



Fiqh of Marriage: Class Fourteen

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

The Hadith:

وَعَنْ أَبِي هُرَيْرَةَ (أَنَّ رَسُولَ اللَّهِ (قَالَ : { لَا تُنْكَحُ الْأَيِّمُ حَتَّى تُسْتَأْمَرَ ,
وَلَا تُنْكَحُ الْبِكْرُ حَتَّى تُسْتَأْذَنَ " قَالُوا : يَا رَسُولَ اللَّهِ , وَكَيْفَ إِذْنُهَا ؟ قَالَ
(: " أَنْ تَسْكُتَ { مُتَّفَقٌ عَلَيْهِ (1283 .

Narrated Abu Huraira: Allah's Messenger said, "A previously married woman must not be wed unless she is consulted, and a virgin must not be wed until her consent is asked." They asked, "Oh Messenger of Allah, how is her consent indicated?" He replied, "It is by her silence."

[Agreed Upon]

The Explanation:

This hadith mentions that “A previously married woman (Ayyim) must not be married until she is consulted”, and what Ayyim actually means anyone without a spouse, even a man, linguistically.

But in this context, it is referring to a woman who was previously married, then her husband died or she was divorced.

She cannot be married until she gives her command (tusta'mar), i.e. she agrees and requests it.

“And a virgin is not married until she gives her permission (tastadhan).”

Since a different word is used regarding a previously married woman and a virgin, there must be some difference in meaning.

Tusta'mar is more emphatic, where as tast'adhan is mere agreement. For the previously married woman, she must fully demand the marriage.

And from this we see that the Prophet was making the marriage of a virgin woman conditional upon her agreement, and the Sahabah replied, how can we get her agreement while she is too shy to talk about matters related to marriage. So the Prophet replied, “Her permission is her silence.”

This is because, being quiet is a sign of agreement.

But there is some specific details regarding these ahadith. Some Ulema said that a woman may be wedded below the age of puberty, though she is not allowed for her to go to the husband until she reaches the age of maturity. At this time, she must give her permission, or reject the marriage. It is only allowed for the father, to wed his daughter in this manner. It would not matter in this case if she was previously married or not.

Anyone else, other than the father, does not have this authority. The Ulema state that this exception is allowed in order to preserve and protect the interests of the daughter, in case a suitable spouse came along, and it was feared that she may lose out on a suitable husband, and that he may travel if they waited for the marriage to take place.

As for virginity, it is a seal that Allah has placed on a woman, this valuable and honored jewel, in order to protect honor. For this reason, virginity is the most valuable and honorable possession of a woman. She can sacrifice everything except this.

As you know the story of the three people who sought refuge in a cave, and became trapped. One of them said that he was seeking to fulfill his desire with a woman, and she said to him, “Fear Allah and do not take away my virginity except by its due right.”

So virginity, is like a seal on an envelope. It protects its contents, and guards what is within, so that it is not touched except by its due right.

Here, the scholars state, that if a woman loses her virginity without a valid marriage contract, will she still be considered a virgin or will she be categorized with women who were previously married?

This losing could be a result of a forbidden relationship, or due to an accident, a young woman could jump strongly, or lift a heavy object, and this could cause her to lose her seal of virginity.

Does losing this seal of virginity without a marriage contract cause her to be considered a previously married woman? The Jumhoor of scholars state that she is still considered a virgin.

For example, should she demand her marriage, and if she committed a crime requiring hadd, she should be given the punishment for a virgin.

Since preserving the seal of virginity is one of the most critical and sensitive issues for a woman.

And her parents are very nervous on her wedding night, since they do not know what will happen between the two, what will be the result.

Speaking of this, how many homes have been ruined, and marriages broken, and innocent people accused, because of this issue.

Why? Because some young women may have relations on the wedding night, and blood does not flow, due to some special

biological circumstances with the woman, and then some doubts come about, and accusations begin, and the husband may think if there is no blood, she was not a virgin, and lost her virginity before hand. But the seal of her virginity is still present.

But due to special circumstances, this seal is not broken except through childbirth.

So for this reason, I always remind that brothers that get married there are special circumstances, and it is not right to expose one's relationship with one's wife, and some people bring a cloth to announce it to the people, this is exposing.

Why announce it among people?

Rather it is narrated that Umar proposed to a man's sister, as Malik narrated in the Muwatta, and the man said to Umar, "She has broken her seal of virginity." So Umar hit him, and said, "Who asked you?"

This was something that happened in the past, and no one asked you, so leave things hidden as they were.

A man should seek excuses for a woman, and it is not appropriate for the parents from either side to ask about the wedding night, since that is not from what is known in marriage, rather they should seek excuses.

Perhaps there was some matter that took place such as a invalid contract, or rape, or she agreed to zina, or it went away by jumping or carrying something, the ruling of virginity remains with her.

So an Ayyam is a previously married women. She must give a demand or command to her guardian, marry me.

But a virgin, she agrees.

Her being quiet means she agrees. What about if she laughs? What about she cries? It could be crying of joy.

Like Aisha mentions when the Prophet told Abu Bakr to accompany him during the Hijra, Abu Bakr cried, from joy.

So the Ulema said, any action from a virgin woman, other then refusing, is an indication of approval.

Yet, this is where we must take into consideration the principle that rulings may change in accordance to a change in circumstances.

We can see that the previously married woman should command, and demand the marriage. So the ruling pertaining to her is in accordance to her nature.

And a virgin, she simply remains quiet, and this is in accordance to her nature.

The Hadith:

وَعَنْ ابْنِ عَبَّاسٍ (أَنَّ النَّبِيَّ) قَالَ { الشَّيْبُ أَحَقُّ بِنَفْسِهَا مِنْ وَلِيِّهَا , وَالْبَكْرُ
تُسْتَأْمَرُ , وَإِذْنُهَا سُكُوتُهَا } رَوَاهُ مُسْلِمٌ (1284) .
وَفِي لَفْظٍ : { لَيْسَ لِلْوَالِيِّ مَعَ الشَّيْبِ أَمْرٌ , وَالْيَتِيمَةُ تُسْتَأْمَرُ } رَوَاهُ أَبُو دَاوُدَ
(,) وَالنَّسَائِيُّ , وَصَحَّحَهُ ابْنُ حِبَّانَ (1285) .

Narrated Ibn Abbas: The Prophet said, “A woman who has been previously married has more right over her person than her guardian, and a virgin must be consulted, and her consent is her silence.”

[Reported by Muslim]

The Explanation:

The woman who was previously has more right over herself (ahaqqu) this is called afa'aal at tafdeel. This means that the previously married woman has more right than her guardian in her marriage. Using a superlative means that both things being

compared share in a specific quality, and here that is in reference to the right of giving in marriage.

And a virgin must give her permission.

Some scholars state that this hadith is proof that a woman has a right to give herself in marriage. And they strengthen their argument with the hadith: “And the guardian has no authority over a woman who has been previous married.”

The Hanafiyya took this position. But the previous hadith state that the nikaah is Batil, and the Jumhoor made their ruling based on this hadith.

What did the Hanifiyya say in regard to these hadith, which state, “There is no nikaah except with a wali.” And “Any woman who married without a wali, her marriage is invalid.” The Hanafiyya said, this is in regard to a young girl.

But the hadith are general (ayumaa), referring to any women. And “la nikaaha” this is called laa nafiyyah lil jinss, any marriage.

And how do the Jumhoor respond to the Hanafi argument that the hadith “a previously married woman has more right to herself than her guardian,” indicates she has more right to give herself in marriage?

The Jumhoor says, “more right over herself” can refer to a number of different meanings, not just giving in marriage. She has more right over some these meanings, but not all of them. Especially not in guardianship, since we have the hadith, “There is no Nikaah except with a wali.”

So what does she have more right over? The scholars say, she has more right over herself in *choosing her husband* than her wali. In agreeing in to marry her husband.

She has more right than her wali in choosing her life partner, to be satisfied, or to reject. She has more right to choose, but not in guardianship, since the hadith, “La nikaah illa bi wali,” is very clear and unambiguous, and ‘nikaah’ refers to the marriage of both a virgin and a previously married woman.

And the Jumhoor replied to the hadith, “A guardian has no authority over a woman who has been previously married,” by saying this refers to whom she chooses in marriage, since she must command.

If she commands, alhamdulillah, but if she refuses, the wali has not authority, and he cannot force her, since she has more right over herself.

Thus we see that the position of the Jumhoor is stronger.

The Malikiyya, they make a difference between a Shareefa and a Wadee'ah, which means an honorable woman, who has noble lineage, and another woman, who does not have such an honorable position.

They said that a Shareefa must have a wali, while a wadee'ah can appoint a man to be her wali.

The Malikiyya, said, this is because the Shareefa is wanted, and many men seek her in marriage, so she needs the protection of a guardian. Whereas a common woman is not so much desired in marriage, so she may appoint any person to give her in marriage.

But she cannot give herself, rather she appoints a person, and this is a view narrated on Aisha, the mother of the believers. If some of her family were proposed to, she would take care of all of the affairs, and agreements, and mahr, and then when it came to the time of the contract she would appoint one of her relatives to conduct the contract. And she was the Mother of the Believers, and she would not do the contract herself.

And Allah knows best.

End of Class Fourteen.