

## Critical analysis of Imam Ibn Taymiyyah's view on the status of contingent divorce (oath or divorce)

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### *Abstract*

*Imām Ibn Taymiyyah holds a view about contingent divorce that it leads to divorce when husband has an intention to effect ṭalāq but it is an oath when the husband intends to instigate or refrain his wife to do certain act or upon affirmation of something. The ruling of an oath would apply over it for which there is an expiation as laid in the Holy Qurān "Allah will not take you to task for that which is unintentional in your oaths, but He will take you to task for the oaths which you swear in earnest. The expiation there of is the feeding of ten of the needy with the average of that wherewith you feed your own folk, or the clothing of them, or the liberation of a slave, and for him who finds not (the wherewithal to do so) then a three days fast. This is the expiation of your oaths when you have sworn; and keep your oaths. Thus Allah expounds unto you His revelations in order that you may give thanks." (AL-Mā'IDAH 5:89).*

*The four school of fiqh held contingent divorce status as divorce. The focus was to see whether contingent divorce leads to divorce or to an oath. It is concluded that contingent divorce leads to divorce.*

### **Introduction:**

There are different forms of ṭalāq i.e, express (ṣarīḥ ṭalāq), implied (kināyah) and conditional (ṭalāq ta'liq). Ṭalāq ta'liq is ṭalāq which is conditional and suspended, to be effected in future upon the fulfillment of the condition. For instance, husband say "if you go out of this house I will let you go with one ṭalāq". Four school of fiqh declare it a divorce. Imam Ibn-Taymiyyah opinion in this regard is that conditional divorce is not a divorce but an oath when the husband has no intention for divorce but just intends to encourage or discourage his wife to do or omit an act, so for that expiation is paid. This expiation is stated in the Qurān as follows:

"Allah will not take you to task for that which is unintentional in your oaths, but He will take you to task for the oaths which you swear in earnest. The expiation there of is the feeding of ten of the needy with the average of that wherewith you feed your own folk, or the clothing of them, or the liberation of a slave, and for him who finds not (the wherewithal to do so) then a three days fast. This is the expiation of your oaths when you have sworn; and keep your oaths. Thus Allah expounds unto you His revelations in order that you may give thanks." (AL-Mā'idah 5:89)

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This is a sensitive issue which has deep impact upon the marriage continuity as if it is considered a divorce then it obviously reduces the husband right to ṭalāq from three times to lower but if it is considered as an oath then it secures his right to ṭalāq. The focus is on the point to understand whether it is a divorce or an oath.

### **Ṭalāq al-Mu'allaq:**

The literal meaning of contingent is conditional (mu'allaq), uncertain<sup>1</sup>, suspending. In fiqh perspective, it is the suspension of one thing upon the other. Thus suspending ṭalāq upon condition and upon the fulfillment of condition ṭalāq will take place<sup>2</sup>.

Ṭalāq al-mu'allaq is that which is dependent upon some future act with the prefixes of condition. For instance "if", "when", "whenever", "when so ever" etc. For example, A man saying to his wife "if you went to such person's home then you are divorced" or "if you went out of home without my permission then you are divorced" or "if you talked to such person then you are divorced"<sup>3</sup>.

It is also called as an oath of repudiation, ḥalf ṭalāq or still more al-yamīn bi'ṭalāq<sup>4</sup>. Qasam from the word aqṣama, designates the oath in general. The word has two synonymous, yamīn and ḥalf<sup>5</sup>. The meaning of yamīn is strength. The determination of doing or not doing of something is expressed through Qasam. In this connection Qasam is also called as yamīn. In technical sense, the expression of determination to do or not to do something is called as yamīn<sup>6</sup>.

This is metaphorically called yamīn (qasam) because ta'liq in reality is shart and jazā'. Yamīn is metaphorically corresponded over it as according to the popular meaning it is synonymous to the ḥalf in the meaning of prevention, instigating or affirmation<sup>7</sup>.

### **Opinion of Ibn Taymiyyah whether ṭalāq al mu'allaq is a yamīn or ṭalāq:**

Ibn Taymiyyah divided ṭalāq in three states i.e tanjiz, ta'liq and oath.<sup>8</sup>

#### **Divorce oath:**

Oath of divorce is when someone says that "divorce is binding upon me, I will definitely do or won't do such thing" or for the affirmation of something he takes an oath of divorce that "my wife be divorced, such is the case or not". All ahl-i-lughat and fuqaha call it Qasam, too. The disagreement is regarding the ruling<sup>9</sup>. Imām Ibn Taymiyyah lay that this oath is like other oaths and has the same ruling as that for other oaths except when he does so to intend divorce<sup>10</sup>.

#### **Ibn Taymiyyah Fatāwa:**

أَنْ يُلْقِيَ الطَّلَاقَ أَوْ الْعَتَاقَ أَوْ التَّنْذَرَ بِشَرْطٍ؛ فَيَقُولُ: إِنْ كَانَ كَذَا فَعَلَيْ الطَّلَاقِ. أَوْ الْحَجُّ. أَوْ فَعْبِيدِي أَحْرَارًا. وَتَحْوُ ذَلِكَ: فَهَذَا يُنْظَرُ إِلَى مَقْصُودِهِ فَإِنْ كَانَ مَقْصُودَهُ أَنْ يَخْلِفَ بِذَلِكَ لَيْسَ غَرَضُهُ وَقُوعَ هَذِهِ الْأُمُورِ - كَمَنْ لَيْسَ غَرَضُهُ وَقُوعَ الطَّلَاقِ إِذَا وَقَعَ الشَّرْطُ - فَحُكْمُهُ حُكْمُ الْخَالِفِ؛ وَهُوَ مِنْ "بَابِ الْيَمِينِ". وَأَمَّا إِنْ كَانَ مَقْصُودَهُ وَقُوعَ هَذِهِ الْأُمُورِ: كَمَنْ غَرَضُهُ وَقُوعَ الطَّلَاقِ عِنْدَ وَقُوعِ الشَّرْطِ: مِثْلَ أَنْ يَقُولَ لِامْرَأَتِهِ: إِنْ أَبْرَأْتِنِي مِنْ طَلَّاقِكَ أَنْتِ طَالِقٌ. فَتَبَرُّهُ. أَوْ يَكُونُ غَرَضُهُ أَنَّهَا إِذَا فَعَلَتْ فَاحْشَةَ أَنْ

يُطَلَّقُهَا فَيَقُولُ: إِذَا فَعَلْتَ كَذَا فَأَنْتَ طَالِقٌ؛ بِجَلَافٍ مِنْ كَانَ غَرَضُهُ أَنْ يَحْلِفَ عَلَيْهَا لِيَمْتَنِعَهَا؛ وَلَوْ فَعَلْتَهُ لَمْ يَكُنْ لَهُ غَرَضٌ فِيهِ طَلَّاقًا فَإِنَّهَا تَارَةٌ يَكُونُ طَلَّاقًا أَكْرَهُ إِلَيْهِ مِنَ الشَّرْطِ فَيَكُونُ حَالِفًا. وَتَارَةٌ يَكُونُ الشَّرْطُ الْمَكْرُوهُ أَكْرَهُ إِلَيْهِ مِنَ طَلَّاقِهَا؛ فَيَكُونُ مُوقِعًا لِلطَّلَاقِ إِذَا وَجِدْتَ ذَلِكَ الشَّرْطَ فَهَذَا يَقَعُ بِهِ الطَّلَاقُ<sup>11</sup>

### Kinds of oath:

Imam Ibn-i-Taymiyyah divided oaths into three kinds i.e .upon Allah, for Allah, other than Allah.

**First** kind of oath is that which takes place upon Allah and its expiation can be given if breached. **Qurān, Sunnat and ijma'** are its **dalīl**.

**Third** kind of oath is taken by other than Allah i.e a person take an oath upon creature. This does not occur nor lead to an expiation. Such oath is also **prohibited in ḥadīth**<sup>12</sup>.

**Second** kind includes divorce oath or vow.

This second kind has further two instances:

1. If by this is intended to have proximity of Allah then it is a vow and it is **laid in ḥadīth**<sup>13</sup> كَفَّارَةَ النَّذْرِ كَفَّارَةُ الْيَمِينِ that expiation of a vow is that of an oath.

**Similarly another ḥadīth**<sup>14</sup> مَنْ نَذَرَ أَنْ يُطِيعَ اللَّهَ فَلْيُطِعهُ، وَمَنْ نَذَرَ أَنْ يَعْصِيَهُ فَلَا يَعْصِيهِ<sup>14</sup> Who ever vows that he will be obedient to Allah, should remain obedient to Him and who ever made a vow that he will disobey Allah, should not disobey Him<sup>15</sup>

2. If it intends to instigate, refrain or the affirmation of something, then **such kind is that of an oath, ṭalāq, 'itq, ṣihār and ḥarām**. For instance someone says that “if I do so then ḥaj be binding upon me or my wealth for charity or fast for a year or say my all slaves be free or my all wives be divorced. **This kind included ṭalāq, vow, ṣihār and oaths and 'Ulamā'** have three assertions in this regard:

**First assertion** is that when an oath is taken upon something, it will be binding upon him in case of its breach because he has suspended an act with a condition that if so happen then it will take place, so as the contingency is met it is binding.

**Second assertion** is that it won't occur and nothing is binding at its breach because **it is an oath other than Allah as it is laid in a ḥadīth**<sup>16</sup> مَنْ كَانَ حَالِفًا فَلْيَحْلِفْ بِاللَّهِ أَوْ يَصْمُتْ<sup>16</sup> whoever has to take an oath, he should swear by Allah or keep quiet<sup>17</sup>.

**Third assertion** is that, this is also like other oaths, when breached expiation is to be paid. Some 'ulamā' undergone in detail and explained further difference in it that one kind of oath is that by which one binds upon himself for the proximity of Allah something from the ḥalāl acts, then this is a vow. Second is that by which one makes something ḥarām upon oneself and this is oath upon divorce or manumission.

Regarding the first oath it is laid that if it is not fulfilled then expiation is to be paid and in the second one, that thing would be binding upon which oath is

taken because he himself binds it upon himself. In the former, he intended to do a virtuous thing and when it is not fulfilled then expiation would be in alternate. In the later, oath is with condition and as the condition takes place then it is not possible to escape from it by expiation<sup>18</sup>.

Ibn Taymiyyah further argued that **لَا يُؤَاخِذُكُمُ اللَّهُ بِاللَّغْوِ فِي أَيْمَانِكُمْ وَلَكِنْ يُؤَاخِذُكُمْ بِمَا عَقَّدْتُمْ** بِمَا عَقَّدْتُمْ أَوْ كَسَوْنَهُمْ أَوْ تَحْرِيرُ رَقَبَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامًا ثَلَاثَةَ أَيَّامٍ الْأَيْمَانَ فَكَفَّارَتُهُ إِطْعَامُ عَشْرَةِ مَسَاكِينَ مِنْ أَوْسَطِ مَا تُطْعَمُونَ أَهْلِيكُمْ أَوْ كَسَوْنَهُمْ أَوْ تَحْرِيرُ رَقَبَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامًا ثَلَاثَةَ أَيَّامٍ ذَلِكَ كَفَّارَةُ أَيْمَانِكُمْ إِذَا حَلَفْتُمْ وَاحْفَظُوا أَيْمَانَكُمْ كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ آيَاتِهِ لَعَلَّكُمْ تَشْكُرُونَ (al-ma'idah5:89)

Allah will not call you to account for what is futile in your oaths, But He will call you to account for your deliberate oaths for expiation, feed ten indigent persons, or a scale of the average for the food of your families, or cloth them or give a slave his freedom. If that is beyond your means, fast for three days. That is the expiation for oaths you have sworn but keep to your oaths. Thus Allah make clear to you His signs that you may be grateful<sup>19</sup> (al-ma'idah5:89)

**Also there is a ḥadīth:**<sup>20</sup> مَنْ حَلَفَ عَلَى يَمِينٍ فَرَأَى غَيْرَهَا خَيْرًا مِنْهَا فَلْيَأْتِهَا وَلْيَكْفُرْ عَنْ يَمِينِهِ

Who take an oath to do something and later on find something else better than the first one, then do what is better and make expiation for oath<sup>21</sup>

<sup>22</sup>These arguments include every kind of oath whether explicit or implicit. Explicit is, as Allah has laid an expiation for oaths and it is the sayings of Allah that this is an expiation for your oaths. He further laid that this is addressed to Muslims that either type of oath they take, falls under this ruling. It is shirk to take an oath upon creature therefore Muslims do not take upon as مَنْ حَلَفَ بِغَيْرِ اللَّهِ فَقَدْ

أَشْرَكَ<sup>23</sup>

From implicit perspective it is so that as Allah has made an expiation of oaths so by this a hardship is removed in the way of getting goodness. If there was no expiation then it would not be possible for the people to get a way out of an oath.

It is said by Allah that: **وَلَا تَجْعَلُوا اللَّهَ عُرْضَةً لِأَيْمَانِكُمْ أَنْ تَبَرُّوا وَتَتَّقُوا وَتُصَلِّحُوا بَيْنَ النَّاسِ وَاللَّهُ سَمِيعٌ عَلِيمٌ** (Al-Baqarah2:224)

And make not Allah's (name) an excuse in your oaths against doing good or acting rightly or making peace between persons, For Allah is one who hear and know all things<sup>24</sup>.

Ibn Taymiyyah further argued<sup>25</sup> that:

لِلَّذِينَ يُؤْتُونَ مِنْ نِسَاتِهِمْ تَرْبِصُ أَرْبَعَةَ أَشْهُرٍ فَإِنْ فَاءُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ (226) وَإِنْ عَزَمُوا الطَّلَاقَ فَإِنَّ اللَّهَ سَمِيعٌ عَلِيمٌ 227

For those who take an oath for absention from their wives, a waiting period for four months is ordained. If they return, Allah is oft-forgiving, most merciful<sup>26</sup>. (Al-Baqarah2:226)

But if their intension is firm for divorce, Allah heareth and knoweth all things<sup>27</sup>.

Al-Baqarah2:227)

This showed that Allah has given two options to the person making *ilā'*, either to break his oath or to effect *ṭalāq*. He has the option to stop her with goodness or to leave her with kindness. If he cohabits then the purpose is achieved and he stopped her with kindness but expiation won't be terminated.

(at-teḥrīm,66:1)<sup>28</sup> يَا أَيُّهَا النَّبِيُّ لِمَ تُحَرِّمُ مَا أَحَلَّ اللَّهُ لَكَ تَبْتَغِي مَرْضَاتَ أَزْوَاجِكَ وَاللَّهُ غَفُورٌ رَحِيمٌ

○ Prophet! Why holdest thou to be forbidden that which Allah has made lawful to thee? Thou seekest to please. Thy consorts. But Allah is oft forgiving, Most merciful<sup>29</sup>

قَدْ فَرَضَ اللَّهُ لَكُمْ تَحِلَّةَ أَيْمَانِكُمْ وَاللَّهُ مَوْلَاكُمْ وَهُوَ الْعَلِيمُ الْحَكِيمُ (at-teḥrīm,66:2)

Allah has already ordained for you, (o men), the dissolution of your oaths (in some cases) and Allah is protector and He is full of knowledge and wisdom<sup>30</sup>

This is addressed to Muslims so every oath of Muslims would include in it for which there is an expiation<sup>31</sup>

### Opinions of jurists whether *ṭalāq al Mu'allaq* is a *yamīn* or *ṭalāq*:

Jurists of four schools of fiqh are of the opinion that *mu'allaq talaq* takes place whether the *ta'liq* is in shape of an oath/*yamīn* or it intends to make her something to do or to refrain her from an act or to affirm something or if it is conditional which aim at the achieveing of a *jazā'*.

### Arguments:

All the four schools have based their opinion upon Qurān, Sunnah and Qiyās. They made an argument upon the verse (Al-Baqara2:229) *الطَّلَاقُ مَرَّتَانٍ*. As Allah has said *ṭalāq* is only twice. This gives the right of *ṭalāq* to a man and makes no distinction between *munjiz ṭalāq* and *mu'allaq ṭalāq* or *ṭalāq -al-muḍāf ilal mustaqbil* or any other type of *ṭalāq*. Moreover it does not confine *ṭalāq* to anything<sup>32</sup>. Also they base their argument for effectiveness of *ṭalāq al mu'allaq* over the verse<sup>33</sup>. (Al-Ma'ida5:1) *يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ*. O ye who believe! Fulfill your obligations<sup>34</sup>.

That as the suspender of *ṭalāq* upon condition has made *ṭalāq* binding upon the fulfillment of condition, so in the light of this verse *ṭalāq* becomes effective upon the fulfillment of condition.

**Sunnah** They have made an argument from the saying of the Holy Prophet <sup>35</sup> *"الْمُسْلِمُونَ عِنْدَ شُرُوطِهِمْ"* that Muslims are bound by their conditions".<sup>36</sup>

Similarly, the jurists made arguments from many other instances at the time of the Holy Prophet (P.B.U.H). One of which is narrated by Bukhārī from Ibn

'Umar, said that a man divorced his wife with **ṭalāq batta**<sup>37</sup> on the condition if she went out. Ibn 'Umar said, if she went out she is divorced and if not then nothing will happen<sup>38</sup>.

Abu Zar Ghifari's wife repeatedly asked him about the time of acceptance of **duā'** by Allah. He replied at the time of Sun set at Friday. Abu Zar Ghifari then said "if you asked again then divorce be upon you". This indicates to the point that it is mu'allaq **ṭalāq** and not a **yamīn**.<sup>39</sup>.

One instance is that which Baihaqī narrated from Ibn Mas'ūd<sup>40</sup> that whoso says to his wife "if you do this thing then you will be divorced and the wife did that. So she would be separated"<sup>41</sup>.

It is narrated by **Ḥasan Baṣri**<sup>42</sup> about the person who says to his wife "you will be divorced If I didn't beat my slave". The slave ran away. Said, she is his wife. He will have benefit from her and would be each other heirs, thus to do every thing which the husband says. So if the slave died before the husband beat him, then the wife would be separated from him. Baihaqī narrated from the **fuqahā'** of Ahl-i-madīna that **fuqahā'** of Ahl-i-madīna said ,whoso says to his wife "if you went out before night you are divorced, thus the women went out without informing husband then she would be divorced."<sup>43</sup>.

**Ibn Qudāma** says **ḥalf bil ṭalāq** intend to suspend **ṭalāq** upon such condition which aim to refrain or to instigate for doing something for instance saying" if you entered the home you are divorced" or "if you don't enter the home you are divorced" or to aim at the affirmation of something for instance '**you are divorced if Zaid came or not**". Suspending **ṭalāq** other than this is a condition not an oath for instance saying "if sun set or pilgrim came or king didn't come, then you are divorced". It is metaphorically called an oath in popular meaning for resembling in instigation, prevention or affirmation<sup>44</sup>. Thus these all argue for the effectiveness of **ṭalāq** upon the fulfillment of the condition<sup>45</sup>

According to **Jumhūr Fuqahā'**, taking an oath upon divorce intends to suspend **ṭalāq** upon such condition which instigate, prevent or the affirm something. If the condition do not give either result then it would be a **ta'liq** which is not under one's control. As for instance saying "if sun sets then you are divorced". In this situation such **ta'liq** would not be considered as an oath upon **ṭalāq** but it would be called as "**ṭalāq bi siffah**".

According to **Imam Nawawvī** **ṭalāq bisiffah** is to suspend **ṭalāq** upon such condition which is not under ones control. As saying to one's wife "you are divorced if sun rises, or when the month starts, or pilgrim comes, or you menstruate or if you delivered a child"

Taking an oath upon **ṭalāq** is that through which one is prevented from something as for instance saying "if you entered in home you are divorce", or instigated for doing something as one saying "if you donot enter the house you

are divorced" or if it affirms something, for example saying "if zaid come you are divorced". These all are situations for taking an oath upon ṭalāq, and where these objects are not achieved then it is not an oath upon ṭalāq but is just a condition<sup>46</sup>.

### **Zāhiriyyah:**

They laid an opinion that yamīn-i-biṭṭalāq or ṭalāq mu'allaq does not take place at all. Although the condition is found and whether the ṭalāq is in shape of an oath intending to make her to do an act or to refrain or affirmation or not an oath but just intends ṭalāq upon the fulfillment of the condition, in either case no ṭalāq takes place. It is called as "ṭalāq bisiffah"<sup>47</sup>.

### **Arguments:**

They argued that ṭalāq would occur in the way as laid in the Qurān by Allah. Similarly expiation is paid for an oath which is sworn upon Allah. Ahl-i-Zawahir are not convinced of qiyas therefore they present this statement of Ibn Hīzm from his book "Almuḥalla" "that Yamīn-i-bi'ṭalāq won't be binding whether the hālif is affixed to his oath or break it, no ṭalāq would occur". Ṭalāq would take place only in the way as commanded by Allah. Similarly qasam would also occur in the way as laid by Allah and whose commandment is stated through His Messenger. For this there is evidence from the verse ذَلِكْ كَفَّارَةٌ لِّأَيْمَانِكُمْ (Al-Mā'ida5:89) i.e this is the expiation when you take an oath.

This clearly shows such kind of a thing can't be Yamīn because there is no Yamīn other than that which Allah laid. There is a saying of the Holy Prophet (P.B.U.H) narrated through Ibn 'Umar that مَنْ كَانَ حَالِقًا، فَلْيَحْلِفْ بِاللَّهِ أَوْ لِيَصْمُتْ<sup>48</sup> whoever has to take take an oath, he should swear by Allah or keep quiet<sup>49</sup>. Thus this make it clear that whoever takes an oath other than Allah, is disobedience and not a Yamīn<sup>50</sup>.

More over if someone say to his wife that upon the first day of the next month you are divorced upon me or mentions some other time that in such a month you are divorced upon me, so no divorce would take place upon her neither at present nor in future because there is nothing for so either in the Quran or Sunnah because Allah has fixed a way after marriage and laid that وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَقَدْ ظَلَمَ نَفْسَهُ (At-talaq65:1)who transgresses Allah's limits commits transgression<sup>51</sup>.

### **Fatāwa's:**

We have consulted the following books of fatāwa on this issue.1.Fatāwā Qāḍī Khān<sup>52</sup>, 2.Fatāwā Imdādiyāh<sup>53</sup>, 3.Fatāwā Usmānī<sup>54</sup>, 4.Fatāwā Dar al 'ulūm Deoband<sup>55</sup>, 5.Fatāwā Ālamgiri<sup>56</sup>.The fatāwa literature, cited above, support four schools of fiqh and declared its status as a divorce.

**Case laws:**<sup>57</sup>

Legally it is declared that contingent divorce leads to divorce.

**Analysis:**

**Ṭalāq has been a crucial issue of every age.** By the passage of time a number of issues arose, among those, contingent divorce was one. Imam Ibn Taymiyyah issued a fatāwa for the non effectiveness of contingent divorce in 718H. Qaḍi of the time refrained him not to issue such fatāwā. Imam Ibn Taymiyyah firstly agreed but subsequently again started to issue fatawa regarding the non effectiveness of such ṭalāq. **As a result of which he was confined in prison in 719H<sup>58</sup>.** Ibn Taymiyyah insists that the divorce oath would not result into the dissolution of marriage, instead, an **expiation is to be paid since the fuqahā' consider it as ḥalf or yamīn.** Ibn Taymiyyah lay that it would only result in ṭalāq when husband intends to effect divorce by it. He made a distinction between **mu'allaq ṭalāq and divorce oath on the basis of an intention.** Here a question arises how intention is to be judged. An act shows a person's intention. An explicit statement does not require an intention because person composes a statement in his mind and then speaks out. So this composition shows his intention. The question of intention arises where the statement is ambiguous i.e it could be understood in more than one ways. **A layman fully knows that word "ṭalāq" leads to divorce one's wife.** So he should be very careful in its usage but if in spite of that he uses, it would mean that he has an intention for so because Allah has blessed him with an intellect to choose, if he chooses, has to bear the consequences accordingly. So intention could not change the status of a statement. For a statement to be an oath there are certain conditions to be fulfilled. Without fulfilling those conditions a statement could not fall in the category of an oath. In

**Qurān at a number of places oath is sworn by the name of Allah for instance:**

تَاللّٰهِ تَفْتًا تَذَكُّرُ يُوْسُفَ، (Al-anbiya,21:57) وَتَاللّٰهِ لَآكِيْدَنَّ اَصْنَامَكُمْ، (al-in'am,6:23) وَاللّٰهِ رَبَّنَا مَا كُنَّا مُشْرِكِيْنَ (yousuf,12:85) تَاللّٰهِ لَقَدْ اَرْسَلْنَا اِلٰى اَمَمٍ مِّنْ قَبْلِكَ، (Al-Nahl,16:63) وَاَقْسَمُوا بِاللّٰهِ، (annahal,16:38)، وَيَخْلِفُوْنَ بِاللّٰهِ (Al-Tawbah,9:56).

**Ḥaḍrat Abū Bakar** said that an oath is to be taken by swearing by one of Allah's name or any of His attributes<sup>59</sup>. **Ḥaḍrat 'Uthmān** used to swear oath by Allah's name<sup>60</sup>. **Ḥaḍrat 'Alī** said that it is valid to take an oath of Allah or by **swearing by any one of His name or attribute.** **Ḥaḍrat 'Alī used to take an oath in a way, swear by him who has created grain and all living things<sup>61</sup>.** The most widely used words of oaths among Muslims are "wallahi, billahi and tallahi". **Ṣaḥīḥ Bukhārī** clearly shows that Holy prophet(P.B.U.H) used to take an oath by the name of Allah like by Allah (wallāhi,wa-billāhi,wa-tallāhi) or by using one of His attributes like by Him in whose hand my soul is or by the lord of ka'ba<sup>62</sup>.

Ibn Taymiyyah placed contingent divorce in a category of a vow. Vow is

to make certain act of worship binding upon one self. It is of two types, unconditional and conditional. In unconditional vow a person binds himself to do certain act of worship. Its basic reason is to get the proximity of Allah. For example one say that "it is binding upon me to fast for two days". Conditional vow is to make certain act of worship binding upon oneself on the happening of certain condition. For instance when a person says "it is binding upon me to offer prayer if his patient gets well". In either case it would be binding to fulfill and its violation is expiable. The type of vow taken for the proximity of Allah is called as nadhar tabarrur. There is also other kind of vow which is undertaken in anger for instigating, preventing from doing certain act or affirmation of one's self, is called as **nadhar lajjāj**. **Ibn Taymiyyah placed divorce oath in this category i.e nadhar lajjāj because of having the same purpose** of instigation, affirmation and affirmation with that of divorce oath. Important thing to note here is that nadhar in either kind is made binding upon oneself for Allah while divorce oath is made binding on the other. Ibn Taymiyyah's contention is that as the sentences are more related to the meanings of an oath thus a ruling of an oath is applied on the basis of Qiyas. The answer to this question is that for Qiyas it is necessary to have a common 'illah. The instigation, prevention or affirmation is not the 'illah but **are the outputs (thamarāt) while vow, oath and divorce oath are different from each other**. Oath is the verbal statement conjoined with the phrase "By Allah" etc for strengthening ones resolution so the 'illah of oath is to strengthen ones resolution by making Allah as witness while vow is to swear by Allah to do certain act of worship, its 'illah is to get the proximity of Allah and contingent divorce is to suspend divorce upon certain contingency to be fulfilled in future i.e **based on shart and jazā'**. **The output of instigation, prevention and affirmation is found in all but in oath and vow it is binding upon oneself for Allah an act of 'ibādah while in contingent divorce it is binding upon the other, also divorce is not an act of 'ibādah**. For the implementation of a ruling the context is seen. The context clarifies the ruling. The context of contingent divorce shows that it is **based on shart and jazā'**. **So upon the fulfillment of shart, jazā' is met. Where the context is explicit there is no space left for intention**. Human being has an intellect. He has full control and authority to use his intellect and express and this expression shows his intention. As it is difficult to judge ones intention so regard is given to the expression. Imam Ibn Taymiyyah based his fatwa upon intention for its effectiveness and tried to justify it accordingly.

**Ibn Taymiyyah made it Qiyās over vow which is not correct because vow and ṭalāq are two different things. Vow is to make an act of worship binding upon oneself whose non fulfillment implies to disobedience but ṭalāq is such a thing whose abandonment cannot be called as disobedience. Also in contingent ṭalāq if the intention is inducement or prohibition and not for ṭalāq, even then it**

is of no proof for payment of expiation.

Regarding Imam Ibn Taymiyyah argument about the verse<sup>63</sup> it is said that **If Surah tehrīm is made base for implementing ruling of oath on divorce oath**, then it must be noted that such oath was taken for prohibition. The right to make something **ḥarām** or **ḥalāl** vested only in Allah not in human beings. The Holy Prophet(P.B.U.H) made it **ḥarām** upon himself for making his wife happy but as it was done by the Holy Prophet(P.B.U.H),who was not an ordinary man, thus there could be danger of following the same by the 'Ummah or atleast consider it **makrūḥ** or the people of the nation might thought that there was no absurdity in making **ḥalāl** things of Allah as **ḥarām**. Therefore Allah asked him to stop from such **Tehrīm**. Moreover Surah **Tehrīm** provides from abstaining making **ḥalāl** things **ḥarām** while divorce is not **ḥarām** as it is laid that with Allah the most detestable of all lawful things is divorce. An important thing to mention here that the Holy Prophet (P.B.U.H) always used to take an oath by the name or any attribute of Allah. So here this things is made clear that the Holy Prophet (P.B.U.H) might had taken an oath by Allah

Further Ibn Taymiyyah argument about the verse<sup>64</sup>it is said that Laghw is that when a person has no intention for saying so, for instance swearing upon something intending it to be true but actually it is not so. Also when people habitually say "yes By Allah" or "no ByAllah". So it is this intention which is called as laghw. Also there is a narration that three things said in jest or seriousness take place i.e **ṭalāq, marriage and taking back a wife**<sup>65</sup>.

Imam Ibn Taymiyyah's argument about the verse<sup>66</sup> is true that if there was no expiation then it would really be difficult and people had to fulfill what they undertook. By an expiation they got the way out of their oath but an important thing in this regard is that it should be really an oath while contingent divorce is not an oath so expiation cannot be paid for it. Interestingly Imam Ibn Taymiyyah at one instance himself accept effectiveness of contingent divorce, but differ on non occurrence on the basis of lack of intention. So it can be said that it was his personal Ijtihād.

Four schools of fiqh base their argument on the verse<sup>67</sup> and narration of the Holy Prophet(P.B.U.H)<sup>68</sup> as a divorce, not an oath as 'aqd is that which makes something binding in future. Oath relating to future is termed as an 'aqd because the swearer binds himself to act upon an oath. For instance a person saying "By Allah I will talk to Zaid". By saying so he makes binding upon himself to talk to Zaid. Similarly if he says that "By Allah I won't talk to Zaid". By saying so he binds upon himself not to talk to Zaid and emphasis upon himself that affirmation or negation present in oath on the basis of that urge/emphasis which is present in the word. His such assertion is termed as 'aqd. This is resembled with a knot of a cord which is in his hands and by which he ties the knot. Contingent

divorce is considered as an oath by its supporters as it consists of *shart* and *jaza'*. *Jaza'* is suspended upon the fulfillment of *shart*, this suspension develops strength in ones resolution and it is for this reason called as an oath and leads to prevention, instigation or affirmation of something which has resemblance with that of *half* billah only in output of prevention, instigation or affirmation of something. Divorce oath is actually not an oath because it is well established that oath must be taken by Allah's name or any one of His attributes. Mere intention does not make the statement an oath specially when the statement is clear.

### Conclusion:

The arguments of *jumhūr fuqahā'* and *Zāhiriyya* have been discussed on contingent divorce. The opinion of *Imām Ibn Taymiyyah* and his reasoning is also celebrated in detail. It is found that *Imām Ibn Taymiyyah* distinguished in contingent divorce and divorce oath on the basis on intention. The study shows that intention is taken into view when the statement is ambiguous. These two verses. *فَأَمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٍ بِإِخْسَانٍ* (Al-Baqara 2:229), *فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ*, (al-ṭalāq65:2) do not lay intention for the effectiveness of *ṭalāq*. The Holy Prophet (P.B.U.H) asked *Ḥadrat 'Abdullah Bin 'Umar* to make *rujū'* when he divorced his wife during menstruation and did not ask him about his intention. If the intention was a condition for divorce the Holy Prophet (P.B.U.H) would had asked him about it. This makes clear that *ṭalāq* can take place without the intention as well. *Ibn Taymiyyah* placed contingent divorce in the category of a vow. Vow is undertaken for a certain act of *'ibādah* while *ṭalāq* is not an act of *'ibādah*. It is a way for the dissolution of marriage. Though it is the most detestable to Allah but it is a lawful act and it is not lawful for us to make something *ḥarām* which Allah declared as *ḥalāl*. *Zāhiriyyah's* declared it *ḥarām* as contingent divorce is not expressly mentioned in the *Qurān*. They lay that *ṭalāq* and oath would only take place in the way prescribed by Allah for *ṭalāq* and oath.

*Imām Ibn Taymiyyah* view does not satisfy the logic. For an oath it is necessary that it should be with the name of Allah or one of his Attributes. An oath is always related to Allah whether Allah's name is expressly mentioned in it or not. Expiation is paid only for the oath which is related to Allah.

The *Jumhūr fuqahā'* made their argument on *Qurān*, *Sunnah* and *Qiyās*. Their arguments attract the logic more than others. The legal practice also considers that contingent divorce leads to divorce. The discussion makes it clear that contingent divorce leads to divorce. *Imām Ibn Taymiyyah* view about contingent divorce that "it leads to an oath and the ruling of an oath would apply over it when the husband does not intend to divorce but just to instigate, refrain his wife to commit or omit certain act or upon the affirmation of something", is based on his personal *ijtihād*.

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<sup>37</sup>This is the word batta meaning cutting and breaking off. It is an implied word for ṭalāq. In this the intention of the husband is seen. If he has an intention for

ṭalāq, then ṭalāq will be effective, if he has no intention than ṭalāq will not take place. If the husband intended for one, than one raj'ī ṭalāq will take place but if intended three than three ṭalāq will be effective. Rahmāni, Khālid Saifullah "Qāmūs al-Fiqh", Karāchi: Zamzam publishers, 2007, vol.2, p.286, ibid Muḥammad Rawās Qala'ījī, "fiqh Ḥaḍrat 'Umar", (ud tr: Sājidurrahmān Sadiqī), 1<sup>st</sup> ed, Lāhore: idārah Ma'ārif Islāmi, 1990, p.491.

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<sup>40</sup> companion

<sup>41</sup> Bahaqī "Al-Sunan al Kubrā", Dār al fikr Bairōt.1413H ,vol.7, Bāb Al-ṭalāq bil waqt o al-fi'l ,p356

<sup>42</sup> born during the caliphate of 'umar at madina

<sup>43</sup> Bahaqī "Al-Sunan al Kubrā" Bāb Al-ṭalāq bil waqt o al-fi'l ,p356, ibid. Waḥba zuhēli, "Al fiqh ul Islāmī wa'adallatahu", vol.7, p448-9, ibid, Sha'bān zakīyyuddīn, "Al Aḥkām ul Sharī'ah li 'aḥwālī'l Shakhsīyyah", p.445-447

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<sup>46</sup> Nawawī, Zikiriyah Yaḥya bin sharf "Al-Majmū' sharḥ ul mahdhab", Bairūt: Dārul fikr, 1421H ,vol.18, p.306-307

<sup>47</sup> Ibn Ḥizm "Al-Muḥallā", rd and ed, Aḥmad Muḥammad Shākir, Beirūt :Dār ul Āfāq ul jadidah ,vol.10, p.211-12, mas'ala no1969, ibid Waḥba zuhēli, "Al fiqh ul Islāmī wa'adallatahu", vol.7, p.447

<sup>48</sup> Ab.Bukhārī, Muḥammad b.Ismā'īl "Al-Jāmi' al Ṣaḥīḥ", Kitābul Iymān wan nadhūr , juz no 4, ḥadīth no:6646, p218, ,

<sup>49</sup> Ab.Bukhārī, Muḥammad b.Ismā'īl "Al-Jāmi' al Ṣaḥīḥ (tr. Muḥammad Muḥsin Khān.), vol.8, p.417

<sup>50</sup> Ibn Ḥizm "Al-Muḥallā", vol.10, p211-12, ibid Waḥba zuhēli, "Al fiqh ul Islāmī wa'adallatahu", vol.7, p.449,

<sup>51</sup> Ibn ḥizm "Al-Muḥallā", p.213, v10, mas'ala no1970

<sup>52</sup> Imām Fakhrūddīn Ḥasan Bin Maṣṣūr Al-Uzjandi al Farghānī "Fatāwa Qāḍī Khān" (Eng T.r. Yusuf and Wilayat Ḥussain), Lāhore :Law publishing company Katchery road ,1977, vol. 2

<sup>53</sup> Thanvī, Ashraf 'Alī "Imdād ul fatāwa" (Tartīb-l-jadīd, mufti Muḥammad shafī'), Akora Khatak :Maktabah sayyid Aḥmad Shahīd bil muqābil Dar ul 'ulūm Ḥaqāniyah, 1327H, vol2, p395-396, ibid p.404, ibid p.418

<sup>54</sup> Muḥammad Mazharulḥaq “*Fatāwa ‘Uthmānī*”, Lahore: Qānūnī kutub khānah Kachehri road, 1340H.

, p156-160

<sup>55</sup> Mufti Maulāna ‘Āzīzur raḥman,”*Fatāwa Dar al ‘ulūm Deoband’*, , 1<sup>st</sup> ed, , ,Karachi: Dārul’ashā’at, 1987, vol.9,p.208,ibid p.225-26,ibid p.276

<sup>56</sup> Saiyyad Amīr ‘Alī “*Fatāwa ‘Ālamgīrī*”, Lāhore :Qānōnī kutub khāna kachhri road,(nd),vol2, p394-458

<sup>57</sup> Bilqees Begum v Manzoor Ahmed PLD 1962 Karachi 491

Bachoo lal verses Mst Bismillah and others AIR 1936 Allahabad 387

Muhammad Irfan verses Mst. Mahando PLD 1952 Peshawar 55

<sup>58</sup>Abū-Zahrah”*Imām Ibn Taymiyyah*” ,(tr,Ra’īs Aḥmad Ja’fary), Lāhore:Shaikh Ghulām Alī and son’s, 1968,p.140-143

<sup>59</sup>Muḥammad Rawās Qala“jī,”*Fiqh Ḥaḍrat Abū Bakar*”, (ur T.r Mauwlānah ‘Abdul Qayyūm),3<sup>rd</sup> ed, Lāhore:īdārah Ma’ārif Islāmī, 1999,p.275, .ibid, Muḥammad Rawās Qala’hjī,”*fiqh Ḥaḍrat ‘Umar*”, (ud tr:Sājidurrahmān Sadiqī), 1<sup>st</sup> ed, Lāhore:īdārah Ma’ārif Islāmī, 1990, p.290

<sup>60</sup>Muḥammad Rawās Qala“jī”*fiqh Ḥaḍrat ‘Uthmān*”, (ur t.r, Mauwlānah ‘Abdul Qayyūm,Ālifuddīn turābī),2<sup>nd</sup> ed,Lahore:īdārah Ma’ārif Islāmī 1999, p.357

**Ḥaḍrat ‘Uthman used to swear an oath with using a word ‘knowledge’ in case of a defect in sale transaction. for instance ‘Abdullah bin ‘Umar sold his slave for eight hundred darhams by saying that there is no defect in him.The buyer later on made an issue about a defect in him.The issue was brought before Ḥaḍrat ‘Uthman. Ḥaḍrat ‘Uthman asked Ibn ‘Umar to take an oath of Allah that he did not had any knowledge about any of his illness. Ibn ‘Umar refused to take oath after which Ḥaḍrat ‘Uthman returned that slave.**

<sup>61</sup>Muḥammad Rawās Qala“jī,”*Ḥaḍrat ‘Alī*”, (T.r, Mauwlānah ‘Abdul Qayyūm,2<sup>nd</sup> ed,Lahore:īdārah Ma’ārif Islāmī, 1998,p.288

<sup>62</sup>Al-Bukhārī, Muḥammad bin Ismāīl” *Al-Jāmi’al Ṣaḥīḥ*

”, vol.4, Kitāb al-Iymān wa al- nadhūr ,p.215-218,

<sup>63</sup> at-teḥrīm,verse1-2)

<sup>64</sup> (al-ma’idah5:89)

<sup>65</sup> Ibn Mājah, Muḥammad bin yazīd”*Sunan Ibn Mājah*”,ed Muḥammad Fawād ‘Abdul Bāqī, Beirut :Dār Al fikr,nd.,hadith no:2039

<sup>66</sup> (Al-Baqarah2:226-7)

<sup>67</sup> (Al-Ma’ida5:1)

<sup>68</sup> المسلمون عند شروطهم that muslims are bound by their conditions ,Ab.Bukhārī Muḥammad bin Ismāīl” *Al-Jāmi’al Ṣaḥīḥ* ”kitab al-‘ijārah, ch.14, ,p.135