

The Necessity of a Standard Prenuptial Agreement for American Muslims

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Abstract

For many Sunni Muslims in the U.S., one of the most important documents in their life might be a marriage contract that unintentionally contains an impermissible amount of gharar (uncertainty). There are seldom disputes when contracts go smoothly, even if gharar is present, but when there are disagreements, it is a cause of major strife. If two Muslims get married, they usually perform a nikāḥ (Islamic marriage contract/ceremony) and then sign a civil marriage contract in their state of residence. Although it would seem that the nikāḥ would imply certain terms for dissolution perhaps based on a classical school of Islamic law or contemporary ijtihād (juristic reasoning) adjusted for modern times and circumstances, the actual authority belongs to a non-Muslim judge and legal system. Does this legal system have a moral right over Muslim marriage contracts in this country, or is the use of such a court an un-Islamic infringement on the other party's rights and therefore a violation of God's law? This author recommends couples should explicitly discuss this issue prior to marriage and proposes a standardized prenuptial agreement to minimize unnecessary disputes.

Keywords: *Islam, marriage, divorce, prenuptial agreements, child custody, nikāḥ, ṭalāq, khul'a, gharar, mediation, arbitration*

Introduction

This author recalls a private discussion in 2005 with an Islamic scholar residing in the U.S., trained overseas at one of the most prestigious institutes, who had some criticism of contemporary Islamic orthodoxy. He mentioned the case of “a wealthy upper class Muslim man divorcing his wife and ‘giving her nothing.’” This scholar felt that modern Islamic scholarship had failed in regards to this issue. In 2008, this author read a case of divorce (Madigan 2008), while recalling this discussion. A Muslim couple married in Pakistan with a \$2,500 *mahr*.¹ At the time, it seems that the man was not wealthy. The couple moved to the U.S. and had two children. Twenty years later, when the marital assets had reached \$2 million, the wife filed for divorce in Maryland. The husband, in response, then divorced his wife in Pakistani court and insisted on following that court's divorce judgment, which would give the wife practically no share of the marital estate. She believed that she had the

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¹ Although the term is commonly translated as “dowry,” this word has a negative connotation that is the anti-thesis of the Islamic perspective. Additionally, its meaning differs in scope from what the translation conveys. Hence, it is best to avoid translating it.

right to file for what a Maryland court would give her, being the larger share. Not surprisingly, the judges in the U.S. rejected the husband's claim.

Although this situation is slightly different in that the marriage was conducted in Pakistan and then the couple moved to the U.S., what is to be done when two Muslims marry in the U.S. and disagree in such a manner? In 2021, a Muslim couple in Texas went through a contentious divorce process² in which the woman had signed a prenuptial agreement. Although she agreed to Islamic arbitration in case of divorce at the time of their marriage in 2008, she claimed coercion and filed to have it voided so she could benefit from the Texas divorce court's judgment.

Two scholars that have dealt extensively with the issue of divorce in America in the past five years responded to an anonymous survey.³ In response to the question:

In the past 5 years approximately **how many** cases of divorce **have been brought to you specifically** in which there was a dispute between the parties about authority on whose judgment (whether in full or part) needs to be followed (i.e. Secular Court Judge vs. Arbitrator / Imam / Mufti, etc.)?

One responded, "at least a dozen times" and the other responded that it was approximately 125 cases, so an average of 25 per year. In response to the question:

In the past 5 years, approximately **what PERCENT** of cases of divorce that have been brought to you have had this issue (dispute between parties about authority)?

The first individual stated, "About half have the issue, although with trust we can usually resolve it. A small percentage don't accept our offer." The other individual stated it was 40% of cases. Although the sample size was small, this data along with the other incidents strengthen the case for the existence of an issue to be resolved.

This author recalls one prominent Islamic scholar stating in 2007 in a private gathering that American Muslims need to develop their own family law courts, similar to the Beth Din courts that serve Orthodox Jews in this country. Broyde, in "Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent" (2013), detailed the experiences of the Beth Din arbitration tribunals. However, there seems to be little progress on this front so far. Per this author's understanding, the couple of arbitration tribunals serving American Muslims in Texas lack widespread recognition or authority. Other arbitration tribunals might exist elsewhere, but they are unknown to the general masses of Muslims. British Muslims have successfully developed Sharia tribunals for family law that function under the well-known 1996 Arbitration Act (Aceris Law 2020); however, they are also subject to a high level of media scrutiny

² For further reference, see the collection of legal documents through July of 2021 that can be downloaded at <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=4b0b5653-b3ae-4689-9a9d-1367516012d4&coa=coa05&DT=Brief&MediaID=bba57f77-3765-4361-aacb-df368800ec01>.

³ Link to the survey conducted is https://docs.google.com/forms/d/e/1FAIpQLSc_R1pGaGIL4vMVgYnNQX6PkLLvCqthnR-fL0QOK3BTbjKXg/viewform.

(Khaleeli 2017) and have been accused of granting British women “fewer rights than women in Islamic countries” (Ahmed 2017).

Questions and Responses of Fatwa Councils

Unlike Christians in certain parts of the Muslim world, the Muslims’ lack of unity under a specific authority gives rise to a few questions. Given that a Muslim man has the right to issue the divorce unilaterally, whereas a Muslima must find a judge to approve the divorce if the man objects, what should she do if her husband refuses to consent? While living in a non-Muslim country, if she gets a divorce under a non-Muslim judge, is it valid and is the marriage Islamically terminated? Are the terms of the divorce imposed by a non-Muslim judge Islamically binding on the parties? Multiple opinions are given:

The first view is expressed by the Assembly of Muslim Jurists of America, making clear that a divorce granted by a non-Muslim judge is of no consequence. A woman who seeks a divorce should apply to Islamic centers for a ruling on her case... Resorting to man-made laws for the legal termination of a marriage is not sufficient to end the marriage from the Islamic point of view. If a woman is granted a judgment of divorce by a civil court, she should take this judgment to an Islamic center to complete the Islamic process. There can be no argument on the basis of necessity, as Islamic centers are available and accessible in all areas.

[...]

The second view is expressed by the European Council for Fatwa and Research... The decision adopted by the Council on this question says: The normal situation is that a Muslim does not refer to anyone other than a Muslim judge or whoever fulfills the role of a Muslim judge. However, as there is no Islamic judicial system to which Muslims may refer in non-Muslim countries, a Muslim who solemnized his marriage according to the laws of these countries must implement the ruling of divorce made by a non-Muslim judge. **Since such a Muslim married according to the same man-made law, he has implicitly accepted its consequences.** One of these is that the marriage contract can only be terminated through a judge. This may be considered as an assignment of right by the husband, and such assignment is permissible according to the majority of [Islamic] scholars, even though the person concerned has not made this verbally. It is a rule of Islamic law that “what is known to be part of social tradition has the same status as what is stipulated as a condition.” **Abiding by court judgments, even though the judicial system is not Islamic, is permissible as it secures benefits and prevents harm, chaos and confusion.** (The Centre of Research Excellence in Contemporary Fiqh Issues, n.d.)

Human nature being what it is, such a situation is ripe for “fatwa shopping” by each spouse to obtain the most beneficial ruling.

The third view goes into more detail. It may be summed up as declaring that if a ruling of divorce issued by a [non-Islamic] court of law happens to be consistent with Islamic law, it is valid. If it is at variance with Islamic law, then it is invalid and inconsequential. (The Centre of Research Excellence in Contemporary Fiqh Issues, n.d.)

And herein lies the crucial question: Who decides what is “consistent with Islamic law” and what is at “variance with Islamic law”? Could some of the terms be at variance with classical Islamic law but consistent with contemporary Islamic law? It seems the American Fiqh Academy, given their most recent 2023 resolution on alimony, would probably disagree:

The Sharia does not obligate an ex-husband to provide *nafaqa* [maintenance] post-*’idda*, and it does not permit a woman to claim any finances above *nafaqa* and debts owed. It certainly does not allow an ex-husband to collect forced payments from an ex-wife. Alimony as a means of financial support post-*’idda* is impermissible, and neither party may claim it as part of the divorce proceedings except to recoup actual *nafaqa* and debts owed. If claimed or awarded nonetheless, the recipient must return the Islamically unlawful wealth to its owner or, in their absence, to the owner’s inheritors.

Family members must realize and step up to their responsibilities in taking care of female relatives. However, their failure or inability does not justify court-facilitated injustice in forcing someone to make payments where no such obligation exists in the Sharia. *Harām* (unlawful) money is devoid of *baraka* (blessings), and, far from a means of assistance, it may be a means of calamity in this world and the Hereafter. (American Fiqh Academy 2023)

The Prohibition of *Gharar*

Generally speaking, *gharar* encompasses some form of incomplete information and/or deception, as well as risk and uncertainty intrinsic to the objects of contract. Since complete contract language is impossible, some measure of risk and uncertainty is always present in contracts. (El-Gamal 2006, 58)

Hence, *gharar* is usually defined as being either major/excessive that is impermissible and nullifies a contract, or minor that does not nullify a contract and is acceptable due to the benefit outweighing the harm. Some scholars also add a third type of medium *gharar*: a grey area that could be impermissible or acceptable, given the circumstances and custom.

In a contract of sale, the word *gharar* often refers to uncertainty, and the ignorance of one or both parties of the substance or attributes of the object of sale, or of doubt over this object’s existence at the time of sale. ***Gharar* is, however, a broad**

concept, and may carry different shades of meanings in different kinds of transactions. (Kamali 2000, 84)

Hence, it seems that *gharar* is not exclusive to financial contracts, and thus a marriage, being a civil contract, could also contain elements of *gharar*. Every contract, including a marriage contract, has terms that govern its dissolution. For a marriage contract, these may be:

Wife: I want a divorce. I am going to file for divorce in the court that awards me 50% of the marital estate and alimony.

Husband: How dare you ungodly woman go against the judgment of God! We only follow the judgment of Allah and these unjust *kāfir* courts have no moral authority over us.

Wife: Well, Sheikh A said that since we signed our marriage contract in America, we agreed to these terms. There is nothing in these terms that is specifically Islamically impermissible.

Or consider an alternative scenario. Let's say a woman earning six figures wants to marry a man who earns minimum wage. The woman wants children, but the man does not.

Man: I'm sorry, but I cannot afford to have children. It's the husband's responsibility to provide for them, and I do not make enough money to support children.

Woman: Don't worry, I agree to provide the money for their support.

Although it is not Islamically her obligation, it would seem she has every right to voluntarily assume such an obligation in such a scenario. So, a woman inquired about paying child support to her ex-husband:

[“]Based on the civil divorce that is still going on right now, we have shared custody of the 2 boys, aged one year and 6 years. He refuses to give me full custody of these kids, and I was forced to pay him child support of \$800/month since I'm working and he is not.[”]

The mother is entitled to the physical custody of the children until they can choose between the parents or reach a certain age (controversial), which yours didn't reach. The father is responsible for their sustenance, and he may not take your money for that. If he takes it by force or through other illegitimate means, then he shall bear a sin, and his reckoning is with Allah. (Al-Haj 2012)

Yet if a man signed a contract accepting those of its implications that were not specifically impermissible but had to do with taking on specific obligations, the same would seem to apply to a woman who accepts its implications. The *gharar* in what terms apply in a Muslim marriage contract in the U.S. is of significant consequence and must be addressed.

Types of Divorce or Separation in Islam

If a husband resorts to *ṭalāq*, his unilateral right to divorce his wife, he must pay for her maintenance during her *‘iddah* (waiting period) and pay any deferred portion of the *mahr*. *Khul‘a*⁴ is the wife’s right to pursue divorce by offering to return to him the *mahr*, in a lesser amount or greater amount. The majority opinion of classical scholarship (Al-Haj 2020) was that *khul‘a* was not actually binding unless the husband agreed to it. The Mālikī school (Munir 2016) disagreed and allowed the judge to terminate the marriage without the husband’s consent within this framework. This particular framework forms the basis for the laws related to a woman’s right to divorce in Pakistan (Mehmood and Farooq 2014). Ibn Taymīyyah (Al-Haj 2020) opined that a woman had a legal right to *khul‘a* provided she returned the *mahr*, and hence it was functionally impermissible for the husband to ask for more. What does this mean?

Table 1: The Opinions of Classical Islamic Scholars Regarding *Khul‘a*⁵

Majority Opinion	Minority Opinion
Under Islamic law, women have no legal right to a unilateral no-fault divorce. <i>Khul‘a</i> is simply a bilateral divorce.	Under Islamic law, women have a legal right to a unilateral no-fault divorce. Hence, <i>khul‘a</i> serves the function of both a bilateral and unilateral divorce.

Faskh includes the judge’s annulment of a marriage due to a defect unknown to one or both parties prior to its consummation. The marriage was never valid in the first place. This concept is very similar to the Western concept of annulment, although not quite exactly,⁶ for it is more inclusive. Whereas some scholars have created a separate category

⁴ Although some scholars might not use “divorce” for *khul‘a* as they would for a *ṭalāq*, from an English language perspective *khul‘a* is a divorce. The difference of opinion over whether *khul‘a* is considered to be “divorce” or “annulment/separation” is in regards to whether *‘iddah* is one or three menstrual cycles and whether it counts toward the three divorces after which a woman is unmarriageable to the first husband unless she first marries another man.

⁵ Instead of going into the evidence regarding each opinion, the author contends that both opinions have strong scholarly backing. In this case, the *maṣlaḥa* (public interest) of the situation in the U.S., as well as the practical reality, dictates that the minority opinion must be adopted. American Muslimas have the same right to a unilateral no-fault divorce that a man does. This should not be problematic, given that Pakistan, the U.A.E., and other Muslim countries follow the same understanding.

⁶ For example, children born to a couple whose marriage has been annulled in Western law are considered legitimate, just like children born during an Islamic marriage that resulted in *faskh*. However, Western law views the marriage as never having existed. So, after an annulment, in American law, a person identifies him/herself as “single – never married” and not “divorced.”

known as *tatlīq* for a fault-based court-ordered divorce by a judge due to a fault from the husband occurring after the marriage; others expand *faskh* to include situations of fault after marriage.

Divorce Laws in the U.S.

Unlike Islamic law, which has been generally consistent for over a thousand years – the modifications proposed here are not radical departures from the classical tradition, but reasonable adjustments for contemporary times – American divorce laws have evolved quite significantly just in the past 200 years. When the U.S. secured its independence from Britain, the British common law applied by individual American colonies had its basis in Christian teachings, which prohibit divorce as a general rule. Hence, in the 1800s, either spouse who wanted a divorce had to prove fault. Although 1969 (Wilcox 2009) was a turning point, it seems that what happened was the result of a trend that had been building up (Ross 2016) over the years. President Ronald Reagan, then governor of California, signed into legislation the first no-fault divorce law. The resulting domino effect caused other states to pass similar laws, as getting married or divorced are dealt with at the state level, not the federal level.

Reagan's first wife, Jane Wyman, accused him of mental cruelty in her 1948 divorce proceedings because she could not get a no-fault divorce. At this time, simply being in an unhappy marriage when there was no fault from the other party was not enough. Today, thirty-three states recognize the right of either spouse to pursue either a fault-based or a no-fault divorce. Seventeen states only recognize no-fault divorce (Armstrong 2023).

Property is classified either as marital (property or assets accrued during the marriage or from which the marriage benefits) or separate (usually defined as inheritance, gifts, and property owned prior to the marriage). "Co-mingling" (Meyer 2019) of separate property with marital property turns separate property into marital property. Nine states are "community property states," meaning both spouses legally own the property jointly such that creditors can seize the property of one spouse for the debts of the other. In these states, the marital estate is most often divided 50/50. The rest of the states are "equitable distribution states," in which the property is legally owned by the individual in whose name it is titled. Although the judge might split it 50/50, he/she has the discretion to split it according to any fraction in consideration of various factors.⁷

Similar to Islamic law, all states permit prenuptial agreements as long as they were neither coerced nor absolute in that they contain no provisions that violate public policy. Although states do have minor variances, twenty-eight of them have adopted the terms of the "Uniform Premarital and Marital Agreements Act,"⁸ whereas the rest have not, even though they permit prenuptial agreements.

⁷ For more information on equitable distribution states, see "Equitable Distribution Legal Faqs" at <https://www.justia.com/family/divorce/docs/equitable-distribution-faq/>.

⁸ For more information on the Uniform Premarital and Marital Agreements Act (UPMAA), see <https://www.prenuppros.com/uniform-premarital-agreement-act>.

Three Main Issues

There are three main issues of concern that come to mind in cases of divorce which can cause *gharar* in Muslim marriage contracts done in the United States:

1. Marital Wealth Distribution
2. Spousal Support Obligation (i.e. Alimony)
3. Child Custody and Support

In the U.S., both spouses are often financially self-sufficient and have roughly equivalent income and assets. Thus, in these cases there is very little risk of post-marital disputes, apart from child custody and support. Disputes are more likely to happen when one party has accrued significantly more wealth than the other and/or has a higher income capacity. This author remembers a traditional scholar in a private gathering who seemed to believe that all the specific details of classical divorce jurisprudence were still fully binding and recommended that “women should demand a large *mahr* upfront. Get at least \$100,000.” Very recently in another private gathering, a prominent scholar stated, “*Mahr* should be at least one year’s salary.” These approaches are both very impractical and violate the Sunnah as a general recommendation. A large *mahr* should be discouraged, unless the groom is already wealthy. However, many young grooms are usually not wealthy and often have student loan debts, even if their income potential is on a promising upward trajectory. Asking a young man to sign such a large amount for a deferred *mahr* is also problematic and goes to the other extreme, as detailed in the following section.

First Main Issue: With regards to marital wealth distribution, should the wife’s non-working intangible contribution be factored into the distribution of assets accrued during the marriage?

This author has noticed two extremes. First, the *mahr* is very low. For example, in the 2021 Texas case, many traditional Muslims might be skeptical about the Muslima’s claim of coercion and feel that she is trying to back out of the agreement she made. However, many others might feel very sympathetic, as the total *mahr* (upfront and deferred) was only \$32. The second extreme is when a high *mahr* is structured as a deferred debt and referred to as *muakhar*, which is essentially utilized to secure a reasonable post-divorce settlement. This is because women who do not earn income are not Islamically entitled to alimony beyond their *‘iddah* or a share of the husband’s assets, given that classical Islamic law⁹ has no concept of “marital property” and all property is “separate property” unless explicitly owned jointly.

Although this is Islamically allowed, as the couples can agree to whatever amount, this seems to go against the spirit of the law and should not be encouraged. The Islamic purpose of the *mahr* is to confirm the man’s commitment, given the difference in the overall intrinsic nature of men and women, not to secure a post-divorce settlement.

A new solution is needed to account for this challenge. This author proposes a 66.6% / 33.3% distribution. Some might be uncomfortable with this due to the similarity

⁹ Although some Muslim countries have incorporated the concept of marital property in their personal status laws (Sait 2016).

to inheritance laws, but the proposed paradigm is gender neutral and works the same way in situations of role reversal.

Additionally, if we compare the scenarios based on the traditional recommendation vs. this new proposal, we find that the latter seems more in line with the spirit of the law and overall equity. The traditional recommendation, although technically permissible, has more “functional *gharar*” than the new proposal. Consider a new couple that is starting out with no wealth: The young man is starting his career, and his career trajectory is unknown. He could end up wealthy, poor, or modestly wealthy. Let’s see the different scenarios of divorce if the *muakhar* is \$100,000 (**Table 2**).

Table 2: Traditional Scenario with a \$100,000 Muakhar

Ending Wealth (The couple’s total amount of wealth):	\$0	\$100,000	\$1,000,000
Husband <i>ṭalāq</i> (the amount he would receive or owe if he pronounces <i>ṭalāq</i>):	-\$100,000	\$0	\$900,000
Wife <i>ṭalāq</i> (the amount she would receive if he pronounces <i>ṭalāq</i>):	\$100,000	\$100,000	\$100,000
Husband <i>khul’a</i> (the amount he would receive if she requests <i>khul’a</i>):	\$0	\$100,000	\$1,000,000
Wife <i>khul’a</i> (the amount she would receive if she requests <i>khul’a</i>):	\$0	\$0	\$0

In the new proposal, there is either no *muakhar* (**Table 3**) or we can assume it to be \$10,000 (**Table 4**).

Table 3: New Proposal with a \$0 Muakhar

Ending Wealth:	\$0	\$100,000	\$1,000,000
Husband:	\$0	\$66,666.66	\$666,666.66
Wife:	\$0	\$33,333.33	\$333,333.33

Table 4: New Proposal with a \$10,000 Muakhar

Ending Wealth:	\$0	\$100,000	\$1,000,000
Husband <i>ṭalāq</i> :	-\$10,000	\$56,666.66	\$656,666.66
Wife <i>ṭalāq</i> :	\$10,000	\$43,333.33	\$343,333.33
Husband <i>khul’a</i> :	\$0	\$66,666.66	\$666,666.66
Wife <i>khul’a</i> :	\$0	\$33,333.33	\$333,333.33

Given the high stakes, the traditional scenario leads to friction and motivates spouses who want out of the marriage to engage in *dhulm* (oppression). For example, if the

ending wealth was \$100,000 and the husband wanted to divorce his wife without paying anything, he might abuse her to entice her to leave him. Or if the wife wanted a divorce but wanted the money and did not want to do *khul'a*, she might fabricate claims of abuse. A poor man is at the mercy¹⁰ of his wife if he wants the divorce. In the traditional scenario, if the man ends up wealthy, the wife receives a paltry sum relative to the couple's overall wealth. The new proposal makes this situation so much simpler, for it removes both the "functional *gharar*" and the temptation to do *dhulm*.

An important disclaimer: This solution is only intended for the American Muslim context and perhaps other Western countries with similar situations. Muslim countries should make laws based on whatever best suits their specific situation. Nevertheless, as information travels, this paper might end up being widely read, and hence individuals in the Muslim world might be convinced that such an idea could benefit their local circumstances as well.

Potential Response from Overseas Traditionalists

This proposal encourages divorce and should not be implemented. For one, as you say, it is true that having a large *muakhar* as a deferred debt might not be recommended, but there is no prohibition from an Islamic perspective against it. Circumstances in our times are different, especially with the liberalization of gender relations and your proposal could encourage men to leave women easily for other women. The traditional understanding that we follow discourages people from divorce, whereas your proposal encourages and makes divorce "functionally easier." Our legal system requires claims of abuse to be proven with evidence. While finances "aren't everything" and people should not stay in a horrible or abusive marriage for that reason, it is true that sometimes couples that are having challenges might be able to deal with those challenges where there is not an instant unilateral incentive to walk out. Our system encourages both parties to negotiate with each other and discourages unilateral termination.

Counterresponse

Point well taken. And this is the fine line with which every society, both Muslim and non-Muslim, must deal. To what level is divorce inevitable and we want policies to simplify it as much as possible for both parties vs. having the right policies that would mildly discourage divorce that would at the same time not burden those going through that route. And Allah Knows Best.

The question of "marital property" leads to questions on the rights of two classes of people. The first class, creditors, is primarily dealt with by secular law. How a couple structures its ownership of assets can affect the abilities of certain legal creditors to access them in certain situations. For example, if both spouses own a joint bank account, creditors in the U.S. can seize the assets to cover a debt owed by either spouse. However, if the

¹⁰ Although per the understanding of this author, who lives in the U.S., it might be the case that an American judge would not enforce such terms agreed to in a prenuptial agreement.

account is individually owned, this would not apply in equitable distribution states. In a community property state, the default is that an asset titled only in one party's name can in many cases be pursued for a debt owed by the spouse.

The second are inheritors.¹¹ From an inheritance perspective, the concept of a "marital estate" is invalid. Hence, what is the Islamic status of such property during the marriage? For example, there is a bank account with \$100,000 and everything belongs to the husband. If he dies and his parents are still alive, then each one inherits from it. However, if the wife owns one-third of the account and he dies, then his parents inherit less. Similarly, if the account is one-third hers and she passes away while her parents are alive, they inherit. In certain situations, siblings can also inherit.

Therefore, the Islamic perspective of how that bank account is owned matters. Does this prenuptial agreement mean that such property will be owned 66.6% / 33.3% during the marriage? This author proposes that it does not from a default perspective and to follow the practice of equitable distribution¹² states that such property is individually owned, and the concept of the marital estate comes into play only in the event of divorce. The divorce is what transfers the property's ownership. This could, in theory and in extremely rare scenarios, motivate some individuals to file for divorce to get a higher share of inheritance if the spouse is likely to die soon. However, the overall benefits outweigh this small technicality. Alternatively, just as many couples when purchasing a marital home purchase it as a joint asset,¹³ there is no reason why they can't come to the same agreement that all property accrued during the marriage is jointly owned.

Second Main Issue: Can alimony be justified Islamically?

If the parties agree, the concept of "human capital appreciation," in which one party's earning capacity greatly increased during the marriage, could be a very reasonable way to compensate the wife instead of arranging for a large *mahr* to be a method¹⁴ for spousal support. It could also compensate the husband if he ends up being the dependent partner

¹¹ It is critical that couples also draft a proper Islamic will so that when one spouse passes away unexpectedly, his/her wealth can be distributed properly.

¹² By default, in community property states, the property is considered jointly owned and taken into account for inheritance purposes. See, for example, "Inheritance rights: Do your closest relatives have a right to claim part of your estate?" at <https://www.legalzoom.com/articles/inheritance-rights-do-your-closest-relatives-have-a-right-to-claim-part-of-your-estate>.

¹³ The author recalls when originating mortgages for Guidance Residential that in the vast majority of cases even if the husband was the sole breadwinner, the ownership of the house was done jointly. While it could be reasonably inferred that this would mean a joint ownership intent from a Sharia perspective, it might also be the case that this was done for convenience purposes.

¹⁴ Given the circumstances of the labor market in the U.S., the underlying philosophy here is that a gain occurred during the marriage and in many cases with the dependent spouse's sacrifices, and hence the latter should have a share of the benefit. This clause does not require the party to continue earning at a certain rate for life, and the amount would decrease if the individual's earnings decreased. The goal here is to share in the gain, not to enslave the other partner.

and it accounts for scenarios in which the husband might think he is entitled to more than the *mahr* in cases of *khul'a*, for example paying for her¹⁵ educational expenses.¹⁶

Another question to consider if the woman has custody of the children and does not work is: is the child support calculation per Western law the same as Islamic law, or is the Islamic calculation equivalent to the Western calculation of “child support + alimony”? If a divorce happens while the child is being breastfed, Qur’ān 65:6 states that the ex-wife should be compensated. But what about beyond that? Legally, “alimony” is supposed to cover the woman’s expenses and “child support” is to cover the children’s expenses.

If the divorced woman is the one who has custody of the children, then the *fuqaha*’ differed concerning her accommodation: is the father (of the children of whom she has custody) obliged to provide it, or is it to be provided by her and the one who spends on her, or is it a shared responsibility, to be paid for by the man and his ex-wife, according to the decision of the judge, or is it the case that if she has accommodation, that should be sufficient for her, and if she does not have accommodation, then the father of the children must provide it for her? (Islam Question and Answer 2020)

It seems that given the classical difference of opinion on this issue and its unclearness, the *maṣlaḥa* (public interest) and practical reality in the American Muslim context supports¹⁷ allowing alimony if the ex-wife needs it while having custody of the children.

Third Main Issue: How should child custody disputes be settled?

Child custody and the payment of child support are very sensitive issues in the American context. The Western system has a strong maternal bias in its origins, although in recent years the trend has been toward more joint custody (Meyer et al. 2017), as opposed to sole maternal custody. Child support, a unique debt with harsh enforcement mechanisms, allows for the parent who is owed to have the non-payer jailed for failure to pay. Additionally, the individual’s passport, driver’s license, and professional licenses can also be suspended or revoked (NCSL 2020).

Both Western and Islamic law prohibit any prenuptial agreement stating that one party has the right of custody in the event of divorce, because a custody dispute should be decided in the child’s best interests. New Jersey (Fox 2011) and other states allow an

¹⁵ Or alternately, if she paid for his educational expenses or worked while he was pursuing education/training.

¹⁶ See for example a recent May 2023 fatwa from the Shariah Board of America at <https://www.shariahboard.org/fatwa/1741>.

¹⁷ If others feel strongly about a different opinion, they should make their case.

arbitration¹⁸ council's agreement in this regard to be binding¹⁹ on both parties, if they accept it, while other states such as New York do not automatically enforce such an agreement and reserve the right to overrule it.

Given this challenging environment, this author proposes the following course of action to help resolve such disputes. First, the leading qualified scholars of the Assembly of Muslim Jurists in America (AMJA), the Fiqh Council of North America (FCNA), and the American Fiqh Academy (AFA) must come together to discuss this issue and produce a detailed manual on a "Child Custody Principles Framework" in consultation with qualified American legal scholars. They will then need to pick the most appropriate opinion from the classical schools of Islamic law or, given the circumstances in the U.S., allow the default rule of equal choice among the multiple opinions²⁰ based on the child's best interests. They must also examine the Western innovation of joint custody and comment on its validity. It does seem to this author, and Allah knows best, that this concept fits within the Islamic framework, especially when both parents are working professionals.

Another issue is the differences between the Islamic and Western approaches toward "legal custody" vs. "physical custody," and whether a woman contributing to a child's support justifies any modifications from the classical tradition. AMJA's (Al-Sawy 2012) family code is a good start for some of these questions, but more detail is needed. If the scholars of the three groups cannot reach an agreement, each group should publish its own document, and couples should be permitted to choose one of them.

Second, Muslims should be encouraged to sign up as mediators. If there is a child custody dispute, most states require (Pandolfi 2023) the couple to go through mediation. If mediation produces no solution, the Muslim mediator should strongly encourage the couple to pursue arbitration.

Third, the scholars, along with consultation of other well connected and influential individuals recognized as unofficial authorities among the community, need to appoint perhaps about six to nine²¹ qualified *mufṭīs* on this specific issue to serve as arbitrators. These individuals must be announced to the general public and their names known that these individuals can be consulted on the specific issue of child custody. The vetting process must include rigorous personality testing so that individuals can avoid implicit biases as well as have a strong knowledge of *'urf* (custom), which should be favored over

¹⁸ For further reference, see "What is Family Law Arbitration" at <https://talkingparents.com/blog/august-2018/family-law-arbitration>.

¹⁹ Based on this author's understanding of the law, the requirement that such arbitration be binding for the purpose of child custody and support is unenforceable from a prenuptial perspective and would only be enforceable if both parties willingly agreed to it after divorce proceedings begin, depending upon the state of residency.

²⁰ For further reference, see "Who Gets Custody of the Children after a Divorce?" at <https://seekersguidance.org/answers/hanafi-fiqh/who-gets-custody-of-the-children-after-a-divorce/> and "Who Has More Right to Custody in Islam?" at <https://islamqa.info/en/answers/8189/who-has-more-right-to-custody-in-islam> and "If a Divorced Woman Remarries, Who Gets Custody of the Daughter?" at <https://islamqa.info/en/answers/171456/if-a-divorced-woman-remarries-who-gets-custody-of-the-daughter>.

²¹ Perhaps more, perhaps less depending on demand.

seniority and degree qualifications. Again, if the three groups cannot agree on the most qualified individual(s), then each group should nominate two to three people. These *muftīs* should have the qualifications of a *qāḍī* (judge), but of course at this point in time their judgments would be legally non-binding but rather morally binding. Criticism of such an approach should be ignored, for the short-term goal is to “plant the seeds” and provide a credible alternative to those who might be Islamically inclined to avoid the family court system but see no alternative. This system’s injustice²² is well known, and if Muslims can lead by example and bring some positive change, this would benefit all Americans. It is best, if possible, to avoid going through the court system altogether.

It seems there is something fundamentally both un-Islamic and universally immoral²³ with how our legal system is set up. This author asked a lawyer about this:

Ideally people should be able to work out their agreements. But that’s not always going to happen and even in Islamic countries people have a right to utilize the court system. **Why is it that to go to court, to get a judgment from the “American Qāḍī,” is so expensive?**

The response, of course, is that “lawyers are expensive.” It seems the process is designed to benefit lawyers, as opposed to society’s overall benefit. Muslims should promote changes at the legislative level to reduce the likelihood of heated custody battles by “reducing the stakes” and advocate for changes in the process itself. This might lead to a sharp outcry from some in the legal community, but it is a necessary and important struggle in standing for justice. One legislative change that should be considered is that the judge’s custody order ends when the child is twelve, not eighteen. At the age of twelve,²⁴ the child has the full right to decide which parent’s custody he/she wants to be under and/or spend most of their time with.

The Framework for a Standard Prenuptial Agreement

This author proposes that the three *fiqh* councils (viz., AMJA, FCNA, and AFA) recommend a general prenuptial agreement with the following clauses. To be legally valid, prenuptial agreements require certain disclosures. In addition, it is highly recommended²⁵ that an attorney reviews the agreement for each party to maximize the chance of it being legally enforceable. In this case, they would need to draft the clauses in language appropriate per state law. Scholars who disagree with these proposed terms should propose different ones. If the groups cannot come to an agreement, it would be perfectly acceptable to have three standard agreements, one recommended by each council. This agreement is not intended to be binding, but couples need to know “what they are signing and what they are agreeing to.” Do they accept the terms of classical Islamic jurisprudence and/or the

²² For further reference, see Krasner’s Huffington Post series “A Broken System” at https://www.huffpost.com/entry/a-broken-system-court-of-parents_b_593e0fc5e4b0b65670e56c03.

²³ Beyond some of the actual judgments that we might disagree with.

²⁴ For most cases with certain exceptions.

²⁵ Regardless of whether or not the individual state requires this for it to be legally binding.

terms of the state of residency? This proposed prenuptial agreement is **not** *wājib*, rather what is *wājib* is to select one of three options:

- Create your own prenuptial agreement (agree to different terms, arbitration, etc.);
- Accept this proposed prenuptial agreement; or
- Explicitly agree to the secular court’s full default ruling and waive any claim that utilizing it is “un-Islamic.”

What are they agreeing to? Even if certain terms that the husband and wife agree to might not be enforceable under American law, that is not the point of contention. The party that violated such terms will be accountable to Allah on the Day of Judgment. However, there needs to be clarity upfront, not *gharar*. This author’s opinion is that the standard prenuptial agreement provided below is the best option, especially given what happened in the 2021 Texas case referred to earlier in this article. But if a Muslim couple prefers a different option to remove the *gharar*, that would also be acceptable. An analogy can be made with the case of inheritance. Allah says:

It is enjoined upon you, when death approaches any one of you and he leaves some wealth, that he must bequeath for the parents and the nearest of kin in the approved manner, being an obligation on the God-fearing. (Qur’ān 2:180, trans. Mufti Taqi Usmani)

Classical scholars viewed this verse as abrogated by the verses prescribing fixed shares of inheritance. However, it seems that this is not the case, as abrogation entails a complete cancellation. This verse is binding on Muslims living in non-Muslim countries, where the default inheritance rules are non-Islamic. The requirement for a standard prenuptial agreement is as follows: It is not required for Muslims who get married and reside in Pakistan, but it seems that it is required for Muslims who get married and reside in the U.S. This prenuptial agreement is recommended for young couples that have never been married or young divorcees without children who are entering a new marriage. When it comes to older individuals, or divorcees and widows with children, the recommendation is to consult an attorney for an agreement that is best tailored to the individual situation, although this agreement could serve as a starting point.

Some American Muslim scholars might still feel that arbitration tribunals are superior to detailing the specific terms in a prenuptial agreement and should instead be endorsed as the preferred generic solution to the general public. However, given the history and lack of any progress in the current societal and political environment, this author feels that the standardized prenuptial agreement is the superior option and that arbitration should be limited to child custody disputes. Those who still feel that arbitration tribunals are superior should take the necessary steps to make them more available and known to the general Muslim population in the U.S.

Actions

In this prenuptial agreement framework, the action of the husband filing for a divorce is considered to be the result of *ṭalāq*. If he files without actually verbally issuing²⁶ *ṭalāq*, this action counts as one *ṭalāq*. As this renders the couple Islamically divorced after the wife's 'iddah concludes,²⁷ confirming the divorce through a civil divorce is a binding obligation on the man, just as it is in Muslim countries. A wife's filing for a no-fault divorce is considered a request for *khul'a*, and the judge's confirmation is Islamically a *khul'a*. Her filing for a fault-based²⁸ divorce in a state that recognizes it is considered to be a request for *tatlīq*. Granting of it by a judge is Islamically a *tatlīq*. A couple's decision to pursue a bilateral divorce²⁹ is either *ṭalāq* or *khul'a* or *tatlīq*, depending upon what the spouses have agreed to. If there is a defect in the marriage that would render it invalid according to both Islamic and American law, an annulment may be pursued. In this case, either party filing for an annulment is considered to be presenting a request for *faskh*. The American judge's annulment of it is Islamically a *faskh*.

Addressing the First Main Issue: Marital Wealth Distribution

This framework would stipulate that in a standard relationship where one party works or is the breadwinner and the other does not, the formula for distributing net marital wealth (marital assets minus marital liabilities) excludes inheritance, gifts, and pre-marital wealth and liabilities. This is currently done under American law. Marital wealth distribution in the case of divorce should be as follows (**Tables 5 and 6**).

Table 5: Husband being the 100% breadwinner

	Portion of wealth granted to the husband	Portion of wealth granted to the wife
<i>Ṭalāq</i>	66.6% - <i>Muakhar</i> ³⁰	33.3% + <i>Muakhar</i>
<i>Khul'a</i>	66.6% + <i>Mahr</i> ³¹	33.3% - <i>Mahr</i>

²⁶ Although this would be sinful. Thus, the following question comes up: If the civil divorce was confirmed prior to the expiration of the 'iddah in the event of less than three divorces, what would the Islamic status be?

²⁷ Unless a triple *ṭalāq* is done, in which case it is immediate according to the overwhelming majority of scholars, or if it is the third *ṭalāq*.

²⁸ Assuming that the reason is also accepted by at least one classical school of Islamic law.

²⁹ Meaning a divorce that is filed with the consent of both parties.

³⁰ A deferred payment of *mahr*. For example, it could be the case that the total *mahr* is \$20,000, with \$10,000 paid upfront and \$10,000 deferred. The deferred portion is known as the *muakhar*.

³¹ Assuming that the *mahr* has been spent and does not currently exist as the woman's separate property.

Table 6: Wife being the 100% breadwinner

	Portion of wealth granted to the husband	Portion of wealth granted to the wife
<i>Talāq</i>	33.3% - <i>Muakhar</i>	66.6% + <i>Muakhar</i>
<i>Khul'a</i>	33.3% + <i>Mahr</i>	66.6% - <i>Mahr</i>

These fractions assume that the breadwinner's income contribution is 100% and the dependent partner's is 0%. Given the amount of contribution from the other party, they adjust. Each party starts out with 1/3 (one third); the remaining 1/3 is distributed as a portion of the income generated by each party. This is for total wage labor and active net self-employment income (passive business income excluded) earned during the marriage. Hence, these fractions eventually adjust to 50/50 once both parties end up being exactly equivalent contributors. These figures can be easily verified by IRS tax return documents, as well as 1099 and W2 documents. Situations where a husband and wife are both contributing an income to the marriage are shown below (Tables 7 and 8).

Table 7: Husband being a 90% breadwinner, wife contributing 10% of income

	Portion of wealth granted to the husband	Portion of wealth granted to the wife
<i>Talāq</i>	63.3% - <i>Muakhar</i>	36.6% + <i>Muakhar</i>
<i>Khul'a</i>	63.3% + <i>Mahr</i>	36.6% - <i>Mahr</i>

Table 8: Wife being a 90% breadwinner, husband contributing 10% of income

	Portion of wealth granted to the husband	Portion of wealth granted to the wife
<i>Talāq</i>	36.6% - <i>Muakhar</i>	63.3% + <i>Muakhar</i>
<i>Khul'a</i>	36.6% + <i>Mahr</i>	63.3% - <i>Mahr</i>

Asset Co-Mingling

The value of inheritance, if co-mingled, would be split 66.6% to the individual to whom the asset belongs and 33.3% to the other individual. For example, an inheritance belonging to the husband would be distributed 66.6% to him and 33.3% to the wife and vice versa. Inheritance accrued after marriage, if not co-mingled, follows the rules of separate property.

Addressing the Second Main Issue: Human Capital Appreciation

This would be calculated as the difference between [Gross Wage Salary + Active Net Self-Employment Income] at the beginning and at the end of the marriage. This is from earned income (whether as an employee or as being self-employed), and not from passive investment income. For example, if there is a \$50,000 income at the beginning and a \$200,000 income at the end of the marriage, the appreciation value is \$150,000. If these two amounts are \$100,000, respectively, the appreciation value is \$0. If the income was \$0 at the beginning of the marriage, it is assumed to be the minimum wage annualized for a

40-hour workweek if the individual has no work experience, or it is his/her most recent salary before the marriage annualized to a 40-hour workweek. Additionally, if the appreciated partner was working part-time at the beginning of the marriage, the annualized 40-hour workweek income is the starting point. Adjustments for inflation might be appropriate to factor in as well.

The human capital appreciation value would be payable both ways from ex-husband to ex-wife and vice versa for the length of the marriage, with an additional add-on for the most recent years: $4 \times$ the most recent full year + $2 \times$ the most recent full second year + 1 for each previous full year, for a maximum of twenty years.³² Hence, if the marriage lasted for five years, this income would be payable for nine years. If it lasted for twenty years, it would be payable for twenty years. If it lasted for one year, it would be payable for four years. Human capital appreciation may be bought out lump sum at the time of divorce utilizing the principles of discounted cash flow modeling.

Additionally, if both spouses have human capital appreciation, the net amount is to be paid from one party to the other. In these situations, it might be advisable for one spouse to buy out the other. This income is not allowed if the appreciated partner has less income than the other partner. For example, at the beginning of the marriage, the husband made \$200,000 and the wife made \$0. At the end, the husband makes \$200,000 and the wife makes \$100,000. Hence, the wife is not responsible for paying the husband anything.

The amount should be between 5% and 10%³³ of the appreciation yearly after deductions for federal, state, and, if applicable, local income taxes, FICA taxes, and any minimum required student loan or other payments for the education/professional training leading to the appreciation.

Additionally, if the individual's income decreases, this payment decreases. If his/her income then subsequently increases, this payment only increases to the income level up to the point at the time of divorce (i.e., if the income at the time of divorce was \$200,000 and then went down to \$180,000 and then went up to \$220,000 the calculation would be based on \$200,000). Finally, up to 50% of the income being paid may be credited³⁴ toward child support or alimony payments if those payments are being made.

Alimony

Both parties waive the right to spousal support, except for what is provided for during the *'iddah*. As an exception, if she has custody as caretaker of the children and is in need, she retains the right to pursue spousal support for the duration of child custody. However, if the man is responsible for a *muakhar* payment, he may spread it out through alimony³⁵

³² The calculations here are pure guesswork on the part of the author. If individuals want to pursue this clause, they should consult with the lawyer drafting the prenuptial agreement on how various scenarios would play out in comparison to traditional alimony and modify it, if necessary.

³³ Further analysis is needed to conclude an optimal percentage. The percentage could also be dependent on the number of other dependents (e.g., 5% if there are multiple other dependents and 10% if there are none).

³⁴ The idea being to avoid "triple-dipping."

³⁵ Although this might be legally infeasible, given that alimony usually ends in the case of re-marriage.

payments without interest. This may also be done with human capital appreciation from either party.³⁶

Addressing the Third Main Issue: Child Custody and Child Support

Both parties agree that any dispute over child custody or support should be settled based on the “Child Custody Principles Framework.”³⁷ In the event of a dispute, both parties agree to pursue mediation and, if no agreement is reached, to submit to the judgment of a qualified arbitrator.³⁸ Parties agree that in case of a dispute, the calculation of child support will be based on *‘urf*.³⁹

Conclusion

The arguments for the existence of an impermissible amount of *gharar* in many contemporary American Muslim marriage contracts have been presented. This leads to the necessity of formulating a standardized prenuptial agreement endorsed by Islamic scholarship in the U.S. This specific proposed agreement is not intended to be binding on couples, just an agreement that is recommended, if the couples do not wish to form an agreement themselves. This country’s Muslims need to be informed that either a prenuptial agreement or simply an explicit acknowledgment that accepting the secular court’s full default ruling is required in addition to the amount of *mahr* for all future marriages. What’s done is done, and nothing should be done in regard to existing marriages, as that could cause marital strife. However, if a couple is already pursuing a divorce, such an agreement can be considered to help avoid a costly litigious battle.

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³⁶ Same.

³⁷ As stated earlier, scholars need to come together and produce this document.

³⁸ This is not legally enforceable.

³⁹ Even though the legal system is non-Islamic, per the understanding of this author, the child support calculations done by the American judge take into account the same or very similar considerations a judge in a Muslim country would. Hence, it seems there is no need to “re-invent the wheel.” If others feel differently, they should make an alternate case.

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