

Petition for a divorce by wife based on the Hardship Clause

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Abstract: The rules of law according to their special nature tend to justice, but justice is a general but also fragile concept. Sometimes, implementation of typical justice, which is the primary ruling of a matter, is in some conditions consistent with fairness and its implementation seems difficult; so, in order to adjust primary legal rules, some principles have been set in order to keep fairness, such as negation of Hardship Clause, that whenever there is an intolerable difficulty due to implementation of primary and typical rules, it will adjust them.¹ In confirmation of this rule it has been said that according to reason, a task should be fitted to the capability of a person, not out of his power, because futile rigidity will create an unfavorable reaction, encourages opposition to law and resistance to it and prompts individuals to sin and revenge. Thus, the duty of legislator requires that not only does not include an out of power and tolerance matter in the rules, but also strictly enforce rules.² In Article 1130 of Civil Code, Hardship of wife has been mentioned, that according to this rule, the wife has been allowed to file a petition from the court by proving the case, in cases when continuing marital life puts her in a state of hardship and continuing life is unbearable and difficult for her. Generality of this article allows a woman to leave marital life, without regard to the basis of creation of the hardship, only by proving the cause of her difficulty and hardship.

Keywords: Hardship Clause, divorce, wife, marital life

INTRODUCTION

In the Islamic society of Iran, women always criticize the fact that men have the right to divorce and that they themselves are deprived of such a right and that they cannot easily use it, but the fact is that neither the man has an absolute right to divorce, nor the woman is absolutely deprived of this right, but the problem is in the writing of law, which explicitly in some articles such as Article 1133 of Civil Code gives the right to divorce to men without any conditions, while if we examine legal issues more carefully and consider the judicial procedures, we will find that, firstly, the man has no right to divorce the woman without any conditions, and secondly, in many cases, the woman can file a request to the court for divorce; therefore, the explicitness of Article 1144 of Civil Code regarding the man's divorce right has been failed in many cases and the man cannot use this right. On the other hand, according to some articles of Civil Code, including Articles 1130, 1129, 1029, a woman can file a petition for divorce.

Hardship Clause has many examples that cannot be limited, but its instances can be mentioned just as examples. In this regard, the main responsibility lies with the judges, who, by applying the science of principles and custom, determine the issues of hardship in any specific case and refrain from spreading any of the instances to others. But judicial procedures can also be effective in determining the instances of this general concept and preventing the exercise of personal tastes.

Concepts of Hardship Clause (Osr & Haraj)³

The term Osr & Haraj lexically is the combination of the two words of "Osr" and "Haraj". Osr is an infinitive meaning get difficult, difficulty, limitation, hardship, and distress; and the gerund of Osr as Osrat also means difficulty and hardship and distress. Haraj is a noun meaning tension and pressure, a tight place, a tight place full of

¹ Katoozian, Naser, Civil law, Khanevadeh, Volume 1, Summer 1992, Bahman Borna Publishing, p 381.

² Arjmand Danesh, Jafar, Examining the Hardship Clause and its application in divorce, 2007, Behnami publications, p 11.

³ Distress and constriction

trees, and also a sin and an offense, such that it is said that “there is no Haraj on him” meaning that there is no sin and protest against him.¹

Jurisprudentially it means “secondary titles their entrance into the title of the obligatory assertive rules causes that the obligation and duty resulted from the order will be removed from the committed persons”. Simply it means that whenever an intolerable difficulty is created due to implementation of rules, that task will be removed.

In definition of Osr & Haraj as a legal rule, it has been said that “every act that causes a person to narrow down and deflect is also hard and difficult, and vice versa; any work which is difficult and hard for a person, will also cause him limitation and pressure. In addition to the norm of determining the instance of Osr & Haraj, as a common law according to that, anything that causes difficulty and restriction is also considered as Osr & Haraj and difficulty”.²

The relationship between Osr and Haraj

Some have considered the relation between Osr and Haraj as absolute generic and particular and have said that: “Osr is generic and absolute from Haraj and constriction, because every Osr is a constriction, but the opposite, that every constriction is Osr, is not true”.³ As, if a person forces his servant to eat a bitter drug, it is said to have put him in Osr, but to say that he has been put in constriction and his master has hardened him is not correct; in the opinion of these people, the duty has grading as follows, in terms of the extent of Osr and Haraj.

1. Duties lower than Osr (hardship) that are easy.
2. Hard duties that are not considered causing constriction and limitation.
3. Duties with constriction that the obliged person has the power to do them (Haraj).
4. Duties that performing them is out of the power of the obliged person.⁴

Emergence of the Hardship Clause in the first amendment to Article 1130 of Civil Code

In 1982, the legislator amended Article 1130 of Civil Code as follows: “In the following cases, a woman can refer to the religious court and file a petition for divorce. If it is proved to the court that continuation of the marital life is causing hardship (Osr & Haraj), it can force the husband to divorce in order to prevent injury to the soul, and, if it is possible, she will be divorced by the permission of the religious ruler”. The lawmaker’s decision to use the Hardship Principle in divorce was a start point in using this principle in the codified laws of Iran. The Hardship Clause was used as the secondary rule and a necessity in divorce case, so that by its help, all cases in the area of divorce that are considered as the instances and titles of disadvantage of wife will be considered. Article 1130 of the amendment approved in 1982 begins with the phrase “in the following cases ...” which indicates that the legislator, in applying the Hardship Clause of Article 1130, has looked at Article 1129 of Civil Code. In other words, instances of “the husband’s refusal to give wife’s alimony” and “the husband’s inability to give wife’s alimony” have been considered as Hardship of the wife and in other words, the legislator has explained and interpreted Hardship in its particular meaning as “Hardship in continuing marital life”, with the help of the instances determined in Article 1129; and despite writing a new general rule which opens the way for all general and particular instances of Hardship in marital life, still it is committed to the legislator in the previous style and by bringing the clause “the following cases ...”, indicates its attachment to previously defined instances.⁵

Instances of Hardship (Osr & Haraj)

Instances of Hardship can be divided into two categories:

- A. Instances that are mentioned in law.
- B. Instances that are not mentioned in law.

A. Instances of Hardship which are mentioned in law are

Leaving family life by the husband for at least six consecutive months or nine intermittent months in one year without a valid excuse. Absence occurs when a husband, deliberately or as a result of lunar events, goes away from the family and there is no news about him at hand; mentioning the adjective “missing” after the word

¹ Amid, Hasan, *Amid Persian Dictionary*, 1992, Amir Kabir Publications, p 787, 1436

² Mohaghegh Damad, Seyed Mostafa, *Rules of jurisprudence, Civil section, volume 1, spring 1995*, Semat Publications, p 62.

³ Naraghi, Ahmad, *Avaedol Ayyam*, 1989, Basirat Publications, p 61.

⁴ *Ibid*, p 61

⁵ Moogooyee, Haji Ali, *Hardship Clause and women’s right in divorce*, Tehran, Etelaat Publications, 2000, First Print.

absence shows that only being far from family does not lead to divorce, and the main element is being unaware of his conditions. However, leaving family life is about cases that a husband deliberately leaves his shared life with his wife and children, whether or not there is no news about him or he is in contact with his family members every day. Therefore, someone who is far from his family as a result of violent incidents such as war and hijacking and exile, one cannot say that he has left the family. Also, when a husband travels for a business or treatment for a while and his absence does not last so much that it can be said that he has sacrificed family life for other purposes, there is no reason for divorce.¹

The husband's being addicted to one of the types of drugs or his alcoholism that affects the basis of family life, and documentation or impossibility of obligating him to quit it during the period that had been required to quit addiction according to doctor, in case that the husband does not fulfill his commitment and after quitting and returns again to the use of the mentioned drugs, the divorce will be made at the request of the wife. In general, drugs are referred to substances that cause erosion of body and soul, some kind of psychological dependence and severe mental tendency and physical belonging; and are used in methods such as swallowing, injection, and inhalation and, if used continuously, cause addiction.

The mentioned addiction should be in such a way as to interfere with the basis of family life; and the addict should previously refer to a doctor for medical treatment and if medical procedures are not effective for his quitting the drugs, or the addict himself does not accept and refuse to refer to doctor for treatment, or his referring is not effective, this addiction will be considered as interfering continuance of marital life and as realization of Hardship Clause.

And at the end of clause 2 of the addendum to Article 1130 of Civil Code, it has been stated that "in case that the husband does not fulfill his commitment and after quitting and returns again to the use of the mentioned drugs, the divorce will be made at the request of the wife". The meaning of this sentence is that the wife must previously encourage the husband to quit the drugs and orally or in writing obliges him to quit the drugs or alcoholic materials. If the husband does not accept the commitment or does not perform it after acceptance, or even returns to these materials after committing (accepting the issue of quitting the drugs or alcoholic materials), the divorce will be made at the request of wife.²

Definitive condemnation of the husband to imprisonment of 5 years or more

Long-term imprisonments disrupt the basis of the family. The wife and children of an imprisoned person will have no caretaker and no helper, and also sometimes they are in need and hardship in supplying their livelihood. In fact, the same reasons and necessities that necessitate making up a family, permit divorce in long-term imprisonments so that the family will reorganize and a new sapling will sit instead of a pest up tree. Recognizing the right to divorce in such a case is fair and true and prevents many kinds of corruption.³

Mayhem or any kind of continuous misbehavior of the husband

The husband and wife are legally and ethically obliged to good companionship with each other. According to clause 4 of Article 1130, mayhem is considered as the most obvious instance of misbehavior. It is evident that a husband who, instead of proper management in the family environment, beats his wife, with or without an excuse, and harasses her, does not consider any respect for the family life and its mutual understandings, and such a family, although having the title of family, but is not more than a place of torture. The life being intolerable for a woman does not mean that it is impossible to continue living because in the worst circumstances and the worst situations still there is the possibility of life in terms of the existential nature of the subject; but the legislator has proposed the cause of Hardship Clause explicitly as the factors making life hard and difficult, and has stated that the Hardship subject to this Article means creation of a situation in which continuing life for the wife is along with hardship and tolerating it is difficult not impossible. According to the above-mentioned materials, in case that misbehavior of the husband causes the life being intolerable for the wife, the courts are obliged to issue a divorce decree.⁴

¹ Katoozian, Naser, Ibid, 412-413.

² Arjmand Danesh, Ibid, p 103-104

³ Katoozian, Naser, Ibid, p 409

⁴ Arjmand Danesh, Jafar, Ibid, p 107 to 108

The husband's hard illness or mental illness or rabidity or any hard-to-treat complication that disrupts marital life

According to paragraph 3 of Article 1130 of the former Civil Code, a wife could apply for divorce from the court in case that continuance of marital life was dangerous for her due to the husband's contagious and hard-to-treat illness. Presently, with the legislative changes, the abovementioned law has been terminated and paragraph 5 of the addendum has replaced this case in which it has been stated that "...the husband's hard-to-treat illness, mental illness or contagious illness, or any other hard-to-treat complication that disrupts marital life, according to this illness clause, causes Hardship in case that it is either untreatable or difficult to treat. If a person is suffering from some kind of contagious treatable disease such that the duration of the illness is long and provides the basis for becoming ill, in case that the health or life of the woman is at risk and continuation of marital life also is difficult and hard, due to the special conditions of the husband, she can file a petition for divorce according to Hardship Clause, because on one hand, this causes a disruption in marital life, and on the other hand, the concept of hard-to-treat means difficulty of treatment of the disease, not merely it's being untreatable. The legislator's emphasis on clause 5 is because of the danger for marital life and the wife's health, and merely the danger factor is enough for that.

B. Instances of Hardship which are not mentioned in law:

The husband's refusal to perform particular marital duties and disability of the husband due to external obstacles

The husband's refusal to intercourse can in some conditions cause Hardship because on one hand, sexual satisfaction is among the primary accessories of marriage and one of its necessities; and on the other hand, refusal of husband is considered a kind of insult to the wife and its continuation will make marital life intolerable, and gives the wife the right to file a petition for divorce. Firstly the wife must file a lawsuit in order to oblige the husband to perform his marital duties, and after issuance of definite judgment and lack of implementation of that by the husband, she can file a petition for obliging the husband to divorce, because it is only in this case that the wife's Hardship claim can be proposed. In addition, according to the addendum of Article 1130 filed in this Article, it is not necessary that performing marital duties will be voluntary and performed by the man himself, but the inability of the husband as a result of external barriers also, in case that the barrier's effect takes a long time and causes hardship for wife's life, will be the license for a woman's petition for divorce. However, the cause of this license is not the husband's refusal to perform his duties, but is the Hardship that has been created for the wife, due to external conditions or external factors.¹

Injustice in dealing with wives and its impact on Hardship

Justice means equality; a virtue by which one must give everyone what is right for him/her.² Regarding the relationship between a husband and his wives, the word "justice" has been used in the same sense. The husband should behave in such a way in giving alimony and in socializing with them so that each one finds herself equal to others. The injustice of a husband in communicating with his wives is a particular form of misbehavior, because the pre-requirement of good communication with each of wives is that she is not humiliated against others. Therefore, injustice also such as misconduct and misbehavior must be considered a constant and intolerable trait. In other words, a woman cannot apply for divorce based on a cruelty which has been imposed on her once, and now does not continue, or claim injustice between herself and the other wife of her husband on the basis of insignificant inequalities that can be neglected in the common sense.

Therefore, discrimination between wives is not itself a cause for divorce but the Hardship, which probably is created due to it, gives the woman the right to end her harsh and intolerable life and request for liberation. The court also considers this effect and forces the husband to divorce in order to prevent future damage.³

The husband's refusal or inability to give alimony

By order of Article 1129 of Civil Code and in case of the husband's refusal to give alimony and impossibility of implementation of the court's order and obligating him to pay alimony, the woman can refer to court for divorce and the ruler will force her husband to divorce. Also, in case of the husband's inability to pay alimony, in two cases

¹ Arjmand Danesh, Jafar, Ibid, p 128

² Katoozian, Naser, Philosophy of law, Behshahr Publications, Volume 1, No. 162

³ Katoozian, Naser, Ibid, p 401

the wife can ask for forcing the husband to divorce: Firstly, if the husband refuses to pay the wife's future alimony, while being able to pay it, the alimony related to previous time of the permanent wife is a commitment on the account of the husband and the wife can claim it at the court and ask it from the husband and the court will consider it and will issue an order to pay it. The court's order will be executed after legal proceedings. If the husband does not implement the provisions of the order and cannot implement them, the woman cannot force the husband to divorce because the mentioned debt is like the other debts of the husband and its origin, although it is the alimony of previous time, requires that the right of divorce will be given to the wife. But, regarding the future alimony, that not payment of that will make continuance of marital life difficult for the woman, in case that the husband refuse to pay it, and he cannot be forced to pay it by the court's order, the wife can ask the court to force him to divorce.

Secondly, if the husband is unable to pay the future alimony of his permanent wife, according to Article 1129, the wife can ask the court to force him to divorce, on the basis of the husband's inability to pay alimony. The court, after considering the issue and proving that the husband is not able to pay the future alimony of his wife, will issue an order and forces the husband to divorce, and the order will be executed as in the first case.¹

A divorce suit may be made by a petition on the basis of a husband's inadmissibility to give him a divorce. The court, after hearing and confirming that the husband does not have the ability to give up the future of his wife, decides to divorce her husband, and the sentence is executed as in the first case.²

Marrying another wife by the husband:

According to the Law of Family Protection, the husband can marry another woman with the permission of court, and if a husband marries again without the permission of court, his remarriage has legal responsibility and is criminally punishable that after the authorization of the Guard Council regarding its being non-religious, this punishment will be executed. However, whether the husband gives permission from the court or the husband will remarry without the permission of court, it does not result in divorce. The hardship and suffering that may be derived from this behavior of the husband may lead to divorce and separation; so each particular case should be examined in particular, and if continuation of life for the considered person is obstinate, it can be considered as the cause of Hardship of the wife and her divorce.²

Committing a crime that is contrary to the dignity of the family and the other party

Distinguishing these kinds of crimes does not have a general and typical aspect. For example, it cannot be said that all crimes are contrary to the dignity of the family and honor of the wife of the offender, because its punishment has leaving aspect. The court does not issue an order about the punishment of crime; it decides on dissolution of a given family and inspects the degree that the crime affects the family's dignity and the wife's honor. Therefore, judgment depends on the circumstances of the parties at that time. In these crimes also, the court will issue a divorce decree only if the offender has been convicted under a definite order. Also, the judicial procedure should pay attention to the provisions of Article 1130 of Civil Code and permits divorce in case that the crime causes humiliation of the offender's wife in the community, and according to common sense, it is difficult and excruciating for her to tolerate such a situation.³

Not abandonment of a job that is inconsistent with the family interests or dignity of the woman:

According to Article 1117 of Civil Code, a husband can prohibit his wife from a profession or job that is a violation of family interests or her own dignity. This article is about the man's right to restrict woman from engaging in a particular job or profession; but this right is not restricted only to man; because the woman also as the partner in the husband's life has rights that are not negligible. Wife has the right to leave the life with a husband whose job is causing abasement, disgrace and disrepute. Thus, whenever the shameful occupation of a husband, as a continuous or frequent and repetitive issue, makes marital life difficult and hard for woman, in case that forcing him to leave it is not possible, and he does not implement the court's order in this regard, or after a temporary stop, he again returns to that work as the first or second job, the court can order to divorce on the basis of this. In addition,

¹ Emami, Seyyed Hasan, Eslamiyah Bookstore Publications, 8th Edition, 1993, volume 5, p 32 to 34.

² Arjmand Danesh, Jafar, Ibid, p 128 to 129

³ Katoozian, Naser, Ibid, p 414

the husband's insistence on engaging in these occupations can, as one of the signs of misbehavior, lead to issuance of divorce order.¹

Barrenness and other complications that prevent rebirth and reproduction

Rebirth and reproduction is the most important goal of marriage, and the marriage contract has been required so that parents will be obliged to maintain and educate their children. Therefore, the obstacles that arise in this way, in most cases make marriage vain and make marital life purposeless and intolerable. Barrenness alone is not an excuse for separating from a spouse; for example, if a woman cannot have a child because of her old age or illness. The husband's being barren or his intentional refusal to make the wife pregnant is the cause of divorce only if it is the only factor in the couple's not having a child; otherwise, it will lose its legal and ethical basis. It is better that barrenness and the other barriers to having a child lead to a divorce only if the spouse had not been aware of that and after knowing it, uses it in a normal reprieve.

Because it is only in this case that treatment regarding childbirth is imposed on them as an unintentional issue and it can be claimed that this is a violation of the implied conditions and basis of the agreement between the two sides. Otherwise, a woman who satisfied to marry a barren husband initially would have a divorce permit and could use it whenever she wanted.²

Conditions for application of Article 1130 of Civil Code

By looking carefully to Article 1130 of Civil Code, the following conditions can be considered for its application:

The cause of Hardship must be available at the time of divorce petition. A wife cannot file a petition for divorce due to a cause that has previously caused her hardship in marital life and has been removed presently. Because the purpose of sentencing is not punishing a husband because of his inappropriate behavior in the past; divorce is not a means of punishment; and the purpose of this is to prevent the existing hardship and loss, not to compensate for the spiritual and material losses in the past.

The rule for determining Hardship of wife has a defined criterion, and it is realized according to the material, psychological and personality status of the wife. But this does not preclude us from referring to the custom in the diagnosis of hardship. The late Dr. Emami states in this regard: "The criterion for determining what is misbehavior and determining the degree to which a woman cannot continue marital life is according to the custom, which is determined in each case by considering the spiritual, moral and social status of the couple as well as the conditions of the environment in terms of time and place".³

Permanence of the marriage: there is no doubt that with regard to the assignment of divorce and marriage under Article 1130 of Civil Code, these are limited to permanent marriage.

Realization of Hardship: this is done by the court; in accordance with the rule of "Al Bayenah al-Almodaee"⁴, the woman must show her evidences and reasons in order to prove her claim. A delicate distinction is needed to be made in this regard, and this is the point that bringing the reasons is the responsibility of the woman, and realization of Hardship is the responsibility of the court, so there is no need that the wife shows her Hardship state to the court but it is enough that she proves in the court the reasons that, as she claims, have caused Hardship; and after proving these reasons such as quitting alimony, intolerable misbehavior of the husband, etc., the court will examine this issue considering the status and personality of the woman and the custom.

The problem of proving Hardship

One of the most important issues proposed regarding the title of "Hardship" is proving it. This problem especially occurs in cases that the subject of dispute has an internal and psychological dimension and individuals are being warned of precise awareness of these cases. For example, in one case, a woman has filed a petition for divorce based on Article 1130, due to the husband's nervousness, scurrility, being liar, and foolish behavior, and since she has failed to bring a reason for the aforementioned cases, the court has rejected her lawsuit. In other words, the mentioned matters are internal and psychological matters that the husband can refrain from revealing them outside the family; and a woman who may actually suffer from Hardship due to the mentioned reasons will remain in Hardship because of the issue being just in the family and because of having no reason to prove it.

¹ Arjmand Danesh, Jafar, Ibid, p 132

² Katoozian, Naser, Ibid, p 416

³ Emami, Hasan, Ibid, p 37

⁴ The claimant has to show his/her evidences [translator]

CONCLUSION

The Hardship Clause is a step towards elimination of emergencies and damages to the wife and creation of legal balance and justice in the situation of couples in the family. On the other hand, Hardship (Osr & Haraj) is a basic concept that has a direct relation with the spirits, personality, and beliefs and commitments of individuals and the best way to identify and prove it in practice is associated with problems. Determining some of the instances of Hardship in the addendum to Article 1130 of Civil Code has caused conflicts in judiciary opinions so that, in almost equal conditions, we are witnessing issuance of contradicted verdicts.

Despite the fact that the legislator has considered the right of divorce for wife because of Hardship, however, still there is a major difference between petition for divorce by the husband and by the wife, in terms of the reasons for the lawsuit. That is why the wife's opposition to divorce petition which have been filed by the husband in court basically has no legal standing and the court will issue a divorce order if the husband is ready to pay all financial rights of the wife.

But regarding the petition for divorce by wife due to Hardship, the wife has to prove her Hardship with so much difficulty so that the court will issue a divorce decree.

In the case of contagious and hard-to-treat diseases of the husband that have been considered as Hardship for the wife, in defense of this point it can be stated that many of the dangerous diseases posed in the past, now by certain rational and practical proofs and in light of the increasing growth of modern medical technologies, are treatable or at least preventable and there is no reason for their development. But, on the contrary, new diseases such as AIDS has appeared, which has been defined as Acquired Immunodeficiency Syndrome, and, as acknowledged by all, is a deadly and dangerous disease that afflicts the body's defense system gradually and over time, and makes the patient defenseless against a variety of infections and diseases and eventually causes him to die. Surely, the severity and intensity of these kinds of diseases is more and at the same time more undeniable than the other mentioned diseases that are the cause of defects leading to termination of marriage or Hardship. In case of the husband's having AIDS, and referral of the wife to the ruler and her petition for divorce because of Hardship, her petition will be accepted due to the described illness, and in case of the husband's refusal to do so, the court will be required to do that.

Recommendations

Creation of a judicial procedure and legal thoughts play an important role in resolving the ambiguities. Judicial procedure in a particular sense is the verdicts issued in the public board, whether they are Insistence Verdict or Required Verdict, and it generally includes the total judiciary verdicts. Judicial procedure is a habit that the court has found in resolving one of the legal issues in a particular way. Although this habit and solution are the result of repetition of verdicts, there is no doubt about weakness of the judicial procedure in our country. The reasons of this weakness may be too much attention to creation of law and lack of attention of the respected judges to the criticisms by the professors and thinkers of law, and not enough attempt in writing the verdict which is the result of plurality of lawsuits and the judges being busy.

Interfering female judges in the issue of recognizing the wife's Hardship means giving the job to the right person. Definitely a male judge cannot understand the feelings of a woman whose husband has chosen another wife, after many years of shared marital life. It may be said that presence of women counselors in the Family Court has been able to compensate for this defect. But lack of a requirement for presence of a female judiciary counsel, the only counseling role of female judges in the Family Court, and ineffectiveness of their viewpoints as obligatory in the verdicts restrict the above answer.

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