



## Fiqh of Marriage: Class Twelve

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

We spoke last time about the importance of announcing weddings, and attending their celebration, as long as they are not openly committing sins at the wedding party. If there is open sin, one should refrain from attending, unless he is a person of social standing who can change the wrong that is being done. In this case it is better for him to attend and put an end to the evil that is being done.

The Hadith:

وَعَنْ أَبِي بُرْدَةَ بْنِ أَبِي مُوسَى ، عَنْ أَبِيهِ قَالَ : قَالَ رَسُولُ اللَّهِ  
{ لَا نِكَاحَ إِلَّا بَوْلِي }  
رَوَاهُ أَحْمَدُ وَالْأَرْبَعَةُ ، وَصَحَّحَهُ ابْنُ الْمَدِينِيِّ ، وَالتِّرْمِذِيُّ ، وَابْنُ حَبَّانَ ، وَأَعْلَى بِالْإِرْسَالِ .

Narrated Abu Burda on the authority of his father; Allah’s Messenger said, “**There is no marriage without a guardian.**”

Reported by Ahmed and the Four. And in a narration: “and two witnesses.”

The Explanation:

This hadith and the next one complete one another, and together formulate an important religious precept regarding the presence of the guardian in marriage. Let us examine it word by word.

“There is no marriage” what is meant here is a valid marriage contract,

“except”, this usage is called negation and affirmation in Arabic, and it results in a restriction of a concept to something specific. Another example is: “There is no god except Allah.” This means that divinity is negated from all things and is restricted to Allah alone, and excludes everything else, such as men, or jinn, or angels, or stones, or animals, or anything else worshipped by people. “no” negates all things, then “except” restricts Godhood to Allah alone.

Likewise here, all types of marriages that are known, the marriage of a previously married woman, or a virgin, a young woman, or an older woman, all types of marriages, “There is no marriage” includes all of these types of marriages, “except with...” what? “a guardian.”

So we can understand that all valid marriages are restricted to those in which a guardian is present. This is very clear from the text, with no ambiguity.

Then, we understand the first hadith, “There is no marriage except with a guardian.”

This hadith has been accepted by all scholars of hadith, and there is no need to debate its chain of narration.

And in a narration, “and two witnesses.”

What type of witnesses are required? And what type of wali? It is not mentioned, but is the meaning ‘whoever is known according to habits and customs to be a guardian or witnesses?’

We shall discuss the order of guardianship in order of closeness of relation to the woman Inshallah.

What are the qualities of the witnesses?

And it is mentioned specifically that there must be witnesses, and for this reason the marriage is not valid if there are only two non-Muslim witnesses, yahoodi or nasrani.

Nor a habitual sinner (faasiq), according to Ahmed, but there is some difference of opinion.

Nor is it valid if the wali is a faasiq. And we shall speak about that more later.

The important thing is that there is a husband, wife, guardian, and witnesses to the marriage.

We shall speak about the Mahr separately Inshallah.

“There is no marriage except with a guardian, and two witnesses.”

So there must be someone who will offer, and complete the contract with the groom, the one seeking the marriage. There must be an offer and an acceptance. There should be the statement *zawajtuk* (I have wedded you my daughter) and the groom must say (I have accepted) .

Even if the bride is not physically present, since are other factors, her permission must be asked, and she has to be listened to.

Thus, the hadith “*La nikaah illa bi wali*” indicates to us that there must be a guardian present at the time of making the contract.

Now, what about the witnesses? Must they be present at the time of the contract, to witness the guardian and the groom’s words? Or is not a condition?

“Why don’t you marry me your daughter?” “I have wed her to you.” “I accept.” But there were no witnesses.

Is it allowed to afterwards make two righteous people witness to what has transpired? They were in an airplane and no one was available that they knew. They were traveling, or in an isolated place, etc.

Then after a week, or a month, before the consummation of the marriage, the guardian comes with two people and makes them bear witnesses that he had wedded his daughter to the groom.

The Jumhoor (majority) of the Ulema state that the witnesses must be present at the time of the contract, and hear from the guardian his offer (ijaab), and they must hear the acceptance (qabool) .

However, Imam Malik says: If there was an ijaab and a qabool between the guardian and the groom, the contract is complete and valid, even if there were no witnesses.

He said, this is similar to if there was no mahr mentioned during the contract. "I have wed you...I accept. What about the Mahr? We will discuss it later..." The contract is still valid.

But then, they must discuss the Mahr. If they agree on a certain amount, that is good alhamdulillah. If not, she receives an amount appropriate for someone of her standing and social status.

Likewise is the case with the witnesses.

Imam Malik says, “Just as a marriage contract is valid without the mention of the Mahr, likewise, the contract is valid without witnesses, however, there must be witnessing before the consummation of the marriage. This is because, after consummation of marriage there are rights of a third-party involved, the children, and the only way to establish these rights are through witnesses.

If the husband decides to abandon his wife after the consummation, he might say: “No I don’t know who she is, nor the child, I never met them.” Who will be there to establish his paternity, and who will prove the innocence of her side and prevent her from being blamed? The witnesses. “No, this is your child. You had us witness the marriage.”

So “there is no marriage except with a wali, and two witnesses.” For business transactions, it is required that the witnesses be just (‘adl). But for marriage, can they be any witnesses at all, just or unjust? This involves intimate relations, and lineages, and families. For buying and selling, it could be something worth one or two dirhams. Should not something as important as marriage have more right to be witnessed by just witnesses?

Yes, the witnesses for marriage must be just and upright. Being just and upright is both inwardly and outwardly. As far as we are concerned, being just, ‘adl, means that the person must be free from openly committing sins.

But what about if we do not know the state of a person, his condition is hidden from us? The state of all Muslims is hidden from us. So as long as we do not know of any sins that a person is committing, or his condition with regard to sin is unknown (mastoor al-haal), then his narration is acceptable.

Thus, they must be just witnesses.

What about female witnesses? In business transactions, “If there are not two male witnesses, then a male and two females.”

Is it permissible in a marriage contract to have a man and two women witness the contract? What about 3, or 4 women?

The majority of Ulema state that women do not witness marriage, divorce, or hudud.

The witnessing is not valid of a woman over another woman in Zina. Nor for qadhf (false accusation of zina) or stealing, since hudud are kept away by doubtful matters.

And the witnessing of a woman has a shubhah, since Allah says, “So that if one of the women forgets, the other will remind her.”

A woman might forget, and hudud are built upon absolute certainty. And likewise marriage, they must be built upon certainty.

So women are not called to witness these things, even one hundred women, except those things which women have specialization in. Such as what takes place in privacy, such as the live birth of a child, that he was born alive and crying, and then passed away. Based upon her witness, we can establish the lineage of the child, and his right to inheritance.

But the witness of how many women is required in this case? Some scholars say, even if there is a single woman, her testimony is accepted. Imam Shafii' says at least four women. Since the testimony of two women is like that of one man.

So the matter is open to ijtihaad (juristic study), but the witnessing of women is established in matters pertaining specifically to them.

So there must be two male witnesses, who are just, or their state is unknown, but what about a child below the age of puberty, or insane, or a semi-conscious person, can he be a witness?

No. Since he is not fully able to witness.

Let us now discuss the guardian. Who is the guardian? Every blood relative that can inherit from a woman. Ibn Qudaamah indicates the order, although there are some differences of opinion amongst the Ulema.



The closest person to a woman in inheritance law is the son. He is ahead of the father. If the father and the son were present when a woman passed away, the father would only take 1/6<sup>th</sup>, while all the rest would go to the son.

So the most right to guardianship belongs to the **son**, and this is the Madhab of Imam Malik.

However, the **Madhab of Shafii and the Hanabila**, they state: the one with the most right of guardianship in marriage is the **father**.

This is because guardianship is a type of authority. So if the father and the son were both present, who has more authority over the woman? Her father or her son?

Of course her father. He has more right to deal with her affairs than her son.

And because the child is a branch, a part of his parents, so preference should not be given to the branch over the original source.

The next in terms of guardianship, after the father, is the grandfather, or great grand father, if they are present.

Imam Malik, again states that the right belongs to the son first.

But Shafii and Ahmed state that it is the father, then the grandfather. Which grandfather, maternal or paternal? Paternal, since the maternal grandfather does not inherit.

After the grandfather and the son is who?

Then, they say, the full brother, or the half brother through the father.

And of course, there are some who say the brother has more right than the grandfather. There is a difference of opinion when it comes to inheritance.

What about the maternal half brother? No, he cannot be the guardian, since he does not inherit.

After the brother, you have the paternal uncles. And then the children of the paternal uncles (cousins).

If there is only one of these present, he is the guardian.

If there is more than one present, such as the father and the son, then who is the guardian? According Shafii and Ahmed, it is the father.

And the farther one wedding the woman before the closer one is a great wrong, and the scholars differ as to what happens, is the marriage annulled or not, before or after consummation, etc.

But what if there is more of one person present from the same direction, such as more than one son, what is the ruling?

Are they all the same, like it is in inheritance, they share? In guardianship, there cannot be sharing. So who is the guardian? The oldest.

So if the younger son weds her in the presence of the older son, without his permission, this is wrong-doing.

In summary, the guardian is the closest male relative, according to what we have mentioned. If there is more than one male relative, the guardian is the closest of them. If there is more than one from the same direction, it is the oldest amongst them.

This is some of what can be said regarding the words of the Prophet:  
“La nikaah illa bi wali.”

And Allah knows best.

End of Class Twelve.