THE "AUTONOMY PRINCIPLE" ON DIVORCE IN JURISPRUDENCE AND IRANIAN FAMILY LAW

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Abstract
Divorce and the explanation of the concepts and regulations controlling it in Iran's legal system is one of the primary issues of family law. Now, one of the main challenges in this field is to consider the expansive powers of men in this field in Iran's legal system, the scope, and domain of the man's authority, the influence of the woman's will, and the viability of applying the principle of will or the role of both parties' will in divorce and its consequences. The question is whether divorce is governed by laws and regulations in Iran and whether the decision of a man and a woman should also be respected in this regard. The purpose of this study is to express and explain this problem using a descriptive-analytical approach, as well as how to determine the contractual right of the couple to divorce and the condition of the possibility of divorce only with the consent of the wife from the standpoint of legal jurisprudence, and the feasibility of the validity of the condition negating divorce or limiting it, as well as the validity or invalidity of the conditions as an integral part of the no-fault divorce agreement. Although it appears that the majority of regulations governing divorce are mandatory and listed in civil law, the role of the parties' will, and not just the man's, in this field cannot be denied. However, the scope of application of the principle of will preeminence in this field is restricted. In addition, a woman's will and how she applies the conditions are significantly more restricted than those of men.

Keywords*: Autonomy Principle, Divorce, Condition, Couples, Marriage Contract.*

1. INTRODUCTION

The definition of divorce is the dissolution of a permanent marriage through formal ceremonies. It is a sort of "unilateral obligation" (iqaa) that requires only the will of a single individual to be fulfilled. In reality, it is a type of right that, according to legal and jurisprudential sources and the prophetic narrative "Al-Talaq bi-ya-di man ʿakhadha bi-al-saḳ" is in the hands of those who made the marital contract, emphasizing the power and will of man. In other words, divorce is a ceremonial and unilateral obligation resulting from the man's total will. Despite legislative developments and contemporary jurisprudential ideas, this freedom is also granted to women under certain conditions. In accordance with the idea of the supremacy of the will and the freedom of contract, which are recognized in Iranian law, either men or women can use this legal authority in accordance with the circumstances established by civil law. The idea of the supremacy of the will, which is established in Article 10 of the Civil Law, appears to have entered the country's legal system from western jurisprudence systems, although to justify it, we can resort to trustworthy sources of jurisprudence, such as the Qur'an and narrations.

Based on an adaptation of the well-known phrase "Al-Uqud Tabieh Lil-Qusud," the meaning of the principle of the supremacy of the will as a principle is to pay attention to the intention of the composition as the creator of the contract and determine the functions and limits of its consequences, as well as the power and authority that the law gives the will by validating the legal acts that were created. This is done by paying attention to what the person who wrote the contract was trying to say. Article 10 of the Civil Law says that "Private contracts are legitimate for those

who have made them, as long as they are not explicitly against the law." This is to show that the will comes before the law and to protect the freedom of contracts. So, the source of every legal system and every person's responsibility is the free and independent will of each person (Jafari Langroudi, 2011, p. 43) (Harbi A. A, et al., 2022).

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Even though the right to divorce is given to the man in Imamiyyah law and Iranian law, a man can use this legal and Shariah right based on the idea that the will is the most important thing and Shariah reasons, he runs into problems when he tries to use this right. It's important to note that the country's family law has changed over time to account for these limits, as shown by the Family Protection Act of 2013 and the note to Article 1133 of the Civil Code.

Some jurists believe that if a man promises his wife during the marriage contract that he will not take another wife or maid during her lifetime and after her death, the condition is unlawful and the marriage contract is legal because it contradicts the Quran and Sunnah (Helli, 1989, p.589). Some believe these terms to be contrary to the Quran and Sunnah and hence void (Helli,1991, p. 327). Due to the diversity of opinion, the explanation of jurisprudential sources in this subject, as well as jurists' opinions, can be taken into account. Some jurists have explored "right and ruling" and the nature of the right to divorce in terms of the permissibility or impossibility of revocation of the right, which can be reviewed and assessed in this field (Mohaghegh Damad, 2010, p. 255).

The present study aims at investigating the following issues: How do Iranian law and Islamic jurisprudence view the scope and territory of the principle of the supremacy of the will in divorce? What is the scope of the husband's authority concerning the right to divorce, and what are its exceptions? From a legal standpoint, what are the contractual determination of the husband's right to divorce and the condition of the possibility of divorce only with the wife's consent? How can the issue between the adoption of the supremacy of the will principle and the required divorce institution norms be resolved? How do Iranian law and jurisprudence address the negation or limitation of divorce? What is the stance of Iranian law and Islamic jurisprudence on the legitimacy and illegitimacy of a marriage contract stipulating no-fault divorce (divorce by consent) as the only method of divorce? How does the supremacy of the spouses' will as two parties to the legal relationship affect the determination of the legislation governing divorce?

2. THE AUTONOMY PRINCIPLE

The principle of the supremacy of the will has a long history in Iranian law and is specified in Article 10 of the Iranian civil code. "From the inception of this concept's incorporation into Iranian law, jurists have discussed the relationship between this theory and jurisprudential criteria, but rarely its philosophical and intellectual foundation." This principle argues that competent parties are free to enter into a contract and can accept any sort of mutual obligation. This freedom is limited only by the law, which, of course, derives from the higher and more general level of individual will. This enlightened principle has its origins in the subjectivist view (mentalism) and volitional and completely free agency, which have been conceptualized in Descartes' and Kant's philosophies (Bigdeli and Sadeghian 2014, p. 126) (Thi H. H, et al., 2023). In the 18th and 19th centuries, Western culture embraced the concept of the supremacy of the will. According to both parties who concur to the occurrence of a legal effect, such as the transfer of property, the establishment of an obligation, or its dissolution, the regarded effect is lawful and backed by the legislature (Khamoushi and Malehi, 2016, p. 84).

In the same way that the principle of the supremacy of the will prevailed as a result of economic circumstances, it also deteriorated and weakened as a result of economic factors. These elements include the construction of major enterprises and powerful corporations, the formation of labor organizations, and the emergence of socialism. Critics claimed that attributing all rights to the will was an exaggeration. Although the duties originating from the contract are fundamentally founded on two wills, the wills of the parties are never documented. The parties to a contract are not tied to it solely because they have agreed to it; there are also social credits associated with contracts, from which the stability and establishment of transactions and the trust that the contract instills in

the parties' souls and spirits come. According to critics, the contract's binding force is contingent on these social credits; hence, the notion of apparent will (Zaker Salehi, 2009).

To date, it has become evident that adherents of the principle of the supremacy of the law will err in choosing it as an absolute principle in all legal elements and dimensions. This exaggeration led to exaggeration on the part of its opponents, who, by rejecting this premise, limited its applicability. This is where the opportunity for the philosophy of moderation arose. It implies that the will does not govern in the world of general law and that the social connections that follow general law are constrained by the general interest (not the will of the individual). However, within the context of private law, it should be noted that the will's family-related scope is limited. The marital contract, which is the foundation of family formation, is founded on both spouses' desires. However, the outcomes of this contract are predetermined by the law in accordance with the family's and society's best interests. Likewise, the objective rights are the same. Although the basis of objective rights is frequently the will, these rights are limited, and the will cannot create or add to their framework (Heidari, 2014, p. 25).

However, in terms of personal rights, the will has a broad scope, serves as the foundation for many of these rights, and has several consequences. However, it should not be overstated in this situation, as criminal behavior is also not permitted. In this expansive arena, free will is restricted to observing public order and etiquette. In addition, the will of the person is diminished in certain contracts that adhere to specific regulations about certain groups and communities. These limits (such as a partnership or group contracts) have reduced the supremacy of the will, set it within an acceptable circle, and balanced the will with justice and the public interest (Heydari, 2013, p. 25).

3. JURISPRUDENTIAL AND LEGAL REVIEW OF THE AUTONOMY PRINCIPLE

According to Article 10 of the Iranian civil code, the principle of Autonomy is one of the most significant themes and the legal basis for contracts. Regarding the proponents of the theory of contract and agreement as synonyms within the purview of Article 10 of the civil code, a variety of perspectives have been observed. According to the first group, the term "contract" in Article 10 of the civil code encompasses both definite and indefinite contracts. The opinion of the third group in this instance is also the same, although this group believes that a contract is not an agreement in the sense that an agreement is used only for definite matters, whereas a contract is used for all kinds of matters. But the second group says that a contract and an agreement are the same things in a general sense and that the word "contract" in Article 10 of the civil code is used specially to mean only an agreement with no end date.

Even though this principle comes from Western countries and the ideas of Western legal theorists like Carbonier, Pothier, and Duma, modern jurists have been able to prove it by looking at legal evidence and approving and taking into account Quranic and narrative references to it. In Islamic law, people are not free to choose how their contracts will work, and jurists look at each contract as having its own rules. However, the modern idea of free will and contract freedom has led to the creation and growth of indefinite contracts. Even though there is a framework and set of principles, business and economic interactions and people's statuses have become more similar. Jurists say that the principle of Autonomy usually means two important things in individual contracts: "A: Everyone is free to enter into and determine the terms of contracts." "B: The principle is based on the consent of the parties to a contract and its conclusion by the will alone, without the performance of special ceremonies such as the recitation of terms." (Katouzian, 2015, p. 57)

A law of obligations principle called "supremacy of the will" or "freedom of contract" says that "people are free to make bilateral or multilateral contracts, and no one can put any kind of limit on the human will to set conditions and boundaries" (Taheri and Ansari, 2005, p. 18).

The majority of jurists have acknowledged the expansion of the principle of the supremacy of the will in definite and indefinite contracts in Article 10 of the modern Iranian civil code. According to this view, the effect of the concept of freedom of contracts is not limited to the right to choose the type of transaction. This idea is generally consistent with Iran's laws. This principle can alter the non-mandatory norms of certain contracts and other regulations and have an impact on the

legal relationships between the parties, even if they extend beyond the boundaries of the contract (Haeri, 1994).

In this way, Katouzian writes: "Not only can the principles and foundations of definite contracts be applied to indefinite contracts, but in the last ten years, the principle of the supremacy of the will can be invoked in Article 10 of the civil code" (Katouzian, 2015).

Jaafari Langroudi says, "The vast majority of jurists and our civil law (Articles 10 and 754 of the civil code) have embraced the principle of the supremacy of the will" (Jafari Langroudi,1989).

First, contracts, both named and unnamed, have been placed in this realm. Particularly the Imami jurisprudence, which places all unnamed contracts in the form of a peace contract and refers to this contract as "Sayed-al-Aqod," which means "head of contracts." The second school of legal thought acknowledges the notion of the Autonomy Principle even outside the realm of named and unnamed contracts, i.e., in the form of "unilateral obligation" (Igha'at). It should be emphasized that in very ancient times, unilateral obligations were not discussed in Europe, but the discussion of Islamic law's unilateral obligations has gone to that continent. One of the jurists writes: (Panjtani) "It would appear that the topic of the decision under Article 10 of the civil code is a private contract." The first thing that springs to mind when you hear the phrase "private contracts" is any contract created in private connections between individuals. Consequently, certain contracts are included in this idea. Conversely, there is no reason to exclude certain contracts from the title of private contracts, especially when the scope of the term "peace contract" encompasses all private connections (Heydari, 2013, p. 31).

In accordance with Imami jurisprudence, the Iranian civil code reflects the principle of the supremacy of the will. Article 191 of the civil code says that the law plays the main role and makes the decision when a contract is made and its functions and limits are defined.

This principle states that "everyone has the freedom to voluntarily accept or reject legally binding obligations and contracts." According to Article 10 of the country's civil law, "private contracts are valid for those who have entered into them, so long as they do not violate the law," and this principle has been incorporated into the country's legal system. This article demonstrates that the impediments and restrictions governing this principle are the only laws. So, unless the law puts a roadblock in the way of a contract, the outcome of a contract depends on the will of the people involved, and freedom should be recognized as the guiding principle (Katouzian, 1995, p. 144).

Although this principle can be explained as having a jurisprudential origin, it appears that the origin of this principle, which led to its introduction into the subject law of Iran, is the legal system of France. Article 1134 of the French civil code confirms this principle by expressing it explicitly. According to this article, "contracts concluded in accordance with the law are considered law for the parties," which means that since the law is sovereign and enforceable, private contracts resulting from the will of individuals are also valid and essential for the parties (Safai, 2005, p. 47).

In addition to the laws enumerated in Article 10 of the civil code, public order and morality should be added to the list of impediments and constraints that may be considered due to the supremacy of the will. Even if the genuine concept of rights and responsibilities can be summed up by observing public order and morality and abiding by the law, there is more to it than that. "Respect for human personality is the foundation of the notion of free will." This means that the perfection of a person's personality is dependent on his freedom of will, and the law should only prevent the collision of free wills so that this freedom does not lead to a negative outcome and collective interests are not sacrificed to individual freedom of will (Jafari Langroudi, 1999, p. 4) (Mubayrik A. F. B, et al., 2021). Secondly, the conclusion of contracts based on the concept of the supremacy of the will must be honored by others, and the courts have the authority to modify the terms of the contract or review and appeal it. Because the legislator respects the will of the people, only the parties to the contract can alter or modify the effects of the contract with each other's consent and approval. Thirdly, consent is the essential premise of contracts. In other words, modern contracts are consensual and devoid of formalities. The formality of contracts (such as in the form of an official document or another unique form) is regarded as an unusual aspect of the principle of supremacy of the will. In actuality, expressing one's will is a means of achieving one's true desires,

and each word and deed has an effect. Fourthly, when interpreting contracts, the parties' actual intentions must be considered. Contract provisions are lawful to the extent that they reflect the parties' real intent. Fifthly, "the effect of the contract is relative and limited to the contracting parties, and third parties neither gain nor lose as a result." Each person's freedom is acknowledged when it does not infringe on the freedom of others, and no one can impose an obligation on another or gain for himself (Katouzian, 1995, p. 147).

4. RECOGNIZING THE NATURE OF DIVORCE (RIGHT TO DIVORCE)

In Islamic and civil law, divorce is a unilateral obligation that is started by the man or his representative. Divorce is a unilateral legal action even when it is based on the consent of the parties and takes the form of Khalaa (divorce granted at the woman's request) or Mubarat (consensual divorce when both parties desire separation) (Iqaa). It's because divorce, which is the final act carried out by concluding the contract and dissolving the marriage, is a unilateral legal act (Iqaa) and is not caused by the parties' will (Safa'i and Emami, 2007, p. 256). The agreement of the couple, which is needed for a divorce or is the reason for it, is different from the divorce itself.

According to the principle of supremacy of the will (Article 10 of the civil code) and the Taslit formula (the absolute legal power of the owner to exercise dominion or control over property) of Article 30, the ownership of land and its property, without any discrimination, is absolute and inviolable, unless the said revocation is against the rules of command, public order, laws of command, and good morals (Katouzian, 1995, p. 477; Safai and Emami , 1993, p. 23), the ability to waive the right to divorce is considered one of the characteristics of the right in the sense of dominion, and this is well known among scholars. The expression of some jurists on this matter is as follows: The ash-Shahīd ath-Thanī says in al-Qa'za and al-Faadiy: The rule of law is that whatever it is permissible for the maid to forfeit is the maid's right, and what is not, such as prohibiting federation (riba) and the aleatory sale (baye gharari), is not a right. Mohaghegh Nayini also considered the continuity of a right to be abrogable, contrary to the ruling. Sheikh Ansari, in his Makasab book, in the discussion of renunciating a right of the option of meeting place, says: "The definite rule is that any owner of a right can renounce his right." The author of Nahj al-Faqaha also refers to the words of Sheikh Ansari and considers them a general rule about the law. "The fairness is that we do not find any case in which its right is certain and definite and its abrogability is questioned, let alone that it is certain that it is inalienable," Ayatollah Kompany said in this context.In the case of the right of guardianship and the like, just because it has been interpreted as a right does not make us consider it a right, although it is certain that it has been interpreted as a right in the science of hadith and the words of the jurists. It should be noted that the essence of abrogation is not pardon and waiver of rights, but rather the disconnection between the "relational party," i.e., the owner of the monarchy, and the "belonging party," which is the dominant one. However, because the right can be renounced, it has become a legal rule with titles like "the rule of renouncing the right," which states that "everyone has the right to waive his right, and everything that was truly droppable."On the other hand, the ruling cannot be a waiver of the right because, firstly, it is an example of "Maharam Halal" and "changing the legislator's ruling from permissible to forbidden." Secondly, the authority of the ruling is in the hands of the legislator, contrary to the right, whose authority is in the hands of the beneficiary. Seyed Bahrul Uloom's statement in this context is as follows: "The decree is not waived by abrogation and it is not transferred by transfer," and this is obvious because the matter of the decree is in the hands of the ruler, not the judgment debtor. Now, if the meaning of the right to divorce is in its first meaning, i.e., in the sense of dominion and appropriation, it will be abrogated, and the condition of its abrogation is correct and must be fulfilled. However, if the right to divorce has a second meaning, i.e., permission (which is a ruling), in this case, it is no longer legitimate to waive the right. Thus, the ruling of "permission" is a valid "forbidden" and an example of "Ma harama halal." Therefore, regarding Article 1133 of the Civil Code, a man can refer to the court by complying with the conditions stipulated in this law and asking for divorce from his wife. In the law, "right" and "judgment" are generally translated as "can." If "can" means "permissible," then the condition of

revocation of the right will come in the way of the permissive decree and it will be corrupt, and according to the legal definition, "divorce rights" are considered among the mandatory laws. It is a privilege for the male couple, and according to the Sharia ruling and the legislator, it cannot be waived. Katouzian writes on this subject: "In cases where a privilege is established by the decree and is mixed with duty or is related to personality and related to public order, it is not possible to waive the right, such as the right to marry" (Katouzian, 2008, p. 57). However, if "can" and "be rightful" mean "dominion and appropriation," then the waiver of such a right will be correct. However, if the waiver of the right to divorce is not general, since the general waiver of the right to divorce conflicts with article 959 of the civil code, which stipulates that "no one can deprive himself of the right to enjoy or exercise all or part of the civil rights," then the partial waiver of the right to divorce, i.e., the waiver of a specific marital relationship, will not conflict with it, according to the meaning of the article, and it is subject to article 10 (Aminifard and Farshi, 2014).

Divorce has the nature of "right," but the reflection on Sharia texts and propositions can strengthen the nature of "judgment" for divorce, according to Ertekaz (it is defined as the penetration of a specific concept in the mind of a group or most or all people, such as the respectability of the Qur'an and Kaaba among Muslims and the respectability of the infallible imams among Shiites). The jurists' Ertekaz is due to the plural use of divorce in the concept of "right," and on the other hand, the analysis of the branches of divorce proves the possibility of the nature of "judgment" for it. It means that divorce starts with the assumption of a ruling and an obligation, and as a result, some people believe that the five types of divorce rulings prevent divorce from being considered right because these situations are not imagined to be legal. The initial presumption of permission (abaha) in divorce, which is thought to be right, forces the couple to go through with the divorce and meet the conditions of its implementation in one of the four situations.

The jurisprudential explanation of this issue and the amendment of the law in this direction can resolve the ambiguities about the nature of divorce. In other words, people who say that divorce is a decree are worried about people abusing divorce as a right, not respecting the interests of the family, and enforcing the rights of the wife. They think that by legalizing divorce in the form of religious instruction, it is possible to use the features of permanent rulings to get rid of these worries and legal ambiguities. It is obvious that the basis of the legislator is to preserve and continue the institution of the family and strengthen the relationships among its members, and its dissolution and disintegration have been denied by God. Regarding the addresses of the Quran and the Sunnah, it is understood that divorce is one of the abaha matters, and deciding that is in the hands of the man. In the public's opinion, this decision is correct; while discretion is permissible, it does not negate the ruling's inherent characteristic. According to the explicitness of Article 1133 of the civil code, a man can divorce his wife whenever he wants, and the will of the man is decisive in the occurrence of divorce. According to the conditions stipulated in Article 1119 of the civil code, the wife in the case of divorce can be an attorney with the right of substitution. In addition, according to Article 1129 of the Civil Code, in the case of incapacity or refusal to pay alimony to the wife, as well as Article 1130 of the Civil Code, if continuing to live with a man causes a woman distress and constriction, she can petition the court for a divorce.

Regarding the nature of divorce, it should be noted that: Firstly, for divorce to be a right or a ruling, dignity is important. Divorce can be seen as a decree from one point of view and as a right from another point of view. Secondly, concerning all types of divorce (Such as Khaala and Mubarat), this right should be considered a mutual and common one between men and women; hence, the composition of a marriage contract is under man’s control. Thirdly, the condition of applying this right for the execution of the divorce decree is to respect the general interests, and it cannot be applied as an absolute and unconditional right. Fourth: There is no permission for men to abuse the right to divorce, and they cannot divorce without a reason, and the proof of expediency in the permission of divorce is a definite matter approved by Sharia and has nothing to do with the nature of divorce. Fifth: In issuing a divorce decree and its legal influence, several things must be verified for the judge: 1. There is no abuse of divorce; 2. There is expediency in separation and divorce; 3. There might be some corruption in the case of a lasting marriage. These conditions apply to all

types of divorce but not to revocable divorce. Sixthly: divorce, as a decree, is not exclusive to the imperative rule, and in some circumstances, it can be a positive rule along with some decrees related to it. When comparing the divorce contract to the marriage contract, it should be noted that because marriage is a positive rule, divorce can also be considered a positive rule with consequences. Therefore, the main argument is that divorce, like marriage, is not only a man's right but also a woman's right, and for this reason, different types of divorce have been established and forged in Sharia. Some types of divorces show that divorce is not only the right of men. 1. Divorce is granted at the request of the woman, judicial divorce at the discretion of the ruler, consensual divorce, divorce by agreement, in which the woman's will also played a roleThe main issue with those who claim that divorce is a ruling is that they focus on revocable divorce, which is only one type of divorce, and then extend their decree to all types of divorce and, above all, to the generalization and nature of divorce.

5. THE POSITION OF THE COUPLE'S WILL AS SUPREME IN DIVORCE (DIVORCE RIGHT)

5.1. Jurisprudential Examination Of The Autonomy Of A Man's Will In Divorce

The right to divorce, which is considered one of the most controversial rights of couples in the collection of Islamic laws, is based on jurisprudential theories and sources as well as the Iranian civil code, Article 1133, which is one of the legal cases that have been given to men. A right that is the source of many discussions and violations of many covenants.

Many verses of the Qur'an's Surahs address the man when talking about divorce, for example, Surah Al-Baqarah, verse 226, and Surah Al-Ahzab, verse 49(Mehrpour,1995, p.233).

In the Sunnah of the Prophet, some traditions were narrated by Shia and Sunni. Among the narrations narrated by the Shia, there is one from the Holy Prophet (PBUH) that says: "Among those whose prayers are not answered is a man who curses his wife while the power of divorce is in his hands." (Sheikh Saduq, 1983, p. 299). Furthermore, Ibn Majah stated a prophetic hadith by Prophet Muhammad, the translation of which is that "the Prophet of Islam warned slave and maid owners and said: "What has happened to you who asked his slave to marry his maid and then tried to separate them, while the divorce is the right of everyone who is not satisfied with his wife?" (Sheikh al-Islami, 1991, p. 179).

Another reason that some jurists have put forward in this regard is that women are more emotional and sensitive people, and they may make sudden and ill-considered decisions due to their emotions and causing the breakup of married life(Diani, 2008, p. 227). .According to the first ruling of Islam, which is derived from the prophetic tradition " Al-Talaq bi-ya-di man ʿakhadha bi-al-saḳ: divorce is in the hand of man as the marriage beholder" (Nouri, 1981, p.306, Helli, 1982, p.534-536), and based on the prophetic narration of the monopoly of divorce in the hands of the husband, respect for divorce is shown towards the owner of the slave and maid, but not necessarily towards the wife, In other words, considering that the dignity of this prophetic hadith was revealed in the position of exercising the right to divorce by the owner of the slave and maid, it was stated to reject her right. Therefore, its provisions cannot be considered an obstacle for the competent government to make regulations to respect the interests of families, prevent divorces without cause or direction, and limit the absolute supremacy of men by ruling the court (Mehrpour, 2000, p.195). Based on this, according to the canonical and legal maxim, the monopoly of divorce in the hands of the man is eliminated, and in cases of distress and constriction, the Sharia court finally forces the husband to divorce, and if he does not accept, to avoid distress and embarrassment, the court directly pronounces the divorce formula. Therefore, according to canonical and legal maxims, the man’s monopoly over a divorce is lost, and the narration of Abi Basir also indicates this concept (Dayani, 2008, p. 238).

In general, several social factors affect how laws change (Katouzian, 1995, p. 1; Katouzian,2008, p. 419). Several factors limit a man's right to divorce. These are active social forces at the societal level that eventually forced the legislator to accept reality and change the ruling of Article 1133 of the civil code, and it has completely limited, if not deleted, the rule of the prophet's Hadith of al-Talaq (Al-Talaq bi-ya-di man akhadha bi-al-sa). In such a way that, at present, this rule of the

absolute supremacy of the man's will on divorce has been practically limited and balanced and has been removed from the list of applicable jurisprudential rules. It seems that the most important of these factors is as follows (Mehrpour And Darvishzadeh.,2021 , p. 180).

Accepting the Hadith of al-Talaq's rule (Al-Talaq bi-ya-di man akhadha bi-al-sa) has caused chaos and violations of women's rights in today's society. So, the lawmaker of the Islamic Republic, who in the early years of the Islamic Revolution was very open-minded about the country's basic laws and rules of jurisprudence, has noticed this chaos. Hence, even though Islamic jurisprudence considered many provisions of the family support law to be against Sharia, it has taken measures to prevent quick and simple divorce, and these measures have also been reflected in the legislative process as well. Naturally, this change in the legislator's position was based on the needs and demands of the public and the realities they faced in practice (Mehrpour And Darvishzadeh, 2021, p. 190).

Some believed that due to distress and constriction, the woman could go to the religious ruler and ask for a divorce, and the ruler would force the couple to divorce after examining and proving the issue. If the man refused to divorce, the ruler would personally proceed with the divorce. According to this group, the cause of distress and constriction here is not only the necessity of marriage but also the monopoly of divorce by men, which is the source of distress. As a result, this monopoly is removed by improving distress and constriction. But some of the jurists in this council had a negative opinion and said: "What is necessary for distress is the necessity of the marriage contract, and if the evidence of distress prevails here, it can ultimately remove the necessity of marriage and create the right of annulment for the woman." Considering that the cases of annulment are limited by consensus and this is not one of those cases, the right of annulment is forcibly excluded. Imam Khomeini, in response to this inquiry of the Guardian Council, stated the method of caution in that, at first, the husband should be forced to divorce with advice and not with compulsion, and if this is not possible, the wife should be divorced with the permission of the ruler of Sharia (Mehrpour, 2008, p. 314).

Also particularly clear is the employment of the mechanism of secondary rulings (Dayani, 2008 , p. 239) to limit the prophetic hadith of al-Talaq (Al-Talaq bi-ya-di man akhadha bi-al-sa). Article 4 of the Constitution mandates that "all civil, criminal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be founded on Islamic values." "This principle determines the application or generality of all the principles of the constitution and other laws and regulations, and it is the role of the Guardian Council's jurists to determine this." On the other hand, the legislator, after several phases of trial and error, concludes that the adjustment of the divorce right of a man is a social requirement that has impacted a significant number of family lives and requires serious consideration. By breaking a stated rule of jurisprudence, a situation is created that can be fixed by secondary rulings (Mehrpour And Darvishzadeh, 2021, p. 194).

According to the decision in the amendment of Article 1133 of the Civil Code and Article 29 of the Family Protection Law, divorce is a judicial matter, and a man must appear in court to apply for it. This is the first barrier to implementing divorce and limiting the supremacy of the couple's will on divorce (Mehrpour , 2000, p. 157). As a result, a man is never permitted to divorce or exercise his right to divorce without first going through the legal process. It cannot be altered, not even by the parties' consent, and to exercise the right to divorce, a court appearance is always required. So, one of the first restrictions and requirements put on the parties, including the man, is that they have to go to court to get a divorce (Mehrpour and Darvishzadeh, 2021, p. 194).

5.2. Legal Exceptions To The Right To Divorce (Judicial Divorce)

In jurisprudence texts, divorce is performed by the man, but divorce at the request and will of the woman by court order is a rare and exceptional occurrence. The definition of judicial divorce is a divorce that the woman requests from the court in cases of legal authorization and upon meeting the conditions; if the conditions are met, the court obligates the man to divorce; if the man does not comply, the court, according to the rule "the governor is the guardian of the recusant," can pronounce the divorce formula and divorce the woman. As a result, divorce under special conditions has been deemed permissible as the rule of the ruler in a great number of texts

concerning the missing person. They have made it more difficult for the husband to give faqih. Some jurists, such as Mohaghegheh Qomi, have gone beyond the prescribed cases and discussed the possibility of the husband divorcing the wife in the event of the wife's distress or harassment. Seyed Mohammad Kazem Tabatabaei-Yazdi, a contemporary enlightened jurist, considered it permissible in all cases where the continuation of married life would cause the woman loss and embarrassment. Another contemporary thinker has attempted to theorize and revise the criterion (manat) in this regard and says: From the context of verse 229 of Surah Al-Baqarah and numerous narrations about divorce, such as the oath taken by the man to cease marital intercourse, failure to maintain, disappearing, and the long absence of the husband, this general rule has been derived that a man should take one of two paths in family life: either he should fulfill Islam prohibits a man from subjecting a woman to distress and hardship, respecting her rights and boundaries, or abandoning her. On this basis, if the husband does not fulfill his responsibilities to his wife and cannot compel her to fulfill her rights, he will be forced to divorce, and if he refuses to divorce, Sharia's guardian will rule on the divorce. Another basis for this ruling is the prohibition on harm rule. The exclusive authority of the husband over a divorce is a Shariah ruling, which, if it causes harm to the wife, violates the principle prohibiting detriment based on other rulings. Whoever does not respect the rights of his wife, oppresses her, and disobeys the order of Sharia's leader in this matter is subject to divorce. In the event of the husband's refusal, the divorce formula is pronounced by the ruler as the "unwilling guardian." The husband's violation of marital duties, whether due to his fault, such as abandoning almsgiving, or even without fault, such as an inability to pay alimony, gives the wife the right to divorce and refers to the ruler (Georji et al., 2014, pp. 358–360).

Article 1029 of the Civil Code states: "When a spouse has been absent for four years, she may file for divorce." "In accordance with Article 1023 of the civil law, the ruler divorces her in this circumstance." Observing Article 1023 on the formalities of issuing a warrant of presumed death results in the woman's divorce. According to a well-known legal opinion, four years must elapse between the date of reference to the ruler and the date of litigation (Tabatabaei Yazdi,1990, p. 68), but according to some narrations, some jurists consider the passage of time before the litigation to be sufficient (Faiz Kashani, 1981, p. 35). The civil law also acknowledged this opinion but stipulated that one year must elapse from the date of the court's initial announcement. In the case of a missing person, it is not necessary to observe the aforementioned formalities because, according to certain jurists, investigating the condition of the husband and searching for his remains exposes the woman to committing a sin and an unlawful act. Therefore, it is permitted to divorce the woman without her consent (Tabatabaei Yazdi, 1990, 76). In fact, this assumption is one of the examples of distress and constriction included in the revised version of Civil Code Article 1130 (Katouzian, 1992, pp. 378–380).

If the husband commits misconduct or if the wife does not have children for other reasons, such as infertility, there is no way to separate them, and the wife must bear this situation unless the husband desires a divorce. Mirza Qomi in Jame al-Shatt and Tabatabaei Yazdi in Arwa al-Waghti agreed for the first time that if the duration of the marriage causes the wife distress, she may petition the court for a divorce. If a man refuses to do the mandatory divorce for certain other reasons, the court will force him to do it using the tactic of ta'zir. If the man still refuses, the ruler will say the divorce formula based on the rule that jurists interpreted as "Al-Hakam Wali-ul-Motna'" (Gorji et al., 2014, p. 358).

According to the twelve conditions outlined in the contract, if the woman can prove that the man has violated one of the conditions outlined in the marriage contract, the court will grant her divorce authority. If her spouse fails to appear at the registry office, she may apply for divorce on his behalf. According to this concept, if the woman's dowry and alimony are not paid, the woman's demands remain the man's obligation until the woman gives up some or all of them.

5.3. Consensual And Contractual Exceptions For Couples In Divorce

By distinguishing consensual divorce from adversarial divorce, the Family Support Law introduced a new type of divorce not limited to Khala and Mubarat. However, this sort of divorce is exceptional

in that there is no longer a need to go to court; instead, couples walk directly to the divorce office to file for a divorce, which poses some practical difficulties. First, to reinforce the family's foundations, mandatory pre-divorce therapy is required. Article 25 of the family protection law mandates that if a couple seeks a divorce by mutual consent, the court must refer the case to a family counseling center. In the second chapter of the new family protection law, it is provided that if a couple seeks a consensual divorce, the court must submit the case to the family counseling center. Second, according to Article 26 of the family protection law, the court issues a certificate of incompatibility if the divorce is mutual and at the husband's request. Upon the wife's request, however, the court issues a ruling compelling the pair to divorce or complete the requirements for filing for a divorce. Article 27 of the family protection law makes it quite clear that a consensual divorce does not require an arbitrator. Because in a consensual divorce, the court assigns the matter to the counseling center, and the counseling center also notifies the court of the outcome of its processes, and the court issues a certificate of incompatibility based on the expert judgment of the counseling center (Nikvand,2014). However, it is unclear why the legislator requires a reference to counseling centers in the interpretation of Article 16 of the Civil Code to strengthen the foundations of the family, prevent the escalation of family disputes and divorce, and attempt to create peace and compromise when it is not required in cases of non-consensual divorce (Fallah and Safaei,2019, p. 41).

Consensual divorce covers khaal and mubarat, and these two types of divorce are realized without particular requirements. In Khaal and Mubarat, the agreement between a man and a woman to dissolve their marriage includes divorce. In exchange for the ransom money, the woman gives her husband the money, and he divorces her (irrevocable divorce). A divorce obtained by mutual consent, however, is not contingent on the disgust of one of the spouses or the payment of ransom by the woman; it can occur without them. The consent of the parties does not affect the legal structure and formal nature of the divorce. Since this type of divorce is against the will of the parties and a violation of intent, it is difficult to consider this divorce as being appealable by the husband. (Falah and Safai, 2020, p. 41).

According to Imamiyeh jurists, the current literature regarding the institution of delegation has been titled "the wife’s choice." In general, Imamiyeh jurists can be divided into two groups: the minority (those who agree with the validity of delegation) and the majority (those who agree with the invalidity of delegation). Seyed Morteza is one of the rare individuals who deems his wife’s choice permissible. Regarding the right to divorce, he argues that the wife’s choice is valid, and somewhere else he considers the concept of the wife’s choice to be invalid and believes that it will result in the couple's separation. Because Imamiyeh jurists issue fatwas on the permissibility and validity of the choice and because there are numerous reports from the infallible (AS) imam on this topic, the choice is deemed permissible and correct by most Imamiyeh jurists (Alam al-Hoda, Beita, 241). Ibn-Junaid is also among the correctors of delegation and has stated in this regard: If a woman is in a necessary state of purity at the moment of divorce execution in the canonical law of Islam and the presence of witnesses, and her husband approves his wife’s choice, either to choose herself (divorce) or to choose her husband (the continuation of the marriage) and then she chooses herself, the divorce will be valid (Eshtehardi, 1995, p. 267).

Most Imamiyeh jurists believe in the permissibility of attorneys in divorce. Ibn Idris says: If someone appoints another as a lawyer to divorce his wife, the lawyer's divorce is permissible, and it does not matter if the client is present or absent (Helli, 1989, p. 95). Sabzevari also believes in the application of legal counsel in divorce. The license to act as a lawyer in divorce includes both those who are present at the divorce meeting and those who are absent. Faiz Kashani has also issued a fatwa on the legality of a legal attorney in divorce. His citation generally applies to the evidence of legal representation, both present and absent, at the divorce hearing. Faiz-Kashani has also issued a fatwa on divorce. His citation is the generality of evidence of representation's legality, specifically in the Sahihe of Araj (Faiz-Kashani, Bita, p.313). Saheb Javaher also does not consider it permissible to act as a lawyer in the divorce. His citation is also in agreement with most jurists’ opinions and the application of the evidence of legal representation (Najafi-Jawaheri, 1984, pp. 23-

31). Kashif al-Ghata considers valid the legal representation in divorce from both the present and absent parties.

Most Imamiyyah jurists believe that the legality of a woman's attorney in divorce is invalid. Mohagheq says in Shari'ee: It is permissible for a woman to act as a lawyer in a divorce other than herself (Mohaghegh Helli, 1987, p. 156). Saheb Javaher issued a fatwa on the permission of a woman's attorney in a divorce other than his own (Najafi-Jawaheri, 1984, p. 395). The reason for most jurors' permission to divorce relies on their attorneys' ability to do so. In both senses, the purpose of the Shariah is not assigned to the maintenance of the couple in the implementation of the divorce form, but rather the principle of obtaining it. Now, it is important to determine whether the spouse himself executes the divorce contract in the form of guardianship or whether he gives the attorneyship to another person. In both cases, the purpose of the Sharia is fulfilled. There is no difference between men and women in lawyering. Therefore, a woman can become a lawyer (attorney) in the execution of the divorce, just as she can have an attorney in the execution of the marriage contract (Bahrani, 1985, p. 59). The wife's representation, or attorney, in divorce, is legally recognized.

The wife's power of attorney over the husband, whether it is absolute or conditional on the fulfillment of an external matter, is conceived in two ways and is carried out with each of these two forms: 1. The condition of the marriage is contingent. The wife needs a formal power of attorney from the husband to prove her power of attorney in court (Safai and Emami,2007,p.256).

2. Independent contract: the wife's power of attorney in divorce may be done with an independent contract. in such a way that the husband gives the wife the power of attorney in divorce in the form of a power of attorney contract. If the wife's attorney in the divorce is done with an independent contract, her attorney is permissible, and it will have the ability to be dismissed because the contract of attorney is permissible (Khalkhali, 2006, p. 100).

As explained above, the principle of the supremacy of the will or freedom of contract is one of the principles that originated in the western legal systems, especially in France, and entered Iranian laws. However, as previously stated, the mentioned principle is also rooted in verses and hadiths and is accepted by jurists in some ways. This principle is used in contracts and agreements, and in the case of concluding a contract, it means the supremacy of the will is limited by the law. On the other hand, divorce is a kind of unilateral contract, according to which each of the parties (husband and wife) can divorce the other party and dissolve the marriage contract according to the provisions of the law. As it was examined, this right is not exclusively in the hands of men, and subject rights and Shariah rulings accept this right for women as well, taking conditions into account (Soltani and Moulai, 2019, p. 92). The principle of supremacy of the will is based on the free will of the parties who conclude a contract. In the case of unilateral obligations (iqaa), this free will results in legal action. On the other hand, divorce is a unilateral obligation in which only the will of one person is necessary and sufficient to create and realize the contract. If we assume that, in accordance with Shari'a rules, recent jurisprudential theories, and old family law laws, the right to divorce is exclusive to the man, then there is a real conflict between the principle of the wife's will and the man's right to divorce. As a result, using a man's right to divorce unconditionally is a way of restricting the contractual freedom of the woman, based on which she concluded the marriage contract. However, according to the legal changes that have occurred in the issue of divorce and the right to divorce in legal laws and regulations, as well as the amendment made in Article 1133 of the Civil Code, the new Family Protection Law, and contemporary jurisprudential opinions, the right to divorce is also accepted for women under some special conditions. Therefore, a man cannot use the right of divorce unconditionally, and to exercise it, he must prove the refusal of his wife to fulfill her marital duties and also the lack of their understanding, etc. Therefore, the husband must request a certificate of the impossibility of reconciliation from the special civil court, and as a result, only the family court is authorized and competent to divorce.

6. CONCLUSIONS

The stated content illustrates the temporal priority of the plan to accept the principle of Autonomy in Islamic law compared to Western law. The collected results suggest that Muslim jurists are ahead of all other legal systems in rejecting the doctrine of exclusivity of contracts and recognizing the principle of supremacy of the will and the legality of the unnamed contracts. Therefore, the untruth of the argument that our Article 10 status is based on following the theory of European law was clarified. By embracing the idea of the Autonomy Principle in all legal systems, this principle does not have absolute validity, and the legislator has limited its validity by passing rules such as the Family Protection Law. The rationale is that in many circumstances if the parties to the contract are left alone, the concept of free will brings unfair results. Although the parties to the contract can freely decide the law regulating the contract, this does not mean that the effect of the will is not subject to any exception. In other words, the will of the parties in the contracts should have clear limits and boundaries so that people do not oppose the mandatory laws or the issue of dealing with disturbances in public order and good morals. It is important to set a radius (border) for the supremacy of the will, just as Article 10 has confined this radius or border for the principle of the supremacy of the will to explicit resistance to the law. Also, the examination of jurisprudential sources such as the Qur'an and hadiths demonstrates that the Holy Sharia has already confirmed and defined this principle.

In the case of contracts, the principle of the supremacy of the will is effective and valid. But when it comes to one-sided obligations, the principle of the supremacy of the will is only accepted to the extent that it doesn't hurt other people's freedom.

Article 1133 of the civil code, which grants the right to divorce unreservedly to the man in accordance with Sharia interpretations, the opinions of contemporary jurists, and ancient laws, was revised to reflect the change. Therefore, based on Articles 1019, 1119, 1129, 1029, and1130, women can have and exercise the right to divorce.

A special civil court is the only official way to get a divorce since it's just a formality. Neither a man nor a woman can divorce the other without a good reason, which shows that the right to divorce is not absolute.

If we assume that the right to divorce is exclusive to men, then there is a genuine conflict between the idea of the primacy of a woman's will and the right of men to divorce. However, the new legislation and contemporary jurisprudence recognize this privilege for both men and women. Due to the law's limitation of the right to divorce, a so-called conflict of rulings emerges, which can be resolved according to the rule "more important instances exclude the important ones." In other words, the legal persuasion of each party results in either a divorce or the continuance of the marriage contract according to the other party's wishes. So, there is no conflict between the two, and the one that is more important and legal will be used.

In the domain of family law, the sage legislator is not content with stating the rulings of the consent of the spouses and the principle of the supremacy of the couples' will. So, the holy Shariah and the lawmakers believed in the idea of divorce by decree of the law, which is also called judicial divorce. This is a divorce that happens when the wife wants it and the husband doesn't like it, when the ruler forces it, or when the believers don't listen.

The addition of a woman's attorney right in divorce can be an effective tool to prevent men from exploiting divorce and refusing to apply undue pressure on women, given that divorce is the exclusive domain of males and women cannot divorce unless in limited circumstances. Because the contractual power of attorney is legal and can be revoked by either party, it is critical to include the power of attorney condition in the divorce during the marriage contract or other necessary contracts so that the power of attorney contract becomes necessary and cannot be revoked.

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