

Legislative Policy on Modifying the Unilateral Will of Man in Divorce

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Abstract

Because of their specific nature, the rulings on divorce are not subject to the rules governing the enforcement of civil rulings. On the other hand, the laws and regulations on the enforcement of divorce at different time periods, both before and after the Revolution, are sometimes founded on Shari'a law, and sometimes while distancing from the Shari'a, they have sought to create equal rights for men and women. Since divorce is a contract and may happen at the request of the man and the woman and by way of agreement, it is subject to different rulings, though the legislator, by enacting rules and regulations, has attempted to develop regulations and to include unifying standards for all divorces, in order to observe women's rights for the facilitation of the divorce. However, because little attention has been paid to the fact that divorce decisions are inherently different from other rulings, the legislator has enacted rules and regulations which are not inclusive and require being interpreted by judges. As a result, this has led to a difference of procedure and confusion among clients and applicants. In this study, the will of men in divorce and the legislator's policy in this regard was investigated.

Keywords: divorce, will, man, woman

INTRODUCTION

It is clear that the survival and continuity of a joint life between two spouses depends on the interest and affection of both parties, not of one single party. The emotional reaction by the woman is the result of the affection and interest expressed by the man. If the man loves the woman, makes sacrifices for her, remains faithful and devoted to her, the woman also likes him and remains loyal to him. Certainly, a woman's temperament is more faithful than the man's. This is while, woman's infidelity is a reaction to the man's infidelity; however, the social relations between the two suggests that naturally the key to terminating a marriage contact lies in the hands of the man who discourages the woman via his indifference and unfaithfulness towards her. The indifference on part of the man causes an indifference of both parties and is followed by the termination of family life; if, however, the indifference originates from the woman, and if the man is still interested and faithful to the woman, he can restore the woman's interest in himself by expressing love and affection. No doubt, this occurs when the reason for the woman's indifference is not assumed to be moral corruption, oppression and violations of rights on the part of the man.

It is true that God has made divorce lawful based on the interests of the human life, but man should not treat it in a tasteful and voluptuous manner, although divorce is lawful, it is resented by God Almighty so that it is close to a forbidden affair.

It should be noted that what results in divorce in the current Iranian laws can be categorized in three areas:

- a- Man's will in divorce
- b- What constitutes divorce at the woman's request
- c- Couple's agreement for divorce

Divorce

Divorce is a unilateral legal act and as with other legal acts, intention, consent and will are considered to be conditions for its validity. Article 1136 of the Civil Code states that: "Divorce must also be concise, suspended divorce is void, competency is also key as the divorcer must be mature and wise, permanent insane cannot divorce his wife personally". This is while concerning a person of unsound mind, the

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Imamyeh jurisprudence considers divorce by such an individual as valid (Article 1136 of Civil Code).

The notion of divorce:

Divorce denotes the separation of a woman from a man. Divorce has always been common among different nations and races, with most of them reserving this right specific for men.

Divorce is a right of a man, however the woman will reserve the right to request a divorce from the judge if it is revealed the husband does not respect her rights, especially when the continuation of the marital life causes incapacity and problems for her, and the court, when conditions are met, will issue a divorce ruling in order to fulfill justice. This ruling extends to all cases of man's disobedience. The realization of this theory is an effective step for adjudicating women's rights and preventing the violation of their rights in the marital life.

Divorce has been narrated as follows: Imam Baqir (AS) is quoted in the book of Kafi Forou' as saying: The Messenger of God walked past a man and asked him "What did you do with your wife?" He said "I divorced her". The prophet said "Did you divorce her without any bad conduct?" He said "yes". Later, the man married another woman and divorced her again. Next time the Prophet (PBUH) saw him, repeating the same question. The man again answered that he had divorced the woman once again without any reason. The Prophet (PBUH) said: "God curses the men and women who seek to divorce without any reasons". Imam Sadiq (AS) is quoted as saying: "Among the which God has considered to be lawful, nothing yields in wrath in the sight of God than divorce". And God considers those who divorce quickly and marry again as enemies.

Again, Imam Sadiq (AS) is quoted as saying: "God likes the house where there is a wedding, but He curses the house where the divorce takes place, and nothing is more coveted by God than divorce".

The Prophet (PBUH) was informed that Abu Ayyub was intending to divorce his wife. The prophet said "It is a sin to divorce Um Ayyub". Imam Sadiq (AS) is also quoted: "The Prophet said: ... Nothing is more lovable in the sight of God than a house flourished by marriage and nothing is more coveted than a house destroyed by divorce". Then Imam Sadegh said: The God has repeatedly emphasized and spoken outright on divorce is because He considers separation the enemy.

It is worth mentioning the laws in other Islamic countries, which are as follows:

In the Laws on Family and Personal Status in major Islamic countries, the right to divorce is in mostly entrusted to men; however, many of which have sought to impose restrictions on the exercise of this right by making a requirement to go to the court or stating the reasons for divorce. On the other hand,

they have attempted to provide grounds for requesting divorce and separation on the part of the woman in cases where it is harmful for her to continue the marital life. For example, let's refer to the following countries whose laws were available to us:

Egypt: Considering the rules pertaining to marriage and divorce and relevant interpretations, it is inferred: In principle, divorce is a unilateral obligation and a man can independently cause the divorce to happen, however a woman can also request for divorce from a court to prevent harms.

Article 5 of the 1985 Amendment Law to the Divorce provides: A husband may divorce his wife without the latter being informed of it; however, the financial effects and rights of divorce arise from when the woman gets informed. This is while, as per Article 6 of the said Law, which is also cited on the issue of termination, a woman can apply for divorce if she claims that it is harmful for her to continue the married life.

Syria: According to the Syrian Personal Status Law, the right to divorce is in the hands of the man, with Article 85 of the Law, enacted in 1953, considering a man who is 18 years old to be fully capable of divorce. According to Article 105, the wife can also file for divorce in two cases, one in the presence of defects preventing the matrimonial relations act and the other in the case the husband is known to have become insane after marriage. Of course, unjustified absence for more than three years and an imprisonment sentence of more than three years as well as quitting of alimony are also grounds by which a woman can apply divorce. As per Article 117, if after the divorce by the man, it is revealed that the man has divorced the woman without a justified reason and the woman is found to have suffered from hardship in life in this connection, the court can issue a ruling condemning the man to pay up to one year alimony to the wife.

Algeria: According to the Algerian Family Law, divorce is in essence in the hands of the man, but the woman can also apply for divorce in some cases. Article 48 of the said law, passed in 1984, stipulates: Divorce denotes the dissolution of a marriage and this occurs either at the will of the husband or by agreement between the parties or at the request of the wife within the provisions of Articles 53 and 54. According to Article 49 of Divorce Law, it must be enforced when a court rules. Article 55 of this law has envisaged that disobedience on the part of either parties can lead to a divorce order issued by the court.

Lebanon: The 1917 Personal Status Law, amended in 1983, reserves the right of divorce at the hands of the husband and requires him to notify the court after the divorce has taken place.

Iraq: According to the Iraqi Civil Status Law in 1959, which was amended in 1978 and subsequent years, especially in the area of divorce, has considered the right to divorce in the hands of men; this is while, such a right may be reserved for

a woman, or by a judge (Article 34). And according to Article 39 of the same law, it is necessary to refer to the personal status court and to get a court order to divorce, while at the same time, it is stated that if it is not possible for the man to go to the court, he can do the divorce, but it is obligatory for him to refer to the court by the time off the Uddah, and get the divorce registered. It is envisaged in the same article that if a man divorced his wife and it became clear to the court that the woman had been oppressed receiving harms in this regard, the court shall oblige the husband to pay an amount which can be for up to a two-year alimony of the woman, if the woman requested so. The Iraqi Personal Status Law, entitled Judicial Separation, discusses the various provisions by which each spouse, especially the wife, can file for divorce (Article 43).

Kuwait: According to the Kuwaiti Civil Status Law, divorce is in essence in the discretion of the man, and Article 97 of the said law provides: Divorce is the dissolution of an appropriate marriage contract at the will of the man or his guardian in specific wording. There is no mention of the referring to the court and taking a court order to enforce the divorce on the part of the man; however, under the title of judicial separation, a woman can ask the court to issue a divorce order, in such cases as quitting the alimony, causing harm, being absent, and being suppressed.

Indonesia: The 1974 Indonesian Marriage Law has been adopted and improves the to improve the status of women's rights in such matters as marriage and divorce. The law also requires couples to refer to the court to file for divorce and ask for relevant provisions.

However, according to the Divorce Law, divorce must take place in the court and after necessary efforts are made for reconciliation. Divorce is allowed when there are sufficient and justified reasons for the impossibility of continuing marital life (Article 39). The request for divorce, even it is made by the man, must be submitted to the court in form of a petition, describing the reason for divorce (Article 14 of the 1975 Executive Regulations of the Marriage Law). Article 19 of the same By-Law mentions the reasons for divorce, as committing a crime, alcohol and drug addiction, gambling, quitting the family life, imprisonment of 5 years, misconduct, and the like. Indonesia's Marriage Law respecting divorce is almost the identical to the Family Protection Law adopted in Iran in 1974.

Malaysia: Although Malaysia is a large Islamic country where Muslims account for a large percentage of the population, and the official religion or, according to the Malaysian constitution, is Islam, a large and significant minority of non-Muslims live there. Malaysia has a federal government comprising of thirty states. Some laws and regulations are subject to the federal government, and in some areas each state enforces its own rules and regulations. Concerning marriage and divorce in Malaysia, there is a set

of customary and federal rules, and at the same time, Islamic religious regulations prevail in different states as they are enforced in the courts.

Respecting divorce, the 1976 Marriage and Divorce Code and its subsequent amendments generally indicate that divorce must be enforced by a court order and that a request for divorce must not be accepted in court two years before the date of the marriage. A divorce request may be made by either spouses, and the court will order a divorce if the applicant's claim stating the intolerable continuation of the marital life along with the necessary reasons and considerations, is proved. Such cases as committing of adultery, severe misconduct, quitting a family life for two years are among the justifiable reasons for filing for divorce. If the couple jointly seeks a divorce after two years of marriage, submits a joint petition to the court and the court ensures that the parties freely agreed to the divorce application, it will issue a divorce ruling.

Concept of will:

Will means to want and to intend. This is the same meaning Arabs have for the word *Will*. From a philosophical point of view, according to the *Refusal Rule of Distinction Without Difference*, unless an external affair interferes, no change will occur in the feasible relation between the doer and each of the acts or omissions. The *preferred* is of two types; it is either the will of the doer, or an affair other than his/her will. This is while, *will* denotes a specific mental relation of the doer along with an interfering affair. In another definition, *will* implies a sensual desire like love, wrath, satisfaction, grief and cheerfulness, etc. with the difference being that it is fulfilled after the stage of knowledge and before the stage of act; thus, unless knowledge of something is realized, *will* is not achieved either and when the *will* is achieved, the act will come then. If, because of some occurrences, knowledge is not fulfilled by the doer, a sensual quality called *will* is not achieved; rather a state called eagerness and enthusiasm emerges. Will in criminal law is a kind of sensual act combined with consciousness that is the directly the source of a criminal behavior, i.e., an act or omission. From a civil law perspective, will can be referred to *wanting*, albeit if one suggests the mental condition of a contract or the thing helping a contract to be made; according to the analysis of mental states and its relevant categories and as per legal provisions, there are two separate internal states; one is consent and the other is intention, also known as intention to make.

Will is sometimes used to refer to intention and consent, and sometimes it is used only to mean intention to make. The human's will can only be effective in material actions, but in legal actions that are valid, it cannot be effective by itself. Rule of the will is an influence or authority the laws gives the will through validating legal actions. Thus, without the protection of the law for the human will, human will enforce no influence and rule of law.

Legislative policy:

The basis of studies in the area of legislative policy is an investigation of critique as it is the most important stage in the criminal and legal cycle, i.e., the stage of evaluating legislation, including the adoption of legal regulations respecting the determination of crimes, violations and the existing responses as well as the limits of powers held by criminal and executive institutions. Legislative policy is in fact indicative of the views and methods adopted by the lawmaker to control crimes and violations. The underlying foundations and strategic principles of a legislative policy must first be sought in the Constitution of each country.

The 2002 Family Protection Law, while reserving for women formative innovations, it has discouraged women too. This law not only confirms the husband's right to divorce under Article 1, while not respecting the woman's right and her conditions, it also legalized the number of wives and temporary marriage registration. This is while Article 1033 can be regarded as to amend this law to a large extent to.

Divorce by man's will: The Holy Qur'an does not specify in any verses related to divorce that man solely reserves the right to divorce or that it is a right and proper right of a man. It does not suggest that men can divorce their wives whenever they intend to. However, addressing the Holy Prophet (PBUH), it states: "When you want to divorce women, you must consider the issue of the Uddah and time of divorce".

It also goes on to suggest that: "Do not expel the woman from her place of residence". The Quran confined divorce to two types in the case of a woman's complaint against her husband, who repeatedly divorces her and revokes it. In the meantime, the Quran emphasizes good companionship and non-pressure on the woman.

In essence, the Islamic law has entrusted man to hold the right to divorce according to a well-known narration "Divorce is reserved for the one holding the wheel". In this regard, Article 133 of the Civil Code, prior to the 2002 amendments, stipulated that a man can divorce his wife any time he desires; however, in 2002, the lawmaker sought to modify the appearance of the phrase, as it was considered shocking for the women's community. Thus he changed it to suggest as follows: "A man can apply for a divorce by observing the conditions set in this law and by referring to the court". Restricting conditions such as the use of divorce wording, the presence of two just witnesses in the divorce session and hearing them, or the failure to divorce in the case of menstruation or post-partum period, do not limit the man's right to divorce.

To equalize the rights of women with men as much as possible, the legislator added a note to this article stating that a woman can apply for divorce from the court despite the conditions set in articles 1119, 1129, 1130 of the law.

These changes came into force when the lawmaker had already sufficiently restricted the man's will in the issue of divorce, and in other words, one could say that the said note would not add anything to the woman's rights, even at the point where it converted the divorce ruling, at the request of the man, to a judicial decision as it is not considered an innovative thing. This is because the single article on divorce regulations had already, in 1992, subjected any divorce and separation affairs to a court ruling. In the meantime, man's will has been restricted in some events in which the lawmaker has entered in different ways, thereby setting preconditions and barriers to the issue of divorce both before and after divorce.

In Iranian law, as per Article 1133 Civil Code, man can divorce his wife any time he wants, thus divorce is an obligation which is in the hands of the man, and whenever he intends, he reserves the right to fulfill it and thus divorce occurs. This comes after the law provided the man with the absolute will to divorce while this caused the divorce rate to increase.

Therefore, consistent with social considerations, the legislator sought to restrict and modify this man's absolute authority as this authority was modified when the Family Protection Law was passed in 1968. Thus, divorce was said to be forbidden unless without an issuance of a certificate to refer directly to the divorce registry, and the husband was not entitled to refer to the divorcee notaries public for divorce. Article 8 of the said law reads: The divorce applicant must mention the valid reasons in his/her petition, and Article 11 envisages the reasons for the divorce. Thus, two different views arose among the lawmakers. First, some of them maintained that the said authority envisaged in Article 1133 Civil Code was still reserved for the man. Finally, the man had to present to court to obtain a license to apply. This issue was raised in the first part of the Article 11 of the Family Protection Law. In contrast, another group suggested that as per Article 8 of the Family Protection Law, which asked the divorce applicant for a reason, one should conclude that the man should also file for a divorce to the court, and in this regard, with Article 1133 of Civil Code being implicitly annulled.

However, the adoption of the Family Protection Law in 1974 almost resolved this disagreement, and as per Article 8 of this law, the phrase "the cases set forth in the Civil Code" was removed, suggesting that the legislator does not want absolute authority for divorce to remain in the man's hands.

After the victory of the 1979 Islamic Revolution, the Bill on Establishment of Special Civil Court was approved which Note 2 of Article 3 of this law stipulates that divorce cases are the same as those envisaged in the Civil Code and Sharia rules. This is while in cases where the husband requests divorce as per article 1133 Civil Law, the husband's authority to divorce the wife and the provisions of Article 1133 have been revived.

Why men reserve the right to divorce:

In recent times, some scholars, especially General lawmakers, reserved the man with the right to divorce and considered two major reasons why men are thought to be holding such a right. One is the rationality of man's actions that would help them not to make fast and hasty decisions and not to dissolve the matrimonial relations and the other is the issue of the financial consequences of divorce on the man, including dowry and alimony in the Uddah days; thus, and as a result, he has more cares for maintaining the marriage than a woman who does not encumber these financial consequences. In the book Islamic jurisprudence and the Reasons, Mr. Wahbeh Zahili says that the authority to divorce lies at the hands of the man, despite the fact that the woman is a partner to the man in the marriage, is for preserving the marriage and preventing it from breaking up quickly. This is because man who has paid dowry and is obliged to provide the alimony is usually more foresighted and is worried about the loss of the marriage than the woman, so if she is reserved the right to divorce, she may easily upset her marital life.

Second, divorce entails financial burdens such as payment of dowry and alimony, and these financial obligations are encumbered by the man, as he is obliged to think more about divorce, preserves the matrimonial relations and contemplate about the risks. This is while, a woman who does not suffer financial loss as a result of divorce, of course, does not have such foresightedness and she may decide hastily. On this issue, Dr. Motahhari states the reason or this is that the familial life depends on the mutual interest between the man and woman not on a unilateral agreement. The only thing which matters is the psychology of man and woman which is different in this respect. The genuine and lasting love and affection of a woman is the same the reaction she has for a man's love and respect, so a woman's interest in a disabled man is the man's interest in a woman and dependent on her. Nature has bestowed man the key to a golden love.

If the man loves the woman and remains faithful to her, the woman also loves him and remains faithful to him. It is the man who discourages the woman by his indifference and lack of affection; this is unlike the woman who, if she has indifference toward the man, it will have no effect in the man. Thus, man's disinterest leads to disinterest in both parties. However, woman's disinterest does not lead to a mutual disinterest. Death of the marriage is cessation of the family life. Thus, both man and woman have to do their best not to break this life apart.

Basic conditions of divorce:

Some of the underlying conditions of divorce are related to the divorcer (man) and some to the divorcee (woman), and some conditions such as the intention of consent and capacity deemed necessary for any legal action are not specific to divorce, while some other conditions such as freedom of a woman from menstruation are specific to divorce.

A- Divorce conditions:

According to Islamic jurisprudence and the Civil Code, the divorcer is the husband who can delegate power to a woman or another person to enforce a divorce formula, and may also provide a ruling on behalf of the law. This is while, the divorcer must have capacity to do so.

B- Absolute conditions

Because divorce is basically done by a man, it is not conditional for the woman to have the intention, consent and capacity; this is while according to the civil law, divorce must be made when the woman is not menstrual, in addition, no intercourse must have occurred between the woman and man since the end of the woman's menstrual period. The woman must have been the permanent wife of the man. This is why divorce cannot be executed on a woman of temporary marriage. The philosophy of this is that, firstly, it prevents a rise in the number of divorce and, secondly, the status of the woman is determined in terms of pregnancy. These conditions help the couple wait for a while for divorce and think about their future and their children. It is possible that over time, fleeting anger subsides and the couple continues their married life due to the expediency of reason.

C- Presenting to court

Laws and regulations, including Civil Code and Family Protection Laws, have not envisaged that a man must have a justified reason for divorce, so a man can divorce his wife for or without justifiable reasons. If divorce by the man requires a justified reason, the lawmaker explicates these reasons, as in the case of a wife requesting a divorce, these cases have been discussed while lack of which by the man imply that the divorce by the man are not confined to specific reasons.

Article 24 of the Family Protection Law stipulates that the registration of divorce in the official divorce notaries public is permitted, as the case may be, when a certificate over impossibility of reconciliation is issued. Thus, when the couple seek divorce without registration at official notaries public, they are found guilty and prosecuted as per Article 49 of the Family Protection Law; if a man divorces his without registration in the official notaries, he will be obliged to pay cash fines and is held guilty of degree five criminality or discretionary imprisonment of degree seven.

Also, according to Article 56 of the Family Protection Law, if a notary official registers a divorce without a court ruling, s/he will be held accountable and prosecuted, so whenever a man decides to divorce his wife, he must, on part of his wife, apply for the issuance of a license from the court over impossibility of reconciliation, and the court must first refer the couple to arbitration, and then makes it clear whether or not the divorce was due to the wife's misconduct, and also specify the woman's financial rights.

Jurisprudential and legal basis for restricting man's authority in divorce:

Although Islam has reserved man with the right to divorce, it has prescribed it as a solution in cases where there is no way but to divorce. Many suggestions have been proposed to prevent unnecessary divorces. These suggestions played an effective role in preventing separation, especially in the past because of strong beliefs in the religion and adherence of most people to moral values; however, with moral and religious foundations of society becoming undermined and the abuse of the right to divorce by men as well as rising divorce rates, almost everyone has today accepted that moral advice do not suffice. Of course, in order to prevent the collapse of the family, cultural, social, and economic contexts must be considered and a fundamental solution must be sought.

It is appropriate to ask the following question: Is the husband's right to divorce absolute and unlimited in Islamic law? and even in cases where the matrimonial life goes through its normal and desirable routine, does the man have the right to divorce?

Many narrations condemn divorce and warn men who divorce without any necessity and in a situation where there is no reason to make their cohabitation undesirable. Some of these narrations contain shocking interpretations of such divorces. Such interpretations as the divine throne shakes when a divorce happens. The Messenger of God walked past a man and asked him "What did you do with your wife?" He said "I divorced her". The prophet said "Did you divorce her without any bad conduct?" He said "yes". Later, the man married another woman and divorced her again. Next time the Prophet (PBUH) saw him, repeating the same question. The man again answered that he had divorced the woman once again without any reason. The Prophet (PBUH) said: "God curses the men and women who seek to divorce without any reasons". In such narrations, the Holy Prophet (PBUH) has clearly stated that men who are divorce their women purely for sexual pleasures are cursed and cursed.

CONCLUSION:

Iranian law provides for the fact that divorce takes place at the man's will. This manifests in the Family Protection Law Divorce, and in principle the husband can divorce the woman without going to court. The woman must also submit the divorce petition to the court stating its causes and reasons. After examining the reasons and trying to reconcile by presenting to arbitration, and should the dispute is not reconciled, the court will allow the applicants to divorce. It is worth noting that referral to arbitration is necessary in all cases of divorce and no divorce can be made without referral to arbitration.

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