



## Historical Developments of Financial Rights after Divorce in the Malaysian Islamic Family Law

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### Abstract

Islamic family law plays a significant role in minimizing the unpleasant effects of the family break up faced by the divorced women and their children by protecting their rights to financial support after divorce. This study undertakes to discuss the historical development of the financial rights after divorce applicable among the Muslims in the pre and post colonial periods, particularly with reference to the *iddah* maintenance, *mut'ah*, arrears of maintenance, and child maintenance. The study indicates that despite the provisions were inconformity with the Islamic principles, the applications were restricted and influenced by the Shafi'i *madhhab*. However, the amount of *iddah* maintenance and *mut'ah* were substantial taking into account the standard of living of the Malay society in the 15<sup>th</sup> and 16<sup>th</sup> century. This means that the welfare of the divorced women was taken care of since the codification of the Islamic law and its implementation in the Malay society.

**Keywords:** Islamic family law, Divorce, Financial rights

### 1. Introduction

The periods beginning with the widespread of Islam into the Malacca Sultanate in the fifteenth century and the importation of the English legal system during the British colonial rule have marked the significant impacts in shaping the unique legal system workable within the heterogeneous cultures, religions, and ethnic groups in Malaysia. This article examines the three distinct periods commencing with the introduction of Islam in the Malay Peninsular, the British colonial period, and the period after the formation of the Federation of Malaya (Note 1), with a view to observe the Islamic law elements exhibited in the Malay Legal Digests and Islamic family law legislations particularly with reference to the rights to financial supports after divorce in terms of *iddah* maintenance (Note 2), *mut'ah* (Note 3), arrears of maintenance, and child maintenance. The study is based on the premise that the Islamic family law plays a significant role in minimizing the unpleasant effects of divorce faced by the Muslim women and their children.

## 2. Islam in the Malay Peninsular (15<sup>th</sup> To 19<sup>th</sup> Century)

So far as the history of Islam in the Malay Peninsular is concerned, Hooker (1984:130) said that “the key geographical and cultural reference has always been to Malacca,” renowned for the sovereignty of its Sultanate, an international entrepôt, and a centre of Islamic religion. The process of Islamization had influenced the introduction of the *Shariah* and modification of the Malay *adat* to accord with Islam. According to Azra (1997:146) although many orientalist of early Islam, such as Landon, Van Leur, and Winstedt viewed that the influence of Islam on the indigenous were far from being substantial or merely a veneer over the Malay indigenous culture, this was opposed by other scholars such as Naquib al-Attas, Van Nieuwenhuijze, and Majul. They maintained almost in similar tone that Islam has transformed the entire structure of the Malay society, particularly in the political, cultural, religious, and social realms. This latter view is considered in the literature as more plausible than the former opinions (Azra, 1997:147). Therefore, in so far as legal heritage in the Malay Peninsular is concerned, the following discussion endeavours to examine the Malay legal digests, which were influenced by *adat temenggung* and the customary laws of *adat perpatih* specifically on the existence of Islamic law principles on the financial supports after divorce.

### 2.1 Undang-undang Melaka

During the early days of the Melaka Sultanate, it had been influenced by the old Hindu tradition from Palembang and according to I-Tsing; it was changed to Islam after its sovereign converted to Islam (Hooker, 1968:157-170). Notwithstanding the influence of Islamic law in Melaka, it had not supplanted the local *adat* in its entirety. Hence, it is generally accepted that the law administered during those days was a composite law in which part of the Islamic law was mingled with ancient Malay custom (Wilkinson, 1908:1-45; Taylor, 1937:1-78). Wilkinson more particularly said that it was in fact a combination of Islamic law and the *adat temenggung*, which had been administered in Melaka (Hooker, 1970:4, 7). *Adat temenggung* had been considered a “decayed” form of *adat perpatih*, since both originated from the Minangkabau highlands in Sumatra. However, *adat perpatih* in Palembang had been affected by profound changes with its exposure to Hindu and later Islamic influences thus, changing it from matrilineal and democratic system to a patriarchal and despotic one (Hooker, 1970:2, 8; Glos, 1965:104).

Although *adat temenggung* was ordained as the law of the Sultan and formed the basis for the law as found in the Malay legal digest, such as the *Undang-undang Melaka*, the digest also contained some aspects of Islamic law. Taylor (1937:4) stated that “Apart, however, from ceremonies of animistic origin, the *adat* did little to regulate marriage and divorce. Consequently, it was not difficult for the Malays to adopt most of the Muhammadan law on these topics....” In order to observe the Islamic elements contained in the *Undang-undang Melaka*, Hooker (1984:9-16) referred to the work of Fang (1976:30). It was ascertained that the four *Fasal* (Chapters) in the *Undang-undang Melaka* (*Fasal 25 – 28*), regarding marriage and divorce were generally the translations of Islamic law, which were based on the Shafi’i school of thought. This was evidenced by the reference made in several authoritative works of the Shafi’i disciples, such as *Fath al-Qarib* by *Ibn al-Qasim al-Ghazi*, *at-Taqrir* by *Imam Abu Shuja’* and *Hashiyah ‘ala Fath al-Qarib* by *Ibrahim al-Bajuri* (Ibrahim, 1965:130-140).

However, according to Wilkinson, the so-called “codes” or *undang-undang* such as *Undang-undang Melaka* was only a digest of Malay law, which may give a very faithful picture of its subjects, but it was not the actual law and no man can be charged in court for violating some sections or subsections of the digest (Hooker, 1970:8). This is because the digest was never enacted by any legislative authority. Wilkinson’s view, which was published during the early part of the twentieth century, should be treated cautiously before making any conclusion, since literature from the latter part of the twentieth century suggested that there were some evidences of the existence of functionaries of Islamic legal institution, especially that of the *kadi* (Hashim, 1988:192). Several religious advisers during the Melaka Sultanate were appointed as *kadi*. They were socially at par with the notables in those days. They had acquired a relatively strong position as *kadi* and had exerted considerable influence upon the population and the rulers in imposing the Islamic law.

Furthermore, Fang (1976:64) states that the injunction in the *Undang-Undang Melaka* ruled that Melaka should be governed in accordance with the Qur’anic law:

Concerning all the ministers and the *sida-sida* (court officers) and the fighting men, they should act in accordance with the words of Allah Most High in the Qur’an; they should obey the command to do good and the injunction forbidding to do evil...

The command shows that not only the idea of the sovereignty was determined by Islamic thought, but also the administration and settlement of legal disputes among citizens contained the Islamic elements. By reinforcing the idea of the divinity of the Sultans (Muslim sovereign) who were often described as the “Shadow of God on Earth,” they attained strong influence over their subjects, thus made it possible to apply Islamic law over them.

Regarding the family law in the *Undang-undang Melaka*, although it was based primarily on Islamic law, *Fasal 28* only illustrates the general principles on *talaq* and nothing was mentioned about the rights and liabilities of the parties following a divorce. Although Hooker (1984:16) said that there were many features of family law that had been left

unanswered or undescribed, “thus admitting by implication, the existence of local custom,” yet, it can still be concluded that the “translation” of the classical text of Islamic law on marriage and divorce would also include the detailed application of *Hukum Sharak*, which is important in administering justice to the Muslim subjects. Moreover, the structure of the text of *Undang-undang Melaka* itself was hybrid. It was not all written at the same period. The Muslim law sections were apparently completed at a later period compared to the *Undang-undang Melaka* “proper” (Hooker, 1984:15). Therefore, the detailed application of the law must have been developed in due course of time.

## 2.2 The Ninety-nine Laws of Perak

According to Mutalib (1997:40), many scholars had widely felt that many of the subsequent written laws in the Malay Peninsular borrowed or were fashioned from the broad guidelines given by the Melaka Digest, such as the Kedah Laws, Customary Laws of Sungai Ujong and Kuala Pilah, and the Ninety-nine Laws of Perak. Hooker (1970:51), on the other hand, had previously cautioned that although the texts of these digests showed some measure of uniformity in their provisions, it was uncertain whether that argued for a common origin or for a process of local diffusion or a conscious imitation. Nevertheless, Hooker said that scholars did agree that the provisions of the digests were often described as containing the rules of *adat temenggung* and the rules relating to marriage and divorce were generally rules of Islamic law that followed the Shafi’i sect.

The Ninety-nine Laws of Perak which was considered as the most detailed of all the digests also contained meticulous laws on marriage and divorce compared to the *Undang-undang Melaka*. There were ten chapters on divorce (Rigby, 1908:20-56), which included the laws on rights of women after divorce. Regarding maintenance of divorced women, *Fasal 7* states that:

If a husband wants a divorce he must pay within three months two *paha* of gold (for her maintenance) and pay the whole of the dowry in cash (if not already paid).

*Fasal 31* reiterates on the maintenance of divorced woman besides the law on division of property after divorce to the effect that:

If the divorce is at the instance of the husband and there is no blame attached to the woman, he must provide her with maintenance for three months, and the personal property will be divided.

Since the period of three months is usually the *iddah* period for a divorced woman, she is entitled to *iddah* maintenance of two *paha* of gold. Howard (2005) states that *paha* is a unit of weight used especially for gold. In addition, *Fasal 39* also spells out on maintenance of divorced women, but it is stated differently:

For her maintenance about a *paha* will suffice, but if there are young children, or if the parties live in a large village, the amount will be two *paha* and a half; if the place where the woman lives is in the jungle, or if she can earn her own livelihood, like the people of the country, she is not entitled to maintenance, she must support herself.

The latter part of the above quoted provision seems to contradict the Islamic law because according to *Hukum Sharak*, a husband is obliged to maintain his wife during *iddah* as their marital tie still exists and maintenance is incumbent upon the husband irrespective of the wife’s place of residence, social status, and capability of earning an income.

Furthermore, the law also explains on the division of property of a woman divorced owing to misbehaviour on her part. *Fasal 31* also states that:

If a divorce is sought owing to the misbehaviour of the woman – that is, on account of either adultery or neglect of service at bed and board, or refusal to do works of charity and to the Almighty – she forfeits her settlements only, and the law is that the husband must pay a *paha*.

According to the above provision, *nushuz* (recalcitrance) on the part of the wife disentitles her to the division of property after divorce although the husband still has to pay a *paha* of gold to her. However, according to *Hukum Sharak*, it is a wife’s right to maintenance, which is forfeited if she is found *nushuz* and she is also not entitled to maintenance during *iddah* (Haskafi, 1970:316-324; Al-Shirazi, 1976:205-206). Therefore, it may be appropriate to conclude that a *paha* of gold payable to a wife who has been divorced under *Fasal 31* of the Ninety-nine Laws of Perak, due to her misbehaviour, may indicate a parting gift or *mut’ah*, not *iddah* maintenance. This is because *mut’ah* according to the Shafi’i *madhhab* is provided to all divorced women except a woman who has been divorced before consummation and her dower has been fixed (Al-Sharbini, 2003:307).

Having discussed all the three provisions on maintenance of divorced women as provided under the Ninety-nine Laws of Perak, though it seems confusing as the amount of gold was not fixed, nevertheless, it may be concluded that the minimum rate of maintenance for a divorced wife was a *paha* and the maximum limit was two *paha* and a half.

The value of the amount of maintenance provided for the divorced women under the Ninety-nine Laws of Perak may be converted to the Malaysian currency based on the international gold spot price. According to Howard (2005), a *paha* of

gold is equivalent to  $\frac{1}{3}$  ounce or 9.45 grams of gold (based on the Metric Conversion Table of 1 ounce equivalent to 28.35 grams). Therefore, it is equivalent to USD \$221 (based on the gold spot price of USD \$662.60 per ounce). By converting it to the Malaysian currency of RM3.47 per USD \$1, this means that a *paha* of gold is equivalent to RM766.87. So, the minimum amount of maintenance that should have been provided by a husband to his divorced wife was about RM767 and the maximum amount was about RM1, 917 (two *paha* and a half of gold). The amount was quite substantial taking into account the standard of living during the 15<sup>th</sup> and 16<sup>th</sup> centuries. The substantial amount of maintenance during *iddah* means that the economy of the divorced Muslim women was better taken care of since the codification of the Islamic law and its implementation in the Malay society.

### 2.3 Adat Perpatih

According to Wilkinson, *adat perpatih*, which is believed to have originally come from the Menangkabau highlands of Sumatra, was found primarily in Negri Sembilan and certain districts of Malacca (Hooker, 1970:7). In due course of time, its practice was recognised as a Malay customary law and enforced by the *Adat* court in Negri Sembilan. It envisages a matrilineal tribal structure and lays importance on the female line of descent. However, contrary to the popular belief, Caldecott said that a man's high position is guaranteed under the *adat* either in his capacity as a husband, an uncle, or a brother who may become an elder or chief in his clan (Kamaruddin, 2005:14).

Under *adat perpatih*, men are responsible for the welfare and heirlooms in the family, but women acquire full rights to the family properties. By this, lands were owned by the wives but the husbands were responsible for its cultivation and strictly subjected by his duty towards his wife and her kin. Therefore, if they did not behave to the satisfaction of "the wife's relations," they ran the risk of being divorced and expelled (Mohammad, 1964:40; Hooker, 1970:13). Therefore, scholars viewed that the men of Negri Sembilan are the most industrious, intelligent, and artistic Malays in the Peninsular because of the pressure put on them by "the wife's relations" that made their positions in the family rather weak upon marriages (Glos, 1965:104).

According to Swift (2001:63), a man's economic interests are very much tied up with his place of residence and he must leave it immediately on divorce. This may well represent a considerable loss to him. Moreover, returning to his matrilineal kin will be unsatisfactory for a man who has been a 'master in his own house' as he is going to live in his sister's house, i.e., in a household headed by his brother-in-law. He may find that his prolonged presence will be regarded as imposition rather than enjoyment of a legitimate privilege because the use and ownership of the property has been vested in his sister's. Therefore, it can be concluded that the matrilineal system provides more protections to women in terms of property rights upon divorce and this is significant in a strongly rooted peasant society.

Furthermore, the *adat* confers on woman in every case an absolute right and duty to take the custody of all the children upon divorce (Taylor, 1929:14-55). Hence, the husband is not liable for the support of the children by his divorced wife (Ibrahim, 1965:78). This is because on divorce of the parents, the children will definitely stay with the mother. Although for legal and religious purpose his status as a father is irrevocable, he can only have the children stay with him occasionally and this can be considered as good as lost (Swift, 2001:63).

On the other hand, Taylor (1929:14-55) observed that with the influence of Islamic principles on the questions of marriage and divorce, the claims for maintenance during *iddah* were made to the Court of *Kadi*. Although the conventional rate fixed was small (\$6 a month), this was not unreasonable when considered in conjunction with a system, which vests so much of the property particularly the *sawah* (paddy field) and *kampung* (village) lands, in the women. From Taylor's manuscript, other claims for post-divorce financial supports, such as *mut'ah* and arrears of maintenance could not be traced in the society of *adat perpatih*, since the Islamic law was administered mainly by the *kadi* whose jurisdiction had been strictly limited to the questions of marriage, divorce, and alimony (Taylor, 1937:4).

Nevertheless, it can be concluded that with the influence of Islam, *Hukum Sharak* should had been made applicable to family affairs except in matters where the *adat* strongly prevailed. Since the divorced women under *adat perpatih* are more protected in terms of property rights, therefore, issues of *mut'ah* may not be relevant.

### 3. The British Colonial Period (1824 till 1948)

The preceding discussion proves that Islamic law, though in a modified form was largely observed by the Malays in the Malay States prior to the European conquests. The fact was further verified through various law cases decided during the British administration (Wilkinson, 1922:49). In the case of *Shaik Abdul Latif & Ors. v Shaik Elias Bux* (1915), Edmond JC held that "the only law applicable to the Malays in the Malay States before the arrival of the British administrators is Islamic law modified by local custom." The position of Islamic law had been repeated in *Ramah v Laton* (1927), whereby Thorne J in delivering the majority judgment of the Appeal Court of the Federated Malay States held that:

Muslim law is not foreign law; it is the law of the land, and as such the court must take judicial notice of it. It must propound the law itself and it is not competent for the court to allow evidence to be led as to what is the local law.

Based on the above facts, one would expect that strong argument exists for the notion that Islamic law should be the *lex loci*. Unfortunately, despite the above-mentioned enlightened decisions by the English judges, it was during the English colonial rule particularly in the Straits Settlements (comprising Melaka, Singapore and Penang), that the status of Islam as the prevailing law had declined to a stage where it was only applied as personal law and was limited to family law and some other aspects of the religion (Ibrahim and Joned, 2002:51). In contrast, English law became the law of general application, although with regard to other Malay States, no formal reception of English law took place until 1937.

### 3.1 The Law in the Straits Settlements

Under the British colonisation, the status of Islamic law as the prevailing law in the Straits Settlements was reduced to personal law under which the practice of this law should have been continued uninterrupted. It was stated under the Anglo-Dutch Treaty 1824 (Article 6 of the Treaty) that the British were not to interfere in matters affecting Malay culture and religion, but to only offer advice on such matters (Mutalib, 1997:36). However, scholars found that operationally, it was clear that such an “advice” had to be acted upon (Hooker, 1972:13-50).

The existence of inconsistencies in the administration of Islamic law had made the British officials to attempt to regulate some key aspects of it. This prompted the passing of the Mohammedan Marriage Ordinance 1880 (Aun, 1999:146; Hooker, 1984:95-101). The Enactment, however, dealt mainly with the administrative or procedural matters, rather than the substance of the *Shariah*. It merely provided for the voluntary registration of Muslim marriage and divorce, the recognition of the *kadi*, and the regulation of the property of married women.

### 3.2 The Law in the Malay States

According to Aun (1999:147), the status of Islam in the Malay States was very different from that of the Straits Settlements as the Sultans retained their sovereignty. Since Islam was the basis of the Malay rule, it might be said that it was indeed the State religion. Therefore, *Shariah* law should have been made applicable. However, in practice, Islamic law was also restricted to a mere personal law pertaining to marriage, divorce, and other related matters applicable to the Muslims, which included divorce matters and the consequences thereto. This was due to the fact that through treaties engagements concluded between the Malay rulers and the British (beginning with Pangkor Engagement 1874) the former must accept the British Resident or Adviser “whose advice must be asked and acted upon on all questions other than those touching the Malay religion and custom.”

However, scholars also found it difficult to uphold that during colonisation, matters relating to Muslim family laws were actually left to the jurisdiction of Islamic laws and *adat* laws (Mutalib, 1997:41). This was due to the colonialists’ efforts at the “bureaucratization” of Islam in the form of greater regulation, standardization and control of Islamic administration, which had marginalized the role of the traditional Islamic religious elites in preference for the colonial-appointed religious functionaries. For example, the establishment of the Religious (Islamic) Council (*Majlis Agama*), which was formed to assist the Sultan in administering the State, was controlled by the British officials.

Moreover, important rulings affecting the Islamic law as well as the jurisdiction of the *kadi* were confined and subjected to the sanctions of the British officials, which made the Islamic law subservient to the British-influenced State enactments. Therefore, it seems that the overpowering of the British legal preferences and values had curbed the role and position of Islam although it had not led to its total overhauling.

#### 3.2.1 Ahkam Syar’iyyah Johor

A significant development of the Islamization of Malay *adat* law can be seen for instance in Johor. A Hanafi text on family law code was translated but adjusted to suit the ruling of the most influential *madhhab* in the Malay Peninsular i.e., the Shafi’i *madhhab* (Ibrahim and Joned, 2002:49-50; Borham, 2002: IV). This was known as *Ahkam Syar’iyyah Johor*. With the arrangement of this Code of 1935 (Volume I), Johor had preceded other Malay States in providing for the first time, the substantive contents of the rules on Muslim family matters to be used as reference for the *kadi*.

Reference to the principle on *mut’ah* was made in *Fasal 37* of the 1935 Code (Articles 375 – 382), all of which related to the detailed *hukum* of an obligatory payment of *mut’ah* to the divorced wife. In fact, the law also provided for the minimum limit of *mut’ah*, which was not less than thirty *dirham* (Article 381). This ruling, which showed the influence of the Shafi’i *madhhab*, was the direct translation of the Shafi’i texts such as *Mughni Muhtaj* (Al-Sharbini, 2003:407-408) and *Minhaj et-Talibin* (An-Nawawi, trans., 1977:313).

It is also possible to convert the value of thirty *dirham* of *mut’ah* into the Malaysian currency. Based on the well-known coin standard established during the period of the Caliph Umar al-Khattab, the weight of 10 *dirham* was equivalent to 7 *dinar* (Ibn Khaldun, trans., 1978:217). The conversion can be made based on the current international gold spot price, which is published in troy ounce of 24k gold (1 kg is about 32.15 troy ounce), while gold *dinar* is 22k gold weighing of 4.25g. Using the gold *dinar* conversion rate i.e., (weight of coin (g) × purity of coin × troy ounces/kg = fraction of spot price per ounce), the international gold spot price is about 7.98 times of the conversion rate:

$$4.25g \times (22k/24k) \times (32.15 \text{ oz}/1000g) = 1/7.98$$

So, if the current gold spot price is USD \$662.60 per ounce/7.98, it is equivalent to USD\$83. By converting to the Malaysian currency of RM3.47 per USD\$1, this will amount to RM288 per one gold *dinar*. Since thirty *dirham* is equivalent to twenty-one dinars, therefore, thirty *dirham* of *mut'ah* payable to the divorced women in the State of Johor about seventy years ago is equivalent RM6,050 (21 gold *dinar* multiplied with RM288). This by all means constituted a substantial amount of *mut'ah*, which indicates the significance of applying the Islamic principle to safeguard the welfare of women upon divorce.

Taking into account that previously many women had been dependent on their husbands for maintenance during the subsistence of marriage, it was important that they should have been compensated for the economic loss that they had suffered. In addition, Article 382 of *Fasal 37* of *Ahkam Shar'iyah Johor* 1935 states that the *kadi* had the discretionary power to determine the reasonable amount of *mut'ah* in case the parties disputed on its quantum, to be based on the financial position of the husband and the condition of the wife.

Nevertheless, it was unfortunate that the relevant laws on maintenance of divorced wife and children was not incorporated in the two volumes of *Ahkam Syar'iyah Johor*, although the translator of the Code did mention of his intention to pursue with the subject of maintenance. According to Borham (2002: V), the arrangement for the subsequent volume might not succeed due to the outbreak of the Second World War. However, it was briefly provided in Article 573 of the Code of 1940 (Volume II), that a man had a duty to pay maintenance to his wife and the *kadi* had the power to make a decree on this matter. In case the husband was legally incompetent to maintain the wife, her *wali* (legal guardian) could be ordered to provide the same. The provision adopted the view of the Hanafi *madhhab*, which is in favour of the non-separation doctrine when the husband is unable to provide maintenance to his wife. In such a case, she may raise a loan on the husband's credit with the order from the *qadi* (Al-Marghinani, trans., 1975:397). Contrarily, the majority of Muslim jurists contended that a wife has a right to separation on account of her husband's poverty (Al-Sharbini, 2003:563; Ibn Qudamah, 2000:577), which is due to great hardships that may be caused to her because it may be difficult for her to get a loan on the husband's credit (Wani, 1995:82). In this sense, the Hanafi jurists maintain that the husband's obligation remains, but the wife shall be supported by her blood relatives in case of necessity as the latter would be responsible for her if she were not married (Al-Marghinani, trans., 1975:412-413). Thus, the Hanafi ruling points towards the significance of the Islamic principle of inheritance whereby those who are related by blood are bound to maintain their daughters or sisters as they would have been entitled to inherit from her, had she been deceased.

Since Islam had discarded the pre-Islamic customs of excluding the daughters and sisters from their natural family upon their marriage, women therefore continue to be the members of their natural family (Khan, 1989:8). In case of hardships, their collateral relations are responsible to help them. Whether the wife raises a loan on the husband's credit or she gets help from her family, her expenditure becomes a claim or debt against her husband for which he is liable to pay when his financial situation improves (Al-Ati, 1977:159).

#### 4. The Law in the Borneo States (1841 till 1963)

Islamic law in North Borneo (now Sabah) and Sarawak was the peculiar creation of the unique systems of private administration under British protection (Hooker, 1984:189). Although there were no special provisions for application by Muslim divorced women for maintenance in both States, the *kadi* had the jurisdiction to deal with such applications (Ibrahim, 1965:55). In North Borneo, Muslims could apply for child maintenance under the North Borneo Maintenance Ordinance 1959, while in Sarawak the application could be made under the Sarawak Criminal Procedure Code. For instance, in Sarawak, it was provided that a man who neglected or refused to maintain his child may be ordered by the court to make monthly allowance that had been fixed at a rate not exceeding fifty dollars (Sarawak Criminal Procedure Code 1948, s 335).

In addition, there were in existence law texts in Sabah known as *Undang-undang Mahkamah Adat Orang Islam* and in Sarawak *Undang-undang Mahkamah Melayu Sarawak*. According to Hooker (1984:215), the former law adhered more closely to the *Shariah* compared to the latter. Nevertheless, by implication, the substantive rules on "divorce and its related matters," as referred to by Hooker, included matters relating to financial rights of women after divorce. Besides, the laws in both States did specifically provide for maintenance of children (Ibrahim, 1965:55).

The amount for maintenance of a divorced wife and children was fixed under the *Undang-undang Mahkamah Melayu Sarawak* at the rate of 20 to 50 dollars and 10 to 25 dollars a month respectively. Under the same law, s 40 as well as Addenda of 9<sup>th</sup> September 1910, it is stated that an ex-husband who failed to provide proper maintenance would not be allowed to marry again (Ibrahim, 1965:78). The law in Sarawak also protected the rights of a Muslim woman who was married to a person not domiciled in that State (or stranger known as *orang dagang*). It had been provided that the husband should not leave Sarawak until the authorities were satisfied that he had made proper provision for the maintenance of his wife and children (Sarawak Muslim Marriage Ordinance 1948).

By not allowing a man to remarry or leave the State of Sarawak and fixing the rate of maintenance, it seems that the laws previously enforced in Sarawak adopted far-reaching efforts of reasonably aimed to serve justice to divorced

women and children by protecting their economic welfare. This guaranteed that the Islamic principles on maintenance were enforced and complied with by the ex-husband.

### 5. The Federation of Malaya (1948)

Since 1952 the Islamic law in each of the Malaya State has been consolidated on a fairly uniform basis, which deals mainly with its administration (for examples, Administration of Muslim Law Enactment 1952 (Selangor); Administration of Islamic Law Enactment 1955 (Terengganu); and Administration of Muslim Law Enactment 1965 (Perak). The provisions contained in the various State Enactments were the statutory restatement of the basic tenets of Islam, which related among others to family law; the rules were taken from the orthodox Shafi'i practice as this was understood and applied in the administration and courts of the pre-war Malay States (Hooker, 1984:151-152).

#### 5.1 The Administration of Muslim Law Enactment

With regard to the financial rights of women after divorce, the law on maintenance in most of the Malay States (such as the Administration of Muslim Law Enactment 1959 (Penang), s 134, s 137, and s 138; the Administration of Muslim Law Enactment 1959 (Malacca), s 132, s 135, and s 136; and the Administration of Muslim Law Enactment 1960 (Negeri Sembilan), s 133, s 136, and s 137) provides:

A woman who has been divorced may, by application in the court of a Kathi, obtain an order against her former husband for the payment in respect of her period of *iddah*, if the divorce was by one or two talaks, or, in any case, in respect of the period of pregnancy by the former husband, of any such sum in respect of her maintenance as she may be entitled to in accordance with Muslim law. In case of wilful failure to comply with such orders, the person in default may be sentenced by the Court to a term of imprisonment which may extend, if the order provides for monthly payments, to one week for each month's allowance remaining unpaid, or in any other case, to one month.

The provision specifically states that only those women who were revocably divorced or those who were pregnant could claim maintenance in respect of the *iddah* period. Therefore, those women who were divorced irrevocably are clearly excluded as there was no possibility for the parties to resume conjugal relation. This provision applies strictly the doctrine of the Shafi'i sect (Al-Shirazi, 1976:210; Al-Jaziri, 1950:575-576), for which the *qadi* in those days had to take effect of the provision. Contrarily, the Hanafi jurists allowed all divorced women to claim *iddah* maintenance in any form of divorce (Al-Marghinani, trans., 1975:373-406), which may be considered as a form of financial protection.

In addition, a woman who was divorced by her husband was also entitled to claim for *mut'ah* or a consolatory gift. The law (such as the Administration of Muslim Law Enactment 1952 (Selangor), s 130 and the Council of Religion and Malay Custom and Kathis Courts Enactment 1953 (Kelantan), s 149) provides that:

A woman who has been divorced may apply to a Kathi for a consolatory gift or *mut'ah* and the Kathi may after hearing the parties order payment of such sum as may be just and in accordance with Muslim Law.

Although the provision regarding *mut'ah* is more general, the application of the law also reflects the influence of the *madhhab*, which is the Shafi'i view. In this regard, all women who had been divorced regardless of whether their marriages had been consummated or not, were entitled to claim for *mut'ah* (Al-Sharbini, 2003:307; Al-Shirazi, 1976:81). Although, there were no statutory provisions for the payment of *mut'ah* in other States of Malaya, it would appear that an order for its payment might be made by the *kadi* in accordance with Islamic law (Ibrahim, 1965:52).

It is also important to highlight the provision of the Administration of Muslim Law Enactment 1963 (Perlis), s 104(3), which provides that:

A divorced woman may apply for an order of maintenance against her former husband, which is payable monthly for so long as she remains unmarried or does not commit any misconduct.

The above provision can be considered as a statutory effort to extend the right to maintenance beyond the period of *iddah*. This provision has gone beyond the explicit Islamic law principles, which oblige an ex-husband to maintain his divorced wife during a specified waiting period only (al-Qur'an, *at-Talaq*: 1 – 2, 4, 6; *al-Baqarah*: 233, 241). However, the provision was successfully invoked in the case of *Che Ah v Ramli* (1981). The *Kadi* Court of Perlis had allowed the claim for *iddah* maintenance as well as an order for monthly maintenance payable to the ex-wife. The *kadi*, while granting the order, expressed that the said Section 104(3), was not based on *Hukum Sharak*. Nevertheless, the reason for inserting such provision may be viewed as a form of providing financial support to the divorced women particularly those who had been divorced without good cause or reason and it was not due to misbehaviour on their part.

However, after the passing of the Perlis Islamic Family Law Enactment 1991, by virtue of Section 133 of the Enactment, Section 104(3) of the Administration Enactment 1963 was repealed and ceased to apply to the State of Perlis. The current provisions on financial rights after divorce in Perlis are similar to that of the other Malaysian States, which

provide that a divorced woman's right to maintenance shall expire after the end of the period of *iddah* or when she is found *nushuz* (Islamic Family Law Enactment 1991 (Perlis), s 65).

Furthermore, the laws in most of the States of Malaya also provide, in accordance with the Islamic law, for the obligation of a lawful father or any other person to support his minor child (the Selangor, Pahang, Penang, Malacca, Negeri Sembilan and Kedah Enactments, a minor is a person under the age of fifteen years, whereas under the Kelantan and Terengganu and Perlis Enactments, a minor is under the age of eighteen years). Child maintenance should also be provided to an incapacitated child by infirmity or disease or an unmarried person, unless the child has sufficient means to support himself (the Administration of Muslim Law Enactment 1962 (Kedah), ss 135-136; Council of Religion and Malay Custom and Kathis Courts Enactment 1953 (Kelantan), ss 160-161; and Administration of Islamic Law Enactment 1955 (Terengganu), ss 118 -119).

## 6. Conclusion

To sum up, as observed by Hooker (1984:155), "the legislation on family law is permissive of Islamic principles but rather restrictive as to the practice or implementation of the relevant rules. The statutory emphasis is on order and certainty of process rather than on either an innovation or detailed confirmation of Islamic laws." It may be understood that despite its conformity to the Islamic principles, the provisions are restricted as it had been much influenced by the dominance of the Shafi'i *madhhab*. Although history proved that the amount of *iddah* maintenance and *mut'ah* paid to the divorced women in the 15<sup>th</sup> and 16<sup>th</sup> century was substantial, legislations that were passed in the later centuries only ensured consistency of the administration of personal law and procedural matters rather than dealing profoundly with the substance of the *Shariah*. This is true because the purpose of the codification of the law is to serve as a guideline only. The detailed dictates of the *Shariah* are to be found in the classical texts of the Muslim jurists from the four established *madhahib*. Therefore, it is left to the judges to refer to the classical texts while interpreting the codified provision to be in conformity with the spirit and objectives of the *Shariah*.

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- Sarawak Muslim Marriage Ordinance Cap. 75 of 1948
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- Undang-undang Mahkamah Melayu Sarawak

#### Notes

Note 1. The discussion is confined to the period before the coming into force of the Islamic Family Law (Federal Territories) 1984 Act 303, which was enacted as a model of uniform Islamic family law legislation for other States in Malaysia.

Note 2. *Iddah* is the length of time a Muslim wife must wait (can not remarry) following her divorce in order to ascertain her state of womb, which is important to establish parentage if she is pregnant, thus protects the rights of both the first as well as the potential second husband. During this period her maintenance is incumbent upon her husband.

Note 3. *Mut'ah* is a payment made by a husband to his divorced wife as a symbol of humility and kindness to remove any cause of accusation or shame, which may arise from the divorce and to lessen her financial burden caused by the separation.