

Darar Or Harm For Failure To Maintain The Wife: A Quranic And Juristic Approach On Marriage Dissolution

Tengku Fatimah Muliana Tengku Muda ^{1*}, Azizah Mohd¹ & Noraini Md. Hashim²

¹Faculty of Islamic Contemporary Studies, Universiti Sultan Zainal Abidin, Gong Badak, 21300 Kuala Terengganu, Malaysia.

²Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Jalan Gombak, 53100 Kuala Lumpur.

*Corresponding Author

Email: tg_fatimah@unisza.edu.my

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ABSTRACT

The Islamic principle on prevention of harm or *darar* is well established in the Qur'an, narrated in the narrations of the Prophets and had long been discussed by classical jurists. The commentaries of the Quran explained the term '*darar*' in various dimensions and meanings as according to the verses to include *al-huznu* or grief, fear and horror, distress and illness, as well as poverty and hardship. In view of this, Islamic law imposes a financial duty on the husband to maintain his wife and that his failure will bring harm to the wife. The duty arises as soon as the marriage completed and ends either through death or separation. This paper seeks to examine the juristic views of different schools of laws in Islam (*mazahib*) on the husband's duty to financially support and maintain the wife, as well as the effect of non-maintenance. Content analysis method is employed where references is made to commentaries of the Quran as well as classical jurists' texts, contemporary references of Islamic jurisprudence, narrations of the Prophet PBUH and relevant sources. Few selected Syariah court cases will also be discussed to support the premise. The findings indicate that where the husbands failed to provide for the wife's maintenance for a certain period of time, it causes not only financial difficulties to the wife but extends far more to an abuse which justifies a judicial dissolution of marriage.

Keywords: : Emotional abuse, *Fasakh*, Harm, Wife's maintenance

INTRODUCTION

A matrimony in Islam is not a mere contract of exchange between a man and a woman, concluded in the presence of two witnesses. Rather, it carries with the ties a responsibility of both spouses; one of which includes financial responsibility of the husband to the wife. The Muslim jurists have discussed at length on the financial obligations of the husband and on the effects of non-maintenance. The discussion ranged from the social effects of non-maintenance to its effect on the permissibility of a judicial dissolution under certain conditions, such as failure to maintain the wife following a certain period of time or following harm suffered by the

wife. In this context, it can be seen that the Islamic principle on prevention of abuse circles around discussion on prevention of harm or infliction of '*darar*'. It is a principle laid down in the Qur'an, narrated in the narrations of the Prophets and had long been discussed by classical jurists. The commentaries of the Quran explained the term of *darar* in various dimensions and meanings as according to the verses.

In view of the family as the smallest social unit, research on family abuse and violence in the seventies supported the hypothesis that domestic violence is more prevalent in low socio-economic status families (Byrd, 1979; Gelles, 1974; Levinger, 1966; Gayford, 1975; Maden and Wrench, 1977; Elmer, 1967; Gil, 1970; Parke and Collmer, 1975; Straus et al., 1980). Likewise, research suggested a low risk of marital disruption to the husband having a high income (Cutright, 1971; Becker et al. 1977; Cherlin, 1979) as well as to stable employment among spouses (Cherlin, 1979). Another consistent finding is that family violence rates are directly related to social stress in families (Gil, 1970; Maden and Wrench, 1977; Parke and Collmer, 1975; Straus et al., 1980). In addition to reporting that violence is related to general measures of stress, researchers also reported associations between various forms of family violence and specific stressful situations and conditions, such as unemployment or part-time employment of male cohabitants or husbands (Gil, 1970; Parke and Collmer, 1975; Prescott and Letko, 1977; Straus et al., 1980) and financial problems (Prescott and Letko, 1977). A more recent studies in the 1990s and the 2000s also suggested that financial issues increased depression, decreased marital satisfaction, increased marital conflict, and predict higher likelihoods of divorce (Dew, 2008; Amato & Rogers, 1997; Conger et al., 1990; Gudmunson, Beutler, Israelsen, McCoy, Hill, 2007; Stanley, Markman, & Whitton, 2002).

Studies by local Muslim scholars on the subjects of financial obligations of husband under the Islamic law can be traced as early as 1948 owing to the work of Ahmad Ibrahim, Raihanah Abdullah (1993), Azizah Mohd (2010); judicial divorce for failure to maintain (Ahmad Ibrahim, 1978), Raihanah Abdullah (1997), as well as *fasakh* for cruelty by Afridah Abas et. al (2012). In view of that, it is the purpose of this article to provide a juristic discourse on the inevitable effect of non-maintenance to the wives' emotional well-being. The article suggests that failure of the husband to support and provide maintenance to their spouses as 'silent abuse' among Muslim married couples. To date, where women are most likely to be a career woman, it is submitted that non-maintenance which causes an abuse is mostly not due to the inability of the wife to support herself, rather, it forms as emotional abuse where the wife feel deserted, lonely and ashamed of being ignored and denied by their spouse.

DARAR OR HARM AS IN QURANIC REVELATION AND THE CONCEPT OF ABUSE

The Arabic word of *darar* derives from *darra* which literally means harm. The word is mentioned in considerable verses of the Quran either in the form of verb (*darra - yadurru*), noun (*darran*) or adverb (*diraran*). Allah says in surah Al-Furqan (25:55):

وَيَعْبُدُونَ مِنْ دُونِ اللَّهِ مَا لَا يَنْفَعُهُمْ وَلَا يَضُرُّهُمْ وَكَانَ الْكَافِرُ عَلَىٰ رَبِّهِ ظَهِيرًا

And they worship besides God that which neither benefits them, nor harms them; and the disbeliever is ever a partisan against his Lord.

In surah al-Maidah (5:6) Allah says to the effect;

قُلْ أَتَعْبُدُونَ مِنْ دُونِ اللَّهِ مَا لَا يَمْلِكُ لَكُمْ ضَرًّا وَلَا نَفْعًا وَاللَّهُ هُوَ السَّمِيعُ الْعَلِيمُ

Say: 'Do you worship besides God what cannot hurt or profit you? God is the Hearer, the Knower'.

Meanwhile in surah al-Baqarah (2:231) the Quran reads;

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِيَتَعْتَدُوا

When you divorce women, and they have reached their term, then retain them honourably, or set them free honourably; do not retain them in harm to transgress'

In its literal meaning, *darar* is defined as anything that cause damage or danger, and it is the opposite of benefit (ضد النفع) (Abu Jayb, 1985). It is clearly justified in the surah al-Syu'ara (26:72-73):

قَالَ هَلْ يَسْمَعُونَكُم إِذْ تَدْعُونَ ﴿٦٢﴾ أَوْ يَنْفَعُونَكُم أَوْ يَضُرُّونَ

He said, 'Do they hear you when you supplicate? Or do they bring you benefit or harm?'

Allah says in another verse (Qur'an, 20:89):

أَفَلَا يَرَوْنَ أَلَّا يَرْجِعُ إِلَيْهِمْ قَوْلًا وَلَا يَمْلِكُ لَهُمْ ضَرًّا وَلَا نَفْعًا

Did they not see that it did not reciprocate their words, nor did it have any power over hurt for them or any benefit?

In surah al-Hajj (22:13) Allah says;

يَدْعُو لِمَنْ ضَرُّهُ أَقْرَبُ مِنْ نَفْعِهِ لِيُسِّمِ الْمَوْلَىٰ وَلِيُسِّمِ الْعَشِيرُ

He calls on him whose harm is likelier than his benefit. Truly an evil patron and an evil friend.

Despite its general meaning of harm, *darar* has been interpreted by the *mufassirin* into multiple definitions and situations. *Darar* can connote *dayyiq* (Abu Jayb, 1985) or a state of narrowness and difficulties. At-Tabari (1986) in his commentary described *darar* as a state of extreme hardship and affliction. Allah says in the Quran (6:17):

وَإِنْ يَمَسُّنَّكَ اللَّهُ بِضُرٍّ فَلَا كَاشِفَ لَهُ إِلَّا هُوَ وَإِنْ يَمَسُّنَّكَ بِخَيْرٍ فَهُوَ عَلَىٰ كُلِّ شَيْءٍ قَدِيرٌ

And if God touches you with an affliction, then none can remove it, except Him; and if He touches you with good, then He has power over all things.

Al-Qurtubi (2010) refers it as *al-ba'sa'*; Ibn Kathir defines *al-ba'sa'* as *al faqr wa al-dayyiq fi al 'aysh* or poverty and hardship in life. The definition is again justified by Al-Qurtubi but he

seems to put a heavier level of hardship when he described *darar* as *syiddah min faqr aw maradh* or extreme poverty-stricken and illness in surah al-An'am (Qur'an, 6:17).

In a more analytical thought, some *mufassirin* have also recognized *darar* as an emotional disturbance or distress. This is justified by As-Suyuti in surah al-Zumar (Qur'an 39:8 & 49):

فَإِذَا مَسَّ الْإِنْسَانَ ضُرٌّ دَعَانَا ثُمَّ إِذَا خَوَّلْنَاهُ نِعْمَةً مِنَّا قَالَ إِنَّمَا أُوتِيْتُهُ عَلَىٰ عِلْمٍ بَلْ هِيَ فِتْنَةٌ وَلَكِنَّ أَكْثَرَهُمْ لَا يَعْلَمُونَ

So when some distress befalls man, he supplicates Us. Then, when We bestow on him a grace from Us, he says, 'I was given it merely by force of knowledge'. Nay, but it is a trial. But most of them do not know.

وَإِذَا مَسَّ الْإِنْسَانَ ضُرٌّ دَعَا رَبَّهُ مُبِيتًا إِلَيْهِ ثُمَّ إِذَا خَوَّلَهُ نِعْمَةً مِنْهُ نَسِيَ مَا كَانَ يَدْعُو إِلَيْهِ مِنْ قَبْلُ

And when distress befalls a person, he supplicates his Lord, turning to Him penitently. Then, when He bestows on him a grace from Himself, he forgets Him Whom he had supplicated before.

This is also the view of Ar-Razi (n.d.) as he described *darar* as *al huznu* (Qur'an, 6:17) or grief; and *khauful syadid* or extreme fear and horror as in the following verse of the Qur'an (17:67):

وَإِذَا مَسَّكُمُ الضُّرُّ فِي الْبَحْرِ ضَلَّ مَنْ تَدْعُونَ إِلَّا إِلَهُهُ فَلَمَّا بَجَّأكُمْ إِلَى الْبَرِّ أَعْرَضْتُمْ وَكَانَ الْإِنْسَانُ كُفُورًا

And when distress befalls you at sea, those whom you [are wont to] invoke are no longer present, except Him. But when He delivers you, to land, you are rejective, for man is ever ungrateful.

In the context of a dissolution of marriage, Allah says to the effect:

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا

When you divorce women, and they have reached their term, then retain them honourably, or set them free honourably; do not retain them in harm to transgress'

Ibn Abbas in referring to the verse of al-Baqarah (2:231) explains that the husbands should not transgress by prolonging the term of waiting period (*iddah*) in order to oppress or cause hurt to the wives. Al-Zuhayli (1991) referred the word *darar* in the verse as inflicting harm to the wife.

The discussion and definitions given by *al-mufassirin* and jurists on the terminology of *darar* clearly elucidate the types of *darar* in question to include physical, psychological, emotional as well as financial. This is also justified by Zaydan (1993) who extends the dimension to anything that can cause injury or hurt her physically, emotionally or psychologically or by putting her into danger or destruction. For the purpose of this paper, harm and *darar* following husband's failure to provide for the wife's financial maintenance justified an emotional abuse, as recognized by the Muslim jurists and recent sociologist.

While the discussion on prevention of harm is well documented among Islamic jurists, it was

not until the sixties and the seventies that researches on the subject of violence can be seen amply conducted. It was by then said that defining both for those involved in the study of wife abuse, child abuse or family violence would normally cause confusion (Straus & Gelles, 1986). In some instances abuse refers to a subset of violent behaviours and those which result an injury to the victim. Kempe et al. (1962) and Strauss et al. (1980) defined abuse as a clinical condition, i.e. with diagnosable medical and physical symptoms caused by physical assault and those acts of violence which had a high probability of causing injury to the victim. As opposed to physical abuse, emotional abuse encompasses emotional neglect, emotional deprivation and psychological abuse (O'Regan, Timothy, 1989). Verbal aggression and verbal abuse may be components of emotional abuse, but do not encompass the range of effects victims of emotional abuse suffer (Loring, 1994). What this article meant by emotional abuse is an abuse in its passive form, an ignorance of someone's needs emotionally and which make them silently feel worthless, depressed and which will cause long term damage, so much so that in many cases it can lead to the victims physical health being harmed (Sims, L., 2008).

FINANCIAL RESPONSIBILITY IN MUSLIM MARRIAGE

In general, the husband is obliged to provide for maintenance to the wife by virtue of a valid marriage. The Qur'an states o the effect (Al-Nisa' 4:34);

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ

"Men are protectors and maintainers of the women because Allah has given the one more strength than the other and because they support them from their means"

The verses established the special nature in a relationship between a man as the husband and the woman as the wife. In the presence of one another, they complement each other with comfort, while the man offers protection and supports the women financially.

Under Islamic law, the discussion by the jurists on maintenance is generally dealt under the subject of *al-nafaqa*. According to the Malikis, *al-nafaqa* means something which is within usual and basic needs (*qiwam mu'tad*) to a human being without extravagance (Al-Khursyi, n.d). Thus *al-nafaqa* to them is purposely constrained to human and does not constitute other than that, and it should be within the needs and not too excessive. According to Hanbalis *al-nafaqa* is to provide sufficient bread (food), accommodation and constitutes water, clothes, shelter, or articles necessary for making food such as fat, oil, or even roof, for human purpose in a way that it is sufficient or *kifayat* (Ibn Qudamah, 1980).

Nawawi (2005), one of the prominent Shafiis jurist discussed in details that a husband must not only supply his wife with necessary nourishment but must also give her maintenance in terms

of necessary clothing, toiletries, medicines as well as doctor's fees, suitable lodgings and necessary servants.

The jurists are also unanimous that it is obligatory for the husband to provide maintenance to his wife according to his means (Al-Muti'i, n.d.). Allah says to the effect (Al-Baqarah 2:233) :

لا تُكَلِّفُ نَفْسًا إِلَّا وُسْعَهَا

No person shall have a burden laid on him greater than he can bear.

The jurists also related to a hadith narrated by Hakim bin Mu'awiyah al-Qushairy from his father who said: O Apostle of Allah, what is the right of a wife? He said: That you should give her food when you eat and to provide her clothes when you clothe yourself (Ibn Majah, 2011).

AMOUNT OF FINANCIAL MAINTENANCE

In relation to the amount of maintenance that should be provided to the wife, Allah says to the effect (Al-Talaq, 65:7):

لِيُنْفِقَ ذُو سَعَةٍ مِّنْ سَعَتِهِ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا

Let the rich man spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him.

Al-Qurtubi in commenting the above verse stated that it poses a fundamental principle of law in the providence of maintenance which is due upon the husbands or the fathers and not the wife. It can be inferred from the verse that providing maintenance to the wife and the children is compulsory on the husband, regardless of his condition being a rich person or a destitute. Islam does not burden a husband to spend more than what he can afford, thus if the husband is a destitute than he shall give the amount of maintenance based on his capability even though the wife is of a rich person. In principle, there is no specific amount of maintenance that must be tendered to the wife but it is to be done according to the custom of the people of their time and place. This is because one type of food or its amount sufficient for a woman of one state may not be the food of the people of another state. The maintenance shall also be in the form of currency (Zaydan, 2000). The jurists justified that the amount of maintenance due to the wife will be determined by the husband's condition whether he is solvent or a destitute (*yasaaruhu aw i'saaruhu*). According to Nawawi (2005), the state of solvency, insolvency or a condition of moderate means is to be determined for each day at dawn. Thus the items considered to be necessary for *al-nafaqa* will naturally differ with the country, social status, and way of life of different people (Ibn Rushd, n.d.). The generally accepted view among the Hanafis is that if both the husband as well as the wife is rich, the maintenance will be such as befits their standard of living. If both are poor then the maintenance must be suitable as according to their position. This view is supported with an injunction from the Quran when Allah says to the effect (Al-Baqarah 2:236):

وَمَتَّعُوهُمْ عَلَى الْمَوْسِعِ قَدْرُهُ وَعَلَى الْمُقْتِرِ قَدْرُهُ مَتَاعًا بِالْمَعْرُوفِ حَقًّا عَلَى الْمُحْسِنِينَ ۝

But bestow on them (a suitable gift), the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good.

This is also in accordance to the hadith whereby Hindun bint 'Utbah came and said to the Prophet P.B.U.H.: 'O Messenger of Allah, Abu Sufyan is a miser man and he does not give me from what is sufficient to me and my son', the he said,'Take what is sufficient for you and your son in a righteous way (*bil ma'ruf*)' (Al-Bukhari, 2010). The hadith demonstrated the obligation of the husband to provide sufficient maintenance to the wife whereby in the event of denial of the right to maintenance, the wife is allowed to take from the husband's property even without his permission and knowledge to support her life. Nevertheless she should take the property with kindness and without extravagance (Ibn Qudamah, 1980).

MAINTENANCE TO A WORKING WIFE

The daily activities of contemporary women are far from the pattern designed by women in the past decades. While women during the forties to sixties centralized their daily activities as housewives within the home that lead to fulfilling the responsibilities of motherhood, the modern women of today are on the contrary. It is reported that the female labour force participation rate in Malaysia was 52.4 percent in 2013, which means that for every 100 women, 52 of them are employed (www.bharian.com). This is evident from the statistics issued in 2013 by the Department of Statistics Malaysia which stated that women's total employment stood at 4,630,000 people. This figure represents the involvement of women in varying dimension of professions and industries which verging from manufacturing, financial and wealth management, education to technical jobs such as mechanical engineering fields (www.kpwkm.gov.my).The emergence of dual career for women outside the home is seen to be the influence of the socio-cultural environment changes such as educational background and urbanisation (Zawawi & Md Sidin, 2015).

According to Ibn Abidin, a working wife who works with the permission of the husband shall be entitled to maintenance. On the contrary, a wife who works without the consent of the husband will not be entitled to maintenance (Ibn Abidin, 2000). This is because the husband is entitled to the service of his wife at all times she is living with him. In this instance, he is deprived of her services during the time which she spends on working. Thus he is not liable for her maintenance (Ibn Abidin, 2000). Mustafa Shalabi (1977) added that even if the husband allows the wife to work, he still has the right to withdraw such consent and if the wife objects and resumes her career, the wife is no longer entitled to receive or claim maintenance from her husband due to her disobedience.

FAILURE TO MAINTAIN AS ABUSE AND JUSTIFY A DISSOLUTION OF MARRIAGE

On the permissibility of dissolution of marriage where the husband fails to provide for maintenance, the jurists are divided into two opinions; the Hanafis and the majority (Al-Shirbini, 1957; Ibn Rushd, n.d.; Al-Dusuqi n.d.). According to the Hanafis (Al-Sarakhsi, n.d.), a

separation between the spouse is not allowed in the case of non maintenance from the husband, since the husband may be a solvent or insolvent person and an insolvent husband is not committing any cruelty by not being able to provide the maintenance. The Hanafi jurists relate that an insolvent loses his religious accountability to maintenance since it is above his capability (*al-infaq min al-mu'sir takleef fauqa istita'atihi*). The majority of jurists remarks that not having religious accountability for maintenance does not mean losing a right for dissolution of marriage. The purpose of the dissolution is to prevent harm to the wives and to release her from the husband (Al-Sana'ani, 1978). Jurists of Hanafis also viewed that if the husband is of a well-off person and is able to maintain the wife but fails to do so intentionally, his refusal is not a sufficient reason to justify a divorce. The argument is based on the fact that there is no Tradition from the Prophet P.B.U.H. allowing a wife to apply for divorce in the case of a poor husband. In addition, there is also no Tradition of the Prophet P.B.U.H. giving the wife a right to dissolve a marriage.

However the judge can authorize the wife to raise a loan on the husband's credit for her support. In such case, the husband shall be responsible for its payment and the creditor gets a right to recover the same from him (Ibn Abidin, 2000; Al-Jaziri, 2001). If however she borrows the money for her expenses without the judge's order, the husband shall not be liable for such payment (Ibn Abidin, 2000; Al-Jaziri, 2001). The judge can also order the husband to imprisonment if he does not comply with the judge's order to maintain the wife. The wife is also allowed to sell the husband's property in order to get maintenance. But if his property is not found, and in the same time he does not maintain the wife who insists on her right to maintenance, the judge can commit the husband to prison and keep him there for a few months or till such time that the judge deems sufficient to test the husband's ability or inability to support the wife. But if the husband is so poor that he is incapable of maintaining the wife, the judge shall not imprison him. If the judge is satisfied that the husband cannot maintain the wife he may release the husband from the jail. If the husband is rich can provide the maintenance but he neglects or refuse to do so, he will not be released until he pays the maintenance. The wife shall be entitled to get maintenance from her husband or can be authorized to borrow money on the husband's credit even while he is imprisoned for failure to provide maintenance (Ibn Abidin, 2000; Al-Jaziri, 2001).

Under the Shafii law a marriage can be dissolved if the husband is unable to maintain the wife with the minimum requirement of maintenance of food, clothes, and shelter (Al-Jaziri, 2001). But if the wife is able to be patient with her husband's condition and maintain herself from her own property, such maintenance will become a debt owed by the husband to her. However if the wife can no longer bear such an insolvent husband, it is permissible for her to apply for a dissolution. It is narrated that Abuz Zinaad said, "I asked Sayyid Ibnul Musayyab relating to a person who is unable to provide the maintenance for the wife, are they separable? He said, 'Yes'. So I asked him back, 'Is it Sunnah?'. He said, 'Yes, it is Sunnah'. And what he meant by sunnah is the Tradition of the Prohet P.B.U.H.

It is related of an *athaar* that the Caliph Umar once wrote to his army officers considering husbands who left their wives for war. He ordered them to return to the wives or to divorce the wives by *talaq* (Al-Sana'ani, 1978). The Shafii jurists have also argued that the harm caused to the wife by the husband's inability to provide maintenance is far greater than the inability to consummate. Thus since the inability to consummate entitled the wife to seek a divorce, the husband's failure or inability to give maintenance should make her more entitled for the dissolution of the marriage (Al-Sarakhsi, n.d.; Ibn Rushd, n.d.).

According to the preferred view of Nawawi (2005), if the husband is solvent, there are few conditions to be considered. A claim for dissolution is admissible if the husband is present and solvent but his property is elsewhere, at a distance so great as to admit *qasar*¹ prayer. But if the husband is absent and solvent, the wife cannot obtain the dissolution of marriage, but the judge should order the husband to send for the necessary money.

If a husband gains enough money from his work to maintain his wife, it may be admitted that he has sufficient substance to allow him to discharge his pecuniary obligations towards her. And a claim for dissolution of marriage on account of complete insolvency is not admissible unless the husband is incapable of supplying his wife even with the maintenance due from an insolvent husband in ordinary circumstances. A degree of complete insolvency is manifested where a husband is unable to give not only the provisions that constitute the principal nourishment but also the clothing, the condiments or the habitation that the law requires. A claim for dissolution should be rejected if it is founded merely upon the fact that the husband is unable to supply condiments (Nawawi, 2005).

Where the insolvency is proved the judge must either pronounce the dissolution of the marriage or authorize the wife to pronounce it herself. In this condition, the majority of jurists assert that three days respite must first be allowed. It is explained by al-Shafii that the intention is 'to remove or eliminate harm' (*li raf'i al-darar*) from the wife (Al-Shafii, 1983).

Where a respite of three days is insisted upon, the wife is free to leave in the morning or to go out for work on the fourth day, unless the husband then gives her maintenance on that day. Where for two whole days the wife has not received her maintenance and the husband gives it only on the third day, and then omits to do so on the fourth, the days of omission are added together and the woman is free on the fifth. Only a few authors maintain that three consecutive days' omission is necessary before the respite expires. All jurists agree that during the respite enjoyed by the husband the wife may quit the conjugal domicile to get necessary needs, provided she returns at night.

¹ *Qasar* : abridgment of prayer from four *rakaat* to two *rakaat* due to a journey from two *marhalah* or above, or approximately of 88 km or above.

A husband cannot oppose a demand for a dissolution of marriage by alleging that his wife has consented to share his hardship or that the marriage was entered into by her with full knowledge of his circumstances since she is not obliged to bear non-maintenance longer than she likes.

Similarly, the Malikis allow a wife to claim dissolution of marriage through *fasakh* in the case of non-providence of maintenance but with several conditions. The judge can order a dissolution provided that the husband's inability to give maintenance is not something in the past, but it is in present or in the future circumstances, since past maintenance will be considered a debt. Furthermore, a *fasakh* can only be applied on the condition that the wife is ignorance of the husband's insolvency or of his inability to provide maintenance. On the contrary, if the wife is aware of his financial condition but willingly married him, she shall no longer claim for *fasakh* (Ibn Rushd, n.d.; Al-Dusuqi, n.d.). If she met him as a beggar, and she consented to his occupation, and he later leaves his occupation as a beggar, in this condition the wife can apply for *fasakh* (Al-Jaziri, 2001) If the husband cannot establish his poverty and he neglects or refuse to maintain her, the judge can order him to provide maintenance or to divorce her. If his poverty is established, the judge in his discretion will allow him days a respite until he gains solvency. If the husband is still unable to provide for her maintenance, then the judge will order for a revocable divorce. The husband shall be given extra time if he is ill or he is in jail during the given duration. Should he become solvent and refuses to maintain the wife, a minority view among the Malikis stated that the judge can imprison him until he maintains the wife, while another viewed that the judge can himself dissolve the marriage (Al-Jaziri, 2001).

The Hanbali jurists meanwhile viewed that if a husband failed to maintain the wife the minimum requirement of *al-nafaqa* from either food, cloth or lodging, the wife shall choose whether to demand *fasakh* from the husband without allowing him any respite, or to remain in marriage and wait as long as she wishes, and the maintenance will be considered as debt owed to her by the insolvent husband (Al-Jaziri, 2001).

The most preferable or '*rajih*' view according to contemporary jurists, Wahbah Zuhayli is the opinion of the majority of jurists based on the reliability and strength of the proof or '*dalil*', as well as to prevent harm to the wives (Al-Zuhayli, 1997). He added further that there is no harm nor return of harm in Islam.

On the type of dissolution of marriage due to the non providence of maintenance, the Malikis considered it to be revocable divorce (Ibn Rushd, n.d.; Al-Dusuqi, n.d.). The husband is able to reconcile and return to the wife during her waiting period or '*iddah*' if he later proves himself able and willing to provide the maintenance. This according to the Malikis as resembling a divorce by *ila'* (Al-Shirbini, 1957) whereby a husband swearing by God or making a declaration to abstain from sexual intercourse with his wife for a period of four months or a longer period (Ibn Al-Humam, n.d.).

In this regard, the Shafiis (Al-Shafii, n.d.; Al-Shirazi, n.d.) and Hanbalis (Ibn Qudamah, 1980).meanwhile viewed that a dissolution on the ground of non-maintenance amounts to a *fasakh* and thus it will not affect the number of *talaq*. Thus even the husband later proves himself able and willing to provide the maintenance, he shall only remarry the wife with a new *aqad*.

REVIEW ON SELECTED SHARIAH COURT CASES ON NON-MAINTENANCE

In the attempt to provide a justification on *darar* or harm inflicted onto wives where the husband had wilfully neglected to provide for the maintenance, twenty-four (24) Syariah court cases registered in the state of Selangor were selected. Using the purposive sampling method, cases from the Syariah Court of Gombak Timur is selected to represent the said state which covers a period of five years from 2009 to 2013. The cases involved an application of *fasakh* by the wives on the ground of non-maintenance as provided under section 53 of Islamic Family Law (State of Selangor) Enactment 2003. For the purpose of this article, five out of the 24 unreported cases will be discussed accordingly. The unreported cases are highlighted in order to demonstrate that the Syariah court judges employed the concept of prevention of *darar* or harm as expounded in the Quranic revelation, the Sunnah and the discussion of the jurists in allowing dissolution of marriage in the case of non-maintenance.

TABLE 1: Demographic Characteristics

Demographic Characteristics	Frequency	Percentage
Age of Plaintiff (years):		
<30	4	16.7
31 – 40	12	50
41 – 50	5	20.8
51-60	3	12.5
Total	24	100
Employment Status of Spouses		
Wife / Plaintiff		
Working	19	79.2
Not working	5	20.8
Total	24	100
Husband / Defendant		
Working	17	70.8
Not working	7	29.2
Total	24	100
Dependant (Children)		
0	7	29.2
1-2	9	37.5
3-4	6	25
5-6	2	8.3
Total	24	100

From the table, it can be noted that the plaintiff's age range was from 26 to 54 years old. Half of the plaintiff (50%) were aged between 31 to 40 years old, and the plaintiff's average age in the study was 39 years. More than half of the plaintiff (79.2%) were working, while the rest (20.8%) were unemployed. Meanwhile, 70.8% of the defendant were working and more than one-fifth of them (29.2%) were unemployed. More than half of the couples (70.8%) have children ranging from 1 to 6 years old.

TABLE 2
Duration of Non-Maintenance From Husband

Duration	Frequency	Percentage
>1	3	12.5
1-3	10	41.7
4-6	6	25
7-9	2	8.3
10-12	2	8.3
13-15	1	4.2
Total	24	100

From the study, nearly half of the plaintiff (45.8%) waited more than 4 years in the marriage tie without financial maintenance from the husband before applying for *fasakh* divorce. 12.5% of the plaintiff have not received maintenance for more than 10 years.

In the case of *Noor Aishah binti Ali Akbar v Mohd Shahnaz bin Mohd Amin* (Mal Case 0530/2013) the wife claimed that the husband had neglected to provide maintenance since July 2012, approximately a month after their marriage. The wife was often disrespectfully shouted at and verbally abused whenever she tried to discuss on their financial issues. In few occasions she was slapped until she became unconscious. The husband's ignorance of her care, needs and maintenance had caused her to be emotionally suffered and depressed. The wife had also been referred to a Psychiatrist and diagnosed as having 'Major Depression'. Two witnesses were also called to testify. The court then allowed the application and dissolved the marriage through *fasakh*.

In the case of *Rohizam binti Maamor v Hasman bin Hussin* (Mal Case 0135/2012) the parties had been married in 1985. The wife claimed that the husband had neglected to provide for her maintenance since November 2006 and failing which, had led the wife to live in distress. The wife also testified that she could not bear with the marriage due to the husband's neglect. Six years after being ignored and denied of her maintenance, the wife then resort to apply for *fasakh* divorce. The application was allowed by the court.

There are also cases where the wife applied a dissolution of marriage on several grounds such as in the case of *Habsah binti Yahya v Suhaimi bin Salleh* (Mal Case 235/2012). The wife claimed for a *fasakh* dissolution on several grounds namely; that the husband had failed to provide for her maintenance since 2006 which caused her suffered out of the neglect, and that she was living in constant fear since the husband had been owing money from loan sharks. The husband was never present during the trial, and the wife was never declared disobedient (*nusyuz*). The court allowed the application and granted *fasakh* divorce on the ground of failure to provide maintenance for more than 3 months.

In the case of *Sariyana Amilia binti Daman Hairy v Mansur bin Ahmad* (Mal Case 0039/2012) the parties had been married in 2001. The wife filed for a *fasakh* divorce on the ground of failure and neglect of the husband to provide for maintenance for more than 3 months. The wife had not been receiving her maintenance since 2004 until the case was filed which was almost 8 years. She alleged that constant misunderstanding between them had made their marital life impossible and the desertion by the husband had caused her depressed. The court then allowed the application and granted *fasakh* on the ground of failure of the husband to provide maintenance for more than 3 months.

In an identical case of *Masrifawati Binti Humala Marpaung v Mohammad Wazir bin Yeop Mat* (Mal Case 0024/2011), the wife claimed that the defendant had been ignoring to provide for her maintenance since 2002 until the case was registered in 2011. During those nine long years, the husband was present but denied her right to maintenance. The wife testified that she suffered emotionally out of the husband's ignorance. The court then granted *fasakh* on the ground of failure of the defendant to give sufficient maintenance for more than 3 months and that the husband's conduct had caused harm (*darar*) to the wife.

DISCUSSION AND CONCLUSION

The above cases demonstrated that a prolonged emotional abuse can lead to a mental depression which is detrimental and impose harm on one's life. In the case of *Noor Aishah binti Ali Akbar v Mohd Shahnaz bin Mohd Amin* as for instance, the wife suffered major depression out of the husband's behaviour and failure to maintain. In the case of *Rohizam binti Maamor v Hasman bin Hussin and Habsah binti Yahya v Suhaimi bin Salleh*, the wives had been denied of their rights to receive maintenance for six years. Meanwhile in the case of *Sariyana Amilia binti Daman Hairy v Mansur bin Ahmad and Masrifawati Binti Humala Marpaung v Mohammad Wazir bin Yeop Mat*, the wives had patiently waited for eight to nine years before resorting to break the marriage chain by court order. Given the duration the wives remained in an abusive marriage, theories have been developed to account for the various factors influencing wife's decision. Rusbult C.E & Martz, J.M. (1995), suggested that feelings of commitment was strongly linked to stay or leave behaviour; the more committed a wife to the marriage, the longer she would opt to stay. Among other factors include psychological entrapment as for example a wife may have spent a great deal of time, energy and work trying to make the marriage work and hoping that the relationship will improve (Strube, 1988). The decision may also due to delay discounting behaviour (Bell & Naugle, 2005), where a victim may continue to remain in an abusive relationship in order to avoid the tension associated with making an active decision to leave. Regardless of the reasons, the impacts of the husband's denial to maintain, coupled with the years the wife remained in the marriage are evident as causing emotional abuse. It can be inferred from the selected decided cases that it is not the intention of the court to examine the different opinions of jurists of the four schools of law, or to limit the observance to a particular school of law only. On the contrary, the rulings are based on the provision provided under the legislation which has been carefully enacted based on the spirit and purpose of Shariah in upholding justice. Thus, the court in its wisdom would evaluate the extent to which harm is normally tolerated in marital life, whether it is justified to repudiate a marriage.

In the effort to reach an impartial decision, the judges also relied on the Quranic revelation as well as the legal maxim such as “Harm must be eliminated” (Ad- ḍararu yuzal) which reflects the essence of Shariah. The permissibility of fasakh divorce in this point is a practical manifestation of the maxim which serves as an option for a woman to initiate a divorce in a situation that renders harm on her. Some of the variant renderings from the maxim such as; “A greater harm is eliminated by means of a lesser harm” (Yuzal al- ḍarar al-ashadd bi al- ḍarar al-akhaf) implies that where a condition exists that one particular harm may give rise to another harm, the one which would cause lesser harm is to be given priority and eliminated. Based on the principle, a harm caused in an abusive marriage is greater than the harm it may cause if the marriage is dissolved although a divorce is detested in Islam. Among the case mostly referred and cited in the selected cases was the case of Joan Mary Sulaiman v Sulaiman bin Haji Musa, JH [1416] 97, where the learned trial judge, Tuan Abu Bakar bin Ahmad observed;

...failure to provide nafaqa (maintenance) to the wife will convey difficulty and hardship in her survival since nafaqa plays as basic needs in life...there is the qawaid fiqhiyyah (legal maxim) which means ‘necessity makes the unlawful lawful’...

It is then evident from the discourse of the majority of jurists that the permissibility for a wife to demand a dissolution where the husband fails or unable to adequately support her is based on the argument to relieve the wife from any infliction of harm. In view of the few selected cases, it can be seen the effects of non-maintenance can convey far more than physical and financial hardship on the wife. Studies also supported that the destruction of self that is the hallmark of emotional abuse more painful and damaging to the victim than physical abuse (Loring, 1994; Kent & Walker, 1998; Gibb, Butler & Beck, 2003). In conclusion, it is always the intention of the Islamic law to protect the family institution. However in a situation where a marriage no longer serves its primary objectives or that a marriage proved to be detrimental to either spouse, an application to dissolve the marriage will be allowed.

REFEENCES

- Ibrahim, A. (1948). Maintenance for Muslim Wives. *Malayan Law Journal*, Xxix.
- Ibrahim, A. (1978). Fasakh for Failure to Maintain. *Journal of Malaysian and Comparative Law*, 329.
- Mohd, A. & Ibrahim, B. (2010) Muslim Wife’s Right to Maintenance: Husband’s Duty to Maintain a Working Wife in Islamic Law and the Law in Malaysia. *IUM Law Journal*, 18: 103.
- Becker G.S., Landes E.M., Michael R.T. (1977). An Economic Analysis of Marital Instability. *Journal of Political Economy*. 85, 1141–1188.
- Bell, K.M. and Naugle, A.E. (2005) Understanding Stay/Leave Decisions in Violent Relationships: A Behavior Analytic Approach. *Behavior and Social Issues*, 14, 21-45
- Byrd, D. E. (1979). Intersexual assault: A review of Empirical Findings in Gelles, R.J. (1980) *Journal of Marriage and the Family*.
- Zawawi, D. & Md Sidin S. (2015). Understanding the Individual Values of Working and Non-Working Wives in Malaysia. *Pertanika J. Soc. Sci. & Hum.* 23 (S): 161 –180

- Al-Dusuqi, S.M. (n.d.). *Hashiah al-Dusuqi 'ala Sharhi Al-Kabir*. Qahirah: Dar Ihya al-Kutub al-Alamiyyah.
- Gayford, J.J. (1975). Wife battering: A preliminary survey of 100 cases. *British Medical Journal*, 1, 194-197.
- Gelles, J. (1974). *The Violent Home: A Study of Physical Aggression Between Husband and Wives*. Beverly Hills, CA: Sage.
- Gil, D. (1970). *Violence Against Children: Physical Child Abuse in the United States*. Cambridge: Harvard University Press.
- Ibn Abidin, M. (2000). *Radd al-Muhtar 'ala Dar al-Mukhtar*. Bayrut: Dar al-Ma'rifah.
- Ibn Al-Humam, K.D. (n.d.). *Fath al-Qadir*. Vol. 4. Bayrut: Dar al-Fikr.
- Ibn Majah (n.d.). *Sunan Ibn Majah*. Al-Riyadh : Maktabah al-Ma'arif lil-Nashr wa al-Tawzi'.
- Ibn Qudamah, A. M. A. (1980). *Al-Mughni*. Qahirah: Dar 'Alam al Kutub.
- Al-Jaziri, A.R. (2001). *Kitab al-Fiqh 'ala Mazahib al-'Arba'ah*. Bayrut: Dar Ibn Hazm.
- Kempe, C., Henry, F. N., Silverman, B. F., Steele, W. D., and Henry, K. S. (1962). The battered child syndrome. *Journal of the American Medical Association*, 181, 107-112.
- Al-Khursyi (n.d.). *Hasyiah al-Khursyi*. Bayrut: Dar al-Sadir.
- Loring, M. T. (1994). *Emotional abuse*. New York: Lexington.
- Maden, M. F. and David, F. W. (1977). Significant Findings in Child Abuse Research. *Victimology* 2 (2), 196-224.
- Al-Muti'i, M. N. (n.d.). *Al-Majmu' Sharhu al-Muhazzab*. Jeddah: Maktabah al-Irshad.
- Al-Nawawi, A. Z. Y.(2005). *Minhaj al-Talibin wa Umdat al- Muftiyin*. Beirut: Dar al-Kutub al-'Ilmiyyah.
- O'Regan, T. (1989). Emotional Abuse Within a Changing Legal Framework. *Journal of Child Law*, 2, 119.
- Parke, Ross D., and Candace W. C. (1975). 'Child abuse: An interdisciplinary Analysis'. In Mavis Hetherington (Ed.), *Review of Child Development Research* (Vol. 5.). Chicago: University of Chicago Press. 1-102.
- Prescott, S. & Carolyn, L. (1977). 'Battered women: A Social Psychological Perspective'. In Maria Roy (Ed.), *Battered Women: A Psychosociological Study of Domestic Violence*. New York:Van Nostrand Reinhold, 72-96.
- Al-Qurtubi, M. (2010). *Al-Jami' li Ahkam al-Qur'an*. Qahirah: Dar al-Hadith.
- Abdullah, R. (1997). Alasan Membubarkan Perkahwinan Melalui Fasakh. *Jurnal Syariah*. 5(1): 51-62.
- Abdullah, R. (1993). Peruntukan Kewangan Bagi Wanita Islam Dalam Akta Undang-undang Keluarga Islam, Wilayah Persekutuan 1984. *Jurnal Syariah*. 1(2): 209-222.
- Rusbult C.E & Martz, J.M. (1995). Remaining in an Abusive Relationship: An Investment Model Analysis of Nonvoluntary Dependence. *Personality and Social Psychology Bulletin*. 21(6):558-571.
- Al-Sana'ani, M. (1978). *Subul al-Salam Sharh Bulugh al-Maram*. Misr: Al-Maktabah al-Tijariyyah al-Kubra.
- Al-Sarakhsi, S.D. (n.d.) *Al-Mabsut*. Bayrut: Dar al-Ma'rifah li al-Tiba'ah wa al-Nasyr.
- Al-Shafii, A.B.M. (1983). *Al-Umm*. Dar al-Fikr li al-Tiba'ah wa al-Nasyr wa al-Tawzi'.

- Shalabiy, M.M. (1997). *Ahkam al-Usrah fi al-Islam*. Beirut: Dar al-Nahdah.
- Al-Shirazi, A.I.A (n.d.) *Al-Muhazzab*. Bayrut: Dar al-Ma’rifah li al-Tiba’ah wa al-Nasyr.
- Al-Shirbini (1998). *Al-Iqna’ fi Hall Alfaz Abi Shuja’*. Qahirah: Al-Maktabah At-Tawfiqiyyah.
- Al-Shirbini, M. A. (1957). *Mughni al- Muhtaj*. Matba’ah Muhammad al-Baabi al-Halabi.
- Sims, L. (2008). Invisible Wounds, Invisible Abuse: The Exclusion of Emotional Abuse in Newspaper Articles. *Journal of Emotional Abuse*, 8(4), 185-197.
- Straus M.A & Gelles, R.J. (1986) Societal Change and Family Violence. *Journal of Marriage and Family*, 48, 465-479.
- Straus, M.A., Violence in the Family: A Review of Research in the Seventies, 42 (4), 873-885.
- Strube, M. J. (1988). The decision to leave an abusive relationship: Empirical evidence and Theoretical issues. *Psychological Bulletin*, 104(2):236-250.
- At-Tabari (1986). *Majma’ Al-Bayan*. Bayrut: Darul Ma’rifah. 435.
- Zaydan, A. K. (2000). *Al-Mufassol Fi Ahkam al-Mar’ah Wa Baitul Muslim Fi al-Syariah al-Islamiyyah*. Lubnan: Muassasah ar-Risalah.
- Zaydan, A. K. (1993). *Ahkam Al-Mar’ah Wal Bayt Al-Muslim Fi Al-Shariah Al-Islamiyyah*. Vol. 8. Bayrut: Muassasah Ar-Risalah. 437-439.
- Al-Zuhaily, W. (1997). *Al-Fiqh al-Islami wa Adillatuh*. Qahirah: Dar al Fikr.
- Al-Zuhaily, W. (1991). *At-Tafsir Al-Munir fi Al-Aqidah wa Al-Shariah wa Al-Minhaj*. Vol. 2. Dimasyq: Dar Al-Fikr. 349.