

Examination and Evaluation judicial divorce in civil law of Afghanistan

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Abstract

Today, supporters of equal rights of men and women are trying hard to ensure equal rights of couples in marriage and its dissolution, and in this regard, they have approved the convention to remove any kind of discrimination against women. Therefore, in this article, while evaluation the judicial divorce in the civil law of Afghanistan, the differences between men and women in the dissolution of marriage are pointed out and compared with the civil law of some Islamic countries, and it is concluded that the condition of attorney for divorce in addition to the marriage contract ensures the equality of the rights of the spouses to some extent. In addition, the reason that prepares the ground for judicial divorce, until the ground for compatibility of the provisions of such a document with domestic law is provided.

Key words : Divorce, judicial divorce, attorney in divorce, refusal to pay alimony, missing person, leaving family life.

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Introduction

Divorce by a judge without the involvement of the spouse is called judicial divorce. According to the opinion of Islamic jurists and current customary laws of Islamic countries, the basic principle in divorce is that it is up to the man to make it happen and he can divorce his wife whenever he deems it necessary.

Although this absolute authority is limited in the laws of some Islamic countries to such an extent that in case of divorce,

The man must refer to the court so that if the advice of the court is ineffective, the divorce will take place, but if the man is determined to divorce without the wife if he can do a certain action, the permission for divorce and its registration will issued.

Moreover, the man has a lot of discretion regarding the right to appeal from divorce, and if the divorce is one of its regressive examples, the man can appeal without the wife's consent.

However, if a woman applies for divorce, she must go to the court and submit her request in the form of special cases: such as leaving unfaithfulness, absence of husband, etc. she has to go a long way to get a divorce and in many cases, she has to wait for years until her duty has known.

Since the supporters of equal rights of men and women are trying hard to establish this equality in the field of marriage and its dissolution and to extend it to all countries that are members of international covenants and the Convention on the Elimination of Discrimination against Women.

the importance of examining judicial divorce and how to develop the scope It is revealed while observing the Islamic standards and the internal regulations of Islamic countries, and this is where the issue of conditions during the marriage contract shows its importance,

Because if a woman has appointed herself as a lawyer during the marriage contract, and a lawyer as a lawyer for divorce, in case of separation factors and the husband does not agree to divorce, she can easily divorce herself according to the condition of the marriage contract, so that she will not have to go through a long road. In addition, avoid possible expenses, but all this is possible in the light of good and timely information, which the society has some distance from that.

However, in the event that divorce is necessary and there is no condition in the contract stating that the divorce will occur and the husband fails to fulfill his marital duties and is not satisfied with the divorce, the judge (ruler) can prevent the wife from incurring serious losses by virtue of the authority he has over him. Moreover, force the couple to behave well or divorce, and if he refuses to divorce, he will perform the divorce himself.

Definition of divorce and its legal nature

Although divorce is one of the most hated halal solutions according to Islamic traditions¹, it used as a final solution for a married life that has suffered a crisis, to provide mental and spiritual peace for the parties to the marriage. Divorce is widespread in all human societies, although the primary emphasis of divine religions is on the durability and survival of the family, but the ways of its dissolution have also predicted according to the problems that have arisen.

Since mankind accepted social life and the institution of the family was formed as a small community, there have been conflicts, disputes, interferences and forced incidents that in some cases the continuation of family life has been impossible or accompanied by great hardships,

Which in This form of separation between husband and wife has been choose as the last and best way.

1- Definition of divorce

Divorce in the word has interpreted as the decline of bondage and release. ² In some dictionaries, it means the separation of a woman from a man and release from the bondage of marriage and freedom from marriage. ³

A woman also called a divorcee because after divorce, she is free from marital restrictions and is independent of herself.

In terms of legal terminology, Mazo, one of the leading law professors in France, has defined divorce as follows: "Divorce is the termination of marital relations by court order during the lifetime of the spouses at the request of one or both of them".⁴

2- The legal nature of divorce

Divorce is a formal divorce that takes place at the will of the spouse and does not require the spouse's approval. In Islamic law, three wills are effective in the occurrence of divorce:

The most important will in this relationship is that of the couple who can divorce their spouse without any reason.

The second will is that of the wife, which appears in the form of a request for divorce from her. That is although the power of divorce is in the hands of the man it is not the case, which the woman can never ask for divorce rather she can force the man to divorce under certain conditions, and the court will issue such a ruling according to the law.

The third causes the divorce of the couple's agreement, which often takes place in the form of dislodge.

In cases where the woman wants a divorce when the conditions are ready, the Iranian Civil Code in Article 1129 says that the court will force the husband to divorce, and if the husband refuses to execute the divorce, the court, which according to the general principles of the legal

representative, refuses to divorce of the woman on his behalf. It goes without tell that coercion is possible in the presence of the spouse, but if she is, absent and has no effect, the ruler will perform the divorce on her behalf.

Judicial divorce in the civil law of Afghanistan

1- Representing the wife in divorce, or delegating the divorce to her

Although the purpose is to examine the judicial divorce, but before examining it, it is better to remember a better way by which women can get their rights more easily, so that it is not necessary to find the cause of the judicial divorce in the path of the court to prove.

This easy and better way, as mentioned before, is to use a divorce attorney or in other words to use a divorce delegation. In such a way that the wife becomes a lawyer along with the marriage contract or other necessary contract or in the form of an independent contract on behalf of the husband to divorce himself if necessary. In this case, the woman's attorney will remain as long as the marriage is not dissolve, and since the attorney contract in this case is subject to the necessary contract (marriage), the client (husband) will not have the right to dismiss the attorney. Apart from being easily accessible, this solution limits the man's discretion in divorce, if he was not satisfied with the healthy and very satisfactory atmosphere of marriage at the time of marriage,

Also considered the future, and predicted that the smiling faces of the day may be a marriage may break down at some point and a reasonable solution such as a lawyer in divorce may needed. "The parties to the marriage contract can make any condition that is not contrary to the requirements of the said contract in the marriage contract or any other necessary contract:

Such as making a condition that whenever the husband takes another wife, or is absent for a certain period. Abandons alms, or against the life of the wife commits malicious intent or misbehavior that makes their life with each other unbearable the wife of a lawyer and a lawyer in law, who divorces himself after proving the fulfillment of the condition in the court and issuing the final verdict".

The same attorney in divorce mentioned in the civil law of Afghanistan with the interpretation of delegation of divorce, because this law based on Hanafi jurist's prudence and the Sunni jurists, although they have considered the authorization in divorce as correct,

Nevertheless, Hanafi jurists are of the opinion that if the husband to the wife in divorce to give power of attorney, this power of attorney is actually delegation.

The difference between power of attorney and delegation is that in power of attorney, the lawyer declares the will of the client and is subject to the opinion of the client, while in delegation, the person to whom the divorce is delegated acts according to his will and is not subject to the will and wishes of the husband. 19

According to the above, the Civil Code of Afghanistan stipulates in Article 142: "A husband can divorce his wife through a legal lawyer, or he can delegate the authority of divorce to the wife herself".

In addition, in Article 143, he told: "The spouse cannot refer to it after delegating the jurisdiction of divorce..."

With regard to the above two articles, it can be said that the followers of Hanafi jurisprudence can use the delegation of divorce during marriage, and the followers of Imami jurisprudence can use the power of attorney in divorce, thus predicting and authorizing a wise solution for the day of fear.

2- Long-term absence of the couple

One of the ways that facilitates the use of judicial divorce for women is the long-term absence of the spouse, according to Article 194 of the Civil Code of Afghanistan:

"When the spouse is absent for a period of 3 years or more without a reasonable excuse, if the wife suffers from his absence can deduct the claim from the court, even though the husband is the owner of the property and the wife can support herself from it."

In Article 195, it stipulated that in such a case, the court will somehow inform the absent couple to return, but if they do not return, or if it is not possible to notify them, the court will issue a divorce.

As the text of the article used, since the husband is not present, the court does not condemn him to give a divorce, but divorces the woman as a guardian on the part of the absentee and the executor of justice.

The civil law of Afghanistan considers the passage of three years or more as the permission to divorce the wife as missing person, while in Shia jurisprudence, the popular opinion is that she should wait four years from the time the woman appeals to the ruler.²⁰

However, some jurists say that even though four years have not passed, as soon as the woman is in trouble, the ruler can divorce the absent wife before the four years have passed, especially if the absence occurred during war and like. Because in this case, a woman who cannot provide for herself or protect her life and honor, it is not fair for her to stay in the marital relationship. ²¹

The Civil Code of Iran stipulates in Article 1029 about the missing person: "If a person is absent for four years, his wife can request a divorce, in this case, the ruler will divorce her in accordance with Article 1023."

The ruling of Article 1023 of this law is about the necessity of publishing an advertisement three times in a widely circulated newspaper so that those who know about the absentee can report or he can refer himself. The husband should notify in writing to return within a certain period and specify the duty of his wife. This article left the determination of the duration to the court and did not set a specific time.

On the other hand, it suggested notifying the husband, which seems incompatible with being absent, because if he had a specific place, he would have introduced the wife, unless the purpose of informing It is the same as publishing the advertisement in the local or national newspaper of the country.

The example of the missing person has many examples in our war-torn society, such as those who disappeared in wars, those who disappeared due to internal coups, and those who have displaced from other countries and their women due to the harsh conditions of revolution and war. Without knowing the fate of their husbands and their rights, and due to old local and tribal traditions, they are in a difficult situation without going to court, and there are few person who can guide them to get a judicial divorce.

3- The husband's refusal to pay alimony

One of the common causes of judicial divorce is the failure of the husband to pay alimony to the wife, which causes many problems for the wife in urban life and forces her to go to court to determine her duty. Article 191 of the Civil Code of Afghanistan stipulate: "Whenever the husband refuses to pay alimony, even though he is apparently not the owner of the property and his inability to pay alimony has been proven, the wife can claim deduction."

In Article 192 of the same law, it stated that if the spouse proves his inability to pay alimony, the court would give it to him a three-month deadline, at the end of which, if the spouse remains incapable, a divorce decree will issued.

Iran's Civil Code also states in Article 1129 that the husband's refusal to pay alimony is the reason for issuing a judicial divorce. The text of the article is as follows: "If the husband refuses to give alimony and it is impossible to implement the court order and oblige him to give alimony, the wife can turn to the ruler for divorce and the ruler will force her husband to divorce. It is also the case if the husband is unable to pay alimony.

Regarding this article, it has discussed whether past alimony is included in the article or not, most of the jurists are against the inclusion of the article on past alimony and they say that the wisdom of judicial divorce regarding the non-payment of alimony related to the present and future, and past alimony is like other ordinary debts. It settled by the husband. 22

It goes to without saying that in Iran, one of the prominent examples of divorce is hardship and embarrassment, which can cover all types of legal divorce cases, because this title includes non-spending, absence of spouse, abandonment of family life, contagious and incurable diseases, etc. As stated in Article 1130 of the Civil Code of Iran: "If the duration of the marriage causes hardship and embarrassment to the wife, she can go to the ruler of Sharia and ask for a divorce. If the said hardship and embarrassment proven in the court, the court can force the husband to divorce, and if it is not possible to force the wife, with the permission of the ruler According to Sharia, divorce is given.

The way to prove difficulty and embarrassment is mostly the opinion of custom, it has kind of aspect, and the conventional man is considered. 23

4- Separation due to loss

In Article 183 of the Civil Code of Afghanistan, one of the causes of judicial divorce is the possibility of harm to the wife and stipulates: "Whenever the wife claims harm as a result of intercourse with her husband, which makes the continuation of intercourse impossible between similar spouses, she can demand from the court to separate".

Apparently, the harm that meant by this article is misbehavior and contagious and incurable diseases that the wife may get and her life is in danger if the marriage lasts, especially acute mental illnesses that can be one of the obvious examples of harm.

It should be mentioned that the civil law of Afghanistan, in addition to the above cases, considers the fault of the husband as one of the reasons for judicial divorce, which in Imami jurisprudence is considered as one of the reasons for the dissolution of marriage. This law stipulates in Article 176: "When the wife can demand a divorce, that the spouse is suffering from an illness that makes it impossible to restore his health or requires a long time to treat him, in such a way that it is impossible to associate with the spouse without general harm.

A similar case has recorded in Egypt's Personal Status Law, this law states in Article 9: "If there is a strong defect in a man that cannot be cured or its treatment is long-term and the wife's survival in the marriage causes harm to him, such as insanity and Leprosy and leprosy can request separation from the court". 24

5- The legal nature of judicial divorce

The Civil Code of Afghanistan has expressed the legal nature of judicial divorce in different ways, that is, it has considered some cases to be effective and others to be retroactive, which seems to be a very desirable and desirable method,

Because the wisdom of judicial divorce is to free a woman from the hardships and hardships that in some cases. For example, if the divorce is regressive, this goal will not be realized, but in other cases, it may be better for the wife to be regressive.

For example, a divorce that occurred due to the husband's inability to pay alimony or his absence is better if it is revocable, because if the husband becomes capable of paying alimony, or if he is absent, the expediency of the divorce will be lost, and the revocability of this type of divorce is more desirable.

Nevertheless, it is better if the divorce is due to the possibility of loss, because retroactiveness does not fulfill the purpose of this type of divorce.

Therefore, the Civil Code of Afghanistan stipulates in Article 180: "Divorce due to fault is a valid divorce".

Paragraph 2 of Article 184 states: "Subtraction (due to loss) has the effect of a mutual divorce."

However, the same law considers divorce due to non-spending in Article 193 and divorce due to the absence of the spouse in paragraph 1 of Article 197 as a retroactive divorce decree, that is, if the cause of divorce disappears, recourse is also possible, otherwise recourse will not be possible.

Article 193 states: "The separation between the spouses due to non-payment of alimony by court order is a retroactive divorce decree. The husband can refer to his wife during the period

of `` Menstruation, provided that the husband prove his financial ability and readiness to pay alimony.

It may be that when applying for divorce, the burden of proving the non-granting of alimony is on the wife, but after the divorce, it is the responsibility of the husband to prove the financial capacity of the husband so that equality of rights can ensured somehow.

Iran's civil law did not mention the legal nature of judicial divorce, but jurists and jurists have discussed its nature, although in this law, the divorce of an absent wife considered retroactive in Article 1030, just as the Afghan civil law considers it retroactive (paragraph 1). Article197.

Among the Shia jurists, Ayatollah Seyyed Abul Qasim Khoei has clearly introduced the nature of divorce that it done by the ruler and in terms of the husband's refusal to pay alimony. 28

However, the usual procedure in Iran's judicial authorities is that they try to convert the judicial divorce into divorce, so that with this method, the divorce terminated and the couple cannot appeal. 30

Conclusion

This was a brief review of judicial divorce in Afghanistan's civil law, and in this review it was clarified that despite the fact that the wife can include the condition of attorney for divorce in the marriage contract or another necessary contract. Still, the man's powers in divorce are very wide and the wife is force to prove the grounds for judicial divorce in the court if she does not have an attorney for divorce, or if the divorce is not delegate to her. In addition, this process may take a long time and cost a lot.

Since Afghanistan has signed many international treaties and joined the Convention on the Elimination of All Forms of Discrimination against Women. In order to meet the goals of these documents, it is necessary to amend its internal laws to protect women and equalize their rights with men, otherwise, simply joining these documents has no value and credibility without implementing them. However, how to adapt the provisions of these documents to the Islamic, constitutional and civil standards does not seem to be an easy task.

References

۱. 28- Seyyed Abulqasem Khoei, Minhaj al-Salehin, vol. 2, p. 293, issue 1469,
۲. 29- Seyed Hasan Emami, civil rights, Tehran Islamia bookshop 1352, volume 5, page 6
۳. 30-Hossein Mehrpour, review of wife's heritage in Islam and Iran, p. 630.
۴. Abd al-Rahman al-Jaziri, Fiqh Ali al-Mahab al-Arba, Misr 1969, vol. 4, p. 370 onwards.
۵. Al-Ahwal Al-Hawsiyyah for Muslims according to latest revisions, 5th edition, Cairo, 1994, quoted by Hossein Mehrpour, - Useful Letter No. 20, Winter 2018, p. 59.
۶. Hossein Mehrpour, "Jurisprudential-legal examination of the different status of men and women in divorce", Mufid Letter No. 21 Spring 2019, p. 160 onwards.
۷. Mohammed Hasan Najafi, Jawaharlal Kalam, vol. 32, p. 5,
۸. Mohammed Hossein Tabatabai, Al-Mizan fi Tafsir al-Qur'an, Tehran Dar Al-Kitab al-Islamiya, 2013, vol. 2, p. 279.
۹. Mulla Ali Qazvini, Saygh al-Aqud Walaiqaat, Qom Shakuri, 1373, p. 311.
۱۰. Nasser Katouzian, family law, Tehran publishing company, vol. 1, p. 378.
۱۱. Nasser Makarem Shirazi et al., Commentary on the example of Tehran, Dar al-Kitab al-Islamiya, 1380, vol. 2, p. 166.
۱۲. Quoted by Seyed Hossein Safaei and Asadullah Emami, Family Law, Tehran University Publications, Vol. 1, p. 226.
۱۳. Ruhollah Khomeini, Tahrir al-Wasila Qom, Dar Alam Press Institute, vol. 2, p. 302.
۱۴. Seyyed Mohammad Kazem Tabatabaei, Arwa al-Waghhi, vol. 2, p. 68,
۱۵. Seyyed Mohammad Kazem Yazdi, Adjuncts of Arwa al-Waghti, vol. 2, pp. 75-76,
۱۶. Shahid Sani, Masalak al-Afham, vol. 9, p. 411. Mohammad Hassan Najafi, previous volume 7 p. 422,
۱۷. Sunan Ibn Majah, Darahiya al-Tarath al-Arabi, 1975, vol.1, p. 672,
۱۸. Wahba Zaheili, Al-Fiqh al-Islami, Vol. 7, p. 360.
۱۹. Wasayel al-Shia Kitab al-Talaq, Chapters of Divorce Preparations, Chapter 1, Hadiths 1 to 8,