

The discourse on family *fiqh* in Malaysia within the broader national agenda of “strengthening Islamic family values” to maintain its indigenous Islamic characteristics in the age of globalization is a part of larger scholarly discussion on constructing local *fiqh* (*al-fiqh al-mahalli*) for Muslims. For such *fiqh* to evolve, a broader understanding of multifaceted aspects of the local family institution, its current problems and concerns warrant serious academic researches and evidence-based analysis. Therefore, scholarly papers contained in this book will fulfil this need in several ways including: first, some studies outline the juristic framework for contextualizing local factors into the Islamic methodology of renewal and reform; second, other researches evaluate the existing family laws with the prime purpose of suggesting relevant legislative and policy recommendations; third, some other studies deliberate on enhancing financial and the economic wellbeing of the family by advocating the introduction of more family-oriented Shariah-compliant services and products; fourth, a few studies focus on the family health by proposing that the existing policies on vaccination and pre-marital HIV screening need further improvements; and lastly, one study calls for integrating more religiosity elements into policies on career-women to enable them to better cope with the double task of family commitments and job responsibilities.

# Family Fiqh in Malaysia

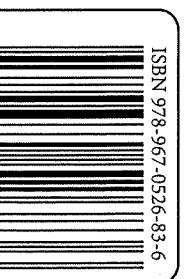
## An Analysis of the Selected Issues

*Editors*

Sayed Sikandar Shah Haneef  
Mek Wok Mahmud  
Mohammed Farid Ali Al-Fijawi  
Raudlotul Firdaus Fatah Yasin

*Foreword by*

Professor Emeritus Tan Sri Dato Dzulklifi Abdul Razak  
Rector, International Islamic University Malaysia



CFRU Contemporary Fiqh Research Unit  
Contemporary Fiqh Research Unit  
CFRU, IUM  
IBT Islamic Book Trust  
Kuala Lumpur

© Contemporary Fiqh Research Unit, IUM 2021

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

*Published by*

Contemporary Fiqh Research Unit (CFRU)  
Kulliyah of Islamic Revealed Knowledge and Human Sciences (KIRKHS)  
International Islamic University Malaysia (IIUM)  
53100 Jalan Gombak,  
Kuala Lumpur, Malaysia.

*In collaboration with*

Islamic Book Trust  
607 Mutiara Majestic, Jalan Ohman  
46000 Petaling Jaya, Selangor, Malaysia  
[www.ibtbooks.com](http://www.ibtbooks.com)

Islamic Book Trust is affiliated with The Other Press.

Perpustakaan Negara Malaysia      Cataloguing-in-Publication Data

Family Fiqh in Malaysia : An Analysis of the Selected Issues / Editors Sayed Sikandar Shah Haneef, Mek Wok Mahmud, Mohammed Farid Ali Al-Fijawi, Mohd Abbas Abdul Razak, Raudlotul Firdaus Fatah Yasin.

ISBN 978-967-0526-83-6

eISBN 978-967-0526-84-3

1. Families--Religious aspects--Islam.
2. Marriage--Religious aspects--Islam.
3. Marriage (Islamic law)--Malaysia.
4. Government publications--Malaysia.

I. Sayed Sikandar Shah Haneef. II. Mek Wok Mahmud.

III. Mohammed Farid Ali al-Fijawi. IV. Mohd. Abbas Abdul Razak.

V. Raudlotul Firdaus Fatah Yasin.  
297.577

## Contents

Foreword.....	ix
Introduction .....	xi
<b>PART ONE</b>	
<b>Family Fiqh Framework</b>	
1. Legislative Significance of Custom in Developing Local Family Fiqh: An Analysis of its Conceptual Framework.....	3
2. Juridical Impact of <i>Urf</i> on Family Law: An Applied Juristic Framework for Local Fiqh.....	36
<b>PART TWO</b>	
<b>Issues in Islamic Family Law</b>	
3. <i>Harta Sepencarian</i> in Business Interest: An Analysis of Malaysian Courts Approaches.....	57
4. The Concept of Rahmatan Lil Alamin for HIV Screening Test in Malaysia.....	75
5. Talag through Electronic Medium under Islamic and Malaysian Law: The Impact on ' <i>Taddah</i> and <i>Rujin</i> '.....	89
6. Reconciliation Process of Muslim Marriage under the	

Persidangan Aids Kebangsaan Ke 4, Tahun 2018—Malaysian AIDS Council. Accessed March 1, 2020.  
<https://www.mac.org.my/v3/persidangan-aids-kebangsaan-ke-4-tahun-2018/>.

Puri, Mahesh, Jyotsna Tamang, and Iqbal Shah. "Suffering in Silence: Consequences of Sexual Violence within Marriage among Young Women in Nepal." *BMC Public Health* 11, no. 1: 29, 2011.

Saidon, R., Kamaruddin, Z., Arifin, M., Ibrahim, N., and Sahari, N. H. "Examining the Policy of Mandatory Premarital HIV Screening Programme for Muslims in Malaysia". *Pertanika J. Soc. Sci. & Hum.* 23 (S): pg 129-140, 2015.

Tagi al-Din Bin 'Ali Ibn Daqiq al-'Ayd al-Qusyayri, *Syarh al-Arba'in al-Nawawiyah fi al-Ahadis al-Sahihah al-Nabawiyah*, 107: (http: Muassasah al-Rayyan, 2003).

Tham Jen Sern & Hasmah Zanuddin. "Affirmative Religious Response Culture to HIV and AIDS: Understanding the Public Relations Role of JAKIM in Curbing the Epidemic among Young Muslim Couples in Malaysia", *Asian Social Science*; Vol. 10, No. 13, 2014.

Wanita Terdedah Jangkitan HIV/AIDS | Nasional | *Berita Harian*. Accessed February 29, 2020.  
<https://www.bharian.com.my/berita/nasional/2017/11/345903/wanita-terdedah-jangkitan-hiv-aids>.

Yassar Mustafa. "Islam and the Four Principles of Medical Ethics." *Journal of Medical Ethics* 40, no. 7 " 479-483, 2014.

## *Talaq* through Electronic Medium under Islamic and Malaysian Law: The Impact on 'Tadakh and Ruju'

Azizah Mohd\*

### Introduction

Marriage is a sacred institution in Islam, especially to legalize sexual relationship between a man and woman so that their dignity and chastity are also protected. It is also one of the *maqasid al-Shariah* to safeguard lineage, dignity and chastity of mankind through marriage. It primarily aims that procreation of mankind can be achieved through a chaste and lawful union between a man and woman. It is also envisioned that through marriage, a man and woman may achieve a happy life and successfully establish a family institution that is blessed by the almighty God. Islam recommends marriage due to such noble purposes, and therefore, discourages divorces unless if such marriage can lead to harm or evil that defeat the purpose of marriage. In that occasion, divorce is allowed through several ways which include *talaq*.

\* Assoc. Prof. Dr., Department of Islamic Law, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Kuala Lumpur, Malaysia.

### The Concept of *Talaq 'Iddah* and *Rujū'* under Islamic Law The Concept of *Talaq*

*Talaq* generally means the dissolution of a valid marriage through the pronouncement of divorce by the husband. *Talaq* in Arabic is a root verb (*masdar*). It can also be used as a perfect verb which is '*tallaqa*' and imperfect verb which is '*yutalliqu*' derived from it (Al-Razi 1999, 192). According to Al-Zuhayli (n.d, vol. 9, 6873), *talaq* literally means untying the marriage knot. Technically, *talaq* means untying the marriage contract ('*aqad*') by using the word *talaq* and other equivalent words. Nasir (1986) provided a more detailed definition of the word *talaq* which refers to "the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent or his wife duly authorized by him to do so, using the word *talaq*, a derivative or synonym thereof" (102).

The above definition indicates that pronouncement of *talaq* is solely on the husband's hand. However, the husband may also authorize another person to pronounce a divorce like his friend or his wife. The principle where the husband authorizes the wife to pronounce a divorce is known as '*tafwid talaq*' (Al-Ansari n.d, vol. 3, 278; Ibn Nujaym n.d, vol. 3, 335; Al-Sawi n.d, vol. 2, 600; Al-Zuhayli n.d, vol. 9, 6935). Furthermore, *talaq* is pronounced by using the word *talaq* or its synonym like the husband said, 'I divorce (*talaq*) you with one *talaq*' (Al-Kasani 1986, vol. 3, 98; Al-Awaysyah 1429H/2008). According to Imann Shafi'i and Imam Ahmad, the marriage is also terminated if the husband uses the word '*firaq* (separate) or *sarah* (release) 'Aqalah. 2010, 121; Mohd Zin *et al.* 2016, 143), for instance, 'I separate from you'.

Among the reasons that authority to pronounce *talaq* is given to the husband is because the husband is considered as maintainer of the family (al-Qur'an 4: 34). Being a leader, a husband has more wisdom and is wiser. Rationally speaking, a man is less emotional and calm when solving problems as compared to a woman (Al-

Zuhayli 2010, vol. 8, 347). Researches seem to reveal the fact that demands for *talaq* are more likely to come from women as compared to the pronouncement of *talaq* by a man (Ismail, 2017).

As marriage is highly recommended in Islam, *talaq* is generally reprehensible if the couple has no valid reason to divorce as the Prophet ﷺ said: "The most detestable in the eyes of Allah is *talaq*" (Ibn Majah n.d, vol. 1, hadith no. 2018, 650). On the other hand, in a situation when the couples have problems that cannot be solved unless, through a divorce, Islam permits divorce in good terms. This is based on the verse of the Qur'an that states to the effect:

"Divorce is permissible twice, so that the husband may continue in kindness or let the wife go in kindness"—al-Qur'an 2: 229.

It follows that divorce in kindness is so significant in Islam to the extent that the husband should not divorce the wife after causing her harm and cruelty. Similarly, any kind of improper mode of divorce should also be avoided so that the pronouncement of divorce should not cause any difficulties to the wife (Al-Qurtubi 1964, vol. 3, 127).

*Talaq* in kindness is also significant in the sense that it gives the right of '*ruju'*' (resumption of conjugal relationship) to the husband. Therefore, on this basis, *talaq* can be either a revocable or irrevocable. The husband can return to his wife if he pronounces one *talaq* or two *talaq* (revocable divorce), but he can no longer do so if he pronounces the third *talaq* (irrevocable divorce) (Al-Kasani 1986, vol. 3, 109; Al-Sharbini 1994, 478).

In general, there are two ways of divorce pronouncement as recognized by Islamic law, to make the pronouncement effective. The first is clear or explicit (*sarih*) pronouncement. For example, the husband said to the wife, 'I divorce you with one *talaq*'.

Another kind is indirect/unclear (*kinayah*) pronouncement of divorce like the husband said 'I don't want to continue living with you' (Al-Kasani 1986, vol. 3, 106; Al-Nawawi 2005, 230; Al-Ansari n.d., vol. 3, 269; Ibn Qudamah 1994, vol. 3, 113; Al-Zuhayli 2010, vol. 8, 365-366).

For a *talaq* to be effective, the husband must be a sane person and has authority as a husband. He must also be at the age of puberty and voluntarily pronounces the word *talaq*. For a clear (*sarih*) pronouncement, the intention is not necessary, but for an indirect pronouncement (*kinayah*), the intention is required (Al-Ansari n.d., vol. 3, 269; Al-Sawi n.d., vol. 2, 542-543). The wife, however, is not necessary to be a sane or a major person, but she must be a legal wife of the husband or is in the term observing her '*iddah* out of a revocable divorce (*Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah* 1993, vol. 27, 9).

#### The Position of Talaq through Electronic Medium under Islamic Law

Significantly, the best kind of *talaq* in Islam is one *talaq*. It may follow with the second *talaq* as it is still permissible based on the Qur'an (al-Qur'an 2: 229). Nevertheless, the Muslim jurists also discussed should *talaq* be pronounced in writing. According to the *jumhur al-fuqaha* (the majority of Muslim jurists), including the Shafi'i, Maliki's and Hanbali's, *talaq* in writing is an indirect (*kinayah*) form of *talaq* as it is not pronounced. Therefore, it should be coupled with intention in order to constitute a divorce (Al-Ansari n.d., vol. 3, 269; Al-Sawi n.d., vol. 2, 542-543; *Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah* 1993, vol. 27, 25). On the other hand, the Hanafi Legal School view that if the writing pronouncement is very clearly addressed to the wife, then it is considered as explicit (*sarih*) pronouncement and does not require intention (*Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah* 1993, vol. 27, 4).

Nowadays, through the advancement of technology, *talaq* can be pronounced through phone calls, video conferencing, skype etc. Similarly, *talaq* in writing can be done in many ways, including messaging through Facebook, WhatsApp, Telegram, email, and so forth. Divorce by pronouncement is valid provided that it fulfils all the conditions of *talaq*. Similarly, for *talaq* through an electronic medium in writing, by applying the principle of divorce by writing, it can be inferred that divorce through electronic mediums can be effective if coupled with intention (Egyptian Fatwa Council, No. 4272; Jabatan Kemajuan Islam Malaysia (JAKIM) 2015b, 159; Jamiatul Ulama (Kwa Zulu Natal South Africa) n.d). According to a fatwa of Dubai's Department of Islamic Affairs and Charitable Activities, an SMS message sent by a husband to his wife comprising the word 'divorce' is sufficient to render the divorce as valid. However, if it was sent in anger, it is not valid (Emirates247, 2013).

#### The Concept of 'Iddah and Raju'

*Iddah* literally means to count. Technically, '*iddah* means a waiting period which a woman should observe due to marriage dissolution or death of the husband (Ibn Nujaym n.d., vol. 3, 138). In other words, a woman has to observe a certain waiting period when she is divorced either through a divorce by *talaq*, any kind of marriage dissolution like *khulu'* and *fasakh*, or the marriage is dissolved by the court due to non-fulfilment of certain conditions (Al-Hattab 1992, vol. 4, 140; Al-Sharbini 1994, 78; Al-Zuhayli n.d., vol. 9, 7166).

*Iddah* due to divorce depends on the divorced woman's situation, i.e. whether she is still menstruating at the time of the divorce or whether she is pregnant. If the divorced woman is still menstruating at the time of the divorce, she has to observe three *quru'* (al-Qur'an 2: 228). According to the Shafi'i Legal School, it

is referring to the three-time clean periods from menses (Al-Sharbini 1994, 78), while according to the interpretation of Hanafi Legal School, three *quru'* refers to three periods of menses (Al-Kasani 1986, vol. 3, 193; Al-Zuhayli n.d., vol. 9, 7176). A woman who is a minor or has reached the age of menopause is to observe three months *'iddah* upon divorce. While a pregnant, divorced woman is to observe *'iddah* until the delivery of her baby (al-Qur'an 65:4). Nevertheless, if the divorce takes place before marriage consummation, the divorced woman does not have to observe any *'iddah* period (al-Qur'an 33: 49). The purpose of *'iddah* in a divorce case is specifically to see whether the divorced woman is free from pregnancy from the previous husband or not. Hence, at least within three terms period of *'iddah*, she can be cleansed from any biological relationship with her previous husband and is free to marry another man (Al-Kasani 1986, vol. 3, 193; Al-Sharbini 1994, 84; Al-Zuhayli n.d., vol. 9, 7170). In the circumstance of the *'iddah* from a revocable divorce, the purpose is specifically to give proper time for the divorced man and woman to rethink and resume their conjugal relation in the interest of their family (Al-Zuhayli 2010, vol. 8, 594).

In the case of death, a widow has to observe four months and ten days upon the demise of her husband regardless of whether the death is before or after the marriage consummation (al-Qur'an 2: 234). This is because the main purpose of this kind of *'iddah*, apart from cleansing the widow's womb, is to mourn on the husband's death. However, the jurists differ with regard to the period of *'iddah* if the widow is pregnant. This is due to conflict of authorities in the Qur'an, between the two terms of 'four months and ten days' and 'until delivery of the baby' (Al-Kasani 1986, vol. 3, 192; Al-Zuhayli 2010, vol. 8, 594; Al-Zuhayli n.d., vol. 9, 7181). *Jumhur al-fuqaha* view that the *'iddah* period of a pregnant widow is until she delivers her baby based on *Surah al-Talaq* verse 4 (Al-Sharbini 1994, 84; Al-Kasani 1986, vol. 3, 192; Ibn Qudamah 1994,

vol. 3, 97; *Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah* 1993, vol. 27, 317). Meanwhile, a minority of Muslim jurists view that the *'iddah* of a pregnant widow will be whichever is longer of the two terms, *ie.* delivery or four months and ten days. Thus, if four months and ten days lapse without her giving birth, her *'iddah* will continue until delivery; and if she delivers before the completion of four months and ten days, her *'iddah* will be four months and ten days. (*Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah* 1993, vol.27, 320).

*Ruju'* literally means to return, and technically, it means to return to the previous marital relationship after a revocable divorce (*talaq raj'i*) (Al-Razi 1999, 118; Qal'aji and Qunaybi 1988, 220; *Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah* 1993, vol. 22, 127). It follows that *ruju'* is only applicable in a revocable divorce that is in the case of the first *talaq* and the second *talaq*. Where in both of these two cases, the husband may take back (*ruju'*) his wife so long as she is still in *'iddah* period using a simple word of *ruju'* such as 'I take you back'. A *ruju'* does not require a fresh marriage contract and does not require consent from the divorced wife. In other words, in the case of *ruju'*, the husband will have a better right than the wife as he divorced the wife with a revocable divorce (al-Qur'an 2: 228; Al-Zuhayli 2010, vol. 8, 439-442).

#### **Talaq, 'Iddah and Ruju' under the Statutory Provisions of Islamic Law in Malaysia**

In Malaysia, *talaq* is one of the family matters which is dealt with under the Islamic Family Law Act and Enactment of respective states in Malaysia. For the purpose of this paper, reference shall be made to the Islamic Family (Federal Territories) Act 1984 (Act 303) (the IPLA).

Where a man or a woman requires a divorce through *talaq*, the IPLA requires that either party apply for the permission of

divorce (Islamic Family Law (Federal Territories) Act 1984, s. 47(1)). After the court is satisfied that both parties mutually agreed for a divorce through *talaq*, the court will order the husband to pronounce one *talaq* before the court (Islamic Family Law (Federal Territories) Act 1984, s. 47(2)). This procedure seems to apply the best form of divorce under Islamic law (the *Shariah*). Nevertheless, there is no direct provision on *'iddah* of a divorced woman other than the provision that follows a pronouncement of divorce under section 47 (revocable divorce) (Islamic Family Law (Federal Territories) Act 1984, s. 47(16 and 17)).

As for *ruju'*, the IFLA defines *ruju'* as a resumption of a conjugal relationship after the wife is divorced with a revocable *talaq*. The IFLA further provides that the husband may register a *ruju'* if the wife consents to the *ruju'*. Applying the view of the Shafi'i Legal School (Islamic Family Law (Federal Territories) Act 1984, s. 51(1-3)), the IFLA seems to emphasize that *ruju'* should be done only by words (Islamic Family Law (Federal Territories) Act 1984, s. 51(8)).

#### **Talaq through Electronic Medium under the IFLA**

There is no direct provision on divorce through an electronic medium in the IFLA. Nevertheless, the IFLA provides provisions for any *talaq* that is pronounced against law or *talaq* outside court. Accordingly, a divorce pronounced outside the court is an offence and subject to a certain penalty. The IFLA states:

1. Notwithstanding section 54, a man who has divorced his wife by the pronouncement of *talaq* outside the Court and without permission of the Court, shall within seven days of the pronouncement of the *talaq* report to the Court.

#### *Talaq through Electronic Medium under Islamic and Malaysian Law*

2. The Court shall hold an inquiry to ascertain whether the *talaq* that was pronounced is valid according to *Hukum Syarak*
3. If the Court is satisfied that the *talaq* that was pronounced is valid according to *Hukum Syarak*, the Court shall, subject to section 124:
  - a. make an order approving the divorce by *talaq*;
  - b. record the divorce; and
  - c. send a copy of the record to the appropriate Registrar and to the Chief Registrar for registration (Islamic Family Law (Federal Territories) Act 1984, s. 55A).

The IFLA further states that:

Any man who divorces his wife by the pronouncement of *talaq* in any form outside the Court and without the permission of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment (Islamic Family Law (Federal Territories) Act 1984, s. 124).

For instance, in the case of *Pendakwa Mahkamah Melaka v Ismail bin Jaqfar* ([1989] 7 JH 100), the husband was found guilty for pronouncing divorce outside the court and therefore, was penalized.

The above provision seems to govern all the provisions on divorce pronounced by the husband who does not follow the proper procedure under section 47 of the IFLA. As divorce through an electronic medium is pronounced outside the court and without fulfilment of proper procedure, such divorces are also governed under section 55A and 124. In other words, if there is such kind of divorce, either through email, WhatsApp, Skype,

video conferencing, etc., it will be an offence and the husband will be subject to a penalty if the divorce is held to be effective.

As to whether *talaq* through an electronic medium is effective or not, there is a decision made by the 59th National Council for Malaysian Islamic Affairs Fatwa Committee Muzakarah held on the 27th of Augusts 2003, which, among others, states that:

1. *Talaq* in writing that is specifically addressed to the wife through SMS, fax, email etc. is a *kinayah* form of *talaq* and can be effective if coupled with intention. Divorce through SMS will follow the principle of *talaq* in writing as viewed by the Muslim jurists.
2. If such kind of *talaq* is pronounced, the parties have to refer to Syariah Court who will decide whether it is effective or not.
3. *Talaq* through an electronic medium is a kind of *talaq* which is not in line with ethics (*adab*) that is recognized in Islam (Jabatan Kemajuan Islam Malaysia (JAKIM) 2015b, 159).

From the legal perspective, it seems that this decision is not binding and enforceable in the states since it has not been gazetted... However, the court may refer to the decision made by the National Fatwa Committee in deciding a case although it is not binding.

#### ***Talaq* through Electronic Medium as Decided in Syariah Court**

To date, there are very few cases reported on *talaq* outside court in Malaysia. In 2003, the decision of the Gombak Timur Syariah Court that a pronouncement of divorce through Short Message System (SMS) is valid as long as it is verified by the court. The court decision has received wide media coverage locally and internationally (Elias and Muthiah 2003: *The Sydney Morning*

*Herald* 2003; CNN.com 2003). In this case, the judge held that the 18-month marriage between Azida Fazlina Abdul Latif and Shamsudin Latif was annulled when the husband sent SMS to the wife stating that if she did not leave her parents' house, she would be divorced by triple *talaq*. In the case of *Hafijah Abdul Rahman v. Zambrze Baharom* (120091 1 CLJ (Sya) 402), the Seremban Syariah High Court also dealt with the issue of whether a pronouncement of *talaq* through SMS is valid or not. The court, in this case, reviewed the decision of Port Dickson Syariah Subordinate Court that the pronouncement of *talaq taqliq* (conditional divorce) made by the defendant to his wife in which "if she goes out to meet a man then she is divorced by triple *talaq*" is clear and does not require an intention for it to be valid. Through the judge of the subordinate court confirmed the divorce, he was in doubt as to the legitimacy or accuracy of the decision, and the case was brought to the high court for review. In the Syariah High Court, the issue arose as to whether the pronouncement of *talaq* through SMS has the same effect as pronouncing through writing. If it so, whether such clear pronouncement still requires an intention to affect the divorce. In arriving at its decision, the Syariah High Court judge referred to several classical books, juristic opinions and the Muzakarah Decision of the National Fatwa Committee held on 27 August 2003, even though it was not gazetted by the Negeri Sembilan Government. The National Fatwa states that divorce in the form of writing that is evidently addressed from the husband specifically to his wife through facsimile, SMS, e-mail or other such devices is a *kinayah talaq* and is only valid if it is accompanied by the husband's intention. Thus, the Syariah High Court judge held and ordered the re-hearing of the case in order to determine whether the pronouncement of *talaq* by the husband through SMS was accompanied with an intention to divorce. Similarly, the defendant in *Nor Aniza bte Idris v. Mohamad*



*Fauzi bin Ahmad* ([2006] 3 ShLR 102) sent SMS to the plaintiff who claimed that it was for the purpose of divorce. The Federal Territory Syariah Subordinate Court heard this case in relation to verification of pronouncement of divorce outside the court. In this case, the defendant pronounced several *kinayah* words which require intention before the divorce could be confirmed. The defendant denied that he had the intention to divorce his wife and the wordings in the SMSS were sent during the state of anger. The issue arose whether the defendant had the intention to divorce his wife when he wrote *kinayah talag* through the SMSS. The judge, in this case, held that the plaintiff's claim to register the divorce was denied since the contents of both SMSS described as *kinayah* were not based on the intention of the defendant to divorce her. The defendant also took an oath to deny that his purpose was for a divorce.

In the unreported case of Mohamad Aidil Zafuan Abd Razak and Rita Rudaini Mokhtar, the couple married on 25 February 2008 at Majlis Agama Islam Wilayah Songkla, Thailand. The marriage was registered with Pejabat Agama Islam Wilayah Persekutuan, and they were blessed with two sons. On 4 August 2013, Aidil Zafuan pronounced a divorce to Rita Rudaini through SMS (Mohd Yunus 2013; mStar 2013; Ahmad n.d.). On 5 September 2013, the Seremban Syariah Lower Court confirmed through a Summons No: 05005-054-1245-2013 that the pronouncement of divorce made by Aidil Zafuan to Rita Rudaini through SMS as valid (Jabatan Kehakiman Syariah Selangor (JAKESS) 2016). The decision was made by Syarie judge, Hamizan Mohd Nor after being satisfied with all the evidence furnished by the couple on the utterance of divorce which took place outside and without the consent of the court. In the proceeding, Aidil Zafuan as the plaintiff admitted to the court that he typed the SMS himself; he was conscious at that time and without influence from others. Rita Rudaini also admitted that she received the SMS and

understood the meaning that her husband tried to convey (Bernama 2013).

#### The Impact of Talag through Electronic Medium on 'Iddah and Ruju'

'*Iddah* of a divorced woman will begin immediately upon the pronouncement of *talag* being effective (Jabatan Kemajuan Islam Malaysia (JAKIM) 2015a). As the divorce through an electronic medium is a kind of divorce outside court, the parties might not be aware of the effect of the pronouncement of *talag* especially if the parties are laymen and have no knowledge about divorce law under Islamic law as well as the law in Malaysia. It follows that the parties might not be aware of the duration of '*iddah* of a divorced wife as to when it will begin. Furthermore, if the divorce is a revocable divorce (*talag raj'i*) the parties might be ignorant of the possibility of reconciliation (*ruju*), when to reconcile as well as what is the duration of reconciliation. So far, the Department of Islamic Development Malaysia (JAKIM) has provided a guideline for divorced women to observe their '*iddah* (Jabatan Kemajuan Islam Malaysia (JAKIM) 2015a). Furthermore, the Office of the Ministry of Prime Minister Department, Islamic Religious Department and Islamic Judiciary Department of Federal Territories, have also published a book on the guideline for registration of '*ruju*' in the Syariah Court (Pejabat Menteri di Jabatan Perdana Menteri *et al.* n.d.). Nevertheless, other than the above provision on registration of divorce outside the court and penalty, there are no further guidelines for any divorce pronounced outside the court, especially to guide a husband and wife who might involve in the divorce outside court phenomenon.

Reported cases seem to suggest problems among the couples who are ignorant of the law on divorce to the extent that they proceed with the marriage without knowing that the divorce

pronounced is effective. This can be seen in the case of *Abdul Rahman bin Ishak v Shariza binti Zainal Abidin* ([2005] 4 ShLR 165) where the husband pronounced a conditional divorce that he agreed for a divorce if he involved in another gambling in 1993. The court held that divorce was effective in 1994, but the case was only brought to the court after the divorced wife gave birth to three children. Meanwhile, in the case of *Ramli v Salleh & Amor* ((1982) 7 JH 40), the husband went to register the *ruju'* only after the third pronouncement of *talaq* outside the court, whereby, in that case, he was not allowed to *ruju'* for the third time as *talaq* is considered irreversibly irrevocable (*bain kabra*).

The above circumstances seem to require further guidelines for divorce pronounced outside the court in Malaysia, including divorce through an electronic medium. This is to ensure that the parties, especially the husband, is aware of the effects of the pronouncement of *talaq* outside the court. Furthermore, with such guidelines, the couples will be able to quickly refer to the status of their *talaq* and *ruju'*.

It is also significant to propose that the provision on *talaq* outside the court in the IFLA should extend further on the regulation of *talaq* through an electronic medium as a form of *talaq* outside the court and subject to a penalty if it is pronounced. This provision will provide a clear picture of *talaq* through an electronic medium as one of the forms of *talaq* outside the court, which is against the procedure in Malaysia.

### Conclusion

*Talaq* is one of the solutions to resolve marital conflict. Even though the husband is given the authority to pronounce *talaq*, he should not simply exercise such authority anytime he likes what more in an unjust manner. Therefore, for a monitored system of divorce, the pronouncement of *talaq* in Malaysia is well-regulated

in each of the fourteen states. Nevertheless, cases on *talaq* that is pronounced against the law are rampant. The era of digitalization may also contribute to this kind of *talaq* against the law, especially when the couples opt for a fast solution to their marital problem. With everything on fingertips, such *talaq* through the electronic medium may also be a click away from husband to simply divorce the wife. As it is not administered, *talaq* through an electronic medium would affect the wife's period of *'iddah* (which might not be realized by the divorced wife) as well as the time to reconcile (*ruju'*) by the divorcing husband.

Therefore, in order to provide certain solutions to this problem, it is proposed that further guidelines are prepared for divorce pronounced outside the court, especially divorce through the electronic medium. The guidelines should consist of the possibility of such divorces to be effective and what are the procedures of registration of such divorces when it is pronounced. The guidelines should further provide clarity on the provisions of *'iddah* to be observed by the divorced wife and its duration, as well as the possibility of *ruju'* by the husband. This guideline can be provided as annexed to the Islamic Family Law statutes or at least published in the Islamic Religious office's website like the Department of Islamic Development Malaysia (JAKIM) or Selangor Islamic Religious Council (MAIS) as previously done.

It is also proposed that provision on divorce outside the court is further extended to provide a certain situation that leads to divorce pronounced outside the court and punishable under the law such as divorce through an electronic medium. This seems to be significant as the layman will have a clear idea on what is termed as divorce pronounced outside the court and that it is considered an offence under the law. This will also provide a precaution and alert the parties that divorce through the electronic medium is an offence and subject to penalty under the law.

## References

- "Aidil Zafuan Cerai Rita Rudaini Talak Satu Melalui SMS." *mStar*, August 5, 2013.  
<https://www.mstar.com.my/spotlight/hiburan/2013/08/05/aidil-zafuan-cerai-rita-rudaini-talak-satu-melalui-sms>.
- "Egyptian Fatwa Council, No. 4272." 2005. Accessed March 19, 2019, <http://www.dar-alifta.org/AR/ViewFatwa.aspx?sec=fatwa&ID=14255>.
- "Fatwa: Divorce SMS sent in anger is invalid." *Emirates247*, March 26, 2013  
<https://www.emirates247.com/news/emirates/fatwa-divorce-sms-sent-in-anger-is-invalid-2013-03-26-1.500033>.
- "Fury over 'rude' SMS divorces." *CNN.com*, July 29, 2003.  
<http://edition.cnn.com/2003/WORLD/asiapcf/southeast/07/29/malaysia.divorce/index.html>.
- "Malaysia rules out divorce by email or SMS." *The Sydney Morning Herald*, September 5, 2003.  
<https://www.smh.com.au/technology/malaysia-rules-out-divorce-by-email-or-sms-20030905-gdhc80.html>.
- "Turkey's Top Religious Body Issues Fatwa on Divorce via Communication Devices." *Hurriyet Daily News*, December 07 2017.  
<https://www.hurriyetdailynews.com/turkeys-top-religious-body-issues-fatwa-on-divorce-via-communication-devices-123726>.
- Ahmad, Azyyati. "Aidil Zafuan cerai Rita Rudaini dalam SMS." *Astro Awani*. Accessed May 7, 2019.  
<http://www.astroawani.com/berita-hiburan/aidil-zafuan-cerai-rita-rudaini-dalam-sms-19751>.

- Al-'Awaysyah, H. A. *Al-Mawsu'ah al-Fiqhiyyah al-Muyassarah fi Fiqh al-Kitab wa al-Sunnah al-Mutahharah*, Vol. 5. Amman: al-Maktabah al-Islamiyyah, 1429H/2008.
- Al-Ansari, Z. M. *Asna al-Matalib fi Sharh Rawd al-Talib*, Vol. 3. Cairo: Dar al-Kitab al-Islami, n.d.
- Al-Hattab, M. M. *Mawahib al-Jalil fi Sharh Mukhtasar Khalil*, Vol. 4. Beirut: Dar al-Fikr, 1992.
- Al-Kasani, A.B. *Bada'i al-Sana'i fi Tartib al-Shara'i*, Vol. 3. Beirut: Dar al-Kutub al-'Ilmiyyah, 1986.
- Al-Nawawi, A. Z. Y. *Minhaj al-Talbin wa 'Umdah al-Muttaqin fi al-Fiqh*. Beirut: Dar al-Fikr, 2005.
- Al-Qurtubi, M. *Al-Jami' li Ahkam al-Qur'an*, Vol. 3. Cairo: Dar al-Kutub al-Masriyyah, 1964.
- Al-Razi, M. A. B. *Mukhtat al-Sohhah*. Beirut: al-Maktabah al-'Asriyyah, 1999.
- Al-Sawi, A. M. *Hashiyah al-Sawi 'ala al-Sharh al-Kabir*, Vol. 2. Cairo: Dar al-Ma'arif, n.d.
- Al-Sharbini, M. K. *Mughni al-Mukhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj*. Damsyik: Dar al-Kutub al-'Ilmiyyah, 1994.
- Al-Zuhayli, W. *al-Fiqh al-Islami wa Adillatuhu*, 12<sup>th</sup> ed., Vol. 9. Damsyik: Dar al-Fikr, n.d.
- Al-Zuhayli, W. *Mawsu'ah al-Fiqh al-Islami wa al-Qadaya al-Mu'asirah*, Vol. 8. Damsyik: Dar al-Fikr, 2010.
- 'Aqalah, M. *Nizam al-Ushrah fi al-Islam*, Vol. 3, Amman: Maktabah al-Risalah al-Hadithah, 2010.
- Bernama. "Court rules Aidil Zafuan has divorced Rita." *Astro Awani*, September 6, 2013.  
<http://english.astroawani.com/entertainment-news/court-rules-aidil-zafuan-has-divorced-rita-21712>.

- Elias, Sa'odah, and Wani Muthiah, "SMS divorce 'not the right way'." *The Star Online*, July 31, 2003.  
<https://www.thestar.com.my/news/nation/2003/07/31/sms-divorce-not-the-right-way/>.
- Ibn Majah, M. Y. Q. *Sunan Ibn Majah*, Vol. 1. Cairo: Dar Ihyā' al-Turath al-'Arabi, n.d.
- Ibn Nujaym, Z. I. *Al-Bahr al-Raiq Sharh Kanz al-Daqa'iq*, Vol. 3. Cairo: Dar al-Kitab al-Islami, n.d.
- Ibn Qudamah A. A. *Al-Kafi fi Fiqh al-Imam Ahmad*, Vol. 3. Beirut: Dar al-Kutub al-'Ilmiyyah, 1994.
- Ismail, Saadiyah. "Wanita Lebih Cenderung Meminta Cerai." *BH Online*, August 8, 2017.  
<https://www.bharian.com.my/wanita/keuarga/2017/08/31/0126/wanita-lebih-cenderung-minta-cerai-pakar>.
- Jabatan Kehakiman Syariah Selangor (JAKESS). "Rita Rudaini Binti Mohamad @ Mokhtar Iwn Mohamad Aidil Zafuan Bin Abd Radzak [Dalam Mahkamah Tinggi Syariah Selangor di Shah Alam (Y.A Tuan Mawardi Bin Che Man, HM/TS) 18 Rejab 1437H bersamaan 26 April 2016M] [Kes Saman No: 10300-023-0598-2013]." Accessed May 6, 2019.pdf.
- Jabatan Kemajuan Islam Malaysia (JAKIM). "Garis Panduan Ber'iddah bagi Wanita yang Bercerai atau Kematian Suami." Latest update December 2, 2015.  
<http://www.islam.gov.my/rujukan/garis-panduan/124-garis-panduan-ber-iddah-bagi-wanita-yang-bercerai-atau-kematian-suami>.
- Jabatan Kemajuan Islam Malaysia (JAKIM). *Kompilasi Pandangan Hukum, Muzakarah Fatwa Kebangsaan*. Kuala Lumpur: JAKIM, 2015.

- Jamiatul Ulama (Kwa Zulu Natal South Africa). "Talaq via SMS, Whatsapp." Accessed May 11, 2020.  
<https://jamiat.org/za/talaq-via-sms-whatsapp/>.
- Mohd Zain, Najibah, Nora Abdul Hak, Azizah Mohd, Normi Abdul Malek, Noriah Ibrahim, Roslina Che Soh@Yusoff, Noraini Md Hashim, and Badrudin Ibrahim. *Islamic Family Law in Malaysia*. Selangor: Sweet Maxwell/Thomson Reuters, 2016.
- Nasir, Jamal J. *The Islamic law of Personal Status*. London: Graham & Trotman, 1986.
- Pejabat Menteri di Jabatan Perdana Menteri et al. *Buku Panduan Proses Nikah, Cerai dan Rujuk di Jabatan Agama Islam Wilayah Persekutuan dan Mahkamah Syariah*. Kuala Lumpur: Jabatan Agama Islam Wilayah Persekutuan, n.d.
- Qal'aji, Muhammad Rawwas, and Hamid Sadiq Qunaybi. *Mu'jam Lughah al-Fuqaha'*. Beirut: Dar al-Nafa'is, 1988.
- Zubir, Mohd Yunus. "Aidil Zafuan Cerai Rita Guna SMS." *Berita Harian*, Nasional, August 5, 2013.