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Authoritative Order, Legal Status and Constitutional Law

Jaber Seyvanizad*

Young Researchers and Elite Club, Urmia Branch, Islamic Azad University, Urmia, Iran.

**PHDC of International Law & Corresponding Author*

Abstract

Authoritative order is a title for some edicts of Islamic leadership in the Iranian legal framework. To observe the national expedient and maintenance of general policies of system, supreme leader issues the Authoritative Orders. Regarding the fundamentals of Islamic sovereignty, issuance of Authoritative Order is one of those authorities that has been specified for the institution of Leadership in Iran. Hence, the important challenge is the determination of Authoritative Order limits under the Iranian Constitutional law and whether it has been recognised in Constitution or not and in case of recognition, what kinds of them are included. Through a descriptive method, current article tries to meticulously scrutinize the legal originality of Authoritative Order under the Iranian constitutional law. This research is based on the assumption, in which not only the Authoritative Order has been institutionalized in Iranian Constitution, but also with regard to the Islamic nature of system, it is recognised as one of the sources of Constitutional law. Accordingly and by resorting to the capabilities of Authoritative Orders, supreme leader is able to legally overcome the possibly various crises and save system from the confrontation with impasses. This peculiarity specifically distinguishes Iranian legal system from the other ones, including the liberal democratic systems.

Keywords: Authoritative Order, Jurisprudence, Constitution, Supreme Leadership

Introduction

There are some differences and similarities among the primary and secondary Authoritative Order and institution of fatwa under Islamic tenets and that is why some researchers make a mistake in correct evaluation of the exact format of supreme leader's decrees and subsequently determination of their religious status. Therefore, some concepts and terms must be defined and explained here. Fatwa is expression of divine rule about something by *Faqih* with regarding to (Quran, Prophet Traditions, onsensus and Reason). Fatwa has "declarative" aspect, in which *Faqih* just declares the divine rules about related cases. Differently, Authoritative Order has innovative aspect and is the order of Islamic leader emanating from Islamic sources about related cases. Furthermore, obedience domain of fatwa is

limited to the emulators of the sources of emulation[1], whereas compliance with an Authoritative Order is necessary for all including the sources of emulation and their emulators one by one.

Primary Authoritative Order is Islamic leader's edict which is in line with divine rules completely, in a way that enjoys the declarative aspect as well. Its issuance is only a kind of emphasis on what has been already determined by God, not a new rule. On contrary, Secondary Authoritative Order is not necessarily in line with primary Islamic rules, in this case the durability of such decree will be limited to existence of an expediency. However, some Islamic experts believe that the primary and secondary rules are different from Authoritative Order in kind. The subject of an Authoritative Order may be different functionally. In some cases, decree proscribes something that is indispensable religiously, in this case decree seems to be against the Islamic jurisprudence, whereas in a higher horizon, is in line with Islamic tenets like decree of *Hajj* issued by Imam Khomeini. Sometimes that is about the permissible acts like the decree of *Tobacco*. But in some other cases, that is also possible that a decree proscribe something which has been proscribed before like *nuclear fatwa*, in such a case there is a primary prohibition against related subject and issuance of fatwa is only a kind of emphasis in that regard and reflection of previous fundamental principles as well.

1. Authenticity Evidence of Authoritative Order

A). Quran:

Chapter *Nisa*, verse 59: "O you who believe! Obey Allah and obey the Messenger (Muhammad), and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and His Messenger, if you believe in Allah and in the resurrection. That is better and more suitable for final determination."[2] There is no any doubt that this verse indicates the validity of Authoritative Orders. In fact, obedience is not realized, unless by complying with decrees. In this verse, obedience of three sources has been listed, first God, second Prophet Muhammad and third some Muslims in authority. Just the third part relates to our discussion as the validity of the Islamic governor's decrees. The view of Islamic scholars about the exact meaning of "…Muslims in authority…" are divided into three main groups, two of which are special and one is general. Generally, the majority of Islamic scholars believe that the purpose of the verse contains Mujtahids and *Faqih*s (Ardabili, 1996, p861). The special groups of Sunnis believe that it includes all authorities, even if be cruel (Al Sayes, 1994, p482). Shia scholars believe that the purpose of the verse is the best people who are only Imams and in their absence, the highest ranks of *Faqihs* in all aspects (Tabatabai, 1999, p139).

B). Traditions:

There are many Prophetic and Imami[3] quotations and narrations which refer to the incumbency of implying with *Faqih*s decrees, including Ibne-Hanzaleh (Ameli, p136). According to this narration, Imam Sadeq has proscribed Muslims from obeying cruel governors, and has appointed *Faqihs* as the governors for Muslims.

C). Reason:

There is no any doubt that even if we fail to bring the Traditional reasons to support the authenticity of Authoritative Orders, rational reasons, as one of the fourfold sources, can be mentioned. The Reason which, in narrations, has been considered as the intrinsic messenger (Koleini, p16) and Imam Sadeq imparted:" Whoever is wise, is religious as well and will enter heaven (Koleini, p11)." Reason based on some conditions, perceive the necessity of the system formation as a government and sovereignty in order to avoid anarchism in society and,

[1] . Islamic high level experts that people must obey them in performance of the Islamic rulings.

[2] . يَا أَيُّهَا الَّذِينَ آمَنُواْ أَطِيعُواْ اللّهَ وَأَطِيعُواْ الرَّسُولَ وَأُوْلِي الأَمْرِ مِنكُمْ فَإِن تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللّهِ وَالرَّسُولِ إِن كُنتُمْ تُؤْمِنُونَ بِاللّهِ وَالْيَوْمِ الآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلاً

[3] . From Imams.

subsequently, confirms the importance of Authoritative Orders and their role in realization of order and organization. Hence, some Islamic scholars try to prove the authenticity of such decrees just by rational arguments (Naraghi, 1996, p518).

2. Thematic Domain of Authoritative Order

Is the decree subject only limited to the religious aspects or not it can also include some other aspects beyond that? In response to the question, it must be said that if the duty of Islamic ruler is only running of religious rulings, and not the management of the secular affairs of society, he is not entitled to issue decrees in the scope of secular affairs. But based on the religious texts and noted scholar works it's evident that the authority of the Islamic ruler is not limited to the religious aspects of people's social life; to sum up, his task is the "maintenance of both people's religion and world".

2.1. Temporal Domain of Authoritative Order

How long is an Authoritative Order valid?
In this regard some assumptions are supposable:
1. Authoritative Orders, bounded by a specific time; obviously, when the life of an Authoritative Order is bounded by a specific time, after elapsing the due date, will be invalidated.
2. Authoritative Orders, concerning some special subjects; if an Authoritative Order is issued based on a subject which no longer exists, the Authoritative Order is automatically terminated too. Like some special rules derived from an Authoritative Order concerning the war time, evidently, after the termination of war, such rules will not be binding.
3.Authoritative Orders limited to a necessity; similar to what mentioned about the first assumption, sometimes issuance of an Authoritative Order emanates from a necessity, naturally, the survival of Authoritative Order will last as long as the necessity (Javadiyeamoli, 1998, p138).

3. Authoritative Order[4] in the Iranian Constitution

3.1. Constitution and the Issuance Authority of Authoritative Order by the Supreme Leader

Now, under the legal system of Islamic Republic of Iran, that would be very valuable to be analyzed, what is the domestic legal status of an Authoritative Order as an aspect of leader's edicts? And also, is it possible to legalize the authority of the supreme leader in the issuance of such orders by referring to the Constitution? It's obvious that our assumption in this debate is the legitimacy and authenticity of the issued decrees by the supreme leader and what comes after this is the depiction of this legal basis. In this part of the research, first the general axes relating to the position of Authoritative Orders and the leader's authority in the issuance of these decrees are discussed, and then some related principles (articles) in Constitution are considered.

3.2. Islamic Nature of System and Authoritative Order

In a general view, it can be stated that the principle axis and base of Iran's political system and Constitution is "Islamic rules and Jurisprudence". Iranian nation basically raised against the monarch regime, with the purpose of realizing the Islamic system and as well operationalization of Islamic rules, under the guidance of the religious leadership. On this basis, the first step of the nation, after the Islamic revolution, was the establishment of Islamic Republic of Iran, and then the ratification of Constitution based on Islamic rules. Thus, the various evidences and signs of the Islamic superiority throughout the Constitution is evident. For example, Islamic nature of the system (principle one), dependency of the system on faith bases (including: principles of religion and Sharia, principle two),

[4] . This is a legal translation for phrase of "*Hokme Hokoomaty* "regardless of being primary or secondary.

the non-diversion of rules and regulations from the Islamic sacred jurisprudence (principle four), the acceptance of the principle of Vilayateh Faqih in the absence of Imam Mahdi (principle five & fifty seven), institutionalization of the religious institutes, such as Consultation (principle seven) and "ordinance to virtue and the interdiction of vice" (principle eight), the conditionality of enjoyment from a great number of citizen rights, based on compliance with Islamic rules and tenets (principles nineteen to forty). These cases, and some other same ones, indicate that the governing spirit on Constitution and the will of lawmakers, imply the necessity of Islamic rules and jurisprudence enforcement in all political, economic, cultural, and social dimensions. Therefore, the Islamic nature of system or the centrality of Islam and its rules in Iran's political system and Constitution, itself, is an evidence for the principle position of the Authoritative Order of Valiyeh Faqih (supreme leader). With this expression that Islamic rules, in addition to the inclusion of the primary and secondary rules, also include the administrative rules that are issued by Valiyeh Faqih which are emanated from Islamic jurisprudence. Thus the sine qua non for the acceptance of the Islamic rules sovereignty and Islamic political system, is the acceptance of the validity of such decrees and the issuance possibility of Authoritative Orders by Valiyeh Faqih.

3.2.1. Vilayateh Faqih and Authoritative Order

As a momentous governmental entity in Constitution (principle five& fifty seven), the institutionalization of the Velayateh Faqih principle is one of the most significant achievements of the Islamic revolution. Vilayateh Faqih that is rooted in the religious fundamentals and has adopted its legitimacy from divine rules, means that, the competent Valiyeh Faqih, in dealing with national affairs, has the authority as much as holy Prophet and infallible Imams (Imam Khomeini, 1956, p75-102). It means that, as those eminences had the authority to issue Authoritative Orders, also Valiyeh Faqih, for to managing country, has right to issue such decrees. That is evident that as the issuance of such edicts have been based on Islamic principles (Ibid, p112-113) Valiyeh Faqih also must obey this procedure in issuance of Authoritative Orders. Consequently, Islamic nature of system and acceptance of Islamic rules and jurisprudence on one hand, and institutionalization of the Vilayateh Faqih principle on the other, per se, signify the issuance possibility of Authoritative Orders- which under the statute law has been considered as "rules and regulation with legal commitment"- by Valiyeh Faqih as a legal constitution.

3.3. Some Constitutional Evidence for Authority and Authenticity of Leader's Authoritative Order.

In addition to the two abovementioned references to Constitution, some other principles of this source indicate the right and authority of Valiyeh Faqih to issue such decrees, such as:

3.3.1. Principle[5] Hundred Ten:

Even though all parts of this principle per se are examples of Authoritative Order which is issued by Valiyeh Faqih, but some provisions of this principle directly signify the authority of supreme leader to issue these edicts, including:

Part One:

Based on this part, one of the obligations of the leader is "The determination of system's general policies, after consulting with expediency discernment council of the system". Hitherto, supreme leadership, has confirmed and imparted various policies in several executive fields of state, after the ratification and suggestion of the expediency discernment council of system, in order to run this part. Our purpose from policies, are the "policies that in order to realization of aims and values are put after the set of ideals and include the principles which approximate the ideals to the executive concepts that are operationalized within system containing the triple powers, armed forces, national broadcasting, and the powers that are active within the society which includes (general, sectional and ultra-sectional) policies". Reconsideration of the definition and characteristics of Authoritative Order, introduces the general policies of system as the most obvious examples of such edicts. The important trait of these policies is their superiority over all rules and regulations; i.e. the ratification and impartation of these policies by the leader, firstly; lead to revocation of adverse previous rules, and also the next rules and regulations must be ratified based on these decrees. Secondly, all powers and executive tools must implement these policies.

[5] . In Iranian Constitutional law, articles of Constitution are called principle.

Part Seven:

One of the other obligations of the leader in the seventh part of principle 110 has been specified: "settlement of disputes and harmonization of relations among the triple powers". Disputes here means, sometimes because of non-liquet, vagueness or conflict of rules, some problems appear in relations among the triple powers and no regulation, in order to solve such disputes, has been predicted. In this case based on the pertinences of the leadership position, he takes action to solve the problem. It is completely obvious that what leader does in this respect is recognizable only under the title of Authoritative Orders and whereby, all state powers must comply with it. In other words, when the harmonization of relations among the triple powers, and the settlement of their disputes by the leader can be possible that leadership enjoys such authorities and others have to be obeyed by him. This general obedience, under the Islamic literature, is called "*Hokmeh Hokoomati*", or what we call Authoritative Order. Otherwise, basically such jurisdiction and authority will not be applicable by leader.

Part Eight:

In part eight of principle 110, "solving the problems of system - which are not solvable through usual methods-through the Expediency Discernment Council of the System" set forth as one of the obligations of supreme leader. According to the statements of the Revision Council of Constitution members, the "problems of system" relate to country management in a way that are not solvable by usual ways including lawmaking. It is evident that supreme leader, based on the authority that has been received from this part, can solve the problems of system through the expediency discernment council of system. Accordingly, what supreme leader issues in this respect, has the aspect of Authoritative Order which has been issued with the consultation of the expediency council and is consequently indispensable.

According to some researchers, the content of part 7 and 8 of principle 110, signify Vilayateh Faqih as well (Javadiyehamoli, 2004, p479). Hence, regardless of what mentioned, it can be concluded that these two parts per se signify the issuance possibility of Authoritative Orders by Valiyeh Faqih.

3.3.2. Principle Hundred Twelve

The revision council of Constitution, by the codification of this principle, more than anything else, has spoken about Authoritative Order. In this principle the expediency discernment council of system has been institutionalized. The record of this principle related to Imam Khomeini's letter in response to heads of powers about "How the Islamic ruler's rights, in case of Authoritative Orders, are applied" (Khomeini, 1965, p464). In the letter text whereby an Authoritative Order, he founded the expediency council. With regard to this record, the perception of the revision council members from Imam Khomeini's letter was this fact that the axis of this letter and formation basis of the expediency council is the" Authoritative Orders of supreme leader". On this basis, the first duty of the expediency council was predicted: " the discernment of system expediency by Authoritative Orders of the leader, in case of disagreement between the Guardian council and Parliament, after the passage of legal steps (Negotiations for the revision of Constitution, sessions 15-28, p 835&1522). The unequivocal remarks of the aforementioned council members, confirmed the fact that, basically the philosophy of the expediency council formation is the application of this task which had been stipulated in the part one of the suggested principle. However, due to the clearness of the " Authoritative Order" centrality in tasks of the expediency council, some members of the revision council, based on this fact that the disagreements between the guardian council and parliament is not always about the Authoritative Orders, considered the phrase of Authoritative Order unnecessary in text of principle 112 and subsequently suggested its elimination. Even though this suggestion could not be directly ratified, but finally after the long negotiations, the aforementioned principle was ratified, whereas the phrase of Authoritative Orders had been eliminated. Anyway, based on what mentioned, that was clarified that basically the axis and basis of the principle 112 and formation of expediency council was the "explanation of the executive way of applying the Islamic ruler right in Authoritative Order cases" and "explanation of Authoritative Order" as well. This is the other evidence for acceptance of Authoritative Order of leader under Iranian Constitution.

3.3.3. The Other Principles of Constitution

Heretofore, we discussed some cases that were more important than the others, but in addition to the aforementioned cases, we can cite some other principles of Constitution in order to consolidate the status of Authoritative Order under the Constitution, These principles relate to the lofty legal position of leadership in the political pyramid, and the structure of the state including, principles fifty seven, sixty, hundred thirteen. All these principles indicate the superiority of leader's legal status on the other state powers. This status deserves to issue some appropriate orders in case of an expediency or necessity, and the other power and authorities must obey them. Accepting this fact, means accepting the possibility of the issuance of Authoritative Order by Valiyeh Faqih (supreme leader). At the end of this part of discussion, it must be stated that, in addition to principles of Constitution on authenticity of Authoritative Orders, there are some other sources of Constitutional law that can be cited. These sources include: the custom of leadership, wills of Imam Khomeini, statute rules and etc.

3.4. Legal Status of Authoritative Order under the Constitutional law of Islamic Republic of Iran

After talking over the position of Authoritative Order under the Constitution, in this part we pay attention to the importance and position of these edicts under the Constitutional law of Islamic Republic of Iran.

3.4.1. Authoritative Order of Valiyeh Faqih as One of the Sources of Constitutional law

"In talking over the sources of law, the main purpose, is an access to the kind of sources which interfere with genesis and formation of the rules of law" (Katozian, 2006, p5). The most important source of Constitutional law in every country is its Constitution. The other sources of Constitutional law in Iran include: the custom of leaders, judicial practice, doctrine, the regulation of parliament and etc. Some researchers, in addition to the principle sources of Constitutional law, consider the "works of politicians" and even their memories and biographies as the subsidiary sources of Constitutional law. (Qazi, 1993, p 117) In addition to the customary sources of law, with regard to this fact that Iran's legal system is based on Islamic jurisprudence, the "Islamic source and rules" is considered as one of the sources of law generally and one of the sources of Constitutional law specifically. In Iran's legal system, one of the sources of Constitutional law is "Authoritative Order" which, on one hand, is rooted in Islamic jurisprudence and whereby gets the legitimacy, and on the other, is recognized as the noted sample of the politician works. The authority of Authoritative Order means that the rules of Constitutional law can be extracted by them and whereby edicts can be issued. That is evident that these legal rules have generality and in the same cases, are applicable. The most evident examples of such decrees, which have made some rules, are the general policies of system that are applicable in several fields as the authentic legal rules. The Authoritative Order of Imam Khomeini about the foundation of Special Court of Clergy (1979), formation of the Supreme Council of Cultural Revolution (1980), and the legalization of its regulations (1984) and the Authoritative Order of Ayatollah Khamenei about the impartation of the law of courts and Special Court of Clergy as well (1990) are the other examples.

3.4.2. Authoritative Order of Valiyeh Faqih, the Extraordinary Situations and Crisis

Part three of principle hundred nine, has prescribed some specific managerial abilities for supreme leader as a necessity. According to this part, supreme leader must enjoy the "correct political and social insight, foresight, courage, management, and enough power for leadership". The important effect of these abilities are the capability of supreme leader in dealing with difficult situations related to the task of leader in running affairs. Possessing such abilities, Valiye Faqih appears in the political scene as a powerful and proficient manager. The power, management and sovereignty of every ruler in society depend on his great foresight, decision-making, and managing extraordinary situations. Some political researchers believe that a ruler is a person who makes a decision in crisis. The exceptional situation includes any kind of riot and political or economic unrests which its control requires utilizing some extraordinary mechanisms. In these situations, the law-based order is not practical, rather there is a severe need to authority of the ruler. According to western politicians, the rulers of liberal sovereignty that is based on man-made statute law cannot overcome such situations, because they can only take steps in a determined way of rules, whereas in such situations, the rate of legal jurisdiction must be unlimited. (Smith, 2011) Differently, according to the fundamentals of Islamic sovereignty, the leader of Islamic Community can take action based on knowledge and justice -two features that are sine qua non for leadership (Imam Khomeini, 1955, p68) - and without

confrontation with legal impasses. The tool at the Islamic leader's disposal is "Authoritative Order". The supreme leader, in a commentary on Vilayateh Faqih, introduced it in meaning of "flexibility". It means that the institution of Vilayat must be able to regularly alter himself based on social transformations -that are part of human life customs-. In other words, when there is a flexibility at the main decision-maker of system disposal can whereby correct and alter the way of society. For example, about the foundation of Islamic banking, this method was used. The main idea in this commentary on Vilayateh Faqih, is seeking a remedy in order to refrain from confrontation with straits and impasses. The key tool to refrain from such straits at the leader's disposal is "Authoritative Order". Therefore, Vilayateh Faqih can, in extraordinary and exceptional cases, in order to avoid such straits, save the system from challenge and crises through the issuance of Authoritative Orders. This expression is the other reading from the "settlement of disputes among the triple powers" (part7, principle110) and "solving the problems of system" (part8, principle110) that was mentioned before. The annals of Islamic revolution has repeatedly experienced the issuance of various Authoritative Orders -with this function- by Imam Khomeini and Ayatollah Khamenei. The other kind of exceptional situation is "crisis". Some majors like management and sociology deal with the concept of crisis and its solutions. In short, "crises are events which happen quickly and, because of their epidemic nature, develop in a short time and affect several political, social, decision making fields. They must be controlled, otherwise several parts of a political system are affected in a way that its daily activities are destructed, and impose a critical situation on their function. With regard to this fact that the emergence of such a situation is along with costs and negative social and political consequences, and the danger of its continuation will impose some irreparable damages on the legitimacy of political system, the foresight of crisis and planning in order to control it, is the task of a decision-making unit in the framework of "crisis management". Crisis management, is the logical process of confrontation with crisis so that: 1. it leads to its control and restitution 2. Preserves the fundamental values and interests which, in result of crisis, have been threatened. In some texts, crisis management has been considered as a kind of strategic tact in which the intrinsic and extrinsic layers of a crisis are analyzed, and whereby the necessary recognition is gained to creation of related tactics and guidance of elites towards problem-solving. (Tajik, 2000, p83) In Islamic Republic of Iran, the decision-making unit is "leader or Valiyeh Faqih", in this way that the leader, as the highest authority of country (principle113), the superior power on the triple powers (principle57) and as a person who enjoys enough knowledge (part1 of principle110), necessary justice and virtue (part2 of principle110), social and political insight and the skills of tact and management for leadership (part3 of principle110), is the most competent post to save the country in case of crisis. Obviously, the leader's tool in this regard is "Authoritative Order" which is binding for all and is considered as the last state ultimatum. This is one of the distinctive privileges of Islamic system compared to other political systems that in case of confrontation with crisis do not have such a practical tool. The annals of Islamic Revolution has always experienced a great many crises which have been frustrated by supreme leader's Authoritative Orders. Some of these crises, with a severity actually much less than what has been occurred in Iran, led to the destruction of many countries.

The performance bond of the Authoritative orders is the set forth principles of Constitution that make any violation of Authoritative Orders impossible. A clear related example is the Authoritative Order of supreme leader on the Intelligence minister reinstatement, after his deposition by the time president that subsequently Dr. Ahmadinejad, in a letter, addressed the leadership, referring to principle 57 of Constitution, declared the operationalization of the aforementioned Authoritative Order, definitive and irreversible. On the other side, if the decree aspect of this Fatwa is not recognized, will not have any authenticity under international law, because a Fatwa does not only relate to international law and merely is respectable for imitators of a *Mujtahed*[6]. Therefore, what is authentic under international law is the formal statements of officials. Based on our assumption, even though this statement has been issued in a religious decree form, however is a binding manifestation by the major figure of state that will be talked more about it in the next chapters.

[6] . The person who is considered as a religious authority and must be imitated in religious rules.

Conclusions:

As mentioned, it was clarified that supreme leader's authoritative order has been indirectly institutionalized in Iranian Constitution, as well as the inherent validity of these orders after the accepting the Islamic nature of Iranian political system. In fact, for applying some constitutional authorities which have been specified for the leadership institution, supreme leader has to have the enough authority for issuing this kind of orders that are binding for all citizens. On the other hand, the orders issued under the framework of authoritative orders are recognized as one of the principle sources of Iranian constitutional law and have this potential to be legally referred concerning the political and constitutional disputes. Moreover, potentially they can be used in extraction of general rules of constitutional law. These kinds of orders are considered as the best tools of confrontation with extraordinary situations that are mostly named as crises. Crisis management is the most complicated issue in every political system. On one hand the law based order cannot cover all social needs and quench the fire of public anarchism and on the other hand, in case of using non law based tools, the legitimacy of those acts would be legally questionable. The legal capacity of the Authoritative Order properly fills this gap and save country from the possibly guided dangers. Authoritative Order is the most significant distinguishing feature of Iranian Constitutional law compared to the other world legal systems.

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