

ANCILLARY ORDERS ON MUSLIM DIVORCE — THE PRACTICE OF THE SHARIAH COURT IN SINGAPORE

Section 36A of the Muslims Ordinance, 1957,¹ (as amended by the Muslims (Amendment) Ordinance, 1960)² provides that in any application for divorce the Shariah Court may at any stage of the proceedings or after a decree or order has been made, make such orders as it thinks fit with respect to —

- (a) the payment of maintenance or *maskahwin*³ to the wife;
- (b) the payment of a consolatory gift or *mata'ah* to the wife;
- (c) the custody, maintenance and education of the minor children of the parties; and
- (d) the disposition or division of property on divorce”.

These provisions would appear to give ample powers to the Shariah Court to make ancillary orders on divorce but in practice these powers have a very limited effect either in alleviating the loss suffered by the divorced wife and children or as economic deterrents on divorce. The reason would appear to be that the Shariah Court considers itself bound by the accepted views of Muslim jurists on these matters to adopt a conservative attitude as regards the interests of the wife and children on divorce.

(a) *Maskahwin* or *Mahr*.

The general principle is that on divorce the husband is liable to pay the whole of the *maskahwin* or *mahr* to the wife. This can act as an effective deterrent to divorce if as is the practice in some Muslim countries like the United Arab Republic, Pakistan and India, a large sum of money is provided as deferred dower to be paid on divorce. The general practice, for example, in the United Arab Republic is to specify a portion of the *mahr* to be paid at the time of the marriage and a larger portion of it to be paid at the time of the divorce. The amount paid on the marriage is used to furnish the house for the married couple, while the deferred

1. No. 25 of 1957.
2. No. 40 of 1960. A similar provision is included in Clause 52(3) of the Administration of Muslim Law Bill with the significant omission of the power to make orders in respect of the custody, maintenance and education of children.
3. *Mas-kahwin* is the Malay equivalent of *mahr* or obligatory marriage payment due under Muslim law to the wife on the solemnization of a marriage.

amount is to be paid only on divorce.⁴ There appears to be no legal limit to the amount of the *maskahwin* or *mahr* and very large amounts have been sustained by the courts in India.⁵ In this respect the doctrine and practice of the Shafii school seems to act against the interests of the divorced wife. As Fitzgerald said:—

In Maliki countries the *mahr* though not excessive is usually substantial. In India both among Hanafis and Shias and it is believed in Hanafi countries generally, sentiment is strongly in favour of high dower. But in many Shafii countries the *mahr*, especially in the lower orders of society,⁶ has sunk so low that it is no longer to be regarded as anything but a symbol.

Moreover while the practice of dividing the *mahr* into two portions — prompt and deferred — is universal in the Hanafi school and in the Shia school as followed in India and prevalent in the Maliki school, in the Shafii law the whole dower is normally regarded as prompt.⁷

The result is that we find that in Singapore the *maskahwin* which is fixed is very low indeed. The normal amount is the customary one of \$22.50, which with the rise in the cost of living, has become very low, and even then *maskahwin* of smaller amounts are permitted. The *maskahwin* can be paid without difficulty on marriage or soon after the marriage and the result is that there is, in this respect, no economic deterrent at all on divorce. In the normal case the husband does not have to face the difficulty of finding a sufficient sum to pay for the *maskahwin* of the wife on divorce.

The position cannot be met by legislation but only by a change in the attitude of *kathis* and the parties and their guardians and it is hoped that Muslim leaders in Singapore will encourage this change.

(b) *Maintenance.*

Under the Muslim law a wife is entitled to reasonable maintenance from her husband during the marriage and she is also entitled after divorce to be maintained by her husband during the period of *eddah* or waiting on the same scale as before the divorce.

The Holy Quran is insistent on fair treatment to divorced women:—

For divorced women maintenance should be provided on a reasonable scale. This is a duty on the righteous.⁸

When you divorce women divorce them at their prescribed periods and count accurately their prescribed periods and fear God your Lord and turn them not out of their houses, nor shall they leave except in case they are

4. Muhammad Rashid Feroze, "The Reform in Family Laws in the Muslim World", in *Islamic Studies*, (Karachi, 1962), Vol. I, No. 1, at p. 118; S. Vesey-Fitzgerald, *Muhammadan Law*, (Oxford, 1931), at p. 67.
5. Syed Ameer Ali, *Mohammedan Law*, Vol. II, (Lahore, 1965), at pp. 392-393.
6. S. Vesey-Fitzgerald, *op. cit.*, at p. 63.
7. *Ibid.*, at p. 67.
8. *The Holy Quran* (Translation of A. Yusof Ali), 22:41.

guilty of open lewdness. These are the limits set by God; and any who transgresses the limits of God does verily wrong his own soul.⁹

Let the women live [in *eddah*] in the same style as you 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; and if they suckle your offspring give them their recompense. And take mutual counsel together, according to what is just and reasonable and if you find yourselves in difficulties, let another woman suckle the child on the father's behalf.¹⁰

It can reasonably be deduced from these verses of the Holy Quran that a divorced woman should be treated after her divorce and during the the period of *eddah* in the same state as regards maintenance and accommodation as she was treated before the divorce; and Nawawi says "Maintenance during the period of legal retirement differs in no respect from maintenance during marriage".¹¹ The practice in Singapore however does not always conform with these high principles. The Shariah Court has powers to order maintenance and orders for maintenance can also be made by consent where a divorce is registered by a Kathi. Where maintenance is granted or agreed to, the amount that is granted or agreed to is usually very small, the wife is usually thrown out of the matrimonial home and the maintenance bears little relation to the standard of living of the parties before the divorce. In some cases where the divorce is an irrevocable one, as, for example, where it is a triple divorce, no maintenance at all is granted,¹² and the right of the wife in such a case to have a suitable lodging is ignored. Too often no inquiries are made as to whether the wife is pregnant or not and certainly very little attempt is made to enforce the right of the wife to get her maintenance and expenses for the period of pregnancy and for her accouchement and the period of weaning the child. In very many cases too the wife loses her right to maintenance as the husband uses pressure to make her forego her rights in return for his granting her the divorce. Even if the rules of maintenance were properly administered in Singapore, the wife would not generally be well provided on divorce, as the average income of a Malay family in Singapore is low and as the wife is economically dependant on the husband and unable to find a living for herself; but in practice she is given and forced to accept no maintenance at all or only a very meagre subsistence maintenance for the period of the *eddah*.

The normal practice is that the divorced wife is only entitled to maintenance for the period of the *eddah*,¹³ which is usually about three months. But in some Muslim countries the period during which such maintenance

9. *The Holy Quran*, 65:1.

10. *The Holy Quran*, 65:6.

11. Nawawi, *Minhaj et Talibin*, translated by E. C. Howard, (London, 1914), at p. 387.

12. Ahmad Ibrahim, *Islamic Law in Malaya*, (Singapore, 1965), at pp. 224-225.

13. Muhammad Asad in the *Message of the Quran*, (Mecca, 1964), translates Surah 2 Verse 241 of the *Holy Quran*, as "And the divorced women too shall have a right to maintenance: this is a duty for all who are conscious of God" and states "The amount of alimony — payable unless and until they remarry — has been left to be unspecified since it must depend on the husband's financial circumstances and on the social conditions of the time."

is payable has been extended. In Syria it is provided that if a man divorces a wife and it is shown to the Kathi that the husband was treating his wife wrongfully by divorcing her without reasonable cause and that the wife would suffer damage and poverty thereby, the Kathi may give judgment in her favour against the husband, having regard to the latter's financial standing and also to the degree to which he has wronged her, of compensation not exceeding the amount of a year's maintenance for one of her position in addition to the maintenance due to her during her *eddah* period, and may order that this be paid either as a lump sum or monthly as the circumstances require.¹⁴ In Brunei it is provided that a woman who has been divorced may by application in the Court of Kathi obtain an order against her former husband for the payment in respect of the period of *eddah*, if the divorce is 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 the Muslim law; a woman who has been divorced and who is not so entitled to maintenance may however apply to the Court of the Chief Kathi and that Court may, if 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 but no such order shall require the former husband to pay to his former wife any amount in excess of one hundred dollars per month.¹⁵ In Perlis there is a clearer and more precise provision. In addition to the maintenance during the period of *eddah*, a woman who has been divorced may apply to the Court for an order against her former husband for maintenance payable monthly, for so long as she remains unmarried or does not commit any misconduct, but the Kathi is required before making the order to satisfy himself that the woman has been divorced without good cause or reason.¹⁶ While an analogy might be drawn with the case of widows, for whom the Quran provided for a year's maintenance and residence,¹⁷ orthodox opinion would perhaps continue to limit the period of maintenance for a divorced wife to the period of *eddah* and it seems better to regard the payment of the extended maintenance as a form of compensation of *mata'ah* for her.

The Administration of Muslim Law Bill in Singapore includes in Clause 51(3) a provision for the payment of maintenance after the period of *eddah*, following the provisions of the Perlis enactment and it is hoped that when the Bill becomes law, the Shariah Court will exercise its powers in this respect to alleviate the hardship caused by divorce to the wife and children.

(c) *Mata'ah*.

According to the Shafii school of law the payment of a consolatory

14. Syrian Law of Personal Status, 1953, article 117.
15. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 158.
16. Perlis Administration of Muslim Law Enactment, 1963, (No. 3 of 1964), s. 104.
17. See *Holy Quran* 2:240 part of which Muhammad Asad translates as "And if any of you die and leave wives behind, they bequeath thereby to their widows the right to one year's maintenance without their being obliged to leave the dead husband's home". Opinions differ as to whether this provision is abrogated by the share which the widow gets (*Holy Quran* 4:12) but both Yusuf Ali and Muhammad Asad do not think so.

gift to the divorced wife is incumbent not only in the case where a woman has been divorced before consummation and before her dower is fixed, but in the case of every divorced woman (except a woman whose dower has been stipulated and who is divorced before consummation), when the separation is not the result of anything for which the woman is responsible.¹⁸ Imam Shafii is reported to have said that the gift is made incumbent "in the way of a gratuity or compensatory gift from the husband on account of his having thrown the woman into a forlorn state by her separation from her".¹⁹ And Nawawi says "It is recommended that the *mata'ah* should never be less than thirty dirhams and where the parties cannot agree as to the amount of *mata'ah*, the decision rests with the Court, which should take into account the condition of both parties".²⁰ The provision for payment of *mata'ah* is therefore a proud feature of the Shafii school of law and this provision has been enacted in Morocco²¹ and in a modified manner in Syria.²² But it is sad to find that in practice in Singapore the payment of *mata'ah* like that of the *maskahwin* has become only a symbol. Indeed the generally accepted practice both in the Shariah Court and in the case of consent orders made by Kathis would appear to be to award *mata'ah* of an amount equal to the *maskahwin* or even half of it; and if the normal *maskahwin* is \$22.50, the normal *mata'ah* is \$10/- or \$20/-, an amount which can hardly be regarded as in the true sense a compensation for the wife unreasonably divorced. The example of Syria where compensation up to the amount of a year's maintenance can be awarded by the Kathi seems worthy of emulation in this respect. It is also hoped that there will be a change in attitude and a realization that the value of the money has fallen and that the Shariah Court will thereby be induced to award more realistic amounts as compensation.

(d) *Interests of the children.*

Although the Muslims Ordinance, 1957, appears to give power to the Shariah Court to make orders for the custody, maintenance and education of the minor children of the parties,²³ this power has not in fact been exercised by the Court. The Shariah Court appears to have taken the view that it can only make consent orders in this respect and that it is only the High Court or the Magistrate's Court which can in disputed cases make orders for the custody and education of minor children and for their maintenance.²⁴ In most cases the interests of the children are ignored. The procedure in the Shariah Court in this respect stands in contrast with the procedure adopted in countries like the United Kingdom,

18. Ahmad Ibrahim, *op. cit.*, at p. 223.

19. *Ibid.*

20. Nawawi, *op. cit.*, at p. 313.

21. Syria Law of Personal Status, 1953, article 117.

22. Morocco Code of Personal Status, article 60.

23. Muslims Ordinance, 1957 (as amended by the Muslims (Amendment) Ordinance, 1960), s. 36(a) (c).

24. Under the Guardianship of Infants Ordinance (Cap. 16) and the Women's Charter, 1961.

for example, where the Matrimonial Proceedings (Children) Act, 1958,²⁵ provides that the Court shall not make absolute any decree for divorce or nullity of marriage unless and until it is satisfied as respects every child who has not attained the age of sixteen years that arrangements have been made for the care and upbringing of the child and that these arrangements are satisfactory and are the best that can be devised in the circumstances. Although the Prophet is reported to have said "kindness to children is a characteristic of the Muslims"²⁶ and although the Holy Quran and the Traditions of Prophet commend the care of and the doing of good to orphans,²⁷ yet we find that Muslim jurists generally ignore the interests of the children in considering the divorce of their parents. It is true that in matters of the custody and guardianship of children the Muslim law appears in theory, at least, to give more rights to the mother than to the father but in practice in Singapore it is difficult for mothers who are divorced to look after their children adequately especially if the fathers are unable or unwilling to maintain the children or do what they can to avoid paying for their maintenance. In too many cases in Singapore we find that it is the children who suffer from the divorce. Where the father does not provide for the maintenance of the children, the mother is forced to take away the children from school. To get maintenance she has to bring an application in the Magistrate's Court²⁸ — this takes time and in the meantime the children are removed from school and their studies interrupted. Until recently too the husbands were able to make use of the Guardianship of Infants Ordinance, which gives the father the primary right to the guardianship and custody of the children, to answer the mother's claim for maintenance for the children, by getting custody of the children. The Guardianship of Infants Ordinance has recently been amended²⁹ to accord more with the Muslim law in giving equal rights to the father and mother and making the welfare of the child the primary consideration. An application to the High Court, however, costs money and time which the parties and certainly the divorced wife can ill afford and therefore the children continue to suffer, as neither the conscience of the parties nor that of the Court is affected by their interests.

(e) *Division of property on divorce.*

It was at least doubtful whether the Malay custom of *harta so-pencharian*, whereby on divorce the jointly acquired property of the spouses is divided between them is applicable in Singapore. The case of *Rasinah v. Said*³⁰ can be quoted as authority for the proposition that the custom has ceased to be applicable in Singapore, but on the other hand, the Muslims Ordinance, 1957, specifically gives power to the Shariah Court to make orders for the disposition or division of property on

25. 4 & 7 Eliz. 2 c. 40.

26. *Jami al-Tirmidhi* 25:15; Ibn Hanbal, *Musnad*, Vol. 2, at p. 207.

27. See for example *Holy Quran*, 89:17-20; 4:2 and *Bukhari* 2:31.

28. Under the Women's Charter, 1961.

29. See the Guardianship of Infants (Amendment) Act, 1964.

30. E. N. Taylor, "Malay Family Law" *Journal of the Malayan Branch of the Royal Asiatic Society*, Vol. XV (1937), Part I, at p. 29.

divorce.³¹ The Shariah Court has in fact made such orders in a few cases, especially where there was evidence to show that the parties jointly contributed to the purchase of property but it is doubtful if the Court would make such an order in the normal case where the husband is the sole earner and the wife does the housework. In such cases there is some authority (even statutory authority in Sarawak) for the view that the property would on divorce be divided in the proportion of two thirds to the husband and one-third to the wife.³² Quite apart from the Malay customary practice, there would appear to be some juristic support for the view that household goods of the parties should be divided equally on divorce.³³ Moreover in theory at least the wife has a right to ask the husband to provide a servant to do the household duties and so if she does those duties herself she has at least some right to compensation.³⁴ Here again modern systems of law, for example, in the United Kingdom, Australia and New Zealand,³⁵ have given the wife an equal right to the matrimonial home and to moneys saved during the marriage and it would certainly not be out of keeping with the policy of the Muslim law to give the Muslim divorced wife, whether by custom or by law, a share in the jointly acquired property of the marriage.

An attempt to clarify the position in Singapore has been made in the Administration of Muslim Law Bill. In making orders for the disposition or division of property on divorce the Shariah Court is enjoined to have regard to the Muslim law, as varied in appropriate cases by the Malay custom and this would certainly appear to give the Shariah Court power to make orders for the division of *harta sapencharian*. A similar power is given to make orders for the division of *harta sapencharian* on the death of a spouse.³⁶

Where an order has been made by the Shariah Court it is not always that the wife is able to get the benefit of the order readily. Section 36B of the Muslims Ordinance, 1957, (as amended by the Muslims (Amendment) Ordinance, 1960), provides that if any person fails or neglects to comply with an order of the Court, the Court may for every breach of the order direct the amount or the value of the property due to be levied in the manner provided for levying fines imposed by a Magistrate's Court or may sentence him to imprisonment for a term which may extend to six months. It has been difficult for the Shariah Court to enforce such orders, as it has not got the facilities or the staff of the Magistrate's Courts. In some cases the Court has granted the divorce on condition of payment of

31. Muslims Ordinance, 1957 (as amended by the Muslims (Amendment) Ordinance, 1960, s. 36A(d).

32. Ahmad Ibrahim *op. cit.*, at p. 228f and Sarawak Undang-Undang Mahkamah Melayu, Sarawak, s. 41.

33. See the authorities cited in J. Schacht, *Origins of Muhammadan Jurisprudence*, (Oxford, 1953), at pp. 278-279.

34. See Nawawi, *op. cit.*, at p. 384.

35. United Kingdom Married Women's Property Act, 1964; Australian Matrimonial Causes Act, 1959; New Zealand Matrimonial Proceedings Act, 1963, and Matrimonial Property Act, 1963.

36. Administration of Muslim Law Bill, 1966, Clauses 35(3) and 106(3).

maintenance or compensation to the wife. The husband undertakes to pay these at some time in the future but when he fails to do so, the wife will then have to apply to the Court again to enforce the order. In the past there have been cases where the husbands have ignored the order of the Court but by a recent amendment to the Muslim Marriage and Divorce Rules, the Court is given power to issue a warrant of arrest. But the process takes time and the procedure of enforcement as if the order was an order for payment of a fine in a criminal court would appear not to be very suitable for such orders. Perhaps it would be better for the Shariah Court not to register divorces until all the payments have been made or to have a summary method of enforcement of the Courts' orders, in the manner for example, of orders of the Civil District Courts.

This survey of the ancillary orders on divorce which may be made by the Shariah Court in Singapore show that laws alone are not enough and that it is necessary to ensure that the laws are applied and followed. In speaking of the reforms in the family law in Morocco the Minister of Justice of Morocco said:

If an abiding union, filled with compassion and affection between the spouses represents the union which Islamic law desires for Muslims — as best suited to human nature, best adapted to family welfare and most consonant with the preservation of the species — yet Islam has also made legal provision for release from the bonds of marriage where the good relations to which marriage is intended to give rise do not materialise. But if, for social considerations, it does not preclude divorce, yet it considers it the most hateful to God of things which He has permitted. On the basis, therefore, of the true principles of Islam in this regard, and with the aim of protecting wives from the inadequate view of the marriage bond on the part of husbands to which they are exposed — a view which causes some laxity and chaos as to preclude the building up of a sound society — the Code has precisely defined the conditions in which divorce is permissible.³⁷

Similarly, in Singapore, a valiant effort has been made to prevent the abuse of divorce, which leads to the breakup of the family, the degradation of women and the neglect of children. The Muslims Ordinance, 1957, gives ample powers to the Shariah Court to exercise control, so as to uphold and maintain the principles of the Muslim law which looks to justice and the prevention of harm. It must be the hope of those who have the interests of the Muslims at heart that the Shariah Court will exercise these powers with wisdom, equity and breadth of outlook, so that no one can doubt that in the words of Ibn Qayyim "The Shariah is God's justice and blessing among his people. Every good that exists is derived from it and every deficiency in being results from its loss and neglect".³⁸

APPENDIX.

(a) *Maskahwin*.

An examination of the Register of Marriages for 1964 showed that out of the 1697 marriages in 1964, the *maskahwin* in 1514 cases was \$22.50. There were 60 cases where the *maskahwin* was less than \$22.50, including

37. Quoted in J. N. D. Anderson, "Reforms in Family Law in Morocco", (1958) 2 *Journal of African Law* at p. 154.

38. Quoted in S. Mahmassani, *Philosophy of Jurisprudence in Islam*, translated by F. J. Ziadeh, (Leiden, 1961), at p. 106.

twelve cases where the *maskahwin* was as low as \$2.50. There were twenty cases where the *maskahwin* was \$75.00 — these were all in marriages registered by one Kathi, a South Indian, who appeared to have persuaded the majority of those who came before him, to agree to this amount. In one exceptional case where the bridegroom was a qualified doctor and the bride a dental student, the *maskahwin* was fixed at \$5,000/-. It is interesting to note that there were 63 cases where gold jewellery was given as *maskahwin*, the value ranging from \$10.00 to \$500/-.

(b) *Divorces registered by Kathis.*

Of the 255 cases of divorce registered by the Kathis in 1964, 234 were *talak* divorces and 21 *kholo* divorces. In 111 of these cases of *talak* no *mata'ah* was agreed upon — in most cases the record showed that the wife had waived (*halalkan*) the *mata'ah* as well as the maintenance. The most frequent amounts given for *mata'ah* in the other cases were \$10.00, \$5.00 and \$20.00 in that order. In one case where the husband was an English soldier, the *mata'ah* was fixed at \$1,000/-. It is significant to note that in many cases consent orders for the maintenance of the wife for the period of *eddah* and for the maintenance of the children were registered. Of the cases of *kholo* the majority were cases where the wife waived her claim to *maskahwin* and maintenance. In the other cases, varying amounts from \$78.00 to \$300.00 were agreed as compensation.

(c) *Divorces decreed by the Shariah Court.*

Of the 69 cases of divorce decreed in the Shariah Court in 1964, 34 were by *talak*, 26 by *taalik*, 6 by *kholo* and 3 by *fasakh*. In half of the cases of *talak*, no *mata'ah* was ordered. In the other cases, the most frequent amounts ordered were \$50/-, \$20/-, \$10/- and \$5/-. There were two cases where \$100/- was ordered as *mata'ah* and one case where \$150/- was so ordered.

The register did not contain any indication of the maintenance awarded to the wives or children. Of the six cases of *kholo*, the compensation ordered was \$90/- in two cases, \$50/- in two cases, \$100/- in one case and \$25/- in one case.

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