

The Validity of Fasakh Due to Non-Cohabitation: An Analysis of Marital Intimacy and its Implications within the Framework of Maqasid al-Shariah

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ABSTRACT

This study investigates the validity of Fasakh (judicial annulment) as a legal remedy for non-cohabitation and the resulting absence of marital intimacy within Muslim marriages, critically analysing its implications through the lens of Maqasid al-Shariah. In Islamic law, the fulfilment of conjugal rights and the maintenance of marital intimacy are fundamental obligations that underpin the objectives of marriage, including the preservation of lineage (*ḥifẓ al-nasl*), the protection of dignity (*ḥifẓ al-‘ird*), and the pursuit of emotional well-being (*ḥifẓ al-nafs*). Drawing on a qualitative methodology, this research reviews Syariah court judgments, classical and contemporary juristic discourse, statutory provisions, and authoritative fatwas to assess the grounds on which fasakh may be granted due to prolonged non-cohabitation or the failure to consummate the marriage. The findings reveal that the absence of marital intimacy, whether resulting from voluntary separation, neglect, or persistent inability to fulfil conjugal obligations, constitutes valid grounds for fasakh if it causes demonstrable harm (*mudarat*) to either spouse. The study further argues that, from the perspective of Maqasid al-Shariah, the legal system should prioritise the welfare and dignity of both spouses by facilitating equitable dissolution when marital objectives are unachievable. In conclusion, the paper advocates for a compassionate and context-sensitive approach in applying Fasakh, ensuring that legal judgments are firmly rooted in Islamic law's higher objectives and the family institution's holistic well-being.

Keywords: Fasakh, non-cohabiting spouses, sexual intimacy, Islamic marriage, Maqasid al-Shariah

INTRODUCTION

A lawful intimate relationship between a man and a woman in Islam is realised exclusively through a valid marriage contract, an agreement that binds both parties in mutual consent and a shared commitment to build a harmonious family (Suryantoro & Rofiq, 2021). This relationship is not only a legal formality but is deeply rooted in the natural human disposition toward companionship, tranquillity, and mutual affection (Hazram & Azahari, 2021). The institution of marriage, as prescribed by Shariah, seeks to fulfil both physical and emotional needs, ensuring the well-being of individuals and the stability of society through the principles of Maqasid al-Shariah, particularly the protection of lineage (*ḥifẓ al-nasl*) and progeny (*ḥifẓ al-nasab*) (Rosidi et al., 2022).

While the marriage contract provides a legal framework, the absence or persistent failure of marital intimacy from the outset can undermine its purpose. Empirical studies indicate that dissatisfaction or inability to establish sexual relations is a significant factor contributing to marital instability and eventual dissolution (Anjer, 2023). Such circumstances, where couples remain technically married yet fail to share conjugal relations, often termed “not sharing the same bed”, are increasingly prevalent and associated with heightened household discord, psychological distress, and a breakdown in family structure (Razak et al., 2015; Astriani, 2019).

The repercussions of non-cohabitation extend beyond the couple, affecting the emotional well-being of children and exacerbating broader social challenges, including increased rates of divorce and mental health

issues within the community (Umar, 2022; Mohamad, 2021). In light of these realities, the validity of *fasakh* (judicial annulment) on the grounds of non-cohabitation and lack of intimacy demands critical re-examination, primarily through the lens of Maqasid al-Shariah, which prioritises justice, the protection of individual rights, and the overall welfare of the family unit.

This study, therefore, investigates whether the persistent failure to establish marital intimacy constitutes legitimate grounds for *fasakh* under Islamic law. By examining doctrinal sources, judicial precedents, and the higher objectives of Shariah, this research aims to contribute to a more holistic understanding of marital rights, obligations, and remedies, and to propose an approach that is both compassionate and consistent with the overarching aims of Islamic jurisprudence.

LITERATURE REVIEW

The Concept of Fasakh in Islam

Fasakh represents a critical legal remedy within Islamic family law, serving as an avenue for couples unable to maintain marital harmony or fulfil the essential objectives of marriage (Aisyahh, 2025). Etymologically, as defined by Ibn Manzur (1995) in *Lisan al-Arab*, *fasakh* means to dissolve or annul, specifically, the legal termination of a contract under Shariah. In the context of marriage, *fasakh* is the judicial annulment of the marital bond by a *qadi* (Islamic judge), based on recognised Shariah grounds such as manifest harm, neglect, or the husband's failure to fulfil matrimonial obligations (Mohd Rapini, 2025).

The various schools of Islamic jurisprudence (*madhahib*) differ regarding the legitimate causes for *fasakh*. According to the Shafi'i school, *fasakh* may be invoked for reasons including the husband's failure to pay *mahr* (dowry), inability to provide material support such as food, clothing, and shelter, as well as in cases of *li'an* (mutual cursing following accusations of adultery), serious illness or deformity, apostasy, or the discovery of milk kinship, which renders the marriage invalid (al-Shirbini, 1994; Jabatan Kehakiman Syariah Pahang, 2025).

The Hanbali school adopts a broader approach, recognising *fasakh* not only in cases of clear marital harm but also where marital intimacy is impossible due to physical impediments (Ibn Qudamah, 1968; Daud et al., 2021). Hanbali scholars also allow for *khulu'* (divorce by compensation initiated by the wife) as a means of dissolution, even without a formal declaration of *talaq* by the husband.

Conversely, the Hanafi school holds that the absence of proper witnesses during the marriage contract may render the marriage invalid, thus justifying *fasakh* (al-Marghinani, 2004). Collectively, these differing perspectives highlight the adaptive nature and flexibility of Islamic jurisprudence in addressing complex family matters (Muliani & Puyu, 2023).

Intimacy: Definition and Islamic Perspective

Dewan Bahasa dan Pustaka (2005) defines intimacy as profound closeness, warmth, and affection between individuals. Within the context of marriage, this concept encompasses a strong emotional and physical bond that enables spouses to meet one another's needs, fostering an environment of tranquillity (*sakinah*) and happiness. The literature consistently affirms that sexual relations are not merely a biological imperative but also serve as a crucial medium for expressing affection, reinforcing marital cohesion, and fulfilling the emotional well-being of both partners (Ali et al., 2008).

From an Islamic legal perspective, sexual intimacy (*jima'*) is strictly permitted within the confines of a valid marriage contract. *Nikah* (marriage) itself is defined as a contract (*akad*) that legitimises sexual relations between a man and a woman, and through which rights and responsibilities are mutually conferred (al-Malibari, 2010). As Ali (2016) highlighted, couples entering marriage are urged to equip themselves with Islamic rulings about family life, encompassing the respective duties of spouses, the reciprocal rights of parents and children, and the broader ethical framework governing interpersonal relationships.

A critical component in maintaining marital harmony is *nafkah batin* (spiritual or emotional maintenance), which extends beyond material provision to include regular, affectionate, and respectful intimate relations (Zin & Aziz, 2020). This spiritual dimension of marital life is deeply intertwined with emotional fulfilment and is a cornerstone of a healthy Islamic marriage.

Classical Islamic jurists have articulated clear guidelines regarding conjugal rights and obligations. Imam al-Nawawi, in *Rawḍah al-Talibin*, underscores that a husband is obliged to engage in sexual intercourse with his wife at least once every four months. A failure to fulfil this duty, without legitimate Islamic justification, is deemed a form of *ḍarar* (harm), and persistent neglect may provide sufficient grounds for the wife to petition for *fasakh* (annulment) (Nawawi, 1992). This demonstrates the seriousness with which Islamic jurisprudence views the fulfilment of physical and emotional needs as intrinsic to the marital contract and the well-being of the family unit.

Furthermore, Imam al-Ghazali, in his magnum opus *Ihya' 'Ulum al-Din*, elevates marital intimacy beyond a mere physical act, framing it as a sacred conduit for nurturing affection, strengthening emotional bonds, and fostering mutual trust. He portrays intimate relations as essential for protecting spouses from loneliness and moral vulnerability, thus reinforcing the Maqasid al-Shariah objective of safeguarding lineage (*ḥifẓ al-nasl*) and promoting the welfare of the family. In this regard, intimacy becomes a manifestation of mercy (*rahmah*) and companionship at the heart of a meaningful and enduring marital relationship (al-Ghazali, n.d.).

Malaysian Islamic family law

In the context of Malaysian Islamic family law, the persistent failure to establish intimate relations within a marriage is categorised as a form of *mudarat* (harm), which provides legitimate grounds for the dissolution of marriage (*fasakh*). Section 52(1)(h) of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) empowers the Shariah Court to grant a *fasakh* if a husband is deemed to have treated his wife with cruelty, as interpreted according to Islamic law. Crucially, the definition of “cruelty” is not limited to acts of physical violence but also includes persistent neglect of conjugal rights, which can result in significant emotional or psychological distress and undermine the harmony and objectives of marriage.

The guiding legal maxim Malaysian Shariah courts apply in such cases is *al-ḍarar yuzal* (“harm must be eliminated”). This principle, fundamental to Islamic jurisprudence, mandates that any substantial, proven physical, psychological, or emotional harm should be remedied, including through marriage annulment when necessary.

Judicial practice substantiates this doctrinal approach. In *Maznah bte Kassim v. Othman bin Nordin* [2007] 3 ShLR 112, the plaintiff sought *fasakh* because her husband had failed to fulfil his marital obligations, particularly regarding conjugal relations, for an extended period. Despite cohabiting under the same roof, the husband admitted in court that he had abstained from sexual relations with his wife for more than five years, without providing a valid reason. The court underscored that a husband must avoid conduct that causes harm or humiliation to his wife and maintain her dignity and well-being. Furthermore, the court emphasised that one of the main objectives of marriage in Islam is to allow for lawful and fulfilling intimate relations, which serve both personal needs and the broader aims of Maqasid al-Shariah, particularly the protection of lineage (*ḥifẓ al-nasl*) and family stability.

Based on the evidence, the court ruled that the defendant’s prolonged neglect of his conjugal duties amounted to unjustifiable harm, satisfying the legal and Shariah requirements for *fasakh*. This case illustrates how Malaysian Shariah courts view the denial of marital intimacy as not merely a private issue but a serious breach of marital obligations with significant legal consequences.

RESEARCH METHODOLOGY

Selecting a rigorous and appropriate research methodology is fundamental to any academic inquiry's integrity and scholarly value. In this study, a qualitative literature review approach was adopted to critically examine the issue of marital intimacy and its implications for *Fasakh* within the framework of *Maqasid al-Shariah*. The

quality of the research is anchored in the systematic identification, evaluation, and interpretation of relevant scholarly works, legal documents, and authoritative fatwas.

Fink (1998) defines a literature review as a structured process involving the collection, synthesis, and critical appraisal of existing research, scholarly writings, and practical insights from local and international sources. This methodological approach enables researchers to map the intellectual landscape of a topic, recognise established knowledge, and identify unresolved gaps or emerging debates in the field (Marzali, 2017; Blanche & Durrheim, 1999).

This study conducted library research by accessing various sources, including academic books, peer-reviewed journal articles, classical and contemporary legal texts, Malaysian statutes, and Shariah court case reports. The core technique used for analysis was content analysis, which involves the systematic coding and interpretation of textual data to derive meaningful patterns, themes, and arguments relevant to the research questions (Krippendorff, 2004).

By employing content analysis, this study could extract, synthesise, and critically discuss the doctrinal, legal, and practical dimensions of marital intimacy, the grounds for *fasakh*, and their alignment with the objectives of Islamic law. This approach ensures that the research findings are comprehensive, evidence-based, and within the broader scholarly and legal discourse.

FINDINGS

This study finds that the concept of *fasakh* in Islamic jurisprudence extends far beyond a procedural means to dissolve a marriage; rather, it is a carefully designed Shariah mechanism aimed at safeguarding the rights, dignity, and well-being of both spouses, with particular emphasis on protecting women from harm and injustice (Saputra, 2024). A comprehensive analysis of classical and contemporary scholarly perspectives reveals that *fasakh* is permissible on multiple grounds, including the existence of an invalid marriage contract, sustained harm or abuse (*darar*), neglect of financial or physical responsibilities, prolonged absence of the husband, and the presence of severe health conditions that impede the fulfilment of marital obligations.

In modern contexts, one of the most prevalent grounds for seeking a *fasakh* is the husband's failure to fulfil conjugal (intimate) duties (Nora, 2022). Islamic law recognises sexual intimacy not only as a natural and emotional necessity, but also as a critical legal right and a central element of *Maqasid al-Shariah* (the higher objectives of Islamic law) (Bahari, 2017). Prominent jurists, such as Imam al-Ghazali, highlight the pivotal role of intimacy in nurturing affection, compassion, and stability within the marital relationship (Djawas et al., 2020).

From the perspective of Malaysian law, Section 52(1)(h) of the Islamic Family Law (Federal Territories) Act 1984 provides statutory recognition that persistent denial of intimate relations constitutes harm sufficient to justify *fasakh*. The precedent established in the *Maznah bte Kassim v. Othman bin Nordin* demonstrates that the Shariah Court views the husband's failure to uphold conjugal responsibilities as a serious breach of marital duties, warranting dissolution of the marriage.

Overall, these findings underscore that Islamic jurisprudence and Malaysian Shariah law stress the holistic well-being of spouses, encompassing physical, emotional, and spiritual dimensions. Failure to establish and maintain marital intimacy disrupts marital harmony and, when it leads to tangible harm, constitutes a legitimate basis for *fasakh* in pursuit of justice and the higher objectives of Islamic law (Zain & Abdullah, 2019).

DISCUSSION

“Not Sharing the Same Bed”: Islamic Solutions through the Lens of Maqasid al-Shariah.

The phenomenon of “not sharing the same bed”, where spouses remain under the same roof yet refrain from engaging in marital intimacy, reflects deeper issues of marital discord, emotional detachment, or chronic

unresolved conflict. These circumstances may be precipitated by frequent arguments, mutual suspicion, psychological or verbal abuse, or a gradual erosion of affection and communication. Frequently, such relationships present a façade of harmony in public, while in private they are marked by distance, dissatisfaction, and profound emotional isolation (Abd Rahman et al., 2020).

Contemporary scholarship underscores that the principles of Maqasid al-Shariah offer a robust framework for restoring well-being within Muslim families by aligning legal and ethical solutions with the higher objectives of Islamic law (Aziz, 2023; Rosidi et al., 2022). The following discussion highlights two of these central objectives, *ḥifẓ al-dīn* (preservation of faith) and *ḥifẓ al-nafs* (protection of life), as practical guidelines for addressing the crisis of marital intimacy.

I. Ḥifẓ al-Dīn (Preservation of Faith)

Spiritual resilience forms the core of a harmonious marital relationship. Cultivating a strong spiritual bond between spouses through joint prayer, frequent remembrance (*dhikr*), and collective supplication fosters mutual empathy, patience, and emotional healing (Baharudin et al., 2018; Kamarulzaman, 2021). In line with Surah al-Baqarah (verses 152–153), which enjoins gratitude, remembrance, and steadfastness, Islamic guidance encourages couples to seek divine assistance in overcoming hardship. A household centred on faith is more likely to withstand external pressures and internal strife, allowing love and tranquillity to flourish as a form of divine blessing (*sakinah*).

II. Ḥifẓ al-Nafs (Protection of Life and Well-being)

Protecting life in the context of marriage extends beyond physical safety to encompass emotional and psychological welfare. Islamic teachings explicitly forbid all forms of harm, whether physical abuse, verbal insult, neglect, or manipulation (Fiza, 2024). Constructing a nurturing environment marked by consistent expressions of respect, affection, and support fulfils the maqasid imperative to preserve the well-being of each family member (Pilus, 2024; Azman, 2023). When spouses feel valued and secure, the risk of alienation or emotional withdrawal is diminished, supporting the overall stability and health of the marital relationship.

III. Integrating Maqasid al-Shariah in Marital Interventions

Practical interventions rooted in these objectives may include structured marital counselling, communication training, and the reinforcement of spiritual practices within the home. The combined application of legal remedies and ethical guidelines derived from Maqasid al-Shariah ensures that solutions are jurisprudentially valid, holistic, compassionate, and oriented toward justice and mercy.

Intimate Relations (Sexual Maintenance) as a Basis for Fasakh Claims

Marriage in Islam transcends its function as a mere social or legal contract; it is fundamentally a sacred covenant (*mithaqan ghaliza*) designed to foster tranquillity (*sakinah*), love (*mawaddah*), and mercy (*rahmah*) between spouses. This ethos is explicitly articulated in Surah al-Rum (30:21):

“And of His signs is that He created for you from yourselves mates that you may find tranquillity in them, and He placed between you affection and mercy.”

This Qur’anic verse highlights marriage’s profound spiritual and emotional objectives, which are actualised through a relationship characterised by mutual affection and emotional fulfilment. Within this framework, a healthy intimate relationship encompassing emotional and sexual dimensions is regarded as both partners’ core right and responsibility (Ibn Kathir, 1998).

In Islamic jurisprudence, the fulfilment of sexual needs is considered one of the essential rights (*huquq*) of the wife, and its consistent neglect by the husband constitutes a legitimate ground for dissolution of marriage (Mohd, 2016). Imam al-Nawawi (1992), referencing classical Shafi’i doctrine, affirms that a wife is entitled to conjugal intimacy at least once every four months unless there is a valid Shariah excuse. Persistent failure by

the husband, whether by refusal or incapacity, is classified as a form of harm (*ḍarar*), granting the wife the right to seek *fasakh* (annulment).

This ruling is underpinned by the overarching principle of *al-ḍarar yuzal* (“harm must be eliminated”), a foundational maxim in Islamic law which requires that any form of sustained psychological distress, depression, or sexual dissatisfaction be remedied through Shariah-sanctioned solutions (Abdullah, 1997). Such harm is not restricted to the physical realm but extends to the emotional and psychological well-being of the spouse, thereby broadening the legal basis for seeking *fasakh*. Moreover, the Qur’an explicitly prohibits men from oppressing their wives, as stated in Surah al-Baqarah (2:231):

“Then retain them in kindness or release them with kindness. However, please do not keep them, intending harm, to transgress against them. Moreover, whoever does that has certainly wronged himself.”

This verse serves as a critical textual foundation for the maxim *al-ḍarar yuzal*, reinforcing the imperative to eliminate harm within the marital relationship (Rosidi et al., 2025). Accordingly, when the absence of intimacy gives rise to emotional and psychological suffering, Islamic law recognises *fasakh* as a dignified and equitable remedy, ensuring justice, compassion, and the preservation of individual dignity within the bounds of Maqasid al-Shariah (Kosmo, 2024)

Sharia Court: Failure to Provide Sexual Maintenance as a Valid Ground for Fasakh

Since the codification of Islamic Family Law across Malaysian states beginning in the early 1980s, the right of a wife to seek dissolution of marriage (*fasakh*) in the Sharia Court has been explicitly recognised and detailed within state legislation. Central to these statutory frameworks is the principle that a marriage may be annulled where the husband fails to fulfil his conjugal obligations, thus causing harm (*ḍarar*) to the wife.

For instance, Section 49 of the Islamic Family Law Enactment of Perak No. 13 of 1984 enumerates specific circumstances justifying a wife’s application for *fasakh*, including:

- The husband’s impotence persists for at least one year after a formal complaint.
- The husband’s affliction with mental illness, leprosy, vitiligo, or a communicable venereal disease, unless the wife has explicitly agreed to remain in the marriage.
- The invalidity of the wife’s consent at the time of marriage due to coercion, confusion, mental incapacity, or any other reason acknowledged by Sharia law.
- The husband’s continuous or intermittent mental illness at the time of marriage, as defined under the Mental Disorders Ordinance 1952.

Similarly, Section 38 of the Kelantan Islamic Family Law Enactment No. 1 of 1983 outlines parallel grounds for annulment, with the additional provision that a woman married by her father or grandfather before puberty may reject the marriage at age 18.

Section 44 of the Kedah Islamic Family Law Enactment No. 1 of 1984 further expands the grounds for *fasakh* to include:

- The husband’s chronic poverty renders him unable to provide maintenance.
- The wife’s incapacity to engage in sexual relations.
- The husband’s possession of a deformed or abnormal sexual organ.

These statutory provisions reflect the broader commitment of Malaysian Sharia law to the principles of Maqasid al-Shariah, particularly the protection of personal dignity (*ḥifẓ al-‘ird*), well-being (*ḥifẓ al-naḥs*), and lineage (*ḥifẓ al-nasl*). By legally recognising failure to provide sexual maintenance as a valid ground for

fasakh, the courts underscore the essential role of intimacy and emotional welfare in upholding the integrity of the marital institution.

CONCLUSION

The phenomenon of “not sharing the same bed” among married couples is symptomatic of deep-seated conflict and the breakdown of marital intimacy, with far-reaching implications for the health and stability of the family unit. In Islamic law, marital intimacy is not merely a physical right but an essential component of *nafkah batin* (spiritual and sexual maintenance) that underpins emotional fulfilment and mutual well-being. Persistent neglect of this duty constitutes *darar* (harm), and as affirmed by both classical Islamic jurisprudence and Malaysia’s Islamic Family Law, it provides legitimate grounds for *fasakh* (annulment).

Addressing this issue demands a holistic approach grounded in the higher objectives of Islamic law (*Maqasid al-Shariah*), particularly the preservation of religion, life, intellect, lineage, and dignity. When internalised within the family, these principles foster resilience, nurture love, and promote effective conflict resolution, safeguarding marital harmony and societal well-being. Ultimately, the solution lies not solely in legal recourse but in empowering families with ethical, spiritual, and communicative tools to build a household characterised by *sakinah* (tranquillity), *mawaddah* (affection), and *rahmah* (compassion).

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