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FAMILY LAW IN ISLAM

Divorce, Marriage and Women in the
Muslim World

EDITED BY
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JUDICIAL DISCRETION IN TUNISIAN PERSONAL STATUS LAW*

Maaïke Voorhoeve

Tunisian personal status law is known for its 'progressive' character, shown for example by its prohibition of polygamy. Charfi writes: 'The Tunisian personal status code is much talked about, both in Tunisia and outside. Abroad, the code is often presented as a model of adaptation of Islamic law to the realities of the 20th century. It is in fact due to this code, that Tunisia is known as a modern state [...] Within the country, people are proud of the code, as people consider it one of the most important achievements of the nation, and maybe even the most precious one.'¹

Nonetheless, Tunisian legislation contains many lacunae that allow for 'non-progressive' interpretations. This chapter examines what factors curtail the judicial interpretation of these lacunae judicial in the field of Tunisian personal status law. Part 1 addresses the concept of lacunae and judicial discretion, both in codifications in general and in Tunisian personal status law in particular. Part 2 describes how, in some delicate areas of law, this discretion leads to uniformity in judicial practices, but how in other areas such practices are characterised by

diversity, and examines what factors lead to these different outcomes. I start with an outline of the methodology used in my research.

Methodology

The material for this chapter was collected during field work conducted between July 2008 and September 2009, in the context of a doctoral dissertation on the judicial interpretation of legislative lacunae in what I call 'delicate fields of law': those fields of law that are particularly sensitive as they concern topics related to a fundamental 'symbolic order' (Françoise Héritier).

In this chapter I make use of field-work material concerning, first, divorce for harm; second, paternity of children born out of wedlock; and third, mixed marriages (specifically cases concerning marriage between a Muslim woman and a non-Muslim man, inter-religious succession, and custody by a non-Muslim mother after divorce).

The material for this chapter consists of recent court decisions, interviews and observations of reconciliation sessions in divorce cases. The larger part of it was collected at the Court of First Instance in Tunis (hereafter CFI Tunis), and dates from the years 2008–09. It includes court decisions issued by the two Family Chambers in this court; interviews conducted with both Family Judges, who are the *vice-présidents*, each presiding over one of the Family Chambers; and observations of reconciliation sessions presided over by the two Family Judges and other *vice-présidents* appointed to conduct such sessions. I also conducted field work at the CFIs in Sousse, Sfax, Gafsa and Le Kef, which resulted in a small collection of recent court decisions, interviews and observations. Finally, I collected published and unpublished decisions of the Court of Cassation, from the period 1996–2008. I also obtained one entire case file regarding a divorce for harm on the grounds of adultery.

In order to examine what factors curtail judicial discretion, I make use of ethnomethodology, which is an epistemological approach to the treatment of empirical data. It emerged in the 1960s as a critique of the dominant theories in the social sciences.² It is a sociological method of studying a variety of social practices, including the study of

law.³ However, the ethnomethodological study of legal practice in the MENA remains uncommon.⁴

Ethnomethodology 'does not pursue the development of typologies or other analytic constructs'.⁵ It describes the acts in themselves, without explaining them on the basis of an underlying structure.⁶ In traditional sociology acts are often interpreted from a predefined theory. For example, Weber studied his data from the *ex ante* presumption of modernisation, Durkheim on the presumption that it reflected society, and Marx from the viewpoint of power relations.⁷ This is problematic as it can lead to what Garfinkel calls 'fact production': if a certain fact does not fit in with the theory, it is manipulated to make it do so. This risk is removed if the study is confined to what actors say.

Furthermore, ethnomethodology focuses on the social construction of reality, and examines how actors organise their everyday activities, what rules they apply. For this, ethnomethodology follows the *actor's account*. Garfinkel argues that actors apply certain rules to organise their everyday activities, and themselves try to understand what these rules are: they make 'inquiries to accomplish rational accountability'. Garfinkel underlines that the way in which actors understand their own acting, and their accounts of it, are reliable, or 'accountable'.⁸ In this way, ethnomethodology differs from other approaches in sociology and anthropology that presume a gap between actors' accounts of why they act in a certain way, and the 'truth'; this is known as the 'ironic' approach.⁹

This study examines how Tunisian judges organise their everyday activities, namely the application of the law: what factors do they employ to curtail their interpretational freedom? This is answered by following the judges' own accounts. Therefore judicial practices are not *ex ante* related to some underlying structure, such as Sharia. The academic value of an ethnomethodological study of judicial decision-making lies in the fact that law in action is a matter of constructing reality. One cannot obtain insights into judicial practice without considering the judge's account of this activity.¹⁰ The social importance of an ethnomethodological study of legal practice in the MENA is related to the current polarised social, political and academic climate. Following the judges' account of judicial interpretation forms a

counter-argument to the many culturalist and orientalist studies that explain everything *ex ante* from the Sharia.

Part 1 Judicial Discretion

The existence of judicial discretion is not limited to Tunisian law: the phenomenon is universal and therefore judicial discretion is a crucial topic in legal theory (see for instance Kelsen 2002; Knight 2002; Hart 1994; Dworkin 1977; Kennedy 1997; Troper et al 2005). In the case of an open norm (e.g. 'equity'), the legislation is extremely vague and indeterminate, leaving much discretion to judges. For example, Tunisian personal status law grants child custody in accordance with 'the best interests of the child', which is a typical open norm.

But provisions that seem clear and determinate at first sight, can appear in specific cases to be *indeterminate*. Hart calls these 'borderline cases' – those that are not regulated by the legislature, deliberately or because they are unforeseen. One cause of this indeterminacy is the open texture of language.¹¹ Hart gives the example of the rule 'No vehicles in the park'.¹² If a car enters the park, this clearly entails a violation of the rule; but if a cyclist or roller-skater does so, it is not clear whether this actually violates the rule. Here, the open texture of language ('vehicle') leaves interpretational freedom to the judge. Another reason for indeterminacy can be the legislature's desire to leave judges able to adapt the decision to the circumstances of the case. A third reason for lack of regulation is the wish to refrain from giving final answers to specific delicate questions.¹³ By contenting themselves with providing open norms, the legislature leaves it to the judge to regulate certain sensitive matters. It has been argued that for this reason Tunisian personal status law is indeterminate on many matters.¹⁴

It should be noted that there is a large amount of theoretical literature on the question of whether judges do indeed have discretionary powers in hard cases, or whether they are bound by specific factors, such as jurisprudence (Hart 1994), principles underlying the legislation (Dworkin 1977), political preferences (critical legal studies), or other legal constraints (Troper et al 2005).

An example of the Tunisian legislature's desire to refrain from regulating sensitive matters concerns provisions in the field of mixed marriages. Tunisian legislation does not explicitly discriminate against inter-religious marriages, but at the same time it does not explicitly allow such marriages either – the relevant provisions are clearly ambiguous. Thus the article with regard to marriage impediments makes no reference to religion (a Muslim woman cannot marry a non-Muslim man), but the general article regarding marriage provides that a marriage should not violate the *mawani*' *shar'iyya*, a term that can be translated as 'legal impediments' or 'Sharia impediments'.¹⁵ Likewise, the article regarding impediments for succession does not provide that a non-Muslim cannot inherit from a Muslim, but it prescribes that homicide is *one of* the impediments to succession (*min al-mawani*); this implies that other impediments may exist which are not mentioned. Similarly, the law does not provide that a mother, to obtain custody rights after divorce, must be a Muslim; on the contrary, it provides that a non-Muslim cannot act as custodian to a Muslim child *unless* she is the mother.¹⁶ But at the same time the law prescribes that the judge assign custody after divorce 'in the best interests of the child'.¹⁷ The effect of these lacunae is to allow discrimination against mixed marriages.

Levels of Discretion

Tunisian personal status law is laid down in a variety of laws. Substantive law is codified in the Personal Status Code (PSC)¹⁸ and additional laws. The PSC dates from 1956 and was amended several times (especially in 1981 and 1993).¹⁹ Additional legislation includes the law legalising adoption (1957),²⁰ that addressing the question of the fund to secure the payment of maintenance after divorce (1993),²¹ that relating to the community of goods within marriage (1995)²², and that concerning children born out of wedlock (1998).²³ Other legislation applicable in personal status cases consists of the Civil Code (CC), the Penal Code (PC) and the Constitution (1957). Procedural law in the field of personal status consists of the Code of Civil Procedure (CCP), the Code of Civil Status (CCS, 1957) and the Code of International Private Law (CIPL, 1998).

Tunisian substantive law in the field of personal status contains many lacunae, but this is only one level of judicial discretion, which also exists on three other levels: the qualification of the facts, the requirements regarding evidence and the financial amounts awarded (in cases of maintenance or damages in divorce cases). An example of personal status law that contains these four instances of discretion is divorce for harm (*darar*).

In Tunisia the law provides that both spouses can file for divorce on three different grounds: by mutual consent (*bi-ttaradi*), without grounds (*insba'an*) or for harm (*darar*).²⁴ In the case of divorce without grounds, the spouse who initiates the divorce is liable to paying damages (*ta'wid*). For this reason, divorce for harm is financially a more attractive option, as in this latter case it is the *defendant* who must pay damages.²⁵

However, the law does not define the term 'harm' in any way – its meaning is left vague, and judges are thus free to interpret this term.²⁶ This is the first instance of judicial discretion, namely at the level of substantive law. On the basis of court decisions, I concluded that judges generally award divorce for harm in cases of domestic violence, adultery or 'disloyalty', non-payment of maintenance and the wife's refusal to cohabit.²⁷

To take the example of domestic violence, judicial discretion is not extinguished with the assertion that 'harm' is interpreted as embracing acts of violence. Three questions remain open to judicial interpretation: which acts qualify as 'violence', how the violence should be proven and what amount of compensation should be awarded.

The first question – which acts are to be treated as violence and which acts are not – concerns the manner in which the facts of the case are qualified.²⁸ For example, the Court of Cassation was repeatedly confronted with the question whether one act of violence sufficed to qualify a situation as domestic violence, or whether the violence needed to be repetitive.²⁹

The second instance of discretion concerning the evidence that is required to prove violence is also open to judicial interpretation. Judges have discretionary powers here as the legislation is vague on the topic: the provision regarding evidence provides that 'No specific form is required for the evidence of an obligation, unless the law prescribes

otherwise.³⁰ I concluded elsewhere that Tunisian judges treat evidence of domestic violence in divorce cases cautiously, as they harbour suspicions about various kinds of fraud. For this reason, judges require either a confession, or the declaration of two witnesses who actually *saw* the act of violence, or a previous penal conviction for violence. Thus a medical certificate together with a police *procès-verbal*³¹ is insufficient.³²

The third instance of discretion concerns the amount of damages the defendant should pay. The claimant has a right to moral damages and, if the claimant is the wife, a sum in compensation for material harm. The legislation provides for indicators to calculate the reparation of material harm (*niveau de vie* and the costs of housing). However, the law is silent on the question of how the amount of moral damages should be calculated. In the decisions issued by the CFI in Tunis between 2008 and 2009, cases for divorce for domestic violence were either dismissed or changed during the process. Thus I cannot provide estimates illustrating the range of the sums decided upon for moral damages. But it is clear that, in the absence of indicators, there is much room for discretion.

Part 2

Uniformity and Diversity in the Application of Tunisian Personal Status Law

One would expect that with so many lacunae in both substantive and procedural law, Tunisian judicial practice would be characterised by a good deal of casuistry, i.e. diversity in the way different judges apply the law. But in fact this is not entirely the case: many provisions are applied in the same way by judges from Le Kef to Mednin to Tunis. This can be explained by several factors that curtail discretionary powers. Section one below enumerates the factors that limit judicial discretion, such as the intention of the legislature, precedents, doctrine, judges' training and procedural law.

But while a range of factors curtail discretionary powers, some questions do remain open to judicial discretion, resulting in a degree of diversity (casuistry) in the application of the law. Section two below elaborates on this issue.

Section One – Uniformity

Article 532 CC prescribes that ‘when applying the law, it cannot be given another meaning than the one resulting from its expressions, its grammatical order, its usual significance and the intention of the legislature.’ In this way, the legislation provides that discretionary powers should be curtailed by the preparatory work that accompanies legislation (‘the intention of the legislature’). However, the PSC, which contains the bulk of Tunisian personal status law, was issued directly after independence and before the installation of parliament. Thus, in many cases such preparatory work did not take place.

Considering this situation, judges might look elsewhere for the intention of the legislature, such as in public communications by the President of the Republic or the Minister of Justice. Indeed, President Bourguiba publicly denied a break with Sharia when he stressed that all developments were accomplished ‘in accordance with the teachings of the Holy Book’.³³ Similarly, Minister of Justice Mestiri pointed out that: ‘The Tunisian legislature is inspired directly by the precepts of Sharia as they are enounced in the Quran, the *hadiths*, jurisprudence and doctrine, following a new conception of *ijtihad*’.³⁴

But judges can also look into the exact wording of the legislation to discover the intention of the legislature. For example, in a case concerning inter-religious succession the Court of Appeal argued that as the legislature explicitly mentioned that homicide excludes a person from succession, this means that the intention was to exclude all other succession impediments, such as difference of religion (a non-Muslim cannot inherit from a Muslim).³⁵ This is in fact an interpretation method, based on reasoning *a contrario*.

Precedents

As Tunisia has a Civil Law system, the legislation does not provide that precedents are a source of law. Thus, judges are not officially bound by decisions of the highest court – the Court of Cassation – but in practice they tend to follow those decisions, simply because they do not wish to see their own contrary decision annulled on appeal. They

learn about the Court of Cassation's decisions through a bulletin, the *nashbriyat mabkamat al-ta'qib*.

Of those decisions containing reference to precedents, most did so in relation to *fiqh al-qada'* (jurisprudence) in general, without mentioning a specific decision. For example, the Court of Cassation argued in a paternity case that the paternity of a child born out of wedlock could not be established as 'the jurisprudence of the Court of Cassation (*fiqh qada' mabkamat al-ta'qib*) has confirmed that illegitimate relations cannot bring about paternity'.³⁶

I came across one decision that explicitly referred to a particular judgment. The wife had obtained a maintenance decision (*hukm nafaqa*) from the Cantonal Court, but the husband went to appeal, arguing that the wife had no right to maintenance as she had left the marital home. The Family Judge annulled the maintenance decision, arguing that this was in accordance with 'the Cassation decisions (*aqrar ta'qibiyya*) of 13 November 1985, 13411, and 23 May 1989, 22664'.³⁷ (Ironically, this practice had already been abandoned by the Court of Cassation – see below.)

Despite these examples of reference to jurisprudence, I noticed regularly that Family Judges were not aware of certain positions taken by the highest Court, although the judges at the CFI Tunis assured me that they read the relevant bulletin every week-end.³⁸

Doctrine

Another source of law that might curtail judicial discretion is doctrine. Law professors as well as practitioners publish articles, notably in three legal journals: *Revue tunisienne de droit*, *Revue de jurisprudence et de legislation* and *Actualités juridiques tunisiennes*. Similarly, edited volumes appear with contributions from a range of law professors, such as *Mouvement du droit contemporain. Mélanges offerts au professeur Sassi Ben Halima*.³⁹ Also, the former president of the Court of Cassation, Mohammed Lajmi, has published a book on the application of Tunisian personal status law, entitled *Qanun al-usra* (family law).⁴⁰ Copies of this were distributed among the two Family Chambers by the president of the CFI Tunis.

I came across only one decision in which reference was made to doctrine. In a case concerning divorce on the grounds that the wife had abandoned the marital home, the Court of Cassation argued that ‘according to doctrine, marriage is a contract that involves duties for both husband and wife, namely that they live under one roof in order to give each other affection and to have sexual relations [...]’.⁴¹

Apart from this one example, I did not come across references to doctrine in court decisions or interviews. This seems to indicate that judges do not follow doctrine, and thus that doctrine does not significantly curtail judicial discretion. This suspicion is corroborated by the fact that judicial practice in the field of paternity flagrantly contradicts doctrine. Numerous articles have appeared, notably from Ali Mezghani and Sassi Ben Halima, on the question of the paternity of children born out of wedlock, where it is argued that judges should apply the relevant provision in the sense that it allows (full) paternity outside marriage.⁴² Nevertheless, judges systematically refuse to interpret the law in this way. Similarly, many other articles appeared, notably this time by Sana and Souhayma Ben Achour, on jurisprudential developments concerning mixed marriages.⁴³ Nonetheless, judges at the CFI Tunis continue to follow the former practice (see below).

Custom and Habit

Some decisions in cases concerning divorce for harm on the basis of the wife’s refusal to cohabit refer to custom and habit, *al-‘urf wa-l-‘ada*, as a factor that curtails judicial discretion.

The law does not explicitly prescribe that the wife should cohabit with her husband, so to justify the opinion that she in fact is so obliged, judges refer to the provision describing the reciprocal rights and duties within marriage (Article 23 PSC). This article provides that ‘the spouses should fulfil their marital duties in accordance with custom and habit’. In some decisions, it is stressed that custom and habit prescribe that the wife cohabits with her husband, and that by violating this duty, the wife harms her husband.

Good Morals

Some decisions make reference to good morals as curtailing discretionary powers. For example, in a case concerning a child born out of wedlock, the Court of Cassation decided that recognition by the father (*iqrar*) could not effect legal paternity, as this would be contrary to good morals because the child was born out of illicit sexual relations.⁴⁴ In this way, the decision referred to Article 439 CC, which provides that recognition does not provide evidence if it is contrary to good morals.

Sharia

Some decisions refer to Sharia as a factor curtailing discretionary powers. This is done by mentioning *al-sbar'ia*, *al-fiqh al-islami*, a specific *hadith* or a legal term originating in Islamic law (*nushuz*, *zina*).

That decisions mention Sharia is interesting, as the law does not *explicitly* provide for it to be a source of law. In this sense, the use of Sharia as a factor curtailing judicial discretion is different from the use of custom and habit (mentioned in Article 23 PSC) and good morals (Article 439 CC). The personal status code does not provide that in case of lacunae, the judge should have recourse to the Maliki *fiqh*, which is the case in Morocco.⁴⁵ Similarly, the Tunisian constitution does not provide that Sharia is a source of law, as the Egyptian constitution does.⁴⁶ However, the constitution does provide that the state religion is Islam (Article 1).

Tunisian judges are not trained in Islamic law: even if they wished to apply the *fiqh*, they in principle do not know what it consists of. This is because neither law school nor the *École Supérieure de la Magistrature* (ESM) pays attention to the *fiqh*, apart from a small introductory course in the first year of law school and some general outlines on the *fiqh* in the third-year family-law course.

However, reference to Sharia is made, for example, in decisions relating to mixed marriage. Here, the motivation consists of the argument that, as the legislation is unclear, recourse should be had to Islamic law, which (according to these decisions) prohibits marriage between a Muslim woman and a non-Muslim man, and inter-religious succession.

Another occasion on which reference was made to Sharia was in a 2007 decision of the Court of Cassation.⁴⁷ The case concerned divorce for harm on the grounds that the husband moved house and the wife refused to follow him. The family, who lived in Mednin, moved to Tunis for the husband, who suffered from epilepsy, to have medical treatment. After living in Tunis for some two years, the husband was cured, and decided to move back to Mednin. However, his wife refused to follow him, staying in Tunis with their children. The husband sought divorce for harm, on the grounds that the wife refused to cohabit with him. The Court of Cassation granted his claim, arguing that 'Amongst her basic duties according to Sharia and to the legislation (*sbar'an wa qanunan*), on the basis of Article 23 PSC, are cohabitation and [sexual] relations (*musakina wa mu'asbara*) with her husband [...]'. Thus, the Court of Cassation argued that Sharia prescribes that the wife should cohabit, and that by violating this duty, she harms her husband.

Some decisions refer to Sharia in more implicit ways. This is true for many cases dealing with paternity outside marriage. In some cases, the Court of Cassation cites the *hadith* that provides that 'the child belongs to the marital bed and the adulterer belongs to the stone'.⁴⁸ In other cases, the decision makes reference to the *fiqh*. For example, the court once argued that 'in case of vagueness in the legislation, the judge should have recourse to the sources of the law, namely the Islamic *fiqh*'.⁴⁹ Again, in other cases, the reference to Islamic law consists of using a term to denote a certain act that seems to be derived directly from that law. For example, in cases concerning divorce for harm on the basis of the wife's refusal to cohabit, decisions often use the term *nushuz*. As these decisions do not refer explicitly to 'Sharia', 'the *fiqh*' or a specific *hadith*, it is not clear whether in these cases judicial discretion is actually being curtailed by such sources. However, in employing these terms, the argument is already directed towards a certain decision. In this way, by qualifying behaviour as *nushuz* or *zina*, the judge in question certainly limits the possible outcomes of the case at hand.⁵⁰

The Constitution and International Conventions

In some cases, reference is made to the Tunisian constitution and/or international conventions. References to the constitution concern the

articles protecting the principle of equality before the law and of freedom of religion (Articles 5 and 6). References to international conventions concern the ICCPR, CEDAW and CRC.⁵¹

In the Tunisian legal system, the constitution prevails over national legislation, and international conventions over national law (Article 32 Constitution). Thus, the law cannot formally be interpreted in a way that contradict these two sources. Before their issuance, the *Conseil Constitutionnel* checks the conformity of laws with the constitution and with international conventions⁵² and, after implementation, both lower Courts and the Court of Cassation check their compatibility with these sources (note that Tunisia, unlike Egypt, does not have a Constitutional Court).

Since 1999, an increasing proportion of decisions in the field of mixed marriages contain reference to the constitution or international conventions. There is an increasing practice among the courts to argue that as the legislation is not unclear on the matter, and as the constitution and international conventions prohibit discrimination and protect freedom of religion, the legislation should be interpreted in a way that allows the marriage between a Muslim woman and a non-Muslim man, inter-religious succession and the recognition of a foreign decision that attributes custody over a Tunisian child to a foreign, non-Muslim mother.⁵³

Another instance where an established judicial practice was contradicted with reference to the constitution and to international conventions concerns a unique paternity case. In 2004, the CFI La Manouba decided on the paternity of a child born out of wedlock. The law prescribes that paternity can be established by marriage, recognition or a declaration by two or more witnesses.⁵⁴ As a rule, judges refuse to bring about paternity when a child is born out of wedlock,⁵⁵ but in the Manouba case paternity was nonetheless established. The court decided that the relevant provision is indeterminate and that on the basis of the constitution and of the CRC discrimination between legitimate and illegitimate children cannot be accepted, and therefore established the paternity relationship between the biological father and his child born out of wedlock.⁵⁶

Training

Another factor that curtails judges' discretionary powers is their training. During their education in law school and at the *École Supérieure de la Magistrature* (ESM) – which provides a two-year training course for law-school graduates – future judges learn about how the law should be applied. This is done on the basis of two general introductory works on Tunisian law and legal interpretation⁵⁷, as well as important decisions of the Court of Cassation and doctrine. At the ESM, professors lecture on how the law should be applied. For example, Professor Sassi Ben Halima gave a lecture in 2008 on how the article with regard to paternity should be applied.⁵⁸ This seemingly enhances uniformity in the interpretation of the law, especially among those who graduated from law school and/or the ESM during the same period. For example, the two Family Judges at the CFI Tunis, who graduated from the same university at around the same time, cited the famous 'Hurriyya' case when asked about the application of the law concerning mixed marriages.⁵⁹ On the basis of this decision, dating from 1966, they argued that marriage between a Muslim woman and a non-Muslim man is null and void, and that a non-Muslim cannot inherit from a Muslim.⁶⁰ They continue to maintain this despite the fact that the Court of Cassation abandoned the practice.

Constant Deliberation Between Judges

The fourth factor that curtails judicial discretion is constant deliberation between judges on how the law should be applied. Once a year the ISM (*Institut Supérieur de la Magistrature*) organises a seminar for all the country's Family Judges, where they all give presentations on the interpretation of the law. Although these lectures do not have any binding force, they do enhance uniformity. Topics addressed here, for example, include proceedings and the provisional measures in reconciliation sessions, the calculation of maintenance, and the attribution of post-divorce custody.⁶¹

Another instance of judicial deliberation occurs during the monthly gatherings of the two Family Judges at the CFI Tunis. In order to prevent the two Family Chambers from interpreting the law differently,

the president of the court invites the two Family Judges to his office every month. During this session, they go over a range of decisions taken during that period, selected by the president. One question to be addressed is for example the amount of damage awarded in divorce cases.⁶² (Note – this is the only CFI in Tunisia that has two Family Chambers.)

The Case File

Another factor that curtails judicial discretion is the case file. The file of a case at the CFI Tunis serves as an example; it concerned the husband's suit for divorce for harm on the grounds of abandonment of the marital home and adultery.⁶³

In the case in question, the wife had been sentenced by the penal judge to eight months' imprisonment for adultery, both in first instance and on appeal (adultery is punishable by up to five years' imprisonment).⁶⁴

The relevant documents in the file were the following: first, documents relating to the penal case for adultery, consisting of the *procès-verbaux* of the police hearings of the husband, the wife and her lover, as well as two men who declared that she had proposed having sexual relations with each of them; a list of the telephone numbers dialled by the wife; and the decisions of the penal judge in first instance and on appeal;⁶⁵ second, documents relating to the divorce case: the birth certificates of the husband, the wife and their two children; the marriage contract; a *procès-verbal* of a bailiff declaring that on a certain day the wife was not at home, seeking to prove that she had abandoned the marital home; the claim for divorce for harm on the grounds of abandonment of the marital home; the pleas of the husband's and the wife's respective lawyers in the divorce case in first instance and on appeal; and the *procès-verbaux* of the reconciliation sessions in the divorce case.

As all these documents tended to confirm the adultery, the file pointed the judge in a certain direction and limited the possibility for him of refusing the suit for divorce for harm.

It should be underlined here that the members of the judicial corpus (both the police and the reconciliation judge) have a great deal of

influence on the composition of the evidence, and thus on the contents of the case file, as the *procès-verbaux* are non-verbatim records of the litigants' statements. An example of the reconciliation judge's influence on the contents of the *procès-verbal*, and therefore on the file, and therefore on the outcome of the case, was demonstrated in a divorce case for domestic violence. During the reconciliation session I attended, the husband confessed that he had attacked his wife with a chair. As the judge did not make a note of this, the confession was not entered in the file. As a consequence, the wife's case was most probably dismissed, as she had no other evidence of violence.⁶⁶

Procedural Law and Judges' Orientation Towards Procedural Correctness

In his praxiological analysis of an Egyptian personal status case, Dupret argues that judicial discretion is limited by the orientation of judges and other legal practitioners towards procedural correctness.⁶⁷ This not only concerns the anticipation of having a decision annulled on appeal on the basis of the interpretation of substantive law (see the discussion of precedents above). It also regards all those facets of a court case that are constrained by procedural law. This begins at the moment when a plaintiff submits a petition to the court: from this moment on 'the judge's work is, at least formally, constrained by the many stipulations of [the relevant] statutory provision. A sequential process is initiated in which the case follows a series of successive steps before reaching the stage of the judge's decision.'⁶⁸

In divorce cases, the legislation provides that the claim should be addressed to the court and that the defendant must be summoned. The court then sets a date for the reconciliation session, and both parties are summoned to attend. At this session, presided over by a reconciliation judge, the judge attempts to reconcile the couple and provisional measures are taken. The session is recorded in a *procès-verbal*, and is followed by two more sessions – unless in case of divorce by mutual consent, or if no children are involved – after which a date is set for the court hearing. At this hearing, the parties or their lawyers have the opportunity to present documents containing evidence, after which

both parties or their lawyers have the opportunity to respond to one another's documents. At the court hearing, a date is set for the final decision.

If one of these (or any other) procedural prescriptions has been violated, the decision risks annulment on appeal. The sequence is therefore recorded in the decision to make public that the necessary steps were taken. Decisions follow a format:

The plaintiff addressed a claim to the Court and to the defendant, providing that [...]. For this reason, the Court set a date for a reconciliation session, which was attended by [...]. During the reconciliation session, the parties claimed that [...]. Then the following provisional measures were taken and the court hearing was set for [...]. At the court hearing, the parties/lawyers claimed that [...]. Then a date was set for the final decision. The final decision is that given the fact that [...] and that [...], the Court decides that [...].'

The procedure delimits judicial discretion in different ways. For example, the legislation requires that in divorce cases the defendant is properly summoned to attend the reconciliation session and the court hearing. If the plaintiff cannot establish that this requirement was properly met, then the case is dismissed.⁶⁹ This procedural prescription was addressed in a large part of the reconciliation sessions I attended; it curtails judicial discretion in the sense that the judge cannot neglect the existence of the second party – in principle, both parties have to be heard.

Another example concerns the question of which party sues for divorce first. In one case, the husband sued for divorce for harm, consisting of an online love affair between the wife and her childhood lover, the evidence for which was a report containing every message sent on the internet between them. The Family Judge in question told me that, much as she wished to grant the husband divorce for harm, she could not, as the wife's suit for divorce without grounds (*insha'an*) predated the husband's suit for divorce for harm. Therefore, the husband's suit was dismissed.⁷⁰

Section Two – Casuistry

Although to a large extent Tunisian judicial practice is characterised by uniformity, some is casuistic. This is true for the four levels of discretionary powers: the award of an amount of maintenance or damages, requirements regarding evidence, the qualification of the facts and the interpretation of the law. As causes for casuistry I came across the following.

Lack of Knowledge of Certain Precedents

As stated above, I did not come across many decisions that mentioned precedents, and I often noticed that the Family Judges at the CFI Tunis were not aware of certain positions taken by the highest court. The case of illegitimate children can serve as an example.

In 1998, the Tunisian legislature introduced a revolutionary law, entitled 'Law concerning the attribution of a father's name to abandoned children and children of unknown descent.'⁷¹ This law provides that the court can grant the father's family name to children born out of wedlock. This has important consequences, both financial and social: financial, as the attribution of the father's name obliges him to pay maintenance;⁷² social, as children born out of wedlock do not have a surname at all (they cannot obtain their mother's family name), or a fictional one. Without any last name, they cannot obtain an ID-card, which in turn prevents them from obtaining formal employment, and this is the reason why some illegitimate children are adopted by a family member.⁷³ When the Public Guardian (*tuteur publique*) assigns a family name to an illegitimate child, this does not necessarily protect against stigmatisation, as the family name is often recognisable as one belonging to a child born out of wedlock. For example, a child born in Gafsa will be called 'Gafsi', a family name that does not exist in Tunisia. Previously, these children would obtain President Bourguiba's last name ('the children of Bourguiba') and were recognisable as such.

In order to apply the 1998 law, biological paternity should be proven. This can be done through recognition by the biological father, or through a declaration by two witnesses that the child is the biological child of a certain man, or through a DNA test proving biological

paternity.⁷⁴ However, many men refuse to co-operate with a DNA test, which leaves the child without any evidence. To solve this problem, the Court of Cassation decided repeatedly since 2000 that the man's refusal to co-operate constitutes evidence that he is the biological father of the child.⁷⁵ In this way, the family name can be attributed to the child without performing a DNA test.

In 2009, nine years after the Court of Cassation had taken its position on the issue, a Family Judge told me about the yearly training for Family Judges he had recently attended. He said: 'I have learned such an interesting thing: the Court of Cassation decided that if a man refuses to co-operate with a DNA test, the court can nevertheless grant the illegitimate child the father's name.'⁷⁶ This remark shows that this judge had failed to apply the 1998 law in all those instances in which the man refused to undergo a DNA test, with all the negative financial and social consequences for the children in question, simply because he was unaware of the ruling.

Diversity in the Assessment of Evidence

Differences in the assessment of evidence is the cause of many annulments on appeal. This seems self-evident, as the appreciation of evidence can be very delicate. For example, if a wife states consistently during three reconciliation sessions that she is mistreated by her husband, judges can decide differently on the question of whether the *procès-verbaux* of these sessions contain sufficient evidence of domestic violence to have legal consequences. This question was the subject of a difference of opinion between the two Family Judges at the CFI Tunis, in a case concerning a couple involved in both a maintenance and a divorce case.

The two cases were each brought before one of the two Family Chambers/Family Judges at the CFI Tunis. In the first case, the husband sued for divorce for harm on the basis of the wife's abandonment of the marital home. The second case concerned the wife's maintenance claim.⁷⁷

The two cases were heard in the same period of time, and both judges based their decisions on what had been said during the reconciliation

sessions in the divorce case. But the judges viewed the *procès-verbaux* of these sessions in two diametrically opposite ways.

The first chamber dismissed the husband's suit for divorce for harm because the wife had established that her abandonment was justified. In this case, the *procès-verbaux* of the reconciliation sessions were held to be sufficient evidence for the alleged violence.⁷⁸ The second Family Judge, on the other hand, dismissed the wife's claim for maintenance, arguing that the wife had no right to maintenance, since her leaving the marital home was in fact without such justification.⁷⁹ This demonstrates that the second judge did not consider the *procès-verbaux* to be sufficient evidence of domestic violence.

Development in the Interpretation of Open Norms in Substantive Law

An example of casuistry that is currently much-discussed in Tunisian legal circles concerns decisions in the field of mixed marriages. As stated above, the Tunisian personal status code does not explicitly discriminate against mixed marriages: it does make explicit that the marriage between a Muslim woman and a non-Muslim man is null and void, it does not explicitly prohibit inter-religious inheritance and it does not explicitly prevent a non-Muslim mother obtaining custody of her child. Nevertheless, the courts have applied the law in a 'discriminatory' way. In a famous case, known as 'Hurriyya', the Court of Cassation decided that the marriage between a Muslim woman (Hurriyya) and her non-Muslim husband was null and void.⁸⁰ The court argued that: 'It is incontestable that the woman who marries a non-Muslim commits a sin, and that Islamic law declares such a marriage null and void.' This decision was in line with a *circulaire* issued in 1962 prohibiting public officers from registering a mixed marriage.⁸¹

'Hurriyya' set a precedent for a judicial practice.⁸² The invocation of the religious impediment was not limited to marriage, but extended to inheritance and custody. In fact, the original 'Hurriyya' case actually concerned an inheritance issue. Because Hurriyya's marriage had made her an 'apostate', the court decided that she could not inherit from her Muslim mother. Similarly, in custody cases the courts refused

recognition of any foreign decision attributing child custody to a non-Muslim mother. They argued that if a child is a Tunisian Muslim, it is not in its best interests to be brought up in a non-Muslim country by a non-Muslim mother.⁸³

It is only recently that more and more judges underline that the legislature has not pronounced on inter-religious issues, and that judges are therefore free to allow mixed marriages, inter-religious succession, and custody by non-Muslim mothers. With regard to the validity of mixed marriages, it was the decision of the CFI Tunis in 1999 that constituted a break with the practice,⁸⁴ the new interpretation being confirmed by the Court of Appeal of Tunis⁸⁵ and finally by the Court of Cassation in 2004.⁸⁶ Similarly, the practice of not recognising a foreign custody decision was revoked in 2001, when a Belgian woman sought recognition of a Belgian decision concerning her custody.⁸⁷ The Court of Cassation decided the child's Muslim Tunisian identity did not provide sufficient grounds to deny the non-Muslim mother her custody rights. But a breakthrough in the field of inter-religious inheritance took longer.⁸⁸ Although the Court of Appeal of Tunis had already affirmed that nothing impeded inter-religious inheritance,⁸⁹ it was not until February 2009 that the Court of Cassation accepted this position.⁹⁰

Although the Court of Cassation has pronounced on these three issues, casuistry remains. This became clear during my fieldwork, in that the Cantonal Court in Tunis follows the reformed practice, whereas the CFI Tunis does not.

Regarding inheritance, the Cantonal Court is competent to draw up the list of heirs, after which the notary divides the inheritance on the basis of the legislation. Following the new practice, the Cantonal Court in Tunis includes the non-Muslim heirs, despite possible objections from the other heirs. But in cases regarding the validity of mixed marriages and the recognition of foreign custody decisions, it is the CFI Tunis which is competent. In interviews, both Family Judges at the CFI Tunis affirmed that marriage between a Muslim woman and a non-Muslim man is null and void unless the husband proves that he is a Muslim, which can be done with a *shabada* from the State Mufti.

Similarly, during observation of a session with the Children's Judge (a separate post within the Family and Children Division of the Court), it became clear that she does not follow the new practice regarding custody cases. In one case concerning a 13-year-old girl named Fathiyya, the facts were as follows: the girl was born and raised in Paris by her French mother and her father, who was of Tunisian origin but had dual French/Tunisian nationality. Every summer, the family went on holiday to Tunisia to visit the father's family. A similar arrangement continued after the parents' divorce (when they continued to live in Paris but in separate homes), and when Fathiyya was 12 she spent the summer with her father in his family's home in Zarzis, a small provincial town in southern Tunisia. At the end of the holiday, her father left for France and took Fathiyya's passport with him. Fathiyya stayed in Zarzis for another five months until her mother came to fetch her. Finally, her mother decided to move to Tunisia, and fetched her child from Zarzis to live with her in Tunis. Throughout all this time, Fathiyya's father was living in France.

At the hearing I attended, Fathiyya's mother requested an emergency measure, consisting of a temporary (24-hour) suspension of the travel interdiction which her ex-husband had obtained in respect of Fathiyya from the President of the CFI Tunis (to legitimise the fact that he had taken Fathiyya's passport away). The Children's Judge, as well as the delegate from the Child Protection Brigade, responded by saying that this would be unlawful as the mother would take the child to France, which would result in a violation of the law regarding custody.

Diversity in the Use of Manoeuvres to Circumvent the Law

An instance where the interpretation of the substantive law differs from one judge to another concerns paternity cases, although it should be made clear that this difference became less significant with the introduction of the law regarding the attribution of the father's name. In fact, the diversity among judgements concerning paternity outside marriage does not so much concern the interpretation of substantive law: all judges seemingly agree that the law does not allow the establishment

of paternity for children born out of wedlock. Thus judicial decisions that do establish paternity out of wedlock remain silent on the subject of whether a child is in fact illegitimate. Instead, the diversity rests in a willingness to use manoeuvres to circumvent this interdiction, and to summon the Registrar to write the father's name on the child's birth certificate despite the lack of a marriage. This is feasible because the Registrar does not require evidence of marriage when a child is registered under the father's name. That there is diversity in the willingness to apply manoeuvres became evident in interviews with the Family Judges in Tunis (the two Family Judges), Sousse, Sfax, Gafsa and Le Kef. The diversity can be described as follows.

Two Family Judges, namely one at the CFI Tunis and the one in Le Kef, assured me that in order to establish legal paternity the claimant had to prove, by producing a marriage certificate, that the child was born within marriage.⁹¹ The second Family Judge in Tunis, as well as the one in Sousse, confided to me that if a couple get married after the birth of a child, these judges will pretend that the child was born within marriage and will summon the Registrar to register the child under the biological father's name.⁹² The judge in Sfax confessed that he allows the paternity claim if the biological father recognises the child, i.e. when he acknowledges that he is the biological father.⁹³ The judge in Gafsa, finally, told me that he also establishes legal paternity if the father recognises the child; but he goes further: when the man denies paternity, this judge grants the demand if the wife establishes that she had a relationship with the man at the time of conception. In this case, the relationship is qualified as an 'informal marriage', which is null and void, but according to the law does have legal consequences for paternity.⁹⁴

Corruption

Some casuistry may be explained by corruption. For instance, if a wife sues for divorce for harm on the grounds of domestic violence, the case might be rejected despite the evidence of an eyewitness's report, perhaps because of personal relations between the litigant and the judge, or in exchange for money or for a favour.

The concept of corruption is often mentioned by litigants, but I have never witnessed it. Many litigants had stories about documents missing from their file, but they are often so much persuaded of their own rightness that they cannot imagine that the case was actually dismissed on legal grounds. For example, one informant told me about her divorce case, which was dismissed. She was sure that the reason for this outcome was that the scribe had removed the evidence from the file. However, the documents in question, a medical certificate and a police *procès-verbal*, are in any case insufficient for divorce for harm.

I did observe (attempts at) clientelism, in the sense that judges were visited or called by friends, or friends of friends, who had a favour to ask: 'Could the judge make sure that [...]?', was an often-repeated question. Requests could be as 'innocent' as talking to the judge handling the case, but some might have been rather decisive for its outcome – but I have no information on the results of such attempts.

Conclusion

This chapter has aimed to make three points. The key argument is that the 'progressive' character of Tunisian personal status law is only relative, as the legislation leaves much room for judicial interpretation. Judicial discretion exists on four levels: the interpretation of substantive law, the qualification of the facts, the requirements relating to and the appreciation of evidence, and discretion regarding financial awards. While due to the vagueness of the law, there is much diversity in its application, at the same time there is also a degree of uniformity. I have attempted to outline the factors that explain this uniformity, namely those that curtail judicial discretion, mentioning that judges have recourse to the intentions of the legislature, to precedents, to doctrine, to Sharia, to good morals, to custom and habit, and to the constitution and international conventions. Likewise, judges' training, and the continuous deliberation between them, the contents of the case file and the requirements of procedural correctness all curtail judicial discretion. However, despite these limiting factors a degree of casuistry remains. This is partly due to the limited knowledge judges have of precedents, to corruption, to the personal willingness of a specific

judge to apply a certain manoeuvre to circumvent the law and to an (as yet ongoing and incomplete) development in the application of the law, where some judges follow a new practice whereas others choose not to do so.

Bernard-Maugiron writes: 'Under the guise of neutrality [...] judicial decisions hide many things.' One of the hidden aspects of judicial decision-making is the extent to which the decision is the result of judicial discretion. This 'fades before the abstract nature of legal jargon, [but a] careful reading of [a] decision [...] shows how the court first proceeded to a construction of the facts in the affair, before constructing the law to be applied and interpreting it'.⁹⁵ A careful study of the process of judicial decision-making reveals its hidden aspects; knowledge of how much judicial discretion judges enjoy, as well as of the factors that curtail or enhance this discretion, enables the person studying such decisions to understand their provenance.

Notes

* This chapter could not have been written without the co-operation of the Family Judges and the help of Baudouin Dupret, Jessica Carlisle, Dorien Pessers, Sarah Vincent and Sarah's parents.

- 1 Charfi 1973 : 11.
- 2 Garfinkel 1967 and Schütz 1987.
- 3 Travers and Manzo 1994
- 4 Dupret 2006a.
- 5 Manzo 1994 : 6.
- 6 *Idem* 1994.
- 7 *Ibid.*
- 8 Garfinkel 1967.
- 9 Dupret 1998.
- 10 Manzo 1994 : 10.
- 11 Bix 1991.
- 12 Hart 1994.
- 13 Maris 1996 : 3.
- 14 Méziou 1992 : 251.
- 15 Articles 5 and 14 PSC.
- 16 Article 59 PSC.
- 17 Article 67 para. 3 PSC.
- 18 *Majallat al-abwal al-shakhsiyya*, 28 December 1956.
- 19 Law no. 81–7, 18 February 1981, and Law no. 93–74, 12 July 1993.

- 20 Law no. 1958–27, 4 March 1958, amended by Law no. 58–69, 19 June 1959.
- 21 Law no. 1993–65, 5 July 1993, amended by Decree no. 1993–1655, 9 August 1993.
- 22 Law no. 98–91, 9 November 1998.
- 23 Law no. 98–75, 28 October 1998, amended by Law no. 2003–51, 7 July 2003.
- 24 Article 31 PSC.
- 25 Ibid.
- 26 The Court of Cassation decided that the interpretation of *darar* is open to the discretion (*ijtihad*) of the judge. Court of Cassation 12 December 1989, 23643.
- 27 See for example: domestic violence – CFI Tunis 5 May 2008, 66970; adultery – CFI Tunis 26 February 2008, 63237; ‘disloyalty’ – CFI Tunis 21 April 2008, 61660; non-payment of maintenance– CFI Tunis 12 January 2009, 69314; wife’s refusal to cohabit – CFI Tunis 5 January 2009, 67836.
- 28 Dupret 1998.
- 29 Interview with the head Public Prosecutor (*Procureur de la République*), CFI Tunis, 16 February 2009.
- 30 Article 422 CC.
- 31 An official record.
- 32 Voorhoeve 2010.
- 33 Speech 1966: ‘Discours prononcé à l’occasion du mouled’ ; see Tessler et al 1978: 147.
- 34 Mestiri 1966. See Ben Achour, Y. 2005–06: 58–9.
- 35 Court of Appeal 14 June 2002, 82861, in *Revue de jurisprudence et de législation*, (December 2002), pp. 85–6 (French), 75–85 (Arabic).
- 36 Court of Cassation 13 May 1997, 56315.
- 37 CFI Tunis 4 November 2008, 13465.
- 38 Interviews on 8 and 12 July 2010.
- 39 Tunis, 2005.
- 40 Lajmi, 2008.
- 41 Court of Cassation 7 June 2007, 12678.
- 42 Ben Halima 1975, Mezghani 2005.
- 43 Ben Achour, S. 2000: 403; 2003: 1203; Ben Achour, Y. 2005.
- 44 Court of Cassation 31 December 1963, 2183.
- 45 Article 400, *Mudawwanat al-usra*.
- 46 Egyptian Constitution, Article 2. Article 1 of the Tunisian Constitution provides that Islam is the state religion, and Article 38 that the President must be a Muslim.
- 47 Court of Cassation 6 December 2007, 15116.
- 48 *Al-walad li-l-firash wa-l-abir li-l-bajar*; see Court of Cassation 7 May 1996, 49089; 18 October 1996, 43354; 13 May 1997, 56315.

- 49 Court of Cassation 26 November 1996, 51346.
- 50 'To say of someone that he gives himself up to sexual perversion means providing an anticipatory justification to his condemnation as a debauchee. It means that typifying someone as perverse serves as a scheme underlying the interpretation of facts and purporting to give them a legal value' (Dupret 2008: 293).
- 51 International Covenant on Civil and Political Rights; Convention on the Elimination of all Forms of Discrimination against Women; Convention on the Rights of the Child.
- 52 Article 72 Constitution.
- 53 Marriage – Court of Cassation 2 March 2001, 7286–2000, *Revue de jurisprudence et de législation* (January 2002), pp. 87–8, 183–95; inheritance – Court of Cassation 5 February 2009, 31115, *Revue de jurisprudence et de législation* (March 2009), pp. 93–4; Custody – Court of Cassation, 20 December 2004.
- 54 Article 68 PSC.
- 55 This practice was set by Court of Cassation 31 December 1963, 2183; for a more recent decision, see Court of Cassation 18 October 1996, 43354.
- 56 CFI La Manouba 2 December 2003, 16189/53.
- 57 Charfi 1997; Ben Achour, Y. 2005.
- 58 Ben Halima, 24 October 2008.
- 59 de Lagrange 1968.
- 60 See for example interview with one of the two Family Judges at the CFI Tunis on 8 July 2010.
- 61 *Al-yawm al-dirasi al-takwin li-qudab al-usra, yawm al-jum'a, 29 fifri 2008, 2007–2008.*
- 62 Interview with the president of the CFI Tunis, 11 July 2010.
- 63 CFI Tunis 21 April 2008, 61660.
- 64 Article 236 PC.
- 65 CFI Tunis 12 September 2006, 27753; Court of Appeal Tunis 30 October 2006, 14264.
- 66 Reconciliation session headed by one of the Family Judges at the CFI Tunis, 19 January 2009.
- 67 Dupret 2006b.
- 68 Ibid
- 69 Article 5 CCP.
- 70 Interview with one of the Family Judges at the CFI Tunis, 9 February 2009, 65920.
- 71 Law no, 98–75, 28 October 1998, amended by Law no. 2003–51, 7 July 2003.
- 72 Article 3 *bis* of the Law concerning the father's name.
- 73 I witnessed this situation at an adoption session at the Cantonal Court Tunis, 27 August 2009.
- 74 Article 3 *bis* of the Law concerning the father's name.

- 75 Court of Cassation 16 November 2000, 4182; 12 October 2001, 10020; 2 March 2006, 7799.
- 76 To prevent any possible repercussions for this particular judge, I do not specify here at which Court this judge works, nor the date of the interview.
- 77 Here, the Family Judge (note, not the Family Chamber) at the Court of First Instance is competent in appeal of decisions taken by the maintenance judge of the Cantonal Court. In first instance, the wife had demanded a maintenance decision (*bukm nafaqa*), arguing that the husband did not pay any maintenance. This would constitute a violation of the personal status code, which prescribes that the husband should maintain his wife and children during marriage. The Cantonal judge awarded an amount of maintenance, to be paid monthly by the husband. The husband went to appeal, arguing that his wife had no right to maintenance since she had left the marital home.
- 78 CFI Tunis 20 October 2008, 66798.
- 79 CFI Tunis 4 November 2008, 13465.
- 80 de Lagrange 1968.
- 81 *Circulaire du Secrétariat de l'État du 17 mars 1962*, followed by a *Circulaire* issued by the Ministry of Justice, 5 November 1973. See Ben Achour, S. 2003: 1203.
- 82 Ben Achour, S. 2005: 827; Ltaief 2005; Ben Halima 2005: 134–5.
- 83 Court of Cassation 3 June 1982, 7422 and Court of Cassation 19 October 1985, 14220..
- 84 CFI Tunis, 29 June 1999, *Revue tunisienne de droit*, 2000, p. 403, annotated by Souhaima Ben Achour
- 85 Court of Appeal Tunis, 14 June 2002, 82861; 4 May 2004, 3351; 6 January 2004, 120; see Ben Achour, S. 2003: 1207
- 86 Court of Cassation, 20 December 2004.
- 87 CC 2 March 2001, 7286–2000, *Revue de jurisprudence et de législation* (January 2002), pp. 87–8, 183–95.
- 88 CFI 1 November 1994, 8179 regarding inheritance. See Ben Achour, S. 2003: 1205 ; CFI Tunis, 18 May 2000, *Revue tunisienne de droit* (2000), p. 247, annotated Ali Mezghani.
- 89 Court of Appeal Tunis, 6 January 2004; Ben Achour, S. 2003: 1208–12.
- 90 Court of Cassation 5 February 2009, 31115, annotated Malik Ghazouani
- 91 Interview with one of the Family Judges at the CFI Tunis, 9 February 2009; interview with the Family Judge, Le Kef, 4 February 2009.
- 92 Observation of a discussion between one of the two Family Judges and a lawyer on 10 June 2009, CFI Tunis; interview with the Family Judge, 27 January 2009, CFI Sousse.
- 93 CFI Sfax: interview with the Family Judge, 31 January 2009.
- 94 Article 22 PSC. interview with the Family Judge, CFI Gafsa, 2 February 2009.
- 95 Bernard-Maugiron 2008: 243.

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