



Interpretation of Incest According To the Mazhab Syafi'i and the Laws of Brunei Darussalam

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Abstract

Incest (Sumbang Mahram) refers to a sexual relationship between two individuals who are prohibited from marrying under Sharia law. If left unaddressed, incest can negatively impact the honor and integrity of a family, potentially leading to the severance of familial bonds known as qatl al-arham which may result in disputes and a loss of trust among family members. This raises the question of how incest is interpreted within mazhab Syafi'i and under the laws of Brunei Darussalam. This analytical study aims to provide a deeper understanding by exploring the differing perspectives of the Syafi'i jurisprudence and Brunei Darussalam's legal framework. To achieve this, the research employs a qualitative approach, specifically a library-based study, utilizing both classical and contemporary fiqh texts and relevant legislation such as the Religious Council and Kadi Courts Act, chapter 77, Brunei Penal Code chapter 22, and the Syariah Criminal Code Order, 2013. These sources are used to examine views on incest. A comparative analysis will be conducted between mazhab Syafi'i and the legislative provisions for both Syariah and Civil laws across various aspects. The study is expected to conclude that, according of mazhab Syafi'i, incest is classified as zinā. In contrast, under Brunei law, incest is described as a man and a woman having sexual intercourse who share a close familial relationship and are prohibited from marrying according to Islamic law.

Keywords: Sumbang Mahram, Incest, Zina, Mazhab Syafi'i, Brunei Darussalam Law

Abstrak

Inses (Sumbang Mahram) mengacu pada hubungan seksual antara dua orang yang dilarang menikah menurut hukum Syariah. Jika tidak ditangani, inses dapat berdampak negatif pada kehormatan dan integritas keluarga, yang berpotensi menyebabkan terputusnya ikatan kekeluargaan yang dikenal sebagai qatl al-arham yang dapat menyebabkan perselisihan dan hilangnya kepercayaan di antara anggota keluarga. Hal ini menimbulkan pertanyaan tentang bagaimana inses ditafsirkan dalam mazhab Syafi'i dan di bawah hukum Brunei Darussalam. Penelitian analitis ini bertujuan untuk memberikan pemahaman yang lebih mendalam dengan mengeksplorasi perbedaan perspektif dari mazhab Syafi'i dan kerangka hukum Brunei Darussalam. Untuk mencapai tujuan ini, penelitian ini menggunakan pendekatan kualitatif, khususnya studi kepustakaan, dengan menggunakan teks-teks fikih klasik dan kontemporer serta undang-undang yang relevan seperti Undang-Undang Dewan Agama dan Pengadilan Kadi, pasal 77, KUHP Brunei pasal 22, dan Perintah Hukum Pidana Syariah, 2013. Sumber-sumber ini digunakan untuk memeriksa pandangan tentang inses. Analisis komparatif akan dilakukan antara mazhab

Syafi'i dan ketentuan legislatif untuk hukum Syariah dan hukum Perdata di berbagai aspek. Penelitian ini diharapkan dapat menyimpulkan bahwa, menurut mazhab Syafi'i, inses diklasifikasikan sebagai zina. Sebaliknya, menurut hukum Brunei, inses digambarkan sebagai hubungan seksual antara laki-laki dan perempuan yang memiliki hubungan kekerabatan yang dekat dan dilarang untuk menikah menurut hukum Islam.

Kata kunci: Sumbang Mahram, Inses, Zina, Shafi'i Mazhab, Brunei Darussalam Law

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INTRODUCTION

Sumbang mahram, sometimes known as incest, is a moral transgression¹ that symbolizes the fragility of the family unit in society. It is viewed by the state as a moral decline and one of the major societal problems. The print and electronic media are paying more and more attention to this problem. Numerous causes contribute to incestuous behavior, which is detrimental to people as individuals, as families, and as a society. Incestuous partnerships can have negative health effects, including the potential for physical and mental problems in offspring and, in rare circumstances, even death.

Incest is considered a crime against humanity in social contexts. This violates the moral fabric of society and can cause social stigma for the families involved, even if the conduct is voluntary and victimless. The sanctions prescribed for people who commit this offense are found in both human and Islamic law. It's called 'zina with mahram' in Islamic law. Under the jurisdiction of the civil court in Brunei Darussalam, this offense is governed by Section 377A of the Brunei Penal Code, as well as by Section 178(3) of Unlawful Intercourse and Chapter 68 Zina of the Syariah Penal Code Order, 2013.

Therefore, this research will look at and evaluate how Mazhab Syafi'i and Brunei Darussalam law view incest. The Researcher also talk about a thorough comparison of these two viewpoints.

METHODS

This study uses a qualitative methodology, gathering data via library research and the analysis of relevant general reference sources, articles, journals, books, and legal documents like the Religious Council and Kadis Courts Act Cap. 77, the Brunei Penal Code Chapter 22, the Syariah Penal Code Order 2013, and others. To get reliable results, additional supporting information from semi-structured interviews with a number of

¹ Siti Zubaidah Ismail, *Undang-Undang Kesalahan Jenayah Syariah Di Malaysia* (Kuala Lumpur: Penerbit Universiti Malaya, 2017).

informants from law enforcement agencies is also thoroughly examined. The similarities and contrasts in interpretations between the two points of view are also analyzed and compared using a comparative method. The results of this study are intended to contribute to a better understanding of the variations in interpretation between the Mazhab Syafi'i and the legislation of Brunei Darussalam.

RESULTS AND DISCUSSION

1. Incest (Zina Mahram) According To Mazhab Syafi'i

Zina

The definition of zinā from both a linguistic and religious perspective carries the same meaning. According to the opinion of the fuqahā' of the Ḥanafīyyah school, zinā means a man having sexual intercourse with a woman in her front private part or qubul without any doubt or ambiguity. The Mālikī² jurists define zinā as intercourse that occurs outside of a legitimate marriage, without any semblance of marriage and without ownership. The scholars of the Syafi'i³ define zina as the act of inserting the male organ, even if only the glans or the equivalent of the glans, into the female genitalia with desire and without any doubt. According to the opinion of the jurists of the Ḥanābilah⁴, zina is defined as sexual intercourse with the genitalia or vagina of a woman who is not owned (by marriage).

From the explanation of zinā above, it is necessary to clarify the concept of ḥashafah, the degree of ḥashafah, and the consequences that follow from that rationalization. The head of the penis, or the circumcised portion of the genitalia, is referred to as ḥashafah in language.⁵

While some scholars refer to intercourse only, based on the understanding of zinā above, only the Shāfiyyah scholars explicitly mention the word ḥashafah or its equivalent, their meaning is the same, as intercourse is defined as the insertion of the male organ into the female vagina, with the minimum requirement being the

² Ibn Rushd al-Ḥafīd, *Bidāyah Al-Mujtahid Wa Nihāyah al-Muqtaṣid*, vol. 4 (Dār al-Salām, n.d.).

³ Al-Sharbīnī, *Mughnī Al-Muḥtāj*, n.d.

⁴ Ibn Qudāmah, *Al-Kāfī Fi Fiqh al-Imām Aḥmad*, vol. 4 (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1994).

⁵ Aḥmad Mukhtār ʿAbd al-Ḥamīd ʿUmar, *Muʿjam Al-Lughah al-ʿArabiyyah al-Muʿāṣirah*, vol. 1 (ʿĀlam al-Kutub, 2008).

immersion of the ḥashafah or its equivalent.⁶ The word "ḥashafah" describes a man who either has no ḥashafah or whose ḥashafah has been severed that is, it is submerged with the quantity of ḥashafah from a phallus that is still there.

The scholars of the Ḥanafiyah⁷, Mālikiyyah⁸, Shāfi'iyah⁹, and Ḥanābilah¹⁰ schools concur that the entry of the ḥashafah that necessitates the ḥadd for zinā is through the entrance of the entire ḥashafah; it is insufficient for only a portion of the ḥashafah to enter.

Mahram

Etymologically, the word mahram comes from the root word حَرَمَ (haruma) as masdar mim محرم (mahram). Its meaning is "forbidden," referring to family members who are prohibited from getting married.¹¹ According to fiqh, a mahram is a person who is either temporarily (muaqqat) or permanently (mu'abbad) prohibited from being married.¹² A man who is barred from marrying a lady for all time is known as a permanent mahram.¹³ A temporary mahram, on the other hand, just forbids a man from marrying a woman for a set amount of time. Marriage between them is acceptable if their relationship develops and they are no longer considered to be mahram.¹⁴

The definition of mahram given above divides it into three categories: first, mahram nasab¹⁵ (by blood) refers to people, such as siblings, children, and grandchildren, who are not allowed to marry because of their blood relations.

⁶ Al-Buhūti, *Sharḥ Muntahā Al-ʿIrādāt*, vol. 3 (: ʿĀlam al-Kutub, 1993); Al-Dusūqī, *Al-Sharḥ al-Kabīr Li al-Shaykh al-Dardīr Wa Ḥāshiyah al-Dusūqī*, vol. 1, n.d.; Ibn ʿĀbidīn, *Al-Dar al-Mukhtār Wa Ḥāshiyah Ibn ʿĀbidīn*, 2nd ed. (Beirut: Dār al-Fikr, 1992).

⁷ Ibn ʿĀbidīn, *Al-Dar al-Mukhtār Wa Ḥāshiyah Ibn ʿĀbidīn*.

⁸ Al-Kharshī, *Sharḥ Mukhtaṣar Khalīl*, n.d.; Al-Dusūqī, *Al-Sharḥ al-Kabīr Li al-Shaykh al-Dardīr Wa Ḥāshiyah al-Dusūqī*.

⁹ Al-Sharbīnī, *Mughnī Al-Muḥtāj*.

¹⁰ Ibn Taymiyyah, *Al-Muḥarrar Fī al-Fiqh ʿalā Madhhab al-Imām Aḥmad Bin Ḥanbal*, vol. 2 (Riyad: Maktabah al-Maʿārif, 1984).

¹¹ Ahmad Warson Munawwir, in *Kamus Al-Munawwir Arab- Indonesia Terlengkap* (Surabaya: Pustaka Progressif, 2002).

¹² Sayyid Sabiq, *Fiqh Al-Sunnah*, vol. 2 (al-Qahirah: Dār al-Hadi, 2009).

¹³ al-Raghib al-Asfahan, *Muʿjam Mufradat al-Fazh al-Qurʿan* (Beirut: Dar al-Fikr, n.d.).

¹⁴ Sayyid Sabiq, *Fiqh Al-Sunnah*.

¹⁵ Sayyid Sabiq.

Second, the term "mahram musaharah"¹⁶ (by marriage) designates those who are forbidden because of their marital links, like a man's stepdaughter or stepmother. Third, people who are forbidden from getting married because they breastfeed¹⁷, such a wet nurse and her foster child, are referred to as mahram rada'ah¹⁸ (by breastfeeding).

When someone is permanently forbidden from getting married because of their blood, marriage, or nursing, this is referred to as a permanent mahram (mu'abbad).¹⁹ Breastfeeding does not prevent marriage if it happens just once or twice. On the other hand, Imam Syafi'i states that breastfeeding twice results in the marriage being permanently prohibited.²⁰

The term "temporary mahram" (muaqqat) describes people who, in certain circumstances, are not eligible for marriage. In-laws, or brothers and sisters-in-law, women married to other men, women who are not Muslims until they become Muslims, women who have been divorced three times before getting married again, and women who have committed zina until they repent and perform istibra' (a time to make sure they are not pregnant) are a few examples.²¹

As conclusions, Mazhab Syafi'i view of incest (zina mahram) results from a combination of the concepts of zina and mahram. This is supported by the explanation of zina and mahram provided above. As opposed to mahram, which is the term for those who are not allowed to marry because of their blood ties, marriage obligations, or nursing status, zina is the act of sexual relations between a man and a woman who is not legally married. Whether zina is committed permanently or momentarily, incest happens when a person has zina with someone who is considered a mahram interm of Syarak.

2. Bruneian Law On Incest

Under Brunei law, the crime of incest (sumbang mahram) is regulated by both civil

¹⁶ Abî Bakr 'Uthmân bin Muhammad Syatta al-Dimyati al-Bakr, *Hasyiyyah l'anah AtThâlibîn*, vol. 2 (Dar al-fikr, n.d.).

¹⁷ Sayyid Sabiq, *Fiqh Al-Sunnah*.

¹⁸ Aldy Darmawan, Nurul Izzati, "HAJJ AND UMRAH TRAVEL FOR WOMEN WITHOUT MAHRAM" Vol 13 (2024).

¹⁹ Abî Bakr 'Uthmân bin Muhammad Syatta al-Dimyati al-Bakr, *Hasyiyyah l'anah AtThâlibîn*.

²⁰ Nadhrah Aina, Rusdiyah, and Sa'adah, "Konsep Radha'ah: Jumlah Persusuan Yang Menjadikan Mahram Menurut Para Ulama," *Indonesian Journal of Islamic Jurisprudence, Economic and Legal Theory* 1, no. 4 (December 20, 2023): 997–1001, <https://doi.org/10.62976/ijjel.v1i4.344>.

²¹ Aldy Darmawan, Nurul Izzati, "HAJJ AND UMRAH TRAVEL FOR WOMEN WITHOUT MAHRAM."

and Syariah laws, a practice known as legal dualism. Under Brunei's Syariah law, incest is known as illicit sexual intercourse. It is allowed under section 178(3) of the Religious Council and Kadis Courts Act CAP.77 (AMUI), as well as section 68 of the Syariah Penal Code Order 2013 (SPCO). In the meanwhile, section 377A of the Brunei Penal Code Chapter 22, describes incest in terms of Brunei's civil law.

Incest Provisions Under The Brunei Civil Court

Sect 377A of Chapter 16: Offenses Affecting the Human Body contains the definition of incest under the Brunei Penal Code Chapter 22. Incest is defined as follows in Section 377A (a) and (b) of Chapter 22 of the Brunei Penal Code:

“Whoever (a) being a male, has sexual intercourse with a female who to his knowledge is his mother, grandmother, granddaughter, daughter, sister or half-sister, or (b) being a female has sexual intercourse with a male who to her knowledge is her father, grandfather, grandson, son, brother or half-brother”.²²

Incest Provision Under The Brunei Syariah Court

Brunei Darussalam's history of zina (fornication) violations begins with the Hukum Kanun (Brunei)²³, which outlined the hadd penalty for zina offenses. Man and woman who were muḥṣan (married) were punished with one hundred lashes and a year of exile, whilst those who were not muḥṣan or ghairu muḥṣan (unmarried) were punished with one hundred lashes and exile. Either a confession or the unequivocal and unambiguous testimony of four free individuals who saw the act of intercourse were used to prove zina.²⁴ Islamic law was in effect prior to the Hukum Kanun's composition in 1582 CE, despite the fact that it had not yet been codified. During that period, incestuous cohabitation between siblings was the only known case of zina, and it happened in 1452 CE. Despite their death sentence, they were executed in accordance with royal customs because they were members of the Royal Family. They were told to dwell with provisions of food and tools in a

²² “Brunei Penal Code Chapter 22,” n.d.

²³ Haji Asri bin Haji Puteh, *Hukum Kanun* (Brunei: Dewan Bahasa dan Pustaka, 2003).

²⁴ “Hukum Kanun Brunei Fasal 41,” n.d.

carefully dug pit atop a hill. A monument discovered at their burial location bore the inscriptions of their honesty and willingness to bear the punishment.²⁵

For the crime of incest, the Brunei Syariah Court has no particular provisions. However, according to discussions with Syariah Prosecutor, incest under Brunei's Syariah law is prosecuted under the Religious Council and Kadis Courts Act (AMUI) and is covered by section 178(3) of Chapter X:

“Any person who has sexual intercourse with any person whom he or she is. and who he or she knows or has reason to believe that he or she is, forbidden Muslim law to marry, shall be guilty”.²⁶

A Comparative Study of Sumbang Mahram As per the Brunei Darussalam Law and the Mazhab Syafi'i

| CATEGORY | MAZHAB SYAFI'I | BRUNEI CIVIL LAW (Brunei Penal Code Chapter 22) | BRUNEI SYARIAH LAW (Religious Council and Kadis Courts CAP.77) | BRUNEI SYARIAH LAW (Syariah Criminal Code Order 2013) |
|------------|---|---|--|--|
| Definition | Intercourse between a man and a woman who are forbidden to marry according to Islamic law is considered | Intercourse between individuals who have certain familial relationships (such as mother, daughter, or | Known as "Prohibited Marriage Intercourse," if both parties are forbidden from marrying. | Penalized under zina provisions, which include hudud and takzir punishments. |

²⁵ Haji Awang Mohd Jamil Al-Sufri bin Begawan Pehin Udana Khatib Dato Seri Paduka Haji Awang Umar, *Catatan Sejarah Penghakiman Di Brunei Pada Zaman Dahulu” Dalam Sejarah Penubuhan Mahkamah Syariah Negara Brunei Darussalam* (Brunei: Jabatan Percetakan Kerajaan, 1426H/2005M).

²⁶ *Religious Council and Kadis Courts Act CAP.77*, n.d.

| | | | | |
|---------------------------|---|--|--|---|
| | incest or zina mahram. | siblings) is considered incest. | | |
| Punishmen | Hudud – punished with the same hudud penalty as zina (adultery). | Takzir punishment, including imprisonment, fines under 377A of the Brunei Penal Code. | Takzir punishment imprisonment | Hudud or takzir punishment, depending on the relevant provision. |
| Proof | Same proof as zina cases (including four witnesses or confession). | Based on evidence of intercourse with individuals listed as prohibited. | Applicable if there is evidence of prohibited intercourse between individuals who cannot marry. | Same evidence as zina cases, including confession or testimony from qualified witnesses.. |
| Element of Consent | Not considered, as the relationship is unlawful according to Islamic law. | Consent is crucial – if there is no consent, it is prosecuted under rape or sexual assault offenses. | Voluntary intercourse incurs takzir punishment; if not consensual, it may fall under other offenses. | Depends on zina provisions under Syariah Penal Code Order 2013 including categories of consent or coercion. |

| | | | | |
|-----------------------------------|--|--|--|---|
| <p>Specific Provisions</p> | <p>Included under the category of zina</p> | <p>Clear provisions for incest under section 377A of the Penal Code.</p> | <p>No specific provisions – categorized as illicit intercourse “forbidden Muslim law to marry”</p> | <p>Incest can be prosecuted under zina provisions</p> |
|-----------------------------------|--|--|--|---|

The Mazhab Syafi'i, Brunei Civil law, and Brunei Sharia law all have different interpretations of incest. The researcher takes the Arabic concept of incest; zina al-mahram, which is defined as having sexual intercourse with a mahram which prohibited by Islamic law. As such, the Mazhab Syafi'i offers a thorough justification of the categories of mahram as well as illicit sexual interactions. In the Mazhab Syafi'i, having sexual intercourse with a woman who is not allowed to marry a man is regarded as incest or unlawful sexual relations and is classified as zina. Thus, it is subjected to hudud punishment, and the evidence required is the same as that for the offense of adultery.

In Brunei's civil law, incest is considered an offense when a man engages in sexual intercourse with a woman whom he knows to be his mother, grandmother, granddaughter, daughter, sister, or half-sister. The same goes for women towards men.²⁷ Brunei's civil law clearly states the perpetrators, and according to the Commissioner of Justice, only individuals mentioned in the definition of incest under section 377A will be taken into account.²⁸ Perpetrators of incest under Brunei's civil law can face takzir penalties, including imprisonment and fine according to Section 377A of the Penal Code Chapter 22.

According to the Public Prosecutor of the Civil Court, incest offenses have indeed occurred, but there has never been a record of incest cases being tried in

²⁷ “Brunei Penal Code Chapter 22.”

²⁸ the Commissioner of Justice, July 22, 2024.

the Civil Court of Brunei. Instead, perpetrators of incest are charged under the offense of rape according to section 376(1) and assault on modesty under section 354(b) of the Penal Code, Chapter 22.²⁹ This is because the incestuous intercourse was not done consensually. The element of consent in sexual relationships is important to investigate in each case before formulating charges, in order to determine the appropriate laws.

In Brunei's Sharia law, there are no specific provisions for the offense of incest, whether under the Islamic Religious Council and Kadis Court CAP.77, or the Syariah Penal Code Order (SPCO) 2013. The offense of incest before the enforcement of the Syariah Penal Code Order (SPCO) 2013 is charged under section 178(3), which is "Prohibited Sexual Intercourse" of the Islamic Religious Council and Kadi Court Act, Chapter 77, if committed voluntarily. This section refers to cases where both parties are prohibited from marrying, which includes cases of incest. However, there is no specific section for incest cases under the Syariah Court.

The main difference between the offenses of incest or unlawful sexual relations with a mahram under Brunei's Syariah law, as stated in the Islamic Religious Council and Kadis Court Act, Chapter 77, is that these offenses are considered as extramarital intercourse and are only subject to takzir punishment. According to the Syariah Prosecutor's Officer, the offense of incest can also be prosecuted under Syariah Penal Code Order (SPCO) 2013, which is outlined in Part IV: Offenses, Chapter I. The provisions regarding adultery in the Syariah Penal Code Order (SPCO) 2013 are divided into seven chapters, namely chapters 68 to 74, which cover offenses that can lead to hudud and takzir punishments. The provisions regarding adultery can be categorized into several topics as shown in Table 1 below:

| BIL | MATTER | SECTION |
|------------|---|----------------|
| 1 | Zina (Adultery) | 68 |
| 2 | Punishment for zina | 69 |
| 3 | Punishment for zina where the offender is not <i>mukallaf</i> or has not attained age of baligh | 70 |
| 4 | Attempt to commit zina | 71 |

²⁹ Public Prosecutor of the Civil Court, July 27, 2024.

| | | |
|---|---|----|
| 5 | Attempt to commit zina where the offender is not <i>mukallaf</i> or has not attained age of baligh | 72 |
| 6 | Abetting commission of zina | 73 |
| 7 | Abetment to commit zina where the offender is not a <i>mukallaf</i> or has not attained age of baligh | 74 |

Perpetrators of incest can also be prosecuted under sections 68-74, which pertain to hudud or takzir punishments in the form of imprisonment or fines, provided that the evidence is sufficient.

CONCLUSIONS

Based on the explanation above, the researcher draws the conclusion that Brunei's Sharia Law, Brunei's Civil Law, and the mazhab Syafi'i each provide different interpretations of the concept of incest. In the mazhab Syafi'i, that act is considered as zina al-mahram, which is equivalent to zina. The perpetrator may face severe punishment, such as stoning or whipping, as prescribed for cases of adultery. Meanwhile, incest is defined more specifically in Brunei's Civil Law, where offenders can be subjected to takzir punishments such as imprisonment and fines, as this law emphasizes the awareness of familial relationships. The Brunei Syariah law does not provide a specific definition of incest. Overall, it can be said that Brunei's civil law indeed follows the mazhab Syafi'i through lineage alone, without considering the ties of affinity and breastfeeding. Meanwhile, the concept of incest under Brunei's Syariah law does not have a specific interpretation and is solely based on Islamic law, although it still prioritizes the use of the mazhab Syafi'i.

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