

Deserting the Wife, Between Disciplining and Abuse - An Islamic Jurisprudential Study-

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Abstract

This study treats the topic of deserting the wife as a means for disciplining the wife upon disobedience of her husband and rebellion against him, such by means of elucidating the manifold opinions of the Fuqaha (Muslim jurists) insofar as the method of desertion such as desertion of the wedlock bed or eschewal of sexual contact or verbal communication or otherwise, while also pointing out the lawful duration.

Moreover, the adoption of desertion as a means for harming the wife was addressed, and the position of the Fuqahavis a vis the right of the wife to demand separation as a result of this reason through the courts of law, and the period that grants the wife this right, and also the type of separation resulting from the separation ordained by the judge in terms of considering it as a separation/ Dissolution (Faskh) or divorce.

The author reached several results including the fact that desertion (Hajr) may be applied to its multiple meanings, whereby the husband may choose the method which influences and assists in ending the condition of the rebellion of the wife in a manner whereby the interests of the children are not affected negatively.

Moreover, the desertion of the wife should be time-specific and it may not be prolonged to several months or years, because al-Hajr entails an aim related to reforming the wife and ending her rebellion or disobedience.

And in case the period of desertion exceeds the Islamically permitted period, or the Hajr was adopted as a means for harming the wife, such will confer on her the right to take recourse to the judiciary, in order to admonish the husband and give him a period of time to mend his ways with his wife, but in case he continues the desertion, the author views with favor the possibility of effecting separation.

As regards the period of desertion enabling the wife to demand separation (Tafriq) the author favors the position that it is four months in case the husband is cohabiting with the wife based on an analogy to Ilaa (eschewal of sexual intercourse for a period of time), and one year in case he is absent, but if the desertion is by eschewing verbal communication and misconduct in the cohabitation, the husband is not given a grace period, but shall be warned, and in case he is insistent he shall be ordered to separate immediately.

The type of separation resulting from the decision of the judge (Qadi) to separate the couple is irrevocable divorce, and this is the plausible position favored by the author.

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Introduction

All praise is to Allah, Lord of the worlds, and prayers and peace be upon the Prophet Muhammad, and all his family and companions.

Among the positive features distinguishing the Islamic Shari`ah, is that it comprehensively addresses the various interests of people, and it does not confine itself to tackling the public issues that concern society, but goes beyond that to treat the finest details related to the private life of the Muslim individual.

This is manifested in rules and principles organizing and governing familial and matrimonial relations, which aim determinedly to effect relations of love and amity between the husband and wife, and they tackle the cases in which there could be marital differences through elaborating some Islamic legal rules and norms, including the lawfulness of deserting the wife as a way to discipline her.

This matter was addressed in the present study aiming to elucidate the reality and nature of this method, and when could al-Hajr be a means for harming the wife thereby being an unlawful act, and how could there be a role for the judicial body to ward off harm from the wife resulting from her desertion.

I found a number of previous studies on this topic, and the topic of Hajr was treated in research efforts in an independent manner, in addition to the fact that this topic is manifestly present in the works of Muslim jurisprudence (Fiqh).

Among those works is the study of Dr. Ismail Shindi titled "Ahkam Hajr Al-Zawjah`ilFiqh Al-Islami-Rules on the Desertion of the Wife in Muslim Jurisprudence" published in the Journal of Al-Quds Open University in 2015 A.D.;

Moreover, the study jointly authored by Dr. Rudaynah Rifa`i and Dr. Mohammad Al-Tawalbeh titled "Ahkam Al-Hajr`ilFiqh Al-Islami- Rules on Desertion in Muslim Jurisprudence", published in Dirasat Journal of the University of Jordan in 2009 A.D.

I actually wished to relate between Al-Hajr as a disciplinary measure and its use as a method for harming the wife, which would negatively affect the matrimonial life and its stability.

In writing this study I adopted the descriptive methodology, where I presented the opinions and proofs of the jurists and thence discussed them and identified the more plausible positions, and I also showed the locations of the Ayahs in the Qur'an,

and I authenticated the Prophetic Hadiths from their sources, and I also documented the opinions of the Fuqaha relying on the authoritative Fiqh works.

I divided the study into two chapters, and each chapter contains several topics as follows:

Chapter I: Disciplining the Wife by Desertion.

This chapter contains three topics:

Topic I: Definition of Hajr and the Islamic Rule on it.

Topic II: Method of Desertion.

Topic III: Duration of Hajr.

Chapter II: Harming the Wife by Desertion and its Impact.

This includes three topics:

Topic I: The right of the wife to sexual intercourse and matrimonial cohabitation.

Topic II: Separation of the Spouses Due to Hajr.

Topic III: Duration of the Hajr Justifying Demand for Separation and the Type of Separation.

I supplicate Allah that He has given me success in authoring this study, and for it to be reckoned a good deed on the Day of Judgment, for He is Hearing and answers our prayers.

Chapter I: Disciplining the Wife by Desertion.

It includes three topics:

Topic I: Definition of Hajr and the Islamic Rule on it.

Al-Hajr linguistically¹ denotes distance and desertion, and it is the antithesis of connectivity.

Al-Hujr, on the other hand, denotes ribaldry.

As to Hajr as a technical term it denotes for a human to separate from another either physically or by tongue or by heart.²

Disciplining the wife by desertion (Hajr) occurs in the sense of distance, whereby the meaning intended in the Holy Qur'an is to distance them in the beds.³

The meaning of Hajr will be elucidated in detail upon discussing the method of Hajr in the next Topic God willing.

As to the rule on Hajr, it is essentially prohibited, because it is impermissible for a Muslim to distance himself from his Muslim brother for more than three days, given the presence of several Prophetic Hadiths which forbid a Muslim to abandon his Muslim brother including:

- 1) The Hadith of Anas Bin Malek: "Do not hate one another, nor be envious of one another; and do not desert one another, but O Allah's worshipers! Be Brothers! And it is unlawful for a Muslim to desert his brother Muslim (and not to talk to him) for more than three nights."⁴
- 2) The Hadith of Abu Ayyoub Al-Ansari God be pleased with him: "It is not permissible for a Muslim to shun his brother for more than three nights. When they meet, this one turns away (from that one) and that one turns away (from this one) and the

best of them is the one who greets his brother first."⁵

However, Hajr was permitted (is licit) in particular situations, including deserting the wife in case of her rebellion and disobedience of her husband.

Thus the Hanafi⁶, Maliki⁷, Shafi'i⁸, and Hanbali⁹ jurists have concurred that a man may desert his wife in case she rebels in order to discipline her, and that desertion is not lawful except after a husband advises and preaches to the wife, and in case she does not positively respond to the advice and insists on her rebelliousness he shall desert her. It should be pointed out in this context that the Fuqaha (jurists) disagree on the method of Hajr, which is a matter which I shall clarify in detail in the next Topic God willing.

The permissibility of desertion is attested to by several sacred proofs or evidences, including:

- 1- { As to those women on whose part you see ill conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly, if it is useful), but if they return to obedience, seek not against them means (of annoyance). Surely, Allah is Ever Most High, Most Great. }¹⁰
- 2- The Hadith of Um Salamah that the Prophet (pbuh) swore not to enter the chambers of his wives for one month, and when twenty nine days passed, he frequented them, whereupon it was said to him, O Messenger of Allah you swore to shun them for one month and he said: "The month is of 29 days."¹¹
- 3- The Hadith of Amro Bin Al-Ahwas: "Treat women kindly, they are like captives in your hands; you do not owe

⁵ Al-Bukhari, Sahih Al-Bukhari, Kitab Al-Adab Chapter (Migration and the saying of the Prophet (pbuh)- it is impermissible for a man to desert his brother....) Part 5, p.2256 Number (5726), Muslim, Sahih Muslim, Kitab Al-Birr W`alSilahW`alAdab (Bab Tahrim Al-HajrFawqThalathBila`UdhrShar`iy) Part 4, p.1984 Number (2560).

⁶ Al-Jassas, Ahkam Al-Qur'an, Part 3 p.150, Al-Kassani, Bada'e` Al-Sana'e`, Part 2, p.334.

⁷ Al-Dardir, Al-Sharh Al-Kabir, Part 2 p.343, Aleesh, Minah Al-Jalil, Part 3, p.545.

⁸ Al-Shirbini, Al-Iqna'a, Part 2, p.432, Al-Ramli, Nihayat Al-Muhtaj, Part 6, p.390.

⁹ Ibn Mufleh, Al-Mubde', Part 7, p.214, Al-Bahuti, Kashaf Al-Qina'a, Part 5, p.209.

¹⁰ [An-Nisa: 34]

¹¹ Al-Bukhariop.cit, Kitab Al-Nikah (Migration of the Prophet- his wives...) Part 5, p.1996, Number (4906); Muslim, Sahih Muslim, Kitab Al-Siyam Bab (the month is twenty nine..) Part2, p.764 Number (1085).

¹ Ibn Mandhour, Lisan Al-Arab, Part 5 pp.250-253, Al-Fayrouzabadi, Al-Qamus Al-Muhit, Part 1 p.637.

² Al-Isfahani, Al-Mufradat, p.536, Al-Manawi, Al-Tawqif `AlaMuhimmat Al-Ta`arif, Part 1 p.738.

³ Ibn Al-Arabi, Ahkam Al-Qur'an, Part 1, p.534.

⁴ Al-Bukhari, Sahih Al-Bukhari, Kitab Al-Adab Chapter (Migration and the saying of the Prophet (pbuh)- it is impermissible for a man to desert his brother....) Part 5, p.2256 Number (5726), Muslim, Sahih Muslim, Kitab Al-Birr W`alSilahW`alAdab, Chapter (Tahrim Al-TahassudW`alTabaghudW`alTadabur), Part 4, p.1983, Number (2559).

anything else from them. In case they are guilty of open indecency, then do not share their beds and beat them lightly but if they return to obedience, do not have recourse to anything else against them..."¹²

- 4- The Hadith of Hakim Bin Mu`awiyah: "That he should feed her as he feeds himself and clothe her as he clothes himself; he should not strike her on the face nor disfigure her, and he should not abandon her except in the house (as a form of discipline)."¹³

Topic II: Method of Desertion

The Fuqaha have differed on how a man would desert his wife through several opinions of which I will cite the most important:

- 1) The Hanafis are of the view in Al-Adhhar¹⁴ that desertion is by eschewing oral communication with the wife, and the man does not eschew sexual intercourse or the matrimonial bed. This opinion was also stated by Ibn Abbas, Ikrimah, Al-Dahhak and Al-Sadiy.¹⁵ The exponents of this view based their view on the premise that sexual intercourse is a joint right of the spouses and its eschewal entails harm to the man, and thus he must not discipline the wife by harming himself and invalidating his right.¹⁶
- 2) The Hanafis¹⁷, Malikis¹⁸, Shafi`is¹⁹ and Hanbalis²⁰ assume the position that Hajr is

to desert the wedlock bed and not to engage in intercourse with the wife.

It is the position of the Hanafis based on this saying that if he has another wife he shall have intercourse with the other from her share, because her share is honored when the rules of God are observed and not in case of disobedience and disputes.²¹

- 3) In one saying of the Hanafis²² and another of the Shafi`is²³ the view is held that desertion is to eschew sexual intercourse with the wife and not to desert the wedlock bed.
- 4) In one saying the Hanafis are of the view that desertion is by eschewal of sexual intercourse at a time in which the wife is desirous rather than the time in which he is desirous; because such is to discipline and reprimand and so he must discipline her rather than himself by eschewing intercourse in case he is in need of it.²⁴
- 5) In one saying of the Hanbalis²⁵ the view is held that Hajr signifies not having intercourse with her in bed nor to speak to her.. This position was also held by Ibn Abbas in a narration.²⁶
- 6) It is the view of Ibn Abbas in a narration according to him, Al-Sadiy, Al-Dahhak and Ikrimah in the generation succeeding the earliest generation of Muslims that Hajr is neither to have intercourse with her nor to speak to her, but to sleep in bed and then to give her his back.²⁷
- 7) In one saying of the Shafi`is²⁸ the position is held that Hajr is to speak to his wife harshly, but does not eschew having intercourse with her or sharing her bed. This was also said by Ibn Abbas, Ikrimah and Al-Hassan in another narration.²⁹
- 8) It is the view of Imam Al-Tabari that Hajr is by confining the wife to the house.³⁰

¹² Al-Tirmidhi, Sunan Al-Tirmidhi, Kitab Al-Rida`a (Right of woman over her husband) Part 3 p.467 Number (1163), and Abu Issa said: the Hadith is sound; Al-Nissa`i, Al-Sunan Al-Kubra, Kitab `Ishrat Al-Nissa` Bab (Kayf Al-Darb) Part 8, p.264 Number (9124); IbnMajah, SunanIbnMajah, Kitab Al-Nikah (Right of woman over her husband), Part 1, p.594, Number (1851); the Hadith is sound, see: Al-Albani, Irwa`a Al-Ghalil, Part 7, p.96,97..

¹³IbnMajah, op.cit., Kitab Al-Nikah (Right of woman over her husband) Part 1, p.593 Number (1850); Al-Hakem, Al-Mustadrak, Kitab Al-Nikah Part 2, p.204, Number (2764). Al-Hakem commented: This is a Hadith of sound chain of transmission (isnadsahih) and did not authenticate it; Al-Bayhaqi, Sunan Al-Bayhaqi, Kitab Al-QassamW`alNushuz Bab (Right of Women Over Man) Part 7, p.295 Number (14503), sound Hadith, See, Al-Albani, op.cit., Part 7, p.98.

¹⁴Al-Kassani, Bada`e Al-Sana`e, part 2, p.334, IbnNujeim, Al-Bahr Al-Ra`eq, Part 3, p.236.

¹⁵ Al-Jassas, op.cit., Part 3, p.150.

¹⁶ Al-Kassani, op.cit., Part2, p.334.; IbnNujeim, op.cit., Part3, p.236.

¹⁷Ibid, Part2, Part2, p.334; IbnNujeim, ibid, Part, p.236.

¹⁸Al-Hattab, Mawaheeb Al-Jalil, Part 4, p.15; Al-Kharashi, Sharh Al-Kharashi, Part 4, p.7

¹⁹Al-Nawawi, Rawdat Al-Talibin, Part 7, p.367; Al-Dimyati, I`anat Al-Talibin, Part 3, p.376.

²⁰IbnQudamah, Al-Mughni, Part 7, p.242.IbnMufleh, Al-Mubde`, Part 7, p.214.

²¹Al-Kassani, op.cit., Part 2, p.334.

²²IbnNujeim, op.cit., Part3, p.236.

²³Al-Shirbini, Mughni Al-Muhtaj, Part3, p. 259.

²⁴Al-Kassani, op.cit., Part2, p.334.

²⁵Al-Mardawi, Al-Insaf, Part8, p.376.

²⁶IbnKathir, TafsirIbnKathir, Part1, p.493.

²⁷Ibid, Part1, p.493.

²⁸Al-Shirbini, op.cit., Part3, p.259.

²⁹Al-Tabari, op.cit., Part5, p.65. Ibn Al-Arabi, op.cit., Part1, p.533.

He grounded the abovementioned opinions in the Qur'anic Ayah: {As to those women on whose part you see illconduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly, if it is useful), }³¹, where the Ayah was interpreted that if the wives refuse to desist from their rebelliousness then they should be confined to their homes.³²

Moreover, there is the narration according to Asma the daughter of Abu Bakr the wife of Al-Zubayr Bin Al-Awam: "that she used to be outside of the home and he was reprimanded for this..and he beat both of them hard, but the other wife protected herself more.. and Asma was hit more.. and she told about him to her father Abu Bakr, and he told her: be patient for Al-Zubayr is a good man and perhaps your spouse in paradise..."³³

The opinion cited by Imam Al-Tabari is reprehensible and alien, but I mentioned it here to discuss it and exposit its weakness as an argument, because there are those who attempt to present an erroneous view of the position of Islam on woman by referring to these alien opinions. Thus Ibn Al-Arabi comments on the statement of Imam Al-Tabari: "Strange it is that in spite of his erudition in the language of the Arabs that he shall have deviated from sound judgment."³⁴

Thus Hajr means eschewal of wedlock bed rather being confined to the home.³⁵

As to the narration according to Asmaa it is an alien Hadith related by IbnWahb from Imam Malek.³⁶

As to the other opinions interpreting the meaning of Hajr what is plausible is that desertion of the wedlock bed relates to multiple meanings, even though the apparent meaning relates to not sleeping with the wife in the same bed which is a manner of disciplining the wife.

Nonetheless, this does not prevent the use of other means in terms of eschewing oral communication or sexual intercourse without abandoning the wedlock bed which would achieve the aim of Hajr, namely to discipline the wife and prevent her disobedience, while emphasizing in this context that choosing the method of Hajr must give due regard to not causing harm to the offspring.

The position favoring variety in the meanings of desertion has been given weight by a number of modern scholars among those who have written on the topic of the desertion of the wife.³⁷

Topic III: Period of Hajr.

The lawful duration of desertion varies according to the method of Hajr to be chosen by the husband, whereby if desertion is by eschewing sexual intercourse the Fuqaha hold several opinions in this matter:

- 1) It is the view of the Hanafis³⁸, Shafi'is³⁹ and Hanbalis⁴⁰ that it is permissible for the husband to desert his wife until she becomes obedient to him, and when she becomes so it is prohibited for him to desert her, and they did not specify for this a time period. They based their position on the Ayah: {refuse to share their beds,}⁴¹, where the latter does not indicate restriction.
- 2) It is the position of the Malikis that the duration of laudable Hajr is one month and should not amount to four months.⁴²

As to their evidence for favoring Hajr for one month there is what is stated in the Hadith of Um Salamah: "The Prophet (PBUH) took an oath that he would not enter upon some of his wives for one

³⁰Ibid, Part5, p.66.

³¹ [An-Nisa: 34]

³²Al-Tabari, op.cit, Part 5, p.66.

³³Ibn Al-Arabi, op.cit., Part1, p.533.This tradition was narrated by IbnSa`ad in Al-Tabaqat Al-Kubra, part8, p.251, and IbnAssaker in TarikhDimashq, Part 69, p.16. Al-Albani said: the transmitters of the tradition are reliable but the chain of transmission is incomplete; because Ikrimah did not encounter Abu Bakr, but he received it from Asma`aBint Abu Bakr. See Al-Silsilah Al-Sahihah, Part 3, p.276 Number (1281).

³⁴Ibn Al-Arabi, op.cit., Part 1 p. 534.

³⁵Ibid, Part 1, p. 534.

³⁶Ibid, Part 1, p. 533.

³⁷See Zeidan, Al-Mufassal Fi Ahkam Al-Mar`ah, Part 7, p. 315; Shindi, HukmHajr Al-ZawjahF`ilFiqh Al-Islami, pp. 134-135; Al-Rifa`i and Tawalbeh, Ahkam Al-HajrF`ilFiqh Al-Islami, p.9.

³⁸Al-Kassani, op.cit., Part 2, p..334; IbnNujeim, op.cit., Part 3, p.236.

³⁹Al-Shirbini, op.cit., Part 3, p. 259; Al-Dimiati, op.cit., Part 3, p.376.

⁴⁰Al-Bahouti, op.cit., Part 5, p.209; Al-Rheibani, MatalebUli Al-Nuha, Part 5, p. 287.

⁴¹ [An-Nisa: 34]

⁴²Al-Hattab, op.cit., Part 4, p.15; Aleesh, Minah Al-Jalil, Part 3, p. 545; Al-Dessouqi, Hashiyat Al-Dessouqi, Part 2, p. 343.

month. But when twenty nine days had elapsed, he went to them in the morning or evening. It was said to him, "O Allah's Prophet! You had taken an oath that you would not enter upon them for one month." He replied, "The month can be of twenty nine days."⁴³

As regards their condition for the Hajr not to amount to four months they grounded this in the period of Ilaa (oath not to have sexual relation) because the husband if he deserts his wife four months and more it is incumbent upon him to return to his wife, and in case he exceeds the period the wife has the option to separate,⁴⁴ based upon the Qur'anic Ayah: {Those who take an oath not to have sexual relation with their wives must wait four months, then if they return (change their idea in this period), verily, Allah is Oft-Forgiving, Most Merciful. And if they decide upon divorce, then Allah is All-Hearer, All-Knower. }⁴⁵

- 3) It is the position of the Hanbalis in one narration that he shall not desert the wedlock bed except for three days, not more.⁴⁶

What is the most plausible in this matter is the position of the Malikis in terms of determining the period of desertion, because the aim is to discipline, whereby if the period is prolonged to no avail, then it should be eschewed and a new means should be utilized.

Moreover, eschewing sexual intercourse with the wife for four months and more does harm to the wife and the rule regarding it is that of Ilaa.

Moreover, not defining the period of Hajr may drive the morally weak to desert their wives and to do harm to them on grounds of disciplining them and this might last for years, whereby the desired aim is not fulfilled, but rather leads to aloofness between husband and wife thereby negatively affecting the Muslim family and the children in particular, and the outcome might be the dissolution of the family through divorce after prolonged suffering.

It is necessary to state here that among the exponents of the first statement are those that conferred on the wife the right to demand separation in case the desertion (Hajr) is prolonged, which is what I will show in Chapter II, where they did not specify the period of lawful desertion, but

⁴³It has been previously authenticated.

⁴⁴Al-Qurtubi, *Tafsir Al-Qurtubi*, Part 3, p. 108; Al-Hattab, *op.cit.*, Part 4, p. 15.

⁴⁵ [Al-Baqara: 226-227]

⁴⁶Al-Mardawi, *op.cit.*, Part 8, p. 376.

when they considered the harm that could be caused by desertion they gave the wife the right to demand separation.

However, if Hajr is by eschewal of oral communication, and the matter related to him and obedience to him, the Hanafis⁴⁷, Malikis⁴⁸, Shafii's⁴⁹ and Hanbalis⁵⁰ held the position that Hajr (desertion) should not exceed three days. This is attributable to the Hadith of Anas Bin Malik that the Prophet peace be upon him said: "...and it is impermissible for a Muslim to desert his brother for more than three nights."⁵¹

Nevertheless in case the desertion by eschewing oral communication aims to deter her from committing a sin and to rectify her religious commitment it is the position of the Hanafis⁵², Malikis⁵³ and Shafii's⁵⁴ that there is no objection for the period to be more than three days.

They based their abovementioned opinion on the Hadith of Ka'ab Bin Malek in the story of his failure to participate in the battle of Tabuk: "Allah's Messenger (PBUH) forbade the Muslims to talk with three of us from amongst those (persons) who had stayed behind him. The people began to avoid us and their attitude towards us underwent a change and it seemed as if the whole atmosphere had turned (hostile) against us and it was in fact the same atmosphere of which I was fully aware and in which I had lived (for a fairly long time). We spent fifty nights."⁵⁵

The preferable and sounder position in this matter is that there is no objection for the desertion by refraining from oral communication to exceed three days in order to prevent the wife from committing a sin or transgressing the commands of Allah, but it is necessary to determine when the desertion ends; because it is a means for disciplining and it is not an aim in itself, while its continuance for a long time negatively affects the Muslim family.

⁴⁷Alaa Eddin Bin Abdeen, *Takmilat Hashiyat Ibn Abdeen*, Part 7, p. 143.

⁴⁸Al-Nafrawi, *Al-Fawakeh Al-Dawani*, Part 2, p. 294.

⁴⁹Al-Shirbini, *op.cit.*, Part 3, p. 259; Al-Ramli, *op.cit.*, Part 6, p. 390.

⁵⁰Al-Bahouti, *op.cit.*, Part 5, p. 209; Al-Rheibani, *op.cit.*, Part 5, p. 287.

⁵¹It has been previously authenticated.

⁵²Alaa Eddin Ibn Abdeen, *op.cit.* Part 7, p. 143.

⁵³Al-Nafrawi, *op.cit.*, Part 2, p. 294.

⁵⁴Al-Shirbini, *op.cit.*, Part 3, p. 259; Al-Ramli, *op.cit.*, Part 6, p. 390.

⁵⁵Al-Bukhari, *op.cit.*, *Kitab Al-Maghazi Bab (Hadith Ka'ab Bin Malek..)* Part 4, pp. 1603-1605 Number (4156).

I wish to mention in this context that deserting the corrupt people- while affirming its lawfulness- differs in nature from deserting the wife who resides with her husband in a single home with the children; and here we might ask how would such affect them as they observe their parents not talking to one another. Hence, choosing the suitable method of desertion is desirable in such cases, while emphasizing that it is necessary to adopt the method of preaching so as to achieve the desired end and it is God who knows best.

Chapter II: Harming the Wife by Desertion and its Impact.

This includes three topics:

Topic I: The right of the wife to sexual intercourse and matrimonial cohabitation.

I had shown in Chapter I that desertion of the wife is considered a lawful means to discipline her and to prevent her disobedience, and that the Hajr is subject to rules and restrictions, but if such desertion continues and lasts for long then it would be harmful to the wife, especially since there are some husbands who intend to harm their wives where the matter has to do with differences unrelated to disciplining or the intention to rectify conduct, which involves affecting the right of the wife to sexual intercourse and familial tranquility and stability.

Some scholars have resultantly take the position that the wife may demand separation between her and her husband in case the latter persists in his desertion and commission of harm.

To discuss this matter it is necessary to exposit the position of the religious scholars concerning the right to sexual intercourse- whether it is the right of the husband or the rights of both the husband and wife.

The Hanafis⁵⁶, Malikis⁵⁷ and Shafiis⁵⁸ have stated in one opinion that sexual intercourse is the right of the husband; while the Hanafis⁵⁹, Malikis⁶⁰ and

Hanbalis⁶¹ held in one opinion that the right to sexual intercourse is the right of both man and wife.

They based their aforementioned opinion on the Hadith of Abdullah Bin Amro Bin Al-'Aass: "O `Abdullah! Have I not been informed that you fast all the day and stand in prayer all night?" I said, "Yes, O Allah's Messenger (PBUH)!" He said, "Do not do that! Observe the fast sometimes and also leave them (the fast) at other times; stand up for the prayer at night and also sleep at night. Your body has a right over you, your eyes have a right over you and your wife has a right over you." ⁶²

The previous Hadith clearly attests to the fact that the wife has rights including the right to sexual intercourse, because the Prophet (pbuh) commanded him to fast and eat, to pray and sleep; because excessive fasting and prayer by night affects the fulfillment by the man of his matrimonial duties.

Moreover, marriage was made lawful in the interest of the married couple and to remove harm from them, by enabling licit fulfillment of sexual desire which is the right of both man and wife.⁶³

Therefore, the position that sexual intercourse is the right of both husband and wife is the superior position; because such is consistent with the purposes of the marriage contract in terms of achieving empathy and tranquility, while considering the right to be solely that of the husband could lead to inattentiveness to his wife thereby negatively affecting matrimonial life.

Topic II: Separation of the Spouses Due to Hajr.

Based on what was mentioned in the previous chapter regarding differences on the right of the married couple to sexual intercourse, the Fuqaha have differed on the possibility for the wife to demand separation due to her husband deserting her and her sustaining harm as a result; there are two opinions in this regard:

- 1) The Hanafis⁶⁴, Shafiis⁶⁵ and the Malikis⁶⁶ in one opinion and Ahmad⁶⁷ in one

⁵⁶Al-Kassani, op.cit., Part 2, p. 331; Ibn Al-Humam, Fath Al-Qadir, Part 3, p.435.

⁵⁷Al-Hattab, op.cit., Part 4, p. 11.

⁵⁸Al-Shirbini, op.cit., Part 3, p. 251; Al-Ansari, Asna Al-Mataleb, Part 3, p.229.

⁵⁹IbnNujeim, op.cit., Part 3, p.235; IbnAbdeen, op.cit., Part 3, p.203.

⁶⁰Al-Muwaq, Al-TajW`alIkliil, Part 4, p. 108.

⁶¹Al-Mardawi, op.cit., Part 8, p.354; Al-Bahouti, op.cit., Part 5, p. 192.

⁶²Al-Bukhari, op.cit.Kitab Al-Nikah, Bab (your spouse has a right over you...) Part 5, p. 1995, Number (4903).

⁶³IbnMufleh, op.cit., Part 7, p. 198.

⁶⁴Al-Kassani, op.cit., Part 2, p. 331; IbnAbdeen, op.cit., Part 3, p. 202.

⁶⁵Al-Shirazi, Al-Muhadhab, Part 2, p. 66; Al-Ansari, op.cit., Part 3, p. 229.

narration are of the view that the wife is not entitled to demand separation due to the husband deserting her and refraining from having sexual intercourse with her.

The Hanafis elaborate by saying that sexual intercourse is religiously mandatory and is thus something beyond the judicial arena and enforcement, while sexual intercourse for one time is something that is within the purview of court rulings.

Those holding this opinion adduced several evidences including:

- 1- The thing that drives to sexual intercourse and pleasure is desire and love.⁶⁸
 - 2- Sexual intercourse is the right of the husband and in case he eschews it he is like one who rents a house and does not use the rented house.⁶⁹
 - 3- The one practicing *ilaa* is not subject to a period given that if separation is decided without an oath to eschew sexual intercourse then the *ilaa* is of no consequence.⁷⁰
- 2) In one statement the Hanafis,⁷¹Malikis⁷² and Hanbalis⁷³ are of the view that the wife has the right to demand separation due to harm sustained as a result of the husband not having intercourse with her, whether the husband is present or absent.

They based their opinion on several proofs including:

- 1- {either you retain her on reasonable terms or release her with kindness.}⁷⁴
- 2- {But do not take them back to hurt them,}⁷⁵

The mode of extrapolation from the two *Ayahs* is that retaining the wife necessitates not doing harm to her, and refraining from sexual intercourse entails doing harm which must be removed.

- 3) There is a narration from ‘Umar Ibn Al-Khattab that he asked his daughter Hafsa- God be pleased with her- what is the longest that a woman can await her husband?, whereupon she said: six months, whereupon ‘Umar did not dispatch his emissaries for more than six months.⁷⁶

In another narration he told his daughter Hafsa: “I am inquiring about a matter which has concerned me so reveal it to me; how long can a woman await her husband, and she looked down and was bashful, whereupon he said: Allah is not bashful of what is true, and she indicated three months or four, and then ‘Umar wrote that the armies should not be kept abroad on duty for more than four months.”⁷⁷

- 4) The absence of the husband from his wife causing harm which should be removed.⁷⁸
- 5) In case a man eschews sexual intercourse with his wife for four months or more then this gives her the right to demand separation, and this materializes by refraining from sexual intercourse by desertion and absence; because harm is caused in both cases.⁷⁹

Thus refraining from having intercourse entails the meaning of *ilaa*, which is to cause harm and to eschew sexual intercourse.⁸⁰

Moreover, whereas the rule of *ilaa* is established for one who swears this does not prevent analogical reasoning like other rules reached by analogy or *qiyas*.⁸¹

- 4- What must be done in case one swears to eschew it must be done in case he did not

⁶⁶Ibn Abdel Barr, *Al-Kafi*, Part 1, p. 282.

⁶⁷Ibn Qudamah, *op.cit.*, Part 7, p. 440; Al-Mardawi, *op.cit.*, Part 9, p. 170.

⁶⁸Al-Shirazi, *op.cit.*, Part 2, p. 66; Al-Ramli, *Ghayat Al-Bayan*, Part 1, p. 258.

⁶⁹Al-Ansari, *op.cit.*, Part 3, p. 229.

⁷⁰Ibn Qudamah, *op.cit.*, Part 7, p. 440.

⁷¹Al-Kassani, *op.cit.*, Part 2, p. 331; Ibn Abdeeen, *op.cit.*, Part 3, p. 203.

⁷²Malek, *Al-Mudawwana*, Part 4, p. 271; Dessouqi, *Hashiyat Al-Dessouqi*, Part 2, p. 431.

⁷³Ibn Qudamah, *op.cit.*, Part 7, p. 440; Al-Mardawi, *Al-Insaf*, Part 9, p. 169, 170.

⁷⁴ [Al-Baqara: 229]

⁷⁵ [Al-Baqara: 231]

⁷⁶Abdel Razzaq, *Musannaf Abdel Razzaq, Kitab Al-Talaq (Right of the woman over her husband.)* Part 7, p. 152 Number (12594); Al-Bayhaqi, *Sunan Al-Bayhaqi, Kitab Al-Siyar (Al-Imam La YajmaB`ilGhaza)*, Part 9, p. 29 Number (17628).

⁷⁷*Ibid*, Part 7, pp. 151-152, Number (12593).

⁷⁸Dessouqi, *Hashiyat Al-Dessouqi*, Part 2, p. 431.

⁷⁹Ibn Qudamah, *op.cit.*, Part 7, p. 440; Ibn Rushd, *op.cit.*, Part 2, p. 76.

⁸⁰Ibn Al-Arabi, *op.cit.*, Part 1, p. 244.

⁸¹Al-Bahouti, *op.cit.*, Part 5, p. 354.

swear such as expenditure on wife and other duties..⁸²

What is plausible in this matter is the position that the wife is entitled to demand separation in case her husband deserts her and does not have intercourse with her, because such is removal of harm to her; and because one cannot imagine the continuance of a stable matrimonial relationship in a situation of Hajr.

This opinion is grounded in analogy relative to the rule of Ilaa, where if a person swears not to have intercourse with his wife for four months and more, then the wife may resort to the judge to remove harm from her, for eschewal of intercourse is actualized in the case of Hajr as well as Ilaa.

As to Hajr by eschewing oral communication and bad cohabitation this involves harm to the wife and could lead to a state of divergence and dispute between the husband and wife, and this also confers on the wife the right to remove harm and to demand separation.

In this context it is necessary to point out that separation between the married couple due to Hajr must be preceded by admonishing the husband and giving him ample opportunity to rectify his situation with his wife.

It is necessary to state here that the Malikis and Hanbalis have set certain conditions as grounds for demanding separation. Thus the Malikis set as a condition harm justifying demand for separation where the wife had become fearful of committing adultery, rather than sexual desire resulting from the long absence of her husband.⁸³

As to the Hanbalis they set as a condition for the Hajr to be without an acceptable excuse, whereby if it is due to an excuse such as sickness, absence and so forth then the demand for separation would not be valid.⁸⁴

As to IbnAqeel the Hanbali he does not consider valid the claim of intending to cause harm by eschewing intercourse, where he finds possibility for demanding separation only as a result of the presence of harm.⁸⁵

In my opinion there is no need to set these two conditions because harm resulting from Hajr is

actualized, even if the woman did not reach the extent of fear of committing adultery.

As to the presence or absence of an acceptable excuse, it may be considered on the basis of prolonging the period of grace for one with an excuse, rather than prohibiting the demand for separation; because we must view with balance both the husband and wife, whereby if the wife sustains harm by remaining with her husband in such situation, and cannot endure staying with him, then she has the right to demand separation.

Topic III: Duration of the Hajr Justifying Demand for Separation and the Type of Separation.

The Fuqaha differentiated between the state of Hajr and the state of absence along with Hajr or desertion.

As for the state of Hajr the fuqaha have differed on the period conferring on the woman the right to demand separation, where the Malikis took the position in one of their sayings⁸⁶ and also the Hanbalis⁸⁷ that the period is four months by analogy to the period of Ilaa.

And in one statement by the Malikis they said that the separation is without a term. And in another saying, determining the period is within the discretionary power of the Qadi or judge.⁸⁸

As to the state of absence with desertion the Malikis have adopted the position that the period is one year, and in another position that it is two years, or three years.⁸⁹

According to the Hanbalis the period is six months⁹⁰ based on the narration concerning when Umar Bin Al-Khattab asked Hafsa about how long the wife can endure being away from her husband, and accordingly he would bring back his armies after six months.⁹¹

The position that I find more plausible is that the period is four months by analogy to the period of Ilaa; as for the state of absence it is one year, given

⁸²IbnQudamah, op.cit., Part 7, p.440.

⁸³Al-Dardir, Al-Sharh Al-Kabir, Part 2, p. 431; Aleesh, op.cit., Part 4, p. 205.

⁸⁴IbnQudamah, op.cit., Part 7, p. 440; Al-Bahouti, op.cit., Part 5, p. 354.

⁸⁵Al-Mardawi, op.cit., Part 9, p. 170.

⁸⁶Al-Muwaq, op.cit., Part 4, p. 108; Al-Dessouqi, op.cit., Part 2, p. 431.

⁸⁷Al-Mardawi, op.cit., Part 9, p. 169; Al-Bahouti, op.cit., Part 5, p. 354.

⁸⁸Ibn Abdel Barr, op.cit., Part 1, p. 282; Al-Dessouqi, op.cit., Part 2, p. 431.

⁸⁹Al-Dessouqi, op.cit., Part 2, p. 431; Aleesh, op.cit., Part 4, p. 205.

⁹⁰Al-Mardawi, op.cit., Part 8, p. 356.

⁹¹It has been previously authenticated.

that there could be an excuse for the absence of that husband.

As to Hajr, if it is by means of silence the Malikis⁹² and Hanbalis⁹³ hold the position that it would be possible to demand separation due to it without defining a time period after admonishing him.

As regards the type of separation due to Hajr and absence the religious scholars have differed:

According to the official position of the Malikis⁹⁴ and the Hanbalis⁹⁵ in one narration it is irrevocable divorce; because it is separation to remove harm at the behest of a ruler. And there is a statement by the Malikis⁹⁶ and the Hanbalis⁹⁷ in one narration it is revocable divorce; because the judge takes the place of the husband in effecting divorce. As to the official position of the Hanbalis they said that separation is not diminished by the times of divorce; because every separation at the behest of the judge is dissolution.⁹⁸

The Hanbalis in one narration stated that the ruler or judge has the choice of effecting divorce or dissolution.⁹⁹

The position that I find most plausible-and Allah knows best- separation is irrevocable divorce; because the judge admonishes the husband to mend his ways with his wife, and leaves it up to the husband to divorce and if he fails to mend his ways and refuses to divorce, then the qadi shall effectuate irrevocable divorce instead of the husband. We do not state here that the divorce is revocable; because the husband could return her and might repeat doing harm to her, and we do not say severance; because the husband after being admonished is not considered free of blame in case he insists on harming the wife, for effectuating the divorce means counting the number of divorces, and so if he return with a new contract to his wife then it shall be reckoned among the number of divorces, and this could prevent him from repeating the harm he commits.

⁹²Al-Kharashi, *Sharh Al-Kharashi*, Part 4, p. 93; Al-Dessouqi, *op.cit.*, Part 2, p. 431.

⁹³Al-Bahouti, *op.cit.*, Part 5, p. 354.

⁹⁴Al-Muwaq, *op.cit.*, Part 4, p. 25; Al-Dessouqi, *op.cit.*, Part 2, p. 364.

⁹⁵IbnMufleh, *op.cit.*, Part 8, p. 28.

⁹⁶Al-Nafrawi, *op.cit.*, Part 2, p. 47; Al-Dessouqi, *op.cit.*, Part 2, p. 364.

⁹⁷IbnMufleh, *op.cit.*, Part 8, p. 28; Al-Bahouti, *op.cit.* Part 5, p. 368.

⁹⁸IbnQudamah, *op.cit.*, Part 7, p. 147; Al-Rheibani, *op.cit.*, Part 5, p. 506.

⁹⁹IbnMufleh, *op.cit.*, Part 8, p. 28; Al-Bahouti, *op.cit.*, Part 5, p. 368.

And it is Allah who knows best.

Conclusion

Upon completion of this study with the grace of Allah, it would be possible to state several findings, foremost of which:

- 1- The desertion of the wife is considered among the lawful methods of disciplining which may take place after advising and preaching to the wife, such in case the wife disobeys her husband.
- 2- The scholars have several interpretations regarding the method of desertion, most prominently, abandoning the wedlock bed or eschewing sexual intercourse or oral communication with the wife or speaking harshly to her. The author favors the position that Hajr is suitable for being ascribed to its various meanings, whereby the husband may choose the method which is of impact and which helps in ending the disobedience of the wife in a manner not affecting the interests of the children.
- 3- The desertion of the wife should be period-specific and it is impermissible for it to last for numerous months or years; because Hajr has the aim of reforming the wife and ending her disobedience and in case such as abortive, then another method should be used to achieve the required aim.
- 4- In case the period of desertion exceeds the period that is religiously lawful, or desertion is adopted as a means to harm the wife, this confers on her the right to resort to the judiciary, so as to admonish the husband or to give him a period of time to mend his ways with his wife, and in case he continues the desertion, then the author favors for there to be separation.
- 5- The period of desertion enabling the wife to demand separation according to the author is four months in case the husband is living with the wife based on an analogy to Ilaa, and one year if he is absent, but if the desertion is by eschewing oral communication and mistreating the wife then the husband is not given a grace period, but shall be warned, and if he persists then there shall be immediate separation.
- 6- The type of separation resulting from the decision of the judge is revocable divorce, which is the position favored by the author.

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