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The interaction between codified law and divine law: the case of divorce for disobedience in Tunisia

Maaïke Voorhoeve¹

Max Weber has stated that, in modern societies, religion as a sphere of activity becomes more and more autonomous from other social fields.² Nevertheless, research may show that religion is actually *not* a completely autonomous sphere: it can interact (and, sometimes, conflict) with the economic, political, artistic, scientific or domestic field. This article examines the interaction between *law* and religion in Tunisia, focusing on the interaction between codified law and divine law (the sharia).

Tunisia is an interesting example, as its law is often called 'secular'. At the same time, the law contains numerous vague norms, which leave room for interpretation. This paper examines whether family judges in Tunisia use the sharia as a subsidiary source of law, in which case there would be an interaction between codified and divine law. We use divorce for disobedience as a case study.

It has to be noted that we can only speak of an *interaction* when judges use Islamic law as a source *next to* the codification; if they were putting the code aside, we would simply deal with divine law. As the Tunisian law contains many vague norms, putting the law aside seems not to be necessary.

Methodology

This article is based on material collected during fieldwork in Tunisia between July 2008 and September 2009, in the framework of a doctoral thesis on *The contemporary application of Tunisian family law by judges*.

In order to establish an interaction between codified and divine law in Tunisia, I disposed of the following sources. The principal source consists in court decisions. For this article, I analysed thirty one recent judgments in cases of divorce for disobedience: fifteen from the Court of First Instance in Tunis (end 2008 till begin 2009), one from the Court of First Instance in Le Kef (2008), and fifteen from the Court of Cassation (between 1996 and 2008). As the judgments from the Court of Cassation give insight in what previous judges in the same case have decided, this body of fifteen can be multiplied by three (Court of First Instance and Court of Appeal). Secondary sources consist in Tunisian legal literature about the application of Tunisian family law, interviews with judges about the application (semi-closed and closed questions, such as: which evidence is required for violence?, or: is this enough evidence to obtain divorce for disobedience?), and the observation of reconciliation sessions in divorce cases (five mornings, on and off during 14 months), demonstrating how litigants and judges deal with the question of disobedience.

The body of court decisions is the result of a haphazard collection of material, as I did not have *all* judgments from a certain period or from a certain court at my disposal. This means that this body does not enable me to generalize about 'the' application of Tunisian family law; this research demonstrates a certain tendency in the application of the law, it shows a certain 'shadow rule' that is applied on the side of the legislation, but in no way does it pretend to give an exhaustive description of how judges (all judges) apply Tunisian family law.

This article will analyse the interaction between codified law and the sharia in the case of divorce for disobedience from a strictly legal perspective. Court decisions will form the basis of an empirical research of *how* the law is applied (without going too much into detail about procedure etc.), without judging this application or trying to understand *why* it is applied as it is: the article will not draw conclusions about Tunisian society (being religious or secularized), but is limited to what judges do.

In order to analyse the interaction between codified law and the sharia in the case of disobedience, we will start with the description of a case dating from 2007.

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² *Sociologie des religions* (ed. J.-P. Grossein), Paris : Gallimard, 1996

A case study

In December 2007, the highest Tunisian court, the Court of Cassation, decides in a divorce case between a certain Abdelwahid and Hedia. This couple, married in 1984, has three children, and lives in Mednin, a small provincial city in southern Tunisia.

In 2001 Abdelwahid turns ill. As medical treatment is only available in Tunis, the capital, and as this treatment will take a long time, the family moves to Tunis. Three years later, in 2004, Abdelwahid is recovered and decides to move back to Mednin, to pick up their life there, his work, and live in their former home.

But Hedia refuses to follow her husband to Mednin, and stays with her children in Tunis. Abdelwahid demands divorce for prejudice (*darar*), probably thinking that if Hedia realizes that she will be divorced and will have to pay him damages if she does not follow him, she will come to Mednin. But Hedia insists, and argues in front of the Court that she is not at fault, as the marital home (*maball al-zanjija*) is in Tunis, since they have lived there for three years. Her second argument is that even if the marital home is in Mednin, her refusal to follow her husband is justified by the interest of her children, as education in Tunis is much better than in Mednin, and as one of their sons developed the same illness as his father, and needs the same medical treatment in the capital.

The Court of First Instance in Mednin accords the divorce for prejudice,³ which is confirmed by the Court of Appeal of Mednin.⁴ The Court of Cassation on its turn, sends the case back to the Court of Appeal, commanding an investigation (*bahth* or *ta'il*) of Hedia's justification for her behaviour.⁵ The Court of Appeal in second instance annuls its previous judgment, arguing that the wife justified her staying in Tunis with the interest of the children regarding their education and their health.⁶ This decision is not accepted by Abdelwahid, who demands annulment by the Court of Cassation.

The Court of Cassation in second instance annuls the latter judgment, arguing that the Court of Appeal's investigation did not result in any evidence that the interest of the children necessitates staying in Tunis. Therefore, the Court of Cassation concludes, Hedia harms her husband as she is disobedient (*nashiza*).

Law

In order to demonstrate an interaction between codified law and divine law in this decision, we should start with a description of the law regarding divorce for disobedience.

The Tunisian Family Code (CSP, *Code du Statut Personnel*, 1956⁷) does not explicitly provide for divorce for disobedience. But there are two vague norms involved which leave room for interpretation: Articles 23 and 31 CSP.

Article 31 CSP enumerates three grounds for divorce: both spouses can demand divorce with mutual consent (*b-al-taradi*), on their simple demand (*insba*), or for prejudice (*darar*). 'Prejudice' is not defined in the code, but on the basis of court decisions we can conclude that the four main reasons for prejudice are non-payment of maintenance (*'adam al-infaq* or *ihmal*), adultery (*zina*), violence (*'anf*) and disobedience (*nushuz*). The first three grounds can be directly based on criminal law: non-payment of maintenance, adultery and domestic violence are punishable with imprisonment and a fine.⁸ The family judge argues that if a spouse has been convicted in a criminal procedure, there is prejudice in the divorce case.

³ Court of First Instance Mednin, 6 June 2005, 20946

⁴ Court of Appeal Mednin, 8 February 2006, 2090

⁵ Court of Cassation 6 July 2006, 3118

⁶ Court of Appeal Mednin, 28 February 2007, 2253

⁷ *Décret du 13 août 1956 portant promulgation du Code du statut personnel*, in: *Journal Officiel Tunisien*, 28 December 1956, no 104, p. 1742-1751

⁸ Non-payment of maintenance: Article 53 bis CSP (3 months-1 year), domestic violence: Article 218 CP (2 years), adultery: Article 236 CP (5 years).

The fourth ground, disobedience (*nushuẓ*), cannot be found directly in the legislation: the duty to obedience was erased from the Code in 1993.⁹ In fact, what judges call ‘disobedience’ is actually the wife; refusal to cohabit: either because the wife abandons the marital home, or because the wife refuses to follow her husband when he moves house. Therefore, the prejudice consists in the wife’s violation of the duty to cohabit.¹⁰ However, as in the case of ‘obedience’, the law is silent about the concept of ‘cohabitation’.

In order to base the duty to cohabit on the legislation, judges refer to Article 23 CSP, which describes the marital rights and duties. Article 23 CSP provides the following:

The spouses shall treat one another with respect, *live on good terms with each other*, and *to harm each other*. Both spouses shall fulfill their marital duties in accordance with *usages and custom*. They co-operate in managing the family, the good upbringing of the children, and the care for the affairs of the children, such as their education, travel and financial transactions. The husband, being the *head of the family*, should satisfy the needs of the wife and the children, in accordance with his means and their mode de vie, within the framework of the components of alimony. The wife should contribute to the charges of the family if she has the means. [curs. MV]

The phrases ‘live on good terms with each other’, and ‘prevent to harm each other’ can be explained as the duty to cohabit, which can also be found in ‘usages and custom’. That the husband decides where this cohabitation shall take place, can be based on the prescription that the husband is ‘the head of the family’: as the principal breadwinner, the family should live where he works.

Here, it has to be noted that the wife can also demand divorce for prejudice in case of the husband’s abandonment. This is the divorce on the ground of *ibmal*, negligence, which regards the situation where the husband has left the marital home leaving his family without any means. This ground is connected with the husband’s duty to maintain his family financially and has nothing to do with the duty to cohabit. However, I came across one judgment where the Court accorded divorce for prejudice to the wife, on the ground that the husband violated the duty to cohabit. Here, the conduct was called *badjr*, abandonment, instead of *nushuẓ*, disobedience.¹¹ This seems to be an exception, as it is the only decision in this vein that I came across and as this situation never came by in reconciliation sessions.

On the basis of court decisions I conclude that judges developed a consistent body of rules around divorce for disobedience, both regarding the evidence, and regarding the justifications for disobedience.

In order to obtain divorce for prejudice, the claimant has to prove his harm (Article 420 COC: who claims has to prove¹²). The law does not require any specific form of evidence (Article 422 COC). In case of the refusal to cohabit, the common means to prove the refusal are: the wife’s confession in front of the judge, the declaration of two witnesses, or a process verbal from a public notary (*‘adil al-ishhad*), who interrogates the wife and constitutes a process verbal (*mahdhar tanbil*) containing the woman’s declaration that she refuses to return.

When the husband has obtained enough evidence, he writes a petition for divorce. Here the rules are similar to the other grounds for divorce: the judge holds three reconciliation sessions behind closed doors, with an interval of 30 days each time. At these sessions, both parties should be present. The judge demands the reasons for the divorce, and tries to reconcile the couple. At the court hearing that follows, the parties or their lawyers present their documents, such as the summons or the process-verbal (Article

⁹ Article 23 CSP ‘The wife should respect the prerogatives of the husband being the head of the family, and in this respect she must *obey* him. The wife has to fulfill her marital duties in conformity with usages and custom.’ Changed by Law 93-74, 12 July 1993

¹⁰ In Islamic law, *nushuẓ* is broader than the violation of the obligation to cohabit: also the refusal to have sexual intercourse is called disobedience. However, it seems that these types of disobedience form a minor category in Tunisian family law, and a different category, as they are not called *nushuẓ* by Tunisian judges. This article is limited to *nushuẓ* in the sense of the violation of the duty to cohabit.

¹¹ Court of First Instance Tunis, 6 January 2009, 67963

¹² *Code des Obligations et des Contrats*

83 CPCC), on the basis of which the family chamber, consisting of three judges, takes its decision, which is open to appeal and cassation.

On the basis of court decisions I conclude that some women do not respond at all to the demand for divorce. However, women who do respond, tend to present justifications for their behaviour, some of which are accepted by the judge. During my fieldwork, I came across the following reasons to abandon the marital home: the husband is violent (*'unf*), or he does not pay any maintenance (*'adam al-infaq* or *ihmal*), or he did not provide her with appropriate housing, or she no longer wishes to live with his family, or a combination of these reasons, often presented together with statements regarding (immoral) behaviour, such as drinking alcohol, returning home late, seeing other women, sitting in the café all day, being unemployed, etc. Another important statement is that the husband expelled her from the marital home, and/or that she is willing to return to the marital home, but that he does not allow her to do so. In the situation where the woman refuses to follow her husband, women argue that they do not want to move (for example because the husband moves too far away from her family or from the capital to the countryside), or that they will lose their job if they do so.

Question remains, whether the judicial practices regarding divorce for disobedience are based on religious law.

The sharia as a source of law

Tunisian family law is often called 'secular', as it applies on all Tunisians regardless of their religion¹³, and as it deviates considerably from (common interpretations of) classical Islamic law. Moreover, the sharia is not mentioned anywhere in the legislation: neither the Constitution, nor the general rules of interpretation in the *Code des Obligations et des Contrats*, nor the *Code du Statut Personnel* refer to the sharia. In this way, the Tunisian legislation differs from many other legislations in the Muslim world. For example, Article 2 of the Egyptian Constitution states that the sharia is a source of law, and Article 400 of the Moroccan family code (*Mudawannat al-usra*) prescribes that in case of doubt, the judge shall take recourse to the Islamic (Maliki) tradition.

At the same time, the Tunisian family legislation contains numerous vague norms, leaving a lot of 'space' to judges. This space might be filled up or *limited* by religious law, in the sense that judges use the sharia as a source to interpret the vague norms. The use of the sharia can be defended on the ground that Tunisian law contains provisions which contradict its secular character: the Constitution states that the State religion is Islam (Article 1 Constitution), and both the general rules for interpretation (Article 538 COC) and the *Code du Statut Personnel* (Article 23 CSP) refer to usages and custom as a source of law, leaving room for the sharia, which possibly forms part of usages and custom. Moreover, the Tunisian family legislation is clearly inspired on the sharia.

The fact that there are arguments for and against the use of the sharia as a source of law, has been called 'the ambiguity of Tunisian family law', making it uncertain whether or not judges should use the sharia as a source of law when they interpret open norms. This question is the topic of a *normative* debate between Tunisian legal scholars.¹⁴ However, this article focuses on the *empirical* question whether judges

¹³ *Décret du 12 juillet 1956 fixant le statut personnel des tunisiens non musulmans et non israélites*, followed by *Décret du 24 juin 1957 modifiant Décret du 12 juillet 1956*, and *Loi no 57-39 du 27 septembre 1957 modifiant Décret du 24 juillet 1956*.

¹⁴ The discussion started with an article by Mohammed Charfi, entitled 'Le droit tunisien de la famille entre l'Islam et la modernité'. Charfi stated that Tunisian family law stands between Islamic and secular law (M. Charfi, 'Le droit tunisien de la famille entre l'Islam et la modernité', in : *Revue tunisienne de droit*, 1973, p. 11-37). This was attacked by Ali Mezghani, who argued that the law was not Islamic at all. He wrote that Islamic law might well be a historical source of Tunisian family law, just as Roman law is a historical source for French law. However, it is not a *formal* source, because this would be 'contraire à la volonté du législateur tunisien.' (A. Mezghani, 'Réflexions sur les relations du code de statut personnel avec le droit musulman', in : *Revue tunisienne de droit*, 1975, II, p. 53-81). A new generation of legal scholars, among whom Sana Ben Achour, state that the character of the law is not clear, that it is ambiguous: there are reasons to conclude that the law is religious, and at the same time it can be defended that the

do use the sharia as a source of law, in which case there would be an interaction between codified law and divine law in Tunisian legal practices.¹⁵

1. The space: limited by the sharia?

In order to establish that judges use the sharia as a subsidiary source of law, I developed two methods to analyse our decision regarding divorce for disobedience. I call the first method ‘the method of contents’, and the second ‘the method of terminology’. We will see that both of them are problematic.

Method of contents

The method of contents makes use of a comparison between the contents of the decision and the sharia and concludes that the judge used the sharia as a subsidiary source of law, if the outcome of the decision is in accordance with the sharia. So what does the sharia prescribe regarding divorce for disobedience?

According to Peters, textbooks of Islamic law define marriage as ‘a contract with the exclusive object of assigning a man the right to have sexual relations with the woman.’¹⁶ In return for sexual relations, the husband is obliged to maintain his wife and children financially. His maintenance obligation is suspended if the wife is disobedient (*nashizā*), in which case he can also repudiate her. Disobedience occurs if she leaves the marital home without her husband’s consent or a valid reason (examples of a valid reason are a visit to her relatives, domestic violence, or the fact that her husband does not provide for appropriate housing), or if she refuses to have intercourse with him.¹⁷ Therefore, the marital duties can be described as financial maintenance versus obedience. This rule would be based on an interpretation of a Quran verse (Q 4:34), which provides ‘As for those (women) on whose part you fear ill-will and nasty conduct, admonish them (first), (next) separate them in beds (and last) beat them.’ Similarly, there is a tradition about the Muslim prophet Mohammed stating that a woman who refuses to have sex with her husband, shall be punished.¹⁸ We could conclude from this that the judicial practice reflected in our judgment is based on the religious law, as it is in accordance with the sharia concept of obedience.

But this is debatable. The sharia is not a fixed corpus of legal norms; it is a general term for many different and sometimes contradictive interpretations of the sources of the Islam, the Quran and the traditions about Mohammed.¹⁹ Besides the traditional interpretations laid down in textbooks of Islamic law (*fiqh*), there are contemporary interpretations, according to which Islam protects the equality between men and women. For example, Asma Barlas, Amina Wadud and Nasr Hamid Abu Zayd struggle for a re-interpretation of the Quran, stating that it should be read in the historical context: now that women are independent, the obligation to obedience, which might have been logical in the 7th century AD, is no longer valid.²⁰ In Tunisia, Olfa Youssef has argued in the same vein in her book *Hayratu Muslima* (Confusion of a Muslim woman).²¹ She writes about her confusion that on the one hand, the Quran and the *hadiths* proclaim gender equality, whereas on the other hand, the interpretations of these sources by religious scholars (*fuqaha*) in the first centuries of Islam proclaim a patriarchal society and suppression of

law is secular (S. Ben Achour, ‘La construction d’une normativité islamique sur le statut des femmes et la famille’, paper presented at *La 655ème conférence de l’université de tous les savoirs*, 10 October 2007).

¹⁵ Although I have stated before that judges do use the sharia to interpret the family legislation, I am now convinced that it is problematic to demonstrate this. M. Voorhoeve, ‘The position of women in Tunisian family law’, paper presented at the Ninth Mediterranean Research Meeting, Florence and Montecatini Terme 12-15 March 2008, organized by the Mediterranean Programme of the Robert Schumann Centre for Advanced Studies at the European University Institute).

¹⁶ Ruud Peters, *A survey of classical Islamic law*, Amsterdam, 2004 (unpublished), p. 11.

¹⁷ Ruud Peters, *A survey of classical Islamic law*, Amsterdam, 2004 (unpublished), p. 30, 31

¹⁸ Compilation of Muslim, Part two, no 3366

¹⁹ M.S. Berger, ‘Sharia – A flexible notion’, in: *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie*, Vol. 35, Nr. 3, 2006

²⁰ Asma Barlas, *Believing women in Islam: Unreading patriarchal interpretations of the Qur’an*, University of Texas Press, 2002, Amina Wadud, *Qur’an and woman: rereading the sacred text from a woman’s perspective*, Oxford University Press, 1999, Nasr Hamid Abu Zayd, *Reformation of Islamic thought, a critical historical analysis*, Amsterdam, 2006

²¹ Éditions Sahar, Tunis, 2009

women. Youssef argues that these orthodox interpretations of Islam are debatable, and are not part of divine law as they are the result of human reasoning.

As Islamic law is not a static corpus of legal rules, and as there are also interpretations which refute the existence of a duty to obedience, it is impossible to compare our Mednin decision with 'the' sharia. There are many sharia's, and if the Court of Cassation would have decided that it was Abdelwahid who was disobedient, this could equally have been conform the sharia. It seems that judges do not follow the sharia, but simply follow a certain tendency when they apply the rule regarding disobedience, whether this tendency is originally based on the sharia or on another source, such as custom.

Method of terminology

The method of terminology focuses on the terminology of the judgment: the point of departure is that if the judge mentions the sharia, he uses it as a source of law.

In our Mednin case, the Court argues as follows:

- 'It has not been contested that a wife has the duty of obedience (*ta'a*) vis-à-vis her husband.'
- 'Amongst her basic duties according to the sharia and to the legislation (*shar'an wa qanunan*) on the basis of Article 23 CSP, are cohabitation and (sexual) relations (*musakina wa mu'ashara*) with her husband as well as taking care of the best interest of the children together with the duties of trust (*i'timad*) and respect (*mura'at*).'
- 'The devotion to public order is the most important of all interests.'

On the basis of the wording we could conclude that the judge used the sharia as a source of law, as he argues that 'according to the sharia' the wife has the duty to cohabit. The fact that the judge mentions religious law, demonstrates the interaction between codified law and divine law.

But let us have a closer look. The Court does not *only* mention the sharia: he also mentions the legislation, public order, and, last but not least, the judge begins by arguing that the wife should obedience her husband, without giving any source for this assumption, simply stating that this 'has not been contested'.

If we look at this range of sources, we get the impression that the judge somehow 'feels' that such a duty to cohabit exists, and that he looks for sources to find it: it seems like *first* there's the rule, and then there's the source, instead of the other way around. This impression is affirmed by the previous decisions in Abdelwahid and Hedia's case: whereas all courts accepted the *existence* of the duty to cohabit, the sources they mentioned differ from one court to another. The Court of First Instance in Mednin stated that the wife's duty to cohabit can be found in *usages and custom*, which are mentioned in Article 23 CSP²², whereas the Court of Appeal in Mednin in second instance decided that the *marriage contract* is based fundamentally on the condition to cohabit.²³ Other examples which show the plurality of sources are the following.

In 2000, the Court of Cassation decided in a case where the husband moved to Italy for work. When his wife refused to follow him as she did not want to leave Tunisia, the Court decided that she was disobedient. The Court based its judgment on Article 23 CSP, which 'provides for the duty of 'good cohabitation'' (*hasan al-mu'ashara*).²⁴ In 1996, the same court decided in a divorce case regarding a couple who lived with the husband's family. The wife had left the marital home and declared her willingness to return under the condition that the husband rented an independent home. The Court accorded the demand for divorce for prejudice, on the basis of 'the law' without explicitly mentioning Article 23 CSP.

²² 'One of the core marital duties is treatment in a friendly manner (*mu'amila bi-l-ma'ruf*), and to have good relations (*mu'ashara bi-l-hasna*) and not to harm each other (*adam ilbaq al-darar bi-ba'dbhuma*) and both of them have the duty to live together according to usages and custom, on the basis of Article 23 CSP.' Court of First Instance Mednin, 6 June 2005, 20946.

²³ 'The marriage contract is based fundamentally (*asasan*) on the condition to live together (*musakina*).' Court of Appeal Mednin, 2 July 2008, 2463

²⁴ Court of Cassation 11 July 2000, 1950. Likewise: Court of Cassation 4 February 1998, 52422, and Court of Cassation 16 April 1996, 48770

The Court argued that the wife's behaviour constituted a violation of the 'legal duty to cohabit' (*ikhlal bi-wajib al-musakina al-mahmul 'alayha qanunan*).²⁵ In some cases, like the Court of First Instance in our Mednin case, the judge found the duty to cohabit in 'usages and custom', which is said to be a source of law through Article 23 CSP.²⁶ In other cases, judges find the duty to cohabit in the existence of a marriage, such as the Court of Appeal in second instance in our Mednin case. Finally, in many judgments regarding *nushuz* no source of law is mentioned whatsoever: neither the legislation, nor the sharia, nor usages and custom, nor the marriage contract, nor public order. For example, in January 2009 the Court of First Instance in Tunis decided in a divorce case between an Egyptian woman and a Tunisian man. As the Egyptian woman had returned to Egypt after the marriage, the Court of First Instance in Tunis argued that 'she violated the duty to cohabit' (*ikhlal bi-wajib al-musakina*). The Court did not motivate where this duty is prescribed.²⁷

As these judgments demonstrate, recourse to the sharia is not deemed necessary to motivate that the wife shall live with her husband. Therefore, in our case, the Court of Cassation could have referred to other sources than the sharia to argue that the wife should cohabit. As judges 'find' the duty to cohabit in a plurality of sources, we can conclude that the Court of Cassation, when using *the term* 'sharia', did not necessarily use *the sharia* as a source of law; mentioning the sharia seems to be mainly rhetorical.

2. The space: not limited at all?

As both methods are problematic, we cannot establish that judge in our case used religious law next to the legislation: we cannot compare the judgment with the sharia, nor can we rely on the judgment's wording. Therefore, it is impossible to prove that the space left by the legislator is limited by religious law. But this does not mean that the space is completely unlimited, nor does it mean that divine law does not play any role whatsoever.

The judge's space *is* limited, as the rule that prescribes that a woman should cohabit with her husband *exists*. Although the legislation does not explicitly contain this rule, its existence originates from the fact that it is constantly contested and affirmed in the court. In this way, the 'shadow rule' which exists next to the legislation, limits the judge's space. This is true, despite the fact that judges are officially not held to follow precedents, as Tunisia is a civil law country.²⁸ The Tunisian judge applies the rule, he inscribes his judgment in the story which is called 'divorce for disobedience'. The judge's space is limited by the *narrative of law*: the judge is a co-author who co-writes a novel, who takes part in a chain, and who needs to respect the coherence of the novel; he has to take into consideration what has been written before him, and what will be written after him. The sharia might have a role in this, as it is possible that the beginning of this novel was based on a certain interpretation of religious law, but as has been stated above, we cannot prove that.²⁹

Similarly, the space which the law accords to the judge, is limited by the *rhetoric of the law*, which can be observed in the terminology of certain cases which refer to the sharia. Law is not a science in the sense that the judge proves what is *true*, like in the natural sciences such as mathematics: it is not $1 + 1 = 2$, so law + facts = decision. Law is a *rhetorical science*, in the sense that the judge does not demonstrate what is true, but what is reasonable, what is acceptable; he could even argue that $1 + 1 = 3$, if the argumentation is convincing. Mentioning the sharia makes the judgment probably more convincing in a Muslim society

²⁵ Court of Cassation 19 November 1996, 50913

²⁶ See for example Court of Cassation 5 November 1996, 50912

²⁷ Court of First Instance, Tunis, 5 January 2009, 70474. See also Court of First Instance Tunis, 5 January 2009, 67836 (the wife left the marital home because her husband was going to leave).

²⁸ The Tunisian system is broadly inspired by the French system. In the French post-revolutionary legal system, judges did not have any discretion, being 'la bouche de la loi', connected with Montesquieu's *Trias Politica* and Rousseau's idea of the 'contrat social'. M. Charfi, *Introduction à l'étude de droit*, Tunis: Cérès, 1997, 3rd edition

²⁹ R.H. Dworkin, 'How law is like literature', in: L. Ledwon (ed.), *Law and literature: text and theory*, 1996

such as Tunisia.³⁰ Having said this, it is interesting to notice that I came across few decisions in which the sharia was explicitly mentioned.

3. Diversity

We concluded in the first part of this article that we cannot establish that the space left by the legislator is filled up or limited by the sharia. In the second part, we argued that the space is nevertheless limited, that is to say by the narrative of the law and the rhetoric of the law. But this limitation of the judge's space is not exhaustive: the diversity between judgments demonstrates that the judge has some discretion left.

The diversity becomes clear in our case. First, the Court of First Instance and of Appeal in Mednin decide that Hedia is disobedient. Then, the Court of Cassation decides that the validity of Hedia's justification has not been properly examined, after which the Court of Appeal in second instance accepts Hedia's justification. Finally, in last instance, the Court of Cassation rejects the justification anyway, stating that it has not been proven that Hedia should stay in Tunis to protect the interest of her children. This diversity demonstrates that all three Courts in this case accept the mere existence of the rule that a wife should cohabit with her husband (the narrative of the law), and that some of them base this rule on the sharia (the rhetoric of the law), while the qualification of the facts of the case differs from one Court to another.

In Hedia and Abdelwahid's case, the difference of opinion between the Courts regarded the qualification of Hedia's justification for her behaviour - the interest of the children. But the Courts could have differed on several principal questions. For example, the location of the marital home. The Court of Cassation decided that the marital home is in Mednin because that is where the husband lives and works, as according to Article 23 CSP the husband is the primary breadwinner. The Court could also have argued that the marital home is in Tunis, as the couple has lived there for three years and the children have built up a life there. This, as according to a certain judicial tendency the interest of the family, especially the stability of the children, has become a decisive factor in the establishment of the marital home.³¹ For example, the Court of First Instance in Tunis decided in a case where the wife refused to follow her husband because her children would be obliged to change schools, that the wife was not disobedient as her refusal was in the best interest of the children.³²

Another example of diversity regards the qualification of the evidence. For example, the Court of First Instance in Tunis decided twice in the same disobedience case. The first judgment regarded a maintenance case. The wife had obtained a maintenance decision at the Cantonal Court, which was appealed by the husband stating that he was not obliged to pay maintenance, as the wife had left the marital home. The family judge at the Court of First Instance decided that as 'the wife refused to return to the marital home *without any justification whatsoever*, factual or lawful', she was disobedient and did not have a right to maintenance.³³ The second case regarded the husband's demand for divorce for disobedience. Here, the family chamber of the same court decided that the wife's abandonment *was justified* as 'the wife has justified her abandonment with the bad treatment by her husband' and 'the husband did not contradict this.' This case demonstrates that some judges demand more evidence for the justification than others.³⁴

³⁰ See for example Chaim Perelman's writings about rhetoric

³¹ N. Rekik, 'Wajib al-ta'a fi majallat al-ahwal al-shakhsiyya wa fi fiqh al-qadha', paper presented at the conference organized by the law faculty of Sfax University, Sfax, 27 February 2009

³² Court of First Instance Tunis, 12 January 2009, 69032

³³ According to some judges, the maintenance judge is not authorized to decide about disobedience, as this is the domain of the family chamber (three judges instead of one). See for example Court of First Instance Tunis, 5 January 2009, 13524

³⁴ Similarly, the Court of First Instance Le Kef argued that the violence had been proven with a medical certificate and a process-verbal of the police (Court of First Instance Le Kef, 16 December 2008, 39100). Although this is stricter than the second family judge in Tunis, the conditions are still less severe than in case the wife would demand divorce for prejudice on the ground of violence: on the basis of case-law, we have seen that for divorce for violence,

A third example of diversity regards the qualification of a specific justification, namely that the wife cannot follow her husband because of her job. In 1980, the Court of Cassation accorded the demand for divorce for prejudice, but stressed that this would have been otherwise, if the wife's income was necessary for the family's well-being.³⁵ But in 1996, the same court decided that the wife had to follow her husband even though she had a job.³⁶

The diversity among the judgments could be explained with the personal convictions of the judge. This is what the Critical Legal Studies Movement calls 'political jurisprudence': it is not so much the legislation which influences the outcome of the case, but the judge's personal conviction, be it political, religious or other. It is the judge's opinion on what is the *good* application of the law, that decides the outcome. Here, it has to be noted that this 'political' character of jurisprudence is not typical for Tunisia or Muslim countries: all legislations leave discretion to the judge, who apply it in accordance with their personal convictions.

When talking about the narrative of the law and the rhetoric of the law, we focused merely on the *external* justification of the judgment: the judge decides in a certain manner as he follows a narrative, and he uses a specific term in order to justify the decision to the public. But when we talk about the judge's personal conviction in the light of the diversity between judgments, we are entering the field of the *internal* justification of the judgment: the judge does not content himself with following other judgments; he needs to agree with his decision himself. And like in case of the narrative and the rhetoric of the law, divine law could play a role here: for a religious judge, 'the sharia' might equal 'the good'. This can be demonstrated citing a judge at the Court of First Instance in Tunis, who stated that 'if the woman presents justifications for her abandonment, the husband should prove that the wife *did not* have a reason to abandon the marital home, *as in the sharia, women do not leave without a reason*'.

Conclusion

This article tried to establish an interaction between codified law and the sharia in Tunisian law, focusing on the application of Tunisian family law, and taking divorce for disobedience as a case study. The Tunisian family legislation contains many vague norms, such as 'prejudice' in the sense of divorce for prejudice. In this way, the law leaves a lot of space to judges. We would establish an interaction between codified law and divine law, if we could demonstrate that judges use the sharia as a subsidiary source when they interpret these open norms. However, the analysis of a decision of the Court of Cassation in a case of divorce for disobedience showed that the two methods presented to establish this interaction, are problematic: it is impossible to compare the judgment with the sharia as 'the' sharia does not exist, and the wording of the decision seems to be merely rhetorical.

However, in the second part of this article, I argued that even if the judges' discretion is not limited by the sharia, this does not mean that the space is unlimited, nor does it mean that the sharia does not play any role whatsoever. In the first place, the space is limited by the narrative of law, as the judge inscribes his decision in the story called 'divorce for disobedience'. The first authors of this story might have been inspired by the sharia, but again this is impossible to prove, as 'the sharia' does not exist. In the second place, the space is limited by the rhetoric of the law, as the 'validity' or 'truth' of a court decision depends on its ability to *persuade* that it is 'true'. The sharia can play a role here, as it might have a persuasive function in a Muslim society like Tunisia.

the wife needs a penal conviction to imprisonment for domestic violence. Many women do not have this conviction, because, among other reasons (such as corruption of policemen), they do not want to put their husband into prison.

³⁵ Court of Cassation, 8 January 1980, 3754. The additional condition that the wife's income should be necessary for the family's well-being is connected with the fact that the wife's maintenance obligation is subsidiary to the husband's; this, as Article 23 CSP states that the wife shall contribute 'if she has the means'. Moreover, the wife officially needs her husband's consent to sign a work contract (Article 831 COC).

³⁶ Court of Cassation, 18 October 1996, 51286

But these two constraining factors do not limit the space entirely. This becomes clear from the diversity between court decisions. As some judges accept divorce for disobedience in a case in which other judges do not accept it, a third factor which decides how the space is filled up, seems to be the personal conviction of the judge, regarding what is *the good application of the law*. Also here, the sharia can play a role, as for some judges, 'sharia' represents the good application of the law.

This paper demonstrated two findings. First, it is impossible to establish a 'true' interaction between law and the sharia. Second, the sharia does play a role, in the narrative and the rhetoric of the judgment, and in the personal conviction of the judge. But this role is an imaginary one. The sharia is a phantom: it does not exist, except for those who believe in it. Therefore its characterization depends on the person who believes in it. Thus, contrary to Western prejudgments that the sharia would be static and dangerous, it is very flexible. The phantom is only dangerous if the person inventing it, wants him to be so.

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