133859 - The difference between khul‘, talaq and faskh (ways of ending a marriage)

the question

How can I explain to my students the difference between faskh, talaq and khul‘?

Detailed answer

Praise be to Allah.

Separation between the spouses can only be done in one of two ways: talaq (divorce) or faskh (annulment).

The difference between them is that talaq is the ending of the marital relationship by the instigation of the husband, and it involves specific, well-known phrases.

As for faskh, it is annulment of the marriage contract and dissolution of the marital bond completely, as if it never happened, and this can only be done by means of the verdict of a qaadi (judge) or a shar‘i ruling.

The differences between the two include the following:

1.

talaq can only be done by means of the husband’s utterance, by his choice and with his consent. As for faskh, it is not uttered by the husband, and is not conditional upon his consent or choice.

Imam ash-Shaafa‘i (may Allah have mercy on him) said: Any case in which it is ruled [by a qaadi] that a couple be separated, when the husband did not utter words to that effect and did not want it… this is a separation and cannot be called talaq. End quote. Al-Umm (5/128).

2.

There are many reasons for talaq, and it may occur for no reason except that the husband wants to leave his wife.

As for faskh, it can only occur when there is a reason that makes it necessary or permissible.

Examples of reasons for which the marriage contract may be annulled (faskh) include the following:

· Lack of compatibility between the spouses, according to those scholars who regard that as one of the conditions for the marriage contract to be valid.

· If one of the spouses apostatises from Islam and does not come back to it.

· If the husband becomes Muslim and his wife refuses to become Muslim, and she is a mushrik (polytheist), not one of the people of the Book (i.e., Jewish or Christian).

· When li'aan occurs between the spouses [li'aan is a process done where the husband accuses the wife of adultery and she denies it, and each swears oaths invoking the curse of Allah if he or she is lying].

· Financial difficulty on the part of the husband, and inability to spend on his wife's maintenance, if the wife requests annulment of the marriage.

· Presence of a defect in either spouse that prevents intimacy or creates revulsion between them.

3.

The husband has no right to take his wife back after faskh (annulment). He can only take her back with a new marriage contract and with her consent. In the case of talaq, she is still his wife so long as she is still in 'iddah following a revocable talaq (i.e., first or second talaq), and he has the right to take her back after the first or second talaq, without a new marriage contract, and regardless of whether she agrees or not.

4.

Faskh is not counted as one of the three talaqs that the man may issue.

Imam ash-Shaafa‘i said: Any faskh that occurs between the spouses is not counted as a talaq, whether a first or subsequent talaq. End quote from al-Umm (5/199).

Ibn ‘Abd al-Barr said: The difference between faskh and talaq, even though each of them is a separation between the spouses, is that if the spouses get back together after faskh, then they will get back together on the basis of the original marriage and the woman still has three talaqs left with her husband, whereas if he divorced her by talaq then took her back, she has two talaqs left with him. End quote from al-Istidhkaar (6/181).

5.

talaq is the husband’s right, and it is not dependent upon the ruling of a qaadi (judge), although it may occur by mutual consent between the spouses. As for faskh, it depends upon a shar‘i ruling or the verdict of a qaadi. Faskh cannot be done simply by mutual consent between the spouses, except in the case of khul‘.

Ibn al-Qayyim said: The spouses do not have the right to agree to annul the marriage without compensation (i.e., khul‘), according to scholarly consensus. End quote from Zaad al-Ma‘aad (5/598).

6.

If faskh occurs before consummation of the marriage, the woman is not entitled to anything of the mahr (dowry). In the event of talaq before consummation of the marriage, she is entitled to half of the agreed-upon mahr.

As for khul‘, this refers to when the woman asks her husband to separate from her in return for financial compensation or giving up her mahr or part of it.

The scholars differed as to whether khul‘ is faskh (an annulment) or talaq (a divorce). What is

more likely to be correct is that it is faskh. This has been explained previously in the answer to question no. 126444.

[Based on explanations of the differences in the following sources:

Al-Manthoor fi'l-Qawaa'id (3/24)

Al-Fiqh al-Islami wa Adillatuhu (4/595)

Al-Mawsoo'ah al-Fiqhiyyah al-Kuwaitiyyah (32/107-113, 32/137)

Fiqh as-Sunnah (2/314)]

And Allah knows best.