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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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Chapter one

The background of the debate in Tunisian doctrine

This chapter elaborates on the debate among Tunisian scholars on judicial practice in the field of personal status law. The first section describes the debate in Tunisian legal doctrine, which evolved from a fierce critique on the judges' application of 'sharia' and 'custom', to an approval of the references to the constitution, fundamental rights and international conventions. The section will show that Tunisian authors blame the continuous application of 'custom' and the 'sharia' on three circumstances: 1. the legislation is not effective because it constituted a too large break with the past; 2. the legislation contains many lacunae, and the legislature does not state clearly what additional sources of law should be applied to fill these; 3. the legislature is not clear about its adherence to 'custom' and the 'sharia'. The 'innovative' spirit that authors witnessed, is explained as being caused by the feminisation of the judiciary. These issues shall be treated in the following sections.

Section one

'in the domain of women's rights [...] the role of the judge is essential'⁸⁸

When talking about personal status law, Tunisian authors concentrate on the role of the judge in the realisation of the enhancement of women's rights. These writings have

⁸⁸ Hafidha Chékir, 1998, p. 279

in common that they show an enormous *frustration* with what judges actually do. Most authors condemn the judges for *blocking* the emancipative possibilities of the law. They are disappointed and turn their backs against the judges in question. However, recent writings show a certain optimism with regard to judicial practice, that according to the authors are more 'innovative'. In this section, I will describe the Tunisian doctrine that addresses judicial practices in the field of personal status law. The section addresses the examples put forward by the authors, and their explanation for their frustration or their relief.

Most Tunisian writings on personal status law begin by stressing that Tunisian personal status law is unique in the region. For example, Mohamed Charfi writes in his article 'Le droit tunisien de la famille entre islam et modernité' that 'It's essentially to this code that people make reference when they say that Tunisia is one of the most developed countries in the Arab and Muslim world.'⁸⁹ The authors continue by a critique of the legislation for the fact that at some points, the legislature remained silent.⁹⁰ This is most adequately put by Kalthoum Méziou, who states that although the PSC is

⁸⁹ Mohamed Charfi, 1973, p. 12. In 1983, he writes that 'No Arab Muslim country has gone as far as Tunisia [in its codification of personal status law]' (Mohamed Charfi, 1983, p. 420). In their report on Tunisian judicial practices in the field of personal status law, Mounia Ben Jemia et al. write that 'the Tunisian example is unique in the Arab Muslim countries.' (Mounia Ben Jemia et al., 2006, p. 1).

⁹⁰ Mounia Ben Jemia et al., 2006, p. 1. See also Kalthoum Méziou, 1992, p. 251

'revolutionary on a certain amount of issues, it contains numerous archaisms; on a number of questions moreover, it is *laconique* and *lacunaire*.'⁹¹ That the PSC (and related laws) contain(s) lacunae is considered to be problematic because the law does not give the judge an indication of what he should do to interpret the law: the code 'is silent on the possibility of lacunae or vague dispositions'.⁹² It is in the light of the legislative silence that the jurists stress their concern for the judge.

Examples

To describe the reasons for their disappointment, the authors give several examples of judicial practice. An often cited example is the Hurriya decision (1966), in which the Court of Cassation decided on the validity of the marriage between a Tunisian (Muslim) woman and a foreigner (a non-Muslim man), as well as on the possibility of a non-Muslim to inherit from a Muslim.⁹³ In this case, the Tunisian woman Hurriya had married a Frenchman. When her mother died, her brothers and sisters contested that Hurriya was included on the list of heirs, arguing that she had not right to inherit from her mother because her marriage to a foreigner had caused that she was not a Muslim anymore. According to the Court of Cassation, the questions of whether a Tunisian woman can marry a foreigner and whether a non-Muslim can inherit from a Muslim are not regulated by the

⁹¹ Kalthoum Méziou, 1992, p. 252

⁹² Sassi Ben Halima, 200, p. 130

⁹³ Court of Cassation 31 January 1966, 3384

legislation, and thus, the court argues, the legislative gap should be filled with 'Islamic law'. With regard to the validity of the marriage, it should be noted that Article 5 PSC provides that a marriage should not be contrary to the *mawani' shar'iyya*, which can be translated with 'lawful impediments' or 'sharia impediments'. The PSC itself does not prohibit the marriage between a Muslim woman and a non-Muslim man (Articles 14 to 20 PSC enumerate a number of marriage impediments). However, in 1962 and 1973 two *circulaires* were issued to prohibit civil servants to contract the marriage between a Muslim woman and a non-Muslim man. This means that if the civil servant suspects that the man is not a Muslim (for example because he is a European national), he can require a *shahada* of the State Mufti testifying that the man converted to Islam.⁹⁴ Nevertheless, it is unclear if a violation of these *circulaires* actually touches upon the validity of the marriage, as Article 21 PSC, that enumerates the grounds of nullity, only refers to Articles 5 and 14 to 20 PSC and not to the *circulaires*. The Court of Cassation decided that the marriage of Hurriya with her French husband is null and void, invoking 'Islamic law' without making any reference to legislation (Article 5 PSC or the *circulaires*) whatsoever, and that as a consequence,

⁹⁴ *Circulaire du Secrétariat de l'Etat*, 17 March 1962, in: *État civil, recueil des textes et circulaires relatifs à l'état civil, au nom et au livret de famille, ministère de l'intérieur*, Imprimerie officielle de la République Tunisienne, 1976, p. 82, followed by the *circulaire* issued by the Ministry of Justice, 5 November 1973, in: *Revue de Jurisprudence et de législation*, November 1973, no 9, p. 83 (Souhayma Ben Achour, 2003, p. 1203).

the Tunisian woman Hurriya had become an 'apostate'. With regard to her right to inherit from her mother, the Court referred to Article 88 PSC which provides for the impediment to succession, stating that homicide is 'one of the impediments' (*min al-mawani*). The Court argued that this article is not limitative, and to fill the gap, it said that 'the sharia' should be applied. The Court's understanding of 'sharia' being that a non-Muslim cannot inherit from a Muslim, Hurriya, declared an apostate, was denied her share in the inheritance of her mother.⁹⁵

Another often cited example of judges blocking the potential of the law is paternity. Whereas the PSC provides that 'paternity is effected by marriage or recognition or two witnesses' (Article 68 PSC), the Court of Cassation repeatedly decided that neither the recognition of the father nor the witness declaration that a specific man is the father of the child can bring about paternity if the child is born out of wedlock. In the same vein, the blood-test proving biological paternity cannot effect paternity if the child is born out of wedlock.⁹⁶ Other examples cited in the doctrine also concern children, namely adoption and custody. With regard to adoption, it

⁹⁵ Cited in : Ali Mezghani, 1975, pp. 63-64, Kalthoum Méziou, 1992, p. 268, Hafidha Chékir, 1986, p. 450, and 1998, pp. 286-7, Mounia Ben Jemia et al. 2006, p. 7, Moncef M. Bouguerra, 2000, pp. 26-33, Sana Ben Achour, 2005-2006, pp. 65-67.

⁹⁶ Court of Cassation 31 December 1963, 2000 and Court of Cassation 18 March 1969, 28744 (in: Sassi Ben Halima, 1976). Hafidha Chékir, 1986, pp. 451-2, Sassi Ben Halima, 2000, pp. 135-6, Moncef M. Bouguerra, 2000, pp. 63-72, Sana Ben Achour, 2005-2006, p. 66, Kalthoum Méziou, 1992, pp. 271-272

has been argued that whereas the law does not state anything with regard to the nationality or the religion of the adoptive parents, judges require that the adoptive parents are Tunisian nationals. Also, it is stated that some judges perceive adoption as a revocable act meaning that they are simply frustrating its application.⁹⁷ With regard to custody the refusal to accord custody over a Tunisian child to a foreign mother who lives abroad is highly criticised in Tunisian doctrine, where the authors state that the law does not provide for this. Judges refuse to recognise the foreign decision that accords the mother custody on the grounds of the open norm of 'public order'.⁹⁸ A final example concerns the marital duties, in the sense that husbands can file for divorce for harm on the grounds that their wife left the marital home, even if this was in order to work.⁹⁹ This understanding of 'harm' is also highly criticised in the doctrine as the law does not prescribe that 'harm' includes that the wife has a job.

Although previous writings mostly criticize judicial practice, the negative tenor in the Tunisian writings has changed over the past decade, as some authors witnessed

⁹⁷ For example CFI Tunis 17 April 1978, 57554, in: *Revue tunisienne de droit*, 1979, pp. 127-131 (revocation adoption). Hafidha Chékir, 1998, pp. 287-289, Sana Ben Achour, 2006-2006, p. 66, Kalthoum Méziou, 1992, pp. 271-2, Moncef M. Bouguerra, 2000, pp. 73-77

⁹⁸ See for example Court of Cassation 3 June 1982, 7422, in: *Nashriat al-mahkama al-ta'qibiya* 1982, part 3, Tunis, 1983, p. 143-144 (in Arabic) and Court of Cassation 19 October 1985, 14220, in: *Nashriat al-mahkama al-ta'qibiya* 1985, Tunis: 1986, p. 61-63. Kalthoum Méziou, 1992, 271-272, Sassi Ben Halima, 2000, pp. 133-4

⁹⁹ Hafidha Chékir, 1986, p. 452

a particular development in the adjudication of personal status law. Sana Ben Achour argues that nowadays, the courts are moving 'between the spirit of tradition and of *innovation*.'¹⁰⁰ Similarly, Bouguerra notes that while 'the majority of the decisions' shows a 'deep conservatism', 'some decisions apply the prescriptions in the code in the sense of *evolution and modernity*.'¹⁰¹ The decisions addressed in these writings concern the area of mixed marriages, or, more specifically: the validity of the marriage between a Muslim woman and a non-Muslim man, the possibility of the non-Muslim to inherit from a Muslim (see above, the Hurriya case), as well as the recognition of a foreign decision attributing child custody to the foreign mother who lives abroad. These decisions show that judges invoke the constitution and international conventions; a practice that was not witnessed before in the field of personal status law (unlike other fields of law).¹⁰²

A decision from the CFI Tunis in 1999 is considered to have constituted a break with regard to the qualification of mixed marriages as being invalid. The facts of the case were as follows. The couple, who lived in Belgium, wished to divorce. The husband, of Belgian origin, brought the case before the Tunisian Court, but the wife, of Tunisian origin, contested the competence of the Tunisian judge. She argued that according to Tunisian

¹⁰⁰ Sana Ben Achour, 2007

¹⁰¹ Moncef M. Bouguerra, 2005, p. 566-7. See also Mounia Ben Jemia et al., 2006, Moncef M. Bouguerra 2000, p. 40

¹⁰² Hafidha Chékir, 1998, p. 279-280

law, the marriage was null and void as it concerned the marriage between a Muslim (Tunisian) woman and a non-Muslim (Belgian) man. (This strategy might have been instigated by her consideration that Belgian divorce law gave her more advantages.) Regardless of the woman's defence, the CFI affirmed its competence, stating that the marriage was valid to Tunisian law. First, it argued that 'nothing in the file demonstrates that the man is not a Muslim.' This implies that it is not up to the man to prove that he is a Muslim, but to the woman to prove that is he *not* (which of course, is practically impossible, because: what is a Muslim?). Second, the Court continued that even if the man was *not* a Muslim, the marriage would be valid, as 'Article 14 PSC does not contain a religious marriage impediment.' Furthermore, the Court argued, 'the New York Convention of 1962, that is signed and ratified by Tunisia, protects the freedom to choose a spouse, and this convention takes precedence over Tunisian national legislation.' This interpretation of the law clearly breaks with the practice reflected by the Hurriya case, for as far as it concerns the validity of a mixed marriage (in the Hurriya case, the Tunisian woman who married a non-Muslim foreigner was declared an apostate). It was confirmed by both the Court of Appeal of Tunis¹⁰³ and the Court of Cassation.¹⁰⁴

¹⁰³ 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); 4 May 2004, 3351, unpublished, and 6 January 2004, 120 (Souhayma Ben Achour, 2003, p. 1207).

¹⁰⁴ Court of Cassation, 20 December 2004

The following decision from 2000 is generally considered to have constituted a break with the practice to deny a non-Muslim to *inherit* from a Muslim. This question arises when a Muslim has deceased and there is a non-Muslim among his (intestate or testate) heirs. When a person has died, the Cantonal Court draws up the list of heirs. This list is then transferred to a notary, who divides the patrimony among the heirs mentioned on the list. (It should be noted that this type of case occurs more often than cases of mixed marriage: many Tunisian men marry foreign, non-Muslim women, who, after their husband's death, do or do not appear on the list of heirs. The marriage between a Tunisian Muslim woman and a foreign non-Muslim man does not occur very often.) On 18 May 2000, the CFI Tunis (again!) decided in a case where a foreign woman had inherited from her Tunisian husband. The husband had died in 1980, and she inherited her part. After a few years, she sold part of her inheritance, which she regretted afterwards. She tried to nullify the sale at the Cantonal Court, and stated that she had not been competent to sell these goods, as she was not competent to inherit from her Muslim husband because she only converted to Islam six days after her husband's death. Thus, she did not own them in the first place. The Cantonal Court granted her demand and nullified the sale, but the defendants went to appeal. The CFI Tunis decided that the wife *was* competent to inherit from her Muslim husband, whether she converted to Islam or not, because Article 88 PSC does not provide that

religion is an impediment for succession.¹⁰⁵ Moreover, a religious marriage impediment would be contrary to international conventions, specifically the UDHR, ICCPR and ICESCR.¹⁰⁶ This view was confirmed by the Court of Appeal in another succession case.¹⁰⁷ But it was not before 2009 before the *Court of Cassation* affirmed this practice¹⁰⁸ (as recent as 2006, the Court of Cassation decided that 'Article 5 of the Tunisian Constitution does not mean that it is possible to simply bypass other legal dispositions concerning the exercise of other rights. Therefore, the right to inherit remains submitted to the conditions provided by the legislator in the Personal Status Code'¹⁰⁹).

A decision from 2001 is generally considered to have formed a break with the practice that is described in Tunisian doctrine¹¹⁰ that courts used to refuse to recognise foreign decisions that attributed custody to the foreign mother if she lived abroad and the child had the Tunisian nationality.¹¹¹ The facts of the decision from 2001 were as

¹⁰⁵ CFI Tunis, 18 May 2000, *Revue tunisienne de droit*, 2000, p. 247, annotated by Ali Mezghani.

¹⁰⁶ CFI Tunis, 18 May 2000, 7602, in: *Revue tunisienne de droit*, 2000, p. 247, annotated by Ali Mezghani

¹⁰⁷ Souhayma Ben Achour, 2003, pp. 1208-1212

¹⁰⁸ Court of Cassation 5 February 2009, 31115, in: *Revue tunisienne de droit*, 2009, annotation: Malek Ghazouani

¹⁰⁹ Court of Cassation, 8 June 2006, 9658, in: *Revue de jurisprudence et de législation*, March 2009, p. 94-95

¹¹⁰ Sassi Ben Halima, 2005, pp. 134, 135, and Yadh Ben Achour, 2005

¹¹¹ Court of First Instance, Grombalia, 7 March 1977, in: *Revue tunisienne de droit*, 1978, p. 95-107, French translation and annotation by Kalthoum Méziou; Court of Cassation 3 June 1982, 7422, in: *Nashriyat mahkamat al-ta'qib*, 1982, p. 143-144. See also Court of Cassation 19

follows. A Belgian woman asked recognition of a Belgian decision that attributed custody to her.¹¹² The Tunisian husband argued that it is 'in the interest of the child who is Tunisian and a Muslim to grow up in Tunisia.' But the Court of Cassation rejected this argument, deciding that: 'nothing in the foreign decision contradicts Tunisian international public order or Tunisian legislative politics. Only the best interest of the child should be taken into consideration and nothing else.'

Analysis and explanations

In many writings, the criticised practices are analysed by stating that the judges are applying 'Islamic law' or 'custom', which is rejected. In the recent writings on the other hand, the authors explain that courts are applying the constitution, fundamental rights and international conventions, which is approved by them.

October 1985, 14220, in: *Nashriyat mahkamat al-ta'qib*, 1985, p. 61-63. Court of First Instance, Grombalia, 7 March 1977, in: *Revue tunisienne de droit*, 1978, p. 95-107, French translation and annotation by Kalthoum Méziou. See also: Court of Cassation 20 December 1966, 3984, in: *Revue tunisienne de droit*, 1966-1967, p. 191-196, French summary and annotation by Eméritienne de Lagrange (in this case, the wife, who did not receive any compensation after divorce, moved to her parents, which was considered 'too far away'. 'Distance' was interpreted with the invocation of the *fiqh*, arguing that the *fiqh* prescribes a maximum of six 'relais de postes').

¹¹² 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)

The majority of the writings that is critical about judicial practice argue that the practices reflect an application of 'Islamic law'¹¹³, 'the Islamic tradition'¹¹⁴, 'classical Islamic law'¹¹⁵, the 'Islamic sharia'¹¹⁶, or 'the conservative Islamic rule'.¹¹⁷ Some argue that 'Islamic law' is applied to interpret the law (and thus, *praeter legem*), while others state that 'sharia' is even applied *contra legem*.¹¹⁸ They argue that the application of the 'sharia' entails a violation of the intention of the legislature, who wished to 'reform [personal status] law in an a-religious sense.'¹¹⁹ The authors who analyse judicial practice with a focus on 'culture' or 'custom'¹²⁰ employ the term 'conservative' to denounce judicial practices.¹²¹ These authors argue that this the application of 'custom' entails a violation of the intention of the legislature, which was to 'facilitate social evolution'¹²², to bring about an evolution of mentality¹²³ and 'women emancipation'.¹²⁴ A number of authors stress

¹¹³ Ali Mezghani, 1975, p. 65, and Hafidha Chékir, 1986, p. 449, Sassi Ben Halima, 2000, p.131

¹¹⁴ Soukaina Bouraoui, p. 426

¹¹⁵ Mohammed Charfi, 1983, p. 420, Moncef M. Bouguerra, 2005, pp. 566-7

¹¹⁶ Hafidha Chékir, 1998, p. 280

¹¹⁷ Kalthoum Méziou, 1992, p. 268

¹¹⁸ *Contra legem*: Ali Mezghani, 1975, p. 426, Hafidha Chékir, 1986, p. 452 and 1998, p. 280 Sassi Ben Halima, 2000, p. 131

¹¹⁹ Ali Mezghani, 1975, p. 70

¹²⁰ Hafidha Chékir, 1998, p. 280 ('religious and cultural references').

¹²¹ Kalthoum Méziou, 1992, p. 268, Moncef M. Bouguerra, 2005, pp. 566-7, Sana Ben Achour, 2007.

¹²² Mohammed Charfi, 193, pp. 35-6. Likewise: Yadh Ben Achour, 1992.

¹²³ Kalthoum Méziou, 1992, p. 268

¹²⁴ Hafidha Chékir 1986 and 1998

that the denounced practices are in violation of the spirit of the code¹²⁵, which is emptied of its 'emancipative contents'¹²⁶, in conformity with the 'patriarchal order'.¹²⁷ And some argue that judicial practice is incompatible with 'universal ideas' and with social reality in Tunisia.¹²⁸

Tunisian authors' explanation for their findings that judges apply 'sharia' or 'custom' is threefold. A first often repeated explanation is that the legislation is not *effective* because it constituted a break with the past that is too large.¹²⁹ A second reason according to Tunisian writers is that the legislation contains many lacunae, and the legislature does not state clearly what *additional sources of law* should be applied to fill these.¹³⁰ A third reason that is put forward by Sana Ben Achour is the legislature's *ambivalent position* vis-à-vis the 'sharia' on the one hand, and feminism on the other.¹³¹ Authors who have written a lot on the 'innovative' practices contend that judges are applying the constitution (mainly the principles of equality and religious freedom), international conventions (mainly CEDAW and the 1962 Convention)

¹²⁵ Mohammed Charfi, 1893, p. 420 ('incompatible with the spirit of the code').

¹²⁶ Hafidha Chékir, 1986 p. 452, and 1998, p. 280

¹²⁷ Hafidha Chékir, 1998, p. 280

¹²⁸ Ali Mezghani, 1975, p. 63

¹²⁹ Yadh Ben Achour, 1990a, p. 69. In the same vein: Adel Ben Nasr and Lamine Klai, 2005, p. 25.

¹³⁰ Kalthoum Méziou, 1992, p. 252. See also Sassi Ben Halima, 200, p. 130.

¹³¹ Sana Ben Achour, 2005-2006

and fundamental rights.¹³² Sana Ben Achour interprets the 'innovative' decisions as a result of the *feminisation of the judiciary*. She argues that the decisions from 1999 and 2000 show that female judges *do* employ the emancipative potential of the law, as the decisions were taken by a *women only* chamber. I will treat all four issues one by one.

Section two

A break with the past

Some authors blame the judges' use of 'sharia' and 'custom' when they apply personal status law to what is in their eyes a 'gap' between legislation on the one hand and the law that was applied before, which, according to them, was 'the sharia'. In this way, they are implying that the legislation is not 'effective'. Of course, this statement is problematic in two ways. First, there is insufficient knowledge about the norms that were applied before 1956. Second, even if it were 'sharia', it is difficult to establish that the present code differs from 'the sharia', as one would have to compare the two. In this section, I shall address two issues. First, I give a short description of Tunisian legal history, which is characterised by the process of codification of law which were to replace *fiqh* works in courts. This part finishes with the introduction of the PSC in 1956. Next, I give a short overview of the contents of the PSC. Although I think it is impossible to compare a code with 'the sharia', I think it is necessary at this point to give an indication of the extent to which this

¹³² Wassilia Ltaief, 2005, Sana Ben Achour 2005a, 2005c, Souhayma Ben Achour 2003a and 2008

codification provoked a break with the past. For this reason, I shall contrast the code with the most generally accepted interpretations of the Maliki *fiqh*, the Islamic school of law that is predominant in Tunisia.

Legal history

Until the 19th century, Tunisian law consisted of Maliki law¹³³, decrees from the *Bey*, and 'custom', as well as precedents set by the judges of Kairouan (*'amaliyyat*).¹³⁴ Judicial powers were with religious courts, presided by *qadis* (judges). Most of these courts were Maliki, but there were also Hanafi courts, which applied Hanafi law to the Hanafi minority (in 1574, Tunisia came under Ottoman rule, and the Hanafi school was the dominant school of law in the Ottoman empire). Separate Jewish courts applied Mosaic law to the Jewish population. Beylical courts applied the decrees, and from the 14th century onwards, consular courts were competent in cases in which Europeans were involved. These courts did not apply the *fiqh*, but 'capitulations' (specific decrees applying to Europeans residing in the area).¹³⁵

¹³³ The most important sources for the Maliki doctrine were Sahnun (*Mudawwana*, d. 854), Ibn Abi Zaid al Qayraqani (*Rissala*, d. 996), Abul Hasan al Lakhmi (*al-Tabsira*, d. 1058), Ibn al Hajib (*Jami' al-umamah*, or *al-Mukhtasar*, d. 1248), Ibn Arafah (*al-Mukhtasar*, d. 1401), and Khalil Ibn Ishaq (*al-Mukhtasar*, d. 1374), mostly of Tunisian origin. These works formed the basis of more recent influential instructive works, such as Mohamed Bechir Touati's *Kitab al-'ifada fi 'ilm al-shahada* (19th century) (Yadh Ben Achour, 2005, p. 148).

¹³⁴ Mohamed Charfi, 1997, pp. 103-104

¹³⁵ Robert Brunschvig, 1965

From the mid-19th century, Tunisia entered a period of legal and political reform. This occurred parallel to, but did not coincide with, the Ottoman reforms (*tanzimat*, consisting for example of the codification of civil law in the *Mecelle* of 1876 and the Ottoman Law of Personal Status of 1917)¹³⁶ which had legal force in the area from Libya to Iraq until far in the 20th century; as Tunisia retained substantial autonomy under the rule of the Husaynid *Bey*,¹³⁷ the Ottoman reforms were of no direct importance for Tunisian law. Nevertheless, the outcome of the Tunisian reforms was similar to the Ottoman *tanzimat*, in the sense that it was characterised by codification, putting sharia aside. Yadh Ben Achour speaks of a 'sacralisation of the State and a desacralisation of law' to describe the situation in which the authority of law depends on its issuance by the state instead of its presumed 'divine' origins.¹³⁸ In 1861, parts of civil and penal law were codified in the *qanun al jinayat wa-l-ahkam al-'urfiya*, under the auspices of Khayr al-Din. This code was of Maliki and Hanafi inspiration, and

¹³⁶ The Ottoman *Mecelle* of 1876 and the Ottoman Law of Family Rights of 1917.

¹³⁷ The Husaynid dynasty ruled from 1704 till 1956 (Yadh Ben Achour, 2005, p. 147). Tunisia was subject to the first Arab conquest in 670. The Sunnite Aghlabid dynasty lasted until 909, followed by the Fatimides (909-972), the Zirides (972-1160), the Almohads (1160-1227), and the Hafsids (1227-1574) (Yadh Ben Achour, 2005, p. 147). It was not until the Ziride dynasty (972-1160) that the population was completely Islamized, apart from the Jews.

¹³⁸ Yadh Ben Achour, 1990a, p. 66. See also Sami Zubaida, 2003, p. 121-157.

contained some Islamic principles of penal law (*ta'zir* and *jinayat* but no *hudud*). It contained important reforms and was applied by separate, non-religious courts.¹³⁹ In the same year, a constitution was proclaimed (*Qanun al-Dawla*)¹⁴⁰, but soon abolished (in 1864) as the *'ulama* argued that the Quran was Tunisia's constitution.¹⁴¹ In 1881, Tunisia became a French protectorate. The *Bey* remained formally sovereign, but the administration and the judiciary were controlled by French officials, and all legislation had to pass France's highest official in Tunisia, the *résident-général*. The first code introduced under the French was the *Code Foncier* in 1885.¹⁴² In 1896, the Commission for the codification of Tunisian laws was set up, composed of four French legal scholars and one Tunisian, the Jewish specialist of Islamic law David Santillana.¹⁴³ The commission composed a civil code (1906) and a penal code (1913). The civil code was based

¹³⁹ Yadh Ben Achour, 2005, pp. 149-150. On this process, see also Wael B. Hallaq, 2003-2004 and Ruud Peters, 2005.

¹⁴⁰ In 1857, the consuls of Britain and France and the *Bey* signed the *'Ahd al-Aman* (security covenant), which contained a number of civil and political rights ('The security of life and of property, the equality of all in regard of the law and taxes, the freedom of religion' for all inhabitants, and 'the freedom of commerce and the right to obtain property and to exercise all professions' for foreigners) and proclaimed the intention of codification. In 1861, the *'Ahd* was implemented in a Constitution (Kenneth J. Perkins, 2004, pp. 18-19 and 24-30).

¹⁴¹ Kenneth J. Perkins, 2004, pp. 18-19 and 24-30

¹⁴² Nada Auzari-Schmaltz, 2007

¹⁴³ Santillana (Tunis 1855 – Rome 1931) was a Tunisian Jew of Spanish descent, a jurist and Arabist and expert of Islam (later naturalized British and then Italian) (Mohammed Charfi, 1997, p. 108).

on several different sources:¹⁴⁴ in the margins of the law and in Santillana's presentation of it, reference was made to French law, the *fiqh*, German law, Tunisian custom, French jurisprudence and the jurisprudence of the French courts in Tunisia.¹⁴⁵ The Penal Code was inspired on both the French *Code Pénal* and the Tunisian Code of penal and civil legislation from 1861. The process of codification was finalized with a Code of Civil Procedure¹⁴⁶ and a Code of Criminal Procedure.¹⁴⁷ The Code of Civil Procedure installed separate adjudication of Europeans and Tunisians.¹⁴⁸

¹⁴⁴ In 1899, the draft was examined by a group of *'ulama* (religious scholars): the *shaykh al-Islam*, two Maliki muftis, one Hanafi mufti, and two professors of Zaituna. (Sana Ben Achour, 1995, p. 59.)

¹⁴⁵ Santillana explicitly referred to the Ottoman *Mecelle* and Qadri Pasha's works as sources of inspiration, as well as Sahnun's *Mudawwana* and Khalil's *Mukhtasar*. When choosing between different solutions from Islamic law, the principle that was closest to French law was chosen. Yadh Ben Achour, 2005, pp. 165-167, Slaheddine Mellouli, 1995, and Mohammed Bagbag, 2002.

¹⁴⁶ 1910, replaced in 1957 by the Code of Civil and Commercial Procedure, CCCP

¹⁴⁷ 1921, replaced in 1968

¹⁴⁸ French courts applied French law and were competent in all cases (both civil and criminal) in which a European was involved. The French tribunals were competent when the defendant was a French national. The decree of 5 May 1883 extended this competence to cases in which foreigners agreed to bring their case to the French court. It was again extended when the French courts were declared competent in civil cases in which one of the parties was European (31 July 1884), and again in 1885 when the French courts were declared competent in all criminal cases in which one party was European (5 September 1885) (Mohammed Charfi, 1997, p. 108). Tunisian nationals brought their cases to either the religious courts in family and inheritance cases, or to the *wuzara'* (national courts), which applied decrees and legislation.

In 1956, Tunisia became independent from the French and entered another era of reform. At this point, most areas of law had been codified, except personal status law: the sharia- and Jewish courts continued to apply *fiqh* works and Mosaic law in this domain, while French courts applied French law in family cases where a foreigner was involved.¹⁴⁹ Shortly after independence, the new president Habib Bourguiba (replacing the Husaynid *Bey*) issued a Personal Status Code.

Legislation in the field of personal status law

In the field of personal status law, the relevant¹⁵⁰ codes are the PSC and connected codes concerning personal status,

Their decisions became practicable after approval of the *Bey*. See Elise Hélin, 1995, p. 93.

¹⁴⁹ In Tunisia, there were several sharia courts, presided by a *qadi*. Tunis had two sharia courts: one Maliki and one Hanafi, each consisting of six judges: a *shaykh al-Islam*, a *qadi*, and four muftis.¹⁴⁹ A case brought before the *qadi* could be transferred (on demand of one of the parties or of law) to a council (*majlis*) consisting of the *qadi* and muftis. Appeal was had from the *qadi* to the *majlis*, from the *majlis* to the *majlis* of Tunis and from here to the *Bey*. Representation by a lawyer did not exist, although the parties could appoint a *wakil*. Elise Hélin, 1995, p. 93

¹⁵⁰ Of course, whether these codes are indeed relevant in practice depends on the question of whether they are actually applied or not. In the following chapters no reference shall be made to the the law with regard to the maintenance fund and the law with regard to the optional community of goods within marriage, because in divorce cases at the CFI Tunis, these codes were not relevant in the sense that no mention of it was made.

namely the law legalising adoption, the law with regard to the maintenance fund, the law with regard to the attribution of a family name to illegitimate children, and the law with regard to the optional community of goods within marriage. Other laws containing provisions that are of importance in the field of personal status are the Code of Civil Status (CCS), the Code of International Private law (CIPL), as well as the Code of Civil and Commercial Procedure (CCCP). Finally, the constitution as well as some provisions in the Civil Code (CC), the Penal Code (PC), and the Code of Criminal Procedure (CCP) can be of relevance for personal status matters. For the text of the law, I refer to Annex I (Arabic text and English translation).

Marriage

With regard to the marriage contract, the PSC provides the following. In the first place, it underlines that the consent of both spouses is obligatory (Article 3). In addition to the consent of the future spouses, the PSC requires the consent of the legal guardian (mostly the father) and the mother in case a minor gets married (Article 6 PSC).¹⁵¹ These rules show that the code abolished an important feature of the Maliki *fiqh* which allows the marriage guardian to force the woman (except the adult who is not a virgin) into marriage *and* which requires the marriage guardian's consent to the marriage

¹⁵¹ The consent can be replaced by the judge's consent. The mother's consent is obligatory since 1993 (Law 93-74 of 12 July 1993).

of women.¹⁵² However, it has been argued that in Tunisia, women from the urban elite already married without a marriage guardian before the issuance of the PSC.¹⁵³

The PSC also requires the presence of two witnesses when the future spouses sign the marriage contract (Article 3 PSC). The Code of Civil Status provides for additional rules in this respect, stating that a marriage should either be contracted in the presence of two *professional* witnesses (*'udul*), or in front of the civil servant in the presence of two reliable witnesses.¹⁵⁴ The presence of two witnesses is also required by the Maliki *fiqh*.¹⁵⁵ However, Tunisian legislation requires that marriages are registered, and contracting a marriage in violation of these rules is called a *zawaj 'urfi* (customary marriage), which is null and void and sanctioned with three months imprisonment.¹⁵⁶ In the Maliki *fiqh*, marriage registration is no requirement. It should be noted in this respect that in practice, the civil servant (if the marriage is contracted at the city hall) and the professional witnesses (if contracted at home) preside prayer during the marriage ceremony. Another important feature of Tunisian marriages in practice is that it often takes place in stages. The most important stages are the signature of the marriage contract, which is called the *sdaq* and the wedding festivities (the *'urs*). This is not prescribed by law, but the division can have important

¹⁵² Ruud Peters, 2006

¹⁵³ Jean Magnin, 1966, pp. 314 and 318

¹⁵⁴ Article 31 PSC

¹⁵⁵ Ruud Peters, 2006

¹⁵⁶ Article 36 PSC

consequences in court, as will be seen in the next chapters.

Article 3 PSC also requires the fixation of a bride price, which belongs to the wife; the husband cannot force his wife to consummate marriage before having paid the dower (Articles 12 and 13 PSC).¹⁵⁷ These provisions are in accordance with the classical Islamic doctrine. However, in practice, Tunisian men pay a symbolic amount of 1 DT (± € 0,50). This is paid in the session where the marriage contract is signed (the *sdaq*). Instead of paying a significant dower, husbands offer their wife jewellery during the wedding celebration (the *'urs*). Also, the husband provides for the furniture (*adbash*) for their future home, while the wife brings in the *trousseau* (small household goods such as kitchen equipment, bed linen and the like). This is not prescribed by law.

Besides these conditions, Articles 5 and 14 to 20 PSC enumerate the marriage impediments. These are the minimum marriage age (set at 18 for both spouses in 2007)¹⁵⁸, consanguinity¹⁵⁹, affinity¹⁶⁰, and suckling.¹⁶¹ Other

¹⁵⁷ Ruud Peters, 2006

¹⁵⁸ Law 2007-32 of 14 May 2007. In the law of 1956 it was provided that the man should have attained 18 years while the minimum marriage age for women was fifteen. If these ages were not attained, judicial authorization was required, based on the 'physical readiness' of the spouse. Since 1964, the minimum marriage age was 20 and 17 respectively, to be circumvented with a judicial authorization on the grounds of 'severe motifs' (Law 64-1 of 20 February 1964).

¹⁵⁹ Article 15 PSC provides that is prohibited the marriage between a man and his ascendants and descendants, his sisters, as well as the

marriage impediments prescribed by the PSC are triple divorce¹⁶², the waiting period and the fact of being married, also for the husband. Only the minimum marriage age entails a deviation from the *fiqh*, which does not prescribe a minimum age to marriage (but it does to consummation).¹⁶³ Another deviation from the *fiqh* is that the waiting period¹⁶⁴ is set at 3 months instead of 3 menstrual cycles. Article 22 provides that every marriage contracted in violation of these impediments is null and

descendants of his brothers and sisters, his aunts, his grand aunts and his great grand aunts. This means that men cannot get married to their cousins, but they can get married to their nieces.

¹⁶⁰ Article 16 prohibits the marriage between the man and his (ex-)wife's ascendants from the moment of marriage, with her descendants from the moment their marriage has been consummated, and the wives of his ascendants and descendants from the moment the marriage has been celebrated.

¹⁶¹ This impediment refers to the idea that if a man and a woman have been fed by the same suckling mother when they were babies, they are supposed to be family and therefore, they cannot get married to each other. Article 17 PSC provides that suckling provokes the same impediments as consanguinity and affinity, except that it is only the child himself and not his brothers and sisters who are involved in the impediment, and that suckling only provokes an impediment if it took place in the first two years of the child's life.

¹⁶² If a man and a woman have been divorced from one another three times, they cannot remarry (Article 19 PSC).

¹⁶³ Ruud Peters, 2006

¹⁶⁴ Article 20 provides that a man cannot marry a woman who is still married or who is still in her waiting period. The article continues to state that the wife who is in her waiting period can only remarry her previous husband. The waiting period lasts three months, unless she is pregnant, in which case it lasts until she has given birth. For the widow, the waiting period lasts four months and ten days (Article 35 PSC).

void. Nevertheless, these marriages do have consequences for paternity.¹⁶⁵ The interdiction on polygamy is mentioned amid the marriage impediments, sanctioned with one year imprisonment.¹⁶⁶ This is a strong violation of the *fiqh*. However, it has been argued that the interdiction of polygamy followed the practice of the *shart kairouanais*, the monogamy condition in the marriage contract.¹⁶⁷

To complete the rules with regard to the marriage contract, a law was passed in 1964 that requires a medical

¹⁶⁵ Articles 21 and 22 PSC. Marriages that are null and void also have consequences for the wife's right to the bride price, her obligation to observe the waiting period, and marriage impediments resulting from alliance.

¹⁶⁶ This article has been changed a number of times. In 1956, Article 18 provided that 'Polygamy is prohibited. It is punished with one year imprisonment and/or a fine of 240.000 francs.' In 1958 (law 58-70 of 4 July 1958) the provision was changed into 'Polygamy is prohibited. Whoever who is married contract another marriage before having dissolved the previous one, will be punished with one year imprisonment and/or a fine of 240.000 francs, even if the new marriage is not contracted in conformity with the law.' In 1964, Article 21 was changed, providing that 'The decision condemning for infraction of Article 18 PSC will automatically cause the nullity of the marriage. The couple who nevertheless continues to live together shall be punished with 6 months imprisonment.' See Slim Krichen, 1979.

¹⁶⁷ This condition involved that if the man married a second wife, the first marriage contract became invalidated automatically, or even that the first wife could oblige her husband to divorce the second wife. The condition became general practice specifically in some social circles and urban areas. See Sana Ben Achour, 2007a.

certificate for both spouses.¹⁶⁸ Also, a *circulaire* was passed in 1962 that prohibited civil servants to register a marriage between a Muslim woman and a non-Muslim man (see above). This is in accordance with the Maliki rule that a Muslim woman cannot marry a non-Muslim man.¹⁶⁹

With regard to the rights and duties within marriage, Article 23 PSC provides that both spouses should treat each other with respect and should refrain from harming each other. They should cooperate in managing the affairs of the family, the education of the children, and their schooling, travel and financial transactions. Article 23 PSC also provides that the spouses 'should fulfil their marital duties in conformity with 'custom'. The provision that the wife should obedience her husband was abolished in 1993.¹⁷⁰ However, the Article still prescribes that the husband is the 'head of the family', although seemingly, this only regards his obligation to 'take care of the needs of the wife and their children in conformity with his means'. This is repeated in Article 38 PSC that obliges the husband to maintain his wife after the consummation of the marriage until the end of the waiting period. Article 23 PSC provides that the wife 'should contribute to the

¹⁶⁸ Law 64-46 of 3 November 1964, *Arrêtée* of the minister of the interior and of public health of 28 July 1995, and *Arrêtée* of the minister of public health of 16 December 1995

¹⁶⁹ Ruud Peters, 2006

¹⁷⁰ Law 93-74 of 12 July 1993

needs of the family if she has the means.¹⁷¹ While the husband's obligation to maintain his wife is in accordance with the Maliki *fiqh*, the requirement that the woman who has means should contribute is not; in classical Maliki law, the wife cannot be obliged to touch her own means (such as the bride price).¹⁷²

The Tunisian legislation allows the spouses to stipulate additional rights and duties in their marriage contract (Article 11 PSC), thus confirming that marriage is a contract, which can be amended in accordance with the agreement of the parties to that contract.¹⁷³ In 1998, a special law was introduced that regulates the optional community of goods (real estate) within marriage.¹⁷⁴ Although the Maliki *fiqh* allows the spouses to stipulate

¹⁷¹ The differences on the level of financial rights and obligations have often been criticised, as they would reinforce inequality within marriage. Other examples of these differences are the bride price (to be paid by the husband to the wife), and the maintenance obligation (*nafaqa*) as prescribed by Article 38 PSC, providing that the husband should maintain his wife from the moment that the marriage has been consummated until the end of the waiting period.

¹⁷² Ruud Peters, 2006

¹⁷³ In 1960 however, the Court of Cassation decided that no clause with regard to a community of goods can be inserted in the marriage contract (Court of Cassation 7 November 1960). See Kalthoum Méziou, 1984, p. 260.

¹⁷⁴ Law 98-94 of 9 November 1998. Already in the 1980s, a commission was installed to examine the possibilities to introduce a community of goods within marriage. See Kalthoum Méziou, 1984, p. 256. This law has often been criticised, as it only regards real estate.

specific conditions in their contract, it does not provide for a community of goods within marriage.¹⁷⁵

Divorce

With regard to divorce, Article 31 PSC provides that the Court of First Instance pronounces the divorce on demand of both spouses, on the grounds of harm, or on demand of one of the spouses without grounds. The divorce cannot take place outside of court, and it can only be pronounced after the judge has undertaken one to three reconciliation sessions¹⁷⁶ behind closed doors. This provision differs significantly from the Maliki *fiqh*, in a number of ways. In the first place, the *fiqh* does not require that divorce takes place through court; the husband can repudiate his wife outside of court (*talaq*), and the same is true when spouses contract a divorce with mutual consent (*khul'*); the only instance of divorce where a judge (*qadi*) is involved concerns the divorce on demand of the wife (*tatliq*).¹⁷⁷ However, it has been argued that the abolishment of repudiation followed the practice of the Tunisian urban elite, who divorced with the intervention of notaries (*'udul*) with a divorce certificate, in the presence of the wife or her father. A second important difference with the Maliki *fiqh* concerns the grounds for divorce: Article 31 PSC gives both

¹⁷⁵ Ruud Peters, 2006

¹⁷⁶ In principle three reconciliation sessions with an interval of 30 days each are required, except in the absence of children or in cases of divorce with mutual consent (Article 32 PSC).

¹⁷⁷ Ruud Peters, 2006

spouses the right to divorce with mutual consent, on the grounds of harm, and without grounds. As in the classical doctrine the husband has the right to repudiate his wife, the divorce with mutual consent (*khul'*) and judicial divorce (*tatliq*) are reserved for the wife.¹⁷⁸ In the Tunisian law however, the husband can also file a petition for divorce with mutual consent and judicial divorce. The divorce without grounds, that can be compared to the repudiation in the sense that the spouse does not need the other party's consent and is not obliged to convince the court of the existence of specific grounds justifying the divorce, is available to both men and women in Tunisian legislation. Another difference with the Maliki doctrine is that the legislation does not define the grounds that can be qualified as 'harm'; in Maliki law, non-payment of maintenance, absence from the marital home for a long period, physical defects and 'harm' (*darar*) give the wife the right to judicial divorce¹⁷⁹, while the Tunisian legislation is limited to the term 'harm' (*darar*).

With regard to the financial consequences of divorce, Article 31 PSC stipulates that the spouse who asks divorce without grounds can be convicted to pay damages (*ta'wid*) to the other spouse. The same is true if harm has been established, in which case the spouse who caused the harm constituting the divorce should pay damages (*ta'wid*). Since 1981, the repair of material harm to the ex-wife is different from the repair of material harm to the

¹⁷⁸ Ruud Peters, 2006

¹⁷⁹ Ruud Peters, 2006

ex-husband:¹⁸⁰ the wife can choose to have her damages paid in monthly instalments instead of a lump sum, thus resembling maintenance after divorce.¹⁸¹ This provision differs significantly from the Maliki *fiqh* which does not provide for maintenance after divorce, except during the waiting period (when the couple is still considered to be married).¹⁸² However, some interpretations do provide for damages in cases of unjustified repudiation, in which case the husband should pay a sum of money (*mut'a*). Also, the traditional doctrine obliges the husband to pay his wife the deferred dower in case of repudiation if she did not obtain the entire sum at once. This is not relevant in Tunisia where no significant dowers are paid.

Divorce becomes final three months after the final divorce decision (*hukm*). Until the final decision, the husband should continue to pay maintenance (*nafaqa*), as the couple is still married and the husband should maintain his wife during marriage. After the final decision, he should pay *nafaqat al-'idda* during the waiting period.¹⁸³ This is in accordance with the Maliki *fiqh*, although the Maliki doctrine provides that the waiting period can be between three menstrual cycles and four years, while Tunisian legislation provides that it takes 3 months (abolishing the possibility of fraud) or one year in case of

¹⁸⁰ Law 81-7 of 18 February 1981.

¹⁸¹ This has been heavily criticised as it reinforces the idea of inequality between men and women. Kalthoum Méziou, 1984.

¹⁸² Ruud Peters, 2006

¹⁸³ Article 38 PSC

pregnancy.¹⁸⁴ After this period, the ex-husband shall no longer pay maintenance to the wife, although he might be obliged to pay material damages in monthly instalments.

Guardianship and custody

With regard to guardianship and custody, the law provides that during marriage, custody (*hadana*) lies with both parents, while in principle, the father has legal guardianship (Articles 57 and 154 PSC)¹⁸⁵. After divorce, guardianship (*wilaya*) remains with the father, while custody (*hadana*) is attributed to one of the parents or a third person in conformity with the best interest of the child (Article 67 par. 3 PSC).

The rules with regard to guardianship and custody have changed significantly over the years. The law of 1956 prescribed that child custody after divorce belonged to the mother and ended at the age of seven for boys and nine for girls. When the children reached this age, they would move in with their father, if the father filed a case for this and unless the judge decided that it was in the interest of the child to stay with its mother. The mother would also lose custody if she remarried. In cases where the mother lost custody before the children reached the ages of seven and nine respectively, the law provided for a list of female relatives that would obtain custody, starting with the mother's mother. Thus, the young

¹⁸⁴ Ruud Peters, 2006

¹⁸⁵ Article 57 PSC was modified by law 66-49 of 3 June 1966 and Article 154 PSC was modified by law 81-7 of 18 February 1981.

children of the remarried mother would normally live with the maternal grandmother, enabling the mother to visit her children as often as the caretaker (the grandmother) would allow her to.¹⁸⁶ In 1966, this law was changed in the sense that the maximum age for custody was abolished, meaning that custody ends when the child reaches the age of majority (at the age of 18). Moreover, the list of female caretakers was abolished, and instead, Article 67 PSC provided that custody was attributed to the mother or the *father* or a third person, *in accordance with the best interest of the child*. Thus, if the mother had obtained custody after divorce and remarried, the children would go directly to the father instead of the maternal grandmother.¹⁸⁷ In 1981, the rules with regard to guardianship and custody were changed once again, this time providing for possibilities for the mother to obtain the legal guardianship, and protecting the mother from losing custody in cases of remarriage. Article 154 PSC provides since 1981 that in case of death or inability of the father, the mother obtains guardianship, abolishing the provision that the father is followed by his male relatives.¹⁸⁸ Article 58 PSC provides since 1981 that the mother who remarried loses custody unless the judge estimates that this is not in the interest of the child, or if the mother's husband is in a prohibited degree to the child, or if he is its guardian. Moreover, custody shall only be transferred to the father if the latter files for custody within one year after he became aware that the

¹⁸⁶ Article 57 – old PSC

¹⁸⁷ Law 66-49 of 3 June 1966.

¹⁸⁸ Law 81-7 of 18 February 1981

mother's marriage has been consummated.¹⁸⁹ In 1993, the rules with regard to custody were extended in the sense that the woman who has custody can execute some guardianship rights, meaning for example that she can travel with her child without the father's consent (Article 67 PSC).¹⁹⁰

The rules as they are now differ considerable from the Maliki *fiqh*, in a number of ways. In the first place, the classical doctrine provides that after divorce, the children stay with their mother¹⁹¹, while the Tunisian legislation makes this dependent on the best interest of the child. In the second place, the classical doctrine provides for a maximum custody age, in the sense that custody ends when the children are still minors.¹⁹² In the Tunisian legislation, custody ends when the children have reached the age of majority. In the third place, the classical doctrine provides that if the mother remarries, the child goes to the mother's mother or another female relative¹⁹³, while the Tunisian legislation as changed in 1966 provides that it goes to the father, while the law of 1981 provides that this is only true if the father asks for it and unless it is not in the best interest of the child. In the fourth place, the Maliki doctrine understands 'custody' (*hadana*) in a very limited way, namely the daily

¹⁸⁹ Law 81-7 of 18 February 1981

¹⁹⁰ Law 93-74 Of 12 July 1993

¹⁹¹ Ruud Peters, 2006

¹⁹² Ruud Peters, 2006

¹⁹³ Ruud Peters, 2006

caretaking.¹⁹⁴ In the Tunisian legislation, *hadana* entails much more, and includes aspects of legal guardianship as well. This is affirmed by the fact that the law requires the consent of the legal guardian *and the mother* if a minor child wishes to contract a marriage. In the fifth place, the Tunisian legislation provides that if the father is not fit to be the legal guardian, the mother can be appointed in this function, while the classical doctrine requires that the guardian is a male agnate.¹⁹⁵

Paternity

With regard to the legal bond between the parents and their child, the principal rule is as follows: the fact of birth causes legal maternity, while legal paternity is effected by the marriage between the father and the mother, the recognition by the father or testimony (Article 68 PSC). Judicial practice demonstrates that recognition and testimony can only constitute paternity if they prove that the parents were married at the time of birth; thus, they should prove that the child is legitimate, and not that it is the child of a certain man.¹⁹⁶ If the child is born out of wedlock, it can obtain the father's family name on the grounds of a special law issued in 1998.¹⁹⁷ This law also provides for additional rights vis-à-vis the biological father, such as maintenance. The legislation deviates from the Maliki *fiqh* in the sense that the classical doctrine does

¹⁹⁴ Ruud Peters, 2006

¹⁹⁵ Ruud Peters, 2006

¹⁹⁶ Maaïke Voorhoeve, 2009

¹⁹⁷ Law 98-75 of 28 October 1998

not provide for a possibility to grant the father's family name to an illegitimate child. However, the classical doctrine is characterised by a number of leeways in order to establish legal paternity between a child born out of wedlock and its biological father. For example, in the absence of a requirement to register marriages, the parents can simply declare that they were married at the time. Also, the Maliki doctrine knows the notion of the 'sleeping embryo', according to which women can carry a baby as long as 4 years. As a result, if a woman gives birth to a child, it can obtain a legal bond with the woman's ex-husband, if she has been married within the past 4 years.¹⁹⁸ These leeways exist to a certain extent in Tunisian legislation as well, as the woman can be considered pregnant during one year (instead of 4, Article 35 PSC), and as an unregistered marriage does establish paternity (Article 22 PSC).

In order to effect a legal bond between the child and someone different from his legal parents is adoption, legalised by a separate law in 1958.¹⁹⁹ This law provides for full adoption, meaning that the child loses its legal bond with its biological parents. An alternative to adoption is *kafala*, regulated by the same law, limiting the relation between the child and its caretakers to the caretaker's obligation of custody and maintenance.²⁰⁰ A second alternative, in the absence of caretakers, are the official institutions that take children under their care and

¹⁹⁸ Ruud Peters, 2006

¹⁹⁹ Law 58-27 of 4 March 1958

²⁰⁰ Article 3-7 of law 58-27 of 4 March 1958

exercise the same rights and duties as the legal parents.²⁰¹
The legalisation of full adoption involves a deviation of the Maliki doctrine.²⁰²

Inheritance

With regard to inheritance, Tunisian law follows the rules for the division of the estate of the Maliki *fiqh*, except for one reform, namely *radd*. The Tunisian rules are as follows. When a person dies, the Cantonal court draws up the list of heirs. At least two third of this list follows the law, as the deceased cannot bequeath more than one third of his estate. The list starts off with the Quranic heirs (male heirs: father, paternal grandfather, uterine brother, and husband; female heirs: mother, grandmother, daughter, agnatic granddaughter, germane sister, consanguine sister, uterine sister and wife, Article 91 PSC), attributing each of them their Quranic parts (Articles 92-113 PSC). What is left over, is divided over the agnatic heirs (the male relatives, namely the father, the ascendant, the descendant by the son, the germane or consanguine brother, the descendant of the latter, the germane or consanguine uncle, the germane cousin, and finally the Treasury, Article 114 PSC), in which case the closest degree takes precedence over the others. This is a mere codification of the Maliki *fiqh*.²⁰³

²⁰¹ Articles 1 and 2, law 58-27 of 4 March 1958

²⁰² Ruud Peters, 2006

²⁰³ Ruud Peters, 2006

In 1959, the concept of *radd* was introduced, providing that in the absence of agnatic relatives, and if the entire estate has not been completely divided among the Quranic heirs, the remainder of the estate is divided among the Quranic heirs in accordance with their relative quota. Daughters and paternal granddaughters also benefit from this repartition if there are agnatic heirs from the degree of paternal brothers and uncles as well as their descendants, meaning that if the deceased did not have a father, a male ascendant, a descendant by the son, etc., the daughter takes the remainder of the estate.²⁰⁴ This deviates from the Maliki *fiqh*, as the latter provides that the state takes the remainder.²⁰⁵ Another deviation from the classical doctrine is that the Tunisian legislation does not prohibit that non-Muslims are among the intestate heirs of Muslims²⁰⁶; Article 88 PSC that provides for impediments to succession, only prohibits the person who murdered the deceased to inherit from him or her.

Recapitulation

The overview of the legislation demonstrates that in some significant domains (polygamy, marriage guardianship, custody, etc.) the PSC seemingly deviates from 'the sharia' which made some people conclude that '[t]he whole tenor of the [PSC] ran counter to traditional Muslim jurisprudence'.²⁰⁷ In this sense the code seemingly

²⁰⁴ Article 143 bis PSC, introduced by law 59-77 of 19 June 1959

²⁰⁵ Ruud Peters, 2006

²⁰⁶ Ruud Peters, 2006

²⁰⁷ C.H. Moore, 1965, p. 51

constituted a break with the past. However, the break with the past is not limited to the contents of the PSC; the mere act of codification already constituted a break with the past in itself: previously, judges presumably applied *fiqh* works, while from 1956 onwards, they were to apply a code in the field of personal status. Another important change concerns the fact that the PSC applies to *all* Tunisians regardless of their religion, unlike personal status law in many other countries in the region where personal status law follows a confessional system.²⁰⁸ Moreover, the role of the *fiqh* in the field of Tunisian personal status law declined even more since the law is applied at national courts instead of sharia courts by judges instead of *qadis*, who received their training at the Law faculty where hardly any attention is paid to the teachings of Islamic law. And last but not least, the break with the 'sharia' in the field of personal status law was intensified by the fact that the legislation does not provide that sharia should be applied as a source of law in case of lacunae: neither the constitution, nor the Civil Code that provides for interpretation rules, nor the PSC mentions the term 'sharia' (see below).

The question arises why the code could deviate from 'the sharia'? A first possible reason lies in the political declarations that accompanied the promulgation of the PSC, and in which the PSC was presented as the fruit of *ijtihad* (interpretation of the sources of Islam, the Quran and hadiths, see below). Another possible reason is that in

²⁰⁸ Except in Senegal, where 90 % of the population is Muslim.

1956, the PSC was simply *imposed* from above: it did not follow a democratic process (parliament was not yet installed at the time), nor did it develop in a dialectical relationship with judicial practice (that is: the practices of the *qadis*). In fact, there has been as little participation from society as possible. The code was drafted by a commission of only three jurists²⁰⁹, and it was composed in such a short period of time that there was simply no possibility for interference from the people. Directly after independence, Bourguiba appointed the commission, who composed the code in less than two months.²¹⁰ In this way, Bourguiba took advantage of the revolutionary atmosphere in which everything seemed possible. Also, by presenting the PSC for signature to the *Bey* in the summer (August 1956), Bourguiba prevented interference as most important religious figures do not work in this time of year. Moreover, as Bourguiba had already appointed a 'liberal' *shaykh* as the head of Zaituna Mosque (Tahar Ben Achour, a relative of Yadh and Sana Ben Achour) in April, the PSC was not criticised by the most important religious figure of the country.²¹¹ Another important means to prevent critique was to introduce some important reforms gradually, in the PSC or separate

²⁰⁹ The commission consisted of Mestiri (a lawyer who studied in Paris), Ben Slama (a judge, educated at the 'secular' Sadiqi college) and Al-Annabi (a judge, and alumnus from Zaituna). As Mestiri was appointed Minister of Justice, he left the drafting to Ben Slama and Al-Annabi.

²¹⁰ Finished on 15 July 1956, the code was signed by the *Bey* on 13 August 1956, and promulgated on 28 December 1956.

²¹¹ It has been argued that this person was appointed in order to get the PSC through (C.H. Moore, 1965, p. 51)

laws, which was the case of the criminalisation of polygamy²¹², and the legalisation of full adoption.²¹³ Thus, the PSC passed rather silently and no concessions were made to the public, delimiting the democratic character of the law to an absolute minimum and enabling a clean break with the law as it was lived by people. It should be noted here that this procedure challenges the commonly shared idea that democracy in the region would automatically lead to the enhancement of women's rights; indeed, the introduction of the Swiss civil code in Turkey passed in a similar authoritarian way. Nonetheless, later amendments and additions to the PSC had more democratic justification and developed more dialectically with legal practice. Since 1959, most legislation *does* pass parliament, and some proposals of law are treated on the initiative of international and national human and women's rights organisations who are aware of practices that should be affirmed or suppressed by legislation (the Tunisian women's organisations ATFD and AFTURD²¹⁴ mainly consist of lawyers and academics). For example, the 1998 law attributing the father's family name to children born out of wedlock was issued on demand of the ATFD, who instigated their action as they were aware

²¹² The prohibition of polygamy was extended during the first years of the PSC to informal polygamous marriages by laws 58-70 of 4 July 1958 and 64-1 of 21 April 1964.

²¹³ Law no 1958-27, 4 March 1958, amended by law no 58-69, 19 June 1959. This law was drafted between 5 o'clock in the afternoon and 9 o'clock in the morning of the next day and supposedly instigated by the fact that Bourguiba had a child with his French wife before marriage.

²¹⁴ *Association des femmes tunisiennes pour la recherche et le développement*

that most judges refuse to effect a bond of paternity between the father and the child born out of wedlock. Of course, the democratic character of personal status legislation should not be exaggerated: until 14 January 2011, the Tunisian parliament consisted for the large majority of the single political party, the *Rassemblement Constitutionnel Démocratique* (RCD, the former ((Neo-))Dustour) and questions that are not deemed to fall within official 'state feminism' (see below) are simply not addressed, such as equal inheritance rights.

Section three

Lacunae and additional sources of law

Another explanation in Tunisian doctrine for the judges' application of 'sharia' and 'custom', is that the PSC contains many lacunae, and that the legislature did not make clear what judges should do to fill these.²¹⁵ Indeed, the PSC does not contain a specific provision in this respect, indicating additional sources of law (as for example Article 400 of the Moroccan family code, which provides that in case of lacunae, judges should take recourse to the Maliki *fiqh*) or interpretation methods. However, the legislation does contain a few *indications* of what should be done in case of lacunae. Some indicate the constitution and international conventions, while others point at the 'sharia' and 'custom'.

²¹⁵ Kalthoum Méziou, 1992, p. 252

Constitution, fundamental rights and international conventions

Although the PSC does not refer to the Constitution in any way as an additional source of law, the Constitution (as in force during the practices observed for this study)²¹⁶ does act as an additional source of law that can be applied to interpret the code. This is not stated explicitly in the constitution itself, but follows from case-law:²¹⁷ a number of decisions of the Court of Cassation confirm that judges can apply the constitution as an additional source of law to interpret legislation.²¹⁸ Relevant provisions in the Constitution concern the equality principle and the freedom of religion (Articles 5 and 6).²¹⁹ However, according to Sana Ben Achour, Article 1 of the Constitution (Islam is the state religion) can inspire judges to apply sharia as an additional source of law.²²⁰ It should be noted that judges might even check the constitutionality of laws (Tunisia does not have a Constitutional Court). However, the constitutional check of legislation does not occur very often in Tunisia, which can be explained by the fact that the Constitution does not explicitly provide for this possibility (it does provide that

²¹⁶ This constitution is currently suspended.

²¹⁷ Rfaaa Ben Achour, 1983

²¹⁸ Rfaaa Ben Achour, 1983

²¹⁹ Law 59-57, 1 June 1959

²²⁰ Sana Ben Achour, 2005-2006

before their promulgation, the constitutionality of laws is checked by a Constitutional Council).²²¹

International conventions can also function as an additional source of law to interpret the PSC. Article 32 of the constitution declares that all international conventions ratified by Tunisia override national law as soon as they have been published.²²² This does not only mean that courts can employ conventions as an additional source of law to interpret Tunisian legislation, but also that litigants can base their claim on international conventions, and that judges can check if existing legislation is in conformity with conventions. Tunisia ratified the ICCPR, IVESCR (1969), CEDAW (1985), the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1968), CRC (1992) and CAT (1988). Tunisia did not make any reservations to the ICCPR, the ICESCR, and CAT. It did make reservations to CEDAW and the CRC, although many have been nullified: all except one reservation to the CRC were revoked in 2002 and 2008, while the interim government announced on 19 August 2011 to revoke all reservations to CEDAW except the general one.

²²¹ Installed by law 96-26 of 1 April 1996. On constitutional councils in the Maghreb, see Omar Bendourou, 1995.

²²² Since 2002, Article 32 distinguishes treaties that entry into force by publication, and which should be ratified by law (by the president after approval by the Chamber of Deputies). The Court of Appeal Tunis decided that for internal force, publication of the law of ratification is sufficient (Court of Appeal Tunis 8 March 1995, in: *Revue de jurisprudence et de législation*, 1996, no. 7, p. 121, in: Narjes Djedidi, 2002, p. 164.

When ratifying CEDAW²²³, Tunisia underlined in a general declaration that no law will be adopted that violates Article 1 of the Tunisian constitution. As Article 1 declares that Islam is the State religion, the reservation might mean that CEDAW only applies as long as it is not incompatible with 'Islam'.²²⁴ This provision might make the convention into an empty shell in the sense that CEDAW might be incompatible with some interpretations of 'Islam' or the 'sharia'. Tunisia also made reservations to some specific articles of the CEDAW, namely Articles 9, 15 and 16. With regard to Article 9.2, which protects equal rights for men and women to pass on their nationality to their children²²⁵, the reservation states that this paragraph 'must not conflict with the provisions of chapter VI of the Tunisian Nationality Code'. Previously, the Nationality Code did discriminate against mothers, in the sense that only the father passed on his nationality to the child. However, since the Code was changed in 1993, it allows women to pass their Tunisian nationality on to their children. Thus, it seems as if the reservation no longer has any consequences, except that the 1993 law requires the husband's consent.²²⁶ With regard to Article 15 of CEDAW, which protects the freedom of movement and

²²³ Signature 24 July 1980, Ratification 20 September 1985.

²²⁴ Saida Chaouachi, 1997, p. 198

²²⁵ Article 9.2 provides that 'States Parties shall grant women equal rights with men with respect to the nationality of their children.'

²²⁶ Law of 23 July 1993, Article 12 of the Nationality Code

the freedom to choose one's residence,²²⁷ the reservation stipulates that 'particularly that part relating to the right of women to choose their residence and domicile, must not be interpreted in a manner which conflicts with the provisions of the Personal Status Code on this subject, as set forth in chapters 23 and 61 of the Code.' Article 61 PSC provides that the person who has custody over the child shall lose custody if he or she moves to a place so far away from the guardian that the latter can no longer execute his rights and duties; in this way, the caretaker of the child, mainly women, is not entirely free to choose residence. Article 23 PSC provided at the time (1985) that the wife should obedience her husband, which could be explained in the sense that the husband could delimit her freedom of movement. However, as this was abolished in 1993, the reservation with regard to this Article seems of no significance nowadays. With regard to Article 16 paragraphs (c), (d) and (f)²²⁸, the Tunisian government declared that it does not '[consider] itself not bound' by these provisions. This article protests equal rights and

²²⁷ Article 15 provides that 'States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.'

²²⁸ Article 16 (c) provides for 'The same rights and responsibilities during marriage and at its dissolution,' Article 16 (d) protects 'The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount,' and Article 16 (f) ensures 'The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.'

duties in marriage and divorce (violated by Article 23 PSC, that provided until 1993 that the wife should obedience her husband, and that continues to provide that the husband is the head of the family), equal rights with regard to children (violated by the rule that the woman who remarries can lose custody, while the man does not)²²⁹ and the same rights with regard to custody and guardianship (violated as the PSC attributes guardianship to the father, although the mother who has custody has certain guardianship rights as well and can obtain guardianship). With regard to paragraphs (g) and (h) of Article 16²³⁰, protecting equal rights with regard to the family name, a profession and property, Tunisia declared that these paragraphs 'must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance'. Equal rights with regard to the family name are violated by the provision that the child obtains the father's family name unless it is born out of wedlock (in which case it can be attributed the father's family name through the application of the 1998 law), while equal rights with regard to professions are protected by the Tunisian legislation. Equality in property contrasts with the Tunisian inheritance law, where a

²²⁹ Article 28 PSC as modified by law 81-7 of 18 February 1981

²³⁰ Article 16 (g) protects 'The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation', and Article 16 (h) provides for 'The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.'

husband inherits twice as much from his wife than the other way around (except in cases of repartition ((*radd*))).²³¹ It should be noted that after the data collection for this study, on 19 August 2011, the interim government announced that it revoked all reservations to CEDAW except the general one, which provides that CEDAW is only in force for as far as it is not in violation of the Tunisian constitution. As the Tunisian Constitution is yet to be drafted, the consequences of this reservation are insecure.

With regard to the CRC²³², it should be noted that *all* declarations and *all* reservations except one have been withdrawn in 2002 and 2008.²³³ In 2002, Tunisia withdrew the declaration that 'its undertaking to implement the provisions of this Convention shall be limited by the means at its disposal', and in 2008 it withdrew the declaration that 'The Government of the Republic of Tunisia declares that it shall not, in the implementation of this Convention, adopt any legislative or statutory decision that conflicts with the Tunisian Constitution.'

²³¹ The Tunisian Government also declared that it shall not be bound by the provisions of paragraph 1 of Article 29 CEDAW which specifies that any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall be referred to the International Court of Justice at the request of any one of those parties. The Tunisian Government considers that such disputes should be submitted for arbitration or consideration by the International Court of Justice only with the consent of all parties to the dispute.

²³² Signature : 26 February 1990, ratification : 30 January 1992.

²³³ 1 March 2002 and 23 September 2008

Especially the latter is very important, as withdrawing this declaration involves that Islam (via Article 1 of the Tunisian constitution) no longer takes precedence over the CRC. In 2002, Tunisia has withdrawn the reservation with regard to article 40, paragraph 2 (b) (v) CRC. This article protects that children who are suspected to have infringed the penal law, 'to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law,' which is protected by the Child Protection Law of 1995. In 2008, Tunisia withdrew the reservations with regard to Articles 2 and 7 CRC. The reservation with regard to Article 2, that protects the equal treatment of children, provided that this article 'may not impede implementation of the provisions of its national legislation concerning personal status, particularly in relation to marriage and inheritance rights.' The reservation referred to the discrimination against illegitimate children. The reservation with regard to Article 7, that provides for the right to be registered immediately after birth and to have a name, a nationality and as far as possible, the right to know and be cared for by his or her parents, provided that this article 'cannot be interpreted as prohibiting implementation of the provisions of national legislation relating to nationality and, in particular, to cases in which it is forfeited.' This article seemingly referred to the impossibility of a mother to pass on nationality to her child, meaning that children born out of wedlock remain without a nationality. The only reservation that remained in force is the one providing that 'The Government of the Republic of Tunisia declares that the Preamble to and the provisions

of the Convention, in particular article 6, shall not be interpreted in such a way as to impede the application of Tunisian legislation concerning voluntary termination of pregnancy,' which should be read in relation with the law legalising abortion.²³⁴

According to the Tunisian doctrine, judges can also take recourse to the Civil Code to fill the lacunae in the PSC. This code provides for interpretation methods in its Articles 513-563 CC. These articles provide for very specified interpretation methods, such as *lex posterior derogat legi anteriori*, *lex specialis derogat legi generalis*, etc.

'Sharia' and 'custom'

Although the PSC does not contain a general Article referring to additional sources of law, it does make reference to 'sharia' and 'custom' in some specific provisions. The most imminent example is Article 23 PSC, which describes the rights and duties of the spouses within marriage. This Article provides that the spouses should fulfil their marital duties in accordance with custom (*al-'urf wa-l-'ada*). Moreover, Article 5 PSC provides that a marriage should not be concluded in violation of the *mawani' shar'iyya*, which, as we have seen above, can be translated as 'sharia impediments' or 'legal impediments'.

²³⁴ 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

Besides the PSC, the former Constitution (that was in force during the practices observed for this study) seems to indicate that the 'sharia' might be a source of law. Although the constitution does not provide that the principles of the sharia are the principal source of law (such as Article 2 of the Egyptian constitution), and although indeed, it does not contain any reference to 'the sharia' whatsoever, the preamble states the wish to remain truthful to Islam, Article 1 provides that Islam is the state religion, and Article 38 prescribes that the President is a Muslim. This can indicate that the sharia is a source of law, because indeed, if the Republic wishes to remain truthful to Islam, it is only logical that at least in cases of lacunae, Islamic law is applied.

With regard to the Civil Code, it is important to note that this code does not mention 'sharia' as a source of interpretation. Moreover, this code provides that 'custom' cannot prevail over formal legislation (Article 543 CC). At the same time however it should be noted that Article 532 provides that 'the law cannot be attributed another sense than the one resulting from its expression, grammatical order, usual significance and the intention of the legislature'. As the intention of the legislature is a very vague term, it might leave room to judges to apply sharia: indeed, if it is the intention of the legislature to act in accordance with the sharia (see below), then the use of the sharia as an additional source of law seems to be in accordance with Article 532 CC.

Section four Ambivalence

According to Sana Ben Achour, the ambivalent attitude of the government causes that judges are insecure about the question of how they should apply the law and what sources they should employ. The ambivalence concerns two issues: the role of sharia in the Tunisian legal order (can the sharia function as an additional source of law?) and the state's intention to enhance women's rights (should all laws be interpreted in accordance with this intention?). It is important to note that clarity on one issue does not necessarily mean that the other problem is solved as well: if the state is clear on the fact that the sharia is the fundamental source of law and no law can be interpreted in contradiction with this source, it cannot be concluded that as a consequence, the state's position vis-à-vis women's rights is clear as well: it has been argued that indeed, sharia is the source of women's rights, while others might argue that 'sharia feminism' is a *contradictio in terminis*.

Sharia

In the political declarations concerning the PSC, the government repeatedly denied the break with the past.²³⁵ On the day of the promulgation of the PSC, the Minister of Justice Ahmed Mestiri affirmed that the code met the approval of the religious jurists as it is based on the 'pure sources'. Also, Mestiri stressed that the code was based on the Code Jaït from 1947, a compilation of Hanafi and

²³⁵ Sana Ben Achour, 2007a, Nawel Gafsia, 2004, Norma Salem, 1984

Maliki law that never obtained force of law.²³⁶ After the promulgation of the PSC, the Secretary of State wrote in a *communiqué* that 'the code was inspired by Islamic law and that the new provisions were issued without going against Islamic precepts.'²³⁷ The promulgation was followed by a campaign on radio and television where Bourguiba underlined that the law did not constitute a rupture with Islam.²³⁸ Specifically with regard to the abolition of polygamy, the Ministry of justice stressed that this was legitimised by some '*ulama* and Quranic exegesis (*tafsir*).²³⁹ A decade after the promulgation of the PSC, Bourguiba stated that all developments were accomplished 'in accordance with the teachings of the Holy Book'.²⁴⁰ In the same period, Minister of Justice

²³⁶ *Communiqué* of Ahmed Mestiri on 13 August 1956, published in *L'Action*, 3 September 1956, no. 65, p. 1. In: Sana Ben Achour, 2005-2006, p. 58.

²³⁷ Sassi Ben Halima, 2005, p. 109. This letter is published in the First edition of the PSC

²³⁸ Sassi Ben Halima, 2005, p. 109.

²³⁹ Note of the Ministry of justice, 3 August 1956: 'We followed the advice of some '*ulama* with regard to polygamy, as well as what some exegeses that comment the Saint Verse that concerns this topic admit : these concluded from it that polygamy is prohibited, both in the light of the sheer impossibility to realise equity between the female spouses in practice [...], and [in the light of] the harm in our days that are caused by this practice, namely the jealousy that has pushed a woman whose husband married a second time to kill her rival.' Cited in Ali el Gharbi 1999-2000, p. 35 (in : Stéphane Papi, 2009, p. 217). A similar argument had been expressed by the Muslim reformer Muhammad 'Abduh (in: Maurice Borrman, *Statut personnel et famille au Maghreb de 1940 à nos jours*, p. 55-56).

²⁴⁰ Speech 1966: 'Discours prononcé à l'occasion du mouled', cited in: Mark A. Tessler, 1978, p. 147

Mestiri pointed out that 'the Tunisian legislator had been directly inspired by Islamic precepts as enounced by the Quran, the hadiths and the *fiqh*, following a new conception of *ijtihad*'.²⁴¹ Under Ben Ali, the continuity between the legal and the 'sharia' was again underlined. The National Pact (*al-mithaq al-watani*, 1989) provided that 'the reforms that intend to free and emancipate women are in conformity with very old aspirations in our country based on a firm rule of *ijtihad* and on the goals of sharia and in this sense, they form the proof for the vitality of Islam and its openness to the demands of time and evolution.'²⁴² This was repeated in Ben Ali's speech on the national woman's day and 50th anniversary of the PSC (13 August 2006) where he stressed that the PSC had been the result of *ijtihad*.²⁴³ According to Saida Chaouachi, the increased religious reference in political discourses during Ben Ali's reign is related to the fact that the state does not have the same legitimacy as it had right after independence.²⁴⁴ However this may be, Sana Ben Achour argues that the political statements that present the PSC as a fruit of *ijtihad* (interpretation of the sources of the sharia) are problematic for judges. She argues that if the government declares the 'sharia' as a source of the law, it is only logical that judges perceive that they should interpret the legislation in accordance with (their

²⁴¹ Ahmed Mestiri in *Révolution Africaine*, no. 157, 29 January 1966, cited in : Sana Ben Achour 2005-2006, pp. 58, 59

²⁴² Sana Ben Achour, 2001

²⁴³ Speech of Ben Ali on 12 August 2006, in Vincent Geisser and Eric Gobe, 2007, annexe 1.

²⁴⁴ Saida Chaouachi, 1997, p. 207

perception of) this normative order. If on the other hand the government would be clear about the 'secular' character of the law, denying every relationship with the 'sharia', judges would be ascertained that the sharia has no role in the Tunisian normative order whatsoever.

The ambivalence with regard to the role of the sharia in the Tunisian legal system is not only due to the declarations on the relationship between the PSC and the sharia, but also by a number of legislative measures that have been issued over the years which reflect an ambivalence with regard to the government's intentions with the role of sharia in the political and legal system. While the legislature issued a range of provisions delimiting the role of religion in the political and public sphere, other measures seem to enhance the intermingling between the state and religion. Examples of legislation that delimited the role of religion were mostly issued right after independence, when Bourguiba abolished the *habus* (or *waqf*, religious endowment)²⁴⁵, included Zaituna (a mosque and university where the *'ulama* and thus, the future imams, were trained) as the faculty of theology in the 'secular' Sadiqi College²⁴⁶, nationalised the *kuttab*

²⁴⁵ Decree of 18 July 1957 abolishing the abolition of the regime of *habus*, modified and completed by laws 57-53 of 2 November 1957, 57-83 of 31 December 1957, 58-55 of 12 May 1958, 60-25 of 30 November 1960, and 92-44 of 4 May 1992. The law prohibited the establishment of a *habus* and installed a commission which abolished existing *habus*. See also Zakia Daoud, 1994, p. 28, who argues that the *waqf* served to exclude women from the inheritance.

²⁴⁶ 1961

(Quran schools),²⁴⁷ and provided that Quran books could only be printed or imported through an authorization of the Prime Minister.²⁴⁸ Under Ben Ali, a law was introduced (the Mosque Law) that increased State control on mosques²⁴⁹ and in 2003, an anti-terrorist law was issued that has formed the basis for a range of sentences against alleged 'extremists' (and other political opponents).²⁵⁰ The most controversial example however is the *circulaire* of 1981 prohibits wearing 'sectarian outfits', the *circulaire* from 1986 that prohibits 'extremist clothing' for people working in educational institutions,²⁵¹ and the one from 2001 that prohibits 'extremist clothing' to students.²⁵²

²⁴⁷ According to the law with regard to Quran schools (1980) the Prime minister appoints the head of each Quran school and access to these schools is limited to the head of the school, the children and their parents. The law also prescribes the maximum amount of hours each child can attend a Quran school, as well as the topics that are taught (*Arrêtée* of 6 September 1980 reorganising the Quranic schools).

²⁴⁸ After consultation of the *Commission des livres coraniques*: Decree 88-1962 of 6 December 1988 fixing the composition and the functioning of the Quranic books commission, and law 88-97 of 18 August 1988 with regard to Quranic books.

²⁴⁹ Laying down that the State subsidises mosques, that it pays the salaries of the imams, and that only personnel appointed by the government may lead activities within the mosques and that mosques are closed outside the hours of prayer and official ceremonies.

²⁵⁰ For a detailed analysis of this law, see Jean-Philippe Bras, 2005-2006

²⁵¹ *Circulaire* of the Prime Minister, no 108, 1981, prohibiting 'sectarian outfits' (*l'habit sectaire*), *Circulaire* of the Minister of education, no 102, 1986, prohibiting 'extremist clothing' to people working in educational institutions.

²⁵² *Circulaire* 35, 2001 prohibits 'extremist clothing' to students.

Whereas this range of legislation might justify to denote Tunisia as a 'secular State', a number of other measures seems to contradict this characterisation. For example, the instalment of a Ministry of Religious Affairs, a State Mufti and a High Islamic Council (all during Bourguiba) does not seem to fit in a 'secular' state. Also, the National Pact (*al-mithaq al-watani*) that inaugurated Ben Ali's reign, seems to contradict the 'secular' character of the Tunisian Republic, as it presented Islam as the axis of Tunisian identity. Moreover, the State introduced a religious radio channel (radio Zaitouna), a religious television channel (Hannibal TV), as well as an Islamic bank (Zaitouna) (all this happened during Ben Ali's reign).²⁵³ As a consequence, it is unclear to what extent Tunisia is a 'secular' Republic. According to Ben Achour, this causes insecurity with judges, because, she argues, if Tunisia would be a straightforward 'secular' Republic, judges would understand that it is not done to apply the sharia in order to interpret 'secular' legislation.

The ambivalence with regard to the role of the sharia in the political and legal system is connected to the government's search for legitimacy. It has been argued that in those instances where the division between religion and state is blurred, this is the result of an *instrumentalisation of Islam* to gain legitimacy. But there are other reasons as well. First, Gobe and Geisser argue that measures such as religious television channels aim to

²⁵³ Radio Zaitouna and Zaitouna bank were owned by Sakhr Materi, Ben Ali's son in law, who fled in his private jet to a Gulf State after 14 January 2011.

introduce an '*islam du juste milieu*', that counters 'extreme' forms of Islam.²⁵⁴ And second, measures such as the instalment of a ministry of religious affairs and to allow Ennahda a position in the political sphere serves to bring religious activities under direct state control.'²⁵⁵ In the past years, this ambivalence was symbolised by the state's position with regard to the *hijab*.²⁵⁶ Prohibited since 1981 as a 'habit sectaire', Ben Ali's regime fiercely repressed all Islamic dress in the years 1990-1992.²⁵⁷ But since the years 2000, Tunisia has been witnessing a rapid increase in the visibility of the *hijab*:²⁵⁸ even university professors wear the *hijab*, as well as one of the judges in the CFI Tunis. But it goes further: in Bab el-Khadra in Tunis, a mosque of the forbidden *Tablighi Jama'at* (in accordance with the idea that the government promotes an *islam du juste milieu*, all sects are forbidden as they would be 'Islamists') is situated, visited by many people from the neighbourhood. The men have beards and wear the *jilab* (men), women wear the *hijab*, a *niqab*, and some even cover their eyes. The neighbourhood is absolutely packed with police and of course, the police know where this mosque is, as well as the names of the people who visit it. These are signs that the government does not maintain

²⁵⁴ Vincent Geiser and Eric Gobe, 2007, p. 350 : '*l'islam du juste milieu*'.

²⁵⁵ C.H. Moore, 1965, p. 50

²⁵⁶ See for example M.M. Charrad, 1998

²⁵⁷ Eric Gobe and Vincent Geisser, 2007

²⁵⁸ Eric Gobe and Vincent Geisser, 2007

the law.²⁵⁹ At the same time however, the government repeatedly showed its *hijabophobia* in official discourses.

Feminism

Although Sana Ben Achour only mentions the ambivalence on the role of sharia as a source of insecurity for judges, the same might be said of the political position with regard to the enhancements of women's rights. On the one hand, the Tunisian legislature issued a number of laws to accentuate its adherence to women's rights, which might make judges confident that in case of lacunae, the intention of the legislature is to enhance women's rights. But at the same time, the government repeatedly refrained from taking the enhancement of women's rights a step further, which, according to Sana Ben Achour, is again an issue of political legitimacy: the government wants to present itself as 'feminist', but too much feminism might harm political legitimacy.²⁶⁰ As a result, the government strongly defends the so-called 'state feminism', leading to the severe oppression of every faction who wishes to delimit or expand the existing feminism.

Although the PSC is probably the most widely known result of Tunisia's 'feminist' politics, there is a number of other laws that brought about the enhancement of

²⁵⁹ According to Gobe and Geisser, the government did not cease to maintain the law, but the Islamic dress persists *despite* repression.

²⁶⁰ See also Emma C. Murphy, 2003, and Aziza Medimegh Dargouth, 2000

women's rights.²⁶¹ For example, the 1957 election code granted women active voting rights (passive voting rights followed in 1969)²⁶², a change in inheritance law was issued in 1959 to the benefit of women,²⁶³ and in 1966 a Labour Code was issued that guaranteed women 'equality in chances and treatment in matters of work and profession'.²⁶⁴ A programme of family planning was introduced, legalising the import of condoms²⁶⁵, and abortion of the fifth child with the husband's consent (1965)²⁶⁶; in 1973 offices of family planning were installed and all abortion was completely legalised up to three months.²⁶⁷ In 1968, Tunisia ratified CEDAW (with reservations), after which the provision that adultery was only punishable for women, was abrogated (1968).²⁶⁸ In 1980 a decree was issued underlining that everyone has a right to education, without distinction between the sexes.²⁶⁹ After Ben Ali came to power, the UN Convention

²⁶¹ See Lucie Pruvost, 1968

²⁶² On the consequence with regard to women's political participation, see Susan Waltz, 2002.

²⁶³ Law no 59-77 from 19 June 1959 provided that the girl can inherit via her predeceased father, and a widow can inherit the full inheritance in the absence of children (*radd*). See Jules Roussier, 1960.

²⁶⁴ Alia Gana 2007. Since July 1993, Article 234 of the Tunisian Penal Code sanctions violation of the non-discrimination principle in labour relations; Saida Chaouachi, 1997, p. 199. On the participation of women on the Tunisian labour market, see Salma Zouari-Bouattour, 2000.

²⁶⁵ Law 61-7 of 9 January 1961

²⁶⁶ Law 65-24 of 1 July 1965

²⁶⁷ Article 214 Penal Code. Decree law 73-2 of 26 September 1973.

²⁶⁸ Law 68-1, 8 March 1968

²⁶⁹ Decree 80-954 of 19 July 1980, in: Saida Chaouachi, 1997, p. 197

for the Rights of the Child was ratified (1992) and a change in the labour code in the same year underlining the principle of non-discrimination between men and women.²⁷⁰ A research centre concerning women (CREDIF) was set up,²⁷¹ as well as a commission to evaluate the PSC, and some of its proposals were inserted in the law in 1993, such as the abolition of the wife's obligation to obedience (Article 23 PSC).²⁷² A secretary of state was installed concerning women and the family, later transformed into a ministry,²⁷³ a fund was created to secure payment of maintenance after divorce,²⁷⁴ and the provision that a *crime passionnel* received significantly less punishment than other murder cases (Article 207 CP old), was abolished.²⁷⁵ Likewise, a provision was issued that provided that the Tunisian mother married to a foreigner could pass the Tunisian nationality to her child, albeit with her husband's consent.²⁷⁶ In 1995, the Child Protection Code was issued,²⁷⁷ followed by a law

²⁷⁰ Alia Gana, 2007

²⁷¹ *Centre de recherche, de documentation et d'information sur les femmes*, founded in 1991

²⁷² Law 93-74 of 12 July 1993

²⁷³ *Secrétariat d'Etat à la femme et à la famille* (August 1992), transformed into the *Ministère des affaires de la femme, de la famille, des enfants et des personnes âgées* (August 1993). In 1997, a *Secrétariat de l'état auprès du premier ministre chargé de la femme et de la famille* was installed as well (decree of 7 December 1997).

²⁷⁴ Law no 1993-0065, 5 July 1993

²⁷⁵ Law no 93-72

²⁷⁶ Law of 23 July 1993, Article 12 of the Nationality Code. See Mohamed Charfi, 1975, on the situation before 1993 and Mounira M. Charrad, 2000b on the situation after.

²⁷⁷ Law no 95-92, 9 November 1995

regulating the optional community of goods within marriage in 1998,²⁷⁸ and a law concerning children born outside marriage in the same year²⁷⁹. The provision that women need their husband's consent to sign a labour contract was abrogated in 2000.²⁸⁰ In 2004, sexual harassment was made punishable,²⁸¹ in 2007 the minimum marriage age was set on 18 for both boys and girls,²⁸² and since 2008, the mother who has custody over her children can stay in the marital home after divorce.²⁸³

For some factions in society the *féminisme d'état* went too far or not far enough: it met with resistance.²⁸⁴ In the 1970s, political and politicised organisations started to critique Bourguiba's rule, and some of the critique concerned personal status law and related issues. Sana Ben Achour concludes that a 'political feminism' emerged, that 'confronted the political powers with an autonomous view on feminism.'²⁸⁵ For example, the *Mouvement de Tendence Islamiste* (later Ennahda) called for reform of the PSC (1977)²⁸⁶ and eight years later, called for a referendum on the PSC and the reintroduction of polygamy, arguing that the PSC has led to huge problems

²⁷⁸ Article 11 CSP and law no 98-91 of 9 November 1998

²⁷⁹ Law no 98-75, 28 October 1998, amended by law no 2003-51, 7 July 2003

²⁸⁰ Article 831 COC, abrogated by law no 2000-17 of 7 February 2000

²⁸¹ Law no 20 2004-74, 2 August 2004

²⁸² Law no 2007-33, 14 May 2007

²⁸³ Law no 2008-20, 4 March 2008

²⁸⁴ Zakia Daoud, 1993, p. 103.

²⁸⁵ Sana Ben Achour, 2001

²⁸⁶ Zakia Daoud, 1994, p. 30

within the families and has caused that divorce rates augmented from 4.000 to 6.000 in to 12.000 per year.²⁸⁷ In 1988, after Ben Ali came to power, some actors called in a petition for a greater presence of Islam in legislation.²⁸⁸ Other examples of organised contestations of state feminism are formed by the *Ligue Tunisienne des Droits de l'Homme* (LTDH)²⁸⁹ and the women's organisation *Femmes Démocrates*.²⁹⁰ These factions formulated their critique on government policies in terms of human and women's rights. Also, some *ad hoc* and more structural women's and feminist think-tanks emerged, such as the *Club d'Etude de la condition de la femme du club culturel Tahar al Haddad* (1978-1984), the *Festival de Tabarka* (summer 1979), la *commission syndicale femmes* in the syndicate UGTT (1981), the women's rights commission within the LTDH (1985)²⁹¹, and *Collectif Maghreb Égalité* (1995).²⁹² ATFD called for the abolition of the reservations to CEDAW and

²⁸⁷ Zakia Daoud, 1993, p. 93

²⁸⁸ *Essabah*, February 1988, in: Yadh Ben Achour, 1990a, p. 69

²⁸⁹ Founded in 1976, abolished between 1992 and 1993

²⁹⁰ Founded in 1982 and legalised in 1989 as the *Association Tunisienne des Femmes Démocrates* (ATFD)

²⁹¹ Sana Ben Achour, 2001. Other women's organisations that emerged in the same period were the Tunisian branch of the *Movement mondial des mères* (MMM) (1992), the *Chambre nationale des femmes chefs d'entreprise* (1990), the *Association de promotion des projets économiques pour la femme* (1990), and the women's organisations *Allysa* in Hammamet en Faouzia Kallel in Nabeul. See Saida Chaouachi, 1997, p. 206. See also Antimo L. Farro, 1997

²⁹² This group of women's organisations from Tunisia, Morocco and Algeria formulated a proposition for egalitarian personal status law 1995.

CRC²⁹³, pointed at the lacunae in the PSC²⁹⁴, argued for the introduction of an effective system of a community of goods within marriage²⁹⁵ and in October 1999 a special commission was installed to campaign for equal inheritance rights.²⁹⁶

Despite these contestations, the government cautiously protected its feminist politics, in the sense that it delimits carefully how far feminism should and can go.²⁹⁷ Although the *Femmes démocrates* (now *Association Tunisienne des Femmes Démocrates*, ATFD)²⁹⁸ and AFTURD (*Association des Femmes Tunisiennes pour la Recherche et la*

²⁹³ *Actes de la table ronde sur la décennie de la convention de Copenhague 1979-1989, 'Pour l'égalité entre les sexes et l'élimination de toutes les formes de discrimination à l'égard des femmes'*, Brochure, Commission Juridique, ATFD, 6 January 1990, and *Actes de la journée nationale sur les droits des petites filles*, ATFD, 9 November 1996, (Archives ATFD). In: Sana Ben Achour, 2001. Declarations and reservations to the CRC were withdrawn in 2002 and 2008, except the one with regard to abortion (as Tunisia legalised abortion). The reservations to CEDAW have as yet remained unchanged.

²⁹⁴ *Actes de la journée d'évaluation des réformes de 1993*, ATFD, August 1993, and declaration of 13 août 1993, (Archives ATFD). In: Sana Ben Achour, 2001.

²⁹⁵ *Actes de la table ronde sur les régimes des biens entre époux*, Tunis, 20 juin 1998 (Archives ATFD). In: Sana Ben Achour, 2001. The current provisions only provide for a community of real estate acquired during marriage.

²⁹⁶ Documents of the Inheritance commission (Archives ATFD). In: Sana Ben Achour, 2001. On female resistance against the state feminism, see also Sophie Ferchaoui, 2000.

²⁹⁷ See Sana Ben Achour, 2001. See also Sophie Bessis, 2004.

²⁹⁸ This happened in 1989, together with the legalisation of AFTURD (*Association des femmes tunisiennes pour la recherche et le développement*)

Documentation) were legalised, they were severely oppressed. The regimes of both Bourguiba and Ben Ali censored the press and academia and put forward State-approved notions of feminism in the press, on the television and on academic conferences. The official institutions dealing with gender equality (such as the Ministry for women and the family, the *Commission nationale femme et développement* (1991), the *Conseil national de la femme et de la famille* (1992)²⁹⁹, and the state's official women's rights organisation UNFT³⁰⁰) only address topics that are not considered taboo and promote the state's feminism. At conferences on women's rights organised by the official institutions, cautiously appointed state officials talk about the Tunisian situation within the limits set by the government. Similarly, on an international conference in Gammarth (suburb of Tunis) on personal status law in the Maghreb (June 2009) organised by UNFT and headed by Soukaina Bouraoui, Tunisian judges underlined the gender equality in Tunisian personal status law, clearly evading critical questions from the audience.³⁰¹ When the conference was divided into working groups, I addressed the possibility that in practice, the *access* to divorce is not equal for men and women. One of the Tunisian judges I knew from court crudely told me to remain quiet. The press only address those topics that are not politically declared 'taboo' and

²⁹⁹ Installed in 1993, 1991 and 1992 respectively.

³⁰⁰ *Union Nationale des Femmes Tunisiennes*. Founded in 1959, this organisation forms part of the RCD.

³⁰¹ Such as voiced by Hafidha Chékir, a jurist and women's rights activist present at the conference.

articles and television programmes that address the gaps in the *féminisme d'état* are censored. For example, an article in *Réalités* (2008) on divorce points out that equal divorce rights in the PSC did not cause increased divorce rates, thus clearly responding to rumours that over 50 % of Tunisian marriages ends in divorce, rumours that could cause critique on the PSC.³⁰² For example, the independent magazine *An-Nissa* ('Women', 1984), that constituted a forum for feminist critique³⁰³, disappeared after 8 issues on women's oppression, rape, *bayt al-ta'a* ('house of obedience')³⁰⁴, and domestic violence.³⁰⁵ Likewise, conferences that address the limits of the *féminisme d'état* are censored. Persons who want to address other topics are banned from these gatherings. For example, at the conference organised to celebrate 50 years of the personal status code (also held in 2009), al-Annabi, a lawyer and a son of one of the drafters of the PSC, was invited to give a lecture. When he declared that he intended to address the fact that over 50 % of Tunisian

³⁰² 'Les fausses idées sur le divorce', in : *Réalités*, no. 117, 17-23 July 2008. Similarly, an article published in *Revue de jurisprudence et de législation* underlines the positive points of the personal status law, clearly remaining within the limits of the state feminism (Jaouida Guiga, 1996).

³⁰³ Ilhem Marzouki, 1993, p. 258

³⁰⁴ The 'house of obedience' is a notion that is codified for example in Jordan (1976 Jordan Law of Personal Status), meaning that if the wife leaves the marital home, the husband can force her to come back. In Tunisia, the wife cannot be forced by the police, but according to jurisprudence, the husband can suspend his maintenance obligation. See Nébiha Mezghani, 1984.

³⁰⁵ Sana Ben Achour, 2001. The journal was issued by the *Club Tahar Haddad*

marriages ends in divorce, he was told that he was not welcome. At a seminar on the rights of illegitimate children organised by *association Amel*, the speakers and organisers pointed out to me that policemen had asked them what they were doing, what topics would be addressed and who would attend.³⁰⁶ At this conference I exchanged contact details with Yosra Frauss who had mentioned some court decisions in her talk that were interesting for my study. The first time I called her, she told me to call her back the next day, and after this brief phone call, she has never answered the phone to me again – possibly to prevent repercussions that any contact with a foreign researcher might have. This is understandable in the light of the fact that until 14 January 2011, the president of the ATFD, Sana Ben Achour, was constantly surveilled, as was another member of the same organisation, the lawyer Bouchra Bel Haj Hamida. Fear to give unwished information also seemed to influence government officials' discourses (I come back on this topic with regard to judges below). In an interview with the head of *Association Beity*, a home for pregnant single

³⁰⁶ Hôtel Belvédère, Tunis, 19 June 2009. The conference treated the possibility to use Article 11 PSC, that enables husband and wife to insert additional conditions into the marriage contract (such as a community of goods), in cases where a single mother gets married: in this case, it was argued, she should be encouraged to stipulate that he treats her and her child well. This would be necessary as in such cases, men do not respect their wife and maltreat her because she was a single mother, and they do not take care of the child. Speakers were a member of Amel who works as a psychologist in home for single mothers, and the guest speaker Yosra Frauss, a lawyer who is also connected to AFTURD. There were not many people present.

mothers and their newborn children in Gafsa, I asked how many of these pregnancies were the result of rape. 'None', he replied, following the official discourse that there is no rape in Tunisia.³⁰⁷ In the same vein, when I was violently attacked myself by three men, I told the police how afraid I had been that they would rape me. They replied: 'There is no such thing as rape in Tunisia'.³⁰⁸

Section five

Female judges and the 'emancipative potential of the law'

Sana Ben Achour stated that in the light of the ambivalence signalled by the government, *female* judges are taking a stance: they apply the law in a gender neutral way, as is witnessed by the decisions of 1999 and 2000 in the field of mixed marriage.³⁰⁹ In this section, I will elaborate on this statement, but before I do so, I should give some inside information about the Tunisian judiciary: division of competence, judicial independence, and the introduction of women in the Tunisian judiciary.

Judicial competence

The constitution of 1957 provides for the basis of the attribution of adjudicative powers, further developed by Law 67-29 of 14 July 1967 with regard to the judicial

³⁰⁷ Interview on 2 February 2009

³⁰⁸ This happened in Tunis on 6 October 2008; the discussions with several police officers took place in the week that followed.

³⁰⁹ Sana Ben Achour, 2007a and b

organisation, the superior council and the status of the judiciary, amended significantly in 2005. Adjudicative powers are with the Cantonal Courts, Courts of First Instance, Courts of Appeal and a Court of Cassation, as well as an Administrative Court and a Real Estate Court. A High Court is established in case of high treason (Article 68 Constitution). The Security Court has been declared unconstitutional in 1985.³¹⁰ With regard to the division of competence, I delimit my description to those fields of law that form the subject of this study: divorce and its consequences.

The Cantonal Courts are competent in conflicts over maintenance, as well as adoption cases and drawing up the list of heirs. The penal judge at the Cantonal Court decides in cases of unmarried cohabitation and polygamy. CFI's are competent in cases concerning marriage and divorce, and paternity, as well as in appeal against decisions of the Cantonal Court. The penal division of the Court of First Instance is competent in cases of adultery and sexual relations with a minor. In 1993, a special Family and Children Division was installed at all Courts of First Instance.³¹¹ The division consists of the following functions: a Family Judge, a Family Judge for endangered children, and a Children's Judge in penal cases, as well as an assistant public prosecutor in family cases that have a penal aspect (non-payment of maintenance and domestic violence) and an assistant public prosecutor in penal cases against

³¹⁰ Administrative Court, 1985, see Yadh Ben Achour, 1992, pp. 47-8

³¹¹ Law no 93-74, 12 July 1993

children. The Family Judge presides the Family Chamber (three members in total) that is competent in cases concerning divorce and paternity. Besides, he (or she) presides reconciliation sessions in cases of divorce, together with other *vice-présidents* who are appointed as a reconciliation judge. Here, the judge tries to reconcile the couple and takes provisional measures. The Family Judge is also competent to revise the provisional measures and decides as a single judge in appeal in maintenance cases decided by the Cantonal Court. The Family Judge for endangered children applies the civil part of the 1995 law for the protection of children.³¹² These cases concern custody. He or she is a single judge, and is assisted by a representative of the Child Protection Brigade.

Judicial independence

In his article on the conditions for an anthropology of law in the Arab world, Bernard Botiveau underlines that it should be kept in mind that the judiciary in this region is very close to the political powers.³¹³ This is also true for Tunisia, where Eric Gobe writes that: 'justice in Tunisia is intensely put into service to assure the continuity and the reproduction of the authoritarian regime, [and] judges are the key actors of the institution of repression.'³¹⁴

³¹² Law 95-92 of 9 November 1995

³¹³ Bernard Botiveau, 1996. It should be noted here that the same has been argued with regard to countries in other parts of the world, such as the United States. See Martin M. Shapiro, 1986.

³¹⁴ Eric Gobe et Michaël Béchir Ayari, 2007. See also Rafea Ben Achour on the Rule of Law in Tunisia (Rafea Ben Achour, 1995).

True, Article 65 of the constitution provides that the judiciary is independent, and Article 23 of the Law concerning the judiciary (1967, amended numerous times) provides that 'Judges should adjudicate with impartiality, without any considerations for persons or interests'. However, there is one important indication that the Tunisian judiciary is not independent at all: the body that decides on the sanction of judges forms part of the government.³¹⁵ The sanction structures, varying from criminal prosecution, transfer, disciplinary sanctions and discharge, are imposed by the *Conseil Supérieur de la Magistrature* (CSM).³¹⁶ The latter is headed by the President of the Republic, the Minister of Justice, and the President of the Court of Cassation.³¹⁷ Moreover, appeal to a transfer decision is not only significantly limited,³¹⁸ the body who decides on the appeal actually forms part of the CSM itself³¹⁹ while in some cases, it is the President who is competent to decide.³²⁰

³¹⁵ With lawyers on the other hand, Gobe witnesses an '*autonomie professionnelle*' (Eric Gobe, 2007).

³¹⁶ Criminal prosecution depends on the CSM's consent (Article 22, Law no 67-29 concerning the judiciary), the CSM or, in exceptional cases, the Minister of Justice decides on the transfer of judges (Article 14 of Law no 67-29 concerning the judiciary, as amended by law no 85-79 of 11 August 1985), and the CSM imposes the disciplinary sanctions (Articles 50-60, Law no 67-29 concerning the judiciary).

³¹⁷ Article 6, Law no 67-29 concerning the judiciary

³¹⁸ Law 2005-81, amending Law no 67-29 concerning the judiciary

³¹⁹ Law 2005-81, amending no Law 67-29 concerning the judiciary

³²⁰ Article 61 (new), introduced by law 91-9, modifying Law no 67-29 concerning the judiciary

That the Tunisian judiciary is not independent was confirmed on a number of occasions. When the measures that intensify the government's control on the judiciary were contested by the (independent) Association of Tunisian Judges (*Association des magistrats tunisiens*, AMT), this organisation was abolished.³²¹ Similarly, when lawyer Hama Hammami was to publish a report on the (non-existent) independence of the Tunisian judiciary, his office was set on fire, destroying the manuscript.³²²

The instrumentalisation of the judicial system can have many different features.³²³ First, the judiciary can be utilized to punish someone for politically unaccepted behaviour, as was the case in the affaire Ben Brik.³²⁴ This is especially possible in the field of penal law, a field I did not study thoroughly. Second, instrumentalisation of the judiciary can mark personal status law when for example politically influential persons are involved in a personal status case and the judge, being dependent on the government, issues a decision that is contrary to the law, to the benefit of the influential figure. Third, the dependence of the judiciary vis-à-vis the government can

³²¹ The association was abolished on 29 August 2005. See: Campus ouvert, 1 sept 2005

³²² Vincent Geisser and Eric Gobe, 2008, p. 372

³²³ See also Martin M. Shapiro on courts in authoritarian regimes, 2008, and Peter H. Salomon, 2007.

³²⁴ Taoufik Ben Brik, who writes about the regime, was condemned to six months imprisonment after he (jokingly) presented himself as a candidate for the presidential elections in 2009. According to him, he was violently attacked by a woman (a police officer) who then 'filed a complaint' for aggression. See Eric Gobe, 2007.

have repercussions on the extent to which judges are inclined to deviate from official discourses, the *féminisme d'état*.

With regard to the second point, I should underline that I never personally witnessed something like this happening, although I might have witnessed the start of it. In one case, where the wife of a minister filed for divorce, I observed the reconciliation session. The couple had been living separately for fifteen years, and the woman had always stayed in the marital home, with their now 40 year old daughter who was mentally ill. At the reconciliation session the husband was absent, and the woman started to cry, telling the judge that the husband had recently sold the house. The judge told her that this was illegal, as the law provides that she can live there after divorce, and expressed his surprise that the woman's lawyer had not pointed this out.³²⁵ The judge called the lawyer in the office, and asked the woman and me to step out. This was the only time that the judge asked me to leave her alone with a lawyer, and this might have been as they wanted to discuss something illegal.³²⁶

With regard to the third point, it should be noted that when the judge at the CFI Tunis Mokhtar Yahyaoui denounced the instrumentalisation of feminism and family law as a mere matter of propaganda, he was dismissed.³²⁷ However, I should underline that it is

³²⁵ Law 2008-20 of 4 March 2008

³²⁶ Reconciliation session 5 November 2008

³²⁷ Vincent Geisser and Eric Gobe, 2007.

difficult to discern if a judge deviates from the official discourse or not. Of course, if all judges always clearly apply sharia without any reference to legislation whatsoever, they clearly deviate from the official discourse of the Rule of Law. If, on the other hand, judges would start to discard Tunisian (and Islamic) inheritance law, this might show their independence with regard to the official discourse as well. But in all situations between these two poles, it is difficult to decide whether they violate the intention of the government, as the official discourse is very fluid and ambivalent, and the government does not pronounce itself on one specific matter in a very clear way, as this would meet with resistance.

Female judges

That women can be a judge in Tunisia has not always been evident; this is only the case since the judicial year 1967-1968. Elise Hélin, who examined the feminisation of the Tunisian judiciary in the 1990s, found that Tunisian female law students are tempted to become a judge because they can combine it with 'taking care of their family': court sessions are mostly in the mornings, leaving the afternoons for work from home which can be combined, according to these students, with care-taking duties. This advantage was confirmed by one of the two Family Judges at the CFI Tunis.³²⁸ As a result, in 2005, 28 % of the Tunisian judges were women. Out of the judges

³²⁸ Elise Hélin, 1995, pp. 99-100

dealing with personal status cases at the CFI Tunis, almost all were women: both Family Chambers were women-only, the Family Judge for endangered children was a woman, and 6 out of 8 reconciliation judges were women too. However, this is not true for the whole of Tunisia: out of the four other Courts of first Instance I visited (Sousse, Sfax, Gafsa and Le Kef), only one Family Judge was a woman (in Sousse); all other three were men.