

Beyond Classical Fiqh: The Disharmony of Applying 'Iddah to Women Divorced through Qabla Dukkūl Ṭalāq in Brunei Darussalam

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Abstract

Contemporary reforms of Islamic family law in Muslim countries have often produced legal provisions that differ from classical fiqh doctrines. One notable example can be found in Brunei Darussalam, which requires a waiting period ('iddah) for women divorced before the consummation of marriage (qabla dukhūl divorce), as stipulated in Article 13(3) of the Islamic Family Law (Emergency Order) 1999. This provision departs from the dominant Syafī'i juristic position, which generally exempts women divorced before consummation from the obligation of 'iddah. Although previous studies have examined Islamic family law reform in Brunei Darussalam, limited attention has been given to the legal rationale and normative foundations underlying the application of 'iddah in cases of qabla dukhūl divorce. This study aims to analyze the legal basis, implementation, and normative reasoning behind the enforcement of 'iddah for women divorced prior to consummation in Brunei Darussalam. Employing a normative juridical method, the study utilizes both a conceptual approach and a statutory approach. Primary sources include the Qur'an and the Islamic Family Law (Emergency Order) 1999, while secondary sources consist of fiqh literature, scholarly books, academic journal articles, and expert opinions. The findings reveal that the application of 'iddah in cases of qabla dukhūl divorce is grounded in considerations of maṣlahah (public interest), local custom ('urf), and the precautionary legal principle of *al-iḥtiyāt*. Furthermore, the legislation does not clearly distinguish between *dukhūl ḥaqīqī* (actual consummation) and *dukhūl ḥukmī* (constructive consummation), thereby allowing broader legal interpretation in its implementation. This study contributes to the scholarship on Islamic family law reform by demonstrating how a modern Muslim state reconstructs classical fiqh doctrines through the integration of maṣlahah, local customs, and contemporary regulatory needs.

[Reformasi hukum keluarga Islam di negara-negara Muslim kontemporer sering kali menghasilkan ketentuan yang berbeda dari doktrin fikih klasik. Salah satu kasus yang menarik ditemukan di Brunei Darussalam yang mewajibkan masa idah bagi perempuan yang bercerai sebelum terjadinya hubungan suami istri (talak qabla dukhūl), sebagaimana diatur dalam Pasal 13 ayat (3) Perintah Darurat (Undang-Undang Hukum Keluarga Islam) Tahun 1999. Ketentuan ini berbeda dengan pandangan dominan fikih mazhab Syafī'iyah yang tidak mewajibkan idah bagi perempuan yang dicerai sebelum terjadinya persetubuhan. Meskipun berbagai kajian telah membahas reformasi hukum keluarga Islam di Brunei Darussalam, belum banyak penelitian yang secara khusus

menganalisis dasar yuridis dan rasionalitas hukum di balik pemberlakuan idah pada kasus qabla dukhul. Penelitian ini bertujuan menganalisis dasar hukum, implementasi, dan argumentasi normatif yang melandasi pemberlakuan idah bagi perempuan yang ditalak qabla dukhul di Brunei Darussalam. Penelitian ini menggunakan metode yuridis normatif dengan pendekatan konseptual (conceptual approach) dan pendekatan perundang-undangan (statute approach). Data primer diperoleh dari Al-Qur'an dan Perintah Darurat (Undang-Undang Hukum Keluarga Islam) Tahun 1999, sedangkan data sekunder berasal dari literatur fikih, buku, jurnal ilmiah, dan pendapat para ahli. Hasil penelitian menunjukkan bahwa pemberlakuan idah dalam kasus qabla dukhul di Brunei Darussalam didasarkan pada pertimbangan maṣlaḥah, adat setempat ('urf), serta prinsip kehati-hatian hukum (al-ihṭiyāt). Selain itu, ketentuan tersebut tidak memberikan penjelasan yang tegas mengenai batasan antara dukhul ḥaqīqī dan dukhul ḥukmī, sehingga membuka ruang interpretasi yang lebih luas dalam penerapannya. Penelitian ini berkontribusi pada pengembangan kajian reformasi hukum keluarga Islam dengan menunjukkan bagaimana negara dapat merekonstruksi doktrin fikih klasik melalui integrasi antara prinsip maṣlaḥah, adat lokal, dan kebutuhan regulasi hukum modern.]

Keywords: Islamic Family Law Reform, 'Iddah, Qabla Dukhul Divorce, Maṣlaḥah, Legal Pluralism, Brunei Darussalam.

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INTRODUCTION

The reform of Islamic family law has emerged as a significant phenomenon across various Muslim countries in response to social transformation, the need for modern legal regulation, and increasing demands for the protection of family rights. Within the Islamic jurisprudential tradition, family law (*al-Aḥwāl al-Shakhsyiyah*) encompasses a wide range of matters relating to familial relationships, including marriage, divorce, lineage, guardianship, child custody (*ḥadānah*), and inheritance (Summa, 2004). Reforms in this area of law frequently introduce new legal provisions that do not always correspond to the constructs of classical fiqh, thereby generating a dynamic interaction among state authority, madhhab doctrines, and the needs of contemporary society.

Brunei Darussalam is one of the Southeast Asian countries that has continuously undertaken reforms in Islamic family law. Guided by the national ideology of Melayu Islam Beraja (MIB), Brunei's Islamic legal system is founded upon the Shāfi'i school of jurisprudence in matters of fiqh and *Ahl al-Sunnah wa al-Jamā'ah* in matters of creed (Ghofur, 2015). This orientation positions the Shāfi'i madhhab as the primary reference in the formulation of Islamic family law regulations. Nevertheless, modern legislative practices in Brunei reveal several family law provisions that reflect legal developments and, in certain respects, departures from the dominant opinions of the Shāfi'i school.

Historically, the development of Islamic family law in Brunei cannot be separated from the influence of British colonial rule. Prior to British intervention, Islamic law had already been formalized through the *Hukum Kanun Brunei*, which was enacted during the reign of Sultan Hassan and subsequently developed by his successors (Othman, 1995). Colonial

intervention through a series of political and judicial agreements in the nineteenth century gradually restricted the scope of Islamic law while expanding the jurisdiction of English law in Brunei Darussalam (Mubarak, 2003; Othman, 1995). This situation led to the enactment of various regulations governing the lives of Muslims, ranging from the Muhammadan's Law Enactment No. 1 of 1911 to the Islamic Religious Council and Kadi Courts Act, Chapter 77, which became important foundations for the development of Islamic family law in Brunei (Besar, 2020; Summa, 2004).

Subsequent developments were marked by the promulgation of the Emergency Order (Islamic Family Law) 1999, which introduced a more systematic and comprehensive framework governing marriage, divorce, and the rights of Muslim families. This regulation is regarded as part of a broader family law reform effort aimed at harmonizing Sharī'ah principles with the needs of modern society while providing greater protection for women's rights within the family institution (Rohmah & Huda, 2020; Tamit, 2012).

One particularly noteworthy aspect of this reform concerns the regulation of the waiting period (*'iddah*) for women who are divorced before the consummation of marriage (*ṭalāq qabla dukhūl*). In fiqh terminology, *qabla dukhūl* refers to the status of spouses who have entered into a valid marriage but have not yet engaged in sexual intercourse, whereas *ba'da dukhūl* denotes the condition after marital relations have taken place (Maulidiyanti & Jazari, 2020). This provision is particularly significant because Article 13(3) of the Emergency Order (Islamic Family Law) 1999 continues to require an *'iddah* period for women who are divorced under *qabla dukhūl* circumstances. This stands in contrast to the dominant view within Shāfi'ī jurisprudence, which holds that a woman divorced prior to the consummation of marriage is not obligated to observe an *'iddah* period.

Several previous studies have examined the development of Islamic family law in Brunei Darussalam, including legislative reforms, the Sharī'ah judicial system, and comparative analyses of family law between Brunei and other Muslim countries (Mubarak, 2003; Cahyani, 2015; Rohmah & Huda, 2020). However, these studies have primarily focused on the general landscape of family law reform and have not specifically analyzed the juridical rationale underlying the imposition of *'iddah* upon women divorced under *qabla dukhūl* circumstances. Consequently, there remains a significant research gap concerning the normative foundations, fiqh-based arguments, and legal considerations employed by Brunei's lawmakers in regulating this provision.

Based on the foregoing discussion, this study aims to analyze the legal basis, implementation, and normative arguments underlying the application of *'iddah* for women who experience *ṭalāq qabla dukhūl* in Brunei Darussalam. It also seeks to explain how the principles of *maṣlahah*, local custom, and legal precaution (*al-iḥtiyāt*) contribute to the formulation of legal provisions that differ from the dominant position of the Shāfi'ī school. Through this analysis, the study is expected to contribute to the advancement of research on Islamic family law reform, particularly regarding the interaction between classical fiqh doctrines and contemporary Islamic family law legislation in Muslim countries.

METHOD

This study employs a normative juridical method (normative legal research), which examines law as a system of norms embodied in statutory regulations, legal doctrines, and legal principles developed within academic literature. In this approach, law is understood as a set of normative rules that function as guidelines for regulating social behavior and resolving legal issues arising in practice (Amiruddin & Asikin, 2012).

This study adopts two approaches, namely the conceptual approach and the statute approach. The conceptual approach is utilized to analyze fiqh concepts related to *iddah*, *qabla dukhūl*, *dukhūl ḥaqīqī*, *dukhūl ḥukmī*, *maṣlahah*, and *al-iḥtiyāṭ* based on the views of Islamic jurists and scholars of Islamic law. Meanwhile, the statute approach is employed to examine the various regulations that constitute the legal framework of Islamic family law in Brunei Darussalam, particularly the Emergency Order (Islamic Family Law) 1999, along with other legal provisions relevant to the subject matter of this research (Amiruddin & Asikin, 2012).

The sources of data in this study consist of primary and secondary legal materials. The primary legal materials include the Qur'an, the Emergency Order (Islamic Family Law) 1999 of Brunei Darussalam, and other statutory regulations related to Islamic family law. The secondary legal materials comprise classical fiqh texts, academic books, scholarly journal articles, and various academic works discussing Islamic family law, Islamic legal reform, and the concept of *iddah* from the perspectives of classical fiqh and contemporary Islamic law.

Legal materials were collected through library research by identifying and compiling various legal sources relevant to the focus of the study. Subsequently, all legal materials were analyzed qualitatively using legal analysis techniques through normative interpretation and doctrinal comparison to identify the legal foundations, fiqh-based arguments, and legislative rationales underlying the application of *iddah* to women who experience *ṭalāq qabla dukhūl* in Brunei Darussalam.

RESULT AND DISCUSSION

Qabla Dukhūl Divorce in Classical Islamic Jurisprudence

Linguistically, *qabla* means “before,” while *dukhūl* etymologically derives from the verbal noun (*maṣdar*) of *dakhala–yadkhublu–dukhūlan*, which means “to enter” (Yunus, 1990). In the context of marriage law, the term *dukhūl* refers to *al-waṭʿ*, namely sexual intercourse or intimate marital relations. Accordingly, the term *qabla dukhūl* describes a husband and wife who have not yet engaged in sexual intercourse, whereas *baʿda dukhūl* refers to spouses who have already consummated their marriage, as *baʿda* means “after” or “subsequent to.”

Wahbah al-Zuhaylī defines *dukhūl* or *al-waṭʿ* as follows:

الختانين ولو من غير إنزال أو الجنابة بمغيب حشفة (رأس الذكر) أو قدرها من مقطوعها في فرج التقاء مطبق للجماع، قبلاً أو دبراً، من ذكر أو أنثى، طائع أو مكره، نائم أو يقظان

“Sexual union, even in the absence of ejaculation, refers to the insertion of the glans penis, or a part thereof, into the vagina of a woman who is physically capable of engaging in sexual intercourse, whether the act occurs in a normal or abnormal manner, voluntarily or involuntarily, and whether the individuals involved are asleep or conscious” (Zuhaili, 1984).

In his work *Fiqh al-Sunnah*, Sayyid Sabiq further explains that the Ḥanafī and Ḥanbalī jurists, as well as the Rightly Guided Caliphs (*Khulafāʾ al-Rāshidūn*), classify *dukhūl* into two categories: *dukhūl ḥaqīqī* (actual consummation of marriage) and *dukhūl ḥukmī* (constructive consummation recognized by law) (As-Sabiq, 1977).

1) *Dukhūl Ḥaqīqī*

الدخول الحقيقي: هو الوطء أو الاتصال الجنسي ولو كان حراماً في القبل أو في الدبر بتغيب حشفة أو قدرها من مقطوعها، أو في حالة الحيض أو النفاس أو الإحرام أو الصوم أو الإعتكاف

"*Ad-dukbūl al-H aqīqī is wath'i or sexual intercourse, even if it is haram to do it, by sinking the hasyafab (head of the penis) or a piece corresponding to the hasyafab into the qubul or anus, or done in the state of menstruation, puerperium, ibram, fasting or i'tikaf.*"

2) *Dukbūl Hukmī*

Dukbūl Hukmī is interpreted as *Khalwat al-Ṣ ahīḥab*, namely:

وذلك بان يفرد الزوجان في مكان يأمنان فيه اطلع أحد عليهما, ولم يكن بأحد منهما مانع شرعي' مثل أن يكون أحدهما صائماً صيام فرض عليه, أو تكون حائضاً. أو مانع حسي, مثل مرض أحدهما مرضاً لا يستطيع معه الدخول الحقيقي, أو مانع طبيعي بأن يكون معهما ثالث

Kholwatus sahebah is a solitary married couple in a place that is safe from the reach of one's eyes, and neither of them experiences an obstacle of a sharia nature, such as for example one of them is fasting obligatorily, or his wife is in the habit of menstruation. Or obstacles that are physical in nature, such as the example of illness of one of the two who is unable to have actual physical intercourse. Or there is a natural obstacle, such as the presence of a third person with the husband and wife (in the place where the husband and wife are alone).

A *ṭalāq qabla dukbūl* gives rise to several legal consequences that possess distinctive characteristics within Islamic law. These consequences relate to the legal relationship between the parties following divorce, as well as provisions concerning *'iddah*, *mahr*, and *mut'ah*. These legal effects may be outlined as follows:

1. Following the divorce, the parties are no longer permitted to interact with one another as husband and wife, nor may they treat each other as though the marital relationship still exists. Their legal status and mutual rights and obligations cease upon the dissolution of the marriage (Syarifuddin, 2006).
2. *Iddah*

As stated in QS al-Aḥzāb [33]:49,

طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ فَمَا لَكُمْ عَلَيْهِنَّ مِنْ عِدَّةٍ تَعْتَدُونَهَا لَمْ يَأْتِيَنَّهِنَّ أَمْ نَافَتْهُنَّ إِذَا نَكَحْتُمُ الْمُؤْمِنَاتِ فَمَتَّعُوهُنَّ وَسَرَخُوهُنَّ سَرَاحاً جَمِيلاً

Based on this verse, it can be interpreted that if the husband divorces his wife who did not have time to get along, then the ex-wife does not have a period of idah. Thus, the ex-husband has no dependents at all related to the idah period, such as the obligation to provide for the idah alimony, residence (*maskan*), or clothes (*kiswah*) for his ex-wife.

الدخول فإن له ذلك فوراً، وإن كان بعد الدخول فإنه لا يصح إلا بعد انقضاء عدتها، وإذا قبل فإن كان عدة إحداهما دون الأخرى صح له أن يتزوج التي لم تنقض عدتها، لأنه إذا تزوج التي انقضت عدتها كان انقضت عدة الأخت المطلقة جامعاً بين الأختين، لأنه يشترط لصحة العقد على الأخت انقضاء

According to 'Abd al-Raḥmān al-Jazīrī, citing the opinion of Imām al-Shāfi'ī, when considering the meaning of *ṭalāq qabla dukbūl* and one of the principal objectives of *'iddah*—namely, to ascertain whether the wife is carrying a pregnancy at the time of divorce—an *'iddah* period is not strictly required for a wife who is divorced before the consummation of marriage. The absence of marital intercourse provides certainty that the wife's womb is free from pregnancy (Jaziri, 2003).

3. *Mahr*

- a) The wife is entitled to one-half of the stipulated *mahr*.

Imām al-Shāfi'ī sets forth his argument in *al-Umm* as follows:

الْمُسْمَى الَّذِي جَعَلَ لَهَا وَنِصْفُ الْعَيْنِ الَّتِي أُصْدَقَهَا إِنْ كَانَ قَائِمًا وَإِنْ فَطَّقَهَا فِيهِ قَبْلَ أَنْ يَدْخُلَ بِهَا فَلَهَا نِصْفُ قَاتٍ فَيَنْصَفُ صَدَاقٌ مِثْلُهَا

If he divorced her before he had intercourse with his wife, then he deserved half of the agreed dowry and half of the goods handed over as dowry. If the item no longer exists, then he is entitled to half of the dowry equal to half of the dowry (Ash-Shafi'i, 1990).

If the husband and wife divorce *Qabla Dukhul* after a valid marriage contract, then the wife gets half of the dowry, but the dowry is fully owned by the wife if it is *Ba'da Dukhul*.

1. The dowry belongs entirely to the wife;

وَهِيَ هُنَاكَ مَلَكَتُهُ بُضْعَهَا قَبْلَ أَنْ يَأْتِيَهَا بِمَا جَعَلَتْ لَهُ قَالَ وَمَا جَعَلَتْ لَهَا فِيهِ عَلَيْهِ الصَّدَاقُ إِذَا مَاتَ أَوْ مَاتَتْ
قَبْلَ إِصَابَتِهَا أَوْ بَعْدَ إِصَابَتِهَا صَدَاقٌ مِثْلُهَا

And there, he had given his body to her before he came to her for something that had been promised, and something that he had promised her in terms of dowry, if he died or he died before sexual intercourse or after sexual intercourse, then the dowry proportional to himself remained valid (Ash-Shafi'i, 1990).

The *mahr* remains payable in full if the marriage is terminated by the death of either spouse, even if the marriage has not been consummated through marital intercourse.

4. *Mut'ah* Grant

Mut'ah refers to a gift provided by a husband to his divorced wife as a form of respect and consolation, separate from his maintenance obligations and proportionate to his financial capacity. The provision of *mut'ah* is based on QS al-Baqarah [2]:241:

وَلِلْمُطَلَّاقَاتِ مَتَاعٌ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

And for divorced women, mut'ah should be given in a proper manner, as a form of obligation for the pious.

There are various scholarly opinions regarding the provision of *mut'ah*, including the following:

- a) The majority of jurists maintain that *mut'ah* is granted only in circumstances where divorce is initiated by the husband. However, *mut'ah* is not considered obligatory when the amount of *mahr* has been specified in advance and the divorce occurs before the consummation of marriage (Al-Qurthubi, 1950).
- b) The Mālikī school holds that *mut'ah* is recommended (*sunnah*) rather than obligatory, as the command contained in the relevant verse is interpreted as indicating a non-mandatory legal status (Syarifuddin, 2006).
- c) The Ḥanafī school maintains that if the amount of *mahr* was not specified at the time of marriage, a husband who divorces his wife before consummation of the marriage is required to provide *mut'ah* (Syarifuddin, 2006).
- d) Under Article 149(a) of the Indonesian Compilation of Islamic Law (*Kompilasi Hukum Islam*), *mut'ah* is not required if a husband divorces his wife before the consummation of marriage. The provision states: "The husband shall provide an appropriate *mut'ah* to his former wife, whether in the form of money or property, except where the former wife is in a state of *qabla dukhul*."

Reform of Family Law in Brunei Darussalam

Several provisions introduced under the Emergency Order (Islamic Family Law) 1999 represent legal reforms and, in certain respects, differ from the legal provisions adopted in other countries or from the dominant opinions of Shāfi'i jurists. These provisions include the following:

1) *Cancellation of Engagement*

According to Article 136, if the male party cancels an engagement agreement, whether made orally or in writing in accordance with Islamic law, he is required to pay the *mahr* as well as reimburse voluntary expenses incurred in preparation for the marriage. Conversely,

if the female party cancels the engagement, any engagement gifts, including money voluntarily provided, must be returned (Tahir Mahmood, 1972). Accordingly, compensation or restitution arising from the cancellation of an engagement may be claimed through judicial proceedings.

2) *Registration of Marriage*

Brunei law designates mosque imams, together with the Chief Kadi and Kadis, as official registrars of marriages and divorces. These imams act as marriage registrars after receiving the necessary authorization (*tawliyah*) from the Sultan or the competent legal authority for Muslims (Tahir Mahmood, 1972). Consequently, their involvement is essential in the administration of marriages in Brunei Darussalam.

A marriage may only be solemnized by a person specifically appointed by the Sultan and duly authorized to conduct a marriage contract. Under this provision, a marriage is not considered legally valid unless it has received the approval or authorization of the registrar assigned to the relevant jurisdiction (Kharlie & Dkk, 2020).

3) *Marriage Guardian (Walī al-Nikāḥ)*

In the solemnization of a marriage, a guardian who marries off his daughter before a marriage registrar must obtain the daughter's consent. If the guardian refuses to marry off his daughter without a valid reason recognized under Islamic law, the marriage registrar may refer the matter to the competent marriage registration authority within the relevant jurisdiction to determine whether the woman may proceed with the marriage. Furthermore, if the woman does not have a lineage guardian (*walī nasab*) as recognized under Islamic law, a judicial guardian (*walī ḥākim*) may act as a substitute (Kharlie & Dkk, 2020).

4) *Polygamy and Polyandry*

Brunei law concerning polygamy requires a married man to obtain permission from a Sharīah Judge, using the prescribed form, before marrying another woman. Article 23(1) of the Islamic Family Law of Brunei 2012 provides:

“No man shall marry another woman at any place during the subsistence of his marriage except with the written permission of a Syar’ie Judge in the prescribed form and should he do so, such marriage can only be registered under this Act subject to section 123 and the completion of the prescribed form.”

Applications submitted to a Sharīah Judge may be made either orally or in writing and must include the reasons for seeking polygamy, evidence of financial capability, the ability to treat wives equitably, details of dependents involved, and the consent of the first wife to the subsequent marriage (Laws of Brunei Chapter 217 Islamic Family Law, 2012). After reviewing and considering the application, the judge may decide whether permission for polygamy should be granted.

According to Article 23(2), a married man who enters into a polygamous marriage without obtaining the required written authorization from a Sharīah Judge is subject to legal sanctions. Such sanctions include a fine of up to BND 2,000, imprisonment for a term not exceeding six months, or both (Laws of Brunei Chapter 217 Islamic Family Law, 2012).

Article 13 of the Islamic Family Law of Brunei Darussalam explicitly prohibits the practice of polyandry. Consequently, a divorced woman must retain her divorce certificate as proof of her legal status when intending to marry another man. Without such proof, she may be unable to remarry because she could still be legally regarded as a wife under the law (Kharlie & Dkk, 2020).

5) *Divorce*

In Brunei, where one of the parties does not fully consent to the divorce, the parties may agree to proceed with the dissolution of marriage through a financial settlement or

redemption payment. In such cases, the Kadi evaluates the financial circumstances of both parties to determine the appropriate amount of payment and subsequently registers the divorce.

In addition, Article 41 of the Islamic Family Law of Brunei stipulates that a divorce may only be granted where: (a) the marriage has been registered in accordance with the law; (b) the marriage was contracted in compliance with Sharīah principles; and (c) at least one of the parties is present in Brunei Darussalam at the time the divorce application is filed.

The Islamic Family Law of Brunei provides for various forms of divorce, including divorce by *ṭalāq* or petition (Article 42), divorce on the grounds of marital discord (*shiqāq*) accompanied by the appointment of *ḥakam* as arbitrators, divorce based on *ḍarar sharī* (Article 44), divorce based on *ta’liq* (Article 45), divorce through *faskh*, divorce due to conversion from Islam (Article 47), divorce through *khul’* (redemption divorce), divorce through *li’an* (Article 49), divorce through *ilā’* (Article 50), and divorce through *zihār* (Article 51).

Pursuant to Article 46, women in Brunei may petition for divorce through *faskh* before the Kadi Court, which constitutes a formal declaration of marital dissolution in accordance with Islamic law. A declaration of *faskh* may only be granted in conformity with Islamic legal principles, requiring the woman to provide testimony before at least two witnesses, either through a sworn statement or formal acknowledgment.

With regard to divorce administration, Brunei Darussalam implements strict divorce registration requirements, particularly when a divorced woman intends to remarry. Article 13(2)(b) of the Islamic Family Law 1999 of Brunei Darussalam stipulates that a previously married and divorced woman seeking to enter into a new marriage must submit a copy of her divorce certificate.

1) *Ḥakam (Arbitrator)*

In addition, where disputes arise between spouses during a marriage, Article 43 provides that the court may appoint one or two mediators or *ḥakam* from the close relatives of each party who possess knowledge of the circumstances of the dispute. The judge instructs the arbitrators to conduct arbitration in accordance with Islamic law. If the judge is dissatisfied with the actions taken by the arbitrators, the judge may dismiss them and appoint new arbitrators.

2) *Divorce through Khul’ (Redemption Divorce)*

Where a husband is unwilling to divorce his wife voluntarily through *ṭalāq*, but both parties mutually agree to separate, the wife may petition the court for a redemption divorce (*khul’*) by offering compensation agreed upon by both parties. If the amount of compensation to be paid by the wife cannot be agreed upon, the court may determine the appropriate amount in accordance with Islamic law, taking into account the wife's social standing, financial capacity, and the amount of *mabr* previously given.

If the amount of compensation has been determined and the court requests the husband to pronounce divorce, but the husband nevertheless refuses to do so, the court may dissolve the marriage. Following the dissolution, the court issues a divorce certificate to both parties in accordance with Article 48.

Furthermore, under Article 124, a husband who pronounces *ṭalāq* outside judicial proceedings and without court authorization is subject to legal sanctions, including a fine of up to BND 2,000, imprisonment for a term not exceeding six months, or both.

Iddah in Cases of Ṭalāq Qabla Dukhūl in Brunei Darussalam

As discussed above, several provisions of family law in Brunei Darussalam have undergone significant reform, one of which concerns divorce by *ṭalāq* or petition. A particularly noteworthy aspect of this provision is the imposition of an *iddah* period upon women who are divorced through *ṭalāq qabla dukhūl*. In Indonesia, it has been established that a wife who is divorced by her husband before the consummation of marriage is not subject to a waiting period (*iddah*). Article 153(3) of the Compilation of Islamic Law (*Kompilasi Hukum Islam*) provides that “there shall be no waiting period for a woman whose marriage is terminated by divorce before consummation with her former husband.”

In contrast, under Brunei law, a woman who has been divorced by her husband before the consummation of marriage is prohibited from marrying another man until the completion of her *iddah* period, except in the case of remarriage to her former husband. Article 13(3) of the laws of Brunei Darussalam provides as follows:

“If a woman claims that she was divorced before being consummated by her husband in that marriage, she shall not, during the ordinary waiting period (*iddah*) of divorce, marry any person other than her former husband, except with the permission of a Syar'ie Judge having jurisdiction in the place where the woman resides” (Saputra, 2024).

This provision is undoubtedly controversial. It stands in contrast to the prevailing consensus among Shāfi'ī jurists, who maintain that a woman divorced before marital intercourse is not required to observe an *iddah* period, even where *khalwah* has occurred. This fact demonstrates that, with respect to this particular regulation, Brunei departs significantly from the legal doctrines articulated in the classical texts of the Shāfi'ī school—its principal jurisprudential reference—as well as from the interpretation of QS al-Aḥzāb [33]:49 discussed earlier.

According to Intan Cahyani, the application of *iddah* to women divorced before the consummation of marriage under Brunei law is based on considerations of *maṣlahah* (public interest and legal benefit) (Cahyani, 2015). The determination of a woman's virginity is regarded as a matter falling within the prerogative of the husband, which subsequently affects the application of *iddah* to a wife divorced prior to marital intercourse. This reasoning gives rise to a specific fiqh maxim which states:

جلب المصالح ودرء المفاسد

Achieving benefits and rejecting harm (Djazuli, 2014).

In her study, Intan Cahyani argues that Brunei Darussalam may prioritize local customary law in addressing this issue, particularly the custom that regards a woman's virginity as the exclusive right of her husband. Within this framework, a waiting period (*iddah*) is imposed upon a wife who is divorced before the consummation of marriage (Cahyani, 2015).

This approach may be understood in light of the recognition of custom (*urf*) as a legitimate consideration in Islamic jurisprudence. In Islamic law, established customs and local practices may serve as a basis for legal determination, as reflected in the following fiqh maxim:

العادة محكمة

Customs can be taken into consideration in setting the law (Abbas, 2004).

In her study, Intan Cahyani contends that Brunei Darussalam may give precedence to local custom in addressing this issue, particularly the belief that a woman's virginity

constitutes an exclusive right of her husband. Within this framework, a wife who is divorced prior to the consummation of marriage remains subject to an *iddah* period (Cahyani, 2015). This approach may be understood through the recognition of custom (*urf*) as a valid source of legal consideration in Islamic jurisprudence. Islamic legal theory acknowledges that established customs and prevailing social practices may serve as a basis for legal rulings, as reflected in the following fiqh maxim:

وإنما وجبت العدة عليها وإن لم يدخل بها وفاء للزوج المتوفى ومراعاة لحقه عدة المدخول بها (يرى الاحناف والحنابلة والخلفاء الراشدون أن المقصود بالدخول حقيقة أو حكما أي أن الخلوة الصحيحة تعتبر دخولا تجب بها العدة).

However, the period of idah is still obligatory on her even though her husband has not been in contact with her, as a form of respect for her deceased husband and to protect her rights (as the opinion of the scholars hanafiyah, hanabilah and khulafa al rashidin namely dukhul, which has legal implications, referring to both dukhul haqiqi and dukhul hukmi. This shows that khalwat formed through a valid contract is considered dukhul, which requires idah (As-Sabiq, 1977).

Post-marital *khalwat*, as interpreted by Ḥanafī and Ḥanbalī jurists, carries legal consequences because it may give rise to serious claims by either spouse concerning the possibility of sexual contact (*iṣābah*). Consequently, acts such as touching or caressing are regarded as *al-dukhul al-hukmī* (constructive consummation), which carries legal implications equivalent to those of *al-dukhul al-haqiqī* (actual consummation).

In *al-Tafsīr al-Munīr fī al-'Aqīdah wa al-Sharīah wa al-Minhāj*, Wahbah al-Zuhaylī also cites the opinions of Ḥanafī and Mālikī jurists, who consider seclusion (*khalwah*) between spouses to entail legal effects comparable to *jimā'* (sexual intercourse). This position is based on a ruling attributed to the Rightly Guided Caliphs (*Khulafā' al-Rāshidūn*), as narrated in a ḥadīth reported by Zurarah ibn Abī Awfā, which states:

الخلوة الصحيحة كالجماع توجب العدة لما رواه الدارقطني والجصاص الرازي ويرى الحنفية والمالكية أن في أحكام القرآن: (من كشف خمار امرأة، ونظر إليها، وجب الصداق، دخل بها أو لم يدخل. وروي عن زرارة بن أبي أوفى أنه قال: قضى الخلفاء الراشدون المهديون أنه إذا أرخى الستور، وأغلق الباب، فلها الصداق كاملا، وعليها العدة، دخل بها أو لم يدخل

Hanafīyyah and Malikiyyah classify a valid khalwah as the consummation of a marriage that requires 'idah. This comes from a narration by Al-Darul Quthny, which asserts that "If a man opens the veil of his wife's anrah and sees her, he is obligated to give a dowry, regardless of whether the marriage has been intertwined or not." This is also based on the Hadith of Khulafaur Rashid as narrated by Zurarah Ibn Abi Aufa, who stated: "If a man (husband) has opened the aurat of a woman (wife), and then he closes the door, the wife is entitled to receive the full dowry, and the wife has the period of 'idah regardless of whether the marriage has been intertwined or not." (Zubaily, 1997).

Beyond the foregoing opinions, the author argues that the application of *iddah* to women divorced through *ṭalāq qabla dukhul* in Brunei Darussalam is intended to implement the principle of legal precaution (*al-iḥtiyāt*) in determining whether the woman's womb is genuinely free from pregnancy resulting from the previous marriage. In addition, within proceedings concerning a claim of *ṭalāq qabla dukhul* initiated by the husband, the wife may present evidence demonstrating that marital intercourse (*ba'da dukhul*) had in fact occurred between the spouses.

In contemporary legal practice, such evidence may be established through modern forensic methods, including *visum et repertum* reports. Consequently, if it is proven that the spouses had already consummated the marriage (*ba'da dukhul*), while the husband

nevertheless files for divorce on the basis of *ṭalāq qabla dukhūl*, such a claim may be deemed inadmissible or rendered legally void due to its inconsistency with the established facts.

CONCLUSION

This study demonstrates that the application of *iddah* to women who experience *ṭalāq qabla dukhūl* in Brunei Darussalam represents a form of Islamic family law reform that does not fully adhere to the dominant position of the Shāfiī school, which serves as the country's official madhhab. This provision is stipulated in Article 13(3) of the Emergency Order (Islamic Family Law) 1999 and reflects a process of legal reconstruction that integrates principles of Islamic law, local custom, and the demands of modern legal regulation. Accordingly, family law reform in Brunei is not merely administrative or regulatory in nature but also involves the reinterpretation of classical fiqh doctrines within the context of a modern state.

The findings indicate that the normative basis for imposing *iddah* on women divorced through *ṭalāq qabla dukhūl* is not solely grounded in considerations of *maṣlahah* and *urf* (local custom), but may also be understood through the concept of *dukhūl al-ḥukmī*, which is recognized in certain schools of Islamic jurisprudence outside the Shāfiī tradition. Furthermore, the absence of a clear definition of *dukhūl* in Article 13(3) creates room for interpretation, thereby allowing the application of the principle of legal precaution (*al-iḥtiyāt*) to ensure the status of a woman's womb and to prevent potential legal disputes in the future. Therefore, this provision is more appropriately understood as a legislative choice within the broader framework of Islamic family law reform rather than merely a deviation from classical fiqh.

From a theoretical perspective, this study contributes to the development of scholarship on Islamic family law reform by demonstrating that family law legislation in Muslim countries may be shaped through processes of selection and reconstruction of fiqh doctrines that incorporate considerations of *maṣlahah*, *urf*, and contemporary social needs. These findings also enrich the discourse on the relationship between madhhab authority, state legal policy, and the dynamics of legal pluralism in modern Islamic family law. From a practical perspective, this study provides a more comprehensive understanding of the rationale underlying the formulation of Islamic family law in Brunei Darussalam and may serve as a reference for the development of Islamic family law regulations in other Muslim countries.

This study is limited by its focus on the normative analysis of statutory regulations and fiqh doctrines without examining the implementation of these provisions in judicial practice or the experiences of individuals affected by the policy. Therefore, future research is recommended to investigate the application of *iddah* provisions for women divorced through *ṭalāq qabla dukhūl* using empirical approaches, analyses of Sharī'ah court decisions, and comparative studies with other Muslim countries such as Malaysia, Pakistan, and the Gulf States in order to obtain a more comprehensive understanding of the trajectory of contemporary Islamic family law reform.

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