



Fiqh of Marriage: Class Twenty-One

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

Chapter: Equality in Marriage and the Right of Choice

The Hadith:

وَعَنِ ابْنِ عُمَرَ - رَضِيَ اللَّهُ عَنْهُمَا - قَالَ : قَالَ رَسُولُ اللَّهِ ({ الْعَرَبُ
بَعْضُهُمْ أَكْفَاءُ بَعْضٍ , وَالْمَوَالِي بَعْضُهُمْ أَكْفَاءُ بَعْضٍ , إِلَّا حَائِكٌ أَوْ
حَجَّامٌ } رَوَاهُ الْحَاكِمُ , وَفِي إِسْنَادِهِ رَاوٍ لَمْ يُسَمَّ , وَاسْتَنْكَرَهُ أَبُو حَاتِمٍ

Narrated Ibn 'Umar: Allah's Messenger said, "The Arabs are equal to one another and the Mawali (freed slaves) are equal to one another; except a weaver of a cupper." Reported by Hakim, but there is a nameless narrator in its chain.
Abu Hatim graded it as Munkar (rejected)

The Explanation:

We come to tonight's topic, which is Equality in Marriage (Kafaa'ah), and the Right of Choice. Kafaa'ah in Arabic means being similar and compatible. In everyday language, you find it used to describe the two pans (kiffataani) on a scale, i.e. the two scales have to be equal in weight. And one cannot be heavier than the other without something being in it.

So they are equal and the same in weight. If a thing is brought to be weighed, and some weights are placed on the other side, and they are equitable in weight, it is called Kafa'ah, and if not one side will be heavier than the other.

So the origin of the sides of the scale is that they be equal. And likewise, the Arabic word 'adaalah, which means just and fair. It is derived from the word 'idlatay, which refers to the two bags that are hung on each side of a camel.

The bag on the side of a camel is called an 'idlah, and likewise the other side, and they must be equal in weight. If the idlataani are equal in weight, the carrying will be balanced, and the camel will be relaxed, even if it is a lot of weight.

But if one of the idlah is heavy and the other light, then the camel will lean towards the side that is heavy, and likewise one who is 'adl (just).

A just person must be fair and equal in giving and dealing with others just like the equality of the two bags over a camels back. And injustice and wrong is not dealing equally with others.

So the Equality or Kafa'ah in marriage are the two who balance equal one another, in the balance of scales within society, or in the balance of scales according to the Shara' (Islamic Law.), depending on what one's point of view.

As for Right of Choice, it is giving a person the right to look from various angles, and take what is the best for him, and this is a matter in which there could be numerous choices, good, better, ugly, ugliest, so one must look and choose what is best and most suitable.

As it was mentioned in the hadith of Barira (the freed female slave of Aisha), the Prophet alayhi as salam gave her the choice, when she was freed, to chose whether to stay with her husband who was a slave.

This chapter, regarding equality in marriage, as the Ulema state, there are few guidelines, and there are a lot of differences of opinion.

Because equality in marriage is not something you can measure by the centimeter, rather it is relative. There are some things that clear limits that cannot be crossed, but other things that can move right or left, is he mukaafa'

(equal and compatible) for her, or no, since their judgment is based upon culture. And culture varies from one place to another.

Culture and traditions in one city might be different than culture in another.

And because of this, Imam Shafii' said: Kafa'ah is not a precondition for marriage, so that I reject someone who is not equitable with the woman, but rather it is a right of a woman and the guardians, and if they accept the suitor, then it is a right that they can give up.

But if there is a single guardian who does not feel the marriage is equitable, he can request a cancellation of marriage.

Why can a guardian request this cancellation? Because as we shall see there are some defects in a wife that may be grounds for annulment of marriage, and there are some defects in the husband that may be grounds for annulment, and there may be defects shared by them both, and there may be defects that affect the children, and in this case the guardian has the right to intercede when the choice is being made.

But in reality this chapter is subject to study, and there is no clear scale that can be used to judge. But the Ulema agree to some things with slight variation, and we will take from this chapter what is clear, and leave the rest for you to find in reference books.

So let us start with the discussion of Kafa'ah in Marriage: Kafa'ah here means equitability.

Having an equitable spouse, is this the right of the man, or the right of the woman? The woman.

The man has no right for equitability. He could be noble, sayyid, sharif, and he can marry a woman from the farthest part of the dunya. And he is not to be blamed for that, and he should not have disregarded because of it.

He is free.

But the study of Kafa'ah is all regarding the woman, has she been married to someone kufu' or not. And the result of this is that if her guardian weds her to someone who is not kufu' for her, she has the right to have it cancelled.

Although, some ulema gave the sole right to wed her in this case to her father or grandfather.

Thus, Kafa'ah has certain rulings related to it.

If the right of kafa'ah belongs to a woman, and she accepted someone lower than her status, but not her guardian, is her desire accepted?

If the one she marries would harm her guardians, then she can be prevented.

After this introduction, what are the qualities that the Ulema agree must be equitable between spouses?

1.) Religion

2.) Freedom

So a Muslim woman, no one is equitable with her except another Muslim, even if he were the king of Rome. If the king of Rome were to approach a Muslim woman who does not own anything except her clothes, he is not compatible with her, because the religions are different.

Thus Kafa'ah in religion is agreed upon, and there can be no disagreement, either he is Muslim or not.

And Freedom, the Ulema agree that a slave is not equitable with a free woman. This is because he is restricted.

This is what is agreed upon.

After this, we take a step further and speak about family status, or wealth. Or lineage, if she is from the family of the Prophet alayhi as salam, and he is not, she is Arab, and he is non-Arab, this is difference in lineage.

So some make 4 qualities:

1.) Religion

- 2.) Freedom
- 3.) Wealth
- 4.) Lineage

And some take it a step further. Profession.

And the Author begins this chapter with the hadith:

“Arabs are equal to one another, and freed slaves are equal to one another.”

And what is understood is that a free slave is not equitable with an Arab. And then some professions are mentioned, weaver, cupper, and in some narrations, those who tan skins of animals.

However, this hadith’s chain of narration is agreed to be weak. Even some Ulema said that it is completely fabricated.

However, since the Author mentioned it, let us understand those who applied this hadith.

Those who say that Arabs are equitable to each other, they asked, are all Arabs the same? They said, No. Some Arabs are better than others.

Banu Hashim are better than others. Quraysh is better than others. And they make reference to the hadith, “Indeed Allah has chosen the Arabs from the children of Adam, and chose from the Arabs Banu Kinaana, and chosen from Banu Kinaana Quraysh, and chose from Quraysh Banu Hashim.”

And so they understood this hadith to mean that there is preference of some over others. And based on this, Abu Hanifa said, “A woman from the Quraysh tribe not equitable except with a man from Quraysh like her.”

And a commentator on this book, al-Sina’ani, mentions how he was pained by what happened in Yemen, that people from the house of the Prophet alayhi as salam only married the same, and he said, how many women were prevented from marriage because of this.

Thus, those who say Arabs are equitable to one another, and they say even tribes have various levels. And various tribes and men have their level. And this understanding is famous amongst the Arabs.

But we must ask, is there a primary difference between Arab and non-Arab, or is what elevates some over others, as Malik says, Taqwa?

“Inna akramakum endallahi atqaakum.”

“Indeed the most honorable of you in the sight of Allah is the one with the most Taqwa.”

And Bukhari began the chapter on equality in marriage with the ayah:

وَهُوَ الَّذِي خَلَقَ مِنَ الْمَاءِ بَشَرًا فَجَعَلَهُ نَسَبًا وَصِهْرًا [الفرقان : 54]

“And He create from water man, and made him related through birth and marriage.”

I.e. the Qur’an did not differentiate between man, who have all been created from water, and they have become related to one another through birth and marriage.

This ‘hadith’ is what has been used to prevent marriage between Arabs, and non-Arabs. And we do not want to encourage tribal mentality.

But culture, and the power of traditions, must be given some regard to prevent harm, since some have said that we should guard lineages, and in Nayl al Awtar Aisha and Umar said, “I will prevent those with noble lineages from marrying except with those who are equitable.”

So, this hadith is weak, but some hold on to it who consider race in marriage.

But the author immediately follows the hadith with what?

{ وَعَنْ فَاطِمَةَ بِنْتِ قَيْسٍ ; أَنَّ النَّبِيَّ (قَالَ لَهَا : { اُنْكِحِي أُسَامَةَ
رَوَاهُ مُسْلِمٌ

Narrated Fatima the daughter of Qais: The Prophet alayhi as salam told her:
“Marry Usama.”

Fatima bint Qays: She was Arab, Hashimi, and she was divorced, and she came to the Prophet alayhi as salam and informed him, and he said, “When your waiting period is over, tell me.” So she came, and the Prophet told her that Mu’awiyya ibn Abi Sufyaan, and Abu Jahm had proposed to her.

So the Prophet said, “Maawiyya’ah does not have any wealth, and Abu Jahm does not put his stick down.” Some scholars say this meant he used to travel a lot, and carry his provisions on a stick over his shoulder. He may leave her alone or force her to travel with him. So he said, “Marry Usama.”

Who was Usama? The son Zaid ibn Haritha, the freed slave of the messenger of Allah.

So here we see a Qurayshi woman, was commanded by the Prophet to “Marry Usamah,” marry the son of a freed slave. And in a narration, she said, “Usama, who is Usama?” but after the marriage, she was happy and joyful with him.

Thus, the Messenger of Allah alayhi as Salaam, if he said, “Arabs are equitable to one another, and freed slaves are equitable to each other” meaning freed slaves are not, but here in his action, we find the opposite. These actions cannot be doubted or interpreted.

Abu Hudhayfa, from the most honorable of the Arabs, had to take care of the daughter of his brother, who passed away, and he took care of Salaam, who was the freed slave of an Ansari woman. So he married her to him.

And the Prophet alayhi as salam entered upon the Sahabiah Daba’ah: And he said, perhaps you wanted to perform Hajj. And she was married to Miqdad ibn Aswad, a freed slave, and she was from the honored Arabs.

The Author of al Muntaqa said: "I heard a woman say, I saw the sister of Abdurahman Ibn Awf under Bilal."

Who was Bilal? Qurayshi? Tamimi? al Habashi, a former slave, and Habishi. He was a slave and Abu Bakr freed him. Who did he marry? The sister of Abdurahman ibn Awf.

So what do these narrations indicate? That Deen is the only reference in Kafaah.

And some narrations indicate that lineage and wealth can be a reference.

And woman came to the Prophet alayhi as salam, and said, "My father has married me to his nephew to raise his nephew's status." And he was not equitable for her, but her father wanted to raise his status, "so the Prophet gave her the choice whether to keep the marriage, or cancel it." He said, you are free, since he was not equitable.

So these texts show that deen is the condition that a woman should require in marriage, and the scholars say that a woman, no matter what her status, is not compatible with a non-Muslim, no matter how high his status.

And likewise freedom, and Barira was given the choice to divorce her husband after her freedom.

End of Class 21