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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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## Conclusion

Since the promulgation of the Tunisian Personal Status Code (PSC) in 1956, there is a discussion going on in Tunisian doctrine about *judicial practice*.<sup>766</sup> This discussion shows an enormous concern amongst Tunisian jurists for what *judges* are doing with the law in the field of personal status. The authors state that judges are applying 'sharia' and 'custom' together with legislation.<sup>767</sup> Some recent writings on the other hand testify to what the authors call a 'development', where judges apply the constitution and international conventions to interpret the law.<sup>768</sup> Sana Ben Achour states that these developments, that can be characterised as a gender-neutral application of the law, might be connected to the feminisation of the judiciary.

The present study examined recent practices (2008-2009) of female judges at the CFI Tunis in the field of divorce. From the practices of these judges, I derived *norms* that were issued by the court, which show what behaviour is normalized by this disciplinary institution and to what extent these female judges issue norms that are 'gender-neutral'. In a second stage, I examined the *sources* the

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<sup>766</sup> Sana Ben Achour, 2005-2006, and 2007a, Monia Ben Jemia, Souhayma Ben Achour and Mariem Bellamine, 2006, Moncef Bouguerra, 2000 and 2005, Hafidha Chékir, 1986 and 1998, Ali Mezghani, 1975, 2000 and 2005, Kalthoum Méziou, 1992, Mohammed Charfi, 1997

<sup>767</sup> Kalthoum Méziou, 1992, p. 268, Moncef M. Bouguerra, 2005, pp. 566-7, Sana Ben Achour, 2007a

<sup>768</sup> Sana Ben Achour, 2000, 2005a and 2005b, Souhayma Ben Achour, 2003, Sassi Ben Halima, 2005, Wassilia Ltaief, 2005

court applied, which enables me to verify statements made in Tunisian doctrine according to which the legislation is not implemented by judges and judicial practices are characterised by legal pluralism.

This concluding chapter proceeds as follows. Section 1 summarizes the norms that I derived from judicial practice, and addresses the questions of 'normalisation' and 'gender-neutrality'. Section 2 will continue with the sources applied by the court, and tries to unpick the role that legislation, the 'ideal', the 'real' and the constitution and international conventions play in judicial practice. Finally, section 3 will conclude this study by giving a short insight in the happenings after the revolution of 11 January that might influence judicial practice at the CFI Tunis.

## **Section 1**

### **Norms**

The practices of the court reflect the existence at this court of three types of divorce: divorce with mutual consent, divorce without grounds and divorce for harm. The court's practices reflect the norm that divorce with mutual consent, which is clearly perceived as preferable over the other types of divorce, is only allowed if both spouses agree on this particular *type* of divorce: if both wish to divorce, but one of them refuses to agree with divorce with mutual consent, the court shall not pronounce this type of divorce *of law*.

The court's practices with regard to divorce *without grounds* reflected the norm that this type of divorce is always allowed, regardless of the consent of the defendant with a divorce and regardless of whether or not the plaintiff has any grounds to file for divorce.

The court's practices with regard to divorce for harm, which is clearly presented as the most difficult type of divorce, reflected the norm that this type of divorce shall be granted if the defendant's behaviour (or lack thereof) is indeed qualified as 'harm' and has been established. The court's practices reflect the norm that this type of divorce shall be pronounced in cases of domestic violence, non-payment of maintenance, expulsion from the marital home, the husband's abandonment from the marital home, the wife's abandonment from the marital home, the wife's refusal to follow when her husband moves house, adultery, imprisonment, sexual abuse of the stepdaughter, sodomy, and lack of sexual relations. The material also demonstrated that the wife's abandonment of the marital home is not qualified as harm if it is justified. Justifications are the husband's non-payment of maintenance and domestic violence, whereas the fact that she is living with his family is not (for the *husband*, this is a justification to wish to move house). The wife's refusal to *follow* if her husband moves house is not qualified as harm if it is justified by the best interest of the nuclear family, but it is not justified by the interest of the (or her) extended family.

With regard to *evidence* of harm, the court's practices reflect that to obtain divorce for harm on the grounds of

domestic violence, non-payment of maintenance and adultery, a penal conviction is required (but it is not necessary that this obtained force of *res judicata*). Abandonment from the marital home should be proven with a *procès-verbal* from the notary containing the wife's declaration that she refuses to return, or several *procès-verbaux* from the bailiff (*'adl al-tanfidh*) proving that the wife is not living in the marital home. Absence of sexual relations should be proven with a medical certificate. The material is not conclusive on the question of how sodomy should be proven.

With regard to the *consequences* of divorce, the norms can be divided into as those concerning damages and other financial consequences, and consequences with regard to the children. The court's practices reflect the norm that in cases of divorce with mutual consent, the consequences are either established by the spouses themselves, and laid down in an agreement, or shall be agreed on in front of the reconciliation judge. The spouses cannot agree to pay damages to each other. If the father does not have custody, he should pay child maintenance, which is an obligatory part of the agreement. The court's practices in the field of divorce *without grounds* reflected the norm that in these cases, the defendant has a right to damages (the wife-defendant has a right to moral and material damages while the husband-defendant has a right to moral damages only). The defendant loses this right if he or she is absent at the first reconciliation session. Another reason to lose the right to damages is that the marriage was not consummated (in which case the wife-defendant loses her right to material damages, while the husband-defendant

loses the right to moral damages). The wife also loses her right to material damages if she has abandoned the marital home without a reason, if she receives a significant income or if she fails to choose between a lump sum and payment in monthly instalments. The *amount* of damages in cases of divorce without grounds is influenced by the income of the husband and allegations of 'bad behaviour'. The court's practices with regard to damages in cases of divorce for *harm* do not reflect a clear norm. It seems as if in principle, the plaintiff has a right to damages, except if he or she did not file for it. However, it is also possible that in some cases, the court qualifies the act as 'harm' while considering it inappropriate to grant damages.

Another financial consequence of divorce besides damages is the maintenance during the waiting period, which might be granted to the wife. The court's practices showed that the wife does not have a right to maintenance during the waiting period in cases of divorce with mutual consent. In cases of divorce without grounds, the wife only has a right to maintenance if it is the husband who files for divorce; if she files for divorce without grounds, she loses her right to maintenance. In cases of divorce for harm, the wife has a right to maintenance during the waiting period if it is her who files for divorce; she loses her right if it is she who caused harm to the husband. Another consequence of divorce concerns the return of the goods. If the spouses divorce before consummation, the wife should return the gifts. If the spouses divorce after consummation, the wife is obliged to return the *adbash*, but she can keep the gifts

from before the *'urs*, and the jewellery given to her during the marriage festivities, as well as the trousseau.

The court's practices with regard to custody and visiting rights reflect the norm that in case of divorce, the mother obtains custody and the father is granted visiting rights, unless in the presence of specific circumstances. Such circumstances are that the father obtained divorce for harm on the grounds of adultery, in which case the father obtains custody unless he is 'not a good catholic' as one Judge described it, or that the mother is a foreigner and lives abroad. In both cases, the father should file for custody to obtain it, otherwise, the mother remains the care taker of the child(ren). If the mother accuses the father of sexual abuse of the child(ren), it seems that in principle, the father is nevertheless granted visiting rights. If the wife wishes to move out of the marital home with the children in anticipation on the divorce proceedings, the judge shall not decide on custody, meaning that she needs to await the first reconciliation session to prevent to be prosecuted for violating the father's custody rights. In cases where parents and grandparents have an argument on custody, the court issues the norm that the parents' custody rights take prevalence over the grandparents'.

The court's practices with regard to maintenance reflect that if the mother obtains custody, the father shall pay child maintenance. This obligation exists until the children have reached the age of majority, and in some cases longer. The mother has no right to maintenance, nor to wages for custody (*ujrat al-hadana*). The court's

practices with regard to housing reflect that if the wife obtains custody, she has a right to housing, meaning that she can stay in the marital home or that he rents her another place. However, the court's practices do not reflect a clear norm with regard to this issue; it seems as if in principle, the wife is supposed to move back in with her parents.

Other norms affirmed in court are the following. A couple is only considered to be married if the marriage has been consummated, and consummation is considered prohibited before the marriage celebration. Divorce during pregnancy is considered forbidden, but there is no sanction and the divorce will nevertheless be pronounced if the couple insist.

### Normalisation

As has been stated in the introduction, Foucault argued that norms do not *exist*, but that they are *produced*. The production of norms is an instance of the production of truth: if powerful institutions such as psychiatric hospitals or courts define behaviour A as 'the norm' and behaviour B as 'abnormal', these institutions are *producing* what 'normal' behaviour is.<sup>769</sup> This is what Foucault calls 'normalisation': the act of making the norm.<sup>770</sup> When

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<sup>769</sup> Jürgen Link and Mirko M. Hall, 2004

<sup>770</sup> Jürgen Link and Mirko M. Hall, 2004. See for example Michel Foucault, 1975, p. 185: 'La pénalité perpétuelle qui traverse tous les points, et contrôle tous les instants des institutions disciplinaires,



taking a look at the overview of the norms affirmed by the court in the light of the idea of normalisation and the production of truth, it can be concluded that the practices do not only reflect norms with regard to divorce, but also with regard to marriage and other topics.

Within marriage, the following types of behaviour are 'normalised'. By insisting that marriage is based on 'respect', 'love' and 'kindness', the court 'normalizes' a marriage that is based on these fundamentals. When the court qualifies domestic violence as 'harm', it normalises a marriage where no domestic violence takes place. As the court also insists that within marriage, the spouses should protect each other's honour, and the wife should protect her chastity, it is normalising faithfulness, meaning that the spouses should not even flirt with other people, for example through the internet or by mobile phone, especially for women. In the same vein, sodomy is considered 'abnormal', as is not having sex with one's spouse at all, or to abuse one's step-daughter sexually. Also, as it is 'normalised' that the spouses protect each other's honour, the court makes it 'abnormal' for the spouses to be convicted to imprisonment for a crime.

Living together under one roof within marriage is also normalised, as is living with the husband's family, while living with the family of the *wife* is not. If the husband moves house, it is normalised that the wife follows him, even if she does not want to, except if moving house

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compare, différencie, hiérarchise, homogénéise, exclut. En un mot: elle normalise.' (citation in Jurgen Link and Mirko M. Hall, 2004, p. 15)

harms the best interest of the family. It is not 'normal' for the wife or for the husband to abandon the marital home or to expulse the other spouse from it. However, the wife's abandonment *is* 'normalised' for those cases where non-payment of maintenance and domestic violence. It is normalised that the husband pays maintenance during marriage, even if he is unemployed.

With regard to divorce, the court normalises divorce even if the other spouse does not agree and the plaintiff does not present any grounds. However, it is normalised that the spouse who wishes to divorce without any reason that he or she compensates the damages this divorce inflicts on the other spouse, unless the other spouse agrees with a divorce with mutual consent. If a spouse causes the divorce by inflicting harm on the other spouse, it is 'normalised' that this spouse compensates the damages resulting from the divorce. It is 'normalised' that both men and women are compensated for the harm that the divorce causes with regard to their honour and social position, and it is also 'normalised' that the wife is compensated for the harm resulting from the loss of a breadwinner and support. However, if one of the spouses wishes to divorce without grounds and the other spouse does not agree with a divorce with mutual consent, it is not considered 'normal' that he or she is absent at the first reconciliation session. Also, it is made 'abnormal' that a wife does not choose between payment of damages in monthly instalments or as a lump sum.

After divorce, it is 'normalised' that the husband continues to pay maintenance until the end of the waiting

period, unless they agreed on a divorce with mutual consent, or if the wife wished to divorce without grounds or if she caused the divorce by inflicting harm on the husband giving him a right to divorce for harm. If the couple has children, it is 'normalised' that the wife obtains custody, and that the father visits the children once a week. In this respect, it is 'normalised' that a father visits small children in their home while he can take them with him if they are older. It is normalised that women who were unfaithful to their husband are denied custody. Also, it is normalised that a child with the Tunisian nationality stays in Tunisia, and thus, that the father obtains custody if the mother lives abroad. If the mother obtains custody, it is normalised that the father pays maintenance for the *child*, but not for the ex-wife after the waiting period, nor that he pays her wages for taking care of the children. It is normalised that divorce women move back in with her parents, but if she does not, and she is the caretaker of the children, it is normalised that the father pays for the living expenses or that she live in a house that he owns.

Outside the context of marriage and divorce, the material reflects that the court 'makes' it 'abnormal' to have sex with the spouse before the marriage celebration (divorce before the *'urs* is qualified as divorce before consummation). Moreover, homosexuality is abnormal (if a boy develops homosexual features, he is considered to be endangered).

### Gender

Sana Ben Achour has argued that the developments in Tunisian jurisprudence are connected to the feminisation of the judiciary in the sense that practices of female judges are gender-neutral. When examining whether the norm imposed by the court is indeed gender-neutral, I did not compare the norms imposed by female judges with the ones imposed by their male colleagues. Thus, I cannot conclude whether the norms imposed by female judges are indeed *more* gender-neutral, but I can state to what extent they are gender-neutral in themselves.

My material shows that indeed, divorce practices at the CFI Tunis are gender neutral when it concerns the right to divorce with mutual consent and the right to divorce without grounds. The right to divorce for harm is gender-neutral in the sense that both spouses have a right to this type of divorce, although the acts (or lack thereof) that are qualified as harm are gendered to a certain extent: whereas domestic violence<sup>771</sup>, abandonment from the marital home,<sup>772</sup> expulsion and imprisonment<sup>773</sup> are qualified as harm for both spouses, non-payment of

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<sup>771</sup> This is what judges told me; I do not have any decisions where the court granted the man divorce for harm on the grounds of domestic violence. In reconciliation sessions, I witnessed that men who accuse their wife of violence are not taken seriously by the judge. This was for example witnessed at a reconciliation session at the CFI Tunis on 16 January and 18 June 2009.

<sup>772</sup> Called *nushuz* for women and *hajr* for men. However, *nushuz*-cases were much more current.

<sup>773</sup> In the case with regard to the imprisoned woman it is possible that the court qualified drunkenness as harm, not the fact that she was in prison.

maintenance is typically male-inflicted harm, while the refusal to follow the spouse who moves house is typically female.<sup>774</sup> With regard to adultery, the court seems to interpret this more extensively for women as the material contains indications that the husband's adultery shall only constitute harm if he has another family, while the wife's digital affair might be qualified as harm. Sodomy is per definition gendered. With regard to the absence of sexual relations I do not have enough material to conclude whether this is gendered; my material only concerns a case of a wife who wished to divorce for harm on these grounds.<sup>775</sup>

While the *right* to divorce is (relatively) gender-neutral, the financial *consequences* of divorce without grounds and divorce for harm are different for men than they are for women. In cases of divorce without grounds, the court's practices reflect the norm that the wife has a right to moral and material damages whereas the husband has a right to moral damages only, and that the moral damages awarded to women-defendants are higher than the

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<sup>774</sup> Although the court affirms that both spouses decide on the location of the marital home.

<sup>775</sup> Two decisions from the Court of Cassation indicate that this court's practice with regard to divorce for harm on the grounds of lack of sexual relations *is* gendered. In the case where the husband filed for divorce, the demand is granted, while in the case where the wife filed for divorce, the demand is rejected on the grounds that there is no *intention* on the side of the husband. Court of Cassation 1 October 2004, 2523 (in: *Nashriyat Mahkamat al-ta'qib*, 2004, pp. 475-477) and Court of Cassation 7 June 2007, 12678 (in: *Nashriyat mahkamat al-ta'qib*, 2007, vol. I, pp. 229-232).

amounts awarded to men (2.000 DT versus 1.250 DT).<sup>776</sup> It should be mentioned in this respect that the norm to deny damages altogether on the grounds that the defendant is absent during the first reconciliation session has a gendered and otherwise discriminative outcome: in practice, my material indicates that almost all Tunisian women-defendants are present at the first reconciliation session while most men are not, meaning that in reality, Tunisian women-defendants generally have a right to damages while men-defendants do not. *Foreign* women on the other hand turned out to be absent very often as they are living abroad, meaning that they receive no damages while their Tunisian counter-parts do. This means that many Tunisian women have financial benefits from divorce that is pronounced on behalf of their husband (he should pay damages) *and* on their behalf (she is not convicted to pay damages if he is absent), that their foreign counterparts nor men have. Besides, the norm that non-consummation affects the right to damages is gendered in the sense that the wife keeps her moral damages while the husband receives nothing.

In cases of divorce for harm, the court's practices reflect the same norm, namely that the wife has a right to moral and material damages whereas the husband has a right to moral damages only. Although the amount of moral damages is quite similar for men and women (4.000

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<sup>776</sup> It should be noted that I only have two decisions on divorce without grounds where damages are granted to the husband; the average of 1.250 DT is calculated on the basis of these decisions (1.000 and 1.500 respectively).

versus 4.200),<sup>777</sup> damages are awarded more often to women-plaintiffs than to men (2/6 versus 8/11). It is unclear whether this practice reflects a gendered norm (e.g. women have more rights to damages than men do), or whether the norm is that the court does not decide on damages of law.

With regard to the other financial consequences of divorce, the norms are quite gendered as well: in principle, the wife has a right to *nafaqat 'idda*, which the husband does not. This is connected to the norm that the husband should pay maintenance during marriage (giving the wife the right to divorce for harm if he does not), which is gendered too. However, the right to *nafaqat 'idda* is denied if the wife files for divorce without grounds or if the husband obtains divorce for harm, and in most cases of divorce with mutual consent. Here, the norm is gender-neutral.

The norm that prescribes that if the couple gets divorced before consummation (i.e. the wedding celebration), the wife should return the gifts, is gendered in the sense that I did not come across an equal norm with regard to the man; this is connected to the gendered practice that only the groom gives presents and not the bride. The norm that prescribes that if the couple gets divorced after the marriage festivities, the wife's returns the *adbash* while keeping the trousseau reflects the practice that people do not marry in community of goods; as in reality, it is the

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<sup>777</sup> The average of 4.000 for men is based on the outcome of the only two cases where damages were awarded to the man (3.000 and 5.000).

husband who buys the furniture and the wife who brings in the *trousseau*, these goods belong to each of them.

The right to obtain custody after divorce is highly gendered in the sense that in principle, the wife obtains custody and the husband obtains visiting rights. However, when the spouses live in different countries, the attribution of custody is no longer gendered, as the question of who obtains custody depends on the question of who is living in Tunisia. Arrangements with regard to child maintenance and housing might be gendered in the sense that I did not come across any decision where custody was attributed to the father and the mother was obliged to pay for child maintenance and housing.

As a consequence, my material shows that the statement that female judges adjudicate in a gender-neutral way should be nuanced: at the CFI Tunis, this was affirmed with regard to the right to divorce (although some grounds for harm are inaccessible for women and others are for men), but the practices with regard to damages and custody are highly gendered.

## **Section 2**

### **Arguments**

As has been outlined in the introduction, I employ the ethnomethodological approach to examine what sources the judges apply in divorce cases. This means that I take their references (in decisions, in interviews and during reconciliation sessions) at face value: if the court says that



a decision is based on a certain norm, I accept this, instead of considering this as a mere post-hoc rationalisation.

The decision to grant divorce is based on the following sources. When it concerns a decision on divorce with *mutual consent*, the sources differ depending on the formulary that is employed for the decision, while the choice for one form or the other is merely a matter of coincidence. Form one explains that divorce without grounds is based on Article 31 par. 1 sub 1 PSC, and adds that the attempts to reconcile the couple failed and that the spouses agreed to contract divorce with mutual consent. Form two adds that it is *impossible* for the spouses to fulfil the conditions of marriage, namely 'respect' and 'love and kindness.' Thus, the decision is based on legislation together with the court's notion of marriage and the Islamic rules of *khul'*.

When it concerns a decision on divorce *without grounds*, the sources differ depending on *who* filed for divorce, the husband or the wife. If the husband files for divorce, the court argues that divorce without grounds is based on Article 31 par. 3 PSC. When the wife files for divorce, the court employs two additional sources: its notion of marriage as being based on love and kindness, and the Islamic rules of *talaq* and *faskh* or *tatliq*.

Decisions on divorce for *harm* are based on Article 31 par. 2 PSC. The grounds for the qualification of particular behaviour (or lack thereof) as 'harm' differ from one type of harm to the other, *and* from one case to the other. In a case of domestic violence, the court's qualification of this

behaviour as 'harm' is based on the court's notion of marital duties (the court argues that domestic violence constitutes a violation of the marital duties) and fundamental principles ('dignity of the wife' and the 'inviolability of her body'), while in the second case of domestic violence, the court does not invoke any source whatsoever to qualify this act as 'harm' (except maybe the mere fact that the husband had been sentenced). In two cases on non-payment of maintenance, the court qualifies this as 'harm' on the grounds of Article 23 PSC which according to the court imposes a maintenance obligation on the husband, while in one case the court does not invoke a source to qualify this as harm (except maybe the sentence), and in the fourth case, the court employs an additional source, namely the court's understanding of how husbands should behave within marriage, which according to the court involves a 'sense of responsibility'. In the case where the husband expelled his wife from the marital home, the court qualifies this as 'harm' on the grounds of legislation (Article 23 PSC) which according to the court obliges the husband to 'good companionship' (*hasan al-mu'ashara*). In the case where the husband abandoned the marital home, the court qualifies this as 'harm' on the grounds of Article 23 PSC which according to the court prescribes that the couple live together and to companionship, filled with love and kindness. In both cases where the wife's abandonment of the marital home is qualified as harm, this is based on the court's understanding of marriage, in the sense that marriage requires cohabitation. In a case where the wife justified her abandonment by stating that her husband did not pay maintenance, the court applied Article 246 CC to release

the wife from her obligation to cohabit. In other cases where the wife's justification for abandonment is accepted, the court does not employ a particular source, implying that if the husband did not fulfil his duties, the wife should not be obliged to fulfil hers, which is a strictly contractual notion of marriage. In the case where the court qualifies the wife's refusal to follow her husband who moved house as 'harm', this is based on legislation (Article 23 PSC) and jurisprudence, which, according to the court, prescribe cohabitation. The court finds the qualification of the husband's adultery as 'harm' on Article 23 PSC. In the cases where the wife is adulterous, the court qualifies this behaviour as 'harm' on the grounds of its own perception of marriage and marital duties, consisting of the obligation of companionship (*mu'ashara*) and of chastity, and of the obligation to protect her husband's honour<sup>778</sup> and position as her husband'.<sup>779</sup> In the case where the wife is imprisoned, the court qualifies this as 'harm' on the grounds of, again, its understanding of marriage as obliging the wife to protect her husband's the honour, reputation, and social position.<sup>780</sup> In the case where the husband is imprisoned, this is qualified as 'harm' because it constitutes a violation of the court's understanding of marriage as prescribing that the husband should protect the wife's honour. In the case where the husband is convicted for sexual abuse of his stepdaughter, the court does not explain why this

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<sup>778</sup> اخلال واضح من الزوجة بشرف و سمعت زوجها و استهتار بالحياة الزوجية مسمى بكرامة الزوج

<sup>779</sup> البغاء هي جريمة مخلة بالشرف و تشكل مضرة مباشرة للمدعي باعتباره زوج المدعي عليها

<sup>780</sup> ارتكاب جرائم السكر هو يمثل اخلالا واضحا بشرف و سمعته الزوج و استهتارا بالمنح الاجتماعية

constitutes harm (but the qualification might be based on the sentence). In the cases of sodomy and the absence of sexual relations, I do not have a final decision and the judge did not explain in the reconciliation session why this constitutes harm.

With regard to the evidence requirements in cases of divorce for harm, the court generally does not mention a source. In one case of non-payment of maintenance, the court employs the spirit of Article 31 par. 1 sub 3 PSC, which according to the court provides that only repeated non-payment of maintenance constitutes harm. In interviews, judges explained that domestic violence should be proven with a penal conviction, because even though a p.-v. and a medical certificate establish that violence took place, only a penal conviction (or a confession) can prove that the defendant caused this.

With regard to damages, decisions are based on the following sources. In cases of divorce without grounds and divorce for harm, the damages are granted on the grounds of legislation and specific notions of marriage and divorce, namely that divorce harms the 'honour and social position' of the spouse (moral damages), and causes that the wife loses 'a breadwinner and support' (material damages). The calculation of the damages is based on the husband's income and might be adjusted in case of allegations of bad behaviour.

For decisions with regard to other financial consequences of divorce (maintenance during the waiting period, return of the gifts if the spouses divorce before consummation,

return of the *adbash*, while keeping the gifts, the jewellery and her trousseau after consummation) the court does not invoke any grounds.

Decisions on custody and visiting rights are based on Articles 66 and 67 PSC, while some decisions remain silent on the source. The decision to deny the mother custody in case of adultery is based on the best interest of the child, while a judge stated in an interview that a mother who does something like that, cannot be considered a good mother. The decision to deny custody to the mother who is a foreigner and lives abroad, is based on the fact that the child has the Tunisian and Arabic nationality and identity of the child. For decisions on child maintenance the court does not invoke any sources. The same is true for decisions on housing.

The court does not indicate what source prohibits consummation before the marriage celebration. In reconciliation sessions, I observed that judges state that divorce during pregnancy is *haram*.

#### 'Sharia'

In Tunisian doctrine, it is argued that in the situation where the legislation contains lacunae, judges are applying 'sharia'. For example, Sana Ben Achour argued that previously, judges applied 'sharia' in cases of mixed

marriage.<sup>781</sup> When looking at the arguments invoked by judges, I witnessed the following references to 'sharia'.

The court applies 'sharia' (or, more specifically: its understanding of sharia) when pronouncing divorce with mutual consent in the sense that the decision is based on legislation and on the consideration that the spouses cannot fulfil the conditions of marriage, which shall remind every Muslim of the *khul'* divorce. The court also applies 'sharia' when granting divorce without grounds in the sense that it denotes the divorce as *talaq* when granted on demand of the husband, while employing the term *fakk* when granting divorce on demand of the wife. In decisions on divorce for harm, the qualification of some acts as 'harm' seems to be based on Islamic law, as the court employs terms to denote specific behaviour that come directly from Islamic law. For example, calling the wife's abandonment from the marital home *nushuz*, and the husband's abandonment *hajr* might be read as a reference to Islamic law where these terms are employed to denote such behaviour. The same might be said of the denotation of adultery as *zina*, albeit that the Penal Code employs this term as well to address adultery (Article 236 PC). Moreover, the notion that the wife should not abandon the marital home shall remind many Muslims of the rule that if the wife abandons the marital home without a valid reason, she waives her right to maintenance.

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<sup>781</sup> Sana Ben Achour, 2005, p. 233

In interviews, one of the Family Judges told me repeatedly that 'in Islamic law, women do not leave without a reason'. This consideration might indicate that Islamic law underlies certain decisions: in some cases of divorce without grounds, the wife's abandonment seemed to be considered as a presumption of bad behaviour of the husband which influenced the amount of damages. Similarly, the presumption might be the reason why in cases of divorce without grounds, the court grants higher damages to women than to men (indicating that if the wife files for divorce without grounds, the court presumes that there *are* grounds). In cases where the husband accused his wife from *nushuz*, I witnessed in reconciliation sessions that judges insisted that the wife must have had a reason to abandon the marital home, again as 'in Islamic law, women do not leave without a reason'. And indeed, the large majority of the petitions for divorce for harm on the grounds of *nushuz* is rejected even if the wife's justification for the abandonment had not been proven in any way.

Also in reconciliation sessions, a Family Judge opposed severely to divorce during pregnancy, stating that this is *haram*, citing the *surat al-nisa'* from the Quran. However, if the plaintiff insisted, divorce was granted and no mention is made of this normative order in the final decision. (It should be noted here that the court seemingly refers to the religious qualification of divorce during pregnancy, *haram* meaning that it is rejected, not that it is forbidden.)

The overview indicates that the statement that judges employ sharia to interpret legislation is to a certain extent

confirmed by the material, but should be strongly nuanced: the majority of the decisions in the field of divorce does *not* contain any reference to sharia whatsoever. This is true for the decision to grant divorce with mutual consent and divorce for harm, and for the large part of the qualification of a certain behaviour as 'harm'. It is also true for the decisions on the consequences of divorce (damages, maintenance during the waiting period, child maintenance, custody, visiting rights and housing). Moreover, the material indicates that invoking 'sharia' does not necessarily mean that it takes precedence over legislation: although judges state that divorce during pregnancy is *haram*, they do grant divorce if people insist. In cases where judges seemingly *do* apply 'sharia' or their understanding of this normative order, an ethnomethodological analysis of the justification does not confirm that judges allow sharia to take precedence over legislation. When the Family Judge states that 'women do not leave without a reason', she presents her understanding of 'sharia' as a tool to apply legislation: it helps her to assess a case where a husband files for divorce for harm on the grounds of abandonment of the marital home, and to calculate the damages, while the norms with regard to divorce for harm and calculating damages are also justified with reference to legislation. In the same vein, the use of notions of *nushuz*, *hajr* and *zina* can be considered to be a tool to interpret the very vague term of 'harm', while the right to divorce for harm is in itself presented as a possibility prescribed by legislation. When the court implicitly refers to notions of *talaq* and *faskh* or *fakk* when pronouncing divorce without grounds, it also refers to legislation; in this way, the court is merely



indicating that it is applying legislation that is in conformity with Islamic law without allowing the latter to take precedence over the first.

### Legislation

In Tunisian doctrine it is argued that if legislation deviates from the 'values' living in society (Adel Nasr and Lamine Klai), it is not 'effective' in the sense that it is not applied by courts.<sup>782</sup> When looking at the sources invoked by judges, I witnessed the following references to legislation.

In decisions on divorce with mutual consent, the court invokes Article 31 par. 1 PSC. In decisions on divorce without grounds, the court invokes Article 31 par. 3 PSC. In decisions on divorce for harm the court invokes Article 31 par. 2 PSC. From an ethnomethodological point of view, this means that the decision to grant divorce is based on legislation. In the same vein, the qualification of a number of acts (and lack thereof) as 'harm', the court invokes Article 23 PSC (non-payment of maintenance, the husband's abandonment from the marital home, his expulsion of the wife, the wife's refusal to follow the husband who moves house, and the husband's adultery). Article 246 CC is cited in one case where it is decided that if the husband does not pay maintenance, the wife cannot be obliged to cohabit. For the conviction to pay damages in cases of divorce without grounds and divorce for harm,

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<sup>782</sup> Adel Ben Nasr and Lamine Klai, 2005

the court invokes Article 31 PSC. In a case of divorce without grounds where damages are denied to the wife who is divorced before consummation, the court invokes Article 37 PSC. In one case, the court invokes the spirit of the law (Article 31 par. 2 PSC) to decide that a penal conviction for *ihmal 'iyal* is required in cases of non-payment of maintenance. For the attribution of custody and visiting rights the court invokes Articles 66 and 67 PSC.

Nevertheless, many norms are not justified with reference to legislation. This is for example true for some decisions that grant custody to the mother and visiting rights to the father, and decisions on the qualification of 'harm', namely decisions on domestic violence, a decision with regard to the non-payment of maintenance, as well as the decisions that qualify the wife's abandonment from the marital home and the husband's sexual abuse of his stepdaughter as harm. In the same vein, for decisions with regard to the evidence requirements in cases of divorce for harm, no reference is made to legislation (for example that domestic violence and adultery should be established with a penal conviction). Also, decisions on damages do not invoke any sources in a number of decisions. This is true for the norm that denies damages in case of divorce with mutual consent, and that denies material damages to the husband in cases of divorce without grounds and divorce for harm. In the same vein, for the decision to deny damages to the defendant in case of divorce without grounds if he or she is absent on the first reconciliation session legislation is not invoked. This is also true for the decisions in cases of divorce without

grounds that deny moral damages to the husband in case of divorce before consummation, and that deny material damages to the wife in case of abandonment from the marital home, an income or lack of choice between payment as a lump sum or in monthly instalments. Also, for the decision that 'bad behaviour' influences the amount of damages in case of divorce without grounds no source is invoked, and the same is true for the decision that no damages are awarded in some cases of divorce for harm. Decisions to grant or deny *nafaqat al-'idda* do not invoke a source, and the same is true with regard to norms on child maintenance and housing.

The overview indicates that the statement that judges do not apply legislation should be nuanced in the sense that part of the decisions in the field of divorce contains reference to legislation. However, in many cases legislation is not invoked as an argument that justifies the norm and thus, as a factor that curtails judicial discretion. This might be explained in two ways. First, the lack of reference to legislation might indicate that the court considers these norms as a matter of common sense, which are applied as a matter of routine.<sup>783</sup> Thus, the court does not refer to the legislative provisions because it does not consider it important to refer to them, but it does *apply* (its conception of) legislation. A second explanation is that legislation does not play a role in the adjudication of these matters, either because legislation (in the court's understanding of it) does not provide anything with

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<sup>783</sup> Richard A. Posner, 2008

regard to these issues, or because the court is simply negligent of the legislative prescriptions.

### 'Custom'

In Tunisian doctrine it is argued that 'custom' is applied instead of or together with legislation. The material does not contain any reference to custom to justify or explain a decision and thus, my material does not confirm that 'custom' plays a role as a source in Tunisian decision-making. On the contrary, in reconciliation sessions, I witnessed that judges affirm norms that seem to deviate from the norm shared by the litigants. For example, in cases where a husband complained that the wife abandoned the marital home and wanted the judge to force her to return, reconciliation judges would make clear that a woman cannot be forced to return.<sup>784</sup> Similarly, in cases where women abandoned the marital home because they did not want to live with the husband's parents, reconciliation judges affirmed repeatedly that if they married into the husband's family home, the woman was obliged to stay, unless they agreed otherwise.<sup>785</sup> In cases where the husband indicated to be unemployed, reconciliation judges would underline that they had a obligation to provide for their family. In a case where the husband moved house and the wife refused to follow, the husband filed for divorce for harm calling the

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<sup>784</sup> For example reconciliation session CFI Tunis 15 January and 13 April 2009.

<sup>785</sup> For example reconciliation session CFI Tunis 14 January and 13 April 2009.

woman's behaviour *nushuz*. When the wife told the judge that she had a job which she would lose when moving house, and that they needed her income as a nurse, the reconciliation judge explained to the husband that his wife was not *nashiza*, and that he would have to commute as the marital home was remaining where it was.<sup>786</sup> Likewise, reconciliation judges affirmed and reaffirmed that cohabitation after signing the marriage contract (*sdaq*) but before the marriage festivities (*'urs*) is forbidden, as is divorce during pregnancy, although litigants did do this or want to do this.

In a similar way, some *decisions* reflect the court's rejection of a norm that according to the court is living in society, as the justification is significantly more elaborate than in other decisions. This is particularly true for the standard decisions on divorce without grounds on demand of the wife. Here, the court invokes a number of arguments to justify that it grants the demand, stating that this type of divorce is prescribed by legislation, that the attempts to reconcile the couple failed and that the woman persisted in her demand, it invokes references to Islamic law which imply that the court is actually pronouncing *fakk*, and it underlines that the marriage is based on 'love and kindness' and that these conditions were not fulfilled in the case at hand. Likewise, in the decision where the court qualifies non-payment of maintenance as 'harm' regardless of the fact that the husband is unemployed, the justification is relatively

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<sup>786</sup> Reconciliation session CFI Tunis 23 April 2009.

elaborate: the court refers to legislation (Article 23 PSC) and adds that the husband should have a sense of responsibility vis-à-vis his family. A similar elaborate justification is employed in the case where the court pronounces divorce for harm on the grounds that the husband moved house and the wife refuses to follow. In this sense, the court seems to anticipate that there is a contrary norm living in society that denies the wife a right to divorce without grounds without the husband's consent, that does not oblige the husband who is unemployed to pay maintenance, and that does not oblige the wife to follow her husband when he moves house.

#### Fundamental rights, the constitution and international conventions

Tunisian doctrine testifies to a development in the field of the adjudication of cases of mixed marriage, in the sense that courts increasingly refer to fundamental rights, the constitution and international conventions.<sup>787</sup> However, my material does not reflect this development: the only decision that reflects the application of fundamental rights is the one on divorce for harm on the grounds of domestic violence. In this case, the court states that this behaviour constitutes harm as it is a violation of the wife's 'dignity' and 'inviolability of the body'. This demonstrates that the court's practices in the field of divorce do not reflect the 'innovative' trend in judicial practice where the court applies the constitution,

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<sup>787</sup> For example, Sana Ben Achour, 2005

international conventions and fundamental rights. On the contrary, the innovative tendency in jurisprudence that *does* grant custody to the wife who is a foreigner and who lives abroad is *not* followed by the CFI Tunis, which is striking as the breakthrough decisions in the field of mixed marriage (validity of a mixed marriage and inheritance rights) were taken by this particular court!

### Sources of law

When taking a look at the summary of the arguments invoked at the CFI Tunis, it can be concluded that the court invoked the following sources of law.<sup>788</sup> For some norms, the court refers to legislation. A much smaller amount of norms is based on the sharia. The court does not apply custom, the constitution, and international conventions, while it applies fundamental rights on one occasion. I already elaborated on the use of these sources above.

Besides these sources of law, the court's decisions are based on other sources as well. Interestingly, the court invoked jurisprudence only once, but there are other factors that delimit discretionary powers. In court decisions, one can observe an understanding of 'marriage' that the court does not find in law, sharia or jurisprudence; it is presented as the court's own, 'personal' understanding of what a marriage should look like and as such, it functions as a factor that curtails

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<sup>788</sup> Paul Scholten, 1974

judicial decision-making in the sense that for the court, this understanding constitutes additional grounds on which the decision to grant divorce is based. In an interview, one of the reconciliation judges explained to me that the continuing education that Family Judges receive curtails discretionary powers, and as such, education is a source of law. It should be noted here that I never came across a case where the outcome was decided by clientelism or corruption, which, if underlying specific decisions, could also be qualified as 'sources'. I will elaborate on these sources here.

When looking at the sources invoked by the court, it is striking that jurisprudence is hardly ever mentioned: the court refers to this source of law only once, without making explicit what decision it is referring to (the decision invokes *fiqh al-qada'* as an argument to justify that the spouses should live together). Again, this might mean two things. First, it is possible that the court is applying case law as a matter of routine while it does not perceive it as its obligation to invoke decisions from higher courts. A second possibility on the other hand is that the court does not apply case law at all, either because it does not *know* it, or because it does not consider itself bound by it. That the court does not know case law was affirmed during two observations. In 2009, one of the Family Judges told me that she had just learned at the yearly conference for Tunisian Family Judges that in paternity cases, the biological father's refusal to cooperate with a DNA test is sufficient evidence that he is the father. This surprised, as even I knew that this was strong jurisprudence of the Court of Cassation since the year



2000, as could be read in the bulletin of this court (*Nashriyat mahkamat al-ta'qib*), of which the judge had a copy in her office.<sup>789</sup> In the same year, I witnessed a discussion between Bouchra Bel Haj Hamida that was filmed by a camera crew making a film on this feminist lawyer. Bel Haj Hamida asked one of the Family Judges in front of the camera whether the marriage between a Muslim woman and a non-Muslim man is valid, to which the judge answered no. In response, Bel Haj Hamida exclaimed: 'judges should know jurisprudence!'<sup>790</sup>

Another source that is invoked to justify the judge's decision to grant divorce is the court's conception of 'marriage'. Marriage is, according to the court, based on love, kindness and respect, obliges the spouses to live together and to protect the other spouse's honour. The wife should also protect her 'chastity'. These notions of marriage, that the court does not find in law, sharia or jurisprudence, is presented as the court's own, 'personal' understanding of what a marriage should look like. It functions as a factor that curtails judicial decision-making in the sense that for the court, it constitutes additional grounds on which the decision to grant divorce is based, besides legislation.

In an interview, one of the Family Judges at the CFI Tunis told me that her decisions are also directed by the continuing education of Family Judges. This education is

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<sup>789</sup> See for example Court of Cassation 12 October 2001, 10020, in: *Revue de jurisprudence et de législation*, January 2002, p. 88 and pp. 197-201

<sup>790</sup> CFI Tunis 21 April 2009

twofold. In the first place, the Ministry of Justice organizes the annual meeting of all Family Judges in Tunisia where the application of the law is discussed around a theme.<sup>791</sup> It was here that one Family Judge learned that in paternity cases, if the alleged biological father refuses to cooperate with a DNA-test, this is perceived as evidence of biological paternity. The second instance of continuous education concerns the monthly meetings of the two Family Judges at the CFI Tunis with the President of the court, which aims to prevent large differences between the two chambers. According to the judge, the large part of these meetings concern the amounts of damages awarded, to prevent that one Chamber consistently awards more damages than the other. The judge also gave the example of the norm on the competence of the Tunisian court in international cases. Apparently, one Family Chamber qualified itself as competent in an international case if the spouses did not contest the Tunisian's court competence, while the other Chamber only accepted competence if it was competent on the grounds of the rules of international private law (i.e. explicit acceptance of the competence of the Tunisian court). When there was no explicit acceptance (for example because the spouse living abroad did not respond to the case in any way), this Chamber only accepted competence as the 'court of necessity', in the sense that it was impossible for one of the parties to go abroad (for lack of a visa, criminal proceedings or the

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<sup>791</sup> Ministry of Justice and Human Rights, 2007-2008. In this judicial year, the theme of the conference was provisional measures in divorce. The next year, the theme was paternity.

costs of a legal procedure abroad). The latter norm was affirmed by the President of the CFI Tunis as the one that should be followed by both Chambers. Interestingly, none of the Family Judges referred to their education in law school as still curtailing their judicial discretion today, while a judge in training at the ESM clearly was influenced by what he was taught in university when we discussed personal status law. This difference might be explained by the time lapse between law school and practice: the two Family Judges had attended law school more than 15 years before, and the knowledge collected there might have lost influence on their practice.

With regard to clientelism and corruption, I'd like to make the following remarks. I observed a range of (attempts to) clientelism, in the sense that judges were visited or called up by friends, or friends of friends, or family, who had a favour to ask. 'Could the judge make sure that [...]?', was an often repeated question. Favours could vary from asking the judge to talk to the judge who handled their case, but some might have been rather decisive for the case's outcome – *if* satisfied. I do not have information on the results of such attempts. On the other hand, I never observed an instance of corruption. However, I interviewed one litigant who accused the court of corruption. She had filed a case of divorce for harm on the grounds of domestic violence, which she had proven with a medical certificate and a p.-v. from the police. These documents had been put into her file. One day during the divorce proceedings, she walked into her husband's lawyer near the court, and found out that he was having lunch with one of the clerks. The woman was

convinced that the lawyer had invited the clerk to have lunch in exchange for a favour, namely to make the evidence of the violence disappear from the file. However, I cannot verify whether this really happened. Indeed, the demand was rejected, but as has been demonstrated in chapter 5, a medical certificate and a police p.-v. are insufficient to obtain divorce for harm; the wife needs a penal conviction. In another case, I witnessed a clear rejection of the perceived attempt to 'pay' the judge: in a case before the Family Judge for endangered children, the mother, who wished to obtain custody, told her child to give the judge a present, and the child gave her a purse full of candies. The judge joked that this was an attempt at bribery and refused to accept it.

It is noteworthy in this respect that I witnessed twice that a reconciliation judge asked a litigant for a favour. In one case, the woman who filed for divorce was working at a telephone company. As the judge was having trouble with her mobile phone, she asked the woman if she could call her to help her out. In another case, the man was a gardener. The judge told him about his lemon tree, and he offered to come and take a look. The judge said something like 'a favour for a favour', and they smiled. I do not know whether the exchange really influenced the outcome of the case.<sup>792</sup>

### **Final remarks**

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<sup>792</sup> Reconciliation session CFI Tunis 23 April 2009

Since 11 January 2011, one can witness a fear among a large part of the Tunisian people that women's rights shall suffer under the end of the authoritarian regime. This fear emerged when short after Ben Ali's departure, the 'Islamist' party Ennahda was legalised. Although Ennahda's leaders declared several times that they will leave the PSC untouched, feminists and other so-called left-wing intellectuals are distrustful: newspapers such as *La Presse* and *El-sabah* are filled with articles on the 'secret agenda' of Ennahda. When Ennahda's leader Rashed Ghannouchi proposed to give women a pension if they stop working to be at home with their children, the reaction was that the next step would be to deny women the right to education. But especially polygamy is a hot topic: when Ghannouchi's wife declared on television that she does not disapprove of polygamy, this was highly criticised in the press, and when Ennahda's second man Samir Dilou declared that polygamy is a right that is fundamental and should be included in the new constitution, many people saw this as an omen. The terminology of rights and freedom is frequently employed in the rhetoric of Ennahda and its soulmates. For example, right after the revolution a demonstration of a group of veiled women called everyone's attention, especially as they called for the 'freedom' to wear the *niqab*. And Samir Dilou declared that because marriage is a 'right' of the woman, he intended to relax the rules on marriage. He did not specify what rules he referred to, but a possibility is the minimum marriage age, that was set at 18 for both boys and girls only a few years ago.

Given that Tunisia is currently governed by an interim government, it cannot be established to what extent these fears are actually justified until the elections of 23 October 2011. At this date, the Tunisian people shall elect a Constitutional Assembly, that will draft the new constitution and that will govern Tunisia for a year. After this year, there will be legislative and presidential elections. Nevertheless, in the eyes of many, the first step in the direction of the abolition of women's rights has already been taken: the decree with regard to identity cards that prohibited that women wear a veil on the picture has been revoked, again in the name of 'freedom'.<sup>793</sup> As many people saw this as the evidence that their fears were justified, women's organisations (since the revolution high in number) called for demonstrations around the country on national women's day (13 August, the 55th anniversary of the PSC) 'to protect our achievements'. But the largest concern regards the constitution: for many, the future of Tunisian women's rights depends on the place that the new constitution shall accord to Islam and sharia. They fear that if (the principles of) 'sharia' become a the principal source of legislation (as is the case in Egypt), the PSC and other 'feminist' legislation shall be declared unconstitutional. This is why many women's rights activists call for a 'secular' Tunisia. It seems as if the interim-government felt that it should show its adherence to women's rights, as right after the national women's day, it was announced that Tunisia will finally abrogate the reservations to

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<sup>793</sup> Decree 715-1993

CEDAW – an issue that the ATFD (*Femmes Démocrates*) have been fighting for for decades. Although this was a relief for many, some discern a typical example of symbolic politics in this measure, as indeed, all reservations have been revoked except one: the general reservation that CEDAW only applies for as far as it is in conformity with the Tunisian constitution. As the contents of this constitution are yet to be defined, the abrogation of the other reservations might very well be an empty shell.

As the present study showed that legislation, namely the PSC, plays a fairly important role in judicial practices in the field of divorce at the CFI Tunis, amendments or even abrogation of this law shall have large consequences for judicial practices at this court. The same is true if the new constitution provides that sharia is a principal source of law: although my material does not indicate that the judges employ the constitution as a source of law, this might encourage judges to employ sharia more than they do now, maybe even to the *detriment* of legislation – something that my data do not reflect. For these reasons, it would be interesting to repeat the study of judicial practices in the web of normative orders in a few years.