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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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Introduction

Since the promulgation of the Tunisian Personal Status Code (PSC) in 1956¹, there is this fascinating discussion going on in Tunisian doctrine about *judicial practice*.² 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 legal pluralism, in the sense that judges are applying 'sharia' and 'custom' besides the legislation.³ 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.⁴ 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, I'm looking 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. From the practices of the judges at this court, I intend to derive

¹ مجلة الاحوال الشخصية , decree of 13 August 1956 promulgating the PSC, first published in *Journal Officiel Tunisien* n° 104 of 28 December 1956.

² Sana Ben Achour, 2005-2006, and 2007a, Monia Ben Jemia, Souhayma Ben Achour and Mariem Bellamine, 2006, Moncef Bouguerra, 2000 and 2005, Hafidha Chékir, 1986 and 1998, Ali Mezghani, 1975, 2000 and 2005, Kalthoum Méziou, 1992, Mohammed Charfi, 1997

³ Kalthoum Méziou, 1992, p. 268, Moncef M. Bouguerra, 2005, pp. 566-7, Sana Ben Achour, 2007a

⁴ Sana Ben Achour, 2000, 2005a and 2005b, Souhayma Ben Achour, 2003, Sassi Ben Halima, 2005, Wassilia Ltaief, 2005

what *norms* are affirmed by the court, and what *sources* are applied.

My personal interest for judicial practices in the field of personal law in the region⁵ was evoked when I was still a student of law, Arabic, and Islamic Studies. Since family law touches upon the most fundamental human experiences relating to birth, love, death, and kinship relations⁶, I became interested in this legal domain when I was in law school. Then, during a Master's of Islamic Studies I was taught that it is specifically this legal domain that was one of the last to be codified in the region, until the codifications in 1917 (the Ottoman empire), the 1920s (Egypt), the 1950s (the Maghreb), and even later (Libya, Yemen, and Indonesia waited until the 1970s while Oman, Qatar and Afghanistan even awaited the years 2000). These legislations constituted - to a more or lesser extent, depending on the country - a break with the past, in the sense that the codifications deviated from the law that was applied before. However, for reasons of

⁵ In this study I refer to Muslim majority countries as 'the region'. Although I am well aware of the vagueness of this term, I prefer it over the ways in which these countries are addressed in other studies, such as 'Islamic countries' (only Iran and Pakistan denote themselves as an Islamic state in their respective constitutions), 'the Muslim world' (there are many non-Muslims in the region), and even 'Muslim majority countries', as this term too denotes countries by the religion of its inhabitants. Although I prefer a geographic denotation over a religious one, the 'MENA' (Middle East and North Africa) is problematic as it neglects the fact that Indonesia has the largest Muslim population in the world, not to mention that India, China and other countries in the far east also have Muslim populations.

⁶ Dorien Pessers, 2003

legitimacy, codifications in this field of law were claimed to be based on the *fiqh* (Islamic doctrine), albeit with the amendments deemed necessary in 'present day societies'.⁷ Because the codes could be considered a break with the past, I became interested in the question of how judges relate to legislation: do they consider themselves bound by it, or do they continue to apply the law as it was applied before? This was the topic of my master's thesis on Libyan personal status law, based on fieldwork in Tripoli (spring 2006). But then my attention shifted to Libya's neighbouring country, Tunisia.

In Tunisia, the legislature seems to have gone much further than other legislatures in its break with the legal past⁸: the Tunisian personal status code is famous in the region and beyond for the abolition of polygamy, repudiation, and marriage guardianship, and the legalisation of full adoption.⁹ For this reason, the question of whether the legislation is really *implemented* by judges is even more fascinating in the Tunisian context than in other countries in the region, which made me decide to examine how Tunisian judges relate to legislation in the field of personal status law.

⁷ See Ruud Peters, 2005, on the process of codification of family law and the rhetoric of 'remaining within the orbit of sharia'.

⁸ Except Turkey, that adopted the Swiss civil code in 1926, be it in a somewhat amended form. On the implementation of Swiss personal status law in Turkey, see H.V. Velidedeoglu, 1957, Esin Örüçü, 2006 and 2008, Ruth A. Miller, 2000, and Umut Özsu, 2010

⁹ In comparison: the Moroccan personal status code from 2004 retained polygamy, repudiation, marriage guardianship (be it all in an amended form) and the interdiction on full adoption.

During the preparation of my fieldwork at the Tunisian courts, the topic turned out to be even more imminent than I thought, because while I was digging into the literature, I found out that the question of how Tunisian judges deal with the law was highly discussed in Tunisian doctrine.¹⁰ It turned out that the overall tendency in these writings was a fierce *critique* on the judiciary on the grounds that judges are applying the 'sharia' and 'custom' besides legislation. In this way, they authors contend that the legislation is not yet implemented and that judicial practice in the field of personal status law is characterised by legal pluralism. I decided to take these writings as a starting point for my study, in the sense that I wanted to examine to what extent this critique is justified, especially because these findings seemed to be based on limited sources as Tunisian authors have little access to unpublished court decisions. I developed two axes for my study. First, I wished to examine what *norms* are issued by the courts. Second, I wanted to examine what *sources* the courts are applying.

My interest was again intensified when my eye fell on some very recent writings that testify to 'developments' as the authors call it, making some authors conclude that

¹⁰ Sana Ben Achour, 2000, 2005a and 2005b, 2005-2006, and 2007a, Monia Ben Jemia, Souhayma Ben Achour and Mariem Bellamine, 2006, Moncef Bouguerra, 2000 and 2005, Hafidha Chékir, 1986 and 1998, Ali Mezghani, 1975, 2000 and 2005, Kalthoum Méziou, 1992, Mohammed Charfi, 1997, Souhayma Ben Achour 2003, Sassi Ben Halima 2005, Wassilia Ltaief, 2005

at the moment, judges 'are moving between a spirit of tradition and a spirit of innovation.'¹¹ The break-through decisions addressed in Tunisian doctrine concern situations of mixed marriage (the validity of the marriage between a Muslim woman and a non-Muslim man, the right of a non-Muslim to inherit from a Muslim and the right to child custody of a non-Muslim mother living abroad).¹² According to Tunisian authors, these decisions do not only reflect a break with existing judicial practice on the level of the *norm* they affirm, but the fact that the decisions invoke the constitution and international conventions is an absolute novelty in the field of the *sources* applied in Tunisian personal status law.¹³

But that was not all, as in the process of filing for a research permit, my fascination continued to rise. Not only was it during this process that I found out to what extent personal status law is a politically sensitive topic (and hence I never obtained an official permit), but when I was eventually allowed access to the court – that is, one particular court – the court in question turned out to be

¹¹ Sana Ben Achour, 2000, 2005a and 2005b, Souhayma Ben Achour 2003, Sassi Ben Halima 2005, Wassilia Ltaief, 2005

¹² Mixed marriage: CFI Tunis 29 June 1999, Court of Appeal Tunis, 14 June 2002, 82861, in: *Revue de jurisprudence et de législation*, December 2002, p. 85-86 (French summary) and 75-85 (text in Arabic); Court of Cassation 20 December 2004; succession: CFI Tunis, 18 May 2000, 7602, Court of Cassation 5 February 2009, 31115; child custody: Court of Cassation 2 March 2001, 7286-2000, in: *Revue de jurisprudence et de législation*, January 2002, p. 87, 88 (French summary) and 183-195 (Arabic text).

¹³ Hafidha Chékir, 1998, p. 279-280

the one where the 'innovative spirit' had actually started, with two so-called break-through decisions in 1999 and 2000 where the court applied the constitution and international conventions.¹⁴ This made me wonder whether this court also used these sources in other fields of personal status law, which might have passed unnoticed. Moreover, the court in question turned out to be *women only* for as far as it concerned personal status cases.¹⁵ This fact immediately drew my attention as one of the most influential Tunisian authors with regard to personal status law (Sana Ben Achour, professor of constitutional law at the law faculty and director of the women's organisation *Association Tunisienne des Femmes Démocrates* (ATFD)) had hypothesised in two articles from 2007 that the 'spirit of innovation' in the field of mixed marriage was related to the feminisation of the judiciary, in the sense that female judges *do* 'mobilise the emancipative potential of the law' as they would apply an *egalitarian interpretation* of legislation.¹⁶ This hypothesis fits in the (highly criticised) theory of Carol Gilligan that female judges add a female voice, a theory that has become the basis for a range of studies on female judges all around the world¹⁷, *except in the region*.¹⁸

¹⁴ CFI Tunis 29 June 1999 and 18 May 2000, 7602

¹⁵ At this court, both Family Chambers (a Family Judge and two assistant judges each) consist only of women. Similarly, the Children's judge who decides in custody cases, and seven of the eight reconciliation judges in divorce cases are female.

¹⁶ Sana Ben Achour, 2007a and 2007b.

¹⁷ See for example the special issue on gender and judging of the *International journal of the legal profession* (2008) and the volume on gender and judging edited by Ulrike Schultz and Gisela Shaw (2003)

As I already noticed when filing for a research permit, personal status law and judicial practice turned out to be sensitive topics during my fieldwork. Like in other countries in the region, personal status law is a crucial stake in public debates on the status of Islam in the political and legal order, and the government is constantly in search for a balance between the different demands from society. The Tunisian government however was particularly repressive in its attempts to severely silence those voices (from 'Islamist' forces and independent women's and human rights organisations) that put the official 'state feminism' into question.¹⁹ Geisser and Gobe argued in 2008 that this repression is due to the fact that since the year 2000, the Tunisian regime has been unstable (which was indeed confirmed in January 2011 when president Ben Ali fled the country).²⁰ The politicised character of personal status law and women's rights made my research more difficult, but also more interesting than expected when I first started working on Tunisia: *because* personal status law concerns fundamental questions of birth, love, death, and kinship

¹⁸ Monique Cardinal has written on female judges in Syria, without addressing their practices. Elise Hélin has done work on Tunisian female judges, but not on their practices either.

¹⁹ For an outline of the repressiveness vis-à-vis 'political feminisms' (Sana Ben Achour, 2001), see: Sana Ben Achour, 2001, Sophie Bessis, 2004, M.M. Charrad, 1998, Jennifer Cotton, 2006, Zakia Daoud, 1993, Olfa Lamoum, and Luiza Toscano, 1998, Mark A. Tessler, J. Rogers and D. Schneider, 1978

²⁰ Vincent Geisser and Eric Gobe, 2008. They proved right when on 14 January 2011, Ben Ali fled the country.

relations, it is at the heart of the basic organisational principles of society²¹, and for this reason, it has an extra, and very weighty, *political* dimension.

And then, when I was writing up my findings, to everyone's surprise, the so-called 'Révolution du Jasmin' took place, inaugurated by a range of protests eventually leading to the flea of president Ben Ali to Saudi-Arabia after 23 years of reign (11 January 2011).²² In the months following this date, a huge range of demonstrations have taken place, where people are voicing their concerns about what a 'new' Tunisia should look like. A large part of these demonstrations regard the question of the place of Islam in the public, political and legal sphere, as well as women's rights and, more specifically, the personal status code.²³ Also, many non-governmental organisations have been set up in the past months, a novelty in Tunisian history.²⁴ Some of these concern women's rights, others concern the relation between the state and religion, and again other organisations concern the judiciary. Also,

²¹ Françoise Héritier, 1996

²² The happenings of 14 January 2011 and after have been called 'Révolution du Jasmin' in the media, but ironically, the 'revolution' of 7 November 1987, when Ben Ali came to power, has this name in Tunisia.

²³ For example the demonstrations on 13 August 2011 (national women's day and the 55th anniversary of the PSC) in Tunis and other large cities in Tunisia, in order to 'defend our achievements'.

²⁴ Among the only *non*-governmental organisations during Ben Ali's reign was the *Association Tunisienne des Femmes Démocrates*. Other non-governmental organisations were AFTURD (women's rights), LTDH (human rights) and the anti-torture organisation. See the next chapter.

about 100 political parties have been established, many of which have the relation between the state and Islam as well as women's rights high on their agenda. On 23 October 2011, the constitutional assembly will be elected, which shall draft a new constitution. If the constitution shall provide that all legislation must be in accordance with (the principles of) the 'sharia' (the current constitution does not mention 'sharia'), the PSC might be at stake.²⁵

It is in the light of all these aspects that the underlying study examines judicial practices in the field of divorce at the CFI Tunis. The study is based on two axes: the *norms* issued by the court, and the *sources* applied by it. Sub-questions connected to these 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'. 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 choice for the study of judicial practice in the field of *divorce* and its consequences is based on the following

²⁵ On the sharia in constitutions, see for example Nathan J. Brown and Adel Omar Sherif, 2004

considerations. First, it is argued that the legislation in the field of divorce deviates considerably from the past. For example, before 1956, people were not obliged to go to court to obtain a divorce, which they are now. Moreover, women were not allowed to obtain divorce without the consent of their husband or a judge (*qadi*), whereas nowadays, men and women have an equal right to divorce. This makes it interesting to examine to what extent the legislation is *implemented*. A second reason to examine judicial practice in the field of divorce is that the legislation is particularly vague on this issue. For example, with regard to divorce for harm, the legislation does not define 'harm' in any way, leaving it to the judge to decide whether a particular act (such as violence, abandonment of the marital home, and adultery) constitutes harm for the other spouse. The vagueness of the legislation makes it interesting to examine what sources the court employs to decide on divorce cases: does it apply the legislation, or do courts use additional sources of law, such as 'sharia', 'custom' or the constitution? The third reason for my choice for divorce is that this topic represents the large majority of the cases treated by the CFI Tunis.

Approach

This study can be summarized as a bottom-up study of law. It derives the *norms* that are affirmed by this court from judicial *practices* as laid down in court decisions and reflected in court sessions and interviews. In a second stage, the study examines what *sources* the court applies by looking at what sources the court *invokes*.

1. Norms

In order to examine what norms organise divorce in Tunisia, one could simply look at *legislation*. However, when suspecting that legislation is not implemented (as Tunisian authors argue), the code does not tell much about reality, as the law on the books differs from the law in action. In order to find out what norms are applied in daily life, one should study *practices*.

A famous defender of a focus on practices to derive norms was Foucault. He argued that norms do not *exist*, but that they are *produced*. The production of norms is an instance of the production of truth: if powerful institutions such as psychiatric hospitals or courts define behaviour A as 'the norm' and behaviour B as 'abnormal', these institutions are *producing* what 'normal' behaviour is.²⁶ This is what Foucault calls 'normalisation': the act of making the norm.²⁷ Normalisation is done through disciplinary techniques, such as imprisonment, but also social exclusion, psychiatric treatment and the like.²⁸ According to Foucault, one should study the practices of powerful institutions to find out what norms they are

²⁶ Jürgen Link and Mirko M. Hall, 2004

²⁷ Jürgen Link and Mirko M. Hall, 2004. See for example Michel Foucault, 1975, p. 185: '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.' (citation in Jürgen Link and Mirko M. Hall, 2004, p. 15)

²⁸ Michel Foucault, 1975. See also Margaret A. Paternek, 1987, p. 97

producing.²⁹ One of these ‘disciplinary institutions’, as he calls them, are *courts*.

The focus on courts and judges in the study of law immediately reminds every legal scholar of Legal Realism. It was especially Alf Ross, the founding father of Scandinavian Legal Realism, who argued that legal science should involve the study of *judges* instead of legislation.³⁰ The difference between Legal Realism and Foucault is that for Alf Ross and his followers, one should focus on judges alone, while Foucault states that courts are only *one* of the powerful institutions that produce norms; other institutions issuing norms are for example psychiatric institutions.³¹ Thus, for Foucault, the norm issued by courts is *a* norm amid other norms (which also implies that Foucault is not uniquely focusing on legal norms, but norms in general).³² This is important to realise in the Tunisian context where the norms issued by the courts in the field of divorce exist side by side with norms issued by other powerful institutions, such as the State Mufti.³³ For example, in 2008, Tunisian newspapers told the story that a woman had addressed the State Mufti to tell him that her husband repudiated her out of court

²⁹ Michel Foucault, 1972: the historical study of psychiatry ‘shows’ how the norm develops in the sense of what is ‘normal’ and what is not.

³⁰ Alf Ross, 1929 and 2004. See also Stig Strömholm, 1980, and Eric Millard, 2007

³¹ Michel Foucault, 1972

³² Michel Foucault, 1976. See also Dianna Taylor, 2009, p. 46

³³ For a typology of State Muftis, see Jakob Skovgaard Petersen, 2004, and on the relation between the judge and the mufti, see Murielle Paradelle, 1995.

and to ask him whether she was divorced now. Apparently, the State Mufti answered the woman that indeed, she could consider herself a divorce woman, but to have this status affirmed by the official legal system, she should go to court.³⁴

In this study, I examine the norms issued by *one* powerful disciplinary institution, the Court of First Instance of Tunis. As the norm issued by this court is only *a* norm amid many other norms issued by other powerful institutions (the State Mufti, but also simply the other courts throughout Tunisia), this study does not pretend to say more than to establish the norms issued by this particular court (as opposed to, for example, the norms at Tunisian courts in general or the norms organising divorce in Tunisia as a whole).

2. Sources

As stated above, the starting point of this study is that a study of legislation is not the proper way to understand what norms organise divorce (inspired by Foucault and Legal Realism), especially in a situation where it is argued that the legislation is not implemented. In this way, this study accepts that judges are not the *bouche de la loi*: they are not necessarily applying legislation or legislation *only*. The statement that judges are not merely a *bouche de la loi* fits in Legal Realism, and the idea that legislation does not have a monopoly is a statement that forms the core of the

³⁴ *Magharebia*, 27 June 2008.

doctrine of legal pluralism.³⁵ I will elaborate on both theoretical frameworks after which I shall present the approach that was chosen for this study, ethnomethodology.

Legal Realism

The starting point of Legal Realism is that 'law' does not equal legislation. As a consequence, it has been argued that judges have discretionary powers. For example, the positivist Hart argued that although in principle, judges are applying legislation, they do have discretionary powers. This is due to the open texture of language,³⁶ the occurrence of so-called 'borderline cases'³⁷ and the use of open norms (such as 'justice and fairness'). In these cases, judges employ jurisprudence, but if this source is silent, judges create new law.³⁸ Diametrically opposite to the presumption that in principle, judges apply legislation, lies another important current in Legal theory and Legal sociology, namely the Critical Legal Studies Movement

³⁵ John Griffiths, 1986. For other works on Legal pluralism, see Brian Tamanaha, 2000 and 2008, Sally Engle Merry, 1988, Sally Falk Moore, 1973, Boaventura de Sousa Santos, 1995, Paul Schiff Berman, 2007, Marc Galanter, 1981, Chris Fuller, 1994, André Hoekema, 2003. On Legal pluralism in the Arab World, see Baudouin Dupret, M.S. Berger and L. al-Zwaini (eds.), 1999

³⁶ Brian Bix, 1991

³⁷ Borderline cases are cases in which it is unclear whether the norm applies to a certain situation. Hart gives the example of the norm 'No vehicles in the Park', arguing that roller skates are a borderline case, as it is not clear whether they should be qualified as a 'vehicle'.

³⁸ Herbert L.A. Hart, 1994

(CLS). This movement argues that judges' discretionary powers are not curtailed by legislation at all. Some Critical Realists state that discretionary powers are merely curtailed by judges' political preferences.³⁹

Although I follow Legal Realism to the extent that authors state that judges do not necessarily apply legislation, I have a problem with these theories' presuppositions about the role of different sources of law (legislation, jurisprudence, and political preferences). I think that it is problematic to argue beforehand that Tunisian judges in the field of divorce law apply legislation except in borderline cases and in case of open norms, and that in the latter, they apply jurisprudence: this is exactly what should be examined in the first place. The same is true for the presupposition that judges do not apply legislation at all.

Legal pluralism

The study of judicial practice in the field of divorce can be considered as a study of the implementation of legislation, and as such, as a study in the field of legal pluralism. In both fields of research (the two are highly interrelated)⁴⁰, authors tend to *compare* (their

³⁹ Duncan Kennedy, 1998. There are many other theories on the sources or factors that might influence judicial decision-making. See for example Jonathan Soeharno, 2010, Niels van Manen, 1996, Louis Newman, 1995-1996, Ori Lev, 1994-1995, Friedrich Schauer, 1991,

⁴⁰ See for example Esin Örüçü, 2008, on the implementation of the Swiss Code in Turkey.

understanding of) legislation to the norms that are applied (by judges or litigants). In case of a perceived 'gap' between the two, the authors conclude that there is no monopoly for so-called state-centred law, and thus, that this is an instance of legal pluralism. The terms employed to denote the alternative normative order that is applied differ from one author to another ('non-state law', 'social norms', 'indigenous law', 'custom', 'sharia', 'international law', etc.).

Although my research was certainly inspired by such writings, I felt uncomfortable with them in one particular way: I do not believe in the possibility of *comparing* practice with a normative order. Thus, the first step in studies on legal pluralism, comparing practice with legislation, is in my eyes problematic as I think that legislation is (almost) always open to interpretation.⁴¹ The same is true for other normative orders, such as 'sharia' and 'custom', the alternative orders that are applied according to Tunisian doctrine. Indeed, 'sharia' is the general term for many different and sometimes contradictory interpretations of the sources of Islam, the Quran and hadiths, which justifies the statement that the contents of sharia depend on the person referring to it.⁴² And with regard to 'custom', Von Savigny already argued that while the *Volksgeist* might be relatively easily identifiable in 'early society', this is less so as society develops and subgroups

⁴¹ See for example Susanna Lindroos-Hovinheimo, 2006, Riccardo Guastini, 2005, Ross Charnock, 2007

⁴² On the flexibility of the notion of 'sharia', see Nahda Shehada, 2009

and classes become more pronounced.⁴³ As Roche put it, 'Any large, complex society, with its multiplicity of social backgrounds and individual experiences, contains varying mores and attitudes within itself.'⁴⁴ Moreover, the division line between 'sharia' and 'custom' is not clear at all.⁴⁵

Ethnomethodology

After having struggled for some time with the possibility to employ the frameworks of Legal Realism or legal pluralism, my eye fell on the writings of Baudouin Dupret and his call for an ethnomethodological study of law and legal practice in the region, or: studying legal practice 'from the inside', as he calls it.⁴⁶ An ethnomethodological

⁴³ Friedrich Karl von Savigny, 1831. See also Roger Cotterrell, 1992, p. 22

⁴⁴ John Pearson Roche, 1964, pp. 353-354. See also Roger Cotterrell, 1992, p. 23

⁴⁵ In this respect, it should be noted that the same problem occurs when relating judicial practice to so-called 'social norms'. As Kaushik Basu stated, 'like cows, social norms are easier to identify than to define' (Kaushik Basu, 1998). On social norms and their definition(s), see also Robert D. Cooter, 2000, Patrick S. O'Donnel, 2007, Lawrence Friedman, 2006, Eric Posner, 2000, Roy Clouser, 2006, and John Bowen, 1998 and 2001.

⁴⁶ Baudouin Dupret, 2005a. A good example of a study of law against the background of 'sharia' forms the doctoral thesis of Stéphane Papi, *l'Influence juridique islamique au Maghreb* (2009). In this book, Papi studies to what extent law in the region has Islamic influences. In order to examine this, he describes 'what sharia is', to compare contemporary legislation with the 'Islamic rules' that he found in the *fiqh* etc.

study of behaviour examines how the actors observed understand their own acts.⁴⁷ For a study of the behaviour of *judges* this means that if they refer to, for example, 'sharia' to explain why they impose a certain norm, an ethnomethodologist takes this reference at face value⁴⁸ instead of considering it as a post-hoc rationalisation⁴⁹. Thus, an ethnomethodologist shall not examine whether the act is 'really' inspired by sharia (for example, by comparing the norm issued by the court with 'the sharia'), and it is in this way that the ethnomethodological approach differs from the approach employed in Tunisian doctrine, where it is argued that judges are applying 'sharia' because the norms they issue are in conformity with (their perception of) this normative order.

⁴⁷ Harold Garfinkel, 1967. Ethnomethodological study of judicial practice: John F. Manzo, 1994.

⁴⁸ In this way, the ethnomethodological study of judicial practice differs from the study of judges proposed by Alf Ross, as the latter argues that by studying judges one can only see what 'law' is, not why judges decide in a certain way; for Ross, examining what sources direct the judges' decision-making is a matter of behaviourism. See for a similar reasoning Coutin and Yngvesson, 2008.

⁴⁹ Anthony A. d'Amato, 1984, p. 60. Treating judicial argumentation as post-hoc rationalization is the point of departure of the rhetorical study of judicial decisions. See the writings of Chaim Perelman, but also for example Pierre Moor, 1997, Hans Kloosterhuis, 2008, H  l  ne Ruiz-Fabri, 2009, Hermann Petzold Pern  a, 1986, Robert Legros, 1978, Andr   Vanwelkenhuijzen, 1978, Massimo La Torre, 2002, Bruce McLeod, 1985, and Sara C. Benesh and Jason J. Czarnecki, 2009. On religious arguments in judicial decisions, see Jennifer Faust, 2008, and on the argument of 'tradition', see Paul Alain Foiriers, 1986. See also Duncan Kennedy on the notion that arguments employed in judicial decisions are post-hoc rationalizations, as well as Pierre Bourdieu.

The ethnomethodological approach solves the two problems I encountered in the writings of Legal Realism and legal pluralism. As it follows the actors' understanding of their own acts, I'm not confronted with a choice between for example Hart or the CLS: I shall *examine* what sources the judges employ, without *presupposing* that they apply legislation unless... Also, I do not need to *compare* the norms issued by the court with different normative orders, nor am I obliged to label these orders with 'sharia', 'custom', legislation and the like. The ethnomethodologist concludes that the judge applies a certain source when he (or she) invokes to it, which is considered to reflect the judge's understanding of his own act of decision-making. This ethnomethodological focus on the act is completely in line with Foucault's focus on practices, on the production of the norm.

Sub-questions

The sub-questions of this study aim to nuance certain statements made in Tunisian doctrine, namely that judges apply sharia and custom instead of or together with legislation, that there is a new tendency that judges apply the constitution and international conventions, and that female judges adjudicate in a gender-neutral way.

To examine how judges relate to the 'sharia', I look at whether judges employ terms such as 'sharia', *fiqh* or the Quran, or whether in any other way a link is made with this normative order. With regard to the question of the relationship between the legal and 'custom', I examine whether judges make reference to notions such as

'custom', 'the Tunisian society' and the like. In order to examine whether the norm is justified with reference to legislation, I look whether judges invoke legislation in their decisions. In the same vein, the invocation of the constitution and international conventions as well as fundamental principles help me to verify that the 'development' witnessed in the field of mixed marriage can also be observed in 'my' court and in other fields of personal status law than only mixed marriage.

As stated above, Sana Ben Achour argued that possibly, female judges issue a gender-neutral norm. The question whether or not the feminisation of the judiciary influences judicial practices is the topic of many studies around the world. These studies aim to verify or falsify the hypothesis put forward by Carol Gilligan in 1982 in her book *In a different voice*. Gilligan argued that female judges add a 'different voice' to legal practice because they have an 'ethic of care' instead of an 'ethic of rights', and therefore, they judge in a more moral and humane way.⁵⁰ This hypothesis has been problematised in two ways. Firstly, it has been argued that the idea that female judges add a different voice only because they are *women* is essentialist. In the footsteps of Judith Butler it is argued that when studying behaviour, the variable cannot be sex, as the mere fact of being born as a woman does not influence one's behaviour.⁵¹ In this sense, it is argued that the variable is 'gender', as not sex but shared life experiences as a woman affect people's behaviour.

⁵⁰ Carol Gilligan, 1982

⁵¹ Judith Butler, 1993

Rosemary Hunter on the other hand argued that the variable is being a 'feminist' or not, and as men can also be a feminist, it is of no use to examine whether female judges decide in a different way.⁵²

A second objection against Gilligan's hypothesis that female judges add a different voice is that although 'gender specific features can be shown to exist in terms of judges' behaviours and working styles, [...] in most countries there is not sufficient hard evidence that they affect the actual *outcome* of particular cases [curs. MV].⁵³ However, some studies do show differences, and interestingly enough, not so much in the sense as Gilligan might have expected. Bogoch found for Israel that women give lower sentences to sexual offences than their male colleagues, which she explains in the sense that female judges do not show special sympathy for victims of rape and sexual assault.⁵⁴ In the same vein, Junqueira found for Brazil that female judges are tougher on questions of alimony and men are more generous, which she explains in the sense that female judges wish to help other women to develop their potential as human beings.⁵⁵ These studies, that compare judicial practices of men and women, concerned countries in the entire world, except in the region.

When I examine if female judges issue a gender-neutral

⁵² Rosemary Hunter, 2008

⁵³ Ulrike Schultz, 2010, p. lvi

⁵⁴ Bryna Bogoch, 2003

⁵⁵ Eliane Botelho Junqueira, 2003, p. 448

norm, I'm doing exactly what Judith Butler and others act against, namely examining behaviour of people with the variable of their sex. However, this is justified by the fact that the actors in my study themselves underlined that men and women decide cases differently: one of the Family Judges stated that 'a good family judge is not necessarily a woman, but in practice they do a better job as they are more humane'.⁵⁶ Moreover, the fact that women are over-represented in family and child matters at the CFI Tunis (in 2005, 28 % of all Tunisian judges was female, while 88 % of the judges in family and child matters at the CFI Tunis was a woman) indicates that the President at this court, who appoints the judges, thinks that women should be on these positions.⁵⁷ I understand the fact that the actors in this study perceive sex as an important variable as a justification for the sub-question of whether female women adjudicate in a gender-neutral way. However, I do not follow the approach applied in other studies on female judges, that were quantitative and comparative, analysing how many female judges decide a certain type of cases in way X and how many men do the same. In this study, I merely examine to what extent the norm imposed by these judges is gender-neutral. As a result of this approach, my study will not enable me to conclude that indeed, female judges are *more* inclined to

⁵⁶ Interview 9 July 2010

⁵⁷ It has been argued elsewhere that presidents prefer women on these positions so as to leave the more 'legal' positions to men. However, this is not true for the President of the CFI Tunis, as four of the female reconciliation judges was a *vice-président* of a civil or commercial chamber.

‘mobilise the emancipative potential of the law’, as my data simply concerned female judges only.⁵⁸ In the same vein, I cannot conclude that if the norms are gender-neutral, this is due to the fact that these judges are women. I can only conclude that these norms are or are not gender-neutral.

Empirical material

The material for this study consists of (published and unpublished) court decisions, interviews and observation, and Tunisian doctrine. An additional ‘source’ (or actually a prerequisite to ‘understand’ my sources) was my ethnographic ‘embeddedness’ in Tunisian society during fourteen months that enabled me to study Tunisian judicial practices in their context.⁵⁹

⁵⁸ My trip past other courts around Tunisia enabled me to collect some material from male Family Judges as well, but this was by far not enough to serve as comparative material.

⁵⁹ The need for integration in the society studied is stressed by several sociologists of law. Friedman argues that ‘every study of a human phenomenon has an ethnographic element.’ There are hard facts, but ‘to know, you have to look, smell, examine, touch, feel, observe’ (Lawrence M. Friedman, 2002, p. 187). This is also true for the study of court decisions (Sally .E. Merry, and Lawrence M. Friedman, 2002). Nader writes: ‘Long-term ethnographic work allows [...] the ethnographer to identify with those she studies and amongst whom she lives’ (Laura Nader, 2002, p. 191). According to Starr, as a rule, a researcher needs at least twelve months of ‘social embeddedness’ in order to understand the social context (June Starr and M. Goodale, 2002).

The court decisions are written in standard Arabic, while court sessions are either in standard Arabic (court hearings) or Tunisian Arabic (sessions behind closed doors); interviews were almost always in French. I was not permitted to record sessions and interviews, but I noted down as much as possible, often *ad verbatim*. As litigants seemed to think that I was an official clerk or a judge in training, my presence at court sessions should not have influenced their behaviour, but it might have influenced the judge.⁶⁰ This problem is partly solved by the possibility to verify the findings from interviews and observation with court decisions.

The material collection began at the *Institut Suisse du Droit Comparé* in Lausanne, Switzerland, where I collected works of Tunisian doctrine as well as court decisions published and annotated in Tunisian legal journals (November 2007).⁶¹ Between July 2008 and September 2009, I conducted fieldwork in Tunisia. In this period, I collected decisions at the CFI Tunis, I interviewed judges and observed public and private sessions at this court. I also collected additional written material (literature, and decisions from the Court of Cassation), and I interviewed other actors involved in personal status cases. A trip around the country in January 2009 enabled me to collect material at other CFI's. This material is not used in the

⁶⁰ Court decisions allow me to check to what extent my presence in court sessions and in interviews influenced the judges' discourses.

⁶¹ The *Revue tunisienne de droit*, *Revue de jurisprudence et de législation*, and the journal *Ahdath*. This material formed the basis for M. Voorhoeve, 2008.

present study, but enabled me to put the practices at the CFI Tunis into perspective and confirmed that I should not generalize my findings for the whole of the Tunisian territory. During a short stay of two weeks in the summer of 2010 I interviewed the two Family Judges at the CFI Tunis to be able to answer some questions that had arisen while analysing my material.

As this is a case study of the CFI Tunis, the material concerns this particular court. It consists of (1) decisions from the years 2008 and 2009⁶², (2) interviews with the two Family Judges, the reconciliation judges, the Family Judge for endangered children and the President of this court, (3) the observation of reconciliation sessions (a total of 450 sessions) and other types of court sessions (sessions of the Family Judge for endangered children and of the Public Prosecutor in family matters⁶³ as well as court

⁶² The first cases I obtained were handed to me by the Family Judges, and concerned divorce for harm. At the end of my fieldwork, I decided to go down to the archives myself, as I wanted to be sure that the decisions handed to me reflected the practices of these judges (I had the impression that they handed me the decisions they were particularly proud of). I also wished to understand better what types of cases are the most important / recurring in the practice of these judges. Thus, I photocopied all decisions taken by the two Family Chambers on four days in January 2009 (5, 6, 12 and 13 January). This also enabled me to study the possible differences between the chambers (the decisions from 5 and 12 January were issued by one chamber, the decisions from 6 and 13 January were issued by the other).

⁶³ Mainly cases of non-payment of maintenance.

hearings of the Family Chamber⁶⁴), and (4) doctrine.⁶⁵ Additional material concerns interviews with lawyers⁶⁶, counsellors at the *centre d'écoute* (treating cases of domestic violence)⁶⁷, the public prosecutor in family matters at the CFI Tunis (who treats cases of non-payment of maintenance), university professors specialising in personal status law⁶⁸ and a handful of litigants involved in divorce cases⁶⁹.

Some domains touching upon divorce are not treated by the Family and Child Department of the CFI's. Thus, maintenance cases are treated by the Cantonal Court and cases of adultery and domestic violence are treated by the penal chamber of the CFI. Therefore I also collected material from the courts/departments concerned. I conducted fieldwork at the Cantonal Court in Tunis

⁶⁴ These did not provide me with much information: the Family Chamber treats about 150 cases per morning in a room cramped with lawyers, and the pleading remains limited to statements as 'present' (*hadir*) and 'demand to adjourn' (*talaba al-ta'khir*). This procedure, where the judge reads out loud cause list, is part of the civil law system.

⁶⁵ Mainly published in the *Revue tunisienne de droit* and *Revue de jurisprudence et de législation*

⁶⁶ Bouchra Bel Haj Hamida and Yosra Frauss

⁶⁷ This is a legal counselling center of the Tunisian women's organisation *Association Tunisienne des Femmes Démocrates*.

⁶⁸ Kamel Sharfeddin, Moncef Bouguerra and Sassi Ben Halima (all at the University of Tunis-el-Manar), Sana Ben Achour, Monia Ben Jemia, Malik Ghazouani, Kalthoum Méziou (all Faculté des sciences juridiques).

⁶⁹ I interviewed three female (ex-)litigants who were involved in a case of divorce for harm.

where I interviewed two maintenance judges and observed court hearings in maintenance cases. I also interviewed the head public prosecutor at the CFI Tunis on the question of prosecution in cases concerning adultery and domestic violence, and the Penal Judge (head of one of the Penal Chambers) at the CFI Tunis on adultery and domestic violence.

The collection of my material was challenged by a combination of factors. In the first place, I never obtained a complete picture of cases in the sense of the reconciliation sessions, the documents in the file (e.g. lawyer's correspondence and evidence) *and* the decision; I had either the court judgment or witnessed one or more reconciliation sessions of a couple. The president of the court did not allow me to read entire case files, as these belonged to the litigants; therefore, I only obtained the entire file of one particular case.⁷⁰ As much time elapses between the reconciliation sessions and the final decision, and as many different reconciliation judges preside the sessions together, I only have one case where I observed the reconciliation session *and* obtained the divorce decision.⁷¹ A second obstacle was that the judges did not

⁷⁰ CFI Tunis 21 April 2008, 61660 (see chapter 5 on divorce for harm on the grounds of adultery). I obtained this file at the Court of Appeal of Tunis, where the vice-president was informed by his secretary that I had a research permit (which I did not). Had I insisted more with the lawyers I knew, I might have obtained more case files, but the lawyers were always too busy and it felt awkward to insist too much as they already gave me much information by allowing me to come by in their spare time (on Friday evenings, during Ramadan or on Sunday).

⁷¹ CFI Tunis 6 January 2009, 70579

allow me to record sessions and interviews. Although I noted down as much as possible, it was often impossible to write everything down *ad verbatim*, and thus, my notes are a 'subjective' version of what was being observed. Moreover, my presence at reconciliation sessions might have influenced the behaviour of the judge.⁷² In the third place, the 'interviews' with the judges did not give as much information on judicial practices as I would have wanted. This was due to a number of factors, namely time constraint and my position as a researcher. Judges did not have much time to answer my questions, they had an extremely heavy workload, and people kept coming in, interrupting our conversation. In order to prevent this from happening, I planned some real 'appointments' with the judges to have a proper interview, but at these instances, judges seemed to give the answers they thought to be the 'proper' answers to give, instead of 'speaking from their hearts'. With regard to my position as a researcher, I mean that I felt often embarrassed by the fact that I was there: I was present in court and at the side of one of the judges five days a week, taking as much as I could from them, without being able to give anything in return. I felt embarrassed by asking them more and more (more explanations, more descriptions), and so I often did not, also out of fear that at a certain point they would simply be fed up with me and ask me to leave. Another problem in the collection of the material was that many male informants would try to 'get something out of it', in the sense that they insisted that I come to their house at 11

⁷² Court decisions allow me to check to what extent my presence in court sessions and in interviews influenced the judges' discourses.

o'clock in the evening to collect the decisions that they were supposed to give me, etc. As a result, there is some material of which I know that it exists (e.g. decisions concerning polygamy and informal marriage), but that I did not obtain. And a final problem was that some informants (for example one particular lawyer) were reluctant to speak to me as they seemed afraid of repercussions from the government.

Existing research

In many studies of law and legal practice in the region, Weber is cited as the first to have addressed the subject of judges in the region.⁷³ Although Weber had not studied the issue but merely used the *qadi* as an example of a judge who does not apply 'modern' legislation, the term *Kadijustiz* has become a magical image of judges in the region, that has often been referred to as something to affirm or falsify.⁷⁴ However, decades passed before other famous writings on law and legal practice in the region appeared.

In his book *The anthropology of justice. Law as culture in Islamic society* (1989), Lawrence Rosen described the practices of a *qadi* in the Moroccan town of Sefrou. In this book, Rosen derives the concept of 'putting the parties back into a position of reconciliation' from the judge's

⁷³ Max Weber, 1968, p. 978

⁷⁴ See specifically David S. Powers' chapter on *Kadijustiz* versus *qadi*-justice in Morocco in the Middle Ages, David S. Powers, 2002, pp. 23-52

practice and concludes that this strategy characterises practices of judges in 'Islamic societies'.⁷⁵ In this way, Rosen relates everything that the judge does to this concept or underlying structure of reconciliation. In the same period, Aharon Layish published a number of works on judicial decision-making in Israel and Libya,⁷⁶ Ron Shaham examined the practices of sharia courts in Egypt,⁷⁷ and a few years later, Lynn Welchman wrote on the West Bank⁷⁸, while Ziba Mir-Hosseini concentrated on Morocco and Iran.⁷⁹ These writings focused on the relationship between legislation and/or judicial practice and the 'sharia'. Other authors concentrate on the interplay between law and custom⁸⁰, sharia and custom⁸¹, or state law, international (European) law and custom⁸², or on the interplay between sharia, state and social norms.⁸³

Recently, a number of studies appeared on legal practice in the region which do not establish a relationship with sharia, custom or another structure. In fact, one can almost speak of a new 'vague'. Names that can be connected to this 'vague' are Baudouin Dupret, who worked on Egyptian law, Jessica Carlisle, who worked in

⁷⁵ Lawrence Rosen, 1989

⁷⁶ Aharon Layish, 1982, 1991, 2004, 2011

⁷⁷ Ron Shaham, 1997

⁷⁸ Lynn Welchman, 2000

⁷⁹ Ziba Mir-Hosseini, 2000

⁸⁰ Lawrence Rosen, 1995

⁸¹ Aharon Layish, 1988, 1995a and b, 2004 and 2006

⁸² For example: Esin Öcürü, 2008 (Turkey)

⁸³ For example: John R. Bowen, 2001 (Indonesia and France)

a divorce court in Damascus⁸⁴, and Nahda Shehada, who focused on Palestine.⁸⁵ These authors problematise the possibility to relate (judicial) practice to sharia or another type of structure such as 'custom' or 'reconciliation' (Rosen), for their concern with the fact that data are often 'messy'. This means that even if a specific structure seemingly comes forward from the data, the effort to relate all findings to this structure is dangerous, as one risks to push certain data into this mould, becoming blind for what they are actually saying.⁸⁶ In fact, what these authors are telling is that research on legal practice in the region should be careful to remain humble towards the material, also once we think we finally 'understood'. Of course, studies that explain specific features from a special structure read nicely, as the data are described around a theme, and as they actually say something *clear*. But unfortunately (or is it?) reality is often not that outspoken.

As I was often confronted with the 'messiness' of my material, I became very interested in this nuanced approach. For example, for this study I came across many data that seemingly confirm that it is very difficult to obtain divorce for harm on the grounds of domestic violence. It would be rather easy to explain this in the sense that judges do not strongly disapprove of domestic violence. However, in interviews judges told me that it was their experience that many women are lying in court

⁸⁴ 2007a, b, c, 2008

⁸⁵ 2004a, b, 2005a, b, 2008, 2009a, b, c, d

⁸⁶ See also John F. Manzo, 1994

to obtain damages. This is a good example of how the collection of a large amount of different types of material (decisions, interviews and observation) enables the observer to assess to what extent data are messy, and how a large data collection makes the establishment of underlying structures problematic. In this sense, I was very lucky to collect as much material as I did, especially having access to court files and court proceedings, and being introduced to judges who were willing to talk to me.

As a consequence, this study is highly influenced by Baudouin Dupret in the sense that I employ an ethnomethodological method to examine what sources judges apply, and with regard to his (and others') nuanced approach to empirical material. Nevertheless, this study deviates from Dupret's approach in a number of ways. In the first place, Dupret's writings tend to describe and analyse one particular court file,⁸⁷ while I'm examining what norms are contested and affirmed by one particular court in one period of time, and what sources are invoked as underlying the norms issued by this court. In this way, I intend to give an impression of the practice at this particular court, while Dupret explicitly refrains from doing so, as he does not draw general conclusions from the individual cases he selects. In the second place, I'm trying to verify/falsify hypotheses/arguments put forward in Tunisian doctrine, while Dupret does not make use of doctrine at all, confining himself to court

⁸⁷ Baudouin Dupret, 1998, 2005a, 2006b, 2006c

files. In the third place, my material is more eclectic than Dupret's, consisting of court decisions, interviews and observation, as well as Tunisian doctrine. This use of eclectic material is rather unique in the study of legal practice in the region, because of the problem of access to decisions and to courts. It allows me to give a more all-encompassing image of judicial practice.

Academic and social relevance

With this study I hope to contribute to existing research in the following ways. In the first place, this study examines the statements made in Tunisian doctrine according to which legislation is not implemented and judicial practice is characterised by legal pluralism as judges are applying legislation together with the 'sharia' and 'custom'. This can be done with the use of a large and eclectic data collection and the bottom-up approach which focuses on practices and the factual production of norms.

In the second place, this study examines *how* judges act in a situation where several normative orders seemingly demand application. Tunisia is, of course, not the only country where this situation occurs. With this study, I'm presenting the bottom-up approach as a method which can be applied to examine judicial practices in countries where the question arises of whether or not legislation is implemented by judges, and whether judicial practice is characterised by legal pluralism.

In the third place, this study provides data on judicial practice in the field of divorce law in Tunisia. This adds

up to the knowledge other academics collected on law and legal practice in the region in general (Lynn Welchman, Ziba Mir-Hosseini, Jessica Carlisle, Nadia Sonneveld, Léon Buskens, Nahda Shehada, Annelies Moors, etc) and to the findings of Tunisian and other scholars on law and legal practice in specifically Tunisia (Sana Ben Achour, Souhayma Ben Achour, Kalthoum Méziou, Monia Ben Jemia, Ali Mezghani, Sassi Ben Halima, etc in Tunisia and Stephanie Waletzki, Stéphane Papi, Sarah Vincent-Grosso, and Marta Arena etc. internationally).

In the fourth place, this study hopes to be a first step in the study of female judges' practices in the region.

An element of practical importance of a study of what norms organise personal status law in a particular courtroom lies in international private law. When applying Tunisian personal status law, foreign judges (mainly in France, Switzerland, Canada and Belgium) are not only inclined to look at the legal text, but also take the national legal practice into account.

A possibly quite evident aspect of the academic importance of this study is that it makes French (legal) literature available to an Anglophone audience. During my studies, I often observed the enormous gap between the Anglophone and Francophone academic worlds: apart from some translated works (e.g. Durkheim, Weber, Foucault and Bourdieu), the two worlds employ different theories, cite different authors and therefore, remain completely ignorant about each others accomplishments.

With this study, I hope to contribute to a cross-pollination of the two academic worlds.

Finally, an element of social importance is connected to the current polarised climate in the 'West' where 'immigrants' (often third generation) from the region are concerned. A high percentage of the 'migrants' in Europe are originally from the Maghreb. These people are increasingly confronted with a polarised debate concerning their religion, their norms and their values. Personal status law plays an important role in this debate, as it is related to images of 'the Other' (Said, 1979): topics such as repudiation, polygamy and child marriage are considered to prove structures of patriarchy and female submission, representing the so-called difference between Western and Muslim 'civilisations' (Huntington, 1992). These images often have nothing to do with any empirical evidence of the norms living in a certain country and the factors influencing those norms. This study might show that for example repudiation is not a norm living in the Tunisian courtroom, and that 'sharia' is not the only factor directing Tunisian judges.

The study proceeds as follows. Chapter one elaborates on the discussion in Tunisian doctrine. Chapter two gives an introduction of the proceedings in cases of divorce. Chapters three, four and five examine judicial practice in the field of divorce: chapter three focuses on divorce with mutual consent, chapter four describes divorce without grounds and chapter five examines divorce for harm. Chapter six examines the consequences of divorce with regard to the children, addressing the topics of custody,

visiting rights, child maintenance and housing. All chapters are divided into three parts: after an outline of the specificities on the proceedings in the first section, the second section gives an extensive overview of the empirical material that is constructed around two to four judicial decisions. The third section then analyses the material in two steps, deriving the norms from the material in a first stage, followed by an overview of the sources invoked. The conclusion at the end of this study is divided into three parts. The first part addresses the first axis of this study, namely the norms. It summarizes the norms that I derived from the material in chapters 3 to 6, and addresses the norms in the light of Foucault's concept of 'normalisation'. This first section finishes with a discussion of the first sub-question, namely whether the norms can be called gender-neutral. The second part of the conclusion addresses the second axis of this study, namely the sources. It summarizes the sources that are invoked in the material as described in chapters 3 to 6, and addresses the other four sub-questions, concerning the role of legislation, 'sharia', 'custom' and the constitution, fundamental rights and international conventions. The third part of the conclusion aims to give a short insight in the happenings after the revolution of 11 January that might influence judicial practice at the CFI Tunis.