

ISLAMIC FAMILY LAW REFORM IN SOUTHEAST ASIA (STUDY OF MALAYSIA AND BRUNEI DARUSSALAM)

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Abstract

study aims to analyze Islamic legal reforms related to divorce in Malaysia and Brunei Darussalam, two Muslim-majority countries with different legal systems but similar approaches to family issues. In Malaysia, divorce law is regulated by the Islamic Family Code, which is based on sharia but has been influenced by secular legal systems. Meanwhile, Brunei Darussalam applies Islamic law more strictly through the Brunei Islamic Family Code, which regulates divorce through mechanisms that prioritize family unity and the role of the state in enforcing sharia law. This study examines how these two countries address the challenges of modernity in handling divorce, such as the increasing divorce rate and the role of women in the legal process. Islamic legal reforms in both countries are reviewed from the perspective of legislation, divorce procedures, and individual rights, as well as the involvement of relevant parties such as religious courts and social institutions. The results of this study are expected to provide insight into the extent to which Islamic legal reforms in Malaysia and Brunei Darussalam are able to respond to evolving social needs while maintaining fundamental sharia principles.

Penelitian ini bertujuan untuk menganalisis pembaruan hukum Islam terkait perceraian di Malaysia dan Brunei Darussalam, dua negara dengan mayoritas Muslim yang memiliki sistem hukum yang berbeda namun serupa dalam pendekatan terhadap isu-isu keluarga. Di Malaysia, hukum perceraian diatur oleh Undang-Undang Keluarga Islam yang didasarkan pada syariat, tetapi mengalami pengaruh dari sistem hukum sekuler. Sementara itu, Brunei Darussalam menerapkan hukum Islam secara lebih ketat melalui Undang-Undang Keluarga Islam Brunei yang mengatur perceraian dengan mekanisme yang lebih mengedepankan kesatuan keluarga dan peran negara dalam menegakkan hukum syariat. Penelitian ini membahas bagaimana kedua negara ini mengatasi tantangan modernitas dalam menangani perceraian, seperti peningkatan angka perceraian dan peran perempuan dalam proses hukum. Pembaruan hukum Islam di kedua negara ditinjau dari aspek legislasi, prosedur perceraian, dan hak-hak individu, serta keterlibatan pihak-pihak terkait seperti pengadilan agama dan lembaga sosial. Hasil penelitian ini diharapkan dapat memberikan wawasan mengenai sejauh mana pembaruan hukum Islam di Malaysia dan Brunei Darussalam mampu merespons kebutuhan sosial yang terus berkembang, sambil tetap mempertahankan prinsip-prinsip syariah yang fundamental.

Keywords: Islamic Legal Reform, Family Law, Southeast Asia



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A. INTRODUCTION

Laws within a country have distinct characteristics. These differences provide insight into whether the law is responsive to the needs of society or, conversely, more reflective of the state's interests. Laws are created to regulate the interests of various groups within society to prevent them from clashing. Laws serve as guidelines for society's actions and conduct, binding all citizens and those appointed to governmental power.¹

From this, a concept emerged that law is a normative rule that regulates human behavior. Law does not develop in a vacuum, but rather grows from a societal awareness that requires shared rules. Therefore, law always adopts values that grow and develop in society, including customary, traditional, and religious values. This is what is meant by al-'adah muhakkamah in Islamic theory. This means that a society's traditions or customs can be made into law. The consequence of this expression is that every legal product must be seen as a product of its time, which is difficult to separate from various socio-political influences. As a political product with ideological nuances, law is always contextual, because society is inherently dynamic and experiences change from era to era.

Thus, in the context of family law and Islamic legal reform, distinguishing between these terms is crucial, as misunderstandings regarding the meaning of law, sharia, and fiqh will impact the development of Islamic law in the context of societal change. Sharia, as the essential source of Islamic law, is a standardized body of reference and cannot be altered by humans, so that all human behavior, from the past to the present, can be accommodated by sharia.

Meanwhile, fiqh is an interpretation by scholars of the Shari'a for certain actions, using detailed postulates, so that fiqh becomes very acceptable to changes and modifications. When we equate the terms fiqh and sharia, we have actually combined two different aspects and have made the fiqh absolute, which is actually a product of ordinary humans. The implication is that fiqh which is taken through the method of legal istinbat or ijтиhad and used as an answer to the social problems of Muslims throughout their existence will become rigid and stop at previous products.

Islamic law ultimately fails to address the problems of contemporary society, or even becomes irrelevant to current developments. This distinction allows for the renewal of family law, as several Islamic jurisprudence regulations governing family law can be reviewed in the light of changing times.

This reality is what makes family law so important to study, and in some Islamic countries, family law has even undergone reform. Every reform is inherently met with pros and cons. Likewise, the reform of Islamic law has sparked debate between traditionalists and modernists. Family law reforms often include outdated material. Furthermore, there are policies of non-Muslim colonial states that have successfully controlled countries with Muslim majorities and

attempted to separate religious and state affairs. Among the countries that have implemented reforms to Islamic family law are Malaysia and Brunei Darussalam.

B. METHODS

The research method is a qualitative study that uses normative juridical research methods. Qualitative research also includes methodologies used for research procedures that produce descriptive data. Descriptive data is data written in detailed words. In this study, the researcher also used a normative juridical approach with the technique used to collect data is by examining library materials. Data obtained from library research will then be systematically compiled and processed with qualitative descriptive analysis, which will then provide conclusions from the analyzed data.

C. ANALYSIS AND DISCUSSION

1. Reform of Islamic Family Law in Malaysia

a. Social Politics of Islamic Family Law

Socially, Islamic family law in Malaysia is heavily influenced by interacting cultural, political, and religious factors. Malaysia has a federal government structure, and Islamic family law is regulated by each state, with federal ministries, such as the Ministry of Religious Affairs in charge of religious affairs, providing direction and oversight.

Several socio-political factors that influence Islamic family law in Malaysia include:

- 1) Religious Identity Politics: Religious identity politics is on the rise in Malaysia, with the growing influence of political Islam, particularly following the "Islamization" policies initiated in the 1980s under Prime Minister Tun Dr. Mahathir Mohamad. In this context, Sharia law has been increasingly applied in family matters, with the aim of strengthening Islamic identity and values within society.
- 2) The Role of Islamic Parties: Islamic political parties, such as PAS (Parti Islam Se-Malaysia), have played a role in influencing Islamic family policy. They have sought to push for stricter implementation of Sharia law, particularly regarding divorce and women's rights.
- 3) The Role of Sharia Courts: Sharia courts play a crucial role in resolving Islamic family disputes. While Sharia court decisions are final at the state level, there are challenges regarding legal consistency across states and the limited authority of Sharia courts in cases involving civil law.

Gender Issues and Women's Rights: Islamic family law in Malaysia is often criticized for not providing adequate protection for women, particularly in matters of divorce and property division. However, there have been efforts by various institutions and activists to advocate for legal reforms to make them fairer and more responsive to women's rights. These reforms, while occurring,

often meet with resistance from those who consider them to be contrary to sharia principles.

b. Family Law in Malaysia

The laws in force in Malaysia before British colonialism were Islamic law and customary law. The laws in force before British colonialism in Malaysia were Islamic law and adat pepateh (traditional adat). Adat pepateh was mostly used by the Malay community in the state of Negeri Sembilan and several areas in Malacca. The Peninsular states used the temenggung customary law. The Sarawak Malay Court Law was used by the state of Sarawak. In the provisions of marriage and sale laws, Islamic law is strongly influenced.¹

In realizing legal reform² There are several things regulated in family law in Malaysia, namely:

c. Divorce

Husband and wife who wish to divorce must submit an application to the court, by filling out a divorce form, accompanied by a statement containing:

- 1) Facts about the marriage, including the names, ages and genders of children, if any, resulting from the marriage.
- 2) Facts that state the jurisdictional authority of a court.
- 3) Facts related to the marriage process that has been carried out, including the location.
- 4) A statement revealing the reasons for the divorce.

¹Abdul Monir Yacob, Pelaksanaan Undang-Undang dalam Mahkamah Syariyah dan Mahkamah Sipil di Malaysia (Kuala Lumpur: Institut Kefahaman Malaysia (IKIM), 1995), hal. 8.

²Berkaitan dengan upaya pembaharuan hukum menurut Taheer Mahmoud ada beberapa konsep pembaharuan hukum Islam di negara-negara Muslim. 1) *intrad doctrinal reform* Pembaharuan hukum Islam dengan metode intra-doctrinal ini merupakan pembaharuan hukum Islam yang didasarkan kepada mazhab hukum Islam (fiqh) yang dianut oleh mayoritas masyarakat suatu Negara. Seperti di Indonesia yang menganut mazhab Sunny dan lebih banyak mengambil dari doktrin Imam Syafii. 2) *ekstra doctrinal reform*, Terkadang pembaharuan hukum Islam di beberapa negara Muslim keluar dari pendapat-pendapat mazhab fiqh yang dianut oleh masyarakatnya. Seperti, adanya ijtihad hukum Islam yang baru yang mereka lakukan. Metode ini disebut sebagai metode ekstra doctrinal. Di antara penerapan ijtihad yang telah ada adalah wasiat wajibah dalam hukum kewarisan; pelarangan poligami dan sebagainya. 3) *regulatory reform* Dalam perkembangan masyarakat muslim setelah bersentuhan dengan Barat, maka hukum Islam juga dipengaruhi oleh berbagai prosedur yang ada dalam hukum barat, seperti legislasi dan berbagai regulasi administrasi dengan system administrasi modern. Berbagai negara Muslim telah melakukan pembaharuan hukum Islam dengan cara ini, seperti Pakistan, Indonesia, Malaysia, Brunei, Singapura dan sebagainya. 4) *codification* yaitu pembukuan materi hukum secara lengkap dan sistematis; pada awalnya dikenal dari system hukum Barat terutama Eropa Kontinental. Dalam pertemuan antara masyarakat muslim dengan Barat di masa kolonial; pengaruh system hukum Barat ini pun diadopsi oleh negara-negara Muslim. Sehingga, berbagai Negara muslim membuat kodifikasi dengan mengundangkan berbagai materi hukum Islam dalam rangka pembaharuan hukum Islamnya. Di antara negaranegara yang telah melakukan pembaharuan tersebut adalah Lebanon, Jordania, Syiria, Tunisia, Maroko dan Irak, yang membuat peraturan perundnag-undangan yang diambil dari hukum Islam tradisional tanpa beberapa perubahan. Begitu juga di Indonesia, Malaysia, Brunei, dan Singapura, membuat peraturanperaturan administratif hukum Islam dengan system pengadilan. Lihat di Sri Wahyuni, "Pembaharuan Hukum Keluarga Islam di Negaranegara Muslim," Al-Ahwal 6 (2013) hal. 213.

- 5) A statement about the efforts that have been made to resolve the dispute.
- 6) All forms of agreement regarding the maintenance and residence of the wife and children, care and upbringing of children, and the division of any property generated after marriage.
- 7) Other evidence that is important to convey.³

The Malaysian Family Law Act requires that a divorce be filed by the husband in court. If the divorce is filed outside of court, the husband must report the matter to the court within seven days. Based on this report, the judge will examine and investigate whether the divorce was in accordance with Islamic law. If the court is satisfied that the divorce was in accordance with Islamic law, it may:

- 1) Make a decision that acknowledges that the divorce has been carried out by talaq.
- 2) Recording the divorce proceedings.
- 3) Send a copy of the divorce registration to the registrar and the head of the registrar.⁴

In the event that a husband divorces his wife without any valid reason, the Malaysian Family Law Act gives the wife the right to ask the court to claim the right to maintenance (mut'ah) in accordance with applicable Islamic law.⁵

The reasons for allowing divorce in Malaysia are similar to the reasons for fasakh in Islamic marriage law. Several reasons are stated, for example in the Perak Law and the Pahang Law, there are five reasons why husband and wife can divorce.

- 1) Impotent or infertile husband;
- 2) A crazy husband suffers from leprosy, or vertigo, or has a sexually transmitted disease, as long as the wife is not willing to accept this condition;
- 3) permission or consent to marriage from the wife (bride) is given illegally, either due to coercion, forgetfulness, imperfect reason or other reasons in accordance with sharia;
- 4) At the time of marriage the husband had a nervous illness which made him unfit for marriage;
- 5) Or other valid reasons for fasakh according to the Shari'a."

While the reasons for allowing divorce in Negeri Sembilan, Selangor and Persekutuan Pulau Pinang are known to be the same as in Pahang and Perak, there are several additions as follows: "It is not known where the

³Pasal 47 Keluarga Malaysia

⁴Pasal 55A Hukum Keluarga Malaysia

⁵Ahmad Tholabi Kharlie dkk. *Kodifikasi Hukum Keluarga Islam Kontemporer*. Jakarta: Kencana. 2020. Hal.205

husband lived for one year; The husband did not provide maintenance for three months; The husband was imprisoned for three years or more; The husband did not provide mental support for one year

The wife was married by the father before she was sixteen years old and refused the marriage and has not been consummated by the husband; The husband abuses his wife.” From the description above, there are several things that need to be considered. First, all laws recognize the element of insanity as a reason for divorce, but Negeri Sembilan, Pulau Pinang, Selangor, and Sarawak require a minimum of two years of illness. Meanwhile, the laws of Kelantan, Pahang, and Perak do not provide a minimum limit. In addition, the laws of Kelantan, Negeri Sembilan, the federation of Pulau Pinang, Selangor, and Sarawak include forced marriage as a reason for divorce. Meanwhile, the reasons for divorce in Malaysia are generally due to talak/ordered talak, redeem talak, and syiqaq. Only the Sarawak law lists other reasons. In addition, the law in Malaysia lists apostasy as a reason for divorce, but it must still be through a religious court decision.

d. **Khulu'**

When a husband is not willing to voluntarily divorce his wife by divorce, but both parties have agreed to a divorce with redemption or a ransom divorce, then after calculating the amount of ransom to be paid and having been agreed upon by both parties, the court can order the husband to divorce his wife with ransom ('khulu') and the divorce is counted as a divorce bain sughra. After this divorce, the judge sends a copy of the divorce certificate and a record of the divorce to the registrar as registration documentation.⁶

In the event that the amount of ransom is not agreed upon by each party, the judge can estimate the amount of ransom that must be paid, in accordance with Islamic law and taking into account the position and capabilities of each party.⁷

2. Islamic Family Law Reform in Brunei Darussalam

Social politics in Brunei is greatly influenced by the role of religion and the state, with Islam is central to social and legal policy. The Islamic family law system implemented in Brunei is based on the desire to maintain the sanctity and purity of Islamic law, which is heavily influenced by state policies based on Sharia principles.

a. Social Politics of Islamic Family Law in Brunei

Darussalam is ruled by Sultan Hassanal Bolkiah, who holds absolute power in both government and religious affairs. The Sultan is directly involved

⁶Ahmad Tholabi Kharlie dkk. *Kodifikasi Hukum...* hal. 206

⁷Pasal 49 Hukum Keluarga Malaysia

in decision-making on religious law and policy, including Islamic family law. The Sultan also serves as the country's religious head, and state policies are heavily influenced by adherence to Sharia law.

Islamization and Sharia Policy: Brunei Darussalam maintains a strict Islamization policy, reflected in the comprehensive implementation of Islamic family law. In recent years, the country passed the Sharia Criminal Code, which applies to all citizens, further strengthening the application of Sharia law in daily life. This includes strict regulations on family matters involving divorce, marriage, and child support.

Sharia Courts: Sharia courts in Brunei have extensive authority in regulating Islamic family matters. In addition to handling divorce, Sharia courts are also responsible for inheritance, child custody, and marital issues. These courts operate with a strict and conservative approach to enforcing Islamic law. The Brunei Sharia courts also have authority to address broader issues related to morality and individual behavior, reinforcing state control over aspects of people's private lives.

The Role of Women: In the context of Islamic family law in Brunei, women have legally protected rights, but inequality often persists in some areas, particularly regarding inheritance and the distribution of property after divorce. In the event of divorce, women in Brunei have the right to living and child custody, but court decisions often favor men's rights in many cases, such as property division. Despite efforts to increase protection for women, traditional and conservative norms often limit their scope in family law.

b. Family Law in Brunei Darussalam

1) Divorce from Husband

Regarding divorce, the provisions in Brunei are controversial. If a woman is divorced based on the qabla dukhul (a condition of marriage), she still has the right to be remarried by her husband because she still has an iddah period. This is stipulated in Brunei law.⁸ This regulation clearly differs from policies in other Muslim countries. It also contradicts the consensus of the imams of the Islamic jurisprudence schools that a woman who is divorced before consummating her marriage does not have an iddah period. This provision also contradicts verse 49 of the Quran, Surah al-Ahzab.⁹ *O you who*

⁸Pasal 140 (c)

⁹*Asbabul Nuzul:* Ayat ini diturunkan sebagai respon terhadap situasi yang terjadi pada zaman Nabi Muhammad SAW, di mana salah seorang sahabat beliau, yaitu Zaid bin Haritsah, yang sudah bercerai dengan istrinya, yaitu Zainab binti Jahsyi, kemudian menikah lagi dengan perempuan lain yang sudah diceraikan oleh suaminya. Pada saat itu, ada beberapa sahabat yang merasa ragu dan khawatir jika hal tersebut dianggap tidak pantas, karena pada zaman itu, pernikahan dengan mantan istri anak angkat dianggap tabu atau tidak biasa.

Zainab binti Jahsyi adalah mantan istri dari Zaid bin Haritsah, yang sebelumnya diangkat menjadi anak oleh Nabi Muhammad SAW. Setelah Zaid menceraikan Zainab, ia kemudian menikah lagi dengan Nabi Muhammad SAW, yang merupakan hal yang dianggap kontroversial di kalangan masyarakat pada saat itu, mengingat tradisi sosial yang berlaku.

believe, if you marry women who believe, then you divorce them before you interfere with them, then it is not at all obligatory for them to complete their 'iddah for you which you ask for.

Thus, it can be said that the provisions of Article 140 of the Brunei Family Law Act deviate from the teachings of the Imams of the Madzhab and even from the Quran. However, this should still be appreciated as a demonstration of Brunei's courage in establishing this regulation. It is possible that there are benefits intended to be achieved through this regulation. This legal provision is based on local customary law in Brunei. Bruneian society considers a woman's virginity to be the right of her husband. This is why, if a woman is divorced before the end of her marriage, she must still undergo the iddah period.¹⁰

2) Talak Ransom (Khuluk) and Fasakh

A redemptive divorce occurs when a husband and wife divorce without the husband's consent. Through this redemptive divorce, the qadi (divorcee) will determine the amount to be paid, adjusted to the parties' means. Afterward, the divorce can be registered.¹¹

If a husband is unwilling to divorce his wife voluntarily by means of talaq, while both parties agree to separate, the wife can file for a ransom divorce or khulu' with the court by submitting the agreed ransom. If the ransom amount to be paid by the wife is not agreed upon by both parties, the court can estimate the ransom amount in accordance with Islamic law, taking into account the wife's position and financial capacity and the amount of the dowry that has been given. If the ransom amount that must be paid by the wife to her husband has been determined and the court requests that the husband divorce his wife, but the husband still refuses, then the court can issue a divorce decree for both of them. From here, the court issues a divorce certificate for both. For men who divorce their wives by divorce outside the court process and without the approval of the court, the threat of a fine of up to 2000 dollars or a maximum of 6 months in prison.¹²

Divorce divorce is prepared for women if they want to sue their husbands. There is another alternative given to wives who want a divorce, namely through fasakh. Fasakh can be carried out as long as the wife gives a

Dalam konteks ini, Allah menurunkan ayat tersebut untuk memberikan penjelasan dan klarifikasi bahwa tidak ada larangan bagi umat Islam untuk menikahi wanita yang sudah bercerai, dan pernikahan seperti ini diperbolehkan, asalkan disertai dengan niat yang benar dan dalam kerangka aturan agama. Selain itu, ayat ini juga memberikan pelajaran mengenai tidak adanya pembatasan dalam hal pernikahan dengan mantan istri, sekaligus memperjelas bahwa pernikahan Nabi Muhammad SAW dengan Zainab bukanlah karena kesalahan atau hal yang tercela, melainkan sebagai wahyu dari Allah untuk menunjukkan bahwa hukum-hukum syariat dapat mengubah norma-norma sosial yang ada pada waktu itu.

¹⁰Cahyani, A. Intan. *Hukum Keluarga Islam di Brunei Darussalam*. Al-Qadau 2 (2015). hal. 156.

¹¹Pasal 145

¹²Ahmad Tholabi Kharlie dkk. *Kodifikasi Hukum...* Hal. 196-197

statement in front of two witnesses (at least) and states her oath. Through this fasakh, the divorced wife can file a mut'ah in court.

Women in Brunei can apply to the Kadi Court to obtain a divorce via fasakh, which is a declaration of dissolution of marriage according to Muslim law. This fasakh statement will not be issued, unless it follows Islamic law and the woman can give a statement in front of at least two witnesses by taking an oath or making a confession.¹³

Both divorce and fasakh require the wife to incur the costs of redemption for herself if she wishes to separate. The difference is that if the divorce rate is given to the husband, the rate charged through fasakh divorce is given to the judge who handles the case.¹⁴

3) Hakam (Arbitrator)

The appointment of a hakam or arbitrator is regulated by Brunei law. A hakam is appointed by a qadi to mediate in marital disputes. As the person who appoints the hakam, the qadi also has the authority to replace one hakam with another. There are several reasons for replacement. First, the qadi disagrees with the hakam's efforts. Second, when the hakam believes that the husband and wife he is mediating meet the requirements for divorce but lack proper grounds for divorce. The hakam has the authority to influence the divorce.¹⁵

Therefore, the position of the hakam significantly determines the fate of a marriage, whether the marriage is maintained or terminated. Brunei follows the Shafi'i school of thought. The existence of the hakam is also influenced by this school of thought.

4) Refer

Similar to the concept of reconciliation in Islamic law, Brunei law also permits reconciliation after a wife has received one, two, or three divorces, and the iddah period has not yet expired. During this period, the husband and wife must live together, provided they do not violate religious norms. If they decide to reconcile, they can re-register their marriage in accordance with existing marriage registration regulations.¹⁶

Although there is an obligation to live together, if the divorce occurs and the ex-wife can be reconciled without informing the wife, then the wife is not obligated to live together until she is informed of the reconciliation. Therefore, once the divorce judgment has been rendered, the husband expresses his desire to reconcile with his wife, and the wife accepts the request. The qadi

¹³Ahmad Tholabi Kharlie dkk. *Kodifikasi Hukum...* Hal. 196

¹⁴Pasal 146-148

¹⁵Pasal 149 Ayat 1 sampai Ayat 5

¹⁶Pasal 150 Ayat 1,2,3

then exercises his authority to order the wife to live with her husband as before. Thus, the wife's consent is the primary requirement for reconciliation.¹⁷

E. CONCLUSION

Malaysia and Brunei Darussalam are two countries that were both once under British colonial rule. As with other colonial aims, the British presence significantly influenced changes in legal policy in both countries. The British sought to separate Islamic law from the state, whereas previously both Malaysia and Brunei Darussalam had used Islamic law for family law matters. Therefore, after both countries gained independence from British colonial rule, they both struggled to reform the Islamic family law applicable in their respective countries. These reforms, based on the concept of reform, did not specifically implement a single reform concept, but rather a blend of intradoctrinal reform, extradoctrinal reform, regulatory reform, and doctrine. This was done in order to adapt to the needs of each country to achieve maslahah (benefit).

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Pasal 145

Pasal 146-148

Pasal 149 Ayat 1 sampai Ayat 5

Pasal 150 Ayat 1,2,3

Pasal 150 Ayat 6

Pasal 47 Keluarga Malaysia

Pasal 49 Hukum Keluarga Malaysia

Pasal 55A Hukum Keluarga Malaysia

Sri Wahyuni, "Pembaharuan Hukum Keluarga Islam di Negara-negara Muslim," *Al-Ahwal* 6, 2013.

¹⁷Pasal 150 Ayat 6