
At-Fault Divorce as A Cause of Domestic Violence According to Iraqi Civil Status Law

Zahraa Salim Sabri

Asst. Lect., Al-Farahidi University, IRAQ.

Email: zahraa.salim@uofarahidi.edu.iq

Abstract

Family ties are the mainstay of society. The more those ties are based on sound foundations, the higher the society within the framework of social relations that the law strives to regulate, as one of the characteristics of the legal rule is a social behavior rule that regulates the relations between members of society. Laws have also been urging establishing relationships between individuals on the basis of honesty and trust and not harming others, so organizing family relationships falls within the framework of organizing relationships in society in general, and one of the topics that has become the focus of legal scholars is the issue of family violence in all its forms, as violence is no longer limited to the husband's physically abusing his wife, but various forms of violence appeared, including direct and indirect, physical and moral, as family violence means the mistreatment of a person by another person with whom he has a close relationship, such as the mistreatment of one spouse to the other or the mistreatment of children, and that domestic violence is a synonymous expression The so-called domestic violence as well as domestic violence and family abuse.

Preamble

The marriage contract is the noblest and holiest of contracts because it contains a lofty building for the family, which is the nucleus of society. However, this contract may experience some reasons that may limit its continuity, such as the harm that leads to the separation between the spouses, and with which it is impossible to continue the marital life, rather it is an attack on the essence of this relationship leading to feelings of hatred towards the other spouse, especially the one who is harmed towards the perpetrator of the harmful act. Since the fault divorce is for material and moral harm by one of the spouses hurting the other by word or deed, such as insults, disfigurement that violate dignity, severe beatings, and committing what God has forbidden.

Significance of the topic

The importance of research on the issue of domestic violence from the lawful perspective is manifested in the need to identify the most important issues that did not receive the attention of legal scholars in order to put them into legal rules that guarantee to prevent the spread of the phenomenon of violence, as personal status laws are no longer able to encounter all issues that affect family, including family violence, in contrast to the widespread of this phenomenon in various forms and means.

The problem of the topic

The problematic issue lies in the extent to which family violence affects the termination of the marital bond, as there are many forms of this violence represented in the psychological, physical and material damage caused by each spouse to the other, which in turn negatively affected the termination of the marital bond.

Methodology

We will adopt the analytical approach by analyzing the texts of the Iraqi Personal Status Law No. 188 and Civil Law No. 40 of 1951.

Research Plan

Based on the foregoing, we will divide this research into six topics. In topic one, we look at harm to the wife and children as a cause of domestic violence. In the second, we look at addiction to alcohol and drugs as a cause of domestic violence. In the third, we look at marital infidelity as a cause of domestic violence. In the fourth, we discuss marriage before the age of eighteen as a cause of family violence. In the fifth, we will discuss out-of-court coercion marriage as a cause of domestic violence, and in the sixth, we discuss marriage with a second wife as a cause of domestic violence.

First Topic

Harm to the wife and children or vice versa as a cause of domestic violence

Damage to the wife and children, or the wife's damage to the husband and children, is considered domestic violence, which leads to the termination of the marital bond, and damage to the wife and children or vice versa is defined as (the husband's harm to his wife or the wife to her husband, whether verbally, such as slander, cursing and defamation, or deeds, such as beating, abuse and not paying alimony. The damage that leads to judicial separation is required to be so severe that it becomes impossible to continue marriage life.

It should be noted that the Iraqi legislator did not put a definition of the damage to the wife and children or vice versa or a clear indication of the damage as he only listed these damages as a form of the damage that leads to divorce. However, the Iraqi Court of Cassation has defined the damage leading to divorce comprehensively as follows: (the damage leading to divorce is that the husband abandons his marital bed and refrain from his wife, cause her to contract syphilis, insult her, swear at her, abandons his marital bed, silence her and leave her bed for a long period without a legitimate excuse, or prefer a woman over her without marriage, or commit a heinous act that affect her in such a way that it undermines her honor and family dignity, such as publicly consuming weed, drugs and intoxicants with a group of morally questionable people, among whom are boys, to which he shall be sentenced to imprisonment). It is clear to us that the decision is inclusive to all forms of harm, and despite that, the decision was limited to the harm that comes from the husband only without mentioning that harm leading to divorce may come from the wife as well, because the text of Article (40) of the Iraqi Personal Status Law, which states "Both spouses may request separation when one of the following reasons is available: 1- If one of the spouses causes harm to the other spouse or their children making it impossible to continue with marital life...." The above article made it clear that both spouses have the right to request divorce as a result of the damage that makes it impossible to continue the marital bond. This right is not limited to the wife only, as it is proven to both spouses or one of them to request separation when the damage occurs, which in turn constitutes family violence represented in this form of abuse. Which may be physical abuse of the wife or children or vice versa, which goes beyond the limits of the right to discipline.

Second Topic

Addiction to alcohol, drugs and gambling as a cause of family violence

The drug problem is among the problems that have a great impact on marital relations in Iraq, as the phenomenon of drug addiction and its spread and abuse in Iraq has become a real threat, equivalent to that of terrorism, on human rights in general and marital life in particular. Iraq has become a popular economic destination for the sale and trade of drugs as the numbers of drug abusers and drug dealers increased and was not limited to males, but also females, leading to the destruction of most of the marital relations of drug abusers because of its direct and indirect effects on the marital relationship. The addicted husband is characterized by nervous and cruel behavior that affect the other partner forcing him/her to accept the current condition without objection, as well as the sexual and health problems that addiction generates between the two partners due to the effect of drugs, which leads to a relationship devoid of any feelings, as well as the absence of an emotional connection between the spouses, as drug abuse increases selfishness and lack of interest, not to mention domestic violence. Overtime, disputes abound, making it impossible for the marital life to continue. The Iraqi legislator indicated in Article (40) that "both spouses may request separation when one of the following reasons is available: 1- It is considered as fault to take intoxicants or narcotics, provided that the state of addiction is proven by a report from a competent official medical committee. It is also considered a fault to practice gambling in the marital home." It is clear to us that the Iraqi legislator gave the right to both spouses to request fault divorce in the event that the other spouse is

addicted to drugs or intoxicants, which shall be proven by a medical report from an official committee, in addition to the fact that the Iraqi legislator deemed gambling as a form of fault and confined it to the marital home. It would have been better for it to be stipulated the practice of gambling as a fault anywhere, for it causes real harm to the person who practices it and to members of his family, as this harm may lead to a negative impact on the aggrieved husband and on the lives and future of the children for fear of delinquency or putting them under influence or psychological pressure that affects their future life. The same was confirmed by the decision of the Court of Excellence, which indicated that “the harm that necessitates divorce..... such as abusing cannabis, drugs and intoxicants openly with a group of degenerates among whom are boys to which he shall be imprisoned."

Therefore, addiction to narcotics and intoxicants leads to a loss of mind, which could lead the addicted husband to commit actions that would cause harm to family members. Loss of reason may lead to beating of spouse or children, insulting, slandering and cursing due to a drugged state of mind, as well as not supporting the wife and children financially due to the high prices of these substances that the husband buys, especially if the addicted husband does not have enough money to spend on his family, such matter may cause this phenomena to promote violence and family disintegration (males and females). thus, drug addiction is one of the causes of domestic violence that leads to the termination of the marital bond.

Third Topic

Marital infidelity as a cause of domestic violence

Marital infidelity is often explained as the husband's association with a woman other than his wife, or the wife doing the same with a man other than her husband, as betrayal, while the term infidelity is broader in sense, as it may include betrayal of trust or betrayal of secret of the other spouse. The term infidelity is a general and comprehensive term for all types of infidelity made by one of the spouses, marital infidelity is a very dangerous matter that cause more pain to the betrayed person than the traitorous one. Marital infidelity is every outrageous act that one of the spouses does after an assault on the rights of the other spouse, even if it is just the creation of emotional connection. the Iraqi legislator indicated in Article 407 of the Personal Status Law as follows: “both spouses may request separation when one of the following reasons is present: 2- If the other spouse has committed marital infidelity. It is also a marital infidelity for the husband to practice sodomy in any way.” It is noted that the Iraqi legislator has used the phrase Marital infidelity instead of the expression adultery, perhaps by using this expression he wanted to give the text a broader meaning than the meaning of adultery. Since the concept of marital infidelity is more general and comprehensive than the meaning of adultery, as it includes adultery and other acts that include marital infidelity. perhaps what prompted the Iraqi legislator to refer to the term marital infidelity is to identify the cases that do not constitute a crime of adultery punishable according to the provisions of the law.

Based on the foregoing, if the husband is caught in the act with a woman who is foreign to him in a suspicious situation, even if they are not in a state of fornication, the same goes for the wife, or if one of them is having an affair, or if one of them engages in acts of kissing or other acts that do not reach the stage of adultery, and in In all cases, marital infidelity shall be voluntary, and the other spouse does not know about it so that he can request a judicial separation. If the wife was raped or the husband was forced to have intercourse with a woman or a man, the rape in this case does not occur by the will of the wife. Therefore, the husband cannot demand divorce, and the wife cannot ask for separation if the husband is forced to have intercourse with a woman or sodomy with a man and she cannot because he has no criminal intent and this The act is not considered a form of domestic violence because it occurred from others, the Iraqi Personal Status Law promised the act of sodomy as marital infidelity in any way, and that the term sodomy came absolute in the sense of realizing sodomy, whether the man had sodomy with his wife or with another person, and it becomes clear to us in the light of the foregoing Marital infidelity is a form of domestic violence that negatively affect family members, leading to the termination of the marital bond.

Fourth Topic

Marriage before the Age of Eighteen as a Cause of Domestic Violence

Concluding marriage before the age of eighteen is a reason for divorce, and therefore, it is one of the causes of domestic violence. In many cases, one of the spouses is young and does not have full realization of marital life and is not able to bear the burdens of marriage, which causes him harm in this marriage. It is

impossible to continue married life, and the Iraqi legislator has indicated in Article (40) of the Iraqi Personal Status Law that “both spouses may request separation when one of the following reasons is available: 3- If the marriage contract was concluded before one of the spouses completed eighteen years of age, without the approval of the judge“ It becomes clear to us that the legislator has made marriage before the completion of eighteen years of age one of the reasons for fault divorce, meaning that the marriage could cause damage if made before adulthood to be held out-of-court. then, the approval of the judge is not needed.

Based on the foregoing, divorce due to harm from marriage before the age of eighteen as a cause of domestic violence, is conditioned by marriage taking place before one or both spouses reach the age of majority, and that the age of puberty for marriage in Iraqi law is eighteen Gregorian years of age based on Article 7/1 of the Iraqi Personal Status Law, which states that “in full capacity for marriage, reason and completion of eighteen years are required,” in addition to the fact that the marriage is carried out without the approval of the judge, because the law stipulates that the marriage under the age of puberty requires the judge’s approval based on Article 8, in which it stated: “1- If a person who has completed fifteen years of age requests marriage, the judge may authorize him, if his eligibility and physical ability is proven, after the approval of his legal guardian. If the guardian refuses, the judge asks him for his approval within a period he determines, and if he does not object or his objection is not worthy of consideration, the judge shall authorize the marriage. 2- The judge may authorize the marriage of a person who has reached the age of fifteen if he finds an absolute necessity calling for such act, and the permission is conditioned by legal puberty and physical capacity”, and in light of the above text, it is clear that the original qualification for marriage is the completion of eighteen years of age. It is permissible for the judge to accept the marriage after obtaining the consent of the guardian and ascertaining the spouse physical ability. 2- reaching the age of fifteen and not completing it, but there need to be an absolute necessity for the judge to grant marriage permission. Accordingly, if the above conditions are not fulfilled in the marriage contract, the Iraqi legislator considers it a fault leading to divorce, and since marriage without the fulfillment of the above conditions results in harm, and consequently in the termination of the marital bond, then it is a cause of domestic violence.

Fifth Topic

Out-of-Court Marriage through coercion as a cause of domestic violence

Coercion has a significant impact on society and individuals in general, and has a key role in marital life. Coercion is one of the factors affecting family structure, which is the first building block in building a healthy society. Since the marriage is the basis for building the family, it must be based on consent, not coercion. since consent is a basic condition in marriage, the Iraqi legislator stated in the Personal Status Law that out-of-court marriage and coercion is one of the reasons for judicial divorce as it was stated in Article (40) of the Personal Status Law, “both spouses may request separation when one of the following reasons is available: 4- If the marriage took place outside the court through coercion.” It is clear to us from the text that the Iraqi legislator has stipulated for the separation that the marriage be outside the court, if it is through coercion, and if the consummation actually takes place after coercion.

Sixth Topic

Marriage to a second wife as a cause of domestic violence

Polygamy is an old age system, as many ancient nations practiced it. Polygamy makes it permissible for a man to have more than one wife. as this system had different forms and situations in terms of restrictions and aspects of its application from one society to another. Restricted according to the man’s social class, and others made him a reason for separation if it took place outside the court, and this is what the Iraqi legislator stipulated in Article (40) of the Personal Status Law, which stated that “for both spouses, a divorce request is allowed when one of the following reasons is available: 5- If the husband married a second wife without the permission of the court, and in this case the wife is not entitled to file a criminal claim under paragraph (1) Item (A) of Article 3 of the law of Criminal Procedure No. 23 of 1971”. It becomes clear to us from the concept of violation of the text that the Iraqi legislator has restricted the second marriage by permission of the court and not fulfilling this permission is a reason for at-fault divorce. Therefore, if the wife requests divorce due to second marriage, she shall not file a criminal claim. The permission granted by the court to the husband for the purpose of remarrying is restricted with conditions stipulated in article 3 of the Iraqi personal status law, which states (4- It is not permissible to marry more than one wife except with the

permission of the judge, and to give permission, the following two conditions shall be met: * The husband has financial sufficiency to support more than one wife * There is a legitimate interest). This means that the Iraqi legislator constrained second marriage permission by two conditions, one of which is financial, represented by the husband's financial sufficiency to support more than one wife, and the other is moral, represented by the realization of a legitimate interest, such as the fact that the first wife is ill with a disease that prevents cohabitation or cannot bear children and other reasons.

Accordingly, the conditions for fault divorce due to second marriage are that the husband marries a second woman while the first wife remains the same, and that the second marriage takes place without the permission of the court, as the second marriage, as we mentioned, is based on conditions, as well as other procedures such as informing the first wife to attend the competent court to express her opinion about her husband's request for a second marriage, as well as the social research procedures with the husband to find out the reasons for the second marriage and to obtain the approval of the Public Prosecution in relation to the social interest. After completing these procedures, the judge issues his decision to authorize it or not.

Based on the foregoing, it becomes clear to us that the Iraqi legislator has given the right to separate both spouses because of the husband's second marriage, because it was mentioned in the general text of Article 40. In fact, this is a matter that should be used to question the Iraqi legislator, so how does he give the husband the right to fault divorce while allowing a second marriage out-court to the husband, which should be illegal act and ill behavior that may harm the two wives. In addition to being the one who caused harm to the first wife, and may cause harm to the second one as well in case he was hiding his first marriage. The Iraqi legislator should have given this right to the wife only, because of the harm it caused to her, which is represented by domestic violence, because the second marriage will reduce the attention that the husband was giving before his second marriage if he does not end it, and this constitutes material and moral violence to the family and thus leads to termination of the marital bond.

Conclusion

Through this study, entitled At-fault Divorce as a cause of Domestic Violence according to Iraqi Civil Status Law, we reached a set of results and proposals, which are as follows:

1- Conclusions

A - The Iraqi legislator made the right of harm guaranteed to each of the spouses if one of them causes harm to the other, in addition to the fact that the Iraqi legislator is the only to mention the forms of separations among the comparative legislations, as the comparative legislations has mentioned the term harm absolutely, in addition to that the Egyptian legislator who made the right to separate for harm is a right guaranteed to the wife only. B- Each of the husband's harm to his wife and children, or vice versa, is one of the causes of family violence that lead to the termination of the marital bond, in addition to the fact that addiction to drugs, alcohol and gambling is a form of damage, which is then a cause of domestic violence. C- The term marital infidelity is broader than the term adultery, and this is something to be praised by the Iraqi legislator, as it did not make the distinction for harm limited to adultery, but rather included all types of infidelity such as the spouses' betrayal of the secret, betrayal of trust, and acts that may not reach adultery, such as romantic relationships and others. D- The legislator made marriage before puberty a reason for separation if it took place without the approval of the judge, in addition to making forced marriage outside the court a reason for separation because coercion is a form of domestic violence that leads to the termination of the marital bond. C - The Iraqi legislator has given the right to separate to both spouses because of the husband's second marriage, because it was mentioned in the general text of Article (40), and in fact this is a matter that is taken against him, as how does he grant the right to the husband to separate for harm, when he married out-of-court on his first wife, since he did an illegal act, and this behavior may harm the two wives, in addition to being the one who caused harm to the first wife, and may cause harm to the second wife as well if his first marriage was hidden from her. The Iraqi legislator was supposed to give this right to the wife only, because of the damage he caused her, represented by domestic violence; Because the second marriage will reduce the attention that the husband used to give him before his second marriage if he does not end it, and this is what constitutes material and moral violence for the family and thus leads to the termination of the marital bond.

Recommendations

We call on the Iraqi legislator to amend Article 40 by referring the fifth paragraph of it to Article 43, and to give this right to the wife only.

Resources

Books

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2. Al-Siddiq Muhammad Amin - The position of Islamic Sharia on drugs - a paper published in the Arab Conference on Drug Affairs in its sixth session held in Riyadh - 1974.
3. Ibrahim Hamid Al-Hantawi - Crimes of honor and public modesty - first edition - Legal Library - Baghdad - 1998.
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5. Said bin Dreb - Islamic Sharia's position on alcohol and drugs - Sixth Regional Conference on Drugs, the Arab League, Part Three - Riyadh - 1974. H.

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9. Dia Abdullah Aboud Al-Jaber and Haider Hussein Kazem Al-Shammari - at-fault divorce types in Iraqi and comparative legislation - Research published in the Journal of Resala Law issued by the University of Karbala / College of Law - seventh year - second issue - 2015.
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Judicial decisions

11. The decision of the Federal Court of Cassation - a decision published on the international information network and at the following link:
<https://boubidi.blogspot.com/2017/04/blog-post-70.html>

Laws

12. Iraqi Personal Status Law No. 18 of 1951.