

**AN APPRAISAL OF MARRIAGE RECONCILIATION
PROCESSES UNDER THE MALAYSIA LAWS**

BY

SARAFUDDIN ABDUL SYAHID SOWELL

A thesis submitted in fulfilment of the requirement for the
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Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia

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ABSTRACT

Reconciliation in family law is part of the effort to assist the married couple on the brink of divorce. This thesis explores the issues surrounding the application of legal provisions relating to marriage reconciliation in Malaysian family laws. The doctrinal and non-doctrinal method was applied in conducting the study. Hence the findings cover both the issues about the provisions of the laws and the practical aspects of marriage reconciliation. The study covers both provisions and practices of marriage reconciliation under Islamic family law and non-Muslim family law in Malaysia. As for the discussion on marriage reconciliation under Islamic family law, this thesis provides a thorough explanation from the perspective of *fiqh* and the statutory law that applies in Malaysia concerning marriage reconciliation. Among the issues identified surrounding the provisions and the practice of marriage, reconciliation includes duplication of processes, absence of a screening process, and inaccessibility to professional support. A comparative study with the practice of other jurisdictions was conducted and the result of the study has been made as a basis for forming a proposal to improve the practice of marriage reconciliation under Islamic and non-Muslim family laws in Malaysia. With the findings and proposal discussed in this thesis, it is hoped that it would be taken as the basis for improvising the marriage reconciliation practice in Malaysia.



ملخص البحث

يعتبر الصلح في قانون الأسرة جزءًا من جهد لمساعدة الزوجين على وشك الطلاق. يدرس هذا البحث القضايا المحيطة بتطبيق الأحكام القانونية المتعلقة بالتوفيق بين الزوجين في قوانين الأسرة الماليزية. اعتمد هذا البحث أسلوب المبدأ القانوني المسمى بـ "Doctrinal" وغير المبدأ القانوني المسمى بـ "Non-Doctrinal" في تحقيق أهداف البحث. وقد غطت نتائج البحث كلا من القضايا المتعلقة بأحكام القوانين والجوانب العملية للصلح الزوجي بما في ذلك أحكام وممارسات الصلح على الزواج بموجب قانون الأسرة الإسلامي وقانون الأسرة التقليدي في ماليزيا. وناقش البحث التوفيق بين الزوجين بموجب قانون الأسرة الإسلامي مع شرح شامل من منظور الفقه الإسلامي والقانون التشريعي الماليزي. ومن بين القضايا التي تواجه أحكام وممارسة الزواج، المصالحة تكرار إجراءات الصلح، وغياب عملية الفحص، وعدم إمكانية الوصول إلى الدعم المهني. تم إجراء دراسة مقارنة مع ممارسات السلطات القضائية الأخرى ثم وضع نتيجة الدراسة كأساس لتشكيل مقترحات تحسين ممارسة التوفيق بين الزوجين بموجب قوانين الأسرة الإسلامية والتقليدية في ماليزيا. الأمل معقود على أن تعتمد نتائج ومقترحات هذا البحث كأساس تحسين وتطوير ممارسة الصلح الزوجي في ماليزيا.

APPROVAL PAGE

The thesis of Sarafuddin Abdul Syahid Sowell has been approved by the following:

Najibah Mohd Zin
Supervisor

Nora Abdul Hak
Co-supervisor

Noraini Md Hahism
Co-supervisor

Normi Abdul Malek
Internal Examiner

Noor Aziah Mohd Awal
External Examiner

Sohirin Mohammad Solihin
Chairman

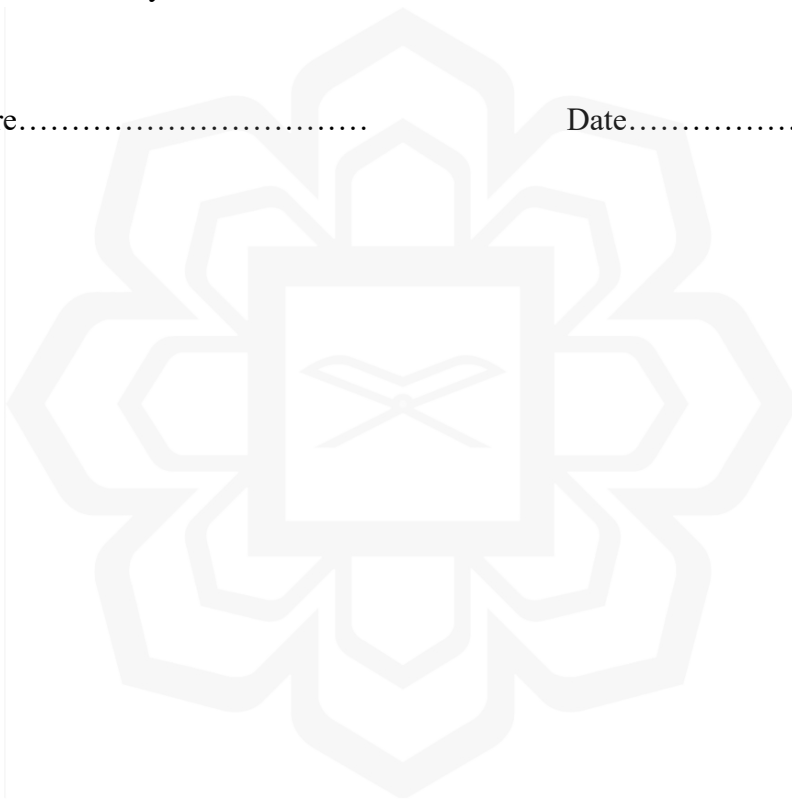
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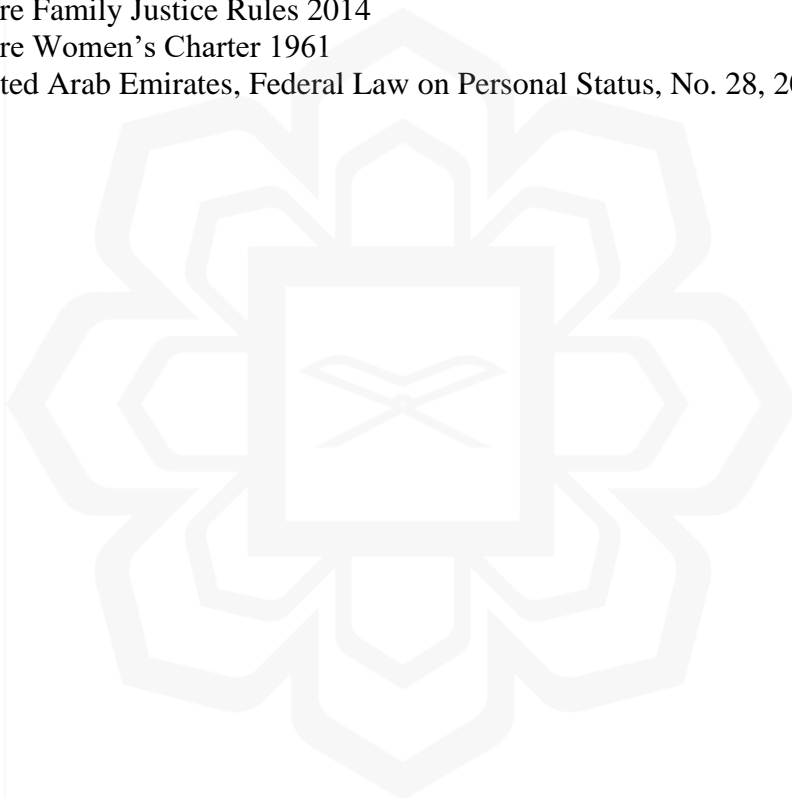


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CHAPTER ONE

INTRODUCTION

This chapter elaborates on the background studies that have motivated the current study on marriage reconciliation in Malaysia. This chapter also provides an insight into the research questions and objectives of the study that formed the parameters of the study. Besides that, this chapter will also discuss previous studies that were conducted on the topic of this study. The discussion on the previous works of literature enables the current study to be scoped properly in meeting the objectives of this study. The literature studies highlight the gaps found in marriage reconciliation in Malaysia which is among the main drives for this study to be undertaken. At the end of this chapter, the importance of this study is emphasised in ensuring better regulatory support is provided for the marriage reconciliation process in Malaysia.

1.1 BACKGROUND OF THE STUDY

The Fifth Malaysian Population and Family Survey 2014 shows that the most cited reason for divorce is irreconcilable differences.¹ The term “irreconcilable differences” refers to disagreements between parties that are serious and cannot be settled². In family issues, it refers to the inability of the married couple to resolve their disagreements or differing opinions, which lead to constant bickering and growing resentment that affect the stability of the marital relationship.³

Do these couples consider separation to be the best resort as they apply for a divorce? If it is not, then would the support provided to these couples in such a situation can prevent their divorce? Many studies conducted focused on answering the first

¹ 56.2% of divorcee men stated that divorce is because of irreconcilable differences and 38% divorcee women stated that divorce is because irreconcilable differences. See National Population and Family Development Board, *Laporan Penemuan Utama: Kajian Penduduk Dan Keluarga Malaysia Kelima*, (Kuala Lumpur: National Population and Family Development Board, 2016), 24.

² Cambridge Dictionary, “Irreconcilable”, < <https://dictionary.cambridge.org/us/dictionary/english/irreconcilable>> (accessed 4 November, 2020).

³ Ava Lawson, “10 Examples of Irreconcilable Differences in Divorce Cases”, Kantrowitz, Goldhamer & Graifman P.C. < <https://www.kgglaw.com/divorce-attorney/10-examples-of-irreconcilable-differences-in-divorce-cases/>> (accessed 4 November, 2020).

question. According to studies, which have been conducted in countries such as the United Kingdom at various levels, including at the government level found that many divorce applications were a ‘cry for help’.⁴ Divorce applications were merely used as a tool by the couples in seeking assistance to fix their marital relationship as the couples have no actual thought for a divorce.⁵ Apart from this, there were also cases whereby divorce was only on the mind of one spouse, while the other partner are not considering a divorce. This led to the second question.

With regard to the second question on the support provided to the couples, there is a procedure under the law of divorce that enable the avenue for the couple to work out their marriages. The process is known as reconciliation with the objective of assisting couples who are in dispute to restore their marital relationship. Reconciliation means “the renewal of amicable relations between two persons who had been at enmity”.⁶ For the purpose of this research, the reconciliation process is referred to as a series of actions or steps taken in order to restore the amicable relations of married couples who are facing marital discord. In Malaysia, the reconciliation of non-Muslim marital discord is governed by the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as the “Law Reform Act”). Under this law, any non-Muslim divorce application is required to refer to a conciliatory body, unless otherwise stated by the law, for the conciliation process. The law provides a mandatory reference of a matrimonial difficulty to a conciliatory body before the presentation of a divorce petition except for cases that fall under sections 51 and 52 of the Law Reform Act and the exceptions listed under section 106 itself.⁷ A conciliatory body under the Law Reform Act is referred to as a body from either (1) a marriage tribunal, (2) a council set up for the purposes of reconciliation by any appropriate religion, community, clan or association or (3) any other body approved as such by the Minister of Home Affairs.⁸ The reconciliation process has been included in the Law Reform Act since the development of the statute itself⁹.

⁴ Lord Chancellor’s Department, *Looking to the Future: Mediation and the Ground for Divorce*, (HMSO Publication Centre, 1995), 9.

⁵ *Ibid.*

⁶ *Black’s Law Dictionary*, “Reconciliation”, 6th ed. (1990).

⁷ See the exception cases in Law Reform (Marriage & Divorce) Act, s 106(1).

⁸ Law Reform (Marriage & Divorce) Act, s 106(3).

⁹ Refer to the first reading of the Bill Law Reform (Marriage & Divorce) Act in Government of Malaysia, *Parliament Hansard of House of Representatives*, (1975), vol I, no 57, 6557-6558.

Upon receiving the reconciliation application, the conciliatory body shall fix a series of meetings with the couple to discuss and review the problems faced by them to restore the marriage. If the conciliatory body concludes that the couple could not be reconciled even after the series of meetings, a certificate will be issued stating that the marriage has irretrievably broken down.¹⁰ Once the certificate is issued, only then the couple could file for a divorce petition at the court.

However, not all divorce applications will be referred to the conciliatory body. Under the current Law Reform (Marriage & Divorce) Act 1976, cases that do not need to refer to the conciliatory body are those involving desertion, long-term separation, incurable mental illness, conversion to Islam, divorce by mutual consent or where the court is satisfied that there are exceptional circumstances that would make reference to the conciliatory body impracticable.¹¹

Under the Malaysian Islamic Family law, the process is similar to the one stated under the Law Reform 1976. The reconciliation process for Muslim marriages is stated under Section 47(5) of the Islamic Family Law (Federal Territories) 1984. When a divorce application is contended by one of the parties or when the Sharī'ah court believes that there is a possibility for reconciliation, the court shall appoint a conciliatory committee to reconcile the Muslim couple. The conciliatory committee consists of one religious officer and two other persons - one acts on behalf of the husband and the other acts on behalf of the wife.¹² The two other persons appointed may be close relatives of the couple knowing the circumstances of the case.¹³ The Islamic Family Law further added the function of *ḥakam* in the Act, which adds another platform for reconciliation. Under section 48 of the Islamic Family Law (Federal Territories) 1984, the law provides that if the court is satisfied that there are constant quarrels (*shiqaq*), between the parties, the court may appoint two arbitrators to act for the husband and the wife. The main difference between *ḥakam* and the conciliatory

¹⁰ Refer to the Law Reform (Marriage & Divorce) Act 1976, s 106(5)(b).

¹¹ Law Reform (Marriage & Divorce) Act 1976, s 106(1).

¹² Islamic Family Law (Federal Territories) 1984 Act, s 47(5).

¹³ Ibid, s 47(6).

body under section 47 is that *hakam* may be given authority by the court to order a divorce in a case where the matter is not reconcilable.¹⁴

1.2 PROBLEM STATEMENT

Provisions of the Malaysian family laws that apply the marriage reconciliation process are a positive effort toward assisting married couples who are in disputes to preserve their marriage. Divorce in most cases has always negatively impacted the couples themselves, the well-being of the children, and to a certain extent, society. Given this scenario, the implementation of the marriage reconciliation provisions should be able to garner positive results towards safeguarding the marriage and avoiding unnecessary divorce. However, the number of divorce cases is increasing instead of declining both among the Muslim and non-Muslims in Malaysia. According to the statistic from the National Registration Department of Malaysia, the divorce rate of non-Muslim and Muslim couples has steadily increased especially at the beginning of 2001.¹⁵ Although the total number of marriages for both Muslims and non-Muslims is reported to be more or less at the same rate every year, unfortunately, the number of divorce cases is on the rise.¹⁶ In 2001, the rate of divorce against the number of married couples (Muslims and non-Muslims) is at 11.24%. Comparatively, the rate stands at 24.41%¹⁷ in 2018. The crude divorce rate (CDR)¹⁸ is at 1.6 per 1,000 population in the year 2018 with the CDR for Muslim couples at 2.0 per 1,000 Muslim population while the CDR for non-Muslim couples is 0.8 per 1,000 non-Muslim population¹⁹. The median age of divorcees in 2018

¹⁴ Ibid, s 48(5) & (6).

¹⁵ Sources from National Registration Department Malaysia and Department of Islamic Development Malaysia quoted in Siti Farhanah Bt Md Sam and Puzziawati Ab Ghani, "Determinants of Divorce Among Women in Malaysia", National Population and Family Development Board Malaysia, <<http://familyrepository.lppkn.gov.my/381/>> (accessed 30 August, 2015).

¹⁶ Ibid.

¹⁷ Department of Statistics Malaysia, "Marriage and Divorce Statistics, Malaysia, 2019, <https://sphweb.bumc.bu.edu/otlt/MPH-Modules/EP/EP713_StandardizedRates/EP713_StandardizedRates2.html> (accessed 4 November, 2020).

¹⁸ Crude rate refers to a calculation method dividing the total number of cases in a period by the total number of persons in the identified population. Refers to Boston University School of Public Health, "Crude Rates", <https://sphweb.bumc.bu.edu/otlt/MPH-Modules/EP/EP713_StandardizedRates/EP713_StandardizedRates2.html> (accessed 4 November 2020).

¹⁹ Department of Statistics Malaysia, "Marriage and Divorce Statistics, Malaysia, 2019, <https://sphweb.bumc.bu.edu/otlt/MPH-Modules/EP/EP713_StandardizedRates/EP713_StandardizedRates2.html> (accessed 4 November, 2020).

is between 34 to 37 years.²⁰ This indicates that the majority of divorces happened among couples at a young age.

In 2008, it was reported that cases for non-Muslim divorce procedures that were referred to the conciliatory body only had a small number of successful cases in persuading the couples to continue with their marriages.²¹ This study hence is written to identify the issues and gaps in the provisions of the Muslim and non-Muslim family laws in Malaysia concerning marriage reconciliation and develop suggestions as solutions to close the identified gaps.

1.3 RESEARCH QUESTIONS

Considering the issues discussed have been long-standing within Malaysian law, it is staggering to note that there is still a low number of scholarships that discuss the issues behind the marriage reconciliation provisions and process in both the Sharī'ah and civil laws. Based on the introduction to the study, the research question for this study is formulated as follows:

- 1) What are the issues and gaps in the current provisions of the laws for marriage reconciliation in Malaysia?
- 2) Do the current provisions of the law of marriage reconciliation provide sufficient support for an effective marriage reconciliation process?
- 3) What are the issues in practising the marriage reconciliation procedures in Malaysia?
- 4) What are the possible improvements and reforms that could be done to increase the rate of success in marriage reconciliation in Malaysia?

²⁰ Ibid.

²¹ It was reported that only 368 out of 12,666 cases referred to conciliatory body between 2004 and 2006 were successful reconciled. See V. Anbalagan, "Tribunals Ill-Prepared to Solve Marriage Woes", *New Straits Times*, 17 November, 2008, via The Malaysian Bar Website, <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/tribunals_ill_prepared_to_solve_marriage_woes.html> viewed on 21 July 2015.

1.4 OBJECTIVES

As explained in the introduction, it is evident that the current marriage reconciliation in Malaysia is not effective in achieving its objective to assist married couples to restore their marital relationship and avoid divorce. The current situation of this matter motivates the four objectives of this study.

- 1) The first objective is to identify issues and gaps in the provision of marriage reconciliation laws for Muslims and non-Muslims in Malaysia.
- 2) The second objective is to examine the issues in the implementation of the marriage reconciliation procedures applicable to Muslims and non-Muslims under the laws in Malaysia.
- 3) The next objective is to identify the best practices concerning marriage reconciliation laws and procedures from selected jurisdictions.
- 4) The final objective of this study is to propose a reform to the law and procedures for marriage reconciliation for both Muslims and non-Muslim.

1.5 HYPOTHESIS

This research is conducted based on the hypothesis that the current provisions for the marriage reconciliation process under the Sharī'āh and civil family laws in Malaysia have not been profoundly successful in achieving its objective of restoring the relationship between married couples **who** are in disputes. Both provisions in the Sharī'āh and civil family laws are not able to create a regulatory environment that is sufficiently able to support a proper marriage reconciliation process to take place. Therefore, resulting in a low success rate for marriage reconciliation in Malaysia. As such, the hypothesis formulated for this research is that the number of successful marriage reconciliation cases would be increased with proper legal provisions that support the marriage reconciliation process.

1.6 LITERATURE STUDIES

Every study conducted in the academic and even in the industry would require the researcher to go through existing literature to identify its findings and the extent of the research conducted in the identified area of study. This is important to allow the current study to focus on a specific area of research and to allow the researcher to guide the study towards the study areas which need to be explored further.

1.6.1 Effects of Divorce

Before analysing past works of literature that discussed the issues in the provisions of marriage reconciliation under the family laws in Malaysia, it is best to first highlight the literature that explored the effects of divorce on couples and their children to understand the position of divorce in Islam. Divorce is one of the options available to married couples when they are facing marriage difficulties that could no longer be mended. Although the option is made available, divorce is supposed to be the last resort for relationships that are no longer working. This is the position of divorce in Islamic law. When elaborating on the Qur'ānic verse regarding the reconciliation in a marriage, Wahbah Al-Zuhaylī stated that divorce is one of the permissible matters in Islam which at the same time, is despised by God.²² Hence in a situation where the married couple is in a dispute, the Qur'ānic teaching requires the couple to work towards reconciling their relationship before considering and opting for divorce.²³ Islam positions reconciliation in the marital relationship as the first and foremost option as opposed to directly resolving a divorce.²⁴ Muhammad Al-Ghazali has explained this further by stating that Islam teaches married couples to focus on mutual kindness and fairness while urging them to resist selfish gains where the married couples are required to reconcile their relationships rather than settling for a divorce.²⁵ The understanding of

²² Wahbah Al-Zuhaylī, *Al-Tafsīr Al-Wasīl*, (Damsyik: Dar Al-Fikr, 2nd edn., 2006), vol. 1, 389.

²³ Ibid. Refer also to the commentary from: Ibnu 'Aṭīyyah, *Al-Muḥarrar Al-Wajīz fī Tafsīr Al-Kitāb Al-'Azīz*, (Beirut: Dar Al-Kotob Al-Ilmiyah, 2001), vol. 2, 101-102; Muhammad Al-Ghazali, *A Thematic Commentary on the Qur'an*, (Kuala Lumpur: Islamic Book Trust, 2001), 80.

²⁴ Wahbah Al-Zuhaylī, *Al-Tafsīr Al-Wasīl*, 389.

²⁵ Muhammad Al-Ghazali, 80.

this Qur'ānic teaching has also been elaborated by a Southeast Asian Muslim scholar prominently known as Hamka. He concurs that the Qur'ān has stipulated that in a situation where a married couple is in a dispute, they should never directly opt for divorce in solving their problems. Instead, they should try their very best to reconcile their marital relationship.²⁶

The reason Islamic law positions divorce as the last resort in a marital relationship is due to the negative effects of divorce on the couples and the children of the marriage.²⁷ Linda J. White and her associates conducted a study on the psychological effects on couples who opted for divorce and those who chose to mend and restore their marital relationship instead. The research investigated whether divorce makes people happier or otherwise makes them more miserable in their life.²⁸ White and her team conducted the study on 645 respondents who had experienced marital difficulties and applied for a divorce five years before the study was conducted. According to the findings obtained from the respondents, they were able to categorise the respondents into two groups; 1) those who chose to mend their marital relationship and maintain the marriage and 2) those who opted for a divorce.

The study shows that 64 per cent of the respondents who put in the effort to mend and restore their marital relationship ended up being happy in their marriages 5 years later.²⁹ Meanwhile, respondents who opted for a divorce, without considering working on their marriages shows a high number of depressive symptoms.³⁰ This study demonstrates that on an individual level, divorce has been proven to affect the psychological health of divorced individuals. This was contributed by the presence of new problems in their lives in the aftermath of the divorce such as financial troubles, issues with the children, and problems in new relationships.³¹ Apart from the negative effects of divorce on couples, the study also discovered that there is a high possibility of having a better married life if the couples stay together to work on their marriages.

²⁶ Abdulmalik Abdulkarim Amrullah, *Tafsir Al-Azhar*, (Jakarta: Yayasan Nurul Islam, 1981), vol 2, 349.

²⁷ Ibid.

²⁸ Linda J. White, and et al, *Does Divorce Make People Happy? Findings from a Study of Unhappy Marriages*, (Institute of American Values, 2002).

²⁹ Ibid, 12.

³⁰ Ibid, 11.

³¹ Ibid, 8.

This finding is further supported by other studies that found quite a significant number of divorced couples regretted their decision in attaining divorce.³² As mentioned before, not every couple intends to separate when filing for a divorce. Charles A. Donovan's article in 2011 quoted a study done in Oklahoma showing that more than one-third of divorced men and one-fifth of divorced women showed remorse for their decision to divorce, reportedly wishing that they should have done more to save their marriages.³³ In her study, White also elaborated that the divorcees whom they interviewed stated that if possible, they would like to look back on their marriages and try to restore them.³⁴ Based on these studies, it is evident that some regretted their decisions and would like to work on their marriages again. This is where provisions of law play an important role during the stages of the divorce application. The law should provide sufficient support to married couples for them to work on their marriages, before finally resorting to divorce.

Based on the findings from the past works of literature, it is evident that the couples themselves are affected by the divorce. Divorce is also proven to have heavily impacted the children of the marriage. Many works of literature have indicated that in the majority of divorce cases, children are harmfully impacted by it psychologically and on their self-esteem or social relations.³⁵ Paul Amato who is a researcher on reconciliation and the effect of divorce on married couples and children highlighted that "...divorce is usually followed by stressful circumstances for children including reduced contact with non-custodial parents, increased tension between children and custodial parents, continuing rancour between parents, a decline in the standard of living

³² Alan J. Hawkins, and et al, "Reasons for Divorce and Openness to Marital Reconciliation", *Journal of Divorce & Remarriage*, no 53 (2012). 454; William J. Doherty & Leah Ward Sears, *Second Chances: A Proposal To Reduce Unnecessary Divorce Presented to U.S. State Legislature*, (Institute for American Values, 2011), 14; William J. Doherty, and et al, "Interest in Marital reconciliation Among Divorcing Parents", *Family Court Review*, vol. 49, no 2 (2011); Brent A. Barlow, "Why Divorce is Often Not the Best Option: Rationale Resources and References", University of Florida, < <https://ifas.ufl.edu/media/smartcouplesifasufledu/docs/pdfs/Marriage-Crossroads---Why-Divorce-is-Often-Not-the-Best-Option.pdf>> (accessed 15 September, 2019), 24.

³³ Charles A. Donovan, "A Marshall Plan for Marriage: Rebuilding Our Shattered Homes", *Backgrounder*, no. 2567, June (2011). 11.

³⁴ Linda J. White, and et al, *Does Divorce Make People Happy? Findings from a Study of Unhappy Marriages*, 7-8.

³⁵ Solangel Maldonado, "Facilitating Forgiveness and Reconciliation in 'Good Enough' Marriages", *Pepperdine Dispute Resolution Law Journal*, vol. 13, no 1 (2013). 105; Paul R. Amato & Juliana M. Sobolewski, "The Effects of Divorce and Marital Discord on Adult Children's Psychological Well-Being", *American Sociological Review*, vol. 66, no 6 (2001). 916-917; Christopher Brohier & Nigel K. Zimmermann, 183-187; Brent A. Barlow, 23-24.

and an increase in residential mobility”.³⁶ As the parents are living apart, the children will be forced to live with either one of the parents or there will be an arrangement made for the children to live with the parent for a designated number of days / certain days. This situation will disrupt the focus and the support of the parents throughout the growth of the children. The study by Amato shows that children who are raised by both parents in a marriage and with low-conflict relationships have the highest level of subjective well-being as compared to children who live with parents who have a high level of conflict or live apart due to a divorce.³⁷ Children will be further affected when they have to undergo inter-parental conflict prior, during, and after the legal process of the divorce. The conflict between the parents during these periods has proven to dominantly affect the children’s psychological and social development.³⁸ Considering these effects on the well-being of the parties involved, divorce should be avoided where it is necessary, and support should be provided to the couple to enable reconciliation. This is the purpose of the law and procedures of marriage reconciliation.

1.6.2 Issues Identified in the Family Law Provisions for the Marriage Reconciliation

The efforts taken in a divorce process in several jurisdictions such as Malaysia to avoid unnecessary divorce by establishing a marriage reconciliation law and procedure are considered in this thesis as a positive effort. However, the success rate is relatively low. A study conducted by Nur Ezan Rahmat on the reconciliation process under section 106 of the Law Reform Act 1976 indicates that out of 105 respondents, 99 respondents had proceeded with divorce applications.³⁹ When reviewing works of literature on the marriage reconciliation process, there have been many comments and critics found on the provisions of the laws and procedures for marriage reconciliation. The provisions of the laws are viewed as not being able to give proper support in facilitating

³⁶ Paul R. Amato & Juliana M. Sobolewski, 901-902.

³⁷ Juliana M. Sobolewski & Paul R. Amato, “Parents’ Discord and Divorce, Parent-Child Relationships and Subjective Well-Being in Early Adulthood: Is Feeling Close to Two Parents Always Better Than Feeling Close to One?”, *Social Forces*, vol. 85, no 3 (2007). 1121.

³⁸ Paul R. Amato & Juliana M. Sobolewski, 916-917.

³⁹ Nur Ezan Rahmat, “A Socio-Legal Study on the Conciliatory Bodies Appointed under Section 106 of the Law Reform (Marriage and Divorce) Act 1976: The Constraints and Suggestions for Reform,” (Ph.D. Thesis, International Islamic University Malaysia, 2017), 199-200.