

Rule Requirement in the Marriage

Dr. Nahedah AlShamrokh

Riyadh, Saudi Arabia

dr.nshmrokh@hotmail.com

Keywords: Requirement, Divorce, Marriage Contract.

Abstract. Summary of research titled (rule requirement in the marriage contract and some exemplified Contemporary). The requirement rule in the marriage contract with the evidence and weighting them some of the contemporary forms. Then some of the contemporary forms as women's requirement to be with her divorce and the requirement to remain in their work.

1. Introduction

In the name of Allah, most Merciful, most Passionate

Praise be to Allah and peace on the best prophet Mohammed and all of his relatives and companions

Now,

The jurisprudential issue between our hands deals with making stipulations in the Marriage Contract and some of its contemporary types. The most important of these is that when a woman stipulates to the man that the decision to divorce shall rest with her. The jurists have three different opinions in this regard:

The First Opinion:

The Malki and Al-Zahri schools most of Al-Shafi school jurists regard this stipulation as invalid explaining that it contradicts the intended purpose of marriage, and that it contradicts the Holy Quran and the Sunnah of the prophet Mohamed, therefore, this stipulation is invalid.¹

To validate their opinion, they quote that Ali and Ibn Abbas they were asked about a man who married a woman; the woman stipulated on him that the decision to divorce would be in her hands and that she would pay the marriage money 'Sidaq', they said to him: You have turned a blind eye on the Sunnah of the prophet and put the matter into the wrong hands. You are the one to pay the marriage money 'Sidaq' and you are the one to decide the divorce."²

¹ Muahib Al-jalil 146/3, Lughat Al-Salik 393/1

² Narrated by Al-Baihaqi in Al-Sunnan Al-Kubr 250/7, and Saeed bin Mansour in 183/1 in his Sunnan, and Abdul raziq in his volume 203/6

Al-Shafi said: “If a woman makes a stipulation that requires the man to do it if the marriage is consummated; the marriage is legal however the stipulation isn’t”³

Al-Zahri school quotes the saying of Allah in the Quran: “O Messenger, if you divorced women ..) and also “Men are responsible on women).⁴

Al-Zahri school jurisprudents say that Allah made men responsible for women and put the divorce issue in the men’ hands not in the women’ hands. Any woman who stipulates to a woman that the divorce will be in her hand is in direct contravention of the commands of Allah and went over those boundaries.⁵

The Second Opinion:

This stipulation is valid if its cause is actually made by the husband. For example if the husband stipulates that if he travelled away and left her, married a second woman and the like, then she can take the matter of divorce into her own hands.

Some of Al-Malki school jurisprudents are of the same opinion, all of Hanbak school jurisprudents.⁶ Imam Malik was quotes as saying: This stipulation only requires the husband to take an oath to divorce the woman, or free a slave, then such oath will oblige him.

Al-Hanbali school jurisprudents quoted proof from Hadith: “The stipulations that are most to be fulfilled are those that are made to legalize marriage”.⁷

The Third Opinion:

The third opinion is what Al-Hanfi school holds true; it says that such stipulation is permissible but is conditional to the woman making the stipulation and spelling it out first. If the woman says I will marry you on condition that I will take charge of my own affair and divorce myself if I see fit, the husband says I accept then the stipulation holds. However, if the husband starts by saying I will marry you on condition that you will take charge of your own affair and divorce yourself, in this case the matter will not be in her hand.⁸

They hold that delegating the divorce to the woman in the second case was achieved before completing the marriage contract just to secure the approval before the marriage. Before completing the contract, the man does not have the right to divorce and cannot therefore delegate it to the woman. In the first case, when the man says I accept that was marriage first then the stipulation came second. So, when the contract is completed, he then has the right to divorce and can delegate it to the wife.⁹

³ Al-Om, 74/5

⁴ Surah Al-Nisaa:34

⁵ Refer to: Al-Ahkam/Ibn Hazm 216/5, Al-Mahali 519/216, 9/10

⁶ Refer to Al-Istizkar/Ibn Abul Bir 64/17, Jurisprudent Laws/Ibn Juz'a p. 146/Al-Maghna

⁷ The Hadith is agreed upon; it is narrated by Al-Bukhari in saheeh Al-Bukhari 323/5 with explanations from Fathul Bari, Muslim in Saheeh Muslim 201/9 explained by Al-nawawi

⁸ Al-Bahr Al-Raieq/Ibn Najeem 343/3, endnotes of Ibn Abdeen 439/3

⁹ Refer to the endnotes of Ibn Abdeen 415/3, the jurisprudence of A-Sayed previous reference 287/2: The extent of the married couple in divorce matters/Al-Saboni 359/1

Al-Hanfi school has quoted proof for the validity of this stipulation saying that making the divorce conditional on some stipulation is lawful such as if a man says to his wife if you enter the house you are divorced. This is the same as saying if I marry you, you are divorced. Here, the man has made the divorce conditional on the marriage. So, if he added: "If I marry you, you are divorced if you wish, this means he has delegated the divorce affairs to the woman. This becomes the stipulation to complete the marriage and cannot recourse from that because the marriage was made conditional on that stipulation.

The Most Probable Opinion:

Having presenting the sayings, proofs and explanations of each school, its my point of view to avoid the permissibility of this stipulation in its entirety as advocated by Al-Hanfi school.

The prevention is in the benefit and best interests to the woman first place and its family in the second place. Allah has dreaded women with a psychological formation that makes her unable to control her emotions, due to her need for such emotions in her function as a wife and mother; these emotions make her ready to accept the changing conditions surrounding her. In contrast, the man is mostly in control of his emotions; he usually uses his head to deal with new events and circumstances. Man is more stable in using this right to depart the wife.

And since the husband burdens the costs of the marriage and divorce, he will be more careful, wiser and patient in divorcing the wife than the woman who cannot mostly control this.

I also see that we must stand fully against the opinion that this stipulation is unlawfulness in its entirety as some Malki jurists hold as it does not contradict the intention of the marriage i.e. pleasure. Nor does it contradict the Holy Quran or the Sunnah of the Prophet. When the wives of the prophet peace and blessings be upon him demanded expenses which he hadn't, he gave them an option between departing from him or staying with him but to make do with the little he had. This leaves the second opinion which legalizes this stipulation but conditional on an action stipulated by the woman in the contract such as stipulating that her husband should not travel and leave her alone, marry another woman and leave her to continue her work outside the house, and if the husband breaches this stipulation, she would then have the right to revoke the marriage contract.

Allah knows better.

References:

- (1) Surah Al-talaq:1
- (2) Narrated by Al-Baihagi in Al-Sunnan Al-Kubr 250/7, and Saeed bin Mansour in 183/1 in his Sunnan, and Abdul raziq in his volume 203/6
- (3) Refer to: Al-Ahkam/Ibn Hazm 216/5, Al-Mahali 519/216, 9/10
- (4) Refer to Al-Istizkar/Ibn Abul Bir 64/17, Jurisprudent Laws/Ibn Juza p. 146/Al-Maghna
- (5) Al-Mudawana Al-Kubr 198/2
- (6) The Hadith is agreed upon; it is narrated by Al-Bukhari in saheeh Al-Bukhari 323/5 with explanations from Fathul Bari, Muslim in Saheeh Muslim 201/9 explained by Al-nawawi

- (7) The Hadith is agreed upon; it is narrated by Al-Bukhari in saheeh Al-Bukhari 323/5 with explanations from Fathul Bari, Muslim in Saheeh Muslim 201/9 explained by Al-nawawi
- (8) Al-Bahr Al-Raieq/Ibn Najeem 343/3, endnotes of Ibn Abdeen 439/3
- (9) Refer to the endnotes of Ibn Abdeen 415/3, the jurisprudence of A-Sayed previous reference 287/2: The extent of the married couple in divorce matters/Al-Saboni 359/1