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## RESEARCH ARTICLE

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### Formalising the informal through legal practice. The case of prostitution in authoritarian Tunisia

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#### ABSTRACT (max 150 words)

*This article explores the dynamics of the law in action beyond the binary formal/informal, using Tunisian jurisprudence in the field of prostitution as a case study. It examines what the formal/informal distinction means in an authoritarian context where formal norms contrast significantly with informal norms: do judges apply the formal norm, or do they apply the informal one, and if so, how do they justify this? This article argues that judges instrumentalise a formal norm (i.e. the ban on prostitution) to impose an informal one (prohibiting extra-marital sex). As a result, the norm prohibiting extra-marital sex can no longer be situated in the formal/informal divide: it is not informal, as judges are State officials punishing the violation of this norm; and it is not formal either, since the norm does not form part of legislation and Tunisian judges, exercising their profession in a civil law country, do not make law.*

**KEYWORDS:** Informal Norms; Judicial Practice; Tunisia; Authoritarian Law; Authoritarian State Feminism

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## 1. Introduction: the formal/informal divide<sup>1</sup>

Whereas the study of law has predominantly been shaped by a positivist outlook, in that legal scholars have maintained a focus on legislation, legal academics since the start of the 20th Century have been increasingly interested in the practices of judges. This interest emerged with Scandinavian Legal Realism, a branch of legal philosophy that argued that in order to study the ‘law’, legal scholars should look at judicial practice.<sup>2</sup> It was not until the 1970s that this interest in judicial practices took a more concrete turn. Indeed, it has evolved from a philosophical and theoretical discussion on ‘what law is’ to a sub-discipline of law and anthropology in the form of ‘legal pluralism’. Researchers in the field of legal pluralism are interested in how law plays out on the ground (the law in action as opposed to the law in the books), especially in developing countries.<sup>3</sup> They look at mechanisms of Alternative Dispute Resolution (ADR) and normative orders alternative to legislation, such as custom, religious law, social norms and international law. As such, there exist various dichotomies which underpin studies in legal pluralism, namely the dichotomy between the ‘courts’ and ‘ADR’, and between formal norms/State law and informal norms/non-State law. Consequently, the dualist approach to law remains dominant in non-positivist legal studies. In reality, however, the formal/informal divide is not always that clear-cut, in particular when official State institutions such as the judiciary, apply informal norms instead of (and opposed to) State law.

This article explores the dynamics of the law in action beyond the binary formal/informal, using Tunisian jurisprudence in the field of prostitution as a case study. It examines what the formal/informal distinction means in an authoritarian context where formal norms contrast significantly with informal norms. Do judges apply the formal norm, or do they apply the informal one, and if so, how do they justify this? I argue that judges instrumentalise a formal norm (i.e. the ban on prosti-

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<sup>1</sup> The author would like to thank the Alexander von Humboldt Foundation and the Gerda Henkel Foundation for their funding during the writing of this article.

<sup>2</sup> For Scandinavian Realism, see Stromholm 1994.

<sup>3</sup> For a clear introduction in the fields of interest of legal pluralism, see Fuller 1994.

tution) to impose an informal one (prohibiting extra-marital sex). This is what I call ‘the formalisation of an informal norm’. As a result, the norm prohibiting extra-marital sex can no longer be situated in the formal/informal divide: it is not informal, as judges are State officials punishing the violation of this norm; and it is not formal either, since the norm does not form part of legislation and Tunisian judges, exercising their profession in a civil law country, do not make law.

By using Tunisia as a case study, I do not suggest that the formalisation of informal norms through judicial practice is unique to this country, or North Africa, or developing countries in general. In fact, when looking at the case of Tunisia, the phenomenon appears to be facilitated by what I call ‘authoritarian State feminism’, where repression allows laws and policies in the field of gender, sexuality and morality to conflict with the societal norms, and where such laws bestow wide-ranging discretionary powers on judges.

### *1.1 Informal norms, formal norms and formalisation*

In the above, I have used the terms non-State law, lived law and informal norms interchangeably. In all cases, I refer to those norms that organise individual behaviour but that do not form part of legislation. In the field of social economy and comparative politics the term ‘informal’ is relatively recurrent. According to Routh, ‘informal’, as in informal employment, denotes the diverse practices and actions that are not regulated by the State (Routh 2011). In comparative politics, informal institutions, including informal rules, are termed the norms that are not institutionalised but are the actual rules that are being followed (O’Donnell 1996, p. 10). In legal pluralism, authors have used different terms to denote informal norms, ranging from ‘unofficial law’,<sup>4</sup> ‘indigenous law’ (Galanter 1981) and ‘folk law’ (Starr 1985), to ‘cultural’ (Rosen 1989), ‘social’ (Bowen 2001) and ‘practical’ (Olivier de Sardan 2015) norms.<sup>5</sup> The use of the term ‘informal’ is preferable as it ascribes per-

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<sup>4</sup> Hence the title of the journal dedicated to the subject of legal pluralism: *The Journal of Legal Pluralism and Unofficial Law*.

<sup>5</sup> On this debate, see Merry 1988, pp. 875-9.

formativity to the term ‘formalisation’, by uncovering the process of turning an informal norm into a formal one.

With ‘formalisation’ I refer to an act that takes place in judicial *practice*. This focus on practice to look at norms is inspired by Foucault’s ideas on the production of truth. He argued that norms do not *exist*, but that they are *produced* by, what he calls, powerful institutions. The production of norms is an instance of the production of truth: if powerful institutions such as legislators, courts but also, for Foucault, psychiatric hospitals, define behaviour A as ‘the norm’ and behaviour B as ‘abnormal’, these institutions are *producing* what ‘normal’ behaviour is (Link and Hall 2004). Foucault calls this act ‘normalisation’: the act of making the norm (Foucault 1975).<sup>6</sup> Applied to the case of Tunisian court practice, the judges normalise certain behaviour, that is: through their practice, they create conceptions of normal and abnormal. Unlike Foucault, I prefer the term *formalisation* in order to highlight the relationship between the norm that judges produce and the one that society produces: the norm on extramarital sex does not come from these judges, it comes from the society of which these judges form part. Therefore, formalisation refers to the act of normalisation by a powerful institution (the court) of a norm that was originally informal.

## 1.2 Sources

This study is based on 31 prostitution cases trialled by the Court of Cassation, Tunisia’s highest court.<sup>7</sup> I focus on the highest Court for three reasons: (1) its rulings contain information about three levels of adjudication (Court of First Instance, Court of Appeal and the Court of Cassation), and about the practices of police and the Public Prosecutor’s office; (2) despite Tunisia being a civil law

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<sup>6</sup> “La pénalité perpétuelle qui traverse tous les points, et contrôle tous les instants des institutions disciplinaires, compare, différencie, hiérarchise, homogénéise, exclut. En un mot: elle normalise.” (Foucault 1975, p. 185).

<sup>7</sup> I want to thank Sadri Saied and Karim el Chazli from the Institut Suisse de Droit Comparé in Lausanne and Mohamed Ali Ettoughourti, lawyer at the Tunisian Court of Cassation, for their help in retrieving these decisions, and Mohammed Habibullah Scheikani for his assistance in translating them.

country, the highest court does have some influence on lower court's practice; and (3) it is the only court whose rulings are public.

The high court rulings are published in an annual bulletin, the *Nashriyat al-mahkama al-ta'qibiyya*, and online on the website of the Ministry of justice.<sup>8</sup> The collection reflects the practices during the rule of Bourguiba (1956-1989) and Ben Ali (1987-2011): I obtained nineteen rulings from the time period 1970-1987 and twelve from the time period 1987-2011. They thus give information about court practice as it existed between the first decade of independence (court practice of the late 1960s is reflected in the earliest rulings' summaries of lower court rulings in the same case) and the end of Ben Ali's rule. The data collection contains all published rulings from the highest court that I found with the search terms 231 (the article number), *bigba'* and *kbina'* (the relevant legal terms of prostitution). The Court stopped publishing its rulings on paper in 2009, when online publications continued sporadically until 2013. However, no rulings on prostitution were published in the period post-Ben Ali.

This article proceeds as follows: Section 2 describes the background of the article on prostitution, revealing the divergence between the formal and the informal norm. Section 3 examines its application by judges, showing that judges instrumentalise the article on prostitution to prohibit all kinds of extra-marital sex. Section 4 situates this formalisation of the informal norm through judicial practice in the authoritarian context.

## 2. Tunisia and sex crimes

After three centuries of relative independence under official Ottoman rule, Tunisia became a French protectorate in 1881. Under French domination, the first codifications were issued to replace classical Islamic law and various decrees from the ruler. Around the turn of the century, Tunisia adopted a Civil Code, a Criminal Code and Codes of Civil and Criminal Procedure, inspired on French law and

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<sup>8</sup> <http://jurisprudence.e-justice.tn/wwwisis/juris.10/form.htm>, 1956-2013.

applied by national courts as opposed to the religious court system. As was common in colonies, the French powers left personal status law (laws pertaining to marriage, divorce, inheritance etc.) untouched, meaning that religious sheikhs continued to apply classical norms in religious courts.

Upon independence in 1956, the nationalist leader Habib Bourguiba, a lawyer trained in France, became president of the Tunisian Republic. One of his first legislative acts was the codification of personal status law, to be applied by national courts. Tunisia owes its reputation of being a ‘modernist’ and ‘secularist’ ‘exception’ primarily to this Personal Status Code (PSC), which grants equal divorce rights to men and women, abolishes repudiation and punishes polygamy. Later reforms further completed this modernisation project, with a law punishing customary marriage,<sup>9</sup> the legalisation of abortion,<sup>10</sup> and several reforms to the Criminal Code punishing sex with minor girls, raising the punishment for rape, and making adultery punishable for women *and* men.<sup>11</sup> Ben Ali continued the modernisation project with a second reform to the Personal Status Code in 1993<sup>12</sup> and the issuance of a small series of separate laws in the field of gender, including a law granting rights to children born out of wedlock,<sup>13</sup> and the criminalisation of sexual harassment.<sup>14</sup> It is no exaggeration to state that this legislative *ensemble* forms an example for women’s rights activists throughout the region.<sup>15</sup>

The laws in the field of gender and sexuality thus generally fit Tunisia’s modernist and secularist reputation. This is not only true for the laws issued upon independence, such as the Personal Status Code and its reforms, but also for the Criminal Code. Issued in 1913 and preserved after independence, this law upholds a

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<sup>9</sup> Article 36 of the Code of Civil Status of 1957.

<sup>10</sup> Article 214 Penal Code as modified by law 65-24 of 1 July 1965 and Decree-law 73-2 of 26 September 1973 ratified by law 73-57 of 19 November 1973.

<sup>11</sup> Law 68-1 of 8 March 1968.

<sup>12</sup> Law 93-74 of 12 July 1993.

<sup>13</sup> Law 98-75 of 28 October 1998.

<sup>14</sup> Law 2004-73 of 2 August 2004.

<sup>15</sup> This is particularly true for its abolition of polygamy, see Welchman 2007, p. 78.

relatively liberal attitude towards sexuality:<sup>16</sup> the Tunisian law is silent on extra-marital sexual relations except in specific circumstances, namely sexual intercourse with a minor, rape, adultery, homosexual relations and prostitution.<sup>17</sup> This approach towards sexual relations is relatively unique in the region, as in most Muslim-majority countries, laws pertaining to gender and morality are inspired by classical Islamic precepts, prohibiting all extra-marital sex under the prohibition of *zina*.<sup>18</sup> For instance, in Morocco, both parties engaged in extra-marital sex are punished with between one month and one year in prison.<sup>19</sup>

Despite the legalisation of extra-marital sexual relations by the 1913 law, these have remained socially taboo. A survey conducted in 2014 shows that for 90 % of the Tunisian population, extra-marital sex is unacceptable, and for 89 %, pre-marital sexual relations are too.<sup>20</sup> These percentages are similar to the countries in the region where the law is much less liberal. In Egypt, for instance, the percentages are 90 and 91 % respectively, and in Jordan 93 and 95 %.<sup>21</sup> This survey thus reveals a strong informal norm according to which sex before or outside marriage is forbidden. My own observations during my fieldwork in 2008-2009 and 2011-2012 confirmed the existence of this informal norm: I noticed for instance that lay people are convinced that extra-marital sex is forbidden by law, having also learned this in school.

The relationship between the formal and the informal norm is thus one of conflict: the informal norm was not codified, as the legislator introduced a formal

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<sup>16</sup> Note that the Tunisian Code punishes homosexuality and lesbianism with three years in prison (Article 230) and adultery with five (Article 236), and that it forbids to serve alcohol to Muslims (Article 317).

<sup>17</sup> Articles 230, 236, 227, 230 and 227 bis.

<sup>18</sup> One of the crimes mentioned in the Qur'an that face corporal punishment. *Zina* is every sexual relation (with penetration) out of wedlock. In classical Islam, men could equally have legal sexual relations with their own female slave. See Peters 2005.

<sup>19</sup> Article 490 of the Moroccan Penal Code.

<sup>20</sup> Pew morality index 2014, viewed on 27 November 2018, <<http://www.pewglobal.org/2014/04/15/global-morality/country/tunisia/>>.

<sup>21</sup> Pew morality index 2014, viewed on 27 November 2018, <<http://www.pewglobal.org/2014/04/15/global-morality/country/egypt/>>, <<http://www.pewglobal.org/2014/04/15/global-morality/country/jordan/>>.



norm that is opposite to the informal one.<sup>22</sup> This conflict can be attributed to the fact that it was not a Tunisian legislator, but the French coloniser who introduced this law. Even if the latter refrained from simply transplanting the French Code Napoléon onto the Tunisian context, as was done in neighbouring Algeria, the French dominated the Tunisian codification process in the field of civil and penal law. When Tunisia became independent in 1956, however, the new Tunisian President did not change the legislation to bring it closer to Tunisian informal norms. On the contrary, Bourguiba introduced more laws and policies that, according to political scientist François Burgat, “went counter to the cultural representations that were dominant among a large majority of the population” (Burgat 1992). As such, the production of law was fully inscribed in the authoritarian context as described by Tunisia specialists Camau<sup>23</sup> and Hibou<sup>24</sup>: formal laws were imposed on society without taking note of the demands of the people.<sup>25</sup> Such neglect of demands from society, as expressed by religious groups, but also by human rights organisations and women’s rights organisations, was facilitated by the security State apparatus that was responsible for the repression of the Tunisian people until 2011.

## 2.1 Prostitution

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<sup>22</sup> On the different relationships between formal and informal norms, see for instance Lauth, 2000, p. 25.

<sup>23</sup> For Bourguiba’s era (1956-1987), Michel Camau wrote that “the Tunisian leadership has not stopped to combine two major characteristics: a strong degree of individualisation and an authoritarian form of power.” (Camau 2004, p. 180, translation is mine). See also Meddeb 2012. Note that several authors tried to add nuance to the label of authoritarianism for the Tunisian case, without, however, denying it (e.g. Camau 2005).

<sup>24</sup> With respect to the rule of Ben Ali (1987-2011), Béatrice Hibou observed that “Tunisia ... is uncontestedly an authoritarian regime and a police State, where human rights violations are numerous, characterised by the total absence of press freedom and the freedom of association, and a political pluralism *de façade*,” Hibou 1999, p. 48 (translation is mine). See also the works of Steffen Erdle, Vincent Geisser, Eric Gobe, and Larbi Chouikha.

<sup>25</sup> Redissi characterises pre-2011 Tunisia not as a State upholding the Rule of Law, where the State is submitted to the law, but as a State of power (*Machtsstaat*), which “reduces the law to a mere instrument of State activity”, Redissi 2004, p. 216 (translation is mine). Compare Rafea Ben Achour 1995, who stresses that this is true despite the ‘verniss démocratique’ guaranteed by the 1959 Constitution.

Where State law deviates from the norms embedded in society, judges, although State officials, continued to apply the informal norm prohibiting extra-marital sex. The vagueness of the article on prostitution facilitated this practice through a wide interpretation of ‘prostitution’, in which judges could punish all sorts of extra-marital sexual relations.

The Tunisian article on prostitution has a fascinating history. The Tunisian Penal Code of 1913 forbade the act of prostitution in its Article 231, punishing “the person who habitually excites, favours or facilitates debauchery or corruption of the youth of either sex”. In 1942, however, the French ruler alleviated the interdiction: a decree of 1942 differentiates between legal and illegal prostitution, placing legal prostitutes under the custody of the Ministry as State officials, organising them in neighbourhoods specifically designated for prostitution.<sup>26</sup> In 1949, the Protectorate erased Article 231 from the Penal Code altogether. As a result, only the pimp (sanctioned by Article 232) was punishable.<sup>27</sup> Upon independence, Bourguiba reintroduced Article 231 and reformed it, punishing prostitutes *and* their clients.<sup>28</sup> At the same time, the system of legal prostitution was maintained: Article 231 refers to the decree of 1942 as an exception to the overall prostitution ban. The legislative situation today is that prostitution is illegal, except in the specific neighbourhoods assigned to legal prostitution, such as the Rue Sidi Abdallah Guech in the old medina of Tunis. Prostitution in these neighbourhoods is carried out by a fixed number of prostitutes who are working as State officials and are under close control of the police, in accordance with the 1942 decree.

## 2.2 *What is ‘prostitution’ anyway?*

Article 231 states: “Apart from the cases covered by other regulations [i.e. the 1942 decree], women who, with gestures or words, offer themselves to passers-

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<sup>26</sup> Taraud argues that this organisation served to “prevent the masses of indigenous prostitutes to contaminate the French nation” (Taraud 2009, p. 86). On Tunisian legal prostitution and the prostitution neighbourhoods in the past, see also Kerrou and M’hallah 1991.

<sup>27</sup> Decree of 26 May 1949. See Sana Ben Achour 2016, p. 77.

<sup>28</sup> Laws 64-34 of 2 July 1964 and 68-1 of 8 March 1968.

by or engage in prostitution, even occasionally, are punished with six months to two years in prison and a fine of 20 to 200 Tunisian Dinars [the equivalent of 10 to 100 euros].<sup>29</sup> Every person who has had sexual intercourse with these women is considered an accomplice and punished with the same penalty.” The article thus punishes three acts: (1.) offering oneself through gestures or words; (2.) prostitution; (3.) sexual intercourse with a woman who offers herself or who prostitutes.<sup>30</sup>

The text of the law suggests that a woman is punished if she engages in prostitution *or* if she merely offers herself for prostitution. But what is meant by ‘prostitution’ here? The Tunisian law does not specify this term, which remains vague. The Arabic text employs the term *kbina*. This term is specific for Tunisian Arabic; in Modern Standard Arabic the usual term would be *bagha*. It seems to be derived from the verb *khanu*, which the dictionary of Hans Wehr defines as “To use obscene language, something indecent or obscene, prostitution, fornication”. In the French version (Tunisia publishes laws in Arabic and in French), the law employs the term ‘*prostitution*’, which according to the French dictionary Larousse means the “*Acte par lequel une personne consent habituellement à pratiquer des rapports sexuels avec un nombre indéterminé d’autres personnes moyennant rémunération*” (“The act whereby a person consents as a matter of habit to the practice of having sexual relations with an undetermined number of other persons in exchange for remuneration”). The definition employed in Article 231 is thus broader than the French definition: it explicitly includes ‘occasional prostitution’ (*sudfa* in Arabic) as opposed to the habit and the undetermined number of persons mentioned in the French dictionary. As a result, judges may qualify ‘one-night stands’ as prostitution. This may even be true if there is no remuneration, since the element of the counterpart is absent in Article 231.

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<sup>29</sup> The amount, which is low in comparison to the prison sentence, has never been adapted since the reintroduction of the article in 1964.

<sup>30</sup> Note that the first two interdictions apply to women only (male prostitution is not foreseen by the law), while the latter applies to both sexes. In light of the generalisation of male prostitution and same sex sex tourism in the Maghreb in general and in Tunisia in particular (see for instance Beaumont 2010), and of Bourguiba’s legislative efforts in the field of gender equality, it is surprising that the article only applies to female prostitutes.

The use of the term *kbina*' instead of *bagha*' combined with the fact that Article 231 includes occasional prostitution raises the question as to what Article 231 intends to forbid: does *kbina*' denote prostitution, i.e. sex for remuneration, or does it include all extra-marital sex? The positioning of the article gives an answer here. The article forms part of Title II of the 1913 Criminal Code, titled 'Attacks against persons', and falls under section III, 'Fornication' (*i'tida' b-al-fawahish*). Section III starts with a sub-section on the violation of morality (*ikbhaq*), containing articles on public violation of good morals and sexual harassment. Sub-section II concerns 'impudence' (*baya*), punishing rape, sexual relations with a minor, and homosexuality. Article 231 is the first provision of sub-section III, titled 'Incitement to unlawful fornication' (*tabrid 'ala fi'li al-kbina*). Article 231 forbids *kbina*' and cooperation (*musharaka*), and the following article forbids pimping (being a middle man, *wasit* in Arabic). If the provision concerned all unlawful fornication, it would rather be situated in the first sub-section of the section on fornication than in a sub-section titled 'Incitement to unlawful fornication'. Also, if Article 231 concerned all extra-marital relations, it would not be conceivable to punish the woman as the 'unlawful fornicator', and the man as her 'accomplice', nor would the provisions on middlemen be logically placed here. Besides, the article's reference to the 1942 decree on legal prostitution suggests that the article concerns prostitution, that is: sex in exchange for remuneration, only.

### 3. Formal versus informal

When looking at court practice in the field of sexuality, it appears that judges punish all extra-marital sex via the prostitution article. A case from 1977 can serve as an example here.<sup>31</sup> According to the facts as they are described in the ruling, a woman named Monjia went to a local court on 23 February 1977, for some personal paperwork. Possibly intimidated by the bureaucratic requirements, she asked a man who was responsible for the maintenance of the heating devices in the

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<sup>31</sup> Court of Cassation 1 December 1977, 1975.

building for his help. After the man had helped her out, he asked her if, given “the risk he had taken by helping her”, she was willing to sleep with him in return. According to the ruling she consented, and they went together down to the boiler room, “of which he had the key, given that he was the manager of the heating device in this building”, as the ruling specifies. According to the court, they had sexual intercourse there, “with penetration” (note that Article 231 does not require penetration). In the meantime, one of the guards became suspicious and notified the head of the clerk’s office. They went to the chamber and knocked on the door, but the suspects remained silent. They went back up to get a key and when they entered the room, they found the suspects “in a suspicious pose”. The officers brought the police in, and Monjia and her accomplice were arrested. The police prosecuted her on suspicion of prostitution and him for sleeping with a prostitute. The Court of First Instance sentenced both to one year in prison, which the Court of Appeal in Tunis confirmed.<sup>32</sup> The man’s lawyer brought the case before the highest court (the Court of Cassation), arguing that it was physically impossible that they had sexual intercourse, because the room was too small and because insufficient time had passed before the court officers had entered the room. However, the legal defense is of particular relevance for the study: the lawyer pointed at the issue of remuneration, stating that since Monjia had not received any money nor gifts, her deed could not be qualified as prostitution, adding that the man’s favour was too negligible to be qualified as remuneration. Nevertheless, the Court of Cassation ruled in favour of the prosecution. The court argued that the act can be qualified as prostitution, because Article 231 does not require repetition nor remuneration. As a result, a one-time stand was punished with the use of the prostitution article. And the case of Monjia does not stand alone. For instance, in the most recent case in our collection, a decision from 2006, the court sentenced a couple to prison after they had been found together in a “suspicious pose”. Here,

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<sup>32</sup> Court of Appeal Tunis, 22 March 1977, 86970.

too, the court argued that remuneration is not required for an act to be qualified as prostitution.<sup>33</sup>

In other rulings, the court does require remuneration, but this does not influence its practice: insignificant amounts of money suffice. In a case from 1991, a woman had a one-night stand with the husband of her sister in the marital home. After the act she had presumably told the man that he now owed her 5 Tunisian Dinars (2 euros 50). As the court considered it proven that she had made this remark, the sexual act was considered prostitution, because the court qualified the debt as remuneration.<sup>34</sup> In a case from 1994, the police arrested two men and two women in Tajerouine, a small town near the Algerian border. One of the men declared to the police that he had invited the women to the house of his friend to have sexual intercourse. After the Court of First Instance had sentenced the women to four months in prison, the Court of Appeal in Le Kef released them for lack of evidence of remuneration.<sup>35</sup> When the Public Prosecution brought the case before the highest court, the latter convicted them, stating that, since the men had taken the women out for dinner, where they had eaten together and drank alcohol at the expense of the men, there was remuneration.<sup>36</sup>

The wide interpretation of the article on prostitution is not limited to cases of one-night stands. A few rulings show that courts qualified sexual relations between people who were in a relationship or engaged to be married, as 'prostitution'. For instance, in a case from 1985, a certain Bya had 'submitted' herself (sexually) to her boyfriend Naji, who had asked her to marry him and who had given her money and pieces of furniture.<sup>37</sup> The highest court qualified the relationship as prostitution, arguing that the law does not require repetition (in the sense of different clients) and that she had received remuneration in the form of

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<sup>33</sup> Court of Cassation 1 March 2006, 12526.

<sup>34</sup> Court of Cassation 27 March 1991, 30735.

<sup>35</sup> Court of Appeal of Le Kef, 3 March 1992, 28790.

<sup>36</sup> Court of Cassation 19 September 1994, 43753.

<sup>37</sup> Court of Cassation 12 June 1985, 8946.

money and furniture. It should be noted that it is custom in Tunisia to offer one's fiancée money and furniture (*adbash*) to furnish the future marital home.<sup>38</sup>

### *3.1 Lower courts and police*

Having focused on the rulings from the highest court, it is now important to delve into how the decisions from the highest court reflect the practices of lower courts and other State officials, particularly the Public Prosecution and the police. These lower State institutions had an even more elaborate practice of prosecuting and sanctioning people for prostitution than the highest court. For instance, in a case from 1970, the police arrested a woman and her partner for prostitution and sleeping with a prostitute because she had been observed at the man's place "without a reason", and the Court of First Instance and the Court of Appeal ruled in favour of the prosecution. It was only when the case came before the highest court that the couple were released.<sup>39</sup> Another example concerns a case from 1995 where six young Tunisian men and women, who were on holidays on the island of Jerba, were arrested after a man had called the police for he heard "screaming and blasphemy" in the neighbouring apartment. According to the ruling, two of the couples were in a relationship, while the third woman and the third man first met on the island. The Public Prosecution decided to bring the case against all six of them before the court, but the courts acquitted them.<sup>40</sup>

Another case from 1975 pertains to a couple that was engaged to be married. Roqayya, who was engaged to an air force officer, was pregnant with his child when he broke off the engagement accusing her of having another bed partner. Roqayya then went to the police, possibly because she felt that there must be a legal remedy to this unjust behaviour or because she hoped that, by filing a complaint and stating officially before the police who was the father of her child,

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<sup>38</sup> One could contend that marriage gifts are in fact nothing else than an exchange for the woman's sexual services, as Kecia Ali argues (Ali 2010). However, the discussion on the similarities between prostitution and marriage in early Islam falls out of the scope of this paper.

<sup>39</sup> Court of First Instance Kairouan (n.d.), Court of Appeal Sousse, 30 March 1970, 13498.

<sup>40</sup> Court of First Instance Mednin, 30 September 1992, 57092 and Court of Appeal Mednin, 4 November 1992, 7684. Court of Cassation 17 January 1995, 48419. They did get sentenced for blasphemy.

she could forebear giving birth to a bastard. However, the police immediately arrested Roqayya (and later also her ex-fiancé) for prostitution. When the case was brought before the highest court, the latter stated there was no prostitution since their intention had been to get married.<sup>41</sup>

These cases confirm that the police had a wider practice of instrumentalising the prostitution article than courts did. It should be pointed out here that the police's practice is even wider than what is reflected in court rulings: I have shown elsewhere that the majority of cases that the police treats as prostitution do not even come before the court, since such cases are often handled informally in the form of bribes (Voorhoeve 2014).

### *3.2 Blurring the distinction between formal and informal norms*

The practices analysed in this section demonstrate that the distinction between formal and informal has little bearing in the Tunisian authoritarian context, as judges (and other authorities) applied an informal norm, which they justified through the invocation of Article 231. The norm prohibiting pre-marital and extra-marital sex is therefore no longer outright informal, in the sense of not regulated by the State (as in Routh's definition), since it is reproduced by State officials.

It is important to point out here that this formalisation occurs in all time periods studied: the rulings cited date from 1970, 1975, 1977, 1985, 1991, 1994, 1995, and 2006. This shows that judicial practice was not more liberal or more illiberal during Bourguiba's or Ben Ali's rule. Where both rulers issued laws pertaining to the 'modernisation' of the field of gender and sexuality, the judges adjudicating the cases discussed here, did not follow suit. The question arises as to why the Tunisian authoritarian State, who is the producer of formal norms, would approve of judicial practice that deviates not only from Tunisian legislation, but also from the modernist and secularist State discourse. This question is the object of the final part of this article.

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<sup>41</sup> Court of Cassation 16 April 1975, 11280.



#### **4. Legislation, informal norms, and window dressing**

Through the instrumentalisation of Article 231 to punish extra-marital sexual relations ranging from one-night stands to pre-marital relationships, the Court brings formal law closer to lived law. However, in a civil law country as Tunisia, it is the legislator, not the judge, who makes the law. By applying a broad interpretation of Article 231, the court takes upon itself the role of the legislator. In a country with such a strong French legal tradition, this self-attribution of legislative powers by courts is certainly surprising, as traditionally in French law, judges are the mere *bouches de la loi* (mouthpieces of the law) (Charfi 1997). But the authoritarian character of the regime makes it even more surprising since, especially in Tunisia, the power was centered in the government or even in the person of the ruler.<sup>42</sup> Indeed, when judges deviate from the ruler's will as expressed in legislation, this is certainly a violation of the power structure. This violation is all the more important since the practices described above contradict the modernist and secularist State discourse. I argue that the reason why the formalisation of the illiberal informal norm was nevertheless possible, lies in the fact that the State was merely concerned with what is generally called 'window dressing'. This term refers to situations where rulers are merely concerned with formal law as a means to convey a modernist image, while at the same time remaining indifferent to its actual implementation.

##### *4.1 Window dressing as part of authoritarian State feminism*

In the field of gender and sexuality, the formal laws and policies under Bourguiba and Ben Ali were the product of what I call 'authoritarian State feminism'. In Middle Eastern Women's Studies the term 'State feminism' systematically refers to state policy with negative connotations associated with authoritarianism.<sup>43</sup> However, such authoritarian connotation is not a given in other

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<sup>42</sup> As is argued by Camau and others, *supra*.

<sup>43</sup> See for instance White 2003. For the Tunisian case, see Sana Ben Achour 2001.

geographical areas. Mervat Hatem states that the term was coined in studies of Scandinavian societies, referring to “government efforts to remove the structural basis of gender inequality” (Hatem 1992, p. 231). In their chapter on comparative State feminism, Dorothy McBride Stetson and Amy G. Mazur define State feminism as the whole of the ‘State’s women’s policy machinery’ (McBride Stetson and Mazur 2010, p. 319). Since the Tunisian women’s policy machinery did not merely consist of government efforts to remove structural inequalities because of its authoritarian characteristics, I prefer to distinguish authoritarian State feminism from other forms of State feminism.

The term ‘authoritarian State feminism’ suggests three things. The first characteristic is connected to the decision-making process, in the sense that the policies are implemented by an authoritarian regime instead of originating in a democratic institution.<sup>44</sup> The second and third factor are inspired on Mazur and McBride Stetson’s parameters in evaluating the State’s policy machinery (McBride Stetson and Mazur 2010). The second characteristic then is that the policy does not so much aim at improving the situation of women as it does window dressing, particularly in the face of civil and political rights violations. The third characteristic is that there are few opportunities for civil society to engage in discussions on law reform. Besides, it is important to point out here that since it concerns a post-colonial context, discourses of modernisation and of women’s liberation are typical for authoritarian State feminism in post-colonial States engaged in nation building upon independence.<sup>45</sup>

In Tunisia, laws pertaining to gender and sexuality are the product of authoritarian State feminism: first of all, the Criminal Code was the product of

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<sup>44</sup> This factor should not be taken too literally. Indeed, studies in Comparative Politics have shown the various faces of authoritarianism. Although present-day Tunisia has a democratic government, its women’s policy machinery still has authoritarian characteristics. See Ben Said 2017.

<sup>45</sup> Laura Bier argues for Nasserist State feminism that it is not just a series of policies, but “a constellation of normalising discourses, practices, legal measures, and state-building programs aimed at making women into *modern* political subjects”. She continues to state that what these policies have in common is “a normative vision of female ‘liberation’ as necessary to the task of building a modern, independent nation capable of overcoming the debilitating legacies of colonial [...] rule” (Bier 2011, p. 7).

colonial rule, with no democratic background whatsoever. The PSC, composed by a three-headed committee appointed by Bourguiba, was promulgated without passing Parliament, and the reforms of both laws passed a Parliament that consisted of the ruling party (Tunisia had a de facto single party system). Second, there was little to no room for civil society in the discussion of laws and policies: the repression of actors discussing women's rights under Bourguiba and Ben Ali can hardly be exaggerated. In the 1970s and 80s, civil society increasingly formulated critique on the women's policy machinery in general and the PSC in particular. The *Mouvement de Tendence Islamique* (MTI), a religious movement established in the 70s, criticised the PSC, drawing attention to the high divorce rates among other things (Daoud 1993, p. 93). Following the 1979 Iranian revolution, the regime put a ban on the MTI, arresting its members, and anyone uttering similar critique on the State's women's policy machinery was silenced. Indeed, like in Egypt, Tunisian State feminism "not only entailed authoritarian political repression but also demanded the refashioning of the sensibilities, commitments, and social worlds of women (and men) whose lives contrasted with its emancipatory vision" (Bier 2011, p. 181). The same was true for those for whom the 'modernisation' and 'emancipation' did not go fast enough. The *Association Tunisienne des Femmes Démocrates* (ATFD), a movement of liberal feminists (on this term, see Al-Ali 2003), expressed critique on the PSC and other laws and policies, such as the legal problems connected to children born out of wedlock, who did not have a family name and subsequently an ID card. Ben Ali legalised the ATFD in 1989, but its members were under continuous surveillance, its funding was often blocked and its activities frustrated. For instance, when a group of feminist activists started to publish a journal (*An-Nissa*) as a platform to address issues related to gender discrimination and related issues, the magazine was soon taken off the market (Marzouki 1993, p. 258). Indeed, against the background of the repression of women's rights organisations, it is ironic to call Tunisian policies 'feminist':<sup>46</sup> the idea of women's emancipation

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<sup>46</sup> See Bier with a similar argument on Nasser (Bier 2011, p. 7).

formed part of nation building, but it did not mean that women could actually participate in a debate that concerned them.<sup>47</sup>

Where the repression of civil society was a generalised phenomenon, the question of the ‘true’ intention to improve the situation of women as opposed to mere window dressing is more complex. As for family law, much can be said about the persistence of patriarchal norms throughout the PSC: it stated that the wife should obey her husband, and until today, it states that the wife is financially dependent on her spouse. Nevertheless, for those reforms that took place in the name of women’s emancipation (no matter how they are evaluated from a feminist standpoint today), State propaganda justifying the reforms and condemning ‘backward practices’ suggests that there was a true intention to change things (Yadh Ben Achour 1987, Tobich 2008). For instance, in the first decade after independence, the government was involved in a ‘media rally’ against polygamy, trying to convince the people that this practice should end. The same was true for the legalisation of abortion, in particular when the law was modified in 1965 and 1973 allowing abortion up to three months into pregnancy. This was accompanied by an effective policy, installing centres where such abortions could be carried out anonymously.

Regardless of these ‘true intentions’ of ‘modernisation’ and ‘liberalisation’, the crucial role of Tunisia’s *image* as a ‘modern’ state cannot be denied.<sup>48</sup> In Tunisia, feminist policy formed an intrinsic part of the identity that the State constructed domestically as well as abroad, especially in the West. Tunisian historian Sophie Bessis aptly describes this when she writes “The Tunisian regime has become a master in the art of brochures. No visitor to the country, no-one invited to the embassy, no participant in a meeting with Tunisia as its theatre or object escapes the dissemination of an abundant documentation boasting Tunisia’s merits and

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<sup>47</sup> Except the appointed members of the national women’s rights organisation, the *Union Nationale des Femmes Tunisiennes*, established in the 1950s.

<sup>48</sup> Also, with the years, co-opting women’s rights activists, who formed part of a cultural and economic elite, that was often secularised and westernised, was an important impetus.

progress. Women and their condition play a prominent role in this domain” (Bessis 1999, p. 1).

In the field of sex laws, the intention to change practice, however, appears entirely absent: changing sexual mores does not appear to have formed part of Bourguiba’s or Ben Ali’s modernisation projects. There was no State discourse surrounding the liberalisation of sexual mores, neither in the media nor through other channels (e.g. in school education). On the contrary, I observed in the years 2000 that even family judges (who are competent in cases of marriage and divorce) informed couples that having sexual relations before the marriage festivities was forbidden (Voorhoeve 2018). The unique reason why Bourguiba did not introduce an article punishing extra-marital sex to adapt the formal norms to the informal ones (as did the Moroccan King in the 1960s) thus appears to be again a matter of window dressing: such reform would conflict with the modernist and secularist image that he was trying to build. The aspect of window dressing (building Tunisia’s modernist image) explains why today for 90 % of Tunisians, extra-marital sex is unacceptable. It also explains why judges can use the provision on prostitution to punish extra-marital sex. With respect to its sex laws, the State is merely concerned with the formal law and has no interest in its actual implementation.

#### *4.2 Ambivalence*

At this point, it is useful to return to the wording of Article 231: the law appears to fit in the modernisation project, but judges are left with wide discretionary powers, because the law does not define *kbina*’ and the article includes occasional prostitution. This vagueness is a recurrent feature in Tunisian legislation related to gender. For Tunisian legal scholar and activist Sana Ben Achour, this vagueness originates in an *ambiguity* in the regime’s intentions to ‘modernise’ and ‘secularise’. Despite a general modernist State discourse, the regime often failed to go all the way (Sana Ben Achour 2005-2006). For instance, in the PSC, allowing divorce for harm without specifying what harm is, opened the way for judges to apply Islamic precepts connected to the wife’s duty to obey her husband

(Voorhoeve 2014). Tunisian political scientist Larbi Chouikha explains this ambiguity as fitting the regime's continuous struggle for legitimacy in an ideologically divided society. Since the regime had not obtained its legitimacy through the ballot box and needed a minimum of support, it chose against siding entirely with one of the two dominant ideological forces (leftists, liberals and secularists on the one hand, and conservatives and Islamists on the other). Especially in periods where Bourguiba and later Ben Ali were facing an uproar of either secularist/communist or Islamist/conservative forces, they reshaped their official discourse. The regime often chose to take no clear stance on issues on the intersection between law and morality, for instance through clear legislation, and the judiciary had relative freedom to move between the two forces in society (Chouikha 2005). As a result, there were liberal judicial practices as well, where courts adopted a legalistic approach to extra-marital sex, restricting the reach of Article 231.

Part of the rulings from the Court of Cassation go against the tendency to punish extra-marital sex through the prostitution article. In these rulings, judges *do* curtail the scope of Article 231, stating that there are two constituent elements for the crime of prostitution: remuneration (*muqabil*) and repetition (*ta'annud*).<sup>49</sup> A ruling from 1998 can serve as an example of this practice. In this case, a mother had called the police when her daughter was out with a friend and had not come home to their house in Tunis. The police found the young women in Beja, a town 100 km away from the capital. When they declared that they had been with a certain Radouane, the police arrested them together with three young men. The Court of First Instance in Tunis, the capital, sentenced all five of them: the daughter for prostitution (six months), her friend for mediating this (pimping, four months), the men for sleeping with a prostitute (two months) and one of them for making his apartment available (qualified as pimping, one month). The Court of Appeal in

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<sup>49</sup> Court of Cassation, 21 December 1970, 7509; 16 April 1975, 11280; 29 November 1978, 2475; 21 July 1979, 3634; 28 December 1983, 8912; 17 January 1995, 48419.

Tunis, however, released the suspects for lack of remuneration, and the Court of Cassation confirmed this.<sup>50</sup>

In other cases, the court gives an even narrower definition of prostitution, requiring the presence of additional elements, such as the intention (*nijya*) of prostitution,<sup>51</sup> the intention of trade,<sup>52</sup> or the element of occupation (prostitution as a job).<sup>53</sup> A ruling that uses a specifically narrow interpretation of Article 231 concerns a case from 1988 on the 17-year-old Fathiyya.<sup>54</sup> According to the court, the facts had been established as follows. On a night in 1984, Fathiyya left her father's house at one in the afternoon to go to her employer's house and get her overdue payments. The employer, who, according to the court, was known for her 'bad morals', refused, but apparently made some remarks about Fathiyya's looks. She then asked Fathiyya to accompany her to a friend's house. Fathiyya agreed, and at this friend's house, the women met a certain Boulbaba, the friend's husband, who proposed they go to the land of a certain Kamel. They brought some wine for the occasion and the four of them headed to Kamel's place. According to the ruling, Kamel made out with Fathiyya, after which she had intercourse with Boulbaba, 'with her consent', as the court points out,<sup>55</sup> and then with a third man. When her father was made aware of this, he notified the police. The court in Gabes sentenced Fathiyya to time in an educational center in La Manouba. The Court of Appeal nullified the ruling and Fathiyya was acquitted. The Public Prosecutor brought the case before the Court of Cassation, arguing that Fathiyya had confessed to the sexual relations, after which she had had food and wine with the men, which should be qualified as a remuneration. The highest court rejected the appeal, stating that the remuneration should be in the form of money (*nuqud*) and should be a certain amount that is agreed upon in advance, and that there should be an intention of trade, since "the aim of prostitutes is money and trade," as the court points out.

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<sup>50</sup> Court of Cassation, 22 January 1998, 76182.

<sup>51</sup> Court of Cassation 16 April 1975, 11280.

<sup>52</sup> Court of Cassation 5 January 1988, 15255.

<sup>53</sup> Court of Cassation 22 January 1998, 76182.

<sup>54</sup> Court of Cassation 5 January 1988, 15255.

<sup>55</sup> Probably in order to point out that the act cannot be qualified as rape, which is punished by Article 227 of the Tunisian Penal Code.

These rulings, dating from 1975, 1988, and 1998, show that both interpretations existed under the authoritarian regimes of Bourguiba and Ben Ali. They prove that the government was not trying to encourage judges to interpret Article 231 in an illiberal way; it was simply not interested in how the law was implemented, as long as the formal norm did not contradict the modernist discourse. The consequence of using a vague crime description was a casuistic and unpredictable legal practice, where Article 231 hangs as a sword of Damocles above the heads of people engaging in extra-marital sex.

## 5. Conclusion

Where non-positivist legal studies take a dualistic approach to law, the distinction between the formal and the informal does not take the practices in authoritarian contexts into account where formal and informal norms do not coincide, and judges can take the liberty to interpret vague laws in order to formalise the informal norm. In such cases, the societal norm is no longer outright informal in the sense of not regulated by the State, because it has been institutionalised by State officials. This phenomenon is particularly facilitated in situations where the formal norm is the result of authoritarian State feminism, where repression allows that laws and policies in the field of gender and sexuality conflict with the norms living in society, and where such laws serve as mere window dressing, granting judges wide discretionary powers. This is even more true when the State is ambivalent on its aim to modernise, resulting in vague legislative prescriptions. The issuing of discretionary powers allows judges and other legal institutions to practice all sorts of interpretations, fitting the modernisation discourse or the norms living in society.

At the end of this article on authoritarian judicial practice in Tunisia, the question arises as to the influence of the 2011 'revolution' on these practices. Although I was unable to retrieve any post 2011 rulings, there are several reasons to believe that these practices did not alter upon regime change. First, the regime change did not provoke a replacement of criminal judges, police officers or public prosecutors. Since the same persons apply Article 231, a change of practice is



unlikely except in case of law reform or official instructions. So far, Article 231 was not modified, and it is unlikely that the State issued instructions on the application of Article 231 since the regime has, up to now, not taken a stance on the issue of instrumentalising legislation to punish acts that are strictly speaking not forbidden. In fact, since the liberalisation of the media in 2011, journalists have related a series of incidents concerning police officers abusing their power by arresting people for ‘morality crimes’ that are not explicitly punishable by law, such as drinking alcohol.<sup>56</sup> Moreover, the current government, consisting of the conservative movement Ennahda and the party Nida’ Tounes that is close to the previous regime, has a tendency to remain ambivalent on issues pertaining to religion and morality. This is true despite the series of law reforms that were carried out since 2014, including the law on violence against women: as I argue elsewhere, the regime decided to leave certain legal maxims untouched, including the PSC which contains provisions such as Article 12, legitimising rape within marriage.<sup>57</sup> And finally, a famous case of 2012 shows that upon regime change, police and public prosecutors persisted their practice of punishing people for extra-marital sex; in this case, on the grounds of the public violation of morality.<sup>58</sup>

Even if judicial practice has not changed, the opening up of the public sphere following the downfall of the authoritarian regime in 2011 has enabled civil society actors to voice demands for legal reform. In June 2018, the working group Colibe (*Coalition des libertés individuelles et de l'égalité*) issued a report calling for further reform, including Article 231 in its proposals. The coalition proposes to replace the term *sudfa* (occasionally) with ‘*ala wajb al-i'tiyad*, ‘habitually’.<sup>59</sup> It states that the term *sudfa* accounts for wide discretionary powers, leading to arbitrary court practices, condemning women who did not practice prostitution.<sup>60</sup> To my knowledge, this is the first time that the court practice discussed in this article is brought to the

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<sup>56</sup> See for instance Boukhayatia 2016a and 2016b. This new media coverage does not suggest that such practices increased, but that the media can talk about it openly.

<sup>57</sup> Maaïke Voorhoeve, ‘Justice transitionnelle et confrontation avec l’héritage juridique: la réforme des lois tunisiennes relatives aux questions de genre’ (under review).

<sup>58</sup> The case of Meriem Ben Mohamed (pseudonym).

<sup>59</sup> Report Colibe, 1 June 2018, p. 94.

<sup>60</sup> Report Colibe, 1 June 2018, p. 42.

attention of the Tunisian public. Whether or not the government will act upon this advice remains to be seen: vague crime descriptions allowing for arbitrary court practices certainly serve authoritarian regimes, and for the time being, the current government has not proven to have distanced itself entirely from pre-existing authoritarian practices.

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