

Protecting the Spouses' Interest (*Maslahah*) in Cases of Defects through the Application of the Islamic Principle of Harm

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Abstract

Two crucial elements serve as the objective of Islamic legal rulings are the achievement of interest (*maslahah*) and the repulsion of harm (*mafsadah*). This paper seeks to examine the juristic views of different schools of laws in Islam on the application of the Islamic principle of harm in protecting the interest of spouses in cases of defects. For comparative purpose, the paper has also discussed the provisions of law related to defects as applied in Jordan, Egypt and Morocco. Using content analysis method, the findings indicate that where either spouses is inflicted with certain types of defects, dissolution of marriage is allowed based on the ground of protecting the interest of the spouses as well as an appraisal to the Islamic principle of repulsion of harm.

Keywords: Harm, Defect, Marital Life, Islamic Law, Maslahah

Introduction

Marriage in Islam is often referred to in a poetic manner describing the love and mutual rights that exist between the husband and the wife (Jaafar-Mohammad & Lehmann, 2011). One of the objectives of marriage in Islam is to enjoy the fulfillment of each other's presence and companionship in a legal framework. Islam views emotional and sexual expression between a husband and wife as a form of worship, institutionalizing them not solely for procreation but as a way for a couple to connect, strengthen their relationship, and help relieve everyday stresses (Hammudah, 1977).

Allah says to the effect:

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً وَاتَّقُوا اللَّهَ الَّذِي تَسَاءَلُونَ بِهِ وَالْأَرْحَامَ إِنَّ اللَّهَ كَانَ عَلَيْكُمْ رَقِيبًا

“O mankind, fear your lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women. And fear Allah, through whom you ask one another, and the wombs. Indeed Allah is ever, over you, an observer.”

(QS, Surah al-Nisa', 1)

If one of the spouses suffers from a defect (*'ayb*) which causes him retracting from the other spouse or being repulsive, or where the spouse can no longer tolerate with the defect then happiness may not be achieved in the marriage. Defects refer to physical or mental flaws in one or both of the parties, which makes marital life unfruitful (Ghaly, 2008). The physical or mental defects of the spouse may prevent him from performing marital obligations arising from the marriage contract, leaving the other spouse with misery and unhappiness. Allah says in the Holy Qur'an:

وَأَلْهَنَ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ وَلِلرِّجَالِ عَلَيْهِنَّ دَرَجَةٌ وَاللَّهُ عَزِيزٌ حَكِيمٌ

“And they (women) have rights (over their husbands as regards living expenses, etc.) similar (to those of their husbands) over them (as regards obedience and respect, etc.) to what is reasonable, but men have a degree (of responsibility) over them.”

(QS Surah al-Baqarah, 228)

This verse is relied upon by al-Zuhayli when discussing the reciprocal rights and obligations of both spouses against each other (al-Zuhayli, 1997). When a husband or wife is suffering from a defect which makes their companionship impossible or intolerable, it becomes necessary for the judge to give the aggrieved spouse a relief by dissolving the marriage. This conception of Muslim law is based on the fact that it does not consider a marriage to be absolutely irrevocable or unbreakable whatever the circumstances are, but a marriage may be dissolved once it can be established that the spouses can no longer live in happiness in any account of defect in one another.

Protecting The Interest (*Maslahah*) Through The Islamic Principle Of Harm

Protecting the rights of those who cannot protect themselves is the main function of the law. The *maqāsid* aims at creating a society based on a deep sense of accountability and responsibility. Ibn Qayyim in explaining the purposes of Shari'a said that foundation of the Shari'a is the safeguarding of people's interest in this world and the hereafter (Ibn Qayyim, 1993). In his *al-Muwāfaqat* al-Shatibi presented a doctrine of *maqāsid al-shari'a* which means the purpose of law which comprises a clarification of the various aspects of the concept of *maslahah* as a principle of legal theory. The concept of *maslahah* or interest also forms the basis of his philosophy of Islamic law. Al-Shatibi (2008) also classified the purposes of Shari'a into three levels which are necessities (*ḍaruriyyāt*), needs (*ḥājjiyāt*) and luxury (*taḥsiniyyat*). Necessities are further classified into what preserves one's faith (*ad-dīn*), soul (*an-nafs*), offspring or procreation (*an-nasl*), wealth (*al-māl*) and mind (*al-'aql*).

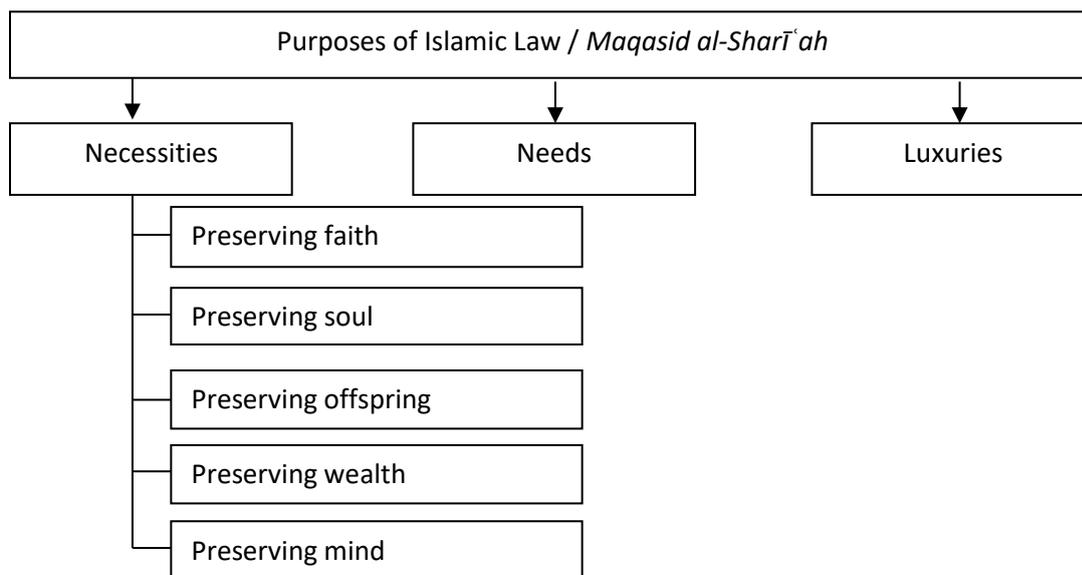


Figure 2.1 Classification of the purposes of Shari'a

The *daruriyyat* are called necessities since they are indispensable in sustaining the *masalih ad-din*. Their disruptions results in the termination of life in the world and in thereafter it results in losing salvation and blessings (al-Shatibi, 2008). *Maslahah* according to Al-Ghazali (1995) is an expression for the acquisition of *manfa'a* (benefit) or the repulsion of *maḍarra* (injury and harm), Rashid Rida (n.d) expanded the concept of *maslahah* which includes reforms of the pillars of faith and spreading awareness that Islam is the religion of pure natural disposition, reason, knowledge, wisdom, and appraisal on women's right.

The principle of harm in Islam is as well employed in cases which involves blocking lawful action because it could be means that lead to unlawful actions. An example of an action that results in certain harm is digging a well on public road which will certainly harm people. In some cases, an action is prohibited for fear of probable harm such as in the case of a woman travelling by herself.

The principle of harm has also formed one of the essential legal maxim of fiqh which reads '*al-darar yuzal*' (harm must be eliminated). Al-Nadawi (1994) explains that the word *darar* or harm quoted refers to any act that can give harmful effect to the religion, self, offspring, mind, wealth, and honour and are meant to be avoided. The maxim is derived from a Hadith of The Prophet PBUH: (لا ضرر ولا ضرار) (Ibn Majah, n.d) which means "there should be no harm nor return of harm". The option in cases of defects (*khiyar al-'ayb*), is thus a practical manifestation of the maxim. It indicates the importance of eliminating every kind of harm. The implication of the maxim can be divided into two parts. The first part is, '*la darar*' or harm shall not be inflicted whether it involves individual, society, environment or any other things shall be avoided. All necessary measures should be taken in order to prevent any kind of harm from happening. Whereas the second part is '*la dirar*' indicates that any harm that is inflicted should not be responded or revenged by inflicting another harm as this will add to the harm already inflicted and accordingly incur further harm. The maxim under discussion has also provided the foundation for some other renderings or supplementary maxim such as

“harm is not eliminated by another harm” and “harm is eliminated to the extent that is possible”.

In relation to that, any harm resulting from the failure of the spouses to live in good companionship with the other may render it to be sufficient reason for a judicial decree of divorce (Tengku Muda & Mohd, 2015). Consequently, discussion among the classical jurists on defects can be seen to revolve around the types of defects in general which make dissolution of marriage permissible (al-Kasāni, 1986; al-Syirāzi, n.d; Ibn Rushd, n.d; al-Ḥaṭṭāb, 1992); Al-Sarakhsi, n.d.; al-Nawawi, 2010; Ibn ‘Ābidīn, 2000). Meanwhile defects as discussed by the contemporary scholars are arranged and divided into several categories which namely physical defects (*al-‘uyūb al-jismiyyah*), sexual-related defects (*al-‘uyūb al-jinsiyyah*), and mental defects (*al-junūn*) (al-Quḍat, 2005; Abdul Aziz, 2002).

Defects, Impotency Or Disability Of The Husband

As regards to defects of the husband, there are three diseases which have been mentioned by the jurists and may be a ground for divorce namely impotence (*‘anīn* or *‘unnah*) as mention by Zainuddin et al. (2008), mutilation (*al-jabb*) mention by Ripsler-Chaim (2007) and castration (*al-khiṣa*) mention by Zainuddin et al (2008).

A husband shall be considered impotent (*‘anīn* or *‘unnah*) if he is incapable of intercourse with the wife either due to the small size of the penis or due to his incapability to penetrate (Ibn ‘Ābidīn, 2000; al-Ḥaṭṭāb, 1992; Al-Sharbīnī, 1998; vol. 3, 202; Ibn Qudāmah, n.d.; Al-Nawawī, 2010; al-Kāsāni, 1986). The Hanafīs view that a person who suffers from the outflow of semen at the man’s approach to his wife so that the erection collapses just before the commencement of the sexual act or before penetration is included in the definition of impotency (al-Kasani, 1986). According to Ibn ‘Ābidīn, *‘unnah* may happen due to old age or even black spell (*sihr*) (Ibn ‘Abidin, 2000). There is consensus among the jurists that a wife is entitled to apply for dissolution of marriage in the case of impotency of the husband since it prevents the high intent of marriage which is enjoyment towards one another (*istimtā*) (Ibn Abidin, 2000). Al-Kāsāni (1986) also views that impotency of the husband inflicts harm on the wife whereby there should no harm nor return of harm in Islam. Among the argument given by the jurists is through an analogical deduction (*qiyās*) to defects in the contract of sale which enables a person to an option (*khiyār al-‘ayb*) to gain for compensation (al-Ramlī, 1993; Al-Kāsāni, 1986; Ibn Rushd, n.d.) The jurists also relied on a hadith narrated by Abdullah ibn Abbas, when ‘Abd Yazīd, the father of Rukanah and his brothers, divorced Umm Rukanah and married a woman of the tribe of Muzaynah. She went to the Prophet P.B.U.H. and said: “He is of no use to me except that he is as useful to me as a hair”, and she took a hair from her head. So separate me from him. The Prophet P.B.U.H. then said to ‘Abd Yazīd: “Divorce her” (Abu Dawud, n.d.). Based on the hadith, the jurist inferred that the order given by the Prophet P.B.U.H. to the husband implies the permissibility of dissolution of marriage in cases of impotency.

However, the wife can only apply for a dissolution of marriage if she had not known of his impotency prior to the contract of marriage (*‘aqad*), conversely, she will lose her right to a dissolution if she had known it before the *‘aqad* (Ibn Nujaym, n.d.; Ibn Qudāmah, n.d.; Ibn ‘Ābidīn, 2000). Apart than that, on acknowledgment of the husband’s impotency, the wife should not have shown her consent to the marriage or else she would lose her right to apply

for dissolution of marriage (Ibn 'Ābidīn, 2000). It is also to be noted that where the husband's impotency is limited to his wife but capable of intercourse with other women, the jurists differ in their view on the permissibility of dissolution of marriage (al-Sharbini, 1998).

A person who suffers from mutilation (*al-jabb*) is called *al-majbub* if the male organ is missing (al-Hattab, 1992). The condition may be from birth or may be caused by accident or surgery. It is also considered *al-jabb* if the male organ is not absolutely missing but is very short in length as to be unfit for penetrating (Ibn Qudāmah, n.d.; Ibn 'Ābidīn, 2000). The jurists are unanimous on the permissibility of dissolution of marriage in cases of *al-jabb* for reasons which prevent enjoyment of intercourse and procreation (Ibn 'Ābidīn, 2000; Al-Sarakhsī, n.d.; Al-Kāsāni, 1986).

A person suffers from castration (*al-khiṣa'*) is called *al-khussī* when he has no testicles but his penis remains (al-Syirazi, n.d), or the testicles are unserviceable either by birth or due to accident, disease or surgical operation. It also applies to a person whose testicles have been so crushed or mutilated as to render them dead and unserviceable (Al-Kāsāni, 1986; al-Haṭṭāb, 1992). Therefore from the definition it can be inferred that a person will not be considered a *khussī* if he has lost only one testicle. The jurists are divided into two opinions on the permissibility of dissolution of marriage in cases of (*al-khiṣa'*). The Shāfi'is and the Hanbalis opined that in such condition, the wife is not permitted to apply to dissolve the marriage since she is not deprived from enjoyment of an intercourse (Al-Syīrāzī, n.d.; Ibn Qudamah, n.d.).

Meanwhile the Hanafis and the Mālikis view that dissolution of marriage is permissible as in the case of *al-'unnah* and *al-jabb* (al-Kāsāni, 1986; al-Haṭṭāb, 1992). There is a consensus among the jurists that an impotent husband should be given a year as grace period in order to cure the disease before dissolution of marriage shall be ordered (al-Sarakhsī, n.d.; al-Syīrāzī, n.d.; al-Kāsāni, 1986; al-Haṭṭāb, 1992, al-Nawawi, 2010). However Ibn 'Ābidīn (2000) also observes that in the case of *jabb* there shall be no grace period (*ta'jīl*) given since it could not be cured as opposed to *al-'unnah*.

Defects Of The Wife

Among the defects that are confined to the wife includes a defect whereby the vagina is sealed either with a bone or a tissue which prevents a penetration (al-ratq) (Fayrūz Ābādī, 1996), and an extra tissue resembling a horn of a sheep by the vagina (al-qarn) (Khurshī, 1900). Where such defects exist, the Mālikis, the Shāfi'īs and the Hanbalis view that it is permissible for the husband to dissolve the marriage since it prevents the enjoyment of an intercourse which serves as one of the purpose of marriage (Khurshī, 1900; al-Syīrāzī, n.d.; al-Nawawi, 2000; Ibn Qudāmah, n.d.).

Defects Common To Both Spouse

Apart from the defects confined to only the husband or the wife, the jurists also discussed on the defects common to both spouses. Among the defects common to both spouse is leprosy (*judhām*) (al-Ba'albaki, 1973), vitiligo (*baraṣ*), insanity (*junūn*), sterility, barrenness or infertility (*'aqum*) (Zainuddin et al., 2008), and halitosis a very foul smell from mouth, body or vagina (*bakhr*) (al-Ba'albaki, 1973; Ibn Rushd, n.d.; Ibn Qudamah, n.d.) which is extreme until it is intolerable. The Mālikis, Shāfi'īs and Hanbalis are in consensus that dissolution of marriage

is allowed where the husband or the wife is suffering from vitiligo (al-Ḥaṭṭāb, 199; al-Muṭṭī, n.d.; Ibn Qudāmah, n.d.; al-Nawawī, 2000).

There is a different translation given to *baraṣ*. Some scholars defined it as the same meaning of *judhām*, as for example it is translated as 'leprosy' in Mohd Khairi Zainuddin et al. (2008), Ghaly (2008), and Chaim (2007), Based on the separate discussion on *judhām* and *baraṣ* by the classical Muslim jurists as well as the definition given by them, *judhām* will most accurately translated as leprosy and *baraṣ* bears the resemblance to vitiligo. For more discussion on leprosy and vitiligo see (Crowley, 2011; Kaufmann, 1988; Boer, 2013).

According to the jurists, the permissibility is due to the reason that a marriage is based on affection and happiness, but such disease will cause abhorance and avoidance from the other spouse for fear of being contagious. The jurists relied on a hadith narrated by Ka'ab bin 'Ajjrah, that the Prophet P.B.U.H. married a woman and found out that she was afflicted with *baraṣ* and the Prophet P.B.U.H. then said, "Put on your clothes and return to your family..." (al-Nīsābūrī, 1990). The jurists also relied on an *athār* where Abi al-Sha'tha' is reported as saying, "Four (things) in which in contract of sale and marriage are not allowed: insanity, leprosy, vitiligo and *al-qarn*" (al-San'āni, 1978; al-Dhahabi, n.d.). The Mālikis, Shāfi'īs and Hanbalis also view that dissolution of marriage is permissible in the case of leprosy as in the case of vitiligo (al-Hattab, 1992; al-Muṭṭī, n.d.; Ibn Qudāmah, n.d.). The jurists observe that leprosy may hinder from the enjoyment of an intercourse as well as feared by the people around them from being infected (al-Hattab, 1992; Ibn Rushd, n.d.). This is based on a narration by Abu Hurairah that the Prophet P.B.U.H. said, "One should run away from the lepers one runs away from a lion" (al-Bukhari, 1996). Where insanity (*junūn*) is concerned, the Malikis, Shāfi'īs and Hanbalis concur that either spouse is allowed to request dissolution of marriage where the other spouse is suffering from insanity (al-Nawawī, 2000). This is since an insane spouse may threaten the life of the other partner as he or she may tend to commit an act of crime. The jurists also relied on the narration of the Prophet and of His Companion as in the case of leprosy and vitiligo (Al- Khurshī, 1900; al-Muṭṭī, n.d.; Ibn Qudamah, n.d.).

In the case of *'aqum*, there is a consensus among the Hanafis, Mālikis, Shāfi'īs and Hanbalis that a husband or a wife may not apply for dissolution of marriage where the spouse is suffering from sterility or barrenness (al-Kasāni, 1986; al-Dusūqi, n.d.; Ibn Qudāmah, n.d.). According to Ibn Qudāmah (n.d.), it is not known whether a person who is a barren during his youth shall be a barren for his entire life. However a minority view from the Hanbalis observes that dissolution of marriage should be allowed in the case of *'aqum*. The opinion is based on a narration by Ma'qil ibn Yasar when the Prophet P.B.U.H. said, "Marry women who are loving and fertile, for I shall outnumber the people by you" (Abu Dawud, 2008). Reliance is also given on the reason that the inability to produce offspring is in fact a grievous harm, thus dissolution of marriage is allowed to prevent harm (*dif'an li al-ḍarar*). Where a husband whose wife is barren is able to divorce his wife through *ṭalāq*, the jurists observe that a wife whose husband is barren shall also be given a right to dissolve the marriage in order to prevent harm (Ibn Qudamah, n.d.). The jurists also differ regarding the permissibility of dissolution of marriage in the case of *bakhr* as according to the various parts from which the bad smell may emanate. The Hanafis, Mālikis, Shāfi'īs and the majority of Hanbalis opined that dissolution of marriage is not permissible in the case of *bakhr* since it does not prevent the enjoyment of each other in an intercourse nor does it an infectious disease (al-Kāsāni, 1986; al-Sarakhsī, n.d.; al-Dusūqi,

n.d.; al-Shirbīnī, 1998; Ibn Qudāmah, n.d.). Ibn Rushd (n.d.) however is on the view that *bakhr* is a sufficient ground to dissolve a marriage since it prevents the enjoyment of an intercourse.

As of other defects and disabilities such as blindness, amputated body or lameness, the jurists of Hanbalis agree that it does not qualify a spouse to apply for dissolution of marriage (Ibn Qudāmah, n.d.).

Right Of The Husband To Dissolve A Marriage Due To Defects

It can be seen that in general, the majority of Muslim jurists view that a marriage may be dissolved if one of the spouses is suffering from certain specified disease. Ibn Qayyim (1972) has also laid down a rule that any defect in the husband or the wife which may result in happiness and affection in marriage is not anymore achieved, then it is valid ground for dissolution of marriage. The jurists however differ whether a husband has a right to dissolve a marriage through the court order in cases of defect of the wife. The Hanafis do not allow the husband the right to judicial divorce on the ground of defects of the wife (al-Kasani, 1986). This is due to the fact that the husband may exercise his right to pronounce a *ṭalāq* in such situation. According to the Mālikis and the Shāfi'ī every defect in the genital parts whether in the husband or the wife and which does not allow an intercourse is a valid reason for dissolution of marriage (Ibn Rushd, n.d.; al-Syirbīnī, n.d.).

It is submitted that the jurists unanimously paid attention to safeguarding enjoying sexual relationship and companionship as an agreed principle that any defect preventing the achievement of these two bring harm to the spouses and affect the validity of dissolution of marriage.

Protection Of Spouse's Interest Against Defects Through Legal Mechanism In Malaysia

As far as Islamic family law in Malaysia is concerned, the term '*darar*' is employed and is defined as "harm to the wife based on what is normally recognized by Islamic Law affecting the religion, life, body, mind, moral or property" [Islamic Family Law (Federal Territories) Act 1984 (Act 303)]. A wife may apply for a judicial divorce through *fasakh* where the husband was impotent at the time of marriage and remains so or when she was not aware at the time of the marriage that he was impotent [Islamic Family Law (Federal Territories) Act 1984 (Act 303 s52)]. It follows that, if a woman has already aware of her husband's impotency prior of the marriage contract, she will lose the right to apply for *fasakh*. Before making an order for dissolution of marriage or *fasakh* on the ground of impotence, the Syariah court must, upon application by the husband, make an order requiring the husband to satisfy the court within a period of twelve months from the date of that order that he has ceased to be impotent, and if the husband satisfies the court within that period, no order of *fasakh* can be made on this ground [Islamic Family Law (Federal Territories) Act 1984 (Act 303 s52); (Act A1261)].

It should be noted that the law also provides that before making an order on the ground of impotency of the husband, the court shall, on application by the husband, make an order inquiring the husband to satisfy the court within twelve months that he has ceased to be impotent. Thus the husband is given a grace period parallel to the view of the majority of jurists. In an interview with medical expert, Dr. Shaharudin bin Abdullah¹ contended that a

¹ Consultant Physician, Salam Specialist Hospital, Kuala Terengganu, Malaysia, Interview by Author, Kuala Terengganu, 6 September 2015.

husband's impotency and sterility are two different terms which may have different implication to the wives. Impotency or medically known as erectile dysfunction causes inability to initiate or maintain an erection thus unable to engage in sexual intercourse which may cause sexual dissatisfaction to the wife. However there are many causes of impotence which can be treated and the wife may have a chance to conceive with current medical technology. On the other hand sterility refers to inability to produce offspring or to conceive, but may have normal sexual intercourse. Dr. Shaharudin emphasized his opinion that since infertility is one of a major life stressor, it may subsequently lead to problems in sexual relationship (see Bernstein, 1993).

Another ground entitling one of the spouse to apply for dissolution of marriage under the law is where the husband or the wife has been insane for a period of two years or is suffering from leprosy or vitiligo or is suffering from a venereal disease in a communicable form [Islamic Family Law (Federal Territories) Act 1984 (Act 303 s52)]. In the light of the proviso, two grounds of *fasakh* are provided under one roof, which is insanity and sufferment from venereal disease. In Sarawak, 'Acquired Immune Deficiency Syndrome' or AIDS is also a ground for *fasakh* [Malaysia, Islamic Family Law Ordinance 2001, s51(1)(f)].

In the case of *Noorihan bt Hussain v Jaaar b Khalid* (Mal Case no. 1300/1997. Syariah Court of Federal Territory of Kuala Lumpur), the husband who was a tourist guide had committed an illegal sexual intercourse with one of his client, and had been infected with AIDS. When the wife was also diagnosed with AIDS in 1997, the husband neglected her and failed to provide for her maintenance. The learned judge in allowing the wife's application of *fasakh*, emphasized that venereal disease & AIDS were among serious defects which made a judicial divorce permissible.

In an identical the case of *Khatijah bt Mamat v Jaidi bin Yusof* (Mal case no. 0049/2012. Syariah Court of Kuala Terengganu), the parties were married in 1993. In 2003, the husband was confirmed as suffering from AIDS and venereal disease out of his drug addiction and social life. However the wife and their five (5) children were not infected. The wife claimed that the husband was also a drunken, habitually assaulted her and did not perform the daily religious duties. The court found in favour of the wife on the grounds that the diseases suffered by the husband since the last nine (9) years denying the right of consummation and was detrimental to the wife. The court relied on the principle of 'harm must be eliminated' (*al-darar yuzāl*) and allowed the application as living with the husband would be harmful to the existing wife and children.

From the cases it can be inferred that the Islamic principle of prevention of harm is thus invoked and applied by the court. Whereby a marriage proves to be detrimental, a dissolution is allowed. Even though in such case a divorce might be harmful, but the harm arising from *fasakh* is lesser than remaining in a marriage which is more destructive to the other spouse. This is also in line to another principle of harm in Islam which reads "greater harm must be prevented even at the expense of a lesser harm"

Legal Consequences Of Defects In Other Islamic Countries

The Islamic personal status law in the Arabic region namely; Morocco Egypt and Jordan have also provided for the law related to judicial divorce in cases of defects. A brief comparison is

made since the Egyptian, Jordanian and Moroccan personal status of law is believed to be strictly adhered to the school of jurisprudence.

Jordan

In cases of defects, the 2010 *Qanun Ahwal al-Syakhsiyyah* of Jordan has inserted a new provision for the wife to initiate a judicial divorce application on the ground of barrenness of the husband (Art. 136. Qanūn al-Ahwāal al-Syakhsiyyah, Raqam 20 li sanah 2010, Jordan, 2010) with several conditions to eliminate harm faced by her. However such provision is not available for the husband. This may due to the fact that in cases of infertility of the wife, the husband may resort to marrying another to eliminate harm on his part. A judicial divorce in this matter of defects will affect a *fasakh* divorce (Art. 138. Qanūn al-Ahwāal al-Syakhsiyyah, Raqam 20 li sanah 2010, Jordan, 2010). It is interesting that the law specifically provided another provision enabling elder woman not attaining more than 50 years old and capable of giving birth to seek for *fasakh* divorce if the husband is barren, provided it is proved with a medical certificate. She may initiate the application only after five years of consummation with the husband (Art. 136. Qanūn al-Ahwāal al-Syakhsiyyah, Raqam 20 li sanah 2010, Jordan, 2010).

Where the husband suffers defects such as leprosy, vitilago and other communicable disease which makes consummation impossible, the wife may apply for judicial divorce and the court will decree a *fasakh* divorce if the defects, upon medical certificate are believed incurable. On the other hand, if the defects are treatable, the judge will adjourn the trial and grant a one year respite. Where after one year the defect is incurable, the marriage is dissolved through *fasakh* (Art. 131. Qanūn al-Ahwāal al-Syakhsiyyah, Raqam 20 li sanah 2010, Jordan, 2010).

Egypt

In Egypt, a woman is also entitled to claim for a divorce if her husband has become afflicted with a chronic defects (*'ayban mustahkaman*) which is either incurable or curable only after a long period of time (Art.9. Law No. 25/1920, Egypt, 1920). The defects also must be as such that will make marital life with him harmful such as insanity, and leprosy. The woman will be accorded the right to demand for a judicial divorce whether the husband suffers from the disease before their marriage and she was not aware of the sufferement at the time of the marriage, or whether he was afflicted after their marriage but she does not consent to continue the marriage. If she consented explicitly or implicitly to continue the marriage, a judicial divorce will not be accorded (Art.9. Law No. 25/1920, Egypt, 1920). A divorce on this ground will be irrevocable (*ṭalāq bāin*) (Art.10. Law No. 25/1920. Egypt, 1920).

Morocco

Defect and diseases that prevents intimate conjugal relations, endangers the life or the health of the other spouse, and where such defect cannot be cured within one year are considered as impacting the stability of conjugal life (Art.107. Mudawwanah al-Ushrah, Morocco, 2010). However, Art. 108 of the *Mudawwanah* elaborates that the petition for divorce on the basis of defect is subject to the fact that the petitioner must not have known about the defect at the time the marriage contract was concluded and that the petitioner must not have behaved in a way that would imply his or her consent to the defect once she or he had knowledge of its incurable nature.

Conclusion

The principle of harm in Islam manifests that the Shari'ah propagates the protection of interest and rejection of any evil deeds which shall bring harm. The principle of no harm shall be inflicted nor reciprocated describes the universal principle upheld by the Shari'ah to ensure attainment of *maslahah* prevails for all in the society. Regardless of the differences in opinion, the jurists' discussion on physical defects, impotency or disability has offered the court the foundation in selecting the best suited rule to be adopted in the current situation in Malaysia, especially in matters of missing clear legal *nas*. The court has so far adopted the view of the Shāfi'īs & the majority in allowing judicial divorce through *fasakh* in cases of defects among spouses. Based on the spirit to eliminate harm, it is also submitted that sterility of the husband and chronic defects which is either incurable or curable only after a long period of time might as well be considered as the grounds entitling a *fasakh* divorce, thus ensuring that the *maslahah* of either spouse is protected at its best.

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References

- Al-Ba'albaki, M. (1973). *Al-Mawrid: Modern English-Arabic Dictionary*. Bayrūt: Dar al-Salam.
- Al-Bukhāri, M. I. (n.d). *Sahih al-Bukhari*. n.p: Dal al-Ma'rifah
- Al-Dhahabi, M. (n.d.). *Al-Muhadhdhab fi Ikhtishār al-Sunan al-Kubra li al-Baihaqi*. Dar al-Waṭan li al-Nashr.
- Al-Ghazali, A.H. (1995). *Al-Mustasfa fi Ilm al-Usul*. Bayrut: Dar Sadir
- Al-Ḥākīm, al-Nīsābūrī, M. A. (1990). *Al-Mustadrak 'Ala al-Ṣaḥīḥain*. Bayrūt: Dar al-Kutub al-'Ilmiyyah.
- Al-Haṭṭāb, A. A. M. (1992). *Mawāhib Al-Jalīl bi Sharhi Mukhtaṣar Khalīl* . Beirut: Dar Al-Fikr.
- Al-Kasāni, A. B. (1986). *Badāi' al-Ṣanāi' Fī Tartīb Al-Sharāi'*, Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1986.
- Al-Muṭṭī. (n.d.). *Takmilah al-Majmu' 'ala Sharhi al-Muhadhdhab*, vol.18. Bayrūt: Dar al Fikr.
- Al-Nawawi. (2010). *Minhāj al-Tālibīn wa 'Umdat al-Muṭṭīn*. Qāhirah: Dār al-Tawfīqiyah li al-Turāth.

- al-Quḍat, A. M. (2005), *Al-Tafrīq Bayna al-Zawjayn li al-'Uyūb al-Jinsiyyah*. Majallah Kulliyah al-Dirāsāt al-Islāmiyyah al-'Arabiyyah Dubī: UAE.
- Al-Ramlī, M. A. (1993). *Nihāyah al-Muhtāj ila Sharḥi Manhāj fi al-Fiqh 'ala Madhhab al-Imām al-Shāfi'i*. Egypt: Dar al-Kutub al-'Ilmiyyah
- Al-Ṣan'ānī, M. I. (1978). *Subul al-Salām Sharḥ Bulūgh al-Maram*, vol.3. Misr: Al-Maktabah al-Tijariyyah al-Kubra.
- Al-Sarakhsi, S. D. (n.d.). *Al-Mabsūt*, vol.5. Bayrut: Dar al-Ma'rifah li al-Tiba'ah wa al-Nasyr.
- Al-Sharbīnī, M. A. (1998). *Mughni al-Muhtāj Ila Ma'rifati Ma'āni Alfāz al-Minhāj*, vol.3. Bayrut: Dar al-Fikr.
- Al-Shatibi, A. I. (n.d). *Al-Muwafaqat fi Usul al-Shari'a*, (Bayrut: Dar Ma'rifah), vol.2. 8-10.
- Al-Shīrāzī, I. A. (n.d.). *Al-Muhadhdhab*, vol.12. Bayrut: Dar al-Ma'rifah li al-Tibā'ah wa al-Nashr.
- Al-Zuhaily, W. (1997). *Al-Fiqh al-Islami wa Adillatuh*. Qahirah: Dar al Fikr.
- Boer, A. (2013). *Dermatological Diseases and Cumulative Life Course Impairment*. Basel: Karger.
- Ash'ath, A. D. (2008). *English Translation of Sunan Abu Dawud*. Riyaādih: Darussalam.
- Abdul Aziz, A.. (2002). *Peranan Sains Perubatan Dalam Menentukan Hukum Keharusan Fasakh Kerana Penyakit*, Unpublished Master Dissertation. Kuala Lumpur: University of Malaya.
- Bernstein, J. (1993). *The Emergence of an Insight: Infertile Couples Are Normal, but Infertility is a Major Life Stressor* in Technology and Infertility: Clinical, Psychosocial, Legal, and Ethical Aspects, Machel M. Seibel et.al (eds.). New York: Springer-Verlag.
- Crowley, Leonard V.. (2011). *Essential of Human Disease*. Sudbury, Mass: Jones and Bartlett Publishers.
- FayrūzĀbādī. (1996). *Al-Qāmūs al-Muḥiṭ*. Bayrūt: Muassasat al-Risālah.
- Ibn Ashur, M. T. (2006). *Treatise on Maqasid al-Shari'ah*, Eng. Trans. El- Mesawi, Mohamed El-Tahir. London: International Institute of Islamic Thought.

Ibn Nujaym. (n.d.). *Al-Baḥr al-Rāiq Sharḥ Kanz al-Daqāiq*, vol.5. Bayrut: Dar al-Ma'rifah li al-Tibā'ah wa al-Nashr.

Ibn Qayyim, S. D. (1972). *Zad al-Ma'd*. Qahirah: Dar al-Fikr li al-Tiba'ah wa al-Nasyr.

Ibn Qayyim, S. D. (1993). *I'lām al-Muwaqqi'in 'an Rabb 'Ālamīn*. Qahirah: Dar al- Hadith.

Ibn Qudāmah. (n.d.). *Al-Mughni*. Bayrut: 'Alam al Kutub.

Ibn Rusḥd, M. A. (n.d.). *Bidāyat Al-Mujtahid wa Nihāyat Al-Muqtasid*. Qāhirah: Dar al-Kutub al-Hadīthiyyah.

Ibn 'Ābidīn, M. A. (2000). *Radd Al-Muhtār 'Ala Dur al- Mukhtār*, vol.2. Bayrut: Dar al-Kutub al-'Ilmiyyah.

Islamic Family Law (Federal Territories) Act 1984 (Act 303)

Islamic Family Law Ordinance 2001, Sarawak.

Auda, Jasser. (2010). *Maqasid Al-Shariah As Philosophy of Islamic Law*. Kuala Lumpur: Islamic Book Trust.

Alicia, K. (1998). *The Social Dimension of Leprosy*, (London: International Federation of Anti-Leprosy Associations.

Khurshī, M. A. (1900). *Al-Khurshī 'ala Mukhtaṣar Khalīl*. Bayrūt: Dar al-Fikr.

Law No. 25/1920, Egypt, 1920

Ghaly, M. (2008). *Islam and Disability: Perspectives in Islamic Theology and Jurisprudence*. London: Routledge.

Mudawwanah al-Usrah, Morocco, 2010.

Qanūn al-Ahwāal al-Syakḥsiyyah, Raqm 20 li sanah 2010, Jordan, 2010.

Rida, M. R. (n.d.). *Al-Wahi al-Mohammadi: Thubut an-Nubuwwah bi al-Qur'an*. Cairo: Muassasah Izz al-din.

Ripsler-Chaim, V. (2007). *Disability in Islamic Law*. Netherlands: Springer.

Zainuddin, M. K., Zainuddin, M. N. & Mohd Isa, M. F. (2008). *Al-Miftāḥ: Mu'jam 'Aṣrī*. Selangor: Al-Azhar Media Enterprise.