

Court Divorce (Talaq Al-Qadi)

Is a judge entitled to divorce someone's wife against his will? Abu Hanifah says: A judge is not entitled to divorce someone's wife, whatever the cause, except when the husband is *majbub*, *khasi* or *'anin*,¹ as mentioned earlier in the section on defects. Thus, failure to provide maintenance, intermittent absence, life imprisonment, etc., do not validate a woman's divorce without the husband's consent, because divorce is the husband's prerogative.

Malik, al-Shafi'i and Ibn Hanbal allow a woman to demand separation before a judge on certain grounds, of which some are the following:

1. Non-provision of maintenance: These three legists concur that when the incapability of a husband to provide essential maintenance is proved, it is valid for his wife to demand separation. But if his inability is not proved and he refuses to provide maintenance, al-Shafi'i observes: The two may not be separated; Malik and Ahmad remark: Separation may take place, because the failure to provide his maintenance is similar to insolvency. The law in Egypt explicitly validates the right to claim separation on the failure to provide maintenance.

2. Causing harm to the wife with word or deed: Abu Zuhrah, in *al-Ahwal al-shakhsiyyah* (page 358). says: It is stated in Egyptian law, Act 25 of 1929, that if a wife pleads harm being caused to her by the husband, so that the like of her cannot continue living with him, the judge will divorce her irrevocably on her proving her claim and after the judge's failing to reform the husband. If the wife fails to prove her claim but repeats her complaint, the judge will appoint two just arbitrators related to the couple to find out the reasons for the dispute and to make an effort to resolve it. On their failing to do so, they will identify the party at fault, and if it is the husband or both of them, they will cause their separation through an irrevocable divorce on the judge's order. This law is based on the opinion of Malik and Ahmad.

The Sunni Shari'ah courts in Lebanon rule separation if a dispute arises between them and two arbitrators specify the necessity of separation.

3. On harm being caused to a wife by the husband's absence, according to Malik and Ahmad, even if he

leaves behind what she requires as maintenance for the period of his absence. The minimum period after which a wife can claim separation is six months according to Ahmad, and three years according to Malik, though a period of one year has also been narrated from the latter. The Egyptian law specifies a year. Whatever the case, she will not be divorced unless he refuses both to come to her or to take her to the place of his residence. Moreover, Malik does not differentiate between a husband having an excuse for his absence and one who has none with regard to the application of this rule. Thus both the situations necessitate separation. But the Hanbalis state: Separation is not valid unless his absence is without an excuse. (*al-Ahwal al-shakhsiyyah* of Abu Zuhrah and *Farq al-zawaj* of al-Khafif)

4. On harm being caused to a wife as a result of the husband's imprisonment. Ibn Taymiyyah, a Hanbali, has explicitly mentioned it and it has also been incorporated in Egyptian law that if a person is imprisoned for a period of three years or more, his wife is entitled to demand separation pleading damage after a year of his imprisonment, and the judge will order her divorce.

Most Imamiyyah legists do not empower the judge to affect a divorce, regardless of the circumstances except in the case of the wife of a missing husband, after the fulfillment of the conditions mentioned earlier. This stand of the Imamiyyah is in consonance with the literal meaning of the tradition:

الطلاق بيد مَنْ أَخَذَ بِالسَّاقِ.

But a group of grand legal authorities (*al-maraji' al-kibar*) have permitted divorce by a judge, with a difference of opinion regarding its conditions and limitations. We cite their observations here.

Al-Sayyid Kazim al-Yazdi, in the appendices to *al-'Urwah (bab al-'iddah)*, has said: The validity of a wife's divorce by a judge is not remote if it comes to his knowledge that the husband is imprisoned in a place from where he will never return, and similarly where the husband though present is indigent and incapable of providing maintenance, along with the wife's refusal to bear it patiently.

Al-Sayyid Abu al-Hasan al-Isfahani, in the *bab al-zawaj* of *al-Wasilah* (under the caption, *al-qawl fi al-kufr*), writes: If a husband refuses to provide maintenance while possessing the means to do so and the wife raises the issue before a judge, the judge will order him to provide her maintenance or to divorce her. On his refusing to do either, and it not being possible to maintain her from his wealth or to compel him to divorce, the obvious thing which comes to the mind is that the judge will divorce her, if she so desires. Al-Sayyid Muhsin al-Hakim has given a similar fatwa in *Minhaj al-Salihin (bab al-nafaqat)*.

The author of *al-Mukhtalif* has narrated from Ibn Junayd that the wife has the option to dissolve marriage on the husband's inability to provide maintenance. The author of *al-Masalik*, while discussing the divorce of a missing person's wife, observes: As per an opinion, the wife is entitled to break off marriage on the basis of non-provision of maintenance due to pennilessness. The author of *Rawdat al-jannat* (vol.4), in the biographical account of Ibn Aqa Mubammad Baqir al-Behbahani, one of the great

scholars says: He wrote a treatise (*risalah*) on the rules of marriage concerning indigence, entitled *Muzhir al-mukhtar*. In it, he has upheld the validity of wife's annulling marriage in event of husband's refusing, despite his presence, to maintain or divorce her, even if his refusal is a result of poverty and indigence.

The Imams of the Ahl al-Bayt (A) are on record as having said: "If a husband fails to provide his wife clothes to cover her body (*'awrah*) and food to fill her stomach, the *imam* is entitled to separate them." This, along with other reliable traditions, especially the tradition:

الطلاق لمن أخذ بالساق,

bestows upon the Imami legist the authority to grant divorce on the fulfilment of the requisite conditions and no one may object to him for it as long as his act is in accordance with the principles of Islam and those of the legal schools.

There is no doubt that the scholars who have refrained from granting divorces have done so on account of caution and the fear lest this power should be misused by persons devoid of the necessary learning and commitment to the faith, resulting in divorces being granted without the fulfilment of the conditions of the Shari'ah. This is the sole reason which has caused me to refrain despite the knowledge that if I do so I would be justified before God. I consider that a sensible solution to this problem and one which would prevent every unfit person from exercising this authority is the appointment by the *maraji'* of reliable representatives in Iraq or Iran bound by certain conditions and limitations within which they may affect a divorce – as was done by al-Sayyid Abu al-Hasan al-Isfahani.

¹. For the meaning of these terms, see "Marriage according to Five Schools of Islamic Fiqh", Part 2, under "al-'Uyub (defects)", al-Tawhid, vol. IV, No.4, pp.39-41.

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