Please give me my divorce: an ethnography of Muslim women and the law in Senegal

Bouland, A.M.

5 'Dragging your Husband to Court'

Introduction

> It is the last week of my stay in Tivaouane. I want to make some last copies to complete the files of the divorce cases I have been following at the court, but the Xerox machine there has broken down. I carefully put the files in my big backpack to take them across the road and make copies in the copy shop opposite the court.
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> While the lady working in the shop is doing my photocopies, she talks to her female colleague about court-divorce. This does not surprise me; I had just seen her colleague in the office of the clerk of court, but, to be sure, I politely remind the one who handles my work not to read the documents. She responds that she does not even look to see what she's photocopying. 'Either way, the whole of Tivaouane is divorcing', she adds. (fieldnotes, December 2017)

Divorce is a common feature of life in Tivaouane, but contrary to the shop attendant's remark, court-divorce is infrequent. It was an important ambition of President Senghor to end repudiation, and the Family Code therefore restricts divorce to the courts (Chapter 3); however, as I set out before, these legal rules are largely disregarded. Nevertheless, some Tivaouane women do bring divorce cases to court, and in this chapter I tell of their experiences. How do these women relate to the state through their use of court and law? And how do judges – situated at the interface between these women and the state – respond? As I will show, the out-of-court divorce practices described in the previous chapter influence the way female court users approach the court.

The goal of this chapter is twofold. First, I provide an analysis of the disjuncture between the ways the Family Code regulates marriage and divorce, as well as an ethnographic description of divorce procedures at the Tivaouane court. Following this, I examine the main reasons women prefer not to go to court. Next, I analyse how and why female users avail of the Tivaouane court of first instance for their divorce, and I conclude that there are two main pathways to court taken by women. In the final section, I shift to the perspective of the judge, to further examine the interaction of court users and judges.

Presenting Court-Divorce and the Tivaouane Court

As set out in Chapter 3, the Senegalese Family Code provides for (1) divorce by mutual consent, *established* by the judge; and (2) contentious divorce, *pronounced* by the judge (art. 157 FC). The code recognizes only these two types of divorce, thus rendering out-of-court practices unlawful and invalid. In contrast, marriage contracted *without* the involvement of the Senegalese state remains lawful. Together, this makes for a rather complex legal situation, one that – as we shall see in subsequent sections – tends to be somewhat ignored by court users, for whom out-of-court divorce remains the standard.

The Complex Legal Nexus of Marriage and Divorce

The code distinguishes civil marriage, concluded by a state registrar, and 'customary' marriages recorded by a registrar.[1] Marriages in Tivaouane, as we saw in Chapter 1, generally take place under the authority of an imam and involve a number of material exchanges both before, during, and after the marriage is contracted, as well as the supposed relocation of the wife from her parental household to that of her husband. The Family Code stipulates that the registrar is to be present at the celebration of such a 'customary' marriage to establish ('*constater*') the marriage (art. 125-131 FC). In legal practice, this does not occur. The procedure for late declaration of marriage provides that 'customary' marriages may still be recorded within six months after their taking place, both spouses needing to present themselves with witnesses before the registrar (art. 147 FC); in practice, however, one of the spouses presents a slip from the mosque detailing the names and the date of the marriage (art. 147 FC).[2] Failing this, spouses can call on the court to authorize a late recording of their marriage by a registrar (art. 87 FC). They will need to submit proof that their marriage has not previously been registered and bring along two witnesses who are to give testimony in a family law hearing (see also N. Diouf 2011). However, my fieldwork made clear that a large number of marriages are never known to the state at all, and many 'customary' marriages are never recorded. Research conducted in Dakar also shows that the majority of 'customary' marriages are not

1 The civil registry is located at the level of the municipality. Civil registries are regulated by Chapter 4 Book 1 of the Family Code. It appears that 'customary' marriages are recognized only insofar as they are in line with a local tradition or one of the Abrahamic religions (Islam, Christianity, Judaism) and/or with one of the customs listed in the Arrêté no. 2591 du 23 février 1961 établissant la liste des coutumes applicables au Sénégal (N. Diouf 2011, 34 footnotes 9 and 10). See also the note following art. 125 Family Code. Note that I never observed a judge demanding proof as to how a customary marriage had been celebrated.

2 Instead, in line with the procedure for the late registration of marriage (art. 147 FC), the marriage is celebrated and registered at the registry within six months after conclusion (see also N. Diouf 2011).

recorded and suggests that the rate of recorded 'customary' marriages is declining (Dial 2008). Moreover, among the marriages in Dakar known to the state, very few are civil marriages (N'Diaye 2016).[3].

Notably, according to Senegalese law, 'customary' marriages that are not recorded still have *some* validity. Next to the recorded customary marriages and civil marriages, Senegalese family law thus appears to recognize a third type of marriage. Should spouses fail to have their 'customary' marriage recorded, it still exists, and spousal rights and duties apply. This also means that if one of the spouses in such a marriage contracts another marriage beyond the permitted maximum number of spouses, the state can prosecute this person for bigamy, impose a fine – 20,000-300,000 CFA – or a prison sentence for a maximum of 12 months (art. 333 Penal Code).[4] This is particularly consequential because it means that people who marry without having their marriage recorded and divorce out-of-court can be prosecuted for bigamy. As explained above, a couple who divorces without going to court remains legally married. For the state, an out-of-court divorce can never dissolve a marriage – even if that marriage was never recorded in the first place and the state was thus unaware of the marriage. This particularly affects women; men may have a maximum of up to four wives at one time. In practice, however, the police or prosecutor is only rarely made aware of cases of bigamy; exceptions are situations in which a vengeful (former) husband introduces a complaint against his (former) wife.[5]

In other dealings with the state this 'third type of marriage' is invalid (FC art. 146). This may engender trouble for people who have something to expect of the state. Fiscally, for instance, the couple cannot benefit from the advantages granted in regard to income tax (see art. 174 Taxation Code). If the couple solicits the court for divorce, they will also need to present a copy of the registration of their marriage; and at the Tivaouane court, procedures for authorizing the late registration of a marriage thus often immediately precede divorce proceedings.

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3 Dial shows how between the generational cohorts 1942–1956, 1957–1966, 1966–1976 the tendency to record one's customary marriage declines. For the last cohort that has been surveyed (born 1967–1976) she shows that 29% of men registered their first marriage. Women of the same age group registered their first marriage in 36% of the cases. In both cases the registration rate is lower for subsequent marriages (Dial 2008, 59). On the basis of quantitative research in the main civil registry of Dakar, N'diaye (2016, 202) shows that among the marriages included in the registry, at the expense of civil marriage rates, the rate of recorded customary marriages has grown from 40% for the generation born 1942–1956 to 70% for the generation born 1967–1976.

4 1 CFA equals 0.0015 Euro.

5 In cases when a woman divorces out-of-court and contracts a new marriage, the fact that the woman is still (formally) married to someone else both renders the remarriage invalid and renders her punishable for bigamy.

Two Types of Divorce Proceedings

Women who bring their divorces to the Tivaouane court – like men – go through either a contentious divorce procedure or a procedure for divorce by mutual consent. The procedures are different in character as well as in length, and different procedural rules apply.

Divorces by mutual consent tend to be established within one hearing. Contentious divorce procedures are generally lengthier and are preceded by a mandatory attempt at conciliation. At the Tivaouane court contentious divorces take from one to eight months between the first conciliation hearing and judgment. During the conciliation hearing the judge can make any remarks that he finds purposive to conciliation (CF art. 169); the Family Code thus explicitly opens up to normative registers beyond the code. Should the judge find that there is a chance at conciliation, the hearing can be adjourned to a later date to give spouses time to reconsider their positions. This period cannot exceed six months, but it can be renewed; in total, the conciliation phase may last at maximum 12 months. However, at the court of Tivaouane, this phase is rarely extended for such a long period of time; in fact, on occasion the judge ruled out conciliation within one hearing. Once conciliation is unsuccessful, the contentious phase of the procedure is opened, which can ultimately lead to the judge's dissolution of the union on the basis of at least one recognized ground for divorce (see Chapter 3). In practice, the ground of 'incompatibility' enables the court to grant any spouse the divorce he or she wants and to dissolve the marriage (art. 166 FC).

Divorce proceedings at the Tivaouane court are always introduced with a written request, often composed by scribes paid to put a request on paper.[6] This applies to both contentious divorce and divorce by mutual consent. On the whole, the rest of the procedure is carried out orally. Only in exceptional cases of contentious divorce do parties submit a defence, reply, or rejoinder in writing. Although evidence might seem crucial to a contentious divorce, witnesses do not play a role in these procedures at the court of Tivaouane. Proof plays only a limited role. In the rare cases that evidence is presented in contentious divorce cases, it concerns, for example, certified medical reports of physical injury suffered, or reports drawn up by a bailiff to prove the wife's desertion of the marital home. In cases where litigants dispute custody over children, judges at times order a social investigation (CF art. 170).

Because the default marital regime in law and in practice is that of separation of property (FC art. 368), the dissolution of the matrimonial regime has little impact on the level of property. Other material consequences are

6 One scribe who is frequently consulted in Tivaouane asks 1000 CFA for a divorce request.

more significant and are linked to the damages that may be claimed by both spouses and, in some cases, to the maintenance women may claim. In cases where the husband is found at fault for incompatibility, the wife may claim maintenance for six to 12 months. Should she herself be found 'at fault' on account of serious and incurable illness, she can claim maintenance for up to three years (CF art. 178 jo. art. 262). If the wife obtains child custody – allocated on the basis of 'the best interest of the child' (CF art. 278) – she is also entitled to receive child maintenance.

There are no lawyers based in Tivaouane, and only in exceptional cases do parties bring in lawyers, either from the capital Dakar where the majority of Senegal's small number of lawyers is based (Samb 2014), or from the city of Thies, 30 minutes away by car. During my observation, the parties who hired lawyers to represent them all belonged to the upper middle-class. Cases sometimes dragged on because both or one of the litigants would miss hearings; particularly at the first hearing of a case, defendants frequently do not show up, as a summons may not always reach them (see also N. Diouf 2011). Divorce cases are heard during the family law hearing that, in Tivaouane, is scheduled either weekly or bi-weekly. Litigants are called case by case into the judge's room, where the hearing takes place behind closed doors. Judgments are pronounced in public hearing (CF art. 171).

Covered up or Going 'Public': Why Do Women Prefer to Avoid the Court?

Be it for a divorce by mutual consent or a contentious divorce, the Tivaouane women who end up in court, in many cases, would have preferred to avoid going there and to divorce without involving court and the law.

One central reason why women – and men for that matter – prefer to divorce out-of-court is the simplicity of out-of-court procedure. Court proceedings, on the other hand, require several back and forths and oblige people to familiarize themselves with a new institutional structure (Tidjani Alou 2005). The different court visits may also be costly, particularly in terms of time. The monetary costs of a court procedure were never mentioned as reasons people did not go to court; the costs are fairly modest: 2,500 CFA to introduce the procedure, with an additional sum of 5,000-10,000 CFA if the other party needs to be summoned.[7]

A second central motive behind the preference for out-of-court divorces relates to women's apprehension of the state and of the state legal system.

7 The procedure for the late registration of marriage costs 1,500 CFA plus an additional total of 1,200 CFA at the registrar for the certificate of non-inscription and subsequently the marriage certificate.

> It is August 2016. I am working in the office of the clerk of court when I meet Aida, who has come in because she is in the process of filing a request for divorce by mutual consent. Not long before, at the advice of the House of Justice personnel, she had obtained a judgment to allow for the late registration of her marriage, making it possible to now introduce the request for divorce. In contrast to some of the shyer women who come into the court's office, Aida appears to be brimming with confidence, taking the time to catch up with the clerk of court, as well as talking to the foreigner (me) she finds sitting at the other end of the clerk's desk. (fieldnotes, August 2016)

In June 2017 Aida and I meet again. She has long finished the court procedure and tells Fatou and me that her husband is currently making a serious effort to contribute to their children's expenses, surely because he wants her back. Aida seems ambivalent about the situation, insisting on his infidelities and his failure to maintain her financially, but admitting, 'It's not easy to forget him.' At the end of our conversation, she asks me how the clerk of court and the judge are doing. 'Ever since, I haven't been back; I'm afraid of the court', Aida says. Given her behaviour at the court, I am a little surprised and ask why. 'The police and the court – you'll never see my name there', she says, adding, 'I do not like men in uniform.

Women – like men – are often frightened of the court: state justice and the law are imagined as being strong and powerful, even if – at least in matters of the family – the law seems to have limited regulatory hold on people's practices. This is linked to a fear of adjudication. Once a conflict reaches the court, the flexibility and the voluntary nature that so characterize out-of-court settlements are largely lost, and it may be undesirable or even risky to let the conflict slip out of one's control (cf. Merry 1990). Going to court is making oneself *visible* to a state justice system that is imagined as being powerful and perceived as being difficult to control. The central importance of harmony and social peace further adds to this apprehension (Chapter 1).

Finally, and in relation to the foregoing, going to court is difficult to justify morally, particularly for women. This relates to the centrality of Wolof conjugal ethics, which, as we saw before, are strongly rooted in the Wolof socio-cultural repository that centres around honour (Chapter 1; Chapter 4). A woman who disputes her husband in court and invokes the judgment of the court does not persevere (*muñ*). More important, she exposes herself and her husband by bringing the case beyond the domestic sphere. To bring a case to court is not only to make yourself and the other visible to the state, but also to make things public – even if, on the face of it, few people become aware of divorce cases at the court (Lagoutte and Fall 2014, 67; cf. Paré 2017, 59). Accordingly, going to court is often described as washing one's dirty linen in public (Dial 2008, 108). This invites fear and shame, on the part of both the woman and her husband. Central to this shame is the Wolof norm of *sutura* and relates to the ethic that 'a bad deed that is not visible to others does not incur dishonour until it is exposed' (Mills 2011, 3). *Sutura* indexes

the states and virtues of privacy, modesty, protection, and cover (Mills 2011; Sylla 1978);[8] it functions both as an individual and a social principle (Sylla 1978, 89). Being held up as the cornerstone of *female* honour in particular, *sutura* extends to feminine modesty generally and is articulated to *diine*, especially the norm of wifely submission to the husband (Mills 2011, 3). A wife is to be modest but is also to protect her husband's *sutura* – to cover his flaws and faults, which are deemed 'domestic, private information'. She is to keep this knowledge to herself, even if she suffers from the behaviour (Macchia-Samba 2018; Mills 2011; Sylla 1978, 89). For women, as I set out above, this worth is linked not only to their own social reputation but also to the success of their children, and women regularly conveyed to me that the children of women who 'dragged their husbands to court' would not be blessed.

Invoking the Court

An Introduction

While women prefer to avoid the court, some women do end up there and, in fact, women do so more frequently than men. My observations at the Tivaouane court made it clear that the number of women who initiate divorce proceedings is far greater than that of men. An analysis of judgments rendered in 2016 shows that the large majority of these divorces were introduced by women. While divorces by mutual consent are, in principle, introduced on behalf of both parties, most of these requests were signed and filed by women.[9] More important, of the contentious divorces more than two-thirds were introduced by women (Table 1). These findings are in line with studies conducted in other Senegalese courts. Lagoutte and Fall, who studied the courts in six different administrative regions, found that the divorce petitions of women constitute 75% of the total number of petitions;[10] Dial, who conducted research in Dakar, reported that women initiate the majority of court cases (Dial 2008, 104; Lagoutte and Fall 2014, 68). Why do these women draw on the court, despite their preference for out-of-court solutions?

8 Hernann (2017) writes about *sutura* in the context of Mali.

9 Women signed and filed 45 out of 60.

10 They studied courts in the regions of Dakar, Thiès, Saint Louis, Diourbel, Kaolack, and Louga.

	Introduced by wife	Introduced by husband
Contentious divorce 2016	22	8
	30	
Divorce by mutual consent 2016	60[11]	
Total number of divorces processed in 2016	90	

Table 1: Divorces processed by the tribunal d'instance de Tivaouane *2016*

As I discussed in the introduction to this dissertation, people resort to court for different reasons, not necessarily or always directly related to legal claims the court enables them to make. Few scholars have studied the use of state courts in contexts where such courts have only limited impact, such as in Africa (see also Cooper-Knock and Macdonald 2020). Still, a number of authors working on state courts in sub-Saharan Africa have considered the reasons people draw on the state and state justice when they could instead turn to non-state justice providers. Together, these studies show that one important reason people do go to court in contexts where law and courts are often ignored by the population is that in the eyes of these users the state may offer solutions that non-state justice providers cannot (Andreetta 2018; Crook 2004; Rubbers and Gallez 2012), even if justice users also have doubts about the functioning of state courts (Jacobs 2018). State courts are seen to have 'superior authority' (Rubbers and Gallez 2012) and to offer definite 'authoritative settlement' (Crook 2004). Court cases, moreover, may be used as a weapon to punish an opponent (Rubbers and Gallez 2012).[12]

Subsequent sections will situate people's perceptions and use of law in context and show that also for part of the Tivaouane women who solicit the court, this institution offers solutions that they cannot obtain out-of-court. Yet this is not necessarily because the judgments are thought to have superior authority.

Ending up Soliciting the Court: The Case of Awa and Mor

'I have the honour to request a divorce from my husband Mor'. Awa is 21 years old and lives with her mother in a town about 25 km from Tivaouane.[13] In her divorce application letter of May 2016, Awa explains that

11 These findings are very different from those of Lagoutte and Fall, who state that over the more than 500 proceedings they studied, 'divorce by mutual consent represents barely 10% of the total' (Lagoutte and Fall 2014, 67).

12 Development organizations tend to ask whether the population has access to (state) justice; see Samb (2014) and the 2014 report by the Africa Governance Monitoring and Advocacy Project (AfriMAP) and the Open Society Initiative for West Africa (OSIWA). Both note an unequal geographical coverage of the courts, financial barriers related to the costs of legal representation, the length of procedures, and a lack of information and education.

13 The town has an estimated 30,000 inhabitants.

she got married to the 53-year-old Mor eight years ago and had joined their marital home five years ago, at age 16. Six months afterward, Mor stopped providing for her. She fell ill and left to re-join her parental home, where she discovered she was pregnant. 'I would like to point out that during the full length of my pregnancy, he never looked after me […] till this day, he never sent me a penny, neither for his child nor for me.' The letter goes on to state that, in 2013, Awa visited Mor to request a divorce, which he refused. When she returned with her sister two months afterward, he refused again. 'I ended up by addressing the court to obtain an official divorce for bad maintenance and neglect.' Attached to the letter is documentation indicating that Awa obtained authorization for the late registration of the marriage, which enables her to now request divorce.

Three weeks after the court has received Awa's request, Awa and Mor's first hearing takes place in the rather luxurious office of the judge. The couple are seated on chairs that are positioned in front of the judge's desk; the clerk of court and I sit on comfortable chairs along the side of the wall. The judge is in his early thirties; he wears formal attire but no gown. He asks Awa to elaborate on her request. She repeats that she fell ill and that Mor did not take care of her. Mor, in response, states that some months into her pregnancy Awa left for her parental home and that shortly after the child was born Awa's mother asked him whether Awa could stay home a little bit longer, which was okay with him. However, soon after, Awa left for another town to work as a maid. She did not ask his permission.

Next, the judge asks Awa to reconsider, asking whether they cannot stay together. Awa repeats she wants a divorce. Mor states that he does not; he wants Awa to return to his home. The judge adjourns the conciliation session for four weeks, instructing Mor and Awa to try to resolve their conflict.

June 2016. Awa and Mor have returned to the court and the judge enquires about the efforts they have made. Mor explains that he went to see Awa's uncle but that he was away. He asks the judge to adjourn the session for another month; he wants to bring the families together and get Awa's uncle to mediate. Awa responds she does not want to wait that long – a week should be enough. Explaining that he holds hearings every two weeks, the judge decides that the couple is to come back in two weeks and sends them out.

July 2016. Awa and Mor are back at the court. Mor explains that he sent a delegation of his family members to Awa's household to try and save their marriage but without success, Awa's mother wants the marriage to end. With an air of nonchalance, Awa maintains that no one came to visit her. She repeats that she wants to divorce and says that she wants to have custody over their child. Again, Mor's statements amount to a refusal; he is visibly

angry, says he does not want to divorce, and adds that his marriage to Awa had cost him a lot. The judge responds that Awa is an adult and is free to ask for divorce. She will be judged after, he says, implying that the final judgment lies with God. Moreover, any maintenance Mor would have to pay is for their child, not for Awa. He will render his judgment in nine days, the judge concludes, but Awa and Mor are not obliged to attend the hearing.

Both Awa and Mor start to leave the room, but at the door Mor hesitates, reiterating his opposition to the divorce. The judge explains that Mor has to leave now, because both parties should leave the room together, but Mor continues talking, saying his wife tries to force him to divorce – the court cannot coerce him, he spent a lot on his wife. The judge responds that the court does not force him to do anything and that everything Mor has said has been duly recorded, and he explains that he is only there to apply the law.

July 2016. The judge pronounces divorce between Awa and Mor, finding fault with Awa for leaving the marital home without prior authorization of the judge.[14] In the judgment, he reasons that Awa did not compellingly corroborate her claim of maintenance failure and thus did not provide justification for her departure. He states that Awa solicited custody over the child and that, given the child has always been with his mother as well as his young age of four, it is in the best interest of the child to grant custody to Awa and to give the father the most wide-ranging visiting rights. He takes cognizance of the fact that Awa did not ask for child maintenance and stipulates that the period of waiting (*iddah*) during which she may not marry another man should be fixed at three months. Although Mor complained about all the money he spent on marrying Awa, he did not ask for damages; therefore, none were awarded.

A First Common Pathway to the Court: Court-Divorce as Last Resort

Whether Mor indeed failed to maintain his wife or, given the large age difference, Awa simply never loved him – as the clerk of court suggested when he and I discussed the case – has never become clear. But it is not disputed that three years earlier Awa had asked for a divorce on two occasions and that Mor had refused, nor is it disputed that her mother supports Awa in her wish to dissolve their marriage.

The fieldwork at the court made it clear that a large number of women who turn to the Tivaouane court have been unable to obtain a divorce by other means. They use the court as a last resort; and, while the judge may some-

14 The husband chooses the family's place of residence. A judge may in certain cases authorize a woman to have a different home for her and their children (art. 153 FC).

times convince their husbands to agree to a divorce by mutual consent, as a rule, these women end up obtaining a 'contentious divorce' (Table 1). This is illustrated by Awa's divorce request.

The remarks of a father who accompanied his daughter to court for a divorce from a husband who she alleged was impotent are also a good example. When Fatou and I visit the father a year after the divorce, he takes a break from his work at the market to explain that they tried to avoid the court – because 'it is ugly to go there' – and that, since his daughter and her husband belong to the same family, they tried to arrange things within the family. But, he recounts, whatever he tried, the husband would not let his daughter go. An imam had also been involved, who told the husband to give his daughter a divorce, but he still refused to dissolve the marriage – and in the end the father saw no other option but for his daughter to go to court.

That the court is used as a last resort indicates that court and out-of-court are equated in their effects. As Aida, a student of 31 whose husband refused to agree to a divorce, explained:

> Aida: [I would have preferred a religious divorce]
> AB: Why?
> Aida: I am a Muslim, but if I cannot obtain it … at the court, now … here in Senegal, the divorce given by the court is valid.

The women who turned to the Tivaouane court as a last resort hailed from all social classes, not merely from the higher classes, as one might have expected and as Dial has also suggested for Dakar (Dial 2008). In fact, Awa and Mor, as well as the father, his daughter, and her allegedly impotent husband all seemed to belong to the lower classes. None had formal employment and they spoke little to no French; their clothing was made from simple fabrics. Often, the women preceded their request with a procedure to authorize the late registration of marriage. Their marriage had never been registered; and had they secured an out-of-court divorce, it never would have been.

It is notable that men only rarely called on the court as a last resort. The reason for this can be found, I suggest, in their out-of-court options; much as it can be difficult for women to obtain out-of-court divorce, it is easy for men. Out-of-court, men may unilaterally repudiate their wives.

Hence, for the many female users of the Tivaouane court who draw on the court when there are no other options left, court-divorce and out-of-court divorce are links in a chain. As opposed to the central role accorded to courts in the Family Code, for these women, out-of-court divorce remains the norm.

A Second Common Pathway to the Court: Court-Divorce as Documentation

Women may also come to court *after* an out-of-court divorce. The second pathway of female users my fieldwork at the court identified is the regularization of an out-of-court divorce. These women have already dissolved their union but want to obtain official paperwork certifying the divorce. From my interviews it appeared that these women as well as their partners regard this step as a mere formality and that they were also careful to justify to family members that they did not go to court to make claims – or, they simply kept the court procedure a secret from them. In contrast to the first pathway, this use of the court is not particular to women. Both men and women solicit the court to obtain documentation recording the dissolution of their marriage. Because the partners – in principle – agree on their separation, the signature under the divorce request also does not necessarily point to the person who took the initiative to come to court.

As a rule, the women who were in court to regularize their out-of-court divorce were in possession of a marriage certificate indicating that their partner or they themselves had registered their marriage upon contracting it.[15] The commentaries of these women, moreover, reveal that they link marriage registration to court-divorce: *because* they had registered their marriage with the state, they needed to divorce in the eyes of the state – to make it official. Ndeye, a local politician in her late forties and running a small business, related: 'When there is a marriage certificate, you need a divorce certificate to dissolve the union.' Had she not had a marriage certificate, she would have divorced 'as recommended by religion', she added. A marriage certificate needs to be *undone* by a court-divorce, and the court petitions of these men and women regularly stated that their union had already been dissolved – sometimes with the qualifier 'religiously' – and that they want to obtain a 'divorce judgment' or a 'divorce certificate' (see also Lagoutte and Fall 2014, 67).

Maram, a 36-year-old divorcee, wrote to the court that she wanted a divorce, only to add a little further in her letter that her husband had accorded her a divorce two months previously. In an interview she explained that, initially, her husband had refused to agree to the divorce, but that, subsequently, her uncle had contacted him and that a month later he finally consented. Her uncle had told the husband that he had tried to convince Maram to return and reconcile, but that she insisted on a divorce. On the day Maram's husband released her, Maram visited his home to pick up her clothes, a sewing machine, and a stove to mount on a gas bottle. She had expected her

15 In rare cases, women and/or their new husbands may try to obtain a false divorce certificate at the administration, without going to court.

husband to go to court to make things official, but when he did not do so, she petitioned the court. In these cases, the court invariably formalizes the out-of-court divorce.[16] It is likely that, for a large number of couples, these court-divorces by mutual consent are not truly consensual, either because the husband had felt pressured to grant the out-of-court divorce, or because the wife was repudiated by the husband.

Because the women who came to regularize their out-of-court divorce so commonly had had their union documented with the state upon contracting it, the question arises as to what kind of women have a registered marriage. Dial, who conducted research in Dakar, reported that 'the higher the level of schooling, the higher the frequency of marriage registration', as well as that women with secondary education or higher are more likely to end up in court than women who have not been to school (2008, 105). By contrast, from my interviews it seems that while the registration of marriage may be correlated to a woman's level of education, it is her husband's form of employment, or her own, that tends to be determinative. Both women and men said that they had registered their marriage because they needed the paperwork for their or their spouse's job, or that the employer demanded that they do so. In formal employment, one may obtain tax income advantages, social security, and pension, as well as fringe benefits from one's employers. A substantial number of the Tivaouane women who came to court had a husband employed by the mining company situated at some 20 km from the city. This company offers healthcare to employers, their spouses, and their children. Contrary to the women who solicit the court as 'last resort', these women hailed from the middle and higher middle classes only.

16 Article 157 states that a divorce may result from the mutual consent between the spouses ascertained by the judge, and Article 159 explains how the spouses may have their divorce recognized. Yet it is clear that while the mutual consent is constitutive of the divorce, so is the judge's recognition. It was the clear intention of the legislator that a marriage can be dissolved only with the intervention of the judge (Lagoutte and Fall 2014, 65-66; see also art. 333 Penal Code, which severely penalizes bigamy). Note that in the cases at hand, it is often irrelevant whether the judge pronounces or merely recognizes a divorce. While spouses should continue to fulfil their marital duties until the moment of divorce, neither spouse will complain about the other's failure to do so when they understand their marriage to have been dissolved. Furthermore, in such cases spouses have often already reached agreements about where the children will live and what the material consequences of the separation will be.

Materialistic Women?

The two pathways of female court users I identified show that out-of-court and court-divorce are not parallel practices, but rather that they are closely linked. These women go to court because it offers something that they have been unable to obtain out-of-court: either the divorce itself or documentation. The law gives women also the right to go to court to claim financial support and compensation. The question arises whether women actually do so.

While damages can be claimed by both men and women, as stated above – depending on the grounds for the divorce – a woman can also obtain maintenance for a number of months. Moreover, if she gets custody she has the right to secure child maintenance; and in cases when her husband is formally employed, the sum is taken directly from his salary. By comparison, among the out-of-court divorced women I surveyed, few ex-husbands contributed toward the care of children that lived with them; and even when women regretted this situation, they felt they could do very little about it. Whether or not men have a religious or moral obligation to provide for children living with their ex-wife is also disputed, especially after she remarries.

It is clear that women stand to gain by going to court, and indeed many people in Tivaouane, men in particular, shared with me their opinion that women who go to court are materialistic. Moreover, on the basis of her research in Dakar, Dial suggests that child maintenance plays a determinative role in women's choice for the court. However, I found that the female users of the Tivaouane court are not necessarily motivated by financial incentives. Among other factors, this is indicated by the fact that in more than a third of the divorces processed in 2016 women did get custody (Table 2),[17] but waived child maintenance (Table 3). Dial also notes the phenomenon (Dial 2008, 106) but does not quantify it and reports that women predominantly solicit the court to claim maintenance. Yet the prevalence with which women waived maintenance over the year 2016 in Tivaouane is notable (Table 2) – all the more so since it is disputable whether child maintenance is a right that belongs to the woman, not to the child, and could thus be renounced by her – and this warrants reconsideration of Dial's conclusion. In many cases the amount of maintenance is moreover left 'at the discretion of the father' (Table 3 – meaning that it will be near impossible for the mother to have this part of the judgment enforced. As the prosecutor at the Tivaouane court, who may prosecute a parent for failing to pay child maintenance, explained: 'she effectively renounces it [child maintenance]'.

17 This is in line with what Dial finds for Dakar (Dial 2008, 105).

	Total	Custody over all children granted to wife	Custody over all children granted to husband	Children divided between husband and wife
Divorce by mutual consent involving children	37	26	7	4
Contentious divorce involving children	20	17	0	3

Table 2: Custody: divorces involving children processed by the tribunal d'instance de Tivaouane *2016*

Type of divorce	Number of cases where mother obtained child maintenance		Not obtained
	Amount left at discretion husband	Amount stipulated	
Divorce by mutual consent where mother obtained (partial) custody	11	11	8
Contentious divorce where mother obtained (partial) custody	10	0	10

Table 3: Child maintenance: child maintenance accorded in divorce cases by the tribunal d'instance de Tivaouane *2016*

Moreover, awards for damages appear to be rather rare at the Tivaouane court. Spousal maintenance was not accorded in any of the cases in 2016, nor was it requested or granted in the cases I followed in 2017; however, this is likely to be explained by the fact that women did not often have the right to claim this support. Husbands rarely claim that their wife has a serious or incurable illness and are rarely found at fault for incompatibility – at least not when the wife is not also found at fault for it. Women did frequently claim that their husband ill-treated them or neglected them, and they could thus claim damages; however, they did so in only four cases, in three of which damages were awarded.[18]

Overall, it appears that while financial concerns may be part of women's motivation in soliciting the court for divorce, the role of this incentive should not be overstated. I argue that this likely relates to a preference

18 Notably, in 2016 the Tivaouane court found women at fault considerably more frequently than men, in particular for 'incompatibility'; in line with Lagoutte and Fall, my analysis of court judgments revealed 'that when one of the spouses […] is unable to prove the invoked grounds', the judge raised the ground of incompatibility *ex officio* as the fault of the spouse who initiated the divorce (Lagoutte and Fall 2014, 77). These women generally failed to substantiate their claims that their husband neglected them or that the latter were at fault for 'ill-treatment, excesses, abuse or serious insults rendering continued marriage intolerable' (see art. 165 FC).

on the part of female users not to exacerbate the conflict and to (moral) ambivalence over whether or not a father has the obligation to contribute financially toward children that stay with his ex-wife. When I asked women why they waived child support, it appeared that in some cases women simply did not want to have anything to do with their ex-husband; in other cases they simply did not expect him to pay. One woman related: 'I didn't want to exhaust him; he doesn't have much'. However, it also appeared that women did not always feel entitled to child support; and, indeed, if the level of income of an ex-spouse were to be determinant, one would expect to find that these women request a low sum rather than nothing at all.

Hence, in analysing the way women draw on the Tivaouane court as well as their motivations for doing so it becomes clear that while damages and child maintenance play a role, women primarily go to court as a last resort to obtain a divorce, or to obtain documentation of a previous out-of-court divorce.

Interaction at the Court: The Judge's Perspective

The way women invoke the court and the reasons they are doing so raise questions about the ways in which judges respond. How do judges react, for instance, to the fact that many of the couples they encounter have already divorced out-of-court? The fact that the law restricts divorce to the court does not automatically imply that judges respond negatively to the couples presenting their case. Much depends on how the judges perceive their role.

When I interviewed judges in Tivaouane about their work, it became clear that they did not see it as their task only to apply the law. While they placed primary importance on the application of the law, it was also important for them to adjust – to adapt to the social realities of the court users. N'diaye, who interviewed judges in Dakar and Mbacke on their role in inheritance cases, similarly reports that judges explained that they accommodate to court users' convictions and understandings of the law in inheritance cases (N'Diaye 2016, 186-187).

First, the comments of the Tivaouane judges revealed that – in their perception – the men they encounter in court do not always treat their wives well; they explained that it is their role to protect these women. The judges thus distinguish themselves from these men, and, in part these male judges are able to do so because, invariably, they position themselves at a social distance from many of the men who solicit the court. The judges at the Tivaouane court belong to an intellectual French-speaking class, and they have only a limited social embedding in Tivaouane, where they are based for work. Their perception of their role is also in line with the common understanding that the Family Code sought to enable greater protection of

women (Chapter 3).[19] Second, it emerged from the interviews that judges find it important to be flexible and accessible. While they state that it is their role to apply the law, they also explained that their function requires them to adapt to social reality.

The judgments I reviewed did not make mention of extra-legal norms, but during divorce hearings I observed this flexibility both in the conciliation phase and in divorces by mutual consent. The Family Code stipulates that in the conciliation phase, judges are to make any remarks that will help reconcile the couple; therefore, the adaptability of judges I witnessed in this phase does not run counter to the law. At the Tivaouane court the judges' comments often addressed the value of marriage and what the judge deemed normal marital behaviour (cf. London 1999). Judges related how another marriage would not necessarily be free of problems either, how a husband needs to maintain his wife, and how, if a wife wants to stay with her husband, she needs to be prepared to wash his clothes and cannot go out late at night to drink tea with friends. These sessions were often heated. Spouses would get angry, and both husband and wives frequently interrupted each other. Judges, in turn, tried to calm things down by sternly policing whose turn it was to speak. Whereas judges made some effort to reconcile the couple themselves, they primarily relied on the couple and their social embedding for the conciliation. It is through adjourning the hearing that they encouraged the couple to talk things through, urging them to involve their family members, and communicating that marriage is not merely a matter between two spouses but also of their respective families.[20]

Beyond the conciliation phase, I witnessed how judges accommodated couples that had divorced out-of-court. Although there were some differences between how judges accommodated these couples, these differences were not particularly pronounced. Judges did not question the ubiquity of out-of-court divorce, nor did they insist that divorce is their prerogative. In one hearing, a judge accommodated a husband who came to agree with his wife's request for a divorce, and who asked the judge to function as a witness to the divorce he pronounced there and then – thus relying on the norm that divorce is for the husband to pronounce. And, when a wife or husband stated that they had divorced out-of-court, judges did not object. I also observed how they ignored cases of bigamy. The following exchange is illustrative.

19 The two judges with children both had their families living in larger cities, because of the better quality of schooling there. A younger judge without children would leave with his wife for Dakar every Friday

20 Note that in cases when a judge orders a social services investigation, the latter in practice tend to try and mediate between the couple first, even if the judge does not instruct them to do so.

Judge (addresses the husband Cheikhouna): You want to divorce?
Cheikhouna: Yes, she is remarried, and I came here – like I have done with the other [ex-wife, AB] – to officialize it
Judge (addresses his wife Fatou): You have remarried?
Fatou: Yes
Judge: Has it been long?
Fatou: Yes, a little bit long
Judge: Did you have children [with Cheikhouna, AB]?
Fatou: Yes, one
Judge: Where is he?
Fatou: In [name of village], with his paternal grandmother
Judge: So [looking in the direction of the clerk], we establish divorce by mutual consent.

On another occasion, when a wife admitted to having remarried and having given birth to a child from her new husband, the judge stated he 'turned a blind eye' because the (ex)husband did not raise it and no one would be served by prosecution. While the judges accommodate to the ubiquity of out-of-court divorce, my observations made it clear that this accommodation is limited to divorces by mutual consent – for instance, when Mor resisted the judge's authority to pronounce a divorce between him and Aida, the judge objected.

It is clear that there is a disjuncture between the legal rule of the Family Code that divorce is restricted to court and the way women use the law and court. Divorce judgments reveal that this disjuncture persists at the level of legal reasoning; the documents do not make mention of extra-legal norms or out-of-court divorces. However, in hearings, judges bridge this disjuncture. Their behaviour shows that they accommodate to the ubiquity of out-of-court divorce and its legal consequences, such as punishable bigamy. In these instances, judges are indeed flexible and do indeed try to protect women. I find that this resonates with observations by Villalón (1995). He explains that the street-level bureaucrats (Lipsky 1983) he studied in Fatick, Senegal, make concessions to encourage users' willingness to play by the state's rules. The registrars who are to record births and issue birth certificates are well aware that the birth dates provided are largely fictional, but they do not pursue the matter (Villalón 1995, 112-113). Likewise, the judges I studied bridged the gap between social realities and laws on marriage and divorce: they do not necessarily adapt non-legal norms; rather, they accommodate them. In fact, they have no choice but to tolerate that the notion that divorce necessarily requires the intervention of the judge remains somewhat fictional too.

Conclusion

Few Tivaouane women bring their divorce cases to court – even if they do so much more frequently than men do. After exploring in some detail why

women prefer to avoid the court and what barriers they may encounter, this chapter identified two common pathways to the court for women: the court as a 'last resort' and the court as 'documentation'. The women who turn to the court as a last resort hail from all classes. By contrast, women who use the court to obtain documentation all belong to the middle and higher-middle classes only. In both cases, Tivaouane women tend to obtain what they set out to get from the court.

The different ways in which Tivaouane women engage with the state through recourse to court show that, while they see courts as 'removed' and preferably to be avoided, court-divorces and out-of-court divorces are not parallel and separate practices; rather, they lie on a continuum as different links in a chain. This also indicates that these women do not share in the norm that divorce is restricted to the court – a norm central to the Family Code. Hence, in invoking the court, women do not simply submit to the court's authority. They actively bring the state into their divorce processes. In doing so they negotiate the meaning of the terms of the Family Code, as well as contribute to shaping the court's function. At the same time, they bestow legitimacy on it and on state family law (cf. Cooper-Knock and MacDonald 2020).

While women are able to negotiate the meaning of law, this ability is not without limits and depends in part on the judge. Notably, the Family Code recognizes 'customary' marriage as well as provides a number of ways in which such marriages can be registered after their conclusion. The Senegalese state wanted to bring marriage under the purview of the state but did so in a pragmatic fashion. This same legislative pragmatism cannot be seen when it comes to divorce: lawful divorce mandatorily takes place in court. It is thus the judge – at the interface between law and the Senegalese citizen – that accommodates to the practice of out-of-court divorce. Processing divorce cases and rendering judgments, judges respond to women's use of the court and partake in the renegotiation of the law's meaning.

As I set out above, one key theoretical question guiding this chapter was how, in a context where state law has only limited impact, court users connect to and use state law. Although few studies have considered the use of state courts in these settings, the existing research on state courts in sub-Saharan Africa suggest that people primarily choose to turn to the courts when they offer something non-state justice providers cannot or something that cannot be obtained without their involvement (Andreetta 2018; Crook 2004; Rubbers and Gallez 2012).

Tivaouane women who solicit the court also hope to obtain something that they have not been able to obtain out-of-court. Nevertheless, this is not, contrary to what Rubbers and Gallez (2012) and Crook (2004) suggest,

because they understand a divorce obtained in court to be more 'real' or authoritative; the women who use the court as a last resort do so because they have no alternative way to secure divorce. For them the court offers an important avenue to obtain release from marriage; nonetheless, women who choose to invoke the court walk a thin line, especially when they lack the support of their kin. Similar to these women, women who engage the court to regularize an out-of-court divorce go there because the court provides something they need. They go because they want to receive the documentation they or their (ex)husbands require in their dealings with the state and employers.

Moreover, it is clear that it is not only the possibilities the court offers that determine how Tivaouane women use court. Women in particular may obtain financial benefit from a court-divorce: when they obtain custody of children they had with their ex-partner, the latter is to pay them child maintenance – and in some circumstances, they also have a right to spousal maintenance. Yet many women who invoke the Tivaouane court do not request child maintenance, in part because of a preference to endure and not to exacerbate the conflict. I suggest this reveals that, even in court, 'out-of-court norms' play an important role: gendered norms pertaining to modesty and perseverance, and about harmony and social peace, as well as norms about who is to provide for children after divorce.