

The Option to Include Conditions (Khayar al-Shari)

The difference between *shart al-khayar* and *khayar al-shari* is that in the first the option to annul the marriage be included in the contract. For example, when the bride making the offer says, "I marry myself to you on the condition that I shall have the choice of annulling the marriage within three days," and the groom accepts with a *qabiltu*, or when the bride says, "I marry myself to you." and the groom, while accepting, says, "I accept on the condition that I shall have the choice to annul the marriage within such and such a time;" we see that in both the cases the option to annul the marriage is mentioned in the contract itself, and this, as has been mentioned earlier, results in the contract becoming null and void, according to all the five schools.

But in *khayar al-shari* (the option to annul the marriage is not mentioned as a condition *per se* in the contract. That which is mentioned as a condition in this case, is a particular quality—such as the bride's virginity or the groom's possessing a university degree—in a manner that if the said quality is not found to exist the other shall have the right to annul the contract. The schools have a difference of opinion in this regard.

The Hanafi's have said: If a spouse mentions a negative condition in the contract, such as the absence of blindness or a disease, or a positive condition, such as presence of beauty, virginity, etc., and then the opposite of it comes to light, the contract will be valid. Regarding the condition, it will not apply except when the wife lays down a condition related to *al-kafa'ah*; such as a condition regarding lineage, profession or wealth. Here she has the right to annul the contract. But as regards the husband, any similar condition laid down by him will not be considered applicable because *al-kafa'ah*, as mentioned earlier, is a condition with reference to the husband, not the wife.

The Maliki, the Shafi'i, the Imamiyyah and the Hanbali schools have said: The condition is valid and if not satisfied results in the spouse laying the condition acquiring the option of either upholding or annulling the contract. The following tradition is cited in support of this view:

The Muslims are bound to (fulfil) their conditions.

Furthermore, they state, therefore said conditions are not against the spirit of the contract and do not contradict the Qur'an or the Prophet's Sunnah; neither they amount to changing *halal* into *haram* nor vice versa.

Deceit (Tadlis)

The Imamiyyah have discussed under this head the deception of the groom by the bride by either hiding a defect or by claiming a merit which is absent. In the first case, i.e., her hiding a defect and not mentioning it. The right to annul the contract will not accrue if he has not mentioned the absence of such a condition specifically in some way or another. A tradition is narrated from al-'Imam al-Sadiq ('a) which says:

في الرجل يتزوج إلى قوم فإذا امرأته عوراء ولم يبينوا له قال: لا ترد

About a person who marries in a family and finds his wife to be one-eyed while they have not revealed it to him. The Imam said: The contract will not be withdrawn.

This is the opinion of all the schools.

As regards the second form of deceit i.e., where she claims a merit which in fact she does not possess—if the claimed merit has been mentioned as a condition in the contract, as said earlier, the condition will hold good according to all except the Hanafis. But if the claimed merit has not been mentioned in the contract as a condition—i.e., it has either been mentioned simply as a quality in the contract, or has been mentioned before the contract and the contract has been recited on that basis—then two different situations arise:

1. The merit has been mentioned in the contract as a quality, such as when the bride's attorney says, "I marry this maiden to you." or, "I marry this girl who is free from any defect to you." The Imamiyyah state that when it is known that she does not possess the mentioned merit, the husband has the choice to annul the contract.
2. The merit has neither been mentioned as a condition nor as a quality in the contract, but has been mentioned during the course of the marriage negotiations, such as when she herself or her attorney says that she is a virgin and has no defect, and then the contract is recited on the basis of this statement, so that it is understood that the contract has been recited on the girl's possessing this particular quality. In the legal sources that I have referred to, I have not come across anyone who has discussed this

particular aspect except the Imamiyyah, among whom there is a difference of opinion as to whether in such a case the husband has an option of annulment. Some of them, including al-Sayyid Abu al-Hasan al-Ishfahani, in *al-Wasilah*, uphold the husband's option, because they point out, the negotiations of the contracting parties regarding a particular quality followed by the conclusion of the contract on their basis, makes this quality similar to an implicit condition. Others, who oppose this view, have said that it will have no effect unless the quality is mentioned in the contract or its presence in the contract established in some way or another. Al-Shahid al-Thani, in *al-Masalik*, holds the same opinion, on the basis that a contract is binding unless there is categorical proof of its invalidity and such a proof is not present in this case.

To summarize, if the quality has been recognized in the contract in one of the three ways (i.e., as a condition, as a quality mentioned in the contract. or when mentioned during pre-contract negotiations), the husband has the option to annul or retain the contract. If he retains it, he will not have any right of reducing her *mahr*, whatever the defect except when the condition was virginity. According to the Imamiyyah, in this case, the husband may reduce the *mahr* by an amount equal to the difference between a maiden's *mahr* and that of a woman who is not a maiden.

If he chooses to annul the contract, she will not be entitled to receive any *mahr* if marriage has not been consummated according to the Imamiyyah and those of the four schools who permit the option of annulment in case of deceit. On the marriage being annulled after consummation, she will receive the *mahr al-mithl*, and, according to the Shafi'i school. The husband paying such *mahr* will not claim it from the person responsible for the deceit.

The Imamiyyah observe: It depends upon who is responsible for the fraud. If it is the bride, she will not be entitled to any *mahr*, even after consummation. If someone else, then she will receive her full *mahr*, and the husband will claim this amount from the deceiver in accordance with the rule, 'the deceived will level his claim against the deceiver.'

Supplementary Issue

1. If after marriage, one of the spouses finds a defect in the other and claims that the contract was concluded after freedom from such defect was understood through one of the three above-mentioned modes, the other refuting, the burden of proof will lie with the claimant. If the claimant furnishes the proof, the judge will grant him/her the right to dissolve the marriage. If the claimant is unable to prove his/her claim, the respondent will take an oath and the case will be dismissed by the judge.
2. When a person marries a woman after it has been understood, through one of the three mentioned ways, that she is a virgin, and then finds her to be otherwise, he will not be entitled to dissolve the marriage, unless it is proved that her loss of virginity preceded the contract. This can be proved, either by her confession, or through evidence, or any such circumstantial evidence a may lead to certain knowledge—such as when after the marriage, intercourse takes place within a period during which the

chances of her losing her virginity (due to other causes) do not exist.

If the issue stays unsettled and it cannot be proved in any of the said ways, whether she lost her virginity before the marriage or after it the right to dissolve the marriage will not accrue to the husband, because the presumption is that her loss of virginity does not precede the marriage, and also because the possibility of her having lost it due to an unknown reason—such as riding or jumping—also exists (*al-Masalik* of al-Shahid al-Thani. vol. 2, Chapter on Marriage in Imamiyyah Fiqh).

3. Al-Sayyid Abu al-Hasan al-'Isfahani. in *al-Wasilah*. the chapter on marriage. writes: If a man marries a girl without virginity being mentioned in the negotiations previous to the marriage without the contract being based on it. and without it being included as a condition or a quality in the contract, but only believing her to be so because of her not having married anyone before him. He will not have the right to dissolve the marriage if it is later proved that she was not a virgin. But he has the right to partly reduce her *mahr*. This reduction will be proportional to the difference between the *mahr* of her like if a virgin and if not a virgin. Therefore, if her *mahr* be fixed at 100 and the *mahr* of a virgin like her is 80 and a non-maiden like her is 60, he will reduce from 100 a fourth part, i.e. 25, with 75 remaining as *mahr*.

Accordingly, al-Sayyid al-'Isfahani envisages four possible conditions regarding virginity:

- i. Where virginity is mentioned in the contract as a condition:
- ii. Where it is mentioned in the contract as a quality:
- iii. Where it is mentioned during settlement of marriage and the contract is based upon it;
- iv. Where he marries her believing her to be a virgin and does not mention it, neither before the contract nor in the contract.

In the first three conditions, the husband has the choice to annul the marriage; in the fourth, he has no such choice, but can reduce a part of the *mahr* in the above-mentioned manner.

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