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RESEARCH ARTICLE

Executive Guarantee of "Abuse of Non-Financial Rights" in the Relationship between Couples in Shia Law

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The rules in the family are the creators of legal relationships, and the implementation of the legal orders is the basis for the organization of the affairs. Sometimes due to the situation where the rights of the family to the spouses are recognized, the parties to each other do harm and use their rights inappropriately and, namely, abuse their rights. In the present paper, using the descriptive-linguistic method, the non-financial rights in spousal relationships and the possibility of their abuse have attracted greater attention. In addition, the explanation of the orientation of the teachings of Islam regarding the abuse of non-financial couples' rights and its prohibition without providing a guarantee of implementation is discussed, which constitutes it among the moral recommendations; the need to develop and determine the guarantee of effective implementations to prevent the abuse of non-financial rights and to control the exercise rights for the realization of the legislator's goal and the realization of justice in the relationships of couples has been examined and proved, and for certain reasons such as the rule of no loss, the principle of expediency, the rule of maintaining the system (social system) and determining the punishment by the government has been referred to prove the point.

Keywords: Abuse of Rights, Executive Guarantee, Non-Financial Rights, Couples' Rights

1. Introduction

Among all the human treaties, marriage has a special place and is distinct from other contracts as a form of sacred-making because the conjugal relationship is a kind of psychological and physical correlation throughout marriage life (Tavakoli and others, 2022: 42). Undoubtedly, the observance of rights among family members will clarify the boundaries and create a balance and relaxation in the family, and will bring more solidarity among couples in all areas. This study has been carried out through understanding this necessity. The main issue of the research is to prove the need to strengthen the guarantee of the abuse of the non-financial rights of couples and its possibility in the rights of Shia.

Therefore, the aim of this study is not to investigate the set of misbehaviors in the family but only to observe the cases that in couples' relationships legitimize a non-financial right for the family members, but the right holder has not properly exercised the right to use it, and the law has not also considered an appropriate Executive Guarantee for its execution.

2 Definition of Executive Guarantee

Jurists consider one of the legal specifications of a rule its Executive Guarantee. In other words, jurists consider the four specifications of being public, having legal obligation, regulating the social behaviors, and bearing an Executive Guarantee for any legal issue (Katouzian, 1997: 54). The term Executive Guarantee means protection of official authorities or support of common law and customs and traditions and public thoughts in exercising the law or the common law or habit or good behaviors, which may be in general as "non-penetration" or, in particular, as "criminal conviction of the criminals" (Jafari Langroudi, 2006: 421), in other words, whenever the law is violated by a member of the society, the public authority to maintain the order and the law which is used while the ruined law is violated and reacts; this reaction is called Executive Guarantee (Katouzian, 1998: 523).

In fact, the guarantee is out of the nature and essence of the legal rule, but in order to realize the mandatory aspect of the legal rule, it needs to support the realization of that rule, which is interpreted as a guarantee of execution. Thus, Executive Guarantee is the public governmental power when in opposition to a legal rule by legal or natural persons. (Ka'bi, 2005: 39).

3 Definition of "Right"

The term right means competence, the right and in accordance with reality speech (Ibrahim Mostafa, same: 187), definite and realizable work (ibn Fars bin Zakaria, 1993, pp 15-17), and it means the privilege or interest that belongs to persons that the legal rights of every country at the position of exercising justice protects it and enables him/her to capture the subject matter of the right and prevent others from violating it (Katouzian, 1998: 374).

In another definition, it is a conceptual credit that does not have on the external reality, although the source of objective abstraction is real, and its status and validity are subject to actual expediencies and real corruptions. Accordingly, that person acquires the legal authority

to carry out an external capture on another object or person, and it is necessary for that privilege to be granted to others who have rights to that person. (Mesbah, 1998: pp 26-27).

The right is referred to as a means which is meant to create a dominant and arbitrary power for the individual and the community to be able to exploit or capture it to their own advantage. (Ghazi Zahedi, 1991: 109) for example, alimony is the right of a woman; that is, it is something that is assigned to a woman, and she has some kind of domination to achieve her desires.

4 Criterion of "Abuse of Rights"

Detecting the abuse of rights is subject to a criterion. In French law, there is no consensus on the determination of this criterion, and some fault in the exercise of the right, the issuance of abnormal behavior that a wise, cautious person does not commit in family relationships, exercising one's own right in order to harm others and violating ethical principles, exercising the right in contradiction with the social goal has specified the criterion of the validity of the right as to abuse the right. (Bahrami Ahmadi, 1987: pp 105-109, Bafam and others, 2023:135). The criterion of abuse of right in Imamiyah jurisprudence is the infliction of harm, mismatch with the purposes of the Shari'a, and social culminations (The same: pp 90-12).

5 Non-Financial Rights of the Couples

In the laws of Islam, like other laws in the world, due to marriage contracts, the couples enjoy a series of non-financial rights. Determining the non-financial rights establishes the relationships based on the criteria and clarifies the boundaries of expectations from each other. Moreover, it causes every individual to endeavor to specify a complete plan for him/herself, and thus the family relationships stabilize.

Some non-financial rights of couples are created jointly for each woman and man by marriage contract, which can be cited as the right to good relations, common habitation, and loyalty (Naghbi: 4; Safai, Imami, 1993, vol. 2: 159); Along with the right to common residence, the most pivotal common right among the non-financial rights in couples' relationships is the right to "associate with the good". This term has been derived from the verse "They associate with the good" (Holy Quran, Nisa: p 19). From the perspective of the jurists, having a fine temperament and peaceful behavior (Imami, 1998, vol 4: 497), also the avoidance of acts that cause great hatred and grief in another are among the examples of good socialization. This principle of the parties implies a set of behaviors that are well-liked and satisfactory to the wise, so it is determined in each epoch according to the customs of the time that is also consistent with the principles of religion.

Among the rights allocated to the husband in the jurisprudence and the laws of Shia, one can refer the right of subordination, the right to preside over the family, the right to determine to house, and the right to return after separation and divorce. Among the non-financial rights of a wife include the right to have sexual intercourse, the right to swear, and the right to dismiss and breastfeed the child, all of which are considered sexual rights.

6 Abuse of Non-Financial Rights in Couples' Relationships

As we observed in some cases the violation of non-financial rights of one of the couples by the other party, we also witness the abuse of the right owner against the other party. Accordingly, in Quran, even about the issue of granting the presidency of the family to the males, it has some emphases and threats and invites him to associate with the best and avoid any kind of loss and damage (Holy Quran, divorce, 6; Nisa, 19). On the other hand, in other cases, although based on the rules of Shia, the spouse (husband) can return to the wife in one kind of divorce, which is called returning divorce; in Quran, men are prevented from returning with the intention of doing harm and imposing loss (Fazel, vol 2: 282). Also, the abuse of the right to divorce in verse 6 of the divorce chapter is also considered, and it is warned in this verse that by refusing to pay the cost of living during the period of life of a woman during which she may not get married to other men, the right to divorce should not be abused. Therefore, in Islamic law, about the method of executing the right to divorce by men, the prohibition of abuse and inappropriate execution of the right is paid attention to due to the fact that, according to the conditions existing between couples, it may be possible to keep or refer to the woman, or to refrain from returning to her, and to hasten with the purpose of harm and without good faith and this kind of use of the right is forbidden (Tabatabaei, 1995, vol 2: 363).

In other cases, in Quranic verses, it is emphasized that a woman should not impose loss and fault on her husband in the case of an infant about the use of the right to breastfeeding, for example, not allowing the father to see the child and making such inconveniences (Tabatabaei, 1995, vol 2: pp 363-361).

7 Orientation of Shia Teachings about Abuse of Non-Financial Rights in Couples' Relationships

Ibn Islamic law has invited the existing tenets and bases present in the family to the perfection and observance of the ethics of socialization by establishing the laws and mutual ethics-driven duties. Also, it has regarded the rules and laws related to the family under the influence of ethics, and due to this, the family environment with the ruling of mutual rights and duties has been regarded as owing to ethics and execution of the rules (Zarei, 2011: 90). Accordingly, although the rights and duties of the family in Islamic laws and ordinances are so carefully regulated to prevent their bad execution by individuals, only recommendations that are similar to the ethical recommendations suffice, and there is no direct Executive Guarantee considered for it. For example, in verse 228 of the Qur'an, Surat Al-Baqarah, after referring to the mutual and fairness of the collection of marital rights and duties of couples, stipulates that the rights of spouses be observed in a well-known and satisfactory way. It is worth noting that from the viewpoint of some of the commentators of this sentence, it also expresses the parity and equality of rights and duties, except for those cases which are accepted in the Shari'a and are assigned to a wife or a husband (Fazl-o-llah, 1997, vol 4: 284; Mousavi Sabzevari, 1961, vol 4: 10). The repetition of the word good things (Maruf), meaning “good and well-known and sensible” work

in these verses, is only a warning to men and women to never abuse their rights, but by respecting mutual rights, try to strengthen marriage engagement and gain God's satisfaction (Makarem, 1968, vol 2: 157).

8 The Necessity of Extending the Executive Guarantee of Abuse of Rights in the Sphere of Couples Relationships

Industrial diversities and ideals have damaged family relationships and deprived them of stability and peacefulness, which is the product of good relations and good morals, and human and ethical issues have disappeared, and families have been undermined (Ghaemi, 2007: 35-36). With the diminution of the ruling of ethics between the couples, we should note that morality and rights are not the same concepts; the Executive Guarantee of ethics is determined by the conscience of the individual, but the government determines the Executive Guarantee of the law. (Katouzian, 2007: 85-88). Therefore, determining the Executive Guarantee of laws has gained more importance. However, care should be taken that, although a systematic review of rules relating to family law always aims at preserving the rights of the family, it will end in the provision of the comfort of the family (Nazari, 2007: 76). However, legislation in the family area is an important and professional issue because, without careful consideration and observance of all aspects, it will leave a lot of bad influences on families. In fact, "the influence of traditions and ethical rules in the family is more than laws and regulations, and the legislator has no authority in the realm of the family, unlike other legal entities, and its interference in the family disappears because the interference of the legislator in the families sometimes causes consequences that weaken its foundation" (Pourismaeili, 2011: pp. 267-280). Accordingly, the Executive Guarantee for the laws of the family that is determined in Shia is different: one of the guarantees is the faith and belief aspect of the couples that regards God as witnessing and observing all the aspects of our behavior. Secondly, social controls or social monitoring, in which relatives on some occasions are the supervisors for couples and their positive or negative views are alerting. The third is the judicial controls and the rules on which the offenders are prosecuted. (Ghaemi, 2007: 119-120). This way, when failure to observe ethical rules creates undesirable social consequences in the society, the legislator not only is capable of but also is obliged to consider the Executive Guarantee of law and legal punishment in order to modify social habits. The legislator is responsible for clarifying the general and vague moral dictates in the light of his/her guidance, eliminating or adding to the ambiguities and conventions of the law, and then providing the guarantee for the development of the mind and the action of society (Ahmadiyah, 2003: pp. 12 and 13). In fact, the legislator is obliged to prevent the infliction of damage and loss to the couples by abuse of the rights of the couples predict its Executive Guarantee in the law and even to compensate the loss incurred so that couples can enjoy the equal rights and duties.

9 Reasons for the Prohibition of Abuse of Non-Financial Rights in Couples' Relationships and Determining an Executive Guarantee for Offenders

Abusing the rights is, in fact, a disruptive factor in their implementation. In the words of some jurists, in the abuse of the right, the soul of the right is legitimate, but the direction of its use and how it is used is outside legitimate legal purposes (Senhour, vol. 1: 838). Accordingly, the legislator should, besides prohibiting abuse, consider preventive punishments in law for the offenders. The most important reason for the prohibition of abuse of the right in the laws of Shia, in addition to the induction made in previous discussions that numerous instances of misuse of rights in non-financial rights of couples is forbidden and consider the rule of No Loss. Based on some theories, it could also imply the determination of the Executive Guarantee in some cases. Also, among the most important reasons for the legitimacy of determining the Executive Guarantee, the principle of expediency and preservation of the system will be explained in detail below.

A. The No-Loss Rule

One of the important rules in the legal system of Islam and has become the base of many laws and rules is the rule of “No Loss”. The term loss means a violation of the right. The rule of causation is the closest rule to the principle of the prohibition of abuse of the right, although this rule seems to be the subject of the prohibition of abuse of the right (Katouzian, Civil Responsibility-Safeguarding Guarantee, 2007, vol. 1: 438). The documentation of this rule, besides wisdom and the verses which imply on the prohibition of loss, is the narratives, including the phrase “there are no losses and no damages in Islam” (NK: Kellini, 2009: 23). Checking the uses of the term loss in the Islamic sources indicates that “loss” includes all “damages” and “injuries” related to the cases in which a person injures another person using a right or a legal license, which in the present term, such cases are interpreted as “abuse of the right” (Mohaghegh Damad, 2008: 141), taking into consideration that the term refers to “loss and harm”, and includes financial, life and moral losses.

According to some scholars, it is not only possible to consider the only use of the rule of No-Loss in the necessary verdicts, but in cases where the lack of forgery of a ruling from the legislature would inflict loss upon the individuals and a legal vacuum would cause damage, one can resort to this rule and determine it eliminate losses and provide an Executive Guarantee to avoid losses (Mohaghegh Damad, 2008: pp. 158-161).

Article 40 of the Constitution of the Islamic Republic of Iran, is in accordance with this rule, which states: “No one can put his right to act as a means of harming or violating the public interests.” In accordance with this principle, the Iranian Constitution also does not accept the absolute use of Rights. This principle is related to the harmful exercise of the right; in other words, the exercise of the right should not cause loss to others.

In the relationships between the spouses, the parties are responsible for not imposing any losses on the other person from the right given to them. The exercise of rights in an unjustly

harmful manner to the other party is inappropriate and is considered an abuse of rights, and this loss must be compensated. The No-Loss rule, when it comes to harming people, considers the necessity to prevent people from being harmed so as not to undermine the rule of justice in existing relationships in the community.

B. The Expediency Rule

Expediency is what is in agreement with the human intentions in the affairs of the world or afterlife or both of them, and its result is obtaining a profit or disposing of harm (Ibn-e Manzoureh: 517; Fakhredin Razi, 1998: 114).

Notwithstanding, expediency is divided into two categories in terms of range and domain of influence, which are community expediency and individual expediency (Taqavi: 10); in the expediency rule, the expediency of the system has been mentioned and talked about more which is the main criterion for the realization of the concept of expediency in it is what its interests are public, whether indirectly (Mousavi Alkhomeini, vol. 3: 112 and 113). Because the expediency of the system and society is among the most vital affairs whose neglect sometimes results in the destruction of a society, in Islamic law, this kind of expediency has two criteria: the first is that it shall not be in contradiction with the rules of customs and laws and the other is that the most important things are observed in it, and the guardian council is obliged to monitor the enactment of rules by taking these two criteria into consideration (Mousavi Al-Khomeini, Sahifah Nour, vol. 20, 1980: 167).

Thus, even if we regard the expediency rule as focusing upon the provision of social expediency and social benefits, then, definite lack of prevention of the abuse of rights in the area of couples relationships not only causes disturbance in their individual relationships, but its effects and scope of influences reaches the community; moreover, since the rules are enacted for the regulation of the relationships among the individuals of society, abusing them to inflict harm on the relationships among the individuals of society gains a general aspect and causes the disturbance of the social system. Thus, providing the individual and social interests and expediencies necessitates that by determining the Executive Guarantee, the abuse of rights is prevented in this regard.

10 The Necessity of Preserving the Social System and Determining Punitive Punishments

One of the reasons that would be resorted to determine the Executive Guarantee of the abuse of the right is the need to preserve the social system and prove the punitive punishment (the punishment whose determining has been granted in Islam to the ruler) is based on this issue that some scholars have also explicitly substantiated it for proving the rule "punishment by the hands of the ruler" (Khuyi, 2000, vol. 1: 408; Tabrizi, 1995: 270). In fact, the laws are stipulated for preserving the social system of society and observing the social and individual expediencies which need an Executive Guarantee for being bound to coming into force. The punitive punishments are, in fact, a kind of Executive Guarantee for non-compliance with the rules and

laws to preserve the social system.

Regarding the verses, narrations, and religious opinions of the jurists, one can claim the certainty of the permissibility of the punishment in whatever that harms the people, disrupts the social system, aspersions of others' respect, corruption in affairs, undermining people's confidence in each other, and in general in all cases where the ruler is obligated, and whenever there is an act against the law, the ruler is requested to punish the perpetrator of these acts.

Since preserving the social system is one of the most important goals of Islam, it prohibits what causes corruption, and it should be left to the government to prohibit any act that causes corruption and a harmful outcome to the extent that it endangers a degree of social security and public rights and the interests of the community, is announced as prohibited and for its commission makes a special punishment. If such an authority is not granted to the Islamic government, the Islamic social system would gradually lose its credibility with the people. In other words, the legislator is allowed to intervene in order to ensure the order and calmness of society and reduce and prevent the risk of its existence and freedom of individuals through Executive Guarantee instruments. Some of the jurists have also acknowledged this and have regarded it permissible for the exercise of punitive punishments in what causes the harassment of people, disruption of the system, aspersion of respect, corruption in the social affairs, and distrust of people in each other (Sadeghi Golpayegani, 1982: 138; Mousavi Ardebili, 1990: 37); so that some jurists have stated in the expression of the difference between the penance by the lash and punitive punishments that "punitive punishment is a function of corruption, although there is no sin; such as the chastisement of the child and the insane. Contrary to the penance by lash that it is a function of sin." (Tabasi, the same: 597) Some others have also regarded the exercise of punitive punishments for uprooting corruption. For example, in the opinion of the jurists, minors or the ones with insanity who commit murder are entitled to discipline and punishment for the destruction of their wisdom (Jabie al-Ameli, 1996, vol. 10: 14).

Conclusion

1. In the legal systems of the world, the theory of the prohibition of abuse of rights is a factor in the correct exercise of the right.

2. There are many examples of abuse of right predictable in the non-financial rights of couples which have attracted attention in the laws of Islam, and the couples are prohibited the right. But in many cases, these prohibitions did not have an effective Executive Guarantee, and thus they are considered an ethical recommendation.

3. Since undermining the constitution of the family and spoiling the human values is one of the results and outcomes of abusing the non-financial rights in the couple relationships, its prevention and prohibition through determining the guarantee of legal and penal practices.

4. The No-Loss rule in Islamic law and some legal provisions in the Islamic laws, such as article 140 of Iran's Constitution, also imply the prohibition of abusing right in the non-financial

rights between the couples.

5. Considering the necessity of accountability of jurisprudence and dynamic laws issues occurring in the area of the family and the recognition of variables regulations that change on the basis of the expediencies and the corruptions of every era and expediency of the community and the discussion of the governing authority in preserving the social system that meets the needs of the people in each era, the development of legal safeguards on the prohibition of the abuse of rights in non-financial couples rights is very necessary.

6. The execution guarantees of the rights would be determined in the form of all types of execution guarantees, including civil liability, the abolition of legal action arising from the abuse of rights, the limitation of the deserving to exercise the right, and a criminal offense and the punitive punishment.

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چکیده:

نقش‌ها در خانواده پدیدآورنده روابط حقوقی بوده و اجرای احکام حقوقی زمینه ساز نظم بخشی به امور می‌باشند. گاه به سبب موقعیتی که حقوق خانواده برای زوجین به رسمیت شناخته، طرفین ضرری متوجه یکدیگر می‌نمایند و از حق خویش به ناشایستی بهره می‌گیرند و به اصطلاح از حق خویش سوء استفاده می‌کنند. در نوشتار حاضر به روش توصیفی-کتابخانه ای حقوق غیر مالی که در روابط زوجین، به امکان سوء استفاده از آن‌ها بیشتر توجه شده است، اشاره شده و با تبیین جهت گیری تعالیم اسلام در مورد سوء استفاده از حقوق غیر مالی زوجین و نهی از آن بدون پیش‌بینی ضمانت اجرا که آن را در زمره توصیه های اخلاقی در می‌آورد؛ ضرورت توسعه و تعیین ضمانت اجراهای کارآمد برای جلوگیری از سوء استفاده از حقوق غیر مالی و کنترل اعمال حقوق برای تحقق هدف قانون‌گذار و تحقق عدالت در مناسبات زوجین را بررسی و اثبات نموده و به دلایلی مانند قاعده لاضرر، اصل مصلحت و قاعده حفظ نظام و تعیین مجازات تعزیری به دست حکومت برای اثبات آن اشاره نموده است.

واژگان کلیدی: سوء استفاده از حق، ضمانت اجرا، حقوق غیر مالی، حقوق زوجین.