

THE RIGHTS OF WOMEN IN THE PROCEDURE OF DIVORCE BETWEEN IRANIAN-SHIA AND INDIAN –SUNNI MUSLIM LAW

Seyed Javad Seyed Alizadeh Ganji¹ and Roza Memari,²

Faculty Member of Islamic Azad University, Qaemshahr Branch, Qaemshahr, Iran & Ph. D Scholar of
Panjab University, Department of Law.¹

E-mail Address: alizadeh_ganji@yahoo.com

Ph. D Scholar of Panjab University, Department of Law²

E-mail address: rzmemari401@gmail.com

Abstract: In Islam, divorce is considered as an exception to the status of marriage. The Prophet Mohammad (peace be upon him) declared that among the things which have been permitted by law, divorce is the worst.¹ Divorce being an evil, it must be avoided as far as possible. But sometimes this evil becomes a necessity. When it is impossible for the parties to carry on their union with mutual love and affection, it is better to allow them to be separated instead of compelling them to live together in an atmosphere of hatred and sufferings.

With the consideration of Islam which emphasizes on the protection of family life and avoidance of divorce taken based on caprice and whim and nervousness, the consideration of procedure of divorce can have an effective role in its prevention. Accordingly, as opposed to Indian Muslim-Sunnis law, in Iranian Muslim-Shi'a laws, there are some formalities for divorce such as refer to the court, determination of arbitrations, etc which are taken into account.

Key Word: Muslim, divorce, procedure of divorce.

1. Introduction

Divorce is not a private matter between, only, husband and wife. It is a public issue because of having great impact on society as well. Therefore, divorce must only be permitted to take place in the last resort. All the ways by which the reconciliation may be achieved, should be considered not by the spouses themselves, but by impartial arbitrators too.

The basis of the Islamic law of divorce is the inability of the spouses to live together. It is to be noted that with this idea behind a divorce, Muslim law recognizes several modes of divorce² which is the purpose of this study to be explained.

Muslims are divided into two major groups: the *Shi'is* and the Sunnis. The *sunnis* are divided into four sub-sects: (a) the *Hanafis* (b) the *Malikis* (c) the *Shafeis* (d) the *Hanbalis*; and The *Shi'is* are divided into three main sub-sects: (a) the *Imamis* (the *Twelver's/ Ithna Asharia*), (b) the *Zaydis* (followers of *Zayd*, the great son of the fourth *Imam*), and (c) the *Isma'ilis* (followers of *Isma'il*, one of *Imam Sadiq's* sons).

Both Sunni and Shi'a Muslims share the most fundamental Islamic beliefs and articles of faith. The difference is in the interpretation of some of the verses of the Holy Quran; and in believing or not believing some of the Sunnat as genuine; or in its interpretation.

In this paper the rights of women in the procedure of divorce between Indian Muslim (Sunni) and Iranian (Shia) are considered.

2. Procedure and Formalities of Taking divorce/Talaq

According to Shi'a and Sunni Muslim law, the man is not allowed to pronounce a *talaq* while the wife is in her menstrual period. Here are procedure and formalities of taking divorce in Indian Muslim-Sunni Laws and Iranian Muslim-Shia Laws.

2.1. Procedure and Formalities of Taking Divorce in Indian Muslim-Sunni Laws

No school of the Sunnis prescribes any formalities for *Talaq*.³ According to Sunni law *Talaq*/divorce may be oral or in writing. *Talaq* may be simply uttered by husband or he may write a *Talaqname*. No specific formula or use of any particular word is required to constitute a valid *Talaq*. Under Sunni law, *Talaq* without witnesses is valid.⁴

2.2. Procedure and Formalities of Taking Divorce in Iranian Muslim-Shia Laws

In the laws of Shia definite formalities for *Talaq* are prescribed. In the Shia law, *Talaq* must be pronounced in the presence of two competent witnesses. A *Talaq* without witnesses or in presence of incompetent witnesses is void under Shia law.⁵

The Shia law requires the use of specific Arabic words in the specific formula in the pronouncement of *Talaq*.^{6,7}

in Iranian Muslim -Shia law prescribes some formalities for taking *Talaq* and also *Talaq*/Divorce under Iranian Law doesn't affect an out of-court only by the own declaration of husband.

The procedures of divorce in Iranian (Shia) Muslim laws are:

(a) The husband or wife intends to divorce, he/she has to go to the special Civil Court² and shall apply to the court and also mention the exact reasons for issuing him or her certificate of incompatibility (non-reconciliation).⁹

(b) The court shall endeavor to bring about a compromise between the husband and wife, through two arbitrators (Hakamain), as the Holy Quran¹⁰ ordered, and prevent the occurrence of a divorce.

(c) The arbitrations must be having some qualifications.¹¹

(d) The Court will hold an extra session to read them their duties.¹²

(e) The Court will determine a time limit for arbitrator to judge, and installed arbitrators must hold no less than two sessions with the couple to make peace among them.

(f) Written report [of arbitrations] on impossibility of reconciliation should be delivered to the Court based on all marriage conditions.

(g) In case all the efforts of the court and arbitrations to bring about reconciliation fail to bring the desired result, the court shall issue a certificate of non-reconciliation between the parties.

(h) The Non-Conciliation Decree issued by judiciary officials is deemed void if not referred to divorced registration offices within three months.

(i) Divorce pronouncement and its registration is conditioned to delivering all payables to the wife in cash (including dowry, marriage portion and etc) and should be done after paying them.

(j) The prescribed words (Sîghah) of divorce shall be pronounced after the court has considered the relevant case and issued a certificate of incompatibility (non-reconciliation) between the parties.

(k) In revocable divorces a written certificate about the living of the divorced woman with her husband in the same house until the end of the Idda¹³ is necessary.

(l) The divorce report is completed and is official if signed by the couple, arbitrators, witnesses, and signed and sealed by head of the Notary Public.¹⁴

(m) After divorce¹⁵ the woman can appeal for the payment of the works that were not her legal and religious duties.

(n) Pregnancy or non-pregnancy certificate by qualified doctors and laboratories should be delivered.¹⁶

(o) The notary public office has no right to register any divorce whose certificate of 'impossibility of reconciliation' has not been issued for; otherwise the faulty Notary would be incapacitated.¹⁷ If each of the parties goes for divorce without receiving the certificate of non reconciliation, he/she will be condemned to 6 months – one year imprisonment. The same penalty would be for the notary public office of the Divorce who has registered the divorce.¹⁸

(p) The divorce must be performed in the actual form of utterance and in the presence of at least two just men¹⁹ who must hear the actual form of divorce.²⁰

(q)The witnesses must be male²¹and just. This requirement is based on the letter of holy Quran²²

As it is clear from context of the above mentioned about procedure of divorce in Iranian Muslim (Shia) laws, there are some phases for resolving the dispute between the parties. The procedure of divorce in Iranian courts is according to Holy Quran, Sunnat and other Shi'a Muslim's sources. This long procedure is necessary because most of the divorces occur due to whim, caprice and nervousness

3. Conclusion

In order to maintain the foundation of the family and prevent the divorce which are out of anger or hasty or whim, it is suggested that in Indian Muslim Law there should be the procedure and formalities that is applied in Iranian Muslim law such as referring to the court by husband or couples and providing rational reasons for divorce, appointing arbitrators from the family of husband or wife (in specific condition that was explained) by the court and their attempt for creating peace between the couples, paying all rights of female before divorce such as dowry and past maintenance and maintenance of waiting period (Iddah).

4. References

- [1] F.B .Tyabji; *Muslim Law*, 5th Ed, Bombay ,1969,p.143.
- [2] R.K.Sinha; *The Muslim Law [Muslim Law as Applied in India]*, 6th Ed, 2006, p.81.
- [3] paras Diwan; *Muslim Law*, 2009,p.88.
- [4] R.K.sinha; *Muslim law*, 2006, p.84.
- [5] According to the Shi'a school of thought and as expressly mentioned in the Holy Qur'an (second verse of Surat al-Talaq), divorce must be pronounced in the presence of at least two trustworthy and righteous witnesses.(R.K Sinha; Supra note, p.84).
- [6] R.K.Sinha; p.84.
- [7] The actual form of utterance of divorce in Arabic is 'Ante Taliqon' means 'you are divorced'. 'Ante' is pronoun for feminine single and 'Anta' for masculine one. 'Taliqon' is name of agent and 'Talaq' is infinitive. That word in the formula which should not be changed is 'Taliqon' otherwise instead of 'Ante; it can be altered to e.g., this wife or her name etc.
Mohammad. b. Muslim narrates the Sixth Imam; Jafar b. Mohammad. As-sadeq that he was asked if the husband says to the wife that 'you are free from my side' or you are separate' or 'you are forbidden to me' there can be a divorce? Iman Sadiq said 'No'(laisa Be Shi'a). [laisa Be Shi'a] , It is Arabic sentences that means: No, He is not Shi'a], Wasail ul-Shi'a, Supra, Vol.15, p295.
- [8] Under Single Clause Bill 1 of the 'Amendment of Divorce's Regulation Act, 1370(21.12.1370 solar year=1991 A.D.) By the Parliament and (71.8.28 solar year = 1992) by the Expeditionary Council (solar year)=1993 A.D.
- [9] Single Clause Bill 1 of the 'Amendment of Divorce's Regulation Act, 1991, 1992 states: "Since the adaptation of this Amendment, all divorce seeking couples, should apply in special civil courts and if their differences are not solved by the court and the arbitrators from both sides, (as it is said in Holy Quran), the Court will issue a Non-Conciliation Decree and introduce the couple to the Notary Public that are no more eligible to register divorce for couples whiteout such Decree. The working permissions of Notaries violating this law will be deemed void."
- [10] Holy Quran ; 65: 2.
- [11] The arbitrations must be; (a). Muslim; (b). With proper familiarity with religious, family and social issues Forty years or older; (c). Married; (d). Trustable; (e). Non-famous for corruption and misbehavior.
- [12] Article V, Supra note.
- [13] Iddat: The wife is required to observe an Iddat of three lunar months after the divorce or, if pregnant, till the delivery of the child. However, if the divorce takes place before consummation, the wife need not observe Iddat.
- [14] Note 4 of Single-Clause Bill, Supra note.
- [15] The jurists interpret the word 'after divorce': As 'within the time of pronouncement of divorce'.
- [16] Note 7 of Single-Clause Bill , Supra note.

[17] Single-Clause Bill ,Supra note.

[18] Section 10 of Family Protection Laws, The Family Protection Act,(1975).

[19] The just men is a person who fears God and does not commit moral sin and does, even, not commit venial sin frequently. Therefore, if the witnesses of divorce are in lack of this term then performed divorce is ineffective and void.

[20] Article of 1134 of Iranian Civil Code

[21] The witnesses based on the letter of Section 1134 of the Iranian Civil Code must be male. Then if there is double number of females e.g., one male and two females or four females of two males, it is not enough.

[22] According to Holy Quran the presence of witnesses at the time of pronouncement of divorce is necessary; "... and call to witness two men of justice from among you, and give upright testimony for Allah..."(Holy Quran; 65: 2.)