



## Fiqh of Marriage: Class Twenty

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

The Hadith:

وَعَنْ ابْنِ مَسْعُودٍ ( قَالَ : { لَعَنَ رَسُولُ اللَّهِ ( الْمُحَلَّلَ وَالْمُحَلَّلَ لَهُ }  
رَوَاهُ أَحْمَدُ , وَالنَّسَائِيُّ , وَالتِّرْمِذِيُّ وَصَحَّحَهُ.  
وَفِي الْبَابِ : عَنْ عَلِيٍّ أَخْرَجَهُ الْأَرْبَعَةُ إِلَّا النَّسَائِيَّ

Narrated Ibn Mas'ud: Allah's Messenger (may Allah's blessings and peace be upon him) cursed the man who made a woman lawful for her first husband and the one for whom she was made lawful (i.e. the men involved in the Halala)  
[Reported by Ahmad, an-Nasai, and at Tirmidhi; the latter declared it Saheeh]

The Explanation:

We come to tonight's topic, which is Nikaah al-Muhalil, and the origin of this name has to do with the situation which requires this type of marriage. That is if a woman was divorced through an irrevocable divorce, as is mentioned in the Qur'an :

{Divorce is two times;} i.e. these first two divorces are revocable and he can return her, {but if he divorces her after that (i.e. a third time) then she is unlawful for him (*la tahillu lahu*) until she marries another husband}.

After the first and second divorces, he may take her back without her marrying another husband, but after the third he cannot.

The reason for this? The ulema say: The first divorce could have been due to some circumstances, or it could have been for a negligible reason. He could have borne it with patience or overlooked it, but anger or hatred overwhelmed him, which brought him to divorce her, and then he felt sorrow and regretted it, so he is given a chance to take her back.

And that first divorce is like an initial warning, and when they get back together and live with one another, and try marriage life again, and the problems happen again, and he divorces her a second time. This second divorce, after having been preceded by the first divorce, is more difficult on the self—for both the husband and the wife. The first lesson, from the first divorce, did not bring any benefit. So they are given the chance to reconcile during the waiting period after they have lived apart for some time, each having been separate from the other, to have a new try at marriage life. He lived some time without her, she lived some time without him, is it better to go back to what they had before? Or is it better to leave her to complete her waiting period and move on?

If there is some remainder of desire and love, and some hope for benefit, he takes her back. And if he take her back, after two separations, and after having compared life together and apart, then if a third divorce takes place, then it is as if the side of letting her go is dominant, so from this point on he is forbidden from taking her back a third time.

And if not prevented from taking her back again and again, then women would be taken as toys as they were in the days of Jahiliyyah. A man would say to his wife if he wanted to part with her: Wallahi I will not divorce you nor take you back, so you will stay in this state for your entire life!

He would divorce, and take her back. He would divorce her, then wait till the near end of her waiting period, then say, 'I take you back.' Then some time would pass, and he would say, 'I divorce you.' Even if he divorced her 100 times.

So Islam came and restricted this: "Two times" and after each one is the permissibility of taking back, and in these two one can realize his or her mistake, and during these two times is experiencing life alone.

But after the third, no, that is enough. And he is placed in a very heavy restriction. His wife, who he was with for so many years, she must now be allowed to marry another man, who will enjoy her, and then after that she may come back to him.

In this, there is a heavy weight on one's self. If this took place, and she comes back to him, then this shows that he is really in need of her. Because he bore with patience such a great hardship.

He gives her to someone else to enjoy her, and the Quran says: "Until she marries (tankiha) another husband."

And the Sunnah clarifies what is meant by 'tankiha' in this ayah. 'Nikaah' in Arabic sometimes refers to the marriage contract only, and sometimes refers to sexual relations only, and sometimes can refer to them both.

So the Sunnah comes and clarifies that what Allah SWT means by "hata tankiha zawjan ghairah" "until she marries another husband" refers to both of the above meanings.

And the hadith is forthcoming in which the Prophet alayhi as salam says to a woman who wanted to return to her previous husband, "Not until you have had relations (with your new husband)."

So she is not permissible for the first until there is consummation of relations with the second husband, and this is after a marriage contract.

So the ayah refers to both a new marriage contract and consummation of marital relations.

Here, we see the heaviness of this burden, of the ex-wife marrying another husband and consummating relations.

Because of this, some people have come up with a trick, and a way of getting around this prohibition, although it involves what goes against one's very conscience: that the ex-husband finds a person, who agrees that as soon as he consummates relations he will divorce the wife, and as soon as she becomes permissible for the first husband, he ends the marriage.

Here is where the concept of Zawaj Muhalil comes about. And this is an old name, and the Prophet sallallahu 'alayhi wa salam said: Should I not inform you of a Muhalil: They said what is it? He said: "It is a borrowed goat" (that is used to impregnate other goats, then he returns it to its owner.)

Then the Prophet sallallahu 'alayhi wa sallam cursed the Muhalil (the second husband who makes the first permissible) and the Muhalili lah (the first husband who requests this).

We understand why the Muhalil is cursed, since he gets married based on a condition and for a temporary time, and what is not permitted in marriage, but why the one who requests the nikaah muhalil?

Because he was pleased with the situation, and took part in it, as it is said:

*As sami'u lidh dhambi shareekun li qaaailiheee*

*Wa mut'im al ma'kooli shareekun li aakilihee*

*The one who listens to evil is partner with the speaker*

*And the giver of food is partner with the eater.*

They cooked the food together!

So the Muhalil is the man who is brought to have relations with a woman for a temporary time, just long enough to fulfill the conditions of the ayah (Until she marries another husband). He brought her wali and witnesses, and then took pleasure in his relations with her.

Then he immediately divorces her, and she completes her waiting period, and then returns to her first husband.

This is Nikaah al Muhalil, about which the hadith state: "Allah curses the Muhalil and the one for whom the wife is made lawful."

Here, the scholars ask, what is the basis for this prohibition: the intention of making her permissible, or the second husband's action, or the first husband's action, or the wife's?

The scholars say the origin of the prohibition is the second husband's actions, since he will be the one doing the action with the prohibited intention.

Since during the marriage contract he marries her, not with the intent of staying with her forever, but only for a short time.

And there is a hadith about a man who did a similar marriage at the time of the Sahabah, but he intended a long term marriage, and it was she who intended that it be a short marriage in order to go back to the first husband, and the hadith is weak in any case.

He came and proposed to her, out of desire for her, and not with any conditions, and it was her who had the wrong intention.

And after the marriage, and the consummated relations, and she knew she could go back to her first husband, she started screaming at him and hating him in order to force him to divorce her, out of dislike for her. This was in order to fulfill her preconceived intentions to go back to her first husband.

But this intention of hers, in and of itself, does not have an effect on the marriage, since she is not the one who possesses the right of divorce.

And the contract is in the hands of the husband, and the intention of the wife or her guardian (wali) have no effect on its validity.

What counts is the intention of the second husband.

And Abdullah ibn Umar narrates that a man came to him and said: "An uncle of mine divorced his wife three times, and then regretted it terribly, so I wanted to marry her in order to make her permissible for him, and he does not know about this and he did not command me to do it."

Ibn Umar said: "No, unless it is a marriage out of desire for her." And he forbade him from that.

So the Ulema say: If they agree to the Nikaah Muhalil beforehand, but they do not make any mention of it during the contract (with the guardian and witnesses), does this have any effect on the validity of the marriage?

The Jumhoor says: As long as there was some sort of agreement beforehand, then it is as if it was written in the contract. Since he has begun this marriage with this intention.

And a Muhalil, if he has this intention, if only in himself, and he does not tell the guardian, or the wife, and he wants to serve the first husband, and he does not even tell him about it, nor did that first husband ask for it, and he marries her: He does not make her permissible for the first husband. This is due to his ill intention.

But if he married her out of desire, and he thinks he will stay with her, but then he finds in her what he dislikes, and then divorces her, out of his own volition, then there is no harm in this type of marriage.

She can go back to the first husband. This is because she married a second husband out of a marriage based on desire, and he divorced her without any preconceived intentions and without any compulsion.

Even if he married her and then died after a day or two, she would be permissible for the first. There is no condition that the period of consummation last or that there be a number of marital relations, it is as soon as there is (dhawk al usayla), ie. The tasting of the sweetness (of intimacy).

And based on this, we have the curse of the muhalil and the muhalilah even if it was not mentioned in the contract, and there is many harms in it, from leaving what is desired by the Shariah in marriage, from building a family, and having children, and inheritance, and spending on the wife, and they say this is like a marriage contract with a precondition (I marry you on the condition that...) and some of the Ulema say it is a type of Nikaah Mut'aah.

Since it is a marriage whose time period ends after one night. So they say it is like Nikaah Muta'ah which restricts marriage to a set period.

So the Jumhoor say that marriage to the second husband with the intention of permitting her for the first is an invalid marriage, and she does not become permitted for the first, even if he touches her and has relations with her.

Here when studying the wording of this hadith, the scholars also ask, is it permissible to curse a specific person or not? The Jumhoor say it is not permissible to curse a person specifically due to some general quality present in him, other than for a specific reason.

But if he has done a specific action, then it is permissible. "Allah curses the one who changes the land demarcation." "Allah curses the muhalil and the muhalilah."

The curse came for a specific reason and action. But if there is no specific action, then we are not allowed to curse them, not even a Kaffir. We are not allowed to curse a specific person. As for Kufr, "La'ana Allahu al Kaffireen." "La'ana Allahu al Dhalimeen."

This is a category, and not a specific person.

What does la'an, or cursing mean? It means casting away from Allah's mercy. If a person who was cursed was a kaafir, and then he became Muslim, where will the curse go?

And for this reason, the Ulema say one should not make it a habit to curse others, even Iblees!

Rather they say, if a person curses Iblees out of anger at him, Iblees becomes puffed up and bigger and prouder of himself. He becomes a known personality, who harms people, and they curse him due to the great harm he is causing them.

“Do not curse Shaitan but seek refuge in Allah from him.”

And so the tongue does not become accustomed to it.

And the Prophet alayhi as salaam was with a caravan, and there was a woman riding with them on a she-camel, and something happened with her camel, so she cursed it.

The Prophet alayhi as salaam said, go back, for a cursed thing shall not ride with us. Even if it were a she-camel.

Thus, a curse means distancing from and casting out from Allah's Mercy, and it should not be directed towards a specific individual.

And in this hadith, the curse is not directed to Zaid or 'Amr, but it is towards a certain characteristic, al Muhalil, and al Muhalil lah, who is that? Like a mushrik, or an oppressor, or wrong doer. Who is being referred to? A category, not a particular individual.

“Allah curses those who change landmarks.” This is not a person, but an action. Likewise, “Allah curses the Muhalil.” It is an action, and not 'Amr nor 'Bakr.

It is a curse directed to one who imbibes a certain characteristic, and not a particular individual.

Thus this type of language in this hadith does not contradict other narrations that forbid directing la'an or curse at a specific person.

And in some narrations it says: "If a curse comes out from a particular person, it goes towards the one cursed. If he deserves it, it will afflict him. But if it does not find him deserving, it goes up to the sky, and cannot find a door to pass through, so it comes back upon the one who said it."

Thus cursing specific persons, while they are alive, is not permissible. But what about after their death?

Can we say, La'an Allahu Firoun. Or La'ana Allah Abu Jahl? After death, his actions ended, and it is allowed. But before death, perhaps Allah will have mercy on him, and forgive him. And he might become Muslim. Then where will the curse go to?

Thus the text of this hadith is regarding a category, and not a specific individual.

And Allah knows best.

End of Class 20