

## Judicial divorce and its nature

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### Abstract

Judicial divorce is a kind of divorce in which the presence of husband or his consent is not a condition based on this couples can get through divorce process and on the other hand, it is not based on initial consent of husband to give this right to his spouse to be his Substitute in divorce process. This type of divorce was of special importance with the enactment of Art.1130 Q.M.; So that it has taken on a variety of topics, including the nature of judicial divorce based on being revocable and irrevocable, because according to what nature it has there will be different effects on it. This paper seeks review of judicial divorce based on being revocable and irrevocable in jurisprudence and civil law. For this purpose, this paper has attempted to express different views that have been offered about being revocable and irrevocable of judicial divorce in addition to instances of judicial divorce in Imami jurisprudence and civil law, and a comparison between these two areas.

**Keywords:** Divorce, Judicial divorce, Revocable divorce, irrevocable divorce.

### Introduction

According to Iran 's law system to comply with Imami jurisprudence, divorce is the right of man and is in his hand. (Article 1133 Q. M.), However, there are more predicted in civil law that wife can ask for divorce from tribunal (court) and if she qualify to file for divorce, the court will divorce her.

### Methods to dissolution of marriage

Today, the divorce is sometimes based on

court's permission, and sometimes based on the decree of magistrate :

#### *Divorce based on court's permission*

In this method, divorce is done by husband, but the court should have certified the impossibility of compromise. If this is done, the divorce will be revocable or irrevocable.

A) Irrevocable divorce: Irrevocable comes from the root «Albain» which is sometimes taken to mean «separation» and sometimes means «join» and it is a kind of paradox. In this type of divorce there is no way for husband to evocate . According to the consensus of Imami jurists, irrevocable divorce has six types: divorce of a virgin spouse, divorce of a menopause spouse, divorce based on disclaiming Spouse's privileges , divorce based on hatred between couple, third divorce that is obtained after three consecutive marriages and divorce of immature Spouse.

B) Revocable divorce: revocable in religious terms, is referring to evocate to the wife who is divorced and conservation of marriage ,based on a the verse, «And their husbands have the better right to take them back in that period» (Surah Al-Baqarah / 228) there is no need to obtain the consent of woman's guardian and her truth of permission .

#### *Divorce based on the decree of magistrate*

In this type of divorce, wife first asks for a divorce from court and the court decrees to divorce in compliance with certain conditions. The reasons of divorce according to a woman asks for a divorce and court's decree are as below: The refusal or inability of the husband to pay alimony (Article 1129 Q. M.), Absence and missing of husband (Article

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1029 Q.M.), if they continue to live together as couple, this leads to hardship and impasse (Article 1130 Q. M.)

Thus, the judicial divorce is divorce based on the decree of magistrate and this type of divorce is not in contrast to other types of divorce and it is done in the form of certain type.

Therefore, the research theory is based on proving judicial divorce and its legitimacy. What is the nature of this type of divorce in light of these questions? And in which cases we can use this type of divorce?

Therefore, the aim of this paper is to examine the nature of judicial divorce and describe its nature.

### **Judicial divorce and its nature from jurisprudence perspective**

The Imami jurists believe the Quran is the main basis of judicial divorce. The Holy Quran says: "The divorce and evocation is no more than two times, after that, either you retain her on reasonable terms or release her with kindness" (Surah Al-Baqarah / Verse 299)

In another verse, he says: "When ye divorce women, and when there is a time to Iddah (period of waiting), you must support them well or let them be free. Lest in order to oppress them, you do not support them well and take care of them in a harmful way, whoever does this should know that he is doing wrong to himself" ( Surah Al-Baqarah / 231)

The Jurists have used these verses: "Every man is bound to choose between two main rules in his life, to take all responsibilities of marriage and competency or dissolute marriage and extricate the woman. There is no third way in Islam in which he does not take all responsibilities and he does not divorce his wife. (Sadr, 1948)

The Qur'an explicitly states: "But do not take them back or do not hurt them in order to oppress them." (Surah Al-Baqarah / 231) These verses are not about those men who want to evocate during Iddah(waiting period) but this is to define a duty of all men toward their wives on any condition. The reason of this generalization is narratives by the Imams (AS) and in the other cases apart from evocation, these narratives refer to above verses.

### ***Inadequacy of taking marriage responsibilities***

Accordingly, it is not necessary to prove the

guilt of the husband in not taking his duties, even if he cannot take his marriage responsibilities without being guilty or doing any fault, his wife can ask divorce from court. More than four years of absence is also from judicial divorce in which decree of court has a judicial aspect.. But in other cases, when the husband avoids to divorce his wife after the final decree, the magistrate or his representative shall proceed to issue divorce decree. The nature of court's decree is different from husband request. The court's decree here is establishments and many contemporary jurists have a verdict about it. Great jurists like Mirza – e - Qomi, Sheikh Ansari, Syed Mohammad Kazem Yazdi and ... have asserted this authority of magistrate. "... If the magistrate be ensured that a husband does not have good behavior and is not faithful to his wife, forcing him to accept divorce is not against of divorce accuracy"(Aljeylani Alqomi 508:1984)

### ***Lack of appertaining of judicial divorce to not paying alimony***

Sheikh Hassan Helly believes that "the judicial divorce does not appertain to not paying alimony and other things. Because not paying an alimony does not have any feature but what is important is to deviate husband from choosing one of two ways of "living with his wife in goodness and truth" and "to extricate his wife properly" (Helly, 97:1994)

Professor "Mughniyeh" made clear the opposition of most jurists with judicial divorce based on caution of jurists and their fear of authority of this type of divorce in the hand of improvident people After quoting the verdicts of owner of Orveh(Syed Muhammad Kazem Yazdi, owner of Vasile, by the owner, Ibn Junayd, Second martyr (Shahid Thani), and Rozat o Aljanat and some narratives of the legitimacy of judicial divorce, otherwise these jurists do not reject divorce From the Shi'ite jurists' point of view the judicial divorce based on woman's request has a wide range. It is not appertained to not paying alimony and related things. If a husband does not take his marriage responsibilities serious and does not extricate his wife in goodness and ignores the order of Holy Quran, his wife can ask a divorce from court.

According to Syed Muhammad Kazem Yazdi, after expression of different forms of absentee, narratives that show the wife's request of divorce are about some cases and we can name to divorce based on divestment and divorce of an absentee's wife and

based on being missed and based on not paying alimony.. The majority say that according to the tradition and narratives “If a woman shows abomination and asks for a divorce and accepts to ignore her Mahrieh (marriage portion payable to the wife) does not make any duty for a husband to divorce her, but he is free to accept his wife’s proposal and instead accepts divorce or he can deny it, Unless the intensity of abomination is high and there is the possibility of committing sin so it is emphatically recommended that he accepts his wife’s proposal and wife may be divorced”. (Second martyr, 2006; Najafi, 2002)

Husband’s absence or his incarceration, in the narratives of not paying alimony and forcing husband to divorce his wife because of not paying alimony, makes him to divorce his wife, so according to the former, whereas the survival of the marriage makes a woman to commit a sin, a magistrate should have the authority to divorce her.

Elsewhere in his remarks, he added: “Although from the words of jurists it appears that the magistrate cannot divorce her; Because divorce is in the hands of men, but according to the rule of negation of disadvantage and hardship, especially if a woman is young and if she waits for too long makes her to commit a sin, may be said that the magistrate could divorce her”. (Yazdi,1983)

Anytime a man ignores his legal and religious duties, such as his refusal to pay alimony or marriage rights or in cases of hardship, circumstances arise in life that continuing such life is unbearable for a woman (Whether it is made by a husband or it is involuntary such as incurable contagious disease), the judicial divorce will be fulfilled. But the nature of this divorce is disputed, some believe that public order and respecting divorce decrees and protecting the oppressed wife, is applicable in this case to be revocable or is lined with all its consequences, but others believe that the text of the Qur’an, the nature of the divorce is revocable, the judicial divorce is also revocable or the consequence of revocable divorce, But a better idea and less disputed one is that the judicial divorce is according to be revocable and i.e. in addition to divestment of authority to divorce from husband, the dominance and his right to evocate also will be divested and will be given to magistrate, so anytime the reason to divorce cancels, judge will let them to continue their married life based on husband’s request and proof of elimination of hardship causes.

Many jurists, especially pioneers, did not de-

fine such authority for magistrate (judge) and they did not know magistrate as guardian in such cases. These jurists also believe that in Islam there is no harm in judgment and to be based on justice is one of the great goals of Prophets and infallible Imams but they have refused to express the woman’s right to divorce based on the precautionary principle in cases of disobedience of husband or hardship and they have advised wife and finally said that the magistrate has this authority to punish husband or to force him to do his duties.

### A judicial divorce and its nature from law views

Instances of judicial divorce in civil law can be found in three sections:

- Case of 1029 Q. M.. (missing husband)
- Article 1129 Q. M.. (not paying or inability to pay alimony)
- Article 1130 Q. M.. (Hardship of wife)

It seems that in two last articles, when magistrate force husband to divorce his wife it can be an instance of judicial divorce.

About the first clause (divorce of absentee or missing husband’s spouse), legislator makes the duty clear in the art 1030 Q. M. and has decreed that this will be revocable divorce, the Shiite jurists also have referred to it; (Mousavi Khoei, 2004; Sobhani, 1993), though she will keep Iddah (waiting period) after her husband death. (According to Article 1156 Q. M.) But in the second and third sections judicial divorce instances, legislator has not referred to the nature of divorce according to court’s decree, there is this possibility to outline all articles of civil law, particularly Article 1145 of the types of revocable divorce and not mention this type of divorce to be against the rest, it is concluded that this divorce is not revocable. So the legislature has mentioned the nature of the judicial divorce law.

But it seems what is in Article 1145 Q. M. concerns the normal divorce cases that based on Article 1133 of the same law, it is done and this is expressed in advisory opinion of legal department. (Mehrpour, 1995)

The silence of legislator has caused disagreements among lawyers. Of jurists seems no one denies this case but some contemporary jurists. (Mousavi Khoei, 2004)

According to some writers in legal area what can document the verdict of being revocable about divorce include the followings :

First: being revocable, it is necessary first principle in divorce because after separation, the accuracy of evocating of husband during Iddah (waiting period) is questionable, and there will be the need for continuity of marriage between couple. (Alavi Ghazvini, 2002)

If it is said based on any doubt, the principle is to be revocable because we can reject any of six titles lead to be revocable by related principle and it results in proof of being revocable and we will say this is of positive principles but not a proof. (Tabatabai Yazdi, 2002)

Second, the main and the only purpose of legal guide by forging being divorce lawyer is to save a person from marriage duties, the one who has not done his marriage duties so meeting this target is possible just to be revocable otherwise defeat the purpose, let's suppose a husband can make everything same as before with a smile. Is it to mislead the magistrate especially when the interpretation in some narratives about divorce reinforces the above argument, for instance in Abu Basir's narration from Imam Sadiq (AS) regarding the refusal of the husband to pay alimony, it is said "it is necessary that Imam separates them." (Hor Ameli, *Bit*: 15/223)

It is necessary to note here that we refer to article 8 of the Family Support Act of 1353: "When a divorce is done under the present law and based on the certificate of impossibility of compromise, it can be irrevocable only by written agreement of the parties during Iddah (waiting period)".

This remark defines the principle in revocable divorce (whether it is done by the husband or according to woman's request and divorce is made by the court.), unless there is the agreement between couple and in this way the divorce is irrevocable.

With this approach, some lawyers say: "The provision in Article 8 of Family Protection law is in conflict with concept of being irrevocable and its background in jurisprudence, so is not binding in the current state. According to Article 3 of the Special Civil Court Act, claims relating to marriage and divorce in a court are function of proper jurisdiction and referring to this kind of competency is copy of implicit rules that are in conflict with religious rules and based on all these the judicial divorce is irrevocable on any condition but if the divorce is done according to woman's request, request of a man to rejoin faces the barrier inspired by public order". (Katouzian, 2006)

It is likely that the above manuscript notes on

Article 8 of the family support law about a divorce done by a husband has been acceptable but in the case of divorce by the court, and women's request is not acceptable, although some contemporary jurists have verdicts about it. (Mousavi Khoei, 2004)

In contrast, some legal writers have improved theory of being irrevocable about judicial divorce and said the general condition of the verse, "And their husbands have the better right to take them back in that period, if they wish for reconciliation" (Surah Al-Baqarah / 228) is the condition of being irrevocable of divorce unless one of the six titles is not on the line, so as long as the divorce is not consistent with one of the six titles it would be irrevocable but as the time the reason of the divorce vanishes (the inability or refusal of the husband to pay alimony or the lack of good maintenance and fault interaction) man's effort to reconciliation would be ineffective. However, other effects of irrevocable divorce such as inheritance rights of spouses to each other or entitlement of spouse to alimony during Iddah (waiting period) will be fixed. (Alavi Ghazvini, 1991)

Practical procedures of tribunals as a magistrate to issue divorce decree according to art. 1130 Q. M. is that they try to make divorce disclaiming in order to make it revocable. (Mehrpour, 2001)

This meaning is according to some contemporary jurists also. (Moussaoui Ardabili, 2005) Some jurists also do not differ between judicial divorce and divorce done based on man's request and they believe according to the divorce case it can be revocable or irrevocable. (Hosseini Khamenei, 2002: Reply to Question 9038)

Generally, when a man divorces his wife willingly, this divorce is irrevocable according to rule, unless the case is one of six titles of revocable divorce

We said earlier that the divorce done by magistrate according to the husband's absence of more than four years is irrevocable and if absentee after divorce and before the expiration of waiting period comes back, he has a right to reconciliation. But it is heavily debated to generalize this feature to a divorce based on absence of a wife because if the husband can rejoin after divorce decree and its enforcement, the wisdom of rules define the woman's right of divorce will be ruined and will hurt her reputation. (Katouzian, 1996)

Currently, the procedures toward issuing divorce decree in accordance with Article 1130 Q. M. is to try to make judicial divorces as disclaiming

privileges requiring a woman to forbear her alimony and properties to call the divorce revocable and a husband cannot use his right of reconciliation; Because the legal procedures in our country are based on the thought that divorce according to court permission is irrevocable naturally and to avoid the consequences of this type of divorce that violates the order they make it disclaiming which is of six types of revocable divorce. We have to say this procedure is to violate the order and is in contrary to the principles of fairness and justice.

If we call this a type of irrevocable divorce it will be to violate the order ,because on one hand , the husband is required to divorce his wife based on court decree and on the other hand, he tries reconciliation during waiting period and ruins its effects. While the main goal of magistrate by forging being divorce lawyer is to release the woman from the marriage to a person who does not do his marriage duties and has trampled the rights of his wife undue. It is clear that meeting this fair and humane target is unfeasible .(Mehrpour, 2001)

For example, a woman due to abuse (immorality) of her husband and his illegal behavior, is forced to go to court and After spending a long time to be able to prove her claim and the court divorces her and it is not rational that her husband can show his willingness by a smile and asks for reconciliation. Article 1145 Q. M. is not inclusive and only refers to the revocable divorces that are located on husband willingness.

The reason of rejection the theory of being revocable divorce by magistrate aside from the confinement and the definition of revocable divorce and their monopoly of the six types, is as below:

Section I: It is possible to remove the reason of divorce decree during waiting period (Iddah). For example, the state of hardship on which the wife has asked for a divorce and magistrate after proceeding issues the divorce decree ,during the waiting period removes and apart from it there is no compleing reason is not against reconciliation when removing the barrier. This is contrary to the interests of families and children whose parents' divorce may be the cause of their homelessness.

Section II: To be revocable divorce located by court has this major drawback that the inalienable rights of the wife, like her alimony during waiting period, inheritance , Mahrieh (marriage portion payable to wife) without sufficient evidence disappears and It is oppression to someone who asked for help to release from injustice. On the other

hand, as was previously said believing in being irrevocable of these divorces is to violate the order and has excuses that should be avoided seriously. (Motahari, 2000)

So what should do? What is a reasonable solution to this problem that is conceivable and has no drawbacks of the frequent solutions ?

Since the divorce based on court's permission is exceptional and unique, therefore, it has its own characteristics and it is not fair that despite the primary principle divorce is done without husband's willingness but in the desire for reconciliation (the will of man which is not involved in a divorce.)the disclaiming will plays a role. It is a common way of reconciliation which is according to causes made it. If a divorce is man's request, reconciliation is also in his authority, but if his will has no role in the decision and is located based on court's decree, reconciliation must be after issuing decree; Because the removal of the cause to issue the decree, is the condition of reconciliation, and the same authority that proved its existence and occurrence and issued the decree based on these has to prove. After verification and proof, the barrier of reconciliation disappears and man can show his willingness for reconciliation. In other words, this type of divorce is irrevocable naturally that after divorce, the principle of survival of cause leads to issue the decree (Impasse mode) and claimant of removal of (the husband) should be in court to prove its removal and if this happens he can try for reconciliation. In this theory, as the divorce decree by magistrate is irrevocable naturally , the rest rights of the wife as alimony during waiting period, accomodation, Mahrieh and inheritance of couple from each other are observed (where one of them dies during waiting period) is observed. (Mousavi Bojnourdi, 2002)

### Evaluating ideas and arguments concerning judicial divorce

Among those pioneers believed in judicial divorce can name jurists like Sheikh Mofid, Abi Ali Hamza bin Abdul Aziz Deilami, known as Salar, Abi alsahah Halabi and from delayed people Mirza Qomi and from the contemporary ones, Sheikh Hasan Helly, Ayatollah Khoei and Ayatollah Ruhollah Mousavi Khomeini. The During evaluating the opinions of these jurists perhaps we can say the most complete and extensive research in this regard is sayings and works of Sheikh Hus-

sein Helly as marriage rights and Alvazei that Bahrol-olum has written these sayings in “jurist arguments”.(1972)

Therefore, according to what is in this research, the refusal of husband to do his marriage duties (including paying alimony, having sex and being good-tempered) whether it is husband fault or is not his fault if threatens the marriage, this give this right to ask for a divorce from court and magistrate and magistrate will force husband to divorce his wife and he avoids doing it ,magistrate as absolute guardian will divorce the woman. (Motahari, 2000)

In addition, according to some of narratives and traditions, Helli refers to following Verses of the Qur’an:

1 – “The irrevocable divorce is two times, after that, either you retain her on reasonable terms or release her with kindness” (Surah Al-Baqarah/ 229)

2-“ And when you have divorced women and they have fulfilled the term of their prescribed period, either take them back on reasonable basis or set them free on reasonable basis. But do not take them back to hurt them and trample their rights, and whoever does that, then he has wronged himself.”(Surah Al-Baqarah/231)

3.” Then when they are about to fulfill their term appointed, either take them back in a good manner or part with them in a good manner.” (Surah Al-Talaaq/2)

It seems that this marks the woman’s husband shall take one of two approaches:

Or fully pay his salary and his duties must do so (restrict yourself to known), or a divorce tells him properly and in accordance with law. (Accelerated beneficence)

These verses show that husband has to choose between two ways toward his wife : to meet all her rights and takes marriage responsibilities and does his marriage duties or divorce her according to religious rules.

Helly concludes that when husband does not care about his marriage duties and does not divorce his wife , magistrate should call husband and first oblige him to divorce and if he refuses to divorce his wife the magistrate divorces the woman and according to woman’s request and as husband guardian (legal representative) divorce the woman so that she can choose another man to marry to find happiness and there will be no third way. (Bahrol-olum, 1972, 187)

## Comparison of judicial divorce in jurisdiction and civil law

### *The refusal of husband to pay alimony or his inability*

In article 1129 Q. M. It is said: «If the husband refuses to pay alimony and impossibility of enforcing court’s decree and obliging him to pay alimony ,as well as his inability to pay alimony, woman can go to court to ask for divorce and court can oblige husband to divorce his wife.”

In this article, two issues can be reviewed :

First, susband refusal to pay alimony: According to a verse « because Allah has made one of them to excel the other, and because they spend (to support them) from their means, men are supporters of women» (An-Nisa / 34)

To support families financially is husband’s duty. The alimony should be commensurate with the social status of wife and husband’s facilities and we cannot define the exact extent .

According to the whole known conditions and lack of barriers, if the husband refuses to pay alimony to his wife based on quotations of jurists and related narratives, the magistrate can divorce them. Of these stories can refer to narrations of Ibn Abu Amir and Abi Basir:

Narrative of Ibn Abi Amir - Imam Sadiq (as) said: “When a man gives his wife a proper food and clothing, she lives with him, otherwise he should divorce her”.

Narrative of Abi Basir - Imam Baqir (as) said: “Whoever has a wife that does not provide her clothes and food , here is the Imam to make them apart and divorce them”.

Second, husband inability to pay alimony: the meaning of inability is husband ‘s inability after marriage not before that. Because this inability is same as husband refusal to pay alimony, In obliging husband to pay alimony according to his richness(solvent) or poorness(insolvent) there are two views:

1. Just in time of husband’s richness (solvent) paying alimony is necessary.

2. Whether he is insolvent or solvent ,he has to pay alimony.

Do court or wife have right to divorce in case of husband inability to pay alimony to the wife or not? In this case, there are different opinions:

1.The wife and the magistrate do not have the right to breakup and they have to wait until husband can find a chance to pay alimony. The evidence of

this verdict is a narration of Imam Ali (AS) in reply to a woman who complained from her husband's solvency: « Verily, with the hardship, there is relief» (Ash-Sharh / verse 6) and Imam did not allow her to divorce. (Nouri Tabarsi, 2005: Hadith 5; Jafarpur, 1999)

Jurists like Mohaghegh Helli and Shahid Thani (Second Martyr) have confirmed this statement. (Helly, 1974; Shahid Thani, 2006)

2. Woman can go to the court and asks magistrate to divorce her and if there is no magistrate she can divorce herself and terminates marriage ; because husband's insolvency depends on his wife's hardship that is rejected from jurists point of view.

Fazel Hindi has accepted this theory and has argued that the Quran says: «soppurt ur wives in goodness or release then with kindness» (Al-Baqarah / 229)

It is obvious that living with wife without paying alimony is not supporting with kindness.

Moreover, the tolerance of this situation equals woman's hardship, besides the clear wording of Imam Muhammad Baqir (as) narrated by Aba Basir said: «The Imam is to cast a separation between them.» (Fazel Hindi, 2002)

3. Woman does not have the right to terminate marriage and she can only refer to court and request that magistrate obliges the husband to divorce her. If the husband does not divorce her, magistrate will divorce her. (Jafarpour, 1999)

It seems that according to the principles and rules governing all aspects of alimony, it is stronger and more convincing. Even the evidence adduced by Fazel Hindi in favor of his theory shows the same result .

Some owners of verdicts who have raised the issue in recent centuries, also have chosen this theory. (Al Mousavi Al Khoei, 2005)

Article 1129 Q. M. has proved the last opinion of known idea of the Shiite jurists and provided: "If the husband refuses to pay alimony and there is impossibility to enforce court 's decree and obliging husband to pay alimony, woman can go to court to ask for a divorce and magistrate can oblige husband to divorce his wife. This is the same when husband has inability to pay alimony".

### *To divorce a wife of an absent or missing husband*

Missing absentee is a person who has missed for a long time and there is no news from him. According to article 1029 Q. M. «When someone is missing absentee for four years, his wife can ask for divorce

and in this regard the magistrate will divorce her in comply with Article 1023.»

It is said in Article Q.M.1023: «The court can issue the divorce decree after woman's request when publishes Ad in one of mass circulation newspapers in Tehran for three times successively ,each one month apart and ask the people who may have any news from absent husband to notify court. Whenever one year from the date of first publication of the ad, court cannot prove that husband is still alive, the divorce decree is issued. «

Civil law rules in divorce of an absentee's wife is based on Imami jurisprudence. At the same time there is nothing found in juridical books about the ceremony of publishing ad and passing a year of notice date (Article 1023 Q. M.) ;but jurists talk about «searching the absentee « that the specific way is defined in civil law according to time necessities that has no conflict with legal principles. Even some new jurists expressed to take advantage of new mass media to know about the state of absentee.

Some of jurists have said that if a woman has been in hardship more than four years and there would be nobody to support her, she can go to court and ask magistrate to divorce her. Some others believe that if a woman is not in hardship she has to wait until her husband comes back or she get news about his death, after that period she can ask for divorce. Others believe after four years magistrate can divorce a woman upon her request and in this regard the guardian of absentee or missing husband has to pay alimony; because magistrate is not allowed to divorce a woman after paying alimony is related to a time when there is no specific time but after this time or during it ,a woman can ask for a divorce however there is someone to pay her alimony.

Is divorce necessary after four years waiting or there is no need to divorce and magistrate issue the waiting period for woman and can a woman marry after expiration of waiting time (Iddah)? There are many statements about this topic. In Sahihe ,the work of Barid Ibn Mo'avieh is it said : "I asked Imam Sadiq about a woman who has an absent and missing husband. He said: if the guardian of absentee refuses to pay alimony ,the magistrate can obliges him to divorce a woman and as the woman has virtue ,she has to have waiting period (Iddah) and this is divorcing from her husband."

In this statement, the divorce by magistrate is considered as divorce by husband ; It means magistrate can divorce a woman and she has to have wait-

ing period (Iddah).this divorce is irrevocable type and husband does not have a right for reconciliation before expiration of waiting period. Some jurists think that divorce is not necessary in this regard and they think magistrate has to order a woman to have a waiting period based on her husband death (Jafar pour, 1999)

According to article 1157 Q.M., when a woman has a husband who is absent or missing and magistrate has divorced her, she has to have a waiting period based on death of her husband. This civil law is based on known saying of jurists that know divorce as irrevocable in this case; however, they believe a woman has to have a waiting period based on husband death.

In fact, the reason of divorcing a woman by magistrate is to suppose the absence of husband or missing husband and to define the marital status of a woman. Naturally, if this happens during waiting period i.e. the husband comes back, he has a right for reconciliation. An absentee has two states:

1. In first place, they will know about husband so it is not permissible for a woman to marry to somebody else.

2. In second case, she has no news from her husband and she does not know where he is , Inter-faith have different idea about this kind of absentee.

In this regard, Imami jurist have said: the missing husband whose death or aliveness is not clear , if he has left properties to meet his wife 's needs or he has a guardian who can pay his wife's alimony or there will be someone who pays her alimony in essentially ,waiting for her husband is necessary and it is not permissible to marry. Until she can get news about her husband's death or a right to ask for a divorce.

But if the husband does not have any property and there would not be any one who can pay her alimony and support her, she can wait for her husband but if she wants to marry she has to go to court and magistrate will give her four years and during this time magistrate will search her husband.

But if there is no news ,magistrate as husband's guardian can divorce his wife , if the husband's guardians or his lawyer refuses to divorce a woman and magistrate cannot oblige then to divorce in any way ,magistrate can divorce her.

A woman will have four months and ten days as her waiting period and after that she can marry and it is permissible. The quality of searching by magistrate is to ask about missing husband in possible places and asking about him from passengers who

come from that place.

The best way to search is that magistrate finds a trustworthy person to look for a missing husband and this person has to write details and results to magistrate and it is enough to search normally and asking frequently about his place is not necessary.

If the enough and convincing search takes less than four years in a way it has been clear there will be no need to search more ,there is no necessity in searching and its obligation will be void.

However, she is forced to wait and to act in line with tradition and according to possibility of finding missing husband during this four years. After this period, the divorce is permissible and a woman has to wait four months and ten days and a Hadad widow is not pregnant (Hadad means a woman who does not wear make ups and wears black because of her husband's death),and waiting period is like alimony and during waiting period couple will inherit from each other ,if husband comes back before expiration of waiting period ,he can try for reconciliation if he wants or he can leave A woman, if he comes back after expiration of waiting period and before a woman marries , it is better to say he has no right for reconciliation and it is the same if in first case the woman has been married.(Najafi 2002;Tabatabaai Yazdi,2002)

## Conclusion

After investigating the problem it can be said that divorce case and especially divorcing a woman and supporting women rights are important from religious and also legal point of view. We can say hat in Islam it is not acceptable to mention everything is in men's hand during divorce process and according to a verse of Surah Al Baqarah (verse 229) Islam limits man.

The jurists interpret this type of divorce when a woman asks for it to judicial divorce and they use it as a strategy to release the captive women and they issue divorce decree.

From legal perspective, according to articles 1119,1129,1130,1029 Q.M. a woman can ask a divorce from court if her husband is not good tempered and in living with him she is in hardship and there is financial, life,.. risks to her.

## Recommendation

Accepting this type of divorce by religion and jurisprudence , removes women concerns about liv-



ing alone and dealing with married life problems and they will be ensured of Islamic government support based on justice. This is something that believers and committed scholars should know and consider the Islamic power range behind the secondary titles. Because this view implies that during waiting period, husband does not have a right for reconciliation and if he can do this, it is to violate the order, on the other hand court permits for reconciliation and if the cause of divorce removes during waiting time and according to husband request, court will permit the reconciliation and in this way court will prevent the dis integration of family circle; additionally during waiting period a woman has a right to have alimony and inheritance.

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