

THE ROLE OF MODERN MEANS OF PROOF IN PROVING MARITAL INFIDELITY

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ABSTRACT

The theory of modern means of proof has always had an important role in illuminating the facts in a certain percentage. These means, both scientific and technical, are a source of their existence. They also have a great role in proving the facts for specific issues (personal status issues), as modern means contributed. In the field of proving personal status issues, a great contribution has been achieved, as a result of which the judicial truth has been approximated by a large percentage of the actual truth. Among these issues are the reasons for divorce, and marital infidelity.

Keywords: Divorce Based on Fault, Judicial Differentiation, Judicial Proof, Modern means of Proof, Marital Infidelity, Adultery, Sodomy

INTRODUCTION

The legislation regulating family affairs stipulates a special type of separation between spouses signed by the judge at the request of one of the spouses based on one of the reasons mentioned by the legislator. A fundamental difference in the impact of the band on the marital bond constitutes two different concepts, namely legal separation, which is a judicial order that allows the two parties to separate in terms of housing, finance and custody with the establishment of marriage, as the spouses intend to follow this path to terminate their marriage contract in a proportional manner. This separation could be for either for moral reasons: stigma as some societies consider divorce as an immoral act or for religious reasons, as some religions (Catholic Christianity) forbid spouses from divorce.

Then a divorce can be based on error according to the terminology of the concept adopted by the Anglo-American system, the Anglo-Saxon system, and the French system. It is called judicial separation in Iraqi law and Islamic jurisprudence. The judge has the right to divorce, the applicant must prove one of the reasons that cause damage to marital life, which is called a husband's fault. The American legislator relies on the criterion (marriage cannot be repaired) as a basis for the dissolution of marriage through Article 302 in the Unified Marriage and Divorce Law. Also, there several images to support the judicial inferences of this criterion. Yet, the judiciary depends on several reasons either stipulated by the laws of the states regulating divorce or as approved previous judicial issues. Among those common reasons is adultery. In the United Kingdom, divorce is subject to the Marriage Issues Act of 1973, which stipulates the criterion (the irreversible breakdown of marriage), and divorce is not granted until after the five facts of divorce are established, which are stipulated in Article 2 of Section 1, and adultery is the first reason. The French legislator organized this form of divorce in Section 4 of the Civil Code, which is termed harm divorce and stipulated the fulfillment of the double condition under Article 242 of the Civil Code. The double condition lies in the existence of a violation of marital duties to the extent that makes joint life unbearable. This concept was taken by the Iraqi legislator, who organized its provisions in Articles (40-45). It is considered as minor irrevocable divorce and in consideration of the reasons upon which the separation is based. The legislator adopted flexible criteria capable of accommodating subsequent and affecting developments in marital life, thus allowing the judge to keep pace with development, rather than adopting restrictive reasons.

In the restriction, the judge is not able to base judgments on the causes created by development, despite their impact, which may exceed the restrictive reasons. Among these criteria is marital infidelity. In this research, we will shed light on the definition of marital infidelity and its regulation in different legislations. We will show the role of science and technology in proving the incident of adultery, with an indication of the consistency of the application of these modern means to the incident of marital infidelity in terms of their compatibility with the nature of the incident. This is followed by the investigation of the extent of certainty obtained from Judicial use.

Definition of Infidelity: Infidelity (tradiťio) in Latin is the fault that breaks the loyalty to be maintained in relation to someone or something either through words or deeds ("D'efinition de trahison,").

Infidelity has two means namely physical betrayal, which includes the act of adultery and sodomy, and emotional betrayal which represents sharing a deep emotional bond with a person other than the husband. Legislations differ in terms of taking both forms as a reason for separation. The American legislator did not stipulate in The Federal Law of Marriage and Divorce infidelity as a basis for a request for separation, but it was taken over by local state laws, which are specialized in regulating physical infidelity rather than emotional such as the New York State law. This law did not recognize granting a separation except on the basis of adultery, then some reasons were considered a mistake until was - Article (170/7) Domestic Relations Law dated 15/8/2010 was modified. It added that the husband's testimony criterion to irreversible interruption of the marital relationship and which establishes the legality of granting the separation without error. Article (170) states that the husband has the right to ask for divorce because of adultery. Adultery is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Some of the adultery forms included by the law are deviant sexual intercourse and sexual behavior. Article 130.00 of the Penal Code deals with the definition of some terms such as sexual crimes, and Article 130.25 deals with the statement of sexual misconduct. Virginia law also regulates bodily infidelity in Article 20-91 of Chapter Six (Divorce, Confession and Annulment), which states the reasons on which the divorce decree is issued (for adultery; or for sodomy or buggery committed outside the marriage).

The legislator has mentioned the terms (sodomy, buggery) to express sodomy, and there is no difference between them except in their linguistic origin (Georgi, 1994).

Article 18.2-365 defines adultery is an act made by any person, being married, who voluntarily shall have sexual intercourse with any person not his or her spouse shall be guilty of adultery, punishable as a Class 4 misdemeanor.

Proving physical infidelity is the most difficult among the other causes, and its proof requires a declaration by the adulterous husband in the court, as the husband's confession of his infidelity to his wife or any other person outside the courtroom is not considered valid. We find this basis stable in judicial previous issues such as New York Supreme Court which state alleged stating that she became romantically involved with another was not proven by convincing evidence (Ganz, 2005).

In Virginia, which considers treason as a fourth-degree misdemeanor. The Fifth Amendment to the (United States Constitution, 1971) with the amendment nor shall be compelled in any criminal case to be a witness against himself husbands enjoy the privilege (the right of the husband not to incriminate oneself). This means that the husband's confession in the judiciary that he committed infidelity will expose him to punishment, and that the constitution grants the person the right not to acknowledge it. Therefore, the judiciary will not be able to force the husband to admit infidelity, not even explaining the husband's silence that he committed infidelity. A major change was made in Virginia Law 8.01-223.1 regarding the affirmation of constitutional rights in civil lawsuits, which entered into force on 1/7/2020. It then facilitated the process of proving physical infidelity. The accused, especially if combined with

witness testimony, photographs, text messages, atypical spending habits, and other available evidence, does not imply that treason has actually been committed but rather could infer that the silent person was willing to take this risk and continues to refrain from providing the court with about it (Kimble, 2020).

Virginia relies on an average standard of proof (provided by clear and convincing evidence), which is higher than the standard of proof in civil cases (predominance of evidence) and lower than the standard of criminal cases (beyond any doubt), and states differ in their definition of the concept of adultery. Fornication, but judicial precedents have shown that intercourse - sexual intercourse - is not required to achieve adultery and is considered to be sexual intimacy, and therefore it requires proof of two elements (the husband's motive to do it. This means that there are some reasons available in his marriage life that gave him the tendency to commit it (the husband's tendency and chance of committing adultery) *i.e.*, the fact that the husband had a close friend or spent time alone with another person behind closed doors. Judicial precedents indicate that they use a mixed standard between (proof with clear and convincing evidence) and predominance of evidence (Proof of adultery must be clear and positive, and infidelity must be proven by a clear preponderance of evidence) (Williams, 2010).

Evidence of physical infidelity requires proving the fact of sexual intercourse, either by means of a definitive means of its significance and termed as evidence derived from it (direct evidence). They could be proofs of a visual recording that includes in its content a depiction of the incident, allowing the judge to view it witnessing, or through presumptions in the sense of deductive formation. It is based on a set of facts indicating the husband's willingness and inclination to do so, and the State of South Carolina takes that through the *Panhorst vs. Panhorst*. The court ruled a divorce based on the wife's fault on the grounds of adultery considering the presumptions as the wife's stay in the same hotel room with someone other than the husband. This evidence showed both the inclination and the opportunity to commit adultery (Proof of inclination and opportunity are sufficient to prove the case) (Johnson, 1990).

Also, the Iraqi legislator has regulated marital infidelity in its absolute sense (physical and moral) as a main reason for granting judicial division, through Article (40/2) (2) which states if the other spouse commits infidelity, and such as marital infidelity is the husband's practice of sodomy and in any form. The judiciary was different in the establishment of granting the band, as the band is granted on the basis of Article (40/1) considering it as a form of harm. In the principle of the Court of Cassation, it ruled that sodomy is considered as harm, although the legislator established sodomy as an independent cause in the article (40/2). The aforementioned that the practice of sodomy, and since the legislator has released the means of proof for the reasons for separation in Article (44), it is permissible to prove by all means of evidence, and marital infidelity is considered among these reasons, so it is proven by all means such as the confession of the adulterous husband and the testimony. The legislator allowed the hearing testimony, which is the testimony of a witness to the incident based on the testimony of a witness who saw it (Al-Sari, 2020). It is stipulated that it is not permissible for reason to agree that they lie (Haider, 1991).

The Iraqi legislator did not regulate in the Evidence Law the quorum of the testimony nor the determination of the gender of the witness. So, if the witnesses are two persons and a female, their gender is not important. Rather, the legal texts were absolute. The Court of Cassation ruled not to reject the plaintiff's lawsuit on the pretext of not completing the quorum of the testimony. When the testimony is mentioned as a means of proof, the divorced person must be released unless restricted by a text as is the case in Article (11/Third) regarding personal status issues. In addition, Article 84/Evidence permits the adoption of the testimony of one person if the court is satisfied with its validity the plaintiff's oath is used as a reason for sentencing (Al-Sari, 2020).

By referring to the text of Article 409 of the Penal Code, the legislator considered watching the husband without the wife as a means of proof of the act of adultery, and this text is taken as well as restricting it to the husband without the wife, despite both parties are harmed

from the act of adultery due to the agreement of the material and moral formation of the man and the woman. It would have been more appropriate for the legislator to deal with the incident without discrimination based on the sex of the accused to prove the incident by witnessing in conjunction with the condition of surprise. Also, fact of witnessing requires further proof with the other person, the fact that a crime scene indicates the commission of adultery, there is no reason to require supervise as a prove. The Iraqi judiciary uses all modern means to prove treason, as it becomes clear from all of these decisions that the Court of Cassation is considered by all modern means of proof, such as the medical report to prove physical infidelity, and electronic services such as calls, recordings, messages and photography in proving. The existence of emotional infidelity based on a basic criterion (the damage that prevents the continuity of married life) as well. The Iraqi judiciary has equated all of these means in their evidentiary authority in terms of ruling to differentiate between these decisions (what was stated in the medical report issued by the forensic medicine in Babylon number 3273 on 2/12/2007 and the presence of old signs of sodomy with the plaintiff, which causes her serious harm It is impossible to continue married life ("Supreme Judicial Council Decision 1352/Discrimination for harm/2014, No. 1244, 9/2/2014," 2014)). The evidence also includes, love letters, photographs and a video clip in which the defendant appears with other women and in an immoral manner, which caused damage to the wife's feelings, making it impossible for the marital life to continue("Supreme Judicial Council Decision 1352/Discrimination for harm/2014, No. 1244, 9/2/2014," 2014).

There is another decision of the Court of Cassation, in which it overturned the ruling of the Personal Status Court in Kufa, which rejected the plaintiff's claim for the damage caused by suspicious communications to his wife with others. The photographs attributed to the discriminated against and the telephone calls linked to photographs of them supported the plaintiff's claim that the aforementioned had a relationship with others and constituted serious harm and prejudice married life (Federal Court of Appeal Decision, No. 5126/Personal Status and Personal Materials Authority, 2017). The one who is distinguished against him claimed that his wife, who is distinguished over her, has relationship with another person and she with phone calls with him *via* the mobile device (Federal Court of Appeal Decision, No. 5126/Personal Status & Personal Materials Authority, 2017).

The English legislator, through the Matrimonial Causes Law, stipulated adultery as one of the reasons for separation, and did not define adultery, while the UK government website defined it as sexual intercourse with another person of the opposite sex)("Get a divorce: Part of Get a divorce: step by step,").

Thus, emotional infidelity is excluded, even if it includes the husband entering porn sites and performing virtual sex, unlike what we will find in the French judiciary. Also, through this definition, we find that if the incident occurred with a person of the same sex (homosexual), it is not considered adultery despite the recognition of the United Kingdom Same-sex marriage and the regulation of a specialized law called (same-sex marriage)("Marriage (Same Sex Couples) Act 2013", 2013).

According to English legislation, adultery is considered among the reasons that fulfill the basic criterion for separation (that the marriage has irreversibly collapsed) and this is what Article (1/2) of the Matrimonial Cases Law stated. It does not allow the court to hear the divorce petition unless the petitioner convinces the court of one of the facts by stating that the defendant has committed adultery and that the petitioner considers that it is not acceptable to live with the defendant. From this text, it is clear to consider adultery in the separation is not sufficient merely to prove the fact, but rather the plaintiff must plead not to accept it to continue married life with the defendant. Also, the English legislator, who in turn sets harsh conditions in proving the fact of adultery, requires that the plaintiff file a claim within a time limit not exceeding 6 months from the date of his knowledge of the incident. As for the standard of proof followed in that, previous judicial decisions require the highest standard followed in cases as for recent decisions, the judiciary prefers the civil standard in proving the fact (balance of probabilities) (Keane &

McKeown, 2014) proving adultery by traditional means such as confession (Burton, 1996) and testimony. In the recent times, the court allows the submission of electronic evidence such as photos, videos and text messages that confirm what happened after verifying its truth and not being subjected to forgery (CFORENSICSLAB, 2017).

As for the French legislator, its legislation did not explicitly include the concept of infidelity, nor did it stipulate all the reasons, but rather stipulated the double condition for granting divorce based on fault, represented by violating the duties and obligations of marriage. This makes the violation unbearable to maintain the joint life ("Article 242, Code civil").

Article (212) of the Civil Code clarifies the obligations of the spouses by its text (the spouses owe each other respect, loyalty, relief and assistance), and betrayal constitutes a violation of the duty of loyalty. Error Article 259 of the Civil Code states (The facts that are invoked as grounds for divorce or as a defense of a claim may be established by any method of proof, including admission ("Article 259-1, Code civil").

The judiciary required that its submission not violate the right of the other spouse to privacy, such as hacking his personal phone and collecting evidence, and the family judiciary was directed to consider the submission of electronic messages as evidence of marital infidelity, to which the provision of Article 1316-1 of the Civil Code that accepts (the document written in electronic form as evidence in the same manner as a document written on paper, provided that the person from which it originated is duly identified and that it is prepared and maintained under conditions such as ensuring the effectiveness of its integrity), not to consider electronic messages obtained without the knowledge of the husband as stated in a judgment of the Court of Appeal In Lyon regarding the consideration of SMS messages that prove the infidelity of the husband, as this constitutes a serious violation of personal privacy, but in the ruling of the Court of Cassation this ruling was canceled and came with a new principle, which is considered evidence that can be presented by any means, including SMS, except by violence or fraud (Cour de cassation, civile, Chambre civile 1, 17 juin 2009, 07-21.796, 2009).

But it is not allowed to install a spyware program on the websites visited by the husband and monitor them, or hack his mailbox, or any other operation of this type aimed at capturing his conversation or exchanging videos, as this represents a fraudulent process in obtaining evidence and this was confirmed by the Court of Appeal in Lyon (Cour d'appel de Lyon, 21 mars 2011, 10/01789, 2011).

Also, the judiciary did not require that the infidelity be physical, as some judicial precedents consider digital infidelity represented by registering on porn sites and sending intimate messages to someone other than the husband (N° de RG : 09/06238, Cour d'appel de Lyon - 2ème chambre, Cour d'appel de Lyon, 7 février 2011, 09/06238).

Although physical infidelity is criminalized in Islamic law, whether it is adultery

Nor come nigh to adultery: For it is a shameful (deed) and an evil, opening the road (To other evils) (Qur'an, 111:32.

The woman and the man Guilty of adultery or fornication, — Flog each of them With a hundred stripes: Let not compassion move you In their case, in a matter Prescribed by God, if ye believe In God and the Last Day: And let a party Of the Believers Witness their punishment (Qur'an, 24:2)

We also (sent) Lut: he said to his people: "Do ye commit lewdness such as no people in creation (ever) committed before you (Qur'an, 7:80)?

As it came in the Qur'anic interpretations that what is meant by indecency is the intercourse of males (Al-Shihi, 1995). However, this did not make physical treason one of the considered reasons for judicial separation.

Modern Means of Proof in Proving Marital Infidelity: The following modern scientific and technical means are used in proving infidelity:

- 1) The husband's acknowledgment: which he obtains from an audio or video recording, or in electronic writing, through which he acknowledges his infidelity. After verifying the authenticity of the evidence, his guilt is proven.
- 2) Recording: The visual recording can provide definitive evidence of the perpetration of infidelity, but the audio recording does not give the same definitiveness because it does not give witness to the incident. Yet, it is possible to take the deduced evidence as a weighting presumption in balancing the possibilities, such as referring to the husband's tendency to establish infidelity outside the marital relationship.
- 3) Photography: The images allow viewing part of the truth, such as the presence of the husband with someone other than his wife in an unfair situation, but the image displayed in front of the courtroom may be forged, especially since there are commercial image editing tools such as Photoshop or GIMP available to everyone. Two images may be combined to create a situation indicating treason, digital forensics intends to detect this forgery by several methods. It may facilitate detection of forgery with the attachment of the watermark that indicates the image was edited by a specific program (Ulutas & Muzaffer, 2016).

But in cases that do not refer to the use of editing programs, and if the editor is a professional person, the expert will use techniques to detect this, relying on the level of lighting, color patterns, quality or shadows, different for the combined images, such as the technology (luminance levels) that detect areas of tampering Intuitively. This is by measuring the brightness levels of the image and following the luminance limit. The abnormal lighting level indicates the presence of two different images that have been installed. This technique is similar to the (HSV) technique that compares the level of color saturation in terms of its purity and intensity, while the (Alternative Filtering Mask) technique detects forgery through image contrasts such double edges, meaning the presence of two images, each image has its own edge, which appears to the expert in the form of hidden or ghostly edges, which shows a distinctive pattern that is abnormal compared to the surrounding area, which indicates merging, and the editor may compress the image after modifying it to become one form that cannot be detected easily. However, the technical expert detects this using the technique of Compression Forgery Detection to extract distinctive patterns in the binary image or focus on areas that are suspected of inaccuracy. With a lower threshold value, black pixels are centered on the manipulated areas, because high levels of JPEG block diversity are typically seen in areas with raised or digitally tampered edges, and white pixels are centered on the tampered and pasted area of image with a higher quality factor (Peterson, 2005).

4- Means of proving kinship (Burton, 1996).

In the case of the wife's physical infidelity (adultery), which resulted in the birth of a child to the other person, the husband can, by proving the child's lineage, prove the infidelity. The following scientific method in verifying the biological link between the father and the son, whether proving or denying:

- 1) **Blood Group Testing:** This method is based on the fact that the type is inherited from the biological parents, where each individual inherits his type by means of a dominant allele from both biological parents and it seems impossible for the individual to have a blood type of a type that comes from other than his parents. It provides definitive and unequivocal evidence in excluding or denying lineage (Encyclopaedia Britannica, 1998).
- 2) **DNA Profiling:** This is to compare the samples of the alleged father and child revealing the biological relationship between them, either as proof with a certainty of 99.99% (Bull, 2019) or a denial with absolute certainty (McClintock, 2008).

It is possible to conduct profiling during pregnancy as well as after childbirth to verify the proportions, and this does not affect the accuracy of the results. Profiling during pregnancy is of three types. The first is NIPP which is a test that involves taking a blood sample from the mother, which contains the fetus's DNA during the first three months of pregnancy and then comparing it with the sample of the alleged father. The CVS from week 10-13 of the woman's last menstrual period is the second, as the expert extracts the sample from the placental tissue and then conducts the comparison, because of this test the pregnancy may be exposed to a slight

risk of miscarriage. The third is amniocentesis that is performed in the 15-20th week, where the sample is extracted from the amniotic fluid, which requires inserting a needle into the mother's abdomen, which exposes her to a greater risk of miscarriage than it was in CVS ("DNA Paternity Test,").

CONCLUSION

We conclude that modern scientific and technical means of proof contribute to proving the fact of marital infidelity and the judiciary can use it. Photography allows to see part of the truth, such as the presence of the husband with someone other than his wife in a disgraceful situation. Also, the scientific development has contributed to proving physical infidelity, if a child comes from it. This is through the means of proving kinship, which is represented by the blood group test, which gives definitive and unambiguous evidence in excluding or denying the lineage, and DNA profiling, which gives proof with a certainty of 99.99%, or a negation with absolute certainty.

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