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# **A Study of Islamic Family Law in Malaysia: A Select Bibliography**

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## **Abstract**

Islamic Family Law is one of the most studied fields in Malaysian law. This is because it affects the personal life of Muslims, and because many issues have arisen as a result of the implementation of the Islamic Family Law Enactment which governs Muslims in Malaysia. Scholarship in this area has expanded with the development of the Enactment itself. Several approaches have been used to analyze the implementation of the law *inter alia*, legal, socio-legal, comparative, and anthropological and sociological perspectives. It cannot be denied that research and scholarly publications in the field of Islamic Family Law have contributed to further strengthening the administration of justice and the implementation of the law. As such, this paper is intended to describe the trends in the area of Islamic Family Law. Doing so will assist in ascertaining the direction of this field in the future.

## **Introduction**

In Malaysia there is no single family law system that applies to the whole country. There exists two different family law systems: one is for Muslims and the other for non-Muslims. The Law Reform (Marriage and Divorce) Act 1976, which was enforced throughout Malaysia from 1 March 1982, governs the Chinese, as well as Hindus and other religions. Muslims, on the other hand, are governed by the Islamic Family Law system. For Muslims, family affairs are closely related to their way of life. This is due to its connection to areas like marriage and divorce, and matters arising therefrom, such as maintenance, matrimonial property, custody and the relationship between children and parents. The Quran itself provides a detailed discussion

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of family affairs. It is clear that this aspect of life is always given great attention and draws the interest of researchers who seek answers to the many questions that arise from the implementation and practice of Islamic Family Law. Hence, this field is constantly evolving, and many issues are still being debated by researchers today. This is because matters pertaining to Islamic family law are practiced fully and executed in the daily life of the Muslim community in Malaysia since the 12<sup>th</sup> century when Islam was introduced to Malaysia.

### **Islamic Family Law in Malaysia**

Questions pertaining to the affairs of marriage, divorce and related matters have long been documented and practiced by the community based on the principles of Islamic law. Early historical documents prove that Islamic family rules applied in Malacca. These laws are said to reflect the patterns and advancement experienced by the ancient Malay community. In these Laws there were 18 clauses that related specifically to Islamic family principles. These rules were adopted directly from the principles of the Shafie school of thought which was predominantly followed in spite of a number of mixed cultural influences.

The influence of Islam on the lives of the Malay family is pronounced. Even the presence of Western colonization was unable to separate family affairs in the Malay community from Islamic influences. Thus, rules pertaining to the Islamic family cannot be separated from the Malay community because the application of the laws was a personal matter that did not impact on colonial interests – or even on the non-Muslim community when compared to other areas of Islamic law, such as contracts, torts, criminal penalties, and commerce.

There exists evidence showing that the British colonial authorities had codified several pieces of legislation related to family matters. This legislation focused mostly on administration, and also on marriage and divorce registration. This can be seen for example in the first family law being enforced in the Straits Settlement namely the *1880 Muhammadan Marriage Ordinace*. According to M.B. Hooker, this Law had many shortfalls, and as such, several amendments were introduced to streamline its provisions. Perhaps because these had limited scope, the Muslim community did not encounter any difficulties in complying with Islamic family rules. This is because there were many books in old *Jawi* written by regional Islamic scholars on the subject of Islamic family law and based on the *Shafie* school of thought.

The situation of the Islamic community in Malaysia is constantly changing, and this posed challenges to the colonial-era family rules in addressing several problems occurring in the Malaysia's Islamic families. Thus, a detailed Islamic family law is needed. Finally, in the early 1980s, Malaysia introduced a special law pertaining to the Islamic family. It is more precise and detailed than its predecessors. This effort is not new. Several Islamic countries had already created and applied a complete system of Islamic family law, upon which several reforms have been made. These laws provide for the administration of marriages, the rights of a wife, protection for those who are victimized in the family Institution and the punishment for those who commit matrimonial offences.

### ***Preference of Study***

If one examines the historical trends in scholarship on Islamic family law in Malaysia, the form and substance of the writers may be grouped according to the period in which they worked. The three periods are:

- pre-independence (which came to Malaysia in 1957);
- post independence to the mid-1980s, and
- from the mid-1980s to the present day.

Writing before independence focused on issues of custom, and its significant role in the Malay Muslim community. In the second period, a particular focus has yet to be identified in the writing on Islamic family law. The second period represents a mixture between the discussion between classical Islamic law and writings focused on Islamic family law legislation, which in turn is based on the provisions of the family in the Islamic Administrative Enactments. This second period is the starting point for scholarship on Islamic family law, which reached a more mature state, particularly through the writings of the late Professor Tan Sri Ahmad Ibrahim in his book *Islamic Law in Malaya* which was published in 1965 in Singapore. Additionally, during this period there were several notable pieces written on Malay family and kinship from an anthropological perspective.

Based on the current development of Islamic Family Laws, the scholarship of the third period shows a rapid development in the promulgation of Islamic family laws. Many articles and studies were produced during this period due to several factors. Among them are the legislation and enforcement of Islamic Family Law Enactment and Act, which has drawn the interest of many to discuss it. In fact, these pieces began to discuss issues pertaining to family law in a more critical and comprehensive manner. The socio-

legislative approach began as a way to examine issues pertaining to the Islamic Family Law. The writings and studies of the Islamic family law are not only bound to the traditional aspects of family laws such as marriage, polygamy, divorce, maintenance, property and the like, but have advanced to current issues that arose from the implementation of the Islamic Family Law. This third period saw the advent of several writings and studies that focused on protection for and assurance of women's and children's rights pursuant to the requirements of the United Nations Convention, guaranteeing and protecting the rights of women and children.

From these three periods we are able to discern the differences of the writers and researchers who are critical of Islamic family laws. On the whole, writings and studies pertaining to the Islamic Family Laws in Malaysia not only discuss the state of marriage, divorce and matters in relation thereto from the perspective of the classical Islamic Law, but it also covers matters pertaining to the history of Islamic Family Laws, the implementation and administration of the Islamic Family Laws and current issues that arise from the implementation of the Islamic Family Laws.

#### **ISLAMIC FAMILY LAWS AND CUSTOM**

British colonial administrators were involved in a number of matters pertaining to the laws of the Malay Muslim community, in particular matters regarding to the family. The accurate information on the practices of the local people with regard to their personal matters was of utmost importance in outlining effective policies that were practical. The requirement of the colonial administration finally caused a few of the British administrators to observe further the practices of the Malay community and the uniqueness of Malay customs, particularly those pertaining to family relationships, which are matrilineal in nature. They promulgated several rules with respect to personal affairs, maternal relatives of the Malay community, and matters regarding land and jointly acquired properties. This may be seen in the works by Wilkinson (Wilkinson 1980), Taylor (Taylor 1929, 289), Parr and Mackray (Parr and Mackray 1910, 114), and Winstead and Kempe (Winstead and Kempe, 1952). Their writings have shown that custom played a very important role in molding the life of Malay families, particularly when it touched on matters regarding land ownership in divorce contexts.

These writings have prompted many local researchers to conduct further study on the application of custom in the Malay community. The uniqueness of the Malay social system and the relatives of the Malay community have also drawn the interest of many researchers, who write on

the question of custom and the Malay community. This question is related to the question of the Malay familial system pursuant to the Customary Laws (*Undang-Undang Adat*).

<sup>1</sup> Meanwhile, many of these researchers write and study the system of Malay Customs, in particular those pertaining to:

the differences between the *Adat Temenggung* and the *Adat Pepateh*,<sup>2</sup> the status of women in the *Perpateh* Custom,<sup>3</sup> the conflict and the relationship between custom (*adat*) and Islamic Law,<sup>4</sup> and also those regarding property, land and estates.<sup>5</sup>

### POST INDEPENDENCE SCHOLARSHIP UNTIL THE LATE 1980S

Writings and studies that examine family aspects from the legislative perspective began around the year 1960 with the writings of Ahmad Ibrahim and Mehrun Siraj. Their writings refer to the implementation of family laws that were in turn provided through the Islamic Administrative Law. One example is the late Professor Ahmad Ibrahim's book, *The Status of Muslim Women in Family law in Malaysia, Singapore and Brunei* (1965). In this book, the writer discusses the question of the status of women in family law according to the Islamic Administration Enactment, which was in force at that time. The Enactment advocated that several aspects of family law needed to be rectified. The author concludes that the provisions related to the family in this Administration Enactment were too brief. Hence, he suggests the inclusion of provisions such as the minimum age for marriage, rules in respect of polygamy, registration of marriages and divorces, reasons for *fasakh* (judicial dissolution) that should be expanded, and most important, the creation of a law that is uniform for the entire country in Malaysia. Even though this book discusses the status of women in the legislative perspective, it is apparent that there are many shortfalls from its family provisions in guaranteeing the position of women in terms of legislation.

On the other hand, Mehrun Siraj focuses on selected topics in the Islamic Family Law such as divorce and polygamous marriages.<sup>6</sup> In their writings, both Ahmad Ibrahim and Mehrun Siraj also took a comparative approach with neighboring countries such as Singapore and Brunei. It is a

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<sup>1</sup> Ahmad Ibrahim 1964, 48.

<sup>2</sup> Nurhalim Ibrahim (1993).

<sup>3</sup> Azizah Kassim 1992, 28.

<sup>4</sup> Durrishah Idrus 1990, 43.

<sup>5</sup> Maxwell 1884, 75.

<sup>6</sup> Mehrun Siraj 1963, 148-159.

reasonable assumption that Singapore and Brunei shared a similar customary background with Malaysia.

Ahmad first book was entitled *Islamic Law in Malaya* (1965). It not only discusses Islamic family law, but also other aspects of Islamic law, namely criminal law, evidence, and property. In his discussion of family law, there is not much difference with his earlier text, *The Status of Muslim Women in Family Law in Malaysia, Singapore and Brunei*. Other than Ibrihim and Siraj, there are few writings at that time that address the law of marriage and divorce.

### **Literature Subsequent to the Enforcement of the Administration of Islamic Law Enactment**

The Islamic Family Law Enactment in its new form is distinct from the Administration of Islamic Law Enactment; thus, there have been many writings and studies that discuss the newer Islamic family law. The scholarly literature still maintains the legislative analysis form, whether on the development of law or even specific aspects in the Islamic Family law. Several writings have analyzed the latest developments and refer to the legislation of the Islamic Family Enactment in every state. In his writings, Mehrun Siraj asserts that legislation around the 1980s represented a big step towards strengthening the administration of the Islamic family law. Several other writers were of the same view.<sup>7</sup> They welcomed legislation related to Islamic family law and concluded that it would remedy the administration and in some way the position of women, in Islamic family law. This writing touched on the provisions available in the enactment of the Islamic family law.

In the 1990s, the literature of Islamic family law centered on certain aspects of the law. Discussion stressed the implementation of the Islamic Family Law in Malaysia. Researchers discussed matters pertaining to polygamy,<sup>8</sup> divorce,<sup>9</sup> maintenance,<sup>10</sup> and other financial rights such as *mut'ah*

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<sup>7</sup> See, e.g., Mehrun Siraj *Marriage and Divorce – the Law Applicable to Muslims in Selangor and the Federal Territory*, MALAYAN L.J. lxxiv-lxxx (1988).

<sup>8</sup> Abdul Kadir Muhammad, *Poligami Dan Pengamalannya Di Malaysia* [Polygamy and its Practice in Malaysia], In UNDANG-UNDANG ISLAM DI MAHKAMAH-MAHKAMAH SYARIAH DI MALAYSIA [Islamic Law in Sharia Courts in Malaysia] 84-92, (Ahmad Hidayat Buang ed., 1998).

<sup>9</sup> Ahmad Ibrahim 1980.

<sup>10</sup> Abdul Kadir Muhammad 1996, 85.

(ancillary order),<sup>11</sup> jointly acquired properties,<sup>12</sup> and custody.<sup>13</sup> Generally these discussions sought to answer whether the family provisions found in the Islamic Family Law Enactment were sufficient to address numerous problems, and they also examined the provisions from the perspective of its implementation.

Writings around the years 1980–2000 also discussed the issues of conflict between the Islamic Family Law Enactment for the Muslims and the Law Reform (Marriage and Divorce) Act 1976 for the non-Muslims. Among the issues debated are in Section 51 Act 1976 and its implications against the Islamic Family Law.<sup>14</sup> An analysis of the concept of jointly acquired property were also discussed, which not only include properties in the traditional form, but also those that involved current assets such as shares, Employees Provident Fund (EPF)<sup>15</sup> and other issues that involved FELDA land.<sup>16</sup> Additionally, issues of domestic violence were also given due attention by a few researchers who used the remedial point of view to examine the subject of victims of domestic violence. They also applied the Islamic perspective in their analyses.<sup>17</sup> This trend is shown through the textbook of Ahmad Ibrahim entitled *Family Law in Malaysia* (3rd edition), which also discusses a new topic pertaining to domestic violence. Domestic violence was not discussed in the 1978 and 1984 editions of the text book. This was because the Domestic Violence Act 1994 was not in force until 1996.<sup>18</sup> However, the domestic violence issue was absent in his final book entitled *Undang-undang Keluarga Islam di Malaysia (Islamic Family Law in Malaysia)*, published in 1999.

Besides discussing certain aspects in the Islamic family, several textbooks on the Family Law were published. Researcher Mimi Kamariah Majid's book, *Undang-undang Keluarga di Malaysia (Family Law in Malaysia)* was published in the early 1992. Her book discusses the implementation of both family law for Muslims as well as for non-Muslims. In 1999, *Family Law in Malaysia* was published. According to its author, the English version is not a mere translation of her original Malay language textbook that was published in the year 1992. The publication of this later

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<sup>11</sup> Nik Noriani Nik Badlishah 1992.

<sup>12</sup> Suwaid Tapah, 2003, 56-65.

<sup>13</sup> Sharifah Zaharah Syed Mohammad 2001, 160-200.

<sup>14</sup> (Mohamed Azam M. Adil 1994).

<sup>15</sup> Suwaid Tapah 2003, 1-22.

<sup>16</sup> Zaleha Kamaruddin, 2003, 76-99.

<sup>17</sup> Mohamed Azam M. Adil 1994, 4.

<sup>18</sup> Ahmad Ibrahim, 1999.

book was due to the request for a course offered by the Law Faculty, University Malaya. Its contents do not differ much greatly from the Malay and English versions except that it updates the reported cases, as there have been no later developments in the amendments of both family laws for Muslims or non-Muslims.

Besides Ibrihim and Majid, there is also another work on Islamic family law entitled *Undang-undang Keluarga Islam: Konsep dan Perlaksanaannya di Malaysia (Islamic Family Law: Concept and Implementation in Malaysia)*. However, this book has yet to be updated in terms of the cases decided and also the amendments made in the mid-1990s. Despite this, the textbook is still being used for reference in particular for the understanding of specific concepts in Islamic family law pursuant to the discussion on the classical Islamic Law.<sup>19</sup>

### **Methodology and Form of Writing on Islamic Family Law**

The scholarship on Islamic family law can be divided into two forms:

1. themes and aspects;
2. approach and analysis.

In most instances, Islamic Family laws are not limited to matters such as marriage, divorce, polygamy, history, or custom. In examining these matters almost all writings and studies use the legalistic approach.<sup>20</sup> The earliest writing using this approach is entitled *The Status of Muslim Women in Family law in Malaysia, Singapore and Brunei* (1965) written by the late Prof. Ahmad Ibrahim. This volume covers most aspects of Islamic Law in Malaysia, and to a lesser extent, touches on the Islamic Administrative Law Enactment.

Based on current developments, Islamic family law has drawn many social researchers to analyze the law from an anthropological and sociological perspective.<sup>21</sup> Their debate on the provisions of the family law focuses on social issues such as the effect of the legislation on the community, and also factors that influence changes in trends and patterns of marriage and divorce. Regardless, the conclusion of their studies show that social changes in the Muslim community pertaining to trends in marriage and divorce rely on the

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<sup>19</sup> Mahmood Zuhdi Abdul Majid & Raihanah Azahari, 1989.

<sup>20</sup> Ahmad Ibrahim, 1997.

<sup>21</sup> Sharifah Zaleha Syed Hassan, 1986.

development of the law enforced. There is a relation between the law and social changes.<sup>22</sup> From this perspective, the law is one agent of social change or social engineering. For example, the study by Jones found that the divorce and marriage rate appeared to decline, especially compared with the years prior to the implementation of the Islamic Family Law Enactments.

Towards the end of the 1990s and in the early 2000s, the literature is more inclined to the settlement of several problems that arose from the implementation of the Islamic Family Law in the Shariah court. Issues related to the delay in resolving family cases<sup>23</sup> most certainly have been deemed as discriminatory against women.<sup>24</sup> Additionally, family cases as well as female judges hearing these cases have all drawn the attention of researchers.<sup>25</sup> The approach used by them is in the form of socio-legal perspective, which not only discusses on the implementation of the law but also discussed its social implications. The prevailing theme in newer research indicates that Shariah court administration continues to contribute heavily to discriminatory decisions against women. Hence, amendments to several provisions of the Islamic Family Law need to be made forthwith, and the effort to unify the Islamic Family Law should also be realized.<sup>26</sup>

As a measure for resolving the problems of family law and issues of the community, the rule of *sulh* (mediation) has been discussed. It was more recently introduced into the Islamic Judiciary system in Malaysia.<sup>27</sup> This rule intends to address the problems arising from the implementation of the Islamic Family Law, in particular the issues pertaining to the delay of cases in the Shariah Court. Unfortunately, not much literature exists yet on the impact on the rule of *sulh*.

In analyzing the implementation of Islamic family law in Malaysia, writers and researchers have assessed the issues that arise from a comparative legal perspective. Not only are references to and examinations of neighboring countries made in the literature, but also Islamic family law enforced in other Islamic countries is also given attention by researchers. Several articles written and published in a collection entitled *Islamic Family Law, Issues 2000*, edited by Zaleha Kamaruddin, generally analyze the comparison

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<sup>22</sup> G.W. Jones, 1994.

<sup>23</sup> Zaleha Kamaruddin, 1999, 95.

<sup>24</sup> Maznah Mohamad, 1999, 237-262.

<sup>25</sup> Rozi Bainun, 1999.

<sup>26</sup> Maznah Mohamad, 1999, 60-76.

<sup>27</sup> Ghazali Abdul Rahmn, 1999, 151.

between implementation of the Islamic Family Law in Malaysia and other Islamic countries. These writings not only discuss issues of reform, but also identify other aspects of Islamic family law and how it is applied in other countries.<sup>28</sup> Through this comparative approach, there are several proposals of Islamic Family Law from other countries that should be enforced in Malaysia.<sup>29</sup>

The latest advancement in Islamic family law is the analysis from a medical perspective, particularly those works pertaining to reproduction using the *bio-medicine technique*. This advancement occurring in the medical world must be discussed in detail not only from the classical Islamic Law perspective (*Hukum Sharak*), but it also involves family law reforms in resolving issues that result from the application of this technology. Zaleha Kamaruddin, in her book entitled *Islamic Family Law: New Challenges in the 21st Century* (2000), attempted to discuss current issues such as determining legitimacy of children born through *bio-medicine techniques*.<sup>30</sup>

## Conclusion

Much of the current research on Islamic Family Law in Malaysia exhibits a legislative approach in their analysis. And it continues to serve as the prevailing approach, although some researchers are injecting a socio-legal perspective.

Even though a significant body of literature exists on Islamic family law in Malaysia, many issues require more research, and even more need resolution. Although enforcement of Islamic family law has now existed for more than 15 years, studies and writings on its effectiveness as a whole have yet to be published. Steps have been taken to analyze the law, including data collection; however, analyses have not yet demonstrated its effectiveness.<sup>31</sup>

Most researchers and writers do appear to believe that whatever the problems may result from implementation, Islamic family law is certainly uniform. Only its application is not uniform, and in a small country like Malaysia, this can cause problems. In 2000, several states addressed this issue, and Islamic Family Law Enactment was amended to become uniform in application throughout Malaysia.

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<sup>28</sup> Ahmad Hidayat Buang, 1997, 35.

<sup>29</sup> Nik Noriani Nik Badli Shah, 2000.

<sup>30</sup> Zuryati Muhamed Yusoff, 2004, 17-31.

<sup>31</sup> Raihanah Abdullah and Sharifah Zahrah Syed Mohamd, 1998, 93.

The Islamic Family Law today not only touches on the requirements of marriage and divorce in the classical Islamic law, but also involves matters pertaining to administration. It also encompasses the protections and the rights of wives and children. Based on current developments, studies and writings focus more on current issues pertaining to the familial environment and phenomena that occurs in the Islamic family law itself. This may be seen for example in issues pertaining to the delay of cases in the Shariah Court and its effect on women and children, discrimination against women and children, issues pertaining to procedures and evidence and also pertaining to family properties – all which begin from matters in relation to Islamic family law. Other issues ranging from divorce through text messages, proof and enforcement of maintenance, triple divorce, polygamous marriages, and custody of children from parents of different religions, and bio-medicine issues continue to be important topics of scholarship and discussion.

Below are selected texts related to Islamic family law in Malaysia. It excludes works on general family law in Malaysia, as well as references to reported cases. This bibliography helps to reveal the direction of research in this important field.

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