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Examination of the Principles Governing the Causes and Instances of Mahramiyat¹ from the Perspectives of Islamic Jurisprudence and Positive Law

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Abstract

This paper is aimed to examination of the Principles Governing the Causes and Instances of Mahramiyat from the Perspectives of Islamic Jurisprudence and Positive Law. Prohibitions of marriage exist among followers of all religions with different rules. However, Islam considers the prohibitions of marriage a serious ethical, social, and legal matter. Therefore, it elaborates on the details and establishes a specific framework for the prohibitions of marriage, determining the conditions under which these prohibitions take place and explaining why these conditions are essential for a marriage.

Keywords: Principles Governing, Instances of Mahramiyat, Islamic Jurisprudence, Positive Law

Introduction

Mahramiyat is a crucial topic in Islamic jurisprudence, particularly in Imami jurisprudence, providing a specific framework for the interaction between men and women that results in the permissibility or impermissibility of marriage and including consanguineal, affinal and milk kinship. Consanguineal mahrams⁵ refer to men with whom marriage is perpetually forbidden due to blood relations not marriage, such as fathers, brothers, paternal and maternal uncles, and nephews. Affinal mahrams are those individuals with whom marriage is perpetually forbidden due to a marriage, such as a man with his mother-in-law or his stepmother or his own son's wife. or a woman. Milk mahramiyat/kinship indicates that a breastfeeding infant, under the specified conditions and regulations of breastfeeding in jurisprudence, becomes mahram to the woman who breastfed him, as well as to the daughters of that woman. However, this mahramiyat is not limited to that woman and her daughters but extends to all individuals who are the real children of that woman and her husband due to the child being considered their real child in legal terms.

In general, the scope of mahramiyat encompasses three areas: marriage, physical touch, and gaze. One of the main issues in this research is to find the foundations and rulings of each of these three areas. According to the findings of the present study, blood relations, milk kinship, and affinity are the three factors that establish mahramiyat. The relationship between marriage of mahrams and the prohibition

¹ (In Islam, a mahram is a member of one's family with whom marriage would be considered haram; mahramiyat is the state of being mahram)

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⁵ (In Islam, a mahram is a member of one's family with whom marriage would be considered haram)

of marriage, in general, is absolute and unconditional, meaning that marriage with blood-relatives is not permissible in any circumstance. However, regarding the rulings of physical touch and gaze, there are differences of opinion among jurists. Despite these differences, in general, there are limitations on all instances of mahramiyat established due to blood relations or marriage, while there are no restrictions on physical touch and gaze concerning a spouse.

One of the unknown aspects in this matter is the use of surrogates in treating infertility, which faces numerous questions and ambiguities. One less-explored issue in this subject is the examination of the relationship and prohibition [of marriage] between the child and the surrogate mother. Proving or disproving this relationship has multiple consequences.

Given that assisted reproductive technologies (ART) are classified into homologous and heterologous types, in the first type, gametes from the couple themselves are utilized, while in the second type, an external factor intervenes. In both situations, the sperm owner is considered the biological father; however, regarding the mother, some jurists consider birth as the criterion, some consider the egg, and a third group deems the person providing both factors as the mother. Various opinions were examined in this research, and it was concluded that the owners of the sperm and egg are the true parents, and the surrogate plays holds the status of a wet nurse. Consequently, children born through ARTs are mahrams of these individuals and their spouses and hence marriage is prohibited between them. After reviewing various arguments, the outcome of this research is that none of these arguments is sufficient to prove the claim. The concept of prohibition [of marriage] through wet nursing, although considered the most important, lacks the necessary conditions for validity. Since mahramiyat cannot be categorically rejected, it is advisable to abstain from it as caution from the perspective of marriage, given its significant importance.

The aim of conducting this research is to elucidate and examine the rules governing the causes and instances of mahramiyat from the perspectives of Islamic jurisprudence and positive law. An effort is made to address all aspects of this topic in the forms of types, causes, instances, conditions, and legal rulings, as increasing public awareness of the subject of mahramiyat can prevent the adverse consequences and effects, both worldly and otherworldly, personal and social, resulting from lack of knowledge on the subject.

Considering that many people lack awareness of religious rulings, including discussions surrounding mahramiyat, it is essential to provide people with the necessary information to observe these laws and religious rulings properly. By clarifying the concept of mahram and non-mahram relationships in society, sins and personal and social harms resulting from improper behavior with non-mahram individuals can be prevented while protecting the mental and spiritual wellbeing of the society. Numerous social problems, such as divorce, mental illnesses, violence, murder, etc., originate from the lack of adherence to ethical principles and values. Therefore, the necessity of expressing the religious rulings related to mahram and non-mahram relationships from ethical and Islamic theological aspects also underscores its importance.

This paper elucidates the subject of mahramiyat from several perspectives, including:

1. Causes of Mahramiyat: Explaining the factors that lead to the establishment of mahramiyat.
2. Conditions of Mahramiyat: Describing the conditions that must be met to establish mahramiyat.
3. Instances of Mahramiyat: Detailing with which individuals mahramiyat is established based on specified conditions and factors.
4. Rules/Laws of Mahramiyat: Exploring the effects that mahramiyat may have.

Literature Review

Some notable examples of the studies that have addressed this topic in the book form are as follows:

Several scholarly works have extensively explored the topic of mahramiyat in Shia jurisprudence throughout the history of Shia Islam. Scholars have addressed the subject of mahramiyat in both quantitative and qualitative ways, with gradual transformations over time. For instance, Sheikh Saduq, in his book "Al-Muqni'," dedicated approximately forty pages to the topic of mahramiyat. Ibn Idris Helli covered two hundred pages in "Al-Sara'ir," while Allama Hilli devoted three hundred pages to the topic in volume 7 of "Mukhtalaf al-Shi'a". Furthermore, Allama Majlisi, in volume twelve of "Maladh al-akhyar," allocated more than five hundred pages to the subject of mahramiyat.

In terms of content evolution, changes are evident in the jurisprudential texts throughout the centuries and the history of Shia jurisprudence. For instance, Sheikh Saduq addressed the topic of mahramiyat in two sections of his book Al-Muqni', whereas Allama Hilli provided a more detailed discussion to support his arguments in various volumes of Mukhtalaf al-Shi'a". Notably, Shahid e-Thani, in volume thirteen of his commentary on "Al-Lum'a", independently explored the subject of temporary marriage. Additionally, some scholars have presented a more varied perspective on the subject of mahramiyat, particularly in the section on the types of mahramiyat as seen in the book "Jame' al-Maqasid," volumes 12 and 13, written by Sheikh Ali ibn Hussein Karaki (d. 940 Hijri. Some scholars have approached the subject of mahramiyat as a part of types of mahramiyat in different ways, such as in the book "Jame' al-Maqasid" volume 12 and 13, by Sheikh Ali ibn Hussein Karaki (d. 940 AH). Other scholars who delved more comprehensively into the subject of mahramiyat include Seyyed Ali Tabatabai in volume 10 of his book "Riyadh al-Masael," the late Ayatollah Khomeini in "Sharh-al-Urwatul-Wuthqa," and the late Ayatollah Fazel Lankarani in volume 22 of "Tafsil al-shariah fi sharh Tahrir al-wasilah."

Articles that have explored the rules governing the causes and instances of mahramiyat from the perspective of Islamic jurisprudence and positive laws are as follows:

Banihashemi (2020) in her article titled "An Examination of the Validity of Temporary Marriage with the Intention of Being Mahram with a Third Person" notes that temporary marriage with the aim of establishing mahramiyat between one of the spouses and a third party has become common with the prevalence of adoption in Iran, especially among religious people. For this reason, this paper examines and investigates the validity and invalidity of this type of Mahramiyat as a type of marriage, and the main question is whether it is possible to correct this type of marriage contract. Using library research methods, the author reviews the perspectives of jurists on this matter and scrutinizes the supporting documents. During the study of the different viewpoints of Shiite jurists and their reasons in this regard, the validity of this type of Mahramiyat is faced with serious challenges, because the spouses do not have a serious intention to get married. Although they have the intention to establish a legal relationship, 'intention' is one of the essential components of any marriage contract. In addition, such marriages have not been reported in the Shari'a tradition in the era of the infallible Imams (PBU). Furthermore, the validity of this type of Mahramiyat cannot be based on general and absolute arguments for the validity of marriage, due to inherent doubts about the seriousness of the intention for marriage.

Shariatinasab, S (2014), explores the topic of mahramiyat in fosterage, asserting that the issue of the prohibition of marriage between an adopted child and the adopting family has its roots in ethics and religion, beyond legal considerations. Therefore, every society, based on its religious and ethical beliefs, has its own rules in this regard. In Islam, it is stated that what causes the prohibition of marriage between individuals is limited to three factors: blood-relations, marriage, and wet-nursing. As the principle is the permissibility, unless there is evidence of prohibition, one cannot exceed the specified boundaries and expand the scope of prohibition without clear evidence. Consequently, fosterage should not have any effect on the domain of mahramiyat. However, given the social nature of legal institutions, the permanent association between the concept of a legal institution on one side, and the effects resulting from it on the other side, creates complexities. Since the concept of legal institutions changes in different times and conditions, one must first understand the current concept and function of the legal institution. Secondly, by referring to the foundations of legal provisions, one should extract its appropriate ruling, thus achieving a dynamic law in line with the current era and conditions, a law that is up-to-date while conforming to Sharia standards. This article follows the same method in addressing the topic of mahramiyat in fosterage. It considers fosterage in contemporary Iranian society based on the family structure and, in analyzing the legal status of the adopted child, focuses on the Sharia approach to individuals present in "quasi-family" institutions, namely the stepson, the stepdaughter and wet-nursed child.

Mozzani, Qasemi, and Kikha (2020) in their article titled "Critical Evaluation of the Establishing Mahramiyat with the Mother-In-Law by Marriage with Minor" state that some legal scholars, for various reasons, find it necessary to establish a mahramiyat with a married woman. One method commonly resorted to is the temporary marriage of the minor daughter of that woman, so that she becomes one of the mahram relatives. This action has led to the question of child marriage. Well-known jurists generally consider even a momentary temporary marriage with a minor girl as establishing mahramiyat with the mother-in-law. Therefore, they endorse this method from a jurisprudential perspective. However, some other jurists consider the ability to consummate the marriage as a condition for the realization of this mahramiyat. A descriptive-analytical approach has been adopted for this article which demonstrates that the mentioned solution is problematic irrespective of potential personal, social, and familial harms, or the ethical justifiability of it. This is because the utilization of evidence, that is establishing mahramiyat with the mother-in-law is tied to the ability of the wife to consummate the marriage, and, therefore, marriage with a minor does not lead to the establishment of mahramiyat with the mother-in-law.

Alizadeh, Merghati, and Amani Samani (2010) have presented an article titled "Combining Gamete Donation and Surrogacy and Child-Parent Rights" which addresses infertility as a crisis in the course of life, potentially threatening individual stability and social relationships. Infertility has been referred to as the third factor or one of the top five causes of divorce. Approximately one-fourth of couples in Iran experience primary infertility. In some cases, one or both partners lack the ability to produce gametes (reproductive cells), so the only treatment for this category of couples is to use gamete donation (sperm or egg) or embryo donation. In cases where there are anatomical problems with the uterus, the need for surrogacy arises. In some rare cases, a combination of two or more types of donations is required, which, in addition to problems arising from the defining law, can be problematic in terms of declaratory laws and can raise doubts and questions about parent-child relationships. This article addresses child-parent rights such as lineage, custody, guardianship, subsistence, and mahramiyat arising from various types of donations, surrogacy, and specifically combined donations, using Islamic jurisprudential and legal sources. It seems that except for the combination of embryo donation

and surrogacy, which is similar to guardianship and step-parenting, in other cases of combined donation, parental rights can be considered similar to simple donation.

Malhan (2011), in her thesis titled " Legal study of Influence of Sex-Reassignment of spouses on marriage" aims to investigate the jurisprudential and legal aspects of gender change. The study, conducted through library research methods, reveals that jurists' opinions on the ruling of gender change fall into three categories: absolute legitimacy, absolute prohibition, and conditional legitimacy. However, most legal systems, medical societies, and jurists, while accepting this issue, are inclined towards conditional legitimacy, providing conditions for gender change. Accepting this matter has given rise to countless legal issues, such as inheritance, dowry, marriage, guardianship, alimony, mahramiyat, gender change, and its effects on contracts and obligations, retribution, blood money, proof of claim, etc. Many of these issues face severe legal gaps.

Masouri (2003), in his thesis titled "Jurisprudential Foundations of Mahrams from the Imamiah Perspective" states that the aim of the study is firstly to clarify which individuals qualify as mahrams and their categories, secondly to identify in what ways mahramiyat can be established and thirdly to examine other categories of mahrams such as Li'an⁶, disbelief or adultery. In most cases, the opinions of Imamiah jurists converge as all of them believe in the fundamental principles of mahram relationships and differences in opinions were seen only in minor details. It was concluded that the viewpoints of all Islamic jurists were similar to one another.

Method

The research method is based on a descriptive-analytical approach. Descriptive research comprises a set of methods aimed at describing the conditions or phenomena under investigation (Naderi and Saif Naraghi, 1395). However, in the context of legal research, coherent and established theories have not yet been presented. Recently, sources have been compiled and presented by researchers in this regard. It seems that due to the novelty and freshness of the subject a cohesive and recognized procedure has not yet emerged (Negahban, 1396). Some researchers believe that in legal research, a combination of recognized research methods may be utilized, although they have not expressed this opinion explicitly.

The data analysis method employed is analytical-descriptive. The activities of jurists and legal scholars primarily revolve around the formulation of appropriate laws, description, interpretation, and justification of existing laws, and in this specific case, considering the foundations of relevant jurisprudence and legal issues.

Results

In general, the scope of mahramiyat encompasses three areas: marriage, physical touch, and gaze. One of the main issues in this research is to find the foundations and rulings of each of these three areas. According to the findings of the present study, blood relations, milk kinship, and affinity are the three factors that establish mahramiyat. The relationship between marriage of mahrams and the prohibition of marriage, in general, is absolute and unconditional, meaning that marriage with blood-relatives is not permissible in any circumstance. However, regarding the rulings of physical touch and gaze, there are differences of opinion among jurists. Despite

⁶ In Islamic law, an oath which gives a husband the possibility of accusing his wife of adultery without legal proof and without his becoming liable to the punishment prescribed for this, and the possibility also of denying the paternity of a child borne by the wife.

these differences, in general, there are limitations on all instances of mahramiyat established due to blood relations or marriage, while there are no restrictions on physical touch and gaze concerning a spouse. To achieve this goal, the author reviews the perspectives of jurists on this matter and scrutinizes the supporting documents, using library research methods. For the first time, the different viewpoints of Shiite jurists and their reasons in this regard are studied and analyzed and the validity of this type of Mahramiyat is faced with serious challenges, because the spouses do not have a serious intention to get married. Although they have the intention to establish a legal relationship, 'intention' is one of the essential components of any marriage contract. In addition, such marriages have not been reported in the Shari'a tradition in the era of the infallible Imams (PBU'T). Furthermore, the validity of this type of Mahramiyat cannot be based on general and absolute arguments for the validity of marriage, due to inherent doubts about the seriousness of the intention for marriage.

Conclusion

The results of this research can be beneficial for the general public, universities, judges, lawyers, students, official document offices, marriage and divorce registration offices, researchers, seminary students, and, overall, academic communities. They can use the present study to explore and discuss various aspects, both apparent and hidden, of the subject of mahramiyat.

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