



PROCEDURAL LAW ON JUDICIAL DISPOSAL OF  
DIVORCE CASES ON *TA'LIQ* AND *FASAKH* IN THE  
MALAYSIAN SYARIAH COURTS: AN APPRAISAL

BY

SUZAINI BT MOHD. SAUFI

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Ahmad Ibrahim Kulliyah of Laws  
International Islamic University Malaysia

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## ABSTRACT

This thesis appraises the overall procedural law in disposal of divorce cases on the grounds of *ta'liq* and *fasakh* in the Syariah Court in Malaysia. The study works on the premise that despite the presence of the provisions in current relevant Enactments, there are still loopholes and drawbacks in implementing the procedural law that cause delay in disposing divorce cases on the grounds of *ta'liq* and *fasakh*. In appraising the efficacy of the existing laws and implementation of it, an empirical research was conducted utilizing a qualitative method apart from conducting library research. The data obtained from several interviews with few personnel such as Chief Syarie Judge, Syarie Judge of the Lower Court, Syarie Lawyers and Assistant Registrar to identify the issues and problems in implementing procedural law in disposing divorce cases under the grounds of *ta'liq* and *fasakh* in the Syariah Court. The unreported files from five (5) Syariah Courts representing five (5) states were examined to identify the implementation of procedural law in disposing *ta'liq and fasakh* cases. To further support the data obtained from interviews and content analysis of the unreported files, the observation was also conducted to see the actual proceedings in court for *ta'liq* and *fasakh*. The comparative study is adopted namely Singapore and Morocco on the procedural law relating to the application of *ta'liq and fasakh*. The purpose is to see the contemporary practices and to observe best practices in disposing divorce cases under the grounds of *ta'liq and fasakh*. The study proves that Syariah Court procedures in disposal of divorce cases under the ground of *ta'liq and fasakh* are comprehensive as far as the substantive and procedural law is concerned. However, there are rooms for improvement in the context of implementation of certain provisions such as service of summons where there are inconsistencies in actual practice especially in the absence of standard operating procedure. These inconsistencies contribute to the delay in the proceeding for *ta'liq and fasakh* cases in the Syariah Court in Malaysia.

## خلاصة البحث

هذا البحث يقوم بالتقييم العام للقوانين الإجرائية المتعلقة بالتخلص من قضايا الطلاق تحت أساس التعليق والفسخ في المحكمة الشرعية الماليزية. وتعمل هذه الدراسة على فرضية مفادها أنه على الرغم من وجود الأحكام المتعلقة بهذه القضايا في القوانين الحالية، لا تزال هناك ثغرات وعيوب في تنفيذ القوانين الإجرائية الأمر الذي يتسبب في التأخر في التخلص من قضايا الطلاق على أساس التعليق والفسخ. ولتقييم مدى فعالية هذه القوانين وتنفيذها، أجري البحث التجريبي باستخدام المنهج النوعي بجانب الدراسة المكتبية. وقد تم الحصول على البيانات المطلوبة من مقابلات مع عدد من الشخصيات مثل رئيس الحاكم الشرعي، والحاكم الشرعي للمحكمة السفلى، والمحامين الشرعيين ومساعد المسجل لمعرفة القضايا والمشاكل جراء تنفيذ القوانين الإجرائية في التخلص من قضايا الطلاق تحت أساس التعليق والفسخ في المحكمة الشرعية. وقد تم فحص خمسة ملفات غير منشورة صادرة من خمس محاكم شرعية تمثل خمس ولايات مختلفة لمعرفة كيفية تنفيذ هذه القوانين الإجرائية في التخلص من قضايا الفسخ والتعليق. ولمزيد من دعم البيانات التي تم الحصول عليها من المقابلات وتحليل المحتوى من تلك الملفات غير المنشورة، طبق أسلوب الملاحظة أيضا على الإجراءات الفعلية في المحكمة لقضايا التعليق والفسخ. واعتمدت الدراسة على المقارنة بين سنغافورة والمغرب في تطبيق القوانين الإجرائية المتعلقة بالفسخ والتعليق. والغرض من ذلك هو معاينة الممارسات المعاصرة ومعرفة أفضل الممارسات في التخلص من قضايا الطلاق تحت أسباب الفسخ والتعليق. أثبتت الدراسة أن إجراءات المحكمة الشرعية في التخلص من قضايا الطلاق تحت أساس التعليق والفسخ كانت شاملة من ناحيتي القوانين الموضوعية لها وإجراءاتها. ومع ذلك، هناك مجال للتحسين في سياق تنفيذ بعض الأحكام مثل خدمة الاستدعاءات غير المتسقة في الممارسة الفعلية وخاصة عند غياب إجراءات التشغيل القياسية. فهذه الحالة هي التي تسبب التأخير في الإجراءات لقضايا الفسخ والتعليق في المحكمة الشرعية الماليزية.

## APPROVAL PAGE

The thesis of Suzaini Binti Mohd. Saufi has been approved by the following:

---

Najibah Mohd.Zin  
Supervisor

---

Afridah Abbas  
Co-Supervisor

---

Zulfakar Ramlee  
Internal Examiner

---

Naim Hj.Mokhtar  
External Examiner

---

Raihanah binti Hj. Abdullah  
External Examiner

---

Radwan Jamal Yousef Elatrash  
Chairman

## DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not previously or currently submitted as a whole for any other degrees at IIUM or other institutions

Suzaini binti Mohd.Saufi

Signature.....

Date.....

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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**PROCEDURAL LAW ON JUDICIAL DISPOSAL OF DIVORCE  
CASES ON *TA'LIQ* AND *FASAKH* IN THE MALAYSIAN  
SYARIAH COURTS: AN APPRAISAL**

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Affirmed by Suzaini Binti Mohd.Saufi

.....  
Signature

.....  
Date

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Syariah Evidence Ordinance (Sarawak) 2001

## **LIST OF ABBREVIATIONS**

JKSM	Jabatan Kehakiman Syariah Malaysia
PTC	Pre Trial Conference
SOP	Standard Operating Procedure



# CHAPTER ONE

## INTRODUCTION

### 1.0 INTRODUCTION

For so many years now, there have been complaints especially among Muslim women that they have to go through a lengthy litigation process when applying for divorce in the Syariah Court. This litigation process is so drawn out that the delay<sup>1</sup> becomes unbearable to the women. Even though Islamic Family Laws in Malaysia grant women many rights and protection from injustice, there are never-ending complaints from women that they are not able to enjoy fully those rights granted to them.<sup>2</sup> This never-ending phenomenon of delay shows that something is not right in the details of implementation by officials entrusted to dispense Islamic justice in the Syariah Courts in Malaysia.

Essentially, the delay is commonly associated with the husband's failure to appear in court on the hearing date or with other reasons related to procedural requirements, for example, failure to provide evidence required by the court or failure to serve the summons to defendants. In some cases, delay extend over several years before being finally dismissed on procedural inadequacy simply because the husband claimed that he gave false evidence and the case was ordered for re-trial.<sup>3</sup>

The study on several reported cases involving claims for *ta'liq* and *fasakh* indicates that almost all cases were subjected to a longer period of settlement. For

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<sup>1</sup> Delay is defined in *Black's Law Dictionary* as 'the act of postponing or slowing and also the period during which something is postponed or slowed'.

<sup>2</sup> Memorandum on Reform of The Islamic Family Laws and The Administration of Justice in The Syariah System in Malaysia, submitted to the Government of Malaysia March 1997. Formulated and approved at the National Workshop on The Reform of Islamic Family Laws and The Administration of Justice in the Syariah System in Malaysia on January 4, 1997, <<http://www.geocities.com/wellesley/veranda/7502/resources/msystem>> (accessed on 17<sup>th</sup> September 2008).

<sup>3</sup> *Harian Metro* dated 5<sup>th</sup> October 2009.

example, in the case of *Faridah v Mohamed Habibullah*<sup>4</sup>, it took six tedious years before the plaintiff was finally granted a divorce by *ta'liq* on the grounds that the defendant had abused her. The case was actually filed in 1989. The Selangor Syariah Court rejected the plaintiff's application for divorce and accepted the defendant's allegation that the plaintiff was in a state of *nusyuz* and the defendant used *nusyuz* as justification for the abuse. The case was then transferred to the Johor Bahru Syariah Court which granted the plaintiff a divorce on the grounds of *fasakh* when the defendant failed to appear after three hearing dates were set. It took a declaration of apostasy, after a failed attempt to have a case heard in the civil court, followed by intervention by the Syariah Court of another jurisdiction before divorce was finally granted in 1995. This case shows that due to the difficulty of getting through with the application for divorce, the plaintiff made an attempt to renounce Islam which is, in itself, an offence in Islamic Law.

In the case of *Aida Melly Tan Mutalib v Khairul Anuar Dato' Kamaruddin*<sup>5</sup>, the plaintiff initially applied for divorce on the grounds of *fasakh* due to the fact that the defendant had abused her, physically and mentally. Subsequently the plaintiff changed the application for divorce under *ta'liq* on the grounds of non-payment of maintenance.<sup>6</sup> In contrast, the defendant husband adduced that the plaintiff was in a state of *nusyuz* by virtue of taking legal proceedings against him, which became part of the proceedings. Finally the court granted the divorce and rejected the allegation of *nusyuz*.

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<sup>4</sup> [1990] 1 MLJ 174; [1992] 2 MLJ 793 (SC)

<sup>5</sup> This case is not reported, the facts and date are based on the plaintiff's notes. In 2001 this case had not been settled yet. Until today, there have been no reports of this case and according to some sources, this case has been settled out of court.

<sup>6</sup> For more than four consecutive months.

Postponement of cases due to the non-appearance or absence of parties may also cause delay in the trial. Non-appearance here refers not only to the defendants but likewise, to the solicitors who represent them in court. As a result of that, the time lapse between mention date and the first date of trial may even extend up to two years, as in the case of *Abdul Hanif v Rabiah*<sup>7</sup>. Judge Y.A.A. Dato' Sheikh Ghazali in delivering judgment for the appeal in the Syariah Court of Appeal said:

'This is a very sad case where in this case the wife (hereinafter referred to as the respondent) tried to get a divorce from the husband (hereinafter referred to as the appellant), from February 1989 but the case had been delayed and now it has been more than seven years and yet she could not get the divorce'.

It can be seen from this case that the non-appearance of certain parties can cause injustice to the plaintiff wife involving time and money. Furthermore, the wife applied for divorce on the grounds that the husband had abused her.

Factors considered to have caused delay is weaknesses in procedures such as the court's insistence on the use of lawyers even though the law allows women to represent themselves in court; the court's insistence on mediation, even though parties have not been able to reach agreement through mediation; the court's insistence on the husband's presence and allowing several postponement of cases because of the husband's absence. Due to these extraneous administrative weaknesses, a woman has to endure endless delay just to obtain a divorce. No mandatory time limit has been set at each step of the process through which a woman suffers in her application for divorce<sup>8</sup>.

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<sup>7</sup> [1996] 11 JH 47

<sup>8</sup> Delay in Divorce Cases,< <http://web.sistersinislam.org.my/BM/PC/delay%20cases.htm>> viewed on 17<sup>th</sup> September 2008.

## **1.1 STATEMENT OF PROBLEM**

Inconsistencies in legal interpretation and lack of judicial creativity have caused unnecessary delay in disposition of *ta'liq* and *fasakh* divorce cases. The delay has brought misery to women who need to find some form of stability in their lives instead of being subjected to a prolonged uncertainty of their marital status. Generally, problems and delay in the disposition of divorce cases in the Syariah Courts in Malaysia are viewed as a normal occurrence. The applications for divorce on the grounds of *ta'liq* and *fasakh* have given rise to frequent disputes and delay. Literature also shows that procedure is one of the factors that contribute to the delay. Inadequacy of the procedural law in disposing of divorce cases on the grounds of *ta'liq* and *fasakh* leads to delay and delay causes injustice to women.

## **1.2 OBJECTIVES OF THE RESEARCH**

This research seeks:

- 1) To examine the substantive and procedural law governing divorce cases on the grounds of *ta'liq* and *fasakh*.
- 2) To investigate the adequacy of procedures in determining whether or not they contribute to the delay in divorce cases.
- 3) To propose reforms to the existing procedural law and to recommend necessary changes to the relevant State Enactments.

## **1.3 HYPOTHESIS**

This study shall proceed on the following assumptions;

1. Rigidity in implementing procedural law in disposition of divorce cases on the grounds of *ta'liq* and *fasakh* leads to delay and causes unnecessary suffering to women.
2. Delay is an injustice especially to women.
3. Proper implementation of procedural law is equally important as substantive law.
4. Procedural law requires suitable amendments.

#### **1.4 LITERATURE REVIEW**

There are readily available literatures on the subject matter of disposition of divorce cases in the Syariah Courts in Malaysia. A number of researches have been conducted on the issue of delay in disposition of matrimonial and divorce cases in the Syariah Courts in Malaysia. These writings are rather general in approach to the extent that the studies merely focus on the duration of settlement rather than extending the findings on procedural aspects of the law.

The first series of discussions and analyses on the problems in the disposition of divorce cases was carried out by Zaleha Kamaruddin. Her research concentrated on delay in matrimonial matters handled by the Syariah Courts. The study addressed several reasons for the delay such as the absence of standard procedures in determining or in identifying which cases go for settlement (*sulh*) and which cases go to open court. The decision to do so depends on the discretion of the judge. In another context, the reasons stated were failure to produce witnesses, summons that could not be served to the defendants, no proper system or procedure to be followed and for states where the procedures exist, some of the judges find them too technical and are

not keen to apply those procedures. The study proposed that further research need to be done on lack of procedural requirements.<sup>9</sup>

Another research conducted by Zaleha Kamaruddin and Mohamad Sahari Nordin addressed that there was a delay in disposition of divorce cases including *ta'liq* and *fasakh* in the Malaysian Syariah Courts. For *ta'liq* and *fasakh* cases in Malacca, Negeri Sembilan and Sarawak, the percentage of delay was less than 10% whereas Perlis recorded the highest rate of delay for this category in which more than 60% of the cases took longer than seven months to be settled. Another problem that causes delay is the disregard for procedures such as the plaintiff or defendant's absence during trial or inability to serve the summons to defendants because of incomplete address or the untimeliness in delivery of summons. The study further claims that delay occurs because of evidential setbacks in *ta'liq and fasakh* cases. As a conclusion, they suggest that a more detailed study or extensive research be conducted in order to overcome delay in disposition of divorce cases. Since the focus of this research is on factors that cause delay on the disposition of the divorce cases, there is no detailed discussion on the issues implicating procedural law as the main reason for delay even though the research suggests improvements on procedural law.<sup>10</sup>

Hashim Kamali in his book claims that two aspects of divorce application, which have given rise to frequent disputes and delay, are of *talaq*, *ta'liq* and *fasakh*. He further made a passing remark that women tend to be faced with difficulties in

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<sup>9</sup> Zaleha Kamaruddin, "Delay in Disposition of Matrimonial Cases in the Shariah Courts in Malaysia (1990-1997)" vol.7, No.1 [1999], IIUM Law Journal.

<sup>10</sup> Zaleha Kamaruddin and Mohamad Sahari Nordin, *A Study on the Disposition of Divorce Cases in the Malaysian Shariah Court (1998-2002)*, IIUM Consultancy Monograph Series 2:2006, Bureau of Consultancy and Entrepreneurship, International Islamic University Malaysia, 2006.

obtaining a divorce especially in cases when they claimed ill-treatment and abuse against the husband.<sup>11</sup>

A research was conducted by Fadilah Abd.Rahman, Hayati Yaakub, Noorul Huda Sahari and Rosma Mohd. Som for the purpose of identifying factors and causes of delayed divorce cases in the Shah Alam Syariah Court. They concluded that there are differences in the duration of the time taken by the court to settle different types of divorces. The longest period of time taken to settle a dispute was for *fasakh* cases followed by cases of *ta'liq*, *talaq* and *khulu'*.<sup>12</sup>

Raihanah Abdullah wrote in an article<sup>13</sup> that even though section 123 of the Syariah Court Civil Procedure (State of Selangor) provides that postponement is part of the procedure, the postponement from one date to another stretches the case over an anomalous length of time and without any compassionate reasons given, will affect the process of justice. Postponement in divorce cases causes immense difficulty to women especially in terms of money, liability and emotional trauma. Among other reasons for postponement is non-appearance of the parties, heavy burden of proof and pre-trial processes such as the inability to serve the summons to the defendant. Sometimes lawyers or parties request postponement because they are not ready to proceed. The defendant will normally ask for postponement to work on filing the defence or the plaintiff wife had used the wrong form for *ta'liq* or *fasakh*.

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<sup>11</sup> Hashim Kamali, *Issues in Divorce in Islamic Law in Malaysia, Issues and Development*, 2000, Ilmiah Publisher, Kuala Lumpur, at 89-91.

<sup>12</sup> Fadilah Abd.Rahman, Hayati Yaakub, Noorul Huda Sahari and Rosma Mohd.Dom, *Factors and Causes of Delayed Divorce Cases: A Study At Shah Alam Syariah Court*, Institute Of Research, Development And Commercialisation UiTM, 2004.

<sup>13</sup> Raihanah Abdullah, "Penangguhan Kes Di Mahkamah Syariah: Cabaran Dan Penyelesaian" Jil.17, Bil.1 (2009) Jurnal Syariah 1-30.

Burden of proof is one of the contributing factors to the delay and it forms the most impactful aspect of procedural law. Najibah Mohd.Zin<sup>14</sup> mentions in her book that Islamic Family Law Enactment does not provide for the requirement to produce witnesses in the application for divorce on the grounds of *ta'liq*. This would lead to confusion as to which standard the court will apply in *ta'liq* and *fasakh*. Under Islamic law as well as the Syariah Evidence Act, the requirement is that for every application for divorce on this ground, the application must be supported by evidence or witness. This is further complicated by the fact that the applicants are unsure whether they must produce two male witnesses or one male witness to support the application. It can be seen therefore that there are loopholes in the provision under Islamic Family Law Act and further studies should be conducted to solve this problem.

The above contention is further supported by Noor Aziah<sup>15</sup> in which the author identifies several reasons that causes delay. Apart from the heavier requirement for burden of proof in which the plaintiff must bring two sane and just males as witnesses, non-appearance of the defendant would also contribute to the delay. In some cases, the defendant may appear at the very last minute and the court will still listen to his side of the story and his witnesses, but this will definitely prolong the trial.

Zulfakar and Normi further highlighted that the complexity of the subject itself, the provisions of the law and how to apply them, misconception on the methods of proof, and the wrong imposition of burden of proof are the reasons for the difficulty in obtaining divorce by way of *ta'liq* and *fasakh*.<sup>16</sup> They conclude that even though a

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<sup>14</sup> Najibah Mohd. Zin, "Pembubaran Perkahwinan dan Permasalahan Berbangkit" in *Manual Undang-Undang Keluarga Islam*, edited by Abdul Munir Yacoob and Siti Shamsiah Md. Supi, (Kuala Lumpur: Institut Kefahaman Islam Malaysia (IKIM), 2006), 171.

<sup>15</sup> Noor Aziah Mohd Awal, "Divorce in Accordance with Islamic Law in Malaysia: Law and Practice" vol. 5, No 2 [2001] IKIM Law Journal 59.

<sup>16</sup> Zulfakar Ramlee and Normi Abdul Malik, "Methods of Proof and Evidentiary Requirements in Divorce Cases: An Islamic Perspective" vol. 16 No. 2 (2008) IIUM Law Journal 223-240.