

**PROPERTY RIGHTS OF MARRIED WOMEN IN SHARIAH LAW IN
BRUNEI DARUSSALAM**

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1432 / 2011

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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08B0310

An academic exercise submitted in partial fulfillment of the requirements for the degree of
BACHELOR OF LAW

**Faculty of Shariah and Law
Sultan Sharif Ali Islamic University
Brunei Darussalam**

Zulhijjah 1432 / November 2011

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I hereby declare that the work in this academic exercise is my own except for quotations and summaries which have been duly acknowledged.

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PROPERTY RIGHTS OF MARRIED WOMEN IN SHARIAH LAW IN BRUNEI DARUSSALAM

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ACKNOWLEDGEMENT

Grateful to Allah Subahanahu Wa Ta'ala and His Messenger Muhammad Sallallahu 'Alaihi Wasallam, the author has manage to finish up the thesis within the time that had been given.

Within the period of making this thesis, Alhamdulillah the author has made some research in order to finish the thesis in time. This may not be achieved without the support given by the Syariah Courts of Brunei Darussalam of giving me permission to do my research in the Court's library.

The author wanted to give this appreciation to Ustaz Dr Sulaiman Dorloh, supervisor of this academic exercise for his continued support and guidance during the writing. The author will not be successfully doing this if there is no guidance given by Ustaz Dr Sulaiman Dorloh. All the questions that had been asked are properly explain and he is willing to help me by giving more time to finish the author's thesis. Thanks to all lecturers who teach me since I was in this university and giving me knowledge especially the Shariah law.

My special thanks to the Government of His Majesty the Sultan of Brunei Darussalam, who granted me a scholarship to pursue my study at Sultan Sharif Ali Islamic University and allows me to spend more time doing my thesis.

Lastly, I would like to thank the member of my family, especially to my parents Haji Suhaimi Bin Haji Mohd. Noor and Hajah Rafiah Binti Haji Mohiddin – who gracefully accepted my long hours at work on this academic exercise and allows me to spend more time to focus on my study and research. Not to forget my friends, especially Nurul Huda Binti Sarbini, Qhairul Azim Bin Nayan and Muhammad Arif Bin Haji Kamis – who kindly giving me supports and advises which I will treasure it in my memories.

ABSTRACT

PROPERTY RIGHTS OF MARRIED WOMEN IN SHARIAH LAW IN BRUNEI DARUSSALAM

This research focus on the issue of property rights which relates to married women in Islam. In this thesis, the researcher did some research in the University's library and the Syariah Courts' library to collect some information and knowledge in order to achieve the objective of this research. The researcher has given some personal ideas and experience that had been gained from the attachment in the Syariah Courts of Brunei Darussalam. The analytical approach will allows the researcher to explain the rights of married women according to law. All the findings will be based on Shariah law and case law from Brunei Darussalam and Malaysia. In order to support the findings, the researcher also refers to some verses of Al-Quran and Al-Hadith to make it more accurate. At the end of this research, it will show that married women also have their own rights in marriage and after marriage (in case of divorce and death of the husband) such as *mahr*, *nafkah*, *'iddah*, inheritance, *harta sepencarian*, and *muta'ah*. Therefore, this research give an idea that women can claim their rights as a wife and the husband is obliged to give those rights to his wife. If the husband failed to give those rights, the wife can claim her rights before the court. Unfortunately, not every woman knows about their rights. As a result, they failed to claim their rights because of lack and weak evidence. Hence, this research will help women to know their rights during marriage and after marriage by virtue of Shariah law in Brunei Darussalam.

ABSTRAK

HAK-HAK HARTA BAGI ISTERI DALAM HUKUM SYARIAH DI NEGARA BRUNEI DARUSSALAM

Kajian ini memfokuskan tentang isu-isu mengenai hak harta yang berkaitan dengan wanita islam yang sudah berkahwin. Di dalam tesis ini, penulis telah membuat kajian di perpustakaan Universiti Islam Sultan Sharif Ali dan perpustakaan Mahkamah-Mahkamah Syariah untuk mendapatkan informasi dan pengetahuan bagi mencapai objektif kajian ini. Penulis juga menyelitkan beberapa idea tersendiri dan pengalaman yang telah diperolehi ketika menjalani kursus industri di Mahkamah-Mahkamah Syariah, Brunei Darussalam. Pendekatan dengan menganalisa beberapa perkara membolehkan penulis untuk menerangkan hak-hak isteri tersebut berdasarkan undang-undang. Kesemua penemuan akan disandarkan dengan undang-undang syara' dan kes-kes daripada Brunei Darussalam dan Malaysia. Bagi menguatkan lagi penemuan yang diperolehi, penulis juga merujuk kepada ayat-ayat Al-Quran dan Al-Hadith supaya fakta yang diperolehi itu tepat. Di akhir kajian ini, ia akan menunjukkan bahawa isteri-isteri juga mempunyai hak terhadap harta di dalam perkahwinan dan juga setelah perkahwinan (dalam kes perceraian atau kematian suami) seperti *mahr*, *nafkah*, *'iddah*, harta pusaka, harta sepencarian, dan *muta'ah*. Oleh yang demikian, kajian ini akan memberi pengetahuan kepada wanita-wanita Islam bahawa mereka boleh menuntut hak-hak tersebut dan suami adalah diwajibkan untuk memberikan hak-hak tersebut. Malangnya, tidak semua wanita-wanita Islam mengetahi hak-hak mereka. Hasilnya, mereka menghadapi kegagalan dalam menuntut hak-hak yang sepatutnya mereka miliki kerana disebabkan kurangnya bukti dan bukti-bukti yang tidak kuat. Oleh yang demikian, tesis ini akan membantu isteri-isteri supaya mereka tahu bahawa mereka mempunyai hak dalam perkahwinan dan selepas perkahwinan menurut undang-undang syariah di Negara Brunei Darussalam.

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ABBREVIATIONS

Bil	Bilangan
Dy.	Dayang
ed.	Edition
e.g.	Example
etc.	et cetera
FMSLR	Federal Malay States Law Reports
Ibid	Ion beam induced deposition
IIUM	International Islamic University of Malaysia
JH	Jurnal Hukum
JKMUI	Jawatankuasa Kehakiman Majlis Ugama Islam
MKB	Mahkamah Kadi Besar Brunei
MLJ	Malaya Law Journal
MRS	Mahkamah Rendah Syariah
MTS	Mahkamah Tinggi Syariah
No.	Number
p.	Page
Pg.	Pengiran
S/SGT	Staff Sergeant
v	And or against
Vol.	Volume

INTRODUCTION

Marriage is a voluntary union of man and woman or legal bond or social contract between man and woman. In Arabic word, marriage is called as “*nikah*” which means “a purposeful contract for obtaining and possessing enjoyment.” The clearest definition of marriage is given by Kamala M.G. Pillai where stated that:

“... it is the fulfillment of a contract satisfied by the solemnisation of the marriage, but marriage directly creates by law a relation between the parties and what is called the status of each of the parties. The status of an individual used as a legal term means the legal position of the individual in or with regard to the rest of the community.”¹

Islam is very keen when deals with marriage. This is because Allah has created mankind with different gender to allow them to marry. The Prophet also encourages the *ummah* to follow his *sunnah* which includes marriage. The *hadith* reads as follows:

“Marriage is my tradition; whosoever keeps away from it is not from amongst us.”

By marriage, it will protect the moral of the people and it is the only lawful and valid way to indulge in intimacy between a man and a woman. In other words, marriage allows the spouse to have sexual intercourse lawfully. Other than that, it will create the feeling of love to one another which will make their life in peace and long lasting relationship.

It is stated in a *hadith* of the Prophet Muhammad Sallallahu ‘Alaihi Wasallam which can be understood that a man should marry women who has wealth, her family background, beauty, and her religion. This is narrated by Abu Hurairah Radhiallahu’an, the Prophet said:

“Obviously, married with a woman because of four factors: due to her wealth, due to her family background, her beauty and due to her religion. Therefore, the most priority is the one who has religion, therefore you will be safe.”²

¹See: Kamala M.G. Pillai (2009). *Family Law in Malaysia*. Kuala Lumpur: LexisNexis, p.39

² Narrated by Al-Bukhari and Muslim.

When a man married a woman, he is responsible to take care of his wife and his family. Mostly, when both man and women are married, they will share everything together as well as their property. In the matter of property, husband and wife have their own rights towards the property. However, not every woman knows about this issue. To bear in mind, it is the responsibility of the husband to make sure his wife get her rights. The rights over the property of married women continue after she married with a man. In Islam, it is an obligation for husband to serve his wife nicely and the wife has to obey her husband's orders and serve her husband nicely.

Islam is a perfect religion, every law and regulations that this religion has, the husband does not have full rights, but also giving rights to the wife. But the husband has more rights than the wife. Allah has given rights to both side and this is mentioned in Surah Al-Baqarah, verse 228:

﴿ وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ ۚ وَلَا يَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ إِنْ كُنَّ يُؤْمِنُنَّ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۚ وَبِعُولَتِهِنَّ أَوْحَىٰ بِرُدِّهِنَّ فِي ذَٰلِكِ ۚ إِنْ أَرَادُوا إِصْلَاحًا وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْعُرْفِ ۚ وَلِلرِّجَالِ عَلَيْهِنَّ دَرَجَةٌ ۗ وَاللَّهُ عَزِيزٌ حَكِيمٌ ۝﴾

Means: “Divorced women shall keep themselves waiting for three periods, and it is permissible for them to conceal what Allah has created in their wombs, if they believe in Allah and in the Last Day. Their husbands are entitled to take them back in the meantime, if they want a settlement. And they (women) have rights similar to those (of man) over them in kindness, and men a degree above them. Allah is Mighty, Wise.”

As what had been mentioned earlier, the wife also has the rights over the property. Some of the rights that the wife will get are as follows:

1. Dowry
2. *Nafkah*
3. Rights over her own property
4. *Harta Sepencarian* (after marriage)

The author will explain in the project paper each of these rights. However, it is important to know that some of these rights only can be given to the wife when there is divorce; or in case of polygamy, such as another types of *nafkah*, which called *nafkah 'iddah*, and *harta sepencarian*.

This project paper will discuss on rights that a married women will get in their marriage and the rights which they get when there is a matter of divorce, or polygamy, or even death including the obligation of the husband to give this rights. Information, books, and articles are based on Brunei Laws and any other Muslim countries which practicing Syariah Law, but the outcome of the research that the author collected will be referred to Syariah Law of Brunei Darussalam. The author also uses Al-Quran to support arguments and strengthen facts.

CHAPTER 1:

PROPERTY RIGHTS OF MARRIED WOMEN

Definition of Property Rights

Property can be defined as any physical or intangible entity that is owned by a person or jointly by a group of people or a legal entity like a corporation. In this thesis, the author will concentrate on the real property because most of the discussion will be on real property.

Nevertheless, not every thing can be a property. This is because it may not be a property if the thing is not owned by someone. Once the thing is owned by someone, then it is called as property. For example, a pen, it is considered as a thing not a property because the pen is not belongs to anyone. If the pen has taken by Ali, then the pen is become the property of Ali.

Rights will come into account if someone has something which belongs to him. For example, Ali who has a pen has the rights to use the pen. This shows that Ali has an absolute right to that pen and Ali will have control of it. Ali can use it, sell it or even destroy it. Hence, these are the definitions of property and rights.

In Syariah law, there is no specific definition of property rights. Therefore, the author decided to make reference to the Civil law to discuss about property rights. Property rights can be identified as an instrument of society and derived their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others. These expectations find expression in the laws, customs, and mores of a society. An owner of property rights possesses the consent of fellowmen to allow him to act in particular ways. An owner expects the community to prevent others

from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights.³

By looking at the opinion given by Harold Demsetz, he defined property rights in the context of economic. But if we apply it to the context of Islamic marriage, property rights can be refers to the power of holding certain property and the person is able to deal with the property and allow him to act in particular way with the property that he has. For example, the wife has property rights to her own car because the money that had been used for buying that particular was from her own money. Therefore, the husband cannot claim that car because a husband cannot claim property which is absolutely belongs to the wife. This view can be apply to Islamic law because in Islamic teaching, every person has their own rights towards their own property and others cannot take that particular property without the consent of the owner. That is the reason why in Syariah law implemented the punishment of *hudud* or cutting of hands for theft or robbery offences.

Types of Property Rights for Married Women

Islam is a beautiful religion which gives rights to all mankind with equal rights. Islam has given some rights to women to make sure that women also have certain power in her life as men have. Allah also put the position of women to the highest level and protects women with securities and rights. In Islamic law, married women also have rights to property. There are as follows:

(a) Rights to dowry

This is where the wife has rights to the *mahr* which she agreed and mentioned during the solemnisation of the marriage. The dowry belongs to the woman entering marriage, and she has the freedom to do whatever she wants with what she owns after marriage contract is fulfilled.⁴

³ See: Harold Demsetz (1967). *The American Economic Review*. Vol. 57. No. 2. Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association, p.347

⁴ Women as Wives (2012). Retrieved May 15, 2012, from <http://www.apastyle.org/learn/faqs/web-page-no-author.aspx>

(b) Rights to maintenance

Maintenance or *nafkah* is an obligation for the husband to give to his wife. This right is established by authority of Al-Quran and the *Sunnah*. The practice in Brunei, the wife will be given *nafkah* every month by her husband. The wife also can claim for the *nafkah* which had not been given to her by making a petition to the Syariah Court. After divorce, women is entitles to support and maintenance from her former husband if she requires.⁵ However, the former husband will not be liable to pay the maintenance anymore, if the wife married with another person.

(c) Rights to her own property⁶

As what had been mentioned earlier, the wife has her absolute rights to her own property. Husband cannot use the wife's property without the permission of the wife or without consent of the wife. Allah has protect this rights in the Holy Quran which will be stated in particular chapter.

(d) Rights to inheritance

Allah gives protection to the women by giving her a share from inheritance. The wife is liable for half share if the spouse did not have any child. If the spouse has a child, then the share that the wife will get is eighth because some the share will also be given to the child. The rationale of this is to maintain the life of the widow after the death of her husband.

(e) Rights to *harta sepencarian*⁷

If the married women has jointly having share on a property and there is an issue of divorce, the wife can claim for *harta sepencarian* in order to get her share.

⁵ Article by Imani Jaafar-Mohammad, Esq. and Charlie Lehmann: *Women's Rights in Islam Regarding Marriage and Divorce*. Retrieved May 15, 2012, from <http://lawandpractice.wordpress.com/2011/04/11/women%E2%80%99s-rights-in-islam-regarding-marriage-and-divorce/>

⁶ Article by Robiatul Adawiyah Mohd: *Hak-hak Isteri Dalam Perkahwinan Menurut Al-Quran dan Al-Sunnah*. p.14

⁷ Ibid. p.15

However, the share will be divided according to the contributions that the parties had made for such particular property. The contribution can be direct and indirect. The amount will be decided by the judge according to the direct and indirect contribution that had been made or taken place during marriage.

(f) Rights to *muta'ah*

*Muta'ah*⁸ is a kind of obligatory gift that a husband should give to the wife after divorce. Allah has made this an obligatory because it is a last gift that a wife will get from her husband as compensation for the wife of spending her life with the husband during the time of marriage and her sacrifices on taking care of the family. The obligation of giving *muta'ah* also mentioned in the Holy Quran which will be mentioned in the particular chapter.

⁸ Muta'ah A Gift for Ex-Wife After Divorce (2011). Retrieved November 8, 2011, from http://www.docstoc.com/docs/84808730/MUTAAH-_A-GIFT-FOR-EX--WIFE-AFTER-DIVORCE_

CHAPTER 2:

RIGHTS OF MARRIED WOMEN TO DOWRY (*MAHR*)

Definition of Dowry (*Mahr*)

In Arabic language, dowry is called as “*mahr*” which literally means the marriage payment. Technical meaning of “*mahr*” according to *Syara*’ is an obligation marriage payment due under *Hukum Syara*’ by the husband to the wife at the time the marriage is solemnized whether in the form of cash or in any other form which according to *Hukum Syara*’ is capable of being valued in terms of money⁹. In other words, “*mahr*” is an amount of money or property that will be given at the time of marriage by the husband to his wife according to *Hukum Syara*’.

In Malay language, dowry is called as “*mas kahwin*”. Under section 2 of Islamic Family Law Order of Brunei Darussalam, 1999 defined “*mas kahwin*” as follows:

“*mas kahwin*” means the obligatory marriage gift from the husband to his wife in accordance with *Hukum Syara*’ ”

Therefore, dowry or *mahr* is a kind of gift that must be given by the husband to the wife at the time of wedding which meant to offer the bride financial security within the marriage. Without *mahr*, the marriage is not valid.

The Obligation of Dowry

As what had been mentioned earlier, husband is obliged to give dowry to the wife. There are verses in the Holy Quran which shows that giving the dowry is an obligation for every husband. Verse 4 of Surah An-Nisaa’ reads:

⁹ Zaleha Kamaruddin (2001). *Islamic Family Law Issues 2000*. Kuala Lumpur: International Islamic University Malaysia, p.13

﴿ وَءَاتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً فَإِن طِبْنَ لَكُمْ عَن شَيْءٍ مِّنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَّرِيئًا ﴾

Means: “And give the women (upon marriage) their (bridal) gifts graciously. But if they give up willingly to you anything of it, then it in satisfaction and ease.”

Meanwhile, the obligation of giving dowry is mentioned in verse 24 of Surah An-Nisaa’ which states:

﴿ وَالْمُحْصَنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ^ط كَتَبَ اللَّهُ عَلَيْكُمْ^ع وَأُحِلَّ لَكُمْ مَّا وَرَاءَ ذَلِكَ أَن تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصِنِينَ غَيْرَ مُسْفِحِينَ^ع فَمَا اسْتَمْتَعْتُمْ بِهِ^ع مِنْهُنَّ فآتوهنَّ أَجُورَهُنَّ^ع فَرِيضَةً^ع وَلَا جُنَاحَ عَلَيْكُمْ^ع فِيَمَا تَرَضَيْتُمْ بِهِ^ع مِنْ بَعْدِ الْفَرِيضَةِ^ع إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا ﴾

Means: “And all married women (are forbidden? Unto you) save those (captive) whom your right hands possess. It is a decree of Allah for you. Lawful unto you are all beyond those mentioned, so that ye seek them with your wealth in honest wedlock, not debauchery. And those of whom ye seek (by marrying them), give unto them their portions as a duty. And there is no sin for you in what ye do by mutual agreement after the duty (hath been done). Lo! Allah is ever Knower, Wise.”

﴿ وَمَنْ لَّمْ يَسْتَطِعْ مِنْكُمْ طَوْلًا أَن يَنْكِحَ الْمُحْصَنَاتِ الْمُؤْمِنَاتِ فَمَنْ مَّا مَلَكَتْ أَيْمَانُكُمْ^ع مِنْ فَتَيَاتِكُمُ الْمُؤْمِنَاتِ^ع وَاللَّهُ أَعْلَمُ بِإِيمَانِكُمْ^ع بَعْضُكُمْ مِنْ بَعْضٍ^ع فَانكِحُوهُنَّ بِإِذْنِ أَهْلِهِنَّ^ع وَءَاتُوهُنَّ أَجُورَهُنَّ بِالْمَعْرُوفِ^ع مُحْصَنَاتٍ غَيْرَ مُسْفِحَاتٍ وَلَا مُتَّخِذَاتِ أَحْدَانٍ^ع فَإِذَا أَحْصَيْنَ^ع فَإِنَّ أُنْتَبِ^ع بِفَحْشَةٍ فَعَلَيْهِنَّ^ع نِصْفُ^ع مَا عَلَى الْمُحْصَنَاتِ^ع مِنَ الْعَذَابِ^ع ذَلِكَ لِمَنْ حَشِيَ^ع الْعَنَتَ مِنْكُمْ^ع وَأَنْ تَصْبِرُوا^ع خَيْرٌ لَّكُمْ^ع وَاللَّهُ غَفُورٌ رَّحِيمٌ ﴾

Means: “If any of you not the means wherewith to wed free believing women, they may wed believing girls from among those whom your right hands possess: and Allah hath full knowledge about your faith. You are one from another: wed them with the leave of their owners, and give them their dowries, according to what is reasonable: they should be chaste, not lustful, nor taking paramours: when they are taken into wedlock, if they fall into shame, their punishment is half that for free women. This (permission) is for those

among you who fear sin; but it is better for you that you practice self-restraint: and Allah is Oft-forgiving, Most Merciful.”¹⁰

﴿ يُرِيدُ اللَّهُ لِيُذْهِبَ عَنْكُمُ الرِّجْسَ الَّذِي فِيكُمْ وَيُنَظِّقَ لَكُمْ سُنُنَ الَّذِينَ مِنْ قَبْلِكُمْ وَيَتُوبَ عَلَيْكُمْ وَاللَّهُ عَلِيمٌ
حَكِيمٌ ﴾

Means: “Allah doth wish to make clear to you and to show you the ordinances of those before you; and (He doth wish to) turn to you (in Mercy); and Allah is All-Knowing, All-Wise”¹¹

Although giving dowry to the wife is an obligation, it is actually not one of the *rukun* of marriage which may invalidate the marriage if the husband failed to give the dowry. The dowry shows that the husband is serious in the marriage and it is also show the love and respect of the husband to the wife. Therefore, the wife has property rights to dowry.

Legal Obligation of Dowry

In Islamic Family Law Order of Brunei Darussalam, giving the dowry to the wife is a legal obligation. In addition, when the groom paid the dowry to the bride, it must be done in front of the *wali* and at least two witnesses and it should be registered and recorded. In Brunei Darussalam, the dowry will be stated in the marriage certificate and signed by the *jurunikah* or “the a person appointed to conduct the solemnisation of a marriage”¹². These are stated in section 20 and section 21 of the Islamic Family Law Order of Brunei Darussalam. The sections are as follows:

¹⁰ Surah An-Nisaa’, verse 25

¹¹ Surah An-Nisaa’, verse 26

¹² Section 2 of Islamic Family Law Order, 1999

Section 20:

“The *mas kahwin*, *belanja* or *pemberian*, or all or any two of them at the same time, may be paid by the man or his representative to the woman or her representative by way of cash or loan whether with or without security and shall be made in a way agreed upon by the parties.”

Section 21.

“(1) ...

- (2) The entry shall be attested by the parties to the marriage, by the *wali* and by two witnesses as well as the *jurunikah* who were present at the time the marriage was solemnised.
- (3) For every marriage to be registered by him, the *jurunikah* shall ascertain and record –
 - (a) the value and particulars of the *mas kahwin*;
 - (b) the value and particular of the *belanja*;
 - (c) the value and particulars of the *pemberian*;
 - (d) the value and particulars or any other *mas kahwin*, *belanja* or *pemberian* which have been promised but not paid at the time the marriage was solemnised;
 - (e) particulars of any security given towards payment of any payments of any *mas kahwin*, *belanja* or *pemberian*.
- (4) The entry shall then be signed by the *jurunikah*.”

As what had been mentioned above, it seems to be that the dowry is a legal and social obligation. Were it possible for men to marry woman without a dowry, this would be a degrading of the dignity of woman, who, in Islam’s view, is considered equal to man in rights and duties. The man is likely to look degradingly on a woman whom he can marry easily without any effort or cost; or whom he can leave wherever he wishes also easily and without any cost, especially keeping in view that Islamic law has given him the right of divorce.¹³

¹³ Prof. Dr. Ala’eddin Kharofa (2004). *Islamic Family Law: A Comparative Study with other Religions*. Malaysia: International Law Book Services, p.85

The Types of Dowry

The practice in Brunei Darussalam, the dowry is given in the form of money and there is no fixed amount for it. Sometimes the amount is depends on the background of the women. In some marriage, the dowry is decided by looking into the appearance, the religion of the woman, the status, the knowledge and the intelligence of the woman. However, Allah recommends the amount of the dowry is in the high value. This is stated in Surah An-Nisaa', verse 20 which reads:

﴿ وَإِنْ أَرَدْتُمْ أَنْ تَسْتَبَدَّالَ زَوْجِ مَكَانَ زَوْجٍ وَءَاتَيْتُمْ إِحْدَهُنَّ قِنطَارًا فَلَا تَأْخُذُوا مِنْهُ شَيْئًا
أَتَأْخُذُونَ بِهِتِنًا وَإِنَّمَا مُبِينًا ﴾

Means: "And if you wish to exchange one wife for another and you have given one of them a sum of money (however great), take nothing from it. Would you take it by the way of calumny and open wrong?"

The Prophet Muhammad Sallahu 'Alaihi Wasallam also encouraged the *ummah* to give the dowry but the husband can be managed to pay for the amount. There is a *hadith* reported by Ahmad and Al-Hakim, Rasulullah Sallahu 'Alaihi Wasallam said:

< اعظم النساء بركة أيسرهن مونة >

Means: "The best woman is the one whose *mahr* is the easiest to pay"

In some issues, the rights of dowry of married women become half of the dowry only. This may happen if the wife got divorced before the spouse is consummated or the spouse have not done any sexual intercourse in the marriage when the wife got divorced by the husband. This is stated in verse 237 of Surah Al-Baqarah which reads:

﴿ وَإِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَوَيْفُوا لَهَا بِمَا فَرَضْتُمْ إِلَّا أَنْ
يَعْفُوَ أَوْ يَعْفُوا الَّذِي بِيَدِهِ عَقْدَةُ النِّكَاحِ وَأَنْ تَعْفُوا أَقْرَبُ لِلتَّقْوَىٰ وَلَا تَنْسُوا
الْفَضْلَ بَيْنَكُمْ إِنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ ﴾

Means: “If you divorce them before you have touched them and you have appointed unto them a portion, then (pay the dowry) half of that which you appointed, unless they (the women) agree to forgo it, or he agreed to forgo it in whose hand is the marriage tie. To forgo is nearer to piety. And forget not kindness among yourselves. Allah is Seer of what you do.”

On the other hand, there are two types of dowry in *Syara*. There are as follows:

(i) *Mahr Musamma*

In *mahr musamma*, the amount of the dowry is clearly stated during the solemnisation of marriage. Nevertheless, this amount will become half if she got divorced before consummated.

(ii) *Mahr Misil*

In *mahr misil*, the amount of the dowry is not stated during the solemnisation of marriage. However, this type of dowry is rarely happened in Brunei Darussalam.

Hence, based on this understanding, we can consider that money and any of the following: a piece of land, an item of clothing, a piece of jewellery, paper money, gold, silver, or agricultural crops like wheat or barley are acceptable as a form of dowry¹⁴. These shows that the wife has rights to the dowry and the husband is obliged to give the dowry by anything stated as agreed during the solemnisation of marriage.

¹⁴ Prof. Dr. Ala'eddin Kharofa (2004). *Islamic Family Law: A Comparative Study with other Religions*. Malaysia: International Law Book Services, p. 87

CHAPTER 3:

RIGHTS OF MARRIED WOMEN TO *NAFKAH*

Definition of *Nafkah*

Nafkah is one of the rights of women after married with her husband. It is the responsibility of the husband to give *nafkah* to the wife. First of all, it is beneficial to understand the definition of *nafkah*. In Arabic language, *nafkah* is called as ‘*assiyannah*’ (الصيانة). Literally, *nafkah* means maintenance. According to *Hukum Syara*’, *nafkah* is defined as an obligation of material support for the wife and children. In other words, it means the maintenance for a wife who the husband is obliged to give such as food, clothing, and shelter regardless of the wife’s own resources.

Some modern scholars of Islamic law defined the word maintenance or the *nafkah* literally means *ikhraj* which means “taking out”. In legal terminology, *nafkah* refers to provision for necessities of life to a wife in consideration of her reserving herself to the husband. Hence, generally maintenance refers to the basic needs such as food, clothing and lodging, medicine, doctor’s and surgeon’s fees and even servants where the wife is of a social position which does not permit her dispense with such or when she is sick.¹⁵

According to Islamic Family Law Order (1999) of Brunei Darussalam, *nafkah* is defined under the section 2 of the Order which reads:

“*nafkah* means the obligatory provision of expenses for food, clothing and accommodation for the wife, children, divorce and any other persons dependent upon a husband or former husband, including parents and step father in accordance with to *Hukum Syara*’.”

By looking at the provision above, it shows that *nafkah* is a kind of living expenses for the wife who is essential for the husband to fund it such as food and shelter.

¹⁵ Zaleha Kamaruddin (2001). *Islamic Family Law Issues 2000*. p.145

Types of *Nafkah*

In marriage, the husband is responsible to give maintenance to his wife. This is an obligation for every husband to give *nafkah* to his wife and should be 'adil to his wives if the husband has more than one wife. In the Holy Quran, in Surah An-Nisaa, verse 34:

﴿ الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ فَالصَّالِحَاتُ قَنِينَاتٌ حَافِظَاتٌ لِّلْغَيْبِ بِمَا حَفِظَ اللَّهُ وَالَّتِي تَأْفُونَ دُشُوزَهُنَّ فَعُظُوهُنَّ وَأَهْجُرُهُنَّ فِي الْمَضَاجِعِ وَأَضْرِبُوهُنَّ ۗ فَإِنِ أَطَعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا ۗ إِنَّ اللَّهَ كَانَ عَلِيمًا كَبِيرًا ﴾

Means: “Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded. As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Lo! Allah is ever High, Exalted, Great.”

The verse above stated that the duty of maintain a wife is the sole responsibility of a husband under Islamic Law. Generally, the husband has an obligation to support the wife eventhough the husband died.

There are few types of *nafkah* which relates to property that a wife can claim during marriage and after divorce. During marriage, the wife can claim for *nafkah* if the husband failed to pay the *nafkah*. In Brunei Darussalam, it is a custom where the husband paying the *nafkah* with money. The amount of *nafkah* is depends on the agreement made by the husband and the wife. The other types of *nafkah* are food, shelter and clothing. The husband is responsible to give maintenance to his wife. It is an obligation of every husband to make sure that the food is enough for the wife and family including clothing and shelter. It is undeniable that the husband is the person who is responsible to do maintenance because a husband is a leader in the family.

Another types of *nafkah* is called 'iddah. The Arabic word 'iddah means counting or enumerating. In Islamic law it means the prescribed period or waiting period that a

woman has to observe after the death of her husband or after divorce from a valid marriage¹⁶. In other words, the wife also has rights to *nafkah 'iddah* after divorce or due to the death of the husband. It is other types of *nafkah* that married women have a right to it. *Nafkah 'iddah* is the maintenance that the husband must pay to the wife for three consecutive months. The three months are actually the waiting period of the wife after the divorce. In other words, the three months period is called *qoru'*. According to Prof. Dr. Ala'eddin Kharofa, the Arabic word *qoru'* refers to a common word for both the menstruation period and the clean period between two menstruations¹⁷. Within these months, the wife cannot remarry with another person because the divorce between the two parties has not been finalised. This is stated in the Holy Quran, verse 228 of Surah Al-Baqarah:

﴿وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ ۚ وَلَا يَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ إِنْ كُنَّ يُؤْمِنُنَّ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۚ وَبِعُولَتِهِنَّ أَوْ حَقِّ بَرَدِهِنَّ فِي ذَلِكَ إِنْ أَرَادُوا إِصْلَاحًا ۚ وَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ ۚ وَلِلرِّجَالِ عَلَيْهِنَّ دَرَجَةٌ ۗ وَاللَّهُ عَزِيزٌ حَكِيمٌ﴾

Means: “Divorced women shall wait concerning themselves for three monthly period. Nor is it lawful for them to hide what Allah hath created in their wombs, if they have faith in Allah and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. 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.”

If the wife is pregnant, then the husband cannot divorce her until the wife done with her delivery. This is stated in Surah At-Talaq, verse 6 which reads:

﴿أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِّنْ وَّجَدِكُمْ ۖ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ ۚ وَإِنْ كُنَّ أُولَاتٍ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ ۚ فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أَجُورَهُنَّ ۖ وَأْتَمِرُوا بَيْنَكُمْ بِمَعْرُوفٍ ۚ وَإِنْ تَعَاَسَرْتُمُ فِي شُرُوعِهَا فُسِّرْهُمُ إِلَيْهَا كِتَابًا مِّنْ رَبِّكُمْ ۚ وَاللَّهُ عَلِيمٌ خَبِيرٌ﴾

¹⁶ Prof. Dr. Ala'eddin Kharofa (2004). *Islamic Family Law: A Comparative Study with other Religions*. p. 195

¹⁷ Ibid. p.199

Means: “Let the women live (in *iddah*) in the same style as you live, according to your means, Annoy them not so as to restrict them. And if they are pregnant, then spend (your substance) on them until they deliver their burden. Then if they give suck to the children for you, give them their due payment, and let each of you accept the advice of the other in a just way. But if you make difficulties for one another, then some other woman may give suck for him (the father of the child).”

The Obligation of *Nafkah*

In Islam, it is the essential responsibility of a husband to support the living expenses of the wife. Allah has stated in the Holy Quran, it is an obligation for the husband to give *nafkah*. It is stated in verse 7 of Surah At-Talaq:

﴿ لِيُنْفِقَ ذُو سَعَةٍ مِّن سَعَتِهِ ۗ وَمَن قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ ۚ لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا ۚ سَيَجْعَلُ اللَّهُ بَعْدَ عُسْرٍ يُسْرًا ۝ ﴾

Means: “Let him who hath abundance spend of his abundance, and he whose provision is measured, let him spend of that which Allah hath given him. Allah asked naught of any soul save that which He hath given it. Allah will vouchsafe, after hardship, ease.”

The obligation of *nafkah* is recommended by Allah because it is the rights of the wife or married women to get this *nafkah* as a compensation for her sacrifices of doing the home works and takes care of the family.

In a *hadith* of the Prophet Muhammad Sallahu ‘Alaihi Wasallam, reported by Jabir Radhiallahu’an, *riwayat* Muslim, the Prophet said:

“And their rights which are your responsibility are to feed and clothed them in accordance to their needs.”

Another *hadith* which also stated the wife has rights to *nafkah*:

Aisyah Radhiallahu’an spoke to the Prophet Muhammad Sallahu ‘Alaihi Wasallam of a woman who was never given any maintenance by her husband, the Prophet said, “Take from his property what is necessary and adequate for your maintenance and your children.”¹⁸

¹⁸ Narrated by Bukhari and Muslim

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