

FATWA

Islamic Laws of Divorce in Court.

Q. I would like you to give me a satisfactory answer with relevant quotes on the following issue: Here, in the United Kingdom, we have a considerable amount of Muslims who have made this country their home. By living here, they are obviously influenced by the culture and way of life, specifically in matters of marriage and divorce. Sometimes the man and at times, the woman files a petition for divorce, with the court issuing divorce proceedings and annulling the marriage. Mostly, the consideration of the woman is taken into account.

The following issues need clarification:

- * Is the divorce issued by the court approved and authorised?
- * If the man or woman files for a divorce, is the ruling in both cases the same or not?
- * If the divorce takes place, what type of divorce takes place?
- * When does the divorce take place in regard to the waiting period (iddah)?

In many circumstances, the woman is abused and mistreated. What measures can be adopted to remove these circumstances?

A. Allah ta'ala states in the Qur'aan, 'Men are the caretakers (qawwaamuna) of women, because of what Allah has favoured one over the other, and of what they spend of their property [on women].' (Qur'aan 4:34)

It is mentioned in a Hadith that the Prophet (Allah bless him and give him peace) said, 'Divorce (the authority to) is given to the one who hold the branch.' From the Islamic viewpoint, the right of divorce rest with an adult and sane Muslim male. It is mentioned in Durr el-Mukhtar (Chosen Pearls) and many books of sacred law, as follows, 'the one who has the right to divorce is the adult and sane husband..' (vol.2 pg.431). For this reason, a man has either the right to divorce his wife or make someone his representative.

For specific reasons, the Shari'ah has not given this right to women. Hence, a woman cannot divorce her husband, nor make anyone her representative. If a woman divorces her husband or makes the judge her representative or files a petition to divorce him, then the Shari'ah does not recognise nor approve this. The woman still remains in the marriage of her husband.

However, if circumstances arise in a woman's marriage and she cannot live anymore with her husband or fulfils his rights, then she is entitled to have the marriage annulled, on Shari'ah principles, by making an arrangement with the husband, giving some wealth and seeking divorce. Likewise, if the husband abuses her; does not support her; leaves her or deserts her; then she can resolve this by following the directives mentioned by the Scholars of Sacred Law in a book titled, 'al-Heelatun-Naajiza' (the Complete Solution).

We live in this country and have made it our permanent residence. This is not an Islamic country, neither are the laws Islamic, but are devised for the successful governance of the country. It is necessary for us, as citizens, to abide by the laws and live a peaceful life. It is our duty to fulfil the contract and agreement we have made, morally and legally. At the same time, we should follow the Shari'ah but not breaks the laws of the country.

The abovementioned issue has to be dealt in a similar manner; therefore, it is necessary to look at it in detail. Those who live in this country and are considered 'married' by either registering their marriage here or come to this country as husband and wife, are the ones who can file a petition for through the country court. The proceeding is as follows: the man or the woman (petitioner) has to write to the court giving reasons for wanting to separate from each other and annul the marriage. Thereafter, the judge sends a letter to the opposite party (respondent), titled 'Divorce Petition' and puts forward a few questions, which

have to be answered. But if the opposite party (respondent) acknowledges the letter by signing it, but does not answer it, then the judge processes the case according to the law, and finding sufficient causes, will write that the marriage has broken down irretrievably unless sufficient cause is shown to the court within six weeks and that there is no opposition between the parties. This is termed 'Decree Nisi'. If no one opposes this decree within this period, then the petitioner has to apply for a final decree and the judge issues a final and absolute divorce, which is termed 'Decree Absolute'. According to the law of the country, both are separated and their marriage is completely annulled. They are now free to marry someone else.

Let us look at the issues in the light of sacred Law:

1. If it is the case, where the man files a petition for divorce in the country court and demands a separation, then in this case, as the man has the right to divorce, he can use it or make someone else his representative. So, it is as if he has made the judge his representative to divorce his wife. It is not necessary that the representative be a Muslim, as is the case in the courts of this country. The divorce will take place issued by the judge and the woman can marry someone else after completing the waiting period (iddah). She does not need to take an Islamic divorce from her husband.

2. If it is the case where the woman files a petition for divorce and when the course case begun proceedings the man gave permission to the judge to proceed, in clear terms, then in this case also the divorce will take place.

3. The third issue is, if the man goes to his solicitors after having received the divorce petition to give a reply. Generally, the solicitor advises clients of no benefit in defending the case except delay with financial implication, with the court issuing the divorce in any case. Because of this, the solicitor writes tyhat both husband and wife will separate or the husband signs and sends the divorce petition to the county court, willingly. Therefore, in this case also the divorce will take place, because of the willing of the husband. It is mentioned in Fataawa Alamgiri, 'If the man says, 'give divorce to my wife', then this man has become his representative and agent.' (vol.5 pg.402).

And it is mentioned on page 407 of the same book, 'If the husband said to his wife, lets go to so and so (judge), in order that divorces you, she goes and is divorced to her, even though he (judge) is ignorant of being made the representative.

4. The fourth issue is, if the woman files for a divorce and the judge sends the divorce petition to the husband, but the man defends his case and is not willing to divorce her, but despite this the judge issues a divorce.

5. The fifth issue is, the husband acknowledges and accepts his mistakes and is willing to fulfil her rights, but the judge issues a divorce.

6. The fith issue is, the man receives the divorce petition but does not proceed with the case nor does he do anything to show his willingness to divorce her, but the judge issues a divorce.

7. The seventh issue is, if the woman files for divorce and the judge sends the divorce petition to the husband, but he refuses to defend his case and is not willing to divorce her, despite this the judge issues a divorce.

In the above four cases (4, 5, 6 and 7) are considered separated according to the law of the country, but not in Islamic Law, where they will still be considered married. The woman cannot marry another man. If she does, the marriage will be void and both will be considered living in sin, because the Shari'ah has not given the authority or right to seek divorce or making someone else a representative. Also, it is not permissible to solve the issue through the secular court system. In the above cases (4, 5, 6 and 7), the woman should make the husband willing to give divorce or refer to an Islamic Shari'ah Council working with correct Shari'ah principles.

As mentioned, the right to divorce or terminate a marriage is given to the husband, who is adult and sane, or the Muslim ruler because of his general authority or his authorised judge. Islam has not given the right to a non-Muslim judge or secular court. Where there is no Muslim judge or there is a Muslim judge but he does not or cannot follow the dictates of the Shari'ah, then the people of the area or country should establish a group or council dealing with such issues, like 'Islamic Shari'ah Councils'. They should be referred to in such issues. It is necessary upon these Council to follow the guidelines and conditions mentioned in Heelatun-Naajiza (the Complete Solution), otherwise the cases dealt by them will not be authorised.

Another issue is the prevalent mental gap between old and modern minds, resulting in many incidents of divorce taking place. Moulana Ashraf Ali Thanwi [may Allah sanctify his soul] mentioned in his colossus, 'al-Heelatun-Naajiza' (the Complete Solution) an 'agreement or written settlement' (iqraar naame), which should be followed cautiously.

There are three types of divorce in Islam: Talaq-e-Raj'ee (revocable divorce), Talaq Baain (Final irrevocable divorce) and Talaq-e-Mughallaza (irrevocable divorce).

The wordings of divorce done through the courts is as follows:

'... be dissolved unless sufficient cause be shown to the Court within six weeks from the making thereof why the said decree should not be made absolute, and no such cause having been shown, it is hereby certified that the said decree was on the, made final and absolute and that the said marriage was thereby dissolved.

The summary of the wordings is as follows:

No sufficient and satisfactory reason has been given, this is why the decree issued before will not be effected conclusively and marriage will be irretrievably broken down. Thus, Talaq Baain (final irrevocable divorce) will take place. The ruling of Talaq Baain is that the marriage is not completely broken down and the man has no right to return her, except after renewing the marriage. There is no need for Halaalah. If the woman does not want to renew the marriage, then she can remarry another man after having completed her waiting period (iddah). Divorce does not take place through the issuing of a Decree Nisi. However, it will take place during that moment and date when Decree Absolute is pronounced. The waiting period (iddah) will also start from that moment and day.

And Allah Ta'ala knows best

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