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The Application of Principle of Res Judicata and Estoppel in Family Law Cases in Syariah Court

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Abstract---This writing examines the Syariah court's approach in applying the principle of *res judicata* and *estoppel* in *family law* cases in Syariah. With the existence of the legal provisions, there are still the unclear application of *res judicata* and the principle of *estoppel* in terms of hearing *mal* cases especially the matter involved with a monetary claim for example *mut'ah* cases, child maintenance, and jointly acquired property. Although this principle has been understood by the legal practitioner, the synchronization between the principle of *res judicata*, *estoppel*, and court procedure is yet to be scrutinized by the Courts. Thus, a qualitative study was carried out along with library research including decided cases in this research. The content analysis method is applied in data analysis. This study indicated that in arriving at a decision, Syariah Court indirectly applied these principles. However, the implementation of these principles should be highlighted to validate the principle of justice in Syariah Courts.

Keywords---family law, legal maxim, Maslahah, *res judicata*, Syariah courts.

Introduction

Res judicata (Bouvier; 1856), determines the effect prior adjudication, ending in a valid legal judgment, has in either binding or precluding a common party as to the same issues or claims raised in a later civil suit. In order to apply the principle of *res judicata*, there are concurrence of essential conditions in the subsequent case. First, identity of the thing. Second, identity of the cause of action. Third, identity of persons or parties to the action. Forth, identity the quality of a persons or parties to whom an action for or against the claim is made. If one case has been decided, final judgement entered, all appeals are exhausted. The decision will be binding in all issued determined in the lawsuit (Agreement, 2017). This principle is a rule of universal law, accepted by all legal systems

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including civil courts and Syariah courts in any adjudicated legal suits. Although the concern is on factual and legal disputes compared to procedural issues, this principle impacted more on the court due process in the first place. Such principle give rise to the principle of *estoppel* that impose certain restriction onto particulars facts that has been agreed upon or adjudicated to be contested (Rahman & Bramantyo, 2020; Rinartha et al., 2018).

Res Judicata stands as defence

The principle of *res judicata* relevant in civil cases be it contract law, family law and others. Settlement by way of court adjudication or arbitral award endorsed by the court give rise to the implication of *res judicata*. Battle cases might end-up with full trial proceeding by obtaining specific order produced by the court; and might be concluded with consultation or discussion between parties resulted an agreement endorsed by the court in the name of Consent Order. Both modes give rise to the principle of *res judicata* and *estopple* (Yermakova et al., 2021; Arsawati, 2016).

Discussion on issues involve different nation and country, consideration towards the proper uniformed and standardized transnational principle of *res judicata* in arbitral award might be appropriate to catter complicated issued which involved public policies (Voser, 2015). N. Joser and J. Raneda highlights the needs for arbitration to have their own procedural on *res judicata* principles so as to avoid 'two bites of an apple'. Three-prong test that has been analyzed seems to verify whether such case jeopardizing or not by identifying (a) the details of the parties (b) the details of the claims and (c) the details of the facts. If the case being filed has dissimilarity of the facts, the principle of *res judicata* ineffective in such a way.

The application of the principle positively impacted in all legal system including Islamic countries and mould the legal procedure in Syariah Courts. Multazimah and Shahrul Mizan findings indicated that several legal maxims being applied in Syariah Court within the year 2009 until 2017. From 20 cases, 2 cases applied the principle of *res judicata* in the judgment indicating the acknowledgment of legal maxims in Syariah Courts' procedure. The recognition of legal maxim in Syariah Courts considered appropriate when (a) the principles inline with Hukum Syarak, (b) involves issues *in pari materia* with provisions applicable in Syariah Courts and Civil Courts and (c) no specific provision provided in Syariah Court procedure.

Siti Shamsiah discussed in detail the position of consent agreement entered by parties in divorce cases in Syariah Court that might lead to discriminate the womens' entitlement to certain rights. Such consent agreement should be closely guided by the legal procedure and legal substance from the islamic viewpoints. Numbers of cases presented by Siti indicating the adjudication of cases on womens' right after divorce for example *harta sepencarian*, child maintenance, *iddah* maintenance drop-out on the basis of consensus reached by the paries to waived such rights which is prescribed by Islamic Law (Bautista et al., 2015; Zaini et al., 2017). Issue arose when parties i.e. the ex-wife intended to vary or amend the order and re-open the case on the ground of unaware of the entitlement of

such rights after divorce. They are estopped with the principles of *res judicata* because the same cause of action has been decided before (by way of Consent Order). However, in civil litigation, the principles might be set aside within 30 days through certain procedures on the basis of fraud, mistake of fact and mistake of law (Abdul Majid Tahir et al., 2017).

The same position applies in Saudi Arabia in arbitral awards. The principle of *res judicata* being applied once the arbitral awards recognized by the competent authority and in line with Syariah and Saudi policies. Such principle highly accepted by the Saudi courts because it puts an end to a conflict and avoid recurrence. The comprehensiveness of this principle could avoid falling into contradictory of multiple verdicts and duplication. *Res judicata* seems to support the success of the enforcement of arbitral award that has been approved by the courts (Aleisa, 2016). The purpose of this principle stood as a defence for various reasons. Although it serve as a procedural approach to restrict double-claim; but the substance and merit of the decided matter has to be evaluated critically in order to apply this legal maxim.

Res Judicata in Syariah courts

The acceptance of this particular legal maxim can be seen widely applied in various legal issue in civil courts not excluding Syariah Courts in Malaysia. Statutorily, by virtue of Section 94 Syariah Court Civil Procedure (Federal Territory) Act 1998 (SCCPA 1998), *res judicata* principle has been clearly invoked on Settlement of Action,

“Where by agreement of the parties an action has been settled, the Court may at any time, by consent of the parties, record the fact of such settlement with the terms thereof, and the record of the settlement shall afford a defence by way of res judicata to subsequent proceedings from the same, or substantially the same, cause of action”.

Upon settlement of cases by parties, and recorded by the Court, such terms of agreement stood as a defence in the principle of *res judicata*. The parties are estopped from filing subsequent action whether the same or substantially the same in its context (Dainelli et al., 2008; Ramadani et al., 2021). This provision indicates the emphasis given by the legislator upon consensus reached by litigating parties to avoid jeopardizing similar matter after the adjudication of an Order.

In relation to Section 94 SCCPA 1998, Section 131 SCCPA 1998 further provides on Consent Judgment that,

“Judgment by confession or consent of the parties, including sulh, may be recorded by the Court at any time”.

This provision connotes the implication in two situations. First, consensus specifically reached in discussion session whether in sulh session at Syariah Courts that is conducted by Sulh Officer, mediation session at Legal Aid Department held by Legal Aid Officer and discussion made via legal representatives or Syarie Lawyer. Second, the litigants – particularly the

defendant or respondent - without proper forum of negotiation with the plaintiff or petitioner, confessed before the court agreed to the claim made before him, with or without modification. In both situations, the court may record Consent Judgment.

Consent Judgment (Resnik, 1993), entered by parties in Syariah Courts have several legal implications. First, by virtue of Practice Direction No. 4 Year 2011, the Consent Judgment which is in line with Hukum Syarak that has been recorded by the court - restrict any appeal matters brought subsequently and abstain any retraction of consent. Such award also gives effect to bar any attempt of variation or modification to the terms agreed before. *Res judicata* principles take effect in this situation. Second, according to Practice Direction No. 15 Year 2006, the Consent Judgment in *sulh* session shall not withdraw any rights of the wife on *hadanah*, child maintenance, *'iddah* maintenance and *mut'ah* before pronouncement of *talaq*. If, the pronouncement of *talaq* took place, then only, withdrawal of any rights after divorce by the ex-wife is effective once agreed by both parties and endorsed by the court. The ex-wife is estopped from revoking the withdrawal as the principle of *res judicata* takes effect.

In matters relating to jointly acquired property, husband and wife may claim from each other in the event of divorce, polygamous marriage and inheritance cases. For example, under Section 122 of the Islamic Family Law (Kedah Darul Aman) 2008 stated that the court has power to order division of *harta sepencarian* (jointly acquired property) upon the pronouncement of *talaq*.

“Section 122 (1) The Court shall have power, when permitting the pronouncement of talaq or when making an order of divorce, to order the division between the parties of any assets acquired by them during their marriage by joint efforts or the sale of any assets and the division between the parties of the proceeds of sale.”

The court will consider the extent of contribution made by both parties, any debts owing for joint benefits and the need of the children of the marriage (if any) in determining the division of the property (Shoaib, 2011). Section 122 (1) and 122 (2) of the Islamic Family Law (Kedah Darul Aman) 2008 illustrate the division of property which has direct contribution of both parties. While Section 122 (3) and 122 (4) of the Islamic Family Law (Kedah Darul Aman) 2008 confine to indirect contribution of either parties in possessing a particular property.

These provisions were further elaborated to prohibit any party from disposing any jointly acquired property as prescribed under Section 108 of the Islamic Family Law (Kedah Darul Aman) 2008.

“Section 108 (1) ... on application of any party to a marriage, make an order prohibiting the wife or husband, as the case may be, from disposing any property...if the Court is satisfied that it is necessary to do so.”

Thus, parties are estopped from disposing the property if any matrimonial proceedings such as *talaq* or *fasakh* or maintenance cases being heard in the Court. This principle of *estoppel* applied as to secure the interest of the parties from being deprived later on.

With regard to polygamous marriage, the husband have to comply Section 23 of the Islamic Family Law (Kedah Darul Aman) 2008 in his application to enter into marriage contract with another women during the subsistence of a marriage.

*“Section 23 (10) Every Court that grants the permission or order the marriage to be registered ... shall have the power... –
(b) to order the division between the parties of the marriage of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division of the proceeds of the sale.”*

This provision indicates the power of court to order division of jointly acquired property in granting permission of polygamy to the applicant. Subsequently, upon division of the properties shared with the existing wife, both husband and wife are estopped from filing another suit under Section 122 of the Islamic Family Law (Kedah Darul Aman) 2008 in the event of divorce or inheritance (death of any party) in the future. Upon death of one party, in inheritance cases, the spouse of the deceased party or the respected heirs are eligible to claim for such property although no specific legal provisions prescribed on those issues ([Mischkowski et al., 2021](#); [Polborn, 1998](#)).

Exception to the general rules

With regard to the mutual consent of parties upon rights after divorce i.e. *hadanah*, child maintenance, wife maintenance, *‘iddah* maintenance, *muta’ah*, jointly acquired property (*harta sepencarian*); or any matters resolved with Consent Judgment - in certain circumstances, the Order and Consent Judgment may be varied and amended. There are exceptions in every general rules. Referring to the matters that could be brought to *sulh* session in Syariah Courts, Practice Direction No. 1 Year 2010 enunciated that; among others; engagement damages, *hadanah*, wife and child maintenance can be resolved by way of *sulh*. However, statutorily, only Oder and Consent Judgment regarding *hadanah* and child maintenance can be varied.

By virtue of Section 75 of Islamic Family Law (Federal Territories) Act 1984 (IFLA 1984), *hadanah* and child maintenance order may be amended if any mistake of facts and material change take place.

“Section 75 of IFLA 1984 on Power of Court to Vary Order for Custody or Maintenance of a Child

The Court may, on the application of any interested person, at any time and from time to time, vary or at any time rescind, any order for the custody or maintenance of a child, where it is satisfied that the order was based on any misrepresentataion or mistake of fact or where there has been any material change in the circumstance.”

Section 76 of Islamic Family Law (Federal Territories) Act 1984 (IFLA 1984), provides that Consent Judgment on *hadanah* and child maintenance may be amended by the Court.

Section 76 of IFLA 1984 on Power of Court to Vary Agreement for Custody or Maintenance of a Child

The Court may at any time and from time to time, vary the terms of any agreement relating to the custody or maintenance of a child, whether such agreement was made before or after the appointed date, notwithstanding any provision to the contrary in the agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

Consent Judgment on *hadanah* and child maintenance may be amended at any time if the court finds it is proper and for the welfare of the child. In matters relating to *muta'ah* payment, *'iddah* maintenance, i.e. matters other than *hadanah* and child maintenance, the verdict seems to be immaterial to be amended as the fact freeze at the time of adjudication and thereupon. Whereas, *hadanah* and child maintenance is a living issue, keep changing with the age and capacity of the child including the custodian; and are not locked when once it was decided. The court due process further prescribed that the litigants who wish to make amendment may file an Application to Vary Order or Consent Judgment under Section 75 and 76 of IFLA 1984 with the code 025 or 026 upon case registration. And both application is subject to *sulh* session after proper filing has been accomplished (Adam & Bakar, 2014; Rosenfeld, 1992).

Property division in reference to jointly acquired property that has been concluded by Consent Judgment between parties stands as it is and should not be varied by another case. If the party obtain an Order on jointly acquired property under Section 23 of the Islamic Family Law (Kedah Darul Aman) 2008 (on polygamy marriage), if the party later on file a proceeding of divorce – no application under Section 122 of the Islamic Family Law (Kedah Darul Aman) 2008 should apply on the same property that has been adjudicated under Section 23 of the Islamic Family Law (Kedah Darul Aman) 2008.

However, in inheritance cases, if the parties (to a polygamous marriage) obtain the judgment on division of property in the polygamous marriage under Section 23 of the Islamic Family Law (Kedah Darul Aman) 2008, the spouse to the deceased are not estopped from filing suit on *faraid* upon the same property, although the said property has been adjudicated in jointly acquired property matters as referred to Islamic principles on *faraid*. However, in order to avoid abuse of process, essential elements explaining the application of *res judicata* and *estopple* principles should be identified.

Procedural justice through *Res Judicata*

Syariah Courts approach towards legal maxims can be seen in many reported cases. Although the acceptance of legal maxims was not elaborated nor scrutinized in detail by the courts, *res judicata* and *estopple* seems to support procedural justice in Syariah Courts. As stated before, *muta'ah* application normally restricted to be amended. In the case of *Jorah binti Doralim v. Ibrahim bin Mamat 14 [2001] 1 JH 89* the applicant was estopped from requesting / claiming *mutah* payment from the ex-husband as she already agreed and recorded by the court in the Divorce Certificate as '*tidak menuntut*' or 'unclaimed' for *muta'ah* in the previous case.

Res judicata took place in restraining her from executing her right of unclaimed *muta'ah* before. In the case of *Dato' Abu Khalil bin Akasah v. Nik Rahimah binti Wan Ahmad 31 [2009] 1 JH 61* the applicant filed for a judicial review. The applicant claimed that he was sick and not in a good health condition upon signing the document for Consent Agreement regarding *muta'ah* payment, 'iddah maintenance, accrued wife maintenance and *harta sepencarian*. The court held that the Consent Judgment entered by both parties and recorded by the court was correct and remain as it is. The application was quashed. It appeared that the principle of *res judicata* being applied in this case accordingly.

The applicant was estopped from appeal or review the verdict sealed in the previous court. In the case of *Nony Binti Ismail & Another v. Zubir Bin Embong 33 (2011) 1 JH 103*, the ex-wife filed a case in the execution stage when her ex-husband failed to comply with the Consent Judgment in the year 1998 with regard to *muta'ah* payment and child maintenance. The respondent raised up the defence of *res judicata* but rejected by the court as the case was filed for committal proceeding due to failure to comply with court order. The judge further elaborated that the cause of action in committal proceeding differ from the latter and render this proceeding valid to be given proper ruling (Iuliana, 2013; Zaina et al., 2015).

The case of *Nony* indicated that maxims of *res judicata* and *estoppel* did not apply in execution stage. In *muta'ah* claim, the court reluctant to vary the order produced before as seen in the case of *Jorlah* and *Dato' Abu Khalil*. Although the elements of identical subject matter, identical facts was not explained in detail, but the assumption of *res judicata* and *estoppel* took place was proven as no material change was documented by the court.

Custody, child maintenance and visitation issue, at all time, acquired the attention of the court whether to vary the court order or consent judgment. The litigants in the case of *Zetty binti Zabir v. Mohammed Rafi bin Mohammed Ya'cob 28 (2009) 1 JH 17* has two sons upon divorce. At the earlier stage, both parties entered into Consent Judgment in January 2007 agreed on terms on custody and visitation schedule. However, in May 2007, the ex-wife applied to vary the Consent Judgment because of material change occurred i.e. she and the children moved from Seri Kembangan Selangor to Kota Warisan, Sepang, Selangor.

The case of *Sheikh Abdul Shakir bin Sheikh Abdul Kadir v. Noor Haryatie binti Harun 35 (2012) 1 JH 129* related to an application to vary consent judgment. In the year 2004, joint custody of the daughter was recorded. She was placed at her fathers's house. But when the mother remarried to a Britain, the father stated that there was material change in the case and applied to modify the mutual deed. The court allowed the variation and held that the custody of the daughter given to the father and scheduled the detail of visitation time for the mother. In both cases, residence of child and status of the mother stand as a strong point to alter custody and visitation right (Azmi, 2010). ; Plyth & Craham, 2020).

Starting a formal schooling become the most popular reason to vary order on custody, child maintenance and visitation schedule. In *Rohana bt Zakaria v. Mokhtar bin Abdul Talib 27 (2009) 2 JH 279*, the terms of child maintenance for 2 children was varied from RM200.00 in 2006 to RM 300.00 in 2007 including RM

400.00 for school preparation expenses and RM400.00 for hari raya expenses every year. The financial condition of the father also considered by the court as a reason to modify child maintenance order in the case *Azizan Marzuki v. Maharum 15 (2001) 1 JH 12*. The court allowed variation of order on child maintenance for 4 children from RM1,000.00 to RM900.00 based on the material change proven to the court on current income statement and burden of financial status for his new wife and 3 children.

In division of jointly acquired property, the court in case of *Tuan Awang Tuan Mamat & Others v. Tuan Alam bin Tuan Ahmad & Others (2006) 22 JH 207*, seems to apply the principle of estoppel as the property has been divided accordingly as agreed by all heirs and subsequent application to declare the property as jointly acquired property was dismissed. Although identical issue, subject matter and parties exist in the application to vary order, the conclusive material change overruled the principle of *res judicata* and *estoppel* – especially in matters relate to custody, child maintenance and visitation schedule.

Conclusion

The uniqueness of court due process in Syariah Courts particularly on issues touched on the welfare of child impacted the Court Order can be amended. The principle of *res judicata* and *estoppel* may be reserved and become legal barrier in order to acknowledge any similarity between two cases. The element of material change must be clearly proven in the court proceedings to ensure proper variation of court order can be passed by the judge.

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