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The Non-Judicial Divorce: A study in the light of the rules of Algerian Private International Law

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Abstract

The new system of non-judicial consensual divorce adopted in France raises many difficulties when demanding its enforcement in Algeria, since the non-judicial nature of this divorce does not allow its enforcement neither according to the rules of the Algerian-French bilateral agreement nor according to the rules of Algerian private international law. However, the need to maintain the stability of the situation of persons across borders necessitates the recognition of this type of divorce according to certain conditions. Therefore, this study came to show the possible solutions to overcome the difficulties presented by this topic.

Keywords: Consensual divorce, Non-judicial divorce, Public policy, The enforcement of foreign judgments, Private International Law.

ملخص:

إن النظام الجديد للطلاق بالتراضي الغير القضائي المعتمد في فرنسا يثير الكثير من الصعوبات عند المطالبة بتنفيذه في الجزائر، فالطبيعة غير القضائية لهذا الطلاق لا تسمح بتنفيذه لا وفق قواعد الاتفاقية الثنائية الجزائرية الفرنسية، ولا وفق قواعد قانون القانون الدولي الخاص الجزائري، غير أن ضرورة المحافظة على استقرار حالة الأشخاص عبر الحدود تستدعي الاعتراف بهذا النوع من الطلاق وفق شروط معينة، لذلك جاءت هذه الدراسة لتبين الحلول الممكنة لتجاوز الصعوبات التي يطرحها هذا الموضوع.

كلمات مفتاحية: طلاق بالتراضي، طلاق غير قضائي، النظام العام، تنفيذ الأحكام الأجنبية، قانون دولي خاص.

1. Introduction

The dissolution of marriage occupies an important position in Islamic law and other religions. The Islamic law '*Shariah*' permits the dissolution of marriage even though it is the most hated and disliked permissible. However, it is sometimes needed to prevent harm and disruption in the family system, just as some other religions have not prohibited the dissolution of the marital bond; as a consequence, the breakup in the family system pushes the legislation of different countries to regulate it with special legal rules. These rules change according to place and time.

The methods of dissolution of the marital bond may vary, it may be by the husband's separate will alone, or it may be at the request of the wife, and it may be by agreement of the spouses, and countries differ in adopting one of these types, each according to its religious and social background as they differ in the issue of who is competent to decide on the issue of the dissolution of the marital bond, some of them assign it to a judicial authority and some of them support it to a non-judicial authority such as the notary or special committees, such as France, which assigned the consensual divorce to a non-judicial authority represented as the notary, in order to reduce the burden on its courts.

Because of the intertwining relationships between individuals within the framework of private relations outside the borders, especially between France and Algeria, and particularly represented in the high number of mixed marriages that usually lead to divorce, and the desire of the parties to declare this divorce at the Algerian civil status services; Recognizing the effects of divorce without a judge will pose many difficulties in Algeria, although this type of divorce does not raise difficulties when applied in France as long as it is applied in its natural environment, these difficulties are related to the extent of acceptability of implementing this type of divorce in Algeria which considers divorce of a judicial nature only. This situation raises an important problematic, namely how will the Algerian judiciary receive a foreign non-judicial consensual divorce contract upon request for recognition?

The expected solutions to this problem require relying on the comparative analytical approach, where we will work on analysing the phenomenon of non-judicial consensual divorce in France and then compare it to the consensual judicial divorce adopted by Algeria, In the end, this approach will allow us to reach the provisions that can control the implementation of non-judicial consensual divorce in Algerian courts. In order to do that, this study was divided into two topics. In the first, we will discuss the nature of consensual divorce in France and Algeria, and in the second, we will examine the possibility of recognizing consensual divorce in the Algerian courts.

2. The Nature of Consensual Divorce in France and Algeria

Researching on the nature of consensual divorce in France and Algeria will allow showing the general concept of this type of dissolution of the marital bond in the two countries, which will help us to understand the way in which a foreign non-judicial divorce can be executed in the Algerian courts.

2.1. Consensual Divorce in French Law

Since 2016, France has witnessed an important change in the issue of consensual divorce, which is now being agreed on outside the courts, so in this part, we will explain the legal rules governing consensual divorce in France, after that, we will discuss the nature of this divorce.

2.1.1. The legal rules governing consensual divorce

The rules governing non-judicial consensual divorce were stipulated by the French legislator from Articles 229, paragraph 1, to Articles 229, paragraph 4, of the Civil Code, issued by Decree No. 1907-2016 related to divorce, which added a fundamental amendment to the French Family Code, By relying on a new procedure for consensual divorce that does not involve recourse to the judge,¹ it was stated in Article 229, Paragraph 1 of the Civil Code that:

When the spouses agree on the dissolution of the marriage and its effects, with the help of their lawyers, they make their agreement that takes the form of a customary contract signed by their lawyers in accordance with the conditions stipulated in Article 1374. This agreement shall be deposited at the notary who monitors the respect of the official requirements stipulated in Clause 1 to 6 of Article 229-3, he also confirms that the draft agreement was not signed before the expiry of the reflection period stipulated in Article 229-4. This deposit gives its effect to the agreement by giving it a confirmed date and enforcement power.²

The new procedure of divorce without a judge, which was introduced by the French legislator within the family law, aims mainly to simplify procedures and relieve pressure on the courts. This type of divorce cannot be resorted to outside the judiciary unless the spouses agree on its personal and financial implications.³ In order this divorce gains executive power outside the authority of the judiciary, the agreement concluded between the spouses relating to divorce must be deposited at a notary, who verifies that it respects the official requirements stipulated in Paragraph 03 of Article 229 of the French Civil Code. These requirements are numerous, namely the agreement must include explicitly and under penalty of nullity on some information such as name, profession, residence, nationality, date and place of birth of each of the spouses, lawyers' information, informing the child of his right to be heard by the judge...Etc., adopting this format of the new divorce in France means removing the divorce from the judicial authority to the area of contractual obligations, as long as the divorce is done through contract, so what is the nature of this contract?

2.1.2. The Nature of Consensual Divorce outside Judiciary

Determining the nature of consensual divorce outside the judiciary will allow knowing the position of the Algerian law and judiciary in facing this form of divorce when it is intended to be implemented within the Algerian territory. The text of Article 229 Paragraph 2 of the French Civil Code states that the consent of the spouses about the divorce must take place in the form of an agreement, and this drives us to wonder: Is this shape of divorce qualified as a matter of contractual obligations? Is it an agreement or a contract?

Consensual divorce outside the judiciary according to French law is based on an agreement between the spouses and without interference from the judiciary, after a negotiation process on the personal and financial issues arising from the divorce. Therefore, some authors believe that the application of criteria by which the conduct is qualified as a contract or agreement applied to this form of divorce,⁴ This new system of divorce possesses all the elements related to the formation of the contract, there is freedom for the spouses to initiate the conclusion of the contract or to refrain from it through the principle of consent, and the freedom to determine its content,⁵ which are the implications of divorce, Although the procedure of this agreement is framed by the law through imposing certain forms of concluding it by stipulating some mandatory conditions, such as granting the spouses a period of reflection and the right to renounce the agreement, this does not preclude that this system is inherent in the formation of the contract.⁶

The contractual qualification ‘Characterization’ of extrajudicial divorce according to the concept of French law does not make it a contract like other known contracts. This divorce agreement is a contract of a special type or of a special nature, as it differs from ordinary contracts in terms of their subject matter and formation, On one hand, it is related to matters of personal status, so its aim is to break the marital bond and regulate the effects of this dissolution. These matters by their nature are uncommon for individuals to act freely on them, and on the other hand, this contract needs a certain period to be concluded, Its convening presupposes in addition to the agreement of the will of the two parties on the principle and the effects of the dissolution of the marital bond; Completion of an additional formal procedure by a third party. This procedure consists in depositing the agreement with the notary; it is a contract that does not produce from one act, but from a series of conducts and multiple interveners. It can be said that divorce without a judge is based on a contract, but in essence it constitutes a friendly procedure, or “a contractual procedure”.⁷

The French legislator’s use of the term ‘agreement’ has no effect on the contractual nature of this form of divorce. The distinction between a contract and an agreement has been defined in French jurisprudence since the era of the jurist ‘Pothier’ on the basis that the agreement is more important and more comprehensive than the contract, the contract is more specific than the agreement, yet this old distinction has been criticized by a large part of contemporary jurisprudence because it has no scientific value and does not have legal implications. The Algerian legislator in civil law expressed the contract by agreement, and made them two synonymous terms.⁸ The distinction between contract and agreement has been abandoned in France, as the contractual category includes all agreements that aim to "create, amend, transfer or nullify obligations."⁹

2.2. Consensual Divorce in the Algerian Law

In Algeria, the Algerian family law is concerned with regulating personal status matters. This law is based in its provisions on the rules of Islamic law ‘Shariah’, which is considered as the main source for it. Article 222 of the Algerian Family Code stipulates that: ‘Everything that is not stipulated in this law is referred to the provisions of Islamic law’.¹⁰

This reason will make us discuss the issue of consensual divorce in Islamic law, and then in Algerian law.

2.2.1. Consensual Divorce in Islamic law ‘Shariah’

Divorce ‘Al-Ṭalāq’ is defined in the Arabic language as the dissolution of the bonds, and it is derived from the word "release", meaning sending and leaving ‘Al-irsāl wa Al-tark’, so it is said that I released the captive in the sense that I sent him and left him and resolved his bond, and in Islamic Shariah it is the dissolution of the Marriage and termination of the marital relationship, either by an explicit word or metaphor, or by writing, or with reference when the individual cannot speak and write, and the principle of divorce is that it is disliked except when needed,¹¹ and the evidence for that is in the Holy Quran:

O you who believe! You are forbidden to inherit women against their will; and you should not treat them with harshness, that you may take away part of the Mahr [3] you have given them, unless they commit open illegal sexual intercourse; and live with them honourably. If you dislike them, it may be that you dislike a thing and Allāh brings through it a great deal of good.¹²

Divorce may be obligatory if it is the only way to defuse the discord and disagreement between the spouses according to Imam Ahmad's doctrine.¹³

The consideration of marriage as a binding contract for two sides makes the agreement of the spouses to terminate the marital bond within the nature of this contract, and therefore it is approved by Islamic law, yet the freedom of individuals in it is not absolute, as most of the controls were set in favour of the wife as the weaker party in this agreement,¹⁴ the basic principle is that divorce, according to Islamic law belongs to the husband alone by his own will, and the wife can also request for the termination of her marital relationship when necessary determined by Islamic law, but this divorce is decided by the judge, just as it can be in the hands of the husband and wife when they agree on separation, This is permissible according to Islamic law without referring to judiciary.¹⁵ Islam recognizes divorce by agreement of the spouses, as in the form of “*Khula*”, when it is far from abuse.¹⁶

Muslim jurists have usually discussed consensual divorce under the concept of “*Khula*”¹⁷, considering that the division between the spouses, when done with the word “*Khula*”, or something similar to its meaning, is called “*Khula*” 'even if it is without compensation. Because the Maliki doctrine does not consider compensation a term in “*Khula*”,¹⁸ thus “*Khula*” may be done without compensation and becomes then a divorce. Other scholars tend to say that taking money from the wife is conditioned on the existence of marital dispute, because originally it is illegitimate to take the other's money with no right.¹⁹

2.2.2. The Legal Rules Regulating Consensual Divorce in The Algerian Law

Article 48 of the Algerian Family Code states: ‘a marriage contract should be dissolved by divorce which is done by the will of husband or consent of the spouses’, this article shows undoubtedly the legitimacy of consensual divorce which uses the term ‘consent’ that refers us to the contract. In this regard and under the framework of civil transactions, the Legal conduct is perceived as every will is set to produce a certain legal effect, and it is conducted

by two wills i.e. from both sides and this is the contract, as the contract of sale or contract of loan...etc. According to the civil code, the agreement cannot be a contract unless it establishes or transfers or amends an obligation,²⁰ whereby the article 54 of the civil code states: ‘the contract is an agreement by which a person or many persons are committed towards another person or other persons granting, doing or not doing something’. The contractual nature of consensual divorce seems clear at first, and the basics on which this contract is built exist, where is an agreement by consent between the spouses, and if the act of marriage is included within the circle of contractual category and it is created like the other contracts with its requirements such as the convergence of the will of the parties and what will result from rights and obligations since it is a binding contract on two sides,²¹ the agreement of spouses to terminate this marital bond is not out of the nature of this contract.²²

In return to the Family code; reading article 49 which states ‘divorce is only proven by judgment after several attempts of reconciliation’, questions all what was mentioned earlier. This article subjects the couple's agreement to the judge's ratification through a judgment proving this divorce. This led some authors to define contracts in the civil code framework as an agreement of two free wills or more on making an effect that is arranged by law, and this legal effect goes just to the financial relations of persons and that are specific to the civil code ,The scope of the general theory of the contract, as part of the general theory of obligation, applies only to contracts that are concluded in the sphere of Civil Transactions with financial value, such as sales contracts and others, Thus, it goes out of the scope of civil contracts specific to personal status, although they are called contracts, because their effect is not to create an obligation as the technical meaning specified in the theory of obligations,²³ it is subjected to the provisions of the Algerian family law exclusively, including the financial relationships arranged by marriage or its dissolution, and it is the jurisdiction of the family affairs judge.²⁴

In Algerian law, it appears that the consensual divorce agreement is a contract, but it needs a certain procedure to enforce it. This procedure is represented in resorting to the judge. As a result, it seems that it takes the judicial contract qualification ‘Characterization’ since it is a voluntary agreement between the sides of the contract ‘the spouses’ which the judge examines it before it be enforceable.²⁵

3. The recognition of non-judicial divorce in the Algerian courts

The Algerian civil status department cannot register the non-judicial divorce contract issued in France because of its nature, as the civil status department only record the divorce issued by virtue of a judgment by the judicial authorities, and when the judgment on the divorce is foreign, it is required that it be under the executive form. Article 58 of the Civil Status Law states that: ‘Registration is the process by which the civil status officer transfers in his records the civil status contract received from another place than his department, or a court judgment related to the civil status’,²⁶ rejecting the enforcement request of non-judicial divorce contract issued in France may push his demanders to file a lawsuit in the judiciary to ask for recognition, this contract can also be invoked because of another case filed in the Algerian judiciary, so what will the position of the Algerian courts be?

3.1 The enforcement of the consensual divorce in the Algerian courts

When the issue of requesting recognition of a non-judicial divorce concluded in France is presented to the Algerian judge, the most important questions he faces are: What are the rules governing the recognition of this Type of divorce? and what is the qualification that the judge can give to it?

3.1.1 The Rules regulating the enforcement of foreign judgments

The enforcement of foreign judgments in Algeria is subjected to two types of rules. The first is related to the rules of the conventional law, and the second is related to the rules of Algerian private international law. However, the latter cannot be implemented only when it does not violate the provisions contained in the rules of the conventional law.²⁷

With regard to the rules of the conventional law, Algeria concluded a cooperation agreement with France that includes the enforcement of sentences and the extradition of criminals.²⁸ This agreement states in its first title the issue of enforcement of judgments issued by the courts of the two countries, as it says in its first article:

The decisions issued according to the judicial jurisdictions and the state jurisdictions in civil and commercial matters in the courts convened in Algeria or in France possess the force of *res judicata* in the other country if a set of the following conditions are met...

This article sets out a set of conditions related to the nature of judicial judgments, as the bilateral agreement stipulates:

1. The decision is issued by a competent court in accordance with the rules on conflict of jurisdiction applied in the country from which the judgment is requested to be executed;
2. Correctly notify parties according to the law of the requested country to enforce the decision;
3. The decision requested to be executed possesses the force of *res judicata* and is enforceable;
4. It does not conflict with a judicial decision issued in the country from which the judgment is requested to be executed, and possesses the force of *res judicata*.
5. The decision does not contain anything that violates the public policy 'ordre public' of the State from which enforcement is requested.

As for the authentic instrument issued by the notary, Article 08 states:

The official documents, especially the documents issued by the notary that are enforceable in one of the two countries, are declared in the other state that they are also enforceable by the competent authority according to the law of the country in which the execution is being pursued. The competent authority only checks whether the document meet the conditions necessary to be considered official in the country to which they were presented, and if the requirements that were followed in the execution procedures do not have contravention of the public policy of the requested State to enforce The official document, or the principles of public law applicable in that state.

With regard to the rules of private international law, the law regulates the issue of executing foreign official documents within the Civil and Administrative Procedures Law

from Article 605 to Article 608, Article 605 applies to orders, judgments and decisions issued by foreign judicial authorities, As for Article 606, it is applied on contracts and official documents drawn up in a foreign country. Article 605 states the same terms stipulated in the convention, except one additional term mentioned in the agreement, but is not mentioned in this article, which is the validity of notification to parties. Regarding contracts and authentic instrument, Article 606 also stipulates almost the same conditions that came in the Algerian-French agreement, the rules that we mentioned earlier, whether related to the conventional law or the rules of the private international law is the one under which the non-judicial divorce contract issued in France is likely to be enforced, but this matter can only be decided upon after the divorce qualification.

3.1.2 Qualification of a foreign non-judicial divorce for its enforcement

When the issue that contains an application for enforcement of the consensual divorce contract concluded in France is presented to the Algerian judge, the first issue that will be presented to him is the qualification of the nature of this document, is it a judicial decision or a contract? Determining the nature of the document submitted to the Algerian judiciary in order to obtain the enforceability for its registration in the civil status departments will allow the determination of the legal rules that are applicable to it. This qualification will be carried out according to the Algerian Law, where article 09 of the civil code states: ‘Algerian law is the reference in qualification of the relationships whose type is required to be defined when laws are in conflict, in order to know the law to be applied’.²⁹

Initially, as for the Algerian judge, he cannot qualify the consensual divorce issued in France by the notary on the basis that it is an order, judgment, or decision simply because it is issued by a non-judicial authority, this divorce that is ratified by the notary is not considered a judgment and its nature is contractual. Therefore, it will be subjected to neither the provisions of Article 1 of the Algerian-French Convention, nor the provisions of Article 605 of the Civil and Administrative Procedures Law. Judgments are those decisions issued by the courts in the litigation brought to them, which include two major elements, the most important elements are the formal one which assesses the consensual divorce contract. This element takes into account certain procedures when issuing the judgment: It must be issued by a judicial authority, and this is what we do not find in the consensual divorce document issued by a non-judicial authority represented by the notary.

A consensual divorce issued by a notary in France can be qualified as a foreign official contract, thus we can apply on it the rules contained in Article 08 of the Algerian-French Convention, or the rules contained in Article 606 of the Algerian Civil and Administrative Procedures Law, and by looking at the conditions mentioned in the two articles, the consensual non-judicial divorce issued legally in France will fulfil the first two conditions, namely: It fulfils all the conditions required to consider it as an official document in France ‘according to the French law, which is the law of the country in which it was issued’, and to consider it as an enforceable title in France ‘according to the French law, which is the law of the country in which it was issued’.

However, the problem will be in the term which requires that official document issued in a foreign country must does not contain any violation of the Algerian Law or public policy and public morals in Algeria, and this type of agreement violates the Algerian family law since it proves divorce outside the judiciary, as Article 49 of the Algerian family law states: ‘Divorce cannot be proven except with a judgment ...’, and this would lead to a refusal to enforce of agreement regarding divorce.

It seems that the enforcement of a consensual non-judicial foreign divorce is obstructed by a dead end according to the rules regulating the enforcement of foreign official documents in Algeria. Refusal of divorce in the Algerian judiciary will raise several questions, the most important ones are: is it conceivable that a person, regardless of his nationality, can be divorced in France while he is considered married in Algeria? Is it logical to ask the person to re-file a new lawsuit to obtain a judicial divorce judgment again in the Algerian judiciary to confirm his valid divorce in France or another country, with the burden and enormous costs involved in that? These questions prompt us to search for the possibility of recognition of consensual divorce in the Algerian judiciary in accordance with the principles sought by the rules of justice in general.

3.2 The possibility of recognizing the non-judicial divorce before the Algerian judiciary

Despite some expected difficulties that can be overcome, the possibility of recognizing a judicial divorce cannot be excluded due to certain considerations, it remains only to search for how to enforce this non-judicial divorce and the necessary conditions for this enforcement.

3.2.1 Considerations supporting the recognition of non-judicial divorce

There is a set of considerations that allow recognition of a non-judicial divorce issued in France; these considerations can be summarized as follows:

3.2.1.1 The role of the judge in relation to divorce in Islamic law and the Algerian judiciary

The questions previously raised call for the search for solutions that allow the recognition of non-judicial divorce, in this context, and because the Algerian family law is derived from Islamic law ‘Shariah’ in its various sects, and is rather its only source, it does not consider an objection to the divorce being consensual without the presence of the judge.³⁰ Although some of the Muslim jurists believe that “*Khula*” ‘divorce by mutual consent’ is not permissible except before a Sultan ‘the judge’, a large part of them go to the contrary, and they believe that “*Khula*” is permissible without the intervention of the judge, because “*Khula*” is a contract based on mutual consent like other contracts, where there is no meaning to the requirement of Judge’s intervention in this contract, and when the agreement is made between spouses by complete consent to the “*Khula*”, there is no need to Judge’s intervention, unless the “*Khula*” is due to the hatred of one of them to the other, the judge’s intervention is necessary to verify the conditions for “*Khula*”, which among them is that the husband does not oppress his wife, and it is not permissible for him to take more than what he gave her ‘compensation’,³¹ This position of Islamic law can support the idea of accepting a non-judicial

consensual divorce, since Islamic law is the most important source of family law according to Article 222.

With regard to the Algerian judiciary, the requirement of divorce before the judge aims to attain the judge's role in investigating the causes of conflict between spouses and dispense justice in the application of divorce, and protecting the woman from her husband's abuse in using his right to divorce,³² Especially since divorce in Islamic law and Algerian law is a right devoted just to the husband, as Article 48 of the Algerian Family Code states that: '...The marriage contract is dissolved by divorce, which is carried out by the will of the husband ...' With regard to the consensual divorce in front of the Algerian judge, it is represented by 'just witnessing by the court of the desire of the two parties to divorce' to prove the divorce with a judgment. The role of the judge in this agreement is to try to reconcile between the spouses if it is possible, and ratification of the terms of this agreement. The judge will not intervene in cancelling or amending these conditions except in the case in which the terms of the agreement conflict with the interests of the children, or violate the public policy, this is what the Supreme Court confirmed and mentioned in a decision issued on 06/13/2013,³³ and the text of Article 431 of the Civil and Administrative Procedures Law also confirm this matter as mentioned in this article:

On the date set for attendance, the judge makes sure that the petition is accepted by the spouses, and he listens to the spouses separately and then together, he makes sure of their consent, and tries to reconcile between them if that is possible. He considers the agreement with the spouses or their agents, and he may cancel or amend the conditions contained in the agreement if their conflicts with the interests of the children or contravenes the public policy, the judge confirms the will of the spouses by making a judgment that includes ratification of the final agreement and declares the divorce.

The term 'declares' mentioned in the text of the article gives a strong meaning to the judge's role in divorce by mutual consent, as it shows that it is possible not to resort to the judge regarding divorce by mutual consent.

If the judge's intervention in the matter of amending the conditions does not take place except when the spouses' agreement conflicts with the interests of the children or their violation of the public policy, then this means that the non-judicial consensual divorce can be recognized outside the judiciary, whereby, the issue of controlling the opposition of agreement to the interests of the children and the violation of public policy can be controlled during the examination of the foreign contract, but there remains one obstacle to the recognition of this agreement, which is the issue of trying to reconcile the spouses, which is required by the Algerian family law in Article 49 which mentions: 'divorce can only be established by a judgment after several reconciliation 'sulh' attempts made by the judge without exceeding three '3' months from the date of litigation was filed...' This reconciliation cannot be imagined taking place in a non-judicial, consensual divorce in France, so can the Algerian judge ignore this issue?

3.2.1.2 The comparison of non-judicial divorce with customary divorce

Divorce by mutual consent in Islamic law and as a general principle takes place without the intervention of the judge. However, the state obliges the spouses to resort to the judge to issue a divorce judgment; the state sets legislation and obliges individuals to follow it in order to regulate their private relationships. However, sometimes individuals violate these laws. The spouses may resort to divorce according to Shariah, yet, they do not abide by the procedures stipulated by the state law, and they act in a customary manner, and then they resort to the judiciary to confirm this divorce.³⁴ Therefore, the study of non-judicial consensual divorce issued in France reminds us of the customary divorce in Algeria, which several jurisprudences have been issued on it. There are many similarities between them, both take place outside the judiciary, except that customary divorce in Algeria is not ratified by an official body such as a notary, as is the case in non-judicial consensual divorce in France, however, customary divorce in Algeria is recognized by the jurisprudence and only witness testimony is required.³⁵ In one of the appeals submitted to the Supreme Court, the court agreed to the opinion of the judge who proved the divorce, which is undertaken between the two parties in front of a group of Muslims.³⁶ This reason makes the possibility of recognizing the consensual non-judicial divorce issued in France, especially since it is issued according to the official form in France.

3.2.1.3 The principle of justice and fairness

Among the most important principles of private international law is the principle of justice and fairness, which requires recognition of the rights of individuals as long as they are valid, regardless of their nationality or where they are located. This principle is among the principles common to peoples and stipulated in international human rights treaties,³⁷ Therefore, this principle must be respected in matters of personal status, as relations regarding personal status with a foreign element can create realistic situations that cannot be denied, because this will lead to instability of the status of persons and their capacity at the international level, and may lead to undesirable consequences such as considering a divorced person in a country and married in another country,³⁸ Therefore, the personal status of individuals must be the same regardless of where they are. These reasons prompted one of the courts of the Maghreb countries to recognize a non-judicial, consensual divorce issued in France. When the Tunis Court of First Instance considered in its decision number '86358' issued on 11/14/2017 that: 'nothing prevents the recognition of this divorce even if it is not of a non-judicial nature'.³⁹

3.2.2 Bypassing reconciliation to recognize divorce by mutual consent outside the judiciary

The issue of reconciliation between spouses is obligatory in Islamic law, and Muslim jurists go to say that reconciliation between spouses is an imperative and obligatory matter⁴⁰ and it is not right to neglect.⁴¹ In Algerian law, in addition to the text of Article 49 of the Algerian Family Code, the Civil and Administrative Procedures Code stipulates the necessity of reconciliation, as it was stated in Article 439 that: 'Reconciliation attempts are obligatory,

and take place in a secret session.’ In fact, it affirms the necessity of reconciliation even in divorce by mutual consent under Article 431 of the same law. Judicial jurisprudence also confirms the issue of the necessity of reconciliation, as it was stated in a judicial decision issued by the Supreme Court:

The judgment criticized actually violates the law and erred in its application, because the article 49 of the Family Code imposes on the judge to make many attempts to reconcile between the spouses before issuing his judgment of divorce.⁴²

The important question that arises regarding this issue is: Is the reconciliation procedure a matter within the public policy and therefore failure to do it leads to the nullification of the consensual divorce?

There is no doubt that the issue of reconciliation is related to public policy. When the judge does not perform reconciliation procedures, it will be considered contrary to a fundamental rule in the procedures. This is the opinion of the Supreme Court which confirmed in a decision issued in 2011 that:

Consensual divorce has special stipulations that the judge must consider. He must ensure that the joint petition is accepted by spouses, after that, he listens to the spouses separately, then together, and make sure of their consent, and try to reconcile between them, if that is possible.⁴³

Nevertheless, there are those who believe that reconciliation in divorce by mutual consent can be bypassed.⁴⁴ The correct interpretation of this issue requires understanding that the reconciliation stipulated in family law and civil procedure law means that the judge is obligated to reconcile when the spouses come to him to confirm the divorce by mutual consent, while this is not binding when the divorce is consensual outside the court,⁴⁵ so reconciliation will not perform its role except when the spouses resort to the judiciary before the divorce takes place,⁴⁶ but if the divorce takes place then What is the benefit of reconciliation! Also, reconciliation is only in conflict; in this context Moroccan law In Article 120 of the Moroccan Family Code gives this impression when it refers to “*Khula*”. Reconciliation in “*Khula*” takes place when the spouses agree on the principle of “*Khula*” and disagree in compensation,⁴⁷ then how to resort to reconciliation if the reconciliation is ‘a contract by which the two parties end an existing conflict or avoid a potential conflict ... According to the provisions of Articles 459 and 462 of the Civil Code.’⁴⁸ As an exception, the attempt at reconciliation takes place only between two conflicting parties,⁴⁹ while there is no dispute in consensual divorce, rather there is a mutual consent.

3.2.3 The mechanism of enforcement of non-judicial consensual divorce in the Algerian courts

If there are many considerations that support the enforcement of a non-judicial consensual divorce in the Algerian courts, then the most important thing remains how this divorce is executed. The nature of the consensual divorce issued in France differs from that known in Algeria, It is imperative to put in place an appropriate mechanism for its implementation that takes into account, on one hand, the non-judicial nature of the divorce issued in France, and on the other hand, the judicial nature of divorce in Algeria, so it is

imperative for the judge to adapt the texts to suit the nature of this contract, so that it can be examined according to some conditions for the enforcement of the foreign judgement, And some other conditions for the enforcement of the foreign official contract, the first conditions that the judge must discuss are the conditions related to the official nature of the non-judicial divorce document and its enforceability according to French law, 'Article 606 of the Civil and Administrative Procedures Law.' Then, examine whether the issuance of this contract does not violate 'or conflict' with the exclusive jurisdiction of the Algerian courts, and that it does not conflict with an order, judgment or decision previously issued by Algerian judicial authorities, and that it does not include anything that contravenes public policy and public morals in Algeria 'Article 605 of the Civil and Administrative Procedures Code'

With regard to the issue of the official nature of the non-judicial divorce document and its enforceability, the Algerian judge will rely on French law to determine it according to what is stipulated in Article 606 of the Civil and Administrative Procedures Code, and this issue does not raise many difficulties. The judge also monitors the non-infringement of the jurisdiction of the Algerian courts when issuing this contract, this process is very important in this context, the agreement on divorce contract issued in France should not be recognized if the Algerian courts are competent in this divorce. We point out here that the jurisdiction of the Algerian courts in matters of civil status of persons is 'unusually' a matter of public policy, and the judge must raise it on his own initiative,⁵⁰ so that the Algerian courts shall have jurisdiction over divorce by mutual consent only if the spouses choose these courts, and the place of residence of one of the spouses is in Algeria. This cannot be envisioned in a non-judicial consensual divorce when the two spouses reside in France, or when the two parties agree to the divorce in France and one of the spouses is residing in Algeria. This is evidence that they did not choose the Algerian courts. Article 426 of the Civil and Administrative Procedures Code states that : 'The court should be territorial competent:... 3- That of the marital home, In matters of divorce or reinstatement, except in the case of a request for divorce by mutual consent, the court of the place where one or the other of the two spouses resides, according to their choice; ...', We note here that the jurisdiction of the Algerian courts will be exclusive only when the place of residence of the spouses is located in Algeria.

The judge must also monitor that the non-judicial divorce contract issued in France does not conflict with an order, or decision previously issued by Algerian judicial authorities, In this context we can expect at the same time the existence of a proceeding of a consensual divorce in France, and a lawsuit regarding the same divorce before the Algerian courts to obtain a divorce judgment.⁵¹ If a decision is issued by the Algerian courts regarding the divorce between the spouses before the conclusion of the consensual divorce contract in France, then it is certain that the non-judicial agreement of the divorce contract will not be executed due to the existence of a decision issued by the Algerian judiciary, whereas if the consensual divorce is concluded before the divorce decision is issued by the Algerian courts here we distinguish between two cases: If the lawsuit of divorce is still pending in the Algerian courts, this contract can be enforced, but if the divorce decision was issued by the Algerian courts after the conclusion of the agreement on divorce in France, and no request was submitted for its enforcement only after the decision was issued by the Algerian courts,⁵² this

contract cannot be executed because the decision issued by the Algerian courts is more powerful than a mere contract issued by a notary.

The issue of monitoring the conformity of the contract to the Algerian international public policy is also an important issue, so the judge in this regard must first ensure that this consensual divorce contract does not harm the child's best interests if there are children between the spouses, especially with regard to the issue of assigning custody of the child,⁵³ such as granting custody to a mother living in a non-Muslim country,⁵⁴ and the Algerian judge also monitors the law applicable to this contract, in this case the judge will not rely on the rules of conflicts of law for contractual obligations, but this monitoring must be carried out according to conflicts rules concerning the dissolution of a marriage 'divorce', so the contract of consensual divorce, even if it is a contract, it is related to matters of personal status, we mention here that if one of the spouses was an Algerian at the time of the conclusion of the marriage then the law applicable to this divorce is the Algerian family law,⁵⁵ In this case when the Algerian Law is not the applicable law on non-judicial divorce, this will prevent the enforcement of this divorce in Algeria.

4. Conclusion

The dissolution of the marital relationship takes an important place in the divine religions and the different man-made laws, as it is one of the most important issues of concern to individuals in all parts of the earth, and although divorce is detestable except for need, its occurrence is increasingly frequent at the global level, whether among Muslims or non-Muslims. This increase has prompted some countries to set up special procedures for the issue of the dissolution of marriage in an attempt to regulate some of its types in order to relieve pressure on their courts. In France, the French legislator, with the aim of simplifying procedures and easing the pressure on the courts, made an important amendment to the rules regulating the family by introducing a system of divorce by mutual consent at the notary. Soon, these contracts began to spread outside France, raising the issue of their compatibility with the regulations that are required for enforcement these contracts related to the dissolution of marriage. In this context, this study came to examine the issue of the enforcement of the non-judicial consensual agreement of divorce issued in France in the Algerian courts in the light of the rules of Algerian Private International Law. This study reached a set of conclusions and recommendations that can be summarized as follows:

As for the results:

- 1- Consensual divorce outside the judiciary according to the concept of French law takes a contractual nature, as it is a contract based on an agreement between the spouses without interference from the judiciary, after a negotiation process on the personal and financial issues arising from the divorce, yet it is a special contract or procedural contract related to personal status matters, its implementation depends on the intervention of a third party which is the notary.
- 2- According to the rules of Islamic law, marriage is a binding contract for two sides and the agreement of the spouses to terminate the marital relationship is part of the nature of this contract, and therefore it is recognized by Islamic law but the personal liberty is not absolute in this type of contracts, and Islamic law permits divorce that is in the

hands of the husband and wife when they agree on separation and without the judicial intervention.

- 3- The Algerian Family Code and according to the text of Article 48 permits divorce that is done with the consent of the spouses, but the nature of this judicial divorce is the opposite of the consensual non-judicial divorce issued in France, and although the divorce by mutual consent has a contractual nature, it needs the intervention of the judge to enforce it. As a result, it is characterized as a judicial contract.
- 4- With regard to the Algerian judge, in principle, he cannot characterize the consensual divorce issued in France by the notary on the basis that it is a decision issued by a judicial authority, and therefore, it will not be subjected to the provisions of Article 1 of the Algerian-French Convention, nor to the provisions of Article 605 of the Civil and Administrative Procedure Code upon its enforcement request, it can be characterized as a foreign official contract, but it cannot be enforced according to the text of Article 08 of the Algerian-French Convention, or the text of Article 606 of the Algerian Civil and Administrative Procedures Law, because it violates the Algerian family law in that it proves the divorce outside the judiciary.

The previous results led us to an important note, which is the enforcement of a non-judicial, consensual, foreign divorce is not possible in light of the rules of conventional law and the rules of Private International Law, and that the rejection of a non-judicial consensual divorce in the Algerian judiciary will present anomalous cases, such as considering a person divorced in France while, he is considered married in Algeria, in addition to that, individuals will be prompted to file a new lawsuit to the Algerian judiciary to obtain a consensual divorce judgement, with the heavy burden and costs, this observation allowed access to additional results, which are as follows:

- 1- Non-judicial consensual divorce can be recognized by the Algerian courts, on the basis that the judge's role in relation to divorce by mutual consent in Islamic law is not imperative, and the role of Algerian judiciary is limited to provide evidence of the parties' desire to divorce, and this means that non-judicial consensual divorce can be recognized in the Algerian courts which can verify all the necessary conditions for its legal validity.
- 2- The Non-judicial divorce can be resembled to customary divorce, and Algerian courts have recognized in many cases the customary divorce that takes place outside the judiciary and unofficially, so it is more appropriate to recognize the formal non-judicial divorce when it fulfils the conditions required to the enforcement of the foreign judgment and the foreign contracts.
- 3- The principle of justice and fairness requiring the recognition of the rights of individuals regardless of their nationality or their whereabouts, and supports the idea of recognition of the non-judicial consensual divorce issued in France, and ignoring it will lead to instability of the status of persons at the international level, and may lead to undesirable consequences.
- 4- The necessity of reconciliation will not affect the recognition of a non-judicial consensual divorce, as the reconciliation stipulated in the Family Law and the Civil

and Administrative Procedures Code means that the judge is obliged to reconcile when the spouses come to him to confirm the divorce by mutual consent. He is not bound by it when the divorce is done by mutual consent outside the judiciary, because reconciliation will fulfil its role only when the spouses resort to the judiciary before the divorce takes place. Also, reconciliation can be only when there is a dispute.

All the previous results allowed for the development of the following recommendations that could overcome the difficulties facing the enforcement of the consensual, non-judicial divorce contract concluded in France:

- 1- The principles of justice require the recognition of the non-judicial divorce under certain conditions by adapting the existing texts to suit the nature of this divorce.
- 2- It would be appropriate to put in place a mechanism for the enforcement of the non-judicial divorce that depends on examining this contract according to the conditions to which the enforcement of the foreign judgment and the foreign contract is subjected to.
- 3- The necessity of updating the Algerian-French agreement to allow the enforcement of non-judicial divorce that do not conflict with the international public policy in Algeria.
- 4- The jurisdiction in divorce by mutual consent can be granted to a non-judicial body such as a notary or a special committee to reduce the burden on the Algerian courts.

In the end, it can be said that we have tried to develop a vision for how to deal with a new legal phenomenon that may be brought to the Algerian judiciary, with the difficulties that it poses, and we have presented solutions that can be relied on in confronting this phenomenon in a manner that achieves the justice that every litigant is looking for and that every country tries to achieve.

5. Notes

- 1- Decree. No 2016-1907, 28 Dec 2016, relating to the divorce provided for in article 229-1 of the Civil Code and various provisions in matters of inheritance, OJ 29 Dec., text no 62.
- 2- Art. 229-1 du Code civil : “ Lorsque les époux s’entendent sur la rupture du mariage et ses effets, ils constatent, assistés chacun par un avocat, leur accord dans une convention prenant la forme d’un acte sous signature privée contresigné par leurs avocats et établi dans les conditions prévues à l’article 1374. Cette convention est déposée au rang des minutes d’un notaire, qui contrôle le respect des exigences formelles prévues aux 1° à 6° de l’article 229-3. Il s’assure également que le projet de convention n’a pas été signé avant l’expiration du délai de réflexion prévu à l’article 229-4. Ce dépôt donne ses effets à la convention en lui conférant date certaine et force exécutoire ”, French Civil Code, online at : <https://beta.legifrance.gouv.fr>, accessed 19 June 2020.
- 3- S. Ben Achour, Le divorce extrajudiciaire français devant le juge tunisien, une tolérance à contrecœur.... À propos du jugement du tribunal de première instance de Tunis du 14 novembre 2017 (no 86358), *Revue critique de droit international privé* 2(2), (2020): 211-212.
- 4- S. David et al., *Droit et pratique du divorce 2018/2019*, Dalloz, France, 2017, p. 88.
- 5- Ali Filali, *General Theoretical Commitments to the Contract*, Mofem Publishing, Algeria, 2010, p. 49.
- 6- S. David et al., *ibid.*, p. 88.
- 7- *Ibid.* pp. 88-89.
- 8- Art. 54 of the Civil Code, which states: “A contract is an agreement whereby one or several persons are committed towards one or several other people to give, do, or not do something”. See: Law N°. 58-75 of Ramadan.20,1395 corresponding to September 26, 1975 containing the Civil Code amended by Law No. 05-10 of June 20, 2005, *The Official Gazette*, N°. 44, p. 21.; Belhadj El-Arabi, *Contract Theory in the Algerian Civil Code*, University Press Office, Algeria, 2015, p. 52.

- 9- David et al., *ibid.*, p. 88.
- 10- Law N°. 84-81 of June 9, 1984, containing Family Law as amended and supplemented by Ordinance 05-02 of February 27, 2005, Official Gazette, N°. 15, p. 19
- 11- Tarek Ben Anwar Al Salem, *the clear in the provisions of divorce*, Dar al-Iman for printing, publishing and distribution, Alexandria, Egypt, 2004, p. 09
- 12- Verse 19 of Surat Al-Nisaa.
- 13- Tarek Ben Anwar Al Salem, *op.cit.*, p. 10.
- 14- Mustafa Ibrahim Al-Zalami, *The extent of will in divorce, in doctrines, laws and customs during four thousand years*, the 1st edition, Ihsan for publication and distribution, Iraq, 2014, p. 383.
- 15- *Jurisprudence Encyclopedia*, Ministry of Awqaf and Islamic Affairs in Kuwait, 29th Part, 1st Edition, Dar Al-Safwa of Printing, Publishing and Distribution, Egypt, 1993, p. 11.
- 16- Mustafa Ibrahim al-Zalami, *op.cit.*, p. 179.
- 17- “*Khula*” “allowing a wife to obtain final separation by means of a financial settlement paid by her to the recalcitrant husband in compensation, without any proof of harm or maltreatment”, see: O. Arabi, *The Dawning of the Thrid Millennium on Shari'a: Egypt's Law no. 1 of 2000, or Women May Divorce at Will*, Arab Law Quarterly, vol. 16, No 01, 2001, p. 03.
- 18- Abdel-Kader Daouadi, *The Rulings of Family (Between Islamic Jurisprudence and the Algerian Family Law)*, Dar Al-Basayer, Algeria, 2010, p. 319, Abdel-Fattah Muhammad Abu Al-Enein, *The Separation between Spouses and its Types*, Treasures of Knowledge Library, Egypt, p. 188.
- 19- Abd al-Rahman al-Sabouni, *The extent of the couple's freedom to divorce in Islamic Sharia, a comparative study with divine laws and Arab and foreign personal status laws*, 2nd edition, Dar al-Fikr, pp. 521, 570, 572.
- 20- Belhadj Al-Arabi, *op. cit.*, pp. 51.53.
- 21- Al-Ghouthi Ben Malha, *Family Law in the Light of Doctrine and the Judiciary*, 3rd Edition, University Press Office, 2015, p. 28.
- 22- Mustafa Ibrahim al-Zalami, *op.cit.*, pp. 176, 383.
- 23- Belhadj Al-Arabi, *op. Cit.*, pp. 53 et s.
- 24- Art. 37 and 426 of the Civil and Administrative Procedures Law, see: the law N°. 08-09 dated February 25, 2008, containing the Civil and Administrative Procedures Law, Official Gazette, No. 21, 2008.
- 25- Y. Muller, *Le contrat judiciaire en droit privé*, University Paris 1 Panthéon-Sorbonne, France, 1995.
- 26- Decree N°. 20-70 of February 19, 1970, relating to civil status, amended and supplemented.
- 27- The text of Art. 608 of the Civil and Administrative Procedures Law states: “The rules set forth in articles 605 and 606 above do not prejudice the provisions of international treaties and judicial agreements concluded between Algeria and other States”.
- 28- Decree N°. 194-65 of July 29, 1965, which includes ratification of the convention on the enforcement of judgments and extradition of criminals concluded between Algeria and France and the exchange of letters related to the amendment of the Algerian-French judicial protocol of August 28, 1962, Official Gazette N°. 68, p. 962.
- 29- Law No 58-75 dated in Ramadhan, 20 1395 corresponding to Sep, 26, 1975 including the completing amended civil code.
- 30- Abd Al Fattah Mohamed Abo El Einein, *op.cit.*, p. 160
- 31- Abd Rahman El Sabouni, *op.cit.*, pp 588, 590.
- 32- Malika Brika Mennadi, *the extent of recognition of non-judicial divorce in the Algerian Law*, the Mediterranean Dialogue Journal, Vol 10, No 02, June 2019, p. 98.
- 33- Decree N°. 243943 issued on 05/23/2000, and Decree No. 138949 issued on 07/07/1996, see: Supreme Court Decree, File N°. 0813942 issued on 06/13/2013, the Supreme Court Journal, No. 01, 2014, p. 309.
- 34- Boujemaa Hamed, *Proving the Customary Divorce in the Algerian Family Law*, Legal and Political Journal of the Professor Researcher, No. 10, June 2018, Vol 02, Faculty of Law and Political Sciences Faculty of University of Mohamed Boudiaf Univeristy M'Sila, Algeria, p. 766.
- 35- Malika Brika Mennadi, *op. cit.*, pp. 97-98; Boujemaa Hamed, *op.cit.*, pp. 760-761.
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- 51-** S. Ben Achour, op. Cit., p. 225.
- 52-** Supreme Court Decree, File No. 0773081 issued on 11/13/2013, Family and Inheritance Affairs Chamber, Supreme Court Journal, No. 02, 2014, p. 256
- 53-** Abdennour Ahmed, The Role of the International Public Order in Child Protection in Algerian Private International Law, Rais Magazine for Social and Educational Sciences, Vol 06, No. 06, June 2019, Turkey, p. 634; online at: <http://www.ressjournal.com/DergiPdfDetay.aspx?ID=2261>, accessed 21 June 2020.
- 54-** Supreme Council Resolution, File No. 52207 of 01/01/1989, the Judicial Magazine, No. 04, 1990, p. 74.
- 55-** Art. 12, the second paragraph of the Civil Code states: "... the dissolution of marriage and physical separation is exposed to the national law to which the husband belongs at the time the lawsuit is filed."; This article responds to an exception made by Article 13 of the Civil Code, which stipulates: "The Algerian law applies alone in the cases stipulated in Articles 11 and 12 if one of the spouses is Algerian at the time of the marriage, except in respect of the Capacity for marriage".