

ENFORCEMENT OF NAFKAH ORDERS IN THE
SYARIAH COURT OF MALAYSIA: A PROPOSAL FOR
THE ESTABLISHMENT OF A FAMILY FUND

BY

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ABSTRACT

This study is of dual purposes. Firstly it is to examine and analyse the procedural law, the system and mechanism used for the enforcement and execution of nafkah orders in the Syariah Court. The study is based on the premise that the procedural law is instrumental to the delayed and failed enforcement and execution of the nafkah court orders. Its agency the Family Support System (BSK) is examined as to the extent of its capacity to facilitate and expedite the enforcement and execution of the nafkah Orders. Secondly, the study also examines the viability of establishing a Family Fund to manage the payment of nafkah. It is the purpose of this study to examine various Funds found in this country. Whilst also benchmarking against some Funds found in some countries overseas to propose for the setting up of a Family Fund as a solution to the failure of payment of nafkah to deserving parties. This study adopts both doctrinal and non-doctrinal method. Analysis of data is based on qualitative analysis and the World Bank methodology. The qualitative method draws data from the Syariah principles, classical texts of the Muslim jurists, contemporary legal writings, the Malaysian Islamic Family laws, legislation, articles and cases both from within the country and other jurisdictions. The World Bank methodology is used to assess the efficiency of the procedure and mechanism on the three main aspects, namely time, costs and process which are indicators of delays and failed enforcement of the Syariah Court Orders. The study revealed that delays are the main complaints of the enforcement and execution of the Maintenance orders. Further it is proven that the process for enforcement and execution are governed by the procedural law which is proven to be complex allowing gaps for delays and increase in costs. Hence there is a need to reform the existing procedural law by removing the provisions that cause delays and to further simplify the proceedings to reduce bureaucracy. The findings indicated that an effective mechanism requires creativity and responsibility of courts personnel which include lawyers and litigants. Also the ingenuity and activism of judges to exercise their wisdom and discretion towards fair and speedy decisions. Judges lacking of empathy and absence of compassion lead to the present state of flux and uncertainties. It is proposed there is a need for a major and comprehensive overhaul of the of the court proceedings. The court set up is to be robust assimilating the administrative and judicial equation. Whilst admitting that an enhanced and more efficient procedure and proactive court system and personnel will improve the enforcement and execution of nafkah orders, the study demonstrated that financial constraint is the bigger obstacle to its success. It is found many defaulters are those without the means to make payments due to commitments such as having remarried or simply men of straw. Therefore, as a solution it is proposed a Family Fund or nafkah Bank is to be set up. This is to provide a source of fund made available for nafkah issues in particular as a preferred mode to the enforcement and execution of nafkah orders.

ملخص البحث

هذه الدراسة ذات غرض مزدوج. أولها، دراسة وتحليل قانون الإجراءات والآلية المستخدمة في تنفيذ أوامر النفقة في المحكمة الشرعية. وتستند الدراسة إلى فرضية أن قانون الإجراءات هو أداة فعالة في تأجيل وفشل تنفيذ أوامر محكمة النفقة. وتدرس الوكالة المعنية بنظام دعم الأسرة (BSK) من حيث مدى قدرتها على تيسير وتسريع إنفاذ أوامر النفقة. ثانياً، تبحث الدراسة أيضاً جدوى إنشاء صندوق للأسرة لإدارة سداد النفقات. والغرض من هذه الدراسة هو دراسة مختلف الصناديق الموجودة في هذا البلد، في حين أيضاً يتم مقارنتها مع بعض الصناديق الموجودة في بعض البلدان في الخارج وذلك لاقتراح إنشاء صندوق الأسرة كحل لفشل دفع النفقة للأطراف المستحقة. تتبنى هذه الدراسة كلا من الأسلوب التقليدي وغير التقليدي في كتابة البحوث القانونية. ويعتمد تحليل البيانات على التحليل النوعي ومنهجية البنك الدولي في ذلك. وتُستمد الطريقة النوعية البيانات من مبادئ الشريعة، وأقوال الفقهاء، والكتابات القانونية المعاصرة، وقوانين الأسرة الإسلامية الماليزية، والتشريعات، والمقالات، والقضايا من داخل البلد ومن ولايات قضائية أخرى. وتستخدم منهجية البنك الدولي لتقييم كفاءة الإجراءات والآلية فيما يتعلق بالجوانب الثلاثة الرئيسية، وهي: الوقت، والتكاليف، وسير العملية، والتي هي مؤشرات على التأخيرات والفشل في إنفاذ أوامر المحكمة الشرعية. وقد ثبت أن عملية التنفيذ يحكمها قانون الإجراءات الذي يعتبر معقداً مما يسمح بوجود ثغرات في حالات التأخير وزيادة في التكاليف. ومن ثم، فهناك حاجة إلى إصلاح قانون الإجراءات القائم بإزالة الأحكام التي تسبب التأخير، وزيادة تبسيطه للحد من البيروقراطية. وأشارت النتائج إلى أن الآلية الفعالة تتطلب مسؤولية من موظفي المحاكم بشكل عام. وكذلك براعة القضاة في حسن تقديرهم تجاه قرارات عادلة وسريعة. فالقضاة الذين يفتقرون إلى التعاطف يؤديان إلى الحالة الراهنة من التقلب. ومن المقترح وجود حاجة إلى إجراء إصلاح شامل لإجراءات المحكمة لاستيعاب المعادلة الإدارية والقضائية. وفي حين أقرت الدراسة بأن زيادة كفاءة الإجراءات سوف يحسّن في إنفاذ أوامر النفقات، وقد أظهرت الدراسة أن القيود المالية هي أكبر عقبة أمام نجاحها، فقد وُجد أن العديد من المتخلفين عن السداد من الأزواج هم أولئك الذين ليس لديهم وسائل لسداد المدفوعات بسبب التزامات مثل الزواج مرة أخرى أو ببساطة رجال لا وزن لهم. لذلك، يُقترح إنشاء صندوق عائلي أو بنك نفقة لتوفير مصدر تمويل متاح لقضايا النفقات على وجه الخصوص كطريقة مفضلة لتطبيق وتنفيذ أوامر النفقة.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigation, 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 institution.

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Arahan Amalan Mahkamah Syariah No.2 Tahun 2013

LIST OF ABBREVIATIONS

LWN	Versus or against
TH	Tabung Haji
EPF	Employee Provident Fund
BSK	Family Support Division
JH	Jurnal Hukum
MLJ	Malayan Law Journal
CJ	Chief Justice
AIFS	Australian Institute of Family Studies
App	Appendix
FMS	Federated Malay States
FMSLR	Federated Malay States Law reform
GH	general hypothesis
i.e.	that is
ibid	(ibidem): in the same place
id	(idem) the same below
IIDL	International Islamic Digital Library
JKSM	Jabatan Kehakiman Syariah Selangor
KPWKM	Kementerian Pembangunan Wanita Dan Keluarga
KWSP	Kumpulan Wang Simpanan Pekerja
n.d.	no date
p.b.u.h	peace be upon him
trans	translated
v	versus or against
vol/vols	volume/volumes

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Dato Wan Halim v Nik Zainab Nik Majid & seorang lagi (2009) 28/2 JH 295
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TRANSLITERATION

ا	a	خ	Kh	ش	Sh	غ	gh	ن	n
ب	b	د	D	ص	s	ف	f	ه	h
ت	t	ذ	Dh	ض	d	ق	q	و	w
ث	th	ر	R	ط	t	ك	k	ى	y
ج	j	ز	Z	ظ	z	ل	l		
ح	h	س	S	ع	°	م	m		

Short Vowels		Long Vowels	
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_____		ا+_____	
_____	ا	ى+_____	ī
/		/	
و	U	و	ū
_____		و+_____	

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND OF THE STUDY

This research examines the procedural laws¹ relating to the enforcement on maintenance (*nafkah*) in the Syariah courts. The issue pertaining to the enforcement of Syariah court *nafkah* order is a major concern since decades.² Despite the fact that the court is able to give orders pertaining to the amount that should be paid to the wife and children, the orders largely could not be enforced if the cooperation of the debtor could not be obtained and if the laws are not efficiently administered. Based on the statistics in 2016 alone, from all the number of divorces that occurred in the country only ten per cent of them applied for *nafkah* and out of that, only ten per cent are successful in getting their *nafkah* paid.³ This is a persisting phenomena as the current system is hampered by the lengthy and complex process,⁴ time consuming court procedure and unnecessary legal costs⁵ despite having various execution mechanism through the judgment debtors summons, seizure and sale, garnishment and imprisonment as well as the newly established *Bahagian Sokongan Keluarga* (BSK)

¹ The short title of the Syariah Courts Civil Procedure (Federal Territories) Act 1998 [Act 585] states that it is “An Act to make provisions relating to civil procedure for the Syariah Courts” and section 2 of the Act states that the “Act shall have effect in all civil proceedings commenced in any Syariah Court except as otherwise provided under any other written law or ordered by the Syariah Court”

² Ahmad Mohamed Ibrahim, (2000), “The Administration of Islamic Law in Malaysia”, Institute of Islamic Understanding Malaysia (IKIM), Ampang Press, xix.

³ Statistics for the year 2016 reported by the Department of Islamic Development Malaysia (JAKIM), see also Statistics of Muslim Divorces by States in Malaysia (1995-2007) (JAKIM) <http://www..islam.gov.my/informasi> (accessed on 12 Feb 2015).

⁴ This was endorsed by the newly appointed Syariah Chief Justice Y.A.A Adjunct Professor Dato’ Dr. Haji Mohd. Naim bin Mokhtar at the Fifth Educational Talk on Neglect of Children’s *Nafkah*, Banquet Hall, Club house PAUM on 23 April 2019 at 2pm-5pm.

⁵ Policy and Research Division, Syariah Judiciary Department Malaysia (JKSM)(2015) *Keberkesanan Bahagian Sokongan Keluarga dalam Membantu Menyelesaikan Ketidakpatuhan Kes Perintah Mahkamah Syariah Tahun 2011 -2015*, Putrajaya.

(Family Support Division) (hereinafter referred to as "BSK") which are still riddled with gaps and weaknesses.⁶

In Selangor, prior to the promulgation of the procedural laws and the Family Law Enactment, the Administration of Muslim Law, 1952 (Enactment No. 3) was applicable and it was found there were eighteen sections on proceedings of court orders and section 86 of the aforesaid Enactment 1952 provides only several provisions on the execution of the *nafkah* orders.⁷ Although, there are similarities in the provisions of the various State Enactments on the enforcement of the *nafkah* orders,⁸ its actual enforcement in all the fourteen states have been reported to be poorly carried out due to the difficulty in enforcing *nafkah* orders. Based on a research conducted on the enforcement of *nafkah* orders, the general reasons for the poor execution of the orders which have been identified are lack of judgmental dexterity in the application of the procedural laws, lackadaisical attitudes of husbands, uncooperativeness of related agencies, absence of disheartened applicants and the muted and gender discrimination of court personnel.⁹ The ground survey from the 1980s until early 2000s found that the *nafkah* orders were largely neglected in all the states.¹⁰ The neglect in the enforcement was proven to have occurred in all the fourteen states of Malaysia through a survey conducted by Yayasan Dakwah Islamiah Malaysia (YADIM) from the year 1984 until 1999. The information indicative of the

⁶ Policy and Research Division, Syariah Judiciary Department Malaysia (JKSM)(2015) *Keberkesanan Bahagian Sokongan Keluarga dalam Membantu Menyelesaikan Ketidakpatuhan Kes Perintah Mahkamah Syariah Tahun 2011-2015*, Putrajaya, 28.

⁷ Professor Madya Dr Mahmud Saedon Awang Othman, "Acara Mal Mahkamah Syariah –Suatu Analisis", *Jurnal KANUN Undang Undang Malaysia*, Disember 1990 2 KANUN (4), 117.

⁸ Reports tabled at the First 2009 BSK Working Committee meeting, Malaysian Syariah Judiciary Department, Prime Minister's Office, Putrajaya.

⁹ Road Show "*Kajian Soal Selidik ke atas Ibu-Ibu Tunggal di Seluruh Negeri-Negeri*" on 10 to 22 October by the BSK Jabatan Kehakiman Syariah Malaysia (JKSM)(2008), also based on the research findings of Nor Fadhilah binti Zakaria, "Pelaksanaan Perintah Nafkah Di Mahkamah Syariah. Kuantan dari Tahun 1995-2000", Masters Dissertation, Syariah and Law Department, Academy of Islamic Studies, University of Malaya, Kuala Lumpur, 2004, 122.

¹⁰ Zaleha Kamaruddin, *Delays in Disposition of Matrimonial cases in Syariah Courts in Malaysia (1990-1997)*, *IUM Law Journal*, Vol. 7 No. 1, (1999), 74.

occurrence of neglect was captured through repeated questions and pleas by estranged wives in all the states together with the admissions of the administrators of *nafkah* orders themselves during the many seminars held on women family rights conducted in all the states.¹¹ The same finding as gathered by the Legal Bureau of the Women's Wing of the United Malays National Organization (UMNO) or *Wanita* UMNO which was set up in the year 2000¹² where most of the complaints were made by divorced single mothers regarding enforcement of the Syariah Nafkah court orders.¹³ This finding is recently backed by a research on the performance of BSK which showed that the enforcement of *nafkah* were still unresolved.¹⁴ Another recent finding showed 32.5% and 12.1% of non-payment of *nafkah* to wives and 31.7% of non-payment to children.¹⁵

In the 1990s most of the states in Malaysia passed the laws relating to enforcement procedures which emulate the civil procedures in the civil courts.¹⁶ It is noted that the procedure in relation to the enforcement and execution of *nafkah* orders came about much later after the substantive Islamic family law was enacted. The delay in enacting the procedure to regulate enforcement mechanisms has contributed to difficulty and delay in enforcing the Syariah court orders. As such, some pre-conceived interpretations and applications of the procedures on enforcement were

¹¹ Seminars were conducted by YADIM in all the states of Malaysia from 1984 until 1999 where the Researcher was a speaker for the series of talks and had personal contacts with many single mothers who complained about *nafkah* issues as well as being left on their own and with children by their husbands.

¹² Report of the Bureau from 2009 until 2013, where the Researcher was the Chairman of the Complaints Bureau which received many complaints on non-payment of *nafkah*.

¹³ Compilation of reported complaints from the year 2000 until 2013 as recorded by the Wanita UMNO Complaints Bureau and the survey by Noor Aziah Awal from Universiti Kebangsaan Malaysia presented in the First BSK Working Committee Meeting JKSM, 2008.

¹⁴ Ibid.

¹⁵ Telenisa Infographic (2018), A Short Summary Based on the Telenisa Statistics and Findings a printed flyer of the Sister in Islam.

¹⁶ The Syariah Court Civil Procedure (Federal Territories) Act 1998 [Act 585] came into force in 1998 that is fourteen years after the promulgation of the Islamic Family Law Act (Federal Territory) 1984 [Act 303].

based on self interpretations of the courts.¹⁷ This has caused the present predicament in the administration of court practice and application of the court procedures and in which many of the court personnel were lacking in terms of the knowledge and skill in relation to the procedure on case management level which resulted in the case management being poorly handled.¹⁸

The current law as embodied in the Syariah Courts Civil Procedure (Federal Territories) Act 1998 [Act 585] specifically outlined and to provide several methods of enforcement of *nafkah* such as judgment debtor summons¹⁹ committal proceedings²⁰, seizure and sale²¹, *hiwalah*²², seizure and delivery.²³ These processes entail a prolonged procedure in courts since the practice of unnecessary delays which incur costs have been allowed by the courts. It has been observed that claims for *nafkah* by divorced wives are minimal, despite having the procedure for enforcement enacted.²⁴ The applicants are discouraged in making the application or claims for *nafkah* due to the long process, money and the general attitude of the courts.

Recognizing the problems faced by the single mothers in the enforcement of *nafkah* orders, BSK was established in 2009 as a Unit under the Syariah Judiciary Department of Malaysia or *Jabatan Kehakiman Syariah Malaysia*. It is a system created as an enforcement as well as a support agency to execute the court *nafkah* orders. Its establishment aims at ensuring that all *nafkah* orders made by the courts

¹⁷ This observation was made by the Researcher while handling several cases at the Syariah courts in the Federal Territories for the period between the year 2016 until 2017.

¹⁸ This information is based on the Researcher's own personal experience in handling Syariah cases at the Syariah Court in the Federal Territory as illustrated in the unreported case of Wani binti Abdullah.

¹⁹ Section 176 Syariah Civil Procedure Federal Territories Act 1998 Act 585 and Rules.

²⁰ Section 182 SCCPA Federal Territory Act 1998.

²¹ Section 160 SCCPA Federal Territory Act 1998.

²² Section 161 SCCPA Federal Territory Act 1998.

²³ Section 163 SCCPA Federal Territory Act 1998.

²⁴ Zaleha Kamaruddin, Delays in Disposition of Matrimonial cases in Syariah Courts in Malaysia (1990-1997), IJUM Law Journal, Vol. 7 No. 1 (1999), 74.

are complied with.²⁵ BSK in facilitating the enforcement of *nafkah* orders, has the authority to give a cash advance for eligible single mothers pending other court proceedings. The amount to be advanced is based on a formula determined by the court²⁶ and will only be dispensed with after a due diligence is done on the ex husband. After having exercised due diligence upon which the husband was found to be unable to repay the advanced sum, no advance will be paid out to the dependants.²⁷ Although, the BSK is a tool introduced to ensure no delay in the payment of *nafkah* and to execute *nafkah* orders without initiating a new proceeding, however it has its weaknesses and limitations. The fate of the aggrieved wives or children will be decided based on the due diligence test of the financial capability of the husband whereby advanced payment of *nafkah* are only given to the dependants if the husband has the financial capacity, leaving cases of indigent husbands or missing husbands to remain unresolved. It is imperative that a support system like BSK is to be enhanced and to create source of funds to overcome this problem and to upgrade the enforcement of the law.²⁸ Just recently EPF SURI was introduced to set up saving accounts for housewives with the government adding on to the savings to ensure housewives have savings of their own.²⁹ However, this is unrelated to the *nafkah* issues.

Other countries like Australia, New Zealand, Morocco and Spain have developed their own support system to enforce payment of maintenance. In Australia, the Child Support Scheme which was administered by the Department of Social

²⁵ Working Paper for the set up of the Family Support Division presented in the Majlis Kebangsaan Hal Ehwal Islam Malaysia (MKI) 2008 at the Prime Minister's Department.

²⁶ A Formula for the calculation of *nafkah* was presented by Dr. Roslina Che Soh and Dr. Noraini Hashim in 2008 during the process of the setting up of BSK under JKSM, Putrajaya.

²⁷ Working Paper for the set up of the Family Support Division presented in the Majlis Kebangsaan Hal Ehwal Islam Malaysia (MKI) 2008 at the Prime Minister's Department.

²⁸ Muslihah bt Abdullah@Abdullah, "Socio-legal Study On Financial Rights Of Muslim Divorced Woman and its effects on Family Welfare", (Ph.D thesis, IIUM, 2009), 267.

²⁹ SURI initiated by the Deputy Prime Minister in July 2018 reported by The New Straits Times (NST) Online accessed on the 5th July 2018.

Services was introduced in 1988 and several legislations on child support were enacted, amongst others, the Child Support Registration and Collection) Act 1988 [No. 3, 1988] and the Child Support (Assessment) Act 1989 [No. 57, 1989] to regulate matters relating to child support and payment of maintenance. New Zealand on the other hand empowers its Inland Revenue Department to manage the collection of maintenance due to be paid and are demanded from the father or ex-husband and failure to pay the amount due shall be deemed to be a state debt. In Morocco the payment of maintenance to the orphans becomes a responsibility of the state and treated as a welfare matter whilst in Spain, the availability of the data on the assets and income of its citizens facilitate the enforcement of maintenance payment.³⁰ These countries have overcome the procedural aspect by creating new procedure through administrative process. Therefore, this study is practically relevant in the current situation where enforcement of *nafkah* orders remains unresolved.

1.1 OBJECTIVES OF THE STUDY

The objectives of the study are as follows:

1. To study legal framework of *nafkah* from Islamic perspective.
2. To examine and analyze the statutory provisions and their application on the enforcement of *nafkah* orders and the support agency in enforcing the court order.
3. To analyze the strengths and weaknesses of the current Procedural Law in its enforcement as well as the Enforcement Agency (BSK).

³⁰ Interviewed with the relevant persons and observations made during visits to various countries Australia (2015), New Zealand (2018), Morocco (2016) and Cordova, Spain (2016).