



Marital Dissolution Due to Sexual Disability in Selangor Shariah Court: A Legal Juristic Study

Nurul Hanan Bt Che Harun – Fatimah Karim

MARITAL DISSOLUTION DUE TO SEXUAL DISABILITY IN SELANGOR SHARIAH COURT: A LEGAL JURISTIC STUDY

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ABSTRACT

This research focusing on the marital dissolution due to sexual disability among married couples in Selangor. The purpose of this study is to highlight the juristic opinion regarding *fasakh* due to sexual disability which known as *uyub* in fiqh perspectives in terms of rulings, types of defects and implication of *fasakh* provided by jurists concerning to sexual disabilities. This research also discussing on *fasakh* claims from the legal point of view that has been adopted in the Shariah Court in Selangor with reference to the Islamic Family Law (State of Selangor) Enactment 53 2003 section 2 which states on the permission given to the wife to file the *fasakh* due to sexual disability afflicted by their partner. Plus, the authors also discussed on the proceeding stated by Selangor Shariah Court in hearing the cases including for *fasakh* application resulting from sexual disability. The authors gain the information through inductive method and descriptive methods which is gathering an information regarding *fasakh* from books, journal, article and so on and the researcher will elaborate more about marital dissolution through *fasakh* within Islamic family law of Selangor. Clearly, the finding of the research shown that asking for *fasakh* due to sexual disability is permissible in Islam and in Islamic Law perspective. There is also implication in term of *nafaqah* and *iddah* resulted from *fasakh*. Despite that, the issue of sexual disability facing by spouses in Selangor that leads to marriage dissolution needs to be addressed and need to find the solution to prevent the marital dissolution from continuing to happen because marriage is not built for *fasakh* or divorce but for the harmony and peace of husband and wife. Hence, effective communication between husband and wife is crucial for addressing any sexual problems they encounter, whether through medical intervention or counseling, thereby fostering domestic harmony.

Keywords: *Fasakh, Sexual Disability, Selangor Shariah Court, Islamic Jurisprudence*

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INTRODUCTION

According to the Syafie, *fasakh* is the dissolution of the marriage bond that is not accompanied by divorce one, two and three.³ Meanwhile, Hanafi said that *fasakh* is the cancellation of the contract from the beginning or prevention for its continuation and is not counted from the amount of divorce. It is important to be noted that *fasakh* and divorce are distinct concepts with different implications. This is because *fasakh* involves nullifying the marriage contract retroactively, thereby rendering it invalid from the beginning and negating its halal (lawful) status. Plus, *fasakh* is the annulment of the marriage bond by the Shariah Court based on the (allegation) of the wife's or husband's claim that can be approved by the Shariah Court or because the marriage has already violated the marriage law. Thus, *fasakh* can only be done by authorities such as judges and *qadhi* when there is a specific reason.⁴

In this study, the researchers will discuss the sexual disability recognized by scholars. To make it clear, there are seven defects (*uyub*) in marriage: leprosy (*al-judham*), vitiligo (*al-baras*), insanity (*al-junun*), *al-Ratq*, protrusion inside the vaginal (*al-Qarn*), passage fleshy obstruction in vaginal (*al-'Afal*), and *al-'Ijda*. This *uyub* (disgrace) faced by both husband and wife that renders incapable of sexual intercourse which can prevent the true purpose of marriage which gives the power of dissolving marriage as a solution if the *uyub* cannot be treated.⁵ In Jurists and mufti of Selangor perspectives, the scholar agrees and give the permission to spouses to ask for *fasakh* due to defects that facing by their partner. The decision made by the scholars is as a way for the husband and wife to separate when the main purpose of marriage is no longer achieved and the *uyub* invites to a long-lasting *syiqaq* if they continue as husband and wife. Many cases of marriage dissolution that happen in Selangor because of sexual disability that facing by husband or wife. According to the Islamic Family Law (State of Selangor) Enactment 2003 (no. 2) mentioned about few grounds that acceptable for spouses to asking for *fasakh*. One of them are “Any person married in accordance with *Hukum Syarak* shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on the ground that the wife is incapacitated which prevents sexual intercourse”.⁶

³ Imam Syafi'i, *Ringkasan Kitab Al-Úmm*, (Jakarta: Pustaka Azzam, cetakan 3, 2007), jilid 2, ms563.

⁴ Al-Khin, Mustafa Bin Sa'id, Al-Bugha, Mustafa Dib and others, *Al-Fiqh Al-Manhaji 'ala Madhhab Al-Imam Al-Shafi'i*, (Damascus: Dar al-Qalam, 3rd ed, 1992 AD), p. 114.

⁵ Al-Zuhayli, Muhammad Mustafa, *Al-Mu'tamad fi Al-Fiqh Al-Shafi'i*, (Damascus: Dar al-Qalam, 3rd ed, 2011 AD), p. 96-101.

⁶ Section 53, Islamic Family Law (State of Selangor) Enactment 2003.



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Hence, one of the factors that lead to marital dissolution among the marriage couple is due to sexual disability for example lack of variety in sex and lack of sexual satisfaction are among the two sexual problems that recorded the highest percentage leading to divorce in Selangor.

1. *FIQH* PERSPECTIVE ON SEXUAL DISABILITY AMONG SPOUSES

1.1 Meaning of Sexual Disability

Sexual disability in *fiqh* perspective known as *uyub* (defects) which is coming from the word *aib*. As ibn Manzur said that: Linguistically, *uyub* means mutilation⁷ and it is a trait to despise, insult. The word defect revolves around the meaning of the deficiency that befalls the person or thing that is the subject of the contract.

Islamically: Syeikh Ali Hasbullah opinion that defects in spouses is shortcomings in physical and mental faced by husband and wife that prevent from achieving the goals of the marriage and prevent from enjoying marital life.⁸ Some of the scholar said that defects mean a disease that prevents or reduces the full enjoyment between spouses.⁹ *Uyub* has a wide meaning and the pronunciation of *uyub* is a general pronunciation that includes various forms of physical and mental disability. But what is discussed here is a defect in marriage which it can be summarized as (defect) in marriage which is discuss about the shortcomings or defects that exist in prospective couples who are about to get married or who are building a household and then defects appear in the couple. This is what Imam Zarkashi said when he talks about *aib* in marriage: A defect in marriage is something that avoids intercourse and breaks the desire for compatibility.¹⁰

1.2 Meaning of Marriage Dissolution

Marriage dissolution based on *fiqh* perspective can be divide into three types either through divorce (*talak*), *khulu'* or annulment (*fasakh*).

⁷ Ibn Manzur, Abu Al-Fadl Jamal Al-Din Muhammad bin Mukarram, *Lisan Al-Arab*, (Dar Sader: Beirut, 1st ed, 2000 AD), p. 346.

⁸ Hasbullah, Ali, *Al-Firqah bayna Al-Zawjayn wa ma Yata'allaq biha min Al-Idah wa Al-Nasab*, (Dar Al-Fikr Al-Arabi: Cairo, 1st ed, 1387 AH), p. 120.

⁹ Ibrahim, Mohammed, *Mawsu'at Al-Fiqh Al-Islami*, (Bait al-Afkar, 1st ed, 1430 AH/2009 AD), p. 21.

¹⁰ Al-Zarkashi, Badr Al-Din Mohammed Ibn Abdullah Ibn Bahadir Al-Shafi'i, *Al-Manthur fi Al-Qawa'id Al-Fiqhiyyah*, (Wizārat Al-Awqāf: Kuwait, 2nd ed, 1405 AH), p. 425.



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1. *Talak*:

The word “*Talaq*” literally means “to snap off” or so “separate”. Technically, it is defined as termination with explicit or implied words by the husband the bond created by marriage contract. It is also defined as “dissolution of a marriage or the annulment of its legality by certain words”.

2. *Khulu'*

Khulu' literally means “to take off, for instance, one’s clothes, and hence to lay down one’s authority over a wife. Removal and stripping, it says she took off the garment, robe, and sandals. A man took off his wife, and she removed from him and removed him if she ransomed him with her money and he divorced her.¹¹

Technically it is defined as the release secured by the wife from the husband from marital tie at her instance on paying compensation to him.

3. *Fasakh*

In lughah (*fasakh*) derived from word *fa sa kha* something *yafsakhuhu faskhan fan-fasakha* which is means rescind.¹² And also bring the meaning of leaving, removing.

Fasakh in terminology is the dissolution of the contract bond. Accordingly, *fasakh* means annulling the contract as husband, returning the contracting parties to their previous position before the contract exist, by making the relation as never existed before. Meanwhile, annulment of marriage means annulling the marriage contract.¹³ Also, some of scholar said that *fasakh* is annul the marriage contract due to a defect or infirmities that occurred at the time of the contract was made such as a woman marries herself without the permission of the guardian, or due to a defect that prevented the marriage to remain and continuing for example one of the spouses change their religion (apostates) or in Arabic called as *murtad*.¹⁴

Clearly, *fasakh* that are mean by the researcher in this research is about annulment of marriage caused by a sexual defect experienced by a married couple that resulted in the purpose or meaning of the marriage.

¹¹ Abdullah Al-Tayyar, Abdullah Ibn Mohammed, Abdullah Al-Mutlaq, Abdullah Ibn Mohammed, et al., *Al-Fiqh Al-Muyassar*, (Riyadh: Madar Al-Watan, 1st ed, 1432 AH/2011 AD), Vol. 5, p. 77.

¹² Ibn Manzur, *Lisan Al-Arab*, p. 44.

¹³ Din, Harun, *Faskh Al-Nikah wa Al-Qadaya Al-Muta'alliqah bihi*, (Vol.1, 1404 AH.), p.15.

¹⁴ Abdul Hameed, Muhammad Muhyiddin, *Al-Ahwal Al-Shakhsiyyah fi Al-Shari'ah Al-Islamiyyah*, (Al-Qahirah: Matba'at Al-Istiqamah, 1st ed., 1361 AH), p.230 .



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1.3 Types of Sexual Disability Recognized in *Fiqh* Perspectives

The jurists have discussed several types of sexual disability experienced by men and women which are categorized as *uyub* in the jurisprudence perspective. To be clear, the defects mentioned by jurist are divided into three parts:¹⁵

1) *Uyub* facing by men

1. Mutilation (*Al-jubb*): The state of mutilation of the male organ maybe the organ of male is missing or very short as to be unfit of penetrating.
2. Castration (*al-khisa'*): Either by the removal or by the crushing of both testicles.
3. Sexual impotence (*Al- unnah*): A disease which renders a man incapable of sexual intercourse.

2) *Uyub* facing by women

1. *Al-Ratqu*: A narrowness or blockage of her vagina, existence of a bone in her vaginal cavity that hinders penile insertion or an obstructed and closed place of intercourse.
2. *Al-Qarnu*: The existence of a bag of meat or bone in the vaginal cavity.

3) *Uyub* that is shared between men and women

1. Insanity or madness (*al-junun*): The loss of reason causes the mind to not function perfectly.
2. Leprosy (*al-judham*): A disease that eats human body parts and makes them drop.
3. Vitiligo (*al-baras*): A disease that can be clearly seen on the body.

All the types of *uyub* mentioned are the result of the views of jurists that have been discussed in the book of *fiqh*. To be clearer, the types of *uyub* according to *mazhab* Shafi'e and Maliki as follows:

Shafi'i Scholar:¹⁶ According to Shafi'i there are seven types of defects: *Al-jubb*, *al-unnah*, insanity, leprosy, *al-baras*, *ratq* and *qarnu*.

¹⁵ Hasbullah, Ali, *Al-Firqah bayna Al-Zawjayn wa ma Yata'allaq Biha min Al-Idah wa Al-Nasab*, p. 120.

¹⁶ Al-Shafi'i, Abi Abdullah Muhammad Ibn Idris, *Al- Umm*, (Beirut: Dar Al-Ma'arifah, 1st ed, 1393 H), Vol. 5, p. 90-92.



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Maliki Scholar: According to imam Maliki there are 13 types of defects and he divided into 3 parts:¹⁷

4 of them sharing by men and women which is insanity, leprosy, *al-baras* and impurity (the emission of feces or urine during sexual intercourse)

1. 4 are specific to men: impotence, castration, *al-unnah*, and objection which is the inability to have sexual intercourse due to a disease.
2. 5 are specific to women: diarrhea (*al-ratqu*), *al-qarnu*, phlegm (*al-bakhru*), which is the stench of genitals and impurity (a gland that prevents the penis to entering or a foam that prevents the pleasure of intercourse and ejaculation, which is the mixing of entrance of the penis with the feces or urine).¹⁸

1.4 Jurist's Opinion Regarding *Fasakh* Due to Sexual Disabilities

The permissibility of *fasakh* can be found in several verses of the Quran such as in Surah al-Baqarah (the translation) where Allah said:

“When you divorce women and they have almost reached the end of their waiting period, either retain them honorably. But do not retain them only to harm them or to take advantage of them. Whoever does that surely wrong his own soul. Do not take Allah's revelations lightly. Remember Allah's favors upon you as well as the Book and wisdom, He has sent you guidance. Be mindful of Allah and know that Allah has perfect knowledge of all things”. (Al- Baqarah: 231)

In addition, based on *fiqh* perspective the defects that allow marriage annulment to occur can be divided into two:

1. Defects that prevent intercourse: *al-Jubb*, *al-unnah* by husband, *al-qarnu*, *al-ratqu* by wife.
2. Disgrace that does not prevent intercourse such as disgusting diseases or inviting dangers such as leprosy, *al-baras* and madness.¹⁹

Meanwhile, scholars have different opinions regarding separation due to *uyub* (defects) facing by spouses. Among them are not allowing separation due to defects and some of other scholar

¹⁷ Malik, Malik Ibn Anas, *Al-Muwatta*, (Dar al-Kutub al-Ilmiyyah, 1st ed, 1415 AH / 1994 AD), Vol. 2, p. 142.

¹⁸ Jaradat, Ahmed Ali, *Al-Wasit fi Sharh Qanun Al-Ahwal Al-Shakhsiya Al-Jadid: Al-Zawaj wa Al-Talaq*. (Jordan: Jar Al-Thaqafa, 1st ed, 1433 AH/2012 AD), p. 254.

¹⁹ Al-Khin, Mustafa Bin Sa'id, Al-Bugha, Mustafa Dib and others, *Al-Fiqh Al-Manhaji 'ala Madhhab Al-Imam Al-Shafi'i*, (Damascus: Dar Al-Qalam, 3rd ed, 1992 AD), p. 111.



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allowing the separation happened. Also, among them said that separation due to defects is allowed before and after having intercourse between spouses and apart from them only allowed separation before having intercourse, meanwhile if the defects happen after intercourse, then it not allowed to make separation. However, they had their own reason and evidence to support their opinion. To make it clear, there are two rulings of separation due to sexual disability or defects (*uyub*):

First: Opinion that not allowed (عدم الجواز) separation due to defects:

Imam Dawud Al- Zahiri: According to them separation is not permitted because of disease or defect of husband or wife. This opinion support by other scholar such as Shaukani, Umar bin Abdul Aziz and some other followers. They base their stance on Quran (translation): “*They learn from them that by which they cause separation between a man and his wife*” (Al-Baqarah:102). This verse explain about separation between husband and wife is not allowed in general and is included in this category of separation due to defects. This is because Allah despises or condemns those who separate a man from his wife. And based on scholars every action that gets condemned by Allah is bringing the meaning of illegal to do that action (separate). So, separation due to defects should be avoided since the act is included in the act that is abhorred by Allah.²⁰

Second: Opinion on permissible to do the separation due to *uyub* based on types of defects itself.

Maliki²¹, Shafie²² and Hanbali²³: This jurist is of the view that both husband and wife has the right to ask for separation due to defects, yet, they had different opinions on the types of defects. This is because marriage is to guarantee peace, if the disgrace prevents the realization of peace, then both parties are given the option to continue the contract or return things to the way they were before the marriage contract took place. As Allah mentioned in Quran’s translation: *And they (women) have rights (over their husbands as regards living expenses,*

²⁰Abdul Karim Alam, Shauqi Ibrahim, *Al-Tafriq Al-Qada'i bayna Al-Zawjayn li Al-'ilal aw Al-'Ayub*, (Maktabah Al-Wafa' Al-Qanuniyah, 1st ed, 2010 AD), p. 36.

²¹ Malik, Malik Ibn Anas, *Al-Madunah*, p. 142-144.

²² Mustofa Al-Khin, Mustofa Al- Bugho dll, *Al-Fiqh Al- Manhaji Mazhab Al- Syafie*, Tahqiq: Zulkifle Bin Mohamad al-Bakri dll, (Putrajaya: Jabatan Kemajuan Islam Malaysia, 2011), jilid 3, ms1.

²³ Al-Buhuti, Mansur Ibn Yunus, *Kashaf Al-Qina' 'an Al-Iqna'*, (al-Saudiyyah: Wizarat Al-'Adl, 1st ed, 1421 AH/1429 AD), vol.5, p. 117.



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etc.) similar (to those of their husbands) over them (as regards obedience and respect, etc.) to what is reasonable, but men have a degree (of responsibility) over them. (Al-Baqarah:228).

1. **Maliki** of the views that it is deemed permissible to annul a marriage in the event of a grave issue between husband and wife, particularly if the issue pertains to the genital region and impedes sexual intercourse such *al- baras*, *al-junun*, *al-judham*, and any defects around vagina. In such cases, the option of *fasakh* can be invoked. If the defects involve blindness or monocular blindness (one-eyed woman), women is black so it is not allowed to return her.
2. **Shafie** of the view that the *illat* of leprosy and *al-baras* being the ground of divorce is their contagious nature. They claim that one cannot be inclined towards intercourse with a person who has leprosy or *al-baras*.
3. **Hanbali** said that it is permissible to do separation due to sexual defects, disgusting defects, or defects that cannot be cured such as tuberculosis, gonorrhoea, syphilis, and other defects known through experts.²⁴
4. **Hanafi** in the opinion that if the husband is unable to establish matrimonial relationship with his wife, she would be entitled to seek separation, though the husband would not as he can do so by the way of *talaq*. He further his opinion that annulment due to defects only accepted if the husband suffer either *al-jubb*, *al-unnah* or castration (the removal of the testicles of a male animal or man) because these three types of *uyub* cannot be eliminated, so the harm in them is permanent and the purpose of marriage which is to give birth, avoid from sexual intercourse is not achieved due to these defects so it was necessary to make separation.²⁵ Meanwhile, another types of defects is not allow to make separation such as insanity, leprosy, *al-baras*, *ratqu* and *al-qarnu*.
5. **Imam Mawardi's** opinion is that the marriage can be annulled by both parties if there are defects. In addition, there are five defects that give the husband the right to annul the marriage contract, which is when the wife suffers from insanity, leprosy, *al-baras*, *Al-ratqu*, *al-qarnu*. And the wife has the right to annul the marriage contract if she finds that her husband has one of five *uyub* including insanity, leprosy, *al-baras*, *al- unnah*, *al-jubb*. As for the defects other than these are not accepted to cancel the marriage contract.²⁶The selected opinion (*jumhur* opinion): It is permissible to do separation or to annul the

²⁴ Jaradat, Ahmed Ali, *Al-Wasit fi Sharh Qanun Al-Ahwal Al-Shakhsyiyah Al-Jadid Al-Zawaj wa Al-Talaq*. (Jordan: Jar al-Thaqafah, 1st ed, 1433 AH/2012 AD), p. 256.

²⁵ *Ibid*, p. 254, Ibn 'Abidin, Muhammad Amin, Al-Shahir Bi-Ibn 'Abidin, *Hashiyat Ibn 'Abidin*, (Misr: Shirkat Maktabah, 2nd ed, 1376 AH/1966 AD), vol. 5, p. 132 and 140.

²⁶ Al-Mawardi, Abu Al-Hasan Ali Ibn Muhammad Ibn Habib, *Al-Hawi Al-Kabir*, (Beirut: Dar Al-Ilmiyah, 1st ed, 1414 AH / 1994 AD), p. 338.



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marriage contract due to defects whether the disability occurs on the husband, or the wife or the disability occurs on both partners. And this ability is also allowed even if the disgrace occurs before or after intercourse. This is so because there is a hadith method that says: “*There should be neither harming (darar) nor reciprocating harm (dirar)*”.²⁷ Plus, the defects will cause harm to other person since it prevents the enjoyment of an intercourse which serves as one of the purposes of marriage that also prevent from having fun in marriage.

1.5 The *Fiqh* Rulings and Implication of *Fasakh* Concerning to Sexual Disabilities

If the defects occurred after the marriage contracts in either of the spouses, either that was after consummation or before it and either the defects was as prevent to have intercourse such as a cowardice and impotence in husband, and licentiousness and horniness in the wife, or was not an obstacle such as a leprosy, *al-baras*, or insanity, then the right to choice is established to annulment of the marriage. However, there is an exception for *al-unnah* (i.e. the husband is unable to have intercourse with his wife) which if it happens after intercourse, then the wife does not have the right to cancel the marriage contract because the purpose of the marriage has been achieved, i.e. the dowry and the intercourse was perfect and took place before the existence of *al-unnah* on the husband.²⁸

1.5.1 *Fiqh* Rulings on Annulment of Marriage Contract due to Defects:

There are two conditions concerning by the jurists for requesting separation due to disability:

1. The person who wants to separate must not know about the defect at the time of the contract or before: If he knows about the defect then he has no right to ask for separation because his acceptance of the marriage contract is his consent to the defect.²⁹
2. He cannot accept and disagree with defects occur after the contract is made. If the person requesting the separation did not know of the defect, then found out about it after making the contract (*akad*) and was satisfied with it, his right to request the separation is forfeited.³⁰

²⁷ Hadith 32, 40 Hadith an-Nawawi, Retrieved on 7 December 2023 from <https://sunnah.com/nawawi40:32>

²⁸ Al-Khin, Mustafa Bin Sa'id, *Al-Fiqh Al-Manhaji 'ala Madhhab Al-Imam Al-Shafi'i*, p. 113.

²⁹ Al-Khurashi, Abu Abdullah Muhammad, *Sharh Al-Khurashi 'Ala Mukhtasar Khalil*, (Beirut: Dar al-Fikr li al-Taba'ah, 2nd ed, 1317 AH), vol. 3, p. 235.

³⁰ Ibn Abidin, Muhammad Amin, *Minhah Al-Khaliq 'ala Al-Bahr Al-Ra'iq*, (Beirut: Dar al-Ma'arif, 2nd ed, n.d.), vol. 4, p. 136.



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If she is not satisfied with the defect, then the choice of the defect is determined immediately according to Shafi'i, and according to Hanbali it is delayed, so it is not waived unless there is evidence of agreement with him, either explicitly or implicitly.³¹ Majority of jurist in opinion that the right to ask for annulment due to defects and disease only valid if the defects occur before the contract is making or defects that occur after being married but not having sex with her husband.

Meanwhile, regarding to defects that occur after the contract can either make the choice to continue the marriage bond or cancel it, scholars have several different views:

1. **Maliki:** If the *uyub* happened after the contract, then the spouses have no right to choose to annul the contract. This *uyub* is a misfortune (*musibah*) that befalls a husband and wife, then if he wants, he can maintain the status of his wife and also can divorce her through talak.³²
2. **Hanafi:** In the opposite opinion which is no rights are given to the wife to annul the marriage contract after the marriage contract and intercourse.³³
3. **Shafie:** The husband's *uyub* that occurs after the contract has a choice to annul the contract whether the *uyub* occurs before or after intercourse. Similarly, for *uyub* that occurs on the wife according to the selected opinion, husband is given the option to choose whether to continue the marriage or cancel the contract. Except for *unnah* that occurs after intercourse, there is no right to make a choice since the purpose of marriage already achieved.
4. **Hanbali:** Agree with Shafi'i opinion that it is permissible to separate because of a disability that occurs after marriage just like the abilities due to a disability that existed before because of the harm it causes and because there is no other option for a woman except to ask for a separation (*fasakh*), unlike a man.³⁴

³¹ Al-Zuhayli, Wahbah Ibn Mustafa, *Al-Fiqh Al-Islami wa Adillatuh*, (Damascus: Dar al-Fikr, 4th ed, n.d.), p. 7054.

³² Din, Harun, *Faskh Al-Nikah wa Al-Qada'iyah Al-Muta'alliqah bih*, (Kuala Lumpur: Sayyid al-Hajj Ja'far Sadiq Ibn Al-Hajj Salam, 1st ed, 1983 AD), p. 179. Al-Dasuqi, Muhammad Ibn Ahmad Ibn 'Arifah, *Hashiyah Al-Dasuqi 'Ala Al-Sharh Al-Kabir*, (Dar Al-Fikr, n.d.), vol. 2, pp. 278-279.

³³ Al-Kasani, Ala Al-Din Abu Bakr Ibn Mas'ud, *Bada'i Al-Sana'i fi Tartib Al-Shara'i*, (Beirut: Dar al-Kutub Al-Ilmiyah, 2nd ed, 1424 AH / 2003 AD), p. 595.

³⁴ Al-Zuhayli, Wahbah Ibn Mustafa, *Al-Fiqh Al-Islami wa Adillatuh* .p. 7055.



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Thus, the selected opinion is that the husband and wife have the same choice to continue the marriage or annul the contract. This ability is valid whether the disgrace occurs before or after the contract and one of the reasons why this matter is allowed is because of harm occurring.

1.5.2 Implication of *Fasakh* due to Sexual Disability based on *Fiqh* Perspectives

Dowry Aspect:³⁵

If *fasakh* occurs before intercourse, the wife is not entitled to dowry and *mutáh*. In this case, even though the disgrace happened to the husband, it was the wife who had applied for *fasakh*. Therefore, the husband is not obliged to give her anything. Similarly, if the disgrace happens to the wife, then the wife does not get any rights because the *fasakh* originates from her. In this regard, she seems to be the person who demands the *fasakh*.

1. If the fornication occurs after sexual intercourse due to disgrace that occurs simultaneously with the marriage contract or which occurs between the time of the marriage contract and intercourse, which is unknown to the husband, then the wife is entitled to dowry *mithil*.
2. If *fasakh* occurs after sexual intercourse due to shame also occurring after it, the wife must be given all the dowry specified in the contract. This is because the dowry is obligatory due to sexual intercourse before there is a reason to annul the marriage. Therefore, the prevailing *fasakh* does not change the obligation to give dowry.

The husband cannot claim back the dowry from his guardian or wife who cheated on him. This is because he has benefited from his wife (intercourse) which was evaluated during the contract. The picture of fraud that occurs is that the wife or guardian does not tell the wife's disability to her husband, with condition that the disability occurs before intercourse.³⁶

Ruju':

Fasakh is a *ba'in sughra* divorce, which is a divorce that cannot be reconciled. If the husband wants to get back with his wife then the husband has to marry her with a new *akad* and dowry.³⁷ Also, the annulment does not reduce the number of divorces a man has, and the annulment of marriage means the loss of the contractual bond between the spouses by the judge's decision,

³⁵ Mustofa Al-Khin, Mustofa Al- Bugho dll, *Al-Fiqh Al-Manhaji Mazhab Al-Syafie*, Tahqiq: Zulkifl bin Mohamad al-Bakri dll, (Putrajaya: Jabatan Kemajuan Islam Malaysia, 2011), jilid 3, ms5-6.

³⁶ Al-Khin, Mustafa Bin Sa'id, *Al-Fiqh Al-Manhaji 'ala Madhhab Al-Imam Al-Shafi'i*, p. 115.

³⁷ Mohammad Izzhar Faizy Osman, Al-Kafi #1447: *Bolehkah Berkahwin Semula Jika Diceraikan Dengan Cara Fasakh*, Retrieved on 31 January 2024 from <https://muftiwp.gov.my/ms/artikel/al-kafi-li-al-fatawi/3837-al-kafi-1447-bolehkah-berkahwin-semula-jika-diceraikan-dengan-cara-fasakh>



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and each becomes a stranger to the other.³⁸ If they remarry each other with a new *akad*, they will start with a new *talaq* which is three.

Nafaqah:

The wife has the right to claim for arrears for maintenance, maintenance during *iddah*, maintenance for living expenses during *iddah* and *mutaah*. When a woman is divorced through *talaq ba'in* (irrevocable divorce), there might be a waiting period called '*iddah*'. During this period, the husband is generally obligated to provide *nafaqah* based on wife's situation:

1. Pregnant: The wife has the right to get financial support, including housing, food, cloth until the ex-wife giving birth.
2. Not pregnant: Only provide the place to her stay until the waiting period is over and not obligated to provide other expenses.

Clearly, the problem of sexual disability has been given attention by scholars of jurisprudence known as *uyub*. Not only that, but the scholars have also discussed in detail related to divorce according to *fasakh* due to differences between husband and wife. The result of the discussion is that the scholars allow *fasakh* to be performed if there are obstacles that prevent the achievement of the meaning and purpose of marriage, but this permission must be accompanied by the conditions that have been outlined by *fiqh* scholars. Not only that, but the divorced wife is also entitled to alimony during the *iddah* based on the condition of the wife when the *fasakh* occurs.

2. ISLAMIC FAMILY LAW OF SELANGOR ON SEXUAL DISABILITY

2.1 The Enactment of Family Law in Selangor Related to Sexual Disability

The dissolution of marriage or *fasakh* has been stated under section 53, Islamic Family Law (State of Selangor) Enactment 2003. Based on this enactment a woman married in accordance with *hukum syara'*, shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on any one or more of the following grounds namely:³⁹

- a) That the whereabouts of the husband have not be known for a period of more than one year
- (b) That the husband has neglected or fail to provide for her maintenance for a period of three months

³⁸ Khaled Al-Ghazzi, *Hal Al-Faskh Yankus Su'adat Al-Talaaqat*, Retrieved on 3 December 2023. <https://mhtwyat.com/%D9%87%D9%84-%D8%A7%D9%84%D9%81%D8%B3%D8%AE-%D9%8A%D9%86%D9%82%D8%B5-%D8%B9%D8%AF%D8%AF-%D8%A7%D9%84%D8%B7%D9%84%D9%82%D8%A7%D8%AA/>

³⁹ Section 53, Islamic Family Law (State of Selangor) Enactment 2003.



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- (c) That the husband has been sentenced to imprisonment of three years or more
- (d) That the husband has failed to perform, without reasonable cause, his marital obligations (*nafkah batin*) for a period of one year
- (e) That the husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent
- (f) That the husband has been insane for a period of two years or is suffering from leprosy or vitiligo or is suffering from a venereal disease in a communicable form
- (g) That she, having been given in marriage by her *wali mujbir* before she attained the age of *baligh*, repudiated the marriage before attaining the age of eighteen years, the marriage not having been consummated.
- (h) That the husband treats her with cruelty, this is to say, inter alia:
 - (i) Habitually assaults her or makes her life miserable by cruelty of conduct or
 - (ii) Associates with women of evil repute or leads what, according to *hukum syara'*, is an infamous life; or
 - (iii) Attempts to force her to lead an immoral life; or
 - (iv) Disposes of her property or prevents her from exercising her legal rights over it, or
 - (v) Obstructs her in the observance of her religious or practice, or
 - (vi) If he has more wives than one, he does not treat her equitably in accordance with the requirements of *hukum syara'*
- (I) That even after the lapsed of four months the marriage has still not been consummated owing to the wilful refusal of the husband to consummate it;
- (j) That she did not consent to the marriage, or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstances recognized by *hukum syara'*;
- (k) That at the time of marriage she, though capable of giving a valid consent, was, whether continuously intermittently, a mentally disordered person within the meaning of the Mental Disorder Ordinance 1952 [Ord. 31 of 1952] in the case of the Federal Territory of Kuala Lumpur, or the Lunatics Ordinance [Sabah Cap. 74] in the case of Federal Territory of Labuan, and her mental disorder was of such a kind or to the extent as to render her unfit for marriage
- (l) Any other reason recognized as valid for dissolution of marriages or *fasakh* under *hukum syara'*.
- (1A) Any person married in accordance with *Hukum Syarak* shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on the ground that the wife is incapacitated which prevents sexual intercourse.
- (2) No order shall be made on the ground in paragraph (1)(c) until the sentence has become final and the husband has already served one year of the sentence.
- (3) Before making an order on the ground in paragraph (1)(e) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of six months



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

(4) No order shall be made on any of the grounds in subsection

(1) If the husband satisfies the Court that the wife, with knowledge that it was open to her to have the marriage repudiated, so conducted herself in relation to the husband as to lead the husband reasonably to believe that she would not seek to do so, and that it would be unjust to the husband to make the order.

Clearly, *fasakh* claims for sexual problems have been stated and recognized by the Islamic Family Law (the state of Selangor) under Section 52 (d), (e) and (f) which allows married couples to file *fasakh* if the couple experiences any problem related to sexual disability.

2.2 Selangor Shariah Court Procedures for *Fasakh* Application on Sexual Disability Among Spouses

If a wife wants a separation from her husband on ground that he is suffering from incapacity, she must move the *qadi* for necessary action and *qadi* shall ask the husband if he admits the truth of the wife's assertion or wants to deny it on oath. If the husband admits the wife's charge or does not deny it on oath, then in either case the *qadi* shall by himself allow the husband one year's time for the cure of his defect. Under the provisions of Muslim Law, it is the duty of the *qadi* to allow such time to the husband even when he does not request for or even does not want it. Should the husband deny on oath the wife's assertion, the *qadi* shall get the wife examined by women to find if the marriage has been consummated. If it is established that the husband's denial is correct and that the marriage has been consummated, the *qadi* shall dismiss the wife's claim. If, however, the wife's complaint is found to be correct, the *qadi* shall himself grant one year's time to the husband to get himself cured. But no time shall be given to him if he is *majbub* (castrated) for no useful purpose can be served by the grant of time. To obtain a degree of judicial separation on grounds of impotency, the following circumstances must concur:

1. The husband must be proved to have been impotent at the time of the marriage,
2. That the wife must not have known it at the time of marriage,
3. That the impotency must have continued till the time of suit,
4. That the impotency is shown to be incurable.⁴⁰

Based on researcher opinion, Islamic Family Law (state of Selangor) 2003 allows *fasakh* to be done in a court of law if there is an *uyub* that causes *syiqaq* in a marriage. Nevertheless, the court is of the opinion that both the husband and the wife should look for and try other initiatives before

⁴⁰ Muhammad Tahir Mansoori, *Family Law in Islam*, (Pakistan: IPS press, 2021), pg164.



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deciding to make a *fasakh* claim. The *uyub* that occur must be proved by medical check-up or examination by a qualified medical expert to confirm the alleged sexual disability.

2.3 Mufti Selangor Opinion Regarding *Fasakh* due to Sexual Disability

The researcher did not find a view from the Mufti of Selangor talked about *fasakh* due to sexual disability in depth, however there was a debate commented by the Mufti of the region regarding the question of whether the wife is considered *nusyuz* for demanding *fasakh* due to the disgrace experienced by the husband.⁴¹ Among the answers given by the regional Mufti is that the wife has the right to claim *fasakh* if there is a disgrace on the husband as determined by *syarak* and is not even considered *nusyuz*. In addition, the wife must submit medical evidence to the Shariah Court. Mufti is also of the opinion that if the husband's illness is not included in the disgraceful matters that allow *fasakh* and can be treated, then it is very appropriate for a wife to take care of her husband when he is sick and find an alternative to get treatment.

However, the Kedah State Fatwa Committee meeting which convened on 25 August 2001 had discussed the *fasakh* claim because of '*unnah*'. The discussion decided that it is required for the wife to claim *fasakh* due to her husband experiencing '*unnah*' on the condition that before the marriage the wife did not know that her husband experienced '*unnah*' but if the wife knew that her husband experienced '*unnah*' before marriage and still wanted to marry her husband then the wife is had no right to claim *fasakh*.⁴²

2.4 Strategies and Solution to Mitigate the Occurrence of *Fasakh* Cases Caused by Sexual Disability

Looking at the case of sexual disability that threatens the relationship between husband and wife until the occurrence of marital dissolution through *fasakh*, there are several strategies shared by the Sulh Officer during the interview. Among the solutions that can be taken by married couples to maintain the harmony of the relationship are:

1. Medication: Medicine is the best solution for couples who have sexual disability problems. By the existence of all sophisticated technologies, it is not impossible that the problem can

⁴¹ Yaqin Bakharuddin, *Adakah Dianggap Nusyuz Memohon Fasakh Sekiranya Suami Terdapat Aib?*. (Al- Kafi# 1565, 2020). Retrieved on 1 December 2023 from <https://muftiwp.gov.my/ms/artikel/al-kafi-li-al-fatawi/4068-al-kafi-1565-adakah-dianggap-nusyuz-memohon-fasakh-sekiranya-suami-terdapat-aib>

⁴² *Tuntutan Fasakh kerana 'Unnah'*, e-smaf e sumber maklumat fatwa. Retrieved on 7 December 2023 from <http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/10685>



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be treated. To make it clear, for husbands who suffer from impotence, known as erectile dysfunction, it is recommended to seek help from medical experts through the method of penile implants or intracavernosal injections, which are injections to the base of the penis and intraurethral suppositories.⁴³ For the women who are facing the sexual disability such *ratqu* which is the existing of bone in vagina, they can do the surgical to remove the lump.

2. Counseling: The Sulh Officer emphasizes the effectiveness of household counseling as a crucial step before resorting to court proceedings. This approach allows couples to openly discuss the causes of sexual disabilities that they are facing, especially when experienced by women. For example, a wife who is experiencing fear or trauma to have intercourse with their husband can be overcome with counseling by providing encouragement and advice to convince the wife to get rid of the fear. Additionally, lack of desire for intercourse can also be addressed through counseling.
3. Communication and Tolerance: The method of communication and tolerance proves highly effective in understanding each other's desires and issues. In cases where wives face sexual disabilities like pain disorders during intercourse, open communication with their partners is vital so that both of them can understand and try to find a solution. One of the causes of *fasakh* occurs because of not being satisfied and unable to accept the situation of the couple which makes the existence of *syiqaq* in marriage. Therefore, it is important to have the communication between spouses to strengthen the marital bond and build an attitude of mutual understanding and tolerance in the relationship between husband and wife.
4. *Hakam*: A method of settlement at the court level where this *hakam* consists of family members on behalf of the husband and wife.⁴⁴ *Hakam* is appointed to end the *syiqaq* between husband and wife either through reconciliation or separation through *talaq* or *khulu'*. If the *hakam* appointed sees that the relationship between husband and wife still has the potential to be repaired, then they will use the power given to reconcile both parties.

CONCLUSION

Sexual disability or known as *uyub* is the defects that facing by man or women that avoids intercourse and breaks the desire for compatibility. Based on the views of jurist and Mufti of

⁴³ Cleveland Clinic, *Sexual dysfunction*, 2022. Retrieved on 6 February from <https://my.clevelandclinic.org/health/diseases/9121-sexual-dysfunction#management-and-treatment>

⁴⁴ Majlis Agama Islam Negeri Selangor (MAIS), *Hakam Penyelesaian Konflik Rumah Tangga*. Retrieved on 6 February 2024 from <https://mais.gov.my/artikel-dakwah/hakam-penyelesaian-konflik-rumah-tangga/>.



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Selangor, *fasakh* due to *uyub* whether the *uyub* is experienced by the wife or the husband is allowed if the *uyub* makes the purpose of marriage unfulfilled or have *syiqaq* in marriage. Despite all these, women who are being divorce through *fasakh* still have *iddah* depending on the condition of the wife when *fasakh* was dropped. In fact, during the *iddah* period, the husband must provide a place to live for his ex-wife if the wife not pregnant. Not only that, *fasakh* also does not reduce the number of divorces that husband have. Means, if the husband wants to get back (*ruju* ') to his ex-wife, the husband needs to make a new contract and dowry. The issue asking for *fasakh* due to sexual disability also recognized by Islamic Family Law (State of Selangor). It is proven by there are special enactment for *fasakh* claims caused by sexual disability, which is mentioned in Section 53, Islamic Family Law (State of Selangor) Enactment 2003.

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