

DESCRIPTION OF ṬALĀQ (DIVORCE)

6.1 *The meaning of ṭalāq and the general rule in the sharī'ah for ṭalāq*

6.1.1 **Literal meaning of ṭalāq**

The word *ṭalāq* in its literal sense means release from confinement or imprisonment. It is derived from the word *ṭlāq* (اطلاق), which means “freeing,” “liberation” and “releasing.” The different words derived from this basic meaning are used in various senses through separate verbal forms, thus, it is like saying, “I released my camel,” “I set free my prisoners,” “I divorced my wife.” The words *ṭalāq* and *ṭaṭlīq* are used for a woman, while *ṭlāq* is used for other things. The underlying meaning of both is “the elimination of confinement.” The word *ṭalāq* is equated with the English word “divorce” and is also used for a single pronouncement (repudiation), but the jurists often use the word *ṭaṭlīqah* for the single repudiation. In its technical sense it means, “the removal of the permissibility of physical access, for which the woman entered into the contract of *nikāḥ*, when the prescribed three counts (repudiations) are completed.”

6.1.2 **The technical meaning of ṭalāq and irrevocability**

The technical meaning is the same as the literal meaning. In its technical sense, *ṭalāq* (divorce) may be defined in two ways in order to highlight the aspect of irrevocability (*baynūnah*) where the word *bā'in* means “irrevocable.” The first definition is: “the removal of the permissibility of physical access, for which the woman entered into the contract of *nikāḥ*, when the prescribed three counts (repudiations) are completed.” This type of divorce creates enhanced or major irrevocability (*baynūnah kubrā*) and prevents remarriage to the wife without an intervening marriage. The second way alters this definition to state: “the removal of the permissibility of physical access, for which the woman entered into the contract of *nikāḥ*, when the prescribed three counts (repudiations) are *not* completed.” This is the minor form of irrevocability (*baynūnah suḡhrā*) that permits remarriage without an intervening marriage.

6.3.3 The general rule for talaaq

The general rule for talaaq is that it is permitted to terminate a marriage when the couple are incompatible, though it is a desecration act in the eyes of the shari'ah. Permitted means no reason has to be assigned for divorce.

Some jurists maintain that talaaq is permissible only in cases of necessity, otherwise it is not permitted. They argue on the authority of a hadith that says, "The curse of Allah on who takes" and divorce without a reason. The opponents of this view provide other arguments as well. In fact, I say that all forms of talaaq are permitted without restriction. The view adopted by the Hanafi school is that talaaq is permitted though it is desecration. The verses "There is no blame on you divorce women at their prescribed periods" (Qur'an 65:1) and "O Prophet! When ye do divorce women, divorce them at their prescribed periods" (Qur'an 65:4) also permit talaaq. In some reports marriage has been called desecration but these are idiosyncratic reports in which talaaq has been called the most desecrating thing. "The most desecrating of permissible things in the eyes of Allah is talaaq" Accordingly, the rule preferred generally is that talaaq is permitted though it is considered a desecration act.

For the four methods of removing the legal effect of the contract of marriage see section 6.4 on page 73.

6.4 The kinds of talaaq, khulaa, and the preferred form of divorce

Talaaq by way of designation is of two types: talaaq al-sunnah (the sunnah talaaq) and talaaq al-bid'ah (the bid'ah talaaq). These types are also called talaaq al-yaqeen (the yaqeen talaaq) and talaaq al-shak (the shak talaaq). Talaaq al-yaqeen is of two types as well: revocable (talaaq al-ra'ee) and irrevocable (talaaq al-ba'in).

6.1.3 The general rule for *ṭalāq*

The general rule for *ṭalāq* is that it is permitted to terminate the contract of *nikāḥ* when temperaments are incompatible, though it is considered a detestable act in the eyes of the *sharī'ah*. Permitted (*mubāḥ*) means no reason has to be assigned for divorce.

Some jurists maintain that *ṭalāq* is permissible only in case of extreme necessity, otherwise it is not permitted. They argue on the basis of a tradition that says, "The curse of Allah on who tastes⁴³ and divorces."⁴⁴ The upholders of this view provide other arguments as well. Imām al-Shāfi'ī says that all forms of *ṭalāq* are permitted without restriction or qualification. The view adopted by the Ḥanafī school is that *ṭalāq* is permitted though it is detestable. The verses "There is no blame on you if ye divorce women" [Qur'ān 2:236] and "O Prophet! When ye do divorce women, divorce them at their prescribed periods." [Qur'ān 65:1] indicate permissibility. In some reports marriage has been called slavery, but there are other reports in which *ṭalāq* has been called the most detestable thing: "The most loathesome of permissible things in the eyes of Allah is *ṭalāq*."⁴⁵ Accordingly, the rule preferred generally is that *ṭalāq* is permitted though it is considered a detestable act.

For the four methods of removing the legal effect of the contract of marriage see section 5.4 on page 72.

6.2 The kinds of *ṭalāq*, women, and the preferred form of divorce

Ṭalāq by way of description is of two types: *ṭalāq al-sunnah* (طلاق السنة) and *ṭalāq al-bid'ah* (طلاق البدعة). These types are also called *ṭalāq masnūn* (طلاق مسنون) and *ṭalāq makrūh* (طلاق مكروه). *Ṭalāq* or repudiation with respect to its finality is of two types as well: revocable (*raj'ī*) and irrevocable (*bā'in*).

Ṭalāq al-sunnah is viewed from two perspectives: from the perspective of time and from the perspective of number. The view from the perspective of number is based upon the distinction between free women and slave women, and is not mentioned here. *Ṭalāq* from the perspective

43. The word used is *dhawwāq*; that is, one who tastes things like a connoisseur.

44. The tradition is found in *Majma' al-Zawā'id* by Haythamī, however, it is considered weak by some.

45. It is recorded by many scholars including Abū Dāwūd though some consider it to be weak.

of time is of two types: *ṭalāq aḥsan* (preferred form of divorce) and *ṭalāq ḥasan* (acceptable or passable form of divorce).

Women for purposes of divorce are of two types: free women and slaves. Each type is again divided into *ḥāmilāt* (those who are pregnant) and *ḥā'ilāt* (those who are not pregnant). Those who are not pregnant are of two types: those whose affair is determined on the basis of periods (*dhawāt ul-aqrā'*) and those whose affair is determined on the basis of months (*dhawāt ul-ashhur*).

6.2.1 *Ṭalāq aḥsan* and its rules

The preferred form of divorce or *ṭalāq aḥsan*, for a wife whose affair is governed by periods, is when the husband pronounces a single revocable (*raj'ī*) repudiation in the period of purity, between two menses, when he has not had sexual intercourse with such wife during this period of purity, after which he does not have intercourse with her till her waiting period is over. This form of divorce was preferred by the Companions of the Prophet (God be pleased with them).

The preferred form of divorce or *ṭalāq aḥsan*, for a wife who is pregnant, is when the husband pronounces a single revocable (*raj'ī*) repudiation with the knowledge that she is pregnant, and then does not have intercourse with her till she completes her waiting period with the delivery of the child. He may repudiate her even though he has had sexual intercourse with her and pronounces the repudiation after such intercourse.

The preferred form of divorce for the woman who has had her menopause and no longer menstruates (one whose affair is determined by months) is similar to the form for the pregnant woman, except that she completes her waiting period at the end of the third month.

A woman who has irregular periods of purity, due to some ailment or because she is close to menopause, is divorced with a single repudiation under the *sunnah* form, and she is treated like those whose affair is based upon periods.

6.2.2 *Ṭalāq ḥasan* and its rules

The *ḥasan* form of divorce, for a wife whose affair is governed by periods, is when the husband pronounces a single revocable (*raj'ī*) repudiation in the period of purity, between two menses, when he has not had sexual intercourse with such wife, after which he does not have intercourse with her and pronounces the second revocable divorce in the next period of purity without intercourse in that period and finally pronounces the third repudiation in the third period of purity. Following the third

repudiation the woman completes her waiting period when she menstruates.

The *ḥasan* form of divorce, for a wife who is pregnant, is when the husband pronounces a single revocable (*raj'ī*) repudiation with the knowledge that she is pregnant, waits for the next month and pronounces the second repudiation followed by the third repudiation in the third month. For the divorce to be effective he is not to have intercourse with her after the first repudiation. The woman completes her waiting period with the delivery of the child. There are jurists who maintain that this form of divorce for the pregnant woman is futile as the purpose is the vacation of the womb, and the same result is achieved with the *aḥsan* form of divorce for such a woman.

The *ḥasan* form of divorce for the woman who has had her menopause and no longer menstruates (one whose affair is determined by months) is similar to the form for the pregnant woman in the *ḥasan* divorce, except that her waiting period is worked out on the basis of months.

6.2.3 Words used for the *sunnah* form of divorce and the role of intention

Words used for the *sunnah* form of divorce, that is, *ṭalāq aḥsan* and *ṭalāq ḥasan* are of two types: *naṣṣ* (explicit in the meaning of divorce) and *dalālah* (implication; equivocal or ambiguous in meaning).

The use of *naṣṣ* is like a husband saying to his wife, "You are divorced in accordance with the *sunnah*," when the husband has not formed an intention. If the woman is one whose affair is determined by periods, this will amount to a single repudiation if she is in a period of purity in which no intercourse has taken place.

Illustrations

1. If she was in her menstrual period or the repudiation was pronounced in a period of purity in which intercourse had taken place, the repudiation will not become effective at once, but will become effective when she has passed through another period of menstruation and has attained purity. This is due to use of the word *sunnah*, which prevents such repudiation to be transferred to the *bid'ah* (innovative form).
2. If he had formed an intention, while using the above words, to the effect that these will be three repudiations, then they are to be treated as the *ḥasan form* in which one revocable repudiation is pronounced in every period of purity.

3. If he had formed an intention that this is a single irrevocable repudiation, then it will not be construed as such, because the *sunnah* form does not accept an irrevocable repudiation.
4. If he had expressly stated, "You are divorced 'thrice' in accordance with the *sunnah*," without forming an intention, then it will be treated as the *hasan* form with each revocable repudiation taking effect in a separate period of purity. If, however, he had intended all three to take effect at once, the divorce will be valid, but it will not longer be the *sunnah* form.
5. The above views apply to the pregnant woman as well according to Abū Ḥanīfah and Abū Yūsuf. Imām Muḥammad says it amounts to a single revocable repudiation.

Dalālah or divorce by implication is like saying, "You are divorced through": *ṭalāq al-'iddah* (divorce of the waiting period), *ṭalāq al-'adl* (divorce of justice), *ṭalāq al-dīn* (divorce of religion), *ṭalāq al-Islām* (divorce of Islam), *ṭalāq al-ḥaqq* (divorce of Truth), *ṭalāq al-Qur'ān* (divorce of the Qur'ān), or *ṭalāq al-Kitāb* (divorce of the Book). All such forms are construed to mean one of the *sunnah* forms of divorce depending on the facts of each case.

6.2.4 *Ṭalāq bid'ah* or the deviant form of divorce

The *bid'ah* form of divorce is usually considered to be of two types, but a third type can also be identified. The first two types are : divorce depending upon time; and divorce depending upon number.

The type depending upon time is as follows:

- (a) A single revocable repudiation pronounced in the woman's state of menstruation when marriage has been consummated with her.
- (b) A single revocable repudiation pronounced in a period of purity in which sexual intercourse has taken place between husband and wife.

The type depending on number is the pronouncement of two or three repudiations in a single period of purity. The use of the words "twice" or "thrice" in a single statement is the same as two or three separate statements saying, "You are divorced," as long as the repudiations are to have effect in a single period of purity.

The words used are those that either imply the deviant form of divorce or are clear statements implying number. The word *sunnah* used to qualify such statements can alter meaning of such statements. (As in the section above)

The third type of deviant divorce occurs when divorce in the *aḥsan* or *ḥasan* is qualified as irrevocable (*bā'in*) instead of revocable (*raj'ī*). Irrevocability linked to *khul'* or divorce prior to consummation is not treated as *bid'ah* (deviation), and is considered to conform to the *Sunnah*.

The deviant forms of divorce, although disapproved, do take effect according to most jurists. The Shiah school maintains that they do not have any legal effect.