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Revisiting the Institution of Marriage in Islam and in the Modern Time

ABSTRACT:

The institution of marriage in Islam except for sexual relationships and its domain - has been classified in human interactions (*mu'āmalāt*), which means it is not 'beyond rational matters' (*tawqifiyya*). Therefore, all of its elements are open to being revisited according to *ijtihād* - 'structural *ijtihād* in principles and foundations', not 'traditional *ijtihād* in derivatives' (*ijtihād fī al-furū' al-fiqhīyya*).

The pillars (*arkān*) of a legitimate marriage (*al-zawāj al-sharī*) in Islam between an adult male and a female - that there is not any legitimate obstacle (*al-māni' al-sharī*) for their marriage - are two: 1) clear consent of two parties themselves for marriage, and 2) binding an agreement of marriage so that they become husband and wife based on this contract.

No legitimate marriage in Islam is meaningful without a contract (*ʿaqd*). The marriage contract could be an unwritten contract (*ʿaqd ghayr al-maktūb*). It could be not submitted to a legal centre for marriage. More importantly, pronouncing the verbal *sharī* formulation of marriage (*al-ṣīgha al-sharīyya li-al-ziwāj*) neither in Arabic nor in other languages is not necessary for a legitimate marriage contract. The major point of the second pillar of the legitimate marriage contract is this: the male and female parties recognise themselves as husband and wife respectively as the product of the marriage contract between them.

'Non-verbal conventional marriage' (*nikāḥ mu'atātī*) is a legitimate marriage because both pillars of marriage were observed in it. A man and a woman are satisfied with each other's marriage, and a woman is legitimately married to a man. The only difference is that the marriage contract is not pronounced. Is the Western style of partnership 'cohabitation' equivalent to non-verbal conventional marriage? Not necessarily. If and only if, the cohabitation of a man and a woman has taken place with a marriage contract (even if it is not written, not submitted anywhere, or even not pronounced), it is permissible to apply the non-verbal conventional marriage to it. It is obvious that a written marriage contract and especially its submission in a legal centre for marriage is closer to caution for a time of frequent disagreement.

Since different names were given to 'cohabitation' in different cultures and legal systems, and they do not have an agreed meaning and condition, wherever both pillars are observed under any title, it is permissible, and it is not permissible without these two.



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BIO:

Prof. Mohsen Kadivar is a Shīʿi theologian and jurist and a research professor of Islamic Studies at Duke University (Durham, NC, US). His interests span both classical and modern Islamic thought with a special focus on Islamic philosophy and ethics, Shīʿi theology and jurisprudence, Qurʾānic studies, Shīʿi political thought, and Islam and human rights.

An author of thirty books in Persian, his recent books are: "*Human Rights and Reformist Islam*;" "*Blasphemy and Apostasy in Islam: Debates in Shi'a Jurisprudence*" (both Edinburgh U. Press, 2021), and his recent articles and book chapters are: "*Democracy and Ethical values from Islamic Perspective*" (March 2020); "*Genealogies of Pluralism in Islamic Thought: Shi'a Perspective and Toward Removing the Punishment of Apostasy in Islam*" (both March 2021).

His forthcoming book chapters (fall 2022) are: "*Rethinking Muslim Marriage Rulings through Structural Ijtihad and Islam and the State from a Shi'ite Perspective*." His forthcoming books in 2023 are: "*Governance by Guardianship: Rule and Government in the Islamic Republic of Iran*" (Cambridge University Press); "*Islamic Theocracy in the Secular Age: Revisiting Shi'ite Political Thought of Islamic Republic of Iran*" (University of North Carolina Press).