

JUSTICE DELAYED IS JUSTICE DENIED?: DIVORCE CASE MANAGEMENT IN MALAYSIAN SHARIAH COURT

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Abstract

One of the problems that influence the quality of administering justice is the duration of court proceeding. This problem has been significantly recognized in many countries. In Malaysia, the lengthy duration of court proceedings pertaining to divorce cases of Muslim couples is particularly considered to be a problem in Malaysian shariah court. In fact, this is the most prevalent complaint ever lodged by the public to Shariah Judiciary Department (JKSM) every year. While it is true that delay indicates inefficiency in management, the interpretive standard used by the JKSM concerning delay is applied for cases which reach settlement after 360 days. Therefore, what is deemed to be delay by laymen, is perhaps not so by the shariah court's standard. There are still far lack of empirical and extensive academic studies on divorce case management especially concerning delay in case settlement. The objective of this research is to examine whether delay exists in case management in Shariah court, how extensive and critical it is by looking at the contributing factors. Dissolution of marriage cases are chosen as the sample of the study as these cases are frequently bogged with delays.

Keywords: *court management, case management, shariah court, divorce, judicial separation*

INTRODUCTION

In Malaysia, the lengthy duration of court proceedings pertaining to divorce cases of Muslim couples is particularly considered to be a problem in Malaysian shariah court. While there are many contributing factors for the long duration taken to settle these cases, it is worth asking about the measures taken by the shariah court to reduce the widely-acclaimed problem. Conventional wisdom has it that divorce cases is not easy to settle, particularly when both parties are not in mutual agreement to separate, thus shariah court gets the blame. The main motivation in writing this paper is instigated by the public complaints, aired in the media or from legal practitioners representing clients in the shariah courts, claiming delay in settling their cases. The objective of this research is to examine whether the existence of delay in case management in Shariah court is a myth or imparted reality. If it is real, how extensive and critical it is by looking at the contributing factors.

JUSTICE DELAYED IN THE COURTROOM?

Delay has to do with long duration to settle a case and when it does not settle within a 'necessary' period, it is assumed to be delay. The term "duration" refers to the period between the submission of application by a plaintiff and the pronouncement of court decision. The lengthy of duration is practically related to the number of adjournment (i.e how many times the case is adjourned by the court) and the duration of adjournment (i.e how long is the case adjourned to the next date). "Case management" refers to procedures followed by the shariah court in determining proceeding for the entire process. The problem of delays in reaching court decision in both criminal cases and civil disputes is not something that is unheard of. Courts around the world are frequently associated with delays, case backlog, poor case management and so on, leading some to tackle the issue drastically by creating new model for case management,ⁱ establishing a night court dedicated to processing certain casesⁱⁱ and many more. In Malaysia, the problem has been identified as early as in the 1980s, when the then Appeal Court Judge of Malaya admitted that "the most pressing problem facing the administration of justice in Malaysia today is the congestion of cases in the Courts and the practical difficulty of getting them disposed as soon as possible."ⁱⁱⁱ Lately it has been observed in Malaysia that the judiciary has come out with what they called key performance indicator (KPI) which emphasizes on speedy case management. But later it was quashed amidst the worry that the KPI would stress more on quantity rather than quality. It was later re-invented, focusing more on quality of judges and their judgment, perhaps in order to honor the maxim "justice hurried is justice buried". In another word, priority is and should be given to the quality rather than quantity. According to Italian researchers Palumbo and Sette,^{iv}, the quality of a decision depends on many factors including how many technical and legal issues the judge has to go through before making decision. A high quality decision resulting from a complex dispute is more indicative of ability than a high quality decision on a dispute that is relatively simple to solve.

DELAY, DIVORCE AND SHARIAH COURT IN MALAYSIA

It is not uncommon to hear dissatisfaction expressed by those seeking justice in shariah court, particularly women when dealing with matrimonial-related cases, i.e legal separation, maintenance, division of marital assets and custody of the children.^v Previous studies show that it was typical to see the disposal of these kinds of cases were done after at least after a year long.^{vi} Several years ago when a woman named Aida Melly claimed to the media that her divorce case took seven years to settle, it caused national uproar. Her case became a focal point for some quarters to attack shariah court and its case management system.^{vii} Women's group like Sisters in Islam (SIS) which is at the forefront of voicing any form of "injustice" towards Muslim women are quick to pinpoint that "Shariah court continued to treat women unfairly and often made decisions in favor of men, mainly because of the chauvinistic attitudes of the officers."^{viii} From their research, SIS also found that women dealing with shariah court expressed their dissatisfaction primarily over the undated adjournment and the lengthy trial of their cases, be it divorce, maintenance, custody and so on.^{ix} Raihanah Abdullah finds that the typical dissatisfaction voiced out by women is in regards to the divorce cases,^x which sometimes took years to settle.^{xi} All these scenarios had led academics to research and find the truth behind the allegations of injustice and bias against women and their terrible ordeal of divorce in shariah courts. The important question to ask is: when a case takes a long time to settle, does it mean that there is an element of delay and if so, does it mean inefficiency in court case management? Many academic enquiries in this area have their focus on court cases particularly to see whether the occurrence of delay is a major problem. In the 1990s, Buang et.al (1997) find that delay or backlog of cases is not that serious, in fact one contributing factor related to delay which lead to

series of case adjournment seems to be justified: request from both parties. They find that the question of effectiveness of shariah court is very much related to the duration it takes to solve a case. Effectiveness is measured by duration taken to settle a case. If one is settled after 12 months, then only it fits the categorization (of delay). Zaleha Kamaruddin, using court data from 1990-1997, finds that delays in disposition of matrimonial cases in the shariah courts is partly due to imbalance between work burden and the number of judges in shariah courts within that period.^{xii} However, the situation is hardly improved because the occurrence of delay is still there, even after that period of study. This is supported by the number of public complaints lodged to states' shariah courts in the recent years. For example in the state of Selangor, at least 20% of complaints (42 out of 213 complaints) are related to delay between 2006-2010. Even though such complaint is not on top of the list, delay could be considered as an essential issue capable of jeopardizing the image of shariah court in public eyes. The Shariah court herself did not remain undisturbed by this figure. In fact, the Selangor Judiciary Department (JAKESS) had conducted their own research to find the root of the problem. Complaints related to delay were gathered from all Shariah courts in Selangor. These data were then divided into five categories, involving judge/court, document management, shariah lawyers, parties (both plaintiff and respondent) and miscellaneous. It is interesting to find that, based on this research, the main contributor for adjournment which leads to delay is the parties themselves (54%), followed by miscellaneous like procedural reason/technical (26%), judge (9%), document management like servicing notice and summons (6%) and lastly lawyers (5%). When the parties themselves failed to appear in shariah court without any valid reason on the day they are supposed to be present, the judge had no choice but to postpone the case to another date and time, by taking into consideration the availability of lawyers, parties and the court. Evidence from this research show that, it is incorrect to blame the shariah court for the delay due to the fact that the hearing cannot be resumed without the appearance of parties. However, the scarcity of research on case management in shariah court is quite evident. This aspect is very lacking, perhaps, because most researchers have been conducted by legal researchers.

DIVORCE AND THE LAW

Under the Malaysian Islamic family law, there are four types of dissolution of marriage, namely:

- A. Divorce (section 47 of Islamic Family Law Act 1984)
- B. *Fasakh* (judicial separation) (section 52 of IFLA 1984)
- C. *Taklik* (loosely translated as stipulation) (section 50 of IFLA 1984)
- D. Confirmation for out-of-court utterance of divorce.(section 55A of IFLA 1984)

The applicant will have to prepare necessary documents to substantiate his/her case prior to registering it. The court registrar will then register the case. Within 21 days, the parties will be called for hearing. This is as stated under the Shariah Court's Client's Charter which indicates that after registration, a case will get its first hearing within 21 days. The applicant or plaintiff will have to prepare a statement of claim intended to clarify before the sitting judge his/her case against the respondent. The respondent will be called to enter his/her statement of defence against claims by the plaintiff.

For type A case, with both agree to separate, the procedure will be simple and fast. Unlike type B and C, both cases solely depend on the wife's evidence. For *fasakh*, the requirement on the female spouse is to prove that the husband falls within one of twelve situations rendering her to obtain a decree of judicial separation.^{xiii} This, according to Chief Registrar of Shah Alam Shariah Court takes a lot of time since she has to bring forward witnesses, adduce documents and certainly, be challenged by the husband in court.

As far as adjournment of hearing is concerned, it is part of the procedure as mentioned under section 192 of Shariah Court Civil Procedure Act of Federal Territory 1998. This provision allows the hearing to be adjourned from time to time accordingly. As far as lawyers are concerned, however, section 22 of Syariah Lawyers Ethics 2008 states that lawyers must not apply for a postponement unless for valid and reasonable ground. It is their duty to be well prepared for the case hearing.

THE METHODOLOGY

Accomplishing this research importantly involve several methods. Firstly, secondary data pertaining to Shariah lower court proceeding for divorce was examined from the year 2005 to 2010. In terms of jurisdiction and management, divorce is dealt with by the lower and not the shariah high court. In order to obtain this data due to its high confidentiality, JKSM was consulted for the release of national data. From the national data, Selangor is chosen as prime sample as it records the highest number of divorce cases in Malaysia. However, due to time factor, the focus was carried out in two out of ten district courts that is Gombak Timur and Gombak Barat Shariah Courts. To ascertain factors for delay, cases that took more than 360 days to settle were selected and thus analysed in depth. In Gombak Timur district, 20 cases which took more than 360 days to settle within the five-year period were identified. There were 40 cases in Gombak Barat Shariah Court. However, for this study (again due to time limitation), only ten cases were chosen i.e. three cases each for judicial separation (*fasakh*) and out-of-court divorce confirmation and two cases each for stipulated divorce (*taklik*) and divorce application.

Furthermore, observation in court proceeding was conducted in order to have a clear understanding on the procedures that are taking place in a divorce hearing. In order to do that, permission from the selected courts in Gombak Timur, Johore Bahru and Penang were obtained prior to the observation. In-depth interviews was also conducted with two experienced judges, Court Chief Registrar of Shah Alam and two lawyers with five years experience. Their experiences are important to the study in order to give the authors some clear views and highlights on the reasons why the judges and the courts delay in settling those divorce cases.

FINDINGS

Divorce cases Management

From the divorce proceeding being observed by the researchers, it is found that in general, the court adhere to all procedures outlined by the law. First ly, when an application is recorded at the shariah court, the mention date is given within 21 days. This is in accordance with the Shariah Court's Client's Charter. For any adjournment that follows, the date must be given for the next hearing by taking into consideration the availability of judge, lawyers and parties. However, there is no rules as to how long can a case be adjourned. It all depends on the parties involved. Before 2010, all cases must be clear within 360 days. Therefore, if a case settles within 360 days, it is not considered as delay. In fact one of the finding in 2002 in the Netherlands show that "the average time for processing an administrative court appeal was 359 days" (von Montfort et.al,2005). However, since 2010, it is made a target within the shariah court's Key Performance Indicator (KPI) that the case must reach the settlement within 180 days.

Number of Divorce Cases in Shariah Court

Data obtained from JKSM in Putrajaya is shown in Table 1, exhibiting the number of divorce cases filed in Lower Shariah Court between 2005 and 2010. The data clearly shows that divorce among Muslim couples is increasing within the five-year period in every state except for Kedah. Selangor has the whopping highest number of divorce cases (8105 cases), followed by Johore (4371) and Kelantan (4296). It is apparent that Selangor double the number of divorce cases in other states. Each year saw the increasing of about one thousand cases, compared with mere hundreds in other states.

Table 1
Divorce Cases Among Muslims According to States in Malaysia 2005-2010

States	2005	2006	2007	2008	2009	2010	Total
Johore	2400	2858	2963	3406	3858	4371	19856
Kedah	1689	2512	1834	2778	1582	1791	12186
Kelantan	3002	3176	3448	3716	3975	4296	21613
Malacca	817	1084	1056	1132	1327	1503	6919
Negri Sembilan	1195	1382	1520	1792	2107	2257	10253
Pahang	1766	2099	2094	2452	2802	3125	14338
Perak	1436	1228	1780	2222	2584	2702	11952
Penang	1337	1463	1504	1669	1793	1951	9717
Perlis	423	478	657	668	691	677	3594
Federal Territory	2062	2141	1759	2843	3215	3295	15315
Sabah	1266	1596	1770	2187	2499	2639	11957
Sarawak	1108	1259	1249	1572	1716	1694	8598
Selangor	3310	4463	5371	6164	7075	8105	34488
Terengganu	1907	2289	2452	2763	3109	3229	15749
TOTAL	23718	28028	29457	35364	38333	41635	196535

Source: JKSM

Figure 1 below illustrates further the increasing trend in divorce cases among Muslims in all states except Kedah.

Figure 1:
Divorce Cases Among Muslims According to States in Malaysia 2005-2010

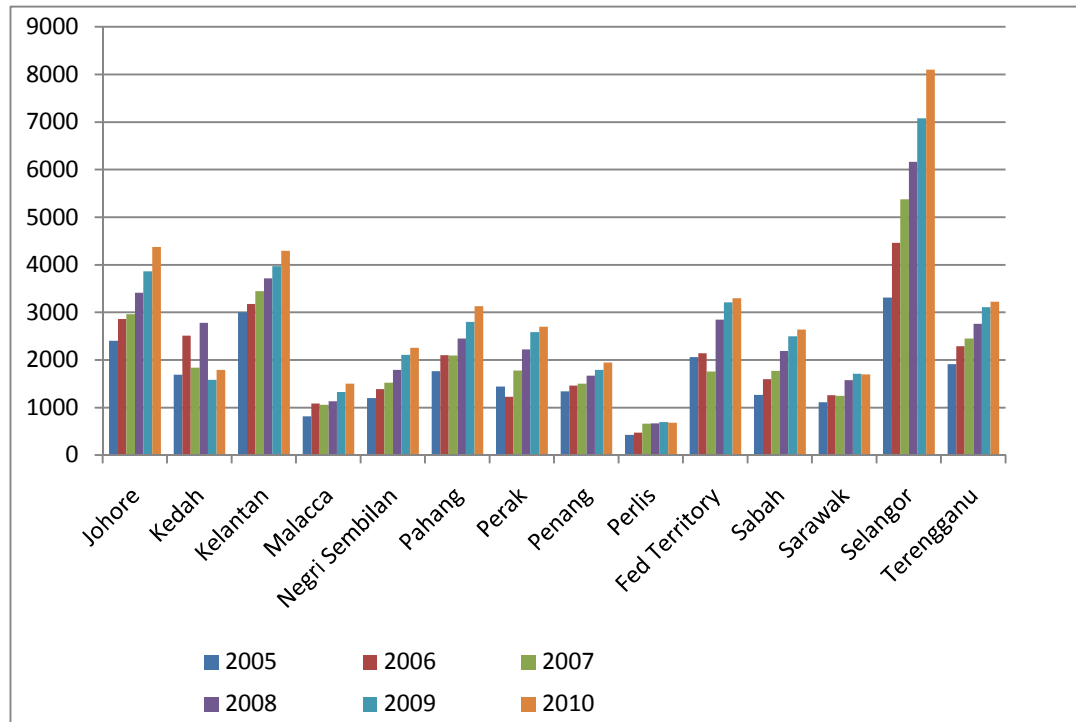


Table 2 shows the increasing number of *fasakh* and divorce cases compared to divorce by *taklik* cases which are declining in Selangor. Please refer to Table 2 for more details.

Table 2

Number of Dissolution of Marriage According to Types in Selangor 2005-2010

Types	2005	2006	2007	2008	2009	2010	Total
Judicial separation	400	486	606	626	788	1051	3957
Stipulated divorce	185	214	211	162	181	141	1094
Confirmation for out-of-court utterance of Divorce	1186	1658	2057	2511	3013	3393	13818
Divorce	1539	2105	2497	2865	3093	3520	15619
TOTAL	3310	4463	5371	6164	7075	8105	34488

Source: JKSM

Figure 2 below illustrates the increasing trend of *fasakh* and divorce cases and the declining rate of *taklik* cases.

Figure 2:**Number of Dissolution of Marriage According to Types in Selangor 2005-2010*****Duration for Case Settlement***

The duration of case settlement, number of postponement and court proceedings vary from case to case as shown in Table 3 below. Parties responsible for the postponement are the involved parties, their lawyers and also court. However, the major party responsible for the postponement is the plaintiffs themselves. The major reasons for the postponement are their unappearance from the hearing, lawyers and emergency leave by judges, delay in submitting either statement of defense or statement of claim as well as failure to appointing lawyers. Another reason why some cases took longer time to settle is because the applicant change her application after half-way through. In one case, the plaintiff changed her first application for divorce to *fasakh* because the husband refused to divorce her. This has created difficulties for all parties because fresh documentation would be necessarily required, not to mention the task taken by the court to postpone the hearing to the next available date. Raihanah Abdullah, however, finds that some women are willing to de-list some of her demands just in order to expedite the process for divorce, to the extent of bargaining with the husband to let her go. This includes to change the application from divorce to *tebus talaq* were she will pay an agreed sum to the husband once he agrees to divorce her, or waive all financial rights after divorce like *iddah* maintenance, *mut'ah* (consolatory gift/money) and sometimes custody of the children.^{xiv} It is very seldom that shariah court is the main factor for delay. Usually if the case needs to be re-scheduled, the court will notify both parties in advanced. Taklik cases normally take longer time to be heard than normal divorce, whereas *fasakh* cases are heard on the date of the registration. The reason for this is unknown. However, it is *fasakh* that were always postponed due to lacking in evidence and procedural requirements. One good thing about delay is, as seen by Sharifah Zaleha, is that “adjourning hearings may help estranged couples to reconcile with one another”,^{xv} but how it could be accomplished was not mentioned. Penang Shariah Lower Court, Zulfahmi Bunaim agrees that the time could be used to exhaust all means necessary to kiss and make-up, and shariah court would then be satisfied in knowing

that all measures are taken by both parties before making a final decision to separate. According to one lawyer, the postponement is unavoidable, but sometimes the reasons for it is unacceptable. For example, mere absence of one party without reason given (usually husband in *taklik* and *fasakh* cases) would be one of the challenges facing the plaintiff wife in proving her case against the husband. Both *taklik* and *fasakh* cases take quite a number of proceedings to be settled compared to divorce application and confirmation for out-of-court utterance of divorce. However, divorce confirmation cases are the longest to be settled as they need lawyers to prove (with witnesses) whether the utterance of divorce has really taken place at that particular stipulated time. Table 3 show in details.

**Table 3:
Duration for Case Settlement**

	Fasakh	Taklik	Divorce Application	Divorce Verification
No. of Postponement	8-12 times	2-10 times	3-4 times	2-7 times
Parties responsible for postponement	Plaintiff, lawyer and court	Courts, lawyer and parties	Courts, parties	Courts and parties
Major party responsible for postponement	Lawyer and plaintiff	parties and lawyers	parties	Plaintiff and court
Major reason for postponement	Absence of parties, lawyers and judges, delay in submitting petition & appointing lawyer	Absence of parties, lawyers and judges, delay in submitting petition & appointing lawyer	Absence of parties, lawyer, judge, delay in submitting petition & changing application of divorce	Unappearance of defendant, witnesses and failure to appoint lawyer.
First hearing	The registration date	8-11 months from the registration date	7 months from the registration date	21 days from the registration date
No. of proceedings	3-5 times	2-5 times	0-3 times	0-2 times
Total days of settlement	375-527 days	416-1008 days	436 days	413-1023 days

Factors for Delay

According to Ridhwan Hussin from Zulkifli Yong, Azmi & Associates, delay in case settlement can be avoided if all parties co-operated well in settling the case. However, he agrees that delay is unavoidable and is caused by more than one factor. Sometimes delay is caused by litigant parties. More often than not, on the day fixed for hearing, the party did not appear. Through his experience, the longest duration he ever experienced to settle a case of *taklik* is six years. This is because of procedural requirements (witnesses, documents, evidence) and contestation between parties. He said as lawyers, they must be well prepared. Postponement must not be applied unless reasonable but must be noticed at least 48 hours before the date. The observation done in Johore Bahru Shariah Court caught the researcher by surprise when an experienced lawyer asked his case to be postponed because he did not come with any preparation. He unashamedly told the court that he thought the hearing on that day was for case management.

DISCUSSION AND CONCLUSION

A court trial is like a circle, one depending on the other for completion. To avoid unnecessary delay, all parties: the plaintiff, defendant and the lawyer must take their case seriously so as not to give the court any room to adjourn the case. The court too must have a good management system to avoid delay. All procedures must have time factor be put to ascertain the duration needed to avoid dragging of cases which lead to backlog. To conclude, all parties must attempt to the best of their ability to settle a case within the shortest amount of time possible, out-of-court discussion and settlement must be encouraged and the shariah court must show leadership through example by avoiding unnecessary adjournment and be strict with parties trying to drag time for their own benefit. Even though postponement is part of the process and understandably that no cases ever reached the disposition at one go, the target to settle the case and resolve issues must be there. So much so with “justice hurried is justice buried”, but it is worth to remember that “justice delayed is justice denied”!

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ⁱ Gensler,2010; Michels,1995

ⁱⁱ Smith et.al.1994

ⁱⁱⁱ Siti Norma Yaacob (1981)

^{iv} Palumbo and Sette (2006)

^v Raihanah Abdullah(2001);Maznah Mohamad (1999);Noor Aziah Mohd Awal (2001)

^{vi} Ahmad Hidayat Buang (2003)

^{vii} Read the full report of her case *Khairul Anuar bin Kamaruddin vs. Aida Melly Tan Mutalib* at (2008) 1 Sh LR 85

^{viii} "Shariah Court Officers Need More Exposure, Say Anwar, Bias Against Women Must Stop." 26th August 1996

^{ix} Ibid.

^x Raihanah Abdullah (2001:117)

^{xi} Sharifah Zaleha Syed Hassan (1986: 2:183)

^{xii} Zaleha Kamarudin (1999:7:1:98)

^{xiii} Section 52 IFLA 1984:(1) Seseorang perempuan yang berkahwin mengikut Hukum Syarak adalah berhak mendapat suatu perintah untuk membubarkan perkahwinan atau untuk fasakh atas satu atau lebih daripada alasan yang berikut, iaitu—

- (a) bahawa tempat di mana beradanya suami telah tidak diketahui selama tempoh lebih daripada satu tahun;
- (b) bahawa suami telah cuai atau telah tidak mengadakan peruntukan bagi nafkahnya selama tempoh tiga bulan;
- (c) bahawa suami telah dihukum penjara selama tempoh tiga tahun atau lebih;
- (d) bahawa suami telah tidak menunaikan, tanpa sebab yang munasabah, kewajipan perkahwinannya (nafkah batin) selama tempoh satu tahun;
- (e) bahawa suami telah mati pucuk pada masa perkahwinan dan masih lagi sedemikian dan isteri tidak tahu pada masa perkahwinan bahawa suami telah mati pucuk;
- (f) bahawa suami telah gila selama tempoh dua tahun atau sedang mengidap penyakit kusta atau vitiligo atau sedang mengidap penyakit kelamin dalam keadaan boleh berjangkit;
- (g) bahawa isteri, setelah dikahwinkan oleh wali mujbirnya sebelum dia mencapai umur baligh, menolak perkahwinan itu sebelum mencapai umur lapan belas tahun, dan dia belum disetubuhi oleh suaminya itu;
- (h) bahawa suami menganiayainya, iaitu, antara lain—

- (i) lazim menyakiti atau menjadikan kehidupannya menderita disebabkan oleh kelakuan aniaya; atau
 - (ii) berkawan dengan perempuan jahat atau hidup berperangai keji mengikut pandangan Hukum Syarak; atau
 - (iii) cuba memaksa isteri hidup secara lucah; atau
 - (iv) melupuskan harta isteri atau melarang isteri itu daripada menggunakan haknya di sisi undang-undang terhadap harta itu; atau
 - (v) menghalang isteri daripada menunaikan atau menjalankan kewajipan atau amalan agamanya; atau
 - (vi) jika dia mempunyai isteri lebih daripada seorang, dia tidak melayani isteri yang berkenaan secara adil mengikut kehendak Hukum Syarak;
- (i) bahawa walau pun empat bulan berlalu tetapi isteri masih belum disetubuhi oleh kerana suami bersengaja enggan menyetubuhinya;
- (j) bahawa isteri tidak memberi keizinan akan perkahwinan itu atau keizinannya tidak sah, sama ada oleh sebab paksaan, kesilapan, ketidaksempurnaan akal, atau hal keadaan lain yang diakui oleh Hukum Syarak;
- (k) bahawa pada masa perkahwinan itu isteri, sungguhpun berkebolehan memberi keizinan yang sah, adalah seorang yang kecelaruan mental, sama ada berterusan atau berselangan, dalam erti Ordinan Sakit Otak 1952 [*Ord. 31 tahun 1952*] bagi Wilayah Persekutuan Kuala Lumpur, atau Ordinan Lunatik bagi Wilayah Persekutuan Labuan [*Sabah Bab 74*] dan kecelaruan mentalnya adalah daripada suatu jenis atau setakat yang menjadikannya tidak layak untuk berkahwin;
- (l) apa-apa alasan lain yang diiktiraf sebagai sah bagi membubarkan perkahwinan atau bagi fasakh di bawah Hukum Syarak.
- (1A) Mana-mana orang yang berkahwin mengikut Hukum Syarak adalah berhak mendapatkan perintah bagi pembubaran perkahwinan atau fasakh atas alasan bahawa isteri menjadi tidak upaya yang menghalang persetubuhan.
- ^{xiv} Raihanah Abdullah (2001:119)
- ^{xv} Sharifah Zaleha (1986:195)