

THE ISLAMIC LEGAL REMEDY ON HUSBAND'S IMPRISONMENT

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ABSTRACT

The need of a prisoner's wife is often not an issue of concern for many. Despite financial struggle, the imprisonment of the husband may affect the wife's emotional being and inner needs. Since the repulsion of harm (mafsadah) serves as the objective of Islamic legal rulings, this paper seeks to examine the juristic views of different schools of laws in Islam on the remedy available where the husband has been sentenced for imprisonment. For comparative purpose, the provisions of law related to husband's imprisonment as applied in Malaysia, Jordan, Egypt and Morocco are also discussed. Using content analysis method, the findings indicate that where the husband has been imprisoned, dissolution of marriage is allowed based on the ground of protecting the interest of the spouse, as well as an appraisal to the Islamic principle of repulsion of harm.

Keywords: Prisoner's Wife, Imprisonment, Harm, Islamic Law, Malaysian Law.

INTRODUCTION

Islam views emotional expression between a husband and wife as a form of worship and companionship, 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). In fact, 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. Allah says to the effect:

"O mankind, fear you're 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." (Al-Qur'an, 4:1).

Al-Zuhayli (1997) when discussing the reciprocal rights and obligations of both spouses against each other invokes the verse of the Qur'an that reads:

"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." (Al-Qur'an, 2:228).

The deprivation of an individual's liberty through imprisonment may be harmful to the wife; preventing him from performing marital obligations and duties arising from the marriage contract. 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

ḍarar 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) which means “*there should be no harm nor return of harm*”. 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 ḍarar*” 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 for the foundation of the Islamic legal remedy on wives where the husband has been imprisoned.

According to the scholar in the field of family communication, the concept of togetherness figures prominently in most people’s ideas of marriage and family, with the hope of spending time with their spouses. Where the spouses were separated by way of any reasons, it seriously alters the family system by necessitating dramatic shifts in roles and creating unfulfilled desires for intimacy and companionship (Chris & Jeanne, 2011). In a study done by Schneller (1976) on the effects of imprisonment on the family of the prisoner, 15 family-changes scale was used to measure the changes in the family following imprisonment. The scale was administered to the wives of the prisoners during interviews. The findings of the research showed that imprisonment of a married man resulted in hardships on the families of those men. He also concluded that the imprisonment of married men caused emotional and sexual hardships on the wives. The major objective and the structure of this study is to discuss the, emotional, financial and the child rearing burden shifted on the prisoner’s wife which may in turn give negative impacts on the life of the person involved. Thus this paper will seek to examine the juristic views of different schools of laws in Islam on the remedy available where the husband has been sentenced for imprisonment. For comparative purpose, the provisions of law related to husband’s imprisonment as applied in Malaysia, Jordan, Egypt and Morocco are also discussed.

Imprisonment of the Husband under the Islamic Law

The Islamic jurists defined imprisonment (*al-habsu*) in several definitions. According to Al-Kasani et al. (1986), imprisonment may connote preventing a person from going out to work or to his religious and social duty. Ibn Qayyim (1963) defined imprisonment as an act of restraining or preventing a person from the freedom of conducts whether in his home, or even in the mosque. According to Al-Qal’aji (1988), to keep a person in imprisonment means to detain him in a certain place and to prevent him from a release. The definition given by the jurists seemed to be identical in which imprisonment involves the act of restraining the personal liberty of a person in a particular place.

Obligation of an Imprisoned Husband to Provide for Wife’s Maintenance

It is interesting that in discussing the effect of a husband’s imprisonment towards his obligation to maintain the wife, the jurists divided the argument into two categories, namely imprisonment which is not caused by the wife and imprisonment which is caused by the wife. The Malikis, Hanafis, Shafi’is and Hanbalis were unanimous that if the husband is imprisoned for reasons which are not related to the wife, it is obligatory for him to provide for the wife’s

maintenance. However the jurists were divided in their opinion whether the husband is still obligated to provide for the wife's maintenance in cases where the husband's imprisonment is caused by the wife, such as by his failure to pay *mahr* or arrears of debt to the wife due to his poverty, the Hanbalis opined that in such case the wife will not be entitled to receive maintenance from the husband (Al-Buhuti, 1997). Meanwhile the Hanafis, the Malikis and the Shafi'is viewed that the wife will still be entitled to obtain maintenance from the husband regardless of his imprisonment (Al-Shirbini, 1968).

Right of Wife to Demand “*Fasakh Due*” to Husband's Imprisonment

Since marriage is built on companionship between the husband and wife, a wife whose husband is imprisoned or detained may lose her patience or may encounter difficulties in surviving her life alone. Among the jurists who opined that a wife whose husband is imprisoned is entitled to apply for dissolution of marriage are the Malikis, some of the Shafi'is and the Hanbalis. According to the Malikis (Al-Dusuqi, 2000), the wife should wait until a lapse of one year after the imprisonment, while some of the Shafi'is opined that the wife should wait until after four years of the imprisonment (Al-Muti'i, 2001). The jurists' arguments were based on the revelation of the Qur'an, the tradition of the Prophet P.B.U.H., the methodology of *fiqh* (*qawa'id al-fiqhiyyah*) as well as analogical deduction (*qiyas*). Allah says to the effect:

“Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence (as) before Allah” (Al-Qur'an, 65:2).

Al-Tabari (1997) in explaining the verse viewed that the Qur'an prescribes kind treatment towards the wife either if he wishes to reconcile with the wife or to separate with her, such decision should be made on equitable terms and without incurring harm to the wife. An act of leaving the wife in abeyance (*mu'allaqah*) is certainly not an act of kind treatment; rather it shall inflict harm on the wife. The jurists also argue that if *fasakh* is permitted in the case of “*unnah*” (impotence) then it should be more allowable in the case of imprisonment and disappearance of the husband (Al-Shirbini, 1998).

Meanwhile the Hanafis and some of the later Shafi'is viewed that a wife is not entitled to apply for dissolution of marriage even if his imprisonment harms her (Al-Dimyati, 1997). The jurists relied on a *hadith* from Al-Mughirah bin Shu'bah, where the Prophet P.B.U.H. said,

“The wife of a missing person (al-mafqud) remains as his wife until she receives a proof or a declaration”.

The jurists who viewed that a dissolution of marriage is not permissible argued that the *hadith* is weak thus inadmissible to be a foundation of an argument. They further argued that an analogical deduction (*qiyas*) between *al-mafqud* and a prisoner is inadmissible since the life or death of *al-mafqud* is uncertain, while a prisoner is confirmed alive (Al-Dimyati, 1997; Al-Kasani et al., 1986).

If a destitute husband is imprisoned and he does not have any relative who can provide for the wife's maintenance during his imprisonment, the Malikis, the Shafi'is and the Hanbalis opined that the wife in such condition shall be entitled to apply for dissolution of marriage. According to the jurists, if the wife could not possibly remain patient and she is aggrieved by non-providence of maintenance, then dissolution of marriage should be allowed. They further relied that keeping a wife in marriage tie without maintenance causes grave harm to the wife (Al-Muti'i, 2001). The Hanafis on the other hand viewed that she is not entitled to dissolution of

marriage; in fact the judge shall order her to owe a debt to support her living or to surrender part of her property and to return to the husband.

The permissibility to apply for dissolution of marriage in the case of husband's imprisonment serves to provide better protection against harm to the wife where the wife could no longer tolerate the absence of her husband. This is also parallel to the protection of the fundamental values which are necessary to human life which also include the protection of life (*al-nafs*) and protection of dignity (*al-ird*).

Legal Remedy under Islamic Family Law in Malaysia

“*Imprisonment*” as in this discussion of the law means imprisonment in accordance with the relevant written law for the time being in force for the regulation of prisons and imprisonment. Imprisonment of the husband is one of the grounds entitling a spouse to apply for *fasakh* in Malaysia. Under the law, *fasakh* divorce is allowed where the husband or wife has been sentenced to imprisonment for a period of three years or more (52 (1) (c) of Act 303). No order shall be made on the ground specified in paragraph (1) (c) until the sentence has become final and the husband or wife has already served one year of the sentence. It is notable that the provision is silent in the case where the husband has been detained in a rehabilitation centre. In the light of the above interpretation, it could be submitted that a husband detained in a rehabilitation centre would as well fall within the ambit of the proviso.

Provision on Imprisonment in other Islamic Countries

In general, a same provision can be seen adopted in Morocco, Egypt and Jordan. Under the *Mudawwanah* of the Moroccan law, if the husband has been sentenced to imprisonment or detention for more than three years, the wife may petition for divorce after a year of his detention (Art.106). A comparable provision can be found under the Egyptian law but with a notable emphasis on the harm inflicted. In the light of Art. 14, Law No.25/1929, a wife can demand for a judicial divorce where the husband has been sentenced to not less than 3 years' imprisonment and after he has served a year of the imprisonment for the harm caused. The Egyptian jurists and judge, Shaham suggested that dissolution should be granted to young women whose husband was imprisoned on the ground of fear for their chastity (Shaham, 1997). Interestingly, Law of 1929 provided a specific provision on judicial divorce if a wife alleges that her husband harmed her in a way that it becomes impossible for her social standing (*bayna amthaliha*) to remain in the marriage (Art.6). There is no instances or explanation on harm provided in the provision, and since the application of harm is not exhaustive, Art. 6 of Law 1929 may encapsulate imprisonment of the husband should it proves to be harmful to the wife which entitles her for judicial divorce. Qanun al-Ahwaal al-Syakhṣiyyah of the Jordanian law provides that the wife can only apply for a divorce if he is sentenced for at least three years time, and that he has already served in the prison for one year, even if he has property where she can take maintenance from (Art. 125). As pointed out by Al-Ashqar (2011), a judicial divorce is allowed not because the husband is unable to maintain the wife, but rather, due to the harm faced by the wife for non-association with the husband.

CONCLUSION

The principle of prevention of harm describes the universal principle upheld by the Shari'ah to ensure the protection of interest prevails for all in the society. It can be concluded that Islam provides protection for the wife in the case of husband's imprisonment under the spirit of elimination of harm. Although the jurists were divided whether a dissolution of marriage shall be permissible, it 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*. On the basis of the above discussion, it is also undeniable that the remarkable power of the Shari'ah is the ability to adjust to different situations in order to serve its overall purpose of promoting the good and preventing harm on the wife.

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