

MUSLIMS' ATTITUDE TOWARDS DIVORCE: THE PROBLEM OF *FIQHĪ* POSTULATES

Mek Wok Mahmud ¹
Sayed Sikandar Shah ²

ABSTRAK

Penceraian dalam bentuk yang berbeza sebutannya sama ada dimulakan oleh si suami atau isteri seharusnya dikawal hingga ke tahap paling minima sepertimana yang dikehendaki oleh sosio-agama Islām. Alasannya kerana Nabi Muḥammad S.A.W telah mengutuk sekerasnya sikap tidak bertanggungjawab ini yang dilakukan oleh kadua-dua pihak, wanita dan lelaki. Namun begitu, perkahwinan yang berakhir dengan perpisahan pada masa kini telah mencetuskan fenomena yang amat membimbangkan di seluruh dunia, termasuklah di Malaysia³. Untuk memulihkan situasi ini, pembaharuan perundangan penceraian acap kali dilakukan. Bagaimanapun, untuk manjayakan pembaharuan undang-undang ini, kami berpendapat bahawa kita perlu menekankan dasar dalil-dalil Syarī'ah yang telah lama terbentuk dan telah dijadikan sebagai panduan bagi masyarakat umum untuk mempraktikkannya. Perkara paling penting yang perlu

¹ The writer is an Assistant Professor at the Department of Fiqh and Usul al-Fiqh, International Islamic University Malaysia and is currently the Head of the Department of Fiqh and Usul al-Fiqh, Kulliyah of Islamic Revealed Knowledge and Human Sciences, International Islamic University Malaysia.

² The writer is an Assistant Professor at the Department of Fiqh and Usul-Fiqh, Kulliyah of Islamic Revealed Knowledge and human Sciences, International Islamic University Malaysia

³ Based on the statistics by the Department of Islamic Understanding Malaysia or its acronym JAKIM, in Kuala Lumpur, the divorce rates increased in 2003 (892 cases) as compared to the divorce rates in 2002 (813 cases). Similarly in Selangor, in 2002 the for the divorce cases is 1977 whereby in 2003 witnessed the higher number of cases which is 3158.

diambil kira ialah bagaimana dan sejauh manakah orang-orang Islām memahami aspek penceraian dan prosedurnya sepertimana telah dijelaskan oleh sebahagian besar 'ulama'-'ulama' silam'. Kebanyakan orang menganggap yang mereka dengan mudahnya boleh mempraktikkan penceraian walaupun ianya bertentangan dengan apa yang termaktub di dalam Qur'ān, kerana sebahagian daripada 'ulama' membenarkannya. Pengetahuan/Pendekatan jahil dalam perundangan Islām sepertimana telah dijelaskan dalam buku-buku perundangan berkaitan penceraian hanyalah sebagai ikutan yang memperluaskan lagi permasalahan taqlīd, dan secara seriusnya telah menghalang kejayaan pembaharuan perundangan penceraian pada masa kini. Oleh itu, melalui kertas kerja ini, kami cuba untuk membawa para pembaca "kembali kepada dasar-dasar" dengan objektif utamanya untuk menyedarkan mereka tentang sebahagian daripada dalil-dalil Syarī'ah itu adalah yang melingkari pembubaran suatu perkahwinan. Kertas kerja ini juga membincangkan secara ringkas gambaran keseluruhan tentang penceraian serta prosedurnya di samping menekankan dalil-dalil Syarī'ah dari kacamata dan nilai Syarī'ah untuk mengenal pasti pandangan Syari' yang paling konsisten dan sejajar dengannya daripada pelbagai pandangan ahli-ahli perundangan Islām

Conceptual Framework: Overview

Divorce in Islamic law is discussed under the title of *ṭalāq* in the Arabic language. Literally, *ṭalāq* means release, dissolution and separation.⁴ *Ṭalāq*, in the legal parlance signifies repudiation of one's wife in accordance with the specific requirements as stipulated by Islamic law.⁵ Accordingly, *ṭalāq* technically denotes termination of marriage at the husband's instance. It can be revocable or irrevocable.

⁴ Muṣṭafā al-Khīn et (1992), *Al-Fiqh al-Manhajī*, vol.4, Damascus: Dār al-Qalam, p.119; 'Abd al-Raḥmān al-Ṣābūnī (1993), *Aḥkām al-Ṭalāq fī al-Fiqh al-Islāmī*, Dubai: Dār al-Qalam, p.27.

⁵ al-Ṣābūnī, Ibid. See also Ḥasan Ḥasanīn (2001), *Aḥkām al-Uṣrah al-Islāmīyyah*, Cairo: al-Āfāq al-'Arabīyyah, p.197.

Revocable divorce (*ṭalāq raj'ī*) means that the husband has the right to take back the wife⁶ during the three-menstrual cycle waiting periods (*'iddah*) for menstruating wife or three months in the case of non-menstruating wife following the consummated marriages.⁷

Illustration

X when divorces his wife by a single divorce within her purity, intervening period between two successive menstrual cycle, during which he has not had sexual intercourse with her, he would validly repudiate her with a single revocable divorce⁸ .i.e., he can cancel such a divorce before the lapse of her *iddah*; three months in the case of a menopause (or a woman of tender age), three menses in the case of a menstruating woman.⁹

Irrevocable divorces (*ghayr raj'ī* or *bā'in*), on the contrary, refers to repudiating one's wife during *'iddah* within which the parties have not resumed marital relationship.¹⁰

For instance, X when divorces his wife by a single divorce within her purity and thereafter desist from sexual intercourse with her till her period expires. Then *ṭalāq* become irrevocable¹¹.

This category together with all other types of divorces by way of judicial separation (*fasakh*), redemption (*khulu'*) including other disapproved types of divorce in which the husband has not followed the approved procedure of pronouncing *talaq* are subsumed under irrevocable *ṭalāq*.

⁶ This mode of divorce is based on the Qur'ān, al-Baqarah : 228 and the Prophet's ﷺ practice when he divorced Ḥaḥṣah and retracted it later on. See Muḥammad ibn 'Alī al-Shawkānī (1938), *Nayl al-Awṭār*, vol.6, Egypt: al-Maṭba'ah al-'Uthmānīyyah, p.219.

⁷ See *ibid.* 333. The rationale is that a reconciliation may take place during this period because the wife is to stay in the husband's home in the waiting period; human nature being what it is, it is difficult to live in close proximity with the woman who was once a wife and yet hold on to the resolve of the divorce, unless they have been seriously at loggerhead with each other.

⁸ K.N.Ahmed (2006), *The Muslim Law of Divorce*, New Delhi: Kitāb Bhavan, p.64.

⁹ For the *'iddah* durations as mentioned in seriatim see al-Ṭalāq: 4; al-Baqarah: 228 and al-Baqarah: 234 respectively.

¹⁰ This becomes final but the parties can remarry and is approved way of exercising it. See, Ahmed (2006), *op.cit.*, p.65.

¹¹ *Ibid.*

But it is important to note that irrevocably divorcing one's wife has two subdivisions, namely irrevocable divorce of the first degree (*bā'in baynūnah ṣughrā*) and triple divorce (*ṭalāq thalāthah* or *bā'in baynūnah kubrā*).

Illustration

1. The first type

X when divorces his wife by a single divorce within her purity during which he had sexual intercourse with her or he repudiates her during her menstruation¹². But, thereafter, he desists from marital relation with her until her *'iddah*, as delineated above, expires. He is said to have repudiated his wife by irrevocable divorce of the first degree.¹³

2. The second type

X when divorces his wife, whether during purity or menstruation, by uttering the pronouncements, such as: you are divorced three times; or you are divorced so many times; or by repeating the single statement of divorce three times .i.e. You are divorced, you are divorced, and you are divorced. He is said to have repudiated his wife by irrevocably triple divorce.¹⁴

The implication is that in the case of the first type of irrevocable divorce is that the parties can remarry and start afresh their marital union by following all the formalities of a regular marriage as set by Islamic law .But in the second situation, no remarriage is allowed between them unless the ex-wife goes through a procedure of intervening marriage known as *ḥalālāh/taḥlīl* in Islamic jurisprudence. Only after this, the original spouses can remarry.¹⁵

¹² Pronouncing divorce against one's wife menses or after having sexual intercourse with her during her purity is against the *Sunnah*. The Prophet S.A.W rebuked Ibn 'Umar for divorcing his wife during her menses and ordered him to retract it and do it, if he wishes, once she returns to her purity before having sex with her in that purity. See Muḥammad ibn Yazīd Ibn Mējah (2003), *Sunan ibn Mājah*, Ṣidqī Jamīl al-'Aṭṭār (edit.), Beirut: Dār al-Fikr, p.469. See also Aḥmad ibn Shu'ayb al-Nasā'ī(2002), *Sunan al-Nasā'ī*, Aḥmad Shams al-Dīn (edit), Beirut: Dār al-Kutub al-'Ilmiyyah, p.553.

¹³ Al-Ṣābūnī, (1993), *op.cit.*, pp.38-39.

¹⁴ Ahmed (2006), *op.cit.*, p.69.

¹⁵ See al-Baqarah: 230 and the Prophetic edict who stated that in such cases, it is unlawful for a woman to return to a husband who had divorced her three times "until she has tasted the sweetness (of intercourse) with her other husband". See *Sunan al-Nasā'ī*, p.555. See also Asaf A. A.Fyze (trans) (2004), *The Pillars of Islam*, vol.2, Oxford: University Press, p.246.

Woman also, among others¹⁶, can file a suit for divorce either by way of negotiated settlement (*khulu'*) or judicial dissolution (*fasakh*) or on account of husband committing the breach of a condition stipulated in the marriage contract (*ta'liq*).¹⁷

Khulu', commonly referred as divorce for compensation signifies the wife's act of returning dower or payment of some other sum to her husband in order to obtain a divorce.¹⁸ It by definition is irrevocable and the husband has no right to take her back, though they may remarry subsequently by mutual consent.

Fasakh refers to judicial dissolution of marriage between the wife and her husband on account of causes as detailed in Islamic jurisprudence. Some jurists like Ḥanafīyyah almost give no recognition for obtaining a divorce under this avenue provided her husband has consummated the marriage. Others like Shāfi'īyyah and Ḥanābilah allow limited grounds for judicial dissolution of marriage, such as illness, defects and decapitation, financial strains and marital frictions. Mālikiyyah, on the other hand, have taken a broader view on this by allowing the wife to seek divorce for non-support, abandonment, and the broad charge of "injury" (*ḍarar*), which can be physical or otherwise. For instance, their view of harm is very much revealing as it has inspired modern reform of Islamic family law in our time.¹⁹ To them even if the husband turns his face away from his wife or stops talking to her, it amounts to injury, thus entitling her to petition or *fasakh*.²⁰

Ta'liq or conditional or delegated divorce, is another way where the wife includes a condition in her marriage contract that allows her the right to divorce on her own initiative under certain specific circumstances, or states that she will be automatically divorced if a particular event occurs (such as the husband taking another wife). This kind of conditional divorce which has been inserted into modern

¹⁶ Other ways that a woman can initiate the petition for divorce include delegated divorce, etc which is not a common way of divorce in Malaysia, thus we intentionally omit it for the purpose of this study.

¹⁷ Al-Ṣābūnī, (1993), *op.cit*, pp.27-31

¹⁸ *Ibid.*, p.81.

¹⁹ For details see, 'Abd al-Raḥmān al-Ṣābūnī(2001), *Nizām al-Ushrah wa Ḥill Mushkilātuhā fī Daw'al-Islām*, Beirut: Dār al-Fikr, pp.149-156

²⁰ *Ibid.*, p.156

legislations on Islamic family law, though its efficacy in practice is doubted²¹, is justified under the principle of “marriage contract co-joined with a stipulation” (*al-‘aqd al-muqtaran bi al-shart*). The jurists were divided regarding the validity of such a condition. Ḥanābilah and Awzā‘ī held it to be valid and the majority regard it as void. The main reason is because of conflicting versions of *aḥādīth* on the point. One version reads: “Muslims are bound by their stipulated terms.”²², as relied upon by the first group. Another version stated: “Muslims are bound by their stipulated terms unless such a stipulation legalizing the prohibited or rendering unlawful what is lawful.”²³, as was the base of argument by the second group. Here the understanding of the Ḥanābilah that, “a condition of such type neither prohibits what was permissible nor legalizes what was illegal but affords the woman another ground for judicial separation (*faskh*)”²⁴ thus is in line with the objective of protecting the wife’s well-being (against future uncertainty). It cannot be also against the law of polygamy as it applies only in the case of those women who are unable to adjust their jealousy of sharing their husbands with another woman.

The Philosophy and Rationale

Marriage is primarily designed to be a durable union between the legally married couples. Its vows cannot be taken lightly nor should it be wantonly repudiated as its contract as unlike other civil transactions, according to Qur’ānic account, is a “solemn covenant,”²⁵ - signifying a serious commitment that should not be sported with. Nevertheless, Islamic law tolerates the termination of divorce when its set objectives of the spouses dwelling together in tranquility (*sakīnah*), being in a state of love with each other (*mawaddah*) and being compassionate towards one another²⁶ (*rahmah*) are frustrated. This is very revealing as it is the frustration or even non-

²¹ For instance, it is held “that admittedly there are possible benefits to these types of stipulations. That is why they are sometimes discussed as a panacea for inequalities in traditional divorce law. Nevertheless, in practice they involve some difficulties, which are often overlooked. The extent to which such clauses in the marriage contract are enforceable in accordance with traditional jurisprudence or in contemporary legal systems varies widely. It is contended that even clauses that were originally valid can be easily rendered ineffective through the wife’s unwitting actions. More troubling still is that though these conditions can increase a woman’s access to divorce, they do not restrict in any way the husband’s right to repudiate her unilaterally at will.” Fyzee (trans.), *The Pillars of Islam*, p.213.

²² *Mishkāt al-Maṣābīh*, vol. 2, 286

²³ *Ibid.*

²⁴ Al-Muwaffiq al-Dīn ‘Abd Allāh ibn Aḥmad Ibn Qudāmah(n.d), *al-Mughnī*, vol.7, Riyāḍ: Maktabah al-Riyāḍ al-Ḥadīthah, p.448

²⁵ The Qur’ān dismisses the notion of temporary or marriage of convenience by declaring marriage basically as *mīthāqan ghalīẓan*. See al-Nisā: 21

²⁶ See al-Rum: 21

achievability *ab initio* of these God-declared goals of the marriage which give rise to marriage discord and litigation for divorce. Some of the common ways²⁷ that such happens includes incompatibility between the spouses on account of behavior and personality type, mistreatment of the wife or disrespect of the husband, lack of care and support by one of the spouses, emergence of serious discord and friction between the spouses on account of belief, political views or family management style, hurt feelings coupled with the sense of mutual or unilateral hatred between the spouses, debauchery on the part of one's partner, mental illness of one's spouse and third party interference.

Basic jurisprudential postulates

Today's phenomenon of divorce litigations that flood our courts, destabilize Muslim families and renders children miserable is more than anything else correlated with the peoples' attitude towards marriage and their thinking of the existence of easy ways for its dissolution, .i.e. How they perceive *ṭalāq* and how they exercise it. Men popular belief is that it is their absolute right²⁸ to dump their wives as and when they desire without any feeling of guilt and moral constraint. Likewise women, being inspired by the idea of woman liberty, try to compete with men in this race. Accordingly, in this scenario we clearly gauge out a serious problem of orientation, thought and outlook on the part of both men and women. The main contributory factor for such an attitude is the segmental, *madhhab* –based

²⁷ Khāshī'Ḥaqqī (1997), *al-Ṭalāq Tārīkhan wa Tashrī'an wa Wāqī'an: Dirāsah 'Ilmīyyah Muqāranah*, Beirut: Dār Ibn Ḥazm, pp.24-26. This is confirmed by what is happening in the local scenario. For instance, in Malaysia according to statistics released by JAKIM in 2001, revealed that the main grounds, symptomatic of such marriage dissatisfaction, for divorce were: lack of communication, drug abuse, third party interference, family management, finance, castigation, sexual problem and being irresponsible to one's spouse.

²⁸ This kind of attitude common to most Muslim men emanates from two premises. First misunderstanding of the verse on *qawwāmah* of man over women, al-Nisā: 34. The false notion from this verse is that man has supreme authority over women and they are subordinate to man. This understanding negates the meaning of *qawwāmah* in the Arabic Language which is about support and care giving. Thus, *qawwāmah* here is one of enhanced charge and responsibility and not a male privilege to abuse, batter and oppress wives. Second is the classical notion of marriage as a contract of ownership of a woman (*milk khāṣ*). For details, see Maḥmūd Muḥammad Ḥassan (1985), *Qānūn al-Aḥwāl al-Shakhṣīyyah: 'Aqd al-Zawāj*, Kuwait: Mu'ssassaṭ Dār al-Kutub, p.39. This is an interpretation which counters many verses (al-Nisā : 1; al-Aḥzāb: 35; al-Naḥl: 97; al-Isrā': 70) that declare husband and wife as equal partners, thus unacceptable as it relegates women to the position of chattel, resurrecting the pre-Islamic view about women. See Wahbah al-Zuhaylī (2000), *al-Ushrah al-Muslimah fī al-'Ālam al-Mu'āshir*, Beirut: Dār al-Fik al-Mu'āshir, pp14-19.

and fragmental understanding of the very notion of divorce law and its *modus operandi* by Muslim masses. The most important among them are as follows:

Sharī'ah value (hukm) postulate

According to most authentic interpretation, divorce, *a priori* is governed by two kinds of *hukm*: *al-hukm al-aṣlī* or *al-hukm al-awwalī* (normative *hukm*) which represents the basic position of Islam about the divorce; and *al-hukm al-thānawī* (secondary rule) which is designed to take care of exigencies in human life - once upholding the basic law proves cumbersome or leads to the loss of benefits that were anticipated by the basic law.²⁹

The normative *hukm*

As to what is the basic law about dissolution of marriage (*al-aṣlu fī al-ṭalāq*)? The legal scholars hold two divergent views on this.

One group³⁰ held that the basic law (*al-aṣlu*) on judicial separation whether by *ṭalāq*, *fasakh*, *ta'liq* or *khulu* is one of disapproval/proscription (*al-ḥaṣru*).³¹ They, among others, argued on the basis of the following traditions of the Prophet S.A.W:

1. "The most detestable of all the lawful things (*abghaḍ al-ḥalāl*) in the sight of Allāh is *ṭalāq*."³²
2. "Any woman who asks her husband for divorce without a good cause, the fragrance of paradise will be prohibited for her."³³

Affirming this normative stand about *ṭalāq*, al-Qurṭubī maintains, "There are numerous *aḥādīth* making *ṭalāq*, if wanton, as one of the most abhorrent behaviors in Islam". The Prophet apart from declaring *ṭalāq* as the most detestable of all the permissible things, also loudly declared: "get married and do not divorce as wanton

²⁹ Muṣṭafā Ibrāhīm al-Zalmī (1984), *Madā Sulṭān al-Irādah fī al-Ṭalāq*, vol. 1, Baghdād: Maṭba'at al-'Ānī, p.177. See also, Muḥammad Yūsuf Mūsā (1956), *Aḥkām al-Aḥwāl al-Shakṣīyyah fī al-Fiqh al-Islāmī*, Egypt: Dār al-Kitāb al-'Arabī, p.257

³⁰ This represents Ḥanafīyyah, Mālikīyyah, Ibn Taymīyyah and the contemporary jurists.

³¹ Al-Ṣabūnī, *Niẓām al-Uṣrah wa Ḥilli Mushkilātuhā fī Ḍaw' al-Islām*, p.121

³² In my opinion, therefore, the factual trend on the rise of divorce cases between 2000 to 2003 from 499-892 in Kula Lumpur alone as provided by JAKIM, points to a serious problem of proper perception among Muslims about the divorce in this country.

³³ Al-Shawkānī (1938), *op.cit.*, vol .9, p. 220.

divorce shakes the Divine Throne; and do not divorce the woman except if necessary as Allāh abhors tasters/changing partners, be they men or women`.”³⁴

Al-Dihlawī commenting on above *aḥādīth* says: “The wisdom of Islam in frowning upon *ṭalāq* as such (whether initiated by the husband or by the wife) is to forestall many *mafasid* (ill-effects) that may ensue from its frequency and rampancy. Otherwise people being driven by their lusts and profanity might not care about ordering their family life nor take their marriages as a durable abode of mutual companionship and mutual support. They instead want more of marriages and divorces so as to change partners on flimsiest of reasons. That is why the Prophet S.A.W strongly denounced the promiscuous men and women, by saying: “Allah curses tasters, be they men or women.”³⁵ This insightful opinion by the great thinker of the sub-continent holds very true for our time where many marriages are rocked due to explosive onslaught of promiscuous culture as promoted by porn sites and posing porn icons via other medias.

Underlining the same view, al-Ṣābūnī says: “This normative rule about *ṭalāq* finds clear support from the Qur’ān which while sanctioning *ṭalāq* of unconsummated wife states,” there is no *junāḥ* (blame /sin) on you if you divorce the women “al-Baqarah: 236. Here the word *laysa* ‘*alaykum junāḥun* implies the idea of *raf’ al-ithm* (removing of the sin) thus confirming the fact that resorting to divorce without any reasonable cause is *maḥzūr* (unlawful/sinful) and a defiance of the Prophet’s S.A.W urging Muslims, during his last sermon, to give best of the treatments to the women”.³⁶

This enlightened understanding of the law was grasped by al-Ṣan‘ānī when he said, “The *ḥadīth* declaring that divorce is the most detestable thing among the lawful is a cogent proof that Muslim scholars regard procedurally wrong divorces (not done in accordance with the approved way) as *ḥarām*. In our opinion, this *ḥadīth* outlaws a divorce which has not been warranted by a genuine reason, once and for all”³⁷

Another group³⁸, on the contrary, maintains that the basic law about divorce is one of *ibāḥah* (permissibility) even without any need. They, among others, argued:

³⁴ Muḥammad ibn Aḥmad al-Qurṭubī (2002), *al-Jāmi‘ li Aḥkām al-Qur’ān*, vol.9, Cairo: Dār al-Ḥadīth, p. 384.

³⁵ Shāh Walī Allāh Ibn ‘Abd al-Raḥīm al-Dihlawī (1978), *Hujjat Allāh al-Bālighah*, vol.2, Cairo: Dār al-Turāth, p.138

³⁶ Al-Ṣābūnī, *Nizām al-Usrah wa Ḥilli Mushkilātuhā fī Daw’ al-Islām*, pp. 121-122.

³⁷ Muḥammad ibn Ismā‘īl al-Ṣan‘ānī, (2004), *Subul al-Salām*, vol.3, Ḥāzim al-Qāḍī (edit.), Mecca: Maktabah Nizār Muṣṭafā al-Barr, p.965.

³⁸ This represents the Shāfi‘ī and Ḥanābilah positions, see Muḥammad ibn Qudāmah (1989), *al-Mughnī*, vol.10, Cairo: Hajr, pp. 323-325.

1. Allah says: “there is no *junāh* (blame/sin) on you if you divorce the women...”³⁹ The phrase no blame implies the idea of permissibility.
2. The Prophet S.A.W also divorced Ḥafṣah and then revoked it. Had it been *maḥẓūr*, he being immune against sin would not have done it.
3. There is a consensus among the legal scholars that it is lawful if needed.
4. Analogically also *ṭalāq* (if initiated by man) involves repudiation of *milk* similar to emancipation of slave, thus is a permissible act.

The second opinion contains many inconsistencies. First, the verse when read completely refers to divorcing one’s wife before the consummation of marriage, it cannot become the base of a general legal stand. Second, the Prophet S.A.W did so on justified reason and not frivolously. Thirdly, the argument of *ijmā* does not support their case as if needed no one dispute its *ibāḥah*. Lastly, the argument based on *qiyās* is against the spirit of the *Sharī’ah* as it seriously questions the unimpeachable principle of equality of man and woman as abound in the Qur`ān - by reducing the position of women as mere chattels.

Even if we agree with them in viewing women as *milk* (acquired property of the husband), which we cannot on any standard, we still cannot take that as a proper precedent (*aṣl*) due to the non-existence of common ‘*illah* to govern both the issues. ‘*itāq* (freeing slaves) entails benefits while wanton divorce of one’s wife entails unspeakable miseries and sufferings (it is a *qiyās ma‘a al-fāriq*).⁴⁰

Accordingly, the first opinion which is consistent with the general denunciation of wanton divorce and is free of internal inconsistency is the preferred view on the point.

The secondary *ḥukm*

To the proponent of *al-hizr*, divorce would become permissible if the parties no longer can live together in peace and serenity. This stand was astutely articulated to be the true position by renown jurists like Ibn al-Humām, Ibn ‘Ābidīn, al-Ghazālī, Ibn Taymīyyah, to name a few.

For instance, Ibn al-Humām said: “The basic law about *ṭalāq* is *al-ḥaẓr* as it dissolves a marriage that serves the worldly and the other worldly interests of the married couples. Nevertheless, it becomes permissible when the couples can none

³⁹ al-Baqarah: 236

⁴⁰ Al-Zalmī (1984), *op.cit.*, vol. 1., pp.177-180

longer get along with each other either on account of divergent character or mutual resentment.”⁴¹

Ibn ‘Ābidīn says: “basically *ṭalāq* is *maḥzūr* except if otherwise it becomes necessary...And any recourse to it without any just cause/reason or need amounts to committing folly and stupidity. A divorce if not impelled by need reverses the position of permissibility to the original position of *al-ḥaẓr*.”⁴²

Ibn Taymiyyah maintains: “If not on account of the need that may arise for the dissolution of marriage, the stern warning of the Prophet S.A.W of its wanton use would have rendered it permanently *ḥarām*.”⁴³

Imām al-Ghazālī also subscribes to the same strict view about divorce when he says that *ṭalāq* (at the husband’s instance) is permissible provided it does not cause injury to the wife – because inflicting injury to others as matter of principle is *ḥarām* unless it is justified by the law.⁴⁴

Accordingly, the recurrent theme in the above juristic discourse on the disapproval of divorce as such leaves no doubt that the dissolution of marriage in the scheme of the Sharī‘ah value framework can neither be pressed for as a matter of right by women nor as *a priori* right by men. Obviously because of its serious after-effects (*mafsadah*) on children, the women and society at large. But once it becomes necessary, both husband and wife must comply with the Qur’ānic commandment of, “either holding together on equal terms or separating in good manner/with kindness (*ma’rūf*)⁴⁵ – neither intriguing nor retaliating against one another. And do it in accordance with the mandatory procedure of divorce i.e., in the case of *ṭalāq*, a man should start with *raj’ī* and then gradually proceed to repeat the same during three consecutive periods of purity if he intends it to be triple. The woman also when petitioning for separation must ensure that she absolutely can no longer enjoy peace and serenity with her husband either on account of his intolerable behavior or other criteria that are essential for a fulfilling marriage in conformity with the teachings of Islam.

⁴¹ *Ibid.*

⁴² Musā, *Aḥkām al-Aḥwāl al-Shakhṣīyyah fī al-Fiqh al-Islām*, pp.2 57-258.

⁴³ Quoted in al-Zalmī (1984), *op.cit.*, vol. 1, p. 182.

⁴⁴ Quoted in *ibid.*

⁴⁵ Al-Baqarah: 229 & 231.

Procedural postulate

Another point that most men are ignorant about is the procedural aspect as we outlined at the beginning. Obviously because as *ṭalāq* initiated by man in terms of Shar‘ī value (*ḥukm shar‘ī*) is classified into two categories of *sunni* and *bid‘ī*.

Sunni *ṭalāq* signifies a pronouncement of divorce which: first, is done in conformity with the prescribed mode as enshrined in the Qur‘ān, i.e., single pronouncement repeated within separate purity during which the husband has not had sexual intercourse with his wife (al-Baqarah: 229). Second, it has been the only option as a way out for ending intolerable marital life.⁴⁶

Bid‘ī ṭalāq, on the other hand, refers to three types of *ṭalāq*: first, the one which is not warranted by genuine reason. Second the one pronounced during wife’s menses, post-natal bleeding or during purity in which the husband had sex with her. Third the one pronounced trice during one period of purity.⁴⁷

Accordingly, all of the jurists agreed that pronouncing *ṭalāq* in such instances is *ḥarām* though they differed into its validity.

Some like Aḥmad, ibn Taymiyyah and Mālik hold it to be invalid based on the following reasons:

- i. The Prophet’s S.A.W order to ibn ‘Umar to revoke the *ṭalāq* that he uttered during his wife’s menses.⁴⁸
- ii. It would be in violation of the mandatory procedure as laid down by the Qur‘ān: *al-ṭalāqu marratān*⁴⁹ (repetition during purity) and *fa ṭalliḳūhunn li ‘iddatihinna* (divorce them during their purity).⁵⁰
- iii. And according to Ibn Taymiyyah and Ibn ‘Abbās it amounts to as *al-ta‘assuf fi al-ṭalāq* (transgressing the limits in matters of *ṭalāq*).

The majority, paradoxically while regarding such *ṭalāq* as sinful and *ḥarām* but still regard it as regular/legal and valid. Ibn Qudāmah argues that in the case of Ibn ‘Umar, when required him to revoke it, then he said: “What if I divorced her trice, would I still revoke it? The Prophet said: “She would irrevocably be divorced from you and you would have sinned for violating the procedure”. Thus this is an authority for this stand. And he also rationalized it by saying: “It is regular as

⁴⁶ Hasānīn, *Aḥkām al-Usrah al-Islāmīyyah*, p. 219.

⁴⁷ Ibid, pp. 219-220.

⁴⁸ Al-Shawkānī (1938), *op.cit.*, vol. 9, pp. 222-227.

⁴⁹ Al-Baqarah: 229

⁵⁰ Al-Ṭalāq: 1

divorce is not a kind of devotional service, even in contravention of the proper manner (*sunnah*), it would still be valid....”⁵¹

However, building such case on the basis of Ibn ‘Umar’s statement is disputed and instead, it is argued that the Prophet warned him of such action by saying: “Would you play with the book of Allāh while I am still alive among you.”⁵² The rationale of Ibn Qudāmah is symptomatic of our jurists going overboard to become more positivists by bifurcating morality from law, which in our opinion cannot be supported by the general notion of submission to the Sharī‘ah value frame of reference, be it law or moral in nature. Accordingly, the ethic-affirming view of the first group is to be credited as the correct statement of the law on the issue.

More problematic throughout the ages has been the pronouncement of most serious type of *bid‘ī ṭalāq*, i.e. the hasty and impulsive utterance of triple divorce by man. Particularly in our time, people with access to fast medium of communication has become more prone to expeditiously put an end to their marriages in this way, unaware of the fact that it is not only immoral but illegal as maintained by erudite jurists like Ibn Taymiyyah and others. This is especially so when the very validity of such a divorce, *ab initio* is subject to intense juristic polemics.

There are four views on this: It amounts to accursed innovation in religion (invalid) as maintained by Ibn Taymiyyah, some Shī‘ah and Zāhirī; it amounts to one *ṭalāq* in the case of unconsummated marriage and triple in the case of consummated marriages as held by Ibn ‘Abbās; it amounts to triple *ṭalāq* as held by all the Four Sunni Schools; it amounts to one *ṭalāq* as upheld by individual jurists from across the schools, such as al-Jaṣṣās and ibn Muqātil of the Ḥanafī, al-Tilmīsānī of the Mālikī, Ibn Taymiyyah, majority of the Ja‘fariyyah and contemporary authorities on the subject⁵³.

The main reason for this is due to conflicting *sunnah*⁵⁴ on the point. However, the *aḥādīth* relied on by both supporting its validity and *vice versa* are criticized as weak. But the view which maintains that such a pronouncement amounts only to

⁵¹ Ibn Qudāmah, *al-Mughnī*, vol. 10, p. 328

⁵² Al-Shawkānī (1938), *op.cit.*, vol. 9, pp. 222-227.

⁵³ For details see, al-Zalmī (1984), *op.cit.*, vol. 1, pp. 236-28

⁵⁴ There are conflicting *ḥadīth*, some saying that the Prophet S.A.W approved such *ṭalāq* from companions although disapprovingly, as he said in one case as reported by Maḥmūd ibn Lubayd, You play with the book of Allāh while I still live among you? On the contrary according to other reports, the Prophet S.A.W asked Rukānah to revoke his triple *ṭalāq* as it amounts to one only (revocable). But the scholars of *ḥadīth* criticize both. See, al-Shawkānī, (1938), *op.cit.*, vol. 9, pp. 227-235. See also al-Ṣan‘ānī, *Subul al-Salām*, vol .3, pp. 969 - 977

one *ṭalāq* is in conformity with the substance of the Qur`ānic expression, "al-ṭalāq marratān"- conveying that the divorce has to proceed phase wise one after another, stands as the preferred law on the point.⁵⁵ One may also add that even if the evidence by those who regard it as valid is to be admitted, the statement of the Prophet in one of them that, "You play with the book of Allāh while I still live among you?"⁵⁶ seriously undermine its moral basis. Accordingly, it should be declared not only morally wrong but illegal as well since it is *ultra vires* of the Qur`ānic mandated procedures.

Accordingly, at attitudinal level, what is needed is a paradigm shift from legalistic notion of divorce to that of ethical orientation and accountability. With all due respect to some of our great legal scholars⁵⁷, they erred in their *ijtihād* when zealously adopting a formalist approach to bifurcate law from morality in the area of divorce, namely it can be against the *sunnah* defined procedure/Qur`an mandated law, immoral thus sinful but still legal. This problem of legalistic approach to Sharī`ah was long ago frowned by Imām al-Ghazālī when he described the whole juristic enterprise of *fiqh* as "the science of this world" and, therefore, having nothing to do with the science of the hereafter (*dīn*). To come out of such a solution, the solution to him lies in the integration between the two sciences, i.e. law and morality.⁵⁸ Other scholars like Ibn Taymīyyah was also seriously troubled by such positions and went to the extent of suggesting that: "The ultimate validity, veracity and ultimate legitimacy of the whole jurists` findings must be evaluated and determined by the Sharī`ah because it is the Sharī`ah that represents the Will of God and binds Muslims and not the juristic formulations of them, particularly if they are shorn of moral content."⁵⁹

Clearly some classical jurists` declaration of wanton divorce as *makrūh*, as most of them maintained, and valuation of *ṭalāq bid`ī* as *ḥarām* but holding them as totally legal and regular seriously has relegated the sublime position of morality in the

⁵⁵ Al- Zalmī, after thorough investigation of all the conflicting views arrives at that conclusion. See al-Zalmī (1984) *op.cit.*, p. 281.

⁵⁶ *Ibid.*

⁵⁷ But there are schools, such as Shī`ah and individual eminent jurists, such as Ibn Taymīyyah, al-Shawkānī and al-Ṣan`ānī who regard it *ultra vires* of the law, thus invalid, which is consistent with the moral purport of *ḥukm shar`ī* as *ḥarām*. See Aḥmad Zakī Yamanī (2004), "al-Musāwāt Bayn al-Mar`ah wa al-Rajul fī Mizān al-Islām", in *Nadwat Ḥuqūq al-Insān fī al-Islām*, London: Mu`ssisat al-Furqān li al-Turāth al-Islāmī, p. 349.

⁵⁸ Abū Hāmid Muḥammad ibn Muḥammad al-Ghazālī (n.d), *Ihyā` Ulūm al-Dīn*, Cairo: Maktabah al-Tijāriyah al-Kabīr, p. 8.

⁵⁹ Sayed Sikandar Shah Haneef (2004), *Ethics and Fiqh for Daliy Life*, IIUM: Research Center, p 41.

thinking and estimation of Muslim masses. As a result, resorting to divorce has become a sport on most flimsy reasons. In our opinion, to overcome the problem of divorce in our time, we hope that a consensus can emerge among Muslims as to the fusion of law with morality in the area of Islamic family law.

Conclusion

In the light of the above, to control divorce, Muslims' reorientation of its moral dimension and implication needs to be aggressively pursued. God-willing, this may help internalizing a proper perspective about it among Muslims the world over. At the state level, the following measures may practically enforce such an outlook:

- Improving the content of nuptial courses by stressing that *ṭalāq* in principle is the commission of the lesser of two evils (*irtikāb akhaffu ḍararrayn*). It as a detestable behavior is only allowed to overcome the problem of irretrievably broken marriages. It is neither a right reserved for man nor a male privilege to change wives as one changes cars.
- Disallowing the practice of *bida'ī* form of *ṭalāq*, known as triple divorce whether done inside or outside the court. The reason being that this form of (*ṭalāq*) is not only the most rude/cruel way of repudiating a wife when it is done via impersonal medias such as Short Messaging System (SMS), it also cannot be supported by any unimpeachable evidence from the Qur'ān and the Sunnah.⁶⁰

⁶⁰ For details, see al-Zalmī (1984), *op.cit.*, vol. 1, pp. 236-289.