

A Critical Analysis of the Wife's Right to Request Divorce in the Case of the Husband's Inability to Provide Maintenance (Nafaqah): A Critique of Article 1129 of the Civil Code

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Introduction

Nafaqah (maintenance), as the provision of the wife's essential living expenses by the husband, is one of the fundamental pillars of the marital bond in Iran's legal system (influenced by Imami jurisprudence). In a situation where the husband refuses to pay maintenance or is unable to pay it, Article 1129 of the Iranian Civil Code provides the solution of granting the wife the right to request divorce. This article places the two scenarios of "refusal" (withholding despite having the ability) and "inability" (financial incapacity) alongside each other and prescribes a single ruling for both: the wife's right to divorce.

Statement of the Problem: The central issue of this study is the failure to distinguish between two entirely different situations of the husband in Article 1129 of the Civil Code: the "financially capable husband who refuses" and the "insolvent husband who is unable." In other words, is it logical and just to treat a husband who, despite having assets, refuses to pay maintenance (a deliberate and destructive conduct) in the same way as a husband who, despite his efforts and genuine willingness, is unable to pay due to poverty and destitution (an involuntary and often temporary situation), and to grant the wife the right to divorce in both cases? This conflation may lead to adverse social consequences such as the breakdown of needy families and may conflict with the higher purposes of Sharia, which seek to preserve the family unit.

Main Objective: The purpose of this article is to offer a critical jurisprudential-legal analysis of Article 1129 of the Civil Code, focusing on the scenario of the husband's "inability." The authors seek to critique the jurisprudential foundations of this article and to demonstrate that, in the case of inability, granting the wife the right to divorce not only lacks strong jurisprudential support but may also be detrimental to the wife and the institution of the family. Ultimately, the final aim of the research is to propose an alternative governmental solution instead of an unconditional resort to the ruling of divorce.

Research Questions: This article seeks to answer several questions: First, what are the

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jurisprudential foundations of Article 1129 of the Civil Code, especially with regard to the part concerning the husband's "inability," and are they consistent with the prevailing view of Imami jurists? Second, is there a substantive difference, from a jurisprudential and legal perspective, between a financially capable husband who refuses to pay and an insolvent husband who is unable to pay? Third, to what extent can the secondary ruling of "hardship and harm" ('usr wa ḥaraj) justify granting the wife the right to divorce in the case of the husband's inability? And finally, what is the appropriate governmental solution to prevent the collapse of needy families when the husband is unable to provide maintenance?

Research Hypothesis: The main hypothesis of the article is that Article 1129 of the Civil Code, in the part concerning the husband's inability, is based on a minority jurisprudential opinion, and that by adopting a distinction between inability and refusal, and by relying on the theory of governmental jurisprudence and establishing protective institutions, it is possible both to preserve the stability of the family and to prevent further hardship to the wife after divorce.

2. Research Background

This topic has been discussed in jurisprudential works. The prevailing view among early and later jurists is that the husband's inability is not a ground for the wife to annul the marriage or request divorce. Only some later jurists, relying on the principle of hardship and harm, have recognized this right for the wife, which has now become the basis of the current Civil Code. In the field of positive law, some articles (such as the article by Kaviyar and colleagues) have analyzed the contradictory judicial practice in interpreting "inability" and distinguishing it from "refusal." However, few studies have provided an integrated jurisprudential-legal critique of this article together with a governmental solution.

3. Research Method

This research was conducted using a descriptive-analytical method with a critical approach. Data collection was library-based, and data analysis was carried out using jurisprudential-ijtihadi inference. The authors have used jurisprudential and legal principles such as the principle of hardship and harm and the purposes of Sharia as an analytical framework. After analyzing the evidence, the legislature's approach (following the minority opinion of jurists) is criticized, and the theory of distinction (separating inability from refusal) is strengthened. Finally, relying on a comprehensive ijtihadi method (governmental jurisprudence), a policy-based and extra-judicial solution to the problem is proposed.

4. Research Findings

- **The necessity of distinguishing between "inability" and "refusal":** From a jurisprudential and logical perspective, there is a substantive difference between a husband who is able but does not pay (refusing) and a husband who cannot pay (incapable). The former arises from bad faith and deliberate violation, while the latter arises from an external and involuntary situation (poverty). A single ruling for these two situations is unjust and contrary to equity.
- **The non-receipt of maintenance due to the husband's inability does not necessarily mean that the wife is permanently in a state of hardship (unbearable difficulty).** The

wife may be able to continue her life with family or social support. Moreover, divorce itself may create a greater hardship (socially, economically, and emotionally) for the wife.

- **A solution based on governmental jurisprudence:** Instead of an immediate resort to divorce, the desirable solution based on the purposes of Sharia is the intervention of the Islamic government. Establishing a national support fund or institution (similar to the fund for compensation for bodily injuries in accidents) that provides the wife's maintenance in the form of an interest-free loan (qard al-hasan) or a non-repayable grant in the case of the husband's genuine inability could prevent the collapse of thousands of needy families. This measure is a clear manifestation of realizing the "preservation of the system" and "protection of the family" as two major purposes of Sharia.

5. Conclusion

Article 1129 of the Civil Code, by extending the ruling of "refusal" to "inability" and granting the wife the same right to divorce in both cases, requires fundamental revision. This study showed that the jurisprudential foundations of this extension are weak and contrary to the prevailing view of jurists. The husband's financial inability, by itself and without establishing continuous and unbearable hardship for the wife, is not an appropriate ground for dissolving the marriage contract. The correct approach is to distinguish between these two institutions: in the case of refusal, the wife's right to divorce is preserved, but in the case of inability, the Islamic government is obliged to fill the family's financial gap through social support mechanisms. This approach not only preserves the family as the primary unit of society but also prevents the wider harms of forced divorce.

Keywords: *Nafaqah* (Maintenance), inability to provide maintenance, right to request divorce, *'Usr wa Haraj* (hardship and difficulty), governmental jurisprudence