

RIGHTS OF WOMEN DURING MARRIAGE FROM QURA'NIC PERSPECTIVES WITH CROSS-REFERENCE TO THE LAW IN MALAYSIA: AN ANALYSIS

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Women's rights issues in relation to marriage are the most significant topic of debate in many countries. Marriage is regularly portrayed as an "oppressive sphere" for women, with their rights being oppressed the moment they enter a marriage contract, especially in Islam. However, in many cases, Islamic matrimony has been demonstrated to liberate women, preserve their honour and place in society, and abolish injustice when guided by principles from the Qur'an and the Sunnah of Prophet Muhammad (s.a.w.). In general, misconception regarding the Muslims is caused by cultural interpretation and malpractice of the original Islamic teachings, which have tainted the true Islamic ideal. This study addresses the rights of women in marriage from the Qur'anic perspective and from the maqasid shariah approach. It also examines the concept by referring to the laws in Malaysia and explores the issue of whether the Malaysian laws uphold the rights of women or not. The discussion is based on the related Qur'anic verses including their tafsir, and supported with the Hadith of the Prophet. Consecutively, the paper analyses the rights of women in the laws of Malaysia, with support from any related cases law. This library research examines the topic from the viewpoints of the Qur'an and the Sunnah as the primary sources of Islamic law, followed by an analysis on the

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statutes of laws in Malaysia and several relevant decided cases. In addition, the opinions of scholars regarding the issue on the rights of women in marriage are also taken into consideration in the analysis. It is hoped that the study may provide a clear reference and guideline regarding the rights of women in marriage from both the Islamic and Malaysian laws as this topic is highly significant and beneficial to numerous parties in the present day.

INTRODUCTION

The fact that discrimination and oppression against women exist, especially in marriage, cannot be denied. Several facts need to be observed and discussed to grasp the issues and differentiate their causes. A historical example is evident through the Athenian women who were subjected to men. In the absence of the concept of marriage consent, Athenian women had to endure forced marriage, and she did not have any say in the choice of her suitor.¹ Western Christianity presents another form of discrimination as they blame the wife of Adam, Eve, for his fall from heaven.² This forms a root cause for discrimination against women in the West.

In Arabia's pagan era, women were treated as commodities and often received treatment worst than animals. Women were regarded as tools for sex, and a man could have as many wives as he pleased. Plus, a husband who has lost interest in his wife could divorce her simply by performing *zihar* (equating her with his mother). Furthermore, a son could inherit his father's wife, except for his mother, after the death of the father. In addition, a husband who were unable to have children on his own could tell his wife to consolidate with another man for the sake of producing an heir.³ Nonetheless, Islam had emerged as a new light for women, offering liberation from the oppressive practices of the pagan Arabs. Notably, Islam delineates marriage policies with a vision to attain and preserve women's rights in marriage. The religion should be comprehended from its holistic view which highlights sense of equality and its significance towards the marriage institution.

Marriage is a sacred contract in Islam that is protected by the Islamic family law. At present, Islam's approaches and policies on marriage face numerous criticisms and claims of being oppressive. This issue has been aggravated through malpractices of few

Muslims, lack of understanding, cultural practices, ignorance, and misinterpretations regarding Islam's true teachings and approaches towards women, particularly in marriage. In reality, the true teaching of Islam preserves the marriage institution based on the equality of human beings, whereby both genders play complementary roles in the worship of God and the creation of fair societies, in which no individual is superior than the other. There are several rights of women during the marriage that will be discussed in this study namely right to dowry (*mahar*), right to receive good treatment from the husband, right to get fair treatment in the case of polygamy, right to apply divorce, as well as the right to inherit property.

RIGHTS OF WOMEN DURING MARRIAGE

Right to Dowry (Mahar/Mas Kahwin)

In Islam's provision for women, in order to enter into a lawful marriage, the husband is obliged to pay a *mahr* (dowry) to his wife as requested by the wife. The dowry is the money that a husband owes to his wife by entering the contract of marriage or due to sexual intercourse between husband and wife.⁴

Notably, Islam encourages the dowry not to be of exorbitant value but instead, the *mahr* is more of a symbolic gesture of willingness, respect, and love.⁵ In this regard, women have full authority over their *mahr*, and it cannot be used without their permission.⁶ Allah (*s.w.t.*) said: "And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer".⁷ This verse relates with the dowry. After the Prophet's emergence, no man is allowed to marry a woman without the required dowry or by giving false promises about the dowry. Therefore, the man is required to pay a dowry to his wife with a good heart, similar to how he presents a gift with a good heart. If the wife, with a good heart, decides to give part or all of that dowry to the husband, it is allowed and lawful for her husband to take it.⁸

It was narrated that Anas said: “Abu Talhah married Umm Sulaim and the dowry between them was Islam. Umm Sulaim became Muslim before Abu Talhah, and he proposed to her but she said: ‘I have become Muslim; if you become Muslim I will marry you’. So he became Muslim, and that was the dowry between them”.⁹ It was also narrated that Abdullah said, in relation to a man who married a woman, but he died before consummating the marriage with her wife, together without naming a dowry: “She should have the dowry, and she has to observe the *‘Iddah*, and she may inherit”. Ma’qil bin Sinan said: “I heard the Prophet pass the same judgment concerning Birwa’ bint Washiq”.¹⁰

The scholars are unanimous that there is no limit on the amount of the highest dowry.¹¹ However, the Prophet (*s.a.w.*) has said regarding this issue as Narrated Uqbah ibn Amir: Abu Dawud said: “The version of ‘Umar b. al-Khattab added in the beginning of this tradition, and his version is more perfect. He reported the Messenger of Allah as saying: The best marriage is the one that is most easy”.¹²

On the issue of the lowest of dowry, the Hanafi School of law said that the lowest dowry is ten dirhams¹³ as *qiyas* of a measure of theft that is cut off by the hand of the thief.¹⁴ It was narrated from ‘Amr bin Shuaib, from his father, that his grandfather said: “The price of a shield at the time of the Messenger of Allah was ten dirhams”.¹⁵

According to Maliki School of law, the lesser dowry is one-quarter of a dinar of gold or three dirhams of silver.¹⁶ On the other hand, Shafii and Hanbali Schools of law said that there is no limit to the lesser dowry. So, as long as the thing can be sold or have the value to be sold, it can be considered as a valid dowry.¹⁷ Their evidence is based on the Qur’anic verse as Allah (*s.w.t.*) said: “...all others are lawful, provided ye seek (them in marriage) with gifts from your property, desiring chastity, not lust, seeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, agree Mutually (to vary it), there is no blame on you, and Allah is All-knowing, All-wise”.¹⁸

This verse means that men are allowed to use their money to

marry up to four wives and for as many female slaves as they like, all through legal means. They are also allowed to enjoy the wives and female slaves sexually, under the condition that the rightful dowry has been given as compensation. If the man has stipulated a dowry for his wife, and she later partially or totally forfeits it, this results in no negative outcome.¹⁹

Narrated Sahl bin Sa'd: "A woman came to Allah's Messenger and said, 'I present myself' (to you) (for marriage). She stayed for a long while, then a man said, 'If you are not in need of her then marry her to me'. The Prophet (*s.a.w.*) said, 'Have you got anything in order to pay her Mahr?' He said, 'I have nothing with me except my Izar (waist sheet)'. The Prophet (*s.a.w.*) said, 'If you give her your Izar, you will have no Izar to wear, (so go) and search for something'. He said, 'I could not find anything'. The Prophet (*s.a.w.*) said, 'Try (to find something), even if it were an iron ring'".²⁰

Based on the discussion above, the preferable view on the issue of the lesser amount of dowry is the view of Shafii and Hanbali Schools of law because of the strength of evidence from the Qur'an and *Sunnah*.²¹ In the context of Malaysian law, section 21(1) of the Islamic Family Law (Federal Territory) Act 1984 (Act 303) states the "*mas kahwin* shall ordinarily be paid by the man or his representative to the woman or her representative".²² Section 57 of the Islamic Family Law (Federal Territory) Act 1984 also states that "nothing contained in this Act shall affect any right that a married woman may have under *Hukum Syara'* to her *mas kahwin* and *pemberian* or any part thereof on the dissolution of her marriage".²³

It also can be seen in the case of *Salma v Mat Akhir*,²⁴ the plaintiff requested for *mas kahwin* in debt amounted to RM600 and the court ask the husband to pay that amount. In the case of *Siti Zamrah v Maliki*,²⁵ the plaintiff made an oath that she never got her dowry. In reaching the decision, the court has ordered the ex-husband of the plaintiff to pay the plaintiff a pair of gold earrings, a gold chain which cost RM 675, a pair of clothes cost RM 80, and a pair of shoes cost RM 15 which total value is RM 770.

In the light of the principles of *Maqasid Shari'ah*, the right of women to dowry protect the principles of *Maqasid Shari'ah* in term of religion, dignity, property, as well as protect the life. It protects the religion by showing that Islam is justice to wife and protect the dignity because upholding the status of the women with a right of dowry in the contract of marriage or by having a sexual intercourse between husband and wife. Dowry considered as a right and property of a wife which protect the element of property and a wife can continue her life if her husband died with her dowry which fulfils the element of protecting the life.

Right to Receive Good Treatment by the Husband

Allah (*s.w.t.*) has ordered husbands to treat their wife with kindness, as reflected by the verses “treat them kindly” and “keep them in good fellowship” which occur repetitively in the Qur'an.²⁶ Hence, a wife has rights to proper and kind treatment, privacy, respect, defend of her honour, and not revealing her secret to other people.²⁷ Allah (*s.w.t.*) said: “O ye who believe! Ye are forbidden to inherit women against their will. Nor should ye treat them with harshness, that ye may take away part of the dower ye have given them, except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity. If ye take a dislike to them it may be that ye dislike a thing, and Allah brings about through it a great deal of good”.²⁸

During *Jahiliyyah*, it was customary for the male relatives of a deceased man to have the right to do whatever they wanted with the deceased's wife. One of the male relatives may marry her, prevent her from marrying, or give her in marriage, as they had more right to her than her own family. Thus, Allah (*s.w.t.*) commands the believers to not treat the woman harshly up to the point that she returns all or part of the dowry that she was given, or forfeits one of her rights due to oppression or coercion. Allah (*s.w.t.*) also orders the husbands to say kind words to the wives, treat their wives kindly, and make their appearance appealing for the wives, to their level best, just as the husbands like the wives to do the same for them. If the husband dislikes the wife, he must be

patient and accepts her accordingly, as Allah (*s.w.t.*) will grant a lot of rewards for him both in life in this world and the hereafter.²⁹

The Prophet (*s.a.w.*) was the model Muslim husband.³⁰ He (*s.a.w.*) says: "The most excellent of you is he who is the best in his treatment of his wife".³¹ The *fuqaha* differed in their opinions concerning the arrangement of the husband's obligation to teach the wife according to this verse in which Allah (*s.w.t.*) said: "As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance)".³² The majority of *fuqaha* (Hanafi, Maliki, and Hanbali Schools of law) are of the opinion that the husband must discipline his wife according to the order mentioned in the verse. However, Shafii School of law stated that a husband should discipline his wife without taking into consideration the arrangement.³³ The husband has right to discipline his wife if *nusyuz* but first he must advise her with compassion and tenderness. If he failed, then the husband can leave her on the bed, and if also failed, he can hit her, and if also failed, then a husband can bring the matter to the judge.³⁴

However, on the issue of the husband can hit her wife, it must be stressed here that a wife can only be beaten with a non-fearful beating, or be beaten with a severe beating that is not severe or infamous. The husband must avoid beating the face which is a tribute to him, avoid the abdomen and places afraid of fear of killing, and be beat as the top ten beats or less.³⁵ Abu Barda Ansari reported Allah's Messenger as saying: "None should be given more than ten lashes, but in case of any Hadd out of the Huded of Allah".³⁶ Narrated 'Abdullah bin Zam'a: The Prophet (*s.a.w.*) said, "None of you should flog his wife as he flogs a slave and then have sexual intercourse with her in the last part of the day".³⁷ It was also narrated that Aishah said: "The Messenger of Allah never beat any of his servants or wives, and his hand never hit anything".³⁸

In Malaysian law, section 127 of the Islamic Family Law (Federal Territory) Act 1984 states that "any person who ill-treats his wife or cheats his wife of her property commits an offence".³⁹

Apart from that, section 2 of the Islamic Family Law (Federal Territory) Act 1984 states *darar syarie* means harm that affecting a wife in respect of religion, life, body, mind, moral, or property.⁴⁰ In the case of *Hasnah bt. Omar v Zaaba bin Mohamad Amin*,⁴¹ the wife claimed that her husband always hit her and tortured her life. Based on her claims, the court allowed the wife application for divorce by *fasakh*. In the case of *Abdul Hanif v Rabiab*,⁴² the plaintiff applied for *fasakh* because her husband always hits and hurt her, and did not provide the maintenance as well as the suitable accommodation for her. The court allowed the application of the wife based on the grounds that applied by her.

Last but not least, the right of women in receiving a good treatment from her husband is in line with the principle of *Maqasid Shari'ah* in term of protecting the religion, life, as well as the intellect of a wife. This right has fulfilled the element of protecting the religion by showing that Islam is justice to women. This right also protects the life and intellect of women because a husband cannot harm wife, and because of abuse, a woman can cause them to suffer which they can end up of being crazy or mad.

Right to Get Fair Treatment in Case of Polygamy

Another aspect of marriage in Islam that has received a lot of criticism is polygamy. Notably, polygamy is highly significant in the argument that marriage in Islam is discriminatory. An article by Heather Johnson provides the statements below: "The polygamous home is habitually nothing but hell of intrigues and violence. This behaviour in polygamy, which apparently normal in masculine ethics, becomes the source of perpetual torment; calumny and dispute constantly appear to recall that the sexual morality of the man does not fit the aspiration of the women, that Islam in particular..".⁴³ It can be seen that Allah (*s.w.t.*) has ordered husbands to treat their wife justly repetitively in the Qur'an.⁴⁴ Thus a wife has rights to justice between wives⁴⁵ in the case of polygamy.

However, there is little discussion detailing the ways in which polygamy is permissible and the rights of the wife therein. The

basis of polygamy is permitted in the Qur'an. Allah (*s.w.t.*) says: "If ye fear that ye shall not be able to deal justly with the orphans, Marry women of your choice, Two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice".⁴⁶

Ibn Kathir wrote "Allah commands that when one of you is the caretaker of a female orphan and he fears that he might not give her a dowry that is suitable for women of her status, he should marry other women, who are plenty as Allah has not restricted him. However, if you fear that you will not be able to do justice between your wives by marrying more than one, then marry only one wife, or satisfy yourself with only female captives, for it is not obligatory to treat them equally, rather it is recommended. So if one does so, that is good, and if not, there is no harm to him. That is nearer to prevent you from doing injustice".⁴⁷ Narrated Anas bin Malik: "The Prophet (*s.a.w.*) used to visit all his wives in one night and he had nine wives at that time".⁴⁸

The true Islamic practice of polygamy is extremely dependent on the responsibility and capability of men. It cannot be practised until all its requirements have been met. In order to practise polygamy, a man needs to have the financial stability, sexual ability, and psychological capability to sufficiently meet the needs of all wives. Additionally, a polygamous husband may not show bias towards his wives.⁴⁹

In addition, the special reasons that husband practice polygamy are many, firstly because of infertility or illness of women. A woman may be sterile and she will not give birth, or she has an illness that prevents her from fulfilling the wishes of the husband, so in these conditions, husband allowed to practice polygamy marriage. Secondly, the reason is that the increasing hatred of men to his wife at that time, which no doubt that taking the second position to keep the wife in the infarction of her husband with another wife is much less than the divorce.⁵⁰ It was narrated from Abdullah bin Umar that the Messenger of Allah said: "The most hated of permissible things to Allah is divorce".⁵¹ Thirdly,

the reason that husband can practice polygamy marriage is that of the increase of the sexual ability of husband which make him not satisfied with one wife, either for old age or unable to have sexual intercourse or the length of the monthly habit and the duration of puberty. So, the solution to such circumstances is polygamous, rather than the search for illegal contacts which is sinful and caused social damage to the public by the adultery.⁵²

Although Islam permitted the polygamy marriage, it must be noted that the permissibility of polygamy is restricted to the necessity which is accepted by law.⁵³ It was narrated from Abu Hurairah that the Prophet said: “Whoever has two wives and is inclined to favor one of them over the other, he will come on the Day of Resurrection with half of his body leaning”.⁵⁴ Apart from that, fair treatment between wives means in term of accommodation, maintenance and other forms of material treatment.⁵⁵ Allah (*s.w.t.*) said: “Ye are never able to be fair and just as between women, even if it is your ardent desire: But turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air). If ye come to a friendly understanding, and practice self-restraint, Allah is Oft-forgiving, Most Merciful”.⁵⁶

According to this verse, a husband will never be able to be perfectly fair among his wives in every respect. Although he fairly divides the visits between the wives, there will still be various degrees concerning desire, love, and sexual intimacy. Nevertheless, if a husband is fair and divides equally everything that he has control over, while fearing Allah (*s.w.t.*) in all conditions, then Allah (*s.w.t.*) will forgive him for any favoritism that was shown to any particular wife.⁵⁷

Abu Hurairah narrated that the Messenger of Allah said: “When a man has two wives and he is not just between them, he will come on the Day of Judgment with one side drooping”.⁵⁸ It was narrated that Aishah said: “The Messenger of Allah used to divide his time equally among his wives then he would say: ‘O Allah, this is what I have done with regard to that over which I have control, so do not blame me for that over which You have control and I do not’. Hammad bin Zaid narrated it in Mursal form”.⁵⁹

Narrated Aisha that during his fatal ailment, "Allah's Messenger, used to ask his wives, 'Where shall I stay tomorrow? Where shall I stay tomorrow?' He was looking forward to Aisha's turn. So all his wives allowed him to stay where he wished, and he stayed at Aisha's house till he died there. Aisha added: He died on the day of my usual turn at my house. Allah took him unto Him while his head was between my chest and my neck and his saliva was mixed with my saliva".⁶⁰

It was narrated by Aisha also: "Whenever Allah's Messenger wanted to go on a journey, he would draw lots as to which of his wives would accompany him. He would take her whose name came out. He used to fix for each of them a day and a night. But Sauda bint Zam'a gave up her (turn) day and night to Aisha, the wife of the Prophet in order to seek the pleasure of Allah's Messenger (by that action)".⁶¹

Abu Bakr b. 'Abd al-Rahman narrated that when Allah's Messenger married Umm Salama and he visited her, she caught hold of his cloth when he intended to leave. In response, Allah's Messenger said: "If you so desire, I can extend the time (of my stay) with you, but then I shall have to calculate the time (that I stay with you and shall have to spend the same time with other wives). For the virgin woman, (her husband has to stay with her) for a week, and for the woman previously married it is three days."⁶²

In Malaysian law, section 23(4) of the Islamic Family Law (Federal Territory) Act 1984 states that the Court may grant the permission for the application to practise the polygamous marriage if it satisfies that the proposed marriage is just and necessary, the husband has such means, the husband is able to accord the equal treatment to all his wives in his polygamous marriage and the proposed marriage would not cause *darar syarie* to the wife of the existing marriage.⁶³

In the case of *Aishah bte Abdul Rauf v Wan Mohd Yusof bin Wan Othman*,⁶⁴ the husband applied for marrying another woman on the ground that he able to provide the maintenance of *zahir* and *batin*, and also want to prevent him from committing an adultery. However, the husband cannot prove that he able to be justice and

fair to his wives if he practices polygamy marriage. On that ground, the court not allowed the husband to marry another woman. In the case of *Sharif bin Jamaludin v. Kuning binti Kassim*,⁶⁵ the applicant applied to marry another woman. The court found that a plaintiff is a rich man and able to provide the maintenance for both of wives if he marries another woman. On that ground, the court allowed the applicant to practice polygamy marriage. In the case of *Mohd Fuad bin Musa v Zainon Binti Abd Rahman*,⁶⁶ the plaintiff applied for polygamy marriage. However, the court found that the husband unable to provide the maintenance for two wives and the children if he practices polygamy marriage. On that ground, the court rejects the application of the plaintiff.

To conclude, the principle of the right of women to get the fair treatment from the husband in case of polygamy is fulfilled *Maqasid Shari'ah* namely by protecting religion, dignity as well as lineage. This right protects the element of religion because it shows that Islam is justice to the husband by allowing them to marry than one woman and justice to wife by protecting them with the right in getting the fair treatment if their husband practices polygamy marriage. It also protects the lineage and dignity because polygamy marriage can avoid the occurrence of adultery and avoid the birth of child effect from the adultery.

Right to Apply/Get Divorced

Islam encourages couples to protect their marriage and suggests many solutions before opting to separate. When divorce cannot be avoided, Islam outlines the best guide for both parties and recommends them to be fair and peaceful. Dissolution of marriage in Islam can be divided into divorce and the death of the husband. In each case, Islam never fails to preserve women's rights. In the event of a divorce, Islam obliges the husband to be equitable. Islam prohibits a husband to divorce his wife while she is in her menses or during consummation. Furthermore, when a divorce takes place, the husband needs to provide maintenance to his wife during the waiting period, and must bear the maintenance of their child.⁶⁷ Allah (*s.w.t.*) said: "So if a husband divorces his wife

(irrevocably), He cannot, after that, re-marry her until after she has married another husband and He has divorced her. In that case, there is no blame on either of them if they re-unite, provided they feel that they can keep the limits ordained by Allah. Such are the limits ordained by Allah (*s.w.t.*), which He makes plain to those who understand".⁶⁸ Alas, misunderstanding has arisen. There is the misconception that Islam granted man the sole authority of divorce. Conversely, Islam clearly granted ways and rights for a wife to divorce initiation known as *Khulu'*⁶⁹ as detailed in Qur'anic verse: "But if their intention is firm for divorce, Allah (*s.w.t.*) heareth and knoweth all things".⁷⁰

During the time of the Prophet Muhammad (*s.a.w.*), Ibn Abbas narrated that: "The wife of Thabit bin Qais came to the Messenger of Allah and said: 'O Messenger of Allah, I do not blame Thabit for any defects in his character or his religion but I dislike to behave in an un-Islamic manner'. On that, Allah's Messenger said to her: Will you give back the garden, which your husband has given you? She said: yes. Then the Prophet turned to Thabit: O Thabit! Accept the garden and divorce her".⁷¹

The common misconception is that Islam grants the men with the sole authority in terms of divorce. Conversely, Islam clearly grants ways and rights for a wife to initiate divorce, which is known as *khulu'*.⁷² The term refers to the separation initiated by the wife in return for payment when the husband accepts the request and releases his wife. This payment may be equal to, more than, or less than the payment of her *mahr*.⁷³ In Islam, the wife is allowed to ask for release from a marriage due to certain circumstances such as abandonment, cruelty, and when the husband fails to meet his obligation. Accordingly, the wife may proceed with the *khulu'* application to the court.⁷⁴ Many traditional scholars interpret that the husband's consent is mandatory for *khulu'*. However, few new interpretations argue that women can obtain *khulu'* through court verdicts, without the consent of the husband.⁷⁵ Allah (*s.w.t.*) said: "O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately), their prescribed periods: And fear Allah your Lord: and turn them not out of their houses,

nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation".⁷⁶

Apart from that, the *'iddah* emphasises cleanliness and the menstrual period. Scholars opined that divorce has two types, namely one that conforms to the Sunnah and one that is innovated. The divorce that conforms to the Sunnah is when the husband pronounces one divorce to his wife while she is not having her menses and without having any sexual intercourse with her after the last menses ended. Furthermore, a husband may divorce his wife when it is clear that she is pregnant. As for the innovated divorce, it occurs when a husband divorces his wife while she is having her menses, or after having sexual intercourse with her after her last menses, although he does not know if she becomes pregnant or not.

A third type of divorce is neither a Sunnah nor an innovated one. The examples are a husband who divorces a young wife who has not begun to have menses, divorce when the wife is beyond the age of having menses, and divorce before the marriage is consummated. During the whole duration of the *'iddah*, a wife has the right to housing from her husband. Islam promotes this way as it tends to encourage the husband to return to his wife.

The wife can also ask for a divorce by *fasakh*. The principle of *fasakh* can be seen in *Surah al-Baqarah*, as Allah (*s.w.t.*) said: "And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms and do not keep them, intending harm, to transgress [against them]. And whoever does that has certainly wronged himself. And do not take the verses of Allah in jest. And remember the favor of Allah upon you and what has been revealed to you of the Book and wisdom by which He instructs you. And fear Allah and know that Allah is Knowing of all things".⁷⁷ Allah (*s.w.t.*) also said: "And if you fear dissension between the two, send an arbitrator from his people and an

arbitrator from her people. If they both desire reconciliation, Allah will cause it to them. Indeed, Allah is ever Knowing and Acquainted with all things”.⁷⁸ Apart from that, *taliq* is a type of divorce that occurs when a spouse breaches a condition agreed upon in the marriage contract. Allah (*s.w.t.*) said: “O you who believe! Fulfill all obligations”.⁷⁹ Uqbah b. Amir reported the Messenger of Allah as saying: “The condition worthier to be fulfilled by you is the one, which you made the private parts (of your wives) lawful (for you)”.

In the context of Malaysian law, section 2 of the Islamic Family Law (Federal Territory) Act 1984 states that “*fasakh* means the annulment of a marriage by reason of any circumstance permitted by Islamic Law in accordance with section 52”.⁸⁰ Meanwhile, the provision of *khulu'* is stipulated in section 49 of the Islamic Family Law (Federal Territory) Act 1984.⁸¹ Section 52 of the Islamic Family Law (Federal Territory) Act 1984 expresses that the grounds of *fasakh* namely if “the whereabouts of the husband have not been known for a period of more than one year; that the husband has neglected or failed to provide for her maintenance for a period of three months; that the husband has been sentenced to imprisonment for a period of three years or more; that the husband has failed to perform, without reasonable cause, his marital obligations (*nafkah batin*) for a period of one year; that the husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent; that the husband has been insane for a period of two years or is suffering from leprosy or vitilago or is suffering from a venereal disease in a communicable form; that she, having been given in marriage by her *Wali Mujbir* before she attained the age of baligh, repudiated the marriage before attaining the age of eighteen years, the marriage not having been consummated; that the husband treats her with cruelty, that is to say, *inter alia* - habitually assaults her or makes her life miserable by cruelty of conduct; or associates with women of evil repute or leads what, according to *Hukum Syara'*, is an infamous life; or attempts to force her to lead an immoral life; or disposes of her property or prevents her from

exercising her legal rights over it; or obstructs her in the observance of her religious obligations or practice; or if he has more wives than one, does not treat her equitably in accordance with the requirements of *Hukum Syara'*; that even after the lapse of four months the marriage has still not been consummated owing to the wilful refusal of the husband to consummate it; that she did not consent to the marriage or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstance recognised by *Hukum Syara'*; that at the time of the marriage she, though capable of giving a valid consent, was, whether continuously or intermittently, a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 [Ord. 31 of 1952] in the case of the Federal Territory of Kuala Lumpur, or the Lunatics Ordinance [Sabah Cap.74] in the case of the Federal Territory of Labuan, and her mental disorder was of such a kind or to such extent as to render her unfit for marriage; any other ground that is recognised as valid for dissolution of marriages or *fasakh* under *Hukum Syara'*.⁸²

Last but not least, the provision of divorce in term of *ta'liq* is also contained in the Islamic Family Law (Federal Territory) Act 1984 as section 2 states that “*ta'liq* means a promise expressed by the husband after solemnisation of marriage in accordance with *Hukum Syara'* and the provisions of this Act”.⁸³ Section 22 of the Islamic Family Law (Federal Territory) Act 1984 provides for the responsibility of the Registrar relating to the *ta'liq*.⁸⁴ Section 26(2) of the Islamic Family Law (Federal Territory) Act 1984 also states that the Registrar shall issue a *ta'liq* certificate to each of the parties to the marriage.⁸⁵

Apart from that, section 50 of the Islamic Family Law (Federal Territories) Act 1984 provides the procedure of *ta'liq* divorce whereby a married woman may apply to the Court to declare that such divorce has taken place.⁸⁶ In the case of *Zainab Bt Hamid v Mat Isa*,⁸⁷ the court found that the term of *ta'liq* has been fulfilled and the court decided that the couple divorce with one *talaq*. In the case of *Joan Mary Sulaiman v Sulaiman bin Haji Musa*,⁸⁸ the plaintiff claimed that her husband has married another woman.

However, since her husband practise polygamy marriage, he did not treat her with justice and fairness. The court allowed the first wife for divorce by *fasakh* on the ground that her husband failed to give the fair treatment among his wives.

In the case of *Rasnah binti Ariffin v Shafri bin Khalid*,⁸⁹ the plaintiff (wife) applied for *fasakh* on the ground that they have no sexual intercourse since 1998 and the husband did not pay the maintenance to her and the children since that date also. The court came to a decision that the couple divorce by *fasakh* based on that both reasons. In the case of *Azlina binti Mohamed Din lwn Abdul Razak bin Ahmad*,⁹⁰ the applicant (wife) has filed a petition for divorce by *khulu'* (*tebus talaq*). However, the applicant contended that the sum of RM 30 000 is higher and appealed so that the sum can be decreased. However, the respondent (husband) asked the value for *tebus talaq* is RM 50 000 as he asked before. The court decided that the couple must go to *hakam* first and settle on this issue before the divorce by *khulu'* can proceed and confirmed.

The right of women in order to apply divorce is in line with *maqasid shariah* because it fulfills the principles of protecting the religion, life, and lineage. Although *talaq* is in the hand of a husband, however, the wife can also apply for divorce on specific reason which can show that Islam is justice. It also protects the life because *divorce* is better if a wife suffers because of that marriage. Apart from that, the children will not become a victim if the parents kept quarrel which can protect the element of lineage.

Right to Maintenance

Islam stresses on the physical and mental obligations of husbands, and husbands' responsibility to ensure the maintenance of their wives as Allah (*s.w.t.*) said: "Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth."⁹¹ The Prophet (*s.a.w.*) emphasised on the maintenance of a wife when one of his companions asked about the right of a wife over her husband.⁹² He said: "That you feed her when you eat when you eat and clothe her when you clothe yourself".⁹³

The *fuqaha* are of the view that the maintenance are including food, clothing and accommodation. However, the order of maintenance is not limited to the specified mentioned only, but some scholars believe that the need for others maintenance such as medicine, cleaning machines and everything in need of the wife.⁹⁴ The husband obliged to provide the maintenance to his wife as long as his wife obeys him and not *nusyuz*. However, if she fails to obey her husband unlawfully, she did not entitle to get the maintenance.⁹⁵ The *fuqaha* differed in the estimation of the provision of the wife's maintenance on four points. The first is that it is capable of its adequacy, without specifying a specific amount, and it is sufficient based on custom. This is an opinion of Hanafi, some of the Shafii and majority of Hanbali Schools of law.⁹⁶ They quoted this as Allah (*s.w.t.*) said: "But he shall bear the cost of their food and clothing on equitable terms".⁹⁷ Narrated by Aisha: Hind bint `Utba said, "O Allah's Messenger! Abu Sufyan is a miser and he does not give me what is sufficient for me and my children. Can I take of his property without his knowledge?" The Prophet (*s.a.w.*) said, "Take what is sufficient for you and your children, and the amount should be just and reasonable".⁹⁸

Secondly, the provision of wife's maintenance is estimated by a specific amount. This is a *qaul muktamad* by Shafii School of law. The amount is two *mud* if the husband is rich, one *mud* if he is poor and one *mud* and a half if the husband in the middle ability.⁹⁹ Their evidence on the difference provision of the rich and poor husband is based on Qur'anic verse as Allah (*s.w.t.*) said: "Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him".¹⁰⁰ The third view is the provision of maintenance of the wife is based on the custom of condition husband, wife, and the state. This is the opinion of Maliki and some of Shafii Schools of law. Last but not least, the maintenance of the wife depends on the decision of the judge and he must decide on it. This is an opinion of some Shafii School of law.¹⁰¹

In Malaysian law, section 59 of the Islamic Family Law (Federal Territory) Act 1984 provides the power of the Court to order

maintenance of wife, and the effect of *nusyuz* as “a wife shall not be entitled to maintenance when she is *nusyuz*”.¹⁰² In the case *Sharifah Asiah v Mohamed Salleh*,¹⁰³ the plaintiff requested from the husband to pay the maintenance to her. After her claim has been filed, she has been divorced. The court asked the husband to pay the maintenance RM 40 per month to the wife from the date she requested until the date she has been divorced. In the case of *Roslan Bt Abdul Ghani v Zulkifli*,¹⁰⁴ the wife claim the husband to pay the maintenance and the court granted her claims by ordered the husband to pay the wife RM 100 per month and arrears of maintenance total RM 1800. In the case of *Rokiah v Mohamed Idris*,¹⁰⁵ the applicant (wife) applied for arrears of *nafkah 'iddah*. The court ordered the ex-husband of the plaintiff to pay *nafkah 'iddah* with a total of RM 530 to the applicant.

In a nutshell, the right of women in entitlement of maintenance fulfil the *Maqasid Shari'ah* because it is in line with protecting of religion, life, as well as the property. The right of women in relating to the maintenance has proven that Islam is justice. In respect of the maintenance that she received from her husband, a wife can continue her life. This right also protects the element of property because the property did not spend on the useless things but the property spends on the family themselves.

Right to Inherit Property

Notably, a portion of the property of a deceased husband is inherited by the wife under the Islamic inheritance system. In the absence of children, the wife is entitled to inherit a fourth of the deceased's estates, whereas her portion is one-eighth if there is any children.¹⁰⁶ Allah (*s.w.t.*) said: “In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts”.¹⁰⁷ After the death of a husband, his widow cannot be expelled from his house until her waiting period of four months and ten days is completed. Plus, the widow has the right to get full financial support during her *'iddah* (waiting time). A group of scholars opined that such waiting time is extended for a year.¹⁰⁸

In Malaysian law, the matter of succession and inheritance is under the state list, whereby the state follows the Islamic law regarding this matter as explained below. Article 1, List II (State List), Ninth Schedule of the Federal Constitution states that: “Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;...”¹⁰⁹

In the case of *Puteh binti Ahmad v Jusoh bin Salleh dan Lain-Lain*,¹¹⁰ the court reached with a decision that the plaintiff is still a lawful wife of the deceased (husband). Therefore, the plaintiff is entitled to inherit the estates from her husband. The right of women to inherit property after the death of her husband fulfils all the elements of *Maqasid Shari’ah*. It protects the religion because it shows that Islam is justice and not bias to man only. It protects the life and lineage because the wife can survive after the death of her husband with the estates left by him and support her children if any. This right also protects the property because the estates inherited by the wife who is a family member of the deceased. Last but not least, it also protects the intellect of the wife because the husband is a breadwinner of the family. By the death of the husband, the wife will feel lost and in some cases, the wife becomes crazy. So, by inheriting the estates left by his husband, it can decrease a little depression of wife from being stressful to think about how she will survive her life especially if they have children.

CONCLUSION

As a pillar of a healthy society, the marriage institution cannot be taken for granted and must be preserved. Nevertheless, a number of individuals may perceive marriage as a discriminatory institution which threatens the foundation of a family. Islam acknowledges the importance of marriage and family, and thus, has legislated many rights and responsibilities to ensure that the integrity of these concepts are preserved. These rights are grounded in the

Qur'an and *Sunnah* to achieve the objectives of marriage. Regrettably, many Islamic teachings are abused by Muslims themselves due to their lack of knowledge, malpractice, and misinterpretation. This has tainted the true teachings of the religion, and has led to understandable misconceptions by the non-Muslims.

ACKNOWLEDGEMENTS

This research is supported by International Islamic University Malaysia and Ministry of Higher Education under Fundamental Research Grant Scheme (FRGS) with title: A New Gender Equality Model Based on *Qur'anic* Perspective (FRGS16-031-0530).

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