

How Divorced Women Can Effectively Enforce the Financial Support Orders: The Legal and Administrative Actions

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Abstract

The issue of inadequate enforcement of the financial supports order becomes an ongoing concern in Malaysia as well as in other countries. This paper aims to analyse the civil and criminal proceedings enforceable in the court of law against the defiance ex-husbands. Results of the content analysis revealed that the proper rules of civil and criminal procedure have been materialized to ensure the degree of impartiality in the administration of Islamic family law in Malaysia. On the other hand, the administrative machinery was found to have better enforcement power in tracking defaulters. Findings imply the need to boost up the legislative and administrative mechanisms to ensure effective execution of the financial supports order after divorce thus protecting the welfare of the divorced women. Comparative overviews with the practices from several Commonwealth and Middle East Countries where enforcement actions are in advance are also included.

Keywords: enforcement; financial supports; administrative actions

1.0 Introduction

A considerable amount of literature on divorce all over the world addresses the issue of economic challenge facing by the women after divorce (Gadalla, 2008; Zhan & Pandey, 2004; McKeever & Wolfinger, 2001), which includes the inadequate enforcement of financial support orders. Difficulties often arise in the enforcement for payment of financial supports for instance when the defendant is not in paid employment, which means that an attachment of earnings order is not possible to be made. As such, the enforcement of these legal obligations on the part of the ex-husband tended to be lax and is often left to the divorced wife. Research evidences around the world prove the incidence of the very low levels of payment and receipt of financial support after divorce (Behrens & Smyth, 2007; McLanahan & Booth, 1989; Amato, 2000). This indicates that to some extent, failure of the ex-husband to comply with the order of court tend to correlate with the likelihood of the divorced women falling into poverty after divorce (Morgan, 1989; Peterson, 1996; Maznah, 1999). Failure of the ex-husbands to comply with the court orders also becomes an ongoing concern in Malaysia, particularly for the Muslim divorced women. This paper aims to analyse the legal procedures and administrative action implemented by the Malaysian Syariah judiciary to enforce and execute the financial support orders in the event of non-compliance of the order.

2.0 Methods of Enforcement of Court Orders

Enforcement for payment of money is well established in the respective Syariah procedural law. All judgments and orders delivered by the courts for the payment of money must be complied with either by instalments or in a lump sum (Syariah Court Civil Procedure (Federal Territories) Act 1998 (SCCPA 1998), s 133 - s 134.

2.1 Attachment of Earnings and Other Periodic Payments

Enforcement for payment of money, which is widely used by the court in cases of financial supports after divorce, is the attachment of earnings order. It is a method by which money will be stopped from a defendant's wages to pay a debt. As such it will only help if the defendant is in paid employment. In case of divorce, a divorced woman may apply to attach the earnings of her ex-husband so as to ensure that he pays the *iddah* maintenance (maintenance during a waiting period following a divorce), *mut'ah* (compensation due to a divorce), arrears of maintenance, and child maintenance as ordered by the Syariah Court. Where an attachment of earnings order is made, the defendant's employer must attach the wages of the defendant to satisfy the order (Married Women and Children (Enforcement of Maintenance) Act 1968, (MWCEMA 1968), s 5. The court will determine the reasonable amount to be attached after taking into account the resources and needs of the defendant as well as the needs of persons for whom he should provide. Therefore, the defendant and his employer are duty bound to comply with such order (MWCEMA, s 7). The court has the power to penalize any failure to comply with the attachment of earnings order. Such failure includes failure of the ex-husband's employer to give written notice to the court if he has ceased to be the defendant's employer; or he fails to give to the court a statement of such particulars of all earnings of the defendant, which should be paid during such specified period (MWCEMA, s 8); or he gives a false statement on certain important matter. Upon conviction, the defendant or his employer shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand ringgit or both (MWCEMA, s 12).

Nevertheless, where the defendant is self-employed, the court can make such order for the payment of money directly to the court (MWCEMA, s 13). Upon receipt of such sum, the court will then pay it to the person for whose maintenance order is made or to the guardian of such person (*Ismadi v Zainab* (2005) JH 20 (1) 87). If the defendant neglects or fails to comply with the order, the court may call upon the defendant to show cause. If he fails to show sufficient reason and the sum of money under the order is still not being paid, the court may proceed to recover it by issuing a warrant for the attachment and sale of the property belonging to the defendant. However, if it cannot be recovered by such attachment and sale, the law provides that the court may direct the defendant to imprisonment for a term not exceeding one month for every such neglect or failure to comply with the order.

Nevertheless, imprisonment will not absolve the defendant from the obligation to pay the said sum of money, which he has neglected or failed to make payment. Once the payment so due has been paid or recovered by the process of law such imprisonment is then terminated. Imprisonment in this case can be considered as a threat for the defendant to make payment in order for him to escape the sentence. However, imprisonment is not the best solution in all situations; depending on the facts of each case, the financial capability of the defendant will determine whether it is an appropriate sentence. When a person defaulted in paying the money adjudged or ordered to be paid by him, the plaintiff may apply to the court for enforcement and execution of the order to be enforced through seizure and sale, garnishee proceedings or contempt of court as provided under the Syariah civil procedures.

2.2 Seizure and Sale

When it is clear to the judge that a debtor refuses to pay his debts while he has the means to do so, the judge can prohibit him from dealing with his property upon request from the creditor. The judge may order the debtor to sell his property and pay the debts (SCCPA 1998, s 159(1) (a)). In case of the debtor's refusal, the judge can seize his property beginning with the money that he possesses. If that is still not sufficient, then the judge can seize his other properties and sell it (*The Mejelle*, 2001; Al Zuhayli, 2000). However, the enforcement and execution by seizure and sale is only applicable in cases of claims for movable properties and the amount claimed is large (*Berita Harian*, 2006, p.12). The property that can be ordered to be seized to satisfy the court's order of execution includes money, shares, stocks, debentures, bonds, and also jewellery. Therefore, in a case where the ex-husband fails to obey the court order for financial supports, even though he is financially able to do so, the court can order for his property to be seized and transfer it to the ex-wife if the property is in the form of money. If the property is in the form of shares, stocks, debentures or bonds, which is not transferable by delivery, it shall be seized and sold after which the court can permit the transfer of the proceeds to the ex-wife to satisfy her claims. Nevertheless, execution by seizure and sale may cause difficulties to the ex-wife.

In terms of procedure for example, the law requires the person having the right to enforce judgment for payment of money to deposit a sum of money for expenses of the execution (SCCPA, s 164 (1)). Thus, for an ex-wife who has no income of her own, having to pay a sum of money in such a situation might be a problem. The matter could be worse when the execution involves property other than money, such as shares, stocks, debentures or bonds. This is because a period of more than fourteen days may be needed for the bailiff to sell the property, which means the ex-wife needs to provide more money as a deposit of expenses and she has to consider more trips to the court, which certainly increases her expenses. Otherwise the property may be released from the bailiff's keeping and all her efforts will be wasted. On top of that, an ex-wife may have certain knowledge about her ex-husband's properties such as his savings as well as his other movable property in the form of shares and so on, but she may not be able to furnish the details of the properties to the court. As such, this method of enforcement may not be appropriate to apply.

2.3 Garnishee Proceedings

A garnishee proceeding is another method of enforcement and execution of court order, which is relevant in the case of claims for financial rights. The proceeding is practical in the Malaysian context, such as when the property is in the form of shares or money held under the Employees Provident Fund (EPF). The issue of the EPF benefit as a personal property, or to be recognised as a matrimonial property which is liable for division in the event of divorce has been raised in quite a number of cases and has also been the subject of scholarly discussion under the Malaysian Islamic family law (Norliah, n.d.). In one research, it was claimed that the EPF money should be viewed as personal property rather than matrimonial property or jointly acquired property. As such, the money could be used to settle any claim for instance claims for maintenance, *mut'ah*, or debt in the absence of any other property (Suwaid, 2003). This is inconformity with the view of the Malaysian National Islamic Fatwa Council, whereby it has been declared that the EPF savings for the Muslims is not a joint matrimonial property liable to be divided in the event of divorce, but it is an individual asset. Hence, being a sole effort property, the EPF savings could be attached for the purpose of satisfying the claims for financial supports after divorce.

The garnishee proceeding is to be carried out with the leave of the court and the Treasury's written consent (SCCPA, s 161(d) (i)). If a debt due on a judgment is payable by instalments, the transferee is also liable to pay in accordance with the order for instalments (SCCPA 1998, s 161(2) (h)). Unfortunately, it is learned that moneys held under the Employees Provident Fund Act (EPFA) 1991 are protected from attachment of earnings order by the court; otherwise it would contradict the objective of EPF itself as a retirement fund as stated in s. 51 (Nik Affendi, 2006, p. 11). As such, it was proposed by the Human Rights Commission of Malaysia for the establishment of a mechanism to enable deductions for maintenance payments from the EPF accounts particularly the fathers' accounts who have defaulted in payments (Human Rights Commission of Malaysia, 2001). Such proposal is yet to be agreed upon by the government.

2.4 Committal Order

The law provides adequate protection for an ex-wife to enforce court order for payment of money in cases of failure to pay by the ex-husband. The proceedings for an order of committal are provided for under the general provisions of the Islamic Family Law Act (IFLA) 1984. Non-compliance with the orders of the court such as for the payment of *iddah* maintenance, *mut'ah*, arrears of maintenance, and child maintenance has been made an offence (IFLA 1984, s 132; SCCPA 1998, s 148(1) (c) reads together with s 151(1) (a)). The law provides that when an ex-husband wilfully fails or intentionally disregards to comply with the order of maintenance or *mut'ah*, the court is empowered either to impose fines or to convict the person with imprisonment. The term of imprisonment, where the payment is to be paid monthly, may not exceed one month for each month's payment that he did not pay (IFLA 1984, s 132(2) (a)). In other words, if he defaulted in payment by instalments for three months, he is to be sentenced to imprisonment for a maximum period of three months only. In any case, other than payment by instalments, the court may sentence such person to imprisonment for a term not exceeding one year for any payment remaining unpaid (IFLA 1984, s 132(2) (b)). This may refer to the situation where payment is to be made in a lump sum. Since, the law only provides for the maximum term of imprisonment, which is not exceeding twelve months; the minimum term might be as short as one month or less.

3.0 How to Prove the Solvency of an Ex-Husband?

Justice must not only be done but must manifestly be seen to be done. From the aspect of the divorced women's rights to financial supports, justice is done when the ex-husband complies with the court order without delay.

Defiance of the court order by an ex-husband means that a divorced woman has been treated unjustly thus causing harm to her interests. Since not all judgments or orders made by the Syariah Court have been abided by the judgment debtor, the law provides several options for the judgment creditor to take actions to enforce and execute the order under the civil proceedings or the Syariah criminal proceedings. The judgment creditor may choose any of such options or any combination that is reasonable in order to get her rights.

3.1 Judgment Debtor Summons

The proof of solvency of a debtor is pertinent under the Islamic law before any punishment is enforced for non payment of debt. According to Ibn Qayyim (2000), a majority of the Muslim jurists agree that a judge is permitted to imprison a debtor in order to ascertain his financial capability to pay debt. In such a case, imprisonment will serve as a threat to the debtor as some people are not willing to stay in prison while they can actually settle the matter instantaneously. The Malaysian Syariah procedural law provides that a judgment debtor is not to be detained in prison but he may be summoned to the court to be examined as to his financial ability to settle the judgment debt (SCCPA, s 176 (1)). The summons is not only to ascertain the best method that may be applied so that the judgment debtor can comply with the court's order effectively but also to review from time to time his financial capacity to pay the judgment debt (Mohd Fauzi, 2007).

In the judgment debtor summons proceedings, the examination will be conducted by the court in inquisitorial. The financial standing of the judgment debtor can be determined through his salary, expenses and his physical appearance (Mohd Fauzi, 2007). The purpose is to ascertain his living style such as whether he is driving a branded car, wearing expensive attire, and living in a luxurious house. Furthermore, it is also advisable that the judgment creditor can get some 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, whenever appropriate. If the judgment debtor is a businessman, the judgment creditor should get information pertaining to his business activities, which can be considered by the court in order to determine the best method of debt settlement.

Upon failure of the judgment debtor to comply with the summons, the judgment creditor can apply for a judgment notice requesting the former to appear in court to show cause as to why he should not be committed to prison for such refusal (SCCPA, s 179). The judgment debtor may be imprisoned for a maximum period of 30 days (SCCPA, s 181). However, the execution of the committal order may be suspended to enable the judgment debtor to pay the debt. Even though the judgment debtor is imprisoned, he can still pay the debt through the officer in charge of the prison and obtain his discharge (SCCPA, ss 183-184; Sariha, 2006, p.1).

3.2 Contempt of Court

An ex-husband's failure to pay financial supports is an offence of contempt outside the court as it is usually committed after a judgment and order for payment of money has been made by the Syariah judge (SCCPA 1998, s 229(1)). He may be imprisoned for a period not exceeding six months or may impose a fine not exceeding two thousand ringgit. However, before an order of committal can be made against a default person, he is given a notice to show cause as to the reason for his failure to obey the court's order. When the reason given by the defendant is acceptable by the court for which the former is found not to intentionally refuse to obey the order but has some valid reasons for doing so, no offence of contempt is committed. In *Roslaili v Ahmad Azman* (2005) JH 19(2) 283, the Syariah High Court Judge of Shah Alam explained that where a person refused or neglected to comply with the order within the specified time, the other party might apply for its enforcement by way of committal. Therefore, an order of committal does not necessarily begin with the proceedings for enforcement and execution of judgement, an order of seizure and sale or garnishee proceedings. The plaintiff can immediately apply for a notice to show cause against the defendant as to the reason why he should not be committed to prison.

3.3 Criminal Proceedings

An ex-husband who fails to adhere to the Syariah Court order for financial supports is also faces criminal penalties whereby he may have to pay fine not exceeding three thousand ringgit or merit arrest and imprisonment for a term not exceeding two years or to both (SCOA 1997, s 10). In case of an ex-husband who defies court order, the maximum fines imposed is somewhat reasonable, but jail sentences might be more appropriate as a deterrent punishment for those who so readily break the law and ignore the court order.

Thus, when an ex-husband defies a court order for financial support, the ex-wife may lodge a reasonable complaint to the authority, such as the police officer, who may arrest without a warrant and an order from a judge (SCOA 1997, s 18). The law further provides that a police officer for the purpose of arresting such person may pursue him in any part of Malaysia. Recently, the Department of Islamic Development and the State Islamic Religious Departments have agreed in principle to prosecute any party defying the orders of Syariah Court including the husband who refuses to pay maintenance to the wife and children (“Defiant of Syariah Court’s Order will be Prosecuted,” n.d.). As such, complaints can be lodged to the Chief Syariah Prosecutor, who will take action by prosecuting those who are found involved in cases of defying court orders according to the existing provision of the Syariah criminal law. The support at the Federal and the States levels will facilitate the divorced women to expedite action against the defiant ex-husband in order to protect her economic welfare in terms of her rights to financial supports. This reform has already been practiced in Morocco under the Moroccan Family Law whereby the public prosecutor is assigned to be a party to every legal action involving the enforcement of Family Law (Benjelloun, n.d.).

4.0 Current Approach on Enforcement Mechanisms

As a matter of fact, research indicates that the few reported cases of enforcement and execution of court orders in the Syariah Courts particularly those that relate to the financial support orders, does not mean that many ex-husbands complied with the orders; rather many women refused to take legal actions for several reasons such as, they were not willing to undergo the tedious and costly court proceedings in order to get a relatively small amount of money that they had bargained for, or they just did not bother to lodge complaints against the ex-husbands, or they did not know that there exist several legal provisions to enforce their financial rights (Raihanah, 2005). Since the implementation of the Malaysian Islamic Family law and the Syariah procedural law, the court enforcement seems to be the only method applicable to enforce a judgment or order particularly pertaining to maintenance order. Should the legal measures fail to generate payments, what are the alternatives that are available?

In several western countries such as Canada, New Zealand, Australia and United Kingdom, they have both categories of enforcement actions: administrative enforcement and court enforcement. Administrative enforcement can range from telephoning the payer and negotiating a payment, garnishment and attachment of payer’s wages and pensions, tracing the payer through federal information banks, and federal license suspension. For example, in Canada, an administrative enforcement known as the Maintenance Enforcement Programs (MEPs) was established since 1980s with the objective to assist recipients in the collection and enforcement of child and spousal support payments and to improve compliance with support obligations (Pronovost, n.d.). An annual survey conducted on the performance of MEPs yielded an encouraging result particularly on the compliance figures of payments. Enforcement actions increase in intensity in response to more difficult cases and complex situations. As a matter of practice, court enforcement actions are only taken as a last resort such as issuing a warrant of arrest.

In both Australia (<http://www.csa.gov.au>) and the United Kingdom (*The House of Commons Debates-Hansard*, 2006), the administrative enforcement is operating primarily for the benefit of children, known as Child Support Agency (CSA) and Child Maintenance & Enforcement Commission (C-MEC) respectively. Although in Canada the MEPs are responsible for enforcing support orders as granted by the courts, they are not involved in any decision concerning the amount to be paid (Pronovost, n.d.); the situation is different in Australia and the UK. The CSA is responsible for calculating the amount of child maintenance, but the parties can choose for private collection or CSA collection. In case of difficulty in collecting the payments, the CSA can take enforcement actions such as withholding the payer’s money from his income tax refund or transferring money from the payer’s bank account and if necessary it can resort to court action.

In Malaysia, a Family Support Unit was established to enforce the Syariah Court orders on maintenance (Hasliza, 2008). As the judges’ duty will end after the pronouncement of the judgment or order, it is often left to the parties involved either to comply or defy the court order. The State Religious Affairs Departments in Malaysia also do not have the power to collect and enforce maintenance arrangements orders. Thus, to assist the divorced women to enforce court orders, early intervention from an organization trained with technical expertise in debt management will prevent cases from escalating to a point that legal action becomes necessary except for certain hard core defiant cases. This mechanism is more important in cases of parent with care of children in order to get regular payments from the non-resident father.

Malaysia was among the first few countries in the world, besides Morocco, Egypt, Britain and Canada, to have a Family Support Unit under the Syariah Court. The Unit, which serves as a one-stop centre to handle issues on family and divorce cases, would also simplify and expedite court procedures when it involves the issue of unpaid maintenance (Siti Nurbaiyah, 2009). Compared with the child support agencies established in other developed countries which had no enforcement power, the Unit will be backed by the bailiffs to track down the defaulters, who could be imprisoned if refused to obey the order unless for some serious reasons, such as where the defendant could not afford to pay.

There might be cases where the ex-husband genuinely does not have financial resources to comply with the court's order. In such a situation, it would be futile to order such person to imprisonment. In Morocco for example, a Family Solidarity Fund was created to tackle this problem ("The Minister of Justice..." n.d.). The Fund will intervene to pay maintenance for the mother and children after the dissolution of marriage, if the incapacity of the ex-husband is established. Though it does not intend to replace the debtor of the maintenance, the intervention is subjected to the condition that the wife does not have any means of subsistence. Therefore, there is possibility that the insolvent ex-husband has to repay once his solvency is established. This kind of administrative action is also important to protect the economic welfare of the divorced women and children.

In Malaysia, there are *Baitulmal* funds in every State established under the State Enactments, although in some States it is generally known as *Kumpulan Wang Khairat Am* (General Endowment Fund) or *Kumpulan Wang Majlis*. Through the *Baitulmal* account, the State Islamic Councils could set up a fund to provide financial disbursement to the divorced women who are in need of financial assistance particularly in cases of insolvent ex-husbands who certainly could not afford to pay for maintenance. In fact, a Practice Direction of the Syariah Court No.14 of 2007 stated that the Syariah Court may order the *Baitulmal* to pay maintenance to any person who has no male relatives or whose male relatives are also facing financial hardship. In order to ensure that the court order can be effectively enforced, the management of the *Baitulmal* needs to improve. Since *Baitulmal* is under the State's control, its management differs between the States. Research found that unsystematic organization is still one of the factors that impede its function as a tool to enhance the socio-economic status of the Muslims (Razali, 2005). However, the States of Sabah and Sarawak are ahead of other States in re-branding the management of the *Baitulmal*. By transforming the *Baitulmal* into a body corporate, more economic investment activities could be planned and implemented for the benefit of the Muslims in Sabah and Sarawak. Perhaps, the money that derives from the fund could also be utilised to help the divorced women in need of financial assistance.

In Egypt, non-payment of maintenance to the ex-wives and children has also become an acute problem, despite a law having been passed in 1985 that called for the imprisonment of men who did not pay child maintenance within thirty days of a court judgment ("Divorced from justice..." n.d.; Al Sharmani, n.d.). Although the Government of Egypt had outsourced the responsibility to enforce the maintenance order to one government entity i.e., the Nasser Social Bank, problems occurred when the ex-husbands were self-employed or worked in the private sector. Therefore, a Family Insurance System Fund law was passed in 2004 to create a specialized fund which was also attached to the Nasser Social Bank (Law No.11 of 2004 of Egypt, Article 2). All couples need to pay the insurance premium before they enter into a marriage, in order to ensure that the wives and children are financially protected if divorce occurs. The purpose of the fund is to distribute a reasonable sum of money to the divorced women to facilitate in providing a good living standard for the family after divorce, while at the same time ensures that the ex-husbands comply with the maintenance order.

In Malaysia, since an Islamic insurance system (*takaful*) has already been established, the government should consider incorporating the suggested scheme i.e. *Takaful* Marriage Fund, for which the practice in Egypt could be referred to (*Berita Harian*, 2006, p.1). The women's financial welfare after divorce will be better protected when immediate assistance could be provided once the divorce is final without the women having to suffer or becoming destitute because of the ex-husbands' failure to comply with the court order.

5.0 Conclusion

A marriage breakdown already causes emotional, physical, and economic hardships to most women. The likelihood of other problematic situations, such as when the ex-husband fails to honour the court orders for financial supports aggravates the matter. Although the latter may be more concerned with the attitude of the ex-husband, tougher enforcement actions will help to decrease the cases of defying the court orders.

Therefore, the judges should not hesitate to impose stricter enforcement actions in dealing with the errant ex-husbands particularly when the law already provides for special provisions relating to judgment debtor summons, which are very pertinent to ascertain the ability of the defendant (ex-husband). Thus, the issues of warrant of arrest and committal order might be more effective in lieu of the imposition of a small amount of fine. Furthermore, the experience of the several Commonwealth and Middle East Countries that have already established their administrative mechanisms in the enforcement of financial support orders is worth exploring in Malaysia. Clear guidelines on the methods of tracing the defaulters as practised in the Commonwealth Countries might enhance the enforcement actions. Nevertheless, the effectiveness of the remedies available in the State Enactments in Malaysia in cases of unpaid maintenance is also very much reliant on the complaints made by the divorced women in the Syariah Court. In other words, the administrative actions and legal enforcement can only work to decrease the problem of non-compliance if the divorced women themselves come forward and bring the matter to court.

6.0 References

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