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Impact of permission rule on determining the inherent jurisdiction of Iranian family courts

Impacto de la regla de permiso en la determinación de la jurisdicción inherente a los tribunales de familia iraníes

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ABSTRACT

The importance of the family institution requires that family lawsuits be dealt with in a specialized court, indicating the considerable importance of discussing the inherent jurisdiction of this judicial body. Therefore, to legitimize and consolidate family foundations, it is necessary to define the concept of family based on the Molazemeh Rule, so that the goals of the Iranian legislature, which include facilitating the formation of the family institution, protecting the sanctity. Relationships of family members and preventing the disruption of the said institution can be achieved by setting forth family-related matters and components in this exclusive judicial body.

Keywords: Inherent jurisdiction, permission rule, family court, family protection code.

RESUMEN

La importancia de la institución familiar requiere que las demandas familiares se tramiten en un tribunal especializado, lo que indica la importancia considerable de discutir la jurisdicción inherente de este órgano judicial. Por lo tanto, para legitimar, es necesario definir el concepto de familia basado en la Regla Molazemeh, de modo que los objetivos de la legislatura iraní, que incluyen facilitar la formación de la institución familiar, protejan la santidad. Las relaciones de los miembros de la familia y la prevención de la interrupción de dicha institución pueden lograrse estableciendo asuntos y componentes relacionados con la familia en este órgano judicial exclusivo.

Palabras clave: Jurisdicción inherente, regla de permiso, tribunal de familia, asuntos y demandas familiares, código de protección familiar.

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INTRODUCTION

Despite its strengths, the judicial precedence is currently suffering from profound passivity. Various issues are being raised in civil proceedings whose legal and jurisprudential roots are disregarded by courts. This is the reason for issuing various kinds of denial contracts and lawsuit non-hearing so that "rights" are sacrificed in many cases due to a variety of formal rules of procedure. Thus, referring to jurisprudence and substantive rules in most issues may resolve many conflicts, thus compensating for many years of inattention to civil litigation through an independent view toward jurisprudential and legal rules (Marandi & Baloo: 2018, pp. 21-27).

This article will attempt to investigate the impact of one of the jurisprudential rules, the Permission Rule, on one of the issues of civil proceedings. It should be noted that permission means giving a person the authority to act. An instance of the Permission Rule is the Rule of Correlation of Permission in Things with Permission in their Components and Consequences (hereafter referred to as the CPTPCC Rule). This rule has been repeatedly mentioned in the jurisprudential books and has been used by many great jurists such as Ibn Idris (Ibn Idris: 1989), Allameh Helli (Allameh Helli: 1999, p. 597), and Imam Khomeini (Khomeini: 1967) as an accepted rule in their books. Although the legislature has not explicitly stated this rule, it is a rational and unquestionable rule. It has been widely used by sages in social life and relationships and being among the sages, the legislature cannot oppose it. Therefore, the silence of the legislature about this rational rule can be a sign of confirmation. Notably, permission is not limited to what is stated in the permissive term; it includes the intellectual, customary and legal components permitted as well.

This study is an attempt to investigate the effect of the CPTPCC Rule on formal matters to prioritize substantive rules -as more important matters- over formal rules- as important rules, even if the important matter is sacrificed for a more important mattering some cases. To sum up, one of the most important points in this study is to eradicate the belief that proceedings law, as formal regulation, are not based on legal rules to address many of the deficiencies and ambiguities based on these rules (Katouzian: 2014/). Despite the scattered views in this regard, the necessity of such a link between jurisprudential civil law and formal rules has not yet been felt neither academically nor practically. Notably, the civil proceeding law generally consists of a set of rules on how to file a lawsuit in a competent judicial body, set up a petition, notify it to the defendant, arrange the defendant's defense and response, the court's formal proceedings and pronouncement, the ordinary and extraordinary ways of appealing against an award, and the time and quality of sentence execution. This article will attempt to examine the impact of the Permission Rule - as one of the most important issues of civil procedure - on the inherent jurisdiction of the judicial authority.

It should be noted that jurisdiction-relates issues are a matter of judgment and are very important in litigation, and the jurisdiction-related rules are a criterion for the judicial authority's jurisdiction to deal with a dispute and are aimed at ensuring the good jurisdiction of each judicial authority toward the other. Judgment authorities in Iran are divided into two branches: judicial and administrative authorities. The judicial authorities, in turn, are divided into two classes: criminal judicial and legal judicial bodies. Legal authorities are either common pleas or special courts. A common pleas court has jurisdiction over all matters about a certain class except for those assigned to special authority. On the contrary, a special authority is one that is competent to deal with only matters assigned to it by law. The family court in Iran is, on the one hand, a legal judicial authority because all matters within its jurisdiction are civil matters. On the other hand, given that it has only limited jurisdiction, it may be considered a type of special court. It is noteworthy that before the enactment of the Family Protection Act of 2012, the majority considered the family court to be a common pleas judicial authority with specialized jurisdiction to deal with family lawsuits. However, after the adoption of this law and relying on Article 1 of this law, the family court appeared to be independent of the common pleas court and has special jurisdiction (Ebrahimi: 2005, pp. 459-476).

In the Family Protection Act of 2012, the legislator adopted a rule about the inherent jurisdiction of this court that caused ambiguities and led to multiple and inconsistent procedures in some cases. On the one hand, it raised the question of why Article 4 of the Law has considered some matters within the jurisdiction of the family court which, given the definition of the family, do not fall within its scope. On the other hand, about Article 1, why are some of the other issues about the concept of family and its components and consequences not mentioned in Article 4?

After defining the concept of family (in the first part), this article will attempt to describe the inherent jurisdiction of the family court and justify the matters that may not relate to the family concept but have fallen within the jurisdiction of the family court (in the second part). It will then deal with family-related matters which are, according to Article 4, not within the jurisdiction of the family court (in the third part). Attempts will be made to solve this problem beyond the framework of the law and through reliance on the CPTPCC Rule and to set rules instead of determining the instances for the jurisdiction of the family court. It is noteworthy that some actions of the legislator in enacting the law are in line with the CPTPCC Rule due to some of the problems with the application of the former family laws. Article 6 gave the mother or any other person having custody of the child the right to bring an action for alimony claim, but in previous rules, judges, relying on the Permission Rule, allowed such persons to bring an action against men (Malekzadeh: 2017).

METHODS

Part I: The Concept of Family and Family Matters

In determining the inherent jurisdiction of the family court, it is necessary to analyze the permitted case, i.e. the family and family matters; otherwise, any comment on the jurisdiction of this court would be wrong.

From the sociological point of view, the family is the first and foremost social institution that every human being encounters from birth, but this institution has been transformed from paternal style to marital style due to the growth of individuals. The family consists of individuals who are related by blood, marriage, or adoption (Robertson: 1989). In general, the family or household is referred to as a group of two or more persons living together, having a common income for food and other necessities of life, and are related by blood, adoption or marriage. Anthropologists generally classify the family institution as follows: matrilineal family (mother and her children), marital family (husband and wife, and children; also referred to as the nuclear family), and extended (consanguineal) family in which parents and the children live others, e.g. relatives in the same place (A'azi: 1997; Achaeva et al.: 2019, pp. 12-21).

From the legal point of view, although no definition has been provided for the family in neither jurisprudence nor law. Jurisprudents have provided a general meaning and a specific meaning for the family concerning its laws and regulations (Katouzian: 2014). In its general sense, the family includes a man, his wife and familial relatives (Katouzian: 2014). The criterion used for this definition is the inheritance of individuals from one another. In their general sense, "relatives" have also been incorporated in the definition. In its specific sense, the family includes a husband, wife, and children. According to Article 1105 of the Civil Law, the husband is the head of the family. In sum, the family can be legally defined as a group whose members are legally and socially related due to kinship or marriage (Aviel: 2014, pp. 14-48; Martynov & Martynova: 2019, pp. 107-111). Some consider the family an institution consisting of a group of individuals with legal components, compliance, inheritance capability, good relationships and the capability of supporting one another. According to this definition, it is not unlikely that a person is a member of two families, such as a child being held in custody of its mother due to its parents' separation, thereby forming a family with its father and another one with its mother.

RESULTS

Part II: Family Functions and Family Court Jurisdiction

As mentioned, one of the issues considered in this part is whether the jurisdiction mentioned in Article 4 of the Family Protection Act of 2012 is limitations. Also, in cases of doubt about the inclusion of other clauses within the jurisdiction of this court, should we rely on the principle of "Lack of Established or Ascertained Size" and consider the general court to have jurisdiction, or should we seek the response based on another jurisprudential rule? Before the enactment of the Family Protection Act of 2012, there was dispersed unclear judicial precedence regarding the question of whether the family court could proceed outside of the thirteen articles contained in the single article adopted in 1997 so that some considered the jurisdiction of the family

court to be limited to the thirteen articles and embryo donation (Boroujerdi: 2019). However, others have considered some additional jurisdiction for the family court to deal with all family matters. With the adoption of the Family Protection Act of 2012, the question remains whether the family court currently has jurisdiction to hear a lawsuit other than the 18 clauses mentioned in Article 4. To answer this question, we examine the seemingly non-family matters of Article 4.

Article 4 of the Family Protection Act considers the matter within the jurisdiction of the family court, although some of the cases may not appear to have anything to do with family matters, such as the first, second, twelfth, fifteenth, and eighteenth clauses. However, deeper reflection shows that these issues are within the inherent jurisdiction of the court and there is no doubt about their nature, relying on the CPTPCC Rule.

In the first clause of Article 4, hearing the claims about betrothal and its resulting damages is within the jurisdiction of the family court. Taking into account the concept of family, we may say that a family is not formed customarily, legally, or religiously through betrothal, which is only an introduction to marriage and family formation. The legislature has therefore viewed it as a prerequisite for establishing a family and has considered its claims and damages to be within the jurisdiction of the family court by relying on the Permission Rule.

In the second clause of the article, the legislature has also considered the issue of temporary marriage to be within the jurisdiction of the family court. This type of marriage can be the prelude to a family formation where issues such as inheritance, alimony and relative relationships may arise. Therefore, temporary marriage can also be considered a religious, legal, or customary requirement of family formation and the Permission Rule justifies the claims relating to this type of marriage.

Clause 12 considers growth, incapacity, and removal to be within the jurisdiction of the family court. Ascertaining a child's growth and the incapacity associated with it in the family court is not disputable. Investigating the foolishness and intellectual growth of adults may be in doubt, but it is also a matter of family matters, as the family plays an important part in these cases, ranging from the petition and proof of incapacity to determination of a conservator, removal of incapacity or proof of intellectual growth (even if the incapacitated person is an infant), which are justifiable as functions of family matters based on the rule in question. As such, the objection to the legislator (Banakar & Ziaee: 2018, pp. 717-742) saying that the family court has no jurisdiction in this regard is not acceptable.

Clause 15 deals with the jurisdiction of the family court to deal with cases where the man has been missing for a relatively long time. Such a person has a specific legal status, rights, and obligations in the law. In general, matters related to such a person, including financial and non-financial matters such as property management and marital life are primarily a function of family matters, having a profound effect on and causing problems in the family, thereby requiring the legislator's support. Therefore, the rule in question justifies the matters related to a missing person which are among family matters to be placed within the jurisdiction of the family court.

Article 18 of the law relates to sex change. This subject is discussed from a variety of aspects not only in medical sciences, psychology, and sociology but also in law. Contrary to what some have said (Taghizadeh & Rashidi: 2019), dealing with sex change issues is a matter of family. Dealing with this subject may not be consistent with the definition of family; however, as it affects the family law system, it is a function of family matters and undeniably affects the family law system such as former marriage, dowry, *Eddeh* (a period, usually about 100 days, during which a divorced or widowed Muslim woman may not be married to another man), headship of children and inheritance. As such, we can justify the matters related to sex change relying on the rule in question (Phelan: 2019, p. 89).

DISCUSSION

Part III: Neglected Family-related Matters in Family Protection Law

As stated, if merely the text of the law is considered to determine the jurisdiction of the family court, the jurisdiction is limited to eighteen clauses. It seems unreasonable to claim that the legislator has deliberately neglected some of the issues and that the jurisdiction of this court is limited because it is clear that when the text does not meet the expected goals, it has to be interpreted; therefore, it is necessary to go beyond the surface of the text and apply the legal rules to understand it and comment on the jurisdiction of the family court. However, some (Mohammadi et al.: 2019) have considered the jurisdiction of the family court to be confined to eighteen clauses, which may be objectionable because of its corrupt consequence, because, on the one hand, the family court has been prohibited to deal with certain family-related components (and consequence), and on the other hand, the restriction of the court jurisdiction to some claims such as embryo donation and denial of jurisdiction over similar claims leads to distinction without a difference.

In any case, it is appropriate to use the CPTPCC Rule to obtain the desired goal, which is to support the family institution. As stated above, among the eighteen clauses of Article 4, some which may seem not to be related to the sense of family, but are among the components and consequences of family matters, and the legislator has considered them to be within the exclusive jurisdiction of the court to protect the family. This section also deals with matters that, despite the legislator's reliance on the rule in question, are related to family matters and should be handled by the family court. It is noteworthy that even with the assumption that the family court has inherent jurisdiction over public judicial authorities, some cases do not fall outside the purview of the legislator and are regarded as the components and consequences of the legislator's permission regarding the jurisdiction of the court.

A: Issues such as reproductive simulation, artificial insemination, and surrogacy are distinct from embryo donation and may raise numerous claims due to disagreements on their issues. It must be said that in all these cases, the decision and even the judgment of the court are needed at each stage of the case, whether at the beginning (issuance of a permit by the court) or in their consequent lawsuits such as claims of relation, inheritance, marriage, etc. On the one hand, in Article 4, the legislator has considered the issue of embryo donation to be within the jurisdiction of the family court and neglected the other three cases. However, as these three cases are related to marriage and family relations and are indeed family matters, relying on the CPTPCC Rule, they can be said to be related to the family court.

B: The husband's claim for cash about the wife's divorce before intercourse and the possibility of the return of half of the dowry is an issue related to the dowry claim. As the dowry claim is within the jurisdiction of the family court, returning half of it by the husband relying on the CPTPCC Rule is also within the jurisdiction of this court. Another important lawsuit to be heard in the family court is the increased dowry claim (Banakar & Ziaee: 2018, pp. 717-742).

C: Another case to be heard in the family court is the claim made about the person assigned the custody of a child to be allowed to leave the country. Of course, this is one of the consequences of the issue of child custody and visitation. In other words, just as custody is within the jurisdiction of the family court, child custody and visitation are also within its jurisdiction relying on the CPTPCC Rule. It is noteworthy that some (Khaleghian et al.: 2016) argue that merely a reference to the right of the beneficiary regarding the possibility of filing a petition to leave the country in the Family Protection Act cannot justify the jurisdiction of the family court. However, as custody is within the jurisdiction of this court, it is rational to have its components and consequences within its jurisdiction as well. Therefore, if custody is within the jurisdiction of the court, it appears unreasonable and irrational to consider child visitation within the jurisdiction of the public court. Thus, we should avoid the literal interpretation of jurisdiction, and consider the family court to be the discretionary court to deal with this matter.

D: Another important case is the claim for the prohibition of the wife's employment mentioned in Article 1117 of the Civil Law as follows: "A husband may prohibit his wife from a profession or industry which is

incompatible with his family expediency or his own or his wife's dignity." The wife's employment principle does not necessarily mean disobedience, because it is related to it. After all, obedience means that the wife must comply whenever the husband wants. ...

If a wife wants to get an outside-of-home job, this would involve leaving the house, which means disobedience. As such, these claims fall under the components (or consequences) of obedience (wife's disobedience) and are within the jurisdiction of the family court.

E: Another contested case is the wife's claim of *Nehle* (donation and gift with full consent) against the husband. The *Nehle* of the marital period is the husband's payment for the activities of the wife at home, for which she was not legally responsible. The Family Protection Law of 2012 is silent about *Nehle*. However, Clause 8 of Article 58 of this law states that Clause B of Note 6 of the Divorce Amendment Act of 1992 and the Law of Interpretation of Notes 3 and 6 of that law adopted by the Expediency Discernment Council in 1994 are still valid. It is noteworthy that the law had anticipated the post-divorce *Nehle*, but because it had no proper legal basis, it caused problems for women and was criticized. To resolve the issue, the Expediency Discernment Council's view in this regard was interpreted, and the Council stipulated under the "Law of Interpretation of Notes 3 and 6 of the Divorce Amendment Act of 1992": "The word "post-divorce", at the beginning of Note 6 of the Expediency Discernment Council's Divorce Amendment Act of 1992, means the time after the court has found it impossible for the couple to compromise." However, as separating *Nehle* from other financial claims is a distinction without a difference and *Nehle* relates to the court's decision to issue a certificate for lack of compromise and divorce, handling the *Nehle* claim is within the jurisdiction of the family court based on the CPTPCC Rule.

F: As stated above, the claim regarding the necessity to set up an official marriage document and register the marriage event in a marriage registry bureau, owing to the Supreme Court's decision No. 560, is within the jurisdiction of the family court. This is because these claims are among the components and consequences of marriage-related claims (second clause of Article 4). Therefore, according to the CPTPCC Rule, this claim is within the jurisdiction of the family court. The Supreme Court also confirmed the reasoning that any claims regarding the necessity to set up an official marriage document and register the marriage event in a marriage registry bureau are related to marriage-related claims and have to be heard in a special civil court under Clause 2 of Article 3 of the Special Civil Court Bill adopted in September 1979.

G: Another common controversial claim is the claim relating to an annulment of the registry operator of the dowry. Such claims seem to be within the jurisdiction of the family court rather than a general court because they are related to dowry. Regarding a dispute between Branch 244 of the Family Court of Tehran and Branch 42 of the Legal Court of Tehran, Branch 30 of the Court of Appeal in Tehran Province on 20/08/2013 stipulated that one of the jurisdictions of the family court is to deal with dowry-related claims. Therefore, the legislator means that any claims related to dowry will also fall within the legal jurisdiction of the family court. In other words, litigating such claims requires examining their nature and whether the wife has a right to dowry or has already received this right. Accordingly, this claim is not within the jurisdiction of general legal courts (Marandi & Bagloo: 2018, pp. 21-27).

At the end of this section, three points are worth noting:

1. As claims regarding the sex change, under Clause 18, Article 4, of the Family Protection Law, are within the jurisdiction of the family court, the components and consequences of such claims, such as annulment or modification of the national ID cards and changes in the document owner's name should logically fall within the jurisdiction of the family court. However, relying on the precedent No. 504, dated 01/07/1987, such claims fall within the jurisdiction of general courts rather than the Dispute Resolution Board of the Registrar Department. It should be said that decision seems to be related to the determination of the discretionary authority in disputes between the Dispute Resolution Board of the Registrar Department and the courts rather than in those between the general judicial courts and family courts. On the other hand, since the legislator has explicitly considered sex change within the jurisdiction of the family court in Clause

18 of the Family Protection Act of 2012, it seems not rational to rely on the precedent decision made many years ago. Therefore, relying on the CPTPCC Rule, this precedent of the Supreme Court should be modified.

2. The lawsuits subject to Article 30 of the Family Protection Act fall under Clause 7 of Article 4 of the Family Protection Act as marital period remuneration claims and thus within the jurisdiction of the family court. When a person benefits from the property or action of another person, the property owner or actor is entitled to receive something in return. It seems that the wife, in addition to being entitled to the remuneration for what she does during her marital life, under Article 30 of the Family Protection Act, can also claim remuneration for the property that she used in her marital life with her husband's permission. Thus, these two claims are within the jurisdiction of the family court.

3. One of the disputes that may arise between couples is the husband's claim for gold against the wife. The man can also take back the gold pieces that he had bought for his wife on different occasions. These claims appear to be within the jurisdiction of a general court, because on the one hand, these may be subsumed under gift or donation contracts in civil law, and on the other hand, they are not family-related or divorce-related, as they may be made by the husband both during marital life and at the time of divorce.

CONCLUSION

As noted above, in Article 4 of the Family Protection Act, the legislator has neglected numerous matters related to the concept of family, which has led to various views in judicial procedure. However, we can resolve these conflicts by considering a few assumptions. On the one hand, an independent view toward jurisprudential and legal rules in civil cases, including the jurisdiction of judicial authorities, has been neglected for years, whereas reliance on jurisprudential (civil) rules in formal matters can be a new way of resolving disputes and conflicts of judicial precedent. The legislator has not acted properly regarding the inherent jurisdiction of the family court in the Family Protection Act of 2012 and has adopted too abridged and thus ambiguous rules which require literal interpretation. Therefore, it is appropriate to resort to jurisprudence. Considering the legislator's action and negligence of some claims which are purely family-related, for greater efficiency of the family court, it is necessary to avoid determining instances of the jurisdiction of the family court and to discuss a rule in this regard. Relying on the Permission Rule, the legislator's order on a subject may be extended to its components and consequences as well, all claims which are related to family matters (and even the eighteen clauses of Article 4) fall under the jurisdiction of the family court. It is noteworthy that relying on the Permission Rule, even with the assumption of the family court's inherent jurisdiction over general judicial authorities (exclusive rather than specialized authorities), the cases do not fall outside the purview of the legislator; therefore, the objections as to non-jurisdiction of the exclusive jurisdictional authority in matters except for those determined by the legislator are removed.

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