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# Jurisprudential and Legal Analysis of Right of Divorce and the Manner of Transferring it

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### ABSTRACT

Divorce is the most hated allowable thing in Islam and it is accepted in Islam divine legislation to save and release the underdog party when the spouses cannot be reconciled and continuation of matrimonial life results in continuation of cruelty and negligence of rights. The principle in divorce is that the husband divorces his wife as according to Qoranic verses, narration and article 1113 of Civil Code man is the owner of divorce right and whenever divorce is mentioned in Koran men are addressed with masculine wording as for women with feminine wording and as Muhammad (PBUH) says divorce is the power and authority of the person who is the authority of woman. Therefore, in the jurisprudential literature of Shiite and Sunnis no de facto limitation is imposed on enforcement of right of divorce for men. However, law has imposed a weak limitation on men as they are required to apply to court for Irreconcilability Certificate. But if the woman applies for divorce she not only is required to refer to court, but also needs to act in the frameworks predicted in Civil Code, that is, she needs to have offered conditions accepted by the husband when married and to have been authorized by the husband to get divorced if the husband fails to fulfill the set conditions and is also required to prove authorization and breach of conditions in order to get Irreconcilability Certificate from the court.

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## INTRODUCTION

### Research question:

This research firstly wants to analyze the word divorce and then analyze ownership of divorce right and ways to deliver it based on five religious (Imamiye, hamafiye, shafeye, maleki, hanabele) and law problems about it to answer questions like:

- 1- What's the meaning of divorce?
- 2- The divorce, right refers to which side?
- 3- Could we deliver this right?
- 4- What are ways for woman to achieve right?
- 5- What are Iran civil law and five religious ideas about this right?

### Research method:

The method used here is experimental, documental way and to answer questions we use quotation books, Shia and sonnet and 4 religious of sonnet and law books also we use jame Al fasir 2 software.

### Review of literal true:

We have articles before:

- 1- The Jurisprudence and law analyze of woman right in divorce two
- 2- woman right in divorce and gave her right
- 3- analyze of terms of woman rights in divorce and each one try discover the different religious in this terms in this paper after analyze of word divorce we try to final out based on Quran and prophet quotations this refers to

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whom and based on Iran civil rights in which ways woman could graph this right or to some extent. Here we try to bring solutions about this topic very Cleary.

The meaning of word divorce:

The word divorce refers to (Talgh) and has different meanings like (gave her thing) (do a good action) that woman got divorce and when Arab said (means camels are free and it means a camel could go anywhere [2].

So based on above definitions divorce means tear up or omit limitations and means to leave or took free or he free from marriage.

As we analyze the Arabic root word now we focus on Persian to analyze this word based on Jurisprudencch and law and we realize this words meaning in Persian is just like Arabic meanings

In Persian book we see (divorce is transitive root, means leave man and woman or free of marriage for woman or omit marriage or to a bandura man or woman [8]. Divorce in Islam sources needs the meaning of word in Arabic and we couldn't use the word without its meaning in Arabic this topic is a favor of law makers and they said two fact or effect divorce: first the meaning in Arabic fully homogeneous with Islam orders, second: divorce orders express in Quran and quotation so both of them talk about a unique option.

We should say divorce is not a (religious fact) when law makers use a word based on religious and talked about it, because before ordering it by Islam Arabs use this word with some meaning.

Sahen javaher in his famous book said: divorce is to tear up the rope of marriage and a like in religious terms [26] in Sharh lame we see it means to omit and cancel the marriage order by means of sigh (Talegh) [13].

Af if tabare one sonnet juraturst in roh Aldineslami said: divorce in Islam is to tear up marriage or cancel it in present or future by words that they are clear like man said to woman: (you divorce).

Most of Jurisprudential in term of divorce words said it means to tear up or breakup the marriage relationship [6].

#### *Divorce definition in Islamic republic of Iran:*

Iran's law makers as laws about marriage and divorce is based on Imamiye Shia laws have to act based on this frame work and define divorce based on civil law and other law related to family.

Dr. sayed Hassan safaee and asad allah emami said: divorce as: ending the full time marriage by husband [3].

Dr. sayed Hassan safaee and asad allah emami said: divorce is ending marriage with special ceremony by husband [14].

Finally Dr. naser katozian based on divorce ceremony and have elements of divorce said (divorce is an action in which man leave a married woman by court order [20].

So divorce is an action with special ceremonies and all of containers should hold.

Does this divorce is a deal or contraction? We should say divorce is an Unilateral obligations is an judgment and one sided action and has logical sources) and difference between deal and Unilateral obligations refers to acceptance of both side in deal but Unilateral obligations needs one side agreement) it mean in its happening just man willing is taken into as count and there is no need to woman agreement so as a man wants to cancel marriage he could divorce woman one sidely.

#### *Divorce reasons:*

What we discuss here as reasons are those terms which cancel marriage and crated divorce situation

Iran civil law based on Imamiye religion brings some reasons in amends 1146, 1129, 1029, 1113, 1130, 1145, 1146.

#### *The reasons come below:*

First: divorce is by man based on amend 1132 of civil law and he could perform it any time

Second: divorce by woman request contain amends 1029, 1129, 1130 of civil law and they are special cases

Third: agreement divorce based on amends 1145, 1146 of civil law it has special cases too!

Here in this paper to avoid redundancy firstly we discuss about divorce by man allow and then we analyze the ways in which woman could receive the allow to divorce

Man right for divorce based on law.

In Iran laws based on amend 1123 civil law (man could divorce his wife any time he want) so divorce is an Unilateral obligations from man side and he could use his right whenever he wants. With approving this law the ownership of divorce gave to men and divorce rate increased.

So the law maker's tries to revise the law and approve the family support law in 1346 and divorce needs the court announcement and man has no right to go to office and divorce his wife. And in amend 8 mentioned law we see (side whom request divorce should explain reasons) and we had reasons in amend 11.

So we have different ideas between law makers: some of them believes that authority of amend 1133 steal remains for man and he could go to court. This element come from the first part of amend 11 family support law that said (more than mentioned laws). In courts others say based on amend 8 family support law the person

whom request should bring reasons so we find that man should give his reasons to court and by this the amend 1133 civil law will omit.

Any way approving the law of family support in 1353 somehow omit this struggle and based on amend 8 (more than mentioned laws) omitted and this said law makers don't want to give the man the authority of divorce [20].

After Islamic revelation in 1357 amend of civil court approved and in sub amend 2 of amend 3 we see (reasons are those brought in civil law and religion and as man request divorce based on amend 1133 civil law. His authority to divorce again comeback by this way man has authority to divorce based on Iran's law and could request to perform.

Authority of divorce for men based on Quran and prophet quotations: Imamiye religion, sonnet 4 religious and all Islamic religious and salafi and others said based on documents men are authors and could divorce whenever he want [9].

Holy Quran Aye's:

- 1- Aye 2 Surah tulagh, prophet (tell to people) when divorce woman use Promise(ede) rule to divorce.
- 2- Aye 230 Surah baqare: if (after 2 divorce comeback) again divorce created after this that woman is haram expect he marry another woman.
- 3- Aye 49 surah azhab: when believed men marry a woman and divorce before sexual relation so there is no Promise (ede) for them and give something to them and leave .

Now based on Quran authority of divorce is by man and if society recognized he doesn't merit for this right he will limit and bring his request to court like woman and as woman attend in marriage she should take a part in divorce rights and many reasons should be logical force court and doesn't disagree with Quran? Or aye 35 Surah nesa order to do it and judge the struggles of pause could aspire these thoughts?

To answer this quotations we could say recently most of Jurisprudential use eyes of surah baqare about men responsibility to his wife (do good things) and we use this general idea to limit men if he doesn't his promises but some said by these situations we couldn't give the authority to woman but woman could request for divorce by court and make free herself [23].

When situation tell us it's necessary to accept of woman request by this aim we could limit men situation. In this part anyway we gonna discuss based on Quran is the authority is with men and it's a heaven source and we couldn't act against it or not?

As it mentioned before most of Jurisprudential said authority is with men and no one could escape for it and some clearly approve it without any reasons man could divorce woman although divorce without reasons is makroh abu hanife the author of hannafiye religion and the writer, of aem alesam book said (divorce is mobah based on Quran and prophet sonnet and the authority is with man and man could divorce his wife whenever he want with try is with man and man could divorce his wife whenever he want without talking about, reasons. But when we have no argue and problem the divorce is makroh but not haram [19]. but as we watch based on eyes of divorce Quran as an approved source didn't talk about men authority in divorce right and to approving couldn't be reformed but we should say the aim is to reform the rules to be more fair for woman. As the interpretation is correct but we use in wrong way we could reforms well we should approve law to limit men logically and morally to avoid divorces.

*Sonnet:*

Here in this part we don't want to talk about different news and quotations but we try to find out about woman rights in term of quotations.

As we see in Quran regard this we have some quotations about prophet and could be seen Islam gives this right to men and we briefly talk: ibn abbas said that prophet told: what happens for one of you

Whom marry a waitress to his waiter and could to make them separate while the divorce right is with the man.

Alame mohagheh heli about the fail of divorce by the clients said the reason is that the divorce refers to the owner and shahid sani said in definition of prophet quotation which said: divorce right is with person whom has authority and this authority refers to man that benefits from woman this quotation is really famous and both shia and sonnet approve it and it has not been mentioned in Shia book like (kafir, tahzib and raseal al Shia and so on) but in sonnet books its existed but Shia Jurisprudential mentioned in deferent situation and accept it as prophet quotation.

We have other quotations that covey this concept and said: one of persons whom his pray didn't accept is aman which his wife curse him while his able to divorce and she could be free by divorce [4] in this quotation that all of them say the authority is with men.

Ways to create woman author of divorce based on law and juratory view:

*Based on civil law we have to omit the marriage:*

- 1- Man agreement with giving money: as woman dislike his man (based on civil law hate him) and wont to be separate as the authority is with man. She could give a portion of money to man based on amount of cobine to

make man agree to divorce. This type in civil law called as: deposal divorce or mobaray divorce (amend 1146 civil law: deposal divorce refers to when woman based on her dislike of husband gave him money to divorce although the money is like just the cabine or more or less of it) .

2- Go to court and request for divorce based on sivila in some cases and based on some reasons could request for divorce but in court she should approve her reasons.

To avoid redundancy and for achieve conclusion are don't explain more and explain about third item based on law.

3- Using the marriage terms and getting the divorce authority. As person that doesn't want to perform divorce could use lawyer and the lawyer could perform the divorce as his client because divorce is an independent action. The divorce authority for man is an oar which comes from god and the man couldn't cancel it but his could assign a client. In marriage to perform divorce as an aren't happens for man so it's not the omit of rights [25].

In this title we talk about reasons after the approving of support family law 1346 law maker struggle about if amend 1133 omitted or not.

After the law fluctuation and struggles at law makers based on some cases based on amends of civil law and religious orders but we have some cases based on amend 1133 civil law husband could request for divorce and court should (based on aye 35 surah nesa) court should discuss about it.

So based on this the family support law about limitation of rights of divorce somehow omitted and the divorce rights with woman and this right could be delivered to others.

Based on amend 1138: it may divorce perform by lawyer husband has rights to make client and could deliver his right to others to divorce woman it clear performing of divorce by lawyer doesn't change the terms and general terms are stable like we need two fair man as witness because lawyer just act as people and terms should be used.

In term of giving right to lawyer by woman question is does man could five his right to wife? Or mentioning the right in marriage office is based on amends 1119 civil law? Or if woman has right could she divorce herself as she wants?

Firstly we should say we could do any action by others expect one's that law doesn't allow. So as in terms law allows we could do action by others based on law terms.

Based on amend 1123 civil law man could give right to wife to divorce and its possible by act based on terms and law makers just talk about terms on amend 1138 civil law there is no limitation to diver to other the divorce right so man could deliver his rights of divorce to his wife.

In amend 1113 of Iran civil law we see (man could divorce his wife as want) this is not one of law's which man could deliver to wife but he could do it in special cases so based on Iran civil la woman naturally doesn't have the right of divorce but in term of convictions and convention this right could be delivered to woman.

In amend 404 marriage law 1310 which come into civil law book 1313 as amend 1119 civil law talked about the terms of right delivery and said sides could delivers the right there is nothing wrong with it and the law and in fact it direct woman to force situation to husband to when man cross the lines lawyer could give her right and divorce.

In official document of (B) for marriage it mentioned (in formal marriage we need another marriage to deliver the divorce right side expect cases need court allow to select the divorce type) the terms of marriage existed in beginning of Islam and quotation of prophet and ahle bayt about it some side terms of Islam are: using lawyer in divorce term for selecting house – term to avoid remarry and ....

The preemie congress of judgment in approve (61/7/19 b, 1/34823) and ( 62/6/28, 1/31823) order to the official record offices: in marriage book should mentioned the authority of divorce and terms and side terms which both sides agree with them and its acceptable and valid (mohaghegh damad bita, P510).

#### *Delegation other fifth religions:*

Imamiye has two ideas here: first allow and this idea a accepted by most od Jurisprudential and said the religion to woman is allowed because we could deliver the divorce right and there is no need to presence of persons and as woman has fall rights could be a client and some of Imamiye Jurisprudential use the prophet delegation to his wife in this situation (shahid sani, 1993,V2 P145) some of jurator of Imamiye fully accepted the delegation of divorce to woman and said it give rights to woman (here we questions in 1358 from imam Khomeini and his answer has some benefits).

#### *To Iran's holy leader imam Khomeini (god blesses him):*

The situation of divorce by man, cause to make some groups of Iran's woman suffer and think they have nothing in divorce situations and it may be cause to misuses, so what's your idea about this problem?

Answer: to respected woman, in our religion its mentioned everyone could be author for divorce, in term of marriage we could assign the authors in divorce to has right to fully divorce any time or by term it means when men temper is bad or marry another woman, his wife could divorce and then we have nothing wrong for woman

and easily could divorce second: no permission in al nahayat book of sheikh toosi we see (when husband make another person client to divorce his wife that person could divorce whenever the man wasn't in town and if he is in town client could perform divorce (Tosi bita, P511).

Documents wife or man could get back his words [18] and in (moghni al mohtaj) book of sheikh of shefee we see: (using client in deals like marriage divorce ... is correct.

Malekies believes divorce is by man and his delegation person and the aim of delegate his wife when man deliver his right they said: if man make his wife client in divorce he could get back his right expect a time man give another right to his wife like if we marry the order is with you to do marry with others or not or divorce) then woman could get the authority and it's to decrease the harms for woman.

Hanbali's believes a person whom deserve the authority could get the divorce right and said: man has right to make other could client whether the client is man or woman or his wife and woman could request divorce expect the cliency has time like said (today divorce her or yourself) so the permission of divorce on another day cancel and client when has time or the client time will expire also client doesn't allow to perform more than 1 divorce expect the person allow him/her to do so and if client said to lawyer: (tell whatever tou want and perform about three divorces) in this case client could perform just two divorce because the word (me) use for expectation (the same, P452) based on said before we could say when woman by cliency of side term marriage divorce herself, regard fifth religion and amend 1145 civil law the divorce is correct and another hand as divorce by man permission is a kind of been divorce so it's kind of (raje) divorce expect it contain one of amend 1145 civil law.

#### *Conclusion:*

The aim of expressing this idea isn't to discuss and conclude in this field and we aren't another enough to do so with this article to express the idea the general aim is to talk and define this problem and talk about Jurisprudential idea and bring question and think about it based on two aspects to reach conclusion we see that most of scientists were worry about divorce and authority of performing it and man may misuse this option and create hardship for woman and quotation could impact on people because they have no guarantee to perform and we see that some Jurisprudential fully accepted the authority of men in term of divorce and based on Quran it's correct and we could delegate it to woman or based on court or her but some law makers and Jurisprudential bring some reasons to create situation for woman to be author and she could achieve this point by approving reasons.

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