

## HUKM (LEGAL EFFECTS) OF TALĀQ

### 8.1 Primary and secondary legal effects of divorce

The legal effects of a divorce prior to consummation of marriage are that even if one repudiation is pronounced, it amounts to an irrevocable (*bā'in*) divorce. The entitlement to dower is discussed above. There is no waiting period in such a case.

The legal effects of divorce after consummation of marriage vary according to whether the divorce is revocable (*raj'ī*) or irrevocable (*bā'in*). It also varies according to the number of repudiations pronounced.

All the forms of divorce have certain primary effects and secondary effects. The primary effects are linked to the way ownership of conjugal rights has been affected. These include the right to retract the repudiation (*rujū'*) or remarriage with the divorced wife in relation to the number of repudiations pronounced.

The main secondary effect of all types of divorce is the obligation to undergo the waiting period (*'iddah*). This has certain related requirements like mourning (*iḥdād*) and not moving out of the house, but these requirements may not apply to all women undergoing the waiting period.

### 8.2 Legal Effects of Revocable (*Raj'ī*) Divorce

#### 8.2.1 Legal effects of *raj'ī* divorce

*Raj'ī* divorce is revocable, which grants the husband the right to retract and take back his wife within the waiting period. This recourse to the wife is called *rujū'*.

The primary legal effect of a revocable divorce is the loss of the number required to give finality to divorce. Loss of ownership of physical access to the wife and prohibition of sexual intercourse are not part of the legal effects. The *aḥsan* form results in a *raj'ī* divorce. The *ḥasan* form too is a *raj'ī* divorce till such time that the third repudiation is pronounced in the third period of purity.

If the husband does not take back his wife, within the waiting period, the divorce becomes irrevocable (*bā'in*) with its accompanying legal effects. Till such time that the divorce becomes irrevocable at the end of

the waiting period, the husband continues to possess the right of *ilā'*, *zihār* and *li'ān*. He is under an obligation to provide maintenance and residence as the woman is still his wife. The wife is under an obligation to abide by the requirements of the waiting period in accordance with the provisions that apply to her case.

The husband has the exclusive right of *rujū'* (retraction of divorce) and *rujū'* does not depend upon the consent of the wife. This requirement has been overturned by the Muslim Family Laws Ordinance, 1961, in which *rujū'* depends upon the consent of the wife supported by her relative as provided by the reconciliation procedure.

### 8.2.2 The nature of *rujū'* (retraction of divorce) and its requirements.

*Rujū'* implies the continuation of the ownership of physical access, the prevention of its extinction and the cancellation of the cause that can lead to such extinction.

#### 8.2.2.1 *RUJŪ'* WITH WORDS

*Rujū'* is undertaken by words or by conduct. Statements like "I have retracted the divorce," "I have taken you back," "I have made her return" or any other words that convey the meaning of the retraction of divorce pronounced earlier amount to *rujū'*. It is not required that witnesses be taken for this form of retraction, but jurists consider this to be recommended and better in order to avoid subsequent disputes.

#### 8.2.2.2 *RUJŪ'* BY CONDUCT

*Rujū'* by conduct occurs when the husband has intercourse with his wife or even physical contact with desire that falls short of actual sexual intercourse. As retraction depends upon the will of the husband and not the wife, it will not be *rujū'* if the wife has physical contact with the husband. It is recommended that the wife seek adornment (assuming that she is staying in her husband's house) so as to make the husband incline towards her.

#### 8.2.2.3 THE CONDITIONS OF *RUJŪ'* (RETRACTION OF DIVORCE)

Among the conditions of *rujū'* (retraction) is the continuation of the waiting period. If the husband does not take back his wife, within the waiting period, the divorce becomes irrevocable (*bā'in*) and the husband and wife can only come together through remarriage. A conditional retraction, one associated with the future or one that stipulates an option is not valid.

The husband does not possess the right of *rujū'* after a divorce that is irrevocable (*bā'in*) or separation resulting from *khul'*, *ilā'*, *li'ān*, and also when the right of divorce has been granted to the wife through different kinds of statements.

The husband does not possess the right of *rujū'* when there has been proper seclusion, but he claims that he did not have intercourse with his wife. The same applies when the woman was menstruating at the time of seclusion, was in a state of *iḥarām*, was in a state of fasting due to *Ramaḍān*, or was suffering from a defect that prevents sexual intercourse. If the husband was suffering from a defect—like impotence, castration, mutilation of the organ—at the time of seclusion, he does not possess the right of *rujū'*.

### 8.3 Legal Effects of Irrevocable (*Bā'in*) Divorcès

#### 8.3.1 The legal effects of less than three irrevocable divorces

*Bā'in* (irrevocable) divorce is of two types: three divorces (see next section); and less than three divorces (two or one) qualified as irrevocable.

The primary legal effect for one divorce qualified as irrevocable, or two divorces qualified as irrevocable, is the loss of number required to give finality to divorce as well as the loss of ownership of physical access. Accordingly, it is no longer permissible for the husband to undertake *rujū'* or have sexual intercourse with his wife. Further, the husband can no longer pronounce *ilā'* or *zihār* nor can *li'ān* take place between the spouses. If one of them dies, they cannot inherit from each other.

The prohibition arising from such a divorce is not enhanced and does not prohibit the woman perpetually for the husband. He can, therefore, remarry the woman within the waiting period or after it without an intervening marriage that is required in the case of enhanced prohibition.

#### 8.3.2 The legal effects of three repudiations pronounced at once or in three periods of purity

Three divorces result from the *ḥasan* form of divorce when three repudiations are pronounced in three consecutive periods of purity and also from the deviant (*bid'ah*) form of divorce in which the three repudiations are pronounced at once. The *ḥasan* form remains a revocable (*raj'ī*) form till such time that the third repudiation is pronounced, after which it becomes irrevocable (*bā'in*).

The primary legal effect of three divorces pronounced at once, or three pronounced in three periods of purity, is the completion of the number three that not only prohibits *rujū'* and sexual intercourse with the divorced wife, but also results in enhanced prohibition that makes the woman unlawful for the man like the women of the prohibited category.

The only way the husband can remarry such a divorced wife is after her valid marriage to another man which must be consummated through sexual intercourse. The contract of the intervening marriage must not stipulate expressly that the husband will divorce the woman even if the inner intention of the husband is to divorce the woman. If a stipulation of divorce is made in such an intervening marriage contract, the resulting contract becomes irregular (*fāsid*) and cannot make the woman lawful for the first husband. Once the second husband divorces the woman, she becomes eligible for the first husband after the waiting period.

#### 8.4 When is Remarriage with Divorced Wife Permissible?

Where the number of repudiations used is less than three, as in the *aḥsan* form on completion of waiting period, or even where repudiations less than three are qualified as irrevocable, the resulting irrevocability is minor (*baynūnah ṣughra*).

Where the three repudiations are complete, whether they were qualified as revocable or irrevocable, the resulting irrevocability is enhanced or major (*baynūnah kubrā*).

In case of minor irrevocability, the husband can remarry his divorced wife without an intervening marriage. Thus:—

- (a) He can remarry his divorced wife, during the waiting period or after it, if he divorced her through a single irrevocable repudiation or through two irrevocable repudiations.
- (b) He can remarry his wife divorced through the *aḥsan* form of divorce after the divorce has become irrevocable (*bā'in*) on termination of the waiting period. Within the waiting period, the husband can exercise *rujū'* and there is no need of remarriage.
- (c) He can remarry his wife who was divorced prior to consummation of marriage.

In case of major irrevocability, the husband cannot remarry his divorced wife without an intervening marriage. Thus, he can remarry his divorced wife, who was divorced through the *hasan* form, in which three repudiations were completed in three separate periods; or was divorced through the deviant form in which three repudiations were pronounced at once, after she has married another man through a valid marriage contract, consummated the marriage with him, and is divorced by him.

## 8.5 Waiting Period ('*iddah*) and its Legal Effects

### 8.5.1 The meaning and types of '*iddah* (waiting period)

The word '*iddah*' in its literal sense means "number." In its technical sense, it means the "period" stipulated for the termination of the remaining effects of the contract of marriage. According to al-Shāfi'ī, it means the "act" of waiting. Waiting period applies to a woman whose marriage has been consummated.

There are three types of waiting period: (a) '*iddah* of menstrual periods, (b) '*iddah* of months, and (c) '*iddah* of pregnancy.

### 8.5.2 The waiting period ('*iddah*) of menstrual periods

The purpose of the waiting period '*iddah* of menstrual periods is the "vacation of the womb." It is imposed as the right of the husband and as the right of Allah.

The '*iddah* of menstrual periods has two causes:

- (a) **Separation after valid contract:** The first is separation after a valid contract of marriage irrespective of the separation being caused by divorce or without divorce. The condition stipulated for this type of waiting period is that there be actual consummation or proper seclusion (*khalwah ṣahīhah*). Thus, the waiting period does not become obligatory without consummation and proper seclusion. Proper seclusion has been considered a sign of actual sexual intercourse for making the waiting period obligatory on account of the right of Allah. Improper seclusion (*khalwah fāsīdah*) does not serve this purpose.
- (b) **Separation after an irregular contract:** Separation after an irregular contract effected by a pronouncement of the *qādī* or by mutual separation. The condition for this type of separation is actual sexual intercourse. Seclusion (*khalwah*) is not stipulated as a condition in this of type waiting period.