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Judges in a web of normative orders: judicial practices at the Court of First Instance Tunis in the field of divorce law

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Chapter two

A description of the divorce procedure

The decisions from 2008 and 2009 and the reconciliation sessions observed show that there are three ways of divorce: divorce with mutual consent, divorce on the grounds of harm inflicted by the other spouse, and divorce without grounds.³²⁹ As marriages are only valid if they are registered in accordance with the Code of Civil Status (involving registration on the birth certificates of the spouses)³³⁰, the nullification of a marriage can only be done by the court³³¹ (involving a summons to the civil servant to register the divorce in the registers and on the birth certificates of the spouses).³³²

The reasons for a plaintiff³³³ to file for a particular type of divorce can be deducted from the judicial practices described in the following chapters. A plaintiff can file for

³²⁹ This is in conformity with Article 31 par. 1 PSC, which provides that the court pronounces divorce in case of mutual consent of the spouses (*bi-ttaradi*), on demand of one of the spouses on the grounds of harm (*darar*), or on demand of one of the spouse *tout court* (without grounds).

³³⁰ In accordance with Articles 31-39 Code of Civil Status. Unregistered marriages (so-called '*urfi*-marriages or customary marriages) are prohibited and punishable with 3 months imprisonment Article 36 par. 1 CCS). According to the Family Judge in Gafsa (south Tunisia), people still contract '*urfi*-marriages in this region (interview with the Family Judge at the CFI Gafsa, 2 February 2009) .

³³¹ Article 30 PSC: 'The divorce cannot take place outside court.'

³³² In accordance with Articles 40-42 Code of Civil Status

³³³ I use this term instead of 'petitioner' as the court decisions employ the Arabic term *mudda'in*.

divorce for harm because if the demand is granted, the court shall not require that the plaintiff pays damages, but might even convict the *defendant* to pay. A reason to file for divorce without grounds is that no harm can be established. In this case, it is generally the *plaintiff* who pays damages to the defendant. A reason to file for divorce with mutual consent is that in this case, none of the spouses pays damages.

A standard case of divorce as witnessed in reconciliation sessions and court decisions proceeds as follows. The plaintiff or his/her lawyer (in divorce cases court representation is not required)³³⁴ files a petition for divorce to the Court of First Instance³³⁵, and the court clerk fixes a date for the first reconciliation session (*jalsa sulhiyya*). The petition, containing the date and place of the first session, is summoned to the defendant by a bailiff.³³⁶

The reconciliation session

³³⁴ In accordance with Article 68 par. 1 Code of Civil and Commercial Procedure, as modified by law 86-87 of 1 September 1986. Indeed, I observed that some litigants are not represented by a lawyer at all, while others are represented either from the beginning of the divorce proceedings or only from the moment where the case is transferred to the Family Chamber.

³³⁵ In conformity with Article 69 CCCP as modified by law 86-87 of 1 September 1986.

³³⁶ In conformity with Article 70 CCCP as modified by law 86-87 of 1 September 1986 and law 2002-82 of 3 August 2002. For the contents of the summons, see Article 6 CCCP as amended by law 2002-82 of 3 August 2002.

The reconciliation sessions are held in one of the offices in the special Family and Children division of the CFI (the division was installed in 1993)³³⁷, or in the office of the Family Judge. All couples are expected at 9 o'clock of a particular day in the waiting room of the Family and Children division of the court, where they check the list with the names of the couples summoned that morning and the room numbers of the sessions.

Every morning, from Monday to Saturday, two to four reconciliation judges preside 10 to 15 sessions each. A little after 9 o'clock, the clerk brings every reconciliation judge his or her pile of files to be treated that morning, in the order of the list established by the guard. Every file contains one standard formulary for the reconciliation judge to fill out during the session. The pile also contains a list with dates for the next reconciliation session or the court hearing.³³⁸ The guard calls out the names of the couple whose turn it is to enter the judge's office. At the end of the morning, the clerk fetches the pile of files. The reconciliation sessions are presided by a Family Judge (the *vice-président* of the Family Chamber) or another reconciliation judge.³³⁹ The reconciliation sessions take

³³⁷ Law no 93-74 of 12 July 1993

³³⁸ For example: case numbers beginning with 6 have their next reconciliation session on 12 March, and those beginning with 7 on 13 March; the court hearing is on 22 March.

³³⁹ At smaller CFI's, the Family Judge is the only reconciliation judge, but at the CFI Tunis there are eight reconciliation judges: 2 Family Judges and 6 other *vice-présidents*.

place behind closed doors; neither a scribe nor a lawyer nor family members of the couple are allowed to be present.³⁴⁰ The sessions are relatively informal, in the sense that the judge is not wearing a robe, and that the spouses sit in comfortable chairs opposite the judge.³⁴¹ If the couple has children, they are obliged to attend three reconciliation sessions, with an interval of 30 days each³⁴², unless they filed for divorce with mutual consent, in which case only one session is obligatory.³⁴³ Reconciliation sessions are held in Tunisian Arabic, sometimes mixed with French. If one of the spouses does not speak Tunisian Arabic, the reconciliation judge might require the presence of a translator.³⁴⁴

³⁴⁰ This practice is in conformity with Article 32 par. 5 PSC.

³⁴¹ At the CFI Sfax, the reconciliation judge even sits between them. Interview Family Judge at the CFI Sfax, 31 January 2009. However, there was one reconciliation judge at the CFI Tunis (who is not a Family Judge but a *vice-président* of the civil chamber) who positioned the chairs at the opposite side of the room, far away from the judge. The same was true for the Family Judge in Le Kef, where the litigants almost had to scream to reach the judge. Interview with the Family Judge in Le Kef, 4 February 2009.

³⁴² In conformity with Article 32 par. 4 PSC.

³⁴³ In accordance with Article 32 par. 10 PSC. However, a reconciliation judge pointed out to me that in principle, the couple has three sessions; they only have one session if they ask for it (16 April 2009).

³⁴⁴ This seemed to be to the discretion of the judge. One reconciliation judge insisted on this, even if the couple spoke French, while one of the Family Judges did not mention this obligation if the parties spoke French (reconciliation session CFI Tunis 16 April 2009: the lawyers are translating because 'What if I didn't understand French?').

If one of the spouses is absent during the session, and this is the plaintiff, the session is annulled and the case is directly transferred to the court session. If the defendant is absent, the judge begins by asking for the 'red paper' (*waraqa hamra*), which proves that he or she has been correctly summoned. If the defendant has not been summoned, the reconciliation session is postponed.³⁴⁵ If he or she is absent but has been summoned in person, and the couple does not have any children, the reconciliation session takes place in the absence of the defendant and the file is transferred to the court hearing (*jalsa hukmiyya*) directly afterwards. If the defendant was not summoned in person or if the couple has children, the defendant will be summoned to attend the second session, but the first session takes place in the absence of the defendant. If both spouses are present or if the defendant is absent but was correctly summoned, the reconciliation judge begins with some formalities. The reconciliation judge asks the spouses to show their ID card³⁴⁶ or their passport, writing down their names, dates of birth, address and ID-numbers on the standard formulary for reconciliation sessions.³⁴⁷ These formularies differ from one court to

³⁴⁵ Article 32 par. 3 PSC requires that the reconciliation judge will do everything possible to assure that the defendant is summoned.

³⁴⁶ Or a copy

³⁴⁷ If one of the parties does not bring his/her ID card (or a copy of this, or a passport), the session is postponed. In cases where the party does not have an ID, the judge calls in a witness to testify to the spouse's identity (reconciliation session 11 December 2008: the wife, born in 1983 and from Algerian origin, does not have an ID-card; her friend enters the office to testify to the woman's identity).

another.³⁴⁸ At the CFI Tunis, the reconciliation judge fills out the following data: level of education, job, income, names of the children and their date of birth, as well as whether or not the spouses are related to each other (*qaraba*), whether this is their first marriage and, if not, how the previous marriage ended (by divorce or death of the spouse).³⁴⁹ The latter two questions are asked for the 'sondages' (statistics), as a Family Judge told me.³⁵⁰

As soon as these formalities are over and done with, the reconciliation judge invites the person who filed for divorce to explain why he/she filed for divorce and the other spouse³⁵¹ is given the opportunity to reply. This seemed to have a double function: to enable the reconciliation judge to try and reconcile the couple, and to gather material that might serve as evidence in the divorce case.³⁵² The reconciliation judges' effort to

³⁴⁸ I compared the standard form of the CFI Tunis with the form of the CFI Le Kef (February 2009) and I obtained information on the form at the CFI Ben Arous from a fellow PhD student, Sarah Vincent-Grosso (December 2008).

³⁴⁹ At the CFI in Ben Arous the reconciliation judge asks how the couple contracted marriage: at the municipality or in front of two notaries (Article 31 par. 1 Code of Civil Status provides for both possibilities).

³⁵⁰ Reconciliation judge CFI Tunis 18 June 2009. I have never seen any of its results nor did I ever hear that these statistics actually exist.

³⁵¹ In cases of divorce without grounds or divorce for harm, the other spouse is the defendant; in cases of divorce with mutual consent, the other spouse is a co-plaintiff.

³⁵² If the parties accused each other of 'bad behaviour', these accusations could play a role in the outcome of the case as they might influence the amount of damages awarded. See paragraph 2.

reconcile differed from one case to another: in cases where children were involved, the judge would invoke their interest, stating things like: 'realise that you will only lose 50 % while they will lose 100%'.³⁵³ Otherwise, reconciliation judges could state things like 'people accept a widow, they do not accept a divorcee'³⁵⁴. In one case, the judge told the spouses: 'Go shopping together on Sundays!'.³⁵⁵ In some cases, the judge would not try and reconcile the couple, and some judges pointed out to me that they only try to reconcile the couple when they have the idea that this is still possible.³⁵⁶ Sometimes, this idea seemed to be based on a bias; this was especially the case if the wife was Tunisian and the husband came from another Arab country.³⁵⁷ I also observed that reconciliation judges tried to convince the defendant to

³⁵³ For example, reconciliation session CFI Tunis 23 April 2009.

³⁵⁴ Reconciliation session CFI Tunis 8 January 2009. In another session, the reconciliation judge said to the man: 'why would you divorce her, she is a widow!' (reconciliation session CFI Tunis 13 April 2009)

³⁵⁵ Reconciliation session CFI Tunis 19 May 2009. In one session, the judge referred to the fact that the wife was wearing the *hijab*, saying 'In your *din* (religion)...' (reconciliation session CFI Tunis 16 April 2009). In another session, the judge said: 'Divorce is the beginning of psychological problems.' (reconciliation session CFI Tunis 23 April 2009). In two cases where the reason for divorce was the wife's infertility the judge pointed at the techniques saying: 'Shortly, infertility will not exist anymore.' (reconciliation sessions CFI Tunis 8 and 21 January 2009).

³⁵⁶ Reconciliation judge CFI Tunis 16 April 2009 and 19 May 2009

³⁵⁷ For example reconciliation session CFI Tunis 11 August 2009: 'Why did you marry an Algerian?', and 21 May 2009: 'Why did you marry an Egyptian? Are Tunisian men not good enough?'

agree with the divorce so that the case could be changed into divorce with mutual consent (*b-ittaradi*).³⁵⁸

I witnessed that many reconciliation sessions are characterised by the same discussions between the spouses, or between one of the spouses and the judge. The discussions start already when the judge is still filling out the standard questions, as the topic of the husband's income can cause a lengthy quarrel between the spouses, or between the husband and the judge. Between the spouses, in the sense that I observed frequently that when the husband mentions an amount, for example 350 DT, the wife immediately reacts to contest this. The contesting was done in different ways, ranging from rolling her eyes, exhaling strongly, sniggering, laughing, to calling him a liar.³⁵⁹ The reconciliation judge does not go into this: she tells the wife to remain quiet, and notes down what the husband said. The wife can provide for a pay slip or other evidence to put in the file at the moment of the court hearing, but the reconciliation session does not seem to be intended to verify how much the husband earns. I also witnessed discussions between the husband and the judge about his income: even if the reconciliation session is not about verifying his exact income, he should name an amount, and I witnessed often that the husband

³⁵⁸ Reconciliation session CFI Tunis 29 October 2008 (Farouk and Ferdaws, see chapter 3).

³⁵⁹ For example, in one reconciliation session the husband declared he was an engineer in La Fayette, Tunis. As soon as he mentioned his income, the wife sniggered (reconciliation session CFI Tunis 8 January 2009).

replied: 'it depends', or 'I don't know'. The reconciliation judges responded to this in an irritated way, insisting that he mentions an amount. Often, I witnessed that the husband continued to be vague, saying something like 'really, it depends, some days I earn 8 DT, sometimes 10 DT, and sometimes nothing'. 'I'm writing down [for example 150 DT], alright?', a judge would respond in such a case.³⁶⁰

When the reconciliation judge invited the plaintiff to explain why he/she filed for divorce and the defendant was given the opportunity to reply, the reconciliation judge could have a difficult job to prevent the spouses from talking at the same time. Most litigants seemed very eager to tell what was going on, sometimes even urging the reconciliation judge to say: 'I'm not interested in your private life. We're here for a divorce case'.³⁶¹ The spouses' stories would consist for a large part of accusations of the other spouse of 'bad behaviour', such as domestic violence, non-payment of maintenance, absence of sexual relations, 'bad words', drinking alcohol, adultery, and aberrant sexual desires. These are made by the husband ('bad words', domestic violence, adultery and absence of sexual relations) or by the wife (domestic violence, non-

³⁶⁰ Reconciliation session 13 May 2009: 'How much do you earn?' '*Kulle marra kifesh*' ('It depends'). 'I'm writing down 150 DT, ok?'. Reconciliation judge 13 April 2009: 'Always when I ask how much they earn, they prevaricate.'

³⁶¹ For example, during a reconciliation session held at the CFI Tunis on 21 May 2009, the husband expressed his concern about where he should live after the divorce. The reconciliation judge replied: 'We are not talking about that! We're doing a divorce case here!'.

payment of maintenance, absence of sexual relations, drinking alcohol, adultery and aberrant sexual desires). The accusations would be uttered by the plaintiff, as an explanation for his/her demand to divorce, *and* the defendant, even if the defendant declared to resist to the divorce.³⁶² Sometimes, the plaintiff or the defendant would also invoke his or her own 'good behaviour', such as prayer and reading the Quran.³⁶³

At the end of the reconciliation session the reconciliation judge would take provisional measures, which provoked yet another debate. The amount of maintenance for wife and children was discussed unless the wife obtained a separate maintenance decision.³⁶⁴ In the light of the spouses' accusations that the other one was lying about income and expenses, it seemed difficult for judges to take a well deliberated decision on this matter. Therefore, I had the impression that the reconciliation judges simply decided on an amount that could be changed in a revision

³⁶² This indicates that even if it was clear that the defendant also wished to divorce, the judge would not change the case into divorce with mutual consent *of law*; divorce without grounds was only changed into divorce with mutual consent if the defendant explicitly agreed with this.

³⁶³ For example, in one case the wife abandoned the marital home and the husband filed for divorce without grounds. The husband argued that she did not have any reason to leave, as he is a good Muslim, who prays five times a day (reconciliation session CFI Tunis 11 December 2009).

³⁶⁴ If the husband does not pay maintenance or not enough in the eyes of the wife, she can address the cantonal court to obtain a maintenance decision, that is a judgment declaring the amount of money the husband should pay.

of the provisional measures or in the final decision, where the litigants had presented evidence of income and costs.

Other discussions concerned the marital home. As this topic is closely related to the question of custody (the parent who obtains custody has the right to live in the marital home), this will be addressed in chapter 6. At a number of reconciliation sessions, the reconciliation judge remarked times in an almost disgusted way that litigants are only interested in the financial part of the provisional measures, 'as if divorce itself is not important'.³⁶⁵

At the end of the first reconciliation session, the judge takes provisional measures with regard to the attribution of child custody and visiting rights, maintenance for wife and children, as well as with regard to the question of who is to stay in the marital home and, if relevant, who pays the rent.³⁶⁶ The spouses can ask revision of the provisional measures at the Family Judge; in such a session, the spouses can be assisted by their lawyers and the judge fills out a form (*mahdar al-muraja'a*) containing their respective pleas and the revision.³⁶⁷

³⁶⁵ During the reconciliation session on 13 April 2009, the judge's remark was inspired by the fact that 'the couple only started to wind up when the judge talked about the financial measures'. During the reconciliation session on 21 May 2009, the judge's remark was inspired by her impression that 'as soon as I mention the amount of money, they get up and leave!'.
³⁶⁶ In conformity with Article 32 par. 6-8 PSC.
³⁶⁷ In accordance with Article 32 par. 8 PSC.

The judge notes down the litigants' arguments and the provisional measures in the standard form, that the judge and the litigants sign and that is added to their case file.³⁶⁸ This is a process-verbal of the reconciliation session and in this way it has the strength of evidence in the divorce case.³⁶⁹

The two consecutive reconciliation sessions (if any) often begin with the judge's question whether the couple reconciled (*sallahtu walla la?*). If there has recently been a holiday, the reconciliation judge would ask something like: 'have you reconciled during *'ed* (*'ed al-fitr* or *'ed al kbir*)?'.³⁷⁰ If they have, which I rarely witnessed, they are summoned to attend the court session where they should state that they reconciled.³⁷¹ If they have not reconciled, the reconciliation judge summons them to present their

³⁶⁸ If the judge forgets to sign the p.-v., it is invalid.

³⁶⁹ This is of particular importance if for example the wife demands divorce for harm on the grounds of domestic violence, and the husband confesses during the session that he is indeed violent with her. In this case, the p.-v. contains sufficient evidence to grant divorce for harm which otherwise is very difficult to obtain.

³⁷⁰ For example reconciliation session CFI Tunis 11 December 2008: *ma-sallahtush fi-l-'ed?* (You haven't reconciled during *'ed*?).

³⁷¹ For example, one reconciliation session concerned a husband who was living in Brussels and a wife who had returned to Tunisia. The judge told the husband to buy the wife an open ticket to Brussels, and told her to try it once again. However, he should provide for good heating in the apartment. The couple agreed and thus, they reconciled, for the time being. Reconciliation session CFI Tunis 22 January 2009. Reconciliation was quite common in cases where the husband argued that his wife had left as actually, his divorce petition turned out to be an effort to make her come back.

ID card, copies the data filled out in the form of the first session, and asks again after the causes of their marital breakdown. This is again filled out in the standard form, which is signed and added to the case file.

After the last session, the reconciliation judge sets a date for the court hearing³⁷², to be held two months later³⁷³, where the litigants should be present in person or represented by their lawyer.

The court hearing

The court hearing is held in the court room (*sala*) of the Family and Children Division (at the CFI Tunis court room number 8). The Family Chamber takes seat in the back of the room. The Family Judge, as vice-president of this chamber, sits in the middle, and the two assistant judges sit on her sides at the same desk, and the scribe has a seat more in front. The court clerk walks back and forth between the scribe, the lawyers/litigants present in the room and the judges. As I was only allowed to attend the court sessions of Family Chamber I (Monday mornings), this description regards this Family Chamber only.³⁷⁴

³⁷² This seems to be a cause-list sitting, given how it is organised.

³⁷³ Article 32 par. 9 PSC. The date of the *jalsa hukmiyya* is indicated on a paper accompanying the pile of files that the reconciliation judge treats that morning. In some cases, I witnessed that the reconciliation judge helped the spouses to get divorce sooner. For example, reconciliation session CFI 23 April 2009: the *jalsa hukmiyya* was set on 11 May 2009.

³⁷⁴ Although the Ministry of justice and human rights awarded me an informal authorisation to attend court hearings only (at the CFI Tunis), the president at the CFI Tunis prohibited me to attend court hearings

When looking through my notebooks from the first period in Tunis (fall 2008), I came across the following description of the court hearing: 'The family judge is a female giant sitting on her throne surrounded by female dwarfs who can hardly look over the edge of the desk [the assistant judges and the scribe], and a male help [the clerk walking back and forth between the people in the room and the judges].'³⁷⁵

The room is packed with lawyers and secretaries of law firms. The lawyers are recognizable by their robe³⁷⁶ and stand up front, backed by the secretaries. As the court room is too small, the guard tells most litigants to wait outside until their case number is called out.

Each Family Chamber holds one court hearing per week (Chamber I on Monday mornings and Chamber II on Tuesday mornings). The court hearings are held in standard Arabic. The Family Chamber treats about 100 to 150 files per session, but a large part of the files are not considered on their content, namely in those cases where

on the grounds that the lawyers would protest; he preferred that I only attended reconciliation sessions. However, one of the Family Judges invited me to attend her court hearings as well.

³⁷⁵ Observation of a court hearing of the Family Chamber at the CFI Tunis, Monday 12 January 2009

³⁷⁶ The robe is the same as in all European civil law countries: black with a white board. The judges are wearing the same (in Libya I observed that judges wear a black robe with a green silk diagonal sash, Spring 2006).

the plaintiff was not present on the first reconciliation session.³⁷⁷

The Family Judge calls out the file numbers through a microphone, followed by the name of the plaintiff and the defendant's name. This allows litigants waiting outside the court room to hear and to enter as soon as their case is called out. As the room is so packed, they are to yell out loud that they are present (*hadir*), which is repeated by the people in front for the judges to hear. The litigant tries to make his or her way up front and is invited to stand behind a small wooden railing and to hand over his or her identity card to the clerk. Most litigants simply state whether they persist in their position or that they reconciled, some add some remarks, and sometimes, the litigants hands in a document. Many cases, however, are dealt with by lawyers.

When a case is dealt with by a lawyer, the lawyer in question calls out that he/she is present, after which he or she states his or her name and the name of the party he/she represents. Often, the lawyer who is present is not the lawyer who actually treats the case. This representation between lawyers is mostly *ad hoc*: as soon as their case is called out, the secretary of the lawyer handling the case taps on the shoulder of one of the lawyers standing in front, passing the document that is to be handed in to the court. This lawyer calls out his or her

³⁷⁷ I often witnessed that lawyers entered the office of the judge to ask dispensation of the obligation to be present, on the grounds that the spouse was living abroad. For example, CFI Tunis 23 April 2009.

name, followed by the term *fi-niyaba* (meaning that he or she is representing a *confrère*, otherwise the lawyer states *fi-haqq* followed by the name of the client), calling out the name of the *confrère* (as indicated on the document), the name of the party this lawyer is representing, and the pleading.

The pleading of lawyers, be it *fi-haqq* or *fi-niyaba*, are generally brief: they state that they persist in their claim (*tamassaka*) and ask a decision (*taqrir*) or delay (*ta'khir*). The rest is dealt with in writing, by documents handed in during the court hearing. These vary from the form of representation (that proves that this lawyer is representing one of the parties), the marriage contract and the birth certificates of the spouses and their children (mostly handed in at the moment when the plaintiff files the divorce case or during the reconciliation sessions), a letter containing a counterclaim (a petition of damages) or a response to such a letter, or evidence (for example a pay slip).

The Family Judge dictates to the scribe what has been argued (for example: *wa hadara al-muhami X fi-niyaba wa talaba al-ta'khir*) and sets the date for the next hearing (if a party filed for a delay)³⁷⁸ or for the final decision. This is filled out by the scribe on a standard form and put in the file.

³⁷⁸ In accordance with Article 119 CCCP as amended by law 86-87 of 1 September 1986

After the court hearing, the pile of files is taken to the office of the Family Judge. She divides the files over the chamber, and every judge of the Family Chamber takes her pile home with her. They agree on a date where the Family Chamber deliberates on the files in the office of the Family Judge. I assisted once to such a session,³⁷⁹ where I witnessed that the Family Judge takes a seat behind her desk, while the two other judges sit on the other side of the bureau. The deliberation takes place per judge, starting with the pile of one judge (the Family Judge or an assistant judge), while the other assistant judge operates as a scribe. The judge who treats 'her' files, opens them one by one to tell the other judges what the case is about, what documents are in the file. The law prescribes that the youngest judge³⁸⁰ gives her opinion first, followed by the middle one and last the Family Judge.³⁸¹ The treatment of most cases goes very quickly: the Family Judge dictates the judge functioning as a scribe how to fill out the standard form of the decision and they move on to the next file. If the case is considered to be complicated, they let the file go around and discuss about it. The decision is taken by majority of votes.³⁸²

The judgment

³⁷⁹ I was not supposed to assist to the session, which is confidential (Article 121 CCCP as amended by law 86-87 of 1 September 1986), but the Family Judge had asked me to help her with her English exercises (the judges were taking an English course).

³⁸⁰ In terms of *anciennité* (years of practice).

³⁸¹ Article 120 CCCP as amended by law 86-87 of 1 September 1986.

³⁸² Article 120 CCCP as amended by law 86-87 of 1 September 1986.

The standard forms for divorce decisions differ depending on the grounds for the divorce (mutual consent, harm or without grounds). In these forms, part of the decision is stated in advance, delimiting the Chamber's work during deliberation. There are several different standard forms, and I had the impression that this is simply due to the fact that if there are no copies left of one form, the clerk quickly draws up another one on the computer.³⁸³

The standard form begins with the following data: 'Tunisian republic, Ministry of Justice and Human Rights, Court of First Instance in Tunis, number of the case [...], date of the decision [...].' This is followed by the phrase '*al-hamdu li-llah*', and the topic of the decision (e.g. *talaq insha*'). Next, the form provides: 'The Court of First Instance in Tunis competent in cases in the field of personal status issued a decision on her general hearing held in the palace (*qasr*) in Tunis on [date] under presidency of [name Family Judge] and the membership of the judges [name] and [name] and with the help of the scribe [name].'³⁸⁴ The standard form continues with space to fill out the specificities of the parties. It is important to

³⁸³ I have two decisions that are hand-written, which show that the forms used are different from one another. However, the overall contents are largely the same (CFI Tunis 5 January 2009, 69248 and CFI Tunis 12 January 2009, 67138).

³⁸⁴ Article 123 CCCP as amended by law 80-14 of 3 April 1980 requires that the decision mentions what court has issued the decision, what department this court is in, the date and the names of the judges. It does not require that the judgment states *alhamdu li-llah*.

note that while the standard p.-v.'s of reconciliation sessions dictate to fill out information on the level of education, the job, the income, the question of whether the spouses have been married before and whether they are related to one another, the standard decisions do not refer to this information at all. The characteristics of the parties to be filled out are limited to: their name, their ID number, their place of birth and the date and place of the issuance of their birth certificate, their place of residence or the address of their lawyer if a party chooses residence at his/her office, and the lawyer's name.³⁸⁵ As a result, I do not have information of the level of education and of the income of the litigants in the cases where my data consist of the decision only.

How the rest of the form is organised depends on the grounds of the divorce, but some aspects are standardised for all divorce types. It is divided into five sections: the 'subject of the claim' (*mawdu' al-da'wa*), the 'proceedings' (*ijra'at*), the 'causes' (*al-mustanadat*), the court's decision (*al-mahkama*) and a recapitulation of the decision (*li-hadhihi al-asbab*). Under the first heading (the subject of the claim), the standard form provides that 'The plaintiff stated that he/she [to be crossed out] is married to the defendant with a legal marriage contract³⁸⁶ issued on [...] and that the

³⁸⁵ Article 123 CCCP as amended by law 80-14 of 3 April 1980 requires that the decision contains the names and domicile of the litigants.

³⁸⁶ If the couple is married without a marriage contract in conformity with the Code of Civil Status, it cannot file a petition for divorce as the marriage is null and void, Article 36 par. 1 CCS as amended by decree 64-2 of 20 February 1964 and law 64-2 of 21 April 1964.

marriage was/was not consummated and that they do/do not have children: 1. [name of the child], born on [date of birth], 2. [etc.].’ It continues with the object of the petition, which depends on the type of divorce the plaintiff files for. However, in all divorce cases, the object of the claim provides whether it is the first, second or third time that the spouses get divorce. This is important as according to legislation and practice, the spouses cannot remarry after their third divorce.

The next section, the ‘proceedings’ (*ijra’at*), provides in the standard form: ‘And for this reason the case was registered at the court in the relevant registers under number [...] and a date was fixed for the reconciliation session and the spouses were present at the family judge and affirmed that they are married and that the marriage is/is not consummated and that they do/do not have children and the husband stated that [...], and the wife stated that [...].’ Here, the form leaves space to fill out the arguments put forward by the spouses during the reconciliation session(s). If one of the spouses was absent at the reconciliation session, the judge strikes out the phrase that both parties were present and marks in the margin that the party was absent and that he or she was (or was not) correctly summoned.

The paragraph on the proceedings finishes with the standard phrase ‘Then the case was subjected to deliberation and to a decision issued on the session held on its date and after deliberation of the law the following

decision was taken'.³⁸⁷ The next paragraph ('the causes') can be read as an introduction to the decision and begins with the standard phrase 'Given that the demand was [...]', followed by the object of the demand. This paragraph can also be employed to describe the positions of the lawyers.

The next paragraph ('the court') contains the decision and repeats: 'With regard to the divorce: Given that the demand was to bring about [...] in accordance with Article 31 par. [...] PSC. Given that the marriage was proven with a marriage certificate.' This is complemented with considerations that differs according to the type of divorce.

In principle, the paragraph on the decision addresses the provisional measures taken during the first reconciliation session, stating: 'With regard to the provisional measures: Given that it comes forward from the file that provisional measures were taken.' Here, the court confirms the measures, and sometimes amends them or adds to them.³⁸⁸

³⁸⁷ Some decisions add the phrase: 'taking place behind closed doors out of respect of the family.' I only saw this phrase on decisions of divorce with mutual consent, although all divorce cases are treated during the same court hearing (*jalsa hukmiyya*). As the court room is packed with people, I'm not sure what this phrase means. But it is possible that in principle, the hearing is behind closed doors, in the sense that only lawyers are allowed in.

³⁸⁸ With regard to the maintenance for the wife: if the judgment confirms the temporary measure with regard to maintenance for her, the character of the maintenance is nevertheless changed from maintenance during marriage (*nafaqa*) to maintenance during the

In decisions on divorce for harm and divorce without grounds, the paragraph containing the decision concerns the financial consequences of the divorce, namely the damages, lawyer's expenses and procedural expenses, in this order. With regard to the lawyer's fees and procedural costs the standard form states: 'Given that the defendant had to pay lawyer's fees the court obliges the plaintiff to compensate these with [...].' Followed by: 'With regard to the procedural expenses: The court decides that procedural expenses are on the plaintiff in accordance with Article 128 CCCP.'³⁸⁹

The last paragraph summarizes the decision. The heading states 'For these reasons' (*li-hadhihi al-asbab*), followed by the phrase: 'On the grounds of Article 40, 68 and 128 and further of the Code of Civil and Commercial Procedure³⁹⁰, and Articles 29, 30, 31, 32 and 54 PSC³⁹¹ and Article 40 of

waiting period (*nafaqat al-'idda*). This does not become clear from the decisions.

³⁸⁹ This article provides: 'Every party that loses in a procedure is convicted to pay the expenses, except if the tribunal divides the costs between them if both have lost on certain points.'

³⁹⁰ Article 40 CCCP provides that the CFI is competent in divorce cases, and Article 68 CCCP provides that court representation is not obligatory in personal status cases.

³⁹¹ Articles 29 PSC defines 'divorce' (*talaq*) as 'the dissolution of marriage', Article 30 PSC provides that divorce can only take place through court, Article 31 PSC describes the types of divorce (with mutual consent, on the grounds of harm or without grounds, par. 1), followed by provisions with regard to the damages (par. 2 and 3), Article 32 PSC describes the divorce procedure (reconciliation sessions, temporary measures, etc.), and 54 PSC defines custody (*hadana*) and

the Code of Civil Status³⁹², the court pronounces the divorce between [...] and [...] for the first time after consummation on demand of the husband/the wife and summons the civil servant to register this in the relevant registers.'

The form is signed by the three judges³⁹³ and put in the file of the litigants. The files are taken to the clerk, where a summary of the decision is typed out³⁹⁴ (this is the *shahada* of the judgment) and put in the file. Lawyers and litigants can obtain the outcome of the case and the *shahada* at the clerk. If a lawyer wishes to obtain a copy of the full judgment (for appeal), he or she should hand in a formal petition.³⁹⁵ Photocopies of all full decisions issued on one particular day are put in a separate file (only containing the decisions, not the related documents; the latter remain

therefore is only mentioned in a divorce case where children are involved.

³⁹² Article 40 of the Code of Civil Status provides that 'The judgments or decisions pronouncing the divorce or declaring the marriage null and void, are, when they obtained force of *res judicata*, transcribed in the registers of civil status where the marriage was inscribed. The judgment or decision shall be mentioned in the margin of the marriage contract and the birth certificates of the spouses.'

³⁹³ In conformity with Article 122 par. 2 CCCP, as amended by law 86-87 of 1 September 1986.

³⁹⁴ This should be done within ten days, see Article 122 par. 1 CCCP as amended by law 86-87 of 1 September 1986. I do not know whether the court respects this period or whether there is much delay.

³⁹⁵ For this, one needs some sort of seal from an office opposite of the court, which charges about 1 DT. This seal is pasted on the original decision with a stamp and the signature of the clerk and additional information (numbers etc.).

in the case file of each particular case) that is stocked in the register in the basement of the CFI Tunis. This is the file that I photocopied, namely the files containing the decisions of 5, 6, 12 and 13 January 2009.

Until the case has reached a final decision, the marriage remains intact, and the husband continues to be obliged to pay maintenance to his wife. As soon as the decision in first instance is taken, the waiting period starts, during which the husband continues to be obliged to pay maintenance to wife and children.³⁹⁶ The waiting period takes three months or, in case of pregnancy, until the child is born, with a maximum period of one year.³⁹⁷ The wife is not allowed to remarry during this period.³⁹⁸ After the end of the waiting period, the husband is no longer obliged to pay maintenance to the wife. If the couple divorce three times, they are not allowed to remarry.³⁹⁹

The final divorce decision in first instance is open to appeal at the Court of Appeal (*mahkamat al-isti'naf*) and to cassation at the Court of Cassation (*mahkamat al-ta'qib*).⁴⁰⁰ The provisional measures have force of *res judicata* regardless of an appeal.⁴⁰¹

³⁹⁶ Article 38 PSC

³⁹⁷ Article 35 PSC

³⁹⁸ Article 20 PSC. I have no information on whether this provision is actually applied.

³⁹⁹ This was affirmed in a reconciliation session (reconciliation session CFI Tunis 29 October 2008) and is in accordance with Article 19 PSC.

⁴⁰⁰ Articles 41 par. 1 sub 1 and 42 CCCP

⁴⁰¹ Article 32 par. 11 PSC