



Financial and non-financial effects of divorce on objective law of Islamic Republic of Iran and Republic of Turkey

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ABSTRACT

Divorce and related issues to this phenomenon has a high impact on the lives of people and society; hence, this issue is one of the most fundamental and important matters in family rights and civil rights. The occurred results of divorce have always been considered by scholars in legal systems. It would be a question that what are the effects of divorce? There are some financial consequences of divorce in legal systems of Iran and Turkey such as dowry, alimony and split-half of property condition. Non-financial effects can be named as head of the family (in Iran law) and the issue of custody and guardianship of children after divorce, which has been extensively assessed. There is a significant point in assessment of the consequences of divorce in two studied systems of Iran and Turkey. There would be different effects of divorce because of substantive difference between legal systems of two countries that is based on the difference between their political systems included Islamic system of Iran and secular system of Turkey.

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Introduction

Although there have been a lot of efforts by societies to strengthen foundation of the family but there is not a way out of divorce and this phenomenon has always occurred in life. Divorce has defined as a unilateral procedure in which, a man leaves a woman who is his permanent spouse by permission and order of the court (Katoozian, 2003, P. 300). Another definition of divorce is stated that divorce is dissolution of a permanent marriage (Mohaghegh Damad, 2003, P. 379). The lawyers consider the divorce as an ending a permanent marriage that is done by husband (Emami, 1999, P. 8). The definition of divorce that is stated in Civil Code of Iran is based on the definition of divorce in jurisprudence. However, some changes have occurred in law of those countries that have separated their legislations from the religion such as Turkey. For instance, the right to divorce is the same for both men and women to comply with the West. It would be mentioned that the basis of family has been based on the equality in accordance with the new Civil Code of Turkey. It is stated in the article 41 of constitutional law of Turkey that family is the basis of the society of Turkey and is based on equality between spouses. Accordingly, there are some considered effects and consequences of divorce in both legal systems of Iran and Turkey that can be assessed in different types of classifications. It would be important to analyze this issue comprehensively because of the importance of consequences and effects of divorce in lives of people. Therefore, the present study has been conducted to research the effects and consequences of the divorce phenomenon on

legal systems of Iran and Turkey. This paper has assessed the mentioned issue in the frame of financial and non-financial effects of divorce in both legal systems through an analytical and comprehensive view.

1. Non-financial effects of divorce in legal systems of Iran and Turkey

According to difference between the law of Iran and Turkey and their different views towards the definition of law, the non-financial effects of divorce would be different in both legal systems of them. The mentioned differences have been reviewed in this study.

1-1.

non-financial effects of divorce on legal system of Iran

Non-financial effects of divorce include custody right, child visitation right, keeping widowhood (Uddah), right of recourse and etc. it would be essential to note the effects of irrevocable divorce and revocable divorce.

1-1-1.

irrevocable divorce effects

In this type of divorce, husband has no right to revoke (article 1143 of Civil Code). According to the consensus of Shia jurisprudents, irrevocable divorce has been divided into six types: non-sexual intercourse divorce (a divorce that occurs before having sex), menopause divorce, Khula divorce (the right of a woman in Islam to seek a divorce or separation from her husband), Mubarat divorce that is based on the mutual dislike (as long as the woman has not revoked after divorce). Third divorce performed after three consecutive marriages (article 1145 of Civil Code) and summary (simple) divorce. The general feature of irrevocable divorce is that husband has no right to revoke

except Khula and Mobarat divorces in which, husband can revoke if his wife has revoked to ransom (Tabatabaee Yazdi, 1999, p. 112). Therefore, there is not any right or obligation between spouses when irrevocable divorce occurs. The residence of wife is not related to the residence of husband and remaining of family name of husband for wife depends on the husband's consent (article 42 of Civil Registration Law adopted in 1976). A woman who is in Uddah (legal period of abstention of a widow) of irrevocable divorce is not eligible to gain alimony of widowhood unless she is pregnant (article 1109 of Civil Code).

1-1-2.

revocable divorce effects

According to Civil Code, the divorce would be revocable in cases that are not irrevocable. Breaking off the conjugal relationship is one effect resulted by divorce. According to article 1120 of Civil Code, marriage would be dissolved by divorce. There would not be a relationship between ex-spouses after the period of abstention and also there is not an important financial and emotional relationship between them. In period of abstention in revocable divorce, the spouses can perform revocation of divorce and the woman is considered as wife in this period and all conjugal rulings can be performed. Therefore, the cost of alimony is a responsibility of husband in period of abstention in the case of revocable divorce and the amount of alimony should be determined by the court. In this situation, if one of them dies before the expiry of the "uddah" period, another one will inherit from the other (article 943 of Civil Code). Adultery with a woman who is in the period of abstention of revocable divorce is considered as adultery with a married woman, which is eternally illegitimate. The man is not able to marry her wife's sister before the ending of the period of Uddah (Rafee 2011, P. 92). According to article 1109 of Civil Code, cost of maintenance or alimony of a divorced wife during the period of "uddeh" is to be borne by the husband. On the other hand, the divorced wife in a case of revocable divorce would inherit from her husband. Hence, a divorced wife in the case of revocable divorce has the former rights and the marriage contract can be resigned if wife revokes. In this personal case, a guardian or tutor has no right to perform revocation of divorce as a representative. Of course, the mentioned matter is not able to prevent couples from to empower an attorney to do legal procedures (Farhadi, 2011, P. 20).

1-2. Personal effects of divorce in legal system of Turkey

Personal and non-financial effects are other types of the divorce that can affect couples. These effects have been assessed extensively.

1-2-1. Removal of legal and judicial restrictions in perspective of non-financial effects

The first obtained result of divorce and removal of restrictions from the marriage of couples can be recognized from article 151 of Civil Code of Turkey. This article states that divorce includes destructive effects and consequences and all rights and obligations in a marriage would be removed after divorce. For instance, husband is not the head of family any more. The common life of couples and their family will be finished through the final vote of divorce. Wife and husband have had some demands during the

common life that they can receive their demands after divorce. The mentioned demand would be received with regard to the relevant exception that is considered in paragraph 1 of article 165 of Turkish Civil Code. This article states that issuing execution writ against each other would be prohibited while this prohibition is removed after divorce and they are able to issue the execution writ to receive their demands. In the period of marriage, the time is not important in terms of demands of wife and husband while the time of receiving demands would be important after the final vote of divorce that is issued by the court (Paragraph 3 of Civil Code), (Tekin, I, 1986, P. 179). **R**

1-2-2. The consequences of restrictions between couples based on the non-financial effects

According to paragraph 1 and 2 of article 95 of Civil Code, a divorced wife is not able to remarry till 300 days from the date of issued final order of divorce. This is a principle that is considered by the legislator and there is an exception predicted by Turkish legislator. This paragraph has said that the period of 300 days can be limited or even removed by the judge if the woman tends to remarry ex-husband. On the other hand, this procedure done by the judge would be legal if there is a possibility of pregnancy of woman. Divorce has some effects on the personal life of the couples due to the effects of the marriage. In divorce, some personal situations occurring after marriage would change such as the loss of husband's last name when it was used by wife while there are other situations that are not changed after divorce such as nationality, maturity right that is recognized by marriage and etc. According to article 141 of Civil Code of Turkey that is based on the article 149 of Civil Code of Swiss, the spouses are not able to legally inherit from each other that are mentioned in article 146 of Civil Code. The time of the mentioned results are not clearly specified in law. It would be a question that whether the consequences of divorce are started from the date of issuing divorce order or from the date of the issued final order? (Tekin, I, 1986, P. 182).

2. Financial effects of divorce in Iran Law and Turkey Law

This study has been conducted to assess the financial effects of divorce such as monthly annuity, split-half of property and other effects in both legal systems of Iran and Turkey.

2-1. financial effects of divorce in legal system of Iran

2-1-1. Monthly annuity: concept and its provisions

At the beginning of this subject, the concept of establishment of this right should be expressed based on the subject of research. The word of annuity literally means payment of wages and salaries to a done task (Jafari Langroudi, 1998, P. 165). The word monthly is equal to the amount of money that should be paid per month. The concept of monthly annuity has noted for the first time in Iran's Law included in article 11 of Family Protection Law adopted in 1974. The mentioned article provides that the court is able to condemn one party to pay an appropriate monthly annuity to another party. This order can be issued based on the request of both party when the issuance of testimony of non-compromise is based on the mistreatment or negligence of the other party. The issued order would be based on the position, age, and duration of matrimony relationship and also it should be confirmed that the applicant is not able to afford the costs of living while the

other party is. The payment of the mentioned annuity might be reduced or canceled under following circumstances: remarriage or enough income of judgment creditor, loss of income or imprisonment of judgment debtor and death of the judgment creditor. In the case, that the testimony of non-compromise has been issued based on the paragraphs 5 and 6 of the mentioned article, the monthly annuity would be paid to the insane and sick party provided that the sickness and insanity have been occurred after marriage. The payment will be canceled based on the issued order of the court if there is a restoration of health (Safaei and Emami, 2002, Pp. 250 & 251). According to the mentioned article and specifics of the order of monthly annuity, it could be noted that the testimony of the non-compromise should be issued based on the demand of the spouses or the fault of one of the couples. Articles 951-953 should be considered to understand the concept of the fault. The request of monthly annuity should be requested from the court based on the following conditions: the incurable disease or insanity of the spouse has occurred after marriage and lack of financial ability of the applicant and financial ability of the other side should be confirmed by the court. The payment of annuity might be requested during divorce proceeding or after performing divorce. In any case, the divorce should be record or performed in order to use annuity. The payment of the mentioned annuity might be reduced or canceled based on the remarriage, death or financial ability of judgment creditor or because of lack of financial ability, imprisonment or loss of income of judgment debtor. In accordance with the nature of the annuity, it would not be possible to develop its instances and the annuity would be canceled based on the death of the judgment debtor. There are some opposed views toward this issue (Katoozian, 2003, P. 484). Every wife or husband is able to benefit from the annuity. The term of annuity is a new concept without any executive and legislative history in Iran. The amount of annuity would be determined by the court based on the position, age of the parties and duration of marriage. In current law of Iran, the legal nature of this concept is a debatable issue. It is believed by some law scholars of Iran that the nature of monthly annuity is related to compensation of loss. The fault of one party would prevent the other party from common life so that this issue would be subjected to the general rules of civil liability and the responsible person would be required to pay an amount of money. It is said that article 11 is based on the compensation of loss (Shokri, 2009, P. 85). Coordination between the occurred loss and compensation of loss would be a debatable issue in general rules of civil liability. It is discussed that there is not any sign of coordination concept and some other conditions (age, duration of marriage and ...) can determine the amount of the annuity without any consideration of the amount of loss. Therefore, the mentioned view would not be a logical opinion to enact the article 11. According to another perspective, the monthly annuity can be considered as alimony because it can be requested in cases of divorce that are based on the fault or sickness and insanity. There is another objection toward the mentioned view. According to the Islamic law, alimony is divided into two types of alimony of marriage duration and alimony of family members while it is not noted by the mentioned perspective. In addition, the alimony can be paid to one party while the

monthly annuity might be paid by the wife to husband. Hence, there would be a conflict between the concept of alimony and monthly annuity (Shokri, 2009, P. 64).

2-1-2. The nature of split half of property and its realization in asset of couple

According to the article 1119 of Civil Code of Iran, The parties to the marriage can stipulate any condition to the marriage which is not incompatible with the nature of the contract of marriage, either as part of the marriage contract or in another binding contract: for example, it can be stipulated that if the husband marries another wife or absents himself during a certain period, or discontinues the payment of cost of maintenance, or attempts the life of his wife or treats her so harshly that their life together becomes unbearable, the wife has the power, which she can also transfer to a third party by power of attorney to obtain a divorce herself after establishing in the court the fact that one of the foregoing alternatives has occurred and after the issue of a final judgment to that effect. The issue of subscription in asset of couple or split half of their property is an important issue included in marriage contracts as a proviso. The mentioned phenomenon has occurred by the government to preserve women's rights and to compensate the shortcomings of the law.

According to the mentioned proviso included in official marriage contracts, if the request of divorce is not asked by the wife and the divorce is not because of the faults or mistreatment of her in perspective of the court, the husband will be required to transfer half of his property to the wife. There are some cases in which, the notary clearly violates the legal duties. The notary should inform the couples about the provisions while couples might sign the marriage contract without any information about their legal rights. The criteria of subscription of couples in future assets are not permitted in any text of the law and there is no history of it in our social and religious customs. The mentioned criteria has been made to preserve women's rights and compensation of shortcomings of law and this concept can be an imitation of west culture that might bring conflict into the family; otherwise, nobody is able to eliminate women's rights (Katoozian, 2003, P. 354).

2-1-3. Fair remuneration of tasks of a wife during marriage times

Fair remuneration is one of the financial rights of the wife after divorce. The relationship between family members and couple depends on the regulations of human society. The relationships between couples have been clarified by the legislator and remuneration of tasks done by a wife during marriage times would be one of the considered rights of women. In fact, the legislator has specified a remuneration for the wife based on the respect to her activities and general regulation of required payment to the tasks that is originated from article 336 of Civil Code and by virtue of the note 6 of the single article of amendment law of related regulations to divorce that was adopted by Expediency Council in 1992 (Hedayatnia, 2006, P. 135). By virtue the note 6 of the single article of amendment law of divorce regulations, the remuneration would be paid under some circumstances included lack of mistreatment of the wife and non-violation of matrimonial duties such as stealing the property of husband, to revile or to use foul language toward husband, having illegitimate relationship, assaulting or

battering husband by wife and etc. there are some matrimonial duties of the wife considered by the legal articles such as obedience, good behavior and cooperation in intensifying of family basis that is the common task of both wife and husband (Safae&Emami, 2011, P. 284). Accordingly, it would be accepted that the mentioned note of the law is not a privilege for women while it is a barrier to vindicate of right. This is right that can be demanded without any conditions based on the article 336 of Civil Code performed by the Family Protection Law adopted in 2012 while the mentioned single article has been cancelled by the article 58 of Family Protection Law. The request of the remuneration is transferred to General Civil Code (Article 336) based on the article 29 of the Family Protection Law states that the fair remuneration is determined by the note of the mentioned article.

2-2. financial effects of divorce in legal system of Turkey

This paper has been conducted to assess the effects of divorce in legal system of Turkey that are mentioned in following parts.

2-2-1. Conditional possessions and settlement of property as financial effects of divorce

The legal effects of some possessions would be changed after divorce such as a testament that is in favor of wife. The period of time is considered by the Turkish legislator in this case. If there is a long period between divorce and death while the testament and rights of divorced wife has not changed, the mentioned rights will be accepted by the court. The testament would be rejected if there was a short time between divorce and death of testator. If there is a given a right to one of the spouses after death based on a contract but that party is dead before the final order of divorce, the contract will be authentic (Tekil, I. Ailehukuku, P. 63). According to the legal regime of property, that is an independent financial regime in law of Turkey, spouses are able to retake their property. According to the paragraph 1 of the article 146 of Civil Code, the mentioned regime can be obtained in terms of communal financial regimes. According to FeiziOghlu, gifts given in engagement or wedding ceremony by the couple to each other or the other relatives such as ring are refundable. There are two orders issued by Supreme Court to approve the mentioned opinion. The order number 10/24 in 1961 issued by General Council of the Court of Turkey mentions that the given gifts in marriage commonly used by wife are belonged to her. The second branch of the Court has expressed in the order number 1550/2967 issued in 1961 that there is not a specific regulation in terms of given gifts during engagement or marriage. Hence, there is not a logical way to retake the concessional gifts included gold, property or 2500 Lira that has been paid to the bank under the name of the wife during common life (Tekin, I, 1986, P.115).

2-2-2. The nature of the damages and alimony in financial provisions of divorce

The nature of damages in the case of divorce has been divided into two categories by the Civil Code. One of them is material damage in which, some conditions should be followed by the applicant. Another type of the damage is moral damage accepted by the legal system of Turkey. In this case, no fault condition should be proved by the applicant of divorce. According to paragraph 1 of article

143 of Civil Code of Turkey that is based on article 151 of Civil Code Swiss, the current or expected interests of spouses that are jeopardized during divorce should be receivable from the faulty wife or husband (Tekin, I, 1986, P. 192). If the condition of no fault is an absolute condition for the applicant of the material damage, it will be hard to compensate the mentioned damage. What is more considerable in this case is a fault that would cause a harsh fault. The mentioned fault would contain limited material damages but a great damage more substantive value; contrary to the second approach that is doctrine approach that is done in Turkey. The other conditions are existed as follows: the respondent of the case should be faulty and the current or expected interest of the applicant should be removed after divorce. The current interests are named under this title because they could continue if there was not a case of divorce. These interests are included in the alimony, cost of maintenance, force the other party to liquidate the commercial place or account and other interests and assets that are belonged to the applicant of the case. The mentioned interests should be refund after divorce (Paul, J. 1974, P. 116). In this case, the amount of the damage would be clarified by the judge based on the social and economic position of spouses, duration of marriage and common life and the degree of the fault. Based on the paragraph 1 of article 143 of Civil Code of Turkey, the term of appropriate material damages does not include the all amount of occurred damages. There would be a third party in the court to judge the amount of damages. The faulty persons and the way of payment (delayed or without hesitation) should be determined by the judge. It seems that demanding can be asked during proceeding of divorce or after issued final order (Hakimpour, 2009, <http://hakimpour.blogfa.com/post/5>).

2-3. Impersonal effects of divorce in perspective of law of Turkey

Impersonal effects of divorce are some effects that would limit the spouses after this phenomenon. The mentioned effects are different from financial procedure and are discussed in terms of child custody and relationship between spouses and children. The present study has investigated these effects.

2-3-2. Children after divorce based on the moral effects

The consequences of divorce are not just related to the couples. There would be some effects on children in a common life. These effects have been categorized into three types as follows: guardianship of children, personal relationship with children and child alimony or cost of maintenance (communal alimony). The guardianship of children should be delegate to one of the parents after divorce. There are a variety of given authorities to the judge by law in this case. It is believed by doctrine that the interests of children should be considered (Tekin, I. 1986, P. 273). This opinion has been accepted by Supreme Court. In this case, the financial position of parents, age and the degree of their fault in divorce is not significant factors. The second legal branch of Supreme Court has issued an order in 1926 (order 1497/646) in which, the guardianship of children was entrusted to mother because of inappropriate situation of father and age of children while the mother was guilty of adultery. Another issued order in 1995 was

repeated in the mentioned branch to emphasize on this opinion. The judge is able to decide giving the guardianship of children neither to father nor to mother choosing a third party based on the children's interests (Tekin, I, 1986,p. 245). The guardianship of children would be given to the wife or husband who is responsible to maintain children. It should be mentioned that the other party who is not guardian of children has right to visit children. Hence, the Law has noted this issue in paragraph 1 of article 148. The quality, time and other related issue to this visit should be determined by the judge. Of course, any problem should not be made from other side or there is a punishment for guilty person. The right to visit is not only related to children but fathers have such a right to visit their children (Tekin, I.1986, P. 278).

2-3-2. Financial situation of children after divorce

The cost of maintenance would be belonged to the born children or who are carried with their mother. The party who is not guardian of children is responsible to pay the cost of maintenance. This cost is named communal alimony. According to the precedent, the amount of communal alimony should be determined by the judge (the issued order 6930/6996 by the second legal branch of Supreme Court in 1954 and the issued order 47/6305 by General Council of the Court in 1949). The Supreme Court has established its opinion through issuing the following order: the party who is not able to work according to the medical certificate and have no income, is not responsible for paying alimonybase on the article 148 of Civil Code. The communal alimony should be continued till the growing up days of the child (the issued order 1971/1388 by the second legal branch of Supreme Court in 1932 andJournal of Court decisions, No. 7, 1982). According to article 149 of Civil code and article 157 of Civil Code of Swiss, the effects of divorce that are related to the children (to determine responsibility of guardianship of mother or father, personal relationship of children and communal alimony) are not able to make a final situation in law while the mentioned sequences can be changed relatively or absolutely based on the given situation. The issued order by the judge could be changed in presence of the mentioned situations or request of one party (Tekin, I, 1986,P. 245). According to article 149 of Civil Code, the competent court that is responsible to make a new decision should not be the previous court in the case of divorce. The new court is able to determine eligibility of parents based on the Procedure Code and General Regulations. Accordingly, the Court of residence of respondent is competent to review the case (the issued order 8596/7422 by the second legal branch of Supreme Court in 1980 andJournal of Court decisions, No. 3, 1981).

3. Realistic attitude to divorce (Failures and innovations in terms of divorce in legal systems of Iran and Turkey)

The internal legislations of Iran have made a variety of limitations for women. In the presence of the mentioned limitations, it would not be easy for women to get divorce when there is an unbearable situation in common life. Therefore, there is not equality in right to divorce between men and women. Accordingly, most of the women are forced to lose their financial rights in order to get divorced after bearing an appropriate relationship. The solution can be a review of Iran's law especially Civil Code and Family

Protection Law in order to make a balance in mentioned right. The suggestion of legal experts to women is to use possibilities and provisos listed in article 1119 of Civil Code in order to compensate their legal shortcomings in the case of divorce. Polygamy is not legal in law of Turkey and it is stated by paragraph 1 of article 112 that if one of the parties (both man and woman) is married at the time of the second marriage, the marriage would be voided. According to paragraph 2 of the mentioned article, if man or woman is sane or discerning at the time of marriage, it will be voided. In law of Iran, marriage of a married man is not voided and it is just related to the satisfaction of the first wife and also a marriage to a sane person is not voided but it has been considered as cancelled cases. Marriage to blood relatives and casual relatives is the case of void marriages based on the paragraph 3 of article 112 of Civil Code of Turkey (Esin, 2012, P. 154). There is one paragraph has been added to the principle 41 in paragraph 43 in current amendment of Constitutional Law of Turkey in which, the spouses are equal in a family. In the mentioned law, there is not and distinguish between men and women except the mentioned cases. Therefore, women have the same general rights as men.

Conclusion

Divorce is one of the legal terms with a significant role in family and society. This paper has been conducted to assess the importance of this issue in research and scientific studies through an analytical and comprehensive study. The present study has clarified the law of Iran and Turkey in terms of effects and consequences of divorce. It should be mentioned that the legal sources of Iran and Turkey are different. The secularist rules of legal and political systems have made the law of Turkey very different from law of Iran that is based on the jurisprudential sources. However, the text of law has been considered as the main and first source of law in both legal systems of Iran and Turkey. On the other hand, the majority of population of both countries has included Muslims with traditional beliefs in their daily life. In legal system of Iran, the authority of men in terms of divorce has been observed and respected in some articles such as article 1133 of Civil Code while there has been inattention towards women's rights during years. The mentioned trend has caused a misconception about Islamic law in terms of protection of women's right.in comparative studies of family law, articles 1120-1157 of Civil Code of Iran are the first written provisions in terms of cancelation of marriage. The mentioned regulations that are mostly adopted by Shia jurisprudence have been changed through approval of two laws of Family Protection Law in 1965 and 1974. These regulations have been revised after the establishment of Islamic Republic of Iran and especial court in 1979. There have been some other transformations in terms of protection of women's rights in divorce cases through the approval of law of amending regulations in 1991. According to the Family Protection Law adopted in 2002, it could be found that the legislator tend to respect rights of women in order to prevent them from possible losses and difficulties. It should be noted that the Civil Code of Iran has been based on the Civil Code of France and Swiss while there have been variety of jurisprudential conformities and Islamic principles in the mentioned laws in terms of family law such as divorce cases.

An important point would be the final clarification of two legislators towards divorce cases and rights of women. As a result of the comparative study, it should be mentioned that there is a considerable power of men in divorce cases in Iran. The evidence of the mentioned claim could be observed in article 1133 of Civil Code of Iran. This principle (the authority of men in divorce cases) has been modified in law of Turkey that is based on the law of Swiss. The right to divorce is not a unilateral right in Civil Code of Turkey. Although there is a right to divorce for women in some cases in law of Iran but the woman is forced to prove that she deserves to get divorced while there is not such exception between man and woman.

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