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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 four

### Divorce without grounds

On a morning begin November 2009, a couple in their late twenties entered the office of the reconciliation judge. The husband declared that he lived and worked in Paris, earned € 1.500 a month, and that this was his first marriage. He was wearing an enormous ring around his pink. The wife declared that she was living in Tunis, that she earned 300 DT a month and that this was her first marriage as well. The couple got married in 2005, but the marriage had not been consummated: they had signed the marriage certificate (*sdaq*) in 2005, but the marriage festivities (*irs*), which according to Tunisian 'custom' justify the consummation of the marriage, had been postponed for three years now.

The husband filed for divorce with mutual consent, but the wife stated that she did not agree. 'But you told me that you wanted to divorce as well!', the husband said. The wife denied and stated that she did not understand why the man wanted a divorce. They quarrelled over the question of whether she had stated that she agreed. The reconciliation judge did not pay any attention, but wrote things down on the p.-v.

When the judge looked up from her desk, the wife exclaimed; 'But what about me?!' 'You have a right to damages', the judge replied calmly. 'But I have been waiting for him for three years!'. While the wife tried to hold back her tears, the judge continued to handle the financial aspects of the case, asking if he was paying maintenance to the wife ('no'), and how much damages she was filing for ('I don't know'). The judge asked the husband how much he was willing to pay and he replied '1.000 DT'.

The wife seemed not able to grasp what was happening. 'Can he divorce me just like that?', she asked. 'Yes', the judge replied, 'according to Tunisian legislation one can divorce if one desires to do so'.<sup>438</sup>

This chapter examines judicial practices in the field of divorce without grounds. The material consists of a total

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<sup>438</sup> Reconciliation session, CFI Tunis, 5 November 2008

of 57 court decisions dating from 5, 6, 12 en 13 January, issued by the two Family Chambers of the CFI Tunis (Monday 5 and 12 January: Family Chamber I and Tuesday 6 and 14 January: Family Chamber II)<sup>439</sup>, as well as the reconciliation sessions observed between October 2008 and September 2009 and interviews with the two Family Judges in the same period.

The chapter proceeds as follows. Section one describes how cases of divorce without grounds proceed. Section two gives an overview of the material concerning divorce without grounds. Section three analyses the material, focusing on the dominant norm affirmed by the court and the sources invoked by judges.

### **Section one**

#### **A description of the procedure**

The procedure of a case of divorce without grounds is largely identical to the divorce proceedings described in chapter two. However, with regard to reconciliation sessions, accusations of 'bad behaviour' of the other spouse can be of particular importance in cases of divorce

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<sup>439</sup> CFI Tunis 5 January 2009, 64562, 66546, 67138, 67906, 68150, 68266, 68330, 68658, 68664, 69110, 69152, 69466, 69614, 69698, 69702, 69714, 69724, 69749, 69756, 69764, 69798, 70277, 70498, 70554, 70598, 70670, 70984, 6 January 2009, 61923, 68019, 68567, 68585, 69179, 69295, 69299, 69437, 69603, 69645, 69693, 69751, 69899, 69911, 70569, 70601, 12 January 2009, 64948, 67835, 68696, 69072, 69258, 69294, 13 January 2009, 67443, 67957, 68351, 69065, 69715, 69985, 70091, 70359

without grounds as they might influence the amount of damages awarded to the defendant (see below).

The standard form of the decision form of a decision on divorce without grounds is set up as the standard forms described in chapter two, being divided into five paragraphs: the 'subject of the claim' (*mawdu' al-da'wa*), the 'proceedings' (*ijra'at*), the 'causes' (*al-mustanadat*), the decision (*al-mahkama*) and a recapitulation of the decision (*li-hadhihi al-asbab*). The paragraph on the subject of the claim begins in the same way as in the other types of divorce,<sup>440</sup> followed by the standard phrase: 'But marital life deteriorated [...]'<sup>441</sup> and the plaintiff ask [divorce] for the first/second time before/after consummation, on the grounds of Article 31 [par. 1 sub] 3 PSC.'<sup>442</sup> The terminology employed to describe the object of the demand differs depending on whether it is the husband or the wife who files for divorce without grounds (see section three).

The paragraph on the proceedings states that 'the spouses were present'<sup>443</sup> at the family judge and affirmed that they

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<sup>440</sup> Stating that the plaintiff is married to the defendant by means of a legal marriage contract and that the marriage was/was not consummated and that they do/do not have any children.

<sup>441</sup> If the wife files for divorce, the cause of the marital breakdown is mentioned here. See paragraph three.

<sup>442</sup> Standard forms mention Article 31 par. 3 PSC, but in fact, it is par. 1 sub 3; paragraph 3 concerns the damages.

<sup>443</sup> If one of the spouses was absent at the reconciliation session, the judge strikes out the phrase that both parties were present and marks

are married and that the marriage is/is not consummated and that they do/do not have children and the husband stated that [...], and the wife stated that [...].’ As there is no special space to differentiate between the first, second and third session, the litigants’ arguments put forward during the three sessions are taken together and summarized. I found it striking how brief the summary of what has been put forward during the reconciliation session(s) is (often limited to the phrase ‘the plaintiff persisted and the defendant resisted’) compared to the endless debates and accusations that I observed during the reconciliation sessions. I had the impressions that *if* the judgment contains a decision on the contents of the allegations made during the session (such as: ‘my husband is violent with me’), the allegation plays a role in the outcome of the decision (see section 3).

The paragraph on the causes describes the object of the demand (which differs according to whether the husband or the wife files for divorce without grounds), states that the marriage was proven with a marriage certificate, and states: ‘Given that the lawyer of the plaintiff replied that [...].’ This phrase can be complemented (or deleted if nothing has been added). The judge can also add what the lawyer of the defendant argued.

The paragraph on the decision repeats the object of the demand (again the terminology differs according to whether the husband or the wife filed for divorce) and

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in the margin that the party was absent and that he or she was (or was not) correctly summoned.

that the marriage was proven with a marriage certificate. It adds the phrase: 'Given that the reconciliation sessions did not succeed, [...]' which is complemented depending on who files for divorce, the husband or the wife (see section 3).

Then, the form addresses the provisional measures taken during the first reconciliation session, stating: 'With regard to the provisional measures: Given that it comes forward from the file that provisional measures were taken.' Here, the court confirms the measures, and sometimes amends them or adds to them.<sup>444</sup> The rest of the paragraph containing the decision concerns the financial consequences of the divorce, namely the damages, lawyer's expenses and procedural expenses, in this order. The standard decision states that: 'With regard to the damages: Given that divorce on the grounds of Article 31 par. [1 sub] 3 PSC justifies the demand of compensation of the harm inflicted on the other spouse.' It proceeds with the moral damages, stating: 'With regard to the moral damages: Given that divorce without grounds inflicts moral harm on the other party affecting his/her honour and his/her social status and causes the bereavement of marital life and this harm is eligible for compensation. Given that taking into consideration the period of co-

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<sup>444</sup> With regard to the maintenance for the wife: if the judgment confirms the temporary measure with regard to maintenance for her, the character of the maintenance is nevertheless changed from maintenance during marriage (*nafaqa*) to maintenance during the waiting period (*nafaqat al-'idda*). This does not become clear from the decisions.

habitation and the age of the defendant and the impact of the divorce on his/her feelings [and the presence of children in his/her custody]<sup>445</sup> and taking into consideration the social status of the parties, the court decides to compensate this harm with [...].’ If the defendant does not have a right to moral damages (see below), this part is struck out. This is followed by the standard phrase on material damages, stating: ‘With regard to material damages: Given that divorce inflicts material harm on the defendant because of the abrupt change in her<sup>446</sup> life circumstances, the woman’s costs caused by the divorce add up to the amount of what she takes upon her with the loss of a breadwinner and support. Given that Article 31 PSC grants the woman the opportunity to choose between a compensation of the damages to be paid monthly or as a lump sum. Given that the wife has chosen [...], however the amount was too high and the court decided to alter it and to lower it to be in accordance with the duration of the marriage and the job of the man and his real income and the *niveau de vie* of the couple, and the court decided to fix the amount on [...].’ If the defendant does not have a right to material damages, this part is struck out. With regard to the lawyer’s fees and procedural costs the standard form states: ‘Given that the defendant had to pay lawyer’s fees the court obliges the plaintiff to compensate these with [...].’ Followed by: ‘With regard to the procedural

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<sup>445</sup> This phrase is wiped out if the woman demands divorce and she obtains child custody, or if no children are involved.

<sup>446</sup> Only women are granted material damages, see paragraph three.

expenses: The court decides that procedural expenses are on the plaintiff in accordance with Article 128 CCCP.<sup>447</sup>

The last paragraph summarizes the decision. The heading states 'For these reasons' (*li-hadhihi al-asbab*), followed by the phrase: 'On the grounds of Articles 40, 68 and 128 and further of the Code of Civil and Commercial Procedure<sup>448</sup>, and Articles 29, 30, 31, 32 and 54 PSC<sup>449</sup> and Article 40 of the Code of Civil Status<sup>450</sup>, the court pronounces the divorce between [...] and [...] for the first time after consummation on demand of the husband/ wife and summons the civil servant to register this in the relevant registers.'

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<sup>447</sup> This article provides: 'Every party that loses in a procedure is convicted to pay the expenses, except if the tribunal divides the costs between them if both have lost on certain points.'

<sup>448</sup> Article 40 CCP provides that the CFI is competent in divorce cases, and Article 68 CCP provides that court representation is not obligatory in personal status cases.

<sup>449</sup> Articles 29 PSC defines 'divorce' (*talaq*) as 'the dissolution of marriage', Article 30 PSC provides that divorce can only take place through court, Article 31 PSC describes the types of divorce (with mutual consent, on the grounds of harm or without grounds, par. 1), followed by provisions with regard to the damages (par. 2 and 3), Article 32 PSC describes the divorce procedure (reconciliation sessions, temporary measures, etc.), and 54 PSC defines custody (*hadana*) and therefore is only mentioned in a divorce case where children are involved.

<sup>450</sup> Article 40 of the Code of Civil Status provides that 'The judgments or decisions pronouncing the divorce or declaring the marriage null and void, are, when they obtained force of *res judicata*, transcribed in the registers of civil status where the marriage was inscribed. The judgment or decision shall be mentioned in the margin of the marriage contract and the birth certificates of the spouses.'



## Section two Judicial practices

In this section I describe court decisions and reconciliation sessions concerning divorce without grounds. The two translated decisions are in my eyes representative for the 57 decisions taken by the Family Chamber of the CFI Tunis on divorce without grounds on 5, 6, 12 and 13 January 2009.

### Case one: Tarek and Khouloud<sup>451</sup> (CFI Tunis, 05 January 2009, 68664)

On 24 April 2008, a man called Tarek (1975, choosing residence with his lawyer) files a petition for divorce without grounds at the CFI Tunis. According to the text of the judgment, the petition states: 'he is married to the defendant by means of a legal marriage contract issued on 25 November 2000, and they consummated the marriage and they have two children [twins]. However, the marital bond deteriorated between them and he asks the reconciliation judge to try and bring about reconciliation and if this fails, to bring about divorce (*talaq*) for the first time after consummation in accordance with Article 31 par. [1 sub] 3 PSC.'<sup>452</sup>

Tarek's wife Khouloud (1974) is summoned to attend the first reconciliation session to be held on 21 May 2008 at 9 o'clock. At this session, both spouses are present, and confirm that they are married and that the marriage is consummated and that they have two children. The judgment summarizes what has been put forward during the sessions by stating that the husband persisted in his demand and that the wife resisted to the divorce.

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<sup>451</sup> The names are fictitious out of respect for the litigants' privacy.

<sup>452</sup> الا ان الحياة الزوجية ساءت بينهما و طلب اجراء الصلح و عند التعذر الحكم بايقاع الطلاق بينهما  
طلقة اولى بعد البناء طبق الفقرة الثالثة من الفصل 31 م ا ش

During the first reconciliation session the following provisional measures are taken:

- Custody over the children Yasmine and Tahar is accorded to Khoulood.
- Visiting rights are accorded to Tarek on Sundays and religious and national holidays from 9 o'clock in the morning to four in the afternoon without company (this means that the husband has the right to take the children with him).
- The husband is obliged to pay 200 DT (around € 100) child maintenance for the two of them together and 100 DT (around € 50) maintenance to his wife to be paid monthly starting on 21 May 2008 until the obligation ends.<sup>453</sup>

The reconciliation session is repeated two consecutive times, after which the judge transfers the file to the court hearing to be held on 22 December 2008.

Here, both spouses are represented by their lawyers, who, according to the decision, persist in their claim and ask for a decision. The wife's lawyer files for material damages (10.000 DT, i.e. around € 5.000) and moral damages (15.000 DT, ± € 7.500), as well as the payment of the rent (*sakan*, 220 DT, ± € 110) and a raise of child maintenance (300 DT, ± €150, as well as compensation of the lawyer's fees (300 DT, ± €150).

In its decision, the court confirms the provisional measures taken during the first reconciliation session, adding that the husband should pay 120 DT (± € 60) for the wife's *sakan*.<sup>454</sup>

With regard to the damages (*gharama*), the court argues that 'divorce on the grounds of Article 31 par. [1 sub] 3 PSC justifies the demand of compensation of the harm inflicted on the other spouse.' It proceeds with the moral damages, stating: 'With regard to the moral damages: Given that divorce without grounds inflicts moral harm on the other party affecting her honour and her social status and causes the bereavement of marital life and this harm is eligible for compensation.

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<sup>453</sup> The obligation to pay maintenance to the wife ends with the completion of the waiting period. See Article 38 PSC.

<sup>454</sup> This is in accordance with Article 56 PSC that was added by law 2008-20 of 4 March 2008, providing that the mother who obtains custody after divorce has a right to stay in the marital home for which the father should pay the rent.

Given that taking into consideration the period of co-habitation and the age of the defendant and the impact of the divorce on her feelings and the presence of children in his/her custody and taking into consideration the social status of the parties, the court decides to compensate this harm with 3.000 DT ( $\pm$  € 1.500).'

With regard to the material damages, the court argues that : 'With regard to material damages: Given that divorce inflicts material harm on the defendant because of the abrupt change in her life circumstances, the woman's costs caused by the divorce add up to the amount of what she takes upon her with the loss of a breadwinner and support. Given that Article 31 PSC grants the woman the opportunity to choose between a compensation of the damages to be paid monthly or as a lump sum. Given that the wife has chosen a lump sum, however the amount was too high and the court decided to alter it and to lower it to be in accordance with the duration of the marriage and the job of the man and his real income and the *niveau de vie* of the couple, and the court decided to fix the amount on 4.000 DT ( $\pm$  € 2.000).'

With regard to the lawyer's fees, the court awards compensation of 250 DT ( $\pm$  €125) and decides that procedural expenses are on the husband in accordance with Article 128 CCCP.

To resume, the 33-year-old Tarek files for divorce without grounds of the 34-year-old Khoulood. The couple have been married for eight years and have four-year-old twins, Yasmine and Tahar. The decision does not give way anything about the reasons for the husband's wish to divorce, nor does it say anything about the wife's position (in the form of accusations) except that she resists. During the first reconciliation session, the judge takes provisional measures, granting child custody to the wife and visiting rights to the husband. The plaintiff is obliged to pay 200 DT ( $\pm$  € 100) per month child maintenance and 100 DT ( $\pm$  € 50) per month maintenance for the wife (the woman's right to maintenance ends with the expiration of the waiting period). The court does not pronounce on the

housing of the children. The couple attends two more reconciliation sessions, but with no result: the husband persists in his demand and the wife continues to resist. The wife's lawyer asks that Tarek pays the rent ad 220 DT ( $\pm$  €110) per month, as well as a raise in child maintenance from 200 to 300 DT ( $\pm$  € 150) per month. For the woman, the lawyer asks 15.000 DT ( $\pm$  € 7.500) moral damages 10.000 DT ( $\pm$  € 5.000) material damages to be paid as a lump sum.

In its final decision, the court confirms the provisional measures concerning custody and visiting rights, adding the obligation that the husband pays the rent, fixed at 120 instead of 220 DT. The court does not pronounce on the issue of maintenance, thus confirming the amount of 200 DT for the children and 100 DT to the wife and rejecting the raise of child maintenance to 300 DT. With regard to the damages, the court agrees that the wife has a right to material and moral damages, but lowers the amount: the demand of 10.000 DT for material damages is adjusted to 4.000 DT ( $\pm$  € 2.000, i.e. 2/5 of the amount asked for) and the demand for 15.000 DT for moral damages is adjusted to 3.000 DT ( $\pm$  € 1.500, i.e. 1/5 of the amount asked for).

The collection of court decisions from 5, 6, 12 and 13 January 2009 contains 34 other decisions where the husband filed for divorce without grounds. In 21 cases, the wife is present at a/the reconciliation session(s), while in 13 cases she is not.<sup>455</sup> 8 of the cases where the wife is not

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<sup>455</sup> CFI Tunis 5 January 2009, 67906 (in this case, the wife is denied material damages), 64562, 69614, 69798, 67138 (the wife refuses

present concern a mixed couple (Tunisian husband and a wife with a foreign nationality; in these cases German, Italian, French or Moroccan) and the wife is living abroad.<sup>456</sup> Only one of these cases elaborates on international private law to justify the Tunisian court's competence.<sup>457</sup> In all cases where the wife responds in the sense that she is present at (one of) the reconciliation sessions, the court awarded moral damages,<sup>458</sup> while the court awarded material damages in all cases except four.<sup>459</sup> Those cases where the court did *not* award

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damages), 66546, 68150 (the husband denies the consummation and therefore the payment of material damages, but the court considers the consummation as proven), 69714, 70498, 69466; CFI Tunis 6 January 2009, 61923 (the husband files for divorce for harm but changes his demand), 69299 (before consummation, no material damages), 69751 (the wife has a job, no material damages), 69899, 68585, 70601, 69437, 69019, CFI Tunis 12 January 2009, 64948 (the husband file for divorce for harm but changes his demand), CFI Tunis, 13 January 2009, 69715, 70091, 67835. The wife does not respond: CFI Tunis 5 January 2009, 69152, 69702, 69764, 70277, 70554, 70598, 70670, CFI Tunis 6 January 2009, 69179, 69693, 69911, CFI Tunis 13 January 2009, 67957. In two cases, the wife is absent on the first reconciliation session but does file for damages (CFI Tunis 5 January 2009, 69110 and 6 January 2009, 70569). The demand is rejected.

<sup>456</sup> CFI Tunis 5 January 2009, 69110, 69152, 69764, 70277, 70670, CFI Tunis 6 January 2009, 69179, 69693, 69911, CFI Tunis 13 January 2009, 67957.

<sup>457</sup> CFI Tunis 5 January 2009, 69152

<sup>458</sup> Except in one case, where the wife explicitly refused damages but insisted on sufficient child maintenance. CFI Tunis, 5 January 2009, 67138.

<sup>459</sup> CFI Tunis 5 January 2009, 67906 (in this case, the demand for material damages was rejected, seemingly as the wife demanded payment in monthly installments *and* as a lump sum, but this is not very clear), CFI Tunis 6 January 2009, 69299 (before consummation)

material damages concern cases where the couple got divorced before consummation, the wife had an income, or the wife was *nashiza* (abandoned the marital home), while in one case the reason did not become clear from the judgment. While the court granted maintenance (*nafaqat al-'idda*, maintenance during the waiting period)<sup>460</sup> to Khouloud in the case described above, this was only done in 7 other cases where the wife responds, while it was accorded in none of the cases where the wife did not respond.<sup>461</sup>

**Case two: Emna and Khaled<sup>462</sup> (CFI Tunis, 12 January 2009, 68696)**

On 10 April 2008, a young woman called Emna (born in 1981, choosing residence with her lawyer) files a petition for divorce without grounds at the CFI Tunis. According to the text of the judgment, the petition states: 'she is married to the defendant by means of a legal marriage contract issued on 2 August 2007, and they consummated the marriage and they do not have any children. However, the marital bond deteriorated between them and she asks a decision to dissolve (*fakk*) the marital bond on the grounds of the desire of the wife (*al-raqhba al-khassa min al-zawja*) for the first time after consummation in accordance with Article 31 par. [1 sub] 3 PSC.'<sup>463</sup>

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and 69751 (the wife has a job), CFI Tunis 13 January 2009, 68351 (the husband alleges that the wife has left the marital home)

<sup>460</sup> Article 38 PSC obliges the husband to pay maintenance during the waiting period.

<sup>461</sup> CFI Tunis 5 January 2009, 69614, 69798, 69714, CFI Tunis 6 January 2009, 69899, 68585, 70601, 69437. This was done either as part of the temporary measures or in the final decision.

<sup>462</sup> The names are fictitious out of respect for the litigants' privacy.

<sup>463</sup>[sic!] لذا فانها يطلب ايقاع الطلاق بينهما للمرة الاولى بعد البناء برغبة خاصة منها

The husband, Khaled (born in 1979), is summoned to attend the first (and only) reconciliation session to be held on 23 May 2008 at 9 o'clock. At this session, both spouses are present, and confirm that they are married and consummated the marriage and that they do not have any children. According to the decision, the wife argues during the reconciliation session that the couple do not live in harmony and that their characters are incompatible and that the continuance of marital life is impossible. The husband replies according to the judgment that her parents are at the heart of their problems, as they are intermingling with her affairs, adding that she refuses to move with him to Kerkennah<sup>464</sup>, where he is originally from (they are living in Tunis).

The court hearing is set on 31 June 2008, where Emna's lawyer as well as Emna herself and her husband are present. Apparently, the husband made clear that Emna failed to return the household goods (*adbash*), as the judgment states that during this hearing Emna 'contests her husband's objection with regard to the consolidation of the *adbash*.'

The court hearing is postponed to 5 January 2009 where the lawyers of both spouses are present as well as Emna herself who according to the judgment argues that she persists in her demand.

According to the decision, Khaled's lawyer argues (in writing): 'My client left the marital home since the moment that his wife submitted a divorce case without consolidating the removal of the household goods and the jewellery that she was hiding from him.' The lawyer files for remittance of the household goods and the jewellery, together worth 15.000 DT (± € 7.500), as well as moral damages of 50.000 DT (± € 25.000) and 1.000 DT (± € 500) for lawyer's fees. To consolidate his demand for remittance of the household goods, the lawyer states that he filed a separate case to oblige her to return the *adbash*, and a decision was issued on 3 November 2008.

Emna's lawyer in turn argues that her client has already returned the *adbash* on 8 October 2008, which was even before the court hearing of 20 October 2008 as is proven with a *procès-verbal* of this hearing testifying to the removal of the furniture.

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<sup>464</sup> A small group of islands opposite of Sfax.

However, the plaintiff puts into question the text of the process-verbal of the hearing of 20 October 2008 for as far as it provides that the jewellery belongs to the wife if the marriage is consummated. At this point, Khaled's lawyer affirms that his client has indeed removed the household goods remitted to him but he insists on the remittance of the jewellery that he paid just like the furniture arguing that 'the plaintiff cannot keep the jewellery after the husband has spent a large amount of money and engaged in several loans to secure his acquisitions to file for divorce after only 8 months of marriage.' According to the husband, Emna should return the jewellery.

The court argues that the husband has a right to moral damages, stating that 'divorce on the grounds of Article 31 par. [1 sub] 3 PSC justifies the demand of compensation of the harm inflicted on the other spouse. With regard to the moral damages: Given that divorce without grounds inflicts moral harm on the other party affecting his honour and his social status and causes the bereavement of marital life and this harm is eligible for compensation. Given that taking into consideration the period of co-habitation and the age of the defendant and the impact of the divorce on his feelings and taking into consideration the social status of the parties, the court decides to compensate this harm 1.500 DT (€ 750).

Then, the court decides on the remittance of the goods and the jewellery, arguing that the process-verbal establishes that Khaled has taken back the goods as has indeed been confirmed by his lawyer, and thus this part of the petition is rejected.

The court continues with regard to the jewellery arguing that these are a gift that belongs to the wife who has consummated her marriage in accordance with Article 28 PSC<sup>465</sup> and thus she cannot be obliged to return it.

To summarise, in this case it is the wife, Emna, who files a petition for divorce without grounds. She files her divorce case after 8 months of marriage. According to the

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<sup>465</sup> Providing that if the marriage is dissolved before consummation all gifts are returned, but that no gifts shall be returned once the marriage has been consummated.



judgment, Emna argued in the reconciliation session that the couple do not live in harmony and that therefore, it is impossible to continue marital life. The husband argued that this is not his fault but her parents', and he accuses her of not moving with him to Kerkennah where he is originally from. At the court hearing, both parties are represented by their lawyers, while Emna is also present in person. The husband's lawyer asks to postpone the court hearing in order to start a separate case concerning the return of the household goods and jewellery. The issue of the remittance of the household goods and the jewellery might seem strange to people who are familiar with legal practice in the region, where it is common practice to file for the remittance of the dower if the wife wishes to divorce. In Tunisia, the groom does not pay a substantive dower *in money* but a symbolic amount of 1 DT.<sup>466</sup> Instead, the husband gives the wife jewellery during the marriage festivities – *'urs* – and prepares the marital home with furniture and the like (washing machine, refrigerator, etc.), while the wife brings in her *trousseau*, consisting of bed linen, kitchen equipment and so on. It has been argued that the jewellery has the same function as a dower, in the sense that it gives the wife financial security after divorce.<sup>467</sup>

The court rejects the demand to give back the household goods, as these have already been returned to the husband. Likewise, the court rejects the demand to give

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<sup>466</sup> I witnessed one marriage where the groom paid 5 DT instead of 1 DT, to show his appreciation of the bride.

<sup>467</sup> See Martin Latreille, 2008

back the jewellery, as the marriage was consummated and therefore all gifts belong to the wife. The court does grant the demand of moral damages, but these are fixed at 1.500 DT ( $\pm$  € 750) instead of 50.000 DT ( $\pm$  € 25.000), i.e. less than 1/30 of the amount asked for. The court does not pronounce on maintenance to be paid to the wife during the waiting period.

I came across 12 other cases where the wife files a petition for divorce without grounds. In 2 of these cases the husband files for damages,<sup>468</sup> while in 10 cases he is not present at the reconciliation session(s) (in one of these cases the husband does reply in writing).<sup>469</sup> In none of the cases where the wife files for divorce without grounds, the court awarded *nafaqat al-'idda* to the wife. In the case between Khaled and Emna, the court awards moral damages. This was only done in *one* of the other three cases where the husband responds: the court awarded 1.000 DT ( $\pm$  € 500) moral damages from the demanded 5.000 DT ( $\pm$  € 2.500),<sup>470</sup> while in the other case the decision simply remains silent on the question of damages.<sup>471</sup> In none of the cases where the husband does *not* respond,

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<sup>468</sup> CFI Tunis, 5 January 2009, 69749 and CFI Tunis 6 January 2009, 69603

<sup>469</sup> CFI Tunis 5 January 2009, 68266, 68658, 69698, 68330, 70984, CFI Tunis 12 January 2009, 69072, CFI Tunis 13 January 2009, 67443, 69985 and 70359. In one case, the husband is absent on the reconciliation session, but is represented by a lawyer on the court hearing; the lawyer files for damages (CFI Tunis 12 January 2009, 69294).

<sup>470</sup> CFI Tunis, 5 January 2009, 69749

<sup>471</sup> CFI Tunis, 12 January 2009, 69294, and CFI Tunis, 6 January 2009, 69603

does the court pronounce on moral damages. In none of the cases material damages are awarded to the husband. In 4 of the 10 cases where the wife files divorce and the husband does not respond, the husband, of Tunisian origin, lives abroad (in France or in Belgium).<sup>472</sup> In two of these cases the divorce took place before consummation.<sup>473</sup>

A typical discussion observed during reconciliation sessions in cases of divorce without grounds concerned the plaintiff's right to divorce. In some sessions, the plaintiff's right to divorce was put into question, on the grounds that he or she did not have any grounds to divorce and that the defendant did not agree (see the description of a reconciliation session at the beginning of this chapter).<sup>474</sup> The judge would reply that indeed, the plaintiff had a right to divorce but that the defendant had a right to damages. Another discussion witnessed during reconciliation sessions in cases of divorce without grounds concerned the amount of damages. When the judge asked how much damages the defendant wishes to receive, some defendants seemed unprepared to this question. They told the judge that they would have to think this over or talk about it with their lawyer, and come back to it in a later stage of the proceedings. Other defendants were prepared, and mentioned a number. The

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<sup>472</sup> CFI Tunis 5 January 2009, 69698, 68658, 68266, CFI Tunis 12 January 2009, 69072

<sup>473</sup> CFI Tunis 5 January 2009, 69698 and CFI 12 January 2009, 69072

<sup>474</sup> Also for example: reconciliation session CFI Tunis 11 December 2009a and b

amounts asked for were often relatively high, which made some plaintiffs cry out that he or she could not pay this and would go to jail.<sup>475</sup>

### **Section three**

#### **Norms and sources**

I derive the following norms from the material described above. The first norm concerns the question of whether or not the plaintiff has a right to divorce, and the second norm concerns the question of whether or not the defendant has a right to damages.

#### **The right to divorce**

With regard to the right to divorce, the material shows that the court imposes the following norm: all spouses, be it men or women, can obtain divorce without grounds and without the consent of the defendant. This norm can be witnessed in cases one and two: in case one, the court granted divorce without grounds to Tarek, regardless of the fact that he does not present any grounds, that his wife does not agree and that they have two small children. In case two, the court granted divorce without grounds to Emna, regardless of the fact that she does not give a particular reason for her wish to divorce except that their characters are incompatible, and Khaled does not agree. The fact that the couple has only been married

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<sup>475</sup> For example reconciliation session CFI Tunis 16 January 2009

for eight months and that Khaled engaged several loans for the marriage does not make this otherwise.

That both men and women have 'unlimited' access to divorce without grounds<sup>476</sup> was confirmed by judges during reconciliation sessions: when a husband-defendant or wife-defendant questioned the plaintiff's right to divorce, the judge stated sometimes in an almost irritated way that of course, the plaintiff could obtain divorce, but that, in return, the defendant had a right to damages.<sup>477</sup> Here, judges would invoke *legislation*. Decisions where the demand was *rejected* invoked procedural grounds for this rejection, whereas the only situation in which I saw a reconciliation judge reluctant to grant divorce without grounds on *substantive* grounds was in cases where the wife was pregnant: I witnessed that reconciliation judges opposed severely to divorce during pregnancy, stating that this was *haram*. Sometimes the judge invoked a verse from the Quran that disapproves repudiation during pregnancy.<sup>478</sup> Nevertheless, if the plaintiff insisted, the divorce was granted.<sup>479</sup>

### Sources

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<sup>476</sup> That is, *formally* unlimited. Of course, financial consequences of the divorce as well and social and emotional consequences can delimit the practical access to divorce without grounds.

<sup>477</sup> Also for example: reconciliation session CFI Tunis 11 December 2009a and b

<sup>478</sup> Reconciliation session CFI Tunis 5 August 2009 (reconciliation judge cites part of the *surat al-nisa'*) and 6 August 2009 ('*haram!*')

<sup>479</sup> CFI Tunis 6 January 2009, 68585

With regard to the right to divorce without grounds, the standard form of the decision provides as follows (see also section one):

**The subject of the claim (*mawdu' al-da'wa*)**

The plaintiff stated that he/she is married to the defendant [...] but marital life deteriorated [if the wife files for divorce, the reason is added, such as 'marital life became impossible'] and the plaintiff asks:

[if the husband files for divorce:] the reconciliation judge to try and bring about reconciliation and if this fails, to bring about divorce (*talaq*)<sup>480</sup>

[if the wife files for divorce:] a decision to dissolve (*fakk*) the marital bond on the grounds of the desire of the wife (*al-raghba al-khassa min al-zawja*)<sup>481</sup>

**The proceedings (*ijra'at*)**

[...]

**The causes**

[...]

**The court (*al-mahkama*)**

With regard to the divorce:

Given that the demand was to bring about divorce [*talaq insha'* or *talaq bi-raghba khassa min al-zawja*] in accordance with Article 31 par. [1 sub] 3 PSC

Given that the marriage was proven with a marriage certificate

Given that the reconciliation sessions did not succeed

Given that Article 31 par. [1 sub] 3 PSC grants both spouses the right to divorce without justification granting the other spouse the right to ask for compensation for the harm resulting from the divorce

[if the wife files for divorce, it is added that 'Given that marriage is based on good cohabitation and that there was no improvement to be

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الى ان الحياة الزوجية ساءت بينهما و طلب اجراء الصلح و عند التعذر الحكم بايقاع الطلاق بينهما<sup>480</sup>  
طلقة اولى بعد البناء طبق الفقرة الثالثة من الفصل 31 م ا ش

لذا فانها يطلب ايقاع الطلاق بينهما للمرة الاولى بعد البناء برغبة خاصة منها<sup>481</sup>

expected in this respect' and that there is an 'impossibility to live together in an atmosphere filled with love and purity']<sup>482</sup>  
Given that the plaintiff persisted in his/her demand, the court cannot do otherwise than to grant it  
[...]

The court based its decision to grant divorce without grounds on *legislation*: decisions state in the paragraph entitled 'the court' that the petition for divorce without grounds is in accordance with Article 31 PSC, underlining that Article 31 par. 1 sub 3 PSC grants both spouses the right to divorce without justification. In the second place, decisions make implicit reference to another normative order than legislation. In cases where the husband files for divorce, the paragraph on the object of the demand states that the husband filed a petition for *talaq*, while in cases where the wife files for divorce, the object of the demand is described as a petition to dissolve (*fakk*) the marital bond. However, Tunisian legislation (Article 31 par. 1) uses the term *talaq* ('divorce') for both spouses and does not contain the verb *fakk*. The use of this verb and the differentiation in standard decisions between the husband's and the wife's demand seems to refer to another normative order than legislation. The term *fakk* shall remind people who know the basics of Islamic law of *faskh*, the judicial nullification of the marriage (both verbs denote 'to dissolve'). In turn, the term *talaq*, while employed by Tunisian legislation as denoting 'divorce', shall remind people with a basic knowledge of classical Islamic *fiqh* of the unilateral extra-judicial divorce brought

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و حيث ان الزواج بني على حسن المعاشرة و متى تبين للمحكمة عدم توفر ذلك بين الزوجين فانه لا  
يسعها الا القضاء بالطلاق بينهما لاستحالة امكانية المعاشرة بينهما في جو ملوه المودة و الصفاء

about by the husband. Thus, one might read an invocation of (the court's notion of) classical Islamic *fiqh* in the terminology employed: a second source underlying the decision to bring about divorce is Islamic law in the sense that the court underlines that it is actually applying the notions of *talaq*<sup>483</sup> and *faskh*.

It should be noted in this respect that the terms employed to denote the *grounds* of the petition (as opposed to the *object* of the petition) are also gendered: if it is the husband who wishes to divorce, the petition is stated to be founded on *insha' min al-zawj* ('creation of the husband'), while it is based on *al-raghba al-khassa min al-zawja* ('the personal desire of the wife') when the wife instigates the procedure.<sup>484</sup> That the husband 'creates' divorce while the wife 'desires' it, indicates that when the husband files for divorce, it is actually *he* who creates it, while when the wife instigates a divorce case, it is the *judge* who brings it about. This differentiation in the role of the judge in the act of divorce might equally remind people of Islamic law, but one can also read it in Tunisian legislation: the Arabic text of Article 31 par. 1 sub 3 PSC (as opposed to the French text, that employs the term 'divorce caprice' for both spouses) provides that the court

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<sup>483</sup> Of course, for a court to apply the notion of *talaq* as provided for by classical Islamic *fiqh* is contradictive as this is in principle an *extra-judicial* form of divorce.

<sup>484</sup> It is interesting to note that this terminology differs from the legislation, where the term *raghba* is employed for the husband, together with *insha'*, while the wife's demand is described as her *mutalaba*.



pronounces divorce 'on the desire of the husband to create divorce or the demand of the wife of it' (*'ala raghat al-zawj insha' al-talaq aw mutalabat al-zawja bihi*).

A third source underlying divorce without grounds does not consist of a source of law, but of a particular notion of marriage. This source is only invoked if the wife files for divorce, in which case court decisions add that 'marriage is based on good companionship' and that 'there was no improvement to be expected in this respect', and that there is an 'impossibility to live together in an atmosphere filled with love and kindness'. In this way, the court presents its understanding of marriage (good companionship, love and kindness, without explaining where this understanding can be found. The notions of love and kindness were also invoked in one of the two forms of decisions on divorce with mutual consent.

### **Right to damages**

With regard to damages, the court imposes the norm that in principle, the defendant in a case of divorce without grounds has a right to damages. This was confirmed in cases 1 and 2. In case one, Khoulood was granted damages, and in case two, Khaled was granted damages as well. This indicates that marriage is perceived as a contract, and that in case of a breach of the marriage contract, the person who is liable to this should compensate the other party's damages resulting from the breach. However, there is one important exception to this rule, namely if the defendant does not respond to the case, in the sense that he or she is absent on the

reconciliation session(s): in these cases, the defendant does not have a right to damages.

In those cases where the defendant *does* respond, the *type* of damages awarded depends on the *gender* of the defendant. With regard to the wife-defendant, the court imposes the norm that she always has a right to moral damages. In principle, she has a right to material damages as well, which according to the standard phrasing will be granted as a lump sum or in monthly instalments in accordance with her choice.

It might surprise those who know legal practice in other countries in the region that no reference is made to the dower (*mahr*): in other countries, the wife has a right to the deferred dower when the husband repudiates her. In Tunisia however, husbands buy furniture (*adbash*) and jewellery (*dahab*) instead of the dower (see the case of Emna). After divorce, the *adbash* remain his property<sup>485</sup>, but she keeps the jewellery and the *trousseau* (unless the marriage was not consummated).<sup>486</sup>

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<sup>485</sup> This is true even if the wife gets to stay in the marital home. However, the husband cannot simply take the furniture back, as the marital home should be in a good condition, with regard to the interest of the children in her custody. I came across one reconciliation session where the husband asked back the *adbash* although the wife had the right to stay in the marital home as she had custody over their three children (reconciliation session CFI Tunis 11 May 2009).

<sup>486</sup> I witnessed some discussions on the property of movable property, as it can be difficult to prove what goods belonged to the *adbash*, what formed part of the *trousseau* and what was bought afterwards and by whom. This is even true if the couple got married in community of

The court affirms that there are exceptions to the wife's right to material damages. The first and clearest exception concerns the case where divorce takes place before consummation.<sup>487</sup> The second exception concerns the wife who is *nashiza* (abandonment of the marital home), although this rule is not clear: in four decisions the husband-plaintiff argued that the wife was *nashiza*,<sup>488</sup> while the court denied the wife material damages in only one of these cases. Here, the husband presented a p.-v. to prove that the wife was absent.<sup>489</sup> The third exception to the rule that wife-defendants receive material damages concerns women who earn a living. However, I came across only one decision confirming this rule (she earned 450 DT a month),<sup>490</sup> whereas the observation of reconciliation sessions showed that in at least half of the cases, the wife has an income. Therefore, I suspect that women who have an income only lose their right to material damages under specific circumstances, but what these circumstances are, does not become clear from the decision.

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goods, as in principle, the community of goods only concerns real-estate (see law 98-94 of 9 November 1998).

<sup>487</sup> CFI Tunis 6 January 2009, 69299

<sup>488</sup> CFI Tunis 5 January 2009, 69614, 6 January 2009, 68019, 13 January 2009, 67835, 68351

<sup>489</sup> Such a p.-v. is generally not considered sufficient to obtain divorce for harm on the grounds of *nushuz* (see the next chapter): the p.-v. merely proves that the bailiff (*'adl al-tanfidh*) rang the bell of the marital home on a certain day, and that she was not at home

<sup>490</sup> CFI Tunis 6 January 2009, 69751

I also have a decision where a wife loses her right to material damages although the marriage was consummated and the judgment does not state that she earns a living or that she is *nashiza*. I'm not sure what the reason for this decision can be, but a possible explanation is that the judgment indicates that she files for material damages as a lump sum *and* in monthly instalments.<sup>491</sup>

With regard to the *husband*-defendant the court affirms the rule that he has a right to moral damages only: in none of the cases the husband is granted material damages. It should be noted that in order to calculate the damages, the court does not refer to the husband's expenses for the marriage (the *adbash* and the jewellery). The case between Khaled and Emna showed that the husband's right to damages is considered separately from his right to the *adbash*, and the value of the jewellery is not indicated as being relevant for the amount of moral damages awarded.

The material shows that the court does not always grant material damages to men either: in two cases where the husband files for damages and is present at the reconciliation session(s), the demand is granted while in one case, the demand is rejected. In this case, the lack of damages might be explained by the fact that the wife filed for divorce before consummation (although this is not sure, as in one judgment the decision states '*wa lam tamma al-bina*' (and no consummation took place), while a few

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<sup>491</sup> CFI Tunis 6 January 2009, 69437

lines further the decision reads '*ba'd al-bina*' (after consummation), which is repeated in the summary at the end of the decision).<sup>492</sup>

Besides the right to damages, there are other rights resulting from divorce. In the first place, there is the *nafaqat al-'idda*, the maintenance during the waiting period. The material shows that if the wife files for divorce, she loses her right to maintenance. If the husband files for divorce, the wife in principle has a right to *nafaqat al-'idda*, unless she does not respond to the case. However, in some cases where the husband files for divorce and the wife is present at the reconciliation session, the decision is silent on *nafaqat al-'idda*, and it does not become clear from the decision what the rule is. It is possible that the wife obtained a maintenance decision. In the second place, there is the right to stay in the marital home and the right to child maintenance. As these topics are interrelated with the question of custody, I will come back on these issues in chapter 6.

### Sources

#### *Al-mahkama*

[...]

With regard to the damages: Given that divorce on the grounds of Article 31 par. [1 sub] 3 PSC justifies the demand of compensation of the harm inflicted on the other spouse

With regard to the moral damages:

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<sup>492</sup> CFI Tunis 6 January 2009, 69603

Given that divorce without grounds inflicts moral harm on the other party affecting his/her honour and his/her social status and also the bereavement of marital life and this harm is eligible for compensation. Given that taking into consideration the period of co-habitation and the age of the defendant and the impact of the divorce on his/her feelings [and the presence of children in his/her custody]<sup>493</sup> and taking into consideration the social status of the parties, the court decides to compensate this harm with [...].

With regard to material damages:

Given that divorce inflicts material harm on the defendant because of the abrupt change in her life circumstances, the costs of the woman derived from the divorce have the amount of what she takes upon her with the loss of a breadwinner and support.

Given that Article 31 PSC gives the woman the opportunity to choose between a compensation of the damages to be paid monthly or in the form of a lump sum to be paid to her at once.

Given that the wife has chosen [...]

However the amount was too high and the court decided to alter it and to lower it to be in accordance with the duration of the marriage and the job of the man and his real income and the *niveau de vie* of the couple, and the court decided to fix the amount on [...].

With regard to the decisions on damages I should make a distinction between the grounds underlying the decision to *grant* (or deny) damages on the one hand and the *amount* on the other.

Standard decisions invoke the following sources as the ones underlying the decision to grant damages (moral and material). The first source is legislation: court decisions argue that Article 31 PSC prescribes that the damages resulting from divorce without grounds are

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<sup>493</sup> This phrase is wiped out if the woman demands divorce and she obtains child custody, or if no children are involved.

eligible for compensation.<sup>494</sup> The second source concerns the attribution of moral damages. Court decisions state that the defendant has a right to moral damages not only because this is prescribed by law, but also because the defendant's *honour* and *position in society* are damaged. The source is invoked in all standard decisions with regard to divorce without grounds, be it on demand of the husband or of the wife. This implies that both divorced women and divorced *men* suffer from a damaged honour and position in society. The court does not explain where it finds this norm (for example: 'according to Tunisian 'custom' divorced men and women suffer from damage to their honour and position in society').

With regard to *material* damages (to be paid to the wife only), court decisions also add a second source besides legislation. Standard decisions state that the defendant suffers from an 'abrupt change in life circumstances', especially the loss of 'a breadwinner and support.' Here, the court invokes a practical, financial argument to grant material damages. Again, the court does not explain why the defendant would lose a breadwinner and support (for example by referring to Article 23 or 37 PSC that stress that the husband is the main breadwinner). As husbands are not granted material damages, divorced husbands are possibly not considered to suffer from an abrupt change

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<sup>494</sup> Article 31 par. 2 PSC provides that the court decides on the compensation of material and moral damages inflicted on one of the spouses and resulting from the divorce pronounced on the grounds of par. 1 sub 2 (divorce for harm) and sub 2 (divorce without grounds).

in life circumstances (in financial terms) and the loss of a breadwinner and (financial) support.

Decisions that *deny* the defendant damages do not always explain this: the paragraph on damages in the standard decision is simply wiped out. This is true for those cases where the defendant is not present at the reconciliation session and thus, it remains unclear why an absent defendant does not have a right to damages. Similarly, in the case where the husband-defendant *did* file for damages but the court did not grant these, the decision does not explain why. Also here, the part on the damages in the standard decision was simply left out in the typed out version. This case seemingly concerned a divorce before consummation. Possibly the husband's honour and social position are not considered damaged if the wife files for divorce before consummation.

Those decisions where the wife-defendant is denied her right to material damages on the other hand *do* indicate the reasons for this denial. The decision that denies the wife material damages in the divorce decision that according to the judgment is pronounced *qabla al-bina* (before consummation) is based on 'the absence of marital life,' while in the summary at the end of the decision, the court adds Article 37 PSC to the standard list of provisions that are applied, which obliges the husband to pay maintenance during *marriage*.<sup>495</sup> Apparently the court did not qualify the situation at hand as a 'marriage', as the

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<sup>495</sup> CFI 6 January 2009, 69299



divorce took place before ‘consummation’ and therefore, the wife did not have a right to material damages after divorce. (It should be reminded that the husband loses his right to *moral* damages in case the marriage is not consummated; apparently, the husband is considered not to suffer from damage to his honour and social position, while the wife *is*, as she keeps her right to moral damages.)

The decision that denies the wife material damages where the husband states that she is *nashiza*, is based on the grounds that ‘the marriage did not last more than one year and that the wife did not get used to the kind of fixed sum to live for the lack of marital life [*fi dull al-hayat al-zawjiyya* means something like the ‘error’ of marital life].’<sup>496</sup> With regard to the first grounds: although indeed, the standard form invokes the duration of the marriage as a factor to count the amount of material damages, it does not make the mere right to it depend on this factor; thus, other decisions concerning cases where the marriage did not last more than a year *do* grant the wife material damages.<sup>497</sup> Therefore, it is more likely that the *second* grounds was decisive in this case, namely that the wife did not get used to maintenance as there was an ‘error’ in marital life. The term ‘error’ seems to refer to the fact that the wife had abandoned the marital home. In this way, the decision is presuming that a wife who abandoned the marital home did not have a right to maintenance during

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<sup>496</sup> CFI 13 January 2009, 68351

<sup>497</sup> CFI Tunis 5 January 2009, 68150, CFI Tunis 6 January 2009, 69437 and 70601

marriage and therefore, she loses her right to material damages after divorce. It is not explained why a woman who abandons the marital home would lose her right to maintenance and thus, her right to material damages after divorce. Possibly, the wife is not considered to be losing a 'breadwinner and support'.

The decision that the wife who has an income loses her right to material damages is based on the grounds that she earns 450 DT and that 'she cannot have two incomes'.<sup>498</sup> The decision does not explain *why* a wife could not have two incomes, e.g. with reference to the legislation. As I witnessed in many reconciliation sessions that often, wives who have an income *do* have a right to damages, I suspect that it is the *amount* she earns that makes that in this particular case, the wife loses her right to material damages. In reconciliation sessions I observed that most people, both men and women, indicate that they earn around 350 DT and thus, it is possible that the wife in this particular case earns *more* than her husband. This would explain why she loses her right to material damages, as in this case, it is not her but the *husband* who loses a 'breadwinner and support.'

The fourth decision that denies the wife material damages concerns the case where the wife files for material damages to be paid in instalments *and* as a lump sum. The court argues that 'there is no foundation to grant material

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<sup>498</sup> CFI 6 January 2009, 69751

damages.<sup>499</sup> The court does not explain why this would be a reason to deny the wife damages.

With regard to the amount of damages awarded, standard decisions refer to several factors that are of importance to calculate the moral and material damages awarded. In order to calculate the moral damages for both husband and wife, the court refers to the period of cohabitation, the age of the defendant, the impact of the divorce on his/her feelings, the presence of children in his/her custody, and the social status of the parties. Again, the court does not explain why the period of cohabitation, the age of the defendant, the defendant's feelings, the presence of children and the social status of the parties should be of interest. Moreover, the reasoning does not differentiate between men and women. However, in reconciliation sessions, I observed one judge stating to the wife: 'People accept a widow, but they do not accept a divorcee',<sup>500</sup> while I never heard a judge say something similar to a divorcing husband. This might signify that a woman is considered to suffer more from divorce than a man, which might explain why in my cases, husbands pay an average of 2.000 DT while the only women who actually paid moral damages, paid 1.000 and 1.500 DT. Thus, an additional factor that plays a role in the calculation of moral damages might be the gender of the defendant (although this is not mentioned in the decision).

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<sup>499</sup> CFI Tunis 6 January 2009, 69437

<sup>500</sup> Reconciliation session CFI Tunis 8 January 2009

With regard to the calculation of material damages awarded to the divorced wife, the court invokes the factors of duration of marriage, the job of the man and his real income, as well as the *niveau de vie* of the couple. The court does not explain why the other factors are of importance. However, that the duration of marriage and the husband's job and income play a role is in line with the notion that a wife has a right to material damages to prevent that she suffers from an abrupt change in her life circumstances. Again, it is interesting to note that the *wife's* job and income are not mentioned here: neither in the sense that her having an income makes her lose her right to material damages, nor in the sense that her amount of income influences the amount of material damages. Possibly standard decisions are based on the presumption that women do not *have* an income.

In some decisions, the decision on the amount of damages seems to be based on additional grounds, namely the 'bad behaviour' of the plaintiff or the defendant. However, the accusations are not mentioned in the paragraph on damages as being one of the factors that influence the amount; they are only mentioned in the paragraph on the proceedings (*al-ijra'at*) in the description of the reconciliation session(s). That mentioning 'bad behaviour' might nevertheless underly the decision on the amount of damages can be concluded from the fact that almost all reconciliation sessions observed are characterised by accusations from both sides, while most *descriptions* of the reconciliation session in the judgments are limited to the statement that the plaintiff persisted in his/her demand and that the defendant resisted (see case one between

Tarek and Khouloud). Only a minority of the decisions mentions the accusations uttered during the session. This was the case in case two between Khaled and Emna: the decision states that during the reconciliation session, Khaled accused Emna's parents of intermingling in her affairs and he accused Emna of refusing to live with him in Kerkennah, where he is from. Other judgments mention the following allegations: domestic violence,<sup>501</sup> non-payment of maintenance,<sup>502</sup> absence of sexual relations,<sup>503</sup> 'bad words'<sup>504</sup>, drinking alcohol,<sup>505</sup> adultery<sup>506</sup>. That the accusations play a role in the amount of damages was confirmed by a Family Judge in an interview.<sup>507</sup> However, it is not easy to establish that bad behaviour indeed influenced the outcome in a particular case since the decisions do not mention the job and income of the spouses, making it difficult to decide whether the damages are indeed relatively 'high' or 'low' in the light of the factors invoked in the judgment.

However, in one case the correlation was evident as the wife was awarded relatively high damages, namely 3.000 DT material and 2.000 moral damages (against an average calculated from my material of roughly 2.000 DT moral damages *plus* 3.700 material damages or 100 DT per

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<sup>501</sup> CFI Tunis 6 January 2009, 69751

<sup>502</sup> CFI Tunis 6 January 2009, 69751

<sup>503</sup> CFI Tunis 6 January 2009, 69751

<sup>504</sup> CFI Tunis 5 January 2009, 64562

<sup>505</sup> CFI Tunis 5 January 2009, 67906

<sup>506</sup> CFI Tunis 5 January 2009, 64562 and 67906

<sup>507</sup> Interview with one of the Family Judges at the CFI Tunis, 10 June 2009

month), although the couple was clearly poor: they were living in the lower class neighbourhood of Hayy Ibn Khaldoun, while her parents lived in Hayy Ettadamun (a large depressed and dangerous township at the outskirts of Tunis).<sup>508</sup> The decision mentions under the heading of 'proceedings' that the husband accused his wife of having left the marital home (*nushuz*). As one family judge often repeated to me that 'women do not leave without a reason',<sup>509</sup> the fact that the wife abandoned the marital home might have been a reason for the court to grant her a high amount of damages, presuming that it was *him* who behaved badly towards her. Thus, mentioning his allegation uttered during the reconciliation session can be conceived as a factor underlying the calculation of the amount of damages awarded to the wife.

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<sup>508</sup> CFI Tunis 5 January 2009, 69614

<sup>509</sup> For example, interview with one of the Family Judges at the CFI Tunis on 29 October 2008