A comparative study of the legal situation of the affairs of the continuously absent person based on Iran’s law and Islamic jurisprudence (sunnī and shīa jurisprudence)

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ABSTRACT: The marriage and divorce status and their financial influence on the continuously absent person’s wife have been under religious investigations by Emamiye jurisprudence since a long time ago. With reference to the code of possession, the continuously absent person is presumed alive and the requisites and administrations of his financial and non-financial affairs shall be carried out, hence all of the security measures in order to protect the continuously absent person’s states are to be provided accordingly on time. In case the continuously absent person whose whereabouts are unknown has left no advice for the administration of his estate or affairs and there may be no person legally in a position to take charge of his affairs, the court will nominate a trustee for the administration of his estate and neither the continuously absent person’s trustees nor his heirs can be entitled to interfere in the above mentioned issue unless the judgment of presumed death of the missing person is issued.

Key words: Emamiye jurisprudence, Iran’s law, Continuously absent person, Divorce, Dissolution of Marriage, Alimony, Marriage portion, Eddeh (the waiting period during which a woman cannot remarry)

INTRODUCTION

The literal meaning of family in particular contains wife and husband and their children, according to article 1105 of Iran’s civil code, in relations between husband and wife; the position of the head of the family is the exclusive right of the husband and up until he is present on his domicile, his states, children and wife are under certain common law yet in case the person disappears and no traces are found behalf him, the granted common law concerning his states, children and wife will alter accordingly.

The initial element of the legal definition of the word “absence” (1), is absence in his place of domicile (place of residence or work place) which is the principal centre of his personal affairs (2), furthermore it’s issued by article 1011 of Iran’s civil code: “A continuously absent person is a person who has been absent for a comparatively long duration of time and no news whatever have been received from him.” There has to be a difference between the concept of “absence” and lack of “presence” from the legal point of view.

The person who is “not present” is the one whose being alive is undoubtedly confirmed and he is not present in his domicile, however there is a certain amount of uncertainty about the continuously absent person’s being alive, no news supporting the fact that he is alive or dead is received from him and the reason why the legislator has added the word “continuously” to the word “absent” in article 1011 of Iran’s civil code is to differentiate the concept of absence from lack of presence.

A: The idiomatic and legal meaning of the continuously absent person

Absence is such a subject associating with personal affairs which indicates a certain situation of an individual in the society, the subject of the continuously absent person deals with a part of legal problems with regard to absence in order to resolve the disputes that sometimes humans, having different motivations and various reasons, move away from their residential area unwillingly or deliberately (3) (Garner 2009) and no other
news of him is received. With reference to article 1101 of Iran’s civil code, a person who has been absent for a short duration of time and all his family and friends are fully aware of his being alive and his whereabouts are unknown is not considered as a continuously absent person. Although his absence lasts for a long time or that he never returns, the recognition of this period is assigned to the jurisprudence (Emami, 2010, 223). Such a person who is called missing news absent person (JafariLangroudi, 1993, 732) and the law of continuously absent person by jurists, is presumed alive and the effects and laws of the alive person regarding his financial and non-financial affairs are imposed (Daroudian, 2009, 41) (4).

Based on Emamiye jurisprudence, the concept of continuously absent person refers to a person whose news is not available (Moghanniye, 1984, 34), yet it is unidentified whether he is dead or alive, such an absence is known as discontinuous absence and the absent person is called a missing absent person (ShahidSani, 2005, 292, 293). And moreover according to article 13 of Islamic Republic of Iran and also the single article on the subject of full respect to Iraninan non-shia’s personal affairs (5), recognized religious minorities in Iran (including Zoroastrians, Christians, Jewish) are free to perform their religious rites in matters of their personal affairs (6).

4. Bryan A. Garner

**Legal effects of absence in the status of continuously absent person’s wife**

Article 1019 of Iran’s civil code has specified circumstances under which the verdict of presumed death of a continuously absent person will be issued in a case where such a duration of time has elapsed from the date of the last news received as to his being alive that such a person would not ordinarily remain alive after that time, on that basis according to article 1020 of Iran’s civil code, The following cases are of those in which a continuously absent person cannot ordinarily be supposed to be alive:

1. When 10 full years have passed from the date of the last news received as to the life of the continuously absent person and at the expiry of the period his age has surpassed 75.

2. When a person was included in an armed force under any denomination and disappeared during the war and till three years after the conclusion of peace no news are received from him. If the war is not terminated by the conclusion of a peace agreement, the period in question must be reckoned as five years from the date of conclusion of the war.

3. When a man engaged in a sea voyage was on board of a ship which was wrecked in that voyage and three full years have passed from the date of wreckage of the ship in question and no news is received from him. In case the trustee or heirs demand to take charge of the continuously absent person’s affair, the court with respect to a legal expert will begin pricing and make an inventory of the entire possessions of the continuously absent person upon either heir or trustee’s request. Subsequently, the list of the possessions will be filed at the court’s archive and a copy of which will be handed to the beneficiaries upon request.

The death of the absent person might be certain yet without specific date of his death, in that case the court has to be informed of every detail. After conducting investigations and enquiries, the court will ascertain the date of his death and announce it to the beneficiaries. By determining the date of the absent person’s death, the problem of distributing the state among the heirs will be resolved.

The heirs of a continuously absent person whose whereabouts are unknown can apply to the court, before the issue of the judgment of his presumed death, asking that his estate may be delivered into their possession, provided that:

1. The missing person has not already appointed a person for the administration of his estate.

2. Two full years may have passed from the date that the last news from the continuously absent person was received and it’s necessary to publish a notice in one of the local newspapers and one of highly circulated papers.

**B: The effect of the issue of the verdict of his presumed death on marriage status and its financial effects on the continuously absent person’s wife**

With respect to the opinions of a few jurists, the issue of the judgment of his presumed death is one of the ways to dissolve the marriage of the continuously absent person’s wife due to which the marriage contract with the absent person will end after the eddeh period is expired. Two theories are put forward with regard to the effect of the issue of the judgment of his presumed death on marriage contract; first theory concerns the transmission of the presumed death verdict to the marriage contract and its dissolution, according to this view the verdict of his presumed death results in the dissolution of the marriage and ends this matrimony in the same way that the distribution of the state of the absent person among the heirs took place. Consequently, the woman can remarry after the expiry period of eddeh time. (Khansari, 1984, page no.563).
On the contrary, according to the theory of lack of transmission of the presumed death verdict to the marriage contract, the legislator has separated the administrative system of the absent person's estate form his marital status and has set certain rules and regulations for each category.

The procedure pertaining the presumed death verdict manages his financial affairs and administration of his estate and it doesn't involve marital issues, since the absent representative or appointed trustee supervises specifically financial affairs and other issues related to the disabilities under the guardianship of the absent person, in case the marital relationship is considered as a separate matter and as a rule the absent person's wife doesn't require a guardian (unless she is disabled) and the contract is only dissolved by the divorce or its termination (in specified cases granted by the judge).

As a result when the judgment of the presumed death is issued, the absent person's estates are distributed among his heirs and his wife's share of inheritance will be granted. Based on law, all the actions taken concerning the presumed death will be ineffective.

C: Financial right of the absent person's wife in particular
1. The right of alimony
With reference to Iran's civil code and Emamiye jurisprudence, husband is responsible to pay off alimony and apparently this right continues to exist for a woman whose husband is absent (7) since the marriage contract contributes to the right of alimony and the absence of the husband doesn't justify the denial of this right. Furthermore, in Islamic jurisprudence kinship and estate are recognized as the causes of the right of alimony in marriage and form the juridical point of view, man hold the responsibility of supporting the family and providing the expenses and cost of living. Therefore, this law doesn't exclude the customary cost of living of the absent person's wife.

2. The right of marriage portion
Immediately after the performance of the marriage ceremony the wife becomes the owner of the marriage portion and can dispose of it in any way and manner that she may like. (8) And the husband's absence cannot manipulate this right in any aspect. The mentioned obligation about marriage portion arises from law and religion and it is not based on contracts and under any conditions man is obliged to pay out marriage portion and it is regarded as an outstanding debt in the distribution of his estates.

3. The right of inheritance
The assertion of this right to the absent person's wife depend on the approval of the absent person's death or the expiry of the certain period of time (9), in Islam according to Quran verses women are granted the right of inheritance. Yet jurisprudences are not in agreement with the judgment of the continuously absent person's inheritance, the known and recent ones believe that we have to wait until when such a person would not ordinarily remain alive after that time, and then issue the absent person's death and his heirs receive inheritance. It seems worthwhile to mention that the wife can only inherit if the marriage contract is not dissolved due to divorce or cancellation of it.

4. Compensation of married life
According to Iran's law and Islamic jurisprudence such a right is upheld for women and wife is entitled to compensation with regard to household chores and demands it from the absent person's estates.

CONCLUSION

Based on what has been discussed so far, it can be claim: although in some aspects Iran's civil code opposes Emamiye jurisprudences, it doesn't contradict with religious beliefs and this verdict is adapted from the household of the prophet of Islam (Ahlulbayt) and in accordance with moral virtues, social interactions, family unit and ensures the rights of wife and husband.

In conclusion the marriage contract between the absent person and his, wife either permanent or discontinuous, would be dissolved by the issue of the judgment of the presumed death of the absent person's death and during eddeh period his wife is granted all her financial rights, which refers to alimony during the absence time and later after the issue of the presumed death of the absent person or upon divorce petition she can be entitled to the right of inheritance and compensation and the marriage portion in either situation as well.
Notes

1. The continuously absent person is a legal term that the legislator has allocated articles 1011 to 1040 of Iran’s civil code and 126 to 161 of Iran’s Non-Litigious Matter Act to this issue and has stated some comments.

2. Article 1002 of Iran’s civil; the domicile of every person is the place wherein he lives and where also is the principal centre of his affairs. If the place or residence of a person is different from the principal centre of his affairs, the latter will be considered as his domicile.

3. Absentee: One who is absent from his usual place of residence or domicile.

4. These rules and regulations are the adaptation of the Islamic jurisprudence, hence in jurisprudence the estates of someone who has been absent with discontinuous news, in such a way that his being alive or dead is not confirmed, cannot be distributed and we have to wait until when such a person would not ordinarily remain alive after that time. Therefore, the code of possession implies that he is alive anything left behind him remains in his possession as it used to be, Sheikh Muhammad Hassan Najafi, Javahe-al-kalam, Vol. 39, p. 63; however the mentioned legal estates in Iran’s civil code (articles 1020 and 1022) are adapted from Germany’s civil code (articles 13 and 17), which is voided by the law on the fourth of July 1939 concerning the subject of absence, (Darouadian, 2009, pp. 40 and 41). For further studies on the mentioned estates refer to: Marcel Planiol, Treatise on the Civil Law, Vol. I, Part I, No. 635, pp. 380-381

5. Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.

6. In Jewish religion, divorce document has to be handed over to wife by husband himself therefore in case of his denial of absence, there is no alternative solution with respect to this religion and there is no possibility to divorce.

7. Article 1028 of Iran’s civil code
8. Article 1019 of Iran’s civil code
9. Article 1082 of Iran’s civil code
10. Article 336 of Iran’s civil code and article 29 of Iran’s family protection code

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