

FASAKH: A CASE STUDY IN
SYARIAH COURT NEGERI SEMBILAN

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**FASAKH: A CASE STUDY IN
SYARIAH COURT NEGERI SEMBILAN**

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**Perpustakaan
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AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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ABSTRAK

Penulisan ilmiah ini membincangkan tentang permasalahan fasakh di Mahkamah Syariah Negeri Sembilan. Walaupun suami mempunyai hak eksklusifnya iaitu talaq, isteri juga boleh memohon fasakh. Permohonan fasakh adalah tertakluk kepada beberapa sebab. Fasakh membawa maksud pembatalan atau pembubaran ikatan perkahwinan melalui hakim selepas isteri memohon kepada hakim untuk mendapatkan hak yang sepatutnya. Jika hakim berpuas hati bahawa si isteri berprasangka terhadap rumahtangganya, hakim boleh membatalkan perkahwinan mereka. Kajian ini merupakan penulisan ilmiah selama sembilan bulan di Mahkamah Syariah Negeri Sembilan. Ia bertujuan untuk mengkaji keadaan-keadaan yang membolehkan fasakh melalui Enakmen Keluarga Islam Negeri Sembilan 1983, untuk mengenal pasti kedudukan sebenar Jabatan Hal Ehwal Agama Islam Negeri Sembilan, Majlis Agama Islam dan Jabatan Kehakiman. Disamping itu, kajian ini disokong oleh definisi fasakh menurut Al-Quraan dan As-Sunnah dan pendapat – pendapat mazhab yang empat. Untuk memperoleh data, beberapa teknik kajian telah digunakan iaitu pemerhatian, temubual dan meneliti dokumen yang berkaitan. Hasil kajian menunjukkan peruntukan undang-undang di Negeri Sembilan menerima pelbagai alasan kepada isteri untuk mendapatkan pembatalan perkahwinan mereka. Disamping itu, kajian ini juga dapat mengetahui kesan-kesan fasakh keatas suami, isteri dan anak-anak. Kesimpulannya, kerjasama pelbagai pihak adalah penting untuk mengurangkan kes fasakh ini.

ABSTRACT

This academic writing discussed about fasakh problems in Mahkamah Syariah Negeri Sembilan. Although the husband has exclusive power of talaq, the wife also can claim for fasakh. The claim of fasakh by wife must be supported with certain reason. Fasakh means the annulment of the marital contract by the judge after the wife has applied to him for her remedy to be granted. If the judge is satisfied that the woman is prejudiced by her marriage, he will annul the marriage. This study is based on academic writing for nine month, case study in Syariah Court Negeri Sembilan. The research sought to study the ground of fasakh according to Islamic Family Law Enactment (Negeri Sembilan) 1983, to analyze the actual position of Islamic Religious Department of Negeri Sembilan, The Council of Islamic Religion and Judiciary Department. Beside that, it also supported with definition of fasakh according Al-Quraan and As-Sunnah and opinions according to the Sunnah Schools. Observations, interviews, and reviewing relevant document were the tools employed for data gathering purposes. The findings indicate that law provision in Negeri Sembilan accepted variety of reason for wife to get annulment for their marriage. Beside that, this study also to know the effect of fasakh to the husband, the wives and the children. Finally, co operations from any members important to reduce the cases of fasakh.

ملخص البحث

يهدف هذا البحث إلى قضية الفسخ في محكمة الشريعة بنكري سميلن . ولو أن الطلاق بيد الزوج إلا أن للزوجة أيضا الحق في طلب الفسخ . وطلب الفسخ مرهونة بوجود الأسباب. و الفسخ هو إلغاء أو إبطال العلاقة الزوجية بطريق الحاكم بعد أن تقدم الزوجة الطلب إلى الحاكم. إذ اقتنع الحاكم بأسباب الزوجة فيما يتعلق بالمشاكل الزوجية، فلحاكم إلغاء علاقتهم الزوجية. وهذا البحث عبارة عن دراسة خلال تسعة أشهر في محكمة الشريعة بنكري سميلن. والغرض فيها دراسة قضية الفسخ في قانون الأسرة الإسلامية بنكري سميلن، وذلك للتعرف على مكانة قسم الشؤون الإسلامية بالولاية والمجلس الديني بالولاية بنكري سميلن وإدارة المحكمة بنكري سميلن . أدلة، هذا البحث مدعمة بالأدلة من القران والسنة وآراء المذاهب الأربعة. وللحصول على المعلومات، فقد استخدم هذا البحث مناهج متعددة مثل الملاحظة، الحوار ودراسة الوثائق. ونتيجة هذا البحث، هي أن القانون بنكري سميلن تقبل الأسباب المختلفة من الزوجة لحل العلاقة الزوجية. إضافة إلى ذلك، هذا البحث يبين أثار الفسخ على الزوج والزوجة والأولاد. والخلاصة، يجب علينا أن نتعاون للتقابل من حدوث قضية.

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GLOSSARY

- 1) Fasakh : cancellation, abolishment, recision, revocation, abrogation or annulment.
- 2) Saudara sesusuan : shared the same mother's milk
- 3) Ila: abstention from sexual intercourse
- 4) Li'an: mutual cursing
- 5) Aib jinsi: separation because of sexual defect
- 6) Iba : separation due to renunciation of Islam
- 7) Fasad: separation due to spoiling of marriage
- 8) Kafa : separation due to lack of equality of status
- 9) Isar : separation due to difficulties
- 10) Darar : separation due to harm
- 11) Khulu' : divorce by redemption or *cerai tebus talaq*
- 12) Ta'liq: suspended or attached
- 13) Ratqa': a muscular growth which is sometimes found covering the vulva and in other cases, the womb
- 14) Qarna': a hard small bone growing like a horn in the woman's vagina
- 15) Jabb: amputated male organ
- 16) 'Unnah: impotence

TRANSLITERATION TABLE

ARABIC WORDS TRANSLITERATION SYSTEM

1. ALPHABET

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ء	'	فار	fa'r
ب	b	برد	burd
ت	t	تلّ	tall
ث	th	ثوب	thawb
ج	j	جدار	jidār
ح	h.	حليب	halīb
خ	kh	خادم	khādim
د	d	ديك	dīk
ذ	dh	ذهب	dhahab
ر	r	رفيق	rafīq
ز	z	زميل	zamīl

س	s	سلام	salām
ش	sh	شعب	sha ^ʿ b
ص	s	صخر	sakhr
ض	d	ضيق	dayq
ط	t	طازخ	tāzikh
ظ	z	ظالم	zālim
ع	c	عقل	^ʿ aq̄l
غ	gh	غلام	ghulām
ف	f	فيل	fil
ق	q	قلب	qalb
ك	k	كلام	kalām
ل	l	لُبّ	lubb
م	m	مال	māl
ن	n	نجم	najm

ه	h	هول	hawl
و	w	ورق	waraq
ي	y	يم	yamm

2. Short Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
_____	a	كتب	kataba
_____	i	علم	°alima
_____	u	غلب	ghuliba

3. Long Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ا ، ي	ā	عالم، فتى	°ālim, fatā
ي	ī	عليم، داعي	°alīm, dā°ī
و	ū	علوم، أدعو	°ulūm, Ad°ū

4. Diphthong

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
و	aw	نوم	nawm
ي	ay	ليل	layl
يّ	iyy	شافعي	shāfi ^ʿ iyy (ending)
وّ	uww	علوّ	^ʿ uluww (ending)

5. Exemptions

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

Example: أكبر transliterated to: akbar (not ‘akbar).

5.2 Arabic letter ة (*ta’ marbutah*) found in a word without ال (al) which is coupled with another word that contains ال (al) at the beginning of it is transliterated to the letter “ t ”

Example: مكتبة الإمام transliterated to: maktabat al-imām.

However if the Arabic letter ة (*ta’ marbutah*) found in a word with ال (al), in a single word or in the last word in a sentence, it is transliterated to the letter “ h ” .

Example: المكتبة الأهلية transliterasi: al maktabah al-ahliyyah

قلعة qal'ah

دار وهبة dār wahbah

ABBREVIATIONS

p	page
SAW	salla Allah alayh wa sallam
SWT	subhanahu wa ta ala
n. a.	no author
n.d	no date
n.pb	no publisher
JAHEINS	Islamic Religious Department of Negeri Sembilan
MAINS	The Council of Islamic Religion
KUIM	Kolej Universiti Islam Malaysia
UKM	Universiti Kebangsaan Malaysia

BACKGROUND OF RESEARCH

This research will discuss about the position of fasakh in the Negeri Sembilan Syariah Court. Islam basically desires in giving permanence to relationships. Marriage is a contract among other reasons, for the purpose of creating love and affection between married couples. However, where the purpose of marriage is not fulfilled and the differences can no longer be tolerated, Islam permits the spouses to end their bond in the best possible way. Besides talaq, there are other a few other types of divorces in Islam and one of them is fasakh.

Fasakh literally means cancellation, abolishment, rescision, revocation, abrogation or annulment. In relation to marriage, it means the annulment or abrogation of the marital contract by the judge to be granted after the wife has applied to him for this remedy. If the judge is satisfied that the woman is prejudiced by her marriage, he will annul the marriage. As against the right of talaq given to the husband, Islam gives the wife the remedy of fasakh to bring her contract to an end.

The remedy of fasakh is not an absolute right of the wife but as the husband has the right of talaq, an application of fasakh by him is rare. Nevertheless, under Hukum Syara', he is conferred with such rights. Islam recognizes the right of any women who has reached puberty to annul her marriage through the medium of the court in order to uphold the rights and to obviate any injury or difficulty to her.

Besides that, this research will elaborate more about the establishment of JAHEINS (Islamic Religious Department of Negeri Sembilan), MAINS (The Council of Islamic Religion) and Syariah Court Department of Negeri Sembilan. It is very important because we can know the position of the Syariah Court as a judicial organization, which can solve any problem related to Syariah.

Next, this research will discuss about the definition of fasakh, fasakh in the Al-Quraan and Assunnah, differences of fasakh with other types of divorces in Islam. It will also

discuss the grounds for fasakh according to the Sunnah Schools and their difference of opinions and lastly the factors of fasakh. It is important to know the basis of fasakh and factors effecting fasakh.

This research will discuss about fasakh by virtue of Section 123 of Negeri Sembilan Administration of Muslim Law Enactment 1960 and section 52 of Family Law Enactment 1983. From here, we know that each state has its own Enactment to solve any problem especially divorces.

Besides that, this research gives realization about the solution process of fasakh in Negeri Sembilan. From there, we know about the latest statistic of mal cases in Negeri Sembilan Syariah Court.

Lastly, this research will identify the ways of solutions of fasakh cases, effects and suggestions to solve the fasakh problem. Fasakh divorce cases consist of appeals by married women to the court to nullity their marriages. Such appeals, however, are few in number. The main reason cited in this type of cases is impotency on the part of the man, which, according to Islamic law, is a valid ground for divorce.

The researcher chooses this topic to explore the position of fasakh especially in the Negeri Sembilan Syariah Court. Besides that, to give awareness for women who have been oppressed and cheated about their property and to give knowledge about the functions of fasakh to dissolve their marriage if they have marital conflict.

SIGNIFICANCE OF STUDY

This research becomes important because fasakh in one of the few rights of divorce given to the wife. This is the only way that a wife can obtain a dissolution of marriage without the husband's consent through the court termination. This kind of divorce can only be granted on a very limited ground, which is regarded differently among the Schools. Besides that, fasakh is used to solve the problems of husband's cruelty, desertion and maltreatment. It can give awareness for women who are oppressed and cheated of their property.

AIM OF RESEARCH

The aim of this research is to give more knowledge to the society especially for wives about their rights of fasakh especially in Negeri Sembilan. It's important for women to know their position when they face marital problem. Besides that, the knowledge will be spread widely to society.

OBJECTIVES OF RESEARCH

- 1) To give clear definitions of fasakh, according to the authority in Al- Quraan and As- Sunnah and according to Sunni Schools.
- 2) To identify the cases of fasakh in Syariah Court Negeri Sembilan
- 3) To analyze the actual position of JAHEINS (Islamic Religious Department of Negeri Sembilan), MAINS (The Council of Islamic Religion of Negeri Sembilan) and Syariah Court Department of Negeri Sembilan as judicial organizations that solve any problems related to Syariah.
- 4) To realize the factors of that causes cases of fasakh in Syariah Court Negeri Sembilan.
- 5) To study the grounds of fasakh according to Negeri Sembilan Administration of Muslim Law Enactment 1960 and Family Law Enactment 1983.
- 6) To illustrate the methods of solutions of fasakh, effects and suggestions to solve the problems of fasakh.

SCOPE OF RESEARCH

This research will focus on the grounds of fasakh in the Syariah Court of Negeri Sembilan. This research also concentrates on the Administration of Islamic Law (Negeri Sembilan) Enactment 1960, Islamic Family Law (Negeri Sembilan) Enactment 1983 and the establishment of JAHEINS, MAINS, and Negeri Sembilan Syariah Court Department as judicial organizations to solve any problems relating to Syariah.

RESEARCH METHODOLOGY

This research is a long-term research where it takes ten months to finish completely. To finish it up, the researcher takes a few times to find a suitable topic, collect information, and meet the lecturer for advice, comments and complete writings. The researcher uses secondary data to support this research. The information had been collected from magazines, journals, websites and the newspapers. A lot of information can finish the research successfully. Besides that, Library research which refers to the libraries in KUIM, UKM, Islamic Centre, Syariah Court cases and National Library and also field research where some of the information, data or statistics only exist at the certain departments such as the Syariah Court of Negeri Sembilan.

LITERATURE REVIEW

Previously, a case study of fasakh was carried out by Suhaili Mustapa from University of Malaya. She focused on Syariah Court in Kuala Terengganu. However, my study will focus on Syariah Court in Negeri Sembilan. This study is also based on the latest cases. Besides that, there also some researchers by Rosliza Ibrahim. The researchers also focused on cases and problems of fasakh in Perlis.

PROBLEMS IDENTIFICATION

While the researcher was carrying out this research, they were some problems faced such as not getting enough information about fasakh. Some cases hadn't been recorded and were not complete or not suitable with the researchers needs. In the Negeri Sembilan Syariah Court, the cases of fasakh were informed because the wives know about the functions of fasakh to dissolve their marriage. Besides that, the Syariah Court of Negeri Sembilan is far away from the researcher's permanent residence. However, the researcher would not give up collecting information to complete this research.

1.1: THE CONCEPT OF FAMILY

People must form a family institution because:

- 1) The family is a media for love, passion and to get children.
- 2) The family is also to fill the living instinct in groups and help each other forward to complete their lives.
- 3) The family as a sharing form which becomes an advantage for husband and wife.
- 4) The family as a place to get protection for women because they are the weaker group and are exposed to dangers¹.

1.2: THE CONCEPT OF FAMILY IN ISLAMIC VIEW

Islam does not refuse the four views above because Islam admits these four are related. If the four views are seen separately, hence, Islam does not accept them. Therefore, the family institution is not only to satisfy passion or to fill instinct on sharing a life or to get protection only.

Every person is supplied by Allah (S.W.T) with instinct and passion. Allah (S.W.T) also granted instinct for life, to get a safety guarantee and for societal life because people cannot live alone based on gender. Men need women to complete their lives; women also need men's protection. With the family institution, they feel safe and their future is guaranteed.

Islam encourages man to live in a family to avoid sexual abuse: homosexuality (sex between man and man), lesbianism (sex between woman and woman) and adultery (man and women having sex outside marriage)².

¹ Sayid Mujtaba Rukni Musawi Lari. 1974. *Western Civilization Through Muslim Eyes*. translated F.J .Goulding . Houston : Free Islamic Literatures. Part 3. Topic 2.

² Mustafa Hj Daud. 1992. *Institusi Kekeluargaan Islam*. Nur Niaga Sdn Bhd.Dewan Bahasa dan Pustaka. Kementerian Pendidikan Malaysia. p. 1.

This is clearly said by Rasulullah (S.A.W) in a hadis narrated by Bukhari and Muslim.

يا معشر الشباب من استاع منكم الباءة فليتزوج فإنه اغض للبصر واحصن للفرج ومن لم يستطع فعليه بالصوم فإنه له وجاء.

Means: O boys! Who has ability to marry, hence, marry immediately, because with marriage, eyes get freshened and maintain sex. But, those who are unable to marry must fast because fasting can arrest the instincts of amorous excitement³.

If marriage is solely because of passion, the purpose of the family institution will fail because passion based on instinct does not last.

Islam defines the family institution to achieve the purposes of:

1) Basic connection in people reproduction

Allah S.W.T generates Adam (A.S) as the first father. Hawa is also generated by Allah as the first mother. Hence, they are married by Allah, forming the first family institution in this world. This is clear by Allah in the following verse:

ياايها الناس اتقوا ربكم الذى خلقكم من نفس واحدة* وخلق منها زوجها وبث منهما رجلا كثيرا ونساء واتقوا الله الذى تساءلون به والأرحام إن الله كان عليكم رقيبا.

Means: O mankind! Respect (and fear) your Guardian – Lord, who created you, from a single person (Adam), created his mate of similar nature, and from the two of them spread (like seeds) countless men and women; respect and fear Allah, through whom you demand your mutual (rights), and (respect) the wombs (that bore you): for Allah always watches over you⁴. In the verse above, it is clear that the family institution is the basis and main connection in completing a new generation. Without this institution, people reproduction is impossible to be generated⁵.

³ H. Mustafa Baisa. *Keluarga Bahagia, Sepanjang : Usaha Keluarga*. p 7.

⁴ Al-Quran. surah al-Nisa'. 4:1.

⁵ Sayid Mujtaba Rukni Musawi Lari. *Ibid*. Part 1. Topic 18.

People are created different from animals. People are created complete by Allah in this world. Hence, completeness in the family institution is essential because people are supplied with minds as representatives of Allah in this world. This completeness must be maintained through the family institution.

In Islamic view, wives and houses are the place to get protection in each family and to get love and bliss in life. This is clear by Allah in the following verse:

ومن آياته أن خلق لكم من أنفسكم أزواجا لتسكنوا إليها وجعل بينكم مودة ورحمة* إن في ذلك لآيات لقوم يتفكرون*.

Means: and from his signs is this, that he created (your) mates for you from yourselves, that you may live in joy (and peace) with them, and he placed love and mercy between your (hearts): surely, there are signs in this for those who think⁶.

2) Comfort of behaviour and attitudes

The feelings of love, instinct and passion are awarded by Allah have value and are dignified in its position if used kindly based on confirmation by Allah (S.W.T) through the marriage system and the Islamic family. All this will become a source of havoc in society if they are used by uncontrolled and strong emotions.⁷

Everyone acknowledges the existence of spirit always misses truth and divinity because it comes from Allah S.W.T. Hence people have inner strength to control them and strive forward to the truth. If they are evil, their spirit will become intolerable because this act is different with the character of people⁸.

3) Happiness, harmony, kindness and love

All people dreams felicity. This can be attained from the family institution. The husband and wife will feel bliss, calm and peaceful when life in the house is bliss, calm

⁶ Al-Quran . surah al-Rum . 30:21.

⁷ Abu Urwah. 1986. *Wanita dan Kekeluargaan*. Petaling Jaya: Pustaka Salam. p. 72.

⁸ *Ibid.*

and peaceful⁹. Bliss in the lifetime is received from sincerity, trustfulness, responsibility, respect to each other and love.

Allah S.W.T says that:

ومن آياته أن خلق لكم من أنفسكم أزواجا لتسكنوا إليها وجعل بينكم مودة ورحمة* إن في ذلك لآيت لقوم يتفكرون*.

Means: : And from his signs is this, that he created (your) mates for you from yourselves, that you may live in joy (and peace) with them, and he placed love and mercy between your (hearts): surely, there are signs in this for those who think¹⁰.

In other verse, Allah S.W.T said:

هن لباس لكم وأنتم لباس هن*

Means: they are your garments and you are their garments¹¹.

4) Ummah development institution

Ummah development starts from the family institution. If the family institution is managed kindly, the generation born for the ummah will be strong. Domestic is the first institution and essentially responsible to develop personal individuals whether in aqidah, syara' or behaviour (akhlak).

A mother is close with her children. She has effective “weapons” to tie the faithfulness of children. Mother’s given loving care can make it easy for children to accept mother’s advice. Rasulullah S.A.W said that parents are responsible to develop the children’s personalities.

⁹ Maryam Jameelah. 1975. *Islam and Modernism*. Lahore: Muhammad Yusof Khan. p 19.

¹⁰ Al-Quran. surah al-Rum.30:21.

¹¹ Al-Quran. surah al- Baqarah. 2:187.

Hadis narrated by Abi Daud:

كل مولود يولد على الفطرة فأبواه يهودانه أو ينصرانه أو يمجسانه.

Means: All children born are fitrah, hence, parent's because he becomes Yahudi or Nasrani or Majusi¹².

A strong generation is a pious generation, godly, and faithful. Hence, a family institution must become a place of birth generation as the place develops children's personality.

5) Social and economic consolidation

The strength of any ummah starts from a strong and tough family institution. If the family institution harmonious is controlled, hence, a safe society and country is guaranteed. The country's economy becomes stable and expands.

A strong economy gets completed when a husband is responsible for the wife and their children whether in maintenance or education. The child, who gets complete education, becomes a kind and strong generation in the future¹³.

6) Relationships and solidarity

The strength of ummah is based on relationships and solidarity. The family institution develops a method of how relationships and solidarity can be increased; at least, create relations between two different families. Through marriage, family relations can be generated¹⁴.

¹² *Ibid.*

¹³ Mustafa Baisa. 1992. *Keluarga Bahagia Sepanjang : Usaha Keluarga* . Nur Niaga Sdn Bhd. DBP. Kementerian Pendidikan Malaysia p 13.

¹⁴ Mustafa Baisa. 1992. *Keluarga Bahagia Sepanjang : Usaha Keluarga* . Nur Niaga Sdn Bhd. DBP. Kementerian Pendidikan Malaysia p 14.

7) Dedication and sacrifice

Trustfulness and responsibilities can be planted between the husband and wife through the family institution. Besides that, it is responsible to be hardworking, dedicated and tough. This attitude is responsible to implant patience and courage in their lives.

The husband and wife are always able to sacrifice for peace and bliss their family. For the children is education, parents are able to work diligently to confirm they become pious, godly and faithful Muslims¹⁵.

1:3 DEFINITION OF FASAKH

The power to annul from marital contract is not absolute in the husband's hand although the power of talaq is for him, woman also has the power to apply for divorce in certain conditions that are clear that her husband neglects his responsibility or habitually assaults her or makes her life miserable by cruelty. Rasulullah S.A.W also gives power of option to his wife whether she wants him or asks for a divorce as Hadis below:

عن الشعبي عن مسروق عن عائشة قالت: خيرنا رسول الله صلى الله عليه وسلم فاخترناه افكان طلاقا.

Hadis from Sya'bi from Masruq from Aisyah, she said: Rasulullah saw ask to choose for us (between together with him or divorce) hence, we choose, what is talaq?¹⁶

One of the wife's powers to annul the marital contract is fasakh.

Ibn Manzur in *Lisan al-Arab* proved that fasakh means cancel (naqada) or dissolve (faraqqa)¹⁷.

According to **Al- Abu Luwis Ma'lufi**, fasakh is a damaged job or aqad.

¹⁵ *Ibid.*

¹⁶ Dra. Firdaweri.1989. *Hukum Islam tentang fasakh perkahwinan kerana ketidakmampuan suami menunaikan kewajipannya*. Cv. Pedoman Ilmu Jaya p50-51.

¹⁷ Ibn Manzur. 1994. *Lisan Al- Arab*. Juz 3. Daral- al -Fikr. p 45.

In **istilah Syari'i**, fasakh aqad (marriage) means cancelled fasakh aqad (marriage) and breaking the tie of betrothal between husband and wife¹⁸.

Fasakh literally means cancellation, abolishment, recision, revocation, abrogation or annulment¹⁹. In relation to marriage, it means the annulment or abrogation of the marital contract by the judge after the wife has applied to him for this remedy to be granted. If the judge is satisfied that the woman is prejudiced by her marriage, he will annul the marriage. As against the right of talaq given to the husband, Islam gives the wife the remedy of fasakh to bring her contract to an end²⁰.

The remedy of fasakh is not an absolute right of the wife but as the husband has the right of talaq, an application of fasakh by him is rare. Nevertheless, under *Hukum Syara'*, he is conferred with such right. Islam recognizes the right of any woman who has reached puberty to annul her marriage through the medium of the court in order to uphold the rights and to prevent any injury or difficulty to her²¹.

Ali Hasabillah described about anything which damaged aqad (marriage) and this is not known as talaq. Fasakh is divided into two circumstances:

1. Fasakh which needs to judge's decision.
2. Fasakh which does not need a judge's decision.

Reasons which damaged fasakh are divided to two:

1. Fasakh needs to judge held, it must through justice process.
2. Fasakh does not need the judge's decision when the husband and wife know the reason which damages their marriage, while they must fasakh their marriage without going through the justice process.

¹⁸ Dra. Firdaweri. 1989. *Hukum Islam tentang fasakh perkahwinan kerana ketidakmampuan suami menunaikan kewajipannya*. Cv. Pedoman Ilmu Jaya p 50.

¹⁹ Aqil ahmad.1995. *Text Book of Mohammadan law*. Central Law. Central Law Agency. Allahabad. p 112.

²⁰ Abdul Rahman I. Doi.1989. *Women in Shariah (Islamic Law)*. Ta-Ha Publishers Ltd. United Kingdom. p 90.

²¹ Zaleha Kamaruddin. 2000. *Islamic Family Issues 2000*. International Islamic University Malaysia. p 245.

As-Sayid Saabiq described about fasakh which needs the judge's decision, when the husband has impotency, hence, the wife can apply for fasakh from a judge. Second, fasakh does not need the judge's decision when the reason for fasakh is clear, for example they have shared the same mother's milk (saudara sesusuan), and so they must fasakh their marriage. Besides that, while the husband and wife know that their marriage is not allowed in Islam, so at that time, they must fasakh their marriage without the judge's decision and the process of justice²².

1.4: THE AUTHORITY OF FASAKH

The jurist's basis for fasakh has been deduced from the Holy Quran where it stated to the effect²³:

وإذا طلقتم النساء فبلغن أجلهن فأمسكوهن بمعروف أو سرحوهن بمعروف* ولا تمسكوهن ضرارا
لتعتدوا* ومن يفعل ذلك فقد ظلم نفسه* ولا تتخذوا آيات الله هزوا* واذكروا نعمت الله عليكم
وما أنزل عليكم من الكتب والحكمة يعظكم به* واتقوا الله واعلموا أن الله بكل شيء عليم*

“When you divorce women and they fulfill the terms of their iddah either take them back on equitable terms or set them free on equitable terms. But, do not take them back to injure them or to take undue advantage. If anyone does that he wrongs his own soul²⁴.

According to Imam Malik, Shafi'i and Ahmad ibn Hanbal schools, the above verse is the legal basis for fasakh whereby, if a husband neglects or avoids his obligations towards his wife such as not providing her maintenance, the authority should order a separation by way of fasakh upon him and his spouse:

الطلق مرتان* فإمساك بمعروف أو تسريح بإحسن*

²² Dra. Firdaweri.1989. *Hukum Islam tentang fasakh perkahwinan kerana ketidakmampuan suami menunaikan kewajipannya*. Cv. Pedoman Ilmu Jaya p 53.

²³ Al-Quran. surah Al-Baqarah 2: 231

²⁴ Al-Quran.surah al-Baqarah. 2:229.

“The parties should either hold together on equitable terms (bi-ma’ruf) or separate with kindness (bil-ihsan)²⁵.

وإن امرأة خافت من بعلها نشوزاً أو إعراضاً فلا جناح عليهما أن يصلحا بينهما صلحاً* والصلح خير* وأحضرت الأنفس الشح* وإن تحسنوا وتتقوا فإن الله كان بما تعملون خبيراً*

“If a wife fears cruelty on desertion on her husband’s part there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best even though men’s souls are swayed by greed. But if you do well and practice self-restraint, Allah is well-acquainted with all that you do”²⁶.

وإن خفتن شقاق بينهما فابعثوا حكماً من أهله، وحكماً من أهلها إن يريد إصلاحاً يوفق الله بينهما* إن الله كان علماً خبيراً*

“If you fear a breach between them, appoint two arbiters one from his family and the others from hers; if they wish for peace, Allah will cause their reconciliation. For Allah has full knowledge and is acquainted with all things²⁷.”

It is reported that the Prophet (peace by upon him) said: “there must be neither harm nor return of harm”. Abu Hurairah said to the effect: “the Prophet (peace by upon him) said regarding a person who does not possess anything to enable him to give maintenance to his wife, they can both dissolve their marriage.

It is also related that Umar, the second Caliph, used to send letters to the commanders of the army about men who had left their wives at home, telling them to detain such persons and request them to send maintenance to their wives or to divorce them. He also asked them to ensure that if such men divorced their wives they should pay all the maintenance due to them.

²⁵ Dr. Musthafa As-Siba’y. 1977. Wanita di antara Hukum Islam dan Perundangan. Bulan Bintang. Jakarta. p 201.

²⁶ ¹ Al-Quran. surah Al-Nisa 4:128.

²⁷ Al-Quran. surah Al-Nisa 4:35.

1.5: CONDITIONS OF FSAKH

Although fasakh is at the disposal of the wife, two conditions must be satisfied before the court approves her application. First, there must not be any agreement or consensual plan between the husband and the wife to divorce each other through fasakh. Second, there must be the evidence or admission of two witnesses if the disability is impotency or evidence on oath²⁸. Finally, it must be shown that the wife is not nusyuz (disobedient) towards the husband and this must be based on the admission of two witnesses²⁹. It appears that in every petition for fasakh, the applicant must produce at least two 'adil' (fair-minded) witnesses along with her own evidence or oath in order to support her claim³⁰.

1.6: DIFFERENCES OF FSAKH FROM TALAQ

The four Sunni Schools allow the husband the right of talaq and the wife the remedy of fasakh depending on the circumstances necessitating separation between them.

According to Hanafi Schools, talaq is pronouncement of divorce by the husband, *ila* (abstention from sexual intercourse), *li'an* (mutual cursing), *khul'*, separation because of sexual defect (*aib jinsi*) in the husband and separation due to renunciation of Islam (*Iba*) by the husband. However, the Kadi or Court may grant the remedy of fasakh to the wife when separation due to apostasy of either spouse, separation due to spoiling of marriage (*fasad*) and separation due to lack of equality of status (*kafa*) or lack of compatibility of husband.

According to Shafi'i and Hanbali Schools, talaq is pronouncement of divorce by husband, *khul'*, declaration of talaq by the Kadi on the husband's refusal to separation because of *Ila*. However, fasakh is separation due to defect in either spouse, separation

²⁸ Mimi Kamariah Majid. 1999. *Family Law in Malaysia*. Malayan Law Journal. Kuala Lumpur p 137.

²⁹ *Rafiah v Hassan* (1987) 6 JH 112.

³⁰ *Zaleha Kamaruddin*. 2000. *Islamic Law Family Issues 2000*. International Islamic University Malaysia p 247.

due to lian, separation due to apostasy of either spouse, separation due to spoiling of marriage (fasad) and separation due to lack of equality of status (kafa) of the husband.

According to Maliki Schools, talaq is pronouncement of divorce by husband, khul', separation due to difficulties (isar) of the husband in providing maintenance to the wife , separation due to harm (darar), separation due to ila, separation due to lack of equality of status (kafa) of the husband. However, fasakh is separation due to li'an, separation due to spoiling of marriage (fasad) and separation due to renunciation of Islam by either spouse³¹.

1.7: DIFFERENCES OF FSAKH FROM KHULU', TA'LIQ AND LI'AN

Khulu' means divorce by redemption or *cerai tebus talaq* is where a wife requests for a divorce from her husband by offering him money or gifts. The wife may request for the divorce where she is unable for various reasons to live with him such as when she no longer loves her husband, she no longer wishes to continue conjugal relations with him, or she is unable to tolerate or accept further his negative behaviour.

Her husband may not have any overt fault at all. The amount of money or value of gifts offered is not fixed, but depends on the husband's approval. The gifts may include a house, a car, an orchard, and a piece of land or even the return of the dowry (mas kahwin) or mahr.

Ta'liq means suspended or attached. It envisages the occurring of something with conditions. In the context of divorce, a talaq will be in effect if one of the conditions in an agreement or surat ta'liq is not fulfilled or is breached. As conditions are prerequisites, there has to be an agreement or the surat ta'liq. This agreement is reached or sealed at the solemnization of the marriage or the akad nikah. The conditions are listed in a specified form and agreed by both parties.

³¹ Abdul Rahman I. Doi, 1992 1413 H. *Women in Shariah (Islamic Law)*. 4th Edition. A.S Noordeen.Kuala Lumpur. p 91.

Li'an means divorce by mutual imprecation, when a man accuses his wife of adultery but has no witnesses other than him, he must testify by God four times that he is truthful, and a fifth time that the curse of God shall be upon him, if he lies. To avoid chastisement, the wife would also testify by God four times that he has lied, and a fifth time that the wrath of God should be upon her, if he had been truthful. The marriage then becomes dissolved and absolutely irrevocable because the parties could not be expected to live peacefully together after having gone through such extreme actions³².

1.8: GROUNDS FOR FASAKH ACCORDING TO THE SUNNAH SCHOOLS

The four Sunnah schools allow the wife the remedy of fasakh depending on the circumstances necessitating separation between them³³.

1.8.1: FAILURE TO MAINTAIN

The non – provision of maintenance on account of which the right of demanding separation accumulates to the wife, may be due to several reasons. One is the incapability of the husband to provide maintenance due to his insolvency or poverty, the other is his refusal or negligence, in spite of his capability to provide maintenance³⁴. The Islamic jurists differ on deeming failure by the husband to pay maintenance as a valid ground for the wife to apply to the court for a fasakh.

The Hanafis Schools categorizes that such a divorce is not permissible whether the reason for the failure to pay maintenance is insolvency or poverty of the husband or mere refusal to provide the same³⁵. The wife shall arrange for maintenance either from her own property or by borrowing in the name of her husband till her husband has an

³² Mimi Kamariah Majid.1999. Family Law in Malaysia. Malayan law Journal.

³³ Zaleha Kamaruddin.2000. *Islamic Law Family Issues 2000*, International Islamic University Malaysia.p 247

³⁴ Dr. Tanzil –Ur- Rahman. *A Code of Muslim Personal Law*. p .642.

³⁵ Jamal J. Nasir. 1990, *The Islamic Law of Personal Status* .Graham & Trotman Ltd: London. p 136.

easier time³⁶. According to them, a husband who is poor or insolvent does not necessarily mean to ill-treat his wife. They quoted the Quranic verse:

ليفق ذو سعة من سعته* ومن قدر عليه رزقه فلينق مما آتاه الله* لا يكلف الله نفسا إلا ما آتاهما*
سيجعل الله بعد عسر يسرا*.

“Let him who hath abundance spend of his abundance, and he whose provision is measured, let him spend of that which Allah hath given him³⁷.”

This, according to the Hanafis Schools, covers the case of the husband who fails to maintain his wife because he is indigent.

The other basis of the argument of Hanafis is that among the companions of the Holy Prophet there were some who were affluent and some who were poor but there is no single instance during the period of the prophet, where separation was affected due to poverty and scantiness or non-provision of maintenance³⁸.

As for the husband who inflicts injustice on his wife by refusing to maintain her although he could afford it, the Hanafis ruled that his injustice could be redressed without recourse to the divorce which is the most detestable to God of all permissible things. But rather the husband could have his property sold, or could be put in jail until he resumes paying maintenance³⁹.

According to Maliki, Shafi’i and Hanbali Schools, they are unanimous on the point which allows a divorce by the judge at the request of the wife on the husband failing to maintain her.

³⁶ Dr. Tanzil –Ur- Rahman. *A Code of Muslim Personal Law*. p .642.

³⁷ Al-Quran.Surah al-Talaq: 7.

³⁸ Dr. Tanzil – U r- Rahman. *A Code of Muslim Personal Law*. p 643.

³⁹ Dr. Musthafa As- Siba’y. *Wanita di antara Hukum Islam dan Perundangan*. p 202.

They agree that the Quran decrees:

الطلق مرتان * فإمساك بمعروف أو تسريح بإحسن *

“The parties should either hold together on equitable terms or separate with kindness⁴⁰.”

A woman must be retained in honour or released in kindness. An abstention from paying maintenance does not conform to retention with honour⁴¹. Hence, the husband who has no means to retain his wife in proper comfort must put the wife away by pronouncing divorce to her. Further, according to Imam Shafi'i Schools, in order to obtain a decree of fasakh on the basis of the husband's failure to maintain, the wife must not be nusyuz and the poor or insolvent husband must be present. The judge shall grant the husband a grace period of three days and three nights for him to provide the minimum maintenance prescribed. Failure to do so shall empower the judge to dissolve the marriage⁴². The positions of these three Imams are preferable among modern law makers⁴³.

1.8.2: HUSBAND'S IMPRISONMENT⁴⁴

According to Maliki and Hanbali Schools, both jurists agree that the imprisonment of the husband is a valid ground for the wife to apply for a divorce. According to them, the imprisonment must cause actual, rather than anticipated injury to the wife, and would render her vulnerable to seduction. The wife, according to Hanbali Schools, may apply to the court for a divorce after one year of the husband staying in prison⁴⁵.

According to Hanafi and Shafi'i Schools, they are not convinced of the right on separation of the wife on the grounds of her husband's imprisonment⁴⁶.

⁴⁰ Al-Quran. surah Al-Baqarah 2:229.

⁴¹ Jamal J. Nasir. *The Islamic Law of Personal Status*. p 137.

⁴² Ahmad Ibrahim. *Undang-Undang Keluarga Islam di Malaysia*. p 199.

⁴³ Jamal J. Nasir. *The Islamic Law of Personal Status*. p 137.

⁴⁴ Imprisonment be deemed to be final when all the remedies such as appeal or revision as provided in law has been exhausted or are barred.

⁴⁵ Jamal J. Nasir. *The Islamic Law of Personal Status*. p 139.

⁴⁶ Dr. Tanzil –Ur- Rahman. *A Code of Muslim Personal Law*. p 639.

1.8.3: DESERTION OR ABSENCE OF HUSBAND

Is the wife entitled to obtain a decree from court for the dissolution of her marriage when the husband's whereabouts are not known? There are also different opinions with respect to the contract of a second marriage by the wife of the person whose whereabouts are not known.

According to Hanafi and Shafi'i Schools, the wife of a person whose whereabouts are not known cannot be considered to have been released from the marriage-tie till her husband's death is determined with certainty by the court. In the most popular opinion of Abu Hanifah, the marriage contract of the wife of a person whose whereabouts are not known is not valid as long as other men of the age of the husband are alive. Nevertheless, in some cases, according to Hanafis, the judge may permit the wife to contract marriage with another person even before the death of the contemporaries of her husband on the basis of apparent circumstances in which the husband's death may strongly be presumed, for example, the husband goes to war and later there is no trace left whether he is dead or alive⁴⁷, or he has to go out during terminal illness and becomes untraceable. In such circumstances, a judge, after the lapse of such time in which a strong presumption of his death may be accepted, may give a decree of dissolving the marriage. Accordingly, the husband shall be deemed to be legally dead and the wife after observing her term of probation of four months and ten days shall have the right of entering into another marriage⁴⁸.

Imam Ahmad sets the duration of absence at six months based on a tradition of Caliph Umar and he stipulates that the absence should be without an acceptable cause.

The view of the Hanafi's is opposed to Maliki wherein, according to Imam Malik, after it is established that the husband's whereabouts have not been known, the court shall

⁴⁷ Dr. Musthafa As- Siba'y. *Wanita di antara Hukum Islam dan Perundangan*. p 199.

⁴⁸ Dr. Tanzil –Ur- Rahman. *A Code of Muslim Personal Law*. p 618.

direct the wife to wait for a further period of four years. In the event of the husband's whereabouts remaining unknown during that period as well, the court shall pass a decree dissolving the marriage. The wife, then, after observing her term of probation shall be entitled to contract a second marriage. Further, according to Maliki jurists, the period of four years shall be calculated from the time fixed by the court.

This is proved from the ruling of Saidina Umar that gives the direction of waiting for four years after the institution of the suit. In other words, the period passed by the woman in waiting prior to the institution of the suit has not been taken into account by the Caliph.

It is interesting to note that, according to Imam Malik, if the wife has not contracted another marriage and her husband returns, his right under his marriage contract shall still exist. However, if the wife, after dissolution of the first marriage under order of the court, has contracted another marriage and the former husband returns, his rights shall lapse totally and he cannot get back his wife.

This view of Imam Malik in his book "Muwatta", which followed the decision of Caliph Umar who held that:

"If the husband returns before the wife contracts another marriage he shall have her as his wife (whatever time has passed). If the wife has already contracted her marriage with another person the right of her former husband lapses and he cannot have that woman as his wife.

It appears that the Maliki doctrine is more practical compared to the Hanafi view that the marriage contract of the wife of a person whose whereabouts are not known is not valid as long as the contemporaries of the husband are alive. It is clear that deserted women of the Hanafi sect are subjected to misery, difficulties and abstinence most probably for the rest of their lives. For a wife to wait patiently for her husband during

her entire life till receiving the news of his death may become a real cause of social problem⁴⁹.

1.8.4: INJURY OR DISCORD

According to Imam Malik Schools, is of the view that the wife is entitled to ask the court to decree a divorce, if she fears that the husband will injure her person to such an extent that she is unable to live with him as husband and wife. Examples are where the husband habitually assaults her or injures her in any way which is unbearable by her or in abusing her or forcing her to stay or do something which is wrong. Imam Ahmad agrees with Imam Malik⁵⁰. They maintain that the judge must be convinced of the validity of the wife's claim either on the strength of her evidence or on the admission of the husband. If the injury is such as to make their continued life together unbearable and the judge cannot reconcile them, then he shall order an irrevocable divorce. If the wife cannot prove her case, or the husband makes no confession, the case shall be dismissed⁵¹.

If she repeats her complaint and requests a divorce and the court cannot establish the validity of her claims, the judge shall appoint two arbitrators who are adults, well-acquainted with the spouses and capable of effecting reconciliation. Preferably, they shall be relatives of the spouses but, otherwise, they can be strangers. They shall investigate the causes of discord and attempt, as far as possible, to affect a reconciliation.

Should they fail and the two spouses or the husband is to be blamed for the injury, or if the arbiters could not establish the facts, they shall decide on an irrevocable divorce. If the wife is to be blamed for the injury, they shall be separated through khulu'⁵².

⁴⁹ Zaleha Kamaruddin.2000. Islamic Law Family Issues 2000. International Islamic University Malaysia. p 253.

⁵⁰ Ahmad Ibrahim. *Family law in Malaysia* . p 266.

⁵¹ Zaleha Kamaruddin.2000. Islamic Law Family Issues 2000. International Islamic University Malaysia. p 254.

⁵² Jamal J. Nasir. *The Islamic Law of Personal Status*. p 126-127.

According to Hanafi and Shafi'i Schools, injury is not a sound ground for divorce as it can be remedied through reprimanding the husband. According to them, the usual practice in such a case is to appoint a Hakam to resolve the differences between the parties. However, they hold further that the arbiters' decision on divorce subject to being authorized, binding on the husband. Should the two arbiters fail to reach a consensus, the judge shall order them to make further investigations, and if they fail this time, he shall appoint two others, and their award shall be binding on him⁵³.

This is all based on the Quranic verse:

وإن خفتن شقاق بينهما فابعثوا حكما من أهله وحكما من أهلها* إن يريدوا إصلاحا يوفق الله بينهما* إن الله كان عليما خبيرا*.

“And if ye fear a breach between them twain, appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment, Allah will make them of one mind....”⁵⁴

1.8.5: HUSBAND'S DISEASE OR DEFECT

According to Hanafi Schools, if the wife finds in her husband such a physical defect or disease that prevents him from having sexual intercourse with her, she shall be entitled to get the marriage with him dissolved. The husband, however, has no such right but rather he has the right of talaq⁵⁵. Abu Hanifah and Abu Yusuf confine the defects to three genital ones: impotence, mutilation and castration, all being impediments of consummation and procreation. The judge on the husband's refusal to repudiate shall act on his behalf and order a divorce. A second disciple, Muhammad, adds the defects of insanity and leprosy⁵⁶.

⁵³ Jamal J Nasir. *The Islamic Law of Personal Status*. p 126-127.

⁵⁴ Al-Quran. surah Al-Nisa :35.

⁵⁵ Dr. Musthafa As- Siba'y. *Wanita di antara Hukum Islam dan Perundangan*. p 204.

⁵⁶ Jamal J. Nasir. *The Islamic Law of Personal Status*. p 132.

According to Maliki, Shafi'i and Hanbali Schools, they hold that each of the couple, when he or she finds certain defect in the other is entitled to demand separation⁵⁷. Imam Malik gives the right of separation to each of the married couple because of four defects viz leprosy, madness, leucocythaemia and impotency⁵⁸. According to Shafi'i, Schools, there are seven types of defect or disease which can be grounds for fasakh; continuous insanity or periodic insanity, leprosy, vitilago, ratqa' (a muscular growth which is sometimes found covering the vulva and in other cases, the womb), qarna' (a hard small bone growing like a horn in the woman's vagina), jabb (amputated male organ) and 'unnah (impotence)⁵⁹.

On the other hand, the Hanbali jurists Ibn Qayyim maintains that every defect, whether on the part of the husband or the wife, shall entitle the other spouse to petition for a divorce, since the contract was entered into on the assumption of freedom from all defects, an implied condition based on custom, which ought to be fulfilled and was found to be lacking. He does not list down such defects, but gives the widest description of them as any shortcoming which causes disgust to the other spouse.

1.8.6: PHYSICAL DISEASE

Diseases like leprosy or leucocythaemia or some other similar diseases which in view of their nature most probably renders the spouses living together impossible and that there is a strong possibility of the failure of the purposes of marriage contract. What forms the basis of the right of separation on account of leprosy and leucocythaemia, according to the followers of the Shafi'i sect, is the infectiousness of those diseases that is passed from the husband to his wife.

⁵⁷ Dr. Musthafa As- Siba'y. *Wanita di antara Hukum Islam dan Perundangan*. p 205.

⁵⁸ Ahmad Ibrahim. *Family law in Malaysia* p 262.

⁵⁹ Ahmad Ibrahim. *Undang-Undang Keluarga Islam di Malaysia*. p 141.

Shaykh Muhammad al-Sharbini al-Khatib , the author of “ Mughni al-Muhtaj” had said, according to learned men and experienced physicians, leprosy and leucocythaemia are highly infectious and are impediments to the having sexual intercourse⁶⁰.

1.8.7: PHYSICAL DEFECT

A woman, who has been married in accordance with the law of Shariah, may obtain a decree of dissolution of her marriage through the court on the grounds that her husband at the time of marriage contract was impotent and he continues to be so. According to the majority of Hanafis, if the wife finds that her husband suffers from a physical defect that hinders him in having sexual intercourse with her, she is entitled to seek separation from him through the court. Physical defects include impotency, amputated male organ or having no testicle.

On application of a husband, it is incumbent upon the court prior to its passing decree for dissolution of marriage on the ground of the husband being impotent; to grant him time for a period of one year, on his request, so that he may within that time satisfy the court that he is cured. The time of one year shall be counted from the day the court grants it. Prior to it whatever the time lapses it shall not be taken into account. If, on the expiry of one year the disease is found not curable, the court will pass a decree dissolving the marriage. A doctor’s certificate is needed to prove by examining the doctor who has issued it so that it may satisfactorily be ascertained what tests he has carried out and how has he arrived at his conclusion. On the event of the husband being impotent, one year’s time is granted with a view that he may get himself treated and get the defect removed, whereas the person whose male organ is severed or is vestigial, after the defect is proved and on the request of the wife, the court shall, without

⁶⁰ Cited in Dr. Tanzil- Ur- Rahman. *A Code of Muslim Personal Law*. p 569-570.

allowing time, direct the husband to pronounce divorce. On his refusal to do so, the court itself shall be entitled to affect separation⁶¹.

A wife's right to request for fasakh due to the other spouse' inability or defect is not confined to those disabilities or defects existing at the time of marriage but also at any subsequent time. When a wife seeks a fasakh, the court has to grant the request promptly after being satisfied of its validity. One exception, however, is that this does not apply to cases of impotence, where she has to wait for one year for the fasakh⁶².

For a husband who becomes impotent after living with the wife, the marriage can no longer be repudiated by her. If a husband or wife knows the defects in the other party enters into a marriage contract, he or she has no option to repudiate the marriage. If a party to a marriage fails to repudiate the marriage within a reasonable time after coming to know of the defect in the other party, then the option is lost. The option to repudiate a marriage on any of the grounds allowed by law must be confirmed by the order of a court and the marriage continues until such confirmation⁶³.

1.8.8: MENTAL DISEASE

According to Hanafi, Abu Hanifah and Abu Yusuf hold that the wife is not entitled to demand separation from her husband on the grounds of his being insane. However, according to Muhammad, she is entitled to do so provided the madness of the husband be of such a degree that her living with him impossible⁶⁴.

According to Malik, Shafi'i and Hanbali Schools, in the event of her husband being insane, a wife is entitled to demand separation. In case of continuous insanity of the husband the court ought to pass a decree for separation without giving any time to the husband. In case of periodic insanity, time for a year may be given to the husband for

⁶¹ Zaleha Kamaruddin. 2000. *Islamic Law Family Issues 2000*. International Islamic University Malaysia p 258.

⁶² Mimi Kamariah Majid. *Family Law in Malaysia* . p 137.

⁶³ Ahmad Ibrahim. 1984. *Family Law in Malaysia and Singapore*. Malayan Law Journal. Singapore.p 233.

⁶⁴ Dr. Tanzil- Ur- Rahman. *A Code of Muslim Personal Law*. p 583.

treatment as is mentioned in some books of fiqh. The difference between continuous and periodic madness is that the insanity which is temporary and wherein recovery occurs at intervals is periodic insanity. As against this, continuous insanity is that which remains constant without any intermittent recovery.

The option to repudiate the marriage by the wife should not be allowed to lapse without her express consent. Her mere staying and living with her husband after becoming aware of the disease or defect in him should not amount to consent resulting in the lapse of her right to dissolve the marriage. In such matters, women often keep silent and the time limit of their silence is subjective because they are under psychological and social inhibitions. They should seek help from other reliable people instead of deciding it on their own. Thus, it may take quite sometime to demand separation⁶⁵.

1.9: PRESUMPTION OF DEATH OR LOSS⁶⁶

According to the Shafi'i Schools, if there is evidence that a husband has died, or a court has declared his death after a period of time has lapsed, his wife would begin her iddah and at the expiry of that iddah, she is able to marry again. Distribution of her husband's property may be postponed until his death is legally established or until the lapse of such time as may justify its presumption. The court should after thorough examination declare that there is a presumption of death and proceed to the distribution of the estate amongst those entitled at the time when the presumption was declared.

Section 53 of the Islamic Family Law (Negeri Sembilan) Enactment 1983 provides for the presumption of death. Subsection (1) provides if the husband of any woman has died, or is believed to have died, or has not been heard of for a period of four years or more, and the circumstances are such that he ought, for the purpose of enabling the woman to remarry, to be presumed in accordance with hukum syara' to be dead, the court may on the application of the woman and after such inquiry as may be proper,

⁶⁵ Zaleha Kamaruddin. 2000. *Islamic Law Family Issues 2000*. International Islamic University Malaysia p 259.

⁶⁶ Mimi Kamariah Majid. 1999. *Family law in Malaysia*. Malayan Law Journal. p 137.

issue in the prescribed form a certificate of presumption of death of the husband and the court may on the application of the woman make an order for the dissolution of marriage or fasakh as provided for under section 52. The certificate shall be registered as if it affected a divorce.

The previous subsection (1) required that absence of news about the husband had to be for a period of seven years. It also provided that once a certificate of presumption of death was issued by the court, the woman was at liberty to remarry in accordance with that Act. The old provision therefore provided the presumption of death as one way of having a marriage dissolved. The present provision makes the presumption of death one of the grounds for fasakh.

Subsection (2) provides that a certificate issued under subsection (1) shall be deemed to be a certificate of the death of the husband within the meaning of section 14(4) (b). It will be remembered that provision prohibits a widow from marrying unless she has produced a certificate of death of her late husband or otherwise proved his death.

She is not entitled to remarry in the absence of a certificate issued under subsection (1) notwithstanding that the High Court might have given leave to presume the death of the husband. The high court is mentioned here because section 108 of the Evidence Act 1950 enables the court to do so. For Muslims, obviously, the High Court's leave to presume the death of a husband, without the certificate of presumption of death is insufficient to enable the Muslim wife to remarry⁶⁷.

2.1: ADMINISTRATION OF ISLAMIC LAW (NEGERI SEMBILAN) ENACTMENT 1960

Several years before this country's independence, more efforts have been done to update the Administration of Islamic Law in States of Malaya. The purpose is to unify the laws in this state in one Enactment.

⁶⁷ Mimi Kamariah Majid. 1999. *Family Law in Malaysia*. Malayan Law Journal. p 137.

Administration of Islamic law (Negeri Sembilan) Enactment is one of the laws provisioned in Negeri Sembilan. Negeri Sembilan takes a step to provide Administration of Islamic Law Enactment in 1960. Generally, this administration of Islamic Law is the same with other states.

The provision of this enactment includes:

- 1) An establishment of Majlis Agama Islam, jurisdiction and function.
- 2) An appointment of Mufti and Fatwa.
- 3) Establishment of Syariah Court, its jurisdiction
- 4) An appointment of Kadi
- 5) Family law
- 6) Evidence and mal procedure followed by Syariah Court

In this enactment, there are also provisions about offences of Muslims people that can be convicted in Syariah Court and other matters such as mosque, mualaf, finance and general matters. But, the family law section is different in several states, for example in the Administration of Islamic Law (Selangor) Enactment 1952 has 25 sections but in Administration of Islamic Law (Negeri Sembilan) Enactment 1960 in Part VI and VII has 23 sections⁶⁸.

The application of Administration of Islamic Law has been different from the other states for a very long time.

The reforming duration for the Administration of State Islamic Law started in the 1970 until the early 1990's. The State of Negeri Sembilan amended their enactment in 1991⁶⁹.

After amendment, this enactment has 9 parts with 102 sections:

⁶⁸ Abdul Monir Yaacob. 1999. Undang-Undang Keluarga Islam di Malaysia. Pelaksanaan dan Penyeragaman. Wanita di Negara – Negara ASEAN. IKIM . p 16.

⁶⁹ Abdul Monir Yaacob. 1999. Undang-Undang Keluarga Islam di Malaysia. Pelaksanaan dan Penyeragaman. Wanita di Negara – Negara ASEAN. IKIM . p 20.

Part I: Preliminary.

Part II: Majlis Agama Islam (The Council of Islamic Religion)

Part III: Syariah Court

Part IV: Litigation and Representation

Part V: Finance

Part VI: Mosque

Part VII: Converts in Islamic Religion

Part VIII: Religious Education

Part IX: General

However, this reformation did not achieve the vision to form the same Administration of Islamic Law in every state.

2.2: THE COUNCIL OF ISLAMIC RELIGION OF NEGERI SEMBILAN (MAJLIS AGAMA ISLAM NEGERI SEMBILAN)

According to section 4 in the Administration of Islamic Law (Negeri Sembilan) Enactment 1991 describes about the establishment and organization of the Council of Islamic Religion of Negeri Sembilan. This Council will perpetuate and can assert and be asserted above it's name, can make contract and acquire, buy, take, hold and enjoy any kind of moveable property and immovable property and can change, submit, return, hock, reimburse, transfer or with other banishing methods or do anything about moveable property and immovable property or other essentials about it under the Council of Islamic Religion followed with any conditions in the Council⁷⁰.

The Council of Islamic Religion established⁷¹:

- 1) To protect the purity of Islamic religion in order to spread out and give services for all Muslims in Negeri Sembilan.

⁷⁰ Administration of Islamic Law (Negeri Sembilan) Enactment 1960.

⁷¹ N. a. 13 Disember 2003. "Majlis Agama Islam Negeri Sembilan" . <http://www.mains.Gov.my.mains.htm>.

- 2) To convey Islamic preaching impressively.
- 3) To constitute and generate a dynamic and progressive Islamic society and always find the acceptance of God.
- 4) To cherish piety and consolidate Islamic relations among Muslims in Negeri Sembilan especially and Malaysia generally to achieved ummah solidarity.
- 5) To work at great strives to increase estates of the Council of Religion through investment and lawful strives for the benefit of Muslim.

The Council of Religious building is situated near the Islamic Religion Matter Department of Negeri Sembilan and District and Land Seremban Office. Behind it, the Syariah Lower Court and Syariah High Court.

Besides that, the Council of Islamic Religion has MAINS Holdings Sdn Bhd. MAINS Holdings Sdn Bhd is also known as EDIFAJAR Development Sdn Bhd which was registered on at 22nd. January 1997 followed by the establishment of the Company Act 1965 as a company Sdn Bhd. This company has now changed its name and is known as MAINS Holdings Sdn Bhd starting on 10 November 1998

This company is divided to three main functions, such as:

- 1) Property Management and Project Department
- 2) Information Technology Department
- 3) Administration and Finance Department

The main activity of this company is related to property administration owned by MAINS managed by the Property Management and Project. This part ensures that all management asset and property of MAINS are implemented efficiently and impressively. This part also plans for implementation of property development which can bring great returns for MAINS.

The Information technology department was established with the realization that information technology is a necessity for implementation of the development agenda in an organization. Therefore, this part will give focus for planning and infrastructure

development on information technology for MAINS and provide skill exercises in related domain⁷².

The administration and finance department is responsible for the company administration which includes the company's employees and finance management.

Besides MAINS Holdings, the Council of Islamic Religion also has MAINS Zakat Sdn Bhd. It's responsible to manage zakat collection in Negeri Sembilan. It's established on 29 September 1998. MAINS Zakat Sdn Bhd uses the name Negeri Sembilan Zakat Centre to enforce administration and zakat collection in Negeri Sembilan. The purpose is to make it easy for society especially in Negeri Sembilan to recognize Negeri Sembilan Zakat Centre as the same with Zakat Centres in other states. It's also to increase the zakat collection in Negeri Sembilan, to educate and enlighten the Islamic society in Negeri Sembilan about zakat which is compulsory, to prepare and give facilities for Muslims in Negeri Sembilan to give zakat easily and to generate a corporate work culture in zakat collection operations.

The Negeri Sembilan Zakat Centre started their operation on 2nd January 1999 in Wisma Cahaya building in Seremban. It also opened six zakat counters in each district in Negeri Sembilan⁷³.

The Council of Islamic Religion also manages Pusat Dakwah Islamiah. The purpose is to enlighten Islamic society at each level to be aware about life's responsibilities in the world to achieve bliss both in the world and eternity. This can be done through dakwah programs and exercises, making the mosque as an essential institution towards society development, to generate new brothers who understand and are proud to be Muslims, to increase knowledge and skills. Islamic Da'i is applicable with current challenges and to

⁷² N. a. 13 Disember 2003. "Majlis Agama Islam Negeri Sembilan". <http://www.mains.Gov.my.mains.htm>.

⁷³ N. a. 13 Disember 2003. "Majlis Agama Islam Negeri Sembilan". <http://www.mains.Gov.my.mains.htm>.

encourage and cooperate with any institutions for carrying out dakwah programs and charities for society.

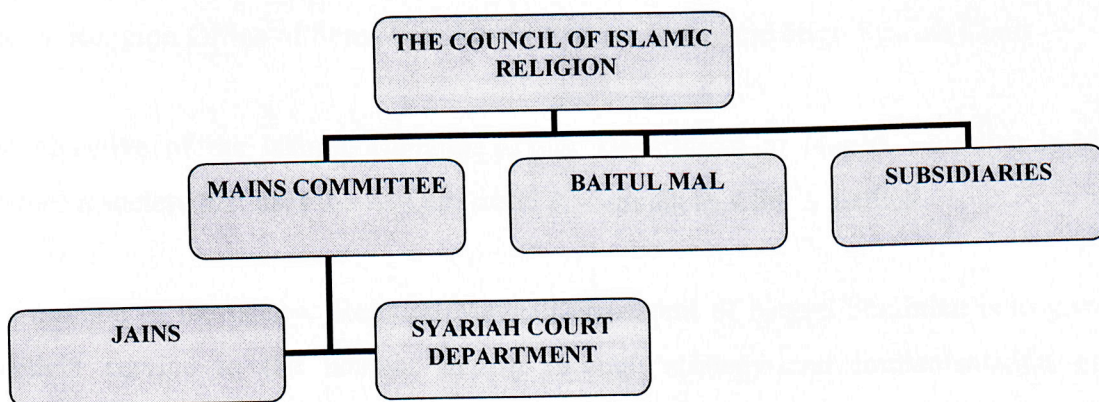
The operation is divided to three departments:

- 1) Dakwah
- 2) Ukhuwah
- 3) Kariah

Its building is situated in Paroi Seremban Negeri Sembilan.

ORGANIZATIONAL STRUCTURE

Figure 1: Organizational Chart in the Council of Islamic Religion Negeri Sembilan



Source: the file of the Council of Islamic Religion Negeri Sembilan

2.3: JABATAN HAL EHWAL AGAMA ISLAM NEGERI SEMBILAN (ISLAMIC RELIGIOUS DEPARTMENT OF NEGERI SEMBILAN)

The Islamic Religious Department exist in each state in this country and is responsible for administrations about Islamic religion and is headed by an administer as called Director. This department is a government department under the administration of Negeri Sembilan government.

This department functions as a body that carries out actions based on results given by the Islamic Religion Society besides implementation their own administration in religious matters. The idea to establish a building known as Islamic Religion Matter Department was originated by the Yang Bahagia Negeri Sembilan Finance Officer: Sir Harun b. Baba when he was appointed as the Yang DiPertuan Islamic Religion Matter Department in 1976⁷⁴.

This building has three levels in a hill near the Islamic Religion Society (Majlis Agama Islam) on its left and District and Land Seremban Office on its right. It is behind the Islamic Religion Office of Seremban, Lower Syariah Court and High Syariah Court.

The objective of the Islamic Religion Matter Department of Negeri Sembilan is to produce a society that uses the Al-Quran and Al-Sunnah as a life's method.

The mission of the Islamic Religion Matter Department of Negeri Sembilan is to give excellent service to the Islamic society through strategy and implementation of programs to increase the development of ummah .

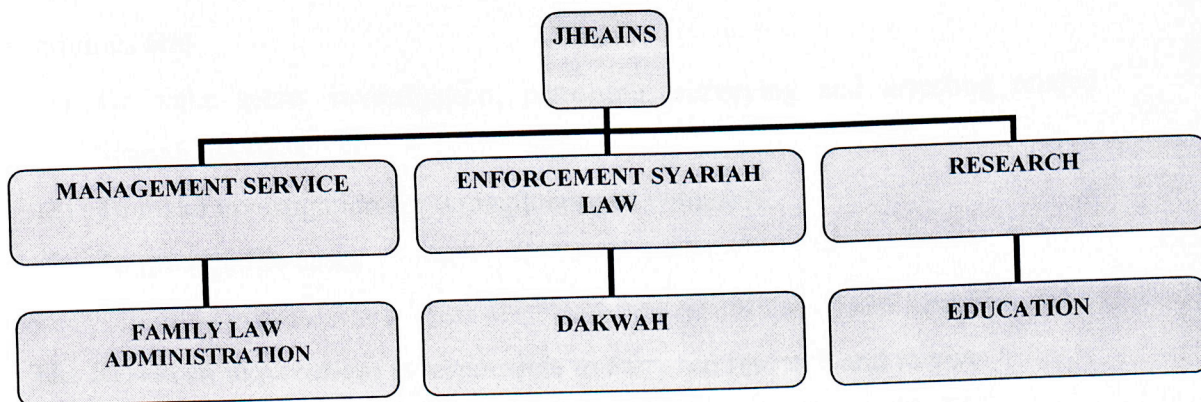
The vision of the Islamic Religion Matter Department of Negeri Sembilan is to build a developed society and practices Islamic teaching and is able to face challenges.

⁷⁴ Interviewed with Mohamed Norazman bin Mohamed Ariffin. Deputy Chief Director, the Management Service Department JHEAINS.

The organizational structure is divided to seven departments:

- 1) Management Service
- 2) Enforcement Syariah Law
- 3) Research
- 4) Family Law Administration
- 5) Dakwah
- 6) Education
- 7) Litigation

Figure 2: Organizational Chart JHEAINS (Islamic Religious Department of Negeri Sembilan)



Source: the file of Islamic Religion Department of Negeri Sembilan.

1) **The Management Service department** is responsible to provide management service for the department. It's headed by the Deputy Chief Director. This part has 4 units:

- 1) General Administration Unit
- 2) Finance Unit
- 3) Service and Exercise Unit

4) Development Unit⁷⁵

The activities include:

- 1) General Service.
- 2) Finance management
- 3) Service and Exercise management
- 4) Scheme and Implement and Development Physical.

2) The Enforcement department is responsible to enforce Syariah Law. It is headed by a Deputy Chief Director. This part has 2 units:

- 1) Enforcement Unit
- 2) Investigation Unit
- 3)

The activities are:

- 1) To make secret investigation, patrolling, surveying and arresting related Syariah offences.
- 2) To make investigation for wrongdoers and witnesses.
- 3) To provide file cases.

3) The Research department is responsible to carry out research and to give information about the importance and problems of Muslims. It is headed by a Deputy Chief Director. This part has 3 Units:

- 1) Syariah Unit
- 2) Filtration Unit
- 3) Social and Economy Unit

The activities include:

- 1) Make research about:
 - a) Deviation of beliefs.

⁷⁵ Interviewed with Mohamed Norazman bin Mohamed Ariffin. Deputy Chief Director, the Management Service Department JHEAINS.

- b) The use and food of Muslims.
- c) Printed media and electronic.
- d) Social and economy.

2) Coordination of Islamic Information System Unit (SISMI).

4) **The Family Law Administration department** is responsible in matters of marriage, divorce and ruju'. It is headed by a Deputy Chief Director. This part has 3 units:

- 1) negotiation unit
- 2) family development unit
- 3) social development unit

The activities include:

- 1) To manage matters about marriage, divorce and reconciliation.
- 2) To give advice and negotiation.
- 3) To provide courses and family seminars.

5) **The Jabatan Dakwah department** operates in Pusat Dakwah Islamiah (Jabatan Agama Islam Negeri Sembilan). It is headed by a Deputy Chief Director.

This part includes:

- 1) Ukhuwah unit
- 2) Islamic Comprehensive unit
- 3) Mosque and surau management unit

The activities include:

- 1) Secretariat celebration Islamic great day.
- 2) Secretariat Al- Quran recital ceremony at state level.
- 3) Provide courses and increase comprehension in Islamic programmes.
- 4) Manage welfare for new brothers of Islam.
- 5) Manage mosque and surau matters.
- 6) Manage media publication and printed matters

6) **The Education department** is responsible in the Islamic education. It is headed by a Deputy Chief Director. This part has 5 units:

- 1) education administration unit
- 2) academic unit
- 3) pupil matter unit⁷⁶
- 4) religious school unit
- 5) Al-Quran and Fardhu Ain Class unit

The activities include:

- 1) To manage religious schools organized by Islamic Religion Matter Department of Negeri Sembilan.
- 2) To provide and implement Curriculum and Co-curriculum of Islamic Education.
- 3) To register and survey centres and Islamic education classes.
- 4) To manage teachers and students.
- 5) To organize courses for the needs of teachers and students.

6) **The Litigation department** is responsible to make litigation for Muslims who make offences provisioned in Syariah Law. It is headed by a Deputy Chief Director.

This part has 2 units:

- 1) Law unit
- 2) Litigation unit

The activities include:

- 1) To file cases to Syariah Court.
- 2) To make litigation.
- 3) To examine present law provisions⁷⁷

⁷⁶ Interviewed with Mohamed Norazman bin Mohamed Ariffin. Deputy Chief Director, the Management Service Department JHEAINS.

⁷⁷ Interviewed with Mohamed Norazman bin Mohamed Ariffin. Deputy Chief Director, The Management Service Department JHEAINS

2.4: THE SYARIAH COURT OF NEGERI SEMBILAN⁷⁸

According to history, the first law in Negeri Sembilan was when “Mahkamah Kadi opened its Perintah Majlis” 1983 known as the “Constitution Powers Criminal and Civil Courts”.

The power of appointment of Kadi was given to DYMM YDP Besar Negeri Sembilan and Undang-Undang Empat in Council. The jurisdiction given to him is in Islamic Religion which includes marriage, divorce and other syariah offences.

In 1901, Negeri Sembilan has a Court Enactment by taking examples from enactment in Perak, Selangor and Pahang.

An appeal case of Kadi Court is not done by DYMM YDP Besar Negeri Sembilan but by the Right Majistret. In 1903, a suggestion in Conference of Rulers, appeal cases in the Kadi Court cannot be held by an English Majistret who does not understand Islamic Law but must be heard by a Chief Kadi.

An amendment was only done in 1918 with has court 1918 Enactment which was enforced in the Federate of States. The Appeal in Kadi Court and vice kadi must be held by Rulers in Conference in each state.

With an Administration of Islamic Law Enactment (Negeri Sembilan) Enactment 1960, a new arrangement was done for the Syariah Court. The power was given to the DYMM YDP Besar Negeri Sembilan the establishment of Chief Kadi Court and Kadi Court. Syariah Court Negeri Sembilan established based on Section 41(1) and (2) in Administration of Islamic Law Enactment (Negeri Sembilan) 1960. Since established until 1991, the Court was administered together by Islamic Religion Matter Department of Negeri Sembilan. Since 1991, the Court was separated from the management under Islamic Religion Matter Department of Negeri Sembilan and has its own administration

⁷⁸ N.a. 13 Disember 2003. “Jabatan Kehakiman Syariah Negeri Sembilan”. [http:// www.geocities.com /jksnsdk/](http://www.geocities.com/jksnsdk/)

known as the Syariah Judgment Department of Negeri Sembilan and has its main office in Seremban.

The Syariah Judgement Department of Negeri Sembilan is responsible to manage Mal and Criminal cases in all Court level whether in lower or high court.

The Syariah Court in Negeri Sembilan is located in seven districts such as Seremban, Kuala Pilah, Tampin, Jelevu, Jempol, Port Dickson and Rembau. The building of Syariah Court is near the Islamic Religion Office of Seremban (PAIDS)⁷⁹.

The mission of the Syariah Judgment Department of Negeri Sembilan is to give dedicated service and trust to generate excellent Syariah Judgement Department of Negeri Sembilan in implementing justice for the Muslim society in Negeri Sembilan.

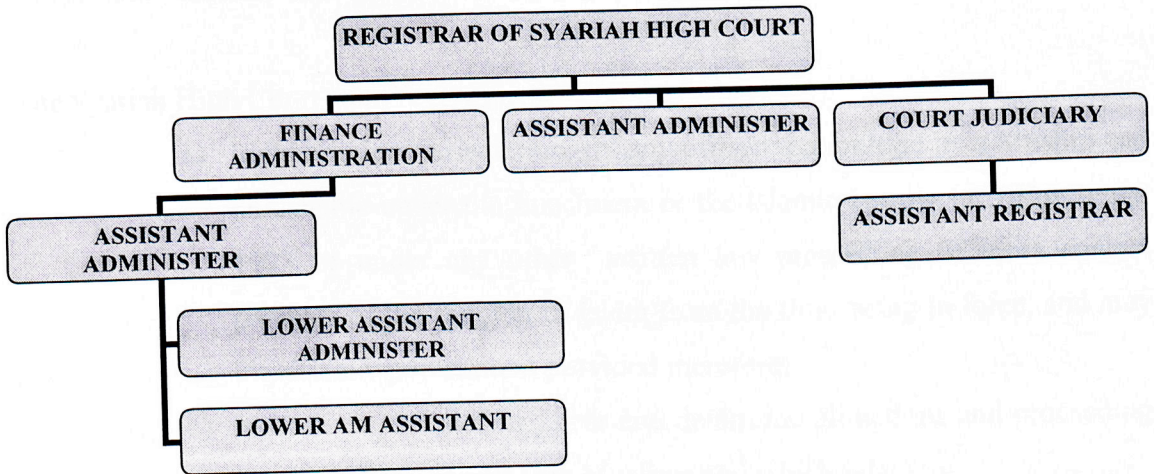
The vision of the Syariah Judgment Department of Negeri Sembilan is to generate an excellent department in implementing justice under the Administration of Islamic Law (Negeri Sembilan) Enactment 1991.

The function of the Syariah Judgement Department of Negeri Sembilan is implementing justice grounded jurisdiction provided laws and constitution similar to Islamic principle needs contained in Al-Quran, Al-Sunnah, ijmak and qias.

⁷⁹ N.a. 13 Disember 2003. "Jabatan Kehakiman Syariah Negeri Sembilan". [http:// www.geocities.com /jksnsdk/](http://www.geocities.com/jksnsdk/)

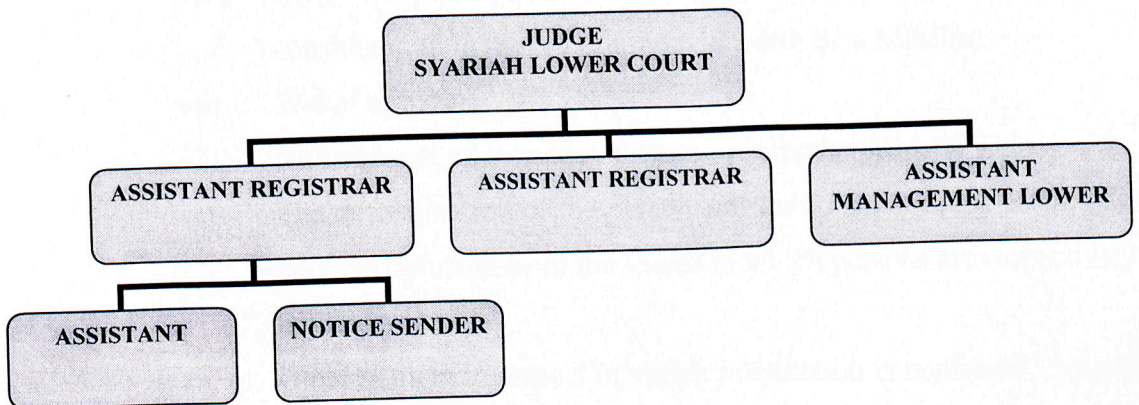
ORGANIZATIONAL STRUCTURE:

Figure 3: Organizational Structure in Syariah High Court Negeri Sembilan



Source: Syariah Court Department of Negeri Sembilan

Figure 3: Organizational Structure in Syariah Lower Court Negeri Sembilan



Source: Syariah Court Department of Negeri Sembilan

2.5: JURISDICTION SYARIAH COURT OF NEGERI SEMBILAN

According to sections 41 and 42 in the Administrative of Islamic Law (Negeri Sembilan) Enactment 1991, the Syariah High Court shall have jurisdiction in whole Negeri Sembilan and must be headed by Judge Syariah High Court.

The Syariah High Court shall⁸⁰:

- a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under the Enactment or the Islamic Family Law Enactment 1983 or under any other written law prescribing offences against precepts of the religion of Islam from the time being in force, and may impose any punishment provided therefore;
- b) in its civil jurisdiction, hear and determine all actions and proceeding in which all the parties are Muslims and which relate to:
 - i) Betrothal, marriage, divorce, marriage cancellation (fasakh) or parting (faraq);
 - ii) Any disposition of, or claim to, property arising out of any of the matters set out in subparagraph (i);
 - iii) The maintenance of dependants, legitimacy, or guardianship or custody (hadhanah) of infants;
 - iv) Dependant for matrimonial property;
 - v) Wills or death-bed gifts (marad al- maut) of a deceased Muslim;
 - vi) Gifts inter vivos, or settlements made without adequate consideration in money or money's worth by a Muslim;
 - vii) Wakaf or nazar
 - viii) Division and inheritance of estate or intestate property;
 - ix) The determination of the person entitled to share in the estate of a deceased Muslim or of the shares to which persons are respectively entitled ; or
 - x) Other matters in respect of which jurisdiction is conferred by any written law.

⁸⁰ Administration of Islamic Law (Negeri Sembilan) Enactment 1960.

The Lower Court must have jurisdiction to hear and hold any civil or criminal cases or any thing evocative and must be headed by a Judge in Syariah Lower Court.

The Syariah Lower Court must⁸¹:

- a) in its criminal jurisdiction, try any offence committed by Muslim under the Enactment or any other written law prescribing offences against precepts of the religion of Islam for which the maximum punishment provided by the Enactment or such written law does not exceed three thousand ringgit or imprisonment for a term of 2 years or to both and may impose any punishment provided therefore;
- b) In civil jurisdiction, hear and determine all such actions and proceedings as the Syariah High Court is authorized to hear and determine in which the amount or value of the subject matter in dispute does not exceed fifty thousand ringgit or is not capable of estimation in terms of money.

In section 43 (1) in Administration of Islamic Law (Negeri Sembilan) Enactment 1983, an appeal shall lie to the Syariah High Court from any decision of a Syariah Lower Court:

- a) in its criminal jurisdiction, by the prosecution or by a person convicted, and such appeal may be against an acquittal, conviction or sentence or any of them;
- b) in its civil jurisdiction:
 - i) by any person aggrieved by the decision, if the amount claimed is not less than fifty thousand ringgit;
 - ii) in all cases involving any decision as to personal status, by any person aggrieved by the decision;

⁸¹ Administration of Islamic Law (Negeri Sembilan) Enactment 1960.

- iii) in all cases relating to maintenance of dependants , by any person aggrieved by the decision, but no appeal shall lie against a decision made by consent; and
- c) In any other case, if the Syariah High Court gives leave to appeal.

On any appeal, the Syariah High Court may:

- i) in a criminal matter, dismiss the appeal, convict and sentence the appellant, order the trial court to call for the defence or make further inquiry, enhance or alter the nature of the sentence , order a retrial, or alter or reverse any order of the trial court;
- ii) in a civil matter, confirm, reverse or vary the decision of the trial court ,exercise any such powers as the trial court could have exercised , make such order a the trial court ought to have made, or order a retrial⁸².

⁸² Administration of Islamic Law (Negeri Sembilan) Enactment 1991 p 22-23.

3.1: PROVISION OF FASAKH IN MALAYSIA⁸³

The provision of fasakh is not a new matter in Malaysia. In Fasal 27 Hukum Kanun Melaka are reasons for marriage annulment through fasakh has provisioned:

“Fasal 27 stated that hukum khiyar is for women and man. The husband has five defects: aib crazy or judham, baras or kedal, aib ratak, aib karan, aib kebiri and impotence (unnah).

If the wife finds that her husband suffers from a physical defect that hinders him from having sexual intercourse with her, she is entitled to seek separation from him through the court.

On the event of the husband being impotent, one year’s time is granted with a view that he may get himself treated and get the defect removed, whereas the person whose male organ is severed or is vestigial, after the defect is proven and on the request of the wife, the court shall, without allowing time, direct the husband to pronounce divorce. On his refusal to do so, the court itself shall be entitled to effect separation.

In the event of her husband being insane, a wife is entitled to demand separation. In case of continuous insanity of the husband, the court ought to pass a decree for separation without giving any time to the husband. In case of periodic insanity, time of a year may be given to the husband for treatment as is mentioned in some books of fiqh. The difference between continuous and periodic madness is that the insanity which is temporary and wherein recovery occurs at intervals is periodic insanity. As against this, continuous insanity is that which remains constant without any intermittent recovery.”

⁸³ Raihanah Hj Abdullah. 1997. *Alasan Membubarkan Perkahwinan Melalui Fasakh*, Journal Syariah, vol. 5 no 1-2 January- July 1997.

This is clear that the reasons for marriage annulment through fasakh are stated in Hukum Kanun Melaka. It is suitable with principles in the Shafi'i Schools⁸⁴.

For Ismail Hamid, Hukum Kanun Melaka is one of the rules that imagine pattern and expansion by the old Malay society⁸⁵.

For Alwi Syekh al- Hadi, he speaks about fasakh when he discussed about widow marriages in the Malay custom¹³. For Wilkinson, Melaka Law is an old Malay digest and not a law code which has effects for those breaks it⁸⁶.

In Mohammedan Marriage Ordinance 1880, fasakh is not a provision directly but it is still mentioned in S.10, Ordinan 1880 ".....if the entry by a divorce, other than the kind known of Khul'.....hence, fasakh is also meant here. However, in amendment 1908, section 19 (1), the fasakh word is mentioned clearly but it still does not have reasons for that annulment.

"A kadi shall have power to receive from a married woman who has either been resident for at least four months in the district within which he is appointed of for whose nationality or sect he is specially appointed, an application for the divorce known in Muhammadan Law as fasakh".

Although no reason is provisioned for application of fasakh, but E.N Taylor said, all Muslims in Malaysia follow the Shafi'i Schools, hence, in fasakh problems, the principle of Shafi'e School is used⁸⁷.

The reasons for the annulment of fasakh is expanded and arranged. When Malaysia made reformation in Family Law as other Islamic countries, all Family Law legislated

⁸⁴ G.W.J.Drewes. 1980. *On a recent edition of the Undang-Undang Melaka*. JMBRAS. Vol: L111. Part 1.p.40.

⁸⁵ Ismail Hamid. 1991. *Masyarakat dan Budaya Melayu*. DBP:KL.

¹³ Alwi Sheikh al-Hady. 1962. *Malay Customs and Traditions*. Eastern Universities Press, Singapore. p 49.

⁸⁶ R.J. Wilkinson. 1922. *Law, Introduction Sketch*. In Paper on Malay Subject. p 3.

⁸⁷ E.N. Taylor. *Mohammedan Divorce by Khulu*. In JMBRAS. vol xxi, pt 2 p 6.

from the year 1983, recognizes wives applying for fasakh in court with one or more reasons which list and provisioned in Islamic Family Law in each state⁸⁸.

3.2: ISLAMIC FAMILY LAW ENACTMENT (NEGERI SEMBILAN) 1983

The importance of jurisdiction for Syariah Court is an Islamic Family Law. Therefore, law needs to be consistent in its application in each state. More effort is done for consistency and detail in the Islamic Family Law which is administered in states which are now provisioned in Administration of Islamic Law Enactment States.

The first draft of Islamic Family Law Enactment legislated does have several important innovations. The purpose is to make provision about marriage, divorce, maintenance, hadhanah and others related with life Islamic Family in this country more impressive.

Islamic Family Law is rearranged and divided into ten parts. Amongst the contents are:

- I) Preliminary
- II) Marriage
- III) Registration Marriage
- IV) Punishment
- V) Dissolve marriage
- VI) Wife ,Child & others maintenance
- VII) Hadhanah or child care
- VIII) Variety
- IX) Penalty
- X) General

Syariah Court, Registration Marriage, Divorce and Rujuk Office and other unit related in Islamic Religion Department are responsible to manage, administer and implement provision and power was given in act or Enactment.

⁸⁸ Raihanah Hj Abdullah. 1997. *Alasan Membubarkan Perkahwinan melalui fasakh* vol. 5 no 1-2 January- July 1997.

Islamic Family Law Act started mightily in Negeri Sembilan in 1983. In general, Islamic Family Law Act application is divided to two categories:

- a) Following the example Islamic Family Law Act (Federal Territories) 1984 Act 303. The States which follow this Act includes Selangor, Negeri Sembilan, Pulau Pinang, Pahang, Perlis, Terengganu, Sarawak and Sabah.
- b) It is still the same with Islamic Family Law Act (Federal Territories) 1984 but has clear differences which includes section arrangement form legislate and law. The states are Kelantan, Johor, Melaka and Kedah⁸⁹.

3.3: PROVISION OF FASAKH IN ISLAMIC FAMILY LAW ENACTMENT (NEGERI SEMBILAN) 1983

Section 52 of Islamic Family Law (Negeri Sembilan) Enactment 1983 speaks about the grounds for dissolution of marriage or fasakh⁹⁰.

(1) a woman married in accordance with Hukum Syara', shall be entitled to obtain an order of fasakh on any one or more of the following grounds namely:

- a) that the whereabouts of the husband have not been known for a period of more than one year;

It may be noticed that under both the enactments the expression "Muslim wife" is not used. Instead, the statutes use the expression "women married" in accordance with Hukum Syara' respectively. Hukum Syara' according to the Family Law Act means the laws of Islam in any recognized sects.

⁸⁹ Abdul Monir yaacob. 1999. Undang-Undang Keluarga Islam di Malaysia . Pelaksanaan dan Penyeragaman . Wanita di Negara-negara ASEAN.IKIM . p 20.

⁹⁰ Section 52 Islamic Family Law (Negeri Sembilan) Enactment 1983.

It may be pointed out that the Malaysian statute uses the expression “dissolution of marriage” as well as “fasakh”. Fasakh according to Islamic Law means annulment or abrogation. It refers to the power of Kadi to annul a marriage on the application of a wife⁹¹.

b) that the husband has neglected or failed to provide for her maintenance for a period of three months;

The period of three months relating to the ground of failure to provide maintenance to the wife is very short in the Malaysian enactment. Professor Ahmad Ibrahim quoting Shafii jurists like Ibn Ujajid , Ibn Kubuzin, Ibn Al- Sabbah and Al-Ruyani points out that where a wife could not obtain maintenance for a period of 3 days from her husband she is entitled to dissolution of marriage, whether her husband be present or absent. The words “has neglected” and “failed to provide maintenance” have been interpreted by the Courts in varying ways. It was due to the fact that under Islamic Law a wife was entitled to maintenance even if she refused to live with the husband for a just cause⁹².

c) that the husband has been sentenced to imprisonment for a period of three years or more;

It may be noticed that apart in the period relating to sentence of imprisonment which is three years in Malaysia. Under the Family Law Act in Malaysia dissolution cannot be granted until the sentence has become final and the husband has already served one year of the sentence.

⁹¹ n.a Syariah law Journal. April 1986. International Islamic University .p 73.

⁹² n.a Syariah law Journal. April 1986. International Islamic University .p75.

d)) that the husband has failed to perform, without reasonable cause, his marital obligations (nafkah batin) for a period of one year;

The period for which there has been a failure to perform marital obligations is shorter by two years in Malaysia. Since marital obligations are not defined under both the enactments the questions what marital obligations are has to be decided according to Islamic Law.

e) that the husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent;

The husband under both the legislations must not only be impotent at the time of the marriage but must continue to be so till the filling of the suit by the wife for dissolution. Before granting a decree on this ground the court shall on the application by the husband make an order requiring the husband to satisfy the court within a period of six months in the Malaysian Statute. If the husband satisfied the court within the stipulated time under the statute no order dissolving the marriage can be made. Under the Family Law Act, the fact of the husband's impotency should not have been known to the wife at the time of the marriage. Therefore, the wife may be aware of the impotency of the husband and yet may proceed to sue him for divorce on that ground⁹³.

f) that the husband has been insane for a period of two years or is suffering from leprosy or vitilago or is suffering from a venereal disease in a communicable form;

The period for which the husband should have been insane for affording a ground of relief to the wife in Malaysia is two years. Under the Malaysian Statute, it may be mentioned, that the period relating to missing husband, failure to provide maintenance, sentenced to imprisonment are shorter than that enacted in its counterpart. As regards the ground of venereal disease, in Malaysia the disease must be in a communicable

⁹³ n.a Syariah law Journal. April 1986. International Islamic University p 79.

form. If the husband suffers merely with a venereal disease it does not entitle the wife to obtain divorce.

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g) that she, having been given in marriage by her wali mujbir before she attained the age of baligh, repudiated the marriage before attaining the age of eighteen years, the marriage not having been consummated;

we may note that apart from the difference in age and the period during which the wife can exercise her option to repudiate the marriage (i.e.: between sixteen and eighteen difference) under the Federal Territory Act the girl must have been given her in marriage, she has the option to dissolve the marriage. In Malaysia, where Shafi'i Law is followed a girl can be married only by her father or grandfather without her consent. The marriage is valid and binding and she has no option of puberty to repudiate the marriage as recognized under the Hanafi Law. Now, the Federal Territory Act confers upon the Muslim wife a right to dissolve her marriage if she had been given in marriage before she attains the age of sixteen years by her father or grandfather subject of course that she files a suit before she attained the age of eighteen years and that the marriage has not been consummated⁹⁴.

h) that the husband treats her cruelly, that is to say, inter alia-

- (i) habitually assaults her or makes her life miserable by cruelty or conduct; or
- (ii) associates with women of evil repute or leads what, according to Hukum Syara', is an infamous life; or
- (iii) attempts to force her to lead an immoral life; or
- (iv) Disposes of her property or prevents her from exercising her legal rights over it; or
- (v) Obstructs her in the observances of her religious obligations or practice; or

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⁹⁴ n.a Syariah law Journal. April 1986. International Islamic University p 81.

(vi) If he has more wives than one, does not treat her equitably in accordance with the requirements of Hukum Syara’.

The Family Law Act provides in addition to the above mentioned grounds other grounds for divorce in cases where even after the lapse of four months the marriage has not been consummate it. The other ground relate to absence of a valid consent to the marriage whether as a result of duress, mistake, unsoundness of mind or consent given during the period of mental disorder⁹⁵.

i) that even after the lapse of four months , the marriage has still not been consummated owing to the willful refusal of the husband to consummate it;

j) that she did not consent to the marriage or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstance recognized by Hukum Syara’;

k) that at the time of the marriage she, though capable of giving a valid consent, was, whether continuously or intermittently, a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 and her mental disorder was of such a kind or to such extent as to render her unfit for marriage;

l) any other ground that is recognized as valid for dissolution of marriages or fasakh under Hukum Syara’.

2) No order shall be made on the ground in paragraph (c) of subsection (1) until the sentence has become final and the husband has already served one year of the sentence.

3) before making an order on the ground in paragraph (e) of subsection (1) the Court shall, on application by the husband, make an order requiring the husband to satisfy the

⁹⁵ Syariah Law Journal. April 1986, International Islamic University.

Court within a period of six months from the date of the order that he has ceased to be impotent, and if the husband so satisfies the Court within that period, no order shall be made on that ground.

4) Nor order shall be made on any of the grounds in subsection (1) if the husband satisfies the Court that the wife, with knowledge that it was open to her to have the marriage repudiated, so conducted herself in relation to the husband as to lead the husband reasonably to believe that she would seek to do so, and that it would be unjust to the husband to make the order.

4.1: PROCEDURE FOR FSAKH

In most of the states, especially in Peninsular Malaysia, the statutory provisions pertaining to procedure of fasakh are quite similar. Negeri Sembilan provides that upon the application of the wife for a fasakh divorce, the qadhi will send a notice to the husband informing him of the wife's intention. He will then proceed to record the sworn statement of the wife and of at least two witnesses. If the qadhi is satisfied that the provisions of Muslim law have been complied with, he will make an order or decree as is lawful for fasakh divorce and he will register and issue the certificate for divorce⁹⁶.

While the wives want apply a divorce to the court, she must bring⁹⁷:

- | | |
|---|---------------------|
| 1. Summon | 1 original & 2 copy |
| 2. Statement of Claim | 1 original & 2 copy |
| 3. Form 8 | 1 original & 2 copy |
| 4. Marriage Certificate | 2 original & 3 copy |
| 5. Plaintiff's identification card copy | 3 copy |
| 6. Children's certificate of birth copy | 3 copy |
| 7. Counseling report | 1 original |
| 8. Pay of registration | RM 59.00 |

⁹⁶ Dr. Zaleha Kamaruddin . 1998.*Introduction to Divorce Laws in Malaysia*..International Islamic University of Malaysia.

⁹⁷ n.a . 2002. *Hak-hak isteri selepas perceraian*. Unit Guaman Syarie dan Ibu Tunggal, Bhg Perundangan Keluarga, JAIS, p 46.

4.2: SOLUTION PROCESS OF FASAKH IN SYARIAH HIGH COURT NEGERI SEMBILAN

Divorce in Negeri Sembilan shows that more than 90% of divorce by fasakh. This situation can be seen through Syariah Court Negeri Sembilan statistic shows that divorce by fasakh is a method usually used in dissolving marriage.

The table shows the divorce rate between ta'liq and fasakh. The statistics is obtained from Syariah Court in Negeri Sembilan.

**TABLE 1: DIVORCE RATE BETWEEN TA'LIQ AND FASAKH
FROM YEAR 1991-2003**

YEAR	FASAKH	TA'LIQ
1991	24	12
1992	23	-
1993	67	-
1994	99	64
1995	92	81
1996	153	60
1997	136	57
1998	211	78
1999	198	50
2000	254	70
2001	306	43
2002	298	61
2003	106	56

Source: interviews with Ustaz Kamal Basyah bin Dato' Hj Ahmad Tajuddin

Even though not all the data is acquired, but one tendency relating with divorce rate follows the types of divorce for Negeri Sembilan shows that fasakh is one of the methods of application greatly and is registered in Syariah Court. This is followed by ta'liq and khulu'. However, if we pay attention to Negeri Sembilan, fasakh divorce increased after the enforcement the Administration Islamic Family Law Enactment (Negeri Sembilan) 1983.

Divorce by fasakh has increased because the wife has applied to her husband for this remedy to be granted because she is prejudiced by her marriage.

Divorce by fasakh increased suddenly because it has good reason for applying for divorce suitable with the provision in Administration Islamic Family Law Enactment (Negeri Sembilan) 1983⁹⁸.

The main reason why the wife in Negeri Sembilan applies for divorce because the husband has failed to perform, without reasonable cause, his marital obligations (nafkah batin) for a period of one year, not provide maintenance, the husband treats her cruelly, the husband has drug addiction and the husband has been sentenced to imprisonment for a period of three years or more.

TABLE 2: REASONS FOR FASAKH IN NEGERI SEMBILAN

TYPES	TOTAL	PERCENTAGE
Does not give marital obligations	8	26.6
Does not provide maintenance	5	16.6
Habitually assaults the wives	4	13.3
The husband is a drug addict	6	20
The husband is sentenced imprisonment	7	23.3
TOTAL	30	100

(Source: File cases in the Syariah Lower Court Negeri Sembilan)

Based on 30 file cases in the Syariah Court of Negeri Sembilan, the researcher obtains that 8 persons or 26.6 % the women don't accept marital obligations from her husband. It's followed by another 5 persons or 16.6% the women did not accept maintenance from her husband. Next, the researcher finds that 4 persons or 13.3% of the husbands

⁹⁸ interviews with Ustaz Kamal Basyah bin Dato' Hj Ahmad Tajuddin , Registrar of Syariah High Court Negeri Sembilan.

habitually assaults his wife. It is followed by 6 persons or 20%, the wife has a husband who has drug addiction. Lastly, it is followed by 7 persons or 23.3% of the women where the husband is sentenced to imprisonment. Therefore, the women are “main customers” in Syariah Court especially in Negeri Sembilan. This is not surprising because divorce cases are high in Syariah Court. The Syariah Court Negeri Sembilan shows that the women are the highest with rate between 80 percent to apply to Syariah Court. The women apply for divorce under fasakh and ta’liq from talaq. This situation shows that there are women who are maltreated until causing them to apply for divorce under fasakh and ta’liq. The Administration Islamic Family Law Enactment (Negeri Sembilan) 1983 has provisioned under section 52 that the married women shall be entitled to obtain an order of fasakh with reasons provisioned. The reasons show that maltreatment occurs to the wives until the law gives entitlement to the wives to dissolve their marital contract. In other words, if no reasons are especially on maltreatment, hence, the wives are not entitled to get fasakh.

The researchers also states that the age of wives being divorced is below 40 years. It shows that divorce in Islamic society occurs among adults person. In Negeri Sembilan, the couple who is divorced is the women aged between 30-39 years⁹⁹.

⁹⁹ interviews with Ustaz Kamal Basyah bin Dato’ Hj Ahmad Tajuddin , Registrar of Syariah High Court Negeri Sembilan

TABLE 3: AGE OF WOMEN APPLYING FOR DIVORCE BY FSAKH

AGE	TOTAL	PERCENTAGE
20 - 30	7	23.3
30 - 40	10	33.3
40 - 50	5	16.6
50 – 60	2	3.3
60 and above	2	3.3
Not inform	-	20.2
TOTAL	30	100

(Source: File cases in the Syariah Lower Court Negeri Sembilan)

The table shows that 10 persons or 33.3% from the wives divorced are aged 30-40 years. Many women are divorced in this age because they are unsatisfied with their husbands according to the reasons above and start to apply to the court. However, it can't be denied that divorce also occurs among the aged 50 years and above. From this research, the women divorced at ages 20-30 years are 7 people with 23.3%. Next, the women divorced in the age of 40-50 years are 5 people with 16.6%. Then, the women divorced at ages 50-60 years are 2 with 3.3% and the women divorced at ages 60 years and above are 2 people with also 3.3%. In this research, the researcher also finds that the women who not don't inform their age is 20.2%.

About the economy of women divorced, many of them are housewives. Some of them also has job but not exceed RM2, 000 per month¹⁰⁰.

¹⁰⁰ interviews with Ustaz Kamal Basyah bin Dato' Hj Ahmad Tajuddin , Registrar of Syariah High Court Negeri Sembilan

TABLE 4: JOB OF WOMEN

JOB	INCOME	TOTAL	PERCENTAGE
Housewife	-	10	33.3
Self work	RM300-RM700	10	33.3
Teacher	RM500 – RM900	3	10
Not inform	-	7	23.3
TOTAL	-	30	100

(Source: File cases in the Syariah Court Negeri Sembilan)

The study shows that 10 persons or 33.3% from 30 persons are housewives which they don't have income. In other words, their income depends on maintenance given by their husbands. If the women have jobs but their income is not enough for their lives. This situation shows that the women who have low income and housewives also apply for divorce if they feel that their marital contract is not safe. This means, their social-economy backgrounds does not hinder them to divorce. It's also followed with the wives who independently like baby sitters with 10 persons and 33.3%. Whereas, the women who work as teachers is 3 persons with 10%, the researcher also found 7persons who don't inform of their jobs with 23.3%¹⁰¹.

¹⁰¹ interviews with Ustaz Kamal Basyah bin Dato' Hj Ahmad Tajuddin , Registrar of Syariah High Court Negeri Sembilan

4.2: DECIDED CASES OF FASAKH IN SYARIAH COURT NEGERI SEMBILAN

1) Rosilah bte Abu Kassim vs Abdul Rahman bin Ibrahim¹⁰²

(Bil: 9 MKDS 121/ 89 dated 1st February 1991)

The plaintiff applied for fasakh divorce and gives the argument her husband didn't give maintenance and kept spirits. The respondent denied his wife's argument and said that his wife was insane. Reports from the Consultant Psychiatrist are acquired by court. One conciliatory committee was appointed by the court and this committee reported that they failed to achieve peace because the wife wanted a divorce and suggested talaq marriage or tebus talaq. However, the court refused the wife's application and committee suggestion because the wife failed to prove her argument and the court has opinion that the husband still loved his wife. The wife made an appeal, and Syariah Court held to have effort to conciliate the husband and wife but still failed. The good way is accepted by the suggestion conciliatory committee and advised them to make application in court under section 47 Administration Islamic Family Law Enactment (Negeri Sembilan) 1983 states that the husband or wife who wanted to divorce must submit one application for divorce to the court.

2) Mohd Alwi bin Sari vs Faizah bt Mohd Ghazali¹⁰³

(Bil: 02-20-97 dated 12 February 1998)

This case is mal case applied by Madam Faizah after called plaintiff above Mohd Alwi bin Sari after this called as respondent under section 52 Administration Islamic Family Law Enactment (Negeri Sembilan) 1983 (Fasakh application).

The plaintiff and the respondent were married on 18 April 1992 in Johor, Negeri Sembilan and has a daughter named Fatin Norsyafiqah aged five years. The plaintiff is a teacher in a school in Tampin whereas the respondent works at in Unicion Resources

¹⁰² Jurnal Hukum (1414 H) Ogos 1993

¹⁰³ Jurnal Hukum (1420 H) Jun 1999 Jld Xiii Bhg 1

Sdn. Bhd , when married, they rented a house in Tampin addressed No.915, Taman Seri Berlian, 73000 Tampin , Negeri Sembilan until the big event between them on 9 May 1997 in 12.30 midnight which Tuan Haji Ibrahim bin Ujang divorced them by fasakh with reasons to confirm about “lafaz bujang” by the respondent and he had given 2 weeks to separate them.

In this case fasakh, the plaintiff made the application with reasons;

- 1) The respondent married an other women without the plaintiff’s knowledge, and made admission that he has unmarried man while he wanted to marry again.
- 2) The plaintiff felt stress
- 3) The respondent was unfair after marrying another one
- 4) The respondent is a liar person and enjoys going out with other women
- 5) The respondent eliminated the wife’s property
- 6) The respondent always asked for money from the plaintiff

The respondent in his defence, he said that:

- 1) He made the admission to marry the second time because the mother in law (mother’s second wife) pushed him and denied the plaintiff felt stress and said that he is pushed by Haji Ibrahim to separate with the plaintiff with fasakh divorce.
- 2) The respondent denied about elimination of the plaintiff’s property and his enjoyment with other women.

The court held that: the court accepted the plaintiff's application to fasakh her marriage with her husband Mohd Alwi bin Sari with allowed express fasakh by cause:

- 1) the husband was unfair to the wife (subsection 52 (h)(vi))
- 2) the husband habitually assaulted his wife and is a liar person
(Subsection 52 (h) (i))
- 3) no maintenance provision for wife exceeding is 3 months (subsection 52 (1) (b))¹⁰⁴

¹⁰⁴ Jurnal Hukum (1420 H) Jun 1999 Jld Xiii Bhg I

5.1: EFFECTS OF FASAKH

5.1.1: Effects to the husband

The annulment or abrogation of the marriage contract by the court after the wife has made an application therefore. The Kadi will send a notice to the husband informing him of the wife's intention. He will then proceed to record the sworn statement of the wife and of at least two witnesses. If the Kadi is satisfied that the provisions of Muslim law have been complied with, he will make an order or decree as is lawful for fasakh divorce and he will register and issue the certificate for divorce. Then, they must separate forever.

5.1.2: Effects to the wives

1) **Financial problems**¹⁰⁵

Not every woman's standard of living decrease, or decrease dramatically, nor does every man's standard increase. But women generally tend to be penalized financially by the no-fault divorce procedure.

No-fault divorce relieves some of the conflict of the old adversarial system. It is argued that the no-fault procedures have weakened the bargaining position of women with the result that divorced women and their children tend to be systematically impoverished. The primary reason for this is that the new laws require husbands and wives to be treated equally. Yet the division of labour in the family, along with the experiences and special skills of each partner, meaning that the men and women are unequal in terms of their resources and opportunities. Because the law no longer presumes that the husbands are responsible for supporting the family after the divorce, men tend to benefit and women, particularly those with children, tend to suffer from no-fault laws. The women

¹⁰⁵ Robert H. Lauer & Jeanette C. Lauer. 2000. *Marriage and Family*. Mc Graw Hill. p 424.

found them facing all kinds of difficult problems; finding and coping with work, the conflict between working and caring for the children and getting food¹⁰⁶.

2) Health problems

Problems with physical and emotional health are common among people who are in the process of divorce. Physical health problems occur because the stress of the divorce tends to suppress the functions of the body's immune system.

Although some emotional difficulties may be present before and contribute to a divorce, the process is sufficiently stressful to create such problems. Divorced people have higher rates of suicide, accidents, and physical and mental health problems including anxiety and depression and alcoholism. Divorced people also report themselves as less happy than married ones.

The stress of a divorce is great because it involves the disruption of an intimate relationship. There is a sense of loss. There are uncertainties about the future, about the individual's network of relationship, and perhaps about the decision to divorce. The prospect of such a radical change in one's life tends to create a certain amount of anger, depression and guilt.

3) Claim of iddah ,mutaah and division of matrimonial properties

Islamic Family Law in Malaysia has provisioned that the wife is entitled to make application after divorce. This application includes iddah maintenance, muta'ah and matrimonial property. Besides that, the wife is also entitled to make hadanah application and child maintenance. However, the law has not provisioned accurate rates for this application. Therefore, it depends on agreement and evidences applied in Syariah Court.

¹⁰⁶ Robert H. Lauer & Jeannette C. Lauer. 2000. *Marriage and Family*. Mc Graw Hill.p 424.

In studies from 30 file cases, the case can be solved through agreement between the husbands and wives. Some women are important to divorce from making application after divorce. They cannot apply their application after divorce.

4) **Less interaction between former spouses**¹⁰⁷

A divorce doesn't necessarily end interaction between former spouses. If children are involved in the divorce, of course at least some contact between the ex-spouses is likely, although having children also means the contact will probably be less friendly and involve more quarrelling than contact between the childless.

On matters other than parenting, the ex-spouses have less interaction. Still, after one year, about a fourth continued to interact with each other every few months.

They talked about such things as new experiences, their families (other than the children), old friends, personal problems, and finances.

Of course the quality of the interaction between ex-spouses varies considerably. About a fourth is fiery foes, those who have minimal contact with each other and who become bitter and angry when they do interact. Fiery foes try to avoid each other. Another fourth are angry associates, those who could tolerate being in the same place with the ex-spouse but who still feel so angry and bitter that they cannot interact pleasantly.

Some of them are cooperative colleagues. They have a moderate amount of interaction and can mutually support each other. They strive to get along for the children's sake.

¹⁰⁷ Robert H. Lauer & Jeannette C. Lauer. 2000. *Marriage and Family*. Mc Graw Hill. p 426.

5.1.3: Effects to the children

1) Education¹⁰⁸

Initial reactions to parental separation may include intense anger, self-blame, fears about the future, and loyalty conflicts as the child is pressured to take sides in the parental battle. Intact- family children have fewer absences at school; higher popularity ratings; higher IQ, reading, spelling and math scores; and fewer behavioral problems at school than do children from divorced families¹⁰⁹.

2) Social relationship¹¹⁰

The children of divorced parents by fasakh are affected very adversely, not only socially, educationally, morally but also psychologically. Such children have higher chances of becoming juvenile delinquents, drug addicts, failing badly at school and also developing depressive illnesses. These children pay a heavy price just because they do not have a stable and happy background.

Other illness like psychopathic personality disorders is also common amongst these children when they grow up. These children, in their turn, when they get married go through a stormy marriage because of the above mentioned attributes and characteristics. These unfavorable characteristics would not have been acquired by them had their parents not been divorced. Their marriages may also end the way their parent's marriage did. Therefore, parents by divorcing by fasakh not only make their own lives miserable but the lives of the next generation who are totally innocent. There are also higher chances of alcoholism.

¹⁰⁸ Robert H. Lauer & Jeannette C. Lauer. 2000. *Marriage and Family*. Mc Graw Hill.p 426.

¹⁰⁹ Kinard and Reinherz 1986; Dawson 1991; Downey 1994.

¹¹⁰ Dr. Amir G.N Lakha, Alhaj Mulia Asghar M.M Jaffer, 1984, *Marriage A Step Towards fulfillment in life, the matrimonial advisory council of the world federation of K.S.I Muslim Communities*.p 55.

3) Custody¹¹¹

Joint custody, an arrangement in which both parents continue to share the responsibility for the care and raising of the children, is an attempt to provide a better solution.

The children may spend time each day at two different homes, various amounts of time during the week at two different homes, differing periods of the time in each of two homes, or alternate years in each of the two homes. In other cases, joint custody does not even require shared living arrangements but is rather joint legal custody where both parents are involved in important decisions in their child's life.

5.2 SOLUTION FOR FASAKH

A realistic view of marriage has to be recognized not only the cliché that “all marriages have problems”, but that in the course of a marriage over time every marriage has serious problems to the point where divorce or separation is at least considered.

When a couple is going through a “stormy marriage”, they should be bold and take the initiative to solve these problems with:

1) The roles played by the authorities in solving the problems

The authorities must take initiative to solve these problems with enforcement of the law, take care of the maltreated women and the husband who treats badly treats their wives must be punished fairly and justice.

2) The family law division of Islamic Religion Department of Negeri Sembilan

(JAINS)

The family law division of Islamic Religion Department of Negeri Sembilan (JAINS) must play their responsible role in matters of marriage, divorce and ruju'. If women want advice about fasakh, the department must give advice clearly and if

¹¹¹ Robert H. Lauer & Jeannette C. Lauer. 2000. *Marriage and Family*. Mc Graw Hill, p 430.

needed, the department must provide courses and seminars to inform the women their entitlement to obtain fasakh when she is unsatisfied with her husband. She also knows about application after divorce, so they have a good chance.

3) The family law division of Islamic Religion Department in the districts in Negeri Sembilan

The family law division of Islamic Religion Department in the districts in Negeri Sembilan must have connection with the head of department. It is important when the women have problems especially in fasakh to refer directly to the head department to take advice or to know about fasakh.

4) The Syariah officials and the registrar officials of the Syariah Courts in Negeri Sembilan

The Syariah officials and the registrar officials of the Syariah Courts in Negeri Sembilan must use procedure fasakh in court kindly. All matters must be done kindly, fast and friendly. As a judicial organization, Syariah Court must give decisions fairly.

5) The Community

Every community has its own methods and criteria for dealing with marital problems amongst its members. When a marriage is on the verge of a breakup, the couple and their relatives, having identified the crisis, appoint a representative respectively for the husband and wife. These representatives meet in a genuine spirit for reconciliation exists, without which most of the time gets taken up with arguments and reconciliation fails dismally. Each case is treated on its individual merit and the decisions reached accordingly. Sometimes, it may become clear, when the various factors have been taken into account, that separation or divorce is the best compromise. However, the couples who have the best prognosis, and who will make it with each other, are the ones who

state, in essence, “We basically love each other and want to stay married, but for some reasons, we can’t get along”¹¹².

6) **The Spouses themselves**¹¹³

When a couple is going through a “stormy marriage”, they should be bold and take the initiative to obtain some guidance from either elders in the Community or expert marriage guidance counselors or members of the Matrimonial Committees in their locality. The counselor is not emotionally involved in the couple’s difficulties and is expected to be able to think clearly and impartially. He is in a position to view the marital problems from the outside and can often see where one partner is deficient in his behaviour towards the other.

It must be admitted that there are some counselors who make matters worse than before. The choice of a counselor should be based on whether he is sincere, honest, and helpful and of a mature personality. Some couples try to be their own marriage counselor, when they have reached a breaking point in their marriage. It is futile to expect clarity of thought and balanced judgement in an atmosphere of highly charged emotion.

For a couple to take the initiative to seek help when there are marital difficulties, it is not easy because both the husband and wife have to swallow their pride and admit that they need help. Once the advice has been sought and obtained then it is imperative that it is taken seriously and implemented. Some of the advice may not be easily palatable but the efforts that the couple make at that time to help them will be rewarded later. Those couples who make considerable progress of the report that they feel really married for the first time. It is not unusual for older married couples, who are also not immune from marital difficulties, to act like adolescents in love after having sought advice.

¹¹² Dr. Amir G.N Lakha, Alhaj Mulia Asghar M.M Jaffer, 1984, Marriage A Step Towards fulfillment in life, the matrimonial advisory council of the world federation of K.S.I Muslim Communities.p 57.

¹¹³ Dr. Amir G.N Lakha, Alhaj Mulia Asghar M.M Jaffer, 1984, Marriage A Step Towards fulfillment in life, the matrimonial advisory council of the world federation of K.S.I Muslim Communities.p 56-59.

5.3: SUGGESTIONS

To solve all problems about fasakh, here some suggestions to reduce fasakh problems;

5.3.1: Authorities

The Authorities and co operation with the family law division of Islamic Religion Department of Negeri Sembilan (JAINS) and districts must take steps to solve the problems of fasakh because many of the women are abused by the husbands. So, the authorities must give strong punishment consistent with Islamic punishment to the husbands who are irresponsible to their wives. Besides that, the authorities must introduce a new act to fight for women in marriage problems.

5.3.2: The husband

To produce man who really implement their roles effectively, education oriented Al-Quraan and As-Sunnah must give good impression especially akidah and akhlak. Parents must give education consisting with Islamic necessity. About marriage education, the man must study before getting married with women. It's important because to avoid abrogation in marriage and the chance women is guaranteed in the future.

5.3.3: The wives

The woman must also be careful and control herself when facing marriage problems. All problems have solutions. Certain women like to go to court to apply divorce when unsatisfied with her husband. The first thing when facing problems, the women must discuss with her husband, then, when not achieving any solution, the case can be referred to Counselors. If the counselor is also unsatisfied, they can refer to the Kadi and then, can apply to the court.

5.4: CONCLUSION

Based on the explanation above, the writer makes conclusion that;

People form a family institution because the family is a media for love, passion and to get children, the family is also to fill the living instinct in groups and help each other forward to complete their lives, the family as a sharing form which becomes an advantage for husband and wife, the family as a place to get protection for women because they are the weaker group and are exposed to dangers¹¹⁴.

The property of husband and wives is all own or get owned by husband and wives which they acquire along their marriage. The compulsory of husband and wife is all compulsory implemented by husband and wives. The compulsory of husbands for the wives is divided to 2 parts:

- a) Material compulsory is dowry and maintenance.
- b) Immaterial compulsory is:
 - 1) Spend time together with wife kindly
 - 2) Sexual intercourse with wives.
 - 3) Maintain the wives.
 - 4) Fair with wives if has more wives.

The compulsory of wives for the husbands is divided to 4 parts:

- a) The wives must obey her husband in all matters not opposite with Islamic religion.
- b) Trustworthy in maintaining the trust of the husbands.
- c) Maintain good relations in family's husbands.
- d) Responsible to manage domain matters, attend the husband whether internal and external.

¹¹⁴ Sayid Mujtaba Rukni Musawi Lari. 1974. *Western Civilization Through Muslim Eyes*. translated F.J .Goulding . Houston : Free Islamic Literatures. Part 3. Topic 2.

Between the husband and wife has entitlement and balance compulsories in building and setting up the domain, but based on difference of power between men and women¹¹⁵.

Fasakh literally means cancellation, abolishment, rescission, revocation, abrogation or annulment. In relation to marriage, it means the annulment or abrogation of the marital contract by the judge after the wife has applied to him for this remedy to be granted. If the judge is satisfied that the woman is prejudiced by her marriage, he will annul the marriage. As against the right of talaq given to the husband, Islam gives the wife the remedy of fasakh to bring her contract to an end.

The remedy of fasakh is not an absolute right of the wife but as the husband has the right of talaq, an application of fasakh by him is rare. Nevertheless, under *Hukum Syara'*, he is conferred with such rights. Islam recognizes the right of any woman who has reached puberty to annul her marriage through the medium of the court in order to uphold the rights and to prevent any injury or difficulty to her¹¹⁶.

Reasons which damaged fasakh are divided to two:

1. Fasakh needs the judge to held, it must go through the justice process.
2. Fasakh does not need the judge's decision when the husband and wife know the reason which damages their marriage, when they must fasakh their marriage without going through the justice process¹¹⁷.

The four Sunnah schools allow the wife the remedy of fasakh depending on the circumstances necessitating separation between them;

- 1) failure to maintain

¹¹⁵ Dra. Firdaweri.1989. *Hukum Islam tentang Fasakh perkahwinan kerana ketidakmampuan suami menunaikan kewajipannya*. Cv.Pedoman Ilmu Jaya. P 107.

¹¹⁶ Zaleha Kamaruddin.2000. *Islamic Law Family Issues 2000*. International Islamic University Malaysia.

¹¹⁷ Dra. Firdaweri. 1989. *Hukum Islam tentang fasakh perkahwinan kerana ketidakmampuan suami menunaikan kewajipannya*. Cv. Pedoman Ilmu Jaya. p 53.

- 2) husband's imprisonment
- 3) desertion or absence of husband
- 4) injury or discord
- 5) husband's disease or defect

Besides that, the writer highlights the position of Islamic Religious Department of Negeri Sembilan, The Council of Islamic Religion and the Syariah Court Department. It's important to know functions of the organization.

Next, the provision of fasakh in Islamic Family Law Enactment (Negeri Sembilan) 1983, which Section 52 speaks about the grounds for dissolution of marriage or fasakh includes four aspects;

- 1) husband's disease or defect
- 2) husband's imprisonment or loss
- 3) injury or discord
- 4) failure to maintain¹¹⁸

Besides that, the researcher also recognizes the effects and solution of fasakh in Negeri Sembilan. The effect divided to three groups such as the husbands, the wives, the children. The researcher also gives solution to solve problems of fasakh in Negeri Sembilan.

¹¹⁸ Islamic Family Law Enactment (Negeri Sembilan) 1983

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5. (1) Kami telah/belum pernah bercerai/rujuk* pada
- (2) Talaq yang ke
6. Nyatakan harta sepencarian yang hendak dituntut oleh/diberi* kepada isteri/suami*
-
-
-
-
7. Cadangan tentang pemeliharaan dan penjagaan anak-anak.
-
-
-

Tarikh.....

.....
(Tandatangan Pemohon)

* Potong mana yang tidak berkenaan.

[Signature]
Ketua Hakim Syarak
Majlis Tertinggi Syarak
Negeri Sembilan Darul Khusus



HAK MILIK PERPUSTAKAAN MASJID

NEGERI SEMBILAN

Warta Kerajaan

DITERBITKAN DENGAN KUASA

GOVERNMENT OF NEGERI SEMBILAN GAZETTE

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ENAKMEN

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No. Enakmen	Tajuk ringkas	Muka
1	Enakmen Pentadbiran Hukum Syarak (Negeri Sembilan) 1991	5
2	Enakmen Perbekalan Tambahan (1991) (No. 1) 1991	97

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Enactment No.	Short title	Page
1	Administration of Islamic Law (Negeri Sembilan) Enactment 1991	55
2	Supplementary Supply (1991) (No. 1) Enactment 1991	99

(9)

NEGERI SEMBILAN

ENAKMEN No. 1 tahun 1991

ENAKMEN PENTADBIRAN HUKUM SYARAK
(NEGERI SEMBILAN) 1991

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2. Tafsiran.
3. Kekecualian dan hak kedaulatan.

BAHAGIAN II

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4. Penubuhan dan memperbadankan Majlis Agama Islam Negeri Sembilan.
5. Keahlian Majlis.
6. Jawatankuasa-jawatankuasa.
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8. Pembatalan perlantikan.
9. Perlantikan sementara.
10. Perlantikan hendaklah diwartakan.
11. Setiausaha.
12. Kehadiran bukan ahli dalam mesyuarat.
13. Mempengerusikan Mesyuarat.
14. Korum.
15. Perjalanan urusan.
16. Memanggil mesyuarat.
17. Kuasa Pengerusi.
18. Kewajipan dan kuasa Setiausaha.
19. Minit.
20. Peraturan mesyuarat dan pengundian.
21. Cuti.

Seksyen

22. Bertindak dalam keadaan tergepar.
23. Perwakilan kuasa dan tugas-tugas.
24. Rahsia.
25. Penjawat awam.
26. Saraan, elaun dan prosedur.

PIHAK BERKUASA DALAM HAL EHWAL AGAMA

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29. Kuasa Mufti.
30. Fatwa.
31. Bentuk Fatwa.
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35. Nas yang akan diikuti.

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38. Tempoh memegang jawatan Hakim Mahkamah Syariah.
39. Perlantikan Hakim Mahkamah Rendah Syariah.
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42. Bidangkuasa Mahkamah Rendah Syariah.
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48. Keanggotaan Mahkamah Rayuan Syariah.
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50. Penerusan prosiding dalam Mahkamah Rayuan Syariah walaupun ketiadaan Hakim.
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52. Kaedah-kaedah rayuan.

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54. Peguam Syarie.

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56. Wakaf dan nazr.
57. Perletakhakan.
58. Sekatan-sekatan ke atas perwujudan amanah khairat.
59. Pendapatan daripada wakaf dan nazr.
60. Modal wakaf dan nazr am.
61. Pengertian suratcara.

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62. Penyata Tahunan.
63. Audit.
64. Harta wakaf dan nazr.
65. Anggaran.
66. Perbelanjaan Majlis.
67. Banker.

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69. Kaedah.
70. Rayuan.

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71. Pungutan khairat.

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74. Penjagaan masjid dan kawasan.
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77. Tauliah.
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79. Kawalan dan arahan ke atas Pegawai Masjid.
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83. Syarat sah memeluk Agama Islam.
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85. Status anak-anak saudara baru.
86. Hak dan kewajipan saudara baru.
87. Daftar Saudara Baru.
88. Pendaftaran pemelukan ke Agama Islam.
89. Sijil Pemelukan ke Agama Islam.
90. Pengiktirafan saudara baru sebagai orang Islam.
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99. Pengecualian kaedah dan perlantikan.
100. Pertukaran nama Mahkamah Kadi.
101. Pertukaran nama Mahkamah Kadi Besar.
102. Pemansuhan.

BAHAGIAN II

MAJLIS AGAMA ISLAM NEGERI SEMBILAN

4. (1) Maka adalah dengan ini ditubuhkan suatu badan yang hendaklah menjadi suatu perbadanan bernama "Majlis Agama Islam Negeri Sembilan" dan yang kekal turun-temurun dan boleh mendakwa dan didakwa atas namanya yang tersebut itu, dan tertakluk kepada dan bagi maksud Enakmen ini, boleh membuat kontrak dan boleh memperolehi, membeli, mengambil, memegang dan menikmati apa-apa jenis harta alih dan harta taklih dan boleh memindahhak, menyerahhak, menyerahbalik, memulangkan, menggadai, menggadai janji, mendemis, menyerahhak semula, memindah milik atau dengan secara lain melupuskan atau membuat apa-apa urusan mengenai apa-apa urusan mengenai apa-apa harta alih dan harta taklih atau apa-apa kepentingan mengenainya yang terletakhak pada Majlis mengikut apa-apa syarat yang Majlis fikirkan patut.)

Penubuhan dan mem-perbadankan Majlis Agama Islam Negeri Sembilan.

(2) (a) Apabila sahaja mula berkuatkuasa Bahagian ini "Majlis Agama Islam Negeri Sembilan" yang wujud dengan kuasa seksyen 4 Undang-undang Pentadbiran Hukum Syarak 1960 hendaklah disifatkan sebagai badan yang ditubuhkan di bawah subseksyen (1).

En. 15/60.

(b) Segala hak, kuasa, kewajipan dan tanggungan yang sebelum mula berkuatkuasa Bahagian ini adalah terletakhak atau dipertanggungkan kepada "Majlis Agama Islam Negeri Sembilan" hendaklah pada mula berkuatkuasa Enakmen ini terletakhak dan dipertanggungkan kepada Majlis setakat ianya tidak berlawanan dengan peruntukan-peruntukan ini.

(c) Segala harta alih atau taklih, daripada segala jenis, yang sebelum mula berkuatkuasa Enakmen ini adalah terletakhak kepada "Majlis Agama Islam Negeri Sembilan" hendaklah, pada mula berkuatkuasa Bahagian ini dengan tiada perlunya dipindahhak, diserahkan atau dipindahmilik hendaklah terletakhak kepada Majlis.

Keahlian
Majlis.

5. (1) Majlis hendaklah mengandungi ahli-ahli yang berikut:

- (a) Pengerusi;
- (b) Timbalan Pengerusi;
- (c) Mufti;
- (d) Penasihat Undang-undang Negeri;
- (e) Pegawai Kewangan Negeri;
- (f) Ketua Polis Negeri;
- (g) 5 orang Ulamak; dan
- (h) 5 orang ahli lain.

(2) Pengerusi, Timbalan Pengerusi dan ahli-ahli yang dilantik di bawah perenggan (g) dan (h) subseksyen (1) hendaklah seorang Islam dan hendaklah dilantik oleh Yang di-Pertuan Besar atas nasihat Menteri Besar bagi tempoh tidak melebihi tiga tahun.

(3) Seorang ahli yang tempoh jawatannya telah tamat boleh dilantik semula.

(4) Jika pada masa orang yang memegang jawatan yang disebut dalam perenggan (d), (e) dan (f) adalah seorang bukan Islam, Yang di-Pertuan Besar atas nasihat Menteri Besar hendaklah melantik seorang Islam lain dan yang terkanan dari Jabatan yang sama menjadi ahli menggantikan orang tersebut.

(5) Orang-orang yang sebaik sahaja sebelum berkuatkuasanya seksyen ini adalah Pengerusi dan ahli-ahli yang dilantik oleh Majlis hendaklah tertakluk kepada Enakmen ini, terus menjadi Pengerusi dan ahli-ahli Majlis yang lain sehingga tamat tempoh perlantikannya.

Jawatankuasa-
jawatankuasa.

6. Majlis boleh melantik jawatankuasa-jawatankuasa bagi membantunya menjalankan tugas atau melaksanakan kuasanya.

Penamatan
perlantikan.

7. Perlantikan ahli-ahli Majlis yang dilantik di bawah perenggan (a), (b), (g) dan (h) subseksyen (1) seksyen 5 hendaklah tamat—

- (a) atas kematiannya; atau

(2) Dalam mana-mana kes seperti yang tersebut di bawah subseksyen (1), rayuan hendaklah diputuskan oleh Hakim-hakim yang ada itu, dan jika tiada keputusan sebulat suara, rayuan hendaklah didengar semula.

(3) Jika di bawah subseksyen (1) kedua-dua pihak tiada memberi persetujuan, atau lebih daripada seorang Hakim tidak berupaya, disebabkan sakit atau sebab-sebab lain bagi menghadiri dan menyelesaikan prosiding atau sebaliknya menjalankan tugasnya sebagai Hakim Mahkamah itu, rayuan itu hendaklah didengar semula.

Mengeluarkan orang bukan Islam dari bidangkuasa.

51. Tiada sesuatu keputusan Mahkamah Rayuan Syariah, Mahkamah Tinggi Syariah dan Mahkamah Rendah Syariah boleh menjejaskan atau melibatkan hak, kepentingan atau harta seseorang bukan Islam.

Kaedah-kaedah rayuan.

52. Yang di-Pertuan Besar boleh membuat kaedah-kaedah bagi menetapkan acara bagi membuat rayuan dan permohonan bagi kebenaran untuk merayu.

BAHAGIAN IV

PENDAKWAAN DAN PERWAKILAN

Pendakwa Syarie dan Pegawai Penguatkuasa Agama.

53. (1) Yang di-Pertuan Besar hendaklah atas nasihat Majlis, melantik seorang yang berkelayakan menjadi Ketua Pendakwa Syarie.

(2) Ketua Pendakwa Syarie hendaklah mempunyai kuasa yang boleh dijalankan mengikut budibicaranya untuk mendakwa, menjalankan atau tidak meneruskan mana-mana prosiding bagi kesalahan di dalam Mahkamah Syariah.

(3) Majlis boleh melantik orang-orang yang sesuai dan layak dari kalangan anggota Perkhidmatan Pegawai Syariah Negeri Sembilan menjadi Timbalan Pendakwa Syarie yang akan bertindak di bawah kawalan am dan arahan Ketua Pendakwa Syarie dan boleh menjalankan semua atau mana-mana hak dan kuasa yang diberikan kepada atau yang boleh dijalankan oleh Ketua Pendakwa Syarie di bawah mana-mana undang-undang bertulis kecuali mana-mana hak atau kuasa yang disebutkan dengan nyata yang mesti dijalankan oleh Ketua Pendakwa Syarie sendiri.

(b) Bila kebenaran telah pun diberi oleh Mahkamah Rayuan Syariah ia hendaklah mendengar dan memutuskan soalan yang dibenarkan untuk dirujukkan bagi keputusannya dan membuat apa-apa perintah yang Mahkamah Tinggi Syariah sepatutnya membuat, sebagaimana ia fikirkan adil bagi penyelesaian rayuan itu.

48. (1) Tiap-tiap rayuan dalam Mahkamah Rayuan Syariah hendaklah didengar dan diselesaikan oleh seorang Pengerusi dan dua orang Hakim Mahkamah Rayuan Syariah sebagaimana yang ditentukan oleh Ketua Hakim Syarie.

Keanggotaan
Mahkamah
Rayuan
Syariah.

(2) Ketua Hakim Syarie hendaklah menjadi Pengerusi bagi setiap prosiding Mahkamah Rayuan Syariah dan sekiranya ia tidak berkeupayaan, maka seorang Hakim Mahkamah Rayuan Syariah yang terkanan hendaklah dilantik oleh Ketua Hakim Syarie untuk menjalankan tugas-tugas Pengerusi.

(3) Ketua Hakim Syarie hendaklah mempunyai kuasa untuk melantik mana-mana Hakim Mahkamah Tinggi Syariah untuk menjadi anggota sesuatu prosiding Mahkamah Rayuan Syariah sekiranya difikirkan perlu.

49. Rayuan hendaklah diputuskan mengikut suara majoriti Mahkamah Rayuan Syariah.

Keputusan
majoriti.

50. (1) Jika dalam masa sesuatu prosiding dalam suatu rayuan atau, bila-bila masa sebelum disampaikan hukuman, seseorang Hakim Mahkamah Rayuan Syariah yang mendengar prosiding itu tiada berupaya hadir dan menyelesaikan prosiding disebabkan sakit atau sebab-sebab lain, atau sebaliknya bagi menjalankan tugas Hakim Mahkamah itu, perbicaraan atau prosiding itu hendaklah, jika kedua pihak bersetuju, diteruskan dan keputusan atau keputusan yang ditangguh, mengikut mana yang berkenaan, hendaklah diberi oleh dua orang Hakim yang ada itu, dan Mahkamah hendaklah bagi maksud rayuan, dianggap telah sepenuhnya dianggotai walaupun ketidakhadiran atau ketidakupayaan Hakim yang tertentu itu.

Penerusan
prosiding
dalam
Mahkamah
Rayuan
Syariah
walaupun
ketiadaan
Hakim.

hukuman maksimum yang diperuntukkan oleh undang-undang tidak melebihi tiga ribu ringgit, atau penjara bagi tempoh yang tidak melebihi dua tahun atau kedua-duanya sekali; dan

- (b) dalam bidangkuasa Mal, mendengar dan memutuskan semua tindakan dan prosiding yang Mahkamah Rendah Syariah dibenarkan mendengar dan memutuskan dalam mana jumlah atau nilai hal perkara yang dipertikaikan tidak melebihi lima puluh ribu ringgit atau yang tidak dapat dianggarkan dengan wang.

(3) Yang di-Pertuan Besar boleh dari masa ke masa melalui pemberitahu dalam *Warta* meluaskan bidangkuasa Mahkamah Rendah Syariah.

43. (1) Suatu rayuan hendaklah dirujukkan kepada Mahkamah Tinggi Syariah dari mana-mana keputusan Mahkamah Rendah Syariah—

- (a) dalam bidangkuasa jenayah, oleh pendakwa atau oleh orang yang telah sabit kesalahan dan rayuan ini bolehlah terhadap pembebasan, sabitan atau hukuman atau mana-mana satu daripada yang tersebut itu;

(b) dalam bidang kuasa Mal—

- (i) oleh mana-mana orang yang terkilan oleh keputusan itu, jika jumlah yang dituntut itu tidak kurang daripada lima ratus ringgit;
- (ii) dalam semua kes yang melibatkan mana-mana keputusan mengenai status peribadi, oleh mana-mana orang yang terkilan oleh keputusan itu;
- (iii) dalam semua kes yang berkaitan dengan nafkah tanggungan, oleh mana-mana orang yang terkilan oleh keputusan itu;

Dengan syarat bahawa tiada suatu rayuan boleh dibuat terhadap keputusan yang telah dibuat dengan persetujuan; dan

- (ii) sebarang pelupusan atau tuntutan kepada harta yang wujud daripada perkara-perkara yang disebut dalam subperenggan (i);
- (iii) nafkah tanggungan, kesahtarafan atau penjagaan (hadzanah) atau jagaan kanak-kanak;
- (iv) pembahagian atau tuntutan kepada harta sepencarian;
- (v) wasiat atau pemberian pada ketika hampir mati (maradh-al maut) seseorang simati Islam;
- (vi) pemberian semasa hidup atau penyelesaian yang dibuat tanpa balasan yang mencukupi dengan wang atau nilai wang oleh seseorang Islam;
- (vii) wakaf atau nazar;
- (viii) pembahagian dan pewarisan harta berwasiat dan tidak berwasiat orang Islam; atau
- (ix) perkara-perkara lain yang berkenaan di mana bidangkuasa diberi oleh mana-mana undang-undang bertulis.

42. (1) Tertakluk kepada seksyen ini dan juga subseksyen (2) atau mana-mana undang-undang bertulis lain, Mahkamah Rendah Syariah hendaklah mempunyai bidangkuasa untuk mendengar dan memutuskan mana-mana kes mal atau jenayah atau apa-apa perkara yang berbangkit di dalam sempadan tempatan bidangkuasa yang diberi kepadanya dan hendaklah diketuai oleh Hakim Mahkamah Rendah Syariah.

Bidangkuasa
Mahkamah
Rendah
Syariah.

(2) Mahkamah Rendah Syariah hendaklah—

- (a) dalam bidangkuasa jenayah, membicarakan mana-mana kesalahan yang dilakukan oleh orang Islam di bawah Enakmen ini atau di bawah undang-undang bertulis lain yang mana

(2) Tiada seorang pun boleh dilantik menjadi Hakim Mahkamah Rendah Syariah kecuali dia adalah seorang anggota Perkhidmatan Pegawai Syariah Negeri Sembilan.

(3) Semua perlantikan di bawah subsekyen (1) hendaklah diberitahu melalui *Warta*.

Pendaftar.

40. (1) Yang di-Pertuan Besar hendaklah atas nasihat Ketua Hakim Syarie, melantik seorang Ketua Pendaftar Mahkamah Rayuan Syariah, seorang Pendaftar Mahkamah Tinggi Syariah dan Penolong Pendaftar Mahkamah Rendah Syariah.

(2) Tiada seorang pun boleh dilantik di bawah subseksyen (1) kecuali dia adalah seorang anggota Perkhidmatan Pegawai Syariah Negeri Sembilan.

Bidangkuasa
Mahkamah
Tinggi
Syariah.

41. (1) Mahkamah Tinggi Syariah hendaklah mempunyai bidangkuasa di seluruh Negeri Sembilan dan hendaklah diketuai oleh Hakim Mahkamah Tinggi Syariah.

(2) Mahkamah Tinggi Syariah hendaklah—

(a) dalam bidangkuasa jenayah, membicarakan mana-mana kesalahan yang dilakukan oleh seseorang Islam dan boleh dihukum di bawah Enakmen ini atau Enakmen Undang-undang Keluarga Islam 1983 atau undang-undang bertulis lain yang memberi kepada Mahkamah Syariah bidangkuasa untuk membicarakan sebarang kesalahan, dan boleh mengenakan sebarang hukuman yang diperuntukkan di dalamnya; dan

(b) dalam bidangkuasa Mal, mendengar dan memutuskan semua tindakan dan prosiding dalam mana semua pihak adalah orang Islam dan yang berkaitan dengan—

(i) pertunangan, perkahwinan, penceraian, pembatalan perkahwinan (*fasakh*) atau perpisahan (*faraq*);

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7/1983.

(b) tidak berkeupayaan oleh kerana kelemahan tubuh atau otak atau apa-apa sebab lain, untuk menyempurnakan tugas dengan sepatutnya,

Yang di-Pertuan Besar hendaklah melantik suatu tribunal mengikut subseksyen (4) dan merujuk rayuan itu kepadanya, dan boleh atas syor tribunal itu, memecat Hakim Syarie itu daripada jawatannya.

(4) Tribunal tersebut hendaklah mengandungi tidak kurang daripada lima orang Islam yang memegang atau pernah memegang jawatan sebagai Hakim atau Hakim Mahkamah Sivil di Malaysia, dan tribunal itu hendaklah diketuai terdahulu oleh ahli mengikut susunan yang berikut, iaitu Ketua Hakim Syarie, Hakim Mahkamah Rayuan Syariah mengikut susunan perlantikan mereka sendiri, dan ahli-ahli lain mengikut tarikh perlantikan mereka bagi jawatan yang melayakkan mereka menjadi ahli.

(5) Sementara menantikan apa-apa rujukan dan laporan di bawah subseksyen (3) Yang di-Pertuan Besar boleh, atas syor Ketua Hakim Syarie, menggantung Hakim tersebut daripada menjalankan tugasnya.

(6) Tertakluk kepada peruntukan seksyen ini, Yang di-Pertuan Besar boleh membuat peraturan bagi memperuntukkan syarat-syarat jawatan, perletakan dan perlucutan dari jawatan Ketua Hakim Syarie.

(7) Walau apapun peruntukan subseksyen (1), kesahan apa-apa perkara yang dilakukan oleh seseorang Hakim Syarie tidak boleh dipersoal atas alasan bahawa Hakim itu telah mencapai had umur yang dia dikehendaki bersara.

(8) Peruntukan seksyen ini hendaklah dipakai kepada semua Hakim-Hakim yang dilantik di bawah subseksyen (1) seksyen 37.

39. (1) Hakim Mahkamah Rendah Syariah hendaklah dilantik oleh Yang di-Pertuan Besar atas perakuan Ketua Hakim Syarie.

Perlantikan
Hakim
Mahkamah
Rendah
Syariah.

(3) Seseorang itu adalah layak dilantik di bawah subseksyen (1) jika—

(a) dia seorang warganegara; dan

(b) telah beramal tidak kurang daripada sepuluh tahun sebelum tarikh perlantikannya sebagai Peguam Syarie di mana-mana Mahkamah Syariah atau sebagai anggota Mahkamah Syariah atau mempunyai kepakaran di bidang perundangan Islam.

(4) Bagi maksud subseksyen (3) seseorang yang sebelum berkuatkuasa Enakmen ini telah pun beramal sebagai peguambela di Mahkamah Syariah hendaklah dianggap sebagai Peguam Syarie dan seseorang yang telah berkhidmat sebagai Kadhi atau Pendakwa di Mahkamah Syariah hendaklah dianggap sebagai anggota Mahkamah Syariah.

(5) Semua perlantikan di bawah seksyen ini hendaklah diberitahu melalui *Warta*.

Tempoh
memegang
jawatan
Hakim
Mahkamah
Syariah.

38. (1) Tertakluk kepada peruntukan subseksyen (2) hingga (5), seseorang Hakim yang dilantik di bawah subseksyen (1) seksyen 37 hendaklah memegang jawatan sehingga dia mencapai umur enam puluh lima tahun atau sehingga suatu masa kemudiannya, sebagaimana diluluskan oleh Yang di-Pertuan Besar, tetapi masa itu tidak boleh melebihi daripada enam bulan selepas dia mencapai umur enam puluh lima tahun.

(2) Seseorang Hakim boleh meletakkan jawatannya pada bila-bila masa dengan mengutus surat yang ditandatangani olehnya kepada Yang di-Pertuan Besar tetapi dia tidak boleh dipecat daripada jawatan kecuali mengikut peruntukan-peruntukan yang berikut.

(3) Jika Ketua Hakim Syarie merujuk representasi kepada Yang di-Pertuan Besar menyatakan bahawa seseorang Hakim patut dipecat atas alasan—

(a) kelakuannya tidak baik; atau

mahkamah selain daripada Mahkamah Syariah, sesuatu persoalan Undang-undang Islam patut diputuskan, mahkamah itu boleh meminta Mufti memberi pendapat mengenai hal itu, dan Mufti boleh mengesahkan pendapatnya kepada mahkamah tersebut.

35. (1) Semasa mengeluarkan fatwa di bawah seksyen 30 atau mengesahkan sebarang pendapat di bawah seksyen 34, Mufti hendaklah pada lazimnya mengikut qaul muktamad Mazhab Shafie. Nas yang akan diikuti.

(2) Jika Mufti berpendapat bahawa dengan mengikut qaul muktamad dari Mazhab Shafie boleh membawa kepada keadaan berlawanan dengan kepentingan awam, Mufti bolehlah mengikut qaul muktamad dari Mazhab Hanafi, Mazhab Maliki atau Mazhab Hambali.

(3) Jika Mufti berpendapat bahawa tiada suatu daripada qaul muktamad dari empat Mazhab boleh diikuti tanpa membawa kepada keadaan yang berlawanan dengan kepentingan awam, Mufti bolehlah memutuskan masalah itu mengikut pendapatnya dengan tidak terikat dengan qaul muktamad dari mana-mana Mazhab yang empat.

BAHAGIAN III

MAHKAMAH SYARIAH

36. Yang di-Pertuan Besar atas nasihat Majlis boleh, dengan pemberitahuan dalam *Warta* menubuhkan Mahkamah Rendah Syariah, Mahkamah Tinggi Syariah dan Mahkamah Rayuan Syariah bagi Negeri Sembilan pada tempat-tempat yang difikirkan sesuai dan boleh menetapkan sempadan-sempadan tempatan bidangkuasa Mahkamah tersebut. Penubuhan Mahkamah Syariah.

37. (1) Ketua Hakim Syarie, Hakim Mahkamah Rayuan Syariah dan Hakim Mahkamah Tinggi Syariah hendaklah dilantik oleh Yang di-Pertuan Besar atas nasihat Majlis. Perlantikan Hakim.

(2) Sebelum mengemukakan nasihatnya mengenai perlantikan seseorang Hakim Mahkamah Tinggi Syariah dan Hakim Mahkamah Rayuan Syariah, Majlis hendaklah merujuk kepada Ketua Hakim Syarie.

ENAKMEN No. 7 tahun 1983

ENAKMEN UNDANG-UNDANG KELUARGA
ISLAM (NEGERI SEMBILAN) 1983

SUSUNAN SEKSYEN

BAHAGIAN I

PERMULAAN

Seksyen

1. Tajuk ringkas, pemakaian dan mula berkuatkuasa.
2. Tafsiran.
3. Kecualian prerogatif.
4. Pemakaian.
5. Kriteriaum bagi memutuskan sama ada seseorang itu orang Islam.
6. Perkahwinan yang masih berterusan hendaklah disifatkan sebagai didaftarkan di bawah Enakmen ini dan boleh dibubarkan hanya di bawah Enakmen ini.

BAHAGIAN II

PERKAHWINAN

7. Orang-orang yang boleh mengakadnikahkan perkahwinan.
8. Umur minima untuk perkahwinan.
9. Pertalian yang melarang perkahwinan.
10. Orang-orang dari agama lain.
11. Perkahwinan taksah.
12. Perkahwinan yang tidak boleh didaftarkan.
13. Persetujuan dikehendaki.
14. Perkahwinan seseorang perempuan.
15. Pertunangan.
16. Permohonan untuk kebenaran berkahwinan.
17. Mengeluarkan kebenaran berkahwin.
18. Rujukan kepada dan tindakan oleh Hakim Syar'iah.
19. Kebenaran perlu sebelum akadnikah.
20. Tempat perkahwinan.

Seksyen

21. Mas kahwin dan pemberian.
22. Catatan dalam Daftar Perkahwinan.
23. Poligami.
24. Akadnikah perkahwinan di Kedutaan-kedutaan, dsb., Malaysia di luar negeri.

BAHAGIAN III

PENDAFTARAN PERKAHWINAN

25. Pendaftaran.
26. Surat perakuan nikah dan surat perakuan ta'liq.
27. Melaporkan perkahwinan yang taksah atau menyalahi undang-undang.
28. Perlantikan Ketua Pendaftar, Pendaftar, Timbalan dan Penolong Pendaftar Perkahwinan, Perceraian dan Rujuk Orang Islam.
29. Buku dan Daftar hendaklah disimpan mengenai semua perkahwinan.
30. Salinan-salinan catatan hendaklah dihantar kepada Ketua Pendaftar.
31. Pendaftaran perkahwinan luar negeri oleh orang yang bermastautin dalam Negeri Sembilan.
32. Daftar yang tidak diakui di sisi undang-undang.
33. Pendaftaran sukarela perkahwinan-perkahwinan orang Islam yang diakadnikahkan dahulunya di bawah mana-mana undang-undang.
34. Efek pendaftaran di sisi undang-undang.

BAHAGIAN IV

PENALTI DAN PELBAGAI PERUNTUKAN
BERHUBUNGAN DENGAN AKADNIKAH DAN
PENDAFTARAN PERKAHWINAN

35. Tidak hadir di hadapan Pendaftar dalam masa yang ditetapkan.
36. Pelanggaran terhadap seksyen 32.
37. Gangguan terhadap perkahwinan.
38. Akuan atau pernyataan palsu untuk mendapatkan perkahwinan.
39. Akadnikah perkahwinan yang tidak dibenarkan.
40. Kesalahan-kesalahan berhubungan dengan akadnikah perkahwinan.
41. Kebenaran untuk mendakwa.
42. Membetulkan kesilapan.
43. Pemeriksaan Daftar Perkahwinan dan indeks perkahwinan.
44. Bukti.

BAHAGIAN V
PEMBUBARAN PERKAHWINAN

Seksyen

45. Takat kuasa untuk membuat sesuatu perintah.
46. Pertukaran ugama.
47. Perceraian dengan talaq atau dengan perintah.
48. Timbangtara oleh Hakam.
49. Perceraian khul' atau cerai tebus talaq.
50. Perceraian di bawah ta'liq atau janji.
51. Hidup semula sebagai suami isteri atau ruju'.
52. Perintah untuk membubarkan perkahwinan atau untuk fasakh.
53. Anggapan mati.
54. Penyenggaraan Daftar Perceraian dan Pembatalan.
55. Perintah perceraian tidak boleh didaftarkan melainkan perintah mengenai nafkah, penjagaan, dsb., telah dibuat.
56. Mut'ah atau pemberian suguhati kepada perempuan yang diceraikan tanpa sebab yang patut.
57. Hak terhadap maskahwin, dsb., tidak akan tersentuh.
58. Kuasa Mahkamah memerintah pembahagian harta sepen- carian.

BAHAGIAN VI
NAFKAH ISTERI, ANAK DAN LAIN-LAIN

59. Kuasa Mahkamah memerintah nafkah bagi isteri, dan efek nusyuz.
60. Kuasa Mahkamah memerintah nafkah bagi seseorang ter- tentu.
61. Pentaksiran nafkah.
62. Kuasa Mahkamah untuk memerintahkan cagaran diberi bagi nafkah.
63. Mengkompaun nafkah.
64. Lamanya tempoh perintah nafkah.
65. Hak terhadap nafkah atau pemberian selepas perceraian.
66. Kuasa Mahkamah untuk mengubah perintah nafkah.
67. Kuasa Mahkamah untuk mengubah perjumlahan nafkah.
68. Nafkah yang kena dibayar di bawah perintah Mahkamah, tidak boleh dipindahkan hak miliknya.
69. Menuntut tunggakan nafkah.
70. Nafkah semcutara.
71. Hak tempat tinggal.
72. Kewajipan menanggung nafkah anak.
73. Kuasa Mahkamah memerintahkan nafkah bagi kanak- kanak.

Seksyen

74. Kuasa bagi Mahkamah memerintahkan cagaran bagi nafkah seseorang anak.
75. Kuasa bagi Mahkamah mengubah perintah mengenai penjagaan atau nafkah seseorang anak.
76. Kuasa bagi Mahkamah mengubah perjanjian penjagaan atau nafkah seseorang anak.
77. Menuntut tunggakan nafkah seseorang anak.
78. Kewajipan menanggung nafkah kanak-kanak yang diterima sebagai ahli keluarga.
79. Lamanya tempoh perintah bagi nafkah anak.
80. Kewajipan menanggung nafkah anak-anak tak sahtaraf.

BAHAGIAN VII

PENJAGAAN

81. Orang-orang yang berhak menjaga kanak-kanak.
82. Kelayakan-kelayakan yang perlu untuk penjagaan.
83. Bagaimana hak penjagaan hilang.
84. Lamanya penjagaan.
85. Penjagaan anak-anak tak sahtaraf.
86. Kuasa Mahkamah membuat perintah mengenai penjagaan.
87. Perintah tertakluk kepada syarat-syarat.
88. Orang-orang yang berhak kepada penjagaan.
89. Kuasa ke atas harta takalih dan harta alih.
90. Perlantikan penjaga-penjaga oleh Mahkamah.
91. Perlantikan ibu sebagai penjaga melalui wasiat.
92. Penjaga bersama dengan ibu.
93. Perubahan kuasa penjaga harta.
94. Pemecatan penjaga.
95. Cagaran hendaklah diberi.
96. Had kuasa bagi penjaga yang dilantik oleh Mahkamah.
97. Penjaga tidak boleh memberi akuan penyelesaian mengenai harta modal.
98. Penjaga boleh menanggung kanak-kanak dari pendapatan.
99. Perintah khas mengenai harta kecil.
100. Permohonan untuk mendapatkan pendapat, dsb.
101. Perintah larangan oleh Mahkamah.
102. Penjaga bagi anak yatim.
103. Akta Penjagaan Kanak-kanak 1961 tidak boleh dipakai jika berlawanan dengan agama Islam.
104. Mahkamah hendaklah mengambil perhatian tentang nasihat pegawai-pegawai kebajikan, dsb.
105. Kuasa Mahkamah untuk menghalang anak dibawa keluar dari Malaysia.

Seksyen

106. Kuasa bagi Mahkamah membatalkan dan menahak per-pindahan-perpindahan yang dimaksud untuk mengecewakan tuntutan-tuntutan nafkah.
107. Tegahan terhadap gangguan.

BAHAGIAN VIII

PELBAGAI

108. Pengiktirafan perkahwinan orang Islam yang dilakukan di luar Negeri Sembilan.
109. Pengiktirafan perkahwinan-perkahwinan yang dilakukan di Kedutaan-kedutaan, dsb., di Malaysia.
110. Siapakah yang dikaitkan sebagai bapa.
111. Kelahiran lebih empat tahun selepas pembubaran perkahwinan.
112. Kelahiran selepas pengakuan bahawa 'iddah telah tamat.
113. Persetubuhan syubhah.
114. Syarat-syarat bagi pengakuan yang sah.
115. Anggapan dari pengakuan boleh dipatahkan.
116. Pengakuan oleh perempuan yang sedang dalam 'iddah.
117. Mengakui seorang lain sebagai ibu atau bapa.
118. Pengakuan lain daripada sebagai anak, ibu, atau bapa.
119. Pengakuan tidak boleh dibatalkan.
120. Permohonan oleh isteri yang ditinggal langsung.
121. Rayuan.
122. Perkahwinan yang tertakluk kepada undang-undang negara asing atau yang diakadnikahkan di luar negeri di bawah Enakmen ini.

BAHAGIAN IX

PENALTI

123. Poligami tanpa kebenaran Mahkamah.
124. Perceraian di luar Mahkamah dan tanpa kebenaran Mahkamah.
125. Tidak membuat laporan.
126. Meninggal langsung isteri.
127. Menganiaya isteri.
128. Tidak memberi keadilan yang sewajarnya kepada isteri.
129. Isteri tidak menurut perintah.
130. Jadi murtad untuk membatalkan perkahwinan.
131. Persetubuhan luarnikah antara orang-orang bercerai.
132. Dengan sengaja cuai mematuhi perintah nafkah.
133. Percubaan dan syubahat.

BAHAGIAN X

AM

Seksyen

- 134. Kuasa bagi membuat kaedah-kaedah.
- 135. Pemberhentian pemakaian Undang-undang Pentadbira Hukum Syara' 1960.

JADUAL.

(2) Jika, selepas sesuatu talaq raj'i, persekedudukan semula berlaku dengan persetujuan bersama, pihak-pihak itu hendaklah melaporkan hal persekedudukan semula itu dan butir-butir lain yang berkaitan kepada Pendaftar bagi kariah masjid (di mana mereka bermastautin.)

(3) Pendaftar hendaklah membuat apa-apa penyiasaan yang perlu dan, jika berpuas hati bahawa persekedudukan semula telah berlaku mengikut Hukum Syara', hendaklah mendaftarkan persekedudukan semula itu dengan membuat suatu endorsmen pada catatan berhubungan dengan perceraian itu dalam Daftar Perceraian, jika perceraian itu telah didaftarkan olehnya, dan hendaklah meminta pihak-pihak itu menyerahkan kepadanya surat-surat perakuan cerai yang berkaitan dan hendaklah mengeluarkan kepada mereka surat perakuan persekedudukan semula dalam borang yang ditetapkan.

(4) Pendaftar hendaklah juga menyerahkan satu salinan surat perakuan persekedudukan semula itu kepada Ketua Pendaftar yang mana hendaklah mendaftarkan persekedudukan semula itu dengan membuat suatu endorsmen pada catatan berhubungan dengan perceraian itu dalam Daftar Perceraian yang disimpan olehnya.

(5) Mana-mana pihak kepada suatu perkaliwinan yang tidak melaporkan hal persekedudukan semula sebagaimana dikehendaki oleh subseksyen (2) adalah melakukan suatu kesalahan dan hendaklah dihukum denda tidak melebihi lima ratus ringgit atau penjara tidak melebihi enam bulan atau kedua-duanya denda dan penjara itu.

(6) Jika perceraian itu tidak didaftarkan oleh Pendaftar yang kepadanya laporan di bawah subseksyen (2) itu dibuat, dia hendaklah merekodkan dalam surat-surat perakuan cerai nombor siri dan butir-butir surat perakuan persekedudukan semula itu dan hendaklah menghantar surat-surat perakuan cerai itu kepada Pendaftar yang telah mengeluarkannya bersama dengan satu salinan surat perakuan persekedudukan semula itu, dan Pendaftar yang satu lagi itu hendaklah selepas itu mendaftarkan persekedudukan semula itu dengan membuat suatu endorsmen pada catatan

berhubungan dengan perceraian itu dalam Daftar Perceraian dan hendaklah menyerahkan salinan surat perakuan persekedudukan semula itu kepada Ketua Pendaftar yang mana hendaklah mendaftarkan persekedudukan semula itu dengan membuat endorsmen pada catatan berhubungan dengan perceraian itu dalam Daftar Perceraian yang disimpan olehnya.

(7) Jika talaq raj'i telah berlaku tanpa diketahui oleh isteri, suami tidak boleh menghendaki atau meminta isteri supaya bersekedudukan semula dengannya tanpa menzahirkan kepadanya hal perceraian itu.

(8) Jika selepas talaq raj'i suami melafazkan ruju' dan isteri telah bersetuju terhadap ruju' itu, isteri boleh, atas permohonan suami, diperintah oleh Mahkamah supaya hidup semula sebagai suami isteri, melainkan jika isteri itu menunjukkan sebab-sebab yang baik mengikut Hukum Syara' sebaliknya, dan, jika demikian halnya, Mahkamah hendaklah melantik suatu jawatankuasa pendamai sebagaimana diperuntukkan di bawah seksyen 47 dan seksyen itu hendaklah dipakai sewajarnya.

(9) Jika selepas talaq raj'i suami melafazkan ruju' tetapi isteri telah tidak bersetuju terhadap ruju' itu kerana sebab-sebab yang dibenarkan oleh Hukum Syara', dia tidak boleh diperintah oleh Mahkamah supaya hidup semula sebagai suami isteri, tetapi Mahkamah hendaklah melantik suatu jawatankuasa pendamai sebagaimana diperuntukkan di bawah seksyen 47 dan seksyen itu hendaklah dipakai sewajarnya.

Perintah
untuk mem-
bubarkan
perkahwinan
atau untuk
fasakh.

52. (1) Seseorang perempuan yang berkahwin mengikut Hukum Syara' adalah berhak mendapat suatu perintah untuk membubarkan perkahwinan atau untuk fasakh atas satu atau lebih daripada alasan-alasan yang berikut, iaitu—

- (a) bahawa tempat di mana beradanya suami telah tidak diketahui selama tempoh lebih daripada satu tahun;
- (b) bahawa suami telah cuai atau telah tidak mengadakan peruntukan bagi nafkahnya selama tempoh tiga bulan;

- (c) bahawa suami telah dihukum penjara selama tempoh tiga tahun atau lebih;
- (d) bahawa suami telah tidak menunaikan, tanpa sebab yang munasabah, kewajipan perkahwinannya (nafkah batin) selama tempoh satu tahun;
- (e) bahawa suami telah mati pucuk pada masa perkahwinan dan masih lagi sedemikian dan isteri tidak tahu pada masa perkahwinan bahawa suami telah mati pucuk;
- (f) bahawa suami telah gila selama tempoh dua tahun atau sedang mengidap penyakit kusta atau vitiligo atau sedang mengidap penyakit kelamin dalam keadaan boleh berjangkit;
- (g) bahawa isteri, setelah dikahwinkan oleh bapa atau datuknya sebelum ia mencapai umur enam belas tahun, menolak perkahwinan itu sebelum mencapai umur lapan belas tahun, dan ia belum disetubuhi oleh suaminya itu;
- (h) bahawa suami menganiayainya, iaitu, antara lain—
- (i) lazim menyakiti atau menjadikan kehidupannya menderita disebabkan oleh kelakuan aniaya; atau
 - (ii) berkawan dengan perempuan-perempuan jahat atau hidup berperangai keji mengikut pandangan Hukum Syara'; atau
 - (iii) cuba memaksa isteri hidup secara lucah; atau
 - (iv) melupuskan harta isteri atau melarang isteri itu dari menggunakan hak-haknya di sisi undang-undang terhadap harta itu; atau
 - (v) menghalang isteri dari menunai atau menjalankan kewajipan atau amalan agamanya; atau

(vi) jika ia mempunyai isteri lebih daripada seorang, dia tidak melayani isteri yang berkenaan secara adil mengikut kehendak-kehendak Hukum Syara’;

(i) bahawa walaupun empat bulan berlalu tetapi isteri masih belum disetubuhi oleh kerana suami bersengaja enggan mensetubuhinya;

(j) bahawa isteri tidak izin akan perkahwinan itu atau izinnya tidak sah, sama ada oleh sebab paksaan, kesilapan, ketidaksempurnaan akal, atau lain-lain hal keadaan yang diakui oleh Hukum Syara’;

(k) bahawa pada masa perkahwinan itu isteri, sungguhpun berkebolehan memberi izin yang sah, adalah seorang yang sakit otak, sama ada berterusan atau berselangan, dalam erti Ordinan Sakit Otak 1952 dan sakit otaknya adalah dari suatu jenis atau setakat yang menjadikannya tidak layak untuk berkahwin;

(l) apa-apa alasan lain yang diiktiraf sebagai sah bagi membubarkan perkahwinan atau bagi fasakh di bawah Hukum Syara’.

31/52.

(2) Tiada sesuatu perintah boleh dibuat atas alasan dalam perenggan (c) dalam subseksyen (1) sehingga hukuman itu telah dimuktamadkan dan suami telah pun menjalani satu tahun dari hukuman itu.

(3) Sebelum membuat suatu perintah atas alasan dalam perenggan (e) dalam subseksyen (1) Mahkamah hendaklah, atas permohonan suami, membuat suatu perintah menghendaki suami memuaskan hati Mahkamah dalam tempoh enam bulan dari tarikh perintah itu bahawa dia tidak lagi mati pucuk, dan jika suami memuaskan hati Mahkamah sedemikian dalam tempoh itu, tiada sesuatu perintah boleh dibuat atas alasan itu.

(4) Tiada sesuatu perintah boleh dibuat atas mana-mana alasan dalam subseksyen (1) jika suami memuaskan hati Mahkamah bahawa isteri, dengan mengetahui bahawa adalah terbuka kepadanya untuk mendapatkan

perkahwinan itu ditolak, telah bertingkahtaku terhadap suaminya dengan cara yang menyebabkan suami mempercayai dengan munasabah bahawa isteri tidak akan menolak perkahwinan itu, dan bahawa adalah tidak adil kepada suami jika dibuat perintah itu.

53. (1) Jika suami seseorang perempuan telah mati, dipercayai telah mati, atau telah tidak didapati apa-apa perkhabaran mengenainya selama tempoh tujuh tahun atau lebih, dan hal keadaan adalah sebegitu hingga dia patut, bagi maksud membolehkan perempuan itu berkahwin semula, dianggap mengikut Hukum Syara' sebagai telah mati, tetapi perakuan kematian di bawah Ordinan Pendaftaran Kelahiran dan Kematian 1957 tidak dapat diperolehi, Mahkamah boleh, atas permohonan perempuan itu dan selepas apa-apa penyiasatan yang wajar, mengeluarkan, dalam borang yang ditetapkan, suatu perakuan menganggap suami itu telah mati, dan kemudian daripada itu perempuan itu adalah bebas berkahwin semula mengikut Enakmen ini.

Anggapan
mati.

61/57.

(2) Suatu perakuan yang dikeluarkan di bawah subseksyen (1) hendaklah disifatkan sebagai perakuan kematian suami itu dalam erti seksyen 14 (4) (b).

(3) Dalam hal keadaan yang disebut dalam subseksyen (1), seseorang perempuan adalah tidak berhak berkahwin semula tanpa suatu perakuan yang dikeluarkan di bawah subseksyen (1) walaupun Mahkamah Tinggi mungkin telah memberi kebenaran menganggap suami itu telah mati.

(4) Perakuan yang dikeluarkan di bawah subseksyen (1) hendaklah didaftarkan seolah-olah perakuan itu telah mewujudkan perceraian.

54. (1) Tiap-tiap Pendaftar dan juga Ketua Pendaftar hendaklah masing-masing menyenggara suatu Daftar Perceraian dan Pembatalan dan hendaklah serta-merta mencatatkan di dalamnya butir-butir yang ditetapkan mengenai semua perintah perceraian dan pembatalan yang dihantar kepadanya di bawah subseksyen (2) dan mengenai semua perintah perceraian dan pembatalan yang dipohon di bawah subseksyen (3) untuk didaftarkan.

Penyenggara
Daftar
Perceraian
dan
Pembatalan.

(2) Tiap-tiap Mahkamah yang memberi dan merekodkan sesuatu perintah perceraian atau pembatalan atau yang membenar dan merekodkan sesuatu talaq atau apa-apa lain bentuk perceraian hendaklah sertamerta menghantar satu salinan rekod itu yang diperakui kepada Pendaftar yang berkenaan dan kepada Ketua Pendaftar untuk didaftarkan.

(3) Jika sesuatu perkahwinan yang diakadnikahkan dalam Negeri Sembilan adalah dibubarkan atau dibatalkan dengan suatu perintah Mahkamah yang layak berbidangkuasa di luar Negeri Sembilan, salah satu daripada pihak-pihak itu boleh memohon kepada Pendaftar yang berkenaan dan kepada Ketua Pendaftar untuk didaftarkan perintah itu, dan Pendaftar yang berkenaan itu dan Ketua Pendaftar hendaklah mendaftarkan perintah itu apabila berpuas hati bahawa perintah itu adalah satu perintah yang patut diiktiraf sebagai sah bagi maksud-maksud undang-undang dalam Negeri Sembilan.

(4) Jika sesuatu lafaz talaq di hadapan Mahkamah atau sesuatu perintah perceraian atau pembatalan, di mana jua telah diberi, telah membubarkan sesuatu perkahwinan yang telah diakadnikahkan dalam Negeri Sembilan dan telah didaftarkan di bawah Enakmen ini atau di bawah mana-mana undang-undang bertulis yang berkuatkuasa sebelum Enakmen ini, Pendaftar yang berkenaan dan Ketua Pendaftar hendaklah, apabila mendaftarkan talaq atau perintah itu, mengarahkan supaya catatan mengenai perkahwinan itu dalam Daftar Perkahwinan ditandakan dengan perkataan "Dibubarkan" dan dengan rujukan mengenai perbicaraan dalam mana talaq itu telah dilafazkan atau perintah itu telah dibuat.

(5) Apabila mendaftarkan sesuatu talaq atau perintah perceraian atau pembatalan itu dan apabila dibayar kepadanya fee yang ditetapkan, Ketua Pendaftar hendaklah mengeluarkan surat perakuan ceraf dan pembatalan dalam borang yang ditetapkan kepada kedua-dua pihak itu.