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Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Laws in Indonesia, Malaysia and the Maldives)

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Abstract:

The phenomenon of domestic violence is on the rise every year and often puts a marriage into divorce. Divorce on the grounds of domestic violence frequently appears in the courtroom of Religious Courts in Indonesia as stipulated in Article 19 letter d PP No. 9 of 1975. It affirms that one party committing cruelty or severe persecution that endangers another party can be the legal reason for divorce. And then what about other Muslim countries? This research is library research with a descriptive-analytical method using a juridical normative approach. It found that domestic violence is accommodated as one of the reasons for divorce in family law in Indonesia, Malaysia (Negeri Sembilan, Persekutuan Pulau Pinang, Selangor dan Johor), and the Maldives. However, there are differences in granting the right for filing a divorce because of domestic violence. Divorce law in Indonesia and Malaysia enables both husband and wife to file for divorce because of domestic violence while Maldives law only enables the wife to do so.

Keywords:

Domestic Violence; Divorce Law; Family Law; Muslim Countries

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Abstrak:

Fenomena kekerasan dalam rumah tangga selalu meningkat setiap tahunnya dan seringkali menjadi sebab perceraian. Perceraian karena kekerasan dalam rumah tangga sering muncul di ruang sidang pengadilan agama di Indonesia. Ini sebagaimana diatur dalam Pasal 19 huruf d PP No. 9 Tahun 1975 bahwa salah satu pihak yang melakukan kekejaman atau penganiayaan berat yang membahayakan pihak lain dapat menjadi alasan hukum terjadinya perceraian. Lalu bagaimana dengan di negara-negara Muslim lainnya? Penelitian ini termasuk dalam penelitian pustaka (library research) yang bersifat deskriptif analitis dengan pendekatan normatif yuridis. Dalam penelitian ini diperoleh temuan bahwa kekerasan dalam rumah tangga diakomodir sebagai alasan perceraian dalam hukum keluarga di Indonesia, Malaysia (Negeri sembilan, Persekutuan Pulau Pinang, Selangor dan Johor), maupun Maladewa. Hanya saja, terdapat perbedaan dalam hak mengajukan perceraian karena kekerasan dalam rumah tangga. Hukum perceraian di Indonesia dan Malaysia membolehkan kedua belah pihak untuk mengajukan perceraian karena kekerasan dalam rumah tangga, sementara hukum Maladewa hanya memungkinkan pihak istri.

Kata Kunci:

Kekerasan Dalam Rumah Tangga; Perceraian; Hukum Keluarga; Negara Muslim

Introduction

The issue of family law is always interesting to discuss. It is because family problems also mean society problems considering that any problems in the family circle will influence society as well. The split of a family because of marriage termination will give consequences not only to individuals in a family, but also society as a whole. This is stated by John Eckelaar as follows:

“The breakdown of marriage involves more than the cessation of a relationship between two individuals, for it signifies the ultimate collapse of what is the most important social group in the community”¹

¹ John Eckelaar, *Family Security and Family Breakdown* (Penguin, 1971, p.11).

The strong relationship between family and society leads the State to intervene in family affairs through the existence of some regulations. The intervention shows the State's attention to family issues. On the other hand, discussion on the dynamics of family law is inseparable from the religious aspects because marriage is deemed as something sacred and noble. Here we find that the law of marriage closely relates to social and religious aspects of life as well as the State.²

In conventional *fiqh* of Islam, divorce is often considered to put women in a powerless position.³ Anytime a husband can divorce his wife. Under any circumstances, if a husband has said the word "*thallaqtuki*" (I divorce you), a divorce occurs no matter he is drunk, joking, swearing and others. Furthermore, the right to do *ruju'* (reconciliation or coming back to the old marriage) is only valid for the husband and not for the wife. This concept is deemed very discriminatory so that many reforms on the Islamic law in Muslim countries have been carried out.⁴

In Indonesia, Article 39 paragraph (2) of Law no. 1 of 1974 which has been described in the Article 19 letter d PP No. 9 of 1975 affirms that one party committing cruelty or serious maltreatment

² Asaf A. A. Fyze and Tahir Mahmood, *Outlines of Muhammadan Law, Fifth Edition* (Oxford, New York: Oxford University Press, 2009, p.88).

³ This issue is discussed at the formulation of concept offered by the Gender Mainstreaming Team (PUG; *Pengarusutamaan gender*) and known as the Counter Legal Draft (CLD) compilation of Islamic law using four key approaches, namely gender, pluralism, human rights and democracy. CLD criticizes articles at the KHI (*Kompilasi Hukum Islam; Islamic Law Compilation*) which are still deemed to contain gender-biased perspective, such as at the problem of *ruju'* (reconciliation) and *'iddah* (waiting period after divorce). CLD demands both husband and wife to be equally entitled to both issues considering that they are partners. See Prof. Dr. H. Khoiruddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia Dan Perbandingan Hukum Perkawinan Di Dunia Muslim: Studi Sejarah, Metode Pembaruan Dan Materi & Status Perempuan Dalam Hukum Perkawinan/Keluarga Islam, Pertama* (Yogyakarta: ACAdemia + Tazzafa, 2009), p.81.

⁴ There is an expansion of understanding in contemporary divorce law in some Muslim countries. Among others, polygamy as the reason for divorce can even be included in *taklik* divorce as found in Turkish law, Lebanon, Morocco, and Jordan. See Khoiruddin Nasution, *Status Wanita di Asia Tenggara: Studi Terhadap Perundang-undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia* (Jakarta: INIS, 2002), p. 120-122.

that endangers another can be a legal reason for divorce. Based on this, domestic violence can be categorized as one of the reasons for marriage termination.

Since 2017, Indonesian Badilag (*Badan Pengadilan Agama*; Religious Court Body) had categorized the causes of divorce more specifically and one of which is domestic violence against women. This might closely relate to 2020 Annual Report of the Directorate General of Religious Courts at the Supreme Court of the Republic of Indonesia about 330824 divorce cases filed by women during the year. Those have been decided at the first level of Indonesian Religious Courts.

In line with it, Religious Courts data from the same year showed that the biggest cause of divorce was ongoing disputes numbering 176,683 cases. The second was the economic factor with 71,194 cases, followed by leaving a spouse away with 34,671 cases, and domestic violence with 3,271 cases.

Furthermore, most of the annual data records compiled by *Komnas Perempuan* (National Commission on Women) on cases handled by the Religious Courts show the same. In 2018, among 406,178 cases of violence against women, 392,610 cases or 96% were from the Religious Courts. The rest of the number, namely about 13,568 cases or 3% were data from 209 service provider partner institutions that filled out the form and returned it to the *Komnas Perempuan* data collection.⁵

The data also shows that the number of cases of violence against women in 2019 Annual Notes has increased from those of 2018 which was 348,446 or around 14% rise. Additionally, The *Komnas Perempuan* observed data on both divorce and divorce lawsuit cases that were granted by the Religious Courts during 2018 and found violence against women as one of the most common causes.

Based on it, this study aims to explain how a country accommodates domestic violence as a reason for divorce in its formal regulation. It focuses on the analysis of similarities and differences among three Moslem countries namely Indonesia, Malaysia, and the

⁵ <https://www.komnasperempuan.go.id> Komnas Perempuan, "Catatan Tahunan Kekerasan Terhadap Perempuan 2018," March 9, 2018 Accessed on Monday, 24 June 2020 at 09.00 WIB.

Maldives. The three countries have codified each family law and are always making efforts to reform it. Moreover, most the related regulations originate from Islamic law. which has undergone a codification process.

Taking the perspective of protecting women as the victims of domestic violence, I will further comparatively analyze the role of Islamic law as the guideline for divorce law in those three countries. All in all, this research is formulated into two problems. (1) To what extent is domestic violence as a reason for divorce regulated in the marriage laws in Indonesia, Malaysia and the Maldives? (2) How is the comparative analysis of regulations regarding domestic violence as a reason for divorce in the marriage laws in Indonesia, Malaysia and the Maldives?

Methods

This is library research with a descriptive, comparative, and analytical way of delivery using the juridical normative approach. The legal materials for this research consist of primary ones in the form of legislation, secondary ones ranging from books, magazines, websites, journals, articles, papers, to analysis of judges' discussion, and tertiary ones covering dictionaries, encyclopedias, and so on. All legal materials are arranged systematically before being processed and researched as well as evaluated and analyzed descriptively-analytically using the comparative model.

Discussion and Result

The Concept of Divorce Law and Domestic Violence

According to the Big Indonesian Dictionary (KBBI), divorce means a matter of split between husband and wife. The word "divorce" itself means "to drop divorce or to terminate the marriage relationship as husband and wife." Meanwhile, the Civil Code Article 207 defines divorce as the abolition of marriage by a judge's decision, due to demand of one of both parties, and is caused by some reasons as stated in the Law. Definition of divorce is not found at all in the Marriage Law as well as in the explanation and its implementing regulations.

Due to its consequence, divorce is a legal mechanism whereby both parties change their legal status from married to single. Barbara

Stark mentioned divorce as the legal mechanism through which parties change their legal status from married to single. They are 'free of the bonds of matrimony' and free of marriage's rights and obligations, except as specifically provided in the decree of divorce.⁶

Meanwhile, according to Islamic law, one of the reasons for divorce is a very serious fight between a couple which possibly endangers the life/the soul of each. It is called *syiqaq* at the Qur'an, particularly at QS. An Nisaa verse 35 reads:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنْ اللَّهُ كَانَ عَلِيمًا حَكِيمًا (٣٥)

The Meaning: And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allāh will cause it between them. Indeed, Allāh is ever Knowing and Aware.

Apart from *syiqaq*, divorce in Islamic law could occur through mechanism of *talak*⁷, *khuluk*⁸, *fasakh*⁹, *ila*¹⁰, *zihar*¹¹, and *li'an*¹².

⁶ Barbara Stark, *International Family Law: An Introduction* (Burlington, VT: Ashgate, 2005).

⁷ Divorce is linguistically derived from the Arabic verb *طلق* which means divorce. It etymologically means breaking the bond. From a terminological perspective, it means breaking the marriage bond. See *Sayyid Sabiq, Fikih Sunnah 8, PT Alma'rif, Bandung, 1980, p.7.*

⁸ *Khulu'* linguistically means ransom. Meanwhile, according to terminology, *khulu'* means divorce pronounced by a wife by returning the dowry (*mahr*) once paid by her husband. Once the ransom is paid back to the husband, he can divorce her right away. Syafi'i scholars say that *khulu'* is a divorce that a wife demands it by paying something and saying the word 'divorce'. See Abdul Rahman, *Perkawinan dalam Syari'at Islam* (Jakarta: PT. Rineka Cipta, 1996), 112- 113.

⁹ Literally, *fasakh* means "canceling an agreement" or withdrawing an offer. *Fasakh*, according to the Hanafi school, is due to one of the following cases: 1) Separation due to the apostasy of the husband and wife; 2) Divorce due to the breakdown (*fasad*) of the marriage; 3) Marriage cancellation because there is no equality of status (*kufu'*) between both or when a husband can not fulfill his obligation. Meanwhile, according to the Syafi'i school and Hambali, *fasakh* are due to as follow: 1) Separation due to the disability of one of both; 2) Divorce due to various difficulties of the husband; 3) Termination due to *li'an*; 4) Apostasy of one of both; 5) Breaking of marriage; and 6) Lack of equal status (*kufu'*). *Fasakh* according to the Maliki school occurs in the following cases: 1) The occurrence of *li'an* 2) The destruction of marriage 3) The

As mentioned before, divorce can be triggered by many factors, including violence committed by one of both parties (husband or wife). Destructive behavior in a domestic circle is believed to cause the breakdown of a household. The forms of domestic violence also vary ranging from physical, psychological, economic, to sexual violence. Regarding violence against women and wives, the United Nations Declaration on the elimination of violence against women defines it as all actions based on sexual differences that cause or possibly cause suffering to women physically, sexually or psychologically. Included in the definition are actions of threats, coercion or deprivation of freedom arbitrarily whether in public or in private life.¹³

The word violence is used as the equivalent of the word hardness in English. It means an attack or invasion of a person's physical or mental integrity. This is exactly what distinguishes it from

apostasy of either husband or wife. See Abdul Rahman, *Perkawinan dalam Syari'at Islam*, (Jakarta: PT. Rineka Cipta, 1996), 83.

¹⁰ *Ila'* according to the language means oath. Whereas according to the term, *ila'* is the oath of a husband by mentioning the name of God or His attributes not to approach his wife either forever or limited to four months or more. See, Abd. Rahman Ghazali, *Fiqh Munakahat* (Jakarta: Prenada Media, 2003), 234.

¹¹ *Zhihar* comes from the word *zhahr* which means back as a part of body. In relation to the relationship between husband and wife, *zhihar* is husband's speech to his wife which equates his wife's back with his mother's back. *Zhihar* in pre-Islamic era was used by a husband to forbid himself and other men worldwide for having sex with the wife forever. Therefore, Islam makes *zhihar* having consequences for both this world and hereafter. See Syekh. H. Abdul Halim Hasan, *Tafsir Al-Ahkam* (Jakarta: Kencana, 2006), p. 578. Also refer back to the revelation at Surah Al-Mujadalah verse 2. Source : <https://quran.kemenag.go.id/sura/58>.

¹² *Li'an* is taken from the word *al-la'nu* which means far away and a curse. This is because *li'an* enables a husband and a wife to get separated from each other as they are forbidden to gather anymore as a spouse forever. Furthermore, the fifth (the last) point of the oath accentuates willingness to accept the curse of God if the accouchement is proven wrong. According to terminological perspective, *li'an* is an oath of a husband for accusing his wife of adultery with four times testimony that he is a righteous person on the accusation. After that, the fifth oath of the testimony is along with a willingness to accept the curse of God if he lies. See Abd. Rahman Ghazaly, *Fiqh Munakahat*, (Kencana, Bogor, 2003), cet. ke-1, p. 238. See the basis of other laws on the word of God in *Surah An-Nisa'* verses 6-7.

¹³ "Declaration on the Elimination of Violence Against Women. Proclaimed by the General Assembly of the United Nations - Pdf Free Download, 'Article 1 H. 12, Accessed November 15, 2020." (2020).

how Indonesians limit violence scope to physical attacks only.¹⁴ Theoretically, Martin R. Haskell and Lewis Yabslonswky divided violence into four categories as follow:

- a. Legal violence covers violent action supported by the law, such as legal and justified violence for soldiers on duties in a war.
- b. Socially sanctioned violence, such as cultural sanction for adultery doers. An important factor in analyzing this type of violence is community support in the form of social sanctions against it.
- c. Rational violence. Some illegal acts of violence without social sanctions become rationally recognized crimes, such as murder in an organized crime.
- d. Irrational/unemotional violence that occurred without any prior provocation and particular motivation where the perpetrators typically do not know the victims. This can be classified into so-called raw violence as a direct expression of a person's psychological disorders at certain times of his/her life.¹⁵

Concerning those four, domestic violence does not occur spontaneously. It is typically triggered by several causes, including the imbalanced relationship between husband and wife. Maggi Humm wrote that violence against women is generally used to control women's sexuality and their reproductive roles. In avsocial relationships, for instance, men are put as the ones in need of sexual intercourse while women are the objects who have to accept anything that the men want regardless of their situation. This, ironically, can not be otherwise.¹⁶

A similar view comes from Stark (2007) who asserts that male psychological and emotional instability lead them to find excuse and strategies to intimidate, hurt, and dominate their partners.

¹⁴ Soedjono Dirdjosisworo, *Sinopsis Kriminologi Indonesia*, (Bandung: Mandar Maju, 1994). 12-13

¹⁵ Adil Samadani, *Kompetensi Pengadilan Agama terhadap Tindak Kekerasan dalam Rumah Tangga, Pertama* (Yogyakarta: Graha Ilmu, 2013). 31

¹⁶ Maggie Humm, *The Dictionary of Feminist Theory* (Columbus/Ohio: Ohio State University Press, 1990, p.23).

He asserts that psychologically and emotionally abusive behavior – men’s use of various strategies to intimidate, hurt, isolate, and dominate their partners – is often subtle and difficult to detect by outsiders. However, this form of coercive control is used in an attempt to “microregulate” everyday behavior and interactions of their partners and secure masculine privileges – such as sex in marriage.¹⁷

From a social and cultural point of view, several factors that cause domestic violence are as follow:

1. A patriarchal culture puts men as superior beings while women as inferior ones.
2. Misleading understanding of religious teachings that lead men to dominate women.
3. A man’s imitation of his father’s habit to abuse his mother, be it physical, psychological or sexual violence.
4. The economic condition of the spouse who lives in poverty.
5. Bad characteristics of a husband, such as alcoholic drinking, frustration or having a mental disorder.¹⁸

Apart from common causes beyond domestic violence, divorce is sometimes a choice taken by domestic violence victims as an alternative to getting out from the violence cycle. This is one of a conclusions from *Rifka Annisa Women's Crisis Center* report which found that divorce is the most common solution chosen by domestic violence victims (data for 2001-2005). They likely consider that marriage termination between the victim and the perpetrator will break up or end the violence series.¹⁹

¹⁷ Kersti Yllö and M. Gabriela Torres, Eds., *Marital Rape: Consent, Marriage, and Social Change in Global Context, Interpersonal Violence Series* (Oxford; New York: Oxford University Press, 2016), 23. See also Stark, Evan. *Coercive Control: How Men Entrap Women in Personal Life*. (Oxford, UK: Oxford University Press, 2007), p.56.

¹⁸ Kementerian Pemberdayaan Perempuan, *Kekerasan terhadap Perempuan-KDRT* (Jakarta, 2002, p.18).

¹⁹ Rika Saraswati, *Perempuan dan Penyelesaian Kekerasan dalam Rumah Tangga, II* (Bandung: PT Citra Aditya Bakti, 2009). 81

Domestic Violence as a Reason for Divorce under the Marriage Laws in Indonesia, Malaysia and Maldives

1. Indonesia

Divorce in Indonesia is regulated in Law Number 1 of 1974 concerning marriage (UUP; *Undang-Undang Pernikahan* or Marriage Law). Additionally, it is also found at the Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law (KHI; *Kompilasi Hukum Islam*) which was confirmed by the Decree of the Minister of Religious Affairs No. 154 of 1991 concerning the implementation of Presidential Instruction No. 1 of 1991.

In the KHI, it is stated that marriage can break up because of: (1) death, (2) divorce, and (3) a court decision. The second factor can occur because of either divorce or divorce lawsuits. Divorce itself can only be done in front of a Religious Court hearing after its trial and failure to reconcile both parties. As a consequence, divorce starts to be valid since the declaration before a court hearing.

A wife who experiences violence from her husband and therefore wants to file a divorce needs to file her lawsuit through the Religious Court. Her lawsuit, for example, can demand divorce, *hadhanah* and child custody such as Number 663/Pdt.G/2019/PA.Tng while mentioning the quite tragic domestic violence at the lawsuit's *posita*.²⁰

In this case, the Religious Court is a judicial institution authorized to adjudicate certain cases including marriage. This is

²⁰ *Posita* Lawsuit Point 16 explained a fight in the car when the defendant escorted the plaintiff to her office and caused the plaintiff to suffer stomach cramps and bleeding. After being examined, it turned out that the plaintiff's fetal sac had fallen and could not be maintained, so a curettage had to be taken immediately to clean the remainder of the fetal and ensure the plaintiff's health. This is evidenced by the results of laboratory and ultrasound examination from the maternity hospital St. Yusuf, which concluded that there was an incomplete abortion in the plaintiff's fetus. Furthermore, the plaintiff argued that the defendant was once so emotional and angry at another time that he violently beat, slapped and kicked the plaintiff who was feeding their child. The plaintiff tried to run out of the house but was chased by the defendant and on the way, the defendant continued to act rudely while finally choking her and taking her back to the house. Source <https://putusan3.mahkamahagung.go.id>, Tangerang Religious Court Decision Number 663/Pdt.G/2019/PA.Tng.

following the general explanation of Law No. 7 of 1989 concerning Religious Court number 2, particularly the third paragraph, which reads: "The Religious Court is the first level court to examine, decide, and settle cases among Muslims in the field of marriage, inheritance, wills, grants, *waqf*, and *shadaqah* based on Islamic law."

Meanwhile, referring to Government Regulation number 9/1975 as the implementation of the regulation of Law Number 1/1974 concerning marriage, reasons for divorce in the Religious Court are as follow:

1. One party commits adultery or becomes a drunkard, gambler and doers of bad habits that are difficult to cure;
2. One party leaves another one during 2 (two) consecutive years neither with permission nor valid reasons nor for other relevant reasons;
3. One party is sentenced to 5 (five) years imprisonment or a heavier sentence after the marriage has taken place;
4. One party commits cruelty or serious maltreatment which endangers another one or as called by domestic violence;
5. One party has a physical disability or illness which disables him/her to carry out the obligations;
6. Constant quarrels and fights between both where there found no hope to live in harmony anymore;

The above-mentioned reasons are valid in the entire sovereign territory of Indonesia no matter what religious affiliation of a citizen is. Additionally, there also found reasons for divorce specifically to Muslims as enlisted at KHI Article 116 (g-h). It covers conditions when the husband violates *taklik* divorce²¹ and religious conversion or apostasy which very likely causes disharmony in the household.

²¹ *Sighat ta'liq* is pronounced after the marriage contract and reads as follows: *Bismillah al-rahman al-rahim*. After the marriage contract, I a son of sincerely promise, that I will fulfill my obligations as a husband, and I will treat my wife named ... a daughter of very well (*mu'âsyarah bil-ma'rûf*) according to Islamic teaching. I declare *sighat ta'liq* on my wife as follows: When I: 1) left her for two years in a row; or 2) I did not give her obligatory living for three months, or 3) I hurt her physically, or 4) I disregard her for six months and she can not accept that and complain about it to The Religious Court or officer who is given the right to handle the complaint, and the complaint is accepted by the Court or the officer, then she paid Rp.1000, - (one thousand rupiah) as *'iwadl* (replacement) to me, then my divorce is counted one for her. See Khoiruddin Nasution, "Menjamin Hak Perempuan dengan

The stipulation of additional and specific reasons in the KHI implies that divorce because of the violation of *taklik* divorce and apostasy of a partner is only regulated in Islamic law. Therefore, as a legal product applicable to Muslims, KHI determines both as additional reasons for divorce. Meanwhile, point three of the article reads "or I hurt my wife's body" strongly indicates domestic violence in its physical form.

Regarding with *sighat taklik* divorce, since the enactment of Law Number 22 Year 1946 jo. Law Number 32 Year 1952, its provisions are enforced uniformly throughout Indonesia. Later on, as the formula was taken over by the Ministry of Religious Affair, *sighat taklik* divorce has undergone several changes. The amendment does not only concerned with the main elements, but also the quality of *taklik* requirements and the amount of *iwadl* money.

According to Abdul Manan, this change cannot be separated from the initial mission of institutionalizing *sighat taklik* divorce, namely to protect wife from any abuses of her husband. Besides that, the changes aim to get closer to the truth of Islamic law. One of the changes made is paragraph (3) of *sighat taklik* divorce. In 1950, it read: 'or I hurt my wife by hitting' which implies the specific physical action and exclude many others.²² Five years later in 1956, the definition and scope of hitting are broadened to any action committed to hurt other people's bodies. It ranges from kicking, pulling others until he/she falls, pulling hair, bumping other's heads to the wall and others.

The above regulations show that every divorce, either it is a divorce or a divorce lawsuit, must be based on the reasons mentioned. A closer look at the regulation also indicates that subject who can take action to initiate or file for divorce can be either husband or wife. This is most evident in each point of article 116 KHI (a to f and h) which begins with "one of the parties" instead of showing to a particular party either husband or wife.

A point that specifically puts the husband as the only subject is KHI article 116 point g which says "husband violates the *taklik*

Taklik Talak dan Perjanjian Perkawinan," *Unisia* 31, no. 70 (2008), p.335 <https://doi.org/335, https://doi.org/10.20885/unisia.vol31.iss70.art3>.

²² Khoiruddin Nasution, "Menjamin Hak Perempuan dengan Taklik Talak dan Perjanjian Perkawinan," *Unisia* 31, no. 70 (2008), p.337 <https://doi.org/335, https://doi.org/10.20885/unisia.vol31.iss70.art3>.

divorce...". This open determination of reasons for divorce implies that both husband and wife have the same potential to make mistakes, including domestic violence, that lead the legal spouse for filing the initiative for divorce.

2. Malaysia

As a federal country, Malaysian Islamic marriage law varies among one another depending on the law provisions of each state. The law itself can be grouped into two categories. *First*, the laws which follow the Deed of Association although to some extent, still need adjustment. They can be found in Selangor, Negeri Sembilan, Pulau Pinang, Pahang, Perlis, Terengganu, Sarawak and Sabah. *Second*, the laws with some striking differences to the Deed although a few parts are still the same. They are the laws at Kelantan, Johor, Melaka and Kedah.

The Malaysian family laws include The Malacca Islamic Family Law 1983, the 1983 Kelantan Law, the 1983 Nine Land Law, the 1984 Alliance Area Law, the 1984 Perak Law (No.1), the 1979 Law on Kedah, the 1985 Pinang Island Law, the 1985 Trengganu Law, the Law Pahang 1987, the Selangor Law 1989, the Johor 1990 Law, the 1991 Sarawak Law, the 1992 Perlis Law, and the 1992 Sabah Law.

An effort to unify the Islamic family law in Malaysia has once been carried out by a committee chaired by Tengku Zaid with the main responsibility to draft the Islamic family law. After getting approval from the *Majlis Raja-raja*, the draft was circulated to the states so that they could use it as the reference on the cases regarding Islamic family law. Unfortunately, not all states accept the entire contents of the law. Kelantan, for example, made improvements to the draft. As a result, the Malaysian Islamic family law is not practically the same among one another, including the valid reasons for divorce.

According to the legislation of Perak and Pahang law, the reasons for divorce by *fasakh* are impotent husband, husband's very serious mental or physical illness such as crazy, leprosy or vertigo, or contagious venereal disease, wife's illegal permission or consent of marriage, be it situation under force, her mental illness or other valid reasons according to the sharia, husband's nervous illness at the time of marriage contract declaration which makes him ineligible for marriage, or other valid reasons for *fasakh* according to the sharia.

On the other state, namely the Kelantan Sharia Court, data on divorce shows that it is due to several factors. Of the total cases numbering 8678 from 2013 to 2016, the main triggering factor, taken from 2975 divorce cases, was different principles between the couple followed by financial problems in 2162 cases. Afterward, 1166 cases were due to mutual consent problems, a situation where the wife left husbands in 919 cases, and irresponsible husbands with 506 cases. In addition, there were 429 criminal cases related to the Criminal Code which trigger the divorce. The reason for domestic violence was in 292 cases, polygamy in 168 cases and apostasy in 61 cases.²³

Meanwhile, the most common types, as well as causes of divorce among the Malaysian Muslim, are four with their respective and different processes, namely: divorce or a divorce order from the Court, divorce by redemption (*khulu'*) or *taklik* divorce, *syiqaq* (irreconcilable fight), and *'li'an* which can only be found at the Sarawak Law.

The process or steps for a divorce starts from filing divorce application to the Court while articulating the reasons or cause, an examination by inviting the parties to the Court and seeking justice, then delivering the verdict.

The second common cause, *taklik* divorce, occurs when a wife reports the violation of *taklik* divorce that her husband does. If the Court considers the report true and reasonable, a divorce hearing will be held under- recording for administrative requirement particularly note-taking. This is based on Article 22 of the Selangor Law (Islamic Family Law of State of Selangor, Enactment 2003).

Taklik divorce itself can be caused by three factors, namely husband's leave for 4 months either intentionally or not, his inability to provide a living for the obedient wife, and his hit or physical attack which makes the wife disabled/sick. The third point implies the domestic violence clause, namely if a husband physically hurts his wife and makes her sick, disabled or bodily hurt. When this happens, a wife can file for divorce, mainly because in Malaysia, although the

²³ Rosfaizal, *Studi Perbandingan Perceraian pada Pengadilan Agama di Indonesia dengan Mahkamah Syariah Malaysia (Studi Kasus di PA Tanjung Karang dan MS Kelantan Tahun 2013-2016)*, 85-86.

taklik divorce is not mandatory and therefore not every couple chose to pronounce it, it still applies right away.

Meanwhile, the divorce process because of *syiqaq* (irreconcilable fight) has the same process as the previous two. It also requires the role of two peacemakers to strive for reconciliation otherwise the divorce decision is finally made. Kelantan satate even makes the same process between divorce and *syiqaq*. Therefore, in principle, the process of divorce, by redemption (*taklik* divorce), and *syiqaq* give the same right for both husbands and wife to initiate the divorce. Additionally, at the end of the process, divorce can be valid under mutual consent or by the decision of the Religious Court.

Meanwhile, the state's law at Negeri Sembilan, Persekutuan Pulau Pinang and Selangor have additional reasons for divorce other than those at Perak and Pahang. The reasons include unknown information about husband's domicile during one last year, his ignorance to provide living (*nafqah*) for three months, his imprisonment sentence for three years or more, his absence to provide spiritual support for one year, his abuse action on the wife, and the condition when the wife was married by her father before her sixteenth birthday along with her rejection and not having intercourse yet.

On the other hand, at the Enakmen of the Johor State Islamic Family Law, Article 53 (1) mentions that a woman or a man following the *syara'* law is entitled to terminate the marriage through either divorce or divorce lawsuit due to the following reasons. They range from unknown information on where either husband or wife lives for more than a year, husband's ignorance on her living during three months, either husband or wife's imprisonment sentence for three years or more, abusement on another party, an unfulfillment of sexual need without any reason for a year, the suffering of insane for two years, leprosy, vitiligo, or venereal disease, husband's impotency while the wife doesn't know it at the beginning of marriage, enforced marriage by the wife's *mujbir* guardian before she reaches the age of adulthood (18 years) along with her rejection and has not been experienced any sexual intercourse.

The description above shows that Malaysian states consider domestic violence as valid reason for divorce from a variety of its

divorce types ranging from divorce, divorce lawsuit, divorce by redemption, to *fasakh*.

3. Maldivive

Maldivive is a country with 1200 small islands in South Asia adjacent to Sri Lanka and India. Before Islam came to this country in 1153 AD, Buddhism was the most popular religion among its people. The country, which is now a member of the Organization for Islamic Cooperation (OIC), has Muslims as its whole population.²⁴

In establishing the Maldivian Family Law No. 4 of 2000, the Maldivive government mainly adopted the Malaysian Family Law because it is considered compatible with the characteristics of their socio-cultural conditions. In addition, the majority of *fiqh* jurisprudence of Maldivive is also the same as that of Malaysia, namely the Shafi'i school of law.²⁵ The codified Maldivian Family law primarily aiming at regulating marriage and divorce contains rules on the minimum age of marriage, restrictions in reconciliation (*ruju'*), divorce and polygamy.

Additionally, other rules indicate unique examples of sharia-based family law targeting to integrate itself into a code law while addressing specific social issues. In the Maldives, for instance, Violence Against Women (VAW) also becomes a national concern. General statistics published in Maldives on VAW show that 1 of 3 women aged 18-59 has experienced some forms of physical or sexual violence.²⁶

Specifically relating to divorce, the Maldivian Family Law only regulates reasons for divorce lawsuits while the divorce is excluded. Explicitly, there found no mention of the valid reasons for divorce in the Maldivian Family Law. In other words, a husband who wants to divorce his wife doesn't need any reason as mentioned by

²⁴ Marium Jabyn, "Transformations in Shari'ah Family Law in the Republic of Maldives", *Jindal Global Law Review* 7, no. 1 (2016): 61.

²⁵ Mohammad Ali Haidar, "Ketentuan Perceraian di Indonesia dan Maladewa," (Skripsi Program Studi Hukum Keluarga Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2020). 39

²⁶ Source: Ministry of Health - MOH / Maldives and ICF. 2018. Maldives Demographic and Health Survey 2016-17. Malé, Maldives, and Rockville, Maryland, USA: MOH and ICF.

the Law. He can simply file a divorce to the Court right away. On the other hand, if a wife wants to file for divorce, she is required to have valid reasons as regulated in the law.

Article 24 the Maldivian Family Law Number 4 of 2000 outlines legal reasons for a divorce lawsuit as follows: *First*, a husband commits any action which degrades his wife's dignity. *Second*, a husband treats his wife cruelly. *Third*, a husband forces his wife to do any forbidden thing. *Fourth*, a husband stands not to have sexual intercourse with his wife for more than four months without any reason.²⁷

When a husband commits any act of domestic violence against his wife as mentioned at the second point, the marriage can be terminated once the wife files for divorce to the Court. The Court might consider one of the following reasons based on the Law No. 3/2012 about so-called *thafriq*. It mentions that if the level of violence has disabled the spouse to rebuild household peaceful life anymore, if the safety, protection, as well as welfare of the victim, cannot be guaranteed, or if the conflict is not possibly reconciled anymore, The Court, based on the article 6 of the family law, can order marriage termination by *thafriq* which then indicates its ending.

In relation with the Article 28 of the Family Law Act (Act No. 4/2000), some events specifically mentioned in Article 48 are hereby considered as those that possibly cause marriage termination because of *faskh* according to Islamic law.²⁸ *Fasakh* is known in the Maldivian Marriage Law when a woman files a divorce request to the Court because of one of the following reasons. It covers her ignorance on where the husband lives, her husband's failure to provide maintenance payment for more than three consecutive months, or her ignorance on his impotency at the time of marriage contract declaration.

Accordingly, The Maldivian marriage law also does not prohibit the imposition of *khulu'* divorce through an application filed

²⁷ "Maldives - Family Act," 2020, 000 (Act No. 4/2000).," accessed August 22, 2020, %0Ahttp://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=85773&p_classification=01.03.%0A.

²⁸ Ismail Wisham and Aishath Muneeza, "Harmonization of Civil Law and Shariah in a Small Island Nation," *The Republic of Maldives Case Study*, n.d., 32.

at the Court. It is agreed that a wife can seek divorce from her husband by paying him or giving him something of monetary value.

Comparative Analysis of Divorce Law Reasons for Domestic Violence in Indonesia, Malaysia and the Maldives

A. Equational Analysis

Indonesian, Malaysian and Maldivian Family Law have similarities in terms of the divorce. The forms of divorce available in those three countries, among others, are: 1) divorce; 2) lawsuit divorce; 3) *khulu'*; and 4) *fasakh*. These four forms of divorce are written in the respective law books of those countries. However, in the context of family law in Indonesia, the term *khulu'* is not as defined in the books of jurisprudence although it is known as a situation when a wife requests divorce by giving her husband *`iwâd* so that he will divorce her afterward.

Khulu' is furthermore classified as a form of *ta`lik* divorce and belongs to the divorce lawsuit category. With the divorce lawsuit format, it can provide an opportunity for a wife to have the same rights as her husband in the case of initiating divorce. Until then, the dominance of a husband in married life no longer exists and neither does the stigma regarding the subordinated rights of women in a household.²⁹

Meanwhile, domestic violence as a reason for divorce has been already included in the marriage law of those three countries. In Negeri Sembilan, the Federation of Penang and Selangor, it is found at the letter f on husband's abuses on his wife. As for the Johor Islamic Family Law Enactment mentioned it at the regulation of *fasakh*, namely an order to determinate the marriage at the Article 53 (1). The article itself explains that both are entitled to an order to terminate the marriage, for example when one of both cases of abuse another as mentioned at the eighth point of the article.

The same is found in Indonesian Family Law which regulates that one of the causes for divorce is when a party commits cruelty or severe persecution that endangers another. This is typically called KDRT standing for *Kekerasan dalam Rumah Tangga* or household

²⁹ Haidar, "Ketentuan Perceraian di Indonesia dan Maladewa,. 59."

violence. Meanwhile, the accommodation of domestic violence at the Maldivian Family Law is obvious in Article 24 a of the Law Number 4 of 2000 which reads “husbands treat their wives cruelly” as one of the reasons for divorce.

Furthermore, the divorce cause clause based on domestic violence is also implied in the *sighat taklik* divorce known in Indonesian and Malaysian family law. Indonesian KHI at the Article 116 (g-h) reads “the husband violates the *taklik* divorce at the third point when he hurts his wife physically. The same goes on at the Malaysian law, particularly The Article 22 of the Law of Selangor (Enactment 2003), which enlists three reasons that can be included in the *taklik* divorce. The last point refers to a situation when a husband does something particular that makes his wife disabled/sick.

As for the Maldives, its family law only recognizes domestic violence as a cause for *khulu'* procedure filed by a wife. The application to the Court is along with agreement that a wife can file for divorce from her husband by paying him or giving him something worth money

B. Differential Analysis

Indonesian Family Law applies the same rights for both husband and wife to file for divorce. This is particularly clear in the clause listed the causes of divorce in article 19 of Government Regulation No. 9 of 1975, The Article 19 and 116 of Compilation of Islamic Law, and the Article 116. 74 PP No. 9 of 1975 which mentions the phrase 'husband and wife' or 'one of the parties'. This is the same as Family Law Enactment in the Johor State of Malaysia at The Article 53 (1) point 8 regarding divorce, *fasakh* or the order to terminate the marriage which uses the diction of phrase ‘a husband or a wife abuses his/her spouse.’

It means that the same reason applies for both husband and wife equally without the one with much more rights and another with the less. This is influenced by the formation of Indonesian Family Law, including The Marriage Law No. 1 of 1974 and the Compilation of Islamic Law, which engaged the spirit of equality between husband and wife. Furthermore, it also reflects the 1948 Declaration of Human Rights held by the United Nations General Assembly in Paris on December 10. Article 16 paragraph 1 of the General Declaration of

Human Rights mentions that men and women, without any limitation of nationality, citizenship, and religion, have the right to marry and to build a family. They also have the same rights in the marriage, during marriage, and at the time of divorce." The last sentence implies that both husband and wife have the same right at the process of divorce, including the same reason that both can apply for filing it.

On the other hand, Maldives Family Law Number 4 of 2000 describing reasons for a divorce which reads "...a husband treats his wife cruelly" only applies to divorce lawsuits and not to divorce. Moreover, there is no requirement or condition for a husband to fulfill when he wants to file for divorce. Once he wants to divorce his wife, there is no reason needed by the law for him to present to the Court. On the contrary, a wife who wants to file for divorce needs a reason as set out in the law. In other words, the reason for divorce based domestic violence does not apply to both parties because it is only valid on behalf of the wife.

Contribution of Islamic Law to the Protection of Domestic Violence Victim in Indonesia, Malaysia and Maldives

Comparative analysis among divorce laws in Indonesia, Malaysia and Maldives imply that the effort of strengthening humanitarian values at the global level, such as human rights and gender equality, especially on the issue of domestic violence, to some extent has affected the legislative process at the national level. This is marked by the emergence of new norms in society as well as legal products in national legislation.

Along with it, Islamic family law also plays an important role in the divorce laws of those three countries. This is particularly clear from the existence of Islamic family law reforms that the countries implement and adopt into their national system by the development of substantial and procedural legal rules in Islamic justice.

In discussing the divorce law, both Imam Malik and Ahmad think that if the wife gets harsh treatment from her husband, she can file a divorce suit. These schools therefore provide possibility of divorce because of the *syiqaaq* situation. Among others, it occurs when a husband endangers his wife by saying dirty words, painfully hitting her, leaving her without any reason, ordering her to do forbidden

things, being more concerned with other wives, unwilling to visit her parents, or taking her property illegally. If a wife cannot accept how her husband treats her then she reports this to the judge while proving the charge for filing a divorce, a judge can divorce her by *ba'in* divorce one time.³⁰ Imam Malik furthermore explained the possibility of *tafriq* because of *syiqaq* or *dharar* as quoted by A. Zamakhsyari (2020). He even recommended the wife ask the judge for divorce once the marriage puts her in danger while the broken relationship is unlikely to get fixed.

Likewise, from the perspective of *maslahah* (advantage) in the framework of Islamic law, the main objective of shari'ah is to create the benefit of mankind in life which includes five main elements, namely maintaining religion, nurturing the soul, maintaining reason, caring for offspring and maintaining the property. Thus, violence against humans on any basis either in the domestic or public sphere is fundamentally contrary to the main mission of God's teachings. Accordingly, the values of protection in the Islamic law as clear at its family law in Indonesia, Malaysia and Maldives are in line with the demands of humanitarian values at the global level. It also shares the same mission with efforts to reform family law in response to contemporary demands.

Conclusion

There are two conclusions from the above discussion. *First*, domestic violence is accommodated as a reason for divorce in family law in Indonesia, Malaysia (Negeri Sembilan, Federation of Penang, Selangor and Johor) and Maldives. Additionally, it is also implied at the *sighat taklik* divorce in both Indonesian and Malaysian family law. *Second*, the family law in both Indonesia and Malaysia enables both husband and wife to file for divorce due to domestic violence, while in the Maldives, the reason is only valid for a wife. This indicates that further effort for strengthening humanitarian values at the global level, such as human rights and gender equality, especially on the

³⁰ Alauddin Kharufa, *Syarh Qanun al-Akhwal asy-Syahsiyyah*, (Baghdad: Matba'ah al-Ma'arif, 1383/ 1963), Juz II, 392.

issue of domestic violence, has affected the legislative process at the national level, including at the family law.

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