

قانون الأسرة الإسلامي في ماليزيا، نشأته وتطوره: نظرة تاريخية

Islamic Family Law in Malaysia its Origin and Development.

A Historical Account

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Abstract:

Malaysia, an Islamic country, experienced a number of developments pertaining to Islamic family law. Islamic family law in Malaysia often addresses marriage and all of its aspects.

This article looks at the history and origin of Islamic Family Law in Malaysia. This paper discussed Four aspects of Malaysian marriage that have undergone historical reformation at the level of marriage, age limitations, divorce, and polygamy.

The article concludes that Malaysia's Islamic law reform can be split into three phases. Malaysia's legal system was largely shaped by Islamic principles during the Malay era. Family law matters like marriage, divorce, and marriage age demonstrate the value of and necessity for family law in today's world.

Keywords: Shari'ah, Malaysia, Codification, History, Modification, Islamic Family Law.

ملخص:

باعتبارها دولة إسلامية، مرت ماليزيا بالعديد من التطورات التشريعية المتعلقة بقانون الأسرة الإسلامي. في ماليزيا، عادة ما يتعلق قانون الأسرة الإسلامي بالزواج وقضاياها برمتها.

تتناول هذه المقالة تاريخ وأصل قانون الأسرة الإسلامي في ماليزيا. ناقش هذا البحث أربعة جوانب تتعلق بالأسرة خاصة الذي شهد إصلاحات تاريخية على خاصة على مستوى الزواج، حدود السن، الطلاق، وتعدد الزوجات.

ويخلص المقال إلى أن إصلاحات قانون الأسرة في ضوء الشريعة الإسلامية في ماليزيا يمكن تقسيمه إلى ثلاث مراحل. تم تشكيل النظام القانوني في ماليزيا إلى حد كبير من خلال المبادئ الإسلامية خلال عصر الملايو. تُظهر مسائل قانون الأسرة مثل الزواج والطلاق وسن الزواج وغيرها من المسائل كما تظهر قيمة قانون الأسرة وضرورته في عالم اليوم. خاصة في العالم الإسلامي.

الكلمات المفتاحية: الشريعة، ماليزيا، التقنين، التاريخ، تعديل، قانون الأسرة الإسلامي.

Introduction:

The Family Law Reform was one of the new developments in the Islamic world during the 20th century.¹ Islamic family law is one of the most well-known areas in Muslim societies today.² Its continued practice in their traditional socio-cultural life is not the only reason for its existence; laws that become national official legislation also give it legal form. The majority of Islamic nations in Africa and Asia have family laws, which demonstrates how crucial it is that Islamic family law be implemented in all of the Islamic world's nations today.³

Malaysia was also not fully under British control until the turn of the 19th century, after centuries of Portuguese and then Dutch rule. The country has a population of over 32.2 million. Malaysia is a country with a head of state known as the Yang di-Pertuan Agung — this refers to a king or sultan who is selected (by means of rotation) each five years. Only the state in which they reign is eligible to appoint a successor King of Malaysia — or Sultan.⁴

Malaysia gained its independence from British colonial rule in 1957. Almost sixty-one per cent of its population profess the Islamic faith and adhere to the Shāfi'ī madhāb. Malaysia, as a multiracial and multicultural society, has different other religions including Buddhism, Hinduism, and Christianity.⁵ Islam however, is considered based on the third Article in Part I of the Malaysian Constitution as the state's religion, people may also peacefully and rightfully adhere to and practice other religions in the country.⁶ The same article has also a section that recognises religious freedom.⁷

The Constitutional Articles in Malaysia preserve and uphold the religious and cultural identity of the Sultan and Malay Muslims. Article 160 for instance asserts that the individuals who profess to adopt Islam, are the Malays and they are accustomed to speaking the Malay language and conforming to Malay traditions.⁸ Before the colonial British impact, Islamic and traditional customs coexisted in Malaysian law. Islam had an impact on local legislative decisions pertaining to state processes during British colonial presence. Shari'ah court systems were established to carry out Islamic law, and Islamic socio-legal structures and administrative regulations, such as those governing marriage, divorce, and inheritance, were enforced nationwide. Until Malaysia gained its independence, this state of undertakings sustained.⁹

The Codification of Malaysian Islamic Family Law

Codifying is the method through which statutes and laws are founded. The expression taqnīn in Arabic denotes codification. Taqnīn is the Arabic word for the source of a verb, derived from the root "qānūn." Meaning a law or code.¹⁰ Taqnīn actually means "wad'u al-qawānīn," which refers to setting and arranging the laws and codes. Ashqar contends that, from an Islamic standpoint, canonization is The compilation of authoritative regulations pertinent to a specific legal domain, presented in the format of a book, code, or collection. This would come after these principles have been examined and sorted, any conflicts eliminated, and they have been arranged thematically for use in judicial article components.¹¹ This definition provides a vivid image of codifying and quickly displays its application. In order to make court rulings easier to refer to, compile

rulings, al-Zuhayli emphasises that the codification of Islamic rules is transforming Shari'ah laws and rulings into simple legal articles that will help individuals comprehend the reasoning behind the decisions.¹²

In the 1980s, Kedah hosted a national conference to establish a committee to address Islamic law. Members of legal aid organizations and specialists in Islamic law comprise the committee that will be considering the various amendments. Following their formation, committees are sent to different Islamic nations to research Islamic law and how it is applied there. The commission focuses on criminal, family, and civil legal procedures. This committee was formed to align Malaysian regulations with Islamic family law.

Moreover, Islamic law is now receiving consideration from the federal government. They established a committee to look into the composition, authority, and scope of Sharia courts in order to achieve this. Members of the Civil Court, attorneys, and specialists in Islamic law make up this committee. It then recommended the establishment of a Sharia Court and that its judges be given expanded powers and responsibilities.¹³ Under the original Islamic Family law in Perak, the 1885 Procedure of Marriage and Divorce together with the 1889 rules of Islamic divorce. Islamic marriages and divorces from the state of Selangor are first recorded in the year 1885.¹⁴

These state laws hinder the creation of the Islamic religious boards, known as the Malaysian "Majlis Agama Islam", along with their authority and

tasks.¹⁵ The formation of Shari'ah Courts to administer the rulings based on Shari'ah laws, is an additional specification of these legislations. Section 45(2)(b) of the Selangor State Management of Islamic Law Enactment 1889 establishes that the Shari'ah High Court shall heed and regulate all activities and dealings related to Muslim affairs including engagements, marriages, divorce, annulment, legal separation, provisions or claim to property resulting from any of the issues mentioned in paragraph (a); child support, legal guardianship, or custody, and partition or claims to matrimonial property.¹⁶

The Origins and Development of Family Law in Malaysia

Whether or not it was affected by Islamic theology, Malay customary law was the rightful legislative basis in pre-colonial period in Malaysia. Considerable amount of Malay customary laws were not written, but transmitted among district or ethnic chiefs occurs through tradition. The practices and traditions of the Malay people that finally become law are referred to as Malay customary law. The materials on early Malay laws that Western academics accumulated in their analysis of the Malay legal history ascertain the existence of customary laws pertaining to the Malays. The legitimate transcripts that outline the existing Malay legal system include the Malacca Law, Pahang Law, Kedah Law, 99 Perak Law, and Sungai Ujong Ujong Law.¹⁷

Grounded on a systematic analysis of the scripts, the author identifies a couple of distinctive customs that were widely exercised, primarily in the Malay Peninsula. First, Perpatih customary law, which is limited

to Negeri Sembilan. The second is the Temenggong culture customary law which implemented along a nation's coastline. It is believed that the Malaysian society initiated the establishment of Adat Temenggong in Malacca, amid the both customary laws. After becoming Muslims, the sultans and rulers of Temenggong Customary Law changed it to reflect Islamic values. Thus, Perpatih custom, Temenggong culture, and Islamic law are the main types into which Malaysian customary law falls.¹⁸

In Malaysian history, specialists identified three distinct epochs through which Islamic law has been utilised. The Malay period (1303-1823) was the first. Inscriptions and manuscripts from Malaysia from this era display the implementation of Islamic law. The 1303 Malacca Brief Law Book that created four legal domains—Malacca ownership law, maritime law, Islamic family law, and obligatory law for Muslims—as well as the Terengganu Inscription, represents this legal system and was written in Javanese script.¹⁹ The fusion of the four divisions of law transformed Malay customary law and law court verdicts into Islamic law. Accordingly, the decrees existing in Islamic family law are fundamentally the product of the Shafi'i school because the Shfi'i fiqh texts with notes were translated into Malay. Additionally, the fifth Mohammad Marriage Ordinance of 1880 is applied during this point.²⁰

Next came the era of British colonization (1824–1957). This period saw the modification of provisions pertaining to Islamic law, which were then no longer the foundation for state governance. Only family law and religious infractions are covered by Islamic law. As an illustration,

English law controls wills and ownership. Under British colonial rule, legislative authority was vested in the Council of Home Affairs and the Federal Council. A significant portion of State Council administrative legislations do not apply Islamic law, despite the fact that ethnic Malays and additional people are represented in the Council. The Shariah courts' authority was reduced at the time, Nonetheless, the civil courts' jurisdiction grew in both extent and standing.²¹

The third period is the one that began in 1957 and continues until today. Following its independence, Malaysia maintained its pre-independence governmental system through Shari'ah application. The federal national constitution outlines the confines of the federal and state governments' rules, with state governments having competence over Islamic administrative matters. Malaysia is separated into numerous parts since fourteen provinces have enacted laws related to Islam. The rule of law in Malaysia did not undergo significant alterations in 1957 because of the substantial influence of British officials and legal professionals. In the 1980s, three decades after independence, Malaysia attempted to clarify, modify, and codify Islamic law in a number of states.²² The Civil Court shall apply English customary law and other Malaysian regulations in the absence of any regulations, as per the Civil Code of 1956.

These clauses limit Islamic law to family law and transgressions of religious principles. Civil courts still have authority over issues relating to property rights, inheritance, and child care and support. The authority of the

civil court takes precedence over that of the sharia court in cases where they conflict. It demonstrates how Malaysia's implementation of Islamic law is insufficient. The former British colonies' legal influence over Malaysia is one of the contributing factors.²³

After independence, British law remains supreme, However, Malaysia still has a sizable portion of uncontrolled Islamic law. English law is still prevalent in some legislation and jurisprudence, even if Islamic law has been regulated (included) in certain contexts.²⁴ Before British law was incorporated into Malaysian national law, the country did not update all of its legal frameworks. Malaysia wants to ensure that laws are in accordance with social life and current values. Therefore, developing and forming legal perceptions is a simpler process than entirely evaluating the previous legal culture and switching it completely. The Islamic legal system and the common law of indigenous groups share a common law heritage.²⁵

The Evolution And Amendments To Malaysia's Islamic Family Law

After Islam was brought to Malaysia in the 18th and 19th centuries, the Shafi'i School of Islamic law came to be implemented there. Just as Islam spread to other parts of Southeast Asia, albeit largely via peaceful means. In Malaysia, local law—typically customary law—behaves peacefully alongside Islamic law. Written in Javanese script, the Terengganu or Terengganu inscriptions on stone contain the oldest known examples of Islamic law in Indonesia. Starting with a preamble and ending

with the stipulation, this law comprises nine or ten regulations. Both the fifth and fourth rules are ambiguous and pertain to debts and receivables. The sixth rule states that adultery is punishable by stoning with stones for married people and one hundred rattan strikes for solitary persons. The seventh rule about impolite ladies. The punishment for charges of infidelity between a husband and wife is covered in the eighth rule. Furthermore, as the eighth rule states, the law is applicable everywhere. The written legislation known as Kanun Malacca (UU Malacca) is ranked second only to Batu Surat Terengganu. The 44 articles that make up the Malacca Law, also known as Kanun Malacca Law, are based on the Shafi'i School of fiqh, which regulates the areas of jinayah, mu'amalah, munakahat, events and clerkships, adab al-qadi, administrative, and government rules.²⁶

Malaysia's legal system is based on English common law, usually referred to it as the Anglo-Saxon law. Islamic law and customary law are two legal directions, especially in regulating personal affairs. Several Malaysian provinces were colonized by the British after the end of the 17th century which was preceded by the Portuguese and the Dutch. The Islamic Marriage Ordinance, also known as Mohamedan Marriage Ordinance Number V of 1880, was introduced by England in the Straits Countries (Singapore, Malacca island, and Pinang). It signaled the beginning of British involvement in Islamic family governance.²⁷ This law's requirements for marriage registration are its most significant component. Meanwhile, the allied Malay nations of Pahang, Negeri Sembilan, Perak, and Selangor were subject to the Registration of Muhammadan Marriages and Divorces Enactment 1885. Furthermore, for friendly or auspicious

nations (Kelantan, Terengganu, Perils, Kedah, and Johor), the Divorce Regulations of 1907 were implemented.²⁸

The year 1957 saw Malaysia's ultimate independence. Over time, all facets of marriage and divorce have been covered by family law changes. Not only is marriage and divorce registration required, as it was under the previous law. Malaka, Kelantan, and Negeri Sembilan were the first states in which this enterprise began operations in 1983.

An Overview of Malaysian Family Law Reformation: Marriage Law

Malaysian states create and carry out legislation pertaining to Islamic family law. These family laws include: This includes marriage law reform. Dowries, marriage and divorce, the necessity of providing for a woman and children, prohibited marriages, the marriage ceremony, divorce, the waiting period after divorce, annulment, separation, additional rights, guardianship, and child custody are a few of these.

Several laws regulate the subjects of Islamic family law. Two examples are the 2006 Amendment and the Islamic Family Law (Federal Territories) Act 1984 (Act 303). Enactment 12 of the Islamic Family Law of 2002 (State of Melaka) was enacted in 2002. (Kelantan) Islamic Family Law was enacted in 2002. (Negeri Sembilan) Islamic Family Law was enacted in 2003. (Perak) Act of 2004, Act of 1984, Act of 1984, Act of 1984, Act of 1984, Act of 1984, Act of 1984, 1979 Enactment of the Islamic Family Law in Kedah (State of Penang) Administration of Islamic Family Law Enactment 2004, 12 of 1985 Islamic

Family Law in Terengganu, (Selangor) Islamic Family Law Law 1990 (Act No. 5 of 2003) Law 5 of 1991 in Johor Islamic Family Law Regulation 1991 4 of 1992 Administration of Islamic Family Law 1991 Perlis, and Regulation No. 8 related to Sabahan Islamic Family Law 2004.²⁹

In general, Four facets of Islamic marriage law have been modified in Malaysia. They incorporate polygamy, divorce, marriage, and restricted age for marriage. One notices slight variations in each Malaysian state's marriage laws concerning the four categories. These variations are both material and technical. Firstly, and with regard to the limits of age to marry, Malaysian law stipulates that a man must be 18 years old to get married, while a woman must be 16 years old. All Malaysian state laws are complied with by these provisions. Section 8 of the Islamic Family Law (Federal Territories) 2006 stipulates in its translation that: "According to this law, marriage cannot be performed if a man is less than eighteen years old or a woman is less than sixteen years old unless the Shari'ah Judge permits in writing in certain circumstances."³⁰ Islamic scholars and ulama' have the power to allow people who are younger than the legal age to marry for particular reasons, such as the bride or groom's unmarried pregnancy, needing financial assistance from family members or the need for a job, or having had extramarital affairs.³¹

A person under the age of eighteen is considered a kid by the 2001 Children's Law, while Islamic Family Law may have a different definition.³² This results in discrepancies between Malaysia's laws on the age of minors, as a 16-year-old female is deemed a minor at the time of marriage under the Children's

Law. Furthermore, Malaysian states and territories have different minimum marriage ages, which differ from those of other Muslim nations like Bangladesh, Egypt, and Indonesia. For instance, the marriage age in Egypt is 18 for men and 16 for women; 21 for men and 18 for women in Bangladesh; and in Indonesia, it is 19 for both men and women.³³

Unlike the Islamic Family Law, the 2001 Children's Law deems a kid to under eighteen. Yet, Islamic sources authorises marriage before that age under specific circumstances and only if couples are mature enough to take on marital duties even though they are under the age of 18.³⁴

Furthermore, Section 25 Registration of the Islamic Family Law, Federal Territory Act necessitates consummation of marriage before it is registered; "Perkawinan setelah tanggal yang ditentukan dari perekat orang tinggal di Wilayah Federal dan pernikahan sekelompena di luar negeri, tetapi tinggal di Wilayah Federal harus didaftarkan sebagaimana dengan usaha-undang-undang ini."³⁵ Additionally, the 1985 Terengganu Law Enactment No. 12 and the Administration of Islamic Family Law Enactment in the same year mandate that marriage registration must be finished seven days following the implementation of the marriage agreement. However, the 2006 Act from the Islamic Family Law (Federal Territories) states that it has no bearing on the validity or cancellation of this marriage registration.

Malaysia and other Muslim majority countries have diverse legal responses to marriage registration infringements. Places like Iran, Saudi Arabia,

Morocco, Indonesia barely have any limitations like that. Some nations, such as Brunei Darussalam, Egypt, Pakistan, Bangladesh, Jordan, Syria, Tunisia, Iraq, Yemen, and Malaysia, have laws that allow fines and imprisonment.³⁶ According to Islamic law, the wife can file for a shared property claim in a marriage in the event of a divorce, polygamy, or death. As such, there are negative ramifications for property, wife rights, and child status in Malaysia in the case of legal registration of marriage.³⁷ In addition, if requiring marriage registration helps the community avoid harm, oppression, and danger, then Islam permits the government to impose this requirement.³⁸

Thirdly, concerning having multiple wives, the foundations of marriage are not expressly defined by Malay legislation.³⁹ If a husband gets a written statement from the judge, he is allowed to practice polygamy. Polygamy is addressed by Sabah State in 2004 Law 8 under Section 23 of the Regulations of Islamic Family Law.⁴⁰ "Laki-laki tidak boleh perkawinan, kecuali dengan izin tertulis sebelumnya dari Pengadilan, mengadakan perjanjian perkawinan lain dengan perempuan lain [...]."⁴¹ The judge's endorsement of polygamy is grounded on the husband's incompetence to provide his wife with fair physical and spiritual care as well as his medical and mental health issues.⁴²

This provision is included in the legislation of Terengganu, Melaka, Sabah, and Terengganu. Some states have different regulations, particularly related to declined registering of polygamous marriages. Marriages in the Federal Territory and the State of Sarawak can be registered without a court permission.

However, polygamous marriages are not accepted in Johor, Perlis, Kedah, Negeri Sembilan, Perak, Penang, and Selangor.⁴³

Moreover, and generally speaking, several nations allow polygamy under strict guidelines, including Malaysia, Indonesia, Pakistan, Egypt, and Morocco. However, polygamy is accepted more widely in Saudi Arabia, Iran, and Qatar.⁴⁴ Although it was legal, women were granted the right to file for divorce on the grounds of common illnesses brought on by polygamy, thanks to the provisions of the Egyptian Ordinance of 1929.⁴⁵ Tunisia and Turkey forbid polygamy, unlike some of these other nations. Due to the frequency of husbands overlooking the wife, children, and families' fundamental needs, polygamy is illegal in Tunisia.⁴⁶

Lastly, concerning family dissolution, in Perak and Kelantan, there are a number of legitimate reasons why a husband might file for divorce, including impotence, mental illnesses, fear of STDs, being forcefully married, guilt, and other circumstances. The lack of financial support from husbands for their wives and their sexual problems are the main causes of divorce in Kedah.⁴⁷ Husband and wife must be in good mental health and not have any communicable physical illness; additionally, in the event that the spouse disappears for a year without providing an explanation, as required by the laws of the Federal Territory, Melaka, Negeri Sembilan, Terengganu, Selangor, and Sabah. A three-month pregnancy is followed by years and maintenance, a forced marriage, four months of no jimā for the wife, or abuse between the husband and wife.⁴⁸ Sharia courts in Malaysia receive the majority of their divorce cases from the fasakh.

Sharia attorneys must serve as middlemen in the majority of fasakh cases, requiring them to present more proof and a judge's decision than in other divorce litigation.⁴⁹ Unlike Malaysia, where the wife's complaint of khulū stemming from conflict, not having a job, and experiencing domestic violence is the primary cause of marriage dissolution in Turkey.⁵⁰ In another instance, Divorce in Pakistan is often caused by financial exploitation, unhappiness, abusive environments, and interference from family members.⁵¹

Conclusion:

Islamic family law, as it exists today in many Muslim nations, governs family matters among Muslims. The codification process of Islamic family law is constantly evolving to address issues that arise in the families of Malaysia's Muslim community. Unquestionably, Malaysia has continuously changed various areas of Islamic family law, particularly those pertaining to marriage, age restrictions, divorce, and polygamy. The benefits of legal codification at least make it simpler to comprehend the rationale behind the codification of Islamic family law. Due to the provisions found in jurisprudential books, the case can proceed more quickly and amicably, fulfilling the desires of the people seeking justice within the family. Overall, three phases make up Malaysia's reform of Islamic law. Initially, during the Malay era, Islamic legal principles were incorporated into laws. Common law was integrated into numerous laws and jurisprudential decisions in Malaysia during the British colonial era because British law was in effect at the time. Third, the federal

territorial constitution marked the beginning of efforts to define the powers of the federal territory government and the thirteen other states' territorial governments and to codify and reform family law after independence. Drawing from the preceding discourse, it is evident that the endeavour to formalize Islamic family law within the Muslim world is crucial because it holds a more pivotal role within the collective framework of Islam and it is more widely accepted and used than other laws in society.

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