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Contents

The Place of Consolidation Principle in Family Law

Ali Reza Barikloo[1], Zahra Al Eshaq Khueyni[2]

Abstract

Stability and instability of family, as the most important and fundamental social organ, has significant effect on the destiny of a society. The increasing rate of divorce, including legal or emotional ones, is a major social dilemma where the role of family cannot be ignored in fixing it. This is a problem that can be solved by altering the approach of lawmakers i.e. an approach based on 'Consolidation Principle' leads to the stability of family. In other words, this as a general legal principle has been in line with the Sharia law. Based on this principle, whatever causes the family stability is accepted and is in accordance with the religious decree and whatever leads to instability and shakiness of the family foundation is hateful and unaccepted. The consolidation principle is based on rationality, expediency, notoriety and necessity. Similarly, this principle, in clerical way from accessories to totalities, is based on the holy Qur'an and Islamic Traditions.

Keywords: Family Stability, Family Instability, Consolidation Principle, Rights.

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Introduction

Family as the first and smallest social organ plays a significant role in the growth and development of individuals. As such, a discussion on stability and instability of family seems to be very important. The increasing rate of divorce, lack of enough stability to the family foundation, weakening of its base, or in other words, the family instability is the problems that most developed and developing countries are encountering with. This dilemma has been doubled with the misuse of virtual space and visual media. Currently, we are witness to the family transformation in western countries, from heterosexual to homosexual and this phenomenon has had legal support in the constitution of some of the countries.

Our country, too, has been encountering with the growing rate of divorce (including legal and emotional) and hence, thelack of family stability. This is evident with a brief insight on family courts and a review of data provided by the Registration Organization. As a matter of fact, due to ever-growing cultural connections, we could also witness the family break-up like the West in the near future, if we do not find the solution despite the fact that religion still dominates our country.

The problem the current paper tries to deal with is the Consolidation Principle in Constitutional Law. This has been mentioned as a general principle in the family domain and that through the Qur'anic verses and Traditions demonstrate the importance and needed to be paid attention implicitly. With regard to Islamic principles toward themarriage and divorce, as well as pre-marital, marital and separationstages, it seems that Sharia viewpoints are there for each as long as there

is possibility of the family foundation. Divorce or separation is embedded as the last option. In other words, marriage is the most desirable foundation near God and divorce is the most hated action in line with the Sharia law. Recommendationsto theobservance of proper standard in choosing spouse, facilitation and acceleration of marriage, delay and difficulty in divorce, consideration of morality during the married life and enforcement of intimacy, mutual trust and love, prevention of suspicion and conflict and creation of barriers for divorce are all indications that attempts should be made to prevent the family break-up.

Therefore, the Consolidation Principle, through the presumption method, is able to discover means from derivatives to totalities. In other words, an advice based on this principle is not seen in Islamic sources but the study of aforementioned accessories to totalities will certainly lead to a general principle called Consolidation. Based on this principle, whatever causes the family stability is accepted and confirmed by Sharia and whatever causes the family break-up and shakiness is hated and rejected. However, divorce has been legitimized at the time of urgency and necessity. Apart from aforementioned reasons, the Consolidation Principle has also been accepted through rational point of views. Expediency, imagination and necessity are the reasons that can confirm the Consolidation Principle.

In this research, we first intend to explain the Consolidation Principle through rational and narrative methods. As such, the subjects are divided into two main parts: conception and proof of the Consolidation Principle. The first part deals with the

definition of the principle, general legal principles and the consolidation principle. The second part focuses on the proof of this principle through rational and narrative points of view.

1. Conceptions
a. Principle

'Principle' in dictionary means stem, root, foundation (Amid, 2008, Vol. 1: 217; Maʹlūf, 2005, Vol. 1: 39).It is said that the principle is the one whose absence leads to the destruction of other parts of a body(Rāgheb Esfahānī, 2018: 79).The principle in the Islamic Jurisprudence has five meanings: appearance, reason, practical principle, essence of law and rule (Mīrzā-ye Qumī, 1999, Vol. 1: 5; Feyđ, 2012: 9; Kātūzīyān, 1998, Vol. 2: 626).

With regard to the aforementioned five terms, the definition of principle in the Consolidation Principle, means neither appearance nor reason and likewise its synonyms is not practical rather it to some extent is closer to the last two terms i.e., essence of law and rule. The consolidation principle as a general legal principle, in this way, is the essence of law in the context of juristic system and with respect to structure, definition and terms of legal system.

b. General Legal Principles

According to some jurists, general legal principles are the non-written rules that have been accepted as customary laws in a moderate society(Ṣādeqī, 2005: 23; cited from Bukrat). Others believe that the general legal principles are guidelines for legislators (to lay down the rules), attorney (to export) and commentator (to interpret laws) (Ibid: 26).Likewise, it is said that whatever is named as "rule" in jurisprudence, is called today as "legal principle". Therefore, general

legal principles are the ones that stem several rules. In other words, it is a singular rule and a complete guideline that can be a basis for many legal rules such as non-tort principle, accuracy of treaties principle, necessity principle and open contract principle (Civil Code: Clause 10) (Kātūzīyān, 1998, Vol. 2: 628).

Broadly speaking, general legal principles must be considered through the legal system and can be found by taking into account their structure, definitions and legal terms. For instance, if we consider godly commands based on laws in Islam, the general legal principles are a complete system through which the order of legal rules can be achieved (Hekmat-Nīyā *et al.*, 2007, Vol. 2: 23-4).Taking into account the above contradictions, the current research avoids presenting a definition and points to the following as the most important characteristics of the general legal principles:

It is a guideline for legislators to lay down rules, a guideline for attorneys to export the rules, and a guideline for commentators to interpret laws. Also, it is a singular rule and a complete guideline that can be a basis for many legal rules.

Aforementioned description gives special place and importance to the general legal principles and indication of systematic rules laid down by legislators. On the one hand, they can be considered as an element in the method of inference and criteria for their proper measurement. Likewise, determining the proper implementation guarantee for legal rules can be called as functions of the general legal principles[1].

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[1] For example, the guarantee of prison term for not paying the marriage portion, with respect to the Consolidation principle is not considered as a suitable execution guarantee.

The role of the general legal principles in selecting the best method to execute rules and likewise to execute juridical orders should not be neglected. Overall, the general legal principles play effective and important role in policymaking that with the aim to find the way out of the present condition give way to the desirable ones (Hekmat-Nīyā et al., 2007, Vol. 2: 25-7).Among legal principles mentioned in the constitution, we can point to the chapter "Public Rights "thatcan be an inspiration for lawmakers in legislating the rules and a guideline for attorneys and commentators in interpreting those rules. These are the principles such as the equality before laws, freedom of press, legislated punishments, clearance and Islamic laws priority.

c. Consolidation Principle

The Consolidation Principle can be presented with two concepts: first, synonymous with jurisprudence law and second, as a general legal principle that is a guideline for legislator and juristic process. In the first case, some jurists in order to confirm the principle of justice take help of verbal roots i.e. rationality and goodness and explain the basis of Sharia issues and relate them to the problem of the interference of reason and science into the inference of Islamic rulings (Muṭahharī, 2005: 954). Such an argument can also be put into discussion on the consolidation principle.

So, the consolidation principle can be defined as: whatever causes thestability to family is accepted and whatever brings instabilityis rejected and must be refused (Muṭahharī, 2004: 437). Undoubtedly, everything that strengthens the family bond and leads to intimate relationship between couple is vital for the family circle and much effort should be made in this regard.

Contrarily, whatever weakens relationship and endangers family affairs must be rejected although the termination of marriage as a medicine for cure is proposed as the last option in certain cases.

The marriage relation is manifested in chapter An-Nisa: "But if you want to replace one wife with another and you have given one of them a great amount [in gifts], do not take [back] from it anything. Would you take it in injustice and manifest sin? And how could you take it while you have gone in unto each other and they have taken from you a solemn covenant?" (Nisā: 20-21).

Wherever Quran uses the word treaty with verb 'take' (*akhadha*) means the divine treaty. Quran uses the same for messengers' treaty meaning the marriage bond is firm in Islam. Because it is solemnized that it is the obligation of spouse to pay marriage portion and family rights (Bī-ĀzārShīrāzī and Hujjatī, 1991, Vol. 2: 232). So, some of researchers believe that 'stable treaty' is a relationship that marriage tie arbitrate between them and one of its signs is *portion* (Ṣedāq or Nafaqa) that is determined at the time of contract and it is demanded by wife. And some opinions regard 'stable treaty' (*peymān-e ghalīz*) as leading to the relaxation wife (God itself order). Some believe contrary to this, and we know these are not hidden (Ṭabāṭabāī, 2005, Vol. 4: 408-09).

Similarly, it is cited from EmāmṢādeq in the book of Kāfī and in the book of Tafsīr-e Ayyāshīon its interpretation: Treaty is the same that is obliged at the time of tying the knot. It is said in TafsīrMajmaul-Bayān that 'stable treaty' (peymān-e ghalīz) means any good deeds a man does in relation to his wife or divorces her in good situation. This last interpretation is confirmed by Ebn-e Abbās,

Qutāde and AbīMalīkewho apparently do not reject this Verse (Opcit: 411).

What does the Consolidation Principle mean? Does it mean the protection of any structure no matter it is slender and unstable? Does it mean thesubmission of one to cruelty and injustice of others? Today, it is obvious that patience is not a resolve to the family stability. If the aim of marriage and family establishment according to Qur'an is "reaching stability to all members" (Chapter Rūm: 21), it is necessary that all acts and coordination in accomplishing this aim and the stability means the same relaxation that is not compatible with little cruelty, wrongdoing and humiliation of evenone member in the family (Huseynī, 2004: 49-50).

So, the Consolidation Principle means the preservation of family where no one but all members are protected. With the above explanations, it is proved that the consolidation principle is in line with Sharia. In other words, whatever causes the family stability is accepted to Islam and whatever breaks up the family bond is rejected.

2. Proof of Consolidation Principle

In this section, the consolidation principle in Islamic laws is studied and analyzed through rational and narrational point of views. In the rational method, we take help of 'notoriety', 'expediency' and 'necessity' whereas in the narrational method, we first explain presumption and textual methods in inferring jurisprudential reasoning and then infer the Consolidation Principle through the presumption method.

a. Rational Reasons

In this section, we focus on reasons that lead our rationality to the accuracy of Consolidation Principle. First, it deals briefly with reasons and then with the presumption method.

Expediency

This is one of the ways to prove the Consolidation principle. The following extracts explain its place in Laws. Sheykh Ansāriin the preface of his book (Makaseb) cites a narrative from Emām Ⱡādeq (Hurr-e Āmelī, 1988, Vol. 17: 84) according to which, when he was asked about living and earning of the people, he responded: All earnings and businesses prevalent among the people depend on four aspects, some of which are forbidden (Haram) and some are allowed (Halal). These four are: Guardianship, business, industries and loans …; and God obliges the people to follow the same in businesses and avoid the forbidden ones. Those are religiously allowed include food, drinksand clothes. Those are forbidden lead to rioting and corruptions … (Dhehnī, 1990: 5-19; Ansārī, 2003: 20).

Therefore, using rational parts of this narrative i.e. everything that is good for them from one side, that is all Halal. An appropriate reasoning is made in deals, for instance, in the discussion about the respectful purchases and the sale of forbidden goods (Ansārī, 2003: 20). Also, in discussion about the sale and purchase of forbidden goods, regard profit equal to necessity(Ibid: 93).

It is observed that Sheykh Ansari gives emphasis on expediency and corruption in the aforementioned narrative while explaining transaction rulings. In that narrative, forbiddance in mentioned and therefore the expediency in marriage can be considered as part of the above issues. On the other hand, the expediency in relation to the consolidation principle, despite the present circumstances, is not hidden to anyone. In other words, if a way is proposed

to deal with unsuitable data of divorce in the country, is the family expedience else the family stability will be in question and will liable to damage the family and society as a whole. This expediency can be realized in laws despite the consolidation principle. This reason proves the presence of stability principle.

Notoriety

This is yet another rational reasoning that proves the Consolidation Principle. Accordingly, there is a need to have theConsolidation Principle. To further explain, as the introductory part stated: Imaginary and affirming knowledge are divided into two categories (Muzaffar, 2007, Vol. 1: 35-6) i.e. necessary and theoretical. Necessary, as also called notorious, is a knowledge accumulation of which doesn't need consultation, opinion and thought rather it is attained suddenly and expediently; such as, our imagination of hot and cold or sunrise or that a total is bigger than accessory. Theoretical knowledge is the one that needs consultation, opinion and thought; such as our imagination about soul and electricity and truth that the earth is static or revolving. In other words, some knowledge is attained without thinking and it is enough that the man give emphasis on one of the aspects (caution, sound mind, senses, and trust)[2] and there is no need to the mediation of intellectual work. However, getting the theoretical knowledge is not an easy task and it needs thinking and the execution of rational and thought processes

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[2] Caution means regard. To cause is necessary in all notorieties because sometime the more obvious aspect remains hidden and unattended to humans. Similarly the sound mind is necessary in all notorieties. Safety of senses is necessary, too, and so is the activity of mind (Muzaffar, 2007: 37-8).

and the man with the help of information attains the theoretical knowledge.

It is said that notoriety is essential for the Consolidation Principle. First, increasing divorce rate and family instability are from notorieties. In other words, as our knowledge to notorieties is attained without thinking, the knowledge to family instability is notorious, too. It is in the same way when it is said that the sun has risen and we ultimately confirm it seeing light. Accordingly about the family, when it is said that the family stability is necessary, our mind turn to the issue considering the family instability in current circumstances. It is said that in notorieties, the man should concentrate on one the causes and they don't need to know all aspects. Sometimes, due to lack of attention, they are unknown to one notoriety and important aspect and this ignorance doesn't impact the obvious notoriety (Ibid: 37). Therefore, in case of lack of attention the necessity of family principle is neglected, it doesn't affect the Consolidation principle.

Necessity

One of the ways to prove the Consolidation Principle is necessity. It is necessary to mention here that necessity is not a jurisprudential rule and to Islamic jurists, it means 'obligation'. According to them, whatever is forbidden including obligated leave and urgent delay, will be possible (Vaḥanī, 2002: 189). The aim of this necessity here is not a done aspect as it is not declared 'Haram' and it is different from the aforementioned rule.

With little knowledge of the current family situation, divorce rate and similarly emotional divorce that is usually not considered in official data, it necessitates legal principle that leads to the stable family

foundation and prevents the family break-up. Mīrzā-ye Qumī, regards necessity as a rule in understanding (Mīrzā-ye Qumī, 1999, Vol. 2: 440, 443 and 445). In later section, we will focus on Islamic sources to prove the Consolidation Principle by means of the narrative method.

b. Narrational Reasons

This section focuses on reasons that through Sharia (Verses from holy Qur'an and Hadiths) prove the accuracy of the Consolidation Principle. First, we briefly discuss about reason, itself, and then the narrative method.

Presumption ofConsolidationPrinciplefrom JuridicalReasons

In order to highlight the presumption method through narrational reasons, we initially focus on the identification method of principle in Islamic laws and then prove the Consolidation Principle through the presumption method.

In Islamic laws, rules are divided into twoparts: Presumption and Textual. Textual rule usesQur'anic verses, Prophet's Tradition and those of sacred families; Presumption rules are derived from collection of traditions and orders (Muballeghī, 2002: 163). The Presumption method is also done either moving from total to accessories and vice versa.

a. Textual Method

Rules derived from the Textual ones are the most important and the most reliable and go back to the prophetic household and its formation is congruent to time of Sharia and jurisprudence. Although, the rules were initially derived from partial orders as unrecognized to people, they accorded

themselves huge volume of sources and references. As such, the most important Jurisprudential references then derived under the frameworks of "Qur'an" and "Hadith". Therefore, during early Islam, huge volume of our rules was compiled unknowingly. We can list a few of those Textual rules following:

- "Honor Rule'isderived from verse أَوْفُوا بِالْعُقُودِ"Fulfill your undertakings" (Mā'ede: 1) and following verses:
- الْمُوفُونَ بِعَهْدِهِمْ إِذَا عَاهَدُوَ"And those who keep their treaty when they make one" (Baqara: 177)
- أَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْؤُلاًَّ"And keep the covenant; lo, of the covenant it will be asked" (Asrā: 34)
- Other rule is derived from verse مَا جَعَلَ عَلَيْكُمْ فِى الدِّينِ مِنْ حَرَجٍ"He hath chosen you and hath not laid upon you in religion any hardship" (Haj: 78)
- اضْطُرَّ غَيْرَ بَاغٍ وَ لا عَادٍ فَلا إِثْمَ عَلَيْهِفَمَن"But he/she who are driven by necessity, neither craving nor transgressing, it is not sin for him" (Baqara: 173)
- In the Prophet Tradition حرج على لامضطر"There is not sin against driven by necessity" (Majlesī, Vol. 21: 376).

In the aforementioned examples, the rules derived from Verses and Traditions are unlike the Presumption Method.

b. Presumption Method

Here, in order to explain the place of the Presumption Method in Islamic laws, we briefly point to inference method and the compilation of jurisprudence rules by

previous jurists (Interview with Muhaqqeq-e Dāmād, 2010, No. 9). For instance, Sheykh Tūsīin the compilation of his book entitled *Mabsū⊠* has made an attempt to reject misunderstandings about Shīʿa jurisprudence. But after him, jurists for long continued his way and refused to pronounce decree contradictory to him. So, before Muḥaqqeq Ħellī, there is no arguing on 'Rational Clearance' until he wrote Tadhkeratul-Fuqahā on rationalism. Tadhkeratul-Fuqahā is a comparative jurisprudence. Thereafter, Vaħīd Behbahānī tried to explain rationalism but he continued with the previous 'Rational Clearance' based on 'forbidden punishment if there is no presentation'. In other words, he emphasized on 'Rational Clearance' to which he depended on. Also, hederived theprinciple of 'bounded occupation needs bounded clearance'. Then Shykh Ansārī's work on jurisprudence due to rationalism and his well-known words on reason meaning: 'what reason order from inside is the same to Quran order outside' confirm Vaħīd Behbahānī.

As such, Shia jurists have tried to introduce overall juristic principles from the beginning and, always, presented a chain of rules that have had legal systems and apparatus and hence; overtook Sunnī jurists in such compilations. Shia jurists by presenting a number of collections entitled *Qawaed al-Faqih* (Juridical Rules) or sometimes entitled *Asool al-Faqih* (Jurists' Principles) could confirm the continuous systemization of jurisprudence. Previous Shīa jurists had had books on jurisprudence entitled *Kitab al-Asl* or *Kitab al-Asool* that too had the same frameworks that could extract from several real sub-categories.

Once the attention is made to the Jurisprudence antecedent, the holy Quran forms part of the juristic roots, but a large quantity of it is formed by Hadith and narration of the house of prophet. In fact, this type is called 'Case Study' in comparison with existing laws. In this particular situation and the study of cases for solving issues and problems, questions are raised to Shia Imam. For instance, one person asks about a killing by another person. Imam says: he/she must pay blood money or give a few camels or give silver instead. Here, experts and jurists must see that whether Shia Imam's order is for all conditions considering time and place or that since the person raise the question belonged to Basra and enjoyed particular value and therefore Imam's response should be taken in accordance with that place and time. Here, there is possibility of the second argument or probably the response was for overall.

By this way, a chain of rules appeared in the Shīa jurisprudence called as 'Presumption Rules'. For instance, there's no Islamic narratives that can identify collateral in business (a thing can be collateral for bad and can be collateral for good, too) or its image in accordance with jurists. The question arises as how jurists could find this rule? This is an example of Presumption Laws. These laws were constituted at the time of Allāmeh Ħellī and the rest of jurists applied them and thus it became a tradition. Therefore, it is necessary for our jurists to first to separate references to juristic resources and do not link the particular case to overall cases. Secondly, they can refer to from among special similar cases and extract presumption rules.

The previous term on this issue is the same differentiation between factual and real issues. There are many real issues, but in inference of sentence they alone do not help

unless we find and extract a factual one from among the real ones. So, jurists first need to separate the real issues from the factual ones; second, they should not introduce a partial decree as a general ruling and third, must presume factual issues, and preserve real issues to help presume factual issues. This is a method Ḥellī used to reach the Presumption Method.

Finally, to realize Consolidation Article, it is necessary, use Presumption Method and go from accessions to totals.

Presumption in the words of infallible is the same for example, Emām Rezā says: "we must teach laws and you must presume" (Hurr Āmelī, 1988, Vol. 27: 62). This indicates that we must mention rules and jurisprudence laws and you must presume cases. This is the way jurists can avoid any presumption and refer simplicity and then, categorize the accessories or presumed truth case from the real ones and reach to presumption rules.

In today's laws, the presumption method can be considered an equivalent meaning that –a lawyer in order to access legal aspect of court proceedings reaches an overall viewpoint with the study of cases in that arena.

Probably, the second model of presumption (moving from accessories to totals) can be considered equal to discovery (moving from surface to deep).[3]As such some researchers regard this as a way to discover theIslamic economic.[4] Contrary to that, there is genesis (takvīn) (moving from deep to surface).[5]The genesis method has been explained further as:

Texts in transitional books are real references to presumption and extraction of Islamic economics. While referring directly to the texts to find fundamental responses about the religious economy, we cannot find answers from it, directly. For instance, when we try to get a response to whether Islam accepts private or general ownership or whether the origin of private ownership is needed, we cannot get an appropriate answer. Some of the dimensions of the Islamic economic school, in a way, are directly possible but their access is impossible in a number of fundamental principles and thoughts. Therefore, the only approach is an indirect way; that is, based on contracts and rights (for further reading see: Ṣadr, 1996: 371-72).

However, there is another way open to Islamic economists because civil code that is based on religious economics is unknown to us. Since the civil code is for emergence, occurrence and appearance of the religious economy, we can reach to religious economy through the civil code (Ṣadr, 1996: 371).Similarly, the same roots and methods through Quran and Hadiths can be applied to access the principles consolidating the family. The above descriptions confirm this approach to the family consolidation.

Inference of Consolidation Principle from Narrational Reasons

With respect to the Presumption Method, moving from accessories to totals, the consolidation principle is studied in the family domain through Islamic reasoning, Qur'anic verses and Traditions. In the

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[3] Shahīd Ṣadr regards this method as the important way in Islam to study Islamic economic. So, Islamic economists can attain laws that resolve around economic difficulties based on Justice Theory (Ṣadr, 1996: 362-72).

[4] Islamic economic means create a way based on Justice (Ibid: 395).

[5] Shahīd Ṣadr differs between Islamic economic and others. He regards discovery mode in Islam as Create Method (Yūsufī, 2006).

following, it is distinguished that the inference of the consolidation principle is presumption in the form of moving from accessories to totals. Since we don't see any texts based on consolidation principle and therefore, the consolidation principle including rules do not account as textual principles, but with the study of Verses and Traditions related to family, it is confirmed that whatever causes the family stability is right in line with Sharia and reject whatever cause to break up the family.

The human system in its introduction explains fundamental principles, structure and functions it is relying on. However, revealed religions that keep in mind natural living existence explain more about the principles of education and worldview. By this reason, rules on minor issues have been explained exemplarily. Therefore, the identification of part-by-part education doesn't work alone rather all components must be reviewed in the system (Cherāghī Kūtīyānī, 2009: 87-8). Islamic laws constitute a harmonic and stable system and therefore, to study them, we must pick accessories and study them broadly (Zībāyī-Nezhād and Subhānī, 2000: 50). This section briefly mentions about book and tradition that focus on the consolidation principle.

Broadly speaking, we can summarize the reasons related to the family structure in three stages: pre-marital; marital and divorce. During the pre-marital period, Islam advises the formation of a family based on suitable standard and on other side easing of the marriage processes. For marital stage, there are numbers of verses and Hadiths about virtues which wife and husband must follow. Also, ways have been explained to prevent differences among couples. For divorce, there are also a number of verses and traditions exposing difficulties. The aforementioned aspects will be discussed below:

Pre-Marital

According to Qur'anic sources and traditions with the focus on the family, we come across a number of verses and sayings that speak about the importance and divine aspect of family, necessity of marriage standards and their easiness. So, Islam focuses on family stability and rejects instability.

a. Islamic View about Family Establishment

The family institution from the point of view of Islam has special and heavenly position than other social organs. Muhammad (PBUH) says: "In Islam, a foundation has not been institutionalized that is more is popular near Allah than marriage" (Ṣadūq, Vol. 3: 383).Nothing could be found more elevated than this saying in explaining the importance of the family. It refersthat thefamily institution, its structure and bases are venerable in Islam. The strong wisdom that Islam gives to the family are heavenly value on bond, ground for strengthening this bond and measures to save it from break-up (Muhammadī Rey-Shahrī, 2014: 12). In these traditions, the marriage is based on the interpretation where its stability and consolidation are hidden.

"And of His sign is this: He created for you soul mates that ye might find rest in them and He ordained between you love and compassion. Lo, herein indeed are portents for folk who reflect" (Rūm: 21).Allah put the family as canon of kindness and mercy. So, more the family has

stability, more it has relaxation (Muhammadī Rey-Shahrī, 2014: 19).

According to the holy Qur'an, the family establishment means getting a divine cover and says: "O, children of Adam! We have revealed unto you raiment to conceal your shame and splendid vesture, but the raiment of restraint from evil, that is the best" (A'rāf: 26). This is of the revelations of Allah that they may remember and emphasize: "They are raiment for you and ye are raiment for them" (Baqara: 187). These two verses show the importance of family which is one of the most prominent examples of covering" (Muhammadī Rey-Shahrī, 2014: 19).

The family establishment apart from providing mental peace and virtue of couples also play fundamental role in social formation (Ibid: 22). Emām Reza says: "If there was not any obvious reason from the holy book and traditions, this important step was not enough to guide human intellect to the social importance of family. He says: If there were not many Verses and Traditions on marriage, family, itself, has goodness, creates ties, and reproduces children, for help in difficulties" (Kuleynī, Vol. 5: 374).

b. *Reasons on Suitable Standards for Family*

The first step to create a stable relation is correct and accurate selection, an aspect that has taken into account in Islamic reasoning; for instance, Allah, while explaining worthy women, says: "So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard" (Nisā: 34).

Also says at other place: "Vile women are for vile men, and vile men are for vile women. Good women are for good men and good men are for good women."

(Nūr: 26). Purity, virtue, chastity, family worthiness, to be wise women, to be noble man, non-drinker are examples of standards that we come across in traditions.

Prophet Muhammad says: "Anyone who marries for the sake of wealth, Allah gives him the same wealth and if marries for beauty, be regretted, but if marries for her religion, Allah gives him both the wealth and beauty" (Abū Ja'far, Vol. 7: 400). Similarly the prophet says: "Give in marriage to those who resemble; take them as spouses so that they become suitable mothers to your children" (Kuleynī, Vol. 5: 332).So, some believe that we must regard proportions for selections in terms of physical, age, belied and moral suitability (Huseyn-Khānī, 2007).

c. *Easing Marriage Process*

With regard to its sanctity and divine status in Islam as well as necessary standards in selecting spouse make it obvious that Islam stresses on facilitating and speeding of the marriage process. Qur'anic verses and Traditions emphasize on marriage and bringing unmarried couples into marital bonds. Allah says: give unmarried couples, your slaves and maid into marriage; if they are poor; Allah will enrich them of his bounty. Allah is of ample means, Aware (Nūr: 32).

Alī (AS) has said: "…..marry, because marriage is the tradition of prophet and then said: anyone who wants follow my tradition, marriage is of my tradition" (Kuleynī, Vol. 5: 329).

Islam has removed barriers in order to ease and facilitate the marriage process. Islam also emphasizes on less portion and dowry. Principally, from the methods of Prophet Muhammad, divine families and Muslims during the early Islam, it became obvious that there's no barriers in marriage

as they have been removed (Mazāherī, 2011: 103). The best example of the easy marriage is that of Alī(AS) and Zahrā (SA) which was very simple and so little. When Zahrā's dowry was brought to Prophet Muhammad, he cried and prayed: O God, bless you for this little property made of clay."

Emām Ṣādeq said: "Muhammad brought the daughter of Zubair Abd-al-Muttalib (who was wealthy) to the marriage of Meqdād bin Aswad. Then said: I facilitated to their marriage in order to make marriages easy. "Follow the actions and traditions of prophet and consider that the most prominent of you near Allah are those with virtues" (Kuleynī, Vol. 5: 344).

MaritalLife (Recommend to ObserveEthicalValues)

With regard to considering moral virtues in the family, the part of fundamental principles of family through Islamic point of view, focus on two positions of rights and virtue. However, here with respect to the topic, we will deal with a number of limits of religious description about such virtues. There are many Verses and Traditions which tell about moral virtues in family. In all of them, aim is to make the family stable. It is obvious that a virtuous family is stable, because virtue leads to the family consolidation.

a. *Husband's Modesty*: "Say to the believing men that they should lower their gaze and guard their modesty: t …" (Nūr: 30).

b. *Wife's Modesty*: "And tell the believing women to lower their gaze and be modest and to display of their adornment only that which is apparent, and to draw their veils over their bosoms, and not to reveal their adornment save to their own husbands …" (Nūr: 31).

Naturally, the control of gaze from unknown and stained to legal spouse and the observance of the privacy in the society lead to mental and spiritual solace and as a result strengthen the family. Modesty in front of unknown men apart from strengthening the sense of satisfaction and creating internal peace prevents illogical comparison of spouse with other people in the society. This has been detailed in the loyalty principle of the family consolidation.

c. *Invigorating Family's Religious Belief*: "O, ye who believe! Ward off from yourselves and your families a fire …" (Tahrīm: 6).

Individual adherence to religion and religious teachings, directly or indirectly lead to the family consolidation. On the one side, the religion favors a firm family and its teachings go with this way. On the other hand, the commitment to religious regulations leads to the sense of responsibility.

d. *Safekeeping in the Absence of Husband*: "So good women are the obedient, guarding in secret that which Allah hath guarded …" (Nisā: 34).

e. *Ease in Living*: "One day Salmān went to the house of Prophet Muhammad's daughter and saw she put on a rag wrapper. He turned sad and remembered Iranian Princes and their glory and splendor. Crying said: O on me! Iranian and Roman Princes put on golden covers and sit on golden chair, but Muhammad's

daughter put on a rag with 12 patches" (Majlesī, Vol. 43: 88). EmāmSajjād (AS) said: Allah likes the most among you who prefer the family ease." (Ibid, Vol. 78: 136).

f. *Compromise with Shortages:* "Fāṭemeh (SA) once told Alī (AS): I feel shame for request things from you, when you are unable to make it" (Ibid). Easiness in living, compromise with shortages, contentment, all cause peace in family. In other words, peace and virtual development lead to the family stability.

g. *Quest for Family Welfare:* "Prophet Muhammad said: anyone who tries for his family through legal ways is like fighting for God" (Ibid, Vol. 103: 103). Islam's insistence on sophisticated and simple living is for men. If efforts are not for consumerism and worldliness could lead to heavenly growth and the family stability, and virtue.

h. *Avoiding Violence against Spouse:* Prophet Muhammad said: don't forget that Allah and his messenger hate those who abuse his wife" (Ibid, Vol. 76: 366).

i. *Calmness:* Prophet Muhammad said: my brother, Gabriel, made me aware and advised me on women, always. I think it is bad

for a man to say 'O', to his wife" (Nūrī, Vol. 14: 252). Observance of virtue, politeness and gentility with wife causes family stability because kindness and affection between wife and husband with result through stable relations between them.

Disagreement and Divorce Period

a. *Outlook of Islam on Divorce and Separation*

In spite of sacred status of marriage, Islam mentions divorce as the worse form of Halāl or permit. We see in words and deeds of the Prophet and the prophet household that they mention divorce as the discredited and hated one. For example, the Prophet says: "The worse Halāl for god is divorce" (Kuleynī, Vol. 5: 328). It means among legal things, nothing is worse than the divorce. Similarly he says: "member that the God and the Prophet dislike women who incorrectly get divorce from their husbands. Remember, God and the Prophet don't like men who abuse their wives in order that they excuse their portion and get divorce" (Hurr Āmelī, Vol. 22: 283).

Emām Ṣādeq cited the Prophet as saying: "nothing is dear to God than a family that is firm with marriage and nothing is worse than that a family in Islam breaks up with divorce and separation. Emām Ṣādeq said: as Qur'an repeatedly mentions divorce and its explanation is obvious through Qur'anic perspective is that God considers separation as an enemy" (Kuleynī, Vol. 5: 328). Emām Kāzem said: "God in the decree on divorce emphasizes on the presence of two just witnesses for divorce, but accepts marriage without any witness" (Kuleynī, Vol. 4: 353).

Islam wants wife and husband to study the characteristics of each other before

marriage and have complete information about their life partners. However, after marriage, it doesn't see it proper for them to break up with any excuse or with partial difference. By this way, Islam regards difficulties for divorce that it could turn out to be a source of desire-inflicted husband and wife. We can presumption from Hadiths that difficulties in divorce are from this point of views, otherwise, divorce, itself is not forbidden (Harām), and sometimes it is necessary(Haqqānī Zanjānī, 1974: 56).

The Prophet says: "Gabriel, frequently, advised me about women, so, I suppose divorcing them is not correct, unless they do bad act"(Majlesī, Vol. 100: 253). But, why divorce is not forbidden (Harām) and is allowable it can be said that in the married life there are instances when divorce becomes necessity. In that situation if divorce doesn't happen, it can cause difficulties, and could lead to mental and physical problems and hence it would not only turn the married life bitter rather could bring social chaos. The best document is the study of family life and social groups in countries where divorce is not allowed. For example, when there is disagreement between the couple under the influence of family training or weakness of religious bases and any love and affection could not fill the gap then what must be done? Is it correct that they continue living together? The answer is no; because divorce in that circumstances becomes a necessity. So, one can see in the West where church could not resistance the divorce necessity and canceled its law (Haqqānī Zanjānī, 1974: 57). But the important point is that the lack of understanding from the point of views of experts was unsolvable and therefore divorce should be taken as the last way not the last choice.

Quran says: O" ye who believe! … But consort with them (your women) in kindness, for if ye hate them it may happen that ye hate a thing wherein Allah hath place much good" (Nisā: 19).

Quran indicates some reasons for divorce in some chapters, though doesn't not limit them to proper incidents because reason of divorce is diverse with respect to thought and characteristics of the people.

b. Ways to Prevent Disagreement and Divorce

Some of theadvices and descriptions have been issued with the aim of strengthening affection, increasing trust and preventing suspicion toward each other.[6]In order to preventing 'discord' Verse 34 of Chapter Nisā introduces three alternatives: preaching (fa'azūhunna); wrath-anger (vahjarūhunna) and punishment (vađrabūhunna).

Wrath-anger means dissatisfaction not distance that according to psychology is one of the best ways to show displeasure. With reference to Verses and Traditions 'vađrabūhunna' means pardon, not punishment. And if there is one then it must not accompany damage.

It seems that in such a stage where peaceful ways endwith partialviolence, is regarded as the best to prevent the abuse of wife and the breakup of family. Contrarily, Islam put barriers for divorce so that they could prevent unnecessary separation. This aspect denotes Islam's attention to the family consolidation.

When signs of disagreement become apparent, Quran says: "if a woman fears the ill treatment or desertion from her husband,

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[6] For example, Nūr: 30-31, Ahzāb: 32, Nisā: 19.

it is not a sin for them to make term of peace between themselves, peace is better. But greed hath been made present in the minds (of men). If ye do goodness and keep from evil, lo, Allah is ever informed of what ye do" (Nisā: 28).

Probably, this verse regards kindness and agreement between couples as 'altercation' and therefore there is no issue of disagreement rather explains the fear of struggle and hence, calls for peace. "And if the condition of correction was put on the fear of failure, and not twos, was because peace is realized when there are signs of fear from divorce and the trend 'Sīyāq' shows that peace means wife renounces some of her rights in order to attract kindness and affection of husband and through this she will prevent separation and divorce a must know that peace is better" (Ṭabā Ṭabāī, 2005, Vol. 5: 163).

The words 'souls bring scarcity: scarcity means scrimp and the sentence under discussion would make this an obvious that skimpiness is one of the instincts God has conceived upon human beings and through this instinct they maintain their interests and profits and hesitate from its loss. As such every self bears scarcity and scrimp and its skimpiness is always in presence for instance, a woman scrimps in her rights as a couple i.e. for dress, food, bed and marital acts. It means she prevent them from spoil. A man too if he dislikes his marriage relationship he turns scrimpy in expressing kindness and attachment to her. In such a scenario, there is no problem if the two make peace and one of them avoid some of the rights. "If do good deeds and fear from god, so, God is the best aware what they do." This sentence advises men not to contemplate through kindness and piety as God is aware of everything. Therefore they

must not resort to oppression in socializing with women and don't force them to do away with their rights unless they do themselves. As most of the sources of differences are stinginess and greed and the best way for their remedy are peace, kindness and piety and avoidance from stinginess (Bī-Āzār Shīrāzī and Hujjatī, 1991, Vol. 2: 338).

Qur'an on the divorce decree in case of intense disagreement between wife and husband and in case of dual fissures when the marital life reaches the very critical stage and makes its continuation very difficult, says: "And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever knowing and Acquainted [with all things]." (Nisā: 35).

In other words, when there is no other way left than divorce, Quran says that each of the couple elect two representatives from their respective families as arbiters so they try to study their differences and hence, make utmost efforts for peace and finally, if peace was not possible, they order divorce.

On the other hand, based on linguistic analyses, one can also find hidden and more new conceptual relations in Verses. In some of these approaches, lingual interpretations can be related to mental processes. Lingual interpretations with special analyses of 'recognize' can be a way to get acquainted with speaker's opinion. When a man wants to divorce his first wife and marry another woman, the Verse "…And how could you take it while you have gone in unto each other …" (Nisā: 20-21), implies memoir of the past in order to prevent divorce (Mustaqīmī, 2009: 110 and 113).

c. *Divorce Barriers*

Unlike marriage, Islam puts a few barriers for divorce, in order to prevent the family break up. Some of these barriers are mentioned below:

- Presence of two just witnesses is necessary for executing the divorce process. Apart from this, the executor of divorce isadvised to make his utmost efforts to discourage the man from divorce. Now it has become usual that the divorce is read in front of witnesses that do not know husband and wife, this is not the way Islam recommends.

- Islam puts woman's menstrual cycle as a barrier for divorce; that means must finish the period when divorce happens. That's why it is a barrier for divorce and has an important point that in case of divorce if man repents and wants to remarry with the same woman, man's motivation to marry with same woman is much, because the woman is out of menstrual cycle.

- To put a Time for divorce, advises womanto stay in man's house and expenditure of the woman is the responsibility of the man. In that period of time, the man can remarry and return to his normal marital life. All of them are factors that prevent divorce. Likewise, the separation of couple and the passage of Time as 'iddeh' can be a barrier to divorce that would have happened in angry circumstances. Qur'an forbids everyone to discourage women

to remarry with the same man after the end of Time.

- Islam also makes man responsible for expenses and care of children after divorce. Besides, man must pay expenses and dowry for his new wife; therefore, he must suffer expenses of children from his new wife. All of them decrease man's motivation for divorce.

- The aforementioned instances i.e. easing or facilitating marriage process, family guardianship and its stability and strength and similarly barriers for divorce are in line with religious principles or sharia.

Conclusion

The real concept of the consolidation principle is neither means appearance nor cause. Likewise it is not contrary to practical principle rather it to some extent is closer to two latest meanings i.e. spirit of law and rule.

The Consolidation principle as an overall juridical principle and with respect to its structure and definition resembles thespirit of law, because it can be found in the texture of juridical system. On the other hand, it resembles jurisprudence, because it is an overall law and can be the basis of many juridical rules. However, contrary to that containing rule not merely rely on behavior rather the rules have been defined with respect to conditions and circumstances hence, juridical rules are different.

According to the Consolidation principle, everything that causes stability to the family is acceptable and contrarily everything that causes instability is rejected.

This principle is proved through two ways: rational and narrational.

Though in Islamic references there is not a proper text for the Consolidation principle, but we access an overall principle with the study Qur'anic verses and traditions in the family domain according to which whatever leads to the stability is in line with sharia and everything that causes instability is rejected. On the other hand, since the Presumption is based on accessories these developed to an overall principle called Consolidation. So, the Presumption method used in Consolidation principle is the one moved from accessories to totals.

With an insight on Qur'anic verses and traditions, Islam's view on marriage and divorce and likewise these stages i.e. pre-marital, marital, and divorce become obvious. It seems that in all these three stages in accordance with sacred sharia, there is possibility to preserve the family, and divorce or separation is defined as the last possible way. To prove, the following viewpoint is important.

The family institution as thesacred in Islam and the most favorable to God against divorce that is worse Halal near sharia, recommendations to suitable standards in selecting spouse, easing and speeding of marriage against barriers and difficulty in the divorce process, recommendations to virtues in marital life such as avoiding abuse, preserving modesty, chastity, making up with shortcomings, efforts for family welfare, and ease of livelihood are the ways to strengthen relationship and increase love and faith to each other and help prevent disagreement, chaos and divorce so that the family is saved from breakup.

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جایگاه اصل تحکیم در حقوق خانواده

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چکیده

تزلزل و استحکام خانواده به‌عنوان مهم‌ترین و بنیادی‌ترین نهاد اجتماع، تأثیر به‌سزایی بر سرنوشت جامعه دارد. افزایش آمار طلاق، اعم از طلاق قضایی و عاطفی معضل مهمی است که نقش حقوق خانواده را در برطرف کردن آن نمی‌توان نادیده گرفت. مشکلی که با تغییر رویکرد قانون‌گذار قابل حل است. رویکردی مبتنی بر اصل تحکیم که به استحکام خانواده منجر می‌شود. اصل تحکیم به‌عنوان یک اصل کلی حقوقی، مورد نظر شارع مقدس بوده است. مطابق این اصل، هر آنچه باعث استحکام خانواده شود مورد تأیید و رضایت شارع مقدس بوده و هر آنچه موجب تزلزل و سستی بنیان خانواده شود، منفور و ناپسند است. اصل تحکیم مستند به ادلۀ عقلی مصلحت، بداهت و ضرورت است، همچنین این اصل، به شیوۀ اصطیادی از نوع سیر از فروعات به کلیات در آیات و روایات قابل استناد است.

واژه‌های کلیدی: اصل تحکیم، استحکام خانواده، تزلزل خانواده.

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