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### Judges in a web of normative orders: judicial practices at the Court of First Instance Tunis in the field of divorce law

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## Summary

Since the promulgation of the Tunisian Personal Status Code (PSC) in 1956, there is this fascinating discussion going on in Tunisian doctrine about *judicial practice*. Tunisian academics argue that the PSC is very 'progressive', but that it is not sufficiently implemented by judges. The authors state that Tunisian judicial practice is characterized by a situation where judges are applying 'sharia' and 'custom' besides the legislation. Some recent writings on the other hand testify to what the authors call a 'development', where judges invoke the constitution and international conventions to interpret the law in an 'innovative' way, as the authors call it. Besides, the famous Tunisian jurist Sana Ben Achour declared that the feminisation of the judiciary leads to gender-neutral judicial practices.

The discussion shows an enormous concern amongst Tunisian jurists for what *judges* are doing with the law in the field of personal status. In the light of this discussion, the present study looks at recent practices of judges in the field of personal status law, using the Court of First Instance (CFI) of Tunis as a case study, and focusing on divorce. From the practices of the judges at this court, I intend to derive what *norms* are affirmed by the court, and what *sources* are applied. Sub-questions connected to these two main axes allow me to verify or nuance statements made in Tunisian doctrine. The sub-question that can be treated when examining the *norm* corresponds to the statement of Sana Ben Achour and is whether the norms affirmed by the court can be qualified as 'gender-

neutral', a question that can be addressed as the Family Chambers at this court are women only. Sub-questions that can be addressed when examining the *sources* are the following: (1) how do judges relate to legislation? (2) how do judges relate to the 'sharia'? (3) how do judges relate to 'custom'? (4) Do my data testify to a 'development' in the sense that sources such as the constitution and international conventions are invoked?

The material for this study consists of court decisions, the observation of reconciliation sessions and interviews, all dating from the years 2008-2009. In order to examine what norms organise divorce at this particular court, and what sources are applied, this study employs a bottom-up approach. With regard to the norms, a bottom-up approach involves that I derive norms from *practices* instead of, for example, legislation. With regard to the sources, the bottom-up approach involves that in order to ascertain what sources the court employs, I look at what sources the court *invokes* instead of, for example, comparing the norms with *my* understanding of specific sources, such as 'sharia' or 'custom'. As a result, I shall only treat the sources of legislation, 'sharia', 'custom' and the like if and for as far as the court makes reference to these sources.

The study is divided into six chapters. The first chapter describes the context in which the Tunisian legal debate takes place. The second chapter gives an introductory outline of divorce proceedings as observed at the court. Chapters three, four and five describe the data with regard to the three types of divorce that are observed at

the court: divorce with mutual consent, divorce without grounds and divorce for harm. Chapter six describes the data concerning the consequences of divorce, both financial and with regard to the children involved.

The study draws the following conclusions. With regard to the norms affirmed and the sources invoked, I refer to the body text, as these are too numerous to enumerate here. With regard to the sub-questions, the conclusions are as follows. First, the material shows that the statement that female judges adjudicate in a gender-neutral way should be nuanced: at the CFI Tunis, this was affirmed with regard to the right to divorce (although some grounds for harm are inaccessible for women and others are for men), but the practices with regard to damages and custody are highly gendered. Second, the statement that judges do not apply legislation should be nuanced in the sense that part of the decisions in the field of divorce contains reference to legislation. However, in many cases legislation is *not* invoked as an argument that justifies the norm and thus, as a factor that curtails judicial discretion. Third, the statement that judges employ sharia to interpret legislation is to a certain extent confirmed by the material, but should be strongly nuanced: the majority of the decisions in the field of divorce does *not* contain any reference to sharia whatsoever. In cases where judges seemingly *do* apply 'sharia' or their understanding of this normative order, an ethnomethodological analysis of the justification does not confirm that judges allow sharia to take precedence over legislation. Fourth, that 'custom' is applied instead of or together with legislation is not confirmed by the material, as the court does not refer to

custom to justify or explain a decision On the contrary, in reconciliation sessions, I witnessed that judges affirm norms that seem to deviate from the norm shared by the litigants. Fifth, the statement that more and more judges apply the constitution and international conventions is not confirmed by my material: I did not come across one single invocation of these sources; however, I did encounter *one* implicit reference to a fundamental right, namely the wife's right to 'dignity' and 'inviolability of the body'.