

Conditions for Verifying the Correct Seclusion for Legal Entry

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Abstract

The correct seclusion is the jurisprudential and legal terminology for the meeting of the spouses after the contract and before entering a place where they are safe from being informed by others, with the absence of legal, natural and sensual obstacles. Intercourse (according to those who say it from the doctrines of Islamic law, from the Hanafis and Hanbalis, as for the Malikis, they see that it proves half the dowry), and they put several conditions for this, if they are available, so it is considered a legal entry between the husband and his wife, the most important of which is the absence of sensory barriers, as if the husband is sick with a disease that prevents him from entering or physical barriers, such as There should not be a third person with them or legal impediments, such as not one or both of them fasting. It is limited only to the real entry, and certainly for disagreement, we have suggested some suggestions in order to clarify this position and make it more accurate.

Introduction

The Research topic:

The concept of correct seclusion is to achieve legal entry, and it does not include within its scope the forbidden seclusion such as the man being alone with a foreign woman, in a place far from people's eyes, because such seclusion is a reason to reach an illegal purpose. It fulfills a number of conditions to be valid for those who take it, and its impediments are negated.

The Search problem:

This subject raises a number of problems, on the one hand, what are the conditions that must be met for the seclusion to be valid in both jurisprudence and the law, and whether the laws explicitly refer to them, especially the Iraqi law, and whether the absence of one of the conditions affects the fact that (the seclusion is valid.)

The aim of the research:

to study the conditions of the correct seclusion in order to know the extent to which it is considered as one of the confirmers of the dowry or not within the scope of the enforceable Iraqi Personal Status Law No. 188 of 1959.

The Research Methodology:

The research adopts the analytical approach to the views of jurisprudence and law in highlighting the research problem and its treatment, and the comparison between jurisprudence and law on this subject.

The research Plan:

The research was divided on the topic (conditions for achieving correct seclusion for judgmental entry), into an introduction and two branches, the first section of which was devoted to: the jurisprudential conditions for achieving the correct seclusion for judgmental entry, while the second section was devoted to: the law's position on the conditions for

achieving the correct seclusion for judgmental entry, and ended The research, in its conclusion, included the most important results and recommendations.

The First Section: The Jurisprudential Conditions For Achieving The Correct Seclusion For The Legal Entry:

The correct seclusion in order to achieve the judgmental entry is the correct seclusion; Which is meant: that the spouses meet after the contract and before entering in a safe place from the knowledge of others, and there is no physical or legal impediment preventing entry. Hence, jurisprudence requires that in order to achieve the correct seclusion, there should be no impediments preventing its realization. We explain them as follows:

First: The (real) obstacles that prevent the realization of the correct seclusion of the judgmental entry:

It is required to achieve the correct seclusion that there is no objection to the realization of the correct seclusion from a sensory point of view, such as if one of the spouses is sick with a disease that prevents intercourse, or the husband is young and does not have intercourse like him, or the wife is young who does not have intercourse like her, or the woman's vagina is blocked by a piece of the meat.()

But if the fault is on the part of the husband, such as he is unable to have intercourse or a castration, then seclusion is still valid; Because that does not prevent from; Therefore, this is not considered an impediment to achieving the correct isolation.()

Seclusion is valid for a man whose penis is not erect according to Abu Hanifa - and Abu Yusuf - and Muhammad said: It is not valid that eunuchs prevent intercourse and prevents the validity of seclusion, such as the (Al karn & AlRatik) (diseases that affect women).()

Second: The natural impediments that prevent the realization of the correct seclusion of judgmental entry:

In order to achieve the correct seclusion of the correct seclusion, it is required that there be no impediment that human nature does not desire, such as the presence of a third person; Because a person hates having intercourse with his wife in the presence of a third person, whether this third person is sighted or blind, awake or asleep; Because if the blind person does not see, then he feels, and the sleeper is likely to wake up at any hour, and a sane boy is in the same position as a man is respected by a person, the same is the case with a foreign woman, and it is not permissible for him to have intercourse with his wife in the sight of another woman, even if she is a slave with him, and if she is his second wife; Because if it is permissible for her to look at him, then it is not permissible for her to look at her, so the second woman will be caught from that.()

The meeting must be real in one place, regardless of the size or smallness of this place, and the place must be safe from others' knowledge of them. Because the mosque is where people gather for prayer, and the public road is a passage for people, as well as the desert and the rooftop without a veil. Because a person withdraws from intercourse in his likeness for the possibility of a third occurrence.()

Third: Religious Obstacles That Prevent Achieving Correct Seclusion for Judicial Entry:

It is also required for the valid seclusion to be achieved that there is no legal impediment to the valid seclusion, such as if one or both of them are fasting the fasting of Ramadan or a pilgrim on a pilgrimage, whether it is an obligatory or a supererogatory or an 'umrah, or that the woman is menstruating or postpartum; Because all of that is forbidden for intercourse, a place that prevents intercourse by law, and menstruation and postpartum bleeding are of course prohibited, because the right nature repels the use of harm.()

As for fasting other than Ramadan, it was seen on the authority of Abu Yusuf that voluntary fasting, making up for Ramadan, expiation and vows do not prevent one from being alone, because fasting other than Ramadan is guaranteed by making up and expiation, and it was not strong in the meaning of prevention, unlike fasting in Ramadan, in which it is necessary to make up and expiate.()

And in a narration, a voluntary fast is like a voluntary pilgrimage that forbids breaking the fast without an excuse, so it becomes like a voluntary pilgrimage, and this prevents one from being alone.()

The second section : the law's position on the conditions for achieving valid seclusion for legal entry:

The amended Iraqi Personal Status Law No. 188 of 1959 did not address the issue of proper seclusion, but referred the issue according to the text of Article (1/2) to the principles of Islamic Sharia that are most appropriate to the provisions of the law.

However, there are those who go to say () that: When extrapolating the texts of the law, we note that he referred to some conditions that prevent the realization of true khilwa, but this reference was in a place other than the dowry, as is the case in cases of judicial separation, where if the husband secluded With his wife after the contract and was afflicted with a disease with which he is unable to perform marital duties, whether for psychological or organic reasons, or the husband is sterile or suffers from leprosy, tuberculosis, syphilis or insanity, this prevents the realization of proper solitude, but he made these impediments restrictive Issuance of reports issued by competent official bodies.()

When referring to the Iraqi judiciary, we find that he clearly admitted to the correct seclusion, which is one of the confirmers of the dowry, including the decision of the Court of Cassation, which stated: ((as there is no text in the law explaining the "entry" mentioned in Article (21) and where it was found that the wife deserves all the named dowry By entering in reality or judging by the correct seclusion in accordance with the Sharia, and where it was found that the distinguished confessed that he had secluded the plaintiff with his wife, a valid seclusion for a period of ten months, and since the plaintiff in this case deserves And also another decision of the Court of Cassation in which it was stated: ((The plaintiff is entitled to the deferred dowry upon separation if she had been married to the defendant and her residence in the hotel and then in the marital home, even if the consummation was not consummated, because in that the correct seclusion between them was achieved and the legal consummation took place)) () .

We believe that the word (entry) is absolute, does not necessarily mean that the legislator wanted to expand the scope of entry to include proper seclusion, especially since it is different in its meaning to the meaning of entry.

Conclusion

Through the study of this topic, some conclusions and recommendations were reached, as follows:

First, the results:

- 1- It is required for the correct seclusion of legal entry (correct seclusion) according to jurisprudence that there are no impediments (natural or legal.()
- 2-The Iraqi legislator did not address the arbitrary entry, especially in its essential form (the correct seclusion), contrary to some Arab laws.

Second: Recommendations:

We suggest that the text of Article (21) of the Iraqi Personal Status Law be amended, and the word (real) should be added after the word (entry), to eliminate doubt about the intended entry in this article, as follows:

Article (21):(The wife is entitled to all the dowry called real consummation or the death of one of the spouses, and she is entitled to half the dowry called divorce before the real consummation).

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