Jurisprudential analysis temporary marriage from the perspective of both Shia and Sunni

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Abstract

Temporary marriage or concubine (Mut'a) is a marriage, in which a marital relationship is created between man and woman for certain duration. In this type of marriage, wife has no right to alimony, right to portion and intercourse and couples don't inherit from each other. Moreover, wife doesn't need permission of husband to go out of home. In temporary marriage, the duration of marriage should be determined and lack of determining dowry in contract can make it invalid. Basis of temporary marriage in Quran, Sunnat and jurisprudence of Islamic religions: temporary marriage or Mut'a is one of the juridical and legal sentences in marriage, which is discussed since long times. The history of the discussions returns to time of caliphs. The main issue is about legitimacy or illegitimacy of such marriage in Holy Religion of Islam. Shiites, especially Imami Shiites, believe that it is legitimate and a branch of legal marriage; although this type of marriage is out of vogue now. Scientific and Ijtihad sources of 4 religions of Sunnis believe that temporary marriage is illegitimate; meaning that it has been legal at past and now it is illegal. However, in common law, outdating is not discussed; but also temporary marriage is counted as the origin of illegality and against sharia. In this study, the main purpose is to explain the topic and to present claims of two parts and boundaries, conditions and limits of temporary marriage and arguments of scholars of 4 religions, especially the Hanafi jurists about its deprivation and arguments of great Imami Jurists about legitimacy of this marriage.

Keywords: temporary marriage, jurisprudence, Sunni, Shiite

Introduction

In view of all Muslim jurists, the sentences of marriage have certain framework and limits similar to Islamic religious rules and human tastes and desires can change or disrupt it. Temporary marriage is one sentence that most disputes are formed about it. Accordingly, necessity of investigating it is felt more than other topics. Almost in all Muslim countries, followers of two great Islamic religions (Shiite and Sunni) have disputes in many cases. Covering and avoiding explanation of basis of disputing sentences can cause warm up of the market for Shiites and can also make the hypocrisy resulted from it affect the society. Then, Shiite people that believe that such action is legal and legitimate may marry with a woman
temporarily and as Sunni judge has not recognized such marriage, he may order for Hadd sentence for the temporary couples. This is because; it has ambiguous and even negative consideration of temporary marriage. Hence, deductive explanation of the discussions can result in more identification for followers of two religions about each other and familiarity with basis of the other religion. Through this, if one religion has not accepted the logic and deduction of the other party, can at least understand that the disputes are fundamental and not on basis of rumor and accusation.

Juridical foundations of deprivation of temporary marriage
Zaid Al-Abyani, one temporary Hanafi Jurist (Egypt), has said in Sharh Al-Ahkan Al-Sharia in note of article 14: "some people believe in legitimacy of temporary marriage (Mut'a) until the time that an abrogating factor is found" (Hanafis have attributed this statement to Malik Bin Ons) (Toosi, 1989, vol.1, p.125). In this statement, he has inferred the verse:

"So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation. And there is no blame upon you for what you mutually agree to beyond the obligation. Indeed, Allah is ever knowing and Wise" (An-Nisa/24).

Moreover, according to Ata’, it has been inferred that said I heard from Jaber: "we used to do Mut'a in time of Prophet Mohammad and Caliphate of Abu Bakr and till the middle of Caliphate of Omar and then, people were prohibited to take that".

Imam Shafei says: "there is nothing that is legitimated by God and then illegitized by him expect for Mut'a" (Bokhari, 1984, p.156). Ibn Hajar Asgholani says: "some explicit and true hadiths to prohibit Mut'a are achieved after permitting it" (Asgholani, 1959, p.57).

Ibn Roshd says in Bedayat Al-Mojtahid: "sucessive news is received on principle of deprivation of Mut'a on behalf of Prophet Mohammad; although there are disputes on time of deprivation. Some narratives demonstrate that Mut'a is prohibited by the Day of Kheibar. Some other say that it was prohibited in Tabuk War, some say in Hajjat Al-Vida' and some say in Omratal Ghaza and some other say that Otas is time of deprivation of Mut'a. Interestingly, he has not mentioned even one of the successive news. On the contrary, after presenting the mentioned issue, he mentions 2 hadiths based on legitimacy of incessant legitimacy of Mut'a" (Abul Walid, 1979, p.502).

Another hadith refers to 3 times prohibition of Mut'a: Mohammad Ibn Khalaf Asgholani has quoted from Ibn Omar:

"When Omar Bin Khotab became gained power, he held a speech for people and then said: Prophet Mohammad permitted Mut'a 3 times and then prohibited it. I swear to God that if someone has done Mut'a, I will stone him (Ibn Majeh, 1990, p.638); unless he brings for witnesses to prove that Prophet has legitimated Mut'a after prohibition" (Abu Riyyah, Mahmud, p.273).

Those people who have inferred to verse 24 of An-Nisa to prove legitimacy of temporary marriage are wrong. The verse says: " So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation. And there is no blame upon you for what you mutually agree to beyond the obligation. Indeed, Allah is ever knowing and Wise". This is because; the term "whatever you enjoy" refers to marriage and the term compensation is also mentioned. Another verse says: "So marry them with the permission of their people and give them their due compensation according to what is acceptable" (An-Nisa/25). In this verse, the aim by the term "Ojrat" is alimony. As a result, temporary marriage is basically illegal and wrong and there is nothing under this title in Islam (this is deduction of opponents of the narratives and ideas of jurists, who have had consensus on legitimacy of Mut'a; although they say that it has been prohibited later).

Hadith of Jaber about legitimacy of Mut'a in era of Prophet Mohammad and caliphate of Abu Bakr and middle of caliphate of Omar that is existed in majority of valid narrative communities is not perfect. This is because; the people who announced Mut'a as legitimate action might be unaware of the announcement
of prohibition and were informed in second half of caliphate of Omar (Neishaboori, 1987, p.61). after mentioning the statement of second caliph, Novey has said in this field that: the statements of caliph based on deprivation of Mut'a is explained as follows: a person who used to have Mut'a marriage in time of Abu Bakr and Omar has been unaware of cancellation of this sentence (Neishaboori, 1987, p.128).

This was a summary of the evidences and documents to prove that temporary marriage is prohibited and doing it now is illegitimate and has sentence of adultery.

**Juridical basis of legitimacy and lack of prohibition of temporary marriage**

Jurists who have claimed on legitimacy of temporary marriage have presented generally two groups of evidence: one is related to evidence to prove their claim and perspective and the other one violating inferences on statements of opponents or violation of their basis and inferences. Here, the basis is presented shortly: Quran and temporary marriage: some Imami jurists have referred to various verses of Quran on legitimacy of temporary marriage:

1- So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation. And there is no blame upon you for what you mutually agree to beyond the obligation. Indeed, Allah is ever Knowing and Wise (An-Nisa/24). Some followers and scholars who worked on reading, interpreting and explaining sentences of Quran used to consider this verse as clear and direct evidence on temporary marriage (Mut'a) and have mentioned it in their proses. Abdullah Bin Abbas, Abi Bin Ka'b, Abdollah Bin Masud, Jabir Bin Abdollah, Abu Saied Khedri, Saied Bin Jabir, Mujahid, Saddi and Ghotadeh have been people that have counted the mentioned verse as the explicit example and evidence on temporary marriage (Nesaei, p.41).

Ghartabi, Shukani et al have said: "Homhur (Sunni) says: the aim by this verse (An-Nisa/24) is Mut'a marriage that has been existed in Early Islam". This statement of Jomhur is confirmed by statement of Abi Bin Ka'b and Ibn Abbas and Saied Bin Jabir (Toosi, 1985, p.195). If the term "Estitma" (whatever you enjoy) in this verse is mentioned absolutely and with no symmetry, it refers just to Mut'a (Toosi, 1998, p.333), unless it is said that sentence in this verse is abolished.

2- Then marry those that please you of [other] women, two or three or four (An-Nisa/3). Shiekh Al-Taefat Abu Jafar Toosi has inferred that Mut'a marriage is also one example of "Ma Tabat" in this verse.

3- And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property (An-Nisa/24). As lawfulness of temporary marriage is based on consensus, it is not among prohibited affairs listed previously.

**Temporary marriage in view of Sunni**

As it was mentioned, there is no dispute on legitimacy of temporary marriage among nations. The discussion is on abolishing its sentence. As it was mentioned, about dispute, the principle is on basis of permissibility and prohibition needs evidence.

Among the scholars and followers, no famous person has believed in abolishment and they have narrated legitimacy and lawfulness of temporary marriage: Ibn Masud Jaber Ibn Abdollah, Salama Bin Al-Aku', Abi Saied Khedri, Moghyarat Ibn Sho'ba, Moaviat Bin Abu Sofian, Ibn Abbas, Ibn Jarih, Saied Bin Jabir, Mujahid, Ata' Bin Abu Rebah are referred. They are other people in addition to previously mentioned interpreters (Toosi, 1985, p.352).
In Fariqeyn hadith communities, numerous hadiths have emphasized accuracy of this attitude and here some of them are presented:

1- Bokhari, Muslem and Ahmad Bin Hanbal et al have narrated from Abdullah Bin Masud: we were beside Prophet Mohammad in war and no woman was with us. We said to prophet: can we make ourselves eunuch? Prophet prohibited such action and permitted us to marry with women for certain period. After that, Ibn Masud has read a verse that you people don't prohibit the lawful things given by God and violate your limit, since God don't like the violators. According to reference of Ibn Masud to this verse, it could be found that he has been aimed in rejecting words of opponents of Mut'a and that Mut'a is among legitimate and lawful affairs (Bokhari, 1984, p.119).

2- A narrative from Imam Ali: I heard from Imam Bagher who said that Imam Ali says: if people could control themselves and if they had not violated the limits of Mut'a, a few people might go toward adultery (Toosi, 1985, p.205). In some versions, "Shaghi" is mentioned as "measurable". Ghortabi has narrated on behalf of Ibn Abbas: Mut'a is nothing other than kindness of God, by which he has blessed people and if it was not prohibited by Omar, no one other than miserable people tended to do adultery (Toosi, 1985, p.314).

3- Fakhr Razi has narrated on behalf of Omran Bin Hasin: the verse "Mut'a" was sent by God and the next verse was not sent to violate the aforementioned verse. Prophet Mohammad has also ordered to do it. Prophet Mohammad passed away but he has not prohibited it. Now, the second caliph says everything he wants (Toosi, 1985, p.319).

4- Narrative of Ata' on behalf of Jaber Bin Abdollah: "at the time of Prophet Mohammad, time of Abi Bakr and middle of caliphate of Omar, we used to do Mut'a and then, Omar prohibited it (Neishaboori, 1987, p.131)."

This narrative that is presented with accurate reference in majority of reliable meetings of Fariqeyn has made many opponents of legitimacy of Mut'a to go even toward irrational explanations. It is narrated on behalf of Ibn Ghayim, Novey and other that they say desperately: "Mut'a was prohibited; although no one was informed except the second caliph. However, the caliph says: I prohibit and I punish". Is it possible that a sentence is abolished in time of Prophet Mohammad and all or majority of friends and followers take the hideous action and even first caliph and all friends that are Mujtahid and just due to statements of Ibn Qayim and his masters did adultery or such as second caliph, who was aware of the sentence of prohibition of Mut'a and was silent against corruption?

Successive news is available on behalf of Prophet Mohammad on prohibition of Mut'a; although there are disputes on time of deprivation. Majority of companions and all jurists of all nations believe in prohibition of this sentence. It is quoted from Ibn Abbas that he believed in legitimacy of this action and his companions (from Mecca and Yemen) also believed in its legitimacy. It has been narrated that Ibn Abbas has referred to the verse "So for whatever you enjoy [of marriage] from them...
(An-Nisa/24). Ibn Jarih and Amru Bin Dinar have narrated from him that Mut'a is nothing other than kindness of God for people of Mohammad's Era. If it had not been prohibited by Omar, no one except for miserable people done adultery (Abul Walid, 1979, p.75). After this issue, Ibn Roshd mentioned same hadith of Jaber based on legitimacy of Mut'a and has ended his words without rejecting or accepting the hadith.

Order of prohibition of Mut'a marriage
According to the narrative "Ata'" on behalf of Jaber, temporary marriage with women was common among Muslims such as Tamato' Hajj in time of Prophet Mohammad and caliphate of Abu Bakr and a period of caliphate of Omar Bin Khotab until the time that he came once on the pulpit and mentioned his famous sentence on prohibition and deprivation of Mut'a: "there were two types of Mut'a in time of
Prophet Mohammad and I am prohibiting them now and I will punish doers of Mut'a" (Sharif, 2007, p.111).

Abu Bakr Mohammad Ibn Sahl Sarakhsi, one of the great Hanafi jurists, believed that the severity of countering Mut'a is high with second Caliph and has narrated on behalf of Caliph: "if I find a man that has married a woman for certain period, I will stone him even if I find him dead" (Toosi, 1985, p.153). This statement shows persona expression of anger by Caliph against those companions who believed in legitimacy of Mut'a. This anger could result in stoning even a dead person. However, Arveh Bin Zobair has supported caliph in this field seriously.

The order for prohibition of Mut'a in time of second Caliph was implemented despite to opposition and protest of many companions and was entered to hadith, interpretation and jurisprudence books. Hence, the order of prohibition of Mut'a was applied and remained strongly on behalf of caliphs I and II to more than one century. Such prohibition caused some losses for thinking heritage of Muslims and especially Sunni people; otherwise, so many disputes and explanations were not existed in many sentences at the current age to an extent that many Orientalists and Muslims like Abu riyya in "Al-Azva ala Sunnat Al-Mohammad" could question the principle of Sunnat. It means that the Sunnat that was codified with an interval of 100-150 years from decease of Prophet Mohammad could not transfer the statements of God properly and truly.

In field of attributing prohibition of Mut'a by caliph II, almost all hadiths have agreement; although some people have later tried to make legal basis for this political order of caliph. Hence, they have attributed this order to Prophet Mohammad in some cases.

Reaction of scholars of companions against order of prohibition of Mut'a (Mutia of women and Tamato' Hajj):

1- Ali Ibn Abi Talib (Imam Ali)

It has been quoted from Imam Ali that: "if Omar had not prohibited Mut'a, no one except for miserable people done adultery" (Ansari Ghortabi, 1980, p.328). Ahmad Ibn Hanbal and Muslem have narrated from Abdollah Bin Shaghigh: "Othman used to prohibit doing Mut'a and Imam Ali used to order it. Othman said to Imam Ali: you are wrong and answered Ali: were used to do Mut'a in time of Prophet Mohammad and said Othman: yes" (Neishaboori, 1987, p.46).

2- Ibn Abbas

Ahmad Ibn Hanbal, leader of Hanbali religion, has mentioned that Ibn Abbas said: Prophet Mohammad used to do Mut'a and then said Orvat Bin Zobair: Abu Bakr and Omar have prohibited Mut'a. Ibn Abbas answered: what are saying Orriya? And he said: I say that Abu Bakr and Omar have prohibited it. Ibn Abbas Answered: I see people are going to fall in misery soon and I say that Prophet has ordered to do Mut'a and they say that Omar and Abu Bakr have prohibited it.

3- Jabber Bin Abdollah

Said Jaber Bin Abdollah: we used to do Mut'a in time of Prophet Mohammad and when Omar gained power and became caliph said: everything that God wants for his prophet is legitimated by God by any means and truthfully, Quran is in right place. Hence, separate your Hajj from Omra Hajj and leave marrying these women. After this, I want to say no man marrying with a woman for certain time (Mut'a); otherwise, I will stone that man (Bokhari, 1984, p.331).

4- Sa'd Bin Abi Vaghas
Sa'd Bin Abi Vaghas, Abdollah Bin Omar, Amran Bin Hasin and others have been strongly opposite to prohibition of Mut'a, especially deprivation in Tamato' Hajj.

5- Abdollah Bin Omar
Abdollah, son of caliph, was among main companions acting against statements and orders of his father about deprivation and prohibition of Mut'a.

6- Abdorrahman Bin O'f
Abdorrahman Bin O'f was informed that Moawiah would prohibit Muti'a later and said: we used to do Mut'a with Prophet Mohammad (Tamti' Hajj); although Moawiah was an unbeliever and had not accepted Islam yet (Toosi, 1980, pp.340-341).

Disputes on time of prohibition
One of the main and most important problems of followers of abolishing legitimacy of temporary marriage was famous statement of caliph II: "there were two types of Mut'a in time of Prophet Mohammad and I am no prohibiting both of them and I will punish the doer (one Mut'a of women and another Tamatto' Hajj)" (Sharif, 2007, p.251).

Fakhr Razi has wanted in Tafsir Kabir to make consensus on order to prohibit Mut'a by Prophet and claim of caliph. They has written: there is no way remained other than saying that the caliph II meant by this prohibition that Mut'a has been legal and legitimate in time of Pophet Mohammad and it is prohibited later and as it has been clear to Caliph (and not to others), he has deprived them. There is no way other than saying that caliph meant that Mut'a was lawful in time of Prophet Mohammad and I prohibit it, since it has been proved to me that Prophet Mohammad has prohibited it (Fakhr Razi, 2006, p.54).

In general, the claim for prohibition of Mut'a is presented in 7 cases:
1-the day of Kheibar; 2- Omrat Al-Ghaza'; 3- the year of occupation of Mecca; 4- in O'tas; 5- by the year of Hanin War; 6- by the year of Tabook War and 7- in Hajjat Al-Vida' (Al-zarei, 2007, p.183)

Ibn Qayim Joziyah has written about 4 items of mentioned items (day of Kheibar, Occupation of Mecca, Hajjat Al-Vida' and Hanin):
"This is the imagination of some narrators that have jumped from Occupation of Mecca to Hajjat Al-Vida' in their imaginations and have jumped from one time to another and from one place to another and from an event to another in their nimbus. This event happens for many summarizers; let alone those lower people" (Al-Zarei, 2007, p.201).

Conclusion
1- Mut'a is one of the binding sentences of Islam, which is proved in Quran and Sunnat and has been taken by Muslims.
2- Caliph II has prohibited Mut'a in ending days of his caliphate following a state order under special conditions. The prohibition has political and governmental dignity and not proof of religious order.
3- Since the time of prohibition of Mut'a by time of caliph II, Muslims were divided to two groups: one group accepted it and another group rejected it and acted based on legitimacy of Mut'a such as many companions, Ibn Abbas and Mecca and Yeemen followers.
4- Fans of rejecting prohibition of Mut'a were divided to two groups: one group believe that the prohibition order or Mut'a is announced by Prophet Mohammad in person and this order is
removed; although all people have been unaware of it except for caliph. The other group believes that the prohibition is order of caliph and believes that his order should be also obeyed.

5- Followers of the prohibition since time of Prophet Mohammad have had disputes on time of prohibition: some of them have even considered 7 steps of analysis and prohibition in 7 times and places.

6- The range of followers of legitimacy of Mut'a believes that prohibition order is political-governmental order of caliph and not prohibition by legislator. They also believe that the explanations of other people are made by others people after thousands of year after death of caliph.

References
Abu Riyyah, M, Al-Azva Ala Sonnat Al-Mohammad, Egypt
Abudl Walid, Mohammad Bin, 1979, Al-Mujtahid va Al-Nahaya Al-Moghtased, Beirut
Al-zarei, Mohammad Bin Abi Bakr, 2007, Zad Al-Ma'ad el a Hoda Khayr Al-Ebad, Cairo Press
Asgholani, Ibn Hajar, 1959, Feiz Al-bari Sharh Sahih Al-Bokhari, Damascus
Bokhari, Mohammad Bin Ismail, 1984, Sahih Bokhari, Beirut, Dar Al-Fekr
Nesaei, Hafez, Nisai Traditions
Neshaboori, M, (1987), Al-Minhaj true explanation of Muslem Novey, Center for publishing Arabic Works
Sharif, Mohammad Bin Hossein, 2007, interpretation of Nahjul Balagha, Ibn Abi Al-Hadid
Toosi, Mohammad Bin Hassan, 1985, Al-Tahzib Al-Ahkam, Tehran