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THE POSITION AND RIGHTS OF WOMEN ACCORDING TO
ISLAMIC FAMILY LAW IN TERENGGANU

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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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Praise be to Allah, blessing and peace be upon the Prophet, Muhammad SAW, his family and companions.

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ABSTRAK

Projek ilmiah ini membincangkan tentang kedudukan dan hak-hak wanita mengikut Undang-undang Keluarga Islam Terengganu. Di dalam kajian ini, penulis membahagikan kepada dua bahagian, dimana bahagian pertama tentang kedudukan dan hak-hak wanita di dalam perkahwinan dan perceraian mengikut hukum syara'. Sementara itu, bahagian kedua memperkatakan tentang wanita di bawah Undang-undang Keluarga Islam Terengganu dari beberapa aspek iaitu pertunangan, perkahwinan, perceraian dan hak penjagaan anak. Ianya bertujuan untuk memberi penerangan dan pemahaman kepada wanita untuk menuntut hak –hak mereka semasa perkahwinan berlangsung dan selepas perceraian. Penulis telah menggunakan teknik kajian perpustakaan dengan mengumpulkan maklumat daripada buku-buku, jurnal, seminar dan sebagainya. Hasilnya, kajian ini telah menunjukkan bahawa Undang-undang Keluarga Islam Terengganu menyediakan hak-hak dan kedudukan wanita.

ABSTRACT

This academic project discusses about the position and rights of women according to the Islamic Family Law in Terengganu. This research is divided into two parts, whereby the first part is about the position and rights of women into marriage and divorce under hukum syara'. Meanwhile, the second part discusses about the women under Islamic Family Law in Terengganu from certain aspect likes betrothal, marriage, divorce and custody. The purposes are to give explanation and understanding to the women to claim their rights in marriage that was solemnized or after divorce. The researcher gathers information by using library research for example by gathering information from books, journals, seminars and others. As a result, this research shows that the Islamic Family Law of Terengganu had provided the rights and position of women.

ملخص البحث

إن هذا البحث يناقش متزلة المرأة وحقوقها في نظر قانون الأحوال الشخصية بترنجانو. وأما الكتابة ينقسم بحثها إلى قسمين. والأول يتحدث عن مكانة المرأة وحقوقها في الزواج والطلاق عند الأحكام الشرعية. وأما الثاني يبحث المرأة في نظر قانون الأحوال الشخصية بترنجانو من حيث الإتجاهات مثل الخطبة والزواج والطلاق والحضانة. وإضافة إلى ذلك، يهدف البحث بمعرفة ومفهوم لمرأة اليوم لحفظ على حقوقها في الزواج وبعد الطلاق. والمنهاج المتبع في هذا البحث دراسة مكتبية تقوم على جمع المعلومات من مصدرها من الكتب والدوريات أو الصحف والاوراق البحثية وغيرها. وحاصلا هذا البحث، إن قانون الأحوال الشخصية بترنجانو قد أقام بحقوق المرأة ومكانتها.

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- 1) Forms

ABBREVIATION

Dr.	-Doctor
e.g.	-Example
Ibid.	- Same references
MLJ	-Journal
n.a.	- No author
n.d	-No Date
n.pb.	- No publisher
No	- Number
p.b.u.h	-Peace be upon him
Pg	-Page
Prof.	-Professor
SAW	- Sallallahu alaihu wasallam
SWT	-Subhanahu wata 'ala
Vol	-Volume

*Introduction of
research*

Introduction of research

INTRODUCTION OF RESEARCH

The coming of Islam to the world has improved the position of women. During the Jahiliyyah period, the man used to abuse the woman. It is proven by the quranic verses, that in Islam there is absolutely no difference between men and women because Allah SWT has promised to give the same rewards to both of men and women if they do good deeds and the equal punishment if they commit sins. The Qur'an says:

وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ

And women shall have rights similar to the rights against them, according to what is equitable.¹

Because of that, the position and rights of women have been discussed in detail in Islam. In fact, it is enforced via enacting the Islamic Family Law in each state and for example the Islamic Family Law Enactment in Terengganu. The Islamic Family Law states that man and woman have equal rights under the law. This does not mean that it is a threat to man because every human being has the respective rights and responsibilities for himself and her own family.

¹Interpretation Of The Meaning Of The Glorious Quran, AL-baqara, 2:228, pg 41

1.1) Aims Of Research

- To expose the positive thinking on the condition of women following the solemnization of marriage and after dissolution of marriage.
- To increase the knowledge, consciousness and give the detailed clarification according to the provision of Islamic family law and protect their lives as a former husband or wife.
- As a reference for any party which is involved either directly or indirectly in pursuing justice for them.

1.2) Research Objective

- To explain the position of Muslim women in relation to marriage and divorce according to *hukum syara'*
- To analyze the position and rights of women in respect of preparation and implementation of Islamic family law
- To discuss about the comparison between the rights and position of women based on the provision under the Islamic Family Law and under *hukum syara'*.
- To show the challenges that are faced by women in the implementation of Islamic family law
- To enlighten the society that Islam recognizes tolerance for the women in a special place

1.3) Research Methodology

Research methodology is a method used by the researcher in getting the true information to complete this academic project. There are several types of methods used in this research such as library research, interviews, survey and other methods. To undertake this problem, the researcher used library research to gather all the information about this topic. The information collected includes books, journal, magazines, newspapers and others. Besides that, it is also the way to get the opinion of the jurists and provision of law from the *fiqh* books.

Introduction

BACKGROUND OF SYARIAH COURT AND ISLAMIC FAMILY LAW

1.1) Introduction

In the case of Terengganu under the administration of Sultan Sulaiman Badrul Alam Shah (1920-1942), the structure of the organization and the jurisdiction of Jabatan Agama Islam Terengganu had been modified as well as the implementation of law at that time was changed to accommodate English law except in matters concerning Muslim family law.

The colonization was enforced in 'Tanah Melayu' during the end of the Second World War. The effect of this colonization is reflected in the structure of Islamic administration, where it was changed to Majlis Agama Islam and Malays custom. Besides that, the colonization also caused the law to become limited in term of jurisdiction for the implementation at Qadi Court.

The implementation of English law had progressed at the Civil Court, where its jurisdiction covered Muslims and non-Muslims. The jurisdiction of the civil court prevailed over the jurisdiction of the Qadi Court. When there was a conflict between Islamic family law and English law although it involved Muslim matters, the English law would prevail.

Later, the written constitution was formed and became the basis for the administration of Malaya. The federal constitution was enforced from 1st February 1948. This became the foundation for the present Federal constitution. Any law that is opposed to the federal constitution after Independent Day is automatically invalid.

Historically in Terengganu, Undang-undang Pentadbiran Hukum Syara' 1955 (*Undang-undang Bil.4 tahun 1955*) was passed to regulate the administration, organization and law for Majlis Agama Islam and Adat Melayu Terengganu, Jabatan Hal Ehwal Agama Terengganu and Syariah Appeal Court, Mahkamah Qadi Besar and Qadi Court. The implementation of this law enforced until 30 July 1987. Starting from 1st August 1987, that law was replaced with the enactment of Pentadbiran Hal Ehwal Agama Islam 1986 and enactment Undang-undang Pentadbiran Keluarga Islam 1985.

1.2) The Jurisdiction Of Syariah Court

The Terengganu Syariah Court was established by the decision of 'Jawatankuasa Kemajuan Hal Ehwal Agama Islam' meeting proceeding on 4 October 1986¹. The decision from that meeting was given to the Yang Amat Berhormat Chief Minister and it was implemented in the state of Terengganu. The implementation of the organizational structure and the position of employment in court were based on the decision of that meeting.

The Syariah court of Terengganu is divided into three levels:

- 1) Syariah Appeal Court
- 2) Syariah High Court
- 3) Syariah Subordinate Court

A Syarie Judge leads the Syariah Appeal Court, Syariah High Court and Syariah Subordinate Court. Generally, these three types of courts have two parts that is the administrative division and the court division. A registrar or his assistant will conduct the administration of court.

¹ Dato' Ismail Yahya, 1999 Mahkamah Negeri Terengganu, *Jurnal Hukum* Terbitan Jabatan Kemajuan Islam Malaysia, Jld 13 Bhg 2, (ISSN 0127-1544).

a) The Syariah Subordinate Court²

The Syariah Subordinate Court has two types of jurisdiction namely criminal and mal. Under criminal jurisdiction its purpose is to deal with any offences committed by Muslims and can be punished under the enactment 'Pentadbiran Hal Ehwal Agama Islam' and Islamic family law administration except the offences that are exempted from both enactments.

Under mal jurisdiction, its function is to hear and to decide cases and proceedings over Muslims. Furthermore, this court also hears cases related to *munakahat* or the things related to marriage except to decide the validity of the marriage, divorce, *ruju*³ and dissolution of marriage. The claims of matrimonial property are also heard in this court.

b) Syariah High Court⁴

The jurisdiction of the High Court covers the whole state of Terengganu and is led by Chief Qadi or Deputy of Chief Qadi. This jurisdiction is divided into three that is criminal, mal and appeal.

Under the criminal jurisdiction, the high court is given the jurisdiction to deal with all types of criminal cases on Muslims under the administration enactment and under the Islamic Family Law Enactment 1985. The Syariah High Court also has the jurisdiction to punish any types of offences based on the enactment above.

² Dato' Ismail Yahya, 1999 Mahkamah Negeri Terengganu, *Jurnal Hukum* Terbitan Jabatan Kemajuan Islam Malaysia, Jld 13 Bhg 2, (ISSN 0127-1544).

³ *Ruju* means a return to the original marriage.

⁴ Dato' Ismail Yahya, 1999 Mahkamah Negeri Terengganu, *Jurnal Hukum* Terbitan Jabatan Kemajuan Islam Malaysia, Jld 13 Bhg 2, (ISSN 0127-1544).

In the mal jurisdiction, the Syariah High Court of Terengganu is given the authority to list and decide on the proceedings and make decisions related to Muslims and other things such as:

- a) *Munakahat* or any thing that is related to marriage and distribution of property or any property claim.
- b) Maintenance of a person who is still in his care, the validity based on *hukum syara'*, and child custody.
- c) Matrimonial property's division and claims.
- d) The right of a person in the position of property inheritance based on *hukum syara'*⁵
- e) Written direction made by a person for the disposal of his property before he dies.
- f) *Wakaf* and *nazar*
- g) For the other things, any written law can give the jurisdiction.

The Syariah High Court also has the jurisdiction to hear and to decide all types of appeals from the decisions by any Syariah Subordinate Court in the state of Terengganu based on criminal and mal cases.

c) The Syariah Appeal Court⁶

The Syariah Appeal Court has the responsibility to manage the proceedings of appeal cases from the Syariah High Court. In the jurisdiction of criminal mal cases, an accused person or a claimant who is not satisfied with the decision by the subordinate court may bring this case to the Syariah Appeal Court.

⁵ Hukum syara' means Islamic Law according to any recognized mazhab.

⁶ *ibid*

The Syariah High Court also has the jurisdiction to hear and to decide all types of appeals from the decisions by any Syariah Subordinate Court in the state of Terengganu based on criminal and mal cases.

1.3) The Enactment Of Pentadbiran Hal Ehwal Agama Islam Terengganu 2001⁷

Every state in Malaysia administers the family laws according to the enactment or ordinance of the Islamic administration. In Terengganu, it's known as the enactment of 'Pentadbiran Hal Ehwal Agama Islam 2001 (second edition)'. It contains the following list, namely:

- I. Preliminary.
- II. Islamic Religious Council and Malay customs and appointment of officers.
- III. The appointment of mufti, the authority in 'Hal Ehwal Agama' and 'fatwa' committee.
- IV. Prosecutors and representatives.
- V. 'Kumpulan Wang Majlis' and 'Tatacara Kewangan Majlis'
- VI. Mosque.
- VII. 'Khairat' collection.
- VIII. Embracement of Islam.
- IX. Islamic education.
- X. General

In general, the Islamic Religious Council actually has authority to make decisions relating to the administrative matters of this enactment. This council also has the function to make the final decision about 'fatwa' that is not allowed by the fatwa committee that is responsible to make it. Besides that, it has the power to establish any corporation. Therefore, the council is established as the 'Jabatan Hal Ehwal Agama Islam' and it possesses the executive duty.

⁷ Jabatan Agama Islam Terengganu, 2001, Enakmen Pentadbiran Hal Ehwal Agama Islam (Terengganu) Bil.2

This council will administer matters like mosque, school, and religion and to register any person that embraces Islam. The jurisdiction and powers of the syariah court are provided in this enactment. Besides that, this enactment also determines the jurisdiction of syariah court as stated in this following list:

- a) Betrothal, marriage, dissolution of marriage and divorce by court order.
- b) Distribution and claim of property.
- c) Maintenance for entitled person and custody of children
- d) Division on matrimonial property, *wakaf* and *nazar*

In practice, the syariah court only discusses and deals with matters that are related to marriage, dissolution of marriage, maintenance of wife and child and matrimonial property. In other words, the syariah court has power dealing with Islamic family law.

1.4) The Islamic Family Law In Terengganu 1985⁸

This enactment was established to explain, to renew and to codify the Islamic family law. The purpose is to make the enactment of law relating to marriage, divorce, maintenance, custody and others in the state of Terengganu more effective.

This law contains provision related to the rights of women as follows:

- a) The rights of women in *mahr*⁹ or maintenance¹⁰
- b) The rights of women in divorce
- c) The rights of women in custody¹¹
- d) The rights of women in matrimonial property

⁸ Jabatan Agama Islam Terengganu, 1986, Undang-Undang Pentadbiran Keluarga Islam 1985, Bil 3

⁹ section 19, Jabatan Agama Islam Terengganu, 1986, Undang-Undang Pentadbiran Keluarga Islam 1985, Bil 3

¹⁰ section 58, *ibid*

¹¹ section 80, *ibid*

The question here is whether the rights provided under this enactment is opposed to Islam? Generally, the Islamic Family Law in Terengganu 1985 is not in conflict with the Islamic family law because the law follows closely the Islamic law. The only difference of the Islamic family law of Terengganu it also contains some aspects of legal administration.

The Islamic family law of Terengganu is established in line with the situation nowadays where the people know where they should go and how to solve the problem based on '*ahwal al-syaksiah*'. In the past women did not know about their rights and how they should handle their rights. So with this law, the women will know about their rights.

Many women do not know about their rights, which are stated in Islamic law for them. So, the parties that have the responsibilities must play an important role to give awareness to them such as to give talks and seminars about family affairs, debates and dialogues between them. Besides that, the media also presents the programs that are related with women's problem nowadays. It is because they can get more information about the rights of women in Islam.

Chapter one

THE POSITION AND RIGHTS OF WOMEN ACCORDING HUKUM SYARA'

1.1) Introduction

Before the coming of Islam, the position and rights of women had the lowest place. Therefore, Allah revealed the Holy Qur'an to his messenger Muhammad saw as the guidance to all human beings to change the position of women in the society especially in marital relationship.

After the coming of Islam, the position of women has been upgraded. In other words, Islam has a special place for women and they should be grateful. In fact, Islam had commanded the relationship between husband and wife through their marriage and provided the rules and guidance to make their lives happy.

So, this study will discuss about the position and rights of women in marriage and after divorce. Marriage is one of the relationships between men and women that are allowed by Islam. Because of that, Islam has provided the procedure of marriage to show the right path for the couple. The marriage will be happy and blissful if they followed the guides and rules with sincerity.

The cause of a marital crisis is the failure in the implementation of the responsibilities. They are lack of knowledge about the rights and position of a husband to a wife or a wife to a husband. So, all of the rules that had been mentioned clearly according *Hukum Syara'*¹² are designed to protect marital relationship.

¹² Means Islamic Law according to any recognized mazhab.

Islam also abolishes the bad perception about women that they are regarded as an instrument of games to play with. Subsequently, Islam provides an honorable place to the women and they have equal rights with men. Allah proved this in the Holy Qur'an.

وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ يَأْمُرُونَ بِالْمَعْرُوفِ
وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَيُقِيمُونَ الصَّلَاةَ وَيُؤْتُونَ الزَّكَاةَ وَيُطِيعُونَ اللَّهَ
وَرَسُولَهُ أُولَئِكَ سَيَرْحَمُهُمُ اللَّهُ إِنَّ اللَّهَ عَزِيزٌ حَكِيمٌ ﴿٧١﴾ وَعَدَّ اللَّهُ
الْمُؤْمِنِينَ وَالْمُؤْمِنَاتِ جَنَّاتٍ تَجْرِي مِنْ تَحْتِهَا الْأَنْهَارُ خَالِدِينَ فِيهَا
وَمَسْكِنٍ طَيِّبَةٍ فِي جَنَّاتٍ عَدْنٍ وَرِضْوَانٍ مِّنَ اللَّهِ أَكْبَرَ ذَلِكَ هُوَ الْفَوْزُ
الْعَظِيمُ ﴿٧٢﴾

The believers, men and women, are protectors, one of another. They enjoin what is just, and prevent what is evil. They perform regular prayers, practice regular charity and obey Allah and His Prophet (Muhammad). On them Allah will spread His Mercy because Allah is Supreme in power, Wise (71) Allah has promised to believers, men and women, gardens under which rivers flow, to live in there and beautiful (and large) homes in gardens of eternal joy...(72)¹³

¹³ Interpretation Of The Meaning Of The Glorious Quran, Al-Taubah 9:71-72, Pg 231

1.2) Marriage

1.2.1) The Position Of Women In Marriage

When a woman is solemnized as a wife, she has a new status. She has the responsibility and it is compulsory for her to fulfill her husband's needs. Besides that, her allegiance is also moved from her parents to her husband in certain things that are determined under *hukum syara'*

Islam gives a special position to a woman in the marriage. Furthermore in looking for a marriage couple, her rights will be given more attention compared to the rights of men. It is because the woman will give all her allegiance to her marriage.

In ensuring persistence of marriage, they need consent from the bride first. It is the right of a woman to say whether she agrees or not. Meanwhile, a widow must say her consent clearly and it is enough for a virgin to show her consent for the marriage quietly.

We can say a marriage as a ready willingness for the husband and wife.¹⁴ In the Holy Qur'an it is stated that the position of women as a loving partner.

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ
بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ ﴿٢١﴾

¹⁴ Al-Imam Muhammad Abu Zahrah, *Muhadharat Fi Aqdu Al-Zawaj Wa Atharuhu*, Dar Fikr A'rabi, Pg 42

And from His signs is this, that He created (yours) mates for you from yourselves, that you may live in joy (and peace) with them, and He has placed love and mercy between your (hearts). Surely, there are signs in this for those who think.¹⁵

1.2.2) The Rights Of Women In Betrothal

Betrothal is one relation that is organized by Islam. Allah stated in the surah al-baqarah.

وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا عَرَّضْتُمْ بِهِ مِنْ خِطْبَةِ النِّسَاءِ أَوْ أَكْنَنْتُمْ فِي
 أَنْفُسِكُمْ عَلِيمَ اللَّهِ أَنْكُمْ سَتَذَكُرُونَهُنَّ وَلَكِنَّ لَا تُوعِدُوهُنَّ سِرًّا إِلَّا أَنْ
 تَقُولُوا قَوْلًا مَعْرُوفًا

There is no blame on you if you make an offer of marriage or hold it in your hearts. Allah knows that you admire them in your hearts. But do make a secret contract with them except in honorable terms...¹⁶

The woman is entitled to look at the person who wants to marry her. This step is very practical to protect the justice and also as an initial relation to the married couple. In another view, the married couple needs to recognize each other.¹⁷ However, the introduction of both must be based on the situation that is allowed under *hukum syara'*

¹⁵ Interpretation Of The Meaning Of The Glorious Quran, Ar-Rum 30:21, pg 500

¹⁶ Interpretation Of The Meaning Of The Glorious Quran, Al-Baqara 2:235, pg 43

¹⁷ Dr. Usman Al-Takruri, 1998, *Syarah Qanun Al Ahwal Al-Syakhsiyah*, Maktabah Dar Al-Thaqafah Lil-Nasyari Wa Tauzi', Jld 1, Pg 20

Ulama fiqh states different opinions about the position of the breach of promise to get married which in this case, the male party had given a betrothal gift to the female party other than the *mas kahwin*¹⁸. The Hanafis¹⁹ School had determined that the betrothal gifts as a *hibah*. If a breach of contract happens, the gift is only returned back if there aren't any obstacles to give them back. If there are obstacles like loss or damage, it does not need to be returned back.

The Hambalis²⁰ School stated that the betrothal gift doesn't need to be returned because it is a gift. If the gift is given and as an ownership property, so the gift is not returned whether the breach of contract is made by the male party or female party.

The Shafi'ie²¹ School stated that it is necessary for the party, which breaches the contract to return the presents or gifts without knowing the truth why the breach of contract happens. If that gift is damaged or lost, the involved party must give compensation for that gift or give adequate value as other alternative for the damages.

The Malikis²² School stated that if it is the male party who has breached the contract for betrothal, hence, the gift given does not need to be returned. If it is the female party, they need to return the gift given by the male party.²³

Therefore, the opinion from the Malikis School accurately elaborates about the betrothal. It is because to protect the truth in breach of contract. On the other hand, the woman is entitled to keep the betrothal gift.

¹⁸ Ibid, page 27

¹⁹ Means the disciples and followers of Imam Abu Hanifah An-Nu'man.

²⁰ Means the disciples and followers of Imam Ahmad Bin Hanbal As-Syaibani.

²¹ Means the disciples and followers of Imam Muhammad Ibn Idris Ash-Shafi'ie.

²² Means the disciples and followers of Imam Malik Ibn Anas.

²³ ibid, page 27

1.2.3) The Rights Of Women In Mahr Or Mas Kahwin

The obligation of *mas kahwin* is stated in the Holy Quran by Allah.

وَأَتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِّنْهُ نَفْسًا فَكُلُوهُ

هَنِيئًا مَّرِيئًا ﴿٤﴾

*And give the women (in marriage) their dowry as a free gift but if they with their own good pleasure give back ant part of it to you, take it and enjoy it with right good cheer.*²⁴

Even though, *mas kahwin* is not a commandment in a marriage but under *hukum syara*, *mas kahwin* has a special role and it is obligatory when the marriage is solemnized. Islam makes it compulsory for the *mas kahwin* to be paid by a husband based on this following list:²⁵

- a) *Mas kahwin* as an evidence that marriage is an important thing because human beings play a special role in the eyes of Allah
- b) *Mas kahwin* is as a way to show respect for the wife and to put women in the highest position.
- c) *Mas kahwin* as a binding of voluntary marriage.

²⁴ Interpretation Of The Meaning Of The Glorious Quran, An-Nisa', 4:4, Pg 89

²⁵ Dr. Usman Al-Takruri, 1998, *Syarah Qanun Al Ahwal Al-Syakhsiyah*, Maktabah Dar Al-Thaqafah Lil-Nasyari Wa Tauzi', Jld 1, Pg 110

According to *fiqh*²⁶ sources, Syafie and Ahmad bin Hanbali stated that there is no maximum amount for the *mas kahwin*.²⁷ In other words, it is not obligatory to claim it in the form of money or cash. It may be in the form of a fruit plantation, a piece of land, a house, jewelery and other properties. If the *mahr* takes a form other than cash, the female party must agree upon it and without her agreement the property would only be a mere gift and not *mahr*.

By the way, the rights of a divorced wife is to accept half of the *mas kahwin* when one of each from this following list happens:

- a) When a former wife is divorced before consummation will get half of the amount of *mas kahwin* as a gift because *akad nikah* had mentioned that the husband wants to give *mas kahwin* to his wife.
- b) When a former wife is divorced before consummation by husband and the source of divorce is by the male party like divorce by *li'an*.

1.3) Divorce

1.3.1) Introduction

Divorce is a dissolution of the marriage union. The prophet has often been quoted to say, "Of all things which have been permitted, divorced is the most hated by Allah". Divorce is undoubtedly bitter but it is the last resort.

This section discusses about the position of women after divorce, types of divorce and their rights after divorce that is provided under *hukum syara'*. If the

²⁶ Means Islamic jurisprudence

²⁷ *ibid*, page 112

relationship of marriage is not proceeded because of the existence of marital crisis, Islam still protects and give guidelines on how to take action to solve the problem. So that, the rights of women are still protected although the close relationship had broken up.

The wife is entitled to get her maintenance in her marriage solemnized, so that the rights are still enforceable and will not be lost after the dissolution of marriage. She has an opportunity to return to his former husband through *iddah*²⁸ and *riju'*. So, her rights will proceed in that time. Instead if her divorce is in the form that cannot receive good remedy, half of their rights will stop immediately. This shows that divorce is permissible when the marital life between the spouses becomes impossible to continue and there is no chance for reconciliation.

1.3.2) The Position Of Women After Divorce

The Power of *talaq* is in the husband's hand. The wife has no rights in *talaq*. However, the wife can also get the rights of pronouncement of *talaq* to herself if the husband gives permission in defining the *talaq*. It doesn't mean that *talaq* is in the women's hand but the husband voluntarily gives his power to his wife to determine what kinds of divorce she wants either one, two or three *talaq*.

The dissolution of marriage means a close relationship between a husband and wife is over immediately or with delay. Therefore, both of them are common friends. In the case of *talaq raj'I*²⁹, the wife is still responsible to her husband because it is decided under *hukum syara'*. Besides that, the woman cannot accept any proposals from other parties.

²⁸ Means a waiting period, a period of abstinence, or a specified, which the wife shall remain unmarried after the dissolution of marriage by divorce, death or any other form of separation under certain condition.

²⁹ Means in revocable divorce, the husband can take his wife back.

Meanwhile, a divorced wife with *talaq ba'in*³⁰ or with presumption of death by husband is still binding with the period of *iddah* and that *iddah* is as a barrier to marry another person. By the way, she has to accept a proposal in figure of speech and not indirectly by other means.

وَلَا تَعْرَمُوا عُقْدَةَ النِّكَاحِ حَتَّىٰ يَبْلُغَ الْكِتَابُ
 أَجَلَهُ ۗ وَاعْلَمُوا أَنَّ اللَّهَ يَعْلَمُ مَا فِيٓ أَنْفُسِكُمْ فَاحْذَرُوهُ ۗ وَاعْلَمُوا أَنَّ اللَّهَ
 عَفُورٌ حَلِيمٌ ﴿٢٣٥﴾

*And do not decide on the tie of marriage till the term prescribed is fulfilled. And know that Allah knows what is in your hearts and become aware of him. And know that Allah is often forgiving most forbearing.*³¹

1.3.3) The Types Of Divorce

There are some types of divorce that are available to Muslims. They are as follows:

- *Talaq*
- *Khulu*³²
- *Ta'liq*³³
- *Fasakh*³⁴

³⁰ Means in irrevocable divorce, the husband cannot take his wife back.

³¹ Interpretation Of The Meaning Of The Glorious Quran, Al-Baqara 2:235, pg 43

³² Means it is that a woman gives a husband some amount of money to let him release or divorce her.

³³ Means a promise expressed by the husband after solemnized of marriage in accordance with hukum syara'.

³⁴ Means the annulment of a marriage by reason of any circumstance permitted by Islamic Law.

1.3.3.1) Talaq

Under *hukum syara'*, *talaq* means permission to leave the dissolution of marriage with a word or pronouncement either immediately or with delay of the *talaq* pronouncement.³⁵ In case of pronouncement immediately, it refers to *talaq bain* because both spouses are not allowed to *ruju'*. Meanwhile, a delayed divorce refers to *talaq raji'* whereby the husband and wife can resume their relationship or *ruju'* but must be in the period of *iddah*. The marriage will continue without a new *akad* or *mas kahwin*.³⁶

We mentioned before this, that pronunciation of *talaq* is in the husband's hand. If the husband pronounces the *talaq* clearly without any cause for inhabitations, the divorce will be valid although it is without intention.³⁷ If he pronounces under insinuation, there is a need to refer on his intention to determine whether he wants the divorce or not.³⁸

Divorce will also happen and will be valid if the husband pronounces although he says it as a joke or is drunk at that time.

³⁵ Qadi Muhammad A-Syammai', 1995, *Al-Mufid Min Al-Abhas Fi Ahkam Al-Zawaj Wa Al-Talaq Wa Al-Mirath*, Dar Al-Qalam, Damsyik Wa Dar Al-Syamiah Beirut, Pg 122

³⁶ Ibid, Page 131

³⁷ Dr. Usman Al-Takruri, 1998, *Syarah Qanun Al Ahwal Al-Syakhsiyah*, Maktabah Dar Al-Thaqafah Lil-Nasyari Wa Tauzi', Jld 1, Pg 183

³⁸ Ibid, Page 184

1.3.3.2) Khulu'

According to *hukum syara*³⁹, *khulu'* or divorce by redemption is where a wife requests for a divorce from her husband by offering him gifts. We can also say that *khulu'* is a type of divorce *talaq* whereby *khulu* is divorce that has compensation.

On one occasion, *khulu'* depends on the husband but that divorce is not valid if the husband does not receive any payment or compensation by his wife. However, the compensation is not obligatory to be paid at the time of pronouncement of *talaq* by the husband or wife.

A *khulu'* divorce is affected by means of appropriate words spoken or written by the two parties in their respective agents by which the wife offers and the husband accepts compensation out of her property for release of marital rights. The divorce is completed by the pronouncement of *talaq*. It is revocable.

1.3.3.3) Ta'liq

The basis of these types of divorce is the stipulation agreement upon by the husband, that the wife would be entitled to a divorce under certain circumstances.⁴⁰

Ta'liq divorce is very important to ensure the spouses do not neglect from performing their responsibilities in the family. Besides that, it is also to prevent the wife from husband's maltreatment and to prevent the husband's leaving their wives and children without any maintenance.

³⁹ *ibid*

⁴⁰ *ibid*

1.3.3.4) Fasakh

The husband has full power to give *talaq* to the wife. However Islam also gives the power to the married woman to dissolve the marriage through divorce by *fasakh*. It literally means to annul or to abolish a bargain. In the context of marriage, it means the annulment or abrogation of the marriage contract by court after the application of the wife. The basis for the *fasakh* has been deduced from the Holy Quran where it states to the effect.

الطَّلَاقُ مَرَّتَانٍ فَاِمْسَاكِ بِمَعْرُوفٍ اَوْ تَسْرِيحٍ بِاِحْسَنٍ وَلَا يَجِلُّ لَكُمْ اَنْ
تَاخُذُوا مِمَّا ءَاتَيْتُمُوهُنَّ شَيْئًا اِلَّا اَنْ يَخَافَا اَلَّا يُقِيْمَا حُدُوْدَ اللّٰهِ فَاِنْ خِفْتُمْ
اَلَّا يُقِيْمَا حُدُوْدَ اللّٰهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهٖ تِلْكَ حُدُوْدُ اللّٰهِ
فَلَا تَعْتَدُوْهَا وَمَنْ يَتَعَدَّ حُدُوْدَ اللّٰهِ فَاُولٰٓئِكَ هُمُ الظَّالِمُوْنَ ﴿٢٢٩﴾

A divorce is only permitted two times. After that the parties should either stay together on just terms or separate with kindness. It is not lawful for you (men) to take back any of your gifts (from your wives). Except when both parties fear that would be unable to keep the limits set forth by Allah. If you (judges) do fear that they would be unable to keep the limits set forth by Allah, there is no blame on either of them If she gives something for her freedom. These are limits set by Allah.....⁴¹

According to the Malikis, Syafie and Hanbalis School, as against the Hanafis school view (which gives the rights only to the wife) each of the married couple is entitled to get the marriage contract dissolved due to disease and physical defects.⁴²

⁴¹ Interpretation Of The Meaning Of The Glorious Quran, Ab-Baqara 2:229, Pg 41

⁴² Qadi Muhammad A-Syammai', 1995, *Al-Mufid Min Al-Abhas Fi Ahkam Al-Zawaj Wa Al-Talaq Wa Al-Mirath.*, Dar Al-Qalam, Damsyik Wa Dar Al-Syamiah Beirut,

Imam Malik gives the rights of separation to each of the marriage couple because of four defects like leprosy, madness, leukemia and impotency.⁴³ The wife has the rights if demanding separation on the ground of the husband's amputated male organ or of his being impotent and the husband has the right of annulling the marriage contract on the grounds of his wife having vaginal growths impeding intercourse.

Besides that, the wife is entitled to claim dissolution of her marriage by *fasakh* if the husband is unable to provide for her maintenance. Subsequently, the wife is also entitled to ask the court to decree a divorce if she fears that the husband will injure her. Thus, she thinks that she is unable to spend her life together as a husband and wife again.

Chapter two

Then, the *fasakh* is also authorized when the husband has deserted the wife or has been imprisoned. The reason for giving the right to the wife is to save her from injury and hardship.

⁴³ *ibid*

Chapter two

THE POSITION AND RIGHTS OF WOMEN ACCORDING TO ISLAMIC FAMILY LAW (BETROTHAL AND MARRIAGE)

2.1) Introduction

Islam is the greatest religion by Allah S.W.T, the belief in the existence of God and belief that God created the universe and gave human beings a spiritual nature that continues to exist after the death of the body and also shows others the way to bliss. Otherwise, Islam is a total and perfect way of life revealed by the creator (Allah) of the universe, this planet and the mankind. Because it is the total submission of humans to Allah's command, that lead to real health, peace and enjoyment of life. It has to fulfill requirement and is capable to solve entire problems that are faced at these times. The rules and laws are extremely good, excellent, just and suitable for each other reason, time and place.

In the eyes of Islam, mankind has the mutual relationship to each other and they were created by Allah with complete of existence either they are man or women, husband or wife. In the Holy Quran, Allah S.W.T says:

لَقَدْ خَلَقْنَا الْإِنْسَانَ فِي أَحْسَنِ تَقْوِيمٍ ﴿٤﴾ ثُمَّ رَدَدْنَاهُ أَسْفَلَ سَافِلِينَ ﴿٥﴾ إِلَّا الَّذِينَ ءَامَنُوا وَعَمِلُوا الصَّالِحَاتِ فَلَهُمْ أَجْرٌ غَيْرُ مَمْنُونٍ ﴿٦﴾

We have truly created man in the best forms (4) then we bring him down (to be) the lowest of the low (5) except those who believe and d righteous deeds for they shall have an unfailing reward (6)⁴⁴

⁴⁴ Interpretation Of The Meaning Of The Glorious Quran, At-Tin 95:4-6,pg 821

يَتَأْتِيهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ
 لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتَقْوَاهُ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ ﴿١٣﴾

O Mankind! We created you from a single (pair) of male and female, and made you into nations and tribes that you may know each other (not that you may hate each other). Surely, the most honored of you, in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things)⁴⁵

In other words, Islam needs equal principles based on *syarie*. Nobody or no relevant people have the authority under Allah's rules because of the privileges and their high status. Allah has ordered to other persons whereby men or women, of different race, language or heritage to cooperate with each other towards a kind, helpful and generous not to be corrupt and malicious or defend on *makruf* and prevent from bad faith.

To understand the status, rights and responsibilities of women in Islam, we must look from all views from each aspect based on Islam's views. As we know, in Islam the status of women is put in the highest position in all aspects and certain laws protect their rights. The women as a part of society, the relationships of women and men are based on humanity in this world.

⁴⁵Interpretation Of The Meaning Of The Glorious Quran,, Al-Hujurat 49:13 pg 655

2.2) Betrothal

A betrothal or proposal organized by Islam as an initial step in the process of marriage. The betrothal can be made by men or his representatives or by women or her representatives. The betrothal only happens to any woman who can marry without any obstacles under *hukum syara'* like the betrothal will not replace another.⁴⁶

We have also a number of Hadith (saying by Prophet) dealing with betrothal:

- a) Ibn Umar reported that Allah's Messenger (peace be upon him) said: A person shall not enter into a transaction when his brother had already entered into but not finalized and he should not make a proposal already made by his brother, until he permits it or until he gives it up.⁴⁷
- b) Uthman bin Afffan reported that Allah's Messenger (peace be upon him) said: A Muslim shall neither marry himself nor arrange the marriage of another nor shall be make a proposal of marriage.
- c) Abu Hurairah reported: I was in the company of Allah's Messenger (peace be upon him) when there came a man and informed him that he had contracted to marry a woman of the Ansar. There upon Allah's Messenger (peace be upon him) said: did you cast a glance at her? He said 'no'. He said: 'Go and cast a glance at her.'⁴⁸

The betrothal usually takes place in accordance with the custom followed by the society. It may be regarded as a preliminary step towards marriage and is encouraged so that the parties may be acquainted with one another before the marriage and then marriage takes place after the parties have seen and assessed one another. The

⁴⁶ Abdul Ghani Azmi Hj. Idris (1996), *Perkahwinan dan Kekeluargaan Islam*, Dine Publisher, page 85

⁴⁷ cited from: *Undang-Undang Keluarga Islam di Malaysia (version malay)*, 1999, Malayan Law Journal sdn. Bhd, page 18

⁴⁸ *ibid*, pg 18

customary practice relating betrothal can be followed so long as they are not contrary to Islam.

The custom of betrothal can bring many benefits and help to bring together the families of the parties. It also encourages the parties to give presents to one another and thus help to increase respect and love for one another.⁴⁹ There is sometimes disagreement between the parties.

- a) If the male party breaks an engagement and does not wish to marry, he cannot claim the return of the gifts by him.
- b) On the other hand, if the female party breaks the engagement, she has to pay double the value of the money or presents given by the man

In the eyes of Islam, these customs are contrary to the principles of Islam that wants justice practised in our lives. We can say that these customs have the exploitation of women. However, if a betrothal is mutually cancelled, it is not right for the man to claim return on the presents. It is because they are regarded as *hibah* or gifts to the woman and becomes her property but if the woman's party voluntarily returns the gift in good faith, the man is allowed to take them back.

In Terengganu, if any person has made agreement or betrothal in accordance under *hukum syara'*, either orally or in writing, and either personally or through an intermediary and subsequently refuses without lawful reason to marry that party whereby that party is willing to marry, so those who are involved will be taken action. If the male party breaks an engagement, they need to pay damages to the amount of the *mas kahwin*. If there isn't any agreement in fixing the amount of the *mas kahwin* that needs to be payable, the court will decide on the amount after referring to the requirement in accordance with *hukum syara'*. The compensation that

⁴⁹ *Undang-Undang Keluarga Islam di Malaysia (version malay)*, 1999, Malayan Law Journal sdn. Bhd, page 18

needs to be paid concludes expenses that are expended in good faith by the female party in the preparation for marriage.

If a female party is in breach of the contract, the presents or betrothal gifts must be returned. They also must pay the damages to the groom who will be the husband in preparation of marriage and the damages by man to the woman who will become wife can receive through court action.⁵⁰

Briefly, the women in Terengganu had been given a good position similar to a man. Therefore there is no persecution to the weak party in this state. So, the damage apposed is based on decision on action in the court. From that, injustice does not occur.

2.3) Marriage

Marriage means the legal relationship between a man and woman where both of them are voluntarily adults agreeing to build a good domestic. Marriage is a commendable act determined by Allah S.W.T to make life complete as a creature of Allah. It is implemented through the order of God based on the religious rules to ensure the, descendance and peaceful life of human beings. Allah S.W.T says:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ
 بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ ﴿٢١﴾

⁵⁰ Jabatan Hal Ehwal Agama Islam Terengganu (1986), *Enakmen Undang-Undang Pentadbiran Keluarga Islam 1985*, section 13