

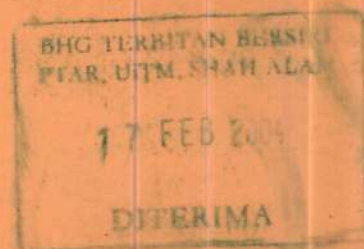
Wahana AKADEMIK

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DARIPADA KETUA PENYUNTING

Assalamualaikum Warahmatullahi Wabarakatuh

Y.A.B. Dato' Seri Setia Di Raja Dato' Seri Syed Razak Syed Zain, Menteri Besar Kedah telah melakukan lawatan rasmi ke UiTM Cawangan Kedah pada 3 Julai 2003 yang lalu. Sempena lawatan beliau, Pengarah Kampus telah memberi taklimat mengenai kemajuan dan sumbangan UiTM Cawangan Kedah melalui penyelidikan dan perundingan terhadap negara khususnya negeri Kedah. Kata alu-aluan Y. Bhg. Dato' Naib Canselor UiTM dalam buku "UiTM Kedah Sepintas Lalu" sempena lawatan Menteri Besar Kedah telah menekankan peranan UiTM terhadap negara terutamanya dalam bidang penyelidikan dan perundingan untuk membantu kerajaan negeri bagi memajukan negeri masing-masing. Oleh itu, satu saluran perlu diwujudkan bagi mendokumentasikan hasil penyelidikan dan perundingan supaya ianya boleh dijadikan sumber rujukan oleh semua pihak yang berminat.

Justeru itu, UiTM Kedah telah menerbitkan jurnal akademik bertajuk 'Wahana Akademik' untuk menampung keperluan penerbitan tersebut. Untuk itu, Jawatankuasa Jurnal Akademik, Universiti Teknologi MARA Cawangan Kedah amat mengalu-alukan hasil penulisan akademik samaada hasil penyelidikan dan perundingan ataupun analisa '*literature*' untuk dimuatkan dalam penerbitannya.

Wan Faizah Wan Abdullah

TA'LIQ AGREEMENT: A PROPOSAL FOR REFORMATION

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*And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect.
[Qur'an 30:21 Yusuf Ali translation]*

ABSTRACT

In Malaysia, the ta'liq agreement was introduced as a means of protecting the rights of Muslim women in marriage. It is a statutory regulation that the ta'liq agreement should be pronounced by the husband and signed by both the husband and the wife, after the marriage contract ceremony.

It is a delegated right of repudiation (talaq) given to the wife based on the stipulations agreed upon by the husband. She would be given this delegated right under certain circumstances, for instance, upon the husband's breach of a condition agreed upon by the parties in the ta'liq agreement. In other words, if the husband breaches the agreement that he had pronounced, the wife can bring the case to the court to confirm that divorce has occurred.

On paper, the ta'liq agreement seems to be an ideal means of protecting Muslim women's rights in their marriage. Hence, this paper is written to ascertain the truth of this contention and to identify whether there is room for improvement or reformation in the procedure.

One particular proposition for reformation that the writer would like to propose is for couples to sign a carefully considered prenuptial agreement as a standard regulation for couples to be married. The paper will also try to ascertain the possibility of such reformation in the Muslim Malaysian society. However, since this paper is preliminary in nature, the focus of discussion for Malaysian legal position will only be limited to the position in the Federal Territory of Kuala Lumpur.

Key words : Islamic Family Law, The ta'liq agreement, Prenuptial Agreement

INTRODUCTION

In recent years, it seems that there is a tendency of wives to use the ta'liq agreement pronounced by their husband after the solemnization of the marriage, as a way out of the marriage. In fact, in the Federal Territory of Kuala Lumpur itself,

ta'liq divorce applications are the third highest number of applications made after *talaq* applications and applications to confirm *talaq* pronounced outside of court, by women troubled in their marriage.¹

It is claimed to be an easier way out of the marriage, since divorce has already occurred and the only thing needed by the wife is confirmation by the Syariah Court.² This seems to defeat the purpose of the introduction of the *ta'liq* procedure in the first place. *Ta'liq* is introduced to protect women in their marriage. The *ta'liq* procedure is rendered to have a positive implication on the marriage rather than a negative one.

By having *ta'liq*, it is hoped that the husbands would give due care to the rights of the wife generally mentioned in the statutory *the ta'liq agreement*. Instead this has not been the case. There are still cases where husbands neglect their wives' maintenance, desert them, assault them, but yet still expect the wives to receive them with open arms.

Perhaps the realization of the effect of the whole procedure has not reached their mindset, or perhaps the whole procedure of having *ta'liq* is invalid, due to the lack of understanding of the effect of the agreement and also the lack of consent on the part of the husband. Is this true? So, in order to ascertain the truth of these contentions, it is only proper to give an overview of the practice in Malaysia.

TA'LIQ AGREEMENT: THE POSITION IN MALAYSIA

In Malaysia, it is usual for the husband to pronounce the statutory *ta'liq* agreement in the prescribed form immediately after the marriage is solemnized. According to Section 2 of the Islamic Family Law (Federal Territories) Act 1984, '*ta'liq*' means a promise expressed by the husband after solemnization of marriage in accordance with *Hukum Syara'* and the provisions of the Act.

The prescribed agreement in the statutory form normally entitles the wife to apply for a *ta'liq* divorce in the event of the husband leaving or neglecting or not providing maintenance for the wife for a period of four months or more, or causing hurt to her person.

In the Federal Territory, the prescribed form of the *ta'liq* reads as follows:

I do solemnly declare when I leave my wife for four months³ voluntarily or involuntarily and I or my representative do not give maintenance for such period whereas, she is obedient to me or I cause hurt to her person, then she makes a complaint to the Shariah Court and if found by the Shariah Court to be true, and she gives to the Shariah Court for me a sum of one ringgit, then she is divorced by a *talaq khul'i*.

Whereas, Section 22 of the same Act provides for the responsibility of the Registrar, amongst others:

- 1) Immediately after the solemnization of a marriage, the Registrar shall enter the prescribed particulars and the prescribed or other *ta'liq* of the marriage in the Marriage Register.

- 2) The entry shall be attested to by the parties to the marriage, by the Wali, and by two witnesses other than the Registrar, present at the time of the marriage is solemnized.
- 3) The entry shall then be signed by the Registrar.

Section 26(2) of the Act grants the Registrar the right to issue a *ta'liq* certificate in the prescribed form, upon payment of the prescribed fee.

While Section 50 of the Act provides the following:

- 1) A married woman may, if entitled to a divorce in pursuance of the terms of a *ta'liq* certificate made upon a marriage, apply to the Court to declare that such divorce has taken place.
- 2) The Court shall examine the application and make inquiry into the validity of the divorce and shall, if satisfied that the divorce is valid according to Hukum Syara', confirm and record the divorce and send one certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

It is observed that generally, the scope of protection provided by the prescribed *ta'liq* agreement is only limited to matters of maintenance, desertion, and hurt caused to the wife. Although Section 22(1) of the Act does provide for the entry of "the prescribed or other *ta'liq* of the marriage in the Marriage Register," it is not possible for additional or optional conditions to be included in the prescribed statutory *ta'liq* agreement.

According to the Registrar of the Syariah Court of Kuala Lumpur, Uztaz Abu Zaky Mohammad, any additional conditions in the *ta'liq* agreement are not allowed. Even if stated, the additions would not be enforceable by the Syariah Court due to the fact that the court does not have jurisdiction to do so.⁴ In other words, under the Act, it is not possible for parties to the marriage to provide for any additional rights.

However, he further stated that the Syariah Technical Committee (JAKIM) is in the process of adding an additional condition to the present *ta'liq* agreement.⁵ Once gazetted, it would be included in the statutory *ta'liq* agreement. But it is obvious that if that additional condition is specific in nature, any other additional condition agreed upon by both husband and wife or the wife's wali, to be included in the *ta'liq* agreement, would not be enforceable in the Syariah Court. Besides, according to Uztaz Abu Zaky, in his years as the Registrar, he has not come across any cases where parties claimed any additional conditions from the statutory ones.

From the writer's observation of the cases involved, the usual cases of *ta'liq* divorce are those where the wife claims that she has not been given maintenance. In some cases the husband attends the court, in others he is not present. There are also some cases where the wife applies for *ta'liq* divorce on the grounds of assault by the husband. In cases of desertion or non-maintenance, where the husband is present, then the court will hear both the parties and decide on the evidence.

In *Salemawegam v. Mohd Anuar*⁶, a case in Kuala Lumpur, the wife applied for *ta'liq* on the ground of non-maintenance. The husband did not deny that he had not paid maintenance, but alleged that the wife had refused to consummate the marriage. Hence, he claimed that he was not bound to give maintenance. The court asked both parties to take the solemn oath. His wife took the oath and said that there had been sexual intercourse between them. The husband, however, had refused to take the oath as required by the court. The court, therefore, gave judgment in favour of the wife and decreed a *ta'liq* divorce by one *talaq*.

In *Aisny bte Mohd Daris v. Haji Fahro Rozi bin Mohdi*,⁷ the wife applied to the Shariah Subordinate Court for the confirmation of the *cerai ta'liq* under section 50(1) of the Islamic Family Law (Federal Territory) Act 1984. The parties had lived together for almost 20 years and had three children. Subsequently, however, when the husband married another woman, difficulties arose and the wife alleged that the husband had neglected to give maintenance to her and her children. The wife made a report to the Kadi but efforts at reconciliation were not successful and eventually the wife applied to the Syaria Court to confirm the *ta'liq* which had been pronounced by the husband on the wife.

The learned trial judge held that the wife was not *nusyuz*, and was therefore entitled to maintenance. Although she had moved from the matrimonial home, this had been done with the knowledge of the husband, and in fact, he had acquiesced in the moving of the matrimonial home as he continued to live with her and their children in the new house for about six months before he deserted them. It was also held that the wife was justified in caveating the lands, which were registered in the husband's name, as they were properties jointly acquired during the marriage.

However, the learned trial judge dismissed the wife's application of divorce as he held that she could have obtained maintenance by selling the shares in her possession (which was owned by her).

The wife appealed to the Syaria Appeal Board. The Board allowed her appeal as there was no proof or evidence that the shares belonged to the husband and therefore it would be wrong to expect the wife to maintain herself out of her own property. The Board distinguished this case from the Hadith relating to Hendon and her husband Abu Sufian as in that Hadith, the lady was asked to take from her husband's property and spend for her needs ("Take from his property what is enough for your needs and those of your children"), not to maintain herself out of her own property. In this case, as the husband had not given maintenance to his wife for over four months, she was entitled to a divorce in accordance with *ta'liq*.

The Arising Issues: Validity of Ta'liq Agreements

The basis of the this type of divorce is the stipulation agreed upon by the husband, that the wife would be entitled to a divorce under certain circumstances, for instance, upon the husband's breach of a condition agreed upon in the marriage contract. This type of divorce is also known as *tafwid at talaq*.⁸

It is generally accepted that Muslims are generally required to honour their promises and agreements, and to fulfil their obligations, as Surah al-Maidah 5:1 states to the effect that:

'O you who believe! Fulfil all obligations.'

Surah al-Isra' 17:34 also refers to the honouring of commitments, when it states to the effect that:

'Fulfil every engagement. For every engagement will be enquired into on the Day of Reckoning.'

It is based on these main texts of the Quran and Sunnah that the conditions in the *ta'liq* agreement are validated. All the Sunni schools have even recognized the doctrine of the delegation of the power of divorce to the wife, i.e. the basis of divorce by *ta'liq*.

The power given by *tafwid* or delegation cannot be revoked, and the wife to whom the power is delegated exercises it in respect of her own person and has absolute right to exercise the power or not as she may choose.⁹

With such a power given to the wife through the *ta'liq* pronounced by the husband, the writer feels that a few arising issues should be made clear. As previously highlighted, from the rules and regulations observed, it is obvious that a husband cannot avoid from pronouncing the *ta'liq agreement*. Not only is it a statutory requirement, but the occasion in which it takes place obviously shows that a husband does not have any choice or say in the matter.¹⁰

Thus, from the whole occasion an issue arises as to whether the husband consented to the agreement. It seems as though an element of coercion was present during the whole occasion. If such was the case, then the *ta'liq agreement* automatically becomes void.¹¹

Under the Islamic law of Contract, consent is one of the foundations to a contract.¹² The Quran says in Surah an-Nisa' verse 29:

"...But let there be amongst you traffic and trade by mutual good will..."

Similarly, consent obtained by coercion, misrepresentation, deceit, or fraud cannot be a valid consent as it is not free but brought about by external forces.¹³ Even the Prophet (saw) had also said that, 'Indeed, Allah has released my Ummah (from liability) for mistake, forgetfulness and things done under coercion.'¹⁴

Thus, consent is a vital element in a contract, without which will affect the validity of the contract. It is also arguable that although consent is given for the performance of the *ta'liq* procedure, no acknowledgment or ignorance of the effect of the contract will also affect the validity of the *ta'liq* pronounced. Hence, it is contended that the procedure of *ta'liq* made by the prospective husband in this country causes uncertainty to the validity of the *ta'liq* pronounced by the husband and would probably make the *ta'liq* and agreement signed invalid.

PRENUPTIAL AGREEMENT: A PROPOSAL FOR REFORMATION

From the previous discussion, it is obvious that there are some uncertainties related to the procedure of the *ta'liq* made by the prospective husband in this country, which would affect the validity of the *ta'liq* pronounced by the husband.

Besides that, the scope of protection provided is only limited to the matters pronounced or mentioned in the *ta'liq*. It is due to these limitations and uncertainties, that the writer is proposing that the practice of *ta'liq* be replaced with a prenuptial agreement.

A great deal of heartache can be avoided by a woman in her marriage if she, as the bride-to-be, agrees to and signs a carefully considered Prenuptial Agreement that guards her rights before entering into wedlock.¹⁵

In general practice of the western society, a prenuptial agreement is a binding agreement entered into prior to the marriage in which the parties, in however much detail they wish, set forth what will happen to their income and assets in the event the marriage ends in death, divorce, or separation.¹⁶

This agreement must be in writing, signed by both parties, and signed before witnesses and entered into the court records or notarized.¹ Unlike agreements made by western couples which only focus on issues pertaining to wealth and property, it can also be used to safeguard Islamic rights within a marriage and, if necessary, in the case of divorce.

The Prenuptial Agreement can also guarantee a woman many of her Islamic rights, which can be enforceable by law, even if she lives in a western country. Arguably, women's Islamic rights are more fair and equitable than the secular women's rights in the west, so it makes sense to know just what her Islamic rights are and how they can be relinquished should she neglect to claim them before marriage. A great deal of misinformation abounds concerning the Prenuptial Agreement and women's Islamic rights.¹⁸

Such agreement is more advantageous when made by Muslim couples living as minorities in a non-Muslim country. For instance, Imam Yusuf Ziya Kavakci,¹⁹ an Imam of the Dallas Central Mosque in Richardson, Texas, strongly recommends Muslim couples to sign a prenuptial agreement before getting married. Here's what he had to say about this in an interview with Sound Vision:²⁰

Since this (the US) is a country where Islamic law is not the law of the land, it is always good to take measures where Islamic law could be applied as much as possible and the rights of Muslims, husbands and wives, could be guaranteed as much as possible. It is good, I would say necessary, to benefit from the law of the land and to get their protection, the protection of the law of the land, in terms of documentation, in terms of court systems. For this purpose, I think no Muslim marriage must be performed without having a marriage license given by marriage offices of the state. These marriage licenses with their blank spaces may be used by Islamic centers, by Imams in their marriage contracts and everything could be recorded on that paper.

But this does not mean that Muslim women in Malaysia will not benefit from the prenuptial agreement system by writing down all the conditions they will observe in their married life including following Islam and Shariah, and that conflicts will be solved by the Syariah Courts.

A prenuptial agreement seems to give more strength to the Islamic marriage contract and the conditions placed therein. Muslim men and women are allowed to put conditions in the marriage contract, provided that they do not contradict Islamic law.

To be enforceable by law, a Prenuptial Agreement must also comply with the laws of the country (as distinct from the Islamic Law of the *Shar'iah*) in which it is drawn up and signed. This will guarantee that the agreement will be legally binding on both the husband and the wife.

Such an agreement would solve the issue of a lack of understanding of the effect of the *ta'liq* agreement and a lack of consent in accepting the agreement, since a prenuptial agreement is individual in nature and has to be carefully drawn up by both parties and mutually agreed upon before signing it. If both parties to be married have understood the content, the effect of the agreement and consented to it, then it would be valid and binding upon the parties.

Besides that, the agreement could guarantee more rights of both parties in the marriage. In addition, certain stipulations could also be made by parties in order to protect their interest in case difficulties arise later in their marriage. In other words, a prenuptial agreement is capable of granting a wider range of protection to both spouses, instead of limited ones under the *ta'liq* agreement.

For instance, in the Middle Eastern countries, though the term 'prenuptial agreement' is not used, in practice there are various provisions in their law granting the parties to the marriage the rights to stipulate conditions in their marriage contract, which are agreed upon by both parties.²¹ In Iraq, the legitimate conditions that have been stipulated must be honoured, and the wife is granted the right to apply for cancellation (*khiyar al-shart*) if the husband does not comply with any such condition (Art.6). In Jordan, an advantageous condition for either party that does not conflict with the marriage aims, does not involve anything unlawful, and is recorded in the contract, shall be honoured (Art. 19).²²

The Syrian law deems any condition in the marriage contract that contravenes its legal order or intentions and involves any illegality to be void without affecting the validity of the contract. A condition that secures the wife a lawful interest without jeopardizing the rights of a third party or restricting the husband's freedom in his lawful business shall be valid and binding, while a condition that restricts such freedom of the husband or infringes on the rights of a third party shall be valid but not binding, and shall entitle the wife to apply for divorce if the husband does not honour it (Art. 14).²³

In fact, a finding by Dr. Amira Sonbol, an American-Egyptian professor teaching society, history and law at Georgetown University in Washington proved that the

practice of attaching prenuptial conditions had been practiced by Egyptian women 500 years ago.²⁴ She found thousand of these contracts in the Egyptian National Archives in the late 1980s. Her study shows that women in pre-modern times played a dynamic role in decisions affecting their legal and personal status.

The Validity of Prenuptial Agreements

As stated before, Muslims must comply with any agreements that they make. Allah said in Surah al-Baqarah in 2:177, about the believers:

'...To fulfil the contracts which ye have made...'

Regarding conditions stipulated in marriage contracts in particular, there is a Tradition of the Prophet (saw) stating to the effect that, Uqbah b. Amir reported the Messenger of Allah (may peace be upon him) as saying: 'The condition worthier to be fulfilled by you is the one which you made the private parts (of your wives) lawful (for you).'²⁵

In other words, the above Hadith stressed that conditions which will lead to a lawful marriage must be fulfilled, so long as it is made within the ambit of the *Shari'ah*.

In a commentary to this Hadith, Ibn Qayyim said that:

The condition imposed by the wife at the time of marriage or the word a man gives before his marriage must be fulfilled. For instance, a woman marries on condition that the husband will not take her outside the place she wants to stay. The husband should fulfill this condition. He cannot legally take her outside the city where she has her residence. He can do so with her consent. The condition, it should be noted, laid down at the time of marriage must be lawful such as dower, residence, maintenance and good living.²⁶

It is accepted by the *Shari'ah* jurists that a marriage contract may include conditions for either or both spouses which must be observed if they are advantageous to either party.²⁷ There are some differences of opinions, however, between the traditional scholars as to the validity of certain conditions.

The difference of views among the classical jurists on this issue is closely related to their different opinions as to the freedom of contracting parties in general to regulate their contractual relationship by means of stipulations in the contract under the Islamic law of contract.²⁸

For those scholars who do not accept such external stipulations at all, they have no effect, are not binding, and do not affect the validity of the underlying contract. For those who accept them, they give the woman the option to annul the marriage upon her request if the condition is violated. We only mention the woman because the man can divorce at any time with or without a particular cause and so has no need of such an option. Notice that even in the fatwa of Umar, he did not require the man to fulfill the condition, rather he allowed that she could end the marriage if she so demanded.²⁹

However, the underlying basis for the validity of prenuptial agreement under the Islamic law of Contract would be based upon the 'Contingent Contract' principles. This is due to the fact that a prenuptial agreement is drawn and signed before the marriage contract itself.

Contingent contract is defined as 'a contract to do, or not to do something, if some event collateral to the contract, does or does not happen'.³⁰ If such contract depends upon the happening of a future event, it cannot be enforced unless that event happens, and if the event becomes impossible, the contract becomes void. Thus, if A contracts to pay B a sum of money when B marries A, and B later dies before the marriage contract, then the contract becomes void.³¹

There are three kinds of contingent contract:³²

- 1) A contract, which does not admit suspension or contingency. Such contracts are contracts by which ownership in property is transferred, contracts of marriage and divorce by khulu'.
- 2) A contract, which is contingent upon a condition fitting the contract, or a condition, required for the contract. This condition is also known as collateral to the contract.
- 3) A contract, which is contingent upon a condition that is not connected or collateral to the contract.

The Shafi'is have no doubt in regard to the validity of condition collateral to the contract. Whereas, the Malikis and the Hanbalis are in favour of its validity on the grounds that the condition is not repugnant to the contract and it is correct on the grounds of public policy. The Hanafis have validated it on the principle of Istihsan. However, jurists argued that the time of completion of the condition must be duly fixed.³³

Thus, it is submitted that prenuptial agreement could come under this form of contract because its performance depends upon the conclusion of the marriage contract in the near future of the parties. Basically, for a prenuptial agreement to be valid, a marriage should ensue between the parties to the contract. Hence, the marriage contract is actually the collateral condition to the validity of the performance of prenuptial agreement. In other words, the performance of the prenuptial agreement is contingent upon the occurrence of the marriage contract. If there is no marriage contract, then the agreement is void.

Although the basis for its validity is rather complicating, this should not be an issue for not drawing a prenuptial agreement. Under the Islamic law of Contract, it is the element of uncertainty which has made the jurists disagree on certain type of condition and contracts. Thus, such elements must be duly eliminated in order to ensure the validity of a contract. Hence, if the written contract highlights every point and detail in certain, then the question of validity should not arise.

The Feasibility of Implementation

The implementation of such a reformation is actually an issue of policy for the Syariah Courts in Malaysia, since the present legislations do not provide for any jurisdiction for the proposal to be implemented. In Malaysia, any new policies or proposals in regard to Islam and its community will have to be dealt with by the Department of Islamic Advancement of Malaysia, Prime Minister's Department (JAKIM). JAKIM functions as the central agency in the planning and management of Islamic affairs and the advancement of the ummah.

They are directly responsible for the planning which determines the advancement and progress of Islamic affairs in the country. Amongst their main functions are to formulate policies for the advancement of Islamic affairs in the country and to safeguard the sanctity of the aqidah and the teachings of Islam; to help draft and streamline laws and regulations that are necessary as well as to evaluate and coordinate the implementation of the existing laws and administration from time to time in efforts to resolve problems faced by the ummah; and to streamline the enforcement mechanisms of laws and administrative procedures pertaining to Islamic affairs in the country.³⁴

JAKIM and its Technical Committee will coordinate the process of adapting any new policies, proposals or amendments. The process will involve a dialogue at the state level and at the national level. From the explanation received from Mr. Yahya Md Zaid, an Assistant Director of Coordination of the Law Unit of JAKIM, the above process usually takes quite an amount of time before a final decision can be made on any particular matter.³⁵ Furthermore, according to him, the process also depends on the issue raised. If it is a totally new policy or proposal, then the idea has to go through the Fatwa committee first in order to ascertain its validity.

In regard to prenuptial agreement, Mr. Yahya commented that the prospective parties to be married could make such an agreement. But for the purpose of implementation, it will depend on whether the terms fall under any of the provisions of the present law.³⁶ Hence, it seems as though the idea for a reformation will have to go through many stages before it can ever be approved. Meantime, Mr. Yahya's comment seems to be an ideal way for couples to draw a prenuptial agreement for their marriage.

Although the feasibility of the implementation of prenuptial agreement seems vague, is interesting to note that the civil courts in Malaysia have recognized contracts made between husbands and wives. For instance, in the case of *Sakamah v. Tasmin*,³⁷ the husband registered a piece of land in the name of his wife in trust for him on the express undertaking that if she requested a divorce, she would retransfer the land to him or pay him the value thereof. It was held that "the agreement was a perfectly proper one, and consonant with the principles and practices of the Muhammedan Law and Custom among the Malays. The court also observed that the divorce granted was a recognized form i.e. the khulu' divorce.

In another more recent case of *Hamzah v. Fatimah Zaharah*,³⁸ the husband on marrying the wife had agreed to pay her \$5000 if he divorced her. Subsequently, he did divorce her and she claimed the \$5000. It was held that she had fulfilled her term of the obligation by marrying him. Hence, upon the husband divorcing her, he

was obliged to fulfill his term of the contract. The court further observed that there is no law in Islam that prohibits a wife or would-be wife from entering into a contract with her husband.

Thus, perhaps terms of prenuptial agreement in regard to matters of property can be brought before the Syariah Court, for instance, if it falls under Section 58 of the Islamic Family Law (Federal Territories) Act 1984, i.e. the division of the *harta sepencarian* or other matrimonial property upon divorce.

CONCLUSION

The Muslim jurists who see no objection in the grant of an absolute power of divorce by the husband to the wife have considered the matter from the point of *tamalluk* or transfer of the right and agency.

Some Muslim jurists have explained that *tafwid* is a special kind of *tamalluk* as it is clear, according to them, from the fact that in the case of ordinary *tamalluk*, the original owner loses altogether the ownership of the thing or the right, but in the case of *tafwid al-talaq*, he retains his right of divorce while the wife is also invested with it.³⁵ Such is the basis for the application of *ta'liq* divorce in Malaysia.

However, observation of the legal position in the Middle Eastern countries mentioned in the discussion above shows that the women in those countries are in a better position in terms of scope of protection. Unlike in Malaysia, the scope is limited as the wife can only apply for a *ta'liq* divorce in the event of the husband leaving or neglecting or not providing for maintenance for the wife for a period of four months or more, or causing hurt to her person.

These limitations draw out many women from non-governmental organizations who argue on the lack of protection given to wives especially when their husbands practise polygamy. Recently, Hjh Nik Noriani Nik Badli Shah, a prominent representative of one of the NGOs in Malaysia, highlighted the right of Muslim women to include a no-polygamy clause in their marriage contracts.³⁹

According to her, Muslim countries such as Syria, Jordan, Morocco, Egypt, Iran, Pakistan and Bangladesh have already adopted the ruling that a husband who had agreed in his marriage contract not to take another wife would be bound by that stipulation. She further quoted that even Prophet Muhammad's great-grand-daughter Sakina Hussein, had included several conditions in her marriage contract, including one that stated her husband would have no right to take another wife. Hjh Nik Noriani is currently fighting for the clause to be included in the *ta'liq agreement*. She said existing *Shari'ah* laws allow for the registration of additional *Ta'liq* clauses, but this was not usually done.

As mentioned before, the inclusion of a new condition is a matter of policy for JAKIM and the jurisdiction of the *Shari'ah* court. In other words, Malaysia's legislation does not grant the freedom to stipulate any other conditions or stipulations in the protection of a wife's rights in a marriage, except for the standard one provided in the statute. Henceforth, it is argued that Muslim women in Malaysia are not actually protected by the statutory *ta'liq* pronounced by the husband. Instead, it only provides for an easy means out of the marriage for the

wife. Besides that, the procedure of *ta'liq* in Malaysia arguably has shown some elements of coercion and thus the uncertainty of its validity.

Therefore, due to these reasons the writer has come up with a proposal that the practice of *ta'liq* be reformed, by either giving more freedom of right to stipulate or allowing couples to draw and sign a carefully drafted prenuptial agreement in order to protect their rights in the marriage.

A prenuptial agreement would create a balance in the rights of both spouses if difficulties arise later in their marriage. In other words, a prenuptial agreement is capable of granting a wider range of protection to both spouses, instead of limited ones under the *ta'liq* agreement. Furthermore, it is able to solve the issue of a lack of understanding of the effect of the *ta'liq* agreement and a lack of consent in accepting the agreement, since a prenuptial agreement is individual in nature and has to be carefully drawn up by both parties and mutually agreed upon before signing it. If both parties to be married have understood the content, the effect of the agreement and consented to it, then it would be valid and binding upon the parties.

However, reforms such as the one proposed need further research not only academically but also empirically, in order to ensure their feasibility in reality and also legally, because with a lack of jurisdiction such a proposal would remain merely a proposal.

NOTES

¹ Interview with Ustaz Abu Zaky Mohammad, Registrar of the KL Syariah Court, 5th September 2001

² Ibid.

³ Referred to as the months of 'Qamariah' in the form.

⁴ Interview with Ustaz Abu Zaky Mohammad, Registrar of the Syariah Court of KL, 5th of September 2001.

⁵ Ustaz Abu Zaky refused to disclose further information on the issue, since it is yet to be gazetted.

⁶ (1983) 5 JH 109.

⁷ [1990] 2 M.L.J. xxvi.

⁸ Nik Noriani Nik Badli Shah, *Marriage & Divorce under Islamic Law*, ILBS, Kuala Lumpur, 1998, p.74

⁹ Tanzit-ur-Rahman, *A Code of Muslim Personal Law*, p.340.

¹⁰ *Ta'liq* is usually pronounced immediately after the 'aqad ceremony. Once pronounced, the *ta'liq* agreement form shall be signed by both husband and wife and attested by witnesses.

¹¹ Harun Din, *Ta'liq Talaq: Antara Hukum Feqah dengan Hukum Kanun*, UKM, Malaysia, 1990, p.107.

¹² Liaquat Ali Khan Niazi, *Islamic Law of Contract*, Research Cell, Dyal Singh Trust Library, Lahore, 1991, p.80

¹³ Ibid., p.81.

¹⁴ As referred to by Harun Din in *Ta'liq Talaq: Antara Hukum Feqah dengan Hukum Kanun*, p. 108.

¹⁵ Rabia Mills, *Women's Rights in the Islamic Prenuptial Agreement: Use Them or Lose Them*,

http://www.zawaj.com/articles/prenup_mills.html

¹⁶ Elayne B. Kesselman, *Frequently Asked Questions: The Prenuptial Agreement*

http://www.divorcecentral.com/legal/legal_answer_5.html

¹⁷ See e.g. of Agreement in Appendix B

¹⁸ Rabia Mills, *Women's Rights in the Islamic Prenuptial Agreement: Use Them or Lose Them*,

http://www.zawaj.com/articles/prenup_mills.html

- ¹⁹ Ph.D holder in Islamic law from the Institute of Islamic Research of Istanbul University in Turkey.
- ²⁰ <http://www.soundvision.com/wedding/prenuptial.shtml>
- ²¹ Jamal J. Nasir *The Islamic Law of Personal Status* p.56-57.
- ²² Ibid.
- ²³ Ibid.
- ²⁴ Referred to by Rose Ismail in her Article 'Contracted to Love', News Straits Times, June 19, 2001.
- ²⁵ Sunan Abu Dawud, Vol. II, Kitab V, chap. 706
- ²⁶ Sunan Abu Dawud, Vol II, Kitab al-Nikah, note 1460 to Hadith 2134 (translation by Ahmad Hasan).
- ²⁷ Jamal J. Nasir *The Islamic Law of Personal Status* p.55.
- ²⁸ Mohamed El Fatih Hamid "The Freedom to make Stipulations in the Islamic Law of Contract" *Journal of Islamic and Comparative Law*, Vol. 6 (1976) 22.
- ²⁹ Syed Peer, Webmaster, *The Marriage Contract*
<http://www.nikahsearch.com/marriage/marriage.html>
- ³⁰ Liaquat Ali Khan Niazi, *Islamic Law of Contract*, p.96
- ³¹ Ibid.
- ³² Ibid.
- ³³ Ibid., p.97
- ³⁴ Interview with Mr. Yahya bin Md Zain, Assistant Director for Coordination, Law Unit, JAKIM, 12th October 2001.
- ³⁵ Ibid.
- ³⁶ Ibid.
- ³⁷ [1938] MLJ Rep. 38
- ³⁸ [1982] 1 MLJ 361
- ³⁹ K.N.Ahmed, *The Muslim Law of Divorce*, Kitab Bhavan, New Delhi, 1978, pp.187,188.
- ⁴⁰ The Star, January, 18, 2003

REFERENCES

- Qur'an, The Meaning of the*, by Abdullah Yusuf Ali. 1991. New Edition with Revised Translation and Commentary. Maryland US: Amana Corporation, Brentwood.
- Elayne B. Kesselman, *Frequently Asked Questions: The Prenuptial Agreement*
http://www.divorcecentral.com/legal/legal_answer_5.html
- Harun Din. 1990. *Ta'liq Talaq: Antara Hukum Feqah dengan Hukum Kanun*. Bangi: UKM.
- Jamal J. Nasir. 1990. *The Islamic Law of Personal Status*. London: Graham & Trotman.
- K.N.Ahmed. 1978. *The Muslim Law of Divorce*. New Delhi: Kitab Bhavan.
- Liaquat Ali Khan Niazi. 1991. *Islamic Law of Contract*. Lahore: Research Cell, Dyal Singh Trust Library.
- Mohamed El Fatih Hamid. 1976. The Freedom to make Stipulations in the Islamic Law of Contract. *Journal of Islamic and Comparative Law* 6: 22.

Nik Noriani Nik Badli Shah.1998. *Marriage & Divorce under Islamic Law*. Kuala Lumpur: ILBS.

Rabia Mills, *Women's Rights in the Islamic Prenuptial Agreement: Use Them or Lose Them*, http://www.zawaj.com/articles/prenup_mills.html

Sunan Abu Dawud, Trans. Ahmad Hasan. 1984. Lahore: Ashraf.

Sunan Abu Dawud, Vol. II, Kitab V.

Syed Peer, Webmaster, The Marriage Contract,
<http://www.nikahsearch.com/marriage/marriage.html>

Tanzil-ur-Rahman. 1978. *A Code of Muslim Personal Law*. Karachi: Hamdard Centre. <http://www.soundvision.com/wedding/prenuptial.shtml>