



AENSI Journals

Journal of Applied Science and Agriculture

ISSN 1816-9112

Journal home page: www.aensiweb.com/jasa/index.html

An Investigation of Divorce in the Law and Religious Jurisprudence; the Case of Iran

¹Mehdi Ghavidel, ²Ali Ale-Booye, ³Masoud Moradi

¹Department of Law, Science and Research Branch, Islamic Azad University, Sistan and Baluchestan, Iran.

²Department of Law, Science and Research Branch, Islamic Azad University, Sistan and Baluchestan, Iran.

³Department of Law, Science and Research Branch, Islamic Azad University, Sistan and Baluchestan, Iran.

ARTICLE INFO

Article history:

Received 14 November 2013

Received in revised form 16

December 2013

Accepted 20 December 2013

Available online 1 March 2014

Keywords:

Divorce, Law Jurisprudence

Religious Jurisprudence Iran

ABSTRACT

Background: Divorce is the right of man, but in some cases this right can be given to the woman and she can divorce without the interference and authority of man. **Objective:** The aim of this study is mention of conditions of this right for woman and specification of its instances. **Results:** We have investigated the divorce in the law and religious jurisprudence. **Conclusion:** it can be said that the definition set forth in the 1130th Article of Civil Code about distress and constriction is not complete, and stipulation of “normally is not tolerable” should come along with “hardship”. But in current situation, the wife with little difficulty in her life can refer to the Islamic judge and request for a divorce, and if the judge just look at the appearance of this Article and does not fully examine its jurisprudential basis and definition can issue verdict of divorce while he has no such authority.

© 2014 AENSI Publisher All rights reserved.

To Cite This Article: Mehdi Ghavidel, Ali Ale-Booye, Masoud Moradi., An Investigation of Divorce in the Law and Religious Jurisprudence; the Case of Iran. *J. Appl. Sci. & Agric.*, 9(1): 240-244, 2014

INTRODUCTION

Law is considered as an institution that it is created to manage and control the human relationship (Alaei Fatemeh, 2002). The family rights is an important part of knowledge achievement that from long time ago and especially in recent centuries, has a prominent place in the modern and ancient rights (Mansour Jahangir, 2007). The importance of family in the history of the nations is very high, and the political, social and philosophical ideologies were not needless to address it (Mirdadashi Mehdi, 2002). Divorce is one of the most important issues in subject of family, which has been much discussed in the law and the religious jurisprudence, and several opinions have been proposed about various aspects of it (Mousavi Bojnordi Mirza Hasan, 2012). The second chapter of the Civil Code of Iran is about the dissolution of marriage. Complexity of social relations in the present era has a direct impact on the family and its aspects such as maintenance, dissolution, custody of children, divorce and etc (Mousavi Bojnordi Mirza Hasan, 2012). In this regard, it should be said that law is silent about many issues related to the family Rights including divorce, and also the religious jurisprudence proposed no comment or opinion or it expressed contradictory verdict about this subject (Mansour Jahangir, 2007). In this study, it has been tried to address this subject in logical and scientific way, and simultaneously by comparative study with Imamiye jurisprudence and considering the social, religious, cultural and historical condition of the Iran, effects of dissolution of marriage, laws, rules, legal doctrine, and judicial procedures of both legal systems is studied, and also some appropriate strategies are proposed. In this regard, this study will look at the different types of divorce from various viewpoints, and elements of divorce and their conditions will be discussed. The issue of attorney in divorce is a discussion that during it we will discuss the delegation of woman in her divorce. Iddah or Iddat of woman is an absolute religious law that a lot of content have been expressed about start time and duration of it. Divorce and each aspects of it have various effects that all of them have been investigated in this study.

Methodology:

Questions of study:

- 1- What is the nature of divorce in the law and religious jurisprudence?
- 2- What are the causes of divorce in the law and religious jurisprudence?
- 3- What are the legal effects of divorce?

Corresponding Author: Mehdi Ghavidel, Department of Law, Science and Research Branch, Islamic Azad University, Sistan and Baluchestan, Iran

Research hypotheses:

- 1- Divorce is one of unilateral obligations in accordance with provisions of the Civil Code and Imamiye jurisprudence.
- 2- The causes of divorce in the Civil Code of Iran and religious jurisprudence are in the three categories. Cases in which divorce is will of man, Cases in which divorce is will of woman, and cases in which divorce is agreed by both sides.
- 3- Divorce depending on being revocable or irrevocable has different effects such as shared housing in revocable divorce, maintenance of Iddah period, remuneration of marriage period.

Research Methodology:

Research Methodology of this study is analytical method. On this basis, first content will be expressed, then, supporting and opposing opinions will be expressed and analyzed.

*Results:**First topic: Terms of Divorce:*

Divorce like other legal enforcement needs some conditions. These conditions are categorized in three part. Conditions of unilateral obligation of divorce, conditions of absolute, conditions of divorced woman.

First speech: conditions related to soul of divorce:

One of legal enforcement that in civil code of Iran is ritual is unilateral obligation of divorce. Divorce from aspect of presence of just witness during implementation of divorce and also from aspect of manner of expression and particular word is ritual.

The first clause: necessity of presence of two just men witness:

Divorce from this aspect that two just men witness should hear the divorce is ritual. 134th Article of Civil Code of Iran noted that at least two just men witness should hear the divorce. Witnesses who testify in divorce, firstly they should be man, and secondly they should hear, and thirdly they should be just witnesses. The best way to prove event of divorce is presence of two just men witness (230th Article) which legislator is considered necessary the presence of them during unilateral obligation of divorce. Legislator has no provision on whether witnesses should know the couple, but in the Sharia, sometimes this condition has been referred.

The reason of necessity of presence of two just men witness during divorce and the absence of such obligation for marriage is that presence of them during divorce sometimes leads to delay or greater precision in divorce, and maybe this matter leads to determent of man from divorce. In marriage, Islam does not want to delay the marriage. It should be noted that absent of necessity of testimony of witnesses at the marriage is one of privileges of Shiite Jurisprudence, but Sunnis consider obligatory the presence of just witnesses in marriage. It seems that conditions of divorce, even where divorce is judicial, must be met.

The second clause: The necessity of expression of special words:

Divorce from this aspect that must be performed in the actual form of utterance and clear and precise wording is ritual. 1134th Article of Civil Code of Iran states that:

<< The divorce must be performed in the actual form of utterance and...>>

This Article specify the obligation of actual form of utterance. If an individual is unable to utter, divorce can be performed with his permission. Method of divorce is that man in presence of two just men witnesses states: 'I divorce you' or 'you are divorced'. The husband can do these either by himself or through a messenger.

Because divorce needs to expression of special words, accordance with 236th Article of Civil Code of Iran, divorce cannot be a condition for another marriage contract. Therefore, if second woman stipulates in her marriage contract that husband should divorce from his first wife, this condition is not correct and is invalid.

The third clause: The necessity of unconditional divorce:

One of important condition of divorce is that it cannot be suspended. From the 1135th Article of Civil Code of Iran, it can be concluded that legislator is not recognized any difference between conditional divorce and suspend divorce, and consider both of them invalid.

This article stipulates:

<<Divorce must be in clear and precise wording, a conditional divorce is null and void. >>

It has been said that if suspension is not a real suspension, for example if suspension is based on condition of authenticity, or an event that it's happening is certain or will happen in the future, in these circumstances, suspension cause no interruption in authenticity of unilateral obligation of divorce. For example, if a husband tell his wife that I divorced you if you are clean or I divorced you if you are sterile, and certainly wife is clean and sterile, therefore divorce is authentic.

Any matter which place marital relationship in an uncertain situation, whether it's from unilateral obligation condition or suspension condition, will leads to nullification of condition and divorce and marriage.

Second topic: Causes and rituals of Divorce:

First speech: divorce at the request of women:

Divorce at the request of women can be categorized in following aspects: Divorce because of distress and constriction, Khul'a or Mubarat divorce, and divorce using condition stipulated in marriage contract. Divorce using condition stipulated in marriage contract and Khul'a divorce are not exclude from divorce at the request of man, because in the first subject, man is willing to divorce, and in the second, husband is who that divorce by giving permission of divorce to his wife.

Divorce because of distress and constriction:

It has been said in the religious jurisprudence that any primary rules of Islam can be converted to secondary rules by mentioning issues such as distress and constriction, coercion and duress. Rules of Islam are constrict and limit that are referred as primary rules, and any rules outside of this gamut are referred as secondary rules. It means that any primary rule that is obligatory, outside of that gamut it can became non obligatory. These cases are distress and constriction, coercion, duress and etc., and recently it has been tried to add the issue of interest to boundary of primary rules. Although, the issue of interest is seen in the 1137th Article of Civil Code about divorce of wife of a person that is under custody of guardian is granted to the guardian, but basically something that grant the permission of divorce to divorcee without husband approval is title of distress and constriction that is placed by legislator in the 1130th Article of Civil Code.

Distress and constriction means extreme hardship, pressures and difficulties that typically an individual cannot endure. Note of Single Article of the Expediency Council define distress and constriction as following:

<< A situation in which living for wife is difficult and along with hardship and situation is difficult to endure.
>>

Instances of this rule are inability of wife to continue married life. It means that continue of married life is excruciating for her, and husband is not willing to divorce her.

Although, according to primary rules of Islam the right of divorce is exclusively in the hands of a man, but in some cases such as distress and constriction, court can force man to divorce his wife, and if he refuse to do that, court will issue unilateral obligation of divorce for prevention of distress and constriction.

Efforts of representatives of the parliament in specification of instances of distress and constriction in the year of 2002 paid off, and legislator specified some of instances of distress and constriction with adding a note to the Article of 1130 of Civil Code.

After the enactment of this Act, the judge is obliged to issue the verdict of divorce in cases that are foreseen in this note related to distress and constriction.

While it is possible that despite substantiation of one of instances of distress and constriction, in reality there is no distress and constriction for woman. For example, addiction in all conditions is not instances of distress and constriction, because it is possible that an addict individual be able to do properly his marital duties. It is possible that rules like this increase the number of divorce without any good reason, and therefore, all aspects of this rule was not considered properly by legislator.

Effects of Divorce:

First topic: Custody of children and their maintenance after divorce:

First speech: Custody of children:

Child custody and guardianship are legal terms which are used to describe the legal and practical relationship between a parent and his or her child, such as the right of the parent to make decisions for the child, and the parent's duty to care for the child.

From the Civil Code points of view, Custody of children is responsibility of both father and mother, and 1168th Article of Civil Code states:

<< Custody of children is right and responsibility of parent. >>

Therefore, they must use from all of their capabilities to rear their children.

The question is what if the parent divorce from each other.

1169th Article of Civil Code of Iran stipulates:

<< A mother has preference over others for two years from the birth of her child for the custody of the child and after the lapse of this period custody will devolve on the father expect in the case of a daughter who will remain under the custody of the mother till 7 years. >>

Therefore, till the age of 7, mother has preference for the custody of the child or children, and after that period custody will devolve on the father.

But after that period if both mother and father wants the custody of child or children, note of mentioned Article states:

<< After the age of 7, if a dispute occur between them about custody of children, court will decide about custody of children with considering interest of child. >>

The court should decide about interest of the child through study from relatives, neighbors and opinion of social worker.

In this context, it should be considered that if the mother becomes insane or marriage another man during her period of custody, the custody will devolve on the father according to the 1170th Article of Civil Code of Iran. The above law is for a situation in which the father is alive, and if father is dead, remarriage of mother will not violate the custody right of mother.

Second speech: maintenance of children:

Maintenance in terms of the law means providing household expenses such as food, clothing, housing and other expenses that may be necessary for the survival of the family. In Iran's law, maintenance in the 9th Article the Law on Marriage and Divorce approved in the 1310 Hijri-Shamsi is defined as follows:

"Maintenance is the appropriate housing, clothing, food and furniture."

1204th article of the Civil law about maintenance relatives says as follows:

"Maintenance of the relatives is the housing, clothing, food and furniture to amount of required, considering the level of affordability of maintenance donor."

According to the 1199th Article of Civil Code of Iran:

Maintenance of children is the duty of the father on his death or his incapacity for maintenance, this duty devolves on the paternal grandfathers, the nearer of his kin coming before the father. In the absence of a father or paternal grandfathers or in the event of their incapacity, the duty of maintenance devolves on the mother.

If the mother is dead also or is unable to maintain the child, the duty will devolve on maternal grandfathers and the grandmothers and paternal grandmother who are sufficiently wealthy to provide maintenance, giving preference to the nearer of kin over the father. If a number of the grandparents are similar in degree of kinship, the maintenance expenses must be paid by them in equal shares.

Second topic: Iddah of wife and her maintenance after divorce:

First speech: Iddah of wife:

In Islam, iddah or iddat is the period a woman must observe after the death of her spouse or after a divorce, during which she may not marry another man.

In 1150th Article of Civil Code of Iran about the Iddah states:

<< Iddah consists of a period during which a woman whose matrimonial bond has been dissolved cannot marry. >>

And 1151th Article of Civil Code of Iran states:

The period of Iddah for a divorce or for the dissolution of a marriage

<< Consists of three consecutive monthly periods of a woman unless the woman concerned though of child bearing age has no monthly period, in which case the period of Iddah will be three months. >>

And 1152th Article of Civil Code of Iran states:

<< The period of Iddah for divorce or dissolution of marriage or waiver of the remaining period or its expiry in the case of temporary marriage for a non-pregnant woman is the expiry of two monthly periods unless contrary to the nature of her age, she no such periods, in which case the period will be 45 days. >>

And 1153th Article of Civil Code of Iran states:

<< The period of Iddah for divorce or dissolution of marriage act or waiver or expiry of the period of marriage in the case of a woman who is pregnant will be until she given birth to a child. >>

And 1154th Article of Civil Code of Iran states:

<< The period of Iddah in the case of death (of husband) in both permanent and temporary marriages will be four months and ten days, unless the wife is pregnant when the Iddeh comes to an end with the birth of the child provided that the interval between the death of the husband and the birth of the child is longer than four months and 10 days: if not, the period of Iddeh will be the same four months and 10 days. >>

Second speech: maintenance of woman after divorce:

Most of jurists believe that maintenance belongs to mother, and if woman is pregnant, she has the right of maintenance. It seems that she has the right and not her child. It appears that the fetus has no independent existence, and before the birth is part of the mother's body.

It is true that special condition of woman cause maintenance become responsible of man, but it appears from Article of 1109 that maintenance is for compensation of hardship and need of woman that she endure. She will be entitled to cost of maintenance and not wage till her child is born.

Conclusion:

Divorce is the right of man, but in some cases this right can be given to the woman and she can divorce without the interference and authority of man.

The aim of this study was mention of conditions of this right for woman and specification of its instances.

In recent years, always there have been concerns about divorce and exclusive right of man for divorce. The argument that there is the possibility of misuse from this right by man led to the approval of amendment to the Article of 1130 in the year of 2002. It can be said that in following conditions the right of divorce can be given to the woman.

1. Exist of loss 2. Exist of distress and constriction

These rules have been incorporated in Civil Code of Iran, and they are described under the following titles:

Inability or refusal of the husband to pay maintenance, husband's absence and one general title named distress and constriction.

About Inability or refusal of the husband to pay maintenance, it is necessary that woman go to the court and plea the court to oblige the husband to pay maintenance. After the issuance of verdict and its finality, if the husband refuses to pay maintenance, woman can request divorce from the court. In this case, the court will oblige the husband to divorce his wife, and if he refuses to do that the judge will divorce the woman.

About husband's absence, after legal procedures of publishing of notice and continuous absent with unknown whereabouts of man for four years, court can divorce the woman. It should be noted that all the mentioned conditions should be verified and in absent of any of those condition, the title of absent does not apply, and court cannot divorce the woman. The point that can be noted here is that if court become certain that living for woman is difficult and excruciating before elapsing the mentioned period, instead of referring to the absent of man with unknown whereabouts it can refer to the Article of 1130 related to distress and constriction in which those condition are not necessary. In the rule of distress and constriction, the judge should become certain that continue of married life is excruciating and difficult for her. It should be noted that this hardness and distress and constriction is not necessarily from husband and his behavior, and present of man as husband can cause distress and constriction.

On the other side, instances of distress and constriction have been changed given the current living conditions of individuals of society. For example, issue of addiction to drugs or AIDS and suchlike illnesses were not existed in old times, and their instances should be set based on new condition and rule of distress and constriction.

In the end, it can be said that the definition set forth in the 1130th Article of Civil Code about distress and constriction is not complete, and stipulation of "normally is not tolerable" should come along with "hardship". But in current situation, the wife with little difficulty in her life can refer to the Islamic judge and request for a divorce, and if the judge just look at the appearance of this Article and does not fully examine its jurisprudential basis and definition can issue verdict of divorce while he has no such authority.

REFERENCES

- Alaei Fatemeh, 2002. Custody from Islamic Jurisprudence and law points of view, Alzahra University.
- Esposito John, 2003. Iddah, the Oxford Dictionary of Islam, Oxford University Press.
- Katoziyan Naser, 1998. Introduction of law science and study of Iranian legal system, Dadgostar Publication.
- Khomeini Rohollah, 2002. Astftayat, Islamic Publications Office, First Edition.
- Mansour Jahangir, 2007. Set of rules and regulations relate to the family, Noor Publication, Tehran.
- Mirdadashi Mehdi, 2002. Jurisprudence and legal study of custody, Monthly magazine of Ravagh Andishe.
- Mousavi Bojnordi Mirza Hasan, 2012. Jurisprudence rules, Second Edition.
- Pourangniya Akram, 2003. Custody and maintenance, mother publication, Tehran.
- Tavakoli Nazari Saeed, 2006. Custody in the Islamic Jurisprudence, Islamic Research Foundation of Astan Quds Razavi, Tehran.