



## Fiqh of Marriage: Class Thirteen

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

We spoke last time about the hadith of the Prophet:

{ لَا نِكَاحَ إِلَّا بِوَالِيٍّ }

One issue that comes up is that if a woman accepts Islam, who is her guardian?

The Ulema state that her guardian is the general body of the Muslims, who are represented by the Imam of the community. Although there is minority opinion that says her guardian is the one who guided her to Islam and gave her the Shahadatayn.

This is in the case that she does not have any Muslim relatives who can act on her behalf as her guardian.

Is it permissible for a woman's guardian to delegate someone as his representative (wakeel)?

For example, can the father delegate someone else as his representative who can act on his behalf in wedding his daughter?

Representation or Wakalah is of two types, general and specific.

One can appoint a general wakeel (power of attorney) who has the authority to carry out actions on behalf of his representee regarding money, buying, selling, etc. This type of wakeel takes his representee's place in business transactions. But he cannot wed.

The guardian must specifically delegate the authority to wed to his wakil. This is because marrying is a special right.

Now, regarding the guardian in marriage, the three Imams: Shafi'ee, Malik, and Ahmed, emphasize the need for the presence of the guardian in order for a marriage contract to be valid.

However, Abu Hanifa states: the presence of the guardian is not a precondition for the marriage contract to be valid.

And there are some from the Hanafi school that state that guardianship is required for a virgin, and it is not required for a previously married woman.

This is a brief introduction to our next hadith.

The Hadith:

وَعَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا قَالَتْ : قَالَ رَسُولُ اللَّهِ  
{ أَيُّمَا امْرَأَةٍ نَكَحْتُ بِغَيْرِ إِذْنِ وَلِيِّهَا , فَنِكَاحُهَا بَاطِلٌ , فَإِنْ دَخَلَ بِهَا فَلَهَا  
الْمَهْرُ بِمَا اسْتَحَلَّ مِنْ فَرْجِهَا , فَإِنْ اشْتَجَرُوا فَالسُّلْطَانُ وَلِيُّ مَنْ لَا  
وَلِيَّ لَهُ } أَخْرَجَهُ الْأَرْبَعَةُ إِلَّا النَّسَائِيَّ , وَصَحَّحَهُ أَبُو عَوَانَةَ , وَابْنُ حِبَّانَ وَالْحَاكِمُ

Narrated Aisha: Allah's Messenger said, **"If any woman marries without the consent of her guardian, her marriage is invalid. If there is cohabitation, she is entitled to the dowry, due to the relations with her. If there is a dispute, the ruler is the guardian of one who has no guardian."**

Reported by the Four except Nasaa'i.

The Explanation:

The word 'ayumaa' or 'any' in the hadith is from the words that are general in their meaning, and together with the word 'imra'ah' or 'woman', includes all those of the female gender from the children of Adam.

So this hadith includes the virgin, as well as the previously married woman. It also includes a young woman, and an older woman.

'marries' meaning she herself performs the contract of marriage with the other party, her suitor or the one who desires to marry her.

So 'marries' here means she gave herself in a marriage contract, and in this case, 'her marriage is invalid.'

Why? Do to the absence of the guardian.

So the first hukm we learn from this hadith is that any woman, i.e. any female, whether she is a young girl, or an elderly lady, who gives herself in marriage, her marriage is invalid.

**"If there is cohabitation, she is entitled to the dowry, due to the relations with her."**

Here, this is to correct something that has already happened, and to make up for what has happened unlawfully.

If a woman gave herself in marriage, and it was not possible to inform her of the invalidity of her marriage until after the one who was to wed her consummated the marriage with her, then he has consummated the marriage unlawfully. And though it was unlawful and invalid, he did attain something, so what is the ruling regarding this thing that he attained based upon an invalid contract?

The basic principle according to legal scholars is that whatever is built upon what is invalid (batil), is also invalid.

But...here by consummating the marriage, this has caused a right to become obligatory upon the man towards the woman, which is the mahr, or dowry.

If there was a dowry mentioned in the contract, she has a right to it, and if not, she has a right to mahr al mithl, or a dowry of her peers.

Not because of the contract, but because of what he made permissible of intimate relations.

And is there a prescribed punishment (hadd)? No. Because the presence of the contract, or the quasi contract, and the fact that they may have been ignorant, is a doubt that prevents the hadd.

However, there are some Ulema who state that if both parties knew that the contract was invalid, then they should still be punished by hadd.

But the Jumhoor are of the opinion that there is no hadd on either of them, whether they knew the contract was invalid or not.

(فَإِنْ اِسْتَجْرُوا)

“And if there is a dispute ( between the woman and her guardian)”

The origin of the word “ishtajara” is “sha-jaa-raa”, which comes from “shajar” or tree, since the trees branches grow close to one another, and they intertwine, and sometimes it is hard to remove one branch that has become intertwined with another.

So from this we get “shijaar” or argumentation, which is taken from the meaning of intertwined branches that are very difficult to take apart without breaking one or the other, or the falling of leaves, or the like.

“If there is a dispute” who are the one’s who have a dispute? The woman and her guardian. Since the guardian prevented her from getting married, so she went off and gave herself in marriage.

**“If there is a dispute, the ruler is the guardian of one who has no guardian.”**

The ruler is the one who has a right delegating the affairs of those under his authority, like a king, or president, and those whom they appoint as their representatives in dealing with disputes, i.e. the judges. So if there is a dispute between a woman who has wed herself and her guardian, and there is a judge, then he becomes the guardian in this case.

And from here the Jumhoor state that there is no valid marriage except with the presence of a guardian. Since if it was permissible

for a woman to give herself in marriage, there would be no need for the intervention of the ruler and those in authority.

Since she could simply be in charge of her affairs and give herself away in marriage.

So if the guardian objects, and he is the one who has this right, he should be asked, why does he object, why is he preventing her from getting married?

Firstly, a man is more likely to know and recognize other men than a woman.

For this reason, the guardian is a man, since the suitor is a man, and the guardian, being a man, is closer to recognizing the traits of a man than a woman.

And a woman can be deceived.

And a woman should be given a high place of honor, she should be sought after and requested, not the one requesting and seeking.

Since this will lower her status, and reduce her honor, amongst the general population of men and women.

And perhaps she will be given the stigma of looking at men excessively, and have a great desire for them, and even if this is the case and true, it should not be publicly announced.

She can fulfill her goal, and attain her desire, through her guardian.

So the guardian will research ahead of time, and get to know the status of this suitor, is he compatible with her or not, is he trustworthy enough to give this noble trust with him so that he will keep it safe or not.

Unlike a woman, who may be deceived by smooth speech, and misled by charming words, as it is said, “many are misled by praise and compliments.”

Unlike a man, who will not be misled by this kind of talk, nor tricked by it.

Thus, Allah has legislated guardianship in marriage in order to protect the woman.

Also, we have some ahadith that state that a woman should not give herself away in marriage, since a zaaniah is a woman who gives herself away.



The zaaniah is the one who presents herself to her partner, and agrees with him, and there is no oversight, and if things were left like this, there would be no difference from the marriage with a husband who wants to stay with her permanently, and one who wants to fulfill some momentary pleasure.

From here, guardianship is a condition for the validity of a marriage.

“And any woman who marries without the consent of her guardian, her marriage is invalid.”

And if there is a disagreement, she can go to those in authority, and the Prophet did not say that she should give herself in marriage, rather she should refer to those in authority, who will take the necessary arrangements.

And if they consummated the marriage, she has right to the mahr.

End of Class Thirteen.