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## REVIEW ARTICLE

# INVESTIGATING THE JURISPRUDENTIAL BASIS OF ISLAMIC RULER'S GOVERNMENTAL AND WARDEN SHIP JURISDICTION SON WOMAN'S DIVORCE IN THE CIVIL CODE OF THE ISLAMIC REPUBLIC OF IRAN

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### ABSTRACT

Governmental commandments are those that the society ruler governs based on the anticipated religious principles and in accordance with the Muslims general interests to protect the health of the society and release from the impasses. Islamic ruler can respond to all the variant requirements with his governmental and warden ship commandment. The extensive jurisdictions of the Islamic ruler are the ways to adapt with the real requirements. The range and scope of the Islamic ruler and supreme leader hasa complete and total inclusion and generality. So, Imam Khomeini knows the supreme leader's jurisdictions as Prophet Muhammad' (PBUH) and other Imams' jurisdictions. Of course, the scope of the supreme leader's jurisdictions is to the extent that does not exceed the framework of Islamic laws. In this study, it has been triedto survey jurisprudence basics of Islamic ruler jurisdictions to divorce woman in certain conditions in the Civil Code of the Islamic Republic of Iran based on the basics and reasons of the subject in the holly Quran, traditions and religious scholars and jurists' opinions and through wisdom perspective. There are some articles in Civil Code of the Islamic Republic of Iran such as the articles 1029, 1129, 1130, which shows the dominancy/validity of the governmental commandmentof the Islamic ruler and his jurisdictions in divorcing woman in certain conditions.

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## INTRODUCTION

Supreme leader is the representative of Imam due to verses of the holy Qur'an, tradition and the consensus of the jurists. This is a publicized representation and includes of all matters relating to Imam. There are many surah (chapters) in the holy Quran that indicate prophet's wardenship and their commandments dominancy confirmation toward the believers and Islamic society. This wardenship is confirmed for Imams and the religious scholars. So the jurist has governmental jurisdictions due to the succession of the prophets. According to Imam Khomeini, supreme leader's jurisdictions are just as the Prophet Muhammad (PBUH) and Imams not less to the jurist be able to govern society and provide its interests. Islamic ruler binds man to respect the women's rights on the dispute between couples and when they are strait. If the man refuses, the Islamic ruler can adopt required decisions verifiable for him. In this study, it has been tried to survey jurisprudence basics of Islamic ruler jurisdictions to divorce woman and analyze the subject's documentations in the holly

Quran, traditions and jurists' opinions. What is the task if the man is causing hardship for women, for example, when the man does not pay her alimony or is missing for a while and also the woman complains for such a situation? Does the woman has to be patient and has not any more options, or Islam has chosen some other ways for such cases? can the supreme leader or Islamic ruler find an entry and provide the condition in which the woman can divorce in the absence of her husband? There are some articles in Civil Code of the Islamic Republic of Iran about the dominancy/validity of the Islamic ruler's jurisdictions according to which the supreme leader can provide conditions for woman divorce. In this paper, we tried examine the jurisprudential basis of these articles. In other words, we are to analyze jurisprudential basis of the supreme leader's jurisdictions.

### Definitions and Concepts

#### Wardenship

##### A. Literary meaning of wardenship

Several different meanings have been mentioned in dictionaries for the word "Welayat", which some cases are mentioned here. Raqeb states that Wala and Tawali mean that

there exists nothing between two things and metaphorically refers to closeness. Either it is related to place or honesty, victory or/and belief (RaghibIsfehiani, 1992, p. 885). Wellye is the infinitive of Walli. Wellaye means king/monarch and also means victory. Walli is opposite of Adu and means victor and protector (Homeiri, Shams Al OlomWaDawa'eAlKalame Al Arab Men Al Kolom, VOL 11, P 285-286). It has been explained in QabosNameh that Wali means nearness and closeness (Ghoreishi, 1992). As it can be seen in the dictionaries, the meaning of Welayat (wardenship) is synonymous with monarch, protector, and helper, thoughtful, etc. in fact, literarily Walli is a person who thinks about the affair and rules them.

### **B - The colloquial meaning of the word "wardenship"**

The word "wardenship" is defined superintendence in the Jurisprudential wardenship field. Jurisprudential wardenship neither belongs to the evolutionary wardenship type nor wardenship of legislation and description and nor to the wardenship of the dead and incapable, but also Jurisprudential wardenship is society management that is formed for the execution and realization of religious commandment and values and flourishing talents of the society members and bringing them to eminence and perfection they deserve. We mean by jurist, in jurisprudential wardenship field, a well-qualified priest not everyone who has merely read jurisprudential law. A well-qualified jurist should have three characteristics: absolute endeavor, absolute justice and management ability and leadership talent. It means that on the one hand he should deeply and reasonably know the stem and base of Islam and on the other hand should comply with the divine principles and restrictions in all fields and does not deviate from any of the principles. Then, he must be qualified in the abilities and talents of ruling a country (JavadiAmoli, 1999).

### **Definition of governmental commandment**

Governmental commandment is also remembered as "dominancy commandment", "ruler commandment", "wardenship commandment" and "variant commandment". Commandment which is originated from interest is not considered as the primary and secondary legal commandment, but this commandment is governmental commandment (wardenship) that the source of this commandment is wardenship which is dominant over law execution and is based on the interests. This governmental commandment continues to the time it is interest-worthy and is nullified when the ruler interest and criterion is nullified (SobhaniTabrizi, Islamic jurisprudential sources and references, p 269). Governmental commandments are those decisions that the jurist adopts in the shadow of religious laws and their agreement and observance due to interest of the time. The difference is that the divine laws are fixed and unchangeable, but the governmental rules/commandments can be changed and their stability and continuation depends on the conditions created them. Since human being life is continuously changed and goes toward perfection, consequently these principles are gradually changed and replaced with the better commandments (Tabatabaei, 1991).

### **Islamic commandments and woman divorce**

Investigating the affair of people who have been disappeared for a while is one of the Islamic ruler duties. In this situation, the Islamic ruler governs the affair with which in the article 1029 is dealt. We want to analyze it: Article 1029: When someone is away and disappeared for four years, his wife can request for divorce. Then, the Islamic ruler can divorce her complying with the article 1023. A jurisdiction has been given to the ruler (supreme leader) in many traditions that when man is missing and with the woman's request, the supreme ruler enforces the missing man to pay the alimony. If the man refused to pay the alimony, the jurist requests him to divorce her wife. Otherwise, the ruler can divorce the woman. Some of the traditions are mentioned here:

- A. It has been narrated in the Sahih of Imam Sadiq that the Imam stated: "the missing/disappeared man should be searched for four years at the first step. If he was not found, the man's parent is obliged by the ruler to pay alimony to the woman. Any kind of complain about the way of paying the alimony is not accepted by the ruler. If the parent or client of the man does not pay the alimony, the ruler can divorce the woman. The reason of the tradition about the ruler's jurisdiction and wardenship is quite clear in divorcing woman who her husband is missing (Kulini, Alkafi, Vol. 11, p 702)".
- B. Barid says that: I asked Imam Baqir what to do if a woman lost her husband? The Imam said that do not do anything until she does not say anything and waits for him. But if the matter was mentioned for the ruler, the ruler should give her a four-year period respite and writes a letter to the region where the husband is missing and asks about the situation, etc. If the missing man has not wealth for woman to live, the ruler should oblige his parent to pay the woman's live expense. The woman cannot marry until her expense is paid by the parent. If the parent refused to pay the expense, the ruler enforces the parent to divorce the woman (Ameli, 1993). It has clearly been mentioned in these traditions that if the parent refused to pay the alimony, the Islamic ruler has the jurisdiction and authority to enforce the parent to divorce the woman. This issue is originated from the well-qualified ruler wardenship based on which he commands and rules.
- C. In another tradition "Abi al-Sabah Al-kenani" narrates from Imam Sadiq; the Imam stated that the ruler enforces the parent to divorce the woman. If the man has not parent, the ruler proceeds to divorce the woman. It means that the ruler can act as the woman parent and divorce her since the ruler or the jurist rules all people.

### **Jurists' sayings**

Jurists also agree with this statement that if the man has disappeared, after four years of his disappearance, the ruler can enforce the man's parent to divorce her if the woman requests for divorce. If the man's parent refused, the ruler can provide the situation to divorce the woman. Most jurists believe that in the absence of the husband, the wife will suffer from hardship and this right (the right to divorce) is confirmed for the woman

based on the principle "no loss is allowed in Islam". A number of jurists' opinions are briefly mentioned here to explain the issue.

### Sheikh Tusi

Sheikh Tusi says: "If the man suffers from frenzy, chaos and imbalance in temperance and some other cases and it is required to divorce his wife, the divorce will not be performed unless the man's parent divorce the woman representing the man. But, if the man has not parent, the ruler or representative can divorce the woman (Toosi, 2009). According to Sheikh Tusi, Imam or his representative has the jurisdiction to agree with the mentioned conditions to divorce the woman, which this action of Imam or his representative indicates the governmental commandment.

### Mohaqq-e-Heli

Mohaqq-e-Heli as Sheikh Tusi agrees with the right for the ruler, which for example, when the man suffers from frenzy and chaos, he cannot divorce the woman. So, the man's parent representing the man can divorce the woman, but if the man has not parent, the ruler can divorce the woman representing the man (Mohaqq-e-Heli, Islamic faith in legally or illegally religious issues, Vol. 3, p 3).

### Ayatollah Golpayegani

Ayatollah Golpayegani as other jurists allows divorcing the woman who her husband has disappeared due to paying attention to certain conditions by the ruler (well-qualified priest) and says: "If a woman's husband has disappeared, she should investigate for 4 years and in the meanwhile should be turned out the man's death or life. After four years, the legal ruler can cautiously divorce the woman. The woman can marry another man after her Iddah passed" (Golpayegani Mousavi, 1989, page 152).

### Mohaqq-e-Damad

Mohaqq Damad in his book "reviewing jurisprudentially family rights" has these jurists' famous opinions about the man who is disappeared and says: "When no news is received about the death or life of the missing man, the woman should wait for the man if the man has wealth or has someone who can pay the expenses. Otherwise, the woman can consult to court and requests for divorce. The ruler should specify a four-year deadline, which searching for the man is required in this time. If no news is received about the missing man, the ruler should divorce the woman and the woman should hold death Iddah (Yazdi, 1994).

## RESULTS

According to what was said, the famous jurists agreed on the subject that the Islamic ruler (supreme leader) governs woman divorce in certain conditions. The Islamic ruler can enforce the man's parent to divorce the woman due to his wardenship jurisdictions. If the parent refused to do so or if the man had no parent, the Islamic ruler as the woman's parent or/and

protector can divorce the woman. This action is performed by the ruler to release the woman from hardship faced her because of the man absence. Thus, the Article 1029 of the Civil Code of the Islamic Republic of Iran writes: "When someone is missing and disappeared for four years, the woman can request for divorce. In this case, the ruler can divorce her complying with the article 1023". This action is based on jurisprudential basis and is considered as governmental commandment approved by the ruler (supreme leader). In marriage subject, the woman alimony should be paid by the man. If the man refused to do so, Imam or/and the Islamic ruler (well-qualified priest) in the Absence Era can enforce the man to pay the alimony. The ruler can divorce the man if he refused to pay the alimony and if the woman requests for divorce. The article 1129 has dealt with this issue: The article 1129; if the man refused to pay the alimony and the court commandment cannot be executed about paying the alimony, the woman can consult to the ruler to request for divorce and the ruler enforce the man to divorce the woman. This action is performed when the man refuses to pay the alimony.

### Jurists have argued Koranic verses as well as traditions to substantiate man alimony payment to woman including;

#### Verses:

A) - Upon the father is the mothers' provision and their clothing according to what is acceptable (Baqara chapter, the Holy Quran, Verse 233).

In the book "the righteous' ways basics" explains clearly the reason of the verse about men's alimony to women (Tabatabaei, the righteous' ways basics, Vol. 10, P 290). It has been mentioned in the book "Sufism Treasure", the verse "the mothers' provision and their clothing" means that total expense and clothes of woman must be provided by men (Heli, Sufism Treasure in Koranic jurisprudence, Vol. 2, P 290).

B- Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth (Nesa chapter, the Holy Quran, Verse 34). In the book "the righteous' ways basics" explains clearly the reason of the verse about men's alimony to women (Tabatabaei, 1983). It is explained about the verse in the book "The Received Letters" as following; Ali Enb Ibrahim has interpreted the verse so; the verse means that Lord has obliged men to pay women's alimony (Muhaddith Noori, The Received Letters And The Deduced Issues, Vol. 15, P 218). Sheikh Tusi also states that; men are dominant over women rights, which means that men should pay the women's alimony.

#### Traditions

The obligation for men to pay alimony of women is emphasized in the traditions. For example, it is stated in the book "Da'a'em-ol-Islam (Islamic Pillars)" that: in this tradition, the prophet Muhammad (PBUH) in the Farewell Pilgrimage reminded men about women who men must pay women's alimony (Maqrebi, Islamic Pillars, VOL 2, P 254). Jurists oblige men to pay women's alimony due to the verses and traditions. If the man refused to pay alimony to the woman and if the woman requested for divorce, can the Imam or the

Islamic ruler (well-qualified priest) in the Absence Era enforce the man to pay the woman alimony? The Islamic ruler has such jurisdictions due to traditions and jurists' opinions, which means that the ruler's (supreme leader) decisions are legal and have jurisprudential basis due to his wardenships. Jurists' opinions and traditions related to this regard are referred to here to analyze and describe the issue.

- AbiBasir says; I have heard from Imam Baqir who said that if a man does not provide his wife clothing with which the woman cover her body and does not provide food to survive, the ruler must divorce them (Shia's Issues, Vol. 21, P 509).
- In another tradition narrated in the book "the received letters" from Imam Ali who says; if the man has nothing to pay to his wife, ... but if pay something to his wife, the would be no separation, and if the man has no this the period is terminated.
- In the above tradition, the woman who is not paid her alimony can divorce her man.

The jurists agree on the issue that the ruler due to the ruler's (supreme leader) wardenships can enforce the man to pay the alimony and/or divorce the woman if the man has financial ability and refuses to pay the alimony. Some jurists' opinions are briefly expressed here.

### **Jurists' sayings**

#### **Sheikh Tusi:**

Sheikh Tusi says: "If a woman falls in hardship due to non-payment of her alimony, she has the right to divorce from her husband (Toosi, 2009, p. 251).

#### **Sheikh Mufid:**

Sheikh Mufid in the book "AlmoQane'a (coverage)" says that the man who does not pay his spouse' alimony should be enforced to divorce his wife. He says" the ruler cannot enforce the man to divorce his wife unless does not pay the woman's alimony (MufidBaqdadi, AlmoQane'a, P 519).

#### **Ayatollah Kho'ei**

If the man leaves his wife and does not pay her alimony and if the woman consults with the legal ruler, the ruler should enforce the man to return and pay the alimony and/or divorce the woman. If the man does refuse of the both states, the ruler must divorce the woman (MousaviKho'ei, the Righteous ways basics, Vol. 2, P 282).

#### **Ayatollah Golpayegani**

It has been explained in the book "Majma-ol-masael" that: if the man does not pay the woman's alimony and ....., the legal ruler (well-qualified priest) can enforce the man to pay the alimony and....., If the man does refuse of the both states, the ruler must divorce the woman (Golpayegani Mousavi, 1999, p 38).

In short, it has been explained in the majority of jurisprudential books such as "the Righteous Ways Basics" (Husseini Sistani,

the Righteous Ways Basics, Vol3, p 108), "Tahrir Al-wasila" (Imam Khomeini, Tahrir Al-wasila, translated by Eslami, Vol3, p 511), and also "Jawaher Alkalam" (Najafi, 1984) and many other jurisprudential books that if the man does not pay the woman's alimony, the ruler (supreme leader) is allowed to enforce the man to pay the alimony and if the man again refuses to pay the alimony, the ruler should enforce him to divorce the woman. Then, if the man again refuses to divorce the woman, the ruler as the woman's parent can divorce her. In fact, the ruler jurisdiction for woman divorce is rooted in his wardenships. The ruler is allowed as the woman's parent to hinder the woman's hardship. So the ruler's intervention is based on jurisprudence and is rooted in the Quran and tradition and the consensus of jurists. Thus, the Article 1129 of the Civil Code states:

If the man refused to pay the alimony and the court commandment cannot be executed about paying the alimony, the woman can consult to the ruler to request for divorce and the ruler enforce the man to divorce the woman. This action is performed when the man refuses to pay the alimony indicating governmental commandment by the ruler. As it was explained the ruler's governmental commandment is rooted in the wardenships that is based on jurisprudence. In the normal situation, divorce right belongs to man, but in some cases such as man's alimony non-payment, the ruler can as her parent divorce the woman. One of the Islamic ruler's jurisdictions is that marriage continuation causes the spouse's hardship. In such cases, the woman can consult to the ruler and requests for divorce. If the man does not divorce the woman, the woman can be divorced by the ruler, which has been explained in the article 1130. We will discuss about the issue. The Article 1130: if marriage continuation causes the spouse's hardship. In such cases, the woman can consult to the ruler and requests for divorce. If the hardship be proved in the court, the ruler can enforce the couple to divorce and if the enforce is not applied, the court (the ruler) can divorce the couple.

### **Traditions**

It has been mentioned in the traditions that any men's action causing woman's hardship and be approved will cause to the ruler enforces the man to remove the hardship or if the man refused, the ruler can divorce the woman. If the men refused to do these two actions, the ruler must divorce the woman.

- Abdullah Halabi narrates that "I asked Imam Sadiq that if a man leaves his spouse for a year without divorcing and swear an oath to do not have sleep with her, so what is the task?. The Imam replied that the man must go to his wife (it means that it does not matter if the man has not sworn an oath). The Imam also stated that any man who swears an oath to do not have sleep with his wife and do so, the couple should wait for four months, then they can consult to the court and the man should be deterred. If the man broke his oath and reconciled, the issue will be terminated and if the man did not decide to have sleep with his wife and did not reconcile, the court must enforce him to divorce the woman. So, the divorce cannot be applied until the man is not deterred although it is after for months. After the detention the court must enforce the man either to reconcile

or to divorce the woman (Qummi (Sheikh Sadoq), Man La YahzaroFaqih, translated by Qafari, Vol221, 222).

- In another tradition narrated from Imam Sadiq in Sahih written by Abu Basir, Ayla' meaning has been defined as so: " Ayla' is an oath that the man does swear to do not have sleep with his wife and do not have marital relationship, which if the woman tolerates the conditions will be better for her. But if the woman consults to the ruler or Imam to judge, the ruler must give the man a four-month period and after the period, the ruler will say: either have marital relationship with your wife or divorce her. If the man did not do one of these options, the ruler can imprison him forever (AmeliHor, 1988).

Imam Sadiq narrated in another tradition that Imam and/or the legal ruler are allowed to enforce the man do not continue this action or divorce his wife if the man provides hardship for the woman. Otherwise, Imam and/or the legal ruler are allowed to imprison the man, in other words, they are allowed to enforce him to divorce his wife. Ali Ebn Ibrahim narrates in another tradition that; it is narrated that Imam Ali made a fence and imprison the man who did swear an oath (Ayla') to do not have sleep and have not marital relationship with his wife. The Imam said to the man either have marital relationship with your wife or divorce her unless I will fire you in this fence (Ibid, P 546). These traditions imply this issue that the Islamic ruler (supreme ruler) have abstention wardenship, that is if a man causes hardship for his wife and does not leave the action due to the ruler's commandment and does not divorce the woman, the ruler can enforce him to divorce the woman. If the man refused to do so, the ruler can divorce the woman, which this action indicates governmental commandment.

#### Jurists' sayings

From the perspective of jurists, this issue is clear and there is a consensus. We would cite examples of their comments :

#### Ayatollah Safi Golpayegani

Ayatollah Safi Golpayegani says: "If the husband refuses to have sleep or marital relationship, the wife can go to the judge. The ruler can enforce the man to do one of these options. If the man refused to do, the ruler can divorce the woman if requested (GolpayeganiMousavi, 1989). This issue has been explained in the book "Majma-ol-Masael. In such cases, the man's permit is not necessary and states that; if the life is really hard for woman and consistency with man is not possible, the legal ruler can enforce the man to divorce the woman. If the man refused to do so, the ruler can divorce the woman without man's permit. The woman will be freed after Iddah. In other words, if the man does not have marital relationship and cannot be obligated and also refuses to do the ruler's commandment, the ruler can divorce the woman due to his wardenship jurisdictions (GolpayeganiMousavi, 1989).

#### Motahari

Motahari knows divorcing woman by the ruler in such cases as examples of the rulers' jurisdictions and governmental commandment. According to Motahari opinion, when the marriage situation is not any more appropriate for the family's interests and the man grudges and does not divorce the woman, the legal ruler can divorce the woman. He narrated a kind of

governmental commandment who MirzaShirazi commands to divorce the woman who the hardship cannot be reformed any more (Motahari, Islam and the era necessities, P 60).

#### Bojnoordi

If the marriage continuation causes hardship for the woman and if the only way to get rid of the situation is divorce, it can be solved by the man due to the principle "La Haraj", which means the man is not sinful (BejnourdiMousavi, 1999).

#### MohaqqDamad

The reason of the principle "La Haraj" is this verse which says; "there is no difficult in religion for you (chapter Hajj, Verse 78). When one of the holy primary commandments causes severe and intolerable hardship for a person, the commandment will be nullified. Here, the primary commandment is the man's divorce authority and nobody can enforce him. But in any case which leads to the woman's hardship, the authority is nullified and the man is enforced to divorce the woman (Yazdi "MohaqqDamad", jurisprudential and juridical reviewing of family-marriage and its dissolution, P 371). The jurists agree with this issue that when a hardship is caused by the man for the woman not tolerable, the woman as consulting to the legal ruler can request for divorce due to the principle of "La Haraj". The legal ruler can enforce the man to divorce the woman based on his wardenship. If the man refused to do so, the ruler can divorce the woman. So, the article 1130 of the Civil Code verifies governmental commandment and legal ruler.

#### Conclusion

Islamic ruler (supreme leader) with his governmental commandment solves people's problems and brings society out of problems. There are provisions in the Civil Code of the Islamic Republic of Iran such as the articles 1029, 1129 and 1130, which represents a valid commandment of the supreme leader about woman divorce in certain conditions. Missing or disappearance of man and refusal to pay the alimony will provide woman's hardship. The ruler's commandment is quiet valid by Islam to woman get rid of the condition and this issue has been necessitated for all people. The supreme leader's jurisdictions and his valid commandments are rooted in the verses of the holy Quran, traditions and the consensus of the jurists. In fact, the Islamic ruler can divorce the woman due to his wardenship, which this action is not based on self-will but also is due to Islamic framework and the ruler's interests.

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