



The study of Financial Effects of Divorce in Iranian and Turkish Law under Comparative Approach

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ABSTRACT

One of the most important discussions of divorce is the effects of divorce. Based on this, the present research was conducted in a library method aiming at studying the effects of divorce comparatively in Iranian and Turkish law. The effects of divorce stem from two approaches in legal system of both Iran and Turkey. Divorce nature is affected by legislatures' viewpoint of both countries following sovereignty approaches. Iranian legal system has been driven by Islamic law and the subject where Islamic religion is stronger. However, in Turkey, the secular approach changes this attitude and has adopted the effects of divorce more from the roots of Roman, German and Swiss legal systems. As the results of the present article show the financial effects in Iranian law are monthly pension, condition during the property-halving contract, quantum merit of household chores of wife during matrimony and financial matters of children, ...but the effects of divorce in Turkish law are personal effects of divorce in Turkish law: marriage contract and loss of possessions subject to death, liquidation of properties and non-personal effects of divorce in Turkish law: children guarding, individual relationships with children and the financial situation of children. It seems that Islamic rules and consequently Iranian legal system are more expressive and more inclined to protect women's rights.

Keyword:

divorce, financial effects, Iranian law, Turkish law

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INTRODUCTION

Applying for divorce and court decision on permission or divorce by judgment is the introduction of dissolution of marriage. Divorce is a formal law act which is done by saying a special formula and its effect never spreads to the past. Wife and husband remain their previous position until the performing this formula and are as members of a family. It is only since this date that the bond of marriage will rupture and the effects of divorce will appear. Divorce has two kinds of effects: financial and non-financial. In this article, financial effects, on one hand, and the resultant personal effects of parties of divorce, on the other hand, are taken into consideration. Effects including monthly annuities, halving properties and the other effects of both countries Iran and Turkey are examined comparatively. Thus, these effects are different in both countries due to their law and their viewpoint to the definition and concept of law. The differences are reviewed and revised in the following sections and discussions. To this end, in this research the non-financial effects of divorce are studied in both Iranian and Turkish law.

2-The Concept of Divorce

"Telque" in Arabic means lawful and permitted which is against unlawful and means free which is against slavery (Tabrizi, 1997). Divorce, in legal term is the dissolution of marriage bond in permanent marriage contract whether by husband consent or by his agent, for example, by legal obligatory guardian or by wife represented by husband (Ja'fari Langroodi, 1999). Mentioning permanent marriage in the definition is for this reason that according to the Article 1139 of civil code, divorce was peculiar to permanent marriage and divorcing in temporary marriage was due to expiring the formula period or dispensing with "remaining term" from husband.

3-The Financial Effects of Divorce in Iranian Law**3-1-Monthly Annuity**

Issuing annuity should be requested from the court and unaffordability of the applicant and affordability of the other party is established by court. Annuity can be requested during hearing divorce claim or can be applied after implementation of divorce formula. However, benefitting from annuity is subject to divorce formula execution and its registering. Annuity may be cut or reduced. This may origin from losing party stature including remarriage, death and improvement of his/her financial stature or from his/her disability and poverty or his/her income reduction.

Considering the annuity nature it is impossible to develop its applicability, thus, the annuity will be cut due to the losing party's death, though, there are dissenting opinions in this regard (Katoozyan, 2003, 484).

Wife and husband, each, can benefit from the annuity judgment. Annuity is a new establishment which there was no legislative and executive background before it. The amount of annuity is determined by the court based on enacted standards, parties' age and duration of marriage. Although according to endowment of Article 11 each of the spouses can benefit from the annuity, the main purpose of Article 11 of Family Protection Law approved by 53 is to protect the divorced women.

3-2-Condition as an Integral Part of Property-Halving Contract

Although civil code of Iran does not take into account the property halving independently within the financial effects of divorce for spouses, it should be claimed that according to law studies, spouses, especially the wife, can benefit from this right only when the condition is mentioned during the marriage contract. According to Article 1119 of Iranian civil code, 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.

Since property-halving condition in marriage contract is subject to proviso that after their agreement on indicating it during marriage contract spouses deserve benefitting from the mentioned condition only by acquiring those proviso, thus all those proviso are addressed as following. Wife should apply for divorce to implement her right for her husband's property. Thus, if the wife applies for divorce for any reason such as distress and constriction (Article 1130 of Iranian law) or husband's denial to pay support (Article 1129 of Iranian law) or divorce due to husband's absence (Article 1029 of Iranian law), then the halving condition will not be implemented, in spite of enabling clause, and the wife should not be effective in divorce application as such the property-halving will not be implemented if wife's misconduct and misbehavior causes husband to present a petition for divorce.

3-3-Quantum Meruit of doing household chores by wife during the matrimony

Of wife's financial rights after divorce is quantum meruit and matrimony donation. Legislature tries to explain spouses' rights and their interactions in various laws and one of the wife's rights is her wage of works that she does during matrimony life at husband's home.

In fact, the legislature maintains respect for wife's action and based on the general rule of paying wage for works with wage inferred in Article 336 Iran Law says that: "when a person according to another affair is to do something which there is commonly wage for it or the person habitually provide the action, then the agent deserves wages for his/her actions unless it is clear that she/he did it gratuitously."

Civil Code has exclusively addressed the quantum meruit of wife in Note 6 of single Article of Reform Rules Act related to divorce approved by State Exigency Council in Novemebr,1992 (Hedayat Niya, 2006, p. 135).

3-4-Financial Matters of Children

Financing the expenses of a child who has been unwantedly entered into a family that its parties are separating is of special importance; because, the child has financial needs as well as emotional and spiritual ones.

The husband is responsible for wife's and children's alimony after the revocable divorce; albeit, he will not be responsible for wife's alimony when the obligation viduity term finishes. But, he must pay children's alimony.

Obligation for paying children's alimony after divorce will still remain until father's death or being disabled to do so. In order to avoid facing problems in financing children's alimony, the legislature emphasizes that if father dies or become unable to pay alimony, the obligation for paying it remains and the child's paternal grandfather can pay it and if he cannot afford it, then the mother is obliged to pay the child's alimony.

5-Financial Effects of Divorce in Turkish Law:

Turkish Legal System also faces some effects from divorce formula which are analyzed in two sections as below. It is worthy to mention that divorce effects in Turkish Legal System are different from those of Iran's.

5-1-Personal Effects of Divorce in Turkish Law

5-1-1-Marriage Contract and Loss of Possessions Subject to Death

After issuing divorce judgment, the legal effects of some possessions are exposed to some change. For example, a husband's will on the part of the wife is annulled by itself due to definite divorce judgment and the husband is not obliged to infer to his will in this case. If the spouses have concluded any condition during marriage contract or based on any other contract that to implement it even after divorce, this emphasis and condition is null, because as one of the Turkish legal experts (Walid Oghloo) has announced, the principle that is in the second paragraph of Article 146, is one of the authoritative decisions. Possessions subject to death delivered by one of the parties on the part of the another: for example, non-enforceability of will by issuing divorce judgment and its reasonability based on other Turkish viewpoints such as Tekin Ay have been discussed and has been divided as: "if a husband makes a will on the part of his wife before divorce and dies ten years after divorce and makes no change in his will since divorce to his death, although he had divorced his wife, this is not his preservation of his will, but if there is a relatively short time between divorce date and his death date, then non-enforceability of will can be discussed."

5-1-2-Liquidating Properties

Regarding the first paragraph of Article 146 of Turkish Civil Code which is a kind of Swiss Civil Code Article 145, husband and wife can get back their personal properties in divorce depending on what kind of financial regime they accept and the remaining properties will be divided based on the agreed financial regime. If there is a loss and defect in their property and there is no evidence to proof its causality to wife, then the husband will be responsible for this deficiency.

The significance of this rule emerges more in cases where husband and wife accept the financial regime namely joined or the common matrimonial regime before or after marriage. Because in Turkish law the legal regime of properties due to being an independent financial regime is for the reason that spouses get back their properties after the divorce. However, the first paragraph of Article 146 allows this result for those who have a common or joined financial regime.

5-2-Non-Personal Effects of Divorce in Turkish Law

Non-Personal effects are those that impose some kind of restriction on the spouses after divorce. Non-personal effects are those that are discussed apart from financial process and in the realm of custody and the spouses' relationship with children. This subject is mentioned and studied as following.

5-2-1-Children Guardianship

In Turkish Civil Code, the child (whether son or daughter) is under the parents guardianship (Article 292). The guardianship whenever the matrimony continues is done jointly and if there is a disagreement, then the father's opinion is valid (Article 293). If one of the parents dies, guardianship belongs to the one who is alive and to the one who undertook the child's guardianship in their divorce (Article 294). Naming the child is parents' duty. The child must obey his/her parents. The parents are obliged to train the child especially the disabled and feeble-minded ones (Article 294). Parents are responsible for child's religious training. The stalwart child is free to select a religion (Article 266). Parents should discipline the child (Article 267). Parents are the child's representative in their limits of child's guardianship and there is no need to judge's verdict in these limits (Article 268).

Parents manage their children's properties during their guardianship continuous (Article 278). Child's revenue first of all are financed for him/herself, if more than his/her needs, some is given to each of his/her mother or father who is responsible for family's expenses (Article 281).

5-2-2-Individual Relationship with the Children

The first paragraph of Article 148 points to this: "during the divorce process, the judge after hearing parents' statements adopts required policies on the parents' personal relationship with the child" and it is expressed in the second paragraph of the same Article that the one who is not entrusted to care the child is properly decided to have a personal relationship with the child. Therefore, the judge is required to decide on the personal relationship and its visiting manner, quality and time.

However, some believe that the one who has lost the right of guardianship; it is not an absolute condition to continue his/her personal relationship with the child. The Swiss judicial opinion indicates that: "if this relationship followed by some mental, behavioral and physical improvement for the child, then the judge refuses the right of visiting clarifying these problems (Taghizadeh Zenoor, 2013, p. 47).

5-2-3-Children after Divorce and Their Financial Status

Whatever included within children's alimony whether the born child or the carrying one is discussed here. Protecting and training the child is undertaken by one of the parents whom the child is left for. However, with regards to the second paragraph of the Article 148 (Article 156 Swiss Civil Code) the other party is also responsible for the child's expenses and education. Therefore, the one whom the child has not been left for is obliged to pay alimony and this is called "common alimony". Judge freely determines the amount of common alimony.

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