

MUSLIM WOMEN'S RIGHTS TO MUT'AH AFTER DISSOLUTION OF MARRIAGE UNDER ISLAMIC LAW: AN ABSOLUTE OR LIMITED RIGHT*

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ABSTRACT

A Muslim divorced woman is entitled to several rights after dissolution of her marriage. Those rights include maintenance during 'iddah, right to accommodation during 'iddah, right to the custody of children, right to any deferred mahr, right to a share in jointly acquired property and right to mut'ah or consolatory gift. These rights are meant particularly to protect the interests and welfare of the divorced wife after dissolution of her marriage. Mut'ah is a property which is a replacement or an addition to the dower given to the divorced wife, to

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console and to assist her in facing life after divorce especially if she is divorced without just cause. This paper seeks to examine whether this right is absolute for all divorced wives or whether it is only limited to a particular situation where for example the wife is divorced without just cause or where the divorce is not initiated by the wife. For that purpose, the principle on mut'ah under the Sharī'ah and provisions of Islamic law in Malaysia will be examined, to determine the extent of its application to the Muslim community in Malaysia.

THE CONCEPT OF *MUT'AH* UNDER ISLAMIC LAW

Most Muslim jurists in their classical works have not discussed the concept of *mut'ah* as an independent subject but this concept has been discussed under the subject of dower (*mahr*) or as a continuation to it.¹ It is the Shāfi'ī jurists who have given more prominence to the discussion on *mut'ah*.² As regards the writings of the contemporary Muslim scholars,³ there are several books which deal with family and personal law (*al-aḥwāl al-shakhṣiyyah*) but these have not discussed *mut'ah* at all. This situation in fact reflects a basic principle that *mut'ah* is a concept which is interrelated with *mahr* or is a continuation of the right of a wife to *mahr*. This fact can also be proven by looking into the definition of *mut'ah* itself.

¹ For example the books of the Ḥanafīs, Shafi'īs and the Ḥanbalīs.

² See for example al-Shirbīnī, Shams al-Dīn Muḥammad ibn al-Khaṭīb, *Mughnī al-Muḥtāj 'ilā Ma'rifat Ma'ānī al-fāz al-Minhāj*, Vol. 3, (Beirut: Lebanon: Dār al-Fikr, 2001/1421), 307. See also al-Ramlī, Shams al-Dīn Muḥammad ibn Abī al-'Abbās Aḥmad ibn Hamzah ibn Shihāb al-Dīn, *Nihāyat al-Muḥtāj 'Ilā Sharḥ al-Minhāj Fī al-Fiqh 'Alā Madhhab al-Imām al-Shāfi'ī*, Vol. 6, (Dār al-Kutub al-'Ilmiyyah, 1993/1414), 364.

³ Zakiy al-Dīn Sha'bān, *Aḥkām al-Shar'iyyah li Aḥwāl al-Shakhṣiyyah*, 6th edition, (Universiti Qaryūnus, Benghāzī, 1993), 289-290. See also Muḥammad Muṣṭafā Shalabī, *Aḥkām al-Uṣrah fī al-Islām*, 2nd edition, (Dār al-Nahḍah al-'Arabiyyah, 1977/1397), 388-390.

The word *mut'ah* carries four implications which include *mut'ah* pilgrimage,⁴ temporary marriage (*mut'ah* marriage), *mut'ah* as a consolatory gift given by the husband to the wife upon divorce and *mut'ah* which refers to the property given by the wife to the husband after *'aqad* to be used for enjoyment based on the custom of certain places.⁵ The third *mut'ah* is the subject which we are discussing in this paper.

The concept of *mut'ah* as a consolatory gift given by the husband to the wife upon divorce can be illustrated based on two definitions. The first definition of *mut'ah* is property given by the husband to the wife upon divorce as a replacement to the *mahr*; while the second definition refers to the property given by the husband to the wife upon divorce as additional to *mahr*. This payment of *mut'ah* is as a consolation to the wife who is divorced by the husband.⁶

Al-Shirbīnī who represents the Shāfi'ī jurists has defined *mut'ah* as property which is obligatory on the husband to pay to his divorced wife whose marriage was dissolved by *ṭalāq* or other kinds of divorce under the meaning of a *ṭalāq*.⁷ Meanwhile, other Shāfi'ī jurists such as al-Ḥusnī and al-Dimyātī, define *mut'ah* as property given by the husband to the wife upon separation of the marriage (*furqah*).⁸ The Maliki jurists define *mut'ah* as an act of kindness to the divorced wife by giving some property to her based on the husband's financial capability.⁹

⁴ This is in the case of *Ḥaj al-tamattu'* which combines *haj* with *'umrah*; See al-Ramlī, Shamsuddīn Muḥammad bin Abī al-'Abbās Aḥmad bin Hamzah ibn Shihābuddīn. *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, Vol. 7, (Dār al-Kutub al-'Ilmiyyah, Beirut-Lebanon, 1414/1993), 364.

⁵ Al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, 4th Ed.; Vol. 9, (Dār al-Fikr, Damshiq, 2004/1425), 6829. See also al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, (tr), Vol. VII, p. 400.

⁶ Al-Zuhayli, *al-Fiqh al-Islami wa Adillatuhu*, (tr.), 400.

⁷ Al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 3, 307.

⁸ Al-Ḥusnī, Taqiy al-Dīn ibn Abī Bakr ibn Muḥammad al-Ḥusaynī, *Kifāyat al-Akhyār fī Halli Ghāyat al-Ikhtiṣār*, Vol. 2, (Syirkah al-Ma'ārif, Bandung Indonesia, n.d.), 67; Al-Dimyātī al-'Alāmāt al-Sayyid Abī Bakr al-Mashhūr bi al-Sayyid al-Bakrī ibn al-Ma'ārif billāh al-Sayyid Muḥammad Shata al-Dimyātī, *I'ānat al-Ṭālibīn*, Vol. 3, (Dār Ihya al-Turāth al-'Arabī, Beirut-Lebanon n.d.), 358.

⁹ Al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, vol. 9, 6829.

In Malaysia, *mut'ah* is recognised as one of the ancillary rights of the Muslim wife after divorce. There is no specific definition of the word *mut'ah* under provisions of the law governing Muslim marriage and divorce. Nevertheless, the law regards payment of *mut'ah* as a method of consolation to the divorced wife who is divorced without just cause. The law in the Federal Territory, for example, provides as follows;

“In addition to her right to apply for maintenance, a woman who has been divorced without just cause by her husband may apply to the court for *mut'ah* or a consolatory gift ...”¹⁰

BASIS OF PAYMENT OF *MUT'AH* AND ITS LEGAL IMPLICATIONS

Obligation and recommendation on payment of *mut'ah* to the wife arises from several authorities from the *Qur'ān*. These verses of the *Qur'ān* indicate the commandment to pay *mut'ah* to the wife upon dissolution of marriage. The first verse concerns payment of *mut'ah* as a replacement to the *mahr* where the *Qur'ān* states to the effect:

“There is no blame on you if you divorce women before consummation or before fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means, a gift of reasonable amount is due from those who wish to do the right thing.”¹¹

“O ye who believe! When ye marry believing women, and then divorce them before you have touched them, no period of *'iddah* have ye to count in respect of them: so give them a present and set them free in a handsome manner.”¹²

¹⁰ Islamic Family Law (Federal Territories) Act 1984, s. 56.

¹¹ Al-Qur'ān, al-Baqarah; 2:236.

¹² Al-Qur'ān, Al-Aḥzāb; 33:49.

Al-Qurṭubī in his commentaries of the above two verses preferred the view of the majority of the Muslim jurists including Ibn 'Umar, 'Alī ibn Abī Ṭālib, Sa'īd ibn Jubāyr, al-Ḥasan bin Abī al-Ḥasan, Abū Qilābah and al-Zuhrī. All of them agree and regard that *mut'ah* is obligatory in cases where the wife is divorced before consummation and there is no prescription of the dower (*mahr*) in the marriage 'aqad.¹³ This includes a situation where the woman is involved in *nikāh tafwīd*.¹⁴ While according to Sa'īd ibn Jubāyr, the second verse al-Ahzāb: 49 has been abrogated by al-Baqarah: 236.¹⁵ Some of the Ḥanafīs like al-Karkhi, al-Rāzī and al-Nakha'i view that this verse rules that if a woman is divorced before consummation and the *mahr* is prescribed during 'aqad, she is not entitled to half of the *mahr* but *mut'ah* in value of the half prescribed *mahr*.¹⁶

The Ḥanafīs, generally agree that the above two verses make the payment of *mut'ah* to the wife obligatory in the case of divorce before consummation and there is no prescription of the *mahr* during marriage 'aqad. Similarly in the case where the dower is prescribed but the prescription of the dower is unlawful. This is due to the fact that, *mut'ah* is payable in such a case, as replacement to half *mahr mithlī* which is obligatory to be paid to the wife. *Mut'ah* in this case is compulsory to replace what is compulsory from *mahr*.¹⁷ The Shāfi'īs and the Ḥanbalīs share the same view with the Ḥanafīs.¹⁸ According to

¹³ See al-Qurṭubī, Abī 'Abdullah Muḥammad bin Aḥmad al-Anṣārī, *al-Jāmi' li Ahkām al-Qur'ān*, Vol. 3-4, (Dār Iḥyā' al-Turāth al-'Arabī, Beirut-Lebanon, 1995/1416), 198-203.

¹⁴ The situation which is described under Hukum Syara' as *nikāh tafwīd* is where the wife did not accept any dower (*mahr*) for the marriage.

¹⁵ Al-Qurṭubī, *al-Jāmi' li Ahkām al-Qur'ān*, Vol. 5, 205.

¹⁶ Al-Kāsānī, al-Imām 'Alā' al-Dīn Abī Bakr ibn Mas'ūd, *Badāi' al-Ṣanāi' fī Tartīb al-Sharāi'*, Vol. 4, (Dār al-Fikr, Beirut-Lebanon, 1996/1417), 439.

¹⁷ Al-Kāsānī, *Badāi' al-Ṣanāi' fī Tartīb al-Sharāi'*, Vol. 4, 447-448; Ibn 'Ābidīn, al-'Allāmah Muḥammad Amīn bin 'Umar bin 'Abd al-'Azīz 'Ābidīn al-Dimashqī, *Radd al-Mukhtār 'alā al-Dur al-Mukhtār al-Ma'rūf bi Ḥāshiyāt Ibn 'Ābidīn*, Vol. 4, (Dār Iḥyā' al-Turāth al-'Arabī, Beirut-Lebanon, 1998/1419), 178-179.

¹⁸ Al-Shīrāzī, Abī Ishāq Ibrāhīm ibn 'Alī ibn Yūsuf al-Fairuzabādī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, Vol. 2, (Dār Iḥyā' al-Turāth al-'Arabī, Beirut-Lebanon, 1994/1414), 80-81; See also al-Ramlī, *Nihāyat*

the Shāfi'ī is therefore, if the *mahr* is prescribed, the wife is not entitled to *mut'ah* but to half of the prescribed *mahr*.¹⁹

The Mālikī jurists view that the payment of *mut'ah* is merely recommended based on the last words of the above verse (al-Baqarah: 236) which states that "on those who wish to do right things." They argue that the command in the verse is only to compliment and what is a compliment is not compulsory.²⁰

Other verses indicate the commandment to pay *mut'ah* to divorced women in any occasion. The *Qur'ān* states to the effect:

"For divorced women *mut'ah* (*matā'*) (should be provided) on a reasonable (scale). This is a duty on the righteous."²¹

In another implication, the *Qur'ān* states to the effect:

"O Prophet! Say to thy consorts: "If it be that ye desire the life of this world, and its glitter, then come! I will provide for your enjoyment and set you free in a handsome manner."²²

Al-Qurṭubī in commenting on the earlier verse of al-Baqarah:241, states the view of Abū Thawr, al-Zuhrī and Sa'īd bin Jubayr to the effect that the verse rules that *mut'ah* is compulsory for any divorced

al-Muḥtāj ilā Sharḥ al-Minhāj, Vol. 7, 364; See also al-Shirbīnī, *Mughnī al-Muḥtāj*, vol. 3, 307. See also Al-Bahūtī, Maṣṣūr Ibn Yūnus ibn Idrīs, *Kashshāf al-Qinā' 'an Matn al-Iqnā'*, Vol. 5, (Dār al-Fikr, Lebanon, 1982/1402), 157-158.

¹⁹ Al-Shirāzī, Abī Ishāq Ibrāhīm ibn 'Alī ibn Yūsuf al-Fairuzabādī, *al-Muḥadhdhab fī Fiqh al-Imām al-Shāfi'ī*, Vol. 2, (Dār Iyyā' al-Turāth al-'Arabī, Beirut-Lebanon, 1994/1414), 80-81; See also al-Ramlī, 364; See also al-Shirbīnī, *Mughnī al-Muḥtāj*, vol. 3, 307.

²⁰ Ibn Rushd, al-Imām Abī al-Wālid Muḥammad bin Aḥmad bin Muḥammad bin Aḥmad bin Rushd al-Qurṭubī, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, 2nd Edition, Vol. 3, (Dār al-Ma'rifah, Beirut-Lubnan, 2000/1420), 140.

²¹ Al-Qur'ān; Al-Baqarah; 2:241.

²² Al-Qur'ān; Al-Aḥzāb; 33:28.

woman who is divorced after consummation of the marriage. Similarly in the case where the woman is divorced before consummation and there is no prescription of the dower. On the other hand, the Ḥanafīs are of the view that the ruling of the above verse implicates that *mut'ah* is only recommended in any case where the divorce is after consummation of the marriage or in the case where the divorce is before consummation and the *mahr* is prescribed in the *'aqad*. This is because in this case, the woman deserves *mahr* either in full if there is consummation or half the *mahr* if there is no consummation. Therefore she no longer deserves an obligatory *mut'ah*.²³ The Ḥanbalīs who are in agreement with the Ḥanafīs, among others state that, in this case the payment of *mut'ah* is not compulsory as the woman has already obtained her *mahr*.²⁴

The second verse (al-Aḥzāb:28) was revealed in the occasion relating to the Prophet (s.a.w.) and his wives, when some of the Prophet's wives requested the luxurious life from the Prophet (s.a.w.) like a gold necklace. After the verse was revealed, the Prophet (s.a.w.) had given the wives the option either to remain with him as his wives or to be divorced upon which he will give them some properties.²⁵

The apparent view (*al-azhar*) in the Shāfi'īs is the view of *al-jadīd*.²⁶ They opine that the above two verses rule that the payment of *mut'ah* is obligatory (*wājib*) on the wife who is divorced either under revocable divorce (*talāq raj'ī*) or irrevocable divorce (*talāq bā'in*). This is because the wife has obtained her dower for the sexual enjoyment that her husband has had with her. However, the wife still deserves *mut'ah* for other benefits (*ibtidhāl*) given by the wife to her husband like cooking, looking after the household, and being loyal to the husband. Nevertheless, the second view from the Shāfi'īs (*al-qadīm*)²⁷ regards that, if the wife has already been paid a dower, and the divorce is after

²³ Al-Kāsānī, *Badāi' al-Ṣanāi' fī Tartīb al-Sharāi'*, Vol. 4, 449.

²⁴ Al-Bahūtī, *Kashshāf al-Qinā' 'an Matn al-Iqnā'*, 158.

²⁵ Al-Qurṭubī, *al-Jāmi' li Aḥkām al-Qur'ān*, Vol. 7, 162.

²⁶ The new school of madhhab Shāfi'ī. This view is based on Shāfi'īs ijtihād after he has moved to Egypt. See Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, 4th edition, vol. 1, 64.

²⁷ The old school of madhhab Shāfi'ī. This view is based on his ijtihād when he was in Iraq. See Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, 4th edition, vol. 1, 64.

sexual intercourse, the husband is not obliged to pay the *mut'ah* as she has already received the *mahr*.²⁸

Contemporary Muslim scholars like Zakiy al-Dīn Sha'abān and al-Zuhaylī have preferred the first view of the Shāfi'is that *mut'ah* is compulsory to be paid due to its strong argument and authorities. Furthermore, payment of *mut'ah* may reduce hardship and pain faced by the wife upon divorce. In the event that the divorce is a revocable or minor irrevocable divorce, it may also encourage the parties to get back together again.²⁹

Legal implications of the payment of *mut'ah* are also highlighted in the Syariah Court in Malaysia to be imperative and compulsory. In the case of *Murshida bte Mustakim v Hassim bin Abdullah*³⁰ the Syariah Court of Appeal, while quoting *I'ānah al-Ṭālibīn* said:

“It is compulsory upon a husband to give *mut'ah* to his wife whom he had intercourse with, even though she is a maid, following a divorce, whereby the cause of such divorce is not due to the wife or not due to the death of either one of the parties.”³¹

PHILOSOPHY BEHIND THE LEGALITY OF PAYMENT OF *MUT'AH*

Based on the discussion of the Muslim jurists, it can be inferred that payment of *mut'ah* is based on several purposes and reasons. In the case of *mut'ah* for the wife who is divorced before consummation and the *mahr* is not prescribed during *'aqad*, *mut'ah* is given to replace the *mahr* by virtue of the *'aqad*.

²⁸ Al-Shirāzī, *al-Muhadhdhab*, 81; al-Ramlī, *Nihāyat al-Muhtāj*, 365; Al-Shirbīnī, *Mughnī al-Muhtāj*, 307.

²⁹ Zakiy al-Dīn Sha'abān, *Ahkām al-Shar'īyyah li Ahwāl al-Shakhṣiyyah*, 6th Edition, (Universiti Qaryūnus, Benghāzī, 1993), 290; Al-Zuhaylī, 6833.

³⁰ [2006] 4 ShLR 43.

³¹ *Ibid.*, 57. See also *Tengku Puteri Zainah v Dato Sri Mohd Najib* (1998) 12 JH 1.

In the case where the woman is divorced after consummation of the marriage, *mut'ah* is payable due to the benefit the husband has enjoyed from the wife. At the same time, divorce is a kind of disgrace (*imtiḥān*) to the wife. Furthermore, if the divorce is through *ṭalāq*, the wife's desire to be divorced is very small as compared to the case of *fasakh* due to the wife's fault or *fasakh* by the wife on the ground of her husband's defect or being poorly off.³² Moreover, the payment of *mut'ah* is to reduce hardship and pain faced by the wife upon divorce.³³ The authors of *al-Fiqh al-Manhajī* while highlighting on the philosophy behind the legality of the payment of *mut'ah* state among others that the payment of *mut'ah* will provide consolation to the wife especially after she leaves the matrimonial home. *Mut'ah* is also aimed at reducing sorrow and sadness of the wife in relation to the divorce and to erase the feeling of loneliness and hatred that is caused by the divorce.³⁴

In Malaysia, the above philosophy was realised and highlighted in the case of *Noor Bee v Ahmad Sanusi*.³⁵ In this case, the court pointed out that the reason for *mut'ah* is to avoid any wrong perception that the society might have on the wife (i.e she is divorced due to any defect on her part). The fact that she is entitled to *mut'ah* is a sign that the divorce is not due to any defect on her part. The court also highlighted that the amount of *mut'ah* given by the husband can be utilised in order to start a new life as a single woman. In *Jaliah bte Hassan v Abu Bakar bin Wan Abdullah*,³⁶ the court mentioned that *mut'ah* can be regarded as a recompense and a recognition of the benefits obtained by the husband from the love and attention given by the wife during the marriage.

³² Al-Shīrāzī, *Al-Muḥadhdhab*, 81.

³³ Zakiy al-Dīn Sha'bān, *Aḥkām al-Shar'īyyah li Aḥwāl al-Shakhṣiyyah*, 290.

³⁴ Muṣṭafā al-Khin, Muṣṭafā al-Bughā, 'Alī al-Sharjī, *al-Fiqh al-Manhajī 'ala Madhhab al-Imām al-Shāfi'ī*, Vol. 2, (Dār al-Qalam, Damshiq, 2005/1427), 82.

³⁵ (1980) JH 63.

³⁶ (1990) 7 JH 73.

FACTORS WHICH DETERMINE THE ENTITLEMENT TO *MUT'AH*

From the above discussion, it appears that under the Shāfi'ī school of law, there are several factors which determine the wife's entitlement to *mut'ah* where the husband will be obliged to pay the *mut'ah* to the wife. The first factor is as earlier mentioned, the case where women are divorced before consummation of the marriage and there is no prescription of the dower. This is as a replacement for the dower which is not prescribed upon *'aqad*.

Mut'ah is also compulsory in cases where women are divorced after consummation where divorce takes place through *ṭalāq* or that which comes under the sub-categories of *ṭalāq* like *khulu'*, *ṭalāq* with condition (*ta'liq*) or *ṭalāq tafwīd*, where the husband gives the power of divorce to the wife.³⁷ Therefore, if the divorce is *ṭalāq*, *mut'ah* is obligatory to be paid by the husband even though the pronouncement of divorce (*ṭalāq*) is due to the wife's act, demand or persuasion.³⁸

With regard to the application of the above principles in Malaysia, there are several cases which were decided based on the above rules. In *Ahmad Shah Ahmad Tabrani v Norhayati Yusoff*,³⁹ the Kelantan Syariah Court of Appeal, quoting *I'ānah al-Ṭālibīn*, said that:

"The payment of *mut'ah* is compulsory on the husband who has divorced his wife after the marriage has been consummated and the divorce is not caused by the wife such as in the case where the wife becomes an apostate..."

The court further explained that the divorce referred to in the statement above is a normal divorce (*ṭalāq*) either by mutual consent or otherwise.⁴⁰ This means that in the case of *ṭalāq*, the wife will be entitled

³⁷ Al-Shīrāzī, *al-Muhadhdhab*, 81. Al-Ramlī, *Niḥāyat al-Muḥtāj*, 365; al-Shirbīnī, *Mughnī al-Muḥtāj*, 307; Al-Ḥusnī, *Kifāyat al-Akhyār*, 67. Al-Dimyātī, *I'ānah al-Ṭālibīn*, 385.

³⁸ Al-Ḥusnī, *Kifāyat al-Akhyār*, 67.

³⁹ (2004) 17 JH 33.

⁴⁰ *Ibid.*, 37.

to *mut'ah* even though in the first place she agrees to be divorced by the husband. Similarly, in the case of *Murshida bte Mustakim v Hassim bin Abdullah*,⁴¹ the Selangor Syariah Appeal Court held that a wife who has been divorced by *talāq* will be entitled to *mut'ah*.⁴²

The Syariah Court has also dealt with the case where the wife demanded a divorce and the Court had to decide whether the wife will be disentitled to the *mut'ah* because of the demand she made. In *Sanisah binti Saad v Zulkifli bin Abd Ghani*,⁴³ the court came to the view that this act would not disentitle a wife to her *mut'ah*.⁴⁴ The court commented that *talāq* is in the hands of the husband and therefore he is free to make a decision whether to divorce or not to divorce his wife. In *Sharifah Sapoyah v Wan Alwi*,⁴⁵ the court, quoting from *Kifāyah al-Akhyār* stated that:

“... if the husband retains her but subsequently divorces her at her request the rule is the same as in the case of *talāq* according to the correct view.”⁴⁶

In the case of *khulu'*,⁴⁷ as illustrated in the case of *Noor Bee v Ahmad Sanusi*,⁴⁸ the wife is entitled to *mut'ah*. The court quoting from *Kifāyah al-Akhyār* said:

“and in the case of *khulu'*, the position is similar to *talāq* (i.e the wife is entitled to *mut'ah*) based on the correct opinion.”⁴⁹

⁴¹ [2006] 4 ShLR 43.

⁴² See also *Noraini bte Abdul Rashid v Dato' Hamzah bin Zainuddin* [2005] 4 ShLR 144; *Norma@Normek binti Ghazali v Mohd. Zain bin Abdullah* (2005) 19 JH 278.

⁴³ (2002) 15JH 197.

⁴⁴ See also *Syed Bulat v Intan* (1973) 2 JH 257.

⁴⁵ (1988) 6 JH 259.

⁴⁶ *Ibid* at pp. 263-264.

⁴⁷ Divorce through redemption.

⁴⁸ (1980) JH 63.

⁴⁹ See *Noor Bee v Ahmad Sanusi*, (1980) JH at 68.

Nevertheless, in *Salma v Mat Akhir*⁵⁰ the court came to the opinion that in the case of *khulu'*, the wife is not entitled to *mut'ah*. The court, however, did not support its opinion with any argument or authority. With regard to *ta'liq* divorce,⁵¹ the case of *Norani binti Abdul Rahman v Md Taib bin Hanapi*⁵² illustrates that a wife is entitled to *mut'ah* in this type of divorce. Similar decision can be seen in the case of *Ainon bte Abdul Aziz v Roslan bin Abdul Rashid*.⁵³

In the case of *fasakh*,⁵⁴ the wife's entitlement to *mut'ah* can be divided into two situations. Firstly, the situation where the wife is entitled to *mut'ah* and secondly, where the wife is not entitled to *mut'ah*. *Mut'ah* is compulsory in the case of separation which is due to outside factors like fosterage or blood relationship,⁵⁵ or the husband's siblings have doubtful sexual intercourse (*wāti' shubhah*) with his wife.⁵⁶ The rule is similar with the rule of *ṭalāq* in both cases that is either before or after consummation. Similarly, if the reason for the divorce or separation is due to the husband, for example, where the husband converts or becomes an apostate or accuses the wife of committing adultery (*li'an*), the rule will also follow the rule in *ṭalāq* before or after consummation.⁵⁷

Mut'ah is no longer compulsory in the case of *fasakh* if the separation is because of the wife, such as where the wife converts to Islam or becomes an apostate, or where the wife initiates a *fasakh* divorce on the ground of inability to maintain or to pay dower due to her husband's poverty, or defect on the part of the husband and the wife,⁵⁸ or where the husband is missing.⁵⁹

⁵¹ *Ṭalāq* that takes place upon fulfillment of certain condition.

⁵² (2004) 17 JH 27.

⁵³ [2006] 4 ShLR 88.

⁵⁴ Divorce by the order of the Court.

⁵⁵ Al-Shirāzī, *al-Muhadhdhab*, 81. Al-Ramlī, *Nihāyat al-Muhtāj*, 365; al-Shirbīnī, *Mughnī al-Muhtāj*, 307; Al-Ḥusnī, *Kifāyah al-Akhyār*, 67.

⁵⁶ Al-Ramlī, *Nihāyat al-Muhtāj*, 365; Al-Ḥusnī, *Kifāyah al-Akhyār*, 67.

⁵⁷ Al-Shirāzī, *al-Muhdhdhab*, 81. Al-Ramlī, *Nihāyat al-Muhtāj*, 365; Al-Ḥusnī, *Kifāyat al-Akhyār*, 67. See also Al-'Imrānī, Abī al-Ḥusayn Yaḥyā Ibn Abī al-Khayr ibn Sālim, *al-Bayān fī Madhhab al-Imām al-Shāfi'ī*, Vol. 11, (Dār al-Minhāj li al-Ṭibā'ah, n.pp, n.d.), 474.

⁵⁸ Al-Shirāzī, 81, al-Ramlī, 365; Al-Shirbīnī, 308. Al-Dimyaṭī, 358.

⁵⁹ Al-Ḥusnī, *Kifāyat al-Akhyār*, 67.

In the case of defect, there is no further discussion in the chapter of *mut'ah*. Nevertheless, if we refer to the case of *fasakh* divorce by the husband due to defect on the part of the wife, the Shāfi'is view is that, the defects in this case are incapability of having sexual intercourse or insanity on the part of the wife or having a contagious disease like leprosy or vitilago.⁶⁰ Nevertheless, as regards insanity, there is an opinion of some Shāfi'is who view that even though the wife is insane or a minor, she might be entitled to the *mut'ah*.⁶¹

In Malaysia, generally, the Syariah Courts are of the view that *mut'ah* is not the absolute right of the wife in all cases of divorce especially in the case of *fasakh*. Nevertheless, in the case of *Hajah Ramlah bt Sharif v Nor Husin bin Othman*,⁶² the court seems to have come to a different view when it was decided in this case that the wife will be entitled to *mut'ah* in all cases of divorce. However, it might be argued in the context of the case, that when the court referred to all types of divorces, this meant in all *talāq* cases regardless of it being a revocable or an irrevocable divorce (*talāq raj'ī* or *bā'in*). In the case of *Ahmad Shah bin Ahmad Tabrani v Norhayati bt Yusoff*,⁶³ the court elaborated on the situations where a wife will not be entitled to *mut'ah*. This covers situations where she becomes an apostate or she initiates a *fasakh* due to the defect on the part of the husband such as insanity or impotency or poverty. The wife will also not be entitled to *mut'ah* if the husband applies for *fasakh* due to defect on the part of the wife such as muscle growth on the private part (*ratq*) or bone growth on the private part (*qarn*).⁶⁴ Similar decisions were made in the cases of *Ainon bte Abdul Aziz v Roslan bin Abdul Rashid* and *Norma @ Normek binti Ghazali v Mohd. Zain bin Abdullah*.⁶⁵

As to the issue of defect, in the case of *Nor Bee v Ahmad Sanusi*,⁶⁶ the court commented that if there are some defects on the part of the wife, she will not be entitled to *mut'ah*. In this case, the court

⁶⁰ See Zakiy al-Dīn Sha'bān, 484.

⁶¹ See al-Ramlī, 365.

⁶² (199) 13 JH.

⁶³ (2004) 17 JH 33.

⁶⁴ *Ibid.*, 37.

⁶⁵ (2005) 19 JH 278.

⁶⁶ (1980) JH 63.

pointed out that *mut'ah* is a gift to be paid if the divorce has not been caused by any defect on the wife's part. However, again there is no further discussion on what constitutes defect on the part of the wife. In *Normaidiah v Azhari*,⁶⁷ the husband claimed that the wife was not entitled to *mut'ah* due to the fact that she was unable to cook or wash clothes. The court rejected the argument as the divorce was not due to any serious defect on the wife's part. While in *Sabariah v Zainol*,⁶⁸ the husband also disputed the claim for *mut'ah* as he argued that the wife did not carry out her household duties and that he had to make his own bed and cook his own meals. The court, however, held that the wife was still entitled to *mut'ah*. Thus, it is presumed that what the court meant by 'defect' most probably refers to the inability to have a sexual relationship as discussed by the jurists above. Nevertheless, it needs to be mentioned here that the wife will not be entitled to *mut'ah* due to the defect on the part of the wife only in cases of *fasakh*. If the separation happens due to *talāq* or similar to *talāq*, the wife will still be entitled to *mut'ah* even where there is a defect on her part.⁶⁹

Based on the above discussion, therefore, it seems that even if the wife is the one who initiates divorce, but the ground for *fasakh* is not the fault of the wife such as in the case of non-payment of maintenance not due to poverty on the part of the husband, she is still entitled to *mut'ah*. Similarly, the wife is entitled to *mut'ah* in the case of cruelty on the part of the husband such as when the husband physically abuses the wife or the husband does not treat the wife equitably in the case of a polygamous marriage or any other reason which are included within the meaning of cruelty as provided by section 52(1)(h) of the Islamic Family Law (Federal Territories) Act 1984.⁷⁰ The wife may also claim the right to *mut'ah* in the case of *fasakh* due to imprisonment of the husband⁷¹ and also in the case where the husband has failed to perform, without reasonable cause, his marital obligations for a period of one year.⁷²

⁶⁷ (1979) 1 JH 91.

⁶⁸ (1979) 1 JH 99.

⁶⁹ See al-Shirāzī, *al-Muhadhdhab*, 81. Al-Ramlī, *Nihāyat al-Muhtāj*, 365; al-Shirbīnī, *Mughnī al-Muhtāj*, 307; Al-Ḥusnī, *Kifāyat al-Akhyār*, 67. Al-Dimyātī, *I'ānah al-Ṭālibīn*, 385.

⁷⁰ See Islamic Family Law (Federal Territories) Act 1984, s. 52(1)(h)(i)-(vi).

⁷¹ See Islamic Family Law (Federal Territories) Act 1984, s. 52(1)(c).

⁷² Islamic Family Law (Federal Territories) Act 1984, s. 52(1)(d).

Besides *ṭalāq* and *fasakh*, another way of dissolving a marriage is due to death. Majority of the jurists agree that in the case of death of either husband or wife, the wife will not be entitled to *mut'ah*.⁷³ In this case, the marriage has absolutely dissolved and has come to an end. The case of *Noraini bte Abdul Rashid v Dato' Hamzah bin Zainuddin*⁷⁴ and *Suriah bte Hassan v Hamzah bin Mohd Nor*⁷⁵ clearly highlight this principle.

WHETHER A WIFE'S DISOBEDIENCE (*NUSHŪZ*) WILL AFFECT HER RIGHT TO *MUT'AH*

The law in Malaysia has raised the issue as to whether a disobedient (*nusyuz*) wife is entitled to *mut'ah*. This particular point has not been clearly highlighted in the discussion on *mut'ah* by the Muslim jurists. Basically, a wife who is *nushūz*⁷⁶ or disobedient to the husband will be disqualified from maintenance.⁷⁷

In the case of *Piah binti Said v Che Lah bin Awang*,⁷⁸ it was argued that *nushūz* on the part of the wife would affect her right to get *mut'ah*. The court, however, was of the view that *nushūz* did not affect the wife's right to *mut'ah*. Similarly, in *Murshida bte Mustakim v Hassim*

⁷³ Al-Shīrāzī, *al-Muhahdhdhab*, 81. Al-'Imrānī, *Bayān fī Madhhab al-Imām al-Shāfi'ī*, Vol. 11, 474.

⁷⁴ [2005] 4 ShLR 144.

⁷⁵ [2007] 3 ShLR 81.

⁷⁶ *Nushūz* is a situation where the wife is disobedient to the husband e.g. if the wife refuses the conjugal relationship with the husband, if the wife refuses the husband's access to her at lawful times, if the wife goes out from the matrimonial home without her husband's permission etc or if she refuses to move to the matrimonial home.

⁷⁷ *Ḥāshiyāt al-Sāwī 'alā al-Sharḥ al-Ṣaghīr*, Vol. 2, 730; Al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 3, 435; Ibn Qudāmah, Abī Muḥammad 'Abdullah ibn Aḥmad ibn Muḥammad ibn Qudāmah al-Maqdīsī, *al-Mughnī 'alā Mukhtaṣār al-Kharāqī*, Vol. 8, (Dār al-Kutub al-'Ilmiyah, Beirut-Lebanon, 1994/1414), 159; As quoted in 'Abdal Fattāḥ 'Amru, *al-Siyāsah al-Shar'īyyah Fī al-Aḥwal al-Shakhṣiyyah*, First Edition, (Dār al-Nafā'is, Jordan, 1998/1418), 90.

⁷⁸ (1983) 3 JH 220.

bin Abdullah,⁷⁹ the respondent husband refused to give *mut'ah* to the appellant wife on the grounds that she was not loyal to the husband and was having an affair with a foreigner. The Syariah Court of Appeal, however, was of the view that the grounds were not a hindrance for the wife to get *mut'ah*.⁸⁰ Similar decision can be found in the case of *Ainon bte Abdul Aziz v Roslan bin Abdul Rashid*.⁸¹ Only in *Jaliah bte Hassan v Abu Bakar bin Wan Abdullah*,⁸² the court came to the opinion that *nushūz* did have an effect on the right of *mut'ah*. Thus, generally we may conclude that the commission of *nushūz* will not affect a wife's right to *mut'ah* but it will most probably affect the amount of *mut'ah* that a wife may get as will be discussed after this.

WHETHER THE WIFE'S RIGHTS TO *MUT'AH* IS ABSOLUTE OR LIMITED

The above discussion indicates that *mut'ah* is not an absolute right of a wife. Based on the juristic discourse, the *jumhūr fuqahā'* including the Shāfi'īs view that the wife is only entitled to *mut'ah* if divorce is before consummation and there is no prescription of the *mahr*. In another occasion, the *jumhūr* other than the Shāfi'īs regard that *mut'ah* is merely recommended. On the other hand, the Shāfi'īs are of the view that a divorced wife is also entitled to *mut'ah* if she is divorced after consummation in several situations. This includes if she is divorced through *ṭalāq*, *ta'līq ṭalāq*, *khulu'* or *ṭalāq tafwīd*. In the case where the divorce is through *fasakh*, the wife is entitled to *mut'ah*, if the *fasakh* is due to her husband's fault like he becomes an apostate or accuses the wife of committing adultery. The wife is also entitled to *mut'ah* if the *fasakh* is due to outside factors like a suckling relationship (*radā'ah*). As regards the law and decisions of the Syariah Courts in Malaysia, it is clear that they follow the view of the Shāfi'īs. Meanwhile, before giving the decision, the Syariah Court judges tend to use their discretion and judicial creativity

⁷⁹ [2006] 4 ShLR 43.

⁸⁰ Nevertheless, the act of *nushūz* will affect the amount of *mut'ah* as will be discussed under the topic of factors affecting the amount of *mut'ah*.

⁸¹ [2006] 4 ShLR 88.

⁸² (1990) 7 JH 73.

when dealing with the wife's entitlement to *mut'ah* to ensure that the right of a divorced wife is protected.

THE AMOUNT OF MUT'AH

According to the Ḥanafīs, *mut'ah* of a wife can be in the form of clothes and veil and its complementary. The least amount of *mut'ah* is five dirhams if the husband is poor and the maximum amount is half *mahr mithlī*⁸³ if the husband is rich. They differ on ways to assess *mut'ah*. The apparent view of the Ḥanafīs regards that, it should be based on the conditions of the husband, while some others view that it should be based on the (financial) conditions of both husband and the wife. There is also a view from al-Kharqī that *mut'ah* should be based on the conditions of the wife, for example, her economic status or her status in society.⁸⁴

The Shāfi'īs hold that the preferred least amount of *mut'ah* is thirty *dirham* or its equivalent in value.⁸⁵ The highest amount is a servant and moderate clothes. This is based on the narration from Ibn 'Abbās (ra) who said that "It is recommended to give the wife a servant or clothes as *mut'ah* ..." and Ibn 'Umar said, "Give the wife thirty dirham as *mut'ah*..."⁸⁶ The *mahr* is recommended not to be more than half *mahr mithlī* but if the amount is more than that it is still permissible.⁸⁷ Nevertheless, if the parties have agreed on a certain amount, then the amount of *mut'ah* is based on their agreement. If there is a dispute, then the *Qāḍī* will determine the amount based on the conditions of the husband and the wife.⁸⁸ However, the preferred view of the Shāfi'īs is that, the amount of *mut'ah* is based on the situation of the husband.⁸⁹

⁸³ *Mahr* which is not determined before or during an *'aqad* of a marriage.

⁸⁴ Ibn 'Ābidīn, *Ḥāshiyāt Radd al-Mukhtār*, 179.

⁸⁵ Al-Shirbīnī, *Mughnī al-Muhtāj*, 308, al-Ḥusnī, *Kifāyat al-Akhyār*, 67.

⁸⁶ Al-Shaykh 'Adīl Aḥmad 'Abd al-Mawjūd et al., *Takmilah Al-Majmū' Sharḥ al-Muhadhdhab*, Vol. 20, (Dār al-Kutub al-'Ilmiyyah, Beirut-Lebanon, 2002/1423), 136-137. See also al-Ṣan'ānī, Muḥammad bin Ismā'īl al-Amīr al-Yamanī, *Subul al-Salām Sharḥ Bulūgh al-Marām*, Vol. 3, (Dār al-Ḥadīth, n.p.p, n.d.), 1049-1050.

⁸⁷ Al-Shirbīnī, *Mughnī al-Muhtāj*, 308, al-Dimyātī, *I'ānah al-Ṭalibīn*, 358.

⁸⁸ Al-Shirbīnī, *Mughnī al-Muhtāj*, 308, al-Ḥusnī, *Kifāyat al-Akhyār*, 68, al-Dimyātī, *I'ānah al-Ṭalibīn*, 358; al-Khin, *al-Fiqh al-Manhajī*, 82.

⁸⁹ Al-Shirbīnī, *Mughnī al-Muhtāj*, 308. Al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu* (tr.), Vol. VII, 6834.

Al-Qurtubī has quoted several views on the amount of *mut'ah*. Among others, the view of Imam Mālik is that, there is no limitation as to the amount of *mut'ah*. He has also quoted the same view of Ibn 'Umar, Ibn 'Abbās and Ḥasan on the minimum and maximum amount of *mut'ah* and the husband's capability.⁹⁰

In Malaysia, the amount of *mut'ah* is not fixed under the law. Instead, the law provides:

"... the Court may ... order the husband to pay such sum as may be fair and just according to Hukum Syara'."⁹¹

In practice, the amount of *mut'ah* is based on the agreement of the parties. When there is a dispute with regard to the amount which needs to be paid, the matter will be referred to the judge. This principle which is in line with Islamic law was highlighted in the case of *Murshida bte Mustakim v Hassim bin Abdullah*.⁹² In this case, the Syariah Court of Appeal, quoting *Hāsyiah I'ānah al-Ṭalibīn*, said:

"When there is a conflict between the two parties concerning the rate of *mut'ah*, it is for the judge to fix based on the rates given by both parties ..."⁹³

There are several important factors that will be taken into consideration by the court before fixing the amount of *mut'ah* which are as follows:

1. Financial standing of the husband

The financial standing of the husband is the most important consideration in order to determine the amount of *mut'ah*,⁹⁴ as based on the principle of the Qur'ān in sūrah al-Baqarah, verse 236 as stated

⁹⁰ Al-Qurtubī, *al-Jāmi' li Ahkām al-Qur'ān*, Vol. 3, 201.

⁹¹ Islamic Family Law (Federal Territories) Act 1984, s. 56.

⁹² [2006] 4 ShLR 43.

⁹³ *Ibid* at 58. See also *Jinah v Abdul Aziz*, (1987) 6 JH 344.

⁹⁴ See *Ainon bt Abd Aziz v Roslan bin Abdul Rashid*, [2006] 4 ShLR 88.

earlier. In order to determine the financial standing of the husband, the Syariah Court in Malaysia will particularly take into account the amount of monthly salary earned by the husband. In the case of *Noor Bee v Ahmad Sanusi*,⁹⁵ RM1500 was given to the wife, taking into account that the husband, who was a soldier, was earning RM700 per month. In the case of *Ida Hidayati binti Taufiq v Ahmad Shukri bin Kassim*,⁹⁶ the wife was given RM48,000 as the amount for *mut'ah*. In this case, the husband, a pilot, was earning around RM10,000 per month. In *Ahmad Shah bin Ahmad Tabrani v Norhayati bt Yusoff*,⁹⁷ the amount of RM50,000 was paid to the wife. In this case, the husband was earning RM9,000 per month as a consultant engineer. In *Norma @ Normek binti Ghazali v Mohd. Zain bin Abdullah*,⁹⁸ the husband who earned RM2,400 per month was ordered to pay RM10,000 to the wife while in the case of *Saffya binti Abdullah v Ruzainee b. Muhamad*,⁹⁹ the husband was asked to pay RM27,375 as he earned RM 8000 per month.

2. Lineage and family status of the wife

Other than the financial standing of the husband, the Syariah Court will also look at the lineage and family status of the wife. This can be seen in *Noor Bee v Ahmad Sanusi*¹⁰⁰ where the court commented that in determining the amount of *mut'ah*, besides financial standing of the husband, the social status of the wife's family must be taken into consideration. Meanwhile, in *Ainon bte Abdul Aziz v Roslan bin Abdul Rashid*,¹⁰¹ the court highlighted the importance of knowing the family status of the wife in order to determine her lifestyle. This will help the court to determine the amount of *mut'ah* taking into account the way of life that she was accustomed to while she was brought up. In *Tengku Anun Zahrah binte Tengku Abdul Hamid v Dato Dr Hussein bin Mohamed Yusof*,¹⁰² the fact that the wife was from a royal family was

⁹⁵ (1980) JH 63.

⁹⁶ (2004) 18 JH 259.

⁹⁷ (2004) 17 JH 33.

⁹⁸ (2005) 19 JH 278.

⁹⁹ (2003) 16 JH 29.

¹⁰⁰ (1980) JH 63.

¹⁰¹ [2006] 4 ShLR 88.

¹⁰² (1983) 3 JH 125. See also *Hazlina bte Hamidin v Muhammad Zaidi bin Majid*, [2005] 2 ShLR 140.

taken into consideration in determining the amount of *mut'ah*. In this case the wife was given RM25,200, an amount which was considered rather large during that time.

3. Character of the wife

The wife's character is also an important factor in determining the amount of *mut'ah*. In *Noor Bee v Ahmad Sanusi*,¹⁰³ the fact that the wife resigned from her work in order to accompany the husband in Kuching was taken into consideration in determining the amount of *mut'ah*. Similarly in the case of *Ahmad Shah bin Ahmad Tabrani v Norhayati bt Yusoff*,¹⁰⁴ the court took into consideration the sacrifice made by the wife while she was married to him. In this case, the wife resigned from her job to become a full time housewife in order to give full commitment to the family. In *Suriah bte Hassan v Hamzah bin Mohd Nor*,¹⁰⁵ the wife had to stay with her parents for some period of time and with her parents in-law for some other period of time. This sacrifice had to be made by the wife as the husband did not provide her with a matrimonial home. The court also took into consideration another good character of the wife namely was she remained patient and loyal to the husband despite accusations that the husband had relationships with various women.

In *Norma @ Normek binti Ghazali v Mohd. Zain bin Abdullah*,¹⁰⁶ the court pointed out that the wife deserved the amount decided by the court as she was a person of good and respected status. In *Noraini bte Abdul Rashid v Dato' Hamzah bin Zainuddin*,¹⁰⁷ the court took into consideration the suffering and hardship which the wife had to go through in taking care of the children without any help from the husband. Furthermore, the wife resigned from her job to concentrate on the family. In this case, the wife succeeded in claiming the amount of salary for the period of twenty two years (if the wife was working) as part of *mut'ah*.

¹⁰³ (1980) JH 63.
¹⁰⁴ (2004) 17 JH 33.
¹⁰⁵ [2007] 3 ShLR 81.
¹⁰⁶ (2005) 19 JH 278.
¹⁰⁷ [2005] 4 ShLR 144.

A question arises as to whether the act of *nushūz* on the part of the wife will have some effect on the amount that is to be paid by the husband. As discussed earlier, it is clear that *nushūz* will not affect the entitlement of the wife to *mut'ah* but it would certainly affect the amount of *mut'ah*. This is established in the case of *Hazlina bte Hamidin v Muhamad Zaidi bin Majid*.¹⁰⁸

4. Length of Marriage

In general, the length of marriage will give some effect on the amount of *mut'ah*. In *Norani binti Abdul Rahman v Md Taib bin Hanapi*,¹⁰⁹ the court considered the length of the parties' marriage which was 16 years while calculating the appropriate amount for *mut'ah*. Similarly in the case of *Saffya binti Abdullah v Ruzainee bin Muhamad*,¹¹⁰ the court commented that the duration of marriage has some effect on the amount of *mut'ah* given to the wife.¹¹¹

Nevertheless, full reliance on the duration of marriage as the basis of calculation of *mut'ah* is not an acceptable method. This can be seen in the case of *Rokiah bte Haji Abdul Jalil v Mohamed Idris bin Shamsudin*.¹¹² In this case, the Chief Qadhi had ordered payment of *mut'ah* at the rate of RM1 per day for the period of the marriage that is 35 years 3 months and 5 days amounting to a total of RM12, 650. On Appeal, the Appeal Committee rejected the method of assessment adopted by the Chief Qadhi. The Committee commented that it was unable to find any juristic basis to support the trial court's judgement. After examining many decided cases on *mut'ah*, the Committee decided that the appropriate amount in this case was RM 6,500.¹¹³

5. Reason for divorce

The Syariah Court will also consider the reason for divorce while assessing the amount of *mut'ah*. In *Hazlina bte Hamidin v Muhammad*

¹⁰⁸ [2005] 4 ShLR 155.

¹⁰⁹ (2004) 17 JH 27.

¹¹⁰ (2003) 16 JH 29.

¹¹¹ See also *Noraini bte Abdul Rashid v Dato' Hamzah bin Zainuddin* [2005] 4 ShLR 144.

¹¹² [1989] 3 MLJ ix.

¹¹³ *Ibid.*, xii – xiv.

Zaidi bin Majid,¹¹⁴ the husband argued that he divorced the wife because she initiated the divorce action by applying for *fasakh* though he did not commit any wrongdoing against her. The husband said that he did not want to have any further arguments with the wife and therefore agreed to pronounce *ṭalāq* on her. With regard to this the court commented:

“... even though the divorce occurred with *lafaz ṭalāq*, the court opined in the context of determining the rate, it was unfair for the defendant if the court did not consider the reasons which led to the divorce. The defendant had argued that he divorced the plaintiff on the ground that the plaintiff initiated the divorce action by applying for *fasakh* in this court. For the sake of not opposing the plaintiff, he agreed to divorce the plaintiff in good terms, even though he did not commit any wrong until it led the plaintiff to apply for *fasakh*. Based on the facts agreed by both parties in this case, the court held that there were no facts relating to the negligence and ignorance of responsibilities committed by the defendant when the marriage was still subsisting. Thus, the court accepted the arguments of the defendant that he should not be blamed because the divorce occurred due to application by the plaintiff herself (*sic.*)”¹¹⁵

Hence, the fact that it was the wife who wanted the divorce in the first place was taken into consideration. It is also worth mentioning that the grounds for *fasakh* that had been relied upon by the wife were never proved in court.¹¹⁶ If the grounds were proved, the court might have decided differently.

¹¹⁴ [2005] 2 ShLR 140.

¹¹⁵ *Ibid.*, 160.

¹¹⁶ In this case, the wife alleged that the husband often uttered vulgar language towards her, acting immorally in contradiction with the *sharī‘ah* and had once attacked her physically. See *ibid.*, 160.

6. Other factors

The court may also take into account other factors which appear to the court to be relevant in order to give fair and just treatment to both parties. In *Hazlina bte Hamidin v Muhammad Zaidi bin Majid*,¹¹⁷ the court took into consideration the fact that the husband was required to pay a large amount of credit card debts which had been used by the wife during the marriage as a factor in determining the amount of *mut'ah*.

CONCLUSION

Islamic law has recognised the ancillary rights of the wife after divorce, one of which is the right to *mut'ah*. This recognition is further enhanced and enforced in the Syariah Court in Malaysia. This right is important to safeguard the wife who is divorced by the husband after spending a certain period of her life with the husband. Nevertheless, the right to *mut'ah* is only absolute in the case involving *talāq*, perhaps due to the fact that the divorce originates from the husband. While, in other cases of divorce or separation, the right to *mut'ah* is limited especially in the case of *fasakh* divorce. The law in Malaysia that emphasises that the right to *mut'ah* is limited to the case of a divorce without just cause seems to have restricted a wife's right to *mut'ah*. Nevertheless, based on decided cases, the Syariah Court seems to have a tendency to grant *mut'ah* to the wife in many cases after taking into account several factors and reasons.

To conclude, it would appear that the court has a judicial discretion when dealing with a wife's right to *mut'ah*. Therefore, in an occasion where the Court thinks that the wife is prejudiced by the divorce, the Court will grant *mut'ah* after taking into consideration several factors which might affect the amount of *mut'ah*. This can be inferred from the present practice of the Syariah court.

¹¹⁷

Ibid.