Al-Islam.org
Ahlul Bayt Digital Islamic Library Project
Published on *Al-Islam.org* (https://www.al-islam.org)

Return To The Divorcee (Al-Raj'ah):

Al-raj'ah in the terminology of legists is restoration of the divorcee and her marital status. It is valid by consensus and does not require a guardian, or *mahr*, or the divorcee's consent, or any action on her part, in accordance with the verses:

وَبُعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ

Their husbands are better entitled to restore them.. (***2:228***)

إذا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ

So when they have reached their prescribed term retain them honourably or separate from them honourably... (***65:2***)

The schools concur that it is necessary that the divorcee being restored be in the *'iddah* of a revocable divorce. Thus there is no *raj'ah* for: an irrevocable divorcee of an unconsummated marriage, because there is no *'iddah* for her; for a triple divorcee, because she requires a *muhallil*; and for the divorcee of *khul'* against a consideration, because the marital bond between the two has been dissolved.

There is consensus among the schools that the return is effected by oral word, and they consider it necessary that the pronouncement be complete and unconditional. Thus if the *raj'ah* is made contingent upon something (such as when he says: "I return to you if you so desire"), it will not be valid.[1] Accordingly, if neither an act nor a satisfactory declaration proving *raj'ah* takes place on his part after the unsatisfactory pronouncement and the period of *'iddah* expires eventually, the divorcee will become a stranger for him.

The schools differ regarding the possibility of *raj'ah* being effected by an act, such as sexual intercourse or its preliminaries, without any pronouncement preceding it. The Shafi'is observe: It is necessary that

raj'ah be either by spoken word or in writing. Thus it is not valid by intercourse even if he intends *raj'ah* through it, and such intercourse with her during *'iddah* is *haram*, making him liable to *mahr al-mithl* because it is an 'intercourse by mistake.'

The Malikis state: *Raj'ah* is valid by an act if it is with the intention of *raj'ah*. Thus, if he has intercourse without this intention, the divorcee will not return to him. But such intercourse does not make him liable to any penal consequences nor *mahr*, and if she becomes pregnant consequently, the child will be attributed to him; and if she does not become pregnant she will release herself after a single menstrual course.

The Hanbalis are of the opinion that *raj'ah* is valid by an act only if he has intercourse. Thus, where he has intercourse, she will be considered restored even if he does not intend it. Any act apart from intercourse, such as caressing and kissing, etc., does not result in *raj'ah*

According to the Hanafis, *raj'ah* is effected by intercourse, as well as caressing, kissing, etc., by the divorcer and the divorcee, provided it is with a sexual intent. Also. *raj'ah* by an act of one in sleep, or by an act performed absent-mindedly or under coercion, or in a state of insanity (as when the husband divorces his wife, turns insane, and has intercourse with her before the termination of her '*iddah*) is valid. (*Majma' al-anhur*, bab al-raj'ah)

The Imamiyyah state: *Raj'ah* is effected through intercourse, kissing and caressing, with and without a sexual intent, as well as by any other act which is not permissible except between a married couple. It is not necessary that *raj'ah* be preceded by an oral pronouncement, because the divorcee is a wife as long as she is observing '*iddah*, and all it requires is an intention of *raj'ah*. The author of *al-Jawahir* goes a step further, observing: "Perhaps the unconditional nature of the canonical texts (*al-nass*) and the fatwas requires that *raj'ah* take place by an act even if he does not intend to restore her by it." Sayyid Abu al-Hasan writes m *al-Wasilah*: "It is highly probable that it (the act) be considered *raj'ah* even if the intent is absent."

The Imamiyyah attach no significance to an act of a person in sleep or something done absent-mindedly, or under a false impression (such as his having intercourse under the impression that she is not his divorcee).

Raj'ah and Witnesses

The Imami, the Hanafi and the Maliki schools state: *Raj'ah* does not require witnessing, though it is desirable (*mustahabb*). A tradition narrated from Ahmad conveys the same, and so does the more reliable opinion of al-Shafi'i. Accordingly, it is possible to claim a consensus of all the schools regarding the non-necessity of witnesses in *raj'ah*.

Raj'ah of an Irrevocable Divorcee

The restoration of an irrevocable divorcee during *'iddah* is possible only in the case of a divorcee who has been granted *khul'* in return for a consideration, provided that the marriage has been consummated and the divorce is not one which completes three divorces. The four schools concur that the law applicable here is the one which applies to a stranger and requires a new marriage contract, along with *mahr*, her consent and the permission of the guardian (if necessary), with the exception that she is not required to complete *the 'iddah.* (*Bidayat al-mujtahid*, vol. 2)

The Imamiyyah observe: A divorcee of *khul'* is entitled to reclaim what she has paid as a consideration as long as she is in *'iddah*, provided the husband is aware of her reclaiming the consideration and has not married her sister or a fourth wife. Thus, when he is aware of it and there is no impediment, he is entitled to recant the divorce. By his recanting she becomes his lawful wife and there is no need for a new contract or *mahr*. If he becomes aware of her reclaiming the consideration but does not recant the divorce, the divorce which was irrevocable becomes revocable and all the rules applicable to it and its consequences will follow, and the divorcer will be compelled to restore what the divorcee had given him for divorcing her.

Disagreement During the 'Iddah

If there is a disagreement between the divorcer and a revocable divorcee, such as when he claims: "I have returned to her," and she denies it, the divorcer will be considered to have made the return if it takes place during the *'iddah*, and similarly if he denies having divorced her at all, because his saying this guarantees his connection with the wife.

The burden of proof rests on the divorcer to prove *raj'ah* if the two differ regarding it after the expiry of the *'iddah*. On his failing to do so, she will take an oath that he has not returned to her, if he claims having returned to her by an act (such as sexual intercourse, etc.). If the divorcer claims *raj'ah* by oral word and not by an act, she will take an oath that she knows nothing about it. According to Abu Hanifah, her word will be accepted without an oath. (Ibn 'Abidin)

If they differ regarding the expiry of *'iddah*, such as when she claims its expiry by menstruation in a period sufficient for creating the possibility of her claim being veracious, her word will be accepted, as per consensus, though the Imami, the Shafi'i and the Hanbali schools also require her to take an oath. The author of *al-Mughni* (vol.7, bab al-raj'ah) has narrated from al-Shafi'i and al-Khiraqi: "In all cases where we said that her word will be accepted, she will have to take an oath if the husband denies her claim."

If she claims the expiry of *'iddah* by the completion of three months, the author of *al-Mughni*, a Hanbali, and the author of *al-Shara'i*, an Imami, observe: The husband's word will be accepted. Both argue that the difference is in reality regarding the time of divorce and not the *'iddah*, and divorce being his act, his

word will be accepted.

But the author of *al-Jawahir* observes that the acceptance of the divorcer's word is in accordance with the principle of presumption regarding the continuation of *'iddah* (unless the opposite is proved) and the presumption that any new situation is a latter development; but it contradicts the literal import of the canonical texts and the prevalent opinion among the legists, which place the affair of *'iddah* in the woman's hand. He further adds: The sole possibility of her veracity in a matter concerning *'iddah* is sufficient for its acceptance. This preference in accepting her word is in accordance with the tradition:

فَوّض الله إلى النساء ثلاثة أشياء: الحيض والطهر والحمل

God has placed three things in the hands of women: menstruation, purity, and pregnancy.

In another tradition, menstruation and *'iddah* are mentioned instead of the above three.

1. The author of al-Jawahir and al-Masalik state that the mashhur opinion among the Imamiyyah legists is that a conditional raj'ah is not valid. The author of al-Masalik (vol.2, bab al-talaq) says: The more mashhur opinion is that raj'ah will not take place, and even those who consider contingent divorce valid hold this opinion by placing raj'ah alongside nikah.

Source URL:
https://www.al-islam.org/divorce-according-five-schools-islamic-law-muhammad-jawad-mughniyya/return-divorcee-al-rajah#comment-0