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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 five

### Divorce for harm

On a Monday morning in the spring of 2009, a couple enters the office of the Family Judge. The wife files for divorce for harm. 'Why?', the judge asks her. 'Because he beats me', she replies. 'But you have children together!', the judge tells her. 'I'm filing for divorce for harm', the woman insists. 'But on what grounds?', the judge replies. 'He is not living with me', the wife replies. 'So what?', the judge says. 'He uses bad words in front of the children', the wife adds. 'So what?' the judge asks again. 'He is not paying maintenance', the wife adds. 'And? Do you have a maintenance decision?', the judge asks her. 'Otherwise it is not possible [to file for harm]. You should file for divorce without grounds.' The husband intervenes, stating that his wife abandoned the marital home. 'But that's because he beats me', the wife replies. The husband says that he has a medical certificate that proves that she beats him. The judge tells both of them: 'You have to prove everything you say!'.<sup>510</sup>

In this chapter, I examine judicial practices in the field of divorce for harm. The material consists of a total of 36 decisions issued by the two Family Chambers of the CFI Tunis in 2008 and 2009 (11 of which were issued in 2008, and 25 date from 5, 6, 12 and 13 January 2009), as well as the reconciliation sessions observed between October 2008 and September 2009 and interviews with the two Family Judges in the same period.

For the study of judicial practices in the field of divorce for harm, additional material consists of the observation of sessions of the public prosecutor who is specialised in family matters (CFI Tunis) and interviews with him,

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<sup>510</sup> Reconciliation session CFI Tunis 18 May 2009

interviews with the head public prosecutor at the CFI Tunis, and interviews with two penal judges (one at the CFI Tunis and one at the Cantonal Court in Tunis). These are all men. I also interviewed two (female) lawyers who are equally women's rights activists and members of the ATFD and the AFTURD, as well as one (female) councillor at the *centre d'écoute* of the ATFD and three female litigants who were implicated in a case of divorce for harm (Jihène, Meriem and Boustaina).<sup>511</sup> Finally, I observed a counselling session at the *centre d'écoute* with regard to a woman who was the victim of domestic violence.

Only 25 of the 36 decisions from the CFI Tunis form part of the decisions issued on 5, 6, 12 and 13 January 2009; the other 11 decisions were issued in 2008 and were handed to me by the Family Judge of Chamber I when I asked specifically for cases of divorce for harm. This is important for three reasons. First, the fact that only 25 decisions were issued on divorce for harm on these four days indicates that not many people file for divorce for harm and/or that many petitions for divorce for harm are abandoned or changed into divorce without grounds/divorce with mutual consent during the proceedings.<sup>512</sup> Second, as the 11 decisions issued in 2008

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<sup>511</sup> These names are fictitious out of respect for the litigants' privacy.

<sup>512</sup> Two cases of divorce for harm on the grounds of abandonment from the marital home were changed into divorce without grounds (CFI Tunis 6 January 2009, 61923, 12 January 2009, 64948) as well as one decision on the grounds of non-payment of maintenance (CFI Tunis 6 200

are selected for me by the Family Judge, they might not reflect general practices. Third, the relative small amount of decisions makes it somewhat problematic to derive the practice at this court with regard to divorce without grounds. This is even more so because the 36 decisions cover different aspects of divorce for harm in the sense that they concern different grounds of harm: some regard domestic violence, others concern non-payment of maintenance, etc. As a result, many conclusions drawn in this chapter are highly speculative.

The chapter proceeds as follows. Section one describes how cases of divorce for harm proceed, partly referring to the procedure described in chapter 2 and gives a general overview of the types of cases I came across, which given an insight into what acts (or lack thereof) are qualified as 'harm' and in what cases the demand is granted or rejected. Section three contains an analysis of the material focusing on the norms that can be derived from the material as well as the sources invoked; this section is divided into several sub-sections each of which treat another grounds for harm (domestic violence, non-payment of maintenance, the wife's abandonment from the marital home, the husband's refusal to cohabit, the wife's refusal to follow the husband when he moves house, adultery, and imprisonment). Every sub-section is divided into three parts, namely a description of the act that is qualified as harm as well as the sources underlying

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January 2009, 69295). One case was changed into divorce with mutual consent (CFI Tunis 6 January 2009, 70579).

this qualification, the evidence requirements to prove the harm and the sources underlying these requirements.

### **Section one**

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

A standard case of divorce for harm as witnessed in reconciliation sessions and court decisions proceeds quite similarly to the other divorce cases. However, the procedure is characterised by some particularities. In the first place, the date of the petition is seemingly of particular importance for cases of divorce for harm, as relatively often, both spouses file for divorce: both on the grounds of harm, or one of the grounds of harm and one without grounds. Here, the rule is applied that the first petition is taken into consideration while the second is rejected.<sup>513</sup>

The process-verbal of the reconciliation session is particularly important in cases of divorce for harm as it can provide *evidence* of the harm. For example, in a case where the wife filed for divorce for harm, the demand was granted on the grounds of the fact that the husband admitted during two reconciliation sessions that he abandoned the wife, which was noted down in the p.-v. of the reconciliation session.<sup>514</sup> However, in a session concerning a wife filing for divorce for harm on the

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<sup>513</sup> For example CFI Tunis 12 January 2009, 69211: the wife files for harm while the husband files for divorce without grounds. The wife's demand is treated as it outdates the husband's petition.

<sup>514</sup> CFI Tunis 6 January 2009, 67963

grounds of domestic violence (she stated that her husband had attacked her with a chair) the husband admitted this, but the judge did *not* note this down in the p.-v..<sup>515</sup> This shows that the reconciliation judge can execute significant influence on the outcome of the case by the way in which he or she draws up the p.-v..

Also, it is possible that the allegations of 'bad behaviour' made by the defendant during the reconciliation session influences the amount of damages granted to the plaintiff, although this is not explicitly indicated among the parameters used for the calculation of damages.<sup>516</sup>

With regard to the deliberation of the Family Chamber, an important difference with cases of divorce with mutual consent and without grounds is that cases of divorce for harm seem to take more time than the other divorce cases, in the sense that the judges take a conscientious look at the evidence in the file. Moreover, the reasoning is often more elaborated, but not always.

The standard form for divorce for harm differs slightly from the other forms. It is set up as follows. The paragraph on the subject of the claim begins in the same way as in the other types of divorce,<sup>517</sup> followed by the

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<sup>515</sup> Reconciliation session CFI Tunis 19 January 2009

<sup>516</sup> This was possibly the case in the decision of 12 January 2009, 65054. I will come back on this in the third paragraph.

<sup>517</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.

standard phrase: 'but marital life deteriorated because of the deliberate act of the defendant consisting of [specification] which inflicted harm on the plaintiff and he/she asks to bring about divorce between them for the first/second time before/after consummation on the grounds of harm brought about by the husband/wife in accordance with Article 31 par. [1 sub] 2 PSC.' The paragraph on the proceedings describes the reconciliation sessions. It seems as if judges take it more seriously to note down what has been stated during the reconciliation sessions when it concerns a case of divorce for harm, as some decisions specify what has been said on which reconciliation session, mentioning the date of the session as well. This is especially true when a party admitted which provides for the evidence of harm. The paragraph on the causes describes the object of the claim, states that the marriage was proven with a marriage certificate, and addresses the lawyers' pleas as well as the documents presented to sustain those pleas. This part is generally much more elaborate than in other divorce decisions. The paragraph on the decision repeats the object of the claim (divorce for harm) and that the marriage was proven with a marriage certificate, and states that the reconciliation sessions remained without result. This paragraph contains an interpretation of the law and a description and qualification of the evidence presented. This part of the decision is generally significantly more elaborate than decisions of divorce with mutual consent or divorce without grounds.

The form continues with the provisional measures taken during the first reconciliation session, and the financial

consequences of the divorce, namely the moral and material damages, lawyer's fees and procedural expenses. Interestingly, the standard phrases are exactly the same as in the forms of divorce without grounds. This means that the standard form does not make explicit reference to the *act* that inflicted harm on the plaintiff as a factor that influences the amount of *moral* harm. The last paragraph summarizes the decision. The heading states 'For these reasons' (*li-hadhihi al-asbab*). In some decisions this is followed by an enumeration of the same articles invoked in other divorce cases (Article 40, 68 and 128 and further of the Code of Civil and Commercial Procedure, Articles 29, 30, 31, 32 and 54 PSC<sup>518</sup> and Article 40 of the Code of Civil Status) without ever mentioning an additional article that was invoked throughout the decision (such as Article 23 PSC). A large part of the decisions does not mention any Articles at all under this heading.

## Section 2

### A description of the material

This section describes the material with regard to divorce for harm.

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<sup>518</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.

## The petition of the wife

### **Case 1 Mounira versus Imed<sup>519</sup> (CFI Tunis, 12 January 2009, 65054)**

On 14 June 2007, Mounira (1977) files a petition for divorce for harm 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 7 December 2006, and they consummated the marriage and they have one child, but marital life deteriorated because of the deliberate act of the defendant consisting of a violent attack on her (*al-i'tida' bi-l-'unf*) and [she obtained] a penal conviction namely decision number [...]. This inflicted harm upon the plaintiff and she asks to bring about divorce between them for the second time after consummation on the grounds of harm brought about by the husband in accordance with Article 31 par. [1 sub] 2 PSC and [she asks to] oblige the defendant to compensate her for her moral damages with 1.000 DT and 10.000 DT for material damages and 600 DT for lawyer's fees.'<sup>520</sup>

Mounira's husband Imed (1971) is summoned to attend the first reconciliation session to be held on 28 July 2007 at 9 o'clock. They are both present at this session. According to the judgment, Mounira recounts that she persists in her claim of divorce for harm consisting of 'an attack with violence' (*al-i'tida' bi-l-'unf*). She also tells the judge that she is pregnant in her fourth month and that this divorce case was preceded by a divorce in 2001 for the kidnapping of her daughter and that they married again on the grounds that he would refrain from doing that, 'but it began all over again.' The husband replies according to the decision that the accusations are without any grounds and that 'the truth is that she attacked herself and that the true reason for their difference of opinion is her refusal to move house with him to an independent marital home as they are living with her parents.' He resists to the divorce.

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<sup>519</sup> The names are fictitious out of respect of the litigants' privacy.

<sup>520</sup> وقد ساءت العلاقة الزوجية بينهما لتعمد المطلوب الاعتداء بالعنف

The reconciliation judge accords custody over both children (in the meantime the second daughter is born) to Mounira, granting Imed visiting rights and obliging him to pay 40 DT for the eldest daughter and 30 DT for the new born every month.

In the paragraph on the *mustanadat*, the court argues that Imed's lawyer stated that the penal conviction has not yet obtained force of *res judicata*, and that there is a witness who declared that Mounira attacked herself. He files for 1.000 DT lawyer's fees.

In its decision, the court argues that (given that the demand was to bring about divorce for harm, and that the marriage was proven and that the reconciliation sessions failed): 'Given that the harm that is insisted upon consists of an attack with violence. Given that the harm is proven with a court decision issued on 29 November 2007 [...]. Given that the harm consisting of severe violence (*'unf shadiid*) is proven, this leads the judge to the pronouncement of divorce for harm.'

The provisional measures taken during the first reconciliation session are confirmed, and the wife is granted 1.500 DT moral and 1.000 DT material damages, as well as 250 DT for lawyer's fees.

In the summary, the decision mentions the same provisions as in decisions on divorce without grounds and divorce with mutual consent.

To summarize, the 30-year-old Mounira files a petition for divorce for harm against her 36-year-old husband with whom she has one child *and* of whom she is pregnant at the moment of the petition. It is their second divorce: the first divorce was, according to her, due to the fact that he kidnapped their daughter. They remarried after he promised to treat her better, but according to her, he did not keep his promise. In this case, she presents a penal conviction of domestic violence to sustain her demand and she files for 1.000 DT moral and 10.000 DT material damages.

During the reconciliation sessions, the husband argues that his wife actually wants to divorce because she does

not want to move house with him (he wishes to move house because they are living with her parents) and therefore, she attacked herself in order to obtain divorce for harm. In this way, the husband refers to the financial advantages of divorce for harm over divorce without grounds: if Mounira files for divorce without grounds, she should (in principle, see the previous chapter) pay damages whereas in case of divorce for harm she will *receive* damages. In order to sustain his accusation, Imed's lawyer argues that the penal judgment convicting Imed for domestic violence has not yet obtained force of *res judicata*, implying that it does not provide sufficient evidence for the violence. Also, the lawyer presents evidence for the fact that the accusation is false, in the form of a witness declaration providing that Mounira attacked herself.

Despite the fact that the sentence did not obtain force of *res judicata* and despite the witness declaration, the court grants the demand, arguing that the violence was proven with the penal sentence. The court grants Mounira a higher amount of moral damages than she filed for, namely 1.500 DT instead of 1.000 DT. On the other hand, she receives 1.000 DT for material damages instead of the 10.000 DT she filed for.

I have one case resembling case 1 between Mounira and Imed, where the wife files for harm on the grounds of domestic violence only. She specifies during the reconciliation session that her husband attacked her with a knife for which she underwent surgery in hospital. She shows a penal sentence. The wife did not file a petition for

damages and did not receive any. Nevertheless, the decision states explicitly that she can file for them in a separate case.<sup>521</sup>

In 5 other decisions, the wife files for divorce for harm on the grounds of domestic violence together with other grounds. In one case, the wife mentions domestic violence together with 'bad treatment' (*su' al-mu'amala*), and expulsion from the marital home (*tarad min al-mahall al-zawjiyya* [sic!]).<sup>522</sup> In another case, the wife mentions non-payment of maintenance (*adam al-infaq*) to her and their child, beating (*i'tida' 'alayha bi-l-darab*), and leaving her behind in a situation of poverty.<sup>523</sup> In yet another case, the wife mentions violence and contempt with regard to her and a violation of her honour.<sup>524</sup> In the fourth case, the wife mentions violence and 'the many problems he tells her about which have repeatedly put him in prison'.<sup>525</sup> In the fifth case, the wife mentions expulsion from the marital home and violence, and during the reconciliation sessions she adds that he took the furniture (*adbash*) from the marital home which forced her to move to her parents' house and that he neglects her (financially). At the court hearing she adds that they have been living separately for five years.<sup>526</sup>

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<sup>521</sup> CFI Tunis 5 May 2008, 66970

<sup>522</sup> CFI Tunis 12 January 2009, 69211

<sup>523</sup> CFI Tunis 27 October 2008, 63944

<sup>524</sup> CFI Tunis 6 January 2009, 66893

<sup>525</sup> CFI Tunis 27 October 2008, 67558

<sup>526</sup> CFI Tunis 5 January 2009, 69210

Out of the five petitions of divorce for harm that mention domestic violence together with other grounds, not one is granted on the grounds of domestic violence. Two petitions are rejected (one for lack of evidence of non-payment of maintenance, and the other on the grounds that a foreign court had already decided on the case). Two demands are granted on the grounds of non-payment of maintenance. In these cases, the wife presented a penal conviction for non-payment of maintenance (*hukm ihmal 'iyal*). In one case the demand was granted on the grounds that the husband refused to live together, which the husband admitted this during the reconciliation session.<sup>527</sup> In all cases, the wife is granted damages.

**Case two: Sana versus Abdallah<sup>528</sup> (CFI Tunis, 12 January 2009, 69314)**

On 15 May 2008, Sana (1973) files a petition for divorce for harm 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 16 June 2000, and they consummated the marriage and they have one child, Amel, but marital life deteriorated because of a deliberate act of the defendant consisting of the neglect his wife and his non-payment of maintenance to her and a court decision was issued against him convicting him to imprisonment for neglect of his family (*ihmal 'iyal*).<sup>529</sup> This inflicted harm upon the plaintiff and she asks to bring about divorce between them for the first time after consummation on the grounds of harm brought about by the husband in accordance with Article 31 par. [1 sub] 2 PSC and [she asks] to oblige the defendant to compensate her for her material damages with

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<sup>527</sup> CFI Tunis 12 January 2009, 69211

<sup>528</sup> The names are fictitious in order to protect the litigants' privacy.

<sup>529</sup> وقد ساءت العلاقة الزوجية بينهما لتعمد المطلوب اهمال زوجته و عدم الانفاق عليها

10.000 DT and the same amount for her moral damages and 500 DT for lawyer's expenses.'

Sana's husband Abdallah (born in 1962, currently living with his parents) is summoned to attend the first reconciliation session to be held on 3 July 2008 at 9 o'clock. At this session, the husband is absent and Sana declares that she persists in her demand, arguing that he does not fulfil his duties with regard to her and to their daughter and that she obtained a maintenance decision (*hukm nafaqa*) and a (penal) decision for neglect of the family (*hukm ihmal 'iyal*).

The judge takes the following provisional measures: custody is awarded to the mother and visiting rights to the father. The case is transferred to the court hearing where the lawyer of the wife is present, but the husband is absent and does not respond in writing either.

In the *mustanadat*, the court argues that besides the birth certificates and the marriage contract, the wife presented a copy (*shahada*) of the penal conviction of her husband.

In its decision, the court argues as follows: (Given that the demand was to bring about divorce for harm, and given that the marriage was proven, and given that the reconciliation sessions failed,) 'Given that with Article 31 par [1 sub] 2 PSC the legislature grants the spouse who suffers from harm the right to file for divorce on the grounds of harm inflicted on him. Given that it is proven with two copies of penal decisions issued on 22 December 2006 and 15 May 2008 that the defendant is convicted for neglect of the family and that he went to prison. Given that the conviction of the defendant for neglect of the family was proven while it was not contested [by the husband] [and that it forms] a violation of the maintenance obligation imposed on him by Article 23 PSC and his abandonment of his wife and his daughter in a condition of neglect and poverty, this forms harm [inflicted by] the defendant that is proven and that obliges to pronounce divorce in the sense of Article 31 par. [1 sub] 2 PSC.'

The court confirms the provisional measures taken during the first reconciliation session.

The court grants 2.000 DT moral and 3.000 DT material damages, as well as 250 DT lawyer's fees and convicts the husband to pay the court expenses.

In the summary at the end of the decision, the court invokes the same articles as in other divorce decisions.

In this decision, Sana files for divorce for harm on the grounds of neglect of the wife and non-payment of maintenance to her and asks for the payment of 10.000 DT material damages and 10.000 DT moral damages. The wife presents two penal decisions (from 2006 and 2008) convicting the husband to imprisonment for neglect of the family (*ihmal 'iyal*). The husband does not respond. The court grants the demand, arguing that the neglect of the family is proven and that this constitutes a violation of Article 23 PSC which justifies divorce for harm ex Article 31 par. 1 sub 2 PSC. The wife is granted 2.000 DT moral and 3.000 DT material damages.

I also have 5 cases that mention non-payment of maintenance alone or in combination with abandonment from the marital home. In 3 cases, the wife files for divorce for harm on the grounds of neglect of the family (*ihmal*) and/or non-payment of maintenance<sup>530</sup>, while in the fourth case, the wife states that in addition, the husband has not been cohabiting with her for a number of years (*'adam musakana zawjatihi mundhu sanawat*)<sup>531</sup> and in the fifth case this was 5 years.<sup>532</sup> One of these petitions is changed into divorce without grounds and one is rejected for lack of evidence. In three of the cases the demand is granted on the grounds of non-payment of maintenance, which is proven with a penal conviction for neglect of the

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<sup>530</sup> CFI Tunis 6 January 2009 69295, CFI Tunis 12 January 2009, 67292 and 69314

<sup>531</sup> CFI Tunis 5 January 2009, 68484

<sup>532</sup> CFI Tunis 5 January 2009, 69210

family (*ihmal 'iyal*). In all cases, damages are granted. I also have one case where the wife files for divorce for harm on the grounds that her husband abandoned her.<sup>533</sup> The husband admitted this during the reconciliation session and the demand is granted. She obtains damages.

Apart from the cases where the wife mentions domestic violence, non-payment of maintenance and/or abandonment from the marital home, I also have cases where women file for divorce for harm on other grounds. In two cases, the harm consists of having a relationship with someone else.<sup>534</sup> One of these was dismissed as a foreign court had already decided on the case, while the second was granted. In the latter case, the wife presented a penal conviction for adultery. She did not file for damages and did not receive any. In one case, the wife filed for divorce for harm on the grounds that the husband was in prison leaving her without a family. He had been convicted for paying with uncovered cheques.<sup>535</sup> The demand was granted and she received damages. In this case, the wife presented the penal conviction of the man. In one case, the harm consisted of 'obscenity' with regard to the wife's daughter from a previous marriage.<sup>536</sup> The demand was granted. In this case, the husband had been convicted for this, and he also admitted it during a reconciliation session. The wife did not file for damages and did not receive any.

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<sup>533</sup> CFI Tunis 6 January 2009, 67963

<sup>534</sup> CFI Tunis 20 October 2008, 66610, CFI Tunis 6 January 2009, 67885

<sup>535</sup> CFI Tunis 27 October 2008, 68110

<sup>536</sup> CFI Tunis 26 May 2008, 65614

In reconciliation sessions, women indicated that they filed for divorce for harm on the following grounds: domestic violence<sup>537</sup>, non-payment of maintenance<sup>538</sup>, imprisonment,<sup>539</sup> adultery<sup>540</sup>, child abuse<sup>541</sup>, expulsion from the marital home<sup>542</sup>, abandonment from the marital home<sup>543</sup>, child abduction<sup>544</sup> and sodomy.<sup>545</sup> In some sessions, women mentioned several grounds at once. For example, in one session, the wife accused her husband of insisting on *haja hrama* before marriage, and after they signed the marriage contract he refused to arrange for the marriage festivities. He promised her to rent them a house but he never did and he beat her.<sup>546</sup> In another session, the wife accused her husband of drinking alcohol and having an affair.<sup>547</sup>

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<sup>537</sup> Reconciliation sessions CFI Tunis, 16 January 2009, 19 January 2009a, 19 January 2009b, 19 January 2009c, 21 May 2009, 10 June 2009, 11 June 2009, 25 June 2009,

<sup>538</sup> Reconciliation session CFI Tunis, 21 January 2009, 25 May 2009

<sup>539</sup> Reconciliation session CFI Tunis, 30 October 2008, 14 January 2009, 26 May 2009,

<sup>540</sup> Reconciliation session CFI Tunis, 29 October 2009, 17 June 2009

<sup>541</sup> Reconciliation session CFI Tunis 8 January 2009

<sup>542</sup> Reconciliation session CFI Tunis 11 June 2009, 25 June 2009

<sup>543</sup> Reconciliation session CFI Tunis 29 October 2008 (the husband moved to France and refused her to join him)

<sup>544</sup> Reconciliation session CFI Tunis 16 January 2009 (the husband left for Ayn Draham taking the children with him), 25 June 2009 (the husband expelled her from the marital home and did not allow her to see her child)

<sup>545</sup> Reconciliation session CFI Tunis 11 December 2008

<sup>546</sup> Reconciliation session CFI Tunis, 11 June 2009

<sup>547</sup> Reconciliation session CFI Tunis, 17 June 2009

It should be noted that in many reconciliation sessions, behaviour such as domestic violence was mentioned, but the spouse invoking this was nevertheless filing for divorce without grounds or with mutual consent. It did not always become clear to me why they did not file for harm<sup>548</sup>, but in some cases, they changed their demand during the session at the instance of the reconciliation judge who stated that she would not be able to prove harm<sup>549</sup> or that she should better change her demand as she was related (by family) to her spouse.<sup>550</sup> Similarly, women-*defendants* would mention behaviour such as domestic violence. This happened in cases where the husband filed for divorce without grounds (see the previous chapter; invoking his 'bad behaviour' might increase her amount of damages) or where *he* filed for divorce for harm. In cases where the husband files for divorce for harm on the grounds that she abandoned the marital home, the wife's invocation of 'bad behaviour' such as domestic violence, non-payment of maintenance or expulsion from the marital home can cause a rejection of his demand, obliging him to change his demand into

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<sup>548</sup> Reconciliation session CFI Tunis, 29 October 2009 (the wife changes the petition into mutual consent although she accuses him of adultery)

<sup>549</sup> Reconciliation session CFI Tunis, 5 November 2009 (the wife wishes to file for harm on the grounds of domestic violence but changes the demand into divorce without grounds as she cannot prove the violence)

<sup>550</sup> Reconciliation session CFI Tunis, 26 May 2009a (the husband abandoned the marital home), 26 May 2009b (the husband returned to Algeria where he contracted a polygamous marriage)

divorce without grounds in which case *he* should pay damages.<sup>551</sup>

During reconciliation sessions, the judge's reply to the wife's petition for divorce for harm consisted mainly of an effort to discourage this. The main grounds was that the wife would not be able to prove the grounds of harm: I often witnessed that reconciliation judges told the wife that her demand of divorce for harm would be rejected as she did not have a penal conviction.<sup>552</sup> Another argument to dissuade the wife was that divorce for harm takes a long time, and again another argument was that the spouses were related to one another. However, I also witnessed one session where the judge seemed to *encourage* the wife to file for harm. Here, the wife told the judge that her husband had been living in France for the past 4 years. 'So you're not asking for anything?', the

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<sup>551</sup> For example: Reconciliation session CFI Tunis 25 June 2009 (the husband files for divorce for harm on the grounds of abandonment of the marital home, arguing that she obtained a maintenance decision and a medical certificate as a strategy to be able to leave without risking that he filed for harm. During the reconciliation session, the wife argues that he meats her and films '*esh haram* (forbidden sex).)

<sup>552</sup> Reconciliation session CFI Tunis, 8 January 2009 (the wife accuses her husband of child abuse but a medical certificate is insufficient according to the judge), 16 January 2009 (the wife accuses her husband of non-payment of maintenance, domestic violence, and child abduction and the judge tells her to do a maintenance case) 19 January 2009 (the wife accuses the husband of domestic violence but a medical certificate is insufficient according to the judge), 21 May 2009 (*idem*), 17 June 2009 (the wife accuses her husband of drinking alcohol and having an affair; she should have a penal conviction according to the judge)

judge asked the wife who was filing for divorce without grounds.<sup>553</sup>

### The petition of the husband

#### **Case 3: Chokri versus Basma<sup>554</sup> (CFI Tunis, 5 January 20091, 70474)**

On 20 August 2008, Chokri (1977) files a petition for divorce for harm 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 [?]<sup>555</sup> August 2007, and the marriage was consummated and they do not have children, but marital life deteriorated because of the deliberate act of the defendant consisting of the abandonment of the marital home in Tunis by returning to her home town in Egypt and she refuses to return despite the summons issued by the bailiff (*'adl al-tanfidh*).<sup>556</sup> This inflicted harm on the plaintiff and he asks to bring about divorce between them for the first time after consummation on the grounds of harm brought about by the wife in accordance with Article 31 par. [1 sub] 2 PSC.'

Basma (no date of birth mentioned, living in Cairo) is summoned to attend the first reconciliation session to be held on 20 October 2008 at 9 o'clock, but she is absent. The judgment is brief with regard to what has been argued on the reconciliation session, summarizing it to the remark that the plaintiff persists in his demand.

On the court hearing, the husband is represented by a lawyer and the wife does not respond.

In the paragraph on the *mustanadat*, the court stresses that Basma was summoned correctly.

In its decision, the court argues that (given that the demand was to bring about divorce for harm, and that the marriage was proven and that the reconciliation sessions failed): 'Given that the harm insisted

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<sup>553</sup> Reconciliation session CFI Tunis 13 May 2009

<sup>554</sup> These names are fictitious out of respect for the litigants' privacy.

<sup>555</sup> The day is illegible on the photocopy.

<sup>556</sup> وقد ساءت العلاقة الزوجية لتعمد المطلوبة مغادرة محل الزوجية بتونس و الرجوع الى مسقط رأسها بجمهورية مصر العربية و قد رفضت الرجوع بالرغم من التنبيه عليها بواسطة عدل تنفيذية

upon consists of the wife's abandonment of the marital home that is in Tunisia and the wife's return to stay in Egypt. Given that it is proven with the documents in the file that the wife is living in Egypt as the summons attained her in Egypt. Given that she was not present and that she did not respond to the claim in any way and that she did not demonstrate what justifies that she abandoned the marital home in the form of a legal justification. Given that the violation of the obligation to cohabit inflicts harm on the husband leading to divorce for harm.' The wife is convicted to pay procedural expenses. In the summary, the decision mentions the same articles as in other divorce cases.

To summarize: in this case it is the *husband* who files for divorce for harm on the grounds that his wife abandoned the marital home, without filing for damages. He argues that the marital home is in Tunis, and that his Egyptian wife returned to Egypt, refusing to come back despite his summons to return (the '*adl al-tanfidih* summoned her to return). The wife does not respond to the claim. The court grants the demand arguing that the marital home is indeed in Tunis, and that the wife's abandonment of the marital home is proven by the documents (namely the summons to return, which attained her), and that she did not give any justification for her abandonment, thus violating the obligation to cohabit which justifies divorce for harm.

I have 10 other decisions on petitions resembling the petition in case three in the sense that the husband files for divorce for harm on the grounds of the wife's

abandonment of the marital home.<sup>557</sup> The demand is only granted *once*, on the grounds that she is not considered to have a valid reason.<sup>558</sup> In two cases, the husband changed his demand into divorce without grounds.<sup>559</sup> In four cases, the demand is rejected as the wife is considered to have a valid reason to abandon the marital home.<sup>560</sup> In two cases, the demand is rejected on the grounds that the marriage is not proven/not valid.<sup>561</sup> In two cases, the demand is rejected as he does not prove the location of the marital home (he states that it is in Tunisia while she says it is in France)<sup>562</sup> and in one case, the demand is rejected as the husband does not state what his harm consists of.<sup>563</sup> In the case where the demand is granted, the wife abandoned the marital home in anticipation on her husband's wish to move back to Le Kef, where he is originally from. She went to live with her (adult) children saying that she could not be so far away from them. The husband asked her to come back to the marital home, which was still in Tunis as he had not moved yet. The court did not qualify the wife's justification as valid as he had not left yet, and

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<sup>557</sup> CFI Tunis 20 October 2008, 66798, 67136/27, CFI Tunis 5 January 2009, 66028, 69156, CFI Tunis 6 January 2009, 61923, 69303, CFI Tunis, 12 January 2009, 66946, 67278, 13 January 2009, 67195

<sup>558</sup> CFI Tunis 5 January 2009, 67836

<sup>559</sup> CFI Tunis 6 January 2009, 61923 and 12 January 2009, 64948

<sup>560</sup> CFI Tunis 20 October 2008, 66798, CFI Tunis 5 January 2009, 67816, 12 January 2009, 66946, and 69032

<sup>561</sup> CFI Tunis 5 January 2009, 66028 and 6 January 2009, 69303

<sup>562</sup> CFI Tunis 5 January 2009, 66028 and CFI Tunis 13 January 2009, 67195

<sup>563</sup> CFI Tunis 20 October 2008, 67136/27

granted the husband's demand. The husband did not file for damages and the court did not grant any.<sup>564</sup>

I have two cases in which the husband files for divorce for harm on the grounds that he wishes to move house and that his wife refuses to follow him.<sup>565</sup> In the first case, the spouses are living in the same building as her parents, and the husband wishes to move to the other side of Tunis because his wife spends more time with her family than with him and their children. The wife refuses to follow him stating that she wishes to live near her parents and that it is not sensible to rent another place while they own the house that they are living in. Her justification is not accepted and the husband's demand for divorce for harm is granted. There are no damages demanded nor granted. In the other case, the wife states that if they move house, their children will have to change schools during the school year. The husband's demand is rejected.

**Case four: Moncef versus Raja<sup>566</sup> (CFI Tunis 21 April 2008, 61660)**

On 25 September 2006, Moncef (1954) files a petition for divorce for harm 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 16 March 1998, and the marriage was consummated and they have two children, but marital life deteriorated because of the deliberate act of the defendant consisting of abandonment of the marital home without a valid reason and having suspicious affairs with a number of people which made him

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<sup>564</sup> CFI Tunis 5 January 2009, 67836

<sup>565</sup> CFI Tunis 5 January 2009, 67836, 6 January 2009, 66985

<sup>566</sup> These names are fictitious out of respect for the litigants' privacy.

suspect something and file a complaint at the public prosecutor in Tunis on the grounds of adultery and the wife was condemned on 18 August 2006 for the crime of adultery and she was convicted to 8 months imprisonment and a fine of 200 DT.<sup>567</sup> This inflicted harm on the plaintiff and he asks to bring about divorce between them for the first time after consummation on the grounds of harm brought about by the wife in accordance with Article 31 par. [1 sub] 2 PSC.' He asks to order her to pay 30.000 DT moral damages and to transfer custody to him.

Raja (1976) is summoned to attend the first reconciliation session to be held on 4 November 2006 at 9 o'clock. Both spouses are present and confirm that they are married and that they have two children. The husband persists in his demand of divorce for harm on the grounds of the evidence of her bad behaviour and her conviction for adultery and he confirms that their children are with him.

The wife answers that the accusations are without any grounds whatsoever and that she was released in appeal for lack of evidence and she resists to the divorce.

The reconciliation judge takes provisional measures granting custody to the husband and visiting rights to the wife allowing her to take them with her every Sunday until 6 in the afternoon.

The wife asks a revision of the provisional measures with regard to the custody granting custody to her and visiting rights to him and obliging him to pay 150 DT for the rent. The demand is granted.

At the court hearing both lawyers are present and persist in their demand. The judgment was reserved for two more court hearings.

In the paragraph on the *mustanadat*, the court describes the standpoints put forward by the lawyers. The wife's lawyer stated that the husband's petition was based on a penal decision that was issued by the court of first instance that convicted Raja for the crime of adultery. However, the lawyer argued, this decision was submitted to the Court of Appeal for revision and to the Court of Cassation who

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<sup>567</sup> و قد ساءت العلاقة الزوجية بينهما دون موجب شرعي و ربطت علاقات مشبوهة مع عدة اطراف  
لتعمد المطلوبة بمغادرة محل الزوجية

returned it to the Court of Appeal to look at it in another composition and the latter decided on 12 December 2007 to nullify the penal conviction and decided to reject the demand.

In its decision, the court argues that (given that the demand was to bring about divorce for harm, and that the marriage was proven and that the reconciliation sessions failed): 'Given that the harm insisted upon consists of the wife's adulterous relation with another man and the issuance of a penal decision convicting her for the crime of adultery. Given that the Court of Appeal in Tunis took a second look at the case in a different composition and eventually decided to nullify the decision in first instance and decided to reject the demand. Given that the evidence of harm in a divorce case differs from the evidence for the commitment of the crime of adultery. Given that the police p.-v. makes clear that the defendant confessed the adulterous relation with the suspect Nabil after having contracted marriage with the plaintiff in the case at hand. Given that the confessions recorded in the p.-v. of the police interrogatory provides the evidence for her violation of the obligation of companionship (*mu'ashara* has a strong sexual connotation) with her husband and of chastity towards him, thus proving the harm.'

The provisional measures are affirmed in the sense that the wife obtains custody and 150 DT for living expenses and the husband obtains visiting rights.

The court convicts the wife to pay 3.000 DT moral damages. The wife shall pay the husband's lawyer's fees, but lowers the amount.

In the summary, the decision mentions the same provisions as in other divorce cases.

In this case, the husband files a case of divorce for harm on the grounds of abandonment of the marital home and having suspicious affairs with a number of people which according to him is proven with a penal decision that convicted her to 8 months imprisonment. This is the only case of which I obtained the complete case file that was

transferred to the Court of Appeal Tunis when the wife went to appeal against the divorce decision.<sup>568</sup>

It becomes clear from the file that the case proceeded as follows. The 22 year-old Raja married the then 44-year-olds Moncef in 1998 and in 1999 and 2000 two sons were born. After 8 years of marriage, in 2006, Moncef refused to make love to Raja and even expelled her from the marital bed, as she tells the police officers. 'Like any other woman', she has 'physical needs', and one day, when she goes shopping for clothes in a second hand shop, she meets Nabil. She returns to the shop several times, alone or with one of her sons, 'but only if she really needs clothes', as she points out to the police. However, things escalate between Raja and the shop-owner: one time, they touch each other in the fitting room and once they make love in the back of the store. This second time, the boy is with her, waiting for her in the shop. The boy tells his father that they're going often to a specific shop and that there is a man working there. Moncef becomes suspicious and starts to follow Raja. In the end, he files a complaint at the public prosecutor, who decides to prosecute Raja and arrests her and Nabil. During the police hearings both confess. The police also finds two other witnesses, namely two men who declare that Raja gave them their telephone number telling them that her husband did not make love to her anymore and

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<sup>568</sup> I obtained this case file at the Court of Appeal Tunis with the help of a lawyer. The vice-president at this court understood from his secretary that I had a research permit without limits, and ordered the clerk to hand me the entire file.

that he didn't pay anything for her and the children and that she needed money. One of these witnesses declares that he gave her money to buy yoghurt for the child, but both of them stated explicitly that they never called her. The file does not show how the police tracked down these men. Finally, Raja and Nabil were convicted to 8 and 6 months imprisonment but Raja went to appeal. In the meantime, Moncef filed a divorce case for harm, filing for a large amount of damages (30.000 DT) and custody over the children. In the meantime, the penal conviction is nullified on procedural grounds, as the police had not undertaken a cross-examination. The police p.-v.'s in the file show that the police heard the husband Moncef, Raja, her lover Nabil and the two other men. Although the records of the hearings of Raja and Nabil do testify to their confessions, there is no p.-v. of a cross-hearing, in which Raja was confronted with Nabil or the witnesses. For the court of appeal, this is a reason to nullify the conviction on the grounds of lack of evidence.<sup>569</sup> Nevertheless, the CFI Tunis grants the demand of divorce without grounds stating that it was proven that the wife had an affair with another man as she confessed during a police hearing. The Court adds that although the confession was not considered sufficient evidence in the penal case, it is in the divorce case. However, the damages are divided by ten (Raja has to pay 3.000 DT) and Raja obtains child custody and 150 DT for living expenses. The court does not decide on child maintenance.

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<sup>569</sup> Court of Appeal Tunis 12 December 2007, 14264

I have 2 decisions on petitions resembling the petition of Moncef in the sense that the husband accuses his wife of adultery.<sup>570</sup> In one case, the husband accuses his wife of absence of sexual relations, while in the reconciliation session he tells the judge that she is absent as she is imprisoned for prostitution.<sup>571</sup> In the other case the conviction has not yet obtained force of *res judicata*.<sup>572</sup> Both demands are granted. In one case, damages are granted while in the other, the husband does not file for damages and he does not receive any. I also have cases where the husband files for harm on other grounds than abandonment from the marital home, the refusal to follow when the husband moves house, or adultery. I have two cases where the man files for divorce for harm on the grounds that the wife is imprisoned. In the first case he accuses her of having stolen money from his bank account and asks damages. The demand is rejected on the grounds that the Tunisian court is not competent.<sup>573</sup> In the second case the husband states that the wife is convicted for public drunkenness and 'loose morals', stating that she goes in and out of prison. The husband shows a penal conviction and does not demand any damages. The demand is granted.<sup>574</sup> I have one decision where the husband wishes to divorce for harm on the grounds that

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<sup>570</sup> CFI Tunis 26 February 2008, 63237 and CFI Tunis 20 October 2008, 65040

<sup>571</sup> CFI Tunis 20 October 2008, 65040

<sup>572</sup> CFI Tunis 26 February 2008, 63237

<sup>573</sup> CFI Tunis 12 January 2009, 69594

<sup>574</sup> CFI Tunis 12 January 2009, 69806

the wife accused him unjustly of domestic violence and robbery.<sup>575</sup> The husband files for damages but the demand is rejected for lack of evidence. I have one decision concerning a husband who files for divorce for harm on the grounds that the wife refuses to set a date for the marriage festivities. The demand is changed into divorce with mutual consent.<sup>576</sup>

During reconciliation sessions where the husband filed for divorce for harm, men indicated that they filed for divorce for harm on the following grounds: abandonment of the marital home,<sup>577</sup> sterility<sup>578</sup>, domestic violence<sup>579</sup>, and absence of marital relations (sex).<sup>580</sup> It should be noted that in many reconciliation sessions, behaviour such as abandonment of the marital home was mentioned, but the spouse invoking this was nevertheless filing for divorce without grounds or with mutual consent. It did not always become clear to me why they did not file for harm, but in some cases, they changed their demand during the session at the instance of the reconciliation judge who stated that he would not be able to prove harm.<sup>581</sup> Sometimes, reconciliation judges actually *encouraged* men to file for divorce for harm on the

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<sup>575</sup> CFI Tunis 12 January 2009, 67790

<sup>576</sup> CFI Tunis 6 January 2009, 70579. This case was treated in the chapter on divorce with mutual consent.

<sup>577</sup> Reconciliation session CFI Tunis 19 January 2009a, 19 January 2009b, 10 June 2009, 12 June 2009, 23 June 2009, 25 June 2009

<sup>578</sup> Reconciliation session CFI Tunis 13 November 2008

<sup>579</sup> Reconciliation session CFI Tunis, 16 January 2009, 25 June 2009

<sup>580</sup> Reconciliation session CFI Tunis 10 June 2009

<sup>581</sup> Like the case between Farouk and Ferdaws in chapter 3.

grounds of abandonment of the marital home<sup>582</sup> or on the grounds that the husband wishes to move house and the wife refused to follow<sup>583</sup>.

I also witnessed that men-*defendants* mentioned behaviour such as abandonment of the marital home. This could occur in cases where the wife filed for divorce without grounds (see the previous chapter; invoking her 'bad behaviour' might increase or decrease the amount of damages) or where *she* filed for divorce for harm. In cases where the wife files for divorce for harm on the grounds of non-payment of maintenance, the husband's invocation of 'bad behaviour' in the sense of abandonment from the marital home can cause a rejection of her demand, obliging her to change her petition into divorce without grounds in which case *she* should pay damages.

During reconciliation sessions, the judge's reply to the husband's petition for divorce for harm could also consist of an effort to discourage this. This was mainly true in cases where he accused her of abandonment of the marital home. The main argument was that 'women do not leave without a reason'; reconciliation judges would insist that the husband admitted that he behaved badly, urging her to leave the marital home.<sup>584</sup>

### **Section three**

#### **Norms and sources**

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<sup>582</sup> Reconciliation session CFI Tunis 23 June 2009

<sup>583</sup> Reconciliation session CFI Tunis 26 May 2009

<sup>584</sup> Reconciliation session CFI Tunis 19 January 2009, 10 June 2009

In this section, I will derive norms from the material described above with regard to the following three questions: whether or not the behaviour (or lack thereof)<sup>585</sup> is qualified as 'harm' justifying divorce for harm, the required evidence for this act (or lack thereof) and the right to and amount of damages. In a second stage, I will look at the sources invoked.

### **'Harm'**

With regard to the acts (and lack thereof) that are qualified as harm by the CFI Tunis, the material shows the following. Concerning the wife's petition for divorce for harm, the court qualifies as harm inflicted by the husband: domestic violence, non-payment of maintenance, expulsion from the marital home, abandonment from the marital home, adultery, imprisonment, and child abuse. Concerning the husband's petition for divorce for harm, the court qualifies as harm inflicted by the wife: abandonment from the marital home without a valid reason, the unjustified refusal to follow the husband who wishes to move house, adultery and imprisonment. Moreover, it came forward from reconciliation sessions that the wife's refusal to have sex can be qualified as harm<sup>586</sup> and well as the husband's wish to sodomise his wife.<sup>587</sup> Moreover, domestic violence

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<sup>585</sup> Non-payment of maintenance and the wife's refusal to follow her husband when he moves house.

<sup>586</sup> Reconciliation session CFI Tunis 10 June 2009

<sup>587</sup> Reconciliation session CFI Tunis 11 December 2008

can also be qualified as harm if it is inflicted by the *wife*.<sup>588</sup> This enumeration is probably not limitative, but my material does not witness of other acts (or lack thereof) that are indeed qualified as harm.

Sources invoked to qualify these acts (and lack thereof) as 'harm'

The standard form for decisions on divorce for harm states that the possibility to divorce on the grounds of harm is provided for by the legislature ('Given that the *legislature* grants both spouses in Article 31 par. 1 sub 2 PSC the right to demand divorce on the grounds of the harm inflicted on him'). Thus, the possibility to divorce on the grounds of harm is presented as a strictly *legal* possibility (contrary to, for example, a religious possibility or a possibility that is directed by considerations of justice and fairness).

The decisions continue with a description of what the alleged harm consists of in the particular case, and why this behaviour (or lack thereof) constitutes harm in the sense of Article 31 par. 1 sub 2 PSC. As opposed to decisions on divorce with mutual consent and divorce without grounds, the reasoning in decisions on divorce for harm differs significantly from one decision to another, both with regard to the length of the reasoning and the sources invoked.

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<sup>588</sup> Reconciliation session CFI Tunis 16 January 2009: the husband files for harm on the grounds of domestic violence and the reconciliation judge states that he should prove this with a penal conviction.

### Domestic violence

As is shown above, I have two cases where divorce for harm is granted on the grounds of domestic violence. In the case of Mounira and Imed, the court grants the demand stating that the harm consists of an attack with violence, and that this was proven with a penal decision.<sup>589</sup> In this way, the husband's conviction for domestic violence seems to underly divorce for harm in this case; however, the court does not indicate *why* domestic violence in itself should be qualified as harm (for example, because it is prohibited by penal law).

In the other decision, the court pays significantly more attention to the explanation that domestic violence constitutes harm. The court argues that: 'this act [an attack with a knife] forms a violation of the marital duties and an attack on the dignity of the wife and of the inviolability of her body'.<sup>590</sup> Here, the court states that domestic violence constitutes 'harm' as it is a violation of 'marital duties', 'dignity' and 'inviolability of the body'. The court does not explain where it finds the notion of dignity and inviolability of the body, nor where the marital duties are prescribed.

A possible explanation for the difference between the two decisions on the level of reasoning is that the case where the court employs an elaborate justification concerns *one*

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<sup>589</sup> CFI Tunis 12 January 2009, 65054

<sup>590</sup> CFI Tunis 5 May 2008, 66970

*specific* attack with violence. Indeed, the chief Public Prosecutor at the CFI Tunis stated in an interview that *one violent attack* is not necessarily qualified as 'harm', as divorce for harm requires *repeated* violence. He stated that this point of view is upheld by the Court of Cassation who repeatedly decided that *one* penal conviction of the husband is not sufficient for divorce for harm.<sup>591</sup> In this way, the CFI Tunis is seemingly referring to the norm upheld by the highest court that domestic violence only constitutes harm if it lead to several penal convictions, but it is not applying this norm.<sup>592</sup>

#### Non-payment of maintenance

I have 6 cases mentioning non-payment of maintenance, 4 of which are granted on these grounds.<sup>593</sup> In one decision

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<sup>591</sup> Interview with the head Public Prosecutor at the CFI Tunis 13 May 2009. However, I have not found decisions that reflect this practice.

<sup>592</sup> The difference in the justification cannot be explained by the fact that the decisions were taken by different chambers (both decisions are taken by Family Chamber I), nor by the question of whether or not the husband defended himself (in the decision that is elaborately justified, the husband does *not* defend himself (he is absent on the reconciliation sessions and has not responded to the case at all; he is not represented by a lawyer) while in the other case, the husband does (his lawyers argues that the wife attacked herself, and that the penal conviction has not yet obtained force of *res judicata*) nor by the demand for damages (in the case where the justification is elaborate, the wife does *not* file for damages).

<sup>593</sup> CFI Tunis 27 October 2008, 63944, CFI Tunis 5 January 2009, 68484, CFI Tunis 12 January 2009, 67292 and 69314. The petitions that are not granted on these grounds concern cases where the demand was changed into divorce without grounds (CFI Tunis 6 January 2009,

the demand was granted as the husband was convicted for the crime of neglect of the family (*ihmal 'iyal*). In this way, the qualification of the behaviour as 'harm' is based on the mere fact that the husband was convicted, while the court does not explain why non-payment of maintenance should in itself be qualified as harm (for example, because it is prohibited by penal law).<sup>594</sup>

In other cases, the court employs additional sources to qualify non-payment of maintenance as 'harm'. In the case of Sana and Abdallah (case two) the court states that 'neglect of the family' entails 'a violation of the maintenance obligation imposed on the husband by Article 23 PSC.'<sup>595</sup> Article 23 PSC describes the marital duties and provides that the husband, being the 'head of the family', should pay for the needs of the wife and the children.<sup>596</sup> It did not become clear to me why the court

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69295), a foreign court decided on the case (CFI Tunis 6 January 2009, 66893), the wife did not present any evidence (CFI Tunis 5 January 2009, 69210) and the husband had not been properly summoned (CFI Tunis 27 October 2008, 67558).

<sup>594</sup> CFI Tunis 5 January 2009, 68484

<sup>595</sup> CFI Tunis 12 January 2009, 69314

<sup>596</sup> This Article provides the following: 'Both spouses should treat the other with kindness (*ma'ruf*) and treat him well (*yuhsin 'ishratihi*) and refrain from harming him. The spouses fulfill their marital duties in conformity with custom and habit (*al-'urf wa-l-'ada*). They cooperate in the operation (*tasyir*) of the affairs (*shu'un*) of the family, the good education of the children, as well as the payment for their affairs consisting of schooling, travel and finances. The husband, being the head of the family, should pay for the needs of the wife and the children in accordance with his means following the parameters of maintenance. The wife should contribute to the expenses of the family

invokes more sources in the case of Sana and Abdallah than in the first case.

In the fourth decision, the explanation is significantly more elaborate, which can be due to the fact that here, the husband defends himself by stating that he has a valid legal justification for his violation of Article 23 PSC, as he is unemployed.<sup>597</sup> The court argues that unemployment does not free the husband from his obligation to maintain his family, because 'the sense of responsibility vis-à-vis one's family should *urge* someone to work and to improve his means in order to reinstate the family. The perpetuity of unemployment is in flagrant contradiction with the sense of responsibility vis-à-vis one's family.'<sup>598</sup> In this way, the court invokes the obligation for a husband to have a sense of responsibility vis-à-vis his family. That husbands should have a sense of responsibility within marriage which obliges them to pay for wife and children and which prohibits them from being unemployed was stated repeatedly in reconciliation sessions.<sup>599</sup> The court does not explain where it finds this obligation (for example in legislation).

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if she has the means.' The same justification was employed in the second decision. CFI Tunis 27 October 2008, 63944

<sup>597</sup> In this way, the husband is implicitly referring to Article 39 PSC that provides that the husband who does not have any means, is not obliged to pay maintenance.

<sup>598</sup> CFI Tunis 12 January 2009, 67292

<sup>599</sup> For example reconciliation session CFI Tunis 11 August 2009. The reconciliation judge says: 'You are a man, you should work!' In another reconciliation session, the judge stated: 'you have children, you should work!' (Reconciliation session CFI Tunis 25 August 2009).

### Expulsion from the marital home

I have one case concerning a husband who expelled his wife from the marital home.<sup>600</sup> The qualification of this act as 'harm' is based on the consideration that 'the refusal of the husband to live together with his wife forms a violation of the obligation of 'good companionship' (*hasan al-mu'ashara*) which is imposed on him by legislation (*qanunan*) and is mentioned in Article 23 PSC as one of the causes that renders marital life impossible'.<sup>601</sup>

### The husband's abandonment from the marital home

In the case where the husband abandoned the marital home, the court qualifies this behaviour as *hajr* (abandonment, separation) and states: 'one of the most important marital duties imposed on the spouses is the obligation to cohabit (*musakana*) and to live under one roof. Article 23 PSC confirms that the marital bond is founded on the necessity to live in one house/room [in Tunisian Arabic *bet* means 'room'] and to be intimate, with love and kindness.'<sup>602</sup> Here, the court invokes the duties to live together (*musakana*) and to be intimate 'with love and kindness'. It finds these norms in Article 23 PSC.

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It is interesting to note that this reprimand was never addressed to women.

<sup>600</sup> CFI Tunis 12 January 2009, 69211

<sup>601</sup> CFI Tunis 12 January 2009, 69211

<sup>602</sup> CFI Tunis 6 January 2009, 67963

### The wife's abandonment from the marital home

I have 12 cases where the husband files for divorce for harm on the grounds that the wife abandoned the marital home without a reason. In two cases the petition was changed into divorce without grounds.<sup>603</sup> In one case, the demand was rejected on procedural grounds.<sup>604</sup> In three cases the wife is not considered to have abandoned the marital home.<sup>605</sup> In two cases, the demand is granted<sup>606</sup>, and in four cases the wife's abandonment of the marital home is considered justified.<sup>607</sup> The latter two types of cases are of importance to derive the norms and sources with regard to the wife's abandonment.

In the case between Chokri and Basma (case three), Basma's return to Egypt was qualified as 'a violation of the obligation to cohabit (*musakana*)' which is considered to inflict harm on Chokri. The same reasoning is employed in the other decision where divorce for harm is granted.<sup>608</sup> The court does not explain where this obligation is prescribed. That the court perceives the obligation to cohabit as part of the marriage was affirmed in numerous reconciliation sessions. For example, in one session, the reconciliation judge said that 'cohabitation is

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<sup>603</sup> CFI Tunis 6 January 2009, 61923 and 12 January 2009, 64948

<sup>604</sup> CFI Tunis 6 January 2009, 69303 (marriage is not proven)

<sup>605</sup> CFI Tunis 20 October 2008, 67136/27, 5 January 2009, 66028, 13 January 2009, 67195

<sup>606</sup> CFI Tunis 5 January 2009, 67836 and 70474

<sup>607</sup> CFI Tunis 20 October 2008, 66798, 5 January 2009, 67816, 12 January 2009, 69032, and 66946

<sup>608</sup> CFI Tunis 5 January 2009, 67836, 70474, and 6 January 2009, 69303

the sense of marriage'.<sup>609</sup> Although the court does not invoke Islamic law, every person with a basic knowledge of this normative order shall be reminded of the rule that if a woman abandons the marital home without a valid reason, she shall lose her right to maintenance. The qualification of justifications as being valid is the topic of a range of *fatawa*'.

The cases where the demand is rejected on the grounds that the wife had a valid reason to abandon the marital home concern non-payment of maintenance<sup>610</sup> and domestic violence.<sup>611</sup> The court does not explain why these reasons are considered valid, except in one case. Here, the court explains why non-payment of maintenance justifies abandonment of the marital home, arguing that marriage is a source of rights and duties and that if one of the spouses does not fulfill his duties, he cannot expect from the other spouse that she fulfils hers, on the grounds of Article 246 CC (which provides that one has the right to suspend his execution of the contract

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<sup>609</sup> Reconciliation session CFI Tunis 19 May 2009. According to one of the lawyers who works for the *centre d'écoute*, civil servants refuse to include a condition in the marriage contract that provides that the spouses do not cohabit (for example because the wife is working abroad, in order to prevent her husband for filing for divorce for harm on the grounds of abandonment of the marital home) (interview with a lawyer, 26 June 2009).

<sup>610</sup> CFI Tunis 20 October 2008, 66798, 5 January 2009, 67816 and 12 January 2009, 69032

<sup>611</sup> CFI Tunis 12 January 2009, 66946

if the other party is violating it).<sup>612</sup> I'm not sure why the court pays more attention to the justification in this case than in the other cases where the husband's demand is rejected. In the case where the wife's justification is rejected, this is not explained either.

#### The wife's refusal to follow the husband who moves house

I have two decisions where the husband files for divorce for harm on the grounds that he wishes to move house and she refuses to follow him.<sup>613</sup> In the first case, the demand is granted and in the second case, it is rejected. In the case where the demand is granted, the court qualifies the refusal to follow the husband as 'harm' on the grounds that 'the obligation to cohabit is one of the core duties of marriage and this means settlement and life in the marital home that was chosen by the spouses and jurisprudence is unanimous on this issue and these are the duties imposed by Article 23 PSC [which provides] that both spouses should be good company (*hasan 'ishra*) for the other and refrain from harming the other, and good company means to live under one roof and to share the same house as is prescribed by custom as well as the obligation to live together (*al-'aish al-mushtarak*) in the sphere of the marital bond.'<sup>614</sup> Again, the court invokes

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<sup>612</sup> CFI Tunis 12 January 2009, 69032. However, although the law prescribed that the husband should pay maintenance, the obligation to cohabit is not provided for, and again, the court does not explain where it finds this obligation.

<sup>613</sup> CFI Tunis 6 January 2009, 66985 and 12 January 2009, 67278

<sup>614</sup> CFI Tunis 6 January 2009, 66985

the obligation to cohabit, explaining that this obligation can be found in jurisprudence and in Article 23 PSC. The court does not identify the exact decisions that uphold this norm.

It is interesting that the court states explicitly that the marital home is the home that is chosen by both spouses, although the outcome of this case is in flagrant contradiction with it, as indeed, the wife did *not* choose this home. Thus, the court is upholding the norm that the *husband* chooses the marital home, although it explicitly states that it does not.

The court employs an elaborate justification to explain why the wife's refusal to follow the husband constitutes harm. That it is more elaborate than the reasoning in cases where the wife abandons the marital home might be connected to the fact that at the same time, the court affirms the existence of the norm that the wife cannot be obliged to follow her husband when he moves house. But the elaborate justification can also be explained differently. In the case at hand, the husband wishes to move house because they are living in the same building as her parents. However, in the opposite situation, where the wife lives in the same building or even apartment as the husband's parents, she does not have a right to abandon the marital home: the legislation does not provide that she has a right to a separate dwelling and in reconciliation sessions, judges repeatedly stated that living with the husband's parents is no valid reason for abandonment unless they did not 'marry into the husband's family home' or the husband had promised that he would rent them a separate

dwelling (for example as an extra condition in the marriage contract).<sup>615</sup> Thus, the court's practice is highly gendered: the husband has the right to move out, while the wife does not. And because it is gendered, the court feels the obligation to explain why in this case, the wife is violating her duties.

In the case at hand, the court does not explain why the wife's justification (she wishes to live in the same building as her family) is not qualified as valid. In the case where the husband's demand is rejected, the wife's justification (they cannot move during the school year as this would require that the children change schools during the year) is qualified as a valid reason without explaining why.<sup>616</sup> In reconciliation sessions, I witnessed how judges responded to the several justifications women presented for their refusal to follow their husband. In one case, the wife stated that she could not follow her husband as this would mean that she would lose her job (she was working as a nurse in the hospital), while they needed the money for the son's upcoming *concours*. The judge said to the husband that he could not force her to come and that her refusal did not constitute harm.<sup>617</sup> In another case, the husband found a job on the countryside as a farmer, but

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<sup>615</sup> For example, reconciliation session CFI Tunis 14 January 2009: the wife abandoned the marital home, stating that it is not a marital home as it is his father's house and that she cannot close their part (implying that it cannot be qualified as a 'separate dwelling'). The reconciliation judge asks: 'did you marry into this home? In that case, it is the marital home'.

<sup>616</sup> CFI Tunis 12 January 2009, 67278

<sup>617</sup> Reconciliation session CFI Tunis 23 April 2009

the wife, who was unemployed at the moment, refused to follow, stating that she had a certain intellectual level and she would not leave the city to go and live on the countryside. The reconciliation judge did not accept this reasoning, stating that the woman was originally from the country side herself. The wife replied: 'Not me, my father, I grew up in La Marsa (a suburb of Tunis)'. This did not convince the judge.<sup>618</sup> Many cases concerning men who wished to move house and women who refused to follow concerned Tunisian couples living in Europe, whose children were grown up. In these cases, it was the husband who moved back to Tunis, while the wife preferred to stay abroad. In such cases, the judge sometimes encouraged the man to file for harm.<sup>619</sup> I'm cautious to derive a norm from these practices, but it does occur to me that in all cases where the justification is accepted, the court is referring to the best interest of the family – that is: the *nuclear* family (as opposed to *her* family).<sup>620</sup>

### Adultery

I have six cases in which the husband or the wife files for divorce for harm on the grounds of adultery.<sup>621</sup> In one case, it is the wife who files for divorce for harm, while in the other cases, it is the husband.

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<sup>618</sup> Reconciliation session CFI Tunis 14 January 2009

<sup>619</sup> CFI Tunis reconciliation session 26 May 2009

<sup>620</sup> See also: Nomen Rekik, 2009

<sup>621</sup> In one of these cases, the husband mentions adultery and abandonment from the marital home; CFI Tunis 5 January 2009, 67816

In the case between Moncef and Raja<sup>622</sup>, the court argues that the wife's adultery constitutes a violation of 'the obligation of companionship (*mu'ashara*) with her husband and of her obligation of chastity'.<sup>623</sup> The court does not indicate where it finds these duties (for example in Article 23 PSC and the penal code). I'm not sure why the court invokes the wife's obligation of conjugal community with her husband if the demand is granted on the grounds of adultery. A possible reason is that in his petition, the husband files for harm on two grounds: abandonment from the marital home and adultery.<sup>624</sup>

In the second case where the husband files for harm<sup>625</sup>, the court argues that a penal conviction for 'treason' (*khina'*) constitutes harm because 'marriage is based on honour and conjugal community and good treatment', and this conviction proves a violation of 'the husband's honour<sup>626</sup> and disdain for marital life'.<sup>627</sup> The court does not indicate where it finds the norm that the wife should protect the husband's honour. I'm not sure why the court states that marriage is based on intimacy as the husband did not complain about the wife's lack of intimacy *with him*, but about the fact that she was intimate with *someone else*. A

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<sup>622</sup> CFI Tunis 21 April 2008, 61660

<sup>623</sup> اخلال بواجب معايشة الزوج و صيانة عرضه

<sup>624</sup> But in the other decisions, the wife's abandonment was qualified as harm on the grounds that it constitutes a violation of the obligation to *cohabit* (see above).

<sup>625</sup> CFI Tunis 20 October 2008, 65040

<sup>626</sup> The decision states *masruf*, but this should be *ma'ruf*

<sup>627</sup> اخلال واضح من الزوجة بشرف و سمعت زوجها و استهتار بالحياة الزوجية مسمى بكرامة الزوج

possible reason is that the wife was convicted to imprisonment, which indeed, means that for a certain period of time, the husband will not be able to be intimate with her.

In the third case where the husband files for divorce for harm on the grounds of adultery<sup>628</sup>, the court argues that 'as the wife has been convicted for prostitution, this violates the husband's honour and forms immediate damage to him in his position as her husband'.<sup>629</sup> Again, the court does not indicate where it is prescribed that the wife should protect the husband's honour.

In the case where the wife accuses her *husband* of adultery, the court states that this forms a violation of the basic marital duties as prescribed in Article 23 PSC.<sup>630</sup> Interestingly, the court does not refer to notions of chastity and honour in this case.

The difference between the decisions on an adulterous wife (violating the husband's *honour* and her obligation of *chastity*) and an adulterous husband (violating Article 23 PSC) might signify that the wife should protect the husband's honour and that she has a obligation of chastity, while the husband does not, as long as he respects Article 23 PSC (prescribing good treatment and the like). This could mean that the norms with regard to the wife are stricter than for a husband. This is confirmed

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<sup>628</sup> CFI Tunis 26 February 2008, 63237.

<sup>629</sup> البغاء هي جريمة مخلة بالشرف و تشكل مضرة مباشرة للمدعي باعتباره زوج المدعي عليها

<sup>630</sup> CFI Tunis 20 October 2008, 66610

by the fact that the decision that qualifies the husband's adultery as 'harm' actually regards a situation where the husband had a second family (he was living with another woman with whom he had a child), while in the case of Moncef and Raja, the wife had had intercourse *once* with someone else. It is also confirmed in an interview and during one reconciliation session, where a Family Judge indicated that the wife's 'relationship' with another man constituted harm, although she did not even have sex with him; in the first case, the wife sent sexual text messages to the other man who, according to her, she had never seen in her life<sup>631</sup> (it is quite common in Tunisia to receive sexual text messages from unknown numbers), and in the other case, the wife had contact by MSN with her childhood lover who, according to her, she had not seen in 30 years as he was living in France.<sup>632</sup> The judges did not explain to me why the norms are stricter for women than for men.<sup>633</sup>

### Imprisonment

I have three cases where the plaintiff wishes to divorce for harm on the grounds that the defendant committed a crime (other than domestic violence, adultery and non-

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<sup>631</sup> Reconciliation session CFI Tunis 16 February 2009

<sup>632</sup> Interview with a Family Judge CFI Tunis 23 February 2009

<sup>633</sup> The Family Judge at the CFI Le Kef told me that the reason is that it is much more difficult for a woman to prove that there was no adultery, whereas 'a man can always justify his seclusion with a woman by saying that he was helping her in the house'. Interview Family Judge CFI Le Kef 4 February 2009.

payment of maintenance) and was imprisoned. In two cases, the husband files for divorce, while in one case, it is the wife who wishes to divorce for harm. One of the cases where the husband wishes to divorce is dismissed for non-competence of the Tunisian court.<sup>634</sup>

In the case where the *husband* wishes to divorce, the petition states that 'she abandoned the marital home to an unknown place after which she was arrested a number of times for public drunkenness and she was convicted a number of times for the crime of loose morals.' The court qualifies as harm the fact that the wife has been convicted repeatedly of drunkenness.<sup>635</sup> Here, the court justifies that this constitutes harm by stating that it constitutes 'a violation of the honour and reputation of the husband and disdain for his social position.'<sup>636</sup> In this way, the justification resembles the one in cases on the wife's adultery, in the sense that it is considered to inflict harm on the husband as she is violating his honour. The court does not explain where the wife's obligation to protect her husband's honour is mentioned.

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<sup>634</sup> CFI Tunis 12 January 2009, 69594. In this case, the wife had been convicted to two years imprisonment for having robbed her husband's bank account. However, as the marital home was in France and the wife had the French nationality, and as the wife contested the Tunisian court's competence, the court dismissed the case.

<sup>635</sup> CFI Tunis 12 January 2009, 69806. The court does not specify that this was for *public* drunkenness, which might imply that for the court, drunkenness is in itself a crime, be it in public or in private.

<sup>636</sup> ارتكاب جرائم السكر هو يمثل اخلالا واضحا بشرف الزوج و سمعته و استهتارا بالمنح الاجتماعية

In the case where the wife wishes to divorce, the petition states that 'the husband took part of a gang that was involved in numerous cases concerning uncovered cheques and he was convicted to imprisonment and these decisions have obtained force of *res judicata* and for this reason the plaintiff stays behind without a family.' The court states that 'the harm justifying divorce is the harm that renders marital life impossible and that is unquestionable and immediate and that harms the other spouse's honour and stability, and marriage is founded on good companionship (*hasan 'ishra*) and cohabitation and security and all that is absent [in the case at hand, for] non-existence of marital life and the impossibility of companionship, and the husband is involved in numerous cases and decisions were issued against him taking away his freedom [...] and he is in prison for a number of years [and thus] there is true harm in the absence of marital life in the shelter of love and kindness and protection and he got possession of the honour of the wife who stayed without a family and without support.'<sup>637</sup> Here, the court is explaining extensively why the husband's imprisonment would justify divorce for harm, stating that marriage is based on 'good companionship', 'cohabitation', and 'security', and 'a shelter of love and kindness and protection', that 'harm' justifying divorce for harm is the harm that 'renders marital life impossible' and that damages the other spouse's 'honour and stability', and that the husband's imprisonment causes absence of marital life altogether

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<sup>637</sup> CFI Tunis 27 October 2008, 68110

and that he took away the honour of the wife who stays behind without a family and without support.

The idea that marriage is based on 'good companionship' and cohabitation, and consists of 'love and kindness' equally underly other decisions where an act is qualified as 'harm'. However, this is the only decision where the court invokes the notion of 'security', stability and 'shelter'. That 'harm' in the sense of Article 31 par. 1 sub 2 PSC is the harm that makes marital life impossible was also invoked in a case where the wife filed for divorce for harm on the grounds of non-payment of maintenance.<sup>638</sup> The idea that the harm justifying divorce is a harm that damages the other spouse's *honour* was seen in cases where the husband filed for divorce on the grounds of the wife's (conviction for) adultery; this is the first and only case in which the *husband* is considered to have an obligation to protect the wife's honour. However, it is seemingly not so much the fact that the husband committed a crime for which he is imprisoned that is considered to violate the wife's honour,<sup>639</sup> but the fact that she is left behind: she is a married woman who is living on her own and who is not supported financially by her husband.

Comparing the reasoning in the two decisions on divorce for harm on the grounds of the spouse's imprisonment,

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<sup>638</sup> CFI Tunis 27 October 2008, 63944

<sup>639</sup> Which might have to do with the spouses' social class; I imagine that if they were upper class people, the fact that he was in prison might have been qualified as harming her honour as well.

the difference in the length of the reasoning is striking. That the court's justification is much longer in the case where the *husband* is convicted for a crime than in the case where the wife is, might have several explanations. One possible explanation is that the husband-defendant actually defended himself, while the wife-defendant did not. Another possible explanation is that indeed, the husband had already spent 6 of the 8 years in prison, thus implying that the wife lost her right to divorce for harm, while the wife-defendant was going in and out of prison all the time. Another possible explanation for the difference in the length of justification might lie in the *reason* for the imprisonment (the wife's abuse of alcohol versus payment with uncovered cheques).

#### Child abuse

In the case where the wife files for divorce for harm on the grounds of the sexual abuse by the husband of the wife's daughter from a previous marriage, the court simply states that as here is a penal conviction, the act is qualified as harm, without explaining why sexual abuse of the wife's daughter should be qualified as harm (for example, because it is prohibited in the penal code to have sex with a minor).<sup>640</sup>

#### False accusation

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<sup>640</sup> Article 227 bis PC added by law 1958 of 4 March 1958 and modified by law 69-21 of 27 March 1969 and modified by law 89-23 of 27 February 1989

In the case where the husband files for divorce for harm on the grounds that the wife accused him falsely of robbery and violence is rejected on the grounds of lack of evidence.<sup>641</sup> The court does not explain whether or not false accusation could or could not be considered as 'harm', if proven.

#### Absence of sexual relations

In the case where the husband accuses his wife of absence of sexual relations, the reconciliation judge tells him how to prove this. This indicates that the court might qualify this as harm. However, I do not know the outcome of this case nor on what grounds the court would qualify this as harm (probably on the grounds of Article 23 PSC which according to the court obliges the spouses to have intercourse).<sup>642</sup>

#### Sodomy

In the case where the wife accuses her husband of sodomy (the wife added that this was during the month of Ramadan), the reconciliation judges tells her how to prove this. This indicates that the court might qualify this as harm. However, I do not know the outcome of this case.<sup>643</sup> Moreover, I'm not sure on which grounds the court would qualify this as harm: sodomy is punishable by law, but during the reconciliation session, the court

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<sup>641</sup> CFI Tunis, 12 January 2009, 67790

<sup>642</sup> Reconciliation session CFI Tunis 10 June 2009

<sup>643</sup> Reconciliation session CFI Tunis 11 December 2008

clearly referred to its understanding of the sharia, stating that sodomy (possibly especially during the month of Ramadan) is *haram*.

### **Evidence**

With regard to the evidence requirements, the material shows the following norms. All decisions that *grant* divorce for harm on the grounds of an act (or lack thereof) that is punishable by law (domestic violence, adultery, non-payment of maintenance, sexual abuse), state that the harm is established with a penal conviction and/or a confession. However, not in all cases, the penal conviction obtained force of *res judicata*. All decisions that reject divorce for harm on the grounds of an act (or lack thereof) that is punishable by law do not mention that there is a penal conviction or that the defendant admitted it. Thus, with regard to harm consisting of an act that is punishable by law, the court upholds the norm that these acts should be proven with a penal conviction or a confession.

All decisions that grant divorce for harm on the grounds of an act (or lack thereof) that is *not* punishable by law (abandonment from the marital home, expulsion from the marital home and the refusal to follow the husband who moves house) state that the harm is proven with a confession or a p.-v. from a bailiff proving that the defendant does not live in the marital home (and refuses to do so).

### Sources underlying evidence requirements

The decisions differ highly from one another with regard to the question of whether or not the court explains why a certain type of evidence is required.

### Domestic violence

The material showed that in the two cases where the demand is granted, the violence is proven with a penal conviction, with or without force of *res judicata*.<sup>644</sup> During reconciliation sessions, judges repeatedly affirmed that a penal conviction is a condition for divorce for harm on the grounds of domestic violence. If the wife showed a medical certificate and/or a police p.-v., the judge would state that this is insufficient.

In interviews, Family Judges explained why a medical certificate together with a police p.-v. is insufficient. They invoked the possibility that a woman attacks herself, obtains a medical certificate and a police p.-v., in order to obtain divorce for harm instead of divorce without grounds (which is financially less attractive). One of the Family Judges at the CFI Tunis stated: 'the fact that she has physical damages does not prove that the *husband* caused this'.<sup>645</sup>

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<sup>644</sup> In an interview, the Chief Public Prosecutor at the CFI Tunis stated that that Court of Cassation decided numerous times that one penal conviction is not sufficient for divorce for harm: only three penal convictions justify divorce for harm, as they prove consistent violence. (CFI Tunis 13 May 2009). I was unable to find any such decision of the Court of Cassation.

<sup>645</sup> Interview Family Judge CFI Tunis 19 November 2008

### Non-payment of maintenance

In the case between Sana and Abdallah (case two), the court states that the non-payment of maintenance is proven with a penal conviction. It concerns a conviction for the crime of *ihmal 'iyal* (neglect of the family).

In one decision, the court explains that a penal conviction is a condition to prove non-payment of maintenance because 'it comes forward from the spirit of Article 31 PSC that "harm" that justifies divorce is the harm that makes marital life impossible and thus, it is not sufficient if it concerns a mere act of recalcitrance of the husband to pay the maintenance imposed on him and his disobedience in this regard except in case of a penal conviction of him [...]'.<sup>646</sup> Thus, the court invokes the 'spirit' of Article 31 PSC to conclude that a maintenance decision is not sufficient. That non-payment of maintenance should be proven with a penal conviction is confirmed in reconciliation sessions where judges stated that a (civil) maintenance decision is not sufficient to establish harm; women need a penal conviction for neglect of the family, which means that the husband has not paid maintenance for a longer period of time.<sup>647</sup>

The requirement of a penal conviction is not based on the presumption that women are *lying*, but that non-payment of maintenance should not be a mere act of *recalcitrance*.

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<sup>646</sup> CFI Tunis 27 October 2008, 63944

<sup>647</sup> For example, reconciliation session CFI Tunis 21 January 2009.

However, the idea that women are lying *is* seemingly upheld by penal judges: a lawyer told me that it is difficult to obtain a penal conviction for *ihmal 'iyal*, as penal judges tend to think that women take disadvantage of the possibility to put their husbands in jail for non-payment of maintenance.<sup>648</sup> With this in mind, it seems possible that the Family Chambers require a penal conviction as in this way, the penal judge already decided that the woman is *not* lying. And thus, the idea that women who file for divorce for harm are actually lying seems to play a role in judicial practices on divorce for harm on the grounds of non-payment of maintenance as well.

#### The husband's refusal to live together

In the case where the husband abandoned the marital home, the husband was present at the reconciliation session and admitted that he abandoned his wife. This was considered sufficient evidence: the court states that 'the non-cohabitation was proven with the husband's confession'.<sup>649</sup>

In the case where the husband expelled the wife from the marital home, he also admitted during the reconciliation session that he changed the locks in order to impede her from entering the marital home.<sup>650</sup>

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<sup>648</sup> Interview with a lawyer, 26 June 2009

<sup>649</sup> CFI Tunis 6 January 2009, 67963

<sup>650</sup> CFI Tunis 12 January 2009, 69211

In reconciliation sessions, I witnessed several cases in which the wife stated that the husband abandoned her and that she did not know where he was. The judge would tell these women that they should investigate his whereabouts to prove that he abandoned the marital home.<sup>651</sup> Article 40 PSC prescribes that if the wife cannot find him, she should prove that he abandoned her without any resources with a oath. However, I never came across a case where this was applied.<sup>652</sup>

#### The wife's abandonment from the marital home

Cases of the wife's abandonment from the marital home concern two issues of evidence. Firstly, the fact that she abandoned the marital home. Secondly, if the wife presents a justification that is considered valid by the court, it should be proven that this justification is untrue.

With regard to the first issue, the material shows that the wife's abandonment from the marital home is qualified as harm if it is proven that she abandoned the marital home *and* that the husband asked her to return and she refused. This was often easily established, as in reconciliation sessions, I witnessed many cases where the wife admitted

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<sup>651</sup> For example, reconciliation session CFI Tunis 13 April 2009

<sup>652</sup> However, I did witness one case where the oath as a means of evidence was applied to end the quarrel that emerged after divorce about the propriety of specific movable goods (the *trousseau* and the *adbash*).

that she abandoned the marital home.<sup>653</sup> Judges told me that in cases where the wife was not present on the reconciliation session, the husband should prove that she abandoned the marital home with a p.-v. of a notary containing the notary's invitation on behalf of the husband to return to the marital home and the wife's declaration that she refuses to return. If the wife cannot be found, the evidence consists of documents that prove that she is not in the marital home. These can be acquired by sending a minimum of three summons to the marital home on different days and different times of the day.<sup>654</sup> If the wife is not at home on three different occasions, the court considers it proven that the wife abandoned the marital home. The Family Judge explained that this evidence is required as men abuse the wife's stay in the hospital and other valid reasons to be away to divorce while keeping their financial rights.

In the decisions, the question of proof for the fact that she abandoned the marital home is only addressed once (in the other cases, the wife replied to the bailiff<sup>655</sup> or she admitted it during the reconciliation session). Here, the evidence consists of a p.-v. from a bailiff that contains the children's declaration that their mother abandoned the

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<sup>653</sup> For example, Reconciliation session CFI Tunis 16 January 2009: the husband files for divorce for harm on the grounds of abandonment from the marital home. The wife replies that he beat her and that the house is empty.

<sup>654</sup> To prevent that the husbands sends the bailiff on purpose on moments that he knows she won't be there, for example because she is at work or in hospital.

<sup>655</sup> CFI Tunis 5 January 2009, 70474

marital home. This is not accepted as evidence as 'the children are not impartial'.<sup>656</sup> In the decisions where the wife had been present at the reconciliation session and presented a justification for her abandonment of the marital home, these were accepted except in one case. Here, the circumstances invoked by the wife (her husband's *intention* to move back to his place of birth) were not qualified as a valid reason.

With regard to the second issue, namely the evidence for the justification, the material seems to show that if the wife presented a justification that was considered valid by the court, the burden of proof was upon the husband, who was to establish that it is untrue. Although in two cases, the wife established the non-payment of maintenance with a penal conviction for *ihmal 'iyal*,<sup>657</sup> in a case where the justification consisted of domestic violence, the penal conviction for this act had been annulled in appeal. Nevertheless, the court accepted the justification and rejected the husband's demand for divorce for harm, arguing that the fact that the conditions for a penal conviction were not fulfilled does not mean that the wife did *not* have a reason to leave the marital home.<sup>658</sup> In another case, the wife stated that her husband behaved badly and that they had an argument on the maintenance; the court rejected the husband's demand for

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<sup>656</sup> CFI Tunis 5 January 2009, 67816

<sup>657</sup> CFI Tunis 5 January 2009, 67816 and 12 January 2009, 69032

<sup>658</sup> CFI Tunis 12 January 2009, 66946

divorce for harm on the grounds that he did not *contest* the allegations.<sup>659</sup>

The fact that the husband should prove that the wife does *not* have a valid reason to abandon the marital home is explained by judges in the following way. Repeatedly judges told me that 'women do not leave without a reason'.<sup>660</sup> This image of women who abandon the marital home inspires judges to pose the burden of proof on the man. One judge added that this presumption of innocence comes forward from Islamic law, as 'in Islamic law, women have almost no possibility to divorce and therefore, a woman who abandons the marital home must have a very good reason.'<sup>661</sup> In this way, the judge is implying that women live in accordance with the prescriptions of (the court's understanding of) Islamic law. And thus, when the husband states that the wife abandoned the marital home, judges insist by asking if she *really* had no reason.<sup>662</sup>

#### The wife's refusal to follow the husband who moves house

In all cases witnessed, the wife admitted that she wished to stay behind when the husband moved house. I do not have any decisions concerning a wife who was not present at the reconciliation sessions and I'm not sure how men are supposed to prove that their wife wishes to

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<sup>659</sup> CFI Tunis 20 October 2008, 66798

<sup>660</sup> For example, interview with the Family Judge on 30 October 2008.

<sup>661</sup> Interview 30 October 2009

<sup>662</sup> For example, reconciliation session CFI Tunis 13 April 2009

stay behind if she does not admit this in front of the judge.

I'm not sure whether in cases where the wife refuses to follow the husband and she presents a valid justification for refraining from doing so, the burden of proof is on the husband, as in cases where she abandons the marital home. In the case where the husband's demand was granted, the wife's justification was not considered valid. In the case where the husband's demand was rejected, the wife's justification was accepted but nothing was decided on evidence; the husband simply did not contest that moving house would involve that the children should change school during the year.

### Adultery

In one case, the court argues that the p.-v. of the police containing the husband's complaint of adultery does not prove adultery.<sup>663</sup> However, a penal conviction is not necessary either: in one case, the penal decision for adultery has not yet obtained force of *res judicata* and the wife went to appeal, but nevertheless the petition for divorce for harm in granted. It is not explained why it is not necessary that the penal conviction is final. In another case, the wife has been acquitted in appeal, but nevertheless, the court grants the petition for divorce. Here, the court argues that 'the evidence for harm in a divorce case differs from the evidence of the commitment

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<sup>663</sup> CFI Tunis, 5 January 2009, 67816

of the crime of adultery'.<sup>664</sup> In this case, the fact that the wife confessed in a police hearing is considered sufficient evidence. The court does not explain why the requirements of evidence would be different in a divorce case.

### Imprisonment

In both cases concerning divorce for harm on the grounds of imprisonment, the harm is established with a penal conviction. However, I am not sure whether a penal conviction of imprisonment always suffices. In reconciliation sessions, I witnessed cases where the husband stated that he was almost going to be released from prison; as the court describes harm in the case of the husband's imprisonment as leaving the wife on her own instead of the mere fact that her husband committed a crime, it is possible that in cases where the husband is about to be released, the court will not grant the wife's demand.

### Child abuse

In the case where the wife files for divorce for harm on the grounds that the husband abused her daughter from a previous marriage, the wife showed a penal conviction for this crime and the husband admitted it during a reconciliation session. Given the fact that sexual abuse of children is a criminal offence, I suspect that the court

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<sup>664</sup> CFI Tunis 21 April 2008, 61660

always requires a penal conviction and that a medical certificate and a police p.-v. are insufficient. This would be coherent in the light of the practice with regard to domestic violence and adultery. However, it is possible that the judge is more lenient when it concerns children, as has been witnessed in custody cases where the Family Judge for endangered children does not require a penal conviction to take away custody or visiting rights from the abusive parents.<sup>665</sup>

#### False accusation

In the case where the husband files for divorce for harm on the grounds that the wife accused him falsely of robbery and domestic violence, the court rejects the demand on the grounds that even if the penal cases were rejected, this does not prove that the husband did *not* commit these crimes.

#### Absence of sexual relations

In the case where the husband files for divorce on the grounds that his wife refuses to have sex with him, the reconciliation judge states that he should prove this with a medical certificate stating that she is still a virgin, and another medical certificate stating that he is not impotent. I do not know the outcome of this case.<sup>666</sup>

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<sup>665</sup> Session at the Family Judge for endangered children, 20 and 21 May 2009

<sup>666</sup> Reconciliation session CFI Tunis 10 June 2009

## Sodomy

In the case where the wife files for divorce for harm on the grounds that her husband wanted to sodomise her, the reconciliation judges asked whether she went to the hospital. As she did not, the judges tells her to change her case into divorce without grounds.<sup>667</sup> I'm not sure whether a medical certificate would have been sufficient in this case; possibly a penal conviction would have been necessary (and possible, as sodomy is punishable by law).<sup>668</sup>

## **Financial consequences of divorce for harm**

Like divorce with mutual consent and divorce without grounds, divorce for harm has consequences with regard to maintenance of the wife, child custody and visiting rights, child maintenance and the right to pay in the marital home as well as the payment of the expenses with regard to this home. Like divorce without grounds, divorce for harm also has the possible consequence of an obligation to pay damages. The consequences with regard to children (custody, visiting rights and the marital home) will be addressed in the next chapter.

The consequences for maintenance for the wife are as follows. Maintenance is only granted for the period until the pronouncement of the divorce, and the waiting period

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<sup>667</sup> Reconciliation session CFI Tunis 11 December 2008

<sup>668</sup> Article 230 PC sanctions this with three years imprisonment.

that follows; in the first period it is called *nafaqa*, while in the second period it is called *nafaqat 'idda*.

In none of the cases where the *husband* files for divorce for harm and the demand is granted, the wife is awarded maintenance. This is similar to cases of divorce without grounds, where the wife who files for divorce is not granted maintenance. In this way, the court indicates that if the *cause* of the divorce lies with the wife, she loses her right to maintenance from the moment she starts a divorce procedure.

In the cases where the wife files for harm, maintenance is only awarded in two decisions. One case concerns the petition for harm on the grounds of adultery<sup>669</sup>, and one concerns a petition for harm on the grounds of the husband's abandonment from the marital home.<sup>670</sup> In the case where the wife files for harm on the grounds of the husband's imprisonment, the court explains that it does not decide on maintenance because the wife has a maintenance decision.<sup>671</sup> In the other cases, the court does not award maintenance without explaining why. In cases where the wife files for harm on the grounds of non-payment of maintenance, a possible explanation is that the wife obtained a maintenance decision providing how

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<sup>669</sup> CFI Tunis 6 January 2009, 67885. The reconciliation judge awards 500 DT maintenance for the wife as a temporary measure, but the case is finally dismissed as there is a German decision.

<sup>670</sup> CFI Tunis 6 January 2009, 67963. The court awards 500 DT maintenance to the wife.

<sup>671</sup> CFI Tunis 27 October 2008, 68110

much maintenance the husband should pay (until the end of the waiting period). In the case where the wife files for divorce for harm on the grounds of adultery before consummation, the fact that the court does not decide on maintenance might be connected to the fact that the spouses divorce before consummation (see the previous chapter).<sup>672</sup> In the cases where the wife files for harm on the grounds of domestic violence, I'm not sure why the court does not decide on maintenance.

With regard to the damages, the material indicates that the court upholds the norm that contrary to divorce without grounds, divorce for harm might result in an obligation for the *defendant* to pay damages.

The court awarded damages to the wife in cases of domestic violence, non-payment of maintenance, refusal to cohabit and imprisonment, while it only awarded damages to the husband in cases of adultery. This shows that the court not only qualifies this behaviour (or lack thereof) as 'harm', but that it qualifies it as harm *justifying the payment of damages*. The *type* of damages awarded to the plaintiff depends on his or her gender: like in cases of divorce without grounds, the wife has as right to moral and material damages, while the husband has a right to moral damages only.

Two decisions with regard to domestic violence and non-payment of maintenance show that in principle, the wife-

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<sup>672</sup> CFI Tunis 20 October 2008, 66610

plaintiff even has a right to damages if she does not file for it.<sup>673</sup> This means that in these cases, the court decides on damages *of law*. In this respect, the practice differs from cases of divorce without grounds, where the court does not decide on damages if the defendant is absent at the reconciliation session(s). Also, the case between Mounira and Imed shows that the damages awarded can be *higher* than the damages filed for.<sup>674</sup>

The sources invoked to award damages are the same as in cases of divorce without grounds. Moral and material damages are awarded because Article 31 PSC provides that this type of divorce justifies damages. The decision to award moral damages is based on the consideration that divorce damages one's 'honour' and 'social position', and the decision to award material damages is based on the consideration that the wife loses 'a breadwinner and support'. In this way, the court's decision to grant damages is based on the *divorce*, instead of the harm causing the divorce.

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<sup>673</sup> CFI Tunis 5 May 2008, 66970 (in this case, the wife does not file for damages, leaving the court to underline that she nevertheless has a right to it, underlining that she can file for damages in a separate (civil instead of personal status) procedure. This concerned the case where the wife filed for harm on the grounds of domestic violence, where the husband attacked her with a knife which obliged her to undergo surgery.) and CFI Tunis 12 January 2009, 67292 (in this case, where the wife obtains divorce for harm on the grounds of non-payment of maintenance despite the fact that the husband is unemployed, the wife does not file for material damages. Nevertheless, the court awards material damages of 50 DT a month).

<sup>674</sup> CFI Tunis 12 January 2009, 65054: the wife files for 1.000 DT moral damages and is awarded 1.500 DT.

That no damages are awarded when the wife files for adultery and sexual abuse of the stepdaughter, and when the husband files for abandonment from the marital home, the wife's refusal to follow him when he moves house, and the wife's imprisonment, can reflect two norms. The first possibility is that the court qualifies this behaviour as a specific form of 'harm', namely a divorce *without* giving a right to damages.<sup>675</sup> This might be based on the consideration that although the act justifies a divorce for which the plaintiff should not be obliged to pay (as is the case with divorce without grounds), the defendant is not obliged to pay either because of an absence of guilt or intention. This could be the case for harm consisting of a refusal to have sex. With regard to adultery, that the court does not grant damages to the wife but does grant damages to the husband might indicate that the court qualifies the wife's adultery as 'worse' than the husband's adultery. In both ways, the court would uphold the norm that there are gradations of harm. However, this is not certain, as the decisions do not state this explicitly: the paragraphs on damages are completely left out of the decision.

The second possibility is that the plaintiff simply did not file for damages, but that if he/she had, the court would have granted damages. In that case, these decisions show that in cases of adultery, sexual abuse of the

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<sup>675</sup> Another Family Judge (at the CFI Sousse) affirmed this with regard to divorce for harm on the grounds of impotence (interview Family Judge CFI Sousse 26 January 2009).

stepdaughter, the wife's abandonment from the marital home, the wife's refusal to follow him when he moves house, and the wife's imprisonment, the plaintiff only has a right to damages if he or she files for it (contrary to cases of domestic violence and non-payment of maintenance).

With regard to the amount of damages, the material shows that the average damages awarded are 3.300 DT moral damages and 3.300 DT material damages<sup>676</sup> to the wife, with one exception where 10.000 DT moral and 12.000 DT material damages were granted. The damages awarded to the husband amounted to 3.000 DT in one adultery case and 5.000 DT in the other.

The parameters invoked to calculate the amount of damages are the same as in decisions on divorce without grounds, namely the period of co-habitation, 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. However, the amount of moral damages is significantly higher in cases of divorce for harm than in cases of divorce without grounds, where wives received an average of 2.000 moral damages, while in the only two cases where husbands were awarded damages, these amounted to 1.000 and 1.500 DT. This indicates that the fact that the defendant inflicted *harm* on the spouse causing the divorce has significant influence on the amount of moral damages awarded.

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<sup>676</sup> In one case, the wife receives material damages in monthly installments of 70 DT and in one case, the wife does not receive material damages because the husband is unemployed.

It is interesting to note that in one case, the amount of damages awarded were significantly above the average: here, the wife was awarded 10.000 DT moral damages and 12.000 DT material damages. As the material damages were high in this case, this might indicate that the couple was well-off, although they are living in a lower-middle class neighbourhood (Wardiya I). Another explanation for the high amount, especially of the moral damages, is that it is their second divorce for harm on demand of the wife (the first was granted), that she filed three penal cases against him (one of which was rejected, and one of which is outdated according to the husband's lawyer), and that he changed the locks of the marital home to prevent her from coming home, which he actually admitted. It is possible that the court takes this case more seriously than other cases.