

Civil Marriage in The Light of Fiqh Al-Maqaasid, Nigeria as a Case Study

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Abstract

Islam has laid a lot of emphases on marriage with regards to its importance, it is not just a platonic relationship between husband and wife, nor is it solely for procreation, but it's also an obligatory act and it's so important that it is declared to be half of single Muslim's faith. Islam has laid extensive ground rules and regulation for marriage and as well assigned different roles to both husband and wife in order to establish peace, happiness, love, tranquillity and security in the family. Despite all the above reasons of marriage in Islam, there are still many families in Nigeria who are been deprived of enjoying their marital life, due to the fact that the contract of marriage was done through what is called civil marriage. When marriage is been done in civil way, the husband has no right to marry another wife with the presence of his wife, it is regarded as one of the fundamental conditions of civil marriage, if he does, such husband would be liable for the offence of bigamy, a punishable offence with 5 years' imprisonment. Based on this reason, this article wants to centre its study on the validation of this kind of condition in marriage under the Islamic jurisprudent and with regards to fiqh al-maqasid.

Keywords: Marriage, Civil, Maqasid, Nigeria.

Introduction

A civil marriage is a marriage between one man and one woman and lasts till the death of either the husband or wife or the legal dissolution of the marriage, whichever comes first. This marriage totally is monogamous in nature and if either the husband or wife contracts a marriage with another person while the first marriage is still on-going, such person would be liable for the offence of bigamy, a punishable offence with 5 years' imprisonment.

Civil marriage is important because it offers security to the woman and her unborn children and protect her rights, the wife has right under the law as legally married to her husband. But on the

other hand it denies the men from practicing polygamy which is allowed for men under the Sharia law, because it is been referred to as bigamy which attracts the punishment of 5 year imprisonment.

Although it is not encouraged for the believers to have a civil marriage in preference to an Islamic Nikaah; if one has had a civil marriage and the essential prerequisites of marriage which are: a clear expression of offer to marry and acceptance of the same through a language that is understood and used as such for marriage in the culture or country one is living, and the presence of two reliable witnesses which is also considered as a prerequisite for the validity of marriage according to the majority of scholars, such marriage will be deemed legal and valid in the sight of Shariah.

Despite the presence of all those prerequisites mentioned above which are very essential in Islamic marriage, non-marrying to second wife would still be stipulated as one of the conditions of civil marriage.

The ruling on fulfilling the stipulation of non-marrying to another wife as one of the conditions of marriage?

The scholars of Islam had different opinions on this issue;

1- The first group among the scholars of jurists maintain that such a contract of marriage is valid, but the accompanying conditions are void, so the husband is not bound to fulfil these conditions. This is the view of Abu Hanifah, Ash-Shafi'i, and many other jurists. They quoted the following proofs in support of their view:

From Sunnah

- I. Allah's Messenger (peace and blessings be upon him) was reported to have said: "Muslims are bound by their conditions, unless it be a condition which turns Halal (lawful act) into Haram (unlawful act) or Haram into Halal."
- II. They maintain that the wife's stipulating that her husband must not marry another beside her, or not to take her with him in his journeys, is null and void, because it makes a lawful thing unlawful.
- III. Aisha said, "Buraira came to me and said, 'I have agreed with my masters to pay them nine Uqiyas (of gold) (in installments) one Uqiya per year; please help me.' I said, 'I am ready to pay the whole amount now provided your masters agree that your Wala will be for me.' So, Buraira went to her masters and told them about that offer but they refused to accept it. She returned, and at that time, Allah's Apostle was sitting (present). Buraira said, 'I told them of the offer but they did not accept it and insisted on having the Wala.' The Prophet heard that." `Aisha narrated the whole story to the Prophet. He said to her, "Buy her and stipulate that her Wala' would be yours as the Wala' is for the manumitted." `Aisha did so. Then Allah's Apostle stood up in front of the people, and after glorifying Allah he said, "Amma Badu (i.e. then after)! What about the people who impose

conditions which are not in Allah's Book (Laws)? Any condition that is not in Allah's Book (Laws) is invalid even if they were one hundred conditions, for Allah's decisions are the right ones and His conditions are the strong ones (firmer) and the Wala' will be for the manumitted."

The Scholars said: the hadeeth was narrated in the story of the owner's stipulation to the slave that the loyalty of the slave is not to the one who bought it, so this condition is contrary to what Allaah has defined as the right of the emancipator. The Prophet (peace and blessings of Allaah be upon him) annulled the condition and executed the Emancipation, and he denied all who stipulated in the contract anything that contravenes Shariah. The wife's stipulation of her husband in the marriage contract that he should not marry on her or take her out of her house is not a requirement of the contract, therefore this is not obligatory to be fulfilled

Al-Qiyas (Analogy)

They compared the wife's requirement that her husband should not marry on her or should not take her out of her home, among the requirement in the marriage contract to drink alcohol or leave the prayer and other conditions, the common factor between them is that each of these conditions is not required by the contract and should not be fulfilled.

Also a marriage contract must be in the interest of both spouses, and neither of them may detract from the interest established by the contract for one of them. The requirement of the wife in the marriage contract not to marry on her or take her from her home detracts from the right that the contract establishes for the husband.

2- The second group among the scholars of jurists, said it is just mustahabb (recommended), meaning that if the husband wishes he fulfils the condition and if he likes he doesn't fulfil it. This is one of the views from Al-malikiyyah (al-Habib, 2007). They quoted the following proofs in support of their view:

From Al-Quran

Allah said: "O you who have believed, fulfill [all] contracts. Lawful for you are the animals of grazing livestock except for that which is recited to you [in this Qur'an] – hunting not being permitted while you are in the state of ihram. Indeed, Allah ordains what He intends."

The area of significance from the verse:

That God Almighty commands the believers in this verse to fulfil the covenants that they made among themselves, and as the requirement of women in the marriage contract such conditions in which there is benefit and interest in it for them, they said that these kind of condition can be accomplished.

From Hadith

Al-Bukhari (IbnHajar, 2001), Muslim and others reported on the authority of `Uqbah ibn `Amir that Allah's Messenger (peace and blessings be upon him) was reported to have said: "The conditions you have the most duty to fulfil are those by which you have made marital relations lawful." With his chain of narrators, Al-Athram reported that a man married a woman; it was stipulated in the marriage contract that he should provide her a certain house. Thereafter, the husband wanted her to dwell in another house, so the wife lodged a complaint to Umar ibn Al-Khattab; Umar said that the wife should be provided with the house stipulated in the marriage contract.

The area of significance from the verse:

The Hadith in which he urged to fulfil the conditions that a person is obliged to fulfil himself, since the requirement of this condition is a benefit for the wife, therefore it is mustahabb to fulfil the conditions that benefit the women.

3- The third group among the scholars of jurists are of the opinion that, if the wife has stipulated in the marriage contract that her husband should not marry another beside her, then if he does not fulfil that condition the contract will be null and void.

This view was held by Umar ibn Al-Khattab, Sa'd ibn Abi Waqqas, Mu'awiyah, Amr ibn Al-'Aas, Umar ibn 'Abd Al-'Aziz, Jabir ibn Zayd, Tawus, Al-Awza'i, Is-haq, and the Hanbali jurists.

They quoted the following proofs in support of their opinion:

- i. O you who have believed, fulfill [all] contracts. Lawful for you are the animals of grazing livestock except for that which is recited to you [in this Qur'an] – hunting not being permitted while you are in the state of ihram. Indeed, Allah ordains what He intends.

The area of significance from the verse:

That God commands the believers to meet the conditions that they require themselves, and every command is eligible for obligation, therefore, if a woman conditions such conditions and is approved by the husband, they are the covenants that must be fulfilled in the Shariah provided that they do not contradict with the origin of the Islamic Shariah.

- ii. Al-Bukhari, Muslim and others reported on the authority of `Uqbah ibn `Amir that Allah's Messenger (peace and blessings be upon him) was reported to have said: "The conditions you have the most duty to fulfil are those by which you have made marital relations lawful." With his chain of narrators, Al-Athram reported that a man married a woman; it was stipulated in the marriage contract that he should provide her a certain house. Thereafter, the husband wanted her to dwell in another house, so the wife lodged a complaint to Umar ibn Al-Khattab; Umar said that the wife should be provided with the house stipulated in the marriage contract.

- iii. Allah's Messenger (peace and blessings be upon him) was reported to have said: "Muslims are bound by their conditions, unless it be a condition which turns Halal (lawful act) into Haram (unlawful act) or Haram into Halal."

The area of significance from the two Hadiths:

In the hadeeth, it is signified that if a Muslim commits a contract to himself, he is obliged to fulfil it, and the marriage contract is in the interest of one of the parties to the contract, so long as it does not violate the provisions of the marriage contract in Islamic law. And also that in this hadith is an explicit indication that any condition that a person is obliged to fulfil must be fulfilled, and that he must fulfil what is related to the marriage contract, if a woman stipulated that her husband should not marry her (Al-Asqalani, 2001).

They moreover, maintain that the wife's condition that her husband should not marry another beside her, is binding, for it contains a benefit for the wife and does not contradict the objectives of marriage; it is the same as the stipulation of increasing the dower.

IbnQudamah (1997) gives preference to this view over the other views; he said, "This was the opinion of the Companions, and we do not know anyone who disagreed with them in their lifetime. In addition, the hadith that states: "Any condition which has no basis in the Book of Allah is void" means any condition which is inconsistent with the rules of Shari'ah, but such a condition is admissible, and we have mentioned the proofs that support its admission; therefore, he who doubts its admission should support his view with evidences.

Conclusion

After reviewing the evidences provided by each scholars of jurists in support of their opinions, the view of the third groups is very strong due the authenticity of their evidences.

Based on that, if the court or the wife herself has stipulated that the husband should not take another wife, this is a valid condition and he must adhere to it; if he does take another wife, she has the right to annul the marriage contract. But if the wife agrees to step down on her right for the husband to take another and ready to stay with him as a co-wife, then there is no issue in taking another wife for the husband.

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