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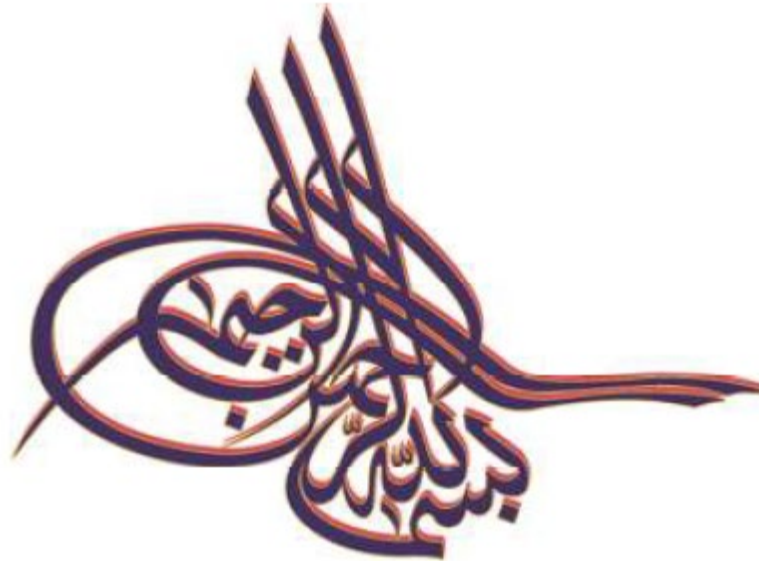


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# Marital Discord in Islam: A Jurisprudential (Qaḍā') Perspective

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"الأراء في هذا البحث تعبر عن رأي الباحث وليس بالضرورة عن رأي أمجا"  
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# ADDRESSING MARITAL DISCORD WITHIN AN ISLAMIC FRAMEWORK: AN OVERVIEW AND IMPORTANCE

Marriage is a cornerstone institution in Islamic theology, depicted as a sacred union characterized by tranquility, affection, and divine mercy, as articulated in Quranic scripture:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

“And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed, in that are signs for a people who give thought.”<sup>1</sup>

Within the broad spectrum of Islamic teachings, the recognition and resolution of marital discord are afforded significant importance, highlighting the value placed on harmonious conjugal relationships. This paper explores the multifaceted dimensions of marital discord within the Islamic context, outlining the theological foundations that shape its understanding and the necessity of addressing such discord within the framework of Islamic jurisprudence.

Marital discord, when left unaddressed, can have profound repercussions, not only on the immediate family unit, but also on the broader societal fabric. From both Islamic and Western perspectives, the detrimental effects of unresolved marital conflict are well-documented, underscoring the necessity of effective conflict resolution mechanisms to preserve familial and societal harmony.

Central to the Islamic perspective on marital discord is the emphasis on communication and compassion, as exemplified by the Prophetic saying:

أَكْمَلُ الْمُؤْمِنِينَ إِيمَانًا أَحْسَنُهُمْ خُلُقًا وَخَيْرُكُمْ خَيْرُكُمْ لِنِسَائِهِمْ خُلُقًا

“The most complete of believers in faith are those with the best character, and the best of you are the best in behavior to their women.”<sup>2</sup>

This maxim underscores the ethical obligation to treat one's spouse with dignity and kindness, reflecting the core principles of Islamic ethics that permeate marital relationships. Additionally, the Prophet (ﷺ) stated:

<sup>1</sup> Sūrat al-Rūm, 30:21

<sup>2</sup> Sunan al-Tirmidhī 1162, Ḥasan Ṣaḥīḥ.

لَا يَفْرَأُكَ مُؤْمِنٌ مُؤْمِنَةٌ إِنْ كَرِهَ مِنْهَا خُلُقًا رَضِيَ مِنْهَا آخَرَ

"A believer must not hate a believing woman. If he dislikes one of her characteristics, he will be pleased with another."<sup>3</sup>

This highlights the importance of focusing on positive traits to maintain harmony in marital relationships.

Islamic teachings advocate for the amicable resolution of conflicts through dialogue and mutual understanding, as encapsulated in the Quranic directive to appoint arbitrators from each family to facilitate reconciliation.

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَأَبْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا<sup>٤</sup> إِنَّ اللَّهَ كَانَ عَلِيمًا  
خَبِيرًا

"And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allāh will cause it between them. Indeed, Allāh is ever Knowing and Aware."<sup>4</sup>

Moreover, the significance of reconciliation is profoundly underscored in the Prophetic narration by Abu al-Dardā', where the Messenger of Allah (ﷺ) said:

"Shall I not tell you something that is better than the status of (voluntary) fasting, prayer and charity?" They said: "Yes." He said: "Reconciling in a case of discord, for the evil of discord is the shaver."<sup>5</sup>

Al-Tirmidhi clarified that the Prophet (ﷺ) said:

"It is the shaver, and I do not say that it shaves hair, but that it shaves (i.e., destroys) religious commitment"<sup>6</sup>.

This narration emphasizes the profound spiritual and communal significance of resolving conflicts and maintaining harmony. It also underscores the need for understanding and compromise in maintaining marital harmony.

Furthermore, the ethos of patience and forgiveness holds paramount importance within the Islamic framework, elucidated through Quranic exhortations to exhibit forbearance and pardon in the face

<sup>3</sup> Ṣaḥīḥ Muslim 1469

<sup>4</sup> Sūrat al-Nisa', 4:35

<sup>5</sup> Sunan al-Tirmidhī 2509

<sup>6</sup> Sunan Abū Dāwūd, 4273; Sunan al-Tirmidhī, 2433, classed as Ḥasan by al-Albānī in Ṣaḥīḥ al-Tirmidhī

of adversity.<sup>7</sup> Patience, regarded as a sacred virtue in Islamic ethics, serves as a fortress against the challenges of marital discord, fostering resilience and fortitude amidst trials. The Prophet (ﷺ) said:

“The strong person is not the one who throws his adversaries to the ground. The strong person is the one who contains himself when he is angry.”<sup>8</sup>

This underscores the importance of self-control and patience in conflict resolution.

This paper also highlights the importance of seeking guidance from learned authorities and religious scholars in navigating the complex terrain of marital discord. Classical Islamic scholars from the Ḥanafīs,<sup>9</sup> Mālikīs,<sup>10</sup> Shāfi'īs,<sup>11</sup> and Ḥanbalīs<sup>12</sup> have all provided significant insights into addressing marital discord through arbitration and mediation.

For this reason, consultation with wise mentors, mediators and arbitrators not only enhances the efficacy of conflict resolution mechanisms but also imbues the process with spiritual profundity, aligning it with the ethical principles delineated within Islamic jurisprudence.

Additionally, fostering a robust spiritual connection between spouses, characterized by shared acts of worship and devotion, serves as a linchpin in strengthening the marital bond and cultivating spiritual intimacy. Highlighting the spiritual dimension of marital responsibilities, the Prophet (ﷺ) said:

“When a man spends on his family seeking Allah's reward, it is counted as charity for him.”<sup>13</sup>

In elucidating these themes, this paper aims to provide a framework for understanding and addressing marital discord within an Islamic paradigm, accentuating the theological, ethical, and jurisprudential imperatives that underpin such endeavors. By outlining the contours of Islamic teachings regarding marital relationships, this inquiry seeks to furnish scholars, practitioners, and

<sup>7</sup> Surah Al-Imran, 3:133

<sup>8</sup> Ṣaḥīḥ al-Bukhārī 6114 and Ṣaḥīḥ Muslim 2609.

<sup>9</sup> al-Bābartī, Muḥammad ibn Muḥammad ibn Maḥmūd, *al-'Ināyah Sharḥ al-Hidāyah*, (Bayrūt: Dār al-Fikr, n.d.), vol. 7, 350, al-Jaṣṣāṣ, Aḥmad ibn 'Alī Abū Bakr, *Sharḥ Mukhtaṣar al-Taḥāwī*, (Bayrūt: Dār al-Bashā'ir al-Islamiyyah, 2010), vol. 8, 68, and al-Sarakhsī, Abū Bakr Muḥammad ibn Aḥmad, *al-Mabsūṭ*, (Bayrūt: Dār al-Ma'rifaḥ, 1993), vol. 21, 62.

<sup>10</sup> al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqḥ Madhhab al-Imām al-Shāfi'ī*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1999), vol. 16, 325, al-Juwaynī, 'Abd al-Malik ibn 'Abd-Allāh ibn Yūsuf ibn Muḥammad, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, (Jeddah: Dār al-Minhāj, 2007), vol. 13, 285, and al-Nawawī, Yaḥyā ibn Sharaf, *Rawḍ al-Tālibīn wa 'Umdat al-Muṭtīn*, (Bayrūt: al-Maktab al-Islāmī, 1975), vol. 11, 121.

<sup>11</sup> al-Qarāfī, Shihāb al-Dīn Abū al-'Abbās Aḥmad ibn Idrīs al-Mālikī, *al-Dhakhīrah*, (Bayrūt: Dār al-Gharb al-Islāmī, 1994), vol. 10, 35, Abū al-Ḥasan al-Lakhmī, 'Alī ibn Muḥammad, *al-Tabṣirah*, (Doha: Wazārah al-Awqāf wa-l-Shu'ūn al-Islamiyyah, 2011), vol. 11, 5337, al-Qayrawānī al-Mālikī, 'Abdullah ibn Abī Zayd, *al-Nawādir wa-l-Ziyādāt 'alā mā fī-l-Mudawwanah min Ghayrihā min al-Ummahāt*, (Bayrūt: Dār al-Gharb al-Islāmī, 1999), vol. 8, 84.

<sup>12</sup> Ibn Qudāmah al-Maqdisī, Abdullāh ibn Aḥmad, *al-Kāfī fī Fiqḥ al-Imām Aḥmad*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1994), vol. 4, 224, and al-Bahūfī, Maṣṣūr ibn Idrīs, *Kashshāf al-Qinā'*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1982), vol. 6, 309.

<sup>13</sup> Ṣaḥīḥ al-Bukhārī 5351, and Ṣaḥīḥ Muslim 1002.

stakeholders with valuable insights into the nuanced dynamics of resolving marital discord within an Islamic framework.

## DOMESTIC VIOLENCE: TYPES, RESTRICTIONS AND RULINGS

### Definition and Types of Domestic Violence

Domestic violence, also known as “domestic abuse,” refers to a variety of abusive behaviors committed by one spouse against the other inside the constraints of the home, aimed at establishing or maintaining dominance and control over an intimate partner. According to the U.S. Department of Justice’s Office on Violence Against Women, domestic violence is a pattern of abusive behavior in any relationship used by one partner to gain or maintain control over another intimate partner. This includes the use of physical, sexual, emotional, economic, psychological, or technological actions or threats of actions or other patterns of coercive behavior that influence another person within an intimate partner relationship. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.<sup>14</sup>

It is worth noting that from an Islamic perspective, physical violence can objectively be verified to a large degree, whereas emotional and psychological are largely subjective, and at times, go against the injunctions of the Quran and Sunnah. To further elaborate, the following practices, as an example, are not considered violence, coercive behavior, intimidation and/or manipulation in the Sharī’ah:<sup>15</sup>

- a. **Adherence to Sharī’ah Regulations in Marital Relations:** Observing the prescribed legal rulings governing marital cohabitation and prohibiting illegitimate forms of relationships.
- b. **Restricting Contraceptives to Legally Married Couples:** The non-availability of contraceptive methods to individuals who are not legally married under Islamic law.
- c. **Prohibition of Abortion Except in Exceptional Medical Cases:** Abortion is only permissible in specific medical circumstances as determined by Sharī’ah.
- d. **Criminalization of Homosexuality:** Homosexual acts are criminalized according to Islamic legal principles.
- e. **Permission Requirement for a Wife’s Travel:** A husband has the right to prevent his

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<sup>14</sup> US Department of Justice, “Office on Violence Against Women” <<https://www.justice.gov/ovw/domestic-violence>>, Dec 6, 2023.

<sup>15</sup> International Islamic Fiqh Academy, “Domestic Violence”, <<https://iifa-aifi.org/ar/2304.html>>, *Resolution No. 180 (6/19)*, 30 April 2009.

wife from traveling alone without his permission and within the bounds of the Sharī'ah.

- f. **Marital Rights of Intimacy and Chastity:** The mutual right of spouses to intimacy and protection against unlawful desires, even if one partner lacks desire.
- g. **Gender Roles in Family and Household:** The woman's primary role in motherhood and managing the household, alongside the man's responsibility of guardianship and financial support.
- h. **Guardianship Over a Virgin Daughter in Marriage:** The requirement of a guardian's consent for a virgin daughter to marry.
- i. **Inheritance and Bequests as Determined by Sharī'ah:** The inheritance shares and bequests are allocated as specified by Islamic law.
- j. **Divorce Within Its Prescribed Legal Framework:** Divorce is permissible but must adhere to specific legal conditions set by Sharī'ah.
- k. **Polygamy Based on Justice:** The allowance of polygamy, provided it is practiced with fairness and justice.

These practices are rooted in Islamic legal and ethical principles, aiming to maintain social order, justice, and the welfare of the community as envisioned by the Sharī'ah.

### **Islamic Perspective on Domestic Violence**

Islam's position on physical violence is unequivocally rooted in the principles of justice, kindness, and the preservation of human dignity. The Quran, Sunnah, and historical and contemporary legal rulings collectively emphasize the prohibition of physical abuse and the necessity of compassionate and equitable treatment within marital relationships.

#### **Quranic and Prophetic Foundations**

The Quran and Sunnah clearly define the nature of the spousal bond. According to the Quran, this relationship is based on tranquility, unconditional love, tenderness, protection, encouragement, peace, kindness, comfort, justice, and mercy. This is encapsulated in several places, such as in the verse:

وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ ۚ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَىٰ أَنْ تَكْرَهُوا شَيْئًا وَيَجْعَلَ اللَّهُ فِيهِ خَيْرًا كَثِيرًا

"And live with them in kindness. For if you dislike them - perhaps you dislike a thing and Allāh makes therein much good."<sup>16</sup>

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<sup>16</sup> Sūrat al-Nisa', 4:19

That is: Speak kind words to them, and improve your actions, and your appearance to the best of your ability.<sup>17</sup>

Regarding this verse, Imām al-Shāfi'ī said:

"The essence of kindness between spouses is to avoid what is disliked and to relieve the one entitled to a right from the burden of seeking it, without showing dislike in fulfilling it. If either of them delays in fulfilling their obligation, the delay by a wealthy person is injustice."<sup>18</sup>

Adding to the discourse, Imām al-Ṭabarī said:

"By His statement 'and live with them in kindness,' He means: O men, treat your women well and live with them in accordance with what you are commanded, which is to keep them by fulfilling their rights that Allah has imposed upon you or to release them with kindness."<sup>19</sup>

Ibn Qudamah said:

"Some scholars said that equality here means that each one of them fulfills their obligations towards the other with kindness, without delay or showing dislike, but with cheerfulness and good spirit, without causing harm or reminding of favors, because Allah says: 'and live with them in kindness.' This is part of kindness. It is recommended for each of them to improve their behavior towards the other, to be gentle, and to bear any harm, as Allah says: 'and to parents, good treatment' ... to the end of the verse 'and the neighbor who is a relative'... It is said: it refers to each spouse."<sup>20</sup>

And in another verse, Allah says:

وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ ۚ

And due to them [i.e., the wives] is similar to what is expected of them, according to what is reasonable.<sup>21</sup>

The Messenger of Allah (ﷺ) exemplified these ideals through his personal conduct, for he said:

خَيْرُكُمْ خَيْرُكُمْ لِأَهْلِهِ وَأَنَا خَيْرُكُمْ لِأَهْلِي

<sup>17</sup> Tafsīr Ibn Kathīr, 2/242

<sup>18</sup> al-Shāfi'ī, Muḥammad ibn Idrīs, *al-Umm*, (Bayrūt: Dār al-Ma'rifah, 1990), vol. 5, 93, and Al-Bayhaqī, Aḥmad ibn al-Ḥusayn, *Aḥkām al-Quran li-l-Shāfi'ī*, (Cairo: Maktabat al-Khanji, 1994), vol. 1, 204.

<sup>19</sup> Tafsīr al-Ṭabarī, 4/312

<sup>20</sup> Ibn Qudāmah, Abdullah ibn Aḥmad, *al-Mughnī*, (Cairo: Maktabat al-Qāhirah, 1969), vol. 7, 293.

<sup>21</sup> Sūrat al-Baqarah, 2:228



"The best of you are the best to their families, and I am the best to my family."<sup>22</sup>

Furthermore, one of his most unequivocal statements on a husband's responsibilities toward his wife is captured in his response when he was asked about marital duties. He (ﷺ) said:

أَطْعُمُوهُنَّ مِمَّا تَأْكُلُونَ وَأَكْسُوهُنَّ مِمَّا تَكْتَسُونَ وَلَا تَضْرِبُوهُنَّ وَلَا تُقَبِّحُوهُنَّ

"Give her food when you take food, clothe her when you clothe yourself, do not revile her face, and do not beat her."<sup>23</sup>

Regarding this narration, Imām Al-Munāwī commented on this, saying:

"It is forbidden to hit the wife, except for rebellion (*nushūz*)."<sup>24</sup>

Imām al-Shawkānī stated:

"The apparent meaning of the ḥadīth is that it is not permissible to abandon in bed or hit, except if they commit an evident immorality, and not for any other reason. There is a general prohibition against hitting women."<sup>25</sup>

And Imām al-San'ānī said:

"And his saying: 'Do not use harsh words' means: Do not let her hear what she dislikes, such as saying: 'May Allah disfigure you,' or similar harsh words."<sup>26</sup>

Moreover, during the Prophet's farewell pilgrimage, he (ﷺ) emphasized the significance of kindness towards women, equating the violation of their marital rights to a breach of the couple's covenant with Allah:

"Surely, I enjoin you to treat women well, for they are like your captives. You do not have any right to treat them otherwise, unless they commit a clear obscenity. If they do so, you may forsake their beds and then strike them without violence, but if they obey you then you may not do so. You have rights over your wives, and they have rights over you. Among your rights over them is that they do not give their beds to anyone, but you and they do not let anyone you dislike enter your homes. Among their rights over you is that you treat them well, clothe them, and feed them."<sup>27</sup>

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<sup>22</sup> Sunan al-Tirmidhī 3895

<sup>23</sup> Sunan Abū Dāwūd 2144

<sup>24</sup> al-Munāwī, Muḥammad Abd al-Ra'ūf, *Fayḍ al-Qadīr Sharḥ al-Jāmi' al-Ṣaghīr*, (Cairo: al-Maktabat al-Tijāriyyat al-Kubrā, 1431H), vol. 1, 66.

<sup>25</sup> al-Shawkānī, Muḥammad ibn Ali ibn Muḥammad, *Nayl al-Awṭār*, (Cairo: Dār al-Ḥadīth, 1431H), vol. 6, 263

<sup>26</sup> al-San'ānī, Muḥammad ibn Ismā'īl, *Subul al-Salām*, (Cairo: Dār al-Ḥadīth, 1431H), vol. 1, 150

<sup>27</sup> Sunan al-Tirmidhī 1163

## DEALING WITH *NUSHŪZ* (MARITAL MISCONDUCT)

The term *nushūz* linguistically denotes defiance, refusal, and elevation, originating from *nashz*, which signifies something elevated and prominent.<sup>28</sup>

In the context of Islamic Jurisprudence, *nushūz* refers to a wife's disobedience to her husband concerning the obligations prescribed by Allah for her to obey him. A wife described as *nāshiz* is one who defies her husband, disregards his commands, and distances herself from him.<sup>29</sup>

### Understanding *Nushūz* and its Implications in Marriage

Despite the technical definition of *nushūz* focusing on the wife's disobedience, it is important to acknowledge that within Islamic Jurisprudence, the concept also encompasses the conduct of the husband. *Nushūz* refers not only to the wife's defiance but also to instances where a husband fails to fulfill his marital obligations. Allah says:

وَإِنْ أَمْرًا خَافَتْ مِنْ بَعْلِهَا نُشُورًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصَلِّحَا بَيْنَهُمَا صَلْحًا<sup>٣٠</sup>

And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them.<sup>30</sup>

This verse provides evidence that *nushūz* can occur from the husband just as it can from the wife, and it encourages both parties to relinquish some of their rights to ensure the continuity of marital life.

Thus, Islamically, the primary objective of addressing *nushūz* within Islamic Jurisprudence is to uphold the stability and integrity of the family unit, which is deemed a fundamental pillar of Islamic society. The measures prescribed for dealing with *nushūz* are designed to be corrective and restorative rather than punitive. They aim to resolve conflicts and foster mutual respect and understanding between spouses, thereby ensuring a harmonious and balanced marital relationship, especially given the sacred status of the family unit in Islam.

<sup>28</sup> al-Azharī, Muḥammad ibn Aḥmad, *Tahdhīb al-Lughah*, (Bayrūt: Dār Iḥyā' al-Turāth al-'Arabī, 2001), vol. 11, 209, and al-Jawharī, Ismā'īl ibn Ḥammād, *al-Ṣiḥāh Taj al-Lughah wa Ṣiḥāh al-'Arabīyah*, (Bayrūt: Dār al-'Ilm li-l-Malāyīn, 1987), vol. 3, 899.

<sup>29</sup> al-Dasūqī, Muḥammad ibn Aḥmad, *Ḥāshiyat al-Dasūqī 'alā al-Sharḥ al-Kabīr*, (Bayrūt: Dār al-Fikr, n.d.), vol. 2, 343, al-Shirbīnī, Muḥammad ibn Aḥmad, *Mughnī al-Muhtāj ilā Ma'rifat Ma'ānī Alfāz al-Minhāj*, (Cairo: Dār al-Kutub al-'Ilmiyyah, 1994), vol. 4, 415, and Ibn Qudāmah, *al-Mughnī*, vol. 7, 318

<sup>30</sup> Sūrat al-Nisā', 4:128

## Measures for Addressing Nushūz of the Wife within the Islamic Framework

It was previously stated that within Islamic Jurisprudence, the act of *nushūz* by a wife is considered ḥarām. This prohibition applies in circumstances where she either engages in:

1. a prohibited act, or
2. neglects a mandatory duty.

The Quran addresses the topic of *nushūz* on the part of the wife where it provides a framework for dealing with certain situations. Allah says:

وَالَّذِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَأَهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَأَضْرِبُوهُنَّ طَعْنًا فَإِنْ أَطَعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا<sup>31</sup>

“But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them<sup>31</sup> [lightly]. But if they obey you [once more], seek no means against them.”<sup>32</sup>

The passage proposes three sequential<sup>33</sup> measures to resolve marital turbulence due to non-compliance on the part of the wife, beginning with **admonishment**, then **desertion** (avoiding sharing the bed with her), and finally, **the application of *ḍarb***.

These measures are intended to be enacted with the utmost care and restraint, aiming to restore harmony within the marital relationship without causing harm or injustice.

### 1. Admonishment:

This measure entails that the husband should initially counsel his wife and remind her of her obligations as a result of the marriage, whilst employing gentleness and kindness in his approach. He should remind her of the duty Allah has placed upon her to maintain good companionship and a harmonious relationship with her husband, acknowledging the position and rights he holds over her.<sup>34</sup> Furthermore, he should highlight the religious obligations she is required to fulfill and the potential sin she incurs by contravening these duties. The husband should also inform her of the

<sup>31</sup> This is the common translation of the term *ḍarb*. Context however reveals *ḍarb* to refer to non-severe physical disciplinary measure. This will be clarified further in the current discourse.

<sup>32</sup> Sūrat al-Nisā', 4:34

<sup>33</sup> Most scholars of Fiqh hold this view. However, Imām al-Shāfi'ī permits a reordering of the disciplinary measures. According to his perspective, physical discipline (*ḍarb*) may be considered an option from the outset, provided that the overarching and specific conditions for its application are met. See: al-Shāfi'ī, *al-Umm*, vol. 5, 208.

<sup>34</sup> Ibn Nujaym, Zayn al-Dīn ibn Ibrāhīm, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, (Bayrūt: Dār al-Kutub al-Islamiyyah, 2<sup>nd</sup> ed., n.d.), vol. 3, 236, al-Kāsānī, Abū Bakr ibn Mas'ūd, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 2<sup>nd</sup> ed., 1986), vol. 2, 334, Khalīl ibn Ishāq al-Mālikī, *Mukhtaṣar Khalīl*, (Cairo: Dār al-Ḥadīth, 2005), 111, al-Mawwāq, Muḥammad ibn Yūsuf, *al-Tāj wa-l-Iklīl li-Mukhtaṣir Khalīl*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1994), vol. 4, 15, al-Nawawī, Yahyā ibn Sharaf, *Rawḍ al-Tālibīn wa 'Umdat al-Muḥtāj*, (Bayrūt: Dār al-Kutub al-Islamiyyah, 3<sup>rd</sup> ed., 1991), vol. 7, 367, al-Ḥajjāwī, Mūsā ibn Aḥmad, *al-Iqnā' fī Fiqh al-Imām Aḥmad ibn Ḥanbal*, (Bayrūt: Dār al-Ma'rifah, n.d.), vol. 3, 250, al-Bahūtī, Manṣūr ibn Yūnus, *Kash-shāf al-Qinā' 'an Matn al-Iqnā'*, (Bayrūt: Dār al-Fikr, n.d.), vol. 5, 209, and al-Shirbīnī, *Mughnī al-Muhtāj*..., vol. 4, 425.

material consequences, such as the forfeiture of financial support and clothing, among other rights, resulting from her disobedience.<sup>35</sup>

In essence, it is also essential to consider a genre of admonishment that is likely to have a significant impact, taking into consideration her individual disposition. The approach may vary depending on the woman's character. For some, reminding her of the religious obligations mandated by Allah and His Messenger, the rewards associated with obeying her husband, and the consequences of disobedience in the hereafter may be effective. For others, warnings and reminders of the negative consequences in this world, such as the loss of her rights, the permissibility of her being ignored or disciplined, and the denial of certain requests and desires, may be more impactful. A discerning husband will understand which type of admonishment will resonate most effectively with his wife's heart.<sup>36</sup>

This approach emphasizes the importance of gentle admonishment and a considerate reminder of religious duties, aiming to restore marital harmony while upholding the ethical principles outlined in Islamic teachings.

## 2. Desertion (avoiding sharing the bed with her):

If reprimands are ineffective in changing a wife's behavior, the second resolution method against *nushūz* is desertion. This approach is used due to its corrective abilities in some relationships as it visibly demonstrates the consequences of persisting in disobedience.<sup>37</sup>

Islamic Jurisprudence manifests desertion in two mannerisms:

- i. The husband may desert her by refraining from sharing the bed with her. This is the view of the majority of the scholars of the four presiding schools of Islamic Jurisprudence thought and entails him not sleeping with her in the same bed, thereby highlighting the seriousness of her disobedience and reinforcing the need for corrective action.<sup>38</sup>
- ii. According to some schools of Islamic Jurisprudence, it is permissible for a husband to desert his *nāshiz* wife by refraining from speaking to her for up to three days. This

<sup>35</sup> al-Bahūtī, *Kash-shāf al-Qinā'*..., vol. 5, 209, and Tafsīr al-Qurtubī, *Sūrat al-Nisā'*, 4:34.

<sup>36</sup> al-Sa'dī, Abd al-Raḥmān ibn Nāṣir, *Taysīr al-Laṭīf al-Mannān fī Khulāṣat Tafsīr al-Quran*, (Riyad: Wazārat al-Shu'ūn al-Islamiyyah wa-l-Awqāf wa-l-Da'wah wa-l-Irshād, 1422H), 138, and Riḍā, Muḥammad Rashīd, *Tafsīr al-Manār*, (Cairo: al-Hay'at al-Misriyyah al-'Ammah, 1990), vol. 5, 59.

<sup>37</sup> al-Shirbīnī, *Mughnī al-Muhtāj*..., vol. 4, 426.

<sup>38</sup> al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, vol. 2, 334, Ibn Nujaym, *al-Baḥr al-Rā'iq*..., vol. 3, 236, al-Dasūqī, *Hāshiyat al-Dasūqī 'alā al-Sharḥ al-Kabīr*, vol. 2, 343, al-Nawawī, *Rawḍ al-Ṭālibīn*..., vol. 7, 367, al-Bahūtī, *Kash-shāf al-Qinā'*..., vol. 5, 209, al-Ḥaṭṭāb, Muḥammad ibn Muḥammad, *Mawāhib al-Jalīl fī Sharḥ Mukhtaṣar Khalīl*, (Bayrūt, Dār al-Fikr, 1992), vol. 5, 262, al-Ruḥaybānī, Muṣṭafā ibn Sa'd, *Maṭālib Uli-l-Nuhā fī Sharḥ Ghāyat al-Muntahā*, (Bayrūt: al-Maktabat al-Islami, 2<sup>nd</sup> ed., 1994), vol. 5, 287

period of silence should not exceed three days, as upheld by the Shāfi'ī<sup>39</sup> and Ḥanbalī<sup>40</sup> scholars. This approach serves as a temporary measure to address and correct the behavior.

### 3. The application of 'ḍarb'

'ḍarb' refers to a concept of physical discipline and is considered the third step in addressing *nushūz* in a wife if admonishment and desertion fail to correct her behavior. This measure is agreed upon by the four major schools of Islamic Jurisprudence: Ḥanafī,<sup>41</sup> Mālikī,<sup>42</sup> Shāfi'ī,<sup>43</sup> and Ḥanbalī<sup>44</sup> with reference to earlier cited Quranic verse and the following Prophetic narration:

"Fear Allah regarding women, for you have taken them with the trust of Allah, and intimacy with them has been made lawful to you by the word of Allah. You have rights over them that they should not allow anyone you dislike to enter your bed. If they do that, then you may strike<sup>45</sup> them, but not severely."<sup>46</sup>

This measure is intended as a last resort and is stringently governed within the framework of Islamic Jurisprudence to ensure it aligns with the spirit of Islamic Law and never approximates the construct of domestic violence in any form.

For important added context, it is worth noting at this outset the advice of the Prophet (ﷺ) in which he said: "Do not strike the female servants of Allah". Subsequently, Umar came to the Messenger of Allah and said: "The women have become emboldened towards their husbands." So, the Prophet (ﷺ) permitted a light physical application. Then, many women gathered around the family of the Prophet (ﷺ), complaining about their husbands. The Prophet (ﷺ) then said: "Many women have gathered around the family of Muhammad, complaining about their husbands. Those men are not the best among you."<sup>47</sup>

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<sup>39</sup> al-Shirbīnī, *Mughnī al-Muhtāj*..., vol. 4, 426, and al-Nawawī, *Rawḍ al-Ṭālibīn*..., vol. 7, 367.

<sup>40</sup> al-Ruḥaybānī, *Maṭālib Uli-l-Nuhā*..., vol. 5, 287, and al-Bahūtī, *Kash-shāf al-Qinā'*..., vol. 5, 209.

<sup>41</sup> al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, vol. 2, 334, and Ibn Nujaym, *al-Baḥr al-Rā'iq*..., vol. 3, 236.

<sup>42</sup> Khalīl ibn Ishāq al-Mālikī, *Mukhtaṣar Khalīl*, 111, and al-Mawwāq, *al-Tāj wa-l-Iklīl li-Mukhtaṣir Khalīl*, vol. 4, 15.

<sup>43</sup> Zakariyyā al-Anṣārī, Zakariyyā ibn Muḥammad, *al-Ghurar al-Bahiyah fī Sharḥ Bahjat al-Wardiyyah*, (al-Maṭba'ah al-Maymaniyyah, n.d.), vol. 4, 225.

<sup>44</sup> al-Bahūtī, *Kash-shāf al-Qinā'*..., vol. 5, 209, and al-Ḥajjāwī, *al-Iqnā'*..., vol. 3, 250.

<sup>45</sup> The term 'strike' is the common imprecise translation for ḍarb and predominantly due to linguistic translation limitations.

<sup>46</sup> Ṣaḥīḥ Muslim 1218.

<sup>47</sup> Sunan Abi Dawud 2146.

This narration highlights that the Prophet (ﷺ) exemplified the highest standards of treatment towards his wives, stating:

حَيْرُكُمْ خَيْرُكُمْ لِأَهْلِهِ وَأَنَا خَيْرُكُمْ لِأَهْلِي

“The best of you are those who are best to their families, and I am the best among you to my family.”<sup>48</sup>

It also underscores the virtue of treating women with kindness, patience, and forbearance and highlights that enduring and overlooking women’s misconduct is better than resorting to physical discipline.

Consequently, Islamic Jurisprudence has explicitly outlined the ethical conditions that must be strictly adhered to in the rare event that *ḍarb* becomes applicable. These conditions ensure that the application of *ḍarb* is regulated, preserving the dignity and honor of all parties involved while maintaining the integrity and ethical principles of Islamic teachings.

### **Ethical guidelines regarding the application of ḍarb**

Islamic jurists have derived the following obligatory protocols that must be followed if *ḍarb* becomes relevant, based on a meticulous examination of Quranic standards and Prophetic tradition:

For *ḍarb* to be considered a normative practice within the couple’s society at the time of its application.<sup>49</sup>

1. For *ḍarb* to be avoided and only used as a last resort.<sup>50</sup>

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<sup>48</sup> Sunan al-Tirmidhī 3895.

<sup>49</sup> Sajid Umar, during a session at the Islamic Council in London, elucidated this condition by drawing upon the normative style of the Quranic discourse, the contextual interpretation of the verse addressing *ḍarb*, and the overarching principles within the sciences of Islamic Jurisprudence and Jurisprudence Methodology. He asserts that these considerations collectively indicate that *ḍarb*, desertion, and admonition are not prescribed as fixed rules, but rather as viable options. This flexibility reflects the universal and timeless nature of Islamic Law since the time of the Prophet (ﷺ), designed to accommodate diverse cultures and societies across different contexts and eras.

Moreover, Sajid Umar notes that the practice of *ḍarb* existed prior to the revelation of the Quran, and the Quran, along with the Prophetic tradition, sought to regulate it. Consequently, the three-pronged corrective approach to addressing *nushūz*—comprising admonition, desertion, and *ḍarb*—is neither exhaustive nor absolutely prescriptive. Instead, it represents a set of strategies from which the most effective one, aimed at achieving the fundamental objectives of marriage, should be selected. This perspective underscores the adaptability and context-sensitive application of Islamic legal principles, ensuring they serve the overarching goals of justice, harmony, and mutual respect within the marital relationship.

<sup>50</sup> Imām al-Shāfi‘ī, citing a ḥadīth narrated in Sunan al-Tirmidhī (3895) in which the Prophet (ﷺ) said: “Do not strike the female servants of Allah.” Subsequently, ‘Umar ibn al-Khaṭṭāb approached the Prophet and stated, “O Messenger of Allah, the women have become emboldened towards their husbands.” In response, the Prophet granted permission to strike them. However, later, numerous women from the household of Muhammad gathered to complain about their husbands. The Prophet then remarked, “Many women have circled around the family of Muhammad tonight, all of them complaining about their husbands. Those who do this (strike their wives) are not the best among you.”

2. For *ḍarb* to have the propensity to achieve the intended outcome, i.e., it will reform her and compel her to fulfill her duty towards him.<sup>51</sup>
3. For the *ḍarb* to be non-severe in both application and reality.<sup>52</sup> It should not break bones or cause any physical disfigurement, resembling only a light nudge or similar minor action. If the application of *ḍarb* results in serious harm or death, the responsible party is liable and will face the consequences established by Shari'ah, as discussed by jurists in the chapters of criminal law.<sup>53</sup>
4. To avoid touching the face or any similar part of the body.<sup>54</sup> The Prophet (ﷺ) is reported to have said: "Do not touch the face, do not disgrace, and do not abandon except within the house."<sup>55</sup>
5. For *ḍarb* to be purely a disciplinary action, and as such the intent behind the discipline should be to correct behavior and improve morals, not to retaliate or release personal anger. Accordingly, if the discipline stems from a desire for revenge, it is considered aggression,<sup>56</sup> even if the concept of *ḍarb* meets the requirements of the other listed conditions.

In conclusion, the application of *ḍarb* as a corrective and restorative measure in marital relationships is embedded within the constructs of Islamic law in a non-prescriptive manner. It is accompanied by mandatory ethical conditions to ensure comprehensive regulation and to safeguard against misuse. These conditions are designed to maintain the integrity and ethical standards of

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Imām al-Shāfi'ī interprets this ḥadīth by noting the initial prohibition by the Prophet against striking women, followed by a conditional permission, and concluding with the statement, "the best of you will not strike". This suggests a nuanced position. The Prophet's initial prohibition reflects a preferred stance against striking. The subsequent permission indicates that it is permissible under specific circumstances. However, the Prophet's assertion that, "the best of you will not strike" signifies an encouragement towards a higher ethical standard, advocating for non-violence and restraint.

Imām al-Shāfi'ī's interpretation highlights the balance between the legal permissibility of certain actions and the ethical aspiration to avoid them. It underscores the importance of maintaining dignity, respect, and non-violence in marital relationships, aligning with the broader objectives of Islamic jurisprudence to promote harmony and ethical conduct within the family unit. See: al-Shāfi'ī, *al-Umm*, vol. 5, 208.

<sup>51</sup> Khalīl ibn Ishāq al-Mālikī, *Mukhtaṣar Khalīl*, 111, and al-Dasūqī, *Hāshiyat al-Dasūqī 'alā al-Sharḥ al-Kabīr*, vol. 2, 343.

<sup>52</sup> al-Kāsānī, *Badā'ī 'al-Ṣanā'ī fī Tartīb al-Sharā'ī*, vol. 2, 334, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*..., vol. 5, 262, al-Dasūqī, *Hāshiyat al-Dasūqī 'alā al-Sharḥ al-Kabīr*, vol. 2, 343, al-Nawawī, *Rawḍ al-Ṭālibīn*..., vol. 7, 368, al-Shirbīnī, *Mughnī al-Muḥtāj*..., vol. 4, 426, al-Bahūtī, *Kash-shāf al-Qinā'*..., vol. 5, 209, and al-Ruḥaybānī, *Maṭālib Uli-l-Nuhā*..., vol. 5, 287.

<sup>53</sup> Tafsīr al-Qurṭubī, *Sūrat al-Nisā'*, 4:34.

<sup>54</sup> Ibn 'Abd al-Barr, Yūsuf ibn Abdullah, *al-Kāfi fī Fiqh Ahl al-Madīnah*, (Riyād, Maktabat al-Riyād al-Ḥadīthah, 2<sup>nd</sup> ed., 1980), vol. 2, 564, al-Nawawī, *Rawḍ al-Ṭālibīn*..., vol. 7, 368, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*..., vol. 5, 262, al-Shirbīnī, *Mughnī al-Muḥtāj*..., vol. 4, 427, al-Bahūtī, *Kash-shāf al-Qinā'*..., vol. 5, 209, and al-Ruḥaybānī, *Maṭālib Uli-l-Nuhā*..., vol. 5, 287.

<sup>55</sup> Sunan Abū Dāwūd 2142.

<sup>56</sup> Sajid Umar shared this condition at the Islamic Council in London, deducing it from the study of 'liability' in the criminal law chapter of Islamic Jurisprudence. For example, see al-Ḥajjāwī, Mūsā ibn Aḥmad, *Zād al-Mustaqni' fī Ikhtisār al-Muqni'* (Riyād: Dār al-Waṭan, n.d.), p. 212.

Islamic Jurisprudence, ensuring that *ḍarb* is applied only in the rarest of circumstances and in a manner that upholds the dignity and rights of all individuals involved.

That said, this study also gives way to the understanding that the application of *ḍarb* faces significant challenges in its viability within Western societies. One primary reason is that *ḍarb* is not a normative practice in contemporary Western cultures. The social and legal frameworks in these societies strongly oppose any form of physical discipline, particularly within intimate relationships, categorizing such actions as domestic violence, which entails severe legal and social repercussions. Furthermore, the potential for *ḍarb* to result in harmful outcomes is significantly higher than any perceived benefit in these contexts. Islamic jurisprudence upholds the principle that the prevention of harm takes precedence over the pursuit of benefit (*dar' al-mafāsīd aw-lā min jalb al-maṣāliḥ*).<sup>57</sup> Given the propensity for *ḍarb* to be misunderstood, misapplied, or to escalate into severe harm, its application would likely contravene this fundamental legal principle. Hence, although its application has been sanctioned by the Sharī'ah, its implementation in the Western society would be deemed non-compliant due to a preventative measure (*sadd al-dharī'ah*), juristic preference (istiḥsān) and consideration of societal interest (istiṣlāḥ).

## INFIDELITY AND WAYS OF DEALING WITH IT

Infidelity, defined as being unfaithful to a spouse, is a serious offense in Islamic teachings. In Islam, the sanctity of marriage is vital, and both spouses are expected to be faithful to this sacred tie. The Quran, ḥadīth, and Islamic jurists all offer thorough teaching on this topic, emphasizing the ethical, moral, and legal consequences of infidelity.

According to the American Association for Marriage and Family Therapy, nationwide surveys show that 15% of married women and 25% of married men have had extramarital affairs. When non-intercourse emotional and sexual connections are included, the incidence rate increases by about 20%. Women's growing participation in the workforce has raised their likelihood of engaging in extramarital affairs.<sup>58</sup>

The Quran explicitly addresses the sanctity of marriage and the severe consequences of infidelity, and adultery (*zinā*).

Regarding infidelity, Allah reveals:

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<sup>57</sup> Ibn Nujaym, Zayn al-Dīn ibn Ibrāhīm, *al-Ashbāh wa al-Naẓā'ir 'alā Madhhab Abī Hanīfah al-Nu'mān*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1999), 78, al-Suyūfī, Jalāl al-Dīn, *al-Ashbāh wa al-Naẓā'ir*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1983), 87, al-Subkī, Tāj al-Dīn 'Abd al-Wahhāb ibn 'Alī, *al-Ashbāh wa al-Naẓā'ir*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1991), vol. 1, 105, 'Alī Aḥmad al-Nadwī, *al-Qawā'id al-Fiqhiyyah: Mafhūmuhā, Nash'atuhā, Taṭawwuruhā, Dirāsātuhā, Mu'allafātuhā, 'Adillatuhā, Muḥimmatuhā, Taṭbīquhā*, (Damascus: Dār al-Qalam, 11th ed., 2013), 207, and al-Zuḥaylī, Muḥammad, *al-Qawā'id al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arba'ah*, (Damascus: Dār al-Fikr, 2006), 238.

<sup>58</sup> Jane E. Brody, "When a Partner Cheats", New York Times, 22 January, 2018, <<https://www.nytimes.com/2018/01/22/well/marriage-cheating-infidelity.html>>.



وَلَا تَقْرَبُوا الزَّانِيَ إِنَّهُ كَانَ فَحِشَةً وَسَاءَ سَبِيلًا

“And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.”<sup>59</sup>

Infidelity entails adultery, but also the illegal relationship that is usually a means to actual fornication. In this verse, the prohibition against even approaching adultery highlights the importance of maintaining chastity and fidelity within marriage. The prohibition against approaching adultery is more emphatic than merely prohibiting the act itself as this includes a prohibition against all of its precursors and temptations. It is also worth noting that Allah characterizes adultery and its inherent evil as a *fāḥishah* (i.e., anything that transgresses its limits: a great sin). This denotes a sin that is considered abhorrent according to Islamic law, sound rationale, and sound human nature, especially since it entails a grave transgression against the rights of Allah, the rights of the woman involved, her family's rights, and the rights of her husband. Furthermore, it propagates immorality, confuses lineage, and entails numerous other social and ethical evils. The term *fāḥishah* further emphasizes that adultery is a malicious path for anyone who dares to engage in this serious transgression.<sup>60</sup>

It is for this reason that the consequence of pre-marital adultery is severe. Regarding a portion of this consequence, Allah says:

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ

“The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes...”<sup>61</sup>

The Prophetic tradition expounds on the topic expansively as well. In a narration, the Messenger (ﷺ) said:

لَا يَزْنِي الزَّانِي حِينَ يَزْنِي وَهُوَ مُؤْمِنٌ

“The adulterer does not commit adultery while being a believer.”<sup>62</sup>

Islamic scholarship also has an extensive voice on the topic of marriage infidelity and adultery. Imam Ahmad stated that he knew of no sin worse than adultery after murder.<sup>63</sup> He cited as evidence the hadith narrated by Abdullah ibn Mas'ūd, in which he asked the Prophet (ﷺ): “O

<sup>59</sup> Sūrat al-Isrā', 17:32.

<sup>60</sup> al-Sa'dī, Abd al-Rahmān ibn Nāṣir, *Tasīr al-Karīm al-Rahmān fī Tafṣīr Kalām al-Mannān*, (Riyāḍ: Mu'assasat al-Risālah, 2000), vol. 457.

<sup>61</sup> Sūrat al-Nūr, 24:2.

<sup>62</sup> Ṣaḥīḥ al-Bukhārī 2475 and Ṣaḥīḥ Muslim 57.

<sup>63</sup> al-Safārīnī, Muḥammad ibn Aḥmad, *Ghīdhā' al-Albāb fī Sharḥ Manẓūmat al-Ādāb*, (Cairo: Mu'assasat Qurtubah, 2<sup>nd</sup> ed., 1993), vol. 2, 435.

Messenger of Allah, which sin is the worst?" The Prophet (ﷺ) replied: "Setting up a rival to Allah when He is the One Who created you." Abdullah then asked: "And then what?" The Prophet (ﷺ) responded: "Killing your child for fear that he may eat with you." When asked further, "And then what?" the Prophet (ﷺ) said: "Committing adultery with your neighbor's wife."<sup>64</sup>

This teaching is corroborated by the Quranic verse:

وَالَّذِينَ لَا يَدْعُونَ مَعَ اللَّهِ إِلَهًا آخَرَ وَلَا يَقْتُلُونَ النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَلَا يَزْنُونَ وَمَنْ يَفْعَلْ ذَلِكَ يَلْقَ أَثَامًا

"And those who invoke not any other god along with Allah, nor kill such person as Allah has forbidden, except for just cause, nor commit illegal sexual intercourse—and whoever does this shall receive the punishment."<sup>65</sup>

Al-Qurṭubī commented on this Quranic verse saying: "This verse indicates that there is no sin greater after disbelief than killing without just cause, followed by adultery."<sup>66</sup>

## How to Deal with Marital Infidelity

Trust in a marriage is not merely a sentimental or optional aspect; it is a crucial and practical asset that can deliver significant value to the entire household. When trust is high, the efficiency of communication and cooperation increases between spouses, and conflicts and misunderstandings decrease. For these and other valid reasons, it makes good emotional and relational sense for couples to consistently find ways to enhance trust levels within a marriage.

Accordingly, fidelity and faithfulness are key protocols in forming a successful and meaningful marital relationship. Infidelity and adultery on the other hand damage a marriage's core trust, eliciting instant feelings of betrayal, wrath, remorse, and deep sadness. According to research and practical experience, as highlighted by Imāms and scholars of Islamic Councils interviewed personally by the author, the effects of adultery go beyond acute emotional anguish, but also can lead to long-term psychological consequences such as sadness and anxiety. Furthermore, infidelity can destabilize the entire family structure, hurting both children and extended family members, which are forms of oppression and forbidden in Islam.

Islamic law recognizes a marriage contract as an immovable and unbreakable contract as per the

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<sup>64</sup> Ṣaḥīḥ al-Bukhārī 4477 and Ṣaḥīḥ Muslim 86.

<sup>65</sup> Sūrat al-Furqān, 25:68.

<sup>66</sup> Tafṣīr al-Qurṭubī, Sūrat al-Furqān', 25:68.

Quran's guidance. About this Allah reveals:

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَىٰ بَعْضُكُمْ إِلَىٰ بَعْضٍ وَأَخَذْنَ مِنْكُمْ مِيثَاقًا غَلِيظًا

"And how could you take it (back) while you have gone in unto each other, and they have taken from you a firm and strong covenant"?

Islamic law does not consider a marriage to be dissolved solely due to the occurrence of infidelity or adultery. However, it grants the aggrieved party the Islamic legal right to seek dissolution of the marriage if they perceive their circumstances to be irreparable, without incurring any sin for pursuing this course of action.

This framework within Islamic law allows for the possibility of marital reconciliation, should both parties be willing to make amends, especially in cases where the marriage has resulted in children. To facilitate effective closure and support marital progress, Islamic Jurisprudence prescribes the following protocols:

1. **Tawbah (Repentance):** Encouragement of sincere repentance for any transgressions and the seeking of forgiveness from Allah.<sup>67</sup>
2. **Individual Counseling:** Provision of support for the offending party to manage triggers of infidelity and for the aggrieved party to achieve emotional healing.
3. **Couples Counseling:** Facilitation of trust rebuilding between the couple through professional intervention.

In instances where the marital relationship has irretrievably broken down, and where dissolution is deemed more beneficial than continuation, Islamic Jurisprudence provides the following options:

**ṭalāq (Divorce):** This process involves the husband pronouncing divorce upon his wife, .1 thereby terminating the marriage.<sup>68</sup> It is the right of the husband and cannot take place

) said: ﷺ unless it is done by him. The Prophet (

إِنَّمَا الطَّلَاقُ لِمَنْ أَخَذَ بِالسَّاقِ ۝

ṭalāq is the right of the one who seizes the leg (i.e., consummates the marriage)" i.e., the

<sup>67</sup> Except for those who repent, believe and do righteous work. For them Allāh will replace their evil deeds with good. And ever is Allāh Forgiving and Merciful. See: Sūrat al-Furqān', 25:70.

<sup>68</sup> هو حلُّ قيد النكاح بلفظ الطلاق ونحوه

See: Ibn 'Abidīn, Muḥammad Amīn ibn Umar, *Radd al-Muḥtār 'alā Durr al-Mukhtār*, (Bayrūt: Dār al-Fikr, 2<sup>nd</sup> ed., 1966), vol. 3, 226, Ibn Ḥajar al-Haytamī, Aḥmad ibn Muḥammad, *Tuḥfat al-Muḥtāj fī Sharḥ al-Minhāj*, (Cairo: al-Maktabat al-Tijariyyah al-Kubra, n.d.), vol. 8, 2, al-Shāfi'ī, *al-Umm*, vol. 5, 126, al-Ḥajjāwī, *al-Iqnā'*..., vol. 4, 2, and Ibn Qudāmah, *al-Mughnī*, vol. 7, 363.

2. **Khulʾ (Divorce Initiated by the Wife):** This procedure allows the wife to initiate a divorce in exchange for compensation (typically financial) to the husband, usually involving the relinquishment of her *mahr* (dower).<sup>70</sup>
3. **Faskh (Annulment):** This involves the annulment of the marriage contract, completely dissolving the marital bond and rendering the marriage as if it never occurred. This can only be executed by a verdict from a *qāḍī* (judge) and based upon Islamic Jurisprudence grounds that makes it necessary or permissible.<sup>71</sup>
4. **Taṭlīq (Arbitrational Divorce):** This occurs when an Islamic judge, *ḥakamān* (appointed arbitrators by the married couple or an authority assuming the role of a *qāḍī* such as a Sharīʿah Council<sup>72</sup>), concludes to dissolve the marriage on specified grounds within Islamic law, such as harm<sup>73</sup>. This option is applicable according to the Mālikī school of Fiqh predominantly and will be expanded upon later on.

Through these listed diligent processes, Islamic Jurisprudence facilitates the complexities of marital discord, providing structured pathways for either reconciliation or amicable separation in accordance with religious principles. This ensures that both parties have clear and equitable options in resolving their marital issues.

## PRINCIPLES FOR DISTINGUISHING BETWEEN KHULʾ AND IMPOSING DIVORCE (*AL-TAṬLĪQ*) ON ACCOUNT OF HARM (*ḌARAR*)

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<sup>69</sup> Sunan Ibn Mājah, 2081; classed as Ḥasan by al-Albani in *Irwāʾ al-Ghālīl*, 2041.

<sup>70</sup> Ibn Najjār, Muḥammad ibn Aḥmad, *Muntahā al-Irādāt*, (Riyāḍ: Muʾassasat al-Risālah, 1999), vol. 4, 197, al-Dasūqī, *Hāshiyat al-Dasūqī...*, vol. 2, 347, and al-Nawawī, *Rawḍ al-Ṭālibīn...*, vol. 7, 374.

<sup>71</sup> Examples of grounds for the annulment (*faskh*) of the marriage contract in Islamic Jurisprudence include the following:

1. **Lack of Compatibility:** Incompatibility between the spouses, as deemed by scholars who consider compatibility a prerequisite for the validity of the marriage contract.
2. **Apostasy:** The apostasy of one spouse from Islam, without subsequent reversion to the faith.
3. **Religious Disparity:** The scenario in which the husband converts to Islam while his wife, a *mushrikah* (polytheist) and not of the People of the Book (i.e., neither Jewish nor Christian), refuses to convert.
4. **Liʾān (Mutual Oath):** The occurrence of liʾān, a process wherein the husband accuses the wife of adultery, which she denies, leading both parties to swear oaths invoking the curse of Allah if they are lying.
5. **Financial Inability:** The husband's financial inability to provide maintenance for his wife, upon the wife's request for annulment of the marriage.
6. **Defects Preventing Intimacy:** The presence of a defect in either spouse that impedes intimacy or induces revulsion between them.

See: al-ʿUmrānī, Yahyā ibn Abī al-Khayr, *al-Bayān fī Madhhab al-Imām al-Shāfiʿī*, (Jeddah: Dār al-Minhāj, 2000), vol. 9 297-362.

<sup>72</sup> Especially in the context of Muslim minorities.

<sup>73</sup> As per the view of the Mālikī school. See: al-Ḥaṭṭāb, *Mawāhib al-Jalīl...*, vol. 4, 17.

## ***Khul'* (Divorce Initiated by the Wife)**

*Khul'* refers to the dissolution of marriage initiated by the wife, wherein she offers compensation to the husband utilizing specific legal terminologies.<sup>74</sup> The primary objective of *khul'* is to extricate the wife from the marital bond in a manner that prevents the husband from remarrying her without her consent. The legitimacy of *khul'* is widely upheld by the scholars of Islam due to unequivocal evidence establishing the practice as valid in the primary sources of Islam, the Quran and Sunnah, as well as due to the practical necessity arising from conflicts and discord between spouses. A wife may develop aversion towards her husband for various reasons—physical, moral, religious, or health-related—leading to a fear that she may not be able to fulfill her religious obligations towards him. In parallel with the husband's specific right to divorce, Islamic law provides this mechanism to alleviate the wife's distress by allowing her to seek termination of the marriage, offering financial compensation to the husband for his marital empathy.

Regarding the legislative evidences for the legitimacy of *khul'* in the Quran, Allah says:

فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ<sup>75</sup>

"But if you fear that they will not be able to keep within the limits of Allah, then there is no sin upon either of them concerning that by which she ransoms herself."<sup>75</sup>

Additionally, Allah mentions:

فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِّنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَّرِيئًا

"But if they give up willingly to you anything of it, then take it in satisfaction and ease."<sup>76</sup>

And He says:

وَإِنْ أَمْرًا خَافَتْ مِنْ بَعْلِهَا نُشُوزًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا<sup>77</sup>

"And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them."<sup>77</sup>

In terms of the Sunnah, the ḥadīth of Ibn 'Abbās offers further establishment and guidance. He narrates that:

<sup>74</sup> al-Nawawī, *Rawḍ al-Tālibīn*..., vol. 7, 374, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*..., vol. 4, 18, Ibn Najjār, *Muntahā al-ʿIrādāt*..., vol. 4, 197, al-Ḥajjāwī, *al-Iqnā'*..., vol. 3, 255, al-Shirbīnī, *Mughnī al-Muḥtāj*..., vol. 4, 430, al-Dasūqī, *Hāshiyat al-Dasūqī*..., vol. 2, 347, and Ibn 'Ābidīn, *Radd al-Muḥtār*..., vol. 3, 439.

<sup>75</sup> Sūrat al-Baqarah, 2:229

<sup>76</sup> Sūrat al-Nisā', 4:4

<sup>77</sup> Sūrat al-Nisā', 4:128

The wife of Thābit ibn Qays came to the Prophet (ﷺ) and said: 'O Messenger of Allah, I do not find fault with Thābit in his character or religion, but I would hate to act in un-Islamic manners after becoming a Muslim.' The Prophet (ﷺ) asked her: 'Will you return his garden to him?' She said: 'Yes'. So, the Prophet (ﷺ) said to Thābit: 'Accept the garden and divorce her once'.<sup>78</sup>

This narration illustrates that her desire for separation was not due to Thābit character or faith but her intense aversion, fearing non-fulfilment of his marital rights. The Prophet's directive, intended as guidance and reconciliation, was for her to return the garden he had given her as a dowry. This case marks the first instance of *khul'* in Islam and embodies the principle of mutual compensation.

### **The Elements for a Successful *Khul'* and its Procedure According to Islamic Jurisprudence**

Islamic Jurisprudence states that, a successful *khul'* must consist of five elements:<sup>79</sup> 1) *al-qābil* (the acceptor), in this case, the husband, 2) *al-mūjib* (the proposer/offeror), the wife, 3) *al-iwad*, the value given in exchange as compensation, 4) *al-mu'awwad* (the 'compensated'<sup>80</sup>, and 5) *al-ṣighah*, the verbal statement consisting of the proposal/offer.<sup>81</sup>

The procedure for initiating *khul'* typically commences with a private discussion between the husband and wife.<sup>82</sup> During this discussion, the wife articulates her desire for *khul'*, and the couple negotiates the terms of compensation. In some instances, family members or community leaders may intervene to mediate the discussions, assisting the couple in reaching a mutually acceptable agreement and ensuring that both parties comprehend their rights and obligations.

Moreover, it is common for couples to seek the guidance of a religious scholar or an Imām. This approach is often preferred due to the socio-personal sensitivities prevalent in contemporary families and communities, as well as the general lack of understanding regarding *khul'* within society today.

Upon reaching an agreement, the verbal declaration of *khul'* is exchanged between the couple on a

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<sup>78</sup> Ṣaḥīḥ al-Bukhārī, 5273.

<sup>79</sup> al-Shirbīnī, *Mughnī al-Muḥtāj*..., vol. 4, 431.

<sup>80</sup> In the context of Islamic marriage, it pertains to the right that renders a woman permissible for a man, and her right to be absolved of the obligations and responsibilities of being a wife. This concept will be elaborated upon.

<sup>81</sup> According to the Ḥanafī madhhab, the process of *khul'* requires only two significant elements: 1) *al-qābil* (the acceptor), in this case, the husband, 2) *al-mūjib* (the proposer/offeror), as all the other elements are applicable by virtue of these two significant elements. See al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, vol. 3, 145.

<sup>82</sup> Upon this, the process of *khul'* is not dependently reliant upon the Islamic Judiciary from an Islamic Jurisprudence perspective. This is the position of the majority of scholars across the four schools of law. See: Ibn Qudāmah, *al-Mughnī*, vol. 7, 324.

form and amount of compensation that is not disputed by the couple,<sup>83</sup> with acceptance being granted accordingly. This exchange may take place privately or in the presence of witnesses. Depending on the terms agreed upon, the wife may return part, or all of the dowry received at the time of marriage, or a mutually agreed upon amount.<sup>84</sup>

Furthermore, it is crucial for the couple to discuss matters concerning child custody, co-parenting arrangements, and financial support. Although these issues are not directly part of the *khul'* process, they are essential for ensuring the well-being of any children involved and for facilitating a smooth transition for both parties.

### **Appointing a Representative (*al-Tawkīl*) in *Khul'***

Given the contractual nature of *khul'*,<sup>85</sup> it is permissible for either spouse or one of them to appoint a representative to act on their behalf during the *khul'* process. Accordingly, Islamic Jurisprudence regulates this representation by stating that anyone who is eligible to enact a *khul'* for themselves can be appointed as a representative or can appoint a representative.<sup>86</sup>

### **Proposed Procedure for *Khul'* in Muslim Minority communities via an Islamic Council/Islamic Centre.**

It has been established that the process of *khul'* is not necessarily dependent on the Islamic Judiciary.<sup>87</sup> However, in certain circumstances, an impartial body—ideally the established judiciary in a Muslim-majority country—may be required. In non-Muslim countries, Islamic jurisprudence advises minorities to seek the guidance of knowledgeable and responsible scholars, typically represented by a Sharī'ah Council or an Islamic Center. These bodies act in the capacity of Islamic judges to ensure justice between spouses, due diligence is followed, the objective(s) of a *khul'* are met in an efficient and timely manner, and to achieve an outcome that aligns with Islamic

<sup>83</sup> al-Shirbīnī, *Mughnī al-Muhtāj*..., vol. 4, 432.

<sup>84</sup> Ibn Qudāmah said: "This statement indicates the validity of *Khul'* with compensation exceeding the dowry, and that if they mutually agree on *Khul'* with a certain amount, it is valid. This is the opinion of the majority of scholars. It has been reported from Uthmān, Ibn 'Umar, Ibn 'Abbās, 'Ikrimah, Mujāhid, Qabīṣah ibn Dhu'ayb, al-Nakha'ī, Mālik, al-Shāfi'ī, and the scholars of opinion. It is narrated from Ibn 'Abbās and Ibn 'Umar that they said: 'If a woman sought *Khul'* from her husband for her inheritance and the adornment of her hair, it would be permissible.'" See: Ibn Qudāmah, *al-Mughnī*, vol. 7, 325.

<sup>85</sup> This is in line with the concluded view of the majority of the scholars of Fiqh.

See: al-Sāwī al-Mālikī, Aḥmad ibn Muḥammad, *Hāshiyat al-Sāwī 'alā al-Sharḥ al-Ṣaghīr*, (Cairo: Maktabat Muṣṭafā al-Bābī al-Ḥalabī, 1952), vol. 2, 365, al-Shirbīnī, *Mughnī al-Muhtāj*..., vol. 4, 429, Ibn Qudāmah, *al-Mughnī*, vol. 7, 58-66, and al-Shirāzī, *al-Muḥadhdhab*..., vol. 2, 495.

<sup>86</sup> al-Shirbīnī, *Mughnī al-Muhtāj*..., vol. 4, 436, and Ibn Qudāmah, *al-Mughnī*, vol. 7, 357-358.

<sup>87</sup> This is the view of the majority of the scholars of Fiqh.

See: al-Shirāzī, Ibrāhīm ibn Alī, *al-Muḥadhdhab fī Fiqh al-Imām al-Shāfi'ī*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, n.d.), vol. 2, 490, Ibn Hazm, 'Alī ibn Aḥmad, *al-Muḥallā bi-l-Āthār*, (Bayrūt: Dār al-Fikr, n.d.), vol. 9, 512, al-Sarakhsī, *al-Mabsūṭ*, vol. 6, 183, al-Ḍasūqī, *Hāshiyat al-Ḍasūqī 'alā al-Sharḥ al-Kabīr*, vol. 2, 347, and Ibn Qudāmah, *al-Mughnī*, vol. 7, 324.

principles at the conclusion of the *khul'* process.

The following briefly outlines the established procedure for *khul'* as facilitated by the Islamic Council America when intervention is required by the spouses:<sup>88</sup>

- I. To do an initial assessment with the petitioner.<sup>89</sup>
- II. To determine at a cursory level whether the petitioner has Islamic grounds for the *khul'* application to proceed further.
- III. If the petitioner's justification is not Islamically sufficient, adjudicator<sup>90</sup> proceeds to suggest marital counselling, coaching, therapy, etc. as the next course of action.
- IV. If petitioner has sufficient grounds for seeking a *khul'*, then proceed:
  - A. To establish communication with the respondent<sup>91</sup> and notify him of the petitioner's application.
  - B. To give the respondent sufficient and ample opportunity to present his views regarding claims made in the application in a joint meeting, or separate meeting if there are legal restrictions in place. Contact should be made primarily in writing via post-mail and email to establish a tracking record.
    - a. If there are legal restrictions in place between both parties, the following should be adopted:
      - a. Proof of legal restriction should be requested.
        - i. If provided, it is to be reviewed and acted upon accordingly.
        - ii. If it cannot be provided, the petitioner's solicitor must confirm the existence of any legal restrictions.
      - b. Written confirmation from petitioner's solicitor is requested, which states that communication with both parties, for the purpose of an Islamic divorce, will not breach any legal restrictions currently in place.
- V. Response from respondent:
  - A. Agrees to attend a joint meeting.
  - B. Declines to co-operate: Respondent's reasons should be recorded and assessed by adjudicator and/or panel of scholars (Shurā).<sup>92</sup>

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<sup>88</sup> See: <https://www.icamerica.org/aboutus>

<sup>89</sup> One who files a *khul'*, i.e. the wife.

<sup>90</sup> Nāzir al-Qaḍiyyah: One who is tasked with sitting on a particular case that requires adjudication

<sup>91</sup> One who responds to claims made against them by Petitioner, i.e. the husband.

<sup>92</sup> Panel of scholars (Shurā) refers to a select group of authoritative scholars tasked with review, deliberation and conclusion of *khul'* cases through a defined process as governed by a robust and set terms of reference.



- a. Adjudicator/panel accepts reasons<sup>93</sup> and case is concluded.
  - b. Adjudicator/panel rejects respondent's reason<sup>94</sup> of non-compliance and proceeds to send further notification until such time that further communication will not produce any positive results. Thereafter, the panel should review the case on the best course of action moving forward.
- C. Agrees to issue *ṭalāq* or accept petitioner's *khul'*
- a. A formal joint meeting (if possible) should be held for a *ṭalāq/khul'* to take place.
    - a. Identify of respondent must be verified and confirmed.
    - b. All outstanding matters (finances, children custody, etc.) should be agreed to amicably.
    - c. Terms such as compensation, etc., must be agreed to by both parties.
      - i. If there are any disputes regarding any *khul'* terms or outstanding matters, the adjudicator should allow for reasonable time until they agree. If they (still) can't agree, then adjudicator should arbitrate taking into consideration the *maṣāliḥ* and *mafāsid* of the Islamic ruling.<sup>95</sup>
    - d. Petitioner and respondent should be given post-*khul'* advice regarding confidentiality, not claiming the petitioner to (still) be the respondent's wife, waiting the *'iddah* period, co-parenting and honoring and abiding by the Islamic ruling.
    - e. Petitioner is granted a "Certification of *Khul'*".
- D. Does not respond entirely, despite many and various attempts made,<sup>96</sup> the following should be implemented:
- a. To request additional contact details for the respondent from petitioner.
  - b. To request additional supporting documentation from petitioner, e.g. witness statements from two male individuals in the family/community/leaders attesting to her statement(s), and an affidavit confirming her reasonings and confirmation for seeking a *khul'*. This is to be implemented when all other avenues and efforts have been exhausted.

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<sup>93</sup> This could be for a variety of (legitimate) reasons, such as not recognizing the authority of the Council handling the case, or differences in madhhab, etc.

<sup>94</sup> For instance, if the respondent's rejection is not for a Shar'i legitimate reason, such as wanting to follow the law of the land, cultural reasons/stigma and the like, or not giving a reason at all, the Council should proceed with the case despite his rejection.

<sup>95</sup> The adjudicator should only concern himself with the Islamic ruling, based upon Islamic principles and jurisprudence, and not be impacted by the potential legal rulings that may apply.

<sup>96</sup> This may be due to a variety of reasons such as respondent is missing, lack of contact details, incarcerated, living outside of the country

- c. The panel of scholars of the Council should issue a *faskh* (dissolution of marriage) to petitioner after a minimum of six months from the time of petitioner's application.<sup>97</sup>

### **Imposing Divorce (*al-Taṭlīq*) on Account of Harm (*ḍarar*)**

Marriage, in Islam, is recognized as a formal contract necessitating the mutual consent and active participation of both spouses. However, there are circumstances where this contract's sanctity is compromised due to harm/abnormal hardship inflicted by one spouse upon the other. In such situations, a form of intervention becomes essential to ensure justice and protect individual rights. An imposition of divorce (*al-taṭlīq*) on the grounds of harm represents a court-ordered/equivalent dissolution of a marriage, aimed at safeguarding a spouse from significant harm or hardship. This judicial dissolution differs from *khul'*, where the wife initiates the separation, and is agreed to and given by the husband in exchange for compensation.

Accordingly, a wife is entitled to seek judicial intervention and separation if she asserts that her husband has subjected her to harm that renders the continuation of their marital life untenable. Such harm may include physical assault, verbal abuse, or any form of intolerable mistreatment, as well as coercion into inappropriate speech or actions. Should the judge, as per his diligence process, validate her claim based on her evidence or the husband's admission, and if the nature of the harm precludes the possibility of sustaining their marital relationship, coupled with the judge's inability to mediate a reconciliation, **an irrevocable divorce** may be decreed. The irrevocable nature of this divorce and the foreign nature of the authority applying it distinguishes *al-taṭlīq* from *ṭalāq* as the latter includes a period during which the *ṭalāq* remains revocable<sup>98</sup> and comes to effect as per the voluntary and measured action of the husband.

Within the framework of Islamic Jurisprudence, the distinctions between *ṭalāq* and *taṭlīq* have led to divergent opinions among scholars regarding the applicability and validity of *al-taṭlīq*. The majority of Islamic jurists do not consider *al-taṭlīq* to be applicable, except in the event of the husband handing over jurisdiction of the right to divorce over to an authority presiding over his marital impasse. However, jurists of the Mālikī *madhhab*<sup>99</sup>, along with a minority of other scholars, advocate for its applicability.

Their precedence for this position are culminated in the following evidences:

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<sup>97</sup> This conclusion, representing the official position of the Islamic Council of America, is based on contemporary *ijtihād*. It ensures that all possible avenues for contacting the husband are thoroughly exhausted, while also providing an opportunity for both parties to undergo a 'cooling off' period. This approach prioritizes preventing the dissolution of the marriage prematurely and mitigating potential greater harm being experienced by either party.

<sup>98</sup> Under normal circumstances, following a husband's issuance of a *ṭalāq*, the wife enters a specified waiting (*'iddah*) period determined by particular conditions. During this period, the *ṭalāq* remains revocable, allowing the husband to reinstate the marriage without the necessity of a new marriage contract or dowry (*mahr*).

<sup>99</sup> al-Dasūqī, *Hāshiyat al-Dasūqī 'alā al-Sharḥ al-Kabīr*, vol. 2, 345.

1. The husband is obligated to either retain his wife in kindness or release her and divorce her graciously, as Allah says:

الطَّلُقُ مَرَّتَانٍ ۖ فَإِمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحُ بِإِحْسَانٍ ۗ

"Divorce is twice. Then [after that], either keep [her] in an acceptable manner or release [her] with good treatment."<sup>100</sup>

2. Furthermore, Allah says:

وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا ۗ

"And do not keep them, intending harm, to transgress [against them]."<sup>101</sup>

3. In addition, the Prophet (ﷺ) also said:

لَا ضَرَرَ وَلَا ضِرَارَ

"There should be neither harming nor reciprocating harm."<sup>102</sup>

As for the (majority of) jurists who opposed *al-taṭlīq*; they argue that the authority handling the matter should promptly implement corrective measures to alleviate oppression and restore balance, thereby allowing the marriage to continue until the conventional procedures for ending a marriage are followed. This would in essence manifest the judiciary's obligation to uphold ethical and moral standards within the marital relationship.

Given the sensitivities of the modern world and the minority context, alongside the numerous challenges faced by Muslims in the United States and the West generally, Shari'ah Councils and reputable Islamic organizations may adopt this minority opinion. Without such quasi-judicial intervention, harm, oppression, and imbalance could become prevalent in Muslim communities. In such circumstances, spouses may exploit the legal system to inflict harm, both worldly and religious, on one another, leading to outcomes that do not align with the principles of Shari'ah.

### **Civil Divorce and the Extent of Its Islamic Validity**

A *nikāḥ* is an Islamic binding contract that a man and a woman enter by fulfilling some of the most basic Islamic conditions, such as the presence of witnesses, mutual consent by both parties, *mahr* (dowry) and consent of the woman's *walī* (guardian). Its main function and objective is the permissibility of sexual relations with one another (*istiḥlāl al-furūj*).<sup>103</sup> The Prophet (ﷺ) said:

<sup>100</sup> Sūrat al-Baqarah, 2:229.

<sup>101</sup> Sūrat al-Baqarah, 2:231.

<sup>102</sup> al-Hākim 2345, al-Bayhaqī 11717, Ibn Mājah 1909, and al-Dāraqutnī vol. 3, 77.

<sup>103</sup> al-Kāsānī, Abū Bakr ibn Mas'ūd, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 2<sup>nd</sup> ed., 1986), vol. 2, 329-331.

فَاتَّقُوا اللَّهَ فِي النِّسَاءِ فَإِنَّكُمْ أَخَذْتُمُوهُنَّ بِأَمَانِ اللَّهِ وَاسْتَحْلَلْتُمْ فُرُوجَهُنَّ بِكَلِمَةِ اللَّهِ وَلَكُمْ عَلَيْهِنَّ أَنْ لَا يُوطِئَنَّ فُرُشَكُمْ أَحَدًا تَكَرَّهْتُمْ إِنْ فَعَلْنَ ذَلِكَ فَاصْرَبُوهُنَّ صَرْبًا غَيْرَ مُبْرَحٍ وَلَهُنَّ عَلَيْكُمْ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ

"Fear Allah regarding women. Verily, you have taken them as a trust from Allah, and intercourse has been made lawful by the word of Allah. Your rights over them are that they do not let anyone in the house you dislike. If they do so, you may strike them without violence. Their rights over you are that you provide for them and clothe them in a reasonable manner."<sup>104</sup>

And the Prophet (ﷺ) also said:

إِنَّ أَحَقَّ الشُّرُوطِ أَنْ تُوفُوا بِهِ، مَا اسْتَحْلَلْتُمْ بِهِ الْفُرُوجَ

"The most deserving of conditions to be fulfilled are those by which you made permissible the private parts (i.e., marital contracts)."<sup>105</sup>

These aḥādīth indicate that sexual intimacy between the spouses, with the husband maintaining exclusivity over his wife, is of prime importance and objectives of an Islamic nikah with the conditions stipulated in marital contracts to be more deserving of being honored. The Prophet emphasized that these conditions related to marriage, which makes intimacy permissible between the spouses, are of utmost importance and must be fulfilled. The rationale is that if the default status of these conditions were not their validity, they would not have been deemed obligatory to fulfill.<sup>106</sup>

Civil marriage, on the other hand, is a union between two individuals (regardless of gender) that is legally recognized. The basic elements for a valid civil marriage are the parties' legal ability to marry each other, mutual consent of the parties, and a marriage contract as required by law.<sup>107</sup> Civil marriage contracts allow the couples to enjoy 1,138 federal benefits, protections and responsibilities.<sup>108</sup> However, its main objective is centered around providing financial incentives, such as social security payments, insurance incentives, tax deductions, and other similar benefits. Based on the above, it can be concluded that a civil marriage is not considered an Islamic marriage<sup>109</sup> due to the following reasons: 1) they have distinct purposes for which they are entered into, 2) the requirements of the Islamic contract are not fulfilled by the civil contract, and vice versa, and 3) both types of marriage do not acknowledge the religious and moral authority of the other. For these reasons, it may be asserted that nearly all Imāms and scholars in the US, as well

<sup>104</sup> Ṣaḥīḥ Muslim 1218

<sup>105</sup> Ṣaḥīḥ al-Bukhārī, 2721 and Ṣaḥīḥ Muslim 1418.

<sup>106</sup> Ibn Taymiyyah, Aḥmad ibn Abd al-Ḥalīm, *Majmū' al-Fatāwā*, vol. 29, 146.

<sup>107</sup> Cornell Law School, "Marriage",

<[<sup>108</sup> National Organization for Women Foundation, "Civil Marriage v. Civil Unions", <<https://now.org/wp-content/uploads/2009/11/Civil-Marriage-v.-Civil-Unions.pdf>>.](https://www.law.cornell.edu/wex/marriage#:~:text=The%20basic%20elements%20of%20a,See%20also%20Common%2DLaw%20Marriage.></a></p></div><div data-bbox=)

<sup>109</sup> The only exception is if the civil marriage was conducted by an Imām as an authorized religious representative and does so by meeting the Islamic requirements and conditions the classical scholars laid out.

as in the Western world, mandate the implementation of an Islamic marriage contract to achieve the intended purpose of the contract, such as allowing for permissible sexual interactions between the spouses. Put simply, the researcher has found no evidence from his extensive interviews with Imāms and scholars in the US and Europe to support the notion that a man and woman can engage in sexual intimacy solely on the grounds of their civil marriage. However, both legally, in Western societies, and per Islamic law, a man and woman are allowed to engage in sexual intercourse solely through an Islamic *nikāḥ*, even without a civil contract or legal marriage in place. Therefore, it is the opinion of the researcher that a civil marriage does not equate to an Islamic marriage, and similarly, an Islamic marriage does not equate to a civil marriage. Each represents a distinct contract with unique conditions and formalities. Individuals may enter into either contract independently, based on their specific objectives and needs. The only exception would be if: 1) There was a conscious intention to satisfy the Islamic criteria for *nikāḥ* while undergoing the civil ceremony, and 2) All requisite conditions for an Islamic marriage, such as the permission of the bride's *walī*, presence of witnesses and the agreement of a *mahr* (dower), were met as well in the same sitting (*majlis*).

Premised on the above, an Islamic marriage can be terminated by one of three ways: *Ṭalāq*, *Khul'*, or *Faskh*. A civil divorce, on the other hand, is a dissolution of marriage granted by a court in situations where a legally recognized marriage has ended. It permits both parties to get married again. In addition to allocating custody and child support when there are children involved, the court may also split property and mandate spousal support. It is crucial to remember that not all states in America handle divorce in the same way. While some allow for the entry of a divorce order and require the resolution of all outstanding matters (such as property and custody) before granting a divorce, others have other requirements.<sup>110</sup>

Regarding the question of whether a civil divorce is equivalent to an Islamic divorce, modern Western scholars have disagreed. Their fundamental division is based on whether they are equivalent or not. Their opinions are summarized as follows:

### **Civil Divorce Equals Islamic Divorce**

This opinion, initially championed by Lebanese judge Faisal Mawlawi, was subsequently adopted by the European Council for Fatwa and Research. The rationale for this *fatwā* is articulated on four grounds: 1) the registration of marriage in a non-Muslim jurisdiction implies consent to its family laws and assigns the husband's right of divorce to its judges, 2) the legal custom (*'urf*) of the civil

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<sup>110</sup> American Bar Association, "Divorce", <[https://www.americanbar.org/groups/legal\\_services/milvets/aba\\_home\\_front/information\\_center/family\\_law/marriage\\_and\\_divorce/annulment\\_separation\\_divorce/ending\\_the\\_marriage/divorce/](https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/family_law/marriage_and_divorce/annulment_separation_divorce/ending_the_marriage/divorce/)>, 03 December 2020.

court's exclusive authority over divorce functions as an implied condition in the marriage contract, 3) the legal and social dilemmas arising from inconsistent marital statuses, and 4) the Islamic principles of necessity, public interest, and harm prevention.<sup>111</sup>

### Civil Divorce Does Not Equal an Islamic Divorce

The second opinion asserts that a civil divorce in a non-Muslim country does not necessarily constitute an Islamic divorce. This perspective is upheld by several reputable, well-known, and established councils in the West, including:

- Assembly of Muslim Jurists of America (AMJA).<sup>112</sup>
- Islamic Council America.<sup>113</sup>
- Sharīʿah Board America.<sup>114</sup>
- Fiqh Council of North America.<sup>115</sup>
- Islamic Council of Europe<sup>116</sup>
- Darul Ifta: Institute of Islamic Jurisprudence UK.<sup>117</sup>

The following is a summary of their reasoning:

1. The fundament is the continuation of marriage (*al-aṣl baqāʾ al-nikāḥ*).
2. A divorce granted by a non-Muslim judge without the husband's consent has no Islamic consequences.
3. The Consensus of the Ummah that a non-Muslim does not have authority over a Muslim.
4. Only Islamic judges or those acting in their capacity, such as Islamic Sharīʿh Councils, reputable and well-known scholars, etc., can issue divorce to a woman without the

<sup>111</sup> Wahb, Yousef Aly, "Secular Court-Ordered Divorces: What Modern Fatāwā and Canadian Imams Say", in *Canadian Journal of Law and Society*, (Cambridge University Press: Vol. 38, Issue 1, April 2023), 67-88.

<sup>112</sup> Assembly of Muslim Jurists of America, "The Assembly's Family Code For Muslim Communities in North America", Salah As-Sawy, <<https://www.amjaonline.org/declaration-articles/the-assemblys-family-code-for-muslim-communities-in-north-america/>>, Article 129.

Assembly of Muslim Jurists of America, "Second Conference of AMJA" Copenhagen, <[https://www.amjaonline.org/wp-content/uploads/2019/02/2nd-session\\_book.pdf](https://www.amjaonline.org/wp-content/uploads/2019/02/2nd-session_book.pdf)>, 228.

<sup>113</sup> The author is the chair and co-founder of the Islamic Council America and holds this position in his personal, academic and scholarly position. Islamic Council America, <<https://www.icamerica.org/>>.

See: Ali Ahmed, "[Ep 13] Divorce: Halal but Most Disliked by Allah w/ Dr. Ali Ahmed - Behind the Minbar Podcast", *Jesus Son of Mary Mosque PA*, <<https://www.youtube.com/watch?v=7bXBLpkJds0&t=35s>>, 13 July 2024.

<sup>114</sup> Sharīʿah Board America, "Did Divorce Take Place", <[https://Sharīahboard.org/single-fatawas-page/?fatwa\\_id=1033](https://Sharīahboard.org/single-fatawas-page/?fatwa_id=1033)>, Nawalur Rahman, Fatwa ID 1033

<sup>115</sup> Fiqh Council of North America, "Aḥkām al-Ṭalāq al-Sharīʿī fī Ḍawʿ Fiqh al-Muslimīn fī al-Gharb", Muḥammad al-Qaṭanānī, <<https://fiqh-council.org/%D8%A3%D8%AD%D9%83%D8%A7%D9%85-%D8%A7%D9%84%D8%B7%D9%84%D8%A7%D9%82-%D8%A7%D9%84%D8%B4%D8%B1%D8%B9%D9%8A-%D9%81%D9%8A-%D8%B6%D9%88%D8%A1-%D9%81%D9%82%D9%87-%D8%A7%D9%84%D9%85%D8%B3%D9%84%D9%85%D9%8A/>>.

<sup>116</sup> Islam21c, "Sheikh Haitham in Defence of Sharia Councils", Haitham al-Haddad, <<https://www.islam21c.com/islamic-law/sh-haitham-in-defence-of-sharia-councils/>>

Islamic Council of Europe, "Marriage & Divorce", <<https://iceurope.org/marriage-divorce-qa/>>.

<sup>117</sup> Darul Ifta: Institute of Islamic Jurisprudence, "Legal/Civil Divorce According to Islamic Law", Muhammad ibn Adam, <<https://darulifta.com/>>.

utterance or consent of the husband.

Nonetheless, in specific circumstances—namely, if the husband files for the divorce or if he accepts the wife's divorce petition from the court and does not object—the majority of contemporary scholars and councils who uphold this opinion still equate a civil divorce to an Islamic divorce. However, it is important to note that just as a civil marriage does not bring about the consequences of an Islamic *nikāh*, similarly, a civil divorce cannot bring about the consequences of an Islamic divorce except in the limited scenario where: 1) The husband applies for the civil divorce with the **intent** of also effecting an Islamic divorce, and 2) All requisite conditions for an Islamic divorce were met according to Islamic jurisprudence, such lack of coercion, sanity, and so on.<sup>118</sup> The crucial point of intent must be taken into consideration before concluding that the Islamic marriage has also come to an end. It is not sufficient that the husband initiated the divorce, as his motivations could include various other reasons, such as dividing or separating assets, safeguarding the wife from financial harm due to bankruptcy procedures, tax incentives, ensuring that inheritance is distributed according to Islamic principles, or taking a second wife. Additionally, if the husband accepts the wife's petition for divorce without contesting and signs the divorce decree, this action alone is also insufficient to effectuate an Islamic dissolution of marriage. Various factors could influence such a decision, including pre-planned financial incentives, coercion, deception, or financial incapacity to contest the divorce. Therefore, merely signing the divorce papers without contest does not necessarily indicate the husband's intent to initiate an Islamic divorce.

The lack of clarity on this issue can have profound ramifications on the family, the lineage of the children, and the marital status of the woman. Hence, the researcher argues that for a civil divorce to be equivalent to an Islamic divorce, the husband's explicit intent must be present when finalizing the divorce. In the absence of such intent, the divorce should not be considered valid under Islamic law, and the wife would continue to be legally married to the husband in the Islamic context. It is recommended that scholars and Imāms in the West adopt a view that is undisputed, thereby avoiding the divergences in scholarly opinions. This approach would involve adhering to the safest and most universally accepted interpretation—one that cannot be challenged in the future. Such a stance would ensure clarity and consistency, prevent potential conflicts, and uphold the integrity of Islamic marital principles.

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<sup>118</sup> Sajid Umar proposed the criterion of intent as a conditional mandate during his participation in The Islamic Council's dedicated Panel of Scholars symposium on the topic of whether civil divorces equate to an Islamic divorce, held in London, UK, in the summer of 2023. This viewpoint is shared by the author and is the position of the Chair of the Panel of Scholars, Haitham al-Haddad, for over a decade. The position of intent being a mandatory requisite was subsequently endorsed as the official stance through consensus by the Panel of Scholars at the Islamic Council at the conclusion of the symposium.

## CONCLUSIONS & RECOMMENDATIONS

This research highlights several pivotal findings concerning marital discord and conflict resolution within Islamic jurisprudence, and are summarised as follows:

1. Marriage is fundamentally regarded as a sacred institution in Islamic theology, intended to foster tranquillity, affection, and divine mercy among partners.
2. Islamic teachings emphasize the importance of resolving conflicts amicably through dialogue and mutual understanding, thereby maintaining harmony within the marital relationship.
3. While physical violence can be objectively assessed, emotional and psychological abuse remains largely subjective. Some interpretations may conflict with the Quran and Sunnah, necessitating careful consideration within Islamic legal frameworks.
4. Islam's stance on physical violence is firmly rooted in principles of justice, kindness, and human dignity. The Quran, Sunnah, and legal rulings consistently prohibit physical abuse, advocating for compassionate and equitable treatment in marriage.
5. Although *nushūz* is technically defined as a wife's disobedience, it also encompasses the husband's failure to fulfil marital obligations. Addressing *nushūz* aims to uphold family stability, a cornerstone of Islamic society.
6. Measures prescribed for dealing with *nushūz* are designed to be corrective and restorative, not punitive. They aim to resolve conflicts and promote mutual respect and understanding between spouses.
7. The application of *ḍarb*, though regulated with mandatory ethical conditions, faces significant challenges in Western societies. Its implementation is often deemed non-compliant due to preventative measures (*sadd al-dharī'ah*), juristic preference (*istiḥsān*), and societal interest (*istiṣlāḥ*).
8. Infidelity, including adultery and illegal relationships, is a grave offense in Islamic teachings. While it does not automatically dissolve a marriage, the aggrieved party has the right to seek dissolution if the situation is deemed irreparable.



9. A detailed proposal for the procedure of *Khul'* in Muslim minority communities has been drafted and tested by the Islamic Council of America, offering a structured approach for marital dissolution.
10. Sharī'ah Councils and Islamic organisations in the West may adopt the procedure of *a/-Taṭlīq* to address the unique challenges faced by Muslim minorities.
11. The research clarifies that civil marriages and divorces do not equate to Islamic marriages and divorces, except under specific circumstances outlined in the study.

### **Recommendations:**

The establishment of Islamic Sharī'ah Councils in America for adjudicating and arbitrating marital discord is essential for addressing the unique needs of Muslim communities based on Islamic principles and ethos. Such councils would provide a culturally sensitive and faith-based approach to resolving disputes, ensuring that solutions align with Islamic values and traditions. Unlike other judicial systems limited by time and geography, Islamic principles are universally applicable, capable of resolving disputes among Muslims regardless of their domicile.

By providing a structured framework for addressing marital issues, Islamic Sharī'ah Councils can promote harmonious resolutions, support the preservation of the family unit, and reinforce the religious identity of the Muslim society. The researcher's extensive interactions with Imams and scholars across the US, involvement in over 950 cases, and presiding in more than 2,000 cases as a senior panel member<sup>119</sup> underscore the increasing demand for Sharī'ah Councils to intervene in matters of marital discord, *ṭalāq*, *khul'*, and *faskh*. It is imperative that various Islamic organizations, such as AMJA, NAIF, and FCNA, collaborate to develop a unified, codified, and principled approach to addressing marital discord. This would ensure that cases are handled by competent, well-trained scholars, thereby reducing the risk of adjudications by less qualified individuals.

However, a significant challenge in establishing a functional national Sharī'ah Council is the need for executive authority and binding clauses. Without such authority, many disputing parties may not seek Islamic arbitration, even if it is morally and ethically binding. Additionally, many Imams and qualified scholars may avoid taking on such cases to avoid potential legal repercussions, media scrutiny, and financial liabilities.

In light of the above, the following recommendations are proposed for consideration by Islamic organizations, Sharī'ah Councils, scholars, Imāms, Muslim lawyers, Islamic researchers/academics,

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<sup>119</sup> Between 01 August 2020 and 31 July 2024.

and policymakers:

1. Sharī'ah Councils, with the support of local government bodies, should adopt a holistic, systematic, and methodological approach to pre-emptively tackle core issues leading to family breakups.
2. Sharī'ah Councils should hold annual seminars to address modern and complex issues pertaining to Muslim family law and offer ongoing training to all potential arbitrators and Islamic judges.
3. Sharī'ah Councils should include well-educated and trained scholars from all four *madhāhib* within their membership.
4. Policymakers and government bodies should recognize, legitimize, and endorse reputable Sharī'ah Councils that are well-established among Islamic scholars and have a proven track record in resolving marital disputes within their communities.
5. Government bodies should recognize and enforce the marriage and divorce awards issued by Sharī'ah Councils.

These methods will guarantee that Sharī'ah Councils can efficiently handle conflicts within marriages in Muslim communities, thus safeguarding the unity of families and upholding the religious values of Muslim society.