

Nushuz and Sheqaq in the Islamic jurisprudence and the Algerian family law

النشوز والشقاق في الفقه الإسلامي وقانون الأسرة الجزائري

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Abstract:

Nushuz and Shiqaq are significant factors contributing to marital instability, and understanding their treatment within legal and religious spheres is crucial for promoting marital harmony. This study aims to examine the concepts of Nushuz (disobedience) and Sheqaq (marital discord) within the framework of Islamic jurisprudence and their implementation in Algerian family law. By analyzing relevant Islamic principles and provisions in Algerian family law, specifically Article 53-08 and Article 55, this research investigates the effectiveness of legal and religious frameworks in addressing Nushuz and preventing its escalation into Sheqaq. The study employs analytic method to explore the practical application of these frameworks and their impact on resolving marital conflicts. The findings shed light on the role of early intervention for Nushuz, facilitated by Article 55, in preventing Sheqaq. However, challenges arise in the effectiveness of reconciliation efforts under Article 53-08 due to a lack of comprehensive support mechanisms.

Keywords : Sheqaq, Nushuz, divorce, harm, separation.

الملخص:

يعتبر النشوز والشقاق من أبرز ما يعكر صفو الحياة الزوجية، وقد بينت الشريعة الإسلامية وكذا قانون الأسرة الجزائري صور كل منهما، فإذا وقع الخروج عن الطاعة والارتفاع في التعامل من أحد الزوجين اتجه الآخر اعتبر ذلك نشوزاً، أما إذا كان التعالي والعصيان من كليهما اعتبر ذلك شقاقاً. وقد أكدت الشريعة الإسلامية على علاج النشوز، وجعلت له وسائل للحد منه قبل أن يستفحل ليصبح شقاقاً. أما قانون الأسرة الجزائري فقد أقر لكل من الزوجين الحق في طلب الطلاق والتعويض في حالة نشوز أحدهما، تبعا لنص المادة 55. أما إذا اشتد الخصام (الشقاق) و لم يثبت الضرر، بعث القاضي الحكيم للتوفيق بينهما بموجب المادة 56، كما أقر للزوجة المتضررة من الشقاق الحق في طلب التطبيق للشقاق المستمر حسب المادة 53/08، بالموازاة مع حقها المقرر في طلب الطلاق للنشوز حسب المادة 55.

الكلمات المفتاحية: الشقاق؛ النشوز؛ التطبيق؛ الضرر، التفريق.

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Introduction:

Society has long been a subject of research and studies, guided by divine laws that seek to organize and regulate it, ensuring its stability and longevity. At the heart of a righteous society lies the family, which plays a crucial role in its strength and stability. The goal is to nurture well-rounded individuals capable of fulfilling the responsibilities of marriage and achieving its objectives. This understanding stems from the belief that the family and the individual are the fundamental building blocks of society.

Justice, with its wise guidance and sound laws, forms the foundation for establishing a righteous society throughout history. The law ensures individuals' freedom, protects them from oppression or infringement upon their rights, regardless of their gender, and shields them from harm and injustice. In turn, society has responsibilities towards the family, providing support and enabling them to fulfill their duties and obligations. Neglecting or exceeding these responsibilities holds the family accountable before the Almighty Legislator, as the famous saying goes, "You are a shepherd responsible for your family."

Marriage, a topic of utmost importance in the field of social studies, requires a comprehensive examination of existing family issues. The aim is to identify appropriate solutions, whether psychological, moral, or social, in order to prevent factors that may lead to family breakdown and societal crises. The increasing prevalence of divorce and various social phenomena witnessed today serve as reminders of the consequences of neglect and the absence of timely and effective solutions to family problems. These issues have become sources of concern for science, society, and religion.

It is crucial to address these challenges and seek proactive measures to strengthen families and promote harmonious relationships. By doing so, we can contribute to the well-being of individuals, the stability of families, and the overall prosperity of society. In this context, Quran says that God created man and woman for each other to share love and compassion¹. However, some obstacles may face the marital life and affect the marital relationship, such as the Sheqaq and Nushuz.

The two parts may fight and reach a Nushuz, and, then, the Nushuz may increase to become a Sheqaq, leading to the impossibility of the marital life. Thus, the Algerian family law² tackled this question in Articles 53/08, 55, and 56. Nevertheless, it did not show the difference between the Nushuz and Sheqaq, and when to refer to these articles. In the light of the vagueness and the number of the problematics that surround the Nushuz and Sheqaq in the Algerian family law, we decided to shed light on the concepts and aspects of both in the Islamic sharia and the Algerian family law. In so doing, we raise the following question, "what is meant by Nushuz and Sheqaq in the Islamic jurisprudence and the Algerian family law? And what is the difference between them?"

From this question, sub-questions arise, as follows:

- Did the Islamic sharia and the Algerian family law clearly tackle Nushuz and Sheqaq?
- Does the Algerian law make a clear difference between Nushuz and Sheqaq cases? E.g., is Nushuz a primary phase of Sheqaq? Or, does each have a definition and procedures?

¹ Surratt al-Rum, verse 21.

² Law 84-11 of 09 July 1984 on the family law, supplemented and complemented by order 05-02 of 27 February 2005, official gazette 15 of 27 February 2005.

- When can the spouses resort to the justice in case of Nushuz and Sheqaq?
- How does the Algerian family judge determine whether the case is Nushuz or Sheqaq?

When is it necessary to send arbitrators to reconcile the couple?

To answer these questions, we used the analytical descriptive method because the nature of the study requires description and analyses of the legal rules, the jurists views, and the take of the Algerian legislator in the issues of Nushuz and Sheqaq. Hence, we divided the study into a chapter for the concepts of Nushuz and Sheqaq and another for their aspects.

Conflict and discord within marital life, known as "nushuz" and "shiqaaq," are considered among the prominent issues that can disrupt marital harmony and threaten its stability. Nushuz refers to one spouse disobeying or showing disrespect to the other, while shiqaaq signifies arrogance and disobedience from both spouses. Islamic Sharia and civil laws, such as the Algerian Family Law, have attached great importance to addressing this phenomenon due to its serious effects on the family and society.

Research Objectives:

The significance of studying the subject of nushuz and shiqaaq within marital life lies in the fact that it represents a significant threat to the stability and cohesion of the family. Nushuz and shiqaaq can lead to the disintegration of the family structure and the collapse of the familial foundation, adversely impacting children and society as a whole. Therefore, addressing this problem and mitigating its effects is crucial for protecting the family unit and preserving its stability. This research aims to achieve the following:

- Shed light on the concepts of nushuz and shiqaaq in Islamic jurisprudence and Algerian Family Law.
- Study the causes of nushuz and shiqaaq and their effects on marital life.
- Review the methods of addressing nushuz and shiqaaq in Islamic jurisprudence and Algerian Family Law.
- Conduct a comparison between Islamic jurisprudence and Algerian Family Law in dealing with nushuz and shiqaaq issues.
- Provide recommendations and proposals for addressing nushuz and shiqaaq in light of Islamic jurisprudence and Algerian law.

Research Methodology:

The research will adopt a descriptive-analytical approach to study the concepts of nushuz and shiqaaq, their causes, and effects in both Islamic jurisprudence and Algerian Family Law. The comparative method will be used to compare the treatment of these issues from a religious and legal perspective. Authentic sources in Islamic jurisprudence and Algerian law will be consulted, along with relevant studies and research.

Chapter one: the concepts of Nushuz and Sheqaq:

Nushuz and Sheqaq have different meanings, which we shall focus on in this chapter. We shall tackle the Nushuz first and, then, move to the Sheqaq.

Section one: definition of Nushuz:

It is the act of insubordination and the wife's action against obeying her husband, or vice versa. For example, the wife may not respond to the husband when he calls her, unless bluntly, and the husband may show rejection of the wife and uninterest. Thus, it is the refusal of obedience. However, if it is mutual from both sides, it becomes a Sheqaq because both

show the same behavior. From this simple definition, we find that Nushuz may be from the husband or the wife, and Sheqaq is from both sides at the same time.¹

- Nushuz terminologically refers to the act of a husband expelling his wife from the marital home without a valid reason, leading to the termination of the marriage.
- This term specifically denotes the husband's action of forcing his wife out of their shared residence without a legitimate cause, as outlined in Islamic jurisprudence.
- Nushuz is a concept rooted in Islamic law and is considered a form of marital discord or breakdown, where the husband unjustly evicts his wife from their home, disrupting the marital relationship.
- The termination of the marriage due to nushuz is a significant issue addressed in Islamic legal texts and discussions, highlighting the importance of maintaining mutual respect and rights within the marital union.
- In Islamic jurisprudence, nushuz is viewed as a breach of the husband's responsibilities towards his wife and is subject to legal and ethical considerations within the framework of Islamic family law.

Defining these terms accurately is essential for understanding the concept of "nushuz" in the context of Islam and its application to marital problems. It allows for a clear distinction between the different types of disobedience and neglect that can occur within a marriage, and it provides a framework for addressing these issues in a way that is consistent with Islamic principles.

Section two: definition of Sheqaq:

In the Arabic language, Sheqaq is the disaccord between two parts. It is derived from the root "shik", which literally means side; i.e., each part is on his side². Besides, it refers to the acute anger³, and to other various meanings that revolve around disaccord and hostility. Practically speaking, it refers to the severe disagreement and discord that occur between the spouses⁴. Its examples include the hatred, petulance, humiliation, and the mistreatment⁵. The interpretation of the concept implies two aspects⁶; that each side made what the other hates, or that each one is on a side far from the other emotionally and mentally⁷. In addition, Sheqaq is derived from the Arabic root "yashuqu", which literally means making what is difficult, i.e., making what is difficult to accept by the other side⁸.

- Nashouz, terminologically, refers to the disobedience of a wife towards her husband, which is a dangerous phenomenon addressed by Islamic Sharia jurists.
- It is a concept that is treated by referring to the Holy Qur'an and the noble Prophetic hadiths, where Islamic Sharia provides guidance on how to handle it .

¹ Abi Abdullah Ben Abi Baker al Qurtubi, al Jamii li Ahkam al Quran, al-Rissala Institution, Beirut, Lebanon, Vol. 01, 2006, Vol. 06, pp. 282-283.

² Mohamed Majd al-Dine Abi al –Saadat Ibn al Athir, Fi Gharib al Hadith wa al Athar, KSA, Ibn al Jawzi house for publication and distribution, 1421 h, Vol. 01, p. 916.

³ Ibid, p. 487.

⁴ Mohamed Metwali al-Shaarawi, Tafsir al Shaarawi, Akhbar al Yawm (administration of the books and libraries), Cairo-Egypt, n.d., Vol. 01, p. 2203.

⁵ Wahba al Zehili, al Fikeh al Islami wa Adillatuh, thought house, Damascus, Syria, Vol. 02, 1985, Vol. 07, p. 527.

⁶ Abi al Hassan Ali al Mawardi, al Hawi al Kabir, Beirut, Lebanon, thought house, 1994, Vol. 12, p. 245.

⁷ Al Qurtubi, op. cit., p. 419.

⁸ Abu Jaafar Mohamed Ben Jarir, Tafsir al-Tabari min Kitabihi Jamia al Bayan an Taawili al Quran, edited by Bechar Aouad Maaruf & Issam Fares al Harstani, Beirut, Lebanon, al-Rissala institution, 1994, Vol. 02, p. 454.

- Nushuz involves actions such as marital disobedience, beating, desertion, and disciplining the wife, and it is discussed in the context of Sharia and law, focusing on its ruling, legitimacy, causes, and manifestations.
- This disobedience is a significant issue within marital relationships, and Islamic teachings provide frameworks for addressing and resolving such conflicts to maintain harmony within the family unit .

Section three: causes of nushuz and shiqaaq:

Both Nushuz and Shiqaaq can significantly strain a marriage and lead to marital discord. Here's a breakdown of the possible causes for each:

- Poor character and a lack of displaying good morals by one or both spouses, such as insults, verbal or physical abuse, which is considered nushuz according to Article 74 of the Algerian Family Law.
- Excessive jealousy or constant doubt regarding the partner's trustworthiness, which can lead to marital tension and a lack of trust, endangering the marital life.
- Excessive interference from the families of either spouse in their private affairs. Article 36 of the Family Law emphasizes the need to respect the independence of the marital home and prohibits interference from the families without the consent of the spouses.
- Financial disagreements and economic problems, such as the husband's failure to spend on the wife or the marital home, or the wife spending her own money without the husband's permission (Article 78), which can lead to conflicts and nushuz.
- Non-fulfillment of marital rights by either party, such as the husband's refusal to provide financial support (Article 78) or the wife's disobedience to the husband (Article 74), which is considered nushuz.
- Neglecting or failing to fulfill marital duties, such as the wife neglecting her household and children or the husband neglecting his duty to maintain a good relationship and marital companionship (Article 39).

It's important to note that each marriage is unique, and the causes of nushuz and shiqaaq can vary from one couple to another. It is crucial to work on communication, mutual understanding, and seeking peaceful resolutions to address marital conflicts and preserve harmony within the marriage.

Chapter 02: the aspects of Nushuz and Sheqaq in the Islamic jurisprudence and the Algerian family law:

Based on the above definitions, we find that Nushuz and Sheqaq take three aspects, the Nushuz of the wife, of the husband, and of both (Sheqaq).

Section one: the Nushuz of the wife:

We shall first tackle this issue from the perspective of the Islamic jurisprudence, and, then, of the Algerian family law. The Nushuz of the wife, in Islamic terminology, refers to a wife's disobedience towards her husband in fulfilling her marital obligations. This disobedience can manifest in various ways, some of the most common being:

First: the Nushuz of the wife from the perspective of the Islamic jurisprudence:

God says in Quran: "Righteous wives are devout and guard what God would have them guard in their husbands' absence. If you fear high-handedness from your wives, remind

them (of the teachings of God), then ignore them when you go to bed, then hit them. If they obey you, you have no right to act against them: God is most high and great"¹ This verse shows the wife's Nushuz and how to deal with it.

In Islamic jurisprudence, the concept of "Nushuz" refers to a state of marital discord or disobedience on the part of the wife. It is important to approach this topic with a balanced understanding, taking into account the broader principles of Islam that emphasize justice, compassion, and respect within marital relationships.

The Quran addresses the issue of Nushuz in a specific context and provides guidance on how to address it. In Surah An-Nisa (4:34), Allah says, "Men are the protectors and maintainers of women because Allah has given the one more strength than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient and guard in the husband's absence what Allah would have them guard. As to those women on whose part you fear disloyalty and ill-conduct, admonish them, refuse to share their beds, and beat them lightly. But if they return to obedience, seek not against them means of annoyance. Indeed, Allah is ever Exalted and Grand."

It is crucial to understand the context of this verse and the principles of interpretation within Islamic jurisprudence. Scholars emphasize that the verse does not promote or encourage violence against women. Rather, it offers a series of progressive steps to address marital discord, with the ultimate goal of reconciliation and maintaining a harmonious relationship.

The first step mentioned is advising or admonishing the wife. This is an opportunity for the husband to engage in open and respectful communication, reminding both partners of their responsibilities and encouraging them to rectify any issues in their relationship.

If the advising does not yield positive results, the verse suggests the husband should distance himself from his wife in bed. This is a symbolic action aimed at expressing his displeasure and seeking her attention. It is not intended as a means of psychological punishment but rather as a wake-up call for the wife to reflect on her behavior and take steps towards reconciliation.

Physical chastisement, which is the final step mentioned, is highly controversial and subject to differing interpretations among scholars. It is important to note that many scholars argue that this step should be understood in its mildest form, as a symbolic gesture rather than a literal act of physical harm. They emphasize that it should not cause any physical or emotional harm to the wife.

Furthermore, it is crucial to consider the overall teachings of Islam, which promote kindness, compassion, and respect within marital relationships. The Prophet Muhammad (peace be upon him) is reported to have said, "The best of you are those who are best to their wives."

In summary, addressing the issue of Nushuz in Islamic jurisprudence involves a gradual approach seeking reconciliation and harmony in the marital relationship. It is essential to understand the broader principles of Islam, including compassion, respect, and the emphasis on maintaining healthy and loving relationships between spouses.

¹ Surratt al-Nissa, verse 34.

Thus, God ordered to resort to the good preach, which includes a smooth discourse that touches the hearts and spirits¹. If it does not work, the man leaves the wife in the bed to psychologically punish her and touch her femininity². This aims at pushing the wife to stop Nushuz. In case this does not work, the man beats her slightly. The following lines detail the steps of remedying Nushuz.

1. The preach:

It is the first method to deal with the disobedient wife. The preach must include good discourse, as God states in Quran that “Invite to the way of your Lord with wisdom and fair preaching, and argue with them with that which is best”³. This makes the wife feel that the husband is attached to her, wants the good, and fears God’s anger against her due to her disobedience to him. In Islamic jurisprudence, the first method to address a disobedient wife is through good preaching and wise discourse. The Quran advises believers to invite others to the path of their Lord with wisdom and fair preaching. This approach emphasizes the importance of using kind and persuasive words to convey the husband's concerns and to remind the wife of her duties and responsibilities. The purpose of this preaching is not to belittle or demean the wife but rather to express genuine care and concern. By using gentle and respectful language, the husband can demonstrate his attachment to his wife and his desire for her well-being. This approach fosters an atmosphere of understanding and encourages the wife to reflect on her behavior, recognizing that her actions may be displeasing to God.⁴

In addition, the husband must consider the psychological state of the wife and use the method that affects her and deters the Nushuz. In this context, preach had better be when the husband feels the time is suitable and that the wife may listen to him. Preach is a sign of attachment. It is important for the husband to choose an appropriate time and place for the preaching, considering the psychological state of the wife. By selecting a moment when she is more likely to be receptive, the husband increases the chances of effective communication and understanding. This approach recognizes the individuality of the wife and acknowledges that different methods may be more impactful for different individuals.

The goal of the preaching is to deter the wife from engaging in disobedience (Nushuz) and to promote reconciliation within the marital relationship. It is crucial to approach this step with empathy, understanding, and the intention of guiding the wife back to a path of righteousness. The husband should strive to create an environment where the wife feels valued, respected, and motivated to rectify any issues that may have caused the disobedience. It is worth noting that the use of good preaching as the first method does not negate the importance of subsequent steps, such as distancing oneself in bed or, in rare cases, a symbolic

¹ Mohamed Rachid al Qabbani, who has the right for divorce, PhD thesis, Cairo- Egypt, University of Al Azhar, Faculty of Sharia and Laws, 1975, p. 84-86.

² Ibid.

³ Surratt al-Nahl, verse 125.

⁴ Abi Bakr Mohamed ben Abdullah, Ahkam al Quran li Ibn al Arabi, Beirut, Lebanon, scientific books house, n.d., Vol. 01, p. 533.

See also: Imad Ammouri Jalil al-Zahedi, al Wassail al Qurania fi Iladji al-Nushuz wa Aqwal al Fuqaha Fiha, journal of the Faculty of the Islamic Sciences, Vol. 08, No° 15/02, 2014, pp. 11-12.

and mild physical chastisement. However, it is essential to prioritize the steps in a progressive and compassionate manner, aiming for reconciliation rather than inflicting harm.¹

2. Leaving the wife in bed:

In addition to the method of good preaching, there are various interpretations regarding how a husband may distance himself from his disobedient wife when addressing Nushuz. These interpretations provide additional guidance on practical actions that can be taken within the context of the relationship. It is important to note that these interpretations may vary among scholars, and individual circumstances should be taken into consideration. Here are four interpretations:²

1. Turning his back to her in bed: According to the interpretation of Ibn Abbas, the husband may physically demonstrate his displeasure by turning away from his wife in bed. This action symbolizes his emotional withdrawal and serves as a reminder to the wife that her behavior is causing a strain in the relationship.

2. Avoiding communication and physical contact: The interpretation of Ikrima and Abu Duha suggests that the husband refrains from speaking to or physically touching his wife. By creating a temporary distance, the husband communicates his dissatisfaction and encourages the wife to reflect on her actions.

3. Sleeping separately: According to the interpretation of Ibrahim, al-Shaabi, Qatada, al Hassan al Basri, and Ibn Wahab quoting Ibn Qacem quoting Malik, the husband may choose to sleep in a separate bed or separate quarters until the wife ceases her disobedience. This physical separation serves as a means of expressing disapproval and highlighting the seriousness of the wife's behavior.

4. Engaging in communication and intimacy with hostility: As per the interpretation of Abu Sufyane, the husband may continue to speak to and have sexual relations with his wife but with a sense of hostility in his tone and manner. This approach aims to convey the husband's dissatisfaction and serves as a reminder to the wife to rectify her behavior.

It is important to note that these interpretations should be understood within the broader principles of Islam, emphasizing kindness, justice, and reconciliation. They should not be seen as a license for abuse or mistreatment. The ultimate goal remains the restoration of harmony and the reestablishment of a healthy marital relationship. Each interpretation represents a different approach that may be suitable depending on the specific circumstances and the dynamics between the husband and wife.

3. The slight beating:

It does not break her, shed blood, or affect her body parts such as the face. Despite beating is allowed, it is better to avoid it, because the story tells that men asked the permission from the Prophet Mohamed peace be upon him to beat their wives, then, almost 70 women complained to him in one night about their husband's behaviors³. Therefore, beating is allowed, but with limits⁴. In this regard, Imam al Qurtubi says "know that God did not explicitly order to beat women unless in Nushuz and the big mistakes. Thus, he put the wife

¹ Metwalli al-Shaarawi, op. cit., p. 2200.

² Ibn al Arabi, op. cit., p. 533.

³ Abi Bakr Ahmed ben al Hussein al Bayhaqi, al-Sunan al Kubrah, Beirut- Lebanon, scientific books house, 2003, Vol. 03, p. 496.

⁴ Ibid, p. 420.

Nushuz with the big mistakes and trusted men with women”¹. Hence, when beating women, the husbands must consider the Prophet’s advice, “ I advise you to treat women kindly, for the woman was created from a rib and the most crooked part of the rib is its uppermost part. If you try to straighten it, you will break it; and if you leave it, I will remain crooked. So treat women kindly”²

The Islamic jurists agree on beating the women slightly, and that avoiding it is better, as the prophet Mohamed says, “Do not beat your women as slaves and, then, sleep with them”³. Moreover, Aisha said “The prophet peace be upon him never beat a woman or anything”⁴. Therefore, the jurists set conditions for beating the wife, as follows:

1. The beating must be slight.
2. It must not be with a whip or a wooden stick because the aim is stopping Nushuz, not torturing.
3. It must not be in the sensitive parts such as the face, the tummy, the head, etc.
4. It must not exceed 10 beats because the Prophet peace be upon him said, “Do not beat people more than 10 beats, unless they violate the limits of God”⁵.

The Islamic jurists disagreed about the order of these methods (preach, leaving in bed, and beating) and gave two interpretations:

- The first group sees that the methods must be in order (preach, leaving in bed, and, then, the slight beating). This is according to the Hannafids, the Malikis, and the Hanbalis⁶. They inspired the order from the order of Quran in verse 34 of Surratt al-Nissa.
- The second group includes the Shafiis⁷. They see no order, and that the husband may leave the wife in bed and beat her simultaneously when she shows Nushuz. Besides, he may use only one method according to his choice⁸.

As far as we are concerned, we believe it is better to order the methods, as it is more efficient and peaceful, and because God gave this order.

Second: the Nushuz of the wife from the perspective of the Algerian family law:

The Algerian legislator did not define Nushuz or show its aspects. Rather, he provided in Article 55 that when Nushuz is shown by one of the spouses, the judge rules the divorce and compensation to the harmed part. Thus, we find that the legislator is aware that the Nushuz may be from both sides, but neither showed its aspects and cases, nor spoke about the

¹ Al Qurtubi, op. cit., pp., 287- 288.

² Ahmed Ben Ali Ibn Hajar al Asqalani, Fateh al Bari bi Shareh Sahih al Bukhari, the national library of King Fahed, 2001, Vol. 09, p. 161.

³ Ibid., p. 2013.

⁴ Muslim Bin Hajaj al Qeshiri, Sahih Muslim, Arabic books revival house, n.d, Vol. 04, p. 1814.

⁵ Muslim Bin Hajaj al Qeshiri, Sahih Muslim, Arabic books revival house, n.d, Vol. 03, p. 1333.

⁶ Ala Dine Abi Bakr Ben Messaoud al Kassai, Badaai al-Sanii fi Tartib al Sharaii, Beirut-Lebanon, scientific books house, 1986, Vol. 02, p. 334.

See also Abi Abdullah Mohamed al Kharshi: al Kharshi ala Mukhtassari Khalil, the big printing house, Polak Egypt the Emirial reservation, 1317, Vol. 02, p. 07.

Mufuk al Dine Abi Mohamed Abdullah Ibn Qadata, al Mughni, Riyadh-KSA, books world house, 1997, Vol. 03, p. 256.

Ibn Hazm al Andalussi, al Muhalla bi al Athar, Beirut, Lebanon, scientific books house, 2003, Vol. 01, p. 176.

Abu al Qacem Najm al- Dine Jaafar Ben al Hassan, Sharai al Islam fi Massail al Halal wa al Haram, al Qari house, Beirut, Lebanon, 2004, Vol. 11, p. 577.

⁷ Abu Abdullah Ben Idris al Shafii, al Om, Amman- Jordan, the international ideas house, n.d, p. 961.

⁸ Abu al Qacem Najm al- Dine Jaafar Ben al Hassan, op. cit., p. 577.

methods of treatment and prevention as Sharia did, despite that Sharia is the basic reference for all the family issues. Besides, he showed that the judge rules divorce and compensation for the harmed part in case of Nushuz. In the light of the vague attitude of the Algerian legislator towards the Nushuz, some decisions of the Algerian supreme court discussed some cases of Nushuz, as follows:

“The loss of the wife’s right to the alimony takes place when the husband proves she had been notified about the final decision of the judge to go back to the husband house, but abstains to abide by the ruling. Besides, she loses the right to appeal. However, if the wife asks for a separate house far from the family of the husband to avoid the harm and problems, the judge finds for her and does not consider her in Nushuz and, thus, keeps her right to alimony. Therefore, she can make grounded appeals. In case the husband provides the house, her appeal is refused”¹.

This decision shows the relation of the alimony and Nushuz. In this context, as long as the judge rules for a separate house for the wife and she refuses to go back to her husband in this house, she is in Nushuz. In the same context, another decision stated that “legally speaking, the divorce pronounced by the wife is not valid, regardless the diverse expressions, and Nushuz is not valid unless the judge rules for the wife to go back to the husband house and she refuses. Based on the provision that proves that the husband did not submit an explicit divorce request and that he has the right to, the marital bond was dissolved and the wife is deprived of the right to alimony as long as she does not submit a grounded appeal”².

Hence, these two decisions explicitly revolved around an aspect of Nushuz, namely the refusal to go back to the husband house after the judge rules so. The judges can rely on this case to rule the wife Nushuz, according to Article 55. In return, the wife who refuses to go back to the husband is not in Nushuz as long as the husband does not respect her requests, such as the separate house. Besides, another decision provides that “not any wife who refuses to go back to her husband is in Nushuz and deprived of her legal rights. In addition, Nushuz is not grounded unless the husband provides all the demands of the wife. Thus, the ruling that does not consider these two principles is a violation of the legal rights. Hence, since the husband did not provide a separate house for his wife based on a previous ruling, the judges of the council who ruled she was in Nushuz violated the legal rules”³

Another decision states, “The wife’s refusal to go back to the husband in case he does not provide a separate house is not Nushuz”. In this case, the appellant shows the abstention report that shows that the wife absolutely abstains to go back to the husband. However, the court replied to him “with reference to the abstention report of 19/04/2008, the appellant did not provide a separate furnished house to the wife according to the case of 27/02/2008. Moreover, ruling the Nushuz is based on the discretion of the competent judges, and that thinking that they violated the law is not true”⁴.

Generally, the wife in Nushuz is the one who disobeys her husband illegally⁵, such as leaving the house without valid reason¹, refusing the return to the house after the judge ruling,

¹ File 33762 of 09/07/1984, judicial magazine 04, 1989.

² File 40428 of 21/04/1986, judicial magazine 04, 1993, p. 69.

³ File 45311 of 09/03/1987, judicial magazine 03, 1990, p. 61.

⁴ File 653323 of 10/11/2011, judicial magazine 02, 2012, p. 234.

⁵ Belhadj al Arbi, al Wajiz fi Sharhi Qanun al Usra al Jazairi (al Zawaj wa al-Talaq), Ben Aknoun-Algiers, University publications office, 2005, Vol. 04, p. 309.

ruling, or refusing the husband in the house². In addition, we believe that the wife is in Nushuz when she commits a crime that affects her husband, house, and reputation, travels without the permission of the husband, and works outside without the acceptance of the husband as long as she did not mention this condition before marriage, according to Article 19 of the family law.

Section two: the husband Nushuz:

We shall focus on the Nushuz of the husband according to the Islamic jurisprudence and, then, according to the Algerian family law.

First: the Nushuz of the husband according to the Islamic jurisprudence

The husband Nushuz takes place when he puts a distance between him and his wife, mistreats her in actions and verbs or both³, or does not speak to her⁴. Quran states: “If a woman fears indifference or neglect from her husband, there is no blame on either of them if they seek ‘fair’ settlement, which is best”⁵. In addition, al Tabari says that the part “If a woman fears indifference or neglect from her husband” refers to when she feels arrogance and hatred due to her shape, age, etc, and a refusal to do his duties towards her⁶. In this context, Imam Shaarawi says about the part “If a woman fears indifference or neglect from her husband” that the Nushuz did not happen, but the wife fears it. Thus, the verse speaks about the fear of Nushuz, not the act of Nushuz per se⁷. He adds, “God wants to end this discord before it takes place. Therefore, he wants the wife to look for the possible causes of Nushuz, as she may be old or sick while the husband is still young. Besides, another woman may have attracted him so much that he wants to marry her. Hence, the wife must rationally handle the issue to reach reconciliation”⁸.

Aisha, the wife of the prophet peace be upon him, commented on the verse saying that the woman can ask the husband to keep her if he wants divorce, and accept him to marry a second wife, because he is the provider for her. Thus, God called for reconciliation and negotiation. In this context, Sawda, the wife of the prophet peace be upon him, feared he would divorce her and said “keep me and do not divorce me, and go to Aisha on my day”. Thus, the verse “there is no blame on either of them if they seek ‘fair’ settlement, which is best”⁹ was revealed to the prophet. The good wife must be patient to maintain her house and children, as God ordered. In so doing, she can give money, waive some rights, and must show patience towards some actions as long as she can support because divorce has bad effects on children, family, and society as a whole.

Second: the Nushuz of the husband according to the Algerian family law:

We said that Article 55 explicitly tackles the Nushuz and that it may be from the husband or the wife as long as the case is legally grounded. However, the Article did not show the aspects of Nushuz. After investigating the decisions of the Algerian supreme court

¹ File 33762, supreme court, 09/07/1984 (unpublished).

² Belhadj al Arbi, op. cit., p. 309.

³ Mohamed Rachid Ragheb al Qabbani, op. cit., p. 79.

⁴ Al Qurtubi, op. cit., p. 161.

⁵ Surah al-Nissa, verse 128.

⁶ Ibn Jaafar Mohamed Ben Jarir al Tabari, Tafsir al-Tabari min Kitabihi Jamii al Bayan an Tafsiri Ayi al Quran, edited by Abdullah Ben Abd al Mohcen al Turki, 2003, Vol. 01, p. 548.

⁷ Mohamed Metwalli al Shaarawi, op. cit., p. 2682.

⁸ Mohamed Metwalli al Shaarawi, op. cit., p. 2684.

⁹ Ibn Hajar al Asqalani, op. cit., p. 215.

regarding Nushuz, we did not find any decision that explicitly speaks about it. Nevertheless, studying some articles of the family law, mainly those on the marital rights in Article 36¹, and on the coercive divorce in Article 53², we can deduce some cases of Nushuz of the husband. These cases include the husband leaving the house, refusal of the legal duties, the mistreatment, the refusal to care for children, the refusal to provide a separate house far from his family after the court rules so, the refusal to take the wife back to the house, leaving the wife in bed for 04 months, going back home late, and the long absence without excuse or alimony.

Thus, Nushuz includes all the violations of the duties towards the wife, which harm her. To prove it in the Algerian family law, a judicial provision ruling the Nushuz of one of the spouses is needed³.

Section three: the Nushuz of the two parts (Sheqaq):

The term Nushuz changes into Sheqaq when the Nushuz is mutual. In this regard, if the previously mentioned measures to stop Nushuz do not work, we face a state of Sheqaq. We shall shed light on it from the perspective of the Islamic jurisprudence and, then, of the Algerian family law.

First: Sheqaq in the Islamic jurisprudence:

God says “If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything”⁴. This means that when the Nushuz between the spouses occurs, and is from both of them, or the one in Nushuz is not known, two readings emerge. The first is the reading of the Malikis, the Shafiis, the Hanbalis, and the Zaydis⁵. They see that if both claim that the other part shows mistreatment, a third party known with honesty is appointed to control them and find out the truth; before sending two arbitrators. In case the arbitrators are sent, they should not separate the spouses if they cannot reconcile them, unless the partners allow them with a proxy⁶.

The second reading is that of Hannafids, Dhahiris, some Malikis, some Hanbalis, al Kharqi, Ibn Taimia, and al-Tabari⁷. They believe that if both accuse each other of mistreatment, there is no need to send a third party; rather, it is necessary to directly send the arbitrators, in compliance with the verse that says “send an arbitrator from his family and an arbitrator from her family”. In addition, they see that the arbitrators decide to divorce them or

¹ Order 05/02 of 27/02/2005 on the family law.

² Ibid.

³ Journal of the supreme court, no° 02, 2008, pp. 317-320.

⁴ Surah al-Nissa, verse 35.

⁵ Abi Isehak Ibrahim al Fairouz Abadi al-Shirazi, al Muhadhib fi Fikeh al Imam Malik, 1959, Vol. 02, 2nd Edition, p. 71.

Shams al-Dine Mohamed Arfa al-Nassuqi, Hashiatu al-Dassuki ala al-Shareh al Kabir, Arabic books revival house, Vol. 02, p. 340.

Shams al-Dine al-Sharbini, Mughni al Muhtaj ila Maarifati Maani Alfadh al Minhaj, Beirut-Lebanon, scientific books house, 2000, p. 425.

⁶ Abi Isehak Ibrahim al Fairouz Abadi al-Shirazi, op. cit, p. 442.

Ibn Qudama, op. cit., p. 264.

⁷ Ibn Hazm al Andalussi, op. cit., pp. 246-247.

Ala al-Dine Abi Bakr Bin Massaoud al Kassani, op. cit., p. 334.

Abi al Hassan Ali al Mawardi, op. cit., p. 249.

Ibn Jazi al Kalbi, al Qawanine al Fikehiya, p. 142.

not without the permission or approval of the spouses or the ruler because they cannot reconcile them¹.

From these two readings, we believe that the two arbitrators can decide to keep or dissolve the marital bond, even without proxy of the two partners, as God named them arbitrators². If the husband mistreats the wife, they separate them, and if the wife mistreats the husband, they separate them provided that she pays part of her dowry without causing her harm. Thus, the two arbitrators can divorce them because they failed to reconcile them³. As for the criteria of the two arbitrators, they must be Muslims, knowledgeable, having good conduct, and be of their families.

Second: Sheqaq in the Algerian family law:

The Algerian legislator tackled the Sheqaq in Article 56 of the family law, which provides that “if the discord between the two spouses increases without proving the harm, it is necessary to send two arbitrators to reconcile them. The judge appoints one of the family of the husband and another from the family of the wife. They must provide a report about their task within two months”. In this regard, the legislator used the term “discord” not “Sheqaq”, as in Article 53/8. However, in Article 56, the meaning is the same as in Article 35 and in Surah al-Nissa.

Moreover, the legislator granted the wife in Article 53/8 the right to ask for divorce due to the continuous Sheqaq. Articles 53, 55, and 56 show that the legislator sometimes uses the term Sheqaq, some other times uses Nushuz, and some other times discord. However, he did not show their meanings and how to prove them. Furthermore, Article 53/08 on Sheqaq did not show the criteria and amount of Sheqaq. The legislator should have conditioned the disconfirmation of the harm; otherwise, it is necessary to resort to paragraph 10 of Article 53, which revolves around the legally considered harm instead of paragraph 08 on the continuous Sheqaq. In case of Sheqaq, the legislator insisted on sending two arbitrators to reconcile them for a period of two months. If they fail and prove the harm, the husband can ask for divorce according to Article 55, and so does the wife according to Article 53/08⁴.

Some decisions of the supreme court state that:

“The principle: appointing the arbitrators is optional” “the judge is not obliged to appoint two arbitrators in case the discord increases and the harm is proven. The decisions show that the judge ruled the divorce based on the continuous and long Sheqaq, using his discretion and jurisdiction to examine the dispute and the harm that hinder the continuity of the relationship”⁵. Besides, the legislator adopted the view of the Malikis regarding the separation of the spouses, mainly regarding the harm. Thus, the wife has the right to ask for divorce based on the harm that is legally recognized in Article 53/10. Among the most important aspects of harm in the marital life is the continuous Sheqaq. A decision was issued by the supreme court on 24/09/1996 ruling the increase of Sheqaq between the spouses and allowing requesting the legal separation. The decision states that, “it is agreed that the increase of Sheqaq between the spouses leads to legal separation. Because, in this case, the

¹ Ibn Jazi al Kalbi, op. cit., p. 142.

² Mahfoudh Ben Seghir, op. cit., p. 660.

³ Ait Shawesh Dalila, ending the marital bond based on the request of the wife (comparative study), PhD thesis in laws, Tizi Ouzou, Algeria, Faculty of Laws and Political Sciences, 2014, p. 235.

⁴ Ait Shawesh Dalila, op. cit., pp. 228-227.

⁵ No° 01, file 620084, judicial magazine, 2012, p. 299.

defendant was harmed by the long increasing discord, leading to neurological diseases and the impossibility of the marital life, the judges deciding to divorce them applied the right decision; thus, the appeal is refused”¹

Another decision on 15/06/1999 stated that, “it is legally agreed upon to divorce the wife when the discord increases, lasts long, and causes the legal harm. Since, in this case, the wife has been harmed by the long discord with the husband, who is responsible for the harm and did not abide by the judicial decision to provide a separate house, the wife is right in asking for compensation and the judges rule the divorce due to the long discord. In addition, they find for the wife and consider any appeal as void”². Moreover, another decision states that “the continuous Sheqaq is proven from the judicial disputes between the two parts. The apparent discord in the reconciliation session is not enough to prove the continuous Sheqaq and use it for divorce. The decision says that the appealed provision shows that the court grounded its divorce ruling on the personal declarations of the two parts that they are in continuous Sheqaq. Thus, the divorce is legally grounded. In this context, this does not respect Article 53/08 of the family law that states that the wife has the right to ask for divorce due to the continuous Sheqaq. Nevertheless, the court should have shown how it knew about the Sheqaq case and that the events of the reconciliation session are not enough to rule the continuous Sheqaq, because the latter manifests in the marital life and the judicial disputes. Hence, the contested decision does not show that the court pointed to it, because regarding the considerable absence as in the contested decision, the court neither saw it nor showed how it discovered it. Therefore, these two faces are grounded and do not cancel the contested decision”³.

Based on what was said, we find that divorce for Sheqaq needs proving the continuity of Sheqaq for a long time, the impossibility of the marital life, and the harm. However, the Algerian legislator did not provide for this in the family law and just pointed to the existence of Sheqaq without discussing who causes it and who is harmed by it. This contradicts with the aims of marriage⁴.

Conclusion:

Since the human soul is changeable, it may find what it did not expect, and aversion may prevail between the man and his wife, and what may disrupt the relationship between the spouses may arise, which leads to ill-treatment between them, and this turns into continuous discord that corrupts married life. There is no doubt that discord is caused by one of them encroaching upon the rights of the other. In the end, Nushuz and Sheqaq are two legal terms that refer to a state of discord between the partners. They affect the family and the society, and may be from the husband or the wife. They have different causes and provisions. In this regard, Sheqaq is more severe than Nushuz because it is from both sides and needs the intervention of the justice or two arbitrators from their families to reconcile them. Findings show that:

¹No° 02, file 624622, judicial magazine, 1997, p. 66.

²Special issue, file 224655, judicial magazine, 2001, p. 129..

³No° 02, file 624622, judicial magazine, 2012, p. 227.

⁴Mahfud Ben Seghir, the legal jurisprudence in the Islamic jurisprudence and its applications in the Algerian family law, PhD thesis in jurisprudence and its origins, Batna-Algeria, University of al Hadj Lakhder, faculty of Sociology and Islamic Sciences, Department of Sharia, 2008/2009, p. 650.

1. Sheqaaq comes from Nushuz, and is mutual from both sides. On the other hand, if it is from one part, it is called Nushuz.

2. Sheqaaq and Nushuz have three aspects. The 1st is the wife Nushuz, when she disobeys her husband wrongfully. This should be remedied with preach, ignorance in bed, and slight beating, as God ordered.

3. The 2nd is the husband Nushuz, when he mistreats the wife in speech or action, or both, and puts a distance. It is remedied by paying money, waiving one of the rights, or showing patience. In this regard, God said, "If a woman fears indifference or neglect from her husband, there is no blame on either of them if they seek 'fair' settlement, which is best". The 3rd aspect is called Sheqaaq, when both disobey each other. The solution is sending two arbitrators, as God said, "If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything". As for the Algerian family law, the legislator tackled Nushuz and Sheqaaq in Articles 55, 56, and 53/08 and did not show their aspects, leaving them for the jurisprudence. However, he clearly provided in Article 55 that in case of Nushuz, the judge rules the divorce on behalf of the harmed party with compensation. If the dispute increases without proving the harm, Article 56 provided for sending two arbitrators to reconcile them, and to submit a report about their mission within two months. In case the arbitrators fail to reconcile them, the harmed party has the right to ask for divorce due to the continuous Sheqaaq, according to Article 53/08.

4. In case of Sheqaaq, Article 53/08 granted the wife an exclusive right to ask for divorce for Sheqaaq, because the continuity of Sheqaaq is seen by the supreme court as harmful for her.

5. Paragraph 08 of Article 53 on the continuous Sheqaaq should have mentioned disproving the harm so that it differs from divorce for harm, according to paragraph 10 of the same article. After amending Article 53/08, it is better for the wife to ask for divorce on the grounds of continuous Sheqaaq, not the dispute mentioned in Article 56.

Recommendations:

To remove the vagueness of the issues of Sheqaaq and Nushuz in the Algerian family law, we suggest abolishing Article 56 of the family law and integrating it with Article 53/08 of the same law, as follows:

"The wife has the right to ask for divorce on the grounds of continuous Sheqaaq in these two cases:

- If the dispute increases without proving the harm, or when the husband did not respect the court decisions on behalf of the wife.

- If the Sheqaaq continues and lasts long, without proving the harm, or the divorce case is repeated on the grounds of harm.

In these two cases, the judge appoints two arbitrators to reconcile the partners, one from the wife's family and the other from the husband's family. The arbitrators must submit a report about their mission within two months.

- When ruling divorce for the wife in the previous cases, the judge rules the suitable compensation for her"

Many marital disputes are often caused by ignorance of spousal rights and a failure of either spouse to fulfill their responsibilities towards each other. The discord between spouses

can be attributed to the wife's nushuz, which refers to her disobedience and failure to obey her husband, or it can be due to the husband's nushuz and his resentment towards his wife. In some cases, both spouses may exhibit nushuz simultaneously, contributing to the conflict within the marriage.

Nushuz can manifest in various forms, such as verbal abuse, neglect of marital duties, financial misconduct, or refusal to fulfill conjugal rights. It is important for both spouses to understand their rights and obligations within the marriage in order to avoid misunderstandings and conflicts. Islamic teachings emphasize the importance of mutual respect, cooperation, and fulfilling spousal obligations. Clear communication, seeking knowledge about marital rights and responsibilities, and practicing patience and understanding are essential in addressing and resolving conflicts within the marriage.

It is worth noting that seeking guidance from religious scholars, marriage counselors, or legal professionals can provide valuable assistance in resolving nushuz and shiqaaq issues, promoting understanding, and restoring harmony within the marital relationship.

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