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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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Citation for published version (APA):

Voorhoeve, M. (2011). 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 three

Divorce with mutual consent

On a Wednesday morning in October, a young couple enters the office of the family judge. Ferdaws is a 24-year-old woman who is studying law in Tunis (Université de Tunis-el-Manar). The 28-year-old Farouk did not continue his studies after his *baccalauréat* that he obtained in France, where he is born. He is working as a guard at Orly airport in Paris where he earns € 1.600 as he told the judge. For both of them it is the first marriage. Farouk makes immediately clear that he files for divorce for harm.

The judge asks when they contracted marriage and they answer something that I can't hear. When I ask the judge when they contracted marriage, the judge replies: 'They are not married.' She adds: 'This does not exist in other countries.'

The judge continues by asking them: 'So when were you supposed to get married?', and she replies: '28 August 2008'. A discussion follows as he insists that they were supposed to get married much earlier.

The judge asks him what the problem is. Farouk explains that he has been trying for months to set a date for the wedding with her, but that she started to evade him. He says: 'I really did everything possible. I can even show you with the registration from Tunisiana (the Tunisian mobile telephone company) how often I called her, I was really calling her all the time.' 'But I was having my exams,' Ferdaws replies, 'And then I was attending a marriage in Klibia.'⁴⁰² She adds that she had been waiting for him to call but he never did.

The judge asks her what she wants and she answers: 'I'm the one who is suffering harm (*ana madrura*)', and now Farouk starts to be angry. Before he can say anything, the judge says: 'Why don't you get divorce with mutual consent?'

Ferdaws starts to show some documents and says that Farouk simply wants money. 'It's has nothing to do with money', Farouk replies. 'Why don't you get a divorce with mutual consent?', the judge asks again. But again Ferdaws underlines that *she* is suffering from harm,

⁴⁰² A village at the far north-east cost of Tunisia.

saying: 'I'm suffering more than he does.' '*J'assume*'⁴⁰³, Farouk says, turning to me and starting to speak in French.

'Mutual consent?' the judge asks again. This time, Ferdaws agrees, but Farouk says: 'That is too easy. I paid so much money and I gave her so many gifts'.

The judge invites him to recount what he gave her, saying that she should return the gifts. He starts by describing clothes and the judge notes it all down. However, when he insists that she returns a Gucci pair of spectacles, the judge looks up and says: 'Her spectacles? No, absolutely not, she shall not return those.'⁴⁰⁴

This chapter examines judicial practices in the field of divorce with mutual consent. The material consists of a total of 25 court decisions dating from 5, 6, 12 en 13 January, issued by the two Family Chambers of the CFI Tunis⁴⁰⁵, as well as the reconciliation sessions observed between October 2008 and September 2009 and interviews with the two Family Judges in the same period.

The chapter proceeds as follows. Section one describes some particularities of the procedure of divorce with mutual consent. Section two gives an overview of the material concerning divorce with mutual consent. Section

⁴⁰³ Which means something like 'I take the responsibility for my share of the problems.'

⁴⁰⁴ Reconciliation session CFI Tunis 29 October 2008

⁴⁰⁵ CFI Tunis 5 January 2009, 64562, 66546, 67138, 67906, 68150, 68266, 68330, 68658, 68664, 69110, 69152, 69466, 69614, 69698, 69702, 69714, 69724, 69749, 69756, 69764, 69776, 69798, 70277, 70498, 70554, 70598, 70670, 70984, 6 January 2009, 68019, 68567, 68585, 69179, 69295, 69299, 69437, 69603, 69645, 69693, 69751, 69899, 69911, 70569, 70601, 12 January 2009, 67835, 68696, 69072, 69258, 69294, 13 January 2009, 67443, 67957, 68351, 69065, 69715, 69985, 70091, 70359

three analyses the material, focusing on the dominant norm affirmed by the court and the sources invoked by judges.

Section one Procedure

The procedure of a case of divorce without grounds is largely identical to the divorce proceedings described in chapter two, with three important nuances with regard to the reconciliation sessions. In the first place, it is of utmost importance that the defendant is present at the reconciliation session; if not, the demand is rejected unless the plaintiff changes his or her petition into divorce without grounds or divorce for harm. In the second place, divorce with mutual consent requires that both spouses *persist* in their consent; the withdrawal of the consent by one of the spouses blocks the possibility to divorce with mutual consent. If the defendant withdraws, the petition is rejected, unless the plaintiff changes his/her demand into divorce without grounds or divorce for harm. If the plaintiff withdraws, the petition is rejected as well, and the defendant should file a new case if he/she continues to desire divorce.⁴⁰⁶ In the third place, the spouses (or their lawyer(s)) can draw up an agreement on the consequences of divorce. In this case, the reconciliation judge will read the agreement and if it is in accordance

⁴⁰⁶ For example: reconciliation session CFI Tunis 18 June 2009: the husband who filed for divorce with mutual consent withdraws his demand while the wife continues to be willing to divorce. The judge tells her that she should file a separate case.

with the judge's understanding of what can be agreed upon in a divorce with mutual consent, she will copy the measures with regard to child custody, visiting rights, maintenance and the marital home into the p.-v. and puts the agreement in the file.

With regard to the decisions, my material witnesses of the existence of two standard forms. Both are divided in the same way as described in chapter two, consisting of five paragraphs: the 'subject of the claim' (*mawdu' al-da'wa*), the 'proceedings' (*ijra'at*), the 'causes' (*al-mustanadat*), the decision (*al-mahkama*) and a recapitulation of the decision (*li-hadhihi al-asbab*).⁴⁰⁷ The paragraph on the subject of the claim begins in the same way as in the other types of divorce,⁴⁰⁸ followed by the standard phrase: 'But finally marital life deteriorated between them until the point that it was not longer possible to continue it and the plaintiff asks a decision to bring about divorce for the first/second time before/after consummation on the grounds of Article 31 par. [1 sub] 1 PSC.'

In the paragraph on the proceedings, the standard form provides with regard to the reconciliation sessions that 'both spouses were present persisting in their mutual consent.' This phrase is wiped out if something changed during the first session (due to absence of one of the

⁴⁰⁷ I have one standard decision of divorce without grounds, that was filled out on 5 January 2009.

⁴⁰⁸ Stating that the plaintiff is married to the defendant by means of a legal marriage contract and that the marriage was/was not consummated and that they do/do not have any children.

spouses or withdrawal of the consent). This paragraph also contains the provisional measures, if any.

The paragraph on the causes is generally wiped out in decisions on divorce with mutual consent.⁴⁰⁹ The paragraph on the decision states that the petition was to bring about divorce with mutual consent for the first/second time before/after consummation in accordance with Article 31 par. 1 sub 1 PSC, that the reconciliation session resulted in a persistence of the spouses to have a decision in accordance with the petition, that the marriage was proven with a marriage contract and that Article 31 par. 1 sub 1 PSC prescribes that 'the court pronounces divorce on the grounds of mutual consent of the spouses to bring about [the divorce]'. The second form adds two phrases, stating that: 'Given that all attempts to reconcile failed although marriage is founded on respect and good cohabitation, this shows a lack of fulfilment of this between the spouses, and given that the court cannot do otherwise but to decide the divorce between them for the impossibility for the plaintiff to live together in an atmosphere of love and purity.' Both forms finish the fourth paragraph with the comment that 'given that the petition was directed to and fixed on a sound legislative foundation and designates the decision in favour of the demand, and given that there was an agreement of the spouses to

⁴⁰⁹ In a number of decisions, the paragraph on the decision is called 'causes' instead of 'the court'. I don't think that this has a particular meaning apart from the fact that decisions on divorce with mutual consent are shorter and therefore consists of less paragraphs.

dissolve the bond between the spouses with mutual consent to divide the court expenses between them.' If the couple agreed on conditions (mainly if they have minor children), the decision adds that the court saw the provisional measures or that the court saw the (written) agreement confirmed between the spouses 'that becomes definite by means of their signature and enforceable on the grounds of it.

The final paragraph contains a summary of the decision. The form that adds the phrases on the foundation of marriage invokes Articles 29, 30, 31, 32, 46, and 54 PSC, Articles 40 and 68 CCCP and Article 40 of the CCS (see chapter 2). The other form does not mention any legal provisions. Both forms provide that: 'The court of first instance decided to bring about divorce between the spouses X and Y for the first/second time before/after consummation on the grounds of the agreement and [to bring about] the registration of this in the relevant registers and on the original of their marriage contract and [to register] the provisional measures and the agreement on the publication of the agreement confirmed between the spouses and becoming definite by means of their signature and enforceable on the grounds of it, and to divide the court expenses between them.'

Section two

Judicial practices

This section describes two court decisions concerning divorce with mutual consent that are in my eyes representative for the 25 decisions taken by the Family

Chamber of the CFI Tunis on divorce without grounds on 5, 6, 12 and 13 January 2009. These descriptions are complemented with a description of the other decisions and of the reconciliation sessions concerning divorce with mutual consent.

Case one: Farouk and Ferdaws

The reconciliation session described at the beginning of this chapter is the only session I observed concerning a couple of whom I also have the judgment.

Case one: Farouk and Ferdaws⁴¹⁰ (CFI Tunis 6 January 2009, 70579)

On 6 October 2008, Farouk (1981, born and living in France) files a petition for divorce for harm at the CFI Tunis. According to the text of the judgment, the petition states: 'he is married to the defendant by means of a legal marriage contract issued on 10 December 2006, and they did not consummate the marriage.' The petition continues, according to the judgment, by stating that: 'And they agreed to do it [the consummation, i.e. the marriage festivities] in the summer of 2008 and they fixed it for July 2008 and he bought a trinket and arranged for a hall (*qa'at al-afrah*) by the sea in Tunis and for a band and the distribution of the invitations for the party but she refused to do the festivities without a justification despite his numerous attempts and despite the important bank loans he engaged in and the expensive presents he gave her and he asks a decision to bring about divorce between them for the first time before consummation on the grounds of harm inflicted by the wife and her compensation to him of 10.000 DT [\pm € 5.000] material damages and 5.000 DT [\pm € 2.500] moral damages and 600 DT [\pm € 300 DT] lawyer's fees.'

Farouk's wife Ferdaws (1985, born and living in Tunis) is summoned to attend the first reconciliation session to be held on 29 October 2008

⁴¹⁰ The names are fictitious out of respect for the litigants' privacy.

at 9 o'clock. At this session, both spouses are present, and confirm that they are married and that the marriage is not consummated. They agree to change the petition into divorce without grounds and agree that she returns to her husband the jewellery and the clothes he gave her consisting of a wedding dress and black sandals and a suitcase and 4 blouses and high heels and lingerie and a frock and two mobile phones as well as a silver necklace.

During the reconciliation session, no provisional measures are taken and the session is not repeated as the judge immediately transfers the file to the court hearing to be held on 23 December 2008.

Here, neither one of the spouses nor the husband's lawyer is present (the wife is not represented by a lawyer).

In its decision, the court confirms that the demand was changed into divorce with mutual consent, that the marriage was proven with a marriage contract, that the attempt to reconcile the parties failed, and that the wife agreed with divorce with mutual consent. The court grants the demand.

In this case, the couple signed the marriage contract in the winter of 2006, but they did not consummate marriage. This reflects the practice in Tunisia where a marriage has two stages: signing the marriage contract (this stage is called *sdaq*) and celebrating the marriage (this is called the '*urs*'). As this case shows, years can pass between the two stages, and in this period, the couple is not supposed to live together as they are not yet considered 'married': it is the '*urs*' that justifies living together as a married couple, not the *sdaq*. For this reason, the reconciliation judge said to me that they are not 'married'. In the decision, it is stated that they are married, but that the marriage is not consummated (*qabla al-bina'*, before consummation).

The husband, who is of Tunisian origin but who is born and living in France, states that they agreed to have the

marriage ceremony in the summer of 2008. While he was arranging for the hall, the band and the invitations, the wife was cutting all contact. This behaviour urged the husband in October of the same year to file for divorce. As he wants her to compensate his material damages consisting of the gifts and the loans he engaged in to plan the wedding, he files for divorce for harm. However, during the reconciliation session Ferdaws says she did not cut the contact with him but that she was simply having her exams and had to attend a wedding in North-Tunisia immediately afterwards which prevented her from calling him. When the judge asks her what she wants, Ferdaws underlines that it is *she* who is suffering from the harm inflicted by Farouk. In this way, she seems to imply that his demand for harm should be rejected, which shall oblige him to change his demand into divorce without grounds, in which case he should pay damages. As soon as Farouk shows his anger, the judge proposes a third possibility, namely divorce with mutual consent, in which case neither one of them shall pay damages. At first Ferdaws declines, underlining that she suffers harm from his behaviour. However, after a couple of minutes she accepts, possibly because she is afraid that his demand of divorce for harm shall be accepted. But then it is Farouk he refuses to contract divorce with mutual consent, saying that that would be too easy on her. Ferdaws implies that he only wishes a divorce for harm because he is in it for the money: he wants damages, but he says that that is not true. The judge proposes a solution: if they contract divorce with mutual consent, Ferdaws shall be obliged to return the marriage gifts. Here, Farouk agrees, and he enumerates all the gifts

he gave her. She shall return everything except the spectacles.

I have 9 other decisions concerning the husband's petition for divorce without grounds. 2 of these concern a situation where the husband's demand for divorce without grounds (which obliges the husband to pay damages) is changed into divorce with mutual consent during the reconciliation session (releasing him from his obligation to pay damages).⁴¹¹ 6 cases concern the situation where the husband files for divorce with mutual consent from the start.⁴¹² In one case the initial petition for divorce with mutual consent is changed into divorce without grounds as the wife is absent during the reconciliation session.⁴¹³ None of the decisions on divorce with mutual consent on demand of the husband decide on maintenance for the wife (i.e. maintenance until the final divorce decision and *nafaqat al-'idda* during the three months following the final decision).

Case two: Fatima and Abdelkader⁴¹⁴ (CFI Tunis 6 January 2009, 70571)

On 30 August 2008, Fatima (1964, born and living in Tunis) files a petition for divorce with mutual consent at the CFI Tunis. According to the text of the judgment, the petition states: 'she is married to the

⁴¹¹ CFI Tunis 5 January 2009, 69776 and 6 January 2009, 70567

⁴¹² CFI Tunis 5 January 2009, 69082, 70569, 70600, 71086, and 12 January 2009, 69414 and 71004.

⁴¹³ CFI Tunis 5 January 2009, 69724. This case is treated in the next chapter on divorce without grounds. The demand was rejected on the grounds that the wife was not correctly summoned.

⁴¹⁴ The names are fictitious out of respect for the litigants' privacy.

defendant by means of a legal marriage contract issued on 1 April 1988, and they consummated the marriage and they have two children, Younes, born in 1993, and Selwa, born in 1989.’ According to the judgment, the petition continues by stating: ‘But finally marital life deteriorated between them until the point that it was not longer possible to continue it and the plaintiff asks a decision to bring about divorce for the first time after consummation on the grounds of Article 31 par. [1 sub] 1 PSC.’⁴¹⁵

Fatima’s husband Abdelkader (1959, born and living in Tunis) is summoned to attend the first reconciliation session to be held on 28 October 2008 at 9 o’clock. At this session, both spouses are present, and confirm that they are married and that the marriage is consummated and that they have two children. They persist in their demand of divorce with mutual consent.

During the reconciliation session, provisional measures are taken with regard to custody (awarded to the wife) and visiting rights (awarded to the husband) and child maintenance (180 DT, ± € 90, for both children together). The reconciliation session is not repeated as the judge immediately transfers the file to the court hearing to be held on 23 December 2008. Here, both spouses are present and persist in their demand.

In its decision, the court confirms that the petition concerned divorce with mutual consent, that the marriage was proven with a marriage contract, and that the attempt to reconcile the parties failed. The court grants the demand, confirming the provisional measures taken during the reconciliation session.

In this case, the 44-year old mother of two teenage children files for divorce with mutual consent. Her husband appears on the reconciliation session and agrees with the divorce. The reconciliation judge takes provisional measures granting custody to the wife and visiting rights to the husband, obliging him to pay child maintenance. The court does not decide on the marital

و ساءت المعاشرة الزوجية بينهما و تعذر استمرارها فقرر فك العصمة بينهما 31 من م اش⁴¹⁵
بالتراضي طبق الفقرة 1 من الفصل

home nor on the maintenance for the wife (that will end with the termination of the waiting period, i.e. three months after the pronouncement of the divorce). The session is not repeated and the case is directly transferred to the court hearing, held four months after the moment the wife filed her petition and two months after the reconciliation session. At the court hearing, both spouses confirm their wish to divorce with mutual consent. None of them asks a revision of the provisional measures. The court decides to bring about divorce with mutual consent, confirming the provisional measures.

I have 15 other decisions on divorce with mutual consent on demand of the wife. 9 of these concern a similar situation in the sense that the wife files for divorce with mutual consent which is not changed throughout the proceedings.⁴¹⁶ 4 cases concern the situation where the wife initially filed for divorce without grounds that is changed into divorce with mutual consent during the reconciliation session.⁴¹⁷ 2 cases concern the situation where the wife files for divorce with mutual consent which is changed into divorce without grounds as the husband is absent on the reconciliation session.⁴¹⁸ None of the judgments on divorce with mutual consent on demand of the wife decide on maintenance for the wife

⁴¹⁶ CFI Tunis 5 January 2009 68538, 69944, 70586, 70642, 70644, 6 January 2009 70571, 12 January 2009 67696, 68948, 70522 and 13 January 2009, 70415.

⁴¹⁷ CFI Tunis 6 January 2009, 69357, 70635, 70647 and 70649

⁴¹⁸ CFI Tunis 6 January 2009, 68055 and 13 January 2009, 69985. These cases are described in chapter three on divorce without grounds.

(i.e. maintenance until the final divorce decision and *nafaqat al-'idda* during the three months following the final decision).

Reconciliation sessions with regard to divorce without grounds testified to two typical discussions. The first concerned the discussion on the type of divorce. I often witnessed that reconciliation judges tried to persuade the spouses to change the case into divorce with mutual consent if they filed for divorce for harm or without grounds as could be witnessed in the case between Farouk and Ferdaws. This was especially true in cases concerning spouses who were related to one another, in which case the reconciliation judge would insist on divorce with mutual consent with the argument that this is 'easier' as they are related.⁴¹⁹ In some cases however, the judge seemed to encourage the plaintiff to change the demand into divorce for harm: in one case, the wife filed for divorce with mutual consent although her husband abandoned the marital home. Here, the reconciliation judge asked: 'So you are really not asking anything from him?', implying that she could.⁴²⁰

If the plaintiff filed for divorce with mutual consent, the defendant could refuse to give his/her consent during the reconciliation session. I witnessed that in some cases, the withdrawal was explained by the fact that the defendant did not agree with the conditions put forward by the

⁴¹⁹ For example, reconciliation session CFI Tunis 10 June 2009: 'File for divorce with mutual consent, that is easier as you are family'.

⁴²⁰ Reconciliation session CFI Tunis, 23 June 2009

plaintiff, while in other sessions⁴²¹, the withdrawal was explained by the fact that the defendant simply wished to receive his/her damages (which the plaintiff should pay if the case is changed into divorce without grounds).⁴²²

The second discussion concerned the consequences of the divorce. In some sessions I observed, the spouses presented a document drawn up by them or their lawyers containing the conditions of the divorce.⁴²³ In other cases, the spouses simply told the judge what they agreed on in wording. And again in other cases the spouses agreed on the conditions during the session. If the spouses could not agree on a specific condition and would ask the judge to decide on it, the judge would reply that she could not as it concerned a divorce with mutual consent.⁴²⁴ If the spouses continued to disagree,

⁴²¹ For example, reconciliation session CFI Tunis 23 June 2008. In this session, the husband withdrew as she changed her conditions by adding 250 DT for living expenses and child maintenance.

⁴²² For example: reconciliation session CFI Tunis 18 June 2009. In this case, the husband filed for divorce with mutual consent. The judge asks the spouses: did you agree (*mitfahmin?*), and the wife replies: 'No, I want my rights.'

⁴²³ For example: reconciliation session CFI Tunis 17 June 2009. In this case, the husband withdrew his consent as he did not agree anymore with the agreement with regard to child maintenance and the marital home.

⁴²⁴ For example, reconciliation session 23 June 2009 a and b. In these two sessions, the couple could not agree on living expenses (the wife, having child custody, was to stay in the marital home). The wife asked the judge to decide, but the judge replied: 'No, you have to decide, it's divorce with mutual consent'.

the judge set a date for the next reconciliation session and told the spouses to agree on the matter in the following days.⁴²⁵

If the spouses agreed on the payment of damages to the wife, the judge replied that this was not allowed in cases of divorce with mutual consent; they could only agree on maintenance until the end of the waiting period.⁴²⁶ On the other hand, if the spouses agreed that the husband was not obliged to pay child maintenance, the reconciliation judge would state that she was obliged to take provisional measures obliging him to pay child maintenance (if the wife had custody, see chapter 6).⁴²⁷

Section three

Norms and sources

In this section, I will derive norms from the material described above with regard to the following questions: whether or not the plaintiff has a right to divorce with mutual consent and if so, on what conditions. In a second stage, I will look at the sources invoked as the ones underlying these norms.

'Mutual consent'

The material indicates that the court grants divorce with mutual consent regardless of whether it is the husband or

⁴²⁵ For example: reconciliation session CFI Tunis 17 June 2009

⁴²⁶ For example reconciliation session CFI Tunis 17 June 2009

⁴²⁷ Reconciliation session CFI Tunis 23 June 2009

the wife who files for it, and regardless of whether or not the couple has children. Indeed, the reconciliation session between Farouk and Ferdaws indicates that the court is clearly in *favour* of divorce with mutual consent: even though Farouk might have obtained divorce for harm (see chapter 5), the judge insisted on divorce with mutual consent.

Sources

That reconciliation judges insist on divorce with mutual consent is explained in some reconciliation sessions in the sense that it is 'easier' if the spouses are related.⁴²⁸ Another possible explanation, not addressed by the judges, could lie in the rapidity of this procedure: as divorce with mutual consent in principle requires only one reconciliation session, these cases are handled very quickly, as is witnessed by the fact that I observed the reconciliation session of Farouk and Ferdaws (October 2008) *and* obtained their decision (January 2009). This can be in the interest of the spouses (for example if one of them wishes to remarry, although the wife can only remarry after the end of the waiting period) and of the court, in the light of the workload of the Family Chambers.

In court decisions, the decision to grant the demand for divorce with mutual consent is based on the following considerations.

⁴²⁸ For example, reconciliation session CFI Tunis 10 June 2009: 'File for divorce with mutual consent, that is easier as you are family'.

Subject of the claim:

[...]

'But finally marital life deteriorated between them until the point that it was no longer possible to continue it and the plaintiff asks a decision to bring about divorce for the first/second time before/after consummation on the grounds of Article 31 par. [1 sub] 1 PSC.'

Proceedings

[...]

On the reconciliation session 'both spouses were present persisting in their mutual consent.'

The court:

Given that the demand was directed towards the demand of a decision to dissolve the marital bond on the grounds of mutual consent applying Article 31 par [1 sub] 1 PSC

Given that the defendant assisted to the reconciliation session and agreed with divorce with mutual consent

Given that the marital bond was proven by means of a legal marriage certificate

Given that the attempt to reconcile the couple failed

Given that Article 31 par. [1 sub] 1 PSC prescribes that it is decided on the divorce on the grounds of mutual consent of the spouses to bring about [the divorce],

[Form 2: Given that all attempts to reconcile failed and that marriage is founded on respect during the companionship (*mu'ashara*), this shows a lack of fulfilment of this between the spouses,]⁴²⁹

[Form 2: Given that the court cannot do otherwise but to decide the divorce between them for the impossibility for the plaintiff to live together in an atmosphere of love and kindness.]⁴³⁰

Given that the court witnessed the provisional measures [or, if the spouses agreed on conditions: 'the agreement confirmed between the

و حيث انه نظرا لخيبة كل المساعي الصلحية و لان الزواج بني على المكارمة و حين المعاشرة و ⁴²⁹ متى تبين عدم توفر ذلك بين الزوجين

فانه لا يسع المحكمة الا القضاء بالطلاق بينهما لاستحالة امكانية المعاشرة بينهما في جو ملؤه المودة ⁴³⁰ و الصفاء

spouses and becoming definite by means of their signature and enforceable on the grounds of it']

Given that the petition was directed to and fixed on a sound legislative foundation and designates the decision in favour of the demand,

Given that there was an agreement of the spouses to dissolve the bond between the spouses with mutual consent to divide the court expenses between them.

For these reasons:

[Form 2: Applying the Articles 29, 30, 31, 32, 46 and 54 PSC, 40 CSP and 40-68 CCCP]

The Court of First Instance decided to bring about divorce between the spouses X and Y for the first/second time before/after consummation on the grounds of the agreement and [to bring about] the registration of this in the relevant registers and on the original of their marriage contract and [to register] the provisional measures [and the agreement confirmed between the spouses and becoming definite by means of their signature and enforceable on the grounds of it], and to divide the court expenses between them.

Form one (the shorter one) justifies the decision to grant the demand of divorce with mutual consent by invoking legislation, namely Article 31 par. 1 sub 1 PSC. It argues that as the spouses agreed on divorce with mutual consent, and as the attempt of reconciliation failed, Article 31 par. 1 sub 1 PSC provides that the court should effect divorce with mutual consent. In this way, the court presents the possibility of divorce with mutual consent as a strictly *legal* possibility (as opposed to, for example, a possibility that is based on 'Islamic law'). Besides, the standard decision reiterates that both spouses expressed their consent with divorce *with mutual consent* during the reconciliation session.

Form two (the longer one) adds another source. It states that it is *impossible* for the spouses to fulfil the conditions

of marriage. These conditions are, according to the court: 'respect' and 'love and kindness.' In this way, the court presents its understanding of marriage, without explaining where this understanding can be found. However, the idea that the couple should be divorced because they do not fulfil the conditions of marriage is a clear reference to Islamic law: everyone with an average knowledge of the Quran shall be reminded of the phrase that provides that the couple should get divorced if they can no longer respect the *hudud* (boundaries) of Allah. As this rule concerns the *khul'* divorce in Islamic law (according to which the wife can obtain divorce with the husband's consent and in exchange for compensation), this phrase indicates that the court is actually pronouncing a *khul'* (which in classical law is not pronounced by a judge but contracted by the spouses themselves, out of court).

That the court mentions additional sources in some cases while leaving them out in others is seemingly a matter of coincidence. Both forms are used for divorce on demand of the wife and of the husband, and both forms are used for cases where children were and were not involved. Besides, both chambers made use of both types of forms. Thus, the source underlying divorce with mutual consent is equal regardless of whether it is the husband or the wife who files the petition and regardless of whether there are children involved.

Conditions

Although the court seems to favour divorce with mutual consent over other types of divorce, it does attach some conditions. The first condition is that both spouses wish this particular type of divorce. This means that the mere fact that both spouses wish to divorce is not enough: both of them should want divorce *with mutual consent*. Thus, if both spouses are clearly in favour of divorce but one of them refuses to contract divorce with mutual consent, the court shall reject the demand. A reason for a defendant to deny a divorce with mutual consent is that if the plaintiff files for divorce without grounds, the defendant has (in principle) a right to damages. A reason for a plaintiff to deny divorce with mutual consent is that if he or she files for divorce for harm, the plaintiff has (in principle) a right to receive damages. That the consent with divorce *with mutual consent* should be expressed clearly came forward from a reconciliation session where the wife filed for divorce with mutual consent. When the reconciliation judge asked the husband if he agreed (*muwafiq?*), he replied '*Normalement*'. 'Yes or no?', the judge asked.⁴³¹ Also, if the defendant refused to contract divorce with mutual consent, while at the same time indicating clearly that he or she wished to divorce as well, the reconciliation judge would not treat the case as a case of divorce with mutual consent. This indicates that the mere fact that both parties wish to divorce does not mean that the court pronounces divorce with mutual consent *of law*: the couple should not only agree on the divorce, but on this specific type of divorce.

⁴³¹ Reconciliation session CFI Tunis 23 June 2009

Besides the requirement that the spouses agree to contract divorce *with mutual consent*, the court also requires that the spouses agree on certain consequences of the divorce. This was witnessed during reconciliation sessions, where judges refused to *impose* provisional measures with regard to housing, stating that if the spouses could not agree, their demand would be rejected. As the consequences generally concern custody, visiting rights, child maintenance and the marital home, the requirement that the spouses agree on the conditions is only relevant in cases where the spouses have (minor) children. However, the case between Farouk and Ferdaws shows that the conditions can also concern the return of the marital gifts when the marriage is not consummated.

Although divorce with mutual consent is only granted if the *spouses* agree on the conditions, they are not entirely free to contract any conditions at all. On the one hand, they are obliged to agree that the husband pays child maintenance if the wife has custody. This was repeatedly confirmed by reconciliation judges, even if the spouses agreed that the wife waived the right to child maintenance⁴³² (see chapter 6). On the other hand, the

⁴³² For example, reconciliation sessions 23 June 2009 a and b: in one of these cases, the wife did not ask for any child maintenance, but the reconciliation judge decided on it anyway and awarded 30 DT for each child (the couple had two children) and in the other case, the couple stated that they did not agree on the amount of the child maintenance but that they would file a maintenance case to have the maintenance judge decide on the matter. The reconciliation judge affirmed that she should nevertheless mention an amount in the temporary measures.

conditions are limited in the sense that spouses cannot agree that the husband pays damages to the wife.⁴³³

None of the judgments on divorce with mutual consent contains a decisions on maintenance to the wife, although reconciliation judges affirmed that she has a right to this.⁴³⁴

Sources

Although court decisions explain why divorce with mutual consent is pronounced, they do not invoke grounds for the decision that the mere fact that both spouses wish to divorce is not sufficient: decisions simply state that the spouses affirmed during the reconciliation session that they both wish this particular type of divorce. It was not explained during reconciliation sessions either. In the same vein, court decisions do not explain why it is of crucial importance that the spouses agreed on the specific consequences of the divorce. Decisions simply state that the court took provisional measures without affirming that these were taken on the litigants' behalf. It was not explained in reconciliation sessions either.⁴³⁵ Similarly, it is not explained in court decisions why it is a condition that the court obliges the husband who does not have custody to pay child maintenance. In reconciliation

⁴³³ This was for example affirmed in a reconciliation session on 21 April 2009.

⁴³⁴ Reconciliation session CFI Tunis 17 June 2009

⁴³⁵ Reconciliation session CFI Tunis 23 June 2009a and b

sessions, this was not explained either.⁴³⁶ Also, court decisions do not explain why the court prohibits that the spouses agree that the husband pays damages to the wife. This was not explained in reconciliation sessions either.⁴³⁷

⁴³⁶ For example, reconciliation session 23 June 2009a and b

⁴³⁷ For example, reconciliation session CFI Tunis 15 January 2009 and 21 April 2009