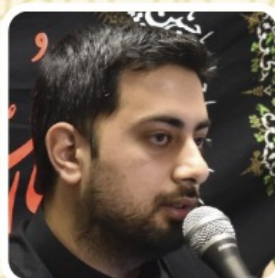


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To Say Or Not To Say: Justification for a Formless Marriage Contract (Nikah Mu'at)

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Introduction

With the advent of our postmodern era, Muslims specifically have faced epistemological and practical challenges that they had never encountered before in history. Amongst the various facets of Islam, it is Islamic law which has often been at the receiving end of many such challenges, leading numerous Shi' and Sunni jurists of the 20th and 21st century to accommodate the ever-changing social and political landscape of the human world. Islamic family law rests at the core of various dilemmas. These predicaments range from; concerns pertaining to the rights of husband and wife towards one another, child custody, guardianship of the father, and much more (Moghissi, 1999, p. 107).

However, most of these matters are dependent directly on the existence of a knot deemed tighter than no other. The knot is that of marriage itself. The paper at hand thus intends to look at the Shi' perspective on the very formula deemed necessary by jurists, through which a man and a woman are deemed husband and wife for one another. It then juxtaposes the discussion on whether uttering any verbal formula is even a necessity or not, and if mere actions that indicate their satisfaction and intent suffices – a contract termed as a synallagmatic formless (Mu'at) contract (Jokisch, 2007, p. 116). Lack of Qur'anic precedent or reliable narrations on the subject matter will not only suggest that the door to discussion is wide open on this matter, but that a strong defence can also be made for the validity of formless marriage contracts.

Contract Law and Mu'at

Islamic law claims to cover essentially every aspect of one's life, and it is no surprise that a large portion of it concerns the law of contracts. One of the most widely discussed contract law is that of transactions. For a decent part of its jurisprudential history, the validity of all buying and selling transactions would be

dependent on verbally pronouncing a declarative statement (*inshāʾ*) that would indicate one party's offer (*ʿajb*) and the other's acceptance (*qubūl*), alongside their mutual approval (ʿilli, 1413 AH, v. 5, p. 51). Likewise, other contracts such as lending, renting, endowments, wills, gifting etc. all have some form of verbal formula to convey the intent of transferring ownership or a right of use over an entity. In these contracts, a receiving party utters a verbal affirmation, signifying their satisfaction with the transfer. Thus, the verbal formula was considered the relevant aspect of such contracts, upon which the validity of these transactions rested.

Nevertheless, in most contractual acts, Imāmī jurists have arrived at somewhat of a consensus in the last few centuries that such extent of formalism is not required. As a result, a contract may be enacted simply by conduct where the offer and acceptance are expressed by the parties involved through any action that signifies their satisfaction. In other words, if one's actions themselves signify that the parties involved are willingly offering and accepting something, the contract is considered valid (Mitchell and Powell, 2011, p. 48).

Needless to say, non-verbal contracts are a norm in the world today, particularly in day-to-day simple transactions. Everyday dealings, where local customs understand a valid transaction and transfer of right or ownership over an entity, are all classified in Islamic law as Muʿāwāt contracts.

Given in the current context, the union of marriage at its core is a contract between a male and a female and has rightfully been discussed in jurisprudence under contract law. However, the aforementioned permissibility has not been extended over to the institution of marriage. The essence of a marriage contract is a relationship, initiated by the female party, verbally pronouncing her intent to marry, and a response given by the male indicating his approval. Many jurists over the centuries have dedicated page after page to the discussion on the verbal marriage formula that signifies the enactment of a valid marriage. Discussions generally range from the precise linguistics of the formula, nature of vocabulary that is permissible to be used, and the validity of bounding the lexical formula by the Arabic language.

On the contrary, classical Imāmī jurists have not entered into the discussion of Nikāḥ Muʿāwāt as far as it pertains to the validity of a marriage contract without the lexical formula. It appears that the aforementioned notion was something they were not even willing to entertain and was not worth contemplating over for them, or rather that its invalidity was explicit to them. However, once Shaykh al-Ansari (d. 1864) produced his comprehensive discussion on Muʿāwāt within the general landscape of contract law in his work *al-Makāsib*, especially with regards to the transactional law (Ansari, 1415 AH, v.3, p. 23), the subject of Nikāḥ Muʿāwāt also eventually began being discussed extensively. Post-Ansari, numerous scholars were inclined to enter the discussion and discuss its theoretical and legal permissibility or impermissibility.

These discourses entail findings pertaining to existence of theoretical and imaginal scenarios indicating marriage via non-verbal actions, and its permissibility as far as its legality is concerned (Khoei, 1417 AH, v. 2, p. 192; Khomeini, 1421 AH, v. 1, p. 267). As will be seen, there does not appear to be explicit textual

evidence rooted in the Qur'ān or narrations by which these jurists argue their points against Mu'āwazāt; rather their strongest attempts to justify their position have been through citing consensus or taking precautionary measures.

Legal Impermissibility of Nikāḥ Mu'āwazāt & Theoretical Possibility

One will be hard pressed to find the name of any Imāmi jurist before the 20th century permitting Nikāḥ Mu'āwazāt. Nevertheless, many during this era onwards did enter the discussion of a theoretical possibility of non-verbal acts signifying marriage in certain local customs. In response to those jurists who would argue against Nikāḥ Mu'āwazāt by claiming the impossibility of any act conveying or signifying the enactment of marriage itself, we find Ayatullah Khomeini and certain others respond to such arguments by claiming the plausibility of such a scenario. Khomeini illustrates one such theoretical scenario as follows:

So if a woman and man decide to get married, and the woman with her items goes to the house of the man and actualizes this intent (of marriage), and the man subsequently accepts her and gives her room in his house with the same intent, marriage through Mu'āwazāt has taken place and the laws of marriage such as permissibility of looking, intercourse, obligation of maintenance (*nafaqah*) will apply (1421 AH, vol. 1, p. 267).

Admitting to a theoretical possibility of acts being able to convey the taking place of a marriage contract between a man and a woman was in and of itself a significant step towards better discerning the customary understanding of societies. Nevertheless, when it came to giving a verdict, even those jurists who entertained a theoretical possibility, deemed such a thing legally impermissible and the marriage contract invalid.

In this regard, it is imperative to also mention that amongst Imāmi jurists, there are many who uphold the principle that Mu'āwazāt in all contracts is applicable unless proven otherwise (Lankarāni, 1387 SH). Thus, many recent jurists have been felt obliged to discuss the matter at length when it comes to the marriage contract, in order to establish evidence by which they can argue the impermissibility of Mu'āwazāt in a marriage contract. Ayatullah Shubeyri Zanjāni argues that unlike business transactions – contracts where Mu'āwazāt has a precedent in the Islamic world accompanied by a lack of prohibition for it from the Imāms – Nikāḥ Mu'āwazāti was not something heard of or practiced as a norm. Therefore, one cannot take the absence of any prohibition for it in the religious text as evidence for it being permissible, especially when there exists a series of narrations that demand precaution in the matter of marriage as a general principle. He essentially concludes, in one of his higher lessons on the jurisprudence of marriage, that the overwhelming consensus and narrations demanding precaution are sufficient to deem Nikāḥ Mu'āwazāti invalid when it comes to the validity of marriage (Zanjāni, 1380 SH).

Mohammad Javād Lankarāni, another proponent of the aforementioned principle, also only resorts to a consensus of the jurists and the subconscious understanding of the religious (*irtikāz mutasharri'ah*), to

claim that a formless marriage contract is not considered valid (Lankarani, 1387 SH).

All in all, it appears that there is no explicit Qur'anic evidence or a clear narration to argue that Nikah Mu'awwafati is not allowed, and therefore jurists generally have had to resort to consensus and/or precaution on the matter. It provides quite an opportunity to contemporary jurists, as it allows itself to be used as a pretext to argue for a different interpretation and approach to the law.

Arguments for Nikah Mu'awwafati

As mentioned earlier, one will be hard-pressed to find any names of Shi'ite Imami jurists who allowed Nikah Mu'awwafati. While Ayatullah Zanjani does not accept the validity of Nikah Mu'awwafati himself, he does make reference to Shaykh 'Abdul Karim al-'Iraqi (d. 1937) who claims that there were certain individuals, contemporary to himself, who apparently believed that engaging in sexual intercourse with the intention of establishing a spousal relationship, resulted in a valid marriage contract (Zanjani, 1380). While the names of these jurists remain a mystery, the scenario is an explicit instance of a Mu'awwafati marriage.

Amongst recent scholars who had openly expressed their views on the subject, was Ayatullah Mohammad Sadeqi Tehrani (d. 2011). Tehrani, well-known for his Qur'an-centric approach to law and renowned for his 30-volume exegeses work *al-Furqan*, held the opinion that Mu'awwafati marriages were indeed valid contracts. He argued that they resulted in a man and woman becoming husband and wife for one another, as-long-as there was actual intent present from both parties. In his work *Tabsirah al-Fuqah*, he writes:

Rather, nothing is required for the validity of Nikah, except a contract with whatever words that tend to clarify it. In fact, what needs to be clarified is the marriage contract itself and there is no evidence for the obligation of using words – let alone a specific formula – whenever possible. Using sign language, writing, or any other act that signifies a marriage, is like the words for a marriage formula, if that is how it is understood in local custom. In some local customs, what is a clear indication of marriage is if the groom places his shoe on the shoe of the bride, and that is their contract ('aqd), while the absence of refusal from the bride implies her satisfaction, as long as there is no substantial possibility given for her lack of satisfaction. Else, the natural course of things conveys that her silence is her satisfaction, just like in the case when words are used (1381 SH, v.1, p. 83).

From the above explanation, it is evident that Tehrani concludes that words have no relevance for the validity of a contract, rather anything that conveys the enactment of it and the satisfaction of both sides is sufficient. While certain arguments using verses of the Qur'an or narrations have been employed for the validity of such a marriage, they have also been critiqued and refuted by other jurists (Ansari-pour et al., 2014, p. 71). It appears that in order to argue convincingly for the validity of a synallagmatic formless marriage contract, a slightly different path needs to be taken in one's methodology and that is to produce evidence for the irrelevancy of words and by extension the marriage formula.

Foremost, it is important to note that there is no consensus on the usage of either specific wording or language that is required in a marriage formula. The above-mentioned difference exists between both Sunni and Shi'ite jurists and acts as a strong indicator that many scholars understood that neither the exact parlance nor the language held relevance; rather, it was the diction that conveyed satisfaction and intent of both parties to the union.

Secondly, by taking a holistic and anti-reductionist approach to Islamic history and its religious text, and subsequently making it the lens through which one views development of religious law – particularly that of contract law – one can arrive at certain conclusions. We find in works of history as well as the hadith corpus of both the Shi'ite and Sunni, that the way the marriage formula has been recorded in various instances does not appear to be strictly fixed in a way that many later jurists seem to have confined it to be. As a clear example, one of the earliest records of a marriage formula recorded is that of the Prophet Muhammad's marriage, recited on behalf of him by his uncle Abū Tālib, and by Waraqah bin Nawfal on behalf of Khadija (Ghazal, 2013, p. 149).

After a customary sermon, both parties exchange words simply implying the satisfaction of both parties to the marriage and a mention of the dower. The mentioned report is important because it shows the nature of marriage formulas and ceremonies before the official declaration of Prophethood and message of Islam. One understands that it followed local customs of the time which was to express satisfaction and agreement between two parties via words leading to the formation of a union of the two parties. In other historical reports discussing pre-Islamic Arabia, we also find similar alibis indicating that marriage was made obvious through certain words during the Age of Ignorance (Ali, 1980, vol. 4, p. 645).

These reports indicate that the marriage formula used in agreement-marriages in Arabia were not something unique to Islam, and initiated or brought for the first time by the Prophet after his declaration of Prophethood. Rather, it is understood from these references that the Prophet signed off on the procedure of marriage formulas – as well as the rest of the formulas used in other contracts – as they were being conducted and essentially permitted the practice to continue. According to the theological views of some Shi'ite academics, this would have been an instance of a phenomenon that adapted itself to the environment and 'took on the colour of the environment' which was to be the Arab society, in every possible way (Soroush, 2008). At the core of this practice, we find that though certain words were more commonly used in a marriage formula – which is expected since those words would have been habitually used to indicate marriage and satisfaction – they do not appear to have any essential relevancy for the validity of the marriage other than Arab custom of the time.

It is thus established that the marriage formula was nothing short of a way to convey the intent of two parties for marriage, and their satisfaction – both of which are relevant and necessary for the formation of a marriage contract. It, by necessity, implies that the verbal formula itself had no relevancy for the validity of a marriage contract, but was merely a means to convey that which was relevant. By extension, if this satisfaction and intent can be conveyed through non-verbal means, then that which was relevant

and was a condition for the validity of a marriage would have indeed taken place in any given local custom. Subsequently a marriage contract would have been established between the two parties, albeit without a verbal formula.

Caution & Room for Thought

Arguing for the permissibility of Nikah Mu'tati by attempting to produce evidence of the irrelevancy of the formula through one's reading of historical literature is a route that is available and not completely void of criticism. The current setup of the jurisprudential framework within the Shi' law, where jurists are seeking to establish probative force (*ujjiyyah*) for themselves in every premise of their argument, poses certain challenges.

Most historical propositions are not given much value when it comes to deducing jurisprudential rulings, due to them not meeting strict criteria for reliability, as they produce nothing more than speculation at most for the investigator. Shi' scholars argue that speculation is of no value when it comes to deducing law, unless we have certain proof that gives that specific type of speculation validation. Historical reports by nature are more often than not single-source accounts whose probativity needs to be established (As-adr, 2003, p. 99–100).

Consequently, most historical references to life of the Arabs before or even during the life of the Prophet, which have documented specific details concerning our topic, do not meet the strict aforementioned criteria. A valid argument to be made here is: Via using these historical reports as a basis to alter the prima-facie of later reliable traditions uttered by the Shi' Imams – to establish the irrelevancy of a verbal formula – is a flawed epistemic approach.

Another reasonably strong argument against Mu'tati marriages that should be considered is through citing the existence of reports within Shi' works evidently suggesting one must be precautionary in matters of marriage ('mili, 1409, v. 20, ch. 157, p. 258). This is rather a calling towards one's intuitive nature to act cautiously when in case of doubt, particularly in such a sensitive matter. The argument is such that while we know for certain that a marriage contract via its lexical formula is valid, on the contrary one must struggle to establish the validity of a formless marriage contract with certainty. Despite efforts to establish this certainty, one is unable to reach conviction regarding the matter. Such exertion of effort should thus be grounds for acting more precautionously. With more than a 1400-year precedent for a marriage contract – considered closely linked to a verbally pronounced formula within the minds of Muslims – attempting to introduce a formless contract is nothing more than a means to bring about confusion and chaos.

In conclusion, while arguments for Nikah Mu'tati are worthy of being investigated, and proponents of it have strong evidence for it that are worth considering, its implementation cannot be taken lightly. Practically speaking, the socio-cultural dimensions of the Muslim world must be taken into consideration by its proponents. The possibility of a law that could be easily abused and misused – particularly if

permitted in both permanent and temporary marriages – when in the hands of 1.8 billion Muslims is a daunting scenario to confront.

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