

HERMENEUTICAL READING OF *ṬALĀQ*

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Abstract. This paper deals with the hermeneutical reading of divorce (*ṭalāq*), one of the sensitive issues in Islamic family law. It is concluded that the existence of Islamic law of divorce is not to denigrate women; however, it is to give response to the injustice suffered by women by giving regulations that are more friendly to women. The regulations of the Quran on the subject of divorce are designed to restrict the practice which had prevailed among the Arabs that they are free to divorce his wife at any time without any reason, and remarry her in unlimited ways. This is indicated that Islam stipulates that divorce is two times: then one may retain with goodness (and reasonable terms), or let go with goodness and reasonable terms. If divorce occurs, a divorced woman should the prescribed period (*'iddah*) and financial consideration (*mut'at al-Ṭalāq*).

Abstrak. Artikel ini membahas pembacaan hermenetis terhadap talak, salah satu isu yang sensitif dalam Hukum Keluarga Islam. Dari pembacaan tersebut dapat disimpulkan bahwa keberadaan aturan hukum Islam tentang talak bukanlah untuk merendahkan atau menghinakan perempuan; namun, ia merupakan respons terhadap ketidakadilan yang dialami perempuan dengan menyediakan aturan-aturan yang lebih bersahabat kepada perempuan. Aturan-aturan hukum tentang talak dibuat untuk membatasi praktik talak yang telah ada dikalangan masyarakat Arab, yang mereka bebas menceraikan isterinya kapan pun dan tanpa alasan apa pun, dan menikahinya kembali secara tidak terbatas. Ini diindikasikan oleh fakta bahwa Islam menegaskan bahwa talak itu dua kali: kemudian, seorang suami dapat menahannya dengan baik atau melepaskan dengan cara yang baik. Jika talak terjadi, perempuan yang ditalak tersebut harus menempuh masa tunggu (*'iddah*) dan mendapatkan dukungan keuangan (*mut'at al-Ṭalāq*).

Kata Kunci: *ṭalāq*, hermeneutics, ethics of divorce, *'iddah*

INTRODUCTION

The issue which is regarded as highly sensitive among the Muslims is unilateral divorce (*ṭalāq*). *Ṭalāq*, which means “repudiation,” is considered as unfair for women. From the perspective of Islamic law, it can be said that *ṭalāq* is a husband’s right to divorce his wife by making pronouncement that the marriage is dissolved. Directly placing right to divorce in the hands of husband has to be understood in the context of the *qiwāmah* issue, which considers the male to be the provider of his family. This is because in Islam the husband has financial responsibilities as a consequence of divorce.

This legal assumption is regarded by feminists and women’s movement as gender-unfriendly. Therefore, they made an effort to eliminate this discrimination. Women’s demands for reform have gained particular momentum since the 1980s, when feminist researchers and activists began to move beyond simplistic statements that “the system of patriarchy is oppressive” towards gathering concrete evidence of how structures of oppression actually work. This is one of the strategies that have made moves towards equality and justice in the Muslim family possible.

Different strategies were used by activists to demand an expansion of women’s rights in family laws. According to Balchin,¹ the strategies include documenting women’s lived realities and experiences of injustice, mobilisation through consensus-building and broad-based platforms, lobbying with lawmakers and raising the political stakes, focusing on procedural amendments, communication and public advocacy, demands for reform based within the framework of religion, multiple frames of reference and reconceptualising the family, safeguarding women’s existing rights in the family, long-term empowerment

¹See Cassandra Balchin, “Family Law in Contemporary Muslim Contexts: Triggers and Strategies for Change,” in *Wanted Equality and Justice in the Muslim Family*, ed. Zainah Anwar (Malaysia: Musawah, 2009), p. 209-236.

strategies, evaluating efforts to promote and protect women's rights in the family.

As a result, this movement to some extent achieved a considerable success. In Egypt, for instance, the Egyptian law (No 25/1920 and law No 25/1929) brought about significant reforms in the country's personal and family laws. These laws *inter alia* established additional factors (such as the husband's incurable defect or contagious disease, his desertion, failure to provide maintenance and maltreatment) as grounds for divorce petitions.² Additional laws were introduced in 1979, which provided for compulsory registration of *ṭalāq* and the requirement that the wife be given notice of the *ṭalāq*.³

Within the Indian Sub-continent, the first concrete initiatives affecting the application of Muslim Personal Laws were brought about by the Dissolution of Muslim Marriages Act 1939.²⁸ The Act continues to be operational in the three countries of the Indian Sub-continent—India, Pakistan and Bangladesh—with a number of modifications and alterations. Injustices caused by the application of the classical Hanafi law were removed by expanding the grounds of divorce for women. The husband's desertion, failure to provide maintenance, cruelty, maltreatment, chronic illness and impotence were grounds appended to the existing provisions for seeking divorce.⁴

However, it must be stressed that, within Sharia, women are given right to divorce, although they have (depending on the school of thought) the significantly onerous task of obtaining it, invariably by means of a judicial decree. The classical schools of Islamic jurisprudence have agreed on the following means by

² Javaid Rehman, "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq," *International Journal of Law, Policy and the Family*, Vol. 21(2007), p. 119.

³ *Ibid.*

⁴ *Ibid.*, p. 121.

which the wife can obtain divorce; first, delegated divorce (*ṭalāq tafwīḍ*), under which a wife has the right to divorce only if the husband has delegated this right to her. This delegation can take place before or after the marriage and, hence, can be included in the marriage contract. Second, *khulū'* (divorce by giving something in return). The right of a woman to *khulū'* is based on her sacrifice of part or all of her dowry to her husband to get a divorce. The husband cannot return to her without her consent. The question may arise is whether or not *ṭalāq* is unfriendly to women. This paper is to analyse this concept of *ṭalāq* using hermeneutical approach.

THEORETICAL FRAMEWORK

A hermeneutical framework situates the social subject in his or her total historical and cultural context. From this perspective, understanding cannot be formulated absolutely, but rather it is formulated in terms of the perspective of a given situation. Hermeneutics is a process of understanding that enables one to interpret the object of understanding. According to this understanding, a meaningful action is an objectification of ideas. In this manner, hermeneutics refers to human actions and social phenomena that can be explained by interpreting the subjective meaning of social action.

Central to this approach is the concept of “distanciation,” introduced by Hans-Georg Gadamer and elaborated by Paul Ricoeur.⁵ Distanciation is the focus of hermeneutics, and it implies maintaining a distance between one’s tradition, knowledge, and experience. This distance is not meant to disconnect the person from his or her traditions; rather, it is supposed to enable each

⁵ See Hans-Georg Gadamer, “The Historicity of Understanding,” in *Critical Sociology: Selected Readings*, ed. Paul Connerton (Harmondsworth, UK: Penguin, 1976); and Paul Ricoeur, *Hermeneutics and the Social Sciences: Essays on Language, Action, and Interpretation* (Cambridge: Cambridge University Press, 1981).

individual to question critically his or her stand with regard to knowledge within his or her own tradition as well as other traditions. Distanciation is made possible by abstaining from prejudice and predisposition.

To address interpretive problems, a semantic, pragmatic, and socio-linguistic analysis of both legal texts and their respective contexts is necessary to use. The main contention is that any language must be understood in its proper context. Context refers to a wide spectrum of elements that must be considered to achieve the goals of communication. These elements are interwoven and are far from representing a typology that can be easily perceived. This would include, among others, the following elements:⁶

- *The founder of the speech act.* This lies at the centre of any communicative exercise as it attaches itself more to adherence than to mere communication. In the Islamic context, the *Asy'arīs*, the *Zāhirīs* and a number of jurists maintain that the originator of language is God, whereas a number of Muslim theologians hold that it is the speaker who originates what he utters. Significantly, Abū Ishāq al-Syātibī (d. 790/1388) dismissed these discussions as lying outside the subject matter of the Islamic legal theory. Obviously, the admissibility of the discourse or otherwise depends chiefly on this element.
- *The speech recipient:* The nature and social class of the person spoken to underscore the efficacy of a discourse. Another important feature of the social context is the context of the person spoken to, and in particular the role relationships and relative statuses of the participants in a discourse.

⁶ Souhalhi Younes, "Islamic Legal Hermeneutics: The Context and Adequacy of Interpretation in Modern Islamic Discourse," *Islamic Studies*, Vol. 41, No. 4 (Winter 2002), p. 586-589.

- *The speech acts*: Distinction must be made between sacred and non-sacred speech acts. Communication, adherence and commitment would always be disrupted when the sacredness or non-sacredness of texts is not settled. Besides, what comes under the purview of the sacred is not always conceptually easy to perceive as people have disagreed and been sceptical as to what constitutes a sacred text.
- *Pragmatics*: on a deeper plane, however sacred a text might be, it is apt to have its semantic force resting on situational grounds. Therefore, pure linguists would perceive the merit of utterance in its use, determining time and space as the main factors underlying the semantic aspect of a speech.
- *Relevance*: The communicative context stipulates that a given speech must adhere to the dictates of 'relevance' that binds its logical parts: "Another term which is also used in recent logic is *Relevance*. The latter term, however, will be reserved to denote certain pragmatic properties of sentences or propositions".⁷ However, relevance here refers more to the syntactical relation than to the meaning of a speech in a particular situation. Relevance would first work on a more literal than circumstantial framework. It perceives the text in relation to the preceding and subsequent texts, regardless of whether they are closely or obliquely related. In the context of a divine speech, this mode of interpretation is a prerequisite.
- *Perceptions and Epistemology*: It is not sufficient to maintain the ordering of sentences and the ordering of facts in order to grasp the meaning of a speech. Facts precede sentences but perceptions precede things. Thus, it is essential to rectify our perceptions of things before we proceed to express our opinions about them. Dijk maintains,

⁷ Teun Adrianus Van Dijk, *Text and Context: Exploration in the Semantics and Pragmatics of Discourse* (London: Longman, 1982).

“The ordering of the perceptions and the knowledge about them determines the structure of the discourse.”⁸

- *Language change and the time-space factor.* Language in its synchronic ordiachronic variation determines, to a large extent, the illocutionary import of the utterance.

In a hermeneutical approach, language plays a significant role in determining the meaning of the legal text. However, language alone falls short of unveiling the nature of the legal text, so context would help view the legal text within its genuine wholeness. Context or *siyāq* refers to any factor either within or without the language boundaries. It is a set of determinants that provides an overview on the text being studied. One has recourse to *siyāq* when the meaning of a text cannot be drawn solely from the text, which is only confined within its linguistic boundaries.

***ṬALĀQ* BEFORE ISLAM**

Pre-Islamic Arabs have already been familiar with the regulation of divorce between husband and wife. However, according to them, *ṭalāq* is merely a husband's right. Men had unlimited rights to divorce and remarry wives. There is no limitation for how many times a man could divorce her and remarry her. Reports suggest it was not unheard of for a man to have divorced his wife 100 times or more. This is one where it is said Muhammad improved the status of women. He allowed a woman to be divorced up to three times, after which the man could not remarry her again. As with any ruling, there was an exception, and the exception is known as a *Muḥallil* marriage.⁹

A wife, in this pre-Islamic times, does not have right to this at all. Husband can divorce his wife at any time without any reason. He is free to leave his wife as he is also free to marry her.

⁸ Ibid. h. 97.

⁹ Sayyid Sābiq, *Fiqh al-Sunnah*, vol 2 (Kairo: al-Fath} li al-I'lām al-'Arabī, nd), p. 158.

Wife does not have right to leave her husband absolutely and asks for divorce in whatever situation. If a wife required this right for herself at the time of marriage contract, she deserved to this right at the moment. It was noble pre-Islamic Arab women who required this right at the time of marriage contract for themselves. Among women who required this right at the pre-Islamic era in Arabia are Salmā binti al-Harshab al-Anmarīyah and Umm Khārijah.

This is due to the fact that the status of women in pre-Islamic Arab and in the world in general is worthless. Particularly in pre-Islamic Arab, the birth of women was regarded as shame; therefore, their birth into this world was hated. So, their birth was a beginning of their death. Female babies, who were born at the moment, are buried alive. If they are kept alive, they will live in disgrace without dignity. Allah said in the Quran, “*When the female (infant), buried alive, is questioned. For what crime she was killed.*” (Q.S. al-Takwīr []: 8-9). Women, who had been kept alive until adult, were despised, and did not get inheritance. They were made as objects to satisfy the carnal passions of men. At this time of darkness, men married women without any limitation, and did not care about justice in the marriage.

In short, in pre-Islamic times, divorce was a weapon used against the woman solely in a man’s hands; when he wanted to harm the wife, he would seek to divorce her and then take her back as he pleased. There were no set rules and the woman had no rights in the matter. So Allah invalidated this injustice by revealing the verse which says:

Divorce is two times: then one may retain with goodness (and reasonable terms), or let go with goodness and reasonable terms. (Q.S. al-Baqarah [2]: 229).

Therefore, from this Quranic verse, it can be said that the regulations of the Quran on the subject of divorce seem rather be

designed to restrict the practice which had prevailed among the Arabs than to encourage it.

ṬALĀQ IN ISLAM

Divorce is generally referred to as *ṭalāq*, meaning “repudiation”. *Ṭalāq* comes from the root *ṭallaqa* which means “to release a human being from any marriage with a particular statement.” In Islam, divorce is instrument of last resort. It is the fact that marriage includes an element of *‘ibādah* which means that marriage relationship must be a permanent one and not be terminated willy nilly at the instance of husband. However, if disputes occur between the parties, the Quran has specified certain preliminary steps such as admonishment in a kind manner, which directed towards the settlement of these disputes and the maintenance of the marriage relationship. This is so because stable family relations are considered as a cornerstone of a healthy society. Marriage breakdowns not only cause considerable hardship to the parties concerned and any children born of the marriage, but are also detrimental to society at large. If these preliminary steps fail, the Quran provides that an effort be made to resolve the dispute by means of arbitration. In this respect, the Quran states:

If you fear a breach between them (husband and wife) appoint a judge from his family, if they both (arbitrators) wish for peace Allah will cause their reconciliation. Allah is all knowing, the most great. (Q.S. al-Nisā [4]: 35).

A number of Quranic verses discourage *ṭalāq* and deter those engaged in such practices. The Holy Quran, while stressing the sanctity of matrimonial bonds, allows them to be broken, not according to the arbitrary will of the husband, but according to certain objective considerations. Thus comes the first command:

As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next) refuse to share their beds, (and last) beat

them (lightly). But if they return to obedience, seek not against them means (of annoyance), for God is most high, Great (above you all). (Q.S. al-Nisā [4]: 34).

When the means mentioned in the above injunctions have been exhausted, then the question of divorce arises. Imperative guidelines have been set out for that final unfortunate possibility. Thus comes the divine declaration in chapter 2 of the Quran,

Prophet! when ye do divorce women, divorce them at their prescribed periods and count (accurately) their prescribed periods. And fear God, your Lord and turn them not out of their houses, nor shall they (themselves) leave, except in cases [where] they are guilty of some open lewdness. Those are the limits set by God and any who transgresses the limits of God, does verily wrong to his (own) soul. Thou knowest not if per chance, God will bring about thereafter some new situation. (Q.S. al-Ṭalāq [65]: 1).

Where all efforts towards reconciliation fail and there is no prospect whatsoever of reconciliation, then in such event the husband may exercise his right of divorce as an instrument of last resort and by way of necessity. In such a case, the right may be exercised because it would be unjust to both parties to maintain a marriage which has irretrievably broken down. The right of divorce as an instrument of last resort is clear from the following hadith, “The worst of permissible things in the sight of Allah is *ṭalāq*.”¹⁰ Therefore, if we look at the Quran and the Hādīth saying *ṭalāq*, it can be concluded that it presents negative attitudes towards *ṭalāq*. Islam encourages reconciliation between spouses rather than severance of their marriage.

In Islamic law, *ṭalāq*, which means “repudiation”, can be categorized into two forms: *ṭalāq al-sunnah*, which is consistent with the Prophet’s teachings, and *ṭalāq al-bid’ah*, which is

¹⁰ Abū Dāwūd Sulaymān ibn al-‘Ash’ath al-Sijistanī, *Sunan Abī Dāwūd*, vol. 2, hadis no. 2178 (Beirut: Maktabah al-‘Aṣriyyah, nd), p. 255.

considered an innovation that does not follow the Prophet's teachings. As for *ṭalāq al-Sunnah*, this entails the man uttering divorce at a time when he has not engaged in any sexual relations with her after her last menstruation, whilst his wife is in a state of purity, that is, she is not menstruating or in a state of *nifās*—post natal bleeding, and that he declares the divorce once only. And so if one of the previously mentioned condition is violated, the divorce process is considered as having been carried out in an innovated manner.

Ṭalāq al-Sunnah is categorised into *ṭalāqḥasan* and *ṭalāq ḥasan*. *Ṭalāqḥasan* or the most laudable divorce is where the husband repudiates his wife by making one pronouncement within the term of *ṭuhr* (purity, when the woman is not passing through the period of menses) during which he has not had sexual intercourse with her, and she is left to observe her *'iddah*. *Ṭalāqḥasan* or laudable divorce is where a husband repudiates an enjoyed wife by three sentences of divorce, in three *ṭuhr*. This regulation of the three-fold divorce formula is intended actually to protect the woman from impulsive divorces that are pronounced in annoyance, intoxication, or just in fun. Divorce, however, remained even in the Islamic era a comparatively uncomplicated process for the husband, since his decision alone is sufficient.

Ṭalāq al-Bid'ah is where a man divorces his wife while she is menstruating or is in a state of post natal bleeding, or that he divorces her after her last menstruation, or that he divorces her by verbalizing the divorce three times in one utterance of divorce at one times as an act of innovation or one same setting. This is the overwhelming opinion of the majority of the scholars. According to the majority of the jurists, the *ṭalāq* holds good, but it is against the spirit of the *Syarī'ah*, and, therefore, the man who follows this course in divorce is an offender in the eye of Islamic Law.

Regarding this kind of divorce thrice at one time, there are four famous different opinions on this issue among the scholars. The first opinion is that three divorces given together at a time befall and the woman is divorced. This is the opinion of the four dominant schools of thought. The second opinion is that if the woman has carried out sexual intercourse, then three will befall, and if she has not, then only one will happen. The third opinion is that of the Mu'tazilah and Sy'ah who say that three divorces at a time are nothing and have no legal status at all. The fourth opinion is that this is only to be counted as one divorce. This is also the opinion of Abū Bakr al-Ṣiddīq, 'Umar ibn al-Khaṭṭāb during the first two years of his *khilāfah*, 'Abd al-Raḥmān ibn 'Awf, 'Abdullāh ibn Mas'ūd, 'Ali ibn Abī Ṭālib, 'Abdullāh Ibn 'Abbās, Ibn Taymīyah, Ibn al-Qayyim, and many others.

According to Muhammad Husain Haykal,¹¹ the noted Egyptian Islamic scholar, says that it was done in view of the extraordinary conditions prevailing at the time. During wars of conquest, many women from Syria, Egypt, and other places were captured and brought to Medina. They were fair complexioned and beautiful and the Arabs were tempted to marry them. But these women were not used to living with co-wives and often made a condition that the men pronounce a triple divorce against their former wives, thinking that they would not be able to take them back. They did not appreciate that according to the Quran and the Sunnah three divorces pronounced on one occasion were treated only as one divorce, and the divorce was therefore revocable. The Arabs would pronounce three divorces to satisfy these women but later took their former wives back, giving rise to innumerable disputes.

To overcome these difficulties, 'Umar thought it fit to enforce three divorces in one sitting as an irrevocable divorce.

¹¹ Muḥammad Ḥusayn Haykal, *Al-Fārūq 'Umar* (Cairo: Dār al-Basyīr, 1364 H), p. 225-285.

He, therefore, decided to hold men to their words and ruled that the pronouncement of a triple repudiation would be treated as a triple divorce. It was *ijmā'* reached by subsequent generations of jurists based on legal reasoning (*ijtihād*) of 'Umar rather than on Divine legislation. Since then, this form of divorce has become an integral part of Islamic *Syarī'ah* among the Sunni Muslims. It is widely practised throughout the Islamic world. It has been the cause of a great deal of concern among Muslim women. It is an arbitrary and non-Quranic form of divorce, and has made the lives of thousands of women miserable. If the husband says divorce thrice, even in a state of anger or inebriation, or just for fun, the woman is irrevocably divorced and the husband, even after coming to his senses, cannot help because his pronouncement of divorce thrice has made it legally valid. No one can help the wife either. The husband cannot take her back, even if he repents. Often husbands use this form of divorce to punish their wives for not submitting to their authority. 'Umar had altered the rules under the pressure of events. It was more in the nature of an ordinance by a ruler to meet a specific situation rather than a divine injunction. It is most unfortunate that it is being enforced as a Divine Law.

According to Nehaluddin Ahmad,¹² Those who support the view that triple divorce pronounced on one occasion is a valid divorce also use the following arguments: (1) Umar, the second Caliph, while accepting theirrevocability of triple divorce nevertheless used to order the public flogging of the person who pronounced it; and (2) That its pronouncement is to be likened to a fatal blow, the effect of which operates independently of the mental condition of the person who administers it. So, while a husband who disregards the prescribed procedure is guilty and deserving of punishment, this does not neutralize the effect of the

¹² Nehaluddin Ahmad, "A Critical Appraisal of 'Triple Divorce' in Islamic Law," *International Journal of Law, Policy and the Family*, 23, (2009), p. 58-59.

divorce on the wife. Some analogize this with an act of murder of the wife.

THE ETHICS OF DIVORCE

Ethics can be defined as “a set of principles of right of conduct”.¹³ Ethics of divorce in Islam are derived from two fundamental sources of Islamic law and ethics—the Quran and the Sunnah of the Prophet Muhammad as well as the life of his companions. It can be seen in two areas: the prescribed period (*‘iddah*) and financial consideration (*mut‘ah al-ṭalāq*).

The prescribed period (*‘iddah*) is emphasized in the Quran Surat al-Ṭalāq (65): 1, which states “*O Prophet! If you and the believers divorce your wives, divorce them at the end of their (‘iddah) prescribed periods, and count their ‘iddah accurately...*” The Quran, sura al-Baqarah (2): 29 also states “*A divorce may be (revoked) twice, whereupon the marriage must either be resumed in fairness or dissolved in a goodly manner.*” Al-Baqarah: 231 further explains, “*When you divorce women, and they fulfill the term of their ‘iddah (prescribed period), either take them back on equitable terms or separate with them on equitable terms; but do not take them back to impose hardship upon them. Whosoever does that, surely wrongs himself...*”

These verses were furthered explained in practical details when Abdullah, the son of ‘Umar ibn al-Khaṭṭāb, had divorced his wife while she was menstruating. ‘Umar sought advice from the Prophet Muhammad about that. The Prophet said to him, “Order your son to take his wife back and keep her till she is clean, and then wait till she gets her next period and becomes clean again, whereupon, if he wishes to keep her, he can do so, and if he wishes to divorce her he can divorce her before having marital

¹³ “Ethics” at <http://www.thefreedictionary.com/ethics> (Accessed: 31 December 2015).

relations with her; and that is the prescribed period which God has fixed for women meant to be divorced.”¹⁴

However, the rule of the prescribed period (*‘iddah*) has many advantages, such as, (1) to provide opportunities for husband and wife to return to their home life if they still see the good in it; (2) to assure whether or not there is pregnancy in a divorced wife. If the answer is positive, the baby should be maintained so that it becomes clear who the real father is. (3) If divorce comes out of husband’s death, the divorced wife will feel grievances suffered by her husband’s family and their children.

Second, divorced woman is given financial support. This is called *mut‘at al-ṭalāq* (post-divorce financial support), as we know it in Islamic jurisprudence. *Mut‘ah* is an Arabic term that linguistically means enjoyment and happiness as opposed to gloominess, depression, and grief. Idiomatically, it is the post-divorce financial support, or post-divorce payment to be made by the divorcer to his divorcee, in an attempt to uplift her self-esteem and tone down the negative impact of the social humiliation associated with the term “divorced woman”.

In the Holy Quran, *mut‘at al-ṭalāq* is profoundly rooted as clearly illustrated in the following Quranic verses:

There is no blame on you if you divorce women before consummation or the fixation of their dowry; but bestow on them *mut‘at al-ṭalāq*, the wealthy according to his means and the poor according to his means. (Q.S. Al-Baqarah [2]: 236)

And for divorced women is suitable *mut‘ah*. This is a duty on the righteous. (Q.S. Al-Baqarah [2]: 241)

O Prophet, say to your wives, “If you desire the life of this world and its glitter, then come! I will make a provision for you and set you free in a handsome manner (i.e. divorce you all). (Q.S. Al-Aḥzāb [33]: 28)

¹⁴ Al-Sijistānī, *Sunan Abī Dāwūd*, vol. 2, hadīth no. 2179, 255.

O you who believe! When you marry believing women and the divorce them before you touched them, no prescribed waiting period should be imposed on them, but grant them the mut'ah and set them free in a handsome manner. (Q.S. Al-Aḥzāb [33]: 49)

It is remarkable that most of existing commentaries of the Quran are mostly identical, not only in the terms of meaning and concepts but also on many occasions in the words they use. For instance, al-Ṭabarī, in his commentary on the foregoing Quranic verse, strongly advocated for women's rights in the mut'ah. He sturdily defended his belief that payment of mut'at al-ṭalāq to a divorced woman is an obligation on the husband by the virtue of the aforementioned Quranic verses. And after reporting different opinions of the jurists on this matter, he said, "I believe what represents the truth among all of the above jurists' arguments is the argument of those who say that post-divorce mut'ah is mandatory for all divorced women, because Allah has said, 'For all divorced women, mut'ah as a duty on the muttaqīn.'" He was also quoted in his Tafsīr as saying:

It is my conviction that post-divorce *mut'ah* is an obligatory payment on the husband who divorced his wife, and he is liable to pay her mut'at al-ṭalāq just like he is liable to pay her due dowry, and he will never be exonerated from such obligation until he pays her or her proxies or heirs, and that mut'at al-ṭalāq is like other debts that are due to her, and the husband is subject to incarceration and his property can be sold for not paying his divorced wife her post-divorce due mut'ah.¹⁵

Moreover, al-Qurṭubī said the post-divorce mut'ah is mandatory. He quoted 'Abdullāh ibn 'Umar, 'Alī ibn Abī Ṭālib, Sa'īd ibn Zubair, and other prominent scholars of the successors who hold that the rule of *mut'ah al-ṭalāq* came in the form of a command and therefore is a binding rule (wājib), although Mālik, al-Qāḍī Shurayḥ, and other jurists who hold it as a non-binding

¹⁵ Muḥammad ibn Jarīr al-Ṭabarī, *Jāmi' al-Bayān 'an Ta'wīl al-Qur'ān*, Taḥqīq Aḥmad Shākīr, vol. 2 (Beirut: Mu'assasah al-Risālah, 2000), p. 80-82.

Islamic rule, saying it is a just recommendable rule. He continued to say that the supporters' argument is based on the wording of Quranic verse as an imperative and binding command from Allah, while the second party did not deny that the word is a command, but based its understanding on the recipient of the said command, claiming the verses addresses the *muḥsinīn* (righteous people) and *muttaqīn* (pious people of the means) only, so it is bindingly upon the *muḥsinīn* and *muttaqīn*. Further, they said that if *mut'ah al-ṭalāq* were a binding Islamic rule, it would have been imposed on all people, not only on righteous and pious people.

After discussing the above conflicting opinions, al-Qurṭubī strongly endorsed the first party's opinion and determination. He added that the second party's argument is indefensible, because the contextual indication and the understanding thereof show the command of *mut'ah al-ṭalāq* referred to the divorcees, and the preposition letter (*lām*) in the word (*lil muṭallaqāt*) is a possessive letter and an indicative element that gives divorced women an undeniable right to their post-divorce financial shares.

Furthermore, al-Qurṭubī pointed out that *muḥsinīn* and *muttaqīn* emphasize and further assure the right of divorced women to post-divorce *mut'ah*, because being a *muḥsin* and a *muttaqī* is a duty on all Muslims. He then addressed jurist opinions on the eligibility of divorced women. He stated that in accordance with Ibn Abbās, Ibn 'Umar, Jābir ibn Zayd, al-Ḥasan, 'Aṭā' ibn Rabāḥ, Ishāq, al-Syāfi'ī, Aḥmad, and opinion adherent jurists, *Mut'at-al-ṭalāq* is mandatory only for the divorced woman who has been divorced before the consummation of the marriage and whose dowry was not fixed, and that it is only recommendable for all other divorcees.¹⁶

¹⁶Muḥammad ibn Aḥmad Al-Qurṭubī, *al-Jāmi' li Ahkām al-Qur'ān*, vol.3, 3rd ed. (Beirut: Dār-al-Kitāb al-'Arabī: 1999), p. 200-201.

Al-Fakhr al-Rāzī, one of the prominent jurists of his times, is in favor of the opinion that *mut'ah al-ṭalāq* is fittingly mandatory. According to his understanding, both Abū Ḥanīfah and al-Syāfi'ī support the opinion that *mut'ah al-ṭalāq* is obligatory on his husband. His comments on verse 2: 26 could summarize his inclination to consider divorced women of three categories:

- Women who are divorced before the fixation of their dowry and before the consummation of their marriages. For them, *mut'ah* is mandatory on their divorcing husbands.
- Women who are divorced before the fixation of their dowry and before the consummation of their marriages. For them, there will be no *mut'ah*, but they are entitled to 50 percent of the fixed dowry.
- Women who are divorced before the fixation of their dowry and before the consummation of their marriages. For them, *mut'ah al-ṭalāq* is mandatory.

Al-Rāzī quoted 'Abdullāh ibn 'Umar as saying that *mut'ah al-ṭalāq* is prescribed for all divorced women. Al-Rāzī did not hesitate to support his argument by the same points made by Al-Qurṭubī, as mentioned above, then added that the preposition letter *'alān* Arabic indicates that the matter in question is neither optional nor recommendable, but rather is obligatory.¹⁷

Moreover, al-Zamakhsharī in his well-accepted exegesis book of al-Kasasyāf, commented on this issue and quoted the opinion of Sa'īd ibn Zubair, Abū al-'Āliyah, and al-Zuhrī, who are among the jurists who believe that *mut'ah* is mandatory duty to all divorced women. Al-Zamakhsharī did not endorse their opinion. He, like other commentators, supports Mālik who believes that post-divorce support is mandatory only for women

¹⁷Al-Fakhr al-Rāzī, *Tafsīr al-Kabīr*, vol. 5 (Beirut: Dār al-Fikr, 1995), p. 150-151.

who are divorced before the consummation of the marriage, and only is recommended for other divorcees.¹⁸

In accordance with the Prophetic Sunnah, the Prophet was married to a woman known as ‘Amrah bint al-Jawn, from the tribe of Kilāb, but due to an uncertain reason the marriage was not consummated. Upon divorcing her, the Prophet paid her what was due according to her post-divorce right and sent her back to her family. In this Prophetic practice, we learn that despite the short time she spent in the Prophet house, when he pronounced an irrevocable divorce on her, he granted her post-divorce *mut‘ah*.¹⁹ In another Prophetic narrative, a man from al-Anṣār married a woman from the tribe of Ḥanīf, but divorced her before the consummation of the marriage. The Prophet commanded him to pay her post-divorce financial support (*mut‘ah*). Many of the Prophet’s Companions, including Uthmān ibn ‘Affān, ‘Abd al-Raḥmān ibn ‘Awf, the judge Shurayḥ, and Ḥasan ibn ‘Alī ibn Abī Ṭālib gave *mut‘ah* to their divorced wives.²⁰

In short, if we have a look at the rule of divorce in Islam derived from the Quran and the practice of the Prophet, it can be said that divorce is not to denigrate the status of women. It is actually only an instrument of last resort. It means that Islam does not totally approve this practice, but made an effort to do some reconciliation. However, if it fails, then divorce is made possible for the benefit of the spouses. If divorce occurs, the ethics described clearly in the Quran should be followed: the prescribed period (*‘iddah*) and financial consideration.

¹⁸Maḥmūd ibn ‘Umar al-Zamakhsyarī, *al-Kasysyāf*, vol. 1 (Riyād: Maktabah al-‘Ubaykān, 1998), 469.

¹⁹ Muḥammad ibn Yazīd al-Qazwanī Ibn Mājah, *Sunan Ibn Mājah*, ḥadīth no. 2037, vol 1 (Beirut: Dār Iḥyā’ al-Kutub al-‘Arabīyah, nd), p. 657.

²⁰ Al-Qurṭubī, *al-Jāmi’*, vol. 3, p. 201-203.

Conclusion

From the above discussion, it can be concluded that Islam does not support the issue of divorce. The Islamic law of divorce is intended to give respons to the injustice suffered by women by giving regulations that are more friendly to them. The regulations of the Quran on the subject of divorce are designed to restrict the practice which had prevailed among the Arabs that they are free to divorce his wife at any time without any reason, and remarry her in unlimited ways. Therefore, Islam stipulates that divorce is two times, then one may retain with goodness (and reasonable terms), or let go with goodness and reasonable terms.

Moreover, Islam strongly condemned divorce. If conflict and tensions occur between husband and wife, and they cannot solve the problem by themselves, each shall appoint an arbitrator or conciliator to resolve the matter. If it fails, divorce can be legally taken as a last alternative. In other words, divorce is only an instrument of last resort.

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