A Baseline Study of the Enforcement of \textit{Nafkah} Orders in the Selangor Syariah Court


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\textbf{ABSTRACT}

This study examines problems in the enforcement of \textit{nafkah} orders of the Syariah Court. Despite the fact that the Syariah Court is guided by comprehensive statutory laws, complaints on matters related to the enforcement of \textit{nafkah} orders remain unresolved. Previous studies on this issue showed that women and children were the most affected group due to the weak enforcement of the Syariah Court’s \textit{nafkah} orders. Therefore, this study was undertaken to examine and identify problems that have resulted in failure to enforce \textit{nafkah} orders. This research uses the qualitative approach based on legal doctrine and data collection from field study. Data were obtained through examination of files from court and from informants, namely, officers from the Syariah Court as well as clients of the court. The study discloses an obvious co-relation between complex and lengthy processes, unnecessary time consumption and cost inefficiency with the enforcement order of \textit{nafkah}. This article is the preamble to an envisaged study on the enforcement of the \textit{nafkah} order in the Syariah Court. The results will be useful for further improvement of existing legal provisions in Malaysia.

\textit{Keywords}: Syariah Court, \textit{nafkah} order, enforcement, procedure

\textbf{INTRODUCTION}

Surveys on the enforcement of \textit{nafkah} claims at the Syariah Court have indicated gaps and loopholes in the laws, especially in the procedures concerning the enforcement of the \textit{nafkah} court orders. Therefore, it was the purpose of this study to reassess the effectiveness of the enforcement laws and
procedures involved with the objective of providing solutions to problems associated with nafkah enforcement. This is to ensure that families entitled to nafkah are duly paid and the legal system is sustainable with cogent laws and procedures, competent staff and sufficient funds.

BACKGROUND

The laws and procedures on enforcement of nafkah court orders in the Syariah Court are incorporated in the various states’ Enactments and Acts. Although each state has its own jurisdiction, and administration of Islamic Law is a state jurisdictional matter, nonetheless there are similarities in the provisions of the various state enactments on the enforcement of the nafkah court orders (Ibrahim, 1997). However, its actual enforcement in all the 14 states has been poorly carried out, proven by the ground survey from the 1980s henceforth until the early 2000, which found that nafkah court orders have been neglected in all the states (Maznah, 2011). Substantiated by YADIM (an agency under the government) during the period of 1984-1999, this problem has gained prominence because of the repeated questions and pleas by estranged wives in all the states as well as the admission of the administrators of nafkah court orders themselves. This is further supported by a compilation of reported complaints from the year 2000 to 2013 as recorded by the Wanita UMNO Complaints Bureau (personal communication with the complainants, 2000-2013). The number one complaint received was on enforcement of nafkah court orders. In addition, other enforcement proceedings indicate considerable delay in their implementation (Zaleha Kamaruddin, 1999). A study on enforcement of nafkah court orders in the Syariah Court from 2000 to 2005 by a research team from University Kebangsaan Malaysia reported that out of 94% of nafkah orders issued by the Syariah Court, 80% were not enforced (Nor Aziah Awal et al., 2009).

Presently, all states are governed by the Islamic Family Laws and State Syariah Civil Procedures Laws. As such, the procedural aspect of enforcement of nafkah is set in a pattern of practice as interpreted by court officials. Further, the practical aspect of its implementation lacks efficiency due to weakness of the procedures themselves, shortage of trained and experienced staff and an inadequate support system within the Syariah judiciary as well as externally. As generally observed, although a nafkah order is granted by the Syariah Court, the claimant is unable to execute the order immediately. The plaintiff has to initiate other proceedings to execute the order, which entails more delays and incurs higher cost. Worse still, even after getting the execution order, the defendant may not still comply with the order, rendering more hardship for the frustrated claimant as well as the court because the order had not been enforced. The problem is further aggravated when there is lack of an appropriate support system to alleviate the problems faced by the claimant (Interview with Syariah Court officials in Selangor and Federal Territory on July 6 and 8, 2015, respectively).
Another aspect of the law that impedes not only the execution of the court order but the actual implementation of the law is the interpretation of the state constitution with regards to the jurisdiction of the Syariah Court in exercising its powers to enforce the court orders. This is seen in the State of Perak, where the enforcement unit for nafkah orders has been displaced from within the Syariah Court system. It affects the smooth running of the enforcement process in enforcing nafkah orders (Interview Session with the Perak Syariah Court Officer on August 6, 2015).

LITERATURE REVIEW
The literature on this subject matter is limited as not much has been written from the enforcement perspective, with a focus especially on the procedural aspect. Although much has been written on nafkah as an issue made popular by NGOs due to complaints of non-compliance by errant husbands, little focus has been given to how errant husbands who do not pay nafkah ought to be dealt with by the law. Many seminars and workshops have called for steps to be taken to resolve this serious problem but the matter has not been adequately addressed by the law and the relevant agency.

The general principles of the law on nafkah and its enforcement are found in the books written by Ahmad Ibrahim touching on both the administration of Islamic law and Islamic Family Law in Malaysia and the comparison between civil and syariah procedural aspects (Ahmad Ibrahim, 1997). Zaleha Kamaruddin (1999) in her research paper discussed the delays in the enforcement of the payment of nafkah from 1990 to 1997. However, the study does not discuss the procedural aspect of enforcement of nafkah orders. Najibah Mohd Zin in a study entitled ‘The Impact of International Instrument on Women’s Rights and Family Well-Being in Malaysia: Challenges and Prospects for Reform’ commented on the failure of the husband to provide nafkah and suggested the strengthening of the relevant laws and procedures. Maznah Mohamad (2000) in an article entitled ‘Di Mana Berlaku Diskriminasi Dalam Islam’ made several observations with regard to discrimination of women due to the inability of the courts to enforce nafkah orders. According to her, the lack of enforcement was due to the lackadaisical attitude of the courts in providing enforcement. She criticised the procedural aspect of the law that was not made enforceable. She was of the opinion that the provisions of the law relating to maintenance were not fully understood and applied by the plaintiff as well as the Syariah court. Being a social scientist, her observations were based purely on her surveys and interviews. Nonetheless, the article identified the legal issues that gave rise to the critical need for improvement to enforcement of the law, which due to its weakness had caused women to be perceived as being legally discriminated against in the Syariah system.
Sheikh Ghazali bin Sheikh Abdul Rahman (2007) in an article ‘Masa Depan Mahkamah Syariah di Malaysia: Cabaran dan Strategi Dalam Masyarakat Majmuk’ proposed the setting up of an insurance-based Family Protection Fund as a mechanism to enforce nafkah orders. However, this article did not provide a mechanism by which such enforcement can be viable to resolve enforcement of nafkah.

Since enforcement of maintenance is a global issue, it makes sense to look at cases from other countries. In the context of Singapore, for example, Leong Wai Kum (2011) propounded the rights to nafkah in Singapore where a system was created to increase the efficiency of the enforcement of court orders by having an enforcement section in the Family Court setting.

Internationally, the Australian government provided in detail the system and law for child support to overcome the problems of errant parents not providing nafkah to rightful dependants and, at the same time, to alleviate the financial status of sole-parent families (Jacobs & Douglas, 1998).

In Muslim countries, the traditional family support system is retained, with the father/husband as financial provider. Where the family system no longer worked in accordance with the Islamic system, for instance in countries like Tunisia, Morocco and Egypt, workings of the support system were changed. Tunisia started a family fund system in 2007 that helps the court with the enforcing of the maintenance order. Egypt established the Bank al Nasr to facilitate payments. The operation of these funds is governed by their respective national legislation in order to provide authority for the purpose of enforcement.

Historically, the issue of nafkah received greater emphasis during the Islamic period. Tucker (1998) traced the historical aspect of the nafkah law back to the days of the Ottoman Empire, and justified the significance of the enforcement of nafkah responsibility in Islam.

The Legal Framework

The Syariah legal system derives its power from the Ninth Schedule List II, which is the State list of the Federal Constitution. Thus, the Syariah Court has the authority to make decisions within its jurisdiction in statutory form (Muhammad Habibullah v. Faridah Dato’ Talib [1992] 2 MLJ 793) or by inference (Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Malaysia (PERKIM) Kedah & seorang lagi [1994] 1 MLJ 690).

In the context of nafkah, the legal framework encompasses both the substantive and the procedural law expounding on nafkah payment and enforcement procedures. In terms of statutory provisions, the substantive law provides, for example, for the payment of nafkah by the husband in the event of divorce (Part VI of Sections 59-80, Islamic Family Law in Selangor). The various sections specifically make it an offence for defaulting parties and clearly spell out the rights to claim.
Complementing the substantive law, the Selangor Enactment for civil procedures in the Syariah Court outlines the procedure for claiming of *nafkah* and its enforcement. Twenty main steps are provided in procedural law involving the payment of money, with *nafkah* being one of them. These include seizure and sale, garnishee proceeding, committal order and judgment debtor summons (See Sections 148, 151, 175 and 181 of the Syariah Procedural Law 2003). The court may impose deduction of salary if the defendant is employed as provided for under Maintenance of Women and Children 1968 through attachment of earnings order. The claimant is expected to comply with the procedures if the case is not settled through mediation (*sulh*) proceedings or other forms of settlement. Under the Practice Direction issued by the Syariah Judiciary of Malaysia, the Syariah Court must make efforts to settle any claims involving *nafkah* through *sulh* proceedings. The plaintiff may invoke any of the enforcement methods if the defendant fails to comply with the order depending on the facts and circumstances of the case and options available for the claimant.

**RESEARCH METHODOLOGY**

The study focussed on the implementation and the enforcement of *nafkah* orders based on Selangor Syariah Civil Procedure Law 2003. It commenced with a preliminary pilot study in Selangor for the baseline report with the objective to identify the cause of delay in procedure and the reason for failure to enforce payment of *nafkah*. For the baseline study, the research method comprised both doctrinal and non-doctrinal approaches. Court Regulations and Practice Directions were analysed in identifying the ramifications of the current law governing *nafkah* orders. Content analysis of four files of four different claimants in the Syariah court of Gombak Timur were studied to examine the legal issues surrounding *nafkah* proceedings and efficacy of procedure. The files were measured according to the World Bank research method, which examines the variables of process of enforcement procedure, time and cost.

The Gombak District was chosen as it is a Muslim area with a demography of urban and semi-urban communities of diverse income and educational background that reflect the capacity and capability of the clients to pursue enforcement of Syariah *nafkah* orders up to completion. A pilot study was conducted at the Lower East Gombak Syariah Court at Jalan AU 2A/17, Taman Seri Keramat, 54200, Kuala Lumpur. The said court is situated in Keramat, within a housing area, and therefore is accessible to the public, especially those who rely on public transport.

In addition, face-to-face interviews were conducted with selected respondents, whose cases were at enforcement stage, using semi-structured questions. Data on the indicators were used to measure the efficiency of the judicial system following step-by-step evolution of *nafkah* disputes before the Syariah Court. The files were categorised according to the coding system.
prescribed in Practice Direction i.e. 023 (arrears), 024 (nafkah of children), 025 (variation order), 037 (enforcement order) and 099 (committal order).

FINDINGS

Law and Proceedings

The study disclosed an obvious co-relation between lengthy processes, unnecessary time consumption and exorbitant cost in the procedure enforcing nafkah orders. Problems associated with substantive and procedural law were found upon examination of the relevant files and as the result of the interviews on enforcement of nafkah. Initially, the study showed that the current legal provisions on substantive law of the Selangor Family Law Enactment 2003 requires the applicant to apply for nafkah after divorce as provided for under Section 59 of the said enactment. The study showed that many opted not to apply for nafkah while the number of those who claimed nafkah was very much lower than the number of divorce cases. Although the reason for not claiming nafkah is not known at the time of the study, one of the contributing factors as explained by the court officer was related to the complexities of the procedure (Interview in February 2015).

The examination of files further indicated that the current procedural law (Syariah Civil Procedural Law) causes delays in enforcing nafkah orders. The technicalities and complexities of procedure have forced the plaintiff to go through lengthy processes. The study also revealed that enforcement is further impeded when a defendant dies during the process or his whereabouts cannot be traced. Although garnishee proceedings can be used by ordering the third party to pay the debt, in reality, the fund is no longer available to meet payments. In spite of the procedure and enforcement options provided by the law, it is a futile attempt when the money is not there.

Time and Cost

The study showed that the court awards the amount to the plaintiff either through a normal claim or by way of consent order (sulh). However, the process of enforcing nafkah follows the same track of enforcement procedures should the defendant fail to pay the amount as ordered. Part of the problem is associated with the ignorance of the plaintiffs on the proceedings. Such a situation is quite understandable due to the complexities and technicalities of the proceedings that often baffle the layman.

Representation by lawyers is important to assist the claimant. However, the study showed that the presence of lawyers contributes considerably to the delays as well as the cost. The length of the proceedings greatly affects cost incurred as a result of making the applications, travelling to court and related personal expenses.

The examination of the Syariah Court’s files in the Syariah Lower Court of Gombak Timur Selangor also showed
that the process of enforcing nafkah can take between 10 and 20 years to enforce the nafkah orders. This delay is mainly contributed by defendants who refuse to cooperate. It creates a setback for many women who end up not claiming nafkah, and their number is higher compared to the number of divorces in a year.

DISCUSSION
The study testifies that enforcement of nafkah court orders is weak and its procedures are inefficient. There is general weakness in the substantive law. The most significant weakness is that there is no automatic granting of order for nafkah upon pronouncement of divorce before the court or dissolution of marriages. The law provides (Part VI sections 59-71) for the court to issue an out-of-court order for payment of nafkah and there is a need for a summons to be filed by the plaintiff, entailing court process. This was found to be difficult for claimants, especially those without money or who do not qualify for legal aid and cannot afford a lawyer. If a lawyer is required to represent the party, this would mean that the claimant would have to bear the costs. If the claimant is not represented, she will be burdened with paper work, and this hassle discourages many claimants. When the ex-husband cannot be located, no action is further pursued. Most of the time, legal action stops there and no further action is taken. This research established that the burden to provide information is on the claimant, who in most instances is helpless in tracing the ex-husband. Although the courts may sometimes make some attempt to assist, inter-agency cooperation is weak and the claimant is usually left without being able to trace the ex-husband.

Further, there is often repetition and redundancy of procedure that cause delay especially in cases where the claims require separate registration and files for each claim like nafkah, custody of children and muta‘ah. As such, this requirement has caused redundancy of procedure and unnecessary repetition of work, cost and time.

The process of application for nafkah order can also be initiated by summons and statement of claim and by application and affidavit. If the proceeding is wrongly commenced, the case is struck off as illustrated in the case of Abdul Hamid bin Kamaruddin v. Rohaya binti Mohamed (2007) JH 24/1,27 where the appeal by the claimant was delayed as the application was by application and affidavit when it should have been by summons and statement of claim. In the case of Moriazi bin Mohammad v. Ajmawati binti Atan (2005) JHXX/1,105, other intricacies in the process proved to be too technical for the claimant to institute proceedings in his own capacity without any legal assistance. Therefore, it cannot be expected that the layman should have legal knowledge about court proceedings.

Even after the order is obtained for a claimant there is no guarantee that the ex-husband will pay. The claimant or plaintiff needs to apply for the enforcement of the
Order through judgement debtor summons. The problem that may arise very often is to serve summons on the husband, especially if he is self-employed. The duration of the issuance of the court order is not regulated and may jeopardise the applicant’s interest. Further, the judgement order must be effectively served.

Delays may be caused when the defendant may want to vary the amount to be paid, usually to reduce the amount of nafkah as stipulated in the court order. There are also instances when the ex-husband further delays payments by making appeals to the High Court and applying for a stay of execution pending the appeal. This is because there is no standard formula to determine the amount of nafkah as the court decides on a case-by-case basis.

Delays are deliberately prolonged by defendants through various means. For example, making an application for notice of judgement obliges the defendant to show cause and state why he should not be sent to prison. It is observed that legal procedures delays as provided for under various sections of procedural law. Moreover, there is no specific timeframe for the execution of a judgement order where the court is supposed to be in a position to ensure that the claimant receives payment of nafkah. Furthermore, court personnel may aggravate the situation if they lack in efficiency, professionalisam and innovativeness in recording and filing cases and giving instructions to clients.

A lackadaisical attitude also contributes to delays. Most claimants come to court with high expectations that the process is to be so easy and simple that they expect the court to grant them nafkah without any procedures to be complied with. Many claimants complain of having to go to court several times and being burdened with paper work. The delay may also be due to the engagement of lawyers, who can prolong the litigation process.

The above discussion emphasises that the complexities of procedural law and attitudinal issues can contribute to delay in enforcement of nafkah orders. This issue of delay requires further exploration for a suitable resolution.

CONCLUSION

The baseline study of the process of the enforcement of nafkah orders in the Syariah Lower Court of Gombak Timur, Selangor provides proof that delay often occurs in the process of the enforcement of nafkah orders, and this requires in-depth study. This study examined the process of the enforcement of nafkah orders as a national issue, encompassing study of enforcement in all states in Malaysia, which confirms the validity of the findings. It is clear that an effective mechanism for the enforcement of nafkah orders is urgently needed for implementation in all states in Malaysia.

REFERENCES

Enforcement of Nafkah Orders


