

***Iddah* Maintenance: Concept, Issues and Methods of Enforcement**

Asari, K. N.*, Makhtar, M., Hamid, N. A., Abdullah Asuhaimi, F. and Pauzai, N. A.

*Faculty of Law and International Relations, Universiti Sultan Zainal Abidin (UNISZA),
21300 Kuala Terengganu, Terengganu, Malaysia*

ABSTRACT

Al-Quran in surah At-Talaq verse 6 presents in a clear order that it is a mandatory obligation of the husbands to provide lodging, sustenance, and other things to their divorced wives during iddah period. However, husbands often neglect to bear this trust forcing the wives to file petition for their right. Nevertheless, cases have shown that very few women claimed maintenance after divorce for themselves. By neglecting their responsibility, it seems that the husbands are trying to waste the Syariah Court's time and challenge its credibility. The objective of this paper is to examine the concept, issues and methods of enforcement of *iddah* maintainance in the State of Terengganu, Malaysia. It also suggests the way forward to enhance the capacity of Syariah court in dealing with the issue. The authors adopted qualitative research method to gather data and they found that the weaknesses of the enforcement and execution of a court order can contribute to the non-compliance with court orders, especially with regard to maintenance orders.

Keywords: Enforcement weakness, *iddah* maintenance, non compliance, responsibility, Syariah court

INTRODUCTION

The public nowadays are often faced with divorce cases happening all the time that it is now considered a normal occurrence.

According to a research conducted in 2010 by the Department of Islamic Development Malaysia (JAKIM) there is an average of 3 divorces per hour for Muslim spouses in Malaysia, an average of 70 divorce cases per day, 2000 cases a month and 25,000 cases per year in the year 2011 (Utusan Malaysia, 2013).

Family disputes among Muslim couples would not end with the pronouncement of *talaq* or divorce as wives and children have the right to claim certain reliefs from the ex-husband. One of these reliefs is *iddah*

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E-mail addresses:

nisaa@unisza.edu.my (Asari, K. N.)

maheranmakhtar@unisza.edu.my (Makhtar, M.)

shikin@unisza.edu.my (Hamid, N. A.)

farhanin@unisza.edu.my (Abdullah Asuhaimi, F.)

nuramani@unisza.edu.my (Pauzai, N. A.)

* Corresponding author

maintenance. In section 59(1) of Islamic Family Law (Federal Territories) Act 1984, it is the jurisdiction of the Syariah Court to order a Muslim man to pay maintenance to his wife or his ex-wife (equivalent to section 58 of the Administration of Islamic Family Law (Terengganu) Enactment 1985). In section 65(1) of the same Act provides that it is the right of a divorced wife to claim maintenance from her ex-husband during her period of *iddah*. Regardless of these important provisions, cases have shown that many of the ex-husbands are unwilling to pay maintenance based on several factors; among others being the husband's new commitment (new wife or children), a long-standing problem between the husband and wife (or ex-wife) that the wife is not cooperating, the ex-husband passing on his responsibility to the new husband of his ex-wife, or because the husband (or ex-husband) has no job and no source of income, and there are cases where the husbands know that a state syariah law is confined to that particular state and not enforceable outside it (Ariff, 2002).

Furthermore, some of ex-wives are also unwilling to claim maintenance because of the time and cost taken to get a relatively small amount of money; not bothering to lodge complaints against the ex-husbands; and lack of awareness of the legal provisions to enforce their financial rights (Azhari, 2005). The objective of this paper is to examine the concept, issues and methods of enforcement of *iddah* maintenance. The authors adopted qualitative research method to gather data by way of library

research on reference such asal-Quran, Al-Hadith and text books, journal articles and manuscript materials or brochures available in Syariah Court, Syariah Judiciary Department Malaysia (JKSM), Social Welfare Department, Department of Family Development and Enforcement, Social Institute of Malaysia (ISM), JAKIM and IKIM. It was found that the weaknesses of the enforcement and execution of a court order can contribute to the non-compliance with court orders, therefore this paper suggests the way forward to enhance the capacity of Syariah court in dealing with the issue.

THE CONCEPT OF *IDDAH* MAINTENANCE

The word *nafkah* derived from an Arabic word 'infaq' which means giving something. Wahbah al Zuhayli (1989) defines *nafkah* as 'someone provided something to meet the needs of people under his responsibility in the form of food, clothing, and shelter. It is also defined as 'the spending for someone's maintenance in the form of food, clothing and shelter, and the consequent price of water, fat, lamp and etc.' (Al-Jaziri, 1969). The responsibility of husband in providing maintenance for the wife and children is evident in the Al-Quran surah An-Nisa', verse 34 where Allah says: "Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth." (An-Nisa': 34).

The duty to provide *iddah* maintenance begins at the moment of pronunciation

of *talaq*. *Iddah* literally means number or counting (Al-Jaziri, 1969). It is the waiting period of a divorced woman before she can engage into another marital relationship (Abdullah, 2009). In Al-Baqarah verse 228, Allah has provided that for divorced women, the waiting period should be three menstrual cycles and in the same *surah* verse 234, the waiting period for women who are separated due to the death of the husband shall be four months and ten days. The Syafi'i School provides that the wife's maintenance is a debt due by the husband and arrears are recoverable by the wife. In deciding the amount of maintenance to be given to the wife, there are certain considerations that need to be taken into account. Those considerations are the earning capacity of the husband and the financial needs of the wife. A wife's right to maintenance may cease when the wife dies, the wife is disobedient (*nusyuz*) or remarries (Al-Jaziri, 1969).

THE LAW ON IDDAH MAINTENANCE IN MALAYSIA

Section 58 of the Administration of Islamic Family Law (Terengganu) Enactment 1985 provides that the court shall order a man to pay maintenance to his former wife unless if the wife is determined to be *nusyuz*, or unreasonably refuses to obey the lawful wishes or commands of her husband.

In the case of *Wan Alwi v. Syarifah Sapoyah* [1988] 6 JH 259; the learned Kadhi of Sarawak when deciding the case in relation to the claim for maintenance during *iddah* stated that according to Islamic

law a wife who has been divorced by her husband is entitled to maintenance if a wife is divorced by *talaq raj'i* or is divorced while the wife is pregnant and she does not commit any act which can be considered as *nusyuz*. In *Noor Bee v. Ahmad Shanusi* [1978] JH [1401H] 63; the learned Kadhi of Penang stated that the right of maintenance during *iddah* if not paid would become a debt due by the husband to his divorced wife. However, the right to residence if it is not claimed during the *iddah* period, the right shall elapse. In *Rahaniah v. Haji Ujang* [1983] 4 JR 270; the divorced wife made a claim for the payment of the *iddah* maintenance calculated at RM300 a month for the period of 3 months and 10 days, amounted to an overall amount of RM1000. The Qadhi made a reference to the al-Mughni al-Muhtaj that explicates: "it is incumbent to provide a woman who has been divorced by a revocable divorce, maintenance for her expenses and garments". The Qadhi assessed the amount of maintenance that was payable at RM6 a day. Thus, the husband was ordered to pay RM600 for the *iddah* period of 100 days.

MAINTENANCE ORDER AND ITS METHODS OF ENFORCEMENT

Enforcement for payment of money is a well-established method in Syariah procedural law. In Terengganu, the Syariah Court Civil Procedure (Terengganu) Enactment (SCCPTE) 2001 covers the procedure for maintenance order in family law cases. Based on Part XVIII Chapter 3 of the Syariah Court Civil Procedure

(Terengganu) Enactment 2001, the types of enforcement and execution used by the judgment creditor can be made using the following methods: (i) Enforcement Order; (ii) Seizure and Sale Order; (iii) Ownership Order; (iv) Transfer of Ownership Order; (v) Hiwalah (Garnishment or, Transference of Liabilities); (vi) Proceeding; (vii) Judgment of Debtor Summon; (viii) Committal Proceeding; and (ix) Attachment of salary. Among the most common being the following:

Judgment Debtor Summons

The judgment creditor who is entitled to enforce the judgment may require the judgment debtor who is liable under the judgment to appear in Court to be examined orally as to his capacity to pay or settle the judgment debt and to secure any property which may be used for such payment (Section 176 SCCPTE 2001). In theory, this mode of execution seems to suggest the best method in ensuring that the judgment debtor is able to comply with the court's order effectively. According to the provision, an inquisitorial examination will be conducted by the court on the judgment debtor or other witnesses on *iqrar* to determine the financial standing of the judgment debtor through his salary, expenses and his physical appearance. This is also an effective way to review from time to time the judgment debtor's financial capacity to pay the judgment debt (Mokhtar, 2006).

In practice however, most cases faces difficulties in serving summons and notice of appearance especially if the address of

the judgment debtor is not known. If such event the judgment creditor may apply for a judgment notice requesting the judgment debtor to appear in court to show cause as to why he should not be committed to prison for failure to comply with the summons (Section 179). When this order is also not obeyed, the court will resort to issuing a warrant of arrest as the last option to force appearance of judgment debtor in court (Section 178(2)), as most people will feel threatened by an order of imprisonment and would rather settle the debt owing. Despite its advantage, it is not always easy to get full cooperation from enforcement agencies such as the police and syariah enforcement officers to serve a warrant of arrest. Cases have often been struck out or dismissed by the court due to the problem of debtor's whereabouts are not known and failure of judgment creditor to appear before the court without any particular reason.

Attachment of Earnings and Other Periodic Payments

Another type of enforcement of *iddah* maintenance is payment by way of attachment of earnings order, allocating money from the defendant's wages to pay the debt. The enforcement of this method is provided in the (Married Women and Children (Enforcement of Maintenance) Act 1968. Where an attachment of earnings order is made, the defendant's employer shall be required to make out of the earnings falling to be paid to the defendant payments in satisfaction of the order (Section 5 MWCEMA). After taking into account

the resources and needs of the defendant as well as the needs of persons under his responsibility the court will determine the reasonable amount to be attached. Section 7 of MWCEMA 1968 directs that the defendant and his employer are duty bound to comply with the order, failure to do so will cause the defendant or his employer to be liable to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand ringgit or both (Section 12 MWCEMA).

In cases where the defendant is self-employed, Section 13 MWCEMA provides the court to make an order for the payment of money directly to the court. In the event of non-compliance of the order, the court may call upon the defendant to show cause. Failing this, the court may proceed to the last resort, by issuing a warrant for the attachment and sale of the property belonging to the defendant. The SCCPT also provides on attachment of earnings order, one of which is to attach the income of the judgment debtor (Section 159 SCCPT). The enactment is however silent on the nature and enforcement of attachment.

Seizure and Sale

When a debtor refuses to pay his debts even though he is capable of doing so, the judge may order the debtor to sell his property and settle the debts (Section 159(1)(a) of the SCCPT). In executing seizure and sale, the judge may seize the debtor's property and sell it. Aside from money and movable properties, other properties such as shares, stocks, debentures, and bonds can also be

seized to execute the court's order of seizure and sale (Section 160 SCCPT).

Hiwalah

Section 161(1) of the SCCPT defines property which can be the subject matter of *hiwalah* to include debt due to the judgment debtor. The civil courts have decided that Employee Provident Fund (EPF) can be used for the claim of financial rights though it is acquired by the sole effort of one party. Thus, in deciding the proportion of the claim, the acquirer will get a greater portion (*Lim Kuen Kuen v. Hiew Kim Fook & Anor* [1994] 2 MLJ 693; *Ching Seng Woah v. Lim Shook Lin* [1997] 1 MLJ 109). Section 53A of the Employees Provident Fund 1991 provides that the Board may order the transfer of a sum of money from the account of a member of the Fund into the account of the receiver upon a court order that it is a matrimonial asset.

Committal order and Contempt of Court

Section 147 of the SCCPT provides that any person who is directed by any judgment of the court to comply with the order without demand and when there is a failure to comply, the person may be deemed to be a contempt of court. The law provides for a protection for the ex-wife to enforce maintenance order for the payment of money whereby section 229 empower the court to make an order of committal for a period not exceeding six months or may impose a fine not exceeding two thousand ringgit (Form 46 of the Third Schedule).

THE WAY FORWARD

The Family Support Division (BSK) of the Syariah Judiciary Department Malaysia (JKSM) has adopted several measures to ensure the ex-husband complies with the maintenance order issued by the court. The BSK in collaboration with JKSM's Information Technology Division, has established 'E-Maintenance' option whereby once a Syariah court order is issued, the order is automatically incorporated into BSK's databank. The databank would give access to the officer in charge to follow up with the respective claimant and enquire as to whether the husband (or ex-husband) has made the payment. This mechanism is adopted not only to ensure only that the husband pays the maintenance, but also to prevent the maintenance accumulating into arrears, making it difficult for the husband to settle the amount. In addition, the BSK is now providing for trust fund to provide for interim maintenance based on the amount of maintenance decided by the Syariah Court. This interim payment is only available for six months but the BSK has the jurisdiction to extend the assistance based on approval by the Trust Fund Committee. This trust fund is deemed as debt owed by the husband (Ariff, 2002).

CONCLUSION

Regardless of how comprehensive an act/ enactment may be, it cannot promise the efficient management of court cases, especially when there is delay in compliance of the court order. As in any other divorce cases, the major reason for delays in

compliance with a court order comes from the judgment creditor or the judgment debtor itself (Ismail, 2011). The wordings of the provision suggest that the order obtained should be based on mutual agreement between the parties, however it still does not guarantee that the order will be complied with by the parties.

In judgment debtor proceedings another major reason for delays are problems in executing summons and warrant of arrest. The fact that it is not easy to get full cooperation from enforcement agencies such as the police and syariah enforcement officers, the judgment debtor disappearing and keeping their whereabouts a secret, and orders obtained *ex parte*, are reasons for the problem. Nevertheless, this type of proceedings offers great advantage if executed properly. For example, in conducting examination of judgment debtor, it is advisable that the judgment creditor can get information regarding the properties of the judgment debtor with the relevant authorities such as the Land Office, Securities Commission, banks, and Department of Road Transportation, where appropriate (Abdullah & Mohd Zin, 2012). Thus, each of the parties have their own roles in ensuring the success of the implementation and enforcement action of any order of the Syariah Court. Furthermore, the working of an effective mechanism cannot depend solely on the legal process, and must be accompanied with legislative and administrative cooperation. To conclude, the process of enforcement of *iddah* maintenance orders in the Syariah

Court can be accelerated if all parties, especially the judgment debtor, cooperate and comply with the existing mechanisms.

REFERENCES

- Abdullah, M. H. (2009). *A socio-legal study on financial rights of Muslim divorced women and its effects on family welfare* (Doctoral thesis), International Islamic University of Malaysia, Malaysia.
- Abdullah, M., & Mohd Zin, N. (2012). How divorced women can effectively enforce the financial support orders: The legal and administrative actions. *International Journal of Humanities and Social Science*, 13.
- Al-Jaziri. (1969). *Kitab al-fiqh cala al-madhahib alarbachah*. Mesir: Al-Maktabah alTijariyyah al-Kubra.
- Ariff, M. M. (2002, April 7). Husband needs to pay maintenance for wife and children. *The Malaysian Times*. Retrieved from <http://www.themalaysiantimes.com.my/husband-needs-to-pay-maintenance-for-wife-and-children/>
- Azhari, R. (2005). *Sulh dalam perundangan Islam: Kajian di Jabatan Kehakiman Syariah Selangor Darul Ehsan*. Kuala Lumpur: University of Malaya.
- Ismail, S. Z. (2011). Justice delayed is justice denied? Divorce cases management in Malaysia Syariah Court. *International Conference on Management 2011*, 977-987.
- Mokhtar, M. F. (2006). *Prosedur saman penghutang penghakiman (SPP/JDS) & notis penghakiman (Buletin JAKESS No.4)*. Malaysia: Jabatan Kehakiman Syariah Selangor.
- Tiga pasangan Islam bercerai setiap jam di Malaysia. (2013, Ogos 9). *Utusan Malaysia*. Retrieved from http://ww1.utusan.com.my/utusan/Dalam_Negeri/20130809/dn_05/3-pasangan-Islam-bercerai-setiap-jam-di-Malaysia
- Zuhayli, W. A. (1989). *Fiqhu al-Islam wa Adilahu*. Beirut: Dar al Fikr.

