



## The effect of scientific progress on waiting period legal law

Naser EBRAHIMI BOUKANI<sup>1</sup>, Alireza LOTFI<sup>2</sup>, Kamel KIANI<sup>3</sup>, Hatam SOLTANI<sup>4,\*</sup>,

Fatemeh MOZAFARI<sup>5</sup>

<sup>1</sup>MA in private law, Attorney at law, Lecturer at Payame Noor Universities of Boukan

<sup>2</sup>Ph.d at Islamic law & Principles of Islamic jurisprudence, Assistant Professor in Islamic Azad university of Urmia

<sup>3</sup>MA in private law, office director of justice

<sup>4</sup>Ph.d student of private law in Islamic Azad university of Urmia, Lecturer at Azad Universities of Boukan

<sup>5</sup>MA in Jurisprudence and Islamic law, Lecturer at Payam Noor university, Azar Shahr, Mamaghan and Gogan, Iran

Received: 01.02.2015; Accepted: 06.06.2015

**Abstract.** Legal law of waiting period of a woman after termination of marriage has tremendous legal and religious consequences. A great number of women whose marriage have been terminated for different reasons are forced to obey the waiting period. Considering that the main philosophy of waiting period is avoiding the mixture of offspring and also scientific progress in the field of medicine indicated that mixture of offspring is absolutely impossible, it can be claimed that the basis for the above mentioned legal law in some types of waiting period in Holy Quran are mainly apparent rather than clear designation or indisputable verses. Therefore, the legal experts in jurisprudence and benefiting from modern technologies, religious experts can take actions toward the transformation of the above-mentioned legal law. This research investigated the effect of modern advancements on waiting period legal law in a descriptive method.

**Keywords:** Legal law – waiting period law – medical and paraclinical advancement termination of marriage – mixture of offspring

### 1. INTRODUCTION

The legal law in Islam extracted from the Holy Quran and the tradition of the holy Prophet Mohammad. The aim of making law is to gain the world and heavenly prosperity. The great and religious leaders have constantly urged the importance of the above mentioned characteristics of Islamic laws. The subject of " family " is of great importance in Islam, the tradition of the Holy Prophet and his household has always been a guide for Islamic Ummah. Islam has elaborated subjects (from very public subjects to the most private ones). Human beings gained relief and relaxation with the help of developments based on knowledge and technology. On the other hand, he faces problems and difficulties in different fields that need to be answered through a dynamic and initiative jurisprudence. Today medicine and scientific methods can solve the issues that human beings suffer from through the history in a scientific way. In the research we have tried to introduce these achievements. We seek to know with the existence of decisive and insuring technologies for avoiding the mixture of offspring's and the exact recognition of pregnancy or purity if we can make review about the basis of the legal law of waiting period? If yes, considering that the laws related to the waiting period exist in Holy Quran. Is it possible to change some provisions. In Islamic jurisprudence and the legal system of Iran or not? Ultimately changing in expedience can lead to transformation of law lower not? The waiting period in jurisprudence and civil law refers to the period in which the woman can't remarry due to the termination of marriage or death of her husband or dissolution of marriage or getting divorced. The researches in the field of family law stated several reasons. It seems that the most important reason for keeping waiting period is avoiding offspring admix. There are also other reasons for justification of the above-mentioned law. Considering that these researchers try to take into consideration the effects of scientific advancements on the

\*Corresponding author. Hatam SOLTANI

transformation of waiting-period law. Other justification for the law is out of the domain of this research. In the field of medicine and laboratory sciences there are achievements that question keeping waiting period. Science the wisdom and philosophy of waiting period is avoiding offspring admix. Nowadays DNA experiment samples can easily decide that the embryo belongs to which one of the two husbands or the sexual partner. Hence offspring mixture is rejected from the viewpoint of medicine. Can't it be said that so achievements unjustified the Philosophy of keeping waiting period.

## 2. LEGAL LAW

Since the rules of waiting period belongs to the domain of religious precepts. Sup posing that is no practical base for them and no expedieece justifies them anymore, they can't easily be dissolved. The religious definition of precept : "The urget order of Islam related to the deed of adult bound whether it is obligatory such as commands and prohibition or permission." The precept has been used in different meanings. But in this research it is discussed as a religious one. Religious Precepts are classified as follow : Primary, Secondary, Mowlavi, guideline, obligatory or positive, declaratory and ultimately state law. State law has been used in two different senses: Sometimes it refers to the law and precepts that the divine legislator has made it and it is found in Holy Quran, sunna and it is about the governing of society. Here the jurist or (faqih) is obliged to discovering, inferring and the executing the rules and laws. But sometimes the above statement mean " the authority " of the holy prophet. Imam and jurists in ruling affairs and it is orders and regulation which he has permitted for executing religious precepts and governing of society. Life in last centuries hasn't changed a lot. But in the modern age it has changed in different aspects. Changes in the style of living is multidimensional. This changes occurred in different aspects. The increased changes need modern jihad and jurisprudence. The huge mass of data and information are the main factor for transformation of laws and fat was in contemporary era. As the past jurist made fatwa according to the limited information and sciences of their age. But today human beings face the explosion of information. Many things that have been ambiguous ones in the past now they are clear. So, the jurist can give fatwa with more open-minded thoughts. On the other hand, the advancement of science is accompanied with various issues. Perhaps Moslems can't settle the world disputes on he basis of fanaticism and the knowledge which is out of date. Luckily in Islamic state, ijthihad can be update perpetually. The jurist can change the rules and precepts and according to time and place. The basis for state law is expedience and expedience is Constantly changing. Maybe there are so many rules that have been useful in the past. But obeying them has no expedience any more. There no other choice but to abolish them and make new rules according to the expedience of time and place.

## 3. WAITING PERIOD

"Edde" or waiting period is derived from numeration of days. It means counting the dayd after a woman doesn't have a husband for any reasons. Waiting period is the time between the purity and for menstruation of a woman. From viewpoint of jurisprudence : waiting time is : " the time after one woman separates from her husband and she is not permitted to remarry." In a more comprehensive definition : " in jurisprudence and civil law waiting period refers to the oeriod of a woman after termination of marriage due to getting divorced, death of husband. Abolishing of marriage." and she is not allowed to remarry during this period. The Holy Quran urges to keep the waiting period for widows ib different verses. The waiting period law is not an established law. It existed in Pre-Islam era too. It's period was more and also keeping it was more difficult. In Pre-Islam era a widow had to do many difficult and booting things. She was not permitted to attend many places and ceremonies. She was forced to live in a very difficult situations for a year. She had to wear her worst dresses, she couldn't use perfume. She wasn't allowed to make up or use any kind of jewelries. After a year she was forced to do awful and senseless things.

So, she was humiliated in a terrible way. For example she was forced to collect waste excrements of animals passing by her.

### **3.1. The Philosophy of waiting period**

The revealed prescripts aim at fulfilling human needs. It is originated from the wisdom of God. So, keeping the waiting period is in accordance with wisdom. But what is its philosophy and why it is different in various cases. Why is it for death of husband 130 days but for getting divorced it is three periods of " Purity" or cleanness and in some cases three months. Why is the waiting period of granting and expire of time in temporary marriage two purity and sometime two months? Maybe the answers to these questions lies in foundation and justification of waiting period. It should be said that waiting time is not just for Moslems or Islamic countries. It exists in non-Islamic Countries like France with some differences. In family law author's opinion – the main basis for waiting period – is to avoid offspring mixture or Purity of womb and respect to marriage. In jurisprudence, the justification for waiting period is more than the previous ones. It aims at forgetting the joy of common life during their common life. There are also other justification like the possibility for husband to return to his wife. Another justification is keeping life of embryo and holding oun for the late husband. But what is more important is the two first cases. In fact the main philosophy for keeping the waiting period and the most Comprehensive justification for it is avoiding the admix of offspring. The admix of offspring is the case where due to remarrying or illegal sexual intercourse with more than one man. Belonging embryo to any of the men would be doubtful. Although the main reason for keeping waiting period is purity of woman's womb, no jurist has commented if the woman's womb is surely pure, it wouldn't be necessary to keep waiting period. Both two cases of expediencies can't justify the waiting –period law. So these are the philosophy of waiting law not their reasons. Jurists have another reason. They believe that even if the woman's wob is free of any embryo, the waiting period should be kept. Though the philosophy of waiting period law is to rest assured that the womb is pure and to avoid the admix of offspring, there is no contradiction in cases that the purity of womb is obvious. There fore jurists have stated that even anal intercourse cause to keep waiting period. Tough in anal intercourse the womb will be pure. In cases where the philosophy of waiting period is to respect the previous marriage, the author of family law criticize the philosophy because they believe that the so-called respect is unilateral. Why aren't men obliged to avoid remarriage? They think that it is unfair just to prevent women from remarriage than the men.

### **3.2. Kinds of waiting period**

Waiting time exist in all Islamic sects because its law aexist in Quran. Of course there are differences in the five sectsof Islam. The same differences are the cause of different laws in these sects. In sunni sects waiting period is divided into two main parts. Generally the fourth part of waiting period -expire of marriage- doesn't exist in temporary marriage. The waiting period according to Shia jurisprudence is their period of " Purity " and in some cases 3 months and in Sunni jurisprudence it is three period of menstruation. In Imamia jurisprudence it is not necessary for menopauses women to keep waiting period. While according to Sunni jurisprudence the menopauses women are obliged to keep the waiting time and its period is equal to three menstruation. In temporary marriage which exists in Shia jurisprudence, waiting period is only two period of purity. ( in some cases 45 days) while the temporary marriage does not exist in Sunni fiqh. The differences of Islamic sects isn't finished here. In article 1154 civil law from Sia jurisprudence waiting period for a woman whose husband is dead is up to the time between the death of her husband and giving bbirth is more than 4 months and 10 days. Except when the woman is pregnant. If so, the waiting period of a woman whose husband is dead. It is up to the time she gives birth, provided that the time between the death of husbands and giving birth is more than 4 months and 10 days. In the four sects of Sunni, it is obligatory for women

whose husbands are dead to keep waiting time for 4 months and 10 days. Here it doesn't make any difference whether the woman is pregnant or not. The rules relating to marriage belong to those which made for termination of marriage and we can say that it is the consequences of termination of marriage. Waiting period can be classified as:

- 1- due to death of husband
- 2- due to getting divorced
- 3- due to dissolution of marriage
- 4- moder laboratory sciences

In this research we have used the laboratory sciences for describing all techniques and methods in order to diagnosing pregnancy.

### 3.3. Recognizing pregnancy or lake of pregnancy

The modern laboratory sciences let us to verify or deny the existence of embryo in the womb as soon as possible. There fore, we introduce the modern technologies briefly. For diagnosing the exact time of pregnancy we need to know LMP. LMP is the last menstrud period tat the woman has experienced. So, the beginning of pregnancy is LMP. In natural pregnancy with the help oh stomach sonography, pregnancy can be recognized from the six week and polar embryo can be recognized from the seventh week. In vaginal sonography it can be recognized from fifth or sixth weeks.

Method	Tie needed for recognizing pregnancy
Sonography	Fifth week after LMP
BHCG Serom	3-5 days after delaying monthly period
Gravindix Test	3-5 days after delaying monthly period

The methods to recognize Pregnancy according to time

It seems that family law authors are not aware of the power of technology. To prove paternity ancestry we can't comment anything for sure. No evidence can surly prove that a baby belongs to a man. Even the modern sciences with its amazing progress hasn't been able to be decisive in this field. Because as the experts say, serology and blood experiment can only show the negative aspect of ancestry not a positive one. In other words blood experiment can only prove the lack of ancestry from a scientific aspect. It can't prove the existence of ancestry decisively. There for in proving fraternity ancesrty we will have to rely just on speculative evidences. But it should be said that recognizing is not just through blood experiment. Laboratory science experts say that various medical experiments can recognize ancestry with certainty. One of the most helpful experiment is DNA recognition or genetic fingerprint. The specialty of DNA experiment is that unlike blood groups used to deny the fraternity, the DNA experiment is used to verify and prove the fraternity ancestry. The accuracy of DNA is so high for recognizing identify that if done well and in a scientific method, its results can be used reliably. The other very important use of this experiment in forensic medicine is in recognizing the relationship of faternity. The interesting characteristic of DNA experiment is that unlike other experiments it can be used to prove faternity. This experiment has positive effect in deciding identification and it proves faternity. We know that in contradiction between legal and law evidence, the legal evidence that is related to a special subject is preferable. There fore, if the laboratory results don't take as causes, at least we shouldn't be doubtful about the being of evidence. In this case the recognition of DNA considering the legality is the only to prove parentage or descent and it is pre fixable.

## 4. CONCLUSION

Recognizing pregnancy or lack of it, except irrare cases in waiting period in pregnant women before the shortest time of legal waiting period that in temporary marriage is forty five days is easily possible. The new sciences can tell us whether a woman is pregnant or not in a very short

time with certainty. On the other hand, the admix of offspring with the help of DNA experiment is rejected. But changing some laws relating to waiting period and considering its obedience aspect is not easily possible. However, in Islamic ruler can change some laws or even abolish them for the sake of expedience of Islamic Society. Since the basis of all Islamic law is on expedience and expediency changes according to circumstances. While the DNA experiment can recognize that the embryo in mother's womb belongs to whom, worrying about the admix of offspring is illogical. When pregnancy can be recognized from six weeks after monthly period. It is not necessary that a divorced woman to wait for go dagsor a woman whose husband is dead to wait for 130 days. Marriage prohibition for women who doesn't have any financial resources is dangerous both socially and psychologically. So the new sciences answer in this field is clear but the main question remains. Considering that the law relating to waiting period is derived from the Holy Quran can they be changed? In the previous discussion we dealt with one of the responsibility of Islamic ruler. Once of Islamic rules' authority is state law. The legal ruler not only can but is obliged to change some law that are in accordance with the expedience of Islamic Society. Basically it should be said that the verses in Holy Quran related to laws are mainly apparent and the reason for apparent law is the lack of cause or denotation to another concept. So, if there is another reason it isn't necessary to restore to apparent. It should be noted that though apparent like texts are part of indisputable verses, the practical procedure in courts trust in modern technologies. As in divorce lawsuit before introducing the couples to divorce notary, the woman is forced to recognize pregnancy or lack of it, in forensic medicine centers. It seems that it can be generalized to waiting period too. If forensic medicine confirms the pregnancy, the waiting period is up to the time of giving birth and after the widow can remarry but if it is not so, and the woman isn't pregnant, there is no need for the widow to keep waiting period. Considering that the Holy Quran contains the most advanced verses and it is a guide for human, the Iranian legislator can change the laws according to the expedience of society. In Iran civil law that is extracted from Imamia jurisprudence and some times it is the exact translation from fiqh, it is necessary to make some changes. Because of the dynamism of Islamic jurisprudence and it can answer all the question that arises from legislator and obligators. Considering the modern technologies in the field of medicine, the transformation of waiting period law is not only a heterodoxy but it is a must. These changes especially can be made in 1151, 1153, 1154, 1156, 1157 in civil law.

## REFERENCES

- [1] the holy Quran
- [2] Albagha, Mostafavi and other jurisprudence according to Imma Shafei sect
- [3] Jafari Langrudi Terminology of law fourth edition Tehran Ganje – danesh publication 1383
- [4] Jafari Langrudi, family law fourteenth edition Tehran Ganje – danesh publication 1386
- [5] Jaziri Abdolrahman jurisprudence according to the four religion vol four Egypt the center for Islamic information 1371
- [6] Horr Amoli Mohammad –bin- Hassn Vasaal-u- Shia Beirut Ahlulbait Le Ehia institution 1409
- [7] Khomeini Rulolla Velayate faghih jurist institution for publication of Imam Khomeini works 1373
- [8] Delgosha Zahra the heygien of offspring and mother Tehran Jamee Negar 1384
- [9] Diani Abdulrasul Family law marriage and its dissolution Tehran Omide – danesh 1379
- [10] Bostami Tabrizi lemia the comparison of waiting period in Iran and other countries Women Book Bahar Num43 1388
- [11] Safaie Said Hossein and Imami Asadolla Family law in brief tenth edition Tehran Mizan Pub 1385
- [12] Sanaie Zade Hossien Forensic medicine Tehran Dadgostari Pub 1387
- [13] Abdian Mir Hossein Factors influencing religious law research magazine Matin summer and autum number 15,16 1381

- [14] Tabatabaie Almizan interpretation of Quran translated by Misbah Yazdi Vol 2 Tehran the scientific foundation of Tabatabaie 1364
- [15] Alavi Qazvini Said Ali Kinda of waiting period and the situation of women without womb strategic studies of Women –research- scientific Quarterly Summer Num 40 1387
- [16] Qarzavi Yousef Contemporary jurisprudence viewpoints Translated by Ahmad Nemati Tehran Ehsan Pub 1384
- [17] Katoozian Naser Civil law of Family vol 1 first edition Tehran sherkat sahami Pub 1388
- [18] Goodarzi Faramarz and Kiani, Mehrdad forensic medicine for law students third edition Tehran 1385 Samt Pub
- [19] Mohaqeq damad said Mostafa jurisprudential research of Family law, marriage and its dissolution tenth edition Tehran A center for Promulgation of Islamic Knowledge 1382
- [20] Najafi Mohammad Hassan javaher –al- Kalam fi sharh Sharaye Al Islam Beirut Darolehia 1981
- [21] Yazdi said M Kazem " orvatol vosgha " Qom the center for Islam Promulgation 1423
- [22] Dongya Y. Yang and Camilla F. Speller, Technical Brief in Historical Archaeology, 1: 11-15, 2006