



CHAPTER II

MARRIAGE CANCELLATION IN ISLAMIC PERSPECTIVE

This chapter explains about theories that used in this research. There are some theories will apply in this research like marriage generally, marriage cancellation, the institution that have power to decide the problem about Marriage cancellation both Indonesia and Malaysia and *masalah al-mursalah*.

A. Marriage

Marriage is agreement that permit a sex relation and limit right and obligation between man and woman and both of them don't have blood relation. Marriage is a main form in social life. Not only to rules a domestic life and to continue generation,

marriage also viewed as a way to get brotherly among ethnics. The brotherly is a way to help among ethnics.²⁶ Allah Said²⁷

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ
مَثْنَىٰ وَثُلَاثَ وَرُبْعًا ۖ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ
ذَٰلِكَ أَدْنَىٰ أَلَّا تَعُولُوا ﴿٦٤﴾

“If ye fear that ye shall not be able to Deal justly with the orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to Deal justly (with them), then only one, or (A captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice.”

In the other verse, Allah rules about Marriage problem, He explain that the creatures have partner and couple. Not only for human but also for animals and plants. To continue the generations, to go the live for each of them. That verse is

وَمِنْ كُلِّ شَيْءٍ خَلَقْنَا زَوْجَيْنِ لَعَلَّكُمْ تَذَكَّرُونَ ﴿٤٩﴾

“And of everything we have created pairs: that ye may receive instruction.”

There are five pillars and conditions of marriage. If it is not filled, the marriage will be considered illegal. And the pillars and conditions did not correct the married is broken. Are,

1. Guardian.

It must be, if doesn't fulfill the marriage will reputed illegal. There are two kind of guardian, is *nasab* guardian and judge guardian.

²⁶Sulaiman Rasjid, *Fiqh Islam*, (Bandung: Sinar Baru, 1992), P. 348

²⁷QS. An-Nisa (4): 3

2. Predilection (like) from wife part.
3. Two fair witnesses
4. *Ijab* (transfer) and *Qobul* (acceptance)
5. dowry

The main purpose of marriage is to legalize the sex relation between husband and wife. Beside that purpose there are other purposes that support the goal of marriage, that are.²⁸

1. To get generation.
2. To fully the instinct as human.
3. To keep human from wickedness and damaged.
4. To form and to rule domestic.
5. To make activities in looking for money and increase responsibility.

There are many legal provision. According to scholars the basic law of marriage is tradition (*sunnah*), but if someone is afraid to make wickedness (*zinâ*) and he is able to marriage then it becomes obligatory. The marriage is forbidden for someone whom don't give money for wife, both body and spiritual.²⁹

There are many goals of marriage, al-Ghazaly divides the purposes and benefits marriage into five part, namely:

1. To get legal to generation, to develops generation and humans ethnics.
2. To fill instinct demand of human.

²⁸Soetojo Prawirohamidjojo, *Pluralism dalam Perundang-Undangan Perkawinan di Indonesia*. (Surabaya: Airlangga University Press. 2006), P. 28-29.

²⁹Hilman Hadikusuma, *Hukum Perkawinan...* p. 21-22

3. To keep humans from criminal and damage.
4. Forming and rolling domestic that be basic of societies be based on loving.
5. Growing to legal work by seriously, and to increase the responsibilities.³⁰

In Islamic religion there are some principles which that principles can reach the purposes of marriage. Neng Djubaidah mentions the principles in marriage in seventh principles³¹

1. Islamic personality principle.
2. Volunteering principle.
3. Agreement principle.
4. Freedom right to choose the spouse principle.
5. Friending principle.
6. Monogamous principle.
7. Forever principle.

1. Marriage in Indonesian Law Perspective

Indonesia is heterogeneous country. There are many ethnics and religion in this country. Indonesia recognized 6 religions namely Islam, Hindhu, Budha, Kristen, Protestan and Konghuchu. Every religions have marriage laws, each of them are different but they are not contradictory.

³⁰Soemiyati, *Hukum Perkawinan Islam dan Undang-UndangPerkawina*, (Yogyakarta: Liberty, 2004), P 12-13

³¹ Neng Djubaidah, *Pencatatan Perkawinan dan Perkawinan Tidak Dicata*, (Jakarta: Sinar Grafika, 2010). P. 94

There are problems when citizens want to submit a marriage, from that problem government make a law that used to all of citizens of Indonesia. It Act No 1 Year 1974 on Marriage this regulation rules about all of marriage problem. And there is additional explanation of the act, it state paper of Republic Indonesia No 3019.³² And before that regulation made there is a regulation was exist, it *Bergerlijk Wetboek* (BW), this regulation is law of Netherland Regulation Book.

In this act the definition of married named on verse 1

“Perkawinan adalah ikatan lahir bathin antara seorang pria dengan seorang wanita sebagai suami dan isteri dengan tujuan membentuk keluarga (rumah tangga) yang bahagia dan kekal berdasarkan Ketuhanan Yang Maha Esa.”

Meanwhile in verse 26 KUPerdata, said *“Undang-undang memandang soal perkawinan hanya dalam hubungan perdata”*. It explains that KUHPerdata just recognize legal marriage that which fully the condition as ruled on KUHPerdata, so it regardless of religion law.

Prof. Subekti, S.H. explain civil relation is³³

“Barang siapa yang tunduk kepada hokum perdata bara (BW) dalam lapangan hokum perkawinan maka perkawinan seseorang itu baru dianggap sah apabila dilangsungkan sesuai syarat-syarat dan ketentuan agama dikesampingkan.”

However Indonesia have 2 Act about marriage, both of that used all. The existence BW in this time is rarely, cause the contents of book do not suitable with societies and in BW not only rules about Marriage but also everything about civil

³²Sudarsono, *Hokum Perkawinan Nasional*. (Jakarta: Rineka Cipta, 2005). P.6

³³Subekti. *Pokok-Pokok Hukum Perdata*. (Jakarta: Intermasa, 2011), P. 23

relation (*perdata*). So, Indonesian societies use The Act No 1 Year 1974 on Marriage because this Act just explain about Marriage and suitable with period.

Meanwhile the Act No. 1 year 1974 of Indonesia on Marriage said, that the marriage have legal reputed if done by the regulation of every religions and and their trust. Like for muslims the marriage have legal reputed by Islam regulation, just like that for every religion.

The conditions of marriage according Act No. 1 Year 1974 of Indonesia On Marriage are³⁴

- a. The dealing of two parties (Article 6 verse 1)
The dealing must pure and trust from the heart of spouses candidate in the form of will for live together and not compulsion.
- b. The permission of parents or guardian (Article 6 verse 2).
- c. Age limit (Article 7 verse 1).

Marriage doing by the person who have reach 19 years old for man and 16 years old for woman. For the man who want to marry and doesn't reach 19 years old and woman 16 years old must get permission from parent and proved by dispensation of court.

- d. There is not forbidden marriage (Article 8).

The regulation that rule about forbidden to do marriage among people whom have blood relation, are:

1. Have blood relation both up and down, like father, mother child.

³⁴The Act No. 1 year 1974 on Marriage, LNRI Nomor 1 Tahun 1974

2. Have side blood relation, like brother marries with the sister of parents (aunt).
3. Have related by marriage, like parent in law and stepchild.
4. Have nest relation, like mother with her nest,
5. Have relation with wife's sister or auntie, and.
6. Forbidden by religion.
- e. For widow was passed waiting period (Article 11 verse 1).

Waiting period in islam namely *iddâh* is waiting period has to wife because of divorce by husband, she can marries again after pass the time. This regulation regulated in Government Regulation No 9 of 1975

- f. Fulfill the procedure of marriage.

2. Marriage in Malaysia Law Perspective

Marriage in *Melayu* is valid relation between man and woman becomes spouse.³⁵ The applicable marriage law in federal territories of Malaysia is Act of Islamic family law year 1984, it says that marriage is invalid except if fulfill all requirements with Islamic law. Then, about the requirements that must be fulfilled are:

- a) Limitation of age between groom and bride.

³⁵Khoiruddin Nasution, *Status Wanita Di Asia Tenggara, Studi Terhadap Perundang-Undangan Perkawinan Muslim Kontemporer Di Indonesia Dan Malaysia*, (Jakarta: INIS, 2002), p. 88. Loaded in Miftahul Rohmah, "*Perkawinan Di Bawah Tangan dan Solusi Hukumnya Di Indonesia dan Malaysia*", (Jakarta: Universitas Islam Negeri Syarif Hidayatullah, 2011), p. 43.

- b) Their agreement.
- c) Prohibition of marriage because family relationship.
- d) Follow the marriage way which is regulated

In Islamic Family Law (Federal Territory) Act 1984 paragraph 8, “*no marriage may be solemnized or registered under this act where either the man is under the age of eighteen or the woman is under the age of sixteen, except where the Syari’ah judge has granted his permission in writing in certain circumstances*”³⁶

Malaysia recognizes 2 law systems in marriage, civil marriage and Islamic marriage.³⁷ The civil or monogamous opposite sex marriage is being practiced by non-Muslims and non-natives in Malaysia under the Law Reform (Marriage and Divorce) Act 1976. Non-Muslims continue to insist on strictly monogamy marital relationships as an essential of marriage.

Whereas in Islamic marriage, polygamy permitted with certain restrictions. Men can only marry up to four (4) wives at any one time; however, most men have only one. Muslim women are not allowed to practice polyandry in which one woman has more than one husband at the same time.

Under Article 23 of the Islamic Family Law (Federal Territories) Act 1984, a husband desiring polygamy must obtain the consent and views of the existing wife or wives and the permission from the *Syariah* Court to enter into a polygamous

³⁶Tahir Mahmood, *Personal Law In Islamic Countries (History, Text And Comparative Analysis)*, (New Delhi: Academy Of Law And Religion 1987), P. 224

³⁷<http://www.lawyerment.com/library/kb/Families/Marriage/1019.htm>. On December 2, 2014

marriage, failing which he is deemed to have committed an offence under Article 123 of the Act.

Meanwhile, in Johor the requirements of marriage ruled in Islamic Family Law Enactment no. 17 year 2003. This Law just for citizens of Johor and whos people who want marriage in Johor. The requirements is.³⁸

Article 7. Persons by whom marriages may be solemnized

1. *A marriage in the State of Johor shall be in accordance with the provisions of this Enactment and shall be solemnized in accordance with Hukum Syarak by*
 - a. *the wali in the presence of the Registrar;*
 - b. *the representative of the wali in the presence and with the permission of the Registrar; or*
 - c. *the Registrar as the representative of the wali.*
2. *Where a marriage involves a woman who has no wali from nasab, in accordance with Hukum Syarak, the marriage shall be solemnized only by the wali Raja.*

Article 8. Minimum age for marriage

No marriage may be solemnized under this Enactment where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Syarie Judge has granted his permission in writing in certain circumstances.

Article 20. Place of marriage

No marriage shall be solemnized except in the kariah masjid in which the woman resides, but the Registrar or Syarie Judge giving permission to marry under Article 17 or 18 may give permission for the marriage to be solemnized elsewhere, whether in the State of Johor or in any other State.

Article 25. Registration³⁹

The marriage after the appointed date of every person resident in the State of Johor and the marriage of every person living abroad who is resident in the State of Johor shall be registered in accordance with this Enactment.

³⁸http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_Enactment._Ori_lib.nsf/f831ccddd195843f48256fc600141e84/8a3accb491fc77c7482576c10031ed2b?OpenDocument. Aceded on 17 january 2015

³⁹http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_Enactment_17_Ori_lib.nsf/f831ccddd195843f48256fc600141e84/8a3accb491fc77c7482576c10031ed2b?OpenDocument. Aceded on 17 january 2015

Article 26. Marriage certificate and ta' liq certificate

1. *Upon registering any marriage and upon payment to his of the prescribed fees, the Registrar shall issue marriage certificates in the prescribed form to both parties to the marriage.*
2. *The Registrar shall also, upon payment of the prescribed fees, issue a fa'liq certificate in the prescribed form to each of the parties to the marriage.*

Article 11. Void marriages

A marriage shall be void unless all conditions necessary, according to Hukum Syarak for the validity thereof are satisfied.

Article 14. Marriage of a woman⁴⁰

1. *No woman shall, during the subsistence of her marriage to a man, be married to any other man.*
2. *Where the woman is a janda-*
 - a. *she shall not, at any time prior to the expiry of her period of 'iddâh, which shall be calculated in accordance with Hukum Syarak, be married to any person other than to the man from whom she was last divorced;*
 - b. *she shall not be married unless she has produced*
 - c. *if the divorce was by ba-in kubra, that is to say three talaq, she shall not be remarried to her previous husband, unless she has been lawfully married to some other person and the marriage has been consummated and later lawfully dissolved and the period of 'iddâh has expired.*
3. *If the woman alleges she was divorced before the marriage had been consummated, she shall not during the ordinary period of 'iddâh for a divorce, be married to any person other than her previous husband, except with the permission of the Syarie Judge having jurisdiction in the place where she resides*
4. *Where the woman is a widow*
 - a. *she shall not be married to any person at any time prior to the expiration of the period of 'iddâh, which shall be calculated in accordance with Hukum Syarak; and*
 - b. *she shall not be married unless she has produced a certificate of the death of the late husband or otherwise proved his death.*

⁴⁰http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_Enactment_17_Ori_lib.nsf/f831ccddd195843f48256fc600141e84/8a3accb491fc77c7482576c10031ed2b?OpenDocument. Accessed on 17 January 2015

Malaysia has regulated the procedure of marriage, there is an instance that rule about Marriage is JPN (jabatan pendaftaran negara). The procedure marriage in Malaysia is.⁴¹

1. Marriage course module pre-integrated course Islamic marriage (MBKPPI)

Divorces, and Ruju 'shall ensure partner bagi warganegara Malaysia submitting their application for leave to marry and have attended courses Pre-Marriage Course Certificate MBKPPI.

2. HIV screening test for public health clinic

Married permission has been approved by the assistant registrar shall be sent back to the Islamic religious department each place along with the results of the HIV screening was approved by the government medical officer.

If the test result is negative, approval process marriage will continue. If the decision is HIV positive, then:⁴²

- a. Applicants must undergo a consultation at the Department of Religion before forwarding the application permission to marry.
- b. Applicant, spouse and family will be exposed to the implications for HIV.
- c. Applicant and spouse will be asked to decide whether wants to continue the marriage or otherwise.

⁴¹Garis Panduan bagi Prosedur Pentadbiran Perkahwinan Perceraian dan Ruju'. P. 4

⁴²Garis Panduan bagi Prosedur Pentadbiran Perkahwinan Perceraian dan Ruju'. P. 4

- d. If the applicant and the couple decided to continue the marriage, then the application will marry truth processed.
- e. Applicant and spouse must refer to Family Physicians and Infectious Diseases Clinic for further medical care.

B. Marriage Cancellation in Islamic Perspective

There are many reason to broke the marriage according Islam like *thalaq*, *khulu'*, *zhihar ila'*, *fasakh* and *lia'an*. All of that ruled on al-Quran and Hadits, every broken marriage have specific cause and effect for spouse. Actually al-Quran and Hadits was regulated completely but by development time there are some problem appears in the societies.

Marriage cancellation in Islamic perspective namely *fasakh*. The meaning of *fasakh* is breaking or cancelling the relation between husband and wife. It happen because of when the marriage agreement (*aqad⁴³ nikah*) the pillars and conditions didn't complete or during marriage period there are something come and cancelling the marriage.⁴⁴

According scholars *fasakh* have some meaning, namely:

1. DR. Ahmad al Ghundur

والفسخ هو نقض العقد وإزالة الحل الذي كان يترتب عليه

Fasakh is cancel the aggrement (marriage) and lost the condition that evaporate to its.

⁴³Marital aggrement between man and woman to make a famiy

⁴⁴Abd. Rhaman Ghazaly, *Fiqh Munakahat*, (Jakarta: Kencana, 2006), P. 141-142

2. Muhammad Husain az-Zihabi

أما الفسخ فحقيقته نقض العقد في الحال

Fasakh is cancel the agreement (of marriage) by spontaneous.

3. Sayyid Sabiq⁴⁵

فسخ العقد : نقضه، وحل الرابطة التي تربط بين الزوجين

Fasakh is to cancel the agreement (marriage) and waives the bond between husband and wife.

4. Al-Jaziri devides that *fasakh* have two meaning

The first *Fâsid* marriage is the marriage that doesn't fulfill the legal conditions to do the marriage. And the second is and *bathil* marriage, it is the marriage that doesn't fulfill the pillar of marriage that decide by *syari'ah*. The legal status of that marriage is same, namely illegal.

5. Prof. Drs. K.H. Hasbullah Bakry SH

Fasakh and divorce was held by the judge based on the reasons that have been defined by *Syari'ah* one husband/wife mad, sick *sopak* (striped), leprosy, husband *innin* (impotent), poor husband, have not power of feeding, clothing or a place of residence to his wife (as specified on the *Shari'ah*). *Fasakh* can also asked if the wedding break the promise that the spouse or the bride must meet certain conditions, for example about the lineage then apparently do not suitable the requirements that have been determined.

⁴⁵ Sayyid Sabiq, *Fiqh As-Sunnah*, Jilid 2, (Beirut : Dar Al-Fkr, 2002), p. 268

In this research the researcher will use the theory of al-Jaziri, Indonesia and Malaysia have same specification in marriage cancellation. Although Indonesia did not acknowledge the *fâsid* and *bathil* marriage, in the regulation there are contents of Article ruled about it. Meanwhile in Malaysia more detail about *fâsid* and *bathil* marriage, in Johor state the regulation about it ruled by detail.

Sometimes due to the occurrence of *Fasakh* damage or defects in the Covenant (agreement) of marriage itself and occasionally caused things to come then that factors caused the marriage contract cannot be extended

1. *Fasakh* caused of defective or there is a defect in the Covenant of marriage, among others, as follows:
 - a. After the marriage takes place, at a later date it is known that her husband was the brother's wife was raised, the mother of father or brothers of the Islamic.
 - b. When dad or Grandpa's marrying a boy or girl under age with people who are also minors. Then after both their adult child is entitled to choose the wedding resume or terminate the marriage. When the boy to stop the marriage, then named *fasakh*. Voting rights of this kind by the *fuqaha ' khiyar: al-bulug*.
2. There are obstructions caused by *Fasakh (mani ' al-characters)* after the wedding for example, among others, the following:⁴⁶

⁴⁶ Abd. Rahman. Ghazaly, *Fiqh Munakahat*, (Jakarta. Kencana. 2006), P. 142-143

- a. One between husband and wife that apostates (leave the religion of Islam).
- b. When the wife has married couples adheres to nonMuslims. Then his wife converted to Islam then by itself it marriage contract (agreement) cancelled. When her husband converted to Islam whereas the *kitabiyah* ladies (Christians or Jews) then the marriage do not cancelled.

Therefore the result between *fasakh and thalaq* (divorce) have same result is broke the marriage but the effects are different. The effect of divorce doesn't broke the marriage directly, there is waiting period (*iddâh*) for wife to waiting the status of herself. But in *fasakh* no waiting period, when *fasakh* done the marriage directly.

In addition, divorce give opportunity for husband to take his wife, because there is waiting period for wife. The goal of waiting period is to give sometime to husband to rethink by take the wife back or release her. When the husband takes his wife back, he doesn't need new agreement. Different with *fasakh* when the husband wishes to take his wife back, he must renew agreement of marriage (*aqad*).

C. The Regulation On Marriage In Indonesia And Malaysia

1. The Act No. 1 Year 1974 on Marriage

In the past 15 years, by the passage of Act No. 1 Year 1974 on Marriage until the birth of Act No. 7 Year 1989 on Religious Courts, there are two things that stand out in the course of Religious Court in the Country. First, about the process of the birth of Act No. 1 Year 1974 on Marriage with Government Regulation No. 9 Year

1975. Second, about the birth of the Government Regulation No. 28 Year 1977 on Endowment Property. And now updated the Act No. 41 of 2004 on Endowments

The birth of Act No. 1 Year 1974 on marriage that apply to all citizens of Indonesia dated 02 January 1974 to largely meet the demands of society Indonesia. These demands have been echoed since the first Congress of women of Indonesia.⁴⁷ Other opportunities, such as expectations improved the position of women in marriage. The coveted it fixes mainly for the "Original Indonesia" that islam is set out in the written law. The legal Marriage of native Muslim Indonesia that appears in the books of *Fiqh*, according to Indonesia's legal system is not able to be classified in the category of written law, because it is not written in a government regulation.

The problems that became the center of attention women's movement at that time were: (1) forced marriage, (2) polygamy, (3) an arbitrary divorce. After Indonesia became independent state remedial measures instituted by the Government among other things by issuing the law on Registration of marriage and divorce Year 1946 on the judge guardian and the Ordinance of case examiner *fasid* marriage, and remarriage in religious courts. However, the improvements that were required had not yet been met because laws and regulations it is merely about formiil, not about the law of material, laws that govern marriage itself.⁴⁸

⁴⁷Indriaswari Dyah Saptaningrum, *Sejarah UU No: 1 tahun 1974 tentang Perkawinan dan Pembakuan Peran Gender, dalam Perspektif Perempuan*, (Jakarta: Lembaga Bantuan Hukum Asosiasi Perempuan Untuk Keadilan, 2000), p. 53.

⁴⁸Moh Zahid, *Dua Puluh Lima Tahun Pelaksanaan Undang-Undang Perkawinan*, Dirjen Bimas Islam dan Penyelenggara Haji, 2003, P. 36-38

In 1950 the Government of Indonesia has been trying to meet the demand by forming the Committee which makes the Marriage Bill then discussed in the Council of Parliament in 1958/1959, but did not manage to materialize in laws.. Between the years 1967 to 1979 Parliament had also been discussed, but his fate is similar to the previous draft legislation.

In 1973 the Government again proposed the draft legislation to the House of representatives and after gaining feedback pros and cons eventually reached a consensus that took effect at the next hearings thus achieved the agreed among members of the House of representatives. After obtaining the consent of the House of representatives, the Government enact/issue date of Marriage Act 02 January 1974 in the same year which incidentally LN number that is no. 1 Year 1974.

On January 1, 1975, after one year of a three-month Marriage laws enacted, born Government Regulation No. 9 Year 1975 that made the rules of implementation of the Marriage Law, and thus, started January 01 1975 Act No. 1 Year 1974 had been able to run effectively.

Furthermore in a Marriage Draft Legislation as saying Government to Representatives on 31 July 1973, Religious Courts only referred to in the draft explanation of article 73 paragraph (2) the draft is, *“Untuk memperlancar pelaksanaan Undang-Undang ini, pemerintah dapat mengatur lebih lanjut hal-hal tertentu yang memerlukan ketentuan pelaksanaan, antara lain segala sesuatu yang bersangkutan paut dengan pengikut sertaan Pengadilan Umum, tata cara*

berlangsungnya perkawinan seperti bagi golongan agama islam adanya saksi, wali, dan sebagainya.”

Article 3, paragraph (2) of the Draft Legislation that a Court in the Public Court, the next in this Act referred to as the Court may permit a husband to marries more than one, what if desired by the parties concerned. Based on the draft of article 3 paragraph (2) and an explanation of article 73 paragraph (2) of the draft is obvious that Matrimonial marriage problems will become Public Court authority.

Draft existence of Religion Court in The Draft legislation is one of the more substantive issues that led to the emergence of unrest and protests from Muslims both in Parliament and in societies. Through lobbying and Congress reached consensus among the ABRI Faction and Representatives warranties as follows:⁴⁹

1. Islamic law in marriage problems will not be reduced or changed
2. As a consequent of points (1) the implementation will not be reduced or changed. The tasks Act No. 22 Year 1946 and Act No. 14 Year 1970 on Key provisions the power of Justice, guaranteed the continuity of the Judiciary.
3. Somethings that are contrary to the Islamic religion is omitted
4. Article 12 Draft Legislation approved to be formulated as follows

(1) Perkawinan adalah sah apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu.

⁴⁹Iral Fauzi” Sejarah Undang-undang No. 1 Tahun 1974 Tentang Perkawinan dan Undang-undang Nomor 7 Tahun 1989 Tentang Peradilan Agama” <http://iralfauzi.blogspot.com/2014/11/makalah-sejarah-undang-undang-no-1.html>. Accsed on may 05, 2015

(2) *Tiap-tiap perkawinan wajib dicatat demi ketertiban administrasi Negara.*

5. Regarding divorce and polygamy is necessary in any conditions and try to prevent arbitrariness.

The warranties set forth in the form of existing norms on the articles of the draft legislation and the explanation on December 22, 1973, the House of representatives approved the Marriage Draft Legislation was passed into Act

On 02 January 1974 passed the draft and enacted by the President into Act No. 1 Year 1974 on Marriage. As for the regulatory implementation of the enacted through Government Regulation No. 9 Year 1975 on the implementation of Act No. 1 Year 1974 on Marriage, It states that the Court meant by the legislation are:⁵⁰

1. Religious Court for Muslims only.
2. Public Court for nonmuslims.

In the Act No. 1 Year 1974 on Marriage there are some principles, the purpose of that is to save the right of husband and wife, the principle are:⁵¹

1. The purpose of marriage is to form a happy family and eternal. For that husband and wife need to help and complete each other, so that each can develop them personality and help achieve spiritual and material wellbeing.

⁵⁰ Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia*, Ed. I, (Jakarta: Kencana, 2006), P. 4

⁵¹ Sudarsono, *Hukum Perkawinan Nasional*, (Jakarta, Rineke Cipta; 2003), p. 18

2. This Act stated that a marriage reputed legal if it carried out according to the respective laws of their religion and beliefs. In addition every marriage should be noted according to the applicable Act and regulations. The registration of each marriage is the same as the registration of events significant events in a person's life, such as births, deaths that are expressed in the letters of a deed which also details contained in the registration list.
3. Act embraced the principle of monogamy. Only if required by the relevant Act and religions in question allow it, a husband can marry more than one. However, the marriage of a man with more than one wife, even though it was desired by the parties concerned can only be done if it meets a variety of specific requirements and decided by the courts.
4. This Act of reciprocity that the prospective husband and wife should has their own body to mature the soul can make a marriage, in order to materialize the goal of marriage is good without ending in divorce and got a good and healthy offspring. For it must be prevented from marriage between spouse who are still minors. Because marriage made women under age resulted in birth rates higher. Therefore Marriage is only allowed if the man has reached the age Year 19 years and the women has reached the age Year 16 years.
5. Because the purpose of marriage is to form a happy family and peace, then everlasting this law of reciprocity to be difficult divorce. To allow divorce,

there should be particular reasons and should be done in front of the Court.

6. Rights and the position of a wife is balanced with the rights of the husband and the position both in domestic life as well as in the Association community. Thus everything within the family can be negotiated and decided upon jointly between husband and wife.

In order to ensure legal certainty, then the marriage following everything that is related to the marriage occurred before the enactment of Act No. 1 Year 1974 on Marriage, which was carried out according to the law existing at the time the Marriage is declared legally valid.

The overall legal norms that define the procedure to be followed, including the provisions of law that determine the consequences of the law called the law of marriage. Marriage itself is its main purpose is to continue the descent, which is obtained from the children of the marriage itself.

The function of law No. 1 Year 1974 on Marriage are legitimizing acts of marriage, whether carried out by certain religions as well as in customs, as expressed in article 1. *perkawinan berdasarkan Ketuhanan Yang Maha Esa*; also, as expressed in article 2 Verse (1) *Perkawinan adalah sah, apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu*. So the function Act No. 1 Year 1974 on Marriage is giving endorsement to the follow up of the marriage.⁵²

⁵²C.S.T. Cansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia*, published. X (Jakarta: Balai Pustaka, 2003), P. 225-227

2. The Islamic Family law Enactment of Malaysia

The constitution of Malaysia established a legal system that resembles, in general terms, the plural legal system that the British established during the colonial era. Most areas of life in Malaysia are regulated by federal law that applies consistently throughout the nation. included most of the issues that, during the colonial period, would have been resolved by civil court judges applying British common law. Each of the states, however, was given the constitutional right to identify an interpretation of Islamic law that would be applied to Muslims in their territory and the right to establish courts to adjudicate disputes involving Muslims and arising in a range of areas.⁵³

In Malaysia, the administration of Islamic family law is under the separate jurisdiction of different States where each State has its own enactment over matters relating to the family law governing Muslims. In this paper, as far as statutory provisions are concerned, the discussion focuses upon the provisions on dispute resolutions under the Islamic Family Law (Federal Territories) Act, 1984, which is also the model followed by many of the States in Malaysia. The paper traces the historical background of the IFLA, 1984 generally and specifically the provisions concerning the dispute resolutions. The critical analysis focuses on section 47 (5) to (17) and, specifically of section 48 and, other related sections of the IFLA, 1984. These relevant provisions are analysed against the background of the principles and

⁵³Farid S. Shuaib, "The Islamic Legal System In Malaysia," Pacific Rim Law And Policy Journal, Vol 2, (January-2012) p. 90

rules of *tahkim* (arbitration) as deliberated in the sources of *syari'ah*. Suggestions and recommendations to further improve the current practice and provisions are made in this paper.⁵⁴

The IFLA, 1984 was enacted to regulate marriage and divorce in Kuala Lumpur. This IFLA, 1984 was the result of an attempt made by the Federal government to have a model law for the administration of Islamic family law in Malaysia. As a consequence, a committee chaired by Tengku Zaid from the Department of Attorney General was formed. The draft was then submitted to the Conference of Rulers and after it was approved in principle, sent to individual States for their comments and adoption. However, the intention to have a uniform legislation relating to Islamic Family Law has not been materialized, as when the draft law was considered by the States, a number of significant amendments were made to it.

This first draft of the Islamic Family Law Enactment had made some important changes to the previous law. It was the aim of this draft of IFLA, 1984 to provide the provisions concerning marriage, divorce, maintenance, guardianship, and other matters connected with the family for the Muslims in this country more effective.

In Kuala Lumpur, a committee was set up to consider the draft legislation, which had among its members the *Mufti*, the Chief Judge, Officials of the Religious

⁵⁴Nora Abdul Hak, Role Of The Conciliatory Committee And Hakam (Arbitrator): The Practice And Provisions Of The Islamic Family Law In Malaysia, International Islamic University Malaysia. P. 1

Department, and two academicians from the University of Malaya and a representative from Wanita *Umno*. The draft legislation produced by this committee was enacted as the Islamic Family Law (Federal Territory) Act, 1984 (Act 303). This IFLA, 1984 as its long title states, “is an Act to enact certain provisions of the Islamic family law in respect of marriage, divorce, maintenance, guardianship and other matters connected with family life.” It has been rearranged and divided into 10 parts. Among its contents are; Marriage, registration of marriages, penalties and miscellaneous provisions relating to the solemnization and registration of marriages, dissolution of marriage, maintenance of wife, children and others, guardianship, miscellaneous, penalties and general matters.

This attempt at codification is a welcome move since the Islamic law has to be traced from several different sources. However, this codification is not complete and there are several sections of the IFLA, 1984 that still refer to the '*hukum shara*' (the rules and principles of *Shari'ah*). This means the primary sources of Islamic law i.e., the Qur'an and the *Sunnah* will still have to be referred to for a full interpretation of provisions that require such interpretation.⁵⁵

The IFLA, 1984 repeals various provisions of the Administration of Muslim Law Enactment, 1952 of Selangor that had been made applicable to Kuala Lumpur, when it became a Federal Territory in 1974. The provisions of the Administration of Muslim Law Enactment, 1952, had been adopted and enforced in Kuala Lumpur in full before the IFLA, 1984 came into force on 29th April 1987, that is, three years

⁵⁵ Nora Abdul Hak, Role Of The Conciliatory Committee And Hakam (Arbitrator). P. 5

after it was enacted. Realizing the fact that the rate of divorce in the Federal Territory of Kuala Lumpur has rise, the IFLA, 1984 is promulgated with the intention, among other things, to make it more difficult to obtain a divorce. Thus, the provisions concerning *hakam/tahkim* are provided for under s 48 of the IFLA, 1984 as one of the means to curb arbitrary divorce in the hand of the husband. Other provisions relevant to *hakam* are ss 47(5) to (17), 49 (4) and 51 (8) and (9).

The Administration of Muslim Law Enactment, 1952 of Selangor however, was only a law of general application. Besides this main Enactment, the Rules on Marriage, Divorce and Revocation, 1967 were also applied. The

Rules of 1967, however, did not apply to Kuala Lumpur because this legislation had not been made under the main Enactment of 1952. Thus, at that time, there were no specific rules and procedures to guide the *qadi* (judge) in conducting marriage and divorce in Kuala Lumpur. The *qadi* usually exercised his discretion in this matter and the procedure they followed was still that prescribed by the Rules, 1967 despite the fact that there was no legal enforcement.

The provisions on *hakam* were also provided for under the old legislation of various states in Malaysia. In Pahang, there was provision for the appointment of *hakam* where a married woman applies to a *qadi* (judge) for divorce. In such a case, if the application has been caused by disagreement of an extreme nature between the husband and the wife, the *qadi* (judge) appoints two *hakams*, each representing the husband and the wife respectively, with sufficient powers given by both parties to enable *hakams* to effect a peaceful reconciliation of the parties, to the extent that the

hakam of the husband divorcing the wife, and *hakam* of the wife applying for a divorce by redemption. If both *hakams* decide for a divorce, whether by redemption or not, *hakam* of the husband may divorce the wife, and the divorce is then registered.⁵⁶

In Negeri Sembilan, under the Malay Customary Law which is followed, it is laid down that before a divorce takes place there should be due deliberation on the reasons for the intended dissolution. Custom demands that a husband who contemplates a divorce from his wife must go through an arbitration called '*bersuarang*' or settlement. A small feast is held by the husband to which he invites the relatives of the wife as well as his own. The husband will then state his grievances, so that they may be considered by the parties present. Often the presence of the elders has a beneficial effect in resolving what may prove to be a hasty decision or a petty quarrel.

Thus, prior to the current provisions of dispute resolution in the IFLA, 1984 there were such provisions provided for under the old legislation, which recognized the practice of resorting the conflicts to a third party for a resolution that prevails among the Muslims society.

Islamic family law is an act for the community certain provisions of family law on Islamic marriage, divorce, maintenance, care and other related to family life. Each individual in Malaysia may refer to family law in accordance with the following

⁵⁶ Nora Abdul Hak, Role Of The Conciliatory Committee And Hakam (Arbitrator). P. 5

States:⁵⁷

No	State	The Act	Original
1	Johor	Enakmen Undang-Undang Keluarga Islam (Negeri Johor) 2003 (En. 17/03)	5/1990
2	Negeri Sembilan	Enakmen Undang-undang Keluarga Islam Negeri Sembilan	7/1983
3	Pahang	Enakmen Undang-undang Keluarga Islam Pahang	3/2005
4	Perak	Enakmen Undang-undang Keluarga Islam Perak	13/1991
5	Perlis	Enakmen Undang-undang Keluarga Islam Perlis	4/1992
6	Pulau Pinang	Enakmen Undang-undang Keluarga Islam Pulau Pinang	2/1985
7	Selangor	Enakmen Undang-undang Keluarga Islam Selangor	4/1984
8	Terengganu	Enakmen Undang-Undang Pentadbiran Keluarga Islam 1985 (En. 12/85)	12/1985
9	Kedah	Enakmen Keluarga Islam Kedah	1/1984
10	Kelantan	Enakmen Keluarga Islam Kelantan	1/1983
11	Melaka	Enakmen Keluarga Islam Melaka	8/1983
12	Sabah	Enakmen Keluarga Islam Sabah	15/1992
13	Sarawak	Ordinan Undang-undang Keluarga Islam Sarawak	5/1991
14	W. Persekutuan	Akta Undang-undang Keluarga Islam Wilayah Persekutuan	(A303) 1983 pindaan / (A828)

D. Al-Maslahah Al-Mursalah

The scholars of *ushul* give some definitions about *maslahah al-mursalah* by “Give a legal law to some case noticeably in Al-Quran and Tradition or consensus,

⁵⁷http://www.jksm.gov.my/jksmv2/index.php?option=com_wrapper&view=wrapper&Itemid=8&lang=bn accessed on may 01, 2015

on the basis of maintaining the benefit". Al-Ghazaly formulate *mursalah al-maslahah* as follows

ما لم يشهد له من الشرع بالبطلان ولا بالاعتبار نص معين

"anything that there was no evidence of *syariah* for her in the form of nash in particular that invalidate it, and no one will do"⁵⁸

Meanwhile, according to al-Syathibi, as quoted by Imam al-Saukani, *maslahah al-mursalah* Affairs that is in line with the actions/type of action the *syara'* are not indicated by a specific proposition. There are many definition defined by scholars but them agreed that the definition of *maslahah al mursalah* suitable with this,⁵⁹

1. *Maslahah al-mursalah* is something have good reputed by consideration can create goodness or evade disrepute for human.
2. Something have good reputed by mind, also in line and suitable by the goals of *syariah* in decide law.
3. Something have good reputed by mind, also in line and suitable by the goals of *syariah* have not specially instruction in *syariah* that push and acknowledge it.

In some literature *maslahah al-mursalah* called by "*maslahah muthlaqoh*" and "*munasib mursal*" there are some scholars also named by "*al-ishtihlaht*". This different mentioning do not bring different definition.

⁵⁸Amir Syarifuddin, *Ushul Fiqh*,. p. 355

⁵⁹Amir Syarifuddin, *Ushul Fiqh*,. p. 356

In applying a law or on the basis of *maslahah* certainly shouldn't be perfunctory, must comply with the specified requirements. Related to the requirements of *al-maslahah al-mursalah*, Al-Syathibi which was later reaffirmed by the Abd. Wahab Kholaf and Abu Zahrah, as inferred by a. Djazuli, mentioned in the following⁶⁰:

1. *Maslahah al-mursalah* must not be contrary to the maqasid *Syari'ah*, a common legal basis, the spirit of the teachings of Islam and the detailed legal basis for sure the cause and instructions.
2. *Maslahah al-mursalah* must be assured in the sense that there should be a discussion and a rational and in-depth research so that it is believed that this provides benefits or deny the dangers
3. *Maslahah al-mursalah* is generally
4. The implementation does not give rise to difficulties which are not reasonable.

From requirements above seen that scholars use *maslahah al-mursalah* in *ijtihad* very carefully. Because of this way used when the scholars brave to set a problem solving in a case which at that time had no clue in Islamic law.

To stronger the arguments in use *maslahah al-mursalah*, scholars use argumentation which the form of argument is rational argumentation. In this case difficult enough to use *nash* argument directly, cause *maslahah al-mursalah* used when the case haven't texts basis legality.

⁶⁰A. Djazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis*, (Jakarta, Kencana, 2010), p. 11

In *masalah al-mursalah* no comparison as in *qiyas and istihsan*, but merely looked at the benefit of the people. Way of *ijtihad masalah al-mursalah* cause Islamic law will be able to accommodate the new things but still will not lose its identity as an Islamic law. In addition to proven theorems also that the values of Islamic law would be appropriate for any time and place. In other words Islamic law will direct people's lives to the General principles on the one hand and on the other hand will absorb the realities and the changes that the conditional nature continues to happen all the time.⁶¹

⁶¹ Amir Syarifuddin... p. 357-362