International Jurisdiction between Nationality and Domicile in Tunisian Private International Law – Has the Perennial Debate Finally been Resolved?

I would like to thank Prof. Lotfi Chedly for providing me with the text of the decision on which this post is based.

I. Introduction

Scholars of private international law are well familiar with the classic debate on nationality and domicile as connecting factors in the choice of applicable law (see, for example, L. I. de Winter, "Nationality or Domicile? The Present State of Affairs" 128 *Collected Cours*es III (1969) pp. 357 ff). In Tunisian private international law, this controversy has been particularly pronounced with regard to the role of nationality as a ground for the international jurisdiction of Tunisian courts. Since the enactment of the Tunisian Private International Law Code ("PILC") in 1998 (for an English translation, see J. Basedow *et al.* (eds.) *Encyclopedia of Private International Law – Vol. IV* (Elgar Editions, 2017) 3895 and my own translation of the provisions dealing with international jurisdiction and the enforcement of foreign judgments in 8 *Journal of Private International Law* 2 (2012) pp. 221 ff)), the debate between opponents and proponents of nationality as a ground for international jurisdiction, especially in family law matters, has never ceased to be intense (for detailed analyses, see eg. Salma Triki, "La compétence internationale tunisienne et le critère de nationalité" in Ben Achour/Triki (eds.), *Le Code de droit international privé – Vingt ans d'application (1998-2018)* (Latrach edition, 2020) 119ff). This divergence in academic opinion is also reflected in the judicial practice of the courts, with the emergence of two opposing trends: one extends the international jurisdiction of the Tunisian courts when the dispute involves a Tunisian party, in particular as a

defendant even when domiciled abroad. The other firmly rejects nationality as a ground for international jurisdiction.

The case commented here illustrates the culmination of this disagreement within the courts. The Supreme Court (*mahkamat al-ta'qib – cour de cassation*), in a second appeal, strongly denied the existence of such a privilege and emphasized the primacy of domicile over nationality as a basis for international jurisdiction in Tunisia. The Court of Appeal, acting as a court of remand, explicitly recognized that the jurisdiction of the Tunisian courts could be based on what is commonly referred to as "privilege of jurisdiction". The Court of Appeal went even further by describing the decision of the Supreme Court, from which the case had been remanded, as "legally incorrect". This stark contrast between the two courts prompted the intervention of the Joint Chambers (*chambres réunies*) of the Supreme Court, which issued what appears to be the first decision of its kind in the field of private international law in Tunisia (*Ruling No. 36665 of 15 June 2023*), signed by 62 judges of the Supreme Court (including the Chief Justice (President of the Court), 21 Presidents of Chambers and 40 other judges as counsellors).

II. Facts

The case concerns a divorce action brought in Tunisia by X (plaintiff husband and appellee in subsequent appeals) against his wife, Y (defendant and appellant in subsequent appeals). The text of the decision indicates that X and Y were married in 2012 and had a child. Moreover, while X's Tunisian nationality appears to be undisputed, there may surprisingly be some doubts about Y's Tunisian nationality, as emerged later in the parties' arguments before the Joint Chambers.

In 2017, the Court of First Instance of Sousse (a city located about 150 km south of the capital Tunis) declared the parties divorced and ordered some measures regarding maintenance, custody and visitation. Dissatisfied, Y appealed to the Court of Appeal of Sousse. In 2018, the court overturned the appealed decision, considering that the Tunisian courts did not have jurisdiction over the dispute. X appealed to the Supreme Court (1st appeal). In its decision issued later in 2018, the Supreme Court overturned the appealed decision with remand, holding that the Court of Appeal did not correctly examine the existence (or not) of a foreign

element in the dispute in order to decline jurisdiction on the grounds that X claimed that the spouses' matrimonial domicile was in Tunisia, where Y lived and worked.

In 2019, the Court of Appeal of Sousse, as the court of remand, accepted jurisdiction and confirmed the decision of the court of first instance with some modifications. Y appealed to the Supreme Court (2nd appeal). Y argued, *inter alia*, that the rules of international jurisdiction laid down in the PILC had been violated, since the spouses' matrimonial domicile was in France and that the couple had only returned to Tunisia during the summer vacations. In 2020, the Supreme Court ruled in favor of Y, stating, *inter alia*, that the Tunisian legislator had made from "the domicile of the defendant the decisive ground for the international jurisdiction of the Tunisian courts". The Court also held that the Court of Appeal had reached an erroneous conclusion based on a misapplication of the facts and a misinterpretation of the law. The case was referred back again to the Court of Appeal.

In 2021, the Court of Appeal, in a frontal opposition, declared that the decision of the Supreme Court, according to which the domicile of the defendant was the ground based on which Tunisian courts could assume international jurisdiction, "cannot be followed" and is "legally incorrect". Then the court affirmed that Tunisian nationals enjoy a "privilege of jurisdiction", and this "means that Tunisian defendants should be subject to their national courts, even if they are domiciled abroad, since the purpose of granting jurisdiction to Tunisian courts in this category of disputes is to ensure better protection of their interests".

Y challenged the decision of the Court of Appeal again before the Supreme Court (3rd appeal). As this was a disagreement between the Court of Appeal and the Supreme Court on a second appeal, the jurisdiction of the Joint Chambers was justified (articles 176 and 177 of the Code of Civil and Commercial Procedure, hereafter "CCCP").

Before the Joint Chambers, Y argued, *inter alia*, that (1) that she was not a Tunisian national but a holder of dual Algerian/French nationality; (2) that the court had also based its decision on the fact that she was resident in Tunisia, ignoring the fact that she had returned to Tunisia only to spend her summer vacation; (3) that she had left Tunisia for France.

On the other hand, X argued that the Court of Appeal was right to hold that disputes in which one of the parties is Tunisian and in which the subject matter concerns matters of personal status fall within the jurisdiction of the Tunisian courts, since matters concerning the family and its protection concern public policy, especially when the dispute also involves a Tunisian minor.

III. Ruling

The Joint Chamber of the Supreme Court held that the Tunisian courts did not have jurisdiction and decided to overturn the decision of the Court of Appeal without further remand. The court ruled as follows (only relevant parts are reproduced here. The gendered style reflects the language used in the text of the Court's decision):

"The dispute concerns the question whether the international jurisdiction of the Tunisian courts should be determined on the basis of the defendant's domicile (*maqarr*), in accordance with Article 3 of the PILC, or on the basis of the privilege of jurisdiction, according to which a Tunisian national is subject to the jurisdiction of his national courts even if he is domiciled abroad.

It goes without saying that in Articles 3 to 10 of the PILC, the legislator has sought to confer jurisdiction on the Tunisian courts on the basis of close connections between the Tunisian legal system and the legal relationship, thereby abolishing the exceptional grounds such as nationality, representation or reciprocity. The reason for the abolition of these exceptional grounds lies in the fact that they do not constitute a genuine connection between the dispute and the Tunisian legal system […].

[…]

As appears from the files of the case, the residence (*iqama*) of Y in France is established either on the basis of the service of the summons […] on her domicile (*maqarr*) in France […] or the judicial admission made by X […] [in which he] admitted that his wife had moved to France where she had settled with their daughter and refused to return to Tunisia.

[However], by considering that the privilege of jurisdiction entails subjecting the

Tunisian defendant to the jurisdiction of his or her national courts, even if he resides (*muqim*) abroad, the remand court misjudged the facts and drew erroneous conclusion, leading to a misunderstanding and misapplication of article 3 of the PILC […]."

IV. Comments

The principle established by the Joint Chamber regarding the role of the defendant's Tunisian nationality as a ground for international jurisdiction can be considered a welcome clarification of the interpretation and application of Tunisian law. However, it must also be said that the decision commented on here contains some intriguing and to some extent confusing features, particularly in the parts of the decision not reproduced above relating to the meaning of and the distinction between "domicile (*maqarr*)" and "residence (*iqama*)". For the sake of brevity, only the issue of nationality as a ground of international jurisdiction will be commented on here.

1. Prior to the Enactment of the PILC

Prior to the enactment of a PILC, nationality – especially that of the defendant – was used as a general ground for international jurisdiction in all disputes brought against Tunisians, even if they were domiciled abroad (former art. 2 of the CCPC). This rule is common in the MENA region and is generally followed even if it is not explicitly stated in the law (For the case of Bahrain, see here, for the case of Morocco, where a new draft code of civil procedure proposes to introduce a similar rule *ex lege*, see here).

2. Nationality as a ground for international jurisdiction under the PILC

The PILC, adopted in 1998, introduced a radical change in this regard by completely excluding nationality as a ground for international jurisdiction (see eg. Imen Gallala-Arndt, "Tunisia", *in* J. Basedow *et al.* (eds.) *Encyclopedia of Private International Law – Vol. III* (Elgar Editions, 2017) p. 2586). Henceforth, the PILC recognizes only one legitimate ground of *general jurisdiction* over any civil or

commercial dispute (including family law disputes) arising between persons *regardless of their nationality*, if the defendant has its "residence (*iqama*)" in Tunisia, although the semi-official French version of the PILC (as officially published in the Official Gazette) refers to "*domicile*" (*maqarr* in Arabic). In literature, there is a general consensus among Tunisian scholars that the word *iqama* (residence) in the Arabic version of article 3 actually means "*maqarr* (domicile)". Case law is, however, quite inconsistent on this issue, with Tunisian courts, including the Supreme Court itself, reaching contradictory decisions on the interpretation and application these basic notions. This issue was addressed in the decision commented here (although in a quite unsatisfactory manner as the Joint Chambers, while distinguishing between "residence" and "domicile", used both notions interchangeably in a particularly intriguing manner). However, this aspect of the decision will not be discussed here.

It is worth mentioning that the solutions introduced in the PILC have attracted the attention of renowned foreign scholars, who have highlighted the peculiarity of the Tunisian solutions in this regard, describing the Tunisian solutions as "interesting" and the exclusion of nationality as ground for international jurisdiction in all matters, including family law disputes, as "courageous" (see eg., Diego P. Fernando Arroyo, "Compétence exclusive et compétence exorbitantes dans les relations privées internationales" 323 *Collected Courses* 2006, pp. 140-141).

3. Judicial Application

However, as soon as the PILC entered into force, a trend developed in judicial practice whereby Tunisian courts at all levels showed a willingness to extend their jurisdiction when the dispute involved Tunisian nationals. At the same time, there has been a parallel trend whereby some courts, also at all levels, have strictly adhered to the new policy of international jurisdiction and have refused to assume jurisdiction whenever it appeared that the defendant (whether a a Tunisian national or not) was domiciled abroad. (For a detailed analysis with different scenarios and cases, see Souhayma Ben Achour, "L'accès à la justice tunisienne en droit international privé tunisien" *in* Ben Achour/Ben Jemia (dir.), *Droit fondamentaux & droit international privé* (La Maison du Livre, 2016) pp. 11 ff).

a. Regarding the former, Tunisian judges have used various approaches and methods to circumvent the law and extend their jurisdiction beyond the limits set by the PILC. For example:

- In some cases, the courts have simply denied the international nature of the dispute on the grounds that all the parties were Tunisian, even though it was established that all or some of the parties (particularly the defendant) were domiciled abroad (see eg. *Supreme Court, Ruling No. 12295 of 14 February 2002*).
- In other cases, the courts have inferred a tacit submission to the jurisdiction of the Tunisian courts, even in the absence of the appearance of the defendant (often a foreign wife) (see eg. *First Instance Court of Tunis, Ruling No. 30605 of 18 January 2000*).
- In some other cases, the courts have confirmed their jurisdiction either on the basis of
    - the choice-of-law rules, according to which personal status shall be governed by the *lex patriae* of the parties (*Supreme Court, Ruling No. 3181 of 22 October 2004*), or,
    - on the basis of the rules of indirect jurisdiction laid down in bilateral conventions on mutual judicial assistance, knowing that these conventions do not contain rules of direct jurisdiction (see eg., *Supreme Court, Ruling No. 6238 of 23 December 2004*).
- More problematically, some courts have relied on the "place of performance" as a ground for international jurisdiction in contractual matters, considering the marriage to be a "contract" and its "performance" to have taken place in Tunisia when the parties consummated the marriage or established their matrimonial residence/domicile there (see eg. *First Instance Court of Tunis, Ruling No. 77280 of 12 July 2010*).
- In some cases, the courts have invoked *forum necessitatis* to extend their jurisdiction without indicating whether the requirements of its invocation were met (see eg. *First Instance Court of Tunis, Ruling No. 75738 of 22 February 2010*).
- Last but not least, in some cases, and in direct violation of the law, the courts have declared themselves to be the "natural" courts in family law disputes involving Tunisians, and that their jurisdiction could be based on the idea of "jurisdictional privilege" based on the Tunisian nationality of

the defendant (see eg., *Tunis Court of Appeal, Ruling No. 76011 of 12 November 2008*) (interestingly, the grounds invoked here are similar to those invoked by the Bahraini courts here).

All these cases, and many others (see eg., Ben Achour *op. cit.*), have given the impression that Tunisian courts would go to any lengths to assume jurisdiction over disputes involving Tunisians in family law matters (cf., eg., Sami Bostanji, "Brefs propos sur un traité maltraité" *Revue tunisienne de droit*, 2005, p. 347).

b. This trend should not, however, be allowed to overshadow another that has also developed in parallel as mentioned above. The Supreme Court itself, despite some inconsistencies in its case law, has reaffirmed on several occasions that the jurisdiction of the Tunisian courts can be established only on the basis of the rules laid down in the CPIL, thereby rejecting the idea of nationality as an additional ground of jurisdiction in disputes involving Tunisian nationals (see eg., *Supreme Court, Ruling No. 32684 of 4 June 2009*).

c. In this respect, the decision of the Joint Chambers is likely to bring some order to the judicial cacophony on this issue, although it may not put an end to the ongoing debate and divergence of opinions among legal practitioners and scholars on the relevance of nationality as a criterion of international jurisdiction. Moreover, the tendency of some judges – sometimes described as "conservative" (cf. Arroyo *op. cit.*) – to continue to assume jurisdiction in disputes involving Tunisians (particularly in family law disputes) seems to be so entrenched that some scholars in Tunisia have described it as a "movement of resistance" against the legislative policy of the State (cf. eg. Lotfi Chedly, "Droit d'accès à la justice tunisienne dans les relations internationales de famille et for nationalité" *in Mélanges offerts à Dali Jazi* (Centre de Publication Universitaire, 2010) p. 264). This state of affairs has led some leading authors in Tunisia to question the state's policy of excluding nationality altogether, even in family law disputes. One of the arguments put forward is that nationality in family law disputes is not an excessive ground for jurisdiction and is widely used in other legal systems (for the various arguments in favor of nationality, see Triki, *op. cit.*).

4. Legislative amendment?

These voices found their way into two legislative proposals in 2010 and 2019 to

amend the PILC and introduce nationality as a ground for international jurisdiction in divorce cases (on the 2019 proposal, its background and peculiarities, see *Triki, op. cit.*). However, these attempts were unsuccessful, mainly due to the unstable political situation in Tunisia (the outbreak of the Tunisian revolution at the end of 2010 and the political crisis that led to the dissolution of the parliament and the suspension of the post-revolutionary constitution of 2014 in 2021). In this general context, and despite the decision of the Joint Chambers, it would not be surprising if some courts persisted in extending their jurisdiction in a disguised manner, based on the methods they themselves have developed to circumvent the constraint imposed by the PILC, when the dispute – particularly in matters of family law – involves Tunisians.