81726 - Divorce does not take place on the basis of a decision or intention unless the words are uttered

the question

A woman rebelled against her husband after many problems and a lack of understanding in a short marriage life that did not last more than four months. She gave birth at her family's home, a daughter from this husband. All attempts to make them return to each other failed. So the husband filed a lawsuit against her to force her return to him, and it sentenced for his favour.
The wife appealed against this sentence and complained to the police that the assaulted her and as result of this harm she asked the court for divorce. She asked as well for financial and moral compensation, and obligating him to give her all her rights. For two years this case has not reached conclusion. The husband does not want her to return or to be his wife after he saw how evil and unfair she and her family are towards him. But he does not want to divorce her before the court says its word in the matter, as he hopes the court will be fairer to him, he thinks he is the oppressed side not the oppressor as how they claim.
The question is:
Is this talaaq valid by him intending in his heart to divorce her despite waiting all this time for the court's word? Is he considered sinful, knowing that he pays her the monthly nafaqah (money to spend on herself and their daughter)? Is there any other duties he is obliged by towards his wife and his two year old daughter?.

Detailed answer

Praise be to Allah.

We ask Allaah to reward you greatly for your keenness to perform all duties perfectly and we ask Him to settle matters between you and your wife in the way that is best for you in this world and in the Hereafter.

With regard to divorce, it does not take place on the basis of a mere decision or intention; rather it

is essential that the words be uttered.

Al-Haafiz Badr al-Deen al-'Ayni (may Allaah have mercy on him) said:

No one (among the scholars) disagrees with the view that if a person intends divorce in his heart but does not utter the words, then he does not have to do anything, apart from what was narrated by al-Khattaabi from al-Zuhri and Maalik, that divorce does take place once one decides upon it. But this is very unlikely to be correct, and al-Khattaabi refuted this view in his discussion of zihaar (a jaahili and invalid form of divorce) and other forms of divorce. So they were agreed that if a person decides to divorce his wife by zihaar, it does not become binding unless he utters the words; and if he thinks of slandering, he is not a slanderer; and if thoughts in the form of words cross his mind during the prayer he does not have to repeat it. Allaah has forbidden speaking during the prayer, so if thoughts had the same effect on the prayer as speaking then his prayer would have been invalid.

Among those who said that thinking of divorce does not have any effect were 'Ata' ibn Abi Rabaah, Ibn Sireen, al-Hasan, Sa'eed ibn Jubayr, al-Sha'bi, Jaabir ibn Zayd, Qataadah, al-Thawri, Abu Haneefah, the companions of al-Shaafa'i, Ahmad and Ishaaq. End quote.

'Umdat al-Qaari Sharh al-Bukhaari (20/256).

It says in al-Mawsoo'ah al-Fiqhiyyah (29/23):

If he intends to speak the words of divorce but then he does not speak them, then no divorce takes place, according to scholarly consensus, because the words were not uttered at all. Al-Zuhri disagreed and said that the divorce of one who intends to divorce does take place even if he does not utter it.

The evidence of the majority is the words of the Prophet (peace and blessings of Allaah be upon him): "Allaah has forgiven my ummah for what they think of to themselves, so long as they do not act upon it or speak of it." end quote.

It says in Fataawa al-Lajnah al-Daa'imah (20/27):

If you have not said anything other than saying to your brother, “We want to get divorced”, then these words do not count as a divorce, rather it is only a promise to get divorced. End quote.

It says in Fataawa al-Shaykh Muhammad ibn Ibraaheem (11/70):

Divorce does not take place unless it is uttered or expressed in some way that takes the place of speech, whether directly or indirectly. End quote.

We have also discussed this issue previously on our website in the answers to questions no. 20660 and 34164.

As for your obligations at present towards your wife and child, so long as you are spending on them every month then you are free of sin and wrongdoing, in sha Allaah, until the sharee’ah judges judge between you, then you will have to do whatever they tell you to do at that time.

And Allaah knows best.