

Delegation in Divorce in Islamic Jurisprudence and Iraqi Law

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Abstract

According to common jurists' topic entitled "delegation in divorce", husband has right to divorce his wife whenever he thinks that it is reasonable. It is natural whoever owns a right is allowed to assign it as well as, the husband can assign the right of divorce to his wife and the wife can get her own divorce in this case. This delegation may be absolute or it may be limited to a certain time or it may be added to the future and the divorce decree made by delegation may be revocable or irrevocable. The jurists have cited arguments to express their views in this regard, such as verses 28 and 29 of Surah Al-Ahzab, as well as various narrations. According to common jurists, delegation, which is regarded as a part of a husband's rights in divorce, is transferred to the wife, in other words, whenever the wife wants to divorce the husband. However, the famous Shiite jurists did not accept the delegation in divorce, while the non-famous ones accepted it. This study explains the relevant topics by an analytical-comparative method through a library study.

Keywords: Divorce, Divorce Delegation, Islamic jurisprudence

1. Introduction

Islam has enacted multiple and various legislative laws in order to ensure the human life's stability and preserve individual's life against oppression. Also, it ordered marriage and based it on the principle of benevolence and encouraged the preservation of married life from beginning to end and its right to security and protected human rights through the law of personal status from the provisions of marriage, inheritance, divorce, release and imprecation. Meanwhile, Islam has guided us to the best way to choose a partner for each spouse to live in a stable family. If each of the couples is not successful in choosing a partner and the marriage is broken up and the spouses are disturbed, and their thoughts are separated and their coordination is limited, and the advice of the reformers is not useful, then there is no choice but to separate and breaking up the marriage bond, while Islam has introduced it when legislating the principle of divorce. However, it has compiled rulings referring to the verses of the Qur'an and the hadiths of the Prophet. For this purpose, many jurisprudential books have examined the issue of divorce. Since divorce is one of the branches of marriage, it is considered by the sharia courts, and because the legislator pays attention to the inherent nature of women, he has assigned the decree of divorce to the husband, therefore, he can divorce or he can delegate it to another or to his wife, and the wife can own her divorce with this property. The latter is what is known as delegation in divorce and it is a legal fact that has its own words. Moreover, it has its own rules and effects. Consequently, we are seeking to explain it according to the view of Islamic jurists and Iraqi law.

2. The concept of delegation in divorce

Delegation indicates resorting on the matter to the other and his response to it [1]. In other words, we charge him with the matter. Regarding partners, i.e., two partners negotiate about the money they share with each other in such a way that he delegates all his affairs to his owner, he is satisfied with what he has done and he is satisfied with what he has done which is legally permissible [2]. Regarding divorce, it means giving permission to divorce to the wife and giving the authority to divorce to the wife, in which case the wife is free to decide for divorce [3]. The definition of new jurists about delegation were not much different from the definitions of their predecessors, their definitions were as follows:

According to the definition of Badran and Faraj, delegation is another's possession on his wife's right to divorce. The positions of the Iraqi personal status laws on regulating delegation in divorce are different; therefore, the issue of delegation in divorce has been organized. Some laws have regulated the delegation of divorce in terms of defining its meaning and specifying its provisions. Among these laws, it can refer to the amendment of the Iraqi personal status laws No. 188 in 1959, which contains texts that specify the meaning of delegation. And this is what Article (1/34) refers to and stipulates: "Divorce is the resolution of marriage at the request of husband or wife, if he or she has been given a power of attorney, or delegated to him or her or by a judge. Divorce takes place only with the specific formula prescribed by law. This text clarifies that the Iraqi legislature has assigned the resolution of the marriage restriction to the husband or wife if it has been delegated to him/her.

3. Delegation in the term of old and new jurists

The position of Islamic jurists is different regarding delegation in divorce. Some jurists believe that delegation in divorce has no rules in terms of defining its meaning and explaining its specific rules and others has texted delegation in divorce and its rules which we express:

According to the Hanafi School: Hanafi School has defined delegation in divorce as the assignment of authority and the jurists of the Hanafi school expressed delegation in such a way that wife has the right to divorce by the order of her husband [4].

According to Malekiye: Maleki jurists have not mentioned a specific meaning for delegation, what can be mentioned in their words is that the husband has delegated the divorce, i.e, he has given the divorce to the wife [5]; And they believe that delegation is giving the power of attorney of the husband to another in divorce. Weber is three types: power of attorney, option and property, therefore, according to Malekiyan, delegation is the assignment of divorce to the other.

According to Shafeiye: Shafei jurists have considered a meaning for delegation; however, they express it with a special word. For instance, if the husband tells his wife to choose or it is up to you and the wife get divorce, and then the husband says I will not divorce, the divorce will not take place unless the husband wants to. Shafei jurists have interpreted delegation as property. No, and if there is a gap between demand and acceptance, divorce will not occur [6]. Delegation according to Hanbalis: Hanbali jurists have not specified a specific and limited meaning for delegation. The researcher believes: The most correct definition of delegation is the definition of Shafī'i, who says that delegation is property. The new Shafei jurists and the old jurists have attributed the delegation to the wife's representation in divorce,

and it has been stated that there is no delay in accepting it in divorce, and if there is a gap between the requirement and the acceptance, divorce will not occur [6].

According to Hanabeleh: Hanbali jurists have not specified a specific and limited meaning for delegation. However, they have defined delegation in this way that the husband has the authority to divorce the woman himself or represent to someone, or assign to his wife [7]. Mohaghegh believes: The most correct definition of delegation is the definition of Shafeiye, who says that delegation is property.

The jurists disagree about the fact of delegating divorce from husband to wife as property, power of attorney or option, and based on this, there are three views that we mention below:

A: According to the religion of Hanafi and Shafei jurists in the new and Zaydiye promise, delegation of husband to his wife for divorce is property and not power of attorney [4].

B: According to Hanbali and Shafei School, delegation of husband's divorce to his wife so that she can divorce herself is a power of attorney, not property [3, 7]. Appointing one's attorney means that the husband delegates his wife to get a divorce.

C: Maleki School believes that there are different types of delegation of divorce from husband to wife. It may be power of attorney or alienation or sometimes option. It is according to a formula indicating it. However, option means any formula indicating that the husband has delegated to the wife to stay in infallibility or leave it [8]. If the husband says to his wife: "Choose" or "Choose yourself", it is considered option. According to the authors, Hanafi and Shafi'i jurists have mentioned the most correct view in Jadid and Zaidian that the husband's authority over the divorce of the wife is ownership and not power of attorney. Since, the wife acts for herself and works in her own will, the delegation of divorce is alienation, not power of attorney.

4. Terms and elements of delegation

The formula of delegation is one of the things that should be considered.

4-1 Formulas of delegation

Delegation formulas may be explicit, as the husband tells his wife: Divorce yourself. If the wife says that I got divorced, the divorce is done without the need for intention [6] and it may be ironic, as if the husband says to his wife: "Choose yourself, or the choice is up to you, or show yourself." This requires the intention of the husband to be considered a delegation according to the Hanafi view [4, 9] and according to the Hanbalis, this is also valid. Because it is not explicit and it is ironic and it needs something that other ironies need [7] And according to Malekiyan, because it is an apparent irony, it does not need intention [5]. If the wife says "I chose myself" or "I made myself irrevocable" without the intention of divorce, the divorce will be gotten according to Hanafeh because the husband has suspended the divorce to an act from the wife, so he does not need her intention. [4]. According to the Shafi'is and the Hanbalis and Zaidis, divorce does not happen because the wife has said the divorce ironically, so, like the husband, she needs intention, because divorce does not happen with this word alone [7].

If the formula of the delegation indicates choice, for instance, saying "choose yourself" without setting a specific time, the woman cannot divorce herself except in the same assembly. The validity of the immediate divorce occurs in it, and if she leaves the assembly or distracted by talking out of the subject of the option, the option is invalidated and after that

there is no option, and this is Hanafi school [10] and Hanabele[7] and Malekiyan in a narration and Shafi'i in the new promise [6] and Zaydia and their argument is that: - it is narrated from Saeed Ibn Mosaiyb that he said: Omar and Usman judged a man who gives the option to his wife in such a way that his wife has the option right as long as they are not away. And Abdullah bin Umar said that as long as the woman is in her assembly, she has the ruling of option. And none of the companions disagrees with this view, so they agreed on it, and since it is an option of ownership, its ruling is immediate, like the option of accepting the sale [10]and the Malekiyan in a narration [5] and the Shafeiyan believe that option is delay and choice in that assembly and after as long as it is not invalidated. And Zohri, Qatadah, Abu Ubayd and Ibn Manzar have said [3, 7] and their reason in this statement is the Prophet (peace and blessings of Allaah be upon him) to Aishe when he chose her. He said to him: "I am mentioning an issue to you, so do not rush until you ask your father for advice" and it has been answered that the Prophet (peace and blessings of Allaah be upon him) choose the delay option for Aishe.

But "you have the authority" is power of attorney, and power of attorney is in the present tense as long as it is not bound [7]. But if the phrase delegation implies ownership or will, it is like saying to him, "It is up to you or divorce yourself." In this case, she has no right to divorce unless she is in the same assembly. Therefore, if she leaves the assembly or engages in other words, the delegation will be void and there will be no optional verdict for her.

This is according to the Hanafiyan, Malekiyan, and Shafeiyan in the new and Zaydiya promise [4-6]. Their argument is that option is unique to the assembly, as he said: "choose" [3]. Hanbalis and the Malekis say in a narration and the Shafi'is in a saying that there is no urgency in divorce and its occurrence is not restricted by doing it in the delegation. Because it is in fact a kind of power of attorney in divorce, then it should be based on delay, as if the husband delegates his wife's divorce to a stranger, so he has the right to withdraw it [5].

4-2 The words of delegation according to four jurisprudential religions

The word may be explicit, or it may be ironic. Thus, explicit is what divorce occurs with, without the need for an intention to express its meaning, because its meaning is obvious and the meaning of the word is understood when it is uttered. Irony is something for which there is a possibility of divorce or otherwise. Divorce is not done except by expressing intention [4]. There are phrases in delegation according to the Hanafi school like, husband says: (divorce yourself) or he says to her: (Divorce yourself if you want), this is an explicit order and does not require intention. But if he says to her, "Choose yourself" or "Your command is in your authority." Delegation is ironic, and both require intention [9]. As I mentioned before, delegation is three types according to Malekiyan: power of attorney, option and alienation. Therefore, there are several words for delegation according to Maleki's school, including:

Words of power of attorney: as if to say to her: (I made you the divorce attorney).

Option words: as if to say to her (choose me) or (choose yourself) or in a number of divorce numbers. Like (choose me or choose yourself to a divorce or two divorces).

Alienation words: as if to say to her: "You are the owner of yourself or divorce", or "You have your authority", or "leave yourself" or "You will be divorced if you want" and we also refer to the words by which delegation is done according to Shafi'i.

Divorce does not occur except explicitly or ironically with intent. If he intends to divorce without explicit and irony words, the divorce will not take place, because the prohibition in

the Shari'a is on divorce and the intention of divorce is not divorce itself and the husband has the right to divorce his wife with delegation and this delegation occurs only with an explicit word or with an ironic word that is not accompanied by intent. Also, the words with which the delegation is done according to Hanabele are as follows. It is permissible for husband to delegate divorce to his wife, and wife may divorce with explicit words or with irony with intention. Because all divorce is in its word [7] and on this basis, delegation is done with the explicit word (divorce yourself) and the words of irony: (it's your authority) that is an apparent irony and (choose) that is a hidden irony [11].

5. The ruling of revocation and response to it in the delegation between couples

If the husband, after delegating the wife to the divorce and before the divorce, wants to annul this delegation, he has this right and the delegation will be annulled upon his termination. According to Shafi'i, Ahmad, al-Awza'i and Ishaq, because he is a trustee and, like a lawyer, has the right of revocation to it. As if someone has addressed a stranger. According to Abu Hanifa and Malek, he has no right to return. Perhaps they mean that he does not have to return to assembly. And, as it has been said, he has no right to divorce after that.

If the husband goes back to what has been set for him or says: I will nullify what has been made for you. Atta, Mujahed, Shaabi, Nakha'i, Awza'i, and Ishaq expressed this opinion, and Zohri, Soori, Malek, and the companions of the vote said: He has no right to take it back, because he was the owner, so he did not have the right to take it back. After researching and examining the nature of the fixed rule of delegation from the point of view of jurists, I concluded about the annulment of the husband's delegation and its details are as follows:

First view: The husband does not have the right of revocation of delegation and this is the saying of the Hanafiyah[4].

Second view: The husband has the right to foreclose the delegation if he is a trustee, and the husband doesn't have the permission of revocation from proprietary or optional delegation, and this is the statement of Malekiye.

Third view: The husband has the right of revocation of the delegation before accepting the wife, and this is what Shafi'i and Hanbali have said [6-7].

6. Judicial separation in Islamic jurisprudence and Iraqi law

6-1 Judicial separation in Islamic jurisprudence

Separation in the word: it indicates the difference between the two things. Disagreement is the source of separation, and separation means its difference. We are separated from people: they are separated from each other, someone was clearly separated from his wife, and he separated two things, one and the other and distinguished things [1], It is pointed out from the study of dictionaries that the linguistic meaning of separation is for a distinction between two things and a difference between several things. And in the Holy Qur'an, evidence has been presented on the meaning of separation, as the separation between couples is mentioned in three verbal derivations:

1) The Almighty said:

فَيَتَعَلَّمُونَ مِنْهُمَا مَا يُفَرِّقُونَ بِهِ بَيْنَ الْمَرْءِ وَزَوْجِهِ

(Sura Al-Baqara: verse 102)

So they learn from them what distinguishes between husband and his wife [12].

2) The Almighty said:

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ

(Surah Talaq: verse 2)

So when their respite comes, consider it as goodness or separate them for good [12].

3) The Almighty said:

{وَإِنْ يَتَّفِقَا بَعْضًا مِنَ الشَّيْءِ فَاعْتَمِدْ عَلَيْهِ وَابْتَاعْ فِى سَبْعَةِ مِائَاتٍ نَفْسًا

[Nesa: 130].

And if they are separated, then Allah will make each of them needless of His abundant mercy, and Allah is Merciful, All-Knowing [12].

Separation in term: Sect and separation are two jurisprudential terms that are the practical result of divorce, divorce or termination of marriage. The jurists have defined divorce before defining separation or termination, and therefore, I try to reach the meaning of separation through the view of jurists on the meaning of divorce.

Some jurists have defined it and said: Dissolution of marital bond is separation and difference between couples. Whether it is by divorce or not, or cutting the marital relationship between the couple by the judge at the request of one of them for reasons such as disagreement, loss, lack of maintaining wife and absence.

6-2 Judicial separation in Iraqi law

Disruption of a marital relationship may be through termination or divorce or couples' Igha, or by consensual separation, which is known as divorce or judicial separation, and it is the subject of our research. And all the above aspects are considered in the dissolution of divorce, and Article 45 of the Personal Status Law No. 188 of 1959 refers to this issue. Accordingly, some commentators of the personal status law have defined judicial separation as follows: (Breaking the marriage bond with divorce with the signature of the judge at the request of the spouse if there are legal reasons) Judicial separation due to damage in the Iraqi Personal Status Law No. 188 (1959).

6-3 Ruling of separation of the judge after delegation

The judge has the general jurisdiction to compensate the damage from the people, and therefore, he is stipulated to separate the couple when necessary. And this right, which is proved for him, is proved by his general guardianship, not because of husband's power of attorney. Therefore, one who is careful notices that the judge in some cases separates the couple against the wish of the husband, so his separation is not a reason for the consent of the husband. Hence, the jurists disputed: Is this separation of judge divorce or termination?

It was said: divorce is considered and it was said: it is termination because if we consider it divorce, it will cause loss to the husband, as the number of divorces will be increased once against his will and consent, while the husband himself has a legal right over her. And the separation of the judge may be preceded by two divorces, in which if the third one also occurs, the wife will be forbidden to her husband, but if it is terminated, they can return to married life. Thus, on the one hand, the circle of divorce becomes narrower, and on the other hand, oppression on women is removed without harming others.

7. Conclusion

Accordingly, it can be said that the husband is authorized to divorce the wife or entrust the divorce to the wife, which is delegation. Delegation in divorce is performed with its own words and the Imams have agreed on these conditions in terms of being explicit or ironic, therefore, revealing with explicit words does not require intention, in the case of ironic words, there must be intention and irony with intention is the same as an explicit word. At the same time, the reasons of the divorce delegation are changed according to the time, and currently, it depends on social, cultural and economic reasons. The Iraqi court of personal status is to separate the couple from what is agreed upon in the principles and rules of Islamic law and what is accepted by the laws of Islamic countries, and what is settled by the religious judiciary in Iraq. This law has taken its provisions from all Islamic schools without considering the various emerging schools. Accordingly, the second paragraph of Article 1 refers to the issue that if there is no executive legal text in a case, it will be acted in accordance with the Shari'a rulings that have the most appropriateness with the texts of the mentioned law. The above law is a moderate and comprehensive case that applies to all Iraqi Muslims and foreign Muslims in Iraq. According to paragraph one of Article 2 of the law, "the provisions of this law include Iraqis, except those who are exempted by a special law, while the personal status files of Christians and Jews are examined according to their own rules and according to their religions, because the trial courts have jurisdiction over the case and issue their verdicts based on their expertise. The Iraqi legislature concluded that if the source of the deprivation of marital life was the husband's absence, the absence period should not be less than two years for the wife to have the right to request a divorce. However, in the Iraqi Kurdistan region, this period is one year, which is closer to Islamic jurisprudence, and according to Malekiyan, this period is not less than one year, and according to Hanabele, the period of absence should not be less than six months for the wife to request divorce. However, there are some suggestions in this regard, including, it is recommended to Iraqi Sharia courts that include the Ministry of Endowments and Religious Affairs, help families increase awareness and explain the legal provisions related to the rights of marriage and divorce in order to make it the last solution for resolving disputes among spouses, and only resort to fire therapy when there is no other solution. Also, it is ordered to a family that parents are required to focus on growing their children based on obedience to God Almighty by instilling them that God has equalized rights and duties between men and women, and in matters that have goals, he has preferred some over others. It is also suggested that Iraqi law provides that if a man who has a wife and children is sentenced to prison, he should be allowed to visit his family under his supervision and control and that he should be able to take care of his family, especially financially. Of course, there are different degrees of this case, which require field research, and it is more acceptable for the Iraqi legislator to review the materials related to the separation among couples because it harms them.

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