MUSLIMS' ATTITUDE TOWARDS DIVORCE: THE PROBLEM OF FIQHĪ POSTULATES

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ABSTRAK


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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.
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 Ṣulāq, 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.

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5 al-Ṣābūnī, Ibid. See also Ḥasan ʿHasanīn (2001), Aḥkām al-ʿUsrah al-İslāmīyyah, Cairo: al-ʿAfāq al-′Arabīyyah, p.197.
Revocable divorce (talāq rajʿī) means that the husband has the right to take back the wife 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 divorce.8 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 rajʿī or bāʾin), 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 talāq become irrevocable.11

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

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6 This mode of divorce is based on the Qurʾān, al-Baqarah: 228 and the Prophet's practice when he divorced Ḥafṣah and retracted it later on. See Muhammad ibn 'Alī al-Shawkānī (1938), Nayl al-Awqāʾ, vol.6, Egypt: al-Māṭbaʿah al-Uṯmānīyyah, 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.
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’în baynînāh ṣughrâ) and triple divorce (tālāq thalāthah or bā’în baynînāh kubrâ).

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 menstruation. 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.

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. You are divorced, you are divorced, and you are divorced. He is said to have repudiated his wife by irrevocably triple divorce.

The implication is that in the case of the first type of irrevocable divorce is that the parties can remarried 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 ḥalālah/taḥlīl in Islamic jurisprudence. Only after this, the original spouses can remarried.

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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 Muhammad ibn Yazîd ibn Mêjah (2003), Sunan ibn Mâjah, Šidqi Jamîl al-’Âṭṭâr (edt.), Beirût: Dâr al-Fikr, p.469. See also Âḥmad ibn Shu’ayb al-Nâsâ’i(2002), Sunan al-Nâsâ’î, Âḥmad Shams al-Dîn (edt), Beirût: Dâr al-Kutub al-’Ilmiyyah, p.553.


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-Nasâ’î, p.555. See also Asaf A. A.Fyzee (trans) (2004), The Pillars of Islam, vol.2, Oxford: University Press, p.246.
Woman also, among others, 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 (taʿliq).  

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. 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 Ḥanafiyyah almost give no recognition for obtaining a divorce under this avenue provided her husband has consummated the marriage. Others like Shafi‘iyyah and Ḥanābilah allow limited grounds for judicial dissolution of marriage, such as illness, defects and decapitation, financial strains and marital frictions. Ṣanʿānīyyah, 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” (darar), 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. 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.

Taʿliq 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, ʿAbd al-Raḥmān al-Ṣābūnī(2001), Niẓām al-Usrah wa Ḥill Mushkilātuḥā fi Ẓaw’al-Islām, Beirut: Dār al-Fikr, pp.149-156
20 Ibid., p.156
legislations on Islamic family law, though its efficacy in practice is doubted, 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. Hanābilah and Awzā‘ī held it to be valid and the majority regard it as void. The main reason is because of conflicting versions of ahādīth 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 Hanābilah 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.
25 The Qur’ān dismisses the notion of temporary or marriage of convenience by declaring marriage basically as mithāqan ghalīzan. 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 ways 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 *talāq* and how they exercise it. Men popular belief is that it is their absolute right 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

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27 Khashi‘ı Haqqi (1997), *al-Talāq Tārīkhan wa Tashri‘an wa Wāqi‘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. 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 (*milākhās*). For details, see Maḥmūd Muḥammad Ḥassan (1985), *Qānūn al-Āhwāl al-Shakhṣīyyah: ‘Aqd al-Zawāj*, Kuwait: Mu’ssassat Dār al-Kutub, p.39. This is an interpretation which counters many verses (al-Nisā : 1; al-Āhzāb: 35; al-Nahl: 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-Zuḥaylī (2000), *al-Uṣrah al-Muṣlimah fī al-‘Ālam al-Mu‘āṣir*, Beirut: Dār al-Fik al-Mu‘āṣir, pp14-19.
and fragmental understanding of the very notion of divorce law and it \textit{modus operandi} by Muslim masses. The most important among them are as follows:

**Sharī'ah value (hukm) postulate**

According to most authentic interpretation, divorce, \textit{a priori} is governed by two kinds of \textit{hukm}: \textit{al-ḥukm al-asli} or \textit{al-ḥukm al-awwal} (normative \textit{ḥukm}) which represents the basic position of Islam about the divorce; and \textit{al-ḥukm al-thānawi} (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.\textsuperscript{29}

**The normative \textit{ḥukm}**

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

One group\textsuperscript{30} held that the basic law (\textit{al-ašlu}) on judicial separation whether by ṭalāq, fasakh, ta’liq or khulu’i is one of disapproval/proscription (\textit{al-ḥaẓru}).\textsuperscript{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 (\textit{abghad al-ḥalāl}) in the sight of Allāh is ṭalāq.”\textsuperscript{32}
2. “Any woman who asks her husband for divorce without a good cause, the fragrance of paradise will be prohibited for her.”\textsuperscript{33}

Affirming this normative stand about ṭalāq, al-Qurṭubī maintains, “There are numerous \textit{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


\textsuperscript{30} This represents Ḥanafīyyah, Mālikīyyah, Ibn Taymīyyah and the contemporary jurists.

\textsuperscript{31} Al-Ṣabā‘īnī, \textit{Nizām al-Uṣrah wa Ḥilli Mushkilātuhā fī Dāw‘ al-Islām}, p.121

\textsuperscript{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.

\textsuperscript{33} Al-Shawkānī (1938), \textit{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-Dihlawî commenting on above ahādīth says: “The wisdom of Islam in frowning upon ṭالاق as such (whether initiated by the husband or by the wife) is to forestall many mafāsid (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-Šābūnī says: “This normative rule about ṭالاق finds clear support from the Qur’ān which while sanctioning ṭالاق 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 mahžūr (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-Šan‘ānî when he said, “The hadīth 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 harām. In our opinion, this hadīth 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 ibāhah (permissibility) even without any need. They, among others, argued:

36 Al-Šābūnī, Niẓām al-Uṣrah wa Hilli Mushkilātuhā fī Ḍaw‘ al-Islām, pp. 121-122.
38 This represents the Shāfi‘ī and Ḥanābalah positions, see Muḥammad ibn Qudāmah (1989), al-Mughnī, vol.10, Cairo: Hajr, pp. 323-325.
1. Allah says: “there is no junāḥ (blame/sin) on you if you divorce the women…” 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 mahzūr, 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 ʿtalāq (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 ʿijmā 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 Sharīʿah as it seriously questions the unimpeachable principle of equality of man and woman as abound in the Qurʾān - 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. ʿitāq (freeing salves) entails benefits while wanton divorce of one’s wife entails unspeakable miseries and sufferings (it is a qiyās maʿa al-fāriq).

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-ḥizr, 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 ʿĀbidīn, al-Ghazālī, Ibn Taymīyyah, to name a few.

For instance, Ibn al-Humām said: “The basic law about ʿtalāq is al-ḥazr 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
longer get along with each other either on account of divergent character or mutual resentment.”  

Ibn ʿĀbidīn says: “basically ṭalāq is maḥṣūr 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-ḥaḍr.”  

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.”  

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.  

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 Shari‘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)” – 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 rajʿī 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.

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41 Ibid.
42 Musā, Aḥkām al-ḥāwāl al-Shakhṣīyyah fi al-Fiqh al-Islām, pp.2 57-258.
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 (hukm shar‘i) is classified into two categories of sunnī and bid‘ī.

Sunnī 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-ṭalāq al-marratiin (repetition during purity) and fa ṭalliqūhunn 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

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⁴⁷ Ibid, pp. 219-220.
⁴⁸ Al-Shawkānī (1938), op.cit., vol. 9, pp. 222-227.
⁴⁹ Al-Baqarah: 229
⁵⁰ Al-Ṭalāq: 1
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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 talāq, 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 Shi‘ah and Zāhirī; it amounts to one talāq in the case of unconsummated marriage and triple in the case of consummated marriages as held by Ibn ‘Abbās; it amounts to triple talāq as held by all the Four Sunni Schools; it amounts to one talāq 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‘farīyyah and contemporary authorities on the subject 53.

The main reason for this is due to conflicting sunnah54 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 hadīth, some saying that the Prophet S.A.W approved such talāq 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 talāq as it amounts to one only (revocable). But the scholars of hadīth 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 *talāq* is in conformity with the substance of the Qur’ānic expression, "*al-talāq 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 scholars 57, 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 *sumnah* defined procedure/Qur’an mandated law, immoral thus sinful but still legal. This problem of legalistic approach to Shari‘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 Taymiyyah 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 Shari‘ah because it is the Shari‘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 *talāq bid‘i* as *ḥaram* but holding them as totally legal and regular seriously has relegated the sublime position of morality in the


56 Ibid.

57 But there are schools, such as Shī‘ah and individual eminent jurists, such as Ibn Taymiyyah, 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 *ḥaram*. See Ahmad Zakī Yamanī (2004), “*al-Muṣāwāt 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.


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 *talāq* in principle is the commission of the lesser of two evils (*irtikābih 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‘i* form of *talāq*, known as triple divorce whether done inside or outside the court. The reason being that this form of (*talāq*) 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.