

Restricting the Permissible and Divorce: From Traditional Jurists to the Coerciveness of the Modern State

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ABSTRACT

Calls for the codification and reform of Islamic family laws in contemporary times have arisen around the globe. Of particular criticism is Islamic family law of divorce, which has drawn harsh criticism and repeated calls for reform to meet the demand of international human rights and gender equality. However, for Modern Muslim states, changing or reforming their laws to adhere to the Western model in divorce is quite problematic because divorce, as part of family law, is more detailed in the scriptures than in any other domain, which gives it a divine significance that results in resistance from the Muslim population when it comes to deviating from these rules. Therefore, these reforms have utilized several marginal Islamic legal tools in order to establish historical and religious legitimacy for formalizing a new law. Tools such as *taqyīd al-mubāḥ* (restricting the permissible) have become crucial in providing a credible Islamic perspective for state

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regulations. As a result, restricting the permissible has become a widespread concept in contemporary legal discourse. However, this has raised debates over the state's authority and right to restrict *mubāh* and traditional Islamic divorce, as well as the legal and moral responsibilities of individuals under such restrictions. It has also raised questions about the role of jurists in law production within the modern state. Thus, this article aims to address two primary questions: 1) Can modern Muslim states restrict divorce and bring it under the court's authority? 2) As a Muslim state, does such restriction align with the broader principles of shari'a? The article is divided into three sections. The first section explores how the modern state depends on the legal tool of *taqyīd al-mubāh* and the shift in juristic thinking to adapt to contemporary changes while discussing the legitimacy of the states right to apply the restrictions. The second section demonstrates the transformation of Islamic family law from traditional jurists' authority to being regulated by the modern state. It also presents three opposing viewpoints on transitioning from traditional divorce to juridical divorce. The third section analyzes and critiques the debates among these views.

Keywords: Taqyīd al-mubāh, divorce, talāq, Muslim state, Islamic family law

INTRODUCTION

Taqyīd al-mubāh (to restrict the permissible) has been a subject of controversy in modern scholarship. This is not only because classical scholars did not dedicate a specific chapter for it in their writings but also because it intersects with many other concepts when defining its boundaries. Moreover, its widespread contemporary use raises questions about its origins, the causes of its expansion and development, and the reasons behind its prevalence in today's legal discourse (Shareef, 2023).

Some notions that intersect with *taqyīd al-mubāh* include the rights of God and the rights of the *mukallaf* (one who is obliged to fulfil religious duties) granted by God. The restriction of textual *mubāh* would infringe on the rights of both God and the *mukallaf*. The concept of *maṣlaḥa*, which governs the restriction, is another problematic concept in modern studies. It prompts questions such as whether it is obligatory to obey the rules of the restriction, and what is the scope of the ruler's authority in implementing it. This is especially relevant since the ruler is entrusted with the duty of upholding religion and worldly issues. The most important element is the radical change in the state's structure and scope of authority, along with the changes in the field of positive law, that brought about a shift in current moral values. The modern state structure has significantly changed the nature and influence of Islamic law in current legal systems. Nonetheless, "Islamic law remains part of modern Muslim states, albeit in a significantly different role than in the premodern period" (Emon, 2021, p. 53). The shift of the concept *taqyīd al-mubāh* from a marginal term, rather—or perhaps a nonexistent concept—to becoming a central term in the modern era highlights the profound transformation in the state's nature and its will-to-power.

Taqyīd al-Mubāḥ

Taqyīd al-mubāḥ is the act of prioritizing one of the two options for legitimate and temporary reasons and to render the permissible required as long as there is no legal impediment, such as a text or a rule ('Abd-Al-Lāwī, 2011, p. 116). This definition applies to both individuals and the state, as individuals may also impose restrictions on some *mubāḥ* activities upon themselves. According to al-Qarāfī, The Lawgiver has categorized legal rulings into two types: those He originally determined to be obligatory or forbidden, and those He entrusted to the *mukallaḥ* to obligate upon himself (restrict) what was not obligatory (1995, p. 39).

This technical legal term was not used by classical jurists in their works before the 18th century (Shareef, 2023); rather they used numerous equivalent terms such as 'to prevent the permissible' (*man' al-mubāḥ*), 'to discontinue the permissible' (*ta'ṭīl al-mubāḥ*), 'to suspend the permissible' (*īqāf al-'amal al-mubāḥ*), and 'to refrain from the permissible' (*al-imtinā' 'an al-mubāḥ*). *Taqyīd al-mubāḥ* is part of the *siyāsa shari'a* (governance based on principles of Islamic law), and it refers to the authority of Muslim rulers to restrict acts that the shari'a permits in order to prevent social corruption (*mafsada*) and obtain a public benefit (*maṣlaḥa 'amma*) (al-Zarqā, 2004, p. 215; al-Qaradāwī, 1993, p. 126).

Accordingly, the state will render the permissible to either require (as obligatory from the state) to perform or to refrain from doing; hence the 'choice' is taken away from the *mukallaḥ*. The concept of *taqyīd al-mubāḥ* has been used since the late 19th century as the main argument in justifying the restriction of permissible acts by the state, such as polygyny and slavery (Ridā, 1947, vol. 4, pp. 344-375). According to Jonathan Brown, slavery has been abolished in the Muslim world primarily through *taqyīd al-mubāḥ* by government orders (Brown, 2020, p. 224).

Taqyīd al-mubāḥ is similar to the legal tool 'blocking the means,' which Muslim scholars have been applying to forbid acts whenever they have overwhelming preponderance (*ghalabat al-zann*) that it will lead to unlawful acts. Jurists have used 'blocking the means' to derive a legal ruling on an act that is not explicitly addressed in the text or to respond to social changes. By contrast, *taqyīd al-mubāḥ* is exercised by Muslim rulers rather than jurists, and it is used to temporarily restrict what is otherwise permissible. It is essential to note that the restriction is not permanent, and it is not intended to establish permanent juridical rulings. *Taqyīd al-mubāḥ* has raised another question about the distinction between what is prohibited (*ḥarām*) and what is illegal. In other words, how *taqyīd al-mubāḥ* is different from 'prohibiting the permissible' (*tahrīm al-mubāḥ*).

Scholars have used three ways to make this distinction. Firstly, the desired *mubāḥ* act to be restricted must either cause social harm (*mafsada*) or secure a social benefit (*maṣlaḥa*). Secondly, the *mubāḥ* act can be restricted only until social harm is eliminated. And thirdly, a ruler may only impose restrictions on a particular instance of the *mubāḥ* category and not the whole category. For instance, a Muslim ruler can restrict child marriage but not outright prohibit marriage (Abū I-Baṣl, 1995, p. 227).

LIMITS AND CONDITIONS OF THE RULER IN RESTRICTING MUBĀḤ

The delineation of the ruler's duties is not explicitly outlined in a definitive text. Rather, jurists have derived these duties from various texts and the practices of the first four caliphs and those who followed them as rulers (al-Māwardī, for instance, listed ten duties of the ruler; see al-Māwardī, 1989, p. 22).

The question of whether the ruler has the authority to restrict *mubāḤ* and whether the public should obey such restrictions has been a subject of intense debate within both classical and contemporary scholarship. According to al-Ālūsī (d. 1270/1854), in the context of interpreting the verse (Q, 4:59), he says that "Obedience to the ruler is obligatory as long as they are following the truth, so it is not obligatory to obey them when they violate the shari'a... Does it include *mubāḤ* or not? There was a disagreement; some argued that it is not obligatory to obey them..., while others asserted that it is obligatory" (al-Ālūsī, 1994, vol. 3, p. 64).

The dispute also extends to contemporary scholars. While most of them affirm the right of the ruler (or the state) to restrict *mubāḤ* under specific conditions, others hold differing opinions. These opposing views can be categorized into several groups: some of them prevent it absolutely (al-Tarīfī, 1994, p. 24), while others distinguish between textual *mubāḤ* and non-textual *mubāḤ* (*al-maskūt 'anh*), claiming that the restriction can only be imposed on the latter category due to concerns that such a restriction might be motivated by political gain. Furthermore, some contend that the ruler can render the *mubāḤ* as required to perform but cannot render it as required to refrain from doing.

There are three views regarding the right of the ruler to restrict *mubāḤ*. First, it is believed by some that the ruler has no authority to impose restrictions on *mubāḤ*, and should he attempt to do so, one is not obliged to obey him. The act of restricting *mubāḤ* is similar to 'blocking the means.' Scholars who do not acknowledge this as a legal tool reject the idea of restricting *mubāḤ*. For instance, Ibn Ḥazm, who believed that changing the status of *mubāḤ* was a violation of shari'a, considered it an act of disobedience to God and the Prophet (n.d., vol. 6, pp. 2-3). To impose restrictions on *mubāḤ* is seen as an act of legislating that supersedes God's legislation.

The main concern among both classical and contemporary scholars is that the ruler may follow his whims and desire to control the laws of shari'a. Thus, scholars advocate preventing the ruler from restricting *mubāḤ* so that he may not act on his own whims instead of considering actual benefits or harm (al-Zarqā, 2004, p. 221). Besides, such restrictions would curtail the freedoms granted by the Lawgiver and potentially increase oppression by modern states over individuals' choices. The restriction is usually based on the assumption of potential future corruption. However, rules and regulations should be founded on evidence, rather than mere conjectures. According to some contemporaries, "the restriction of polygamy has gone astray from God and His Messenger because polygamy is permissible. So, who prevents it has removed the permissibility established by God, the Sunnah and consensus, so who does so is a sinful" (Āl Būrnū, 2003, vol. 4, p. 384).

The second viewpoint is more permissive than the first. Advocates of this perspective argue that the ruler has the right to restrict only the non-textual *mubāḥ*, and not the textual *mubāḥ*. They believe that the ruler's right should be limited to restricting non-textual *mubāḥ* because there cannot be reasoning (*ijtihād*) in the presence of a text. Textual *mubāḥ*, on the other hand, is a right given by God, and to restrict it is perceived as a revocation of this right. Actions that fall under *siyāsa shari'a* are subject to change, in contrast to those that fall under *shari'a*, which are characterized by their unalterable and permanent nature. Giving the ruler the authority to restrict and abolish these rights would transform the ruler into a source of legislation. This would constitute an encroachment on God's right, allowing the ruler to supersede *shari'a* law based on whims and desires (Abū l-Baṣl, 1995, pp. 227, 242).

Both viewpoints emphasized the concept of rights in their approach to preventing restriction, specifically focusing on God's right to legislate and not invalidate the texts. The second perspective is the right granted to the *mukallaḥ* by God through an explicit text, even if its legal ruling is permissible. The restriction will abolish both rights. Many scholars have been dismissive of the aforementioned viewpoints. For example, Al-Raysūnī argued that even in cases of textual *mubāḥ*, restriction may be required to achieve benefits and avert corruption (2000, p. 32). The majority of scholars hold this later opinion that base the concept of restriction on the principle of *maṣlaḥa*. However, it should be noted that even though this viewpoint is widely held, "the restricting of *mubāḥ* by the ruler based on *maṣlaḥa* has a room for consideration, and is not from the consensus that it is not allowed to disagree with" (Ibn 'Āshūr, 1984, vol. 2, p. 418). Besides, questions remain regarding the ruler's role in achieving the public's *maṣlaḥa*, as well as what constitutes such *maṣlaḥa*.

The third viewpoint maintains that the ruler has the authority and the right to restrict *mubāḥ*, and it is obligatory to obey the restriction in both textual and non-textual *mubāḥ* (al-Mūs, 2014, pp. 211). In both cases, the ruler is subject to the legal maxim "the actions of an Imam (leader) are driven by the interest of the community" (al-Suyūṭī, 1983, p. 121). The ruler's responsibility is to guard the religion and to govern worldly matters (al-Māwardī, 1989, p. 3), and to secure the *maṣlaḥa* of the governed, much like the responsibilities of a guardian towards an orphan. For example, Ibn 'Ābidīn emphasized the obligation of obeying the ruler's restrictions in matters classified as *mubāḥ* (2000, vol. 5, pp. 167-168).

In the case of non-textual *mubāḥ*, the ruler's authority to restrict *mubāḥ* follows the rule "Wherever there is the *maṣlaḥa* (benefit), then there will be the *shari'a* of Allah." Jurists have established that if the ruler restricts a non-textual *mubāḥ*, one must abide by the restriction, effectively rendering the *mubāḥ* as forbidden (al-Ghazālī, 1993, p. 346).

In textual *mubāḥ*, scholars have adopted a more rigorous stance. They propose a set of conditions that must be met for restrictions to be applied. According to al-Qaraḍāwī, "the righteous ruler has the right to restrict the permissible for a *maṣlaḥa*, but such restrictions must be temporary and justified" (2008, p. 206). In the absence of a definitive text, some permissible actions may require restriction for *maṣlaḥa*.

Recent literature on restricting *mubāh* raises three concerns. Firstly, it highlights the need to align *mubāh* restriction with the context of the modern state, replacing the ruler, Imam, or guardian used in classical references by the state or one of its governmental bodies.

Secondly, it aims to establish that the restriction has existed in classical times since the advent of shari'ā. In other words, to claim history and premodern legal culture as its frame of reference, scholars cite instances from the lives of the Prophet and the four caliphs. They also make analogies to the writings of classical scholars to legitimize the restriction of *mubāh* and to refute the arguments of the previous viewpoints. For example, the instance where the second Caliph, Umar, restricted the issuance of three divorces at once, rendering it a *bain* (irrevocable) divorce serves as a historical precedent. Scholars then determined and deduced that the restriction has a purpose (*'ila*), which is the *maṣlaḥa* of the community (Shalabī, 1947, pp. 87- 93).

Thirdly, recent literature on *mubāh* restriction focuses on safeguarding the integrity of the shari'ā texts to prevent them from being manipulated to fulfill the ruler's whims and desires. This is achieved by clarifying the concept of *maṣlaḥa* and setting conditions for the validity of restrictions. Scholars have outlined a list of conditions that must be met to validate a restriction based on *maṣlaḥa*, preventing the misuse of shari'ā in favor of the ruler's whims and desires. For instance, a restriction must either prevent social harm (*mafsada*) or secure a social benefit (*maṣlaḥa*).

Additionally, a restriction should only continue until social harm is mitigated, and the ruler may impose restrictions on specific instances within the *mubāh* category rather than the whole category (Abū l-Baṣl, 1995, p. 227). According to al-Qaraḏāwī, from a shari'ā perspective, the intended interest is comprehensive, encompassing both specific and universal aspects, individual and collective dimensions, local and global considerations, materialistic and moralistic aspects, and the concerns of both the worldly and the hereafter.

However, one of the most controversial issues in recent Islamic scholarship is the concept of *maṣlaḥa*: what is *maṣlaḥa*? When to consider something as *maṣlaḥa*? Whose *maṣlaḥa* should be considered? These questions are not easy to answer and differ from one researcher to another. For example, the so-called Muslim modernists and Islamist reforms aimed to reconcile the shari'ā and the modern state. This required a new exploration of the possibility of reconciliation beyond the text, representing a constraint. They introduced conceptions of *maṣlaḥa* and *maqāṣid* that they understood as a means of transcending the limitations of the text and its apparent meanings, playing an important role in this reconciliation. In other words, *maṣlaḥa* and *maqāṣid* provided an avenue to avoid the 'secular' solution outside the textual framework (Hallaq, 2011, p. 12).

On the other hand, Muḥammad Sa'īd Ramaḏān al-Būṭī (d. 2013) affirmed the tight linkage between the shari'ā and *maṣlaḥa* but rejected that *maṣlaḥa* can revise the shari'ā. Instead, he argued that because the shari'ā constitutes *maṣlaḥa*, it is not possible for the rules of the shari'ā to be repealed by *maṣlaḥa* (1977, pp. 58- 59). Wael Hallaq also rejected the modernist approach to *maṣlaḥa*, arguing that they have elevated a marginal concept in Islamic law to make it central, leading to a form of religious utilitarianism in some sort

(2009, p. 511). Mohammad Fadel, on the contrary, believes that *maṣlaḥa* is not a marginal concept within the field of Islamic law but a “particular kind of flourishing rather than a form of utility” (2022).

Notably, *taqyīd al-mubāḥ* is a term governed by the *maṣlaḥa* to a large extent. Consequently, whenever there is a need to achieve benefit or to avert corruption, the concept of *taqyīd al-mubāḥ* comes into play; but how to define this benefit, and who has the authority to define it? Can it be protected from whims and desires?

It seems that the modern interpretation of benefit has distanced itself from a term established to safeguard the *fiqh* of one’s legal school and the shari’a. The intent was to protect existing Islamic laws from imputing human rationality into a term that can be exploited in favor of the modern nation-state or a desired interpretation. This has resulted in diluting the concept of benefit to make it suitable for such an understanding, reducing *taqyīd al-mubāḥ* to a mere tool for such endeavors.

The prominence given to the concept of *taqyīd al-mubāḥ* in recent studies reflects a significant transformation that occurred with the shift to the modern state system. One of the most significant features of the modern state is the monopoly of power and the coercive enforcement of the law. Hence, the state is the sole authority in decision-making and law enforcement. In this context, certain concepts in shari’a must be adjusted to fit within the framework of state control.

In one way or another, the state governed by shari’a simultaneously requires justifications and historical and religious legitimacy to establish a new law. If a state needs to codify laws that seem to conflict with the shari’a, it must invoke an Islamic rule to resolve this contradiction. As a result, *taqyīd al-mubāḥ* has become a key concept supported by Islamic historical legitimacy. It is, in fact, a tool for implementing the state’s objectives and political interests through reasoning based on *maṣlaḥa*.

THE PROBLEM OF DIVORCE IN MODERN CONTEXT

Marriage, according to the Qur’ān, is meant to be unlimited in time (firm bond). Ideally, the foundation of this relationship should be built upon love and understanding, referred to as “*mawaddah wa-raḥma*”, in the Qur’ān (Q, 30:21; Q, 2:228). In addition to this ideal, the primary purpose of the marriage contract is to facilitate sexual intercourse between the spouses, which is considered a primary reason for marriage, aimed at protecting them from committing a sexual sin.

Nevertheless, in cases where this harmony fails to develop or fades away over time, the Qur’ān allows to bring the marriage to an end (Q, 2:231), because “the Qur’ān recognizes the possibility of divorce in every marriage that it does not stigmatize divorce but provides the skeletal framework for dissolving the contract” (Siddiqui, 2010, p. 35).

There are several ways for ending a marriage for both men and women. However, *ṭalāq* denotes that the authority to end the marriage is in the hand of the man (or his proxy); it is the husband’s exclusive right to dissolve a marriage, according to the Qur’ān and Islamic law. *Ṭalāq* “is a means by which the man purposely brings his marriage to an end” (Motzki, 2003, p. 279). Just like a marriage is established through a verbal agreement

or declaration, divorce can also be initiated verbally by the husband.

In this context, language serves as the sole requirement for initiating a divorce, without the need to explicitly state one's intentions, as language reveals intention. *Talāq* can be unequivocal when employing the verbal form of *ṭalāq*, such as saying “*antī ṭāliq.*” However, it can also be ambiguous when using a more general formula to indicate *ṭalāq*, such as “I want you to go.” This would lead to the first issue, which originates from the potential misinterpretation of divorce, which starts from the translation of *ṭalāq*.

The term *ṭalāq* is typically translated as divorce or repudiation. However, this translation falls short of capturing the full juristic and Islamic understanding of divorce. In English-speaking contexts, divorce is commonly perceived as a mutual agreement between both parties to end the marriage. In contrast, *ṭalāq* is a type of divorce that is entirely initiated by the husband's will and actions. Therefore, “assigning the term ‘divorce’ to mean *ṭalāq* unduly predetermines a paradigmatic meaning of what divorce represents in Islam” (Hallaq, 2009, p. 324; Siddiqui, 2010, p. 19).

Accordingly, modern Western divorce laws do not incorporate the unilateral aspect of *ṭalāq*. Modern Muslim states are gradually introducing legal and formal restrictions on *ṭalāq* in order to confine the husband's freedom to end marriages. The reasoning behind it is to reform divorce law and to enhance women's rights as a type of equality between a man and a woman since women are required to present arguments and justifications to seek dissolution of marriage while men face no such scrutiny for their motives. Furthermore, states grasp this opportunity to control family matters and reduce divorce rates (Voorhoeve, 2013, p. 212).

As a result, there have been calls for the legalization of juridical divorce as the only form deemed genuine and valid. In this proposed system, verbal divorce would not be recognized unless it is officially registered. This raises a myriad of complex issues, such as the conflict between the apparent legal aspects and the underlying religious aspects (*al-ḥukm al-diyānī wa-lqadā'ī*). In a scenario where a man declares divorce to his wife without informing the court, she would remain his wife in legal terms, yet simultaneously it is proscribed to him. By virtue of the law, he would inherit her if she passed away, but because he knows she is no longer his wife, he does not have the right to her inheritance. This situation leads to several additional legal consequences of divorce, including considerations such as the waiting period, inheritance, alimony, and custody, raising the critical question of the extent to which invalidating verbal divorce serves the best interests of both the family and society as a whole.

THREE POSITIONS ON RESTRICTING DIVORCE

The debate over juridical divorce emerged in the early second-half of the 20th century, primarily in response to shifting social and economic dynamics. This debate was further fueled by the commitment of Islamic countries to international human rights agreements. It was exacerbated by instances of arbitrary divorce by some husbands, which led to unfavorable consequences for the family.

In this context, many voices advocated for the necessity of transferring the right of

verbal divorce from the husband to the judiciary. Three opposing viewpoints emerged in response to this issue. The first favors the attribution of divorce in the presence of two witnesses. Advocates of this stance argue that it serves the public interest and is in harmony with the shari' a. This perspective is championed by scholars who recognize the importance of revisiting some traditional rulings with the goal of addressing them in light of the changes that have taken place on these matters, ensuring consistency and closing any gaps that may arise from recent social and moral transformations.

The second perspective advocates for emulating the Western model, viewing Islamic divorce as demeaning to women and a threat to their dignity. According to proponents of this stance, Islamic divorce portrays women as a man's property. This perspective is endorsed by both the so-called Islamist reforms, which are often rooted in Islamic studies, as well as feminists. They view the text as an impediment because it conflicts with the modern system developed independently from these texts. In response, the text is circumvented to create new laws that comply with contemporary societal demands.

The third perspective denies all claims advocating for restrictions on divorce and supports the right that God granted to man for verbal divorce.

First Position: Only Before Two Witnesses

Some contemporary jurists, including Aḥmad Muḥammad Shākīr, Muḥammad Abū Zahra, 'Alī al-Khafīf, 'Abd al-Raḥmān al-Ṣābwnī, and others, have argued that for a divorce to be valid, it must take place in the presence of two witnesses. This requirement does not necessitate that the testimony takes place in a specific place like a court; the man can divorce his wife anywhere and at any time, as long as two witnesses are present. For example, Abū Zahra said that "If we were to pick a divorce strategy for Egypt, we would have gone with the opinion that a divorce could only be finalized in the presence of two fair witnesses capable of persuading the spouses. Thus, the circle of divorce is narrowed" (n.d., p. 369; and see, Shākīr, 1970, p. 18).

While this viewpoint is not held by the majority, it found support in classical times among certain Shāfi'īs, such as Ibn Ḥazm and others, who believed that the presence of two witnesses is obligatory (al-Ramlī, n.d., vol. 7, p. 55). They argued that since two witnesses are required to establish a marriage contract, their presence is equally necessary in its dissolution.

Furthermore, this requirement facilitates the process of proving the occurrence of divorce. Importantly, the involvement of two witnesses could deter many divorce cases, as it would take time for those seeking a divorce to find witnesses. This extended process could help reduce the state of anger that often accompanies divorce. Moreover, the witnesses would play a role in mediating and persuading the parties to reach an agreement, ultimately aiming to protect the family and the institution of marriage. Others follow a different path.

In his article, A. Faizur Rahman argues that despite the clarity of the Qur'ān and Prophetic teachings, divorce has been completely misunderstood by clergy. According to Faizur Rahman, divorce, as outlined in the Qur'ān, is a long process that a Muslim should

follow before reaching the final divorce. He builds his analysis on the Qur'ān, and concludes that a "Muslim husband is not entitled to pronounce even one *ṭalāq* without having first exhausted the four reconciliation attempts mentioned in 4:34-35" (2011, p. 4). And even after the pronouncement of *ṭalāq*, there are further steps to follow, including notifying the Chairman of the state-appointed Union Council in writing. These steps are intended to facilitate reconciliation between the couples.

Second Position: Only by Judicial Authorities

This position sees Islamic divorce as demeaning to women, eroding their dignity and portraying women as a man's property. It is seen as promoting equality between men and women, given that traditional Islam granted men exclusive divorce rights. This perspective necessitates emulating the Western model to overcome traditional flaws.

Besides, the modern progressive approach mandates a shift to juridical divorce (al-Mūs, 2015, p. 137). Proponents of this perspective advocate for preventing men from getting a divorce outside of a court setting and insist on allowing only juridical divorce. Under this framework, if a man wants to end his marriage, he has no independent free will to do so unilaterally. Instead, he should file for divorce through the court. If the court finds his justifications and reasons convincing, the divorce is sanctioned by the court and is recognized by the law. Otherwise, the request is dismissed. The man's verbal divorce inefficiencies stem from the laws and legislations rather than the man's lack of legal capacity (al-Mūs, 2015, pp. 128-206).

Some Islamic countries, such as Tunisia and Morocco, have already implemented this divorce form. Al-Ḥusayn al-Mūs, for instance, published a book that outlines the Morocco government's restriction of divorce exclusively to juridical divorce. In Egypt, Sa'd al-Dīn al-Hilālī published a book arguing for the invalidity of verbal divorce unless it is registered (juridical divorce) (2015).

According to proponents of this viewpoint, the Qur'ān addresses the rulers and those in authority, urging them to serve as arbitrators to set things right if there is a breach and facilitate reconciliation between spouses (Q, 4:35). They view the marriage contract as a legal agreement between two consenting adults, establishing obligations on both parties. Therefore, entrusting the power of divorce solely to the husband, without negotiation, should make the contract invalid (Abū Zahra, n.d., p. 281). As a result, men and women are considered equally entitled to seek judicial divorce (Badrān, n.d., p. 308). The ruler must apply the principle of restriction permissible to achieve the interest of the public as it protects the family from the potential harm stemming from verbal divorce. This aligns with the hadith, "Do not cause harm or return harm," and the application of the legal maxim that blocks the means of harm (Badrān, n.d., p. 308; Biltājī, 2000, p. 353).

These principles are essential tools in *siyāsa shari'a*, justifying the ruler's decision of *taqyīd al-mubāh*. Juridical divorce is seen as a solution to reduce divorce incidents, as it involves an impartial judge who investigates the reasons behind the divorce request. If convinced by the valid grounds, the judge grants the divorce, a process fully consistent with the rules of shari'a and does not violate them (Badrān, n.d., p. 308; Abū Zahra, n.d., p. 281; Biltājī, 2000, p. 354).

Notably, this issue extends beyond juridical divorce for some, encompassing an entire legal system affected by the relationship between shari'a and the modern state. Others perceive it as more than just a matter of equality before the law between men and women; it aligns with a modern feminist tendency that challenges male guardianship over a woman and seeks to shift the authority to divorce away from the husband to an external party. For them, the core issue lies in the male guardianship and the so-called "hierarchy of men over women." This position aims to strip men from dominance and the associated guardianship (see Chaudhry, 2013, pp. 40-55).

Third Position: Opponents of Restriction

Many jurists oppose the restricting of verbal divorce, arguing that it runs counter to the historical practice since the time of the Prophet in which divorce cases were not brought before a judiciary; they were only subject to a legal proceeding in cases where the husband did not adhere to shari'a or in inexplicable circumstances (Emon, 2012, p. 62) to resolve disputes (As-Sūsī, 2007, vol. 2, p. 49). Furthermore, such a restriction contradicts the principles of the four *madhāhib* that permit a husband to announce divorce without requiring court permission.

Ibn Rushd, Mālik, al- Shāfi'ī, and Abū Ḥanīfa have all agreed to accredit the verbal divorce of those who uttered it explicitly (Ibn Rushd Al-Jadd, 1996, p. 78). Among the contemporaries who rejected this position were Muḥammad Shaltūt, Wahba Al-Zuhaylī, Muṣṭafā al-Sibā'ī, and others who considered juridical divorce incompatible with shari'a. They pointed out many harmful consequences, including that it is not in the woman's best interest to announce the divorce in court because the divorce may be for secret personal reasons (Shaltūt, 1983, p. 179).

Additionally, there is a difference between restricting and abolishing the right. While the ruler may restrict non-textual *mubāḥ*, this should not extend to textual *mubāḥ* that has established rights through texts that leave no room for *ijtihād*. Giving the ruler the authority to abolish such rights would mean that he has the authority to legislate, which could ultimately lead to the suspension of the texts of shari'a. Besides, when a man pronounces divorce, he believes that his wife is immediately divorced without waiting for the judge's ruling. However, his divorce would not be recognized and has no legal effect outside the court. In this case, the woman has two contradictory legal statuses: she considers herself divorced and her waiting period starts immediately; yet simultaneously, she is still considered a wife because the divorce is not recognized outside the court, and consequently, her waiting period does not start (Biltāji, 2000, p. 356).

It is possible to argue that the positive law may have misinterpreted the divine text, even after a legal decision has been made. This could have many implications, affecting matters such as inheritance and her right to marry.

CRITIQUE AND ANALYSIS

Premodern Moral-Legal Constraints

In the premodern period, divorce (*ṭalāq*) constituted one type of contract dissolution, which was considered exclusively the man's right. If a woman sought to dissolve a marriage, she could resort to *khul'*. Notably, *khul'* was more prevalent in practice during the premodern period than divorce (Rapoport, 2005, p.4).

Jurists reached a consensus that terminating a marriage, whether initiated by the man or the woman, was generally discouraged (al-Kāsānī, 1328 AH, vol. 3, p. 95). For example, Al-Sarakhsī called the dissolution of the marriage an “ingratitude of [God's] blessings (*kufrān al-ni'ma*)” (n.d., vol. 6, p.2). Divorce is inherently a harm (*mafsadah*) as it ends a marriage, impacting both religious and worldly interests.

Yet, it was permitted as a means to alleviate the harm (al-Marghinānī, n.d., p. 227). Thus, The Lawgiver's intent behind divorce is to remove the harm. Depending on the circumstances and external influences, divorce can take on any of the five legal rulings (al-Dasūqī, n.d., vol. 2, p. 361). The authority to pronounce and effect a divorce was generally vested in the man after satisfying specific conditions set by the jurists. These conditions included being sane, making the decision willingly, and attaining adulthood. For example, if a man divorced his wife in a fit of fury, the divorce was invalid because rage could impair one's mental state. Similarly, if he pronounced a divorce by mistake for any reason, it was also invalid and had no legal effect, except for the Ḥanafīs who hold a different view. Additionally, the words used to convey a divorce must be clear, as the ambiguous language does not affect as well, and it is a subject of intense scrutiny by the jurists.

Jurists established many moral, legal, and even social customary constraints to deter a man from divorcing hastily. Even if a man intends to divorce, he must adhere to some conditions and demonstrate a valid reason, such as a long and irreparable dispute, so he complies with the divine law; otherwise, he is considered sinful. Jurists also differentiated between two types of divorce: *Sunnī ṭalāq* (the Sunnah method of *ṭalāq*) and *bid'ī ṭalāq* (the prohibited method of *ṭalāq*). They discouraged men from employing the *Sunnī ṭalāq*. Specifically, they discouraged a man from divorcing his wife three times at once.

In cases where a valid reason for divorcing exists, he must adhere to only one divorce, allowing time for reflection (during the three-month waiting period for women), because if a man divorces his wife three times, he cannot remarry her unless she marries another man first. This served as a significant deterrent for hasty divorces, especially in societies where honor was highly valued. Moreover, jurists prohibited *khul'* resulting from a husband's intentional mistreatment of his wife in order to push her to seek a divorce in exchange for financial compensation, thereby relieving the husband of the financial burdens of divorce. According to the Ḥanafīs, a man is not entitled to compensation if a woman seeks *khul'* due to her husband's misconduct (*nushūz*). Even if he takes compensation for the *khul'* requested by the woman, the majority of jurists maintain that this compensation should never exceed the value of the dowry (al-Ḥiṣnī, 1994, vol. 2, p. 80).

These moral constraints imposed on the husband were equal to or even more restrictive

than those imposed today in modern Islamic countries to restrict male freedom and guardianship. In the premodern period, a woman was required to file a complaint with a judge and provide valid reasons to obtain a divorce. In contrast, husbands were not obligated to follow such procedures or present reasons, except in extreme cases, due to the principle of concealment and the preservation of the privacy of marital life, as many reasons for divorce are matters that cannot be disclosed to preserve family dignity and reputation.

On the other hand, the one who bore the consequences of divorce was the man, which served as a deterrent against initiating divorce. For a man, there was little incentive to seek divorce without a valid reason, primarily due to the significant financial implications involved. In many cases, such a decision could be financially devastating for the husband. Moreover, upon divorce, the husband was legally obliged to provide financial support in various forms. This included maintenance payments to his ex-wife for at least three months, as well as children's maintenance, in addition to the delayed dower, which often involved a substantial sum, and the cost of nursing if the children were of a young age. Due to these financial obligations, he was granted the right to divorce by his own will. Therefore, it was deemed unfair for the wife to be able to dissolve the marriage shortly after its initiation, as this would neglect the financial costs incurred by the husband and those that lay ahead when entering another marriage.

Before and at the beginning of Islam, divorce was not limited to a certain number a man could initiate. This allowed a man to divorce his wife without restrictions, sometimes with the intention of harming her. In response to the potential harm that such unrestricted divorces could cause to women, divorce was restricted to three, a measure put in place to protect women.

The traditional jurisprudential stance on divorce considered it as part of a coherent system governed by moral values that aligned with the norms of premodern societies. It acknowledged the individual's private autonomy, which empowered them to alter their legal relationships. However, *ṭalāq* was a long process involving various considerations. Dissolving a marriage carried significant implications for the rights and obligations of both the husband and the wife, which is why jurists approached the matter with great care.

Jurists made significant efforts to minimize the occurrence of divorce, and to do so, they established legal guarantees for the wife's rights in the event of a husband misusing his right to divorce. These guarantees were rooted in ethical and legal principles centered on key values, such as upholding rights, preventing harm, and making the man financially accountable for any unwarranted divorces.

The Quest for Legal Divorce in Modern Societies

In contemporary times, because of the challenges posed by modernity and the influence of feminist thought, or even to comply with the desires of the state (the ruler) in embracing Western-inspired changes, there has been a growing call for divorce to be placed under the jurisdiction of the court. However, within Islamic societies, it remains challenging to regard the personal status law as anything less than sacred.

Two groups advocate for juridical divorce: the Islamist reformers and feminists. The

Islamist reformers, who support the state's decisions, follow an approach aimed at legitimatizing juridical divorce using Islamic sources and arguments, mainly by employing the legal tool *taqyīd al-mubāḥ* to serve the interests of society and to avert corruption. Therefore, the most important factor influencing the restriction of *ṭalāq* is societal interest, as it is theoretically allowed for the state to restrict textual *mubāḥ*. In this context, proponents have published several books to demonstrate the validity of the state's authority to regulate personal status laws. Nevertheless, one must question whether such writings should have been produced before the state decided to establish the need for the restriction based on Islamic authority, rather than after.

The public interest should not serve the whims and desires of one group or party over the others. According to al-Shāṭibī, "the public guardianship is one that is exempt from whims and desires" (2004, p. 334). Hence, the benefit must be real, publicly oriented, and free from any whims and desires. This position relies on several approaches to legitimize the restriction of *ṭalāq*, such as inference on unsound historical narration and general discourse that claims the existence of interest but without specification or statistics. Most importantly, it remains unclear where this societal interest lies in the context of restricting divorce in Islamic countries. Who among the scholars has determined the existence of such an interest? Is it permanent or temporary? Furthermore, where are the studies that substantiate the detrimental consequences of not restricting divorce? This position justifies the state's actions but fails to establish a conclusive ruling. On the contrary, the traditionalist group supports its claim with robust arguments, numbers, studies, and statistics (for example, Abū l-Baṣl, 1995).

Juridical divorce, particularly in Arab-Islamic societies, does not achieve any interest or avert corruption. Firstly, how can the judge prevent mistreatment between spouses and resolve the causes of dispute? Conversely, it can inadvertently lead to situations where the husband mistreats his wife to compel her to seek a divorce, which goes against the teachings of traditional jurists and leads to the forbidden *khul'*.

Secondly, juridical divorce may enable the husband to file for divorce and ask for compensation, thus shifting the financial burden from the man to the woman, who often lacks independent financial sources, especially in Islamic countries.

Thirdly, this approach risks exposing the private matters of the spouses before the judiciary. In an attempt to persuade the judge to grant a divorce, one may resort to harsh descriptions and potentially false accusations, undermining the chances of reconciliation. Women, especially in Islamic societies, bear a more significant brunt of damage to their reputation in such situations. This contradicts the Qur'ānic text that emphasizes confidentiality, compassion, mercy, and benevolence, even in divorce.

Fourthly, many reasons for divorce involve psychological and internal factors that cannot be easily regulated or monitored by legal mechanisms.

Fifthly, the restriction on divorce based on the notion of societal interest must be temporary, with specific conditions and criteria. Laws often impose permanent and perpetual restrictions, which encroach upon the legislative authority of God. Juridical divorce does not necessarily reduce divorce rates or achieve any societal interest, especially

since it depends on the husband's will. If the husband is determined to obtain a divorce, he would inevitably do so, whether by his own will or by involving the judiciary.

Finally, attributing family disintegration and societal harm solely to the divorce system, particularly the husband's free will, is an oversimplification. Depriving the husband of his right to divorce does not address the root causes of divorce, which often relate to broader societal issues such as poverty, resulting from government policies. The Qur'ānic text and jurisprudence cannot be held responsible for the problem of family dysfunction, a universal human issue driven by multiple factors in the modern world.

Feminists, in contrast, start from a different vantage point, demonstrating a strong inclination to challenge the text. For them, "there is no getting around law; we must understand it, then work to replace it" (Ali, 2003, p. 166). Their perspective differs from that of Islamic modernists concerning interests, customs, traditions, and contexts. Their advocacy for equality hinges on denying the husband the right to divorce, in which they rest their reference on international conventions. They contend that Islamic divorce, rather than the concept of male guardianship, perpetuates the inferiority of women, violates equality, and constitutes a form of domestic violence against women. They view premodern concept of divorce as a construct of Islamic jurisprudence. The fact that the verse was initially directed at men at the time of revelation indicates that Arab societies were dominated by jurists who enshrined patriarchal norms.

Assigning the authority to grant divorce solely to the judge means that all husbands are incapable of exercising their legal right, thereby requiring the judge's guardianship over them. This is attributed to the feminist perspective, which distrusts men, contradicting previous practices and regulations, where men were entrusted with the responsibility divorce and family matters. The feminist approach risks severing the foundation of the marital relationship, characterized by love and compassion. Feminists prioritize the legal aspects of marriage over moral considerations, often overlooking ethical principles regulating marriage, such as autonomy, freedom, and confidentiality.

The disagreement with this position goes beyond the question of equality, delving into the issue of male guardianship over women.

CONCLUSION

In premodern times, divorce was just one of many methods (such as *khul'*) for dissolving a marriage, and it was not subject to the jurisdiction of courts or ruler authorities. The text of the Qur'ān entrusts this authority to the husband. However, the significant transformation in the structure of the modern state has affected the influence of Islamic law within the legal system, even though it remains integral to modern Muslim states.

Amid calls from many parties, including feminists or the so-called Muslim reformists, modern Muslim states are moving towards codifying Islamic family laws in general and making divorce a part of the judiciary. They argue that this transition aligns with human rights and gender equality while also serving the public good. To do so, the concept of *taqyīd al-mubāh* has emerged as the preferred legal tool for Muslim states to restrict *mubāh* and legitimize this restriction. This concept has gained prevalence in the current

era and reflects the modern state's pursuit of authority and control over its governed population.

However, as a Muslim state, does this restriction align with the broader principles of shari'a? If the concepts and rules governing the restriction of *mubāḥ* fail to prevent corruption or achieve the benefit, then the restriction should not be imposed since the anticipated benefit is nonexistent. Furthermore, the values governing the assumed relationship between spouses are affection, mercy, confidentiality, love, and understanding.

Therefore, resolving marital issues through legal tools contradicts the teachings of the Qur'an and human nature. That is why there is a distinction highlighting the contrast between the classical approach to divorce and modern calls for its legalization. Many modern proponents do not feel compelled to reference the premodern era in order to understand Islamic law in the present day. Interestingly, they deny Islamic law any sense of integrity, significance, or relevance in the contemporary world. In many respects, Islamic law has become a platform for political slogans, ideological demagogues, and shabby scholarship. However, in the context of *ṭalāq*, if the matter is placed in the hands of a judge, it effectively cancels all these values and considerations at the individual level, shifting them to the judiciary. Subsequently, important moral values, as well as the right and freedom of choice God granted to individuals in such *mubāḥ* actions, are revoked.

In premodern times, divorce was part of a coherent system governed by moral values that aligned with the prevailing norms in those societies. Individuals had the autonomy to make decisions that could impact legal relations. However, the *ṭalāq* process was a meticulous one, with various considerations taken into account. Therefore, it has been a subject of intense scrutiny, as the dissolution of a marriage entails intricate rights and obligations between the husband and the wife.

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