

# A comparative study of divorce laws in Islamic jurisprudence and Iranian law

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## ARTICLE INFO

### Article history:

Received 07 Dec 2016

Received in revised form 10 Jan 2017

Accepted 26 Jan 2017

### Keywords:

Divorce,

Conditions,

Religious jurisprudence,

Iran's civil laws.

## ABSTRACT

**Objective:** In this paper, it was tried that by comparative study of divorce in religious jurisprudence and civil laws of Iran, different dimensions such as definition, properties, causes and conditions of divorce to be considered. According to the article 1133 of Iran's civil law and following the Imamate jurisprudence, the right of divorce is with husband and his will; and the wife in the event of proving special cases can request for divorce and also according to the article 1139 of civil law, the way of divorcing the wife in temporary marriage, expiry of the concubine time or waiver of it are done on behalf of husband.

**Methodology:** Civil law in special cases permitted to the wife to request for divorce from court. These causes have been taken from Islamic jurisprudence: Lack of execution of obligatory laws (article 1129 of civil law), dysfunction in social intercourse (clause 2 of article 1130), being affected by contagious and refractory diseases (clause 2 of article 1130), absence more than four years (article 1029 of civil law).

**Results:** In the Imamate jurisprudence and civil law, "divorce due to the wife generosity in waiver of her marriage portion to the husband) and divorce due to the aversion of parties from each other" have been discussed which are as a kind of divorce with mutual agreement of parties. Also, in civil law, divorce with consent of parties has been known with two mentioned titles namely due to the generosity of wife and aversion of parties from each other which follow the Islamic jurisprudence. **Conclusion:** The research results indicate that there is accordance between the religious jurisprudence and civil laws of Iran about some dimensions and conditions of divorce and in some cases, there is difference.

## 1. Introduction

Duality is a pervasive law among all animates such as plants: « And we caused to rain from sky, we created different kinds of plants by it» (Surah Taha/ verses 20, 53). Duality in animal and human is a response to the sexual instinct which has been put in them naturally for eternity of generation: «And he created some spouses for you from your genus, also he created couple for beasts and multiplied your generation and beasts by it» (Surah Shora/ verse 11). Despite of this, some problems sometimes take place in the duality relations that occurrence of divorce (which is from the most hatred things by the side of God) is the only solution of the problem. Although, the possibility of dissolution of duality (divorce) is from the affairs that many sayings have been mentioned about its profits and losses, but the contradiction of reasons is in a manner that the topical laws of countries and social scholars haven't been also able to reach to the full mutual agreement in this field.

The word of divorce which has been applied in Quran (Surah Baghareh/ verses 227 and 229) is an independent issue in religious jurisprudence that its rules in this field have been mentioned in detailed form. Verbally, it means to open the knot and release, but it is so-called "disruption of matrimony joint" (Jabaie Ameli, 1992).

In Iran's civil law, no definition has been presented from divorce, but in the legal term, it is to dissolve the matrimony relation in the permanent marriage contract whether according to the husband consent or by his representative, for example interdicted forcible saint or wife with procuration on behalf of husband (Jafari Langroodi, 2009).

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DOI: <https://doi.org/10.24200/jsshr.vol5iss01pp13-17>

Anyway, in the religious jurisprudence and civil law, the family has special importance in which legislator has determined the will freedom of parties due to the full adherence of the society's life to the limited family life and the cases of dissolution of marriage and divorce. But there are subtle contradictions and, in some cases, significant differences between the religious jurisprudence and laws of Iran in some problems of divorce. These contradictions are arisen from difference in the legislation references, manner of inference and kind of view of these two sciences. This same difference in the approach has caused that some issues which mostly have juridical aspect, not to be mentioned in the law and some of the issues are mostly in the spotlight of laws science.

Therefore, the main issue of current research is to study the contradictions of laws governing on divorce in the religious jurisprudence and laws of Iran so that the ambiguities and contradictions existing in this field to be specified by it and the field of more conformity and convergence of laws governing on divorce is provided in these two important institutes.

### ***1.1 Conceptualization of divorce***

Divorce is infinitive and it means to open the knot and release from annoying, it means to release the woman from the marriage contract (Zoozani, 1923). In the Amid Dictionary, the same meanings have been mentioned about divorce (verbal noun) [Arabic], so in the dictionaries, numerous meanings have been mentioned for the word of divorce such as freedom, to release, to leave, abandon, In the lawful term, divorce consists of dissolving the marriage bound and joint with a special concubine (Taheri, 1997).

In the Islamic jurisprudence, in definition of divorce, it has been said: Divorce is to dissolve the marriage bound with special word (Najafi, 2002). For example, it is said that «free camel» means a camel that can go anywhere that wants and grazes and the phrase of "I divorced such tribes", means I abandoned them and in the religious law, it is for dissolving the marriage bound; prophet Mohammad (peace b upon him) said: From the most popular permissible rights toward the excellent God is marriage and from the most hatred permissible rights by the side of God is divorce (Helli, 1994).

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## **2. Materials and methods**

### ***2.1 The divorce properties in Iran's civil laws***

The following properties are inferred from definition of divorce in Iran's civil laws:

1-Divorce is unilateral; namely, it is done with the will of man or his representative and he doesn't need the agreement of wife. Although, according to the note of article 3 of legal bill of special civil court, the spouses can do the mutual agreement about divorce and with adducing to this same mutual agreement, they are exempted from referring to the court, but it should be known that divorce isn't done with mutual consent or issuance of command and permission of court. The court's intervention or mutual consent is the permission of occurrence and registration of the divorce in the notarial office and it doesn't any effect on the legal act.

2-Divorce is the ceremonial act; in addition to this issue that occurrence of divorce in the event of conflict should be with permission of court and acquisition of this permission has special ceremonies, the unilateral principle isn't only according to the man's consent and needs special conditions. Article 1134 of civil law in expressing these same conditions says: "Divorce should be done according to the divorce concubine and in the presence of at least two just persons who hear the divorce."

3-Divorce is done with permission or command of court; in a case that wife request for separation, undoubtedly, she should take command from court for proving the existence of difficulties in continuing the life and according to it, she should coerce the husband to divorce. But, in an assumption that husband tends to divorce, according to the note 2 of article 3 of legal bill of special civil court, she should take the permission of divorce from court by special ceremonies and after referring to the arbitration. This permission in the family support law is called "the testimony of compromise impossibility".

4-Divorce is the mean of dissolving the permanent marriage; if the matrimony life is for the determined period, the marriage will be temporary, dissolution of it is done by waiver of period on behalf of husband or as the result of finishing the period. As article 1120 of civil law says: "The marriage contract is dissolved by nullification or waiver of period in the temporary contract".

5-Divorce is done with the husband's will; of course, the purpose of it isn't this case that wife never can request for divorce or the court's vote has no effect on occurrence of it. Wife has the right to want the man's compulsion to divorce with determined conditions and the court also in such a case commands for divorce; but the point is in this issue that should differentiate between the divorce causes and conditions and components of occurrence of it; in all cases, whether the requester for divorce is husband or wife, man should say the divorce concubine and do it. In the cases that wife request for divorce, the court coerces the husband to divorce and cannot dissolve the marriage directly (article 1129 of civil law); but, if the husband doesn't execute the command with his authority, the court that according to the general principle is the abstainer legal representative divorces the wife on behalf of him (recent part, article 1130 of civil law).

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## **3. Discussion and results**

### ***3.1 Comparative study of divorce causes in the religious jurisprudence and laws of Iran***

Despite of this issue that divorce is done with the will of husband or his legal representative, but sometimes he himself tends to divorce the wife and sometimes wife wants from the court to coerce the husband to divorce.

The law in both cases, proportional with the divorce requester has necessitated the permission or command of court; namely, as introduction, the court should be requested for investigation. This request about wife should adduce to the reasons and aspects which have been predicted in the law for requesting the divorce and we call these legal aspects as "divorce causes".

In the civil law in terms of the separation possibility, there is full difference between woman and man. In the family support laws, it was tried that both of them to be placed in an equal situation. Despite of this, since the natural difference of woman and man isn't an affair which can be removed by law, inevitably in that same affair, difference in the commands was manifested somehow unavoidable. But, legal bill of special civil court re-established the civil legal system with a little difference; Husband can divorce his wife whenever he wants, but he is coerced to take the permission from the court and this permission is given in the event that the selected arbitrators cannot succeed in amendment between both of them; but, vice versa, wife can take the command on the husband's compulsion from the court only if it has legitimate cause.

Therefore, the divorce causes according to this issue which are related to the wife or husband can be divided into two groups and divorce on mutual agreement can be added on them as third group.

Firstly-Whenever husband wants, he can divorce his wife (article 1133 of civil law).

Secondly- Wife in special cases according to the articles 1029, 1129 and 1130 of civil law can request for divorce from the court and legislator.

Thirdly- The spouses with special conditions can agree about the divorce mutually. This kind of divorce is called "divorce due to the wife's generosity in waiver of her marriage portion or divorce due to the aversion of parties from each other. Therefore, divorce is done by one of the following ways:

### ***3.1.1 Husband's will***

According to the article 1133 of civil law, whenever husband wants, he can divorce his wife. And this command is according to the Islam's jurisprudence that basically has given the authority of divorce to the man's hand, this rule has been justified with dominance of feelings in women and this issue that in the Islamic laws, man has had more share in formation of family and the heavy load of expenses and responsibility of family is mostly on his shoulder and with this same proportion, his interest in keeping the family is more severe (Noori, 2008) and some others in justification of man's authority have said: Whenever the flame of man's kindness and interest is extinguished, marriage has died naturally (Motahhari, 1991).

In the special civil law, man's will have been known as one of the divorce causes, but with stipulated instruction of verse 35 of Nesa Surah, by arbitration of spouses' relatives at the time of conflict, abusing of this authority and divorce is prevented as much as possible, but if there was no possibility of compromise, there would be no remedy except "divorce".

### ***3.1.2 The cases that only wife can demand for divorce***

Civil law in special cases permitted to the wife to demand for divorce from court. These causes have been taken from Islamic jurisprudence.

According to the articles 1129 and 1130 of civil law, wife in the following cases can refer to the court for divorce.

#### ***3.1.2.1 Lack of execution of obligatory rights***

In the cases that husband doesn't execute the obligatory rights of wife and his obligation on this execution isn't also possible, wife can demand for divorce from the court, one of the obligatory rights of wife is alimony; therefore, in the event of refusal of husband from giving the alimony and lack of possibility of execution of the tribunal's command and obligation to give the alimony, wife can refer to the legislator for divorce and the legislator coerces her husband to divorce. It is the same in the event of husband's disability in giving the alimony (article 1129 of civil law).

#### ***3.1.2.2 Dysfunction in social intercourse***

Whenever dysfunction in social intercourse of husband with wife reaches to an extent that continuance of wife's life with him to become unbearable, in this event also the legislator has given the right of divorce demand to the wife (clause 2 of article 1130).

#### ***3.1.2.3 Being affected by refractory contagious diseases***

Whenever as the result of husband's affection by a refractory contagious disease, the matrimony durability for the wife is perilous, wife can divorce with court's command (clause 2, article 1130)

Diagnosis of this issue that husband has been affected by a refractory contagious disease is with specialist physician and the judge with regard to the physician's testimony will command. If the court according to the physician's testimony proves that husband has been affected by a refractory contagious disease, but with regard to the presumptions and evidences cognizes that the marriage durability isn't perilous for wife, and if the husband is hospitalized and till the end of treatment cannot make a connection with wife because it causes the contagion of disease, in this event the court cannot command for divorce.

#### ***3.1.2.4 Absence more than four years***

"Whenever the person is a missing absent for four years, his wife can demand for divorce"(article 1029 of civil law).

#### ***3.1.2.5 Marring with another wife without consent of former wife***

According to the clause 3 of article 11 of "family support law", "whenever the husband marries with another woman without the consent of former wife, the former wife will have the right to demand for issuance of compromise impossibility testimony for divorce from the court".

In these same cases, a question and a response have been mentioned in the honorable book of Jame al Shatat of deceased Mirzaye Ghomi as follow:

"Question- Husband behaves with his wife incompatibly and always annoys her, rather this affair has led to injure and break in the event that the sample wife hasn't withheld in observance of wife's rights even a minute, husband in the presence of a group has stipulated that this wife doesn't any consumption

for me and I am never interested in her and nevertheless, he doesn't divorce her. Whenever it is determined that with durability of matrimony between them, the husband revulsion of that evil act isn't possible and they aren't sure that husband doesn't kill the wife, in this event that elimination of corruption is confined in divorce; can the lawful command or believers' derogation coerce him to divorce?

Response-Undoubtedly, as the husband has some rights on wife that in violation of them, the wife is unruly, also the wife has several rights on husband that in violation of them, husband becomes unruly. And the rights of wife on husband include the following cases:

He must give her alimony and cloths according to the holy religious law, he must not be ill-humored with her without lawful consideration and he must not annoy her. So, whenever husband violates from the wife's rights and the wife's claim hadn't any benefit, she refers to the legislator and after proving by the side of him coerces him on being faithful on divorcing her, whenever the legislator knows that husband doesn't behave properly and he isn't faithful on the wife's rights, coerces him on divorce and this compulsion doesn't contradict the correctness of divorce" (Mirzaye Ghomi, 1993). From the mentioned question and response, it is inferred that whenever husband isn't faithful on the obligatory rights of wife and coercing him to execute them isn't possible, the legislator coerces the husband to divorce and in the event of husband's refusal from divorce, legislator divorces woman and this divorce is correct legally.

### **3.1.3 The mutual agreement of spouses**

In Imamate jurisprudence and civil law, "divorce due to the generosity of wife in waiver of her marriage portion and divorce due to the aversion of parties from each other" have been discussed which are a kind of divorce with mutual agreement of parties. In these kinds of divorce, wife gives a property to the husband to acquire his consent for divorce. The first one is according to the wife's generosity and the second one is according to the parties' aversion.

The divorce without aversion on behalf of wife and husband has been also accepted by "Shahid Sani" (Jabaie Ameli, 2011) and deceased Mirzaye Ghomi after forty years opposition with the view of Shahid Sani, has announced his agreement with the view of Sani for some reasons (Mirzaye Ghomi, 2000). And Saheb Javaher opposes with divorce without aversion severely and says: I wish Mirzaye Ghomi remained on his opposition with Shahid Sani and also, he rejects the reasons of Mirzaye Ghomi (Najafi, 2002). In Iran's laws, mutual agreement of spouses is also as one of the causes of divorce. In civil law, divorce with mutual consent of parties has been cognized as the divorce due to the wife's generosity and divorce due to the aversion of parties following the Islamic jurisprudence.

### **3.1.4 According to the article 11 of family support law, the cases that each one of wife and husband can demand for divorce are as follow:**

1-In the event that wife or husband with certain command is punished for five years or more, or due to a penalty which has been as the result of disability in payment, one of them is prisoned for five years or they are condemned to prison or penalty which is totally 5 years or more and the command of imprisonment or penalty is being executed.

2-Affection by any kind of harmful addiction that according to the court's cognition creates disorders in the foundation of family's life and causes that the continuance of matrimony life to be impossible.

3-Whenever husband without consent of his wife marries with another woman.

4-Whenever one of the spouses leaves the familial life, cognition of leaving the familial life is with court.

5-In the event that each one of spouses as the result of being committed by a crime which is contrary to the familial dignity and dignities of another party is condemned to the certain command in the court. Cognition of this issue that a crime is contrary to the familial dignities with regard to the parties' situation, customary law and other criteria is with court.

The family support law in order to respect to the traditions and religion to an extent and give the legitimate form to the divorce of women that according to the article 11 of this law acquire the compromise impossibility testimony, has used of a legal technique predicted in the Islamic jurisprudence and civil law and it has ordained that the contents of article 11 should be stipulated in the form of condition meantime the contract in the marriage contract and in these cases, the irrevocable power of attorney is given to the woman on behalf of man for execution of divorce (article 17).

Therefore, in the event that man has given such a power of attorney to the woman meantime the marriage contract, woman after issuance of compromise impossibility testimony can make herself a divorced woman.

From studying the causes of divorce, in an order which was said, this result is gained that the cases that wife can demand for divorce are more than the cases that the man has been permitted to request for issuance of compromise impossibility testimony.

### **3.2 Power of attorney in divorce**

Imami in his civil laws book in the divorce discussion about the power of attorney in divorce says: "Any affair can be done by another one, unless law has assigned it on the person himself/herself; therefore, all affairs that law hasn't stipulated which are undertaken by the person or the presumptions, situations and conditions don't predicate on them, can be done by another one (Imami, 1995).

Divorce isn't from the affairs which is undertaken by person, otherwise the legal representative of husband, saint, guardian of permanent insane couldn't do it; therefore, husband can give the power of attorney to another one or power of attorney in substitution of another one so that wife divorces him, as she can appoint him as attorney or attorney in substitution to make herself a divorced woman; according to this, the article 1138 of civil law says: "The divorce concubine may be executed by attorney; there is no difference in correctness of attorney in divorce that the husband is absent or not" (Imami, 1995). Allameh Helli in the Sharaye al Islam book about this issue that husband makes his wife attorney in her divorce, has said: It isn't permitted. The wife is permissible (Helli, 1994).

The known jurists believe that the power of attorney is current in divorce; therefore, whether the man is present or absent, can make another one attorney in divorcing his wife (Najafi, 2002). And for correctness of their claims, they have resorted to two reasons:

First- Divorce is the case of attorney which includes all vicarious affairs. And the purpose of vicarious affair is an act that the view of holy legislator hasn't belonged to it in a manner that the person lonely does it with overseeing and without intermediary, rather the main purpose of it is to do that act, whether it is done with overseeing or in viceregency.

Second- There is a narrative from Imam Sadegh (peace be upon him) that he was asked that a man has assigned the right of divorcing his wife to another and has said: See! I have assigned the right of divorcing my wife to another one; has this affair been permitted? Is this divorce correct?

Imam Ali (peace be upon him) in responding to those questions said: Yes, it is correct and it has no impediment.

Other narratives have been mentioned in this field (Horre Ameli, 1975). Therefore, the civil law following the known saying has accepted the power of attorney in divorce.

There are two views about the wife's (power of) attorney in divorce in Imamate jurisprudence: The known Imamate jurists believe that as such a work can be done in other contracts and unilateral treaties, in divorce, the power of attorney can be given to the wife to make herself a divorced woman. And the reasons of it are the public affairs of attorney permission in the vicarious acts and woman has been complete legally, she can become attorney (Najafi, 2002). Thus, Woman's (power of) attorney will not have any impediment.

#### 4. Conclusion

In this paper, after studying the nature, causes and conditions of divorce in jurisprudence and laws of Iran and also studying the views of Muslim lawyers and scientists especially Shia jurists, verses and narratives, legal and juridical aspects, this issue was considered. In Islam in which all recommendations about this issue have been about keeping the family and avoiding from divorce, there is no doubt in the legitimacy and permission of divorce in jurisprudence; in Iran's laws, whenever man wants, can divorce his wife (article 1133 of civil law) and woman has this right to request for divorce from the court in the special cases (articles 1119, 1129 and 1130 of civil law). Totally, it is concluded that in Iran's civil law, the nature, causes and conditions of divorce have been adapted from Islamic jurisprudence and it can be said that between jurisprudence and civil laws of Iran, in some dimensions and conditions of divorce, there is difference and, in many cases, there is conformity.

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#### How to Cite this Article:

Marandi M.R., Farzizadeh Z., A comparative study of divorce laws in Islamic jurisprudence and Iranian law, UCT Journal of Social Sciences and Humanities Research 5(1) (2017) 13–17.