

Committal Order Claims in the Execution of Maintenance Orders: A Study From The Perspective of Civil Procedure Law

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Abstract

The implementation of maintenance orders is often a topic of discussion that never been neglected in the Syariah Court. The issue of maintenance is also an issue that is often discussed on most media platforms. In the post -Covid 19 era that is still plaguing, the Malaysian Syariah Judiciary Department (JKSM) receives 5 complaints a day about husbands not providing maintenance compared to only 5 complaints a month before the Movement Control Order (MCO) was enforced. The committal order discussed is one of the alternatives that can be applied for for those who are determined to get their alimony back. This article focuses on the committal order related to default in the implementation of the maintenance order from the perspective of the Civil Procedure Law of the Selangor Syariah Court 2003. The objective of the study is to identify the provision of committal for default of the maintenance order. Provisions covered include the process of submitting summons and notices, trial proceedings, and appeal process. This study is a qualitative study using document analysis and data collection approaches and analyzed using descriptive and inductive methods. The results of the study found that the committal order was effective in recovering the arrears of maintenance. The study also found that further studies need to be done in ensuring that the weaknesses in the implementation of the committal order can be overcome thereby improving the laws and procedures of the committal order

Keywords: Alternative, Committal, Maintenance, Execution, Syariah Court

Introduction

Issues related to maintenance are often a polemic, and never seem to subside with each coming year and are even frequently discussed in the courts, electronic media, and print media. The maintenance claim is either filed against the husband, the ex-husband after the divorce, or the father. In early 2010, it was reported that over 12,300 ex-husbands had been negligent or failed to pay maintenance to their former wives and children (Yusoff et al., 2017). According to statistics released by the Department of Syariah Judiciary Malaysia (JKSM), there

were 12,983 maintenance cases registered in Syariah Courts across Malaysia between 2013 and 2017. Selangor recorded the highest case registration with 3,409 cases. These data show that maintenance cases continue to be one of the major contributors of cases tried in Syariah Courts. The issue of maintenance is undeniably happening everywhere (Machae et al., 2015) and it is a hot topic frequently discussed (Fatiha, 2020), and if destituted, it is very concerning as long-term neglect of maintenance, neglect of responsibility (Abdullah, 2001), and the actions of husbands who do not pay maintenance (Rahman et al., 2014) may lead to divorce. In terms of claims, the aggrieved party can claim their rights through various provisions available in the Syariah Court, which include Attachment of Earnings Order, Seize and Sell, Judgment Debtor Summons, Hiwalah, and Committal Order (Sapian & Shariff, 2019). An order issued by the court is mandatory to be complied with (Azman & Hussin, 2017). Any party who willfully defaults a court order, the aggrieved party may seek the imprisonment (Nasohah, 2019) of the party at default. A committal order is an enforcement order that can be applied for to imprison any party who has been served with an order but failed to comply with the order issued by the court.

Methodology

A qualitative research method was used in this study by applying the approaches of document analysis, data collection and data analysis. This study analyzes documents such as turath books, dictionaries, journal articles, the JKSM website, Selangor Syariah Judiciary Department (JAKESS), enactments and acts. A data collection method was conducted by means of semi-structured interviews. A total of respondents were interviewed in this study, consisting of Judges of Court of Appeal of the Syariah Judiciary Department of Malaysia, Judges of Syariah High Court of Selangor, Senior Assistant Director of the Selangor Legal Aid Department, Senior Assistant Director of Family Support Division of Selangor and Research Officer of the Syariah Judiciary Department of Malaysia. While data were obtained from (Family Support Division) BSK of Selangor and JAKESS. The data obtained were analyzed descriptively and inductively to answer the questions and objectives of this study.

Execution of Committal Orders in Syariah Court of Selangor

Execution of committal orders can be done if there are applicants who wish to claim rights through this order and usually imprisonment will be imposed as a last resort (Noor, 2014). Committal orders are provided for in the Civil Procedure Enactment of the Syariah Court of each state. However, this article will focus on the Syariah Court Civil Procedure (State of Selangor) Enactment 2003 only. A committal order can be applied through the execution of committal proceedings under Section 151 (1) to apply for a Show Cause Notice for default of court order, Section 181 (1) ETMSS for default of directions in Judgment Debtor Summons and Contempt of Court proceedings through Section 229 (1). An application for an enforcement order and execution of a committal order can be made if the plaintiff who has received any court order regarding the maintenance deliberately fails to comply with the order.

According to a case report released by the Selangor Syariah Judiciary Department (JAKESS), the total number of Mal cases in the Selangor Syariah Court from 2013 to 2016 was 70,289 cases. While applications for orders leading to committal from 2016-2020 were 144 cases (refer to Table 1). Data on Committal cases can be seen as follows:

Table 1

Number of Cases Related to Committal Order in Selangor

Tahun	2016	2017	2018	2019	2020	COURT
Kes						
Application for Committal Order Permission	0	1	0	4	1	SHC, SLC Shah Alam, SLC Klang, Hulu Langat
Notice of Judgement	2	17	30	49	33	SLC Klang, Hulu Selangor, Kuala/Hulu Langat, Gombak Barat/Timur, Sepang, Petaling Jaya, Shah Alam
Committal	0	1	2	4	0	SHC Shah Alam, SLC Klang, Ampang, Gombak Timur
TOTAL	2	19	32	57	34	144

Source: Selangor Family Support Division

According to the data gathered, the number of applications for Committal Orders in Selangor varies from year to year. Based on the Committal Order Permission Application application, no case was applied for in 2016, in 2017 there was one application filed, and no application was applied for in 2018, while in 2019 there were four cases, followed by one case applied for in 2020. The cases were applied for at the Shah Alam Syariah High Court (SHC), as well as the Shah Alam, Klang and Hulu Langat Syariah Lower Courts (SLC). In terms of Notice of Judgment applications, in 2016, there were 2 cases, followed by 17 cases in 2017 and 30 cases in 2018, and the number increased to 49 cases in 2019, and there were 33 cases in 2020. The courts that received applications were SLC Klang, Hulu Selangor, Kuala and Hulu Langat, Gombak Barat and Timur, Sepang, Petaling Jaya, and Shah Alam. Apart from that, no cases were recorded for Committal applications in 2016, one case in 2017 and there were 2 cases in 2018, then in 2019 there were 4 cases applied for while there was no case in 2020. Committal application was applied for at SHC Shah Alam, SLC Klang, Ampang, and Gombak Timur.

In terms of effectiveness, the Committal Order in the state of Selangor has great potential because it is a short cut to force people to execute the order (Yasoa, personal communication, 2021) and play a big role in solving (Zaizan & Rahman, 2019) maintenance order issues. According to Noor (2010), imprisonment will be more effective than fines that are perceived as being too light and taken lightly by those who violate the rules. A report from the Selangor Family Support Division on the effectiveness of committal cases can be seen in the case of *Zarela Aizul Binti Zulkifli v Mohd Radzi Bin Mohd Zaidy* Case No 1002- 023-0422-2018, the court ordered the defendant to pay the child maintenance arrears of RM 6500 and the payment had to be made in installments of RM 150 per month. However, the defendant failed to settle the debt to the plaintiff for 15 months. Plaintiff applied for a Show Cause Notice

application which could lead to imprisonment and after mention of the case was done, defendant cleared his debt gradually until settled. In the case of *Mariah Binti Kadir v Ghazali Bin Rahmat* Case No. 01001-076-1584-2015 where the Judge of SLC of Johor Bahru ordered the Judgment Debtor to pay his debt or if failed, the Debtor would be committed to imprisonment. Then the Debtor makes the first payment in cash RM5,000 and RM 13, 588.00 a month later.

Committal Claims in The Execution of Maintenance Orders From A Civil Procedure Law Perspective

The author will look at how the practices and procedures of Committal order claims adhere to the provisions of the Civil Procedure Law. Although in general, each state has its own Civil Procedure Law, the author will refer to the Syariah Court Civil Procedure (State of Selangor) Enactment 2003 or specifically, Section 151 (1) ETMSS 2003 enforcement of judgment to conduct or refrain from committing an act or for defaulting a court order and Section 229 (1) ETMSS 2003 for Contempt of Court as an example of the following provisions which are the basis of the action of the Committal proceedings conducted in court:

The Processes of Committal Order Claims and Service of Summons

The committal order to be applied for must be accompanied by any order that can be applied for to be committed by the defendant and the party wishing to apply for a committal order must have any order or judgment issued by the court in advance as specified in Part XVI – Judgments and Orders (Section 130 – Section 137 ETMMS 2003). If the party seeking to claim rights has an order, and the order is ignored by the claimed party, then the aggrieved party may apply to commit the defaulting party to the court order as contained in Section 151 (1) ETMSS 2003.

An application for a Committal order must be made ex-parte and also accompanied by the applicant's supporting affidavit, which contains the applicant's identification details; personal information of the party to be committed, namely the respondent; and also the reason for the application, such as what order was violated and how the order was ignored. The court receiving the application will analyze the application and affidavit attached and issue a Show Cause Notice if permission is given for the claimed party to appear in court on the day and time specified in the order as contained in Sections 147 (1) and 135 ETMMS 2003. The Show Cause Notice issued by the court must be personally served to the claimed party, namely the respondent, and the notice is to be accompanied by a committal order permission as well.

As for the case of committal order claims for Contempt of Court in Section 229 ETMSS 2003, in principle, contempt of court is divided into two parts, namely contempt in court (in facie) and contempt out of court (ex facie) or also known as constructive contempt (Rahman, 2013). As for the case of contempt in court, no Show Cause Notice is required to be served because the contempt occurred face-to-face. The court only needs to make the perpetrator understand the types of offenses committed and give him the opportunity to defend himself in accordance with Section 229 (2) ETMSS 2003, and the court needs to record the case.

Meanwhile, for the offense of contempt out of court, the Show Cause Notice must be served in person to the party accused of committing the charge. As for the respondent who violates

the court order by failing to show up on the specified dates, the court has the authority to issue an arrest warrant against him to attend the case trial.

Committal Order Claim Trial Procedure

The trial stage is the most important stage in any case claim, including the committal case claim. In terms of attendance, the parties involved in the case trial must be present on the date and time specified. Their presence will indirectly help to ensure that the trial runs smoothly. According to Judges of Court of Appeal of the Syariah Judiciary Department of Malaysia, justice will be served in an inter-parte trial, which involves the presence of two parties (Latif, personal communication, 2021). Any noncompliance in terms of attendance will only cause inconvenience and may result in various risks, such as the case being dissolved from court if none of the parties are present, or the case being decided without his presence if only one party is present, as stated in Section 121 ETMSS 2003.

On the day of the case's hearing, the respondent may make a defense or answer the show cause notice orally or by affidavit. If the respondent chooses to respond orally, the judge will conduct an investigation by means of inquisitorial, that is, through investigation (Nasohah & Tapah, 2001). The court also has the discretion to allow the respondent to be questioned personally by the applicant or his own lawyer. If the respondent chooses to make a defense by sending an affidavit, then the judge will give permission for the respondent to be cross-examined by the parties, including the trial judge himself (Man, 2012).

As for the claim of Section 229 ETMSS 2003 committal order, on the day of the case hearing, the respondent will be questioned about why he should not be imprisoned for contempt of court, the factors of his noncompliance with the court order, questions about his capability, and others. At the case decision stage, the court will carefully examine every aspect of the respondent's arguments and counter-arguments so that the decided outcome is fair and the best decision. Therefore, if the defense made by the respondent is accepted, then the court has the option of releasing the respondent with or without conditions. However, if the defense is rejected, then the court can either impose a fine of not more than RM2,000 or imprisonment not exceeding 6 months.

As for Section 151 ETMMS 2003, there is a fatal loophole when there is no specific period provision on how long the period can be imposed. In other words, there is no stipulation on how much time is allocated for imprisonment. According to Yaso (2021), there is a loophole because this section does not specify the period, whether 3 months, 30 days or 6 months. Meaning can only be committed to prison, only to that extent under Section 151. However, according to the ruling issued by the Judge of the Court of Appeal in the case of *Zetty Binti Zabir v. Mohammed Rafi Bin Mohamed Yaacob* Civil Appeal Case (Selangor) Case No. 10000-036-011-2009, the term of imprisonment for this section is not more than 3 years if the case is in the Syariah High Court and 2 years if the case is in the Syariah Subordinate Court. Section 229(1) ETMMS 2003 provides for two types of punishment, with the judge deciding between imprisonment for no more than six months and a fine of no more than two thousand ringgit.

Case Appeal Process

Any decision issued by the Trial Judge is considered final at that level of court. It is natural that there are decisions that cannot be swallowed, accepted and satisfied (Nasohah & Shukur,

2018) by the parties. An appeal against the decision of any court shall be appealed to a higher court as provided in Section 139 (1) ETMSS 2003. However, cases that have been mutually agreed upon cannot be appealed (Nasohah, 2018).

For the commencement of the appeal, the appellant shall commence by filing a notice of appeal on Form MS 29. The notice of appeal must be filed within a period not exceeding fourteen days from the day the court's decision is issued. If fourteen days have passed since the decision for the case was issued, the appellant must first apply for an order to extend the appeal period before being permitted to proceed with the appeal. As in the case of *Sharifah Badariah bt. Mari v. Yasran B. Haji Hussain* Case No. 10000-099-0005-2009, which concerned an application for an extension of the appeal period and an application to file a notice of appeal within 14 days of being granted the extension period. The case was decided in the Shah Alam Syariah High Court, where the applicant, who was previously a respondent, was sentenced to committal punishment for 7 days for violating a court order issued to him on 23/10/2008. On 23/12/2009, the Syariah High Court approved the Application for Suspension of the Committal Order after the applicant was granted permission to revive the application for suspension of the committal order, which had been dismissed by the court. However, the applicant failed to file a notice of appeal as provided by law, and the matter was appealed by the appellant. As the matter to be appealed involves a serious matter, which is imprisonment, and in view of the fact that the applicant, who is ignorant of procedural law, was not represented by a lawyer during the committal proceedings, the Court of Appeal held that the applicant's failure to file the Notice of Appeal within the stipulated period is forgivable.

In the context of the appeal part, the appellant must also determine which part of the decision to appeal, whether it is the entire decision or only part of it. If only part of it is to be appealed, the appellant shall clarify and determine which part. The appeal procedures are mentioned in Part XVII-Appeal (Section 138-146 ETMSS 2003).

Findings and Discussion

From the debate that has been discussed, it can be seen that prison is a matter that has a basis in *syarak* (Islamic law) and has been codified in the Laws of Syariah Courts of the States. According to the findings, the Committal order is effective for giving lessons and, more importantly, able to recover the maintenance arrears. However, the success of the Committal order also depends on the applicant's knowledge (Kiflie, personal communication, 2021) about the laws and provisions that can be applied for.

Based on the result of the analysis of the informant's answers on Committal order, the matters that need to be noted in the Committal order are as follows:

Table 2
Committal Order Interview Findings

Subject	Informant 1	Informant 2	Informant 3	Informant 4	Informant 5
Committal Order is Effective in Recovering the Maintenance	/	/	/	/	/

There is a Loophole in the Committal Laws and in Serving the Summon/Notice	/	/	/	/	/
Orders Need to Be Clear		/	/	/	/
Element of Intentional Imprisonment Factors	/	/	/	/	/

Source: Interview Participants (2021)

According to the findings of the interviews, the effectiveness of the Committal order in recovering maintenance rights was acknowledged by all respondents. The five informants also believed that there was a loophole in Section 151(1) of the Committal law, which does not provide an imprisonment period, in addition to the challenges in serving the summonses and notices. Furthermore, informants 2, 3, 4, and 5 believed that an order issued by the court should be clear in terms of the time period and method of payment to facilitate the enforcement of the order. Meanwhile, all of the informants mentioned that the element of intentionality was the main factor considered by the judge in deciding on the imprisonment order.

Conclusion

This study aimed to give impact to the practitioner and legislator in Selangor to upgrade the provision and enforcement of committal order due to refusal of maintenance order. This study also assists in giving recent information to petitioner on the provision and enforcement of order related to maintenance. Finding of this study discovered that the Committal order is one of the claims that can be found in the Civil Procedure Law. Committal orders have a distinct method of applying for and enforcing orders. The findings of the study showed that committal orders can effectively recover the rights of those who are persecuted. In addition, improvements need to be made to ensure the smooth process of application and enforcement of orders, such as providing imprisonment periods for the sections without such provision. Further studies also need to be conducted to streamline the provisions and enforcement of existing orders.

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