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# Investigating the Legal and Penal Aspects of Alimony and Endowment Withdrawal from the Perspective of Islam and Iran's Laws

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**Abstract:** *When it comes to individuals' rights, especially the conjugal rights, such an establishment as alimony shows up before all the other provisions and becomes the pivot of all the legal and penal thoughts. In between, women's entitlement to alimony as a right stemming from marriage bond accounts for a large volume of the civil and penal claims having transformed the fundamental distinction of the civil law from the penal law to a relative unity of the both. It seems that women's entitlement to alimony and the amount and the quality of its receipt that are pertinent to the prior aspects and the civil rights of the wives have been supported by the advanced posterior sanctions of the penal code of procedure and they have altogether made up for an appropriate mechanism. Being drawn on the theoretical data and practical procedures, the present study tries offering a proper mechanism for safeguarding the women's entitlement to alimony.*

**Keywords:** *closeness, alimony, spouse, legal enforcement sanction, criminal punishment.*

## INTRODUCTION

Alimony literally means "making donations", "spending money", "becoming poor", "money and other expendable things" and "sustenance" (Anis Ebrahim, et. al., 2007). In Persian dictionary, alimony means "cost, expenditure, products, daily sustenance" (Ali Akbar Dehkhoda, 1998). Alimony's common meaning is close to its literal meaning and includes the things that are required for continuing the life (Safa'ei, et. al., 2003). Iran's civil law in article 1107 defines alimony as "all of the normal and ordinary needs in proportion to a wife's status, including housing, clothing, food, furniture and treatment and healthcare costs and maids, in case of being accustomed or habituated to for such reasons as deficit or disease". Of course, it seems that the cases introduced in the article are exemplary not exclusive, meaning that the things that a woman needs for continuing life as accepted by norms and mores are cases of alimony and it is the duty of a husband to provide his wife with them all. The same meaning can also be inferred from the term "need" used in the article. More importantly, it is necessary to consider the husband's financial status when determining the alimony (Katouziyan N., 2000).

The importance of the wife's alimony has caused the allocation of a diverse array of legal and penal sanctions both in Islam law and in Iran's law thereto. These sanctions will be pointed out in the upcoming sections followed by the author's selective ideations in regard of each of them.

**Topic One: Means and Types of Alimony**

In Iran and Islam laws, there are three reasons generally giving rise to the alimony's necessity. These means are marriage, closeness and ownership. It is made clear in a study of the threefold mean that each of them is the necessary condition, but not the sufficient condition, for the compulsoriness of the alimony rather there is a need for some other conditions as sufficient conditions to be met. For example, marriage is the necessary condition requiring a husband to shoulder the payment of alimony to his spouse but it is not the sufficient condition rather the wife is entitled to receive alimony provided that she proves obedience to her spouse. In Iran's civil law, as well, there are implications indicating marriage and closeness as means necessitating the alimony payment. Article 1106 of the civil law stipulates in this regard that: "the husband is obliged to pay his wife's alimony in permanent marriage".

As for the alimony that has to be paid to close relatives, article 1196 states that "in relationship hierarchy of the relatives, only the blood relatives in a vertical line, including the upper and the lower, are entitled to giving and taking alimony to and from one another".

It is worth mentioning that there are two types of alimony realized in Iran's law and jurisprudence: spouse alimony and relatives' alimony.

Corresponding to article 1107 of the civil law, the spouse alimony incorporates all the normal needs in proportion to the status of one's wife, including housing, clothing, food, furniture and treatment and healthcare expenses as well as maid (in case of her being accustomed or habituated to for such reasons as disability or disease). The civil law, in its second volume and under the articles 1195 and 1206, deals with the verdicts on the relatives' alimony. Article 1204 of the civil law states in defining relatives' alimony that "relatives' alimony encompasses such provisions as housing, clothing, food and furniture to the extent of satisfaction of essential needs and as affordable by the endower".

In regard of the relatives' alimony, the legislator, as well, has obliged the endowment between the blood relatives and that only for the ones who are related in a direct vertical line.

### **Topic Two: Premises of Endower's Responsibility in Iran's Law**

Concerning the spouse's alimony and the legal premises of such an obligation, article 1106 of the civil law explicitly and with no ambiguity states that the husband is obliged to make alimony payments in permanent marriage; but, article 1113 on the temporary marriage (concubine) pends the entitlement to the alimony right on in-contract conditions and/or the parties' agreement in such a way that the contract is laid upon the foundation of alimony payment.

Article 1106 of the civil law states in this regard that "a wife is entitled to receive alimony from her husband in permanent marriage". Thus, in case that the woman's entitlement to alimony holds true, it is the obligation of the husband to supply his wife with the life expenditures and if he denies fulfilling such an obligation the wife can refer to a court. The court requires the spouse to pay alimony and if he is found still denying the fulfilment of the right then the court, playing the role of the wife's guardian, takes such measures as paying the alimony by selling the husband's properties.

As for the obligatory alimony payable to the relatives and the endower's premise of responsibility, article 1196 of the civil law explicitly states that "in relatives interrelationships, only the blood relatives on a direct, ascending or descending, line are entitled thereto".

In fact, it can be clearly asserted in regard of the endower's premise of responsibility before the relatives entitled to compulsory alimony that the endower is obliged to make such a payment by law and the endower has been obliged by the legislator to pay alimony.

Therefore, if the blood relationships hold on a direct and vertical line between the individuals some of whom have been born by some others, including the ones between whom there are intermediaries (like ancestors and grandchildren) and the ones between whom there is no intermediary (like father and child and/or mother and child), and the endower affords such a payment, he is obliged by the legislator to pay alimony to his blood relatives.<sup>1</sup>

### **Paragraph I: Alimony Payment Sanctions**

As put by jurists and stipulated in Iran's law, there are two types of sanctions considered for the alimony payment: legal and penal.

#### **A) Legal Sanctions:**

Some Imamiyyeh jurists have opined the requiring of an endower by the ruler to pay the alimony in case that he refrains making such a payment even when he is obliged to do so and there is not made any reference to imprisonment and it is believed that the ruler is allowed to sell his properties for paying the alimony if the endower owns properties the spending of which for the fulfilment of such a right is found obligatory.

Two aspects are considerable in selling the endower's properties:

- 1) The ruler can sell part of the properties to the extent it is required on a daily basis.
- 2) Due to its being cumbersome, the ruler can borrow money for the alimony of a poor person on behalf of the person who is obliged to make the payment to the extent that it reaches to the amount for which a property and its furniture and other things of the like could be sold.

It seems that both these cases are permissible and if none is found feasible, meaning that if no person can be found buying a small part of the property and also if no person can be found lending some money and if there is no public treasury from which the ruler can borrow, the judge can sell the lowest salable part from the endower's properties even if it is worth higher than a day's alimony<sup>2</sup>.

In article 1111 of the civil law, as well, the wives have been given the right to refer to a qualified court (family court of the place wherein the husband resides) in case of the husband's withdrawal from doing so in case of which the court specifies the alimony amount and sentences the husband to make the payment. In case that the verdict is left unenforced by the husband, the court, in a next stage, pays the alimony from the husband's properties and the woman will be given the right to divorce if the husband's properties are found inaccessible or if the husband is found having no properties.

#### **B) Penal Sanctions:**

Besides selling the properties, some Imamiyyeh jurists have also permitted the necessity of imprisonment in case of the husband's withdrawal from paying the alimony even with financial affordability<sup>3</sup>.

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<sup>1</sup> Al-Mohaqqeq Al-Helli, "Al-Mokhtasar Al-Manafe'e Fi Fiqh Al-Emamiyyeh", pp.195-196; "Shara'e'e Al-Islam fi Masa'el Al-Halal wa Al-Haram", v.2, pp.568-572; "Al-Fazel wa Al-Mohaqqeq Al-Aabi", v.2, pp.202-204; Al-Allameh Al-Helli, "Ershad Al-Azhan Ela Ahkam Al-Iman", v.2, pp.34-40; Tabsarah Al-Mota'allemin fi Ahkam Al-Din", pp.187-188; "Tahrir Al-Ahkam Al-Shar'eyah Alla Mazhab Al-Emamiyyeh", v.4, pp.21-43; "Qawa'ed Al-Ahkam fi Ma'arafah Al-Halal wa Al-Haram", v.3, pp.104-107; "Mokhtalaf Al-Shi'ah fi Ahkam Al-Shari'ah", v.7, pp.320-328; Al-Shahid Al-Sani, "Al-Rawzah Al-Bahi'ah fi Sharh Al-Llam'ah Al-Dameshqiyyeh", v.5, pp.465-486; "Masalek Al-Afham Ela Tanqih Shara'e'e Al-Islam", v.8, pp.438-496; Al-Fazel Al-Hendi, v.7, pp.557-575 and Al-Mousavi Al-Khomeini, Sayyed Ruhollah, v.2, pp.313-323

<sup>2</sup> Al-Shahid Al-Awwal, "Al-Llam'ah Al-Dameshqiyyeh", p.178; Al-Shahid Al-Sani, "Al-Rawzah Al-Bahiyyah fi Sharh Al-Llam'ah Al-Dameshqiyyeh", v.5, p.481; Al-Terablosi, Abdulaziz Ibn Al-Borraj, "Al-Mazhab", v.2, pp.213-214 and Al-Helli, Abi Ja'afar Muhammad Ibn Ahmad Ibn Edris, v.2, p.592

In this regard, Shahid Sani writes "if a person who is obliged to pay alimony refrains from doing so, the ruler can sell part of his properties and make the endowment thereof"

<sup>3</sup> Sheikh Al-Ta'efeh, "Al-Khalaf", v.5, p.129; Al-Mohaqqeq Al-Helli, "Shara'e'e Al-Islam fi Masa'el Al-Halal wa Al-Haram", v.2, pp.574-575; Al-Allameh Al-Helli, "Ershad Al-Azhan Ela Ahkam Al-Iman", v.2, p.37; "Tahrir Al-Ahkam Al-Shar'eyyah

Desertion of endowment as an offence against the familial rights and obligations has been criminalized in article 642 of the Islamic penal code of law and it can be sentenced to incarceration from three months and one day to five months. According to the regulations of the article: “should anyone, affording his wife’s alimony, refrain from doing so even with his wife’s complete obedience or should anyone withdraw from paying the alimony of the other individuals entitled to obligatory alimony, he can be sentenced by a court to imprisonment from three months and one day to five months”.

It appears that there is no difference between the alimony payable to one’s spouse and the alimony payable to the relatives in terms of the criminal punishment and the article 642 of the penal code can be enforced for both of the foresaid cases.

### **Topic Three: Actualization Conditions of Endowment Desertion Offence**

#### **Paragraph I: Financial Affordability of the Endower**

Alimony desertion is amongst the offenses the objective element of which is actualized through leaving the action undone. The actualization of the offense in regard of one’s spouse and other individuals entitled to obligatory alimony has been made suspended over the endower’s financial power, meaning that it is necessary for the husband to have the required ability and financial power to pay the alimony. Considering the description, the endower’s lack of financial affordability revokes his requirement to do so and the criminal attribute of the endower’s desertion of fulfilling the debt will be removed in such cases.

In this regard, article 1198 of the civil law stipulates that “an individual affording the alimony can be required to make the endowment, meaning that he can pay the alimony without suffering meagerness in his sustenance. To determine the financial affordability or otherwise, the entire obligations and the life status of the endower have to be taken into account in the society”.

Therefore, if the husband is found incapable of paying his spouse’s alimony due to the lack of financial ability, even though the material element of the offense, i.e. the desertion of paying alimony, is apparently actualized the spouse cannot be held legally liable and suable because such a desertion of obligation is not accompanied by malicious intentions and there is a lack of mental element constituting the offense, to wit general mala fide meaning the intention for perpetrating a criminal act; in addition, such an unfulfillment of obligation cannot be considered as an offense due to the husband’s lack of financial power.

The Second Division of the country’s Supreme Court states in this regard within the format of the verdict no.2921 that “as it is stipulated in the article 642 of the Ta’azirat, the precondition for the actualization of the article is the financial ability of the person who is legally obliged to pay alimony and the elements and components constituting the offense have to be essentially verified in the court and, in summary, the desertion of alimony payment is considered a crime when the culprit’s avoidance of paying the alimony is confirmed with his financial affordability”.

However, it has to be noted that the principle here is the endower’s lack of financial affordability<sup>4</sup> and the financial ability mentioned in the article 642 of the Islamic penal code of law has to be verified for the court and based on poofs. In other words, the spouse and the other individuals entitled to obligatory alimony who claim their being victimized by the endower’s desertion of fulfilling his debt have to append to their criminal trial request and filing of a lawsuit their proofs indicating the financial affordability and power of the endower because the court cannot convict the endower in case it is proved that he lacks the affordability condition.

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ala Mazhab Al-Emamiyyah”, v.4, p.43; Al-Helli Abi Taleb Muhammad Ibn Al-Hassan Ibn Yusef Ibn Al-Motahhar, v.3, p.285 and Al-Najafi, Muhammad Hassan, v.31, p.388

<sup>4</sup> By the financial affordability, the possession of actual properties is intended.

## **Paragraph II: Spouse's Obedience**

In case there is a conjugal relationship between the endower and the receiver of the alimony, the offense actualization condition becomes the spouse's complete obedience to her husband and she should have not denied the fulfilment of the marital duties and obligations.

It seems that the article intends both general and special obedience and if the wife is found not obedient to her husband in marital relationship, including disobeying her husband and/or unjustified prevention of him from taking pleasure in her, and the husband takes measures parallel to desertion of alimony, the action committed by the husband is not an offense hence non-suable and unpunishable.

But, it has to be noted that in case that the husband, despite the wife's disobedience, keeps on paying the alimony, it (payment of alimony in spite of the spouse's disobedience) does not entitle him to any right so that the husband's desertion of paying alimony later on and for other reasons (except the current disobedience) can be considered as not an offense. That is because the condition giving rise to the actualization of such offense as desertion of fulfilling endowment obligations, as specified in the foresaid article, is the wife's obedience to her husband and any disobedience exercised by her makes her disqualified for the alimony entitlement. This way, the husband is not legally obliged to provide his spouse with alimony so that the desertion of it could be regarded as an offense even though the lack of fulfilling the endowment is being found justified by the wife's disobedience.

In case that the spouse is entitled to the disobedience of her husband by the order of a court then the husband's obligation for paying alimony is not revoked and lack of making such a payment under such conditions is considered as an offense hence suable and punishable.

For instance, if a wife succeeds in acquiring a verdict from a court indicating the permissibility of her desertion of the husband's house for the fear of physical or life harms, the husband cannot deny paying the alimony for the reason that she is disobedient to him and his unfulfilling of the obligation will be considered as an offense.

Moreover, if the spouse avoids fulfilling her conjugal duties and obligations in respect to her husband for a justified excuse, she will not be stripped of her alimony entitlement. As an example, if the wife is found incapable of coitus due to a women-specific disease and denies fulfilling her marital duties and obligations in respect to her husband for such a reason, it cannot be taken as the wife's disobedience following which the husband could be permitted to desert alimony payment; because the wife's excuse is justified in such cases and she denies fulfilling her matrimonial duties and obligations based on a legitimate reason and such a withdrawal of the wife cannot be considered as repudiating of her alimony entitlement. The theory proposed on 10/01/1998 by the commission on investigation of the legal and judicial affairs affiliated with the judicial vice chancellorship of the justice department's scientific research can be pointed out in this regard. The theory asserts that "an exception to the articles 1085 and 1108 of the civil law and article 642 of the Islamic penal code of law occurs when a woman refrains from fulfilling her conjugal duties for a legitimate reason in case of which she is not deprived of her alimony entitlement and the husband is suable if denies doing so with his financial ability".

A woman is not deprived of her alimony entitlement in case her lack of obedience is urged through force majeure of a sort. As a specimen, if the spouse is indicted and arrested for a reason or another and she is found incapable of fulfilling her marital duties due to being under custody, her lack of complete obedience cannot serve the lack of alimony payment by the husband for its being based on a force majeure.

However, if the wife withdraws from fulfilling her marital duties and obligations for no justifiable excuse, she will lose her alimony entitlement according to the article 1108 of the civil law. Based on article 1085 of the civil law, a wife can refrain from fulfilling her matrimonial duties as long as her dowry money is left unpaid

on the condition that it is payable as demanded and such a denial of matrimonial obligations' fulfilment does not revoke alimony entitlement.

Based on article 1113 of the civil law: "a wife is not entitled to alimony in temporary marriage unless otherwise is determined or if the marriage contract has been signed based thereon".

Now, the desertion of alimony payment is not considered as an offence included by article 642 of the civil law in case it is set as a condition for a temporary marriage contract and the husband denies fulfilling his obligation to his concubine. That is because firstly by the term "wife", as introduced in the article, a permanent wife is intended not the temporary wife according to the phrase "other individuals entitled to obligatory alimony"; and, secondly, the desertion of alimony payment in case it is set as a condition in a temporary marriage contract cannot be considered as an offense but merely a violation of the contractual obligations and the wife can ask the court to make him fulfill his obligation but no such a right as criminal complaint is given to the wife. The judicial procedure is also well indicative of this same process. Based on the verdict no.2970 issued by the second division of the country's supreme court: "the desertion of the alimony payment in temporary marriage is not included by article 214 of the general penal code of law (article 642 of the Islamic penal code of law) and such an unfulfillment of the right is essentially not an offense albeit with the setting of alimony payment as a contractual condition that is because the present article includes the statuses of the permanent wives the divorcement of whom revokes the suability".

The desertion of alimony payment is considered as a continuous offense by the majority of the jurists. After the desertion of endowment was actualized, the subsequent fulfillment of the alimony payment cannot put a stop on the prosecution unless the wife withdraws from continuing the lawsuit.

#### **Topic Four: Qualified Court for Trial**

In terms of inherent jurisdiction, the general courts, not the family courts, are qualified for trying such offenses as desertion of alimony payment but demanding a husband to make alimony payment is within the jurisdiction of the family courts according to paragraph 6 of the single article enacted in 1997. In terms of the local jurisdiction in respect to desertion of alimony payment, the local courts of the place wherein the culprit, the endower, lives have the qualifications for trying such cases. According to article 54 of the general civil procedure, the culprit can be tried in a court in whose jurisdiction the offense has occurred and because the desertion of alimony payment is considered amongst the continuous crimes in such a way that the offense goes on to the time that the wife receives alimony from her husband, the offender's place of residence is the place wherein the desertion of alimony payment has taken place. It is quite likely for a husband to be exonerated in regard of desertion of alimony payment for such a reason as the disobedience of his wife and the wife can again file a lawsuit for the husband's desertion of alimony payment when being proved obedient. Therefore, in this regard, the husband cannot defend oneself on the credit of the previous case's termination (his prior exoneration) because his desertion of alimony payment even with the wife's obedience provides for his criminal pursuance (Hojjati, et al., 2005).

#### **Study Findings:**

- 1) It seems that alimony incorporates all the things that are commonly needed by the wives and the husbands have to provide them to their wives, including all the normal needs and the ones proportionate to the wives' prior statuses such as housing, clothing, food, furniture and healthcare and treatment costs as well as maids (in case that the women are used to them). More importantly, the situation and the financial status of the husbands have to also be taken into consideration.
- 2) It has to be noted that the principle is the endowers' lack of financial affordability and the obedience condition, mentioned in the Islamic penal code of law, has to be proved to the court based on documents and proofs. In other words, the spouse and the other individuals entitled to obligatory alimony who have claimed their victimization by the endower's desertion of alimony payment should

along with their criminal trial request present reasons indicating the financial capability and affordability of the endower because the court cannot convict the endower in case he is found lacking the financial power.

- 3) After it was made clear by a qualified court that the husband can financially afford the alimony payment and it was proved that he has refrained from doing so, there is a need for appropriate legal and penal sanctions and the penal law seems to be capable of playing an outstanding role in this regard because it can provide for an appropriate safeguarding of alimony payment and accountability of the husband through its enjoyment of preventive and compensatory sanctions in regard of this large volume of the lawsuits. It also appears that powerful sanctions like requiring the financially capable husband to make alimony payments, his imprisonment and even selling of his properties can be effective.

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