

VOLUME 10 ISSUE 1

2025

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Published online: 5 March 2025



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To cite this article:

Shah, Khalid. "Validity of Faskh (Judicial Annulment) of Nikah (Islamic Marriage) due to Shiqaq (Marital Discord) and its 21st Century Application." *Australian Journal of Islamic Studies* 10, no. 1 (2025): 41-65. DOI:

<https://doi.org/10.55831/ajis.v10i1.751>.

VALIDITY OF *FASKH* (JUDICIAL ANNULMENT) OF *NIKĀH* (ISLAMIC MARRIAGE) DUE TO *SHIQĀQ* (MARITAL DISCORD) AND ITS 21ST CENTURY APPLICATION

Khalid Shah*

Abstract: *Nikāh* or an Islamic marriage can end due to many reasons. This paper analyses rulings, evidence, principles of *faskh* (Islamic judicial annulment of marriage) due to *shiqāq* (marital discord) and its procedures. First, thorough definitions are established for concepts such as *shiqāq* and *faskh*, along with an introduction to an ideal Islamic marriage, and the laws according to which a *qāḍī* or Muslim judge operates. Modern applications of *faskh* are compared by examining the *faskh* legal procedures of five Muslim countries – Jordan, Morocco, Kuwait, Qatar and Malaysia – and one Muslim minority country – India – and the procedures set by its peak body on Muslim personal law, i.e. the All-India Muslim Personal Law Board. All codes are derived from the four canonical legal schools of thought of Sunni Islam, i.e. Ḥanafī, Mālikī, Shāfi‘ī and Ḥanbalī. These provide a sufficient cross-section of the Muslim world for the on-the-ground reality and judicial operating procedures of how *shiqāq* is dealt with by judges. It was discovered that the Mālikī *madhhab* was chosen unanimously by all the legal codes as it provides the greatest recourse for women in bad marriages.

Keywords: *faskh* (judicial annulment), *nikāh* (Islamic Marriage), *shiqāq* (marital discord), *tahkīm* (arbitration), Islamic family (personal) law, *qaḍā* (Islamic judiciary)

INTRODUCTION

In the early and mid-20th century, due to rapid societal changes, Muslim personal law codes were created to provide standardised presentations of the legal aspects of Sharia¹ for modern nation states. This development started in the latter part of the Ottoman Empire with the creation of its civil code, the *Majallah al-Aḥkām al-‘Adliyya* in 1877. However, it did not

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¹ Generally, Sharia is translated as ‘Islamic Law’; however, its scope is much greater. Al-Sharīf al-Jurjāni (d. 1414 CE) in his dictionary of Islamic terms *al-Ta‘rīfāt* defines Sharia as “the command to adhere to submission of God or it is the path of religion.” It can be defined as Divine guidance for all aspects of human life including law. Al-Sharīf al-Jurjāni, *al-Ta‘rīfāt* [The Definitions] (Beirut: Dār al-Kutub ‘Ilmiyya, 1983), 126, <https://shamela.ws/book/7312/122#p1>.

address family law until 1917.² The family law was bold but not thorough, and was surrounded by politics due to its reformative nature to conform to European national codes and there was resistance from religious Muslims and non-Muslims leaders, whose authority was undermined.³ With the fall of the caliphate, its fragmentation into nation-states and the withdrawal of European colonial powers from Muslim lands, development of standardised family law codes based on Sharia continued.⁴ Each nation-state developed its own national code informed by Islam.

This article explores aspects of *faskh* (judicial annulment) due to *shiqāq* (marital discord) within various family legal codes, which provides a contemporary presentation along with the on-the-ground reality of *faskh* by Islamic courts. The starting point after this introduction is the *faskh* section of the *Compendium of Islamic Law*, which is a translation of the *Majmū'a Qawānīn al-Islāmi* ("Majmū'a") as prepared by the All-India Muslim Personal Law Board in 1972.⁵ The *Majmū'a* built on earlier works, such as *al-Hīla al-Nājiza* (*The Effective Stratagem for the Helpless Wife*) by Ashraf 'Ali Thānwi and *Kitābul al-Faskh* by 'Abdul Ṣamad Raḥmāni. Also, the detailed commentaries of the *faskh* section of the *Majmū'a*, such as *Asbābe Faskh Nikāḥ* written by Thamīruddīn Qāsmī (UK) and *Asbābe Faskh wa Tafrīq* by Muḥammad Salmān Mansūrpūri (India), were relied on. The *Majmū'a* is based on the Ḥanafī *madhhab* (Islamic school of jurisprudence) and its contributors over several generations have produced well-researched and thorough procedures.

Along with the *Majmū'a*, comparison between it and national civil codes and their commentaries will be made as they are influenced by one of the four *madhhabs*, e.g., the Jordanian Code is primarily based on the Ḥanafī *madhhab*, Kuwaiti and Moroccan ones are based on the Mālikī *madhhab*, the Malaysian code is based on the Shāfi'ī *madhhab* and the Qaṭar code is based on the Ḥanbali *madhhab*.

However, the Mālikī *madhhab* is the most accommodating for modern social circumstances. All the codes lean on the Mālikī *madhhab* for *qāḍīs* (Muslim judges) to remove harm from women in bad marriages via *faskh* after attempts to salvage the marriage through arbitration are made. The *qāḍīs* and the laws by which they judge must recognise harm, those suffering due to it, the degree of that suffering and act to remove it. This is exhibited in the details of the law codes.

² Muḥammad N. Qudāt, *Al-Wāfi: Sharḥ Qānūn Ahwāl al-Shakhsiyya al-Urduni al-Jadīd* [The Complete: Commentary on the New Jordanian Family Law] (Amman: University of Jordan, 2012), 16, noor-book.com/h0ugia.

³ Ilber Ortayli, "Ottoman Family Law and the State in the Nineteenth Century," in *Studies on Ottoman Transformation* (Piscataway, USA: Gorgias Press, 2010), <https://doi.org/10.31826/9781463231767-017>.

⁴ Sara Razai, "Law and Legal Systems in the Arab Middle East: Beyond Binary Terms of Traditionalism and Modernity," IEDJA, October 2019, <https://iedja.org/en/law-and-legal-systems-in-the-arab-middle-east-beyond-binary-terms-of-traditionalism-and-modernity/>.

⁵ All India Muslim Personal Law Board, *Compendium of Islamic Laws* (Delhi: Dawat Offset Printers, 2001), 30, <https://ia802902.us.archive.org/4/items/MusarhadSimpleFiqh/Compendium.Of.Islamic.Laws.pdf>.

PURPOSE OF THIS RESEARCH

In English speaking countries where an Islamic judiciary does not exist, researchers would be hard-pressed to find detailed documentation for issues such as *faskh* and all details according to the well-known *madhhabs*. For example, Ahmed and Krayem, in their recent compelling contribution *Understanding Sharia Processes*⁶ to the subject area, discuss procedures, women's experiences and outcomes around *faskh* in Muslim minority contexts. Despite the book being mainly about *faskh*, only one page explains its Islamic textual basis.

Sharia researchers tap into the rich *fiqh* (Islamic positive law) encyclopedias, their commentaries and *uṣūl al-fiqh* (Islamic legal theory) discussions to connect the judiciary to the established schools and provide textual and academic rigour to any laws. Furthermore, the classical four *madhhabs* do not collect all the reasons and procedures of *faskh* into one chapter⁷ and they are scattered in various *fiqh* topics. The legal codes and their commentaries excellently collate the valid reasons and the subsequent procedures in one place.

This research will try to understand the processes and conditions for a valid *faskh* due to *shiqāq* (discord), which leads to marital breakdown from a *fiqh* analysis perspective.

SCOPE OF THIS RESEARCH

Initially, all valid reasons and procedures for an acceptable *faskh* as performed by a *qāḍī* or in their absence by Sharia Councils (as is conducted in many Muslim minority countries where there are no *qāḍīs*) were considered. As the research continued and details of *faskh* grew beyond the scope of this small article, the focus shifted to *faskh* due to *shiqāq* (discord); issues such as impotence, absence, lack of financial support etc. will not be addressed. However, most of those reasons contribute *shiqāq* as well. By focusing on *faskh* due to *shiqāq* and its various procedural applications today, it is hoped the reader will be able to navigate the other reasons for *faskh* and their subsequent judicial procedures.

Furthermore, the rulings, their evidence and *uṣūl* (legal principles) at work will be explored.

This article also briefly explains the judicial aspect of the *tahkīm* or arbitration. Since the man has the option of *ṭalāq* (Islamic divorce), the focus here will be on *faskh* mainly due to the man's fault and that he refuses to issue a *ṭalāq* and the matter appears before a *qāḍī* or Sharia council.

There is significant literature on marital counselling and couples therapy that discusses salvaging a failing marriage. Islamically, the ideal is reconciliation. But this does not always pan out. Hence, conclusive closure is required, especially for women and that is what *faskh* offers. Reconciliation via the *tahkīm* process is mentioned later, but it is an extensive and

⁶ Farrah Ahmed and Ghena Krayem, *Understanding Sharia Processes: Women's Experiences of Family Disputes* (Oxford: Hart Publishing, 2022), 15-33.

⁷ Thamīruddīn Qāsmi, *Asbābe Faskh Nikāh* [Causes of Annulment of Marriage] (Manchester: Maktaba Thamīr, 2012), 11, https://www.academia.edu/39954687/ASBAB_E_FASKH_E_NIKAH.

drawn-out process and is beyond the scope of this article, which is concerned primarily with *faskh*, the validity of *qāḍīs* conducting *faskh* and the circumstances that allow them to do so.

ISLAMIC PRINCIPLES OF AN IDEAL MARITAL RELATIONSHIP

In attempting to understand a bad marriage filled with *shiqāq*, it is important to contrast it to the ideals of a good or normal marriage in Islam.

The Qur'ān 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 recognised.⁸

The translations here are from the *Saheeh International Translation*. The word *ma'rūf* in the above verse has been translated as “what is recognised.” In the context of marriage, it refers to what is recognised as kind treatment of a wife.⁹

The Qur'ān also says:

وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ

And live with them in kindness.¹⁰

In the translation of this verse, *ma'rūf* has been directly translated as *kindness*.

Regarding this second verse, the great Ḥanafī jurist al-Jaṣṣāṣ,¹¹ in his *Aḥkām al-Qur'ān*, commentates that this is a command to husbands to be good to their wives by giving their rights, such as paying *mahr* (dowry), expenditure and fairness in their turn (of spending the night, if she is a co-wife) and avoiding all harm by harsh speech, expressing disinclination from her, and showing inclination to another (wife), frowning, and scowling in her face without fault. Instead, al-Jaṣṣāṣ says this is similar in meaning to other verses in the Qur'ān, such as “If you happen to dislike them, you may hate something which Allāh turns into a great blessing”¹² and “then [after that], either keep [her] in an acceptable manner (*ma'rūf*) or release [her] with good treatment.”¹³ This last verse clearly indicates the norm of marriage is something positive and not something to be endured or suffered.

Al-Jaṣṣāṣ also relates *aḥādīth* (pl. of *ḥādīth* or prophetic narrations), such as “The most hated of permissible things to Allāh is divorce,” that are a censure of those that do not take the institution of marriage seriously and divorce easily, which is part of *not living with them*

⁸ Qur'ān 2:228.

⁹ Saheeh International, *The Qur'ān* (Jeddah: Saheeh International, 1997). <https://archive.org/details/QuranSaheehInternationalTranslationWithMainArabicText/page/n1/mode/1up>.

¹⁰ Qur'ān 4:19.

¹¹ Abū Bakr al-Jaṣṣāṣ, *Aḥkām al-Qur'ān* [Rulings of the Qur'ān] (Beirut: Dār Iḥyā al-Turāth al-Arabi, 1984). <https://shamela.ws/book/23579/201>.

¹² Qur'ān 4:19.

¹³ Qur'ān 2:229.

in what is recognised (as kind treatment). Furthermore, other *aḥādīth* order the Muslim man to be mindful of their conduct at home, such as “Treat women kindly, they are like captives in your hands.”

Maḥmūd Saraṭāwi’s commentary¹⁴ on the Jordanian Family Law mentions a verse about what the expected outcome of a good marriage is meant to look and feel like:

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 tranquillity in them; and He placed between you affection and mercy. Indeed, in that are signs for a people who give thought.¹⁵

Although aiming for such a marriage should be a goal for all Muslims, many marriages are far from this ideal. Discord may occur and might not be solved at home, then these may trigger an arbitration process. The basis of this process is the verse:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهَا وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا

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.¹⁶

This arbitration process, as in the verse above, is a form of mediation; if reconciliation is not possible, it may lead to the end of the marriage, which can be in the form of *faskh*.

FASKH

Marital relations in Islamic law can end in three ways: *ṭalāq*, *khula* ‘ and *faskh*.¹⁷ *Ṭalāq* is the main form and generally issued by the husband, while *khula* ‘ is a negotiated settlement with the consent of both parties (it cannot be unilaterally conducted by the wife) and *faskh* is a judicial annulment of the marriage by a *qāḍī* and is the focus of this article. Depending on the law code, *faskh* maybe referred to as *tafrīq* (separation) or even a judge-issued *ṭalāq*.

Faskh Definition in Sharia, its Ruling and Valid Reasons for it

The linguistic meaning of *faskh* is to *dislocate* something, e.g. a bone from its joint, or to disintegrate or break apart, e.g. a dead mouse disintegrating in water.¹⁸

Technically, for Sharia and *fiqh* purposes in the context of a *nikāḥ* (Islamic marriage) agreement, *faskh* according to the Ḥanafī jurist al-Kāsānī (d. 1191) is “the eliminating it from

¹⁴ Maḥmūd Saraṭāwi, *Sharḥ Qanūn Aḥwāl al-Shakhsiyya* [Commentary on Personal Law] (Jordan: Dār al-Fikr, 2010), 299-301, <https://feqhbook.com/book/2643/>.

¹⁵ Qur’ān 30:21.

¹⁶ Qur’ān 4:35.

¹⁷ AIMPLB, *Compendium of Islamic Laws*, 39-40.

¹⁸ Muḥammad ibn Manzūr al-Ifrīqī, *Lisān al-‘Arab* (Beirut: Dār Ṣādir, 1993), Letter Fa section, 45, <https://shamela.ws/book/1687>.

its original (state) as though it never was,”¹⁹ or it means “the dissolution of an agreement,” as mentioned by Ibn al-Subkī.²⁰ The two definitions have no bearing on the outcome, i.e. after *faskh* the *nikāh* agreement has been dissolved and no longer in effect. The *Majmū`a*²¹ puts it as “Separation means putting an end to marital relation. In the following cases a decision of the *qāḍī* is required for separation between the parties...”

In the Mālikī *madhhab*, two *ḥakams* or arbitrators appointed by the *qāḍī* can conduct *faskh* or reconcile between the couple, but in all law codes, even the ones based on the Mālikī *madhhab*, the *qāḍī* makes the final decision and is the ultimate authority in this process. The Ḥanafī *madhhab* does not allow the arbitrators to annul; they can only reconcile. This will be discussed later.

Qāsmi details 18 reasons for *faskh* which are listed below. He relies on Thānwi’s *al-Ḥīla al-Nājiza* and the subsequent derived family law code, i.e. the *Majmū`a*.

In the mid-20th century India context, other than the initial contribution of *al-Ḥīlatun al-Nājiza*, the contributions of `Imārat al-Sharī`a of Bihar, especially work undertaken by `Abdul al-Ṣamad Raḥmāni, are noteworthy and a precursor to the *Majmū`a*.

Eighteen Reasons for Faskh

According to Qāsmi,²² there are 18 reasons for valid *faskh*:

1. Discord between the couple
2. Husband incapable of fulfilling his obligations
3. Husband, despite ability, does not provide sufficient expenditure
4. Incapable of affording expenditure
5. Physical abuse
6. Disappearance and no confirmation of life or death
7. Whereabouts unknown but alive
8. They are in two different lands and he is unable to fulfil marital rights
9. Impotence
10. Husband becomes mentally handicapped
11. Severe physical illness, such as leprosy or coma
12. Marriage to a non-compatible spouse
13. Deficient *mahr* (dowry), which the bride later discovered is below her family standard and the family ignored that
14. Marriage by deception regarding his status
15. Right to annul on puberty

¹⁹ `Alā al-Dīn Kāsāni, *Badāi` al-Ṣanāi` Fi Tartīb al-Sharāi`* [Marvellous Artistry in the Arrangement of the Legal Regulations] (Beirut: Dār al-Kitāb al-`Ilmiyya, 1909), 336, <https://shamela.ws/book/8183>.

²⁰ Jalāl al-Dīn al-Ṣuyūṭi, *al-Ashbāh wa al-Nathā`ir Fi Qawā`id wa Furū` al-Shāfi`iyya* [Similarities and Counterparts of the Maxims and Rulings of the Shāfi`i Jurisprudence] (Beirut: Dār al-Kutub al-`Ilmiyya, 1983), 287, <https://shamela.ws/book/217179>.

²¹ AIMPLB, *Compendium of Islamic Laws*, 57.

²² Qāsmi, *Asbābe Faskh Nikāh*, 22-23.

16. Due *ḥurmat* of *muṣāhara* (annulment due to husband having lustful physical contact with wife's descendants or antecedents)
17. Invalidity of marriage causing separation (e.g. apostacy)
18. Non-Muslim ruler's annulment of the marriage

This is the most comprehensive list of reasons for *faskh*. Not even the *Majmū'a* nor any of the other national codes are as thorough. Mansūrpūri, in his *Asbābe Faskh wa Tafrīq*,²³ considered a supplemental commentary to the *Majmū'a* has enumerated 14 reasons only.

This article focuses on two main reasons, i.e. *cruelty* and *discord*. The reason is that the other national codes do not treat these as two separate reasons for *faskh* but as one where they see cruelty as excessive discord. The table below compares how *shiqāq* (discord) is classified according to all the codes.

Table 1: Comparison between different legal codes classification and categorisation of discord

<i>Majmū'a</i> – India	Jordan	Kuwait	Morocco	Qatar	Malaysia
1. Husband's physical cruelty to wife 2. Existence of a serious discord between the parties	التفريق للشقاق والنزاع Separation due to discord and enmity	التفريق للضرر Separation due to harm	التطليق بطلب أحد الزوجين بسبب الشقاق Seeking divorce by any of the couple due to discord (one of the reasons being 'harm')	التفريق للضرر والشقاق Separation due to harm and discord	Dissolution of marriage due to cruelty

The classifications of the *Majmū'a* are more precise. But all the labels are simply attempting to capture the range of discord, enmity and harm that result in the breakdown of a marriage. The first reason in the *Majmū'a* is not only restricted to physical cruelty but by its own definition includes “extreme disdain or torture.”²⁴ Also, some of the labels restrict the cruelty to the man while other codes include the wife as well.

SHIQĀQ

In *fiqh*, *shiqāq* refers to enmity or division between two parties.²⁵ In the context of this article, it is a husband and wife that are divided to the point of the marriage breaking down. So, in defining the scope of *shiqāq*, we will look at how 20th century laws define it based on classical *fiqh* manuals.

The *Majmū'a* stipulates two causes that are *shiqāq*-related and can be grounds for *faskh*. These are covered by Sections 81 and 82 of *The Compendium of Islamic Law*.

²³ Muḥammad Salmān Mansūrpūri, *Asbābe Faskh wa Tafrīq* [Causes of Annulment of Marriage and Separation] (Delhi: Imarat Shariyya, 2018), 5-8, https://archive.org/details/jan21_1/ASBAB_E_FASKH_O_TAFREEQ.

²⁴ AIMPLB, *Compendium of Islamic Laws*, 62.

²⁵ Ibn Manẓūr al-Ifriqi, *Lisān al-'Arab*, Letter Shīn section.

Section 81 relates to extreme abuse and is treated separately from simple discord, as in section 82. The procedure for establishing harm is straightforward and a *qāḍi* can immediately rule *faskh*. However, it is possible to rectify even an abusive marriage and, if the *qāḍi* sees possibility of reconciliation, the procedures of section 82 can be followed in extreme cases as well, but this is at the *qāḍi*'s discretion.

Table 2: Reason 1 from “Grave Cruelty to Wife” from *The Compendium of Islamic Law (India)*

Section 81

If the husband rebukes the wife or hurls such abuses on her as may cause her extreme disdain or torture, or inflicts grave physical cruelty on her, she will have a right to separation.

This is in accordance with the Holy Qur'ān (2:231), teachings of the Holy Prophet صلى الله عليه وسلم, and the Islamic injunction against inflicting injuries to anybody. The *qāḍi* will, after ascertaining the facts, give a suitable decision. He may admonish the husband, acquit him on furnishing a bond (for damages), or effect separation between the parties.

Table 3: Reason 2 from “Discord between Parties” from *The Compendium of Islamic Law (India)*

Section 82

If the parties develop severe abomination so that it seems impossible to lead the married life in keeping with the limits of God, in such a situation:

(a) *The qāḍi will first appoint arbitrators to effect a reconciliation.*

(b) *If despite arbitration no reconciliation or agreement on separation by mutual consent is arrived at, the qāḍi can on the woman's demand effect separation on the ground of mutual discord.*

If the parties develop differences and a serious discord, i.e., if for some reason they come to have such abomination for each other that it leaves no room for normal cohabitation, initially an attempt will be made to effect a reconciliation, and arbitrators will be appointed for it. The arbitrators shall try to remove the mutual abomination or to make the parties agree to separation. If they fail in this effort, separation will be effected through the *qāḍi*.

It is notable that God's injunction is for normal cohabitation for which mutual love is necessary. There will be no room for normal cohabitation if the parties begin to hate each other. If either party begins to hate the other, this too will be regarded as discord as the willingness of both is necessary for normal cohabitation and lack of love and willingness on one side too is enough to end normal cohabitation. So, if both hate each other, or if for whatever reason the wife has a severe abomination, the *qāḍi* should appoint arbitrators to attempt a reconciliation; and if despite these efforts no reconciliation is possible and the marriage becomes devoid of its objects, i.e., normal cohabitation becomes extremely difficult, the husband is liable to “release the wife with grace”. And if the husband avoids it, the *qāḍi* deputizing for the husband will affect separation.

Reasons for Shiqāq

Shiqāq in a marriage can reach a level that life together become unbearable. Qāsmi says that “out of the eighteen reasons, it is the most important. If there is no *shiqāq* a woman will tolerate life with an ill old man. If there is *shiqāq* then a perfect couple cannot tolerate each other, even for a few days. Even for the other seventeen reasons, the underlying reason is *shiqāq*.” That is why the *Majmū'a* in clause 82 (reproduced in table 3 above), as opposed to *al-Ḥīla Nājiza* (a precursor to the *Majmū'a*), has placed *shiqāq* as the first reason for *faskh*.²⁶

²⁶ Qāsmi, *Asbābe Faskh Nikāh*, 24.

'Abdul al-Ṣamad Raḥmāni. provides a list of reasons for *shiqāq* in *Asbābe Faskh Nikāh*,²⁷ also a predecessor to the *Majmū'a*:

1. Hitting with no reason
2. Misappropriating the wife's wealth
3. Forcing the wife to expose herself in public
4. Forcing the wife to commit *ḥarām* (Islamically forbidden)
5. Stopping fulfilling obligations
6. Other reasons that make life intolerable

The *Jordanian Family Law Code* does not provide specific reasons for *shiqāq* but general principles:

either spouse may request separation due to conflict and discord if one claims they have been harmed by the other party, making it impossible for the marital life to continue, whether the harm is physical, such as harm by action or word, or moral. Moral harm is considered any disgraceful or immoral act or behaviour that causes moral abuse to the other party, as well as the other party's insistence on breaching the marital duties and rights...²⁸

The *Malaysian Family Law*,²⁹ which is based on the *Shāfi'ī Madhhab* and like the *Majmū'a* does provide specific reasons for *faskh* due to *shiqāq*, says:

if a woman married in accordance with *Hukum Syarak* (Malay for Sharia ruling), shall be entitled to obtain an order for the dissolution of marriage or *faskh* on any one or more of the following grounds, namely:

- (h) that the husband treats her with cruelty, that is to say, inter alia—
- (i) habitually assaults her or makes her life miserable by cruelty of conduct; or
 - (ii) associates with women of evil repute or leads what, according to *Hukum Syarak*, is an infamous life; or
 - (iii) attempts to force her to lead an immoral life; or
 - (iv) disposes of her property or prevents her from exercising her legal rights over it; or
 - (v) obstruct her in the observance of her religious obligations or practice; or
 - (vi) if he has more wives than one, does not treat her equitably in accordance with the requirements of *Hukum Syarak*.”

²⁷ 'Abdul al-Ṣamad Raḥmāni, *Kitābul al-Faskh wa Tafrīq*, [The Book of Judicial Annulment and Separation] (Mongayr: Dār al-Ta'lif, 1967), 108-112, <https://www.rekhta.org/ebooks/kitab-ul-faskh-wal-tafreeq-abdus-samad-rahmani-ebooks>.

²⁸ Personal Status Law no. 15 (Jordan) (Amman: Dār al-Iftā, 2019), 16-17, https://sjd.gov.jo/DetailsPage/SJD_Ar/NewsDetailsAr.aspx?ID=400.

²⁹ *Islamic Family Law (Federal Territories) Act 1984* (Malaysia), January 1, 2006, 36, <https://learningpartnership.org/sites/default/files/resources/pdfs/Islamic-Family-Law-Malaysia-1984.PDF>.

Regarding the *Malaysian Family Law*, Hashim et al. also say that, since the Shāfi‘ī *madhhab* does not give recourse, the Mālikī position has been incorporated into the law of Malaysia like other nations.³⁰

In *Wajīz*,³¹ a commentary on the *Qatari Family Law Code*,³² which is based on the Ḥanbali *madhhab*, it too borrows from the Mālikī *madhhab* and defines *shiqāq* caused harm as:

the inability to live together and that harm exists whether it be intangible or tangible. If he swears at her and intends her humiliation or hits her with no cause; all people loath to be humiliated, belittled or to be harmed. This then results in dislike and hatred.

Due to this definition, the Qatari law allows annulment due to an act, speech or anything else that results in the inability of a person to tolerate the other person as this results in the purpose of the marriage being lost, i.e. love and affection.

However, the *Mudawwana* or *Compendium of Moroccan Family Law*,³³ based on the Mālikī *madhhab*, has the most accommodating position for modern circumstances of all the *madhhabs* when it comes to harm as a basis of *shiqāq*, which can be any form that prevents a couple from living together harmoniously. It explicitly mentions:

1. Ignoring her without a valid *shar‘ī* reason
2. Striking her without a valid *shar‘ī* reason
3. Swearing at her
4. Swearing at her father, e.g. daughter of dog, *kāfir*, accursed etc.
5. Stopping talking to her
6. Turning his face away

These examples are also found in classic Mālikī references, such as *al-Sharḥ al-Kabīr* by al-Dardīr and its gloss *Hāshiya al-Dasūqi*.³⁴

These harms, according to the *Mudawwana*,³⁵ even once may deserve *faskh* if they are established before a judge.

Although the Kuwaiti³⁶ law is also based on the Mālikī *madhhab*, it does not have the detail of the Moroccan *Mudawwana* and simply says “annulment can be sought due to harm of the other with words, action or the inability to continue family life together.”

³⁰ Noraini Hashim, Afridah Abas and Nora Abd Hak. “Dissolution of Marriage on the Grounds of Cruelty: A Comparative Overview of Fasakh and Irretrievable Breakdown of Marriage Principles,” *Journal of Malaysian and Comparative Law* 37, January (2019), 92, <https://fiqh.um.edu.my/index.php/JMCL/article/view/16306>.

³¹ Muḥammad A. ‘Abdul al-Sattār and Tāriq al-Rashīd, *Al-Wajīz fī Sharḥi Qanūn al-Usra al-Qatari* [A Concise Commentary on the Qatari Family Law] (Alexandria: Lamar Book Maker, 2018), 221, <https://libguides.qu.edu.qa/c.php?g=1021378&p=7398355>.

³² See Appendix A.

³³ See Appendix B.

³⁴ Muḥammad bin ‘Arfa al-Dasūqi, *Hāshiya al-Dasūqi ‘alā al-Sharḥ al-Kabīr* [The Dasūqi Gloss of the Major Commentary] (Beirut: Dār al-Fikr, 2006), vol. 2, 345, <https://shamela.ws/book/21604>.

³⁵ See Appendix B.

³⁶ See Appendix C.

In concluding the reasons for *shiqāq*, the wordings vary from country to country, but they all lean on the Mālikī *madhhab* as it offers a solution to a woman when she feels that she is being harmed, which are many and of varying degrees. The principle of harm will be discussed later.

Primary Source Evidence for Faskh due to Shiqāq

There are two views in the primary sources as to whether *shiqāq* can result in *faskh*.

View 1: Evidence for being Permissible

To ask a woman to live in a bad marriage is to contradict the verses where the man has been ordered to act otherwise: “And live with them in what is recognised (as kind treatment)”³⁷ or “but do not retain them ‘only’ to harm them.”³⁸ Separation in such situations is an obligation to remove the harm.

Here the Islamic legal theory concept, *istiṣhāb al-ḥāl* or *presumption of continuity*,³⁹ can be seen as a harmonious relationship and anything that undermines that goes against the original terms of the marriage contract; hence, it can be considered annulable.

Judges base conducting *faskh* on the verse: “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.”⁴⁰

Qāsmi says,⁴¹ according to Mālik, the above verse establishes *faskh* via the arbitrators’ decision and it is judicially effective. In his *Muwatta*, Mālik says this is the best that he has heard from the people of knowledge regarding the two *ḥakams* (arbitrators) that their word is effective regarding the keeping together or separating between a husband and wife. As per the verse, the arbitrators are not simple agents but authorised by the Qur’ān to decide the outcome of the marriage.⁴² Narrations from the Companions of the Prophet support this view:

- Ibn ‘Abbās said “I and Mu‘āwiya were sent as arbitrators, we were told that if you see it as befitting to keep them together then do so, if you see that they should be separated, then separate them. Ma‘mar said that the one who sent them was ‘Uthmān.”⁴³
- Another saying of a companion is from ‘Ali bin Abi Ṭālib, who also delegated two *ḥakams* in a similar situation to the above.⁴⁴

³⁷ Qur’ān 4:19.

³⁸ Qur’ān 4:231.

³⁹ *Istiṣhāb al-ḥāl* or presumption of continuity is a concept in the study of *uṣūl al-fiqh* or Islamic legal theory, where the status quo or previous condition continues unless evidence to the contrary is provided.

⁴⁰ Qur’ān 4:35.

⁴¹ Qāsmi, *Asbābe Faskh Nikāh*, 37-38.

⁴² Saratāwi, *Sharḥ Qanūn Aḥwāl al-Shakhsiyya*, 300.

⁴³ Ibn Jarīr al-Ṭabarī, *Jāmi ‘al-Bayān ‘an Ta’wīl Āy al-Qur’ān* [The Collection of Explanation About the Interpretation of the Qur’ānic Verses] (Cairo: Dār al-Hijrā, 2001), vol. 6, 726, <https://shamela.ws/book/7798/4563>.

In elaborating the role of *ḥakam*, Qāsmi presents the *ḥadīth* of Thābit bin Qays from *Ṣaḥīḥ Bukhārī*, where a separation via *khula* was conducted due to a negative relationship between the couple:

The wife of Thābit bin Qays came to the Prophet (peace be upon him) and said, “O Allāh’s Messenger! I do not blame Thābit for defects in his character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner (if I remain with him).” On that Allāh’s Messenger said (to her), “Will you give back the garden which your husband has given you (as mahr or dowry)?” She said, “Yes.” Then the Prophet said to Thābit, “O Thābit! Accept your garden and divorce her once.”

When one looks at this narration, a woman in the time of Prophet Muḥammad was not left in a harmful situation as perceived by her. As a *qāḍi*, he made the issue reach a positive conclusion where harm was removed and this is also the role of the *qāḍi* today in similar situations. Once he heard the reasoning, he did not force continuity in the marriage.

View 2: Evidence for being Impermissible

According to the second view, oppression from the husband is not sufficient to cause *faskh*, because he can be ordered to behave well. If the discord can be resolved without separation, then it should be done so. The arbitrators are to rectify not to separate. They can separate only if they are made *wakīls* (agents) by the couple and then they can only work under the limits of that agency.⁴⁵

Qāsmi’s summary⁴⁶ of the evidence from the early authorities who considered *faskh* inapplicable is further condensed as:

The evidence of this view comes from ‘Aṭā’ ibn Abū Rabāḥ (d. 733 CE) a jurist of the second generation of Islam, who when asked about the *ḥakams*, that “Should they be separated? He said “No, except if the couple have appointed them as such.” However, a *ḥakam* can make any decision after being made *wakīl*. Ḥasan Baṣri an early authority from the second generation and Abu Ḥanīfa from the later part of the second generation both said that the *ḥakams* can unite but not separate.

Ultimately, this is an interpretation of the verse of arbitration and in this view since separation is not mentioned in the verse, only *islāḥ* (rectification) can be performed.

This is also the Shāfi’ī view that only if the *ḥakams* (arbitrators) are made *wakīls* then they can separate. Shaykh Wahba Zuḥayli, in his contemporary *fiqh* encyclopedia, says they cannot do *faskh* unless they are made *wakīls* by the couple.⁴⁷

This view can also be said to follow the principle of Islamic legal theory, *istiṣḥāb al-ḥāl* or *presumption of continuity*, that since the contract of marriage is now in place, nothing can rescind that. All the evidence presented for the first view can be interpreted as those

⁴⁴ Ibid., 729.

⁴⁵ Saraṭāwi, *Sharḥ Qanūn Aḥwāl al-Shakhsiyya* 299.

⁴⁶ Qāsmi, *Asbābe Faskh Nikāḥ*, 26-27.

⁴⁷ Wahbah al-Zuḥayli, *al-Fiqh al-Islāmī wa Adillatuhu* [The Jurisprudence of Islam and its Evidence] (Damascus: Dār al-Fikr, 1984), 9:7061.

appointed as *hakams* were *wakīls* or any narration such as Thābit bin Qays's are not *faskh* but *khula'* (a negotiated settlement for separation that has a financial consideration) and not applicable.

Concluding Remark Regarding the Evidence

Saraṭāwī⁴⁸ summarises the views:

- According to the *Ḥanafīs*, *Shāfi'īs*, one view of the *Ḥanbalīs* and the *Zāhirīs* is that she does not have this right of annulment. If the matter is raised to a *qāḍi*, then he can prevent the husband and reprimand him. The *qāḍi* will send arbitrators as representatives on behalf of the couple who will attempt to resolve the conflict. Exhaustive efforts are made to save the marriage to avoid divorce and separation. If they do not produce any results, then the *qāḍi* can resort to *ṭalāq* or *khula'* which require the couple's approval.
- According to the *Mālikīs* and *Ḥanbalīs* (in another view) is that the wife can stay in the marriage or raise it to a *qāḍi* who can order him to behave well or to separate them. If she asks for separation and harm is established. The *qāḍi* will order the husband to give *ṭalāq* (an Islamic divorce). If he refuses, then the *qāḍi* will issue the *ṭalāq* (in other words a *faskh*).

Both views have legitimate supportive arguments. If a *qāḍi*, in his role and as a representative of a *fiqh* school, judges according to one of these views, then the judgment would be valid. All ensuing narrations, whether they are from Prophet Muḥammad or his Companions, support each view. However, each counterview can negate the evidence of the other with an interpretation that suits their own view.

The *Majmū'a* and the other national legal codes are approaching this from a judiciary's perspective and strengthening the hand of the *qāḍi* in removing harm from women by taking the view of the Mālikī *madhhab*, if harm exists. This is also the case with Sharia Councils throughout the world, including Australia, Canada and the UK, as expounded by Ahmed and Krayem.⁴⁹

Faskh is a conclusive legal decree like divorce procedures in modern family law courts; it is not counselling or mediation and a *qāḍi* is required to administer *faskh* if the conditions are fulfilled. Once judgment is pronounced, *faskh* is effective immediately.

If a *qāḍi* (or a Sharia council/board) was to use the Mālikī position, i.e. annul a marriage due to discord or enmity after a thorough arbitration process that might conclude in a reconciliation or in a voluntary *khula'* like the narration of Thābit bin Qays, this would be ideal and uphold the position of majority of scholars. But even if a voluntary *khula'* is refused and the *qāḍi* exercised his judicial authority to annul via a *faskh*, then this will also be valid and cannot be rescinded by another *qāḍi*, as there is a legitimate basis for such a judgment.

⁴⁸ Saraṭāwī, *Sharḥ Qanūn Aḥwāl al-Shakhsīyya* 299-301.

⁴⁹ Ahmed and Krayem, *Understanding Sharia Processes*, 15-33.

However, the arbitration process should be thoroughly exhausted to save the marriage and improve its condition, as has been explicitly mentioned in all the law codes.

Pre-Faskh Steps: Tahkīm (Arbitration)

After an initial hearing by a *qāḍi*, the immediate step before judicial annulment is *tahkīm* or arbitration, which will lead to a conclusive end, i.e. reconciliation or an end to the marriage. Saraṭāwi,⁵⁰ in his commentary on the Jordanian Family Law, says, if a husband goes beyond the limits in his conduct and it results in *shiqāq* (discord) or *nizā'* (enmity), separation may be sought by the wife.

Since all the national codes have adopted the validity of *faskh*, arbitration is necessary as per the Mālikī *madhhab*. Below is an explanation of arbitration procedures for the Indian code in detail and anything additional or different that is noteworthy from the other codes has also been mentioned.

Contemporary Indian Ḥanafī 'Ulamā's Arbitration Procedure

'Abdul al-Ṣamad Raḥmāni,⁵¹ an Indian Ḥanafī scholar, writes that the wife can, according to the Ḥanafī school, request a *qāḍi* to reprimand or punish her husband. However, if the *shiqāq* reaches the level of *ḍarar* (harm), she requests separation and a Ḥanafī *qāḍi* establishes with certainty via witnesses and/or evidence that her claim is true, then he may act on the Mālikī *madhhab*. Khālīd Saifullāh Raḥmāni,⁵² relying on Mālikī works, also says, if the *qāḍi* cannot establish the truth of any abuse nor decide based on the information, the couple is to live in an area with people that are upright and they can identify who is at fault.

The *qāḍi* will first admonish the husband by encouraging good behaviour, the harms of ill-conduct, effects on children etc. If she comes to the court again due to him not changing, then two arbitrators are appointed to reconcile between the couple. It is interesting to note that 'Abdul al-Ṣamad Raḥmāni gives instructions to a *qāḍi* to follow another *madhhab*, if his own does not give recourse. This does not change the *madhhab* but provides flexibility in his role as a *qāḍi*.

Qāsmi,⁵³ also a Ḥanafī scholar, explains that, to remove the *shiqāq* and bring the couple closer, the arbitrators will actively listen to the complaints and try to bring about understanding between the husband and wife. He explains that the arbitrators should be two upright experienced men who are tasked with this duty of reconciling. It is better if they are from the couple's families; one from each side as per the verse of arbitration.⁵⁴ If not, the

⁵⁰ Saraṭāwi, *Sharḥ Qanūn Aḥwāl al-Shakhsiyya*, 299-301.

⁵¹ Raḥmāni, *Kitāb al-Faskh wa al-Tafrīq*, 103-112.

⁵² Khālīd S. Raḥmāni, *Jadīd Fiqhī Masā'il* [Contemporary Juristic Rulings] (Karachi: Zam Zam, 2010), 3:104, <https://archive.org/details/JadeedFiqhiMasail-5Voumes-ByShaykhKhalidSaifullahRahmani/>.

⁵³ Qasmi, *Asbābe Faskh Nikāḥ*, 12-13.

⁵⁴ Qur'ān 4:35.

qāḍi can appoint two men not related (to the couple); it is better if they know the couple, such as neighbours who know the condition of the couple and can rectify their situation.⁵⁵

If the man is at fault, they will mutually separate them without any financial exchange. If it is her fault, there are two options:

1. The husband is entrusted to stay with her in a good way, or
2. They are separated for a monetary exchange i.e. *khula*. This may be less, more or the same as the *mahr* given to her.

If they equally mistreat each other, then the majority view in the Ḥanafī *madhhab* is that there is a monetary exchange while others view that there is not. The Jordanian law has similar details.

The *Majmū'a*, which is based on the Ḥanafī school, also says “The *qāḍi* will first appoint arbitrators to effect a reconciliation. If despite arbitration no reconciliation or agreement on separation by mutual consent is arrived at, the *qāḍi* can on the woman’s demand effect separation on the grounds of *shiqāq*.”⁵⁶

Jordanian Arbitration Procedure

Like the Indian procedures of *faskh*, the Jordanian code also follows the Mālikī position, according to Qudāt.⁵⁷ The priority is removing oppression and harm from her. The only notable difference to the Indian code is that a *qāḍi* only gives a one-month period to the husband to rectify his behaviour. There is also emphasis in the Jordanian law on determining the proportion of fault that is the cause of the discord. Another difference is if the arbitrators disagree, then the *qāḍi* appoints others or a third arbitrator to break the tie.

Qatari Arbitration Procedure

In *al-Wajīz*, the commentary on the Qatari Family Law Code,⁵⁸ it is stated, if harm is established by evidence of two men as per the Ḥanbali *madhhab*, the *qāḍi* will try to reconcile it himself. He will remind the man to fear Allāh in the matter of the wife and prevent him. If he continues with harm, they will be separated via *faskh*. Based on the Qur’ānic verse, arbitration will take place and a report is required from the arbitrators. If there is no progress, the *qāḍi* will annul the marriage after a fixed period.

Kuwaiti Arbitration Procedure

According to the Kuwaiti Family Law Code in articles 128-132,⁵⁹ *faskh* due to *shiqāq* is discussed under the section “separation due to harm.” If all means are exhausted for

⁵⁵ Raḥmāni, *Jadīd Fiqhi Masāil*, 3:104.

⁵⁶ *Majmū'a Qawanīn al-Islāmi*, Clause 82, 200.

⁵⁷ Qudāt, *Al-Wāfi*, 150.

⁵⁸ Al-Sattār and Al-Rashīd, *Al-Wajīz fi Sharḥi Qanūn al-Usra al-Qatari*, 220.

⁵⁹ See Appendix C.

reconciliation via arbitrators and the cruelty is all from the husband, then *faskh* would be conducted by a *qāḍī*, resulting in a divorce.

Ultimately, the *qāḍī* will pass judgment. However, in the Mālikī *madhhab*, the arbitrators are authorised to reconcile or annul the marriage without final sign off from the *qāḍī*. In all codes, due to modern court procedures, the arbitrators will bring the case back to the *qāḍī* to conclude.

Application of Islamic Legal Principles

Some of the Islamic legal principles that guide the jurists and *qāḍī* in their *fatwas* (legal rulings) or judgments regarding *faskh* due to *shiqāq* are mentioned below.

Let there be no Harm or Reciprocating Harm

The principle of “let there be no harm or reciprocating harm” is applicable in *faskh* of marriage due to *shiqāq* and repeatedly appears in commentaries of the law codes and *fiqh* texts. Furthermore, a *qāḍī* is responsible for trying to remove the harm under the sub-maxim, i.e. “harm is to be removed.”

Shaykh Wahbah Zuḥayli summarises in his *Fiqhul Islami*⁶⁰ that *shiqāq*, if harmful, needs to be severe according to the Ḥanafī, Shāfi‘ī and Ḥanbali *madhhabs* to consider separation. While the Mālikīs say that discord and harm of any level that lead to hostility and will render life a living hell would justify a separation. This is based on the maxim based on the *ḥadīth* “let there be no harm or reciprocating harm.”

It can be concluded that any form of cruelty that is a source of harm (physical or mental) can form the basis of *faskh*.

Qāḍī Mujāhid al-Islam, in his *Fatāwa Qāzi*,⁶¹ mentions further reasoning for choosing the Mālikī *madhhab* for conducting *faskh* by the *qāḍī*. The harm is not restricted to the wife only but also there is harm to the morals of a whole community. By a wife being stuck in an abusive or loveless marriage, this potentially opens the door to extramarital affairs and creates other social ills.

Fatwas (Legal Ruling) Change According to Time

A *qāḍī* may use discretion to ascertain the level of mental anguish the woman is suffering. People in general have become more individualistic and sensitive due to affluence and education. The *urf* or custom has changed. People’s tastes, likes, dislikes and tolerances have changed. What might have been tolerable once might no longer be the case. Furthermore, modern societies are generally deprived of the support of the extended family. This feeds into

⁶⁰ Al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, 9:7060.

⁶¹ Qāḍī Mujāhid al-Islām Qāsmī, *Fatāwa Qāzi* [Qāzi’s Legal Judgments] (New Delhi: IFA Publications, 2024), 149, <https://archive.org/details/FatawaQaziByShaykhQaziMujahidulIslamQasmir.a/page/n75/mode/1up>.

the *ḥājah* or necessity of separation because marital life was not intended to be misery or excessively difficult.⁶² This is defined as *‘illa* or effective reasoning, i.e. harm might not have been present previously but now can be present due to the enormous transformation in the human condition or *‘urf*. Its effects are real and psychological scars can last on a person like physical scars. But identifying the *‘illa* of harm in each case that is influenced by modernity or the modern man’s condition would require great judiciousness and caution in its identification and subsequent annulment.

Qāḍā (Judicial Ruling) on another Madhhab

Since all codes advocate reinterpretation and expansion of the definition of harm according to the Mālikī *madhhab*, which may be at odds at what is valid grounds for *faskh* in, e.g., the Ḥanafī *madhhab*, a Ḥanafī *qāḍi* would have to be cautious. However, the function of a *qāḍi* is different to a *mufti* as he is required to make *ijtihād* (independent reasoning) on the case before him and conclude the matter to a beneficial outcome. Mufti Taqī ‘Uthmāni has quoted al-Kāsāni that the *qāḍi* can follow another *madhhab* in an issue and his judgment cannot be rescinded, if it does not negate the Qur’ān, *sunna* and *ijmā’* (consensus) since there is a legitimate scholarly difference.⁶³ This is also the view of Abu Ḥanīfa and Abu Yūsuf.

Sadd Al-Dharāi’ (Obstructing the Means)

Sadd al-dharāi’ (obstructing the means) is a legal maxim where that which leads to the *ḥarām* (forbidden) is also *ḥarām* and must be obstructed. Since harming someone is *ḥarām*, in a marriage or otherwise, the *qāḍi* can annul the marriage that has become a means of harm. Also, as previously mentioned, that harm is not restricted to the wife, if those who are in loveless bad marriages are prone to extra-marital affairs, which is now a cause for harm spreading beyond the individual to the society; therefore, a *qāḍi* must also consider this as harm removal.

An Alternative Consideration

In the 1930s, Ashraf ‘Ali Thānwi, in his seminal work *Al-Ḥīla al-Nājiza lil Ḥalīlat al-‘Ajiza* or *The Effective Stratagem for the Helpless Wife*, suggests *ṭalāq tafwīd* where the husband delegates the *ṭalāq* to his wife at the time of enacting the marriage contract.⁶⁴ Thānwi’s solution was forward thinking and helped the women to avoid being stuck in bad marriages with no recourse, since there were no Muslim *qāḍīs* in British India who could conduct *faskh* effectively and immediately, if required. In Muslim countries, cases can be lodged via state appointed courts. However, in situations where Muslims are a minority, *faskh* via a Sharia Council, which has no state authority, can be an arduous and long undertaking

⁶² Muḥammad Taqī ‘Uthmāni, *Uṣūlul Ifṣā wa Adābuhu* [The Principles of Issuing Fatwa and its Etiquettes] (Karachi: Maktaba Ma‘ārif al-Qur’ān, 2011), 272.

⁶³ Ibid., 220-225.

⁶⁴ Ashraf ‘Ali Thānwi, *Al-Ḥīla al-Nājiza lil Ḥalīlat al-‘Ajiza* [The Effective Stratagem for the Helpless Wife] (Deoband: Maktaba Rida, 2005), 21-22.

for a woman. Ahmed and Krayem extensively explore this aspect in their book *Understanding Sharia Processes: Women's Experiences of Family Disputes*.⁶⁵ However, to avoid *faskh* outright, she can place a *ṭalāq tafwīd* clause to divorce herself via another person or organisation, e.g. the Board of Imam Victoria, a Sharia council in Melbourne, Australia, within their marriage contract have placed the following clause “The husband has agreed to relinquish his exclusive right to pronounce *ṭalāq* to the wife provided that she shall exercise this delegated authority...”⁶⁶ This empowers the wife to end a bad marriage without requiring *faskh*.

CONCLUSION

If a man wants to leave a marriage, he can simply give *ṭalāq*. The couple can also end the marriage through a negotiated settlement called a *khula*. This article looked at the third option, i.e. *faskh* (judicial annulment), which is normally performed by a *qāḍi* or Sharia Council. While there are many reasons why *faskh* can take place, this article looked at *shiqāq* or marital discord. Legal codes developed in many countries in the early 20th century allowed *faskh* due to *shiqāq* based on the Mālikī *madhhab*'s *taḥkīm* or arbitration process under a final judgment by a *qāḍi*. The reasons, definitions, laws, and procedures around *faskh* due to *shiqāq* such as arbitration were explored to better understand the on-the-ground realities and what *qāḍīs* must consider in concluding such cases.

Furthermore, the evidence was discussed. There is a legitimate view of *faskh* being allowed in one *madhhab*, but others do not agree and counter the evidence with alternative interpretations. If a *qāḍi* was to choose the most accommodating position, i.e. the Mālikī school, the *faskh* for *shiqāq* would be valid.

The principles of averting harm, changing *fatwas* due to time and place, and borrowing from another *madhhab* were looked at in the context of *faskh*. Principles related to harm and changes in *fatwa* due to *illa* or *urf* are part of the legal process and play a role in court judgments.

Finally, further exploration of this topic is required through actual court judgments and effectiveness of varied arbitration cases to see the application of the law.

⁶⁵ Ahmed and Krayem, *Understanding Sharia Processes*.

⁶⁶ *Ibid.*, 138.

APPENDICES

Appendix A: Shiqāq section from the Qatari Family Law Code

الفصل الثالث

التفريق للضرر والشقاق

المادة 129

للزوجة قبل الدخول أو بعده طلب التفريق للضرر الذي يتعذر معه دوام العشرة لمتلها. وعلى القاضي بذل الجهد لإصلاح ذات البين. وإذا تعذر الإصلاح وثبت الضرر حكم بالتفريق. ويثبت الضرر بالبينة، بما في ذلك شهادة التسامع.

المادة 130

إذا لم يثبت الضرر واستمر الشقاق بين الزوجين، وتعذر الإصلاح يعين القاضي حكيمين من أهليهما ممن يتوسم فيهما القدرة على الإصلاح، وإلا فمن غير أهليهما، ويحدد لهما مدة التحكيم.

المادة 131

على الحكيمين تقصي أسباب الشقاق وبذل الجهد للإصلاح بين الزوجين. ويقدم الحكمان إلى القاضي تقريراً عن مساعيها متضمناً مدى إساءة كل من الزوجين أو أحدهما للآخر مشفوعاً برأيهما.

المادة 132

للقاضي اعتماد تقرير الحكيمين إذا كان موافقاً لأحكام المادة السابقة، وإلا عين حكيمين غيرهما بقرار مسبب للقيام بمهمة التحكيم مجدداً، أو ضم إليهما حكماً ثالثاً.

المادة 133

للقاضي أن يحكم بالتفريق استناداً إلى تقرير الحكيمين إذا تعذر الصلح واستمر الشقاق بين الزوجين. فإن لم يقدم الحكمان تقريرهما وثبت استحكام الخلاف بين الزوجين، فيحكم بالتفريق بينهما.

المادة 134

إذا رأى القاضي التفريق بين الزوجين للشقاق وكانت الإساءة كلها أو أكثرها من الزوجة، فيفرق بينهما بمال يقدره القاضي بعد الاطلاع على تقرير الحكيمين، وإذا كانت الإساءة كلها أو أكثرها من الزوج، أو كانت منهما أو جهل الحال، فيفرق بينهما بلا مال.

المادة 135

إذا اتفق الزوجان على الفرقة بعوض واختلفا في مقدار العوض، فعلى القاضي أن يصلح بينهما، فإن عجز واستحکم الخلاف، حكم بالتفريق بينهما على عوض يقدره.

المادة 136

إذا طلبت الزوجة التفريق قبل الدخول، وبذلت مهرها وما تسلمته من أموال وتنازلت عن حقوقها المالية، فرفض الزوج طلاقها بدون مبرر مقبول، فعلى القاضي بذل الجهد للإصلاح بينهما، فإن تعذر واستحکم الخلاف، فيحكم بالتفريق بينهما على المال المبدول.

Appendix B: Shiqāq section from the Moroccan Family Law Code**الباب الثاني: الفسخ**

المادة 77

يحكم بفسخ عقد الزواج قبل البناء أو بعده في الحالات أو طبقاً للشروط المنصوص عليها في هذه المدونة.

المادة 82

عند حضور الطرفين، تجري المناقشات بغرفة المشورة، بما في ذلك الاستماع إلى الشهود ولمن ترى المحكمة فائدة في الاستماع إليه.

للمحكمة أن تقوم بكل الإجراءات، بما فيها انتداب حكمين أو مجلس العائلة، أو من تراه مؤهلاً لإصلاح ذات البين. وفي حالة جود أطفال تقوم المحكمة بمحاولتين للصلح تفصل بينهما مدة لا تقل عن ثلاثين يوماً.

إذا تم الإصلاح بين الزوجين حرر به محضر وتم الإشهاد به من طرف المحكمة.

المادة 83

إذا تعذر الإصلاح بين الزوجين، حددت المحكمة مبلغاً يودعه الزوج بكتابة الضبط بالمحكمة داخل أجل أقصاه ثلاثون يوماً لأداء مستحقات الزوجة والأطفال الملزم بالإنفاق عليهم المنصوص عليها في المادتين الموالتين.

المادة 84

تشمل مستحقات الزوجة: الصداق المؤخر إن وجد، ونفقة العدة، والمتعة التي يراعى في تقديرها فترة الزواج والوضعية المالية للزوج، وأسباب الطلاق، ومدى تعسف الزوج في توقيعه.

تسكن الزوجة خلال العدة في بيت الزوجية، أو للضرورة في مسكن ملائم لها وللوضعية المادية للزوج، وإذا تعذر ذلك حددت المحكمة تكاليف السكن في مبلغ يودع كذلك ضمن المستحقات بكتابة ضبط المحكمة.

المادة 85

تحدد مستحقات الأطفال الملزم بنفقتهم طبقاً للمادتين 168 و 190 بعده، مع مراعاة الوضعية المعيشية والتعليمية التي كانوا عليها قبل الطلاق.

القسم الرابع: التطلق**الباب الأول: التطلق بطلب أحد الزوجين بسبب الشقاق**

المادة 94

إذا طلب الزوجان أو أحدهما من المحكمة حل نزاع بينهما يخاف منه الشقاق، وجب عليها أن تقوم بكل المحاولات لإصلاح ذات البين طبقاً لأحكام المادة 82 أعلاه.

المادة 95

يقوم الحكمان أو من في حكمهما باستقصاء أسباب الخلاف بين الزوجين وببذل جهدهما لإنهاء النزاع. إذا توصل الحكمان إلى الإصلاح بين الزوجين، حررا مضمونه في تقرير من ثلاث نسخ يوقعها الحكمان والزوجان ويرفعانها إلى المحكمة التي تسلم لكل واحد من الزوجين نسخة منه، وتحفظ الثالثة بالملف ويتم الإشهاد على ذلك من طرف المحكمة.

المادة 96

إذا اختلف الحكمان في مضمون التقرير أو في تحديد المسؤولية، أو لم يقدماه خلال الأجل المحدد لهما، أمكن للمحكمة أن تجري بحثاً إضافياً بالوسيلة التي تراها ملائمة.

المادة 97

في حالة تعذر الإصلاح واستمرار الشقاق، تثبت المحكمة ذلك في محضر، وتحكم بالتطبيق وبالمستحقات طبقاً للمواد 83 و 84 و 85 أعلاه، مراعية مسؤولية كل من الزوجين عن سبب الفراق في تقدير ما يمكن أن تحكم به على المسؤول لفائدة الزوج الآخر.

يفصل في دعوى الشقاق في أجل لا يتجاوز ستة أشهر من تاريخ تقديم الطلب.

الباب الثاني: التطلق لأسباب أخرى

المادة 98

للزوجة طلب التطلق بناء على أحد الأسباب الآتية:

1- إخلال الزوج بشرط من شروط عقد الزواج؛

2- الضرر؛

3- عدم الإنفاق؛

4- الغيبة؛

5- العيب؛

6- الإيلاء والهجر.

الفرع الأول: إخلال الزوج بشرط من شروط عقد الزواج أو الضرر: لا

المادة 99

يعتبر كل إخلال بشرط في عقد الزواج ضرراً مبرراً لطلب التطلق.
يعتبر ضرراً مبرراً لطلب التطلق، كل تصرف من الزوج أو سلوك مشين أو مخل بالأخلاق الحميدة يلحق بالزوجة إساءة مادية أو معنوية تجعلها غير قادرة على الاستمرار في العلاقة الزوجية.

المادة 100

تثبت وقائع الضرر بكل وسائل الإثبات بما فيها شهادة الشهود، الذين تستمع إليهم المحكمة في غرفة المشورة.
إذا لم تثبت الزوجة الضرر، وأصررت على طلب التطلق، يمكنها اللجوء إلى مسطرة الشقاق.

المادة 101

في حالة الحكم بالتطبيق للضرر، للمحكمة أن تحدد في نفس الحكم مبلغ التعويض المستحق عن الضرر.
الفرع الثاني: عدم الإنفاق....

Appendix C: Shiqāq section from the Kuwaiti Family Law Code**4.1.2.3.3- التفريق للضرر****المادة رقم 126**

لكل من الزوجين قبل الدخول أو بعده، أن يطلب التفريق، بسبب إضرار الآخر به قولاً أو فعلاً، بما لا يستطاع معه دوام العشرة بين أمثالهما.

المادة رقم 127

على المحكمة أن تبذل وسعها للإصلاح بين الزوجين، فإذا تعذر، عينت حكيمين للتوفيق أو التفريق.

المادة رقم 127

على المحكمة أن تبذل وسعها للإصلاح بين الزوجين، فإذا تعذر الإصلاح وثبت الضرر، حكمت بالتفريق بينهما بطلقة بائنة، وإن لم يثبت الضرر عينت حكيمين للتوفيق أو التفريق.

المادة رقم 128

يشترط في الحكيمين: أن يكونا عدلين من أهل الزوجين إن أمكن، وإلا فمن غيرهم ممن يتوافر فيهم حسن التفهم، والقدرة على الإصلاح.

المادة رقم 129

على الحكيمين أن يتعرفا أسباب الشقاق، ويبدلا جهدهما في الإصلاح بين الزوجين بأي طريقة ممكنة.

المادة رقم 130

إذا عجز الحكمان عن الإصلاح:- أ- فإن تبين أن الإساءة كلها من الزوج، وكانت الزوجة طالبة للتفريق اقترح الحكمان التفريق، وإلزامه جميع الحقوق المترتبة على الزواج والطلاق. وإن كان الزوج طالبا للتفريق، اقترح الحكمان رفض دعواه. ب- وإن كانت الإساءة كلها من الزوجة، اقترحا التفريق بين الزوجين، نظير رد ما قبضته من المهر، وسقوط جميع حقوقها المالية المترتبة على الزواج والطلاق.

ج- وإن كانت الإساءة مشتركة اقترحا التفريق دون عوض أو بعوض يتناسب مع الإساءة. د- وإن لم يعرف المسيء من الزوجين، فإن كان طالب التفريق هو الزوج اقترحا رفض دعواه، وإن كانت الزوجة هي الطالبة، أو كان كل منهما يطلب التفريق، اقترح الحكمان التفريق دون عوض. هـ- التفريق للضرر يقع طلاقة بائنة.

المادة رقم 131

أ- على الحكيمين أن يرفعا إلى المحكمة تقريرهما مفصلاً، وللقاضي أن يحكم بمقتضاه، إذا كان موافقاً لأحكام المادة السابقة. ب- وإذا اختلف الحكمان، ضمت المحكمة إليهما حكماً ثالثاً مرجحاً من غير أهل الزوجين، قادراً على الإصلاح.

المادة رقم 132

أ- يرفع المحكمون الثلاثة تقريرهم بالاتفاق، أو بالأكثرية إلى المحكمة، لتفصل في الدعوى، وفق المادة (130). ب- وإذا تفرقت آراؤهم، أو لم يقدموا تقريراً، سارت المحكمة في الدعوى بالإجراءات العادية.

المادة رقم 133

يثبت الضرر بشهادة رجلين، أو رجل وامرأتين.

المادة رقم 134

يكفي في إثبات الضرر الشهادة بالتسامع المبني على الشهرة في نطاق حياة الزوجين، ولا تقبل هذه الشهادة على نفي الضرر.

المادة رقم 135

تقبل شهادة القريب، ومن له صلة بالمشهود له، متى كانوا أهلاً للشهادة.

Appendix D: Shiqāq section from the Jordanian Family Law Code**1. التفريق للشقاق والنزاع**

المادة (126): لأي من الزوجين أن يطلب التفريق للنزاع والشقاق إذا ادعى ضرراً لحق به من الطرف الآخر يتعذر معه استمرار الحياة الزوجية، سواء كان الضرر حسيماً كالإيذاء بالفعل أو بالقول أو معنوياً، ويعتبر ضرراً معنوياً أي تصرف أو سلوك مشين أو مذل بالأخلاق الحميدة يلحق بالطرف الآخر إساءة أدبية، وكذلك إصرار الطرف الآخر على الإخلال بالواجبات والحقوق الزوجية المشار إليها في الفصل الثالث من الباب الثالث من هذا القانون بحيث:

أ. إذا كان طلب التفريق من الزوجة، وتحقق القاضي من صحة ادعائها، بذلت المحكمة جهدها في الإصلاح بينهما، فإذا لم يمكن الإصلاح أُنذر القاضي الزوج بأن يصلح حاله معها وأجل الدعوى مدة لا تقل عن شهر، فإذا لم يتم الصلح بينهما وأصررت الزوجة على دعواها أحال الأمر إلى حكيمين.

ب. إذا كان المدعي هو الزوج وأثبت وجود النزاع والشقاق، بذلت المحكمة جهدها في الإصلاح بينهما، فإذا لم يمكن الإصلاح أجل القاضي الدعوى مدة لا تقل عن شهر أملاً بالمصالحة، وبعد انتهاء الأجل إذا لم يتم الصلح وأصر الزوج على دعواه، أحال القاضي الأمر إلى حكيمين.

ج. يشترط في الحكمين أن يكونا عدلين قادرين على الإصلاح، وأن يكون أحدهما من أهل الزوجة والآخر من أهل الزوج إن أمكن، وإن لم يتيسر ذلك حكم القاضي اثنين من ذوي الخبرة والعدالة والقدرة على الإصلاح.

د. يبحث الحكمان أسباب الخلاف والنزاع بين الزوجين معهما أو مع أي شخص يرى الحكمان فائدة في بحثها معه، وعليهما أن يدونا تحقيقاتهما بمحضر يوقع عليه، فإذا رأيا إمكان التوفيق والإصلاح على طريقة مرضية أقرها ودونا ذلك في محضر يقدم إلى المحكمة.

ه. إذا عجز الحكمان عن الإصلاح وظهر لهما أن الإساءة جميعها من الزوجة قررا التفريق بينهما على العوض الذي يريانه على أن لا يزيد على المهر وتوابعه، وإذا كانت الإساءة كلها من الزوج قررا التفريق بينهما بطلقة بائنة، على أن للزوجة أن تُطالبه بغير المقبوض من مهرها وتوابعه ونفقة عدتها.

و. إذا ظهر للحكمين أن الإساءة من الزوجين، قررا التفريق بينهما على قسم من المهر بنسبة إساءة كل منهما للآخر، وإن جهل الحال ولم يتمكن من تقدير نسبة الإساءة قررا التفريق بينهما على العوض الذي يريانه من أيهما بشرط أن لا يزيد على مقدار المهر وتوابعه.

ز. إذا حكم على الزوجة بأي عوض وكانت طالبة التفريق فعليها أن تؤمن دفعه قبل قرار الحكمين بالتفريق ما لم يرض الزوج بتأجيله، وفي حال موافقة الزوج على التأجيل يقرر الحكمان التفريق على البديل وبحكم القاضي بذلك، أما إن كان الزوج هو طالب التفريق وقرر الحكمان أن تدفع الزوجة عوضاً فيحكم القاضي بالتفريق والعوض وفق قرار الحكمين.

ح. إذا اختلف الحكمان حكم القاضي غيرهما أو ضم إليهما ثالثاً مرجحاً، وفي الحالة الأخيرة يؤخذ بقرار الأكثرية. ط. على الحكمين رفع التقرير إلى القاضي بالنتيجة التي توصلوا إليها، وعلى القاضي أن يحكم بمقتضاه إذا كان موافقاً لأحكام هذه المادة.

المادة (127): أ. مع مراعاة الفقرة (أ) من المادة (126) من هذا القانون يثبت النزاع والشقاق والضرر بشهادة رجلين أو رجل وامرأتين، ويكفي فيه الشهادة بالتسامع المبني على الشهرة في نطاق حياة الزوجين. ب. الحكم الصادر بالتفريق للنزاع والشقاق يتضمن الطلاق البائن.

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