

خدمات أكاديمية

كفاءات وطنية

معايير عالمية

دراسة
للإستشارات والدراسات والترجمة

UNIVERSITY

drasah 1 | 00966555026526

00966560972772

www.drasah.com | info@drasah.com

خدماتنا



توفير المراجع العربية والأجنبية



التحليل الاحصائي وتفسير النتائج

الاستشارات الأكاديمية



جمع المادة العلمية

الترجمة المعتمدة



 drasah1

 Info@drasah.com

 00966555026526

 00966560972772

 drasah.com



دراسة

للاستشارات والدراسات والترجمة



تواصل معنا



00966555026526

00966560972772



متواجدون على مدار الساعة

Divorce in Tunisian law

الطلاق في القانون التونسي

منى القرقوري - Mouna GARGOURI

Doctoral researcher in private law at the Faculty of law in Sfax -Tunisia

باحثة دكتوراه في القانون الخاص بكلية الحقوق بصفاقس - تونس

Abstract:

Due to the high number of divorce cases recorded in recent years, whether in the Arab world in general, or in Tunisia in particular, this topic has become one of the most researched topics by society. Therefore, the aim of this research is to shed light on the legal system of this issue, in a succinct form, as well as, simplified through Tunisian law.

الملخص:

بسبب ارتفاع حالات الطلاق المسجلة في السنوات الأخيرة سواء في العالم العربي بصفة عامة، أو في البلاد التونسية بصفة خاصة، فإن هذا الموضوع أصبح من أكثر المواضيع بحثا من قبل المجتمع؛ لذلك فإن الهدف من هذا البحث هو تسليط الضوء على النظام القانوني لهذه المسألة، وذلك بشكل موجز، وكذلك، مبسط من خلال القانون التونسي.

Introduction:

1 - Divorce is an important family event because the family's situation changes radically⁴⁸⁹. So it is a social problem that threatens the network of social relations within the family and in society as a whole, and even threatens the entire family entity, through the social and psychological effects it has, and it is, also, considered the socially acceptable way to end the failed marriage project, so that it gives the spouses another opportunity to establish a new marital relationship⁴⁹⁰.

⁴⁸⁹ Look: **Kamal BOUGHERRA**, Divorce, A socio-anthropological introduction to the study of the phenomenon, (In the Arabic language), Revival Magazine, thirteenth issue, 01/12/2009, page 387, posted online in Algerian scientific journal platform visited on: 28/11/2022, The link: <https://www.asjp.cerist.dz/en/downArticle/92/11/1/13733>.

⁴⁹⁰ Look: **Kamal BOUGHERRA**, Previous article, page 387.

So, divorce can be defined as the event that ends the marital relationship between a man and a woman⁴⁹¹. And in the same context, the Tunisian legislator is defined it in the article 29⁴⁹² of the personal status code, as meaning, the dissolution of the marriage contract⁴⁹³. So, although this definition is correct, but it is incomplete because marriage can be dissolved, also, by death or annulment⁴⁹⁴. Therefore, it should have been said that divorce is the dissolution of the knot of a valid marriage while the spouses are alive⁴⁹⁵.

2 – And any way, the divorce differs from the dislocation because the latter is defined as an action which is filed by the wife against her husband if she hates life with him and there is no hope that the life will continue between them and, also, the wife fears that the limits of God will not be fulfilled. So, in this case, the wife promises to return the dowry to the husband and waive all her legitimate rights⁴⁹⁶.

3 - And in general, the study of this topic requires exposure to the following question: **What is the legal system of divorce in Tunisian law?** Thus, the answer of this question requires exposure to divorce cases (I), and to divorce procedures and its effects (II).

I – Cases of divorce

4 - The study of divorce cases requires exposure to the case of divorce by mutual

consent (1), and to the cases of non-consensual divorce (2).

1 – Divorce by mutual consent

5 – The Tunisian legislator is explicitly adopted the case of divorce by mutual consent in the article 31 in its paragraph 1⁴⁹⁷ of the personal status code. So this case may be defined that the two parties agree together to divorce and dissolve the contract that their mutual will previously agreed to conclude, which is considered an embodiment of the contractual basis of marriage, so

⁴⁹¹ Look: **Kamal BOUGHERRA**, Previous article, page 387.

⁴⁹² جاء بالفصل المذكور ما يلي: «الطلاق هو حل عقدة الزواج».

⁴⁹³ Look: **Sassi BEN HALIMA**, Lectures on personal status law, (In the Arabic language), University publishing center, Tunisia, 2011, page 89.

⁴⁹⁴ Look : **Sassi BEN HALIMA**, previous lectures, 89.

⁴⁹⁵ Look : **Sassi BEN HALIMA**, previous lectures, 89.

⁴⁹⁶ Look: **lythar Moussa**, Definition of dislocation and what it means to dislocate her husband by force of law, (In the Arabic language), 05/02/2017, page 1, posted online, visited on: 27/11/2022, The link: <https://2u.pw/qQs7f9>.

⁴⁹⁷ جاء بالفصل المذكور ما يلي: «يحكم بالطلاق: 1- بتراضي الزوجين...».

they have no choice but to resort to the judiciary to give an official and legal character to this agreement⁴⁹⁸.

And in this context, it should be remarked, that this case is considered the least one that raises problems because usually the two parties agree on the origin of the divorce as well as its effects⁴⁹⁹. But, also, it must be noted, that if the agreement of the parties on the origin of the divorce obligates the judge, their agreement on the effects of divorce does not bind him if it conflicts with the interest of minor children, so the judge can monitor the agreement of the parties and he is able to amend it⁵⁰⁰.

6 – And in all, it must be affirmed, that the advantage of divorce by agreement or in otherwise known as by amicable divorce is that the court does not have the discretion to decide the origin of the divorce, and the spouses do not need to disclose the reason for the divorce request, and if the conciliatory attempt fails and the two parties insist on their request, it must declare obligatory the divorce⁵⁰¹.

2 - Cases of non-consensual divorce

7 - In Tunisian law, the cases of non-consensual divorce are “divorce due to damage” and “divorce on a whim”.

8 - For the case of divorce due to damage, the legislator is explicitly adopted this case and inserted it into the second paragraph of the article 31⁵⁰² of the personal status code. And in general, this case can be defined that the plaintiff in the divorce case maintains that the defendant has caused him harm that enables him to request the divorce⁵⁰³.

9 – Or for the case of divorce on a whim, the legislator is, also, explicitly adopted this case and inserted it into the third paragraph of the article 31⁵⁰⁴ of

⁴⁹⁸ Look : **Lamia GALLALI**, Family law (In the Arabic language), 2017 – 2018, page 216, posted online, visited on: 17/11/2022, the link: <https://drive.google.com/file/d/1po4pUPz9vcgV6WHtMrXEzU789EKzvBsX/view>.

⁴⁹⁹ Look : **Lamia GALLALI**, Previous lectures, page 216.

⁵⁰⁰ Look : **Lamia GALLALI**, Previous lectures, page 216.

⁵⁰¹ Look : **Lamia GALLALI**, Previous lectures, page 216 and following.

⁵⁰² جاء بالفصل المذكور ما يلي: «يحكم بالطلاق: 2... - بناء على طلب أحد الزوجين بسبب ما حصل له من ضرر...».

⁵⁰³ Look : **Mohamed TRIKI**, Damage in a divorce suit (In the Arabic language), Journal of judiciary and legislation, 05/1998, page 111.

And for more information about this case: Look: **Fawzi BALKANANI**, Divorce and damage, memorandum for obtaining a certificate of in-depth studies, Faculty of Law and Political Science of Tunis, 1987 – 1988.

⁵⁰⁴ جاء بالفصل المذكور ما يلي: «يحكم بالطلاق: 3... - بناء على رغبة الزوج إنشاء الطلاق أو مطالبة الزوجة به».

the personal status code. Thus, in general, this case can be defined as a request for divorce from the husband or the wife⁵⁰⁵.

And in the same context, it must be confirmed and, also, noted, that in this case, the court may not refuse to rule on divorce, so it must only, or rather the family judge, tries to reconcile the spouses, but if the conciliatory attempt fails, the court becomes obligated to authorize the divorce⁵⁰⁶.

II – Divorce procedures and its effects

10 – The study of divorce procedures and its effects requires exposure to divorce procedures (1), and to the effects of divorce (2).

1 – Divorce procedures

11 - The personal status code is stated in its article 30⁵⁰⁷ that divorce takes place only in the court; and this divorce is not judged until after the procedures have passed in two phases: The first one is named “the conciliatory phase”, and the second is named “the judgmental phase”⁵⁰⁸.

12 - As for the conciliatory phase, and in application of the article 32⁵⁰⁹ of the personal status code, the judge tries to reconcile between the spouses, and the legislator says that it is possible to seek the assistance of persons in order to reach reconciliation between spouses⁵¹⁰.

And in all, the judge moves on to taking immediate decisions concerning “the couple’s residence”, “custody”, “visitation rights”, and “alimony”⁵¹¹.

13 – Or as for the judgmental phase which meaning that the department of personal status at the court of the first instance looks at the cases of divorce with their tripartite structure⁵¹².

And in general, the preliminary rulings in divorce are subject to appeal and, also, to cassation⁵¹³.

⁵⁰⁵ Look : **Hajer AL-HASHIRI YAQOUB**, A woman’s right to divorce (In the Arabic language), 24/08/2015, posted online, visited on: 19/11/2022, the link: https://maitremahmoudyacoub.blogspot.com/2015/08/blog-post_53.html.

⁵⁰⁶ Look: **Sassi BEN HALIMA**, Previous lectures, p. 105.

⁵⁰⁷ جاء بالفصل المذكور أعلاه ما يلي: «لا يقع الطلاق إلا لدى المحكمة».

⁵⁰⁸ Look: **Sassi BEN HALIMA**, Previous lectures, p. 106.

⁵⁰⁹ جاء بالفصل المذكور ما يلي: «...ولا يحكم بالطلاق إلا بعد أن يبذل قاضي الأسرة جهدا في محاولة الصلح بين الزوجين ويعجز عن ذلك. ولقاضي الأسرة بناء على موافقة الزوجين المتنازعين، أن يستعين بمصالح عائلي،...».

⁵¹⁰ Look: **Sassi BEN HALIMA**, Previous lectures, page 106; **Sassi BEN HALIMA**, The conciliation session on the meaning of the provisions of article 32 of the personal status code, (In the Arabic language), Tunisian law journal, 1976, the second part, page 32; **Sassi BEN HALIMA**, The role of the family judge in divorce cases, Journal of judiciary and legislation, number 1, 1994, page 25.

⁵¹¹ Look: **Sassi BEN HALIMA**, Previous lectures, page 110.

⁵¹² Look: **Sassi BEN HALIMA**, Previous lectures, page 113.

2 – The effects of divorce

14 - If a divorce ruling is issued, the marriage relationship is dissolved for the future, and that meaning all the effects resulting from the marriage⁵¹⁴ remain for the past, and as for the future the spouses become aliens from each other⁵¹⁵. And in this context, it must be noted, that divorce can produce two types of effects: The first one is named “the material effects” and the second is named “the non-material effects”⁵¹⁶.

15 – For the material effects which are “Compensation for damage”, “alimony of iddah”, “gifts”, and “house belongings”⁵¹⁷.

As for the compensation for damage and in accordance of the article 31⁵¹⁸ of personal status code, the latter is provided for the material and moral damage and is caused by divorce on a whim or in divorce due to damage⁵¹⁹.

And as for the alimony of iddah, the Tunisian legislator is approved for the wife an alimony after divorce for the duration of the iddah pursuant to the article 38⁵²⁰ of the personal status code⁵²¹.

And as for the recovery of the gifts, the Tunisian legislator is regulated this subject in the article 28⁵²² of personal status code and in this context, it must be noted, that this article is distinguished between two forms: For the first form: Divorce is occurred after entry, so none of the gifts given by one spouse can be retrieved to the other⁵²³. And as for the second form: Divorce is occurred before entry, so the partner who don't cause divorce can retrieve the remaining gifts from the other partner⁵²⁴.

⁵¹³ Look: **Sassi BEN HALIMA**, Previous lectures, page 114 and following.

⁵¹⁴ Voir : **Michel ANDRE** : «Modèles sociologiques de la famille dans les sociétés contemporaines», Archives de philosophie de droit : réformes du droit de la famille, 1975, page 127.

⁵¹⁵ Look: **Sassi BEN HALIMA**, Previous lectures, page 116.

⁵¹⁶ Look: **Sassi BEN HALIMA**, Previous lectures, page 220.

⁵¹⁷ Look : **Sami ayadi**, Personal status lectures, (In the Arabic language), Faculty of law in Sfax, unpublished, 2015 – 2016, page 91.

⁵¹⁸ جاء بالفصل المذكور ما يلي: «ويقتضى لمن تضرر من الزوجين بتعويض عن الضرر المادي والمعنوي الناجم عن الطلاق في الحالتين المبينتين بالفقرتين الثانية والثالثة أعلاه».

⁵¹⁹ Look : **Sami ayadi**, Previous lectures, page 91.

⁵²⁰ جاء بالفصل المذكور ما يلي: «يجب على الزوج أن ينفق على زوجته المدخول بها وعلى مفارقتها مدة عدتها».

⁵²¹ Look : **Sami ayadi**, Previous lectures, page 91.

⁵²² جاء بالفصل المذكور ما يلي: «الهدايا التي يعطيها كل واحد من الزوجين للآخر بعد العقد يتم استرداد ما بقي منها قائما ولو تغير إذا وقع الفسخ قبل البناء بسبب من الطرف الآخر. ولا يتم استرجاع شيء منها بعد الدخول».

⁵²³ Look : **Sami ayadi**, Previous lectures, page 92.

⁵²⁴ Look : **Sami ayadi**, Previous lectures, page 92.

And, finally, as for the house belongings, the Tunisian legislator is regulated what can arise from a dispute over the belongings of the house in the case of divorce by the article 26⁵²⁵ of personal status code⁵²⁶.

16 – Or for the non-material effects of divorce which is only the custody, the legislator is regulated this subject in the article 54⁵²⁷ of the personal status code and he is defined it as the preservation of the child's home and upbringing him⁵²⁸. And in the same context, The Tunisian jurisprudence is defined, also,

⁵²⁵ جاء بالفصل المذكور ما يلي: «إذا اختلف الزوجان في متاع البيت ولا بينة لهما فالقول للزوج بيمينه في المعتاد للرجال وللزوجة بيمينها في المعتاد للنساء وإن كان من البضائع التجارية فهو لمن يتعاطى التجارة منهما بيمينه. أما في المعتاد للرجال والنساء معا فيحلف فيه كل منهما ويقتسمانه».

⁵²⁶ Look : **Sami ayadi**, Previous lectures, page 92.

⁵²⁷ جاء بالفصل المذكور ما يلي: «الحضانة حفظ الولد في مبيته والقيام بتربيته».

⁵²⁸ And for mor⁵²⁸ Look: **Kamal BOUGHERRA**, Divorce, A socio-anthropological introduction to the study of the phenomenon, (In the Arabic language), Revival Magazine, thirteenth issue, 01/12/2009, page 387, posted online in Algerian scientific journal platform visited on: 28/11/2022, The link: <https://www.asjp.cerist.dz/en/downArticle/92/11/1/13733>.

⁵²⁸ Look: **Kamal BOUGHERRA**, Previous article, page 387.

⁵²⁸ Look: **Kamal BOUGHERRA**, Previous article, page 387.

⁵²⁸ جاء بالفصل المذكور ما يلي: «الطلاق هو حل عقدة الزواج».

⁵²⁸ Look: **Sassi BEN HALIMA**, Lectures on personal status law, (In the Arabic language), University publishing center, Tunisia, 2011, page 89.

⁵²⁸ Look : **Sassi BEN HALIMA**, previous lectures, 89.

⁵²⁸ Look : **Sassi BEN HALIMA**, previous lectures, 89.

⁵²⁸ Look: **Iytha Moussa**, Definition of dislocation and what it means to dislocate her husband by force of law, (In the Arabic language), 05/02/2017, page 1, posted online, visited on: 27/11/2022, The link: <https://2u.pw/qQs7f9>.

⁵²⁸ جاء بالفصل المذكور ما يلي: «يحكم بالطلاق: 1- بتراضي الزوجين...».

⁵²⁸ Look : **Lamia GALLALI**, Family law (In the Arabic language), 2017 – 2018, page 216, posted online, visited on: 17/11/2022, the link:

<https://drive.google.com/file/d/1po4pUPz9vcgV6WHtMrXEzU789EKzvBsX/view>.

⁵²⁸ Look : **Lamia GALLALI**, Previous lectures, page 216.

⁵²⁸ Look : **Lamia GALLALI**, Previous lectures, page 216.

⁵²⁸ Look : **Lamia GALLALI**, Previous lectures, page 216 and following.

⁵²⁸ جاء بالفصل المذكور ما يلي: «يحكم بالطلاق: 2... - بناء على طلب أحد الزوجين بسبب ما حصل له من ضرر...».

⁵²⁸ Look : **Mohamed TRIKI**, Damage in a divorce suit (In the Arabic language), Journal of judiciary and legislation, 05/1998, page 111.

And for more information about this case: Look: **Fawzi BALKANANI**, Divorce and damage, memorandum for obtaining a certificate of in-depth studies, Faculty of Law and Political Science of Tunis, 1987 – 1988.

⁵²⁸ جاء بالفصل المذكور ما يلي: «يحكم بالطلاق: 3... - بناء على رغبة الزوج إنشاء الطلاق أو مطالبة الزوجة به».

⁵²⁸ Look : **Hajer AL-HASHIRI YAQOUB**, A woman's right to divorce (In the Arabic language), 24/08/2015, posted online, visited on: 19/11/2022, the link: https://maitremahmoudyacoub.blogspot.com/2015/08/blog-post_53.html.

⁵²⁸ Look: **Sassi BEN HALIMA**, Previous lectures, p. 105.

⁵²⁸ جاء بالفصل المذكور أعلاه ما يلي: «لا يقع الطلاق إلا لدى المحكمة».

⁵²⁸ Look: **Sassi BEN HALIMA**, Previous lectures, p. 106.

⁵²⁸ جاء بالفصل المذكور ما يلي: «...ولا يحكم بالطلاق إلا بعد أن يبذل قاضي الأسرة جهدا في محاولة الصلح بين الزوجين ويعجز عن ذلك. ولقاضي الأسرة بناء على موافقة الزوجين المتنازعين، أن يستعين بمصالح عائلي...».

the custody as meaning of protecting the young from what can harm him psychologically and mentally and, in addition, undertaking to do what is good for him⁵²⁹.

Conclusion:

17 - And in general, considering that the divorce has become a common and increasing phenomenon in society, therefore, this research wanted to shed light on the legal divorce system through Tunisian law and thus by clarifying its cases and procedures as well as its effects.

⁵²⁸ Look: **Sassi BEN HALIMA**, Previous lectures, page 106; **Sassi BEN HALIMA**, The conciliation session on the meaning of the provisions of article 32 of the personal status code, (In the Arabic language), Tunisian law journal, 1976, the second part, page 32; **Sassi BEN HALIMA**, The role of the family judge in divorce cases, Journal of judiciary and legislation, number 1, 1994, page 25.

⁵²⁸ Look: **Sassi BEN HALIMA**, Previous lectures, page 110.

⁵²⁸ Look: **Sassi BEN HALIMA**, Previous lectures, page 113.

⁵²⁸ Look: **Sassi BEN HALIMA**, Previous lectures, page 114 and following.

⁵²⁸ Voir : **Michel ANDRE** : «Modèles sociologiques de la famille dans les sociétés contemporaines», Archives de philosophie de droit : réformes du droit de la famille, 1975, page 127.

⁵²⁸ Look: **Sassi BEN HALIMA**, Previous lectures, page 116.

⁵²⁸ Look: **Sassi BEN HALIMA**, Previous lectures, page 220.

⁵²⁸ Look : **Sami ayadi**, Personal status lectures, (In the Arabic language), Faculty of law in Sfax, unpublished, 2015 – 2016, page 91.

⁵²⁸ جاء بالفصل المذكور ما يلي: «ويقضى لمن تضرر من الزوجين بتعويض عن الضرر المادي والمعنوي الناجم عن الطلاق في الحالتين المبينتين بالفقرتين الثانية والثالثة أعلاه».

⁵²⁸ Look : **Sami ayadi**, Previous lectures, page 91.

⁵²⁸ جاء بالفصل المذكور ما يلي: «يجب على الزوج أن ينفق على زوجته المدخول بها وعلى مفارقتها مدة عدتها».

⁵²⁸ Look : **Sami ayadi**, Previous lectures, page 91.

⁵²⁸ جاء بالفصل المذكور ما يلي: «الهدايا التي يعطيها كل واحد من الزوجين للآخر بعد العقد يتم استرداد ما بقي منها قائما ولو تغير إذا وقع الفسخ قبل البناء بسبب من الطرف الآخر. ولا يتم استرجاع شيء منها بعد الدخول».

⁵²⁸ Look : **Sami ayadi**, Previous lectures, page 92.

⁵²⁸ Look : **Sami ayadi**, Previous lectures, page 92.

⁵²⁸ جاء بالفصل المذكور ما يلي: «إذا اختلف الزوجان في متاع البيت ولا بينة لهما فالقول للزوج بيمينه في المعتاد للرجال وللزوجة بيمينها في المعتاد للنساء وإن كان من البضائع التجارية فهو لمن يتعاطى التجارة منهما بيمينه. أما في المعتاد للرجال والنساء معا فيحلف فيه كل منهما ويقتسمانه».

⁵²⁸ Look : **Sami ayadi**, Previous lectures, page 92.

⁵²⁸ جاء بالفصل المذكور ما يلي: «الحضانة حفظ الولد في مبيته والقيام بتربيته».

e information about this subject: Look: **Al-Bashir al-Farshishi**, thoughts on custody in Tunisian jurisprudence, Journal of the Judiciary and legislation, 1978, page 10; **Hadi Mehresi**, Custody, Journal of the Judiciary and legislation, 1959, page 15.

⁵²⁹ أنظر: قرار تعقيبي مدني عدد 36815، بتاريخ 1993/03/08، ن. 1993، مجلة القضاء والتشريع، صفحة 294.

List of references :

*** En langue Française :**

- Articles :

- Michel ANDRE : «Modèles sociologiques de la famille dans les sociétés contemporaines», Archives de philosophie de droit : réformes du droit de la famille, 1975.

*** باللغة العربية:**

- مذكرات وأطروحات:
+ فوزي بالكناني، الطلاق والضرر، مذكرة للحصول على شهادة الدراسات المعمقة، كلية الحقوق والعلوم السياسية بتونس، 1987 – 1988.
- المقالات:

+ البشير الفرشيشي، خواطر حول الحضانة في فقه القضاء التونسي، مجلة القضاء والتشريع، 1978.
+ الهادي المحيرصي، الحضانة، مجلة القضاء والتشريع، فيفري 1959.
+ ايثار موسى، تعريف الخلع وماذا يعني أن تخلع الزوجة زوجها بقوة القانون، بدون دار ومكان نشر، 2017/02/05، منشور على الانترنت:

<https://2u.pw/qQs7f9>.

+ ساسي بن حليلة، الجلسة الصلحية على معنى أحكام الفصل 32 مجلة الأحوال الشخصية، مجلة القانون التونسية، 1976، الجزء الثاني.
+ ساسي بن حليلة، دور قاضي الأسرة الصلحي في قضايا الطلاق، مجلة القضاء والتشريع، عدد 1، 1994.

+ كمال بوقرة، الطلاق، مدخل سوسيو أنثروبولوجي لدراسة الظاهرة، مجلة الإحياء، العدد الثالث عشر، 2009/12/01، منشور على الانترنت في موقع Algerian scientific journal platform، الرابط:
<https://www.asjp.cerist.dz/en/downArticle/92/11/1/13733>.

+ محمد التريكي، الضرر في دعوى الطلاق، مجلة القضاء والتشريع، 1998/5.
+ هاجر الهيشري يعقوب، حق المرأة في الطلاق، بدون دار ومكان نشر، 2015/08/24، منشور على الانترنت، الرابط،

https://maitremahmoudyacoub.blogspot.com/2015/08/blog-post_53.html .

- المحاضرات:

+ ساسي بن حليلة، محاضرات في قانون الأحوال الشخصية، مركز النشر الجامعي، تونس، 2011.
+ سامي العيادي، محاضرات في الأحوال الشخصية، كلية الحقوق بصفافس، غير منشورة، 2015 – 2016.

+ لمياء القلالي، قانون العائلة، بدون دار ومكان نشر، منشورة على الانترنت، الرابط،
<https://drive.google.com/file/d/1po4pUPz9vcgV6WHtMrXEzU789EKzvBsX/view>.