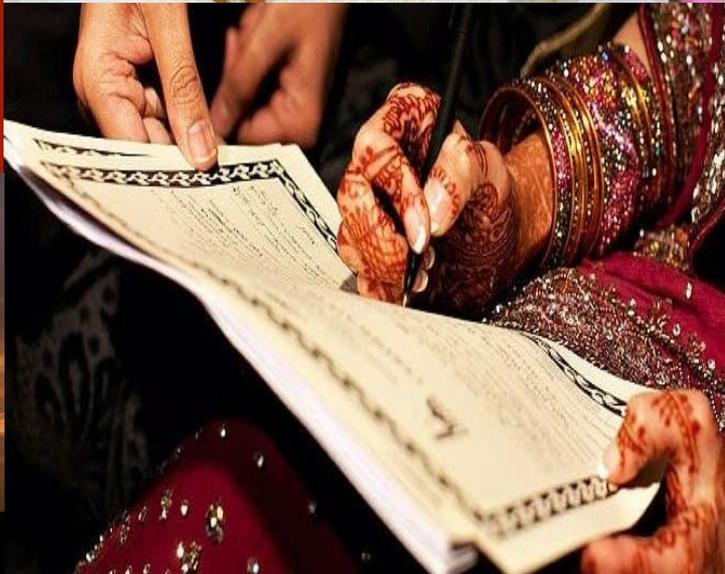


MODULE 7 FAMILY LAW

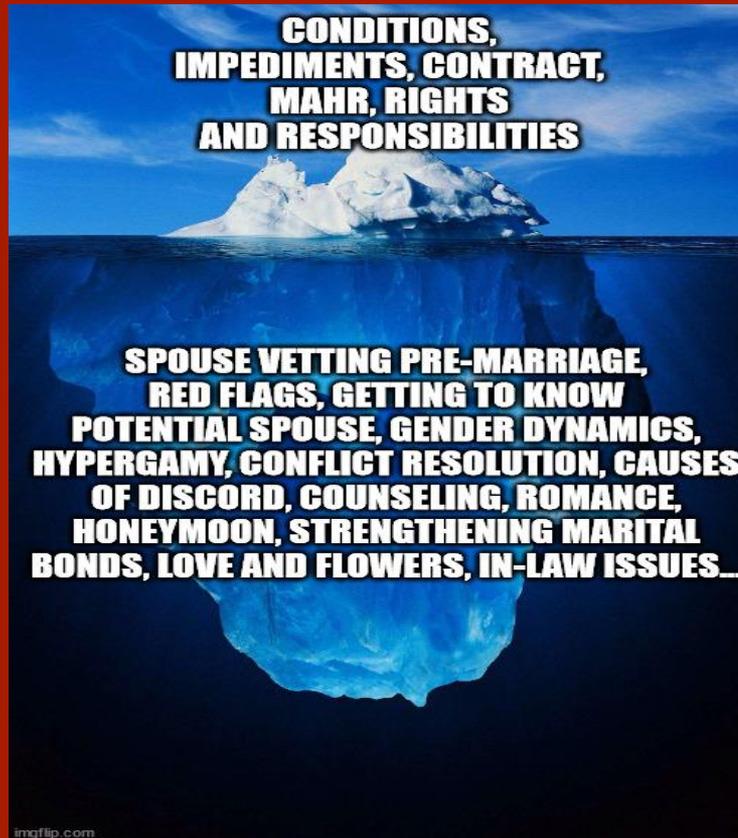


Module 7: Family Law

- 7.1 Marriage
- 7.2 Conflict and Divorce
- 7.3 Rights of Children
- 7.4 Rights of Parents
- 7.5 Family ties



7.1: What We Will Learn (and Not Learn)



SHIQAQ-CONFLICT

The revealed law is for humans, not angels. It guides our ethics and behavior, and is revealed for all human possibilities: the good, the bad, and the ugly.

Marital conflict (shiqaq) is four types:

- 1] Bad treatment or harm from the husband to the wife.
- 2] Bad treatment or harm from the wife to the husband.
- 3] Mutual bad treatment or harm.
- 4] Unclear cases where it is not readily determining who is the aggressor and who is the victim.

SHIQAQ–FROM THE HUSBAND

- Domestic violence
- Cursing, verbal abuse
- Denying her conjugal rights
- Denying her other rights

REDRESS

Scenario #1: She suffers one or more of these but does not want to get divorced, but raises the matter to the Qadi and establishes it via evidence or the husband's admission or it being common knowledge. The Qadi is to deter him and prevent him from future harm by:

- 1] Counseling him, advising him, warning him, etc.—as the Qadi sees fit.
- 2] If that doesn't work, the Qadi advises her to forsake the bed (withdraw conjugal rights).
- 3] If that doesn't work, the Qadi threatens the man with discretionary punishment (strikes or jail time, etc.), with the condition that the Qadi is reasonably certain that will work.
- 4] If none of that works, the Qadi can only advise and speak harshly.

REDRESS

Scenario #2: She suffers one or more of these and wants to get divorced, and raises the matter to the Qadi and establishes it via evidence or the husband's admission or it being common knowledge. She can seek a separation and the Qadi can grant it.

SHIQAQ–FROM THE WIFE (NUSHUZ)

Recalcitrance (nushuz) is when the wife:

- Is disobedient to her husband; or
- Disobedient to Allah

She is Nashiz if she:

- Refuses direct or indirect sexual access
- Leaves the home without his permission going where he does not want her to go
- Locks him out of the house
- Betrays him by being unchaste (through fornication or other forms of indecency)
- Betrays him financially (uses his money unlawfully)
- Neglects purification and prayer, fasting, and other obligations of Allah.

REDRESS

1] **Exhortation.** Words that soften her heart and remind her of the rewards of obedience and warn her of disobedience. If needed, an Imam or respected figure can convey this exhortation. If this fails, he goes to step 2.

2] **'Forsaking the bed.'** This means denying her conjugal rights and not sleeping with her in the same bed. The fuqaha' state that an ideal time is one month, and it should not exceed four months. If this does not benefit, he goes to step 3.

3] **Light physical discipline.** If steps 1 and 2 do not work, he is allowed to engage in light physical discipline, defined as 'non-injurious, that leaves no mark, and which avoids the face.' This is only allowed if he is reasonably certain that it will bring her back to obedience. If he is reasonably certain it will not, he is not allowed to do it.

MUTUAL CONFLICT

- If it is mutual and each claim to be the victim but neither can prove it; or
- If the wife raises a complaint to the Qadi but cannot prove it

The Qadi has righteous locals (who are upright and whose testimony is accepted) sit with them and hear their stories and investigate the matter and present their findings to the Qadi, who will take one of the steps mentioned previously depending on who the aggressing party is.

If complaints continue, and it is not possible to determine the aggressing party, the Qadi sends a judge from the wife's family and a judge from the husband's family.

MUTUAL CONFLICT

- If the husband and wife consent to one judge, that is allowed.
- The default is that the two judges are appointed by the Qadi.
- The role of the judges is Islah. Islah is not the opposite of ‘separation,’ it is what is best (aslah) for the husband and wife, which might be separation or staying together.
- The judges are literal judges, not witnesses or representatives. Thus, if they both determine that the husband and wife are to be separated, the separation takes effect. This separation assumes the role of a single pronouncement of divorce.

DIVORCE–TALAQ

‘No permissible thing is more detested by Allah than divorce.’

Divorce is permissible according to the Quran, the Sunna, and Consensus.

Divorce law is detailed; we want to cover the basics here so that if—God forbid—a marriage deteriorates to the point of divorce, the husband and the wife know their options and how divorce is carried out according to the Sunna.

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THE SUNNA DIVORCE

It is called Sunna Divorce in contrast to the Bid'a Divorce that takes effect but which is done contrary to the Sunna.

- 1] A single pronouncement of divorce (not 2 or 3 at once).
- 2] The divorce pronouncement takes place when the wife is ritually pure from menstruation and post-natal bleeding, and not after having intercourse after she has purified herself from either.
- 3] That the divorce pronouncement not be uttered during her 'Idda from a previous divorce pronouncement in which he could take her back.

THE BID'A DIVORCE

All forms of Bi'da take effect (i.e., though done improperly, it still counts as a divorce).

- During the woman's monthly cycle
- During the woman's post-natal bleeding
- After intercourse post-purification
- Triple divorce uttered in one sitting

The Qadi is to order the husband to take his wife back if he pronounced divorce during her monthly cycle or during post-natal bleeding.

TYPES OF DIVORCE

1] **'Take back'**—where a man can take back his ex-wife during her 'idda, or re-propose after the 'idda with a new contract and mahr. This is affected after the first or second divorce initiated by the husband.

2] **'No take back'**—where a man cannot take back his ex-wife during her 'idda, but can only re-marry her through a new proposal after her 'idda, if she accepts it. This is affected by:

- **Khul'**—where the wife seeks divorce due to dissatisfaction.
- **Tafriq**—when the authority separates the two due to the man not fulfilling her rights.

TYPES OF DIVORCE

3] **Irrevocable divorce**—when the ex-husband can neither take her back in her 'idda (#1), nor remarry her with a new contract (#2) unless she:

- Marries another man
- Consummates that marriage
- Gets divorced from him

This is affected by:

- A third divorce pronouncement
- A bid'a divorce of three pronouncements in one sitting

WORDS THAT ENACT DIVORCE

1] Plain words: ‘You are divorced,’ ‘I divorce you.’

2] Allusive words: ‘You are separated from me,’ ‘Go back to your family,’ ‘You are no longer lawful for me,’ ‘Our marriage is over.’

- Plain words effect divorce whether one intends divorce by them or not.
- Allusive words only effect divorce if one intends divorce by them.
- Doubts about one’s intention when using allusive words mean that the divorce will not take effect.

KHUL'

Khul' is 'the end of the marriage when the husband receives a material offering from his wife and using the pronouncement of *khul'* or *talaq*. Or when the husband divorces/releases his wife by accepting her request for separation in exchange for a compensation she offered him.'

وَلَا يَحِلُّ لَكُمْ أَنْ تَأْخُذُوا مِمَّا آتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ يَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ

“And it is not permitted for you [husbands] to take back what you have given them [your wives] unless they both fear that they cannot uphold the *hudud* of Allah. So if you all feared they cannot keep up the limits of Allah, then there is not fault upon them with what she ransoms herself with.” [2:229]

KHUL'

Ibn `Abbas told that the wife of Thabit b. Qays came to the Prophet ﷺ and she said: *O Messenger of Allah, Thabit b. Qays, I do not fault him for his character or religiosity, but I hate to be ungrateful (kufr) after Islam.* So the Prophet ﷺ said: ***Would you return to him his garden?*** She said *yes*. The Messenger of Allah ﷺ then said ***“Accept the garden and divorce her a single divorce.”***
(Bukhari)

Thus, the basic concept is that the woman offers to give back the dowry her husband originally gave her in order that he divorce her against his preference.

KHUL'

- It is generally forbidden for the husband to make her life difficult with the hope that she will 'bribe' him for a divorce.
- Khul', like divorce, should be a last resort. Other means should be pursued first, especially when she is displeased with things he has control over (behavior, religiosity, money management, etc.)
- Khul' is usually a last resort when there are irreconcilable differences.
- The Dowry, or its customary value, is offered back to the husband. It may also be an object.
- In North America, where there are no Qadis who can decree that a Khul' is executable (with or without the husband's agreement), the general practice is to only issue a Khul' or a legally enforced divorce due to harm AFTER the civil divorce papers are issued, in order to avoid the harm that could be provoked by affecting the angered husband.

THE WAITING PERIOD–‘IDDA

- 1] The ‘Idda of divorce begins as soon as the divorce occurs. It ends upon the beginning of the third menstrual period that follows. It is three Quru’ (purities) beginning with the purity in which the divorce occurred.
- 2] If the woman does not menstruate, the ‘idda is three months from the day of the divorce.
- 3] If she is pregnant, it ends at birth.

PROHIBITIONS DURING THE ‘IDDA

- 1] She may not remarry during the ‘idda (because the purpose of the ‘idda is to ensure that the womb is empty and that lineages will not be confused).
- 2] She may not accept marriage proposals (but it is okay for a man to make an indirect proposal or hint at marriage).

THE WAITING PERIOD–‘IDDA

- 1] If the husband has intercourse with his wife during her ‘idda with the intention that she is his wife again, this is considered ‘taking her back’ (raj’a).
- 2] If he had intercourse with her and still intends to divorce her, he is sinful for making light of the religion, but it is not fornication.

MAINTENANCE DURING THE 'IDDA

1] A man must maintain his divorced wife during her 'idda if he consummated the marriage and one of the following apply:

- He has the right to take her back (raj'a)
- She is pregnant

2] A woman has NO right to maintenance after the following:

- Khul'—unless she is pregnant
- Triple divorce
- Separation (tafriq) due to harm by the husband
- Separation (tafriq) due to change of religion

IMPORTANT NOTE ON KHUL'

- If feasible, a woman granted khul' will move to her family's home, or a relative, or even a shelter or guest bedroom of another home. If none of that is possible, she may stay in the husband's home and live as a stranger, in a separate room while observing hijab in front of him.
- Unlike talaq, he cannot 'take her back' through intercourse during her waiting period. Once he accepts her offer of khula' they are haram for each other.