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RESEARCH PAPER

Reproductive Right in Islamic Law

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Abstract
Bearing a child has always been one of the most magnificent matters of mankind. Naturally speaking, making a decision about it relies on its pros and cons. By the development of modern assisted reproductive technologies and contraceptive methods in recent decades, the issue of human reproduction has gained more importance in Islam (and Islamic law) and in other religions. In this paper, we use the document analysis and descriptive-analytical research methods to figure out the conditions and status of mankind's reproductive rights according to Islamic law. The purpose of this article is to show the perspective of Islamic law toward the nature of reproductive rights. By considering this issue, we can decide better about other issues in this realm such as the aspects of reproductive rights, the right-holders, and the duty-bearers. In conclusion, according to the standpoint of the Qur'ān and the traditions about the permission to practice *ʻazl* (withdrawal or coitus interruptus), we might maintain that human reproduction is a right rather than a commandment (*ḥukm*); moreover, it is a mixture of duty and right, because is not sufficient to only take rights into consideration. Thus, according to this right, obligations or duties must be imposed against other opposing parties (persons or the government), as it is not possible to imagine rights without responsibilities.

Keywords: reproductive right, right, commandment, Islamic law, obligation, duty.

Introduction

Recent technological developments play an important role in modifying many aspects of human reproductive life. By introducing innovative reproductive technologies, human beings have tried to control reproductive tendencies and behaviors at both the individual and social level. Every religion, state, and legislation tries to answer all ambiguities concerning this matter. Moreover, religion can impact people's views to new issues related to human reproduction. In Islamic countries, religion plays a central role in the ratification of laws including the human reproduction. In addition, one of the important issues in the area of family law is the reproductive right. It is one of those human rights that is rooted in post WWII era. From the viewpoint of liberal theory, the procreative right is a negative right against state interference, not a positive right to the resources needed to procreate (Roberts, 1995: 1015).

In contrast, Islamic law has explained reproductive rights since many years ago, and in old Islamic jurisprudence books, we can find some terms that are directly related to reproductive rights. Both Shīʻa and Sunnī scholars have discussed *ʻazl* (withdrawal or coitus interruptus) in

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their old books. That is to say, reproductive rights have been addressed by them long before Western scholars.

Additionally, the Muslim scholars have to make judicial decisions about new issues; therefore, we can see a prefect theory that involves all old and new aspects of reproductive rights from *ʻazl* to cloning and so on.

Islamic law, by principle, is the basis for enacting regulations in Islamic countries. In novel matters, the Islamic legislator stops enacting laws until he receives the views of Muslim scholars; so knowing Islamic law's perspectives toward the reproductive rights and all aspects of them is necessary. Accordingly, this paper tries to figure out the above-mentioned viewpoints.

Many authors have written about aspects of human reproduction such as ARTs and surrogacy in Islam (Ḥaram Panāhī, 1997; Islāmī, 2005; Yazdī, 1996), but no one has addressed reproductive rights as a whole. Although Muslim scholars have stated their *fatwās* (legal opinions) regarding these issues, most papers do not mention all existing opinions and reasons about the various aspects of reproductive rights. In summary, although there are many papers in Persian and Arabic and to some extent in English regarding some aspects of human reproduction such as ARTs, there are still very few articles about other aspects of reproduction and reasons for considering them as religiously acceptable or not.

The definition of the reproductive right in Islamic law

In ancient Islamic jurisprudential books written in Arabic, we find two terms such as *istīlād* and *ḥaqq fī al-walad* that are directly related to the reproductive right.

The first word has two meanings: first, the ability for every man and every woman to reproduce and second, the actualization of female slaves being able to reproduce (Al-Baḥrānī, n.d., vol. 18: 488; Al-Ḥillī, 1982: 232; Al-Ḥillī, 1997, vol. 3: 257; Al-Makkī al-ʻĀmilī, 1990: 198; Fāḍil ʻĀbī, 1987, vol. 2: 309; Iṣfahānī (Faḍl Hindī), 1995, vol. 8: 528; Najafī, 1984, vol. 34: 372; Sabziwārī, 2002, vol. 2: 472). The second meaning is not used in this era. Consequently, the first meaning of "reproductive right" is related to our discussion. Moreover, it is mentioned more than the second one in Fiqh books, particularly Shīʻa books. In contrast, Sunnī scholars have only discussed the second meaning and have ignored the first.

In Shīʻa books, the term "*the right to istīlād*" is used by Zayn al-Dīn al- Jubaʻī al-ʻĀmilī (Shahīd al-Thānī) and Najafī. Shahīd al-Thānī after having had discourses about the proof of prohibition viewpoint on the *ʻazl* by the husband, having had prohibited ʻazl based on the violation of the wife's reproductive right (Al- Jubaʻī al-ʻĀmilī, 1992, vol. 7: 65). Similarly, Najafī discusses this right in regards to the topic of the *ʻazl* method. He rejects the view of the prohibition of *ʻazl* and then referrs to "the right to *istīlād*." Likewise, he believes that the wife and husband can make a provision in the marriage for *istīlād* or wanting and having children against each other's will (Najafī, 1984, vol. 29: 113). Thus, we can see that he considers this right for both spouses.

In addition, in other books, this right is cited indirectly, because Shīʻa scholars have discussed contraception or family planning. The reason for this is that some early forms of birth control were practiced during the lifetime of Prophet Muḥammad (s) as he did not prohibit methods such as *ʻazl*.

Al-Nuʻmān al-Maghribī, too, declared this right completely (Maghribī, 1963: 212) and other Zaydīyya scholars demonstrated this right after affirming the wife's sexual right (Hārūnī Ḥasanī, n.d., vol. 3: 205; Jandārī, n.d., vol. 2: 319).

The second term mentioned above is *ḥaqq fī al-walad* which is mentioned by Sunnī scholars, particularly by Ḥanafī and Ḥanbalī. When discussing *ʻazl* method and *istīlād*, they talk about this right and consider it for every man and woman (Al-Kāshānī, 1988, vol. 2: 334; ʻIbād, n.d.: 1; Ibn Mufliḥ, 2003, vol. 7: 180; Shaybānī, 1985, vol. 1: 187).

Ibn al-Qayyim Al-Jawzīyya believes that in order to apply *ʻazl*, the husband must obtain his wife's consent. He declines that this right belongs to the women in marriage because this right is one part of the custody, because he supposes that the right to custody is first for women and then for men (Al-Jawzīyya, 1994, vol. 5: 128, 132). In conclusion, both spouses have this reproductive right because they have obtained each other's consent.

Al-Kāshānī declares that both ejaculation and sexual intercourse together causes the bearing of a child. Therefore, the wife has reproductive right that is not protected in *ʻazl*. In his viewpoint, *ʻazl* is makrūḥ (legally disliked), because this right will be abolished in it. If it is done with the consent of the wife, it will not be legally disliked, because the wife willingly consents to give up her right (Al-Kāshānī, 1988, vol. 2: 334). In their discussion of the issue of *fīrāsh*, some scholars assert that the adulterer does not have this right (Al-Marghīnānī, n.d., vol. 2: 284; Al-Qasṭalānī, 1905, vol. 6: 399). From the viewpoint of the Ḥanafī scholars, the term *ḥaqq fī al-walad* is applied for the right to custody as well (Al- Qudūrī, n.d., vol. 1: 96). In conclusion, the wife can enjoy the right to custody after enjoying the reproductive right.

Other Islamic scholars such as Shāfiʻī, Mālikī, and most of the recent Shīʻa scholars have not discussed the human reproductive rights in their writings; consequently we have reviewed their books about *ʻazl*, abortion, ARTs, and contraception so that we can introduce their viewpoints about this subject.

Al-Ghazālī is one of Shāfiʻī scholars who has many arguments such as *ʻazl* about family. After the discussion about *ʻazl*, he concludes that this method is legally permissible (Al-Ghazālī, 2004, vol. 2: 47), and then he tries to explain the reasonable reason for this. By reviewing his reasons, his viewpoint about the reproductive right becomes clear. He thinks that it is permissible when somebody gains this right with the aim of protecting the wife's health, preservation of the wife's beauty, and fear of poverty, and when somebody attains it with the aim of fearing having a daughter, not a boy or Excess-woman in cleanliness and avoids bearing child, bleeding of childbirth and breastfeeding such as Khārijīs' women (Ibid: 47). After reviewing the Shāfiʻī opinions about *ʻazl* through Al-Ghazali's stance, we can conclude that he assumes that the reproductive right is only for men and not women because he, too, presumes that the sexual right is specified for men (Al-Nawawī, n.d., vol. 18: 253). Although he says that both spouses have a role in the creation of the fetus, he believes that the sexual right is for men only, not women (Al-Ghazālī, 2004, vol. 2: 51). Considering his idea about a spouses' participation in child-bearing, his opinion about the wife's lack of a reproductive right is not correct.

Al-Bāji indicates that regarding right of Allāh and a wife's sexual right and reproductive right, the husband could not refuse sex with his wife (Al-Zubayr, 1991: 173). In response to a question about family planning program, Shaykh Abdul-Majid stated that according to Islamic law, the husband could not enjoy *ʻazl* without his wife's consent (Al-Sharbāṣī, 1965: 186). Correspondingly, the wife cannot do that either. However, some new scholars have supposed that if the wife reasonably fears her child's deviation and aberration, she could practice contraception without her husband's consent (Ibid: 186).

Similarly, Būṭī supports the wife's reproductive right and says that Islam recognizes this right for couples in the context of Islamic legislation. He also asserts that they can exercise this right by considering it in that context (Al-Būṭī, n.d.: 39).

Ḥasanī Ghamārī maintains that in Islam, human beings have the freedom to marry. Accordingly, they have freedom to decide about bearing a child according to their common good or their interest. Then he referrs to Al-Ghazālī's idea that has been reported previously in this paper and states that using contraception without wife's consent is an abomination; however, it is not forbidden. He similarly supposes that bearing a child has four causes: marriage, sexual intercourse, ejaculation, and sperm travel up into the wife's uterus. Although some causes are close to the result (child), not engaging in them is like not engaging in others. Subsequently, all causes are equal; furthermore, all of them are legally permissible (Ḥasanī Ghamārī, 2002: 50-53). It seems that his idea about the quality of these four causes is not correct, because ejaculation into the wife's uterus is the last part of the adequate cause and furthermore, permission of one cause does not mean that the other is likewise acceptable. Lastly, we can refer to the idea of the International Islamic Fiqh Academy, Jeddah, which is expressed as follows:

1. Enacting legislation that restricts the freedom of spouses to reproductive right is not legal.
2. The sterilization of men and women is forbidden according to Islamic jurisprudence.
3. The temporary and reversible methods of contraception is permissible in the conditions like existence of both spouses' consent, preventing harm to the spouses and the fetus, and lawful approach of contraception in Islam (Jamal, 2009: 107-108).

After reviewing the Sunnī scholars' viewpoints, we can understand that they similarly recognize spouses' reproductive rights. Now we refer to Shīʿa scholars' opinions about reproductive rights. Many Shīʿa scholars have not debated the reproductive right directly, but by going over their opinion about ARTs, abortion, and contraception, it can be concluded that they believe in reproductive rights, because they have accepted some of the assisted reproductive methods that have not been real and actual. As a result couples can use these methods to have a child. From the negative aspect of reproductive rights, they similarly think that abortion before the fourth month is forbidden. However, before this, if the pregnancy puts the mother's life at risk or causes unbearable damage to the mother, abortion would be legal. They allege that practicing contraception is allowed in some situations, e.g., when there exists the wife's consent or when it is done without permanent sterilization. Therefore, according to Sunnī scholars' views, we can conclude that they believe in the spouses' domination on the issue.

Muʾmin is one of the Shīʿa scholars who openly defend the reproductive right of spouses according to qurʾānic verses (Muʾmin, 2003: 55-58).

In conclusion, the reproductive right is a conceptual quiddity which is made by God. According to this quiddity, every person can decide whether to bear a child or not. But we must know that these decisions must be in the context of Islamic commandments. This means that Muslims must respect actions that are obligatory (wājib), legally prohibited (ḥarām), legally permitted (mubāh), undesirable (makrūḥ), and recommended (mustaḥab) by Islamic Law.

All the discussions here show that most of aspects of the reproductive right have been considered by Islamic scholars. This is a process which is in line with the history of Islam. In the past fourteen centuries, an effort has been made by Islamic scholars to make all the aspects of reproductive right and issues related to it clear. As new technologies are being introduced into the human reproduction arena, they try to consider them and recognize the status of the person. Thus, according to the Muslim scholars' view, each individual – either man or woman – can decide whether he or she wishes to have a child or not.

Content and aspects of reproductive right in Islamic law

In Islamic jurisprudence, the origin of the rights is God and His legislation. Therefore, to

provide instances of the reproductive right, Islamic sources must be referred to, because specific topics might be instances of the reproductive right in customary law rather than in divine law.

Regarding the content and instances of the reproductive right, Islamic law considers both its affirmative and negative aspects (having and not having a child). There are qur'ānic verses and Islamic traditions that show the perspective of God concerning this issue. The Islamic commandments indicate a point that is related to several topics such as marriage, marriage proposal, sexual relationship, bearing a child, the rights of the fetus, abortion, conception, and assisted reproduction methods. This illustrates that Islamic law considers both aspects of reproductive right (affirmative and negative aspects) and tries to manage it to protect public and individual interest at the same time. In Islamic law, all instances of this right must be in the context of Islamic legislation. Moreover, exercising this right is restricted by Islamic legislation, which means that Islamic law prevents the misuse of this right.

The right holders of the reproductive right in Islamic law

In Islamic law, however, there is no restriction against considering every being as the holder of rights. Accordingly, in this perspective, all beings and God are the holder of all rights (Al-Ṣadr, 2008: 26).

According to what has been mentioned above, the reproductive right does not belong to God, because as mentioned in the Qur'ān 112:3, "God neither begets nor is (He) born." Hence, attributing this right to God is not accepted and is rationally impossible. Like human beings, other beings have this right as well. In Islamic law, there is no restriction for human beings, as the holder of rights, to exercise reproductive right; because, from this standpoint, non-beings also have rights. Therefore, the procreative right belongs to each person, but exercising this right is limited by conditions like mental and physical maturity and wisdom. There are specific viewpoints among Muslim scholars as regards to the holder of the reproductive right in family, as follows.

- Ghazālī: This right belongs exclusively to the husband (Ḥaydar, 2004: 23-24) according Qur'ān 4:4 and Islamic traditions regarding practicing *'azl* without wife's consent or permission (Muḥsinī, 2003: 92-93).
- A number of Shī'a scholars: In this viewpoint, both the husband and the wife can earn this right, with husband's priority because of lineage matters and the alimony, which are the obligations of father (Shams al-Dīn, n.d., vol. 2: 75).
- Several Shī'a scholars and Ḥanafī scholars: These scholars consider this right as belonging to the husband and the wife (Ḥaydar, 2004: 24; Ibn Qudāma, n.d., vol. 8: 133). Their proof comes from Qur'ān 2: 223 and traditions regarding the permission of *'azl* with the wife's consent ('Ibāda, 2011: 78).
- Ḥanbalī scholars, Shāfi'ī scholars and most of the other scholars of the Sunnī denomination: This is a mutual right between parents and Islamic community; however, the parent's right has priority (Ḥaydar, 2004: 24-25). This idea is based on traditions about the permission of *'azl* without wife's consent and this idea that the subject of child bearing is not an individual topic; hence, it is responsibility of parents in God's eyes ('Ibāda, 2011: 78).
- Ibn Ḥazm and Shaykh Maḥmūd Shaltūt: On the basis of traditions regarding the legal prohibition of *'azl*, they believe that reproductive rights belong to the parents and Islamic community; however, the Islamic community's right has priority (Ibid: 78; Ḥaydar, 2004: 24- 25).

Legal justification of reproductive rights in Islamic law

The legality of reproductive rights in Islamic law can be upheld through the canonization of these rights and the way of expression of the rights. In the first method, the difference between the right's nature and the commandment's nature are analyzed, but in the second approach, Shīʿa scholars arrive at a solution via the process of deduction regarding rights. These scholars are divided into two groups. The first are those paying attention to theological language, *ijmāʿ* (consensus of scholars), and effects and implications of rights. The second groups regard *tanqīḥ manāṭ* (expurgation), manner of wise person's action, Muslims' manner of conduct, and practical principles.

Canonization of rights

Shīʿa scholars believe that *right* and *commandment* are both rooted in laws made by God. Subsequently, there is no difference between right and commandment in this point, but there are several differences between them by means of their canonization. To apprehend this approach, it is necessary to pay attention to the essential differences between the terms *right* and *commandment*, because their specific features are not part of their essence. Some of their differences are discussed below.

The waiving capacity of a right and the lack of waiving capacity of a commandment

A number of Shīʿa scholars believe that waiving capacity is an essential part of a right against a commandment (Nā'īnī, 1997, vol. 1: 107-108); but others have divided right into three groups: first, rights that can be waived; second, rights that do have waiving capacity; and third, undetermined rights (Baḥr al-ʿUlūm, 1983, vol. 1: 17; Ṭabāṭabā'ī Yazdī, 1958, vol. 2: 3). Subsequently, according to the first view, when there is verbal proof such as verses of the holy Qur'ān or the Islamic traditions for waiving something, it is a right and if not, it is a commandment.

On the basis of first theory on the subject of the reproductive right, by considering the traditions about permission to *ʿazl* as a verbal proof, it must be said that the reproductive right has the waiving capacity, so it is a right rather than a commandment. But in my view, we must study steps that start from conception to birth. This shows that although *ʿazl* is permitted, but if the spouses do not use it, they cannot waive their reproductive right by carrying out an abortion.

A commandment's subordination to interest and mischief that is considered by God and right's subordination to causal means

This feature is connected to two kinds of commandments in Islamic law, namely *ḥukm* (defining law) and *ḥukm al-waḍʿi* (situational law). Therefore, if it is accepted that rights come into existence by God, they will be under the category of *ḥukm* as a whole. According to a different view, they can also be under the category of situational law. In defining law, there are resurrection and retribution for doing and giving up defining law, but situational law does not involve resurrection and retribution (Al-Ṣadr, 2008: 16-17).

On the topic of reproductive law, there is no resurrection and retribution for having or not having a child. In conclusion, we can claim that in Islam, spouses' reproductive actions are a right rather than a commandment.

The relationship of right to the holder of these rights as a factor differentiating right from commandment

Diagnosing the interest in defining law is by God, but in situational law, identifying the interest is by the holder of the right such as human beings (Ḥusaynī Rawḥānī, 1997, vol. 3: 18; Ṭabāṭabā'ī Yazdī, 1958, vol. 2: 2-3). This means that rights as a commandment in the step of God's making a commandment, have an interest that is recognized by God and after God's making, it is related to the legally competent, recognizing its interest is done by the legally competent (Al-Ṣadr, 2008: 16). Accordingly, in this topic, distinguishing the interest of bearing a child or not belongs to the legally competent. As a result, childbearing is a right rather than a commandment.

The forth difference between a right and a commandment is related to the obligation of the duty-bearers

This means that obligations arise from another person's right. In defining law, there are occasionally other persons as a duty-bearers; however, at times, there are not other persons as a party like Salāh (namāz), but in situational law, there are other persons as a party (Ibid: 23-25).

In regards to the reproductive right, finding specific persons that are negatively affected by this right will be difficult, because it is possible to recognize particular different people that are negatively influenced by this right. This means that in several aspects of the reproductive right, this right is against certain persons and in other specific aspects of this right it is against some other persons. This multiplicity may not make difficult in practice, but it makes recognizing this person hard. In other rights, this person is identified and his duties that are related to the holder of these rights are clear.

In addition, recognizing the government as a person who has obligations in the area of being a reproductive health service and allocating resources equitably needs several worthy and respectable reasons.

Quality or the process of deduction regarding rights

Muslim legislators have the different positions where, according to these legislators, there are different speeches. We can see different ways of exposition in different speeches. Therefore, we can see that certain speeches show that something is right but, in fact, there is not any right. In contrast, we can see that particular speeches do not show that something is right, but Islamic scholars can deduce that something is a right from these speeches. In this section, specific methods will be explained that have been mentioned above.

Considering theological language

There are two methods by which the right can be recognized:

- By reviewing revealed texts it is possible to recognize that something is a right or a commandment.
- Considering absoluteness and generality of a text in a situation in which the domain of the reason is not clear.

Revealed text of the proof

There are two kinds of texts that are very important in Islamic law: The holy Qur'ān and the Islamic traditions. These are the two fundamental sources of the Sharī'a, which are aimed at establishing basic standards for any Muslim society and introducing their rights and responsibilities.

If there are certain words in the revealed text of the proof (the holy Qur'ān and the traditions) that appear to be a right or a commandment, they must be adopted as the criterion for action. In addition, specific situational evidence or indications and particular rational indications in texts can imply that something is a right or not.

Subsequently, in order to recognize a reproductive right, it must begin from the context of the holy Qur'ān. By reviewing the verses of the holy Qur'ān, certain verses can be found that are related to proving the issue that making decisions in area of a human being's reproduction is his right. An example is the Qur'ān 2:223, "Your women are a cultivation for you; subsequently approach your cultivation whenever you like, and send ahead for yourselves. And fear God, and know that you will meet Him. And give good news to the believers." According to this verse, we can make two arguments.

The first concentrates on the word "cultivation," which means planting seeds in earth according to other verses and the transmission of traditions. Accordingly, this meaning applies to women on the basis of this verse. The second is the word "for you," which connotes that there is "ownership" or "domination" in this right for the husband. However, it must be known that this right is not limited to him; thus, it also belongs to the wife, because bearing or not bearing a child is on the condition of the wife's consent. Therefore, the wife can prevent her husband from demanding her to bear children (Mu'min, 2003: 122-124).

It must be said that the last part of his deduction is not acceptable, because a number of Shī'a scholars believe that a husband or a wife does not need the other party's consent in making decisions about bearing or not bearing a child (Tabrīzī, 1995: 361). Moreover, reproduction is the main act that is dependent on two persons (the wife and husband); consequently, it is a right for both of them.

Certain scholars believe that this verse expresses something that is normal in human beings' lives. Consequently, it cannot prove a couple's reproductive right. To respond to this view, it must be said that the trend of this verse shows that "Your women are cultivation for you", so they belong to you (Every man's wife cultivation for him).

In addition, it is possible to say that this verse establishes the sexual right rather than the reproductive right (Qā'inī, 2006, vol. 1: 250). To answer this doubt, it must be said that the statement "send ahead for yourselves" shows that the goal of this verse is to guide women and men or only men toward marriage and having a child. Hence, the trend of the verse proves that the reproductive right is the main issue in this verse.

The second deduction concentrates on relation or correlation between "cultivation" and a person, which shows providing someone with something in Islamic jurisprudence (Raḍawī, 2010: 152-153). Therefore, God recognizes this right.

One of the Sunnī scholars, as well, has tried to prove this right according to this verse. He, similarly, believes that the reproductive right belongs to the couple (Al-Uthaymeen, 2000, vol. 26: 8).

After the holy Qur'ān, the Islamic traditions are the second most important source that must be reviewed on the topic of reproductive rights. There are ten groups of traditions on the subject of reproduction and other related issues. Among these, one group can prove the reproduction right. This group is the one that introduce *'azl* as permitted.

The ten groups of the traditions consist of:

- Traditions about the prevention of emasculation or Castration
- Traditions about emphatically recommended Sunnah (way) of marriage and bearing child in the marriage context
- Traditions about the goal of marriage, which is bearing children
- Traditions about marriage with women who have the capacity of bearing children and the prevention of marriage with infertile women
- Traditions about introducing children as pupil of one's eye and a great blessing
- Traditions about the calling for having more children
- Traditions about blood-compensation (dīya) in abortion cases
- Traditions about permission to practice *'azl*
- Traditions about the denial of accepting the child as one's own child in *'azl*

Considering absoluteness and generality of a text

A number of Shī'a scholars believe that this is the only way of determining whether something is a right or a commandment (Mūsawī Khu'ī, n.d., vol. 2: 55-57). But other scholars believe that this method is applied after other techniques which are mentioned above (Mūsawī Khumaynī, 2000, vol. 1: 50).

The reproductive right is established according to the Qur'ān 2:223. Subsequently, there is no need to use this method to show that reproduction is a right.

Ijmā' (consensus)

According to Sunnī scholars, *ijmā'* (consensus) is an important secondary source that provides the Islamic community with the essential tools to reach agreements (Rehman, 2007: 112). But from Shī'a scholars' view, this Islamic term means "a consensus in which the opinion of the Imam is included." There are several ways to understand this issue, which are explained by some Shī'a scholars. By reviewing the opinions of Islamic scholars, we can see that some scholars have not addressed this issue; however, others believe that bearing children or not is a right rather than a religious commandment. According to the meaning of *ijmā'* in Shī'a and Sunnī resources, it must be said that there is no *ijmā'* that shows that reproduction is a right.

Considering the effects and implications of rights

In the Canonization of Rights section, we explained the features of rights and commandments. In that part, many different ideas by Shī'a scholars were presented, but the point is that no consensus about the issue exists among them. Free from the disagreement of Shī'a scholars about this issue, it is possible to use it in sub-topics, although it cannot be a good criterion, as a whole, for recognizing rights such as reproductive right.

***Tanqīḥ manāṭ* (expurgation)**

Tanqīḥ manāṭ (expurgation) means that something for the relinquishment or waiving of which there are reasons must be elicited, and then the common criterion of relinquishment or waiving is extracted. Thus, we have a formula, according to which, we can establish certain rights if there are not any reasons for them to be rights. This approach cannot be used very

easily in the area of human reproduction because there is not any text that expresses the relinquishment or waiving of this right.

Muslims' manner of conduct

Muslims' manner of conduct means that there are common acts for Muslims with respect to an issue, because they are Muslims. In fact, this method is a kind of *ijmāʿ* (general agreement) and it is the most valid kind of general agreement. It includes both *ijmāʿ* of all Muslims and scholars, but the verbal or oral *ijmāʿ* includes only the *ijmāʿ* of scholars. Its validity depends on two factors: proving that *ijmāʿ* or sīra existed at the time of the Prophet (s) and Imāms (a), and that they have not rejected them.

By reviewing Muslims' behavior in the time of the Prophet (s), it can be understood that there is a kind of domination on reproduction. This point can be revealed by considering the tradition about *ʿazl*. In addition, many Shīʿa and Sunnī scholars believe in the reproductive right.

Wise person's manner of behavior

This means that, by considering wise people's behavior from the beginning of time until now, we can have criteria that show that there is a common behavior with regards to an issue among them. Its validity is dependent on three facts:

1. God has not prohibited it.
2. Domination of wise people's concentration about reasons.
3. Wise people's concentration is verified by God (Qanawātī & Jāwar, 2012: 26).

Wise people's behavior, in all eras, is based on mankind's control of reproduction and they make the decision about it themselves. It can be understood by reviewing the transmission of traditions about *ʿazl*, as well. In addition, we can see specific transmission of traditions about child bearing that strengthen this viewpoint.

Moreover, the prohibition of abortion is a specific issue that is not related to the reproductive right, because there are particular reasons in the context of the holy Qur'ān and the Islamic traditions against it.

Practical principles

From the Shīʿa point of view, practical principles are divided into four groups: istiṣḥāb (continuity or presumed existence or continuation of a previous state or fact in disregard of its continuance having been called in question at or beyond a certain point in time), takhyīr (authorizing to choose or the liberty of a person to choose either one of two alternatives to the permanent exclusion of the other), barāʾat (freedom from any legal obligations), and iḥtīyāṭ (precautionary meature or caution or precaution). All four principles are used as practical principles when the Muslim jurists cannot find reasons for *ḥukm* in the holy Qur'ān and traditions. They help the Muslim jurists show Muslims their religious responsibilities in instances where they do not know their exact duties. Shīʿa scholars believe that if there is no evidence in the context of the holy Qur'ān and traditions concerning an issue, they must be referred to as practical principles. So, if the relinquishment or waiving of something is doubted, it will be possible to say that there is no relinquishment or waiving. Therefore, there is no right here (Nāʾīnī, 1997, vol. 1: 108).

With regards to the reproductive right, we can say that there is no need for this method, because in the previous sections we proved the reproductive right in the context of the holy Qur'ān.

In conclusion, I think we can imagine two theories about the nature of the reproductive right in Islamic law:

- The reproductive right is a simple and indivisible right. This means that it is not possible to use the power of constraint against each person to bear or not bear a child.
- The reproductive right is a right mixed with obligations. It appears that this theory is more acceptable; because, before conception, parents can decide to have a child or not, but after this, their rights are mixed with obligations. This means that after conception, a fetus has an important right to live. Consequently, a parent can not violate its right. After the soul is blown into the fetus, abortion will be illegal. Thus, not violating its right to live is an obligation of both parents. After the birth of the child, parents cannot deny their child, the child belongs to them, and the child can enjoy her/his rights.

From amongst these two theories, I agree with the second, because in this view, the rights and benefits of all persons in a family (namely wife, husband and child) are taken into account and respected. It is a crucial principle that exercising a right by a person does not do harm to others. Therefore, exercising the reproductive right by parents must not harm the child; they also have the responsibility of respecting his/her rights.

Conclusion

In Shīʿa denomination, there are three theories regarding the definition of rights: ownership, sovereignty, and hypostatized object. Both Shīʿa and Sunnī scholars have taken into reproductive rights for a couple and have discussed it in their books, using the words *istīlād* and *ḥaqq fī al-walad* before non-Muslim scholars. Similarly, they have paid attention to the affirmative aspect of reproductive right and have tried to explain all defined law (obligatory, legally prohibited, legally permitted, undesirable, and recommended) about exercising it.

The legality of the reproductive right in Islamic law can be uphold through the canonization of rights and the way rights are expressed. In the first method, the difference between the nature of a right and the nature of a defined law are analyzed; but in the second approach, Shīʿa scholars arrive at a solution through deduction about those rights. The second method can be further divided into two groups:

- First, paying attention to the theological language, the consensus (*ijmāʿ*), and the effects and implications of rights.
- Second, expurgation (*tanqīḥ manāṭ*), wise persons' manner of behavior, Muslims' manner of conduct, and practical principles.

In all these methods, reproductive right can be established via methods such as theological language. Therefore, after this method proves the right, there is no need to use other techniques such as consensus (*ijmāʿ*) and the effects and implications of rights, expurgation (*tanqīḥ manāṭ*), and practical principles. But we can say that reproductive rights can be established via the two methods discussed above, namely wise persons' manner of behavior and Muslims' manner of conduct.

Finally, it must be said that the reproductive right is one mixed with obligations; it is not a pure right. The first theory has the capacity to consider making law or legislation. Considering obligations of couple for supporting children as a vulnerable group in the family is necessary and curial, and it can help government manage the family affairs better than before. The family is an important unit needed by society for training members of the society. Therefore, imposing duties on it for this goal can help the government fulfill other obligations in society.

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