

# The Jurisprudential Adaptation of Sham Divorce in the European Context

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## التكييف الفقهي للطلاق الصوري في السياق الأوروبي

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## ABSTRACT

This study examines the phenomenon of “sham divorce,” which has become increasingly common among Muslims living in European countries and has generated significant jurisprudential debate. The research aims to define the concept of sham divorce and its related terms, analyze its underlying causes within the European context, and assess the positions of contemporary Muslim jurists regarding its legal status. Based on these discussions, the study seeks to offer a coherent legal framework that can guide Muslims in Europe and provide them with informed jurisprudential advice.

Particular attention is given to the issue of divorces pronounced by non-Muslim judges in European civil courts, a matter that raises complex legal and religious questions. The study is structured into four sections: a conceptual definition of sham divorce; an examination of its causes and manifestations in Europe; a review of contemporary juristic opinions on its ruling; and the author’s reasoned position on the issue. Methodologically, the study adopts an analytical and comparative approach, consistent with established practices in comparative Islamic jurisprudence.

## KEYWORDS:

Sham Divorce; European Context; Non-Muslim Judge; European Courts; Jurisprudential Characterisation.

## المخلص:

تتناول هذه الدراسة ظاهرة "الطلاق الصوري" المنتشرة بين المسلمين المقيمين في الدول الأوروبية، والتي أثارت العديد من التساؤلات الفقهية. ويسعى البحث إلى تحديد مفهوم الطلاق الصوري والألفاظ المرادفة له، واستعراض أسبابه المتعددة في هذا السياق، وتقييم آراء الفقهاء المعاصرين في حكمه الشرعي. وفي ضوء ذلك، يهدف البحث إلى تقديم رؤية شرعية واضحة لهذه المسألة، ما يساهم في توجيه المسلمين المقيمين في أوروبا وتقديم الاستشارات الشرعية لهم في هذا الشأن، فالبحث يركز بشكل خاص على دراسة حكم الطلاق الصادر عن قاض غير مسلم في المحاكم الأوروبية.

وقد جاءت هذه المقالة لتسهم في معالجة هذه المسألة عبر أربعة مباحث: تناول المبحث الأول التعريف بالطلاق الصوري. أما المبحث الثاني، فخصص لدراسة أسبابه وصوره في السياق الأوروبي. وعرضت في المبحث الثالث أقوال الفقهاء المعاصرين في حكم الطلاق الصوري في السياق الأوروبي، وفي الأخير، خلص المبحث الرابع إلى الرأي الأنسب في الطلاق الصوري في السياق الأوروبي. وقد انتهج في البحث منهجاً تحليلياً ومقارناً؛ ملتزماً بالإجراءات البحثية المتبعة في الدراسات المقارنة.

## الكلمات المفتاحية:

الطلاق الصوري؛ السياق الأوروبي؛ القاضي غير المسلم؛ المحاكم الأوروبية؛ التكيف الفقهي.

## INTRODUCTION<sup>1</sup>

The family holds paramount importance in the construction of human society in general and Islamic society in particular. Islam emphasizes the establishment of a solid family foundation and a successful family life. The noble Sharia pays meticulous attention to the family, both in its creation and dissolution; it organized it through foundational and structural principles, and granted it special consideration, particularly through numerous legislative provisions that ensure its establishment upon Islamic concepts in thought, emotion, and as a way of life.

The pivotal role of the family in nurturing the individuals and addressing their material and emotional needs is conspicuous. It serves as the foundation of the good societal model and is the fundamental determinant of intellectual, political, and behavioural orientations within the broader social context. It is no exaggeration to assert that one of the positive opportunities available to Muslim minorities to introduce Europeans and the Western world to the beauty of Islam lies in presenting a successful model of a cohesive, dynamic family, committed to fulfilling its role in civilizational witnessing, which aligns with Allah (SWT)'s statement: ﴿And so We have made you "believers" an upright community so that you may be witnesses over humanity and that the Messenger may be a witness over you.﴾<sup>2</sup>

This role of the Muslim family becomes even more significant when living in the Western society, where Islamic concepts are absent from social life. In

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<sup>2</sup> Al-Baqarah: 143. Translator: The translation is taken from <https://quran.com/2?startingVerse=143>

such settings, the familial environment serves as the primary substitute for Islam's absence from the social sphere.

What prompts us to devote greater care and attention to the family is the widespread prevalence of familial problems and the disintegration of the family system in Western societies. Among the most notable manifestations of this in the European context is the phenomenon of "sham divorce", pursued for the purpose of obtaining certain immediate benefits. In light of this phenomenon, shaped by the prevailing conditions and governing systems in the European context, this study aims at clarifying the true nature of sham divorce and addressing the issues and questions it raises.

The central issue of this study revolves around the extent to which a sham divorce, which is obtained through a divorce decree issued by European courts and pronounced by a non-Muslim judge, is considered valid, particularly when the husband intends to maintain and continue the marital contract. This issue gives rise to several subsidiary questions: Are rulings based on purposes and the underlying meanings, or are they determined by wording and structures? Consequently, are the effects of a sham divorce enforceable, or the husband's verbal declaration of divorce shall be taken into consideration? Furthermore, is a sham divorce merely a dead letter, holding no validity in Islamic law? Does the European context, where the divorce decree is obtained from non-Islamic courts and pronounced by non-Muslim judges, influence the ruling? Finally, are the reasons underlying such divorces in the European context sufficient to render them permissible?

In this research, we adopt an analytical and comparative methodology. We presented the causes and motives behind sham divorce in the European context, outlined its forms, and then analysed its jurisprudential ruling by reviewing the opinions of Islamic jurists, bringing their evidence, and discussing their arguments. We traced the origins of their rulings back to the rulings of classical jurists and identified the most preponderant ruling after conducting a jurisprudential adaptation of the issue and reaching the motive for its practical application. Our study adheres to the standard procedures of comparative research, including documentation from the works of jurists while acknowledging their differences, attributing opinions and perspectives to their

references, as well as referencing Qur'anic verses and Prophetic Hadith from its reliable sources.

With regard to prior studies, we had previously provided a brief analysis of the jurisprudential ruling on sham divorce in our doctoral dissertation titled “*Contemporary Jurisprudential Issues of Muslims in Europe: Foundations and Applications*”<sup>1</sup>. However, we chose to dedicate a separate, detailed study to this topic due to its importance and sensitivity, the necessity of providing an in-depth clarification of its ruling given the frequent questions it generates, and the discovery of additional motives, causes, and forms that were not addressed during the preparation of the doctoral research.

We did not come across any academic research specifically addressing divorce within the European context. However, we did find studies that examined sham divorce in a general sense, such as:

First: Dr. Haila Al-Yabis’s study titled “*Sham Divorce: Its Reality and Ruling in Islamic Jurisprudence*”, a valuable work published by the Center of Excellence in Contemporary Jurisprudential Issues at Imam Muhammad bin Saud Islamic University (1437 AH / 2016). Although Dr. Al-Yabis highlighted the relevance of this topic to Muslim minorities, stating in her research’s significance: “Sham divorce is a contemporary issue that has emerged in Islamic societies in general and particularly among Muslim minorities in non-Muslim countries, necessitating prompt scholarly examination of its ruling”.<sup>2</sup> However, a thorough reading of her study reveals that it addresses only a single motive related to the reality of Muslims in the West, which is: “To obtain residency in a non-Muslim country that prohibits polygamy, one divorces their first wife in appearance only, in order to marry a foreign woman and thereby secure residency rights”.<sup>3</sup>

The study primarily focused on the ruling of sham divorce within the context of countries governed by a Muslim ruler, as evidenced by her statement: “The eighth evidence: initiating a sham divorce to circumvent regulations constitutes disobedience to the Muslim ruler, and disobedience to

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<sup>1</sup> It was published under the title: *Contemporary Jurisprudential Issues of Muslims in Europe: Foundations and Applications*, by Dar Abi Raqraq in Rabat, in the year 1439 AH – 2018 CE.

<sup>2</sup> Haila bint Abdulrahman Al-Yabis, *Sham Divorce: Its Reality and Ruling in Islamic Jurisprudence*, Center of Excellence for Research in Contemporary Fiqh Issues, 1437 AH – 2016 CE, p. 7.

<sup>3</sup> Ibid., p. 26.

the Muslim ruler is prohibited in Islamic law.”<sup>1</sup> Although she briefly addressed its ruling in non-Muslim countries, stating: “Falsely showing a divorce without intending it is considered deceit, fraud, and a circumvention of regulations, as well as disobedience to the ruler. All of these are prohibited in Islamic law, and the husband is held accountable for them, even in a non-Muslim country, as long as he resides there under its protection”<sup>2</sup>, she did not address the core issue. Specifically, she did not explore the fact that in European countries, divorces are issued by non-Islamic courts and by non-Muslim judges.

Second: Dr. Amir Sharibet's study titled “*Sham Divorce: For Personal Interests*,” published in *Al-Manhal Journal*, Volume 7, Issue 02, 2021, pp. 251–276.

Third: Dr. Tawfiq bin Ali bin Ahmed Al-Sharif's study titled “*Sham Divorce in Islamic Jurisprudence*,” published in Issue 63 of the *Journal of Islamic Studies and Academic Research*. This study merely presented the jurisprudential opinions on the ruling of sham divorce, linking them to classical jurists' views on the rulings of the jestful's divorce<sup>3</sup> and false acknowledgment of divorce. However, it only touched on sham divorce in the European context briefly under the section titled “*The Jurisprudential Harms of Sham Divorce*”. In this section, quoting Dr. Haila Al-Yabis, he mentioned the motives behind sham divorce as follows: “To obtain residency in a non-Muslim country that prohibits polygamy, one divorces their first wife in appearance only, in order to marry a foreign woman and thereby secure residency rights”.<sup>4</sup>

Fourth: The Study by Dr. Mohammed Mahmoud Hassan Mohammed, Titled “*Sham Divorce: A Contemporary Jurisprudential Analysis*” Published in the *Journal of the Faculty of Sharia and Law at Al-Azhar University, Assiut*, Issue 33, January 2021, part two. In the introduction, the author outlines his focus on specific cases of sham divorce such as divorce undertaken to obtain a pension or to evade military service. These cases, however, bear no relevance to the experiences of Muslims in the European context.

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<sup>1</sup> Ibid., p. 37.

<sup>2</sup> Ibid., p. 59.

<sup>3</sup> [That who divorces his wife, verbally, in jest.]

<sup>4</sup> Amir Sharibet, *Sham Divorce for Personal Interests*, Al-Manhal Journal, vol. 7, no. 2, November 2021. p. 265.

What sets this study apart from previous research is its analytical approach to sham divorce within the European context. In this study we explore the jurisprudential adaptation of sham divorce, its ruling in Sharia, and its evaluation through the framework of *maqāṣid sharī'a* (The Objectives of Islamic law). Sham divorce is granted by non-Muslim judges in countries where religion does not inform legal systems, as these nations have historically chosen to separate religion from the state, law-making, and judiciary processes. The study also sheds light on the distinctive motives and reasons for sham divorce in Europe, which diverge from those prevalent in Islamic countries.

To achieve the aforementioned objectives, the research is structured into four sections. The first section examines the concept of sham divorce, while the second focuses on its underlying motives and manifestations within the European context. The third section analyses the perspectives of contemporary jurists regarding the ruling on sham divorce in the European context, and the fourth evaluates the most appropriate opinion for application in this context. The study concludes with a conclusion that encompasses the key findings and recommendations.

## THE CONCEPT OF SHAM DIVORCE

### Definition of Sham Divorce in Terms of Its Components

**First:** The Definition of “*Talaq*” (Divorce) Linguistically and Terminologically.

In linguistic terms, “*Talaq*” (Divorce) refers to liberation, release, the removal of restraint, and discontinuance.<sup>1</sup> The “*Talaq*” of a woman denotes the dissolution of her marital bond to her husband<sup>2</sup>. Terminologically, *Talaq*, as in the norms of Islamic jurists, is defined as “the termination of the marital bond either immediately or eventually through a specific utterance.”<sup>3</sup> The Kuwaiti Encyclopedia similarly defines it as “the termination of the marital bond either immediately or eventually through a specific utterance or its equivalent”<sup>4</sup>.

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<sup>1</sup> Zain al-Din al-Razi, *Mukhtar al-Sihah*, entry (T-L-Q), critically edited by Yusuf al-Sheikh Muhammad, Al-Maktabah Al-Asriyah, 5th edition, Beirut – Sidon, 1420 AH – 1999 CE.

<sup>2</sup> Ibn Manzur, *Lisan al-Arab*, entry (T-L-Q), Dar Sader, 3rd edition, Beirut, 1414 AH.

<sup>3</sup> Ibn Abidin, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, Mustafa al-Babi al-Halabi & Sons Library, 2nd edition, 1386 AH – 1999 CE, vol. 3, pp. 226–227.

<sup>4</sup> *The Kuwaiti Encyclopedia*, Ministry of Awqaf and Islamic Affairs edition, Kuwait, vol. 5, p. 29.

**Second:** The Definition of *al-Ṣūrī* (Sham) Linguistically and Terminologically.

The term *al-Ṣūrī* (sham) “is derived from the word *ṣūra* (image), which signifies imagery”<sup>1</sup>. Muhammad Rawwas explains, “To image something is to give it a shape or representation; thus, *al-Ṣūrī* relates to the concept of image”<sup>2</sup>.

Terminologically, a sham contract is defined as “a contract that lacks legal existence despite its apparent form and presentation”<sup>3</sup>. Muhammad Rawwas Qal‘aji, in his Dictionary of Jurists, defines it as “a deliberate display of one action while concealing another, with the intention of executing the concealed action”<sup>4</sup>.

**Third:** *al-ṭalāq al-ṣūrī* (Sham Divorce) as a Compound Term.

The North American Council of Islamic jurists defines *al-ṭalāq al-ṣūrī* (sham divorce) as “a divorce executed by some individuals to achieve specific interests, such as marrying a second wife in a country that prohibits polygamy or securing certain legal benefits”<sup>5</sup>. Dr. Haila Al-Yabis defines it as “the apparent dissolution of a marital bond, or a part of it, while secretly maintaining it”<sup>6</sup>.

The researcher defines sham divorce as “an agreement between spouses to formally dissolve the marital bond for administrative purposes, with the intention of achieving personal benefits, such as worldly gains or legal advantages, by circumventing governing systems and regulations, while secretly intending to maintain the marital relationship”.

This phenomenon is referred to by various terms, including: formal divorce, paper divorce, or divorce on paper, interest-based divorce, administrative divorce, civil divorce, and deceptive divorce<sup>7</sup>.

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<sup>1</sup> Al-Rafi‘i, by Al-Allamah Al-Fayoumi, *Al-Misbah Al-Munir fi Gharib Al-Sharh Al-Kabir*, Al-Maktabah Al-Asriyah, 2nd edition, 2000, p. 350.

<sup>2</sup> Muhammad Rawwas Qal‘aji, *Mu‘jam Lughat al-Fuqaha*, edited by Hamid Sadiq Qunaybi, Dar al-Nafa‘is for Printing, Publishing, and Distribution, 2nd edition, entry (S-W-R).

<sup>3</sup> *Mu‘jam al-Lugha al-‘Arabiyya al-Mu‘asira*, vol. 2, p. 1334.

<sup>4</sup> Muhammad Qal‘aji, *Mu‘jam Lughat al-Fuqaha*, entry (S-W-R).

<sup>5</sup> The Assembly of Fiqh Scholars of Sharia in America, held in Copenhagen in cooperation with the Islamic League, from 4–7 Jumada al-Awwal 1425 AH, corresponding to June 22–25, 2004 CE.

<sup>6</sup> Haila bint Abdul Rahman Al-Yabis, *Sham Divorce: Its Reality and Ruling in Islamic Jurisprudence*, Center of Research Excellence in Contemporary Fiqh Issues, 1437 AH – 2016 CE, p. 17.

<sup>7</sup> Amir Sharibet, *Sham Divorce: Achieving Personal Interests*, p. 4. *Sham Divorce: Its Reality and Ruling in Islamic Jurisprudence*, p. 16.



## SHAM DIVORCE IN THE EUROPEAN CONTEXT – ITS CAUSES AND MANIFESTATIONS

### Causes of Sham Divorce in the European Context

Based on the previously outlined definition of sham divorce, it becomes evident that the primary motivation driving some Muslims in European countries to engage in this practice is the desire to circumvent legal systems and regulations for personal gain, such as securing a specific benefit or avoiding a potential detriment. The process entails obtaining a divorce from the official authorities in a sham manner while maintaining the actual marital relationship, and those involved believe they can simultaneously achieve two advantages at the same time. The main reasons for resorting to this form of divorce can be summarized as follows:

First: The Desire to Obtain Legal Benefits: acquiring citizenship or residency.

Second: Financial Gains: In the European context, this may involve obtaining social assistance, evading taxes, or receiving monetary compensation for a sham marriage.

Third: The Pursuit of Personal Interests: the desire to practice polygamy, which is prohibited under European law.

Below is a detailed analysis of the causes and motives observed through inquiries received at Islamic centres across Europe:

First: Facilitating Polygamy Despite Legal Restrictions in Europe; in this case, a man may pursue a sham divorce from his first wife, whether residing in Europe or their country of origin, to provide evidence of divorce. This allows him to marry a second wife and later reinstate the first wife in his care.

Second: A man who is already married to two wives in his country of origin may seek to bring them both to Europe under family reunification policies. He may initially apply for one wife's residency, and once she secures official documents, he divorces her in a sham manner to enable the second wife to join him.

Third: Gaining Residency or Citizenship; A man married to a woman who lacks European citizenship might divorce her in a sham manner to facilitate permanent residency or citizenship. He may subsequently marry a woman who holds European citizenship to expedite the process.

Fourth: One might seek a sham divorce to obtain financial benefits provided exclusively to divorced individuals by European social welfare institutions.<sup>1</sup>

Fifth: This practice is often pursued by business owners and professionals with high incomes for tax evasion purposes. By divorcing their spouses on paper, they reduce their tax burden and reclaim tax benefits from tax authorities because of the alimony paid to their officially divorced spouse.

Sixth: Some individuals use sham divorce to offer marriage contracts to women seeking residency or citizenship in exchange for financial compensation. Unfortunately, this has become a profitable trade for some, so a married couple divorce on paper and turn sham marriages into a lucrative trade.

Seventh: Those who have entered the European lands as refugees may resort to sham divorce to ensure that each partner can independently qualify for additional financial support and social welfare benefits.

Eighth: In cases where a husband secures a residence permit but cannot apply for his wife's reunion due to low income, for example, a sham divorce might be arranged. The wife then marries another individual with citizenship who meets the financial requirements, expediting her entry into Europe. Once reunited, the wife resumes her relationship with her original husband.

## **Manifestations of Sham Divorce in the European Context**

### ***First Manifestation***

Sham divorce occurs when the spouses complete all the legal procedures for divorce, including filing a petition in court, signing it, and appointing a lawyer to handle the necessary formalities on their behalf after the husband verbally pronounces the divorce. However, the husband has no intention of dissolving the marriage and is determined to maintain the marital relationship.

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<sup>1</sup> Yahya Abu Zakaria, *The Phenomenon of False Divorce in Sweden!*, on elaph.com. I say: and it is the prevailing practice in most or all European countries, according to my personal observations.

### ***Second Manifestation***

It occurs when the spouses complete all the legal procedures for divorce, including filing a petition in court, signing it, and appointing a lawyer to handle the necessary formalities on their behalf. However, in this case, the husband does not verbally pronounce the divorce, nor does he intend to dissolve the marriage, as he is determined to preserve the marital relationship.<sup>1</sup>

### ***Third Manifestation***

In this case, the spouses initially register their marriage in an Islamic country, then proceed to conduct another civil marriage contract in a European country. Subsequently, they carry out all the necessary procedures to obtain a civil divorce in the European country while keeping the marriage contract issued in the Islamic country intact. They refrain from validating the civil divorce or registering it in the Islamic country. This manifestation includes the following scenarios:

- Scenario One: The marriage contract is first conducted in an Islamic country and later officially registered in a European municipality.
- Scenario Two: The civil marriage is first conducted in a European country and then validated in the Islamic country.
- Scenario Three: The marriage is conducted in an Islamic country without validation in Europe, or it is conducted in Europe without authentication in the Islamic country.

### ***Fourth Manifestation***

Muslim spouses who arrived in Europe under asylum claims may falsely assert that they were married in an Islamic country and later divorced there. However, they claim that they were unable to obtain official divorce documentation due to the war conditions in their home country.

## **ANALYSIS OF CONTEMPORARY JURISTS OPINIONS ON THE RULING OF SHAM DIVORCE IN THE EUROPEAN CONTEXT**

Contemporary scholars have differed on the ruling of sham divorce, falling into five main views:

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<sup>1</sup> Dr. Haila mentioned both manifestations—the first and the second as well—in her study, *The Ruling on Sham Divorce in Islamic Jurisprudence*, p. 29.

## First Opinion

Non-Occurrence of Divorce. This view holds that divorces issued by European courts on cases related to personal status are not valid in Islamic law. Proponents argue for the necessity of obligating Muslim communities to “fulfil the role of arbitration and reconciliation while establishing a precise system adhering to Islamic rulings”<sup>1</sup>. They base their opinion on several evidences, including the principle: “What is attainable should not be forsaken because of what is unattainable”<sup>2</sup>. This opinion was adopted by researcher Khalid bin Abdulaziz bin Awad Al-Shahri in his study “*The Recourse of Muslims to Non-Islamic Laws in Personal Status Matters*”<sup>3</sup>.

## Critique of This Opinion

The following points challenge this view:

- **First:** divorce is typically within the authority of the husband; however, he has the right to delegate this authority to his wife or another party, according to the majority opinion of Islamic scholars<sup>4</sup>. Furthermore, the person to whom this authority is delegated is not required to be a Muslim.<sup>5</sup>
- **Second:** Based on the Hanbali school of thought, any condition that is not explicitly invalidated by textual evidence (from Quran and Sunnah) is considered valid and binding, especially if it is associated with the marriage contract. This view is supported by the prophetic hadith: “The conditions that are most deserving of fulfilment, are those by means of which the private parts become allowed to you.”<sup>6</sup> By agreeing to conduct their

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<sup>1</sup> *International Adjudication and Arbitration in Islamic Sharia*, The Scientific Journal of the European Council for Fatwa and Research, Issue 3, p. 136.

<sup>2</sup> [refers to the principle in Islamic jurisprudence that if it is not possible to fulfill a command in its complete and ideal form as prescribed by the Sharia due to an inability to do so, but it is possible to fulfill part of it -provided that it is divisible- then one is obligated to perform what is within their capacity. The entirety should not be abandoned merely because part of it is difficult to achieve.]

<sup>3</sup> Khalid bin Abdulaziz bin Awad Al-Shahri, *The Recourse of Muslims to Non-Islamic Laws in Personal Status Matters*, Master's thesis in Islamic Jurisprudence, pp. 63–64, 151.

<sup>4</sup> Al-Fatawa Al-Hindiyya, 1/391. Alish, Manh al-Jalil, 4/158. Ibn Hajar Al-Haytami, Tuhfat al-Muhtaj, 8/23. Al-Buhuti, Sharh Muntaha al-Iradat, 3/91.

<sup>5</sup> Fayçal Mawlawi, *The Ruling on Divorce Issued by a Non-Muslim Judge*, The Scientific Journal of the European Council for Fatwa and Research, Issue 1, pp. 75–88.

<sup>6</sup> Reported by Al-Bukhari, Book of Conditions, Chapter on Conditions Regarding the Dowry in the Marriage Contract, Hadith No. 2721. Translator: The translation is taken from <https://sunnah.com/nasai:3281>

marriage in accordance with European laws, the spouses are effectively committing to the conditions of these laws. The provisions of such laws, therefore, function as conditions appended to the marriage contract and are subject to the rules of contractual conditions. Consequently, the Hanbali position, being one of the recognized schools of thought and the most facilitative for Muslims in this context, is preferred.<sup>1</sup>

- **Third:** The Principle of Preventing Harm. This principle is a key argument for the opinion that favours accepting the rulings of non-Muslim judges regarding divorce. Sheikh Faisal Mawlawi states: “Enforcing judicial rulings, even if issued by a non-Islamic authority, is permissible when it serves the purpose of attaining benefits and avoiding harm...”<sup>2</sup>.

## Second Opinion

This view holds that divorce does not take effect unless the husband explicitly pronounces the words of divorce. Merely signing the court documents or accepting the court’s ruling is insufficient. Scholars supporting this opinion include Dr. Mohammed Al-Kadi Al-Amrani<sup>3</sup>, Sheikh Muhammad Nasir al-Din Al-Albani<sup>4</sup>, and Sheikh Suleiman Al-Asqah<sup>5</sup>, among others<sup>6</sup>. Their reasoning is based on the condition that the husband’s explicit verbal pronouncement is required for a valid divorce, which is absent in such cases<sup>7</sup>.

They further draw an analogy between sham divorce, in case it is explicitly pronounced by the husband, and the jestful’s divorce, citing the hadith of the Prophet ﷺ: “There are three things which, whether undertaken seriously or in

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Reported by Muslim, Book of Marriage, Chapter on Fulfilling Conditions in Marriage, with the wording: "The most deserving of conditions to be fulfilled are those by which you make intimacy lawful." Hadith No. 1418.

<sup>1</sup> Fayçal Mawlawi, *The Ruling on Divorce Issued by a Non-Muslim Judge*, Issue 1, pp. 82–86.

<sup>2</sup> Ibid., p. 88.

<sup>3</sup> Mohammed Al-Kadi Al-Amrani, *Fiqh of the Muslim Family in Migration*, Dar Al-Kutub Al-Ilmiyah, Lebanon, 1st ed., 1422 AH – 2001 CE, vol. 2, pp. 196–198.

<sup>4</sup> Transcription of the Al-Huda wa Al-Noor Series, Tape No. 624, on the website of the late Sheikh: [www.alalbany.me](http://www.alalbany.me).

<sup>5</sup> His Fatwa No. (24,886), titled: *Sham Divorce* Issued, dated: 11/11/1436 AH, on the website: [www.almoslim.net/node](http://www.almoslim.net/node).

<sup>6</sup> Fatwa No. (43626), Fatwa No. (152637), Fatwa No. (8656), and the following fatwas: (28042/8632/15814), on the website: [fatwa.islamweb.net](http://fatwa.islamweb.net). See also: the Islam Today website.

<sup>7</sup> This is explicitly stated in Fatwa No. (43626) and Fatwas (28042/8632/15814) on the website: [fatwa.islamweb.net](http://fatwa.islamweb.net).

jest, are treated as serious: marriage, divorce and taking back a wife after a divorce which is not final”<sup>1</sup>.

Basis for Their Argument: The Prophet ﷺ ruled that divorce uttered in jest takes effect, and sham divorce resembles the jestful’s divorce in the absence of a genuine intent behind the pronouncement, the jestful’s divorce is valid though he means the utterance without the ruling.

### Critique of This Opinion

The claim that divorce does not occur in the absence of verbal pronouncement is not accepted. Scholars have differed on the ruling of divorce initiated through written statements (as will be detailed in the third opinion). In reality, spouses often explicitly confirm their intent to divorce during interactions with lawyers and in court sessions before the judge when the ruling is pronounced. This practice will be further elaborated in the third opinion and addressed in detail in the final subsection of this study.

### The Third Opinion

According to this opinion, if divorce is issued in writing without verbal pronouncement, it is not considered valid unless accompanied by the intent to divorce. This aligns with the Maliki school, as stated by Khalil: “[Divorce is valid] through writing if intended”<sup>2</sup>. This view is supported by Dr. Salah Al-Sawy<sup>3</sup> and has been adopted by imams of mosques along the western coast of the United States<sup>4</sup>. Their reasoning is that when a husband signs a sham divorce document in court, it falls under the category of written divorce, which is not explicit and therefore requires intention to be valid<sup>5</sup>.

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<sup>1</sup> Ibn Majah, *Sunan*, Book of Divorce, Chapter on Irrevocable Divorce, Hadith 1603.

Abu Dawud, *Sunan*, Book of Divorce, Chapter on One Who Divorces, Marries, or Takes Back His Wife in Jest, Hadith 2039.

Al-Tirmidhi, *Sunan*, Book of Divorce, Chapter on Divorce in Jest, Hadith 2194.

<sup>2</sup> Khalil ibn Ishaq, *Mukhtasar Khalil*, ed. Ahmad Jad, 1st ed., Dar al-Hadith, Cairo, Egypt, (1426 AH – 2005), p. 117.

<sup>3</sup> His Fatwas No. (2308), titled *Sham Divorce in American Courts*, on his official website: el-wasat.com.

<sup>4</sup> Also in the text of the recommendations of the First Training Session for Mosque Imams on the West Coast of the United States, titled *Contemporary Family Issues for Muslims in American Society*, held in Sacramento, California, on 26–28 Safar 1425 AH (April 16–18, 2004), on the official website of Dr. Yusuf al-Shubayli.

<sup>5</sup> His Fatwa No. (2308), titled *Sham Divorce in American Courts*, on the official website: el-wasat.com. And Fatwa No. (152637), issued on Thursday, 18 Rabi‘ al-Thani 1432 AH (March 24, 2011), on IslamWeb: fatwa.islamweb.net.

## Critique of This Opinion

The response to this argument is that the issue under discussion differs from the original matter to which it is being compared. The original dispute among scholars pertains to cases where a man has not verbally declared divorce, but it appears in his handwriting. Some Islamic jurists hold that a clearly written statement of divorce—one that remains legible after being written—is as valid as verbal pronouncement; and they differ on whether or not the genuine intention is a condition. This view is held by Ahmad, a narration from *Al-Shafi'i*, as well as by Al-Nakha'i, Al-Sha'bi, Al-Zuhri, Al-Hakam, and the Hanafis regarding explicit writing<sup>1</sup>. They assert that divorce through clear writing occurs just as it does through speech, with or without intention, since writing is one of the two types of discourse. *The Malikis* and *Hanafis*, however, stipulate that unclear writing requires intention<sup>2</sup>.

## The Fourth Opinion

This opinion holds that sham divorce is valid and counts toward the number of divorces judicially but not religiously. It is based on the view of the majority of scholars, including the Hanafis, Malikis, Shafi'is, and a view from the Hanbalis regarding divorce falsely admitted by the husband, that it is enforced in judicial rulings not in religion<sup>3</sup>. This opinion is endorsed by the Assembly of Muslim Jurists of America (AMJA). In its final statement from the second conference, AMJA stated: "If divorce is recorded in writing without verbalization, it is considered valid in judicial rulings because writing is a

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<sup>1</sup> Al-Mawardi, *Al-Hawi al-Kabir fi Fiqh Madhhab al-Shafi'i*, ed. Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud, 1st ed., Dar al-Kutub al-Ilmiyah, Lebanon – Beirut, 1419 AH – 1997, vol. 10, p. 167.

*Al-Insaf*, vol. 8, p. 472.

*Al-Mughni*, vol. 7, p. 486.

Jamal al-Din al-Rimi, *Al-Ma'ani al-Badi'ah fi Ma'rifat Ikhtilaf al-Sharia*, vol. 2, p. 253.

Ala al-Din al-Kasani, *Bada'i al-Sana'i*, 2nd ed., Dar al-Kutub al-Ilmiyah, Beirut, 1406 AH.

<sup>2</sup> *Bada'i al-Sana'i*, vol. 3, p. 100.

*Minah al-Jalil*, vol. 1, p. 486.

<sup>3</sup> Ibn al-Humam, *Fath al-Qadir*, Dar al-Fikr, Lebanon – Beirut, vol. 4, p. 7.

Muhammad ibn Ahmad ibn Muhammad Alish, *Fath al-Ali al-Malik fi al-Fatwa ala Madhhab Malik*, Abu 'Abd Allah al-Maliki, Dar al-Ma'rifah, vol. 3, p. 294.

Al-Juwayni, *Nihayat al-Matlab fi Dirayat al-Madhhab*, vol. 14, p. 157.

*Al-Mughni*, vol. 10, p. 378.

primary means of evidence and documentation in contemporary reality. However, from a religious standpoint, it is only valid if accompanied by intention, according to the preferred scholarly view”<sup>1</sup>.

A key piece of evidence to their view is the hadith of the Prophet ﷺ: “I am only a human being and litigants with cases of disputes come to me, and maybe one of them presents his case eloquently in a more convincing and impressive way than the other, and I give my verdict in his favor thinking he is truthful. So if I give a Muslim's right to another (by mistake), then that (property) is a piece of Fire, which is up to him to take it or leave it”<sup>2</sup>.

The reasoning behind this evidence is that judicial rulings are based on apparent evidence and proof, the judgment, then, follows the strongest evidence without consideration of hidden intentions. However, this does not render the religious status of permissible acts as forbidden or vice versa.

### **Critique of the View That Sham Divorce Is Judicially Binding but Not Religiously**

A rebuttal to this opinion is that individuals who officially sign divorce documents are often required to affirm the divorce verbally in multiple settings, such as tax offices and municipal registries and others. Whether they do so through direct statements or in response to official inquiries, the divorce is enforced both in outward legal terms and internally, as an explicit verbal declaration of divorce is binding regardless of intent.

### **The Fifth Opinion**

This perspective maintains that sham divorce is binding in terms of the number of divorces both judicially and religiously, regardless of the reason behind it or the form it takes. Once a court issues a divorce ruling, it is legally effective regardless of the couple's true intentions. This view is derived from the Hanbali

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<sup>1</sup> Resolutions and Recommendations of the Conference of the Academy, held in Copenhagen, Denmark, in collaboration with the Islamic League, from 4–7 Jumada al-Awwal 1425 AH (June 22–25, 2004), pp. 67–68.

<sup>2</sup> *Sahih al-Bukhari*, Kitab al-Hiyal, Chapter on If a Slave is Seized and It Is Claimed That She Died, and the Value of the Deceased Girl Is Ordered, Then She Is Found Alive, She Belongs to Her Owner, and the Value Is Refunded, but the Value Is Not Considered as Her Price, Explanation of Hadith No. 6967. Translator: The translation is taken from <https://sunnah.com/bukhari:7185>



position on falsely admitting to divorce. The book *Al-Furu'* states: "If a man is asked, 'Did you divorce your wife?' and he replies, 'Yes,' or if he is asked, 'Do you have a wife?' and he responds, 'I have divorced her,' even if he intends to lie, the divorce is nonetheless valid"<sup>1</sup>. This opinion is supported by Dr. Ahmad Hajji al-Kurdi<sup>2</sup> and Dr. Shawqi Allam, the Grand Mufti of Egypt<sup>3</sup>.

The scholars who support this view based their argument on a group of evidences:

First, sham divorce is a form of tampering with God's sacred boundaries, which is explicitly forbidden in the Quran: {Do not take Allah's revelations lightly}<sup>4</sup>

Allah Almighty has forbidden tampering with and mocking His rulings. The marriage contract is a covenant and a solemn contract, so it is not permissible for anyone to make it a means for selfish desires<sup>5</sup>. The pronouncement of a sham divorce, both in appearance and in reality, preserves the sanctity of this contract and protects it from manipulation and tampering.<sup>6</sup>

Second, "fundamentally, speech must be interpreted according to its apparent meaning, especially in forbidden Sharia contracts. If a husband declares divorce -verbally or in writing- it is binding regardless of his internal intent"<sup>7</sup>.

Analogy can be drawn to *tahlll* marriage<sup>8</sup> in terms of the misuse of divorce for purposes other than those for which it was legislated. Just as the *muhallil*<sup>9</sup> is treated contrary to his intention, "so too is the case with one who divorces a sham divorce. His divorce, which he officially documents and acknowledges as having taken place -while not intending thereby to render the marital relationship dissolved but rather to ensure its continuity-is deemed valid and

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<sup>1</sup> *Al-Mughni*, vol. 7, p. 306.

<sup>2</sup> Fatwa No. (14970), and Fatwa No. (62396), issued on April 23, 2013, on the website: [www.islamic-fatwa.com](http://www.islamic-fatwa.com).

<sup>3</sup> See the website Masrawy: <https://www.masrawy.com/islameyat/>.

<sup>4</sup> Al-Baqarah: 231. Translator: The translation is taken from <https://quran.com/2?startingVerse=231>

<sup>5</sup> Fatwa by Hussam al-Din Afanah, without reference, cited from the website: [islampart.com](http://islampart.com).

<sup>6</sup> Cited from "*Sham Divorce: Its Reality and Ruling in Islamic Jurisprudence*", p. 57.

<sup>7</sup> Ibid., with modifications, p. 60.

<sup>8</sup> [Tahleel marriage refers to the practice in which a woman, following a triple talaq divorce from her husband, enters into a new marriage with another man, consummates the union, and subsequently divorces, enabling her to remarry her former husband.]

<sup>9</sup> [The facilitator of tahleel marriage, that who marries the three-times divorced woman and divorces her so that she can remarry her ex-husband.]

binding. This parallel arises from the fact that both cases involve the formalization of a legal contract (In Sharia) with the deliberate intent of achieving the opposite of its intended legal purpose”<sup>1</sup>.

Thirdly: the assignment of legal rulings to their causes is a matter determined by the Lawgiver (Allah Almighty), and it is not for an individual to engage in a cause that necessitates a legal ruling while intending to evade its consequences. Thus, if a husband acknowledges the cause, he is bound by its ruling and subject to its legal effects<sup>2</sup>.

Fourthly: a fortiori analogy can be drawn with the ruling on *talji'ah* (coercion or pretense) in marriage and divorce<sup>3</sup>. According to Muslim jurists, its scenario occurs when two individuals agree to enact a contract that they do not genuinely intend but are coerced into due to fear of an oppressor or similar circumstances. This concept is discussed by the Hanafis and Hanbalis in the context of marriage, and by the Malikis in the context of acknowledging a marriage. The Hanafi jurists state: “If a man says to a woman that he intends to testify before witnesses that he has married her for one thousand dirhams as a dowry in a null and coercive manner *talji'ah*, and the woman agrees to do so in this manner in the presence of witnesses, and then the man formally testifies that he has married her, and the woman acknowledges this, then the marriage is valid and binding upon them. The prior testimony clarifies that their intent in this contract was jest, not seriousness”<sup>4</sup>. Similarly, the Malikis state: “If a woman says to her husband: 'Testify that you have divorced me three times, even though it is not real,' and he does so, then the divorce is binding upon him. This is because marriage, like divorce and manumission, is inherently

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<sup>1</sup> Ibid., pp. 59–60.

<sup>2</sup> Ibid., p. 59.

<sup>3</sup> Al-Talji'ah in language: AlJa'ahu ila Kada wa Laj'ahu if he forced him and coerced him. Al-Talji'ah means compelling you to do something whose inner meaning is contrary to its apparent meaning. Al-Talji'ah is coercion... such as bearing witness to something whose apparent meaning contradicts its inner meaning. See: Burhan al-Din al-Khawarizmi al-Maturidi, *Al-Mughrib fi Tartib al-Mu'rib*, Chapter on Al-Lam with Al-Jim (L-J-A), Dar al-Kitab al-Arabi, *Lisan al-Arab*, Al-Hamzah, Section on Al-Lam, Entry (L-J-A).

<sup>4</sup> Al-Sarakhsi, *Al-Mabsut*, Dar al-Ma'arif, Beirut, 1414 AH – 1993, vol. 18, p. 123.

serious”<sup>1</sup>. The Ḥanbalis further affirm: “If one enters into a marriage contract in jest or as *talji’ah*, it is nevertheless valid”<sup>2</sup>.

Fifthly: The enforcement of sham divorce serves to uphold rulings<sup>3</sup> and prevent frivolous manipulation. Rejecting the validity of such divorces -despite the existence of official documents proving their occurrence- leads to significant legal and social harms, such as: preventing inheritance between the spouses, the possibility of the woman officially marrying another man, and the psychological distress experienced by both parties. Additionally, the prevalence of such deceptive practices among Muslims in non-Muslim societies tarnishes the image of Islam. It fosters misconceptions about Islam and may serve as a barrier to faith for non-Muslims<sup>4</sup>. In this regard, the Quran warns: {Our Lord! Do not subject us to the persecution of the disbelievers. Forgive us, our Lord! You ‘alone’ are truly the Almighty, All-Wise. }<sup>5</sup>

Sixthly: Circumventing legal systems and regulations in non-Muslim countries contradicts the obligation to uphold covenants and agreements. Faithfulness to such commitments is more virtuous, fitting, and in harmony with Islamic principles. European nations -as attested by those who have resided in them- generally strive for justice in their judicial systems, ensuring the enforcement of rights regardless of nationality, religion, ethnicity, or skin colour. The most accurate characterization of these countries would be as “lands of justice and rights” rather than merely “lands of security” or “lands of pledge” rather than “lands of war”.

## THE MOST APPROPRIATE OPINION ON SHAM DIVORCE IN THE EUROPEAN CONTEXT

### The Ruling on Resorting to European Courts in Family Matters

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<sup>1</sup> See Ibn Abi Zayd al-Qayrawani, *Al-Nawadir wa al-Ziyadat ala ma fi al-Mudawwana min Ghayriha min al-Ummahat*, ed. Abd al-Fattah Muhammad al-Halu and others, Dar al-Gharb al-Islami, 1st ed., (1999), vol. 9, p. 231.

<sup>2</sup> Ibn Qudamah al-Maqdisi, *Al-Kafi fi Fiqh Imam Ahmad*, Dar al-Kutub al-Ilmiyah, vol. 3, p. 21.

<sup>3</sup> Haila al-Yabis, *Sham Divorce: Its Reality and Ruling in Islamic Jurisprudence*, p. 61.

<sup>4</sup> Ibid., with modifications, p. 61. See: Resolutions of the Fifth Session in the Book of Resolutions, pp. 18–49. And Resolution: 15(5/3).

<sup>5</sup> Al-Mumtahanah: 5. Translator: The translation is taken from <https://quran.com/60?startingVerse=5>

Contemporary scholars have expressed divergent views on the permissibility of referring family matters to European courts. These views can be summarized as follows:

### **The First Opinion**

This view holds that it is absolutely permissible to resort to a non-Muslim judge, whether the case pertains to personal status matters or otherwise. This position was affirmed by the European Council for Fatwa and Research during its fifth session, which took place from 4<sup>th</sup> to 7<sup>th</sup> May 2000, in decision 3/5. It was also endorsed by the Islamic Fiqh Academy in its ninth conference (April 1 to 6, 1995 AD/ 1 to 6 Dhul Qi'dah 1415 AH) held in the United Arab Emirates (decision 95/8/D.9).

They based their ruling on several key arguments, including:

- The principle of preventing harm and securing benefits, arguing that refusing to resort to European courts may lead to greater harm.
- The understanding that ruling by what Allah Almighty has revealed is conditional upon two factors: choice and ability. As Imam al-Izz ibn Abd al-Salam states: “If one is assigned to perform an act of obedience but is capable of fulfilling only part of it while being incapable of the rest, he must fulfill what he is capable of, and he is excused from what he cannot do... This is also the view of the Zahiri school”<sup>1</sup>.

### **The Second Opinion**

This position asserts that European court rulings should not be recognized in personal status cases specifically. Instead, the Muslim community should “assume responsibility for arbitration and reconciliation and establish a well-structured system that adheres to Islamic law”<sup>2</sup>. Proponents of this view cite numerous evidences and principles, including: The principle: “What is attainable should not be forsaken because of what is unattainable”. This

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<sup>1</sup> Al-Izz ibn Abd al-Salam, *Qawa'id al-Ahkam fi Masalih al-Anam*, vol. 2, pp. 6–5.

<sup>2</sup> *International Arbitration and Judicial Settlement in Islamic Sharia*, The Scientific Journal of the European Council for Fatwa and Research, Issue 3, p. 136.

position is notably supported by researcher Khalid ibn Abdulaziz ibn Awad al-Shahri<sup>1</sup>.

### The Third Opinion

This view completely prohibits resorting to European courts, regardless of whether the matter concerns personal status or other legal disputes. Proponents argue that such courts do not rule by what Allah Almighty has revealed, and they cite various Sharia texts that mandate adjudication according to divine law and prohibit referring disputes to non-Islamic legal systems, including: the saying of Allah Almighty in the Quran: “Have you ‘O Prophet’ not seen those who claim they believe in what has been revealed to you and what was revealed before you? They seek the judgment of false judges, which they were commanded to reject. And Satan ‘only’ desires to lead them farther away.”<sup>2</sup> and also in the Quran: “But no! By your Lord, they will never be ‘true’ believers until they accept you ‘O Prophet’ as the judge in their disputes, and find no resistance within themselves against your decision and submit wholeheartedly”<sup>3</sup>.

Given the absence of choice and ability in fully adjudicating according to Islamic law within the European context, the more Preponderant stance appears to be the permissibility of resorting to European courts for securing legal rights and preventing tangible or anticipated harm. This position is supported by the following considerations:

First: The Prophet ﷺ explicitly permitted resorting to non-Muslim rule when necessary. He said regarding Najashi: “Indeed, in the land of Abyssinia, there is a king under whom no one is wronged. So migrate to his land until Allah grants you relief from your affliction”<sup>4</sup>. His statement “under whom no one is wronged” implies recognition of adjudication under his rule. It is well known that Najashi at that time was not a Muslim, yet his fairness as a ruler was

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<sup>1</sup> See: *The Recourse of Muslims to Non-Islamic Laws in Personal Status Matters*, A supplementary thesis submitted for the Master's degree in Islamic Jurisprudence by researcher Khalid ibn Abdulaziz ibn Awad al-Shahri, pp. 63–64–151.

<sup>2</sup> An-Nisa: 60. Translator: The translation is taken from <https://quran.com/4?startingVerse=60>

<sup>3</sup> An-Nisa: 65. Translator: The translation is taken from <https://quran.com/4?startingVerse=65>

<sup>4</sup> Abu Muhammad Abdul Malik ibn Hisham, *Sirah al-Nabi Muhammad Peace Be Upon Him*, vol. 1, p. 408.

mentioned. This indicates that referring cases to a non-Muslim judicial authority is permissible when necessary to remove or mitigate harm.

Second: Resorting to courts in non-Muslim countries is often essential for preventing tangible or anticipated harm, demanding and securing rights, and also the most urgent necessity to resolve disputes. A blanket prohibition on resorting to European courts would leave Muslims vulnerable to financial exploitation, violations of personal rights, and legal injustices. This is inconsistent with the fair objectives of Islamic law.

Third: based on the principle of securing benefits and preventing harm, Imam al-Izz ibn Abd al-Salam states: “If non-Muslims take control of a vast territory and appoint judges to oversee the public interests of Muslims, then it is apparent that these rulings should be upheld to secure general benefits and avert widespread harm. It is far from the mercy of the Sharia and its concern for its adherents that it would allow the disruption of public interests and the endurance of widespread harm”<sup>1</sup>.

Fourth: Hanafi jurists affirm the validity of rulings issued by non-Muslim judges over those residing in their lands. The book *Al-Fatawa al-Hindiyya* states: “Islam is not a condition for the ruler who is being followed, as mentioned in the book *Fatawa Tatarkhaniya*”<sup>2</sup>.

Fifth: prohibiting resort to European courts particularly in family matters leads to numerous harms including:

1. Some husbands may refuse to verbally divorce their wives, arguing that court rulings are un-Islamic. This obliges wives to bear what is unbearable sometimes, or they may be coerced into paying exorbitant sums for *Khula* (divorce requested by the wife, in exchange for a compensation given by her).
2. A husband’s refusal to recognize a civil divorce ruling could be interpreted as abuse under European legal systems. If he insists on

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<sup>1</sup> *Qawa'id al-Ahkam fi Masalih al-Anam*, vol. 1, pp. 121–122.

<sup>2</sup> A committee of scholars from India, chaired by Nizam al-Din al-Balkhi, *Al-Fatawa al-Hindiyyah*, vol. 3, p. 295.  
Imam al-Sarakhsi, *Al-Sharh al-Kabir ala al-Sayr al-Kabir by Muhammad ibn al-Hasan al-Shaybani*, vol. 1, p. 169.

- treating his wife as still married while disregarding the court's decision, he may be considered under laws against coercion or sexual violence<sup>1</sup>.
3. Civil divorces are granted only when one spouse petitions for separation due to the other's failure to fulfill marital obligations. If one spouse is unwilling or unable to fulfil his or her duties in the marriage, seeking divorce becomes permissible for the harmed party because the marital relationship should be based on *ma'aruf* (kind treatment). Therefore, it is prohibited for a husband to refuse to acknowledge a legally issued divorce while simultaneously mistreating his wife. This contradicts the essence on which the marital contract is founded, which is staying together with mutual kind treatment or separation on a gracious manner.
  4. If there is no other way to protect a woman from harm except through the ruling of a civil court, then it is permissible in Islamic law to accept such a ruling as a means of removing harm, which is a fundamental principle of Islamic jurisprudence. The Sharia principles that support this are numerous.

### **Divorce Procedures in the European Context**

To accurately conceptualize the case at hand and determine its applicable framework, it is essential to understand the divorce procedures in the European context. For this purpose, I will present a model illustrating how divorce proceedings are conducted in German and French courts as an example. Generally, European countries share similar procedures for divorce.

In German courts, there are two main ways to initiate divorce proceedings<sup>2</sup>. The first is when one spouse files for divorce at the family court nearest to the residence of either party. In such cases, both parties, or at least one of them, must be represented by a lawyer in court. The court then notifies the other spouse of the request, allowing them to decide whether they agree to the

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<sup>1</sup> *Fiqh al-Usrah fi al-Mahajir*, vol. 2, p. 235.

<sup>2</sup> Article 250 of the French Civil Code states: "The divorce application is submitted by a lawyer for each party or by a jointly chosen lawyer". The French Civil Code in Arabic, p. 302.

divorce<sup>1</sup>. The second case occurs when both spouses jointly submit a request for divorce; in this case legal representation is also mandatory<sup>2</sup>.

In both scenarios, the family court reviews the request<sup>3</sup> and sends it to the other spouse for a response. Simultaneously, the court provides both spouses with forms that must be completed to assess pension rights that need to be divided between them<sup>4</sup>.

To prevent hasty decisions in such a serious matter, German law mandates a "separation year" (Trennungsjahr), during which the spouses must live separately. This period allows them to experience life independently and reconsider their decision before proceeding with the divorce<sup>5</sup>.

Once the separation year has passed, the court schedules an official divorce hearing. Both spouses and their respective lawyers must be present at this session<sup>6</sup>. The spouses must bring their identification documents, passports, and family records. During the hearing, the court settles any outstanding disputes between the spouses. If reconciliation efforts fail<sup>7</sup>, the court officially declares them divorced and issues a "divorce decree" (Scheidungsbeschluss)<sup>8</sup>.

Divorce proceedings in family courts are held privately, not in public sessions. The duration of the process depends on the length of the marriage and the financial assets of each party<sup>9</sup>.

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<sup>1</sup> Adapted with modifications from: <https://handbookgermany.de/ar/divorce>.

<sup>2</sup> Ibid.

<sup>3</sup> The second paragraph of Article 250 of the French Civil Code states: "The judge examines the request with each spouse separately, then brings them together and subsequently summons the lawyer or lawyers". The French Civil Code in Arabic, p. 302.

<sup>4</sup> Adapted with modifications from: <https://handbookgermany.de/ar/divorce>.

<sup>5</sup> Article 296 of the French Civil Code states: "Physical separation of spouses is granted upon the request of one of them". The French Civil Code in Arabic, p. 356.

<sup>6</sup> Article 2522 of the French Civil Code states: "When attempting to reconcile the spouses, the judge must first speak separately with each of them before bringing them together in their presence. The judge then invites the lawyers to attend and participate in the discussions. If the spouse who did not file the request is absent from the session or is unable to express their will, the judge speaks with the other spouse and asks them to reflect". The French Civil Code in Arabic, p. 304.

<sup>7</sup> Article 252 of the French Civil Code states: "An attempt at reconciliation is mandatory before judicial proceedings and may be renewed during the trial. The judge works to reconcile the spouses regarding both the principle of divorce and its consequences". The French Civil Code in Arabic, p. 304.

<sup>8</sup> Article 232 of the French Civil Code states: "The judge approves the agreement and grants the divorce if convinced that each spouse's intent is genuine and that their consent is free and clear". The French Civil Code in Arabic, p. 292.

<sup>9</sup> Adapted with modifications from: <https://handbookgermany.de/ar/divorce>.



If both spouses agree on asset distribution and child custody, or if they have limited financial means or a short marriage duration, the divorce may be finalized within no less than four to six months. However, if disputes arise over assets, pension entitlements, or custody rights, or if the marriage has lasted for a long period, the process may take a year or more<sup>1</sup>.

### **The jurisprudential Adaptation of Sham Divorce Cases in the European Context**

From the preceding discussion, it is evident that “sham divorce” manifests in three forms:

#### ***The Jurisprudential Characterization of the First Form***

In cases where both spouses complete all legal procedures including: signing documents, filing the case in court, appointing a lawyer to finalize the process, and verbally pronouncing the divorce; the ruling is as follows:

Claiming that divorce does not take effect due to the absence of intention is contrary to the view of the majority of scholars, in the past and present, who do not consider intention a prerequisite for a valid divorce once it has been pronounced. Ibn Rushd summarized the opinions of Muslim jurists in this regard, stating: “As for the consensus, Malik, Al-Shafi‘i, and Abu Hanifa agreed that if a husband explicitly pronounces divorce to his wife by saying, 'You are divorced,' his claim that he did not intend divorce is not accepted. This also applies to separation or dissolution according to Al-Shafi‘i. The Malikis have made an exception: the cases where there is evidence that prove he is right, such as if she –the wife -asked him to release her from some sort of bondage and he responded with ‘You are divorced.’ (in the meaning of ‘you’re released’)”.

According to Al-Shafi‘i and Abu Hanifa, divorce does not require intention. While Malik is known for requiring intention in divorce, in this case, Al-Shāfi‘ī did not consider the absence of intention in cases involving suspicion. Mālik’s position is grounded in the principle of adjudicating on the basis of suspicion in order to block the means to potential wrongdoing. This is where Al-Shafi‘i and Abu Hanifa disagreed with him. Therefore, according to the opinion of

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<sup>1</sup> Ibid.

those who require intention in the verbal pronouncement of divorce but do not rule based on suspicion, it is obligatory to accept the husband's claim if he asserts that he did not intend divorce”<sup>1</sup>.

Hence, the majority of scholars from the Hanafi, Maliki, Shafi'i, and Hanbali schools affirm the validity of divorce pronounced in jest, even without intent<sup>2</sup>. Ibn Al-Mundhir reported a consensus on this matter: “All scholars whose opinions are preserved agree that both earnest and jesting divorces are equally valid”<sup>3</sup>. However, scholars like Al-San'ani and Al-Shawkani dissented, ruling that a divorce pronounced in jest does not take effect<sup>4</sup>.

### ***Jurisprudential Adaptation of the Second Form***

In cases where both spouses complete all legal procedures, signing documents, filing the case in court, and appointing a lawyer to finalize the proceedings, without verbally pronouncing divorce, the prevalent opinion among jurists is that divorce through clear written documentation is as valid as verbal divorce, regardless of intention, because writing is one of the two types of discourse as a number of Islamic jurists view<sup>5</sup>.

It has been suggested that this form differs from cases where written divorce is deemed conditional on intention. Here, both spouses willingly approach legal authorities or a lawyer to file for divorce, explicitly expressing their desire to end the marriage. This process often spans several sessions in court to address post-divorce matters like custody and finances. Can it be reasonably argued that such explicit statements and repeated affirmations in court are insignificant? Is the continuous court attendance meaningless, especially when both parties are repeatedly asked if they wish to divorce and respond affirmatively?

Asserting that such statements and actions do not constitute a valid divorce contradicts Sharia texts and logic, and implies an endorsement of deceit and manipulation, which are strictly prohibited in Islamic law. The Prophet

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<sup>1</sup> Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, Dar al-Hadith, Cairo, 2004, 2/492.

<sup>2</sup> *Bada'i al-Sana'i*: 9/463. Al-Hattab, *Mawahib al-Jalil Sharh Mukhtasar Khalil*, 4/44. *Mughni al-Muhtaj*, 3/239. *Al-Mughni*, 7/135. See also: Ibn Taymiyyah, *Majmua al-Fatawa*, 33/106-107.

<sup>3</sup> Ibn al-Qattan, *Al-Iqnaa fi Masa'il al-Ijmaa*, Dar al-Faruq al-Hadithah, 1st ed., 1424-2004, 2/31.

<sup>4</sup> Al-San'ani, *Subul al-Salam fi Sharh Bulugh al-Maram*, Dar al-Hadith, 3/176. Al-Shawkani, *Nayl al-Awtar Sharh Muntaha al-Akhhbar*, Dar al-Hadith, Egypt, 1st ed., 1993, 6/235

<sup>5</sup> *Bada'i al-Sana'i*, 3/100. *Al-Insaf*, 8/472. *Al-Mughni*, 7/486.

Muhammad ﷺ said: “Truth leads to piety and piety leads to Jannah. A man persists in speaking the truth till he is recorded with Allah as a truthful man. Falsehood leads to transgression and transgression leads to the Hell-fire. A man continues to speak falsehood till he is recorded with Allah as a great liar”<sup>1</sup>. This is entirely incompatible with Islamic legal texts and overarching objectives.

Additionally, official written divorce documents, clearly written and signed, transform the action from implicit to explicit, unequivocally indicating the intention to divorce.

### ***Jurisprudential Adaptation of the Third Form***

This form involves obtaining a civil divorce without registering or endorsing it in the Islamic country, thereby keeping the marriage contract issued in Islamic jurisdictions legally valid. This scenario aligns with the previous form: initiating civil divorce proceedings, whether verbally or through written documentation, renders any delay or omission of supplementary legal procedures irrelevant, as the divorce is already valid and established. The Prophet Muhammad ﷺ stated: “There are three things which, whether undertaken seriously or in jest, are treated as serious: marriage, divorce and taking back a wife after a divorce which is not final”<sup>2</sup>.

### ***Jurisprudential Adaptation of the Fourth Scenario***

The fourth scenario pertains to a situation where spouses claim that they have not divorced but were unable to obtain an official divorce certificate due to wartime conditions. This scenario brings up the issue of false acknowledgment of divorce, which is a controversial matter in jurisprudential discourse as previously addressed. The Maliki and Hanafi schools of thought assert that divorce is valid judicially but not religiously, whereas the Hanbali school holds that it is valid both religiously and judicially. Ibn Qudamah al-Maqdisi stated: “Al-Kharqi said: If he were asked, ‘Do you have a wife?’ and he replied, ‘No,’

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<sup>1</sup> Reported by Al-Bukhari, *Kitab al-Adab* (The Book of Manners), Chapter on the Saying of Allah, the Most High: “O you who have believed, fear Allah and be with those who are true” and on the prohibition of lying, Hadith No. 5743. And by Muslim, *Kitab al-Birr wa al-Silah wa al-Adab* (The Book of Virtue, Relations, and Manners), Chapter on the Repulsiveness of Lying and the Virtue of Truthfulness, Hadith No. 2607. Translator: The translation is taken from <https://sunnah.com/riyadussalihin:1542>

<sup>2</sup> Previously cited. Translator: The translation is taken from <https://sunnah.com/bulugh/8/130>

intending to lie, no consequence would befall him. However, if he said, ‘I have divorced her,’ intending to lie, the divorce would be binding”<sup>1</sup>.

### The Researcher’s View and Justifications

In my view -and Allah knows best- sham divorce within the European context should be considered valid both religiously and judicially upon issuance by European courts, regardless of whether the husband verbally pronounces divorce or merely complies with judicial divorce procedures. This ruling is based on the concept of talji’ah and the Hanbali position regarding false acknowledgment of divorce. It is also supported by various Sharia texts, juristic principles, and the objectives of Islamic law, which I summarize as follows:

**First Evidence:** Denying the validity of sham divorce trivializes the acts of marriage and divorce and reduces them to a mere game, which contradicts the sanctity that Islamic law accords to marriage and divorce. Among the signs of this divinely ordained reverence is that Allah Almighty has made marriage a sign *aya’*, a garment *libās*, and a solemn covenant *mithāq ghalīz*: {And how could you take it back after having enjoyed each other intimately and she has taken from you a firm commitment? }<sup>2</sup>. Moreover, the Prophet ﷺ emphasized that both jest and seriousness in marriage and divorce carry legal consequences: “There are three things which, whether undertaken seriously or in jest, are treated as serious: marriage, divorce and taking back a wife after a divorce which is not final.”<sup>3</sup>.

Scholars have stressed the importance of caution in the contract that is deemed dignified by Sharia due to its profound implications related to establishing a family, which is the nucleus of a righteous Muslim society.

**Second Evidence:** Dismissing the validity of sham divorce constitutes mockery of Allah’s signs and verses, which is categorically forbidden by consensus. Allah Almighty says: {Do not take Allah’s revelations lightly<sup>4</sup>}.

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<sup>1</sup> *Al-Mughni*, 8/285.

<sup>2</sup> Surah An-Nisa:21. Translator: The translation is taken from <https://quran.com/4?startingVerse=21>

<sup>3</sup> Previously cited.

<sup>4</sup> Al-Baqarah :231. Translator: The translation is taken from <https://quran.com/2?startingVerse=231>

Allah says in the Quran also: {Say, “Was it Allah, His revelations, and His Messenger that you ridiculed?”<sup>1</sup> }.

On the same matter, Ibn Taymiyyah comments: “The Lawgiver prohibited using Allah’s signs, including contracts, in jest. A person should speak of these contracts only with seriousness, intending their implications in Sharia. Thus, jesting and talji’ah are prohibited, just as sham marriages *tahlil* are forbidden.”<sup>2</sup>.

**Third Evidence:** Refusing to recognize these legal or civil sham divorces would open the door to various legal tricks and manipulative practices that contradict the aims of Islamic law. This includes the proliferation of sham marriages<sup>3</sup>, thereby turning marriage and divorce into means of pursuing worldly interests.

**Fourth Evidence:** Allah Almighty has placed marriage and divorce under a framework of Sharia rulings due to their connection with sexual relations, which Islam treats with utmost reverence and caution. This is because sexual relations pertain to preserving lineage and honour, which are two key objectives that Islamic law came to preserve and take care of.

**Fifth Evidence:** The principle of preventing harm and detriment requires recognizing the validity of sham divorces, as their invalidation could lead to severe consequences for spouses and society, including:

In a sham marriage, if the husband dies, the wife would be deprived of her rightful inheritance. This could cause public harm in society as it allows for taking the Sharia rulings lightly. One of the cases that we have witnessed is: when a woman who has obtained a legal civil divorce remarries, her former husband falsely claims that she remains his wife since he did not intend the divorce.

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<sup>1</sup> At-Tawbah: 65. Translator: The translation is taken from <https://quran.com/9?startingVerse=65>

<sup>2</sup> Ibn Hajar, *Al-Fatawa Al-Kubra Al-Haythami*, with marginal notes by Fatawa Shams Al-Din Al-Ramli, edited by Abdul Hamid Ahmad Hanafi, 6/65.

<sup>3</sup> A report by a German crime statistics office revealed that in 2017, approximately 202 cases of suspected “sham marriages” were detected through applications submitted by foreigners seeking residence permits. Additionally, 191 other cases were uncovered in which foreigners obtained entry visas to Germany through sham marriages. In 2016, authorities identified 408 cases of “white marriages”. Suspected cases are often detected through employment centers or foreign registration offices. See: <https://www.dw.com/ar>.

**Sixth Evidence:** The prohibition of sham divorce is further reinforced by considering its broader consequences and the harm it causes to the image of Islam and Muslims, particularly when those Muslims who obtain sham divorces for deceitful purposes are detected in non-Muslim societies. In these Western contexts, people often judge Islam only through what they receive from the media and by observing the behaviour of Muslims living amongst them. Positive behaviour gives them a good insight on Islam and Muslims and it may even lead them to embrace the religion of Allah; whereas if they witness evil or wrongdoing, it will become a cause for their aversion and turning away from the religion of Allah. This is because they will not say, “So-and-so made a mistake”, but rather, “This is Islam, and Islam calls for such behaviour.” Thus, through his crooked conduct, he becomes a cause for people to be driven away from the call to Allah and Islam.

In reality, a Muslim living in these European lands should make himself a caller to Islam and a defender of it, ensuring that no harm or misrepresentation of the faith arises from his actions. This is the true essence of sincere advice for the sake of Allah, His religion, and the general body of Muslims, which is an obligation that Allah has imposed upon every Muslim.

## CONCLUSION

Sham divorce within the European legal context is a serious matter, distinct , in many ways and for many reasons and in terms of who rules it, from sham divorce in Muslim countries.

The most appropriate and consistent ruling is to favour the opinion that the divorce is valid both judicially and religiously. This is based on the reasoning of those who consider divorce under compulsion (*taljī'ah*) valid, an opinion held by the majority of Muslim jurists, as well as those who uphold the validity of a divorce admitted by acknowledgment both religiously and judicially. This ruling is grounded in the Sharia texts that prohibit deception, forgery, and fraud and obligate the sincere fulfilment of contracts.

Furthermore, the message-related and representational impact of the fatwa should not be overlooked, keeping in mind that other rulings might lead to harmful misrepresentations of Islam and its image. As Allah says: ﴿Our Lord!

Do not subject us to the persecution of the disbelievers. Forgive us, our Lord! You 'alone' are truly the Almighty, All-Wise<sup>1</sup>).

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<sup>1</sup> Al-Mumtahanah: 5.

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