

Lineage caused by doubt in law the Islamic Republic of Iran

Ehsan Nazari(M.A) (Corresponding author)¹, Mohammad Reza Ghaleghi²

¹ Department law, college of private law, Kermanshah Branch Islamic Azad University, Kermanshah, Iran

E-mail: nazari2320@yahoo.com

² Department law, college of private law, Kermanshah Branch Islamic Azad University, Kermanshah, Iran

Abstract: Following Islamic jurisprudence source, under legal regulations, reference to doubt is a case resulting in realization of lineage outside the family. However, such lineage realization itself requires realization of some conditions, the most principal of which is to obtain good faith and mistakes made by the man and woman on whom, as claimants, the burden of proof is imposed. In this writing, definition of reference to doubt, causes and conditions of its realization, and man's/ woman's rights and obligations in relation to a child caused by doubt are addressed and, finally, differences between other Islamic nations' laws and ours with respect to the issue of lineage caused by doubt are stated briefly.

[Ehsan Nazari, Mohammad Reza Ghaleghi. **Lineage caused by doubt in law the Islamic Republic of Iran.** *Rep Opinion* 2014;6(5):34-39]. (ISSN: 1553-9873). <http://www.sciencepub.net/report>. 7

Key words: Lineage caused, doubt, law, Islamic Republic, Iran

1. Introduction

1- Lineage

Literally, Lineage means "ancestry", "descent" (Taheri and Anssari, 2005, 3: 2046) and in legal terms, it means blood relation created between 2 individuals through birth, therefore, its origin is birth (Ja'fari Langroodi, 2002,5:3631). In *Izah- al Favāed*, Ibn Allaameh says, "Lineage is personal connection to another person since one relates to another through birth and/ or both of them relate religiously to a third party (Ibn Allameh Helli, 2000, part 4, 170). Some verses of Holy Quran also watch lineage (Boroujerdi, 2002, 198). In Iranian Law, however, lineage has not been defined and only its rules and effects have been stated by legislator.

In general classification, lineage is divided into 2 categories: (1) lineage caused by marriage, and (2) lineage not caused by marriage. The former, which is called legitimate lineage, is a typical type of lineage (Emami, 2004, 5:163) and the child whose parents were married while forming the embryo is surely attributed to his parents. But there exists another type of lineage where the child's parents were not married for which a number of states are assumed (Safaie and Emami, 2002,2:41).

First, the child results from the partners' fornication relationship, in which case our law does not recognize lineage and such a child is not attached to adulterer and adulteress. Second, lineage is caused by artificial fertilization in which partners have no physical and sexual relationship and their eggs are fertilized by means of medical tools. Third, a child results from a man and a woman relationship, either or both of whom made a mistake about their act leave, explanations are given on lineage of such a child in this writing.

2. Doubt and its concept (meaning)

Literally, doubt or mistake means "not to recognize", "to become alike", and/or "to confuse one thing with another" (Mo'een, 1996,1) and in jurisprudence and Arabic texts, it is synonym of "suspicion", "mistrust", "subreption" (Mousavi, 2003,90) and in views of jurists, mistake or doubt is a wrong imagination a person has about something (Safaie and Emami, 2002,2:89).

By paying careful attention to what mentioned, we find that any mistake is, in fact, based on some ignorance and lack of knowledge of the reality of an object or thing. Now, if the reality of an object or thing. Now, if the reality of an external subject is ignored, for example, a man does not know the woman he wants to marry her is keeping divorce period in relation to another man, this is called subject doubt, but if the man does not know he fornicated with a married woman, he can't marry her after she is divorced, and/ or he does not know that marriage of the woman keeping another man's divorce period has been cancelled, this is called decree doubt, that is, some doubt exists due to ignorance of legal and religious decrees on an external subject or relationship.

Considering what stated in relation to doubt concept (meaning), reference to doubt can be defined as: "stranger man and woman consider themselves entitled to have sexual intercourse and do it believing in the existence of relationship, but, in fact, such entitlement does not exist". In this regard, of course, jurists have given a more common definition (Safaie and Emami, 2002,2:92), for example, in *Tahrir-al Vassileh*, vol.3, 9.473, problem.3, Imam Khomeini says, "reference to doubt is some sexual intercourse to which the couples are not entitled, but they are not aware of its veneration (Katousiyan,

2004,2:19).

Although 2 above definitions are, to some extent, identical, they are actually different, in that, in the first definition, criterion of intercourse's being doubtful and distinction between doubtful sexual intercourse and fornication is to believe in intercourse leave, but in the second one, merely ignorance of intercourse veneration causes doubt to be realized. Based on this, effects of acceptance of either definition are also different. If the former is accepted, for example, reference to doubt is possible only in case the man and woman have will and discernment power but, due to subject or decree ignorance, they believe in legitimacy of their relationship, so they engage in sexual intercourse. But if the latter is accepted, since to believe in and to imagine the act leave is not necessary, it is possible to obtain ignorance of act veneration in any states such as unconsciousness, negligence, sleep, mania, and even intoxication where a person loses his will and discernment power, therefore, in such states, if a person has sexual intercourse with a stranger, his act is referred to doubt. This discussion is theoretical and supporters of the first definition also believe that last cases join in doubt and are in lieu of that since in such cases a person still has good faith with no intent to violate religious and legal rules and, on the other hand, attribution of such generalities as removal Hadees include such cases so the first definition's supporters consider effects of doubt true for these cases.

Another difference encountered due to acceptance of either definition in relation to the effects is that by accepting the first definition, when a person's ignorance is caused by fault and, in addition, he is also aware of his ignorance during sexual intercourse, his act can't be referred to doubt, in that, mere probability can't be regarded imagination and belief and even it is not unlikely that act to be subject of the title of punishable by the lash act, although to exercise punishment by the lash on such a person will be an extended interpretation of Article 64 of Islamic Penal Act (Gerami, 2006,15). Specifically, some believe that there is no difference between innocent and guilty parties within decree doubt resulting in "in of Parentage" rule (Rohani, 1999,95).

To explain this, it should be noted that ignorance is of 2 guilty and innocent types. The former is a case where ignorant person is able to obtain religious and legal decrees, but he, due to negligence or other reasons, does not do so. In jurisprudence texts, guilty ignorance or guilty ignorant persons are divided into 2 groups of aware and unaware ones. In the first group, despite that ignorance, he did not seek to obtain knowledge or religious/ legal decrees and other party is an ignorant person who does not pay attention to his ignorance despite being guilty of not acquiring

knowledge. But innocent ignorance is a case where the required person is under conditions where it is impossible for him to have access to the knowledge of religious/ legal decrees (Mousavi, 2003,102).

In summary, jurisprudents believe that doubt of a guilty ignorant person aware of his ignorance while having sexual intercourse is not a doubt resulting in abolishment of punishment by the lash.

3. Mian causes of realization of reference to doubt

Following are examples of reference to doubt:

3.1- The woman claims that she is not married. Trusting her words, man marries her, having sexual intercourse. But later, it is known that she was under other man's marriage.

3.2- The woman claims that her divorce period has expired, but after marrying and having sexual intercourse, opposite of her claim is proved.

3.3- Two just witnesses give evidence of the woman's husband's death or divorce, but opposite is proved after second marriage and having sexual intercourse.

3.4- A man who married 4 woman (ceiling) divorces one of them and marries another woman for an unlimited period, but later, it is known that the divorce was not valid.

3.5- A primitive or newly Muslim person marries one of his foster relatives within forbidden degrees, or his foster mother or sister.

3.6- A man has sexual intercourse with his partner, thinking that she is his own wife, but later, it is known that she was stronger.

Given above instances and dominant cases of reference to doubt, major causes of its realization are as follows:

First, subject mistakes which may be caused by inappropriate environment, improper personal mood/ mental states, or other party's lying or deceiving.

Second, having no access to religious training and missionary works. It is sometimes seen, for example, a man living in a remote village and having no sufficient knowledge of religious rules has 2 sister under his marriage contract simultaneously.

Third, being a new Muslim, since such a person has no knowledge of specific Islamic rules like veneration of marrying foster or causative relatives within forbidden degrees.

4- Conditions of lineage joining in reference to doubt

Three conditions are necessary to realize lineage in the family: (1) the man and woman to whom the child's lineage relates need to be married each other lawfully; (2) they should have sexual intercourse resulting in the birth of the child. For sexual intercourse, of course, mere sexual contract is not

characteristic, but forming embryo from man's sperms and woman's ovule is intended whether it is caused by sexual relationship or by physical contract without penetration or even artificial fertilization; and (3) embryo of the child is formed after marriage (Katouziyan, 2004,2:7).

However, lineage realization is not specific to inside of the family and, in some cases including reference to doubt, lineage is realized outside the family since jurists did not include reference to doubt in their definitions of fornication. From available interpretations, it is understood well that one of causes of intercourse legitimacy is the leave doubt and reference to doubt (Mo'meni, 2004,85) and jurists consider it as an instance of marriage, with the child resulted from it having legitimate lineage, on the basis of several narratives included in jurisprudence chapters (Jabbaran, 2004,406), although some conditions have been noted for lineage realization in relation to doubtful sexual intercourse, as are examined below:

1- There is no marriage relationship between the man and woman.

2- They have sexual intercourse and it is obtained that the child's embryo has been formed by that very intercourse. Of course, legislation points to sexual intercourse with regard to dominant case and there is no characteristic in the intercourse, therefore, it suffices to obtain that embryo has been formed by the man's sperm and woman's ovule.

3- Major element of reference to doubt while having sexual relationship is the perpetrators' good faith.

4- Some believe that (Emami, 2004,5:85) another condition is absence of inherent obstacles of marriage like lineal, causative, and foster relationship between the man and woman since if these relationships exist, to attribute the child to them is in breach of public order and good ethics. Of course, as some experts said (Safaie, 2002,2:97 ; Katouziyan, 2004,2:20), given Article 1164 of civil law, this case is not different from others such as one where married woman is referred to doubt and her child is attributed to a man other than her husband, in which we observe breach of good ethics, too. This is an unnecessary condition given generalities like Holy Prophet's Ahadees and given necessity of support for the child and protection of his interests.

5- Unlike Imamieh Fiqh (jurisprudence), in common jurisprudence, to confess the lineage by the person making mistakes is valid in addition to the first 3 conditions. As Mohammad Mohyedin says in *Al-Ahval Al-Shakhsiyeh*, p.480, lineage is not proved by any kinds of doubt unless the person making mistakes claims and confesses he is father of the child because no one is aware of his act more than he

himself is (Moghniyeh, 2003,95).

In our law, regardless of weakness of above reasoning for this condition, such a condition is not necessary.

In discussion of realization, following points need to be mentioned:

1- As pointed out earlier, jurists define reference to doubt so commonly that if the person is not aware of intercourse veneration, his very ignorance suffices for realization of title of reference to doubt, as a result, probable or suspected to prove lineage. But it seems that we have to separate these 2 things:

First, belief in the existence of marital relationship by Wata means that he must be sure of such relationship existence while having sexual intercourse; second, the basis of this belief may be being sure and certain of subject or decree matters and/ or some suspicion hindering the person's awareness of his act illegitimacy. Therefore, we do not deal with belief basis (whether weak or strong), but the person should not believe weakly, in other words, despite probable existence of marital relationship and entitlement to have sexual intercourse, reference to doubt is not true and lineage is not joining in Wata. For example, if a man considers collection of 2 sisters probable and marries his sister-in-law (his wife's sister) and after marriage, he believes in the existence of marital relationship, the child resulting from the second marriage is a doubtful child. But if the same man still has misgivings about having marital relationship after second marriage, it can't be said that he believes in such a relationship existence and even that he is ignorant of the act veneration since he is aware of his ignorance, but he abandoned required prudence and did not do any research and questioning so it can be said that he had even no good faith and is not the child's father.

2- As some (Safaie, et al.,2002,2:104; Emami, 2004,5:176; Mehrpour,2000,376) believe, lineage realization is of customary truth, and Islamic law has accepted this customary view that formation of embryo by the man's and woman's eggs results in realization of lineage, and it has refused to accept a special type of lineage which is very lineage created by fornication. This example may be criticized on this basis that the person was not aware of act veneration for certain so fornication was not realized and lineage is proved. In response, it should be argued that according to all religious laws and Islamic punishment law's definitions, having sexual intercourse without marital relationship is fornication by which lineage is not proved unless in such a case, a special reason exists for lineage realization just as with intercourse with reluctance is related to such a reason.

Secondly, as mentioned in definition of doubt, this case does not include doubt and jurisprudence

considers fornication as proved regarding the aware guilty person while ignorance is not a justified excuse. In Islamic punishment law requiring existence of conditions of wisdom, maturity, will, and awareness to prove fornication, this excuse can't be referred to for lineage subject because this law emphasizes on flagellation; although such punishment is not executed on a child committing fornication, it can't be argued that resulting child is attributed to him.

5- The way to prove a child attribution to new husband.

In general, any reasons or grounds can be resorted to for proving the child's lineage attribution to Wata, the most important of which are marry presumption and/ or medical tests (Emami,2004,5:184), in that, under Article 1164 of civil law, rules on proof of the child's lineage in the family also apply to doubtful cases. But for lineage proof, some points need to be mentioned:

1- To prove lineage caused by marriage, occurrence of sexual intercourse is in conformity with appearance, requiring no proof, therefore, marriage presumption flows at the moment of conclusion of marriage contract, but for the matter of proving lineage caused by doubt, although marriage presumption is invokable, occurrence of sexual intercourse needs to be proved since it is against appearance and if it is proved, marriage presumption has flowed since intercourse occurrence, so if a child is born 6-10 months after its occurrence, according to Articles 1158 and 1164 of civil law, the child is attributed or reason is opposed.

2- If a married woman is doubtful Mootooih during marriage life or the divorce period and marriage presumption applies to either her husband or to her new husband, the child is of his lineage; but if marriage presumption applies to both men, to which of them is the child attributable? Some (Emami, 2004,5:184; Safaie, et al. 2002,2:95) believe that marriage presumption is preferred and strong for the husband so it is prudent to attribute the child to him, but according to jurisprudents, this case should be subject to induction. In Tahrir Al-Vassileh, vol.3, p.551, Imam Khomeini says, "If the woman has a husband and gives birth to a child on doubt, 3 states apply: ... and (3) marriage presumption applies to both men and drawing lots is required" (Kiyai, 2005,2:555).

There seems to be problems with the first view. Firstly, legislation considers marriage presumption valid equally to both new husband and the woman's husband, having no rules on their weaknesses/strengths. So in problem assumption, both presumptions need to be abolished.

Secondly, marriage presumption is among provable grounds provided for in lineage matter; and in proof-

based matters, the child's interest can't undermine one ground and strengthen another, to (from) reality of a being we want to prove.

Thirdly, prudence is a vague and relative concept with no specified position in our law, which changes in accordance with circumstances, for example, if a woman attempts, due to hardships, to divorce with a lot difficulties and, next, marries another man, because of unawareness of divorce period rule, in the period she is keeping for divorce and, then, gives birth to a child who is attributable to both ex- and new husbands, it can never be argued that based on the child's interest, he should be attributed to ex- husband because the woman and her new husband have all parents' rights and obligations due to their mistake and, in addition, they can marry again lawfully while if the child is attributed to ex- husband, there will be a child whose mother has divorced and his father may humiliate him after he is of 7years of old.

In any case, if we want to take prudence into account, we'd better say that if the judge obtains the obvious in attributing the child to either new or ex husband regarding special case of prudence, he can consider one's marriage presumption dominant to other's and order to attribute the child to the former and, in cases where such prudence is absent and/ or is not obtained, the judge can attempt to induce. This view refers to "the obvious" because it does not consider prudence as an assumed or guessed thing, giving it a conventional and typical aspect, that is, most ordinary individuals of society consider it is in the interest of child, under conditions at hand, to be attributed to new husband or ex husband, in that, difficulty with prior view was that although the child's interest has been emphasized on, the results were occasionally against his interest; but with this view, the child's interest is met depending on the case and principles are observed.

Now, what law says. Article 1164 of civil law states rules on prior cases apply also to a child born through doubtful sexual intercourse although his mother has not been mistaken. As a rule, this Article's rule observes Article 1160 of civil law stating that if marriage contract is dissolved after having sexual intercourse and if the woman marries again and gives birth to a child, the child is attributed to the second husband, according to prior Articles providing that the child may be attributed to both husbands, unless decisive presumptions signify contrary.

Given these articles, a different response is given to the problem assumption. If, after being divorced while keeping divorce period or even after this period, a woman marries a man and is a doubtful Mootooih giving birth to a child whose attribution to former husband and/ or to new husband is doubtful given the marriage presumption rule, the child needs to be attributed to

new husband. This rule is against what jurists have said about strength of the husband's marriage presumption and, on the other hand, it does not meet the child's interest given above explanations.

3- Having had sexual intercourse, if a man and woman claim that they were mistaken, how can they prove such a mistake? As we know, the principle is based on the lack of mistakes, in breach of which their words are and they are in position of claimants. On the other hand, almost no one is aware of marital affairs between the man and woman and person's mind states are not testable, therefore, it is difficult, and sometimes impossible, to prove mistakes made. So can a rule confirming mistakes be given solely on the basis of such claim? Some (Moghniyeh,2003,96) believe that words of claimants of mistakes should be admitted without evidence and swear, especially when a child is concerned, because principles of Shiite and Sunnite (2 Islamic sects) legislations require that if there is only one percent of probability that a child's lineage is considered legitimate by considering him as resulting from doubt, we need to avoid contrary strong probability, not considering the child a bastard. But this statement is not acceptable in our law. Article 66 of Islamic punishment law states that whenever a man or woman, who had sexual intercourse, claims they were mistaken and unaware, such claim is accepted without evidence and swear in case the claimant's words are probably true, and legal punishment by the lash is abolished. Although this Article's rule is based on negligence, it does not accept mere claim and requires the probability of claimant's words truth, that is, circumstances of the case must be such that there is no obstacle to accept the claim because when there is no grounds, mere probability is not sufficient to accept claimant's words. However, it seems that rule of this Article is caused by exercising in rule and monitors lack of flagellation and lineage attribution must be proved by proving mistakes with grounds and evidence.

6- Effects of lineage caused by doubt

According to Articles 1165 and 1166 of civil law, all effects and rules related to a legitimate child apply to a child born out of doubt, so lineage effects are as follows:

- 1- Marriage veneration (Article 1045 of civil law);
- 2- Child custody: if both parents were mistaken, the child would be their lawful child and their rights to have custody of the child remain according to Article 1164 of civil law;
- 3- Legal guardianship: If the father was mistaken, he and his father are legal guardians of the child. But in the case where father was aware of the truth and mother was mistaken alone, the child would be joined to her and would be like a child having no specific

guardian, therefore, a trustee is determined;

4- Alimony (according to Articles 1196 and on of civil law);

5- Inheritance (Article 884 of civil law).

With respect to legal articles and to Imamieh Fiqh, reference to doubt has other effects in addition to creating lineage such as:

1- Abolition of legal punishment by the lash from mistaken person(s);

2- Need for keeping divorce period by the woman, whether she was mistaken or the man (Article 1157 of civil law) (Katousiyan, 2005,710); and

3- Fixed marriage portion for a virgin girl (now a woman) who was ignorant of the act veneration.

4. Discussion

Like in our law, in other Islamic nations' laws, the child resulting from doubt is attributed to new husband. Article 133 of Syrian personal circumstances Act states that: (1) If a woman having doubtful sexual intercourse gives birth to a child within minimum to maximum period of pregnancy, the child's lineage is proved to the man having sex with her; and (2) whenever lineage is proved, whether due to unlawful marriage or to doubtful one, it is subject to all effects of kinship, as a result, marriage is prohibited at all forbidden kinship degrees, due to which entitlement of alimony and inheritance caused by kinship result.

Moroccan and Tunisian personal circumstances Acts also have referred to that Article under their Article 88 and Article 71, respectively, accepting lineage caused by doubt. But in this regard, it is necessary to mention 2 points:

1- Moroccan and Syrian Laws have accepted lineage caused by unlawful/ corrupt marriage, that is, when a man and a woman, even aware of obstacles and corruption of marriage, marry and a child results from such a marriage, the child is attributed to the man and woman, but in our law, there is no independent title as lineage caused by corrupt marriage, rather in such cases, if the man and woman are ignorant of intercourse veneration and marriage corruption, their act will be an instance of reference to doubt and resulting child is attributed to them; otherwise, mere existence of apparent marriage relationship does not cause the child to be attributed to them (Safaie et al., 2002,2:98);

2- Like in our law, in other Islamic nations' laws, marriage presumption applies also to proving lineage of a child resulting from doubtful relationship except for that in our law under Article 1185 of civil law, the child needs to be born within 6-10 months after the date of sexual intercourse, but this figure is between 6 and 12 months under Article 128 of Syrian personal circumstances Act and under Article 15 of 1929 Egyptian Act 25, maximum of such a

period is 12 months, too, although some of our jurisprudents argue that maximal and minimal period of pregnancy is 12 months and 6 months, respectively (Kiaie, 2005,2:558).

Correspondence to:

Ehsan Nazari(M.A)

Department law, college of private law, Kermanshah

Branch Islamic Azad University, Kermanshah, Iran

E-mail: nazari2320@yahoo.com

References

A - Books Persian

1. Abdoh Boroujerdi, Mohammad. "Islamic law generalities", 1st edition, Rohām Publications, 2002.
2. Emami, Seyyed Hassan. Ph.D., "Civil law", vol.5, 14th edition, Eslamiyeh Publications, 2004
3. Gorji, Abolghassem. Ph.D., "Legal punishments by the lash, Discretionary punishments awarded by the judge, and Retaliation", 2nd edition, Tehran University Press, 2006.
4. Ibn Allaameh Helli. "Izah Al-Favāed Fi Sharh Eshkalat Al-Qavāed", part.4, Al-Tabaqah Al-Dula, Esmaeelyan Institution, 2010.
5. Jabbaran, Mohammad Reza. "To marry Non-Muslims", 1st edition, Boostan-e- Ketab, Qom, 2004.
6. Ja'fari Langroodi, Mohammad Ja'far. Ph.D., "Extended in law terminology", vol.5, 2nd edition, Ganj-e Danesh Library, 2002
7. Katouziyan, Nasser. Ph.D., "Civil law in current legal order", 11th edition, Mizan Publishing House, 2005.
8. Katouziyan, Nasser. Ph.D., "Family civil law", vol.2, 6th edition, Enteshar Corporation, 2004
9. Kiyae, Abdollah, Ph.D., "Civil law and Imam Khomeini's constructions with authority", vol.2, 1st edition, Samt Publications, 2005
10. Mehrpour, Hossein. Ph.D., "Topics from women law", 1st edition, Information (Ettelāat) Publications, 2000
11. Mo'een, Mohammad. Mo'een Dictionary, vol.1, Amirkabir Publications, 1996
12. Moghniyeh, Mohammad Javad. "Al-Ahval Al-Shakhsiyeh", translation by Jabbari, Mostafa. And Masjedsoraie, Hamid., 1st edition, Amirkabir Publications, 2003
13. Mo'meni, Ābedin. Ph.D., "Islam Private Criminal Law", 1st edition, 2003
14. Mousavi, Seyyed Mohammad Sadegh, Ph.D., "Theoretical bases of ignorance and mistake and their effects on legal actions", 1st edition, Amirkabir Publications, 2003
15. Rohani, Seyyed Mohammad Sadegh. "Seeking legal advice", vol.1, Sepehr Publishing House, 1999
16. Safaie, Seyyed Hossein. Ph.D., and Emami, Assadollah. Ph.D. "Family law", vol.2, 3rd edition, Tehran University Press, 2002
17. Shahid-e Aval. "Lamah Al-Dameshqiyeh", vol.2, 22th edition, Dār Al-Fekr Publications, 2004.
18. Taheri, Mohammad Ali. Ph.D; and Ansari, Masoud. "Private law University Degree", vol.3, 1st edition, Mehrab-e Fekr Publitions, 2005.

5/12/2014