

The Effect of the Passage of Time on Marital Alimony

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The Effect of the Passage of Time on Marital Alimony

(A comparative Study)

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ABSTRACT

The passage of time after the marital alimony lawsuit is one of the most important issues that affect the life of the family from the financial aspect. Some of the jurists have decided that the right to marital alimony does not lapse and it is not acquired with the passage of time, whereas other jurists, and for certain considerations of it, are due to the stability of dealings among members of society. They decided that the owner of the right who does not require his right in spite of the fact that he was able to do so for a specific period of time, is as evidence either that he had fulfilled his right or discharged the debt from it, so they lapse his action with the passage of time. After the extinction of this period, it is not permissible to hear the case, and by reference to the position of the Iraqi legislator, we find that the passage of time has generally been regulated in the civil law. The passage of time on the marital alimony action and its impact was not regulated by a text in the Personal Status Law, whose legislature was limited to regulating the effect of the passage of time on the past alimony of wife. In this research, we will also clarify the position of the Arab legislations which dealt with the subject.

INTRODUCTION

First; An introduction to the research topic

The Alimony is one of the marital rights arising from the marriage contract and owed by the husband, and in the case that the husband fails to perform it, the wife has the right to claim it judicially. The question which may be raised in this regard is that in the case that alimony is due to him, how long will the right of the wife to claim it judicially? Does her silence for a

period of time without an excuse concerning this judicial claim prevent hearing her action? This is the focus of our research entitled : (The effect of the passage of time on marital Alimony).

Second: The Problem of the Research

This topic is one of the thorny issues which is worth studying carefully because it is closely related to the rights of women to alimony. This necessitated shedding light on the position of both Islamic jurisprudence and the positive legislation, including the Iraqi Personal Status Law and comparative legislations (Syrian, Jordanian, Emirati, Kuwaiti). From his part, the Iraqi legislator did not organize the effect of the passage of time on the marital alimony lawsuit in the personal status law. He did not take the forfeiture of the right to alimony itself, in order to avoid the religious and worldly problems that occur. We will clarify the importance of adhering to the lapse of the period by the beneficiary, with the other party not acknowledging the right as a condition for its implementation. Therefore, we will show that this system is one of the legal systems that are indispensable in any society for the sake of the stability of transactions between individuals, in appreciation of the principle of respect for stable conditions that have passed over a period of time that is sufficient to reassure them, more than it is based on the presumption of payment.

Third: Research Questions

- 1- What is meant by the passage of time that prevents hearing the case?
- 2- What is the effect of the passage of time in the marital alimony action ?
- 3- Does the passage of time lead to the forfeiture of the right to marital alimony as a religion or only a judiciary?
- 4- Is there anything contained in the Iraqi Personal Status Law that indicates the effect of the passage of time that prevents hearing the marital alimony lawsuit?

Fourth, the Plan of the Research

We divided this research as follows:

The first part: Defining the passage of time

The first section : Defining the passage of time

The second section : The passage of time that prevents hearing the case

The third section : The provisions resulting from the passage of time

The second part :The alimony and the effect of the passage of time in it.

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The first section : The position of jurisprudence and law regarding the lapse of alimony over time

The second section : The position of jurisprudence and the law from the time when alimony is considered a debt owed by the husband

Conclusion

Results and Recommendations

The First Part

Defining the passage of time

In this part , we discuss the definition of the passage of time in the first section , and the statement of the passage of time that prevents hearing the case in a second section. Then it is followed by a statement of the most important provisions resulting from the passage of time in the third section which are as follows:

The first section

Defining the passage of time

To clarify the meaning of the passage of time in its general form, we must clarify the linguistic concept, and then we will present its idiomatic concept, according to the following two branches:

The first branch

Defining the passage of time in the language

To determine the linguistic meaning of the passage of time, this requires explaining the linguistic connotation of the vocabulary of this sentence as a compound term, as follows:

The word pass is the infinitive of what has passed, over the days and years it has gone and passed (¹).

The word “time” or “period ” in the language it is a noun indication a little time and a lot, and its plural is times and periods , and when we deal with the two times this means that the time is lax (²). We should bear in mind that the concept of the passage of time in the

) Dr. Ahmed Mukhtar Abdel Hamid Omar: Dictionary of the Contemporary Arabic Language, 1, Volume 3, Dar Alam Al-Kutub, No Publication Year, pp. 2085-2086

²) Ibrahim Mustafa, Ahmad Al-Zayyat et al.: Al-Mu’jam Al-Wasit, Revision: (The Arabic Language Academy), part 2, Dar Al-Da’wah, without a year of publication, Bab Al-Mim, p. 862

language corresponds to (prescription): by adding the signifier from ancientness , the thing has gone forward, so it is old, unlike the modern.

Prescription means the lapse of a long time since the existence of the thing, and the prescription of the action means : “The passage of a long period of time since the suit has not been moved by its owner, and with the passage of time the right to hear the suit lapses. (3)”

Accordingly, we conclude that the concept of the passage of time in the language means: the extinction of a specific period of years and the claim for the right to alimony or the implementation of its ruling lapses; That is, the claim of the right becomes void due to the passage of legal time over it(4).

The second section

Defining the passage of time

Muslim jurists took the rule of the passage of time and its impact on changing the provisions , and they did not adopt a specific definition of the passage of time, so they dealt with it in the general sense which is:(The change of provisions are not changed over time) (5)

Referring also to the Journal of Judicial Judgments, we notice that it organized the passage of time and its impact on judgments without giving a specific definition of it, it is important to say that the Journal adopted the concept of the passage of time in its general sense: preventing hearing the case before the judiciary after leaving it for a legally prescribed period(6). Throughout this concept, we can come across that the prevention of hearing the case after it has been left for a period of time is considered as an independent judgment as long as its period is subject to a limitation by the law most of the personal status laws in Arab

³⁾ Ibid, Ibrahim Mustafa, Ahmed Al-Zayat, Hamed Abdel-Qader and others, part 2, , p. 719 and p. 720

⁴⁾ Ibid, (Free translation) By: Dr. Ahmed Mukhtar Abdel Hamid Omar, Volume 3, , p. 2086.

⁵⁾ The meaning of the rule: that if the previous provision was based on custom, or the interest of the people, then the custom changed or the people’s interest changed, then the Sharia ruling, which is decided in this rule, must be changed in order to achieve the interest and repel evil,(Dr. Muhammad Mustafa Al-Zuhaili, Al-Wajeez in the Fundamentals of Islamic Jurisprudence, Volume 2, Dar Al-Khair, Damascus / Syria, 2006, p. 339) . An example of this is the introduction of the system of passage of time on marital rights, including the right of alimony, in order to stabilize transactions among individuals taking into consideration the principle of respect for stable conditions that have passed over time enough to reassure them more than it is based on the presumption of fulfilling and repaying the debt. The principle of the passage of time must be taken into account ,that is to say the extinction of obligation is not a debt..

⁶⁾ Ali Haidar, Durar Al-Hakam”The Pearls of Judgments” in Sharh Al-Majalla, I 1, Part 4, Dar Al-Jeel, year 1991, the articles that mentioned the passage of time are (1660 to 1675), pp. 295-298

countries have adopted it⁽⁷⁾. The system of the outdated (marital alimony) lawsuit, without forfeiting the right itself, this is influenced by the Islamic jurisprudence, to protect stable social and economic conditions and prevent their destabilization. This has put an end to disputes between them and will prevent them from claiming rights if their owners have been silent about for a while. So this silence is considered as an evidence of acquittal or waiver of the right. Silence about the right missed the enjoyment of legal protection, provided that this silence is not predicated on tolerance, as in the case of the marital relationship in order to preserve the good and lasting relationship between the spouses.⁽⁸⁾ Therefore, the important condition in the issue of the prescription of rights is that failure to use the right during a certain period forfeits the right to claim, because non-use is an evidence of consent⁽⁹⁾

Thus, we can define the passage of time as “the passage of a legally defined period of time on the right to alimony without the wife claiming it and this leads to the extinction of her right to hear her claim.” The wife neglect of not using her right or silence about it is an evidence of her consent to the loss of her right to enjoy judicial protection to claim alimony. It entails the extinction of the right from judicial point of view and it is not a debt.

The Second Section

The passage of time that prevents hearing the case⁽¹⁰⁾

There was a dispute among Muslim jurists on the issue of the legality of the passage of time that prevents hearing the case, so they are divided into two directions:

The first direction: (Hanafi, Hanbali, Dhahirah and Imami)⁽¹¹⁾ refer to not forfeiting the right to claim the lapse of time, but rather the case is heard and considered⁽¹²⁾

⁷⁾ The Iraqi Personal Status Law No. (188) of 1959, the Syrian Personal Status Law No. (5) of 2019, the Jordanian Personal Status Law No. (15) of 2019 and the UAE Personal Status Law No. (5) of 2020 adopted the statute of limitations for the marital alimony suit. Kuwaiti Personal Status Law No. 66 of 2007, as amended. We will mention the texts of this in the aforementioned laws, successively

⁸⁾ The amended Iraqi Civil Law No. 40 of 1951 regulated the rules for stopping the validity of the period within the excuses rule. It was mentioned as an example but not limited. See Article (35/1) of the Iraqi Civil Code.

⁹⁾ For more details on the conditions for the passage of time, see: D. SaharHayalGhanim, The Theory of the passage of time that prevents hearing the lawsuit, Ph.D. thesis submitted to the College of Law, University of Mosul, 2016, pp.30-33

¹⁰⁾ The Iraqi Personal Status Law and the laws in question did not agree about the issue of provision of a marital alimony suit in terms of its forfeiting by the passage of time or not, except for the issue of past alimony, which we will present successively in this research.

¹¹⁾ IbnAbidin, Al-Muhtar's Response to Al-Durr Al-Mukhtar, 2nd Edition, Part 5, Dar Al-Fikr, Beirut, 1992, p. 420; Muhammad bin Saleh bin Muhammad al-Uthaymeen, Al-Sharh al-Mumti' Ali Zad al-Mustaqni', 1,

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The proponents of this trend cited the following arguments:

1- His saying The Prophet (may God's prayers and peace be upon him): "The right of a Muslim is not invalidated even if it is outdated" (13)."

2- It has not been proven in the texts that the hearing of the case is restricted to a specific time. Rather, a person has the right to claim whatever he wants if the conditions for the validity of his claim are met. In this case, the judge has the authority to assess the judgment and not in light of the evidence, except that he rejects it or not, except that he rejects it with the availability of evidence with the presumption of hand placement (14)

We believe that these evidences are insufficient because the issue of the prescription is not workable, and it is assumed that the holder of the right is neglectful of his right, here he does not deserve any protection in that, rather he deserves a penalty for doing this (15)

The second trend: The (Hanafi, Maliki and some of the later Hanbalis) (16) refer to the failure to hear the case after the passage of a specific period specified by some as thirty years, and others by thirty-three years, and thus this trend led to the extinction of the right to claim the right after the silence of its owner for a known period of time and without a legitimate excuse.(17)

The proponents of this view cited the following arguments:

Volume 13, Dar Ibn al-Jawzi, year 1428 AH, pg. 200; Abu Muhammad Ali bin Hazm, Al-Muhalla Bi-Athar, I 1, C6, Dar Al-Kutub Al-Ilmiyya, Beirut, 2003, p. 371; Allama al-Hilli, Tadhkirat al-Fuqaha', investigation (The Aal al-Bayt Foundation, peace be upon them, for the revival of heritage), i 1, part 11, year 1420 AH, with no place of publication, p. 74

¹²⁾ Saddam Oud, Ahmed Hashish: The provisions of prescription in Islamic law (a comparative study), a Master Thesis submitted to the College of Graduate Studies, University of Jordan, 1992, p. 24

¹³⁾ I did not find the origin of this Hadith, and I found this Hadith in the books of the Malikis, where it was mentioned by the Malikis in the book of Abu Muhammad Abdullah al-Nafrawi, The anecdotes and the additions to what is in the Mudawana from other mothers, achieved by (Muhammad Abdel Aziz al-Dabbagh), vol. Dar al-Gharb al-Islami, Beirut, 1999, p. 20. And without attributing the author of the book to any source of the hadith

¹⁴⁾ Saddam Oud, Ahmed Hashish, op. cit., , p. 24-15

¹⁵⁾ Here the procedural right extinct without the substantive right. For more, see: D. AjjadThamerNayef Al-Dulaimi, The Prescription and Extinction of the Civil Case with Expiration of Time, Al-Jeel Al-Arabi Library, Mosul, 2009, p. 13

¹⁶⁾ IbnAbidin, Al-Muhtar's Response to Al-Durr Al-Mukhtar, Edition 2, Part 6, Dar Al-Fikr, Beirut, 1992, p. Muhammad bin Ahmed bin Alish, Manah Al-Jalil, an expert explanation of Khalil, Part 8, Dar Al-Fikr, Beirut, 1989, p. 575; Muhammad bin Saleh bin Muhammad al-Uthaymeen, the abstaining explanation of Ali Zad al-Mustaqni', 1, volume 15, Dar Ibn al-Jawzi, 1428 AH, p 33

¹⁷⁾ This view was adopted by the Iraqi Personal Status Law and the laws of the countries under comparison in the matter of the marital alimony lawsuit, with its difference in the period between one and two years.

1- The proponents of this opinion argued in favor of the interest, as evidence for the principle of prescription, which was found to serve the stable conditions in the transactions which have passed a sufficient time for reassurance about them. Thus, the guardian may restrict these rights in order to organize the relations of individuals in the community and preserve its safety⁽¹⁸⁾.

2- The inference by blocking the pretext, as it is a jurisprudential source from which provisions are derived, and the jurists inference with this source is represented in its legitimacy to block the path of fraudsters and those who have the ability to forge and change the truth with allegations that have no basis other than assaulting people.⁽¹⁹⁾Through the foregoing and clarifying the opinions of the jurists on the issue of the legality of the passage of time in not hearing the case, we prefer the group that decided not to hear the case due to the lapse of time, due to its consistency with the requirements of the times and not violating the principles of Islamic Sharia, which is to achieve the public interest.

The third section

Provisions arising from the passage of time

With the passage of time, some provisions will be followed which we list as follows (20):

First: the extinction of right

. One of the effects of the lapse of time is the forfeiture of the right from its owner to claim his right, and this is achieved by fulfilling its conditions, namely consent to the damage.

If the right holder is aware of his right and is satisfied with the damage, and does not use the right within its duration, then this is an evidence of his consent, as in the case of the right seeker aware of his right and did not use this right.

Second: No recourse of right

One of the consequences of forfeiting the right due to the passage of time is that the right cannot be reverted, in application of the rule (the lapsed does not return) ⁽²¹⁾.As it becomes

¹⁸⁾ Dr. Muhammad Salam Madkour: The Permissibility Theory of Fundamentalists and Jurists, 2nd Edition, Dar Al-Nahdha Al-Arabiya, Cairo, 1984, p. 84

¹⁹⁾ Marwan Muhammad Rushdi, The Rule of Blocking Pretexts, Al-Rushd Library, Kingdom of Saudi Arabia, 2009, p.165

²⁰⁾ These effects only apply to financial marital rights, including (marital alimony). As for non-financial rights, such as marriage, divorce, and the waiting period, these effects do not apply to them even if a long period of time has passed without a claim due to their attachment to the solution and sanctity. In addition, the effects of the passage of time on marital alimony are only before the judiciary, but in terms of religion, the right does not fall and remains forever.

clear from this rule that if something extinct from the rights in a drop, it does not return after its extinction just as the non-existent does not return, and the extinct becomes non-existent after its fall and does not return. Throughout what preceded , it becomes clear to us that the passage of time since the performance of the right, or not using it (i.e. leaving it), prevents hearing the case before the court, for the sake of stabilizing transactions among individuals, in appreciation of the principle of respecting stable conditions. Likewise, whoever neglects his right for the specified period becomes unworthy of any protection provided by the judiciary, and he will bear the burden of his negligence and insufficiency in this by forfeiting his right⁽²²⁾

The second section

Alimony and the effect of the passage of time

In this section , we treat the position of jurisprudence and law regarding the lapse of marital alimony as one of the effects of the passage of time on it, and the extent to which marital alimony is considered a debt owed by the husband, so we divide this subject according to the following two parts:

The first part

The position of jurisprudence and law on the lapse of alimony over time

We divide this part according to the following two branches:

First branch

The position of jurisprudence on the lapse of alimony over time

The jurists differed regarding the lapse of marital alimony with the passage of time on the following statements:

The first saying: The wife alimony does not cease with the passage of time at all, and the wife returns to her husband with the previous alimony, and it becomes a debt in the husband's custody if he refrains from paying it after it was obligatory on him without the need for her to

²¹⁾ What is meant by lapsed here is the judgment or the disposition that was completed, and the lapsed is an adjective for a noun omitted is the judgment or the disposition, and its omission is by the act of the person concerned or by the legal omission, and the meaning does not return: i.e. to pour; Like the dead, there is no way to return it except for a new reason that will return the same, not the original , Dr. Muhammad Sidqi bin Ahmed Al Borno, Al-Wajeez in Clarifying the General Rules of Fiqh, 4th Edition, Part 1, Al-Resala Foundation, Beirut, 1996, p.369

²²⁾ Dr. Muhammad Obaid Abdullah al-Kubaisi, The provisions of time in Islamic law, Volume 2, Al-Insha Press, Baghdad, 1977, p. 307 (Free translation).

consent to her or the judge's judgment on her, and this is what the Shafi'is and Hanbalis said.⁽²³⁾

They cited the following arguments:

1- It was narrated that Omar Ibn Al-Khattab (may God be pleased with him) wrote to the commanders of the soldiers about men who were absent from their women, ordering them to spend or divorce them, and if they divorced them, they would be sent with alimony for the time which has already passed.⁽²⁴⁾

. This effect indicates that alimony is like a debt that is not waived even if the divorce takes place ⁽²⁵⁾

2- The wife alimony is a right that is obligatory with the solvency and insolvency, so the alimony does not lapse with the passage of time.⁽²⁶⁾

3- Alimony has been obligatory, and the principle is that everything that is obligatory on a person is not forfeited except by payment or discharge, like all other duties ⁽²⁷⁾

The second saying is that the wife alimony lapses with the passage of time after it becomes obligatory, and the wife does not have the right to ask her husband for past alimony before filing the case before the judge, but it is decided for her from the time of filing the case, and this is what the Hanafis and a version of Ahmed stated.⁽²⁸⁾

They cited the following arguments:

1- The wife alimony is legitimate for sufficiency, so it does not become a debt in the custody except by decree or consent, in analogy with the alimony of parents and children which does not become a debt as soon as time passes ⁽²⁹⁾.

²³⁾ Ahmed bin Muhammad bin Ahmed bin Al-Qasim, *The Door in Shafi'i Jurisprudence, investigation:* (Abdul Karim bin Hunitan Al-Omari), Part 1, Dar Al-Bukhari, Medina, 1416 AH, p. 346; Ishaq bin Mansour bin Bahadam, Abu Yaqoub al-Marwazi, *Issues of Imam Ahmad bin Hanbal and Ishaq bin Rahwayh*, Part 4, Islamic University of Madinah, Saudi Arabia, 2012, p. 1880

²⁴⁾ Abu Abdullah Muhammad bin Idris Al-Shafi'i, *Al-Musnad*, Volume 1, Dar Al-Kutub Al-Ilmiyya, Beirut, 1400 AH, p. 267

²⁵⁾ Mowaffaq Al-Din Abdullah bin Qudamah, *Al-Mughni*, Part 8, Cairo Library, 1968, p. 202

²⁶⁾ Mansour bin Younis bin Salah Idris Al-Bahooti, *Scouts of the Mask on the Board of Persuasion*, Volume 5, Dar al-Kutub al-Ilmiyya, p.. 480

²⁷⁾ Mansour bin Youssef Al-Bahooti, vol. 5 *Ibid*, , pp. 480-483

²⁸⁾ Alaa al-Din al-Kasani, vol. 4, previous source, pp. 28-29; Alaa Al-Din Abu Al-Hassan Al-Mardawi, *Fairness in knowing the most correct of the dispute*, 2nd edition, part 9, Arab Heritage Revival House, without a year of publication, p. 353

²⁹⁾ Dr. Muhammad bin Saud al-Khamis, *The Impact of Prescription on the Financial Duties*, Research Submitted to the Journal of Justice at Imam Muhammad bin Saud Islamic University, Riyadh, Issue (51), 1432 AH, p. 125

2- The wife alimony is obligatory day by day, as it is the same as the alimony of a relative, so it is waived by her delay if the judge does not impose it.⁽³⁰⁾

3- When the wife has dispensed with the alimony of the past by the passage of time, so in this case it lapses as the alimony of the relative ⁽³¹⁾.

The third saying: the wife alimony lapses with the passage of time if the husband abandons spending on his wife because of his insolvency; That is, it lapses only at the time of his insolvency, the view of the Malikis.⁽³²⁾

And their argument for that is the verse from the Glorious Quo'ran : “ Let the man of means expend according to his means. And the man whose resources are restricted, let him expend according to what GOD has given him”.⁽³³⁾This one is insolvent and he is not given anything, and he is not charged with anything. If it lapses and she spent something on herself at the time of his insolvency, then she does not return any of that to him because she forfeited it in this case.From what preceded, we prefer the opinion that the wife alimony does not lapse with the passage of time, and that it becomes a debt owed by the husband when he refrains from paying it until he pays him or his owner absolves him from him, and this also confirms the honorable Prophetic Hadith: (The right of a Muslim does not forfeit even if it is outdated)⁽³⁴⁾

The second branch

The position of the law on the lapse of alimony over time

The position of the law came in two directions:

The first trend: He adopted what the Shafi'is and Hanbalis held, including the Iraqi, Syrian, Emirati and Kuwaiti Personal Status Law, where the Iraqi legislator stipulated in Article (24/1) that: time to spend on it.Here, we notice that the Iraqi legislator has made it clear that marital alimony is obligatory for the husband, and that it does lapse from his responsibility with the passage of time, if he refrains from performing it, this provision does not require the

³⁰⁾ Mowaffaq Al-Din Abdullah bin Qudamah, Al-Mughni by IbnQudamah, Volume 8, Cairo Library, 1968, p.202

³¹⁾ Al-Mughni by IbnQudamah, Volume 8, previous source, p. 202

³²⁾ Muhammad bin Abdullah Al-Kharshi, a brief explanation of Khalil Al-Kharshi, part 4, Dar Al-Fikr, Beirut, without a year of publication, p. 195

³³⁾ Surat Al-Talaq (The Divorce) : Verse (7

³⁴⁾ Previously stated.

consent of the two parties or the judiciary of the judge. It shall be judged for no more than a year.

And it was set for a period of two years prior to the claim and from the date of the husband's refusal to spend with the Syrian legislator, according to what was mentioned in Article (78), which states that:

1. The wife shall be judged for alimony from the date the wife refrained from the required alimony.

2. No more than two years of alimony shall be judged prior to the prosecution. The Kuwaiti stipulates in Article (78) that: (The wife's alimony is considered from the date of abstaining from spending with it being a debt on the husband that does not depend on judiciary or mutual consent, and does not lapse except by payment or discharge), taking into account the following paragraph: (The lawsuit shall not be heard for a previous period of more than two years, the end of which is the date of filing the lawsuit, unless it was imposed by mutual consent...). As it made the consent between the spouses a basis for judging over a period of two years, which prevented hearing the case, without losing the right to alimony.

This is the direction of the UAE legislator in Article (67), which states that: (The wife's alimony is considered from the date of abstaining from spending while it is obligatory as a debt to the husband without interruption to the judiciary or by mutual consent. three years from the date of filing the lawsuit, unless imposed by mutual consent).

We all agree with the view of the Iraqi legislator and not to lose the right to alimony with the passage of time, even if the period for which each of them was used to prevent hearing the case varied with what the comparative legislation is used to considering as an exception to the prevention of hearing the case.

The second trend: They adopted what the Hanafis and Ahmad said in recitation , including the Jordanian Personal Status Law, according to the text of Article (64) which states that:

(the alimony is obligatory either by the consent of the spouses to a certain amount or by the judge's ruling, and the alimony for the period that preceded the consent or the request from the judge is forfeited). Article (65) states that :

(If the present husband refrains from spending on his wife and the wife requests alimony, the judge rule on her alimony as of the day of the request, and order him to pay it to him). Here, the wife does not have the right to ask her husband for past alimony before filing the lawsuit before the court, but it is decided for her from the time of filing the lawsuit).

The second section

The position of jurisprudence and law from the time of considering alimony a debt owed by the husband

We explain this section by dividing it into the following two subsections:

The first branch

The position of jurisprudence regarding the time when alimony is considered a debt owed by the husband.

:The jurists differed on this issue with two opinions

The first saying: The Hanafi school held that alimony does not become a debt in the husband's custody except by one of two things: the judge's ruling on it, or the spouses consent on its estimation.⁽³⁵⁾

The Hanafis inferred that the wife's alimony means the relatives⁽³⁶⁾

This is the meaning of compensation, it is a compensation in one way because it is a penalty for withholding the husband's right from enjoyment, and it is a connection in another way in terms of establishing the right of Sharia.⁽³⁷⁾

The second saying: The majority of jurists adopted it : (Shafi'is and Hanbalis in the most apparent of the two versions, Malik and the Imamiyyah), and that alimony becomes a debt as soon as it becomes obligatory, and the husband refrains from paying it⁽³⁸⁾

They cited the following arguments:

1-What is mentioned in the Glorious Qur'an: the Almighty's verse: (And it is upon the one who is born to him that they should provide for them and clothe them in a reasonable manner) ⁽³⁹⁾As an evidence of the husband's obligation to alimony and its obligation on him
As an evidence of the husband's obligation to alimony and its obligation on him

2- It was narrated that Omar Ibn Al-Khattab (may God be pleased with him) wrote to the commanders of the soldiers about men who were absent from their women, ordering them to

³⁵⁾ Muhammad bin Ahmed Al-Sarkhi, Al-Mabsout, Part 5, Dar Al-Maarifa, Beirut, 1993, p. 184; IbnAbidin, vol. 3, previous source, p. 595

³⁶⁾ It means the gift, see: Dictionary of the Language of Jurists, Part 1, previous source, p. 376

³⁷⁾ Muhammad bin Ahmed Al-Sarkhi, vol. 5, previous source, p. 184

³⁸⁾ Abu Abdullah Muhammad bin Idris, The Mother, part 5, Dar al-Maarifa, Beirut, 1990, p. 96; IbnQudamah, Al-Mughni, Part 8, previous source, pg. 202; Abu Abdullah Muhammad bin Ahmed, Healing Al-Khalil in a closed solution to Khalil, investigation (Dr. Ahmed bin Abdul-KarimNajib), vol. 1, Najbawiyeh Center, Cairo, 2008, p. 584; Munther Abdel Aziz Al-Shamali, Personal Status in Jaafari Jurisprudence, Mansha'at Al-Maaref, Alexandria, 2006, p. 213

³⁹⁾ Surat Al-Baqarah: Verse (233)

spend or divorce them , and if they divorced them , they would be sent with alimony for the time which has already past.⁽⁴⁰⁾

The second branch

The position of the law on the time when alimony is considered as a debt owed by the husband

The position of the law is in two trends:

The first trend: the laws that considered the debt of alimony as a strong debt

They are the laws that are adopted by the opinion of the majority of jurists, including the Iraqi, Syrian, Emirati and Kuwaiti Personal Status Law, and considering that alimony, after it becomes obligatory and becomes a strong debt, is not forfeited except by performance or discharge, and it is considered as a debt owed by the husband from the time he refrains from spending on the wife.⁽⁴¹⁾

This matter was settled by the Iraqi Court of Cassation, as alimony was considered a debt owed by the husband for a period not exceeding one year. ⁽⁴²⁾

In one of its decisions the Court stated that: (The date of leaving and not spending has been proven to the court with the approval of the defendant's agent. As for his plea that the plaintiff left the apartment due to security conditions, this does not forfeit her right to alimony, because the issue of security conditions is not a failure of the plaintiff).

During the long period of abandonment, he could file a complacent lawsuit against her, and since the past alimony is considered a debt owed by the husband for a period not exceeding one year from the time of his refusal to spend on it, he decided to ratify it. ⁽⁴³⁾ The past alimony is estimated and its increase is judged in light of the husband's financial condition and the cost of living during the aforementioned alimony period, and the economic changes during that period must be taken into consideration, as it was stated in a judgment of the Iraqi Court of Cassation that:

⁴⁰⁾ Abu Abdullah Idris Al-Shafi'i, Ibid, p. 203

⁴¹⁾ See the text of Articles 24 and 32 of the Iraqi Personal Status Law, Article 79 of the Syrian Personal Status Law, Article 65 of the UAE Personal Status Law and Article 78 of the Kuwaiti Personal Status Law.

⁴²⁾ Although we see that the religious ruling is obligatory for alimony from the time of abstaining from it, unless the wife's silence in her claim is evidence of forfeiting her right, but the issue of determining the year is to put an end to neglect and it is not the forfeiture of the right, but rather by not hearing the case for claiming alimony for a period of more than a year

⁴³⁾ Federal Court of Cassation Decision No. (5914) on 12/12/2011, Judge Ahmed Mahmoud Abdel-Daibel, Brief Personal Status in Iraqi Law and Islamic Sharia, Baghdad, Dar Al Asdeqaa, 2009, p. 48

((The plaintiff at the Personal Status Court claimed in this case that she had previously obtained two decisions obligating the defendant to pay past and continuing alimony, and since it is not sufficient to meet the requirements of living, so she requested to invite him to plead and order an increase in the imposed alimony. ⁽⁴⁴⁾)

The wife is not entitled to claim past alimony during the pleading, because it is considered an increase in the lawsuit, and the court is not allowed to rule on past alimony unless it is claimed in the lawsuit petition, as it has returned to accord with her husband from the mentioned date. ⁽⁴⁵⁾ ⁽⁴⁶⁾.

The second trend: the laws that did not consider the alimony debt as a strong debt except with conditions

This is what was stated in the text of Article (69) of the Jordanian Personal Status Law: (The judge imposes, from the time of the request, alimony for the wife of the absent or missing person in his money, on his debtor, on his depositor, or on those who are in the same position if they agree to money and marriage or deny them or one of them after Proving the impediments to denial and after taking it in all cases, the legal oath stipulated in Article (68) of the law). ⁽⁴⁷⁾)

The Jordanian legislator differed from the position of the Iraqi, Syrian, Emirati and Kuwaiti legislators, which is that the imposition of alimony should be from the date of the request and not from the date of refusal, and by this he has dropped the previous alimony prior to filing the request, and the judge does not rule on its alimony from the day of the request, not after taking the legal oath. Likewise, the Jordanian legislator differed from the Iraqi legislator and the rest of the laws in question in the Jordanian legislator's consideration of the opinion of the Hanafi school, which states that the alimony does not lapse after it becomes a debt in the husband's custody through payment or release.

⁴⁴⁾ Federal Court of Cassation Decision No. (3356) Personal Status and Materials Authority for the year 2018 on February 18, 2018, QasimFakhri Al-Rubaie, Principles of the Federal Court of Cassation, Personal Status Department, Part 2, Al-Kitab Press, Baghdad, 2019, p. 152

⁴⁵⁾ Decision No. (162) dated 3/31/1965, FawziKazem Al-Mayahi, friend of the lawyer in personal status cases, House of Books and Documents, Baghdad, 2011, p. 115.

⁴⁶⁾ The Syrian judiciary also stated: (If the appellant leaves the executive claim in the alimony claim for more than five, it must be dropped and it is forbidden to claim it again), Decision No. (168) dated 28/7/1972, AdibIstanbuli, Saadi Abu Habib, mediator in explaining the law Syrian Personal Status, 3rd Edition, Part 1, No Place in 1997, p. 283.

⁴⁷⁾ Article (68) of the amended Jordanian Personal Status Law No. (15) of 2019 stipulates: (If the husband is absent and leaves his wife without maintenance or travels to a relative or distant, or the judge may rule her alimony from the day of the request based on the evidence established by the wife on the establishment of the marriage between them after he took an oath stating that her husband had not left her maintenance and that she was not disobedient and that she was not aware that she was divorced and that her waiting period had expired.

. Rather, it lapses by mutual consent or the judge's ruling, which is what Article 62 of the law stipulates by saying: (Alimony is required either by mutual consent of the spouses to a certain amount, or by the judge's ruling, and the alimony for the period that preceded the consent, or the request of the judge, is forfeited).

Conclusion

After completing our research entitled : (The Effect of the Passage of Time on Marital Alimony), we reached a number of results and recommendations, which are as follows:

First: The Results

1- Muslim jurists, and legal scholars did not deal with the definition of the passage of time that prevents hearing the case, and through the statement of its linguistic definition and the provisions resulting from it, we came to define it as follows:

The passage of a legally specified period of time on the right to alimony without the wife claiming it leads to the extinction of her right to hear her claim.

2- Provisions resulting from the passage of time is the forfeiture of the right to claim it in court.

3- The system of the passage of time in which there is no neglect of the religious aspect or a loss of rights, but the adoption of it entails the expiration of the commitment to it by the judiciary and not by religion, and did not take the abolition of the right itself.

4- There is no explicit text in the Glorious Qur'an that acknowledges the principle of the lapse of the right over the passage of time, and that the Prophetic Sunnah came with a hadith whose authenticity was not clearly supported in the books of prophetic hadiths.

5-The position of the Iraqi legislator and the legislation in question varies in terms of the period during which the case for marital support is not heard.

6- The Iraqi Personal Status Law did not refer to the lapse of alimony with the passage of time if a period of time has passed since its entitlement without a claim and without a legitimate excuse, with the exception of the wife's past alimony, which made it a debt owed by the husband for a period not exceeding one year from the time he refrained from spending on it, which made the Iraqi Court of Cassation faltering in her decisions.

Second: Recommendations

We call on the Iraqi legislator to organize a text in the Personal Status Law for the provisions of the passage of time that prevents hearing the case to treat the rules and provisions related

to the financial rights of the wife, including the marital alimony suit, because its introduction is indispensable for the sake of social and economic stability by protecting and stabilizing transactions.

Sources and references

First: language books

- 1- Ahmed Mukhtar Abdel Hamid Omar, Dictionary of Contemporary Arabic Language, Dar Alam Al-Kutub, without a year of publication.
- 2- Ibrahim Mustafa, Ahmed Al-Zayyat and others, Al-Mu'jam Al-Wasat, investigation: (The Arabic Language Academy), Dar Al-Da'wa, without a year of publication.

Second: Fiqh books

- 1- IbnAbidin, Al-Muhtar's Response to Al-Durr Al-Mukhtar, 2nd Edition, Dar Al-Fikr, Beirut, 1992.
- 2-Ahmed bin Muhammad bin Ahmed bin Al-Qasim, The Door in Shafi'i Jurisprudence, investigation: (Abdul Karim bin Hunitan Al-Omari), Dar Al-Bukhari, Medina, 1416 AH.
- 3-Ishaq bin Mansour bin Bahadam, Abu Yaqoub al-Marwazi, Issues of Imam Ahmad bin Hanbal and Ishaq bin Rahwayh, Islamic University of Madinah, Saudi Arabia, 2012.
- 4- Abu Abdullah Muhammad bin Idris, The Mother, Dar Al-Ma'rafa, Beirut, 1990.
- 5-Abu Abdullah Muhammad bin Ahmed, Healing Al-Khalil in a closed solution Khalil, investigation (Dr. Ahmed bin Abdul-KarimNajib), Najbiwayh Center, Cairo, 2008
- 6- Abu Muhammad Ali bin Hazm, Al-Mahali Ya Al-Athar, Dar Al-Kutub Al-Ilmiyya, Beirut, 2003.
- 7-Abu Muhammad Abdullah Al-Nafrawi, Anecdotes and additions to what is in the Mudawana from other mothers, achieved by (Muhammad Abdul Aziz Al-Dabbagh), Dar Al-Gharb Al-Islami, Beirut, 1999
8. Al-Allama Al-Hilli, Tadhkirat Al-Fuqaha', investigation (The Aal al-Bayt Foundation, peace be upon them for the revival of heritage), year 1420 AH, with no place of publication.
- 9- Alaa Al-Din Abu Al-Hassan Al-Mardawi, Fairness in knowing the most correct of the disagreement, 2nd edition, Arab Heritage Revival House, no publication year
- 10- Muhammad bin Ahmed bin Alish, Manah Al-Jalil, an expert explanation of Khalil, Dar Al-Fikr, Beirut, 1989.
- 11- Muhammad bin Saleh bin Muhammad Al-Uthaymeen, the abstaining explanation of Ali Zad Al-Mustaqni', Ibn Al-Jawzi House, year 1428 AH.

- 12- Muhammad bin Abdullah Al-Kharshi, a brief explanation of Khalil Al-Kharshi, Dar Al-Fikr, Beirut, without a year of publication
- 13- Muhammad bin Ahmed Al-Sarkhi, Al-Mabsout, Dar Al-Maarifa, Beirut, 1993.
- 14-Mowaffaq Al-Din Abdullah bin Qudamah, Al-Mughni, Cairo Library, 1968.
- 15-Mansour bin Younis Al-Bahooti, Scouts of the Mask on the Board of Persuasion, House of Scientific Books

Third: Legal books

- 1-AdibIstanbuli, Saadi Abu Habib, the mediator in explaining the Syrian Personal Status Law, 3rd edition, part 1, with no place of publication, 1997.
- 2- Ahmed Mahmoud AbdDaibel, Brief Personal Status in Iraqi Law and Islamic Law, Baghdad, Dar Al Asdeqaa, 2009.
- 3-Dr. AjjadThamerNayef Al-Dulaimi, The Fall and Expiration of the Civil Case by Expiration of Time, The Arab Generation Library, Mosul, 2009.
- 4- Sheikh Ahmed bin Sheikh Muhammad Al-Zarqa, Explanation of the Jurisprudential Rules, 2nd Edition, Dar Al-Qalam, Damascus, 1989
- 5- Ali Haidar, Pearls of Rulers in Explanation of the Majalla, 1st Edition, Dar Al-Jeel, 1991.
- 6-QasimFakhri Al-Rubaie, Principles of the Federal Court of Cassation, Personal Status Department, Al-Kitab Press, Baghdad, 2019.
- 7- FawziKadhem Al-Mayahi, lawyer friend in personal status cases, House of Books and Documents, Baghdad, 2011.
- 8-Dr. Muhammad bin Saud al-Khamis, The Impact of Obsolescence on Financial Duties, Research Submitted to the Journal of Justice at Imam Muhammad bin Saud Islamic University, Riyadh, Issue (51), 1432 AH
- 9- Dr. Muhammad Salam Madkour, Theory of Permissibility for Fundamentalists and Jurists, 2nd Edition, Dar Al-Nahda Al-Arabiya, Cairo, 1984.
- 10- Dr. Muhammad Sidqi bin Ahmed Al Borno, Al-Wajeez in Clarifying the General Rules of Jurisprudence, 4th Edition, Part 1, Al-Resala Foundation, Beirut, 1996.
- 11 - d. Muhammad Mustafa Al-Zuhaili, Al-Wajeez in the Fundamentals of Islamic Jurisprudence, 2nd Edition, Part 2, Dar Al-Khair, Damascus / Syria, 2006
- 12-Dr. Muhammad Obaid Abdullah Al-Kubaisi, Provisions of Waqf in Islamic Sharia, Al-Insha Press, Baghdad, 1977.
- 13- Marwan Muhammad Rushdi, The Base of Dam Al-Dhari`a, Al-Rushd Library, Saudi Arabia, 2009.

14- Munther Abdel Aziz Al-Shamali, Personal Status in Jaafari Jurisprudence, Mansha'at Al-Maaref, Alexandria, 2006.

Fourth: Thesis and dissertations

1- Sahar Hail Ghanem, the theory of the passage of time that prevents hearing the lawsuit, a doctoral thesis submitted to the College of Law, University of Mosul, 2016.

2- Saddam Oud, Ahmed Hashish, Prescription provisions in Islamic law (a comparative study), a master's thesis submitted to the College of Graduate Studies, University of Jordan, 1992.

Fifth, The laws

1- Iraqi Personal Status Law No. (188) of 1959.

2- Syrian Personal Status Law No. (5) of 2019.

3- Jordanian Personal Status Law No. (15) of 2019.

4- UAE Personal Status Law No. (5) of 2020.

5- Kuwaiti Personal Status Law No. (66) of 2007, as amended.

6- The amended Iraqi Civil Code No. 40 of 1951.