



Fiqh of Marriage: Class Eighteen

الحمد لله و الصلاة و السلام على رسول الله و بعد:

The Hadith:

وَعَنْ عُقْبَةَ بْنِ عَامِرٍ (قَالَ : قَالَ رَسُولُ اللَّهِ

إِنَّ أَحَقَّ الشُّرُوطِ أَنْ يُوفَى بِهِ , مَا اسْتَحَلَّتُمْ بِهِ الْفُرُوجَ { مُتَّفَقٌ عَلَيْهِ }

Narrated Uqbah bin 'Aamir: Allah's Messenger said, "The most worthy conditions to be fulfilled are those by which you make sexual intercourse lawful for yourselves (in marriage.)"

[Agreed Upon]

The Commentary:

This hadith presents a general rule regarding conditions that are made between the two spouses in a marriage contract. The husband might make conditions, or the wife might make conditions, or her guardian might request these conditions.

The husband might make certain conditions regarding his wife, in order that she have certain traits, or that she would travel with him, or that she would perform certain work or duties.

This is from the husband's side.

But most of the study that is made on this subject regarding conditions in the marriage contract is regarding conditions made by the wife on her husband.

The general principle regarding conditions in contracts is based on the words of the Prophet: "Every condition that is not in the Book of Allah is rejected."

This is to begin with. But then in addition to this, we have the words of the Prophet:

"The most worthy conditions to be fulfilled are those by which you make sexual intercourse lawful for yourselves (in marriage.)"

The condition upon which the wife will be pleased with her husband has the most right to be fulfilled. This is her right, and it has more right to be fulfilled.

And we have the general text, the Prophet said, "Al-Muminoona 'and shurutihim."

And Allah says, "Awfoo bil 'uqood."

So Allah has commanded fulfilling one's contracts, and abiding by conditions.

But the Prophet s warned against generalizing these conditions, by saying that all conditions are valid in a contract except what "ahalla haraaman aw harama halalan, permits the forbidden or forbids the permissible."

What are the conditions that are placed by the wife on the husband that he must fulfill?

The scholars state that conditions in a marriage contract, or in general between people, fall into two types.

Conditions (shuroot) that are in accordance with what is implied by the contract.

And conditions that are not in accordance with what is implied by the contract, and contradict it.

Whichever conditions are in accordance to the essence of the contract, are correct and binding.

And whichever conditions contradict the essence of the contract, then they are invalid.

We then have the question, if the conditions are invalidated, is the contract too invalidated, or does it remain valid?

Many of the Ulema state that the condition is annulled while the contract remains binding. However, this is not always the case.

There are a number of situations where the conditions may either be binding or not binding, for example from those conditions which do not have to be fulfilled:

--If the husband places the condition on his wife that he will not spend time apportioned time with her, (if he has another wife, for example). Or just the days, for example.

This is a case where the condition violates the essence of the contract, since part of the essence of the contract is to spend equal time with ones wives and to be just with them, and this contradicts this essential part of the contract, so it is nullified.

--If he places the condition that after consummation of the marriage, he will take back her Mahr that he had given her. This contradicts the essence of the contract, since Mahr is a gift, and gifts should not be taken back.

These are examples of things that contradict what is essential and implied by the marriage contract.

But if he makes that condition that she is religious, or beautiful, or serve him in the house, and these matters are related to culture and customs, and this type of Shart is Saheeh and the contract is valid.

Now we have the example of a woman who places a condition that is invalid, because the Prophet s specifically prohibited it, which is if she says that her husband must divorce his current wife in order to marry her. She says, you want to marry me, that is fine, but on the condition that as soon as the marriage takes place, you will divorce your current wife.

This was prohibited by the Messenger, when he said, "Do not let one of you request the divorce of her co-wife in order to benefit from her possessions."

This is an invalid condition, and it is not binding if it is placed in the contract.

If she places the condition that he does not marry another wife, or he does not move with her to another home, or that her Mahr has to be given in a specific type of wealth...

As for not taking her from her house, the Jumhoor say that she has the right to make that condition, although Malik disagreed.

As for not marrying another woman, Imam Ibn Taymiyyah says she has the right to make this condition, and it must be fulfilled. If it is not fulfilled, she has the right to request divorce.

And regarding making this condition of not marrying another, we find some that respond by saying, how can you prevent him and Allah says, “Mathnaa wa thulaatha wa rubaa” “Two, three, or four”?

And I heard from Shaikh Amin Shinqeeti that he once traveled to Africa, and a person stood up and asked him, “It is common in our culture that a potential wife will say to her suitor, “Laa saabiqah wa laa laahiqah”, meaning, “there must not be wife that you are married to before me, nor one that you will marry in the future.”

The man continued, “And she will say, you have to agree with this condition in order to marry me. But Allah says, “Marry of your choice, two, three, or four.” and the Prophet said, every condition that is not in the Book of Allah is invalid. What do you say about this, may Allah protect you?”

The Shaikh responded, “Yes, this condition is valid. And it does not contradict the book of Allah. This is because she did not say it is haram for a person to marry two, three, or four. Rather she is saying, if you want to marry two, or three, or four, that is fine for other women, but I do not want to be one of them.

But if you want to marry me, then you must give up your right for two, three, or four, and restrict yourself to me.

If the husband accepts this condition, then he is giving up his right to marry two, three, or four, by his own volition. She desired this condition for her own personal benefit, and he agreed to it.

And likewise if she makes the condition to not make her leave her home, or leave her children that are in her custody, or not marry another, all of these conditions must be fulfilled, since they may affect her decision to accept the Mahr that is offered to her.

If he accepts these conditions, then offers her a Mahr, she may accept it, but if he says no, she may request a different Mahr.

Thus, fulfilling these conditions are part of the Mahr. And for this reason, we have the principle, "Every condition that violates the essence of the contract is invalid."

And there is a difference of opinion amongst the Ulema regarding the annulment of the contract along with the annulment of the condition. Some of them say the contract is invalidated along with the condition, while others say that the contract remains valid and the condition is invalidated.

However, they all agree that the condition that does not violate the essence of the contract must be fulfilled, and if it is not, the wife has the right to request a divorce.

The Hadith:

وَعَنْ سَلَمَةَ بْنِ الْأَكْوَعِ (قَالَ : { رَخَّصَ رَسُولُ اللَّهِ (عَامَ أُوطَاسٍ فِي
الْمُتْعَةِ , ثَلَاثَةَ أَيَّامٍ , ثُمَّ نَهَى عَنْهَا } رَوَاهُ مُسْلِمٌ

Narrated Salama bin al-Akwa': In the year of Autas, Allah's Messenger permitted Muta' marriage for three nights, then he prohibited it afterwards.

[Reported by Muslim]

The Explanation:

The year of Autass was the year of the Fathi Makkah, and there are other texts that mention the year of Fathi Makkah, or the Year of Umrah al Qadiyyah, or Khaibar, or Tabook, and they all indicated that the Prophet s forbade Zawaj Muta'ah.

They year of Autass the year Makkah was opened, and it was is in the 8th year after Hijra, and the Prophet allowed a dispensation for three days, and in some narrations, after three days, the Sahaba said, "We have been celibate for a long time, should we castrate ourselves, oh Messenger of Allah?" He said "No, you may take benefit from these women," and in some narrations, he said, "and after three days, leave them behind." Since that Rukhsa was enough, since they complained of the hardship of celibacy.

And in some narrations, when Makkah was opened, the people of the city dressed up, and complained to the Prophet about celibacy, and so the Prophet allowed them to benefit from these women, but they refused without setting a time limit, since we were coming and going.

And Ibn Abdul Barr mentions that one of the Sahabah said, "I and a cousin of mine went out, and I was younger than him, and we passed by a very beautiful woman, and we asked if she would marry one of use temporarily. She said, what will you give me? He said, "I will give you my shoulder cloth." He says, my cousin had a nicer shoulder cloth than mine, and I was younger than him. She looked at me, and at my cousin, and she looked at our clothes, and said, "Shoulder clothes are the same, but youth is more beloved to me." So he said I stayed with her for 3 days. Then I left, and I saw the Messenger of Allah at the door of the Kaaba, and he commanded an announcer to say, "I had previously allowed you to have mut'ah with these women, but I forbid you from it, for Allah

has forbidden it until the Day of Judgment, and whoever has one of these women, let her go, and do not take anything he had given her.”

This is a clear text that the Prophet forbade Mut’ah in the year of Fathi Makkah.

Allah knows best.

End of Class 18.