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**ANCILLARY ORDERS ON DIVORCE IN  
THE SHARIAH COURTS: THE LAW  
IN SOUTH-EAST ASIA**

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**THIS DISSERTATION IS SUBMITTED  
AS A PARTIAL REQUIREMENTS FOR COMPLETING MASTER OF  
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## DECLARATION

I SWEAR THAT THIS DISSERTATION IS ORIGINALLY MY OWN WORK,  
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## PREFACE

Islam does not consider woman 'an instrument of the Devil', but rather the Qur'an calls her "muhsana"- a fortress against Satan, because a good woman by marrying a man, helps him keep to the path of rectitude in his life. It is for this reason that marriage was considered by the Prophet Muhammad S.A.W. as a most virtuous act.

In Islam, a woman is a completely independent personality. She can make any contract or bequest in her own name. She is entitled to inherit in her position as mother, as wife, as sister and as daughter. She has perfect liberty to choose her husband.

The worst calamity for a woman is when her husband passes away or when she was divorced by her husband leaving children with her. At this time the responsibility of maintaining the children is upon her own initiative. In Islam the divorced wife are protected by certain rights especially with regards to maintenance during iddah and maintenance of children. They also have a right for custody of children.

The idea of writing this topic is to examine the law in South-East Asia for ancillary reliefs of divorced woman which was practised by Shariah Courts. From the explanation given we can see the court's trend in giving judgment for any application by the divorced woman. Are they enjoy their rights or not?

The first part mainly deal with the provisions of Islamic law as regards to ancillary relief. References has been made to the Qur'anic verse and ahadith collection and also juristic opinions to support the arguments.

Chapter two, specifically deals with the law in Malaysia. The author has made a comparison between two main Act, i.e Islamic Family Law (Federal Territory) Act 1984 and Islamic Family Law Enactment of Kelantan 1983.

The following chapter, the author tried to look at the statutory provisions to other country in Southeast Asia, such as Singapore, Indonesia, Brunei and Philippines.

The last part, an attempt has been made to compare the situation in Sri Lanka, since there was a great development for Islamic Family law in that country.

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## بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ

### INTRODUCTION

The aim of Syariah is to establish a healthy family unit through marriage, but if for some reasons this purpose fails, there is no need to linger on under false hopes as is the practice among the adherents of some other religions where divorce is not permitted. Islam encourages reconciliation between spouses rather than severance of their relations. But where good relations between spouses become distinctly impossible, Islam does not keep them tied in a loathsome chain to a painful and agonising position. It then permits divorce.

Islam has permitted divorce reluctantly neither liking nor commending it. Said the Prophet (peace be on him):

قال ابن عمر رضي الله عنهما : قال رسول الله صلهم :  
ابغض الطول الى الله الطلاق ، ( رواه ابو داؤد وابن ماجه )

"Among lawful things, divorce is most hated by Allah." (Reported by Abu Daud and Ibnu Majah).<sup>1</sup>

That a thing is lawful yet detested by Allah means that it's permissible under unavoidable circumstances, when living together becomes a torture, mutual hatred is deep-seated and it becomes difficult for the two parties to observe the limit of Allah and to fulfill their

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<sup>1</sup> Sunan Abu Daud, Kitab At Talaq Vol 2 p 586.

marital responsibilities. In such a situation, separation is better and Allah says in Surah An Nisa';

وان يفرقا يغن الله كلا من سعته وكان الله  
وسيعا حكيما

"But if they separate, Allah will provide for each of them out of His abundance..." (4:130).

The Syariah emphasizes on reconciliation as a better course than divorce for the married partners and gives them opportunity to mend their relations if they gone sour. Therefore the Holy Qur'an prescribes a period of waiting after divorce has been pronounced so that a spell of temporary separation and suspension of conjugal relations may give the spouses time for rethinking and reconsideration in the interests of the family and children, if any, of the question whether divorce should be revoked or made final and irrevocable.

#### TREATMENT OF DIVORCED WOMEN DURING IDDAH

The Holy Quran prescribes the time when divorce should be pronounced and the treatment that should be given to the divorced woman during iddah. It says in Surah At Talaq ayat 1:

يا ايها النبي اذا طلقتم النساء فطلقوهن لعدتهن واجصوا العدة  
واتقوا الله ربكم. لا تخرجوهن من بيوتهن ولا يخرجن الا  
ان ياتين بفحشة مبينة وتلك حدود الله

"O Prophet, when you do divorce women, divorce them at their prescribed periods and fear Allah your Lord and turn them not out of their houses nor shall they themselves leave, except in case they are guilty of some open lewdness. Those are the limits set by Allah." (65:1).

In another ayat at the same Surah,

خَازَا بَلْعَن اَجَلِهِنَّ خَازَا مَسْكُوِهِنَّ مَعْرُوْفٍ اَوْ خَازَا مَعْرُوْفٍ  
وَاشْهَدُوْا ذُوِي عَدْلٍ مِّنْكُمْ وَاَقِيْمُوْا لِمَا هُوَ لِلّٰهِ

"When they fulfill their iddah either take them back on equitable terms or part with them on equitable terms; and take for witnesses two persons among you, endued with justice and establish the evidence as before Allah." (65:2).

Thus the divorced woman lives in the husband's house until she finishes her iddah. It is not lawful for her to leave it, nor must the husband turn her out of it. Even if she was not present in her matrimonial home at the time of the pronouncement of divorce or separation, it is essential for her to return to the house of the husband.

The Quran says in Surah At-Talaq :

لَا تُخْرِجُوهُنَّ مِنْ بَيْوتِهِنَّ وَلَا يَخْرُجْنَ اِلَّا اِنْ يَبْتَئِنَّ  
لِغِيْطَةٍ مَّبِيْنَةٍ .

"And turn them not out of their houses, nor shall they themselves leave except in cases where they are guilty of lewdness." (65:1).

## RIGHTS OF DIVORCED WOMAN IN ISLAMIC LAW

When there is a divorce between husband and wife, the wife is entitled for certain rights. These includes maintenance during iddah, consolatory gift or mut'ah, dowry, custody and maintenance of children and also jointly acquired property.

## MAINTENANCE OF WOMEN AND CHILDREN

Maintenance is the right of a wife and children to receive food, clothing and a residence and some other

essential services and medicine, even if the wife happens to be wealthy in her own right. Maintenance in this form is an obligation according to the Quran, the Sunnah and the consensus of the jurists. Where both spouses are above the age of puberty, it is the duty of the husband and not that of the wife, contrary to what happens in some Western countries today, to supply his wife and children with food, clothes and lodging on a scale commensurate with their social position and in accordance with the customs and habits of the society in which they live.

In the event of divorce, the divorcing husband is responsible for her residence and maintenance for the iddah period which is three menstrual courses or the total period of pregnancy of 3 months (in the absence of pregnancy and menstruation) after a pronouncement of divorce. The Qur'an explicitly commands men to fulfill his obligation of maintenance to divorced women during 'iddah.

The Holy Quran points out the responsibility of maintenance in cases of divorce in the following ayat of Surah al-Talaq:

اسكنوهن مما حيث سكنتم من وجدكم ولا تضاروهن لتضيقوا عليهن  
 وان كن اولت حمل فانتفقوا عليهن حتى يرضعن من لبنه فكل ارضعن  
 لكم فائوهن اجورهن والتمروا بينكم بمعروف .

"Let women in iddah live in the same style as you live, according to your means. Trouble them not in such a way as to make things difficult for them. And if they are pregnant, then spend your substance on them until they deliver the baby and if they suckle your child, give them recompense; and take mutual consent together

according to what is just and reasonable."  
(65:6).

In this verse, the residence and maintenance of a divorced woman is clearly made incumbent upon the divorcing husband until the termination of pregnancy which means until the expire of her 'iddah period, for the end of pregnancy marks the end of the 'iddah period of a pregnant woman. The maintenance to be thus provided by a divorcing husband to a divorced wife is to be according to his means and economic standard and also according to the divorced wife's requirement and standard of life enjoined during the marriage. However a woman who is separated from her husband by khul' is not entitled to any maintenance for the 'iddah period or to mata'-e-Talaq (parting gift from divorcing husband).

The husband's responsibility for the maintenance of his wife and his children by her pertains not only when they are living with him but continues in the event of divorce. There are some selfish people who may maltreat their wives and make their lives miserable after pronouncing the first divorce and while they are still in iddah. This is forbidden. A wife must be provided for on the same scale as her husband according to his station in life. There is still hope of reconciliation and even if there is not, yet the parting must be honorable.

In the event of pregnancy, the Holy Quran imposes additional responsibility. No separation is possible until after the child is born. Hence she must be properly

maintained. As for the child, it's nursing, welfare and similarly the care of the mother remain the father's duty. If the mother's milk fails or if circumstances arise which bar the natural course of the mother's nursing her child, it is the father responsibility to give the child to someone else to suckle at his own expense. This contingency however must not induce the father to cut down the reasonable maintenance to which the mother is entitled.

A divorced woman with children is not left unsupported even after the 'iddah period, for the divorcing husband is required to pay her wages for two years for feeding her children conceived through him. This amount, naturally is over and above the maintenance provided to her for the 'iddah period. If by mutual consent, however they agree to stop breast-feeding of the child before the expire of the normal feeding period of 2 years, then the divorcing husband will be released from the payment to her for feeding. He will however continue to be responsible for the maintenance of the child until he becomes a major if he is a male and until marriage if the child is a female.

The Holy Qur'an clearly says regarding the matter of maintenance in Surah al-Baqarah ayat 233 :

والوالدات يرضعن اولادهن حوليين كاملين لمن اراد ان يتم  
الرضاعة وعلى المولود له رزقهن وكسوتهن بالمعروف

"Mothers shall give suck to their offspring for two whole years, if the father wishes to complete the term. But he shall bear the cost



of their food and clothing on equitable terms."  
(2:233).

The verse specifically mentions the maintenance of the child so that no selfish people on either side may use the child as an excuse for driving a hard bargain, whether from the mother or the father

The father and the mother must conclude all the arrangements for the maintenance of the child by mutual consent. They must agree to some course which is both reasonable and equitable regarding the period before weaning, the maximum time of which is two years, even if a wet-nurse is engaged or if the child is fed on artificial milk and feed.

Further guidance on the subject is offered in the following verse:

لِيُنْفِقَ ذُو سَعَةٍ مِّنْ سَعَتِهِ وَمَن قَدِرَ عَلَيْهِ رِزْقُهُ  
فَلْيُنْفِقْ عَالِدًا وَاللَّهُ لَا يَكْفِي اللَّهُ نَفْسًا إِلَّا مَا أَسَاءَ  
بِسَعَدِ اللَّهِ بِعَدْعَتِهَا سَيِّئًا

"Let the man of means spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After difficulty, Allah will soon grant him relief."  
(65:7).

As befits a practical religion, The Shariah of Islam does not impose undue burden on either party. They must do their best in the interest of the child according to their means. If they act with honest integrity, Allah will provide a solution to their problem.

The necessity of providing maintenance is emphasized in the address the Prophet made during the Farewell Pilgrimage [Hajj al-Wida']:



"Beware of your treatment of women. You have accented them with the word of Allah and you have a duty to provide them with reasonable maintenance and clothing."<sup>2</sup>

In a hadith narrated by A'ishah, Hind bint 'Utbah once said to the Prophet,

"O Messenger of Allah, Abu Sufyan is miserly person. He does not provide for me and my son except whatever I take away myself secretly about which he does not know." The Prophet advised, "Take whatever is sufficient for you and your son in a reasonable way".<sup>3</sup>

According to Maliki jurists, it is the duty of the husband to provide accommodation for his divorced wife if he has consummated the marriage. No maintenance is due to a divorced woman, however except where the divorce is less than three pronouncements. But a pregnant woman, whether repudiated once or thrice is entitled to maintenance. A woman who has separated from her husband under khul' (divorce by giving something in return) is not entitled to maintenance except when she happens to be pregnant. But any woman who becomes separated from her husband through li'an (mutual cursing) cannot claim maintenance from that husband, even if she happens to be pregnant.<sup>4</sup>

According to the Maliki school, a wife observing her iddah due to the death of her husband is not entitled to maintenance. But she is entitled to accommodation if the

<sup>2</sup> Sayyid Sabiq, Fiqh al Sunnah Vol7 p. 86.

<sup>3</sup> Narrated by Al Bukhari and Muslim.

<sup>4</sup> Al Qaywarani, Risalah Ch 33: Bab Fil 'Iddah Wal Nafaq pp 98-101.

house she happens to be staying in, belonged to her husband or if the deceased had paid rent in advance.<sup>5</sup>

Imam Abu Hanifa says that she is entitled to her maintenance as well. A wife must not leave her house, either in the case of divorce or the death of her husband, until she has completed the iddah prescribed for the occasion. In the Hanafi school of law, as laid down in *Durr al-Mukhtar* the wife will be treated as *asl* (root) and the child as *furu'* (branch) in establishing priority in awarding maintenance, although both are inseparable and their maintenance is *wajib* according to the jurists of all schools.<sup>6</sup>

According to the Shafie school, a wife who has been irrevocably divorced cannot claim maintenance during her period of iddah from her husband, unless she is pregnant by him. But it appears that a woman who has been irrevocably divorced may claim a suitable lodging during the period of iddah. Maintenance is not due to a woman whose marriage has been dissolved by her husband's death or where her wrongful action has led to the divorce. According to the Shafie school of law, the wife's maintenance is a debt on the husband and arrears are revocable by the wife though there be no decree of the

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<sup>5</sup> *Ibid*, op cit pp 98-101.

<sup>6</sup> Abd. Rahman I. Doi, *Women in Syaria*, page 110.

court or a kadhi or mutual agreement in respect of such maintenance.<sup>7</sup>

In fixing the sum to be paid for maintenance, all the schools lay down the rule that the Kadhi in exercising his discretion should consider the rank and circumstances of both the spouse. But the following conditions must be fulfilled:<sup>8</sup>

1. It must be a valid marriage.
2. The wife must submit herself to her husband and be obedient to him.
3. The wife must give him free access at all times.
4. The wife must not refuse to accompany her husband when he travels unless strongly feels that during the journey her person and her property will not be safe.

If the above conditions are not fulfilled, a wife is not entitled to maintenance. The husband's duty to maintain his wife commences when she attains puberty and not before.

#### MUT'AH / CONSOLATORY GIFT

The divorcing husband has been advised by the Qur'an to present a parting gift (mut'ah) to the divorced wife. This gift or mut'ah though voluntary, according to some, has been signified as a sign of piety of the divorcing

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<sup>7</sup> An Nawawi, Minhaj Al Talibin, page 338.

<sup>8</sup> Sayyid Sabiq, Fiqh Al Sunnah op cit vol 7 pp 88-89.

husband, for it would indeed befit him to bestow a gift voluntarily on the woman who has once his wife and to part with her with grace.

Mohammad Ali Ash-Shobuny says:

"mut'ah is a payment from a husband to his wife, whether in the form of property, clothing etc."<sup>9</sup>

A wife who has been divorced without just cause by her husband has a right to claim mut'ah. It is considered as a compensation for the dissolved marriage. The payment of a reasonable sum of mut'ah has been clearly recommended by the Qur'an Surah al-Baqarah ayat 241 :

وللاطلاقات مناع بالمعروف . حقا على للاتقين .

"Reasonable provision should also be made for divorced women. That is incumbent on righteous men." (2:241).

In another ayat;

لا جناح عليكم ان طلقتم النساء ما لم يمسوهن وان تقرضوا  
لهن فريضة ومنعوهن على للموسع قدره وعلى للمقتدر  
قدره مناعا بالمعروف حقا على المحسنين .

"There is no blame on you if you divorce women before consummation or the fixation of their dower, but bestow on them a suitable gift the wealthy according to his means and the poor according to his means. A gift of reasonable amount is due from those who wish to do the right thing." (2:236).

There is no reason why a clear Quranic suggestion should be ignored or backways be sought to escape it.

<sup>9</sup> Rawai' al-Bayan fi Tafsir Ayat al-Ahkam, Ali ash-Ashobuni, juzuk 1, page 379.

According to the Shafie school of law, the payment of mut'ah is incumbent not only in the case where a woman has been divorced before consummation and before her dower is fixed but also in the case of every divorced woman, except a woman whose dower has been stipulated and who's divorced before consummation. The present is made incumbent according to Imam Shafie in the way of a gratuity or compensatory gift from the husband on account of his having thrown the woman onto a forlorn state by his separation from her. The gift is therefore incumbent only when it's the husband who repudiates the wife. The consolatory gift can take the form of money, clothing and other articles.<sup>10</sup>

#### MAHAR

The Dower (Mahr, Sadaq or Oqr, also referred to in the Qur'an as Nehla, Ajr and Fareedha portion) is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage.

In Islam, mahar or dower is a marriage gift from the bridegroom to his bride which becomes her exclusive property. Islam has elevated the status of the women as mahar is given as a mark of respect for her. Even if the marriage ends in divorce, the dowry remains the wife's property and the husband has no right to take it back, except in the case of khul' where the divorce takes place

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<sup>10</sup> Ibid., page 313.

at the request of the wife in consideration of the return of the whole or part of the mahar paid to her at the time of her marriage. It is clear stipulated in the Holy Qur'an, Surah an-Nisa':

وَأُولَئِكَ سَاءَ حَيْدَمَاتِهِنَّ لِلْحَلَةِ .

"Give women their dowry as a free gift....."  
(4:4).

Another verse in the Holy Qur'an declares;

وَأَنْ أَرَدْتُمْ اسْتِبْدَالَ زَوْجٍ مَكَانَ زَوْجٍ .....

"But if you decide to take a wife in place of another, even if you had given the later a whole treasure for a dowry, take not the least bit of back. Would you take it by slander and manifest wrong." (4:20).

This verse makes it clear that the dowry belongs to the divorced wife whatever it's value. The husband is not entitled to take it by force or threat or through slander. Every husband should fear Allah and have taqwa (piety) and refrain from usurping the rights of his former wife. The Qur'an further emphasizes:

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَى بَعْضُكُمْ إِلَى بَعْضٍ .

"And how could you take it when you have gone in unto each other." (4:21)

A divorced woman is entitled to take all her properties and gifts given to her. These must be delivered to her when she departs. The divorcing husband can't retract anything which he may have given her earlier. Her rights do not end still. The ex-husband is

also required to compulsorily pay her the mahar if still unpaid at the time of divorce.

According to the Hanafi jurist Al Kamal ibn al Humam (died 861 AH), "Dower has been ordered to underline the prestige of the marriage contract and to stress its importance. It has not been enjoined as a consideration like a price or a wage, otherwise it would have been set as a prior condition.<sup>11</sup> This is the reason why dower is neither an essential nor a condition for the validity, binding or effectiveness of the marriage contract. It's not mentioned as such in any modern Islamic legislation.

If the divorce occurs before consummation, the divorcing husband is bound to pay only half the amount of mahar if still unpaid. However if the mahar has not been stipulated and the divorce takes place before consummation, suitable gift must be presented to the divorced woman by the divorcing husband according to his economic means.

A marriage contract is deemed valid without any mention of dower. The classical jurists cite the authority of the Qur'anic ayat, Surah al Baqarah;

"It's no sin for you if you divorce women while yet you have not touched them, nor appointed unto them a portion (dower)." (2:236)

The jurists infer, that since no sin is committed by those who divorce their wives before marriage

<sup>11</sup> Fat-ul Qadeer Vol 3 (Cairo) p.143; al Kasani, al; Badaii Vol 4 p. 43.



consummation or agreement on dower and since divorce only occur after a valid marriage, therefore this verse proves that a marriage contract can be valid without any mention of dower.

#### HARTA SEPENCARIAN

Marriage does not in general, affect the personal status of Muslim woman. In Islam, a woman is a completely independent personality. She can make any contract or bequest in her own name. She is entitled to inherit in her position as mother, wife, as sister and as daughter. She retains her property and wages and earnings acquired or gained by her. Following a divorce, a woman can claim her property as being acquired during the marriage. She is entitled to sue and be sued in her own name in respect of her property and respect of any contract entered by her.

In the Holy Qur'an, Surah An-Nisa' Allah says;

ولا تمنوا ما فضل الله به بعضكم على بعض. للرجال نصيب مما اكتسبوا وللنساء نصيب مما اكتسبن. وسئلو الله من فضله. ان الله كان بكل شيء عليما.

"And in no wise covet those things in which Allah has bestowed His gifts more freely on some of you than on others: to men is allotted what they earn, and to women what they earn: but ask Allah for His bounty. For Allah has full knowledge of all things." (4:32).

This ayat is regarded as an authority for husband and wife to share the property jointly acquired by them during the marriage.