

Mechanism of Enforcement and Execution of Muslim Maintenance Order: Court Based System

Mekanisme Penguatkuasaan dan Pelaksanaan Perintah Nafkah Orang Islam:
Sistem Berasaskan Mahkamah

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ABSTRACT

The weaknesses of the enforcement and execution of a court order always becomes as a reason of the occurrence of non-compliance with court orders issued by the Syariah Court. In other words, the effectiveness of enforcement mechanisms will enhance compliance with orders issued by the Syariah Court. Many looked at the weaknesses of enforcement as the weaknesses of the Syariah court as the agency for implementing justice and thus undermining the position of Islamic law. However, very little attention has been given in the literature what constitutes the mechanism of enforcement and execution of maintenance order in syariah court. Hence, the purpose of this article is to examine the mechanism used pertaining to the non compliance of the court order as regard to maintenance orders. The content analysis approach will be used as it is appropriate to identify the mechanism used by the selected Syariah courts in settling the enforcement and execution cases. Through the content analysis method the background of the cases as well the approach of the courts player will be identified respectively. The data from the study then will be presented in descriptive and inferential statistics to explain the frequency and the percentage of variables studied. The study suggested that the process of giving judgment relating to maintenance should be improved. In addition, the assimilation between non legal and legal process should be well organized to make the enforcement and execution process more effective. The weaknesses found should be addressed in future studies to identify the best method to implement it well.

Keywords: Enforcement; maintenance order; syariah court

ABSTRAK

Kelemahan penguatkuasaan dan pelaksanaan perintah mahkamah sentiasa menjadi sebab berlakunya tidak mematuhi perintah mahkamah yang dikeluarkan oleh Mahkamah Syariah. Dalam erti kata lain, keberkesanan mekanisme penguatkuasaan akan meningkatkan mematuhi perintah yang dikeluarkan oleh Mahkamah Syariah. Ramai melihat kelemahan penguatkuasaan sebagai kelemahan Mahkamah Syariah sebagai agensi untuk melaksanakan keadilan dan dengan itu melemahkan kedudukan undang-undang Islam. Walau bagaimanapun, perhatian yang sangat sedikit telah diberikan dalam literatur apa yang menjadi mekanisme penguatkuasaan dan pelaksanaan perintah nafkah dalam mahkamah syariah. Oleh itu, tujuan artikel ini adalah untuk mengkaji mekanisme yang akan digunakan berkaitan dengan ketidakpatuhan perintah mahkamah sebagai mengambil kira perintah nafkah. Pendekatan analisis kandungan akan digunakan kerana ia adalah sesuai untuk mengenal pasti mekanisme yang akan digunakan oleh mahkamah syariah terpilih dalam menyelesaikan kes-kes penguatkuasaan dan pelaksanaan. Melalui kaedah analisis kandungan, latar belakang kes serta pendekatan peranan mahkamah akan dikenal pasti. Data daripada kajian itu akan dibentangkan dalam statistik deskriptif dan inferensi untuk menerangkan kekerapan dan peratusan pembolehubah. Kajian ini mencadangkan bahawa proses memberi pertimbangan yang berhubungan dengan penyelenggaraan perlu diperbaiki. Di samping itu, asimilasi antara proses bukan undang-undang dan undang-undang harus juga dianjurkan untuk membuat proses penguatkuasaan dan pelaksanaan yang lebih berkesan. Kelemahan yang ditemui harus ditangani dalam kajian masa depan untuk mengenal pasti kaedah terbaik untuk melaksanakannya.

Keywords: Penguatkuasaan; perintah nafkah; mahkamah syariah

INTRODUCTION

The weaknesses of the enforcement and execution of a court order always becomes as a reason of the occurrence of non-compliance with court orders issued by the *Syariah* Court. In other words, the effectiveness of enforcement mechanisms will

enhance compliance with orders issued by the *Syariah* Court. Many looked at the weaknesses of enforcement as a weaknesses of the *Syariah* court as the agency for implementing justice and thus undermining the position of Islamic law. The objective of this quantitative study are to analyze the mechanism used in enforcement and execution of maintenance order

procedures and to examine the implementation of enforcement and execution mechanism based on the court based system. Hence, this research will answer the following question:

1. What are the processes taken during case proceeding?
2. What are the types of courts order requiring to legal action for the enforcement and execution?
3. To what extent roles played by the parties are important in settling the enforcement and execution cases?
 - a. What is the demographic characteristic of plaintiff and defendant?
 - b. Is the determination of the method and channel of the payment can help to improve the compliance of court order?
4. How long will it take the plaintiff to take a legal action against the defendant?
5. How long it takes to resolve the legal enforcement action?

As mentioned earlier, the weaknesses of the enforcement and execution of a court order always becomes as a reason of the occurrence of non-compliance with court orders issued by the *Syariah* Court (Mejidah 2007; Norazlita 2010; Zaini 2007). In other words, the effectiveness of enforcement mechanisms will enhance compliance with orders issued by the *Syariah* Court. Previous studies found there are several main problems of enforcement and execution of maintenance order in Selangor that need further consideration. Most of the listed problems are related to human factor. Most of the listed factors are come from the parties, the courts, Religion Officer and also law and regulation pertaining to enforcement (Marhayu 2010; Zaini 2007). The researchers had shown that cases related to non-compliance of court order are still continued particularly in maintenance cases even said that an effort has been made for its elimination (Kamalruazmi 2003; Fatimah 2010).

Further, the research (Muslihah 2000) also indicated that the effective enforcement of court order are significant factors that might augment the economic welfare of the woman after divorce. It also suggested the tougher enforcement action by prosecuting to the unruly ex-husband and the establishment of administrative machinery in order to assist the divorced women and effectively enforce the court order. Pertaining to the enforcement of child maintenance (Nurwairani 2009) had suggested that as a good enforcement mechanism requiring to produce full compliance of court orders. Although non-compliance with court orders is likely to be

caused by many factors, (Harlina 2008) but weak enforcement mechanisms will definitely mess up the efforts to disperse justice to the party who obtained the order.

Furthermore, another study found the main obstacle in enforcing the maintenance order is the negative attitudes of the parties. The study also revealed that the whereabouts of the ex-husband is crucial in determining whether the maintenance order could be enforced because all modes of executing the order would require information of the husband whereabouts (Aliyah 2007).

METHODS OF ENFORCEMENT AND EXECUTION OF MAINTENANCE COURT ORDER (SECTION 133-134 SYARIAH COURT CIVIL PROCEDURE) (FEDERAL TERRITORIES) ACT 1998 (SCCPA)

Types of the enforcement and execution used by the judgment creditor can be made by following method:

1. Enforcement Order
2. Seizure and Sale Order.
3. Ownership Order.
4. Transfer of ownership Order.
5. *Hiwalah* (or, Transference of Liabilities) proceeding
6. Judgment of Debtor summon
7. Committal proceeding
8. Attachment of salary

These kinds of methods are classified based on the code of the particular case in accordance with practice directions.

METHODOLOGY

The design of this study is purely descriptive and explanations. For this purpose, content analysis of the court documents i.e.; the case files and the implementation of the enforcement of maintenance orders will be made. The content analysis method will be used as it is appropriate to identify the mechanism used by the selected *Syariah* courts in settling the enforcement and execution cases. Through the content analysis method the background of the cases as well the approach of the courts player will be identified respectively. The data from the study then will be presented in descriptive and inferential statistics to explain the frequency and the percentage of variables studied.

For purpose of this study, the population is all the cases of enforcement of maintenance order in the Syariah courts in five states that have been randomly selected. According to statistical experts, if the study involves the calculation of statistical, sample submitted must contain at least 150 subjects (Sabitha Marican 2009: 132). Five states are Federal Territory, Negeri Sembilan, Pulau Pinang, Terengganu and Sarawak. All states were selected based on the region. Thus for this study, 500 of files from each five states will be analyzed based on a checklist of files created. It means that from each state, approximately 100 of files will be analyzed.

One basic reason for choosing these 5 states is that it may not be possible to collect information from 102 *Syariah* courts in 13 states all over Malaysia therefore 5 selected state were selected based on the region throughout all Malaysia. Randomized samples of court cases taken from the *Syariah* Court of each state will be chosen for this study. The study made by examining the cases of enforcement and execution of the order that has been resolved for 2005 to 2010.

In order to determine what is the mechanism used, the researchers will determine the mechanism based on the provisions of the law in the legal procedure. On the other hand, the study on the variable will base on the formation of the checklist. The checklist form was divided into six sections. The analysis of the court's files is pertaining to the information of the acquisition, case information, background of the parties, background of the proceeding, judgment and authorities used in the judgment.

Section 1: The acquisition of the data

This section comprised two checklists. The checklists were intended to analyze the information about the place of data, which included state and type of the court.

Section II: Cases information

This section was intended to explain the background of the cases. It comprised of eight information which included type of application, type of cases, reason for application, type of order, channel of payment, method of payment period between judgment and application for enforcement and the information about the endorsement of the order.

Section III: Background of the parties

In this section, the checklists were intended to gather the information about the background of the parties ie; plaintiff and defendant. The characteristics of the information were included of age, type of employment, monthly incomes, number of the children, marital status and level of education.

Section IV: Background of the proceeding

This section comprised of the background of the proceeding either pre-trial and during trial. The checklist intended to know the information about process of mediation, summoned, notice, warrant of arrest and defendant mean test.

Section V: Judgment

This section describes the information of the judgment and the period of case settlement.

Section VI: Authorities

In this section the checklist was formed to analyse the authorities referred by judges.

RESULT AND DISCUSSION

Results are presented in the form of Table 1 to table 9 to ease the discussion.

ENFORCEMENT AND EXECUTION OF MAINTENANCE ORDER BY COURT CHARACTERISTIC

As indicates from the data collected, there are only five types of cases that are often being used for the enforcement and execution through a legal process. Most states tend to use the Judgment Debtor Summon (JDS). This is evidenced by the high percentage of *Syariah* court states. A total of 297 (83.7%) reviewed cases is an application based on JDS. Sarawak has the highest percentage of JDS cases with 297 cases or 89.9%. This was followed by Penang (88.9%), Terengganu (86.9%), Federal Territories (79.2%) and Negeri Sembilan (77.9%).

Based upon the observation of cases related, an early conclusion could be made that the court from the perspective of the judge is actually ready to carry out other procedures for enforcement of maintenance orders rather than Judgment of Debtor Summon (JDS) such as Garnishment (Hiwalah). However, it is discovered that there are lawyers who are still not ready and reluctant to initiate the proceedings. For instance, in one case the court has directed the judgment creditor in the case of Judgment Debtor Summon to be revoked and suggested to apply for Hiwalah proceeding as claimed to be a more effective method (Siti Nadzwa binti Mohd Noor v Razali b Abdul Razak 2007).

In order to decide which type of application to use, it relies on the judgment creditor herself/himself. It can be complex, and may depend on the availability of accurate and up-to-date information relating to the whereabouts, the employment of the judgment

TABLE 1. Enforcement and Execution of Maintenance Order by Court Characteristic

Court characteristic	Sarawak		Federal Territories		Penang		Negeri Sembilan		Terengganu		Total	
	Freq	%	Freq	%	Freq	%	Freq	%	Freq	%	Freq	%
Type of application												
033-Application for Enforcement of Maintenance Order	2	7.4	9	10.4	7	9.7	8	10.4	1	1.2	27	7.6
034-Application for Execution of Court Order	0	0	5	5.2	1	1.4	9	11.7	6	7.1	21	6.0
036-Application for Order of Contempt of Court	0	0	5	5.2	0	0	0	0	4	4.8	9	2.5
037-Application for Judgment of Debtor Summoned	24	89.9	76	79.2	64	88.9	60	77.9	73	86.9	297	83.7
099-others	1	3.7	0	0	0	0	0	0	0	0	1	0.3
Total	27	100	95	100	72	100	77	100	84	100	355	100
Method of application												
Application	23	85.2	88	92.7	71	98.6	77	100	84	100	343	96.6
Summon	4	14.8	7	7.3	1	1.4	0	0	0	0	12	3.4
Total	27	100	95	100	72	100	77	100	84	100	355	100

debtor, the amount of income and notwithstanding the property that belongs to him. The above factors play an important role which can influence the ability of the judgment debtor to pay the debt. This relate to the reason why the judgment creditor/lawyer unwilling to try other actions is due to less information or particulars about the judgment debtor (particularly on his property), hindered the efforts to try taking action under other applications. The information was from an Interview conducted with En. Hairuddin Abdul Rahman, The Officer of Family Support Division, Department of Sarawak *Shariah* Judiciary.

PROFILE OF JUDGMENT DEBTOR AND JUDGMENT CREDITOR TO APPLY FOR ENFORCEMENT AND EXECUTION OF MAINTENANCE ORDER

The profile of the judgment debtor and the judgment creditor are very difficult to access because most of the enforcement and execution of the maintenance order cases, affidavit or statement of claim does not clearly state the profile of the judgment debtor and the judgment creditor. Furthermore, the judgment debtor's financial capability is not mentioned in the application even though information is very important to be declared in the process of enforcement and execution of the court order. Only in the Federal Territory *Syariah* Court, provides a specific registration form for the judgment creditor to fill up the necessary

information about the judgment creditor and judgment debtor. Thus, the judgment debtor's and the judgment creditor's profiles and all the information needed will be provided in the registration form. Profiles of the judgment debtor and the judgment creditor from the data are as displayed in the Table 2.

1. Judgment Creditor and Judgment Debtor by Age

Almost half (45.5%) of the judgment creditors were aged 31-40 years old followed by nearly one-third (33.3%) who were 41-50 years old. For the age of 21-30 and 51-60 years old, their percentage are at 12.1% and 7.0 % respectively. Meanwhile, more than one-third of the judgment debtors (38.9%) are in the age of 41-50 years old, followed by 31-40 years old which is about 34.9%. About one fifth (13.5%) of the respondents are in between the age of 51-60 years old.

2. Judgment Creditor and Judgment Debtor by Occupational Status

More than one third of the judgment creditors for enforcement and execution cases were from housewives, which indicate the percentage of 41.0%. On the other hand, nearly one third (30.2%) of the judgment creditors are working in private sectors whereas a small number of them are employed by the government (14.7%). Conversely, for the judgment debtor, most of them are working in either private,

TABLE 2. Demographic Characteristic of Judgment Creditor/ Judgment Debtor

Demographic characteristics	Judgment Creditor		Judgment Debtor	
	Frequency	Percentage	Frequency	Percentage
Age (years)				
Less than 20	1	0.3	0	0
21-30	43	12.1	33	9.4
31-40	161	45.5	124	34.9
41-50	118	33.3	138	38.9
51-60	25	7.1	48	13.5
61-70	6	2.0	9	2.5
Total	354	100	352	100
Mean	34		36	
SD	8.9		9.9	
Type of employment				
Government	38	14.7	64	24.3
Private	78	30.2	118	44.9
Retiree	3	1.2	9	3.4
Self employed	32	12.4	66	25.1
Not working	0	0	5	1.9
Housewife	105	41.0	0	0
Others (eg:student)	2	1.0	1	0.4
Total	258	100	263	100
Monthly income (RM)				
Less than RM1000	33	43.4	13	16.0
RM1001-RM2000	22	29.0	27	33.3
RM2001-RM3000	13	17.1	15	18.5
RM3001-RM4000	3	3.9	10	12.4
RM4001-RM5000	1	1.2	3	3.7
RM5001-RM6000	3	3.9	2	2.5
RM6001 and above	1	1.3	11	13.5
Total	76	100	81	100
Mean	3400		3700	
SD	896		998	
Dependant				
No child	1	0.3	0	0
One child	37	10.4	34	9.6
2 children	81	22.8	80	22.5
3 children	107	30.1	103	29.0
4 children	56	15.8	62	17.5
5 children	73	20.6	76	21.4
Total	355	100	355	100
Mean	3.2		3.2	
SD	2.5		1.2	
Marital status				
Married	26	7.4	57	16.6
Divorce	326	92.6	299	87.1
Total	352	100	343	100

government or self employ. The data indicates that more than one-third (44.9%) of the respondents are working in private sectors. The remaining respondents are working in government sector at 24.3% and self-employ at 25.1%.

3. Judgment Creditor and Judgment Debtor by Monthly Income

Nearly half (43.4%) of the judgment creditors have a monthly income below RM1000. This is followed by those with monthly income between RM1000-RM2000 and RM2001-RM3000 at 29.0% and 17.1% respectively. On the other hand, the findings show that judgment debtors with monthly income between RM1001-RM2000 formed more than one third (33.3%) of the judgment debtor's monthly income. This is followed by the monthly incomes between RM2001-RM3000 at 18.5%. There are also judgment debtors who have a monthly income below RM1000, which is formed at 16.0% of the judgment debtor's monthly income. In addition, there are a small number of judgment debtors who have a monthly income of RM6001 and above but also failed to maintain their obligation to pay for the maintenance. Their distribution is represented by 11 judgment debtors or 13.5%.

4. Judgment Creditor and Judgment Debtor by Dependant

Nearly one-third (30.1%) of the total judgment creditors have three children followed by judgment creditors who have two children (22.8%). The amount is only slightly more than judgment creditors who have five and more children (20.6%). Meanwhile, for the judgment debtors, more than one third (29.0%) of them have three children, followed by the judgment debtor who have two and five children. This is represented by 22.5% and 21.4% respectively.

5. Judgment Creditor and Judgment Debtor by Marital Status

Majority of judgment creditors are widows (91.6%) and not remarried after divorce. Only a small number of them (7.6%) who remarried after divorce. The same goes to the judgment debtor. Majority of the judgment debtors are widower (84.0%) and only one-third (16.0%) of them who remarried after divorce.

NATURE OF MAINTENANCE ORDER

The nature of the court order by type of order refers to the order given through ex parte, mutual consent, interim order or court intervention.

TABLE 3. Nature of the Maintenance Order

Nature of the maintenance order	Frequency	Percentage
Others (no order given)	2	0.6
Interim order	7	2.0
Ex-parte order	44	12.4
Order with the appearance		
Of both	123	34.6
Mutual consent order	179	50.3
Total	355	100

NATURE OF THE COURT ORDER

More than half of the enforcement and execution cases analyzed are an order derived from the mutual consent agreement (50.3%). It seems that the agreement reached upon settling the case, cannot be a mechanism to ensure that the order will be followed and the payment will be made. The natures of the court orders appear to be the important factors in determining that the judgment debtor will comply with the order itself and the most appropriate mechanism should be used for.

This finding contradict with the earlier findings that points out to the fathers in child maintenance order are likely to comply when they have a voluntary child support agreement or when their divorce was uncontested (Beller et al. 1991; Arygs 1993). The possibility to end up the process earlier or just one way of escapism may be the reason of the agreement made. Therefore, it is no significant correlation between agreement and compliance with the order. Even the research on *Sulh* application in the *Syariah* court has revealed that *sulh* managed to shorten the time and early settlement could be made (Raihanah 2000) but the result did not promise that the agreement would be complied. Conversely, the ability of willingness to pay, to be an important factor improve judgment debtor adherence to the court order. Further, more than one third of the orders (34.6%) are the orders granted in the appearance of the both parties. This means that the full trial proceeding has been reach and the judgment given based on the evidence submitted by both parties.

CLASSIFICATION OF PAYMENT

For the order of payment, there are two types of payment namely the regular and arrear payment. Besides viewing the forms of payment, based on the distribution of regular and arrear payment, the writer has gone in deep to detail the pattern on the amount of each types of payment. The

discussions are to detail the total payments made during either regular or arrear payment. Payment of certain sums was made by various channels and methods. Channels and methods of payments made are to facilitate the judgment debtor and judgment creditor. Existing facilities provided were in line with the provisions enacted. Classification of payment is as showed in Table 4.

TABLE 4. Classification of Payment

Type of payment	Frequency	Percentage
Regular payment	194	54.6
Both	128	36.1
Arrear payment	33	9.3
Total	355	100
Amount of payment (RM)		
Regular payment		
30 to 100	13	8.0
101 to 500	112	68.7
501 to 1000	23	14.1
1001 to 5000	15	9.2
Total	163	100
Arrear payment (RM)		
100 to 500	8	2.5
501 to 1000	24	7.5
1001 to 10000	203	63.0
10001 to 50000	73	22.7
50001 to 100000	9	2.8
100001 to 200000	5	1.6
Total	322	100
Channel of Payment		
Bank in	152	42.8
Not specified	135	38.0
Attachment of the salary	30	8.5
By hand	24	6.8
Via third party	9	2.5
Via court	5	1.4
Total	355	100
Method of Payment		
Monthly payment	212	59.7
Not specified	96	27.0
Installment	39	11.0
Lump sum	8	2.3
Total	355	100

1. Type of payment

More than half of the data (54.6%) 19 are to enforce the arrear payment. Only 9.3% or 33 cases are to enforce the regular payment. On the other hands, the total cases, which constitute both regular and arrear

payment are 128 cases (36.1%). It is found that, most of the applications made through judgment debtor summon are to enforce the arrear payments, whereas under the code of 034 (application for the execution of the court order) and code 033 (Application for the enforcement of maintenance orders) are to enforce the regular payment.

2. Most recent amount of payment

1. Most recent amount of regular payment

The most recent amount of the regular payment shows the wide range of amount. The amount in the range of RM101 to RM500 achieve the highest frequency which is more than half (68.7%) of the data. Followed by the amount of RM501-RM1000 at 14.1%. Whereas the lowest amount (RM30 to RM100) and second lowest (RM1001 to RM5000) at 9.2% and 8.0% respectively.

ii. Most recent amount of arrear payment

As same as the most recent amount of regular payment, the most recent amount of arrear payment also shows that there is a wide range of arrear payment from the smallest amount to the biggest. It was depended on the cases. More than half (63.0.6%) of the arrear payment are amounted to be more than RM1000 to RM10,000. This was followed by the amount of RM10,000 to RM50,000 and the amount of RM501-RM1000 in the second and third stages. The percentages of both are at 22.7% and 7.5% respectively.

3. Channel of payment

Channel of payment refers to the place where the payment should be made. The most popular channel was through bank-in, which represent is by more than one third (42.8%) of the cases. It is noteworthy to find that there are more than one third (38.0%) of the cases are not specified to the channel of payment. It seems where the payment should be pay through was solely depend on the judgment debtor and judgment creditor.

4. Method of payment

More than half (59.7%) of the cases choose monthly payment as their method of payment followed by installment at 11.0%. Moreover, a small percentage of the cases chose the lump sum method to pay the arrear maintenance. The monthly, installment or lump sum method depend on the type of payment whether regular or arrear payment. Most of the regular

payments were made using monthly payment while the arrear uses installment method. As same as the channel of payment, the data also indicates that nearly one third (27.0%) of the order did not determine the method of payment when the judgment is given.

The determination of the method of payment will indeed expedite the process of implementation and enforcement of maintenance orders. Even this action has no significant correlation with the non-compliance, but practically once the method of payment has been determined, the application would then be easier. From the observation made, some of the cases are only there to justify the channel or method of payment. Thus, in granting the order to the judgment creditor, the task of judges is not just to ensure whether the order should or not be given on the evidence adduced, but the judge has the duty to ensure that the order could be implemented and executed, hence the justice can be fully achieved.

REASON AND DURATION OF APPLICATION OF ENFORCEMENT AND EXECUTION OF THE COURT ORDER

Basically, the enforcement and execution of maintenance order is made because the voluntary payment did not occur. However, when the implementation or enforcement application is made, a variety of reasons were put forward by the applicant in providing justification to why such action should be made. The reason given to some extent affects the time taken as soon as the maintenance orders issued before an application for the enforcement and is made.

1. Reason for application

Reason of application might also be a reason for the non-compliance of the court order. However, the reason for the non-compliance behaviour is too diverse and cannot be specified. For instance, in the strictest sense, father or ex husband are in defaults if they miss a scheduled according to the order or agreement. However, there is a diversity of payment patterns ranging from full and consistent compliance to near or total non-compliance. For this study, the researcher has differentiated into five types of reasons for application of the non-compliance of the court order namely:

- i. Never pays for the maintenance order,
- ii. The payment not following the order,
- iii. There was irregular payment,
- iv. The undetected judgment debtor, and
- v. The payment was made one time only

The reasons for the application were showed in Table 5.

TABLE 5. Reason for Application of Enforcement and Execution of Maintenance Order

Reasons	Frequency	Percentage
Not following the order	172	52.8
Never pay for the maintenance order	126	38.6
Irregular payment	19	5.8
Pay one time only	9	2.8
Undetected judgment debtor	2	0.6
Others (e.g.: employers refuse to deduct the salary)	7	2.1
Total	326	100

The data indicates that almost half of the applications (52.8%) are due to the judgment debtor who was not following the order. This was followed by the reason of never pay for the maintenance order at 38.6%. Another reason stated were irregular payment, pay one time only and undetected judgment debtor. All these reasons formed at percentage of 5.8%, 2.8% and 0.6% respectively.

The reason was stated on the judgment creditor's application form. The term not following the order referred to the pattern of judgment debtor's payment, which is usually the amount that was smaller than the amount ordered. Hence, once the payment was not the same as the order was, it was calculated and presumed as an arrear payment. From this finding, it is presumed that the unwillingness to pay contributed more for this reason. In addition, there are cases that the application made by employers who do not or refuse to abide to the attachment of the salary. Sometimes the judgment debtor tends to stop working or change the working place in order to run away from their obligation.

2. Duration of application

The duration of application here refers to the period taken by the judgment creditors to register for the enforcement and execution legal action from the time when judgment was given. Indeed that many factors have hindered the judgment creditor to take immediate action in filing the cases. Always the reason relies on the awareness of women and children upon their rights provided by laws (Musa 2010). For most cases, failure to apply earlier will result to arrear of payment or debt. This will increase the possibility of judgment debtor to pay such huge amount.

The following Table 6 illustrates the duration of the application taken after the judgment.

TABLE 6. Duration to Register for Enforcement and Execution

Duration	Frequency	Percentage
1 month	6	1.7
2 months to 1 year	119	33.5
1 years to 5 years	162	45.6
6 years to 10 years	55	15.5
11 years to 20 years	13	3.7
Total	355	100

More than one-third (45.6%) of the cases are registered between 1 year to 5 years from the time when judgment was given. This was followed by a period of 2 months to 1 year (33.5%). Whereas between 6 to 10 years is at 15.5%. There are a small number of cases (13 cases or 3.7%) which took 11 to 20 years to register. The only 1.7% of cases are register within 1 month.

The longer the time taken to register a case, the larger the amount of arrears payment. The amount increases the disability of judgment debtor to pay the debt. For instance, the longest time recorded was the order obtained in 1986 and only registered for enforcement and execution action in year 2006 with the total claims amount of RM78296.00 (*Suria Daud vs Wan Abdullah Haji Wan Hamat 2006*). This case took 20 years to register. The amount was paid through Hiwalah proceeding. The action was registered under the code of 034, which is under the code of execution of the maintenance order. However, in their affidavit the action mentioned was a Hiwalah proceeding. The third party (*Amanah Raya Berhad*) as the trustee for judgment debtor property made the payment. In this action, it was found that the judgment debtor / respondent was no longer working and failed to make payments until the arrears of maintenance reaches RM78,296. The payment was obtained through this action, the money was from the judgment debtor's late son who has passed away, and the compensation was given to the judgment debtor as one of the *faraid* receiver.

It is noteworthy to find that on the average, the judgment creditor took only seven months up to one year prior to hand in the application of enforcement and execution of the order to the court. Usually, a period of three months are given to the judgment debtor after the order for maintenance is granted before taking action for the enforcement of the order. Practically three months is the period which is usually given by the judgment creditor and the lawyer in order to ensure voluntary compliance by the judgment debtor. If after three months passed

and the judgment debtor yet to comply with the maintenance order, legal action will be initiated by the judgment creditor against the judgment debtor.

COURT PROCEEDING TO ENFORCE AND EXECUTE THE COURT ORDER

Enforcement mechanism and effective execution of the order depend on the ability of the parties to follow the right procedure and process. In addition, a non administrative action before the court process also increase the percentage of compliance to the court order. This process need to be settled before the proceeding. Table 7 shows the process taken before and during the proceeding of enforcement and execution legal action.

TABLE 7. Enforcement and Execution Process

Processes (N=355)	Frequency	Percentage
Summon	303	85.4
Notice of Appearance	288	81.1
Mediation	149	42.1
Judgment Debtor Mean Test	62	17.5
Warrant of Arrest	36	10.2

*multiple response

1. Summon

Summon is a court order to an individual to appear in court at a specified place and time (Elizabeth 1994). Summon must be served to the judgment debtor before or during the seven days of the first hearing (*Syariah Court Civil Procedure (Federal Territories) Act Section 45*). Summon could be delivered to the respondent either through delivery service of the court or law firm notice server (*Penghantar Notis*). Also, it can be delivered via post and district office (*Pejabat Daerah*) services.

The data indicate that majority of the cases reviewed (85.4%) have succeeded to serve summon to the judgment debtor. The rest (14.6 %) summons could not be delivered to the judgment debtor for several reasons such changed of judgment debtor's workplace, residence and address missing info.

2. Notice of Appearance

For many cases, even though summon could be delivered, it is often that the judgment debtor failed to appear during the hearing/trial without any specific reason. The judgment creditor would request for notice of appearance. Similar to the process of serving a summon, notice of appearance would also be served

to judgment debtor before or during seven days of the first hearing.

The data show that for majority of the cases (81.1%), the notice of appearance had been succeeded to serve to the judgment debtor. The rest (18.6%) of the cases could not be delivered.

Similar to the summon process, reasons for undelivered notice of appearance are changed of judgment debtor's workplace, changed of residence and unknown address. It is presumed that the percentage of undelivered notice of appearance is higher than the undelivered summon due to the action of the judgment debtor changing residency, once the summon has been delivered to them as a way to avoid getting traced.

Since the establishment of the Family Support Division Unit in every *Syariah* Court in Malaysia, summon and notice appearance being handled through this unit. In most cases of the enforcement and execution of a maintenance order, the service of the summons and notice of appearance become difficult to serve if the address of judgment debtor is not known. Usually it happens to the cases where the order is obtained without his appearance (ex-parte) (interviewed with FSD officer, En Hairuddin Bin Abdul Rahman).

3. Mediation

Mediation or *sulh* is a pre-condition to the trial process. It is assumed to be successful when the parties have reached a consensus; that will be recorded, and the record is brought before a judge for his endorsement (Raihanah 2010). Mediation or the *sulh* process is vital for the settlement of any claims in the *Syariah* court.

However, the data indicates that only 148 of the enforcement and execution cases went for mediation or *sulh* process compared to non-mediation process (57.7%). It is presumed that the judgment creditors have no interest to go for the mediation or *sulh* process since most of the judgments are granted by way of mutual consent. Furthermore, in most cases, the judgment debtor could not be detected and the mediation session, requiring the appearance of both parties, could not be held.

4. Judgment Debtor Mean Test

In certain cases, if the payer can show a reason of inability to make payment such in the order, the court has the power to allow the variation of payment with the consent of the payee. However, in order to get a clear information over the capability of the judgment debtor, the judgment debtor mean test should be done properly.

The data indicate that less than one-fifth (17.5%) of the cases had applied a judgment debtor mean test during the proceeding. One of the reasons behind this occurrence is disappearance of the judgment debtor. Since the examination did not happen during the trial, the judgment debtor summon relies only on the judgment creditor evidence; and in certain cases, the court just validated the amount of debt without any concrete evidence.

5. Warrant of Arrest

Only 36 cases had applied for warrant of arrest. The small number of using warrant of arrest significantly shows that it is unpopular in the case of enforcement and execution of the maintenance order.

Naturally, in certain cases, the judgment debtor resists presenting himself to the court even when summon and notice of appearance had been served. Alternatively, the warrant of arrest is used as the last option for the court to force the judgment debtor to appear before court, when voluntarily appearance could not be made. For most cases, the execution of warrant of arrest becomes a typical problem. The reason is not being able to get full cooperation from enforcement agencies such as the police and *Syariah* enforcement officers. Furthermore, the respondents' actions, who had fled and could not be detected of their whereabouts have increased the existence problems.

JUDICIAL DECISION IN ENFORCEMENT AND EXECUTION OF MAINTENANCE ORDER CASES

This subsection lays out the pattern of judicial decision delivered by the *Syariah* court. It provides the type of judgment and duration of case settlement (Table 9). The duration of case, settlement refers to the period taken by the court to settle the cases.

1. Type of Judgment

Almost half of the cases (52.5%) brought to the court were approved by the judges. It is followed by the withdrawal cases (22.5%). In addition, one-fifth of the cases (10.1%) ended up by the consent order and by strike out by the court. However, in some cases where the judgment debtor cannot be detected, the court will still award the approval for the application. The approval given was to verify the amount of arrear payment. It seems that the court will just make a repetition on the same process of application for the maintenance orders.

Usually, the judgment creditor tends to withdraw the case voluntarily if the judgment debtor's

TABLE 9. Judicial Decision in Enforcement and Execution of Maintenance Order Cases

Type of Judgment	Frequency	Percentage
Approved	187	52.5
Withdrawal	81	22.5
Consent order	36	10.1
Strike out	36	10.1
Dismissed	7	2.0
Variation	4	1.1
Remained	1	0.3
Others (e.g.: no judgment given)	4	1.1
Total	355	100
Duration (Months)		
Below 6	225	63.4
7-12	70	19.7
13-24	46	12.9
25 and above	14	4.0
Total	355	100

whereabouts cannot be detected. Similarly, the debtor's whereabouts is one of the reasons for the cases to be strike out or dismissed. Sometimes the court will dismiss the cases when the judgment creditor fails to appear before the court without any particular reason.

2. Duration of Case Settlement

More than half of the cases 63.4% were settled within 6 months or less. This was followed by 7 to 12 months at 19.7%, whereas 46 cases or 12.9% were settled between 13 to 24 months. The only 4.0% of the cases were settled in more than 25 months.

Similar to maintenance cases, the duration of the case settlement actually cannot reflect the compliance of the court order. Nevertheless, it will reflect the efficiency of management in the court cases. This also indicates that the court has fulfilled the requirement for *Syariah* court key performance indicator, which in the case, must reach the duration of settlement within 180 days.

As in any other family cases such as divorce cases (Siti Zubaidah et al. 2011), the major reason for delays came from the judgment creditor or the judgment creditor itself. However, for the enforcement and execution cases, the problem regarding execution summon and warrant of arrest also became the most raised issues for the delays.

CONCLUSION

To conclude, the study revealed that the nature of the court order is crucial in determining the mechanism of

the enforcement and execution. It was found that many orders issued by the court did not state the channels and methods of execution, especially those involving the payment of money orders. The study also found out that although the order obtained was based on mutual agreement between the parties, it does not constitute a guarantee that the order will be complied by the parties. Thus, court players have their own role in the success of the enforcement action. The study also found out that regardless of any mechanisms used to implement and enforce the maintenance order of *Syariah* court, the parties, especially the cooperation of the judgment debtor that is able to accelerate the solution process of enforcement of maintenance orders in the *Syariah* court. Pertaining to the duration of case settlement, it has achieved the key performance indicator set up by the government which is not over than 180 days. However there are a small number of cases that dragged up to more than 12 years. Overall, the study shows that an effective mechanism for the enforcement and execution of the order does not only depends on the legal process alone but also must have a strong assimilation between legislative and administrative action.

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- Case no: 14100-034-0214-2006 (Suriah Daud vs Wan Abdullah Haji Wan Hamat)
- Case no: 05005-037-0573-2009 and 05005-037-0122-2010 (Aisyah Bt Abdullah vs Md Hasram Mahat)

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