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بِوَسِيْلَتِي اِسْلَامٌ اِنْبَارٌ اِيْجِبًا مِلْدِيْنَا

PROTECTION OF WOMEN'S RIGHTS
ON DIVORCE UNDER ISLAMIC
LAW OF BRUNEI

BY

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the requirements for the Degree Master of
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ABSTRACT

Islam bestowed on the women innumerable rights in almost every field of human life including matters relating to divorce. In Brunei, as compared to previous legislation that administered Muslim marriages and family affairs, the enactment of the Emergency (Islamic Family Law) Order, 1999 has given a better protection and comprehensive provisions to deal with matters pertaining to rights of women on divorce and financial obligations after divorce. Thus, the research is undertaken to examine the efficiency of the said provisions of law in protecting and preserving the rights of women in Brunei on divorce and matrimonial matters namely deferred dower, maintenance during 'iddah, mut'ah, and harta sepencarian. The discussion will go further to examine the administration of such law with reference to case law in order to ascertain the extent of the Syariah Courts efforts to protect those rights. Apart from that, the sources from the Qur'ān, the Sunnah and the opinions of the Muslim scholars relating to divorce effected by women as well as their financial rights when the separation takes place is also discussed. Where appropriate, certain references and comparisons with the relevant laws in some other Muslim countries are also made. The study, however, reveals that the existing Islamic family law, in general, does provide sufficient provision in protecting the rights of divorced women in Brunei. Nevertheless, in order to provide a better protection, there is a need for the existing law to be amended especially provisions relating to divorce by *ta'liq*, divorce outside court, 'iddah maintenance and *harta sepencarian*.

ملخص البحث

لقد منح الاسلام المرأة العديد من الحقوق في جميع حقول في جميع الحياة الانسانية بما في ذلك المسائل المتعلقة بالطلاق. في بروناي, مقارنة مع التشريع السابق المطبق على الزواج الاسلامي وشؤون العائلة, قام التشريع الجديد (قانون العائلة الاسلامي) الذي تم إقراره في 1999 بتوفير حماية أفضل ونصوصا شاملة للتعامل مع المسائل المتعلقة بحقوق المرأة عند الطلاق والالتزامات المالية بعد الطلاق وهكذا, فقد أجري البحث لاختبار فعالية نصوص هذا القانون في حماية حقوق المرأة المطلقة في بروناي والمسائل الزوجية أي المهر المؤجل والنفقة خلال العدة والمتعة والأموال المكتسب. وقد امتد النقاش لاختبار تطبيق مثل القانون بالرجوع إلى قانون الحالة للتأكيد على جهود محاكم الشريعة في حماية هذه الحقوق, وبعيدا عن ذلك, ستنم مناقشة المصادر من القرآن والسنة وأراء العلماء المسلمين فيما يعلق بالطلاق وحقوق المرأة المادية عند حدوث التفريق. وسيتم الرجوع إلى مراجع معينة وعقد مقارنات بين القوانين ذات العلاقة في الدول الإسلامية الأخرى إن كان ذلك ممكنا. تظهر الدراسة مع ذلك أن قانون الأسرة الإسلامية الحالي ينص بوجه عام على أحكام كافية لحماية حقوق المرأة المطلقة في بروناي. برغم ذلك ليعطى الحفظ الأحسن هناك حاجة الى تعديل في القانون الموجود خصوصا للمواد التي تتعلق باطلاق المعلق الطلاق خارج المحكمة النفقة في العدة والأموال المكتسب.

APPROVAL PAGE

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DECLARATION PAGE

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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Civil Code (no. 19/1992)

Law concerning Personal Status / Personal Status Act 1992 (no. 20/1992)

CHAPTER ONE

INTRODUCTION

1.0. BRIEF HISTORY OF BRUNEI DARUSSALAM

Brunei Darussalam is a small country with a total area of 5,765 sq. km (2,226 sq. miles). It is situated on the northern coast of the Island of Borneo in Southeast Asia. It is bounded on the north by the South China Sea, and on all other sides by Malaysia.¹

Brunei has an estimated population of 383,000 in 2006. About two-third of the population is Malay, minorities includes Chinese, Indians and various indigenous people.²

The country regained its independence from Britain in 1984 after becoming a protectorate of the British Empire in 1906. The Constitution was promulgated in 1959 and the country adopted the *Melayu Islam Beraja* (Malay-Islamic-Monarchy) as its national philosophy. Islam is the official religion of Brunei. Article 3 of the Constitution declares that “The religion of Brunei Darussalam shall be the Muslim religion according to the Shāfi‘ī sect of that religion.” The Constitution also designates the Sultan as the Head of the Islamic Faith in the country.³

The majority of the people are Muslim and they are very keen in maintaining their Islamic cultural traditions and the faith. Hence, Islam plays a crucial role in the life of every Muslim in the country. There are minorities of Buddhists, Christians, and

¹ The Brunei Economic Development Board, “Creating Employment and Business Opportunities for the People of Brunei Darussalam”, <<http://www.bedb.com.bn/bruneibrief.asp>> (Accessed 28 September, 2006).

²Ibid

³The Government of Brunei Darussalam Official Website, “The 1959 Constitution”, <<http://www.brunei.gov.bn/government/contitut.htm>> (Accessed 30 September, 2006).

those holding traditional beliefs. Malay is the official language, but English and Chinese are also spoken widely.

The legal system in Brunei is a dual system, based on both English Common law and Islamic law. Civil courts have jurisdiction over the majority of laws, including contracts, torts, property, crimes and administrative matters. Syariah courts were established in 1998 with jurisdiction over Muslim personal law which covers areas such as marriage, inheritance and some minor offences against the religion of Islam. Today, Brunei is heading toward the implementation of Islamic law and ideas in all realms.

1.1. BACKGROUND OF THE STUDY

Women have a very important place in the Islamic society. Islam was the first to raise the women's status to a position of honor and dignity in society. Before Islam the history of women was no doubt the history of subjugation and oppression. Most of the cultures and religions of the world did not do justice to women and deprived them of some or all of their basic rights. With the advent of Islam, they were given their full human rights and were accorded a place of respect and honor in the society and were granted equality with men and this includes in the matter of divorce.

Although Islam discourages divorce but does make provisions for divorce by either party, be it a husband or a wife, in the cases of absolute necessity, with emphasis that it should be done in the amicable manner so both parties will obtain equal access to justice and to their rights as granted by Islam. The *Qur'ān* states:

“When you divorce women, and they reach their prescribed term, then retain them in kindness and retain them not for injury so that you transgress (the limits)”⁴.

⁴ The *Qur'ān*, Surah al-Baqarah : 231

Under traditional jurisprudence, despite the unilateral power to divorce that Islam has granted to the husband, similar rights also have been given to the wife. There are two ways women can use to obtain access to divorce either through mutual agreement between the husband and the wife which is called *khulu'* or through judicial decree by filing a suit against the husband in a court of law. Yet, after the divorce the women are still entitled to get the same maintenance as they did before the divorce as long as the waiting period has not due. In fact Islam has provided that compensation called *mut'ah* must be presented by the former husband to his divorced wife as to show his appreciation for her contributions during their married life. As women's rights to their property is fully acknowledged in Islam, be they are single or married, so as when the marriage dissolves, they would retain this right and they can claim marital property which they had required during the period of marriage. This clearly shows that Islamic law has fully provided women the rights on any matters related to divorce as fairly and evenly balanced as those given to the husband, begin with right to divorce her husband without his consent and followed by entitlement to several financial claims after divorce.

However, in some countries, women are still treated in the manner as they were treated in the past. There is no recognition as to the rights of the wife in marriage except on paper. Many laws still discriminate against women and undermine their right to end a marriage. The women find it very difficult to get their rights in the courts. The divorce process takes a long time to be settled due to the countless social, legal and bureaucratic obstacles the divorced women have to confront while men never need to resort to the court to seek divorce. To initiate a fault-based divorce, which can provide full financial rights, a woman must show evidence of harm inflicted by her spouse during the course of their marriage. Even physical abuse often

needs to be supported by eye witness testimony. To obtain a faster no-fault divorce like *khulu'*, they must give up all their financial rights and thus it brings injustice to the women.⁵ The injustice the divorced women suffer remains continuous when they claim for deferred dower, maintenance, *mut'ah* and *harta sepencarian*. In general, there must be a struggling and lots of barrier that women have to encounter in obtaining their access to their rights through the law of the land and this is against the principle of Islam that all Muslims regardless of their sexes, races, colours etc, are all equal before the law.

In Brunei, matters related to divorce and matrimonial arrangement after divorce is governed by two separate legal systems. One is Islamic law applicable to Muslims triable in Syariah courts and the other is the law applicable to non-Muslims which is triable in civil courts. With regards to Muslim law, the Emergency (Islamic Family Law) Order, 1999 was introduced in 1999 for the proper administration of Muslim family affairs through the Syariah courts while for non-Muslims', Married Women Act, Ch.190 was enacted to preserve and protect the interest of married women in any matters related to marriage and divorce.

Although the Islamic family law of Brunei has provided more comprehensive provisions with regard to divorce and its financial matters but still, there are numerous unsatisfied voices raised by women. They complained about the law and the administration of the court that are more biased towards men and urged the legislators to improve the situation and the shortcomings in regard to some provisions in that particular statute.

⁵ Women's Unequal Access to Divorce in Egypt from Human Rights Watch As Of December 20, 2006, <<http://members.cox.net/ahmedheissa/mardivor.htm>> (Viewed on 1 October, 2006)

An example of the injustice women endure, especially those who are divorced, is given here. A woman filed a divorce against her husband under *ta'liq* on the ground that he had abandoned her and their kids for a long time. The Syariah court rejected the application since she failed to provide sufficient evidence to prove her allegation. Then she resorted to *khulu'* but still she could not obtain a divorce because the husband demanded a high amount of consideration or otherwise he refused to repudiate her. However, she finally succeeded to untie the marriage knot but only after she has gone through all the difficulties. This shows how women are treated unfairly in getting justice and their rights through legal system as compared to men who exploit the loopholes in the legal system and physically and mentally harass women in order to take more than their rights while depriving women of theirs.

Therefore, this study is intended to evaluate whether or not the existing family law has succeeded in upholding and protecting the rights and the interests of the women in Brunei in matters relating to divorce and financial obligations following the divorce.

1.2. OBJECTIVES OF THE STUDY

- (a) To examine the existing legal provisions in Brunei which provide protection to women relating to divorce and their financial rights.
- (b) To determine the basis of those legal provisions from the Islamic principles.
- (c) To analyse whether the present provisions are adequate enough in protecting those women's rights.
- (d) To identify weakness and loopholes in the present law and to come up with suggestions and recommendations.

1.3. STATEMENT OF PROBLEM

The study is undertaken to examine the relevant provisions relating to rights of women on divorce and the financial obligations in Brunei. It works on the premise that the present provisions are still inadequate in protecting the women's rights.

As a result, there are still loopholes in its application. Thus, the present provisions need to be amended by having a comprehensive provision so that it could provide a better protection to the women in Brunei.

1.4. HYPOTHESIS

The study seeks to establish the hypothesis that the existing law governing the women's welfare and interest in regard to divorce and its matrimonial matters is inadequate. Still, there can be found inconsistency between some of the provisions in the Islamic family law and the Islamic principles stipulated by the *Qurān* and the *Sunnah*. There were also defects in the administration of divorce law in Brunei, for example, it takes a long time for the court to verify the *talāk* that the husband had pronounced which then affects the period of '*iddah*'. Thus, although the period has due but the couples still live together and unaware of what their status are. This leads to injustice in favor of the wife.

Therefore to address the issues, the provisions of the law and the administration of the Syariah court today need to be revised and improved by exploring and combining the very best for women from all of the interpretations of the Quranic texts. In addition, justice and fairness are one of the main objectives of the Syariah and thus to implement justice, the women's voices should be heard and their interest should be reflected in the law by granting unrestricted rights as a human being and not merely as a woman.

1.5. LITERATURE REVIEW

There are few literatures that can be considered to be relevant and useful to the study which discuss and focus on the subject. The review of the literatures comprises of both local and foreign literatures. Although some of the discussions are not directly focused on the issues addressed but still regarded as significant to the study particularly in the aspect of the evolution of Islamic family law in Brunei prior to the codification of the Emergency (Islamic Family Law) Order, 1999 in 1999.

The earliest study on the application and administration of Islamic family law in Brunei was done by Ahmad Ibrahim.⁶ The discussion was made together with the administration of Islamic Family law in Malaysia and Singapore. Various aspect of family law in all those countries has been analysed such as marriage, dissolution of marriage, offences, parental authority and inheritance rights of women. However, the discussion focuses upon the statutory provisions in the Islamic Religious Council and Kadis' Courts Enactment of 1955 since it was the existing law that governed the family affairs in Brunei at that time. The book is indeed a beneficial literature available on the subject because it focuses on the rights of women in different aspects of marital life including divorce. However, no decided case has been cited to provide a fair evaluation on whether the provisions of the said law have adequately been implemented.

Similarly, Hooker M.B.⁷ in his book has discussed specifically in one chapter about the administration of Islamic law in Brunei in its early time. Hence, the legislative provisions focused upon in this book are the provisions in the Mohammedan Laws Enactment of 1912, the Mohammedan Marriage and Divorce

⁶ Ahmad Ibrahim, *The Status of Muslim Women in Family Law in Malaysia, Singapore and Brunei*, (Singapore: Malaya Law Journal Pte. Ltd, 1965)

⁷ Hooker M.B, *Islamic Law in South-East Asia*, (Singapore: Oxford University Express, 1984)

Enactment (No. 3 of 1913) and the Religious Council, State Custom and Kadis' Courts Enactment. Every provision of the said laws is explained thoroughly including the part contained the provisions dealing with marriage and divorce but no focus has been made upon the rights of women. In his study, the author has concluded that the administration of Muslim law in Brunei is imitative and derivative of Muslim legal culture elsewhere in Archipelago like North Borneo, Sarawak, Sabah and Kelantan. He further added that the originality of Brunei Islam probably lies more in the anthropology of the religion than in its strictly legal formulation. Yet there is no data available to prove his assertion on the subject.

A discussion on the implementation of Islamic law in Brunei since the arrival of Islam till present can be found in a book written by Haji Mahmud Saedon Awang Othman⁸. It also includes the administration of Islamic legal system prior to the coming of British and the time when Brunei came under British rule. Thus, this will facilitate the information on the historical aspect of the existence of Islamic law as well as its implementation in Brunei in the past particularly the law governing the family affairs of Brunei people during that time.

Haji Awang Salim Haji Besar⁹ has also initiated another research in this area when he discussed in his work about the application of Islamic family law in Brunei in the past until the codification of the Emergency (Islamic Family Law) Order, 1999. This research highlighted the development of law in Brunei focusing on the relevant provisions in the Religious Council and Kadis' Courts Act, Ch. 77. The Emergency (Islamic Family Law) Order, 1999 which was introduced to replace the former law

⁸ Haji Mahmud Saedon Awang Othman, *Perlaksanaan dan Pentadbiran Undang-Undang Islam di Negara Brunei Darussalam*, (BSB:Dewan Bahasa dan Pustaka, 1999)

⁹ Haji Awang Salim Haji Besar, "Perlaksanaan Undang-Undang Keluarga Islam: Pengalaman Negara Brunei Darussalam" in *Undang-Undang Keluarga Islam dan wanita di Negara-Negara ASEAN*, (Kuala Lumpur: IKIM, 2000)

was also analysed by stating several issues encountered. The dissertation examined the issues and declared them suitable for the study since it will facilitate a general idea about the problems that affect Muslim spouses in Brunei especially the wives when there is a lacking of provisions in the Islamic family law.

A discussion on the implementation of Islamic family law affecting the rights and position of women has also been made by Hajah Masnon Haji Ibrahim¹⁰ in her Ph.D. thesis. Since at that time, the Emergency (Islamic Family Law) Order, 1999 has not been implemented, the main discussion was only focused on the provisions provided in the Religious Council and Kadis' Court Act, Ch. 77. A comparison is also made to evaluate the consistency of such provisions with the legal rights as given in the Quranic teachings. The research found that the law is inadequate enough to cover certain issues such as polygamy, *harta sepencarian*, custody and the jurisdiction of kadi's court and further suggested the existing law should be revised to the extent of the enactment of the new and more comprehensive law to accommodate all aspects of family life system. This thesis is figured as one of the important material in the field.

Similar research was also done by Hajah Hasnah Haji Ibrahim¹¹. She emphasized in her study that the introduction of the Emergency (Islamic Family Law) Order, 1999 is to ensure that the rights and the interest of the women are fully protected as in accordance to *Hukum Syara*. Evidence has been shown by indicating some provisions that highlight the best interest of the women such as provisions pertaining to registration of marriage, conditions stipulated on polygamous marriage,

¹⁰Hajah Masnon Haji Ibrahim, "Hak wanita dalam Undang-Undang Keluarga Islam di Brunei", (Ph.D. Dissertation, University Malaya, 2001).

¹¹Hajah Hasnah Haji Ibrahim, "Penggubalan Perintah Darurat (Undang-Undang Keluarga Islam) 1999 di Brunei Darussalam, Akan Memastikan Lagi Terpeliharanya Hak dan Kepentingan Wanita yang Diberikan di Bawah Hukum Syara", Jurnal Undang-undang Syariah Brunei Darussalam, Vol. 1, No:1, (BSB:Dewan Bahasa dan Pustaka, 2001).

dissolution of marriage due to *darār* and many more. However, the article never seeks to examine whether or not the said provisions have succeeded to implement as what have been intended for the enactment of the Islamic family law.

A specific study on the rights of women has been dealt with by few researchers. Haji Mahmud Saedon Awang Othman¹² in his research focused on the rights of women in Islamic law during marriage and after divorce by referring to the provisions in the Islamic Family Law (Federal Territory) Act, 1984 of Malaysia because of the more or less uniformity of the Islamic family law provisions elsewhere in the country and this may include Brunei. It contains the women's right to *mahr*, *ta'liq*, polygamy, divorce and its implementation, *mut'ah*, *harta sepencarian*, maintenance and custody. This will provide a useful facilitator to the study because it expounds the rights of women of which they entitled under the provisions of law.

The same study also has been ventured by Mohd Daud Ismail¹³. However, his article concentrated on the rights of woman to apply *fasakh* by highlighting and distinguishing the relevant provision in the Emergency (Islamic Family Law) Order, 1999 and the classical Islamic law. This article is very useful in the sense that it analyses the extent of the consistency of both law as to eliminate any discrimination whatsoever with respect to women. This article is figured as an important material for the study because it concentrates on the issue of the rights of women in Brunei pertaining to divorce.

¹²Mahmud Saedon Awang Othman, "Hak Wanita dalam Undang-undang Keluarga Islam" in *Undang-Undang Keluarga Islam dan wanita di Negara-Negara ASEAN*, (Kuala Lumpur: IKIM, 2000)

¹³Mohd Daud Ismail, "Fasakh : Hak Isteri Teraniaya : Kedudukannya dalam Undang-Undang Keluarga Islam di Brunei dan Perbandingannya dengan Undang-Undang Keluarga Islam", *Jurnal Undang-undang Syariah Brunei Darussalam*, Vol. 1, No:1, (BSB:Dewan Bahasa dan Pustaka, 2001).