanor, who tried "artificial insemination," which failed, and agreed to see a "sexologist" whom she saw "only once." With the husband desperate and confused, they couple "went the way of moral and spiritual [i.e., pastoral] consultation," to no avail (55) After continued efforts on the husband's part, the wife finally stopped seeking assistance, and "expressed her ultimate intention, which … she would repeat during every attempt for a sexual relation, to put an end to her legal relationship with her husband."

The ecclesiastical tribunal restricted the question in this case to one: "was the marriage void due to the wife's incapability to assume its essential obligations and duties?" The judge defined "the notion of incapability [to] include … both anatomical and psychological aspects." (56) The tribunal attached its initial question to "two additional components" pertaining to the time before and after the marriage was contracted. (66) Effectively, the tribunal needed to know more about the conditions of the marriage, whether it took place "according to custom and law" and, therefore, whether "cohabitation … including physical acts" became possible. (67) The tribunal was particularly interested in the history of "the physical and psychological" problem between them, whether it existed prior to the marriage,

and if it "may be treated or may heal" in future. If not, the marriage would be considered as having been "decided but incomplete," and the current case analogous to cases of "non-consummation."

A procedural problem faced the tribunal, however, following from the nature of the evidence required to ascertain non-consummation, which depends "on the couple's integrity (*misdaqiyya*), and on what the closest and sincerest of witnesses knew directly and with certainty." Moreover, the Vatican allowed ecclesiastical tribunals, in order to assist in proving non-consummation, the use of tape recordings of private conversations between the spouses, or between them and someone else. It was also the judges' discretion to decide whether to do so or not, based on his assessment of the available evidence. The tribunal saw the advantages in this technology in the possibility of recording conversations without drawing the interlocutors' attention and, therefore, of "allow[ing] the tribunal easy access to the relevant persons' psyche (*nafsiyya*)." (68) This constituted an obvious breach of individual privacy and personal rights, and while the tribunal asked itself whether it is justified or not, argued as follows. It recognized that "the system of public freedoms (*nidham al-hurriyat al-'amma*) deriving from the charter of basic human rights prohibited (*yuharrim*) the interception of private [communication]." But, it pointed out that the prohibition could be suspended under "exceptional circumstances that threaten public safety (*al-salam al-'amma*)." What was it in the intimacy of sexual intercourse that threatened public safety? Here is how the tribunal reasoned. "Concerning marriage," it wrote, "the Church connects the fate of a marriage to public good and the salvation of souls," and grants the judge discretion to decide which "evidentiary means, written and oral" to employ.

So the tribunal decided that the evidence presented by the husband was valid, for in this case the fate of the marriage was connected to "his private right and to public good." (69) However, the use of the material, which consisted of taped phone calls between his wife on the one hand, and her mother and sister on the other, should remain confidential.

That evidence did not replace what could be elicited from the parties to the case. The tribunal then proceeded to verify their trustworthiness by cross-examining witnesses, most of whose accounts focused on the couple's "devotion (*al-ta'abbud*)" and "honesty (*al-sidq*)" in everyday life. (69) The distinction between devotion and honesty implied a distinction between external acts and behaviors and the internal world of conscience. Whereas the former was observable, it did not necessarily entail that the person was sincere. Sincerity could be inferred from—and implied—a certain knowledge or familiarity with the person, although by itself was not enough for an ecclesiastical tribunal. The ecclesiastical—Christian—witness was, by definition, devoted and honest. According to the wife's mother, Eleanor was "devoted to St. Rita and is honest," while Sammy was "known for his devotion to the saints and his religiosity … and [was not] dishonest." The defendant's sister confirmed "Eleanor's sincerity and her devotion to St. Rita," and asserted that "Sami 'regularly practiced his devotional acts … and the sacraments.'" However, she also "'noticed that … he twisted some things to his interest.'" A few witnesses later, the tribunal concluded that "the parties, especially the husband, are believable when they provide intimate information about the martial relationship." (70)

The rest of the case is a long and detailed discussion of the couple's sexuality beginning with a description of their relations prior to the marriage. According to the husband, Eleanor "complained [then] about a real difficulty to accept a physical relationship." (71) Apparently,

the husband was asked to explain the character of that relationship at the time, which he detailed with a distance between him and his—and his wife's—body marked by the distinctively depersonalized of definite articles to speak about his—and his wife's—sexual organs. "I tried … to initiate penetration of the vagina," he attested, "even superficially, by means of the genital organ or the finger." He continued, "but my wife would adamantly refuse because we were not yet married. At the time, I did not know … that [she] was suffering from vaginism (*musaba bi da' al-vaginism*)." The husband explained further that they "started an intimate relationship two months after they had met, which lasted until five months after the wedding …" Apparently, it was important to specify what that intimate relationship consisted in, namely, "clitoral pleasure, which she preferred."

The husband complained that their relationship was not reciprocal, for although he expressed his complete love for her, she, on the other hand, "was incapable of offering him sincere and spontaneous love … without psychological inhibition (*'inkimash nafsani*) …" His conclusion was that "she remained on the receiving end, as if by propriety … because she was careful to keep me as her life companion." (72) The husband's statement digresses into an account of Eleanor's life story focused on her family history, her loss of her father while she was young, her mother's second marriage, and her relationship with other women. The tribunal saw the significance of that last observation in a rotal precedent, in which the "the father's absence, when she was still a four year old girl, led her to become introverted, staying at home except at night which she would spend with a woman who had entered her life." In addition, Eleanor had witnessed her friend's abortion, which "shocked her" and added to the "deep hatred towards men" that had grown in her "after seeing her father abusing her mother, and her brothers-in-law abusing her sisters …"

During the first night after the wedding, the Eleanor "confronted the husband with a total rejection, yelling, 'impossible … impossible … it is a nightmare for me.'" (73) The active medicalization of Eleanor's sexuality, which had already started prior to the marriage the gynecologist, continued afterwards through the administration of various doses of Valium and other drugs, both oral and intravenous. The purpose of that treatment was to get her to sleep with her husband, by first helping her relax and, ultimately, subjecting her to "anesthesia." Of course, the tribunal had nothing to do with this, but the compulsion for sex already inscribed in Church doctrine about marriage articulates with the secular medicalization of marriage, the family and sexuality on the one hand, and the state's policies of public health and hygiene on the other. The assumption in Eleanor's case—an assumption the tribunal deduced from the medical and psychiatric report in analogous rotalian precedents—was that she was "terrified … from sexual relations", and that her fear "causes (*yuhdith*) cramps and acute pain around the vaginal opening."

Despite this recognition of Eleanor presumed fear, the tribunal does not question—maybe because it is not its task to do so—the conditions of her consent to be administered the drugs, which it acknowledged. Now, given that consent is a fundamental premise of the Sacrament, resulting as it must from an internal unadulterated act of will, and that extreme fear invalidates consent; and given that, the tribunal itself explicitly stated in its summary of this case, citing the Holy Ecumenical Council and the Pope's approval, that "the act of will, at least implicit, is the limit required to qualify the marriage as completed in a full physical relation according to the legal definition" (89); one has the right to ask: how come her consent to be drugged and, therefore, her consent in general, was not questioned?

At any rate, eventually, the husband lost patience with "the phase of superficial fondling on the level of the 'clitoris' [transcribe into Arabic in the text]," considering that it was time "to try correct intercourse (*al-jima' al-sahih*)." Every time she would refuse, "her blood pressure would fall, she would get a severe headache, her heart rate would increase, and she would feel sick and nauseous." (74) Although she had refused to see gynecologists and sexologists when they were on their honeymoon, she did agree eventually to go through a procedure to "widen the vaginal entry" and "the hymen, which [the doctor] found hard." As a result, the wife was more "accepting of intercourse … with increased reluctance, effort and disgust … until all contact [between them] stopped completely …"—a physical separation the consequences of which on their marriage the doctors warned them about.

The detailed description of the couple's sex life elicited by the tribunal from the husband continued. The wife kept vigorously refusing intercourse, "preferring immediate and direct divorce" rather. (75) The husband, to support his claim that was incapable of "proper physical relations (*'ilaqat jasadiyya sahiha*)," pointed out that "she is known that her favorite friends before and after the marriage were women and girls …" She would "constantly avoid being present with him alone," and the only period they did spend together for "almost one year was while her aunt and sister lived with us under one roof in her paternal house …" She "not once cooperated with him [sexually] … as if she were a block of ice …"

This whole description was aimed to establish one thing, and one thing only: the truth. Her sexuality, her body, her genitals, her fears and anxieties were subjected to the "will to truth" about her capacity to assume martial responsibilities. That will motivated the tribunal to pass judgment on her, that "had she cooperated with her husband with loyalty, she might have achieved control over her fears …" Truth and judgment were supported by science,

"models (*namadhij*)" provided by a "doctor with long and vast expertise," and which would "no doubt compensate the lack of detailed psychiatric expertise and scientific analyses appropriate to the state the defendant had gone through." The level of detail the tribunal is interested in tends towards the microscopic, demanding "precise description of the muscular and neural cramps in the region directly surrounding the vaginal entry." The doctor, interestingly, reversed the causal relationship between pain and intercourse the tribunal had presumed earlier in the case. She—the doctor, that is—"ascertained that the mere refusal of the physical relationship on the part of a healthy woman might put the aforementioned genital area in a rebellious and deprecating condition." (76)

As it turned out, the tribunal was citing from a book written by a certain Doctor Lotrario, entitled "The impotence of the woman, organic and functional."[22] The tribunal then cited a long passage it translated into French offered a graphic image of what is involved in vaginism and impotence: "a state of anxiety … memories of suffering endured [during intercourse] … spasmodic, painful and involuntary contraction of the 'pelvic floor' muscles that block almost completely the vagina by constituting henceforth an obstacle to penetration by the penis … an hyperesthesia of the hymen and vulva … lesions and malformations …" This is accompanied by a psychological and physical symptoms: irritability, nervousness, defensiveness, transpiration, crying, moaning, screaming, agitation, trembling … The doctor—"a specialist and enjoys a wide expertise," as the tribunal did not fail to remind its audience and itself—also provided a list of treatment techniques: discernment, patience,

[22] A title search of the Internet I did in English, French and Italian (the book was published in Rome, apparently) yielded no results.

scientific awareness, commanding authority, medicine, psychiatry (or psychotherapy, *al-mu'alajat al-tubbiyya*), "all together." (77)

Indeed, the list is a characteristic feature of the tribunal's approach to the material presented to it, be that witness accounts or clinical reports. The tribunal verifies the sufficient reliability of the source of its information—devoted and honest witnesses, and authoritative experts—and in the solace of that assurance, picks the elements it needs to constitute an image. From hesitant accounts of everyday life, and from the uncertain network of symptoms, causes and diagnoses that give sense to the clinic, the tribunal selects items that it could list as constitutive of the person. The person is a list of items kept together and given consistency by ecclesiastical authority.

"What did the defendant [Eleanor] say" now that everything was said about her? The tribunal saw her account to be identical to what was already revealed about their relationship. However, what emerges more prominently in her deposition is a figure so far concealed: the masturbator. The tribunal had already mentioned, in passing, acts associated with masturbation, but now a discourse opens up. This discourse on masturbation is medical and moral at the same time, and it is associated with her as a person. It serves to say more about her—and about herself, for she was the subject of that discourse, albeit not the sole speaking subject. Masturbation appeared medicalized at the very beginning, as it was medically sanctioned. It was the "doctor … who advised her of 'the secret habit (*al-'ada al-sirriyya*),' as she says," as if invoking medical authority against the ecclesiastical one this time. The tribunal seemed to counter this challenge by means of framing devices such as "she admitted (*'i'tarafat*, also confessed)" at the beginning of her statements, and "as she says" at the end. While she authorized masturbation medically, the tribunal questioned the very truth of her

claim. “But,” she wavered nevertheless, redeeming herself by telling the tribunal that “she could not ‘bear this situation.’”

The tribunal explained that situation in scientific and ecclesiastical terms. Medical experts often suggested masturbation as a way of “self-treatment,” and it involved “introducing the finger into ‘the vaginal entry point.’” It was also possible, the tribunal explained, “to use modern means (*wasa’il haditha*) to help widening the ‘entry point.’” “The husband may be invited to take part” in that procedure, “as the doctors had advised her … in order to pave the way for an attempt at a natural physical relationship.” The lesson ends with an explanation of the objectives of masturbation, namely, “to achieve the woman’s sexual relaxation by excitation through fondling ‘the clitoris.’” Having said that, “that secret habit” is nevertheless “destructive of the will, and is often the cause that destroys the family structure.” The danger, then, was a medical technique becoming a habit, rather than the practice itself. On that basis, “it was possible to say that the defendant, by admitting that she could not bear that situation, had refused the simplest available means …” to save her marriage. (78) In the tribunal’s summary, we learn that Eleanor had “mistakenly described” what the doctor prescribed as “the secret habit.” (89)

Her claims that her husband “brutally raped me with his finger,” and his “request that she sleep on top of him and copulate with him unnaturally” under the pretext that “his genital organ was sprained,” were dismissed by the tribunal. (78) The first claim was confronted by the doctor’s description of her hard hymen and tight vaginal opening, which justified for the tribunal the husband’s “behavior” as “positive and legitimate.” Regarding the second claim, the tribunal explained the virtues of the sexual position the husband had proposed, which “encouraged the woman to take the initiative and to be the actor … [thus] help[ing] the

anxious wife to control her fears and hallucinations …" This position implied, therefore, "a familiar and ordinary erection … rather than a 'sprained organ' …" The tribunal elaborated with a lesson in male genital anatomy, "preordained by God to fulfill its function"—"on condition of the other party's cooperation." (79)

The penultimate part of the case, before the tribunal's opinion and decision, consists of witness accounts. One of the declarations of Eleanor's mother, Rose, was that "Sami would insist on her [the mother] to put her own (finger) in Eleanor's vaginal entry to facilitate the conjugal relationship." (83) This piece of information is important for the tribunal, for it proves that the marriage was not yet consumed. Eleanor's sister pointed out that "the man possessed books and information about sex thanks to which he acquired masculine force … after my sister left for Canada." The sister's observation did not escape the tribunal, which asked her what made her so sure about "Sami's acquisition of masculine power." (84) Her brother provided the answer, by claiming that it was Sami who had told him, after "testing himself with another woman." (85) Another defense witness "admitted that the physical union happened after the surgery," a claim which yet another witness corroborated.

The plaintiff's witnesses testified to the contrary, namely, that the wife refused to have intercourse with her husband. His aunt claimed that "everything was failing between the couple, especially that the wife … neglected the affairs of her household and avoided staying with her husband alone in one house to avoid an intimate relationship." (86) The husband's cousin knew about the failure of his cousin's marriage "directly [because the couple] declared [it] before him and his wife …" He "imagined that Eleanor's difficulties were identical to the one's his wife had had and eventually overcome, giving birth to three children …" This "encouraged" Eleanor to "to return to her marital household," with no

result. The cousin's wife also testified that Eleanor adamantly "refused any sexual relationship with Sami and any other man …" Even the husband's maternal uncle intervened to "encourage" Eleanor, and "in a private [conversation]," she told him that she "refused all of Sami's manifestations of generosity and cajoling to her and her family because all of it 'might end … with a request for intimacy.'"

In conclusion, "was the marriage void due to the wife's incapacity to assume the marriage's essential duties and obligations?" Yes, decided the tribunal, placing a conditional prohibition on the wife to marry again before receiving the parish pastor's authorization, granted on the basis of a medical report showing that she is capable of assuming the burdens of marital life. (93)

Conclusion

Maronite Catholic ecclesiastical courts rely heavily on medico-legal expertise to examine and evaluate the spouses before they declare a marriage null. They do so in order to constitute a representation about the spouses' psychological, anatomical, and physiological states at the time they consented to marry. This practice became possible after the redefinition of marriage at Vatican II, which recognized it as an interpersonal relationship between a man and a woman. Besides the qualities residing in the relationship itself, such as love, marriage also rests on qualities residing in the person consenting to the relationship. These qualities determine the validity of consent and the endurance of the marriage bond in the future, and if found defective, invalidate the consent and render the marriage null. The story of Catholic marriage in Vatican II and at the ecclesiastical courts highlights the contingent effects of the shifts in the relationship between "the secular" and "the religious."

Adopting the psychological notion of interpersonal relationships to redefine marriage led to the introduction of medico-legal expertise into the ecclesiastical judicial process, which in turn enabled the latter to satisfy the exigencies of the Church, its adherents, and the modern state. The next chapter turns from "religious" to civil courts, and look at the intersection of marriage and conversion, and the legal and constitutional problems they reflect.

CHAPTER V
Marriage in a State of Conversion

The Problem: Conversion's Decisiveness

In February 1951 Olga and Caesar appeal to the Lebanese Cassation Court to decide if they are divorced or are still married. (C.C. 1951: 253-258) Fifteen years later, in 1967, Tania approaches the Cassation claiming full rights over her father's inheritance. (C.C. 1967: 171-172) Salah, Tony, and Hanan appear before the same court in 1970 with a petition to rule that Salah's claim to place a hold (*hajr*) on his granddaughter's—Hanan's daughter—person and properties is invalid. (C.C. 1970: 429-430) More recently, in 2002, Vivian files a complaint against her husband Ibrahim and his lawyer before the First Instance Civil Court in Mount Lebanon, petitioning the latter to annul an agreement made by the spouses to end their marriage. (F.I.C.C. 2002: 750-754) All of these cases revolve around problems arising from marriage or regarding the family, and call upon the Cassation Court, the highest judicial instance in Lebanon, to arbitrate in matters of personal status. They are not exclusive to civil courts, and both Islamic *shar'i* and Christian ecclesiastical tribunals receive occasionally their fair share. However, an important difference marks the two types of jurisdiction: civil courts make a clear decision in favor of one of the principals, whereas confessional tribunals decide to reject the case for lack of competence. Such was the outcome for Shafiqa, for example, who, on the 27th of April 1984, petitioned the Maronite First Instance Tribunal to nullify a divorce (M.U.F.I.T. 1985: 198-200) or an unidentified woman at the Higher Sunni *Shar'i* Tribunal, who wished to be separated from her husband. (H.S.S.T. 1994: 2-8) Ironically, the latter, which are the legally competent jurisdictions for handling personal

status affairs, cannot do so, while the former, whose powers do not encompass personal status, do.

What explains this jurisdictional *volte-face*? What extracts these cases from their confessional jurisdictions and transfers them to the civil courts? A common theme running through them all marks them as a particular class of personal status cases, and justifies the exceptional civil legal attention they draw. Caesar and Olga, both Maronite Catholics, converted to Orthodoxy, Tania's father, an Orthodox, purportedly had converted to Sunni Islam, Hanan, once a Muslim, converted to the Christian faith, and the Maronites Vivian and Ibrahim had agreed to convert to Syriac Orthodoxy. In the first, the Cassation ruled in favor of the Catholic decision to uphold the marriage, basing its decision on the spouses' conversion, and in favor of Tania in the second, considering her father's conversion "incomplete." In the case of Salah, Tony, and Hanan, it ruled against the maternal grandfather, again because of the mother's conversion, and abrogated the agreement between Vivian and Ibrahim because it involved, precisely, conversion. But, why is conversion a reason to uphold in personal status cases the rights of one person against another, or to dismiss a confessional jurisdiction's decision and ratify another's? What meaning or power does conversion possess to determine the outcome of those cases?

Olga and Caesar approach the Cassation in the first place with a peculiar problem: each is issued a decision from a distinct religious tribunal entailing two diametrically opposite outcomes. Olga is granted an Orthodox divorce, while the Catholic Rota, before which Caesar ends up, upholds their marriage. Tania, a Greek Orthodox, wishes the Cassation to overturn a decision issued by the Beirut Islamic *Shari'a* Tribunal in favor of the Administration of Public Islamic Endowments (*al-'awqaf*) in Beirut excluding her from

receiving a share of her father's inheritance. In Hanan's case against her father Salah, the Cassation is asked to decide which of the two decisions is valid: the one issued by the Sunni *Shari'a* Tribunals granting the latter his request for a hold over his granddaughter's person and properties, or the one issued by the Orthodox Ecclesiastical Tribunal contradicting it? Shafiqa's divorce is issued by the Orthodox Ecclesiastical Tribunal, and she herself had to dissolve her Catholic marriage to a once-Maronite man who had decided to marry another woman before Islamic authorities while they were still married. The Maronite tribunal sees this state of affairs clearly as beyond its purview, as does the Sunni Islamic tribunal in the case of the unnamed woman, for she had converted to Islam in the Kingdom of Saudi Arabia while still attached to her Catholic marriage.

These cases articulate three distinct relationships: among individuals, between individuals and institutions—administrative and judicial, civil and confessional—and among institutions, all mediated by marriage and the family. When conflicts erupt among them the Cassation Court, as the ultimate judicial arbiter in the country, is summoned to set things straight. The claims are usually of two sorts: claims over persons and properties, and claims of competence. Often, the Court proceeds by calling into question the validity of "the conversion" it identifies in a sequence of "facts," a validity questioned because it is perceived to be the source of conflict, and, therefore, because of its consequences on the aforementioned relationships. Under what conditions does conversion so legally significant?

To begin addressing these questions I suggest to take a look at the Lebanese Constitution, particularly its two distinctive, yet problematic, principles, namely, "there shall be absolute freedom of conscience" and "the personal status and religious interests of the population, to

whatever religious confession they belong, are respected."[1] (Lebanese Constitution 1923, Article 9 [Conscience, Belief]) The former may be interpreted to imply an absolute right to "convert," while the latter recognizes the distinctiveness, particularly in matrimonial and familial affairs, of the eighteen officially recognized Islamic, Christian, and Jewish "religious confessions," the legal form of which is "the system of [fifteen] personal status" laws. (Decision No. 60 L.R. 1936) Roughly, to each religious confession corresponds an autonomous personal status jurisdiction that operates under the presumed sovereign eye of civil power. Besides their legal form, personal status jurisdictions possess a regulatory function over certain aspects of life: desire and sexuality, kinship relations, the transmission of property, death, and so on. This legal arrangement rests on the two interrelated assumptions that the population is a multiplicity of discrete units the defining "religious" essence of which justifies granting each the privilege of moral personhood and limited jurisdiction over its individual members, and that these "religious confessions," "religious" jurisdictions, and the "personal status" of their individual members are distinct.

Now, *if* the first constitutional principle guaranteeing absolute freedom of conscience is interpreted to mean absolute freedom to convert, it leads to conflicting rights claims, jurisdictional conflicts, and, importantly, casts doubt on the moral, legal and sociological/anthropological presuppositions of the whole order. But, to constrain individual choice within that legal configuration by prohibiting movement across the boundaries of its

[1] "Article 9 [Conscience, Belief]. There shall be absolute freedom of conscience. The state, in rendering homage to the Most High, shall respect all religions and creeds and guarantees, under its protection, the free exercise of all religious rites provided that public order is not disturbed. It also guarantees that the personal status and religious interests of the population, to whatever religious [confession] they belong, is respected." An English translation is available at: http://www.presidency.gov.lb/English/LebaneseSystem/Documents/Lebanese%20Constitution.pdf (retrieved on Thursday, January 12, 2012).

diverse jurisdictions could compromise freedom of conscience, and give rise to the logically untenable situation whereby "conversion" is and is not absolutely free. This situation, however, is a limit reached only occasionally, necessitating, when it is reached, the intervention of civil judicial power. The following pages describe instances when this occurs, analyzing some of the strategies deployed by the civil judiciary to define "conversion" without appearing to do so, and by the confessional tribunals to avoid doing so altogether.

The Secular Problem of Conversion

The problem of conversion is certainly not unique to Lebanon, despite the distinctiveness of its historical conditions, the terms of its articulation, and the practices within which it is inscribed. In the United States, for example, it assumes the form of "the problem of religious conversion fraud" (Samahon 2000: 2211) in the context of asylum policy, whereby asylum is granted to claimants on grounds of "persecution or a well founded fear of persecution on account of … religion" in their home country. (8 U.S.C. § 1101(a)(42)(A)(1994), cited in Samahon, 2211) However, the INS suspects cases of "eleventh hour" conversions, requiring the administration to determine whether "whether a religious convert is an imposter or a legitimate member of a religious group …" (2212) This is "complicated" by the First Amendment, which imposes on the INS the delicate assignment of determining the sincerity of conversion while avoiding the "impairment of free exercise" and the "imposition of a religious orthodoxy." (2212)

What is distinctive about both, however, is their secular character, which in the Lebanese case is highlighted when its continuities and breaks with the conditions of conversion in Ottoman Empire in the 19th century are sketched out. Although the problem of conversion in

Lebanon is at least in part the direct outcome of the constitutional principles mentioned above, it may also be sought in relatively more distant shifts taking place in the 19th century Ottoman Empire. The Empire also saw a duality emerging from its initial "inten[tion] to guarantee equality before the law to all subjects" with the *Tanzimat* Edict of 1839. That intention was expressly confirmed in the Reform Edict of 1856 recognizing "religious freedom." (Deringil 2000: 556) At the same time as the Empire guaranteed the freedom to exercise "all forms of religion" and asserted that "no one shall be compelled to change their religion," (556) "religion" got tied to a configuration of the social and legal orders based on distinctions between "Muslims," "privileged communities" of non-Muslims, and "non-privileged" communities. Non-privileged communities included such groups as "Islamo-pagans" and "Islamo-Christians," (Young 1905) those "nominal" and "heretical Muslims" who became prime targets of the Empire's conversion campaigns to the "'official faith,' the Sunni Hanefi *mezheb*." (Deringil 1998: 68-76) While non-privileged communities were seen to be legitimate objects of forced conversions, Christians received a privileged treatment in the form of a "'bureaucratization' of the … procedure" of conversion from Christianity to Islam developed during the same period, as a result of increased "complaints about conversions (*ihitida*) which had taken place 'against accepted practice.'"[2] (85)

[2] The Ottoman procedure required, besides the convert, who must have reached the "age of puberty," the presence of the "highest ranking local priest" of the religious confession to which he belonged, as well as his "parents or next of kin." (2000: 559) The documents attesting to the procedure were to be "signed and sealed by Muslim and Christian officials," and the converts "should not be forced to go back to the home of their parents …" In the case of veiled girls, the "'veil should be lifted to ascertain identity.'" The process involved the convert making her intention "known to the local administrative council of the province," who would question her, "ascertaining [her] religion, community affiliation, and the fact that they were 'free, sane, and adult.'" She was then "asked if he/she had been 'tricked, forced or coerced …'" and then required to "repeat the sacred formula in the presence of the council and the governor or his representative." Finally, "the case was then referred to the *kadi* court, where the same procedure was carried out again. At the end of all this the convert was accepted as a Muslim and registered as such, being given a 'certificate of conversion …'" (Deringil 2000: 560)

Thus, in addition to the fact that "conversion" in the Ottoman Empire articulated a relationship between Muslims, privileged non-Muslims, and non-privileged communities in a state with a distinctively Islamic character, the Ottoman problem of conversion consisted in the transformation of the conditions of state-sponsored conversions of non-Muslims to Islam, prospects becoming more limited with the promulgation of the freedom of religion backed by European interference and criticism. According to Deringil, the shortage in military conscripts and the simultaneous constraint that limited military service to Muslims, the Empire had to look to new sources, readily found among heretical or nominal Muslims. Third, the Ottoman formulation of the problem of conversion distinguishes it sharply from the contemporary secular formulation in the way it is discursively formulated. It was construed as a movement from a "state of ignorance" towards "[correct] … beliefs," the "true faith," the "true path," and the "true God." (70-72) It opposed an Islam "'the local populations inherited from their ancestors'" and embedded in their everyday life to "'a consciousness of the honor of being Muslim.'" (76) Conversion meant both, "reinforce[ing] the Hanefi *mezheb* and instill[ing] the feeling of obedience towards the sultan," while heterodoxy implied a lack of such "loyalty." (76-77) Ottoman officials saw that people "appearing to be Muslims while secretly remaining Christian," and those with "two sets of religious practices" were perceived to cause confusion in the minds of other simple Muslims. (Deringil 1998: 79) Their "minds were … poisoned," and were likened to "a wound oozing pus into the healthy flesh of the Muslim population." (79-80) They constituted, therefore, a "danger for the Sublime State and the Holy *!eriat*," and for this reason were to be "brought back into the circle of salvation of Islam," "rescued from their ignorance[,] and shown the high path of enlightenment." (The governor of Ankara, referring to the !stvari, "Greeks of the

Black Sea regions … who had converted to Islam," cited in 1998: 81-82) This difference between conversion to and from Islam was further linguistically marked by the two distinct terms, *'ihtida* and '*irtidad* (apostasy; 77, 81) respectively, a distinction that vanishes entirely from the vocabulary of the Lebanese state, to be replaced by the generally applicable "*tabdil din*" or "*madhhab*."

The secular marker of the problem of conversion in Lebanon, in contrast to the Ottoman Empire, is that in contemporary Lebanon the very status of conversion, as well as "religious" authority and the reasons of state are altogether called into question. I propose to see secular conversion as a "point of problematization" (Foucault 1997: 118) through which the very relations between and the assumptions upon which rest the freedom of conscience, the system of personal status, and civil and confessional judicial authority, "offer [themselves] to be, necessarily, thought." (Foucault 1990 [1985]: 11) Conversion, therefore, is not simply an "act" or "experience," but rather designates "the ensemble of discursive and nondiscursive practices that make something enter into the play of true and false …" (Cited in Rabinow 2003: 18) In the Lebanese case at least, it is the very notion of "the state" that is made to enter into that play. Why is that so? Because although the courts try to grapple with the initial irreconcilable duality in the Constitution mentioned above, it is reproduced in and structures their very definition of "conversion."

Conversion and The Limits of Confessional Power

An immediate implication of the constitutional principles mentioned earlier regarding freedom of conscience and the confessional personal status jurisdictions is that the latter do not encompass conversion. Nevertheless, given the occasional interferences between

conversion and matters of personal status, cases involving conversion sometimes do appear before confessional jurisdictions, which are then compelled to declare themselves incompetent, thus facing a particularly acute challenge to their authority. The difference between the respective approaches to the problem of the Sunni *shar'i* and Maronite ecclesiastical tribunals may be schematized as follows: for the former, the problem consists of articulating the non-antagonism and complementarity of civil law and procedure on the one hand, and Islam and *shari'a* on the other; the latter draws a subtle contrast between the *a*morality of civil laws on the one hand, and the moral authority of the Church on the other. In *shar'i* tribunals, the figure that articulates law and *shari'a* is the public prosecutor at the Higher Sunni *Shar'i* Tribunal—himself a Sunni Muslim—who plays the role of monitoring judicial decisions, making sure they do not overstep their jurisdictional bounds and break the rules and regulations imposed by civil law. By so doing, he is both exegete of Lebanese civil laws and a protector of the interests of Muslims. There is no such function at the Maronite tribunals, the judge's being the sole decision makers.

On the 19th of December 1994, the public prosecutor at the Higher Tribunal elaborates an opinion regarding an appeal against the first instance tribunal involving conversion. The appellant objects to the lower tribunal's decision "because it was based on the decades-long settled and continuous jurisprudence (*'ijtihad*) of the Cassation Court's General Assembly …" (P.P. 1994: 10) These precedents "establish that the procedures (*'usul*) of conversion (*taghyir al-din*) … are obligatory and related to public order." Moreover, the Court's jurisprudence considers "the certificate of declaration of Islam (*wathiqat 'ishhar al-'islam*) issued by the Islamic religious authority (*al-marja' al-dini al-'islami*) … insufficient by itself to consider him [the convert] Muslim …" Having drawn this binary opposition between

"positive law" and "God's *shari'a,*" the appellant concludes by arguing that "it is inadmissible (*la yajuz*) to neglect the rules of the *shari'a*."

The public prosecutor, however, sees things differently. Having begun by restating the plaintiff's demands as reasons for his intervention, he continues his justification by enumerating the steps required, by law *and shari'a*, to convert to Islam. He begins with the "benevolent Islamic *shari'a* (*al-shari'a al-'islamiyya al-samha'*)," which "considers conversion (*'i'tinaq al-dan al-hanif*) to have taken place after the postulant's (*al-raghib bi tabdili dinihi*) uttering the two *shahada*s [that there is no god but God, and that Muhammad is His Prophet], and by relieving (*tabri'atihi*) him of any other religion that does no contradict the religion of Islam." After stating two articles concerning procedure, one specifying the judges' sources of authority in a descending order of priority (the first being the "most probable sayings of Abu Hanifa," followed by the Ottoman "Law of Family Rights"), another defining the Sunni judiciary's competence, the prosecutor ends with a reason derived from Lebanese Sunni legal memory,

> "Since the Sunni *shar'i tribunals*, which in the past used to go by the *shar'i rule* that *'ishhar al'islam* [itself] was sufficient to grant it civil consequences (*mafa'il madaniyya*) used to be confronted, when its decisions were obstructed, by [the consequences of] its contravention to essential formulations related to public order, and the Cassation Court considering [those decisions] non-executable and void." (11)

The prosecutor then cites with significant detail five Cassation Court pronouncements on conversion to Islam—one from 1967, two from 1970, and two from 1972—and proceeds to elaborate an interpretation of what they mean for Islam and Muslims. The five decisions have in common Article 41, Law of December 07, 1951, the object of the appeal in the

present case, which describes the proper procedure to be followed by converts for their conversion to be officially valid.[3]

> "Any petition concerning religious or *madhhab* conversion (*taghyir din aw madhhab*) is to be sent to the personal status registry (*qalam al-'ahwal al-shakhsiyya*) to correct the record … [T]hat petition must be supported by a certificate [of acceptance] (*shahada*, also testimony) from the leader of the *madhhab* or religion to be embraced (*'i'tinaq*) and accompanied by the signature of the postulant, whom the personal status clerk will then summon and ask, in the presence of two witnesses, if he insists on his demand, in which case a report (*mahdar*) to that effect is written up on the petition and the record corrected." (Cited in 1994: 14)

How does the public prosecutor at the Higher Sunni *Shar'i* Tribunal justify its submission to that article and its interpretation? Backed by the authority of "Article 1 of the Law Organizing the *Shar'i* Judiciary" he states "that the [latter] is part of the state's judicial organs (*tandhimat*)." This implies that, according to "the Law of Civil Procedure," the Cassation Court possesses "the right to examine" a *shar'i* tribunal's decisions "for incompetence … or contravention of essential formulations (*siyagh*, singular *sigha*) relating to public order (*nidham 'am*)." The prosecutor clarifies that right as "the right to regulate (*al-raqaba*)" the tribunal's decisions "if it transgresses the limits of its competence, or if it contravenes essential formulations …" (16) This is the case for two related reasons: first, to ensure the proper "organization" and functioning of the legal process "among the *shar'i, madhhabi,* and ecclesiastical (*ruhiyya*) tribunals," and second, to "prevent transgressions among them[,] for the sake of securing accord (*al-wifaq*) among the confessions (*al-tawa'if*) of which Lebanon consists." What justifies the Cassation Court's role of overseer is the aim of realizing "judicial safety among all confessional tribunals." (16)

[3] The Article is cited in full on page 9 below.

Does this mean that judicial safety overrides "religious" considerations or, more seriously, constitutes an affront to Islam? Answering this question in the negative, the public prosecutor explained that "it is must be acknowledged that the True Religion (*al-din al-hanif*, i.e., Islam) is neither a state religion, nor the religion of the majority of Lebanon's population." Moreover, "it is not admissible to neglect or waste (*'ihdar*) that in Lebanon positive or sectarian (*ta'ifiyya*) laws exist that must be applied to the citizens of the country (*al-bilad*)." For these reasons, it was no "embarrassment (*'ihraj*) to Islam if it is in agreement with the other religious systems (*al-'andhima al-diniyya*)," for "Islam is inside every Muslim and has nothing to do with its civil dimensions (*ab'aduhu al-madaniyya*)." This seemingly paradoxical formula, which labors to separate "religion" from its "civil" effects or consequences simply by denying its relationship with them is analogous to the one upon which rest the Cassation Court's justification of its own interventions in conversion. Here, however, the paradox is dispelled by the expression "has nothing to do with," which may be interpreted to mean that the civil consequences of Islam are so due to the historical existence of the "civil" in the first place; in other words, with the historical conditions within which Islam has found itself.

At any rate, what is significant in this formulation is the prosecutor's view of "the Muslim[, who nevertheless] remains a Muslim or becomes a Muslim if he was not one originally regardless of personal status records." The issue is not one of "doctrine (*'aqida*) [since] the Muslim [can] practice his religion's *shara'i'*… without the mediation of his record in the civil state's registries …"; he does not require "an identification card to indicates that he is a Muslim (*'ila annahu mina al-muslimin*)" for him to "pray at the mosque and fast …" (16) For the "Sunni judiciary," on the other hand, "there is no embarrassment if

it applies the rules (*'ahkam*) of Lebanese positive law, because, as the ordinary judiciary, must respect that law …" (17) While the prosecutor puts the Sunni and the civil judge on a par with each other relative to positive law, he betrays an important difference by qualifying the latter as ordinary, which inflects the former as exception.

Conversion to Islam raises a more serious problem, which the prosecutor formulates in the following manner: "the Lebanese Christian citizen who truly wishes to change his record to Muslim, can do so easily, and there is no legal obstacle that prevents that. For this reason (*lidha*), his declaration of Islam (*'ishar al-'islam*) by merely uttering the two *shahada*s[,] and relieving him of any other religion[,] are insufficient in the light of Lebanese positive codes to consider him Muslim." The declaration "must necessarily be followed by a modification of his civil status record (*al-nufus*)." (17) While it is unclear what it could mean to truly wish to change one's record to Muslim, what the prosecutor highlights are the legal and political stakes involved in conversion—in the freedom of conversion, in particular. He continues, "legal protection, judicial competence, and the exercise of worldly and political rights are connected[,] in the Lebanese system[,] to those records." Where does the problem lie? While so far the prosecutor has emphasized the separation of the civil and the religious, he now points out that they are not so easily severed, the link between the two consisting in that irreducible legal subject, the "single person (*al-shakhs al-wahid*)." Yet, the person's Islamic identity is meaningful and problematic only in the differentiated textual régime that is supposed to ground that identity. The prosecutor asserts, one "may not be considered a Muslim according to the document of declaration of Islam and a Christian according to his record at the personal status registry," asking rhetorically, "for is he Muslim here and non-Muslim there?" How is that presumed identity kept from splitting apart? By means of

"Lebanese law," which "proscribed [and, the prosecutor could have added, gave rise to] this duality of belonging (*al-'izdiwajiyya fi al-'intima'*) to more than one confession (*ta'ifa*)."

So how would the *shar'a* courts handle a case of "a Muslim unregistered as a Muslim"? They have the "right … to consider [that he is not] a civil Muslim," (17) for legal and political reasons. Not considering a Muslim a civil Muslim (*musliman madaniyyan*) does not mean that the court "doubts" his true Islam, but is rather a way to protect the Islamic judiciary. The public prosecutor is concerned that the *shar'i* tribunal lose another confrontation with civil power. Thus, the Islamic tribunal's incompetence to hear an unregistered Muslim's case not because it doubts his faith, but because "all of the Cassation Court's rulings were annulling its decisions" in such cases, and because of the "requirements of coexistence" between the different religions in Lebanon. With respect to these considerations, completing the "civil appearance (*al-madhhar al-madani*)" of conversion, which is a mere administrative procedure after all, is minor. "If he neglects" to do so, the public prosecutor pointed out, "he has only himself to blame, not the *shar'i* judiciary." (17) The prosecutor's role and ultimate aim is to safeguard the authority of *shar'i* tribunals, Islamic public order, and the Islamic interests, by thinking about law and *shari'a* as being "not opposed," but rather "complement[ary to] each other for the good of the Islamic *'umma* (*fi sabil khair al-'umma al-'islamiyya*)." (18)

How do ecclesiastical tribunals articulate their incompetence to resolve personal status cases involving conversion? Shafiqa's story begins with her marriage to Pedro "according to the Maronite Catholic *madhhab* (*'ala al-madhhab al-maruni al-kathuliki*)" in Accra on the 29th of July 1939. Thirty-two years later, Pedro "converted to Islam (*'aslama*)," married Slovakia, and had three children who remained illegitimate because "he could not register

them under his name." According to the plaintiff, one of the "proposed solutions" to this problem was "conversion (*taghyir al-madhhab*)" to Greek (*rum*) Orthodoxy "in order to divorce," and thus clearing the way for Pedro to marry Slovakia. She, the plaintiff, "accepted the offer … mercy on the innocent children and craving (*tama'*) for the ten million Lebanese Liras paid her from her husband's immense wealth."[4] Forty-one years after his first marriage and nine years after his conversion to Islam, Pedro finally managed to acquire a divorce ruling from the Orthodox ecclesiastical tribunal and marry Slovakia. In her petition to the Maronite tribunal Shafiqa wanted the latter to overturn the Orthodox ruling, and "therefore, nullify the subsequent marriage," and to "consider the three children … *awlad zina* (literally, offspring of adultery)."

Slovakia's response was straightforward: The Maronite tribunal is "incompetent, based on Article 23 of the Law of the System of Religious Confessions No. 60, 13 March 1936," which stipulates,

> "If the spouses convert (*'idha taraka al-zawjan ta'ifatahuma*) their marriage and the documents or obligations related to personal status shall follow the law of their [the marriage, documents, and obligations'] new system (*nidhamiha*) starting from the date at which their [the spouses'] conversion is recorded in the Personal Status Registry."

The Maronite ecclesiastical tribunal's response opens with a secular formulation repeated by civil judges of a legal interpretation of Article 23 based on an opposition between "freedom of belief (*hurriyyat al-mu'taqad*)" guaranteed by "the Constitution" on the one hand, and "ridding [oneself] of the confessional judiciary" on the other. The tribunal is pointing out the aforementioned ambiguity in the Lebanese Constitution, which it interprets in a way that makes it possible for it to assert its moral authority while remaining within its legal limits.

[4] It is unclear from the record if the second part of that statement regarding the money was the plaintiff's own or the judges'.

Thus, the tribunal suggests that Article 23 was stipulated "to protect the freedom of conscience" rather than "encouraging legal fraud," a distinction possible because "it should not be the case (*la yajuz*) that such a fraudulent intention (*niyya 'ihtiyaliyya*) be attributed to the legislator (*al-mushtari'*)." The tribunal manages to avoid trespassing beyond its jurisdiction by invoking good faith and judicial sincerity as the foundations of law (Suksi 2009; Schwartzman 2008), hence clearing out the terrain for a specific interpretation of the freedom of belief, which "the Catholic Church[,] with her feeling towards the obligation to proselytize and spread Christ's teachings[,] respects …" The ecclesiastical tribunal appears here not only as a legal space, but an articulation of legal, moral, and religious (Catholic) claims, the first of these characterized by the power to issue enforceable decisions—enforceable, that is, by the state's coercive instruments.

Indeed, the ecclesiastical tribunal becomes a forum for the reiteration of Church doctrine—on conversion. Consistent with its initial claim about its respect of the freedom of belief, "his Maronite confession" considers the Maronite who converts as a result "of a firm belief in Islam or Orthodoxy" an "ingrate and apostate (*jahidan wa mariqan*) and therefore excluded from and stripped of his rights in it." However, due to "the permanent mark of baptism," the apostate/convert remains "tied to [the confession's] past, present, and future laws" according to which he will be "judged" and "redeeming punishment be imposed on him[,] if he repents and returns to it." The tribunal, by explicitly indicating belief as the basis of conversion seems to suggest that other motives or purposes, such as converting for divorce, does not count. (The Cassation Court in the cases analyzed below does not make this distinction.) At any rate, whatever lay behind "the Maronite['s]" conversion, be it "conviction," "deceit," "legal fraud[,] or love of money or status," in case he manages to

divorce and remarry, the Maronite Church considers "null" both "his divorce and his new marriage" and, therefore, "his children from [the latter] illegitimate (*'awlad zina*) … despite what article 23 stipulates."

In contrast to the Church's concern for this "spiritual aspect," it is "uninterested" in whatever "strictly civil consequences" conversion carries, such as "support," "inheritance," or "dowry," which "it leaves to the civil courts …" This formulation of sovereignty over its own decision is reinforced by the ecclesiastical tribunal's justification of its inability to hear the case in terms of legal form (*shakl*). Given that the "purpose" of the current case is "inheritance," it argued, it was not "presented according to proper form," which would be to ask, "In the view of the Maronite Church, is the marriage of Shafiqa … and Pedro … still valid when he died?" This formulation would have enabled the Maronite tribunal to "decide upon its authority to at least present the Church's correct teaching on this issue." The Maronite tribunal interprets the distribution and separation of confessional jurisdictions upon which the system of personal status laws in Lebanon is based in a way that construes these jurisdictions—and therefore itself—as a representation of the confessions. In a subtle statement, it implicitly distinguishes between the "legal actions of another confession," which it is "not to judge … and declare null" on the one hand, and the decision of another confessional tribunal as a legal action performed regardless of whether it "represents" the people that fall under its jurisdiction or not. The latter, as already mentioned, the Maronite tribunal sees as the legal form of the "system of religious confessions" that presupposes the Lebanese state.

The Maronite ecclesiastical tribunal considers itself also "unconcerned" with "declaring the annulment of a divorce or marriage" in a "non-Catholic confession" insofar as the

"apostate" from that confession wishes to marry in the Catholic Church. "In other matters," it concludes, "the decision is left to civil authority the laws of which we must respect and act upon [and not, significantly, obey] unless it contravenes the essence of religion (*jawhar al-din*)."

Conversion and the Foundations of the State

Looking into conversion is not the business of either *shar'i* or ecclesiastical tribunals because conversion is not, strictly speaking, a legal matter; although it bears on marriage and some of its results, it does not belong to the acts, transactions, and rights that fall under "personal status." Conversion is a category of its own. In what does that category consist? Ecclesiastical tribunals mention its relationship to beliefs, while the public prosecutor elaborates on its legal and political consequences. To know more about conversion we must turn to what the civil courts do with it. Unlike the tribunals, the Cassation Court is perfectly competent to give an opinion on, and, therefore, regulate, conversion. It must do so in order to resolve legal problems arising from the latter without appearing to restrain—gratuitously, at least—freedom of conscience and belief. In other words, the Cassation must prove that conversion is indeed a matter of conscience and belief, not of law.

A common strategy the Cassation deploys to accomplish this task is to invoke the law, specifically, Article 41 of the Law of 12 July 1951, which stipulates the organization of personal status records, the article the public prosecutor at the Sunni tribunals set about explaining in the case analyzed above. Article 41 stipulates,

> "Any petition concerning religious or *madhhab* conversion (*taghyir din aw madhhab*) is to be sent to the personal status registry (*qalam al-'ahwil al-shakhsiyya*) to correct the record … [T]hat petition must be supported by a certificate [of acceptance] (*shahada*,

> also testimony) from the leader of the *madhhab* or religion to be embraced (*'i'tinaq*) and accompanied by the signature of the postulant, whom the personal status clerk will then summon and ask, in the presence of two witnesses, if he insists on his demand, in which case a report (*mahdar*) to that effect is written up on the petition and the record corrected."

The Cassation's Decision No. 8 (C.C. 1967: 171-172, cited in full in P.P. 1994: 14-16 above) refers to that article to solve Tania's case against the Administration of Islamic Public Endowments in Beirut. Her "father, Jean [John] died in Beirut on January 22, 1967," after which the civil "singular judge in Beirut" decides to allocate his property ("*'inhisar 'irth*") to his mother Souraya and daughter Tania, the plaintiff. Two months later, "Beirut's *Shar'iyya* Tribunal … considering Jean Muslim," decides to designate the aforementioned Administration of Endowments his rightful successor. "On the 6th of April 1967," Tania, his daughter, "petitions the Cassation Court" arguing that the Islamic tribunal is incompetent, since "Jean was legally Christian because his conversion (*tabdil din*) did not occur according to article 41 …" The Administration, as "defendant," countered by presenting, through its council, "a certificate of conversion to Islam (*shahadat 'ishhar*) registered with the Cairo Documentation Office (*maktab al-tawthiq*) on the 12th of June, 1966" demonstrating that the conversion did indeed occur. It argued that "the procedure cited in article 41 … is not essential (*mu'amala jawhariyya*) but a bureaucratic procedure (*mu'amala qalamiyya*) …" (171)

The Cassation locates "the point of the inquiry (*madar al-bahth*)" around the problem of figuring out whether "Lebanese law considers conversion accomplished (*taghyir al-din tamm*)" when it occurs "before the religious authority (*al-marja' al-dini*) of the adopted religion," or only after "other procedures" are performed "before Lebanese civil authorities." By "accomplished conversion" the Court means an officially "recognized" conversion. The

question implicitly refers to article 41. The inquiry begins by "noting that the deceased Jean[,] the plaintiff's father[,] is Greek Orthodox and was registered as such in the census of 1932." Tania, his daughter, is also Greek Orthodox, because she falls "under his name" in "Beirut's Personal Status Registry." On the other hand, the *shar'i* tribunal "derives its authority … from Jean's certificate of conversion to Islam," which justifies its decision to exclude Tania from receiving her share of her father's inheritance. To know whether Jean's conversion was complete, the Cassation proceeds to cite article 41, and to "conclude" from its "text" and "expressions" that "the certificate of conversion to Islam" by itself "is insufficient." For conversion to be considered complete—in other words, for it to be officially recognized—it must be inscribed, and therefore, must occupy a space in the state's textual domain as a demonstration of the postulant's autonomous will. In the Cassation's own words, "in Lebanese law to correct the record of conversion (*taghyir madhhab aw din*) … the postulant must demonstrate his will autonomously (*'iradatahu bi nafsihi*) and clearly (*bi sura jaliyya*) …"

The Cassation's interpretation of article 41 marks a distinction between the document of conversion issued by the religious leader on the one hand and the petitioner's conversion proper on the other, and asserts that the former is insufficient for the latter's completion. The necessary link between the two is the petitioner's *will*, which must be "clearly (*bi sura jaliyya*) demonstrat[ed] by the petitioner himself." Conversion is construed as a process the starting point of which is not determined, but which must end by recording the petitioner's will in a legal document. The eminent sign of the petitioner's will is his insistence on converting in the presence of two witnesses and the state official. The final confirmation of conversion is the corrected registration (*tashih al-qaid*) of the petitioner's religion in the

documents of personal status. Conversion and inscription, which, for the Court renders the former legible, are correlated. What is supposed to be a private matter of conscience unfolds in a public setting, in the presence of public officials and witnesses. However, the petitioner's motivations remain concealed, unquestioned, and, in this case at least, irrelevant. The distinction is one between a hidden and protected domain: that of the petitioner's conscience and an external one where the will may be demonstrated.

Based on that lack of documentary evidence of Jean's "perform[ance of] the procedure of his conversion … before the bureau of personal status," and, therefore, of his will to convert, "his conversion is incomplete in the view of Lebanese law" for whom he "remains … Christian Orthodox …"

In two subsequent decisions the Cassation provides more reasons why it is necessary to document conversion with the Personal Status Registry. An aim of article 41, which prescribes the procedure of conversion before witnesses and the Registry's officials, is to make sure that the convert was not coerced, documenting the act constituting the necessary evidence. However, in Decision No. 26 mentioned in the introduction to this chapter, the Cassation considers the *shar'i* decision to grant Salah hold (*hajr*) over his granddaughter invalid because converting "according to procedure … extracts the convert from the authority of the tribunal of his previous religion (*yukhriju al-mu'taniq al-jadid 'an sultan mahkamat dinihi al-sabiq*) and subjects him to [that] of his new religion." (C.C. 1970: 429-430) This transfer of authority across confessional jurisdictions is a "matter related to the social and procedural public order (*al-nidham al-'am al-'ijtima'i wa al-'usuli*)," and the "legislator's intention in imposing" (C.C. 1981: 72) a procedure of conversion is to maintain it "under civil surveillance (*al-raqaba al-madaniyya*)." The Ottoman Empire also had

required a procedure (Deringil 2000: 560; see note 2) to ensure that Christians were not forcibly converted to Islam, but the Lebanese version is justified in terms of the "effects" conversion may have on "Lebanese society[,] which consists of multiple confessions" and conversion's "important legal consequences" on that society, "especially in the matters related to inheritance and personal status." (72)

Another strategy civil courts deploy in their efforts to override the outcome of the dual constitutional stipulations is to distinguish the individual act of conversion from the system of rights—in other words, the family—that results from the act of marriage. Although in all these cases conversion is ruled faulty retrospectively, and because the courts have no authority abrogating an act of conversion once completed, the court's decisions turn conversion into an act constitutive of relations among people who, by that virtue, are made to bear its consequences, even if they have unwittingly been drawn into those relations. For instance, in some inheritance lawsuits, while the very existence of the convert's progeny is an indirect outcome of his conversion, and are not, therefore, held responsible for whatever brought them into being, they do not have the right, being consequences of a faulty act, to have a share of their father's property.

Ibrahim and Isabel married in the Maronite Church in 1936, and when trouble stirred between them he left for "Kuwait [where he] converted to Islam in 1953." (C.C. 1981: 362) He then contracted a "second Islamic marriage in 1960," "registered [it] in Beirut at the *shar'iyya* tribunal in 1962," and a few years afterward converted back to "Christianity[, choosing] the Orthodox *madhhab*." He "died in 1973," (361) leaving behind two wives and six children, four from his first marriage, two from the second. When the singular judge distributes, upon Giselle's petition, Ibrahim's fortune over all of them, including the first

wife and her four children, the latter manage to get the decision overruled, and to designate them as sole benefactors. Giselle appeals that decision a first time and is defeated, petitioning for a second attempt on the 9th of May 1978.

On the 18th of December 1981, The Cassation Court decides to dismiss her case and grant the first wife Isabel and her children full rights of inheritance, "because," among other reasons, "the Constitution, if it did guarantee the freedom" to convert, "did not guarantee the freedom to escape from the consequences of marriage" by contracting another. Although the second marriage "was possible due to that conversion," marriage in general "is … not a requirement that may not be detached from religion." Paradoxically, the Cassation finds the proof of that statement in religion itself. Thus, "if even the Muslim's freedom" may be "limited" by his wife's condition (in the marriage contract) of monogamy, then "a Christian attached to another indivisible marriage … whose system of personal status does not accept absolutely plural marriages" is even more so; "neither he, even if he converts, nor his second family may limit the rights of a family resulting from a first marriage." (352-353)

In a similar case in 2001 the Cassation varies slightly the formulation to consider that the "freedom of belief (*hurriyat al-mu'taqad*) does not render permissible the circumvention of proven rights acquired by the successor through an act of marriage in a binding legal institution" that falls outside "the scope of the freedom of contract." (C.C. 2001: 622)

Sincerity and Order

> Olga and Ceasar "belong to the Maronite *ta'ifa* (confession) and were married on the 6th of May, 1926, before the Maronite Church … The wife petitioned the Maronite Archbishopric's Administrative Office (*al-diwan al-'usqufi al-maruni*) in Beirut on the 10th of June, 1939, for separation (*hajr*) and support (*nafaqa*) … The Office managed to reconcile them under certain conditions, [undisclosed by the Cassation]. On the 27th of

> April, 1940, each filed a complaint against the other at the same Office, which … ordered the spouses back to marital cohabitation … They appealed this decision before the Maronite Patriarchal Administrative Office, which decided on the 4th of December, 1941 to overturn the first instance ruling … and granted Olga separation from her husband Caesar for a year and a half … In 1942, the husband filed a new complaint at the Administrative Office of Beirut's Maronite Diocese … On May 10, 1944, the Office dismissed the case of annulment due to fear, but considered instead the marriage incestuous (*al-zawaj batilan li jihati al-qaraba al-'ahliyya al-natija 'an jama'in muharram*) and therefore void. But, upon the Defender of the Matrimonial Bond's appeal, the Maronite Patriarchal Administrative Office overturned the first instance decision and dismissed the case altogether. Caesar objected, [and was] repealed by the Office, which decided on August 24, 1945, to leave the case to the Holy Council of the Eastern Church. On 21 January, 1946, upon a Papal summons, the Council transferred the case to the Roman Rota. While the case lingered there, the spouses petitioned the Orthodox Archbishop of Mount Lebanon (*siyadat mutran 'abrashiyyat jabal lubnan 'ala al-ta'ifa al-'urthudhuksiyyah*) to accept them into the Orthodox *ta'ifa*, and on the 15th of October, 1947—prior to registering their conversion to Orthodoxy (*tabdil madhhab al-zawjayn wa 'i'tinaqihima al-madhhab al-'urthudhuksi*) with the Civil Status Registry in the Metn on the 26th of January, 1948—the wife petitioned the Orthodox Tribunal in Mount Lebanon for divorce with compensation. On the 29th of January 1948 the Tribunal ruled in favor of divorce. However, the wife, who claimed that she was coerced to sign the divorce case, went back to her Maronite *madhhab* (*'adat wa raji'at 'ila madhhabiha al-maruni*) on March 23, 1948, and appealed the first instance Orthodox decision before the [Orthodox] Patriarchal Tribunal in Damascus. [The latter] accepted the case on January 12, 1948, and on the 26th of May 1949, decided to revoke the first instance ruling issued on the 29th of January 1948, and to consider the two parties married. Based on Caesar's appeal, the Orthodox Appeals Tribunal overturned the last decision and dismissed [Olga's] appeal on January 11, 1951. Meanwhile, the Rota, which interrogated Caesar, who swore before it (*halafa laha yaminan mu'adhdhama*) that he remains Catholic (*la yazal 'ala 'imanihi al-kathuliki*) and that he adopted the Orthodox *madhhab* without applying for it, ruled on April 12, 1949 that the annulment did not hold. Caesar did not accept this decision and appealed it to another circuit, which issued a decision on April 25, 1950 rejecting his appeal."[5] (C.C. 1952: 253-256)

The Cassation Court is asked to decide which of the two rulings is valid: the Orthodox divorce or the Catholic marriage? How does the Cassation proceed? The first step is to justify its role as a competent court by spelling out its intuitions about the case. It identifies two sets of interrelated problems. On the one hand, "fraud," which "corrupts legal rules (*al-*

[5] Cassation Court (first chamber). 1951. Decision No. 110, 18 September 1951. *al-Nashra al-Qada'iyyah* (N.Q.) 1952, 253-258. Beirut: Ministry of Justice.

qawa'id al-qanuniyya)," and "the issue of competence" on the other. Among the legal rules is the "principle" that "it is not possible (*min ghayr al-mumkin*) … to prevent the defendant from being tried before his natural judges (*al-qudat al-tabi'iyyin*)." By "natural judges" the Court is referring to the respective competencies of two different jurisdictions, in this case, the Orthodox and Catholic ecclesiastical tribunals. The notion is of French derivation, one of its earlier official appearances being in the Laws of 16 and 24 August 1790, aimed at organizing the judiciary after the Revolution and ratified by Louis XVI. (Jeuland 2008: 35) In the New Lebanese Law of Procedure of 1983, the expression is mentioned once in a section stipulating the rules specifying judicial competence. "Locational competence (*al-'ikhtisas al-makani*)" corresponds to the jurisdiction to which a person belongs by virtue of residence ("*maqam*" or "*sakan*"). "In cases relating to the bond of marriage," Article 104 of the same law assigns ordinary competence to the court ("*al-mahkamah*") to which "belongs the defendant's last residence (*maqam*) in Lebanon." (N.L.P. 1983: Bk. I, Pt. 2, Ch. 5, Sec. 1; Art. 104) Moreover, Article 97 states that his complaint (*'iddi'a'*) would be dismissed "if the plaintiff's intention in choosing a defendant's court were merely the removal of competence from the natural judiciary (*al-qada' al-tabi'i*) in order to harm the opponent …"[6] (Art. 97)

A suspicion of fraud, which threatens to corrupt the legal rules and lead to a clash of competencies between Orthodox and Catholic tribunals gives the Cassation the "right to examine" the case "if necessary to solve the issue of competence." The third reason the Cassation possesses is an appeal to the "duty to examine if the purpose (*al-ghaya*) of the claim is to transfer the defendant away from his natural judges." The first three reasons are

[6] *"'idha kana qasdu al-mudda'i min ikhtiyari mahkamati ahadi al-mudda'a 'alayhim mujarrada naz'i al-'ikhtisas 'an al-qada' al-tabi'i 'idraran bi al-khasm …"*

strictly concerned with the legal rules of fraud and competence. What, it could be asked, would bring about a transfer of natural judges? One way is for a plaintiff to choose a court to which the defendant does not belong, or would be at a disadvantage for one reason or other. In the current case, "conversion" implies such a transfer, and for this reason its is subject to statutory regulation. For its fourth reason, the Cassation cites article 23 of Decision 60, which states, "In case both spouses leave their *ta'ifa* [convert] their marriage and the documents and obligations (*al-mujibat*) related to [their] personal status will follow the laws of their new system (*nidham*) starting from the date their [conversion] is recorded in the Civil Registry." The Cassation then adds a condition, which it justifies by reference to the "aforementioned legal principles," that the preceding article is valid as long as "the purpose of conversion be not the corruption of the rules of public order and competence, and legal fraud (*al-tahayul 'ala al-qanun*)." Finally, "circumstantial evidence (*al-qara'in*) was available that the spouses' conversion was a result of a complicity (*tawatu'*) the purpose (*ghayatuhu*) of which being the disruption of the rules of public order and the transfer of … competence …" (256)

The Cassation does not evoke any concern with freedom of conscience and belief. Moreover, it does not ask whether the conversion is religious or legal, but rather, what does it mean for conversion to take place in such contexts? To answer this question it engulfs the whole case with an appeal to a discourse on "sincerity" that provides it with a point from which to offer legal justification of its intervention *and* interpret the facts—the persons and their actions. The meaning of conversion emerges within this sphere of sincerity, to which judge and principals belong, yet asymmetrically inhabit, for it is woven by the former. Sincerity links together several disparate notions, namely, fraud, legal foundations, public

order, natural judges, and intention or purpose, and the Cassation's justification of its role as arbiter articulates assumptions about their relationships.

The strategy the Cassation employs is to articulate the problem of conversion and justify its intervention—two sides of the same coin—in terms of sincerity, thus tying convert and judge together in a moral and legal presumption or precondition of legitimate action and authoritative decision-making. How does one know when someone is sincere or whether one is lying or being deceitful? In the discursive legal context of the conversion cases this chapter is concerned with, figuring out or uncovering a person's intentions is one way of doing so. However, this raises two interrelated problems: First, how to know the convert's intentions if his "private reasons"—partly and possibly his conscience and beliefs—are not subject to public scrutiny? Second, how to know that the judges are sincere, or, in other words, if they conform to the "duty to believe the reasons they give in their legal opinions"? (Schwartzmann 2008: 987) Regarding the first problem, what the Court does is to try to infer intentions that are other than reasons of "conscience and beliefs," which it does by subtraction, as it were, thus telling in what conscience and beliefs consist, and therefore demonstrating that not all "private reasons" are private after all, some of which being indeed privatized and therefore concealed public reasons that must be brought to light and consequently ruled out of the gamut of valid reasons for conversion. While this procedure is available to the Courts, the second problem rests on a "belief" in the judges' intentions, who must remain above suspicion, a belief the preconditions of which are to be sought in the construction of the moral authority of the judge, or, in other words, an ideology of "judicial sincerity." (Schwartzmann 2008)

After having laid down the assumptions about the legal and social order, and the moral exigencies that position individuals in them, the Cassation proceeds to offer its own account of the couples' journey in light of the "circumstantial evidence (*al-qara'in wa al-'adilla*)."

> The spouses appear to have "proceeded (*'amada*) to convert (*tabdil madhhab*) with the intention (*qasd*) of ridding themselves from their natural judges." (256) That Olga petitioned the Orthodox ecclesiastical tribunal "prior to registering the conversion in the civil status registry, at a time when [that] tribunal was incompetent … indicates (*yadull*) clearly that the parties intended by converting in the circumstances of this case to disrupt the rules of public order that designate the competent tribunal, which is the Maronite tribunal." (257) From this, the Cassation concludes that "the spouses' conversion [changing of their Maronite *madhhab*] was not sincere (*sadiq*) but fraudulent (*'ihtiyal*) the evidence being that the wife returned to her Maronite *madhhab* … and that the husband … declared before the Rota that he was still upon his Catholic faith and swore an oath before it ascertaining his admission …" (257) The Cassation rules in favor of Olga, considering the "Maronite tribunal and, therefore, the Rotal tribunal, which is its last instance (*marja'uha al-akhir*), competent … and repealed the ruling issued by the Orthodox *madhhabi* tribunal …" (C.C .1952: 253-254)

Evidence for the spouses' *intentions* was found in the *effects* of their conversion. While the effects of their actions might indeed have been the disruption of public order, in that disruption the Court found evidence of their intentions *to disrupt* public order. "Evidence was available," wrote the Court, "that the spouses' leaving their Maronite *ta'ifa* was … a result of complicity (*tawatu'*) intended to disrupt the principles of public order and displace the authority of ecclesiastical tribunals to others." The evidence "was inferred from the case and its circumstances," it explained. First of all, it noted that the "spouses are initially of the Maronite *ta'ifa* and subject to the Maronite ecclesiastical tribunals …" The Maronite court had rejected their claim and transferred the case to the Roman Rota, "the ultimate authority for Maronite ecclesiastical rulings." It was while the case was "suspended (*'aliqa*) before [the Rota]" that the spouses [had] proceeded to "switch (*tabdil*) their *madhhab* (rite)," which revealed their "intention (*qasd*) [to rid] themselves of their natural judges." They had then

filed their complaint before the Orthodox ecclesiastical tribunal while not yet registered as Orthodox in the state's records. This fact and what it entailed, namely, that their case was still outside Orthodox jurisdiction, "indicated clearly" for the Cassation Court that "by changing rites in the circumstances of this case the parties intended to disrupt the rules of public order …" (257) Third, Olga had returned to the Maronite *ta'ifa* at some point during the trials, while Caesar had sworn before the Roman Rota that he was still a Catholic. All this was an indication that the conversion "was not honest (*sadiq*) but rather was a legal fraud (*'ihtiyal 'ala al-qanun*) …" These three reasons—the intention to rid themselves of their natural judges, the intentions to disrupt public order, and fraud and dishonesty—rendered their conversion null. The spouses were therefore still Maronite Catholic, the Catholic ruling was the valid one, and more than a decade after filing the first complaint, Olga and Caesar were still married.

Olga and Caesar converted on the 15th of October 1947, registered on the 26th of January 1948, and received their divorce on the 29th. Article 23 of Dec. No. 60 does not mention any condition. On the other hand, if it did mention a condition, then all that was required was to apply the law. This addition, however, seems to be an outcome of judicial discretion, which set a precedent for subsequent cases. Thus, in a decision issued four years later on the 29th of September, 1955, in a similar case, the Cassation Court again stated the same article followed by the same conditional formulation, with the addition, "… *kama 'istaqarra 'alayh al-'ijtihad*," which effectively means: in accordance to a precedent set by the Cassation Court in a previous decision. This formulation is repeated in several subsequent decisions.

In another case, the Cassation again is called upon to decide which of the two rulings, issued by the Orthodox ecclesiastical tribunal in Akkar and the Maronite ecclesiastical

tribunal in Tripoli, respectively. The first granted the spouses Zahiyya and Toufic divorce, the second is undisclosed, but it is stated that the two are "contradictory (*mutanaqidain*)." The Cassation's account is as follows: "The spouses were and remained Maronites in continuous cohabitation for fourteen years, and intentionally converted (*''amada ila taghyir madhhabihima*) at the Civil Registry on the 29th of July, 1954[,] and on the 31st of the same month, that is two days after converting to another *madhhab*[,] the spouses signed a confession before the notary public (*katib 'adl*) in Tripoli saying (*ma'aluhu*) that one divorced the other considering that they are of the Orthodox *tai'fa* … [T]hen on the 3rd of August 1954[,] that is five days after converting Zahiyya's lawyers filed for divorce … and on the 9th of August 1954[,] that is eleven days after converting the Orthodox ecclesiastical tribunal issued a divorce ruling." The decision followed: "And since the spouses' conversion to the Orthodox *madhhab* did not follow in this case from *conviction* [emphasis added] but was a legal fraud intended to get rid of the competence of the Maronite tribunal[,] which is [their] natural judge … And since legal fraud renders dysfunctional (*yu'attil*) the application of all legal rules …" What is implied in such rulings is not that conversion is invalid, irreligious, or illegal, but, rather, that it is legally "irrelevant (*la 'ibra li taghyir al-din*)," because it is "conditional upon its purpose being not the corruption of the bases of public order [or] legal fraud." (C.C. Decision No. 36, 03 April 1956) A decision of irrelevance means that the jurisdiction under which the first marriage took place is competent—in Olga's and Caesar's case, the Rota, whose decision the Court upheld.

In "Nader vs. Labban," a decision issued on the 10th of June, 1974, the appellant Abla argues that her husband's conversion (*taghyir madhhab*) "after marriage" carries "no effect … since that marriage remains subject" to the jurisdiction within which "it was contracted[,]

according to Article 23 of Decision No. 60 L.R." (B.B.C.A. 1974: 120) Therefore, determining the deceased husband's heirs is subject to the "Inheritance Law for Non-Mohammedans (*qanun al-'irth li ghayr al-muhammadiyyin*)" and the jurisdiction of "the civil court[,] considering that [his] conversion from Christian to Muslim [*sic*] was legally fraudulent (*'ihtiyal 'ala al-qanun*) and intended to dispossess his wife from her legitimate (*shar'i*) inheritance." (119)

She and George were married on the 11th of January, 1958 at Beirut's Capuchin church as Western Catholics (*latin*, officially a *madhhab*). He eventually "embraced the Islamic religion into the Sunni *madhhab* (*'i'tanaqa al-diyana al-'islamiyya 'ala madhhab 'ahl al-sunna*)" and had his conversion "registered at the Personal Status Registry according to procedure and law on the 15th of December, 1967." (119) Soon thereafter he died, his wife Abla receiving promptly from the single civil judge a confirmation of his death" and of herself as "sole heiress[,]" given that he "was Christian." (120) However, at the same time around 1968, the late George's "paternal cousins" managed to "acquire from the *shar'iyya* tribunal" a "notification (*'i'lam*) … considering them sole heirs because the decedent died a Muslim and the Islamic religion does not put in possession (*la yurith*) a non-Muslim." (120) They also appealed the single judge's decision, who "revoked his earlier decision" on grounds on "incompetence … after it was proven that the decedent … died a Muslim." (120) Abla petitioned Beirut's Civil Court of Appeals to overrule both the civil and *shar'i* decisions.

The court reasons as follows. Abla and George were still married when he died, and "article 11" of Decision No. 60 "stipulate[s] that every sane adult has the right to leave or embrace a confession (*ta'ifa*)" that possesses its own "recognized personal status system."

Conversion carries "civil effects" as long as it is followed by a "correction of the records of personal status[,] which is nothing but confirmation of the freedom of belief, one of the fundamental personal freedoms guaranteed by the Lebanese Constitution in its 9th article and stated by the Declaration of Human Rights." (121) Regarding the relationship between conversion and marriage, the court cites the relevant statutes, all of which are found in the aforementioned Decision. The first specifies that "in case the spouses convert (*taraka ta'ifatahuma*) or one of them does so the children will follow their father's status[,] their personal status documents remaining as they are or corrected" accordingly. (Art. 12, 121) The second specifies that "in case one of the spouses converts the marriage and personal status documents remain subject to the law according to which the marriage was celebrated or the documents signed," and "in case both" do, their marriage and children will be transferred to the new jurisdiction. (Art. 23, 121)

The court's interpretation overrode all of the above, distinguishing *marriage* and its consequences—such as "divorce, support, and custody"—on the one hand, and *inheritance* on the other. The court argued that, whereas the former belong to the jurisdiction of the confessional tribunals, the latter fall under a "private law" that is "independent of marriage law and marital documents." (122) The matter of inheritance is to be decided based on the religion to which the decedent belonged no matter where his marriage—"*de jure* dissolved at death"—took place. "And since if," the court reasoned,

> "the Islamic or Christian inheritance law specifies for the wife a share of the inheritance[,] this inheritance in itself is not considered to arise from the law of marriage (*qanun al-munakahat al-zawjiyya*) but is a right established by private law for the decedent's heirs[,] whether he was married or single[,] and includes the father, mother, and other relatives as much as it includes the wife and children[,] whose interests may conflict as a result [if they belong to] various *madhhab*s." (122)

Having delineated the legal basis of the distinction between inheritance and marriage, the court then asserts that the inheritance law is that "of the confession to which the decedent belongs to at death," thereby confirming his paternal cousins as rightful heirs.

Regarding George's conversion to the "Christian *madhhab*" and the accusation of "fraud," the court recognized that "conversion (*taghyit al-madhhab*) … is a personal act related to the individual 'self' (*nafs*), thoughts, and beliefs[,] and is a basic human right the legislator (*al-mushtari'*) guaranteed the citizen." But, it then drew a careful distinction between the convert's possible "motivations" of "pure belief (*'i'tiqad mujarrad*) and the appeasing of conscience (*rahat al-damir*)" on the one hand, and his equally possible "intent[ion] to inflict harm (*darar*) on his wife the appellant's right" to inherit. (122) Without questioning the former, the court indicated that "assuming" the latter—"that harmful and wrongful act (*hadha al-'amal al-dar wa ghayr al-muhiq*)"—was indeed the case, then "all she could ask for … before the competent civil court … is compensation (*'itl wa darar*) from his legitimate heirs (*warathatihi al-shar'iyyin*) …" (122) This solution secures the separation of confessional jurisdictions in matters of inheritance, threatening neither "the public order established in Lebanon *nor* "personal freedom [of] belief (*al-mu'taqad*)." (122)

Based on the above line of reasoning, the court dismissed Abla's claim and confirmed George's paternal cousins as rightful heirs. Nevertheless, one of the three judges dissented, interpreting the facts in a remarkably different way. His objection, published as an appendix to the court's ruling, observed "from the facts" that "the late George … had a disagreement (*'ikhtalafa*) with his wife the appellant and left her [for] another woman to whom he passed his property (*'awsa laha bi 'amlakihi*)." (123) In addition, George "had already converted" a third time (he first converted from Islam to Catholicism) from "his Latin *madhhab* to

Orthodoxy" before converting back to Islam. Moreover, the judge pointed out, George "was not satisfied by the announcement of [his return to Islam] to his relatives (*dhawaih*) and … the *shar'i* judge, but made sure to accomplish the conversion procedure at the registry of the Public Administration of Personal Status in order to secure temporal consequences (*mafa'il zamaniyya*) …" (123) For the dissenting judge, these "facts" are "sufficient to prove that the hidden purpose" of George's last minute conversion was to "dispossess his wife" and constitutes, therefore, "legal fraud (*'ihtiyal 'ala al-qanun*)." From this alternative interpretation, the judge concludes that George's conversion carries no legal effects, and consequently does not "change the system of inheritance" he was subject to "prior to that act." (123)

Conscience and Beliefs vs. Legal Fraud

The disagreement among the judges in the preceding case highlights less the arbitrariness of the "legal fraud" claim against conversion than the hesitation between two distinct theories of law. Whereas the court of appeals based its decision on a positivist understanding that construes Lebanese law as a hierarchy of rules, the dissenter, following the practice of the Cassation Court dominant in the cases from the 1950s analyzed above, takes as his point of departure the moral intention behind the individual act as the basis of judgment. Although the court does take into consideration the possibility of the intention of legal fraud behind George's conversion, it excludes it from the range of decisive acts in that kind of case on grounds that it does not override the exigencies of competence. In that respect, the court of appeals' decision is diametrically opposed to the earlier Cassation rulings, which based public order on sincerity. The force of "legal fraud" against conversion may sometimes be

neutralized by invoking the "interiority" of conversion, and the difficulty, therefore, of proving its motives.

The case of Georgette, Greek Orthodox, and Antoine, Maronite Catholic, illustrates. Bound by a Maronite marriage, they signed a notarized agreement on the 24th of July 1971, proclaiming their "conversion (*'i'tinaq*) to the Orthodox *madhhab*," thus enabling themselves to petition the Orthodox ecclesiastical tribunal for a dissolution (*faskh*). (C.C. 1983: 198) Georgette, authorized by an Orthodox archbishop (*mutran*), then married Shafiq in August 1971, the two remaining childless when he died eight years later. (199) On the 15th of December, 1980, Shafiq's son François from a previous marriage managed to acquire a ruling from a Maronite archbishopric "confirm[ing] Georgette['s]" first marriage and considering them both "unqualified to contract (*'aqd*) a subsequent correct (*sahih*) legitimate (*shar'i*) marriage." (199) Georgette challenged the archbishop's ruling, claiming the Orthodox archbishopric the rightful authority, for various reasons. In his accusatory act, François claimed, among other things, that "the conversion was legally fraudulent," intended "solely" as a means to "acquire a ruling of dissolution" from the Orthodox Church. (198)

In its response to the accusation of legal fraud, the Cassation cites "Article 23 of Decision No. 60, 1936, and Article 33 of Decision No. 146/1938," according to which the spouses' conversion to Orthodoxy entails the transfer of "all that relates to their marriage" to that jurisdiction. (199) In other words, according to these two articles at least, the Orthodox dissolution of Georgette's initial Maronite—later Orthodox—marriage was perfectly legal, but could still be disqualified on ground of fraud. Moreover, one of the plaintiff's arguments specifically pointed out that "Article 14 of the Law [of] 2 April 1951 … stipulates that the *madhhabi* authority competent to rule over marriage and its effects is that under which *that*

marriage was contracted …" (198; emphasis added) In response, the Cassation asserted that this article "did not abrogate" the two previous articles, "because limiting personal freedom and coercion in [matters of] religious doctrine (*al-'aqa'id al-diniyya*) was absolutely not the legislator's intention," making sure to stress the incompatibility of such constraints with "what is customary (*muta'araf 'alaih*) and [with] the essence of all religions (*jawhar al-'adian kulliha*) …" (199)

To determine Antoine's religion, the Cassation distinguished between the marriage and the "rite" according to which he was buried, to conclude that even though the latter was Maronite—in other words, even if he did die a Maronite—what "are taken into consideration are the documents of personal status only," which inscribe him as Orthodox. (199) But, remarkably, the Cassation did not see any "indicat[ion] that Georgette ever surrendered (*takhallat*) her Orthodox *madhhab*[,]" because "on the 24th of July, 1971[,] she consented to it and was accepted by the Orthodox ecclesiastical authorities (*al-maraji' al-ruhiyya*) …" (199) However, it is worth pointing out that Georgette was Orthodox *before* she married the Maronite Antoine, to whose *madhhab* she therefore belonged by virtue of marriage, then she and her husband converted to Orthodoxy as a way to dissolve their marriage. Maybe this would have been sufficient in the 1950s for the Cassation to declare fraud, but in this case it takes another path, arguing that,

> "legal fraud remains unproven because conversion is a matter of religion and religious belief (*al-'i'tiqadat*) that are difficult for the civil courts to delve into in order to say whether faith exists or not[;] this issue is restricted to the relationship between the human being and his conscience[,] unless the nullifying means of fraud [for the ends of] violating public order and intentionally harming the interests of others are evident and certain[;] this case lacks such evidence." (200)

Given the above, the Cassation decided to dismiss François's claims, to consider the Maronite ecclesiastical tribunal "absolutely incompetent," and confirm the Orthodox ruling of dissolution valid.

The above formulation is used in another case in 1988 with slight variation, the Cassation considering itself incapable of determining whether conversion is fraudulent or not, first "because it is difficult … to delve into such doctrinal (*'aqa'idiyya*) and spiritual (*ruhiyya*) matters between the human being and his conscience," and also because both "spouses were involved[,] one cannot accuse the other of [something] in which he himself has participated." (C.C. 1988: 131-134). However, in a later decision issued on the 17th of May 2002, the First Instance Civil Court in Mount Lebanon manages to circumvent, yet assert "freedom of belief" as a "pillar of individual freedom consecrated by (*karrasa*) the Declaration of Human Rights and the Lebanese Constitution." While recognizing its incompetence to "interfere in the doctrines of persons and examine the depths of their hearts to prove whether their faith is correct (*sahih*)," it nevertheless argued that "the official appearance" being available to it, it may "intervene if that aforementioned appearance indicates (*yadull*) clearly that … conversion was enacted fraudulently[,] which is a violation of public order." (F.I.C.C. 2002: 753)

Conclusion

In this chapter I began by asking a general question: Under what conditions does conversion become legally meaningful, and what are the consequences or effects of that legal attention to conversion, on conversion? I sought those conditions specifically in the two principles that constitute the Lebanese state: absolute freedom of belief and conscience on the one hand, and

the protection of the personal status of the diverse religious confessions. The Lebanese Constitution, where the two notions are explicitly stipulated, their outcome, both individually and combined, is not articulated. The first notion may mean unhindered conversion, while the latter establishes jurisdictional boundaries between the religious confessions, and, therefore, may hinder conversion. Conversion articulates the two principles, which, as features of the Lebanese state and the assumptions upon which it rests, tie the two together *problematically*. I then described the possibilities this configuration offers individual converts, and the legal problems it gives rise to, analyzing in considerable detail the strategies deployed to *regulate* conversion, or, in the case of confessional tribunals, to avoid doing so.

As do the courts, I did not ask whether conversion in these cases is valid or not, or religious or not, but rather tried to delineate some of the interconnections the courts make between conversion and aspects of the state, such as, public order, sincerity, morality, family, and procedures. Although the courts claim not to interfere in conversion *per se*, they do so indirectly, in two ways: first, by assuming a particular definition of conversion—as a motivated act—and, second, by determining its conditions; more specifically, by constituting the conditions within which that act—but not, curiously, its motives—occurs, and upon which it bears—regardless of the convert's intentions.

These cases make it possible to draw some conclusions about conversion and secularism. The two aforementioned notions are *secular* notions, presumably intended to secure personal freedom and a particular *modus operandi* among religious confessions. What is interesting, however, is their unintended effects, namely, that conversion becomes *decisive* not only as a right, but as an extra-judicial instrument with the capacity to alter the law—in other words,

the very conditions of those rights and their distribution. It is in this respect that conversion is, as I suggest in the introduction, a “point of problematization.”

CONCLUSION

What is the relationship between shifting articulations of "the religious" and "the secular" on the one hand, and marriage on the other? In the first chapter, the question is addressed by an account of various responses to "civil marriage." Marriage figured there as a practice, whereby individual choose to marry in civil jurisdictions falling outside the sovereignty of the Lebanese state, and as a discourse when these marriages become matters of discussion and public debates, or as legal proposals, which, in turn trigger polemics and controversies. The newlywed couple are put in a position in which they must justify their civil marriage against the objections of a Sunni Muslim mufti on an evening talk show. The discussion turns not as much around the definition of marriage as such, but rather some of the secular assumptions the couple hold about individual autonomy, humanity, authority, morality, the self and the body, which, nevertheless, determine their notion of marriage. Thus, "civil marriage" is claimed as a right based on the idea that marriage is a self-authorized decision made by a free, self-possessing individual, whose attributes as such follow from her being human. The sufficient condition of that decision involving two identical individuals is love. This view has no room for "the religious," which is theorized or explained in a way that secures its exclusion from the domain of the secular. Religion assumes the figure of a Muslim mufti opposed adamantly to it, although a closer look at his arguments shows not so much an objection to the conception of marriage proposed *per se*, but rather its *shar'i* underpinnings. For the mufti the problematic distinction is one between *shar'i* and non-*shar'i* marriage rather than the secular opposition between civil and religious marriage.

Assumptions about marriage and "the religious" converge with claims of rights and normative views about "the state," to sustain the demands for legal reform. The latter, such as the president's proposal for an optional civil marriage, draw into the debates Muslim and Christian religious authorities, whose objections are distinct and concerned less with religious issues than questions of state and the place Muslims and Christians occupy in it. Supporters of civil marriage law, the Sunni mufti of the republic, and the Maronite Catholic Patriarch each holds a distinctively normative view of the Lebanese state, each inscribed already in its organic laws. The first highlight the possibility of civil marriage already inscribed in the latter, but wish to see it actualized in codes; the second consider the Lebanese state in terms of the institutional continuity the *shari'a* courts ensure for Muslims with the Ottoman state; the third prefer to emphasize freedom of conscience and equality among various religions, leaning towards the latter in this case. Marriage figures contingently, as an effect of the aspect of the Lebanese state each occupies, or, reversibly, reconfigurations of marriage are determined by different conceptions of the state. Civil marriage is implied in the principle of freedom of conscience, and whereas the Maronite Catholic view of a plurality of laws—including a civil marriage law—secures the vision of a state of religious minorities, the Sunni Muslims see in civil marriage as an extension of a particular genealogy of a will to reform opposed to the Ottoman heritage.

The second chapter was an account of that genealogy and the legal arrangements to which each gave rise. The reforms do not directly target marriage, but rather reconfigure its conditions. The outcome of the Ottoman reforms is the restriction of *shari'a* to family law and the consignment of marriage to the millet—the non-Muslim communities of the empire—as part of their privileged status. Moreover, Ottoman reforms maintain a distinction

between legal reforms on the one hand, and the various Muslim and non-Muslim communities, and do not, therefore, constitute conditions for them to conflict, except in occasional cases of conversion and "inter-communal" marriages that nevertheless remain subject to the rules of each community. Only with the French Mandate is a common space of relationships among them carved out, which consists of questions about judicial competence. The reason is twofold: first of all, the French attempt to systematize them all under a single category—personal status—and, second, the French tie their reforms to a concern with equality among religious minorities. The latter is upheld along with the principle of freedom of conscience, with the consequence that both marriage and conversion are now detached from the judicial competences of the various religious "personal status" jurisdictions. Here, "the secular" legally constitutes the character of the Lebanese state, transforming the relationship between "religions" into a relationship of judicial power.

Turning the *shari'a* courts into jurisdictions in charge of the application of both law and *shari'a*—with the former enjoying priority—raises questions about the distinction and relationship between the two, and about the authority of the court, the judge, and the *shari'a*. The *shari'a* court marks the distinction between them by emphasizing the positivity of law, but also its ethical insufficiency and its inadequacy as a source of knowledge for conducting one's affairs and relationships. Marking the law as such, the *shari'a* and the virtues it instills are asserted. The *shari'a* courts do not handle cases of marriage but rather of its consequences: custody, support, and inheritance. While marriage does not figure as a legal or *shari'a* problem, it is not entirely absent, for it is encompassed within a broader set of relationships among members of the same family. While these relationships are regulated legally and according to *shari'a* provisions, their particularly Islamic or *shar'i* character is

emphasized not merely in terms of legal rules, but rather according to Islamic ethical and affective prescriptions. Thus, expectations to provide support and assume the right of custody is not only a matter of following rules, but also of the dictates of one's conscience and sentiments premised being a proper Muslim, which not only guide the principals in their everyday affairs, but secure the judge's authority and the justice of his decisions as well.

While the distinction between "law" and "*shari'a*" articulate "the secular" and "the religious" in Sunni *shari'a* courts, in Maronite Catholic ecclesiastical courts it is the relationship between medico-legal expertise and Catholic Canon Law that does so. Catholic matrimony is a Holy Sacrament, and once it is accomplished—by the act of mutual consent between two persons—the bond cannot be dissolved. However, Holy Matrimony has a worldly aspect, which the Second Vatican Council redefined as an interpersonal relationship depending for its existence and perpetuation on the faculties of the mutually consenting persons at the time of consent. These faculties are taken to consist in the psychological, physiological, and anatomical constituents of the person, the normal state of which at the time of consent is necessary for the latter's—and therefore of the marriage's—validity. Declaring a marriage void implies a recognition that the marriage never took place, or, in other words, that the act of consent was invalid, which means that the conditions that gave rise to it—the person's natural capacities—were anomalous at the time of consent. To establish this, medico-legal expertise is summoned to examine, diagnose, and offer a prognosis for future marriage. Medico-legal expertise offers possibilities for ecclesiastical adjudication, by enabling annulments and securing the integrity and sovereignty of conscience.

The last chapter revisited the two constitutional guarantees of the freedom of conscience and the protection of the personal status of religious confessions. It identified a tension between the two arising from the difficulty of drawing an *a priori* distinction between the "religious" and the "secular" aspects of "personal status" jurisdictions. This invites people to convert for both "religious" and "legal" purposes—namely, marriage and its legal consequences. While the law regulates the conditions of conversion, some ambiguous cases occur nevertheless, that give rise to conflicts among religious competences. These elicit the intervention of the civil court—authorized exclusively to handle such cases—which, in order to resolve the conflict and uphold the competence of only one religious court, must decide whether the conversion is valid or not, placing limits on the freedom of conscience—and defining "the religious." In these cases, which threaten the foundations of the state, the absolute freedom of conscience does not *always* include conversion. These decisions are unstable, however, for they rest on assumptions about the state that shift among different cases.

Articulations of "the secular" and "the religious" and the meaning of marriage are mutually implicated, and are inevitably tied to the modern state. Thus, marriage is deployed in Lebanon today as a claim of right—civil, personal, or human—distinct from religious beliefs or membership to a religious community. It is platform to assume a political, moral, or a "religious" position, the three often, if not always, occurring together. A particular sort of marriage—or an opinion about marriage—is an assertion of one's progressiveness and secularism on the one hand, or the current order on the other. It may be self-conscious expression of a "religious" commitment, despite the fact that it is also the ordinary thing members of a religion do, and it requires elaboration, explanation, and interpretation to

disentangle—or connect—the two. It is also a means of regulating relationships between "religions," or a device of subverting them, and may motivate or lead to conversions, whether for the sake of marrying a member of another religion, or to facilitate pragmatically one's conjugal affairs—by obtaining divorce, for instance, securing one's succession, or preventing someone else from inheriting. Marriage in Lebanon is a domain of problems that renders "the secular" and "the religious" both legible and unstable.

BIBLIOGRAPHY

Legal Journals and other Documents

Abou Eid, Elias, ed.
Al-qararat al-kubra fi al-'ijtihad al-lubnani wa al-muqaran/Les grands arrêts de la jurisprudence libanaise et comparée. Nos. 7, 8, 36, and 41. Beirut.

Al-zein, Aref Zeid
2003a *Qawanin wa nusus wa 'ahkam al-ahwal al-shakhsiyya wa tandhim al-tawa'if al-'islamiyya fi lubnan*. Beirut: *Manshurat al-halabi al-huquqiyya*.
2003b *Qawanin wa nusus wa 'ahkam al-ahwal al-shakhsiyya wa tandhim al-tawa'if al-masihiyya fi lubnan.* Beirut: *Manshurat al-halabi al-huquqiyya.*

Badawi, Hanna, ed.
Al-huquq al-lubnaniyya w al-'arabiyya, parts 1, 2, 3 and 4. Beirut.

Bakkar, A, ed.
1987 *Qadaya al-'ahwal al-shakhsiyya w al-jinsiyya*, 2nd edition. Beirut.

Beirut Bar Association
Al-'adl. Beirut.

League of Nations
1922 "*Nidham al-'intidab 'ala suriya wa lubnan*" in Sader Encyclopedia. 2007. P. 1. Beirut: Sader Legal Publishing. The French version is available at http://www.tesisenxarxa.net/TDX-0519106-124817/ (retrieved March 13, 2010).

Lebanese Constitution
http://www.servat.unibe.ch/icl/le00t___.html (English), http://www.lp.gov.lb/SecondaryAr.Aspx?id=12 (Arabic), and http://www.conseil-constitutionnel.gov.lb/fr/constitution.htm (French) (retrieved on September 24, 2009).

Ministry of Justice
Al-Nashra al-qada'iyya. Beirut.

Weygand, Maxime
1923 "*Qanun dusturi sadir fi 5 tishrin al-'awwal 1923, saqq al-'intidab al-faransi 'ala lubnan min al-giniral weygand ila hakim lubnan al-kabir* (Constitutional Law issued 5 October 1923, the Text of the French Mandate on Lebanon from General Weygand to the Governor of Lebanon)" in Sader Encyclopedia. 2007. P. 1. Beirut: Sader Legal Publishers.

http://www.cormacburke.or.ke/Rotal_Decisions?from=0 (retrieved on January 1, 2010).

http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html (retrieved on March 18, 2011).

http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html (retrieved on April 08, 2011).

http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html (retrieved on August 9, 2010).

Newspapers

Annahar, December 1997-April 1998
Assafir, December 1997-April 1998.

Secondary Sources

Abu-Lughod, Lila and Anupama Rao, eds.
2011 Women's Rights, Muslim Family Law, and the Politics of Consent. New York: Center for the Critical Analysis of Social Difference, Columbia University.

Abu-Odeh, Lama
2005 Modernizing Muslim family law: The case of Egypt. Peace Research Abstracts. 42(2).

Abu Zahra, Mohammad
1955 Family Law. *In* Law in the Middle East. M. Khadduri and H.J. Liebesny (eds.) Washington, D.C.: The Middle East Institute, 132-178.

Agamben, Giorgio
1998 Homo sacer. Sovereign Power and Bare Life. Daniel Heller-Roazen, transl. Stanford: Stanford University Press.

Agnes, Flavia
2011 Interrogating "Consent" and "Agency" Across the Complex Terrain of Family Laws in India. *In* Women's Rights, Muslim Family Law, and the Politics of Consent. Abu-Lughod and Rao (eds.) New York: Center for the Critical Analysis of Social Difference, Columbia University, 1-16.

Agrama, Hussein Ali
2010a Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State? Comparative Studies in Society and History 52(3): 495-523.
2010b Ethics, Authority, Tradition: Towards an Anthropology of the Fatwa. American Ethnologist 37(1): 2-18.

Al-Azri, Khalid
2010 Family Law with the Focus on Oman's Response to Modernity. Journal of Middle Eastern and Islamic Studies (in Asia) 4(1).

Anderson, J. N. D.
1959 Islamic law in the modern world. New York: New York University Press.
1976 Law Reform in the Muslim World. London: University of London, Athlone Press.

Aquino Siapno, Jacqueline
2011 *Shari'a* Moral Policing and the Politics of Consent in Aceh. *In* Women's Rights, Muslim Family Law, and the Politics of Consent. Abu-Lughod and Rao (eds.) New York: Center for the Critical Analysis of Social Difference, Columbia University, 17-29.

Asad, Talal

2006 Trying to Understand French Secularism. *In* Political Theologies: Public Religions in a Post-Secular World. Hent de Vries and Lawrence E. Sullivan (eds.) New York: Fordham University Press.

2003 Formations of the Secular: Christianity, Islam, Modernity. Stanford, Calif.: Stanford University Press.

1993 Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam. Baltimore: Johns Hopkins University Press.

1986 The Idea of an Anthropology of Islam. Washington, D.C.: Center for Contemporary Arab Studies, Georgetown University.

Benveniste, Émile

1971 Problems in General Linguistics. Coral Gables, Fla.: University of Miami Press.

Bourdieu, Pierre

1987 The Force of Law*:* Toward a Sociology of the Juridical Field. Hastings Law Journal 38(5): 814-853.

Braude, Benjamin

1982 Foundation Myths of the Millet System. *In* Christians and Jews in the Ottoman Empire: the Functioning of a Plural Society. Benjamin Braude and Bernard Lewis (eds.) New York: Holmes & Meier Publishers.

Buskens, Leon

2003 Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere. Islamic Law and Society 10(1): 70-131.

Canguilhem, Georges

1966 *Le normal et le pathologique*. Paris: *Presses universitaires de France*.

Carrithers, Michael, Steven Collins, and Steven Lukes

1985 The Category of the Person: Anthropology, Philosophy, History. Cambridge, U.K.: Cambridge University Press.

Clarke, Morgan

2012 The Judge as Tragic Hero: Judicial Ethics in Lebanon's *Shari'a* Courts. American Ethnologist 37(1): 106–121.

Cohen, Amnon

1982 On the Realities of the *Millet* System: Jerusalem in the Sixteenth Century. *In* Christians and Jews in the Ottoman Empire: the Functioning of a Plural Society. Benjamin Braude and Bernard Lewis (eds.) New York: Holmes & Meier Publishers.

d'Arvieux, Laurent

1982 *Mémoires*. Voyageurs d'Orient 2. Beyrouth: Editions Dar Lahad Khater.

Das, Veena

2004 The Signature of the State: The Paradox of Illegibility. *In* Veena Das and Deborah Poole (eds.) Anthropology in the Margins of the State. Santa Fe, N.M.: School of American Research Press.

Davison, Roderic H.

1963 Reform in the Ottoman Empire, 1856-1876. Princeton, N.J.: Princeton University Press.

de La Roque, Jean and Jean Raymond

1981 *Voyage de Syrie et du Mont-Liban*. Voyageurs d'Orient 1. Beyrouth: Editions Dar Lahad Khater.

Deringil, Selim

2000 There Is No Compulsion in Religion: on Conversion and Apostasy in the Late Ottoman Empire: 1939-1856. Comparative Studies in Society and History: an International Quarterly.

1998 The Well-Protected Domains: Ideology and the Legitimation of Power in the Ottoman Empire, 1876-1909. London: I.B. Tauris.

Derrida, Jacques

1992 Force of Law: the Mystical Foundation of Authority. *In* Deconstruction and the Possibility of Justice. Drucilla Cornell, Michel Rosenfeld, and David Carlson (eds.) New York: Routledge.

Donahue, Charles

1977 Comparative Reflections on the "New Matrimonial Jurisprudence" of the Roman Catholic Church. Michigan Law Review 75(5/6)

Emon, Aver M.

2006 *Huquq Allah* and *Huquq al-'Ibad*: a Legal Heuristic for a Natural Rights Regime. Islamic Law and Society 13(3): 325-391.

Foucault, Michel, Mauro Bertani, Alessandro Fontana, François Ewald, and David Macey

2003 Society must be defended: Lectures at the Collège de France, 1975-76. New York: Picador.

Foucault, Michel, and Jacques Lagrange

2006 Psychiatric Power: Lectures at the Collège de France, 1973-74. Basingstoke, Hampshire [England]: Palgrave Macmillan.

Foucault, Michel, Paul Rabinow, Nikolas S. Rose, and Michel Foucault

2003 The Essential Foucault: Selections from Essential Works of Foucault, 1954-1984. New York: New Press.

Foucault, Michel, Michel Senellart, François Ewald, and Alessandro Fontana

2007 Security, Territory, Population: Lectures at the Collège de France, 1977-78. Basingstoke: Palgrave Macmillan.

Geertz, Clifford

1983 Local Knowledge: Further Essays in Interpretive Anthropology. New York: Basic Books.

Gerber, Haim

1999 Islamic Law and Culture, 1600-1840. Studies in Islamic law and Society Volume 9. Leiden: Boston.

1994 State, Society, and Law in Islam: Ottoman Law in Comparative Perspective. Albany, N.Y.: State University of New York Press.

Hallaq, Wael B.

2009 An Introduction to Islamic Law. Cambridge, UK: Cambridge University Press.

1997 A History of Islamic Legal Theories: an Introduction to Sunni *u!ul al-fiqh*. Cambridge: Cambridge University Press.

Hanio! lu, M. "ükrü

2008 A Brief History of the Late Ottoman Empire. Princeton: Princeton University Press.

Hart, H. L. A.
1961 The Concept of Law. Oxford: Clarendon Press.
Heelas, Paul, and Andrew Lock
1981 Indigenous Psychologies: the Anthropology of the Self. London: Academic Press.
Hirschkind, Charles
2006 The Ethical Soundscape: Cassette Sermons and Islamic Counterpublics. New York: Columbia University Press.
Hobsbawm, Eric J. and Terence O. Ranger
1983 The Invention of Tradition. Cambridge: Cambridge University Press.
Hourani, Albert Habib
1962 Arabic Thought in the Liberal Age, 1798-1939. London: Oxford University Press.
Housset, Emmanuel
2007 *La vocation de la personne: l'histoire du concept de personne de sa naissance augustinienne à sa redécouverte phénoménologique*. Paris: *Presses universitaires de France*.
Johansen, Baber
1999 Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim *fiqh*. Studies in Islamic Law and Society Volume 7. Leiden: Brill.
Kanafani-Zahar, Aïda
2006 *Les tentatives d'instaurer le mariage civil au Liban: l'impact des Tanzîmât et des réformes mandataires*. *In Le choc colonial et l'Islam - La politique religieuse des puissances coloniales en terre musulmane*. Pierre-Jean Luizard (ed.) Paris: La Découverte.
Khadduri M. and H.J. Liebesny (eds.)
1955 Law in the Middle East. Washington, D.C.: The Middle East Institute
Khalaf, Samir
2002 Civil and Uncivil Violence in Lebanon: a History of the Internationalization of Communal Conflict. New York: Columbia University Press
Koselleck, Reinhart
2004 Futures Past: on the Semantics of Historical Time. New York: Columbia University Press.
LaDue, William
1974 Conjugal Love and the Judicial Structure of Christian Marriage. Jurist 34: 36-67.
MacIntyre, Alasdair C
1981 After Virtue: a Study in Moral Theory. Notre Dame, Ind.: University of Notre Dame Press.
Mahmood, Saba
2005 Politics of Piety: the Islamic Revival and the Feminist Subject. Princeton, N.J.: Princeton University Press.
Makdisi, Ussama

2000 The Culture of Sectarianism: Community, History, and Violence in Nineteenth-century Ottoman Lebanon. Berkeley, Calif: University of California Press.

2008 Artillery of Heaven: American Missionaries and the Failed Conversion of the Middle East. Ithaca: Cornell University Press.

Marcel Mauss

1938 *Une Catégorie de L'Esprit Humain: La Notion de Personne Celle de "Moi."* The Journal of the Royal Anthropological Institute of Great Britain and Ireland 68: 263-281.

Masters, Bruce Alan

2001 Christians and Jews in the Ottoman Arab World: the Roots of Sectarianism. New York: Cambridge University Press.

Méouchy, Nadine

2006 *La réforme des juridictions religieuses en Syrie et au Liban (1921-1939) – Raisons de la puissance mandataire et raisons des communautés." In Le choc colonial et l'Islam - La politique religieuse des puissances coloniales en terre musulmane*. Pierre-Jean Luizard (ed.) Paris: La Découverte.

Méouchy, Nadine, Peter Sluglett, Gérard D. Khoury, and Geoffrey Schad (eds.)

2004 The British and French Mandates in Comparative Perspectives*/Les mandats français et anglais dans une perspective comparative*. Leiden: Brill.

Messick, Brinkley Morris

1993 The Calligraphic State Textual Domination and History in a Muslim Society. Berkeley: University of California Press.

Moors, Annelies

2003 Introduction: Public Debates on Family Law Reform. Participants, Positions, and Styles of Argumentation in the 1990s. Islamic Law and Society 10(1)

Moosa, Matti

1986 The Maronites in History. Syracuse, N.Y.: Syracuse University Press.

Murad, Nicolas, Youssef Hamid Mouawad, and An!uwan Qawwal

2007 *Nubdhah tarikhiyah fi a!l al-ummah al-Maruniyah*. Beirut?: s.n.

Nacchi, A-M.

2004 *Alep et la Syrie*. *In Lettres édifiantes et curieuses des Jésuites du Levant*, I. Vissière and J-L. Vissière (eds.). Paris: Editions Desjonquères.

Noonan, John T. Jr.

1972 Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia. Cambridge, MA: The Belknap Press of Harvard University Press.

Opwis, Felicitas

2005 *Maslaha* in Contemporary Islamic Legal Theory. Islamic Law and Society 12(2): 182-223.

Örücü, Esin

1992 The Impact of European Law on the Ottoman Empire and Turkey. *In* European Expansion and Law: the Encounter of European and Indigenous Law in 19th- and 20th-century Africa and Asia. Wolfgang J. Mommsen and Jaap de Moor (eds.) Oxford: Berg.

Pottage, Alain, and Martha Mundy

2004. Law, Anthropology, and the Constitution of the Social: Making Persons and Things. Cambridge: Cambridge University Press.

Rabbath, Edmond

1986 *La formation historique du Liban politique et constitutionnel: essai de synthèse*. 2nd edition. Publications de l'Université Libanaise 1. Beyrouth: Libraire Orientale.

Rahman, Fazlur

1980 A Survey of Modernization of Muslim Family Law. International Journal of Middle East Studies II: 451-465.

Rosen, Lawrence

1989 The Anthropology of Justice: Law as Culture in Islamic Society. Cambridge: Cambridge University Press.

Rousseau, Jean-Jacques, Donald A. Cress, and Peter Gay

1987 Jean-Jacques Rousseau: the Basic Political Writings. Indianapolis, IN.: Hackett Publishing Company.

Said, Edward W.

1978 Orientalism. New York: Pantheon Books.

Samahon, Tuan N.

2000 The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem. The Georgetown Law Journal 88(7): 2211-2238.

Schmitt, Carl

1985. Political Theology: Four Chapters on the Concept of Sovereignty. Cambridge, Mass: MIT Press.

Schouppe, Jean-Pierre

1991 *Le droit canonique: introduction générale et droit matrimonial*. Bruxelles: Story-Scientia.

Stuart, Eileen F.

1994 Dissolution and annulment of marriage by the Catholic Church. Sydney: Federation Press.

Takla, Youssef S.

2004. *Corpus Juris* du Mandat Français. *In* The British and French mandates in comparative perspectives/*Les mandats français et anglais dans une perspective comparative*. Méouchy, Nadine, Peter Sluglett, Gérard D. Khoury, and Geoffrey Schad (eds.) Leiden: Brill.

Taussig, Michael T.

1999. Defacement: Public Secrecy and the Labor of the Negative. Stanford, Calif.: Stanford University Press.

Taylor, Charles

2007 A Secular Age. Cambridge, Mass: Belknap Press of Harvard University Press.

Thompson, Elizabeth

2000 Colonial Citizens: Republican Rights, Paternal Privilege, and Gender in French Syria and Lebanon. NY: Columbia University Press.

Tucker, Judith E

2008 Women, Family, and Gender in Islamic Law. Cambridge, U.K.: Cambridge University Press.

Turner, Victor W.

1986 The Anthropology of Performance. New York: PAJ Publications.

Van der Veer, Peter

2001 Imperial Encounters: Religion and Modernity in India and Britain. Princeton, N.J.: Princeton University Press.

Van Leeuwen, Richard

1994 Notables and Clergy in Mount Lebanon: the Khazin Sheikhs and the Maronite Church, 1736-1840. Leiden: E.J. Brill.

Volney, Constantin-François de Chasseboeuf, and Adolphe Bossange

1821 [1785] *Oeuvres complètes de C.-F. Volney: mises en ordre et précédées de la vie de l'auteur, Tome second, Voyage en Egypte et en Syrie : Tome I.* Paris: Bossange frères.

Weber, Max, Hans Heinrich Gerth, and C. Wright Mills

2009 From Max Weber: Essays in Sociology. Milton Park, Abingdon, Oxon.: Routledge.

Weiss, Max

2010 In the Shadow of Sectarianism Law, Shi'ism, and the Making of Modern Lebanon. Cambridge, Mass.: Harvard University Press.

2009 The Historiography of Sectarianism in Lebanon. History Compass 7(1): 141-154

2008 Institutionalizing Sectarianism: The Lebanese Ja'fari Court and Shi'i Society under the French Mandate. Islamic Law and Society 15(3): 371-407

Welchman, Lynn

2003 In the Interim: Civil Society, the Shar'i Judiciary and Palestinian Personal Status Law in the Transitional Period. Islamic Law and Society 10(1): 34-69.

Whitman, James Q.

2008 The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial. New Haven: Yale University Press.

Winnifred Fallers Sullivan

2005 The Impossibility of Religious Freedom. Princeton N.J.: Princeton University Press.

Würth, Anna

2003 Stalled Reform: Family Law in Post-unification Yemen. Islamic Law and Society 10(1): 12-33.

Yanagihashi, Hiroyuki

1998 The Doctrinal Development of "*Marad al-Mawt*" in the Formative Period of Islamic Law. Islamic Law and Society 5(3): 326-358.

Zuhur, Sherifa

2002 Empowering Women or Dislodging Sectarianism?: Civil Marriage in Lebanon. Yale Journal of Law and Feminism 14(77)