

Child Marriage in Islamic law

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Abstract

There is a consensus among *Imami* jurists about permitting marriage with a minor, provided that it is to his/her own benefit and there is no sin or corruption. However, there are some *fatwas* (legal opinion) about the permission or prohibition of pleasure from a minor wife in many recent books of Imamiyya jurisprudence which at first glance, indicate some non-conventional pleasures from an immature wife. By elaborating on the jurists' comments, the present paper rejects the above accusations, arguing that they stated the preliminary injunction and that they did not state the issue in a secondary injunction. The author then tries to prove that rulings which are in accordance with Imamiyya jurisprudence, have absolutely prohibited pleasures from a child, by providing details on the jurisprudence reasons and documents and by referring to the generalities of no loss principle.

Keywords: minor, marriage, pleasure (Istemta), no loss principle.



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1. Statement of the Problem

One of the undeniable needs of human beings is sexual instinct which if not controlled properly, it creates various problems for the individual and the society. Islam allows marriage with the opposite sex under certain conditions, to satisfy this important need. It does not place any age limits on the marriage and it assigns this decision to the man and woman (if they are mature), or their parents (if they are immature).

There is no doubt for the Imami jurists that parents can decide for the marriage of their immature children. (See Ibn Idris, 1410, vol. 2, pp. 560; Muhaqqiq Hilli, 1408, vol. 2, pp. 220; Allamah Hilli, 1420, vol. 3, pp. 433; Shahid Sani, 1413, vol. 7, pp. 116). The jurists' well-known opinion is that the condition for marrying minors is "lack of corruption"; the marriage which involves a corruption or sin is null and void. Fazil Naraqī declared consensus in *Mustanad al-Shia*: "it is essential that parents observe lack of sin or corruption in their children's marriage. There is general consensus among Imamiyya jurists about this and application of no loss principle to this subject. If there would be corruption in the minor's marriage, it is null and void." (Naraqī, 1415, vol. 16, pp. 167)

Also, there is consensus among jurists that if a minor gets married, it is prohibited to engage in sexual intercourse (specifically pleasure) with one's wife who is before 9 years old. Shahid Awwal in the book of *al-Lom'ah* states: "it is prohibited to engage in sexual intercourse with one's wife who is less than 9 years of age. If it is done and laceration of perineum (Ifza) occurs, one's wife would be eternally haram. (Shahid Awwal, 1410, pp. 174)



The author of Urwah notes: “It is not permitted to indulge in sexual intercourse with one’s wife before she is 9 years old--whether she is free or slave; whether in a permanent or in a temporary marriage.”

Muhaqqiq Khuyi in her marginal notes in *Urwat al-Wusqa* and Imam Khomeini in *Tahrir al-Wasilah* express similar comments. (Khuyi, 1418, vol. 32, pp. 124; Musawi Khomaini, 1421, vol. 2, pp. 241)

Nevertheless, the open question is that if parents marry their children to someone provided that it is to their own expediency, are all the pleasures allowed except for sexual intercourse? The present paper aims to find an appropriate answer to this question by investigating the jurisprudential sources and reasons.

To explain this issue, it has to be noted initially that guardianship of children is essential, especially in nutritional, educational, financial, possessive, physical and sexual matters. Children without guardians and desirable supervision, are subject to abuse and jeopardy. Thus, Islam has always considered this issue seriously. According to Islamic teachings, parents are seen as the best guardians for their children, who can fulfill their needs in the best possible way.

Furthermore, it has to be noted that according to some narrations¹, it is indecent for parents to marry their immature daughters. It is uncommon in Islamic communities and such marriages have hardly been seen. Parents’ discretion is not meant for sexual abuse or so which has recently been put forward by Islam’s enemies and even by those who hold biased views against Sharia teachings;



1. In book of Kafi, there is a chapter titled: «باب أنّ الصغار إذا رُوجوا لم يأتلفوا» which emphasizes on the fact that prematurity marriage is better be avoided. (ref Khomeini, Kafi, vol5, pp398)

yet, it is meant to protect the child's benefits and make a good future for her.

As we will see, Islamic rules enjoy a comprehensive privilege in comparison with the other legal systems which do not provide any solutions and end in stalemate. There have been numerous shocking reports on child abuse. The following statistics reported by western sources are crimes against children which show the tip of the iceberg. For example, it is estimated that four million children and women are traded for sexual abuse, slavery, prostitution or forced marriage every year throughout the world. In addition, one million children mostly female, enter into the sinister trade of sexual abuse. Also 50,000 children and women are transferred every year from Asia, Eastern Europe, and South America to North America for prostitution and housework.

Every year, 10,000 girls from neighboring countries travel to Thailand for prostitution. Furthermore, 5000 to 7000 girls from Nepal are transferred every year to India to be sex slaves in Mumbai and New Delhi. (See Chilala, 1386, pp31).

In any way, Imami jurists' opinions in this respect are presented and the abovementioned question about the permission or prohibition of pleasure from a minor wife and its condition will be elaborated in detail.

2- Jurisprudents' Opinions

The jurists' opinions concerning on the child marriage are fallen into three categories: Some early jurists did not object this issue and kept silent on this. Some of them emphasized on preliminary injunction. It seems that contemporary jurists' well-known opinion is permission of sexual pleasure other than sexual



intercourse; still, this illusion will be dispelled upon contemplation on their opinions. And some jurists believe in secondary injunction. They prohibit any pleasure or any non-conventional pleasure by referring to secondary reasons.

2-1-No Objections

Many early jurists accept the marriage with a child provided that it is to her interests. They stated that it is not permitted to indulge in sexual intercourse with a minor wife, and stated rulings on the husband's violation in this matter. For instance, Sheikh Mofid says: If the husband engages in sexual intercourse with a minor wife who is less than 9 years old and cause harm on her, he has to pay the full blood money and he has to pay all her expenses until death (Mofid, 1413, pp747). The same fatwa is also issued by Salar Deilami (Marasim 1404, pp 241).

Ibn Joneyd issues a fatwa in this respect: If the husband engages in sexual intercourse with a minor wife who is less than 9 years old and cause harm on her, he is required not to divorce her and to pay all her expenses until death and pay the full blood money and dowry (Ibn Joneyd 1416, pp248).

Sheikh Tusi stated in *Khilaf*: If the husband engages in sexual intercourse with a minor wife and cause harm on her, if she is less than 9 years old, he has to pay the full blood money and dowry. Shafei issued the same fatwa. Our reason is the consensus about the narrations and sects (Tusi, 1407, vol. 5, pp. 257; also *ibid* 1400, pp453).

Ibn Idris believes: If the husband engages in sexual intercourse with a minor wife who is less than 9 years old, she will be eternally haram for him and there is a separation between them (Ibn Idris, *ibid*, vol. 2 pp. 531).



Muhaqqiq Hilli in *Nokt al-Nahaya* and Allamah Hilli in *Mukhtalaf al-Shia* made similar comments: If the husband engages in sexual intercourse with a minor wife who is less than 9 years old, there will be a separation between them and she will never be halal for him (Muhaqqiq Hilli, 1412, vol. 2, pp 292; Allamah Hilli, 1413, vol. 7, pp. 64).

Obviously, these jurists do not object such marriage, so they cannot be regarded as agreeing or disagreeing with the above issue.

2-2- Some jurists emphasized on preliminary injunction

It seems that the question has been recently reflexed in the fatwas of contemporary jurists. Although the injunction can also be observed in the early jurists fatwas (to be discussed later on), the first one who discussed the issue seems to be Sayyed Yazdi, author of *Urwat l-Wusqa* and contemporary jurists followed him. Therefore, his fatwa will be initially elaborated before other contemporary jurists. He states: It is not permitted to engage in sexual intercourse with one's wife before she is 9 years old, whether in a permanent or temporary marriage. However, he can take other pleasure such as looking, touching, cuddling, *Tafkhiz*, even when she is an child (Sayyed Yazdi, *Urwat l-Wusqa*, vol. 2, pp. 811).

Obviously his comments seem to permit other pleasure. At first glance, he seems to be permitting other pleasure of a minor wife, by the word "even"; yet on closer look, it becomes apparent that he was basically issuing a preliminary injunction and did not consider a secondary one and inflicting harm. Thus, it cannot be inferred that Sayyed's fatwa means child abuse.

Like Sayyed Yazdi, Muhaqqiq Khuyi issued a preliminary injunction in his notations on *Urwat al-Wusqa*, justifying



that other pleasures are not prohibited, considers a general pleasure from the wife (Khuyi, *ibid*, vol. 32, pp126).

Imam Khomeini has also issued the same fatwa as Sayyed Yazdi (Musawi Khomeini, *ibid*, vol. 2, pp. 241; also, *ibid*, 1422, pp 696).

Fazil Lankarani explained Imam's comments in *Tafsil al-Sharia: Permissibility principle* applies to other pleasures from a minor wife and the fact that marrying a minor is allowed in Sharia gives permission for other pleasures, because otherwise it would be meaningless to allow such a marriage. Documented hadiths prohibit only sexual intercourse before 9 years of age If other pleasures are prohibited as sexual intercourse before 9 years of age, it would be necessary to prohibit the marriage itself too. According to narration, what is prohibited in Sharia is the sexual intercourse (Fazil Lankarani, 1421, pp. 24-25).

The author of *Muhazzab al-Ahkam* confirms the above comment, justifying it with permissibility principle, reference to reasons, and consensus among Imamiyya jurists (Sabzevari, 1413, vol. 24, pp 73).

After quoting Sayyed Yazdi, Ishtihari in *Madarek al-Urwah* points to the generalities of pleasure reasons and sexual intercourse with a minor wife is removed from the injunction according to narrations and other pleasures remained in the injunction (Ishtihari, 1417, vol. 29, pp 165)

Asking a question, the author of *Fiqh al-Sadiq* (pbuh) permits other pleasure except for sexual intercourse with a minor wife, justifying it with Permissibility principle and the fact that there is no objection to this issue (Ruhani, 1412, vol. 21, pp. 88).

Marashi Najafi in *Menhaj al-Mumenin* (1406, vol. 2, pp. 208), Musawi Golpaygani in *Hedayat al-Ibad* (1413, vol. 2, pp. 305), Bohrani in *Sanad Urwat al-Wosqa* (1429, vol. 1,



pp. 124) and Safi Golpaygani in *Hedayat al-Ibad* (1416, vol. 2, pp. 396) are other contemporary jurists whose comments apparently suggest permission on other pleasures from a minor wife.

So far, the comments of the author of *Urwah* and his successive expounders were presented, since other jurists followed him. As already mentioned, this issue was raised briefly in some jurisprudential books, before the author of *Urwah* started to explain it.

For instance, a tenth century jurist, Fazil Meqdad (deceased in 826 AH) states: It is not permitted to engage in sexual intercourse with one's minor wife who is less than 9 years old. Only the sexual intercourse and no other pleasures is prohibited (Fazil Meqdad, 1404, vol. 3, pp 26).

The author of *Jawaher*, a thirteenth century AH jurist says: According to some jurists' fatwas and the apparent comments of others, the prohibition is restricted only to sexual intercourse and other pleasures are allowed due to permissibility principle which proposes no objection (Najafi, 1404, vol. 29, pp 425).

As discussed above, these jurists issued preliminary injunction and did not issue a secondary one which can be totally different from the preliminary one; as a result, biased claims from those who criticize Jafarite Fiqh, arguing that the above jurists' fatwas to other pleasures absolutely contradicts wisdom, which they call them very indecent. They claim that such pleasure might inflict irrecoverable harm on the minor wife. Nevertheless, the great jurists' opinions emphasize on the preliminary injunction and it can never be inferred from the meaning of their fatwas that other pleasures are permitted even if harm is inflicted. Because in this case, no loss principle is applied and jurists accept the rule of no loss principle over



preliminary reasons. Consequently, any pleasure which inflicts harm on one's wife will be prohibited.

2-3-Some jurists emphasized on secondary injunction.

Ayatollah Makarem Shirazi is one of the first jurists who stressed the secondary injunction, considering the fact that Islam's enemies may abuse early jurists' fatwas superficial meaning. In *al-Nekah*, which is an explanation of Imam's *Tahrir al-Vasilah*, under the title "Are all other pleasures (than sexual intercourse) of one's wife who is less than nine years old permitted?", he states: some old and contemporary jurists elaborated on the permission of other pleasures ...; however, to be honest, I cannot accept such a general injunction, because some pleasures from a minor wife is logically indecent such as *razia* (foster sister). Thus decency is the ruling element. Other pleasures from one's wife is limited to our own logic and do not include such behavior. (Makarem Shirazi, 1424, vol. 2, pp135)

Quoting Sayyed Yazdi in *urwat al-Wosqa*, Ayatollah Shobeiri Zanjani in *al-Nekah* stresses on the secondary injunction and prohibits pleasure which inflict harm on one's minor wife: "Other pleasures which do not inflict harm are permitted; yet, if they cause harm, they would also be prohibited." (Zanjani, 1419, vol. 5, pp. 1499)

Hossein Ali Montazeri is another contemporary jurist who objects such a fatwa, saying that: "It is not right to marry a minor who is unable to indulge in sexual intercourse, unless the age is set so that pleasure is possible, e.g. 10 years of age or more, provided that her parents see her interest in doing so. (Montazer, 1425, vol. 3, pp. 254)

Mostafa Khomeini, in *Mostanad Tahrir al-Vasilah* objects Imam's comments about permitting other pleasures, stating



that: It is learned from some comments of Imam Khomeini that he made other prohibition of subject to wife's physical ability (Mostafa Khomeini, vol. 2, pp. 344). On the marital intercourse and marriage, he states in Tahrir al-Vasilah (Imam Khomeini, ibid, vol. 2, pp. 277):

If a man marries a woman, her mother will become haram to him, either through an in-law or fosterage marriage, either the wife is minor or adult. Of course, in temporary marriage with a minor, caution has to be exercised that sexual pleasure other than sexual intercourse is possible. She has to be six years old or more or during marriage she grows to that age. Therefore, what is conventional is that one or two hours of temporary marriage with a female infant with the purpose of making her mother haram to the man is not prohibited.

Obviously, Imam does not permit the marriage with a female infant who lacks the physical ability for sexual pleasure, even pleasure other than sexual intercourse.

3- An Analysis of Reasons to Permit Other Pleasures

The author of the present paper believes that permission to other pleasures given the absolute rule of no loss theory in the present subject, lacks the legitimate justification and authority and after reviewing the reasons, the reader will be inclined to absolute prohibition of such pleasures. Therefore, the present article aims to prove the prohibition of any pleasure through a critical analysis and review of reasons.

There have been various reasons to justify the permission for pleasures other than sexual intercourse, which will be assessed against jurisprudence criteria below.



3-1-Citation of Generalities and Ascription of Reasons

As already discussed, one of the reasons that jurisprudents cited was the generalities of reasons to permit pleasure. It was justified that sexual intercourse with one's minor wife is removed from the generalities of injunction according to narration and other pleasures generalities remain.

The narration they cited are found in valid Shiite narration books:

a) Ammar Sejestani quotes Imam Sadiq (pbuh) talking to his bondman:

Go to the judge and tell him the Prophet (pbuh) said: "the age limit for sexual intercourse with a minor wife is 9" (Koleini, 1407, vol.5, pp 398; Hor-e Ameli, 1409, vol. 20, pp101).

b) Halabi quotes Imam Sadiq (pbuh): When a man marries a minor girl, he may not engage in sexual intercourse with her before she is 9" (Koleini, ibid, vol. 5, pp 399; Hor-e Ameli, ibid, vol. 20, pp102).

c) Zarareh quotes Imam Baqir (pbuh): It is not permitted to indulge in sexual intercourse with one's wife before she is 9 or 10 (Koleini, ibid, vol. 5, pp 399; Hor-e Ameli, ibid, vol. 20, pp102; Sadouq Qomi, 1413, vol., pp. 221). Abu Basir quoted the same narration from Imam Baqir (pbuh) (Koleini, ibid; Hor-e Ameli, ibid)

However, it should be noted that although in the above narrations the age limit is set at 9 or 10, it cannot be inferred that since in narrations only sexual intercourse is limited to a certain age, other pleasures are permitted. As some jurisprudents like the author of Tafsil al-Sharia points to, inferring from narrations is only possible in the framework of title which is considered as the weakest conception by scholars of the Osul. (See Muzafar, 1381, vol. 1, pp. 107; Muhageqq Khorasani, 1409, vol. 2, pp 132).



Furthermore, in the above narration of Imam Sadeq (pbuh) in which he orders his bondman to go to the judge and tell him the age limit for sexual intercourse, it seems that the sexual pleasure is meant to be sexual intercourse (ref Allamah Hilli, 1414, vol. 9, pp 121; Najafi, ibid, vol. 30, pp 330); this narration is an answer to the question raised by the judge, which is not mentioned in the narration; thus, it seems that other narrations followed this narration and so they cannot be ascribed to. In fact, the reason for describing the prohibition of sexual intercourse and restricting it to a certain age level is the experience of the condition. So they it is not conceptually understood and such description is not considered as having authority by scholars of the Osul (see Muzafar, ibid, vol. 1, pp. 101)

It should be noted that even though the above justifications are incomplete, secondary principles like no loss principle requires that in this matter we prohibit any pleasure from one's minor wife. As jurists and scholars of the Osul stipulated secondary injunctions reject inflicting harm and are seen better than preliminary injunctions. (See Ansari, 1411, vol. 2, pp127; Sobhani, 1421, vol. 3, pp 94) preliminary reasons have generality and include all injunctions either harmful or non-harmful injunctions. No loss principle removes harm injunctions. Therefore, based on this definite principle in Islamic jurisprudence any preliminary injunction which may harm the people is rejected. (See Bojnurdi, 1401, vol. 1, pp. 263)

As already mentioned, jurists permit marriage with a minor on the condition of that it is to the minor's interest and there would be no corruption. It should be noted that interest is quite relative and depends on the person, time, or place and it changes by social norms. It might be proved that in the past minors' marriage was to their interest and it



was accepted by the community norms, so jurists acknowledged such a benefit due to social acceptance; however, it is quite difficult to prove it today. It is not surprising that today minors' marriage is often against their interests and the supposition that harm in a marriage decided by minor's parents is quite realistic. The parents, who replace their children's affections with their own intentions and make a decision instead to inextricably link their children's destiny to someone else, definitely deprived them from a significant and almost irreparable benefit. If the parents recognize their minor's interests, they have to prevent their minor children to get married in most situations.

Marriage depends on the age and maturity and the mentioned elements vary in different circumstances. As Ayatollah Makarem Shirazi said in the above issue, subject transfiguration occurred. To dispel this illusion that legal marriage is wrong and free affairs are right, it should be mentioned that the present paper investigates pleasures not the marriage itself. It does not entail that if such pleasure of one's minor wife is wrong, it necessarily means that free affairs are the right way, as there is no inherence. The authors of the present paper agree with Ayatollah Makarem Shirazi's opinion that pleasure of minor's wife is illegitimate, and in the same vein, disapprove free affairs.

Ayatollah Makarem Shirazi is one of the contemporary jurists who does not permit marrying a minor, justifying that nowadays guardianship on minor children has changed. He believes that there is no benefit to a minor getting married and it has to be delayed until physical and mental maturity: "there is no benefit to a minor getting married. Rulings did not change; however, guardianship of minors and the benefits and the corruption and sins therein



did change. It rarely happens that someone marries a minor. If this marriage takes place, the girl may object the marriage and if not so, there is always the fear that this objection or dispute might happen and it is a corruption that should be avoided. Therefore, we have to stop until she is mature enough; even it might not be right to marry a minor in her early maturity. She should be mentally mature to avoid any dispute in the future. So those who are nowadays in favor of minors' benefits should not allow this marriage to take place. The well-known opinion, which is the lack of any sins or corruption, points to prohibition of such a marriage. I should be noted that the rulings did not change but the subject changed and when this occurs its rulings change, too (Makarem Shirazi, *ibid*, vol. 2, pp 35).

He also stated in *Anvar al-Fiqhaha*:

As noted above, based on the minors' benefit or lack of sins or corruption, it is not wise nowadays for parents to marry their minors, since such marriage will lead to various corruptions later when she becomes mature. Girls choose men whom they like and they test for themselves, so parents should avoid marrying their minors (Makarem Shirazi, 1425, pp 300).

He also responded to a fatwa that if necessary, may Islamic government prevent parents or guardian to marry their minors "I believe that in our age and era it is absolutely prohibited to marry minors, because it is not to their own good." (Makarem Shirazi, 1428, pp144) Obviously, when basically such a marriage is prohibited, sexual pleasure in this marriage is also prohibited.

The author of *Tafsil al-Shari'a*, citing a few narrations considers one of the reasons for the prohibition of sexual pleasure from one's minor wife is the potential harm that may be inflicted on her (See Fazil Lankarani, *ibid*, pp24).



Now the question remains that if other pleasures are permitted, especially when some jurists allowed it, is there any harm caused on her? Can we adopt the same justification in our discussion? Should we basically consider only the physical harm? It seems that we should stop discussing strictly on physical harm and consider both physical and mental harm; in some circumstances mental harm is sometimes stronger and more dangerous than physical one.

In Kafi, a chapter entitled "bab anna al-sighar iz zowijun lam ya`talifu" in which there is

a hadith from Imam Sadiq or Imam Baqir (pbu) emphasizing the fact that prematurity marriage should be avoided (see Kuleini, *ibid*, vol. 5, pp. 398).¹

It should be noted that according to jurists even though mujtahid's injunction is the reference, he is like a legally competent individual in understanding rulings. It is up to the legally competent individual to recognize the ruling and they have to consider social norms and practices (See Musawi Khomeini, 1424, vol. 1, pp27; Montazeri 1425, vol. 2, pp67).

In our discussions, what is quite clear is that according to the Prophet Muhammad (pbu), there is no loss in Islam (la darara wa la dirara fi al-Islam) (see Kuleini, *ibid*, vol. 5, pp 293; Horr Ameli, *ibid*, vol. 25, pp 429). Rulings that cause harm are rejected in Islam. To decide if it causes harm, we should consider social norms and practices. It is obvious that in our society it is undoubtedly obnoxious to take sexual pleasure from a minor and it can cause irreparable harm on her. One of the most probable reasons why it is not



1. «قيل له (ع) انا نزوج صبيانا و هم صغار، قال فقال: إذا زوجوا و هم صغار، لم يكادوا أن يأنفوا»

stipulated in Ahl al-Bayt's (pbut) traditions is that it is quite obvious and its indecency is quite clear to all.

In order to avoid mixing up pleasure and touching, it should be explained that pleasure in jurisprudential terms means sexual pleasure and no jurists have ever used it with this meaning. Therefore, touching the minor is not forbidden but sexual pleasure like sensual touch are prohibited.

It might be claimed that marriage entails sexual pleasure and if anything contradicts the essence of marriage, no marriage would have taken place. Therefore, it is invalid to prohibit sexual pleasure in a marriage, which essentially makes the marriage void and null.

The answer is that this claim that marriage entails sexual pleasure is controversial and has to be discussed. Initially, it has to be said that although marriage is basically meant for sexual pleasure, there are two viewpoints (See Raqib Isfahani, 1412, pp 823; Tarihi 1416, vol. 2, pp421; Johari 1410, vol. 1, pp413). The jurists' well-known opinion is that the word nikah means marriage (Najafi, ibid, pp 7). In Holy Quran, it means marriage too, except for the verse Nur/3, which might mean sexual intercourse (Qoreshi, 1412, vol. 7, pp 108).¹

By examining jurists' comments, it is found out that although many believed that marriage entails sexual pleasure (Allamah Hilli, 1418, vol. 7, pp 314; Mir Fatah Maraq' i, vol. 2, p 249), others believed that marriage entails pleasure other than sexual pleasure, justifying that some legitimate rulings or logical purposes are used for marriage. (Bojnurdi, 1401, vol. 2, pp 431). Imam Khomeini



seems that agrees with it (Musawi Khomeini, 1421, vol. 5, pp. 282).

To confirm the above viewpoint, we can discuss marriage with an impotent person. Such a marriage is recognized in jurisprudence, yet impotency only entitles the wife to get divorced. This right verifies marriage, since divorce is given where a marriage is recognized and if the wife waives this right, marriage will legally persist with all its effects.

In temporary marriage, it is of less controversy among jurists to set out the condition of no sexual intercourse, and hadiths were often cited (Tusi, 1378, vol. 2, pp. 383); for example, if a condition is laid down that the man cannot engage in sexual intercourse with the woman, he cannot do without her consent (Ibn Idris, 1410, vol. 2, pp. 617). It paves the way to accept the same conditions of temporary marriage (which is definitely marriage and sexual needs are considered) in permanent marriage.

Many Imamiyya jurists also do not see such conditions (of no sexual intercourse) in contrary either to marriage entailments nor legitimate rulings. Marriage contains various purposes and sexual intercourse is not its only purpose, and it will not become null and void by just laying down no sexual intercourse condition beforehand (Iravani, 1427, vol. 2, pp. 372).

3-2- Principle of Permissibility and Permission

As already mentioned, some jurists cited permissibility principle to permit other pleasure from a minor wife, justifying that such pleasure is permissible unless jurists prohibit it. As discussed in detail before, no loss principle governs permissibility principle and leaves no room for permissibility principle.



It may be questioned that no loss principle is used where pleasure entails harm; nonetheless, there are pleasures such as sensual touch which do not entail harm on the wife. Therefore, in our discussion, it is not appropriate to use the generalities of no loss principle and its dominance on permissibility principle.

Its answer is that first of all, non-harmful pleasure (if accepted at all) is negotiable when there are significant instances, but when there are few instances -if one supposes that most pleasures are harmful- permissibility principle cannot be used. Secondly, reduction of instances to physical harm is inappropriate and unlikely, because by harm we do not mean just physical harm which might be rejected in some instances in our discussion, but we mean all physical and mental harms. Consequently, how can mental harm be denied and the generalities of no loss principle be rejected, when a child who is now grown up understands her past? Will a child not be subject to numerous mental problems when she understands after she is grown up that she used to be a sexual object in her infancy while she did not have the slightest idea what sexual pleasure might be. Are the wife's corruptions and mental problems more than the benefits of the marriage? In particular, it is in line with a just religion which considers inherent decency and indecency of practices and assesses the injunctions frequently based on their benefits. So to be honest, no loss principle is quite appropriate in here and there remains no room for lack of generality of no loss principle in our discussion.

Another reason for inappropriateness of Permissibility principle in our discussion derives from the fact that some types of pleasure are abnormal in social norms and practice. Ayatollah Makarem Shirazi in his comments on `urwat al-Wosqa, quoting Sayyed Yazdi, states: Caution should be



exercised that one's minor wife has the sexual capability and the type of pleasure should be according to social norms. About female infant, it is prohibited as mentioned in the book, and it is forbidden to use permissibility principle or reasoning in this regard, since reasoning is for instances of conventional pleasures (Makarem Shirazi 1428, vol. 2, pp. 772).

In addition, it seems that the author of *Tafsil al-Sharia* justification on the permission for other pleasure is that the principle, suggesting that it is legitimate to marry a minor, permits other pleasure; otherwise there will be no use to permit that (Fazil Lankarani, 1421, p.24). Firstly, it is not constant and quite controversial to reduce the benefits of marriage to some pleasures, especially in the modern era when sociologists and psychologists proved the contrary, pointing to the fact that its mental benefits weigh more than the physical ones¹. Secondly, it is sometimes because of beneficiary intents, such as marrying an infant who lost her family in an accident and thus she has no guardians or to establish mahramiat (non- sexual relationship) between a man and a woman in family environments (given the traditional conditions) or those who work in the same place. In such circumstances, a woman's minor girl was married to a man to make her mother-in-law. Also, a father married her daughter to a great person to enjoy the resulting honor.

Therefore, there have been various reasons to permit marriage with a minor across the history. As discussed above, it is meaningless to claim that jurisprudents prohibiting marriage with a minor is useless when all pleasure are not permitted.



1. Hossein Ali Montazeri in "Women Rulings and Knowledge" (1427, pp 224-229) and Makarem Shirazi in "Al-Nikah" (ibid, vol. 1, pp 8-11) referred to some of these benefits.

3-3-Justification based on Consensus of Jurisprudents

There is a consensus among some jurisprudents, such as the author of *Muhazzab al-Ahkam*, about pleasures other than sexual intercourse; yet, it is not logical to refer to consensus in terms of both minor and major premises in the present discussion, because firstly, many early jurisprudents did not stipulate this issue and did not object it, and secondly, even if we accept the consensus, it is not sufficiently reliable due to potentially invalid documents. As scholars of the *ʿosul* science said, the validity of consensus derives from the Infallibles (pbut). The consensus documents are available to the jurisprudents and he can refer to them and issue a fatwa or reject them. The value of documented consensus is not more than its documents (See Sobhani, 1418, vol. 2, pp 56; Jazaeri, 1414, vol. 4, pp 386).

Marashi Najafi states: “the consensus derived from the Infallible (pbut) is scarce and close to nothing; especially when most consensuses are of documented type which point to jurisprudents’ agreement and not of religious consensus which is reliable. Therefore, we have to refer to legitimate documents. In this condition, consensus is a confirmatory reason and not a stand-alone one” (Marashi Najafi, 1415, vol. 1, pp 342).

In conclusion, the reasons justifying the permission for other pleasure suggest that the claims are too weak and a more sensible reason which is in accordance with legitimate and rational principles is to prohibit all the pleasures from a minor wife.

4-Legal Perspective

Legally, there are no articles clearly stipulating this issue in the case law, the only reference being in article 1041 of civil law regarding the age of marriage: “the marriage of a girl before 13 and a boy before 15 depends on the parents’



permission to their children's own good and the decision of the court of law" (Revised on June 22, 2002).

Article 1041 of civil law stipulates legal age of marriage of girls and boys. The content of this article has been revised several times since 1934 when the age limit for boys was set out at 18 and for girls 15, and marriage at less than these age limits had to be permitted by the proposition of attorney-general and the approval of court of law. In article 23 of family law passed in 1974, the content of article 1041 changed: "It is forbidden for a boy before 20 and a girl before 18 to get married. Nevertheless, in exceptional circumstances the age limit might be broken by the attorney general's proposition and the court of law approval, e.g. for a 15-year-old girl who is physically and mentally ready for marital life."

In post-revolution era with the transitional government, article 23 which was passed in 1974 was annulled and the legal age for marriage was reset at 18 for boys and 15 for girls.

However, since the criteria in jurisprudence is maturity or immaturity and the content of the above law contradicts with Sharia, in January 1983, article 1041 was revised with a note, as follows: "It is forbidden to get married before maturity". Note: "Prematurity marriage is allowed with parents' permission provided that it is to the minor's own benefits" (See Muhaqqiq Damad, 2007, pp47).

In May 1996, article 646 of Islamic penal code stipulated the enforcement of the above article: "It is forbidden to get married before maturity without parents' permission. If a man marries a girl who did not reach maturity and breaks the article 1041 of civil law and its note, he will be sentenced to imprisonment from 6 months to 2 years."



Given the fact that, the age of maturity varies across individuals and there were problems to match law with objective circumstances, the legislators once again set out the minimum age limit for marriage. In November 2000, Iranian Parliament revised article 1041, but it was sent to Expediency Council due to disagreement between Guardian Council and the Parliament on this article which was ultimately adopted in June 2002 as follows: “The marriage of a boy before 15 and a girl before 13 depends upon their parents’ permission and the approval of the court of law provided that it is to their own good.”

It should be noted that even in the above revised article, there is no clear statement on the permission for pleasure from immature married girls, it might be inferred that since legislators permitted the marriage of minors with certain conditions, it is also permitted to take pleasure from one’s minor wife.

Therefore, this article seems to be contrary to the consensus among Imamiyya jurisprudents; because all Imamiyya jurisprudents do not permit sexual intercourse with minors before they reach maturity. The controversy is over other pleasures. In contrary, the above article seems to permit all the pleasures.

Given the results of the present paper, the first suggestion is that the legislators clearly forbid marriage with minors before maturity in harmony with jurisprudents who consider marriage with minors as the very imprudence and contrary to common practice and benefits or at least clearly forbid all the pleasures from minor wife in the above article.

5-Conclusion

In spite of an extensive anti-Shia propaganda of giving permission for unconventional sexual pleasures and child



abuse, it was proved by the present paper that the jurists' fatwas on the permission for pleasures were on preliminary injunctions. It tried to refute the charges by proving that grand jurists basically did not consider secondary injunction. Considering the dominance of no loss principle, the Imam jurist principles require that any pleasure from one's minor wife be prohibited given the physical and particularly mental harm that might be inflicted on her.

6-Implications

Given the results of the present study, some implications about the benefits of minors and her physical and mental health are proposed.

- 1) Legislators follow jurists like Ayatollah Mustafa Khomeini to clearly forbid any unconventional pleasures from one's minor wife in the case law, if any law permitting marriage with minors is passed.
- 2) If not so, given the potential harm that may be caused on minor wife, it is recommended she undergo a medical test before engaging in sexual intercourse. If the doctor believes that she is not physically capable for marriage, the court of law prevents the marriage and no notary office can register this marriage. If marriage takes place without being registered at the notary office and the husband engages in intercourse in contrary to doctor's diagnosis and the wife is harmed, he has to pay fine. Obviously, it will come into effect when the associated laws are enacted and a penal system is established.
- 3) To overcome the difficulty to enforce the laws of minors' marriage according to Shiite jurisprudence, it is recommended that the meaning of benefit of minor girls



in the case law be explicitly defined. It is of great significant given the various factors in the modern society about the criteria of choosing spouse.

- 4) It should be stipulated if spouses have no consent to their marriage after maturity the legal order of annulment is issued. This is in accordance with some narrations² and is based on no loss principle, with this approximation that without consent to marriage, the requirement to pay alimony and dowry by the husband, and the requirement to be obedient and accept the dominance of husband by the wife causes harm on them, which is rejected in Islam.

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