

***FARAQ* MARRIAGE:
A CASE STUDY IN THE SYARIAH COURT OF KUANTAN**

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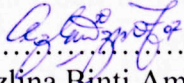
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I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledgement.

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allah SWT Most Merciful and Most Compassionate

Alhamdulillah, I am highly grateful to Allah SWT and His Messenger Prophet Muhammad SAW because with his blessings, I can complete my own academic project.

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والسلام

ABSTRAK

Kajian ini dibuat untuk melihat secara dekat kes-kes perkahwinan yang difarapkan yang telah dilaporkan di Mahkamah Tinggi Syariah di Kuantan. Perkahwinan yang difarapkan ini boleh juga di anggap sebagai perkahwinan yang tidak sah dari segi hukum syarak dan Enakmen Undang-undang Keluarga Islam. Selain itu method kajian yang digunakan di dalam kajian ini ialah kaedah penyelidikan melalui perpustakaan dan juga kaedah penelitian melalui kes-kes yang telah didaftarkan di Mahkamah Tinggi Syariah Kuantan. Turut dikaji ialah pandangan mazhab-mazhab berkaitan perkahwinan yang difarapkan, sebab-sebab sesuatu perkahwinan itu difaraq dan kesannya terhadap anak, isteri dan juga suami. Di samping itu juga mengenalpasti bidangkuasa Mahkamah Tinggi Syariah Kuantan mengenai faraq serta contoh-contoh kes yang melibatkan penceraian melalui faraq.

ABSTRACT

In this project paper, the writer tries to give information and to expose the cases that are related to *faraq* marriages. *Faraq* marriage is one of the social problems in our present environment due to particular factors. This *faraq* marriages is invalid because it does not fulfill the guidelines of *syara'* and Islamic Family Law Enactment of Pahang. Besides, the methodology of research that is used in this study is through library research and observation on cases was conducted in the Syariah Court of Kuantan. This study is also related to the views of scholars about the dissolution of marriage by way of *faraq*, its causes and the effects to the children, the wife and husband after dissolution. It is also to identify the jurisdiction of the Syariah High Court of Pahang and the example of cases that are involved in *faraq* marriages.

ملخص البحث

هذا البحث يركز القضايا المتعلقة بالنكاح التفريق المقررة في المحكمة الشرعية بهانج. والمراد بالنكاح التفريق هو النكاح الذي يخالف قانون الأحوال الشخصية في ماليزيا كما أنه يعرف بالنكاح الذي قد تم مع عدم إذن ولي المرأة. والمنهج الذي تطرقت اليه الباحثة في هذا البحث هو المنهج المكتبي الاستقرائي بحيث درس الباحثة مسائل من خلال قراءة الكتب والملاحظة على المسائل المحلة في المحكمة الشرعية بهانج. ثم أسرقت الباحثة شيئاً من أقسام امتناع النكاح وأسبابه كما أضفت إليه شيئاً الحديث من المسائل الواقعة بسبب فرق النكاح.

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GLOSSARY

<i>Al-Qur'an</i>	the Holy Book revealed by Allah SWT to Prophet Muhammad SAW
<i>fasiq</i>	transgressor
<i>fiqh</i>	jurisprudence
<i>fuqaha</i>	Muslim jurists
<i>hadith</i>	the tradition of Prophet Muhammad SAW
<i>hukm</i>	ruling of Shari'ah
<i>iddah</i>	the period of time for which a woman must wait before remarrying after divorce
<i>jumhur</i>	dominant majority of jurists
<i>li'an</i>	imprecation
<i>mahar</i>	a dowry given by husband to wife
<i>mazhab</i>	doctrine
<i>murtad</i>	a person who renounces the faith of Islam
<i>nasab</i>	paternity or lineage
<i>qadhi</i>	judge
<i>qamariah</i>	months
<i>shari'ah</i>	the collective name for all the law ordained by Allah SWT for his servants through Prophet Muhammad SAW including the Islamic systems of 'aqidah, akhlaq, ibadah and mu'amalah
<i>shubhah</i>	doubt
<i>talaq ba'in</i>	an irrevocable <i>talaq</i>
<i>ulama'</i>	plural of alim, muslim jurists
<i>wali</i>	helper, supporter, patron, protector, or guardian power or guardianship

ABBREVIATIONS

Ibid	as previously mentioned
n.a	no author
n.d	no date
n.pl	no place
n.pb	no publisher
p	page
pp	pages
vol	volume
SAW	Sallah Allāh alayh wa sallam
SWT	subhānahu wa ta'ālā
Vol	volume

INTRODUCTION

In marriage, the word of 'divorce' is the one of the last solutions to end or dissolve their marriage. Actually, divorce or *talaq* is the most detestable of lawful things by Allah SWT as narrated by Abu Dawud:

عن ابن عمر أن النبي (ص) قال : أبغض الحلال إلى الله الطلاق

Ibnu Umar reported that the Apostle of Allah said that the most detestable of lawful things by Allah s.w.t is divorce.

Nevertheless, there are various ways in which a marriage becomes terminated in Islamic law either automatically or in the initiative of the husband, the wife or a judge. On the other hand, *faraq* method is also a part of divorce to dissolve their marriage other than *fasakh*, *khulu'* and *ta'liq*.

Faraq literally means 'separate' that brings divorce for spouses through application, an order or legal power of the syariah judge. Whereas, in *syara'* and law the term is mostly known as *Tafriq al-Qadhai'e*. The law provision is based on section 11, 47, 50 and 52 of the Islamic Family Law Enactment of Pahang 1987, states about the relation with the dissolution of marriage and *faraq* marriage.

Besides that, through *faraq*, marriage can be terminated due several specific causes based on *Hukum Syara'* although there is no divorce claims from the wife. With request from the wife and then followed by authority of law to dissolve her marriage, the marriage can also be terminate when it comes from legal action and legal enforcement from the Islamic council department of the state. Then, the Syariah Court also has the power to make such order to separate (*tafriq*) the spouses temporarily while waiting an investigation, examination and decision of terminating their marriage or vice versa.

CHAPTER ONE

CHAPTER 1

THE DEFINITION OF *FARAQ* MARRIAGE

1.1 The Definition of Divorce and Dissolution of Marriage

The word divorce is actually not alien among society nowadays especially Muslims. Nevertheless, there are also societies that know about the meaning of divorce but do not really understand this word deeply.

“*At-talaq*” in the literal sense means discharge of discharge the tie.¹ Divorce or *talaq* is also known as “*al-hallu*” (الحل) or “*al-inhilal*” (الإنحلال) that brings the meaning of break.² Furthermore, in its primitive sense the word *talaq* or in Arabic “طلاق” means dismissal, but in law it signifies a release from the marriage tie.³

In response to the bitter realities of life, some difficulties cannot be resolved except through the separation of the provision of divorce. Islam has reluctantly, neither liking nor commending it. A *hadith* found in the book *The Lawful and Prohibition in Islam* written by Dr. Yusuf al-Qardawi says that:

عن ابن عمر أن النبي (ص) قال : أبغض الحلال إلى الله الطلاق

“*Among lawful things, divorce is most hated by Allah SWT*”

(Reported by Abu Dawud).⁴

¹ Muhammad Idris Abd Raof al-Marbawi. *Idris al-Marbawi Dictionary*. Mesir: Fourt Edition. p. 364.

² Mustafa Al-Khan Et Al. 2000. *Al-Fiqh Al-Manhaji*. Damsyik: Darul Al-Falah. Vol 2. p. 113.

³ Thomas Patrick Hughes. N.D. *A Dictionary of Islam*. Lahore. Kazi Publication. p. 86.

⁴ Muhammad Abd Aziz al-Khaaladi. 1996. *Sunan Abu Daud*. Lebanon: Darul Kutub Al-I’lmiah. Al-Kotob Al-Ilmiyah. Kitab al-Tafsir. Bab Ma Karahu al-Talaq. Juzu’ 2. p. 120.

In such situation separation is better, Allah s.w.t says in the effect:

وَإِنْ يَتَفَرَّقَا يُغْنِ اللَّهُ كُلًّا مِنْ سَعَتِهِ وَكَانَ اللَّهُ وَاسِعًا حَكِيمًا (130)

“But if they separate, Allah SWT will provide for each of them out His abundance, For Allah is He who cares for all and is wise”(An-Nisa’ 4:130)⁵

In the legal terms, it means the legal dissolution to a marriage or a severance or separation.⁶ The word dissolution literally means the breaking up or dissolving.⁷

Besides that, Harith Suleiman Faruqi defines that dissolution means to release the tie of marriage which separates or dissolve the marriage in accordance to the legal ruling of Islam (*Hukum Syara’*) or *Fiqh Islamiah*. (Also means of *Fasakh*).⁸

Prof Dr. Ahmad Ibrahim in his book, *Family Law in Malaysia*, states that dissolution also includes *talaq* that the husband is permitted to divorce his wife by pronouncing a *talaq* or repudiation against her. Besides that it also includes that the married Muslim woman may also apply for divorce like *cerai ta’liq*, *khulu’* and *fasakh*.⁹

However, the dissolution of marriage is also known as divorce and the sole ground for divorce is that the marriage has broken down irretrievably.¹⁰

Hence, the dissolution of marriage also a divorce either the husband can be permitted to divorce his wife or the married Muslim wife can also apply for divorce to the court. There is a variety of ways which the marriage becomes terminated under Islamic

⁵ Al-Quran. An-Nisa’ 4:130.

⁶ Dorling Kindersley. 1998. *Oxford Dictionary*. University Press. p. 236.

⁷ *Oxford Advanced Learner’s Dictionary*. 1995. “Dissolution”. Oxford University Press. Fifth Edition. p. 364.

⁸ Harith Suleiman Faruqi. 2000. *Faruqi’s Law Dictionary*. Beirut: Riad Solh Square. Third Revision Edition. p. 123.

⁹ Ahmad Ibrahim. 1997. *Family Law in Malaysia*. Kuala Lumpur: Malayan Law Journal Sdn Bhd. Third Edition. p. 226.

¹⁰ Sherman. 1998. *Dictionary of Law*. Kuala Lumpur: Golden Books Centre Sdn.Bhd. p. 104.

law either automatically or on the initiative of the husband, wife or judge. The power of divorce is actually in the hands of the husband and not the wife. However, the wife can also ask for her husband by the court through *faraq* method excluding any other dissolution of marriage.

Furthermore, the *faraq* will not take place without an order from the judge. An investigation must be in progress to ensure that such *faraq* takes place. Normally, the investigation is done by enforcement officers in the Religious Enforcement of the state. For example an invalid marriages, marriages without consent of *wali*, syndicate marriage, false information and others.

1.2 Division of Judicial Separation in Marriages

There are several ways in judicial separation that can be ordered by the judge or court. From this matter, it will be divided into four divisions of judicial separation in marriage. There are *Fasakh*, *Khulu'*, *Ta'liq* and also *Li'an*.

1) *Fasakh*

Fasakh literally means cancellation, abolishment, recession, revocation, abrogation or annulment.¹¹ It is also means to annul a deed or to rescind a bargain. Therefore, in the context of marriage, it means the annulment of marriage is contract by the court after the wife has made an application to the court. Hence, whilst the husband has the *talaq*, the wife has the *fasakh* to dissolve their marriage. Thus, in the section 50(A) of Islamic Family Law Enactment of Pahang states that *fasakh* means the annulment of a marriage by reason of any circumstances permitted by Islamic Law.¹²

¹¹ Azita bt Ahmad. 2000. "Grounds for *Fasakh*: Comparative Perspective". *Islamic Family Law Issues 2000*. Kuala Lumpur: International Islamic University of Malaysia. p. 245.

¹² Dewan Undangan Negeri Pahang. 1987. *Islamic Family Law Enactment (Pahang) (No. 3 of 1952)*. Section 52.

The juristic basis for *fasakh* has been deduced from the Qur'an where it is stated to the effect:

الطَّلَاقُ مَرَّتَانِ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ (229)

“A divorce only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness....”¹³

Furthermore, it can also be found in the *hadith* that states to the effect:

Abu Hurairah said to the effect:

لما روى أبو هريرة: أن النبي (ص) قال في الرجل لا يجد ما ينفق على امرأته، قال:

يفرق بينهما.

“The Prophet (peace by upon him) said regarding a person who does not posses anything to enable him to give maintenance to his wife, they can both dissolve their marriage”¹⁴

Besides that, *fasakh* can also take place on the following grounds.¹⁵

1. Separation due to disease or defect
2. Separation due to non-providing maintenance
3. Separation on account of cruelty
4. Divorce because the husband has deserted the wife or been imprisoned and others.

¹³ Al-Qur'an. Al-Baqarah 2:229.

¹⁴ Saifuddin bin Abu Bakar. 1988. *Hulliyatul Ulama' fi Ma'rifatu Mazaahib Fuqahā'*. Oman: Maktabah Al-Risalah Al-Hadithat. Vol. 7. p. 404.

¹⁵ Ahmad Ibrahim. 1997. *Family Law in Malaysia*. Kuala Lumpur: Malayan Law Journal Sdn Bhd. Third Edition. pp. 261-267.

2) *Khulu'* or Divorce by Redemption

Divorce by redemption or *khulu'* is where the wife request his husband to divorce her by offering him money or gifts as a ransom.

In the literal sense, *khulu'* means ransom demands by the wife and naturally, *khulu'* is the wife releasing herself from the husband by paying something as a ransom for her freedom.¹⁶ Technically, *khulu'* is dissolution of marriage by an agreement made between husband and wife, but the parties agree to divorce by redemption or *khulu'*, the court shall after payment is agreed by both parties, cause the husband to pronounce a divorce by redemption, such divorce irrevocable has taken place.¹⁷ This is based on the verse of the *Qur'an*:

الطَّلَاقُ مَرَّتَانٍ فَإِمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ وَلَا يَحِلُّ لَكُمْ أَنْ تَأْخُذُوا مِمَّا
 آتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ يَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ
 عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَئِكَ هُمُ الظَّالِمُونَ
 (229)

"A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you, (men), to take back any of your gift (from your wives), except when both parties fear that they would be unable to keep the limits ordained by God. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by God; so do not

¹⁶ Nurhayati Hj Hamzah. 2000. *Crucial Matters Pertaining to Khul'*. Islamic Family Law Issues 2000. IIUM. p. 206.

¹⁷ Dewan Undangan Negeri Pahang. 1987. *Islamic Family Law Enactment (Pahang) (No. 3 of 1952)*. Section 49.

transgress them if any do transgress the limits ordained by God, such persons wrong (themselves as well as others)."¹⁸

Furthermore, in *hadith* also states related about *khulu'* that says to the effect:

أن امرأة ثابت بن قيس أتت النبي صلى الله عليه وسلم فقالت: يا رسول الله، ثابت بن قيس ما أعتب عليه في خلق ولا دين، ولكني أكره الكفر في الإسلام، فقال رسول الله صلى الله عليه وسلم: أتردين عليه حديقته؟ قالت: نعم، قال رسول الله (ص): أقبا الحديقة وطلقها تطليقة. قال أبو عبد الله: لا يتابع فيه عن ابن عباس.

*"The wife of Thabit bin Qais came to the Holy Prophet (peace be upon him) and said: 'O Allah's Messenger! I do not blame Thabit for his defect in his character or his religion but I, being a Muslim, dislike behaving in an Islamic manner (if I remain with him).' On that Allah's Messenger said to her "will you give back the garden which your husband has given you?" she said: Yes! Then the Prophet (peace be upon him) said to Thabit: 'O Thabit! Accept your garden and divorce her once'.*¹⁹

3) *Ta'liq*

Taklik or *ta'liq* means suspended or attached.²⁰ It also means divorce by breaking a condition and is also solemnized during *akad nikah*.²¹ The divorce by *ta'liq* will be affected where the husband does not fulfill one of the conditions in the agreement or *ta'liq* which is lasted in a special form. The *ta'liq* is also agreed by both parties. Thus,

¹⁸ Al-Qur'an. Al-Baqarah 2:229.

¹⁹ Muhammad Muhsin Khan Dr. 1987. *The Translation of Meaning of Sahih Al-Bukhari*. New Delhi: Kitab Bhavan. Vol 7. Fifth Revised Edition. p. 150.

²⁰ Mimi Kamariah. 1999. *Islamic Family Law in Malaysia*. Kuala Lumpur: Malayan Law Journal. p. 135.

²¹ *ibid*.

after the solemnization the *ta'liq*, a husband will bind himself to divorce his wife and if fails to fulfill the conditions, the *ta'liq* divorce will take place.

Furthermore, in Islamic Family Law Enactment of Pahang defines *ta'liq* as promise expressed by the husband after solemnization of marriage in accordance with *Hukum Syara'* and the provision of this enactment.²² Then, the provision of this enactment is also stipulated in section 50 states that a married woman may, if entitled to a divorce in pursuance of terms of a *ta'liq* certificate made upon marriage, she may apply to the court to declare that such divorce has taken place after the court examines and is satisfied that the application is valid according to *Hukum Syara'*.²³

Ta'liq can also be said as a promise and declaration or affirmation made by the husband after the solemnization of marriage which can do verbally or in writing. Then, the husband who makes the declaration (*lafaz ta'liq*) is bound to his wife.²⁴ Thus, it is important because Muslim is also obliged to fulfill their promises as stated in the Holy *Qur'an*:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ أُحِلَّتْ لَكُمْ بَهِيمَةُ الْأَنْعَامِ إِلَّا مَا يُتْلَى عَلَيْكُمْ غَيْرَ
مُحَلِّي الصَّيْدِ وَأَنْتُمْ حُرْمٌ إِنَّ اللَّهَ يَحْكُمُ مَا يُرِيدُ (1)

“O ye who believe! Fulfill (all) obligations, lawful unto you (for food) are all four-footed animals, with the exceptions named: but animals of the chase are forbidden while ye are in the Sacred Precincts or in pilgrim garb: for God doth command according to His will and plan.”²⁵

²² Dewan Undangan Negeri Pahang. 1987. *Islamic Family Law Enactment (Pahang) (No. 3 of 1952)*. Section 42.

²³ *ibid.* Section 50 (1).

²⁴ Suzaini Mohd Saufi. 2000. “*Ta'liq: Practice and Procedure in Malaysia.*” *Islamic Family Law Issue* 2000. IIUM. p. 228.

²⁵ Al-Qur'an. Al-Maidah 5:1.

With regards to the conditions and promises in a marriage agreement, there is also *Hadith* said relating *ta'liq*:

“The condition worthier to be fulfilled by you is the one by which you made the private parts (of your wives) lawful (for you).”²⁶

However, *ta'liq* is also not necessary because of the breach of the promise or one of the conditions in the agreement that is entered by both parties. But it also can mean that divorce of which is threatened by the husband if his wife does or omits to do something such as the husband said to his wife, ‘if you go out to your parent’s house, then will be a divorce on you with one *talaq*’.²⁷ This means that if the wife goes out to her parent’s house then *talaq* will take place.

4) *Li'an*

The other division of judicial separation in marriage is *li'an*. *Li'an* refers to divorce by mutual imprecation.²⁸ It occurs when the husband accuses his wife for adultery and there are no witnesses other than him to support his allegation. Then, he must testify to God four times that he is truthful and for the fifth times that the curse of God shall be upon him if he lies.

²⁶ Muhammad Abd Aziz al-Khalaadi. 1996. *Sunan Abu Daud*. Lebanon: Darul Kutub Al-Ilmiah. Hadith 2134.

²⁷ Suzaini Mohd Saufi. 2000. “*Ta'liq: Practice and Procedure in Malaysia*.” *Islamic Family Law Issue* 2000. IIUM, p. 231.

²⁸ Mimi Kamariah. 1999. *Islamic Family Law in Malaysia*. Kuala Lumpur: Malayan Law Journal. p. 136.

Furthermore, the process of *li'an* is laid down in the *Qur'an*:

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ (4) إِلَّا الَّذِينَ تَابُوا مِنْ بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ (5) وَالَّذِينَ يَرْمُونَ أَزْوَاجَهُمْ وَلَمْ يَكُنْ لَهُمْ شُهَدَاءُ إِلَّا أَنْفُسُهُمْ فَشَهَادَةُ أَحَدِهِمْ أَرْبَعُ شَهَادَاتٍ بِاللَّهِ إِنَّهُ لَمِنَ الصَّادِقِينَ (6) وَالْخَامِسَةُ أَنَّ لَعْنَةَ اللَّهِ عَلَيْهِ إِنْ كَانَ مِنَ الْكَاذِبِينَ (7) وَيَدْرَأُ عَنْهَا الْعَذَابَ أَنْ تَشْهَدَ أَرْبَعُ شَهَادَاتٍ بِاللَّهِ إِنَّهُ لَمِنَ الْكَاذِبِينَ (8) وَالْخَامِسَةَ أَنَّ غَضَبَ اللَّهِ عَلَيْهَا إِنْ كَانَ مِنَ الصَّادِقِينَ (9)

*“And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors. (4) Unless they repent thereafter and mend (their conduct); for God is oft-forgiving, Most Merciful. (5) And for those who launch a charge against their spouses, and have (in support) no evidence but their own,-their solitary evidence (can be received) if they bear witness four times (with an oath) by God that they are solemnly telling the truth; (6) And the fifth (oath) (should be) that they solemnly invoke the curse of God on themselves if they tell a lie. (7) But it would avert the punishment from the wife, if she bears witness four times (with an oath) by God, that the husband is telling a lie. (8) And the fifth (oath) should be that she solemnly invokes the wrath of God on herself if (her accuser) is telling the truth. (9)”*²⁹

²⁹ Al-Qur'an. An-Nur 24:4-9.

Then, it is also provided in the Islamic Family Law Enactment of Pahang that where the parties to a marriage have taken oath by way of *li'an* according to *Hukum Syara'*, and upon judgment, the judge should order them to be *faraq* and to be separated from life forever.³⁰

1.3 The Definition of *Faraq* Marriage

Literally, *faraq* or in Arabic words (فرق، تفريق) which means separation.³¹

Conceptually, *faraq* means separate or disband the marriage whether through *talaq* or other ways. Furthermore, *faraq* is also most known as a “*Tafriq al-Qadhaie*” in the legal and technical sense. In other words, it is divorce between married Muslim spouse (husband and wife) through desire or order from Syariah Court.³² However in Malaysia Islamic Law, *faraq* means the separated marriage not through *talaq*.

In Fiqh Munakahat, the meanings of *faraq* are divided into three.³³

1) *Talaq* or divorce (فرق هي طلاق)

It is known as *talaq* which includes *Tafriq al-Qadha'ie* or by the court (judge), *Khulu'*, *Ila'* and *Li'an*.

2) *Fasakh* (فرق هي فسخ)

It is also known as *fasakh* because of defect by husband or wife.

³⁰ Dewan Undangan Negeri Pahang. 1987. *Islamic Family Law Enactment (Pahang) (No. 3 of 1952)*. Section 50A(1).

³¹ Thomas Patrick Hughes. N.D. *A Dictionary of Islam*. Lahore: Kazi Publication. p. 86.

³² n.a. 1998. “Bubar Perkahwinan Lewat Faraq”. *Al-Islam*. Kuala Lumpur: Utusan Karya. April. p. 26.

³³ Muhammad Rous Qal'adji Dr. 2000. *Māusu'atul al-Fiqhiyyah al-Muyassaratusun*. Darul Nafais. Vol 2. pp. 1516-1517.

3) *Tafriq* other *talaq* and not *fasakh* (فرقة هي تفريق, من غير طلاق ولا فسخ)

Faraq also means separation other than the meaning of *talaq* and not *fasakh*. For example invalid marriage, apostasy, void marriage and others.

1.2.1 *Tafriq* Other Than *Talaq* and Not *Fasakh*

It is considered as *tafriq* where the causes are mentioned below situation:

- 1) Difference of country such as if a husband flees from *darul-harb* (دار الحرب) or land of enmity or a non-Muslim country to a *darul Islam* or Islamic country, and she refuses to perform flight (*hijrah*) and to accompany him, *tafriq* takes place.
- 2) Refusal of Islam is if one of the parties embraces Islam, the judge must offer it to the other three distinct times and if he or she refuses to embrace the faith, *faraq* takes place.
- 3) Apostasy from Islam is when the husband or wife apostates from Islam, then *faraq* takes place whether the apostasy of the husband or wife.
- 4) An invalid marriage of any kind, arising from incomplete *nikah* or marriage ceremony or by affinity or from consanguinity. In Arabic term, it also means as *nikah fasid* (نكاح الفاسد)

- 5) *Zihar* is that the husband equalizes back his wife with his mother. From these cases, *tafriq* takes place until the husband pays fine (*kaffarah*) of *zihar*.³⁴

1.4 *Faraq* in the *al-Qu'ran* and *as-Sunnah*

Everybody knows that much information can be found in the al-Quran and as-Sunnah. Besides that, in the al-Quran, Allah SWT also explains relating to *faraq* in Surah An-Nisa' 3:130:

وَإِنْ يَتَفَرَّقَا يُغْنِ اللَّهُ كُلًّا مِنْ سَعَتِهِ وَكَانَ اللَّهُ وَاسِعًا حَكِيمًا (130)

“But if they separate, Allah s.w.t will provide for each of them out His abundance, For Allah is He who cares for all and is wise”

The verse above explains regarding inevitably generous of incapable persons and ways to solve a marriage problem and it is also clear that if the spouses are apart from each other, Allah SWT will give them such rewards. This is because when the spouses are incapable to save their marriages from shattering, Allah SWT give the rewards to them.

Hadith:

Faraq has also been practiced since the year of Prophet of Muhammad SAW as such narrated by Hashim bin Tabiin period (Islamic followers at that time met the companion of Rasulullah SAW.)

³⁴ *ibid.*

وروى سعيد بن سفيان، عن ابن أبي الزناد، قال: سألت سعيد بن المسيب عن الرجل

لا يجد ما ينفق على امرأته أيفرق بينهما؟ قال نعم، قال: سنة؟ قال: سنة، وهذا ينصرف إلى

سنة رسول الله (ص)

“Abu Zinad asked to Said bin Musayyab, if the husband is unable to pay maintenance to his wife, has the *faraq* of the marriage is taken place? Said answer: Yes! Abu Zinad asks again: is this *Sunnah*? Said answers again: Yes!”³⁵

In the *hadith* above, it is clear that the *faraq* is implemented since the period of Rasulullah s.a.w which is supported that when the girl dislikes the marriage, so when she comes to the Rasulullah s.a.w, the messenger declared the marriage is invalid.

Besides that, the other *Hadith* can also be found in *hadith* of *li'an*:

عن مالك، عن نافع، عن عبد الله بن عمر أن رجلا لعان امرأته في زمان رسوا الله

(ص) وانتقل من ولدها، ففرق رسول الله (ص) بينهما، والحق الولد بالمرأة.

In this *hadith*, it is narrated by Malik that the husband had made a mutual imprecation (*li'an*) to his former wife and separating his child from his wife. Then, Rasulullah s.a.w ordered to them to be separated (*faraq*) and the child is given back to his wife.

³⁵ Saifuddin bin Abu Bakar. 1988. *Hulliyatul Ulama' fi Ma'rifatu Mazaahib Fuqaha'*. Oman: Maktabah Al-Risalah Al-Hadithah. Vol. 7. p. 405.

The other *hadith* also stated in Sahih Bukhari which says:

وقال أهل العلم: إذا طلق ثلاثا فقد حرمت عليه فسموه حراما بالطلاق والفراق.

Meaning: *And the Religious learned man said: if somebody divorces (his wife) thrice then she becomes unlawful for him. So it is called "haram" (unlawful) by virtue of divorce and separation.*³⁶

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³⁶ Muhammad Muhsin Khan Dr. 1987. *The Translation of The Meanings of Sahih Al-Bukhari*. New Delhi: Kitab Bhavan. Vol: 7. Fifth Revised Edition. p. 138.

CHAPTER TWO

CHAPTER 2

THE CONCEPT OF *FARAQ* MARRIAGE

Faraq mostly discussed in *fiqh's* book and usually it is related to the effect of invalid marriage. *Faraq* is different from *talaq raj'ie* where *talaq raj'ie* is usually because of misunderstanding in marriage whereas *faraq* was happened because of the pillars of the marriage itself which is invalid.

In the case of *faraq*, only court has the power to determine the validity of a marriage. Therefore, the order of *faraq* only can be made by the court when the validity of the marriage is proven after the investigation has been done. Invalid marriage defines as a marriage which not exists or one or more of the conditions are uncompleted.

The clarification of the legal ruling of marriage is important before *faraq* can be discussed deeply. Generally, the legal ruling of marriage can be categorized into 2 categories that are, valid marriage and invalid marriage. However, there has some of the jurist such as Hanafi jurists which differentiate the marriage between '*bathil*' and '*fasid*'

2.1 The Legal Ruling of Marriage

2.1.1 Valid marriage

Islam looks upon marriage as a social institution and makes it necessary for men as well as women to get married, unless they are physically unfit or have other important reason for not marrying. Besides that, the marriage also as commendations from Allah SWT and for complete these commendations a person wants to marry must fulfill this items it is a:

- 1) A male party
- 2) A female party
- 3) A *wali*
- 4) Two witnesses
- 5) *Ijab* and *qabul*³⁷.

The valid marriage is a marriage which fulfills every pillars and conditions of marriage. The valid marriage gives effect in everything related to spouse such as dowry, wife's maintenance and the lineage of the child. It's also has effect to the prohibition to marry because of the existence of marriage relation (*musoharah*).

If one of these items is not complete so the marriage is invalid. One of these important issues that cause problems among the society it is the authority of *wali* to marry off the bride. The following is an explanation about an authority a *wali* and who's have the right to marry a women even though without a *wali* from *nasab*.

2.1.1.1 Who is a *Wali*?

Wali is a protector, supporter, and friend etc. *Wali* also the representations, mediator, and guardian for women seeking marriage. He is one from items for a valid marriage without him the marriage is invalid.

Besides that, to become a *wali*, he must be a male, sanity, Islam, maturity, not being in ihram or *umra* and lastly must have a good character or '*adl*'.

1. Father
2. Paternal grandfather and above
3. Brother of the same father and mother
4. Brother of the same father

³⁷ Al-Haji Ad.Ajjola. 1999. *The Concept of Family in Islam*. India: Adam Publisher & Distributors. p. 41.

5. Nephew of the same father and mother
6. Nephew of the same father
7. Paternal uncle of the same father and mother
8. Paternal uncle of the same father
9. Son of paternal uncle of the same father and mother and below
10. Son of paternal uncle of the same father
11. Paternal grand-uncle of the same father and mother
12. Paternal grand-uncle of the same father
13. Son of paternal grand-uncle of the same father and mother
14. Son of the paternal grand-uncle of the same father and below
15. Great grand-uncle of the same father and mother
16. Great grand-uncle of the same father
17. son of grand-uncle of the same father and mother and below
18. son of grand-uncle of the same father and below
19. Sultan (*Wali raja*) or ruler.

There are types of *wali* or guardian for marriage who may relay the girl's consent to a marriage. They are:

a) *Wali nasab* (the guardian of paternity or lineage)

Refers to the father, paternal grandfather, father's brother, and the girl's brother and above. They are her close male relatives. It is also a person who has power to compel a girl who is still a virgin to marry. Only two persons qualify to do this and they are the girl's father and her paternal grandfather.

b) *Wali mujbir* (the father or paternal grandfather and above)

It is a *wali* who is able to compel a girl who is still a virgin to marry. Based on *Shafi'e* School only two people have an authority to do this, they are the girl's father, and her paternal grandfather. *Wali mujbir* has a major influence over a woman, he has charge

of. This is because he has power to force a woman into a marriage even without her consent.³⁸

c) *Wali hakim* (the representative other than actual guardian)

It's a Sultan or Ruler of the state who gives his consent where there is no *wali nasab* or for some reason the *wali nasab* is not able to consent. The ruler normally delegates his power to the *qadhi* of the state, and the *qadhi* implements the power. If the consent of the *wali* is not obtained, the marriage is invalid.³⁹

d) *Wali raja* (a representative authorized by Yang di-Pertuan Agong or Ruler)

Refer to the ruler of the state who gives consent where there is no *wali nasab* or for some reason the *wali nasab* is not able to give consent. The Ruler normally delegates his power to the *qadhi* of the state, and the *qadhi* implement the power. If the consent of the *wali* is not obtained, the marriage is not valid.⁴⁰

2.1.2 Invalid Marriage

2.1.2.1 Invalid Marriage (*fasid /bathil* marriage according to Abu Hanifah)

- a) According to Abu Hanifah, Imam Abu Yusuf and Imam Muhammad '*bathil* marriage does not has legal effect similar to valid marriage. Therefore, it is prohibited to the husband to commit sexual intercourse with his wife. In other aspects, the wife does not have the right to get maintenance or dowry and also there is no '*iddah* period for her after separation. Besides that, the wife does not involve in the prohibition of '*musoharah*' (prohibition to marry because of the existence of marriage relation) with any man who has blood relation with the husband. If there is sexual intercourse, the *qadhi* should order them with

³⁸ Zaleha Kamaruddin. 2001. *Islamic Family Law Issue 2000*. Gombak: International Islamic University Malaysia. p. 82.

³⁹ Mimi Kamariah Majid. *Family Law in Malaysia*. Kuala Lumpur: Malayan Law Journal Sdn Bhd. p. 53.

⁴⁰ *ibid.*

faraq coercively. No *'iddah* period for this separation which happened in *bathil* marriage according to Imam Abu hanifah.

b) According to the Maliki Jurists, a marriage should be *faraq* no matter whether it is *bathil* or *fasid* marriage because the Maliki Jurists do not differentiate between *bathil* and *fasid*. The Maliki jurists stated several rules/ *hukm* which arise from *bathil* and *fasid* marriage as followed:

- The *hukm* is *haram* (unlawful) and *faraq* is compulsory at once. The reason is to prevent them from doing sin continuously. In this case, *faraq* before sexual intercourse is differing than *talaq* before sexual intercourse where *faraq* before sexual intercourse is free from dowry.
- It is compulsory to pay dowry if there is sexual intercourse was occurred.
- If the *aqad* is questioned or *fasad*, the child was born after *aqad* still be on father's names. There is no adultery in this case if the husband did not know that the sexual intercourse is prohibited. In the other hand, if he knows about the prohibition, at that time he is doing adultery and will be punish with 'had' punishment. The child was born from that relation will not be on father's names.
- For *fasid's aqad* which is questioned, it is still has legal effect related to inheritance between the spouses. If one of them was passed away before *faraq*, the other parties has a right to inherit the inheritance whether is sexual intercourse or not. However, if the marriage is totally *fasid*, there is no right in inheritance.

- A woman, who has been *faraq* and had done sexual intercourse with her husband, shall finish her 'iddah period before remarry another man. But if she wants to marry her former husband, there is no 'iddah period for her.⁴¹

2.2 The Marriage Procedures

There are variety of ways which the marriage becomes terminated under Islamic law either automatically or on the initiative of the husband, wife or judge. The power of divorce is actually in the hands of the husband and not the wife. However, in case of *faraq* only the judge have the authority to *faraq* the spouses after the investigation has been done. Normally, the investigation is done by enforcement officers in the Religious Enforcement of the state. For example an invalid marriages, marriages without consent of *wali*, syndicate marriage, false information and documents and others.

Furthermore, the couples who want to get marry must understand the procedures of marriage clearly to prevent the dissolution of marriage. There are four main characteristics which have been allocated in the marriage procedures that must followed by everybody who wants to get married. These four conditions must be satisfied and completed as to consider that they have fulfilled the guidelines which have been provided in Islamic Family Law of Pahang.

2.2.1 Application of marriage

As the first step, each couple who is planning to get married, both of them must apply for the permission to marry from the marriage registration unit or 'Qadhi' office nearby. Based on Section 10(1) states that 'the registrar is not permitted to do a marriage except after receiving the application from the man or woman through the 3A form and

⁴¹ n.a. 13 January 2007. "*Faraq Dalam Perkahwinan*" <http://www.Islam.gov.my/portal/pdf/faraq/pdf/>.

3B form.⁴² At least that application which has been suggested to the registrar before the marriage is very important to be carried out, except that marriage is very important to be carried out immediately, because of certain reasons which cannot be avoided and it is possible from the point of view of *qadhi*.

The same case has been stated in Pahang as stated in Section 16(1).⁴³ It is also a condition that the bridegroom who resides in any state, his application must be supported by the authority bodies of that state.

Besides, he must apply for the marriage permission. Several pre-conditions have been launched in the Pahang. The rules are the couple must attend the marriage course organized by Islamic Religious Department or through the registered private marriage intensive classes and have acknowledgement by the Islamic Religion Department.

After attending the marriage course, the couple will be given certificates as proof that they have attended the marriage course. Besides JAIP (Pahang Islamic Religion Department) has introduced a proposal holding interviews to the newly-weds, as an alternative for the marriage course. This process is formal or through certain courses, after everything is satisfied, so the application to marry would be done based on the marriage formality. These steps are not included in the marriage; the couple is told that there is no need for them to follow all the rules because the permission has been given to the person who gives in the marriage.

⁴² Dewan Undangan Negeri Kelantan. 1983. *Islamic Family Law Enactment (Kelantan) (No.1 of 1983)*. Section 10.

⁴³ Dewan Undangan Negeri Pahang. 1987. *Islamic Family Law Enactment (Pahang) (No. 3 of 1952)*. Section 16.

2.2.2 The Permission for Marriage

After each couple has completed the marriage application form, this will be followed with another pre-condition, the couple must ask for the permission to get married to the *qadhi* or the registrar with the related documents.

The application is the main basis to ensure and support the marriage to the *qadhi* or the registrar by enclosing the related documents.

This rule is a main basis to ensure and support the application of marriage. Each couple must get permission at first from the nearest (*akrab*) '*wali*' for the unmarried woman.

Several provisions in section 17 clearly state 'the registrar on being satisfied of the truth of the matters stated in the application, of the legality of the intended marriage and where the man is already married, that the permission required by Section 23 has been granted, shall at any time after the application and upon payment of the prescribed fee, issue to the application his permission to get marry in the prescribed form'.⁴⁴

The same provision is also stated in section 19 of Islamic Family Law Enactment of Pahang:

- “No marriage shall be solemnized unless a permission to marry has been given-
- a) By the Registrar under section 17 or by the Syariah Judge under section 18, where the marriage involves a woman residents in state of Pahang; or
 - b) By the proper authority of a state, where the marriage involves a woman residents in that state.

⁴⁴ *ibid.* Section 17.

2.2.3 Marriage Registration

Section 25 states that the marriage every resident in Pahang and every person living abroad who is a resident in Pahang shall be registered in accordance with this enactment.⁴⁵

In the case of syndicate marriage, the couples are cheated with the false marriage and this kind of marriage could not be registered under the Islamic Family law. The legislation is very important in order to get the marriage certificate which is needed in many matters afterwards. As a result, this marriage is always in confusion except if it has been approved that the marriage through this syndicate is on the right track of *syara'* law.

Whereas, based on the procedures of the Islamic Family Law, after the whole investigation has been done and the court is satisfied that all commandments have been completed, the marriage could be registered to make it authentic under the law and the marriage certificate will be given out.

The syndicate marriage is one of the causes of *faraq* marriage. Section 40 Islamic Family Law Enactment of Pahang states the offences relating to solemnization of marriage. As a result, bad effects of the syndicate marriage could destroy the basis development of the marriage institution. So this action could be considered as an offence in Islamic Family Law. Based on this law, the marriage is illegitimate and could not be registered under this law except if the marriage has is carried out by the following all the rules being allocated in this law.⁴⁶

⁴⁵ *ibid.* Section 25.

⁴⁶ n.a. 1997. "Perkahwinan Sindiket di Malaysia" *Mingguan Malaysia*, 25 Mei. p. 12.

2.2.4 The Authoritative Body to Solemnize Marriage

Each registrar who is endorsed by Islamic Religion Department has an authority to solemnize the marriage of Muslim couple. The rule strictly permits only a '*wali*' or appointed registrar to solemnize the marriage.

In Islamic Family Law Enactment of Pahang states that the authoritative body also has the endorsement letter to solemnize the marriage. This allocation says that:

“A marriage in the Pahang shall be in accordance with the provision of this enactment and shall be solemnized in accordance with '*Hukum Syara*' by-

- a) a *wali* in the presence of the registrar
- b) the representative of the '*wali*' in the presence and with the permission of the registrar
- c) the registrar as the representative of the '*wali*'.⁴⁷

Where a marriage involves a woman who has no '*wali*' from descendants in accordance with '*hukum syara*' the marriage shall be solemnized only by the *wali raja*.

If the marriage has been solemnized by the false marriage giver-in through the syndicate marriage or wrong person as a *wali* or not being endorsed even though the couple has gotten permission, it is still unauthentic because it has conflict the allocated rules, which uses the service from the endorsed marriage giver-in.

This means when the marriage is not authentic so the marriage could not be registered under the enactment which would cause a marriage certificate not is given out to the involved couple. Besides that, for the invalid marriage, the judge will order to *faraq* to the spouses.

⁴⁷ Dewan Undangan Negeri Pahang, 1987. *Islamic Family Law Enactment (Pahang) (No. 3 of 1952)*. Section 7.