

بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ

Series of Questions Addressed to Eminent Scholar Ata Bin Khalil Abu Al-Rashtah,
Ameer of Hizb ut Tahrir through his "Fiqhi" Facebook Page

Answer to a Question

Batil and Fasid Contracts In Marriage

To: Farah Farahat

Question:

Bismillah Ar-Rahman Ar-Raheem

Assalam Alaikum Wa Rahmatullah Wa Barakatuh

Our Ameer, May Allah protect you.

My question is what is the difference between the conditions of the validity of marriage and the conditions of the contracting of marriage? What effects do they have on the contract; when do they make the contract *Batil* and when do they make *fasid*? Jazak Allah Khair and May Allah grant you victory over your enemy, may Allah protect always.

Answer:

Wa Alaikum Assalam Wa Rahmatullah Wa Barakatuhu

1- We have explained this and in its details in *the Social System in Islam* book:

"(...The marriage is contracted by legitimate proposal and acceptance. The proposal is what originates initially from the statement of one of the two contracting parties. The acceptance is what originates secondly from the statement of the other contracting party,

The sound contracting of marriage stipulates four conditions:

The first condition is the occurrence of the offer and acceptance in the same sitting, where the sitting in which the offer was given is the same sitting in which the acceptance took place. This is if the two contracting parties are present together. If the two parties are in two different countries and one of them writes a letter to the other with an offer of marriage and the recipient of the letter accepts, then the marriage has been contracted. However, in such a situation, it is stipulated that she reads or lets someone read the letter out to two witnesses who are made to hear its wording. Or she should say to them so-and-so person has sent me a letter in which he has proposed to me and calls upon them in the same sitting to bear witness that she has given herself in marriage to him.

The second condition for the contracting of marriage is that each of the two contracting parties should hear the statement of the other and understand it to mean that he wants to contract the marriage with this statement. If he did not know, either because he did not hear or did not understand, the marriage will not be valid. For example, if a man dictated to a woman the meaning of 'I have married you to myself' in French whilst she did not understand the language, and she repeated the expression without knowing that the purpose of what she said was the contract of marriage, and the man subsequently accepted it, then the marriage will not be valid. If, however, she knew that the purpose of what she had said was a contract of marriage, then the marriage would be valid.

The third condition is that the acceptance should not object to the offer, whether the objection is to the whole offer or part of it.

The fourth condition is that the Shariah has allowed the marriage of one contracting party to the other, such as when the woman is a Muslim or from the People of the Book and the man is a Muslim and nothing else. **If the contract meets these four conditions, the marriage will be valid. If any of the conditions is not met, the marriage will not come into effect. It will be void from its very basis.** When the marriage is contracted, it must, in order for the marriage to be correct, satisfy the conditions of correctness which are the following:

The first condition is that the woman should be suitable for the contract of marriage. "Like not marrying two sisters at the same time".

The second condition is that the marriage will not be correct without a guardian (wali) since the woman does not possess the right to give herself or give others in marriage. Similarly, she does not have the right to delegate anyone other than her guardian to give her in marriage. If she does this, the marriage will not be correct.

The third condition is the presence of two sane, mature Muslim witnesses who hear the statements of the two contracting parties and understand that the purpose of the offer and acceptance statements is to contract in marriage. **When the contract satisfies these conditions it will be correct. If any of these conditions are lacking, the marriage will be improper (fasid.) After that, we have made the evidence for these conditions clear in the book (The Social System). Based on this, it becomes clear that if one of the conditions of contracting marriage isn't met, the contract will be batil, and if one of the conditions of validity isn't met, the contract will be fasid.**

2- We need to understand the difference between Fasid (improper) and Batil (void). Batil (void) is what contradicts the Shariah rule in origin, i.e. it is prohibited, or that the contract lacks a required condition that its absence violates origin of the action (i.e., marriage in this case). Fasid (improper) is in agreement with the Shariah rule in origin; however, its attributes that do not violate the origin is what contradicts the Shariah.

Fasid (contracts) are not found in the acts of worship; but Batil is found because the person who follows the conditions and elements finds them all related to the origin (of the rule). Rather, Fasid contracts can be present in the transactions. In the contracts, for example selling what is impregnated, which is in the stomachs of animals, is *Batil* from the basis because it is prohibited in origin, unlike someone who sells the one who is unaware of the price, like someone from the country side, it is a *fasid* sale; for ignorance of the price, and when he is in the market he will be given a choice; he can proceed with the sale or cancel it. In the example of shares in companies, they are *Batil* in origin because they don't have the Badan (physical effort) partner; they are free from a condition related to the original (rule), but if the partners participate in accordance with the conditions of the Shariah, but one of the partners insists that he gets an amount as a condition, the contract of the company is *Fasid* because it involves Garar (unknown element) in the attribute (detail) and not in the original (rule) because the partner has a proportion of the profit and not a certain amount; the company may lose. If they agreed on the percentage of profit, the contract will not be *fasid* any longer, and it will be a correct contract.

Thus, there is no difference between *Batil* and *Fasid* in the acts of worship. Act of worship could be either valid (removing a sin) or invalid (not involving removing the duty). Prayer is either valid or invalid. However, in financial contracts that result in corresponding obligations or transfers of ownership, such as contracts of sale, leasing, transfer, companies and the like.

As for marriage, *Batil* and *Fasid* contracts are both contrary to Shariah, but the *Batil* contract is annulled from the basis and is separate from its effects. If intercourse occurs, it takes the rule of the *zina* (adultery), and the child is not associated with the man who did *zina*; there will be no laws of *Idda*, nor the entitlement to dowry, nor women prohibited by marriage: It is *Batil* in origin. As for the *Fasid* contract, its violation of Shariah is in the conditions of validity and not in the conditions of the contract. Therefore, despite the sin that was inflicted on the two contracting parties, it has consequences if there was intercourse but if there wasn't intercourse, there wouldn't be any consequences. The consequences of *fasid* contracts that has intercourse include:

The Dowry: Dowry is required in the *Fasid* Marriage on the condition that the marriage is consummated (i.e., by intercourse); the evidence for this is the saying of Prophet Muhammad (saw): «أَيُّمَا امْرَأَةٍ نَكَحْتُ بِغَيْرِ إِذْنٍ وَلِيِّهَا فَنِكَاحُهَا بَاطِلٌ فَنِكَاحُهَا بَاطِلٌ فَإِنْ دَخَلَ بِهَا فَلَهَا الْمَهْرُ بِمَا اسْتَحَلَّ مِنْهُ...» «**Any woman who gets married without the permission of her guardian (wali), her marriage will be void, her marriage will be void, her marriage will be void; if he (husband) consummates with her, she is entitled to the dowry due to his making permissible her private parts.**» [Tirmithi] and it is said it is Hassan Hadith.

In this Hadith the Prophet (saw) entitled the dowry to the woman who is married through a *Fasid Nikah* (i.e. without the permission of her wali (guardian)) on the condition that the marriage is consummated because the Prophet linked the dowry to the consummation (i.e., intercourse): «فَإِنْ دَخَلَ بِهَا فَلَهَا الْمَهْرُ بِمَا اسْتَحَلَّ مِنْهُ...» «**If he (husband) consummates with her, she is entitled to the dowry due to his making permissible her private parts.**»

There are other effects of the *fasid* marriage if there is consummation. But these entail details and differences in the school of thoughts, such as *Iddah*, lineage, inheritance and the prohibition of marriage (to certain women). Whoever wishes to learn more, they can go back and refer to the relevant references.

Allah is Most Knowledgeable and Most Wise

Your brother,

Ata Bin Khalil Abu Al-Rashtah

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The link to the answer from the Ameer's Facebook page:

<https://web.facebook.com/AmeerhtAtabinKhalil/photos/a.122855544578192.1073741828.122848424578904/773059359557804/?type=3&theater>

The link to the answer from the Ameer's page on Google Plus:

<https://plus.google.com/u/0/b/100431756357007517653/100431756357007517653/posts/YqWUovRLGtB>

The link to the answer from the Ameer's page on Twitter:

<https://twitter.com/ataabualrashtah/status/967029657924235264>