

Retain in fairness or release nicely...



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The refusal to give Talaq and the link to controlling and coercive behaviour

I often come across situations in practice where Muslim husbands refuse to give *Talaq* to their wives. It is a very specific situation and the parties involved often confine their understanding of the issue to the problem of separation between husband and wife, ie due to the husband's refusal, the wife cannot move on with her life and remarry. Often in those scenarios, I am instructed by the wife to assist in obtaining the *Talaq*.

As a private law children practitioner, I also regularly deal with allegations of controlling and coercive behaviour. When acting for Muslim clients in disputes relating to child contact arrangements where the allegation of controlling and coercive behaviour was an issue, I noticed how often the issue of the husband refusing to give *Talaq* was not being referred to as an example of that controlling and coercive behaviour.

To really link the two, it is first important to gain an understanding of the different methods of *Talaq*, what *Talaq* actually is, and how we define controlling and coercive behaviour in the context of private law family and criminal law proceedings in England and Wales.

For the different types of the *Talaq* and Islamic separation, what it actually is, and the different methods of pronouncing *Talaq*, see my previous articles in issues 214 September/October 2021 and 217 March/April 2022.

For the definition of controlling and coercive behaviour, we will be looking towards the definition as outlined in the Family Procedure Rules 2010, Practice Direction 12J (FPR 2010 PD 12J) and case law. We will also be looking at the legal criminal definition of controlling and coercive behaviour.

A reminder about *Talaq*

By way of simple summary, this form of separation provides for the husband to pronounce *Talaq* upon the wife. There are

different methods of pronouncing *Talaq* which can be done verbally but better if written and with witnesses. The wife can also pronounce *Talaq* upon herself if the couple have agreed beforehand. This is called *Tafwidh*.

The difficulty arises when the wife wants to separate and the husband refuses to give *Talaq*. This is very clearly against Islamic principles. Islam is very explicit in directing husbands that they should retain their wives in kindness, or they should let them go in kindness. This is specifically mentioned in the *Qur'an* (*Surah Al-Baqarah* – 2:229):

الطَّلَاقُ مَرَّتَانٍ فَإِمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَنٍ

"Divorce is twice; then either to retain in all fairness, or to release nicely."

So, when the principles of *Nikah* (Islamic marriage) are not being fulfilled and there is no future in the relationship, the husband should pronounce *Talaq*. If he refuses to do so, he is going against the teachings of Allah.

In his seminal *Ma'ariful Qur'an (The Meanings of the Noble Qur'an)*, the great Islamic scholar of *Tafsir* (the field of interpretation and explanation of the *Holy Qur'an*), Mufti Muhammad Taqi Usmani writes in explanation of the verse above:

"By this verse, a cruel practice prevalent in Arabia was eliminated. In pre-Islamic Arabia, a husband had the power to divorce his wife innumerable times, and then revoke the divorce each time. This power brought misery to the women whose husbands divorced them, but when the period of *Iddah* came near (waiting period after pronouncement of *Talaq*), they revoked the divorce, and after some time divorced her again, and so on. Thus they neither maintained her as their wife, nor... leave her to



marry someone else. By the present verse, the power of husbands was restricted to divorcing twice only. The verse means that the proper way of divorcing one's wife is that the divorce is pronounced twice at the most. So long as the number of divorces is not more than two, it is open for the husband to revoke his divorce during the period of *Iddah*, in which case they may resume their marital relations without entering into a new marriage, and even after the expiry of *Iddah*, they may enter into a fresh marriage by mutual consent. But it should be done in all fairness with *bona fide* intent to restore a just marital life. This is meant by the words, '*either to retain in all fairness*'. But if the marital relations are broken so badly that their restoration is not intended, then the husband should not revoke the divorce, and after the expiry of the period of *Iddah* the woman will be released to contract marriage with someone else if she so wills. This release too should be in a proper and graceful way without causing any impediment for the woman. This is the purport of the words, '*or to release nicely*'." (Emphasis added)

It is important to remember that like any of the other Abrahamic faiths, the basic principles of Islam encourage kindness, decency and equitable behaviour between human beings. Islam encourages and teaches that we should be really fair and equitable with one another, but Islamic teachings also go further and state that should a wrong be done unto you, then instead of becoming angry, we should be even more merciful and kind to the aggressor unless to do so would be injurious to oneself.

Clearly, when the principles of *Nikah* are not being fulfilled and the husband refuses to pronounce *Talaq* at the request of the wife, he is in contravention of the principles of kindness, decency and equitable behaviour, and is considered to be unjust and oppressive in his refusal.

Putting aside the unfairness and extreme emotional impact upon the wife for just one moment, the reader should be aware that this then puts the wife in an extremely difficult position to obtain the Islamic dissolution of that marriage. If a Muslim woman finds herself in this position, in England & Wales, she is forced to seek redress through the process of obtaining a dissolution by application to a Sharia Council. There is no unified or central organisation and there are a number of different Sharia Councils dotted around the UK with various different interpretations of the same procedure.

Controlling and coercive behaviour – the criminal law definition

In September 2012 the government published guidance to assist criminal prosecutors to better understand the nature and features of controlling or coercive behaviour.

Domestic violence and abuse is defined as:

"Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse

between those aged 16 or over who are or have been intimate partners or family members, regardless of gender or sexuality. This can encompass, but is not limited to, the following types of abuse: psychological, physical, sexual, financial and emotional."

The definition is supported by the following explanatory text:

"This definition, which is not a legal definition, includes so called 'honour' based violence, female genital mutilation (FGM) and forced marriage, and is clear that victims are not confined to one gender or ethnic group."

The government's definition also outlines the following:

- Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.
- Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape, and regulating their everyday behaviour.

Section 76 of the Serious Crime Act (SCA) 2015 created a new offence of controlling or coercive behaviour in an intimate or family relationship. Prior to the introduction of this offence, case law in criminal proceedings indicated the difficulty in proving a pattern of behaviour amounting to harassment within an intimate relationship.

The new offence, which did not have retrospective effect, came into force on 29 December 2015.

An offence is committed by A if:

- A repeatedly or continuously engages in behaviour towards another person, B, that is controlling or coercive; and
- at the time of the behaviour, A and B are personally connected; and
- the behaviour has a serious effect on B; and
- A knows or ought to know that the behaviour will have a serious effect on B.

A and B are "personally connected" if:

- they are in an intimate personal relationship; or
- they live together and are either members of the same family or they live together and have previously been in an intimate personal relationship with each other.

There are two ways in which it can be proved that A's behaviour has a "serious effect" on B:

- if it causes B to fear, on at least two occasions, that violence will be used against them (s76 (4)(a)); or
- if it causes B serious alarm or distress which has a substantial adverse effect on their day-to-day activities (s76(4)(b)).

Controlling and coercive behaviour – the family law definition

A full definition of how the family courts categorise and define domestic abuse, which includes controlling and coercive behaviour, can be found at FPR 2010 PD12J. As practitioners will be aware, this is the practice direction which deals with how cases are to be managed where there are allegations of domestic abuse and harm in applications for child arrangements.

However, a more useful and current analysis of "controlling and coercive behaviour" in the family courts can be found in the words of Hayden J in his seminal judgment in *F v M* [2021] EWFC 4, which followed a two-week fact-finding hearing of domestic abuse allegations centred on controlling and/or coercive behaviour. His view was endorsed by King LJ and Holroyde LJ in the recent case of *Re H-N & ors (Children) (Domestic abuse: Finding of fact hearings)* [2021] EWCA Civ 448. I think it is helpful to set out one of the central paragraphs of Hayden J's judgment (referred to at paragraph 29 in *Re H-N*):

"4. In November 2017, M [the mother] applied for and was granted a non-molestation order against F [the father]. That order has been renewed and remains effective. The nature of the allegations included in support of the application can succinctly and accurately be summarised as involving complaints of 'coercive and controlling behaviour' on F's part. In the Family Court, that expression is given no legal definition. In my judgement, it requires none. The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation. There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse. My strong impression, having heard the disturbing evidence in this case, is that it requires greater awareness and, I strongly suspect, more focused training for the relevant professionals."

"The succinct analysis provided by Hayden J clearly places the husband's refusal to pronounce Talaq at the request of the wife as 'controlling behaviour' designed to render her subordinate and corrode her personal autonomy."

Refusal to pronounce *Talaq* is strong evidence of controlling and coercive behaviour

When considering the criminal and family law definitions of controlling and coercive behaviour set out above against what we know about the rules of *Talaq*, the intention of the husband when refusing *Talaq*, and the impact upon the wife of the husband's refusal, it is clear that if raised in court with sufficient evidence of the refusal and impact upon the wife, it may be accepted as a compelling feature of the common characteristics of controlling and coercive behaviour. It is argued that the succinct analysis provided by Hayden J clearly places the husband's refusal to pronounce *Talaq* at the request of the wife as "controlling behaviour" designed to render her subordinate and corrode her personal autonomy. The definition in criminal proceedings at s76(4) (a) and (b) SCA 2015 is equally helpful in putting the refusal to pronounce *Talaq* within the realms of those definitions. In family proceedings the threshold is much lower.

Aside from the legal definitions which leave no room for doubt, it is also my strong belief that refusal by the husband to pronounce *Talaq* to the wife is unjust and unfair. The reader will see that it is clearly against the explicit written rules of Islam as set out in the *Qur'an*. It is also against one of the fundamental principles of an Islamic way of life, which is that no one party should act in an unjust and unfair manner towards another party. Further, it is noted by Islamic scholars that when the husband acts in such a manner, his behaviour is deemed "tyrannical" and "oppressive" against the wife.

This sort of behaviour however is not to be taken on its own. It is a feature of controlling and coercive behaviour in private law children cases that they must be or should form a pattern of controlling and coercive behaviour for a finding to be made. No doubt the reader will note the recent case law whereby the courts have recognised that incidents which may constitute controlling and coercive behaviour may well be numerous and indeed quite discrete individually, but when taken together as a whole, may cross the threshold for a filing of controlling and coercive behaviour to be made. This has to be distinguished from simple bad behaviour, which may not cross the threshold and which a family court may not be able to rule upon. A helpful illustration of this is once again provided by the judgment in *Re H-N*, where at paragraph 32 the court endorses the approach taken by Peter Jackson LJ in



Re L (Relocation: Second appeal) [2017] EWCA Civ 2121 (paragraph 61):

"Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is 'used to harm, punish, or frighten the victim...'

and 'controlling behaviour' as behaviour 'designed to make a person subordinate...' In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict."

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