

The Right of the Maiden (Bikr) and the Previously Married Woman (Thayeb) to Choose Her Husband and the Established Purposes of this Right According to the Four Schools of Jurisprudence

Muhammad Salim Mustafa (Muhammad Ali)

Faculty of Qur'an

Al-Quds University

m_salim208@yahoo.com

Received :24/12/2020

Accepted :30/05/2021

Abstract

This research explores the right of a maiden and a previously married woman to choose her husband according to the four schools of jurisprudence. The researcher used the analytical descriptive approach and the comparative one. One of the most important conclusions of this research is the agreement of the schools of jurisprudence on the right of a woman to choose her husband without coercion, and that the responsibility of the guardian over her is the advice and guidance.

Keywords: Marriage, Bikr (Maiden), Thayeb (Previously Married Woman), Guardian, Schools of Jurisprudence.

Introduction:

Praise be to God, Lord of the worlds, I bear witness that there is no god but Allah alone and have no partner, and I bear witness that Muhammad is his servant and Messenger. We pray to Allah to shed His peace and blessings upon Prophet Mohammad, upon his family, his companions, and his followers to the Day of Judgment.

one of the characteristics of the Islamic Shari'ah is that it was revealed in order to realize the best interests of people as the Almighty says in the holy Quran: { O mankind! We created you from a (pair) of a male and a female and made you into nations and tribes that you may know each other}¹. God Almighty made marriage the origin of the family; God created Adam and created Eve (Hawwa) to be his wife, God Almighty says {O people! Fear your Lord, who created you from a single soul, created from it its mate, and propagated from them many men and women}². Islam built the relationship between the spouses on solid foundations, and on compassion and mercy, which can only be realized if the marriage is held with the consent of both spouses. Hence, the Islamic law gives the right to choose for both spouses, and this research emphasizes the right of the maiden and the previously married woman to choose her husband through the four schools of jurisprudence.

Research Problem:

Choosing a husband by the maiden woman and the previously married woman is a right that is guaranteed by Sharia (Islamic Law). This right is practiced by the woman herself if she was previously married and through her guardian (Wali) if she was a maiden. It is very important that this right is not violated or neglected. Neither maiden woman nor previously married woman is to be forced to marry someone against her will, but at the same time, she is not free to choose whomever she wants without regard to the provisions of the Shari'a. This research aims to answer the following two questions:

The first question: What is the right of a maiden woman and the previously married woman in choosing a husband according to the four schools of jurisprudence).

The second question: What are the established purposes (Maqasid) of the right of maiden woman and the previously married woman to choose a husband?

Research Importance:

The importance of this research comes from explaining the ruling of Shari'a (ḥukm sharī) of the right of maiden woman and the previously married woman to choose her husband. This research comes at a time in which we are witnessing distancing from the Shari'a by some women who choose a husband in

a way that does not comply with the Shari'a and does not consider the right of her guardian to arrange her marriage in a way that preserves her dignity.

Previous Studies:

There are studies that tackled topics close to this research such as studies on the Role of the Guardian in marriage.

Studies close to the topic of this research:

First: Al willaya ala annisa' fei aqd azawaj bayn attaraadi wl ijbar (Guardianship Over Women in Marriage Contract between Consent and Compulsion) A Comparative (fiqhi) Study, Abkar bin al-Banat, Adam Ibrahim, University of Bahri, Faculty of Humanities, 2018 (refereed research).

Second: Haq al Wali al mojber wa ibnatahu al bekr fee ikhteyar azzawj (The Right of the Compelling Guardian and his Maiden Daughter to Choose a Husband), Ahmed Siri, Islamic State University, Mawlana Malik Ibrahim Malang, 2011.

Third: New Forms of Marriage Contract in Light of Islamic shari'ah and the Personal Status Act, Abdullah Muhammad Khalil Ibrahim, An-Najah University, Palestine, Master thesis, 2010.

The following are studies related to the role of the guardian (Wali) in marriage: -

First: Dawr al Wali fi aqd azzawaj bayn asharia al Islamiyah wl qanoun al jazaeri (The Guardian's Role in the Marriage Contract between Islamic Law and Algerian Law, Qarun Fazia, Colonel Akli Olhaj University, Bouira, MA, College of Law and Humanities, 2014.

Second: Ahkam wali al amr fee aqd azawaj fi doo' al fiqh al islami (Rulings of the Guardian or Wali on Marriage Contract in the Light of Islamic Sharia), Omar Hama Rashid Ahmed, Refereed Research, University of Arts, Literature, Humanities and Social Sciences, No. 13, 2017

Third: Al wilaya fe nikah (The Guardianship in Marriage) A Comparative Study, Saeed bin Humaid Al-Subaie, Umm Al-Qura University, College of Sharia, 1980-1981

These two types of study did not tackle the established purposes of guardianship over the maiden women nor the previously married in the right to choose a husband, and this is the new addressed issue in my research.

Research Methodology:

This research uses the descriptive analytical approach as well as the comparative approach.

Research Plan

The research consists of an introduction and one section:

Section I: The concept of: Choice, maiden and the previously married woman

1.1: choice; lexically and contextually

1.2 maiden (bikr) lexically and contextually

1.3: the previously married woman (thayeb) lexically and contextually

Section II: The choice of the maiden and the previously married woman of her husband and the purposes of the choice according to the four schools of jurisprudence

2.1: The purposes established in choosing the maiden woman and the previously married of her husband according to the Hanafi madhab

2.2: The purposes established in choosing the maiden woman and the previously married of her husband according to Al Mālikī School

2.3: The purposes established in choosing the maiden woman and the previously married of a husband according to Al Shafi'i School

2.4: The purposes established in choosing the maiden woman and the previously married of a husband according to the Hanbali School

Conclusion: findings and recommendations

Section I

The concept of: Choice, maiden and the previously married woman

1.1 "Choice" lexically and contextually

Choice lexically: having the possibility of selecting between two things and seeking the better of the two³. Choice contextually: selection⁴ and requesting doing the better of the two⁵.

1.2 "Maiden" (bikr) lexically and contextually

Maiden" (bikr)) lexically: a maiden is a woman who never had a sexual intercourse⁶.

Bikr (Maiden) contextually: refers to any woman who did not have intercourse within marriage by a valid contract, nor by a defective contract⁷, a maiden woman who never had a sexual relationship.⁸

Previously Married Woman (Thayeb) Lexically and Contextually

Previously married woman (thayeb), lexically, is every woman who was married, then separated from her husband either by divorce or for other reasons and she is not a virgin,⁹ the plural of Thayeb is Thayebat¹⁰.

Thayeb (A previously married woman) contextually is the woman who got married.¹¹

Al-Shafi'i and Al-Hanbali schools: a woman who lost her virginity; whether the intercourse was permissible "Halal" or impermissible "Haram" or happened while the woman was asleep.¹² A previously married woman is a woman who is not a maiden any more by marriage¹³ (Qurtubi, 1964, 18|194) and called "thayeb" because she is with her husband or returned to her parents' house after separation (Qurtubi, 1964, 18|194).

We conclude from the above definitions of *choice*, maiden and previously married woman the following:

First: The right of choice is owned by the person who chooses between two.

Second: The choice is made by choosing the better of the two by the person who has the right to choose.

Third: A maiden woman differs from a woman who was previously married and is not maiden any more while the maiden is still virgin as God created her.

Fourth: She is called “thayeb”, which is derived from the Arabic verb “thaba” which means “returned” and called so because she either returned to her husband after separation, or to her father's house.

Section II

The Choice of the Maiden and the Previously Married Woman of a Husband and the Purposes Established according to the Four Schools of Jurisprudence

The purposes established in the woman's right to choose her husband according to the Schools of Jurisprudence are linked to the guardianship over her in marriage. The jurists (Imams) have two opinions in that, an opinion of Al-Hanafis¹⁴, and the opinion of the Maliki, Shafi'i, and Hanbali¹⁵, so what are the purposes achieved in a woman's right to choose her husband in the two opinions¹⁶.

2.1 The Purposes Established in Choosing the Maiden and the Previously Married of Her Husband according to the Hanafi Madhab

First: According to the Hanafi madhab there is no compulsory guardianship over the adult mature maiden woman neither over the previously married woman, and that the Wilaya (guardianship) over them in marriage is a guardianship of guidance and advice. Hence, it is not permissible to marry off an adult maiden and the previously married without their consent¹⁷, the Guardianship over the woman ends by her reaching puberty¹⁸. And for this, if the guardian or Wali married her off without consulting her and without her consent; then he would have been violating the Sunnah, and the Islamic Sharia, so if the marriage is held by force, then it is considered as an incompatible act and violating the Sharia¹⁹.

Second: In marriage; men normally propose to women and not the opposite, and this is one of the purposes of Islamic Sharia in honoring and raising the status of women. Hence, the guardianship over the woman in marriage is for the purpose of advice and guidance so as not to be considered as a disrespectful woman in her society²⁰.

Third: The guardian has the right to object to the marriage if the woman marries herself off to an incompetent man²¹. The purpose of Islamic Sharia in this matter is to prevent disgracing her and her guardian.

Fourth: If a woman reaches the age of maturity and puberty then she is responsible (*mokalafa*) and no other person has a compulsory guardianship (wilayat Ijbar) over her in marriage²², because she is a mature adult and because coercion, in this case, contradicts with the legal purposes.

Fifth: When an adult maiden woman chooses a husband, she will be acting within her right, because she is a mature responsible adult and this is the same as her right of disposition of her money²³, this indicates the *fiqh of the purposes of sharia in taklif* (obligation) and bearing its consequences.

Sixth: The guardianship *Wilaya* of the father over his mature adult daughter is unanimously confirmed. It is a guidance guardianship²⁴, and the purpose of it is the father's compassion²⁵, which is an apparent compassion that cannot be overlooked.

Seventh: The maiden is unaware of the benefits of marriage or its harms. Hence, the guardianship (wilaya) here is a Recommended Guardianship (Wilayat ul Istahbab)²⁶ which is one of the purposes of marriage, through enlightening the woman of her rights in marriage in terms of choice and sharing opinion, hence it is necessary to consider her consent.

Eighth: According to the Hanafi madhab; the consent of the woman on the person to is to be taken in consideration; so if the contract is made with her consent then it is valid otherwise the contract is invalid²⁷.

Ninth: One of the purposes of the Sharia is to consider the silence of the mature adult maiden as a sign of her consent because her shyness prevents her from uttering explicit consent words, for her fear that this will be explained as her desire to marry, and this is undesirable to people and attributed to an indecent act of the woman. Hence, her silence is taken as a sign of consent²⁸ as this will prevent her missing the chance of the marriage while her consent is necessary²⁹.

Tenth: One of the respective purposes in considering the silence as a consent is to show the forms of silence and the extent of its indications of contentment. The Hanafi school considers that “smile” is a sign of consent, but if she cries then this is a sign of her hating it, if she sobs or she laughs comically then this is a sign of her dissatisfaction³⁰, if she sheds tears without sound then this is a sign of consent, because they are tears of sorrow over leaving her parents' house³¹. These forms show the purposes (maqasid asharia) in this issue in terms of not neglecting the right of an adult sensible mature maiden to choose whom she wishes to marry.

Eleventh: If the Guardian (wali) is not the father nor the grandfather, then the silence of the adult mature maiden is not interpreted as consent. It can mean either consent or dissatisfaction. There is no evidence of consent with suspicion and possibility³² because her silence to the answer of the guardian or wali, other than the father and grandfather, might be considered as a contempt towards him, and because she is usually shy from the close guardian or wali and not from a stranger. Therefore, it is necessary for her to say something that indicates her consent³³.

Twelfth: The consent of the previously married woman must be in saying or action³⁴. As for the

saying, it is by uttering consent or what indicates it, such as: "I agree", or by action through demanding her dowry and alimony or other rights, because all of this indicate her consent³⁵), and there is an apparent justice in terms of making sure that she is satisfied with this choice. As just as the silence of an adult mature maiden is interpreted as consent; the consent of the previously married woman is considered by word or action.³⁶

Thirteenth: It is a form of *maqāsid al-sharīʿ* (purposes of sharia) to make sure of the consent of the mature and adult maiden through asking trustworthy women to know whether she agrees or not, and the more entitled woman to do so is the mother because she is closest to her daughter³⁷.

2.2 The Purposes Established in Choosing the Maiden and the Previously Woman Married of Her Husband according to the Al-Maliki School

First: The father has the right to marry off his mature adult maiden daughter without her consent³⁸ and the established purpose in that is the father's care and compassion for his daughter and keenness to achieve her best interest for through marriage³⁹. If the guardian is not the father; then it is impermissible to marry off a mature adult maiden without her consent. Imam Malik was asked by an uncle who wanted to marry off his reckless niece in order to protect her by marriage; Malik replied "you don't have the right to marry her off to a man without her consent"⁴⁰ and the purpose here is that the compassion and care of a guardian, other than the father, is never like the father's care nor can it be ascertained as the father's care; so her consent must be considered⁴¹.

Second: The compulsory guardianship (*wilayat al ijbar*) of the father over his adult mature maiden daughter does not mean that he does not ask her permission, but rather ask her consent, which is desirable before making the marriage contract⁴² for the marriage to last⁴³.

Third: The young adult maiden and the maiden are equal in the permissibility of the father marrying them off without their consent⁴⁴ because the father knows their best interest, and he is the compassionate one who cares for his daughters⁴⁵.

Fourth: One of the purposes (*maqasid*) of the father's guardianship over the mature adult maiden is not to be disgraced and bring shame to her family if she was driven by her lust and marries herself off without the guardianship of her father⁴⁶.

Fifth: The adult mature (sensible) maiden, has the right to agree on the husband even if her guardian was the father⁴⁷, (sensible) here means that the daughter who is considered sensible by her father and he gives her the freedom⁴⁸, the purposes of Shari'ah is that she has the right to choose because her father trusts her ability to choose because of her sensibility.

Sixth: if the father mandates another wali (guardian) over the adult mature maiden, then it is impermissible for the wali (guardian) to marry her off without her consent⁴⁹.

Seventh: As for the previously married woman, her consent and right to choose must be considered, whether the guardian is her father or someone else, since she is mature and knows her best interest⁵⁰ and because it is her right⁵¹.

Eighth: The consent of the adult maiden in the *fiqh* (*al-Maqasid al-Shari'ah*), appears through: first form: her silence, which is an indication of her consent if it is known that her silence means satisfaction⁵²; the second form: that her guardian says to her three times: stay silent if you consent, and speak if you don't consent⁵³; and the third form: the silence of the adult maiden is not considered consent if she is to be married off by other than her father and in this case she must be consulted⁵⁴, but for the previously married woman; her consent must be uttered⁵⁵, so her consent is only considered by the explicit words⁵⁶.

In all these forms, moderation (*wasatiyah*) of the *Maaliki*s is manifested with the maiden and the non-maiden alike in not waiving the right of the guardian, and the right of the daughter to choose the husband that she wants.

Ninth: One of the purposes is that the honor of the woman is not compromised and preserving the honor is one of the purposes of Shari'a so if the previously married woman was overcome by her desire and lust⁵⁷, then her guardian marries her off regardless of her consent because he has to protect her honor and dignity.

2.3 The Purposes Established in Choosing the Maiden and the Previously Married of Her Husband According to the Shafi'i School

First: One of the established purposes of choice according the Shafie School is that stipulating for the compulsory guardianship (*Wilayat al Ijbar*) over the adult mature maiden several conditions:

First condition: that there is no apparent enmity between the woman and her father⁵⁸, because enmity may cause him to oppress her or harm her, and this contradicts with the purpose of the Sharia for a woman to choose her husband. The compulsory guardianship is to ensure the daughter's interest in marriage, and so that she does not marry off herself to an incompatible person and the society disgraces her and her family for that marriage⁵⁹. Therefore, the purpose in this issue is that the daughter does not abandon her right to preserve honor.

Second condition: He marries her off to a competent husband and this is, as we have mentioned in the previous condition, to prevent her being disgraced for marrying an incompetent man, which will also disgrace her family.

Third condition: He marries her off with a dowry (*mahr*) as her peers, because if her dowry is less; then

she will be disgraced for not having her right as her peers and this is unfair and contradicts with the purposes of the Islamic Sharia.

Fourth condition: The dowry (mahr) is to be calculated as per the currency of the country, in order not to be wronged by decreasing its value or depression, as this contradicts with the purposes considered therein.

Fifth condition: that the husband pays the dowry on time without delay, because delay in the prompt dowry (muqqadam), hinders the preparation of the woman for the new marriage.

Sixth condition: that he does not marry her off to someone who is incompetent such as a blind or to an old man, and the purpose in that is in terms of preventing a harm and injustice for her.

Seventh condition: That she is not obligated to perform Hajj, because the husband may neglect this right and prevent her from performing the Hajj, which is a violation of the purposes of Shari'a because he prevented the woman from performing a right that was obligatory for her and she is capable of it.

Second: According to Al-Shafi'e; the compulsory guardianship on the adult mature maiden lies in the fact that she is shy to express her desire to marry⁶⁰, so it is necessary to announce it by the guardian, and the compulsory guardianship - as we explained earlier - will be for guidance and support.

Third: What indicates that the compulsory guardianship is one of guidance and advice, and that the opinion is shared between the father and his daughter in choosing the husband, is asking for the consent in the form, defined by the fuqaha (jurists), including that the mother asks the daughter about her opinion, because mothers know their daughters better, know their feelings and whom they desire as a husband⁶¹, and that it is better for the father to ask the daughter's consent, to make her feel appreciated⁶².

Fourth: If the daughter chooses a competent man, and her father chooses an incompetent one, then her father is obliged to marry her off to the competent one⁶³.

Fifth: the father marries off his mature maiden daughter⁶⁴ but her consent is a must, and her silence is sufficient in this case, because she is shy to explicitly utter the consent⁶⁵ and the purpose in this matter is in terms of not waiving the right of a woman to choose whomever she wants as her husband.

Sixth: As for the previously married woman, her consent should only be uttered in words because she was married before and she is less shy to show her consent to marry, and this is from the jurisprudence of moderation not to be forced to marry a person whom she does not want⁶⁶.

Seventh: One of the purposes of the guardianship (wilaya) of the adult, mature maiden is that her

silence is considered a consent unless she weeps or slaps her cheek⁶⁷, this indicates her dissatisfaction.

2.4 The Purposes Established in Choosing the Maiden and the Previously Married Woman of Her Husband according to the Hanbali Madhab

First: According to the Hanbali madhab; the purpose for the father's guardianship over his mature adult maiden daughter is his compassion as a father and that he is more aware of her best interest⁶⁸ and because the children are gifts to the father⁶⁹, and the grandfather is like the father in this guardianship, and no one else has this right⁷⁰.

Second: Among the purposes is that the father or grandfather asks for the consent of the daughter or the granddaughter because this will please her, and it will solve any dispute⁷¹.

Third: Marrying off the maiden with involving her mother to know the opinion of her daughter, because the mother is also compassionate for her daughter and cares for her as the father does. Another reason for that is involving the mother in such issue is an act of kindness to her and would please her heart⁷².

Fourth: for the previously married woman, it is not permissible neither for the father nor for anyone else to compel her to marry⁷³, because she is sensible and knows what marriage and men mean⁷⁴.

Fifth: Considering the "words" of the previously married and her explicit uttering as a consent or a refusal of the marriage, while considering the silence of the adult mature maiden as an indicator of her consent, and her explicit uttering the approval, in addition to her smile or her tears as a sign of her acceptance and consent⁷⁵, all of these purposes prove the woman's right to choose her husband.

Sixth: Among the explicit rights of the adult mature maiden is to know the name of her husband to be, and that she knows it in an unambiguous way, and can decide whether she accepts the marriage or not⁷⁶.

Findings and Recommendations

Findings

- 1- According to the Hanafi School; the established purposes indicate and emphasize clearly the right of the maiden woman and the previously married woman to choose a husband with no coercion.
- 2- The Sharia purposes are clear to the majority of Maliki, Shafi'i and Hanbali jurists through their statements regarding the guardianship over the maiden woman and asking her consent when it comes to marriage, and the previously married woman who has the explicit right to choose whomever she desires as her husband.
- 3- The guardian is compelled to have the permission of the maiden woman and the previously married woman.

- 4- The purpose of forced marriage amongst jurists is based on the idea that guardianship is based on advice and guidance.
- 5- Anything that states and legalizes forcing a woman to marry someone whom she does not want to marry is an anomaly and contrary to the Sunnah.
- 6- A woman's right to choose her husband with respect to the new forms of marriage does not fulfill the legitimate purposes of marriage.
- 7- There should be a focus on the role of the guardian to emphasize the rights and purposes agreed upon vis-à-vis the maiden and previously married woman when choosing her husband.

Recommendations

- 1- Conduct more research regarding the jurisprudence of the purposes related to the rights of women in marriage.

The Holy Qur'an

- Ibn Abd al-Barr, Yousef Bin Abdallah. *Alkafi Fi Fiqh Madhab Ahl al-Madina*. Investigated by: Mohammed Mohammed Uhaïd Walad Mike al-Muritani, Maktabat al-Riyad al-Haditha, Saudi Arabia, Vol.2, 1980.
- Ibn 'Abidin, Radd al-Muhtar ala al-Durr al-Mukhtar, Dar Alfikir, Beirut, first floor, 1992.
- Al-Adawi, Ali Bin Ahmad: *Hashiyat al-Adawi ala Sharh Kifayat Altaleb Arabany*, investigated by Yousef Alsheikh Mohammed ALbiqa'ee, Dar AlFikir, Beirut, 1994
- Anas, Malik Bin Amir Al-Asbahi. *Al-Mudawena*. Dar Al Kotob ilalamiyah, first floor, 1994
- Al-Ayni, Badr Aldeen Abi Mohammad Mahmoud. *Omdat Alqari Sharh Sahih Albukhari*, Scientific Books House, Beirut, first floor, 2001
- Al-Baghawy, al-Husayn ibn Mas'ud ibn Muhammad. *al-Tahdheeb fi fiqh al-Imam al-Shafi'i*. Investigated by: Adel Ahmad Abdel Mawjoud, and Ali Mohammad Awad. Dar Al Kotob ilmiyah, first floor, 1997.
- Al-Bahūtī, Shaykh Manşūr ibn Yūnus: *Kashshaf al-qina an matn al-iqna*. Dar Al Kotob ilmiyah
- Al-Bahūtī, Shaykh Manşūr ibn Yūnus. *Sharh Muntaha al iradat*. Alam al Kotob , 1st floor, 1993
- Al-Barkati, Sayed Muhammad Amimul Ehasan. *Ata'reefat al fiqhiyah (Juristic*

definitions), Scientific Books House, first floor, 2003.

- Ibn Dowyan, Ibrahim Bn Mohammed Bin Salim. *Manar al-Sabeel fi Sahrh al-Daleel*. Investigated by: Zuhair al-Shaweesh. Almaktab ALIslami, 7th floor, 1989.
- Al-Ghunaimi al-Midani, Abd al-Ghanī ibn Tālib. *Al-Lubab fi Sharh al-Kitab*. Investigated by: Mohammed Muhyi Deen Abdel Hamid, Al maktaba al ilmiyah, Beirut, Lebanon.
- Abu Habib, Sa'di. *Alqamous al fiqhi lughatan wa istelahan*, investigated by: Mohamad Radwan addayeh , Beirut, 1st floor, 1990
- Ibn Hajar, Ahmad Bin Ali al'asqalani. *Fath albari Sahrh Sahih AlBughari*. Dar al-Ma'rifa, Beirut, comments by Al'llamah Abdel Aziz Bin Abdallah Bin baz, 1959.
- Al-Jawhari, Ismail Bin Hammad. *al-Sihah Taj Alugha*. Investigated by: Ahmad Abdel Ghafour Atta, Dar al'ilm ll Mallayeen, Beirut, fourth floor .1987.
- Ibn Juzayy, Mohammad Bin Ahmad: *Al qawanin al fiqhiyah*
- Al-Kasani, Abu Bakr Bin Masood. *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, Scientific Books House, 1986
- Al-Kharqy, Omar Bin Al-Hussain. *Matn al-Kharqy 'ala Madhab Abi Abdellah Ahmad Bin Hanbal al-Shibany*, Dar al-Sahaba Lturath, 1993
- Al-Khen, Mustafa al-Bagha, al-Fiqh al-Manhagi 'ala Mathhab al'Shafi'ii. Dar alqalam, Damascus, first floor, 1992.
- Ibn Manẓur Moḥammad ibn Mokram. *Lisan al-'Arab*, Daar Saader, Beirut, Vol. 2, 1993.
- Al-Maqdesy, Abd ālrḥmn ibn Ibrāhīm ibn Ahmd. *A-sharh al-kabeer 'ala matn al muqanna'*. Dar al Hadith Cairo, 2003.
- Al Mardawi, ibn Sulaiman: *al Insaaf fi m'refat al rajeh mn al khelaaf*. Dar ihya' Atturath al Arabi.
- Al Marghinany, 'Ibn aby bkr bn abd aljalaal, al-Hidaya fi sharh bidayatal muḥtadi, investigated by: Talal Yousef, Dar Ihya' atturath al Arabi, Bierut , Lebanon.
- Ibn Māzah, Mahmoud Ibn Aḥmd. *Al- Mohit al Burhani fi Alfqh al Nu'mani*. Investigated by: 'bdālkrym sāmy ālḡndy, Scientific Books House, Beirut, Lebanon, 1st floor, Lebanon, 2004
- Ibn Mefleḥ, Ibrahim bn Mohammad. *Al Mubdi' fi sharh al muqana'*, Dr al kutub Al alamiyyah, Beirut, Lebanon, 1st floor. 1997.

- Al Nafrawi, Ahmad Ibn Ghanem Bin Salem Bin Mhana. Al Fawakeh adowani ala risalat Ibn Abi Zaid Alqairawani, Dar al Fikr. 1995.
- Ibn Nasr, Abdulwahhab Bin Ali. Al Maounah ala madhab Alam al Madinah Imam Malik Bin Anas, Invistigated by: Hamish Abdul haq, Al maktabah attejariyyah, Macca Al Muukarama.
- Qal'aji, Rawwās, Quneibi, Hamed, Mo'jam Lughat Al Fuqaha', Dar Annafaes, 1988
- Al- Qarafi, Aḥmd bn Idris. Al-Dakhira, investigated by: Mohammad Hajjy, Saeed A'rab and Mohammad bu khubze , Dar al gharb al Islami, Beirut, Vol.1. 1994
- Al Qastalani, Ahmad bn Mohamamd. Irshad assari le sharh sahih al bukhari, al- Maṭba'ah al-Kubrā al-Amīriyah, Egypt, 7th. Floor. 1905
- Al-Qazwini, Abd Alkrim ibn Mohammad. A-sharḥ al-kabeer lilrafe'i. Investigated by: Ali Moḥamd 'wḍ w'ādī ḥmd 'bd ālmwḡwd, Scientific Books House, Beirut, Lebanon. 1997
- Ibn Qudāmah, Abd Allāh bn Aḥmad bn Muḥammad: Asharh alkabir ala mtn almuqana'. Dar al Ketab al Arabi, the printing of the book was supervised by Mohamed Rashid Reda, the owner of Al-Manar
- Ibn Qudamah, Abdullah Ibn Ahmad. Umdat al faqeeh. Investigated by: Ahmad Azouz, al maktaba al asriyya, 2004.
- Ibn Qudamah, Abdullah Ibn Ahmad. Al Mughni, Maktabet al Qahira, 1968.
- Al-Qurtubi, Mohammad bn Ahmad. Al jame' liahkam Al Quran Al Kareem, investigated by: Ahmad al Bardouni and Ibrahim itfeish, Dar Al Kutub Al Masreiyah , Cairo, 2nd. Floor. 1964
- Al Sarkhasy, Mohammad Bin Ahmad. Al-Mabsut. Dar al-Ma'rifah, Beirut
- Al Sawy, Ahmad Bin Ahmad: Bulghat al-sālik li-Aqrab al-masālik, Dar al-Ma'arif .
- Al Sharbini, Mohammed Bin Ahmad. Mughani al-Muhtaj, Dar al-Kotob al-Ilmiyah;, Beirut, 1994
- Sheikhi, Zadah, Abdulrahman ibn Mohammad: Mojama' Annahr fi Multaqa tajamo' al abhor, Dar ihya' Atturath al arabi.
- Al Zamakhshari, Mahmoud Ibn Amr. Al faeq fee ghareeb al hadeeth, investigated by: Ali bajawi and Mohammad Ibrahim, Dar al-Ma'rifah, Beirut
- Al Zamakhshari, Mahmoud Ibn Amer. Asaaleeb al balagha, investigated by Mohammad Baseil uyun al sud, dar al Kutub Al-ilmiyyah, Beirut, 1998.
- Al- Zarkashi, Mohammad Bin Abdel Allah. Sharh al-Zarkashi. Dar al-Kaiban, 1993.
- Al Zila'y, Othman Bin Ali: Tahqiq al-Haqa'iq Sharh Kanz al-Daqa'iq, Almatba'a Alkubra Alamiriy, 1895

References :

- 1 Surat Al-Hujurat [verse 13]
- 2 Surat An-Nisa', Verse 1
- 3 Al- al-Jawhari, Ismail bin Hammad, As-Sahhah, vol. 2, p. 652
- 4 Abu Habib, Sa'di, Al-Qamous al fiqhi lughatan w istelahan, Part 1, p. 125
- 5 Al-Barkati, Sayed Muhammad Amimul Ehasan. At T'rifat al- Fiqhiyyah, Part 1, p.91, Qalaji Rawas, and Qunibi, Hamid Sadiq, The Dictionary of the Language of the Jurists, Part 1, p. 201
- 6 Al- al-Jawhari, Ismail bin Hammad, As-Sahhah, vol. 2, p. 595, and al-Zamakhshari, Asass al-Balagha, vol. 1, p. 72, and al-Zamakhshari, al-Faiq fi Gharib al-Hadith wa'l-Atha, vol. 1, p. 125, and Ibn Manzur, Lisan al-Arab, vol. 4, p. 78
- 7 See: Al-Asqalani, Ahmad Ibn Hajar, Fateh Al-Bari, vol. 9, p. 120, and Ibn Abdin, Muhammad Amin, Response to al-Muhtaar on al-Dur al-Mukhtar, vol. 3 p. 63, and Abu Habib, Saadi, The Jurisprudence Dictionary in language and idiomatically, Part 1, p. 41, and al-Minawi, Abd al-Raouf, Al-Minawi, Abd al-Raouf, The Detention on the Missions of Definitions, Part 1, p.82 Al-Barkti, Sayed Muhammad Amimul Ehasan, At-ta'rifat al fiqhiyyah, Part 1, p. 42, and Qalaji Rawas, and Qunibi, Hamid Sadiq, Dictionary of the Language of the Jurists, Part 1, p. 109
- 8 Al-jawhari, Ismail bin Hammad, As-Sahhah, vol.1, p. 95, and Al-Zamakhshari, Al-Faeq, in Gharib Al-Hadith and Athar, vol.1, p. 182
- 9 Ibn Manzur, Lisan al-Arab, vol.1, p. 248
- 10 Abu Habib, Sadi, Al-Qamoos Al-Fiqhi lughatan wa istelahan, part 1, p. 55, and Al-Qastalani, Irshad assari le sharh sahih al bukhari, vol. 8, p. 13, and Al-Halabi, Ibrahim, Majma Al-Anhar fi Sharh Al-Ubhar Forum, Part 1, p.493
- 11 Abu Habib, Sadi, Al-qamoos al fiqhi lughatan wa istelahan, Part 1, p. 55
- 12 Al-Qastalani, Irshad assari le sharh sahih al bukhari, vol. 8, p. 54, and Qalaji Rawas, and Qunibi, Hamid Sadiq, The Dictionary of the Language of the Jurists, Part 1, p. 155, and Al-Barkati Al-Majdidi, Sayed Muhammad Amimul Ehasan, At-ta'rifat al fiqhiyyah, The Definitions of Jurisprudence, Part 1, p. 155
- 13 Abu Habib, Sadi, The Juristic Dictionary, Language and Idiomatically, Part 1, p. 55
- 14 . Al-Ayni, Badr Aldeen Abi Mohammad Mahmoud. Omdat Alqari Sharh Sahih Albukhari, Scientific Books House, Beirut, first floor, 2001 vol.20 p. 182
- 15 IBID
- 16 The aim of this research here is not to address the evidence of each of the two groups regarding guardianship over the woman in marriage, discuss it, and explain the most correct of it. Rather, the aim is to extract and derive the purposes of the right of the maiden and the previously married woman to choose her husband only, away from the evidence and preferences.
- 17 Ibn 'Abidin, Radd al-Muhtar ala al-Durr al-Mukhtar, vol. 3, p. 58, al-Marghanani, al-Hidayah, at the beginning of al-Muhtadi, vol. 1, p. 191, and al-Kasani, Badaa'i 'al-San'a'i, vol. 2, p. 242
- 18 Al-Zayla'i, Explanation of the Facts, Part 2, p. 118, and al-Ghunaimi al-Midani, Al-Labab fi Sharh Al-Kitab, vol. 3, p. 8, and Ibn Abidin, Radd Al-Muhtaar to Al-Dur Al-Mukhtar, Part 3, p. 58
- 19 IBID
- 20 Al-Marghinani, Al-Hidayah fi Sharh Bidaya al-Muhtadi, part 1, p. 191, and al-Kasani, Badaa'i al-San'a'i, vol. 2, p. 242, and al-Zayla'i, Tabiyan al-Haqiq, part 2, p. 117
- 21 Ibn Mazah, Al Al Muhit al-Burhani fi Fiqh al-Numani, vol 2, p. 46
- 22 Al-Kasani, Bada'i al-Sanai fi Tarteeb al-Sharaii, vol 2, p. 242
- 23 Al-Marghinani, Al-Hidayah fi Sharh Bidayat Al-Muhtadi, vol.1, p. 191
- 24 Al-Kasani, Bada'i al-Sanai fi Tarteeb al-Sharaii, vol 2, p. 242
- 25 IBID
- 26 IBID
- 27 IBID
- 28 IBID
- 29 IBID
- 30 Ibn Mazah, Al Muhit al-Burhani fi Fiqh al-Numani, vol 2 p. 55, and al-Marghaniani, al-Hidayah fi Sharh Bidayat al-Muhtadi, vol. 1 p. 191, and al-Kasani, Bada'i as Sanai ` , vol 2, p. 238
- 31 Al-Sarkhasi, Al-Mabsout, vol.5, p. 4, and al-Ghanimi, al-Lubab fi Sharh al-Kitab, vol. 3, p. 8, and al-Zayla'i, Explanation of the facts, part 2, p. 128
- 32 Al-Kasani, Bada'i as Sanai, vol 2, p. 243
- 33 IBID
- 34 al-Ghunaimi al-Midani, Al-Lubab fi Sharh al-Kitab, vol. 3, p. 9, and Sheikhi Zadeh, Majma` al-Anhur fi Sharh Multaqā al-Abhur, Part 1, p.134
- 35 Al-Kasani, Badaai` Al-Sanai, vol 2, p. 243
- 36 IBID

- 37 Ibn Abdin, Muhammad Amin, Radd al-Muhtar ala ad-Dur al-Mukhtar , vol. 3, p. 59
- 38 Anas, Malik, Al-Moudawana, Part 2, p. 100, and Al-Nafrawi, Al-Fawkeh Al-Dawani, Volume 5, P5
- 39 IBID
- 40 Anas, Malik, Al-Modawenah, part2, Page 100
- 41 Al-Nafrawi, Al-Fawakeh Al-Dawani, vol 2, p.5
- 42 Ibn Abd al-Barr. Al-Kafi fi Fiqh 'ala madhhab Ahl al-Medina, vol 2, p.523
- 43 Al-Nafrawi, Al-Fawakeh Al-Dawani, vol. 2, p. 6, and Al-Adawi, Hashiyat al-Adawi ala Sharh Kifayat Altaleb Alrabany, vol. 2, p. 41
- 44 Ibn Abd al-Barr. Al-Kafi fi Fiqh 'ala madhhab Ahl al-Medina, vol 2, p.523
- 45 IBID
- 46 Al-Qarafi, Abu al-Abbas Ahmad ibn Idris, Al-Dakhira, vol.4, p. 201
- 47 Al-Sawi, Belughat Al-Salik li aqrab Al-Masalak, part 2, p. 353, and An-Nafrawi, Al-Fawakeh Al-Dawani, part 2, p. 6
- 48 IBID
- 49 Ibn Nasr, Al-maounah ala mathhab ahl al Madinah, vol 1, p. 733
- 50 Al-Nafrawi, Al-Fawakeh Al-Dawani, vol 2, p. 6
- 51 Anas, Malik, Al-Mudawenah, vol. 2, p. 101
- 52 Anas, Malik, Al-Mudawenah, vol. 2, p. 102
- 53 Al-Qarafi, Al-Dakhira, vol 4, p. 227
- 54 Ibn Juzzai, Al-Qawanin al-Fiqhiyyah, vol.1, p. 133, and Anas, Malik, al-Mudawwanah, vol. 2, p. 103
- 55 Anas, Malik, Al-Modawenah, vol.2, p.102
- 56 Ibn Juzzai, Al-Qawanin al-Fiqhiyyah, vol.1, p. 133, and al-Quraafi, al-Thakhira, vol. 4, p. 227
- 57 Al-Nafrawi, Al-Fawakeh Al-Dawani, vol 2, p. 6
- 58 See these conditions in: El-Sherbiny, Mughni Al-Muhtaj, part 4, p. 246
- 59 Al-Khan Mustafa, and Mustafa Al-Bagha, Al-Fiqh al manhaji ala madhab al imam Imam Al-Shafi'i, Part 4, p. 66
- 60 El-Sherbiny, Mughni Al-Muhtaj, vol.4, p. 246
- 61 IBID
- 62 Al-Khan Mustafa, Methodological Jurisprudence on the School of Imam Al-Shafi'i, Part 4, p. 66
- 63 Al-Qazwini, al-Aziz fi Sharh al-Wajeez, vol.7, p. 539, and al-Baghawi, al-Tahdheeb fi fiqh al-Imam al-Shafi'i, vol.5 p. 255
- 64 Al-Qazwini, al-Aziz fi Sharh al-Wajeez, vol.7, p. 539
- 65 Al-Baghawi, Al-Tahdheeb fi fiqh Al-Imam Al-Shafi'i , vol.5, p. 255
- 66 Al-Qazwini, al-Aziz Sharh al-Wajeez, vol.7, p. 540, and al-Sharbini, Mughni al-Muhtaj, vol. 4, p. 248, and al-Baghawi, al-Tahdheeb fi fiqh al-Imam al-Shafi'i, vol. 5 p. 255, and al-Khan Mustafa and his colleague, Methodological jurisprudence on the doctrine of Imam al-Shafi'i, vol. 4 p. 67
- 67 Al-Qazwini, al-Aziz Sharh al-Wajeez, vol.7, p. 540, and al-Sharbini, Mughni al-Muhtaj, vol. 4, p. 248
- 68 Ibn Muflih, 'Sharh Al-Muqni', vol.6, p. 15, and Ibn Qudamah, al-Sharh al-Kabir, on board al-Muqni ', vol.7, p. 412
- 69 Al- Bahūtī, Shaykh Mansūr ibn Yūnus, Kashshaf al-qina an matn al-iqna, vol.5, p. 50, and Ibn Qudamah, al-Sharh al-Kabir, vol.7, p. 411
- 70 Ibn Dowyan, Manar As-Sabil fi Sharh al-Daleel, vol. 2, p. 150
- 71 Ibn Qudamah al-Maqdissi, Al-Mughni, vol.7, p. 42, and al-Kharqi, Muhtasar al-Kharqi, vol. 1, p. 99
- 72 The two previous references are the same part and page, and Al-Zarkashi, Explanation by Al-Zarkashi Ali Mohtasar Al-Kharqi, vol.5, p.
- 73 Ibn Qudamah al-Maqdissi, Al-Mughni, vol.7, p. 42, and Al-Mardawi, Al-Insaf, vol. 8, p. 57, and Al-Kharqi, Mukhtasar Al-Kharqi, vol. 1, p. 99
- 74 Ibn Qudamah al-Maqdissi, Al-Mughni, vol.7, p. 44, and al-Zarkashi, Sharh al-Zarkashi, on Mukhtasar al-Kharqi, vol. 5 p. 87, and Ibn Dwayyan, Manar al-Sabil fi Sharh al-Daleel, vol. 2, p. 148
- 75 Ibn Qudamah al-Maqdissi, Al-Mughni, vol.7, p. 45, and 'Umdat al-Fiqh, vol.1, p. 90, and al-Maqdisi, al-'Udah fi Sharh al-Umdah, vol.1, vol. 394, and al-Kharqi, Muqtasar al-Kharqi, vol.1, p. 99
- 76 Ibn Dowyan, Manar As-Sabil fi Sharh al-Daleel, vol. 2, p. 150

حق اختيار المرأة البكر والثيب زوجها ومقاصده في المذاهب الفقهية الأربعة

محمد سليم مصطفى (محمد علي)

كلية القرآن والدراسات الإسلامية

جامعة القدس

m_salim208@yahoo.com

قبول البحث 2021/05/30

استلام البحث: 2020/12/24

الملخص

يتناول هذا البحث موضوع حق المرأة في اختيار زوجها، سواء أكانت بكرًا أم ثيبًا، ويهدف إلى بيان المقاصد الشرعية المرعية في هذا الحق من خلال الولاية عليها في الزواج، وذلك من خلال المذاهب الفقهية الأربعة. وقد استخدم الباحث المنهج الوصفي التحليلي والمنهج المقارن. ومن أهم نتائج هذا البحث اتفاق المذاهب الفقهية الأربعة على حق المرأة في اختيار زوجها من غير إجبار، وأن مسؤولية الولي عليها هي مسؤولية نصح وإرشاد وتوجيه.

الكلمات المفتاحية: زواج، بكر، ثيب، ولي، المذاهب الأربعة.