Women, family affairs, and justice: Tunisia in the 19th century

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Abstract

This contribution proposes an examination of the role of women within the family before the confrontation with the great changes of modernity. It focuses on the problematic of the visibility of women and on their efforts to impose their identity and renegotiate their status in spite of the weight of the normative patriarchal culture, enveloped by religious ethics. With reference to several affairs involving women deposing in court against husbands and relatives, it aims to illustrate how strategies used by women were pointing at the paradoxes of the patriarchal system. In this perspective, the court can be seen as a space of the fabric of women’s identity and of gender regulation as well as a theatre of daily life, a space where private affairs go beyond their usual boundaries, a space offering Muslim women the unique occasion to impose their rights.

Keywords: Women; Rights; Patriarchal system; Tunisia; Identity; Gender

1. Introduction

A woman petitioning the court on the grounds of a husband’s cruelty, or to refuse a marriage arranged by her father, or to fight against a brother taking her part of the family inheritance, constitute ordinary scenes recorded by court scribes and notaries. Important studies focusing on women, law and the family in Muslim societies underline this fact (Pierce, 2003; See also Antoun, 1980, pp. 455–67; Jennings, 1975a, 1975b, pp. 53–114). Despite the social obstacles that they might face, Tunisian women, like others, during the Ottoman period, used the justice system in significant numbers. Even if it did not happen as frequently as for men, the use of the court by women to claim their rights was a feature of everyday life.

‘Women’ and ‘everyday’: these are two key paradigms in the social sciences; they continue to prove their value in historiographic practice, but not without having being regarded for a long-time as not worthy of any interest or consideration: the banality of everyday life and the banality of women’s lives were never undertaken by historians before the turn of the Annales school (1950s). Since they made their grand entrance in several strata of thought, first in sociology and then in history, these two concepts were ‘pushed from the periphery toward the centre of intellectual debate’ (Schulling, 2003). With the two notions linked to each other, we are faced with a very singular case of enquiry: a field which allows us to rediscover, through common actors and ephemeral events, real life. Everyday life cannot be better coupled than with women. Left in history’s
shadow and ignored for a long time, women and everyday life were also enclosed within the very ‘infra’ spaces: ‘the infra-economy’ and ‘the infra-society’.

Regarding these new fields, another history was born: a history reconciled with ‘its reality’ and its universal dimension (Perrot, 1998). After initial doubts, the history of women became essential in the historiographic field and could overcome the challenge of rewriting history; it clarified the multiple points left in the shade and subverted well-established frames of reference (Branche & Voldman, 2002, p. 3). Even if in Tunisian historiography, the field of women and gender is still being constructed, nevertheless, it has not been without influence on the orientation of research with its paradigms and its problematic (Larguèche, 2009).

The renewal of critical tools, methodologies, and manners of enquiry into the traces of the past opened many doors and provided means of access to ‘real society’. The Tunisian example in the pre-modern period is interesting in more ways than one: inserted within the Ottoman framework since the end of the 16th century, and crossed through by various cultural influences, Tunisian society has certain specific characteristics, in particular in social practices.

To make women visible in social dynamics, to include/understand their place and their condition, require a multitude of questions and the displacement of the borders established between the norm and the lived, the private and the public, theoretical knowledge and practical knowledge, between objectivity and subjectivity (Martin & Corradin, 1999, pp. 15–16).

This contribution aims to highlight some aspects of women’s real lives within the family framework in Tunisian society at the very moment of its confrontation with the great changes of modernity. This reflection is set in the problematic of the visibility of women’s gestures and acts within a socio-cultural framework managed and controlled by the norms of religious and moral ethics. It helps us to reconsider the history of women in the light of everyday life and their different manners to be present with their own individuality and voices, even if their lives were embedded in family relationships.

Discourses, images, and established legal norms in Islamic culture hide specific lived experiences, which could provide us very interesting testimony of the complexity and variety of reality. These traces could not be collected without the work of the historian in touch with reality and its materials.

Thus directed, our viewpoint will enable us to seize a female identity, complex and plural, subjected to the proof of social life and whose construction is driven through practices as different as interconnected, but not apart from the articulations and interferences of the categories of the masculine and feminine, categories not less defined by ethics and religious culture. This relational gender dynamics, which underlies the material production and symbolic system of a status and a culture, is likely to make more visible the prints and the roles of women, as inventive agents in the fabric of the social body and its history over the ‘long term’.

The choice of the court of justice as a space of the fabric of women’s identity and of gender regulation is more than a fortuitous case. The court is a theatre of daily life, a space where private affairs go beyond their usual boundaries. The emphasis in this contribution is on the uses that Tunisian women made of the legal resources available to them. Focusing on women at court and their negotiation with legal affairs as an aspect of women’s daily life has the benefit of highlighting the limits of normative prescriptions and their distance from actual practice. Thus, we will be in position to see women speaking, improving their position and taking their own destiny in hand.

Among the primary sources for my research are the sharia court records and notary records, available from the late 19th century, to be precise since 1874, thanks to the policy of Minister Khereddine (On Tunisia at the time of Khereddine Pacha: Van Krieken, 1976; For a perspective centred on material and social aspects of women’s daily life, see my previous study: Bouzgarrou-Larguèche, 2000).2 Because they come from within the given society, the archival data reveal women’s authentic life-conditions. They highlight the gap between normative prescription and real practice. The further we move from doctrinal legal formulations, the closer we come to the complex reality of gender relationship in the family space.

2 The Decree promulgated the 10 December 1873, under Khereddine Pacha’s ministry, ordered the reorganisation of the notary system and the setting up of the notary’s archives; see Archives Nationales, reg. no. 4065.
Sharia’, and that legal codes drew sharp distinctions between women and men in this context. However, Islamic law gives women a full legal personality, even if it promotes gendered legal structures. In consequences women are just as entitled legally as are men to enjoy their rights and access to the judge’s court, at least in theory. The ‘social disabilities’ which women endured did not turn them necessarily into mere passive objects of law. These women could be legally active in significant situations.

Malikisme has been well-established as a Sunni School of Islamic law in Ifriqiya and the entire Maghreb and Andalusia since the early centuries of Islam in western Islamic lands. Kairouan’s School of Islamic law (fiqh), with its famous jurists, such as Assad Ibn al-Furât (d.213 H/828), Suh’nûn (d.240/854), Abû Zay al-Qayrawânî (d.386/996), and others had played an important role in ensuring the permanence and durability of Malikisme, in spite of several difficult historical contingencies. After the official reattachment of the province of Tunis to the Ottoman Empire in 1574, the Hanafi madhhab established its mufîs and qâdis alongside Malikite jurists (Brunschvig, 1966, pp. 27–42). It is true that the majority of society adhered to Malikisme, however litigants could choose freely between the schools (Coulson, 1964, pp. 182–183). In regard to matters of personal status or waqf issues, it was current for Maliki people to follow the Hanafi doctrine. Although the four Sunni Schools of fiqh share many similarities, they are also marked by numerous differences. In regard to matters of personal status, these differences are very interesting (Milliot, 1953, pp. 268–385; Schacht, 1964, pp. 28–30; Coulson, 1964, pp. 97–101). What our documentation shows us is a ‘technical’ adoption of the Hanafi jurisdiction for legal issues by numerous women. How can this be explained?

Hanafi jurisdiction is known by its openness toward women’s right in marriage, the most important feature is that is permits a woman to conclude her own marriage contract without permission from her father or guardian: the right of jabr (obligation) that the wali has to his daughter, a principle defended by Maliki School, is absolutely denied in the Hanafi doctrine. ‘According to Abû H’anîfâ, the marriage contract of a free, adult, legally competent woman can be concluded with her agreement even if a wali does not conclude it on her behalf, and regardless of whether she is virgin or thayû’’ (Qudûrî, 1991, pp. 148–149). In consequence of this right, according to Hanafi opinion, a woman can refuse a marriage contracted by the father or another tutor without her agreement, and thus can cancel her marriage using the procedure of ‘rad al-fîl’: and so he allowed her to marry herself by her own choice. By contrast, the Maliki madhhab does not recognise this right and states: ‘A woman can marry only with the consent either of her wali, or a responsible relative like a man of her tribe, or the qâdis’ (Al-Qayrawânî, 1968, pp. 174–175).

The principle of the khul, the contractual dissolution of marriage, which permits a woman’s release from the matrimonial relation by offering the husband a compensation payment, is shared by both Malikites and Hanafites, although with some differences. As this principle was advantageous for them, it was frequently used by Tunisian women. In addition, Maliki jurisdiction gives a wife the right to obtain judicial divorce in case of her husband’s sexual impotence, incurable disease, absence, cruelty, or failure to maintain her (Al-Qayrawânî, 1968, p. 187). With regard to conditions in marriage contracts, the original Maliki jurisprudence in the Maghreb gives wide individual freedom to regulate contractual relationships. Accordingly, Tunisian women had largely used this right which safeguards their matrimonial position. The most remarkable stipulation concerns the principle of monogamy. Many other conditions, such as that the wife should not be obliged to live anywhere against her will, or that she should be free to continue her professional activity, were stipulated in many contracts. These stipulations, mostly used by women were a possible way to diminish the husband’s power (Larguèche, 2010).

Such differences and variations between the two legal Schools operating in Ottoman Tunisia, and the flexibility of the juridical practice rooted in social practice and custom (On the question of the influence of custom on Islamic law and jurisdiction, see Johansen, 1999, pp. 163–171), were very important in their consequences on women’s lived reality.

On the level of the practice of waqf, documents or waqfiyya reveal also the choice of the Hanafi madhhab by the majority of founders, if not for their entirety. In giving the right to retract or to change the terms of the foundation, Hanafi madhhab was very attractive in that case, the fact was well shared by women as well as by men (Ben Achour, 1992, pp. 51–78). The same data in the archives provide us with interesting details about the founder’s individual characteristics and also, about his/her freedom of decision in choosing the terms of the foundation or its management. It is well known in historical literature that the institution of the waqf in Islamic societies was largely used for turning away the shari’a law of inheritance, by excluding female from the

3 A waqf constitutes a settlement of property under which the ownership of property is ‘immobilized’: the waqf could be a waqf ahli (of family) or waqf khayri (charitable).
familial patrimony regarding various attitudes (Milliot, 1953; Gast, 1987).

Even if that was a daily reality for numerous urban Tunisian women, others had chosen the way of female solidarity by favouring female descendants: the case of Fatma daughter of Ali al Soufi from Kairouan who established her patrimony in waqf, in 1835 to the benefit of her daughters and their descendants, while she had also a son, is very interesting.4 But, this case and some others, even if they show us some interesting female practice of waqf, they cannot hide the contribution of women themselves to the fabric of gender culture by privileging males in their waqf foundations ( Ferchiou, 1985, pp. 251–270; Lacoste-Dujardin, 1985). What we can observe is that there was no standard practice or attitude in this respect, because the documents of daily life are there to show us the diversity of social and cultural behaviours.

What do our archives tell us about women’s practice of justice? Did Tunisian women, during the pre-modern period, easily decide to go in front of the qâdhî court? Did they decide naturally to defend their rights and choices?

Women’s voices which pierced the silence of history through their complaints registered in court records, testified to women’s awareness of fighting for their rights. Through transactions of daily life women’s courage and perseverance shines through despite gender subordination. Records very often allow us to see individual women portrayed in action: asserting their rights, protesting against violation of their rights, manoeuvring for social or material advantage, or breaking the law.

3. Women, marital affairs, and the court

It is true, that married women in Islam were under the power and the control of the husband. Before marriage, they were under their father’s authority. But, was that authority unlimited? Did wives have an obligation of total and inalienable obedience to their husbands? Muslim women’s rights within marriage, as prescribed in the Quran, and Sunna and legal texts, are to ensure limits to the husband’s authority (Milliot, 1953, pp. 275–386). They provide women with legal facilities to preserve their respectable place in the matrimonial link. Yet, as many studies of different Muslim societies have shown, the frequent use of the qâdhî court by women is a proof of the women’s legal capacity, as well as their tenacity in refusing the husband’s excessive subjugation (Pierce, 1992, pp. 143–175; Jennings, 1975a, 1975b, pp. 53–114; Tucker, 1994, pp. 295–300).

As legal registrations of daily matters, the sijillat of shari’a or dafîtir al-‘udîl provide us with variety of data that reveal voices, gestures and stories of women using the justice system to claim and defend their rights. The first important aspect of ordinary life which historians can reconstruct from the data available deals with marital relationships and associated matters. Numerous cases were treated by the shari’a court of Tunis, Kairouan, Sousses, Nabeul, Monastir, Sfax, and other Tunisian cities, showing us that private life could easily emerge from within the house walls and be ‘unpacked’ on the stage of the court (Blili, 1999, pp. 65–68). In regard to marital matters, the primary image of women is that plaintiff’s wives were frequently subjected to husbands’ subjugation. Some cases could also demonstrate the rejection of excessive paternal authority. The fact is not surprising in regard to woman’s status as defined by religious and moral culture as well as appointed by social norms.

4. Contesting a marital relationship

Dozens of complaints, emanating from girls (bikr bâligh) contesting the father’s or the wallî’s act of marrying them against their will, were dealt with by judges. Introduced to the qadhi hanafi, these girls demanded the right of rad al-fa’l: the refusal of the wallî’s act that was allowed by the Hanafi madhhab. By using this legal opportunity, they dared contest the right of the father’s (the wallî) constraint or h’aq al-jabr, as allowed by the Malikite doctrine. Two cases will illustrate the way that such matters were handled at court.

An orphan, ‘Aïsha, the virgin daughter of the late Sâlah’ Methnâni, went to the qâdhî of Kairouan city, and claimed that her brother had constrained her to marry the old man Moh’ammad bin Fraj al-Methnâni. She never accepted him and so demanded the cancellation of her marriage contract. The judge ordered the dissolution of this marital link (23 Muh’arram 1293/18 February 1876). Months later she married the young man Muh’ammad bin Sâlah’, by her own choice.6

Sallûh’a, the virgin daughter of the late Ah’mad Ba’t’ût’ al-Ma’mûri, made the claim to the qâdhî of Nabeul, that her uncle had married her without her consent

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4 Archives du domaine de l’Etat (ADE), fonds habous, dossier Kairouan.

5 Archives Nationales (AN), notary records; Archives du tribunal de Tunis, shari’a and notary records, (RC) nos 2-7-14, 2-5-14,5-5-2,13-5-36, 5-2-14, 15-13-21, 14-2-5.

6 AN, notary’s record of Kairouan, no. 2, p. 97.
to Moh’ammad bin Slimân; she asked for the cancellation of her contract. The judge accepted her demand and decided on annulment of her marital link (2 Safar 1309/6 September 1891).7

It is clear from these cases, and others, that the judge responded positively to the girls’ claims following the rule prescribed by Hanafi doctrine. And so, these girls, who had reached the age of majority, were permitted to get married according to their own wishes.

5. Petitioning for a divorce

The matter of divorce (talāq), requested in cases taken to the courts by women for numerous reasons, was regularly treated by shari’a courts in all Tunisian cities. Divorce among Tunisian people at that period, and probably among Muslims elsewhere, was not unusual. In Islamic law, the process of divorce is fixed by legal procedures. Even, if divorce in Shari’a, occurs unilaterally at the discretion of the husband, Muslim women have opportunities to demand a divorce. Maliki jurisdiction allowed a wife to ask for a judicial annulment of her marriage in case of husband’s cruelty, his refusal or inability to maintain her, his long absence, his affliction with serious disease, or even his sexual incapacity (Al-Qayrawânî, 1968, p. 187). Approaching the court by themselves or represented by their wakîl, women do not hesitate to assert themselves freely and to give ample information on their marital lives. The following cases illustrate clearly the fact.

The woman Fat’t’ûma bint Mah’mûd bib H’sîn ’Arfa al-Sfâxî from Kairouan, took her claim before the judge court in 27 Safar 1293/23 March 1876, she claimed that one and a half years ago, her father married her to the merchant H’ammûda al-Qallâl. Until this date, she was still virgin, her marriage had never been consummated because her husband was sexually impotent. After having waited during all this time for him, she told the qâdhî that she was no longer able to stay with him. The qâdhî gave him to treat his condition, the situation was still the same, and then the divorce was announced.9

These two interesting cases, and they are not the only ones, testify not only how the judiciary defends women’s rights as prescribed by the law, but also how women were able to speak to the judge about sexual matters, and to claim their rights to a normal sexual life. Islam, as a religion and moral code, encourages fulfilling sexuality in the framework of the marriage, both for men and for women (Bouhdiba, 1975, p. 127). What we see here is women’s courage and tenacity to outweigh social and cultural obstacles. Social morality tried to keep hidden women’s voices and feelings. Women’s attitudes and behaviour implicated the honour of the family and the entire group. Certainly, numerous wives at that period, would not have had the same courage as Fat’t’ûma or Sâlma, to talk about their sexuality to the judge. But when petitioning the court, women always have justice on their side.

Other cases reveal women’s applications to the court about a husband’s violence and cruelty. The qâdhî assigned trustworthy people to investigate the abuse of the husband, before ordering the divorce.

On 20 Shawwâl 1308/28 May 1891, the women Khadija daughter of Abd al-H’afîdh al-Bakkûsh sued her husband Sâlah’ ibn Sâlem al-Mershânî al-T’râbîlîsî. She declared to the qâdhî of the shari’a court of Nabeul, that her husband was cruel to her, and besides his violence, he did not provide her the necessary food and clothes. The qâdhî ordered him to provide her with all that she needed and gave the order for them to stay under the control of an honest and trustworthy couple (iskânihim ‘ind qawmin sâlihîn).10

The fact was very frequent among urban population as well as rural (Larguèche, 1992a, 1992b).

A woman might also go to the court after her divorce in order to claim for her unpaid mahr: Hannûna bint Muh’ammad al-Klibî complained, by means of her wakîl, that her husband had divorced her but would not pay her the forty piastres of her deferred dowry. The qâdhî stepped in to regulate the payment for her money.11

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7 AN, notary’s record of Nabeul, no. 186, p. 31.
8 AN, notary record of Kairouan, no. 2, pp. 96, 112.
9 AN, notary record of Nabeul, no. 186, p. 16.
10 AN, notary record of Nabeul, no. 186, p. 16.
11 AN, notary record of Kairouan, no. 616, p. 25.
If these cases illustrate the case of women’s indemnification divorce, in other cases wives have themselves initiated their divorce under the rule of the *khul*, which is a ‘divorce in exchange of compensation paid by the wife to her husband’ (Jennings, 1975a, 1975b, pp. 53–114), in other words a divorce with a price. This divorce initiated by the wife and requiring the husband’s agreement could be practised, in some circumstances, without compensation (Bellefonds, 1970, pp. 185–195). So, unlike *talâq*, the husband’s right, *khul* is not a unilateral act; it needs the consent of the husband. Such divorces were relatively frequent; numerous cases taken by couples to the court for dissolving their marital link reveal some interesting information behind the couple’s discord.

Naçr bin Belgâsim bin ‘Ayyād al-Jlācī, present with his wife, Fat’t’ūma bint Mou’hammad bin Mançûr al-Jlācī in the court of Kairouan, declared to the judge that he divorced his wife Fat’mâ, daughter of the late Yûnis bin Romdhân al-Jlâcî, stated before the court of Kairouan with his wife Fat’mâ, that he divorced his wife and gave her commitment to nourish her child with her own means. She also promised to pay him two hundred piastres d’argent *khul*, if she were to marry another man. The divorce was accomplished with their agreement, and according to the testimony of two notaries (27 Jumâda II 1292/30 July 1875).12

Ibrâhim bin ‘Amor bin Karîm al-Methnâni, present before the court of Kairouan with his wife Fat’mâ, daughter of the late Yûnis bin Romdhân al-Jlâcî, stated that he divorced his wife *khul*; she renounced her right to *mahr* and *nafaqa* and gave her commitment to give him four thousand *piastres d’argent* *khul*, if she were to marry another man. The divorce was accomplished with their agreement, and according to the testimony of two notaries (10 Shawwâl 1292/8 November 1875).13

These cases, and many others, handled by the court illustrate the frequent practice of the *khul*, a way that many women used to escape from unhappy or unbearable marriages. In several cases, wives initiating a divorce were often married just after the legal period.

6. Imposing rights as stated in marriage contracts

The use of stipulations in marriage contracts was a practice well known in pre-modern Tunisia, particularly in the city of Kairouan, the first Islamic city founded in Ifriqiya. We know from our juridical sources that the city of Kairouan was distinguished by its specific stipulation whose use became a custom known as the Kairouanian marriage contract (Larguèche, 2010).

The question of Muslim marriage, its terms, and juridical constituents have been much observed and analysed. However, the conditions or *shart*, which women and their families could negotiate or even impose on husbands at the time of the conclusion of the contract to expand their rights in marriage, are rarely taken into account by the many studies of Muslim marriage (Some of the studies concerned with Islamic law had some information about this aspect, but the only study which focused on it is: Lapanne-Joinville, 1954, pp. 112–125; Toledano, 1981 presents information and comments on the matter). Even if these conditions, which varied, did not change the essence of the nature of gender relations which continued to rest on the base of male supremacy, they succeeded in introducing a definite change in the wife’s position in the matrimonial relationship.

The phenomenon of specific local jurisprudence, called ‘*amal* (or ‘case law’), such as ‘*amal Fâs* (Fez), ‘*amal Qurtuba* (Cordoba) or ‘*amal al-Quyrawâni* (Kairouan) (Al-Jîdî, 1982), is evidence of this rich legal reality. The example of stipulations in marriage and above all, the case of the custom of Kairouan, exemplifies this.

The *fatâwâ* collections, which constitute the *muftis’* answers to questions posed in everyday life to the judges or *qudhât-s*, provide us with an important legal source through which we can trace the practice of stipulations in marriage contract through time. The *shart*, or stipulation, was well used over the centuries, and thus confirms the idea of the permanence of the practice, notably for what concerns the banning of a second spouse. The practice was widely used in the Maghreb and Al-Andalus, specifically in large cities, such as Kairouan, Tunis, Fez, Tlemcen, Cordoba, and Granada. The concept of the ‘*amal’, most effective in the Maghrebian Malikism (Toledano, 1981, p. 7), was the basis for the wide practice of stipulations in marriage in urban society. Normally, a stipulation is a binding condition forming an integral part of the contract: the husband empowers his wife to repudiate on her own behalf in the event of his non-respect for his commitment to not doing a specific act.

Stipulations could be various: a ban against the husband taking another wife; the right for the wife not to leave her family’s city or country; or the acceptance by the husband of living with his wife in her parent’s house; and others stipulations allowing women more autonomy in the marriage. The stipulation of the ban against the husband taking another wife; the right for the wife not to leave her family’s city or country; or the acceptance by the husband of living with his wife in her parent’s house; and others stipulations allowing women more autonomy in the marriage. Normally, a stipulation is a binding condition forming an integral part of the contract: the husband empowers his wife to repudiate on her own behalf in the event of his non-respect for his commitment to not doing a specific act.

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The use of stipulations in marriage contracts was a practice well known in pre-modern Tunisia, particularly in the city of Kairouan, the first Islamic city founded in Ifriqiya. We know from our juridical sources that the city of Kairouan was distinguished by its specific stipulation whose use became a custom known as the Kairouanian marriage contract (Larguèche, 2010).
According to this contractual stipulation the husband conceded his power of repudiation to his wife. So, therefore the principle of monogamy was controlled by women. However, some husbands tried to evade the binding stipulation by taking another wife. But complaints of wives are the best testimony of women’s reaction in defending their rights as inscribed in their contracts. The cases of litigation about a husband not respecting his commitment, especially concerning the taking of a second wife, point to men ignoring the rule, but also to women’s attachment to their rights. Judges generally ruled in favour of the woman if she had a contract that testified to their rigorous adherence to the stipulation’s rule. All cases with regard to a husband’s violation of the conditions of the contract that were carried by wives to the judge’s court, as registered in our sources, confirm the power of wives to bind their husbands to the rule of monogamy, or another condition defined by the marriage’s contract.

The affair of Fat’ma bint al-Shâush ‘Ali bin Ma’t’allah carried to shari’a court of Kairouan, is a very illustrative case. She was married under the rule of the custom of the prohibition of the polygamy to Muh’ammad ibn al-Shâush H’sîn al-T’awwâlî al-Waslâti from Kairouan on 4 Rajab 1290/5 August 1873. Three years after, in 3 Rabî‘II 1293/27 April 1876, she came to the judge and claimed that her husband had married another spouse, her neighbour Mnâ bint Abd al-Qâdir al-‘Abîdî, secretly and without her permission. Further to this and taking into account the clause of his marriage contract, she pronounced the repudiation of the spouse who her husband had just taken. In the presence of her father and brother, the act of repudiation was certified by two notaries.

This case, and others, testify how wives defended their rights inscribed in their marriage acts. Every time that they had to use justice, their claims were approved — proof, that the custom was definitely a juridical rule, and a legal advantage that women knew how to use.

7. Women, property, and the court

Muslim women easily acquired property, primarily by inheritance according to definite shares, and secondarily by purchase, using in many cases their dowry. As property owners, women share the same capacity as men. Islamic law gives women the capacity to manage their own properties and fortune. Archives, relating to this period, registered a variety of real estate owned by Tunisian women, urban as well as rural. The presence of women in urban properties, both residential (dâr, ’ulû) and commercial properties, such as shops (h’ammâm), public baths (h’ammâm), was revealed by an inventory compiled in Tunis in 1846–47 for the payment of rental tax. Even if women did not own as much property as men, the amount they did own was remarkable. The ownership of houses was a dominant feature, and largely explained by familial strategies in regard to houses’ inheritance. Women approached the court to register their sales and purchases; they appeared heavily involved in transactions to transfer houses. Some transactions involving properties, registered by notaries, reveal women’s competency to supervise the transactional practice and to manage money.

‘Late Dhû al-H’ijja 1294/January 1878, Muh’ammad Bin H’âmîda al-Wirfîlî from Soliman, bought from the two sisters, Mannâna and Fat’t’ûma, daughters of the late ‘Ali al-H’âjîmî al-H’ânafî from Solima, a plot of olive trees’ composed of 129 trees, located in the ghâba of the village, the price of each tree was five Tunisian silver piastres.

‘Late in the month of Jumâda II 1295/June 1878, the Jew Shû’a Bin David, bought from the five sisters Fat’ma, H’âlîma, Khadijâ, Sâlh’â and Emna, daughters of the late al-Hâj Muh’ammad al-Dahmânî al-Shâfîî al-Qarwî from Soliman, the entire piece of land which they inherited from their father; the price was fixed at two hundred Tunisian silver piastres.

However, even if property rights are recognised by Sharî’a, these rights are often disregarded even by very close relatives in daily reality. Social practice reveals daily abuses against women’s interests. Property was the issue that women most often took to court. Mostly, they were plaintiffs, as attested by various archives. Women’s

14 AN, Kairouan notary record no. 616, case dated on 3rabii’2 1293/1872, pp. 37–38; case dated in 16 rabii’21293/1872, p. 47; record no. 705, case dated on 17 jumâda 1 1302/1884.
15 AN, notary reg. of Kairouan, no. 616, p. 38.
16 For urban properties, the case of Tunis city, see for example, AN, reg. de la kharrîba no. 2287. For olive tree properties, see for example, the case of the Sahel, AN, registres du qâmân.
17 AN, reg. de la kharrîba no. 2287.
18 AN, notary records, Soliman, no. 5, p. 42.
19 Ibid., p. 62.
voices and acts were well inscribed in the records when litigation was over property or inheritance, showing that females did not hesitate to come to court and to fight against brothers or other relatives who usurped their part in the familial inheritance. By herself or via her wakil, the woman plaintiff was determined to overcome multiple obstacles to succeed in her goal.21 Within the family circle, women’s rights were usurped by various relatives, mostly by brothers. Some examples from the long list of cases we gathered from our archives illustrate the fact. ‘

10 Shawwâl 1308/18 May 1891, the two sisters Khadija and Lat’ifa, daughters of the dying Ahmad al-Hammâmi, sued their brother Ismâ’il, for usurping their part in the land inherited from their father. Through their nâib, they presented to the sharî’a court of Nabeul their legal request and documents to claim their right.22 ‘

15 Jumâda I 1295/16 May 1878, the woman Fâfa Bû’adhdûm from Soliman, sued her brother al-Hâj Ibrâhîm, claiming a share of the estate of the house of her late father. Her brother has denied her right and rented the house for his own.23

The conflicts inside the family over the patrimony generally induced the judicial division of the tarîka. The registration of mukallaflât, in the court records or in Bayt-al mâl archives, with the legal repartition of the inheritance between relatives, testify to the frequent abuse of women’s property rights within the family, even if disputes over inheritance could only oppose male relatives. In many cases, heiresses were young girls or orphans whose inheritance had been misappropriated by brothers, uncles, or cousins.25 But at the age of majority, maybe after marriage, some of them decided to defend their rights by bringing their case before the court. Supported by the husband or not, represented by a wakil or not, numerous women were very attached to their properties, houses, shops or lands, and dared to deal with many legal proceedings in the aim to recover their ownership.

The nature of some complaints testifies to their active participation in different economic transactions: sale, purchase, and debt.

If women when dealing with marital affairs went with some gender-related handicap to the judge, the situation was quite different in regard to property and wealth. In defending their interests in these cases, their strategies were completely different, without any need to look for an adequate negotiation, their use of the laws and justice was direct and clear.

8. Which women appear in the court?

Women approached the justice, qâdi court or just a notary, as both plaintiffs and defendants, suing men and also women, relatives, or non-relatives. They also could be sued by men, particularly for issues of debt or other pecuniary affairs. The court is a public space where private matters are debated. In this regard, it seems understandable that women from the notability or the elite category rarely appeared in court, in particular in the case of complaints dealing with marital matters. In regard to their high status, their appearance in court might ‘beneath their dignity’. Elite women, the ‘daughters of hasab wa nasab’ had to protect the ism (noun) and the honour of the family (Larguèche, 1992a, 1992b, pp. 10–16). Female users of the court were often women of lower categories or at least they belonged to middle class. Women’s status and wealth can be easily discerned throughout the archival inscription of the nisba; the name of the father and his social status and function, and often the grandfather’s. Honoric patronymics were completely absent from the list of ordinary women’s names registered by the court, particularly involved in marital matters.

Many examples from the records of court cities illustrate the frequency of the use of the court, and illustrate feminine will and courage to choose their way in life or to defend their property. Even if most of these women belonged to lower social categories or had rural origins, the fact that such a practice was present is proof that women at that period were full participants in the life of the court. The same question has been thoroughly discussed by many interested researchers studying other Ottoman territories: Egypt, Aleppo, Damascus, Istanbul, and Antab (See for example: Sonbol, 1996; Pierce, 1992; Tucker, 1984).

According to this fact, the specific social position determines to a large extent how a woman entered the court and her use of different strategies. All our cases demonstrate the frequent access to the court by ordinary women and how they used their legal rights to defend their own interests. They were not only consumers of the law; they were also actors in their choice of life. Like men, they approached the judge’s court with knowledge of their rights and the conviction that justice was there to enforce their rights. They could operate by themselves or by the mediation of the wakil. According to our sources, women appointed a wakil to represent them before the qâdi, and to defend their interest more often than men did (Jennings,
The *wakil* was designated legally by a contract mandating him ‘for everything’ or just for a specific service, such as the sale or purchase of a property. The former cases was called ‘*wakâla -*âmman’ (general), the later ‘*wakâla* khâssa’ (specific). As demonstrated for other cases, our sources reveal that a *wakil* was not necessary a special court officer, he was often a relative: husband, father, brother, or son, or even a person from outside the family (Jennings, 1975a, 1975b, p. 148).

However, the cases from 19th century Tunisia show some particularities: the *wakil* could be a special court officer, and a woman could appoint another woman to represent her in the court. The following cases illustrate the fact.

On 14 Safar 1293, Jannat daughter of the late bin Belghith al-Jâcî al-Methnâni al-Mbarkî made Moh’mmad bin Fraj, one of the agent, *wukalâ’a* of Kairouan’s, her *wakil*, to represent her in everything, *tawkîlan* ‘âmman’.

On 25 Shawwâl 1292, Nawwa daughter of the late ‘Ali bin Khîlîfâ al-Methnâni al-Mbarkî, attested that she has mandated the woman ‘Aîsha daughter of the late Moh’mammad ibn al-H’âj ‘Ali, from her tribe, as her *wakil* to represent her in all kinds of litigation, *tawkîlan* ‘âmman’.

It is true that the fact that women could act as *wakil* was not very usual; however, it was real and a woman could not only speak to the *qâdhî* for her own sake, but also on behalf of another woman. This is a proof of the legality of such an action.

### 9. Conclusion

The idea we get from these juridical data, and many others, is that these women in general were very well aware of their legal rights and customary laws, in regard to personal status and also knew how to manipulate these rights in order to win various benefits, or how to use the flexibility of legal practice in the Tunisian context. Without doubt, they were often helped by a *wakil*, who was not necessarily a member of the family. Their stories have given us another view of Muslim women in this pre-modern Islamic context, a view other than seclusion or passivity: the transgression of the sexual mores was a daily reality even if the traditional gender roles did strongly structure family and society. As active actors, guided by their wisdom, their skill, and even their trickery, numerous women were already pushing against gender boundaries in Tunis, in Kairouan, as elsewhere in Tunisia and other Ottoman cities, before modern developments. Unlike elite women, secluded behind walls of notable houses, common women made freer use of the court; they did not hesitate to claim their rights and to sue to defend them. They were active participants in the court’s life. They might develop their own strategies and used all resources available to them to promote their interests.

### References


