



## Fiqh of Marriage: Class Twenty-Two

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

### Chapter: Equality in Marriage and the Right of Choice

The Hadith:

وَعَنْ أَبِي هُرَيْرَةَ ( أَنَّ النَّبِيَّ ) قَالَ : { يَا بَنِي بَيَاضَةَ , أَنْكِحُوا أَبَا هِنْدٍ ,  
وَأَنْكِحُوا إِلَيْهِ " وَكَانَ حَجَّامًا } رَوَاهُ أَبُو دَاوُدَ , وَالْحَاكِمُ بِسَنَدٍ جَيِّدٍ

**Narrated Abu Hurayra: The Prophet alayhi asalam said, “O sons of Bayada’, marry Abu Hind (some of you women) and marry from his women (his daughters) even though he was a cupper.”**

**[Narrated by Abu Dawud]**

The Explanation

This hadith is used as a response to those who say that one must marry from someone with the same profession, and that profession is not to be regarded in determining compatibility in marriage.

Those who hold to this hadith say that the cupper was not as honored as others in society, such as a sword maker, etc, and this varies from one society to another.

And in some narrations it says that weavers and cuppers are not compatible with others, but here this is a very clear hadith that contradicts this notion.

And some Ulema say that compatibility are those things that are mentioned in the hadith:

“A women is married for four (qualities): Here family status, her wealth, her beauty, and her deen. Seize the one with deen may you be successful.”

So some regarded a spouse as being compatible if these things are considered equitable.

But most ulema said that beauty should not be considered in compatibility, other than the Malikiyyah. Ibn Abdul Barr says: “If he made the condition in the marriage contract that she be beautiful, your face is fair, etc, and he finds other than that, the husband is given the choice to cancel the contract, this is because she is not compatible for him.”

This is studied in the chapter on defects after the marriage contract.

So some ulema considered profession as a factor in compatibility, but others did not. What is the result of this difference? The wife or the guardians and relatives would have a right to cancel the marriage if the profession is not compatible in the case that we consider profession a factor in compatibility.

And Allah knows best.

My brothers, I want to say a few words outside of the book. There remains some tribes and countries that are so extreme in their pride that sometimes if a person marries someone from another nationality or lineage matters reach to the point of even killing.

And I remember during my studies I had a colleague who was from a village that had this type of fanaticism and he had a sister, and he told one of his colleagues, I'd like to wed you my sister.

That person was from another country and came to study. He wed the student to his sister, and when the people of the town came to know, they came to his

house and said: "Either you remove this person from your home or else we will demolish your house!"

He negotiated with them and tried to make them understand and say what until morning, but they said, we will not wait, send him out from your house. The husband left, and went to the neighbor's house.

In the morning the family of the girl went to Shaikh Muhammad Ibrahim, who was wise, and he asked them, why did you perform this wedding?

They said, did not the Prophet alayhi as salam say, "If someone comes to you with whom you are pleased with his deen and character and trustworthiness, then wed him, and if not there shall be great corruption on earth."

The shaikh said, yes, but if your family are common folk who do not understand, and they only understand extreme loyalty to their tribe and lineage, and you bring a new person whom they do not know, my son, not everything that is correct according to Shari'ah is easily applied amongst the people.

Now you have the choice: You can practice your right and continue with the marriage, but this will result in great fitnah. Or you can leave it. The Ulema say, "Dar' al mafaasid muqaddam 'ala jalb al masaalih." "Repelling harm takes precedence over acquiring of benefit."

The man said, I will divorce her.

What is important, is that this chapter is not easy to apply always, and the student of knowledge should not go to extremes and force its application. So if you are not able to marry someone, what will happen? Will the world come to an end? Are there no more men, or no more women?

You cannot force, and one must be careful in matters where culture is given authority and precedence amongst people.

#### The Hadith:

وَعَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا قَالَتْ : { خَيْرَتُ بَرِيرَةَ عَلَى زَوْجِهَا حِينَ  
عَتَقَتْ } . مُتَّفَقٌ عَلَيْهِ

Narrated Aisha: Barira was given her choice regarding her husband when she was freed.  
[Agreed Upon]

**The Explanation:**

The Ulema have taken a number of rulings from this hadith. From it the Ulema state that a female slave, when freed, is given a choice in the matter of marriage to her previous husband. And the permissibility of giving Sadaqa to a slave woman.

And some Ulema have derived from this hadith one hundred and some odd rulings.

As Imam Shafii' stated, he derived forty rulings from the hadith of the Prophet alayhi as salam regarding when he set out one day and saw the young child Abu Umair, with a little bird called an-Nughri, which is still known to the people of Madina until today.

When he came back, he found Abu Umair crying, and the bird dead in his hands. So the Prophet alayhi as salam said, "Ya Abu Umair, ma fa'ala an nughair?" "O Abu Umair, what did the bird do?"

Imam Shafii' said he spent the night in contemplation of this hadith until he arrived at 40 rulings.

And the scholars when they reflect on a hadith, they not only study its actual wording, but what is implicit in its text as well.

And the Mother of the Believers Aisha, she bought Barira in order to grant her her freedom, and Barira asked Aisha to write a contract with her owners for her freedom. Aisha asked Barira, "If you want to go to your owners and let them know, I will purchase your freedom and let you go in charity as long as your wala (right to inherit from a freed slave after the latter's death) is for me."

Barira left and came back, and said they refused, saying they would only accept if the wala was for them.

'Aisha went to the Prophet alayhi as salam, and he said, "Any condition that is not in the Book of Allah is Invalid (Baatil)."

The Prophet alayhi as salam wanted to make this ruling known to the public, so he said, "Bring my Minbar."

He then said, "What is wrong with people who say such and such, any condition that is not in the book of Allah is invalid. The right of Wala belongs to the one who purchases the freedom of a slave."

So Barira was the freed slave of Aisha, radiallahu 'anha. And thus, Barira knew the most about Aisha.

And when Barira was freed, the Prophet alayhi as salam gave her the choice whether to stay with her husband who was a slave, or to be freed from him.

And so she had the choice, and she said, "I choose to stay by myself." When her husband knew about her choice, he used to follow Barira in the streets, and beg her to keep him as her husband.

This story of her husband reached the Prophet alayhi as salam, and he said, "O Barira, (what about) your husband (i.e. Take pity on him.)"

She said, "Do you command me O Messenger of Allah?"

He said, "No, but I just wanted to intercede on his behalf."

She said, "I have no need for him."

We must always stop to reflect on these words, "I have no need for him," and point out: The elevated position Islam gives to women, in terms of freedom of speech, and her noble position in society, after she was an object to be inherited, and to be owned and inherited, and could not inherit anything herself.

And she would be forcefully married, and she had no affair in the dealings of life.

She was simply an object to be used

And now, with Islam, and here Barira who yesterday was a slave women, and her husband a slave, and the Messenger of Allah is interceding, this was not any ordinary Shafaa'ah, it was the Shafa'ah of the Messenger of Allah, alayhi wassallam. The one whom Allah will grant Shafa'ah on the Day of Judgement, for all people, the first and the last of them, which is called the Maqaam al Mahmood.

And she says, with full confidence: "I have no need for him."

This type of speech, in the language of logic, can be understood as saying, "I do not accept your intercession." She did not say this explicitly, but it was implicit in her saying, "I do not want him." i.e. your intercession on his behalf did not change my decision.

And from this hadith, regarding the subject of choice in marriage and equality in marriage, we agreed that equality must be in terms of religion, so a Kaafir cannot marry a Muslimah.

And in terms of lineage, we spoke about it.

Now regarding equality in terms of Freedom, this hadith is a clear regarding it. But if Barira chose to go back to her husband, and be a free woman under the authority of a slave, would the marriage be valid? Or would it be invalid, just as if she were marrying a slave from the get go?

The answer is that the marriage would remain valid. Since the Messenger of Allah alayhi as salam gave her the option of returning to her husband. And so she would have been in marriage under a slave.

And slavery is a quality in a husband for which a woman, or her guardians, can cancel a marriage.

This is because Freedom is a type of perfection in a person, and slavehood is a type of relative deficiency.

And the scholars say that a slave is not compatible with a free woman because of the very differing natures of freedom and slavehood.

And secondly, since a slave is under the authority of his Sayyid (master), and thus his time belongs to the Sayyid, who has the right to make use of this time. And thus what remains for the right of the wife?

The slave does not possess anything to give to his wife except with the permission of his Sayyid. And it is not likely that he will be rich enough to spend

on his wife what she is in need of. Because anything that he owns belongs to his Sayyid.

And a slave, in his possession, and state of affairs, and time, is not the same as someone else.

And from the nature of married life, is that the husband his fully devoted to his wife, and his wife is fully devoted to her husband. And if there is a partner who shares one of the spouses, it will take away from the right of the other spouse.

And a slave woman, if she becomes free, and she wishes remain in her marriage to a slave, then there is no harm, since it is the right of a free woman to marry a free man, but she and her guardians can give up this right.

And Imam Shafii said, in words that are considered a reference in the matter of equitability in marriage: "Equitability is not a condition for the validity of marriage. Rather it is a right of the woman and her guardians, and they can chose to give up this right and accept the marriage of someone who is not equitable should they chose to do so."

This is true for all types of kafaah, other than in religion (i.e. a Muslimah cannot marry a Kafir, even if all parties agree.)

But if the guardians do not give up this right, as we shall see this in the chapter of defects between the two spouses, then they have the right to nullify the marriage contract.

As for a free man marrying a slave woman? There is no problem, with the condition that he cannot find a free woman to marry, and he fears falling into fornication.

But if he has the ability to marry a free woman, or he does not fear promiscuity, then this is not permissible for him.

This is because the child of the slave woman will belong to her master. But if the Sayyid accepts the condition that her child will be free, then the Fuqaha say there is no harm in a free man marrying her.

Yet some Ulema say, no, it is not allowed.

And Allah knows best.

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