

***Dharar* as a Reason for Divorce Lawsuit in *Fiqh*  
and Legislation of Some Muslim Countries: Study  
on Indonesia, Bahrain, Sudan, Qatar, and Morocco**

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**Abstract**

This paper aims to explain *dharar* as a reason for divorce in the legislation of five Muslim countries, namely Indonesia, Bahrain, Sudan, Qatar, and Morocco. The five countries were chosen with consideration of representing the Sunni Islamic School and one Shia Islamic School. The approach used is a normative approach combined with a comparative method of the law. Primary legal materials are acts and other legislation relevant to the topic of discussion. The results show that the five countries equally provide room for divorce for the wife if she is experiencing *dharar*, the judge or *hakam* is obliged to reconcile the two disputing spouses, *dharar* includes physical and psychological, and the accusation must be proven using evidence generally applicable in procedural law. As for the difference, only Indonesia emphasizes cruelty and physical abuse, while other countries are general. Morocco is the most complete in regulating *dharar* as a reason for divorce and has several specifics such as violating the marriage agreement which is categorized as *dharar*. Morocco also regulates compensation due to *dharar* suffered by the wife, while the other four countries do not discuss it in their family law.

**Keywords:** *Dharar*; divorce; legislation; *qānūn*

## Introduction

In marriage, a husband and wife are taught to get along with their partners in a good manner. However, in practice, a husband or wife can commit disgraceful and hurtful actions towards their partners, both in words and actions. If bad treatment comes from the wife (*nusyūz*), the husband can advise, separate bedrooms or 'beat' to educate her.<sup>1</sup> If it doesn't work, then the husband can divorce her by dropping the divorce before court. On the other hand, if the husband behaves badly (*nusyūz* from husband), the wife can make such treatments or peace. If it does not work to improve the situation, then the way for the wife is to file a complaint with the judge for divorce because the husband has committed *dharar* which is detrimental and makes his wife suffer.<sup>2</sup>

As stated by Ayat Syawisy Dalilah in his dissertation, every divorce initiated by the wife who is justified by *fiqh* has the real reason for *dharar*, in this case, it is excluded in the case of *khuluk*. The pain that the wife can experience is then described in more detail, such as the husband is disabled, the husband does not provide a living, the husband leaves his wife for a long time, the husband disappears, and the husband is imprisoned for a certain period. In the legislation, the definition of *dharar* is further expanded to include anything that harms and endangers the wife, both physically and psychologically. This word in the popular language today is known by another name for domestic violence.<sup>3</sup>

Studies on divorce on the grounds of *dharar* have been carried out by several researchers, such as that of Ammar Marzuq Mulhim Thahir, a student in Palestine who wrote a thesis entitled *Da'wa at-Tafrīq li az-Zaujaini li al-Ghaibah wa ad-Dharar Dirāsah Fiqhīyah Qānūniyah Muqāranah*. This thesis discusses the divorce of husband and wife because the husband disappears or goes comparing *fiqh* with legislation in Jordan. While the writing by the author does not include the country of Jordan in the discussion.

Al-Jabir and ash-Syamri wrote an article entitled *Shuwar at-Tafrīq ad-Dharar fi at-Tasyrī' al-'Irāqi wal al-Muqāran; Dirāsah Muqāranah bi al-Fiqh al-Islami*. This paper discusses divorce because of *dharar* comparing between *fiqh* and

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<sup>1</sup> Ibnu Izzah, "Nusyuz And Its Solutions in Compilation of Islamic Law From The Perspective of The Al-Quran," *Jurnal Al-Dustur* 4, no. 1 (June 9, 2021): 31–48, <https://doi.org/10.30863/jad.v4i1.1420>.

<sup>2</sup> Moh Subhan, "Rethinking Konsep Nusyuz Relasi Menciptakan Harmonisasi dalam Keluarga," *Al-'Adalah: Jurnal Syariah Dan Hukum Islam* 4, no. 2 (December 10, 2019): 194–215, <https://doi.org/10.31538/adlh.v4i2.542>.

<sup>3</sup> Ayat Syawisy Dalilah, "Inha` ar-Rābiṭah az-Zaujiyah bi Ṭalab az-Zaujah Dirāsah Muqāranah bain al-Fiqh al-Islāmī wa Qānun al-Ushrah al-Jazairi wa Ba'du at-Tasyrī'at al-Aḥwāl asy-Syakhshīyah al-'Arabīyah", *Disertasi*, (Tizi Wizu : Fakultas Hukum dan Ilmu Politik Universitas Maulūd Ma'mari, 2014), p. 199-200.

legislation in Iraq, while in this article the author does not include the state of Iraq in a discussion.<sup>4</sup>

Talking about divorce because of *dharar* in the Maliki school of law compared to the legislation of three countries, namely Egypt, Jordan, and Kuwait, was carried out by Ash-Shaqr & Muhammad, *Mabda` at-Talaq li ad-Dharar 'Inda al-Mālikīyyah; Muqāranah bi Qawānin al-Aḥwāl ash-Shakhsīyyah al-Mu'āsirah*. The difference with this article is that none of the countries appointed by ash-Ṣaqr and Muhammad are mentioned in this article.<sup>5</sup>

While in the dissertation Ayat Syawisy Dalilah, the author of this dissertation discusses the termination of marriage at the initiative of the wife, especially in Algerian legislation compared to several other Arab countries. The difference with this article is that the author does not include Algeria and the topic discussed is more specific, namely divorce due to *ḍarar* committed by a husband against his wife.

In jurisprudence within the four schools of thought, claiming divorce on the grounds of *dharar* is justified by the Maliki and Hanbali schools. As is understood, the Maliki and Hanbali schools are known to be the most widely recognized in allowing divorce because *ḍarar* is based on *maslahat mursalah* (public interest) or *istishlah* which is widely used in these two schools. However, the Hanafi and Shafi'i schools tend not to justify divorce for this *dharar* reason. Therefore, it is not surprising that some Muslim countries do not explicitly provide room for divorce on the grounds of *dharar*, but most of the legislation in Muslim countries accommodates this reason in their legislation.

This paper aims to describe the position of fiqh and legislation in five contemporary Muslim countries regarding divorce on the grounds of *dharar*. The approach used was normative. The method used was a comparative law approach between five countries. Primary legal materials were taken from the laws of each country. Secondary legal materials were extracted from the opinions or books of family law experts. Analysis of the data was conducted by using content analysis.<sup>6</sup>

Five Muslim countries were chosen, namely Indonesia, Bahrain, Sudan, Qatar, and Morocco, considering that each country represents the existing Sunni schools of jurisprudence and one Shia school. Indonesia represents the Shafi'i

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<sup>4</sup> Al-Jabir dan asy-Syamri, "Shuwar at-Tafriq adh-Dharar fi at-Tasyri' al-'Iraqi wal al-Muqaran; Dirasah Muqaranah bi al-Fiqh al-Islami", *Majallah Risalah al-Huquq* No. 2, (2015).

<sup>5</sup> Ash-Shaqr & Muhammad, "Mabda` at-Talaq li adh-Dharar 'Inda al-Mālikīyyah; Muqāranah bi Qawānin al-Aḥwāl asy-Syakhsīyyah al-Mu'āsirah, *Majallah Kulliyah Dar al-Ulum Jami'ah al-Fayyum* No. 36, (2014) : 247-278.

<sup>6</sup> Arfa & Marpaung, *Metodologi Penelitian Hukum Islam*, (Jakarta : Kencana, 2016).

school, Bahrain represents the Shia school, Sudan and Morocco represent the Maliki school, and Qatar represent the Hanbali school.

This article aims to describe *dharar* as a reason for divorce in both fiqh and legislation in five Muslim countries while at the same time comparing it with the comparative method to know the similarities and differences.

## Discussion

### Definition of *Dharar*

*Dharar* (harmful) is the opposite of *an-naf'u* (benefit). *Dharar* itself in terms means hurting other people regarding matters of honor, property, and himself. Wahbah az-Zuhaili, a contemporary jurist, defines *dharar* as the husband's act of hurting his wife either by word or deed, such as vile curses, dishonorable abominations, harsh beatings, forcing to do what Allah forbids, turning away and leaving his wife for no good reason.<sup>7</sup>

While ash-Shalabi defines *dharar* as the husband's actions against his wife who hurt his wife which causes the husband and wife relationship to be disrupted such as hitting the wife with an injury blow, cursing with a painful curse, forcing the wife to commit immorality, leaving the wife in bed without intending to educate her even though she is still alive in one house or taking forcibly the wife's property, etc.<sup>8</sup>

As for the law of performing *dharar*, scholars agree that *dharar* is an act that is prohibited in Islam. The basis of this prohibition is contained in the very popular hadith of the Prophet which reads:

حَدَّثَنِي يَحْيَى عَنْ مَالِكٍ عَنْ عَمْرِو بْنِ يَحْيَى الْمَازِنِيِّ عَنْ أَبِيهِ أَنَّ رَسُولَ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ « لَا ضَرَرَ وَلَا ضِرَارَ ».<sup>9</sup>

*Narrated me Yahya, from Malik from 'Amr bin Yahya al-Mazini from his father that the Messenger of Allah said, "Do not cause harm and should not be exposed to danger". (HR Malik)*

From this hadith, a fiqh rule is made which reads *ad-dharar yuz'alu*, namely that all kinds of dangers are eliminated.

الضرر يزال<sup>10</sup>

<sup>7</sup> Wahbah az-Zuhaili, *al-Fiqh al-Islami wa Adillatuhu*, ( Damaskus : Dār al-Fikir, 1985), Jilid VII, p. 527.

<sup>8</sup> Muhammad Mustafa Shalabi, *Ahkām al-Ushrah fi al-Islām Dirāsah Muqāranah baina Fiqh al-Maḥāhib as-Sunnīyah wa al-Maḥābah al-Ja'fari wa al-Qānun*, (Beirūt : Dār al-Jāmi'iyah, 1983), p. 601.

<sup>9</sup> 'Aud bin Husen Magram Al syahri, Qa'idah la Dharara wa la dhirara fi al-fiqh al-Maliki fi quthub an nawadzil "32", no. 4 (July 1, 2020): 1428-64, <https://doi.org/10.21608/jfsu.2020.111761>.

While the instructions for the prohibition of *dharar* in the Qur'an is mentioned in Surah al-Baqarah verse 231 which means:

And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms, and do not keep them, intending harm, to transgress [against them]. And whoever does that has certainly wronged himself. And do not take the verses of Allah in jest. And remember the favor of Allah upon you and what has been revealed to you of the Book and wisdom by which He instructs you. And fear Allah and know that Allah knows of all things.

In Muhammad ad-Dusūqī's observation, the reasons for the wife to file for divorce are based on the existence of *dharar* which needs to be removed from a wife. In his book he explains the form of *dharar* experienced by a wife which can be the reason for filing for divorce such as because her husband is bad at having sex with her, her husband cheats on her, the husband leaves her for a long time, the husband goes to jail, the husband goes missing, the husband falls into poverty, and the husband does not want to provide for it even though he can afford it. All of these by the author are put into the category of *tafriq li ad-dharar*.<sup>11</sup>

*Dharar* itself by the scholars is divided into two, namely *dharar iradi* (deliberately doing *dharar*) and *dharar la iradi* (*dharar* beyond the ability of the husband). In other languages, there is an intentional *dharar* and an unintentional *dharar*. Intentional abuse, for example, a husband intentionally hurts his wife physically by hitting her or hurting her psychologically by cursing. Unintentionally, for example, the husband becomes poor or suffers from illness or disability after marriage, so his wife or partner feels suffering because of it. In general, *dharar* itself can be the reason why a wife demands a divorce which in *fiqh* discussion includes the ability to file for divorce because the husband is disabled or sick, the husband has been away for a long time, the husband is missing, the husband does not provide a living, the husband is imprisoned and the like, all of which result in *dharar* in one or both parties.<sup>12</sup>

Can *dharar* be a reason for divorce? Scholars have different views on this. Some scholars allow it, especially in the Malikiyah and Hanbaliyah circles,

<sup>10</sup> Sugianto Sugianto, "Membangun Lemma Ekonomi Islam Berbasis Qawâ'id al-Fiqhiyah (Studi Kasus Adh-dharar yuzaal)," *HUMAN FALAH: Jurnal Studi Ekonomi dan Bisnis Islam* 1, no. 1 (July 28, 2016): 1–16.

<sup>11</sup> Muhammad ad-Dusūqī, *al-Ahwāl asy-Syakhsīyyah fi al-Mazḥab asy-Syāfi'i*, (Kairo : Dār as-Salām, 2011), p. 197-211.

<sup>12</sup> Mustafa Ibrahim Az-Zalmi, *Aḥkam aḥ-Zawāj wa at-Ṭalaq fi al-Fiqh al-Islami al-Muqaran Dirāsah Muqaranah bi al-Qānun*, ( t.tp : Nasyr Ihsān li an-Nasyr wa at-Tauzi', 2014), hal. 159 dst.

while others tend to prohibit it, especially in the Hanafiyah and Shafi'iyah circles.<sup>13</sup>

In this article, *dharar* that the author means are limited to *dharar* that is intentional and hurt the wife directly, either in the form of words or actions, which in today's language are commonly known as domestic violence or domestic violence for short.

### **Divorce Because of *Dharar* in *Fiqh***

A more detailed explanation regarding the permissibility of divorce because the husband performs *dharar* according to the scholars of the four schools of thought can be explained in their brief views as follows: (a) According to the Hanafi School. In terms of reasons for divorce, it can be said that the Hanafi School is the narrowest and allows the wife to file for divorce from her husband. In the case of a wife experiencing *dharar* from her husband, the Hanafi School argues, basically a wife is not allowed to ask for a marriage annulment (*faskh*) if her husband hurts her with a beating and its kind, or when it is unfair in the distribution of turns between her and her honey. However, she was allowed to report this situation to the judge. If the report is proven, the husband can be sentenced to *ta'zir*, or the judge will reprimand him, or order the husband to be gentle and kind to his wife. If the husband's *nusyūz* continues, the judge can impose a sentence that he thinks is appropriate, but he may not be imprisoned if the contents of the report relate to the issue of injustice in the distribution of turns. The opinion of the Hanafi School is the same as the opinion of the Ja'fari, Zaidi, and Zhahiri schools.<sup>14</sup> (b) According to the Maliki School. The Maliki School is the one that permits the matter of divorce because of this *dharar*. If the husband harms his wife (doing *dharar*) in the form of painful words or beatings that hurt or leave her without cause, or he orders his wife to do something unlawful, or is more concerned with his other wives, or does not want to visit her parents, or confiscate her property or other that's hurting or endangering the wife. If the husband does that and the wife does not accept this treatment then she complains to the judge and she can prove the charge (according to the opinion that is popular in this school) and if the wife demands a divorce, then the judge can divorce her with one *ba'in* divorce because it relies on the hadith. The famous:

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<sup>13</sup> 'Uwairan & an-Nashafi, "at-Tafrīq baina az-Zaujaini li al-Ġaibah wa ad-Ḍarar fi al-Fiqh al-Islāmi wa Qānun al-Aḥwāl asy-Syakhṣiyyah al-Kuwaitī", *Majallah ad-Dirāsah al-'Arabiyah* 41, No. 2, (2020) : 1083-1112.

<sup>14</sup>Ibtisam Khalil Usman, *Al-tathliq li ad-Dharar wa al-Asal al-Mutaratthabah 'Alaihi (Dirasah Muqaranah wa Muqarabah Baina al-Fiqh al-Islami wa Qanun Raqm "8" Sanah 1984 M wa ta'dilatub)*, Thesis, University of Zawia , 2021), <http://dspace.zu.edu.ly/xmlui/handle/1/1045>.

## لا ضرر ولا ضرار

“There should neither be harming (of others without cause) nor reciprocating harm (between two parties)”<sup>15</sup>

According to the Maliki school,<sup>16</sup> among the forms of *dharar* that husbands do to their wives exemplified in the Maliki *fiqh* books include: husbands not wanting to ‘touch’ their wives in bed, hitting their wives with blows that are not meant to educate, berating, cursing, doing intercourse with their wives through the anus, and unfair when polygamous. These examples are called *dharar* which are considered *muktabar*.<sup>17</sup>

These views and examples certainly reflect the era in which the author of the book lived. In the present context, of course, there are changes and alternations of examples that deserve to be considered as a form of *dharar*.

Eliminating *dharar* is one of the *maqāshid shari’ah* which in Jamaluddin al-Athiyya's terms is included in the scope of *maqāshid shari’ah* in the family realm. He divides *maqāshid syari’ah* in the family realm including *tanzīm al-’alaqah baina al-jinsain* (regulating the relationship between two types of men and women), *hifẓ al-nasl* (maintaining offspring/breeding), *tahqīq al-sakāmah wa al-mawaddah wa al-rahmah* (realizing a sense of peace, love, and affection), *hifẓ al-nasab* (maintaining nasab/lineage), *hifẓ al-tadayyun fi al-usrah* (maintaining diversity in the family), *tanzīm al-jānīb al-mu’assasi li al-usrah* (managing basic aspects in the family), and *tanzīm al-jānīb al-mālī* (managing finances in the family). (c) According to the Shafi’i School. The Shafi’iyah group argues that *dharar* or bad treatment sometimes arises from the wife's side, or the husband alone, or even comes from both. If the reason arises from the wife's side, the husband must educate as well as possible. So far, the opinion of the Shafi’i school is the same as the Hanafi School.

If it arises from the husband's side such as being bad in treatment and resulting in *dharar*, then the wife may complain to the judge. If the complaint is proven, the judge can prohibit the husband from doing *dharar* again but not until he is sentenced to *ta’zīr* in the first case. If the complaint occurs again and is proven, the judge can punish him with a punishment commensurate with his guilt. If *dharar* comes from both, for example, the husband accuses his wife of

<sup>15</sup> Samirah Al-Farisi, Nurullah Kurt, and Mohd Bakhit Hj Ali, *Alqawa'id Al-mundarijab tahta qa'idab la dharara wa la dhirara wa tathbiqatuba fi al-masail al-thibbiyyah Albasirah Journal* 9, no. 2 (December 31, 2019): 67–80.

<sup>16</sup> Yusuf Dziyab Muhammad & ash-Shaqr, “Mabda` At-Talaq Li Ad-Darar ‘Inda al-Mālikiyah Muqāranah Bi Qawānin al-Aḥwāl Asy-Syakhshiyyah al-Mu’Āsirah,” *Majallab Kulliyah Dār Al-’Ulūm, Jāmi’ Ab al-Fayyūm* 36 (2014): 247–48.

<sup>17</sup> A. Zamakhsyari Baharuddin and Rifqi Qowiyul Iman, “At-Tafrīq Al-Qadhā’i And The Religious Courts’ Authority In Deciding A Divorce,” *Syariah: Jurnal Hukum dan Pemikiran* 20, no. 1 (June 27, 2020): 1–12, <https://doi.org/10.18592/sjhp.v20i1.3493>.

disobeying him, and the wife accuses her husband of treating her badly and hurting her, the judge is obliged to send two *hakam*-based on the word of Allah in the Surah an-Nisa' verse 35.<sup>18</sup>

The Shafi'i school, as well as the Zahiri and Ja'fari schools, basically does not justify a wife seeking divorce because of *dharar*. The task of the judge or court is only to reconcile and correct husband and wife who are in conflict, and not to divorce them. If the husband is stubborn, the judge can advise and even if necessary denounce him so that he returns to doing well with his wife because after all, divorce is avoided as much as possible because it is an act that, although lawful, is hated by Allah SWT. (d) According to the Hanbali School. The Hanbali School is one of the schools that allow divorce on the grounds of *dharar*, although it is not as explicit as the Maliki School. If the Maliki School is famous for using *maslahat mursalah* as one of the foundations of its jurisprudence, the Hanbali school is also known for using *istishlah* as a method of determining the law.<sup>19</sup>

From the explanation of the various schools of thought above, it seems clear that the schools that openly allow divorce on the grounds of *dharar* are the Maliki School and followed by the Hanbali. While the Hanafi and Shafi'i schools tend not to want divorce as a way to resolve the occurrence of *dharar* in husband-wife relationships. According to the two schools of thought, *dharar* can be eliminated not necessarily through a divorce, but it is enough to report it to the judge and the judge can educate and arrange for the life of a husband and wife to return to normal.<sup>20</sup>

In the author's opinion, closing the permission for divorce for a married couple who often quarrels and there is no hope of reconciliation, coupled with bad actions and violence against the spouse, is tantamount to keeping coals of fire that can burn the contents of the house at any time. Isn't a marriage that is always colored by commotion and bickering and bad actions will not be by the purpose of marriage? Therefore, the opinion that is more beneficial and closer to the truth is the opinion of the Maliki and Hanbali schools, besides being more realistic, it is also more by the cues given by the Qur'an in Surah an-Nisa' verse 130 which allows divorce. Through this verse, Allah also promises that each separated partner will get sufficient or according to the explanations of the

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<sup>18</sup> Haniah Ilhami, "Interpretation of Syiqaq and Its Procedural Law at Religious Court in Yogyakarta", *Mimbar Hukum* - Fakultas Hukum Universitas Gadjah Mada, accessed March 25, 2022, <https://journal.ugm.ac.id/jmh/article/view/16060>.

<sup>19</sup> Ayat Syawisy Dalilah, *Inba` Ar-Rabitah Az-Zaujyyah Bi Talab Az-Zaujah Dirasah Muqaranah Bain al-Fiqh al-Islami Wa Qanun al-Ushrah al-Jazairi Wa Ba'du at-Tasyri'at al-Ahwal Ayy-Syakhsyyah al-'Arabyyah* (Tizi Wizu: Fakultas Hukum dan Ilmu Politik Universitas Maulud Ma'mari, 2014), p. 204-205.

<sup>20</sup> Wahbah az-Zuhaili, *Al-Fiqh al-Islami Wa Adillatuhu*, vol. VIII (Damaskus: Dar al-Fikr, 1985), p. 527.

scholars of interpretation (*mufassir*), get a more suitable husband. The fact is that in modern legislation in Muslim countries today, divorce caused by *dharar* turns out to have a 'place' in the legislation.

### Provisions in Legislation

As mentioned earlier, among the reasons for divorce that are considered by the judge in granting divorce claims, whether submitted by husband or wife, of them is if one partner endangers the other so that the survival of the husband and wife becomes impossible to continue. In the section above, it has been explained how fiqh experts view the issue of divorce on the grounds of *dharar*. Next, the author will explain how the family law in Muslim countries regulates divorce on the grounds of *dharar*.

In the author's observation, not all Muslim countries provide 'room' for divorce on the grounds of *dharar*. Some countries provide space and some do not. Others take *dharar* and *syiqāq* as one discussion. This is a result of the influence of the dominant fiqh school in the country, although not absolute. Here, the author describes some countries that provide space for divorce on the grounds of *dharar*.

#### First, Indonesia

In Indonesia, the issue of marriage is regulated in Law Number 1 of 1974 concerning Marriage. This law was passed on January 2, 1974. Provisions governing divorce are possible because it is contained in Article 2 of UUP Jo. KHI (Compilation of Islamic Law) article 116.

Article 39 paragraph 2 of the Marriage Law states:

"To divorce, there must be sufficient reason that the husband and wife will not live in harmony as husband and wife"<sup>21</sup>

Divorce can be submitted to the court if there is sufficient reason that husband and wife will not be able to live in harmony as husband and wife as formulated in Article 39 paragraph (2) of the Law of the Republic of Indonesia Number 1 of 1974. This means that when submitting an application or lawsuit for divorce, the husband or wife must have certain legal reasons that form the basis for submitting a divorce application or lawsuit to the court. In other words, the marriage law does not permit divorce without a reason as regulated in the legislation.

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<sup>21</sup> Suhaila Zulkifli, "Putusnya Perkawinan Akibat Suami Menikah Tanpa Izin dari Istri," *Jurnal Hukum Kaidab: Media Komunikasi Dan Informasi Hukum Dan Masyarakat* 18, no. 3 (April 15, 2019): 14–26, <https://doi.org/10.30743/jhk.v18i3.1184>.

The reasons that can be used as a basis for divorce are:

1. One of the parties commits adultery or becomes a drunkard, compactor, gambler, etc. which is difficult to cure;
2. One of the parties leaves the other party for 2 (two) consecutive years without the permission of the other party and a valid reason or for other reasons beyond his control;
3. One of the parties gets a prison sentence of 5 (five) years or a heavier sentence after the marriage takes place;
4. One of the parties commits atrocities or severe persecution that endangers the other party;
5. One of the parties gets a disability or disease as a result of not being able to carry out his obligations as husband/wife;
6. Between husband and wife there are constant disputes and quarrels and there is no hope of living in harmony again in the household;<sup>22</sup>

KHI through article 116 adds two more reasons for filing a divorce to the court, namely:

7. Husband violates *taklik talak*;
8. Conversion of religion or apostasy that causes disharmony in the household.<sup>23</sup>

From the provisions of the UUP and KHI above, a wife can file for divorce if she gets *dharar*. The speech seems to place more emphasis on physical attacks which are discussed with cruelty and severe abuse that endangers the other party because proving physical harm is easier than proving psychological pain due to insults or other hurtful words. Persecution itself must be categorized as severe, not just cruelty or light persecution.

Furthermore, the issue of *dharar* was further elaborated through Law no. 23 of 2004 concerning the Elimination of Domestic Violence (UU PKDRT) which was passed on September 22, 2004. With this law, perpetrators of violence do not only deal with civil issues such as divorce but can also be charged with criminal articles that can lead to imprisonment.<sup>24</sup>

## Second, Sudan

Sudan gained independence from Britain and Egypt in 1955. The country is located in Northeast Africa with about 60 percent Muslim, 25 percent

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<sup>22</sup> Miti Yarmunida & Busra Febriyani, "Kedudukan Talak Di Pengadilan Perspektif Siyasah Syar'iyah." 4, no. 2 (2019): 257.

<sup>23</sup> Euis Nurlaelawati, "Muslim Women in Indonesian Religious Courts: Reform, Strategies, and Pronouncement of Divorce," *Islamic Law and Society* 20 (2013): 242.

<sup>24</sup> Anita Rahmawati, "Perlindungan Hukum atas Kekerasan Terhadap Perempuan: Kritisisme atas UU No. 23 Tahun 2004 Tentang KDRT," *PALASTREN Jurnal Studi Gender* 7, no. 1 (March 31, 2016): 79–102, <https://doi.org/10.21043/palastren.v7i1.999>.

animist, and another 15 percent Christian. This country was once colonized by the British and along the way; it often experienced conflicts among its fellow natives.<sup>25</sup>

The composition of the tribes living in Sudan consists of Arabs (39%), Beja (6%), and local African tribes (52%). According to other information, out of 40 million people based on the 2005 census, Islam-Sunni-Maliki is the majority force (70%), the rest are local beliefs (25%), and Christians (5%).<sup>26</sup>

The 1991 Family Law Law in the eyes of women activists is considered conservative and backward because it reinforces a patriarchal culture that is opposed by gender activists. Compared to other countries in the North African region, Sudan is considered the most conservative in reforming family law compared to Morocco, Algeria, Tunisia, and Egypt, which have moved ahead with many family law reforms.<sup>27</sup>

In Sudan, the arrangement for divorce due to *ḍarar* is regulated through *Qānūn Ahwal ash-Syakshiyah li al-Muslimin* 1991 Article 3 *at-Taṭliq li ad-ḍarar wa ash-Syiqāq*. Lawsuit for divorce because of *ḍarar* and the determination of *ḍarar*.

### الفصل الثالث

#### التطليق للضرر والشقاق

#### طلب التطليق للضرر وإثبات الضرر.

126. (1) يجوز للزوجة طلب التطليق للضرر، الذي يتعذر معه لمثلها

دوام العشرة، ولا يجيزه الشرع.

(2) يثبت الضرر بكل طرق الإثبات الشرعية، بما في ذلك شهادة

الشهرة والتسامع.

التحكيم.

163. (1) إذا لم يثبت الضرر، وإستمر الشقاق بين الزوجين، وتعذر

الإصلاح، وعادت الزوجة بعد ثلاثة أشهر لطلب التطليق فيعين القاضي

حكيمين من أهلها، إن أمكن، وإلا فمن يتوسم فيهما القدرة على الإصلاح<sup>28</sup>

Article 162 reads:

<sup>25</sup> Ahmad Tholabi Kharlie dkk., *Kodifikasi Hukum Keluarga Islam Kontemporer*, (Jakarta : Kencana, 2020), hal. 174.

<sup>26</sup> Qodir Zaelani Qodir Zaelani, "Pembaruan Hukum Keluarga: Kajian atas Sudan – Indonesia," *Al-'Adalah* 10, no. 1 (2012): 331–42, <https://doi.org/10.24042/adalah.v10i1.280>.

<sup>27</sup> Samia al-Nagar and Liv Tønnessen, "Family Law Reform in Sudan: A Never Ending Story?," *CMI Brief* 2018:08 (2018), <https://www.cmi.no/publications/6581-family-law-reform-in-sudan-a-never-ending-story>.

<sup>28</sup> "Jumhuriyah al-Sudan -Qanun li Sanah 1991- 24/7/1991 n.d., <http://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=201670>.

1. The wife is allowed to sue her husband for divorce because of *dharar* which causes disruption of the continuity of the household and is not allowed to do *syarak*.
2. The existence of *dharar* is proven by legal methods of proof, including well-known testimony and hearings.

#### Article 163

If *dharar* is not proven and the dispute persists and the amicable path fails, and the wife repeats her demands after three months, then two arbitrators are sent from her family to assist the judge if possible, if not possible from anyone who can reconcile.

Observing the above provisions, the door for litigation is open for the wife if she experiences harm from her husband which causes the survival of her household to be threatened, where *ḍarar*'s action is also not justified according to *syara*. Meanwhile, proving the existence of *dharar* is achieved through the laws of evidence recognized in procedural law, generally in the form of witnesses who know or hear directly what happened.

Meanwhile, if *dharar*'s accusations are not proven, the dispute continues, peace efforts fail, and the wife persists in demanding a divorce, it will be handled with the *syiqāq* procedure. In this case, two arbitrators from each family will be appointed if possible to assist the judge. If it is not possible from the family, then it can be taken from anyone who can arbitrate.

### Third, Bahrain

The next country that gives a place for divorce on the grounds of *dharar* is Bahrain. Bahrain itself is in the form of a kingdom and is inhabited by around 1.2 million people with 98 percent of the population embracing Islam. About 70 percent are Shia and 30 percent are Sunni. The Shia that developed here is the Ja'fari or Imamiyah Shiites, while the developing Sunni sect is the Shafi'i school.<sup>29</sup>

So it is not surprising that Bahrain's Family Law Law regulates these two groups simultaneously. The law according to the Shia and the law according to the Sunni are set together in the same article if there is a difference. Another interesting aspect is that although the majority of Bahrain is inhabited by Shiites, the rulers in Bahrain are Sunni. Bahrain's complexity in drafting the Family Law Law is similar to that of other Muslim countries, involving a strong tug of war

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<sup>29</sup> Ahmad Tholabi Kharlie dkk, *Kodifikasi Hukum Keluarga Islam Kontemporer* (Jakarta: Kencana, 2020).

between conservative clerics, both Sunni and Shia, women activists, and the king himself as the holder of government power.<sup>30</sup>

Bahrain allows the wife to sue her husband for divorce because of *dharar* as can be seen in Qānūn number 19 of 2017 article 98 which reads:

1. A wife can sue for divorce because of *dharar* which disrupts the continuity of the life of husband and wife.
2. A wife can sue for divorce if her husband completely abandons her and leaves her hanging without excuse.
3. The judge must devote all his abilities to reconciling the two parties.
4. If the judge fails to reconcile and *dharar* is proven, the sentence will be divorced.

#### Article 99

If *dharar* is not proven and the dispute continues between husband and wife and fails to be reconciled, then the judge appoints two arbitrators from each family of the husband and wife if possible, if not then from a person who can reconcile or special experts (mediators). This is without ignoring Article 89 of this Law.

From the provisions of the two articles, it is clear that Bahrain provides an opportunity for divorce because the wife gets *dharar* from her husband. This warning is general, which is important; it can cause the continuity of household life to be disrupted. In this case, the law still mandates the judge to try to reconcile and improve as much as possible, but if it fails, the judge can divorce the two. If *dharar* is not proven, but the husband and wife are still in disagreement, then it is resolved by the procedure for dealing with *shiqāq*, namely two arbitrators from each family or special experts in the field are sent to reconcile and improve the relationship between husband and wife who are in conflict.

#### Fourth, Qatar

Qatar in 2011 had a population of 1.6 million. The country gained independence in 1970 after being controlled by the British. Until World War I, Qatar was under the rule of the Ottoman Turks. Qatar has opted for a form of the kingdom like its neighbor Bahrain. The majority of Qatar's population is Sunni Hanbali schools.

Divorce in the Gulf countries, including Qatar, is quite high compared to Indonesia, for example. It is estimated that 34-46% of marriages in Qatar and Bahrain end in divorce, especially among the educated middle class.<sup>31</sup>

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<sup>30</sup> Sandy Russell Jones, "God's Law or State's Law: Authority and Islamic Family Law Reform in Bahrain," *Publicly Accessible Penn Dissertations*, August 13, 2010, <https://repository.upenn.edu/edissertations/186>.

Qatar family law is regulated through *Qānūn al-Uṣrah* No. 22 of 2006 which contains 304 articles. This law was compiled with the main sources extracted from the Hanbali School. This law allows divorce on the grounds of *dharar* as can be seen in the provisions of Article 129 Article 3 *at-Tafrīq li ad-Dharar wa ash-Syiqāq*.

Article 129 reads:

The wife can ask for divorce both before and after *dukbūl* because *dharar* which results in the continuation of the husband and wife relationship becomes impossible to continue. Qadhi must make every effort to reconcile the two. If peace fails and *ḍarar* is proven then the judge divorces the two. The existence of *ḍarar* is evidenced by the evidence of witnesses who witnessed and heard the incident.<sup>32</sup>

From the title of chapter 3, it can be seen that Qatar filed for divorce on the grounds of *dharar* along with *syiqāq*. Divorce is open to wives who have received *dharar* both before and after the husband and wife relationship, where the *ḍarar* makes it impossible for the continuity of the household to continue. In this case, the judge is still expected to reconcile the two disputing couples. However, if peace is not reached and *ḍarar* is proven based on evidence and hearing evidence, the judge will divorce them.

### **Fifth, Morocco**

Divorce on the grounds of *dharar* is also provided by the Moroccan kingdom. Morocco itself is in the form of a kingdom and has the title *Mamlakah al-Maghribiyah*. It is estimated that Morocco's population is around 35 million and 99 percent are Muslim. Just like the Muslim countries in North Africa in general, the population of Morocco largely adheres to the Maliki school of thought. Morocco was also colonized by France and Spain, and its influence in the field of common law is felt to this day. The official language used is Arabic, while French is quite widely used, especially among educated people and in the field of public law.<sup>33</sup> In the author's experience when visiting Morocco in 2013, Arabic and French are often used together on bulletin boards and traffic signs.

Morocco is a country that dares to reform family law and gives women more rights in the field of family law. Wives get several rights that are not found in other Muslim countries such as the right to agree not to be combined, the

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<sup>31</sup> Layachi Anser, "Divorce in the Arab Gulf Countries: A Major Challenge to Family and Society," in *Contemporary Issues in Family Studies*, ed. Angela Abela and Janet Walker (Oxford: John Wiley & Sons, 2013), 59–73, <https://doi.org/10.1002/9781118320990.ch5>.

<sup>32</sup> Qanun Raqm (22) li Sanah 2006 bi Isdhar Qanun al-Uṣrah" accessed March 25, 2022, <https://almeezan.qa/LawPage.aspx?ID=2558>.

<sup>33</sup> Ahmad Tholabi Kharlie dkk., *Kodifikasi Hukum Keluarga Islam Kontemporer*, (Jakarta : Kencana, 2020), p. 158-159.

right to file for divorce for certain reasons, a marriage guardian is no longer a requirement in the marriage contract, the possibility of divorce by agreement and others.<sup>34</sup>

Regarding the opportunity for divorce in Morocco, the Moroccan kingdom through the *Mudawwanah al-Ushrah* 2004 article 98 explains that a wife can file for divorce for one of several reasons, such as violation of the marriage agreement, experiencing *ḍarar*, the husband is unseen, the husband suffers from a disability, *ila`* and *ḥajr*. If you think about it carefully, the reasons for divorce above all lead to one problem, namely the emergence of *ḍarar* felt by the wife.

*Dharar* itself in Moroccan legislation is quite broad in scope and can involve material and non-material matters, those involving physical or material matters, for example being hurt by beatings or violence, those involving non-physical matters, such as being scolded and yelled at, and so on. This includes when the husband does not want to touch her and leaves the wife languishing for a long time (as in the case of *ila`*).<sup>35</sup>

Article 99 of *Mudawwanah al-Ushrah* of 2004 states:

All forms of violation of the marriage agreement are considered as *dharar* which justifies the wife to file for divorce. Considered *dharar* as the basis for demanding a divorce, every act of a cruel, immoral husband causes the wife to suffer both psychologically and physically which makes the wife unable to continue the continuity of the husband and wife relationship.<sup>36</sup>

Furthermore, Article 100 states that the fact of the occurrence of *dharar* is determined through all means of evidence, including the testimony of witnesses whose testimonies are heard in court in the mediation room. If *dharar* is not proven, but the wife persists in asking for a divorce, then it is possible to resolve this by overcoming *shiqāq*.

A special room was chosen for mediation considering that domestic matters are private matters whose privacy and secrets need to be guarded so as not to spread to the public. *Dharar* in the form of physical violence is sufficient as long as it is proven and causes the survival of the household to be disrupted or even unable to take place at all.<sup>37</sup>

Article 101 stipulates that in the case of a divorce due to *dharar*, the court determines the amount of compensation received by the wife as a result of being exposed to the *dharar*.

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<sup>34</sup> John Hursh, "Advancing Women's Rights through Islamic Law: The Example of Morocco," *Berkeley Journal of Gender, Law & Justice* 27 (2012): 252.

<sup>35</sup> Wuzarah Al-'Adl, *Dalil 'Amali Li Mudawwanah al-Ushrah* (Rabat: Jam'iyah Al-Ma'lumah Al-Qānuniyyah wa al-Qadhā'iyah, 2004), p. 73.

<sup>36</sup> Muhammad al-Faruji, *Mudawwanah Al-Ushrah*, p. 35.

<sup>37</sup> Wuzarah Al-'Adl, *Dalil 'Amali Li Mudawwanah al-Ushrah*, p. 74.

The compensation referred to is outside the rights of the wife who was divorced by her husband. This compensation is determined through a court decision based on the wife's demands and after being considered by a panel of judges by looking at the magnitude of the *ḍarar* and the impact of the *dharar* on the wife.<sup>38</sup>

After describing the provisions for divorce due to divorce from five countries, to facilitate understanding, the author has simplified it into a table as follows:

**Table 1: Comparison of *dharar* regulations as reasons for divorce in five countries.**

No.	Isu	Indonesia	Sudan	Bahrain	Qatar	Maroko
1.	<i>Dharar</i> as a reason for divorce if it interferes with the perpetuity of the household	x	v	v	v	v
2.	<i>Dharar</i> and <i>shiqaq</i> in one discussion	x	v	v	v	v
3.	Violation of the marriage agreement as <i>dharar</i>	x	x	x	x	v
4.	<i>Qadhi</i> is obliged to reconcile	v	v	v	v	v
5.	Evidence <i>dharar</i> with witnesses	v	v	v	v	v
6.	Regulations for compensation for victims of <i>dharar</i> violence'	x	x	x	x	v

The similarity of the *dharar* rules as the reason for divorce in the five countries above is the same as providing space for divorce for the wife if she experiences *dharar*, the judge or *hakam* (the arbitrator) is obliged to reconcile the two disputing spouses, *dharar* includes physical and psychological, and the accusation must be proven with evidence.

As for the difference, only Indonesia emphasizes violence and physical abuse, while other countries only speak in general terms. Morocco can be said to be the most complete country in regulating *dharar* as a reason for divorce and has several specifics such as violating the marriage agreement which is categorized as *dharar* while the other four countries it does not mention it.

<sup>38</sup> Wuzarah Al-'Adl, *Dalil 'Amali Li Mudanwanah al-Ushab*, p. 75.

Morocco also regulates compensation due to *dharar* suffered by the wife, while the other four countries do not discuss it in the family law, although it may be regulated in a special law on domestic violence. Furthermore, four countries other than Indonesia make *dharar* and *shiqaq* in one discussion in their laws, while in Indonesia, as can be read in the KHI, it seems that they do not make one discussion between *dharar* and *shiqaq*.

## Conclusion

This is a brief description of how *dharar* was used as one of the reasons for divorce in five Muslim countries. It turns out that quite several countries have adopted it in their family law. Even though this opinion, which was originally only popular among the Maliki school of thought, is a minority opinion, it is also the benefit (*maslahat*) that encourages lawmakers in these Muslim countries to consider the permissibility of divorce on the grounds of *dharar*. In principle, in countries that open a chance for divorce for this reason, from the beginning, they still try their best to avoid divorce and optimize the function and role of the judge to be able to reunite the two disputing couples. However, if the judge's efforts fail, then the judge decides to separate them. Indeed, *dharar* in all its forms needs to be eliminated, if it can still be saved with advice and teaching, either by judges, arbitrators, or religious leaders, then the household deserves to be maintained and continued. However, if efforts to reconcile and repair do not materialize, then the path of divorce can be taken because sometimes divorce is the last resort that becomes the last savior of a *dharar*.

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