



Studying conditions of divorce in Iranian law

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ABSTRACT

Divorce conditions are considered as one of the most important discussions related to divorce. Based on this, the present article has been conducted in a library method in order to study the conditions of divorce in Iranian law. One of the ways to dissolve marriage ties is executing divorce formula. Divorce is one of the unilateral legal acts in which the intention of a party is the legal effective. Spouses separate when the divorce formula is executed by serious intention of husband or his representative to initiate and in the appearance of two just men. In ascertaining the divorce formula, some characteristics have been provided for divorcer, divorcee and the witnesses and some for the divorce formula. According to what has been expressed in this article, the essential conditions of divorce, according to the civil code of Iran can be divided into 5 parts as following: 1) husband's intention and consent and necessity of declaring his intention and determination of subject matter of divorce (article 1136) 2) un-conditionality in divorce (article 1135) 3) fool competency and insane in divorce (article 1137) 4) wife delegation in divorce (article 1119) 5) divorcee conditions in purity (penetrated woman while in pureness state and unpunctuated woman while in pureness state) (articles 1140 to 1162).

Keyword:

divorce, conditions, validity, Iranian law

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INTRODUCTION

Family importance and its related issues are not secret for anybody. Family law is one of the discussions that continuance confrontation is not pertain only to the law experts and all classes of society including poor and rich with any kind of job or gown are involved in problems related to family law such as marriage, divorce, alimony etc., and this is an inevitable. Divorce is considered as bad because it ruptures bonds of marriage, that is, falls it apart, however, this is not absolute. When two people none of whom has no evil designs have been trained under the personal and family mental structures in such a way that it is impossible to live together, is it possible to force them to live together in full disagreement and finally result in rebel? Definitely not; although Islam has called divorce bad, this restricts to a time when the divorce has been done on impulsive.

According to Islamic law, husband has the power to divorce his wife whenever he likes; also, the wife, in special cases, has the right to apply for a divorce to ecclesiastical judge. Iranian law also following Islamic rules, has authorized the husband to divorce; also, some special cases have been foresighted in the law that, if implemented, the wife can refer to the competent court and apply for divorce. Divorce is a kind of unilateral legal act that is done by husband and no special judge has been enacted to the validity of unilateral legal acts in Iranian civil code and the expected essential conditions of contracts in unilateral legal acts are also necessary and transmissible. Furthermore, definiteness of divorce in civil code has been added to the general rules of contracts (Imami, 1388, p. 201). The present article aims at studying the divorce conditions in Iranian law.

1. Concept of Divorce

“Talaque” meaning “divorce” is the infinitive of the entry “Telque, Yatlaque” in Arabic and means freedom, to free, to leave, to abandon, and finally to get rid of bond, promise and covenant (Raghib Isfahani, 1412 lunar year, p. 523) and removing the restrictions, whether the restriction is natural or secondary proviso and/or by promise and covenant (Mostafavi, 1989, vol. 7, p. 112). However, idiomatically, it means removing and separating the wife (Farahidi, 1410 lunar year, vol. 5, p. 101; Raghib Isfahani, 1412 lunar year, p. 523) from a restriction that was created between husband and wife by marriage contract, promise and covenant (Mostafavi, 1989, vol. 7, p. 112). With regard to the literal definitions, this point dawns on mind that the physical separation of wife from her husband and ignoring their duties against each other may result in divorce and separation. However, in fact, the true religion, Islam, in addition to approving the mentioned definition, adds another proviso to it without which no divorce has been executed in Islam viewpoint. Therefore, in religious term, divorce means: “.....” (Najafi, 1986, vol. 32, p. 3) meaning divorce is destroying bond of marriage by a special formula that occurs by the husband’s side (Imami, 2011, vol. 5, p. 5).

2. Essential Conditions of Divorce Validity in Iranian Law:

Divorce validity conditions can be divided into two parts: a group that is related to the principal organs of unilateral legal act, such as consent and intention and

the competency and so on and the other group which is related to its occurrence formalities such as using special words before two just men.

2.1. Husband’s intention and consent and the necessity of declaring intention and the determination of the divorce subject matter

As cited in article 1136 of Iranian civil code “the divorcer should be mature, just, intent, and authorized”; so, if the husband lacks intention to free his wife, for example, the husband expresses some special words jokingly, the divorce does not occur; because he has no intention to do this. Also, consent is required to the validity of divorce. In divorce, like other contracts, consent is considered to be duress of vices and defects, as cited in above-mentioned article 1136 and it has been exactly quoted there.

Here, this question rises that “does the later consent makes the victim of duress operative and effective in divorce like the other contracts?” according to article 209 of Iranian law, as this is accepted in contracts that “transaction signing causes effectiveness of transaction after removing duress”; so, is that impossible to execute this exceptional rule in divorce? Aside from those who, in Shi’as law, regard deeds of victim of duress as null and void in all cases, generally, they believe in annulment of divorce due to duress and there are various narrations in this regard.

Albeit, it should be noted that “accepting this view is difficult in civil code” because, if the consent of victim of duress can make the forcible signed contract operative and effective, then, why cannot it be effective in unilateral legal act driven from duress?

The main reason of creating obligation in contracts is obligator’s intention and the necessity of other’s agreement is due to the effect that the obligation has on his/her property. Then, at first look, there is no cause that article 209 of Iranian civil code is particular to contracts and is not applicable in the divorce” (Kattoziyan, 1382, pp. 317-318). What is more, actual or genuine will are of voluntary acts and its influence depends on husband’s will. So, if a person does not intent to free his wife, but he utters some words in this regard when sleep, unconscious, drunken, or some expressions jokingly, then, the divorce is not occurred (article 1136). Also, the husband means something else and he says the divorce formula mistakenly to state his purpose or a husband who has two wives who divorces one of them instead the other one by mistake (mistake as to the identity of the other party), his act has no legal effect because it is not dependent on actual will.

Intention is not enough only to the validity of the divorce and the divorcer should be satisfied and decide in an environment free of fear and threat. As cited in article 1136 of Iranian civil code: “the divorcer should be intent and authorized” (Katoziyan, 1382, p. 318).

Divorce is a formal legal act and it is necessary to perform formula formalities in a decisive will and with the witnesses hearing such a will. In other words, divorce occurrence is not just depend on articulating the will to say that the later consent can also supplement it; the condition of divorce validity is subject to the

complete consent when fulfilling formula and witnesses' hearing.

However, it is not required that will publicizing is pertain only to the divorcer and according to article 1137 of Iranian civil code, the guardian of permanent insane can divorce his wife, if advisable. Finally, in cases where the court issues divorce judgment, if the husband withdraws the judgment passing or in case of his absence, the court will execute divorce by his representative (Katooziyani, 1382, p. 320). So, the husband should decide seriously to divorce. Thus, undetermined divorce is like a person who decides to divorce in asleep or a person who utters the divorce formula unwittingly, mistakenly, or jokingly which in these cases the divorce is not valid (Moosavi Khomeini, 1409, p. 326).

On the other side, the subject matter should be determined in divorce executing. Divorce is of affairs that are carried out by the husband's or his representative's will. Husband and wife's separation should be the subject matter of intention in divorce, that is, it should take form in divorcer's mind. Therefore, the husband should know that which wife he divorces and he should articulate this will with a special formula. Necessarily, wife determination is felt, especially in cases where the husband has several wives and he is going to divorce one of them. Then, he should take into account a spouse whom he is to divorce and express his intention in such a way that the witnesses present in the divorce contract know that who is divorced.

Presenting two just witnesses in the divorce ceremony is for this reason that its substantiation leads to no difficulty. So, if its case is not determined, it will be null and void, though, it has been determined in the divorcer's mind; because in this case it cannot be claimed that the divorce was heard by two just men. Anyway, this difficulty will not be encountered in practice, if the divorce permission is taken by the court based on law of civil code and the husband should determine his intention in application form (Katooziyani, 1382, vol. 1, p. 326).

3.2 Un-conditionality in Divorce

According to article 1135 of civil code: "divorce should be unconditional and the conditional divorce is null and void" because divorce which is the primary cell dissolution in society has a deep effect on the social system and it should not undergo uncertainty and spouses' wait; thus, the divorcer's intention to free his wife should be unconditional and decisive. If implementing wife freedom is conditional, namely it depends on the other affair, for example the husband says that I divorce my wife unless she is pregnant up to two months later and as far as she does not give birth to a son, the divorce is null and void because the marriage status will be uncertain since divorce date to the emergence of conditional party and the spouses should wait for conditional party and this is incompatible with the proof and establishment of family organization. Abeyance causes the divorce to be null if the conditional party is of future affairs, whether prospective like the above-mentioned example or certain to occur for example he says that: "I divorce you when the sun rises tomorrow morning; otherwise the conditional party is one of the divorce conditions or of affairs that exists during the divorce as the husband says

that: "if you are my wife, or when I am alive and divorce you, the said-divorce is valid because such a divorce is not, in fact, subject to implementing the other affair or its emergence is not uncertain, though it is literally conditional and suspension; rather it comes into being with intention to initiate (Imami, 1378, pp. 31-32).

3.3 Competency of Fool and Sane in Divorce

Considering that divorce is a non-financial possession and the protector's or guardian's permission has not been anticipated in this field, then, it can be said that the fool can divorce his wife with no need to protector's or guardian's permission and according to article 1136 of Iranian law it can be said that maturity is not required in divorcer. The second anticipated condition in article 1136 of Iranian civil code is the divorcer's reason. So, the permanent sane that lacks this condition cannot divorce his wife. In fact, the legislator has authorized the sane guardian to protector to divorce his wife observing rules and expediency of ward. Article 1137 of Iranian law provides in this regard that "the guardian of a permanent sane can divorce his wife if the ward advises it." Guardian, in this article implies forcible protector, representative and guardian. However, probate code has added another condition about the protector which is the public prosecutor's assent and court ratification. Article 88 provides in this case that:

"When the wife divorce is a binding sane, then, the guardian can divorce by public prosecutor recommendation and ratification of court."

It should be noted that based on a Note of article 12 of Courts of General Jurisdiction and Revolutionary Court Establishment Code approved in 1373 in these cases the chief justice of the city has been replaced by the public prosecutor.

As the guardian's power in Iranian law is more limited than forcible protector's or representative's power, if the guardian wants to divorce his ward wife, it requires substituted public prosecutor's assent and court ratification. However, no agreement requires on forcible protector or representative, though court permission is required and what is said relates to permanent sane. But, if the sanity is periodical, that is, sometimes he is in lucid interval, then, divorcing his wife is not valid by guardian or protector because divorce is something personal which basically the person himself takes action on it (Safayi and Imami, 1381, p. 217).

Article 1137 of Iranian civil code provides in this regard that "the permanent sane can divorce the wife if the ward allows it," but if the husbands is sane after the maturity period and the guardian undertakes his works, then the public prosecutor suggests the divorce. As article 88 provides: "when the wife divorce is binding, then, the guardian can divorce the wife based on public prosecutor's suggestion and ratification of court", as it can be observed Iranian civil code has made allowable the divorce of a fool's wife if and only his sanity is permanent; but, this condition is not in probate code. So, this discussion appears that is it possible to say that the probate code has removed the limitation in Iran and has made the judgment of article 1137 of Iranian civil code as implied termination in this regard or when taking these two judgment together into account, is it possible to consider Iranian civil code controlling his power and the probate code particular to the guardian?

In response, it can be said that divorce is an affair that husband and wife should decide on it. The exception related to the divorce of a fool's wife is for this reason that sanity problem may not heal soon and his competency requires her separation from his husband.

This reason can be a case when the husband is permanently sane. Otherwise, the husband, in lucid interval, can decide in case of continuance and marriage dissolution. So, public prosecutor's and guardian's interference in works of a periodical fool is against his liberation and is no case. Article 88 of probate code should be taken into an issue that the husband is a permanent sane (Katoozian, 1382, vol. 1, p. 225). However, the periodical sane can himself divorce during the lucid interval.

3.4 Wife's Delegation in Divorce

It is possible that the husband give attorney ship to his wife during marriage or any other binding contract. Such a condition is valid according to Islamic law and Iranian civil code. The first law that has explicitly accepted the proviso for divorce in Iranian law is the article 4 of marriage law approved in 1320.

Article 1119 of Iranian civil code approved in 1313 has iterated the text of article 4 of marriage law with a slight expressive modification. According to the mentioned article: "parties of marriage contract can make any kind of condition not opposed to the requirements of mentioned contract during marriage contract or another binding contract; For example, it can be conditioned that whenever husband marries another woman, he gets absent for a time, fails to maintain, attempts assassinate his wife, misconducts with his wife so that their joint life become intolerable; the wife can appoint an attorney for herself and get divorce after proofing the conforming with condition in court and issuing final judgment.

It is worthy of noting that the aforesaid cases in article 1119 of Iranian civil code is analogy not limitative and the mentioned rule at the early of article 1 is a general rule which can be of different applicability. Albeit, a condition can be valid that is neither against the requirements of the substance of contract or illegal nor against the imperative rules (Safayi and Imami, 1381, p. 210).

3.5 Divorcee Conditions in Purity (penetrated woman while in pureness state and unpunctuated woman while in pureness state) in Iranian law:

According to the prophet's tradition it can be said that wife's will has no contribution in divorce occurrence. The prophet's tradition: "right of divorce belongs to the husband" is not required due to the reason that wife has competency, albeit, if the divorce granted at the woman's request against compensation and she donates some property to her husband, then the competency necessitates. Articles 1140 to 1162 of Iranian civil code have determined essential conditions for wife and can be summarized, generally, in wife's pureness and the physical separation of spouses.

Article 1140 of Iranian civil code provides that "divorce is not valid during menstrual cycle or children parturition". Children parturition is a state occurring during child birth delivery and a time after that in women and it lasts maximum 10 days after delivery and the menstrual cycle is called menstruation in Islamic law term and: is a blood often

black or red, concentrated, and warm with pain. The purpose is that divorce is executed when there is a, association desire between wife and husband; however, the spouses decide on separation. This implies a deep dispute between them.

3. Conclusion

Divorce conditions are considered as one of the most important discussions related to divorce. Based on this, the present article has been conducted in a library method in order to study the conditions of divorce in Iranian law. One of the ways to dissolve marriage ties is executing divorce formula. Divorce is one of the unilateral legal acts in which the intention of a party is the legal effective. Spouses separate when the divorce formula is executed by serious intention of husband or his representative to initiate and in the appearance of two just men. In ascertaining the divorce formula, some characteristics have been provided for divorcer, divorcee and the witnesses and some for the divorce formula. According to what has been expressed in this article, the essential conditions of divorce, according to the civil code of Iran can be divided into 5 parts as following:

1) Husband's intention and consent and necessity of declaring his intention and determination of subject matter of divorce (article 1136)

2) un-conditionality in divorce (article 1135)

3) Fool competency and insane in divorce (article 1137)

4) Wife delegation in divorce (article 1119)

5) Divorcee conditions in purity (penetrated woman while in pureness state and unpunctuated woman while in pureness state) (articles 1140 to 1162)

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