

TA'LIQ DIVORCE: THE PROCEDURE AND ITS  
IMPLEMENTATION IN THE SYARIAH COURT OF SHAH ALAM

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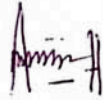
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I hereby declare that this academic project is my own except for quotations and summaries which have been acknowledged.

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**In the name of Allah, the compassionate, the merciful**

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
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## ABSTRAK

Projek ilmiah ini menfokuskan serta membincangkan tentang prosedur dan pelaksanaan *cerai ta'liq* di Mahkamah Syariah Shah Alam. Penyelidikan ini bertujuan untuk mengetahui dengan lebih dekat tentang prosedur dalam mendapatkan penceraian melalui *ta'liq* serta pelaksanaannya di Mahkamah Syariah Shah Alam sebagaimana yang telah digariskan di dalam Undang-Undang Keluarga Islam Negeri Selangor 1984 dan Enakmen Syariah Selangor 1991. Bagi memastikan kelancaran perjalanan dalam memperolehi data, pelbagai kaedah digunakan antaranya penyelidikan perpustakaan, meneliti dokumen yang berkaitan serta menjalankan temubual bersama kakitangan mahkamah tersebut. Hasil yang diperolehi daripada kajian ini mendapati bahawa proses permohonan penceraian melalui *ta'liq* haruslah mengikut beberapa prosedur serta peringkat pelaksanaan melibatkan proses kehakiman dan proses pentadbiran.

## ABSTRACT

This study is focused on the discussion on the procedures and its implementation of *ta'liq* divorce in Syariah Court of Shah Alam. The research is to explore the procedures and its implementation of *ta'liq* divorce in Syariah Court Shah Alam according with Islamic Family Law Enactment in Selangor 1984 and Selangor Syariah Enactment 1991. The research is library research and field study in Syariah Court of Shah Alam. The result from this study shows that the process to apply divorce under *ta'liq* must be based on the existing procedure as provided in the enactments to implement *ta'liq*, various procedures involved such as the judicial and administration process.

## ملخص البحث

هذا البحث العلمي يتحدث عن إجراءات تنفيذ الطلاق بالتعليق في المحكمة الشرعية بشاه عالم. ويهدف إلى معرفتها كما جاء في قانون الأحوال الشخصية الإسلامية بولاية سلنحور ١٩٨٤ وفي القانون الشرعي بولاية سلنحور ١٩٩١ وتعريفها أو توضيحها للمجتمع. لتحقيق هذا الهدف، قام الباحث بجمع المعلومات بطرق مختلفة كالقراءة والبحث والنظر في السجلات والمقابلة مع موظفي المحكمة الشرعية. ونتيجة هذا البحث هي أن إجراءات طلب الطلاق بالتعليق تتم بطرق متعددة ومرتبطة بتنفيذها القضاء والإداري.

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Islamic Family Law (Federal Territories) Act 1984

Islamic Family Law Enactment of Selangor 1984

Selangor Syariah Enactment 1991

## GLOSSARY

Al – Quran	The Holy Book revealed by Allah to Prophet Muhammad S.A.W
As- Sunnah	The tradition of prophet Muhammad S.A.W including his deeds, saying and approval
Ayah	Signs
Darar shar'i	Harm, according to what is normally recognized by Islamic law, effecting a wife in respect of religion, life, body, mind, moral or property.
Fasakh	The annulment of a marriage by reason of any circumstances permitted by Islamic law.
Hadith	The tradition of the prophet Muhammad SAW.
Harta sepencarian	Property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by hokum syara'
Hukum syara'	Practical laws of Islam
Holy quran	The Holy Book revealed by Allah to Prophet Muhammad
Istizhar	The oath is administered by the judge without an application
Jalibah	The oath taken by the plaintiff in order to prove his right together with the testimony of a single male witness.
Kathi's	Judge
Kafarah	Penalty
Khulu'	Divorce by redemption
Li'an	Divorce by mutual imprecation
Marad al-maut	The disease which causes death
Pegum syarie	Syarie Lawyer.
Qadhi	Judge

Qamariah	Month
Qur'anic	The Holy Book revealed by Allah to Prophet Muhammad S.A.W
Ruju'	A return to the original married state.
Surah Al-Maidah	Chapter 5 of Al-Quran
Surah Al-Isra'	Chapter 17 of Al-Quran
Surah An-Nisa	Chapter 4 of Al-Quran
Surah Al-Ahzab	Chapter 33 of Al-Quran
Tafwid at-talaq	<i>Ta'liq</i> divorce
Talaq	Repudiation
<i>Ta'liq</i>	A promise expressed by the husband after solemnization of marriage in accordance with hokum syara'
<i>Ta'liq</i> qasami	<i>Ta'liq</i> with oath
Ulama'	Plural of 'alim, Islamic jurists
Yamin istizhar	The oath is ordered to be taken by plaintiff to discharge any tuhmah against himself after submitting his evidence in the course of his suit. It serves to perfect the evidence of the plaintiff.
Wakaf	Charitable endowment
Yamin mardudah	The oath which returned to the plaintiff when the defendant refuses to take the oath

**ABBREVIATIONS**

i.e	that is to say
IFLAS	Islamic Family Law Enactment Selangor
n.a	no author
n.p.l	no place
p.	page
P.b.u.h	peace be upon him
pp.	pages
S.A.W	Sallallahu 'Alaihi Wa Sallam
trans.	translated
vol.	volume

# CHAPTER

1

# CHAPTER 1

## INTRODUCTION

### 1.1 BACKGROUND OF THE STUDY

Islam promotes mutual love, respect and unity between the husband and wife. It aims to establish a loving and healthy family through marriage. Thus, marriage is a strong relationship between the husband and wife<sup>1</sup>. Allah says in Surah An-Nisa (4), ayat 21 to the effect:

وكيف تأخذونه وقد أفضى بعضكم إلى بعض وأخذن منكم ميثاقا غليظا.

Meaning:

*" and how could ye take it when ye have gone into each other, and they have taken from you a solemn covenant".<sup>2</sup>*

In Islam, marriage is an important institution. The family in Islam is a special unit when every married Muslim should protect his or her material life and as a unit to share life together according to the rules and regulations laid down by Syariah.

However, sometimes the relation between husband and wife has problems that can make the family unhappiness and conflict. So, because of these reasons they prefer to pronounce the talaq.

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<sup>1</sup> Zaleha Kamaruddin. 2000. *Islamic Family Law Issues 2000*. Selangor: IIUM Press Sdn. Bhd. P. 167

<sup>2</sup> All Quranic Translation in writing are based on Syed Vickar Ahamed Holmded (Dr.). 1999. *Research, Writing and Translation*. Cairo, Egypt: Percetakan Yayasan Islam Terengganu Sdn. Bhd.

Divorce had been practiced even before the spread of Islam, including within the Arab community. But at the time, the type of divorce practiced was done without control and it usually was to the detriment and disadvantage of the wife's. The husband had the power to divorce his wife as many times as he wished.<sup>3</sup>

The prophet (peace be upon him) says:

" بعض الحلال عند الله الطلاق "

Meaning:

*"Of all things which have been permitted, divorce is the most hated by Allah"*<sup>4</sup>

At the first indication of disobedience to marital authority, a wife should be exhorted by her husband without is immediately breaking off relations with her. If she insists on pursuing such behaviors, her husband may confine her to her chamber; than if she further persists, he may inflict corporal chastisement, with a view of educating her. If the disharmony continues, a *Hakam* or arbitrators may be appointed to mediate and to encourage reconciliation. If all reconciliatory steps fail, divorce may be the solution.<sup>5</sup> The talaq is a power, which is available exclusively to the husband, although in certain circumstances the wife can also be given the right to instigate the divorce.

A man and woman entering into a contract of marriage may also impose certain conditions upon which their marriage is to take place. The imposed conditions would define their future obligations and marital rights. As we know, in Islam there

<sup>3</sup>Zaleha Kamaruddin. 2000. *Islamic Family Law Issues 2000*. P.167

<sup>4</sup>Sunan Abu Dawud, Kitab Al Talaq, vol. 5, p.586

<sup>5</sup>Mimi Kamariah Majid. 1999. *Family Law in Malaysia*. Kuala Lumpur: Malayan Law Journal Sdn. Bhd.p.129

are many types of divorce available to Muslims which are *Talaq*, *Khulu'*, *Ta'liq*, *Li'an*, and *Fasakh*. Every types has different meanings, definitions and procedures.

*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. 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.<sup>6</sup>

There are many problems and issues being raised from this study about the procedure and its implementation of *ta'liq* divorce in Syariah Court. The first and the main problem encountered in *ta'liq* proceeding are the protracted court delays and difficulties over proof.<sup>7</sup> The second issue in the context of divorce whether a *talaq* will be in effect if one of the conditions in the agreement or *Surat Ta'liq* is not fulfilled or is breached. The third issue is whether *ta'liq* divorce can occur only by breach of the conditions in agreement or *Surat Ta'liq* which are listed in a specified form and agreed by both parties.

The fourth issue is whether the divorce by *Ta'liq* is valid or not? If the husband promises in the contract of *ta'liq* divorce if he takes another wife or practices polygamy without the permission of the existing wife. Can the marriage be dissolved by one talaq?. This is because polygamy is permissible in Islam. Hence, could the couples put such condition to the agreement of *ta'liq*?. Hence, the last issue is whether the conditions of divorce by *ta'liq* which are agreed by both parties should be in accordance to hukum syara' or Islamic perspective?

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<sup>6</sup> Mimi Kamariah Majid. 1999. *Family Law in Malaysia*. P.135

<sup>7</sup> Mohammad Hashim Kamali. 2000. *Islamic law in Malaysia issue and developments*. Kuala Lumpur: Ilmiah Publishers. P.90

## 1.2 AIM OF RESEARCH

The aim of this research is to provide the information on the existing procedure of *ta'liq* divorce and its implementation in the Syariah Court of Shah Alam. This research tries to related *ta'liq* divorce with Al-Quran and As-Sunnah which are based on the Islamic Family Law Enactment of Selangor 1984 and Selangor Syariah Enactment 1991 (Syariah Civil Procedure Code Enactment 1991).

## 1.3 RESEACRH OBJECTIVE

The objectives of the research are to know in detail about the procedure of *ta'liq* divorce and its implementation in Syariah Court of Shah Alam and also to show the importance of conditions as laid down in the agreement of *ta'liq*. Besides that, the research highlights on the procedures of *ta'liq* divorce that is applicable in Syariah Court in Shah Alam. The research also to look whether divorce by *ta'liq* in today's Muslim society is relevant or not. Besides that the writer will look at the conditions in agreement of *ta'liq*.

## 1.4 SCOPE OF RESEARCH

This academic project will focus on the procedures of *ta'liq* divorce and its implementation in the Syariah Court of Shah Alam. It consists of the procedures of *ta'liq* and its implementation in that court, for example section 50 (1), (2) of Islamic Family Law Enactment in Selangor 1984 provides the procedure divorce for *ta'liq*.

Besides that, the research would look at the right of the women (wife) to get their right under *ta'liq* divorce, in other words, the privilege and benefit to the wife in this procedure and its implementation.

## 1.5 LITERATURE REVIEW

Mimi Kamariah, in her book entitled *Family Law in Malaysia*, (1999), found that the talaq by *ta'liq* will be in effect if one of the conditions in the agreement or *Surat ta'liq* is not fulfilled or is breached by the husband. As conditions are prerequisites, there must 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.

Zaleha Kamaruddin, (2000) in her article *Cerai ta'liq* in Malaysia – practice and procedure, found that the form of *ta'liq* in all states in Malaysia is not standardized. The standardization of the form can only be made in that particular state. It should be noted that the requirement that the husband has to pronounce a *ta'liq*, is not one of the marriage pillars. Failure of the authority to ask the husband to pronounce the *ta'liq* after the solemnization of marriage, it is the same in a case where the husband neglects to pronounce the *ta'liq* and there is no action that can be taken against the husband because there is no law or provision on that matter.

Mohammad Hashim Kamali, (2000), in his *Issues in Divorce*, found that the main problem encountered in *ta'liq* proceeding is the protracted court delays and difficulties over proof. Women's groups and critics have expressed dissatisfaction over this and highlighted the case of *Mohd. Habibullah bin Mahmood v Faridah BT Dato Talib*, which took six years before the plaintiff was finally, granted a divorce after she applied for a *ta'liq* divorce in 1989 on the ground that her husband had abused her. The Selangor Syariah court rejected her application for divorce because of

her husband's allegation that she was refractory (*nusyuz*) and neglected her marital obligations toward him. It took a declaration of apostasy, a failed attempt to have her case heard in the civil court, followed by intervention divorce was finally granted in 1995. Women tend to be faced with difficulties in obtaining a *ta'liq* divorce especially in cases when they claim ill treatment and abuse against the husband. It was thus stated in a seminar paper prepared by women's groups that "the court has often rejected medical and police reports of violence, demanding instead eye witness evidence". In cases of desertion, the court often goes to extraordinary lengths to trace the whereabouts of the husband instead of relying on the available evidence regarding the alleged desertion. The court is often reluctant to grant a divorce as provided for under section (50) of the Islamic family law "even where the husband has failed to maintain the wife for years". A newspaper report has it that "in one case the court did not grant a woman *ta'liq* divorce even though she was physically abused and not given maintenance, and her husband was also a drug addict who had been sentenced to jail before." She was instead ordered by the court to be loyal to her husband, but the question arose "as to how the court could come to such a decision when the man was not even present in court.

In an analysis of *Cerai ta'liq* in Malaysia written by Dr. Harun Din (1977-1982) found that divorce by *ta'liq* or *Cerai ta'liq* in Malaysia is not suitable to be performed in a Islamic society it is because the conditions and procedures in *ta'liq* are not in accordance with *Hukum Syara'* and Islamic perspective. For example, the condition in the contract of *ta'liq*, that if the husband takes another wife or practice polygamy without the permission of the existing wife. The marriage will be dissolved by one *talaq*. It is not suitable with *hukum syara'* because polygamy is one of *syariat* from Allah.

Professor Ahmad Ibrahim, (1965), in his book *Islamic Law in Malaya*, stated that *Cerai ta'liq* (divorce by the breaking of a condition), in cases where there has been a *ta'liq* (condition) in the marriage and the condition has been broken, the wife may make a complaint and if her complaint is substantiated she will be entitled to a

*Cerai ta'liq*, in accordance with the terms of the *ta'liq*. This form of divorce is a conditional divorce by the husband. Any lawful condition may be included in the *ta'liq* in Malaya the most frequent form of *ta'liq* is the condition, which gives the wife the right to ask for the divorce if the husband has not maintained her for a period of three months. Another usual stipulation is that the wife will be entitled to a divorce if the husband absents himself for six months on land or a year at sea without sending any letter or money to the wife.

Nik Noraini Nik Badli Shah,(2000) in her article Divorce By *Ta'liq* and By Judicial Decree, mentioned that in Malaysia, the prescribed conditions would generally be included in the statutory *ta'liq* agreement in the marriage contract. The prescribed agreement in the statutory form normally entitles the wife to apply for a *ta'liq* divorce in the event that the husband leaving or neglecting or not providing maintenance to the wife for a period of four months (qamariah) or more, or causing hurt to her person.

This research (ta'liq divorce: the procedure and its implementation in the Syariah Court of Shah Alam) will focus and discuss on the procedure of *ta'liq* divorce under Section 50 (1) and (2) of Islamic Family Law Enactment of Selangor 1984 and its implementation process in the Syariah Court of Shah Alam .It also to show the importance of conditions as laid down in the agreement of *ta'liq*. Besides that, the research highlights on the procedures of *ta'liq* divorce that is applicable in Syariah Court in Shah Alam and also will look at the conditions in agreement of *ta'liq*.

## **1.5 RESEARCH METHODOLOGY**

In order to identify the procedure of *ta'liq* divorce and its implementation in Syariah Court of Shah Alam. The researcher used primary data to collect the information from the Syariah Court in Shah Alam, it is where the researcher make an

interview with some officers Ustaz Mohd Fuad bin Abdul Latip (Assistant Registrar 1) and Ustaz Abdul Hadi bin Ismail ( Assistant Registrar 2) in Syariah Subordinate Court of Shah Alam about the procedure and its implementation of *ta'liq* divorce.

The researcher will use secondary data gathered from references books and articles to support the research in this topic. This research also used the Islamic Family Law Enactment in Selangor 1984 and Selangor Syariah Enactment 1991. The result from the argument was arranged to receive the base about the topics as an actual proof.

# CHAPTER

2

## CHAPTER 2

### 2.1 THE CONCEPT OF *TA'LIQ* DIVORCE

Marriage amongst the Muslims is practically a civil contract as far the parties to it are concerned. Under Muslim law the husband has the right to divorce his wife. The wife also has, under certain conditions, the right to dissolve the marriage, i.e. *khulu'* and *fasakh*. A man and woman entering into a contract of marriage may also impose certain conditions upon which their marriage is to take place. The imposed conditions would define their future obligations and marital rights.<sup>8</sup>

In Islamic jurisprudence, a formula uttered by any sane adult husband as a condition for divorcing his wife upon the occurrence of a specified condition is effective. The condition, according to the majority of jurists of the four schools can be operative, not merely when the husband really desires to terminate the marriage if the specified conditions are fulfilled, but also includes the use of the condition as a threat to the wife, an inducement or deterrent to a third or an oath to reinforce some assertion or promise made by the husband.<sup>9</sup>

This conditional divorce is known in Muslim jurisprudence as *ta'liq talaq*. Thus, a husband may bind himself to divorce his wife for example if he cruelly assaults her. This mode of divorce is popular under the Shafi'i School of law and is known by the Malays as "*cerai taklik*" that is divorce by breaking of a condition.<sup>10</sup>

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<sup>8</sup> Zaleha Kamaruddin. P. 227

<sup>9</sup> Zaleha Kamaruddin. 1998. *Introduction to Divorce Law in Malaysia*. Selangor: Potensi Serentak Sdn. Bhd. P. 186

<sup>10</sup> Zaleha Kamaruddin. 1998. P. 186

*Ta'liq* means suspended or attached. It envisages the occurring of something with conditions. In the context of divorce, the 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 pre-requisites, there has to be an agreement or *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.<sup>11</sup>

In Selangor, the Islamic Family Law Enactment in Selangor defines *ta'liq* as a promise expressed by the husband after solemnization of marriage in accordance with *hukum syara'* and the provision of this enactment.<sup>12</sup>

In the Federal Territories, the Islamic Family Law (Federal Territories) Act 1984 defines *ta'liq* as a promise expressed by the husband after solemnization of marriage in accordance with *hukum syara'* and the provisions of this act. For example in Johore and Pahang, it defines *ta'liq* as a promise or declaration or an affirmation made by the husband after the solemnization of marriage.<sup>13</sup>

In Terengganu the definition is quite different from other states in which it is more detailed compared to others. It defines *ta'liq* as meaning a declaration, whether verbal or in writing, made by the husband upon solemnization of marriage or at any time thereafter, that his wife will become divorced upon the occurrence of the contingency specified in the declaration. On the other hand, Perak seems more general in defining *ta'liq* in which it is defined as to suspend the happening of a divorce upon a contingency.<sup>14</sup>

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<sup>11</sup> Mimi Kamariah Majid.P.135

<sup>12</sup> Islamic Family Law Enactment in Selangor. 1984

<sup>13</sup> Islamic Family Law ( federal territories ) Act 1984 (Act 303).

<sup>14</sup> Zaleha Kamaruddin. P. 228

From the above definitions, *ta'liq* can be said as to mean a promise or declaration or affirmation made by the husband after the solemnization of marriage, which can be verbal, or in writing. *Ta'liq* divorce also can be based on agreement and stipulated conditions agreed on by both parties, that is husband and wife. In case of breach, the wife is given the right to ask for divorce.

It is a very important provisions under the Muslim law of marriage which enables a wife to safeguard her future during the marriage. She can make a condition of her marriage that the husband should delegate his power of divorce to her so that she can exercise it, that is, divorce herself on his behalf, whenever she is not satisfied with his behavior or the husband commits a breach of the terms agreed upon. Such a divorce by her will take effect as if the husband himself had pronounced a divorce. This type of divorce is also known as *tafwid at talaq*.<sup>15</sup>

When a marriage contract is prepared, it is possible for the bride's guardian as a means of protecting his ward's interest, to insist upon the attachment of a *ta'liq*. The usual form of *ta'liq* is the condition set down giving the wife the right to seek divorce if the husband fails to maintain her for a period of three to four months or if the husband absents himself for six months on land or a year at sea without sending any letter or money to the wife. If such a thing happens, the wife, on the evidence of the breaking of this condition, may make a complaint to the qadhi and apply for a divorce by *ta'liq*. Upon receiving such application, the qadhi will then record the sworn statement of the wife and of at least two witnesses. If he is satisfied that the provisions of Muslim law have been complied with, he will proceed to make an order the decree as is lawful.<sup>16</sup>

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<sup>15</sup> Zaleha Kamaruddin. P. 228

<sup>16</sup> Zaleha Kamaruddin. 1998. *Introduction to Divorce Law in Malaysia*. P. 187

The particulars and the nature of the divorce are then entered into the register and a certificate of divorce issued. *Ta'liq* as described above is perhaps the easiest way of getting divorce because the entire wife needs to establish is the breach of the promise on the part of the husband.

Section 50 (1), (2) of Islamic Family Law Enactment in Selangor 1984 provides that:

- (1) A married woman may, if entitled to a divorce in pursuance of the terms of a *ta'liq* certificate made upon a marriage, apply to the court to declare that such divorce has taken place.
- (2) The court shall examine the application and make an inquiry into the validity of the divorce and shall, if satisfied that the divorce is valid according to *hukum syara'*, confirm and record the divorce and send one certified copy of the record to the appropriate registrar and to the chief registrar for registration.<sup>17</sup>

Similar provisions are contained in section 37 of the Kelantan Islamic Family Law Enactment 1983. The usual *ta'liq* agreement in Malaysia normally entitles the wife to a divorce by a *ta'liq* in the event of the husband deserting or not providing maintenance for the wife for a period of four months or more, or causing hurt to her person.<sup>18</sup>

Section 26 (1), (2) of Islamic family law enactment in Selangor 1984 provides that marriage certificate and *ta'liq* certificate:

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<sup>17</sup> Islamic Family Law Enactment in Selangor. 1984

<sup>18</sup> Nik Noraini Nik Badli Shah.1998. *Marriage and Divorce Under Islamic Law*. Kuala Lumpur: season sdn. Bhd. P. 76

- 1) Upon registering any marriage and upon payment to him of the prescribed fees, the registrar shall issue marriage certificates in the prescribed form to both parties to the marriage.
- 2) The registrar shall also, upon payment of the prescribed fees, issue a *ta'liq* certificate in the prescribed form to each of the parties to the marriage.<sup>19</sup>

In the Islamic Family Law Enactment in Selangor 1984 it is provided that the registrar shall, upon payment of the prescribed fee, issue a *ta'liq* certificate in the prescribed form to each of the parties to the marriage.

The form of *ta'liq* in Selangor is as follows:

*“Every time that I fail to provide maintenance to my wife for a period of four months or more and she makes complaint to the kathi’s court and if her complaint is proved, then she is divorced by one talaq, and every time I revoke the divorce and my wife refuses to agree to it, she is divorced by one talaq”.*

The form of *ta'liq* prescribes in Kuala Lumpur is as follows:

*“I do solemnly declare when I leave my wife- for four months hijrah continuously or more voluntarily or with force, and I or my representative do not give her maintenance for such period whereas she is obedient to me or I cause hurt t her person, then she makes a complaint to the syariah court and if found by the syariah court to be true, and she gives to the syariah court which received on my behalf a sum of one ringgit, then she is divorced by a talaq khuli.*

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<sup>19</sup> Islamic Family Law Enactment in Selangor. 1984

In most part of the other states in Malaysia, the situation is similar to Kuala Lumpur. Specifically in Kelantan, Terengganu, Pahang, and Perak, the registrar of marriage is required, in registering a marriage, to prepare a *Surat ta'liq* in a prescribed form and to obtain the signatures of the parties thereto. In the other states, *ta'liq* is encouraged even though is not made compulsory.<sup>20</sup>

The general form of the *ta'liq* for the states is similar although there are differences in various aspects. In all the states except Perlis which has no special provision for *ta'liq*. The procedure for application of a divorce by *ta'liq* is expressly provided by their respective enactments. The procedure is generally similar. A married woman may apply to the qadhi's court for the declaration that a divorce in pursuance of the terms of *ta'liq* made upon marriage has taken place. Notice of the application is required to be served on the husband and the qadhi is required to record the evidence of the wife and at least two witnesses.

However, these requirements are not stipulated in Kelantan, Terengganu, Perak, and Pahang. The qadhi will then examine and make inquiry into such application and shall if satisfied that the divorce is valid, confirm the divorce and register it. It is interesting to note that *ta'liq* in customary law in Rembau woman to a man from another state and may also be used where the bridegroom is a local man.<sup>21</sup>

The juristic basis of *ta'liq* divorce may be found in the Holy Quran, (Surah Al-Maidah (5), ayat 1 to the effect:

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<sup>20</sup> Zaleha Kamaruddin. P. 191

<sup>21</sup> *ibid.* P. 191

يأيها الذين آمنوا أوفوا بالعقود أحلت لكم بهيمة الأنعام إلا ما يتلى عليكم غير  
 محلى الصيد وأنتم حرم إن الله يحكم ما يريد.

*"Oh you who believe! Fulfill all obligations."*<sup>22</sup>

From this verse we can see that Muslims are obliged to fulfill their obligations or promises.

Surah Al-Isra' 17: 34 also refer to the honoring of commitments, when it states to the effect that:

ولا تقربوا مال اليتيم إلا بالتي هي أحسن حتى يبلغ أشده وأوفوا بالعهد إن العهد  
 كان مسئولا.

*"Fulfill every engagement. For every engagement will be enquired into on the day of reckoning."*<sup>23</sup>

With regard to agreements or settlements made between a husband and wife, Surah An-Nisa 4: 128 also states to the effect that:

<sup>22</sup> All Quranic Translation in writing are based on Syed Vickar Ahamed Holmded (Dr.). 1999.

<sup>23</sup> All Quranic Translation in writing are based on Syed Vickar Ahamed Holmded (Dr.). 1999.

وإن امرأة خافت من بعلها نشوزا أو إعراضا فلا جناح عليهما أن يصلحا بينهما  
 صلحا والصلح خير وأحضرات الأنفس الشح وإن تحسنوا وتتقوا فإن الله كان بما  
 تعملون خبيرا.

*“If a wife fears cruelty or desertion on her husband’s part, there is no blame on them if they arrange an amicable settlement between themselves; and such agreement is best; even though men’s souls are swayed by greed. But if you do good, and practice self-restraint, Allah is well- acquainted with all that you do.”<sup>24</sup>*

From the above verse it can be seen that the wife is permitted to give a condition or enter into a agreement with her husband if she fears cruelty or desertion on her husband’s part because a settlement is better in order to solve any problem or to secure their future married life.

The prophet (p.b.u.h) himself was asked to give his wives an option to obtain a divorce from him, in Surah Al-Ahzab 33: 28 which states to the effect that:<sup>25</sup>

*“O prophet! Say to thy consorts: “if it be that you desire the life of this world, and its glitter, \_\_\_\_ then come! I will provide for your enjoyment and set you free in a handsome manner”.*

With regards to the conditions and promises in a marriage agreement, there is also a Hadith on that. It is related by Uqbah bin Amir that the messenger of Allah (p.b.u.h) said:

<sup>24</sup> All Quranic Translation in writing are based on Syed Vickar Ahamed Holmded (Dr.). 1999.

<sup>25</sup> Al-Quran. Al-Ahzab 33: 28

عقبة بن عامر رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم إن أحق الشرط أن يوفى به ما استحللتم به الفروج.

*“The most worthy condition which must be fulfilled is that which makes sexual intercourse lawful”.*<sup>26</sup>

The prophet (p.b.u.h) said to the effect:

*“A believer is bound by his agreement, except an agreement to make lawful what is unlawful and to make unlawful what is lawful.”*<sup>27</sup>

In the *Kifayah Al-Akhyar* is related a Hadith to the effect:

*“A Mukmin is bound by his conditions and promises”*

In *Kitab Al- Sharkawi Ala Tahrir* states which means:

*“Anybody who pronounces ta’liq with a provision of divorce on one condition and that condition happened, the divorce will occur according to the pronouncement of ta’liq”*

In *Ianah At-Talibin* states which means;

<sup>26</sup> Sahih Muslim, Kitab Al-Nikah, Vol 2, p 714. Sunan Abu Dawud, Kitab Al-Nihah, Vol 2,p 573

<sup>27</sup> Sahih Bukhari, Kitab Al-Ijara, Vol 2, p52.

*“It is permissible to divorce with ta’liq just like a promise to freed a slave with a condition an it is not permissible to revoke it before the occurrence of that thing and a divorce will take place when the condition happened”<sup>28</sup>*

Regarding to Hadith Uqbah bin Amir. There is explanation by Ahmad Hasan in the English translation of *Sunan Abu Dawud*:

*The condition imposed by the wife at the time of marriage or the word a man gives before his marriage must be fulfilled. For instance, a woman marries on condition that the husband will not take her outside the place she wants to stay. The husband should fulfill this condition. He cannot legally take her outside the city where she has her residence. He can do so with her consent. The condition, it should be noted, laid down at the time of marriage must be lawful such as dower, residence, maintenance and good living.<sup>29</sup>*

All the Sunni Schools recognize the doctrine of the delegation of the power of divorce to the wife. The incident regarding the prophet (p.b.u.h) and his wives referred to in Surah Al-Ahzab 33:28 cited above is also put forward by some jurists as a basis for this doctrine. It is explained by the jurists that the prophet (p.b.u.h) had, in obedience to the qur’anic injunction, empowered his wives to choose between living with him or a separation; the wives chose the prophet (p.b.u.h) and so the marriages were not dissolved. It is inferred that a husband can lawfully delegate to his wife the power to dissolve the marriage, if she so chooses.

The power given by *Tafwid* or delegation cannot be revoked, and the wife to whom the power is delegated exercises it in respect or her own person and has absolute right to exercise the power or not as she may choose. There are some

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<sup>28</sup> Ianah At-Talibin. Vol 4. at pp 22 and 23.

<sup>29</sup> Ahmad Hasan. 1984. *Sunan Abu Daud. English translation with explanatory notes*. Vol.11. First edition. Sh. Muhammad Ashraf. P.573.

differences of opinions, however, between the traditional scholars as to the validity of certain conditions that would entitle the wife to a dissolution of marriage e.g. the Hanbali view is that a husband who agreed in his marriage contract not to take another wife during the continuance of the marriage would be bound by such a stipulation so that the first wife would be entitled to a dissolution of the marriage in the event of its breach, while the Hanafis and the Shafie would hold such a stipulation to be void. This point has also been discussed in stipulation to be void.<sup>30</sup>

From all the authorities mentioned above, it is clear that *ta'liq* is permissible on the basis of a promise made by the husband that the wife will be entitled to get a divorce if, for example, the husband breaches the condition that has been agreed upon by the parties in a marriage agreement.

But it is to be noted here that, *ta'liq* is not necessarily based on the breach of condition in an agreement entered by the parties immediately after the solemnization of marriage, but it can also mean a divorce which is threatened by a husband if his wife does or omits to do something. For example the husband say to his wife:<sup>31</sup>

*“If you go out from this house without my permission, then there will be a divorce on you with one talaq”.*

In this situation, if the wife goes out from the house without her husband's permission, the wife is divorced with one talaq.

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<sup>30</sup> Nik Noraini Nik Badli Shah. 1998. *Marriage and Divorce Under Islamic Law*. P. 76

<sup>31</sup> Zaleha Kamaruddin. P. 228

## 2.2 Types of *ta'liq*

The scholars are of the opinion that *ta'liq* can be of two types depending on the situation where the husband pronounces it:<sup>32</sup>

- a) If the husband who makes a *ta'liq* with the purpose of threatening or prohibiting his wife from doing something, whereas at the time he has no intention to divorce his wife and there are no reasons whatsoever that show the intention of the husband to divorce his wife, then, the pronouncement of *ta'liq* is of no effect to the marriage relationship between the spouses.
- b) If the husband at the time of the pronouncement of *ta'liq* purposely and intentionally divorces his wife, then, the divorce is effective on the occurrence of certain things or acts contained in *ta'liq* or in other words, the conditions in the *ta'liq* are fulfilled.

With regards to the above types of *ta'liq*, Sayid Sabiq in his book named this *ta'liq* as:

- a) *Ta'liq Qasami* (ta'liq with oath)
- b) *Conditional ta'liq*

However, there are different opinions among the jurists on the first type of *ta'liq* that is *ta'liq* is *ta'liq Qasami* or oath. For example, according to Zahariah, some scholars from the Shafi'i and Hanbali schools are of the opinion that:

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<sup>32</sup> Zaleha Kamaruddin. P. 228

- a) If a husband pronounces *Ta'liq Qasami* with the intention of strengthening a prohibition on the wife, while he has no intention to divorce his wife, then, the words pronounced by him will be considered as an oath only, and no divorce will occur. But the husband must pay the penalty (Kafarah).
- b) On the contrary, if a husband who pronounces *Ta'liq Qasami* has the intention to divorce his wife, then, upon the occurrence of a certain act by the wife, as contained in *ta'liq*, the divorce will take place.

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### 2.3 The condition of *ta'liq* divorce

The current *ta'liq* agreement varies from state to state; Perlis does not even provide for a *ta'liq* agreement. It is consequently suggested that a standard *ta'liq* agreement should be adopted by all the states preferably on the following grounds:

- 1) Failure to maintain for four months;
- 2) Desertion for six months;
- 3) Any action that causes injury or, *darar shar'i* to the wife;
- 4) Any other grounds that the parties may agree to, including, for example, the husband's taking another wife. There is at present no provision for redress in cases where the husband contracts a polygamous marriage without the agreement of the existing wife.
- 5) When the husband is absent for a maximum of three occasions within a maximum time frame of six months.<sup>33</sup>

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<sup>33</sup> Mohammad Hashim Kamali. 2000. *Islamic law in Malaysia issue and developments*. P.91.

Condition of *ta'liq* generally can be divided into three categories.

- 1) Conditions against the purpose of marriage, such as making a condition that a husband must divorce his first wife.
- 2) Condition not against the purpose of marriage, such as a condition that a husband must treat his wife politely.
- 3) Condition that can benefit a wife, such as the husband cannot beat the wife or take her property.

The conditions under the Hanafi School of law:

The following conditions were held to be valid and reasonable, and where there was an agreement that the wife would have the power to divorce herself if they were not fulfilled, it was held to be binding on the parties:

- 1) The husband should not beat or ill-treat his wife or if he oppresses her wrongfully she will be entitled to reside at her father's house and realize maintenance allowance from him.
- 2) The husband should allow his wife to be taken her father's house four times a year; or that if the wife be in need of going to and coming back from her father's residence he would send her there and bring her back at his own expense.
- 3) If the husband marries a second wife during the subsistence of the instant marriage.
- 4) If the husband by his conduct gives the wife or her parents or relatives mental torture.

- 5) If the husband does not lead a respectable life, does not earn his livelihood and does not live in a house approved by the wife and her parents.
- 6) If the husband fails to deliver certain ornaments agreed to be given to the wife on a demand by her.
- 7) If the husband keeps a concubine.
- 8) If the husband fails to pay separate specified maintenance to the wife in case of disagreement between the parties.
- 9) If the husband does not pay the wife an agreed sum of money while she is living with her parents.
- 10) If the husband does not pay maintenance to the wife even if she does not reside in the house with him and his second wife.
- 11) If the husband does not continue to pay to the wife an adequate or specified subsistence allowance when the relations between the parties become strained.
- 12) If the husband leaves the wife without making any provision for her maintenance or if the husband treats her habitually in a criminal matter, or if the husband fails to perform the marital duties and obligations.
- 13) If the husband does not pay to the wife her prompt dower on demand.
- 14) If the husband would bring any of his other wives to stay with him without the consent of the wife.

- 15) If the husband assaults the wife.
- 16) The wife, if a minor, shall live with her parents for a specified period of time during her minority.
- 17) The husband shall not take his wife outside her permanent place of residence where they were married.<sup>34</sup>

The usual cases of *ta'liq* divorce are those where the wife has not been given maintenance. In some such cases the husband attends the court, in others he is not present. There are also some cases where the wife applies for *ta'liq* on the ground of assault by the husband.

### **2.3.1 Cases of the desertion or failure to maintain where husband was present.**

In the Selangor case of *Fakhariah binti Lokman v. Johari bin Zakaria* [1992] 9 JH 69<sup>35</sup>, the wife claimed the confirmation of the divorce by *ta'liq* in accordance with the *ta'liq* pronounced by the husband after the marriage. She claimed that the husband had not given her maintenance for more than four months. The husband admitted that he had not paid the maintenance but that said that he was not obliged to pay the maintenance as the wife had left the matrimonial home and had gone to further her studies in America without the consent of the husband. The *ta'liq*, which was pronounced by the husband, stated that if the husband did not pay maintenance for four months or more the wife can make a complaint to the Syariah Judge and if the case is proved she will be divorced by one talaq. The learned Judge of Shariah Court dismissed the application of the wife as he held that although the husband had not paid the maintenance for over four months, the wife was not entitled to receive the maintenance as she had left the matrimonial home and went to America to study without the permission of the husband. On appeal by the wife, the appeal was allowed.

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<sup>34</sup> Zaleha Kamaruddin. P. 228

<sup>35</sup> *Fakhariah binti Lokman v. Johari bin Zakaria* [1992] 9 JH 69

The Syariah Appeal Court held that *ta'liq* pronounced by the husband was clear and did not contain any condition that the wife was only entitled to claim the maintenance if she was not nusyuz. On the strict wording of the *ta'liq* the wife was entitled to the divorce by *ta'liq* as the husband had not in fact given her maintenance for over four months. The husband had never applied to the court for an order of nusyuz against the wife and on this ground also the application of the wife should be allowed.

In the federal territory case of *Case of Aisny v. Haji Fahro Razi* [1990] 7 JH 216<sup>36</sup>, the wife had applied to the Syariah Subordinate Court to confirm a conditional divorce. She claimed that the husband had pronounced the condition (*ta'liq*) and failed to comply with it, as he had not given maintenance to his wife and children for over four months. At the trial the following issues were raised:

- a) a question as to the *ta'liq* which is used in Selangor which makes it incumbent on the husband to pay the maintenance to the wife without touching on the question of the wife to the husband.
- b) The question of the wife moving from the matrimonial home without the permission of the husband.
- c) The question of the wife caveating four pieces of land which were registered in the name of the husband.
- d) The question of shares in the possession of the wife.

The learned judge of the subordinate court decided the first three issues in favour of the wife but dismissed her application as he held she could have obtained the maintenance for herself and her children by selling the shares in her possession. The wife appealed. In allowing the appeal, the Syariah Appeal Board held:

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<sup>36</sup> *Aisny v. Haji Fahro Razi* [1990] 7 JH 216