

FASAKH: A STUDY CASE AT MAHKAMAH RENDAH SYARIAH
PEDALAMAN ATAS KENINGAU SABAH

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Almighty Allah, The Most Merciful, The Most Compassionate, praise and gratitude are to Allah for His guidance and His inspiration. And my peace and all blessing are upon the beloved Prophet Muhammad SAW, the last messenger of Allah Taala.

First and foremost, I would like to express my thankful to Allah, the Almighty for granting my wish and giving the courage and faith to complete this project paper. With very pleasure, I would like to take this opportunity to give my precious thankful to my supervisor, Madam Nik Salida Suhaila Nik Saleh for her initial push, advices, criticism, suggestion and supervision thereafter for the immeasurable amount of support and encouragement during the writing process.

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ABSTRAK

Mempunyai keluarga yang bahagia adalah impian setiap orang. Ini juga adalah salah satu daripada tuntutan agama yang mulia agar setiap manusia mampu mencapai ketenangan dari anak-anak dan suami atau isteri yang baik. Namun begitu bukan semua orang mampu mencapai tahap bahagia yang diimpikan itu. Kes penceraian dan penganiayaan dalam rumah tangga kerap berlaku dan selalunya yang menjadi mangsa penderitaan serta penganiayaan ini adalah golongan isteri dan anak-anak. Dalam kajian ilmiah ini, penulis telah mengkaji tentang kes-kes penceraian melalui *fasakh* yang telah dilaporkan di Mahkamah Rendah Syariah Pedalaman Atas Keningau Sabah di antara tahun 2001 sehinggalah tahun 2005. Tujuan penulis untuk menjalankan kajian ini adalah untuk mengetahui sebab-sebab serta tahap-tahap penceraian melalui *fasakh* di daerah Keningau dan juga ingin mengetahui prosedur-prosedur yang perlu diikuti untuk mendapatkan penceraian melalui *fasakh* ini. Diharapkan agar kajian ilmiah ini boleh membawa manfaat kepada penulis amnya dan kepada umat Islam khususnya untuk memberi kefahaman yang lebih mendalam tentang pembubaran perkahwinan melalui *fasakh*.

ABSTRACT

Having a good family is the desire of all person. This is also one of the assertions of Islam to mankind so that they can gain their appeasement through a peaceful family. Despite that, not every one can achieve such desire. There are too many of ill-treatment cases that happen in marriages and mostly infected on weaker persons such as the wife and the children. In this academic research, the writer studies about the dissolution of marriage through *fasakh* that occurred at Mahkamah Rendah Syariah Pedalaman Atas Keningau Sabah from year 2001 until 2005. The objectives of this academic research are to identify the reasons and phase of *fasakh* cases at that Syariah Court and also to know the procedures that someone must follow if he/she wants to apply dissolution of marriage through *fasakh*. This academic research is made by library research and also case studies that have been done at Mahkamah Rendah Syariah Pedalaman Atas Keningau Sabah. The findings of the research, the writer was able to identify the causes of *fasakh* to how such marriage can be dissolved using *fasakh*. Lastly, the writer hope that this academic studied will bring a lot of benefits of writer herself and also to all Muslims for deeper understanding about the dissolution of marriage through *fasakh*.

ملخص البحث

عائلة جيدة هي الرغبة من كلّ الناس. هذه أيضا إحدى مزاعم الإسلام إلى البشرية لكي هم يمكن أن يكسبوا إسترضائهم خلال العائلة السهلة والسلمية. على الرغم من ذلك، ليس الناس يمكن أن ينجز كلّ الرغبة التي حلمهم. إنّ حالات القسوة التي تحدث في الزواج كثيرا الضعفاء مثل الزوجة والأطفال يكونون ضحية الكيان دائما. في هذا البحث الأكاديمي، دراسة المؤلف حول الزواج عن طريق الفسخ التي حدثت في محكمة رنده شريعة فدا لمن أتس كنينغاو سابه من سنة ٢٠٠١ حتى ٢٠٠٥. إنّ هدف هذا البحث الأكاديمي أن يعرف الأسباب ومرحلة الفسخ يفتّشان في تلك محكمة سريعة وأيضا للمعرفة حول الإجراءات الواجبة على الشخص إذا حاجة إلى الحلّ التطبيقي من الزواج عن طريق الفسخ. هذا البحث الأكاديمي بطريق البحث المكتبة والدراسة الحالات الذي عمل في محكمة رنده شريعة فدا لمن أتس كنينغاو سابه. النتيجة من هذا البحث الأكاديمي. يكتشف المؤلف بأنّ الزواج يمكن أن تدوّب من قبل الفسخ. وأخيرا، يتمنى المؤلف بأنّ هذا البحث الأكاديمي سيجلب الكثير من المنفعة إلى المؤلف بنفسها وأيضا إلى كلّ الناس المسلمون إلى فهم الأكثر عمقا حول حلّ الزواج خلال الفسخ.

CONTENT PAGE

CONTENT	PAGE
AUTHOR DECLARATION	i
ACKNOWLEDGEMENT	ii
ABSTRAK	iii
ABSTRACT	iv
<i>MULLAKHAS AL-BAHTH</i>	v
CONTENT PAGE	vi
LIST OF TABLES	viii
LIST OF CASES	ix
LIST OF STATUTES	x
ABBREVIATION	xi
TRANSLITERATION	xii
INTRODUCTION OF THE RESEARCH	
Background of Research	xiv
Objectives of Research	xv
Importance of Research	xv
Scope of Research	xv
Methodology of Research	xvi
Literature Review	xvi
Problem Identification	xviii
CHAPTER 1	
DISSOLUTION OF MARRIAGE THROUGH FASAKH	
1.1 Definition of Fasakh	1
1.2 The Authority That Related To Fasakh	
1.2.2 Sunnah	6
1.3 Reasons of Fasakh	
1.3.1 Injury or Discord	7
1.3.2 Illness and Defect	7
1.3.3 Failure to Pay Maintenance	8
1.3.4 Desertion or Imprisonment	10
1.3.5 Change of Religion	10
1.4 Conclusion	13

CHAPTER 2**PROVISION OF FASAKH**

2.1 Provision of Fasakh in Islamic Perspective	14
2.2 Provision of Fasakh in Malaysian Law	15
2.2.1 Islamic Family Law (Federal Territories) Act 1984 (Act 303)	16
2.2.2 Islamic Family Law (Negeri Sabah) Enactment 1992	18
2.3 Conciliatory Committee	21
2.4 Arbitration by Hakam	22
2.5 Procedure to Apply Fasakh	
2.5.1 Basic Documents	23
2.5.2 Support Document	24
2.6 Conclusion	24

CHAPTER 3**MAHKAMAH RENDAH SYARIAH PEDALAMAN ATAS KENINGAU
SABAH**

3.1 Introduction	25
3.2 The Background, Objective and the Jurisdiction	25
3.3 Chart of Fasakh Application	26
3.4 Statistic of Fasakh Cases	27
3.5 Reasons of Fasakh	28
3.6 Reported Cases	30
3.7 Conclusion	32

CHAPTER 4**PROBLEM AND SUGGESTION**

4.1 Introduction	34
4.2 Problems	
4.2.1 Gender Bias in the Attitude of the Court	35
4.2.2 Weaknesses in Procedure	35
4.2.3 Counseling Sessions	36
4.2.4 Problem with Lawyers	36
4.2.5 Lack of Information	36
4.2.6 Administrative Weaknesses	36
4.3 Suggestions	
4.3.1 Process and Procedure	37
4.3.2 Appointment of Judges and Officers	37
4.3.3 Legal Counsel	37
4.3.4 Amendment to the Islamic law	37
4.4 Conclusion	38

BIBLIOGRAPHY

41

APPENDICES

43

LIST OF TABLES

	Page
Table 1: Statistic of Fasakh Cases at Mahkamah Rendah Syariah Pedalaman Atas Keningau, Sabah year 2001 until 2005	27
Table 2: The reasons of Fasakh year 2001 until 2005	28

LIST OF CASES

	Page
1. Lina Binti Jamari v Kelvin Lagijun [2006] MRSPA	30
2. Linda Angkokon v Suwid Mualip Bin Hj Para [2006] MRSPA	31

LIST OF STATUTES

	Page
1. Islamic Family Law (Federal Territories) Act 1984 (Act 303)	16-18
2. Islamic Family law (Negeri Sabah) Enactment 1992	18-21

ABBREVIATION

Dr	Doctor
MRSPA	Mahkamah Rendah Syariah Pedalaman Atas Keningau
n.a	no author
n.d	no date
n.pg	no page number
n.p	no publish
n.pl	no place of publication
n.pp	Number
p	page
prof.	Professor
s.a.w	Salla allah 'alayh wa sallam
s.w.t	Subhanahu wa ta'ala
vol	volume

TRANSLITERATION

1. Alphabet

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ء	'	النساء	An-Nisā'
ب	b	بدري	Badri
ت	t	تفكر	Tafakkur
ث	th	مباحث	Mabāhith
ج	j	جيلاني	Jālānī
ح	ḥ	حديد	Ḥadīd
خ	kh	خليل	Khalīl
د	d	داعي	Dā'i
ذ	dz	ذكر	Dzīkr
ر	r	رابطة	Rābiṭah
ز	z	زكير	Zakīr
س	s	سيد	Said
ش	sy	شيخ	Syeikh
ص	ṣ	صبر	Ṣabr
ض	ḍ	ضعيف	Dai'f
ط	ṭ	الطور	At-Ṭur
ظ	ẓ	عظيم	'Aẓīm
ع	'	عمان	'Ammān
غ	gh	غافر	Ghāfir
ف	f	فتح الله	Fethullah
ق	q	القسطون	Al-Qāsiṭūn
ك	k	كثير	Kathīr
ل	l	لم	Lam
م	m	مسلم	Muslim

ن	n	نطفة	Nuṭfah
و	w	وجودية	Wujūdiah
هـ	h	هريرة	Hurayrah
ي	y	يوسف	Yūsuf

2. Short Vowel

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ـَ	a	أمر	Amr
ـِ	i	عاصم	‘Aṣim
ـُ	u	صبر	Ṣabr

3. Long Vowel

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ا	ā	مذاكرة	Muzākarah
و	ū	المتقون	Al-Muttaqūn
ي	ī	علمين	‘Ālamīn

4. Diphthong

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
و	ww	منورة	Munawwarah
ي	yy	تيمية	Taimiyyah
ي	iyy	البخاري	Al-Bukhāriyy

5. Exemption

5.1. Arabic letter ء (hamzah) found at the beginning of a word is transliterated to the letter “a” not to ‘, example:

<u>Example</u>	<u>Transliterated</u>
أحمد	Ahmad

INTRODUCTION TO THE BACKGROUND RESEARCH

BACKGROUND OF RESEARCH

The study case are overall to study of the statistic of *fasakh* that happen at the Mahkamah Rendah Syariah Pedalaman Atas between year 2001 until 2005. This study is also to compare *fasakh* cases with other cases such as *talak*, *ta'liq* and *khulu*. Mahkamah Rendah Syariah Pedalaman Atas has it jurisdictions not only at the district of Keningau, but also included at the district of Tenom, Tambunan and Nabawan.

This research is related to section 53, Islamic Family Law Enactment of Sabah 1992 and also referred to Islamic Family Law (Federal Territories) Act 1984 and also other related statutes.

The research also will discuss about the definition of *fasakh* based on point of view of Al-Quran, As-Sunnah and Sunni schools. It will also discuss about the differences of *fasakh* with other types of divorces in Islam and lastly the reasons of dissolution of marriage by *fasakh*. It is very important to us to know the basis of *fasakh* and the rights for the wife.

Lastly the research will identify the solution that has been recommended by the Islamic law and *Hukum Syara* also analyzes the effects and suggestion to solve *fasakh* problem.

The writer chooses this topic to explore the position of *fasakh* especially at Mahkamah Rendah Syariah Pedalaman Atas Keningau Sabah. Besides that, the writer hope that this research increase awareness among the spouses to keep their relationship always in track. Also, as an additional knowledge for the wife to know their rights if this thing happen to them.

OBJECTIVES OF RESEARCH

First, the writer wants to give clear definitions of *fasakh* according to the authority in al-Quran and *As-Sunnah* and also according to Sunni Schools. The writer also wants to analyze the effectiveness and position of administration system of Mahkamah Rendah Syariah Pedalaman Atas also to give disclosure to the societies especially to the wife on the position of their rights through the concept of *fasakh* according to *Hukum Syarak* and provisions of law in Syariah Court.

Furthermore, the writer wants to analyze statistic of other cases compared with *fasakh* cases from year 2000 until 2005 and besides that, to identify the reasons why this *fasakh* happen and also to reflect the methods of solution of *fasakh*, the effects of dissolution of marriage through *fasakh* and suggestions to solve the problems of *fasakh*.

IMPORTANCE OF RESEARCH

The research is important because to know more deeply about the status of *fasakh* at Mahkamah Rendah Syariah Pedalaman Atas from year 2001 until 2005. By doing this research, we can know the position of *fasakh* cases compare with other Mal cases and this research also giving us deeply understanding the real reason why these wives choose *fasakh* for dissolution of their marriage.

SCOPE OF STUDY

The scope of research which is done by the writer respecting around the definition of *fasakh* and others *talak* and it comparison between them and events which are related with them. The writer also tries to focus on *fasakh* cases and statistics which were held at Mahkamah Rendah Syariah Pedalaman Atas from year 2001 until 2005.

METHODOLOGY OF RESEARCH

Methods which are used in this research are:

1. Method of data analysis

The writer will collect all the statistics cases of *fasakh* from the court that is related to the research.

2. Method of library research

The writer will made research in the library to search for information and data which is needed in the writing of this research through reading process and examining the printed materials. Several libraries will be involved in this research namely Library of Islamic University College of Malaysia, Library of University Kebangsaan Malaysia, Islamic Public Library and National Library.

3. Method of interview.

The writer uses method of interview with the Syariah Judge and Assistant Registrar of Mahkamah Rendah Syariah Pedalaman Atas, also a few wives whom made application for *fasakh*.

LITERATURE REVIEW

Referring to the book entitled “Perkahwinan Dan Penceraian Di Bawah Undang-Undang Islam” written by Nik Noriani Nik Badli Shah in 1998, the writer mentioned that most of the modern legislation provision included the provisions in Islamic Family Law (Federal Territories) Act 1984 is accepted the liberal conjugation and made various of reasons to give the rights of wife to get order for dissolution of marriage.

Ahmad Ibrahim (1978) defines that; *fasakh* literally means to annual a deed or to rescind a bargain. In the context of a marriage, it means the annulment or abrogation of

the marriage contract by the court after the wife has made an application. Hence, whilst the husband has the *talak*, the wife has the *fasakh* to dissolve the marriage.

The paperwork “Fasakh: Jenis Dan Sebab-Sebab” written by Al Ustaz Ahmad Hesamuddin Bin Mohd Tahir, discussed about the difference between *fasakh butlan* (void) and *infasakh* (terfasakh) that is *fasakh butlan* (void) is happen in *akad* is exactly not exist in *syara'* view since the early it have form. Further more, the writer also discusses the opinion of *ulama'* related on this, namely: disablement and ailment, not fulfill the condition, failed to provide maintenance, maltreatment and wrangle, *khiyar al-bulugh wa ifaqah*, *ghayb* and no *kufu*. Lastly the *hikmah* and secret why *fasakh* is consent by Islam is to avoid the spouse oppressed and one way out for the wife when *talak* and is in function. The obligation of *fasakh* as justice in Islam for Muslim goodness in order that their live in peaceful family and not oppressed.

Meanwhile, the article “Alasan Membubarkan Kahwin Melalui Fasakh” written by Raihanah Haji Abdullah discuss about the development particularly when *Fasakh* is used to solve the problems of husband's cruelty, desertion and maltreatment. Beside that, the writers discuss about the position of *fasakh* in Islamic legislation and mentioned that *fasakh* is accepted in Islam based on *Hadis Rasulullah: La darar Wa la dirar*. The holy Quran also explain it clearly in *Surah al-Baqarah* Verses 231 and *an-Nisa'* verses 35. The dissolution of marriage based on the concept of *fasakh* need assistance from *Qadi* or judge. The writer also discusses about the provision of *fasakh* in Malaysia where the provision *fasakh* have existed long time ago and the proof is, the provision of *fasakh* contained in Malacca Digest. The provision about *fasakh* is also regular arranged since Malaysia also did not left behind in establishing the family law reformation like other countries based on request from Muslim woman leagues that want their position in law and ask for upgrading the Islamic Family Law.

Next the thesis entitled “Fasakh and Ta'liq: Study Case at Gombak Timur Syariah Subordinate Court of Selangor” written by Zaiton Ismail. The writer wants to give disclosure to the society especially to wife on the position of their rights through the

concept of *fasakh* and *ta'liq* according to *hukum syara'* and provisions of law in Syariah court and further to understand the difference between *fasakh* and *ta'liq*. The issues that the writer raised is whether there arises self-consciousness or not among the woman who got married on their rights in this problem. The writer also discovers were there is news about the wife whose husband has disappeared, committing of *dharar* to the wife, when the husband did not provide maintenance to the wife and others in the family although the wife also has the right to dissolve marriage.

Lastly, the thesis entitled “Fasakh: A Study Case at the Syariah Court of Negeri Sembilan” written by Ruhil Hayati Ismail in 2004. The writer discuss about *fasakh* by virtue of section 123 of Negeri Sembilan Administration of Muslim Law Enactment 1960 and section 52 of Family Law Enactment 1983 as to know that each state has its own Enactment to solve any problem especially divorces. The aim of this research is to give more knowledge to the society especially for wives about their rights of *fasakh* especially in Negeri Sembilan and she contended that it is very important for women to know their position when they face matrimonial problem. Besides that, the knowledge will be spread widely to society.

PROBLEM IDENTIFICATION

There are some of the problems that had been identify while bring out for research, the writer found that the wife took a long time to brought their cases to the Syariah court and there have a case that the wife have been left by her husband for 13 years and also lost contact with him during that time.

The pose of husband that emerge a problems during the hearing cases made the *fasakh* case late to dissolved by the Syariah judge. It made the wife impatient and more pain to wait the result.

CHAPTER ONE

CHAPTER 1

DISSOLUTION OF MARRIAGE THROUGH FASAKH

1.1 DEFINITION OF FASAKH

Fasakh may be defined as the dissolution or rescission of the contract of marriage by judicial decree.¹ Divorce by intervention of the court is also called *tafriq* in Arabic.²

Fasakh is literally means to annul a deed or to rescind a bargain in the context of a marriage, it means the annulment or abrogation of marriage contract by the court after the wife has made an application therefore. Hence, whilst the husband has the *talaq*, the wife has the *fasakh* to dissolve the marriage.³

According to Abdullah A.An-Na'im, *talaq* is the common form of divorce among Southeast Asia's Muslims. There are two other forms of divorce; *khulu'*, the purchase by the wife of her freedom and *fasakh*, pronounced by *Qadi* or judge on grounds such as impotence or disease.⁴

In the classical law the School differed widely as to the permissible scope of *fasakh*. *Hanafi* law adopted the extremely restrictive approach that a woman might obtain decree from the *Qadi* ordering her husband to divorce her only where the husband was incapable of consummating the marriage. At the other extreme *Maliki* law accepted this right in a wide variety of circumstances including various physical and mental defects,

¹ Dr.Ahmad Ibrahim. 1965. *Islamic Law In Malaysia*. Singapore: Malaysian Sociological Research Institute Ltd. p. 213.

² Nik Noraini Nik Badli Shah. 1998. *Marriage and Divorce under Islamic Law*. 2nd Edition. Kuala Lumpur: International Law Book Services. p. 83.

³ Mimi Kamariah Majid. 1999. *Family Law In Malaysia*. Kuala Lumpur: Malayan Law Journal Sdn Bhd. p. 137.

⁴ Abdullah A. An-Na'im. 2002. *Islamic Family Law In A Changing World*. London: Zed Books Ltd. p. 255.

failure to maintain her, desertion and ill-treatment. The other Schools occupied intermediate positions.⁵

1.2 THE AUTHORITY THAT RELATED TO FASAKH

1.2.1 Al-Quran

The juristic basis for *fasakh* has been deduced from the Holy Quran where it is stated to the effect:

الطَّلُقُ مَرَّتَانٍ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ ۗ وَلَا تَحِلُّ لَكُمْ أَنْ تَأْخُذُوا مِمَّا

ءَاتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ تَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ ۗ فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا

جُنَاحَ عَلَيْهِمَا فِيهَا إِذَا افْتَدَتْ بِهِ ۗ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا ۚ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ

فَأُولَٰئِكَ هُمُ الظَّالِمُونَ ﴿٦٥﴾⁶

Meaning:

“Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah Hath created in their wombs, if they have faith in Allah and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. And women shall have rights similar to the rights

⁵ Keith Hodkinson. 1984. *Muslim Family Law – A Source Book*. Great Britain: Biddles Ltd, Guildford and King’s Lynn. p. 224.

⁶ Al-Qur’an. Al-Baqarah 2:229.

against them, according to what is equitable; but men have a degree (of advantage) over them. And Allah is Exalted in Power, Wise.”

During waiting period, the husband still has the responsibilities towards his wife as if they are still tied in a wedlock (except sexual intercourse), including her provision for maintenance. The reason for the *iddah* on woman upon divorce is to ensure that she is free from carrying anything in her womb. If she is pregnant during the divorce, then the period of *iddah* is extended until she gives birth to the baby. This regulation is to protect the woman, in which it guarantees that the needs of the wife will be provided fully by the husband throughout the period⁷.

The benefit for the *iddah* is for the husband and wife to rethink and reconcile their marriage. The fact that the husband and the wife need to be together during the period of *iddah* often helps to reconcile the marriage. There will always be space for the couple to do things together and talk to each other, and this might help to regain love between each other and the couple could be reunited. That is the beauty of the law of God, and the reason why a couple is given two chances to reconcile their marriage as can be seen from *Surah Al-Baqarah* verse 229⁸.

In other *Surah*:

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ وَلَا

تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا ۗ وَمَنْ يَفْعَلْ ذَلِكَ فَقَدْ ظَلَمَ نَفْسَهُ ۗ وَلَا تَتَّخِذُوا آيَاتِ اللَّهِ

⁷ Rafidah Abdul Jamal. 1st July 2006. “Women and Divorce From The Islamic Perspective”. Fasakh. <http://www.bismikallahuma.com>.

⁸ Ibid.

هُزُوا^٩ وَأَذْكُرُوا نِعْمَتَ اللَّهِ عَلَيْكُمْ وَمَا أَنْزَلَ عَلَيْكُمْ مِنَ الْكِتَابِ وَالْحِكْمَةِ لِيُعْظِمَ بِهِ^٩

وَاتَّقُوا اللَّهَ وَأَعْلَمُوا أَنَّ اللَّهَ بِكُلِّ شَيْءٍ عَلِيمٌ^٩ ﴿٢٣١﴾

Meaning:

“When ye divorce women, and they fulfill the term of their (Iddat), either 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 one does that; He wrongs his own soul. Do not treat Allah's Signs as a jest, but solemnly rehearse Allah's favors 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.”

The above verse outlines the regulations set by God binding the husband that the husband is allowed to take his wife again on equitable term and also allowed to set the wife free from him on equitable term too. The husband is totally not allowed to cause injury to the wife, nor can he abuse her, nor can he take advantage of her out of her weaknesses. This regulation protects a wife from being abused by her husband upon divorce. Apart from that, Islam guarantees the right of the wife with regard to her maintenance.

According to the Syariah regulation about the right of woman while in *iddah*, a woman in *iddah* is still considered as the responsibility of the husband and therefore still has the right to get the provision for her maintenance throughout the period. This is the period whereby the wife will be able to prepare herself for her future life.

⁹ Al-Qur'an. Al-Baqarah 2 :231.

In other *Surah*:

وَإِنْ أَمْرًا خَافَتْ مِنْ بَعْلِهَا نُشُورًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا

صُلْحًا وَالصُّلْحُ خَيْرٌ وَأُحْضِرَتِ الْأَنْفُسُ الشُّحَّ وَإِنْ تُحْسِنُوا وَتَتَّقُوا فَإِنَّ اللَّهَ

كَانَ بِمَا تَعْمَلُونَ خَبِيرًا¹⁰

Meaning:

“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; and such settlement is best; even though men's souls are swayed by greed. But if ye do well and practice self-restraint, Allah is well-acquainted with all that ye do.”

The *ayah* is explaining about looking for peace is better than divorce. Islam suggest reconciliation than argument especially between husband and wife, this is because Allah S.W.T will granted a peaceful life for whom that seeking for reconciliation in good way.

Other *Surah*:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا

يُوفِّقَ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا¹¹

¹⁰ Al-Qur'an. An-Nisa 4:128.

¹¹ Al-Qur'an. An-Nisa 3:35.