UK Divorce Process and its Compliability with the Sharī'a

Introduction

People of faith have two marriages and I am not referring to polygamy; of the two priority is given to the one recognised by the religious moral code they follow, which they will do without fail, and then sometimes the one recognised by UK law. Therefore there are two matters, a religious one and a civil one; Muslims marry through a nikāḥ primarily and may carry out the civil marriage for a number of reasons. A recent study by the UK government on Muslim marriages/divorces in particular (Secretary of State for Home Department, 2018) made a number of recommendations[1] which would mean the increase of civil marriages and that could unfortunately mean more civil divorces. Hence the importance of understanding whether a divorce obtained through the UK civil courts equates to a ṭalāq is paramount. Some have adopted the legitimacy of a ṭalāq taking place based upon the premise that the judge acts as an agent for the man, as the husband is in a position to unilaterally issue ṭalāq. This is when he is the petitioner or if he chooses not to defend the divorce during the process.[2] However, there is some doubt cast on this premise of wakāla and it is argued that the judge is independent and therefore cannot act on behalf of any party and as a result ṭalāq does not take place.[3] However in all these cases there has been no details on the actual divorce process and what documents are being considered with respect to ṭalāq. It is the author's intention to highlight the UK divorce process and hand-in-hand compare and contrast it with the sharī'a as understood by the Ḥanafī school in order to determine its compliance and whether a ṭalāq occurs during the process.

The Stages of the UK Divorce Process

Stage One - Petition

The UK Divorce Process

The husband or wife can apply for a divorce petition and this person is then referred to as the petitioner. In order for this process to be initiated the Form D8 (divorce petition) must be sent to the court together with the marriage certificate and Statement of Reconciliation.

[1] Secretary of State for Home Department, (2018), The Independent Review into the Application of Sharia in England and Wales, Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFG_Report_into_Sharia_Law_in_the_UK_WEB.pdf, Accessed on 22nd March 2018.

[2] Fatwa from Darul-Iftaa wal-Irshaad (2003); Indian Fiqh Academy Fatwa (2010) ; Draft Document Fiqh Council Birmingham (2012); daruliftabirmingham.co.uk/would-a-court-divorce-be-counted-as-an-islamic-divorce/ daruliftabirmingham.co.uk/court-divorce/ https://www.central-mosque.com/index.php/Relationships/court-divorce.html

[3] Various Fatawa on Civil Divorce and Talaq (2007); Majlis Rebuttal of Fatwa from Darul-Iftaa wal-Irshaad Parts 1 and 2 (2009); Majlis Rebuttal of Indian Fiqh Academy Fatwa (2010); Rebuttal to Indian Fiqh Academy (2010); www.askimam.org/public/question_detail/33926

Sharīʿa

Similarly, the husband and wife may initiate the divorce process, however there is no need to involve and engage with Islamic moral experts except for seeking advice. Witnesses are advised to be in attendance, their names and details should be recorded, so that both petitioner and respondent do not issue contrary statements in the future. However, many divorces are issued by the husband in the absence of everyone but the wife, and in fact it can take place even in her absence; therefore it will be rare to organise it as described above. One may argue that divorce could take place in the heat of the moment which may be regrettable to both parties and as a result would be better arranged as above, however the soundness of the divorce is based on the moral code that the couple have chosen to live their lives by rather than its emotional outcome. This is a paramount difference between the UK legal process and the Sharīʿa as the judge decides to divorce based on sound grounds and reasonable probability in the first case and is the husband in the latter, even if there are no grounds for ṭalāq.

The UK Divorce Process

For the petitioner to be successful, he or she must show that the marriage has irretrievably broken down by establishing one of the following five facts as proof:

Adultery of the other spouse;

Unreasonable behaviour of the other spouse;

Desertion of the other spouse after two years;

Separation with consent after two years;

Separation without consent after five years.

After a few days of the court receiving the petition, it will send the petitioner Form D9H (notice of issue of petition) confirming receipt of the petition and also when this was sent to the respondent. The court sends a copy of the petition, acknowledgement of service and marriage certificate to the other spouse, known as the respondent.

If the respondent has instructed a family lawyer to act on his or her behalf, then these documents will be sent to them. Where the reason for the divorce is adultery, a copy of the petition must be sent to this person. This person is known as the co-respondent, however, their name does not have to appear on the petition.

Sharīʿa

There is no need for the petitioner to demonstrate that the marriage has irretrievably broken down; a divorce can occur without it. However, divorce is considered a morally undesirable act and as such should be based on sound grounds in order to avoid the sin of intentionally engaging in an abhorrent act.

Some grounds for divorce are mentioned below and are gender specific:

The husband not providing residency or maintenance or sexual intimacy and the wife not providing sexual intimacy or challenging the authority of her husband. This is based on a traditional set-up and many marriages are now based on the woman being financially independent and as a result may not be considered grounds for divorce. The other obvious grounds are those based on criminal acts like spouse-abuse and beating or other forms of cruelty.

The following details the sharīʿa's position with respect to the five grounds for divorce, which have been repeated here for discussion.

Adultery of the other spouse; adultery is a grave sin in Islam, however committing grave sins do not impact on the suitability of the spouse as long as the rights of the spouse are met. Having said that, most couples would struggle in that relationship and there is sufficient evidence in the tradition in which it is grounds for ṭalāq.

Unreasonable behaviour of the other spouse; this is open to interpretation and would have to be serious for it to be considered as grounds for ṭalāq.

Desertion of the other spouse after two years, separation with consent after two years and separation without consent after five years are not grounds for ṭalāq as such, therefore the nikāḥ would have to be dissolved if the absence was over a certain period of time and the wife was left to fend for herself.

As is evident, in all the above scenarios the husband would have to pronounce ṭalāq, otherwise in all cases a Qādī or board of ʿUlamāʾ would have to dissolve the nikāḥ. This could be problematic in the last three cases if he was meeting her rights but was absent for great lengths of time.

In the above two stages the divorce according to the sharīʿa would have taken place whereas according to UK divorce process there are a number of other stages which are required. Our focus now will be that does the British law courts process bring about not only the legal divorce but also the ṭalāq which is the Islamic divorce that brings an end to the nikāḥ, the Islamic marriage. The three fundamental areas which require analysis are

a) Does the husband give ṭalāq to the wife in the process of a UK divorce? This is based on the premise that irrespective who the petitioner is for divorce, it is the husband only who can issue ṭalāq unless he does not and then a Qāḍī or board of ʿUlamāʾ dissolve the nikāḥ.
b) Can the husband make the judge a wakīl and deputise him to issue a ṭalāq based on the assumption that the judge is acting as his representative in the UK divorce process?
c) Can the judge dissolve the nikāh like the way the Qāḍī or board of ʿUlamaʾ can, when the husband refuses and there are sufficient grounds for ṭalāq?

Stage Two - Respondent

Within 8 days (including the day of receipt) of the petition and statement of arrangements from the court, the respondent must send to the court Form D10 (acknowledgement of service). The respondent must state on the form if he or she intends to defend the petition and if the claims for costs are disputed.

If the respondent intends to defend the divorce, within 29 days (including the day of receipt) of the petition from the Court, he or she must send to the Court a defence known as an 'Answer'. A defended divorce leading to a final contested hearing is unusual as the majority of parties reach an agreement during divorce proceedings. A defended divorce leading to a final hearing is also very expensive, public and can be reported through the press.

If the petitioner knows that the respondent intends to defend the case but does not respond within 29 days, then she can apply for directions for trial (also known as the application for Decree Nisi). The petitioner must complete Form D84 (application for Decree Nisi) and Form D80 (Statement in Support of Divorce) which are provided free from a court office. There are different versions of Form D80 for each of the five grounds for divorce.

If the respondent does not file either the acknowledgement of service or Answer to petition within 14 days of receipt of the petition, the petitioner then needs to effect service in such a manner so that the Court is satisfied that the respondent is aware (or reasonable attempts have been made to attempt service) of the proceedings. This can be done by personal service either by Court bailiff (Form D89 with a recent photograph of the respondent) or process server.

Sharīʿa

If the petitioner is the husband, then he would have already issued a ṭalāq or can do so with great ease, however the legal marriage would still exist and he would be required to engage with the civil divorce proceedings in order to dissolve that legal marriage; this is based on the fact that they are two separate 'marriages'. However, we will explore shortly any affect on the nikāḥ, if in the situation he is the petitioner and applies for divorce. Even if the wife as the respondent defends the case it would be very much a paper exercise as the sharīʿa would not permit them to live as husband and wife if a ṭalāq had been issued, and as we will see later, the divorce will be issued irrespectively. Therefore, this would in the main be when the wife is the petitioner as she has struggled to obtain a ṭalāq from her husband and is now seeking divorce through the divorce process. The aim would be that a successful outcome would bring about the necessary pressure on the husband and the realisation of the futility of holding out on issuing a ṭalāq.

Wife is Petitioner

In the situation where the wife is the petitioner then the question is, if the husband chooses not to defend the case, does that constitute a ṭalāq? As it seems to be suggested that he has in that one statement made the judge his wakīl and then issued instructions to him, to divorce his wife on his behalf. The husband's response could be to the accusations against him or the proceedings of the divorce case; in either scenario it seems very far fetched and cannot be accepted as plausible. Hence further discussions will focus on the husband being the petitioner and an undefended divorce, paying particular attention to the three questions raised at the end of stage one; having said that, we will touch upon this scenario as and when required.

Husband is Petitioner

On the petition in its current form the husband will choose as to what he is applying for:

I apply for divorce, dissolution or judicial separation.

A dissolution is used by a same sex couple to end the civil partnership. This would have no impact on the nikāḥ.

A judicial separation is used when the husband and wife are no longer seen as a couple legally, but are still married. This would have no impact on the nikāḥ either, as it is not a divorce.

A divorce is used to end the legal marriage between a couple.

This is a ṣarīḥ, explicit statement of divorce which could bring about a ṭalāq rajʿī. The question that requires answering is, does this constitute some form of wakāla and does a revocable divorce take place?

Stage Three - Decree Nisi

If the divorce is not defended, then upon receiving the duly completed Form D10 (acknowledgement of service) from the respondent, the petitioner can apply to the Court for the decree nisi. The petitioner must complete Form D84 (application for Decree Nisi) and Form D80 (Statement in Support of Divorce).

Once the court receives the application for the decree nisi, a District Judge will review the paperwork to ensure that it is in order. If this is so, the court will send both the petitioner and the respondent Form D84A (certificate of entitlement to a decree) informing of the time and date the judge will grant a decree nisi.

The court then makes an appointment for the pronouncement, this being about 5 weeks after sending the application for a decree nisi to the court. It is not a requirement that the parties be present when the decree nisi is pronounced and the court will send to the petitioner, respondent and co-respondent Form D29 (decree nisi).

Sharī'a

The process to bring about a decree nisi does not constitute a ṭalāq as the husband makes no statement, nor signs any documents which could be considered as a written ṭalaq when the husband does not defend the case as a respondent. There is even less of a possibility when the husband as the respondent decides to defend the case. In that situation he will send an acknowledgement of the service form that he is defending the divorce. Proceedings can continue if the court judges that the paperwork was received by the husband and he had either delayed or refused to send them in. It is worth bearing in mind at this juncture that even if he defends the case the judge will pursue to determine if there are grounds for divorce and dissolve the marriage inspite of the husband resisting. Also that the judge will only proceed if a request for a decree nisi is made from the petitioner which challenges the concept that he is a wakīl for the husband, as his ability is restricted. Within 21 days he would have to 'give an answer' as to why the divorce should not go ahead. The court will then decide if the petitioner has grounds for divorce. This is very much like the Qāḍī dissolving the nikāḥ; however, in this case he is dissolving the civil marriage; the question which comes out from this is can this also be considered as a faskh of nikāḥ? In the case the husband is the petitioner then he would have to apply to the judge for a decree nisi of divorce in order to proceed, therefore his original petition cannot solely bring about divorce. This is an interesting point which will be raised during the discussion.

Stage Four - Decree Absolute

When the decree nisi is granted, 6 weeks and 1 day later the petitioner can apply for the final decree called the decree absolute and submit Form D36 (notice of application for decree nisi to be made absolute). This is processed within a few days and the Court can then grant the decree absolute making the divorce final. The court will send to the petitioner and respondent Form D37 (decree absolute).

If the petitioner does not apply for a decree absolute, then the respondent can apply 3 months after the date the petitioner could have applied for the decree absolute. This is 4½ months and 1 day after the decree nisi is granted. The petitioner can prevent the respondent from doing this if the petitioner can show that by doing so would create financial difficulties, where a final financial order for ancillary relief has not been granted.

Sharī'a

As we saw during stage three the husband as a petitioner has to request for the divorce to proceed by, in this case, applying for a decree absolute; again demonstrating the limitations on the judge, which questions the view of accepting him as a wakīl. Hence it is this statement and request which brings about divorce, and is the one which requires investigation as to whether a ṭalāq occurs. If the wife, as a respondent, applies for the decree absolute then even though the marriage could still be dissolved the nikāḥ will remain intact.

Discussion

Let us return to the main issues and discuss them and propose a position supported by classical sharī references, in which every effort has been made to keep to a minimum for the sake of brevity;

a) Does the husband give ṭalāq to the wife in the process of a UK divorce?
There is no evidence that the husband issues a ṭalāq during the UK divorce process. We now need to explore whether he deputises the judge to act on his behalf.

b) Can the husband make the judge a wakīl (agent) and deputise him to issue a ṭalāq based on the assumption that the judge is acting as his representative in the UK divorce process?
There are two possible scenarios in which this could arise; firstly when the husband is the petitioner and applies for a divorce and secondly when the wife is the petitioner and the husband chooses not to defend the case.
In the first case as the husband is applying to the judge for a divorce and as virtually all applications do result in the judge dissolving the divorce then could this bring about ṭalāq? There is good reason for accepting that the husband is asking the judge to issue the divorce on his behalf. As it is an application and the judge is an independent adjudicator, then it will be considered as al-ṭalāq al-mashīʾa (divorce at third-party's discretion), as this is tafwīḍ of ṭalāq, the transfer of ṭalāq to a third party; hence tamlīq takes place, as it is at the choice and discretion of the third party. In other words, the judge is made a mumallaq and not a wakīl by the husband (mumalliq). This also means it does not affect the independence of the judge as he decides whether to issue the divorce or not. If we adopt the understanding that the application is for a single ṭalāq rajʿī as he has selected the explicit word 'divorce', then this seems contrary to the outcome, as is evident from the decree absolute, "...and that the said marriage was thereby dissolved," which does not result in a ṭalāq rajʿī but rather a dissolution of the marriage. This would mean the husband cannot take his wife back, as she is irrevocably divorced, unless he marries her again; which may not be acting on the husband's request of a ṭalāq rajʿī. If we accept it as a ṭalāq bāʾin then the judge has not carried out the application of the husband. We can accept that as the judge has only been permitted to issue a ṭalāq rajʿī and he chooses to divorce the man's wife then only that occurs and the added descriptor of a faskh of the nikāḥ is irrelevant. Some have postulated that the term 'divorce' during the application is not a ṭalāq rajʿī but rather a ṭalāq bāʾin as the husband is applying for that type of divorce which would separate him from his wife completely as his marriage has irretrievably broken down. This is an interesting point on the use of the term 'divorce' and what it means to the average Muslim in the UK; we will return to this discussion soon. It is argued that there is a precedent for use of a term which should bring about a ṭalāq bāʾin but instead a ṭalāq rajʿī takes place; it is the case when allusive (kināya) terms that require an intention or circumstantial evidence in order to be considered as a ṭalāq bāʾin, but due to their accepted meaning for ṭalāq are treated as ṣarīḥ and as a consequence bring about a ṭalāq rajʿī. The following are example statements, 'Complete your waiting period', 'Vacate your womb' and 'You are alone.' However, this can occur one way and not the other; in other words when allusive terms become synonymous with the word

'ṭalāq' then the jurists can consider them as ṣarīḥ resulting in a ṭalāq rajʿī rather than a ṭalāq bāʾin. In fact even if his intention is an irrevocable divorce, during his application for divorce, due to the term being a direct expression, a ṭalāq rajʿī will occur. Therefore our discussion must return to our earlier point of ṭalāq rajʿī, which requires further discussion as the husband is requesting the judge to divorce his wife based on the grounds that his marriage has irretrievably broken down. Taking into consideration the aims of the husband, the divorce process and the fact that the marriage is absolutely over, then we need to understand the term 'divorce' as currently it is being accepted as a single utterance.

The Oxford dictionary[4] defines divorce (n.) as;

The legal dissolution of a marriage by a court or other competent body.
1.1 A legal decree dissolving a marriage.
1.2 A separation between things which were or ought to be connected.
'a divorce between ownership and control in the typical large company'

As a verb
1 Legally dissolve one's marriage with (someone)
1.1 Separate or dissociate (something) from something else, typically with an undesirable effect.
'religion cannot be divorced from morality'

1.2 divorce oneself from; Dissociate oneself from (something)

Merriam Webster[5] dictionary has a similar definition of divorce;
1 *law* : the action or an instance of legally dissolving a marriage

2: separation

Divorce of the secular and the spiritual

Origin and Etymology of divorce
Middle English *divorse*, from Anglo-French, from Latin *divortium*, from *divertere, divortere* to divert, to leave one's husband

Cambridge dictionary[6] is no different in that divorce is an official or legal process to end a marriage:

formal a separation:

divorce verb in reference to people - to end your marriage by an official or legal process

divorce verb in reference to other than people - to separate two subjects:

[4] Available at https://en.oxforddictionaries.com/definition/divorce; Accessed on 1st April 2018.

[5] Available at https://www.merriam-webster.com/dictionary/divorce; Accessed on 1st April 2018

[6] Available at https://dictionary.cambridge.org/dictionary/english/divorce; Accessed on 1st April 2018

Divorcee noun
UK /dɪˌvɔːˈsiː a man or a woman who is divorced and who has not married again

The legal and religious definitions are also the same.

Divorce n
[Middle French, from Latin *divortium* , from *divortere divertere* to leave one's marriage partner, from *di-* away, apart + *vertere* to turn]

: the dissolution of a valid marriage granted esp. on specified statutory grounds (as adultery) arising after the marriage.[7]

Bible linguistics experts use the word divorce and divorcement in relation to the biblical term, kàritu,t.[8]

Therefore, it is clear that the word divorce in reference to people means to end the marriage and a divorcee is a person who is divorced and not married again; as a result, it is accepted as a phrase for ṭalāq. This can also be seen in the etymological origins of the word.[9] Now that the word divorce has been established to refer to ṭalāq and it is a direct statement so it cannot be ṭalāq bāʾin that is issued but rather ṭalāq rajʿī, but not only that, it is not that type of divorce which states that the man and woman remain husband and wife but rather are no longer husband and wife. So, the term divorce through the UK courts cannot be considered ṭalāq bāʾin as the term is specifically for ṭalāq; it cannot constitute one ṭalāq rajʿī either, as divorce brings an end to one's marriage, which a single ṭalāq rajʿī does not, and it cannot be

[7] Available at http://dictionary.findlaw.com/definition/divorce.html; accessed on 1st April 2018

[8] The technical term for divorce or divorcement is kàritu,t. The root of this word is bàti,t, the word for "covenant," which means to "cut off." The idea of the root is that a covenant was an agreement solemnized by the cutting up of an animal, just as God had cut up the animals and passed between them in the covenant with Abraham (Gen. 15:18). Subjects of a covenant (i.e., the ones making the covenant) walk between the cut animals, saying by the action that they intend the same destruction of themselves, if they break the covenant, that they have done to the animals. In marriage, the reciprocity of the vows implies that the partners each will the same self-destruction if they break the terms. Thus, the word for divorcement speaks of the "cutting off of the offending party. It is as if they have received the self-appointed penalty for breaking their vows. The divorced person is "as if dead" to the former spouse. These ideas reveal how appropriate it was for divorce to become a righteous (though second-best) substitute for the death penalty.
This makes it clear that divorcement was meant to apply only to times when the partner had broken the covenant terms. In those cases, the divorce would function like an execution. The concept behind the term also shows how wrong it would be to cut off the partner who had not broken those terms. In that case, the divorce would be like murdering the innocent. The term kàritu,t, then, was meant to convey moral stigma against the divorced person. But that stigma was to be in the context of moral offense. Insofar as divorce could occur to an innocent party, it would be necessary to qualify this stigma. Available from https://bible.org/seriespage/17-biblical-terms-divorce; Accessed on 1st April 2018.

[9] "Divortere" is Divorce
To understand the full history of divorce, first the term should be defined. "Divorce" comes from the Latin word "divortium" which means separation. It is also equivalent to the word "divort" or "divortere." "Di" means apart and "vertere" means to turn to different ways. Divertere was also referred the meaning of divert, turn aside, separate or leave one's husband. The word was traced in French vocabulary in the later part of the 14th century and in the Middle English in the year 1350-1400.
Today, although divorce is expressed or defined in different ways, it expresses a single idea. Most common definitions of divorce include: (1) a judicial declaration dissolving the marriage in whole or in part releasing the husband and wife from the matrimonial obligation to live together; (2) any formal separation of husband and wife according to established customs; and (3) total separation or disunion or to disunite a marital union. Available at http://phillyesquire.com/history-of-divorce-meaning/; accessed on 1st April 2018

a dissolving of the marriage as the judge does not have the sharʿī capacity as will be discussed later. There is use of a similar term 'ṣāf ṭalāq' (absolute ṭalāq) which a community use in order to completely end the nikāḥ by implying three divorces and as a result ṭalāq mughallaẓa occurs[10]. As this is understood by the community from an ʿurf perspective and is applied as such, then we find the divorce application to be of a similar nature as it constitutes an absolute divorce with the end of the marriage.

Therefore, the correct way to understand this in its context of legal divorce process would be a divorce in absolute terms, an irrevocable divorce, as the term has the potential to mean the least (one) with the possibility of maximum (three) depending on intention as it is the genus term rather than the individual term. The intention is clear that when the petitioner is informed that the judge will dissolve the marriage upon his request then he is clear in his actions. As if he wanted to threaten or frighten his wife then that can be achieved through a ṭalāq rajʿī. There is a precedent for this when the husband uses generic nouns to divorce his wife and intends three divorces then three occur, of which an example was provided above. Hence if the husband is the petitioner and he applies for divorce in the absolute understanding of the term by requesting the judge to issue the divorce which results in the marriage being dissolved, then three ṭalāq rajʿī occur which brings an absolute end to the marriage (ṭalāq mughallaẓa) in which the two are separated absolutely. On a final note, some may argue that what is the point in the husband engaging with the civil courts when he can issue a ṭalāq with ease and little formality; in response we say that this is not what is being discussed, but rather if a man did engage with the legal divorce process then what would be the ramifications upon his nikāḥ. That would be it if the judge issued a dissolution of marriage on this application, but he does not. Based on what has been observed, when engaging with the divorce process we find that the judge issues no dissolution of the marriage after the Divorce Petition Form D8 is filled in and submitted. In other words, the judge does not, upon the request of the husband, issue ṭalāq through tafwīḍ and as he has tamlīq then it is limited to this point in time (majlis). The husband then makes another request to the judge to issue divorce in a similar manner as above when completing 'Application for a Decree Nisi' Form D84 with Statement in Support of Divorce Form D80, stating that the petitioner applies to the judge for a decree nisi of divorce. As in the petition one would expect that the judge has been given the authority to issue three ṭalāq rajʿī on behalf of the husband at his discretion. However as before he does not accept the offer of the husband and issues no divorce. The decree nisi is referred to as the 'Certificate of Entitlement to a Decree' in which it is proven that the petitioner "is entitled to a decree of divorce on the grounds that the marriage has irretrievably broken down." It is only when the husband completes Form D36 'Notice of Application for Decree Nisi to be made Absolute or Conditional Order to be made final,' that a decree absolute is issued and is certified on the decision's date by stating that the decree has been "made final and absolute and that the said marriage was thereby dissolved." In summary, the

[10] Mufti Maḥmūd al-Ḥasan al-Gangohī (2010), Fatāwā Maḥmūdiyya, Vol. 12, pp. 519-21, Dār al-Iftā Jāmiʿa Fārūqiyya, Karachi

husband petitioner has made one request for divorce via the original petition, which did not result in a divorce and the husband could have abandoned the proceedings at that point with his marriage intact. Then he made a second request when applying for divorce by applying for a decree nisi, which did not result in a divorce and again he could have abandoned the proceedings at the point, still married. It was only when he requested the judge to issue a divorce by applying for a decree absolute that the judge at his own discretion issued a divorce. The statement the husband, or his wakīl (solicitor) signs is as follows;

"The Petitioner applies for the decree nisi made in their favour on such-and-such date to be made absolute/final." The statement is not a direct statement of divorce but with the circumstantial evidence, is sufficient to constitute a ṭalāq bāʿin. The judge issues a divorce at his discretion, through tafwīḍ from the husband which affords him tamlīq, and the fact he has been involved and/or aware of the divorce proceedings. Therefore, a single ṭalāq bāʿin takes place only when the divorce proceedings go to completion and a absolute decree is issued.

Returning to the original question, then in the second case it can only be understood at the point the respondent (in the particular case of the husband) receives the petition for divorce and must acknowledge it via the D10 form. The question asked is, 'Do you intend to defend this case?' This has been understood that the husband is making the judge wakīl in order to issue a divorce to his wife when he responds with, 'No', or words to that effect. However, that is not the case, as the ʿaqd of wakāla requires an explicit statement of offer from the husband and a similar statement of acceptance from the judge, admittedly this can also be by action, however in both cases the intention must exist in both the husband (muwakkil) and the judge (wakīl). This does not happen from the judge and cannot be accepted to occur by the above answer to the question. In summary if there are no procedural issues, and one of the five grounds is met and not defended by the respondent, and a sworn affidavit is presented by the petitioner then the judge will dissolve the marriage based on this evidence. The judge's role is not to fact find and reach a decision that is beyond reasonable doubt, as required by the criminal courts, but be satisfied that on the balance of probabilities the petitioner is correct. *Chapter 9: Undefended Divorce: Procedure for Obtaining the Decree,* from 'A Practical Approach to Family Law'[11] a highly regarded text for both student and practitioner of UK family law, discusses the role of the judge; relevant parts have been quoted in full with my comments in square parantheses [ ].

> **9.55** Note that the fact that the respondent states in the acknowledgment that he or she intends to defend the divorce does not amount to a formal step towards defending. [If it is not a formal step then how can it be considered to be a statement in which the judge is being made an agent and then requesting him to issue a ṭalāq on behalf of the husband].
>
> **9.63** The district judge will not grant the decree nisi automatically. It is up to the applicant's solicitor to make a written application that he or she should do so (r 7.19 (1), FPR 2010). [This demonstrates that the husband as the

[11] Black, J. et al (2015), A Practical Approach to Family Law, Oxford University Press, Oxford, 10th Edition

petitioner will again transfer capacity to issue divorce at the judge's discretion so the first tafwīḍ is limited in terms of majlis up to this point].
b) a statement from the applicant in support of the petition (r 7.19 (4)). These statements...contain a statement of truth to be signed by the applicant.
ii) it is this statement that provides the district judge with evidence of the fact relied on in the petition and of irretrievable breakdown of marriage. It also replaces the need to attend court and to give oral evidence in front of a district judge.
c) any corroborative evidence on which the applicant intends to rely. It is not always easy to decide when the district judge will be satisfied with the applicant's evidence alone and when further independent evidence will be required.
i) the object of the exercise is, of course, to satisfy the district judge that the applicant is entitled to a decree. [We can observe clearly the role of the judge which is to reach a decision based on evidence, being independent and not acting on behalf of respondent].

9.78 If the district judge has certified that the applicant is entitled to a decree, decree nisi will be granted by a judge or district judge on the day fixed by the district judge.

The judge is clearly and without any ambiguity described as an independent adjudicator akin to the Qāḍī or a board of ʿUlamāʾ who dissolve a marriage on the behest of the petitioner, who is the wife, as the husband has no need to resort to a board. The ʿUlamāʾ will also balance the probabilities and request the respondent to engage with the process. We will next explore whether a judge within the UK divorce process can act as a Qāḍī.

قال لها طلقي نفسك فقالت أبنت نفسي

م: (وإن قال لها طلقي نفسك، فقالت: أبنت نفسي، طلقت) ش: أي رجعية، لأن المفوض رجعي، وقد أتت بزيادة وصف وهو البينونة، فيلغو ذلك م: (ولو قالت قد اخترت نفسي لم تطلق؛ لأن الإبانة من ألفاظ الطلاق) ش: فصلحت جوابا لقول الرجل طلقي نفسك، بخلاف ما إذا قالت اخترت نفسي، لأن الاختيار ليس من ألفاظ الطلاق.

قال لرجل طلق امرأتي

م: (وإذا قال لرجل طلق امرأتي فله أن يطلقها في المجلس وبعده، وله أن يرجع، لأنه توكيل واستعانة، فلا يلزم ولا يقتصر على المجلس) ش: أما جواز التطليق للوكيل فلأنه أقامه مقام نفسه، وأما جواز ذلك بدون قيد المجلس، فلأن الوكيل أجنبي وقد يقدر على أن يعين الوكيل في المجلس، وقد لا يقدر، فلم يقتصر على المجلس، وأما جواز رجوعه عن ذلك، فظاهر من كلام المصنف م:

(بخلاف قوله لامرأته طلقي نفسك، لأنها عاملة لنفسها، فكان تمليكا لا توكيلا) ش: فليس له الرجوع عن قوله.

م: (ولو قال لرجل طلقها إن شئت، فله أن يطلقها في المجلس خاصة، وليس للزوج الرجوع، وقال زفر: هذا) ش: أي هذا الحكم م: (والأول) ش: أي القول الأول، وهو قوله لأجنبي: طلق امرأتي بدون ذكر مشيئة م: (سواء) ش: في الحكم، وبه قال أصحاب الشافعي م: لأن التصريح بالمشيئة كعدمه) ش: لأنها لغو م: (لأنه) ش: أي لأن الرجل الذي قال له طلق امرأتي إن شئت م: (يتصرف عن مشيئته) ش: لا محالة م: (فصارت) ش: أي حكم هذا م: (كالوكيل بالبيع) ش: يعني إذا وكل رجلا يبيع شيئا م: (إذا قيل له) ش: يعني إذا قال له م: (بعه إن شئت) ش: يكون توكيلا لا تمليكا، ولا يخرج كلامه ذكر المسألة عن التوكيل، فكذا هذا.

البناية شرح الهداية ج٥ ص٣٩٥

قَالَ – رَحِمَهُ اللَّهُ – (وَلَوْ قَالَ لِرَجُلٍ طَلِّقْ امْرَأَتِي لَمْ يَتَقَيَّدْ بِالْمَجْلِسِ إلَّا إذَا زَادَ إنْ شِئْت)؛ لِأَنَّهُ تَوْكِيلٌ مَحْضٌ لَا يَشُوبُهُ تَمْلِيكٌ وَلَا تَعْلِيقٌ، وَلِهَذَا كَانَ لَهُ الرُّجُوعُ فَكَذَا لَا يَقْتَصِرُ عَلَى الْمَجْلِسِ بِخِلَافِ مَا إذَا قَالَ لَهَا طَلِّقِي نَفْسَك حَيْثُ يَلْزَمُ وَيَقْتَصِرُ عَلَى الْمَجْلِسِ؛ لِأَنَّهُ تَمْلِيكٌ وَتَعْلِيقٌ لِكَوْنِهَا عَامِلَةً لِنَفْسِهَا فِي رَفْعِ قَيْدِ النِّكَاحِ كَمَنْ يَرْفَعُ الْقَيْدَ الْحَقِيقِيَّ عَنْ رِجْلِهِ فَالتَّمْلِيكُ يَقْتَصِرُ عَلَى الْمَجْلِسِ وَالتَّعْلِيقُ يَلْزَمُ بِخِلَافِ الْأَجْنَبِيِّ فَإِنَّهُ عَامِلٌ لِغَيْرِهِ فَيَكُونُ تَوْكِيلًا مَحْضًا فَلَا يَقْتَصِرُ وَلَا يَلْزَمُ. وَأَمَّا إذَا زَادَ كَلِمَةَ إنْ شِئْت بِأَنْ قَالَ طَلِّقْ امْرَأَتِي إنْ شِئْتَ فَإِنَّهُ يَقْتَصِرُ عَلَى الْمَجْلِسِ وَيَلْزَمُ حَتَّى لَا يَكُونَ لَهُ الرُّجُوعُ، وَقَالَ زُفَرُ هُوَ الْأَوَّلُ سَوَاءٌ؛ لِأَنَّهُ تَوْكِيلٌ كَالْأَوَّلِ، وَهَذَا لِأَنَّهُ عَامِلٌ لِغَيْرِهِ وَبِذِكْرِ الْمَشِيئَةِ لَا يَكُونُ عَامِلًا لِنَفْسِهِ وَلَا مَالِكًا؛ لِأَنَّ التَّوْكِيلَ يَتَصَرَّفُ عَنْ مَشِيئَةٍ ذَكَرَهَا الْمُوَكِّلُ أَمْ لَا فَصَارَ كَالْوَكِيلِ بِالْبَيْعِ إذَا قِيلَ لَهُ بِعْهُ إنْ شِئْت وَلَنَا أَنَّ الْمَأْمُورَ يَصْلُحُ وَكِيلًا وَمَالِكًا؛ لِأَنَّ الْوَكِيلَ مَنْ يَتَصَرَّفُ بِرَأْيِ غَيْرِهِ وَالْمَالِكُ مَنْ يَتَصَرَّفُ بِرَأْيِ نَفْسِهِ سَوَاءٌ تَصَرَّفَ لِنَفْسِهِ أَوْ لِغَيْرِهِ فَإِذَا قَالَ لَهُ طَلِّقْهَا إنْ شِئْت كَانَ تَمْلِيكًا؛ لِأَنَّهُ فَوَّضَ الْأَمْرَ إلَى رَأْيِهِ وَالْمَالِكُ هُوَ الَّذِي يَتَصَرَّفُ عَنْ مَشِيئَتِهِ. وَأَمَّا الْوَكِيلُ فَمَطْلُوبٌ مِنْهُ الْفِعْلُ شَاءَ أَوْ لَمْ يَشَأْ. وَقَوْلُهُ؛ لِأَنَّ الْوَكِيلَ يَتَصَرَّفُ عَنْ مَشِيئَتِهِ إلَخْ قُلْنَا الْمُرَادُ بِالْمَشِيئَةِ مَشِيئَةٌ تَثْبُتُ بِالصِّيغَةِ وَمَا ذَكَرَ مِنْ الْمَشِيئَةِ لَيْسَتْ كَذَلِكَ وَإِنَّمَا نَشَأَتْ مِنْ عَدَمِ الْقُدْرَةِ عَلَى الْإِلْزَامِ وَكَلَامُنَا فِي مُوجِبِ الصِّيغَةِ، أَلَا تَرَى أَنَّهُ إذَا صَدَرَ مِمَّنْ لَهُ وِلَايَةُ الْإِلْزَامِ لَا يُفِيدُ الْوُجُوبَ إذَا قَالَ إنْ شِئْت وَإِلَّا أَفَادَ، وَلِأَنَّ الْأَجْنَبِيَّ بِالْأَمْرِ بِهِ صَارَ رَسُولًا لِكَوْنِهِ سَفِيرًا وَمُعَبِّرًا فَإِذَا قَالَ لَهُ إنْ شِئْت فَقَدْ جَعَلَهُ مُتَصَرِّفًا مَالِكًا لَا رَسُولًا مُبَلِّغًا بِخِلَافِ الْمَرْأَةِ نَفْسِهَا؛ لِأَنَّهَا لَا تَصْلُحُ رَسُولًا إلَى نَفْسِهَا فَكَانَتْ مَالِكَةً كَيْفَمَا كَانَ وَالتَّمْلِيكُ يَقْتَصِرُ عَلَى الْمَجْلِسِ وَلَا يَكُونُ لَهُ الرُّجُوعُ فِيهِ لِمَا فِيهِ مِنْ مَعْنَى التَّعْلِيقِ بِخِلَافِ الْبَيْعِ؛ لِأَنَّهُ لَا يَحْتَمِلُ التَّعْلِيقَ.

تبيين الحقائق شرح كنز الدقائق ج٢ ص٢٢٦/٧

[فَصْلٌ فِي قَوْلِهِ طَلِّقِي نَفْسَكِ]

(فَصْلٌ)

وَأَمَّا قَوْلُهُ: طَلِّقِي نَفْسَكِ فَهُوَ تَمْلِيكٌ عِنْدَنَا سَوَاءٌ قَيَّدَهُ بِالْمَشِيئَةِ أَوْ لَا وَيَقْتَصِرُ عَلَى الْمَجْلِسِ كَقَوْلِهِ أَنْتِ طَالِقٌ إنْ شِئْتِ. وَعِنْدَ الشَّافِعِيِّ هُوَ تَوْكِيلٌ وَلَا يَقْتَصِرُ عَلَى الْمَجْلِسِ قَيَّدَهُ بِالْمَشِيئَةِ أَوْ لَمْ يُقَيِّدْهُ، وَأَجْمَعُوا عَلَى أَنَّ قَوْلَهُ: لِأَجْنَبِيٍّ: طَلِّقْ امْرَأَتِي تَوْكِيلٌ وَلَا يَتَقَيَّد بِالْمَجْلِسِ، وَهُوَ فَصْلُ التَّوْكِيلِ فَإِنْ قَيَّدَهُ بِالْمَشِيئَةِ بِأَنْ قَالَ لَهُ طَلِّقْ امْرَأَتِي إنْ شِئْتَ فَهَذَا تَمْلِيكٌ عِنْدَ أَصْحَابِنَا الثَّلَاثَةِ وَعِنْدَ زُفَرَ هُوَ تَوْكِيلٌ فَوَقَعَ الْخِلَافُ فِي مَوْضِعَيْنِ.

أَمَّا الْكَلَامُ مَعَ الشَّافِعِيِّ فَوَجْهُ قَوْلِهِ أَنَّهُ لَوْ أَضَافَ الْأَمْرَ بِالتَّطْلِيقِ إلَى الْأَجْنَبِيِّ وَلَمْ يُقَيِّدْهُ بِالْمَشِيئَةِ كَانَ تَوْكِيلًا بِالْإِجْمَاعِ فَكَذَا إذَا أَضَافَهُ إلَى الْمَرْأَةِ وَلَمْ يُقَيِّدْهُ بِالْمَشِيئَةِ لِأَنَّهُ لَمْ يَخْتَلِفْ إلَّا الشَّخْصُ وَالصِّيغَةُ لَا تَخْتَلِفُ بِاخْتِلَافِ الشَّخْصِ. وَكَذَا إذَا قَيَّدَ بِالْمَشِيئَةِ؛ لِأَنَّ التَّقْيِيدَ بِالْمَشِيئَةِ وَالسُّكُوتَ عَنْهُ بِمَنْزِلَةٍ وَاحِدَةٍ؛ لِأَنَّهَا تُطَلِّقُ نَفْسَهَا بِمَشِيئَتِهَا وَاخْتِيَارِهَا إذْ هِيَ غَيْرُ مُضْطَرَّةٍ فِي ذَلِكَ فَكَانَ ذِكْرُ الْمَشِيئَةِ لَغْوًا فَكَانَ مُلْحَقًا بِالْعَدَمِ فَيَبْقَى قَوْلُهُ: طَلِّقِي نَفْسَك، وَأَنَّهُ تَوْكِيلٌ لِمَا ذَكَرْنَا فَلَا يَتَقَيَّدُ بِالْمَجْلِسِ كَمَا فِي الْأَجْنَبِيِّ، وَلَنَا لِبَيَانِ أَنَّ قَوْلَهُ لِامْرَأَتِهِ طَلِّقِي نَفْسَك تَمْلِيكٌ وُجُوهٌ ثَلَاثَةٌ: أَحَدُهَا أَنَّ الْمُتَصَرِّفَ عَنْ مِلْكٍ هُوَ الَّذِي يَتَصَرَّفُ بِرَأْيِهِ وَتَدْبِيرِهِ وَاخْتِيَارِهِ، وَالْمَرْأَةُ بِهَذِهِ الصِّفَةِ فَكَانَتْ مُتَصَرِّفَةً عَنْ مِلْكٍ فَكَانَ تَفْوِيضُ التَّطْلِيقِ إلَيْهَا تَمْلِيكًا بِخِلَافِ الْأَجْنَبِيِّ؛ لِأَنَّ ثَمَّةَ الرَّأْيَ وَالتَّدْبِيرَ لِلزَّوْجِ وَالِاخْتِيَارَ لَهُ، فَكَانَ إضَافَةُ الْأَمْرِ إلَيْهِ تَوْكِيلًا لَا تَمْلِيكًا.

وَالثَّانِي أَنَّ الْمُتَصَرِّفَ عَنْ مِلْكٍ هُوَ الَّذِي يَتَصَرَّفُ لِنَفْسِهِ، وَالْمُتَصَرِّفَ عَنْ تَوْكِيلٍ هُوَ الَّذِي يَتَصَرَّفُ لِغَيْرِهِ؛ وَالْمَرْأَةُ عَامِلَةٌ لِنَفْسِهَا لِأَنَّهَا بِالتَّطْلِيقِ تَرْفَعُ قَيْدَ الْغَيْرِ عَنْ نَفْسِهَا فَكَانَتْ مُتَصَرِّفَةً عَنْ مِلْكٍ،.

فَأَمَّا الْأَجْنَبِيُّ فَإِنَّهُ عَامِلٌ لِغَيْرِهِ لَا لِنَفْسِهِ؛ لِأَنَّ مَنْفَعَةَ عَمَلِهِ عَائِدَةٌ إلَى غَيْرِهِ فَكَانَ مُتَصَرِّفًا عَنْ تَوْكِيلٍ وَأَمْرٍ لَا عَنْ مِلْكٍ. وَالثَّالِثُ أَنَّ قَوْلَهُ لِامْرَأَتِهِ: طَلِّقِي نَفْسَك لَا يُمْكِنُ أَنْ يُجْعَلَ تَوْكِيلًا؛ لِأَنَّ الْإِنْسَانَ لَا يَصْلُحُ أَنْ يَكُونَ وَكِيلًا فِي حَقِّ نَفْسِهِ فَلَمْ يُمْكِنْ أَنْ تُجْعَلَ وَكِيلَةً فِي حَقِّ تَطْلِيقِ نَفْسِهَا، وَيُمْكِنُ أَنْ تُجْعَلَ مَالِكَةً لِلطَّلَاقِ بِتَمْلِيكِ الزَّوْجِ فَتَعَيَّنَ حَمْلُهُ عَلَى التَّمْلِيكِ بِخِلَافِ الْأَجْنَبِيِّ لِأَنَّهُ بِالتَّطْلِيقِ يَتَصَرَّفُ فِي حَقِّ الْغَيْرِ، وَالْإِنْسَانُ يَصْلُحُ وَكِيلًا فِي حَقِّ غَيْرِهِ وَاَللَّهُ الْمُوَفِّقُ.

وَأَمَّا الْكَلَامُ مَعَ زُفَرَ فَوَجْهُ قَوْلِهِ: أَنَّهُ لَوْ أَطْلَقَ الْكَلَامَ لَكَانَ تَوْكِيلًا فَكَذَا إذَا قَيَّدَهُ بِالْمَشِيئَةِ لِمَا مَرَّ أَنَّ التَّقْيِيدَ فِيهِ وَالْإِطْلَاقَ عَلَى السَّوَاءِ؛ لِأَنَّهُ إذَا طَلَّقَ طَلَّقَ عَنْ مَشِيئَةٍ وَلَا مَحَالَةَ لِكَوْنِهِ مُخْتَارًا فِي التَّطْلِيقِ غَيْرَ مُضْطَرٍّ فِيهِ، وَلَنَا وَجْهُ الْفَرْقِ بَيْنَ الْمُطْلَقِ وَالْمُقَيَّدِ وَهُوَ أَنَّ الْأَجْنَبِيَّ فِي الْمُطْلَقِ، فَيَتَصَرَّفُ بِرَأْيِ الْغَيْرِ وَتَدْبِيرِهِ وَمَشِيئَتِهِ فَكَانَ تَوْكِيلًا لَا تَمْلِيكًا.

وَأَمَّا فِي الْمُقَيَّدِ فَإِنَّمَا يَتَصَرَّفُ عَنْ رَأْيِ نَفْسِهِ وَتَدْبِيرِ نَفْسِهِ، وَمَشِيئَتِهِ وَهَذَا مَعْنَى الْمَالِكِيَّةِ؛ وَهُوَ التَّصَرُّفُ عَنْ مَشِيئَتِهِ وَهَذَا فَرْقٌ وَاضِحٌ بِحَمْدِ اللَّهِ تَعَالَى.

(وَأَمَّا) قَوْلُهُ: التَّقْيِيدُ بِالْمَشِيئَةِ وَعَدَمُهُ سَوَاءٌ؛ لِأَنَّهُ مَتَى طَلَّقَ طَلَّقَ عَنْ مَشِيئَةٍ، فَمَمْنُوعٌ أَنَّهُمَا سَوَاءٌ، وَأَنَّهُ مَتَى طَلَّقَ طَلَّقَ عَنْ مَشِيئَةٍ؛ فَإِنَّ الْمَشِيئَةَ تُذْكَرُ وَيُرَادُ بِهِمَا اخْتِيَارُ الْفِعْلِ وَتَرْكُهُ وَهُوَ الْمَعْنَى الَّذِي يَنْفِي الْغَلَبَةَ وَالِاضْطِرَارَ وَهُوَ الْمَعْنِيُّ بِقَوْلِنَا: الْمَعَاصِي بِمَشِيئَةِ اللَّهِ تَعَالَى، فَإِنَّ اللَّهَ تَعَالَى يَتَوَلَّى تَخْلِيقَ أَفْعَالِ الْعِبَادِ وَاَللَّهُ تَعَالَى غَيْرُ مَغْلُوبٍ وَلَا مُضْطَرٍّ فِي فِعْلِهِ وَهُوَ التَّخْلِيقُ، بَلْ هُوَ مُخْتَارٌ، وَتُذْكَرُ وَيُرَادُ بِهَا اخْتِيَارُ الْإِيثَارِ يُقَالُ: إنْ شِئْتُ فَعَلْتُ كَذَا وَإِنْ شِئْتُ لَمْ أَفْعَلْ أَيْ: إنْ شِئْت آثَرْتُ الْفِعْلَ وَإِنْ شِئْتُ آثَرْتُ التَّرْكَ عَلَى الْفِعْلِ وَهُوَ الْمَعْنِيُّ مِنْ قَوْلِنَا: الْمُكْرَهُ لَيْسَ بِمُخْتَارٍ، وَالْمُرَادُ مِنْ الْمَشِيئَةِ الْمَذْكُورَةِ هَهُنَا هُوَ اخْتِيَارُ الْإِيثَارِ لَا اخْتِيَارُ الْفِعْلِ وَتَرْكِهِ؛ لِأَنَّا لَوْ حَمَلْنَاهُ عَلَيْهِ لَلَغَا كَلَامُهُ، وَلَوْ حَمَلْنَاهُ عَلَى اخْتِيَارِ الْإِيثَارِ لَمْ يَلْغُ، وَصِيَانَةُ كَلَامِ الْعَاقِلِ عَنْ اللَّغْوِ وَاجِبٌ عِنْدَ الْإِمْكَانِ، وَاخْتِيَارِ الْإِيثَارِ فِي التَّمْلِيكِ لَا فِي التَّوْكِيلِ لِمَا ذَكَرْنَا أَنَّ الْوَكِيلَ يَعْمَلُ عَنْ رَأْيِ الْمُوَكِّلِ وَتَدْبِيرِهِ، وَإِنَّمَا يَسْتَعِيرُ مِنْهُ الْعِبَارَةَ فَقَطْ فَكَانَ الْإِيثَارُ مِنْ الْمُوَكِّلِ لَا مِنْ الْوَكِيلِ.

وَأَمَّا الْمُمَلَّكُ فَإِنَّمَا يَعْمَلُ بِرَأْيِ نَفْسِهِ وَتَدْبِيرِهِ وَإِيثَارِهِ لَا بِالْمُمَلِّكِ فَكَانَ التَّقْيِيدُ بِالْمَشِيئَةِ مُفِيدًا، وَالْأَصْلُ أَنَّ التَّوْكِيلَ لُغَةً هُوَ الْإِنَابَةُ، وَالتَّفْوِيضَ هُوَ التَّسْلِيمُ بِالْكُلِّيَّةِ لِذَلِكَ سَمَّى مَشَايِخُنَا الْأَوَّلَ تَوْكِيلًا وَالثَّانِيَ تَفْوِيضًا، وَإِذَا ثَبَتَ أَنَّ الْمُقَيَّدَ بِالْمَشِيئَةِ تَمْلِيكٌ وَالْمُطْلَقَ تَوْكِيلٌ وَالتَّمْلِيكَ يَقْتَصِرُ عَلَى الْمَجْلِسِ لِمَا ذَكَرْنَا أَنَّ الْمُمَلَّكَ إنَّمَا يَمْلِكُ بِشَرْطِ الْجَوَابِ فِي الْمَجْلِسِ لِأَنَّهُ إنَّمَا يَمْلِكُ بِالْخِطَابِ؛ وَكُلُّ مَخْلُوقٍ خَاطَبَ غَيْرَهُ يَطْلُبُ جَوَابَ خِطَابِهِ فِي الْمَجْلِسِ فَلَا يَمْلِكُ نَهْيَهُ عَنْهُ لِمَا مَرَّ، ثُمَّ التَّوْكِيلُ لَا يَقْتَصِرُ عَلَى الْمَجْلِسِ

بدائع الصنائع في ترتيب الشرائع ج٣ ص١٢٣

(وَ) أَمَّا فِي (طَلِّقِي ضَرَّتَكِ أَوْ) قَوْلُهُ لِأَجْنَبِيٍّ (طَلِّقْ امْرَأَتِي) فَ (يَصِحُّ رُجُوعُهُ) مِنْهُ وَلَمْ يُقَيِّدْ بِالْمَجْلِسِ لِأَنَّهُ تَوْكِيلٌ مَحْضٌ، وَفِي طَلِّقِي نَفْسَكِ وَضَرَّتَكِ كَانَ تَمْلِيكًا فِي حَقِّهَا تَوْكِيلًا فِي حَقِّ ضَرَّتِهَا جَوْهَرَةٌ (إلَّا إذَا عَلَّقَهُ بِالْمَشِيئَةِ) فَيَصِيرُ تَمْلِيكًا لَا تَوْكِيلًا. وَالْفَرْقُ بَيْنَهُمَا فِي خَمْسَةِ أَحْكَامٍ: فَفِي التَّمْلِيكِ لَا يَرْجِعُ وَلَا يَعْزِلُ وَلَا يَبْطُلُ بِجُنُونِ الزَّوْجِ وَيَتَقَيَّدُ بِمَجْلِسٍ لَا بِعَقْلٍ، فَيَصِحُّ تَفْوِيضُهُ لِمَجْنُونٍ وَصَبِيٍّ لَا يَعْقِلُ، بِخِلَافِ التَّوْكِيلِ بَحْرٌ،

الدر المختار

(قَوْلُهُ تَفْوِيضٌ وَتَوْكِيلٌ) الْمُرَادُ بِالتَّفْوِيضِ تَمْلِيكُ الطَّلَاقِ كَمَا يَأْتِي.

وَذَكَرَ فِي الْفَتْحِ فِي فَصْلِ الْمَشِيئَةِ أَنَّ صَاحِبَ الْهِدَايَةِ جَعَلَ مَنَاطَ الْفَرْقِ بَيْنَ التَّمْلِيكِ وَالتَّوْكِيلِ مَرَّةً بِأَنَّ الْمَالِكَ يَعْمَلُ بِرَأْيِ نَفْسِهِ بِخِلَافِ الْوَكِيلِ، وَمَرَّةً بِأَنَّهُ عَامِلٌ لِنَفْسِهِ بِخِلَافِهِ، وَمَرَّةً بِأَنَّهُ يَعْمَلُ بِمَشِيئَةِ نَفْسِهِ بِخِلَافِهِ. قَالَ: وَالْفَرْقُ بَيْنَ الرَّأْيِ وَالْمَشِيئَةِ أَنَّ الْعَمَلَ بِالرَّأْيِ عَمَلٌ بِمَا يَرَاهُ أَصْوَبَ بِلَا اعْتِبَارِ كَوْنِهِ لِنَفْسِهِ أَوْ غَيْرِهِ، وَالْعَمَلُ بِمَشِيئَتِهِ أَيْ بِاخْتِيَارِهِ ابْتِدَاءً بِلَا اعْتِبَارِ مُطَابَقَةِ أَمْرِ الْآمِرِ وَلَا اعْتِبَارِ مَعْنَى الْأَصْوَبِيَّةِ، ثُمَّ قَالَ بَعْدَمَا بَحَثَ فِي الْأَوَّلَيْنِ أَنَّ الْفَرْقَ الثَّالِثَ أَصْوَبُ

(قَوْلُهُ فَيَتَوَقَّفُ عَلَى قَبُولِهَا فِي الْمَجْلِسِ) أَرَادَ بِالْقَبُولِ الْجَوَابَ، وَالضَّمِيرُ فِي يَتَوَقَّفُ عَائِدٌ عَلَى التَّطْلِيقِ الْمَفْهُومِ مِنْ قَوْلِهِ فَلَهَا أَنْ تُطَلِّقَ لَا عَلَى التَّمْلِيكِ لِمَا صَرَّحُوا بِهِ مِنْ أَنَّ هَذَا التَّمْلِيكَ يَتِمُّ بِالْمُمَلِّكِ وَحْدَهُ، وَلَا يَتَوَقَّفُ عَلَى الْقَبُولِ لِكَوْنِهَا تَطْلُقُ بَعْدَ التَّفْوِيضِ وَهُوَ بَعْدَ تَمَامِ التَّمْلِيكِ كَمَا أَوْضَحَهُ فِي الْفَتْحِ وَالنَّهْرِ، وَبِهِ عُلِمَ أَنَّ هَذَا التَّمْلِيكَ لَا يَتَوَقَّفُ تَمَامُهُ عَلَى الْقَبُولِ وَلَا عَلَى

الْجَوَابِ فِي الْمَجْلِسِ لِأَنَّ الْجَوَابَ: أَيْ التَّطْلِيقَ بَعْدَ تَمَامِهِ وَإِنَّمَا الْمُتَوَقِّفُ عَلَى الْجَوَابِ هُوَ صِحَّةُ التَّطْلِيقِ فَافْهَمْ (قَوْلُهُ فَلَمْ يَصِحَّ رُجُوعُهُ) تَفْرِيعٌ عَلَى كَوْنِهِ لَيْسَ تَوْكِيلًا، فَإِنَّ الْوِكَالَةَ غَيْرُ لَازِمَةٍ فَلَوْ كَانَ تَوْكِيلًا لَصَحَّ عَزْلُهَا قَالَ فِي الْبَحْرِ عَنْ جَامِعِ الْفُصُولَيْنِ: تَفْوِيضُ الطَّلَاقِ إلَيْهَا، قِيلَ هُوَ وِكَالَةٌ يَمْلِكُ عَزْلَهَا فَالْأَصَحُّ أَنَّهُ لَا يَمْلِكُهُ

مَأْمُورِهِ (قَوْلُهُ وَأَخَوَاتِهِ) الْأُولَى وَأُخْتَيْهِ، وَهُمَا: اخْتَارِي؛ وَأَمْرُكِ بِيَدِكِ. وَاعْلَمْ أَنَّ مَا ذَكَرَهُ الْمُصَنِّفُ هُنَا إلَى قَوْلِهِ وَجُلُوسُ الْقَائِمَةِ سَيَذْكُرُهُ أَيْضًا فِي فَصْلِ الْمَشِيئَةِ (قَوْلُهُ فَلَا يَتَقَيَّدُ بِالْمَجْلِسِ) أَمَّا فِي مَتَى وَمَتَى مَا فَلِأَنَّهُمَا لِعُمُومِ الْأَوْقَاتِ فَكَأَنَّهُ قَالَ فِي أَيِّ وَقْتٍ شِئْتِ فَلَا يَقْتَصِرُ عَلَى الْمَجْلِسِ، وَأَمَّا فِي إذَا وَإِذَا مَا فَإِنَّهُمَا وَمَتَى سَوَاءٌ عِنْدَهُمَا، وَأَمَّا عِنْدَهُ فَيُسْتَعْمَلَانِ لِلشَّرْطِ كَمَا يُسْتَعْمَلَانِ لِلظَّرْفِ لَكِنَّ الْأَمْرَ صَارَ بِيَدِهَا فَلَا يَخْرُجُ بِالشَّكِّ ح عَنْ الْمِنَحِ (قَوْلُهُ لِمَا مَرَّ) أَيْ مِنْ أَنَّهُ لَيْسَ تَوْكِيلًا بَلْ لَوْ صَرَّحَ بِتَوْكِيلِهَا لِطَلَاقِهَا يَكُونُ تَمْلِيكًا تَوْكِيلًا فِي الْبَحْرِ عَنْ الْفُصُولَيْنِ

(قَوْلُهُ أَوْ قَوْلُهُ لِأَجْنَبِيٍّ طَلِّقْ امْرَأَتِي) قَيَّدَ بِالطَّلَاقِ لِأَنَّهُ لَوْ قَالَ: أَمْرُ امْرَأَتِي بِيَدِكَ يَقْتَصِرُ عَلَى الْمَجْلِسِ وَلَا يَمْلِكُ الرُّجُوعَ عَلَى الْأَصَحِّ بَحْرٌ عَنْ الْخُلَاصَةِ فِي فَصْلِ الْمَشِيئَةِ وَلَوْ جَمَعَ لَهُ بَيْنَ الْأَمْرِ بِالْيَدِ وَالْأَمْرِ بِالتَّطْلِيقِ فَفِيهِ تَفْصِيلٌ مَذْكُورٌ هُنَاكَ (قَوْلُهُ فَيَصِحُّ رُجُوعُهُ) زَادَ الشَّارِحُ الْفَاءَ لِتَكُونَ فِي جَوَابِ أَمَّا الَّتِي زَادَهَا قَبْلُ (قَوْلُهُ لِأَنَّهُ تَوْكِيلٌ مَحْضٌ) أَيْ بِخِلَافِ طَلِّقِي نَفْسَكِ لِأَنَّهَا عَامِلَةٌ لِنَفْسِهَا فَكَانَ تَمْلِيكًا لَا تَوْكِيلًا بَحْرٌ (قَوْلُهُ كَانَ تَمْلِيكًا فِي حَقِّهَا) لِأَنَّهَا عَامِلَةٌ فِيهِ لِنَفْسِهَا وَقَوْلُهُ تَوْكِيلًا فِي حَقِّ ضَرَّتِهَا لِأَنَّهَا عَامِلَةٌ فِيهِ لِغَيْرِهَا وَالظَّاهِرُ أَنَّهُ لَيْسَ مِنْ عُمُومِ الْمَجَازِ وَلَا مِنْ اسْتِعْمَالِ الْمُشْتَرَكِ فِي مَعْنَيَيْهِ لِأَنَّ حَقِيقَةَ قَوْلِهِ طَلِّقِي وَاحِدَةٌ وَهُوَ الْأَمْرُ بِالتَّطْلِيقِ وَإِنْ اخْتَلَفَ الْحُكْمُ الْمُتَرَتِّبُ عَلَيْهِ بِاخْتِلَافِ مُتَعَلَّقِهِ كَمَا قَالَ الْآخَرُ طَلِّقِ امْرَأَتِي وَامْرَأَتَكَ فَإِنَّهُ وَكِيلٌ وَأَصِيلٌ فَافْهَمْ (قَوْلُهُ فَيَصِيرُ تَمْلِيكًا) فَلَا يَمْلِكُ الرُّجُوعَ لِأَنَّهُ فَوَّضَ الْأَمْرَ إلَى رَأْيِهِ، وَالْمَالِكُ هُوَ الَّذِي يَتَصَرَّفُ عَنْ مَشِيئَتِهِ وَالْوَكِيلُ مَطْلُوبٌ مِنْهُ الْفِعْلُ شَاءَ أَوْ لَمْ يَشَأْ

رد المحتار ج٣ ص٣١٥-٧ وكذا في الهداية ج٢ ص٣٨١

فَإِنْ كَانَ مُطْلَقًا بِأَنْ قَالَ: أَمْرُكِ بِيَدِك فَشَرْطُ بَقَاءِ حُكْمِهِ بَقَاءُ الْمَجْلِسِ وَهُوَ مَجْلِسُ عِلْمِهَا بِالتَّفْوِيضِ فَمَا دَامَتْ فِي مَجْلِسِهَا
فَالْأَمْرُ بِيَدِهَا؛ لِأَنَّ جَعْلَ الْأَمْرِ بِيَدِهَا تَمْلِيكُ الطَّلَاقِ مِنْهَا لِأَنَّهُ جَعَلَ أَمْرَهَا فِي الطَّلَاقِ بِيَدِهَا تَتَصَرَّفُ فِيهِ بِرَأْيِهَا وَتَدْبِيرِهَا كَيْفَ

وَسَوَاءٌ قَصُرَ الْمَجْلِسُ أَوْ طَالَ؛ لِأَنَّ سَاعَاتِ الْمَجْلِسِ جُعِلَتْ كَسَاعَةٍ وَاحِدَةٍ؛ لِأَنَّ اعْتِبَارَ الْمَجْلِسِ لِلْحَاجَةِ إلَى التَّأَمُّلِ وَالتَّفَكُّرِ وَذَلِكَ يَخْتَلِفُ بِاخْتِلَافِ الْأَشْخَاصِ وَالْأَحْوَالِ وَالْأَوْقَاتِ وَلَا ضَابِطَ لَهُ إلَّا الْمَجْلِسَ فَقُدِّرَ بِالْمَجْلِسِ وَلِهَذَا جَعَلَهُ الصَّحَابَةُ – رَضِيَ اللَّهُ عَنْهُمْ – لِلْمُخَيَّرَةِ فَيَبْقَى الْأَمْرُ فِي يَدِهَا مَا بَقِيَ الْمَجْلِسُ فَإِنْ قَامَتْ عَنْ مَجْلِسِهَا بَطَلَ؛ لِأَنَّ الزَّوْجَ يَطْلُبُ جَوَابَ التَّمْلِيكِ فِي الْمَجْلِسِ، وَالْقِيَامُ عَنْ الْمَجْلِسِ دَلِيلُ الْإِعْرَاضِ عَنْ جَوَابِ التَّمْلِيكِ فَكَانَ رَدًّا لِلتَّمْلِيكِ دَلَالَةً؛ وَلِأَنَّ الْمَالِكَ لَمَّا طَلَبَ الْجَوَابَ فِي الْمَجْلِسِ لَا يَمْلِكُ الْجَوَابَ فِي غَيْرِ الْمَجْلِسِ؛ لِأَنَّهُ مَا مَلَّكَهَا فِي غَيْرِهِ وَقَدْ اخْتَلَفَ الْمَجْلِسُ بِالْقِيَامِ فَلَمْ يَكُنْ فِي بَقَاءِ الْأَمْرِ فَائِدَةٌ فَيَبْطُلُ،

وَسَوَاءٌ كَانَ التَّمْلِيكُ بِكَلِمَةِ كُلَّمَا أَوْ بِدُونِهَا بِأَنْ قَالَ لَهَا: أَمْرُك بِيَدِك كُلَّمَا شِئْت لِمَا ذَكَرْنَا أَنَّ اخْتِيَارَهَا زَوْجَهَا رَدُّ التَّمْلِيكِ فَيَرْتَدُّ مَا جُعِلَ إلَيْهَا فِي جَمِيعِ الْأَوْقَاتِ هَذَا إذَا كَانَ التَّفْوِيضُ مُطْلَقًا عَنْ الْوَقْتِ فَأَمَّا إذَا كَانَ مُوَقَّتًا فَإِنْ أَطْلَقَ الْوَقْتَ بِأَنْ قَالَ: أَمْرُكِ بِيَدِكِ

إِذَا شِئْتِ أَوْ إِذَا مَا شِئْتِ أَوْ مَتَى مَا شِئْتِ أَوْ حَيْثُمَا شِئْتِ، فَلَهَا الْخِيَارُ فِي الْمَجْلِسِ وَغَيْرِ الْمَجْلِسِ وَلَا يَتَقَيَّدُ بِالْمَجْلِسِ حَتَّى لَوْ رَدَّتْ الْأَمْرَ لَمْ يَكُنْ رَدًّا.

وَلَوْ قَامَتْ مِنْ مَجْلِسِهَا أَوْ أَخَذَتْ فِي عَمَلٍ آخَرَ أَوْ كَلَامٍ آخَرَ فَلَهَا أَنْ تُطَلِّقَ نَفْسَهَا؛ لِأَنَّهُ مَا مَلَّكَهَا الطَّلَاقَ مُطْلَقًا لِيَكُونَ طَالِبًا جَوَابَهَا فِي الْمَجْلِسِ، بَلْ مَلَّكَهَا فِي أَيِّ وَقْتٍ شَاءَتْ، فَلَهَا أَنْ تُطَلِّقَ نَفْسَهَا فِي أَيِّ وَقْتٍ شَاءَتْ إلَّا أَنَّهَا لَا تَمْلِكُ أَنْ تُطَلِّقَ نَفْسَهَا إلَّا مَرَّةً وَاحِدَةً لِمَا نَذْكُرُ فَإِنْ وَقَّتَهُ بِوَقْتٍ خَاصٍّ بِأَنْ قَالَ: أَمْرُكِ بِيَدِكِ يَوْمًا أَوْ شَهْرًا أَوْ سَنَةً أَوْ قَالَ: الْيَوْمَ أَوْ الشَّهْرَ أَوْ السَّنَةَ أَوْ قَالَ: هَذَا الْيَوْمَ أَوْ هَذَا الشَّهْرَ أَوْ هَذِهِ السَّنَةَ لَا يَتَقَيَّدُ بِالْمَجْلِسِ وَلَهَا الْأَمْرُ فِي الْوَقْتِ كُلِّهِ تَخْتَارُ نَفْسَهَا فِيمَا شَاءَتْ مِنْهُ، وَلَوْ قَامَتْ مِنْ مَجْلِسِهَا أَوْ تَشَاغَلَتْ بِغَيْرِ الْجَوَابِ لَا يَبْطُلُ خِيَارُهَا مَا بَقِيَ الْوَقْتُ بِلَا خِلَافٍ؛ لِأَنَّهُ فَوَّضَ الْأَمْرَ إلَيْهَا فِي جَمِيعِ الْوَقْتِ الْمَذْكُورِ فَيَبْقَى مَا بَقِيَ الْوَقْتُ؛ وَلِأَنَّهُ لَوْ بَطَلَ الْأَمْرُ بِإِعْرَاضِهَا لَمْ يَكُنْ لِلتَّوْقِيتِ فَائِدَةٌ، وَكَانَ الْوَقْتُ وَغَيْرُ الْوَقْتِ سَوَاءً غَيْرَ أَنَّهُ إنْ ذَكَرَ الْيَوْمَ أَوْ الشَّهْرَ أَوْ السَّنَةَ مُنْكِرًا فَلَهَا الْأَمْرُ مِنْ السَّاعَةِ الَّتِي تَكَلَّمَ فِيهَا إلَى مِثْلِهَا مِنْ الْغَدِ وَالشَّهْرِ وَالسَّنَةِ؛ لِأَنَّ ذَلِكَ يَقَعُ عَلَى يَوْمٍ تَامٍّ وَشَهْرٍ تَامٍّ وَسَنَةٍ تَامَّةٍ وَلَا يَتِمُّ إلَّا بِمَا قُلْنَا.

بدائع الصنائع في ترتيب الشرائع ج٣ ص١١٣—٥

وكذا في رد المحتار ج٣ ص٣٣٢ والفتاوى الهندية ج ص٣٩٠ وفتاوى محمودية ج١٣ ص١٣٩

م: (**ولا يفتقر إلى النية لأن صريح فيه لغلبة الاستعمال**) ش: أي على الطلاق ولا دلالة على البينونة، وهذا بإجماع الفقهاء. وقال داود: يفتقر الصريح إلى النية لاحتمال غير الطلاق.

قلت: هذا الاحتمال مرجوح، فلا يعتبر نفي الاستعمال في الطلاق والنية في تعيين المبهم والإبهام فيه م: (وكذا) ش: أي وكذا يكون معقبًا للرجعة م: (إذا نوى الإبانة) ش: بلفظ الصريح م: (لأنه قصد تنجيز ما علقه الشرع بانقضاء العدة فيرد عليه) ش: كالوارث إذا قتل مورثه يحرم الميراث، لأنه قصد تعجيل ما أخره الشرع.

البناية شرح الهداية ج٥ ص٣٠٦

قال أنت الطلاق أو أنت طالق الطلاق أو أنت طالق طلاقًا

م: (ولو قال: أنت الطلاق أو أنت طالق الطلاق أو أنت طالق طلاقًا، فإن لم تكن له نية أو نوى واحدة) ش: أي أو نوى بواحد من هذه الألفاظ الثلاث طلقة واحدة م: (أو اثنتين) ش: أي أو نوى طلقتين م: (فهي) ش: أي الطلقة بهذه الألفاظ طلقة م: (واحدة رجعية) ش: فوقع الطلاق بهذه الألفاظ ظاهرًا لأنها صريحة في الطلاق لغلبة الاستعمال فيه م: (وإن نوى ثلاثًا) ش: أي ثلاث طلقات طلقة م: (فثلاث. ووقوع الطلاق باللفظة الثانية) ش: وهو قوله أنت طالق الطلاق م: (والثالثة) ش: أي وقوع الطلاق باللفظة الثالثة، وهو قوله: أنت طالق طلاقًا م: (ظاهر) ش: بالرفع خبر لقوله ووقع الطلاق. م: (لأنه) ش: أي لأن الرجل م: (لو ذكرت النعت) ش: أي الصفة م: (وحده يقع به الطلاق فإذا ذكره) ش: أي فإذا ذكر

النعت م: (وذكر المصدر معه) ش: أي مع النعت م: (وأنه) ش: أي والحال أن ذكر المصدر مع النعت م: (يزيده وكادة) ش: أي يزيد المصدر وكادة، أي تأكيدًا كقولك قمت قيامًا، وقعدت قعودًا، وقوله م: (أولى) ش: جواب إذا. م: (أما وقوعه باللفظة الأولى) ش: وهو قوله أنت الطلاق م: (فلأن المصدر قد يذكر ويراد به الاسم، يقال: رجل عدل، أي عادل) ش: للمبالغة م: (فصار) ش: أي قوله: أنت الطلاق م: (بمنزلة قوله أنت طالق) ش: م: (وعلى هذا لو قال: أنت طلاق، يقع الطلاق به أيضًا) ش: لأنه بمعنى طالق، والخلاف في قوله أنت الطلاق صريح أو كناية، فعندنا ومالك والشافعي في قول صريح.

وقال الشافعي: أنها كناية، وبه أخذ القفال.

فإن قلت: أنت الطلاق لو كان بمنزلة أنت طالق لما صح فيه نية الثلاث، كما لا يصح في أنت طالق. قلت: أجيب: بأن نية الثلاث إنما لا يصح في طالق، لأنه نعت فرد كما تقدم، وأما الطلاق فهو مصدر في أصله، وإن وصفت به يلمح فيه جانب المصدرية، وصحت نية الثلاث.وقال الطحاوي في " مختصره ": فلو قال: أنت طالق لم يكن أكثر من واحدة وإن نوى أكثر منها، وفرق بينه وبين أنت الطلاق للتعريف، وليس ذلك بمشهور بين أصحابنا.

م: (ولا يحتاج فيه إلى النية، ويكون رجعيًا لما بينا، أنه صريح الطلاق لغلبة الاستعمال فيه، وتصح نية الثلاث لأن المصدر يحتمل العموم والكثرة لأنه اسم جنس) ش: يتناول القليل والكثير م: (فيعتبر كسائر أسماء الأجناس فيتناول الأدنى) ش: وهو الواحد م: (مع احتمال الكل ولا تصح نية الثنتين فيها خلافًا لزفر) ش: فإنه يقول: يصح نية الثنتين وبه قال الشافعي ومالك.

م: (هو) ش: أي زفر م: (يقول: إن الثنتين بعض الثلاث، فلما صحت نية الثلاث) ش: بالإجماع م: (صحت نية بعضها ضرورة) ش: لأن المصدر يحتمل الواحدة والاثنين، ولهذا يصح أن يوصف به، فتصح النية، لأنه يحتمل لفظه. ويقول زفر: قال مالك والشافعي م: (ونحن نقول) ش: يعني في جواب زفر م: (نية الثلاث إنما صحت لكونه جنسًا) ش: أي لكون الثلاث جنسًا للطلاق من حيث العددية م: (حتى لو كانت المرأة أمة تصح نية الثنتين باعتبار معنى الجنسية في حقها) ش: لأن ذاك جنس طلاقها م: (أما الثنتان في حق الحرة عدد) ش: أي عدد محض لا واحد حقيقة، ولا واحد اعتبارًا م: (واللفظ) ش: أي لفظ الاثنين م: (لا يحتمل العدد) ش: لعدم صدق حد العدد عليه. م: (وهذا) ش: أي كون اللفظ لا يحتمل العدد م: (لأن معنى التوحد مراعى في ألفاظ الوحدان) ش: بضم الواو جمع واحد، قال الجوهري: الواحد أصل العدد، والجمع وحدان مثل شاب وشبان، ومراعاة التوحد إما باعتبار الذات كزيد وإما باعتبار النوع كرجل، وإما باعتبار الجنس كالحيوان، ولا تنوع في لفظ الطلاق. فلا بد من مراعاة التوحد فيه.

م: (وذلك) ش: أي مراعاة التوحد يكون بأحد الأمرين م: (إما بالفردية) ش: بطريق الحقيقة أو بطريق الاعتبار، وأشار إليه بقوله م: (أو الجنسية) ش: وهو بطريق الاعتبار كما قلنا إن صحة النية في الثلاث بقوله أنت طالق باعتبار أن الثلاث جنس طلاقها وهو واحد اعتبارًا عند تعدد الأجناس، فصحت النية بالثلاث باعتبار أن الثلاث واحد لا باعتبار أنها عدد م: (والمثنى بمعزل منهما) ش: أي الاثنان بمعزل من الفردية والجنسية، لأنه لم يوجد فيه معنى التوحيد لا بحسب الذات ولا بحسب الجنسية، ومعنى بمعزل بعيد عنه. وقال ابن دريد: يقال أنا عن هذا الأمر بمعزل أي متنح.

البناية شرح الهداية ج٥ ص٣٠٩-١١

فَأَمَّا إذَا قَالَ لَهَا أَنْتِ طَالِقٌ يَقَعُ بِهِ تَطْلِيقَةٌ رَجْعِيَّةٌ نَوَى أَوْ لَمْ يَنْوِ لِأَنَّ هَذَا اللَّفْظَ صَرِيحٌ فِي الطَّلَاقِ عِنْدَ النِّكَاحِ لِغَلَبَةِ الِاسْتِعْمَالِ فَلَا حَاجَةَ إلَى النِّيَّةِ فِيهِ وَلِأَنَّهُ يَخْتَصُّ بِالنِّسَاءِ وَلَا يُذْكَرُ لَفْظُ الطَّلَاقِ إلَّا مُضَافًا إلَى النِّسَاءِ، وَإِنَّمَا يُذْكَرُ فِي غَيْرِهِنَّ الْإِطْلَاقُ وَالْمَعْنَى الْمُخْتَصُّ بِالنِّسَاءِ النِّكَاحُ فَتَعَيَّنَ الطَّلَاقُ عَنْ النِّكَاحِ عِنْدَ الْإِضَافَةِ إلَيْهَا، وَكَذَلِكَ مَا يَكُونُ مُشْتَقًّا مِنْ لَفْظِ الطَّلَاقِ كَقَوْلِهِ قَدْ طَلَّقْتُكِ أَوْ أَنْتِ مُطَلَّقَةٌ إلَّا أَنَّهُ رُوِيَ عَنْ مُحَمَّدٍ – رَحِمَهُ اللَّهُ تَعَالَى – أَنَّهُ إذَا قَالَ أَنْتِ مُطْلَقَةٌ بِإِسْكَانِ الطَّاءِ وَتَخْفِيفِ اللَّامِ لَا يَكُونُ طَلَاقًا إلَّا بِالنِّيَّةِ لِأَنَّ هَذَا اللَّفْظَ غَيْرُ مُخْتَصٍّ بِالنِّسَاءِ وَلَوْ نَوَى بِقَوْلِهِ أَنْتِ طَالِقٌ ثَلَاثًا أَوْ اثْنَتَيْنِ لَا تَعْمَلُ نِيَّتُهُ عِنْدَنَا وَلَا يَقَعُ عَلَيْهَا إلَّا وَاحِدَةً رَجْعِيَّةً.

وَنِيَّةُ الثَّلَاثِ إنَّمَا تَصِحُّ بِاعْتِبَارِ مَعْنَى الْعُمُومِ لِأَنَّهُ تَفْوِيضٌ، وَالتَّفْوِيضُ قَدْ يَكُونُ خَاصًّا وَالْمُفَوَّضُ إلَيْهَا بِهَذَا اللَّفْظِ طَلَاقٌ، وَذَلِكَ ثَابِتٌ فِي هَذَا اللَّفْظِ لُغَةً وَالطَّلَاقُ بِمَنْزِلَةِ أَسْمَاءِ الْأَجْنَاسِ يَحْتَمِلُ الْعُمُومَ وَالْخُصُوصَ فَتَعْمَلُ نِيَّتُهُ فِي الْعُمُومِ، وَلَسْنَا نَقُولُ فِي قَوْلِهِ ثَلَاثًا أَنَّهُ نُصِبَ عَلَى التَّفْسِيرِ بَلْ هُوَ مَنْصُوبٌ بِنَزْعِ حَرْفِ الْخَافِضِ عَنْهُ مَعْنَاهُ بِثَلَاثٍ كَقَوْلِهِ {مَا هَذَا بَشَرًا} [يوسف: ٣١] أَوْ هُوَ مَنْصُوبٌ عَلَى طَرِيقِ الْبَدَلِ عَنْ مَصْدَرٍ مَحْذُوفٍ، وَمَعْنَاهُ طَلَاقٌ ثَلَاثًا، وَبِأَنْ صَحَّ الِاسْتِفْسَارُ عَنْ الْعَدَدِ فِي الْحِكَايَةِ فَذَلِكَ لَا يَدُلُّ عَلَى أَنَّهُ مِنْ مُحْتَمَلَاتِ اللَّفْظِ كَمَا يَصِحُّ الِاسْتِفْسَارُ عَنْ الشَّرْطِ وَالْبَدَلِ.

وَأَمَّا إذَا قَالَ أَنْتِ طَالِقٌ طَلَاقًا فَقَدْ رَوَى أَبُو يُوسُفَ عَنْ أَبِي حَنِيفَةَ رَحِمَهُمَا اللَّهُ تَعَالَى أَنَّهُ لَا تَعْمَلُ نِيَّةُ الثَّلَاثِ فِيهِ لِأَنَّ الْمَصْدَرَ يُذْكَرُ لِتَأْكِيدِ الْكَلَامِ يُقَالُ أَكَلْت أَكْلًا وَقُمْت قِيَامًا فَلَا تَسَعُ فِيهِ نِيَّةُ الثَّلَاثِ ثُمَّ وَلَئِنْ صَحَّتْ نِيَّةُ الثَّلَاثِ فَلَا تَصِحُّ بِاعْتِبَارِ الْعَدَدِ بَلْ بِاعْتِبَارِ مَعْنَى الْعُمُومِ لِأَنَّ الْمَصْدَرَ يَحْتَمِلُ الْكَثْرَةَ قَالَ اللَّهُ تَعَالَى {وَادْعُوا ثُبُورًا كَثِيرًا} [الفرقان: ١٤]، وَلِأَنَّ الْمَصْدَرَ يُضَارِعُ الِاسْمَ فَكَانَ هَذَا وَقَوْلُهُ أَنْتِ طَالِقٌ الطَّلَاقَ سَوَاءً، وَتَصِحُّ نِيَّةُ الثَّلَاثِ فِي قَوْلِهِ الطَّلَاقُ لِأَنَّهُ مِنْ أَسْمَاءِ الْأَجْنَاسِ مُحْتَمِلٌ لِلْعُمُومِ وَالْخُصُوصِ، وَلِأَنَّ الْأَلِفَ وَاللَّامَ لِاسْتِغْرَاقِ الْجِنْسِ فِيمَا لَا مَعْهُودَ فِيهِ

المبسوط للسرخسي ج٦ ص٧٤-٧

[بَابُ صَرِيحِ الطَّلَاق]

(قَوْلُهُ مَا لَمْ يُسْتَعْمَلْ إلَّا فِيهِ) أَيْ غَالِبًا كَمَا يُفِيدُهُ كَلَامُ الْبَحْرِ. وَعَرَّفَهُ فِي التَّحْرِيرِ بِمَا يَثْبُتُ حُكْمُهُ الشَّرْعِيُّ بِلَا نِيَّةٍ، وَأَرَادَ بِمَا اللَّفْظَ أَوْ مَا يَقُومُ مَقَامَهُ مِنْ الْكِتَابَةِ الْمُسْتَبِينَةِ أَوْ الْإِشَارَةِ الْمَفْهُومَةِ فَلَا يَقَعُ بِإِلْقَاءِ ثَلَاثَةِ أَحْجَارٍ إلَيْهَا أَوْ بِأَمْرِهَا بِحَلْقِ شَعْرِهَا وَإِنْ اعْتَقَدَ الْإِلْقَاءَ وَالْحَلْقَ طَلَاقًا كَمَا قَدَّمْنَاهُ لِأَنَّ رُكْنَ الطَّلَاقِ اللَّفْظُ أَوْ مَا يَقُومُ مَقَامَهُ بِمَّا ذُكِرَ كَمَا مَرَّ (قَوْلُهُ وَلَوْ بِالْفَارِسِيَّةِ) فَمَا لَا يُسْتَعْمَلُ فِيهَا إلَّا فِي الطَّلَاقِ فَهُوَ صَرِيحٌ يَقَعُ بِلَا نِيَّةٍ، وَمَا اُسْتُعْمِلَ فِيهَا اسْتِعْمَالَ الطَّلَاقِ وَغَيْرِهِ فَحُكْمُهُ حُكْمُ كِنَايَاتِ الْعَرَبِيَّةِ فِي جَمِيعِ الْأَحْكَامِ بَحْرٌ. وَفِي حَاشِيَةِ لِلْخَيْرِ الرَّمْلِيِّ عَنْ جَامِعِ الْفُصُولَيْنِ أَنَّهُ ذَكَرَ كَلَامًا بِالْفَارِسِيَّةِ مَعْنَاهُ إنْ فَعَلَ كَذَا تَجْرِي كَلِمَةُ الشَّرْعِ بَيْنِي وَبَيْنَك يَنْبَغِي أَنْ يَصِحَّ الْيَمِينُ عَلَى الطَّلَاقِ لِأَنَّهُ مُتَعَارَفٌ بَيْنَهُمْ فِيهِ. اهـ. قُلْت: لَكِنْ قَالَ فِي [نُورِ الْعَيْنِ] الظَّاهِرُ أَنَّهُ لَا يَصِحُّ الْيَمِينُ لِمَا فِي الْبَزَّازِيَّةِ مِنْ كِتَابِ أَلْفَاظِ الْكُفْرِ: إنَّهُ قَدْ اشْتَهَرَ فِي رَسَاتِيقِ شروان أَنَّ مَنْ قَالَ جَعَلْت كُلَّمَا أَوْ عَلَيَّ كُلَّمَا أَنَّهُ طَلَاقٌ ثَلَاثٌ مُعَلَّقٌ، وَهَذَا بَاطِلٌ وَمِنْ هَذَيَانَاتِ الْعَوَامّ اهـ فَتَأَمَّلْ.

مَطْلَبٌ " سن بوش " يَقَعُ بِهِ الرَّجْعِيُّ [تَنْبِيهٌ] قَالَ فِي الشُّرُنْبُلَالِيَّةِ: وَقَعَ السُّؤَالُ عَنْ التَّطْلِيقِ بِلُغَةِ التُّرْكِ هَلْ هُوَ رَجْعِيٌّ بِاعْتِبَارِ الْقَصْدِ أَوْ بَائِنٌ بِاعْتِبَارِ مَدْلُولِ " سن بوش " أَوْ " بوش أَوَلَ " لِأَنَّ مَعْنَاهُ خَالِيَةٌ أَوْ خَلِيَّةٌ فَيَنْظُرُ. اهـ. قُلْت: وَأَفْتَى الرَّحِيمِيُّ تِلْمِيذُ الْخَيْرِ الرَّمْلِيِّ بِأَنَّهُ رَجْعِيٌّ وَقَالَ كَمَا أَفْتَى بِهِ شَيْخُ الْإِسْلَامِ أَبُو السُّعُودِ. وَنَقَلَ مِثْلَهُ شَيْخُ مَشَايِخِنَا التُّرْكُمَانِيُّ عَنْ فَتَاوَى عَلِيِّ أَفَنْدِي مُفْتِي دَارِ السَّلْطَنَةِ وَعَنْ الْحَامِدِيَّةِ

رد المحتار ج٣ ص٣٤٧

فهو الإيجاب والقبول فالإيجاب من الموكل أن يقول: " وكلتك بكذا " أو " افعل كذا " أو " أذنت لك أن تفعل كذا " ونحوه. والقبول من الوكيل أن يقول: " قبلت " وما يجري مجراه، فما لم يوجد الإيجاب والقبول لا يتم العقد؛ ولهذا لو وكل إنسانا بقبض دينه فأبى أن يقبل، ثم ذهب الوكيل فقبضه لم يبرأ الغريم؛ لأن تمام العقد بالإيجاب والقبول، وكل واحد منهما يرتد بالرد قبل وجود الآخر، كما في البيع ونحوه

ثم ركن التوكيل قد يكون مطلقا؛ وقد يكون معلقا بالشرط، نحو أن يقول: " إن قدم زيد؛ فأنت وكيلي في بيع هذا العبد " وقد يكون مضافا إلى وقت بأن يقول: " وكلتك في بيع هذا العبد غدا "، ويصير وكيلا في الغد فما بعده، ولا يكون وكيلا قبل الغد؛ لأن التوكيل إطلاق التصرف، والإطلاقات مما يحتمل التعليق بالشرط والإضافة إلى الوقت كالطلاق، والعتاق وإذن العبد في التجارة، والتمليكات كالبيع والهبة والصدقة والإبراء عن الديون، والتقييدات كعزل الوكيل، والحجر على العبد المأذون، والرجعة، والطلاق الرجعي لا يحتمل ذلك

بدائع الصنائع في ترتيب الشرائع ج ٦ ص ٢٠

وأما بيان ركن التوكيل.

وَالْحَاصِلُ أَنَّهَا فِي اللُّغَةِ بِمَعْنَى التَّوْكِيلِ وَهُوَ تَفْوِيضُ التَّصَرُّفِ إلَى الْغَيْرِ الثَّانِي فِي مَعْنَاهَا اصْطِلَاحًا فَهِيَ إقَامَةُ الْإِنْسَانِ غَيْرَهُ مَقَامَ نَفْسِهِ فِي تَصَرُّفٍ مَعْلُومٍ كَذَا فِي الْعِنَايَةِ إلَى الْغَيْرِ الثَّانِي فِي رُكْنِهَا وَهُوَ مَا دَلَّ عَلَيْهَا مِنْ الْإِيجَابِ وَالْقَبُولِ وَلَوْ حُكْمًا فَلَوْ قَالَ: وَكَلْتُك فِي هَذَا كَانَ وَكِيلًا بِحِفْظِهِ لِأَنَّهُ الْأَدْنَى فَيُحْمَلُ عَلَيْهِ هَكَذَا ذَكَرُوا وَقَيَّدُوا بِقَوْلِهِ فِي هَذَا لِأَنَّهُ لَوْ قَالَ: وَكَلْتُك فَقَالَ قَبِلْت الْوَكَالَةَ فَقَالَ الْوَكِيلُ: طَلَّقْت امْرَأَتَك ثَلَاثًا أَوْ أَعْتَقْت عَبْدَك فُلَانًا أَوْ زَوَّجْت بِنْتَك فُلَانَةَ مِنْ فُلَانٍ أَوْ تَصَدَّقْت مِنْ مَالِك بِكَذَا عَلَى الْفُقَرَاءِ فَقَالَ الرَّجُلُ: لَا أَرْضَى بِذَلِكَ فَهَذَا الْكَلَامُ مُتَوَجِّهٌ إلَى الَّذِي تَحَاوَرَا فِيهِ وَقَلِيلًا مَا يَكُونُ هَذَا الْكَلَامُ وَالتَّفْوِيضُ إلَّا بِنَاءً عَلَى سَابِقَةٍ تَجْرِي بَيْنَهُمَا فَإِنْ كَانَ كَذَلِكَ فَالْأَمْرُ عَلَى مَا تَعَارَفُوهُ بِمَا جَرَتْ الْمُخَاطَبَةُ فِيهِ فَإِنْ فَعَلَ شَيْئًا خَارِجًا مِنْ ذَلِكَ النَّوْعِ لَمْ يَنْفُذْ عَلَى الْمُوَكِّلِ دُونَ إنْفَاذِهِ كَذَا فِي خِزَانَةِ الْمُفْتِينَ.

البحر الرائق شرح كنز الدقائق ج٧ ص١٣٩

c) Can the judge dissolve the nikāḥ like the way the Qāḍī can when the husband refuses and there are sufficient grounds for divorce?
The judge cannot dissolve the nikāḥ as he is required to be Muslim and acting on the sharīʿa, which is not the practice within the UK civil courts. This wilāya is not found and the fact that it is a secular court dealing with secular issues.

وَفِي الْفَتْحِ: وَإِذَا لَمْ يَكُنْ سُلْطَانٌ، وَلَا مَنْ يَجُوزُ التَّقَلُّدُ مِنْهُ كَمَا هُوَ فِي بَعْضِ بِلَادِ الْمُسْلِمِينَ غَلَبَ عَلَيْهِمْ الْكُفَّارُ كَقُرْطُبَةَ الْآنَ يَجِبُ عَلَى الْمُسْلِمِينَ أَنْ يَتَّفِقُوا عَلَى وَاحِدٍ مِنْهُمْ، وَيَجْعَلُونَهُ وَالِيًا فَيُوَلِّي قَاضِيًا وَيَكُونُ هُوَ الَّذِي يَقْضِي بَيْنَهُمْ وَكَذَا يُنَصِّبُوا إمَامًا

يُصَلِّي بِهِمْ الْجُمُعَةَ اهـ. وَهَذَا هُوَ الَّذِي تَطْمَئِنُّ النَّفْسُ إلَيْهِ فَلْيُعْتَمَدْ نَعَمْ، وَالْإِشَارَةُ بِقَوْلِهِ: وَهَذَا إلَى مَا أَفَادَهُ كَلَامُ الْفَتْحِ مِنْ عَدَمِ صِحَّةِ تَقَلُّدِ الْقَضَاءِ مِنْ كَافِرٍ عَلَى خِلَافِ مَا مَرَّ عَنْ التَّتَارْخَانِيَّة، وَلَكِنْ إذَا وَلَّى الْكَافِرُ عَلَيْهِمْ قَاضِيًا وَرَضِيَهُ الْمُسْلِمُونَ صَحَّتْ تَوْلِيَتُهُ بِلَا شُبْهَةٍ تَأَمَّلْ

رد المحتار ج٥ ص٣٦٩ كتاب القضاء، مطلب في الاجتهاد وشروطه

وذكر في الملتقط: والإسلام ليس شرط فيه أي في السلطان الذي يقلد: وبلاد الاسلام التي في أيدي الكفرة لا شك أنها بلاد الاسلام لا بلاد الحرب لانها غير متاخمة لبلاد الحرب ولأنهم لم يظهروا حكم الكفرة بل القضاة المسلمون والملوك الذين يطيعونهم عن ضرورة المسلمين رإن كان من غير ضرورة فكذلك أيضاً وهو فساق

وكل مصر فيه وال مسلم من جهتهم يجوز منه إقامة الجمعة وأعياد وأخذ الخراج وتقليد القضاة وتزويج الأيامي لاستيلاء المسلم عليه فأما طاعته للكفرة فذلك موادعة ومخادعة وأما بلاد عليها ولاة الكفار فيجوز للمسلمين إقامة الجمعة والأعياد يصير القاضي قاضياً بتراضى المسمين ويجب عليهم أن يلتمسوا والياً مساماً منهم فعسى الله أن يأتي بالفتح أو أمر من عنده

الفتاوى التاتارخانية ج١١ ص٨-٩ كتاب أدب القاضى

وَأَمَّا بَيَانُ مَنْ يَصْلُحُ لِلْقَضَاءِ فَنَقُولُ: الصَّلَاحِيَّةُ لِلْقَضَاءِ لَهَا شَرَائِطُ (مِنْهَا) : الْعَقْلُ، (وَمِنْهَا) الْبُلُوغُ، (وَمِنْهَا) : الْإِسْلَامُ، (وَمِنْهَا) : الْحُرِّيَّةُ، (وَمِنْهَا) : الْبَصَرُ (وَمِنْهَا) : النُّطْقُ، (وَمِنْهَا) : السَّلَامَةُ عَنْ حَدِّ الْقَذْفِ؛ لِمَا قُلْنَا فِي الشَّهَادَةِ، فَلَا يَجُوزُ تَقْلِيدُ الْمَجْنُونِ وَالصَّبِيِّ، وَالْكَافِرِ وَالْعَبْدِ، وَالْأَعْمَى وَالْأَخْرَسِ، وَالْمَحْدُودِ فِي الْقَذْفِ؛ لِأَنَّ الْقَضَاءَ مِنْ بَابِ الْوِلَايَةِ، بَلْ هُوَ أَعْظَمُ الْوِلَايَاتِ، وَهَؤُلَاءِ لَيْسَتْ لَهُمْ أَهْلِيَّةُ أَدْنَى الْوِلَايَاتِ - وَهِيَ الشَّهَادَةُ - فَلَأَنْ لَا يَكُونَ لَهُمْ أَهْلِيَّةٌ أَعْلَاهَا أَوْلَى، وَأَمَّا الذُّكُورَةُ فَلَيْسَتْ مِنْ شَرْطِ جَوَازِ التَّقْلِيدِ فِي الْجُمْلَةِ؛ لِأَنَّ الْمَرْأَةَ مِنْ أَهْلِ الشَّهَادَاتِ فِي الْجُمْلَةِ، إلَّا أَنَّهَا لَا تَقْضِي بِالْحُدُودِ وَالْقِصَاصِ؛ لِأَنَّهُ لَا شَهَادَةَ لَهَا فِي ذَلِكَ، وَأَهْلِيَّةُ الْقَضَاءِ تَدُورُ مَعَ أَهْلِيَّةِ الشَّهَادَةِ.

(وَأَمَّا) الْعِلْمُ بِالْحَلَالِ وَالْحَرَامِ وَسَائِرِ الْأَحْكَامِ: فَهَلْ هُوَ شَرْطُ جَوَازِ التَّقْلِيدِ؟ عِنْدَنَا لَيْسَ بِشَرْطِ الْجَوَازِ، بَلْ شَرْطُ النَّدْبِ وَالِاسْتِحْبَابِ، وَعِنْدَ أَصْحَابِ الْحَدِيثِ كَوْنُهُ عَالِمًا بِالْحَلَالِ وَالْحَرَامِ؛ وَسَائِرِ الْأَحْكَامِ؛ مَعَ بُلُوغِ دَرَجَةِ الِاجْتِهَادِ فِي ذَلِكَ شَرْطُ جَوَازِ التَّقْلِيدِ، كَمَا قَالُوا فِي الْإِمَامِ الْأَعْظَمِ.

بدائع الصنائع في ترتيب الشرائع ج٧ ص٣ فَصْلٌ فِي بَيَان مِنْ يصلح لِلْقَضَاءِ

Conclusion

During the UK divorce process the husband does not at any point issue a ṭalāq, nor does he appoint the judge to act on his behalf when he is the respondent, and neither can the judge act as a Qāḍī to dissolve the nikāḥ as he is not acting according to the sharīʿa. However if the husband is the petitioner then he assigns the judge to issue divorce at the judge's discretion to his wife. This is achieved through ṭafwīḍ of the ṭalāq which brings about tamlīq to the judge, and he becomes a mumallaq, who subsequently issues on his mashīʿa; this has no impact on the independence and impartiality of the judge. The term divorce is clear when applying for divorce via the petition and when applying for a decree nisi, however, the judge does not issue a dissolution of marriage at the point of petition nor when an application for a decree nisi is made. It is only when the husband applies for a decree absolute through an indirect statement that, supported by circumstantial evidence, the judge dissolves the marriage. The method of transferring divorce capacity to the judge has been discussed above. As a result one ṭalāq bāʿin occurs and the wife will serve her ʿidda from the date of the decree absolute. The UK divorce process is a means to dissolve the civil marriage which has a bearing on the nikāḥ in the situation described. The study's focus has been to determine any effect on the nikāḥ when a husband or wife petitions for a divorce through the UK legal process. Therefore, ṭalāq takes place in that one situation; in all other scenarios a ṭalāq is required in order for the nikāḥ to be dissolved which permits both husband and wife to move on and marry again if they choose to do so.

Acknowledgements

The author appreciates the time and resources of Dewsbury Sharee Council and Mohammed Siddique Patel (Head of Family Law at Kamrans Solicitors).

Amjad M Mohammed

18th Rajab 1439/5th April 2018