

## **Dissolution of Marriage on the Grounds of Cruelty: A Comparative Overview of *Fasakh* and Irretrievable Breakdown of Marriage Principles**

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### **Abstract**

In Islam, if a husband treats his wife with cruelty, either physically or mentally, she has the right to apply to the court for the marriage to be dissolved, on the grounds of *fasakh*. In Malaysia, the practice is that the Syariah Court will ask the wife to provide sufficient evidence to prove her claim, failure of which the application for *fasakh* will be set aside. In some cases, a Syariah Court demanded on a higher standard of proving the act of cruelty by the husband. For example, a Syariah Court had insisted on the requirement of two male witnesses, who saw the act of beating the wife. This has caused difficulty to the wife as it would not be easy for her to fulfil this requirement. Whilst, section 54 (1) (b) of the Law Reform (Marriage & Divorce) Act, 1976, states that the plaintiff may petition for divorce on the grounds that the respondent has behaved in such a way and thus, the plaintiff cannot be reasonably be expected to live with the respondent. The act of cruelty of the respondent, either physically or mentally is more than adequate to the term "behaviour" as stated under the present divorce law. In the case of irretrievable breakdown of marriage, both objective and subjective tests have been used by the court to decide whether or not the plaintiff can reasonably be expected to live with the respondent in consequence of the respondent's behaviour including cruelty. If it is proven, then the application for divorce will be granted by the court. The article examines the above issues relating the methods of proof and evidentiary requirement in cruelty cases. Relevant legal provisions as provided under the Malaysian laws *i.e.*, the LRA 1976 and the Islamic Family Law Act/Enactments and the practice of the Malaysian courts deliberating this issue are the focus of the article. Decisions of the Syariah and Civil Courts on cruelty in divorce cases are analysed to highlight the practice in Malaysia.

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## I. Introduction

At present, in most countries in the world including Malaysia, cruelty whether in the form of physical or mental, has become one of the most common grounds sought for divorce. However, this can often result in a contested divorce and the burden of proof of cruelty is on the petitioner. In order to establish cruelty under the old law,<sup>1</sup> the petitioner had to show that the respondent's conduct was such as to pose a danger to the petitioner's life, limb, or health, bodily or mental or to give rise to a reasonable apprehension of such danger.<sup>2</sup> However, under the present law such grave and weighty misbehaviour is no longer required.<sup>3</sup> In Malaysia, by virtue of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) (hereinafter referred to as LRA, 1976),<sup>4</sup> particularly for the non-Muslims in Malaysia, the act of cruelty now falls under the grounds that the marriage has irretrievably broken down.<sup>5</sup> The requirement is less strict where the petitioner is to prove that the respondent has behaved in a manner that the petitioner cannot reasonably be expected to live with the respondent. As for the Muslims, the parties can dissolve their marriage by way of *fasakh* on the grounds of cruelty affecting her whether physically; mentally; emotionally; on her property; her religious obligation and practice or even not being fair if he practices polygamous marriage.<sup>6</sup> Hence, this article discusses the law and the practice of cruelty as the grounds for divorce. The method of proof and the evidentiary requirement in the adjudication of cases of cruelty and the unreasonable behaviour are also discussed.

## II. Dissolution of Marriage under LRA, 1976

Currently, the law governing the divorce for the non-Muslims is the Law Reform (Marriage and Divorce) Act, 1976 (Act 164), which came into

<sup>1</sup> Before the coming of the Law Reform (Marriage and Divorce) Act, 1976 (Act 164), the law governing divorce was the Divorce Ordinance 1952 which referred to the English law of divorce.

<sup>2</sup> *Sundari Raja Singam v Rasaramam Raja Singam*, [1976] 2 MLJ 7; *Ng v Lim*, [1969] 1 MLJ 3.

<sup>3</sup> *Buffery v Buffery*, [1988] 2 FLR 365.

<sup>4</sup> Section 53 of the LRA, 1976.

<sup>5</sup> *Ibid.*

<sup>6</sup> Section 52 (1) (h) (i) – (vi) of Islamic Family Law (Federal Territories) Act, 1984.

force on 1<sup>st</sup> March 1982.<sup>7</sup> The coming of this Act has repealed the Divorce Ordinance, 1952 where divorce was no longer grounded on the fault-based principle. As such, the present law introduces the objectives of the modern law of divorce that is to uphold and support marriages<sup>8</sup> and to allow a dead marriage to be ended as painless as possible, where the law should not make the divorce so easily obtainable that the spouse has no incentive to work out their difficulties.<sup>9</sup> More importantly, the new law ensures that the marriage should be dissolved with the minimum bitterness, distress and humiliation.<sup>10</sup> Under the LRA, 1976, besides divorce within two years of marriage<sup>11</sup> or by conversion<sup>12</sup> or by mutual consent,<sup>13</sup> parties can also petition for divorce under irretrievable breakdown of marriage.<sup>14</sup> With the new law, cruelty is now petitioned under para (b) of section 54 (1) namely that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

### III. Divorce by Way of Irretrievable Breakdown of Marriage

In order to petition for divorce under irretrievable breakdown of marriage, either party must at the first instance prove that the marriage has irretrievably broken down and the court upon hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as leading to the breakdown of the marriage and if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.<sup>15</sup> In considering whether it would be just and reasonable, the court shall consider all the circumstances including the conduct of the parties and

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<sup>7</sup> Section 3 (3) of the LRA, 1976 which provides that the Act shall not apply to a Muslim or to any person who is married under Muslim law.

<sup>8</sup> *Tan Keok Yin v Cheah Saw Hong*, [1991] 2 MLJ 266, 271.

<sup>9</sup> By virtue of section 50 (1) of the LRA, 1976, the Act prohibits any petition for divorce from being presented within two years from the date of marriage.

<sup>10</sup> SM Cretney, *Principles of Family Law*, Fourth Edition (Sweet & Maxwell, 1984), London, p 111.

<sup>11</sup> Section 50 of the LRA, 1976.

<sup>12</sup> Section 51 of the LRA, 1976.

<sup>13</sup> Section 52 of the LRA, 1976.

<sup>14</sup> Sections 53 and 54 of the LRA, 1976.

<sup>15</sup> Sub-section (1) of section 53, LRA, 1976.

how the interests of any child and children of the marriage or of either party may be affected if the marriage is dissolved.<sup>16</sup> It appears that the court must be satisfied that both the limbs of subsection (2) of section 53 are satisfied and failure to satisfy either one will make it non-sufficient for the court to act.<sup>17</sup>

Meanwhile, the proof of breakdown of marriage is provided under section 54 (1) of the LRA, 1976 namely adultery of the other spouse;<sup>18</sup> unreasonable behaviour of the other spouse that the petitioner cannot reasonably be expected to live with the respondent;<sup>19</sup> desertion by the other spouse after two continuous years<sup>20</sup> and separation with consent after two continuous years.<sup>21</sup> For the purpose of this article, only para (b) will be discussed *i.e.*, the unreasonable behaviour as grounds for divorce.

As mentioned earlier, cruelty is no longer one of the grounds of divorce in Malaysia. However, it has been included as one of the facts evidencing the breakdown of marriage under the LRA, 1976.<sup>22</sup> Cruelty relates much to the extreme misbehaviour, either physical or mental; of the respondent towards the petitioner which includes but not limited to, such acts as domestic violence, mental or verbal abuse, *etc.* Nonetheless, with the present law, mild misbehaviours such as, the respondent being a workaholic, spending extravagantly, internet-related obsessions, rejection of sexual relationship with the petitioner,<sup>23</sup> lack of help around the home or with the care of children, lack of emotional support, refusal to socialize with the petitioner or his or her friends or family and so forth can be difficult if one were to allege such behaviour as unreasonable. If violence or cruelty is the issue then it is very easy; but in many cases, it is a question

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<sup>16</sup> Sub-section (2) of section 53, LRA, 1976.

<sup>17</sup> See Mimi Kamariah Majid, *Family Law in Malaysia*, Second Edition (Malayan Law Journal Sdn. Bhd., 2000), Kuala Lumpur, p 168.

<sup>18</sup> Para (a) of section 54 (1) of the LRA, 1976.

<sup>19</sup> Para (b) of section 54 (1) of the LRA, 1976.

<sup>20</sup> Para (c) of section 54 (1) of the LRA, 1976.

<sup>21</sup> Para (d) of section 54 (1) of the LRA, 1976.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Dowden v Dowden*, [1978] 8 Fam Law 106, CA; *Mason v Mason*, [1980] 11 Fam Law 143, CA.

of proving the effect of such behaviour has on the petitioner which is a question of fact depending on the case being tried by the court.

#### IV. Methods of Proving Unreasonable Behaviour

Behaviour may be defined as something that is more than a mere state of affairs or a state of mind.<sup>24</sup> Behaviour must be an action or conduct by one party that will affect the other.<sup>25</sup> As such, behaviour may take either as acts or as the form of an act or omission or maybe a course of conduct and it must have some reference to the marriage.<sup>26</sup> Therefore, when reference is made to unreasonable behaviour, the question that needs to be answered is whether the behaviour of the respondent is unreasonable, or whether the petitioner can reasonably be expected to continue living with his/her spouse of such a character.

In deciding this question the court is not concerned as to the 'unreasonableness' of the respondent's behaviour but, the test is as to whether it is reasonable for the petitioner to continue living with his/her spouse.<sup>27</sup> This test is an objective test or the 'reasonable man' test<sup>28</sup> where the judge must put himself in the position of the petitioner and asked himself whether such a person with his personality and attributes, can reasonably be expected to live with the respondent in light of the respondent's conduct.<sup>29</sup> The court must consider the effect of the behaviour on the particular petitioner, and ask the question, is it established? It should not be that she is tired of the respondent, but she cannot reasonably be expected to live with him.<sup>30</sup> However, in certain cases, the court will not only apply the objective test but to apply the subjective test too. In the English case of *O'neill v O'neill*<sup>31</sup> Cairns LJ in

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<sup>24</sup> *Livingstone-Stallard v Livingstone-Stallard*, [1974] 2 All ER 766.

<sup>25</sup> *Ibid.*

<sup>26</sup> Per Sir George Baker J., as in the case of *Katz v Katz*, [1972] 3 All ER 219, 223.

<sup>27</sup> Tan Cheng Han, *Mairimonial Law in Singapore and Malaysia*, First Edition (Butterworth Asia, 1994), p 134.

<sup>28</sup> Dunn J., as in the case of *Livingstone-Stallard v Livingstone-Stallard*, [1974] 2 All ER 766.

<sup>29</sup> *Ibid.*

<sup>30</sup> Bagnall J., as in the case of *Ash v Ash*, [1972] 1 All ER 582.

<sup>31</sup> [1975] All ER 289.

his decision stated that the word 'reasonably be expected' *prima facie* did suggest an objective test. However, in considering what is reasonable, the court will have regard to the history of the marriage and the individual spouses before it and from that point of view will have regard to what that particular petitioner and to what that particular respondent have in assessing what is reasonable.<sup>32</sup>

From the application of the test in determining unreasonable behaviour, the requirement of "behaviour" is less strict and accordingly, much of the old law on cruelty is irrelevant<sup>33</sup> namely that grave and weighty misconduct must be proven. Still, conduct which under the old law would have constituted cruelty is likely to satisfy the requirement of behaviour which the petitioner cannot reasonably be expected to endure.<sup>34</sup> For example, in the case of *Wong Siew Fong v Wong Siew Fong*,<sup>35</sup> it was decided that there was conduct amounting to cruelty where the wife persistently nagged the husband with the result that his health had deteriorated and where he had assaulted the wife.<sup>36</sup>

However, in the case of *Hariram Jayaram v Saraswathy Rajahram*<sup>37</sup> the new grounds of unreasonable behaviour under irretrievable breakdown of marriage is being applied where the learned judge concluded that the respondent wife had not shown herself to be of such a character and personality as to understand her husband's problem, and her behaviour had not been such that his Lordship could conclude that the husband could reasonably be expected to live with her.<sup>38</sup>

In contrast with the case of *Bhanu Sekaramani v Nagamma*<sup>39</sup> his Lordship in this case has decided against the husband's complaint of her

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Thurlow v Thurlow*, [1975] 2 All ER 979, 984.

<sup>34</sup> Tan Cheng Han, *Matrimonial Law in Singapore and Malaysia*, First Edition (Butterworth Asia, 1994), p 136.

<sup>35</sup> [1964] 30 MLJ 37.

<sup>36</sup> *Theresa Tee v Luke Lim*, [1981] 2 MLI 205.

<sup>37</sup> [1990] 1MLJ 114.

<sup>38</sup> *Ibid.*

<sup>39</sup> [1991] 3 MLJ 34.

wife's misconduct as they were trivial. The husband had wanted the divorce not because of misbehaviour on the part of the wife, but because he was tired and bored of her and desired his freedom. His petition was dismissed as he had failed to prove that the marriage has irretrievably broken down. Similarly, in the case of *Dowden v Dowden*,<sup>40</sup> the wife petitioned for divorce on the grounds of the husband's behaviour, where he was disinterested in sex and their physical sex was brief and occurred only about once a month. The judge refused a decree and the Court of Appeal agreed that a low sex drive cannot in itself be regarded as unreasonable behaviour. Therefore, it is submitted that the more trivial the conduct complained about, the more difficult it would be to satisfy a judge as in this case.

#### V. Dissolution of Marriage by *Fasakh*

Islam provides ways on how the marriage may be terminated. One of it is where the wife applies to the court to annul the marriage based on certain reasons. This dissolution of marriage is known as *fasakh*. *Fasakh* may be defined as the dissolution or rescission of marriage contract by judicial decree. The permissibility of this type of dissolution can be inferred from the Holy Quran, Allah SWT says to the effect "*The parties should either hold together on equitable terms or separate with kindness*".<sup>41</sup>

In another verse, Allah SWT says to the effect:

Take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them or to take undue advantage; if any does that, he wrongs his own soul. Do not treat Allah's sign as a jest, but solemnly rehearse Allah's favours on you, and the fact that He sent down to you the Book and Wisdom, for your instruction. And fear Allah, and know that Allah is well acquainted with all things.<sup>42</sup>

The reference to arbitration (*tahkim*) and the role of *hakam* (arbitrator) in cases of disputes or breach between husband and wife is

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<sup>40</sup> [1978] 8 Fam Law 143, CA.

<sup>41</sup> *Al-Qur'an, al-Baqarah* 2:229.

<sup>42</sup> *Al-Qur'an, al-Baqarah* 2:231.

relevant with regard to judicial dissolution of marriage. In the Holy Quran, Allah SWT says to the effect:

If you fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation. For Allah has full knowledge and is acquainted with all things.<sup>43</sup>

If the wife fears cruelty or desertion on her husband's part, the Holy Quran allows for the amicable arrangement between them:

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves.<sup>44</sup>

In Islam, there are various opinions among the schools of law as regard to the power of the court to order dissolution of marriage. According to Shafi'e School of law, *fasakh* is allowed on the grounds of the husband's defect and on the grounds of the husband becoming insolvent and could no longer give the minimum maintenance prescribed, but there can be no dissolution of marriage where the husband has means, even if no news can be obtained from him and no maintenance procured from his property.<sup>45</sup> *Fasakh* (by the husband) is also similarly allowed on the wife's defects, but as the husband has the right of *talaq*, an application of *fasakh* by him is rare.<sup>46</sup> Hanafi Scholars view that the wife has no right to seek the annulment of marriage on the basis of the husband oppressing her by beating and not being fair in treatment between her and her fellow wife/wives. However, she can complain to the judge, who on having sound proof of the case, can impeach the husband, give him advice, and

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<sup>43</sup> *Al-Qur'an, al-Nisa'* 4:35.

<sup>44</sup> *Al-Qur'an, al-Nisa'* 4:128.

<sup>45</sup> Al-Syarbini, *Mughni al-Muhtaj*, (Matbaah Mustafa al-Babi al-Halabi wa Awladuhuh, n.d.), Egypt, Vol. 3, at p 203.

<sup>46</sup> Al-Nawawi, *Minhaj al-Talibin*, translated by E.C. Howaqrs, (Law Publishing Company, n.d.), Lahore, Pakistan, at p 229.



command him to treat her fairly.<sup>47</sup> The opinion of the majority of Maliki scholars is that if the husband mistreats his wife and hurts her persistently, she can complain to the judge. If she could prove her claim before the judge, and sought separation, the judge can order a divorce.<sup>48</sup> The opinion of Maliki Scholars has been incorporated into the law of many Muslim countries such as Egypt, Syria, Tunisia, Morocco, Iraq, Jordan, Algeria and Kuwait.<sup>49</sup>

#### VI. *Fasakh* under the Islamic Family Law in Malaysia

In Malaysia, the law that governs the marriage and divorce of Muslims is the Islamic Family Act/ Enactment of every State. It is observed that the dissolution of marriage by the judicial decree is recognized by the respective law.

For example, section 52 (1) of the Islamic Family Law (Federal Territories) Act 1984 provides twelve grounds upon which a woman married according to *Hukum Syara'* shall be entitled to obtain an order for the dissolution of marriage through *fasakh*. The grounds provided by the section are:

- (a) That the whereabouts of the husband have not been known for a period of more than one year;
- (b) That the husband has neglected or failed to provide for her maintenance for a period of three months;
- (c) That the husband has been sentenced to imprisonment for a period of three years or more;
- (d) That the husband has failed to perform, without reasonable cause, his marital obligations (*nafkah batin*) for a period of one year;

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<sup>47</sup> Al-Jaziri, Abdul Rahman, *Kitab al-Fiqh 'ala Mazahib al-'Arba'ah*, (Dar al-Kutub al-Ilmiyyah, 2001) Lebanon, at pp 161-177; See also Ala'eddin Kharofa, *Islamic Family Law: A Comparative Study with other Religions*, (ILBS, 2004) at p 161.

<sup>48</sup> Al-Jaziri, Abdul Rahman, *Kitab al-Fiqh 'ala Mazahib al-'Arba'ah*, (Dar al-Kutub al-Ilmiyyah, 2001) Lebanon, at pp 161-177; See also Ala'eddin Kharofa, *Islamic Family Law: A Comparative Study with other Religions*, (ILBS, 2004), Kuala Lumpur, at p 163.

<sup>49</sup> Jamal J Nasir, *The Islamic Law of Personal Status*, (Graham & Trotman, 1990) London, at pp 126-127.

- (e) 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;
- (f) That the husband 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;
- (g) That she, having been given in marriage by her father or grandfather before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years; the marriage not having been consummated;
- (h) That the husband treats her with cruelty, that is to say, *inter alia*:
  - (i) Habitually assaults her or makes her life miserable by cruelty of conduct; or
  - (ii) Associates with women of evil repute or leads what, according to *Hukum Syara'*, is an infamous life; or
  - (iii) Attempt to force her to lead an immoral life; or
  - (iv) Disposed of her property or prevents her from exercising her legal rights over it; or
  - (v) Obstruct her in the observance of her religious obligation or practice; or
  - (vi) If he has more wives than one, does not treat her equitably accordancce with the requirements of *Hukum Syara'*.
- (i) 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;
- (j) 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 recognized by *Hukum Syara'*;
- (k) That at the time of the marriage, she, though capable of giving consent, was, whether continuously or intermittently, a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 and her mental disorder was such of a kind or to such an extend as her to her unfitted for marriage;
- (l) Any other ground that is recognized as valid for dissolution of marriages or *fasakh* under *Hukum Syara'*<sup>50</sup>.

It is submitted that the wife in Malaysia who is married according to *Hukum Syara'* shall be entitled to apply for the dissolution of marriage

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<sup>50</sup> Islamic Family Law (Federal Territories) Act, 1984, s 52.

from the Syariah Court based on the grounds provided in the Islamic Family Law Act/Enactment of each States. It is also submitted that the words “any other ground” as provided for under subsection (1) includes any other reason that is recognised under *hukum syarak* such as Aids, drugs including any act of ill-treatment or cruelty like beating, kicking and punching.

#### **VII. Application for *Fasakh* on the Grounds of Cruelty in the Syariah Court**

Any woman, who intends to apply for the annulment of marriage, may do so at the Syariah Court. The summons will be served to the husband to attend the Court and defend himself. The court is required to record the evidence given by the wife. If the court is satisfied that the wife is entitled for *fasakh*, the court may make an order of dissolution of marriage.

In the case of *Hairun v Omar*<sup>51</sup> the wife applied to the Syariah Court for the dissolution of marriage on the grounds of the husband's cruelty under section 52(1) (h) of the Selangor Islamic Family Law Enactment 1984. Although the learned judge found that the husband has contravened *Hukum Syara'* by beating and injuring the wife, the wife's application was dismissed as the learned judge interpreted the words “habitually assaults her” in sub-paragraph (i) of that section to mean frequently, and held that the husband's physically assaulting the wife on two occasions did not amount to “habitually”. The wife's appeal was allowed by the Syariah Appeal Board who held that the learned judge had misinterpreted section 52 (1) (h). The Appeal Board held that the main point in section 52(1) (h) is cruelty and subparagraphs (i) to (iv) are merely illustrations, among others, of cruelty. Cruelty may either be physical or mental cruelty, and “habitually assaults” does not mean physical assaults as there is a difference between “assault” and “battery”. The question of habitual is only relevant in cases of mental cruelty. In cases of physical cruelty, battery even though not habitual may be sufficient to establish cruelty.

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<sup>51</sup> [1991] 8 JH (2) p 289.

In the case of *Hasnah v Zaaba*<sup>52</sup> the wife claimed that the husband had habitually assaulted her and made her life miserable by cruelty of conduct. The Syariah High Court judge was of the opinion that the cruelty has taken place whereby the husband had habitually assaulted the wife by beating and cursing her, which made the wife's life miserable. The Court allowed the application of the wife for the dissolution of marriage. In another case of *Zarina bt Syaari v Mohd Yusof b. Omar*<sup>53</sup> the learned judge of the Syariah Lower Court (Federal Territory) had decided that the refusal to communicate on the part of the husband, cheated the wife by having another marriage without her knowledge, refusal to sleep with the wife constituted mental cruelty which were habitual. The court held that the term habitual assault was relevant in cases of mental and emotional assault. Thus, the wife has to prove that the action happened habitually, continuously and repeatedly more than once. The court therefore granted *fasakh*.

The Syariah Subordinate Court (Taiping, Perak) in the case of *Halijah bt Mat Serat v Mohd Idris bin Nordin*,<sup>54</sup> allowed the application for *fasakh* by the plaintiff wife who alleged that her husband (the defendant) had battered her to the extent of threatening to kill her. In 2005, the defendant was placed at the rehabilitation centre for a period of two years. During the period, the defendant had failed to provide the plaintiff with maintenance. The court held that the defendant had been cruel to her and his involvement in drugs and detention at the rehabilitation centre had made the plaintiff suffer that it left her no choice but to work. The defendant's cruelty had a devastating impact on the plaintiff.

In *Khairul Faezah bte Haji Abdul Majid v Muhamad Salleh bin Bidin*<sup>55</sup> the plaintiff contended that the defendant had been cruel towards her. She claimed that the defendant has hot temper attitude and he often cause harm to the plaintiff and their children, physically and mentally. The court held that section 52 of the Act is specifically enacted to protect

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<sup>52</sup> [1995] 10 JH 59.

<sup>53</sup> [2005] ShLR, Vol. 4, 173.

<sup>54</sup> [2009] 1 ShLR 151.

<sup>55</sup> [2005] 1 ShLR 171.

the wife from any harm, physically and mentally. While hot tempered attitude is not specifically regulated by section 52, but may be inferred from subsections (i) and (ii), "any other ground that is recognised as valid for dissolution of marriage or *fasakh* under Islamic Law," where the court was of the view that such behaviour would bring harm to the plaintiff and the children, as they would be subject to torture, physically and mentally. The court thus is of the opinion that the plaintiff has valid reasons to dissolve the marriage.

It is interesting to note that the court recognised hot tempered attitude as a valid reason for the wife to apply for *fasakh*. Hot tempered attitude which subsequently lead to physical torture and injury on the wife and children should not be tolerated as Islam teaches Muslims to treat the wife with respect and honour.

### VIII. Method of Proving Cruelty under *Fasakh*

Evidence is important to prove the facts relevant for the judgment of a court. The Prophet said:

If the people would be given what they claim (without evidence), some persons would claim other people's blood and properties, but it is obligatory on the claimant to produce evidence.<sup>56</sup>

It is required of the claimant to prove beyond reasonable doubt for the court to give judgment against the accused or the defendant.

The proof given must be clear and convincing. Failure to support the proof will generally cause the claim to be rejected. Therefore, the burden of proof is on the claimant because he or she normally claims what is contrary to the original presumption or apparent fact.<sup>57</sup> The concept

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<sup>56</sup> Al-San'ani, *Subul al-Salam Bulugh al-Maram Min Jami'al-Ahkam*, (Maktabah al'Asriyyah, 1992), Beirut, Vol. 4, at p 235.

<sup>57</sup> The maxim states "*al-asl baraah al-dhimmah*". See al-Sayuti, Jala al-Din, *al-Ashbah wa al-Nazair*, First Edn. (Dar al-Kutub al-Ilmiyyah, 1983), Beirut, at p 53.

of burden of proof is well established in Islam. The Prophet s.a.w. said: "Evidence is on the claimant and oath is on the defendant."<sup>58</sup>

The requirements for the discharging burden of proof have been embodied in the Syariah Court Evidence (Federal Territories) Act, 1997 (hereinafter referred to as SCEA). Section 73 SCEA provides:

- (1) Whoever desired any court to give judgment as to any legal right or liability which is dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on the person.

It is clear that the wife who applies for *fasakh* must prove her allegation. Since the wife alleges the husband's cruelty *ie* allegation of criminal conduct, she needs to prove her case beyond reasonable doubt (*dhan al-ghalib*).<sup>59</sup> Therefore, the wife is required to bring two male witnesses to testify to the conduct of the husband or one male witness combine with two female witnesses.<sup>60</sup> There is also an opinion that one male witness and an oath may also be acceptable.<sup>61</sup> The witness must fulfil the requirement to give *al-shahadah* (testimony).<sup>62</sup> Alternatively, if the wife has no such witness, the allegation may also be proved through *bayyinah* (evidence) in the form of *al-qarinah* (circumstantial evidence).<sup>63</sup>

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<sup>58</sup> Al-San'ani, *Subul al-Salam Bulugh al-Maram Min Jami'al-Ahkam*, (Maktabah al-'Asriyyah, 1992) Beirut, Vol. 4, at p 235.

<sup>59</sup> Zulfakar Ramlee and Normi Abdul Malek, 'Methods of Proof and Evidentiary Requirements in Divorce Cases: An Islamic Perspective', [2008] *IJUM Law Journal*, 16(2), at p 236.

<sup>60</sup> Al-Baqarah, 2:282.

<sup>61</sup> Ibn Qayyim al-Jawziyyah, *Turuq al-Hukmiyyah fi al-Siyasah al-Syar'iyyah*, (Daral-Madani, 1985), Cairo, at p 147.

<sup>62</sup> The conditions are: *mukallaf*, just, Muslim, free, not liable to suspicion and good character. Al-Nawawi, *Minhaj al-Talibin*, (Dar al-Minhaj, 2005), Jeddah, at p 568.

<sup>63</sup> *Qarinah* is one of the methods of proving in Islamic law of evidence. It refers to things that will be used as proof for the existence or non-existence of the matter. See, Abdul Karim Zaydan, *Nizam al-Qada' fi al-Shar'iyyah al-Islamiyyah*, (Resalah Publisher, 2002), Beirut, at p 188.

In the case of *Hanif v Rabiah*<sup>64</sup> the Federal Territories Syariah Appeal Court had accepted *qarinah* of quarrelling between the parties, bruises on some part of the plaintiff's body, bleeding and swollen marks on the plaintiff's face as evidence to support plaintiff's claim on the husband's cruelty. The honourable judge in his judgment states:

It is unreasonable to impose (a burden) on a wife who claims that she has been beaten by the husband to bring witnesses as it is very unlikely that a husband will call two male witnesses or one male witness combined with two female witnesses whenever he wants to beat his wife. In this type of cases, evidence in the form of *shahadah* is not required as *bayyinah* and *qarinah* are sufficient.

In *Rasnah Ariffin v Shafri bin Khalid*,<sup>65</sup> the plaintiff applied for *fasakh* on the grounds that the plaintiff and the defendant had not been sleeping together since 1998 and the defendant failed to provide maintenance to her since then. The Syariah Court allowed the application of the plaintiff. Syarie judge of the Syariah Lower Court in his judgement stated that:

In this case the plaintiff had provided evidence by way of oath before the court and the witnesses were from her own children. Those witnesses fall under the category of *bayyinah* as they cannot give *shahadah* to their own parents under the syariah. Such type of evidence can be accepted as *bayyinah* to support the application as provided under subsection 3(1) of the Syariah Court Evidence Act, 1996.

The judge went on to say:

Without *bayyinah* it will be difficult for the plaintiff to support the application as the incident happens in a situation where the outsider or witness cannot see. Thus, *bayyinah* is accepted as long as it upholds justice.

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<sup>64</sup> [1996] 11 JH 47.

<sup>65</sup> [2002] IX JH, 189.

## IX. Conclusion

In Malaysia, it is apparent that in order to petition for divorce under the grounds of cruelty for non-Muslims, it is the responsibility of the petitioner to prove that whether he or her can reasonably be expected to carry on living with his or her unreasonable spouse's behaviour. If the behaviour is of extreme nature, it is easy to prove the unreasonableness of the act. However, if the behaviour is trivial but have a significant negative impact on the petitioner, then the question of proving the effect of the behaviour will be on the petitioner to prove. The task to prove this behaviour is normally very difficult. Thus, it is the responsibility of a wise and learned judge to see that there is irretrievable breakdown of marriage. As for the dissolution of marriage for the Muslims, it is apparent that if the husband oppresses the wife, treats her badly and causes her life to be miserable, the wife can raise a complaint to the judge seeking for the annulment of marriage. The schools of Islamic thought have varying opinions on this. In Malaysia, the law recognizes the right of a Muslim woman to apply to the Syariah Court for the dissolution of marriage on the ground of cruelty. If the wife can prove her claim, the court will not hesitate to grant *fasakh* to her.