

## THREE ṬALĀQS IN ONE SESSION FROM THE PERSPECTIVE OF MAQĀSID AL-SHARĪAH

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**ABSTRACT** – There is no consensus among Muslim jurists regarding the pronouncement of three ṭalāqs in one session: Does it constitute as one or three ṭalāqs? In Malaysia, a judge of Islāmic Court normally will give the final decision based on what most muftis hold in conforming the three ṭalāqs in one session. This opinion is based on the ijtihādīc view of khalīfah ‘Umar al-Khaṭṭāb when he saw many Muslims at his time have begun to hasten in the divorce. Researcher found that the ruling of three ṭalāqs in one session should constitute as one ṭalāq for normal cases nowadays. This ruling is stronger due to the practice of the Prophet himself when he allowed Rukānah to go back to his wife after the three ṭalāqs in one session. Its one of the Islāmic approaches to make the divorce three times and not once, as it gives the husband opportunity to review thoroughly, and this is his right. The ruling is line with the demand of Maqāsid al-Sharīah in protecting lineage. However, for certain situations, the pronouncement of three ṭalāqs in one session may constitute as three ṭalāqs, this means that both ijtihād are correct based on spesific situations.

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## INTRODUCTION

The dissolution of a marriage normally happens through the pronouncement of *ṭalāq* [divorce] by the husband. The Islāmic Family Law in Malaysia has provided that every marriage dissolution application must be submitted to Syariah Court to ensure its validity[1]. Comparing to other means of marriage dissolution, ṭalāq is the easiest way; it only requires the husband to pronounce the ṭalāq and the maximum number of ṭalāqs allowed are three (3) times, i.e. three ṭalāqs<sup>1</sup>. After the third ṭalāq done by the husband, the couple can no longer make *rujū’* [return]<sup>2</sup> to each other, except if the ex-wife gets another divorce from a new husband who has had sexual intercourse with her. After getting divorce from the new husband, then she can get back to the first ex-husband after completing the *‘iddah* [waiting period]. These ruling is clear to all Muslim jurists, and they have agreed on the ruling.

It had prevailed among the Arabs that they were free to divorce their wives and remarry them at any time. When Islām came, it gives justice to women by stipulating the divorce only by two times, then a husband may retain his wife with goodness, or let her go with goodness. In general, the division of ṭalāq in Islām is divided into two types: *ṭalāq sunni* and *ṭalāq bid‘i*. The *ṭalāq sunni* is the pronouncement of divorce spoken by the husband according to sharīah; on the contrary *ṭalāq bid‘i* is prescribed as the pronouncement of divorce which contradict to sharīah. One of the contradictions to sharīah is when the husband pronounces the divorce with three/ triple ṭalāqs in one session. He may say: “I divorce you with three ṭalāqs”; or he repeatedly three times the pronouncement of the divorce by saying “I divorce you”, “I divorce you”, “I divorce you”<sup>3</sup>. There is no consensus among Muslim jurists regarding the validity of pronouncement of three ṭalāqs in one session/ time: does this counted as one ṭalāq or three ṭalāqs? Even though both opinions refer to the same hadith which states that the Prophet SAW has allowed Rukānah to go back to his wife after divorcing her with three ṭalāqs in one session. In Malaysia, the prominent ruling held by Islāmic Courts in Malaysia is that it constitutes as three ṭalāqs. However, there is a serious need to look back at the ruling held since it contradicts to the demand of Maqāsid al-Sharīah in protecting lineage [*hifz al-nasl*] nowadays. Moreover, the ruling seems to be only temporary ijtihādīc view of Caliph ‘Umar during his reign.

Hence, this study aims to analyze the contradicting opinions among Muslim jurists about three ṭalāqs in one session. Which opinion or legal ruling that is in line the demand of Maqāsid al-Sharīah in protecting lineage/ descendants/ offspring (*nasl*) nowadays?

<sup>1</sup> Other means of marriage dissolution such as through *fasakh*, *li‘ān* and *ta’līq* obviously take time a lot; and they are not the focus in this paper.

<sup>2</sup> *Rujū’* means returning to the state of marriage without the need to a new marriage.

<sup>3</sup> If the husband mentioned three times in one session to confirm that he has divorced the wife, not intending the three ṭalāqs; then Muslims jurists do hold that the talāq constitutes as one talaq.

## METHODOLOGY

This qualitative study analyzes related Islāmic legal texts and opinions of scholars in the issue.

## RESEARCH FINDING

### Literature Review

Regarding three divorces in one session, there had been no disagreement regarding this issue since it was said that the four madzāhib<sup>4</sup>; i.e., the Hanafis, the Malikis, the Shafi'is and the Hanbalis; hold that it constitutes as three ṭalāqs[2]. Therefore, the husband who has pronounced voluntarily<sup>5</sup> three ṭalāq in one session even if he regrets then, the ṭalāq or divorce becomes *ṭalāq bāin kubrā*. The second opinion is the three divorces in one session only constitutes as one ṭalāq. This opinion was actually the opinion of many Prophet's companions such as Abū Bakr al-Ṣiddīq, 'Umar ibn al-Khaṭṭāb during his first two years of khilāfah, 'Abd al-Raḥmān ibn 'Awf, 'Abdullāh ibn Mas'ūd, 'Ali ibn Abī Ṭālib, 'Abdullāh Ibn 'Abbās[3]. Moreover at the end of the 7th century Hijrah, Ibn Taimiyah and Ibn al-Qayim have challenged the position of the *jamhūr* [majority] when they had argued the validity of three ṭalāqs in one session[4]. This opinion also held by many nowadays scholars such as Ibn Bāz[2]. Most of the Arab laws have held that the three divorces in one session constitutes as one ṭalāq. Among them are: the Egyptian Personal Status Law, the Jordanian Personal Status Law, the federal law for the United Arab Emirates, and the unified Arab draft law for the Council of Arab Ministers of Justice[5]. In Malaysia, a sharia court usually rules that the pronouncement of a triple talaq divorce is valid, i.e. it constitutes as three ṭalāqs[6].

Both groups do have different understanding when it comes to the ijtihād of caliph 'Umar RA as what was narrated in Ṣaḥīḥ Muslim, Book 18, Chapter 1472, Hadīth no. 15[7].

((عَنِ ابْنِ عَبَّاسٍ قَالَ: كَانَ الطَّلَاقُ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَأَبِي بَكْرٍ وَسَنَّتَيْنِ مِنْ خِلَافَةِ عُمَرَ طَلَاقُ الثَّلَاثِ وَاحِدَةً فَقَالَ عُمَرُ بْنُ الْخَطَّابِ إِنَّ النَّاسَ قَدْ اسْتَعْجَلُوا فِي أَمْرٍ قَدْ كَانَتْ لَهُمْ فِيهِ أَنَاةٌ فَلَوْ أَمَضَيْنَاهُ عَلَيْهِمْ . فَأَمَضَاهُ عَلَيْهِمْ)) .

*"Ibn 'Abbās reported that the (pronouncement of) three divorces during the lifetime of Allāh's Messenger SAW (may peace be upon him), and that of Abu Bakr and two years of the caliphate of Umar (was treated) as one. Then 'Umar ibn al-Khaṭṭāb said: Verily the people have begun to hasten in the matter in which they are required to observe respite, so, if we impose this upon them, then he imposed it upon them".*

The first group strictly holds to the ijtihādīc view of Caliph 'Umar; they argue that the Caliph's wording "*so, if we impose this upon them, then he imposed it upon them*", means that validity of the three ṭalāqs in one session. For the second group, it argues that the validity of three ṭalāqs in one session was only the Caliph's ijtihādīc view and it may subject to wrong ijtihād.

Both groups have given their respective argument and evidence which may cause any reader to be dizzy in their long debates. Moreover, the arguments are logical, not to mention they have been well-presented to support the view. It is not even an exaggeration, if the researcher says that even religious students who do not have critical opinion will not be able to get out of the long debate that tires our mind. In Malaysia, there is no provision regarding the above matter under the Islamic Family Law Enactments[1]. If the case arises, a judge of Islāmic Court normally will give the decision based on what most muftis hold in conforming the three ṭalāqs, particularly if the pronouncement is clear[8]. Some cases, the courts count the three ṭalāqs as one ṭalāq based on factors such as coercion, loss of judgment and ignorance, which must be proven through oath or medical documents[9]. This process consumes time a lot, and it obviously impractical nowadays, particularly when the divorce cases are a lot in Malaysia. Moreover some researchers also state issues brought up were delayed by the Shariah Court [10].

## DISCUSSION

In short, the researcher could sum up that both ijtihāds could be used based on different situations, i.e., both are correct in specific situations. However, the second ijtihād, i.e., the three ṭalāqs in one session constitutes as one ṭalāq is the preferable one since it obviously stronger in the argument. It's also more appropriate to the demand of Maqāṣid al-Sharīah in protecting lineage/ descendants/ offspring (*nasl*) nowadays. Some arguments summarized by the researcher as follows:

<sup>4</sup> There are the four schools of Islāmic jurisprudence.

<sup>5</sup> If the husband was forced to divorce his wife, then the talaq is not valid.

## 1. The stages for divorce process in the Qur'an

In sūrah/ chapter al-Baqarah, āyah/ verse 229, clearly explains about the talāq process that needs to be done one by one. Allāh SWT says in the Qur'an:

﴿الطَّلَاقُ مَرَّتَانٍ فَإِمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٍ بِإِحْسَانٍ﴾

"Divorce (is permissible) only twice, then either maintain (them, i.e., the wives) in honor or let (them) go in kindness"

The verse 29 of sūrah al-Baqarah aims at the reform of serious evil that was rampant in the social life among Arabs in pre-Islāmic era. According to the customary laws of pagan Arabs, a husband was entitled to divorce his wife thousands of times and revoke it, there was no limit in pronouncement the divorces upon his wife. The husband often exercised his right to revoke the divorce that he had pronounced; as the result, the poor wife could neither live with him in happiness nor free herself to contract a fresh marriage with someone else.

According to this verse, a man may only pronounce revocable divorce upon his wife not more than twice. It clearly says that revocable divorce is only twice, and of course it should be pronounced in different meetings, not in one session alone. The complete process of a talaq must be spaced about three months, i.e., the three qurū' to give husband and wife time for reconciliation. During the time of reconciliation, families, relatives, and friends can intervene in advising the spouse. Allāh says in sūrah al-Baqarah, verse 228:

﴿وَالْمُطَلَّقاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ ۗ وَلَا يَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ إِنْ كُنَّ يُؤْمِنَنَّ بِاللَّهِ وَالْيَوْمِ  
الْآخِرِ ۗ وَبُعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ فِي ذَلِكَ إِنْ أَرَادُوا إِصْلَاحًا...﴾

"And divorced women shall wait (before they can get married) for three menstrual periods, and it is not lawful for them to conceal what Allah has created in their wombs, if they believe in Allah and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation".

Moreover, a talaq should be pronounced only outside the time of the wife's menstrual period, i.e., when the wife is in a state of *tuhur* [purity]. After the first divorce he may pronounce a second in the next clear period if he wants to. For these two divorces, the husband retains the right to revoke the divorce at any time before the end of *'iddah*. If the *'iddah* has lapsed, the couple have the right to recontract the marriage by mutual consent. But if the husband, pronounces divorce in his wife's third clear period, he has no right to revoke the divorce, and the spouses are not entitled to recontract the marriage. These regulations of *'iddah* [waiting period] and *rujū'* are certainly in line with protecting lineage (*nasl*) which is one of the demands of *Maqāṣid al-Sharīah*. Allowing immediate triple divorce by one time or session, means destroying marital life in one pronouncement. This obviously not in line with the demand to protect the lineage. Except, if the husband really hates the wife and does want to divorce his wife totally. For this case, of course a sharia judge should allow the triple talāqs in one session to take its place in protecting the woman which most probably will be abused by the husband later.

## 2. The hadith of Rukānah Ibn Yazīd

During the time of the Prophet SAW, it was reported that Rukānah Ibn Yazīd had divorced his wife: Suhaimah, three talāqs in one session, and the Prophet allowed him to make *rujū'* to his wife.

((أَنَّهُ طَلَّقَ امْرَأَتَهُ سُهَيْمَةَ الْبَتَّةَ، فَأَخْبَرَ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بِذَلِكَ، وَقَالَ: وَاللَّهِ مَا أَرَدْتُ إِلَّا وَاحِدَةً، فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: وَاللَّهِ مَا أَرَدْتُ إِلَّا وَاحِدَةً؟ فَقَالَ رُكَّانَةُ: وَاللَّهِ مَا أَرَدْتُ إِلَّا وَاحِدَةً، فَرَدَّهَا إِلَيْهِ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ. فَطَلَّقَهَا الثَّانِيَةَ فِي زَمَانِ عُمَرَ، وَالثَّلَاثَةَ فِي زَمَانِ عُثْمَانَ)) الراوي: ركانة بن عبد يزيد بن هاشم، المحدث: أبو داود، المصدر: سنن أبي داود، الصفحة أو الرقم: ٢٢٠٦. خلاصة حكم المحدث: سكت عنه، وقد قال في رسالته لأهل مكة كل ما سكت عنه فهو صالح.

"He divorced his wife Suhaima at all<sup>6</sup>, so he told the Prophet SAW the incident, and he told: By Allāh, I only wanted one, then the Messenger of Allāh SAW asked him: By Allāh, you did not want except one? Rukanah replied: By Allāh, I only wanted one. So the Messenger of Allāh SAW returned her to him. He then divorced her the second in the time of 'Umar, and the third in the time of 'Uthmān". Abu Dawūd: Sunan Abi Dawūd, page or number: 2206.

When the Prophet asked Rukānah to swear by Allāh if he really meant three talāqs: "By Allāh, you did not want except one?", this clearly shows that three talāqs can constitute as three if the husband really wants the three talāqs. This is the

<sup>6</sup> Arabic word: "al-battah" [البتة] means "at all", i.e., three talāqs.

fact somehow the second group has missed in their discussion. It's not the question of following the Prophet SAW, but it's about understanding the deep meaning of the prophetic saying, protecting both, particularly the woman from any abuse that might happen. The hadith of Rukānah clearly shows that the Prophet SAW allowed him to make *rujū'* to his wife at his request himself. If ṭalāq three in one time are counted as three, then the Prophet will not allow it at all. In other words, any request and oath made are meaningless, have no effect on the law.

Hence, the ruling whether three ṭalāqs in one session constitutes as three or one goes back to the intention of the husband. This what has been highlighted by Allāh in chapter al-Baqarah, verse 228: “*And their husbands have the better right to take them back in that period, if they wish for reconciliation*”. If a husband is serious to unite back with his wife, not because he intends to take revenge at the wife, then the three ṭalāqs constitutes as one talaq. If he serious to be separated forever from the wife, then the three ṭalāqs in one session constitutes as three ṭalāqs. Same also for the case if the husband has pronounced three ṭalāqs in one session to his wife that has committed a fornication, then it's obviously for the judge to legalize the three ṭalāqs in one session.

### 3. Ijtihād of ‘Umar al-Khaṭṭāb

The main argument for the first group seems to be the ijtiḥād made by the Caliph ‘Umar RA. They follow the ijtiḥādīc opinion in legalizing the three ṭalāqs in one session. Bare in mind that the right of divorce revocation is up to the husband for the sake that the marriage remains longer. But some people during the caliphate of 'Umar RA moved exactly opposite to this direction, i.e., abusing the right of ṭalāq revocation by pronouncing the divorce frequently<sup>7</sup>, playing with the right. This clearly stated in Ṣaḥīḥ Muslim, Book 18, Chapter 1472, Hadith no. 17[7].

((أَنَّ أَبَا الصَّهْبَاءِ قَالَ لِابْنِ عَبَّاسٍ هَاتِ مِنْ هُنَاتِكَ أَلَمْ يَكُنِ الطَّلَاقُ الثَّلَاثَ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَأَبِي بَكْرٍ وَاحِدَةً فَقَالَ قَدْ كَانَ ذَلِكَ فَلَمَّا كَانَ فِي عَهْدِ عُمَرَ تَتَابَعِ النَّاسُ فِي الطَّلَاقِ فَأَجَازَهُ عَلَيْهِمْ)).

“Abū al-Ṣaḥbā' said to Ibn 'Abbās: Enlighten us with your information whether the three ṭalāqs (pronounced at one time) were treated as one during the lifetime of Allah's Messenger ﷺ and Abū Bakr. He said: It was the fact, but when during the caliphate of 'Umar, people began to pronounce divorce frequently, then he allowed them to do so<sup>8</sup>.”

The Caliph ‘Umar perhaps saw that indirect mockery against the existing ruling; hence he legalized the three ṭalāqs in one session to protect the first pillar of *Maqāṣid al-Sharīah*, i.e., the protection of religion. It's obviously that during the era of Caliph 'Umar, religious knowledge particularly the marriage is clear to most Muslims. However, on the contrary, Muslims nowadays are lack. In fact the lack of religious belief is considered as the main factor which contributes to higher divorce cases among Muslims[11]. Even though the latest statistics shows that the divorce is slightly declining among Muslims in Malaysia[12]; however, its crude divorce rate (CDR), has remain higher compared to non-Muslims. Last study done in 2018 has shown that the CDR of Muslims remains at 2.0 per 1,000 Muslims; on the other hand, the CDR of non-Muslims is only 0.8[13]. Many husbands nowadays are arrogant to their wives, they don't admit to the wives their mistake or whatever wrongdoing they have done. They still have wrong patriarchal mentality which they have inherited by generations. Some also are easily angry because of petty things that could be solved peacefully. With such these marriage in-competencies, they easily pronounce ṭalāqs three in one session without thinking deeply the effect of it.

Obviously, we have seen many Muslim husbands who have regretted much after divorcing their wives with three ṭalāqs in one session. The situation is worsened when they do have children from the marriage. The children also do suffer a lot from the mistake done by the fathers who were angry during the pronouncement of the three ṭalāqs in one time. In fact, we have heard stories of ex-husbands or certain communities pay some men to get married with the ex-wives, with condition the new husbands divorce the wives later, so the ex-ones can get married back to their ex-wives[14]. Therefore, it is a wisdom that Islām makes the divorce process in three stages, not by once. In fact, it is not logic and sound well in Islām when the mere utterance of three words in one breath could terminate a marriage within a second. How could the recklessness of one husband or father dissolve the union of two people so instantly? Hence a mufti or judge nowadays cannot simply use the ijtiḥādīc opinion of the Caliph ‘Umar RA because the outward statement is also subject to the situation at his time, it may change later[15].

## CONCLUSION

In short, the researcher holds that the ruling of three ṭalāqs in one session only constitutes as one talāq, except in certain situations that must be confirmed by a shariaḥ judge. This ruling is clearly supported by the Qur'anic verses and the practice of the Prophetic himself. The ruling is obviously in line with the demands of *Maqāṣid al-Sharīah* in protecting lineage [*hifz al-nasl*] nowadays. For certain situations such if a shari'aḥ judge confirms that the husband was playing with the pronouncement of divorce to take revenge against the wife; or if the husband really wants the three ṭalāqs; then the

<sup>7</sup> In addition to that, some husbands also take revenge against their wives by playing the pronouncement of divorce.

<sup>8</sup> This means that ‘Umar allowed the pronouncement of three ṭalāqs in one time to be counted as three ṭalāqs.

judge may hold to the first opinion which legalizing the three ṭalāqs in one session. By applying this ruling, it obviously saves time a lot in resolving many cases related to marriage and divorce.

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