



Feasibility of Criminalizing the Marriage of Underage Girls from the Perspective of Jurisprudence and Law

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Abstract

One of the challenging issues in the field of Islamic jurisprudence and law is the issue of the marriage of underage girls; although this issue was not considered very important in the past due to the simplicity of family relationships and was accepted as one of the issues; but today, since on the one hand, the type of attitudes towards married life has changed compared to the past; because, unlike in the past, the necessity of couples making decisions regarding marriage is accepted and emphasized, and on the other hand, the marriage of underage girls entails problems, the question arises as to whether the same past practice and method can be logical and justified or whether there is a need to rethink the jurisprudential sources of this issue so that, relying on jurisprudential and legal rules and regulations, it can be discussed about the possibility of criminalizing this issue. The present study seeks to answer this question using descriptive and analytical methods and library tools. The results of the research indicate that by relying on principles such as the principle of human dignity, harm, expediency, justice, the rule of attribution and laharj, the criminalization of the aforementioned act can be justified and its possibility can be discussed.

Keywords: Criminalization, marriage, minor girls, the principle of harm, the rule of attribution, jurisprudence and law.

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Introduction

Marriage of minor girls as one of the legal events has long been discussed in the sources of Islamic jurisprudence, and Islamic jurists and thinkers have devoted relatively serious discussions to it. It is worth mentioning that in the past, in parallel with the simplicity of family and legal relations, jurisprudence also observed the same lifestyle and was more individual in nature; the simplicity of life in the past had caused the age of marriage to not be very important; therefore, the marriage of minor girls was considered an accepted matter; on this basis, jurists also ruled in favor of the marriage of minor girls; but over time, the lifestyle and attitude towards the people involved in the marriage changed; in the sense that, as in the past, only parents choose a spouse for their children; rather, the decision in this regard has been largely left to the parties; this is due to the positive consequences of giving the parties a role in the scope of marriage; on the other hand, studies on family issues indicate that the marriage of minor girls has very adverse consequences for them. On this basis, it is necessary to reconsider the jurisprudential foundations and examine whether the ruling on the permissibility of minor girls, which has been raised by many Islamic jurists, is inflexible or whether it can be deviated from by relying on the principles and rules governing Islamic jurisprudence and law; in other words, it should be examined whether, relying on the principles and rules of jurisprudence and law, it is possible to talk about the possibility of criminalizing this act or whether such a possibility does not exist. On this basis, the present research has been organized with the aim of examining the aforementioned issue and has tried to evaluate the possibility of criminalizing the marriage of minor girls by relying on principles such as the principle of

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dignity, harm, expediency, justice, the rule of justification and the rule of laharj, which will be discussed below.

1. Application of the principle of harm in justifying the criminalization of minor girls

The principle of harm means the prohibition of causing harm to others, which has been accepted in legal systems; the Iranian legislator has also referred to this principle in various legal cases; Not harming others is accepted and emphasized in all legal systems and has been insisted upon by legal thinkers. This principle has been proposed in Islamic law as the "rule of no harm" which has many applications; since the legal system of Islamic countries is derived from Islamic jurisprudence, this principle is also widely present in the penal system of Islamic countries. It can be said that in Islam, the only behavior that leads to harm is criminalization; in the sense that everything that is prohibited or criminalized by Islam actually or in the future leads to harm and is therefore prohibited; harms can also have an individual or social dimension; the aforementioned principle, with its constructive and repelling function of "deterrence", in a way prevents harm from being caused. In other words, by adhering to this principle, we can speak of the necessity of criminalization in cases where significant harm and damage is caused to society or an individual (Khalilollahi, 1389, p. 155). This principle, which has the support of the Quran (Baqarah/233), the Sunnah (Maraghi: 1417, p. 320; Nouri, 1408, vol. 3, p. 150), reason (Mousavi Bojnourdi: 1419, p. 53), consensus (Moghagheeq Damad: 1382, vol. 1, p. 134) and jurisprudential doctrine (Maraghi: Pishin, vol. 1, p. 305; Tabatabaei: 1418, vol. 1, p. 8), is one of the principles that can be applied in the scope of criminalizing the marriage of minor girls.

It should be noted that this principle is present in both the scope of criminal law and in the field of private law; although it has been referred to in various legal provisions, it is not possible to state all of them in this context; however, some legal articles are referred to as examples; for example, Article 1 of the Iranian Criminal Code states: "Anyone who, without legal authorization, intentionally or as a result of negligence, causes harm to life, health, property, freedom, dignity, commercial reputation, or any other right created for individuals by law, which causes material or moral harm to another, is responsible for compensating for the damage caused by his act." As can be seen, this legal article explicitly prohibits any harm to another. This is also found in many criminal provisions; For example, Article 499 of the Islamic Penal Code states: "Whenever someone frightens another and that person, as a result of fear, flees involuntarily or makes a move without his/her consent that causes harm to himself/herself or to another person, the person who frightens is liable according to the definitions of intentional and unintentional crimes." This article also stipulates the principle of harm; in general, it can be said that one of the goals of punishment is to compensate for the damage and losses caused to individuals or society.

Legal thinkers also emphasize this principle and consider it a kind of manifestation factor of liability. It should be noted that the principle of harm means that society and the state can intervene in the personal affairs of others in necessary cases or use coercion and force to prevent damage and losses. Of course, this intervention is only justified if it is proven that the actions of others cause harm to others, otherwise there is no such absolute and unregulated authority for the government, society, and other individuals (Afrasiabi et al., 2019, p. 2). Based on this principle, intervention is justified and logical when it prevents harm; therefore, if there is no necessity arising from peaceful coexistence, the establishment of criminal laws will in fact be nothing more than an unjustified restriction. One way to assess the necessity of criminal legislation is to pay attention to the realities of society; therefore, if these realities indicate that in the absence of criminal laws and restrictions, harm and damage will be caused to others, then criminalization in that area is justified and logical. It should be noted that the aforementioned principle refers to something beyond criminalization; That is, criminalization is correct only if interference and restriction are necessary, otherwise it will be nothing but an unjust and improper restriction. On the other hand, this interference must be based on accepted principles and principles and be effective (1984, p120). Feinberg J. (

In the area of marriage of minor girls, this principle can also be applied and stated that if their marriage causes harm and losses to them, legal criminalization should be applied to prevent it. Since, according to

many studies, such marriages cause harm and problems to children and, as a result, to society, criminalization in this area is consistent with both the principles and objectives of Sharia, which is to avoid and prevent undue harm, and with the legal regulations that are established to achieve justice and social order; because many criminal laws sometimes prohibit a social behavior because it causes harm and loss to others; for example, murder, assault, theft, intentional arson that lead to harm to others; in such cases, the guarantee of punishment is due to the existence of harm; it is clear that criminalization in these areas is to eliminate or prevent harm that may be caused to others and the goal of It is the protection of social and individual values against harms that cannot be prevented through other measures (Mahmoudi Janaki: 2003, p. 205.)

2. Application of the principle of human dignity in justifying the criminalization of marriage of minor girls
Dignity has its origins in the Quran and literally means nobility, freedom from baseness, chivalry, generosity and honor, and it also refers to morality and good deeds (Moin: 1362, 2, p. 2929; Tarih: 1416, vol. 6, p. 153). Based on Islamic sources and human rights documents, humans have this characteristic; therefore, various documents and regulations have been compiled to protect this dignity. Without a doubt, one of the most fundamental issues raised in the Quran is the characteristics and status of humans in the world; in fact, among creatures, humans have very different characteristics; Perhaps this is why the Quran describes His creation as "the best of creators" (Al-Mu'minun/14). Human dignity and greatness, like many other rights, are fundamental human rights that are respected and emphasized based on religious teachings (Jafari: 1378, p. 223). Since man is a social being, he can only achieve the desired growth and perfection when he has the ability to benefit from the capacities and blessings of the Creator of the universe; therefore, in the first stage, it is essential that for his growth and development, his social dignity be protected and maintained as a fundamental and innate need; because someone who is humiliated and insulted suffers from a shaky and abnormal personality. It is worth mentioning that anthropologists and legal scholars have analyzed dignity in various fields, which there is no opportunity to examine all of them in this space; Therefore, the two categories of dignity, which are inherent and acquired, will be briefly examined in order to answer the question of what is the position of this principle in the sources of Islam.

Inherent dignity means that God has created man in such a way that he has many capabilities compared to other creatures in terms of existential structure; in other words, the organization of man is special compared to other creatures (Gharviyan, 1379, p. 137); therefore, it makes it easy to achieve perfection. However, it can be said that man enjoys greater richness in this regard (Ramzani: Bitā, p. 56.) This existential capacity of man, compared to other creatures, expresses God's special care for him; the aforementioned capacity belongs to humans as humans (Misbah Yazdi: 1382, pp. 294-302) and is not specific to a particular individual or group; Therefore, no human being can make it a source of pride and arrogance; because this characteristic is for all humans; therefore, it should be respected by everyone. Acquired dignity is the achievement of perfection that humans achieve in the shadow of faith, piety, and righteous deeds. In fact, the origin of acquired dignity is human efforts, which are considered the criterion for approaching and evaluating; because, unlike the first type, which does not involve humans in its creation, it is human freedom and choices that play a decisive role in acquired perfection; it is he who, with his free will and will, strives on the path to achieving perfection and closeness to God; because acquired dignity is the result of human effort and will, it is important (Sadeghpour: 2007, p. 55.)

Human dignity has been considered in the Constitution and other regulations; For example, Article 30 of the Press Law states: "Publishing any type of material containing slander, libel, swearing, vulgar language, or insulting references and the like to individuals is prohibited." As can be seen, human dignity is generally emphasized and activities that contradict it are prohibited. This importance is such that Article 697 of the Criminal Code criminalizes behaviors that are contrary to human dignity and states: "Whoever, by means of printed or written papers or by means of publication in newspapers and magazines or by giving speeches in assemblies or by any other means, explicitly attributes or publishes to someone an act that is considered a crime according to the law of that act and cannot prove the authenticity of those documents, except in cases that result in a hadd punishment, shall be sentenced to one month to one year

of imprisonment and up to (74) lashes or one of them, as the case may be.” It seems that one of the principles of this legal article is to defend the human dignity of individuals.

In addition, in Article 2 of the Constitution, human dignity is listed as one of the foundations of the Islamic Republic of Iran system, and it is stated: “The Islamic Republic is a system based on faith in.....6. The dignity and high value of man and freedom combined with his responsibility before God”; As can be seen, in this legal principle, human dignity is explicitly emphasized; therefore, it can be said that one of the foundations of Islam and the Islamic Republic system is the principle of human dignity, which press activists must pay attention to and adhere to. Therefore, since they have been endowed with inherent dignity by their own will, no person has the right to use humans as instruments and humiliate them; Because man has dignity and honor, and others should respect and honor him (Sadeghi: 2006, p. 121.) Now that the inherent dignity of man has been clarified based on Islamic sources and principles, it can be said that if the marriage of minor girls causes their inherent and human dignity to be in trouble, such an action is wrong because it is incompatible with their dignity, and can be considered a crime by the legislator; Since studies and research indicate that today, the marriage of minor girls somehow causes many psychological and physical problems for them (Farahmand et al.: 2010, p. 133), it can be said that such actions are incompatible with their inherent dignity. Accordingly, behaviors that are incompatible with human dignity are rejected. This also applies to the marriage of minor girls; This means that if their marriage causes the human dignity of minor girls to be violated, which is the case in many cases according to research, the marriage will be prohibited. Regarding the marriage of minor girls, it can also be said that if someone causes their dignity to be endangered by this action, legislators can criminalize it. Therefore, there must be attention and commitment to it in the area of marriage of minor girls; because in the approach of monotheism of dignity, it is considered as a mandatory ruling; therefore, it is up to others to take care of it and no negative or threatening action should be taken (Salimi: 2013, p. 255.)

3. Application of the principle of expediency in justifying the criminalization of marriage of minor girls

One of the natural and instinctive goals and aspirations of man is to achieve the benefits and interests for which he strives and strives; It does not matter whether the interests in question are worldly or otherworldly, or whether they are related to personal affairs or cover collective affairs. As stated in the previous articles, Islamic laws have also been established to secure human interests; because, based on the Quranic foundations, the religion of Islam is based on human nature and nature (Rum/30). In general, it can be said that access to interests and benefits is one of the basic and fundamental goals of all human individuals, heavenly and non-heavenly religions, and political and legal schools. For example, many criminal and human legal laws are intended to achieve expediency and prevent harm; it is on this basis that some have spoken of the importance of the principle of expediency in the scope of criminal law (Dehghan Chabaki: 2011, p. 218).

Now that the position of the principle of expediency in the Islamic legal system has been clarified to some extent, it can be said that if the marriage of minor girls causes moral, family, etc. harm to her, even if it is permissible based on the primary rulings; but the legislator can criminalize it by adhering to secondary rules and principles; since research shows that early marriage has very unfortunate and destructive consequences for children that in some cases cannot be compensated (Farahmand et al.: 2010, p. 133), it can be said that criminalizing this act is justified. Therefore, it can be said that the marriage of minor girls is wrong since it is against the interests and interests in many cases, and as a result, the legislator can take action to criminalize it, and on the other hand, the Islamic government can also criminalize it to the necessary extent based on the determination of the interests and benefits of society; Because the role of the government in criminalization is unparalleled (Farah Bakhsh: 2013, p. 172) and on the other hand, based on the principles of the Islamic ruling, even the Islamic ruler can, taking into account the interests of the society, suspend the first ruling and issue a second ruling (Izadehi: 2014, p. 72); this is possible in the case of the marriage of minor girls.

4. Application of the principle of justice in justifying the criminalization of marriage of minor girls

One of the goals of criminalization and penal legislation in Islam is to expand and establish justice and fairness; this function of punishment has been considered and emphasized by legal systems in different periods, which is referred to as retribution and punishment (Qiyasi et al.: 2012, vol. 1, p. 376); in other words, punishing criminals and those who cause harm to social order or individual rights is so that the effects of this harm are eliminated as much as possible; it is on this basis that in the penal system of many countries, one of the goals of punishment is to achieve criminal justice; because, from the perspective of Islam, committing a crime is, on the one hand, oppression towards the criminal himself, and on the other hand, oppression towards others, which others may be another person or society.

It is on this basis that the Islamic penal system has legislated punishments to eliminate such injustice and through this it instructs people to be fair and implement justice (An-Nahl/90; An-Nisa/58; Al-Ma'idah/8). Based on the principle of justice, which is one of the goals of the Islamic penal system, it can be said that if the marriage of minor girls leads to oppression and tyranny, which is the case based on studies, such an act should be prevented by legislation and preventive measures, one of which is criminalizing the act in question. Although some may believe that the marriage of minor girls does not need to be criminalized; rather, it can be prevented with civil laws and guarantees; However, it should be said that since the consequences of marrying off minor girls are very widespread, posing serious challenges to both their individual lives and the health of society (Farahmand et al.: previous, p. 145), the only way to prevent this is to criminalize it; because it is only in the shadow of the implementation of punishment that the principle of equality before the law and public justice is realized on the one hand, and on the other hand, a significant guarantee of implementation is created to prevent arbitrary actions; for example, the punishment of blood money or other deterrent punishments can facilitate the reduction of the marriage of minor girls to some extent; because in this case, by implementing the punishment, on the one hand, the criminals will no longer attempt this act, and on the other hand, the victims will also benefit to some extent from the existence of justice and find solace.

Therefore, it can be said that the principle of justice, which is one of the goals of the penal system of Iran and Islam, requires that if the marriage of minor girls causes oppression, it should be criminalized; because fighting oppression and establishing justice constitute one of the philosophies of punishment in the penal system of Islam and in the country under study, and since, based on sociological, psychological and legal research, the marriage of minor girls has very unfortunate consequences for minor girls, which in a way indicates the cruelty of such marriages, it can be said that the principle of justice requires the criminalization and prohibition of such marriages. Therefore, by adhering to the aforementioned principle, the criminalization of the marriage of minor girls can be justified.

5. Application of the rule of causation in justifying the criminalization of the marriage of minor girls

The cause is any act that causes loss; therefore, in the book of *Diyat*, it is said about the cause: "If it were not for him, the loss would not have occurred, but the cause of the loss is something else" (Moghaikh Heli: 1408 AH, vol. 4, p. 237); The cause is something that would not have occurred if it were not there; but the main cause of the loss is something else.

In the discussion of the marriage of minor girls, this matter is also conceivable and applicable; in the sense that if someone, through the execution of the contract, issuing the document, registering the marriage, etc., somehow creates the ground for this event and causes it, he will be responsible; sometimes, it is possible that the said act may lead to life, physical and mental damages, in which case, with the establishment of a causal relationship, the perpetrators will be responsible; Because, based on the rules governing the criminal system, one of the pillars of a crime is the existence of a causal relationship (Najib Hassani: 2007, p. 27); in the sense that the material element of a crime is realized when a causal relationship is imagined between the criminal act and the perpetrator of the crime. It may be thought that all of the aforementioned definitions are somehow related to the issue of liability, while the research presented is of a criminal nature; therefore, it should not be left out of the discussion; but in response, it should be said that liability or responsibility for causing damage is not only in the scope of civil liability; but it also has a strong presence in the field of punishments (Golduzian: 2007, p. 442) and

the title of Diyat has been allocated to criminal regulations; Articles 492 to 537 of the Islamic Penal Code of Iran are also dedicated to this issue, which indicates the existence of the aforementioned matter in the criminal system. Accordingly, in Article 506 of the aforementioned law, abetment in a crime is defined as follows: "Abetment in a crime is when someone causes the death or injury of another person without directly committing the crime, in such a way that if his behavior had not occurred, the crime would not have occurred, such as digging a well and someone falling into it and being injured." This is also clearly conceivable in the case of the crime of marrying off minor girls; because in the discussion of those responsible for this crime, it became clear that various individuals and persons can be involved in the occurrence of the crime in question; for example, the execution of a contract can be considered an abetment in some cases, or encouraging the marriage of minor girls can sometimes be an example of abetment in a crime.

Therefore, in general, it can be said that, given that in many cases, the marriage of minor girls causes physical, financial and mental damage, this act is done by adhering to the rule of attribution, which proves responsibility in the penal system of Iran (1st century BC) and Islam; meaning that if the marriage of minor girls causes harm and loss, those who caused it are responsible; because according to the aforementioned rule, those who caused the harm are also responsible; accordingly, if the father, grandfather, lawyer, executor, notary or any other person causes the harm, they will be responsible to the injured parties.

6. Application of the rule of hardship in justifying the criminalization of the marriage of minor girls

The rule of hardship is that in the religion of Islam, hardship and hardship are not included; in other words, the rule of hardship is the negation of hardship and difficulty in religion (Maraghi: Previous, Vol. 1, p. 282). In the Quran, the word hardship is used in various meanings; including the meaning of narrowness and difficulty (Hajj/78; Al-A'raf/2), sin and rebellion (Tawbah/91; Fath/17; Al-Ahzab/38). Some commentators also believe that hardship has the aforementioned meanings (Tabarsi: 1373, Vol. 3, p. 362). Therefore, anything that confronts a person with difficulty and hardship is one of the examples of hardship and hardship (Kashuri: 1390, p. 13) and the aforementioned rule negates such difficulties. This rule has Quranic and narrational evidence, a few examples of which will be mentioned.

1-6. Quranic evidence for the rule of hardship and hardship

Various verses have been cited regarding this rule; a few examples will be mentioned.

1-2-6. Sahih al-Banzati

In this narration, Imam Sadiq (AS) blames the Khawarij for making themselves difficult, which indicates the existence of lenience and tolerance in Islamic religion and jurisprudence; therefore, the Imam (AS) said: "Indeed, the Khawarij were harsh on themselves due to ignorance and ignorance; while the religion is broader and easier than they imagine (Hir-e-Amili: 1403 AH, Vol. 1, p. 120). As can be seen, in this narration, the Khawarij are blamed for being harsh.

2-2-6. Famous and Famous Prophet

In this narration, the Holy Prophet of Islam says that he was sent to an easy and simple religion, which means that there are no difficult and strict rules in this religion; The Messenger of Islam said: "I have been sent to make religion easy and simple" (Haramali: previous, vol. 1, p. 120); it is clear that the ease of religious rulings is incompatible with the difficulty and hardship of the hardships.

Since the marriage of minor girls always creates many problems for them, their families and society, it is possible to justify the criminalization of this act by adhering to the rule of negating hardship and hardship and to talk about the criminal responsibility of the perpetrator; in other words, considering the conditions of today's life, the marriage of minor girls causes them to face physical and mental problems and hardships that are unbearable for them in many cases. Since the said rule negates hardship and hardship, it can be said that the marriage of minor girls is criminalized because it is incompatible with this jurisprudential rule.

Research Outcome

The specific task of the present research was to discuss the foundations of criminalizing the marriage of minor girls; therefore, the jurisprudential and legal sources were examined and explored. The research outcome is that the principles governing jurisprudence and the legal system indicate that the marriage of minor girls can be criminalized. Although, according to the primary rulings and documents governing the Setni jurisprudence, the marriage of minor girls is permissible; therefore, parents can marry minor girls under certain conditions and rules; however, since the continuation of this practice in modern life has created problems for girls and the family system, the need for rethinking the jurisprudential and Islamic law texts becomes clear; therefore, the present research, by exploring the jurisprudential sources and the rules governing the inference of rulings, has attempted to examine the criminalization of the marriage of minor girls by adhering to the rules of this field; Based on this, the study of jurisprudential rules indicates that the aforementioned ruling on the permissibility of marrying off minor girls is not inflexible; rather, it can be changed based on changes in people's lives; because rulings are based on interests and harms, and when their implementation is not accompanied by interests or brings about harms, they can be changed; this is also true for the marriage of minor girls; of these rules and principles, such as the principle of harmlessness, the principle of human dignity, the principle of expediency, the rule of hardship and hardship, and the rule of justification can in a way justify the criminalization of the justification of minor girls; Because the principle of non-harm is that no harm should be done to anyone, and since, based on scientific research, the marriage of minor girls is accompanied by many losses and harms, this act will be a harm that is prohibited. On the other hand, the marriage of minor girls will confront them with problems and hardships that are devastating, and based on the rule of hardship and hardship, such difficulties are not permissible. On the third hand, the principle of expediency also indicates that the rulings must be accompanied by expediency. Since the marriage of minor girls not only does not bring expediency, but in many cases also leads to corruption; Therefore, the marriage of minor girls is also incompatible with the principle of expediency. Finally, the principle of human dignity, which is a fundamental principle of Islamic law, also negates any action that is contrary to human dignity. Since today, in many cases, the marriage of minor girls is associated with problems that ultimately endanger the human dignity of girls, it is possible to speak of the need to criminalize the act in question based on this principle.

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