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**DIVORCE RELATED ISSUES:
A STUDY OF FINANCIAL SETTLEMENT UNDER MUSLIM
FAMILY LAW IN BRUNEI**

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ABSTRACT

Finance is one of the most significant issues associated with divorce. In Brunei, although the Islamic Family Law Act (CAP. 217) was intended to reform and enhance the marriage and divorce relations, yet more pressing issues, as regards finance, have occurred. Therefore, the research is aimed at the following main objectives: to examine the current legal framework that entails financial aspects of divorce, to determine the Islamic principles from which those legislative provisions are derived, to analyze the financial settlements made in the Syariah courts of Brunei, to examine the factors that Syariah courts take into account in determining financial settlements, and to seek any contributing factors that further placed strains upon attaining a fair and equitable settlement in the family court system in Brunei.

Settlement of maintenance for divorced wife and children, the issues of consolatory gift and matrimonial property are the primary focus in this study. The research will look into the Syariah Law to explore the very best of interpretation of the Quran and Sunnah as primarily derived by the four prominent scholars, to be considered as a point of reference, relative to Bruneian law and practice. Apart from the legislative provisions, the enforcement of the law of divorce financial-related matters will be critically examined, by doctrinal and empirical approach. Further, a comparison analysis will be attempted, in two different aspects of current divorce law, firstly, to compare the given provisions in the financial settlement statute with those stipulated in the Quran and *Sunnah*; secondly, to contrast the written law with the law in practice.

Ultimately, the research would not only contribute positively to the development of the Islamic knowledge but also would contribute for reconstruction of a modern and wide-ranging Islamic family law when relating to specific divorce issues in Brunei, and that it would further serve as a body of reference to legal professionals, as well as academicians.

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Malaysia

Hukum Kanun Melaka or the Code of Melaka
Islamic Family Law Enactment Selangor

ABBREVIATION LIST

| | |
|-----------|---|
| BPUKDSP | Begawan Pehin Udana Khatib Dato Seri Pduka |
| CAP/Cap | Chapter |
| DDW | Dato Derma Wijaya |
| DP | Dato Paduka |
| DPSS | Dato Paduka Seri Setia |
| DSLJ | Dato Seri Laila Jasa |
| DSS | Dato Seri Setia |
| Hj | Haji |
| Hjh | Hajah |
| HM | His Majesty |
| IFLA | Islamic Family Law Act |
| JAPEM | Jabatan Pembangunan Masyarakat (Department of Community Development) |
| JPKE | Jabatan Perancangan Kewangan dan Ekonomi (Department of Economic Planning and Development) |
| KDYMM | Kebawah Duli Yang Maha Mulia |
| MUIB | Majlis Ugama Islam Brunei (Islamic Religious Council Brunei) |
| P.B.U.H | Peace be Upon Him |
| PDSMDPSS | Pehin Datu Seri Maharaja Dato Paduka Seri Setia |
| Pg | Pengiran |
| POKSUDPSS | Pehin Orang Kaya Seri Utama Dato Paduka Seri Setia |
| PJLPRDSU | Pehin Jawatan Luar Pekerma Raja Dato Seri Utama |
| PSKDPSSU | Pehin Siraja Khatib Dato Paduka Seri Setia |
| SCA | Syariah Court Act |
| SS | Seri Setia |
| S.W.T | Subhanahu Wa Ta'ala |
| UPI | Unit Perundangan Islam |

CHAPTER 1

INTRODUCTORY CHAPTER

1.1 INTRODUCTION AND RESEARCH PROBLEMS

Brunei Darussalam is one of the smallest countries among ASEAN with a population of 408, 766 (as in July 2012),¹ which comprises a majority of Malay-Muslims with minorities of Chinese, Indian and Indigenous Groups. The Brunei official religion is Islam,² following the Syafi'i School of Jurisprudence. Brunei achieved its independence from Britain in 1984, after being a British protectorate since 1906. During the administration of the British Empire, some laws governing Muslim affairs were introduced but with limited Syariah³ court jurisdictions and they were more procedural in content. The Religious Council and Kadis Court Act (Cap. 77)⁴ was one of the most important mechanisms for dealing with family matters in Brunei that continued to be applied in the country until the emergence of the new Islamic Family Law Act in 2001. This new law is based on the sources of Syariah law, aiming for a more systematic

¹ Central Intelligence Agency, "The world fact book: Brunei," accessed 17th May 2012, <https://www.cia.gov/library/publications/the-world-factbook/geos/bx.html>

² Constitution of Brunei Darussalam, Art. 3

³ The word 'Syariah' will be adopted throughout the thesis in place of the word 'Shari'ah' as this conforms to the spelling in Brunei

⁴ It came into force on 1st February 1956 and is still being enforced up to the present time especially the provisions deal with the Religious Council establishment and its related matters. It underwent a number of amendments between the periods 1967 and 1972 until it was revised in 1984 and changed its name to Religious Council and Kadis Courts Act, (Cap 77) (hereinafter referred to as RCKCA, (Cap 77))

administration of Muslim affairs relating to marriage and divorce and further to improve the rights of the parties, particularly women. Despite that, there are some problems with the provisions and application of this law. One area, in particular, the financial and property settlement after divorce, has become so problematic that now it needs serious attention.

Some notable problems that have emerged in this regard are the escalating rate of financial claim cases in the Syariah Court; the neglect of husbands to provide maintenance; non-compliance with the legal provisions as well as court orders on the part of the parties; lack of power to the religious authorities; inefficient law enforcement mechanisms; inequitable property settlement; an increasing trend of seeking the state's financial aid; endless complaints against court judgments for being discriminatory; the poor attitudes of some parties; lack of awareness etc. Recent statistics reveal that there was an increase of 95% of civil cases in the Brunei Syariah Court from 2001 to 2010, which includes ancillary relief claim cases.⁵ Accordingly, the issue of the husband's failure to provide financial support to his former wife and children is one of the most serious issues faced by the Syariah court which raises great concern to the some authorities in the country. To quote the Chief *Syar'ie* Judge of Brunei,⁶ "Men should not simply divorce. Sometimes, when they remarry, they do not look after their children from

⁵ Email to author by HjH Wan Zurina Dato Seri Setia (DSS) Hj Abd Rahman, Deputy Registrar of Syariah Subordinate Court, Brunei, 18th September, 2013

⁶ Pehin Siraja Khatib Dato Paduka Seri Setia Haji Yahya Haji Ibrahim at the International Seminar on Islamic Law in Brunei. Rasidah HAB, "Syariah Legal Aid", *Brunei Times*, October 13, 2011, accessed 07 November 2011, <http://www.bt.com.bn/news-national/2011/10/13/syariah-legal-aid-bureau-aims-help-abused-women>

a previous marriage. There a lot of cases like these.”⁷ Although Muslim Brunei law entitles a woman to claim for *mut’a al-talaq* or consolatory gift, in practice, the recovery of this right is never always simple and straightforward. The issue of matrimonial property or *harta sepencarian*, even with a statistic of being the least heard cases in the Syariah court, still does not solve the problem. Many *Syar’ie* judges find it extremely challenging to decide what is fair in the division of property between parties. Equally, the parties often face difficulties to recover their assets in a just and equitable manner.

There are a number of possible reasons that lead to these poor outcomes: the current law that deals with settlement of divorce financial cases is inadequate in the sense that it still lacks provision to promote gender equalities and also children’s welfare. Apart from that, the legal professionals also fail to follow the rules and the guidelines as set out in the written law, resulting in failures towards achieving fair and equitable judgments. Among other potential reasons for such failures might also be the worrying attitudes of couples who favour financial disputes to be sorted out at the hands of a judge rather than by negotiation outside the court system. Despite awareness of the consequences, parties still persistently fight each other to win a case for the sake of revenge.

In light of the above, this thesis intends to examine the statutory provisions on financial arrangements after divorce that govern Muslim communities, focusing on the issues of the wife’s maintenance during *‘iddah*; *mut’a al-talaq*; *harta sepencarian* and child support. The application of those provisions will be analysed by assessing the court judgment system in Brunei. Apart from that, it is also intended to explore other critical

⁷ Debbie Too, “Money Matters,” *Brunei Times*, April 16, 2008, accessed 07 November 2011, http://www.bt.com.bn/local_business/2008/04/16/money_matters_and_ugly_divorce_proceedings

factors that may have provoked further strains in achieving a more effective and equitable financial settlement after divorce in Brunei.

1.2 THE DOMINANCE OF SYARIAH LAW IN BRUNEI

The codification of Muslim laws in this modern age has depended heavily upon the various interpretations of Quran and Sunnah that the Muslim jurists have developed over past centuries. The *Sunni* or *Ahl-ul-Sunnah* is one of the survived groups of those Muslim jurists that has formed the basis of most of the Muslim laws in the world today. There are four orthodox schools of law within the *Sunni* group, namely the school of Hanafi, Maliki, Syafi'i, and Hanbali. Each school has its own interpretations and rules, and there is a variety of legal opinions among the different schools, although they are essentially the same as regards the basic principles of Islam. Importantly, their differences grew out of freedom of thought and of *ijtihad* (individual reasoning) as well as the need to base Syariah rulings in all areas on the factors involved in them.⁸

The Quran serves as a basic foundation containing God's revelation and intent⁹ whereas the Sunnah consists of the religious actions and quotations of the Prophet Muhammad¹⁰ (P.B.U.H), is an essential supplement to the Quran, and provides further clarification and guidance. The next important source of Syariah is *ijma'* followed by *qiyas* or analogical deduction; *ijtihad* also plays a significant role in interpreting and

⁸ Dawoud Sudqi El Alami, *The marriage Contract in Islamic Law in the Shariah and Personal Status Laws of Egypt and Morocco*, (London: Graham & Trotman, 1992), 2

⁹ Marshall Cavendish, *Islamic Beliefs, Practices and Cultures*, (Malaysia: Marshall Cavendish, 2011), 121

¹⁰ *Ibid*

elaborating Quran and Sunnah where both Quran and Sunnah are silent on a matter. Under established principles of *ijtihad*, it is permissible to resort to a variety of Islamic legal principles such as *istihsan* (juristic preference), *istishab* (presumption of continuity), *'urf* (customary practice) and so on, so long as they are consistent with the Quran and Sunnah. These in short, are the principles which constitute the basis of Syariah or law in Islam. Similarly, Islamic laws in Brunei are guided mainly by the principles in the Quran and Sunnah as well as other sources mentioned earlier. In fact, Islam as the official religion in Brunei is explicitly stated in the Constitution of Brunei.¹¹

Today, almost all Muslim countries have formally adopted one of the established four schools of *Sunni* law as the primary basis of their family laws. As mentioned earlier, Brunei has officially followed the Syafi'i School of jurisprudence. However, in some circumstances, Brunei has embraced views from different schools under the principle of *takhayur* (selection) such as the Malikis on the judicial dissolution of marriage. The preference of particular views of a major school of jurisprudence is justified, not only in the light of promoting justice and equality, but also of improving the status of women and children, and further to strengthen the family values in Brunei-Muslim society. Such flexibility denotes the notion that in exercising *ijtihad* as equally practised in Brunei Syariah courts, it is to be observed that the underlying objective is for a more efficient management which can be understood from the doctrine of *Siyasah Syariah*. Significantly, *Siyasah Syariah* is permissible so long as it is in harmony with the spirit of

¹¹ Art. 3(1)

Syariah i.e. to bring benefit (*maslahah*) and prevent harm as noted by Ibn Qayyim.¹² Accordingly, as far as *maslahah* is concerned, it is also one of the basic purposes of legislation in Islam¹³ besides justice.¹⁴

To trace back the origin of Islamic law in Brunei, it has always been the governing law in Brunei, manifested by the existence of the *Hukum Kanun Brunei* or the Code of Brunei (hereinafter referred to as HKB) in the 15th century.¹⁵ The content and the spirit of this Code essentially are influenced by the injunctions in the Quran and Sunnah.¹⁶ Despite Brunei remained under British rule for a long time, Islamic law managed to survive in its limited scope of application until it ultimately became a very prominent feature of the Brunei legal system today. Accordingly, there are a number of *titah* or proclamations confirming His Majesty the Sultan's vision of Islam and its laws expressed in Brunei from as early as 1979.¹⁷ To quote an example of the prominent *titah* or proclamation of His Majesty the Sultan that highlights His Majesty's conviction that Islamic law is compatible with modern life¹⁸ as follows:¹⁹

¹² Ibn Qayyim Al-Jawziyah, Muhammad ibn Abi Bakr, *Al-Turuq al-Hukmiyah fi al-Siyasah al-Shar'iyah*, (Cairo: Matba'ah al-Madani, 1961), 16

¹³ Wahbah Mustafa Zuhayli, *Nazariyat al-Darurah al-Syar'iyah: Muqaranah Ma'a al-Qanun al-Wadi*, (Damsyiq: Maktabat al-Farabi, 1969), 48

¹⁴ *Ibid*, 41

¹⁵ Pehin Jawatan Luar Pekerma Raja Dato Seri Utama (PJLPRDSU) Dr Ustaz Hj Mohd Zain Hj Serudin, Malay Author. *Brunei-An Islamic Nation: Islamic Background*, (Brunei: Islamic Da'wah Centre, 2000), 11; Dato Paduka Seri Setia (DPSS) Prof. Dr Haji Mahmud Saedon Othman, *Perlaksanaan dan pentadbiran Undang-undang Islam di Negara Brunei Darussalam: Satu tinjauan (The Implementation and the Administration of Islamic Law in Brunei : An Overview)*, (Brunei: Dewan Bahasa dan Pustaka, 1996), 24

¹⁶ *Ibid*, 23; *Ibid*, 24

¹⁷ *Warkah* (letter) of His Majesty the Sultan and Yang Di-Pertuan, No: HHPO 14/1965

¹⁸ Darul Aqsha, "Upholding Islamic law in Brunei", *Brunei Times*, March 18, 2011, accessed 06 March 2012, <http://nuarualhilal.wordpress.com/2011/10/14/brunei-to-implement-islamic-law/>

¹⁹ *Titah* (proclamation) of His Majesty the Sultan of Brunei at the opening of the 8th Session of the Council of the Islamic Jurisprudence (Fiqh) Academy, 1993

The present world will witness a more extensive application of Islamic law as a comprehensive and complete way of life in all aspects of life. And it is precisely on this basis that Brunei Darussalam is currently actively moving towards the Islamization of its laws.

To carry out this honourable vision of His Majesty the Sultan, a number of important committees were established toward the implementation of Islamic laws in Brunei. The Committee on the Modification of Brunei Laws in accordance with *Hukum Syara'* is one of the major ones, which is responsible for examining all the existing laws in Brunei, to see whether or not they contradict Syariah injunctions. Should any of these laws be found to be contrary to the Syariah, an amendment would be proposed or if necessary a new draft law would be prepared based on Syariah tenets.²⁰ More importantly, in 2009, a former Chief Justice of Malaysia was appointed to guide and assist the said Committee towards the thorough harmonization of the judicial system that is between the Syariah and Civil models in Brunei.

In conclusion, the on-going efforts and measures taken by the Brunei government towards the implementation of Syariah law has proven that Brunei has been developed as the system of monarchical government based on the teaching of Islam. However, there is yet a lot more to accomplish in order to tackle modern living, especially in the area of family law. This may include measures taken to reformulate the family law, under the doctrine of *Siyasah Syariah*, by following the guidance provided in the Quran and taking into account the purposes of the Syariah (*Maqasid Syariah*) and public interest considerations (*maslahah*). What is more, there has been no substantial review or reform

²⁰ Dato Seri Laila Jasa (DSLJ) Prof Dr Anwarullah Shafiullah, 'Islamization of Brunei Darussalam Laws', *Sejarah Penubuhan Mahkamah Syariah Negara Brunei Darussalam (the History of the Establishment of the Syariah Courts of Brunei)* (Brunei: Jabatan Kehakiman Negara, 2005), 152-4

made to the law of the financial aspects of divorce since 2001, and its examination may be critical towards a more effective and equitable settlement.

1.3 THE ISLAMIC CONCEPT OF FINANCIAL RIGHTS AFTER DIVORCE

Under *Syariah*, the entitlement of man and woman towards certain rights of property and finance are certainly undisputable. However, due to the distinctive capabilities and roles, a woman has been given more rights than a man. Quran and Sunnah recognize a man as head of the family because of his physical superiority and power of endurance. Hence, this advantage has equally enhanced responsibilities of a man including those of providing maintenance to his wife and children.²¹ Comparably, a woman excels a man in the qualities of love and affection and thus the responsibility for the management of the household and the up-bringing of children lies on the shoulders of a woman.²² This shows how Islam recognises equality between man and woman considering their different physical and emotional strengths and not on a question of superiority or inferiority as a widely spread misconception about Islam.

Similarly, when the marriage ends, a Muslim woman remains entitled to divorce financial rights more than a man, in particular maintenance and *mut'a al-talaq*. This obligation of post-divorce maintenance, however, is limited to a specified period of time called '*iddah*'.²³ There are at least two purposes for this; one is to give husband and wife

²¹ Mohammad Iqbal Siddiqui, *The Laws of Islam*, (Delhi:International Islamic Publisher, 1994), 105

²² Ibid

²³ Quran, 2: 241

an ample time to reconsider their decision to divorce in the best interest of the family and children. And another is to ensure the wife is not pregnant so as to avoid confusion about the paternity of such a child if she remarries.²⁴ The prescription of *mut'a al-talaq* under *Syariah*,²⁵ on the other hand, serves as a parting gift to be offered to a wife, among other reasons, to save her dignity and to console and soothe her broken heart due to the dissolution of marriage initiated by the husband. All such advantages undoubtedly indicate that *Syariah* provides measures necessary for the uplifting and protection of the dignity of women, and further recognizes their rights. However, although the woman's right is decisive it may be categorical in some circumstances. For instance, the woman will have her post-divorce maintenance forfeited if she is found to be disobedient²⁶ to her former husband in the period of '*iddah*.²⁷ Likewise, she will not get her *mut'a al-talaq* if she is the one who seeks for the divorce.²⁸

In regards to matrimonial property or *harta sepencarian*, while there is no explicit verse in the Quran and the Sunnah about it, there was discussion among Muslim jurists about joint property which can be deduced as similar to as matrimonial property.²⁹ *Harta*

²⁴ Abdul Rahman I. Doi, *Woman in Shariah*, 1st ed., (London: Ta Ha Publishers Ltd, 1989), 100

²⁵ The principle of *mut'a al-talaq* generally can be derived in the Quranic injunction, *Surah al-Baqarah*, verses 241 and 229. However, the *Sunni* differ in their opinion as to whether *mut'a al-talaq* is obligatory or recommendable and are to be expounded in chapter 3

²⁶ Basically, the *Sunni* differ as to what factors can be regarded as obedient, for example, some consider an act of leaving the house without husband's permission is to be disobedient, in which will be discussed further in the study.

²⁷ Wahbah Al-Zuhayli, *Al-Fiqh al-Islami wa-Adilatum (The Islamic Jurisprudence and Its Evidences)*, vol. 10, *An-Nafaqat: Nafaqat al-Zaujah wal-Aqarib (Maintenance: Maintenance of the Wife and Relatives)*, 4th ed., (Damsyiq, Dar al-Fikri, 1997), 7364

²⁸ *Ibid*, *Mut'ah*, vol. 9, 6832

²⁹ Abdurrahman Raden Aji Haqqi, Malay Author. '*Harta Sepencarian dalam Perundangan Keluarga Islam Brunei, Malaysia dan Indonesia: Produk Fikah Nusantara dan Implementasinya (Harta Sepencarian in Islamic legislation of Brunei, Malaysia and Indonesia: A Product of Jurisprudence across Archipelago and its Implementation)*', *Jurnal Undang-undang Syariah Brunei Darussalam* 2, no. 2, 2002, 53

sepencaharian is also a Malay customary practice which becomes a Syariah rule based on the principle of *'urf*.³⁰ Therefore, a claim for *harta sepencaharian* can be brought by a Muslim following lifetime divorce or divorce upon death. Accordingly, Islam also emphasizes great concern on children matters and has prescribed the financial responsibilities of a father according to scholarly consensus, no matter in what condition, whether he is still married to his wife or not. Even if the children are in the custody of a divorced woman, then their father must support them. This is mainly to protect the children's best interests following a broken marriage. To quote an instance of the general authorities which indicates the man's financial obligation toward his child, the Prophet Muhammad (P.B.U.H) said:

Each of you is a shepherd and each of you is responsible for his flock. A man is responsible for his family and his flock.³¹

It is why in this thesis a reference to Syariah laws is of important significance because it will determine the consistency of this prevailing law and its implementation with the theory and practice of the Syariah, when compared with that of principles relating to property matters on divorce as stipulated in the Quran and the Sunnah. In doing so, all of the interpretations of the Quranic texts should be explored so that their very best aspects may be combined in order to establish a family legal system that promotes equality and justice.

³⁰ Ahmad Ibrahim, Malay Author. *Family Law in Malaysian and Singapore*, 2nd ed., (Kuala Lumpur: Malayan Law Journal Pte Ltd, 1984), 252

³¹ The mentioned Sunnah is originally quoted by Mohammad bin Saalih Al-'Uthaymeen in his writing: *On the Rights of Children in Islam and The Prohibition on Abusing Children*. The author has referred the *hadith* to Al-Bukhari, *kitab al-Jumaah, Book of the Friday Prayer, Ch. 1-Jumu'ah in Villages and Cities*, No. 893

1.4 PREVAILING APPROACHES IN THE SETTLEMENT OF DIVORCE FINANCIAL-RELATED CASES IN THE SYARIAH COURTS OF BRUNEI

Although the Syariah Courts Act or SCA (Cap. 184)³² has empowered the Syariah court to try and decide any financial and property claim cases for Brunei-Muslims, the Act contains little guidance as to how the settlement will be achieved. Significantly, this gives the Syariah court a very wide discretion to determine what factors to be taken into account in settling all the financial cases before him. More importantly, this vesting of wide discretion in the courts must not depart from a decision that observes fairness and justice as an overriding objective. Basically, there is a general principle that has been set out in the IFLA (Cap. 217) which requires the court to refer to *Hukum Syara'* in circumstances where no provision is found in any written law to solve a particular issue.³³ The concept of *Hukum Syara'*³⁴ as defined under section 2 of IFLA (Cap. 217) has accordingly given considerable freedom to *Syar'ie* judges to use their own *ijtihad* to choose any school of thought among *Sunnis* that they deem valid for their judgment. Such a freedom, however, has been argued to have led into differences and inconsistencies among the Syariah court judgements in Brunei that would ultimately picture the court as a poor legal institution³⁵

In exercising the discretion in deciding the divorce financial settlement, the court may order lump sum or instalment payments to be made by husband to wife as regards maintenance and *mut'a al-talaq* order. Factors like the husbands' financial resources, the

³² See footnote 217

³³ s 144

³⁴ Defined as the laws of any sects which the court considers valid

³⁵ Hj Johar Hj Mohammad, Malay Author. *Tuntutan selepas Pembubaran Perkahwinan (Claims Following a Marriage Dissolution)*, (Brunei: Dewan Bahasa dan Pustaka, 2011), 148-151

financial needs of the wife, the welfare of the children, the contributions made by each party to the acquisition of the marital assets are some of the statutory guidelines on the matters to be taken into account when exercising these powers. However, there are also other circumstances that have a great influence on a court judgement such as the duration of the marriage, the conduct of the wife, the parties' standard of living, the type of divorce, and any other relevant factors of the case.

1.4.1 Income and Financial Capability of the Husband

The financial capabilities of the husband have always been a key factor of the court to take into account when making financial decisions for maintenance and *mut'a al-talaq*. As regards maintenance, there is a provision that facilitates such a rule as in section 63 of the IFLA (Cap. 217). However in practice, there are likely more circumstances that require the court to consider, following on that of financial resources. This can be shown in *Pengiran Mohd Yussof v Erni@Nurul Hidayah*,³⁶ where the willingness of the husband was one of the important factors. In this case, the husband had applied to pay \$100(BND) monthly as divorce maintenance but the wife instead demanded for \$500(BND). Having regards to the economic situation of the husband in addition to his request for a smaller amount than the wife desired, the court finally made judgment in favour of the husband and rejected the wife's claim. The court may also, in its discretion to make an order consider the husband's capacity based on his good commitment upon the family financial

³⁶ MRHS/MAL/BM/366/2003(MRHS stands for Mahkamah Rendah Syariah or Syariah Subordinate Courts, MAL means civil case and BM stands for Brunei Muara (one of the districts in Brunei))

obligations during the marriage rather than after the divorce.³⁷ The decision to consider the husband's capacity as a determinant factor is in fact in line with Syariah ruling, even though there is a distinctive opinion between the *Sunni* Schools on the matter. Some consider both spouses and others are limited to the consideration of one party only.³⁸

In relation to *mut'a al-talaq*, although the right to claim *mut'a al-talaq* is guaranteed by the IFLA (Cap. 217) there is no rule setting out precisely how the payment will be made as to the mode and amount. In most cases however, the husband's economic situation is most likely to become the first consideration in all circumstances. Similarly, the courts are also likely to determine the claim for child maintenance based primarily on the earning capacity of the husband rather than assessing the genuine needs of those children.

1.4.2 Financial Need and Condition of the Wife

Apart from a man's financial resources, section 63 of the IFLA (Cap. 217) also requires the court to treat the financial needs of the wife as a primary consideration in deciding maintenance claim cases. However, not many cases are found to be determined by observing this statutory rule. In comparison, as far as *mut'a al-talaq* is concerned, the wife's situation is often taken into account equally with that of the husband's financial capacities. While there is no consensus among Muslim jurists about this matter, the wide

³⁷ Ibid

³⁸ Al-Zuhayli, *Al-Fiqh al-Islami*, 7388 (See footnote 27)

discretion of the court has given more room to the *Syar'ie* judge to choose any opinion of the *Sunni* Schools that he thinks valid.

1.4.3 Needs and Welfare of Children

Harta sepencarian is the only case where the court is under a duty to consider the needs and welfare of children except the claim for their maintenance. This provision is explicitly stated in section 59 of IFLA (Cap. 217). This is to ensure that the couple are still equally responsible for the welfare of children even if they go separate ways. Therefore, in the distribution of the assets, the interest of the child is one of the priorities that the court must be concerned with although it is not considered a primary consideration as practised in some jurisdictions like that of English Law. This statutory rule seems to be parallel with that of Syafi's attitude toward the man's responsibility for child maintenance even if he has no means at all to perform it. According to the Syafi's, the father's incapability is not an excuse to waive him from such commitment; alternatively if he owns property like land etc, he could sell it in order to fulfil this obligation. This concept has also been adopted in the Syariah court decisions involving the case of child maintenance claims.³⁹

³⁹ As decided in *Norainah v Pengiran Abdul Hamid*, TSP/BM/32/2001 (TSP stands for *Tuntutan Selepas perceraian* or Claims After Divorce, BM means Brunei Muara i.e. one of the district in Brunei followed by the number of case and the year in which it was registered)

1.4.4 Contribution Made by Each Party

This is the most crucial factor in the assessment as to how a case of *harta sepencarian* should be divided. Section 59 of IFLA (Cap. 217) thus obliges the court to consider the contributions made by each party towards the acquisition of the assets during the marriage. Such contribution may take various forms such as money, property and labour. Additionally, in accordance to this section 59, the court must also take into account the non-monetary contribution that is typically made by a wife in the form of child care, house-work and moral support for the welfare of the family. However, in practice, this does not always occur. Previous studies have revealed that most Syariah courts practically ignore the woman's household and familial efforts in that the court awards her no greater claim to a share of the assets.

As mentioned earlier, although there is no explicit ruling about *harta sepencarian* in the Quran or Sunnah, implicitly, an established rule in scholarly writing has mentioned that the division of the property has to be made equally between husband and wife. However, this approach only applies to cases where the couple's dispute involves household goods and furnishing and there is no evidence to support their claim.⁴⁰

1.4.5 Other Factors

Previous studies have shown that there are other factors that have also influenced the court in assessing the financial disputes after divorce like duration of marriage,

⁴⁰ Ibn Al-Qayyim, *Al-Turuq al-Hukmiyah*, 24-26

conduct of the parties, types of divorce whether it is revocable or not, divorce at fault or otherwise and so on. The thesis therefore will seek to canvass the statutory provision and the cases decided thereunder, to look at the factors which might influence the judge in his decision in financial cases after divorce.

1.5 RESEARCH QUESTIONS

For the purpose of the study, the analysis will seek to answer the following questions:-

- i. What are the prevailing legal provisions that regulate financial matters after divorce for Muslims in Brunei?
- ii. What is the basis of those legal provisions and where are they derived from?
- iii. To what extent are they consistent with the Islamic principles?
- iv. How are financial settlements made in the Syariah courts of Brunei?
- v. What are the factors that Syariah courts take into account in determining financial settlements?
- vi. To what extent are those settlements fair and equitable?
- vii. What are the problems and challenges that may have complicated the efforts toward attaining a fair and equitable settlement?
- viii. What recommendations and proposals for the development of the law on financial settlement can be made following a divorce?

1.6 RATIONALE OF THE STUDY

As there has been no substantial review or reform made to the law relating to the financial aspects of divorce in Brunei since 2001, a law review and an examination of the judicial system may be critical towards a more effective and equitable financial divorce settlement, particularly from the wife's perspective. The thesis therefore, would not only fill a gap in the knowledge in the area of family law but would also serve as a guide to the reconstruction of the law by policymakers or legislators which in turn should provide more comprehensive and up to date rules and mechanisms without neglecting the element of equality and fairness both in theory and practice. The research would also help the judge to identify the strengths and the weaknesses contained within previous judgments and, at the same time, would operate as a point of reference to any judge that lacked experience in dealing with such matters. Such research can also be a point of reference for academicians and *Syar'ie* lawyers as well. The public must also be aware of their rights, especially women and children and thus it is hoped that they will also benefit from this study. Finally, this research would further add to a wealth of materials and reading in law not only at the national but also at the regional level.

1.7 LITERATURE REVIEW/PREVIOUS STUDIES

The literature addressing financial settlement matters after divorce under the Islamic law of Brunei is not only limited but almost all written in the Malay language. Therefore, in order to examine the relevant literature discussing the topics, different

major areas of literature will be reviewed. The first section of this literature review focuses on a brief description of the new Islamic Family Law in Brunei. It is then followed by a separate discussion on every form of financial matter upon divorce considered in this study; maintenance for wife, *mut'a al-talaq*, *harta sepencarian* and child support. The review in this respect will only focus on the debatable areas and relevant issues raised by some researchers.

1.7.1 An Overview of the New Islamic Family Law in Brunei

To understand the perspective of the financial matters after divorce, it is important to review, in general, the discussion surrounding the enactment of the new Islamic family law in Brunei. In this section, selected themes focusing on the basic principles of the enactment, its objectives and issues arising out of family matters are presented.

It is an assertion among a few Bruneian researchers that the introduction of IFLA (Cap. 217) has provided more comprehensive and developed provisions as opposed to the previous legislation to deal with marriage, divorce and other family related issues.⁴¹ These researchers are also in agreement about the fact that the substantive provisions of IFLA (Cap. 217) are primarily based on Islamic principles as enjoined in the Quran and

⁴¹ Hasnah Ibrahim, Malay Author. 'Penggubalan Perintah Darurat (Undang-Undang Keluarga Islam) 1999 di Brunei Darussalam, akan Memastikan Lagi Terpeliharanya Hak dan Kepentingan Wanita yang Diberikan di Bawah Hukum Syara' (The Codification of the Emergency of Islamic Family Law Order 1999 in Brunei will Further Ensure the Protection on the Rights and the Interest of Women as Awarded by the Syariah), *Jurnal Undang-undang Syariah Brunei Darussalam* 1, no. 1, 2001, 66; Pg Hj Mohd Tashim Pg Hj Hassan, Malay Author. *Prosedur Pentadbiran Perkahwinan, Mahkamah-mahkamah Syariah: Penubuhan, Bidangkuasa dan Pentadbiran (The Marriage Administrative Procedures, Syariah Courts: its establishment, jurisdictions and administration)*, (Brunei: Dewan Bahasa dan Pustaka, 2011), 32; Datin Hj Saadiah DDW Hj Tamit, Malay Author. 'Transformasi Kedudukan Wanita (Transformation of Women's Status),' *Transformasi Undang-undang Keluarga Islam Brunei (Transformation of Islamic Family Law of Brunei)*, (Brunei: Dewan Bahasa dan Pustaka, 2010), 25

the Sunnah.⁴² Interestingly, some also highlight the existence of rules and guidelines which are not Syariah-based, but instead are derived from the civil family law.⁴³ However, according to Pg Haji Tashim such a measure is permissible based on the doctrine of *Siyasah Syariah*.⁴⁴

Accordingly, the establishment of IFLA (Cap. 217) has many objectives. In short, the existence of IFLA (Cap. 217) is mainly for the proper administration and efficient management of all matters related to marriage, divorce and family relations as well as for better protection of different aspects of daily living such as economy, social, justice and self-defence, especially for Muslim women.⁴⁵ This can be evidenced by the stipulation of innumerable provisions that reflect these various objectives, for example; sections 15, 16, 18 & 19 of IFLA (Cap. 217) facilitate marriage procedures and sections 24, 29 & 33 are the relevant provisions that entail gender equality; sections 20, 58 & 61 imply the economic protection for⁴⁶ and of woman.

Despite that, some also argue that the effectiveness or the weakness of a particular written law is very much subject to the enforcement of the law itself.⁴⁷ It is because the Syariah legislators often could not foresee a law's outcome even though the enactment for the IFLA (Cap. 217) is basically intended for a good cause.⁴⁸ Further, to serve its purpose, the implementation of the IFLA (Cap. 217) must be carried out in an efficient

⁴² Pg Hj Hassan, *Prosedur Pentadbiran Perkahwinan*, 32

⁴³ Ibrahim, H., 'Penggubalan Perintah Darurat', 66

⁴⁴ Pg Hj Hassan, *Prosedur Pentadbiran Perkahwinan*, 32

⁴⁵ Ibid; DDW Hj Tamit, 'Transformasi Kedudukan Wanita', 4

⁴⁶ DDW Hj Tamit, 'Transformasi Kedudukan Wanita', 28

⁴⁷ Hj Mohammad, *Tuntutan*, 57; Ibrahim H., 'Penggubalan Perintah Darurat', 66

⁴⁸ Hj Mohammad, *Tuntutan*, 157

and strict manner.⁴⁹

Apart from that, the liberal definition of *Hukum Syara'* as provided in the IFLA (Cap. 217) is one of the issues that are raised by scholars especially Hj Johar.⁵⁰ He claimed that such a definition would lead to differences and inconsistencies in judgement among the *Syariah* judges in Brunei and could ultimately give rise to confusion in the minds of the public.

Despite the range of good purposes intended for its existence, IFLA (Cap. 217) is still subject to issues of contention. The non-efficient operation of such a law affects its success. Therefore, it is felt that there is a need today to review the IFLA (Cap. 217) and conduct a critical examination of it in order to provide more practical and equitable solutions to newer and more complicated problems.

1.7.2 'Iddah Maintenance

Very little was found in the literature on the discussion of a wife's maintenance during *'iddah* in Brunei. This limited research, however, suggests that there is a need to provide more detailed guidelines on maintenance and to bring about an improvement to it, especially in the provisions relating to the determinant factors for its amount⁵¹ and the specific qualifications for its entitlement.⁵²

⁴⁹ Ibrahim H., Penggubalan Perintah Darurat', 70

⁵⁰ Hj Mohammad, *Tuntutan*, 148-150

⁵¹ Noryati Hj Ibrahim 'Protection of Women's Rights on Divorce under Islamic Law of Brunei' (MCL Dessertation, International Islamic University Malaysia, 2008), 71-6

⁵² Ibid; Mohammad, *Tuntutan*, 121-4

My previous study⁵³ shows that the court decisions made when determining the amount of maintenance are often based only on the perceived financial capabilities of the husband, without taking into account the wife's need. It was revealed in some reported cases⁵⁴ that the quantum of maintenance that the husband was instructed to pay is relatively lower as compared with the standard of living for average Bruneian people.⁵⁵

Other issues that were claimed in some studies to be likely to complicate Syariah judgements as well as confusing judges in dealing with maintenance cases are the unclear criteria which qualify a woman as regards her maintenance. This includes the types of divorce⁵⁶ and matters of '*iddah*.⁵⁷ Although there is a discussion among Muslim jurists on both matters the IFLA (Cap. 217) is silent about these provisions.⁵⁸ Therefore, as for the former, a new approach by adopting the opinion of Hanafi's school is suggested, that is to entitle maintenance following the irrevocable divorce.⁵⁹ Whereas the latter, as Hj Johar proposed is to incorporate in the IFLA (Cap. 217) the explicit stipulations for the duration of '*iddah* and the form of rights that woman should be entitled during this period. He further stresses that this measure would be practical and could speed up the process of the maintenance claims similar to what is practised in Jordan and Kuwait.⁶⁰ Although matters of maintenance on divorce are not dealt with in very much detail, the above mentioned literatures can be used to develop more questions that need further investigation in this

⁵³ Hj Ibrahim N., 'Protection of Women's Rights, 71-6

⁵⁴ E.g., in *Abdul Mohammad v Juliana*, MRHS/MAL/BM/106/2006

⁵⁵ Hj Ibrahim N., 'Protection of Women's Rights, 71-6

⁵⁶ Ibid

⁵⁷ Hj Mohammad, *Tuntutan*, 121-4

⁵⁸ Ibid; Hj Ibrahim N., 'Protection of Women's Rights, 107

⁵⁹ Hj Mohammad, *Tuntutan*, 121-124

⁶⁰ Ibid

study.

Another striking provision in the IFLA (Cap. 217) relating to maintenance as pointed out by Hj Johar is that of the earning order.⁶¹ It is a newly introduced approach that never existed in the previous legislation which is aimed at achieving proper payment of any sort of maintenance according to its schedule by deducting from a dependent's salary.⁶² This provision practically gives an advantage to women and children too. As this issue has not been explored exhaustively in this study or elsewhere, this might become a starting point for further research, through an examination of its efficacy in settling financial cases upon divorce.

1.7.3 *Mut'a al-talaq*

To date there has been little agreement on the question of *mut'a al-talaq*. The commonly addressed issues surrounding *mut'a al-talaq* are as follows: its amount, mode payment and the question of *mut'a al-talaq* itself as to whether it is a right or a claim.

In general, some studies seem to agree with the view that the decision to determine the amount of *mut'a al-talaq* was not in the hand of the courts, but subject to the husband's willingness and his capability to pay.⁶³ This is why according to Datin Saadiah that the sum of *mut'a al-talaq* that the women received was unsatisfactory, for example too low in some cases, while the husbands potentially could offer more. This conclusion is based on her observation from a quantitative investigation that she

⁶¹ Ibid, 136-141

⁶² s 84

⁶³ DDW Hj Tamit, *Mut'ah di antara Hak dengan Tuntutan (Mut'ah between Rights and Claims)*, *Jurnal Undang-undang Syariah Brunei Darussalam* 3, no. 4, 2003, 16; Hj Mohammad, *Tuntutan*, 16-17

conducted on 200 divorced women; 100 from both urban and rural areas respectively. Apart from the above finding, she also revealed that it was just under one-fourth of those surveyed who were awarded *mut'a al-talaq*. Not only that, a lack of awareness on the part of woman has also contributed to the poor recovery they have achieved in court.⁶⁴

Similarly, Hj Johar in his study⁶⁵ concludes that the court judgements are most likely to be built on the factor of the husband's financial situation and no other. He identifies that the main cause for this is the non-existence of comprehensive guidelines about *mut'a al-talaq* in the IFLA (Cap. 217). Furthermore, in qualitative analysis, the author came up with a suggestion that *mut'a al-talaq* should be settled in a way of instalments subject to several reasons and conditions.

For Hjh Masnon,⁶⁶ the awarding of *mut'a al-talaq* in the Syariah courts of Brunei is classified according to whether it is a question of entitlement or claim into several different aspects. This analysis ultimately has advanced a very interesting suggestion, that is to encourage more alertness and willingness on the part of any husband to provide *mut'a al-talaq*, to encourage more awareness from women towards their rights to *mut'a al-talaq* and to have no fear to fight for *mut'a al-talaq* in court and also to encourage more proactive efforts from the court that could protect the interest of all parties, especially the wife, so as to decree more equitable rulings on *mut'a al-talaq*.

⁶⁴ DDW Hj Tamit, *Pembubaran Perkahwinan dalam Undang Keluarga Islam Brunei dan Perbandingannya dengan Undang-Undang Keluarga Islam Malaysia (Termination of Marriage in Islamic Family Law in Brunei and its comparison with Islamic Family Law in Malaysia)* (Brunei: Dewan Bahasa&Pustaka, 2012), 232

⁶⁵ Hj Mohammad, *Tuntutan*, 16-20&152

⁶⁶ Dr Hjh Masnon Haji Ibrahim, Malay Author. 'Perolehan *Mut'ah* di Bawah Undang-Undang Islam di Negara Brunei Darussalam (Allocation of *Mut'ah* as under Islamic law of Brunei)', *Jurnal Undang-undang Syariah Brunei Darussalam* 4, no. 6, 2004, 23

In summary, although some authors measured the issues of *mut'a al-talaq* in different ways, from quantitative (Datin Hj Saadiah) to qualitative analysis (Hj Johar), these studies are vital as a foundation to stretch this current study in a more systematic manner which employs both doctrinal and empirical research as well as comparative analysis.

1.7.4 Harta Sepencarian

The issue of *harta sepencarian* was found to be the most controversial problem that has gained increasing interest among many researchers. In this category, several issues are raised: the basis on which *harta sepencarian* is conceptualized; the issues of a woman's non-monetary contribution and efforts such as moral support; and the provision relating to earning order.

As regards the concept of *harta sepencarian*, most researchers are in agreement that the concept is strongly influenced by Malay custom,⁶⁷ which is widely practised in any state in the Malay Archipelago except Singapore. Under Brunei Malay custom which is also called *harta laki bini*,⁶⁸ in the event of divorce, the marital property acquired together during marriage is divided equally between the husband and wife. Basically, this idea had its roots in Malacca and Negeri Sembilan which practise a matrilineal system under *adat pepatih*.⁶⁹ There are three types of property classified under *adat perpatih* and *harta sepencarian* is one of them which connotes property acquired during wedlock such

⁶⁷ DDW Hj Tamit, "*Harta Sepencarian Menurut Adat dan Undang-Undang (Harta Sepencarian in Accordance to Custom and Law)*", *Jurnal Undang-undang Syariah Brunei Darussalam* 3, no. 5, 2003, 7; Haqqi, '*Harta Sepencarian*', 43

⁶⁸ DDW Hj Tamit, "*Harta Sepencarian Menurut Adat*", 7

⁶⁹ Ibrahim A., *Family Law*, 252

as a rubber estate, joint savings or a rice crop.⁷⁰ Further, the main object of *adat perpatih* is to provide for the continuance of the tribe through its female members and to prevent alienation of the landed property, so that there will always be sufficient to provide maintenance for the woman who though alone the tribe can continue.⁷¹ The fact that there is a strong connection between *harta sepencarian* and Brunei Malay custom of *harta laki bini* has not been substantially discussed in any of the writings of Brunei scholars.

Another perspective about the concept of *harta sepencarian* is that it also reflects the general principles of Syariah law called ‘urf’ or custom. Therefore, any custom like that of *adat perpatih* which does not contravene the expressed edicts in the Syariah can be accepted as part of the Syariah law and can then, further, be applied in the court of law. This notion has also been presented by Brunei researches in their studies.⁷²

Apart from this, the majority of the Brunei scholars suggest that *harta sepencarian* is also similar with the concept of partnership property under Islamic Law by the way of *qiyas*.⁷³ However, since there is a disagreement among the *Sunni* schools on the validity of its different classification, a few of those Brunei scholars have come up with other suggestions. For instance, Datin Hj Saadiah suggests the need to explore other approaches than the Syafi’is, such as the Hanafis, because it is more relevant to the definition which considers a wife’s contribution other than money and effort such as moral support and the maintaining of households. This is due to the fact that most court

⁷⁰ Ahmad Ibrahim, *Undang-Undang Keluarga Islam di Malaysia (Islamic Family Law in Malaysia)*, (Kuala Lumpur: Malaysian Law Journal 1999), 244

⁷¹ Civil case no-41-001-1-95, High Syariah Court of Terengganu: reported in [1997] 5 Jurnal Syariah 183-4 as cited in Nurhayati Hamzah, “*Harta Sepencarian: A Matter of Malay Adat?*” in *Islamic Family Law Issues 2000*, ed. Majid K., (Kuala Lumpur, IIUM Press, 2001), 362

⁷² DDW Hj Tamit, “*Harta Sepencarian Menurut Adat*”, 7 Haqqi, “*Harta Sepencarian*”, 43

⁷³ Ibid

judgments are based on *fatwa* rulings which have adopted the Syafi'i's school of thought relating to the division of *harta sepencarian* which do not value or recognise a woman's household and familial efforts.⁷⁴ Hj Johar accordingly, suggests that the classification of 'sole property' as mentioned in the IFLA (Cap. 217), is to be removed by absorbing the concept of 'moral support' of the wife in helping the husband towards the acquisition of the asset into the classification of 'joint property'.⁷⁵

Furthermore, another different perspective of *harta sepencarian* is also advanced stating that the lacuna of the provisions on particular issues in Islamic jurisprudence is meant to be left open so that jurists can find solutions to deal with current and new issues that were encountered in the past by using their own *ijtihad*.⁷⁶ Surprisingly, there is one author who found that the concept of *harta sepencarian* is relatively similar to that of the English Law concept of acquired property during marriage which also recognizes the monetary contribution and effort of the wife.⁷⁷

As far as the provision of earning order is concerned, there is only one scholar who discussed this matter. He argues that such provision and its application should be extended to cases involve *harta sepencarian* and *mut'a al-talaq* as this provision is only applicable to maintenance claims.⁷⁸ As an overall picture of the provision on *harta sepencarian*, it is claimed that it fails to provide better settlement, both theoretically and practically.⁷⁹

⁷⁴ DDW Hj Tamit, "Harta Sepencarian Menurut Adat", 14-20

⁷⁵ Hj Mohammad, *Tuntutan*, 151-2

⁷⁶ Haqqi, "Harta Sepencarian", 43

⁷⁷ Ibrahim H., "Penggubalan Perintah Darurat", 66

⁷⁸ Hj Mohammad, *Tuntutan*, 157

⁷⁹ Ibid

In conclusion, it is important to note that despite the weaknesses still evident, the existence of *harta sepencarian* and its application has indeed produced benefits to Brunei Muslim societies for giving equal treatment to divorced couples in recovering their marital property. As its establishment is strongly inspired by the Malay custom of *adat perpatih* and is not purely from Islamic origin, it has convinced the current study that it might be somewhat rewarding to explore a new interpretation of the Quran and Sunnah in the light of *Siyasah Syariah*, so long as it can improve the current situation of financial issues relating to divorce towards a more equitable settlement.

1.7.5 Child's Financial Support

Unlike child custody, far too little attention has been paid to the issues of children's maintenance. While the cases of a father's neglect in supporting his children become more problematic, however it is one of the issues that has received very little interest from scholars. Therefore, the only relevant literature found so far is written by Hj Johar.⁸⁰ He notes that the non-existence in the IFLA (Cap. 217) of such a provision which would determine the amount a father should provide has put a lot of pressure on judges. Both the circumstances of the father and his children must equally be considered and taken into account. In this case, the father is obliged to exhibit any relevant documentation to show his financial condition so that the court judgement would not be based on mere claims by the father of being incapable to provide support for his children

⁸⁰ Ibid, 124-9

due to other financial commitments. There are several court cases that have uncovered this phenomenon which will be further examined in the study.

1.8 METHODOLOGY

This research will be attempted through doctrinal or library-based research, combined with empirical research. Also, comparative analysis will be undertaken. The limited availability of sources that cover the topic of financial matters on divorce in Brunei, has prompted a need to consider empirical analysis as another method of finding sources about financial issues to strengthen the research.

1.8.1 Doctrinal Research:-

The primary and secondary sources of information will be analysed; the researcher's attention will be on library based materials.

Primary Sources

Government documents such as statutes, gazettes, subsidiary legislations and court decisions are considered as primary authorities for the research.⁸¹ The study has identified the Religious Council and Kadhi's Court Act, (Cap 77), the Islamic Family Law Act (CAP. 217) and the Syariah Court Civil Procedure Order 2005 or SCCPO 2005 as primary authorities that relate to Brunei.

⁸¹ Leo D. Pointon 'Legal Research', in *How to Research: A Guide for Undergraduate & Graduate Students*, ed. Stanley Richardson & Balachandher Krishnan Guru (Thomson, 2005), 78

Despite its non-legally binding nature, the document⁸² *fatwa Mufti* is considered as important material for it has a record of valuable sources of information about Islamic legal subjects which include family issues. Significantly, the document *fatwa* in Brunei is produced by the State *Mufti's* Office of Prime Minister Office which has also an important position in the political system in Brunei as *Mufti* was designated as the chairman of both Legal and Judicial Committees of the Religious Council or Majlis Ugama Islam (hereinafter referred to as MUIB). As a result, by the virtue of section 43 (2) of the RCKCA, (Cap. 77) states that the ruling or *fatwa* issued by the Legal Committee if determined by the MUIB⁸³ or if directed by His Majesty the Sultan of Brunei to be published in the Gazette then those *fatwas* would become obligatory and binding on all Muslim people in Brunei.

Secondary Authorities

The secondary sources comprise any publications that discuss the definition and general idea regarding financial settlement on divorce, such as treaties, books, legal encyclopaedias, working papers, legal journal articles, conference and seminar papers, lecture notes, dictionaries of law and newspapers. Such materials will guide the researcher towards finding the relevant primary sources and will help to nurture a better understanding of the research topic which can later lead to a more detailed analysis.

Besides that, references and bibliographies contained in these materials are also important

⁸² Generally, it has no legal effect if the opinion given is to answer questions from a private individual but when it is sought by government then it would become a binding precedent.

⁸³ A body corporate as established under s 5 of the RCKCA, (Cap. 77), which has an authority to aid and advise His Majesty on all matters relating to the religion of Brunei and shall in all such matters be the chief authority in Brunei Darussalam (s 38 of the Act)

in that they can also give further leads that might aid the researcher.⁸⁴ The searching for data on internet websites is more crucial these days because it can access a flood of information ranging from news to legislation, as well as online databases, online journals and many more electronic information facilities.

In terms of the Islamic law, besides relying upon the Quran and the Sunnah, the research will also be based on the classical as well as contemporary works that discuss the issues of financial divorce written by prominent Muslim scholars as authoritative support in the research.

Sources Location

In Brunei, to locate all these sources, the Syariah Courts, Islamic Legal Unit, Ministry of Religious Affairs and the Attorney General's Chambers will be consulted. To access the Brunei Laws, it will be made through the Attorney General Chambers website⁸⁵ as it is available online. As Syariah court cases are not easily accessible, the researcher would write in to the Syariah Court Registrar of Brunei to seek permission for an access into the files of registered court cases involving claims for maintenance for a divorced wife or a child, *mut'a al-talaq* and *harta sepencarian* in the selected years i.e. 2001, 2002, 2010 and 2011.

In the UK, as the library of the School of Oriental and African Studies has extensive resources that it could offer including the writings authored by classical or contemporary Muslim jurist, thus it would almost certainly meet the research needs.

⁸⁴ Pointon, "Legal Research", 79

⁸⁵ at <http://www.agc.gov.bn/Theme/Home.aspx>

1.8.2 Empirical Research

Data collection will consist of gathering information and facts obtained through empirical research by employing a qualitative method, which will comprise of interviews, questionnaires and observation.

Data Collection

As regards interviews, a semi-structured approach will be adopted on a face to face basis. Alternatively, the research participants may also provide feedback in writing. The researcher will prepare a list of questions or specific topics to be covered, which can identify areas of concern or attitudes regarding the efficacy of law provision and its implementation. If the sample chooses to be interviewed in person, the interview will be recorded in order to facilitate transcription and easy data processing. Arrangements will be made for the interview at times throughout the study, subject to the conveniences of the research participants. If the participants choose to provide the answer in writing, the questionnaires will either be emailed or posted to their office address. The telephone interview will also be incorporated into the research design, particularly to allow for respondents who would rather stay anonymous or not be interviewed in person. Additionally, there is a non-participant observation involved where the researcher is not involved in any particular activities in such groups but is there only to observe the

situation and draw conclusions from this, such as an observation made while hearing a court case.⁸⁶

Participants

The research group selected for the research will include government officials and public figure such as *Syar'ie* judges, *Syar'ie* lawyers, Syariah law legislators and Syariah Courts registrars, as they play important roles in enacting and implementing the Islamic family law in Brunei. The researcher will prepare a list of names, in rank order, of accessibility and the acceptance of at least two officials of different categories of profession would suffice to accomplish the interview. As email is not yet widely used within government sectors, thus the letter of request or consent for an interview would be sent to their office addresses either by mail or in person.

The information would also be sought from private individuals who have experienced court proceedings relating to divorce settlements which include husbands and wives. To access the respondents' contact details, the researcher would try to look into the files of all the divorce settlement kept in the Syariah Registrar Court and also in the records of private law firms. Accordingly, to draw a sample of an accessible population, about twenty to twenty-five respondents would be randomly selected.

⁸⁶ Ranjit Kumar, *Research Methodology: A Step-by-step Guide for Beginners*, 3rd ed. (London, SAGE, 2010), 141

The interview and questionnaire findings represent the personal views based on the experiences and knowledge of the respondents and cannot be generalized to represent all of the other legal professionals or of those with access to Syariah Court services.

The Selection of Samples

While Brunei has four districts, the analysis will be confined to Brunei Muara population as Brunei Muara is the capital district and the most populated area. As opposed to other districts (Belait, Tutong and Temburong), Brunei Muara also has registered the most number of family law proceedings relating to divorce and its financial claim. Accordingly, the study will be based on a content analysis of random samples of court archives (such as official statistics, registration logbooks, correspondence and other materials) and also judicial court files surrounding the financial divorce cases from the Syariah Subordinates Courts in Brunei Muara district only. It can be assumed that this sample can be generalised as applying to other courts in Brunei (courts in other three districts) as the Syariah courts in Brunei Muara is the head office of which the Syariah Court of Appeals, the Syariah High Court, the Syariah Subordinate Court, the Registry of Marriage, Divorce and reconciliation and other relevant administrative offices are mainly situated. Hence, the judicial cases analysis will consist of two major phases; the early years (2001-2002) and the late stage years (2010-2011), in order to discern the differences of the Syariah court approach in the financial divorce settlement between these two phases of IFLA (Cap. 217) implementation. In short, a total of 919 court cases were registered in these selected years, but due to time availabilities and courts

accessibilities the samples proposed would be approximately one-fourth of all possible cases.

Data Analysis

The information gathered from interviews, questionnaires and observation notes will be identified according to the main themes that emerge and also, if necessary, these main themes will be quantified in order to provide their prevalence and significance.⁸⁷ Eventually, data generated from these empirical research efforts will be compared to the data generated by analysis of case-laws as well as from the existing literatures that discussed the relevant issues.

Anticipated Problems and Ethical Consideration

The potential problems that the research may encounter would include the contact details of disputed parties, which are most likely to be out-dated. Another concern for the researcher will be to obtain the cooperation from the parties (to financial claim proceedings) to participate and share their experiences, which in many cases are most likely to be bitter. However, to overcome this difficulty, alternative methods (e.g. survey questionnaires) to gather information will be adopted.

Ethics approval will be sought from the SOAS Research Committee. Written consent from all selected respondents will also be obtained. Participants' privacy, confidentiality and anonymity will be guaranteed. Similarly, the selected Syariah Courts

⁸⁷ As methods suggested in Kumar, *Research Methodology*, 277-8

will need to give permission for access to archival material and court case files useful to the study. Raw data including questionnaires, interview recordings, observation notes and transcripts will be stored securely and will not be used for any purpose except for execution of this study.

1.8.3 Comparative Analysis

The comparative approach also plays a significant role in an attempt to uncover the answers for the research questions. The comparative analysis between the IFLA (Cap. 217) and Islamic principles which will be made in chapter 4, seeks to determine the consistency of this prevailing law with the principles relating to property matters on divorce as stipulated in the Quran and the Sunnah. In doing so, a further examination will also be made to identify which opinions of the early prominent Islamic jurists have been adopted as the legal basis for the codification of specific provisions in the IFLA (Cap. 217) particularly relating to property rights on divorce. In bringing out the distinctive element between the ‘law in book’ and ‘law in action’,⁸⁸ the *Syariah* Court judgment system should be exhaustively investigated and will make use of any related-law financial cases tried in the courts in pursuit of the aim of compiling an in-depth comparative review about the mismatch between the intended aims for law as written and the law in practice.

⁸⁸ Borrowed from Michael Salter & Julie Mason, *Writing Law Dissertations* (Pearson Longman, 2007), 182

1.9 Scope of the Study and its Limitation

The study deals primarily with both the substantive and procedural laws concerning financial matters following divorce for Muslim people in Brunei. Every statutory provision is identified and further explained in the light of *Syariah* or the general principles of Islamic law. Apart from analysing the legislative provisions, the application of such law will also be analysed by referring to decided court cases. The study's focus will be limited to the forms of financial provision of maintenance for woman and children, *mut'a al-talaq* and *harta sepencarian*. Although the study acknowledges most financial rights upon divorce are an exclusive right for women, as provided in both *Syariah* and Brunei legislation, the study will try to depart from a biased one gender discussion and analysis in order to extend the coverage in more general terms to include both men and women.

Occasionally, a number of other countries may be referred to wherever necessary, such as Malaysia, Singapore, Egypt, United Kingdom, in order to provide this and any other putative legal reformer useful inspiration.

CHAPTER 2

EVOLUTION OF ISLAMIC LAW IN BRUNEI: AN OVERVIEW

2.1 INTRODUCTION

This chapter describes the historical evolution of the Islamic legal and judicial system in Brunei from the coming of Islam followed by the colonial administration of the British down to the contemporary period. Thus, this chapter focuses on the laws that deal with matters related to Muslims and the establishment of Muslim courts only. The relevant religious institution or organization that plays a number of important roles in the administration of Islamic law in Brunei will also be highlighted.

2.2 THE BIRTH OF ISLAMIC LAW

Islam has always played, and in fact today is still playing, a very central role in the daily lives of the Brunei Malays. Very great efforts were made by the Sultans of Brunei to spread Islam into Brunei and to enforce Islamic law gradually until it became the complete law of the land which it is today.⁸⁹

⁸⁹ Hj Mohd. Jamil Al-Sufri Begawan Pehin Udana Khatib Dato Seri Paduka (BPUKDSP) Hj Umar, Malay Author. *Latar Belakang Sejarah Brunei (History of Brunei)* (Brunei: Jabatan Pusat Sejarah 1990), 33

2.2.1 Arrival of Islam and Theories Evolved Around it

Several theories have emerged as to the question of when and how Islam actually first appeared in Brunei. In terms of the date, some writers have claimed that the earliest was the 10th century. According to Chinese records in 977, one Chinese Islamic trader arrived in Brunei⁹⁰ named Pu-lu-sheh which is the Chinese equivalent of Abu al-Layth.⁹¹ In return, the King of Brunei had sent a delegation to China headed by another Muslim by the name of P'u A-li accompanied by persons named Syeikh Noh and Kadi Kasim.⁹² This therefore, according to some historians, proves that Islam actually arrived in Brunei in the year 977. Despite this, however, Islam at that time was not entirely accepted by the Bruneians until the 14th century when the Sultan Awang Alak Betatar converted to Islam under the name of Muhammad Shah.⁹³ At that time Hindu and Buddhist influences were very strong to the extent of possibly hindering the propagation of Islam.⁹⁴

Accordingly, a number of artefacts also show that Islam was actually practised in Brunei by the 12th century. Amongst these were tombstones found in the various Islamic graveyards in Brunei; particularly the one at Rangas which showed one with a Chinese

⁹⁰ Brunei is used to be known as Po-li or Po-lo or Puni and the name Puni was even used in the 8th and early 9th centuries AD.

⁹¹ According to S. Q. Fatimi, *Islam Comes to Malaysia* (Singapore: Malaysian Sociological Research Institute, 1963), 63, that the word "P'u" is originated from the Arabic word of "Abu".

⁹² According to Pg Dato Seri Setia (DSS) Dr Hj Mohammad Pg Hj Abd Rahman (Malay Author) in *Islam di Brunei Darussalam Zaman British (Islam in Brunei during the British Era (1174-1984))* (Brunei: Dewan Bahasa dan Pustaka, 2007) 81, that the title of 'kadi' and 'Syeikh' has clearly shown that they both have a good command of religious knowledge.

⁹³ It has been argued by some European historians that Sultan Muhammad Shah converted to Islam as late as the 16th century and not during the 14th century as is widely known. Meanwhile, according to Brunei historians, Sultan Muhammad Shah converted to Islam in 1376 and ruled until 1402.

⁹⁴ Pg DSS Dr Hj Mohammad Pg Hj Abd Rahman, "Islam Masuk ke Brunei dan Hubungannya dengan Nusantara (The Coming of Islam into Brunei and its connection with the Archipelago), in *Majalah Dakwah Malaysia*, Feb, 1986, 35

Muslim by the name of P'u Kung Chih-mu'.⁹⁵ He was buried there in 1264; more than a hundred years earlier than the conversion of Sultan Muhammad Shah.⁹⁶ The location of Brunei was strategic being on the sea trade-route between Western Asia and China. Brunei was used as a refuelling and port of call for Muslim merchants. These assisted in the dissemination of Islamic teachings in the area.⁹⁷

Despite all the above theories, it has been generally recognised particularly among the Brunei Scholars, that it was during the reign of Sultan Muhammad Shah⁹⁸ that Islam was officially accepted as the religion of the monarch and its people even though it was yet in its infancy. According to Al Sufri⁹⁹ Sultan Muhammad Shah's marriage to a Johore princess sometime in 1368-1370 resulted in him converting to Islam. His two brothers Awang Semaun and Pateh Berbai also converted to Islam whereby the latter finally became the second Sultan of Brunei known as Sultan Ahmad.¹⁰⁰

At least three theories were put forward as to the sources that brought Islam to Brunei. Firstly, according to some European historians Islam came to Brunei from China. The writings on the tombstone found at Rangas were put forward to support this theory. However, others argued that according to Chinese records in 1247 AD, the Chinese Emperor who sent the envoy to Brunei at that time was not even a Muslim, let alone a

⁹⁵ Although there is no mention on the tombstone made of Pu Kung being a Muslim, but the name of Pu was used mostly by Chinese Muslims.

⁹⁶ The Daily Brunei Resources, 'Sultan Hassan's Canons: Islamic Law in Brunei from the 16th Century', accessed 20 July 2012, <http://bruneiresources.blogspot.com/2012/04/sultan-hassans-canons-islamic-law-in.html>

⁹⁷ Haji Mohd Jamil Al-Sufri BPUKDSP Hj Umar, *Tarsilah Brunei (The Early History of Brunei up to 1432 AD)*, trans. Mohammad Amin Hassan (Brunei: Brunei History Centre, 2000), 69

⁹⁸ Basically, there is an argument among European Historians regarding the precise date of the islamization of Awang Alak Betatar.

⁹⁹ BPUKDSP Hj Umar, *Tarsilah*, 46-9

¹⁰⁰ Hj Serudin, *Brunei-An Islamic*, 2

ruler who would spread Islam to Brunei.¹⁰¹ On the other hand, there are historians who claimed that it was Arab traders who were those who firstly brought Islam to Brunei. Several evidences have been discovered which indicate that Islam came to South East Asia via Arab traders who disseminated Islamic teaching in Brunei. To illustrate, Brunei was used as a traditional port of call for Muslim missionaries who wanted to go to Sulu,¹⁰² so it is likely that the Arab missionaries who went to spread the teaching of Islam in Sulu Islands in the mid 14th century AD would have stopped at Brunei on their way to Sulu Island. The missionaries would have grabbed the opportunity to spread the teaching of Islam in Brunei, though it may have been only a small community that received it.

The fact that India was the first that propagated Islam to the Malay world was a theory advanced by a number of European scholars and orientalist justified by several factors that would strengthen their stance. For example, the strong relationship between India and the islands in the Malay Archipelago that had been established in a very long time in a way that those Malay nations always looked upon to India when it comes to knowledge and trade, and not to others. That was why when the Hindus embraced Islam and further introduced this new religion to those Malay populations, they without question accepted Islam.¹⁰³

¹⁰¹ BPUKDSP Hj Umar, *Tarsilah*, 71

¹⁰² Najeeb M. Saleeby, *the History of Sulu* (Manila: Bureau of Public Printing, 1908), 139, accessed 05 Feb, 2015, <http://www.glutenberg.org/files/41771/41771-h/41771-h.htm/#ch1.42>,

¹⁰³ Aboebakar Aceh, 'Sekitar Masuknya Islam ke Indonesia (The Coming of Islam into Indonesia)', 4th ed., (Solo: CV. Ramadhani, 1985), 21-30, accessed 05 Feb, 2015, http://www.acehbooks.org/pdf/ACEH_02545.pdf

2.2.2 The Evolution of Islam and its Law in Brunei

The Sultan of Brunei provided a very significant contribution toward the assimilation of Islam and the implementation of Islamic laws in Brunei. One of the most important Sultans of Brunei was the third Sultan: Sultan Sharif Ali. It was through all his dedicated effort that the Islamic spirit flourished and became strong until Islamic law succeeded in becoming the basic law and the national policy of Brunei as is practised today. In fact, this Sultan was the first to build a mosque in Brunei and was also the one who determined the direction of the *Qiblat*.¹⁰⁴ Such a measure was observed to be as if Sultan Sharif Ali had followed the actions undertaken by the Prophet Muhammad (P.B.U.H) when the Prophet first migrated to Medina and built a Mosque called Quba Mosque. Sultan Sharif Ali also constructed a fortress in stone which is in accordance with Islamic injunctions to defend the state and religion and life against any attack by enemies.¹⁰⁵ Essentially, the title *Darussalam* (abode of peace) was also used first during his reign as a result of the peaceful and harmonious state that Brunei was experiencing at the time he ruled the country.¹⁰⁶

Originally, Sultan Sharif Ali was among the Arab traders that came from Taif, South Arabia.¹⁰⁷ He was believed to be a descendant from the Prophet Muhammad (P.B.U.H) through his grandson Sayidina Hassan. He was married to a daughter of Sultan Ahmad (the second Sultan of Brunei) when he ascended the throne as the third Sultan of Brunei. Ultimately, due to his piousness, he was known as Sultan *Berkat*

¹⁰⁴ BPUKDSP Hj Umar, *Tarsilah*, 90

¹⁰⁵ Hj Serudin, *Brunei-An Islamic*, 72

¹⁰⁶ BPUKDP Hj Umar, *Latar Belakang*, 13

¹⁰⁷ According to BPUKDSP Hj Umar S. in *Tarsilah*, 77, the actual date of the arrival of Sultan Sharif Ali in Brunei has not been found yet from local sources.

(blessed). From then on Islam has become an important aspect in the life of people in Brunei where eventually it has become the official religion of Brunei Darussalam.

2.2.3 First Codified Islamic Law

It is on the record that Islamic law had taken its root and was widely practiced in Brunei in the 16th century as is manifested by the existence of a written and codified law known as the Hukum Kanun Brunei or the Code of Brunei.¹⁰⁸ The HKB was initiated by the ninth Sultan of Brunei, Sultan Muhammad Hassan (1582-1598)¹⁰⁹ and was duly implemented and enforced during the reign of Sultan Abdul Jalilul Akbar (1598-1659)¹¹⁰ and his son Sultan Abdul Jalilul Jabbar (1659-1660). The HKB which contained 96 pages, covered a wide range of laws with at least 47 clauses divided into six parts including law of contracts, law of evidence and criminal law as well as matters relating to family law. Although limited, the overall contents of the manuscript were no doubt based on Islamic teaching as prescribed in the Quran and Sunnah.¹¹¹ To illustrate,¹¹² Part V of the Code contains 6 clauses dealing with marriage and family procedures which consists

¹⁰⁸ The HKB has many versions and were kept in certain institutions and also under the possession of some individuals. According to M.B. Hooker, the oldest manuscript of the Code was under the possession of orang kaya DiGadong Seri Lela Muhammad Hussain which was claimed to be dated A.H year 1211 (A.D. 1708). (Refer to M.B. Hooker, *Islamic Law In South East Asia* (Singapore: Oxford University Press, 1984), 173-4). At present it is kept at the Language and Literature Bureau, Brunei. A copy for reference can be found at the Brunei Museum with reference no. A/BM/98/9024.

¹⁰⁹ According to DPSS Prof. Dr Haji Mahmud Saedon Othman (Malay Author) in *A Review on: the Implementation and Administration of Islamic Law in Brunei Darussalam*, trans. S. Khadijah Husien Alkaff (Brunei, Islamic Dawah Centre, 2008), 43, there is a possibility that it was written earlier but no concrete evidence to this effect has been found.

¹¹⁰ Ibid, 21

¹¹¹ Ibid

¹¹² The point of discussing this particular Part of the HKB and not others is because it is very much relevant to the thesis for Family law is the main focus of the study

of the following clauses followed by a brief comment on its consistency with Islamic principles:-

- Clause Eighteen deals with the offence of proposing to somebody else's fiancé, the punishment of which would be the liability to pay 10 *tahils* of gold and if the new proposal is accepted by the parent of the woman then she must also return all engagement gifts to the fiancé. Basically, engagement is only a promise to marry and the beginning of marriage. It is not a contract which requires offer and acceptance like those which are present in marriage. Many jurists are of the opinion that fulfilling a promise is a noble quality so that it is therefore advisable for the promisor to observe it. Even though according to them it is neither mandatory nor enforceable through the courts, its violation is reproachable.¹¹³ Islamic law established a rule that it is not allowed for any man to propose marriage to somebody else's fiancé for this will cause pain and hatred on the part of the first man.¹¹⁴ This prohibition is clearly mentioned in the Sunnah which states to the effect: "No one can purchase somebody else's purchase; no one can propose to somebody else's fiancé; unless he permits it."

- Clause Twenty Five deals with marriages, focusing on the *wali* (guardian) and its classification; *wali majbur*, *wali aqrab* and *wali hakam*. It further outlines the ruling as to the requirement of a woman's consent in marriage. After examining

¹¹³ It is a discussion as to the question whether or not a promise has a binding nature which was put forward in Mushtaq Ahmad Qazi, 'The Binding Nature of *Wa'ad* (Promise) and Its Application in Islamic Finance', *International Journal of Business and Social Science*, vol. 3, no. 4, February 2012, accessed 20th Feb, 2015, http://ijbssnet.com/journals/Vol_3_No_4_Special_Issue_February_2012/25.pdf

¹¹⁴ Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, *Muqaddamat al-Jiwaz (Marriage Introduction)*, 6493

this provision, it clearly shows that it is based on Islamic principle. Under Islamic law,¹¹⁵ certain conditions must be met in order for the marriage to be recognized and this includes the role of *wali*. The general consensus of jurists is that the woman shall not conduct her own marriage contract without a male guardian.¹¹⁶ Despite some differences of opinion among the scholars, in general view however, a father may marry off his virgin daughter without her consent. But it is *sunnat* (desirable) for the father to request her consent. For a daughter who is widowed or divorced, the father may not force her into a marriage unless by a clear consent as explained in the Sunnah by the Prophet (P.B.U.H) by Darulqutni which stated: “A widowed woman has more rights unto herself than her guardian and a virgin woman is married off by her guardian”.

- Clause Twenty Six concerns the conditions for becoming a witness in a marriage. According to this clause, a witness to a marriage contract should be of sound mind, have reached the age of puberty, be upright, a male and a free man (not a slave). The minimum of two witnesses required in marriage is also mentioned. Despite that, the Muslim jurists differ as to what the terms and conditions are to be fulfilled as a valid witness in marriage, but the provision as a whole, is in harmony with Syariah law. In fact, based on Syariah principle, the HKB has made the witnesses as an essential requirement for the validity of a marriage. This ruling

¹¹⁵ Basically, there are differences of opinion among prominent Muslim jurists as to the issue of *wali* and this can be referred to in Zuhayli, *Al-Fiqh al-Islami*, vol. 9, *Al-ahliyah wal-wilayah wal-wakalah fi al-ziwaj (Qualifications & Authorities & Representatives in Marriage)*, 6690-6700

¹¹⁶ Jamal J. Ahmad Nasir, *The Islamic Law of Personal Status*, 2nd ed. (London: Graham & Trotman, 1990), 50

- suits the principle in the Prophet (P.B.U.H) saying: "There is no marriage without a *wali* (guardian) and two upright, trustworthy witnesses."¹¹⁷
- Clause Twenty Seven provides that the solemnization of the marriage should be in the presence of four qualified witnesses as recognized by Syariah law. However, if this condition could not be met, two witnesses are sufficient to validate the marriage. Although the presence of witnesses is essential in the formation of marriage under Syariah law, there is no maximum number of witnesses specified except that the marriage would become in void if there is only one witness.¹¹⁸The Prophet (P.B.U.H) says to this effect: "There is no marriage without a *wali* (guardian) and two upright, trustworthy witnesses."¹¹⁹ Thus, it appears that this law in its general sense does not contradict with the Syariah stipulation as discussed above.
 - Clause Twenty Eight deals with the ruling on *khiyar* (cancellation of contract) that can take place in women and men for the five reasons: Insanity, leprosy, vitiligo, *'aib ratak* (irregular growth of additional flesh), *'aib karan* (irregular growth of additional bone) and impotence and erectile dysfunction. If a man is married to a woman with such disease as problem and later it is found out then the marriage is dissolved. The same ruling applies if the husband is suffering from a disease as such. If the husband is suffering from erectile dysfunction, the judge will ask him

¹¹⁷ *Hadith*, Al-Imam Al-Hafiz 'Ali bin 'Umar Ad-Daraqutni, *Sunan Al-Daraqutni*, vol. 3 (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1996), no.3481

¹¹⁸ Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 9, *Syurut al-jiwaz (Conditions of Marriage)*, 6563

¹¹⁹ See footnote 117

to seek treatment with a physician, and then wait for a year before *fasakh* (dissolution of marriage) could be granted. If the husband or the wife has leprosy and insanity but the partner accepts the disease, the judge will not perform *fasakh* since the party agrees to be with such a partner. There is no *khiyar* and the vow is valid. If a wife gets a disease from her husband, the wife may claim for *fasakh*. Similarly, if a husband gets a disease from his wife, the husband may claim for *fasakh*. It appears that the reasons for dissolution of marriage by *fasakh* specified in the HKB suits the view of the majority of Muslim scholars.¹²⁰

- Clause Twenty Nine not only outlines the ruling on divorce and its classification like *talaq raj'i* (returnable) and *talaq bain* (separation) but the issues about a marriage to a woman of *ahlu-kitab* or slaves are also dealt with. Furthermore, matters about *'iddah* are stipulated too. In comparing the content of this clause, it is principally, not contrary with Syariah stipulations.¹²¹ However, in terms of the slavery marriage, there is a general principle under Syariah law which prescribes that a marriage between a free man or woman and a slave (either male or female) is not allowed. It is to some extent permissible only if the *wali* or the slave-owner has given their consent to such marriage and also the slave is a Muslim.¹²²

¹²⁰ Al-Zuhaily, *Al-Fiqh al-Islami*, vol. 9, *At-Tafriq Al-Qada'ie (Dissolution of Marriage through the Court)*, 7045-56

¹²¹ Ibid, *At-Talaq (Divorce)*, 6955-65

¹²² Ibid, *Al-Muharramat Min An-nisa'ie (Forbidden Women to Marry)*, 6651-56

A number of examples prove that the implementation of Islamic law in Brunei in the past was not just theory but a fact. Among these is the documentation made by W.H Treacher, the British Acting Consul General who visited Brunei in 1880. He reported that the punishment that was executed for an offence of stealing during that time was hand amputation. According to him, when his ship lay anchored off the port of Brunei, a gold watch and a rifle were stolen and he made a report to the Sultan about it. A few weeks later, the stolen items were returned and the three culprits had their hands chopped off as punishment.¹²³ Such a punishment which is provided in the HKB is indeed a provision prescribed in the Quran and Sunnah, as part of what is called *hudud*.¹²⁴ In another case, Treacher reported having been a witness to the execution of a criminal named Maidin. He was found guilty of committing a spate of robberies and murders upon traders plying between Brunei and Labuan and finally was executed by the bow string for his punishment.¹²⁵ Under the HKB that a murderer justly deserves death as punishment is in conformity with *Hudud* law. Although Maidin was the son of one favourite officer of the Sultan it did not stop him being treated the same as other criminals¹²⁶ In Islam, justice is the utmost character that must be the dominating force in all judgements. There is no exception for anyone whether or not he is related to the judge because everyone is equal

¹²³ W.H. Treacher, "British Borneo: Sketches of Brunei, Sarawak, Labuan and North Borneo", *JMBRAS*, 1880, vol. 20, 40

¹²⁴ *Hudud* is defined as punishment stipulated in the Quran and the *hudud* crimes are: apostasy, theft, highway robbery, drinking alcohol, unlawful sexual intercourse and false accusation of unchastity (Muhammad Rawwas Qal'aji and Hamid Sadiq Qunaibi, *Mu'jam Lughat al Fuqaha (Dictionary of Islamic Legal Terminology)*, (Beirut: Dar al-Nafaes, 1985), 176)

¹²⁵ There was also other execution prescribed as a punishment, i.e. by way of *kris* (small sacred sword) which was meant for common people only. (W.H. Treacher, "British Borneo", 41)

¹²⁶ *Ibid*

before Allah (S.W.T.). Thus by comparison, the Sultan's decision in the case of Maidin is clearly based on Islamic injunctions.

It is interesting to note that there were theories stating that the HKB was greatly influenced by the *Hukum Kanun Melaka* (the Code of Malacca); the earliest Islamic law to be enacted as canon law and to be implemented in the Malay states.¹²⁷ This was by no means surprising as acts of copying and duplicating were widely practised in Brunei in those days.¹²⁸ In fact Brunei had a close relationship with Malacca for decades. However, if one compares between these two codes (HKB and *Hukum Kanun Melaka*), beside similarities there are also significant differences. Both codes stipulate a large part of the same provisions such as the death penalty for murder, adultery, apostasy and neglecting prayers. But they also differ on some provisions relating to punishment such as the offences of stealing and slapping. The punishment for those who commit stealing would be the chopping off of hands only, prescribed in the *Hukum Kanun Melaka* while according to HKB that it was just one of several other punishments.¹²⁹

2.3 ISLAMIC LAW ADMINISTRATION UNDER THE BRITISH PROTECTORATE (1906-1984)

Brunei was one of the strongest Malay-Islamic countries in the 15th Century, manifested by the existence of the HKB. However Brunei lost its prominence when it began its relationship with the British. Originally, the relationship between Brunei and

¹²⁷ Othman, *A Review on: The Implementation*, 32

¹²⁸ Metassim Haji Jibah, Malay Author. "Catatan Mengenai Hukum Kanun Brunei (A note on the Code of Brunei)", *Bahana Magazine* (Brunei: Dewan Bahasa dan Pustaka, October-December, 1980), 47

¹²⁹ Hj Serudin, *Brunei-An Islamic Nation*, 24

the British had existed long before the 1906 treaty.¹³⁰ In fact the relationship began as early as 1847 through several trade and friendship agreements sealed between the two countries. However, it was the 1906 Agreement whereby Brunei Darussalam officially accepted a British Resident. The Supplementary Protectorate Agreement¹³¹ required that the British Resident's advice had to be sought in all matters except on matters relating to custom and the Islamic religion. Such a provision was the beginning of the deterioration of the Islamic sphere of influence in Brunei's legal system which accordingly led to the formation of two separate legal systems in the state as it is practiced today. More importantly, the HKB was no longer the sole governing law of Brunei because the English legal system was brought in and began to firmly establish itself to the extent of limiting the application of Islamic law to purely personal matters. As a result of the formation of the Resident system, by virtue of the Application of Laws Act (Cap. 2), the English common law and the doctrines of equity together with the statutes of general application are made sources of Brunei law.¹³²

2.3.1 Governing Muslim Legislation under British Rule

Despite the setbacks, a number of Islamic laws were introduced during British rule which governed Muslim conduct and daily affairs: namely the Muhammadan Law

¹³⁰ The said treaty was a supplementary agreement to amend the Protectorate Agreement of 1888 which was signed by Sultan Hashim and Sir John Anderson. The first treaty the two governments had entered into of which gave the British power to administer justice in Brunei was the Treaty of Friendship and Commerce 1856.

¹³¹ The Protectorate Agreement 1888 as amended by the Supplementary Protectorate Agreement 1905/1906

¹³² There was an exemption however, as to the extent of the application of these laws, i.e. subject to the local situation and custom in the country.

1912, the Muhammadan Marriage and Divorce Law 1913, the Courts Enactment 1951 and the Religious Council and Kadhi's Courts Law 1955.

The Muhammadan Law 1912¹³³

The enactment of the Muhammadan Law 1912 in Brunei was a landmark in that for the first time the British colonial authorities officially recognized, through legislation the status of Muslim personal law within the colony. The Muhammadan Law was introduced in 1912 during the reign of Sultan Muhammad Jamalul Alam II, in which its implementation officially replaced the HKB. The law covered limited aspects of family and criminal law based on both custom and Islamic law. However, it had a very small number of provisions; less than half of those contained in the HKB, i.e. 18 sections only. It is the Law that divided the courts into *Kadhi's Courts* and the Magistrate's Courts and at the same time delineated the jurisdiction of that *Kadhi's Court* as opposed to the Magistrate's Court. In aspects of criminal law, it laid down the penalties for a few offences committed by Muslims jurisdiction over which had been distributed between these two courts as a result of the residential system. Therefore, the offences to be tried in a *Kadhi's Court* were absence from Friday congregation,¹³⁴ breach of betrothal,¹³⁵ desertion and maintenance,¹³⁶ and unlawful cohabitation.¹³⁷ Offences such as enticement

¹³³ Known also as Enactment No. 1 of 1912 and was revised in 1951 cited as Muhammadan Laws, Cap. 31 of Revised Laws 1951

¹³⁴ s 3

¹³⁵ ss 8 & 9

¹³⁶ ss 11 & 12

¹³⁷ s14

of an unmarried girl,¹³⁸ an unmarried girl absconding to an immoral life style,¹³⁹ adultery,¹⁴⁰ incest,¹⁴¹ religious teaching without authority¹⁴² and prostitution¹⁴³ were the kind of offences that were under the jurisdiction of the Magistrate's Court.

With the introduction of the Residential System in Brunei in 1906, the Sultan could not do much as executive power was transferred completely from the Sultan to the Resident. The Sultan reserved his power only on matters involving Islam which empowered him to decide on persons convicted by the *Kadhi's* Court. The system also empowered the Resident¹⁴⁴ to take over the Magistrate Court's cases.

Another distinguishing feature between these two courts was the extent of the jurisdiction each court had. To illustrate, the *Kadhi's* Court was only empowered to impose penalties not exceeding fifty ringgit¹⁴⁵ and imprisonment limited to a term not exceeding fourteen days. By contrast, the Magistrate's Court had more powers whereby it could impose fines up to two hundred fifty ringgit and imprisonment up to five years and could also decide whether or not to impose banishment from the state. This shows that the position of the *Kadhi's* Court was far below that of the Magistrate's Court.¹⁴⁶

It is also important to note that the Mohammadan Law 1912, one of the laws created under British supervision, had abolished some Syariah law penalties provided in the HKB and replaced them with more lenient punishments instead. To cite an example,

¹³⁸ s 4

¹³⁹ s 5

¹⁴⁰ s 6

¹⁴¹ s 7

¹⁴² s 10

¹⁴³ s 13

¹⁴⁴ s 17

¹⁴⁵ Refers to Brunei currency

¹⁴⁶ Hj Serudin, *Brunei-An Islamic Nation*, 37

it is provided under Clause 41 of the HKB that the penalty for adultery was stoning for married persons and flogging for those who were unmarried which is clearly an application of *hudud* law. However, in the Muhammadan Law of 1912, the punishment for the same offence was replaced with a one year imprisonment and a fine of two hundred fifty ringgit for a male offender and a six-month imprisonment for a female offender.¹⁴⁷ From the above, it is obvious that with the arrival of western powers, the implementation of Islamic law (that used to be the main and basic law in the country) was restricted and its full application was limited especially with criminal law.

The Muhammadan Marriage and Divorce Law 1913¹⁴⁸

In 1913, a new law known as the Muhammadan Marriage and Divorce Law was designed to complement the Muhammadan Law. It contained 7 sections and 4 schedules, and mainly provided for registration of marriage and divorce among Muslims in Brunei as well as a penalty for non-compliance with the procedure that was provided.¹⁴⁹ If it is compared with the HKB, it may appear that the Muhammadan Marriage and Divorce Law is a procedural enactment, while the HKB was more substantive in content.

The Courts Enactment 1951¹⁵⁰

Another enactment was later introduced in 1951 which was known as the Courts Enactment. The purpose of this Enactment was to amend the law¹⁵¹ relating to the

¹⁴⁷ ss 37 & 38

¹⁴⁸ Also known as Muhammadan Marriage and Divorce Enactment (No. 3 of 1913), and was finally revised and cited as Mohammadan Marriage and Divorce Enactment (Cap. 77 of 1951), Laws of Brunei

¹⁴⁹ Hj Serudin, *Brunei-An Islamic Nation*, 38-39

¹⁵⁰ This Act had repealed the Court Enactment 1906 and 1908.

establishment and jurisdiction of the civil as well as the criminal courts. The Enactment placed the *Kadhi's* Court in a subordinate position in the court structure¹⁵² and the scope of its civil and criminal jurisdiction was restricted as compared to that of the Magistrate's Courts. By virtue of this enactment, the Supreme Court was the most important court as it exercised appellate jurisdiction to hear and determine all appeals from the decision of the Court of the Resident¹⁵³ as well as all the cases involving the death penalty. For the courts of the Magistrates, each class had their own jurisdiction in both civil and criminal matters as given by the Enactment based on the seriousness of the crime committed and the amount in dispute.¹⁵⁴

The Religious and Kadhi's Court Law 1955¹⁵⁵

The final legislation that was enforced before the independence of Brunei in 1984 was the Religious and Kadhi's Court Law 1955. It is by comparison more comprehensive than previous legislation and sets out the provisions for regulating Muslim religious affairs and the framework of how Islamic law in Brunei is applied.

More significantly, with the enforcement of this Law, *Kadhi's* Courts were removed from the structure of the Civil Courts of Brunei and thereafter, formed a part of a dual system of courts: the Civil Courts and the *Kadhi's* Courts. Despite that, the

¹⁵¹ Known as Courts Enactment, (No.8 of 1951) and was revised and so is finally cited as Courts Enactment, Cap. 6

¹⁵² The courts constituted under the Enactment are: the Supreme Court, the Courts of a Magistrate of the First Class, the Courts of a Magistrate of the Second Class, the Courts of a Magistrate of the Third Class and the Kadhi's Court.

¹⁵³ This court had been constituted in accordance with the Court Enactment of 1906 and since this was repealed by the Court Enactment of 1951 this resulted in the abolition of the Resident's Court which was replaced by the Supreme Court.

¹⁵⁴ s 8

¹⁵⁵ Also known as Law No.20 of 1955 (See footnote 4)

Kadhi's Courts still have lesser powers and more limited jurisdiction than that of Civil Courts. Today, the enforcement of this Law is still in place, though it has been subjected to a number of amendments and the major one was the provisions concerning marriage and divorce. A new and extensive Islamic Family Law was enacted in 1999 to repeal those related provisions in the RCKCA (Cap. 77). It is cited as the Islamic Family Law Act (Cap. 217) (hereinafter referred to as IFLA (Cap. 217)).

2.3.2 The Structure of Bruneian Muslim Courts

As in other parts of the Muslim World, the colonial period was the key turning point for the institutionalization of religious authority in Brunei. The establishment of the Muslim courts of Brunei was not officially introduced until 1908, when Brunei officially accepted the British Residential System. With this development, Brunei was enabled to manage the affairs of Muslims and the application of Islamic law in a proper and efficient manner, though in its limited scope of power. However, this does not mean that the functionaries of the Islamic legal institution did not exist during the earlier centuries. Several important religious posts like *Kadhi*, *Khatib*, *Imam*, *Mudim* etc., had long been created.¹⁵⁶ More importantly, one of the duties of *Kadhi* at those days as described in the *Silsilah Raja-Raja Brunei* was to act as a judge.¹⁵⁷ This suggests the evidence of the

¹⁵⁶ Hj Abd Karim Hj Abd Rahman, "Sejarah Perkembangan Kehakiman dan Mahkamah Syariah di Brunei: Suatu Tinjauan Awal Sehingga Tahun 1955" (Historical Development of the Judiciary and the Syariah Courts in Brunei: A review on the Earlier Period until the year 1955), *Sejarah Penubuhan Mahkamah Syariah Negara Brunei Darussalam* (Historical Background of the Establishment of Syariah Courts in Brunei), (Brunei: Jabatan Kehakiman Negara, 2005), 82. Hj Abd Karim also added that no known sources indicate as to when the exact date of the creation of these religious posts, but it is strongly believed it existed in a period when Sultan Sharif Ali ruled Brunei.

¹⁵⁷ P.L Amin Sweeney, "Silsilah Raja-Raja Brunei", *JMBRAS*, Vol 41, Pt. II, (1968), 11

existence in ancient Brunei of an Islamic judicial institution. The only question that remains vague is whether or not its existence stands as a separate body like that of Syariah court or the *kadhi* acted individually without a proper court.¹⁵⁸

The Beginning of the Official Institution of Muslim Courts

As a result of the petition proposed by the Brunei government in 1906, the British agreed to set up a specialized court for managing legal matters in connection with Islam. In the petition, Brunei demanded that every case involving the Islamic faith should be tried by local judges and also, that local laws and customs were never to be revamped, amended or breached. The British rejected the latter but approved the former which consequently led to the institution of the first Muslim court in the country called the *Kadhi's* court.

According to the arrangement of the court structure established by the British,¹⁵⁹ the *Kadhi's* Court however, was placed in the lowest position, merely as a part of the system and the administration of the Brunei Civil Court. The jurisdiction of the *Kadhi's* Court was only allowed to administer and implement Islamic law related to matters concerning marriage, divorce and religious worship (*'ibadah*). This court was also just authorised to impose fines that were no more than ten ringgit and an imprisonment no more than fourteen days. On the other hand, the Civil Court's area of influence was wide and comprehensive.

¹⁵⁸ Hj Abd Rahman, "Sejarah Perkembangan Kehakiman", 83

¹⁵⁹ As provided for by the Court Enactment 1908, arranged as follows; The Court of the Resident, Courts of Magistrate of the First Class, Courts of Magistrate of the Second Class, Courts of Native Magistrates, Courts of *Kadhis*.

With the establishment of the British styled Civil Court system, the jurisdiction of the *Kadhi's* Court became limited in scope and principle as any appointment of a *kadhi* made by the Sultan still needed to be approved by the British Resident. More importantly, appeal cases from the *Kadhi's* Court were to be brought before the Resident's Court or the Magistrate's Court Class I. By comparison, the Civil Court had extensive powers conferred to more than one judge to handle a large number of civil and criminal cases. In fact, the scope of jurisdiction of the Civil Court continued to expand and became more organized with the introduction of the Sarawak, North Borneo and Brunei Courts Council Order in 1951.¹⁶⁰ With this new system, the position, structure and power of the *Kadhi's* Court however, remain unchanged and still in the same place in the hierarchy as 1908.¹⁶¹

Evolution of the Position of Kadhi's Court

The Religious Council and Kadhi's Courts Law 1955 was the legislation that brought into existence the major changes in the *Kadhi's* Court system. The *Kadhi's* Court then had their own distinctive system and were no longer under the administration of the Brunei Courts. In fact, the organization of the *Kadhi's Courts* was restructured in the following ascending order to ensure the efficiency and the smoothness of its judicial administration:-

- i. *Kadhi* Courts
- ii. *Kadhi Besar* Courts

¹⁶⁰ The Order required the Brunei Court System and structure to be reconstituted in the following order; Supreme Court of Sarawak, North Borneo and Brunei that consisted of a Court of Appeal and High Court, Magistrate Court Class I, Magistrate Court Class II, Magistrate Court Class III and finally *Kadhi's* Court.

¹⁶¹ Courts Enactment, Cap. 6, s 3(1)

iii. Judiciary Committee

With this reform, *Kadhis'* Courts were established in every district,¹⁶² administered by a *Kadhi* with a jurisdiction restricted to their respective district only. Although the *Kadhi's* Court did not have its own full and comprehensive jurisdiction, the scope of civil and criminal jurisdiction that was conferred on the *Kadhi's'* courts was better and wider than in the past.

The Chief *Kadhi* Court, according to the 1955 Law, had the jurisdiction all over Negara Brunei Darussalam (the official name for the state of Brunei) which was headed by the Chief *Kadhi Besar* and assisted by the Deputy Chief *Kadhi*. The *Kadhi Besar's* Court in its criminal jurisdiction could hear and punish an offence with a maximum sentence of imprisonment up to five years or a fine of five hundred ringgit. While in terms of civil jurisdiction, the *Kadhi Besar's* Court could hear a number of claims which exceeded five hundred ringgit. As for civil cases, the *Kadhi Besar's* Court has the jurisdiction on family law matters for Muslims only such as engagement, marriage, divorce, maintenance, child status, child care, claim of common property, *waqf* (Muslim endowment), *nazr* (vow) which was more than the jurisdiction given prior to the implementation of the 1955 Law.

The Judiciary Committee was established based on a requirement provided by section 44 of the 1955 Enactment and accordingly acted as the final Court of Appeal. This Committee consisted of several members chaired by a *Mufti*.¹⁶³ The Judiciary

¹⁶² Brunei has four districts: Brunei Muara, Tutong, Belait and Temburong

¹⁶³ As appointed under s 40 of RCKCA, (Cap. 77)

Committee was empowered to hear any appeals against the decisions made by the *Kadhi* Court and *Kadhi Besar* Court.

In 1984, the 1955 Law underwent a few amendments and eventually changed its name to the Religious Council and Kadhi's Courts Act. Basically, the amendments aimed to upgrade the sentences for religion offences that occurred in the 1955 Law so as to meet the needs of the Muslim Bruneians at that time.

2.3.3 Major Changes Over the Roles of Islamic Law in Brunei

His Majesty Sultan Omar Ali Saifuddien (the 28th Sultan of Brunei) played a highly influential role in developing Brunei in many aspects; in administration, education, economy, construction and more importantly in religion. With his effort and leadership, the position of Islam in Brunei has become strong and stable.¹⁶⁴ Many steps have been taken toward achieving this since he ascended the throne. Among the most important are the formation of a written constitution for Brunei as a basis for the administration of the internal affairs of the country which has also included the aspects of Islamisation of Brunei itself;¹⁶⁵ and the strengthening of the status of the MUIB as a supreme council that assists the Sultan in laying the groundwork with regard to Islamic affairs.¹⁶⁶

¹⁶⁴ Othman, *A Review on: The Implementation*, 56

¹⁶⁵ Haji Serudin, *Brunei: An Islamic Nation*, 58

¹⁶⁶ Othman, *A Review on: The Implementation*, 56

The Constitution of Brunei 1959

The Brunei Constitution¹⁶⁷ makes it clear that the official religion of Brunei is Islam.¹⁶⁸ This constitutional requirement was not a new matter in the religious life of Bruneians as Islam had long taken its root in the state since the 13th century when the first Sultan converted to Islam. It is just an emphasis that Brunei shall continue to make Islam a way of life in its community where not only the culture, progress, management and administration, but also the state law need to be based on Islamic teaching. This has been clearly declared in the Constitution which states as follows:

For the purpose of this Article, His Majesty the Sultan may, after consultation with the MUIB, but not necessarily in accordance with the advice of that Council, make laws in respect of matters relating to the Islamic Religion.¹⁶⁹

MUIB is the ruling body that has the most authority to advice and guide His Majesty the Sultan in making and formulating Syariah law in the country. However, the fact that the Constitution clearly says that Islam is the official religion of Brunei does not necessarily mean that the rights of other believers are denied. There is in fact a “freedom of religion” clause. Article 3(1) state the following: “The official religion of Negara Brunei Darussalam shall be the Islamic Religion: provided that all other religions may be practised in peace and harmony.” This shows that the Constitution protects freedom of religion, even though there are some restrictions especially those matters that involve the propagation of any religious belief among persons professing the religion of Islam. Recognizing religious freedom for non-Muslims should be taken to mean that the

¹⁶⁷ Since 1959, the Constitution has been subjected to a number of important amendments, in particular in 1971, 1984 and most recently in 2004. A newly revised Constitution was published in 2004 incorporating all the amendments that had been made since its birth year of 1959.

¹⁶⁸ Art. 3

¹⁶⁹ Ibid

Constitution has stressed on harmony between Syariah laws and Civil laws so as to create an atmosphere where distinct ethnic and religious groups and society are able to be appreciated and tolerated effectively.¹⁷⁰

Briefly, the background of the Brunei Constitution can be traced back to when Sultan Omar Ali Saifuddien III formed a seven-member committee named *Tujuh Serangkai* (Seven Leading Malays) in 1953, aimed at conducting research and analysis, among other things to find out the Citizens' reactions towards the Government's proposal in establishing a written Constitution for Brunei.¹⁷¹ It was not until six years later that the draft of the Constitution was completed and subsequently put forward in London by the Sultan himself for further discussion and negotiation. The drafting process took years to be finalised when ultimately a legislator from Malaysia came to the state to take over the drafting works.¹⁷² Finally the signing of the Constitution Agreement between Sultan Omar Ali Saifuddien III and Sir Robert Scott, the Commissioner-General for Southeast Asia took place on 29 September 1959 at Lapau, Bandar Seri Begawan, Brunei.¹⁷³ Since then, the Constitution has continued to shape the country's governing basis and provide the underlying principles for its administrative system until the country stepped forward and gained full independence in 1984.

¹⁷⁰ DSLJ Prof. Dr Anwarullah Shafiullah, *Shariah Laws: Implementation and Harmonization*, International Seminar on Islamic Law with the Theme of "Towards an Implementation of Syariah Law." Brunei, 2010, 1-2

¹⁷¹ J.O. Gilbert, State of Brunei, *Annual Report 1953*, 2, as cited in Pg Hj Abd. Rahman, *Islam di Brunei Darussalam*, 332

¹⁷² *Pelita Brunei* (Official Newspaper of Brunei Government), No. 37, Year 31, issuance of 10th September 1986, 8, as in Pg Hj Abd Rahman, *Islam di Brunei Darussalam*, 332

¹⁷³ The signing however, was undertaken earlier in London, yet it has not official.

I will highlight some of the important points contained in the Constitution. It sets out that the supreme executive authority vests in His Majesty the Sultan who is also the Prime Minister of Brunei.¹⁷⁴ This is a clear indication that the Constitution has put an end to the direct rule of the British Government in the internal affairs of the state of Brunei. The post of Resident is abolished and replaced by a British High Commissioner. In governing the country, several councils were created by the Constitution namely the Privy Council,¹⁷⁵ the Council of Ministers,¹⁷⁶ the Legislative Council¹⁷⁷ and the Council of Succession. In short, all the basic orders, structures, functions, responsibilities and the underlying principles of the governing authorities are premised on what is prescribed in the Constitution.

The Establishment of the Islamic Religious Council of Brunei

Islamic Religious Council Brunei or MUIB (Majlis Ugama Islam Brunei) is the highest Islamic authority in charge of Muslim affairs in Brunei, and was established as a statutory body in 1956 when Religious Council and Kadhi's Court Act (Cap 77) came into effect. Under the RCKCA (Cap 77), the MUIB is to aid and advise His Majesty the Sultan as the head of religious matters relating to Islam in Brunei. With its distinctive position, MUIB has supreme authority in making and determining policy with regards to Islamic affairs and administration in Brunei. In this regard, the Council of MUIB is the overall decision-making body and is responsible for the formulation of policies and

¹⁷⁴ Art. 4

¹⁷⁵ Art. 5

¹⁷⁶ Art. 1

¹⁷⁷ Art. 23

operational plans. All members of the Council are appointed by His Majesty the Sultan. The Council comprises the President and the vice president of MUIB, the *Mufti* of Brunei, and not less than six other members¹⁷⁸ who include the Religious Adviser and the Secretary of MUIB.¹⁷⁹ All council members appointed by His Majesty the Sultan and are deemed to be public servants defined by the Penal Code.¹⁸⁰ It is a statutory requirement that a copy of the minutes of all meetings of the MUIB be sent to His Majesty the Sultan.¹⁸¹

In addition to the major role as a Syariah advisory body, the RCKCA (Cap. 77) lists the several functions of the MUIB in the administration of matters relating to the Muslims of Brunei including *waqf*,¹⁸² *nazr*,¹⁸³ trust property,¹⁸⁴ *zakat*¹⁸⁵ and *fitrah*,¹⁸⁶ and the promotion of Islam and the Muslim community in Brunei. Among other things, MUIB is also the sole trustee of all mosques within Brunei, and further is responsible for the maintaining of those mosques in a proper state.¹⁸⁷ More importantly, the appointment of any Brunei religious authorities like Syariah Court judges of any level of courts,¹⁸⁸

¹⁷⁸ RCKCA (Cap. 77), s 13

¹⁷⁹ s 18

¹⁸⁰ s 35

¹⁸¹ s 27(3)

¹⁸² s 100

¹⁸³ Defined under s 2 of the Act as an expressed vow to do any act or to dedicate property for any purpose allowed by Muslim law

¹⁸⁴ s 100

¹⁸⁵ s 123, and is defined under s 2 of the Act as the tithe of the crop payable annually under Muslim law in respect of padi land, subject to the exemptions prescribed by the Act

¹⁸⁶ Defined under s 2 of the Act as the amount of rice payable under Muslim law annually by every Muslim at the end of the month of Ramadhan to be used for religious or charitable purposes recognized by Muslim law.

¹⁸⁷ RCKCA, (Cap. 77), s 125

¹⁸⁸ The appointment of Chief Syariah Judge is stipulated under s.8 of SCA, Cap. 184, while the appointment of Syariah Appeal Court Judges is under s 9, s 10 of the Act is for the appointment of Syariah High Court Judges and finally Syariah Subordinate Court Judges are appointed based on s 11

Syariah prosecutors,¹⁸⁹ Religious Enforcement Officers,¹⁹⁰ *Imams*,¹⁹¹ *Jurunikah*¹⁹² and so on are all under the power of MUIB to make. As provided under the Halal Certificate and Halal Label Order 2005 and Halal Meat Act (Cap. 183), MUIB is vested with the powers to act as the sole authority to administer and regulate Halal certification in Brunei. In short, the role of MUIB is to ensure that the many and varied interests of Brunei's Muslim community are taken care of religiously, socially, economically, educationally and so on, in accordance with the principles and traditions of Islam as enshrined in the Quran and Sunnah.

2.4 THE ADMINISTRATION OF ISLAMIC LAW IN CONTEMPORARY BRUNEI

Today, Brunei is actively moving toward the complete implementation of Islamic law in the state. This significantly, is to fulfil the wishes and the aspirations of His Majesty the Sultan (the current ruler of Brunei i.e. the 29th Sultan, Sultan Haji Hassanal Bolkiah Mu'izzaddin Wadaulah) to bring the Brunei Darussalam laws in accordance with the demands of the Syariah. Repeated calls have been made by His Majesty Royal Command that urge the relevant government authorities to take Islamic law matters into action and speed up the process of Islamization. For example, in one of his recent

¹⁸⁹ Ibid, s 25

¹⁹⁰ Ibid, s 26

¹⁹¹ *Imam* generally means the male prayer leader in a mosque and his appointment is stipulated under s 129(1), RCKCA (Cap. 77)

¹⁹² Means a person appointed under s 26 of the IFLA (Cap. 217) to conduct the solemnization of a marriage under the Act (See s 2 of IFLA (Cap. 217))

meetings with religious and the legislative officials, His Majesty the Sultan posed the question as to why to delay the implementation of Islamic Criminal Law while Brunei now has resources at its disposal.¹⁹³ Interestingly, His Majesty the Sultan even concluded one Royal Command by saying:

To simplify it, both the Civil Courts and the Syariah Court can run parallel without affecting one or the other, this is the uniqueness of Brunei, may Allah (S.W.T) bless us with peace, prosperity and justice.

The vision, the hope and the ambition of His Majesty the Sultan with regard to Islamic law and its implementation in Brunei can be clearly shown when the Sultan declared independence for Brunei on the 1st January 1984. By adopting the concept of the Islamic Malay Monarchy as Brunei national policy, Islam has been elevated to the status of an official religion and has been a reference point for all activities in the state. Ultimately, so as to ensure a comprehensive implementation of Islamic law in Brunei, effective and appropriate measures have been adopted. This includes the establishment of Islamic law making committees and organizations, and also the institution of the new Syariah courts into the highest level of courts.

2.4.1 The Concept of Malay Islamic Monarchy

The concept of Islamic Malay Monarchy (which is widely known as MIB or Melayu Islam Beraja) is believed to have been a part of the Brunei national heritage and culture as early as the 14th century when Brunei's first Sultan converted to Islam.¹⁹⁴

¹⁹³ Izam Said Ya'akub, "Islamic Criminal Law: Don't Delay," *Brunei Times*, October 11, 2011, accessed 02 October 2012, <http://www.bt.com.bn/news-national/2011/10/11/islamic-criminal-law-dont-delay>

¹⁹⁴ "Brunei Darussalam, The Abode of Peace: Key Information on Brunei," Brudirect, accessed 02nd October, 2012, http://www.bruneidirecthys.net/about_brunei/

Legal references to the concept MIB first surfaced in the 1959 Constitution, which had references to the Malay language as the official language, Islam as the official religion, and the Sultan as the head of state. On 1st January 1984, His Majesty the Sultan and yang Di-Pertuan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah officially proclaimed the Concept of MIB as Brunei's national philosophy at the very moment Brunei assumed its independent status:

Brunei Darussalam will, by the consent and the blessings of Allah S.W.T forever remain a Malay Islamic Monarchy, a sovereign nation that is independent and democratic, which is based upon the teachings of Islam according to the *Ahli Sunnah Wal Jama'ah*....¹⁹⁵

MIB is described as a blend of the Malay language, culture and Malay customs, the teaching of Islamic laws and values and the monarchy system which must be esteemed and supported by all.¹⁹⁶ The MIB has since become a doctrine enshrined and embedded into the policies of the state and has even been incorporated in its law, significantly.¹⁹⁷ According to Mahmud Saedon¹⁹⁸ the above message of Royal Command is clear that Islamic values are to be applied in the administration and in the national policy of the country.

2.4.2 The Committees towards the Implementation of Islamic laws in Brunei

In executing the full implementation of Islamic laws in Brunei, the MUIB has established two important Committees namely the Committee on the Modification of

¹⁹⁵ According to the Declaration of Independence as proclaimed by HM the Sultan on the eve of

independence on 31st December 1983 at Padang Sir Muda Omar Ali Saifuddin, Bandar Seri Begawan

¹⁹⁶ Melayu Islam Beraja, accessed 5th October 2012, http://en.wikipedia.org/wiki/Melayu_Islam_Beraja,

¹⁹⁷ Hj Nabil Daraina Badaruddin, Challenges to Legal Education in a Changing Landscape, accessed 02nd October, 2012, http://www.aseanlawassociation.org/docs/w3_brunei.pdf,

¹⁹⁸ Othman, *A review On: The Implementation*, 63

Brunei Laws in accordance with *Hukum Syara'* (*Jawatankuasa Mensesuaikan Undang-Undang Brunei Dengan Kehendak Ugama Islam*), and the Committee on the Drafting of Islamic Law (*Jawatankuasa Penggubalan Undang-Undang Islam*).¹⁹⁹

The Committee on the Modification of Brunei Laws in accordance with Hukum Syara'

The Committee on the Modification of Brunei Laws in accordance with *Hukum Syara'* was created in 1988 to examine all the existing laws in Brunei and plays a number of important roles in carrying out works towards the enactment of Islamic law. Initially, it was headed by the Chief *Kadhi* assisted only by a few members including those from the Attorney General Chambers. At present the Committee is comprised of a President,²⁰⁰ Vice-president²⁰¹ and a prescribed number of others²⁰² appointed on the recommendation of the MUIB.²⁰³ Specifically, this Committee is to examine all the Brunei legislation in practice and to highlight whether or not they are in contradiction with *Syariah* injunctions, wholly or partly. Should any of them be found to be contrary to *Syariah*, an amendment would be proposed or if necessary a new draft law would be prepared based on *Syariah* tenets. Accordingly, all the drafts would be passed to MUIB for perusal and

¹⁹⁹ Author's own translation

²⁰⁰ According to the MUIB, the president of the said committee shall be a holder of the rank of Deputy Minister of Ministry of Religious Affairs (MORA) position and currently it is occupied by Pg DP Hj Bahrom Pg Hj Bahar

²⁰¹ Pehin Siraja Khatib Dato Seri Setia (PSKDPSS) Ustaz Hj Yahya Hj Ibrahim

²⁰² At this time, seven other members were part of the Committee including Deputy *Mufti*, Islamic legal Expert, representatives from AGC, High magistrate Court Judge, Chief *Syar'ie* Prosecutor, Chief Registrar of *Syariah* Court Appellate.

²⁰³ Latest Appointment as made on 23rd August 2010

onward submission to His Majesty through the Attorney General for final approval and enactment.²⁰⁴

As discussed earlier, given the long history of being a British Empire's Protectorate prior to its independence in 1984, the major Acts of Brunei legislation are mainly based on English law and English Statutes. Currently, approximately more than 200 Acts are still in place, which contain constitutional, civil, criminal, fiscal, personal, procedural and administrative laws and are applicable to both Muslims and non-Muslims. Since its formation the Committee has been thoroughly analysing about 170 Acts and has revealed that about one-fifth of the Acts²⁰⁵ contain provisions that are incompatible with the requirement of the Syariah.²⁰⁶ To bring those acts in conformity with Syariah, an Islamization process then should be performed by the Committee to suggest replacements for those 'un-Islamic' provisions or Acts. As for those Acts which are not contrary to Syariah principles, they are retained without amendment and continue to serve as prevailing legislation. There are also some Syariah non-compliant laws that are maintained for the purposes of non-Muslims' use such as the Banking Act (Cap. 95). Accordingly, as and when required, the Committee also has authority to draft new Syariah laws. This has led the formation of another Committee specifically designed to prepare laws drafted upon Syariah principles, beginning with the work to draft a comprehensive Islamic Family Law for the Muslim community in Brunei.

²⁰⁴ DSS Anwarullah Safiullah, "Islamization of Brunei Darussalam Law", *Sejarah Penubuhan Mahkamah Syariah Negara Brunei Darussalam (A History of the Institution of Syariah Courts of Brunei)*, (Brunei: Jabatan Kehakiman Syariah, 2005), 152

²⁰⁵ As the work of law islamization is still on-going process, the author prefers not to state the precise total number even though according to Anwarullah Shafiullah in *Shariah Laws: Implementation and harmonization* (See footnote 170), the Committee found about 39 laws to be partly non-Syariah compliance.

²⁰⁶ It includes whether they are wholly or partly in contrary to Syariah principles

The Committee on the Drafting of Islamic Law

The Committee on the Drafting of Islamic Law was primarily in charged with preparing drafts of family laws based on Syariah tenets that are to be administered by the Syariah Courts. It was set up in 1995 by the MUIB with the consent of His Majesty the Sultan and is chaired by the first local Islamic Legal Expert.²⁰⁷ The initial duty of the Committee was to draft a more organized and comprehensive Islamic family legislation to meet the needs of modern Muslim marriages and family matters of Bruneians. Over time, the role of the Committee has been effectively extended to enact other substantive and procedural Syariah laws in other matters in keeping with the evolving role of the Syariah courts since 1998, when they were first established to replace the *Kadhi's* courts.

This Committee, as it presently operates has ten members comprising government legal professionals and representatives from private law firms chaired by the High Syariah Court Judge²⁰⁸ and assisted by another judge of the same court.²⁰⁹ All the Committee members²¹⁰ are appointed by the MUIB with the consent of His Majesty the Sultan. In making changes in the existing laws, reference shall be made by following the principles of the Syafi'i School of Islamic law. However, the Committee can depart from this and may resort to other Schools of Islamic interpretation provided there is no lead found in the school of Syafi'i or if the Committee considers the following of the tenets of the Syafi'i School of Islamic law to be contrary to the public interest. Once a draft is

²⁰⁷ The late DPSS Prof. Dr. Hj Mahmud Saedon Othman

²⁰⁸ Pehin Orang Kaya Seri Utama Dato Paduka Seri Setia (POKSUDPSS) Hj Salim Hj Besar

²⁰⁹ Dato Seri Setia (DSS) Hj Metussin bin Haji Baki

²¹⁰ Other members include Director of Syariah Affairs, Subordinate Syariah Court Judge, Registrar of Marriage, Divorce, Revocation and Reconciliation for Muslim, Director of UPI and representatives from Attorney General Chambers and also private law firm.

completed, it has to go through a pre-approval stage (like that in the Islamization of laws process) such as a perusal by the MUIB followed by the consent of His Majesty the Sultan and finalisation by Attorney General Chambers before it passes for implementation.

2.4.3 Islamic Legal Unit²¹¹

As a measure for establishing one legal and judicial system in accordance with Islamic injunctions, a small organization called 'Unit Undang-Undang' (Law Unit) was established in 1988. At that time a Pakistani Islamic Legal expert²¹² was hired to assist the works operated by the Unit especially those which involved the islamization of Brunei laws. In fact, most of the tasks were largely undertaken by him until the Unit was developed into an independent department in 1997 known as the Islamic Legal Unit (Unit Perundangan Islam or UPI). As it is today, the UPI comprises a Director and his deputy, an Islamic Legal Expert, the Chief Syariah Prosecutor²¹³ and a number of Syariah Legal Officers and is further supported by several staff. To acquire a more efficient and effective administrative system, the organization of UPI has been arranged into five small divisions; a legislative modifying division, a legislative drafting division, an administration division, a civil division and an international affairs division. In short, the UPI has been entrusted with the following responsibilities:-

- Modifying the laws of Brunei with the Syariah law requirement;

²¹¹ The entire discussion presented in this section is based on unpublished working papers prepared by the Islamic Legal Unit to be put forward in various events that require briefing about the establishment of the Islamic Legal Unit itself.

²¹² DSLJ Prof. Dr. Anwarullah Shafiullah

²¹³ The creation of the said post is provided under s 25(1) of SCA (Cap. 184)

- Drafting legislation based on Syariah law;
- Giving legal advice based on Syariah law to any government agencies, non-governmental organizations and the private sector;
- Delivering talks or courses on Islamic laws that are being enforced in Brunei.

In addition to above mentioned duties, the UPI also acts as a secretariat to two Committees; the Committee on the Modification of Brunei Laws in accordance with *Hukum Syara'* and the Committee on the Enactment of Islamic Law. In general, as regards the duties to be carried out for each Committee, the UPI is responsible for organizing meetings and preparing the Syariah-based draft laws to be discussed in the meeting as well as handling the minutes and processing all the Committee's comments and decisions before a submission be made to MUIB for the perusal. Once approved by the MUIB, a proposed law will be submitted to His Majesty the Sultan to obtain his consent. If it is assented to by His Majesty the Sultan, the Attorney General's Chambers then will publish the proposed law in an Official Gazette to be enforced. In carrying out the task of legislative drafting, apart from the instruction from the MUIB, the UPI works closely with the relevant Government Ministries and Departments, particularly those under the Ministry of Religious Affairs.

In conclusion, it is fair to say that the creation of UPI is a very significant development concerning the role of Islamic law in Brunei. It has become one of the driving forces or generators for the Brunei government to achieve what has always been a vision and ambition of His Majesty the Sultan to implement a system of law and justice

in accordance with the teaching of the Quran fully.²¹⁴ In fact, the UPI has more or less similar responsibilities and tasks to those in the legislative drafting division in the Attorney General Chambers Office, but as far as Islamic law is concerned.

2.4.4 The Present Muslim Courts System in Brunei

Historically, the Syariah court decisions had to be enforced by the Magistrate's court; the lowest court in the hierarchy of civil courts. But today, Syariah courts have gained comprehensive powers. In 2001, Syariah Courts Act (Cap. 184)²¹⁵ was enforced, establishing a three-tier structure of Syariah courts:²¹⁶ the Syariah Subordinate Courts are the courts of first instance, the Syariah High Courts are the intermediate courts of appeal and the Syariah Appeals Courts are the final courts of appeal. With the adoption of this new courts structure, the *kadhi* court system was therefore abolished.

As for the jurisdiction of the contemporary Syariah courts²¹⁷ they are given an exclusive power to adjudicate cases arising under Islamic family law, including the Islamic law relating to wills, *waqf* (Muslim endowment), *nazr* (vow), inheritance, adoption, legitimacy, guardian, custody and any written law which confers jurisdiction on Syariah courts. Moreover, the amount in dispute that Syariah courts are sanctioned for could reach more than five hundred thousand ringgit. In criminal jurisdiction, Syariah courts have powers all over offences committed by Muslims as specified under RCKCA

²¹⁴ This is the department where I have been working for since 1998

²¹⁵ Although it was enacted in 1998 but its implementation did not commenced until 2001. Then a few amendments were made to it and finally revised in 2011.

²¹⁶ s 6

²¹⁷ For more detail about the jurisdiction of each level of the Syariah courts respectively, see SCA (Cap. 184) s 15 for Syariah Subordinate Court, s 16 for Syariah High Court, s 20 for Syariah Court of Appeal.

(Cap. 77), IFLA (Cap 217), Syariah Penal Code Order, 2013, and other offences in respect of which jurisdiction is conferred by any written law. The punishment that the current Syariah courts could impose is an imprisonment of more than seven years or a fine that could exceed \$10,000(BND). A criminal case that takes place outside Brunei will be also under the jurisdiction of Syariah courts.²¹⁸ With respect to marriage and divorce matters, remarkably, the Syariah courts are empowered to hear and determine all proceedings even if only one party is Muslim.²¹⁹ This was not the case in previous law²²⁰ which stipulated that both parties must be a Muslim.

With the introduction of SCA (Cap. 184), there is clear demarcation between Syariah courts and Civil courts jurisdictions. The Civil courts decide the cases relating to the common laws and the personal laws of non-Muslims and Syariah courts decide the cases relating to Syariah laws and any written law which confers jurisdiction on Syariah courts.²²¹ However, there are some areas which have caused complicated jurisdictional issues particularly in those cases that involve matrimonial claims or child custody in which one party converts to Islam.²²² Areas like Muslim succession and wills also have

²¹⁸ Ibid., s 6(3)

²¹⁹ IFLA (Cap. 217), s 5

²²⁰ RCKCA (Cap. 77)

²²¹ Shafiullah, *Shariah Laws*, 7

²²² E.g., in the case of *Mohd Jamil bin Abdullah@James Chiew Siew Hua* (Civil Appeal No. 17 of 2002), initially the parties were a non-Muslim married couple and when differences began to arise, they both filed for a divorce. But the husband converted to Islam and filed a petition to divorce in Syariah court. The wife initiated the same proceeding in the High court as well as various ancillary reliefs. The husband then applied for the High court to deny the wife's petition as the case should be under the jurisdiction of Syariah court for one party is a Muslim. His application however, was dismissed and he further made an appeal to the Court of Appeal. His appeal was finally granted and the Court of Appeal held that the husband's conversion to Islam changed the law from civil to Syariah and which would now be the competent court to try the case. The judgement was decreed by dismissal of the wife's claim for her ancillary relief and but allowed the appeal with respect to the custody of their children.

raised public concern due to the fact that they are governed by two statutes and are within the jurisdiction of the civil courts.²²³

2.4.5 Brunei's Modern Islamic Legislation

While the Civil courts have jurisdiction over most types of disputes, Syariah law has grown more pervasive in Brunei. Since the beginning of his rule, His Majesty the Sultan has largely given his full support to make Brunei national laws more Islamic. This was clearly expressed in his Royal Command at the opening ceremony of the Islamic Youths Conference of South East Asia and Pacific held on 18th March 1984, when he declared that the laws of Brunei shall be brought in conformity with the injunctions of Islam. Since independence, a number of new Syariah laws have been enacted which were primarily intended to be administered by the Syariah courts, but there is also some legislation that is within the jurisdiction of the Civil courts.

New Islamic Laws Governed by the Syariah Courts

While analysing the RCKCA (Cap. 77), the Islamic law making Committees realised that Islamic laws provided in the Act need to be improved and updated and the jurisdictions of the Syariah Courts required to be extended and upgraded so as to meet the modern requirements.²²⁴ SCA (Cap. 184) was the first contemporary Islamic Law enacted in Brunei that contributes toward the evolution of the role of Islamic law in the legislative

²²³ E.g., matters relating to inheritance, the Syariah court merely certifies the shares allotted to the beneficiaries under Islamic law but it is for the civil courts to enforce it.

²²⁴ Shafiullah, *Shariah Law*, 4

and judicial system in Brunei. It primarily provides for the establishment of Syariah courts to replace the *Kadhi* courts system with an administratively far better structure and which has an extensive power and jurisdiction in both criminal and civil matters. The appointment of the Syariah court related-authorities were also made under this Act.

In matters of rules and procedure, the Syariah Civil Procedure Court Order 2005 has come into effect, adopting the rules and procedure applicable in Civil court. It contains, among others, provisions on how proceedings are initiated, types of orders which could be obtained from the Syariah court, interlocutory proceedings, discontinuance, withdrawal and discharge of proceeding, appeals, costs, fees and contempt of court. As the SCA (Cap. 184) allows the chief *Syar'ie* judge to make such a rule that is appropriate for the efficiency of Islamic law administration, two rules were introduced namely Syariah Court (Court fees and Costs) Rules 2005 and Syariah Court Rules (Syarie Lawyer) 2002. While the former provides for fees payable for all civil proceeding in Syariah court, filing of summons, service of summons and warrants, allowance to witnesses and taxation of bill of costs, the latter is the rule for matters in connection with regulation before and after becoming a Syarie lawyer.

In the context of Brunei family law today, the IFLA (Cap. 217) is the important mechanism for dealing with the Muslim family matters. It was enforced in 2001. It is a comprehensive personal law which regulates among other things, conditions for marriage, polygamy, registration of marriage, dissolution of marriage, maintenance of wife and children, custody of children and other related matters. This law applies to a

marriage in which at least one of the parties is a Muslim.²²⁵ Areas like marriage and divorce and matters arising therefrom, is an aspect of life that are practised fully and executed in the daily of the Muslim community in Brunei since the 12th century, when Islam first came. This field is constantly developing and as such, a detailed and updated Islamic family law is required to deal with any issues arise therefrom. The Islamic family law in its new form is distinct from the RCKCA (Cap.77). With its limited provision, it has posed challenges to the Syariah judges in addressing several issues emerging in the Brunei's Islamic families.

On the question of how to prove any particular fact relating to Islamic law issues, it previously relied on a specific provision which requires the Syariah court to observe all provisions of Muslim law.²²⁶ Ideally, the Evidence Act that is prevailing in civil courts²²⁷ shall also be referred to while deciding any Muslim's civil and criminal case. However, the said above provision has caused the Syariah authorities great difficulties to implement it.²²⁸ This weakness thus, has prompted the Islamic law making committees to draft a new evidence law for the Syariah courts in 2001 and cited as Syariah Court Evidence Order 2001. If one may compare between the governing evidence law in the Syariah court and the Civil court, there is generally not much difference. Some Islamic elements however,

²²⁵ s 5

²²⁶ RCKCA (Cap. 77), s 57(1)

²²⁷ Evidence Act (Cap. 108)

²²⁸ POKSUDPSS Haji Salim Haji Besar, Malay Author. 'Perkembangan Kehakiman dan Mahkamah Syariah di Brunei Sejak Tahun 1955 Hingga Sekarang (The Development of the Judiciary and Syariah Courts in Brunei since the Year 1955 until now)', *Sejarah Penubuhan Mahkamah Syariah Negara Brunei Darussalam*, (Brunei: Jabatan Kehakiman Negara, 2006), 147

have been incorporated in the Order. For instance, in criminal *hudud* cases, four credible male witnesses are required to prove *zina* (adultery) offences.²²⁹

The Islamic law making committee revealed that the concept of adoption adopted in the Registration of Adoption Act (Cap. 123)²³⁰ is contrary to Syariah principles. According to the Syariah law, adoption of another's child was allowed and appreciated, but adoption does not make the adopted child as the real child of the adopter and such child is not entitled to the rights and obligations of a real child.²³¹ By adopting those principles, Islamic Adoption of Children Act (Cap. 206) was implemented, restricted only for Muslims.

To enhance the position of Islamic law, many new Islamic laws are more yet to come. MUIB has approved a number of Islamic law drafts which cover a wide range of areas such as matters related to religious education, *hibbah* (gift), will, *nazr* (vow), *waqf* (Muslim endowment) and many more. More importantly, the very recent development in which His Majesty the Sultan had consented is the establishment of the Islamic Penal Code that must be carried out in the country. This decision however, does not mean that the existing Penal Code will cease to take effect, but it in fact will still be used, according to the need.²³²

²²⁹ Syariah Court Evidence Order 2001, s 106 (1)

²³⁰ 1984 ed., however the 2003 Revised Edition has repealed this concerned provision.

²³¹ The prohibition is based on the Quranic verse which states to the effect: "Nor has He (Allâh) made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But God tells the truth, and He shows the way. Call them by (the names of) their fathers, that is better in the sight of God." (verse 33:4-5)

²³² This is clearly stated in HM the Sultan's *titah* in conjunction with his 66th birthday.

New Islamic Laws within the Jurisdiction of Civil Court

As a measure for ensuring that the Muslim community in Brunei would obtain *halal* (permissible in accordance to Syariah tenet) food, a few laws in connection therewith have recently been enacted. They are the Halal Meat Act (Cap. 183) together with its subsidiary legislation called the Halal Meat Rules 1999. Under this Act, the meat sold across the country must be slaughtered in the way as prescribed by the Syariah law. It is then followed by the introduction of the Halal Certificate and Halal Label Order 2005 in 2005 intended to control the *halal* food business in which any particular company or restaurant should obtain *halal* certificate *or* *halal* label to be exhibited for the people.

As Islamic finance has become increasingly important in Brunei, the Brunei government had taken the move to pass several Islamic financial laws and other related-matters therefrom since 1991 namely Islamic Banking Order 2008, Takaful Order 2005, Syariah Financial Supervisory Board Order 2006, Pawnbrokers Order 2002, Hire Purchase Order 2006. The Islamic Development Bank of Brunei (IDBB) and Tabung Amanah Islam Brunei (TAIB) are the bank institution in Brunei that successfully operating their business in accordance with the injunction of Syariah. The main principle that any Islamic banking business should observe is that any form of interest should be eliminated in any kind of financial banking operations.

While Syariah court has jurisdiction over all matters relating to Islamic law, it has no power to adjudicate cases arising under the laws of financial banking and *halal* food control (specifically referred to the laws mentioned above). This seems to have shown

that the Syariah court continues, in some ways, to have more limited enforcement mechanisms than the Civil court.

Brunei Islamized Laws

Efforts to incorporate Syariah principle into the Laws of Brunei have been underway for a while now. To this end, out of about 200 Acts,²³³ a comprehensive analysis has been made on approximately 170 Acts. Some have been notably repealed, either in whole or in part to make them “Islamic”. As for the Orders,²³⁴ not much been done yet by the Committee. The following are the legislation (Acts and Orders) and amendments that have taken place so far: Application of Laws Act (Cap. 2), Criminal Procedure Code Act (Cap. 7), Undesirable Publications Act (Cap. 25), Common Gambling Houses Act (Cap. 28), Unlawful Carnal Knowledge Act (cap. 29), Stamp Act (Cap. 34), Excise Act (Cap. 37),²³⁵ Education (Non-Government Schools) Act 1984 (Cap. 55), Road Traffic Act (Cap. 68), Censorship of Films and Public Entertainments Act (Cap. 69), Births and Deaths Registration Act (Cap. 79), Cooperative Societies Act (Cap. 84), Newspapers Act (Cap. 105), Contracts Act (Cap. 106), Specific Relief Act (Cap. 109), Women and Girls Protection Act (Cap. 120), Prevention of Corruption Act (Cap. 131), Legal Profession Act (Cap. 132), Internal Security Act (Cap. 133), Public Order Act (Cap. 148), Royal Brunei Armed Forces Act (Cap. 149), Fatal Accidents and

²³³ Which are in loose leaf form kept in ring binder volumes that consist of legislations that were passed prior to Independence Day and those that were enacted after it

²³⁴ At present Brunei pass their laws in accordance with article 83(3) of the Constitution, any new laws that has been approved by HM the Sultan will be published in *Government Gazette* form and will for the time being be referred to as an Order and not an Act. There are about 56 Orders are in place so far.

²³⁵ However it is now been repealed by S40/06 Excise Order 2006

Personal Injuries Act (Cap. 160), Adoption of Children Act (Cap. 206) and Banking Order 2006.

Efforts toward the islamization of knowledge and law do not end there. Notably, to date various Government ministries and departments in enacting laws, constantly seek advice on the question of Islamic law from the Committees or the Islamic legal Unit. This has shown their great concern and awareness that Islamic law plays a very important role in outlining effective policies, in line with the vision of His Majesty the Sultan toward the implementation of Islamic law fully.

2.5 CONCLUSION

Although Islam is believed to have come to Brunei as early as the 10th century, it has succeeded to become the official religion of Brunei only when the first Sultan converted to Islam. Since then Islamic law began to acquire recognition as an important source of the Brunei legal system. This, however, did not last long as the British came and introduced the residential system which gradually limited the application of Islamic law. The Religious Court Kadhi's Court Law 1955 is the most important legislation for Muslims at that time. Brunei finally got its independence in 1984 and Islamic law began to pave its way to regain its sovereignty that used to dominate the system of law in ancient Brunei. Steps have been taken toward the implementation of Islamic law completely to achieve what the current Sultan has always aspired for Brunei. Similarly, much improvement has taken place in the position of the Muslim courts in a country that

led to the institution of the Syariah court with greater powers than that of *Kadhi* court system established by the British. Ultimately, this apparent accomplishment of the continued evolving of the role of Islamic law in a unique country like Brunei is very much attributable to the mutual understanding and cooperation between many organisations, such as the MUIB, the Attorney General Chambers, the Islamic law making Committees, the Syariah Court, the Civil Court, the Islamic Legal Unit and many other authorities. But more importantly, all of these would not have been achieved successfully without the endless blessing and full support of His Majesty KDYMM Sultan of Brunei.

CHAPTER 3

FINANCIAL RIGHTS ON DIVORCE AS AWARDED IN THE SYARIAH

3.1 INTRODUCTION

This chapter considers the provisions of the four forms of financial rights that arise from divorce as recognised under Syariah namely maintenance for a divorced wife and children, *mut'a al-talaq* and *harta sepencarian*. In this chapter, the arguments made by the four early prominent Islamic juristic scholars in particular, i.e. the Shafi'is, Hanafis, Malikis and Hanbalis in these areas will be thoroughly discussed, taking into account also contemporary views, by highlighting their supportive authorities from different sources of Islamic Law. As the sources of *Syariah* law such as the Quran, Sunnah, *ijma'* and *qiyas* etc., constitute the basic principles in the enactment of any Islamic law in most Muslim countries, a brief overview on this topic will also be presented in the beginning of the chapter.

3.2 Sources of Syariah Law: An overview

Syariah is an Arabic word which literally means the road to the watering place,²³⁶ the straight path to be followed. It is the path not only leading to Allah (S.W.T) but the path believed by all Muslims to be the path shown by Allah (S.W.T) through His Messenger Prophet Muhammad (P.B.UH).²³⁷ This has been affirmed by the Quran which reads:²³⁸

Then We put thee on the (right) Way of Religion: so follow thou that (Way), and follow not the desires of those who know not.

The sources of Syariah law mainly consist of primary and secondary sources. The primary sources comprise the Quran and Sunnah. The secondary sources include *ijma'*, *qiyas*, *istihsan*, *'urf*, *istishab* or *sadd al-zaraie'*.

3.2.1 Quran

The Quran is the first authoritative and primary source of Syariah law. It may be defined as the word of God revealed to the Prophet Muhammad (P.B.U.H) and transmitted to us by continuous testimony, or *tawatur*.²³⁹ The Quran comprises 6239 verses in 114 chapters, revealed over a twenty-three year period. Each chapter has a separate topic.²⁴⁰ There are an estimated 140 verses in the Quran on devotional matters. Family and civil relations are addressed in approximately seventy verses. There are about

²³⁶ Qal'aji & Qunaibi, *Mu'jam Lughat al-Fuqaha*, 255

²³⁷ Abdur Rahman I. Doi, *Shariah: the Islamic Law*, (Kuala Lumpur: A.S. Nordeen, 2007), 2

²³⁸ Quran, 45:18

²³⁹ Qal'aji & Qunaibi, *Mu'jam Lughat al-Fuqaha*, 359

²⁴⁰ Ahmad Von Denffer, *Ulum al-Quran: An Introduction to the Sciences of the Quran* (Leicester: The Islamic Foundation, 1981), 10-12; Thomas Patrick Hughes, *Dictionary of Islam* (New Delhi: Munshiram Manoharial Publishers Pvt. Ltd, 1995), 483-90

thirty verses relating to crime and penalties; ten verses on the subject of constitutions and another ten concerning economic matters. Matters concerning justice, equality, evidence, consultation and the rights and obligations of citizens are dealt with in about thirty verses.²⁴¹

The Quran is a complete code of life.²⁴² It deals with at least three important rules to guide mankind namely the rules pertaining to their religious belief, morals and behaviour.²⁴³ The remarks made by certain western Scholars in describing the Quran are interesting. Bosworth Smith called it a code of laws; Margoliouth remarked that the Quran first gave impetus to the Renaissance in Europe and according to Sir William Muir the Quran is a pure text book.²⁴⁴

As regards to law, despite being mentioned in only about five-hundred verses,²⁴⁵ the Quran provides general principles on almost every major topic of Islamic law: criminal law, civil law, family law, evidence, administrative law and many others. While the Quranic legislation consists of an enunciation of general principles only, it is the role of the Sunnah to explain and elaborate the details.

Quranic text can be definitive or speculative. A definitive text is one which is clear and specific, has only one meaning and admits of no other interpretation. Therefore

²⁴¹ ‘Abd Al-Wahhab Khallaf, *‘Ilm Usul al-Fiqh (Principles of Islamic Jurisprudence)*, 8th ed. (Cairo: Maktabah al-Da’wah Islamiyah, n.d), 32-33

²⁴² Liaquat Ali Khan Niazi, *Islamic Jurisprudence: Including Muslim Personal Law* (Lahore Pakistan: Adeel Niaz, 2009), 32

²⁴³ ‘Abd al-Karim Zaydan, *Al-Wajiz fi-Usul al-Fiqh (Fundamentals of Islamic Jurisprudence)*, 3rd ed. (Baghdad: Matba’ah Salman al-Ala’azami, 1967), 129-130

²⁴⁴ Hughes, *Dictionary of Islam*, 487; See also Niazi, *Islamic Jurisprudence*, 33

²⁴⁵ Muhammad Taqi Hakim, *Al-Usul al-‘Ammah lil Fiqh al-Muqaran (The Basis of Comparative Dogma)* (Beirut: Dar al-Andalus, 1963), 100

there is no room for *ijtihad* in this area e.g. as regards the *hadd*²⁴⁶ and *qisas*²⁴⁷ punishments. For a speculative text, interpretation can be obtained either from the Quran itself or from the Sunnah.²⁴⁸ This is ultimately left to the jurists to investigate and express the best interpretation. An example of this is the injunctions concerning *zakah* (alms) which is not provided in detail in the Quran but there are many *hadiths* elaborating the detail regarding its payment. In Syariah, *ijtihad* is encouraged so that there are many different views; whether or not they are right they offer the ruler or judge a range of choices from which to select the view that is deemed to be most beneficial to the community.²⁴⁹

3.2.2 Sunnah

The second source of Syariah law is the Sunnah. Sunnah literally is used to imply a normative practice, whether it is good or bad.²⁵⁰ Various definitions are given by many scholars of different fields. Essentially, the definition given by scholars of *Usul al-Fiqh* (jurisprudence) is that the Sunnah contains all that originated from the Prophet (P.B.U.H), other than the Quran, by way of his sayings or actions or whatever he tacitly approved.²⁵¹ This is supported by references in the Quran which makes the Sunnah an important source of the Syariah on a level with the Quran.

²⁴⁶ Punishment specified in the Quran for major crimes such as murder, stealing or fornication (Prof. Mahmoud Isma'il Saleh, *Dictionary of Islamic Words and Expression*, 2nd ed. (Al-Jumu'ah, Al-Muntada Al-Islami, 2002), 59)

²⁴⁷ Punishment both retributive and compensatory, it includes killing the murderer, the ruling of 'an eye for an eye' as well as compensatory payment for money. (Saleh, *Dictionary of Islamic*, 187)

²⁴⁸ Khallaf, *Ilm Usul*, 35

²⁴⁹ Mahmud Shaltut, *Al-Islam 'Aqidah wa Shari'ah* (Cairo/al-Qahirah: Dar al-Qalam, No date) 498

²⁵⁰ Ibid, 503

²⁵¹ Zaydan, *Al-Wajiz*, 134

However, it is important to note that the word *hadith*, although it has often been interchangeably used with Sunnah, in fact has a different meaning. *Hadith* literally means a narrative, communication or news consisting of a factual account of an event and comprises one single story relating to the Prophet (P.B.U.H).²⁵² The collection of all the *hadith* is known as the Sunnah.

Muslim jurists are unanimous about the position of Sunnah as the second source of Syariah law after the Quran. Allah (S.W.T) says:

Nor does he say (aught) of (his own) desire. It is no less than inspiration sent down to him.²⁵³

In the above verse, Allah makes it clear that whatever the Prophet (P.B.U.H) says does not come out of his own desire, but is an inspiration from Allah. This indicates that Sunnah can be considered as a type of revelation from Allah to His Prophet (P.B.U.H).²⁵⁴

Another verse which reads:

Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourself, refer it to Allah and His Messenger.²⁵⁵

The Quran enjoins obedience to the Prophet (P.B.U.H) and calls for reference to his judgment if Muslims were in dispute and no solution is found in the Quran. Referring to the Messenger of God as stated in the verse means recourse to the Sunnah.²⁵⁶

²⁵² Mohammad Hashim Kamali, *Principle of Islamic Jurisprudence* (Selangor: Pelanduk Publications Sdn Bhd, 1989), 58-9

²⁵³ Quran, 53:3-4

²⁵⁴ Mohamad Akram Laidin, *Introduction to Shariah and Islamic Jurisprudence* (Kuala Lumpur: CERT Publications, 2006), 75

²⁵⁵ Quran, 4:59

²⁵⁶ Abu Ishaq Ibrahim Shatibi, *Al-Muwafaqat fi Usul al-Ahkam*, vol. 4 (Cairo: Al-Matba'ah al-Salafiyyah, 1341 A.H.), 7, as in Kamali, *Principle*, 49

With regards to the role of the Sunnah as a source of Syariah law next to the Quran, the Islamic scholars specify three areas in this regard. The first role is that the Sunnah reemphasises and reiterates the injunctions of the Quran such as the injunctions related to performing prayer, paying *zakah*, fasting in Ramadhan,²⁵⁷ performing the *haj* pilgrimage, the prohibition of killing people etc. Secondly, the Sunnah explains and elaborates the concise injunctions of the Quran. For instance, the Quran enjoins the Muslims to perform prayer and pay *zakah* but is silent about the number of *raka'at*²⁵⁸ of the prayer and also the amount of *zakah*. Thus it is the role of Sunnah to elaborate those matters. The third role of the Sunnah is to enact a ruling about which the Quran is silent. To give some examples, the prohibition regarding simultaneous marriage to the maternal and paternal aunt of one's wife or prohibition of wearing silk and gold on a man etc., are all originate in the Sunnah as the Quran itself is silent on these matters.²⁵⁹

3.2.3 *Ijma'*

The third source of Syariah law is *ijma'*. Literally, *ijma'* is an Arabic term meaning a determination or an agreement. In its technical meaning the majority of jurists have defined *ijma'* as the unanimous agreement of the *mujtahidun*²⁶⁰ of the Muslim community after the demise of the Prophet Muhammad (P.B.U.H) in any particular age

²⁵⁷ The ninth month of the Muslim calendar which is the month of fasting, (Saleh, *Dictionary of Islamic*, 194)

²⁵⁸ A set of actions that are done is *salah* (prayer); standing, bowing, two prostrations and sitting between them, (Saleh, *Dictionary of Islamic*, 194)

²⁵⁹ Khallaf, *Ilm Usul*, 39-40

²⁶⁰ A legist formulating independent decisions in legal or theological matters, based on the interpretation and application of the main principles of derivation of Islamic law, (Saleh, *Dictionary of Islamic*, 160)

on a Syariah ruling.²⁶¹ The authenticity of *ijma'* as a source of Syariah law is supported by the authorities in the Quran and Sunnah. An important verse requires obedience to God, to His Messenger, and those who are in charge of affairs, the *wali al'amr*.

Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourself, refer it to Allah and His Messenger.²⁶²

The word '*amr*' in this verse is general and would thus include both political ruler and jurist.²⁶³ One of the *hadith* that is frequently quoted by the jurists in support of *ijma'* reads:

Indeed Allah will not gather my *Ummah* upon deviation, and Allah's Hand is over the *jama'ah*.²⁶⁴

This *hadith* gives an assurance that it is impossible for Muslims to agree on an error or something which could lead Muslims astray. Thus *ijma'* is clearly an important source in the Syariah law but subject to certain requirements that must be fulfilled for its validity. Among these requirements are as follows:²⁶⁵

- i. A consensus must come from all *mujtahidun* (independent legist) available at the time an issue arises. If one of them disagree, *ijma'* thus cannot be materialized.
- ii. There must be a plurality of *mujtahidun* because no *ijma'* could be obtained from only a single *mujtahid*.

²⁶¹ Wahbah Al-Zuhayli, *Al-Wasit fi al-Usul al-Fiqh al-Islami*, 4thed. (Beirut: Dar al-Fikr, 1969), 278; see also Zaydan, *Al-Wajiz*, 149-150

²⁶² Quran, 4:59

²⁶³ Kamali, *Principles*, 175

²⁶⁴ *Hadith*, Hafiz Abu 'Eisa Mohammad Ibn 'Eisa At-Tirmidhi, *Jami' At-Tirmidhi*, English Translation, trans. Abu Khaliyl, vol. 4, ch. 7 (Adhering to the *Jama'ah*), no. 2167 (Riyadh: Maktabah Dar-us-salam, 2007)

²⁶⁵ Al-Zuhayli, *Al-Wasit*, 280-3; Zaydan, *Al-Wajiz*, 150-152

- iii. There must be only one opinion which all the *mujtahidun* are agreed upon. Should there be a situation where two agreed opinions have been expressed among the *mujtahidun*, this is still acceptable; but not where there are three opinions as *ijma'* could not be expected to materialise upon such disagreement between the *mujtahidun*.
- iv. According to the majority of the scholars, unanimity is a prerequisite of *ijma'*. All the *mujtahidun*, regardless of their locality, race, colour and school of following must reach a consensus on a judicial opinion at the time the issue is encountered. The presence of a different view, even by a small minority precludes the possibility of *ijma'*.
- v. The agreement of the *mujtahidun* must be demonstrated by their expressed opinion verbally or in writing.
- vi. The agreement must be achieved in one particular time when the issue is encountered. This opinion is of no account for a different time and also if the *mujtahidun* enact a ruling out of *ijtihad* or *nass*.²⁶⁶

3.2.4 *Qiyas*

The next authoritative source of Syariah law after *ijma'* is *qiyas*. Literally, *qiyas* is an Arabic term meaning to measure or ascertain the length, weight or quality of something. Technically, *qiyas* is defined as the extension of a Syariah value from the original case, or *asl* to a new case because the latter has the same effective cause (*'illah*)

²⁶⁶ Means a clear injunction or an explicit textual ruling (refer to glossary in Kamali, *Principles*, 513)

as the former. The original case is ruled by a text from the Quran and Sunnah and *qiyas* aims to extend the same ruling to a new case based on the shared cause (*'illah*). Being an extension of the existing law, *qiyas* discovers and develops the existing law but does not create a new law.

Although there is no explicit text from the Quran or Sunnah regarding the authenticity of the utilization of *qiyas*, there are several authorities that are frequently quoted by scholars in support of *qiyas*. One of these authorities is a *hadith* regarding an occasion when a woman came to the Prophet (P.B.U.H) and said that her father had died without performing the *hajj*. Will it benefit him if she performs the *hajj*²⁶⁷ on her father's behalf? The Prophet (P.B.U.H) told her, "supposing your father had a debt to pay and you paid it on his behalf, would this benefit him?" To this her reply was affirmative and the Prophet (P.B.U.H) said, "The debt owed to Allah merits even greater consideration."²⁶⁸

In exercising *qiyas*, there are four rules that are considered as the essential requirement for its validity. These rules are:

- i. The original case, or *asl*, is a case about which a ruling is given in the text of the Quran or Sunnah and analogy seeks to extend it to a new case.
- ii. The new case, or *furu'*, is one on which a ruling is needed and it is the extension of the same ruling which is applied in the original case.
- iii. The effective cause or *'illah*, which is an attribute of the original case, is found to be in common in both the original and the new case.

²⁶⁷ It is the fifth corner-stone of Islam which should be performed by every able, adult Muslim once in his/her life time. It has to be performed in a very specific manner, at the time specified in the month of pilgrimage, (Saleh, *Dictionary*, 75)

²⁶⁸ Muhammad ibn 'Ali Shawkani, *Nayl Al-awtar: Sharh Muntaqa al-Akhbar min Ahadith Sayyid al-Khiyar*, vol. 3 (Beirut: Dar al-Jil, 1992), 292-3

iv. The rule (*hukm*) governing the original case, is extended to the new case.

To quote an example of the utilization of *qiyas*, the Prophet (P.B.U.H) is reported to have said in a *hadith*, “The killer does not inherit (from his victim).”²⁶⁹ By analogy or *qiyas*, this ruling is extended to bequests, which would imply that the killer cannot benefit from the will of his victim either as both issues share the same effective cause which is to prevent killing in order to obtaining financial benefit.

3.2.5 Other sources of Syariah Law

Apart from the four main sources as discussed above, there are other sources that have been used by Muslim scholars as a tool to derive a Syariah ruling. These sources namely *istihsan*, *istishab*, *‘urf*, *maslahah mursalah* (consideration of public interest), *sadd al-zaraie*’ (blocking the means to an evil), however, are not anonymously agreed and accepted by all Muslim scholars. For instance, *istihsan*, that is a method of exercising personal judgment in order to avoid rigidity and unfairness which might result from the literal enforcement of the existing law is widely used by the Hanafis while others are not seriously concerned with *istihsan*. The Syafi’is, in this regard, reject the use of *istihsan*.²⁷⁰ An example of *istihsan* can be observed in the Hanafi’s view on *waqf* (Muslim endowment) that the *waqf* of cultivated land includes the transfer of all the ancillary rights which are attached to the property, such as the right of water (*haqq al-shurb*) or the right of passage (*haqq al-murur*) etc., even if these are not explicitly mentioned in the instrument of *waqf*. Under the concept of *isitihsan*, *waqf* should benefit

²⁶⁹ *Hadith*, Ibn Majah, *Sunan Ibn Majah*, vol. 4, ch. 8 (Inheritance of a Killer), no. 2735

²⁷⁰ Al-Zuhayli, *Al-Wasit*, 494

its recipient and the basic purpose of transferring cultivated land for a charitable reason cannot be gained without facilitating the use of water and passage. Therefore *waqf* in this case is allowed even if the attached rights are not clearly specified in the contract. Other schools draw an analogy with the contract of *ijarah*.²⁷¹

In formulating legislation, *maslahah mursalah* is also one of the instruments that is often utilised by the scholars, particularly by the Maliki and the Hanbali scholars.²⁷² On the other hand, the Hanafis and the Syafi'is view this rule as invalid. It indicates unregulated public interest in the sense of not having been regulated by the Lawgiver as no textual authority can be found on its validity or otherwise.²⁷³ The validity of *maslahah mursalah* nevertheless is subject to certain conditions that are to be met so that Islamic scholars can use it without it being seen as arbitrary desire or individual bias in legislation. These conditions, as specified by the Malikis, are that the public interest (*maslahah*) must be genuine, general and must also not be in conflict with a principle or value which is upheld by the Quran, Sunnah or *ijma'*.²⁷⁴ An example of *maslahah* in Malikis doctrine is that of such a situation where all the means of earning a lawful living are inaccessible to a Muslim and he is in a situation where he cannot escape to another place so that the only way for him to earn a living is to engage in an unlawful occupation; he may do so but only to the extent that is necessary.²⁷⁵

²⁷¹ Khallaf, *‘Ilm Usul*, 82

²⁷² Zaydan, *Al-Wajiz*, 203

²⁷³ ‘Ali Muhammad Al-‘Amidi, *Al-Ahkam fi Usul al-Ahkam* (Beirut: Dar al-Kitab al-‘Arabi, 1984), vol.4, 167-8

²⁷⁴ Zaydan, *Al-Wajiz*, 207

²⁷⁵ Abu Ishaq Ibrahim Shatibi, *Al-I’tisam* (Cairo: Matba’ah al-Manar, 1914), 300

Similarly, there is no agreement among the scholars as to whether or not *sadd al-zara'i* (*blocking the means*) is a valid principle of jurisprudence in Islam. The Malikis and the Hanbalis are the jurists who have validated the use of *maslahah mursalah* in the Syariah ruling while the Syafi'is and the Hanafis do not recognise it as a source of law. However, it has been argued that the jurists have only differed on the application of *maslahah mursalah* and not over its conceptual validity.²⁷⁶ It is to be observed that, notwithstanding the application of *sadd al-zara'i* is primarily concerned with the prevention of evil, it does not always mean to turn the *haram* (forbidden) into the *halal* (permissible). But in certain circumstances whenever there was a likelihood of the occurrence of a greater evil, something *haram* (forbidden) could be turned into *halal* (permissible) or *mubah* (recommendable). To quote an example, it is permissible to seek the release of Muslim prisoners of war in exchange for the payment of a monetary ransom. To give money to the warring enemy is basically unlawful as it adds strength to the enemy, which is generally harmful. However with the principle of *sadd al-zara'i*, it is allowed in this case: for it achieves the freedom of the Muslim prisoners which would in turn add to the strength of the Muslim forces.²⁷⁷

Al-istihsab is accepted as a secondary source of Syariah only by the Shafi'is and the Hanbalis while the Malikis and the Hanafis are the opponents of *al-istishab*.²⁷⁸ According to the Shafi'is and the Hanbalis, *al-istishab* presumes the continuation of both the positive and the negative until the contrary is established by the evidence. For

²⁷⁶ Shatibi, *Al-Muwafaqat*, 201, as in Kamali, *Principles*, 314

²⁷⁷ Muhammad Abu Zahrah, *Usul al-Fiqh* (Cairo: Dar al-Fikr al-'Arabi, 1958), 231

²⁷⁸ Kamali, *Principles*, 377

instance, the ownership of the seller is presumed to continue until a transfer of ownership can be established by evidence and is based on the concept of *al-istishab*.²⁷⁹

The jurists have generally accepted *'urf* (customary practice) which does not contravene the principles of Shariah as valid and authoritative to become a basis for law. To give an example, concerning the amount of the maintenance for wife and children, the Quran only specifies that this is the duty of the man as a husband and a father but leaves the quantum of maintenance to be determined by reference to custom.²⁸⁰ However, in order to be authoritative *'urf* must fulfil a few certain requirements: it must represent a common and recurrent phenomenon; it must be in existence at the time a transaction is concluded; it must not contravene the clear stipulation of an agreement and it must not violate the *nass* that is the definitive principle of the law.²⁸¹

The above discussion on the sources of Islamic law manifests different varieties of instruments that can be utilized in dealing with various contemporary issues in Islamic law. These tools if used wisely probably will be able to meet the challenges of the modern world in all matters except those pertaining to *'ibadah* (worship).²⁸²

3.3 RIGHTS TO MAINTENANCE

The Quran establishes a clear duty for the husband to maintain his wife in no matter what his condition is. Even the Prophet Muhammad (P.B.U.H) in his many

²⁷⁹ Badran Abu al-'Aynayn Badran, *Usul Al-Fiqh Al-Islami* (Alexandria: Mu'assasat Shayban al-jami'ah, 1984), 218

²⁸⁰ Quran, 65:7 i.e. referring to husband's duty & verse 2:233 which refers to a duty of a father

²⁸¹ Kamali, *Principles*, 363-5

²⁸² Laidin, *Introduction to Shariah*, 128

sayings urged his followers to make a proper provision for the maintenance of their wife. Not only maintenance provisions during marriage, but provisions upon termination of marriage both due to death or divorce are also greatly emphasized. However in the case of divorce, the woman's right of maintenance is limited to a certain limited period known as *'iddah*. Moreover, the duty to provide maintenance is not only effected between the husband and his wife or his divorced wife, but also is effected between a father and his child.

Therefore, in this context, this part proposes to deal with discussion of the rights of maintenance to both divorced wife and children. Since a divorced wife during *'iddah* is prescribed under the *Syariah* to be treated like a wife as regards to her maintenance, the discussion hereinafter will be therefore touch heavily upon matters related to maintenance for the wife who is still validly married to her husband.

3.3.1 Meaning of Maintenance

Maintenance, or in Arabic termed as *nafaqah*, is extracted from the word *al-infaq* which means taking out something and it is not to be used only for good cause.²⁸³ The literal meaning of *nafaqah* is that which a person spends on his family²⁸⁴ while in its legal terminology it refers to the sufficient needs (according to who is providing it) in the form of food, clothing and housing.²⁸⁵ In practice, the food maintenance consists of bread, food to be eaten with bread (*udam*) and also drinks; the clothing comprises a piece of cover

²⁸³ Al-Zuhayli, *Al-Fiqh al-Islami*, 7348 (See footnote 27); Mustafa Al-Khin and Mustafa Al-Bugha, *Fiqh al-Manhaji 'ala Mazhab al-Syafi'i (The Methodical Jurisprudence upon the Doctrine of Syafi'i)*, Vol. 2 (Damsyiq: Darul-Qalam, 1998), 161

²⁸⁴ Al-Zuhayli, *Al-Fiqh al-Islami*, 7371 (See footnote 27)

²⁸⁵ Al-Zuhayli, *Al-Fiqh al-Islami*, 7348 (See footnote 27)

and jacket and finally the lodging entails the house and its effects and other complements such as the cost of water, cleaning equipment, provision of a housemaid and other matters according to custom.²⁸⁶ The definition given above is general and covers the maintenance for all eligible beneficiaries as laid down by the *Syariah* and this includes a wife and children.

3.3.2 Legality of Maintenance

Wife or Divorcee

There are a number of authorities from the Quran and Sunnah that indicate the legality of maintenance for wife in general such as:

(Husbands) are the protectors and maintainers of their (wives), because Allah has given the one more (strength) than the other, and because they support them from their means.²⁸⁷

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 a difficulty, Allah will soon grant relief.²⁸⁸

The above verses clearly indicate that maintenance for the wife is incumbent upon the husband. This is due to the fact that a man is considered to be physically and mentally stronger than a woman and thus by nature he should be responsible for the duty of maintenance towards his wife. This can be understood from what seems to appear in the first verse. The second verse contains a general guideline that the circumstances of the husband whether he is wealthy or poor is the primary factor that should be taken into

²⁸⁶ Ibid, 7348

²⁸⁷ Quran, 4: 34

²⁸⁸ Ibid, 65: 7

account in the assessment of maintenance. The wife's situation is immaterial because the maintenance is the sole responsibility of the husband and therefore the scale should be subject to whatever he can afford.

The legality of providing maintenance is further supported by a number of Sunnah such as follows:

It was narrated from Hakim bin Mu'awyah, from his father, that a man asked the Prophet (P.B.U.H): "What are the rights of the woman over her husband?" He said: "That he should feed her as he feeds himself and clothe her as he clothes himself; he should not strike her on the face nor disfigure her, and he should not abandon her except in the house (as a form of discipline)." ²⁸⁹

It is related by Jabir bin Abdullah that the Prophet (P.B.U.H) said in his oration before the farewell pilgrimage: "They are entitled to their maintenance and clothing from you in accordance with what is equitable." ²⁹⁰

It was reported by Aishah that Hind bin 'Utba (the wife of Abu Sufyan) came and said: "O Allah's Messenger! Abu Sufyan is a miser, so, is it sinful of me to feed my children from his property?" He said, I do not allow it unless you take for your needs what is just and reasonable." ²⁹¹

Abu Hurairah reported the Prophet as saying: "Of the dinar you spend as a contribution in Allah's path, or to set free a slave or as a *sadaqa* (charity) given to a needy or to support your family, the one yielding the greatest reward is that which you spend on your family." ²⁹²

What may be derived from the above prophet's sayings is that the duty of providing a wife with maintenance of food, clothing and housing by her husband is obligatory. If she does not get sufficient maintenance from her husband she is even

²⁸⁹ *Hadith*, Muhammad bin Yazeed Ibn Majah Al-Qazwini, *Sunan Ibn Majah*, English Translation, ed. Hafiz Abu Tahir 'Ali Za'I, trans. Nasiruddin al-Khattab, vol.3, Ch. 3 (The Wife's Rights over the Husband), No. 1850 (Riyadh: Maktaba Darussalam, 2007)

²⁹⁰ *Hadith*, Abul Hussain Muslim Ibn al-Hajjaj, *Sahih Muslim*, English translation, ed. Hafiz Abu Tahir Zubair 'Ali Za'i, trans. Nasiruddin al-Khattab, vol. 3, Book 15 (The *Hajj of the Prophet (P.B.U.H)*), Ch. 19, No. 2950 (Riyadh: Maktaba Darussalam, 2007)

²⁹¹ *Hadith*, Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari* (Arabic-English), trans. Dr. Muhammad Muhsin Khan, vol. 5, Book 63, Ch. 23 (The narration about Hind bint 'Utba bin Rabi'a), No. 3825 (Riyadh: Maktabah Darussalam, 1997)

²⁹² *Hadith*, Al-Hajjaj Muslim, *Sahih Muslim*, English translation, vol. 3, Book 12 (*Zakat*), Ch. 39, No. 2311

permitted to take some money discreetly from him limited to what she requires only. Spending on a wife is not a mere obligation that is meant to put a burden on the husband because it is subject to his means and abilities. In fact, the husband will be greatly rewarded in the hereafter by discharging this honorable duty.

The duty of providing maintenance to the wife is so important that the *Syariah* makes even a divorced woman entitled to maintenance in the same manner as when she is still validly married to her husband for a certain period. This has been clearly stated in many Quranic verses such as follows:

Let the women live (in *'iddah*) in the same style as ye live, according to your means. Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden...²⁹³

For divorced women is a provision in kindness. This is a duty on the righteous.²⁹⁴ The woman's right to post-divorce maintenance is however limited to a certain period only. This period known as *'iddah* is either three menstrual periods, three lunar months or the duration of pregnancy if the divorced wife is pregnant.²⁹⁵ *'Iddah* under the *Syariah* is the period a divorced woman has to wait before she can remarry.²⁹⁶ This is based on the Quranic verse which states:

Divorce women shall wait concerning themselves for three monthly periods.²⁹⁷ In another verse, the Quran says:

Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months, and for those who have no courses (it is the same).²⁹⁸

²⁹³ Quran, 65:6

²⁹⁴ Ibid, 2: 241

²⁹⁵ Saleh, *Dictionary of Islamic*, 77

²⁹⁶ Ibid

²⁹⁷ Quran, 2: 228

In observing the *'iddah*, the marriage must be consummated before the divorce occurs otherwise there is no *'iddah* imposed on the wife according to the Quranic ruling which states:

O ye who believe! When ye marry believing women, and then divorce them before ye have touched them, no period of *'iddah* have ye to count in respect of them.²⁹⁹

The significance of *'iddah* is that if the divorced wife is pregnant the paternity of that unborn child that she carries then would be known. Besides it gives time to the divorced couple for reconciliation.³⁰⁰ It is because in the case of divorce, the relationship between husband and wife during *'iddah* remains intact. The husband can take her back into married life without a new contract and a new dower so long as the divorce is revocable or a *talaq raj'ie*.³⁰¹ What is more, the stipulation of *'iddah* apparently could also save the woman from the danger of becoming destitute at once.³⁰²

Children

It is laid down by the *Syariah* that a duty of maintenance takes effect in three ways; either by contract of marriage or by consanguinity or else by ownership.³⁰³ Therefore, due to the reason of consanguinity, a father is obliged to maintain his children according

²⁹⁸ Ibid, 65: 4

²⁹⁹ Ibid, 33: 49

³⁰⁰ Fayyuz-ur-Rehman, "Islamic Law of Maintenance for Wives in Pakistan and Afghanistan since 1960" (PhD thesis, University of Peshawar, 2003), accessed Dec 07, 2013, <http://www.Prr.hec.gov.pk/Thesis/2565H.pdf>.

³⁰¹ It is the case in which a man and his divorced wife may return to each other without remarrying (a new marriage contract). This happens after the 'first divorce' or 'second divorce' before the passage of the waiting period or *'iddah*, as in Saleh, *Dictionary of Islamic*, 231

³⁰² Fayyuz-ur-Rehman, "Islamic Law of Maintenance" (See footnote 300)

³⁰³ Muhammad Amin Al-Syahir Ibn 'Abidin, *Radd al-Muhtar 'ala Al-durr al-Mukhtar*, vol. 5 (Riyadh: Dar al-'Alim al-Kutub, 2003), 278; Syamsuddin Muhammad bin Al-Khatib Al-Syarbini, *Mughni al-Muhtaj*, vol. 3 (Beirut: Darul Ma'rifah, 1997), 558

to his means and abilities. There is a provision in the Quran which validates the above ruling:

The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way.³⁰⁴

This verse makes fathers responsible for providing their children with food, clothing, shelter and other needs. The responsibility of maintenance in this case arises due to the mere birth of his child.³⁰⁵ However, what may seem to appear from the verse is that the maintenance right of the child could not be meant to become a burden on fathers and therefore the scale should be in line with the father's situation, both financially as well as his capability in earning income.

There is also a *hadith* that establishes a clear duty for a man to maintain his child. It is related on the authority of Aishah that the Prophet (P.B.U.H) gave permission for Hind, the wife of Abu Sufyan, to take money from her husband without his knowledge, which she and her child required if her husband did not provide them with maintenance. If the maintenance is not obligatory the Prophet would not have approved the secret taking of money.³⁰⁶

³⁰⁴ Quran, 2: 233

³⁰⁵ Al-Zuhayli, *Al-Fiqh al-Islami*, 7349 (See footnote 27)

³⁰⁶ El-Alami, *Marriage Contract*, 114

3.3.3 When Does the Maintenance Become Obligatory?

Wife or Divorcee

There appears to be a general consensus among the Muslim jurists that maintenance is one of the obligations that the husband is bound to fulfill toward his wife once they enter the contract of marriage. However, they differ on when this obligation becomes effected. The *Sunni*, except the Hanafis, opine that the wife is entitled to maintenance instantly after the solemnization of their marriage.³⁰⁷

The Hanafis on the other hand, are of the opinion that the wife's entitlement to maintenance does not take effect immediately after the marriage has been contracted but only after she gives a full submission of herself to her husband.³⁰⁸

The Hanbalis view is that the factor that makes it compulsory for a husband to maintain his wife is the full submission of the wife who is fit for consummation and this means that she must be aged nine years old or above.³⁰⁹

Children

It is unanimously held by the Muslim jurists that maintenance by a father is the lawful right of the child according to the father's means. *Surah al-Baqarah*, verse 223, shows that the responsibility of maintenance between a father and his child becomes fully effected once the child that his wife has been carrying was born. The same rule applies to the situation where the divorced wife is pregnant. Essentially, the husband is bound to

³⁰⁷ Al-Zuhayli, *Al-Fiqh al-Islami*, 7371-2 (See footnote 27)

³⁰⁸ Ibid; Ala Al-Din Abi Bakar bin Mas'ud Al-Kasani, *Badai' al-Sanai' fi Tartibi al-Sharaie'*, vol. 4, 2nd ed. (Beirut: Dar al-Kutub al-'Ilmiyyah, 1986), 16

³⁰⁹ Mansur bin Yunus bin Idris Al-Bahuti, *Kashaf Al-Qina' 'An Matan Al-Iqna' (The Uncovery of the Mask)* Vol.5 (Beirut: Darul Fikr, 1982), 470

maintain her because of the existence of that child too.³¹⁰ In fact, the divorced wife's entitlement to maintenance may be extended to the period up to 2 years until the baby stops breastfeeding from the mother. However, as the Quran³¹¹ says that no father or mother should be made to suffer because of his or her child, therefore it connotes the notion that the provision of food, clothing, housing and other basic needs that a father should allocate, must be at a scale suitable to his means and abilities, irrespective of the child's needs.

3.3.4. Conditions for the Rights of Maintenance

Wife or Divorcee

The following are the conditions that are generally agreed by a majority of jurists that entitle woman to her maintenance if they are fully met:

- i. The marriage contract must be valid. The effect of this condition is that the valid contract empowers the husband to have rights over his wife such as that wife confines herself solely to him. If the marriage is *fasid*³¹² or irregular, the wife is not entitled to maintenance.³¹³
- ii. The wife must be of age that fits for physical relationship with her husband to consummate their marriage.³¹⁴ However, Abu Yusuf from the Hanafi's school of

³¹⁰ Al-Zuhayli, *Al-Fiqh al-Islami*, 7349 (See footnote 27)

³¹¹ Quran, 2: 223

³¹² It is a marriage that violates the basic requirements of proper marriage, such as marrying a first degree relative, as in Saleh, *Dictionary of Islamic Words*, 165

³¹³ Abdul al-karim Zaydan, *Al-Mufasal fi Ahkam al-Mar'ah wa al-Bayt al-Muslim fi al-Syariah al-Islamiyah (Detailed Provisions on Woman's and the House of Muslim under the Syariah Law)* 2nd ed, vol. 7, 156

³¹⁴ Al-Zuhayli, *Al-Fiqh al-Islami*, 7375 (See footnote 27)

law does not consider the wife's capability to perform sexual relations as an essential requirement for the right of maintenance. The situation of her being useful as a companion would be qualified enough to entitle her to maintenance. The purpose of her being a wife in this case is actually served even without the physical connection.³¹⁵

- iii. The wife must give a total submission (*taslim*) of herself to her husband.³¹⁶ The jurists define 'submission' here as 'the state where the husband and wife can have each other freely without any barrier preventing them to conjugal relations or to enjoy each other's companionship.'³¹⁷ The wife's full submission in this context can be either actual (*haqiqi*) or metaphorical (*hukmi*). Her action is considered as *haqiqi* if she actually moves to her husband's residence which allows him access to her anytime he desires. *Hukmi* is when she is always ready and makes herself available for her husband even though she has not yet moved to his house due to valid reasons such as taking care of her sick-parents.³¹⁸
- iv. There must be no factor that can diminish the husband's right to have his wife under his full authority without justifiable cause like that of disobedience (*nusyuz*) or any factor which is not due to his fault.³¹⁹ *Nusyuz* may consist in the wife's rejecting to have intercourse with her husband,³²⁰ leaving the marital home

³¹⁵ El-Alami, *Marriage Contract*, 115

³¹⁶ Al-Zuhayli, *Al-Fiqh al-Islami*, 7375 (See footnote 27)

³¹⁷ Al-Kasani, *Badai' al-Sanai'*, vol. 4, 18

³¹⁸ Zaydan, *Al-Mufasal*, 157

³¹⁹ Al-Zuhayli, *Al-Fiqh al-Islami*, 7375 (See footnote 27)

³²⁰ This is the predominant view of the Malikis. The Shafi'is and the Hanbalis accordingly hold the same opinion as in Wizarah al-Auqaf wa Shu'un al-Islamiyah al-Kuwait, *Al-Mausu'ah al-Fiqhiah al-Kuwaitiah*, vol. 40, *Nusyuz (Disobedience)*, (Kuwait: Ministry of Auqaf and Islamic Affairs, 2001), 288-290

without her husband's consent,³²¹ declining to move with him to his residence,³²² refusing to travel with him or travelling alone with no permission from the husband³²³ etc. The *Sunni*, except some of the Malikis generally agree that a wife who is *nusyuz* will not be entitled to her maintenance for as long as she remains disobedient until she repents.³²⁴ This is based on the Quran and Sunnah. *Surah an-Nisa*, verse 34 regulates the methods to implement when dealing with disobedient wife. Those methods are admonition, desertion of the marriage bed and light beating. From this verse, the Shafi'is, Hanafis and Hanbalis conclude that if the wife does not repent from her disobedient act, she then would receive no maintenance. This has no different if the wife is insane, when she commits *nusyuz*, would be treated the same and also loses her maintenance. In fact, the Shafi'is has taken a slight stricter approach by not distinguishing the act of disobedience if it only remains for several hours, the wife would yet lose her a whole day maintenance.³²⁵ However, the wife is not considered as disobedient simply if one of the above mentioned actions has taken place. There are instances of absolutely necessity or lawful reasons that Islam permits her not to obey her husband's instruction. An example is that of the wife's denial of her intimacy to

³²¹ As agreed upon amongst the jurists; the Shafi'is, the Hanafis, the Malikis and the Hanbalis. The Hanafis viewed this ground as causing disobedience without distinguishing whether the wife is in the subsistence of her marriage or observing her *'iddah*, as in Wizarah al-Auqaf, *Al-Mausu'ah*, 287-290 (See footnote 320)

³²² This is the opinion supported by the Shafi'is as stated in Wizarah al-Auqaf, *Al-Mausu'ah*, 289.

³²³ As viewed by the Hanafis and the Shafi'is, and the Shafi'is nevertheless do not consider a wife disobedient if she travels with her husband but without his consent, as in Wizarah al-Auqaf, *Al-Mausu'ah*, 289 (See footnote 320)

³²⁴ *Ibid*, 290 (See footnote 320)

³²⁵ *Ibid*, 291. For a general discussion of Q4:34 see Ayesha S. Chaudhry, *Domestic Violence and the Islamic Tradition*, (Oxford University Press, 2013) and particularly Ch 1: The Multiple Contexts of Q4:34.

her husband due to illness.³²⁶ In contrary, the Malikis' view is that a divorced wife (on *talaq raj'ie*) who is disobedient due to her act of leaving the house without her husband's permission, would still be entitled to her maintenance. The same ruling also applies to a disobedient wife who is pregnant.³²⁷

As the issue of a working or career wife becomes a common phenomenon today, it is useful for the study to discuss the Islamic jurist's opinion on this matter. The majority of Islamic jurists rule that the wife who goes out to work without permission of her husband would not deserve maintenance from him.³²⁸

There is some disagreement among the jurists however, regarding a condition stipulated by the wife in the marriage contract that she would remain in her job after the marriage. While the Hanafis invalidate such a condition but not the contract, the Malikis and the Hanbalis opinion are that it is indeed a valid condition. The only difference is that the Malikis do not make the condition binding upon both parties and stipulate that the husband has the right to stop her from working. If she disobeys him she would be then considered as *nusyuz*. On the contrary, the Hanbalis do not count her refusal as *nusyuz* because according to them the condition is compulsory. As the Shafi'is in the predominant view specify that the right of maintenance does not take effect due to the contract, therefore any condition placed in the contract is totally immaterial. They simply

³²⁶ There is a long discussion among the jurists as to what ground is considered as lawful for the wife to disobey her husband's instruction which has been presented by few modern scholars in their books like Sayyid Sabiq in *Fiqh al-Sunnah (Jurisprudence of the Tradition)*, Malay translation, trans. Nuor Hasanuddin, vol. 3 (Jakarta: Pena Pundi Aksara, 2006), 57-8; Al-Zuhayli, *Al-Fiqh al-Islami*, 7380-3 (See footnote 27); Zaydan, *Al-Mufasal*, 158-9 etc.

³²⁷ Wizarah al-Auqaf, *Al-Mausu'ah*, 291 (See footnote 320)

³²⁸ Zaydan, *Al-Mufasal*, 165; Nasir, *Islamic Law*, 105

rule that any act of disobedience would make the wife immediately lose her right to maintenance.³²⁹

Children

There is no disagreement found among jurists that the maintenance for a child is obligatory. However, the maintenance right of a child becomes conditional when the jurists have specified certain requirements for its entitlement. Firstly, the father must be capable of providing maintenance either because he is rich or he is capable of working to earn an income. This is the view held by the majority of jurists; i.e. the Shafi'is, the Hanafis and the Hanbalis. Therefore in a case where the father is poor or is not able to work, the responsibility to provide the child's maintenance would rest on any other relatives as stipulated under the Syariah such as the child's grandfather or the child's mother etc.³³⁰ The Malikis, on the other hand, hold that it is not a duty of a father who is poor to make money in order to maintain his children.

The second condition for the entitlement is that the child must be poor and having a difficult life with no property of his own and also no ability to work. This means that a child who owns property or who has ability to earn his own income would be responsible for his own maintenance and not his father.³³¹

³²⁹ The detailed discussion of the jurists about the matter can be found in Al-Zuhayli, *Al-Fiqh al-Islami*, 7379-80 (See footnote 27)

³³⁰ Basically, there are considerable opinions among jurists as regards the question on who would be responsible for the child's maintenance if the father is incapable of doing so due to justifiable reasons but however, there seems to be an agreement that the duty of maintenance is given priority to either the grandfather or the mother of the child.

³³¹ Al-Zuhayli, *Al-Fiqh al-Islami*, 7412-3 (See footnote 27)

Lastly, a condition stipulated only by the Hanbalis is that the father is not bound to maintain his child if either one of them is not Muslim. In other words, they both must embrace the same faith and religion. According to them the provider of maintenance must be the father's legal heirs (*warith*) and in inheritance law both the deceased and his heirs must be Muslim based on *Surah al-Baqarah*, verse 233. From this, the Hanbalis applied the ruling of the same religion to the case of maintenance. The majority of jurists i.e. the Shafi'is, the Hanafis and the Malikis, nevertheless do not agree with this and maintain that religion is not important in stipulating the obligation of maintenance. They strengthen their view based on the general verse regarding the duty of maintenance for children in *Surah al-Baqarah*, verse 233.

The verse as explained earlier indicates that the rights and duties of maintenance between a father and his child arise as a result of the birth of the child and the occurrence of that birth is a mere fact irrespective of their religion. They further add that maintenance is a means for living and thus living a life is crucial without distinguishing whether or not the provider of such living is Muslim.

3.3.5 What Does Maintenance Consist of?

Wife or Divorcee

Many of the Quranic verses and Prophet's sayings where only food, clothing and residence that are repeatedly mentioned might give rise to the notion that maintenance is

limited only to those three items.³³² However, there has been a long discussion among jurists on the other articles that should be included in maintenance. According to the jurists maintenance should consist of such items that are considered as necessities for life according to the custom of the country and for the particular class of people to which the spouse belongs.³³³ Those articles are in general like toiletries such as soap, shampoo, hair oil and articles of use such as cooking utensils, mats, furniture etc., and also the hire of a housemaid. For instance, in Asian counties like Brunei, as rice is the staple food for the inhabitants in the state, therefore the maintenance of food should be provided in the form of rice.

In determining how much provision of food and clothing is to be allocated to the wife, the Shafi'is have fixed the scale according to different classes of people that the husband belongs to; whether he is wealthy, moderate or poor. For instance if he is wealthy then he should provide his wife with two *mud*³³⁴ of rice or wheat, one and a half *mud* for a wife of a moderate class husband and a *mud* if he lives a poor life.³³⁵ This is based on their understanding over the Quranic verse that says: "Let the man of means spend according to his means."³³⁶ The Shafi'is further assert that there should be a standardized provision of maintenance for the wife following the custom of the particular country so as to prevent unnecessary argument between the spouses on this matter.³³⁷

³³² Mohammad Afzal Wani, *Maintenance Rights of Muslim Women: Principles, Precedents & Trends*, (India: Genuine Publications, 1994) 9

³³³ Al-Khin and Al-Bugha, *Fiqh al-Manhaji*, 174-5

³³⁴ An Arabic term which is equivalent to 6 oz of rice or wheat

³³⁵ Al-Khin and Al-Bugha, *Fiqh al-Manhaji*, 177

³³⁶ Quran, 65: 7

³³⁷ Sabiq, *Fiqh al-Sunnah*, trans. Nor Hasanudin, 62

However, the majority of jurists do not specify any specific description as to the type or quality or quantity of the food that a wife should get from her husband for maintenance. It seems that their opinion on this matter is more liberal by generalizing the maintenance to any type of food that is sufficient for her. The Hanafis and the Malikis even accepted the arrangement of maintenance in a form of money which is more practical and convenient today. The Hanbalis on the other hand, allow such payment to be ordered by the court only if both spouses consent to it.³³⁸

As for clothing, there appears to be an agreement between the jurists that the husband should undertake maintenance in the form of clothing which is necessary subject to the condition of the husband whether he is rich or poor. To decide what is necessary or proper is totally left to the judge to decide as no explicit description or regulation about this matter is found in the Quran or Sunnah. However, there are instances given by the jurists as to the estimation of this type of maintenance. For example, in terms of the quality that the clothing should be given for a wife whose husband is rich it is an expensive material; while for a destitute husband, it is sufficient to provide his wife with a piece of clothing that is made of cotton.³³⁹ As for the husband who practices an average standard of life he can give her a piece of ordinary material that is normally worn by the modest people in his country.³⁴⁰ It is also necessary to provide clothing for summer and winter.³⁴¹

³³⁸ Zaydan, *Al-Mufasal*, 208-210

³³⁹ Al-Zuhayli, *Al-Fiqh al-Islami*, 7390 (See footnote 27)

³⁴⁰ Ibid

³⁴¹ Sabiq, *Fiqh al-Sunnah*, trans. Nor Hasanudin, 62

Apart from the two above types of basic maintenance, a husband is also liable to provide accommodation for his wife to live in but this does not concern us here as the research will only focus on the divorce settlement matters that involve finance. However, in the light of the above, it can be concluded that the provision of maintenance comprises anything that a wife requires in life which is necessary and appropriate. Besides the custom of any practices, it is obvious that the financial position of the husband has always been seen as the primary factor in the assessment of the maintenance as will be discussed at length later.

Children

The same rule also applies to the maintenance of a child which a father is required to provide in the form of food, clothing, residence and expenses for nursery (*radha'ah*). It should be within the limit of what is essential to fulfill the needs of the child. These matters are agreed upon among the jurists³⁴² based on the Sunnah regarding the instruction made by the Prophet to Hind, the Abu Sufyan's wife to take money secretly from her husband to the extent of what she and her son require. According to the jurists, the cost of a maid is also incumbent upon the father if the child requires it.

³⁴² Al-Zuhayli, *Al-Fiqh al-Islami*, 7418-19 (See footnote 27)

3.3.6 Assessment of Maintenance

Wife or Divorcee

Basically, the Quran is silent about the detailed guidance as to how the maintenance should be assessed. The Quranic verse in *Surah at-Talaq*³⁴³ however, has provided only the general principle which stipulates that the quantum of maintenance should be according to the means and the abilities of the husband. This has resulted in Muslim jurists differing in their views on this regard. The first view which is supported by the Malikis and the Hanbalis is that both the husband's means and the wife's status together should be taken into account in determining the amount of maintenance. They supported their view by a combination of the two authorities; the general command about the wife's maintenance in *Surah at-Talaq*, verse 7 and also the Sunnah regarding the Prophet's instruction to Hind, the wife of Abu Sufyan. According to them, the above references contain a clear indication of the wife's circumstances is equally important as to that of the husband's in determining maintenance.

The second view which is supported by the Shafi'is³⁴⁴ and the Hanafis who prescribe that the maintenance should be fixed by referring to the husband's circumstances alone. This is based on the Quranic verse³⁴⁵ and *hadith* in which the Prophet was asked about the right of a wife. The Prophet answered by saying: "It is that you shall give her food when you have taken your food, that you shall clothe her when

³⁴³ Quran, 65: 7

³⁴⁴ Al-Khin and Al-Bugha, *Fiqh Al-Manhaji*, vol.2, 174

³⁴⁵ Quran, 65: 7

you have clothed yourself....”³⁴⁶ The jurists of this view have interpreted the word ‘*ma’ruf*’ in the *hadith* regarding Hind as a restriction that the maintenance assessment should be limited to the condition of the husband alone and not others.³⁴⁷

Children

Like the maintenance for a wife or a divorced wife, there is no upper or lower limit of maintenance for a child too.³⁴⁸ In fact, it is an unanimous opinion among Islamic jurists that the provision of food, clothing and lodging should be within the limit that a child only requires to survive in reference to the Prophet’s saying about Hind who wrongly took her husband’s money: “Take from his money that which you require for yourself and your son.”³⁴⁹ Apart from taking into account the means of the one providing it, the assessment should also be based on the customs that is normally practiced by the societies in which the father and his child belong.³⁵⁰

3.3.7 Other Relevant Rulings Regarding Maintenance

Suspension of Maintenance

In the case where the wife does any act that amounts to disobedience (*nusyuz*) and this is confirmed by the Court, the entitlement to maintenance would be suspended for a

³⁴⁶ *Hadith*, Ibn Majah, *Sunan Ibn Majah* (See footnote 289)

³⁴⁷ Al-Zuhayli, *Al-Fiqh al-Islami*, 7738 (See footnote 27)

³⁴⁸ Al-Khin and Al-Bugha, *Fiqh al-Manhaji*, 169

³⁴⁹ *Hadith*, *Sahih Al-Bukhari* (See footnote 291)

³⁵⁰ Al-Khin and Al-Bugha, *Fiqh al-Manhaji*, 165; Al-Zuhayli, *Al-Fiqh al-Islami*, 7352 (See footnote 27), (As quoted by Al-Zuhayli that this opinion is referred to the various sources; Al-Badaie’: 4/36&37, Hashiyah Ibn ‘Abidin: 2/293, Al-Qawanin Fiqhiyah:223, Al-Muhazzab:2/167, Mughni al-Muhtaj: 3/448, Al-Mughni:7/595); See also Al-Khin and Al-Bugha, *Fiqh al-Manhaji*, 169

certain period that she remains in this position. However, the husband is obliged to resume her maintenance once she repents and returns to become an obedient wife for him. The date at which the maintenance should be recommenced nevertheless is subject to different opinions between the jurists. The Hanafi's opinion is that the date should be the one on which the wife returns to her husband's house and the husband's acknowledgement about her arrival is sufficient for her to receive back the maintenance.³⁵¹ The Hanbalis adopt a slight stricter approach by specifying the date of maintenance as the day when she actually submits herself to her husband in his house.³⁵² The Shafi'is on the other hand, hold two different views; the first view is in parallel with the Hanafis while another is the view supported by the Hanbalis which is the predominant view according to the Shafi'is.³⁵³

As for children, there is no discussion found among the jurists regarding the issue of suspension of maintenance. Essentially, the Quran establishes 'sillah' or relationship/linkage that arises from the birth of the child as the main factor that binds the father to maintain his children. However, the child's entitlement is not conditional on certain qualifications. Whereas for the wife, it is the contract or the act of submission on the part of wife (as discussed earlier) that makes it incumbent for the husband to maintain her and nothing can absolve him from this duty in the subsistence of marriage and even in the event of divorce (*talaq raj'ie*) except the act of *nusyuz*.

³⁵¹ Ibn 'Abidin, *Radd al-Muhtar 'ala Al-durr al-Mukhtar*, 286

³⁵² Al-'Alamah Mansur bin Yunus Al-Buhuti Al-Hanbali, *Kashaf al-Qina' 'An al-Iqna'*, vol. 13 (Saudi Arabia: Wizarah Al-'Adl, 2008), 133-4

³⁵³ Al-Khatib Al-Syarbini, *Mughni al-Muhtaj*, 573-4

Variation in the Conditions of Husband and Wife

In the case where the fixed maintenance has been ordered by the Court and either the husband or the wife wishes to apply for variation in such maintenance, it is subject to two different changes of circumstances. There are either changes in the financial position of the husband or changes which affects the price of goods.³⁵⁴ According to al-Zuhayli, the application for variation is allowed if the changes affect both the husband's situation from poor to rich and also the price of goods in a state of emergency due to war, drought and natural disaster.³⁵⁵

In the case where a variation order is applied for children, there is no argument put forward by the jurists about this matter. However, based on the above, one may deduce that there is no difference between the application for variation for a wife and a child so long as the changes that have occurred allow any relevant party to apply to the court for the variation order. The variation to the amount of maintenance may be for an increase if the husband's circumstances have got better. The application for variation in this case can either be made to the court by the child himself/herself or by the mother in the interest of her child's benefit.

Arrears of Maintenance

Where the husband fails to maintain his wife for a certain period of time and the wife demands payment of the arrears of such maintenance, the case is subject to two

³⁵⁴ Al-Zuhayli, *Fiqh al-Islami*, 7398 (See footnote 27)

³⁵⁵ *Ibid*, 7397 (See footnote 27)

different aspects. The first is the position whether or not the wife brings this matter into court and the second aspect is the parties' agreement to consider it as a debt. According to the Hanafis, the wife has no right to claim unpaid maintenance unless with a court order or she has entered into an agreement with her husband in this respect. This contrasts with the view of the majority of the jurists, supported by among others, the instruction issued by Omar towards the armies that they should maintain their wives even in their absence or otherwise they have to divorce their wives and further reimburse any maintenance that is in arrears.³⁵⁶

Any arrears of maintenance for a child are not recoverable as debts according to the Hanafis whether it has been decreed by a court or there is an agreement between the parties regarding this matter.³⁵⁷ The Shafi'is also agree that any arrears of child's maintenance would not be reimbursable except in the case where a court order is in place or the child has consented to this due to the father's absence or his inability, such arrears would be therefore considered as debts due from the father.³⁵⁸

Release from Maintenance

In the case where the wife releases her husband from the liability for payment of maintenance, the ruling laid down is subject to the position whether the release is meant for past or future maintenance. In the case of past maintenance, there are two different opinions in this regard. First, is the opinion of the Hanafis who say that it will take effect

³⁵⁶ Al-Muwafiquddin Abi Muhammad Abdullah bin Ahmad bin Muhammad bin Qudamah, *Al-Mughni*, vol. 11, (Riyadh: Dar 'Aalam al-Kutub, 1997), 366-367

³⁵⁷ Al-Zuhayli, *Fiqh al-Islami*, 7419 (See footnote 27)

³⁵⁸ Ibid

provided there is a court order or an agreement between parties in this respect. The second view is the more liberal approach taken by the majority of the jurists who allow the release of past maintenance in any way. As for future maintenance, there is a general agreement among the jurists that the release of such maintenance by the wife will not in all circumstances be effective.

As to the question as to whether or not a child may release his father from the payment of his maintenance, there seems no argument has been raised by any jurists about this. This could be because the general rule about the child's maintenance is that it is not an absolute right like that of the wife. In fact, as the majority of the jurists say, if a child owns property or is able to work, it is not incumbent on the father to provide maintenance for him. This is not the case in the wife's maintenance whereby the husband is always liable to maintain her, in any circumstances, according to his means.³⁵⁹

3.4 RIGHTS TO *MUT'A AL-TALAQ*

Mut'a al-talaq is an exclusive Islamic right for wives that takes effect upon the termination of marriage. It is not maintenance or *mahr* (dower) as it serves as a consolatory gift or compensation to the wife for a divorce which has not been initiated by her. *Mut'a al-talaq* carries some benefits to both wife and husband. The wife, apart from the benefit from the economic aspect that she could gain through *mut'a al-talaq*, can also preserve her dignity and emotional instability caused by the divorce. Equally, it bears

³⁵⁹ Al-Zuhayli, *Al-Fiqh al-Islami*, 7412-3 (See footnote 27)

some reflection on the status of husband as the act of awarding his divorced wife the *mut'a al-talaq* projects his kindness and compassion in not leaving her destitute and in pain which further preserves his reputation.³⁶⁰

3.4.1 Definition of *Mut'a al-talaq*

It is an Arabic term extracted from the word of *al-mata'* and refers to all that which gives benefit and enjoyment.³⁶¹ The Shafi'i consider the term *mut'a al-talaq* to mean property that is incumbent on the husband to pay to his wife for divorcing her (or its equivalent) under certain terms and conditions;³⁶² whilst the Malikis consider it to mean something that is given by the husband to his divorced wife in addition to her dower to protect her honour.³⁶³

3.4.2 The Ruling of *Mut'a al-talaq* Whether or Not it is Obligatory and its Relevant Authorities

There is some difference of opinion as to whether the award of *mut'a al-talaq* is obligatory or recommendable and subject to such factors as to whether the divorce occurs before or after consummation and whether dower is mentioned in the marriage contract or not. As regards divorce where the wife has never had sexual intercourse with her husband or whether dower was not stipulated in the marriage contract, there are two opinions in this regard. The first view, supported by the majority of jurists, maintains that

³⁶⁰ Wizarah al-Auqaf, *Al-Mausu'ah*, vol. 36, *Mut'a al-talaq At-Talaq (Consolatory Gift upon Divorce)*, 95

³⁶¹ Al-Zuhayli, *Fiqh al-Islami*, vol. 9, *Al-Mut'a al-talaq (Consolatory Gift)*, 6829

³⁶² Abu Jayib Sa'di, *Al-Qamus al-Fiqhi Lughatan Wa Istilahan (Dictionary of Jurisprudence in Terminology and Idiomatic)* 2nd ed. (Damsyiq: Dar al-Fikr, 1988), 335

³⁶³ *Ibid*

the gift of *mut'a al-talaq* to the woman in the above two circumstances is obligatory. This has been clearly stated in the Quran that says:

There is no blame on you if ye 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.³⁶⁴

For divorced women a provision in kindness. This is a duty on the righteous.³⁶⁵

In interpreting the first verse, al-Bahuti³⁶⁶ says that the instruction in the verse to “bestow” is a command and is not affected by the words it is ‘a duty on the righteous’ as obeying the command is indeed the act of the righteous.³⁶⁷

The second view is that of the Malikis³⁶⁸ who consider paying *mut'a al-talaq* to be recommendable only. They base their opinion on the words ‘*muttaqin*’ (piety) in verse 241 and ‘*muhsinin*’ (righteous) in verse 236 of *Surah al-Baqarah* which respectively connote the meaning that the award of *mut'a al-talaq* is only considered obligatory by those seek to be included in the categories of persons mentioned.³⁶⁹

As for divorces after consummation, the jurists also differ on this matter. In contrast with their view on divorce prior to consummation, the Hanafis do not consider *mut'a al-talaq* upon a divorce after consummation to be compulsory and in fact it is only desirable.³⁷⁰ The Shafi'is have a more liberal approach by which divorced wives are entitled to *mut'a al-talaq*. In their view, *mut'a al-talaq* is compulsory on every divorce

³⁶⁴ Quran, 2: 236

³⁶⁵ Ibid, 2: 241

³⁶⁶ Wizarah al-Auqaf, *Al-Mausu'ah*, 95 (See footnote 360)

³⁶⁷ Ibid

³⁶⁸ An-Nadwi Taqiyuddin, *Al-Muwatta' Al-Imam Malik*, vol. 2, (Damsyiq:Dar al-Qalam, 1992), 554

³⁶⁹ Abi 'Abdillah Muhammad b. Ahmad b. Abi Bakr Al-Qurtubi, *Al-Jami' li Ahkam al-Quran*, vol.4 (Beirut: Muasasah al-Risalah, 2006), 162

³⁷⁰ Al-Zuhayli, *Fiqh al-Islami*, 6831 (See footnote 361)

providing that it is initiated by the husband which includes the divorce after consummation, supported by *Surah al-Baqarah*, verses 236 and 241.³⁷¹ The Malikis, as mentioned earlier, consider the payment of *mut'a al-talaq* as recommendable in any case, except for the divorce which takes place before consummation where the dower is stated in the contract.³⁷² This has also been agreed by the Shafi'is.³⁷³

To conclude, a woman when being divorced by her husband will face a tangle of difficulties; economically, emotionally, psychologically etc. By prescribing provision of *mut'a al-talaq* this will relieve her from some of such difficulties. However, despite the differences of the jurists on this subject, it is more acceptable to follow the Shafi'is view as it would place divorced women at a great advantage for the woman who is divorced before or after consummation would receive an equal treatment as regards to the entitlement to the gift of *mut'a al-talaq*. If the wife has not given any service to her husband before divorce she still has right to *mut'a al-talaq*, but the wife who has served her husband in total submission and in fact has carried his child should be entitled to more so as to appreciate the contribution she had made during the marriage.

3.4.3 Quantum of *Mut'a al-talaq* and its Assessment

Basically there is no explicit verse of the Quran or Sunnah that stipulates as to what form the *mut'a al-talaq* should take nor fixes the upper and lower limits of the

³⁷¹ Ibid; Al-Khin and Al-Bugha, *Fiqh al-Manhaji*, 81

³⁷² Taqiyuddin, *Al-Muwatta'*, vol. 2, 554; Al-Zuhayli, *Fiqh al-Islami*, 6831 (See footnote 361)

³⁷³ Al-Khin and Al-Bugha, *Fiqh al-Manhaji*, 81

compensation wives should receive as *mut'a al-talaq*. The Quran³⁷⁴ does state however that the payment is to be based on the situation of the husband whether he is rich or poor. This has raised a disagreement among the jurists as to whose condition should be assessed to determine the quantum of *mut'a al-talaq*.

The Hanafis and the Shafi'is are of opinion that *mut'a al-talaq* is to be fixed by the judge who will consider the position of both parties equally.³⁷⁵ However if the couple have agreed on a certain amount, no matter how small or big it is, then *mut'a al-talaq* should be paid in such amount as viewed by the Shafi'is. The judge would have the authority to fix a reasonable amount only if the parties fail to reach an agreement on the matter.³⁷⁶ The Malikis and Hanbalis on the other hand, confine the assessment to the financial circumstances of the husband only³⁷⁷ based on *Surah al-Baqarah*, verse 23, “the wealthy according to his means and the poor according to his means...”

The modern juristic commentator Al-Imam al-Jasas, asserted that the guidelines in determining the quantum of *mut'a al-talaq* can be found in the verse 236 of *Surah al-Baqarah* in which his commentary goes like this: Allah (S.W.T) has stipulated 2 factors to be taken into consideration when determining the amount of *mut'a al-talaq* which are the financial abilities of the husband and the fact that it is a beneficial thing. Such a benefit must then be according to the custom subject to the changes that will occur over time.³⁷⁸

³⁷⁴ 2:236

³⁷⁵ Al-Zuhayli, *Al-Fiqh al-Islami*, 6834 (See footnote 361)

³⁷⁶ Al-Khin and Al-Bugha, *Fiqh al-Manhaji*, 82

³⁷⁷ Al-Zuhayli, *Al-Fiqh al-Islami*, 6834 (See footnote 361)

³⁷⁸ Al-Imam al-Jasas, *Tafsir al-Quran "Ahkam al-Quran"* (Commentary on the Quran "The Quran Rulings") vol. 1, 433, as in Zaydan, *Al-Mufasal*, 133

In determining what *mut'a al-talaq* should consist of, the Hanafis are of opinion that *mut'a al-talaq* should comprise three pieces of clothes which is not in excess of half the amount of the *mahr mithil* (proper dower)³⁷⁹ if the husband is rich. As for a poor husband, the amount should be not less than five *dirhams* or equivalent to it. The Shafi'is maintain that it is favourable not to fix *mut'a al-talaq* at less than thirty *dirhams* or its equivalent. According to them, thirty *dirhams* and a slave³⁸⁰ are respectively the minimum and the maximum amount for *mut'a al-talaq* while the average limit is a certain amount of cloth.³⁸¹ The upper limit of *mut'a al-talaq* to be given by the rich husband as viewed by the Hanbalis is a slave or its equivalent value at that time. If he is poor, the cloth that can be worn for praying would be sufficient for *mut'a al-talaq*.³⁸² Essentially, the jurists' views as to what *mut'a al-talaq* should comprise are in fact based on their own reasoning and none of them is found to be confrontational against each other's opinion over the matter.

From the above, we may note that *mut'a al-talaq* may take various forms such as three pieces of cloth, praying clothes, five dirhams, thirty dirhams, a slave or servant etc. Thus this suggests that there is no hard and fast rule on the quantum of *mut'a al-talaq* payable to divorced wives. It would be best however to be done according to the affordability and willingness of both parties and then confirmed by the Court. This is so that the settlement made involves all parties who are satisfied so that justice could be achieved for all.

³⁷⁹ It is a dower given to woman of a similar social status as in Saleh, *Dictionary of Islamic Words*, 129

³⁸⁰ This was a factor in the time of slavery but is no longer relevant now as the system of slavery has long been abolished in Islam

³⁸¹ Al-Zuhayli, *Fiqh al-Islami*, 6834 (See footnote 361)

³⁸² Ibid

3.4.4 Will the Right of *Mut'a al-Talaq* be Lost if the Divorced Wife Acts *Nusyuz* or Disobedient?

This was another area that needed to be deliberated from the Islamic point of view as it has given rise to a controversial issue in the Syariah courts today. There are many cases whereby the husband claimed his divorced wife, who has filed for *mut'a al-talaq* payment, is disobedient or *nusyuz* so as to prevent her receiving *mut'a al-talaq* (this will be discussed further in Chapter four). Basically, there is no discussion among the jurists about this specific issue. However, many jurists do not consider the wife to be entitled to *mut'a al-talaq* if the divorce was caused by her alone. The examples that have been put forward by the jurists would be the apostasy of the wife or defects in the wife which terminate the marriage (*fasakh*)³⁸³ or the husband's insolvency where his wife chooses to terminate by way of *fasakh* or the wife discovered her husband has suffered from 'inah³⁸⁴ but finally chooses to divorce by *fasakh*.³⁸⁵ Although there is no explicit mention among the jurists about *nusyuz* as regards to the gift of *mut'a al-talaq*, by referring to the above rulings it is sensible to say that if the divorced wife has been *nusyuz* which leads to the termination of their marriage then she has no right to a *mut'a al-talaq* for the divorce has been caused by her action alone.

³⁸³ It is meant as cancelling a contract (including that of marriage) or consider it void as in Saleh, *Dictionary of Islami*, 46

³⁸⁴ Incapability to perform sexual intercourse especially due to inability to reach erection of his organ as in above reference, 85

³⁸⁵ Abi Al-Hasan 'Ali Muhammad Al-Mawardi, *Al-Hawi al-Kabir fi-Fiqh Mazhab al-Imam al-Syafi'i*, vol. 9, (Beirut:Darul Kutub al-Islamiah 1999), 548

3.5 HARTA SEPENCARIAN

In Islam, men and women are equal in their rights to acquire, own, hold and dispose of any of their property as they wish, regardless of their status of being single or married. In reality, however when they are married, they may practically share everything with their spouses including their assets and properties. In this way property that was accumulated throughout the marriage can be regarded under customary law as *harta sepencarian*. During the subsistence of the marriage, the situation where the spouse raises the ownership over the matrimonial property hardly occurs but upon divorce the parties start to distinguish ‘what belongs to each’ and to lay a claim on it to the court, expecting it to be returned or divided between them. In the Quran or Sunnah, there is no single provision that mentions about property division on marriage and nor do the traditional jurists discuss specifically this matter. This is because the existence of the practice of the division of matrimonial property upon divorce in Brunei is based on Malay custom. In fact, in today’s Muslim legal system in Brunei, there is a clear provision that allows either spouse to make a claim for the division of *harta sepencarian* to the Syariah courts. Therefore unlike *‘iddah* maintenance and *mut’a al-talaq*, it appears that *harta sepencarian* is the recognized economic right that gives both husband and wife equal rights to bring claims of property to the Syariah court in the event of divorce.

3.5.1 The Definition of *Harta Sepencarian*

The term *harta sepencarian* does not exist in Quran and Sunnah nor in any Islamic *fiqh* (jurisprudence) writings. It is a term widely known among the Malays which

is also termed as *carian laki bini*³⁸⁶ that refers to the old practice in many parts of Malaysia. As defined by M.B. Hooker it is the property jointly acquired by the husband and wife during a marriage.³⁸⁷ Accordingly, Ter Har has defined *harta sepencarian* as the property acquired by the husband and wife which belongs to them together during the subsistence of the marriage.³⁸⁸ The definition given by Soekanto is that *harta sepencarian* means the property that is brought to the marriage due to the joint efforts of the husband and wife.³⁸⁹

Harta Sepencarian is also known by other terms based on its origin in which it was practised such as *Charian laki bini*,³⁹⁰ *Pencarian*,³⁹¹ *Gono Gina*,³⁹² *hareuta sihareukat*,³⁹³ *harta usaha sama*,³⁹⁴ *guna kaya*,³⁹⁵ *druwe bagro*,³⁹⁶ *barang-barang perpatangan*.³⁹⁷ In Brunei, the term *harta laki bini* is also used for *harta sepencarian*.³⁹⁸

3.5.2 The Concept of *Harta Sepencarian* and the Theories Evolves around it

There is no mention of *harta sepencarian* or its equivalent in the Quran and Sunnah. The traditional jurists also never discussed specifically about *harta sepencarian*

³⁸⁶ The earnings of husband and wife

³⁸⁷ M.B. Hooker, *Personal Laws of Malaysia* (London: Oxford University Press, 1976), 77

³⁸⁸ As been referred by S.H Surojo Wignjodipura, *Pengantar dan Asas-Asas Hukum Adat* (Bandung: Penerbit Alumni, 1971), 203

³⁸⁹ *Kamus Hukum Adat*, (Bendung: Penerbit Alumni, 1982), 84

³⁹⁰ As it is known among the Malays of the State of Sembilan

³⁹¹ The popular term among the Malays of Sarawak

³⁹² Is the term used among the Malays of the Java

³⁹³ Is the term used among the Malays of the Aceh

³⁹⁴ Is the term used among the Malays of the state of Terengganu

³⁹⁵ Is the term used among the Malays of the Sunda

³⁹⁶ The popular term among the Malays of Bali

³⁹⁷ As it is known among the Malays of Kalimantan

³⁹⁸ DDW Hj Tamit, “*Harta Sepencarian* Daripada Perspektif Adat (*Harta Sepencarian* from the Perspectives of Custom)” in *Transformasi Undang-Undang*, 101

or its equivalent. However, among the Malay people, the term *harta sepencarian* is not alien to them. There is a long practice of the property distribution between Malay couples in the event of divorce or death. When the Malays became Muslims, various theories have been put forward regarding the concept of *harta sepencarian*. Some jurists say it is *harta sharikat* or Islamic partnership property and other claim that the proportion the wife receives is just her fee or *ujrah*. Subsequently, as custom is also a part of Syariah law, the Malay scholars have generally agreed that the old Malay custom of *harta sepencarian* is not a practice which contradicts the principle laid down in the Quran and Sunnah but adds to it for the benefit of the spouses (particularly the wife).

The Malay Old Custom

To trace back the existence of the concept of *harta sepencarian*, it basically originated from the Malay custom called *adat perpatih* which is of matriarchal origin. *Adat perpatih* was brought from Minangkabau and is practiced by the Malays of Negeri Sembilan and Malacca.³⁹⁹ Eventually, other parts of states of Malaya and the Borneo states also followed the same practice including Brunei. A divorced wife according to *adat perpatih* is entitled to a substantial share of the property acquired during the marriage mainly land.⁴⁰⁰ This is because it was common practice in those times for the wife to assist her husband to cultivate the land acquired during their marriage. Generally, it was held that if she made an actual contribution toward the cultivation works in that

³⁹⁹ E.N. Taylor, "Malay Family Law" in *Journal of the Malayan Branch of the Royal Asiatic Society*, vol. 15, No. 1 (127) (May, 1937) (Singapore; Printers Limited, 1937), 3; Ahmad Ibrahim, *The Status of Muslim Women in Family Law in Malaysia, Singapore and Brunei* (Singapore: Malayan Law Journal Ltd, 1955), 59

⁴⁰⁰ Ibrahim A., *Status of Muslim Women*, 55

land she would be entitled to a one-half share in it; but if there was no contribution by the wife she would then only get a smaller proportion usually one-third.⁴⁰¹ The main objective of *adat perpateh* is to provide for the continuance of the tribe through its female members and to prevent the alienation of the landed property, so that there will always be sufficient to provide maintenance for the women who alone can ensure the tribe can continue.⁴⁰²

To elaborate,⁴⁰³ in *adat perpateh*, marriage property is categorized into *harta charian*, *harta pembawa* and *harta dapatan*. The first refers to the property acquired during marriage. The property brought by the husband at the time of marriage is called *harta pembawa* while that which belonged to the wife is called *harta dapatan*. The personal property brought by the husband and wife to the marriage respectively remains with them separately. Only the property of *Charian laki bini*⁴⁰⁴ will be divided between spouses upon divorce regardless who causes the divorce and irrespective of the wife's adultery or the number of children as can be seen in the early decision in *Teh Rasim v. Neman*.⁴⁰⁵ In this case despite the divorce was due to the wife's adultery, her claim for a share of the matrimonial property was a success. The distribution of matrimonial property however cannot be made until all the debts are settled. This rule of equal distribution nevertheless does not apply in the case of *ta'liq*⁴⁰⁶ in which the wife retains the whole

⁴⁰¹ Taylor, "Malay Family Law", 55

⁴⁰² Ibrahim A., *Undang-Undang Keluarga Islam*, 244

⁴⁰³ As briefly explained by Ibrahim A., *Status of Muslim Women*, 59

⁴⁰⁴ Property acquired by the joint efforts of the married couple

⁴⁰⁵ Perak Supreme Court No. 232 of 1919

⁴⁰⁶ It is a divorce where one of any conditions stated in the *ta'liq* certificate made upon marriage has occurred, and those conditions were the husband's failure to maintain his wife for a period of four months

property.⁴⁰⁷ In some other states, the pre-arrangement made between spouses with the *Ketua Kampung*⁴⁰⁸ (the leader of the village) has also become a decisive factor for the proportion each party would receive. An example of that is the arrangement that provides the wife who helps in the actual cultivation of the land could claim a half and accordingly if she does not work on the land she would receive a smaller proportion.⁴⁰⁹

The long Malay custom of the division of property continued to be in practice until it was finally accepted and absorbed as part of the law. In fact, there were numerous cases in which this old practice became the basis for judges to decide the *harta sepencarian* claim cases before them. This is best illustrated in the Malaysian case of *Re Hajah Nek Maimunah bte Salleh*⁴¹⁰ where the judge made his decision by holding the following opinion:

When *adat*'s positive points are acknowledged and given due recognition by the law, its status is no longer *adat*. It shall become a rule or law which must be followed and enforced. Sale and purchase rules based on mutual consent, the *qasamah* and *musyawarah* systems which were previously thought to be customary, have been accorded legal recognition and have to be practical in the Muslim community. The same development has applied to *harta sepencarian* which hitherto has been recognised as a custom practised especially by the Malays and by Muslims in Malaysia, Indonesia and Singapore.

The Concept of Sharikah or Partnership

In the light of the practice of *carian laki bini* in *adat perpateh*, it is evident that the position of *harta sepencarian* is more of the old Malay custom. However, there have

or more; the husband's absents himself for six months on land or a year at sea without sending any letter or money to the wife; and the husband beats his wife that causes hurt and without valid reason

⁴⁰⁷ Ibrahim A., *Status of Muslim Women*, 59

⁴⁰⁸ The leader of the village

⁴⁰⁹ Taylor, "Malay Family Law", 55-56

⁴¹⁰ Mal (Civil) case Bil-41-001-1-95, Syariah High Court of the state of Terengganu: reported in [1997] 5 Syariah Journal 296

been only a few approaches to analyse the concept of *harta sepencarian* from an Islamic perspective. One question is as to whether or not *harta sepencarian* is the same as *harta syarikat* or partnership property under Islamic Law. The earliest case in Malaysia in fact was the first in history to adopt an Islamic principle in a decision for *harta sepencarian* and can be found in *Wan Mahatan v Haji Abdul Samat*.⁴¹¹ In this case, by applying the Islamic principle of *harta sharikat*, the wife was given a half share from the property acquired during marriage. In his opinion, the *kathi* of Larut declared that if ‘a person marries and there is no property between the pair at the commencement of their married life, afterwards if by any means by which two people together can acquire property they acquire property, such property is divided into two shares.’⁴¹²

Basically, in Islamic law there are two types of *syarikah*⁴¹³ (partnership): firstly is the one in which the ownership of the property is shared by two people or more without any contracts⁴¹⁴ known as *syarikah milk or amlak*.⁴¹⁵ The other type cited as *syarikah ‘uqud* is the contract of partnership between two people or more who share the property and also the profit.⁴¹⁶ It is divided into four parts⁴¹⁷ namely *Syarikah*

⁴¹¹ Ipoh Civil Appeal No. 27 of 1925

⁴¹² Salleh Buang, *New Frontiers in Harta Sepencarian* (Selangor: Nordin & Salleh Sdn. Bhd, 1988),10-11

⁴¹³ The literal meaning of *syirkah* or *syarikah* is mixing two or more shares together such that neither can be distinguished from the other. The jurists however differ their opinion as to the legal definition of the term *syarikah* but the most appropriate definition is the one supported by the Hanafis i.e. an expression for the contract between partners in the capital and the profit. (As quoted in Al-Zuhayli, *Fiqh al-Islami*, vol. 5, 3875-6)

⁴¹⁴ Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 5, 3877

⁴¹⁵ It is a partnership of assets such as partnership in a property that has been inherited, bought or gifted and it is further divided into two types: *Ikhtiair* (by choice) and *Jabar* (by force).

⁴¹⁶ Al-Zuhaily, *Fiqh al-Islami*, vol. 5, 3878

⁴¹⁷ As specified by the Syafi’is and the Malikis. The Hanafis specify the same categories as the Syafi’is and Malikis but add *syarikah mudharabah*. The Hanbalis on the other hand, in addition to *syarikah amwal*, *syarikah abdan* and *syarikah wujuh*, add *syarikah ‘inan* and *mufawadhah* as a part of each categories which ultimately gives a total of six categories.

'inan,⁴¹⁸ *Syarikah abdan*,⁴¹⁹ *Syarikah mufawadah*⁴²⁰ and *Syarikah wujuh*.⁴²¹

The Hanafis is the jurist who validates all the four forms of *syarikah* mentioned above providing that all the conditions are met. Similarly, the Malikis recognise all forms of *syarikah 'uqud* except *syarikah wujuh*. Except *syarikat mufawadhah*, the Hanbalis view other types of *syarikah* as valid. In contrast, the Syafi'is rejects all types of *syarikah* except *syarikah 'inan*.⁴²² Following this, there are views which equate *harta sepencarian* with either *syarikat 'inan* or *syarikat abdan* or *syarikat mufawadhah* or *syarikah amlak* by looking at the forms of contribution that both husband and wife make towards the acquisition of the property during marriage.

Harta sepencarian is claimed as *syarikat 'inan* because there is a mixed contribution in term of property or capital and efforts between the husband and the wife and it is the only form of partnership which is universally accepted by all jurists for its validity.⁴²³ On the other hand, the basis for those who consider *harta sepencarian* as the equivalent of *syarikat abdan* is the fact that *harta sepencarian* is acquired through the work that both husband and wife have carried out, with an objective to accumulate the property from which they eventually earn a return or a reward for the contribution that

⁴¹⁸ This is a partnership contract made between two or more parties to invest and expand business from the capital contributed by them and the profits will be shared pro-rate according to the percentage of their properties contributed.

⁴¹⁹ This is a partnership contract made between two or more parties to gather the money earned from their own efforts respectively in a fund which is then to be divided among them without taking into account the extent to which each party has contributed to that fund. This type of *syarikah* is also known as *syarikah 'amal* and *syarikah sanai'e*.

⁴²⁰ This is a partnership contract made between two or more parties in term of efforts with terms and condition stipulated by each of them respectively that they should provide the same amount of capital, they bear the same rights and responsibilities and they become guarantor toward each other on any court action.

⁴²¹ This is a partnership contract made between two or more parties whereby they use their names and their position to buy a property by instalments without providing any capital and then sell it for a cash price.

⁴²² Al-Zuhayli, *Fiqh al-Islami*, vol. 5, 3878

⁴²³ Ibid

each party has made.⁴²⁴ Additionally, it may be claimed to be *syarikah mufawadhah* because the partnership between husband and wife in *harta sepencarian* is not limited. Whatever they had acquired during the subsistence of marriage is considered as *harta sepencarian* except acquisition by gift or will where the division is fixed and specified to any one of them.⁴²⁵

Another opinion is that as the husband and wife in acquiring *harta sepencarian* do not require any contract it is thus in parallel to the principle of *syarikah milk* or *amlak*. In *syarikah milk* or *amlak* two people share in owning property without requiring a contract. The situation is that they either buy something or have been given something by way of gift or bequest or charity and they agreed to receive it, and thus the rights of partnership over such goods is based on *syarikah amlak*.⁴²⁶ The same situation might also occur with regards to the property of both husband and wife. Similarly, there does not exist in the practice of *harta sepencarian* a contract that stipulates the condition where the husband and wife should combine their property and further divide between them the profits from such property. Essentially, the marriage contract does not empower the spouse to gain ownership and to take control over the property of the other spouse. What obviously happens is that both husband and wife work together to invest their property for a better life and their future savings.⁴²⁷

⁴²⁴ Abdullah Abu Bakar, "Harta Sepencarian Mengikut Perspektif Islam (Harta sepencarian according to the perspective of Islam)" in *Al-Ahkam*, Vol.3, (Kuala Lumpur: Dewan Bahasa & Pustaka, 1991) 158-159, as quoted in DDW Hj Tamit, "*Harta Sepencarian* Daripada Perspektif Adat, 104

⁴²⁵ Siti Zalikah Md. Nor, *Pemilikan Harta Dalam Perkahwinan (Property Ownership in Marriage)* (Kuala Lumpur: Dewan Bahasa & Pustaka, 1996), 21

⁴²⁶ Al-Kasani, *Badai' al-Sanai*, vol. 6, 56

⁴²⁷ Md. Nor, *Pemilikan Harta*, 23

However, by examining the underlying principles within the Islamic partnership or *syarikah* in general, it can be seen that none of it is found in the Malay practice of *harta sepencarian* which can be summarised as the following:⁴²⁸

- i. In *syarikah*, there must be a contract or *ijab wa qabul* (offer and acceptance) to ensure the acceptance while *harta sepencarian* does not require *ijab wa qabul* (offer and acceptance) for its validity;
- ii. The division of the property in *syarikah* is divided by consent of all parties while *harta sepencarian* should only be divided after the end of marriage either by death or by a divorce;
- iii. In *syarikah* all members have to contribute their efforts while *harta sepencarian* does not require compulsory contribution by both parties. Indirect contributions in the form of moral support etc., is still considered as contributions for *harta sepencarian*;
- iv. There is normally a pre-arrangement between the parties in *syarikah* as to the ratio of shares of the profit that each party will earn in specified period of time, but this does not happen between husband and wife where the division of *harta sepencarian* will normally be determined when divorce occurs or the claim of its division has been raised in the court.

Overall, whatever is the legal concept of *harta sepencarian*, it is a practice that does not contravene the two primary sources of Syariah: the Quran and the Sunnah. In

⁴²⁸ Azma Mamat, 'Matrimonial Property: Its Provisions, Practice and Application in Federal Territory of Kuala Lumpur (Project for fulfilment of the Bachelor of Syariah and Judiciary, Kolej Universiti Islam Malaysia, 2003), 8

fact there is a general rule in the Quran⁴²⁹ laying down that both men and women are allowed to claim an absolute ownership from their income.⁴³⁰

The Concept of Ujrah or Fee

There is also a theory declaring that *harta sepencarian* is the same as the concept of *ujrah* or fee that is payable to a worker. For instance, in the old Malaysian case of *Ramah v Alpha*,⁴³¹ it was held that the divorced wife is entitled to claim her share in the work of cultivation of the land as her fee or remuneration only. A *fatwa* issued by the state Mufti of Brunei also holds a similar opinion in the case where there is a mixed contribution in the forms of efforts between husband and wife and it cannot be differentiated or separated as to the extent to which each party made a contribution towards the acquisition of the property. To solve this according to the said *fatwa* is that the division is to be made on the basis of fee or *ujrah*.⁴³²

However, it has been observed that there are slight dissimilarities between the principle of *ujrah* and *harta sepencarian* which may be summarised as follows:⁴³³

⁴²⁹ Quran, 2:32

⁴³⁰ Hamzah, "*Harta Sepencarian: A Matter of Malay 'Adat'*", 361

⁴³¹ (1924) 4 F.M.S.L.R. 179

⁴³² MKB 4/1968, Bil. 1 (MKB stands for Mufti Kerajaan Brunei or State Mufti of Brunei)

⁴³³ Abu Al-Qasim Najmuddin Jaafar bin Al-Hassan, *Syarai' al-Islam fi Masai'l Halal wal Haram*, 3rd ed., (Beirut, 1996),194

- i. In *ujrah*, the fee paid will be that reasonable to the work performed⁴³⁴ while the division of *harta sepencarian* is totally subject to the extent of contributions made by the husband and wife during their marriage;
- ii. The fee will be paid after the work has been completed.⁴³⁵ In *Harta sepencarian*, its division will be given in most cases when the divorce occurs;
- iii. The fee will be given to the worker who has done the job while *harta sepencarian* will be given to any party to the marriage according to their contribution even though he or she does not work.

The Principle of 'Urf or Custom

The general principle of Islamic Law has laid down that a particular '*urf* or custom which does not violate the dictates of the Quran and Sunnah can be accepted as a part of *Syariah* law. This principle can be found in one of the major maxims of Islamic *fiqh* known as *al-'adah*⁴³⁶ *al-muhakkamah* which means custom is arbitrary. Custom or '*urf*' is defined as what is established and common in a group of people from their sayings and doings and which is consistently repeated until it influences them is therefore

⁴³⁴ Under Islamic law, the work must be clearly specified as it is one of the basic essentials for the validity of *ujrah*. Other conditions must also be met such as the work must not entail such labour that is prohibited under *Syariah* etc. See al-Zuhayli, *Al-Fiqh al-Islami*, vol. 5, 3811-22

⁴³⁵ Ibid, 3812, according to al-Zuhayli there is a difference in opinion among the jurists as to whether or not the duration for the completion of work should be prescribed. Some say there is no prescribed period required while others say it is required.

⁴³⁶ The terms '*adah*' and '*urf*' are largely synonymous and the majority of jurists have used them as such. The difference is that the scope of '*urf*' is wider than that of '*adah*'. See Kamali, *Principles*, 359

accepted by their reason.⁴³⁷ Various references can be quoted in support of *'urf*. One of them is the saying of 'Abd Allah bin Mas'ud which states:

What the Muslims deem to be good is good in the sight of Allah.⁴³⁸

It is apparent that *harta sepencarian* has a positive point in terms of its position in helping to maintain the status of women in society. The fact that it has been practised for such a long time further proves that the Malays have appreciated the benefit of *harta sepencarian*.

However, it is to be understood that *'urf* or custom which is recognized by the Syariah should not contravene the Quran or the Sunnah. If it goes against these primary sources, then it is rejected. This is the most important factor to determine for *'urf* or custom to be acceptable. As it is evident that *harta sepencarian* is a well-established practice among the Malays, therefore so long as it does not contradict a principle of Syariah there is no reason why it should not continue to be practised. What is obvious is that the Malay practice of *harta sepencarian* has in fact manifested the position of equality between men and women in accessing their acquired property rights in the event of divorce or death.

⁴³⁷ Badran, *Usul al-Fiqh*, 224

⁴³⁸ There is a disagreement between jurists as to whether this saying is from the Prophet or from Ibn al-Mas'ud, the companion of the Prophet. Despite many jurists regarding it as hadith from the Prophet (P.B.U.H), Al-Shatibi has stressed that it is the saying of 'Abd 'Allah b. Mas'ud. See Al-Hakim, *Al-Usul al-'Ammah*, 424

3.5.3 Authorities Regarding Property

Harta sepencarian is not clearly mentioned in any Islamic authorities. Nevertheless, there are some Quranic provisions which talk about property in general, among which are:

Allah says to the effect:

In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; if ye leave a child, they get eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they get share in a third; after payments of legacies and debts; so that no loss is caused (to any one). Thus it is ordained by Allah; and Allah is All-knowing, Most Forbearing.⁴³⁹

The above verse has made it clear that there is a share for men and women in the property left by a deceased. The injunction also shows that the male has a greater proportion than the female although this general rule has exceptions. However, this cannot be taken to mean that woman is inferior to man. It is in fact because the Syariah has placed an economic responsibility upon a man to maintain his wife and children if he is married that has resulted in him receiving a greater share. It is observed that although there is no clue from the verse to show that *harta sepencarian* had been discussed, the clear indication of the proportion for the surviving members of the family connotes the Islamic recognition of the rights of both men and women towards property.

In another verse, Allah says:

And in no wise covet those things in which Allah hath bestowed His gifts more freely on some of you than on others: to men is allotted what they earn, and to

⁴³⁹ Quran, 4:12

women what they earn: but ask Allah of His bounty, For Allah hath full knowledge of all things.⁴⁴⁰

This verse of the Quran shows that earning a fortune or acquiring property is possible through one's own effort and hard work. In this, both men and women have got equal rights. Both can earn, own, manage and dispose of property according to their will.⁴⁴¹ Therefore it can be understood that whatever property the husband and wife have worked for together in acquiring it during their marriage, they both have equal rights over that property. And if they get divorced this right should remain and the said property should be divided between them in an equal manner as it was obtained through their joint efforts.

In Islam, the acquisition and use of wealth or property by unlawful means is strongly prohibited. Offering bribery for the purpose of taking another's wealth is sinful in Islam. This has been emphasized in the following verse of the Quran which states:

And do not eat up your property among yourselves for vanities; nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property.⁴⁴²

The prohibition quoted above is a general term in which it would also imply that neither husband nor wife is permitted to take possession over the other party's property. *Harta sepencarian*, even if the parties do not know how much they have contributed in acquiring it, is yet other solution to deal with it. The jurists have described a few methods each party could use; either by making an agreement or dividing the property equally and

⁴⁴⁰ Quran, 4:32

⁴⁴¹ Muhammad Sharif Chaudhry, *Women's Right in Islam*, 1st ed., (New Delhi: Adam Publishers & Distributors, 2003), 113-4

⁴⁴² Quran, 2:188

if the party is still in dispute, they should take an oath so as to affirm the ownership of any property that he or she claims as his or hers.⁴⁴³

3.5.4 How to Determine the Division of the Property

As mentioned earlier, *harta sepencarian* is originally not of Islamic origin. However, there can be found in the provisions of the Islamic *fiqh* writings which discuss matters about the issues regarding the property of a husband and wife. The matters regarding the roles and functions of husband and wife toward each other in managing their married life have also been deliberated so as to justify their entitlement to get a share of the property acquired during their marriage. Many Syariah court judges today have referred to these authorities when they face the cases of *harta sepencarian*. Among these authorities is in the book of *Bughyah al-Mustarshidin*,⁴⁴⁴ where it is stated that:

When the property of a husband and wife has merged and it is not known whose property is more, there are no signs to differentiate the property from one to the other, and then divorce or death occurs between the two, it is therefore unlawful for one or both (spouses or heir) to rule over (utilise) part of the property before it can be differentiated or before conciliation (*al-sulh*) unless together with the owner because there is no *murajih* (signs to differentiate). As they say, if the pigeons of the spouses are mixed and at that instance, is known or differentiated, between the two, but if it is not known and cannot be differentiated, the issue must be postponed until the husband or the heirs both make peace or delivers (*hibah*) equally or approximately if they (spouses) and heirs are good people (not *mahjur 'alaih*) and it is compulsory not to lessen (people who are not allowed to administer property). But if it is normal and consistent that one of the two (spouses) has more income than the other, conciliation (*sulh*) and deliverance

⁴⁴³ As-Sayed 'Abd al-Aa'lawi, *Bughyah al-Mustarshidin*, Last ed., (Thailand: Maktabah wa Matba'ah Muhammad al-Nahri wa Awaladihi, 1952), 159

⁴⁴⁴ Muhammad, Dato' Aria Diraja Dato' Haji Daud, *Matrimonial Property, Issues, and Practices* (Seminar paperwork presented at the Syariah Court issues 2 on 9th February 2002, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia), 8-11, accessed 09th May 2013, http://www.islam.gov.my/sites/default/files/matrimonial_property.pdf

(*hibah*) is based on that (approximate). If they do not agree to either of these, the party which owns something from the property (holds the property) will have their statement accepted under oath; that the property is theirs. However, if the property is owned by both (each holding property), each one can ask the other party to take oath, after which the property is divided into two.

In the light of the above text, it can be concluded that in the case where it is not possible to differentiate the ownership of mixed property between the husband and the wife, they should either make an arrangement on how much each party will get or equal division is to be made. If they do not agree then they should take an oath as a last resort. However, it has been argued that it is not *harta sepencarian* that is meant by the ‘the mixed property between husband and wife’ in the text. Property in such a condition is considered as property of *musya*⁴⁴⁵ which is to be resolved according to the verse in the text above.

According to Sayid Sabiq⁴⁴⁶ in discussing the role and duties that Islam has determined for each husband and wife is that it is reasonable to the nature of a husband to concentrate on seeking maintenance for his family and on the other hand, it is the habit of a woman to spend more time at home in managing the family and the household as well as looking after the children. The evidence he put forward to support his saying is found in *Surah al-Baqarah*, verse 228 which states:

And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them. And Allah is exalted in Power, Wise.

⁴⁴⁵ *Musya* ' in its literal meaning is a share which cannot be separated or differentiated. See Qal'aji & Qunaldi, *Mu'jam Lughat al-Fuqaha*, 430

⁴⁴⁶ Sayyid Sabiq, *Fiqh al-Sunnah*, vol.7, (Maktabah Al-Adab, 1962), 161-166

The separate roles and works of husband and wife in their married life have also been stressed in the Sunnah where the Prophet instructed his daughter Fatimah to work from home and her husband, Ali Ibn Abi Talib to work outside the house.⁴⁴⁷ From this, it is therefore necessary that the property acquired from them working together be made joint property between husband and wife and further be divided fairly. However, it is to be noted that this rule is only applicable when either husband or wife fails to prove specific ownership on any part of that joint property.⁴⁴⁸

In *al-Turuq al-Hukmiyah fi al-Siyah al-Shar'iyah*, written by Ibn Qayyim⁴⁴⁹ it was said that, it is not considered that a party who has kept property for himself only has the sole right to the property, because if the property is obtained during the marriage, in this case it can be considered like other property such as houses, land, transport and so on, as long as there is no evidence to show that the property has been divided.⁴⁵⁰

From the above, it is observed that there is no express mention in the Quran and Sunnah regarding matrimonial property. However, the opinions from the Islamic scholars and principles which have been used in determining the division of the property have shown that a rule of matrimonial property does exist and in fact has given recognition by Syariah law. Ultimately, the philosophy of Islam and its knowledge are flexible and suitable to anyone in any period of time. The opinions and its practice should be

⁴⁴⁷ Ibid

⁴⁴⁸ Muhammad, "Matrimonial Property, Issues and Practices", 9

⁴⁴⁹ Ibn al-Qayyim, *Al-Turuq al-Hukmiyah*, 24-26

⁴⁵⁰ Mamat, 'Matrimonial Property', 12

developed continuously in order to improve the Islamic Law practice and its judiciary among the challenging world nowadays.⁴⁵¹

3.6 CONCLUSION

In Islam, the financial divorce-related rights of *mut'a al-talaq* and maintenance either for wife or children seem to be well-recognised. Although the jurists have differed in some areas in its details, the Quran is expressive of the man's duties to provide *mut'a al-talaq* and maintenance to his former wife as well as maintenance to his children. At the same time, it is not denied that while there is no express provision in the *nass* about the right of harta sepencarian, the long practice of division of matrimonial property among the Malays has placed the couple in a great advantage particularly the woman. Whatever the basis that harta sepencarian is relied on for its stipulation in modern legislation, contemporary scholars seem to have proved that this provision does not contradict with any principles in the Quran or Sunnah.

From the above discussion, it is to be observed however, that the disagreement among jurists on any particular matter regarding these financial consequences after divorce does not amount to a conclusion that some opinions are wrong and cannot be followed. In fact the divergence of opinion in one issue can create a realm where a ruler or judge may choose a view which he deems fit and is the most relevant with the issue

⁴⁵¹ Ibid, 14

that is faced. This can be understood from the *hadith* which implies that there is no right and wrong in exercising *ijtihad* which reads as follows:

When a judge exercises *ijtihad* and gives a right judgment, he will have two rewards, but if he errs in his judgment, he will still have earned one reward.⁴⁵²

⁴⁵² *Hadith*, Hafiz Abu Dawud Sulaiman bin Ash'ath, *Sunan Abu Daud*, English Translation, ed. Hafiz Abu Tahir Zubair 'Ali Za'I, trans. Nasiruddin Al-Khattab, vol. 3, Book 23, Ch. 2 (*Regarding the Judge Who is Mistaken*), No. 3574 (Riyadh: Maktabah Darussalam, 2008)

CHAPTER 4

STATUTORY PROVISIONS AND PROCEDURES ON FINANCIAL SETTLEMENT FOLLOWING A DIVORCE IN BRUNEI

4.1 INTRODUCTION

This chapter aims to examine the legal provisions in the substantive and procedural laws of Brunei for financial settlement after divorce and the problems that may arise under these provisions. In modern Brunei, there are two pieces of legislation governing financial matters upon divorce; the Islamic Family Law Act (CAP 217) 2001 and Syariah Court Civil Procedures Order 2005 (hereinafter referred to as SCCPO 2005). The IFLA (Cap. 217) is part of a major legal development and reform made to the Muslim family law in Brunei which was introduced during the period of British rule which was the Religious Council and Kadhi's Court Enactment 1955.⁴⁵³ The SCCPO 2005 provides a very comprehensive set of rules and procedures as to how financial claims should be initiated in the Brunei Syariah court which the earlier law does not. This chapter will be divided into three parts. Part I will set out the provisions that were enforced prior to the emergence of the IFLA (Cap. 217) i.e. the RCKCA (Cap. 77) to highlight the reforms made so far in the area of financial divorce matters for Bruneian Muslims. Part II will thoroughly discuss the relevant provisions in the IFLA (Cap. 217) to

⁴⁵³ See footnote 4

examine whether these new laws provide adequate protection and equitable settlement to its beneficiaries. The analysis will also consist of discussion which identifies whether or not the relevant provisions are consistent with the established rules underpinned by the Quran and Sunnah. Part III will point out the procedures for financial settlement following a divorce application as stipulated under the SCCPO 2005 and its enforcement. Essentially, comparative overviews with the provisions of the law and practices from several other countries, that are considered advanced in terms of reform, are also included in this chapter.

4.2 RELIGIOUS COUNCIL AND KADHI'S COURT ACT (CAP. 77)

Before the introduction of the IFLA (Cap. 217) in 2001, the RCKCA (Cap. 77) was one of the most important mechanisms for dealing with family matters in Brunei. To trace back the origin of RCKCA (Cap. 77), its enactment was based on the Islamic Religious Council Law of Kelantan⁴⁵⁴ with some modifications according to the circumstances and the requirements in Brunei. It was basically designed to consolidate the laws relating to the Islamic Religious Council and *Kadhis* Courts and the constitution and organization of relevant authorities of the religion and regulations of religious affairs that were introduced separately. The introduction of this law marked an important development in the Islamic law management in Brunei through the establishment of an Islamic Religious Council to advise the Sultan of Brunei in Islamic religious matters and

⁴⁵⁴ One of the states in Malaysia

the expansion of the power of the Kadhi's courts in dealing with matters related to Muslims in Brunei. However, so far as the provisions relating to marriages and divorces are concerned, although it was based primarily on Islamic law, its scope is rather limited. During the period 1967 to 1972, the RCKCA (which used to be cited as the Religious Courts and Kadhis Enactment 1955 before its revision in 1984) underwent a number of amendments but the provisions on family matters remained the same. There are merely 30 sections on marriages and divorces which are under Part 6 of the RCKCA (Cap. 77) which included the laws on rights of women after divorce. Maintenance of wife and children matters were dealt with separately in Part 7, consisting of only 7 sections from section 157 to section 163 of the Act. Regarding the financial matters on divorce, the RCKCA (Cap. 77) only stipulates three general provisions on *'iddah* maintenance, *mut'a al-talaq* and maintenance for children and nothing was mentioned about the rights of *harta sepencarian*. Unlike the present IFLA (Cap. 217), the RCKCA (Cap. 77) applies only to claims made by a Muslim against a Muslim.⁴⁵⁵

Although the provisions regarding financial matters upon divorce are more general, the application of the law also reflects the influence of the Syafi'is opinion. In fact, there is a general provision for reference to the view of the Syafi'is in making and issuing any ruling, provided that it does not contradict the public interest.⁴⁵⁶ However, if the view of the Syafi'is is not appropriate and is opposed to the public interest, then the appropriate views of the other three remaining schools will be considered (the Hanafis,

⁴⁵⁵ s 134(concerning marriage and divorce) & s 157 (maintenance)

⁴⁵⁶ s 43

Malikis and Hanbalis).⁴⁵⁷ In the light of this, it can be understood that the RCKCA (Cap. 77) has relied on the four main schools with special reference to the Syafi'is view.

4.2.1 Provisions relating to Maintenance for Divorced Wife

There is only one section available in the RCKCA (Cap. 77) that regulates the maintenance of divorced women. Section 158 (2) of the Act provides as follows:

s 158(2) A woman who has been divorced may by application in the Court of a Kadi obtain an order against her former husband for the payment in respect of the period of *iddah*, if the divorce was by one or two *talak* or in any case in respect of the period of her pregnancy by the former husband, of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim law.

From the above provisions, it seems that not all divorced women are entitled to a maintenance order. It has been stipulated that only those women who were divorced by way of *talaq raj'ie*⁴⁵⁸ or those who were pregnant would be qualified to claim '*iddah* maintenance through the process of the *Kadhi's* court. Therefore, this provision clearly does not apply to those women who were divorced by *talaq bai'n*.⁴⁵⁹ In this provision, it is essentially the Syafi'is view which is applied. Contrarily, the Hanafis allowed women to claim '*iddah* maintenance in any form of divorce, which may be considered as a form of financial protection. However, it could be noted that the enactment of section 158(3) serves as a safety clause for any cases other than that mentioned above which states:

⁴⁵⁷ Ibid

⁴⁵⁸ Defined under s 2 of the IFLA (Cap. 217) as a divorce by one or two *talaq* followed by completion of '*iddah*

⁴⁵⁹ It means a *talaq* that cannot be *ruju* unless with a new solemnisation as defined under s 2 of the IFLA (Cap. 217). The word *ruju* here means the return to the original state of marriage without requirement of a new solemnisation of marriage, for a woman who has been subjected to *talaq* by her husband, except in cases of *talaq ba'in* (IFLA (Cap. 217), s 2)

s 158(3) A woman who has been divorced and who is not entitled to an Order for maintenance under subsection (2) may apply to the Court of the Chief Kadi and that Court may, if it is satisfied that it is just and proper so to do in view of all the circumstances of the case, make an order against the former husband for the payment by him of such sums for such period as the Court considers fit: Provided that no such order shall require the former husband to pay to his former wife any amount in excess of \$1,500⁴⁶⁰ per month.

4.2.2 Provisions Relating to *Mut'a al-Talaq*

Besides maintenance for the *iddah* period, there was also a provision⁴⁶¹ in the RCKCA (Cap. 77) for a divorced woman to apply to a *kadi* for a consolatory gift or *mut'a al-talaq*, and the *kadi* could after hearing the parties order payment of such sum as may be just and in accordance with Muslim law. This provision applies strictly the doctrine of the Syafi'is who allow the gift of *mut'a al-talaq* to all divorced women regardless of whether their marriage has been consummated or not. Thus, adopting the Syafi'is view indicates that the Muslim Bruneian law explicitly recognizes the woman's right to *mut'a al-talaq*. However, previous studies reveal that there are only a small number of cases where *mut'a al-talaq* was claimed.⁴⁶² This failure could be caused by the fact that not all Bruneian women at that time were aware of their Islamic rights of *mut'a al-talaq*.

⁴⁶⁰ Refers to the currency of Brunei dollars

⁴⁶¹ s 148

⁴⁶² DDW Hj Tamit, *Pembubaran Perkahwinan*, 222-3 (n.63). It is based on the findings from the study conducted on 200 both urban and rural women (100 respondents from each category) whereby there were only 19 urban women and 25 from rural areas that had been given *mut'a al-talaq* by their husband

4.2.3 Provisions Relating to *Harta Sepencarian*

Although by the virtue of section 48(1)(b)(iv) of the RCKCA (Cap. 77), the *kadhi* was empowered to hear and determine all actions and proceedings which relate to any claim of *pencharian* property, there is no provision on the guidelines as to how to determine its division between spouses. Furthermore, the word *sepencharian* property was also left undefined. This is possibly due to the fact that issue of *harta sepencarian* has been widely accepted in Brunei as a matter of *adat* or local custom. Since the Malay custom is also part of the law of the land of ancient Brunei, thus the distribution of matrimonial property or *harta sepencarian* may be determined based on these customary practices. The application of Islamic law during this period of time was very limited which might hinder the full implementation of the law of *harta sepencarian*.

4.2.4 Provisions Relating to Maintenance for Children

With its limited provisions, the RCKCA (Cap. 77) only lays down one general rule that governs maintenance for children. It reads as follows:

s 159 (1) A minor may by application in the Court of a Kadi, to be made either personally or through a representative as provided in section 83, obtain an order against his lawful father or any other person liable in accordance with Muslim law to support him for the payment from time to time of any such sums in respect of his maintenance as he may be entitled to in accordance with Muslim law.

(2) It shall be a sufficient defence to any such application that the applicant has sufficient means to support himself.

It is undeniable that the previous law established a rule that it is a duty of the father to maintain his child, which is based on the established ruling in Syariah law. However, this provision is not adequate enough to protect all a child's needs and interests

as it does not cover the situation if the father is unable to pay the maintenance due to being missing or dead or other such unusual circumstances etc.

4.3 ISLAMIC FAMILY LAW ACT (CAP. 217)

The Emergency Islamic Family Law Order 1999 came into force on 26th March 2001 and was revised in 2012 so as to be cited as the Islamic Family Law Act, (Cap. 217). It is submitted that this new law brings about important and desired changes from the positions under the provisions of the previous law regarding the financial settlement after divorce. It gives more detailed and comprehensive provisions, facilitates proper administration and efficient management for financial divorce-related matters as well as offering better protection, particularly for women and children.⁴⁶³ While the substantive provisions of this Act are largely based on Islamic principles,⁴⁶⁴ the Act is derived from civil family law principles when it comes to its procedural provisions.⁴⁶⁵

It was noted that the law concerning general rulings on divorce and its related matters are drawn from all four schools of law (the Syafi'is, Malikis, Hanafis and Hanbalis). In other words, IFLA (Cap. 217) has taken a more liberal approach than the RCKCA (Cap. 77), by not restricting the application to one particular school of law only. For instance, in matters relating to *mut'a al-talaq* assessment, the view of the Malikis and Hanbalis are essentially applied for better protection especially of women. In fact, the law

⁴⁶³ DDW Hj Tamit, *Wanita, Keluarga, dan Undang-Undang di Negara Brunei Darussalam (Woman, Family and Law in Brunei)*, (Brunei: Dewan Bahasa dan Pustaka, 2009), 4

⁴⁶⁴ Pg Hj Hassan, *Prosedur Pentadbiran Perkahwinan*, 32

⁴⁶⁵ Ibid, 32; Ibrahim H., "Penggubalan Perintah Darurat", 66

of *harta sepencarian* has no explicit provision in the Quran or Sunnah but its stipulation in the IFLA (Cap. 217) has promoted gender equalities in the sense that it gives an equal right to both husband and wife towards matrimonial property based on the doctrine of *Siyasah Syariah*. Furthermore, where no specific reference in the law can be found on a particular issue, there is provision which authorises the judge to seek the most appropriate view that he deems valid for his judgment.

As a matter of its application, section 5 (1) provides that the Act shall apply in any matter in which at least one of the parties professes the Islamic religion and at least one of the parties, whether or not he professes the Islamic religion, is in a *bermukim*⁴⁶⁶ manner in Brunei or is *bermastautin*⁴⁶⁷ in Brunei and in a *bermukim* manner outside Brunei. The Act⁴⁶⁸ further stipulates that no court other than the Syariah Courts that were established under the SCA (Cap. 184) shall hear or determine any claims or proceedings where at least one of the parties is a Muslim and the proceedings are related with any matters arising in this Act. As opposed to the RCKCA (Cap. 77), IFLA (Cap. 217) has extended the jurisdiction of the Syariah Courts to try and determine any disputes where non-Muslims are involved. This provision often applies to cases where one party to a marriage converts to Muslim. Thus any matters or claims arising from this include *'iddah* and child maintenance, *mut'a al-talaq* and *harta sepencarian* which will be under the sole jurisdiction of the Syariah courts with no interference at all from the Civil courts. It

⁴⁶⁶ The definition given by s 2 of IFLA (Cap. 217) is residing without the intention to be *bermastautin* in a certain area whilst not being a traveller.

⁴⁶⁷ Defined under s 2 of IFLA (Cap. 217) as permanently or ordinarily residing in a certain area

⁴⁶⁸ s 5(2)

is best illustrated in the case of *Liew Mui Len v Muhammad Jamil*⁴⁶⁹ where the parties were originally Chinese Bruneians who got married in 1985 according to Murut custom (one of the indigenous groups in Brunei). Their marriage became void when the husband converted to being a Muslim in 2009. The non-Muslim ex-wife then applied for *mut'a al-talaq* order in the Syariah Court. Her application was successful and a *mut'a al-talaq* order was granted by the Syariah court adopting a *sulh* agreement with her Muslim ex-husband as to amount he should pay her.

In terms of the disputed amount, the Syariah Subordinate Court⁴⁷⁰ has jurisdiction to try financial claim cases which are not more than \$500,000(BND) while for the Syariah High Court the limit can be more than that. This is another area of Islamic family law development opposed to the RCKCA (Cap. 77) where fewer powers and extent of jurisdiction were given to the Chief *Kadhi's* Court and also to the *Kadhi's* courts. The amount that the *Kadhi's* court were empowered to determine was \$5000(BND) only.

As compared to RCKCA (Cap. 77), the IFLA (Cap. 217) has more comprehensive and detailed provisions, consisting of 145 sections which are divided into 10 parts. It contains provisions on marriages, registration of marriages, solemnisation of marriages, dissolution of marriages, protection of family, maintenance, guardianship, penalties and other related matters. The law concerning general rulings on financial matters upon divorce comprises 20 sections: 17 sections regulate maintenance matters for both wife and children (from section 61 to section 87), 2 sections are for *harta sepencarian* (sections 59 and 60) and section 57 is the only provision which deals with *mut'a al-talaq*.

⁴⁶⁹ MRHS/MAL/BM 682/2011 (see footnote 679)

⁴⁷⁰ SCA (Cap. 184), s 16(1)(b)

4.3.1 Provisions Relating to Maintenance for Divorced Wife

The provisions relating to the law of maintenance and its procedure of enforcement have been dealt with greater attention in the IFLA (Cap. 217) than the previous legislation. The legislative purpose behind the enactment of this particular law is to protect wives and children. Part VI of the IFLA (Cap. 217) contains 26 provisions regulating various types of maintenance including those for wives, divorcees and children.

Statutory Definition of Maintenance

In the IFLA (Cap. 217), the Arabic term *nafaqah* (which is equivalent to maintenance) is used to describe the obligatory provision of expenses for food, clothing and accommodation for the wife, children, divorcee and any other persons dependent upon a husband or former husband including parents and step fathers in accordance with *Hukum Syara'*.⁴⁷¹ It appears that the statutory definition of *nafaqah* or maintenance is rather wide as regards the beneficiaries, covering almost all recipients or beneficiaries who are entitled to maintenance under Syariah law including a divorced wife. However, maintenance in this context only refers to the basic needs of food, clothing and lodging as these are the fundamental necessities that one normally needs in preserving life. This does not mean that other necessities like toiletries, medicine and child care (such as a maid) are immaterial but the provision of those components should be subject to the providers' capabilities to fulfil them. In fact, there is a discussion among traditional

⁴⁷¹ s 2

Islamic scholars as to what components should be included as maintenance for a wife (which was discussed in some detail in chapter three). Thus, it can be understood that the rationale for limiting the maintenance to those three articles is that the husband would not feel obligated to fulfil the so-called maintenance (other than food, clothing and accommodation) that are beyond his capabilities and also to prevent the wife from demanding such other things which are unnecessary. To support this, reference can be made to the general rule about the obligation of maintenance as expounded in the Quran that maintenance should be provided in accordance with the means of the one providing it and his ability to pay.⁴⁷² The Quran ties the obligation of maintenance with the means of a husband. If he is well off then he should give more but if he has no or limited resources then he just needs to provide whatever he can.

As a comparison, it is interesting to note that the Middle Eastern countries like Jordan, Syria, Kuwait and Egypt have taken a more liberal position by extending the provisions of maintenance to other items than food, clothing and housing such as house amenities, treatment fees, servants, fees of midwife, cost of birth etc.⁴⁷³ In fact, Egyptian law⁴⁷⁴ enumerates the components of matrimonial maintenance by way of non-limitative illustrations such as food, clothing, housing and medical expenses, adding “and any such other things as are dictated by the Syariah”.⁴⁷⁵

From above, it is a clear indication that a husband has to provide maintenance to his wife no matter what his financial status is and regardless of the wife’s situation

⁴⁷² Qur’an, 65:7 which states to the effect: “Let the women live (in ‘iddat) in the same style as you live, according your means: Annoy them not, so as to restrict them”

⁴⁷³ Nasir, *Islamic law*, 102-3

⁴⁷⁴ Personal Status (Amendment) Law (no. 100/1985)

⁴⁷⁵ Nasir, *Islamic law*, 102

whether or not she is wealthier than him. The authorities from the Quran⁴⁷⁶ and further the consensus of opinion amongst the four prominent jurists on this matter have strengthened this. However, in reference to the discussion of the jurists on matters as to whose situation should be considered, when there is dispute between parties as regard to the amount, it has been shown that the financial position of a wife of being rich indeed gives an impact on the payment of her 'iddah maintenance. The majority of jurists except the Syafi'is (the Hanafis, Malikis and Hanbalis) specify the circumstances of both husband and wife as factors equally significant in assessing the amount of maintenance.⁴⁷⁷ In fact according to the Hanafis if the wife is rich while his former husband is not, the entitlement is to be based on what is required by his affluent wife but as regards its payment he may pay the sum that he can afford with the remaining balance of the sum considered as a debt on him.⁴⁷⁸ Contrarily, although the Brunei's IFLA (Cap. 217) has adopted this view in theory, in practice this guideline is rarely referred to by the judges in the Syariah court. This can be seen in most financial cases that give an impression that the woman's financial position is immaterial. The settlement is entirely based on the so-called agreement made between parties in which the wife has to accept whatever amount the husband offered which was often very small. In the case of *Pg Kamariah Pg Hj Momin v Yussof Hj Jambol*⁴⁷⁹ the wife had applied for her 'iddah maintenance at \$1000(BND) while she was an employed woman earning a fairly good income i.e. \$3530(BND) per month. In this case, the husband who had a big income had no objection

⁴⁷⁶ Quran, 65:7

⁴⁷⁷ Zaydan, *Al-Mufasal*, 200

⁴⁷⁸ Ibid, 201

⁴⁷⁹ MRHS/MAL/BM 224/2011 (refer to footnote 664 for the facts of the case)

at all to fulfill her wish and the court decision was made based on this agreement. From this case, it appears that the amount claimed by the wife can be substantial even considering the fact that she has a steady income. The court simply granted her maintenance order as she wished since the husband was not reluctant to pay her such an amount.

Court's Power to Order Maintenance

The specific provision that empowers the court to make the husband responsible for providing maintenance to his former wife is section 61(1) IFLA (Cap. 217). Section 61 (1) of the Act provides:

s 61(1) Subject to *Hukum Syara'*, the court may order a husband to pay maintenance to his wife or former wife.

The above provision is very general and applies to both an existing wife and also a divorced wife limited to the *'iddah* period only. A provision found in section 67(1) IFLA (Cap. 217) has confirmed this which states to the effect:

s 67(1) The right of a divorced wife to receive maintenance from her former husband under any order of the court ceases on the expiry of the *'iddah* period or when she is *nusyuz*.

By virtue of this provision, the financial right of a divorced woman was held to last for the duration of the *'iddah* period or when she becomes *nusyuz*. However, there is no explanation as to how to calculate the period of *'iddah*. Section 2 of the IFLA (Cap. 217) nevertheless has defined *'iddah* but also in general terms i.e. the duration or period under which a woman is forbidden by *Hukum Syara'* to remarry, without specifying the exact length of that duration. Essentially, the period of *'iddah* under the Syariah is either

three menstrual periods, three lunar months or the duration of pregnancy if the divorced wife is pregnant.

Accordingly, section 72 provides as follows:

s 72(2) Any person who has been divorced by her husband may, on application to the court, obtain an order against her former husband for payment during her *'iddah* period, if the divorce is by pronouncement of one or two *talaq* or during her period of pregnancy with her former husband for any amount of maintenance she may be entitled to receive and any other reasonable expenditure in accordance with *Hukum Syara'*.

This provision is a clear indication that a divorced wife is entitled to claim her *'iddah* maintenance by making an application to the Syariah court for its payment. This seems to suggest that section 61 contains a provision that the court has power to award a maintenance order whether or not the application is made while section 72(2) appears to be the specific provision that requires the divorced wife to make an application before the granting order is decreed by the court.

Essentially, the above quoted provisions are consistent with the established Islamic principle whereby a Muslim husband is still liable to provide financial assistance for his ex-wife so long as it is in the *'iddah* period. The clearest authority for this obligation of maintenance can be found in *Surah at-Talaq* which states:

O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately), 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....⁴⁸⁰

In practice, the divorced wife's right to maintenance during *'iddah* seems to be well-established. Although the award of maintenance in a Brunei Syariah court is most

⁴⁸⁰ Quran, 65:1

likely granted in favour of divorced wives it should be noted that the success of the claim very much relies on the fact that an agreement was attainable between the parties as can be seen in many *'iddah* maintenance cases such as *Rostina Abdul Hamid v Ardy Ahmad*⁴⁸¹ and *Rogayah Hj Jumat v Jamil Hj Harun*.⁴⁸²

Assessment of Maintenance

In deciding how the court determines the amount of maintenance, the IFLA (Cap. 217) does not stipulate detailed guidelines about it. However, the means and the needs of the parties have been laid down in the Act as the criteria to be applied by the Court in assessing the amount of maintenance such as follows:

s 63 In determining the amount of any maintenance to be paid, the court shall base its assessment primarily on the means and needs of the parties, by taking into consideration the proportionate amount of maintenance compared to the income of the person against whom the order is made.

The effect of this section is that to protect the economic position of the divorced wife, the husband will not be forced to spend more than his earning capacity. This ultimately shows a balanced equitable concern for both sexes. The guidance for the assessment of maintenance may be sought from the Quranic verse which states:

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.⁴⁸³

Most decided cases however reflect the opposite. It appears that most Syariah court judgements are based solely on the financial capabilities of the husband rather than

⁴⁸¹ TSP/BM 35/2001 (See footnote 624)

⁴⁸² TSP/BM 22/2001 (See footnote 625)

⁴⁸³ Quran, 65:7

the resources of both. Many instances of cases confirm this such as in *Kamarul Zaman Mohammad v Nurulikmah Masdi*,⁴⁸⁴ *Limah Hj Pungut v Ali Ajis Hj Rasil*,⁴⁸⁵ and *Nurul Hidayah Abdullah v Pg Nordin Pg Hj Osman*.⁴⁸⁶ In all 'iddah maintenance cases, the duration of marriage, the ages and conduct of the parties do not appear to be taken into account in assessing the amount of maintenance. However, the conduct of the ex-wife would not only affect the amount payable to her but could completely disentitle her to the 'iddah maintenance (which will be discussed later in this chapter).

The word *Nafaqah* or maintenance in the IFLA (Cap. 217) has been generally referred to food, clothing and accommodation, and the statute is silent about the provision of money as another method of paying maintenance. However, a large and growing number of maintenance cases in the Syariah court show that the Muslim wives can claim maintenance to be paid by money and the judge will simply allow this.⁴⁸⁷ To illustrate, in *Amnah Hj Lamat v Hamry Hj Asar*,⁴⁸⁸ the wife applied for her 'iddah maintenance at \$100(BND) per month and the husband agreed. He indeed made a lump sum payment of \$300(BND) instantly before the Syar'ie judge on the same day. In the case of *Rostina*⁴⁸⁹ the wife applied for 'iddah maintenance at \$100(BND) per month amounting to a total of \$300(BND). The husband agreed to make the payment only by instalments at \$100(BND) per month and the court allowed this.

⁴⁸⁴ MRHS/MAL/BM 280/2010 (See footnote 668)

⁴⁸⁵ MRHS/MAL/BM/284/2010 (See footnote 667)

⁴⁸⁶ TSP/BM 34/2001 (See footnote 633)

⁴⁸⁷ This is based on the researcher's own analysis on a large number of 'iddah maintenance cases in the selected years: 2001, 2002, 2010 and 2011. In fact, almost certainly all those cases that were analysed show that maintenance is only in the form of money.

⁴⁸⁸ TSP/BM 41/2001 (See footnote 622)

⁴⁸⁹ TSP/BM 35/2001 (See footnote 624)

This shows that the maintenance can be paid by any method so long as the parties have agreed to this. Indeed, paying by money is more convenient and practical these days. Nevertheless, the real concern that one may raise is the question as to why the wife still wants to claim a sum of money for maintenance from the court, while the husband provides her with sufficient food, clothing and other needs. In this regard, this issue would affect the husband greatly if his ex-wife claims for unpaid maintenance (i.e. arrears of maintenance) that was due for a long time when they were still married. This could open the door for a wife to take advantage of the situation and what is worse, she might misuse the available provision that was meant for their protection. Even though claims with big figures are not likely to be granted in the Syariah court in Brunei, this issue needs to be looked upon seriously in order to alleviate injustice to either party.

Situations where the Divorced Wife loses her Maintenance

The IFLA (Cap. 217) lays down three grounds that the divorced wife loses her ‘*iddah*’ maintenance as follows:⁴⁹⁰

- i. when she withholds her association with her husband;
 - ii. when she leaves her husband’s home against his wishes;
 - iii. when she refuses to move with him to another home or place
- without any valid reason in accordance with *Hukum Syara*’.

It appears that the IFLA (Cap. 217) has restricted the characteristics of what can be considered as *nusyuz* to only the three instances above. This is probably because they

⁴⁹⁰ s 61(2)

are the commonest instances of acts that occur to women. Accordingly, the Hanbalis also define *nusyuz* to consist of those actions with the addition of her refusal to travel with him.⁴⁹¹ In reference to section 2 of the IFLA (Cap. 217), the definition of *nusyuz* is somewhat wider, which includes any acts by a wife against the husband which is considered as unfaithful in accordance with *Hukum Syara* (Syariah ruling). This is essentially consistent with the view of the Syafi'is who define *nusyuz* in broader terms as withdrawing of obedience to the authority of the husband so long as it concerns the affairs of married life and which is in no way offensive to God.⁴⁹² In interpreting the Quranic provision regarding *nusyuz*⁴⁹³ Maulana Usmani says that *nusyuz* does not refer to ordinary household quarrels but to a woman's breach of sexual conduct, her arrogant misdemeanour or her taking advantage of her husband.⁴⁹⁴ However, it might be argued that the term *nusyuz* does not necessarily refer to women's act or behaviour only but also to men. According to Muhammad Asad when interpreting the term *nusyuz* as stated in the Quran,⁴⁹⁵ it comprises every kind of deliberate bad behaviour of a wife towards her husband or of a husband towards his wife, including what is nowadays described as mental cruelty.⁴⁹⁶

⁴⁹¹ Zaydan, *Al-Mufasal*, 161

⁴⁹² El-Alami, *Marriage Contract in Islamic Law*, 116

⁴⁹³ In *Surah an-Nisa*, verse 128, which states: "If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's soul are swayed by greed. But if ye do good and practise self-restraint, Allah is well-acquainted with all that ye do."

⁴⁹⁴ Ashgar Ali Engineer, *The Rights of Women in Islam*, (New Delhi: Sterling Publishers, 1992),51

⁴⁹⁵ In *Surah an-Nisa*, verse 34: "...As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly); But if they return to obedience, seek not against them means (of annoyance)..."

⁴⁹⁶ Muhammad Asad, *The Message of the Quran*, (Dar Al-Andalus Gibraltar, 1980), accessed 08 Feb 2015, <http://www.geocities.com/masad02/073.html>

However in the Brunei Syariah court practices, it should be noted that the husband's word claiming his wife being *nusyuz* will not be taken for granted as he is obliged to provide evidence in order to prove his accusation. It has to be confirmed by the Syariah court if she is really *nusyuz* or not as can be found in the case of *Hjh Siti Hawa Hj Bungsu v Ismail Hj Zaini*.⁴⁹⁷ In this case, the wife applied for various financial orders such as *mut'a al-talaq*, *harta sepencarian* and arrears of maintenance. The husband who earned \$8353(BND) per month working at the Brunei Petroleum Shell Company, claimed his wife was *nusyuz* as she had declined to move in to his house ever since they got married. She also refused to travel with him to accompany him living in Oman for 2 years, he added. The learned judge conducted a parallel proceeding to try and determine the issues of *nusyuz* raised by the husband before granting the wife the recovery of all her financial claims. This was to ensure whether the wife really had committed the act of *nusyuz* as this would disentitle her from some of those financial rights. The wife finally withdrew her application and was willing to negotiate the matters in amicable manner. Thus the judgement was based on settlement which was made before the Syariah judge between the parties.

The effect of this measure is also to stop the husband from misusing the provision of *nusyuz* in order to escape from the obligation of maintenance. This section 61(2) IFLA (Cap. 217) reflects the prevailing opinion in Islamic law that there is no maintenance for the disobedient woman on the ground of non-submission to the husband's authority. However the divorced wife ceases to be *nusyuz* as soon as she repents and obeys the

⁴⁹⁷ MRHS/MAL/BM 381/1430/2009

lawful wishes and commands of her husband. This would also be subject to the Court's decision to determine her attitude as no longer disobedient, a provision found in section 61(3).

Other Court Orders Concerning Maintenance

Section 68 of the IFLA (Cap. 217) was enacted to empower the court to vary or rescind orders for maintenance where the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances of the parties. Under Syariah law, the Hanafis allow a maintenance variation if the changes affect the condition of either a husband or a wife, including changes in the price of goods. According to the Hanafis, if one of the mentioned factors occurs the wife may apply to amend the court order as has been discussed in chapter three. In practice, it was very unlikely that a wife would apply for this variation order for her *'iddah* maintenance and this was probably due to the fact that the duration of *'iddah* was very short. This provision might be more useful if the application is to be made for maintenance during marriage.

Section 69 of the IFLA (Cap. 217) also provides that subject to section 65, the court may vary terms of any agreement as to maintenance made between the husband and wife where there has been any material change in the circumstances, notwithstanding any provision to the contrary in the agreement.

Section 65 further provides that an agreement for the payment of a capital sum in settlement of all future claims to maintenance shall not be effective until it has been

approved with or without conditions by the court, but when so approved, it shall be a good defence to any further claim for maintenance.

There might be a situation where a wife may secure a valid agreement from her husband as regards to her maintenance. Thus once agreed and started, the agreement will be binding on both parties for the duration specified and cannot be revoked,⁴⁹⁸ on the basis of *Surah al-Ma'idah* which states: "Believers, stand by your contracts (and obligation)."⁴⁹⁹ However, in making an agreement there should be no element that contradicts with Syariah principles otherwise the agreement becomes void.⁵⁰⁰ As far as future maintenance is concerned, there is a discussion among jurists on the question whether or not the wife is allowed to seek security for the payment of her future maintenance. According to the Hanafis and the Syafi'is, the husband cannot be forced to provide anything to secure its payment on the view that future maintenance is not yet compulsory until the time comes. Conversely, other jurists like the Malikis and the Hanbalis are of opinion that it is desirable for a wife to take security from her husband in order to protect her right.⁵⁰¹ Thus, it may be appropriate to say that it was the view of the latter jurists which is adopted in section 60, but with a limitation i.e. subject to the approval of the court. Essentially, the intervention of the Syariah court in an agreement involving variation in a necessitated situation or security for a future payment would leave no room for any party to take advantage of each other.

⁴⁹⁸ Sabiq, *Fiqh al-Sunnah*, trans. Nor Hasanuddin, vol. 6, 81-3

⁴⁹⁹ Quran, 5:1

⁵⁰⁰ Al-Zuhayli, *Al-Fiqh al-Islami*, vol. 4, *Annazariyat al-Fiqhiyah wal'Uqud (Jurisprudence Theories & Contracts)*, (Damsyiq: Dar al-Fikri, 1984), 226

⁵⁰¹ Wizarah Al-Auqaf, *Al-Mausu'ah*, vol. 41, *Nafaqah (Maintenance)*, 56

In awarding maintenance, section 64 gives the court the power to order the husband to secure the whole or any part of it by vesting any property in trustees upon trust to pay maintenance or a part thereof out of the income from the property. To guarantee that the payment of *'iddah* maintenance is really made by the husband, placing some sort of security for the payment is sometimes necessary. Also based on the doctrine of *Siyasah Syar'iah*, this provision would serve as a remedy to deal with a defiant husband. Yet, it only benefits a woman if the husband is affluent and owns some properties to secure such payment. Although it is beneficial, the burden rests on the wife to prove the capabilities of the husband in order to get a successful application.

Another remedy for any case where a divorced wife is left without maintenance is interim maintenance which is available under section 73 of the IFLA (Cap. 217) which states:

s 73 (1) Where the court is satisfied that there are grounds for payment of maintenance, it may make an order against the husband for payment of maintenance to take immediate effect and to be in force until an order is made on the application for maintenance.

(2) The husband may adjust the interim maintenance paid against the amount ordered to be paid for maintenance under the order.

In a desperate situation, the divorcee has the right to apply for an interim maintenance order which takes effect immediately and could last until the court makes a final order. The provision of the interim order is basically intended to overcome certain issues that often arise from lengthy court trials while immediate action is desperately needed.⁵⁰²Hj Johar has asserted that there are several factors that have resulted in cases taking a very long time to settle i.e. cases overload and a few technical problems like

⁵⁰² Hj Muhammad, *Tuntutan*, 144

those affecting applications and hearings in order to meet the requirements provided by the SCCPO 2005 and the IFLA (Cap. 217). The failure of the disputing parties to come to an agreement might also prolong the case where in a full court hearing, all the documentary evidences are to be exhibited and the entire witnesses are to be called, Hj Johar added.⁵⁰³ This interim order though temporary, may serve as an express remedy for financially distressed divorcees when the couple cannot agree on a short term arrangement outside the court while a final settlement is still under consideration. An application for an interim maintenance may be made prior to or at any time after the maintenance order has been applied for. Section 203 of the SCCPO 2005 also contains a specific guideline requiring the application for an interim maintenance to be made only when it is necessary. For example, where a wife files a petition of marriage dissolution by *fasakh* on the ground of physical harm, she may at the same time apply for an interim maintenance order on the view that the *fasakh* proceeding might be lengthy and time consuming. Thus, in the name of justice, the Syariah court may grant her an interim order in order to avoid her being left without maintenance while the divorce decree has not yet been finalized. Unlike the case of interim child maintenance, the Syariah court is not required to consider the financial abilities of the husband in order to grant the application for an interim maintenance order for the wife. This seems to appear from section 203(2) of the SCCPO 2005.

⁵⁰³ Ibid

Duration of Maintenance

The duration of maintenance as stipulated under section 66 of the IFLA (Cap. 217) is that an order for maintenance shall expire on the death of the person against whom or in whose favour it was made, whichever is the earlier. This principle is in conformity with Islamic maintenance law which ceases to be in force whenever any party to the court order dies. However, it is important to note that some jurists' view is that the termination only takes place if there is no previous court order made against the husband determining that any past maintenance should become debt on him if he defies.⁵⁰⁴ The above provision on the other hand seems to be silent about this. In fact it seems to suggest that the maintenance order would automatically cease to take effect even without requiring the surviving party to apply to the court confirming the termination of such order.

4.3.2 Provisions Relating to *Mut'a al-talaq*

Despite the fact that the women's financial right of *mut'a al-talaq* is well established in Brunei there is only one provision available to deal with it in the IFLA (Cap. 217).

Meaning of Mut'a al-talaq

Mut'a al-talaq is different from *'iddah* maintenance and nor it is related to the division of *Harta Sepencarian*. It is under Islamic law a token from the husband and

⁵⁰⁴ Zaydan, *Al-Mufasal*, 222

serves as a parting gift due to the divorce to show fairness on his part.⁵⁰⁵ Accordingly, the IFLA (Cap. 217) has defined *mut'a al-talaq* as the obligatory gift from the husband to his divorced wife in accordance with *Hukum Syara'*.⁵⁰⁶

The above definition indicates that *mut'a al-talaq* should cover any gift that is permissible under the Syariah. Many Brunei cases illustrate what the gift of *mut'a al-talaq* entails. In the case of *Mohammad Raffizan Hj Mohd v Suzilayaniee Selasa*⁵⁰⁷ the gift of *mut'a al-talaq* the wife received in this case was two pieces of clothing. Sometimes, a wife might also get gold jewelery from her ex-husband for *mut'a al-talaq* as in the cases of *Dk Ratikah Pg Sabli v Mohd Azmi Hj Ahmad*⁵⁰⁸ and *Mohd Azami Morsidi v Norhani Hj Hassan*.⁵⁰⁹ In the former case, apart from some cash, she also received other materials namely a praying cloth and a Quran book. A gift in a form of immovable or movable property such as house, land, cars are also practical like in the old case of *Abdul Rahim v Rosita*.⁵¹⁰ The husband in this case awarded his ex-wife a fully furnished house and also a car for her *mut'a al-talaq*. The above cases elaborate that *mut'a al-talaq* may comprise any property or asset so long it does not contain such an element that is not allowed in the Syariah such as an alcoholic drink, a bird in the sky, stolen jewelery etc. The most common gift and most widely given is the gift of money as *mut'a al-talaq*. Depending primarily on the means and the abilities of the husband, the

⁵⁰⁵ Mohammad Afzal Wani, *The Islamic Law on Maintenance of Women, Children, Parents & Relatives* (Kashmir: Upright Study Home, 1995), 194

⁵⁰⁶ s 2

⁵⁰⁷ MRHS/MAL/BM 221/2010 (See footnote 682)

⁵⁰⁸ MRHS/MAL/BM 713/2011 (See footnote 677)

⁵⁰⁹ MRHS/MAL/BM 65/2011 (See footnote 683)

⁵¹⁰ MKB/121/95 (MKB stands for Mahkamah Kadhi Brunei or *Kadhi's Court of Brunei*)

payment is to be made either in a lump sum as decided in *Dk Kartini v Saiful Rizan*⁵¹¹ or by instalments as in *Hjh Norhayati Hj Suana v Malik Puasa*.⁵¹²

Court's Power to Award Mut'a al-talaq

Section 57 of IFLA (Cap. 217) provides that in addition to her right to apply for maintenance, a woman who has been divorced by her husband may apply to the court for *mut'a al-talaq*, and the Court may, after hearing the parties and upon being satisfied that the woman has been divorced, order the husband to pay such sum as may be fair and in accordance with *Hukum Syara'*. The effect of Section 57 is that it would benefit not only the economic position of a divorced woman, but also her emotional and physical well-being in that she would be entitled to an additional gift apart from her maintenance which is often not substantial. While the prescription of *mut'a al-talaq* is clearly manifested in the Quran.⁵¹³ Muslim scholars differ in their opinion as to whether it is obligatory or only recommendable. In the light of section 57, it appears that it is an Islamic law-based provision adopting the view point of the Shafi'i school of Islamic law. According to this school, every divorced woman is entitled to her *mut'a al-talaq* so long the divorce is not due to her fault or defect. Thus, by adopting this rule, it ultimately shows equal protection for both parties because it is unfair to order a husband to pay his ex-wife a *mut'a al-talaq* where he is not at fault. Unlike *'iddah* maintenance, it appears that the woman's financial rights of *mut'a al-talaq*, though exclusive are conditional.

⁵¹¹ MRHS/MAL/BM 682/2011 (See footnote 678)

⁵¹² MRHS/MAL/BM 654/2010 (See footnote 675)

⁵¹³ Allah says: "And for divorced women a provision in kindness: this is obligatory for the righteous." (Quran, 2: 241)

It is clear that the right of *mut'a al-talaq* is basically subject to the fact that the divorce is not due to the woman's fault or defect. However, a question may arise as to whether or not the woman's fault could disentitle her to the gift of *mut'a al-talaq* such as the act of *nusyuz*. To answer this, there is no explicit mention in the Quran and Sunnah about this matter, not even a jurist was found that expressly categorizes *nusyuz* as one of the acts that would affect the wife's right of *mut'a al-talaq*. Due to this, the Syar'ie judges seem to adopt the principle that an act of *nusyuz* would not deny a wife her right to *mut'a al-talaq*. It is best illustrated in the case of *Hashim Tuah v Pg Sabariah Pg Daudi*⁵¹⁴ where despite that the husband claimed his wife as *nusyuz* for leaving the matrimonial home and neglecting her duties as a wife, this did not affect her right to *mut'a al-talaq*.

Assessment of the Quantum of Mut'a al-talaq

One of the issues that the Syariah court often finds it difficult is how to determine the reasonable amount of *mut'a al-talaq* that divorced wives should receive. The absence of detailed guidance in the law on *mut'a al-talaq* assessment might be the reason causing this problem. In fact the Quran and the Sunnah are also silent about this matter. Nevertheless, in exercising his wide discretion, the Syar'ie judge may refer to any Muslim scholars writing that is relevant to *mut'a al-talaq* cases before him. Accordingly, there are several opinions on the basis of how the quantum of *mut'ah* should be assessed. Some Muslim jurists recommended to take into account both the husband's and wife's

⁵¹⁴ MRHS/MAL/BM 775/2010 (See footnote 676)

condition equally. While some consider the husband's condition alone, others see the wife's need as more important.⁵¹⁵ Generally, the case law has revealed that, although a *mut'a al-talaq* order could be made by the court in favour of wives, generally a settlement has always been made based on the alleged agreement of both parties, after persuading the wives to accept whatever amount that the husband offers. For instance in *Pg Kamariah*,⁵¹⁶ the wife filed for a number of financial orders after divorce including *mut'a al-talaq* claiming that her husband had abandoned her and their seven children without maintenance for several months. Although she filed for a *mut'a al-talaq* gift at \$168,000(BND) the husband declined and offered to give \$3,000(BND) instead. The wife finally agreed to accept it. Thus, by examining the difference between the total sum demanded by the wife and the offered amount by the husband, it could be assumed that there was an element of duress on the wife towards the alleged agreement reached between them.

There is one case where the wife had to dismiss her claim for *mut'a al-talaq* considering her ex-husband's financial incapability. This was the case of *Hjh Meriani Abdullah v Nurudi@Nordin Hj Lamat*⁵¹⁷ where the 49 year old wife filed for the payment of *mut'a al-talaq* at \$62,400(BND) from her former husband she had been married to for about 24 years. The husband was aged 51 and earned \$2,155(BND) every month. However, he refused to satisfy her claim due to his numerous liabilities. In this case, the wife filed for a divorce decree due to her husband's affair with another woman. As the

⁵¹⁵ Wizarah al-Auqaf, *Al-Mausu'ah*, 95-6 (See footnote 360); Al-Zuhayli, *Al-Fiqh al-Islami*, 6834-6835 (See footnote 27)

⁵¹⁶ MRHS/MAL/BM 224/2011 (See footnote 684)

⁵¹⁷ MRHS/MAL/BM 588/2011 (See footnote 687)

parties could not come to an agreement with regard to the *mut'a al-talaq* dispute matters the court finally urged them to resolve their differences by *sulh* but still, it did not turn out well. Finally, the wife gave up and withdrew her claim and the court allowed this. From this case, it appears that it was the wife who had to surrender her Islamic rights although she actually deserved the money as the divorce was not her fault. The husband in this case had no heart even to award her some amount of *mut'a al-talaq* so that she could use that money to maintain herself before she could stand on her own feet. It was shown that she had no income for living and she even applied to the court as a destitute applicant so that she could be exempted from paying the court fee and the court indeed approved this application.

In the case of *Nurul Hidayah*,⁵¹⁸ the learned Syar'ie judge viewed that it was fair if the award of *mut'a al-talaq* is to be based by looking primarily at the sum that the wife claimed with a balanced consideration with the financial condition of the husband. Therefore if such amount is higher than the husband could afford, then the payment should be made by instalments. The learned judge further viewed however that this payment should be terminated once the woman remarries. The above case shows that the assessment by emphasizing the amount that a woman has claimed without regarding the ex-husband's capabilities would benefit a woman whereby she could use that sum to cater for her daily needs until she gets a job (if she used to be financially dependent on her ex-husband) or she remarries. Equally, the approach could ease the ex-husband's burden by allocating a small amount of money every month for his ex-wife's *mut'a al-*

⁵¹⁸ TSP/BM 34/2001 (See footnote 641)

talaq as compared to a one-off payment which would normally be very large and burdensome.

In Singapore, the principle that is often adopted in dealing with *mut'a al-talaq* cases is that the Syariah court uses the calculation formulae by multiplying the number of days of the marriage with a specific rate which the judge thinks appropriate. The rate is usually fixed between \$1 and \$3 (in Singapore dollars) per day.⁵¹⁹ A similar approach has been adopted in a few cases in the Brunei Syariah Courts such as in *Pg Mohd Yussof v Erni Hayati*.⁵²⁰ In this case, the parties' marriage lasted for only 3 years thus giving the total amount of \$2097(BND) for the payment of *mut'a al-talaq* for the ex-wife. The calculation of such a payment is based on the formulae whereby the length of marriage is to be multiplied by the rate determined by the judge i.e. \$3(BND). However, it is questionable whether the rate of \$3(BND) per day is reasonable when one compares it to the wages a housemaid receives that is approximately \$8(BND) per day. In the light of the duties and the responsibilities that a wife shares with a housemaid these days their roles could be taken as almost as equal. Indeed a wife has bigger responsibilities if she has to engage in outside work to help her husband strengthen their economy stabilities.

4.3.3 Provisions Relating to *Harta Sepencarian*

The existence of IFLA (Cap. 217) has improved the situation where before the Act, despite there being a provision empowering the court to hear and determine matters

⁵¹⁹ Women's Rights Within Islamic Family Law in SEA, 22, assessed 20 April 2013, http://www.karamah.org/docs/Womens_rights_%20SEA.pdf

⁵²⁰ MRHS/MAL/BM/366/2003

regarding *harta sepencarian*, no specific guidelines were found as regards the assessment. The provisions relating to the division of *harta sepencarian* are now found in sections 59 and 60 of the IFLA (Cap. 217).

Definition of Harta Sepencarian

The IFLA (Cap. 217) offers a general definition for *harta sepencarian* which leaves the judge a wide discretion to decide what form of assets or properties falls within the given definition of *harta sepencarian*. It is defined as the property jointly acquired by the husband and wife during the subsistence of marriage in accordance with the conditions stipulated by *Hukum Syara'* (Syariah ruling).⁵²¹ The above definition clearly indicates that *harta sepencarian* could cover anything so long as it is acquired by both parties during the marriage such as land, house, car, furniture, joint account and so on. As a comparison, the Islamic Family Law Enactment of Selangor in Malaysia for instance,⁵²² has inserted the words 'directly or indirectly' in addition to the definition⁵²³ as given by the IFLA (Cap. 217) of Brunei. It is interesting to note that such a definition shows a clearer indication that a wife's indirect contribution as a homemaker is entitled to a share of *harta sepencarian* that is acquired solely by the husband.⁵²⁴

⁵²¹ s 2

⁵²² s 2(1)

⁵²³ The definition given by the Islamic Family Law Enactment of Selangor is as follows: property jointly acquired by husband and wife, whether directly or indirectly during the subsistence of marriage in accordance with the conditions stipulated by *Hukum Syara'*.

⁵²⁴ Norliah Ibrahim, *The Rights of the Wife to Claim on a Division of matrimonial Property after Dissolution of Marriage: Malaysian Perspective*, accessed 20th May 2013, <http://www.childjustice.org/index.php/component/edocman/?task=document.viewdoc&id=226&Itemid=47>

In Islamic law, there is no specific provision that defines *harta sepencarian*. This is because the concept of *harta sepencarian* is not a part of Islamic Law. There is no explicit verse or Sunnah that mentions it. It was basically a Malay custom which entitles a divorced wife to a share of all property acquired during the marriage irrespective even of the wife's adultery and regardless of the number of children.⁵²⁵ Nevertheless there are a number of Islamic *fiqh* writings discussing the issue of household property. For instance, if there is a dispute between a husband and wife on the household property, and they cannot provide evidence to prove ownership, according to some scholars each of them shall take an oath.⁵²⁶ As discussed earlier, there was also a discussion among Muslim scholars as to whether *harta sepencarian* is the same as *harta sharikat* or the partnership property under Islamic Law and they further argued on its details.⁵²⁷

The task of a Syar'ie judge in defining *harta sepencarian* might put him in a complicated situation. For example, the question of whether money contributed by the parties in the Tabung Amanah Pekerja (Employees' Trust Fund or TAP) during the marriage is one of the difficult and substantial issues that has been raised in some cases and an area of research among modern scholars across the region. Court decisions seem to show that the money in the fund is categorized as personal property rather than as *harta sepencarian*. To illustrate, in *Gani v Hayati*,⁵²⁸ a Brunei Syariah court did not consider the ex-husband's retirement gratuity as *harta sepencarian* and so denied the

⁵²⁵ Ibrahim A., *Status of Muslim Women*, 55

⁵²⁶ Md Akhir bin Haji Yaakob, *Harta Sepencarian*, Jurnal Hukum, 46-47, as quoted in Arif Fahmi bin Mohd Yusof, "Settling New Legal Issues in Harta Sepencarian", in *Islamic Family Law: New Challenges in the 21st century*, ed. Zaleha Kamruddin, (Kuala Lumpur: Research Centre IIUM, 2004), 196

⁵²⁷ Haqqi, '*Harta Sepencarian*', 53

⁵²⁸ MRHS/MAL/BM 234/2006

wife's claim to it. The court held that the award of such gratuity by the government to the entire government service is made in consideration of past service toward the state and has no relevance at all with the marriage.

The above decision is in conformity with the view of the *fatwa* issued by the state Mufti of Brunei which declares that the service gratuity benefit⁵²⁹ for the government civil servant is not a *harta sepencarian* liable to be divided in the event of divorce but is personal property. The ex-husband however may consider to award a share of such gratuity benefit to his wife by way of gift.⁵³⁰ According to the state Mufti of Brunei Islam has laid down the rights and duties that both a husband and a wife are held to fulfil towards each other. Thus, when both husband and wife are totally aware that they are under obligation to fulfil those specified duties properly, the issues of 'who gets what' if they get divorced would not arise. Indeed in Brunei, it has become a custom that the mother has always been responsible for looking after the children and it was unlikely for her to demand for remuneration for carrying out her duty as a mother.⁵³¹

In western countries like England and Wales on the other hand, pension rights are treated as part of matrimonial property. The Matrimonial Causes Act 1973 gave the English courts the power to take the value of pensions into account when settling the

⁵²⁹It is a non-contributory scheme established in 1959 called the Government Pension Scheme (GPS) which offers old-age pension, disability and survivorship benefits to civil servants hired prior to January 1, 1993 and all members of the uniformed forces including the military, police and prison guards. Civil servants hired since 1993 have been the members of the Employee Trust Fund (TAP). Old age retirement benefits are payable at age 55 for men and 45 for women (The World Bank, "Brunei Pension Report", accessed on 21 May 2013, http://www.csps.org.bn/publications/CSPS_Report_4_-_Brunei_Pension_Report_-_WorldBank_-_Nov2007.PDF)

⁵³⁰ *Fatwa Mufti Kerajaan Negara Brunei Darussalam 2002*, 2nd ed., (Brunei: State Mufti Office, 2007), 135-140

⁵³¹ *Ibid*

matrimonial assets.⁵³² In fact, quite a few orders have been introduced that the courts have power to make in relation to pensions such as offsetting,⁵³³ pension attachment⁵³⁴ and pension sharing.⁵³⁵ It can be observed that this entitlement of pension rights like other financial rights after divorce is to ensure that each party and their children have enough to supply their needs at a level as close as possible to the standard of living which they enjoyed during their marriage.⁵³⁶ Since in Brunei, pension funds or TAP have been always seen as one of the most important individual assets, it would place the spouses at a more advantageous position if the practice in England were to be considered by Bruneian judges so as to prevent the likelihood of the after-divorce-scenario that hits most women in Brunei that is poverty. As a matter of fact, it could also remedy the issue of a husband's insolvency or husband's non-compliance of any financial support order because it might be the only property owned by the husband to support the payments.

⁵³² Nigel Lowe and Gillian Douglas, *Bromleys's Family Law*, 10th ed., (London: Oxford University Press, 2006), 999

⁵³³ It is the type of financial provision order that was first introduced that relates to pension rights long before 1955 (prior to the establishment of Pension Act) and still remains a popular remedy today which involved getting the value (usually the cash equivalent or transfer value) of the pension benefits as at the date of divorce, then this value would be included in the total value of the matrimonial estate to be divided on divorce. (Prudential, "Pensions & Divorce", assessed 21st May 2013, http://www.pruadviser.co.uk/new_pdf_folder/P523.pdf)

⁵³⁴ It is a form of financial provision order made under s 25B-25D of the MCA 1973. It involves a pension being 'earmarked' for the other party. If an order is made, then once the pension becomes payable, the person responsible for the pension arrangement must pay part of the pension income and/or lump sum available under the arrangement to the other party to the marriage. (see Michael Freeman, *Understanding Family Law* (London: Sweet & Maxwell, 2007), 126)

⁵³⁵ It is a separate type of order made under s 24B of MCA 1973 and was introduced by the Welfare Reform and Pensions Act 1999. This re-adjusts the spouses' pension entitlements and enables each party to make future pension arrangements independently of the other. The spouse in whose favour the order is made can either become a member of the other's pension in her own right, or she can transfer the value of the ordered share into her own pension arrangement. (See Lowe & Douglas, *Bromley's*, 1001)

⁵³⁶ Margaret Hatwood, "Maintenance: Where Are We Now?" June (2010) *Fam Law*, 636, accessed 22nd May 2013, http://www.anthonygold.co.uk/site/ang_articles/maintenance.html

Further, it is worth noting that there is a provision under the Brunei Old Age and Disability Pension Act (Cap. 18) that states:⁵³⁷

s 9. A pension or other allowances granted in pursuance of this Act shall not be assignable, transferable or chargeable except for the purpose of satisfying-

- (1) a debt due to Government; or
- (2) an order of any competent Court;

and shall not otherwise be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatever except a debt due to the Government.

While according to the above provision a pension cannot be assigned, transferred or charged, in particular circumstances those actions are possible if the court allows to do so. This principle may be rendered beneficial as the court is empowered to make such an order that relates to a pension that could produce a fair outcome for both parties.

The Division of Harta Sepencarian

The IFLA (Cap. 217) provides a specific guideline for settling disputes on the division of matrimonial property. Section 59 is the provision which states that the Syariah court has been empowered to order the division of *harta sepencarian* acquired by the parties during the marriage when divorce occurs. Exercising this power requires the court to consider the parties respective contributions towards the acquisition of the property. Accordingly, the IFLA (Cap. 217) seems to restrict the parties' contribution into two forms: joint effort and sole effort. Generally, for property obtained by joint efforts, the court inclines towards equal division while for property obtained by the sole effort of one party, that party will get a greater proportion. However, in most cases, the Syariah court does not specifically determine whether *harta sepencarian* is jointly or solely acquired by

⁵³⁷ s 9

one of the parties. In the case *Nurazlina Abdullah Chin v Muhammad Azli Julaihi*,⁵³⁸ the Syariah court consented to the *harta sepencarian* settlement in which the wife was successfully granted the ownership of a car, for it was the only property claim the husband agreed on. In this case, the court did not appear to bother to examine whether or not the property in dispute was acquired solely by one party or was jointly acquired by both parties. The judgment seemed to be based entirely on the question if an agreement could be attained between husband and wife in the sense that it was often the husband who took charge of the negotiation process.

Essentially, there was also a practice in the Syariah court to look mainly into the direct financial contribution of the parties only. In *Hjh Fauziah v Hj Mohd Umar*,⁵³⁹ the Syariah court decided that although there was no sufficient evidence of the wife's financial contribution to the construction of the house having her making an oath of proving that she was telling the truth, a *harta sepencarian* order of approximately \$34,026(BND) was granted. This case proves that the presence of a direct contribution from both the husband and wife appears to be very significant in entitling him or her to a share of the division of *harta sepencarian*. However, one may argue that the amount that the wife received in this case was not practically a share from the division of the house but it was in fact the recovery of the expenses she had spent to build the property. The learned judge seems to overlook the fact that the wife might also be entitled to some share in that property, for the contribution she had made in acquiring the property.

⁵³⁸ MRHS/MAI/BM 744/2010 (See footnote 690)

⁵³⁹ TSP/BM 16/2001 (See footnote 648)

Basically, there were totally two different matters; first was the contribution and the other was the share. Therefore it is suggested that the *Syar'ie* judge should first examine if there is a contribution made by each party which subsequently gives rise to a rebuttable presumption that the property is *harta sepencarian*. If it is proven that the property is jointly acquired by both parties as such in the above quoted case, then they both should be entitled to some share in that property based on how small or big their contribution are. The *harta sepencarian* case of *Hj Yahya Hj Abd Ghani v Rauyah Mohidi*⁵⁴⁰ can be said to provide an illustration where an equal division was granted to both husband and wife because the parties had jointly contributed to the acquisition of the house during the marriage.⁵⁴¹

Factors to Consider in a Division of Property

The law has set out certain factors which the Syariah court has to consider in deciding whether to make a *harta sepencarian* order such as the following:

- i. the debts owned by the parties in acquiring the property; and
- ii. the needs of the minor children

From the observation on the above provisions, it is clear that the interests of the children also play a decisive part in the distribution of the *harta sepencarian*. The court is required to ensure that the children will have the security of financial provision even

⁵⁴⁰ MTS/R/KB/3/2002 (MTS stands for Mahkamah Tinggi Syariah or Syariah High Court, KB means Kuala Belait i.e. one of the district of Brunei)

⁵⁴¹ The husband however, made an appeal against the Syariah lower court judgment on the ground that the wife was absent when the decision was made. Since both the husband and wife agreed to sell the property in dispute and the proceeds of the sale were to be divided equally between them, the Syariah High Court therefore had no objection to grant the order based on this.

though their parents are separated. Many previous law cases indicate that when the parents are separated, the children would always continue to stay with the mother, even without a court order.⁵⁴² This scenario would place a woman in a more serious difficulty especially if she is destitute and used to be economically dependent on her former husband. Therefore in order to ease the burden, it is necessary for the court to award a bigger share of *harta sepencarian* to the wife than the husband even though he may have contributed a larger amount towards that *harta sepencarian*. This is to ensure that the children would get proper care if they have more stabilized financial resources. Such an approach, in fact, has already been practised in the United Kingdom. For the welfare of the children, the English court is concerned to ensure that the children will be provided with a secure home. As such, the English court may particularly wish to transfer the matrimonial home or enough money to fund a suitable home to whoever will be caring for the children.⁵⁴³ Another interesting point that can be observed regarding the family home issue is that spouses are allowed to claim some of the value of that property when the children have grown up.⁵⁴⁴ A similar principle has been adopted in some cases in the Brunei Syariah Court which indicate that the best interests of the child also becomes the main factor in the determination and division of the matrimonial home in Brunei. For

⁵⁴² This can be seen in the majority of decided cases involving a petition for child custody or child maintenance such as the cases of *Nur Afiqah Multazimah* (See footnote 653) and *Umi Kalsum* (See footnote 655). In fact, the researcher's telephone conversation with a few women who were used to involve with this financial-divorce settlement cases had confirmed this. In the above quoted cases, the fact that the mother applied for custody of the children gives an impression that the children had always stayed with her as soon the divorce was decreed.

⁵⁴³ Lowe & Douglas, *Bromley's Family Law*, 941

⁵⁴⁴ It is a new rule that has been adopted following the English case of *White v White* ([2001] 1A.C.596) where previously the transfer of the matrimonial home to whoever takes care of the children is final and no recovery is to be made by the other spouse in future.

instance in *Pg Siti Zaliha Pg Hj tengah v Masri Hj Shari*,⁵⁴⁵ the Syariah court decided that the two houses that were located in Mulaut and Muara should be given to the children of the disputed parties. Another case of *harta sepencarian* that illustrates the same point is *Rokayah Jumat v Jamil Harun*⁵⁴⁶ where the grant of the house in Sengkuring was given fully to the parties' seven children.

Today, a common problem in *harta sepencarian* cases involves what to do when a house or land established under the National Housing Scheme is given to either party by the Government. It is one of the sort of housing scheme designs for those without land to build their own houses under which housing units are made available at subsidised prices to be repaid over a period of 20 to 30 years.⁵⁴⁷ The general trend of the recent case law is to favour the rights of the ex-wife with custody of the children over that government housing despite the fact that repayments on the property are still borne by the husband. For instance, in *Siti Mariam Hj Madewa v Idris Hj Abas*⁵⁴⁸ the wife applied for the ownership of the government housing that the husband was entitled to and her application was successful and the husband agreed the house to be transferred to her.

Indeed in some cases, the divorced wife, though there are no children involved, has been granted a full right over the house that was basically given to the husband by the Government as in the case of *Fatimah Haji Mohd Ali v Pg Ahmad Bin Pg Haji Sarpudin*.⁵⁴⁹ This decision however, is not in conformity with the view taken by the State

⁵⁴⁵ MRHS/MAL/BM 234/2010 (See footnote 692)

⁵⁴⁶ TSP/BM/22/2001

⁵⁴⁷ Housing Development Department, "National Housing Scheme", accessed 16 September, 2013, <http://www.housing.gov.bn/rancang.htm>

⁵⁴⁸ MRHS/MAL/BM 64/2010 (See footnote 693)

⁵⁴⁹ MRHS/MAL/BM/112/2010

Mufti which does not consider the above property (the house or land that is specifically awarded to a husband or a wife by the Government) as *harta sepencarian* that is liable for division.⁵⁵⁰ If the Syar'ie judge were to follow the *fatwa* ruling, his decision approving or granting the wife the ownership of the government housing, which was legally owned by the husband, could be taken instead to mean that it was merely a gift and not as a share from the division of *harta sepencarian*. Looking at the court order issued by the judge, he never mentioned the fact that the property in dispute was *harta sepencarian*. It could be said that the Syar'ie judges in the above quoted cases do not seem to bother to examine and determine if the property in dispute was *harta sepencarian* or not. What seems to matter is that if there is an agreement stating the husband agreed with the transfer to his ex-wife, the settlement would then be totally based on that.

The IFLA (Cap. 217) seems to restrict the factors that the court is required to consider in the division of *harta sepencarian* into two factors only: the debt both parties owe towards the acquisition of the property and the welfare of the children. Other factors than those two are not subject to consideration. However, it can be argued that the law has given the judges in Brunei a very wide discretion to decide disputes for which no specific law provides so that it could produce a fairer outcome for the parties. The relevant factors that should be taken into account are those such as the financial needs of the parties, the duration of marriage, their standard of living, their ages etc. By contrast, English judges are more flexible in dividing matrimonial assets in such a way that 'all the

⁵⁵⁰ *Fatwa Mufti Kerajaan Negara Brunei Darussalam 2000*, (Brunei: State Mufti Office, 2001), 342-4

circumstances of the case” are considered, aiming to arrive at a solution which is fair without discrimination to both parties.⁵⁵¹

4.3.4 Provisions Relating to Maintenance for Children

The Meaning of Child

The IFLA (Cap. 217) does not define the meaning of ‘child’. However, a ‘minor’⁵⁵² is described by the Act as a person who has not attained the age of eighteen years according to the Islamic lunar calendar (*qamariah*) for the purpose of guardianship of person and property. The question is then whether the word ‘child’ falls within the meaning of ‘minor’. At this juncture, reference could be made to the section 82 of the IFLA (Cap. 217) which stipulates that the duration of a maintenance order of a child shall expire when that child attain the age of eighteen years. Thus, it is appropriate to state that both child and minor have a similar meaning for the purposes of the IFLA (Cap. 217).

Duty to Maintain Children

Section 75 imposes upon a father the duty to maintain or contribute to the maintenance of his children. In fact, the Act makes ‘a person liable under *Hukum syara*’ as holding the same duty in the case the father is unable to maintain his children. It provides as follows:

s 75(1) Except where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether or not they are in his custody, either by providing them with such accommodation, clothing, food,

⁵⁵¹ s 25(1) of the Mtrimonial Causes Act 1973

⁵⁵² s 2

medical attention and education as are reasonable having regard to his means and status in life or by paying the cost thereof.

(2) Except as aforesaid, it shall be the duty of a person liable under *Hukum Syara'*, to maintain or contribute to the maintenance of children if their father is dead or his whereabouts are unknown or if and in so far as he is unable to maintain them.

It could be noted that while the general definition of maintenance has been limited to three items only namely food, clothing and accommodation,⁵⁵³ i.e. the basic necessities that a person would normally require to preserve his life, but when it comes to maintenance for children, medical attention and education have also been included for these requirements are also necessary for the wellbeing of a child.

In the case where a person has accepted a child that is not his or hers as a member of his or her family, section 81 also prescribes that it is under his or her duty to maintain such child. It provides as follows:

s 81(1) Where a person has accepted a child who is not his child as a member of his family, it shall be his duty to maintain the child while he remains a child, so far as the parents of the child fail to do so, and the Court may make such orders as may be necessary to ensure the welfare of the child.

(2) The duty imposed by subsection (1) shall cease if the child is taken back by either of the child's parents.

(3) Any sum expended by a person in maintaining a child as required by subsection (1) shall be recoverable as a debt from the father or mother of the child.

It can be said that all of these provisions offer great attention and protection to the needs and welfare of the children. Accordingly it is an established principle under Islamic law that the maintenance for child is obligatory where the provider can be a father or

⁵⁵³ IFLA (Cap. 217), s 2

other persons that are eligible according to Syariah law. This has been discussed in some detail in chapter three.

Court's Power Regarding Maintenance

It could be noted that the enactment of the children's maintenance law could bring relief to every neglected child in any circumstances whatsoever. Therefore section 76 of the IFLA (Cap. 217) has empowered the court to order a man to pay maintenance for the benefit of his child in the four following situations:

- i. if he has refused or neglected to reasonably provide for his child;
- ii. if he has deserted his wife and the child is in her care;
- iii. pending the outcome of any matrimonial proceedings; or
- iv. when making or subsequent to the making of any order placing the child in the custody of any other person.

And again for the benefit of children, the Court may also, when ordering the payment of maintenance, order the person liable to pay the maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay the maintenance or a part thereof out of the income from the property which is provided for under section 77.

Further, there are also other types of court order that can be applied as regards a child's maintenance such as an order to vary or revoke an existing custody or maintenance order and also an order to vary an agreement concerning child custody or

maintenance. These provisions can be found in sections 78 and 79 of the IFLA (Cap. 217).

Further, it appears that section 78 is rather general and covers the application for maintenance for both wife and children. In fact, there are numerous cases in the Syariah court where the variation order for child maintenance is applied. For instance, in *Haji Jolkifli Duraman*,⁵⁵⁴ the learned Syariah judge allowed the application of the father to terminate the maintenance order of \$300(BND) per month issued on 6th September 2010 on the ground that one of his daughters was married while another has got a job. The mother of the children in this case died in 2006 thus the application was made through an ex-parte. Therefore, section 68 shall apply in dealing with cases where there is a significant change in the circumstances of the beneficiaries which in this case was the marriage of the first daughter in that the obligation of maintenance would subsequently be transferred to her husband and the capability of the second daughter to earn her own income. Under Islamic law, a father is obliged to maintain his child yet subject to certain conditions. The factor of the child being incapable to maintain himself or herself is one of them, either due to his or her position of being a minor or being poor with no property as specified by many jurists including the Syafi'is.⁵⁵⁵ This condition may apply to both a female and a male child. As for marriage, the Syafi'is and the Malikis consider it as a valid factor that would stop the female child from being maintained by her father.⁵⁵⁶ In

⁵⁵⁴ MRHS/MAL/BM 579/2010

⁵⁵⁵ 'Abd al-Rahman Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-'Arba'ah (the Book of Jurisprudence on the Doctrine of the Four Jurists)*, vol. 4, Kitab At-talaq, (Beirut: Darul Kutub Al-'Ilmiah, 2003), 511-4, accessed on 08 Feb, 2015, http://ia902604.us.archive.org/9/items/waq78101/04_78104.pdf

⁵⁵⁶ Al-Zuhayli, *Al-Fiqh al-Islami*, 7414 (See footnote 27)

the light of this, it is apparent that the above quoted provision is essentially in parallel to the Islamic law, generally drawn from the four schools of law.

Duration of Maintenance Order

Generally, a maintenance order for a child will not expire until the child attains the age of 18 years as provided for under section 82 of the IFLA (Cap. 217), except on the following circumstances such as:

- i. if a maintenance order of a child is expressed to be for any shorter period
- ii. if any such order has been revoked
- iii. if any such order is made in favour of a daughter who is not married or a child who, by reason of any mental or physical disability, is incapable of maintaining himself or herself

On the application by the child or any other person, the maintenance order for a child may also be extended to enable the child to pursue higher education or training, to such period that the court thinks necessary. Thus, the above provision could place children at a great advantage as it empowers the court to extend the father's duty of maintenance beyond the age of 18. It seems that the law seeks to ensure that Muslim children can pursue tertiary education without worrying about the financial burden.

Recovery of Arrears of Maintenance of a Child

Section 71 of the IFLA (cap. 217) provides adequate protection for a child whereby on his or her application or by application of someone on his or her behalf that

may recover the arrears of maintenance in cases of failure to pay by the father. In fact, the payment of maintenance that has been in default would remain a debt on the father and would not be waived even if he dies. In this provision, it is essentially the Syafi's view which is applied. According to the Syafi's any arrears of maintenance for a child are recoverable as debts provided that a court order is in place or there is an agreement between the parties regarding this matter.⁵⁵⁷

4.3.5 Attachment of Earnings Order

The main means of enforcement of payment of money, which is widely practised by the Syariah court in cases of financial settlement after divorce, is the attachment of earnings order. The IFLA (Cap. 217) provides for the court to issue an attachment of earnings order against the defendant's employer. The employer deducts the maintenance amount every month from the defendant's earnings and channels the money to a specified bank account for the claimants which are generally the wife or children. As such, a divorced woman may apply to attach the earnings of her former husband so as to ensure that he pays the *'iddah* maintenance, *mut'a al-talaq*, arrears of maintenance and child maintenance as ordered by the Syariah court. However, it should be noted that in practice, the attachment of earnings order is often applied for the enforcement to pay maintenance only and not for others such as *mut'a al-talaq* or *harta sepencarian*. The provisions regarding the attachment of earnings order which may be enforced by the IFLA (Cap. 217) are found in the following sections: section 84 (Power of court to make

⁵⁵⁷Al-Zuhayli, *Al-Fiqh al-Islami*, 7419 (See footnote 27)

attachment of earnings order); section 85 (Nature of attachment of earning order); section 86 (Effect of attachment of earnings order) and section 87 (Duty of defendant and employer to comply with attachment of earnings order).

It appears that this method of payment enforcement could benefit women and children in securing their financial support in a way that it will be paid regularly and in a more effective manner. As a result, this would protect their future needs and welfare. However, as noted in practice, the attachment of earnings order is often applied for the enforcement to pay maintenance only and not *mut'a al-talaq* or *harta sepencarian*. It is therefore suggested that the use of the attachment of earnings order should be extended to the payment of *mut'a al-talaq* and *harta sepencarian* as it may also involve payment of money.⁵⁵⁸ Another point that can be noted here is that it seems that the attachment of earnings order as provided in the IFLA (Cap. 217) will only help if the defendant is in paid employment. This therefore will raise the question of how to deal with a defendant who is self-employed as there is no clear provision in the Act about this matter.

4.3.6 Provisions relating to Penalty for Default Payment

All judgements and orders issued by the Syariah Courts for the payment of financial settlement after divorce must be complied with. Non-compliance with such court orders such as the payment of *'iddah* maintenance, *mut'a al-talaq*, *harta*

⁵⁵⁸ Haji Mohammad, *Tuntutan*, 153-4

sepercarian and child maintenance has been made an offence and would be punishable under a court of law.

Section 133 of the IFLA (Cap. 217) provides that any person who wilfully fails to comply with a court order for monthly payments, is liable to imprisonment not exceeding one month for each monthly payment that is unpaid, or to imprisonment not exceeding one year if the order is for another payment such as a lump sum. This appears to be a punishment for a specific category of non-compliance i.e. default payment which, besides *'iddah* and child maintenance, could also remedy the issues of failure to pay *mut'a al-talaq* or *harta sepercarian*. Meanwhile, there are other specific categories of non-compliance specified in the relevant provisions under IFLA (Cap. 217). For example, section 136 involves any person who fails to comply with an attachment of earnings order which on conviction will be punished with a fine not exceeding \$5,000(BND), or an imprisonment for a term not exceeding one year, or both. It should be noted that the same penalty would apply to the case where the defaulting person is the defendants' employer. In *Mushinah Hj Buntan v Jaini@Khalid J Walid Hj Muhd Jair*,⁵⁵⁹ the learned judge granted the wife's application for an attachment of earnings order for all the financial settlement after divorce that she has claimed regardless of the ex-husband's refusal. The wife in this case claimed for maintenance for herself and also her children, *mut'a al-talaq* and an annual bonus which were to be settled by way of an attachment earnings order. The husband, who worked as a trainer at the Ministry of Culture, Youth and Sport (MCYS) was reluctant to agree and instead applied for an order for the payment of

⁵⁵⁹ MRHS/MAL/BM 363/2010

money made through the court. The court however, denied his request and warned him that if he and his employer willfully failed to comply with such an order they will commit an offence as provided for under section 36(1) of IFLA (Cap. 217). Accordingly, the Act prescribes a penalty for non-compliance of any agreement relevant with financial support after divorce in section 137. Upon conviction, the offender would face a fine not exceeding \$2,000(BND), or imprisonment not exceeding six months or both.

Essentially, the Syariah courts have been given the power to generally punish for contempt of court under section 134 which states:

s 134 Without prejudice to the provisions in any other law, failure to comply with an order of the Court made under this Order shall be regarded as contempt of Court and liable on conviction to a fine not exceeding ten thousand dollars, imprisonment not exceeding three years or both.

Although this provision is more of a general perspective the law expressly treats as contempt of court the failure to comply with any order made by the Court under IFLA (Cap. 217). Thus, any person who disobeys the court's order to make payment either for maintenance or *mut'a al-talaq* or *harta sepencarian* can be punished under this general provision. This can be referred to judgment made in the case of *Nikmah v Mohamad Satri*,⁵⁶⁰ where the husband who was found to be constantly disobeying the Syariah High Court orders, was finally punished with a 25 days imprisonment for the contempt of court unless he settled the first instalment of \$500(BND) i.e. for the payment of his ex-wife's 'iddah maintenance, *mut'a al-talaq* and also her share in *harta sepencarian* at the total sum of \$68,024.20(BND).

⁵⁶⁰ TMM/16/2001 (TMM stands for *Tuntutan Melalui Mahkamah* or Claims through the Court followed by the number of the case and then the year in which the case was registered)

In conclusion, Islam takes all measures to ensure that justice prevails in every field especially in the implementation of Islamic law and its judicial system. The concept of justice under Islam can be seen as expounded in the Quran and the practice of the Prophet Muhammad (P.B.U.H) For example, Allah says:

Allah commands justice, the doing of good and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition.⁵⁶¹

In the light of the above verse, it is appropriate for the state to impose a penalty against a defaulting person. As a matter of fact, the few reported cases of enforcement and execution of court orders in the Syariah Courts that relate to the financial support orders show long periods of non-compliance. In *Rusnah Hj Yusof v Su'ief Suhaili*,⁵⁶² the wife applied for enforcement of the court order for the payment of her maintenance during pregnancy at \$75(BND) per month for 7 months and also her *mut'a al-talaq* at \$50(BND) which gave a total of \$575(BND). The payment was due for over three years from the date on which the court order was issued and indicates that the issue of husband's non-compliance has become a worrying phenomenon. This in fact raises a great concern for some authorities in the country. To quote the Deputy Minister of Culture, Youth and Sports Datin Paduka Hj Adina Othman she says, "Some divorced men default on providing *nafkah* (sustenance) for their children despite a court order." Therefore, this kind of legal action is important to protect the economic welfare of the beneficiary especially the divorced woman and her children. However, the very limited number of cases of the application for the enforcement of the court order which were

⁵⁶¹ Quran, 16:90

⁵⁶² MTS/45/2001/PPH

made by the ex-wives in the Brunei Syariah court suggests that in reality not many women want to take legal action against their defiant ex-husbands. According to Raihanah⁵⁶³ many women refused to take legal action 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. That is why the issue of non-compliance becomes an on-going concern in Brunei these days which needs critical attention.

Therefore, to address these issues, it might be appropriate to take an example from the experience of several countries that have already established non-court administrative mechanisms for the enforcement of financial support orders. For example, in the United Kingdom,⁵⁶⁴ the administrative body known as the Child Support Agency (CSA) is responsible for calculating the amount of child maintenance, but the parties can choose either 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 Egypt, a Family Insurance System Fund law was passed in 2004 to create a specialized fund as a measure to address the issues of

⁵⁶³ Raihanah Azhari, *Sulh dalam perundangan Islam: Kajian di Jabatan Kehakiman Syariah Selangor Darul Ehsan* (Unpublished PhD thesis). (University of Malaya: Kuala Lumpur, 2005), as in Muslihah Hasbullah & prof. Dr. Najibah Mohd Zin, "How Divorced Women Can Effectively Enforce the Financial Support Orders: The Legal and Administrative Actions", *International Journal of Humanities and Social Science*, Vol. 2 No. 13; July 2012, 145, http://www.ijhssnet.com/journals/Vol_2_No_13_July_2012/14.pdf

⁵⁶⁴ The House of Commons Debates-Hansard, 2006 (Memorandum submitted by One Parent Families. United Kingdom: UK Parliament) <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmworpen/291/219we06.html>, as in Hasbullah & Mohd Zin, "How Divorced Women", 146

the non-payment of maintenance to the ex-wives and children.⁵⁶⁵ 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 providing a good living standard for the family after divorce, while at the same time ensuring that ex-husbands comply with maintenance orders.⁵⁶⁶

In Brunei, the IFLA (Cap. 217) and the SCCPO 2005 seem to be the only method applicable to enforce a judgment or order for financial matters after divorce. However, by referring to the above quoted examples, the *Syar'ie* judges should not hesitate to impose other mechanisms such as administrative enforcement rather than strictly be reliant on court judgements through attachment of earnings orders as well as seizure and sale of property and garnishee proceedings as provided under the existing law. Administrative methods can range from telephoning the payer and negotiating a payment; garnishment and attachment of the payer's annual bonus and gratuity fund; tracing the payer through national information banks etc. Warrants of arrest and committal orders should only be taken as a last resort. Imprisonment can be considered as a threat for the defendant to make payment in order for him to escape the sentence.

⁵⁶⁵ Egyptian Law, Law No.11 of 2004, Art. 2

⁵⁶⁶ Ibid

4.4 SYARIAH COURT CIVIL PROCEDURES ORDER, 2005

The Syariah Court Civil Procedures Order 2005 was gazetted on 6th April 2005 laying down the various rules and procedures for civil matters in a Syariah court. It contains among other matters provisions on the mode of commencing proceedings, the parties to proceedings, service of proceedings, interpleader, pleading, payment into and out of the court, settlement, withdrawal and discharge of proceedings, evidence, the hearing, appeals, judgments and orders and many other matters connected with Syariah court proceedings. To a large extent, they are similar to the Rules of Civil Procedure for the civil court, with certain modifications to bring the law into line with the teachings of Islam. A provision worth noting is section 235 which provides:

s 235 (1) Any provision or interpretation of the provisions in this Order that is inconsistent with *Hukum Syara'* shall be invalid to the extent of its inconsistency.

(2) In relation to any matter which is not expressly provided for in this Order or in any rules made under this Order, the Court shall apply *Hukum Syara'*.

This reference to *Hukum Syara'* or Syariah rulings shows that the primary sources of Islamic law will still have to be referred to for a full interpretation of some provisions. This would mean that a Syariah judge is given a freedom to choose from the various interpretations in the Quran and Sunnah and would apply what he thinks appropriate in his judgment. It appears that the doctrine of *ijtihad* is seen as a powerful weapon or tool in the hand of the Syariah legislature or a Syariah court of law in Brunei.

4.4.1 Who Can Make an Application?

In an application for financial claims or orders in divorce proceedings, the person applying may be referred to as the Plaintiff, and the other party as the Defendant which

also includes the Respondent.⁵⁶⁷ Hence, either husband or wife can make an application to the Syariah court for orders to resolve issues over financial matters upon divorce, regardless who started the divorce proceedings. However, as maintenance during *'iddah* and *mut'a al-talaq* are the exclusive rights of women after divorce these applications are only made by the wife and not the husband. This also includes an application for a maintenance order for children where the claim is always brought by the mother. Unlike maintenance and *mut'a al-talaq* orders, *harta sepencarian* can be claimed by either husband or wife. The Syariah court also can make variation orders for maintenance that may be applied by either spouse if the other spouse has a significant change of circumstances.

Furthermore, at least one of the parties to the proceedings must be a Muslim when the application is filed, and also he or she at that time must be a Brunei citizen or resident. There is also section 5(1) of the IFLA (Cap. 217) which states as follows:

s 5(1) Notwithstanding any contrary provisions in any written law, this Order shall apply in any matter in which at least one of the parties professes the Islamic religion and at least one of the parties, whether or not he professes the Islamic religion, in a *bermukim*⁵⁶⁸ manner in Brunei Darussalam or is *bermastautin*⁵⁶⁹ in Brunei Darussalam but in a *bermukim* manner outside Brunei Darussalam.

⁵⁶⁷ s 18

⁵⁶⁸ It is a Malay word and has been defined under s 2 of IFLA (Cap. 217) as residing without the intention to *bermastautin* in a certain area whilst not being a traveller

⁵⁶⁹ A Malay word which means permanently or ordinarily residing in a certain area. This definition is given by s 2 of IFLA (Cap. 217)

4.4.2 How to Initiate a Court Proceeding

Basically, there are two types of procedures in relation to an application for civil actions that may be made in the Syariah court namely summons and applications.⁵⁷⁰ A summons is a civil action or proceeding that is to be commenced with a summons together with a statement of claim;⁵⁷¹ whereas an application is a civil action or proceeding which is to be started with notice of application supported with an affidavit.⁵⁷² Cases which should start by an application are those which are for a wife's maintenance during *'iddah* and also financial support for her children, while *mut'a al-talaq* and *harta sepencarian* cases are the financial cases following a divorce that are to be commenced with summons.⁵⁷³

To initiate court proceedings for *mut'a al-talaq* and *harta sepencarian*, MS2 is the main document used by the Syariah courts to which should be attached with a Statement of Claim which shall comply with the requirements of section 62 of the SCCPO 2005.⁵⁷⁴ Other forms are MS15 (Judgment (or Order) on interpleader summons),⁵⁷⁵ MS16 (Defense),⁵⁷⁶ MS17 (Notice of Hearing of Action Transferred from Subordinate Court to High Court),⁵⁷⁷ MS18 (Notice of transfer of action to Syariah High

⁵⁷⁰ s 8 of the SCCPO 2005 provides:

“8(1) Subject to subsection (2) or any other written law, every civil proceeding in a Court shall be begun by summons.

(2) All proceedings in respect of any of the matters specified in the Third Schedule shall be begun by application.”

⁵⁷¹ SCCPO 2005, s 9

⁵⁷² SCCPO 2005, s 14

⁵⁷³ This can be referred to the Third Schedule of SCCPO 2005

⁵⁷⁴ This has been provided for under s 9 of SCCPO 2005

⁵⁷⁵ SCCPO 2005, s 61(3)

⁵⁷⁶ Ibid, s 63(3)

⁵⁷⁷ Ibid, s 91(1)

Court from Syariah Subordinate Court),⁵⁷⁸ MS19 (Notice of Discontinuance)⁵⁷⁹ whichever is necessary. A Personal Details form is required to be filed together with MS2. Various documents such as an identification card (IC) of the parties, certificate of marriage or divorce, birth certificate or identification card of children, previous court order etc., are also needed to be attached to the forms.

As for the maintenance for both wife and children, the application should be made by notice in Form MS 3⁵⁸⁰ supported by an affidavit sworn in accordance with the law.⁵⁸¹ Another set of forms namely MS26 (Form of Affidavit),⁵⁸² MS27 (*Jurat* Form),⁵⁸³ MS28 (Identification of Exhibit)⁵⁸⁴ and Personal Details are also important materials that need to be completed as a part of the application. The application must clearly state in full the nature of the order applied for and further should contain a detailed summary of the facts of circumstances to support his or her application.⁵⁸⁵ When applying, MS3 also requires a number of documents such as the identification card (IC) of the parties, marriage or divorce certificate, birth certificate or IC of the children, Bank account book etc., that are to be filed at the same time.

⁵⁷⁸ Ibid, s 92

⁵⁷⁹ Ibid, s 94(1)

⁵⁸⁰ SCCPO 2005, s 14(1)

⁵⁸¹ s 115 of SCCPO 2005 provides that “An affidavit to be used in any proceedings in Court shall be sworn—

(a) in the Federal Territories, before any Syariah Judge or Registrar;

(b) in a State of Malaysia, before the Syariah Judge or Registrar, as the case may require;

(c) at any place outside Malaysia, before any Muslim officer of the Malaysian Embassy or High Commission or Consulate or Permanent Mission thereat authorized to administer oath.”

⁵⁸² SCCPO 2005, s 113(1)

⁵⁸³ Ibid, s 116(2)

⁵⁸⁴ Ibid, s 117(2)

⁵⁸⁵ Ibid, s 14(3)

proceeding. The Court can still decree a divorce without the need to hear the application for a financial order at the same time. The divorcee may also apply for a financial claim anytime following separation. Generally, there is no time limit for the parties to make such an application provided that they are able to supply all necessary documentation to support his or her case. Hence, this practice can essentially prevent the parties from a time-consuming and stressful divorce application process.

Given that the procedure for a financial claim after divorce can be taken either by way of application or summons, the petition thus will also differ. As for an application, once it is issued, the plaintiff prepares an affidavit to swear before a Syariah Court officer to confirm that the contents of the application are true.⁵⁸⁶ In this process, the Form MS27 needs to be signed by the officer, verifying the person who makes an affidavit before him.⁵⁸⁷ The court then will issue a notice to be served upon the other party which is normally carried out by the court. This is to ensure that the service has taken place but in some circumstances, the plaintiff will serve it personally on the defendant. Once the notice has been received, the defendant should file a defense. If the plaintiff is the husband (which is normal) and he wishes to dispute his wife's claim regarding maintenance for herself and also her children he must do so within two days of the receipt date. By virtue of rule 120 of SCCP 2005 no affidavit may be filed after the trial has begun except with leave of the Court. This connotes the meaning that all types of document of forms or any relevant information in conjunction with maintenance cases should be filed before the date of the first hearing.

⁵⁸⁶ SCCPO 2005, s 115

⁵⁸⁷ Ibid, s 116(2)

For a summons on the other hand, the defendant will be given seven days to file his defense to the court. Upon receipt of the summons, the defendant if he intends to defend or dispute the claims must complete the defence statement form (MS16) and returns the completed form to the Court at any time prior to the day of appearance. He may also dispute the plaintiff's claim on the day of appearance itself and the Court may then order him to serve a defence within such time as it may direct.⁵⁸⁸

When either procedure (application or summon) is completed with the relevant court fee, the Syariah Court will fix a first appointment hearing with a Syariah Subordinate Court Judge on the next available date approximately 12 to 24 weeks ahead.⁵⁸⁹ A notice for court appearance on any specific date fixed by the court will be served on the parties together with the Form MS2 or MS3.

4.4.4 Syariah Court's Hearing Stages as it is Today

At the first hearing, both parties to the proceedings must attend, and if they are represented by a Syariah lawyer must also appear with them. This appointment is conducted with the objective of defining the issues in dispute which is also known as a directions or case management hearing. At this very first appointment, the parties will give the judge a brief outline of the case and from that the judge will make directions as to what should happen next. Often at this stage, if an agreement is reached regarding the financial claims one party has against the other, then the divorce decree will be obtained

⁵⁸⁸ Ibid, s 63(1)

⁵⁸⁹ This is based on the researcher's own estimation by looking at the date of which the application was made and also the date that both parties to proceeding are called to appear in court for first hearing or case mention

together with a court order stating the parties' full agreement towards their financial claims settlement. Thus it is straightforward and the financial settlement is made without having a hearing.

If however, the parties cannot reach an agreement at this stage, the court will list the matter for another hearing. This sometimes, will result in a number of hearings before a final decision or financial order can be made by the Syariah Court. The hearings following the directions case appointment are treated initially as meetings held for the purposes of negotiation and discussion to see if an agreement can be reached between the parties. In this hearing process, a judge may also hear evidence from the parties and also review documents. However, the divorce decree is not stopped because of unsettled financial claims. Often the plaintiff is advised to make a separate application for his or her financial claims to be tried on a later date.⁵⁹⁰ If the likelihood of an agreement being reached is remote then it will proceed to a final hearing. At the end of the hearing, the court will exercise its wide discretion to make an order determining the financial provision for the parties on divorce.

It is a duty for both parties to attend all hearings.⁵⁹¹ However, in some circumstances the court may make a final order even without the presence of the defendant or respondent.⁵⁹² In rare situations, where the plaintiff is absent in one of the hearings, the Syariah Court Judge may order that the case be dismissed.⁵⁹³ Their absence

⁵⁹⁰ This can be seen in many decided court cases where financial claims were made together with the divorce application as will be illustrated in chapter 5

⁵⁹¹ SCCPO 2005, s 123(1)

⁵⁹² Ibid, s 124(2)

⁵⁹³ Ibid, s 124(3)

however must be subject to proof of due service and also be based on a reason that is valid according to the law or Syariah.

4.4.5 Enforcement of the Payment for Financial Claims Following Divorce Orders

All orders delivered by the courts for the payment of money either by instalments or in a lump sum must be complied with.⁵⁹⁴ There are various methods of enforcement for the payment of money that the Syariah court is empowered to execute namely an attachment of earnings order,⁵⁹⁵ seizure and sale, garnishee proceedings and committal order.⁵⁹⁶ As discussed earlier, the attachment of earnings order is a method that is widely used by the court in enforcing the payment of money in cases of financial matters after divorce. Where an attachment of earning order is made, the defendant and his employer are duty bound to comply with such order.⁵⁹⁷ Failure to comply will be penalized under section 136 of the IFLA (Cap. 217). Nevertheless, the attachment of earning order will not always be the best solution in all situations. Essentially, it will only help if the husband is in paid employment but not for the one who is self-employed.

A seizure and sale order is another method which can be used by the court to execute the payment of a financial claim order. In the case where the ex-husband fails to obey the court order to pay his wife's or children's financial support while he has the means to do so, the wife may apply to the court to prohibit him from dealing with his

⁵⁹⁴ Ibid, s 136-137

⁵⁹⁵ IFLA (Cap. 217), s 84

⁵⁹⁶ SCCPO 2005, s 150

⁵⁹⁷ IFLA (Cap. 217), s 87

property.⁵⁹⁸ The property that can be ordered to be seized to satisfy the wife's claim includes money, shares, stocks, debentures, bonds and also jewelery. If the property or the asset that the husband owns is in the form of money, the court can order for the money to be seized and transfer it to the ex-wife. Whereas for property which is not transferable by delivery such as shares, stocks, debentures and bonds, it shall be seized and sold, after which the court can permit the transfer of the proceeds to the ex-wife to pay his debts. The provision which contains the guidelines on the execution by seizure and sale can be found in section 163 of SCCPO 2005.

Alternatively, to enforce court orders for financial claim cases, a garnishee proceeding is also possible in Brunei Syariah court. It is an order directed at the garnishee, requesting him to release to the judgment creditor any moneys which he owes the judgment debtor. The law governing garnishee proceedings is found in section 164 of SCCPO 2005.

The law provides that when an ex-husband willfully fails or intentionally disregards to comply with the court order for payment of any amount, he is liable to punishment provided for by section 133 of IFLA (Cap. 217). The punishment that the court is empowered to impose, is if the order is for monthly payments, imprisonment not exceeding one month for each monthly payment that is unpaid; or, if it is for any other payment, imprisonment not exceeding one year. For example, if the husband defaulted in payment by instalments for two months, the court may sentence him to imprisonment for a term not exceeding two months only.

⁵⁹⁸ SCCPO 2005, s 162(1)(a)

On the other hand, in any case where the payment is to be made in a lump sum, the maximum term of imprisonment for the defaulter is one year for any such payment that remains unpaid. Therefore, if there is non-compliance on the part of the ex-husband with a financial claim order, an order of committal may be used by the Syariah court to deal with his defiance. However, before an order of committal can be made against a defaulting husband, he is given a notice to show cause as to the reason for his failure to obey the court's order. In *Nikmah*,⁵⁹⁹ before granting the committal order, the wife was ordered to apply to the Syariah High Court for a judgment order for the husband to show cause as to why he should not be sent to prison for his defiance act. The husband however, still failed to appear even after the court had allowed his application for adjournment against the committal order application made by his ex-wife. The court finally decided to grant the committal order sentencing the husband to imprisonment for 25 days until the first instalment of \$500(BND) was fully paid. In this case, the husband was ordered to pay his ex-wife the total sum of \$68,024.20(BND) for her 'iddah maintenance, *mut'a al-talaq* and also her share in the matrimonial house as harta sepencarian. After making various efforts to seek the payment, the wife finally received a lump sum payment of \$50,000(BND) from her ex-husband in 2004 and two-times payments at \$500(BND) in December 2006 and January 2007 respectively. The committal order was finally allowed in April 2007 when the husband constantly failed to obey the Syariah High Court order where the last order was the settlement over the

⁵⁹⁹ See footnote 560

remaining balance of \$17,015.95(BND) that was to be paid by instalments at \$500(BND) per month.

Another statutory remedy for treating an ex-husband who fails to adhere to the Syariah court's order for financial claim made by the wife is punishing him for an offence of contempt of court. The penalty he may face is an imprisonment not exceeding 6 months or a fine of an amount not exceeding \$2000(BND). This provision has been clearly stated in section 134 of the IFLA (Cap. 217). It is best illustrated in the case of *Nikmah* as set out earlier where the husband was sentenced with 25 days imprisonment for committing an offence of contempt of court.⁶⁰⁰

Thus it clearly shows that the law has facilitated various means of enforcement to ensure that the financial order is actually complied with in order to protect the rights of those to whom the order is made, particularly women and children. It is therefore totally left to the woman whether or not to take legal action against her defiant ex-husband for her rights and also the rights of their children. However, research indicates that not many Bruneian women came forward to take these matters into Court action⁶⁰¹ and go for the Government support instead.⁶⁰² The reasons for this appears to be that women are not aware that there exists several legal provisions to enforce their financial rights or they did not bother to obtain a relatively small amount of money from the husband after which by they had to undergo tedious and costly proceedings for that or they tended to feel guilty

⁶⁰⁰ Ibid

⁶⁰¹ Informal interview with Kartini Hj Abdullah, Registrar of Brunei Syariah High Court, September 2013

⁶⁰² It is based on the researcher's own opinion by referring to the statistic given verbally by Dk Hj Norasmawati Pg Hj Metussin, Religious Officer, Zakat Collection and Distribution Section, MUIB, that the number of Zakat applicants has been increased every year which also includes single mothers

easily when they know their ex-husband might be sent to prison if they proceed to the full legal action. However, it should be noted that there is a limitation period for an application for an enforcement order that can be made that is 6 years from the date of the judgment an order. This statutory restriction can be found in section 157(1)(b) of SCCPO 2005 which provides as follows:

s 157. (1) An order for execution to enforce a judgment or an order shall not issue without the leave of the Court-
(b) if at any time six years or more have lapsed since the date of the judgment or order.

4.5 NON-LEGAL MEASURES OR GOVERNMENT SUPPORT

One of the objectives of the Government of Brunei is to achieve zero poverty by 2035.⁶⁰³ However, statistical analysis has found there has been a considerable increase in the number of Bruneians who are categorized as poor or destitute in the last few years.⁶⁰⁴ This indicates that to some extent, these poor people include divorced women. Additionally, the previous Syariah court cases of Brunei in financial-divorce claim matters⁶⁰⁵ also prove that the children of divorced parents are most likely to live with the

⁶⁰³ *Titah* (proclamation) of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam, at the opening of the State Legislative Council meeting, new legislative Council building (Shareen Han, "Agricultural growth can help raise living standards," *Brunei Times*, March 5, 2008, accessed 09 Feb, 2015, http://bt.com.bn/home_news/2008/03/05/agricultural_growth_can_help_raise_living_standard_hm

⁶⁰⁴ Telephone interview with Dk Hj Norasmawati (See footnote 602)

⁶⁰⁵ This point can be seen in most maintenance claims cases for children as illustrated in ch. 5, E.g in the cases of *Nur Afiqah Multazimah v Erwan* (See footnote 653) and *Hashim v Pg Sabariah* (See footnote 699), both mothers applied for custody of their children which was finally decreed by the Syariah court. In both cases (and in fact in almost all child's custody and maintenance application cases) the father gave his total blessing on the mother's request to take the children in her custody. But when it came to the financial support matters for the children, many cases show that the father seemed to be reluctant and hesitant to

mother after divorce which would worsen her financial situation due to the burden to support all her children on her own. One of the main reasons for this problem is that many ex-husbands fail to fulfill their obligations of providing maintenance to their ex-wife and children. As such, the Government of Brunei has taken various measures to address this worrying phenomenon. One of them is to provide assistance to those who are needy through two main agencies: the MUIB and the Department of Community Development (JAPEM). Basically, a wide range of assistance is provided both monetary and physical such as accommodation.

4.5.1 The Islamic Religious Council of Brunei (MUIB)

The MUIB may provide financial support to individuals and families through a special fund called the *Zakat* Fund or the General Endowment Fund. The General Endowment Fund is a collection of money accumulated through *zakat mal*⁶⁰⁶ or *zakat* on wealth and also *zakat fitrah*.⁶⁰⁷ *Zakat* is an obligatory form of charity and one of the five pillars of Islam which is required of Muslims as a way of purification from selfishness and greed. In Brunei, the entitlement to the General Endowment Fund depends upon meeting the particular criteria of one of the six *asnaf* (categories of people who are

agree with the mother's request. The above quoted cases have proved this point. This might be the reason why many single mothers resort to other solutions i.e. seeking for financial aid from MUIB or JAPEM.

⁶⁰⁶ *Zakat mal* collected in Brunei are *zakat* on savings, business, gold, silver and also rice fields.

⁶⁰⁷ *Zakat fitrah* is payable every year by all Muslims according to the market value of 2.268 kilograms of rice

eligible) laid down by the Quran⁶⁰⁸ namely the poor (*faqir*),⁶⁰⁹ the needy (*miskin*),⁶¹⁰ *Amil* (workers in *Zakat* administration),⁶¹¹ *Muallaf* (those whose hearts are being reconciled),⁶¹² *al gharimin* (those in debt) and *ibn al sabil* (travellers). Other categories than the poor and the needy are not discussed here, since they do not relate directly to support for families where a divorced wife is involved. Thus, through the *Zakat* fund account, the MUIB could set up a fund to provide financial disbursement to divorced women who are in need of financial assistance. Given her financially difficult situation, the divorced woman or single mother is often treated under the categories of the poor or the needy when they apply for the assistance.⁶¹³

Assessment as to whether or not the applicants are eligible for zakat assistance, differs from one case to another as there is no statutory provision that sets out the rules or regulations to determine the extent of eligibility of that particular applicant. All applications undergo an investigation carried out by a special unit established under MUIB⁶¹⁴ and will then be brought to the meeting of the Committee of Disposing Zakat for a final decision. In general, to be eligible to be given aid through the General

⁶⁰⁸ Basically, there are eight *asnaf* that are eligible to *zakat* assistance mentioned in the Qur'an including the slaves (*ar-riqab*) and those who struggle for the cause of Allah (*Fi sabilillah*). It has submitted by the *fatwa* issued by Mufti State of Brunei (ref no: 14 MKB 3/1969, dated on 1st September 1970) that these two groups do not exist in Brunei thus confining the entitlement to the other six groups only.

⁶⁰⁹ A person who cannot make both ends meet but yet does not ask for help due to modesty and self-respect (Mushfiqur Rahman, *Zakat Calculation Primarily Based on Fiqh Az-Zakat by Yusuf Al-Qardawi*, (the Islamic Foundation: UK, 2003) 61)

⁶¹⁰ Those who are totally destitute (Ibid)

⁶¹¹ Those who collect and distribute zakat (Ibid, 62)

⁶¹² This includes people who recently became Muslims, those whose evil acts can be prevented and those who need to strengthen their commitment to the faith (Ibid)

⁶¹³ Telephone interview with Dk Hajah Norasmawati, September, 2013 (See footnote 602)

⁶¹⁴ This Unit called Zakat Collection and Distribution Unit or UKAZ, which was first established in the 1970's and was known as the Baitul Mal Zakat and Fitrah Section. The change to the existing name (UKAZ) was based on the decision made in the 9th meeting of the Religious Ministry in 1999.

Endowment Fund, an applicant must be a Muslim and a Brunei citizen or a resident in Brunei. The applicant may apply not just for herself or himself but also for the children under her or his custody. In 2004, a new policy was introduced which enables each dependent of a family to receive money from the fund separately. Prior to that, the assistance was only given to the breadwinner and not to the dependents.⁶¹⁵

Various types of assistance are offered by the MUIB such as basic necessities in terms of food, education and house accommodation (rental fee payment, renovation and construction), medical assistance, higher education institution's fees etc.⁶¹⁶ Zakat distribution in a monetary form can be made in two ways: by monthly and annual assistance. Apart from this direct financial assistance, successful applicants may also receive assistance in the form of capital to enable them to carry out activities that can support their livelihood and help them get out of poverty. Accordingly, MUIB has set out the applicable amount that the eligible family may be entitled to in respect of monthly assistance such as: (i) \$200(BND) for the head of family; (ii) \$65(BND) per head of family members (for basic needs) and; (iii) \$60(BND) per head (for children's school expenses). In the annual assistance category, the head of a family would be entitled to \$1,300(BND) (\$1200(BND) derived from the zakat fund with \$100(BND) from the Zakat and Fitrah fund) and \$380 (\$330(BND) from the zakat fund and \$50(BND) from the Zakat and Fitrah fund) per head for the dependent family members. Primarily, this

⁶¹⁵ Telephone interview with Dk Hj Norasmawati (See footnote 602)

⁶¹⁶ Rose Abdullah, "Zakat Management in Brunei Darussalam: A Case Study," (paper presented at the 7th International Conference-the Tawhidi Epistemology: Zakah and Waqf Economy, Bangi, 2010) 382, assessed 14th July 2013, http://www.academia.edu/5326631/ZAKAT_MANAGEMENT_IN_BRUNEI_DARUSSALAM_A_CASE_STUDY

assistance is meant to cater for the needs of the family when the 'Eid celebration is approaching. However, this assistance would not be given in a lump sum; rather the payment is split up into two occasions. First half of the payment is made prior to 'Eid and this is followed by another half at the end of the year.

To conclude, a spouse especially a woman without support when divorce occurs will frequently turn to the MUIB as the solution to their financial difficulties for they have been financially dependent on their husband during marriage. According to the records kept by MUIB, in the year 2013 there were about 125 divorced women or single mothers that were entitled to receive assistance from the *Zakat* fund across the country. Almost half of that total number are unemployed. Another finding that can be highlighted here is that the assistance they are likely to receive is the cash sum of \$65(BND) per month for her and her children respectively (if any) for a period of 2 years. This type of assistance is meant to cater for their basic needs. Apart from that, they also are entitled to a sum of cash of \$200(BND) as financial assistance on a monthly basis. MUIB is also paying for some of those women their house rental fee including electric and water supply bills. In fact, there were a number of cases⁶¹⁷ where a divorced woman receives various types of assistance altogether simultaneously. As far as the children concerned, the MUIB might provide a school allowance which is normally paid to the mother, without any restriction on the number of children the family might have. The sum payable to each child is \$60(BND) every month. This is to ensure that the children's educational welfare is best served. However, it is important to note that the assistance

⁶¹⁷ Telephone interview with Dk Hjh Norasmawati (See footnote 602)

particularly the one for a monthly basis only lasts for 2 years. It appears that the MUIB sets this limitation so that the parent without income could find a job within that 2 year period to maintain herself and her children. The aim was to reduce dependence upon government support.

4.5.2 The Department of Community Development (JAPEM)

There are a range of assistance programmes and schemes for the underprivileged in Brunei operated by the Department of Communities Development or JAPEM (*Jabatan Pembangunan Masyarakat*) of the Ministry of Culture, Youth and Sports. Monthly Welfare Assistance (Bantuan Kebajikan Bulanan or BKB) is one of them. It was primarily intended to help and ease the burden of an individual or a family where their livelihood is difficult and has no resource. The entitlement to BKB is not an automatic one. Assessment is on an individual case by case basis and all forms of income and capital will be taken into account in any assessment. Essentially, an applicant (a) must hold a yellow identification card (Brunei citizens); (b) be divorced, widowed or an orphan; (c) have no job and have dependents aged 18 years old or less; (d) must not receive any form of benefit such as a service pension or inherited pension, assistance from any government agency or private agency like MUIB; (e) have no other side income; and (f) must obtain a confirmation from a Government medical officer if he/she suffers any disease that is hazardous to his/her health. From the above, a divorced woman especially with children that fit within the categories may be entitled to BKB.

Through BKB, benefits are paid to eligible applicants as a cash sum to meet their fundamental needs. The benefits comprise (a) a living allowance of \$200(BND) which is paid to the head of family which includes a mother if she is on her own with her children; (b) a \$65(BND) living allowance for a child who is under 5; and (c) a school allowance at \$65(BND) for a child aged between 5 and 18. Payment is made on a monthly basis for the period of normally one year. It is important to note that the applicant may be eligible for one benefit and not the others and in some circumstances may receive all simultaneously.

Basically, there is no clear-cut rule or guideline to follow when assessing whether or not the applicant is eligible for any of those benefits. Before any decision is made, an investigation is to be carried out by the Community Welfare Officer, either by conducting an interview or paying an applicant a visit. Then the officer must prepare a full report regarding the investigation which is further to be brought into meetings of the special Committee for the final decision.

Income to be taken into account includes net earnings after all the deductions from housing cost repayments and utilities bills. However, it should be noted that the applicable amount does not take into account payment for a housing loan on a large scale which is considered as excessive. For example, if the amount of the cost repayment of a housing loan is \$1,000(BND) per month, only \$200(BND) might be taken into account in the assessable amount for eligibility and not the whole sum. Other payments for loans like car loans or personal loans will be totally disregarded.

The \$200(BND) living allowance is meant to meet the monthly needs of the applicant personally and does not include an amount for any children in the family. This is because there is a separate child welfare scheme to cater for these. As above, a child who is under the age of 5 who has not yet started his or her education he or she may receive a living allowance to cater for their basic needs. On the other hand, if such a child studies or goes to school then he/she may be entitled to school allowance so long he/she still is under 18. Under the Compulsory Education Act (Cap. 211),⁶¹⁸ it is compulsory for a parent to send his child to school whenever that child has attained a school-going age set by the law. Therefore the school allowance received through BKB will help to fulfill the needs of a child regarding his education or school expenses where a parent has no or very low income.

The statistics have revealed the increasing number of BKB applicants over the past few years.⁶¹⁹ Hence this shows that BKB is frequently the first line of support for a divorced woman who is on her own with a child and unable to work full time when her husband has left her. Despite the accessibility of these Government supports, it is important to understand that the recipient is persistently encouraged to continue to strive to find a job so as not to require these supports in the future. The JAPEM never intends to take over the responsibility of the head of family towards other family members in the giving of maintenance. As a matter of fact, it only serves as a token to ease the burden borne by that family temporarily.

⁶¹⁸ s 3

⁶¹⁹ The document is obtained from one of the officer in JAPEM, 2013

4.6 CONCLUSION

In Brunei, as compared to the previous legislation, the IFLA (Cap. 217) has showed a lot of development in the area of Islamic Family law particularly in the field of financial matters after divorce. For example, previously, there was only one provision available to regulate the maintenance of divorced wives, but now it has been increased to more than 20 provisions which contain a complete system of dealing with maintenance issues in general. The introduction of the attachment of earnings order is certainly desirable and quite consistent with the principle of Islam to remedy the issues of default payment on the part of the husband or the father. The introduction of the provision regarding *harta sepencarian* has also brought great benefit to both spouses where they are each entitled to a fair share of what he or she has contributed toward the acquisition of their matrimonial property. As for *mut'a al-talaq*, although the new provision is similar to the previous one, there has been an increasing number of applications for *mut'a al-talaq* orders which the court in most cases grants without objection. This indicates that this Islamic right of *mut'a al-talaq* today has been given greater attention than it was before. Apart from the legal protection, there has been an initiative from the Government to help Bruneian families financially, subject to certain conditions that have to be met for their eligibility. This Government support certainly would be beneficial for those divorced wives who used to be economically dependent on their husband. The children from that broken marriage are also entitled to a number of benefits that the Government has provided. From the above, it shows in general that the present provisions, be they

statutory or non-statutory are adequate to do justice for divorced parties particularly women and children.

However, it has been submitted that the present law does not set out detailed rules or guidelines how financial settlement cases should precisely be made on a divorce. Nevertheless, the law has given a very wide discretion/power to a Syariah judge to redistribute all the assets of the parties especially in a situation where a provision in the prevailing law for a specific issue is absent. It is therefore left to the judge to decide without departing himself from causing injustice to either party.

CHAPTER 5

SYARIAH COURT CASES REGARDING FINANCIAL CLAIMS FOLLOWING A DIVORCE

5.1 INTRODUCTION

This chapter will examine a series of cases involving financial disputes following a divorce which is divided into two parts. The first part will give illustrations of cases that were filed and registered in the Syariah Subordinate Courts in 2001 and 2002 while the second part will be focused on the 2010 and 2011 cases. As mentioned in the introductory chapter, permission was sought from the Syariah Court Registrar as regards an access to the cases of those selected years and was granted but yet in certain limitation. The cases that the researcher had been given access to for analysis was picked randomly by the Syariah court officer. Basically, the selection of cases was made by examining every each of those random files to determine if it can be taken as reliable evidence in seeking answer for the research questions. This requires the checklist of important elements which then to be recorded in a specified form created by the researcher⁶²⁰ such as case registration number, case name (plaintiff and respondent names), date of judgement, level of the Court in which the case was tried, forms of financial settlement involved whether it is *'iddah* maintenance, *mut'a al-talaq*, *harta sepencarian* or child maintenance, facts of the case, court decision e.g. as to whom its in favour with (a husband or a wife or children), factors that were taken into account by the Syar'ie judges, references for his decision and any other relevant factors.

⁶²⁰ See appendix C

Although the selection was certainly extensive where the researcher ended up with approximately 200 cases, but only 69 cases were used in the analysis. This is due to the fact that many of the relevant court cases were either inadequate as regards its relevant facts etc., or has a repetitive judgement or contain no/little issue that is significant enough to be raised in the study

Ultimately, to conduct and present critical analysis of the financial settlement made in the Syariah court, the study has grouped the selected examined cases into relevant categories focusing on the court judgment for whom it is given and who initiates the claim as well as contributing factors towards the dismissal or denial of claims. The comments and the findings of those cases will be discussed in some detail later in this chapter. The cases set out in this chapter would serve as the samples that represent the general trend of settlement made in many divorce financial cases in the Syariah Court of Brunei.

5.2 FINANCIAL SETTLEMENT CASES IN 2001 AND 2002

Out of 695 civil cases⁶²¹ that were registered for over two years period, i.e. 2001 and 2002, child's maintenance claims constitute most of the cases filed in the Syariah Subordinate Court in Brunei followed by *'iddah* maintenance and *mut'a al-talaq* cases. *Harta sepencarian* is the least of the financial orders upon divorce that was applied for during that time. Usually the practice in these earlier years was that the hearing would

⁶²¹ Email to author by Hajah Wan Zurina DSS Hj Abd Rahman (See footnote 5)

deal with all types of cases at that time which were registered in the Syariah court under the name of TSP (*Tuntutan Selepas Perceraian* or Claims after divorce). There was no separate procedure required as was required after 2005 when the SCCPO 2005 was first introduced. In many of the cases, the application for orders to recover arrears of payment was also made in cases for payment relating to maintenance. For the purpose of this case law analysis, a total number of 57 cases were scrutinized. However, only 39 cases will be set out to serve as illustrations which will be further divided into three parts by looking at (i) the party to whom the court judgment is in favour or (ii) whether it is based on the wife's claim or the husband's offer and (iii) what factors cause the financial order application to be denied or dismissed.

5.2.1 *'Iddah* Maintenance for Wife

a) Cases where the judgment was made in favour of wife or in accordance to wife's claims

*Amnah v Hamry*⁶²²

The parties' marriage lasted for 4 years and they had 2 children. The wife applied for her *'iddah* maintenance at a very low rate, i.e. \$100(BND) per month, of which there was no dispute at all on the part of the husband. In fact the husband made the full settlement of \$300(BND) instantly before the judge on the same day itself.

⁶²² TSP/BM 41/2001

*Nur Afiqah Multazimah@Adina wati Mohd Zain v Erwan Hassan*⁶²³

The parties' marriage lasted for about 7 years and had 3 children from that marriage. They have been divorced for just about 10 days before this application was made. The wife applied for *'iddah* maintenance at \$100(BND) per month amounting to a total of \$300(BND). The husband who was undergoing drug rehabilitation at that time agreed to make the payment as soon as he was discharged from the Drug Rehabilitation Centre and the judge consented to this.

*Rostina Abd Hamid v Ardy Ahmad*⁶²⁴

The parties had been married in 1995 and were divorced in 2001. There were two children of the marriage; daughters aged 6 and 4 years. The wife applied for *'iddah* maintenance at \$100(BND) per month amounting to a total of \$300(BND). The parties then reached a settlement. The husband who was in the army agreed to pay the amount claimed but applied to pay in instalments at \$100(BND) per month. The court by consent, allowed this application.

*Rogayah Hj Jumat v. Jamil Hj Harun*⁶²⁵

The parties had been divorced in 2001. They were 7 children from that marriage aged between 18 years old and one year old. The wife claimed \$300(BND) per month for her *'iddah* maintenance. The husband agreed to pay such an amount and he was even

⁶²³ TSP/BM 45/2001

⁶²⁴ TSP/BM 35/2001

⁶²⁵ TSP/BM 22/2001

willing to give up the matrimonial home for his ex-wife and their children. Thus, based on the agreement the parties had reached, the court decreed the *'iddah* maintenance order of \$300(BND) per month amounting to a total of \$900(BND).

*Hjh Siti Amsah Hj Idris v Saffary Aba@Ismail*⁶²⁶

They had been married for about 8 years. There were 5 children of that marriage of all whom were still under 12 years old. The husband, who worked at the Ministry of Defense, had a monthly earning and allowance amounting to a total of \$1827(BND). However, after all the deductions, there was only a sum of \$303(BND) left in his salary account. The wife in this case, had applied for *'iddah* maintenance order at only \$50(BND) per month and the husband had no objection against it. Thus the court order was decreed based on the mutual agreement reached between the parties.

*Hjh Fauziah Besar v Mohd Umar Hj Abu Bakar*⁶²⁷

The parties had been married for about 29 years, and they had 3 children. The wife claimed \$1000(BND) per month (amounting to a total of \$3000(BND)) from her husband as her *'iddah* maintenance. She had successfully proved to the court that her expenses required the sum more than \$2000(BND) per month. However, the husband kept on requesting to have the trial adjourned and he even did not appear in the court for several times. The Syariah court finally allowed the wife's application in the absence of the husband, and ordered him to pay \$750(BND) per month for *'iddah* maintenance.

⁶²⁶ TSP/BM 40/2002

⁶²⁷ TSP/BM 16/2001

*Bungsu Hj Sundit v Zakaria Hj Metussin*⁶²⁸

The parties had been divorced in 2001. In this case, the wife had applied for ‘*iddah*’ maintenance at \$200(BND) per month amounting to a total of \$600(BND). The husband was a pensioner who received a monthly allowance at \$1500(BND). The ex-wife who was a full housewife believed that the husband also had a bank saving of a total sum of \$20,000(BND). According to the husband the savings was belonged to both him and his first wife. He further added that he also had sons who financially depended on him. He had to allocate every month the sum of money at \$160(BND) and \$144(BND) for his 20 year old and 10 year old sons respectively and also a car loan repayment of \$454(BND). Although the court ruled that the wife had not been able to prove the husband’s financial resources a judgment was made in favour of her by instructing the husband to pay her the amount that she had claimed.

*Norsiah Aji v Julaihi Mail/Ismail*⁶²⁹

The parties had been divorced in 2001 by a way of *ta’liq*.⁶³⁰ They had 3 children; two girls of aged 5 and 4 years old respectively and a boy who was under a year old. The wife had applied for an ‘*iddah*’ maintenance order at \$100(BND) per month. The husband was a hospital attendant who earned a net salary including allowance of \$1067(BND) per month. A sum of \$400(BND) was deducted every month from his bank account for loan repayment. According to the wife, the ‘*iddah*’ maintenance that she claimed would be

⁶²⁸ TSP/BM 29/2000

⁶²⁹ TSP/BM 10/2002

⁶³⁰ The definition as given under s 2 of IFLA (Cap. 217), is that the vow expressed by the husband after the solemnisation of marriage in accordance with *Hukum Syara*’.

spent partly for their children's needs. Since the husband failed to appear in court in a few sessions thus the court instructed the wife to take an Islamic oath or *yamin*.⁶³¹The court then decreed the maintenance order regardless of the husband's absence. The judgment was made based on the principle as laid down under section 124(2) of SCCPO 2005.

*Hjh Masnani Hj Ishak v Mahdi Hj Junaidi*⁶³²

The parties' marriage lasted over 7 years and they had a 5 year old daughter together. In this case, the wife had applied for *iddah* maintenance at \$500(BND) per month amounting to a total of \$1500(BND). The husband who worked at Goh Hock Kee (one of the biggest car sales company in a country) and earned about \$800(BND) out of a monthly deduction for TAP saving (*Tabung Amanah Pekerja* or Employment Provident Fund). According to the husband his expenditure for petrol also required him to spend the sum between \$300(BND) and \$400(BND) for he had lived with his mother at Kuala Belait ever since the divorce. Although the husband admitted that he was a member of Amway (a multi-level-marketing business) he said the income was not very good as it required a full commitment. Due to his limited financial resources, the husband could only offer \$100(BND) per month for the maintenance. He told the court that he would not borrow any money from anyone just to satisfy his ex-wife. He also claimed that she had deliberately abandoned him for several months when they were still married. At the

⁶³¹ In reference to s 2 of the Syariah Court Evidence Order 2001, that *yamin* is defined as statement made solemnly regarding matters that would occur or otherwise occur or confirming it by pronouncing Allah or one of Allah's attributes

⁶³² TSP/BM 08/2002

beginning, the parties could not reach an amicable agreement on this *'iddah* maintenance issue and they constantly fought against each other for what they assumed are their rights. Despite the fact that the husband finally accepted the wife's arrangement, the court held that this maintenance matter should be determined by the court by taking into account the wife's needs as well as the husband's resources. The court judgment for this case was that the *'iddah* maintenance order was granted at \$750(BND) by instalments at \$100(BND) per month for 7 months. It seemed that it was made in favour of the wife but with a decreased amount.

b) Cases where the judgment was made in favour of husband or in accordance to husband's offer

*Nurul Hidayah v Pg Nordin*⁶³³

The parties' marriage lasted only for about two months whereby they got married in March and were divorced in May the same year (2001). Despite their short marriage, the wife applied for her *'iddah* maintenance at \$500(BND) per month. The husband refused to pay such a big amount considering his monthly salary net balance was extremely small that is \$7.92 only. He incurred a number of deductions namely petrol, utility bills, food, children's school expenses and so on. The husband who worked at the Department of State Finance, earned about \$1270(BND) every month, but also had financial obligations towards another wife and children. Therefore he could only offer to pay \$100(BND) per month which was rejected at first by the ex-wife. Eventually,

⁶³³ TSP/BM 34/2001

however she accepted it and the court accepted the settlement made according to the arrangement achieved between them.

*Zainon Hj Menudin v Ali Hj Bahar*⁶³⁴

The parties were divorced in 2002. The wife in this case applied for a maintenance order during *'iddah* at a total amount of \$1500(BND). The husband strongly disagreed with this claim due to his insufficient salary and claimed he could only pay \$150(BND) for the whole *'iddah*. He, a 46 years old man who was working at JKR (Department of Road Work) had a net income of approximately \$988(BND) per month with a statutory deduction of about \$175(BND). In the end, the wife accepted the offer in order to make things easier so that she could have the issue of *'iddah* maintenance settled quicker. The court order of maintenance was issued based on the agreement of both parties on that matter.

*Rosidah Morshidi v Omar Hj Bungsu*⁶³⁵

The parties got married in 1986 and they were divorced in 2002, for approximately 4 months before this application was made. They had 4 children together; 3 daughters and a son. During their marriage, the husband was working in the Royal Brunei Army Band while his ex-wife was just a housewife. However, she managed to earn income on her own at approximately \$35(BND) per day by selling various Malay foods. After the divorce, the wife lived with her auntie and the children were also with

⁶³⁴ TSP/BM 11/2002

⁶³⁵ TSP/BM 35/2002

her. She had claimed \$600(BND) for her *'iddah* maintenance but the husband refused as he claimed that the wife deserted him that she only deserved \$50(BND) per month for her *'iddah* maintenance. In this case, the wife had to accept it and the court sanctioned the maintenance order instructing the husband to pay the amount that he himself had proposed.

(c) Cases where the wife's claim is denied or dismissed or withdrawn or adjourned (that is to be made separately in a new proceeding)

*Samiah Hj Randah v Madil Sitam@Hitam*⁶³⁶

The parties' marriage lasted for about 16 years. They had seven children, four of whom were above 12 years old. They have been divorced for over a month prior to this application. The wife, besides other financial claims, applied for a maintenance order at \$1000(BND) per month amounting to a total of \$3000(BND). She was a homemaker while the ex-husband had already retired and relied entirely on his pension allowance for his daily necessities. Based on this reason, he declined to pay the maintenance claim which finally made the wife withdraw it. However, she intended to file a new maintenance order application in a separate proceeding.

*Saddah Assiah Abdullah v Mohamed Sopian Jumat*⁶³⁷

The parties' had been married for about 3 years and had 3 children from that marriage. The husband worked as a policeman earning a salary of \$1200(BND) per month. According to the husband his salary left a balance of only about \$62(BND) per

⁶³⁶ TSP/BM 43/2001

⁶³⁷ TSP/BM 44/2001

month after all the deductions from personal bank loan, car loan, children's school fees etc. The wife claimed for her 'iddah maintenance at \$250(BND) per month amounting to a total of \$750(BND). There was a strong refusal on the part of the husband as regards to the amount claimed. For this reason, the wife finally withdrew it together with her other financial claims such as *mut'a al-talaq* and *harta sepencarian*.

*Vidjayantimala Hj Mat Noor v Puasa Hj Anggas*⁶³⁸

The parties were divorced in 2002, almost a year after they got married. There was no child of that marriage. The wife in this case had filed for an 'iddah maintenance order at \$300(BND) per month. At the trial, the husband was absent for a few times as the writ of summons was not properly served to him. The husband who worked at a private company, when he finally appeared in the court declared his refusal to pay such an amount. According to him that their divorce was caused by his ex-wife and he never wanted it at all. However, the court ruled that the case was dismissed based on section 87(1) of the RCKCA (Cap. 77) on the ground that the wife was absent at the final hearing.

*Suboh Hj Saban v Abu Samah Hj Damit*⁶³⁹

The parties' marriage lasted for about 22 years. They had five children, one of whom was already married. They have been divorced for a few months prior to this application. After the divorce, the husband was not working whereas the wife was a

⁶³⁸ TSP/BM 02/2002

⁶³⁹ TSP/BM 38/2001

cleaner with a relatively small income. The husband used to work at JKR (Public Works Department) as a guard but he was fired when he was still married to the wife. At the first hearing, the husband was absent and finally the wife had to agree to file a separate claim at a later date.

*Norsiah Hj Baha v Mohammad Ali Anafiah Hj Sabtu*⁶⁴⁰

The parties were divorced in 2001 and this application was made about 2 months later. The husband was unemployed while his ex-wife worked in the army. The wife applied for her *'iddah* maintenance order at \$200(BND) per month for 3 months. Apart from this maintenance order, the wife also applied for custody of their three children and also for their maintenance. In this case, the judge sanctioned the decree of child custody to the wife and advised the wife to make a separate application for her maintenance claim.

5.2.2 *Mut'a al-Talaq Cases*

a) Cases where the judgment was made in favour of wife or in accordance to wife's claims

*Nurul Hidayah v Pg Nordin*⁶⁴¹

The parties' marriage lasted only for about two months whereby they got married in March and were divorced in May the same year (2001). The wife in this case, applied for \$5000(BND) from her husband as her *mut'a al-talaq*. The husband disputed this

⁶⁴⁰ TSP/BM 46/2001

⁶⁴¹ See footnote 632

amount and said he could only pay \$50(BND) based on the ground that his net income was very limited. Although his monthly earning was relatively good after all the deductions he alleged he only had about \$8(BND) left to spend. Indeed he also had another wife and children to maintain. The husband further said that the amount the wife asked for was unreasonable and he would not borrow money from others in order to satisfy her claim. The wife argued that the reason for her seeking \$5000 was not only for the sake of her dignity but to compensate for her being divorced without a valid reason. The husband admitted this, claiming that he did not love her and he even wanted to cancel the wedding in the first place. Since the fact that the divorce was caused by the husband is very important in determining the wife's entitlement to the right of *mut'a al-talaq*, the judge therefore allowed this issue to be heard in the court. There were also many other issues raised with the judge that needed to be looked at before the decision could be made such as the question if the husband had actually effected the divorce; if the wife was qualified to receive the sum of \$5000(BND) for her *mut'a al-talaq*; the impact of the divorce and so on. Finally the court granted the wife her application for a *mut'a al-talaq* order and ordered the husband to pay her \$5000(BND) by instalments of \$200(BND) per month for a period of 25 months. The judge in this case based his judgment by giving a priority to the wife's demand but without denying the circumstances of the husband. However, the husband made an appeal to Syariah High Court and applied for the amount to be reduced to \$1800(BND) and further to be spread over 36 months for \$50(BND) each month. The wife accepted this suggestion and a court settlement was then made based on the agreement reached between them.

*Hjh Fauziah v Hj Mohd Umar*⁶⁴²

The parties had been married for about 29 years, and they had 3 children. The wife claimed a sum of \$5000(BND) from her husband as her *mut'a al-talaq*. The husband however, did not agree with the amount as he claimed himself to be poor and weak on the basis of which he only could afford to pay \$1000(BND). In response to this statement, the wife argued that she stayed in the marriage for 29 years and she never asked him to divorce her. She further said that she could not accept the fact that she was going to become a divorcee while she did not have any sort of income to depend on. In this case, the learned judge held that there was no way that the wife could not claim that sum of \$5000(BND) for her *mut'a al-talaq* because it was the sum that was normally claimed in most *mut'a al-talaq* cases previously. Therefore, the *mut'a al-talaq application* made by the wife was allowed regardless the husband's declaration over his very limited means. Since the husband's property would be held by the court for sale in order to recover all other financial court orders besides *mut'a al-talaq* for the wife, the husband then would not face any problem to settle the *mut'a al-talaq* payment. Additionally, it was a reasonable amount considering that the duration of their marriage was quite long. It has also been shown in this case that the husband was absent in almost all the hearing appointments even after several attempts had been made to summon him to appear in the court.

⁶⁴² See footnote 627

*Hjh Masnani v Mahdi*⁶⁴³

The wife as the plaintiff for this case had applied for a *mut'a al-talaq* order of \$5000(BND), based on the reason that she had never demanded anything for the whole 7 years of their marriage. In fact she had sacrificed by moving to her husband's house far away from town, hoping for the happiness that she always expected. However since the day she moved, no single maintenance had she received from her husband. She told the court that she would not accept any bargain whatsoever against her *mut'a al-talaq* claim as the husband had neglected her badly. The husband then argued that the wife did not deserve to receive *mut'a al-talaq* as she was the one who sought for their marriage to be terminated. The wife also left him for quite a while and all his needs had been taken care of by his own mother. He further added that even though he never actually handed over the cash money of \$450(BND) to his wife (the sum he claimed his wife demanded when they were still married but which the wife denied), his act of paying all his wife's items which she bought when they went shopping together should be counted as his having fulfilled the duty of maintenance. Therefore, the amount that he offered was only \$100(BND). In this case, the wife was required to prove that the divorce was not her fault and further as to why she was entitled to *mut'a al-talaq*. The husband was not able to bring any witness to support his allegation. The court finally ordered the wife to take an Islamic oath (*yamin*) and the decision then was made in favour of her by ordering the husband to pay \$5000(BND), to be settled by instalments of \$100(BND) per month.

⁶⁴³ See footnote 632

b) Cases where the judgment was made in favour of the husband or in accordance to husband's offer

*Bungsu v Zakaria*⁶⁴⁴

The parties had been divorced in 2001. In this case, the wife had applied for *mut'a al-talaq* at the total sum of \$5000(BND). According to the wife, on the day of the hearing for their divorce decree, the husband was willing to give her \$1000(BND) as her *mut'a al-talaq* but she refused to accept it. She added that her ex-husband had promised to give her \$5000(BND) and this has been witnessed by the counseling officer who attended their case that time. At the hearing, the husband was still on his stance of not giving more than he could offer that is \$1000(BND). The court held that the wife had failed to prove her allegation that the husband would be capable to pay her as she demanded. She also refused to take an Islamic oath (*yamin*) as another method to prove she was telling the truth about her ex-husband's resources. As a result, the *mut'a al-talaq* order was granted but at the sum of \$1000(BND) only.

c) Cases where the wife's claim is denied or dismissed or withdrawn or adjourned (that is to be made separately with a new application)

*Samiah v Madil*⁶⁴⁵

The parties' marriage lasted for about 16 years and they had seven children. The wife applied for a *mut'a al-talaq* order for \$1500(BND) but her ex-husband refused to pay. The husband at that time had no job but only depended on his pension allowance which he received after all the bills payment at \$566(BND) every month excluding the

⁶⁴⁴ See footnote 627

⁶⁴⁵ See footnote 635

expenditure for everyday needs. The wife however, in the end applied for the claim to be heard separately in a new proceedings and the only financial order made was where the parties reached a settlement concerning the quantum of maintenance for their children.

*Rosidah v Omar*⁶⁴⁶

The parties got married in 1986 and got divorced 7 years later. There were 4 children from the marriage. In this case, the wife claimed \$150(BND) as her *mut'a al-talaq*, but even with this relatively small amount, yet the husband refused to pay. He claimed that his wife had left the house and had become *nusyuz*.⁶⁴⁷ Against this, the wife told the court that she left because the husband kicked her out and she could no longer stand her husband abusing her. As she received a poor response from the husband, the wife in the end withdrew the claim for her *mut'a al-talaq*.

5.2.3 Cases Involved *Harta sepencarian*

a) Cases where the judgment was made in favour of wife or in accordance to wife's claims

*Hjh Fauziah v Hj Mohd Umar*⁶⁴⁸

The parties had been married for about 29 years, and they had 3 children. The wife in this case claimed the house that had been empty since 1992. Although the repayment for the cost of the house was incurred by her ex-husband by using a

⁶⁴⁶ See footnote 634

⁶⁴⁷ It has defined under IFLA 2001(s 2)as an act by a wife against her husband which is considered as unfaithful in accordance with *Hukum Syara'*

⁶⁴⁸ See footnote 627

government loan, she also had contributed a large amount of money to cover some of the expenses in building the property. She had listed the expenditures as follows; a cash money of \$5000(BND) for the flooring in the living room; a cash sum of \$2500(BND) for installing a door gates, \$4000(BND) cash to make a courtyard, curtain making at \$10,000(BND), window and door rails at \$1800(BND), 4 sets of air conditioning with a total cost of \$3000(BND), 2 bedroom sets at \$2500(BND) and dining set at \$2500(BND) and finally a smoke suction system in the kitchen and sinks amounting to \$466(BND). However, no receipts were exhibited to the judge to prove all those payments. The husband argued that the property was not considered as *harta sepencarian* as he bought the house with his own money whereby his salary been deducted every month by the Government for the house cost repayment. Nevertheless, he would be willing to repay back the sum that the wife had spent on over the house. In his defense, he had confirmed that some of those claims were accurate and argued others were too high such as the curtain making (\$7000(BND)), the courtyard constructing (\$2000(BND)), the window railings installations (\$900(BND)), and the furniture (\$1500(BND)). The wife admitted that some amounts that the husband had argued were true but in terms of the window railings and courtyard, she persistently declared that her calculation was the accurate one. The learned judge ordered the wife to take an oath (*yamin*) to prove that she was telling the truth of spending \$34,026(BND) on such a property and she did so. The court therefore, granted her the *harta sepencarian* order, instructing the husband to pay her the total sum she demanded. It was also shown in this case that the husband had been absent

for almost all the hearing appointments even after several attempts had been made to summon him to appear in the court.

*Hjh Naimah Hj Ahmad v Hj Mohd Salleh Hj Hidup*⁶⁴⁹

The parties' marriage lasted for 18 years. There were three children from the marriage. The husband worked as an educational training officer at the Royal Brunei Armed Forces while the ex-wife was just a homemaker. In this case, the wife applied for a financial order of *harta sepencarian* for a share of the husband's gratuity fund to the extent of the 18 years of their marriage. According to her the justification for her entitlement was that while her husband was going out for work she carried out all the duties as a wife at home; taking care of the household and also the children. Her contribution though indirect, had helped the husband perform his job very well which made him earn a relatively good income and further entitled him to the grant of the Government's gratuity fund. During the hearing process, the husband however, said he has not yet retired but, in reference to a statement issued by the Department of State Finance, stated that the amount he expected to receive at the end of his service was approximately \$209,790(BND). In his defense, the husband declared that his ex-wife did not deserve a single penny from that gratuity's grant based on several authorities and grounds which among others were the *fatwa Mufti* which provides that the gratuity awarded by the Government is not a *harta sepencarian*. Besides that, the wife had also made a few attempts to tarnish the husband's image so that he would get sacked from his

⁶⁴⁹ TMM/BM/27/2001

job. However, the learned judge decided that the property in dispute was *harta sepencarian* in which the wife had a right to claim for its division, limited to 18 years shares they lived together. Based on his own calculation, the learned judge determined that that the wife was entitled to 1/8 of the total amount of \$149,608(BND) which was \$18,700(BND). Since the husband had used up all that money, the Court then ordered the husband to pay her at \$300(BND) per month by way of earning deduction until it was fully settled. At the first hearing, the court, upon the wife's request had ordered the husband to refrain himself from using that money but he ignored it and instead authorized the bank to debit his account for the settlement of his bank loan.

(b) Cases where the wife's claim is denied or dismissed or withdrawn or adjourned (that is to be made separately in a new proceeding)

*Mariah Hj Ibrahim v Yusop Hj Basri*⁶⁵⁰

The parties' marriage lasted for about 25 years and they had four children. The wife applied for the husband's gratuity fund to be divided between them to the extent of the 25 years of their marriage. The husband, who was out of a job, married another woman in 2001. Due to the husband's financial condition that time, this led the wife to change her mind and decided that the claim of *harta sepencarian* would be made separately at a later date.

⁶⁵⁰ TSP/BM 33/2001

*Ajijah Hj Ibrahim v Kamaluddin Hj Mohd Sum*⁶⁵¹

The parties got married in 2000 and their marriage was terminated 18 years later, leaving behind 7 children. After the divorce, the wife had filed a petition to claim a *harta sepencarian* order on the ownership of the vehicle belong to the husband. According to her, she needed the car because her own car was not in a good condition and it was also meant for the children too. Unfortunately, the learned judge denied her application on the basis that the property was not a *harta sepencarian* and thus it was not liable for division or transfer. Indeed, the court held that it was no point in taking possession over that car while their children need it the most. It had been used by their eldest son to send to and fetch his other siblings from school. Accordingly, she also owned a car for her everyday use.

5.2.4 Child's Maintenance Cases

(a) Cases where the judgment was made in favour of wife/children or in accordance to wife's claims (on behalf of the children)

*Norliah Uda v Mohamad Hj Damit*⁶⁵²

The parties had been divorced since 2000 and had a son. The wife, when she filed her petition, claimed for his son's maintenance from her ex-husband at \$500(BND) per month. However, on the hearing she changed her mind and had reduced it to \$400(BND) monthly. The husband agreed to satisfy her claim provided that the payment should be

⁶⁵¹ TMM/BM/30/2001

⁶⁵² TSP/BM 05/2002

made by hand. Therefore, the court granted the wife's application based on the arrangement reached by the parties.

*Nur Afiqah Multazimah v Erwan*⁶⁵³

The parties' marriage lasted for about 7 years and had 3 sons from that marriage: 6, 4 and 2 years old respectively. They had been divorced for just about 10 days before this application was made. The wife applied for a custody and maintenance order for all the children at \$100(BND) per month for each child amounting to a total of \$300(BND). The husband who was undergoing drug rehabilitation at that time agreed the child custody to be given to his ex-wife and further made the maintenance payment when he was discharged from the Drug Rehabilitation Centre. Thus, the court made a decision based on the mutual agreement between the parties on this matter.

*Noorsiah Mohamad v Sarapudin Saman*⁶⁵⁴

The wife in this case applied for child custody of their two daughters (14 and 10 years old respectively) from her ex-husband and their maintenance at \$100(BND) for each child per month. The husband at that time worked as a fireman and had a monthly earning which included all the allowances of \$1489(BND). However when he listed all the debts that he incurred every month which reached the total amount of \$1534(BND), it showed that there was nothing left for him. In resolving the child custody issues, the

⁶⁵³ See footnote 623

⁶⁵⁴ TSP/BM/10/2001

learned judge had empowered the children to choose between their parents as to whom they wished to stay. When both chose their mother, then the court had to decide whether or not the wife's or mother's claim for child maintenance should be granted. The parties however, could not reach an agreement as regards to the quantum of that maintenance. Considering his poor financial situation, the husband told the court that he preferred paying unfixed maintenance but the wife persistently voiced her stance of \$100(BND) maintenance. The husband then offered maintenance of \$50(BND) per each child but the wife was totally against it. The only amount that she found reasonable was \$75(BND) and the learned judge also agreed with her on this. The judge held that the decision to fix the maintenance at \$75(BND) per month for each child would be a fair decision for the parties even though if it was to be compared to the standard of living of Bruneians at that time such an amount was considered as low. Besides, the judge found that the statement the husband delivered before him as regards to the fact that he was full with debts appeared to be vague. By referring to authorities from the Quran, the learned judge held that whatever his financial difficulties he was having, would not absolve him from the obligation of maintenance. Therefore, the maintenance for the children's order was granted by ordering the husband to pay \$75(BND) per month for every child directly to the wife/mother.

*Umi Kalsum Hj Mohamad v Mohd Alias Budin*⁶⁵⁵

The parties' marriage lasted for about ten years whereby they got married in 1991 and were divorced in 2001. There were four children from the marriage: a 10 year old son and three daughters aged between 6 and 8 respectively. The wife in this case, besides a custody order, applied for \$150(BND) maintenance for each child from her husband. According to her, she also had not received any maintenance from her ex-husband since their divorce and she therefore filed for the arrears of it too. No court order was made previously regarding the children's matters for both custody and maintenance. While the husband worked as a policeman, he received a monthly pay at \$1823(BND), and the wife also earned \$704(BND) a monthly income of her own. However, both parties respectively had their own financial liabilities they needed to pay every month such as bank loans, credit cards, utilities, car petrol and so on. During the hearing, the wife told the court that she spent approximately \$570(BND) in meeting all the children's needs which included clothes, food and drinks, books, school stationeries, school pocket money etc. The husband in his argument said that he was aware the obligation to provide maintenance should rest on him but the only matter he did not agree was the \$150(BND) payment and instead offered \$50(BND) for every child. In this case, the decision was reached by giving child custody to the wife and ordering the husband to pay monthly maintenance to their children at \$570(BND) through an attachment of earning order. The learned judge held that the reasons as to why he made such a decision, among others were that if the provision for the maintenance of the children was inadequate, this would

⁶⁵⁵ TSP/BM 42/2001

then cause difficulties to them which would eventually affect their studies. Besides, the father's relationship with his children would be also affected and he might lose respect from them too. This would also create many social problems. The husband was not satisfied with the judgment and made an appeal to amend the decision on the said amount. His appeal was granted and the amount that he was required to pay was reduced from \$570(BND) to \$200(BND) per month for the duration of about 3 years followed by \$300(BND) maintenance until the children reached the age of 18.

*Hjh Siti Amsah v Saffary*⁶⁵⁶

They had been married for about 8 years. There were 5 children of that marriage of all whom had not reached the age of 12. The wife in this case, had applied for child custody of all their children and also a maintenance order at \$400(BND) per month (\$80(BND) for each child) if custody was given to her. The husband, who worked with the government, had a monthly earning of \$1827(BND). However, after all the deductions, there was only \$303(BND) left in his account. During the hearing, both parties could not reach an agreement as to how much the maintenance should be paid. At first the husband offered only \$100(BND) maintenance. The wife said she could go down by \$100(BND) only which gave a total of \$300(BND) per month. The negotiation was a failure even after the husband agreed to raise the payment to \$150(BND). Therefore, in dealing with the dispute, the learned judge held that he would look into both situations and also the Syariah ruling on this matter. The judge maintained that both parties had

⁶⁵⁶ See footnote 625

failed to quote any authorities from the Quran or Sunnah and also from any statutory provisions in order to support their case. Ultimately, the decision was made by ordering the husband to pay \$300(BND) every month. The court held that the wife had been considerate enough to reduce the amount while the maintenance ranges between \$300(BND) and \$400(BND) is sensible. However, to make it easier on the husband, he was allowed to pay \$150(BND) maintenance every month while the remaining \$150(BND) would become a debt that he must pay when his condition improved.

(b) Cases where the judgment was made in favour of husband or in accordance to husband's offers

*Erawana Salleh v Bolkiah Othman*⁶⁵⁷

The parties got divorced in 1997 by a way of *ta'liq*. They had two children; a 10 year old son and an 8 year old daughter. In this case, the wife had filed for custody of both children and also their maintenance from the husband. According to her, after the divorce the husband had promised to pay their maintenance at \$50(BND) for each child every month but he had never kept his word since then. Therefore she only asked for the same amount as the husband had promised her before. Unfortunately, the husband had no job that would enable him to provide that maintenance for his children. However, he promised to settle the payment when he got a job. Since the wife failed to prove to the court her allegation on the husband's promises, the court therefore decided to grant a full custody to the wife but a joint maintenance order to both husband and wife. This means

⁶⁵⁷ TSP/BM 13/2001

that she would be responsible for the maintenance of their eldest son while their daughter was to be maintained by the husband.

*Saddah Assiah v Mohamed Sopian*⁶⁵⁸

The parties had been married for about 3 years and had 3 children from that marriage: a 3 year old daughter and 2 sons of aged 2 years and 10 months respectively. The wife had applied, apart from the child custody of the children, for a monthly maintenance order for each at \$200(BND). The husband who worked as a policeman, receiving a monthly salary of \$1200(BND) per month, refused to pay such an amount. He could only afford \$60(BND) for all (i.e. \$20 per month), claiming that his monthly resources left a balance of only about \$62(BND) per month after all the deductions for personal bank loan, car loan, children's and school fees and all sorts of statutory deductions. According to him that he came from a large family with 8 other siblings and also had another wife and children that he needed to maintain too. The wife had listed expenditures for one child that could reach up to \$308(BND) every month. However, she finally agreed to a decrease and asked for an increase of \$20(BND) only for each child that was to be paid through the court. The decision hence was made based on the amount agreed between the parties; that is \$40(BND) per month for each child.

⁶⁵⁸ See footnote 636

*Norela Hj Abdul Rahman v Hj Mohd Junaidi Hj Mohiddin*⁶⁵⁹

The parties' marriage lasted for about 6 years until it ended in divorce in 1997. They had 2 children who were born in 1991 and 1993 respectively. When the divorce was decreed by the court, the child custody order was also granted and it was given to the mother. The learned judge at that time advised her that before filing for any financial order, she should consider the husband's circumstances for being in prison and further he had no income at all. According to the wife when she came to know that her ex-husband had got out from prison and got a job she went to see him and asked for maintenance from him. However, no action had been taken by the husband over that matter. On that basis, she decided to bring this matter to the court and applied for the payment of \$200(BND) per month. At the trial, the husband told the court he was still in prison and would not be released until the next 4 years. The court decided that the duties of providing maintenance would fall on the wife's shoulder. The court held that given the circumstances of the husband at that time he then would not be obliged to provide maintenance to the children. However, he still could pay in an amount that he managed to give and when his condition has improved he should pay the full amount of \$200(BND) maintenance to them.

⁶⁵⁹ TMM/BM 19/2002

*Zainon Hj Merudin v Ali Hj Bahir*⁶⁶⁰

The parties had been divorced since 2002, over a year before this application was made. They had six children of whom five of them were over 12 years old. The wife filed a petition for child custody of their 6 children and also their maintenance from her ex-husband at \$100(BND) for each which gave a total of \$600(BND) per month. Apart from that, she also claimed the husband to provide them a house which is located at kampong Mentiri because she and the children were at that time living in a rental house. In this case, the husband offered to pay only as little as \$50(BND) per month but promised to ensure that the children's needs would be fulfilled whenever they stayed with him. In relation to the house, he told the court that he had given the property to his existing wife by way of will after they got married. His new wife in fact had contributed a lot toward that property such as repairing and maintaining it and even buying furniture too. At the hearing the ex-wife changed her mind as to the maintenance and reduced it to \$400(BND) monthly. Yet, the husband could not fulfill this as his monthly resource was very limited. Although he received \$1157(BND) every month as he told the court, but the total deductions were considerably high; that is approximately \$982(BND). With the money as little as about \$175(BND) left he could not afford much while he still had the utilities and the maintenance for his current wife as well as his daily expenses. The ex-wife had no choice but to accept whatever the husband could afford. She just wanted the case to be settled quickly on the day itself. Thus, the court granted a children's

⁶⁶⁰ See footnote 633

maintenance order by ordering the husband to pay \$50(BND) per month to the wife by way of earning deduction.

(c) Cases where the wife's claim is denied or dismissed or withdrawn or adjourned (that is to be made separately in a new proceeding)

*Norsiah v Mohammad Ali Anafiah*⁶⁶¹

The parties were divorced in 2001 and this application was made about 2 months later. The husband was unemployed while his ex-wife worked in the army. Apart from this maintenance order, the wife also applied for custody of their three children and also their maintenance. In this case, the judge sanctioned the decree of children custody to the wife and advised the wife to make a separate application for a maintenance order.

*Suboh v Abu Samah*⁶⁶²

In this case, the husband failed to appear in the court and thus the decision was made when the wife agreed to take an Islamic oath (*yamin*) to strengthen her case. She had filed a petition for child custody of their four children as well as their maintenance order. She took an oath confirming that all the children had been living with her since the divorce. According to the wife her ex-husband was no longer working at that time but she earned her own income being a cleaner. Since the husband was absent, the wife was willing to give up the maintenance claim so that the child custody issues could be heard and settled quickly because that was what concerned her greatly at that time.

⁶⁶¹ See footnote 639

⁶⁶² See footnote 638

*Kamariah Hj Bustaman v Bahar Hasan*⁶⁶³

The parties had been divorced since 1994, approximately 8 years before the application was made. Their marriage lasted for about 9 years and they had a daughter aged 13 and a son aged 11 years. The wife had claimed for the child custody of both children including their monthly maintenance at \$150(BND) for each. The wife claimed that the husband did not take a good care of the children when they were under his custody. She also received complaint from the school that the teacher had found bruises on the children's bodies. At the first hearing however, the wife did not appear in the court to further prove her allegations against the husband. The court thus allowed the husband to present his defense instead. The husband told the court that both their children had been living with him since the divorce and even a year before that (1993). He also added when they stayed with their mother and they missed their school for several months. The children in fact, when were asked about their opinion by the learned judge, they chose their father over their mother. As a result, the court decided that child custody was to be given to the father and further denied the wife's claim. The wife/mother also failed to attend the final hearing.

5.3 Financial Settlement Cases in the Recent Years

The IFLA (Cap. 217) had been implemented since 2001 but the Syariah Court Civil Procedure 2005 was not introduced until 2005. As discussed earlier, after the

⁶⁶³ TSP/BM 37/2002

SCCPO 2005 came into effect, a separate procedure was required when filing for the different types of financial order following a divorce. For example, an application is the procedure to be used for cases that involve wife's and children's maintenance, while a summons is made to initiate *mut'a al-talaq* and *harta sepencarian* proceedings. Similar to those years prior to the SCCPO 2005, financial claims following a divorce could be made either simultaneously with the divorce application or separately after the divorce has been decreed. In practice, to file a petition for divorce either party must complete Form 15 which contains all the particulars that he or she must disclose including the details about occupation, marriage, children, and also the reasons for the termination of the marriage. If it is the husband who initiates the divorce proceedings he then may state the amount that he would offer to pay for 'iddah maintenance or *mut'a al-talaq* or maintenance for his children. On the other hand, if it is the wife who starts the procedure she may quote the amount of the claims that she wishes to recover including her own 'iddah maintenance and even maintenance in arrears during marriage. A claim for a share of *Harta sepencarian* can also be made at the same time with same form. Generally, the most frequent cases filed in the Syariah court in Brunei in the two-year period i.e. 2010 and 2011, were the cases of child maintenance followed by 'iddah maintenance and then *mut'a al-talaq* cases. *Harta sepencarian* was the least financial order sought following a divorce that was made during that time. Most cases are decided based on mutual agreement reached between parties regardless of the husband's offer or the wife's demand. To analyze the law cases, this particular section is divided into three parts

according to several different areas where it consists of 30 example of cases relative to the overall number of cases that were analysed i.e. 50 cases.

5.3.1 *'Iddah Maintenance for Wife*

(a) Cases where the judgment was made in favour of wife or in accordance to wife claims

*Pg Kamariah v Yussof*⁶⁶⁴

The parties got married in 1983 and had 7 children. Both parties were working and earned a fairly good income on their own. In this case the wife applied for divorce and a number of financial orders after divorce including her *'iddah* maintenance. In her statement of claim, she said that her husband had abandoned her and their seven children without maintenance for several months before the application was made. The amount of *'iddah* maintenance she claimed for in this case was quite substantial i.e. \$1,000(BND) per month but the husband had no objection at all to fulfill it. Therefore, the maintenance order was granted by the court based on the parties' agreement together with the divorce decree.

*Harni Hj Said v Pg Mustapha Pg Brahim*⁶⁶⁵

The parties got married in 1994; approximately 17 years before the petition for divorce was filed by the wife. In her statement, the wife claimed that she and her husband

⁶⁶⁴MRHS/MAL/BM 224/2011(the word MRHS stands for *Mahkamah Rendah Syariah* or *Syariah Subordinate Court*, MAL is a Malay word means Civil, BM stands for Brunei Muara in which the area or district where the court was registered followed by the number of case and the year when it was filed. This explanation will hereafter apply to all cases that refer to the same above quotation.

⁶⁶⁵ MRHS/MAL/BM 37/2011

were constantly fighting each other and the husband was inconsiderate especially when it came to matters related to money. She also added that the husband never tried to change to get better and that was why she decided to have her marriage ended. In this case, besides the claim for children's maintenance and *harta sepencarian*, the wife also applied for 'iddah maintenance at \$100(BND) per month. The husband who worked as a hotel driver and earned \$1000 (BND) monthly income did not argue against this. Thus, the decree of divorce was obtained together with a maintenance order in the amount as agreed between the parties.

*Hjh Norul Affiza Hj Ibrahim v Shahril Hj Tengah*⁶⁶⁶

The parties got married in 2002 and had 2 sons from that marriage. Both parties were working and earned their own income; the husband was a technician whereas the wife was an accountant. In this case the wife applied for divorce and a few other financial orders after divorce including her 'iddah maintenance. In her statement of claim, she said that there was no harmonious relationship between the husband and her anymore. She further added that her husband also failed to provide for her needs, both financially and sexually. In the court, the husband declared his consent that he would pay the wife's maintenance as she wished i.e. \$200(BND) per month. Therefore, the maintenance order was granted by the court based on the parties' agreement together with the divorce decree.

⁶⁶⁶ MRHS/MAL/BM 36/2011

(b) Cases where the judgment was made in favour of husband or in accordance to husband's offer

*Limah v Ali Ajis*⁶⁶⁷

The parties got married in 1989. There was only one child from the marriage who was 6 years old. Both parties had their own career, earning more than \$1500(BND) every month. In this case it was the wife who sought divorce on several grounds; among them that they were constantly in disagreement, the husband was dishonest and did not fulfill his duties towards her. Apart from the divorce application, the wife also claimed for *'iddah* maintenance at \$500(BND) per month, amounting to a total sum of \$1500(BND). On the first appointment with the judge, the parties changed their mind to give another attempt to reconcile their marriage and the Court allowed this. However, the case was later reopened by the husband due to the fact that the reconciliation effort was a total failure. The wife also agreed to divorce and accordingly continued to bring forward similar claims as in the previous case regarding her *'iddah* maintenance. The husband disputed this and offered \$200(BND) *'iddah* maintenance per month instead. The wife had no choice but to accept this as the learned judge reminded her that if she remained in disagreement with the husband's offer then her maintenance claim would be denied and should be applied separately. The court thus, decreed a maintenance order at the sum that was finally agreed by the parties that is \$200(BND) per month giving a total sum of \$600(BND).

⁶⁶⁷ MRHS/MAL/BM/284/2010

*Kamarul Zaman v Nurulikmah*⁶⁶⁸

The parties' marriage was only 5 years when the husband applied for divorce in 2010. There was only one child of that marriage. In this case, the wife also agreed to have the marriage terminated due to the reason that they could not stay any longer as husband and wife. The husband also suggested that he would give \$50(BND) *'iddah* maintenance every month for three months to his wife and she agreed. An *'iddah* maintenance order was granted together with the divorce decree.

*Mohammad Ibrahim Metusin v Nurizzah Bazilah Hj Wahab*⁶⁶⁹

The parties got married in 2008; just about 2 years before the petition for divorce was filed by the husband. In the process of the application, the parties had to undergo a few sessions of counseling with the Religious Officer of the Ministry of Defense in which the husband worked at that time. During the appointment, the parties discussed various matters regarding financial arrangements after divorce including *'iddah* maintenance at \$200(BND) per month. Although the wife did not appear in the court, the court was satisfied that the parties' marriage had broken down and was irreparable. The divorce decree was therefore granted and so was the \$200(BND) of *'iddah* maintenance per month despite the wife's absence.

⁶⁶⁸ MRHS/MAL/BM 280/2010

⁶⁶⁹ MRHS/MAL/BM 82/2010

*Muhammad Nurul Iman Ali v Siti Ruzana Ahmad*⁶⁷⁰

The parties got married in 2007 and had a 2 year old daughter together. In 2010, the 20 year old husband filed a petition for their marriage to be terminated, declaring that there was no harmonious relationship anymore between him and his wife. He offered to pay her *'iddah* maintenance at \$50(BND) per month amounting to a total of \$150(BND). The wife who worked as a photocopier, earning \$350(BND) wages monthly, agreed to this without question. The Court therefore granted the maintenance order according to the settlement reached between parties.

(c) Cases where the financial order claim is denied or dismissed or withdrawn or adjourned (that is to be made separately in a new application)

*Suriani Mat Said v Kamal Afifin Saimon*⁶⁷¹

The parties' marriage was just about 5 years old when the wife filed for a divorce in 2011 on account that she and her husband had not lived together for over a year and she had received no maintenance in that time. During the counseling session with the Religious officer at the Ministry of Defense several matters were raised including the issue of *'iddah* maintenance. The wife wanted her husband to pay her \$100(BND) maintenance per month and this was refused by the husband when the Court asked about his opinion on this. Since there was no agreement reached between parties on *'iddah* maintenance the court then advised it to be filed separately after the divorce proceeding had finalized.

⁶⁷⁰ MRHS/MAL/BM 85/2010

⁶⁷¹ MRHS/MAL/BM 101/2011

*Nor maizatul Lebun Mohammad Suhaibun v Mohammad Sufri Tajuddin*⁶⁷²

The parties got married on May 2010, but it was not even a year later when the 37 year old wife applied for divorce in 2011. The husband, also aged 37, made money out of doing the air-conditioning services but was a lazy person, womanizer, gambler and even worse was an abusive husband. The wife based her application for marriage termination on all the quoted above characteristics. She further added that her husband never gave her a single penny for her maintenance during their marriage. In this case, she claimed for only \$100(BND) 'iddah maintenance per month but the husband disagreed and offered to pay \$50(BND) per month instead. The parties failed to come up with a mutual agreement on all the financial orders that the wife claimed in this proceeding. The court then decided that the wife's claim was denied temporarily and was to be applied separately at a later date.

*Metassim Hj Metasan v Satrimin Tayanti*⁶⁷³

The parties got married in 2009 and had a 3 years old son together. In 2011, due to constant disagreement between couples, the husband decided to file for a divorce. He was a 49 years old contractor, having an income of \$9000(BND) every month but offered to give his wife \$50(BND) per month only for her 'iddah maintenance. The wife was an Indonesian 20 years younger than the husband. In this case, the husband finally applied for the case to be withdrawn and the court allowed this. According to the Syariah Court Officer the husband's application for marriage termination could not be accepted as the

⁶⁷² MRHS/MAL/BM 48/2011

⁶⁷³ MRHS/MAL/BM 266/2011

parties had got married in Indonesia and they never registered their marriage in the Syariah Court in Brunei.

*Karmawarina Bee Sharikhan v Baharun Samsudin*⁶⁷⁴

The parties were just recently married when the wife filed a petition for divorce and financial order of 'iddah maintenance as well as *harta sepencarian*. The wife claimed that she could not stand being married to her husband as he was incapable of giving her a child. He had been suffering a serious health problem and she was not aware until after the marriage that it affected his sexual performance. The 49 years old husband who earned an income which was substantial, that is \$6000(BND) per month however declined to pay her maintenance as she wished (\$300(BND) per month). The court therefore granted the divorce decree but not the 'iddah maintenance order. The wife was advised to file a separate petition at a later date.

5.3.2 *Mut'a al-Talaq* Cases

(a) Cases where the judgment was made in favour of wife or in accordance with wife's claims

*Hjh Norhayati v Malik*⁶⁷⁵

The parties got married in 1996 and finally divorced in 2006. There were two children from the marriage. In this case, the wife claimed \$60,000(BND) *mut'a al-talaq* from her ex-husband for all the sacrifices she had made for the family over 10 years of

⁶⁷⁴ MRHS/MAL/BM 283/2011

⁶⁷⁵ MRHS/MAL/BM 654/2010

marriage. The husband even from the earlier years of their marriage was not working and it was the wife who supported the family assisted by her father. According to the wife her father had a few times provided the husband with capital so that he could open a business to earn an income but it never succeeded. In this case, both parties were represented by their Syarie lawyers respectively. However, during the trial the husband never showed up in the court despite attempts being made to reach him. Finally the court had to decide without his presence as the case had already been delayed for too long. Nevertheless, the Court asserted that he being absent did not mean that his financial capabilities whether he is wealthy or poor would be ignored. Eventually, the learned judge arrived at a decision that the wife was entitled to *mut'a al-talaq* of \$6,050(BND) that is to be settled by instalments at \$50(BND) per month for a period of 121 months.

*Hashim Tuah v Pg Sabariah Pg Daudin*⁶⁷⁶

The husband in this case filed for a divorce application based on the reasons that his wife had left the house in 1989 without his consent and further had neglected her duties as a wife even though he never neglected her maintenance. She even took all their three children with her and prohibited them to make contact with him. The husband earned a monthly income that was relatively substantial \$4,840(BND). The wife also earned her own income. On the divorce application, he offered to award her \$400(BND) *mut'a al-talaq* but this was turned down by the wife who alternatively sought for \$10,000(BND). The husband tried to negotiate the figure to \$6,000(BND) but the wife

⁶⁷⁶ MRHS/MAL/BM 775/2010

was not willing to accept this. However, agreement was finally reached when the wife agreed that the payment could be made after the husband's gratuity fund was released when he got retired. Thus, beside the divorce decree, the *mut'a al-talaq* order was also granted by the court ordering the husband to pay his wife \$10,000(BND) deferred until the husband retired.

*Dk Ratikah v Mohd Azmi*⁶⁷⁷

The wife in this case was in prison and filed for a divorce from the court after over a year she had lived separately from her husband. In their five years marriage, they did not have a child of their own. Beside her *'iddah* maintenance, she also claimed for her *mut'a al-talaq*; a cash of \$200(BND), a praying cloth, a Quran book and a gold bracelet. The husband who worked as a policeman receiving \$1,407(BND) per month, agreed to satisfy her requests. The Court order was thus issued granting a divorce decree and including a *mut'a al-talaq* order according to the arrangement achieved between parties.

*Dk Kartini v Saiful Rizan*⁶⁷⁸

The wife in this case, had applied for a *mut'a al-talaq* order at \$7,000(BND) after 5 years of marriage. They got one son together who had already reached 4 years of age when the divorce occurred. Both husband and wife had their own career with fairly good income of more than \$3000(BND) each every month. According to the wife, in their married life, she had tried enough to become a devoted, loyal, considerate and supporting

⁶⁷⁷ MRHS/MAL/BM 713/2011

⁶⁷⁸ MRHS/MAL/BM 682/2011

wife who at all times kept the husband's name and image in the best terms. Despite all the sacrifices, the husband deliberately denied her position as a wife of which he was supposed to take responsibility for both financially and sexually. This resulted her in great distress which also affected her work performance. Therefore to compensate all those pains and losses she endured, she believed that she deserved the *mut'a al-talaq* she claimed for. The husband in this case, did not dispute this and therefore a *mut'a al-talaq* order of \$7,000(BND) was granted to the wife.

*Liew Mui Len v Muhammad Jamil Abdullah Abai*⁶⁷⁹

In this case, the parties were originally a Chinese Bruneian who got married in 1985 according to Murut custom (one of the indigenous groups in Brunei). The husband however, converted to Islam in 2009 and hence their marriage became void. The wife now had applied for several financial orders in the Syariah Court including a *mut'a al-talaq* order. She told the court that she had contributed both monetarily and by effort towards the stability of the family. In her own personal opinion, the sum of *mut'a al-talaq* that she should receive was \$25,920(BND) based on the calculation of \$3(BND) rate per day for the period of 24 years marriage. The court advised the parties to discuss openly to each other and in as amicable way as possible so that their issues could be resolved by adopting a *sulh* settlement. In the end, the *mut'a al-talaq* issue was finally settled and the *sulh* document was produced, ordering the husband to allocate the

⁶⁷⁹ MRHS/MAL/BM 298/2011

provision of money amounting to a total of \$28,450(BND) extracting from his gratuity's grant to cover the *mut'a al-talaq*.

(b) Cases where the judgment was made in favour of husband or in accordance to husband's offers

*Muhammad Nurul Iman v Siti Ruzana*⁶⁸⁰

The parties got married in 2007 and had a 2 year old daughter together. In 2010, the 20 year old husband filed a petition for divorce, claiming that there was no longer harmonious relationship between him and his wife. Besides *'iddah* maintenance, he offered to pay her \$50(BND) for her *mut'a al-talaq*. The wife who earned \$350(BND) per month accepted the offer without question. The Court therefore granted the *mut'a al-talaq* order according to the settlement reached between parties.

*Sani'ah Matusin v Hj Alias Hj Metussin*⁶⁸¹

The parties got married in 1989 but their marriage ended ten years later. They had five children together. The husband was a 40 year old security guard, having an income of \$1,516(BND) per month while his ex-wife earned three times less than him as a gardener. In this case, the wife filed a number of financial orders after divorce including a *mut'a al-talaq* order at a total sum of \$240,000(BND). She believed that she had right towards *mut'a al-talaq* because the husband had divorced her outside the court without her consent. The husband totally disagreed on this, claiming that he was in great debt

⁶⁸⁰ See footnote 669

⁶⁸¹ MRHS/MAL/BM 278/2010

which only gave him about \$320(BND) to spend on every month. Therefore, he suggested that he would pay her \$500(BND) but this was rejected completely by the wife. The court held that given the fact that the divorce was not the wife's fault then she should be entitled to *mut'a al-talaq*. Accordingly in determining its amount, the court would take into account the circumstances of both husband and wife. However, the learned judge emphasized the fact that *mut'a al-talaq* was not meant to create burden and difficulties and thus finally the decision was made by ordering the husband to pay \$1000(BND) to the wife as her *mut'a al-talaq*. The said sum was to be paid by instalments at \$50(BND) per month until it was fully settled.

*Mohammad Raffizan v Suzilayanie*⁶⁸²

The parties got married in 2007 and had 2 children. After about 3 years, the 27 year old husband filed for a petition to divorce his wife. According to him his wife disobeyed him, neglected her duties as wife and had an affair with another man. On the counseling session with the officer in charge, the husband had come up with some arrangement which also including matters related to *mut'a al-talaq*. He offered to give his wife 2 pieces of clothing material as *mut'a al-talaq* and the wife, without objection accepted it. Therefore the Court's decision was based on the arrangement attained between them on this.

⁶⁸² See footnote 507

*Mohd Azami Morsidi v Norhani Hj Hassan*⁶⁸³

The parties' marriage was not even 2 years when the husband filed for divorce in 2011. He was a 27 year old army man, earning \$990(BND) per month, while his wife was a clerk at the post office. The reason for the husband to divorce his wife was that they constantly fought with each other and in fact no longer lived together for several months. For her *mut'a al-talaq*, the husband offered to give her a gold bracelet and the wife simply accepted it. Therefore the Court's decision was based on the arrangement reached between them including this matter of *mut'a al-talaq*.

*Pg Kamariah v Yussof*⁶⁸⁴

The parties got married in 1983 and there were 7 children from that marriage. Both parties were working and earned a fairly good income on their own. Apart from the divorce application, the wife also filed for a number of financial orders after divorce including a *mut'a al-talaq* order. In her statement of claim, she said that her husband had abandoned her and their seven children without maintenance for several months. The amount of *mut'a al-talaq* she claimed for in this case was \$168,000(BND) but the husband on the other hand offered \$3,000(BND) *mut'a al-talaq* to her and she simply accepted it. Therefore, the *mut'a al-talaq* order was granted based on this.

⁶⁸³ See footnote 509

⁶⁸⁴ See footnote 664

(c) Cases where the financial order claim is denied or dismissed or withdrawn or adjourned (that is to be made separately in a new application)

*Hjh Norul Affiza v Shahril*⁶⁸⁵

The parties got married in 2002 and had 2 sons from that marriage. Both parties were working and earned their own income; the husband was a technician and the wife was an accountant. Apart from the divorce application, the wife also applied for a *mut'a al-talaq* order and a few other financial orders. However, since there was no agreement reached between the parties on matters regarding *mut'a al-talaq*, it should then be filed separately as the court ordered. This approach was meant for the divorce case to be settled as quickly as possible to avoid unnecessary delay that causes injustice to either party.

*Mohd Zakhran Ahmad v Norlina Hj Lamit*⁶⁸⁶

The parties' marriage had been almost 6 years when the husband filed a divorce in 2011. There was no child from the marriage but they adopted a child a year after they got married. The husband worked at the Telbru (Telecommunication of Brunei) receiving a monthly pay of \$1,345(BND), and had offered to give a gold ring for the wife's *mut'a al-talaq*. The wife who was only a housewife, however, refused to accept it. The court denied this but granted the divorce decree together with the financial orders that the parties had agreed on earlier. The court nevertheless, advised the wife to make a *mut'a al-talaq* claim in a separate proceeding.

⁶⁸⁵ See footnote 665

⁶⁸⁶ MRHS/MAL/BM 250/2011

*Hjh Meriani v Nurudin@Nordin*⁶⁸⁷

In this case, the 49 year old wife had filed a claim of *mut'a al-talaq* at \$62,400(BND) from her former husband that she was married to for almost 24 years. There were 5 children from that marriage; 4 sons and a daughter of whom all were aged above 18 when this application was made. The wife declared that she was loyal to the husband and took care of his welfare very well which she believed would entitle her to the right of *mut'a al-talaq*. The husband aged 51, who worked at the Ministry of Internal Affairs and got paid \$2,155(BND) every month however refused to satisfy her claim. In his statement of defence, he had listed all the monthly payments that he was liable to make such as bank loan, car loan, credit card, outstanding utility bills, groceries and also financial provision for his youngest son. He also told the court that the wife must have been aware of the full commitment that the husband had been showing all those years in terms of the children's maintenance. Since there was an unsettled dispute between parties on the amount of *mut'a al-talaq*, the court urged the parties to resolve their differences by a way of *sulh*. A *Sulh* Officer was appointed to manage their settlement but unfortunately it did not turn out well. Finally, the wife voiced her intention to withdraw the claim against her ex-husband and the Court allowed it. The husband said he was really thankful and appreciated her action.

⁶⁸⁷ See footnote 517

5.3.3 Harta Sepencarian Cases

(a) Cases where the judgment was made in favour of wife or in accordance with wife's claims

*Erni Lasim v Sawdi Hj Jamaie*⁶⁸⁸

Apart from marriage termination based on *dharar syar'ie*⁶⁸⁹ as provided under section 44 of the IFLA (Cap. 217), the wife filed for two types of financial orders namely child's maintenance and *harta sepencarian*. The parties' marriage was about 11 years when she made that claim and they had 3 sons from the marriage. She wanted the husband to give her the Ibiza car as *harta sepencarian* and the husband agreed to grant her wish. The court allowed such a settlement and decreed divorce by way of *talaq*. Earlier on during the hearing, the wife had asked for the court's permission to amend her *dharar syar'ie* application when the husband voiced his denial to divorce unless by way of *talaq*.

*Nurazlina v Muhammad Azli*⁶⁹⁰

In this case, a 35 year old wife who was a Malaysian Chinese Muslim applied for several orders such as orders for child maintenance, 'iddah maintenance and also *harta sepencarian*. She was married to her husband in 2000 and had 4 children together. At

⁶⁸⁸ MRHS/MAL/BM 88/2010

⁶⁸⁹ It is one of the ways of divorce provided under s 44 of the IFLA (Cap. 217) that can be applied by a wife to enable her to release her from the bond of marriage in a situation where her husband has harmed her mentally or physically. s 2 of IFLA (Cap. 217) defines *dharar syar'ie* as harm affecting a person in respect of religion, life, body, morals, mind or property, according to what is normally recognized by *Hukum Syara'*

⁶⁹⁰ MRHS/MAL/BM 744/2010 (See footnote 538)

first, the type of divorce she wished to apply was *dharar syarie*⁶⁹¹ due to the many reasons which generally caused her great harm. This included the *harta sepencarian* on the car and a newly-built house for her and their children. She also applied for an amendment to claim other assets such as kitchen appliances and home furniture. The husband was willing to give up the car alone but not the others, and thus the settlement, with the court's consent, was to be made according to what been agreed between parties while for the non-agreed matters they had to be filed in a separate proceeding afterward.

*Pg Siti Zaliha v Masri*⁶⁹²

In this case the wife applied for a court order on *mut'a al-talaq* and *harta sepencarian* settlement that she wished to make with her ex-husband; \$10,000(BND) *mut'a al-talaq*, land at Muara, a half share of his gratuity's grant and also land together with a house at Kilanas Village. The latter house was a jointly acquired property purchased together by using a government loan which cost about \$500,000(BND). The parties, who were both during this application pensioners, got married in 1982 and their marriage ended 25 years later, leaving 6 children in the custody of the mother. Finally, the court arrived at a decision where the properties in question were ordered to be given to the parties' children.

⁶⁹¹ IFLA (Cap. 217), s 44

⁶⁹² MRHS/MAL/BM 234/2010

*Siti Mariam Hj Madewa v Idris Hj Abas*⁶⁹³

The parties' marriage lasted for over 19 years and the wife had applied for *mut'a al-talaq* and *harta sepencarian* order. After 6 months the divorce decree was granted. In this case, the property of *harta sepencarian* that the wife wished to recover was the house under the housing scheme that the husband was entitled to from the Government as well as the homewares which cost a total sum of \$12,150(BND). Both husband and wife at that time were still working with the Government as a clerk and Chief Warder respectively. The husband however, agreed to transfer the ownership of the house to their eldest child and said he would ensure that the name transfer process with the Department of State Housing would be carried out. Basically, the settlement on the *harta sepencarian* issues was achieved by way of *sulh* managed by the *Sulh* Officer appointed by the court. The court further approved the *sulh* arrangement and the decision thus arrived was based on this.

(b) Cases where the judgment was made in favour of husband or in accordance with husband's offer

*Omar Hj Bahar v Aidah Seruji*⁶⁹⁴

The parties had been married for about 12 years when the husband filed a divorce in 2011. There were three children from the marriage aged between 16 and 20 years old. The husband aged 33 was employed as a Policeman with a monthly salary of about \$2800(BND). In his petition, he offered his non-working wife the two cars of his as her

⁶⁹³ MRHS/MAL/BM 64/2010

⁶⁹⁴ MRHS/MAL/BM 34/2011

harta sepencarian and additionally, allowed her to live in the family home they used to live together as long as she desired. This offering had been well-accepted by the wife and the court's decision therefore was based on the settlement reached by the parties on the matter.

(c) Cases where the financial order claim is denied or dismissed or withdrawn or adjourned (that is to be made separately in a new application)

*Pg Kamariah v Yussof*⁶⁹⁵

In this case the wife applied for divorce and a number of financial orders after divorce including her share on properties consisting of a piece of land and the house as well as all the equipment that existed in it. The parties got married in 1983 and had 7 children together. Both parties were working and each earned an income of more than \$3000(BND) every month. In her petition, she said that her husband had abandoned her and their seven children without maintenance for several months until when she made the application. The husband agreed to fulfill all the claims she wished for in this case except that of *harta sepencarian*. Therefore, the *harta sepencarian* order was denied by the court but they allowed it to be applied for separately soon after the divorce case has been settled

⁶⁹⁵ See footnote 663

*Sani'ah v Hj Alias*⁶⁹⁶

The parties' marriage lasted for ten years and had five children. The husband was a 40 year old security guard, having an income of \$1,516(BND) per month including the pension allowance he received every month. As for the ex-wife, she only earned a salary of \$455(BND) per month working as a gardener. In this case, the wife filed a number of financial matters after divorce including *harta sepencarian* of which she claimed a half share from the husband's gratuity grant that he would receive at the end of his service. However, the court decided that such a claim should be made after the husband retired and thus in this proceeding it was denied.

*Misbah Hj Osman v Mohd Yussof Hj Abdullah*⁶⁹⁷

The wife in this case filed a petition for a marriage termination from her husband by way of *fasakh*⁶⁹⁸ under section 46 of IFLA (Cap. 217) including *harta sepencarian*. The parties were married in 1987 and had 8 children together. According to the wife that her husband constantly degraded and beat her and what is worst he had accused her of having intercourse with other man. When it came to maintenance, she never received it from the time she left her husband's house. The husband who earned about \$2,000(BND) monthly, declined to divorce her as he still loved her and he said his decision was for the sake of their children too. As for *harta sepencarian*, the wife claimed a share of her husband's gratuity fund and also a newly built house for her and their eight children to

⁶⁹⁶ See footnote 680

⁶⁹⁷ MRHS/MAL/BM 109/2011

⁶⁹⁸ It has been defined under s 2 of IFLA (Cap. 217) as the annulment of a marriage by reason of any circumstances permitted by *Hukum Syara'* in accordance with s 46

live in. The case eventually was denied by the court due to the fact that the wife was absent in the latest hearing even though she had a valid reason for that. According to her, she needed to attend a medical check-up that day and was not able to get hold of the court to inform them about the situation. Later, she applied to reopen the case but it was rejected and she was advised instead to make a new application.

5.3.4 Cases Dealing with Maintenance for Children

(a) Cases where settlement has been reached in favour of wife/children or according to wife's claims (on behalf of the children)

*Hashim v Pg Sabariah*⁶⁹⁹

The husband in this case filed for the divorce application based on the reasons that his wife had left the house without his consent and further had neglected her duties as a wife even though he never neglected her maintenance. She even took all their three children with her and prohibited them to make contact with him. Accordingly, when he made that application he proposed an arrangement regarding his children's monthly maintenance of \$160(BND) for each. The wife did not accept it and requested the payment to be increased by \$90(BND) i.e. \$250(BND) giving a total of \$750(BND) per month. The husband however, who earned a relatively substantial income of \$4,840(BND) every month, was reluctant to agree due to the debts that he was liable to pay every month such as a house loan, credit cards, maid's wages and utilities. According to him there was nothing left for him to cater his daily needs. A settlement was eventually

⁶⁹⁹ See footnote 675

reached when the husband was ordered to pay \$200(BND) per month for the maintenance of each child.

*Ismawi Aswandi Ismail v Anati Mohamd*⁷⁰⁰

In this case the husband applied for divorce and suggested a few settlements regarding maintenance for his wife and his two children including their custody as well as *mut'a al-talaq* if the divorce was decreed. He offered to pay to both his children \$100(BND) per month but the wife requested an increase. The court allowed the request and therefore ordered the husband to provide \$200(BND) maintenance every month for both children through TPT payment.

*Norbayah v Rossam*⁷⁰¹

The parties were just recently divorced when the wife made an application for the execution of the financial order that had been issued earlier with the divorce decree. According to the previous court order the custody of the children was to be given equally to both parties. A maintenance order was also granted ordering the husband to pay \$100(BND) per month to each child. The wife told the court that the husband had missed a few payments of the children's support and therefore she applied for the further payments to be made by way of earnings deduction. The court allowed this and thus the settlement regarding their children's maintenance was no longer paid by hand but instead through a TPT payment at \$200(BND) per month.

⁷⁰⁰ MRHS/MAL/BM 322/2011

⁷⁰¹ MRHS/MAL/BM 460/2010

(b) Cases where settlement has been reached in favour of husband/father or in accordance to husband's/father's offers

*Masniah Hj Bungsu v Mohammad Hj Abu Talip@Ali*⁷⁰²

Apart from the application for a divorce decree, the wife applied for several financial orders including a maintenance order for her four sons who were aged 17, 13, 10 and 2 years old respectively. The amount of maintenance that she claimed for them was a \$100(BND) payment for each child, amounting to a total of \$400(BND) per month from her husband. The husband was unemployed but ran a business of his own. The court finally decided that the provision for that of children's maintenance would be according to what the husband or the father was capable of. There was no precise amount fixed for the children's maintenance.

*Nor Idahwati Hj Abd hamid v Khalid Abdullah*⁷⁰³

The parties were just after several months divorced when the wife filed a petition for maintenance payments for her 2 children: both were boys aged 11 and 8 years old. Both the wife and her ex-husband were employed at the Government sector where the wife earned \$630(BND) while the husband received \$850(BND) every month. In this case, the wife claimed for \$100(BND) for each son, gave a total of \$200(BND) for the husband to pay every month. The husband however, was reluctant to do so, claiming that the monthly liabilities that he incurred was quite a lot i.e. \$553(BND) per month, which did not include the daily expenses. The wife agreed to whatever amount the husband had

⁷⁰² MRHS/MAL/BM 365/2010

⁷⁰³ MRHS/MAL/BM 76/2010

offered her, and the court in the end ordered the husband to pay \$50(BND) for each child per month by way of TPT starting from May 2010. The court held that the payment for 3 months maintenance which was in arrears since February 2010 was to be settled by hand.

*Mohammad Ibrahim v Nurizzah Bazilah*⁷⁰⁴

The parties got married in 2008; just about 2 years before the petition for divorce was filed by the husband. In the process of the application, the parties had to undergo a few sessions of counseling with the Religious Officer of the Ministry of Defense in which the husband was employed at that time. During the counseling sessions, the parties discussed various matters regarding financial arrangements after divorce including the provision for child's maintenance at \$150(BND) per month. The wife in this case never appeared in the court even after several attempts were made to reach and summon her. The divorce decree nevertheless, was granted and so was a maintenance order for his child at \$150(BND) per month.

*Ali Zaidi Dayem v Fatin Syahirah Abu Bakar*⁷⁰⁵

The parties were married in 2007 and they had a daughter of 3 years age together. When filing for a divorce in 2011, he stated that he would pay \$50(BND) every month for the maintenance of his daughter and he also applied for joint custody of her. At the hearing, the wife aged 19 years old, had voiced her consent to all matters that the husband had suggested including the payment by hand. The husband who worked in the army

⁷⁰⁴ See footnote 668

⁷⁰⁵ MRHS/MAL/BM 113/2011

received a monthly salary of \$1,310(BND) while the wife earned an income of her own at \$700(BND) per month. The court therefore issued an order, granting a divorce decree and also a child maintenance order as agreed between parties.

*Pg Sufri Pg Hj Hashim v Norhaffydzah Lamat*⁷⁰⁶

When filing for a divorce petition, a 35 year old husband also offered a few post-divorce maintenance arrangements, i.e. regarding ‘*iddah*’ maintenance and children’s support. He worked as an assistant of a Senior Technician, receiving a net income of \$1,860(BND) per month. The wife aged 25, was also a government servant with a monthly pay at \$1,070(BND). In this case, the husband proposed an arrangement where both he and his wife would be equally responsible for the maintenance of their children; a 5 year daughter and a 2 year old son. The court allowed this but denied his application for divorce. The decision on children’s maintenance matters therefore was made in accordance to what the husband had offered earlier.

(c) Cases where the financial order claim is denied or dismissed or withdrawn or adjourned (that is to be made separately in a new proceeding)

*Erni v Sawdi*⁷⁰⁷

The parties’ marriage was about 11 years old when the wife made a claim for the custody of their 3 sons as well as their maintenance from her husband, in addition to the

⁷⁰⁶ MRHS/MAL/BM 99/2011

⁷⁰⁷ See footnote 688

marriage termination on the ground of *dharar syar'ie*.⁷⁰⁸ The 3 sons were still under 12 when the application was made; two of them were 10 and 7 years old while the youngest was only 4. Both husband and wife were respectively employed by different private companies whereby the husband received a pay of \$1,000(BND) every month while his wife was paid only half of the husband's salary. In this case, the wife wanted the husband to pay her \$160(BND) maintenance for each child per month but this was rejected by him. Since no mutual agreement was achieved between parties on their children's matters, the court therefore denied the application and advised the wife to make a new claim after the divorce was decreed.

*Suriani v Kamal Afifin*⁷⁰⁹

The parties' marriage was just about 5 years old when the wife filed for divorce in 2011 on the ground that she had not lived with her husband for over a year without maintenance at all from him. During the counseling sessions with the Religious officer at the Ministry of Defense, several matters were raised including the issue of financial support for their 4 and 2 year old daughters after divorce. The wife suggested a payment of \$50(BND) for each child by TPT every month but the husband did not approve this. Based on this fact, the court advised the parties that the non-agreed matters regarding finance were to be filed separately after the divorce was finalized and this included the children's maintenance.

⁷⁰⁸ IFLA (Cap. 217), s 44

⁷⁰⁹ See footnote 670

*Nurazlina v Muhammad Azli*⁷¹⁰

The parties were married in 2000 and had 4 children together: 2 sons and 2 daughters all under the age of 12. The wife, a Malaysian Chinese Muslim, who was only a homemaker, applied for a number of financial orders including an order for children's maintenance, in addition to a petition for *dharar syar'ie*.⁷¹¹ The wife wanted the husband to provide a sum of \$200(BND) for each child every month. The husband who worked in the Royal Brunei Armed Forces was not willing to compromise except the payment of *mut'a al-talaq*. Thus, the dispute over the children maintenance was ordered to be filed separately at a later date after the divorce.

5.4 COMMENTS ON SYARIAH COURT CASES

Cases illustrating how the financial disputes after divorce are usually resolved in the Syariah courts of Brunei are set out in this Chapter. The selected years concerned for the study are those cases decided in 2001 and 2002 and 2010 and 2011, i.e. the first two years in which the law of financial settlement after divorce was implemented and the last two years after 10 years of its implementation. From the cases outset, a number of factors will be looked at.

⁷¹⁰ See footnote 690

⁷¹¹ IFLA 2001, s 44

5.4.1 *'Iddah* Maintenance Order or Arrangement Made in the Syariah Courts and its Related Matters

'Iddah maintenance orders that were applied in the Syariah courts could either be granted, denied or dismissed. At a glance, the majority of cases involving claims for *'iddah* maintenance that were decided in the four selected years were successful. The fact that the period in which the divorced wife was entitled to maintenance during *'iddah* was very short, i.e. three months, might have led the husband not to argue very much about paying it. However, it could be observed that the wife's role for her to get a successful claim was in fact the most crucial one. If she was being flexible, for example willing to reduce the sum of the claim anytime when the husband tried to contest it, then the straightforward settlement would be the outcome. This can be seen in those cases where the settlement was made in favour of the husband or according to the husband's offer in cases such as *Nurul Hidayah*,⁷¹² *Zainon*,⁷¹³ *Limah*,⁷¹⁴ etc. In fact in *Limah*,⁷¹⁵ the learned *Syar'ie* judge warned the wife that if she remained in disagreement against the amount the husband offered her, her claim would be denied and should be made separately afterward which the study found quite discriminating. The wife applying for a low sum of maintenance was also likely to have a better chance to achieve a successful claim like the claim made by *Hjh Siti Amsah*⁷¹⁶ i.e. \$50BND. However, by looking at the length of marriage and the number of children the divorced couple had together in this case, the claimable amount was way too small and the wife should deserve more.

⁷¹² See footnote 633

⁷¹³ See footnote 634

⁷¹⁴ See footnote 667

⁷¹⁵ See footnote 667

⁷¹⁶ See footnote 626

There were other circumstances where the claims were sometimes dismissed or denied like those cases where either the wife as applicant was absent as in *Vidjayantimala*⁷¹⁷ or the husband as respondent was absent as in *Suboh*,⁷¹⁸ and the constant denial on the part of husband to fulfil the wife's demand which eventually made her to withdraw the case as in *Samiah*⁷¹⁹ *Saddah Assiah*⁷²⁰ *Suriani*,⁷²¹ *Normaizatul*,⁷²² etc. The same grounds were also seen to cause the dismissal or the denial of other financial claims of *mut'a al-talaq*,⁷²³ *harta sepencarian*⁷²⁴ and maintenance for children.⁷²⁵ From the observation of those dismissed or denied cases, it could be felt that there was injustice faced by the wife particularly in a situation where the husband showed a high degree of denial against her claim. Rather than advising or ordering the husband to compromise, the fact that the Syariah court instantly denied the wife's claim instead has shown the unbalanced treatment between genders. This is totally against the Syariah law that emphasizes the Syar'ie judge to uphold justice in any circumstances.

'*Iddah* maintenance orders that were granted in the Syariah court could be in the form of periodical payments or a lump sum provision. As far as a divorced woman is concerned, if she were to be granted a periodical payment order, she may receive her maintenance for the period of her '*iddah* only. It is a general principle under the Syariah law that the period of '*iddah* is for about three months unless she is pregnant by the

⁷¹⁷ See footnote 637

⁷¹⁸ See footnote 638

⁷¹⁹ See footnote 635

⁷²⁰ See footnote 637

⁷²¹ See footnote 670

⁷²² See footnote 671

⁷²³ See *Samiah* (footnote 644), *Rosidah* (footnote 646) and *Hjh Norul Affiza* (footnote 684)

⁷²⁴ See *Pg Kamariah* (footnote 695) & *Misbah* (footnote 697)

⁷²⁵ See *Suboh* (footnote 661), *Erni* (footnote 707), *Suriani* (footnote 708) etc

former husband, in which case the period would be extended for the period of her pregnancy. To illustrate this, in *Amnah*⁷²⁶ the former husband settled a lump sum of ‘*iddah* maintenance instantly in the court and the learned judge allowed this. In another maintenance case *Nur Afiqah Multazimah*,⁷²⁷ the Syariah court allowed the arrangement proposed by the husband to make the payment to his former wife of ‘*iddah* maintenance after he was discharged from the Drug Rehabilitation Centre. Nevertheless, this could also create problems as there would be still room for a husband to delay or neglect the payment which would affect the wife greatly.

In setting the amount, there seem no hard and fast rules on the minimum or the maximum amount that a wife should receive for her ‘*iddah* maintenance. Under Syariah law, a divorced woman is entitled to get the same maintenance as she received during marriage, for food, clothing and housing. From the cases that have been outlined earlier in this chapter, it can be said that maintenance awards in the Syariah court are generally lower as opposed to the standard living of Brunei today. The most common payment order awarded was \$100(BND) as found in many Syariah court cases, for instance the cases of *Rostina*,⁷²⁸ *Amnah*,⁷²⁹ *Nur Afiqah Multazimah*,⁷³⁰ *Norsiah Aji*,⁷³¹ and *Harni*.⁷³² Among these cases, the highest maintenance order made was for the sum of \$1,000(BND) per month like that granted in the case of *Pg Kamariah*⁷³³ and the lowest

⁷²⁶ See footnote 622

⁷²⁷ See footnote 623

⁷²⁸ See footnote 624

⁷²⁹ See footnote 622

⁷³⁰ See footnote 622

⁷³¹ See footnote 628

⁷³² See footnote 664

⁷³³ See footnote 664

was only for \$50(BND) per month. The cases of *Hjh Siti Amsah*,⁷³⁴ *Rosidah*⁷³⁵ and *Kamarul Zaman*⁷³⁶ supported this view. This indicates that the parties' agreement is the key factor for the Syariah court to make a final decision. This approach shows that it would encourage the parties to resolve their differences in the most amicable way as possible and come up with a settlement that each party is happy with. However, the case is not always as it may seem, because in many of the cases set out, it can be felt that there was an element of duress against the wife because she had no choice but to accept it in order to get a speedier and non-complicated court settlement. Then again the Syariah court simply consents to it without taking into consideration the facts of whether or not the so-called agreed amount is literally sufficient or appropriate. To illustrate this, in *Zainon*,⁷³⁷ the wife had applied for 'iddah maintenance order at a total amount of \$1500(BND) which was strongly refused by her former husband due to his insufficient salary. He instead offered to pay \$150(BND) and the wife had to finally accept it in order to obtain a quick settlement. The Syariah court in this case had no objection at all against such a low maintenance so long as the agreement existed.

To argue against this, 'iddah maintenance is rather a limited provision that a divorced wife is entitled to for a short period of approximately three months. Even in the real sense, this would not put much burden on the husband as it was just a short term financial commitment. Besides, the wife deserves some sort of reward or appreciation token from the husband for all the contribution she had made for him and the family

⁷³⁴ See footnote 626

⁷³⁵ See footnote 635

⁷³⁶ See footnote 668

⁷³⁷ See footnote 634

during the marriage. If he was ready to commit himself with unnecessary debts such as a loan to buy a new hand phone or new car for which he has to incur payment for years then why should he not be obliged to pay a certain amount to his former wife for just a short period? Therefore it is the duty of the Syariah courts to ensure that the husband is really transparent with his earnings as well as his debts and then determines which debts are necessary or otherwise to eliminate any possibilities of deceit meant to avoid the obligation of *'iddah* maintenances. There are a number of cases set out previously especially those cases that were registered between the years 2001-2002 where judgment was made in favour of wife for various possible reasons. For example, the husband might not show his full commitment to the case where he failed to attend the trial in the Syariah court few times (*Hjh Fauziah*⁷³⁸ and *Norsiah Aji*)⁷³⁹ or the husband appeared reluctant to cooperate and kept on giving thousand excuses about his limited earning capacity though the amount claimed by the wife was not that substantial (*Hjh Masnani*⁷⁴⁰ and *Saddah Assiah*).⁷⁴¹

Another important point that should be looked at is the question of what factors affected the assessment of *'iddah* maintenance. From the cases set out, it clearly shows that income and earning capacity is the most important factor that influenced the court in assessing the amount of maintenance. This is best illustrated in *Rosidah*⁷⁴² where the Syariah Court made its final decision based on the agreement in which case the husband appears to have the final say about the amount the wife should get. Besides his limited

⁷³⁸ See footnote 627

⁷³⁹ See footnote 628

⁷⁴⁰ See footnote 632

⁷⁴¹ See footnote 637

⁷⁴² See footnote 635

resources, he claimed that his ex-wife had deserted him that made her deserve just \$50(BND) maintenance. The Syariah Court in this case seems to be ignorant of other factors that could be considered so that the wife would be entitled to more than that \$50(BND) maintenance, such as the length of marriage or her efforts in looking after their four children or her contribution by selling Malay food in order to ease the burden of the husband to maintain the whole family.

Besides the husband's means, the study also found that the success of 'iddah maintenance claims seem to be very much dependent on his willingness to pay. In *Kamarul Zaman*⁷⁴³ and *Mohammad Ibrahim*,⁷⁴⁴ the husband voluntarily offered to pay the wife her 'iddah maintenance even without she asked for it. Although the payable sum was quite low i.e. \$50(BND) in *Kamarul Zaman*⁷⁴⁵ and the wife was absent in *Muhammad Nurul Iman*⁷⁴⁶ but yet this manifested that some husbands showed their commitment to their wife even they were separated. In fact the willingness factor has become a focal point for some Syar'ie judges in deciding whether or not the maintenance order should be granted. E.g. the husband's unwillingness to pay the wife claims in *Saddah Assiah*⁷⁴⁷ has led to its denial by the court and to its decrease as in *Limah*.⁷⁴⁸

The needs of the wife are also very relevant in assessing the amount of 'iddah maintenance. This can be proven in those decisions which are grouped under the cases

⁷⁴³ See footnote 668

⁷⁴⁴ See footnote 669

⁷⁴⁵ See footnote 668

⁷⁴⁶ See footnote 670

⁷⁴⁷ See footnote 637

⁷⁴⁸ See footnote 667

where the settlement was made in favour of wife such as *Hjh Fauziah*⁷⁴⁹ and *Bungsu*.⁷⁵⁰ As we have discussed earlier in chapter 4, certain types of conduct would disentitle a wife to 'iddah maintenance. These specific conducts can be referred to in Section 61(2) of IFLA (Cap. 217) which are generally termed as *nusyuz* or disobedience under Islamic law. Other factors like duration of marriage, age of the parties and also health of the parties do not appear to be taken into account in the assessment of 'iddah maintenance.

5.4.2 *Mut'a al-Talaq* Orders and Arrangement made in the Syariah Courts

According to the Syafi'is the payment of *mut'a al-talaq* is incumbent on the husband to pay to his former wife subject to certain conditions. The *mut'a al-talaq* cases in this chapter earlier also show that *mut'a al-talaq* is not an absolute right but indeed a contested one when it was brought into court action. It was very likely that the wife needed to prove to the Syariah court as to why she deserved the award of *mut'a al-talaq*. This generally involved a very large amount of *mut'a al-talaq* and the husband showed some degree of refusal against it. In *Hjh Masnani*,⁷⁵¹ the wife who claimed for \$5000(BND) for her *mut'a al-talaq* was required to prove that the divorce was not her fault and further had to prove why she was entitled to such an amount of *mut'a al-talaq*. The husband in this case was quite reluctant and not willing to pay more than \$100(BND) *mut'a al-talaq*. The judgment was however made in her favour after she agreed to take an oath in order to prove her words while the husband failed to prove his. In *Bungsu*,⁷⁵²

⁷⁴⁹ See footnote 627

⁷⁵⁰ See footnote 628

⁷⁵¹ See footnote 643

⁷⁵² See footnote 644

although the wife failed to prove the husband's means and further refused to take an oath, yet the *mut'a al-talaq order* was granted at \$1,000(BND) but not as the sum she wanted i.e. \$5,000(BND). The husband in this case stressed that he would not give more than \$1,000(BND) and thus it appears to the study that the court's decision seemed to be based on both parties' situation.

A burden of proof on the part of wife is in some cases unnecessary if the claim involved was very small or when there was no objection from the husband against it. In *Hashim*,⁷⁵³ it appears that the wife successfully had her *mut'a al-talaq* application granted as the husband was willing to negotiate. A straightforward settlement was also attained in *mut'a al-talaq* of *Dk Ratikah*⁷⁵⁴ because the claimed items of *mut'a al-talaq* did not entail big money and were affordable by the husband, that were cash of \$200(BND), a praying cloth, a Quran book and a gold bracelet. The case of *Muhammad Nurul Iman*⁷⁵⁵ also provides an illustration of a quick *mut'a al-talaq* settlement as the husband voluntarily offered to pay \$50(BND) *mut'a al-talaq* to the wife when he applied for a divorce decree and the wife simply accepted this. However, by looking at such a very small *mut'a al-talaq*, one may say it was unreasonable considering her monthly income was also very small i.e. \$350(BND) and a child was also born out of that marriage which the study thinks that should entitle her to more.

Accordingly, from the *mut'a al-talaq cases* set out previously, it shows that the sum of *mut'a al-talaq* was more substantial than that of *'iddah* maintenance. The award

⁷⁵³ See footnote 676

⁷⁵⁴ See footnote 677

⁷⁵⁵ See footnote 680

could reach up to about \$28,000(BND) or more as was seen in *Liew Mui Len*.⁷⁵⁶ As regards to the payment of *mut'a al-talaq*, it can be a lump sum provision or a periodical payment. The periodical payment however, usually applies to the case where a very large sum of *mut'a al-talaq* was claimed. For example, in *Nurul Hidayah*⁷⁵⁷ and *Hjh Masnani*,⁷⁵⁸ the total cost of the payments of *mut'a al-talaq* order in both cases were to be spread over a certain period until it was fully settled, i.e. \$50(BND) per month for the former case and \$100(BND) monthly for the latter. Besides cash or money, *mut'a al-talaq* can also be in the form of property or an asset. Whereas the *mut'a al-talaq* order in *Dk Ratikah*,⁷⁵⁹ comprised of a praying cloth, a Quran book and a gold bracelet in addition to \$200(BND) cash money, the *mut'a al-talaq* that the wife received in *Mohammad Raffizan*⁷⁶⁰ was only a piece of gold bracelet. One of the most striking points noted among those *mut'a al-talaq* cases is that there was a tendency of paying *mut'a al-talaq* through a deduction from the gratuity fund that a former husband would receive when he retired. This certainly means that it would become a deferred payment in which case this could place an ex-wife at great disadvantage especially if the husband had yet many years ahead of him until his pension fund entitlement. However, this kind of settlement could also be worthwhile when dealing with the case of a husband having no other or limited means to pay at the time of court order but who would be entitled to a gratuity fund after some years. The award of this exclusive fund is often in a lump sum provision at a very massive figure. Thus the wife could benefit from this fund even though she has to wait

⁷⁵⁶ See footnote 679

⁷⁵⁷ See footnote 641

⁷⁵⁸ See footnote 643

⁷⁵⁹ See footnote 676

⁷⁶⁰ See footnote 682

for years rather than receive nothing at all and indeed it could be meant as a saving for her future use. Essentially, taking this measure could also help tackling issues of defiance or neglect by a husband which have been affecting wives and children more seriously.

In assessing the amount of *mut'a al-talaq* payment, it appears that there were a number of factors taken into account by the Syariah court. The earning capacity of the husband is often considered as in *Hjh Norhayati*⁷⁶¹ where the granted *mut'a al-talaq* was only about 10 percent (\$6,050BND) of the total amount (\$60,000BND) that the wife initially claimed when making the application. However, it could be argued that the granted amount was way too low as compared to the wife's contribution towards the marriage and children for over 10 years. It could be felt there was an element of injustice as the learned judge seemed only to look into the husband's situation and ignored other factors such as the 10 years marriage and the sacrifice the wife has made to support the family while the husband was unemployed. The fact that the husband's absence in numerous hearings proved that he did not take the matter seriously and has shown disrespect towards the court. As can be seen the *mut'a al-talaq* order was an instalment payment as small as \$50(BND) per month, so it should not be a much burden on the husband even if *mut'a al-talaq* was a large amount. The case of *Pg Kamariah*⁷⁶² also proved the same point where the husband's means and willingness was seen as the determining factors.

⁷⁶¹ See footnote 675

⁷⁶² See footnote 684

Another factor is the needs of wife like that of *Sani'ah*⁷⁶³ whereby the learned Syariah judge held that the decision to grant a \$1000(BND) *mut'a al-talaq* and not \$500BND as the husband insisted was based on looking at the condition of both parties; the husband's capacity as well as the need of the wife. However, similar to the previous case, the *mut'a al-talaq* order here was also very much low as compared to the amount the wife had claimed i.e. \$240,000(BND). By looking at both figures, one may say it was totally unreasonable and seemed to be incomparable with the 20 years the wife had spent in the marriage, devoting herself for the husband and her five children's wellbeing. In a fair sense, the wife might also be wrong as regards the claimable amount which one might find too much while the husband was not such a wealthy person. Nevertheless, the court's opinion of dropping the amount to \$1,000(BND) might cause injustice to the wife and what is more the settlement was in an instalment at only \$50(BND) per month. Ultimately, the husband's condition appeared to be what mattered the most to the judge than the condition of both as the judge stated in his judgment. Therefore, the granted amount for the wife in this case was only \$1,000(BND) whereby the court increased an additional of \$500(BND) from the sum that the husband actually insisted to pay.

Occasionally, the length of marriage was also considered. For example, in *Hjh Fauziah*⁷⁶⁴ the wife's claim of \$5000(BND) for her *mut'a al-talaq* was allowed by the Syariah court having regards to the length of their marriage which was relatively long i.e. 29 years.

⁷⁶³ See footnote 681

⁷⁶⁴ See footnote 642

5.4.3 *Harta Sepencarian* Orders and Arrangement made in the Syariah Courts with Its Related Issues

Today, claims for the division of *harta sepencarian* in the Syariah courts of Brunei have grown in number and scope. This is mainly due to the fact that the property in dispute is generally worth a lot of money and it takes various forms of property, be it movable or immovable. This claim could be initiated either by husband or wife. In *Hjh Fauziah*⁷⁶⁵ the *harta sepencarian* claim was made by the wife and it was a successful claim. The claim of *harta sepencarian* in *Omar*⁷⁶⁶ was made by the husband who offered to give up the matrimonial home to his former wife and children to live in for as long as they desired as well as two cars of theirs.

As mentioned earlier, this is a form of property or asset that a wife or husband is allowed to recover in the Syariah court in the event of divorce. From the *harta sepencarian* cases set out earlier, without looking at the decisions whether or not it was a successful claim, the cases of *Hjh Fauziah*,⁷⁶⁷ *Nurazlina*,⁷⁶⁸ *Pg Siti Zaliha*,⁷⁶⁹ *Siti Mariam*,⁷⁷⁰ *Pg Kamariah*⁷⁷¹ and *Misbah*⁷⁷² were all about claims to a house which were generally made by the wife. Land is also one of the matrimonial assets that was likely to be claimed as ownership for by either party or the parties. Many cases illustrate this like

⁷⁶⁵ See footnote 648

⁷⁶⁶ See footnote 694

⁷⁶⁷ See footnote 648

⁷⁶⁸ See footnote 690

⁷⁶⁹ See footnote 692

⁷⁷⁰ See footnote 693

⁷⁷¹ See footnote 695

⁷⁷² See footnote 697

those of *Pg Kamariah*,⁷⁷³ *Pg Siti Zaliha*⁷⁷⁴ and *Misbah*.⁷⁷⁵ Other recoverable properties and assets in the event of divorce included cars as can be observed in *Ajijah*,⁷⁷⁶ *Erni*,⁷⁷⁷ *Nurazlina*⁷⁷⁸ and *Omar*.⁷⁷⁹

Furthermore, some cases like *Hjh Naimah*,⁷⁸⁰ *Pg Siti Zaliha*,⁷⁸¹ *Sani'ah*⁷⁸² and *Misbah*⁷⁸³ show that the claim over the husband's gratuity fund has now gained popularity as a claim among divorced wives. Nevertheless, a few problems have emerged which make such claim hard to succeed. One of the main problems is the issue of determining whether or not a husband's gratuity fund is harta sepencarian to which a divorced wife is entitled to have a share in it. The State Mufti of Brunei does not view the service gratuity benefit for the government civil servant as harta sepencarian but as a personal property not liable to be divided in the event of divorce. The wife is allowed to have a share in it just as a matter of remuneration for her efforts.⁷⁸⁴ This issue was discussed in some detail in Chapter 4.

In the matter of assessment, as with the decision made in other financial disputes after divorce, an agreement achieved between parties seems to be the most important factor influencing the Syariah judges to decide. This may mean that the disputed parties have to make as much effort as possible to resolve their differences so that they could

⁷⁷³ See footnote 695

⁷⁷⁴ See footnote 692

⁷⁷⁵ See footnote 697

⁷⁷⁶ See footnote 651

⁷⁷⁷ See footnote 688

⁷⁷⁸ See footnote 690

⁷⁷⁹ See footnote 694

⁷⁸⁰ See footnote 649

⁷⁸¹ See footnote 691

⁷⁸² See footnote 696

⁷⁸³ See footnote 697

⁷⁸⁴ *Fatwa Mufti Kerajaan Brunei 2002*, 135-140 (See footnote 530)

conclude it in a more amicable and pleasant manner. Thus if an agreement is attainable between husband and wife, it would be without question that the Syariah judges who hear the case and would approve it as it was agreed and from there the final judgment would follow. This is manifested in many decided cases of *harta sepencarian* set out earlier such as *Omar*,⁷⁸⁵ *Erni*⁷⁸⁶ and *Siti Mariam*.⁷⁸⁷ However, in a situation where agreement is unachievable, it is then left to the judge to determine what he thinks appropriate to resolve the case before him. In assessing the award of the claim, the approaches of the judges differ from one to another. For example, the wife in *Hjh Fauziah*⁷⁸⁸ was instructed to take an Islamic oath to prove that she was telling the truth regarding her expenses toward the acquisition of the property in dispute. This approach was taken because the wife had no evidence to prove her words while the husband contested its accuracy. She finally agreed to do so and, based on this, the Syariah court arrived at the decision that her application for the recovery of her expenses over their *harta sepencarian* of matrimonial home should be granted. From this, it indicates that the oath-taking has been taken as one of the approaches to help a Syariah judge in his decision-making and also the application of oath-taking took place when no or little evidence could be found.

Accordingly, there were some Syariah judges who were more flexible and who were willing to look at other possible factors to help arriving at a decision that seemed more equitable for both parties. In *Hjh Naimah*⁷⁸⁹ the learned judge decided that the gratuity fund of the husband was *harta sepencarian* in which the wife had a right to claim

⁷⁸⁵ See footnote 701

⁷⁸⁶ See footnote 688

⁷⁸⁷ See footnote 693

⁷⁸⁸ See footnote 648

⁷⁸⁹ See footnote 649

for its division but limited to 18 years shares which was the time they lived together. Based on his own calculation, the learned judge determined that the wife was entitled to 1/8 of the total sum of the husband's gratuity fund (\$149, 608.80BND) which he would receive at the end of his work service and that was \$18,700(BND) in total. Therefore, one could gather that the judgment made by the Syariah judge in this case appears to be quite fair to both parties especially to the wife considering all her contributions and efforts she made during their 18 years marriage, let alone her sweat and tears bringing up their three children. Given the fact that the *fatwa* ruling does not allow the division of gratuity fund except by the way of gift or wage, the opinion of the judge granting the wife a one-eight share of it could be taken to mean remuneration for her 18 years contribution. This approach in fact is exactly what section 59(4) of IFLA (Cap. 217) intended for, i.e. to consider any contribution made during marriage in the acquisition of any property, directly or indirectly.

Other Syariah judges prefer not to hear and try any claim of *harta sepencarian* before them if the parties fail to achieve agreement on any part of it. Thus, no *harta sepencarian* order would be granted and the wife if she wished has to file a new petition on *harta sepencarian* separately at a later date to avoid the tendency to prolong the divorce case. The case of *Pg Kamariah*⁷⁹⁰ has proven this fact. In the light of this, the study found that some *Syar'ie* judge appear to be prejudicial and have no concern to give justice to wife as it should be. What he should do at least is conduct another session of

⁷⁹⁰ See footnote 695

hearing to give her a chance to state her reasons if she happens to be absent (*Misbah*)⁷⁹¹ or advice the husband to compromise and e.g. warn him of the God's punishment for deliberately not giving up the wife's share (*Pg Kamariah*)⁷⁹² and not to completely deny it. The woman would have not come to the court if she was not desperate and needed the court to help her obtaining her rights. There is a tendency if the court denies her application, this would put the woman off to make a new application for she cannot be bothered to face all over again the court bureaucratic process as well as the court fee and the expenses of travelling back and forth to the court.

It is worth mentioning here that none of the *harta sepencarian* cases set out in this chapter shows the use of experts or appraisers in obtaining an opinion or estimation on the current market value of certain assets that were in dispute. This is particularly important because the division of assets for the divorce property settlement needs to be appraised properly to give each party a fair share of the property value. In a Malaysian case of *Tarmizi Abu Hanipah v Zahara Saidin*,⁷⁹³ the court decided that the house in dispute which had a current market value of \$2,800,000(MYR) was *harta sepencarian* liable to be divided between the parties. The calculation of such value was made by a licensed appraiser appointed by one of the parties and each party indeed appointed their official appraiser respectively from different company. As the wife contributed a larger amount of monetary contribution in the acquisition of the estate than the husband, the court then held that the division should be in a ratio of 2:1. Thus, if the current, fair

⁷⁹¹ See footnote 697

⁷⁹² See footnote 694

⁷⁹³ Civil Case No. 14200-017-0028-2004

market value of the property is in place, it would be much easier for the judges to determine as to how much exactly each party will receive which consequently makes it possible for the fair and equitable distribution to materialize.

5.4.4 Maintenance Orders for Children or Arrangement made in the Syariah Courts

The right of the child to maintenance is a right that is separate, distinct and independent from the right of the wife. Having said that, the right of wife to her maintenance may be lost if she is *nusyuz*, but as far as a child is concerned nothing can absolve the child from his/her right to maintenance no matter to whom custody is given, be it his mother or his father. Under Syariah law, a father is under obligation to support his child and thus the same principle was adopted in IFLA (Cap.217) to safeguard the children's welfare. In the area of law application, most Syariah Judges strictly adhere to this principle making the father liable to pay his child a reasonable maintenance. For example, the duty for children's maintenance in *Norliah*,⁷⁹⁴ *Nur Afiqah Multazimah*,⁷⁹⁵ *Noorsiah*,⁷⁹⁶ *Hashim*,⁷⁹⁷ *Ismawi Aswandi*⁷⁹⁸ and *Nor Idahwati*⁷⁹⁹ was entirely made responsible upon the father no matter how rich or poor he is.

However, the duty to maintain a child may also be imposed upon a woman, having regards primarily to the difficult situation that the husband endures at the time of the application which enables him to earn an income. This point is best illustrated in

⁷⁹⁴ See footnote 652

⁷⁹⁵ See footnote 653

⁷⁹⁶ See footnote 654

⁷⁹⁷ See footnote 699

⁷⁹⁸ See footnote 700

⁷⁹⁹ See footnote 703

*Norela*⁸⁰⁰ where the Syariah Court placed the duty to maintain their two children to the mother alone while the father was still in the prison. The Syariah Court may also enforce a joint maintenance order to both father and mother like that of *Erawana*.⁸⁰¹ In this case, having regard to the condition of the father who had no earnings and was not working at that time, the Syariah court ordered both parents to maintain their two children equally whereby the mother had to maintain the eldest son while the maintenance for the other child would rest upon the father. In *Pg Sufri*,⁸⁰² child maintenance order was granted enforcing equal responsibility to both parent and this was actually requested by the father.

As regards the period in which the child would be entitled to his maintenance it generally lasts up to the time when the children attain 18 years of age or until they are able to maintain themselves or when they get married. This is what the Syariah judges often emphasize when they issue a court order regarding a child's maintenance. For example in *Norliah*,⁸⁰³ the court granted the wife's application for her son's maintenance at \$400(BND) per month in which case the husband, during the trial, showed no objection against fulfilling it except wishing it to be delivered by hand. The court order quotes as follows:

Based on the agreement between the two parties, the Syariah ruling and Section 76(1) of Islamic Family Law Order 1999, that this order is made to whom the claim is made that is the father to a child named Abdul Kairi Bin Mohamad was born on 5.01.1997, to pay maintenance to the said child until grown-up or has own income or get married or this order is amended, a payment at a total sum of \$400BND per month. The money is to be handed over to who made the claim (the mother of the child) as authorized by the law.

⁸⁰⁰ See footnote 659

⁸⁰¹ See footnote 657

⁸⁰² See footnote 706

⁸⁰³ See footnote 652

From the above case, it is obvious that the maintenance is often ordered for minor children. Subsequently, it is more often to find that it is the mother who normally makes the application for the child. More importantly, the mother is bound to do so as the custodian of her children, as in most cases, it is given to her and not the father. However, as shown in some decided cases in this chapter, the father may, without been asked by the mother, offer to make some provision for his children under the care of the mother as can be seen in *Ismawi Aswandi*.⁸⁰⁴

Another point worth noting is the practicality of an attachment of earning order for enforcing orders involving payment which undeniably benefits children in securing their financial support. This would mean that with an attachment of earning order, the maintenance will be paid regularly and more importantly on time without unnecessary delay. Since the introduction of section 84 of IFLA (Cap. 217) in 2001, it has been the trend in most maintenance cases where the mother would apply for the payment to be made through salary deduction of the father. Many cases illustrate this point such as the cases of *Umi Kalsum*,⁸⁰⁵ *Siti Amsah*,⁸⁰⁶ *Nor Idahwati*,⁸⁰⁷ *Norbayah*⁸⁰⁸ etc. However, it is important to note that this approach is mostly workable only when the father is in a salaried employment. Subsequently, to deal with cases of an unsalaried father, the traditional method of payment is either through the Syariah Court Registrar or directly to

⁸⁰⁴ See footnote 700

⁸⁰⁵ See footnote 655

⁸⁰⁶ See footnote 656

⁸⁰⁷ See footnote 703

⁸⁰⁸ See footnote 701

the mother whichever may be practicable as can be seen in *Ali Zaidi*,⁸⁰⁹ *Norliah*⁸¹⁰ and *Noorsiah*.⁸¹¹

So far as the assessment to make a smaller or larger award is concerned, certain factors were also seen to be the focus of the Syariah Judges in resolving the maintenance disputes before him. By referring to some decided cases set out previously, the earning capacity of the father emerged to be the most relevant factor. In fact, the mother in *Zainon*⁸¹² constantly received some degree of denial from the father which led to the point where she had to agree to a reduction as low as \$50(BND) for maintenance of all her six children from an initial claim of \$100(BND) per each child. Although the Syariah court considered the parties to be mutually agreed and sanctioned an order totally based on this agreement, one may say that the judgment was unfair. Not only was her net income far too small compared to the father then with just the \$50(BND) maintenance the father offered for all the six children, this would certainly place her at a great difficulty. The Syariah Judge should not have allowed the father to manipulate the situation, constantly making excuses about his limited resources so that he could get away with his obligations as a parent. Having regard to the fact that the father owned another house the better and more equitable settlement that one might think was at least to order such property to be sold and a certain amount from the proceeds of that sale to be allocated for the maintenance of the children. Nevertheless, this does not mean that other factors like

⁸⁰⁹ See footnote 705

⁸¹⁰ See footnote 651

⁸¹¹ See footnote 654

⁸¹² See footnote 660

the needs of the children are never referred to. *Noorsiah*⁸¹³ provides the best illustration of a case where the learned Syariah judge appears to have been concerned to put the children's welfare first, despite the fact the father requested to grant him a non-fixed maintenance or else a mere payment of not more than \$50(BND). The same factor was also considered in *Hashim*.⁸¹⁴

By looking at the decided cases involving children's maintenance in this chapter, where it shows the highest maintenance that a mother received for her children was \$400(BND) for one child as in *Norliah*,⁸¹⁵ it also indicates that the lowest settlement was just \$50(BND) for six children as in *Zainon*.⁸¹⁶ Nevertheless, it is also interesting to note that there were cases where no fixed sum was determined by the Syariah judges and indeed it left the matters to the father alone to make provision of any sum he would be capable of. This is exactly the decision made for the mother's claim for her four children in *Masniah*.⁸¹⁷

5.5 CONCLUSION

Apart from the substantive laws, there is no doubt that considerable developments have also taken place in the area of the law implementation in Brunei relating to financial rights after divorce. It can be summarized from the cases set out in this chapter that the

⁸¹³ See footnote 654

⁸¹⁴ See footnote 699

⁸¹⁵ See footnote 651

⁸¹⁶ See footnote 660

⁸¹⁷ See footnote 702

type of orders involving finance in the event of divorce that are made in the Syariah court are:

- i. Monthly *'iddah* maintenance
- ii. Lump sum *'iddah* maintenance
- iii. Monthly maintenance for children
- iv. Monthly *mut'a al-talaq*
- v. Lump sum *mut'a al-talaq*
- v. *Mut'a al-talaq* in a form of items, money or properties
- vi. *Harta sepencarian's* share or division from immovable property like land and house etc., and also from movable property like cars etc.
- vii. *Harta sepencarian's* share or division from property like government's gratuity grant etc.

An application for the court order for *'iddah* maintenance or *mut'a al-talaq* or *harta sepencarian* or maintenance for children in the Syariah court of Brunei can be granted, denied or dismissed. Generally, in most cases the court order was granted because the parties have reached a mutual agreement on particular order or claim that was made. Accordingly, where negotiation is impossible between parties in some cases, the order was often denied but with an opinion from the judge that the order is to be applied for separately later. In rare circumstances, the Syariah court also dismissed the order where the applicant himself or herself failed to attend the court for hearing. Factors like the husband's financial resources, wife and children's needs, contribution of the parties

etc., are the common factors that a Syariah judge often takes into account when assessing and deciding the financial cases upon divorce.

CHAPTER 6

EMPIRICAL ANALYSIS FINDINGS

6.1 INTRODUCTION

Apart from doctrinal research which includes case law study, this research uses empirical research comprising interviews, questionnaires and observation. Thus this chapter is divided into two parts. The first part deals with the empirical study where the opinions of the legal professionals and court litigants will be thoroughly discussed. The second part briefly discusses the observations made during the Syariah Courts trial and the findings therefrom.

6.2 EMPIRICAL ANALYSIS THROUGH INTERVIEWS AND QUESTIONNAIRES

6.2.1 Background

A questionnaire was undertaken on legal professionals as well as the court litigants. The legal authorities that were focused on were the Syariah judges, the Syariah Court Registrars, *Syar'ie* lawyers, Islamic legal expert, Syariah Legal officers etc. It aimed to seek views and opinions on the matters involving financial disputes after divorce based on the extent of their knowledge and experience engaging in this area.

Apart from that, an opinion from a group of people who have been through financial cases after divorce was also sought. This was meant to examine the extent of awareness among respondents of the existing law and their extent of satisfaction towards the court service they received.

6.2.2 Methodology

To seek views, two types of methodology were used in this regard. For the legal professionals, a set of structured questions was prepared which allowed the respondents to provide free text comment only. They were given liberty to choose either to provide feedback orally in the form of an interview or in writing. Initially, it was the personal interview that was intended to be employed for this purpose (as mentioned in the introductory chapter), however, in the end, the majority of the legally professional respondents chose to answer the questions in writing rather than in an oral interview. The questionnaire was divided into seven parts according to different subject matters namely, the background of profession, the general perspective of the Islamic law on financial settlement after divorce, *'iddah* maintenance, *mut'a al-talaq*, *harta sepencarian*, child financial support, and suggestion and comments. The questionnaire in part one contained information on the personal context thus analysis cannot focus on it. An overall majority of the comments were given in Malay although there were a very small number of the feedbacks either in English or in both Malay and English.

A questionnaire was also released to enable the litigants to provide responses. It contained thirteen questions which were mostly tick box. Some questions required

respondents to rate ranging from the lowest to the highest level of satisfaction based on the experiences they had had. There were also some questions with space for free-text comments. As mentioned previously in chapter 1, the telephone interview was also employed, for this type of methodology could help the author to reach the respondents quicker and easier than approaching them in person. The names of the respondents were fully secured and confidential to enable them to provide feedback freely and comfortably.

6.2.3 Profile of Respondents

Legal Professionals

The majority of respondents have been involved with the areas of Muslim family law concerned in this thesis either directly or indirectly. The length of period of their involvement ranged from 4 years to as long as 26 years at the time of the questionnaire. The number of respondents who finally agreed to participate and fully completed their questionnaires was 12 officials relative to the overall number of selected legal professionals, i.e. an acting Registrar of the Syariah Court of Appeal, a Registrar of Syariah High Court, a Deputy registrar of the Syariah Subordinate Court, two Syariah Court Judges, an Islamic Legal Expert, a Deputy Director of Islamic Legal Unit, two Syariah Legal Officers, an acting Deputy Director of Syariah Affairs Department and two Syariah lawyers. Of all the responses obtained, some comments are relatively detailed and extensive and sometimes provide a very useful opinion. There are also answers which are brief yet concise. Additionally, a number of questionnaires were either left

blank or left with such expressions of either “no comment” or “no data about it” or “no idea”.

Litigants

As intended prior to the questionnaires, about twenty to twenty-five respondents would be randomly selected. However, owing to certain difficulties particularly in obtaining the samples and also in getting their cooperation to participate, this hindered the process and therefore regrettably, there were only 16 respondents who finally took part in the questionnaires. Despite the small samples/small proportion of respondents, yet this could produce useful information that can identify some issues associated with their case litigation matters, which among others were the attitude and roles of the court officials involved, the courts procedures and the complications faced throughout the proceeding.

The sample included more women (79%) than men (21%). The majority of respondents were in the 25-39 (50%) year age group, followed by those aged 40-59 (43%). Seven percent indicated they were 24 years and younger. The largest proportion of the cases that respondents went through had been settled in previous years (86%). The remaining 14 percent of respondents said that their case was still proceeding at the time of the questionnaire.

6.2.4 Interviews/Questionnaires Feedback from Legal Professionals

The General Perspective of the Islamic Law of Financial Settlement after Divorce

a) General perception towards the present system of law for administering financial settlement after divorce for Muslims

In general, all respondents believed that the system of law governing financial settlement after divorce is relatively effective and adequate. It is best illustrated in the following comments:

The Emergency (Islamic Family law) Order, 1999 is a suitable and favourable law for Muslims in Brunei Darussalam especially its provisions relating to the financial settlement after divorce. Under section 61, the husband is obliged to pay maintenance to his divorced wife during the *iddah* period. The amount of maintenance is determined according to the earning position of the husband and the needs of the divorced wife as provided in section 63.....

I think the existence of Islamic family law today, as compared to the past, has given more protection especially to wives. For example, prior to this law many marriage problems got stuck and could not be resolved by the Syariah court due to the absence of specific provisions; thus, the existing law has a number of provisions that enable the wife to seek for divorce....

Generally, I am pretty sure that the legal system in administering financial settlement after divorce for Muslims is really effective so long it is implemented in a wise manner and using integrity by the relevant agencies...

In spite of being effective and adequate, there is yet the need for improvement, added by some respondents. In fact, a particular respondent suggested that practice directions for Syariah courts should be set up for the use of legal practitioners. According to him, due to this, there were inconsistencies between the provisions of the law and court practices such as the procedures for cases that were to be commenced by application, whereby in accordance to the law these are to be heard in chambers/closed hearing but in practice were heard publicly.

b) Views on gender bias in the financial settlement after divorce in the Syariah court

The comments indicate that the respondents generally do not agree that most of the court decisions made on the financial issues are gender-biased. In fact, according to one comment, the Syariah Courts apply Islamic law equally and provide justice for all in making their decisions in financial divorce cases. Those disapproving of the gender-biased judgment pointed out that the court's decisions depend on the wisdom of the judge and his wide discretion to make a decision based on the facts presented before him. They also said most of the court judgments were Islamic-based decisions and relied on the conclusive evidence the parties had presented in the court. For example:

No, because judges decide based on Islamic law by way of *ijtihad* (personal reasoning). In other words judges do not base it on gender....

I disagree with the statement. It relies on the strength and wisdom of the parties involved in presenting their cases in court. Probably, as in the case of an application by the ex-wife or wife they should be able to convince the court that such an amount was the reasonable amount to be ordered to be paid by the court by giving evidence and reasons which were appropriate and sensible and they also need to convince the court that the former husband is capable to pay it....

However, some comments appeared to claim that they found injustices in some financial cases after divorce. According to one person, the problems very much relied on how judges interpreted the Prophet's traditions and certain provisions of the law. Further, the reference to *Hukum Syara'* or Syariah rulings as stipulated in the IFLA (Cap. 217) has put the judges under the impression they can exercise their own *ijtihad* when making decisions. Therefore, not many cases were found where the judges followed the precedent rules made by the higher courts as was more widely practiced in the civil courts.

A small minority of the respondents refused to comment claiming that they had no data about the facts of any court cases.

c) The causes of the increasing rates of some cases relating to financial settlement after divorce in the Syariah court

Whereas some respondents declined to give comment, others outlined mostly the parties' attitudes and behaviour as the main reason. These included the growth of population, the husband's negligence and defiance to pay, the increasing awareness of rights on the part of wife that prompted her to file a number of petitions against defiant husbands, etc. Indeed, this has been taken by a particular respondent as a positive development as regards the knowledge of modern communities. Other common marriage problems were loss of patience; insensitivities; lack of knowledge of marriage duties as well as parenting; scandal or extramarital affairs; financial difficulties; incitement; family intervention; lack of quality time together; resentment; health problems; polygamy; exposure to many immoral activities like drug use; unnatural sex activities/relationships. Additional comments also noted that the Syariah judge's role also contributes to the growing number of family court cases, because lack of knowledge and experience in the legal aspects, meant that the respondents had little confidence in their decision making. The increases in the cost of living and inflation were also highlighted in the questionnaire as among other reasons for increased cases.

Matters Related to Spousal Support during ' Iddah

a) Definition of 'iddah maintenance

All respondents seemed to have a clear understanding of what 'iddah maintenance is. For example, one extensive definition that was given states as follows:

It is a support that is compulsory on the husband toward his wife who is still in her waiting period with certain terms which consists of subsistence, clothes and accommodation. The subsistence includes food, drinks, toiletries, medicine which are the basic needs to live but not education. The phrases "certain terms" should be taken to mean that the obligation of providing maintenance is not automatic as there are conditions that qualify a wife to receive her maintenance such as her obedience to the husband.

However, one respondent provided additional comment that the quantum of maintenance as in the marriage should be maintained even after the divorce. Many cases instead show that the divorced wife received a lower maintenance than she did previously during the marriage, which prompted them to leave their matrimonial home in order to earn more income, said this particular respondent.

b) Factors to be considered in determining its amount

Most questionnaire respondents suggest that the conditions of the husband and the wife should be taken into account equally. The most important aspect in a husband that a judge must consider in determining the appropriate amount is his earning capacity while the needs of a wife is also material. Additional factors that are seen by a few respondents as of equal significance included the treatment of husband and wife towards each other, and the wife's contribution as well as her family status (whether or not they are rich). However, there were also divided opinions on this, where one view emphasized more on

the husband's capability while another saw the needs of the wife as more important. The one who gave emphasis to the wife, based his view on the fact that the wife suffered more than husband, emotionally and through the pressure of having to face the surrounding people. Others also said the success of a court claim is subject to the compliance of each party to the requirements set out by the court of law. For example, to commence a maintenance claim proceeding, a former wife must identify the title of claim she wishes to file and further she must also show evidence to prove to the court that her husband is factually capable to provide her the amount of maintenance that she requires. Further suggestions also made by other respondents were that the examination on debts incurred by the husband should be made in such a manner that all those unnecessary debts like credit card repayment, mobile phone bills, hire purchase payment for new car etc., should not count as determining factors for the award of maintenance. One of them also added that the husband should also be liable to pay if his former wife rented a home. Another respondent suggested the necessity to maintain the same amount of maintenance that was paid during marriage and even after divorce as this might create a pleasant environment between the divorced parties as well as the children and perhaps, might bring the divorced spouses back together.

c) The greatest challenges/difficulties when dealing with wife's maintenance claim and its appropriate approach

From the comments, a number of difficulties were noted. Self-represented litigants is one of them. The complication becomes greater if the other party is represented, especially if the ex-husband appoints a lawyer to represent him while the

unrepresented wife knows nothing or a little about the court procedures including the methods of making an application. To illustrate this where the wife submitted an incomplete application, she was less able to provide detailed facts in an affidavit of her claim, she had insufficient means to pay court application fees and she received lack of support from her family and so on.

Another respondent felt that it was the judges who faced more problems when it comes to making decisions. They could err in fixing a payable amount which eventually could cause injustice to either party. Accordingly, one respondent said that it is a challenge to determine the value of maintenance that a wife deserves while at the same time not placing a burden on husband. He suggested that using an expert's advice as widely practised in Jordan would be beneficial for a just and fair evaluation. The agencies like the Community Welfare Department, the MUIB, those who conduct the survey of the population or any other agencies that have knowledge about Brunei's custom and culture might be useful to help the judges in their decision-making.

Respondents also made a number of suggestions for solutions. These can be summarised as follows: enforcing a penalty that affects the record of service if the husband is a government servant; enforcing punishments if legally provided; holding further discussions among the authorities to find a court solution; making amendments to court fees, seeking assistance from an NGO, *Syar'ie* lawyers need to be more aggressive in obtaining more information about the husband's property and they should not represent their clients just for the money; *Syar'ie* judges must also be firm for example in enforcing bonus deductions; the parties to a dispute should be aware of their limit in claiming what

rights are theirs and what are not and they should also not act selfishly forcing their *Syar'ie* lawyers to do things beyond their legitimate rights; introducing an electronic e-maintenance system that can help the former wife to make a claim; establishing a legal aid Bureau and so on.

Matters Related to Mut'a al-Talaq

a) The concept of *Mut'a al-talaq*

The majority of feedback described *mut'a al-talaq* which was quite reasonable. For example:

It is an honor to woman and is meant to place woman where she deserves to be. A protection for woman and an appreciation for the efforts and contribution she has made.

Mut'a al-talaq means a gift of money or other property given by the husband to his wife after her divorce. *Mut'a al-talaq* is aimed at reducing sorrow and sadness of the wife at the time of divorce and erasing the feeling of loneliness and hatred that is caused by the divorce. *Mut'a al-talaq* is further required by the divorced woman to start a new life as a single woman. *Mut'a al-talaq* is also regarded as compensation and recognition of the benefits obtained by the husband from the love and attention given by the wife during the marriage. After all *mut'a al-talaq* is meant to console the divorced wife.

Mut'a al-talaq is a husband's gift to the wife due to their divorce. It is intended to become as a way of divorcing a wife in a kind manner. The benefit: the relationship among Muslims remains good despite the separation.

b) Determining factors for the amount of *Mut'a al-talaq*

The majority of respondents viewed factors of both husband and wife as equally important i.e. the financial situation of the husband together with the divorced wife's needs. Additionally, one respondent said that he would bind himself to adhere strictly to a

Syariah ruling and the decision of the Syariah Court of Appeal as in his view the Syariah Court of Appeal based its decisions totally on Syariah law. However, some added other factors that needed to be assessed for setting the amount. These revolved around various aspects such as length of marriage, the wife's contribution throughout marriage in a form of money or effort or moral support, lineage and family status of the wife, the wife's character or attitude and the reason for divorce.

c) Views as to the existing *mut'a al-talaq* settlement law whether or not it has adequate guidelines and rules

A minority of respondents had no comment while others were divided in their views of the current provisions on *mut'a al-talaq* settlement. Those who were positive commented as follows:

Yes. This is because the current laws cover all aspects, from claims to issuing order and also provides methods as to how to execute the payment. In fact, it also stipulates a clear approach to deal with failure to comply with any order.

The Guidelines and Rules for *mut'a al-talaq* settlement have not yet been made but the Courts have been empowered under section 144(2) of the Emergency (Islamic Family Law) Order, 1999 to decide any difficult case of *mut'a al-talaq* amount or any other matter according to Hukum Syara' even if there is no express provision for that in this law. Any hardship to any party shall be removed and neither of the parties will face any difficulty due to divorce.

Some examples that provided negative comments, and which viewed the existing *mut'a al-talaq* law as inadequate, are as follows:

Section 57 is too simple. We have to make the decision based on decided cases/Shariah laws.

The existing provision is not yet comprehensive to solve *mut'a al-talaq* issues as there is only one provision available namely section 57 of IFLA (Cap. 217). The

provision that prevails now empowers judges to determine the value of *mut'a al-talaq* if parties differ about it. Likewise maintenance, judges need to be assisted by experts in accessing such a value even though it is not binding on him.

...in the existing law, there is no express provision, if there is, it might help judges and *Syar'ie* lawyers what amount they should fix and with this specific provision they might also resolve the case speedily....

The respondent who provided the above comment further raised issues relating to the time when *mut'a al-talaq* should be assessed. This assessment either should be made when separation occurs or when filing the case or when the judge wants to make a decision. His view is that the evaluation should be made at the time when divorce occurs, based on the principle of equity. According to him, this is to avoid the wealthy husband delaying payment of *mut'a al-talaq* to his wife and when he is on the point of paying it he then falls poor and would say: "I only can afford this" even though at the time of divorce he in fact was a rich man.

d) The challenges/difficulties that are most likely to occur when dealing with *mut'a al-talaq claim* cases and its solution

Several respondents commented on issues relating to the wife's unawareness or little knowledge about court procedures. One comment emphasized that such problems often occur when a wife files an application. In fact, according to another comment the case gets more complicated if the husband hires a lawyer to represent him but the wife does not. Additionally, many respondents also highlighted the issues where a husband refused to pay *mut'a al-talaq* to his former wife or failed to comply with a court order as problematic. For example:

There are husbands who try to escape from the responsibility of *mut'a al-talaq* by being silent after divorcing his wife, while he is in fact aware of it and capable of giving *mut'a al-talaq* to his wife (without the wife needing to demand for it).

Other issues noted were the excessive claim of *mut'a al-talaq*, the attempt to evaluate *mut'a al-talaq* by equating it with maintenance; the judges lack of discretion; the weak enforcement; no established guidelines for determining the amount; no limitation period for settlement; no imprisonment imposed for failure to comply; failure to reach an agreement (*sulh*); lack of family support; the parties' personal attitude; the cost incurred by parties to seek advice from private agency being high, parties not being aware of the existence of the provision that would exempt them from court fees and so on.

A number of suggestions were then proposed by some for solutions namely by setting up instalment payments for a specified duration; freezing the gratuity fund; amending the court fees; strengthening the role of NGO etc.

Issues around Harta Sepencarian

a) The concept of *harta sepencarian*

A number of definitions of *harta sepencarian* were given based on the personal understanding of the respondents. From all the definitions, it can be concluded that *harta sepencarian* refers to any property that was acquired during the marriage either by joint efforts or the sole effort of any party in which the contribution made to its acquisition was in the form of money, property, labour or moral support. Further description of *harta sepencarian* was also provided by some respondents. For example:

It includes moveable and immoveable property like household goods and furnishings, joint bank accounts, shares registered in the name of either spouse as well as business assets which have been acquired during the marriage.

Another interesting point is that there were views which equated *harta sepencarian* as similar to that of *harta syirkah* or partnership property as can be seen in the following:

It is equivalent to partnership (*syirkah*) property where both are contributors and either one provides capital only while another acts as a creative partner or both carry the same contribution.

In my opinion, partnership between husband and wife towards some properties would share the same concept with a partnership between a person and another person on some properties. The only difference between the two is the term whereby a partnership between husband and wife in marriage is known as *harta sepencarian*. An example of *harta sepencarian*: a father gives a piece of land and a house to his daughter and his son-in-law on the occasion of their wedding. In this case, the daughter and the son-in-law are the co-owners.

Nevertheless, there was a view saying that while it was all up to the court to define what property as *harta sepencarian* and to estimate its value, in some cases where *Syar'ie* lawyers were appointed, consultants such as the land surveyor officer were appointed by those *Syar'ie* lawyers to provide an opinion in the matter. This respondent emphasized the need to appoint a *Syar'ie* lawyer that could help the parties to get a more precise estimation of the value of their property so that an equitable division could be achieved. In today's practice, neither a consultant nor an expert is referred to in the Syariah court for value estimation of the property. This respondent said that the *Syar'ie* judges are most likely to base the division of *harta sepencarian* on their own opinion and estimation, or sometimes relied on whatever amount the claimant wished its division for, which might cause injustices.

(b) Other forms of contribution made by each party (husband or wife) such as emotional and moral support

All comments indicated that it has been generally agreed that the contribution made by the party in a form other than physical or financial should entitle her or him to a share of *harta sepencarian*. For example:

Other contributions should be considered too and taken into account such as the wife's moral support toward her husband during married life. This moral support is greater compared to that of monetary form. E.g. the sacrifice made by a wife in giving birth to a child. Pleasing her husband with a child is of such a great value and ultimately would lead the husband to success.

I agree that other contributions like moral support and so on would be necessary to be taken into account as a right to entitle a share in *harta sepencarian*. This is the circumstances where a wife who doesn't work, full time is just managing the household, caring for children, making food and drink for the husband, preparing the husband's clothes, managing whatever needs a husband requires.

...I agree because the accumulation of a property in marriage is attained through the process of harmonization that occurs in marriage, a husband's success is achieved through the harmonized relationship between parties, for example if the husband goes out to work his wife would pray to Allah that he would be blessed with wealth, good things and safety...

Interestingly, according to one specific respondent, in a situation where the wife contributed in whatever form and then acted immorally or *nusyuz*, yet this did not affect her right to the division of *harta sepencarian*, but might just cause her share to be reduced as the decision was made in some appeal cases in the Syariah court.

However, there were responses which added recommendations; for example it was suggested that any contribution made by each party should be defined and identified as early as it possible throughout the marriage. A good example of this is where a property that was originally owned by one party, such as a land acquired by way of gift, is brought into the marriage and, in the expansion of such property, the other party also

contributes to it. Therefore in this case, the parties should make clarification against each other of what status such a contribution would be i.e. whether it was meant for mere assistance or seeking for wages or for other different purposes. As a result, added the same respondent there would be no share in *harta sepencarian* if the moral support given was for merely good cause but if it was intended to get wages in return then he or she would deserve what is deemed to be appropriate only. This concept has also been agreed by another respondent who commented:

.....And it should also be noted about the share that she would not receive it entirely, just need for assessment and consideration on the contributions mentioned above and it is up to the Court to consider.

c) Views regarding the system of *harta sepencarian* if it has placed equal benefit to both husband and wife

A small proportion of respondents were silent about this. The remaining respondents indicated that they believed that the present law has given equal rights to both husband and wife. This can be seen in the following comments:

Yes. The present law has certainly given equal rights to both husband and wife. Husband is allowed to claim according to the contribution he has made or vice versa. This matter may be referred to the provisions related to it.

I believe that the system of law on *harta sepencarian* in the country has placed both husband and wife in an equal position in securing their share of *harta sepencarian* in Syariah Court.

I see *harta sepencarian* is relatively fair, because in Syariah law there is a concept of fairness, fairness covers all aspects...

Further it can be found in the comments that highlighted the need of hard work from all parties including the judiciary in order to achieve an equal division of *harta sepencarian*.

d) The greatest obstacles/challenges that may have complicated the situation towards attaining an efficient and equitable settlement in *harta sepencarian* cases

A number of issues were raised. These related mainly to the law and the litigants. Some thought that the law provides no comprehensive guidelines and this included provisions dealing with *harta sepencarian* cases on death and polygamous marriage. In fact there was a respondent who claimed that the current provisions on *harta sepencarian* were inconsistent with the Islamic requirements in the matter of property ownership. The absence of a provision or procedure to refer to any consultant or expert to provide advice and estimation in the distribution of *harta sepencarian* was also problematic, asserted by another respondent. As for the parties, some felt that the inability to appoint a Syariah lawyer; failure to prove his or her contribution to the acquisition of matrimonial property due to fact that it was registered solely under the name of his wife or her husband; ignorance of the law and lack of awareness about court procedures, bad attitudes like being greedy, impatient, inconsiderate, stubborn etc. may all have hindered an equitable settlement. There was only one respondent who pointed out that an obstacle also might originate from the court itself who expressed:

The courts should gain experience and learn from the civil courts.

The role of the *sulh* officer was further noted by another respondent as crucial in assisting the parties to find the best solution.

Child's Financial Support

a) Definition of child's maintenance

The responses to this question indicated that overall a majority of the respondents had a clear vision of what child maintenance is and what it entails. Thus the general definitions that can be deduced from those responses is that maintenance is a provision for children to be fulfilled by a father and it takes various forms mainly food, clothing and accommodation. Apart from those three basic necessities, education, health care and social needs also matter as pointed out by some. Many respondents also accepted it as a general principle for the maintenance's assessment that a father's capacity is the primary concern although there was an opinion which considered the children's needs as also to be given preference in every case.

b) The primary factor in determining the amount of maintenance for children

Apart from the position of respondents that gave priority to the father's financial situation for determining the child's maintenance, the children's needs were also seen as equally important. This can be seen in some of the following examples of comments:

Consider the father abilities and the child's needs. If both factors collide, the ability of the father to pay is more preferable.

The quantum of child maintenance is to be referred to the essentials of daily necessities of a child depending also on the ability of the father himself.

...child's maintenance is quite important, their needs must be prioritized, same as before divorce takes place, should not reduce their maintenance after divorce, not only have they already suffered due to their parent's divorce they should not have to face financial difficulties, thus this would affect his future..

In fact, various forms of maintenance were itemised by some respondents that a child should receive. This can be summarised as follows i.e. food, clothes, accommodation, schooling requirements such as books, school uniform, sports attire, shoes, stationeries etc., education included extra tuition, healthcare, toiletries like soap and toothpaste and other social needs like toys. An interesting point highlighted by one respondent highly experienced in the courts was that the minimum maintenance that sometimes a child received was \$50(BND) per month, taking into account the earning capacity of the father. He added that the normal circumstances are when divorce takes place, the child would live with the mother and thus the father would allocate a specific budget for that child after deduction of everything. This has been a problematic issue that affected the child greatly. What is more complicated is when the father takes a new wife and has children with her. The issue of 'insufficient maintenance' is rarely raised when the parent does not divorce because the child, for example, would eat the same whatever the father eats and brings into home and so on. The respondent further suggested that the maintenance of children should be prioritised over that of the wife, considering children as being not fully grown mentally and physically; hence they required more provision of food and other basic necessities for their development.

c) The challenges/difficulties in dealing with child's maintenance claims and its solution

Many comments related to unawareness of the parties about their rights and the courts process together with the husband's inability to pay and his defiance

against his obligation to maintain his children and against the court order. These were the issues commonly encountered. For example:

Among challenges or inconveniences that often arise when dealing with cases related to claim of child's alimony was that mother or child do not know their rights and how to make a maintenance claim; father has no fixed income; bad relationship between mother, father or child; father does not comply with maintenance order issued by the court.

The challenge is that the father is unable to provide adequately due to his low income or has a new commitment (new wife) and many other liabilities or total maintenance is insufficient to meet the needs of children.

Other issues noted were self-represented litigants; excessive claims; incompetence in making assessment and decision; lack of cooperation from other parties (including the child himself) and examination of the husband's debts conducted by the court was found to be misleading (husband or father often manipulated it as a way out to escape from the duty of maintenance). Respondents also proposed a few solutions to deal with these issues which emphasized more on the court system and enforcement. There were also respondents who suggested the need of discussion among relevant authorities to find solutions for children's issues by organizing a special TV programme for this matter as occurs in Malaysia.

Suggestions and Recommendations

a) Recommendations for improving the efficiency in financial settlement after divorce

Respondents made a range of suggestions. To begin with, a number of respondents recommended the need for a legal aid bureau or a specific body to help the parties or litigants with their claim processes. To quote an example:

What needs to be done today is that a body or legal bureau should be established that will benefit those parties who cannot afford to hire a lawyer. With the introduction of this bureau will assist the parties to recover their rights and to help the court to conduct efficient trial procedures.

Need to set up a body that could help those who are in need to guide and give advice in making an application in accordance with the applicable provisions.

Some also stressed the importance of imposing punishments for breaches of orders as this has been a serious problem that has affected wives and also children. There was even a respondent who suggested that a special agent should be established that would be in charge with this matter including the maintenance collection etc. Another comment relating to maintenance collection highlighted the need for *e-nafkah* or e-maintenance for this purposes. Specific suggestions included conducting a critical review of the law and a requirement for amendment. For example:

The law for the settlement of financial matters after divorce needs amendments especially the provisions relating to *harta sepencarian*, *mut'a al-talaq* and maintenance. Keeping in view the difficult cases to be decided by the Syariah Courts and the change in the life style of the people, certain amendments are necessary to be made so that the divorced wife does not face difficulty after divorce.

It is undeniable that there are some provisions which lack clarity. Therefore those provisions require critical review.

The law as it exists needs to be monitored from time to time to ensure the effectiveness in granting justice to all. If the existing law (such as *mut'a al-talaq*) needs amendment it should then be carried out.

Moreover, the knowledge and the skill of certain legal professionals including the *Syar'ie* judges needs to be enhanced, not to forget the law teaching and training that is conducted regularly for all legal practitioners as well as maintaining good links with

different agencies. This was advocated by some respondents which can be understood from the following examples:

All cases should be represented by lawyers with depth of knowledge on Islamic law and well-trained in the field of judicial decision making.

Firstly, judges should be enhanced in their competence and skill in adjudication matters, secondly, the law teaching that is available now needs to be conducted regularly....for all legal practitioners..

.....Collaborating with other agencies for example the father's or ex-husband's employer, bank and others to ensure maintenance will be paid to the person who claimed it.

b) Other comments or suggestions

Apart from the recommendations proposed in 7.1, some respondents provided additional suggestions which emphasised the necessity to conduct workshops or seminars to seek solutions. According to one respondent a workshop could help spouses to gain more awareness of their respective duties and marital obligations so that there would be no room for excuses for not knowing what their responsibilities are as is commonly encountered these days. Another comment on the other hand suggested making use of the workshop for addressing issues, constraints or impediments in the enforcement aspect. Apart from workshops and seminar, there was also a comment which suggested the making of rules and practice directions for the Syariah courts:

...for any changes in the court procedures there should be practice directions issued from time to time by the Chief of the *Syar'ie* Judges as has been done in Malaysia. This is necessary whereby the practice directions would become the procedures as the existing procedures might be vague or less accurate; therefore before amendment is made, practice directions could help right away...

Apart from that, this respondent also proposed that the court fees as well as the fees for legal practice needed to be revised as in his view these had caused strains to litigants as well as *Syar'ie* lawyers.

6.2.5 Questionnaire Responses from Litigants

Form of Dispute

In the questionnaire these respondents were asked what form of financial disputes they had been involved in the courts in the last 10 years whether it was claim for *'iddah* maintenance, maintenance for children, *mut'a al-talaq* or *harta sepencarian*. The majority of respondents were involved in cases affecting child maintenance (64%) followed by the cases of maintenance for the wife during *'iddah* (57%). Thirty six percent involved *mut'a al-talaq* cases and *harta sepencarian* constituted the least cases that the respondents underwent in the courts (14%).

How the Dispute was Resolved

Respondents were asked how their financial disputes after divorce were resolved. Most respondents had their disputes resolved by court order (86%). *Sulh* arrangements between respondents and the other party or parties before the Syariah courts officers resolved only 14% of disputes.

Role of Lawyer in Resolving Disputes

For those respondents who had their disputes handled by their lawyers, they were divided in their views on how helpful their lawyers had been in resolving their dispute in the Syariah courts. They indicated that 71 percent of them found their lawyers to be very helpful. 14 percent claimed them either to be ‘fairly’ or ‘not very’ or ‘not at all’ helpful.

Some respondents provided additional comments relating to the use of their Syariah lawyer. One respondent said that the Syariah lawyer should be more efficient and not deliberately prolong the case for personal financial gain. Another comment was that the legal fee charged by the Syariah lawyer was imbalanced and high as compared to the economic situation today. Considering the poor financial status he had during the case proceeding, one respondent said that he could only afford to pay the Syariah lawyer for preparing the paperwork for his case.

Satisfaction with the Length of Time to Resolve Disputes

Respondents were asked whether or not they were satisfied with the length of time that was taken to settle their financial cases upon divorce in the Syariah courts. The majority of respondents (36%) were fairly satisfied with it. Twenty one percent (21%) expressed the highest level of satisfaction towards the length of the court process. Only a small minority was dissatisfied (7%) or not really satisfied (7%). The remaining respondents were either unsure or the question was not applicable in their case.

Complications throughout the Court Process/the Case proceeding

The majority of comments were positive saying that they did not encounter any problem in any time of the proceeding of their cases. Those who experienced problems when dealing with their cases highlighted the lack of family support, extreme pressure, incompetence of the lawyer, incapacity to appoint a Syariah lawyer and lack of cooperation from the other party as issues that complicated their cases.

Competence of Court Professionals

Respondents were asked to rate the competence of various legal professionals namely Syariah court judge, Registrar of the Syariah court, Syariah court officer, *Sulh* officer and Syariah lawyer, whichever applicable to their case. Overall the Syariah Court judges were the most favoured court officials rated by 93% of respondents as ‘very’ or ‘moderately’ competent. A very small proportion of 7% of the respondents felt the Syariah Court judge that heard the case was not competent. Registrars of the Syariah courts were perceived by over a half of respondents (71%) as either ‘very’ or ‘moderately’ competent. A small 7% did not feel the same about the registrar, labelling them as not competent while the other 21% were either unsure or the question was not applicable in their case. The majority of respondents were positive towards the Syariah court officers, with 36% rating them as ‘very’ competent and 29% reporting them as ‘moderately’ competent. Of the remaining respondents, 7% felt that the Syariah court officers in their case were not competent while 29% were either unsure or the question was not applicable to their case. *Sulh* officers were the courts officials who received no

ratings from half of the respondents. The other respondents on the other hand were split in their views of *Sulh* officers, with 14% rating them as not competent and 35% rating them as either ‘very’ or ‘moderately’ competent. The Syariah lawyers were among the legal professionals who also received good comments of either ‘very’ or ‘fairly’ competent from 50% of the total respondents. Only 14% rated the Syariah lawyers to be not competent while the remaining respondents did not give any ratings.

Most Helpful Court Professionals

Respondents were asked to indicate which court professional was most helpful in achieving settlement in their cases. Syariah court judges were considered as the most helpful (50%), followed by Syariah lawyers (38%). Only one respondent found a Syariah court officer to be helpful. Other persons than the legal professionals mentioned above such as Counsellors were also viewed by another respondent as helpful.

Satisfaction with the Court Judgment

The majority of respondents (83%) were satisfied with the decision that was made to settle their cases. Only a small minority were dissatisfied (21%), claiming that the judgment was unfair, the judge was biased in favour of the man, and the judge took lightly the claims filed by the applicant wife. A respondent who had her case appealed said that she was only satisfied with the decision granted by the Syariah court of appeal but not with the lower Syariah court’s judgement. The remaining one respondent stated that he did not know whether he was satisfied or otherwise.

Actions taken after the Order was issued by the Syariah Court

The respondents were asked what actions were taken after they received a court order as regards their cases. These actions could be either a party of interest or parties had executed the order; an application was filed for amending the order; an appeal was lodged due to dissatisfaction with the order; or the parties had achieved informal arrangement. The majority of respondents (79%) complied with the court order and implemented it. One particular respondent reported that she had appealed her case to the higher Syariah court as she was not happy with the judgment of the previous court which tried her claim. A small number of respondents (14%) were either unsure or refused to comment.

Comments or Suggestions on the Syariah Court Process

Respondents were asked to provide comments or suggestions on how to improve the court process in dealing with the cases of financial disputes after divorce. Various themes/factors emerged from the comments. Some respondents suggested the need to improve the length of time taken for court process in settling cases. This is mainly to take into account the difficulties endured by wives to face new lives as added by one respondent. Other comments highlighted that there should be a guideline for Syariah lawyers to follow which must be in accordance with Syariah principles so that they would not act merely for the purpose of money. Some said that the Syariah court could have acted stricter and firmer in relation to the enforcement of a financial order so as to eliminate default payment. In fact a further suggestion made by another respondent was the need to establish a specific body or committee who would be responsible for

monitoring whether or not the payment was made. There was also a comment related to specific aspects of judges' discretion and competencies as areas that could be improved.

For example:

A judge must be more firm and put his concern more on factors of the sufficiency of the claim, by balancing out the cost of paying children's need (if still a baby/schooling) that was agreed/offered by the payer. The judge however, even if the claimant agreed to that should be more aware of the amount that is given by the payer is really appropriate.

Another area that could also be improved was the aspect of assistance that the parties could obtain anytime they wished throughout the process of their cases. This is why according to one respondent that a Syarie legal aid fund needed to be set up for this purpose.

6.2.6 General Comments on the Opinion Survey

A number of comments can be made on the results of the opinion survey as conducted on the legal professionals and courts litigants. First, the legal professionals seem to agree that today's law for administering financial settlement after divorce for Muslims in general, is relatively effective and adequate. No opinion regarding the law was sought from the group of litigants.

Secondly, there were two areas which appear to be not in agreement among the legal professionals; its specific provision and its implementation. By way of example, the provision regarding *mut'a al-talaq*, some said that it was still lacking and need to be revised. As a matter of its implementation, some respondents expressed concern that element of injustices were found in some settlements made in the Syaria court, of which

the research also find it in consistent with the findings of the law case analysis discussed in chapter 5. The complaint voiced by some litigants regarding the inappropriate ordered amount has strengthened this.

Thirdly, the issues related to litigants seem to be the most highlighted among the professionals as the reason for the failure to achieve an effective settlement. To argue this, by looking at the many cases set out earlier, it might be true that the parties to dispute have an influence towards an inequitable settlement, but sometimes the weaknesses also came from other factors and even from the legal professionals themselves. In contrast, the litigants overall, seem to have a good impression towards the courts officials and the judgment they received for their cases. However, this could not be taken to mean that this would represent the views of non-participated litigants in the study. Whether they were being genuinely happy with the decision or were reluctant to share their real feelings as their cases were already over or settled, might lead to this positive comment.

6.3 Empirical Analysis through Court Hearing Observation

6.3.1 Background

As part of the research, court trial observation was employed, aiming to witness and observe in reality how the case proceedings on financial settlement after divorce in the Syariah Courts takes place and also the surrounding context. The observation focused on visiting a few different court rooms of the Syariah Subordinate Court tried by different

Syar'ie judges, and which took place on various dates between 10th and 27th February 2014. In order to gain access to any court hearing, an official letter was submitted to the Deputy of Syariah Court Registrar so as not only to acknowledge my presence and the reason for my visit, but also to obtain timetables of court cases that were being available to public. The cases heard were claims relating to *'iddah* maintenance, *mut'a al-talaq*, *harta sepencarian* and maintenance for children. In these cases, some (either plaintiff or defendant only or both parties) were represented by *Syar'ie* lawyers and others were self-represented litigants. In order to see the differences between the different stages of court hearing three instances of report of court trial observation are presented which included two court proceedings i.e. first-mention hearing and hearing of pleading.

6.3.2 The Hearing of the 10th of February, 2014

The case observed was about claims relating to *'iddah* maintenance, arrears of maintenance, salary for a housemaid, *harta sepencarian* and *mut'a al-talaq*.⁸¹⁸ The wife as plaintiff appointed a *Syar'ie* lawyer to represent her case while her ex-husband as defendant failed to appear. The hearing was a first-mention case and took place at court room two. It was located in the first level of the main building of the Syariah Court of Brunei.

With regards to the layout, the courtroom was generally decent in size with a division of two separate seatings; men on one side and women on another. There was a raised dais in the front of the room for the *Syar'ie* judge to sit on and also a door nearby

⁸¹⁸ MRHS/MAL/BM 55/2014 & 56/2014

for the *Syar'ie* judge to have access to. A long counter was installed facing the judge's bench where the plaintiff and *Syar'ie* lawyer sat on the left side of it while the defendant was on the right side with the *Syar'ie* lawyer's position next to it. Also there were two witness boxes at both edges to give evidence in favour of plaintiff and defendant.

Before the *Syar'ie* judge appeared, all those who were present were briefed by the Syariah Court Officer with what to do and not to do in the court room during the proceeding. The plaintiff and her *Syar'ie* lawyer were present but the defendant was absent. The hearing eventually commenced at 9.27a.m. When the *Syar'ie* judge came in, all those in court stood up and nodded as an indication of respect to the *Syar'ie* judge. The proceeding began with the Syariah court officer reading out some material details about the case that was going to be heard such as the registration number, what the case is about, the name of each party to the case etc. As this was a first mention hearing, the *Syar'ie* judge instructed the Syari'e lawyer to mention a number of relevant factors to the case such as matters related to his *wakalah* or his appointment of being *Syar'ie* lawyer to the plaintiff, the service of a summons, statement of claim etc. According to the *Syar'ie* lawyer there had been attempts to serve the court summons on the defendant but they appeared to have failed too. The latest update about the defendant was that he was currently in Indonesia and refused to say when he would be back. Therefore, the *Syar'ie* lawyer applied for a notice to appear to the court to be issued to the defendant. The *Syar'ie* Judge held that if the plaintiff wishes to pursue such an application, an application for interlocutory proceeding had to be made which was to be heard separately

in order to obtain the leave of the Syariah Court. The next hearing date was fixed at another date six weeks after for the first-mention hearing to be continued.

It could be observed that there were some concerned issues in this case, such as the lack of cooperation from the husband, the overlapping of hearings as advised by the *Syar'ie* judge if notice to appear is to be applied. The husband in this case showed no concern at all about the wife's wishes and let alone the sense of respect towards the court order. This could be felt when he refused to say when he would be back from Indonesia. With regards to the application for notice to appear that the wife wished to make, it did not support the idea that the court process should be less-complicated and not lengthy. The court order for an interlocutory application might prolong the case while there was uncertainty if the leave would be granted and the worst case scenario would be that the wife might have to withdraw her claim or to refile the case on a later date when the husband is back to the country. The judge seems to be too strict restricting himself to the court procedure while his action could lead to prejudices against the wife. While it was justice that the husband should be given a chance to defend himself whether or not he agreed to the claim made against him but the same treatment must also be given to the wife. In this case, rather than delaying the proceeding and waiting for the husband to go back which was uncertain, the judge should just proceed the case for there is an indication that the husband did acknowledge the hearing date. This could be noted when the *Syar'ie* lawyer told the court that the husband could not determine when he would be back. It could be felt that the husband treated this case lightly and not seriously.

6.3.3 The Trial of 19th of February, 2014

The case was about the application of divorce and *'iddah* maintenance⁸¹⁹ filed by a wife. Both husband and wife were self-represented litigants. The hearing was a first-mention case and took place in court room four. Similar to other financial disputes hearing described earlier, the hearing was began with a short introduction speech, in this case by the plaintiff for she did not appoint a *Syar'ie* lawyer, on some details about her statement of claim and service of a summons. A number of questions were asked by the *Syar'ie* judge for example, if there was any other reasons to divorce than those stated in the application form; how long the crisis has occurred between the couple; if there was any effort made to reconcile and if both parties were really satisfied with their intention to divorce etc. The husband, after showing his satisfaction to divorce, suddenly mentioned about the \$200(BND) *'iddah* maintenance that he offered to pay his ex-wife but the *Syar'ie* judge appeared to ignore him. There was also a question regarding the condition of the wife if she was pure or menstruating. The wife told the court she was pure so the proceeding then was pursued by the utterance of words of divorce by the husband according to the text provided by the court. Following that, the *Syar'ie* judge questioned each party if there was any financial matters after divorce which they wanted to bring to the attention of court. The wife replied saying she wanted a payment of \$200(BND) per month as her maintenance during *'iddah* and the husband simply agreed. It was a straightforward case and so the judgment was sanctioned on the same day the

⁸¹⁹ MRHS/MAL/BM 45/2014

order of divorce and also the agreed *'iddah* maintenance. The hearing lasted for less than an hour.

The observation that could be pointed out here was that the case was easy to follow, short and straightforward, and more importantly, the good cooperation from both parties made the proceeding of the case run smoothly. This can be seen in the fact that the husband raised the *'iddah* maintenance even before he was asked about it by the court. Despite the fact that the payment of \$200(BND) was not that substantial as opposed to the current standard of living, but yet it could be felt that he did have some concern about his ex-wife's situation financially. As for the wife, the fact that she did not argue much on the sum offered by the husband is that she might want to get the case over as immediately as possible. In spite of the hearing being short and smooth, as opposed to the complex first mention-case hearing earlier, it might be more appropriate if the court, before consenting to the arrangement, examine first whether the settlement is one that both parties are happy with, where a sense of being forced is not present and that amount is really sufficient to cover the wife's monthly requirements.

6.3.4 Another Trial of 19th of February, 2014

The case observed was a continuation case of claims on *harta sepencarian* and arrears of maintenance⁸²⁰ applied by a wife. She was the plaintiff in this case, represented by her *Syar'ie* lawyer while her ex-husband was the defendant. The hearing took place at

⁸²⁰ MRHS/MAL/BM 32/2013 & 33/2013

court room six, located in the first level of the main building of the Syariah Court of Brunei.

The structure of court room, in terms of the position of the judge and the parties seating etc., was not much different from other court rooms used to hear cases under the jurisdiction of the Syariah Subordinate Court. Around 2 p.m., the parties to the case were called in and when entering the court room, similar procedures as in every hearing were to be followed as regards to 'do' and 'don't do' rules during proceeding. The hearing did not commence until the *Syar'ie* judge appeared at 2.51 p.m. Generally speaking, the case was not so complicated to follow. Besides the claim of arrears of maintenance during marriage, it involved property disputes between the wife and her ex-husband as to ownership and claims for the recovery of the value on certain properties such as a car, a motorcycle and a wardrobe. However, a few other issues were put forward in this case namely the accusation of acting indecently that both husband and wife threw against each other which was totally irrelevant and the post-divorce maintenance agreement made between the parties in which there was no mention about the *harta sepencarian* claim. In order to protect her dignity, the wife's *Syar'ie* lawyer, in the beginning of the hearing, had proposed for this matter to be resolved by *sulh* but it seemed that the husband was reluctant. The *Syar'ie* judge however, held that if the husband was willing to admit to have committed the alleged wrongdoing, then no further evidence should be presented before him as this could tarnish his dignity. He further added that such accusation was not relevant to this case of *harta sepencarian* and if it were to be put forward to contest the

wife's claim of *mut'a al-talaq*, the only matter was the question as to who caused the divorce. It appears that the issue of *mut'a al-talaq* had been heard in previous hearings.

As regards to the divorce agreement, the wife's *Syar'ie* lawyer argued it was invalid but it was held by the court that it was indeed a valid document. The car, as claimed by the husband, was his and bought under his name. No further examination was made by the *Syar'ie* judge as regards to the question of whether the wife also had contributed to the acquisition of that car or not. Again, as for the motorcycle the husband insisted that it was a present from the wife and thus was not *harta sepencarian* liable for division. Nevertheless, he agreed that the wardrobe should be divided between them as in his view this was *harta sepencarian*. Since she declined to accept that the motorcycle had been her gift during marriage, the wife finally was ordered to take an oath to refute it. The husband on the other hand, also took an oath in order to prove the truthfulness of his sayings that he bought the wardrobe out of his own salary. Finally, the court held that the wardrobe's net value should be split into half, i.e. \$238.50(BND) per each. Since the wardrobe remained in the wife's house, it was held that the wife was liable to pay that sum to the husband.

From the observation made in this proceeding, it could be noted that the *Syar'ie* judge seemed to be slightly biased, paying more attention to questioning the wife than the husband. It was felt that more pressure was placed on the wife than the husband even though there were evidences which she had brought before the court to prove her claims while the husband did not. In fact, when the wife's *Syar'ie* lawyer insisted to call in their witness to give evidence regarding the invalidity of the post-divorce maintenance

agreement, the *Syar'ie* judge seemed to be reluctant. He appeared to have kept the proceedings moving forward, persuading the wife to reconsider her decision in making those claims, and ignoring the application to bring forward the witness. This does not support the idea that the Syariah court objective is to discuss, question and decide on evidence. A few other matters were also noted; there was disorganisation in terms of the examination and cross-examination process and also some speeches were incomprehensible to a layman. However, despite the parties being unreasonable at times, the *Syar'ie* judge's intonation and expression remained under control. No impatience and angry expression could be seen in his face. However, since the case was long the next hearing was set to another day, and so the outcome was not known. But it can be assumed that whatever decision was determined as regards to *harta sepencarian* on that hearing it would be also the final judgment for that particular claim.

6.3.5 Other Remarks on the Syariah Court Hearing Observation

In conclusion, the atmosphere certainly had positive dimensions, but there were also aspects of concern. For example, in the matter of punctuality, the plaintiff and the defendant in normal circumstances appeared to come in time or much earlier than the scheduled time. However, it is felt that the punctuality for *Syar'ie* judges needs to be improved in order to allow enough time for the next case to be heard. There were judges in some cases who seemed not to have their emotions in control and the expression of anger could be sensed by some in court. It was even so strong as to make a wife in one particular case to burst into tears and make her change her mind to immediately withdraw

her claims. Of course, the slow and lengthy court proceeding in some financial divorce cases laid its problem at the parties themselves. They were ignorant about the law as well as the court procedure. This is why there have been suggestions made by several legal professionals in the beginning of this chapter that there was a strong need to appoint a *Syar'ie* lawyer to assist the disputed parties with their cases. The *Syar'ie* judge could also benefit from this as some of the tasks would be carried out by the *Syar'ie* lawyer including the task to draft the court order.

6.4 CONCLUSION

It is submitted that the IFLA (Cap. 217), with more comprehensive provisions than the past law, has conferred more or less equal rights between men and women especially its provisions relating to the financial settlement after divorce. The children too receive many benefits from this modern Muslim law. However, the outcome is not always as fruitful as what is expected to occur. From the analysis made in this chapter, it was discovered that there are still some improvements that need to be done, not only to the law itself but also to the court process as well as the people involved in the court process. Today, the strength of the legal system is not just about the law, courts, judges and lawyers. Litigants also play a role in it. For example, the law should be amended and newer provisions added to it; the court process should be made less complicated and as speedy as possible; judges should be more observant by looking at all relevant factors and should not just rely on whatever has been agreed between parties particularly when they

feel there are some elements of injustice in that settlement; lawyers should be more aggressive in helping their clients to earn their legitimate rights and depart themselves from acting beyond what is permissible under Syariah law and finally, litigants should be more aware of their legitimate duties towards the other party and avoid themselves from making claims for immature reasons.

It is hoped with new changes and improvements, this could at least lessen today's numerous worrying problems arising from financial matters after divorce that hinder the settlement that is favourable and satisfactory to all parties.

CHAPTER 7

CONCLUDING REMARKS AND RECOMMENDATION

7.1 GENERAL CONCLUDING ANALYSIS AND FINDINGS

As noted in the Introduction through a focus on the legal aspect and its implementation, this research sought to answer eight basic questions: (1) what are the prevailing legal provisions that regulate financial matters after divorce for Muslims in Brunei? ; (2) what is the basis of those legal provisions and where are they derived from?; (3) to what extent are they consistent with the Islamic principles?; (4) how are financial settlements made in the Syariah courts of Brunei?; (5) what are the factors that Syariah courts take into account in determining financial settlements?; (6) to what extent are those settlements fair and equitable?; (7) what are the problems and challenges that may have complicated the efforts toward attaining a fair and equitable settlement?; and (8) what recommendations and proposals for the development of the law on financial settlement can be made following a divorce?

In seeking to answer these questions, the research employed doctrinal and empirical research combining with comparative analysis. The doctrinal method was used to seek findings for the first six questions above, which involved the analysis of the present legislation and Syariah laws focusing on the rulings issued by the *Sunni* scholars

as well as case law. The research made use of a large number of divorce financial cases tried in the Syariah courts in pursuit of the aim of compiling an in-depth comparative review about the mismatch between the intended aims of the law as written and the law in action. An empirical methodology, on the other hand, was employed to identify the practical impact of the law on people to which the last two questions are related by examining the results of interviews and questionnaires. An analysis on the court hearing observations is of important significance for it assesses the functioning and the structure of the Syariah court system in administering justice or in other words whether the litigants are able to get a fair trial. The findings discovered from this analysis have also contributed to the answers that questions six and seven seek to reveal.

In this concluding chapter, first, I would summarise the topics discussed in the previous chapters and at the same time would try to expose whatever findings been discovered that relate to any of the research questions stated earlier. An overview of the issues that are of primary concern followed by suggested proposals for reform conclude the chapter.

In the second chapter, the discussion revolved around the historical evolution of the Islamic legal and judicial system in Brunei from the coming of Islam to the colonial administration of the British down to the contemporary period. The research found that despite various theories about when exactly Islam came to Brunei, the most significant aspect in the legal system of Brunei is that Islamic law constituted the earliest comprehensive system of law in the country. The existence of the Hukum Kanun Brunei or the Code of Brunei in the 15th century made Brunei one of the strongest Malay-Islamic

countries at that time. Through colonization, although English law became a dominant influence in the development of the legal system, Islamic law still persisted in it and control over the lives of the ordinary Bruneian citizens. Despite its limited provisions, the Religious Council Kadhi's Courts Law 1955 is the most important piece of legislation that governs Muslim personal affairs from that time to this day and in fact has been used without serious change for almost 60 years. When Brunei got its independence in 1984, the research found that much improvement took place in the application of Islamic law and its implementation in the country. This included the institution of the Syariah courts with greater powers and a wider discretion than that of former *Kadhi* court system established by the British; also the promulgation of a number of Brunei Syariah laws to be administered by the Syariah courts including the Islamic Family Law Act (Cap. 217) in 2001; the establishment of many Islamic authorities namely the Islamic law making Committees; the formation of the Islamic Legal Unit; and finally the efforts towards the islamization of all the Brunei laws which are still based on English laws. This apparent accomplishment of the continued evolution of the role of Islamic law in Brunei is very much attributable to the dedicated efforts and leadership of all the Sultans of Brunei. Today, Brunei is actively moving toward the complete implementation of Islamic law in the personal law sphere where both civil law and Islamic law merge together as one law. This has always been the vision and ambition of His Majesty the Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah Ibni Al-Marhum Sultan Haji Omar Ali Saifuddien, the existing Ruler of Brunei, to implement a system of law and justice in accordance with the teaching of the Quran fully.

As one of the aims of the research was to examine the extent to which the present law theoretically and practically is consistent with the principles as stipulated in the Quran and the Sunnah, chapter three seeks to explore all of the interpretations of the *nass* (Quran and Sunnah) made by the *Sunni* Islamic scholars and the arguments that revolve around the financial matters after divorce. The research found that the Quran is expressive of the man's duties to provide *mut'a al-talaq* and maintenance to his former wife as well as maintenance to his children. However, when it comes to its detail (e.g. what the maintenance entails; when this obligation becomes effected; what factors are to be looked at when making the assessment etc.) not all those matters were unanimously agreed by all four *Sunni* Muslim Schools of Law. For example, there are differences in opinion as to when the obligation of maintenance to a wife becomes effected: whereas according to the Syafi'is it is after the solemnization of the couple's marriage; the Malikis set it when intercourse has happened and the Hanafis require a full submission of a wife to her husband for the maintenance to become effective. While there is no express provision in the Quran or Sunnah about the right of *harta sepencarian*, the long practice of division of matrimonial property among the Malays has placed the couple at a great advantage. In fact, the discussion in many writings of the Muslim scholars about property in general has manifested that matrimonial property does exist and in fact has been given recognition by the Syariah law. Essentially, the disagreement between the Muslim scholars does not amount to a conclusion that some opinions are wrong and cannot be followed and others are right and must be adhered to. Their differences indicate a freedom of thought and of *ijtihad* as well as the need to base *Syariah* rulings in all areas

on the factors involved in them. The divergence of opinion may well be a blessing to allow for the necessary flexibility in application in accordance with the socio-economic circumstances that may differ from place to place and may change from time to time. In fact the process of selection is beneficial means reform is possible (especially in the area of family law) as a means of tackling modern living.

In order to discuss the laws of financial matters upon divorce in Brunei, chapter four concentrated on the IFLA (Cap. 217), the Islamic family law mechanisms for contemporary Muslims Bruneian. The research found that the introduction of IFLA (Cap. 217) brought about a major development in the area of divorce financial settlement laws. Newer provisions and more guidelines have been regulated in the IFLA (Cap. 217) as compared to the RCKCA (Cap. 77), the previous Islamic legislation introduced in the British era. The obvious examples of the reforms made in the aspect of finance are the promulgation of more regulations on maintenance which included tools of payment that were found to be useful such as the attachment of earning order and also certain guidelines on *harta sepencarian*. Regarding the examination on the sources of the legal provisions of financial matters after divorce, it is not easily disputed that they are, by and large, the Syariah-based provisions which have a clear source in the Quran or Sunnah for their legality. The research further discovered that the IFLA (Cap. 217) has taken a more liberal approach where the opinions of any of the four schools of laws (*Sunni*) may be applied as opposed to the strict application of the Syafi'is school of law in the RCKCA (Cap. 217). To illustrate, where the stipulation on the award of divorce maintenance in section 61(1) of the IFLA (Cap. 217) was viewed as mandatory by all *Sunni* schools of

law and limited to the *'iddah* period, in matters of assessment under the statutory requirement⁸²¹ the conditions of both the husband and the wife are to be considered, adopting the view of the Malikis and the Hanbalis. In fact, several legal provisions affecting finance where the Quran and Sunnah are silent about it, have been introduced such as the claim of *harta sepencarian* and the attachment of earnings order in the light of promoting justice and equality, as well as of improving the status of women and children. This approach is consistent with the doctrine of *Siyasah Syar'iah* that allows a ruling that can bring benefit and prevent harm. Therefore it can be concluded that nothing in these legal provisions conflicts with Syariah, but upholds the principle of equality and justice for all.

Overall, the law has many positive aspects that we can consider as steps forward. Nevertheless, it does have some loopholes that might threaten its effectiveness and implementation which could lead to unfair and non-equitable divorce settlements. From the number of single mothers applying for financial assistance from the Islamic Religious Council Brunei (MUIB) or the Department of Community Development (JAPEM), it could be inferred that women suffer badly after divorce especially as to the economic consequences which fall more heavily on women with dependent children and which causes them to go to either one of these government authorities. It is difficult for such single parent families headed by women to lift themselves out of extreme destitution without the help of an extra income in the household which in the case of divorce was supposed to come from the ex-husband (e.g. through the distribution of *'iddah*

⁸²¹ s 63 of the IFLA (Cap. 217)

maintenance or *mut'a al-talaq* or *harta sepencarian*) and also from the father through the payment of maintenance for his children. In this chapter, the procedures on how to make an application for a financial court order following divorce was also described.

In chapter five, a large number of Syariah court cases were analysed to discover findings from which the third, fourth and the fifth research questions could be answered. It was observed from those case reports that financial settlements in the Syariah court can either be made by court order or by consent order following an agreement proposed by the parties. With regards to question four, the absence of specific rules setting out precisely how *'iddah* maintenance, *mut'a al-talaq*, *harta sepencarian* or maintenance for children will be distributed, has led the Syariah court to exercise its own discretion to determine, those taking into account only a very limited number of factors. The study revealed many *Syar'ie* judges gave first and foremost consideration to the financial resources or the earning capacity of the husband and appeared to have ignored other important elements. This was particularly when a claim of maintenance was involved including *mut'a al-talaq*. Despite the statutory stipulation of giving primary consideration to the interests of the child in the division of *harta sepencarian*, not many *Syar'ie* judges were found to have regarded this as a priority as the law requires. Having little or no regard to the circumstances of the case would often result in an unfair outcome where the most aggrieved party is almost always the wife and children.

From the cases reports set out in chapter 5, there were not many cases where the wife's claim was fully satisfied: indeed in some extreme cases the reduction of the claim dropped to a very low point in order to meet an amount that suited the husband's

situation. However, this should not be taken to mean that the wife was always right as regards the claimable amount that she filed in the court. Sometimes she just simply put a large amount that she thinks she deserves into her claim while it turns out that she has contributed virtually nothing to the marriage. In a case like this, if the husband simply agrees to satisfy her desires, such a settlement could be unfair if the court allowed it, for the wife might misuse the available provisions in the law in the pursuit of self-interest. As mentioned earlier, a financial settlement can be based on the parties' agreement. However, the research showed that a so-called arrangement made between parties regarding finance upon divorce in the Syariah court of Brunei may turn out to be an unreasonable settlement. It was discovered that the wife was often the one who was always called upon to be more flexible than the husband. The wife was always the victim that had to endure the consequences of having her claim reduced or lost in order to counter-balance the husband's limited earning capacity. It was also felt that the husband often took control of the negotiations when it proved very difficult for him to compromise and be more open to the wife's requests. The husband's reluctance was not only shown from his constant denial to satisfy the wife's needs but by his complete disappearance in a few hearings which indicated that he treated lightly this matter.

The trend in the Syariah court of Brunei is that they simply approve whatever terms are agreed between parties without scrutinizing if they are a fair settlement or not. In a case where negotiation is impossible between parties, an order was often denied but with an opinion from the judge that an order is to be re-applied for individually. In some circumstances, the Syariah court also dismissed an order where the wife as the claimant

failed to attend the court for a hearing. Failure to reach a negotiated settlement however, is generally caused by the husband as he may constantly disagree, if he were to agree, the amount should be in the limit he solely fixed. As is seen in the many rejected cases, the practice of setting the wife's application aside might also take place when the wife as the applicant fails to attend the hearing. Contrary to this, was the fact that frequently the absent party is the husband and, even worse, where he failed to attend not only once but number of times. The impact from this court practice might result in the wife either being asked to relinquish her financial rights or, if she carried on with an individual re-application, she has to go through all over again the trouble in paying a court registration fee, spend time for another hearing and endure also another episode of mental and emotional suffering due to the husband's recurring reluctance and stubbornness. How could be any settlement be considered as fair and equitable if it is achieved on the basis of this sort of prejudice to the wife. This is totally against the principle of the Syariah because the establishment of the Syariah court means that it serves as an Islamic institution that provides equality and justice for all. Hence, it is not justifiable if the Syariah court lets the aggrieved parties who come forward seeking for their disputes to be settled justly, instead to feel more increasingly aggrieved due to injustices inflicted on them.

Chapter six set out the feedback that was received from two different groups, i.e. legal professionals and litigants who had their cases heard by the Syariah courts. A different set of questionnaires was designed for each group respectively for this purpose. From the analysis of those results, the research discovered two major aspects which could

answer questions seven and eight, i.e. the problems and difficulties that might have hindered an equitable settlement; and the proposed improvements and changes for the development of the law (which will be discussed later in this chapter). It is noted that many legal experts have stressed the problems more on the litigants than the law or the court process. Among these problems are that the husband is incapable of or refuses to pay; that the wife seeks for an excessive demand; or that either the husband or wife is not aware of the provisions of law as well as the court procedures and that either of them has an attitude problem (e.g. impatience, stubborn, inconsiderate etc.). Regarding the law, the majority of the group seemed to agree that the absence of detailed guidelines for determining the amount payable was the major issue. Only a minority of the group viewed the court professionals and the court process as problematic such as questioning the wide discretion exercised by the Syariah courts including the self-interpretation of certain legal provisions and *hadith*; also Syar'ie judges having a lack of knowledge and experience in the legal aspect and a low-confidence in making a decision; and the absence of enforcement of imprisonment for failure to comply with court orders. With regards to the results of the survey made on court litigants, where the study found positive attitudes from almost all respondents toward the questionnaires that revolved around the services they received during the proceedings of their cases, it however could not be implied that the same attitudes would be expected from other non-participated litigants. They also showed some degree of satisfaction concerning the roles of certain legal experts involved in their cases. Nevertheless, a minority of the group complained that the judgment was unfair; the judge was biased in favour of the husband; and the

judge took lightly the claims filed by the wife. This was also agreed by a few respondents from the group of legal professionals who considered some court judgements as gender-biased.

With regards to the observations made in the Syariah court hearings, it reinforced the findings from the analysis made in the case report previously that a lot of what goes on the courtroom is extremely complex and needs to be improved immensely. Some notable problems that emerged in this regard were the non-punctuality of some legal professionals; the very slow and complicated process of the hearing; the poor attitudes of some parties (e.g. totally unaware of what should be said and done at the hearing and being negative towards each other where the sense of hatred could obviously be seen from their gestures and expressions); the unpleasant reactions of some *Syar'ie* judges (e.g. hot-tempered and biased towards the husband); the lack of knowledge of some legal professionals on how to apply the statutory court procedures and so on.

7.2 RECOMMENDATIONS AND SUGGESTIONS

The legislation, case reports, practices and opinion surveys which have been discussed in the proceeding chapters are so critical and important that, inevitably the whole topic remains the subject of continuing proposals for reform. In fact there has been no substantial review or reform made to the law relating to the financial aspects of divorce in Brunei for over 14 years of its implementation. Therefore, it is highly urgent

that these issues be carefully researched and resolved to provide a fairer and more equitable divorce settlement affecting finance for Muslims in the state.

An increase rate of divorce in Brunei each year means that there is a high level of applications for divorce financial settlement that Syariah court has to deal with. Where it is true that the judges' aim is fairness and that judges are given a very wide discretion to apply what is fair, the outcome should be then as fair as is possible in all the circumstances. However, fairness is like beauty lies in the eye of beholder: features that are important when assessing it may be different in each case.⁸²² The Islamic concept of fairness is very comprehensive and its practice is such an important Islamic requirement that the Prophet Muhammad (P.B.U.H) gave detailed instructions on how to ensure that justice is carried out such as the need to listen to both parties properly before arriving at a decision, basing the decision on evidence and not on any claim, nor giving a verdict or passing a judgement when angry etc.⁸²³ It may worth noting how fairness is measured in divorce settlement as put forward by Peter Saunders.⁸²⁴ According to him there are three different concepts according to which a distribution of income and property might be considered as fair, i.e. the one which is equated either with equality of outcomes or the one with prior entitlement or the one with compensation for wrongs done or contractual promises. To illustrate, a couple divorces where the husband has a good job which promises to provide a high standard of living through to retirement and whereas the wife has never been in the labor force since married and has no future assets. It seems only fair

⁸²² As quoted by the lords of Nicholls of Birkenhead in his opinions for judgment in the case of *White v. White*, at <http://www.publications.parliament.uk/pa/Id199900/Idjudgmt/jd001026/white-1.htm>

⁸²³ "Justice ('Adl)" in *What is Islam*, at <http://www.huda.tv/articles/what-is-islam/427-justice-adl->

⁸²⁴ Peter Saunders, "What is a fair divorce settlement?" in *Family Matters* No.53 Winter 1999, <http://www.aifs.gov.au/institutue/pubs/fm/fm53ps2.pdf>

in this situation that the principle of equality of income should be applied whereby a good chunk of the financial entitlements will be given to the wife in order that they will each be able to live at a roughly an equal standard.⁸²⁵ As the Islamic notion of fairness is so comprehensive, it may be a good idea for fair arrangements, wherever possible, to take account also of the above three principles.

As discussed earlier, the settlement over finance or property may be made either by issuing a court order or by approving the parties' agreement with a court order to follow based on the terms agreed between the parties. Whereas a negotiated settlement is strongly encouraged, for it may reduce hostility and bitterness between the parties and save the emotional and financial cost of a full hearing which also can be extremely heavy and stressful, the Syariah court should retain a duty to scrutinize the terms of such an agreement before approving it. In contrast, the study found that there have been numerous cases where the settlement appeared to be made under duress or undue influence or pushed through without thought of whether it was appropriate or fair. The constant disagreement expressed by the husband not to compromise with the wife's request makes the wife either withdraw the application totally or accept any sum for maintenance the husband is happy with. Consequently, as was seen in almost all the previous cases, an instant approval would be given towards such agreement and the Syariah court did not seem to bother to examine if the terms are reasonable and fair. The intention of the Syariah courts in such actions might be for a good enough reason e.g. to ensure a speedy process of the court hearing so that a lot more and newer cases can be

⁸²⁵ Ibid

heard and settled within a short time. While providing a quick and straightaway settlement is desirable, taking a bit more time for scrutinizing the parties' arrangement so as to ensure no 'unbalanced' settlement would occur in fact promotes more justice. This can be inferred from a general Syariah principle of how to determine between two situations where harm is unavoidable in both, where the answer is to choose the situation with a lesser harm in order to avoid inflicting a more harmful one. Therefore, it is proposed that the Syariah court should not approve any agreement proposed before it has been satisfied that such an agreement is made without prejudice and is appropriate and fair. The Syariah court should also be more firm not to let the husband manipulate the negotiation process. If necessary, a statutory provision should be enacted for this purpose.

In seeking to achieve a fair outcome of settlement, before making any financial order, the Syariah court should be bound to have regard to as many factors as possible and look in turn at each of the elements to be applied to all the circumstances of the case. These factors are the parties' financial resources; their respective financial needs; their standard of living; their ages and the duration of the marriage; the welfare of the children; the contributions made by each party to the welfare of the family; and in exceptional circumstances their conduct and any other relevant circumstances of the case. The application of these considerations should not be confined to merely making a financial court order, but the Syariah court before approving any negotiated settlement should still look into the above criteria of assessment. The checklist of matters which the Syariah court is to take into account when making an order, may be used to determine whether the payment is to be made periodically or by lump sum, and to determine the amount the

husband should pay to his wife and children in maintenance or *mut'a al-talaq* or the distribution each party is to receive in a *harta sepencarian* claim. Probably, the best way to ensure that this particular approach of considering all the factors is effectively applied before the Syariah court, is to use a universal rule like that in English law, s. 25 of the Matrimonial Causes Act 1973 (but only to the extent it is consistent with the Syariah principle and is relevant to the circumstances of Brunei people). This could be stipulated for and applied in Brunei so as to set out all those relevant criteria as mentioned earlier. Although there is no express provision in the Quran or Sunnah or in any discussion among *Sunni* jurists about this, referring to the broad perspective of *Siyasah Syariah*, it can be used not only in the sense of administering the existing Syariah but also initiating new laws in other areas.⁸²⁶

In the Syariah court of Brunei, the study found that it has become modern practice to set aside a woman's application for a financial order if the husband is reluctant to compromise with her regarding the amount. Another frequent circumstance noted in the study that led to the dismissal of the woman's application is her failure to attend the hearing. This not infrequently happens where the absent party is the husband and in a worst case scenario the Syariah court keeps on adjourning the proceedings just to make sure he gets justice. In the light of this, the Syariah court apparently denies the wife's application completely without giving her an equal chance as the husband gets and it puts the burden on her alone to go through all the application process again while the husband has to do nothing. This practice is not acceptable to Allah as the Syariah courts do not do

⁸²⁶ Kamali, "Shariah and the Challenge of Modernity", *IKIM Journal*, 2(1),1994, 13-15

justice to the wife for she is a weaker party in the proceeding and it is even cruel due to all these pressures making her finally withdraw her application. Allah commands to the effect:

...then make peace between them with justice, and be fair: for Allah loves those who are fair and just.⁸²⁷

Therefore, it is proposed that the Syariah court procedures and practices should be amended to abolish the need for women to file a separate application for different items of financial orders which parties have failed to negotiate due to the husband's poor attitudes or the wife's failure/inability to attend without giving her a chance to state her reasons. What should be done is that the Syariah court instead of straightaway denying or dismissing the wife's application, should first advise the husband to be more positive and flexible towards the wife's request or set a time for another appointment of hearing for the wife as has always been the case with a disappearing husband. If he fails to appear again the judge should decide against him in his absence and in favour of the wife.

Ultimately, for a complete development and enhancement of the financial law system on divorce, combining the suggestions and recommendations proposed by the group of the legal experts and the group of litigants, the research concludes with the following suggestions and recommendations:

- that both the substantive and court procedural laws should be reviewed and amended or new guidelines and procedures stipulated such as reducing court fees, requiring the litigants to make full and frank disclosure of all material facts and

⁸²⁷Quran, 49:9

- relevant documents and information including any material changes to their financial situation in the course of the proceeding; restricting the examination of debts to merely the mandatory one; setting up a systematic instalment payment for a specified period; deducting a gratuity fund for defaulting payment; requiring each party to identify their contribution respectively while still in marriage;
- that a practice court direction needs to be established and issued regularly to provide an updated or administrative directive for the use of legal practitioners;
 - that the cooperation from other authorities should be established such as MUIB, JAPEM, JPKE and many more e.g. by organizing a workshop in order to discuss and find solutions for family law issues or by seeking the opinion from JPKE regarding the amount of current maintenance as JAPEM based their guidelines for the amount of assistance on the calculation provided by JPKE and so on;
 - that a legal aid bureau should be set up to help the litigants with the court process and for those who is incapable of hiring a private *Syar'ie* lawyers;
 - that a pre-application protocol should be set up such as organizing the information and assessment meeting that is to be attended by the litigants to inform them e.g. about how to make an application, what to expect in the court hearing and the

benefit of making *sulh* agreement outside the court as well as many more provisions;

- that the skills of the legal experts and the legal practitioners as well as the law enforcements should be enhanced through training, workshop, seminars etc;
- that a special agent for collection of payments should be created and would be responsible for any matters related to it such as to ensure the payment is effectively made as is widely practised in England;
- that if a husband refused to appear a number of times the court would find in favour of the wife in the absence of the husband.

In this way the present system in Brunei could be improved to the benefit of all women.

APPENDIX A

ENGLISH TRANSLATION OF THE INTERVIEW QUESTIONS PERTAINING TO THE SYSTEM OF LAW FOR THE MUSLIMS FINANCIAL SETTLEMENT AFTER DIVORCE IN BRUNEI THAT WERE ASKED AGAINST LEGAL PROFESSIONALS

- 1. Occupation Background Information**
 - 1.1 What is your current post?
 - 1.2 How long have you been in this occupation?
 - 1.3 Please describe your roles as regards to your current job?/Describe your work details?
 - 1.4 To what extent have you practiced in the area of family law?

- 2. General Perspectives on Islamic Family Law/Financial Settlement after Divorce Laws (FSAD)**
 - 2.1 How well do you know and understand about the legal stipulations on FSAD for Muslims in Brunei?
 - 2.2 Do you believe, in general that today's system of law for administering FSAD for Muslims is effective? Why or Why not?
 - 2.3 What are your views on whether the Syariah court, as a whole, deals with gender bias in dealing with FSAD?
 - 2.4 What do you believe, in general, are the causes of the increasing rates of some cases relating to FSAD in the Syariah court?

- 3. Wife's Maintenance**
 - 3.1 How do you define the right of a divorced woman towards her maintenance during her *iddah* (waiting period)?
 - 3.2 If you were to decide a wife's maintenance claim, what factors should be considered in determining its amount? (E.g. the financial situation of the husband alone or together with the divorced wife's need etc.)
 - 3.3 What do you perceive as the greatest challenges/difficulties when dealing with wife's maintenance claim? What do you think is the appropriate approach for the judiciary in addressing these difficulties?

4. *Mut'a al-talaq*

- 4.1 What do you understand about the concept of *mut'a al-talaq*?
- 4.2 If you were the person responsible for determining the amount of *mut'a al-talaq*, what are the contributing factors that need to be taken into account? (E.g. the financial situation of the husband alone or together with the divorced wife's need etc.)
- 4.3 Do you think that the existing Islamic FSAD law has adequately provided guidelines and rules for the *mut'a al-talaq settlement*? Why or why not?
- 4.4 What do you believe are the challenges/difficulties that are most likely to occur when dealing with *mut'a al-talaq claim* cases? If any, how would you handle it?

5. *Harta Sepencarian* (Matrimonial Property)

- 5.1 Can you define in your own word the concept of *harta sepencarian*?
- 5.2 The law has explicitly stipulated that the contribution made by each party (husband or wife), physically or financially, toward the acquisition of the property is the most important factor in the division of *harta sepencarian*. To what extent do you believe/agree that other forms of contribution such as emotional and moral support should or should not be taken into account for the entitlement to a share of *harta sepencarian*.
- 5.3 Do you think the court system of *harta sepencarian* has placed an advantage for both husband and wife equally? Why or why not?
- 5.4 What do you perceive as the greatest obstacles/challenges that may have complicated the situation towards attaining an efficient and equitable settlement in *harta sepencarian* cases fought in the *Syariah* Courts?

6. Child's Financial Support

- 6.1 How can you define a child's right to maintenance?
- 6.2 What do you see as the primary factor in determining the amount of maintenance to which children should be entitled?
- 6.3 What do you believe are the challenges/difficulties that are most likely to emerge when dealing with cases relating to claims for a child's maintenance? If any, how you would handle it?

7. Suggestion and Recommendations

- 7.1 Could you recommend any changes in practice, services or the law for improving efficiency in FSAD?
- 7.2 Do you have any other comments or suggestions that you would like to share?

APPENDIX B

ENGLISH TRANSLATION OF THE SURVEY QUESTIONS PERTAINING TO THE FINANCIAL SETTLEMENTS AFTER DIVORCE CASES THAT THE COURT LITIGANTS INVOLVED WITH

About yourself:

1. What is your gender?
 - Man
 - Female
 - Wish not to answer

2. What is your age?
 - 24 years and below
 - 25-39 years
 - 40-59 years
 - 60 + years
 - Wish not to answer

About your case and related matters:

1. When was your case settled?

| | |
|----------------------------|-------------------------------|
| <input type="radio"/> 2001 | <input type="radio"/> 2007 |
| <input type="radio"/> 2002 | <input type="radio"/> 2008 |
| <input type="radio"/> 2003 | <input type="radio"/> 2009 |
| <input type="radio"/> 2004 | <input type="radio"/> 2010 |
| <input type="radio"/> 2005 | <input type="radio"/> 2011 |
| <input type="radio"/> 2006 | <input type="radio"/> Pending |

2. What were the types of financial claims after divorce that you involved with/applied for?
 - 'Iddah* Maintenance
 - Mut'a al-talaq*
 - Harta Sepencarian*
 - Child Maintenance

3. Do you hire a Syar'ie lawyer?
 - Yes
 - No

4. How was your case settled?
- Settlement outside of the court between your spouse and yourself
 - Sulh* agreement prepared by Syar'ie Lawyers
 - Sulh* agreement made by the *Sulh* Officers of the Syariah Court
 - Court Order
 - Other than as stated above
- Please specify_____

5. If you hire a Syariah lawyer, do you feel that your lawyer has given proper assistance in handling your case?
- Very helpful
 - Quite helpful
 - Less help
 - Not helpful at all
 - Do not know

6. Please provide comments/views on the advice and assistance given by the Syar'ie lawyer in solving your case. What is your recommendation for improvement to help solving any financial cases after divorce?

7. To what extent that you are satisfied with the length of time taken by the Syariah Court to resolve your case?
- Very satisfied
 - Quite satisfied
 - Do not know either satisfied or not
 - Fairly satisfied
 - Very unhappy

8. Do you experience any inconvenience during the proceedings of your case?
- No
 - Do not know
 - Yes
- Please specify_____

9. How do you assess the level of competence of the Syariah Court officers/Law Professionals as the following (whoever relevant with your case only)?

| | Very competent | Moderately competent | Not competent | Not sure/ Not relevant |
|-------------------------|-----------------------|-------------------------|-----------------------|---------------------------|
| Syariah Court Judge | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Syariah Court Registrar | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Syariah Court Officer | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

| | | | | |
|---------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| <i>Sulh</i> Officer | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Syar'ie Lawyer | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

10. Who do you feel that helped you the most in resolving your case?

- Syariah Court Judge
- Registrar of the Syariah Court
- Syariah Court Officer
- Sulh* Officer
- Syariah Lawyer
- Others that the Officers mentioned above

Please specify _____

11. Are you satisfied with the solution/decision made in the Syariah Court against your case?

- Yes
- Do not know
- No

Why? _____

12. What happened after the Syariah Court's order was decided against your case?

- My husband/wife and I have complied with the order
- An application was applied for to amend the order due to a change in the circumstances
- An apeal was applied for due to the unsatisfactory court decision
- My husband/wife and I have entered our own arrangement
- Other than the mentioned above

Please specify _____

13. Please provide any comments or suggestions on how the process of the Syariah Court in handling cases of financial claims after divorce can be improved.

APPENDIX C

COURT CASES STUDY FORM

No: _____

Date: _____

Case Year: _____

| | |
|---|--|
| Case No/Citation: | |
| Name of the Case: | |
| Date of Judgement: | |
| Name & Level of the Court: | |
| Forms of FS involved: [WM, M, HS, CM] | |
| Plaintiff: | |
| Defendant/Respondent: | |
| Issues in Question: | |

| | |
|---|--|
| | |
| <p>Facts:</p> <ul style="list-style-type: none"> -Date of Divorce & type of Divorce -How Many Children -Amount demanded (Agreed or not) -Reasons for Refusal etc -Relevant Dates for analysis (Claim,trial etc) | |
| <p>Court Decision:</p> <ul style="list-style-type: none"> -the Author of the opinion/Judge in charge -Amount -Mode of Payment -Date of Effective -Other Remark | |

| | |
|--|--|
| <p>Factors taken into Account:</p> <ul style="list-style-type: none"> - Husband's Financial Capabilities/Situation - Wife's needs - Children's needs - Other factors such as Marriage Duration, Wife's bad attitude, Type of Divorce etc. | |
| <p>References for Decision:</p> <ul style="list-style-type: none"> - Syariah principle or Law (SL) - Statutory Provisions (SP) - Mutual Agreement (MP) | |
| <p>Other Relevant Factors:</p> <ul style="list-style-type: none"> - Whether or not consistent with H/S? - Whether or not consistent with provision of law? - Represented by lawyer or not? | |

| | |
|--|--|
| <p>- Concluded by way of <i>Sulh</i> or not?</p> | |
| <p>Miscellaneous e.g. Documents attached/required</p> | |
| <p>Analysis Remarks:</p> | |

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