SHAR'I LEGAL OPINION ON OATH OF SUSPENDED DIVORCE (N.D.)

Introduction

Shaykh 'Ali of 'Arab al-'Ubaydiyya had divorced his wife by an oath of suspended repudiation of the category used to express determination in a matter that had nothing to do with his wife. He repeated the oath several times in circumstances that were probably beyond his control. The condition of the suspended repudiation materialized, and it seems that only then did someone draw his attention that his wife had been divorced by three successive repudiations; and that the only way to rehabilitate his marriage would be to have his wife marry someone else in an intermediate marriage before being legally permitted to him. All the law schools agree that the intermediate marriage must be contracted in good faith and consummated before it can be dissolved, and that the woman can only remarry her former husband upon the expiration of the waiting period (idda). The Hanafi school holds that the intermediate marriage is valid even with the intention to render the woman lawfully permitted again to her former husband (bi-qasd al-tah lil), provided that this intention is not explicitly expressed; other schools hold that such a marriage does not meet the requirements of the intermediate marriage and hence is null and void.

Shaykh 'Ali sought a remedy that would exempt him from the need to separate from his wife. Since the regional shari'a court was bound by the Ḥanafi doctrine, which could not offer him a satisfactory solution, he resorted to a Shafi'i muftī, who proposed three alternative solutions, to extricate him from the intermediate marriage, based on: (1) lack of intent to divorce the wife, which is a precondition for the validity of the divorce; (2) the revocability of regular divorce, which enables the divorcing husband to reinstate the marriage within the waiting period; and (3) the customary nature of the extant marriage, which does not meet the shari'a conditions for a valid (sahih) marriage and hence can be ignored.

The fatwā is not dated but was probably solicited prior to the enactment of the JFRL, 1951, since this law provides sufficient remedies for extricating the Shaykh from his predicament. Thus Article 70 provides, inter alia, that a suspended divorce intended as a threat to prevent something being done shall be null and void. In other words, its validity depends on whether the husband really intended to divorce his wife. Article 72 provides that a divorce accompanied by a number (and by implication, three successive divorces pronounced on one and the same occasion, as in the case under review), whether by word or sign, shall count only as a single revocable divorce.

The document demonstrates the important role of the Shafi'i muftì in bringing the Bedouin closer to Orthodox Islam by bridging the gap between the formalistic shari'a in its Ḥanafi version and customary tribal law.

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1 Based on Layish, “Fatwā and Islamization;” idem, “Fatwa and Accommodation.”
2 Cf. al-'Arīf, 133, art. 2 (Bedouin use Islamic expressions of triple divorce, such as anti muṭalaqa bi'l-thalātha kullanā tahillī tahrumī, anti muftaraq bi'l-thalātha).
3 Art. 82 of the JFRL, 1951; Anderson, “Jordan,” 202; Layish, Divorce, 99–100.
4 The law applicable in the West Bank prior to the 1951 law was the OFRL, 1917, as adopted by the British Mandate in 1919.
—concerning a man between whom and his brother’s son-in-law (sihr) ill-feeling and conflict arose because of the former’s objection to the [amount of the] mahr of the bride? The full [germane] (shaqīq) brother of the groom lost his temper. His temper got the better of him; he became very angry at the bride’s father, whereupon he uttered:

[I swear that] my wife, so-and-so, shall be forbidden to me (alayya al-harām); my brother shall not marry (yatahallal) that man’s daughter.7

When [people] approached the person who swore the oath, [trying to dissuade him from speaking as he did], [5] he repeated the oath of prohibition (harām) and the divorce [utterance] again and again: “The groom shall not marry the bride; she shall not enter my house.”8 Afterward, the contract [of marriage] (aqd) with the bride was concluded,9 and of course, his brother married her and consummated the marriage, and the bride entered the house concerning which an oath had been taken to the effect that she should not enter it.

Under these circumstances, we beg you to direct us by a responsum (jawāb),10 and yours are the wages and the reward (al-ajr wa’l-thawāb).11

The inquirer
ʿAlī [Muḥammad] Ḥasan

{10}ANSWER (JAWĀB)

As he has repeated the oath of prohibition (harām) and the divorce [utterance],12 the repudiation has become an established fact. This conclusion is inescapable because the condition to which the oath relates (al-mahlūfʿ alayhi) [the marriage and the entry of the bride into the house] has been fulfilled. As regards the oath of prohibition, it is an implicit declaration (kināya) which, to be effective, requires [the ascertainment of] the intent (niyya).13 If he

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6 This is a usual formula of request for a legal opinion (istiftā). That formula is also used in a request for a legal opinion from sharīʿ qādīs in Cyrenaica; see Layish, Shariʿa and Custom in Libya, 265, doc. 71; Layish & Davis, 124, doc. 158. It is noteworthy that an oral pleading to a tribal qādī in the Judean Desert usually employs the formula “aysh qawlukum” or “aysh raʾyukum”; see Glossary, s.v. ḥujja, 2 [Custom. Law] ḥijjih.

7 Although this formula would seem to consist of two independent sentences, it should be construed as a suspended repudiation in spirit involving an oath (al-yamīn bi’l-talaq), intended to emphasize the man’s determination, in this case—to prevent his brother’s marriage because of an excessive amount of mahr or some other reason. According to Ḥanafī doctrine, once the condition is fulfilled the divorce becomes effective. See Shalabi, 495–96; the literal meaning of tahāllala is “to render [the daughter] lawfully permitted [for marriage].”

8 After payment of the prompt mahr, the wife must obey her husband in the conjugal dwelling at any place chosen by him (the OFRL, 1919, art. 71): as the brothers lived in the same house, the bride’s entry into Shaykh ʿAlī’s house would have indicated that she had indeed married his brother.

9 The suspended repudiation seems to have made an impact upon the bride’s father: he probably agreed to reduce the mahr to an amount acceptable to the other party, thus removing the obstacle to the marriage.

10 Jawāb, in this document, is synonymous with fatwā. This use of the term is common among the Bedouin and occurs also in the shariʿa courts. Cf. Layish, Divorce, 184; idem, Shariʿa and Custom in Libya, Glossary.

11 The closing passage, a typically Islamic element, refers to wages and reward in the next world. This embellishment (note also the rhyme), an expression for religious sensibility and piety, is usual also among the Cyrenaican Bedouin; see Layish & Davis, 122, docs. 156/2–3.

12 That is, repeated the suspended repudiation involving an oath.

13 This rule reflects the Shāfiʿī (unlike the Ḥanafī) doctrine. See Shalabi, 480–81.