A CRITICAL ANALYSIS OF THE STATUTORY FRAMEWORK ON MAINTENANCE OF NON-MUSLIM CHILDREN AND YOUNG PERSONS IN MALAYSIA

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2017

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THESIS SUBMITTED IN FULFILMENT OF THE

REQUIREMENTS FOR THE DEGREE OF DOCTOR

OF PHILOSOPHY

FACULTY OF LAW
UNIVERSITY OF MALAYA
KUALA LUMPUR

2017

UNIVERSITY OF MALAYA

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Matric No: LHA 090005

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ABSTRACT

A family unit is the basic unit in a society. The collapse of a family unit will ultimately lead to the collapse of the society. In a family unit comprising of a man, his wife and child, the child is the most vulnerable person, as he has to depend on his parents for his survival. The parents have a responsibility towards the child, one of which is to maintain the child. The parents have a legal as well as a moral duty to maintain their child. Breach of the moral duty will not attract any penalties whereas breach of a legal duty would. In Malaysia, there are two systems of maintenance laws:- one for the Muslims and one for the non-Muslims. This thesis, as the title states, examines the non-Muslim maintenance laws. There are about five maintenance laws, which are in force currently for the non-Muslims. However, despite the existence of these laws, the number of child maintenance cases is increasing annually. In addition, the number of articles or reports reported in the press on children being neglected or abandoned by their parents or guardians is also high. Further thereto, there are judicial decisions which state that a maintenance order in favour of a child ceases when the child reaches the age of eighteen, thereby leaving the child to fend for himself once he is eighteen years of age. The problems stated above leads to the research questions for this thesis. The research questions are two-fold, i.e. a) do the child maintenance laws and the enforcement of maintenance orders laws in Malaysia adequately safeguard the rights and interests of the children? b) If the answer is no, what are the defects or weaknesses in these laws that need to be rectified in order to protect the welfare of the children? In order to answer these research questions, the thesis aims: a) to identify the current situations concerning the problems faced by non-Muslim children in obtaining maintenance from their parents; b) to identify and critically analyse the laws on maintenance concerning non-Muslim children in Malaysia; c) to analyse the stakeholders' perception on the laws on child maintenance and the problems concerning enforcement of maintenance orders; d) to compare the existing maintenance laws in Malaysia with

other jurisdictions such as England and Wales, Singapore and Australia; and e) to suggest or recommend reforms to the existing legislations. This research would be significant as it would gather the most recent data, opinions and feedback from respondents who are either directly or indirectly affected by the weaknesses in the maintenance laws, alert the relevant authorities to revisit the current laws and rectify the weaknesses and finally, on the whole, it would contribute towards "reviving the rights of the children" (which have been lying dormant for a considerable period of time due to the enforcement of archaic laws) to claim maintenance from their parents.

ABSTRAK

Keluarga merupakan unit yang paling asas dalam sesebuah masyarakat. Keruntuhan sebuah keluarga akan mengakibatkan masyarakat tersebut juga runtuh. Di dalam sebuah keluarga biasa, yang terdiri daripada seorang lelaki, isterinya dan anak mereka, yang mana si anaklah yang menjadi pihak yang paling lemah (vulnerable). Ini kerana si anak perlu bergantung kepada ibubapa untuk menyaranya. Ibubapa bertanggungjawab untuk menyara anak mereka. Salah satu daripada tanggungjawab ibubapa adalah untuk memberi nafkah kepada anak mereka. Ibubapa mempunyai tugas di sisi undang-undang dan juga moral untuk memberi nafkah kepada anak mereka. Kemungkiran tugas moral tersebut tidak akan mengakibatkan apa-apa tindakan diambil terhadap mereka. Walau bagaimanapun, jika mereka memungkiri tugas di sisi undang-undang maka mereka akan dijatuhkan hukuman. Di Malaysia, terdapat dua sistem undang-undang berkenaan nafkah iaitu untuk orang-orang yang beragama Islam dan juga untuk mereka yang bukan beragama Islam. Sepertimana tajuk di atas, tesis ini akan mengkaji undang-undang berkenaan nafkah orang bukan Islam. Terdapat lebih kurang lima undang-undang berkenaan nafkah yang diluluskan bagi orang bukan Islam. Sungguhpun terdapat undang-undang tersebut, bilangan kes yang melibatkan nafkah kanak-kanak semakin bertambah setiap tahun. Selain daripada peningkatan kes nafkah yang melibatkan kanak-kanak, terdapat juga kes yang memutuskan bahawa sesuatu perintah nafkah yang memerintahkan ibu atau bapa membayar nafkah kepada anak mereka tamat apabila kanak-kanak itu mencapai usia lapan belas tahun. Oleh sebab itu, kanak-kanak tersebut perlu menyara dirinya sendiri apabila dia berusia lapan belas tahun. Masalah-masalah yang dinyatakan di atas menimbulkan soalan-soalan kajian (research questions) bagi tesis ini. Soalan-soalan kajian yang timbul adalah seperti berikut: a) adakah undang-undang berkenaan nafkah kanak-kanak dan undang-undang berkenaan penguatkuasaan perintah-perintah nafkah di Malaysia menjaga hak-hak dan kepentingan kanak-kanak? b) Jika jawapan

adalah tidak, apakah kekurangan atau kelemahan dalam undang-undang berkenaan yang perlu diatasi bagi menjaga kebajikan kanak-kanak? Bagi menjawab soalan-soalan tersebut, tesis ini akan: a) mengenalpasti situasi-situasi semasa berkenaan masalah-masalah yang dihadapi oleh kanak-kanak bukan Islam dalam mendapat nafkah daripada ibubapa mereka; b) mengenalpasti dan menganalisa secara kritikal undang-undang nafkah yang berkaitan dengan kanak-kanak bukan Islam di Malaysia; c) menganalisa persepsi mereka yang berkepentingan berkenaan undang-undang nafkah kanak-kanak dan masalah berkenaan penguatkuasaan perintah nafkah; d) membuat perbandingan undang-undang nafkah yang berkuatkuasa di Malaysia dengan bidang kuasa lain seperti England dan Wales, Singapore dan Australia; dan e) memberi cadangan untuk penambahbaikan undang-undang yang sedia ada. Kajian ini adalah penting ‘mengingatkan’pihak berkuasa yang berkenaan tentang keperluan untuk mengkaji semula undang-undang yang sedia ada dan mengatasi kelemahan-kelemahan yang wujud. Secara keseluruhan, kajian ini akan menyumbang terhadap usaha untuk mengembalikan hak-hak kanak-kanak yang telah lama tidak ditekankan akibat kewujudan undang-undang lapuk.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank God Almighty for guiding me through this lonely and challenging journey. Without His guidance, I would not have been able to complete writing my thesis. I would also like to thank the late Professor Dato' Dr. Mimi Kamariah Majid, the former Dean of the Faculty of Law, for initiating and encouraging me to pursue my PhD.

My sincere and deepest gratitude goes to my supervisor, Associate Professor Dr Jal Zabdi Mohd Yusoff. Words cannot describe how grateful I am to him for being such a patient, caring and understanding person, who is ever-willing to lend a helping hand and even listening to the many challenges that I had to face in this journey. I would also like to thank my family members – my mother, brothers, husband and not forgetting my beloved son, Vishva Vinayagan for all their help and encouragement.

I would be failing in my duty if I do not thank the following persons : Associate Professor Hajjah Norbani Mohamed Nazeri (Deputy Dean (Higher Degree), Faculty of Law, UM) for her kind assistance when it came to applying for an extension, Puan Siti Wirni Mohamed (Assistant Registrar, Faculty of Law, UM), Dr Saroja Dhanapal, Puan Maizatul Akmar, Ms Theresa Symon , Mr Arul Noval Das (Senior Assistant Registrar, Court of Appeal), Ms Mabel Victor Mutthiah (Bahagian Statistik, Putrajaya), Puan Namirah Hanum, Puan Saadiah Bajuri, Sister Helena Vythilingam, Sister Angelina, Sister Patricia, Cik Anith Raihana bt Zahari, Puan Noor Aza binti Ahmad, Cik Haridah, Miss Tracy Samat, Dr Balakrishnan, Puan Asiah, Dr Farah Nini Dasuki, Puan Aishah Soberi, Dr Sik Cheng Peng, Puan Kamaliah Salleh and many others who have helped me in one way or another in completing this thesis.

Once again, I would like to thank God for giving me the strength to face the challenges that cropped up in the past three years.

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Common Abbreviations:

Ed.	:	Editor
Eds	:	Editors
et al	:	(et alioa) and others
ibid	:	(ibidem) in the same place
id.	:	(idem) the same as below
supra	:	used when referring to sections of the writing or footnotes that has appeared before the present footnote
vol.	:	volume

Periodical Legal Journals:

CLJ	:	Current Law Journal
JH	:	Jurnal Hukum
MLJ	:	Malayan Law Journal
MLJ Rep	:	Malayan Law Journal Reprint
MLJU	:	Malayan Law Journal Unreported
Sing JLS	:	Singapore Journal of Legal Studies

Law Reports:

AC	:	Law Reports Appeal Cases
AIR	:	All Indian Reports
All	:	Allahabad Law Reports
All ER	:	All England Law Reports
ALR	:	Australian Law Reports
Beng L.R.	:	Bengal Law Reports
Bom	:	Bombay Law Reports
Cal	:	Calcutta Law Reports
Ch/ChD	:	Chancery Appeal Cases or Chancery Division
CLR	:	Commonwealth Law Reports
Del	:	Delhi Law Reports
Fam CA	:	Family Court of Australia
Fam Law	:	Family Law
FCR	:	Family Court Reports
FLC	:	Australian Family Law Cases
FLR	:	Family Law Reports
J.P.	:	Justice of the Peace Reports
Mad	:	Madras Law Reports
Mal LR	:	Malaya Law Review
P	:	Law Reports, Probate
QB	:	Law Reports Queens Bench
SGHC	:	Singapore High Court
S.L.R.	:	The Singapore Law Reports
WLR	:	Weekly Law Reports

Selected Abbreviations:

BSK : *Bahagian Sokongan Keluarga, Jabatan Kebajikan Masyarakat* (Family Support Unit, Department of Social Welfare)

CA : Children Act 1968/Court of Appeal

CMEC : Child Maintenance Enforcement Commission

CMS : Child Maintenance Services

CRC : Convention on the Rights of Child

DO : Departure Order

FC : Federal Court

FLA : Family Law Act 1975

HC : High Court

MCA : Matrimonial Causes Act 1973

NRP : Non-Resident Parent

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CHAPTER 1: INTRODUCTION

1.1 GENERAL OVERVIEW OF FAMILY SYSTEMS

A society basically consists of families. There are generally two types of families, i.e. the nuclear family and the extended family. A nuclear family which consists of a man, his wife and their children, could be largely seen in the modern society. On the other hand, an extended family comprises a man, his wife, their children, the man's or wife's siblings or parents.[1] This form still largely exists in rural areas. There is also a third type of family, which is called a polygamous family. Here, a man is married to two or more wives according to his religion, custom or practice. He thus heads two or more families.

Family systems vary from country to country depending on the country's culture and tradition. As an examination of all the family systems in the world is not possible, the writer would next look at selected family systems that exist globally. These family systems would be discussed under two categories, i.e. the Western families and the Eastern families.

1.1.1 Western families

Western families are generally nuclear families, comprising a husband, wife and their children. Rarely do the grandparents live with the family. The concept of individualism is well developed in the West. For example, in the United States of America, children are encouraged to be individual and independent.[2] Children start fending for themselves once

[1] Mimi Kamariah Majid, *Family Law in Malaysia*, (Kuala Lumpur: Malayan Law Journal, 1999), at 1

[2]Benson,R,(ed.) 'Am I smart?' AFA Journal January 2017, accessed at the American Family Association Journal's website at http://www.afajournal.org/past-issues/2017/january/am-i-smart/ on 3 January 2017.

they either complete their high school or tertiary education. They rarely stay with their parents once they start earning a living.

When the children are young, both the mother and the father share the responsibility of raising them. Usually, the father manages the financial matters, while the mother takes care of the housework.[3]

1.1.2 Asian families

When compared to the Western families, it is more common to see extended families among the Asian families. Families live with the grandparents, uncles, aunts and cousins. The grandparents are treated as the head of the family. However, this trend has started changing in the last two decades as children leave their parents' home when they start earning a living and start a family of their own. The writer would briefly examine the family systems of the majority Asian communities such as the Malays, Chinese, Indians and the Japanese.

In the Malay community (which professes the religion of Islam) both the husband-wife relationship and parent-child relationship are considered as very important.[4] The father has the primary duty to feed, clothe and protect his children until they become adults. Parents also have a duty to provide education to their children. Education, in Islam, does not only refer to bookish knowledge but it also refers to moral and religious training. In addition, children, especially small children, have a right to love and affection. Parents too have an obligation to provide for their children's welfare.[5]

[3] *Ibid*
[4] I.A. Arshed, *Parent-Child Relationship in Islam*, http://www.islam101.com/sociology/parchild.htm accessed on 3 January 2017.
[5] *Ibid*.

Among the Chinese community, male babies traditionally, were valued more than female babies (even currently in rural areas). This is due to the fact that females were considered a liability and also because in their old age, the parents can depend on their son to look after them as he owes a duty of care to them. Unfortunately, with the Chinese government's one-child policy, there is an increase in the rate of female infanticide and abandonment.[6]

Similarly, the Indians too prefer male offspring for the same reason as the Chinese. In addition to the above reasons, it is a financial burden for the families with daughters when it comes to getting them married as they have to be given a lot of dowry. On the other hand, sons support their parents when they start earning.[7] It used to be a practice among the Indians a few decades ago, especially those in the rural areas, to kill baby girls as soon as they are born as they are considered a burden to their families. Although this practice has considerably reduced now, unfortunately it is still practised in the remote areas in India.

According to the Indian tradition, men shoulder the burden of supporting their families financially while the women are responsible for maintaining their household and caring for their children and aged relatives. However, in modern times, Indian women have progressed in various fields.[8]

In Japan, most of the families are nuclear families. The population of children however has been decreasing, with the average currently being one or two per family.[9] The men in Japan have a duty to financially support their families, while the women raise their children, supervise their education and do the housework.[10] The Japanese place a lot of emphasis on

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[6] *Culture of China – tradition, history, people, clothing, women, beliefs, food, customs, social, dress, marriage, men, life, population, religion, rituals*, http://www.everyculture.com/Bo-Co/China.html#ixzzorBGgutQ2 accessed on 3 January 2017.
[7] Chanda,R.K. & Deb K.S.,Indian family systems, collective society and psychotherapy, *Indian J Psychiatry*, 2013 Jan; 55 (Suppl 2): S299-S309.
[8] *Ibid*
[9] Immamura, A.E., The Japanese Family, For Video Letter from Japan II: *A Young* Family. *Asia Society* (1990): 7-17 accessed at http://www.exeas.org/resources/pdf/japanese-family-imamura.pdf on 3 January 2017.
[10] *Ibid*

education. Japanese parents invest large amounts of money on their children's education to ensure that they graduate from college.

Having looked at certain family systems that exist globally, it is pertinent to state that the strength and stability of a society depends on a family unit. The parents play a major role in ensuring the stability and harmony of the family. Based on the examination of the different family systems, it could be observed that generally the husband or father shoulders the financial burden of providing basic necessaries to his wife and children. The wife or mother on the other hand takes on the responsibility of looking after the welfare of the family and nurturing her children. If the parents fail to play their respective roles, the family would disintegrate. When families disintegrate, society's harmony and well-being are jeopardized.[11] Therefore, family law steps in to play a big role in ensuring that the family unit is maintained and strengthened.[12] One of the methods in which family law protects the family unit is by ensuring that parents do not neglect their duty of providing maintenance to their children, which would be examined in this thesis.

As to what constitutes maintenance, the Osborn's Concise Law Dictionary defines 'maintenance' as 'the supply of necessaries of life for a person'.[13] A similar definition is given by LB Curzon, *Dictionary of Law,* where it is explained as 'the supply of necessaries, e.g. food, clothing.'[14] Hence, parents have an obligation to maintain their children by way of providing basic necessities such as food, clothing, shelter and education.

[11] *Supra* n1
[12] *Ibid*
[13] Rutherford, Leslie and Bone, Sheila (eds), *Osborn's Concise Law Dictionary*, 8th ed. (London: Sweet & Maxwell, 1993) at 209.
[14] LB Curzon, *Dictionary of Law*, 6th ed, (London: Longman, 2002) at 236.

1.2 TERMS AND TERMINOLOGIES USED IN THIS THESIS

In this thesis, the writer has used the following terms, the meanings of which are given below. Some of these meanings may vary from the interpretations given by other authors.

1.2.1: '*Adult children'* refers to persons who are between the ages of eighteen and twenty-four as generally, an undergraduate in Malaysia graduates at the age of twenty-four.

1.2.2: '*Children'* refers to non-Muslim persons below the age of eighteen as defined by the Age of Majority Act 1971

1.2.3: '*Child support'* refers to child maintenance.

1.2.4: '*Illegitimate child'* refers to a child born out of a lawful wedlock.

1.2.5: '*Institutions of higher learning'* refer to both public and private institutions of higher learning.

1.2.6: '*Legitimate child'* refers to a child born during a lawful wedlock, though conceived before the parents' marriage. It would also include a child born within a reasonable period after the dissolution of the parents' marriage or after the father's death.

1.2.7: '*Maintenance'* basically refers to provision of basic necessities such food, clothing and shelter. It could also be extended to other essential necessities such as education and medical treatment.

1.2.8: '*Neglect or abandon'* refers to the failure or refusal of the parents to maintain their children.

1.2.9: '*Parents'* refer to the natural and adoptive parents of the child concerned.

1.2.10: '*Paying parent'* refers to the parent against whom the maintenance order has been issued.

1.2.11: '*Single mother'* refers to a woman who is unmarried and has a child.

1.2.12: '*Stakeholders'* in this thesis refer to single mothers, undergraduates and social workers.

1.2.13: '*Tertiary education'* refers to A-Levels, *Sijil Tinggi Persekolahan Malaysia* (Malaysian Higher Schooling Certificate), Diploma, Matriculation and undergraduate studies.

1.2.14: 'Y*oung vulnerable adults'* bears the same meaning as *'adult children'* as defined in 1.2.1.

1.2.15: '*Young persons'* stated in the title of this thesis bears the same meaning as *'adult children'* as defined in 1.2.1.

1.3 PROBLEM STATEMENT

Despite there being laws that impose a legal duty on the parents to maintain their children in Malaysia,[15] it is disheartening to note that the number of cases claiming for child maintenance seems to be increasing every year. This could be seen from the tables below, which show the number of cases registered for child maintenance in the Magistrate's Court in 1983 and 1984 as well as between 1999 and 2002 and the High Court (Civil Division) between 1999 and 2001 as well as in the High Court of Kuala Lumpur (Family Court) from 2000 to 2011.

Tables 1.1 and 1.2 show the number of maintenance cases registered for maintenance cases in the 1980s as well as from 1999 to 2002 respectively.

[15] For example, the Islamic Family Law (Federal Territories) Act 1984 and the Islamic Family Law Enactment 1983 (Kelantan) for the Muslims and the Law Reform (Marriage and Divorce) Act 1976 and the Married Women and Children (Maintenance) Act 1950 for the non-Muslims.

Table 1.1: Types of Maintenance Cases in the Magistrate's Court in 1983 and 1984

Types of maintenance orders	1983	1984
Maintenance for wife and child assessed separately	3	2
Maintenance for wife and child assessed together	7	7
Maintenance for child alone	-	1

Source: Data obtained from Nik Noriani Nik Badli Shah, Family Law: Maintenance and Other Financial Rights, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1993, at 72

From the above table, it could be noted that in 1983, cases concerning child maintenance were either assessed separately or jointly with the wife. There was no case filed solely for child maintenance. In 1984, there was only one case where the maintenance order was made for the child alone. On the other hand, in Table 1.2 as shown below, it could be noted that the number of cases registered for child maintenance alone has increased substantially when compared to the 1980s.

Table 1.2: Cases registered for child maintenance between 1999 and 2002 (Magistrate's Court)

Year	Total
1999	17
2000	17
2001	10
2002[16]	5
Total	49

Source: Civil Suits Register of the Magistrate's Court[17]

[16] Data obtained until March 2002

[17] Data obtained from Noor Aziah Haji Mohd Awal, "Nafkah Anak: Kedudukannya di sisi Undang-Undang di Malaysia", Abdul Monir Yaakob and Siti Shamsiah Md Supi (eds), *Manual Undang-Undang Keluarga Islam*, (Kuala Lumpur:IKIM 2006) at 53

The number of cases registered in the High Court is much higher when compared to the Magistrate's Court. This could be seen in Tables 1.3 and 1.4 as follows:

Table 1.3: Cases registered for child maintenance between 1999and 2001 (High Court)

Year	Number of Cases
1999	2650
2000	3771
2001	4881

Source: Main Causes Register of the High Court Civil Division[18]

The latest statistics from the year 2006 until October 2016 concerning the number of child maintenance, wife maintenance and committal cases could be seen in the table below:

Table 1.4: Number of Cases From 2006 To 2016 At High Court of Kuala Lumpur (Family Court) As At 31 October 2016

Number of Cases According to Type Of Cases			
Year	**Child Maintenance**	**Wife Maintenance**	**Total**
2006	799	882	**1681**
2007	813	998	**1811**
2008	886	817	**1703**

[18]*Ibid* at 55

Table 1.4: Number of Cases From 2006 To 2016 At High Court of Kuala Lumpur (Family Court) As At 31 October 2016 (Continued)

Number of Cases According to Type Of Cases			
Year	**Child Maintenance**	**Wife Maintenance**	**Total**
2009	901	1005	**1906**
2010	743	688	**1431**
2011	612	151	**763**
2012	653	167	**820**
2013	638	152	**790**
2014	633	141	**774**
2015	630	160	**790**
2016 (Up To 31 October 2016)	652	155	**807**
TOTAL	**7,960**	**5,316**	**13,276**

Source: Family Court Registry, High Court of Kuala Lumpur (Family Court).

The statistics shown in all the four tables prove that more and more parents are failing in or neglecting their duties to maintain their children despite there being laws that impose such an obligation and impose penalties if they (the parents) fail to do so.

Apart from the increase in the number of child maintenance cases filed in the courts of law, the number of articles or reports concerning children being neglected or abandoned[19] by their parents or guardians published in the press is also relatively high. Based on newspaper

[19] ''Neglected or abandoned' in this context refers to the failure or refusal of the parents to maintain their children (see 1.2.8)

reports from 1 January 2016 to 22 December 2016, there are more than 60 articles published in leading newspapers in Malaysia on this issue.[20]

Hence, the first question that arises at this juncture is whether there are any defects in the laws pertaining to child maintenance in Malaysia? Secondly, if the petitioner succeeds in obtaining a maintenance order, the issue that arises then is whether the respondent would comply with the order? In other words, the question of enforcement of the maintenance order arises.

As mentioned earlier, maintenance means provision of basic necessities which includes education. When it is said that a father has neglected to maintain his child, this includes the fact that he is not supporting the child's education. One may argue that school going children do not need to fear as the Government has waived school fees for government schools. But what about other expenses such as school uniforms, books and tuition fees (for those who are weak in their studies)? What about children who intend to pursue their tertiary education in universities? Would he or she be able to pay the university fees without any financial support from their parents?

The situation mentioned above has been made far worse by the Federal Court decision in the case of *Karunairajah a/l Rasiah v Punithambigai a/p Ponniah*,[21] where the court held that parents need not maintain their children upon them (the children) reaching the age of 18 years. This decision applied a literal interpretation to section 95 of the Law Reform (Marriage and Divorce) Act 1976, which states that the duty to maintain a child ceases upon the child reaching the age of 18 years or if the child is disabled, physically or mentally, upon the

[20] See Appendix A on the List of Newspaper Reports Concerning Children Being Abandoned or Neglected By Their Parents or Guardians obtained from the New Straits Times, The Star, Utusan Malaysia and Harian Metro from 01/01/2016 to 22/12/2016. It is pertinent to note at this juncture that the reports here include Muslim children.
[21] [2004] 2 MLJ 401.

ceasing of such disability, whichever is later. The existence of such a provision needs to be seriously reviewed by the legislature as these are the very children who would be pursuing their tertiary education upon reaching 18 years and need financial support from their parents, bearing in mind at the same time that Malaysia is not a welfare state.

At this juncture, reference is made to the Federal Constitution of Malaysia, which is the supreme law of the land,[22] in order to see if the right to free education is guaranteed thereunder as a fundamental liberty in Part II. Unfortunately, the only provision as regards to education is Article 12, which guarantees the right in respect of education. Article 12(1) provides as follows:

> 12. (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth-
>
> (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees: or
>
> (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupil's or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation.)

Article 12 (1) as stated above does not guarantee the right to receive free education. Hence, it is disheartening to note that the right to free education is not guaranteed by the supreme

[22]Article 4(1) of the Federal Constitution.

law of the land. Nevertheless, at this juncture, an interesting issue that arises is whether the right to free education could fall within the meaning of right to life guaranteed by Article 5(1) of the Federal Constitution? Reference could be made to the landmark case in Constitutional Law and Administrative Law, *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan.*[23] In this case his Lordship Gopal Sri Ram JCA (as he then was) gave a very wide interpretation to the 'Right of life' in Article 5(1) as follows:[24]

> ... I have reached the conclusion that the expression "life" appearing in article 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonable healthy and pollution free environment.

As the right to receive free education was not stated expressly by His Lordship above, the issue that arises next is whether the said right could be implied within the phrase 'all those facets that are an integral part of life itself', bearing in mind that education is indeed an integral part of a person's life?

In addition, it is also to be noted that Malaysia is a signatory to the International Covenant on Economic, Social and Cultural Rights 1966. Article 13(2) of the Covenant provides that 'primary education shall be compulsory and available free to all'. It also provides that secondary, technical, vocational and higher education shall be accessible to everyone. Primary and secondary education is free in Malaysia. Tertiary education is highly subsidised

[23][1996] 1 MLJ 261.
[24]*Ibid* at 288.

by the Government in the public institution of higher learning.[25] Howsoever, students who are unable to get a place in the public universities will have to apply to private institutions of higher learning, where they would have to fork out a substantial amount to pay for their fees. These students have no choice but to rely on their parents to pay their fees or in the alternative apply for scholarships or loans.

Thus, this dissertation seeks to critically examine such provisions that exist concerning maintenance of non-Muslim children in Malaysia, the problems faced in enforcing maintenance orders issued by the courts and seeks to suggest recommendations to amend the relevant provisions so that the rights of these children to claim maintenance from their parents is protected and guaranteed.

1.4 RESEARCH QUESTION

Based on the problem statement above, the research question that arises is two-fold, first, whether there are any defects in the laws pertaining to child maintenance in Malaysia? Secondly, if the petitioner succeeds in obtaining a maintenance order, the issue that arises then is whether the respondent would comply with the order? In other words, the question of enforcement of the maintenance order arises.

1.5 OBJECTIVES OF STUDY

The objectives of the study are as follows:

(a) To identify the current situations concerning the problems faced by non-Muslim children in obtaining maintenance from their parents;

[25] Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia*, (Kuala Lumpur: Star Publications (Malaysia) Bhd, Malaysia, 2008).

(b) To identify and critically analyse the laws on maintenance concerning non-Muslim children in Malaysia;

(c) To analyse the stakeholders' perception on the laws on child maintenance

(d) To compare the existing maintenance laws in Malaysia with Singapore, England and Wales and Australia.

(e) To suggest or recommend reforms to the existing legislations on maintenance.

1.6 METHODOLOGY OF STUDY

"Methodology of study" refers to "various methods adopted by a researcher in conducting the research as well as the logic, reasons or rationale behind them. It refers not only to the research methods followed but also the reasons why the researcher selected a particular method or technique and why he or she did not use others".[26] In adhering to the definition, the following methods were used in this study:

1.6.1 Library research

As far as lawyers are concerned, the law library could be described as their workshop. This is due to the fact that most legal studies are essentially a library-based exercise.[27]The most efficient way to acquire knowledge about the law and to keep up-to-date is through an informed use of the library.[28]

Research on the laws on maintenance in Malaysia was conducted and a comparison with Singapore, England and Wales and Australia were made in this thesis, where the respective

[26]Anwarul Yaqin, *Legal Research and Writing* (Malaysia: Lexis-Nexis,2007) at 20.
[27]*Ibid* at 53.
[28]*Ibid.*

legislatures in these countries had amended their laws on child maintenance in order to safeguard the interests of the children. Reference was also made to Malaysian, Singaporean, English and Australian text books, statutes, law reports, law journals, legal encyclopaedias, press reports, academic articles and dissertations. Internet sources such as Lexis-Nexis, CLJ online, HEIN online, JSTOR and WOS (World of Sciences), to name a few, were referred to by the writer.

1.6.2 Questionnaires

Questionnaires were distributed to undergraduates pursuing their tertiary education in public institutions of higher learning. The objective of distributing the questionnaires to the undergraduates is to get their perception regarding the laws concerning extending the duty to maintain young vulnerable adults in Malaysia. Further thereto, they are the persons who are directly affected by the statutory provision which states that the parents' duty to maintain his or her child ceases when the child reaches the age of eighteen years, unless he or she is physically or mentally disabled. These undergraduates, especially non-law undergraduates, are not aware of the existence of such a legal provision.

These questionnaires were distributed in public institutions of higher learning in West Malaysia as well as Sabah and Sarawak. The respondents were chosen at random. Please refer to Appendix B for a sample of the questionnaires that were distributed among the undergraduates). Data was analysed using SPSS 22 for Windows. Data is presented in a descriptive manner in order to observe the frequency of the respondents' answers.

1.6.3 Interviews

According to Anwarul Yaqin in his book *Legal Research and Writing*,[29] 'interview is a widely-used method of information collection'.[30] Further thereto, he also states that 'face to face interviews or personal interviewing is the oldest and the most widely used method of survey research'.[31]

In this study, face to face interviews were conducted with social workers and single mothers in shelter homes in West Malaysia as well as East Malaysia[32] in order to obtain their views on the child maintenance laws concerning non-Muslims in Malaysia. Semi-structured interviews were conducted where the respondents were asked the same questions in the same manner. However, towards the end of the interviews, the writer asked other relevant questions to find out more about the respondent's opinion.

The objective of the interviews is to find out if the respondents, especially the single mothers, are aware of the existing laws that confer a right on illegitimate children to claim maintenance from their parents. The respondents were chosen from non-Muslim shelter homes that housed single mothers. The interviews with the social workers took about half an hour per session as the writer asked them questions based on their experience dealing with the single mothers in their respective shelter homes and also on the existing maintenance laws. On the other hand, the interviews with the single mothers took about twenty minutes per session. (Please refer to Appendix C for the semi-structured questions which were posed

[29] *Supra* n 26.
[30] *Ibid* at 169-170.
[31] *Ibid.*
[32] Due to the request by the social workers to maintain confidentiality of their names and the shelter homes, the writer is unable to reveal the names of these homes as well as the names of the social workers and the single mothers who were interviewed.

to the social workers and Appendix D for the semi-structured questions that were asked during the interviews with the single mothers).

1.7 SCOPE OF RESEARCH

The proposed thesis will be examining child maintenance in Malaysia as follows:

1.7.1 Statutes

As mentioned in the Problem Statement, the main aim of this thesis is to critically analyse the existing laws on child maintenance in Malaysia and enforcement of maintenance orders concerning non-Muslim children. The following laws would be examined:

(a) Law Reform (Marriage and Divorce) Act 1976

(b) Married Women and Children (Maintenance) Act 1950

(c) Maintenance Ordinance 1959 of Sabah

(d) Child Act 2001

(e) Married Women and Children (Enforcement of Maintenance) Act 1968

(f) Maintenance Orders (Facilities for Enforcement) Act 1949

1.7.2 Non-Muslim children

Malaysia has two systems of family law, one for the Muslims and one for the non-Muslims. The Muslims are governed by the *Syariah* law. Each State has enacted its own Enactment concerning Islamic family law matters. The thesis would only focus on the non-Muslim family laws in Malaysia. The reason for this is because it would be beyond the scope of this thesis to examine Muslim laws as the examination of such laws would constitute a thesis by itself. On the other hand, the aim of this thesis is to critically analyse the laws

concerning maintenance for non-Muslim children in Malaysia in order to extract the defects in such laws and to suggest reforms to the existing laws. Nevertheless, this thesis would not altogether ignore Muslim law. A comparison with Muslim child maintenance laws will be made when the writer proposes reforms to the relevant non-Muslim laws.

1.7.3 Sabah and Sarawak

As stated above, this thesis would be examining child maintenance laws concerning non-Muslim children in Malaysia. Non-Muslim children here refers not only to the Chinese, Indian and other non-Muslim races, it also includes the natives of Sabah and Sarawak who are non-Muslims (who decide to be governed by the Law Reform (Marriage and Divorce) Act 1976).[33] Further thereto, Sabah has its own Maintenance Ordinance 1959 of Sabah. This ordinance will also be critically analysed in this thesis in order to see whether it adequately safeguards the interests of the children in Sabah. As far as Sarawak is concerned, maintenance matters used to be provided for in Chapter XXXIII of the Criminal Procedure Code of Sarawak.[34] However, according to the Modification of Laws (Married Women and Children (Maintenance) Act (Extension to the State of Sarawak) Order 1992 (P.U.(A) 271/92), Chapter XXXIII is repealed and the Married Women and Children (Maintenance) Ordinance 1950 is extended to Sarawak from 24 July 1992.

[33] It is to be noted that the *Orang Aslis* (natives) in West Malaysia are governed by their native customary laws. The Law Reform(Marriage and Divorce) Act 1976 however provides in section 3 that these natives have an option to either be bound by the LRA or their personal laws. Due to space constraint, the writer would not be examining the native customary laws pertaining to maintenance of the native children.
[34] Cap 62: 1949, revised edition.

1.7.4 Comparison with laws of other countries

This thesis would be examining the laws of other countries, in particular, England and Wales, Singapore and Australia. The reason why the writer intends to refer to the above three jurisdictions is because the laws in these countries have been amended over the years so that the rights of children are protected in relation to maintenance. For example, in all the above jurisdictions, a parent is still under a duty to maintain his child, even though the child has attained the age of majority, if the child intends to pursue his or her tertiary education at an institution of higher learning. This is a positive development in these countries, when compared to Malaysia where the law provides that a parent's duty to maintain his child ceases upon the child attaining the age of majority, save if the child is disabled, physically or mentally, such duty continues until the disability ceases, whichever is the later.

Thus, comparison with the laws in the above jurisdictions would be beneficial especially when suggesting reforms to amend the domestic legislations on maintenance which are defective.

1.8 LITERATURE REVIEW

Before embarking on the journey to write this thesis, the writer reviewed various literatures, both local and foreign in order to see if there have been any publications on this topic. The literature reviewed is discussed below under two broad categories: local literature and foreign literature.

1.8.1 Local Literature

Several authors have written on child maintenance in Malaysia. Their contribution to this topic mostly consists of chapters in books on Family Law in Malaysia, where the authors

generally discuss the laws and cases pertaining to child maintenance in Malaysia. So far, only one author has written a book on Maintenance and Other Financial Rights in Malaysia.[35] Hence, the gaps that exist in the local literature are as follows: First, there is no publication which shows the latest statistics on child maintenance cases in Malaysia, Secondly, there is a lacuna on the feedback from the respective stakeholders pertaining to the existing maintenance laws. Thirdly, comparison with the laws in other countries is rarely made, especially in the text books. One or two of the articles published on this topic may have compared the local position with one or two countries. Fourthly, the literature available hardly discusses the child welfare principle as the underlying basis of the right to maintenance of a child. The writer intends to fill up the above gaps by addressing these four issues in this thesis. The writer would next review the literature available to point out what has been discussed in each of them.

The late Professor Ahmad Ibrahim has discussed non-Muslim child maintenance in Chapter 5 of his book entitled *Family Law in Malaysia.*[36] Chapter 5 entitled 'Parent and Child' discusses various matters concerning children, for example, guardianship and custody, adoption, legitimacy and legitimation and maintenance in Peninsular Malaysia, Sarawak and Sabah. Maintenance is discussed as a small part in the above chapter, where the author briefly states the laws applicable in Peninsular Malaysia, Sarawak and Sabah concerning maintenance as well as a few cases.

As mentioned earlier, Nik Noriani Nik Badli Shah has written a book on maintenance entitled *Maintenance and Other Financial Rights in Malaysia.*[37] In her book, she discusses the laws and cases on maintenance, both under Muslim and non-Muslim laws. She has also

[35] Nik Noriani Nik Badli Shah, *Family Law, Maintenance and Other Financial Right*s, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1993).
[36] Ahmad Ibrahim, *Family Law in Malaysia*,3rd ed. (Kuala Lumpur: Malayan Law Journal, 1997)
[37]*Supra* n 35.

discussed maintenance as regards wife and child. She has commented on decided cases and has suggested or recommended reforms in the future.

In 1999, Professor Mimi Kamariah Majid published her book entitled *Family Law in Malaysia.*[38] In this book, there is a chapter on maintenance where the author discusses the position concerning maintenance, both for the Muslims and the non-Muslims, as well as for the wife and child. She has discussed the problems concerning maintenance that arise, both for the wife and the child, by giving her opinion on how to resolve such problems. The writer submits that the author of this book has raised salient issues pertaining to child maintenance, which would be referred to in this thesis.

In 2004, the *Child Handbook* was published as a practical reference as to the law and procedure on matters pertaining to child.[39] In this Handbook, child maintenance is discussed as a sub topic.[40] The laws pertaining to, *inter alia*, the duty to maintain children, the courts power to make a maintenance order, expiration of maintenance order, arrears of maintenance, assessment of maintenance and recovery of arrears of maintenance are stated in this sub topic, together with a few cases.

In 2006, a manual entitled *Undang-Undang Keluarga Islam*[41] (*Islamic Family Law*) containing various articles written by revered authors was published. One of the articles published here is on child maintenance, entitled *Nafkah Anak: Kedudukannya di sisi Undang-Undang Malaysia (Child Maintenance: The Islamic Law Position)* by Noor Aziah Haji Mohd Awal.[42] The author discusses the laws and decided cases concerning child maintenance

[38] Mimi Kamariah Majid, *Family Law in Malaysia*, (Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1999).
[39] Rasamani Kandiah (Advisory Editor), *Child Handbook*, Malayan Law Journal Handbook Series, (Kuala Lumpur: Malayan Law Journal Sdn Bhd, 2004).
[40] *Ibid* at 70-77.
[41] Abdul Monir Yacoob & Siti Shamsiah Md Supi (eds), *Manual Undang-Undang Keluarga Islam*,(Kuala Lumpur: Institut Kefahaman Islam Malaysia (IKIM), 2006).
[42] *Ibid* at 35-60

applicable both to the Muslims and non-Muslims in Malaysia. She has also discussed the various issues that arise concerning child maintenance. Nevertheless, it is submitted that there is a gap pertaining to the comparison with other countries as well as the perception of stakeholders on the existing maintenance laws.

In an article entitled *Parents Obligation Towards Maintenance of Children in Tertiary Education: An Overview of the Islamic Law and Family Laws in Malaysia in Comparison With UK*,[43] Nuraisyah Chua Abdullah looks at maintaining non-Muslim children above the age of 18 years in Malaysia who wish to pursue their tertiary education. She compares the position with the Islamic law and Enactments and also highlights the English law in comparison with the Law Reform (Marriage and Divorce) Act 1976.

In the following year, 2007, an article on maintenance written by Shamsuddin Suhor was published in *Undang-Undang Keluarga (Sivil)*[44]*(Family Law (Civil))*. The contents of this article too cover laws and cases on maintenance for non-Muslim wives and children. The author has generally described the maintenance laws under different sub topics, for example the duty to maintain, the relevant Acts of Parliament, duration of maintenance orders, variation of maintenance orders, enforcement of maintenance orders to name a few.

In 2009, Kamala M.G. Pillai published a book entitled *Family Law in Malaysia*.[45] In this book too, there is a chapter on maintenance, where the author discusses the laws and cases concerning maintenance, both for the wife and child. This chapter discusses the latest cases that have been decided on maintenance. The author has divided the discussion on child maintenance into four parts, i.e., maintenance of children generally, maintenance of disabled

[43][2006] 5 MLJ cvi; [2006] 5 MLJA 106.
[44] Shamsuddin Suhor , "Nafkah*", Siri Perkembangan Undang-Undang di Malaysia, Undang-Undang Keluarga (Sivil),* Vol.9, Shamsuddin Suhor & Noor Aziah Mohd Awal (eds), (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2007).
[45] Kamala M.G. Pillai, *Family Law in Mala*ysia, (Petaling Jaya: Lexis Nexis, 2009).

children, maintenance of children above the age of 18 years of age and maintenance of illegitimate children.

In 2010, in an article entitled *The Role of Law and The Courts in Preventing the Abuse of Children-The Malaysian Perspective,*[46] the author focusses on the issue of child abuse and the role of the law in protecting children. The author refers to maintenance of a child in one of the sub-topics. Nevertheless, the main focus is on the protection provided in the Child Act 2001.

In 2012, a family law book in Bahasa Melayu entitled *Undang-Undang Keluarga Di Malaysia (Family Law in Malaysia)* was published by Nor Aini Abdullah.[47] The author discussed the laws and judicial decisions concerning both child maintenance and spouse maintenance in Chapter 8 of this book. The following statutes were examined i.e. the Married Women and Children (Maintenance) Act 1950,[48] the Married Women and Children (Enforcement of Maintenance) Act 1968,[49] the Maintenance Act (Facilities for Enforcement) Act 1949[50] and the Law Reform (Marriage and Divorce) Act 1976.[51]

In 2013, in an article entitled *Bayi Yang Dibuang: Hak dan Kedudukan Bayi Di Sisi Undang-Undang,*[52] *(Baby Dumping: Legal Rights and the Position of Babies)* the authors examine the rights of babies who are dumped by their mothers under Islamic law, civil law, and Western laws. The authors also give their suggestions to overcome this problem.

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[46]Murugesu, N, *The Role of Law And the Courts in Preventing the Abuse of Children,* [2010] 5 MLJ cxxv
[47] Nor Aini Abdullah, *Undang-Undang Keluarga,* (Kuala Lumpur: MDC Publishers Sdn Bhd , 2012).
[48] Act 263.
[49] Act 356.
[50] Act 34.
[51] Act 164.
[52]Mustafa 'Afifa Ab Halim, Mohd Mahyeddin Mohd Salleh, Razlei Perdani Sawai, Nurhafizah Muhd Shukor, Dini Farhana Baharuddin, Joki Perdani Sawai, Abdul Halim Mohd Hussin, *Bayi Yang Dibuang: Hak dan Kedudukan Bayi Di Sisi Undang-Undang,* [2013] 5 MLJ lxii

In 2014, in an article entitled *A Review of Married Women and Children (Maintenance) Act 1950 and Married Women and Children (Enforcement of Maintenance) Act 1968*,[53]the authors examine the lacuna that exist in the Married Women and Children (Maintenance) Act 1950 and the Married Women and Children (Enforcement of Maintenance) Act 1968. A comparison is also made with the laws in Singapore, Ireland and Australia as well as the laws in East Malaysia in order to recommend suggestions to overcome the weaknesses that exist in these two statutes. The lacuna that exists in this article is that the discussion is restricted to only two of the maintenance laws in Malaysia.

In addition to books and articles as mentioned above, a dissertation for a Master of Comparative Laws degree was written by Shafiah Mohd Shariff entitled *"Maintenance of Married Women and Children: A Comparative Studies Under The Civil Law and Syariah"*[54] in 1992. In this thesis, the author discusses the position regarding maintenance of women and children both under the *Syariah* law as well as the Civil law. She then makes a comparison between both the laws.

In the following year, a dissertation on the *"Right of a Wife To Maintenance and Ancillary Relief: A Comparative Study of the Shariah and The Common Law"*[55] was submitted by Noraini bt Mohd Hashim for a Master of Comparative Laws degree. In this thesis, the writer mainly discusses a wife's right to maintenance both under the Syariah law as well as under the common law. She concludes her dissertation by making a comparison between the laws in the final chapter. In the course of discussing a wife's right to maintenance, the author has also referred to the maintenance of children.

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[53]Nair,H., Dhanapal,S. & Kanapathy,J *A Review of Married Women and Children (Maintenance) Act 1950 and Married Women and Children (Enforcement of Maintenance) Act 1968*, European Journal of Business and Social Sciences, Vol.3 No.4,pp 257-272, July 2014.
[54]Shafiah Mohd Shariff *"Maintenance of Married Women and Children: A Comparative Studies Under The Civil Law and Syariah"*,(Diss: M.C.L,Kulliyah of Laws, International Islamic University, Petaling Jaya 1992).
[55]Noraini bt Mohd Hashim, "*Right of a Wife To Maintenance and Ancillary Relief: A Comparative Study of the Shariah and The Common Law",* (Diss: M.C.L Kulliyah of Laws, International Islamic University, Petaling Jaya, 1993)

In 2006, a dissertation on the *"Impact of Divorce On Children's Welfare: A Pilot Study On Children Living With Single Mothers In Selected Rural Areas in Selangor"*[56] was submitted by Nor'Asyikin Bt Hamzah for a Master of Comparative Laws degree. In this thesis, the focus is on the impact of divorce on children from the socio-legal perspective. This thesis discusses the plight of single mothers who have to depend on their family members in the rural areas to bring up their children, when the children's father neglects to pay maintenance.

1.8.2 Foreign Literature

Foreign literature here refers to the literature on family law, specifically on child maintenance laws, available in the three jurisdictions that the writer intends to refer to for the purpose of comparing the Malaysian laws with the laws of the said countries, i.e. Singapore, England and Wales and Australia. It is respectfully submitted that when comparing the local literature to the foreign literature, the latter contains discussion of child maintenance issues in depth. The respective authors, especially of the literature in Singapore, have examined in detail the issues that arise when it comes to child maintenance. Hence, the writer is of the opinion that these foreign literatures are of great help when it comes to recommending reforms to the existing maintenance laws in Malaysia, as the laws in all the three countries that would be examined below have undergone several amendments since they were enacted.

A. Singapore

Several books have been published on Family Law in Singapore. Professor Leong Wai Kum could be said to be the Family Law exponent in Singapore, having published several

[56]Nor'Asyikin Bt Hamzah, *"Impact of Divorce On Children's Welfare: A Pilot Study On Children Living With Single Mothers In Selected Rural Areas in Selangor",*(Diss: M.C.L Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, December 2006.)

books and articles in this field of law. In one of her earlier books, *Principles of Family Law,*[57]one of the Chapters is entitled "Maintenance Among Family Members". In this chapter, maintenance of child is discussed as one of the subtopics where the author traces the development of the duty of maintenance of a child back to common law. She then discusses the provisions in the Singapore Women's Charter on child maintenance pertaining to various issues that arise concerning child maintenance and the enforcement of maintenance orders.

In her next book, *Cases and Materials of Family Law in Singapore,*[58] there is a similar chapter as her earlier book stated above[59], on 'Maintenance Among Family Members'. In this Chapter too, she discusses 'Maintenance of Child' as a subtopic. Specific provisions in the Women's Charter on child maintenance are highlighted. Questions are posed to the reader based on the provisions highlighted. Thereafter, the author refers to the articles written and cases decided on that particular issue. Having done so, she then poses questions to the reader.

In 2007, Professor Leong Wai Kum published a book entitled *Elements of Family Law in Singapore.*[60] In this book, there is a chapter specifically on maintenance, i.e. Chapter 12 entitled 'Maintenance of Child and Child's Maintenance of Aged Parents'. The author discusses both the parents' duty to maintain a child as well as the child's duty to maintain his or her aged parent. The first part of the Chapter discusses child maintenance issues under Singaporean law, similar to the issues discussed in the *Principles of Family Law in Singapore.*[61] The author ends the discussion on child maintenance issue with the enforcement of maintenance orders in Singapore.

[57] Leong, Wai Kum, *Principles of Family Law*, (Singapore: Butterworths Asia, 1997).
[58]Leong, Wai Kum, *Cases and Materials of Family Law*, (Singapore: Butterworths Asia, 1999)
[59]*Supra* n 57
[60]Leong, Wai Kum, *Elements of Family Law in Singapore*, (Singapore: Lexis-Nexis 2007).
[61]*Supr*a n 57

One of the earlier books published on Family Law in Singapore was by O.S. Khoo in 1984, entitled *Parent-Child Law in Singapore.*[62] In this book, the author specifically discusses several issues regarding parent-child relationship such as guardianship, custody, adoption and maintenance, to name a few. Chapter 5 specifically discusses maintenance in Singapore where the author traces the historical background of the maintenance laws in Singapore and then goes on to discuss the law on maintenance and enforcement of maintenance orders under the Women's Charter. However, as the Women's Charter has undergone several amendments since 1984, the discussion on the legal provisions under the Women's Charter in this book cannot be referred to now. Nevertheless, this book could be referred to as a source of reference when examining the historical background of the Women's Charter

Another book that was referred to by the writer when researching maintenance laws in Singapore was the book written by Foo Siew Fong entitled *When Marriages Break Down: Rights, Obligations and Division of Property.*[63] The author of this book looks at marital breakdowns and the legal issues that arise once a marriage is dissolved in Singapore. One of the legal issues that is discussed in this book is pertaining to maintenance for the child. The writer looks at the procedural as well as the substantive laws in a maintenance claim, compared to the books referred to above, which only discuss the substantive laws. In addition, the author here also looks at the enforcement of maintenance procedure and states the steps that need to be taken in order to enforce a maintenance order.

In 2011, Professor Leong Wai Kum published a book entitled *The Singapore Women's Charter: 50 Questions.*[64] In this book, the author has basically divided the chapters according

[62] Khoo, O.S., *Parent-Child Law in Singapore*, (Singapore: Butterworths, Singapore 1984).
[63] Foo, Siew Fong, *When Marriages Break Down: Rights, Obligations and Division of Property*, (Singapore: Sweet & Maxwell Asia, 2005).
[64] Leong, Wai Kum, *The Singapore Women's Charter: 50 Questions*, (Singapore: Institute of Southeast Asian Studies, 2011).

to Family Law issues such as, Marriage, Regulation of Husband Wife Relationship, Regulation of Parent-Child Relationship, Violence in the Family, Divorce and the Process, Maintenance, Division of Matrimonial Assets and Muslims. In each chapter, the writer poses questions and answers these questions by citing the Women's Charter as the authority. However, no judicial decisions were referred to in this book. This book could be said to be a handbook for anyone who wants to find out the answers to any Family Law issue in Singapore. In the Chapter on 'Maintenance', the author has posed various questions on the issue of maintenance of a wife as well as a child.

Apart from books, articles have also been written on maintenance laws in Singapore. In 1987, an article on the provisions concerning maintenance in the Women's Charter[65] was written by Professor Leong Wai Kum entitled '*The Duty to Maintain Spouse and Children During Marriage'*.[66] This article examines issues concerning the law of maintenance during the subsistence of marriage. The author has divided the discussion onto two parts, the first part concerning the husband's duty to maintain his wife and the second part referring to the duty of a parent to maintain his children. In the first part, the author examines the validity of the High Court decision (on appeal) in *Quek Ah Chian v Ng Guan Chg*,[67] where the court held that the husband's duty to maintain his wife rests on proof of the husband's culpability. In this respect, the author further examines the 1980 amendments to the Women's Charter. In the second part, the author examines the duty of a parent to maintain his child by examining statutory provisions and case law.

In 2011, Professor Leong Wai Kum also wrote an article entitled *The Next Fifty Years of the Women's Charter - Ripples of Change*.[68] In this article, the author discusses the

[65](Cap 353) 1985 (Rev Ed) Statutes of the Republic of Singapore.
[66] (1987) 29 Mal LR pp 56 – 79.
[67][1968] 1 MLJ 255.
[68] [2011] SJLS 152-177.

developments that have taken place in the past fifty years in the Family Law of Singapore since the Women's Charter was passed (i.e. from 1961 – 2011). The author looks at the various amendments that have taken place since 1961, the significant amendments taking place in 1967, 1980, 1996 and 2011. The author then discusses in detail provisions concerning the protection of children in order to see whether the rights of children are adequately protected in the Charter. The main focus of the author in this article is concerning the usage of the word 'illegitimate child' in the Charter. The author traces the history as to how legitimacy came to Singapore law, the developments of the concept of legitimacy in Singapore and the judicial call to remove the word 'illegitimate children, from the Singaporean Laws. The author then gives her own opinion on this issue. Having discussed the rights of children, the author then goes on to discuss other developments in Singaporean laws such as equalising maintenance obligation between spouses and responding to diverse family forms in Singapore.

B. England and Wales

The English legal position on child maintenance could be obtained from various reference books. One of the leading books on Family Law is *Bromley's Family Law*[69] written by Nigel Lowe and Gillian Douglas. This book basically discusses family law in England by looking at various topic starting from Formation of Marriage and Civil Partnership to International Aspects of Child Law. More than half the contents of this book refer to issues concerning children. The position as to child maintenance could be found in Chapter 2 – Financial Obligations to Members of the Family. This chapter very briefly looks at the Parents' Duty to support their children. The focus in this chapter is more on the role of the State in providing

[69]Lowe, Nigel and Douglas, Gillian, *Bromley's Family Law*, (United Kingdom: Oxford University Press, 2015)

child support. Child support laws in England and Wales are more developed and sophisticated when compared to Malaysia as they have Child Support Agencies which assess the maintenance that needs to be paid by the parents and ensures that the maintenance amount is collected and enforced. In addition to the existence of the Child Support Agency, the social security system is also available. It provides a means of supporting family members whose income is not adequate to meet their needs. It would also provide additional income where there are dependent children.

Jonathan Herring has also published a book entitled *Family Law.*[70] The author discusses both spousal maintenance as well as child support. He looks at the recent law pertaining to child support, i.e. the Child Maintenance and Other Payments Act 2008, in addition to the existing laws such as the Children Act 1989 and the Matrimonial Causes Act 1973. The author discusses the theoretical issues around child support, including the issue as to whether the obligation to support children falls on the state or on the parents. The welfare principle is also discussed in depth here.

Hayes and Williams' Family Law's [71] contents are divided into two parts, Part 1 deals with Adult Family Law and Part 2 deals with Child Family Law. Chapter 6 in Part 2, entitled 'Financial Support for Children', discusses the background and recent reforms to the Child Support Act 1991. In addition, the chapter also discusses the courts' powers under the Matrimonial Causes Act 1973 and the Children Act 1989.

In addition to the books written on Family Law in the United Kingdom, several books have also been written on children's rights. One particular book which the writer has referred to is by Jane Fortin entitled *Children's Rights and the Developing Law.*[72] This book examines

[70] Herring, Jonathan, *Family Law*, 7th ed (United Kingdom: Pearson, 2015)
[71] Gilmore, Stephens and Glennon, Lisa, Hayes and Williams' *Family Law*, 5th ed, (United Kingdom: Oxford University Press, 2016)
[72] Jane Fortin, *Children's Rights and the Developing Law*, 3rd edition, (United Kingdom: Cambridge University Press, 2009).

the various rights of children, for example, the right to support, healthcare, education, representation and state protection. The author looks at the theoretical perspectives concerning children's rights. A child's right to support is specifically discussed in Chapter 9 entitled 'Children's rights versus family privacy - physical punishment and financial support'. The author looks at the right guaranteed by the Convention on the Rights of the Child (CRC) as well as the Child Support Act 1991. The author goes on to assess the child support scheme prescribed by the Child Support Act, looking at the weaknesses that exist. In addition to that, she finally discusses the role of the state in protecting the rights of the children, by 'maintaining a safety-net approach to family support'.

In addition to the above book, Andrew Bainham and Stephen Gilmore have also written a book which focusses on children, entitled *Children, The Modern Law.*[73] This book has four parts. Part I deals with the Background and Sources of Children Law, Part II on Children and Families, Part III on Children and Local Authorities and Part IV is on Children and Society. Child Support is discussed in Chapter 9 which falls under Part II. This Chapter looks at the Child Support Act 1991 and the Children Act 1989 as well as other issues such as variation, rescissions, welfare principle and the court's powers to make financial provisions.

The English position on the maintenance of a child could also be seen in Michael Lett's article on *Children-The Continuing Duty to Maintain.*[74] In this article, the author examines the right of a child to claim financial support from his parents continuing beyond the age limits set by the Child Support Act 1991. The author states that in certain circumstances, the child may be able to claim financial support if his or her parents have separated or divorced by referring to the provisions of the Matrimonial Causes Act 1973 and the Children Act 1989.

[73]Bainham, Andrew and Gilmore, Stephen, *Children, The Modern Law*, 4th ed. (Bristol: Family Law, 2013)
[74] Lett, Michael, 'Children – The Continuing Duty to Maintain', *Fam Law* 31 (839).

The possibility of claiming under both the abovementioned statutes is considered in this article.

C. Australia

One of the earlier books written on Family Law in Australia was by H.A. Finlay entitled *Family Law in Australia*.[75] In this book, the author discusses Family Law issues such as marriage, divorce, the legal position of children, Maintenance in Family Law, Property in Family Law and the Adoption of Children. In the chapter entitled 'Maintenance in Family Law', the author looks at maintenance between spouse as well as maintenance of children. He also goes on to examine maintenance orders and maintenance agreements and concludes the chapter with an examination of enforcement of maintenance orders and maintenance agreements overseas.

In 1993, Richard Ingleby published his book entitled *Family Law and Society*.[76] The author divided the chapters into three parts, i.e. Part A - Families and the Law, Part B - Children and Part C - Financial Matters. Child support is discussed in Part B, where the author discusses the reforms to the law governing the calculation and child support orders under the Child Support (Assessment) Act 1984 (Cth), Child Support (Registration and Collection) Act 1988 (Cth) and the Social Security Act 1991 (Cth). The author concludes the chapter by evaluating the law reform that has taken place in Australia at that point of time and considering whether future reforms to the law might introduce parental support obligations.

[75] Finlay, H.A., *Family Law in Australia*, (Australia: Butterworths, 1983).
[76] Ingleby, Richard, *Family Law and Society*, (Australia: Butterworths, 1993).

In the following year, 1994, two more books were published. First, the *Australian Family Law in Context: Commentary and Materials*[77] by Stephen Parker, Patrick Parkinson and Juliet Behrens. The authors have discussed Family Law in Australia by dividing the book into five parts. Part A looks at 'The Family In Context', Part B on 'Family Law in Context', Part C on 'Marriage and Cohabitation', Part D on 'Economic Aspects of Relationship Breakdown' and Part E on 'Children in Family Law'. Although Part E states 'Children in Family Law', the discussion in that part is basically on child custody and access as well as child abuse and neglect. Child maintenance is in fact discussed in Part D. This Part discusses not only child support, but also spousal maintenance as well as property rights during marriage. Chapter 13 which discusses on child support traces the background of child support in Australia. It then goes on to look at the provisions concerning child support in the Family Law Act, followed by the Child Support scheme under the Child Support (Assessment) Act 1989. The authors conclude the chapter by evaluating the child support scheme in Australia.

The second book that was published is by Jan Bowen entitled *Child Support: A Practitioner's Guide.*[78] This book was published in association with the Child Support Agency. As the name suggests, this book was written with the aim of providing information on child support, specifically on the Child Support Scheme in Australia to practitioners. The discussion in this book is divided in two parts. Part 1 discusses how the child support scheme works, child support assessment, child support agreements, court orders, child support applications and payment, social security and child support, employers and the child support scheme, reviewing an assessment and the enforcement of child support obligations. Part II discusses how a child support assessment is worked out.

[77] Parker, Stephen, Parkinson, Patrick and Behrens, Juliet, *Australian Family Law in Context: Commentary and Materials*, (Australia: The Law Book Company Limited, 1994).
[78] Jan Bowen, *Child Support: A Practitioner's Guide*, (Australia: The Law Book Company Ltd 1994).

Having examined the literature available on child maintenance, the writer is of the opinion that there is much to be done to solve the current problems that arise. Research has to be carried out to find out the actual problems faced by the children in getting maintenance and in enforcing the maintenance orders. Only one or two of the Malaysian authors mentioned above have done some fieldwork and obtained statistics from the courts to show the number of child maintenance cases. However, the statistics published in their respective books were obtained more than six years ago. Further thereto, only one or two of the above Malaysian literature contains discussion on interviews held with the 'victims', for example, single mothers and children (of sufficient age of maturity to express the opinions), to reflect the true picture. It is of no use to merely rely on judicial decisions when critically analysing the position as to child maintenance. The actual situation would only be discovered when fieldwork is carried out, which the writer intends to do in the course of writing this thesis.

In addition thereto, comparison with the maintenance laws in other jurisdictions has not been discussed in depth in the Malaysian literature. Save for one article which refers to Singapore, Ireland and Australia,[79] the rest of the literature refer mainly to the United Kingdom laws. As such, the writer is of the opinion that in suggesting reforms to our present maintenance laws, it is pertinent to look at the laws in more than one country, where there have been positive developments in safeguarding the interests of children.

1.9 SIGNIFICANCE OF RESEARCH

Having examined the local literature on child maintenance, the writer is of the view that

[79] *Supra* n.53

this issue needs further study as there is insufficient coverage in the local material. Hence, this research, by critically analysing all laws concerning child maintenance concerning non-Muslims in Malaysia and conducting fieldwork to find out the actual state of matters, is hoped to contribute to the existing knowledge and will be useful to ensuring the welfare of these innocent children is safeguarded as well as to preserve harmony in the society.

1.10 LIMITATIONS

The following limitations arose in the preparation of this thesis:

1.10.1 Interviews

The writer faced difficulties in getting the single mothers to consent to being interviewed in Sabah. The reason for the reluctance was the embarrassment it would cause then if they were to reveal their experiences. However, the writer managed to get a few of them to agree after promising them anonymity and stating that they have the right to refuse to answer the questions posed to them if they felt uncomfortable answering them.

In addition to the above limitation, due to time constraint, the writer was unable to interview policy-makers as regards to the issue as to why the laws in Malaysia have not undergone amendments for a long time.

1.10.2 Accuracy in the responses

The issue as to whether the responses given by the respondents were genuine during the interviews conducted with single mothers. The reason for this is that when these single mothers were interviewed, they became very emotional, some even getting very angry with the father of their child. Hence, in the heat of the moment, the writer had to decide whether to accept the responses as true, as it was doubtful whether they were able to think with an open mind. However, this issue was resolved when the writer managed to speak to the social workers who worked with these single mothers. Some of the questions that were put to the single mothers were also asked of the social workers. Based on the answers given by the social workers, the writer was able to observe if their answers are consistent with that of the single mothers.

1.10.3 Access to foreign literature

The writer faced a problem in accessing recent foreign literature, especially Australian text books, in the library. As could be seen in the Literature Review, the Australian text books that were available in the library were published in the 1980s and 1990s. In order to overcome this limitation, the writer referred to the text books that were available to examine the basic principles of child maintenance in Australia as well as a source of reference pertaining to the origins of child maintenance laws in Australia. As to find out the current laws and judicial decisions in Australia, the writer had to rely on the resources available on the internet such as www.austlii.edu.au.

CHAPTER 2: OVERVIEW OF CHILD MAINTENANCE LAWS

2.1 INTRODUCTION

Having briefly examined selected family systems that exist globally in Chapter 1, the writer next intends to zoom in to the issue of child maintenance, which forms the crux of this thesis, in this Chapter. Before examining the non-Muslim maintenance laws in Malaysia, the writer would first refer to child maintenance laws in selected Western and Eastern countries to see who shoulders the duty to maintain a child in those societies. The writer would next trace the development of maintenance laws in Malaysia, i.e. from the Straits Settlements era to the present time in order to see if there have been any developments concerning these laws. Thereafter, the writer would compare with the development of maintenance laws in Singapore. The writer would conclude this Chapter by examining the child maintenance issues which would be examined in detail in the following Chapters.

A parent has a legal as well as a moral duty to maintain his children. A breach of a moral duty to maintain would not attract any penalties. However, the breach of a legal duty would. Before discussing the laws concerning maintenance, it is pertinent to first find out the meaning of 'maintenance'. 'Maintenance' basically refers to the provision of basic necessaries such as food, clothing, shelter and education. In *Re Borthwick (Deceased), Borthwick v Beauvis*,[1] Harman J. Explained 'maintenance' as follows:[2]

[1] [1949] Ch. 395.
[2] *Ibid* at 401.

> It is said that maintenance is the only thing that you can look at. What does it mean? It does not mean that you can only give the dependant just enough to put a little jam on his bread and butter. It has already been held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he dies a rich man or no, because a rich man may be supposed to have made better provision for his wife's maintenance that a poor one. Maintenance does not only mean the food she puts in her mouth, it means the clothes on her back, the house in which she lives, and the money which she has put in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. Maintenance cannot mean only a mere subsistence.

The above definition, although concerns a testator and provision for his widow, it should be applicable to the meaning of 'maintenance' generally for a wife and a child. This explanation was adopted in the local cases of *Sivajothy a/p Suppiah v Kunathasan a/l Chelliah*[3] and *Koay Cheng Eng v Linda Herawati Santoso.*[4] The Law Reform (Marriage and Divorce) Act 1976, in placing the duty to maintain a child on the parents, states that maintenance refers to providing accommodation clothing, food and education. One pertinent matter is missing in this explanation. i.e. medical treatment for a child. In comparison, the Indian counterpart to this provision, i.e. the Indian Adoption and Maintenance Act 1956 in

[3] [2000] 6 MLJ 48.
[4] [2005] 1 CLJ 247. Note that both these cases were concerning maintenance for the wife. However, the same explanation could be applied for child maintenance as well.

its section 3(b)(i) defines "maintenance" to include provision for food, clothing, residence and medical attention and treatment.

The importance of medical treatment was explained in the Indian case of *Ajay Saxena v Rachna Saxena*,[5] where the court held as follows:

> It is trite to state that medical assistance, just like food, clothing, shelter and education is an essential requirement for survival and cannot be withheld by the husband from the wife and children till final adjudication of the suit.

The state too plays an important role in enacting laws which impose a duty upon parents to maintain their children. However, mere enactment of legislations is insufficient. It is equally important to ensure that such laws do indeed adequately protect the rights of children regarding maintenance.

A brief insight into the position concerning child maintenance globally (which includes different religions) and in Malaysia is stated below. This insight is pertinent in order to see the values each culture and religion referred to below, places on the duty to maintain children, be it on the child's parents, grandparents, relatives and so on. Finally, the writer would briefly state the position in Malaysia before going into the details in the Chapters that follow.

2.2 GLOBAL OVERVIEW ON CHILD MAINTENANCE

Prior to examining the Malaysian laws on child maintenance, the writer would first briefly look at the maintenance laws in selected legal systems such as the common law, civil law (the laws in France and China) and also under selected religions such as Christianity, Islam and Hinduism.

[5] AIR 2007 Del. 39.

2.2.1 Common Law

Under common law, there is no legal obligation on parents to maintain their children. The law has left it to the parents own sense of morals.[6] Blackstone states that the duty of a parent to maintain his or her child is a principle of natural law. He elaborates on this duty laid by nature as follows:

> ... an obligation, ... laid on them not only by nature herself, but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved.[7]

Further thereto, in *National Assistance Board v Wilkinson*,[8] Lord Goddard CJ, citing Lindley LJ in *Thomasset v Thomasset*[9] stated as follows:[10]

> I know of no case in which a father has been ordered by a Court of Equity to maintain his child.

Thus, in common law there is no civil obligation on a parent to maintain his child. However, if a father neglects to maintain his child, the matter could be brought under criminal law. The liability to maintain was imposed by criminal law statutes.[11]

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[6] Leong Wai Kum, "The Duty to Maintain Spouse and Children During Marriage*"* (1987) 29 *Mal LR* 56.
[7] *Blackstone Commentaries on the Laws of England*, Vol. 1, 16th ed. 1825, London, pp 446-447.
[8] [1952] 2 QB 255
[9] [1894] P 295
[10] *Ibid* at 299.
[11] For example, statutes such as The Poor Relief Act 1601 and the Poor Relief Act (Deserted Wives and Children) 1718.

2.2.2 Civil Law/Communist Law

2.2.2.1 Child Maintenance Laws in France

In France, the law imposes the duty of providing maintenance on close relatives for their relatives who are in dire need.[12] Such a duty is imposed between relatives on the vertical axis of consanguinity, descendants and ancestors provided that the relationship is legal but not between peripheral relatives.[13] Parents who adopt children are under a duty to maintain their adopted children but for one degree only, i.e. a duty to maintain the adopted child, but has no duty to maintain the child of the adopted child. Further thereto, in France, a parent's duty to maintain his children does not cease for any reason.

2.2.2.2 Child Maintenance Laws in China

With the establishment of the Chinese Communists in the Chinese Soviet Republic in 1931, marriage law and the land reform law were promulgated. The same happened in 1950 with the establishment of the People's Republic of China.[14] Land reform and marriage policy supplemented one another in various fields of social and economic organisation, all aimed at realization of socialism.[15]

The Marriage Regulations 1931 was enacted on 1st December 1931 which was later abolished by the Marriage Law of the Chinese Soviet Republic on 8th April 1934. Nevertheless, both these laws were more or less similar with one another.[16] The parents' duty to maintain their children is expressly stated in Article 13 of the Marriage Law as follows:

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[12]Ala'eddin Kharefa, Islamic Family Law, A Comparative Study With Other Religions, (Kuala Lumpur: International Law Books Services, 2004) at 280.
[13]*Ibid.*
[14]Marinus J Meijer, *Marriage Law and Policy in the People's Republic of China, Chinese Family Law and Social Changes in Historical and Comparative Perspective*, David C Buxbaum (editor), (Hong Kong: University of Washington Press, 1978), at 436.
[15] M J Meijer, *Marriage Law and Policy in the Chinese People's Republic*, (Hong Kong: Hong Kong University Press, 1971), 42
[16]*Ibid* at 48.

> The parents have a duty to bring up and to educate their children. The children should be taught to be loyal to their father and mother and to the socialist enterprise; they should love the Party, love the leadership, love collectively, love labour and common production.[17]

Parents have a legal duty under the Marriage Law to provide education to their children. Children who have been abandoned by their parents have a right to institute legal proceedings against them. The duty to maintain a child ceases upon the child attaining the age of majority.[18] In the event the child is suffering from an illness or for any other reason, the child is unable to earn a livelihood, the parents are still under a duty to maintain him even though he is a major.

2.2.4 Christianity Law

Referring to the Code of Anglicans, a father is responsible for providing maintenance for his young child who has no money of his own.[19] Basically, under this Code, assessment of maintenance is done by considering the needs of the child and the financial ability of the spender. The father could be asked to pay maintenance in advance every month or if convenient, tri-monthly.[20]

[17] *Questions and Answers on the Marriage Law*, Anhui Provincial Court and the Judicial Bureau of that Province.
[18] *Ibid.*
[19] Article 38 of the Code of Anglicans.
[20] *Ibid*.

2.2.5 Islamic Law

In Islam, generally blood relationship is the reason for imposing the duty of maintenance.[21] However, the definitions of 'blood relationship' vary between the different jurists.[22] According to the Maliki School of Thought, Imam Malek refers to *Surah Al-Talaq*:7 as evidence to state that maintenance is only due to direct parents: father and mother and to the immediate children. Immediate children here refer to a son until he reaches puberty and to the daughter until she gets married. *Al-Talaq*: 7 states as follows:

> Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a diffi*culty, Allah will soon grant relief.*

The scholars attached to the Shafei, Hanafi and Hambali Schools of Thought state that maintenance is due to all the relatives on the lineage scale that is to ancestors and to descendants.[23] They refer to the following Quranic verse as proof:[24]

> A grandson is still called a son, even if he is low on the scale of lineage. The Quranic verse stipulates that inheritance should be divided in accordance with Quranic teachings: the son has two shares and the daughter one.

Hence, it could be observed that the difference between the Maliki School of Thought and the other three Schools of Thought is that the former restricts the duty to maintain to the

[21] *Supra* n 12 at 266
[22] *Ibid.*
[23] *Supra* n 12 at 268-269.
[24] *Al-Nisa*:11.

immediate dependent, be it from the parent to the child or *vice versa* whereas the latter extend the duty to all the dependents on the lineage scale, be it the ancestors or the descendants.

2.2.6 Hindu Law

A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents whether he possesses any property or not. The obligation to maintain these relations is personal in character and arises from the very existence of the relation between the parties.[25]

As mentioned above, a father is bound to maintain his minor sons until they reach the age of majority. This obligation to minor sons exists even if it means maintaining out of the father's self-acquired property.[26] Where it concerns daughters, a father is bound to maintain his daughter until she gets married. If the father dies before her marriage, she is entitled to be maintained out of his estate.[27] When the daughter gets married, she becomes a member of her husband's family and therefore has to be maintained by her husband. After the husband's death, she is entitled to be maintained out of his estate.[28]

2.3 THE MALAYSIAN POSITION

Malaysia, consisting of various races such as the Malays, Chinese, Indians, Natives of Sabah and Sarawak and Sikh, has two systems of family laws, i.e. one for the Muslims and one for the non-Muslims.[29] A general overview on the position concerning maintaining children under Muslim and non-Muslim laws in Malaysia is stated as below.

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[25] *Savitribai v Luxmibai&SadasivGanoba* (1878) 2 Bom 573, 597-598 [F.B.]
[26] *Ammakannu v Appu* (1888) 11 Mad 91; *Premchand v Hullaschand* (1869) 4 Beng L.R. App 23; *Ramachandra v Sakaram* (1878) 3 Bom 346, 350, 351; *Bhoopathi Nath Chakrabarti v Basanta Kumaree Debe*e (1936) 63 Cal 1098 (136) A.C. 556
[27] *Bai Mangal v Bai Rukhmini* (1899) 23 Bom 291; *Tulsha v Gopal Rai* (1884) 6 All 632.
[28] *Kartic Chunder v Saroda Sundari* (1891) 18 Cal 642, 646
[29] See Article 121(1A) of the Federal Constitution which provides that the courts referred to in clause (1) shall have no jurisdiction in respect of any matters within the jurisdiction of the *Syariah* Courts. See also Article 74(2) of the Federal Constitution which provides that the State Legislature may make laws with respect to any of the matters enumerated in the State List. The State List refers to the Second List, which falls under the Ninth Schedule. Matters enumerated in the Second List include family law of persons professing the religion of

2.3.1 Muslim children

Generally, in Islam, a father is under a duty to maintain his children who fall under any one of the following categories:

(a) his children who are infants, irrespective of whether or not he has custody of them;

(b) his son's infant children, where the son is unable to maintain them;

(c) his son who is disabled or is a student;

(d) his daughter who is unmarried, irrespective of her age; and

(e) his daughter who is widowed or divorced, if she is ill.[30]

In Malaysia, each state has its own Enactment concerning Islamic Family Law. The State Enactments basically impose a duty on the father of the child to pay maintenance in accordance with the *Hukum Syarak* or the *Syariah* principles for the benefit of his child:

(a) if he has refused or neglected reasonably to provide for his child;

(b) if he has totally deserted his wife and the child is in her charge;

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the child in the custody of any other person.[31]

2.3.2 Non-Muslim children

The non-Muslims in Malaysia have their own set of laws concerning maintenance. In Malaysia, the origin of the parent's duty to maintain their children is the Straits Settlements

Islam, including the Islamic Law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship and gifts.

[30] Mimi Kamariah Majid, *Family Law in Malaysia*, (Kuala Lumpur: Malayan Law Journal, 1999) at 344.

[31] For example, see the Islamic Family Law (Federal Territories) Act 1984 (Act 303) and the Islamic Family Law Enactment 1983 (Kelantan) Enactment No.1 of 1983.

Summary Criminal Jurisdiction Ordinance of 1872. This Ordinance has placed the duty to maintain their child on both the parents.

Pursuant to the above Ordinance, various laws have been enacted pertaining to the issue of maintenance. Upon observing these subsequent laws, it could be noted that the duty to maintain as provided under the Straits Settlements Summary Criminal Jurisdiction Ordinance of 1872 was gradually extended. The current laws that lay down the duty to maintain are as follows:

(a) Law Reform (Marriage and Divorce) Act (Act 164) which applies throughout Malaysia;
(b) Married Women and Children (Maintenance) Act 1950 (Act 263), which applies to West Malaysia and the State of Sarawak:
(c) Maintenance Ordinance 1959 of Sabah;

2.4 DEVELOPMENT OF THE LAWS RELATING TO MAINTENANCE IN MALAYSIA

Prior to examining the development of maintenance laws in Malaysia, it is pertinent to note that Malaysia comprises of West Malaysia (or also referred to as Peninsular Malaysia), Sabah and Sarawak. Sabah and Sarawak are also referred to as East Malaysia.

As mentioned earlier, one of the earliest legislations to be enacted pertaining to maintenance of a child is the Straits Settlements Summary Criminal Jurisdiction Ordinance of 1872. Pursuant to this Ordinance various laws on maintenance have been passed. The stages of development concerning maintenance laws will be discussed below.

2.4.1 Stage One: 1870 - 1910

This initial stage contains the pioneer batch of maintenance statutes in our country. There are two statutes which were passed in this stage, i.e. the Straits Settlements Summary Criminal Jurisdiction Ordinance of 1872 and the Straits Settlements Minor Offences Ordinance No. XIII of 1906.

2.4.1.1 Straits Settlements Summary Criminal Jurisdiction Ordinance of 1872

As mentioned earlier in this Chapter, there is no legal obligation under the common law on a parent to maintain his or her child. The duty to maintain was codified for the first time in the Straits Settlements Summary Criminal Jurisdiction Ordinance of 1872. This Ordinance, which came into force on 8 November 1872, was passed to consolidate and amend the law relating to Summary Criminal Jurisdiction in the three colonies that fall under the Straits Settlements, i.e. Penang, Malacca and Singapore.

Provisions concerning maintenance could be found in section 45, which falls under Chapter 4 entitled Preventive Jurisdiction. Section 45, *inter alia*, provides as follows:

> I. If any person neglects or refuses to maintain his wife or legitimate child unable to maintain itself, it shall be lawful for the Court of Quarter Sessions or for Magistrate, upon due proof thereof, to order such person to make a monthly allowance for the maintenance of his wife or such child as aforesaid, in proportion to the means of such person, as to the Court or Magistrate shall seem reasonable; and
>
> II. If any person neglects or refuses to maintain his illegitimate child unable to maintain itself, it shall be lawful on due proof thereof, to order such person to make

such monthly allowance not exceeding ten dollars, as to the Court or Magistrate may seem reasonable.

III. Such allowance shall be payable from the date of the order.

IV. If such person shall wilfully neglect to comply with any such order, the Court or Magistrate may, for every breach of the order, by Warrant, direct the amount due to be levied in the manner by law provided for levying fines imposed by Magistrates; or may sentence him to imprisonment of either description for any term not exceeding one month for each month's allowance remaining unpaid.

Upon perusing the above provisions, it is to be noted that similar wordings could be found in later legislations concerning maintenance, which would be discussed below.

According to Professor Leong Wai Kum in her book, *Principles of Family Law in Singapore*,[32] the codification of a parent's duty to maintain his or her child under this Ordinance is two-fold, as section 45 is a substantive enactment as well as means of enforcement. This could be described as a quantum leap when compared to the common law position, which did not impose any such obligation on a parent. In the words of Professor Leong Wai Kum:[33]

> The first provision allowing the courts, directly, to enforce the husband's duty, in the Straits Settlements Summary Criminal Jurisdiction Ordinance 1872, referred both to the duty of the husband to maintain his wife and of a parent to a child. The latter was,

[32] Leong, Wai Kum, *Principles of Family Law in Singapore*, (Singapore: Butterworths Asia, 1997) at 842.
[33] *Ibid*

clearly, both a substantive enactment and means of enforcement as the common law never imposed a duty on a parent to a child.

2.4.1.2 Straits Settlements Minor Offences Ordinance No. XIII of 1906.[34]

In 1906, with the enforcement of the Straits Settlements Minor Offences Ordinance 1906, section 39 of this Ordinance repealed section 45 of the Straits Settlements Summary Criminal Jurisdiction Ordinance 1872. The new section 39 was a similar to section 45, save for subsection III which provides that a wife loses her right to maintenance only if 'she is living in adultery or if without any sufficient reason, she refuses to live with him'.

2.4.2 Stage Two: 1911-1950

Stage 2 witnessed maintenance laws being enacted in the rest of the parts of the country, which included the Federated Malays States (F.M.S.). The F.M.S. was a federation of four protected states established by the British government in 1895. This federation lasted until 1946. The four protected states are West Malaysia, i.e. Selangor, Perak, Negeri Sembilan and Pahang.

2.4.2.1 Ordinance No. 96 (Minor Offences), Straits Settlements Laws, Revised, Ed. 1926

Section 39 of the Straits Settlements Minor Offences Ordinance 1906 became section 38 without any alteration in the 1926 Revision of the Straits Settlements Laws.[35]

[34] Straits Settlements Married Women and Children (Maintenance) Ordinance No. 26 of 1949.
[35] Ordinance No.96.

2.4.2.2 Federated Malay States (F.M.S.) Criminal Procedure Code, Cap 6

Having looked at the laws concerning maintenance in the Straits Settlements, it is equally important to look at the maintenance laws in the other states before the Federation of Malaya was formed. Kedah had its own Enactment on maintenance entitled Enactment No. 61 (Maintenance of Wives and Children) and Johore had a law specifically on maintenance of wives, The Maintenance of Wives Enactment, Enactment No. 79.

On 1 January 1927, the Federated Malay States Criminal Procedure Code Cap 6 was brought into force to repeal and re-enact with amendments the Criminal Procedure Codes, 1902 and 1903. Provisions concerning maintenance of wives and children could be seen in Chapter XXXV of the Code, in particular sections 360,361,362,363 and 364. Section 360, similar to the provisions in the maintenance legislations governing the Straits Settlements, provides as follows:

> If any person neglects or refuses to maintain his wife or legitimate child unable to maintain itself, it shall be lawful for a Magistrate, upon due proof thereof, to order such person to make a monthly allowance for the maintenance of his wife or such child as aforesaid, in proportion to the means of such person, as to the Magistrate shall seem reasonable.

Section 361 confers the right to an illegitimate child to claim maintenance from his parent. However, this provision states that the maximum amount of maintenance which a Magistrate could award is twenty dollars.

Section 362 provides for the penalty for wilfully neglecting to comply with the Magistrate' order as follows:

> (i) If such person shall wilfully neglect to comply with any such order, the Magistrate may for every breach of the order, by warrant, direct the amount due to be levied in the manner by law provided for levying fines imposed by Magistrates, or may sentence him to imprisonment of either description for a term not exceeding one month for each month's allowance remaining unpaid.
>
> Provided that if any person against whom an order has been made for the maintenance of his wife offers to maintain his wife on condition of her living with him, and his wife shall refuse to live with him, it shall be lawful to consider any grounds of refusal stated by such wife, and the Magistrate may make the order aforesaid notwithstanding such offer, if he be satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

2.4.2.3 Maintenance Orders (Facilities for Enforcement) Act 1949

In order to safeguard the interests and rights of the beneficiary of a maintenance order, where the defendant lives and works in a foreign country, the legislature enacted the Maintenance Orders (Facilities for Enforcement) Act 1949. The predecessor to this Act was the Straits Settlements Maintenance Orders (Facilities for Enforcement) Ordinance No. 8 of 1921 to 'facilitate the enforcement in the Colony of maintenance orders made in England or Ireland or vice versa'.

In 1949, the Maintenance Orders (Facilities for Enforcement) Act 1949 (which was later revised in 1971) was enacted to facilitate the enforcement in Malaysia of maintenance orders

made in reciprocating countries and vice versa.[36] This Act which originally applied in West Malaysia was extended to East Malaysia from 1 January 1971.[37]

'Reciprocating country' is defined in section 2 to mean 'any country or territory including England, Wales and Northern Ireland, to which this Act for the time being applies and which is specified in the Schedule'.[38] In the year 2004, vide P.U.(A) 33/04, this Act was extended to the Hong Kong Special Administrative Region of the People's Republic of China.

Basically, this Act applies when the defendant is a resident in a reciprocating country. The Malaysian court, which made a maintenance order against the defendant, shall send a certified copy of the said maintenance order to the Minister charged with the responsibility for foreign affairs for transmission to the appropriate authority in the reciprocating country. The same procedure applies if a reciprocating country intends to enforce a maintenance order issued in that country.

2.4.2.4 Married Women and Children (Maintenance) Ordinance No.36 of 1950

In 1950, the Married Women and Children (Maintenance) 1950 ("the 1950 Ordinance") was enacted. This Ordinance specifically provided for the maintenance of wives and children. Section 38 of the Ordinance 96 (Minor Offences) Straits Settlements Laws 1926 was removed from the Ordinance and reproduced in the 1950 Ordinance without any alteration

The 1950 Ordinance was later superseded by the Married Women and Children (Maintenance) Act 1950 (Act 263) (Rev. 1981) with effect from 11 December 1982 which is currently in force. In 1982, with the coming into force of the Law Reform (Marriage and Divorce) Act 1976 on 1 March 1982, the maximum maintenance limit of fifty ringgit to

[36] Long title of the Maintenance Orders (Facilities for Enforcement) Act 1949.
[37] Vide P.U.(A) 460/70.
[38] See Appendix E for the Schedule of reciprocating countries.

illegitimate children was repealed in section 3(2) by the 1950 Ordinance.[39] With the deletion of the ceiling of the maintenance sum the court may award to an illegitimate child, the right of an illegitimate child is now in *pari materia* with a legitimate child, thus, ensuring that an illegitimate child is not discriminated against and his welfare safeguarded.

With the coming into force of the Married Women and Children (Maintenance) Ordinance 1950 on 4th July 1950, all the following legislations were either wholly or partially repealed:

(a) Kedah Enactment No 61 (Maintenance of Wives and Children) - Whole

(b) The Maintenance of Wives Enactment of Johore, Enactment No 79 - Whole

(c) The F.M.S. Criminal Procedure Code Cap 6- Sections 360, 361, 362, 363 and 364

(d) Straits Settlements Minor Offences Ordinance Cap 24 - Section 37

With the repeal of the laws above, only one single statute applied throughout West Malaysia with effect from 4th July 1950.

2.4.3 Stage Three: 1951-1990

The statutes on maintenance that were enacted during this stage are currently still in force. Most of these statutes repealed the old statutes when they came into force.

2.4.3.1 Maintenance Ordinance 1959 of Sabah [40]

The 1950 Act applies only to West Malaysia, Sarawak and the Federal Territory of Labuan. Sabah has its own statute on maintenance, i.e. the Maintenance Ordinance 1959 of

[39] Vide Act 164/76, section 109.
[40] No. 7 of 1959.

Sabah (the 1959 Ordinance). The provisions in this Ordinance are similar to those in the 1950 Act save for two provisions. The first difference is regarding the maximum amount of maintenance the court may award to an illegitimate child. Section 3(2) of this 1959 Ordinance provides that the amount that a court can order cannot exceed RM50 on the whole. It is submitted that as this limit was removed in the 1950 Act with the enforcement of the LRA, section 3(2) of the 1959 Ordinance should also be amended to reflect the same[41] in order to ensure that the law does not discriminate against illegitimate children but on the other hand safeguards their welfare.

The second difference is concerning the arrears of maintenance which may be ordered. Under the 1950 Act, section 3(3) provides that maintenance may be payable from the date of such neglect or refusal or from such later date as may be specified in the order. However, under the 1959 Ordinance, section 3(3) provides that maintenance, which is payable may be ordered from the date of the order or from the date of the application form. The court may however, for special reasons which should be recorded and having regard to the means of the parties order the payment of a lump sum by way of arrears in respect of any prior period but not exceeding twelve times the amount of any allowance ordered under subsection (1) or (2). When compared to the 1950 Act, section 3(3) of the 1959 Ordinance seems to be more specific concerning the arrears of maintenance which may be claimed. *Prima facie* the provision in the 1950 Act allows the child concerned to claim maintenance from the date his or her parent neglected or refused to pay maintenance,[42] whereas the 1959 Ordinance reduces the time frame to from the date of the maintenance order or from the date of the application form. Hence, it could be observed that a child applying for arrears of maintenance under the

[41] *Ibid*
[42] However, it is to be noted at this juncture that two cases have restricted the time frame to claim the arrears of maintenance under the 1950 Act to one year, i.e. the cases of *Amrick Lall v Sombaiavati* [1973] 2 MLJ 191 and *Gangagharan v Sathiabama* [1979] 2 MLJ 77.

1950 Act is in a better position compared to a child in Sabah, claiming under the 1959 Ordinance, as the former would be able to claim for arrears from the date his father neglected or refused to pay maintenance, whereas the latter is restricted to twelve months prior to the date of his petition for maintenance.

2.4.3.2 Married Women and Children (Enforcement of Maintenance) Act 1968

The Married Women and Children (Enforcement of Maintenance) Act 1968 (the 1968 Act) was enacted in 1968 to apply in situations where a man refuses to comply with a maintenance order. Prior to the enactment of the 1968 Act, a man who failed to comply with a maintenance order could only either be imprisoned or be imposed with a penalty or levy. The wife and children would not benefit by punishing the husband or father.

Hence, 1968 Act, as the name suggests, was enacted to enforce maintenance orders. This Act, however, only applies to the States of West Malaysia.[43] The method of enforcing maintenance orders under the 1968 Act is by way of attaching the earnings of the defendant. This could be seen in section 4(1) of the Act which states that the court may on the application of the beneficiary of a maintenance order, make an attachment order if it (the court) considers it just so to do.

The nature of the attachment order is provided for in section 5 of the 1968 Act. Basically, the attachment of earnings order is directed to the defendant's employer to attach a specific amount of the defendant's earnings as prescribed in the said order.[44] However, if the defendant does not have an employer or is self-employed, sections 4 and 5 of the 1968 Act do not apply. Section 13(1) of the 1968 Act would come in to help the beneficiary of the

[43]States of West Malaysia include Perlis, Kedah, Penang, Perak, Selangor, Malaccca, Negeri Sembilan, Pahang, Johore, Kelantan and Terengganu. It also includes the Federal Territories of Kuala Lumpur and Putrajaya.

[44]The nature of section 5 was explained by the learned judge in the case of *Thelagavathi a/p Murugesu (IC No.: 660803-10-6372) v Karuppusamy @ Selvaraj A/L K. Munisamy (IC No.: 601220-10-5933)*[2010] MLJU 1887as follows: 'Under s.5 of Act 356, an attachment of earnings order shall require the person to whom the order in question is directed, i.e. the Respondent's employer, to appear in Court to make out the earnings to be paid in satisfaction of the order.'

maintenance order in such an instance. According to section 13(1), if the defendant's income is derived from other sources other than earnings the court may on the application of the beneficiary, make an order directing the defendant to directly pay the sum of money payable under the maintenance order to the court. The court will then pay the sum to the beneficiary. The 1968 Act applies to maintenance orders issued under the following Acts:

(a) Married Women and Children (Maintenance) Act 1950;

(b) Law Reform (Marriage and Divorce) Act 1976;

(c) Maintenance order confirmed by the court under the Maintenance Orders (Facilities for Enforcement) Act 1949[45]; and

(d) Where this Act is made applicable by virtue of an authorization under section 14 to or in respect of a maintenance order made by a Syariah Court[46] shall include such order.

2.4.3.3 Law Reform (Marriage and Divorce) Act 1976

The Law Reform (Marriage and Divorce) Act 1976 (LRA) came into force on 1 March 1982 throughout Malaysia (both West Malaysia and East Malaysia). As stated in its long title, the LRA is an Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto. Apart from marriage and divorce, ancillary matters such as maintenance for spouses and children, custody of children as well as matrimonial property are also provided for in the LRA. Basically, the LRA applies to the non-Muslim Malaysians.

[45] Act 34

[46] 'Syariah Courts' which has jurisdiction only over Muslims is a creature of state law according to Article 74(2) of the Federal Constitution

The provisions as to maintenance of children in the LRA are broader when compared to the earlier legislations mentioned above in four instances. For example, under the LRA, in addition to ordering the father of the child to pay the child maintenance[47] the court may also order the mother of the child to pay maintenance for the benefit of her child where it is satisfied having regard to her means it is reasonable so to order.[48] In this respect, if the child's mother is earning and is able to provide or contribute towards the maintenance of her child, the child would be able to claim maintenance from both the parents.

The second instance is the situations under which the court may order a man to pay maintenance under the LRA. The LRA provides four situations when the court may order a man to pay maintenance to his child, whereas the 1950 Act merely provides that the court may order a person who has neglected or refused to maintain, *inter alia*, his child. The four situations in section 93(1) of the LRA are as follows:

(a) If he has refused or neglected reasonably to provide for the child;

(b) If he has deserted his wife and the child is in her charge;

(c) During the pendency of any matrimonial proceedings; or

(d) When making or subsequent to the making of an order placing the child in the custody of any other person.

The third instance is under section 99 of the LRA which provides that a child who has been accepted by a man as a member of his family shall be maintained by him while he or she remains a child, so far as the father and the mother of the child fails to do so. If the child

[47]Section 93(1) of the LRA
[48]Section 93(2) of the LRA

is taken away by his father or mother, the duty of the man ceases and any sums spent by him in maintaining the child shall be recoverable as a debt from the child's father or mother.

According to Professor Mimi Kamariah Majid in her book *Family Law in Malaysia,*[49] child in section 99 'refers to other children accepted as members of the family, such as foster children or children adopted in accordance with custom and whose adoptions may be registered under the Registration of Adoptions Act 1952. This provision obviously seeks to protect such children and to provide for their maintenance'.

The fourth instance is where the LRA in section 100 provides that when considering any question relating to the maintenance of a child, the court must whenever it is practicable take advice of a person who is trained or experienced in child welfare. However, the same section provides that that the court is not bound to follow such advice. The person who is trained or experienced in child welfare here usually refers to a social welfare worker or a child psychologist.[50] The 1950 Act does not contain a similar provision as the above.

2.4.4 Stage Four: 1991 - Present

Stage Four denotes the development in the last twenty years. It is disheartening to note that only one statute was passed during this stage concerning children's rights, i.e. the Child Act 2001. Howsoever, at the same time, it is to be noted that some of the maintenance legislations passed earlier are still in force, such as the Married Women and Children (Maintenance) Act 1950, the Law Reform (Marriage and Divorce) Act 1976, the Maintenance Ordinance of Sabah 1959, the Married Women and Children (Enforcement of Maintenance) Act 1968 and Maintenance Orders (Facilities for Enforcement) Act 1949.

[49]Mimi Kamariah Majid, *Family Law in Malaysia*, (Kuala Lumpur: Malayan Law Journal, 1999) at 337.
[50]*Ibid* at 338.

2.4.4.1 Child Act 2001

In 2001, the legislature, realising that there is an immediate need to protect the rights of the children in Malaysia passed the Child Act 2001. In its Preamble, this Act states, *inter alia,* as follows:

> An Act to consolidate and amend the laws relating to the care, protection and rehabilitation of children and to provide for matters connected therewith and incidental thereto.

With the coming into force of this Act, three Acts which were in force then were repealed, i.e. the Juveniles Courts Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991.[51]

The provisions in this Act concerning maintenance are in Part V, Chapter 3. The provisions in this Act provide strict penalties for parents or guardians or any person who has the care of a child for failing to maintain the child properly. In relation to maintenance, the relevant provision is section 31. Section 31 was recently amended in 2016[52] where the penalties provided in section 31(1) and (2) were increased as could be seen below. The duty to maintain of a parent or a guardian or other person legally liable to maintain a child could be seen in section 31(4), which reads as follows:

> A parent or guardian or other person legally liable to maintain a child shall be deemed to have neglected him in a manner likely to cause him physical or emotional injury

[51] Section 130 of the Child Act.
[52] Vide Child (Amendment) Act 2016 (Act A1511). The amendments came into force from 25 July 2016.

if, being able to so provide from his own resources, he fails to provide adequate food, clothing, medical or dental treatment, lodging or care for the child.

The penalty for neglecting a child is provided in section 31(1) and (2) as follows:

(1) Any person who being a person having the care of a child –

(a) abuses, neglects, abandons or exposes the child or acts negligently in a manner likely to cause him physical or emotional injury or cause or permit him to be so abused, neglected, abandoned or exposed; or

(b) ...

commits an offence and shall on conviction be eligible to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding twenty years or to both.

(2) The Court shall, in addition to any punishment specified in subsection (1), order the person convicted of an offence under that subsection-

(a) execute a bond with sureties to be of good behaviour for such period and on such conditions as the Court thinks fit; and

(b) to perform community service.'

Subsection 3B further states that 'Any person who fails to comply with the order of the Court to perform community service under paragraph 2(b) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit.'

The enactment and passing of this Act with its strict penalties shows that the government has indeed taken positive steps in addressing the issue of child abuse and neglect in Malaysia. However, the issue that arises at this juncture is concerning the enforcement of this Act. The

issue as to whether the implementation of this Act has reduced the number of child neglect cases in Malaysia would be discussed at length later in this thesis.

2.4.5 Government Policies

Having ratified the Convention on the Rights of the Child (CRC) on 17 February 1995, the Malaysian Cabinet approved two policies concerning children in 2009, namely:[53]

1. National Child Policy; and
2. Child Protection Policy.

The National Child Policy is a policy on the rights of survival, protection, development and participation of children so that they can enjoy the opportunity and space to achieve a holistic development in a conducive environment. The Child Protection Policy is to ensure that every child in this country is protected from neglect, abuse, violence and exploitation.[54] Both the said policies would be examined below in order to observe if it contains provisions on child maintenance.

2.4.5.1 National Child Policy

The Statement of Policy states that this 'is a policy on the rights of survival, protection, development and participation of children in order to enjoy the opportunity and space in achieving a holistic development in a conducive environment.'

In its Statement of Goal, the Policy aims to produce individuals who are healthy, active, knowledgeable, creative, self-sufficient, competitive, and progressive and has good values. The objectives of the Policy are to ensure the following:

[53] Press Statement By Senator YB Dato' Seri Sharizat Abdul Jalil, the then Minister of Women, Family and Community Development on National Child Policy and Child Protection Policy on 15 September 2009 accessed from www.kpwkm.gov.my/ on 21 April 2011.
[54] *Ibid*.

(a) each child has a right to live by receiving care, love, health services, support and social assistance;

(b) each child, including disabled children, have the right to be protected from any act of neglect, abuse, violence and exploitation; and further be given rehabilitation and integrated into the family and society;

(c) each child has the right to holistic development from the physical, cognitive, language, socio-emotional, personality and spirituality perspective;

(d) each child has the right to speak out, participate and get involved according to their capacity level in matters relating to their best interests and welfare;

(e) children, parents, guardian, community and society are aware of children's rights for survival, protection, development and participation; and

(f) research and development on children's survival, protection, development and participation be carried out from time to time.

The Policy also lays down the various strategies designed to achieve the objectives mentioned above. The following strategies concerning 'Survival' are stated as follows:

(a) Provide basic needs such as identity, shelter, food, drink, clothing, love, security and a conducive and child friendly environment;

(b) Enhance collaboration between government agencies, NGOs, private sector and local communities in health care, safety and education for prosperity and welfare of children;

(c) Improve quality and expand support services and social assistance according to the needs of children including disabled children and orphans;

(d) Expand access to appropriate information and materials from various sources so that the children have the knowledge and skills for their survival; and

(e) Ensuring that children received social security protection.

The strategies stated above emphasise the importance of providing maintenance to children. The writer intends to focus on strategies (b) and (e) for the purpose of this thesis. Strategies (a), (c) and (d) would not be discussed here as these strategies are already codified in the existing maintenance laws. On the contrary, strategies (b) and (e) are new issues that need to be discussed in order to ensure that the authorities concerned do indeed implement these measures to safeguard the welfare of our children.

Strategy (b) suggests that in order to protect the welfare of children, there is an inevitable need to promote cooperation between government agencies, NGOs, private sectors and the local communities in health care, safety and education. It is submitted that it is insufficient to merely state on paper the need for such collaboration. Positive steps need to be taken to ensure that all the parties mentioned in strategy (b) join hands in ensuring that the welfare of children in Malaysia is not neglected.

In addition to strategy (b), it is interesting to note that strategy (e) clearly provides that it must be ensured that children received social security protection. The policy, howsoever, does not define 'social security protection'. At this juncture, two issues arise. First, who would be giving out this social security protection to the children? Would it be given by the state as is done by Western countries? It is respectfully submitted that as Malaysia is not a welfare state as the Western countries, she is not in a position to provide social security protection to the children. At the most, it could be observed that the Social Welfare

Department provides financial assistance to a certain extent to the poor and needy. Hence, this financial assistance is only provided to children who are 'poor and needy'.

The second question that arises is as to who is entitled to this social security protection? The strategy merely states 'children' Does it mean that all the children in Malaysia are entitled to receive this protection or is it only meant for the poor and needy?

Reference at this point could be made to the definition of 'children' in the policy. 'Children' are defined as a person below the age of eighteen as enshrined in the CRC and the Child Act 2001. The CRC in Article 1 states that child for the purpose of the CRC means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

> The Child Act 2001 defines 'child' as:
> 'child' –
> (a) means a person below the age of eighteen years; and
> (b) in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code.'

Referring to the above definitions, it could be noted that they (the said definitions) merely state that a child is a person below the age of eighteen. Thus, the question that arises at this juncture, is whether all the children in Malaysia below the age of eighteen are entitled to social security protection? If the answer to this question is in the affirmative, single mothers and children who are abandoned or neglected by their parents or guardians need not worry about their financial support. However, it is sad to note that this is not the case in Malaysia. There are many children who are left to fend for themselves on the streets, some even begging, as a result of being abandoned by their parents or guardians.

The situation in Malaysia pertaining to abandonment of children could be observed from the following examples, taken from press reports. On 2 November 2015, the Malay Mail reported that 'A baby is found abandoned in the country every four days based on the statistics acquired from the police over five years but the figure could be much higher'.[55] The report referred to a statement made by a psychiatrist, Dr Salmi Razali who said, 'For every 100,000 live births, there is an estimated 16.33 babies found abandoned illegally in 2011, compared to 13.06 in 2007'.

The Home Minister, Datuk Seri Dr Ahmad Zahid Hamidi, in his interview to the The Star, referred to the act of baby dumping as someone's 'inappropriate behaviour'.[56] The Minister also said that 'Based on investigations conducted by the police, baby dumping cases are also a fast way to cover up embarrassment'.

In January 2016, in her interview to the Star, the current Women, Family and Community Development Minister, Datuk Seri Rohani Abdul Karim said that the number of baby dumping cases in 2015 was the highest, at 104, since 2011. [57]She also stated that the number stood at 98 in 2011, 90 in 2013 and 103 in 2014. She encouraged out-of-wedlock pregnant women and girls to seek advice and counselling through Childline 15999 (*TalianNur 15999).*[58] This is a line set up by the Women, Family and Community Development Ministry for children, which includes girls, to call and seek information or to report abuse and neglect. In this regard, the Minister also said that her ministry fully supported the 'baby hatch' concept mooted by OrphanCare as it has reduced fatalities among the babies being dumped. The ministry has, through the Department of Social Welfare, established *Taman Seri Puteri* (TSP)

[55]S.K. Thanusha Devi, 'Born to be abandoned and left to chance', The Malay Mail, 2 November 2015.
[56]T.Avineshwaran, 'Zahid: 87 baby dumping cases reported as of September this year', The Star, 5 November 2015.
[57]Loh Foon Fong, 'More than half of 104 dumped babies found dead in 2015', The Star, 17 January 2016.
[58]Childline 15999 is a helpline for distress set up by the government to report on matters such as abuse, neglect, domestic violence, juvenile issues, poverty, single mothers, to name a few. Information obtained from the Official Website of the National Population and Family Development Board at http://www.lppkn.gov.my/index.php/en/nur-info.html

and *Pusat Jagaan Sinar Kasih* shelter homes. These homes provide protection and care to pregnant women and girls out-of-wedlock.

As stated in pages 62 and 63 above, the Social Welfare Department provides financial assistance to a certain extent to the poor and needy. However, this Department would only be able to assist if the individuals or NGOs apply (on behalf of the poor and needy) for such assistance. However, the problem that arises is how would a child know the procedure to apply for such assistance from this Department if he or she is abandoned or neglected by his parents? Hence, it is important for the relevant authorities to take positive steps to ensure that strategy (e) in the National Child Policy is successfully implemented in the interests of these children.

In addition to the strategies mentioned above, realizing the importance of creating awareness among the families and the communities on the rights of children, the following strategies have been designed under Objective 5 'Advocacy':

(a) To increase awareness among families and communities on the importance of health care to children;
(b) To increase awareness among families and communities on equal rights of children from any form of discrimination;
(c) Strengthen existing programmes and introduce a suitable programme for the prevention of abuse, neglect, violence and exploitation of children;
(d) Raising awareness of parents, guardians and community members on the importance of care and education for children; and
(e) Increase awareness and understanding of the rights, welfare and interests of the child to all parties concerned.

Having looked at some of the important strategies designed to achieve the objectives of the Policy which are relevant to this thesis stated above, it could be observed that all these strategies are drafted with the sole and noble aim of protecting and safeguarding the welfare of the children in Malaysia. At the same time, it is disheartening to note that these strategies are mere clauses in a policy and not provisions in a statute. Policies have to be enacted into laws in order for them to be enforceable in the courts. Hence, it is submitted that it is time that the Malaysian legislature takes positive steps to incorporate these strategies in the laws concerning children in Malaysia in order to ensure that their (the children's) welfare is indeed safeguarded.

2.4.5.2 Child Protection Policy

The National Child Policy was drawn up with the intention of safeguarding the welfare and lives of children on the whole. On the other hand, the Child Protection Policy was drawn up to specifically protect children against neglect, abuse, violence and exploitation. This Policy is also in line with the philosophy of the Convention on the Rights of Child (CRC) and the Child Act 2001.

The definition of 'child' under this Policy is similar to the definition under the National Child Policy. 'Child protection' refers to the strategies and activities to prevent and respond to neglect, abuse, violence and exploitation of children.

The drafters of this Policy have defined the meanings of 'neglect', 'child abuse', 'physical abuse', 'emotional abuse', 'sexual abuse', 'violence' and 'exploitation'. For the purposes of this thesis, the writer intends to specifically refer to the definition of 'neglect" which states as follows:

> ‘Neglect’ refers to a continuous and serious failure to provide basic physical, emotional and development in health, education, emotional development, nutrition, shelter and safe living for children. Neglect can expose children to all forms of harm, including threatening their lives.’

In short, the definition of ‘neglect’ above refers to the failure to maintain a child.

In its Policy Statement, the policy states that it focuses on advocacy, prevention, support and research and development to protect children. The Policy is a catalyst for awareness and commitment of all parties including all members of the society in protecting children.

The seven main objectives of the policy are as follows:

(a) To increase awareness and commitment of various parties towards the safeguarding of children as a shared responsibility;
(b) To create a safe and child friendly environment;
(c) To encourage organizations that deal directly or indirectly with children to develop a policy on child protection for their respective organizations;
(d) To protect all children from any form neglect, abuse, violence and exploitation;
(e) To decide that only appropriate individuals should deal directly with children;
(f) To improve support services to address the issues of neglect, abuse, violence and exploitation of children; and
(g) To increase research and development to improve child protection.

One of the strategies outlined to promote advocacy is ‘to adopt and promote awareness of the importance of the responsibility of protecting children to all levels of society including

the creation of partnerships (smart partnerships) with the media and non-governmental organizations (NGOs) including the private sector and community organizations.'

Three strategies have been designed to prevent children from being neglected, abused and exploited. One of the strategies, which the writer feels is crucial to provide basic knowledge to children to enable them to protect themselves from neglect, abuse, violence and exploitation and to identify the risk to them.

The Policy goes on provide information on places such as the police station, the Social Welfare Office, Childline *15999* and the Ministry of Women, Family and Community Development which the public could turn to in the event there is a child abuse or baby dumping case.

2.5 COMPARING WITH THE DEVELOPMENT OF MAINTENANCE LAWS IN SINGAPORE

As Singapore and Malaysia share the same origin of maintenance laws, the writer would next examine the development of maintenance laws in Singapore in order to see if their maintenance laws are pro the welfare of a child.

Singapore was part of the Straits Settlements via the Second Charter of Justice 1826. Therefore, the origin of a parent's duty to maintain his or her child in Singapore too is found in the Straits Settlements Summary Criminal Jurisdiction Ordinance 1872. This Ordinance places the duty on both the parents. When the Straits Settlements was dismantled, Penang and Malacca joined the other states in Peninsular Malaya after World War 2. Singapore became a separate Crown Colony. Under the British control, Singapore was granted increased levels of self-government. In 1963, Singapore merged with the Federation of

Malaya to form Malaysia. However, as a result of social unrest and dispute between the Singapore People's Action Party and the Malaysia's Alliance Party, Singapore became an independent republic in 1965.[59]

The Women's Charter, which forms the key piece of legislation in Singapore of matters concerning family law in Singapore was enacted in 1961. One major amendment made under this Charter, when compared to the provisions in the Straits Settlements Summary Criminal Jurisdiction Ordinance 1872, was the removal of the maximum amount awarded to illegitimate children under the said Ordinance and place the illegitimate children on an equal footing with the legitimate children.[60]

Since it was enacted, the Women's Charter has undergone several amendments, including provisions on maintenance. The writer will focus on the key amendments pertaining to maintenance. In 1980, the Women's Charter (Amendment) Act 1980 amended the existing laws on maintenance by dividing the persons liable to maintain children into two groups: 1) parent and 2) persons who accept the child as a member of the family.

In 1996, the Women's Charter Amendment Act 1996 passed two major amendments. First, the duty to maintain a child is the same, whether the parents' marriage is still subsisting or has been terminated. Previously, there were separate provisions in the Women's Charter pertaining to the duty to maintain: 1) duty to maintain when the parents' marriage still subsists and 2) the duty to maintain upon termination of marriage. Secondly, the amendment also extended the duty to main children who have reached the age of majority in Singapore,

[59]Information obtained from '*Singapore Separates From Malaysia and Becomes Independent'* accessed at the Singapore Government's website at http://eresources.nlb.gov.sg/history/events/dc1efe7a-8159-40b2-9244-cdb078755013 on 1 February 2017.
[60]Leong, Wai Kum, Principles of Family Law in Singapore, (Singapore: Butterworths Asia, 1997), at 855.

i.e. 21 years in exceptional circumstances, one of which is if the child is pursuing tertiary education.

In 2011, the Women's Charter Amendment Act 2011 introduced some substantial amendments to the Charter. One of the key amendments was to enhance the enforcement of maintenance orders. The court is empowered to impose new sanctions and penalties (in addition to the existing penalties) on persons who default on maintenance orders such as:

(a) ordering defaulters to set up a banker's guarantee against future defaults;

(b) perform community service orders;

(c) attend financial counselling;

(d) direct the Central Provident Fund Board to disclose the employment information of a defaulter for attachment of earnings orders.

Finally, in February 2016, the Charter was once again amended. On the issue of maintenance, it stated that spousal maintenance is to be extended to incapacitated husbands or ex-husbands. This provision is similar to section 77(2) of the Malaysia Law Reform (Marriage and Divorce) Act 1976.

From the above examination of the development of maintenance laws in Singapore, it could be noted that the Singapore legislature has been pro-active in ensuring that the children's welfare is safeguarded. It is indeed disheartening to note that although Malaysia and Singapore have the same roots in maintenance laws, Singapore has advanced far ahead, even though they have only one piece of legislation to work on, whereas there are about two or three pieces of legislation in Malaysia.

2.6 DISCUSSION

Having examined the right to maintenance of a child under different religions as well as different nations, the writer is able to arrive at one conclusion. Save for the position under common law, all the religions examined as well as the different legal systems looked at in this Chapter, impose a duty on the father to maintain his child. Therefore, it is submitted that the duty to maintain a child is considered as an inevitable duty on the parents, especially the father, by religions as well as the legal systems.

The various pieces of legislations and policies passed by the Malaysian Legislature and the Cabinet in the last two centuries have also been highlighted above. Looking at the number of legislations on children's rights, it cannot be said that Malaysia does not have sufficient laws to protect such rights, in particular the right to maintenance. The existence of these laws and policies shows that the Government has given recognition to the fact that the right of a child to maintenance is crucial and needs to be safeguarded. Nevertheless, despite the existence of these pieces of legislations, the real question that needs to be answered at the end of the day is whether these laws are indeed effective in protecting and safeguarding the rights, interests and welfare of the children in Malaysia.

In order to answer the question above, the writer intends to examine certain important issues pertaining to the right of a child to maintenance. The relevant provisions in the maintenance laws would be examined when discussing these issues to see if there are any weaknesses or *lacunae* in the laws that need to be rectified.

In examining whether the current maintenance laws in Malaysia have indeed safeguarded a child's right to maintenance, the writer would be discussing several issues in the following order:

(a) Children's (both legitimate and illegitimate) right to maintenance as provided for under the relevant maintenance laws;

(b) Whether young vulnerable adults[61] have a right to continue claiming maintenance under the existing maintenance laws, in particular, the right to pursue their tertiary education;

(c) Arrears of maintenance and variation/rescission of maintenance orders; and

(d) Enforcement of maintenance orders.

As an examination of all the provisions in the maintenance laws would be beyond the scope of this thesis and would also exceed the word limit imposed, the writer would focus on certain pertinent issues (as stated above) in relation to a child's right to maintenance in Chapters 4, 5,6 and 7 of this thesis. Having discussed these crucial issues, the writer would then attempt to recommend reforms to the existing laws in order to ensure that the right to maintenance, in particular, and the welfare of children, as a whole, is protected in Chapter 8 of this thesis.

2.7 CONCLUSION

In conclusion, it is reiterated here that the benchmark set by the various religions and legal systems is that the parents have a duty to maintain their child. The duty imposed by the religions, however, could be described as a moral duty and does not attract any penalties. On the other hand, the legal systems impose penalties if the parents neglect or fail to maintain their child.

[61] *'Young vulnerable adults'* as explained under Terms and Terminologies in Chapter 1 refers to persons between the ages of eighteen to twenty-four.

It is also submitted that having examined the development of the maintenance laws in Malaysia and Singapore, we are lagging far behind when compared to Singapore in many aspects as would be discussed in Chapters 4, 5, 6 and 7. Hence, the writer aims to examine the weaknesses that exist in our laws and compare the position in Singapore, England and Wales and Australia and would attempt to suggest certain recommendations in order the safeguard the right to maintenance of the innocent children in Malaysia.

CHAPTER 3: THE CHILD WELFARE PRINCIPLE IN RELATION TO THE RIGHT TO MAINTENANCE

"It is the theory that decides what can be observed"

- *Albert Einstein*

3.1 INTRODUCTION

Before proceeding to discuss child maintenance issues, it is trite to examine the foundation on which the right to claim maintenance is based. It is pertinent to see whether the foundation is strong before examining the problematic issues concerning child maintenance. If the foundation is weak, the arguments in favour of protecting the child's right to claim maintenance would collapse. Therefore, the purpose of this Chapter is to examine the relevant theoretical framework which constitutes the foundation for the right to claim maintenance.

In a basic family unit comprising a father, mother and children, the child is the most vulnerable person and as such the welfare of the child requires maximum deliberation. The state, therefore, plays an important role in enacting laws concerning children which should focus on one very important aspect, i.e. the welfare of the child.

The principle of welfare of children or 'the paramountcy', which originated in the Chancery Courts, has been applied by the judiciary when deciding any question with respect to a child's upbringing. The court states that the welfare of the child is to be the single deciding factor[1], which is paramount over and in fact, displacing all other considerations.[2]

[1] *J v C* (1970) AC 668.
[2] Shazia Choudhry and Fenwick, Helen *"Taking the Rights of Parents and Children Seriously: Confronting Welfare Principle under the Human Rights Act",* Oxford Journal of Legal Studies, Vol. 25, No.3, 453-492.

Thus, the purpose of this Chapter is to examine the welfare principle in relation to child maintenance and in particular, to analyse the relevant theoretical framework that is applicable.

3.2 THE CHILD WELFARE PRINCIPLE IN RELATION TO CHILD MAINTENANCE

Judicial decisions generally have applied the welfare principle in relation to matters concerning adoption,[3] custody and guardianship[4] of children. In this thesis, the writer will attempt to connect the welfare principle to child maintenance, the reason being, adoption, custody and guardianship refer to the duty to maintain children, which includes providing food, clothing, shelter and education to the child. Therefore, the welfare principle should equally apply to maintenance of children.

The welfare principle forms the basis for the protection of the rights and interests of children. The landmark case in England on the welfare principle is the case of *J v C*.[5] In this case, Lord Mac Dermott described the paramountcy of welfare principle as:[6]

> ... a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term is now to be understood. That is the first consideration because

[3] *Re L (An Infant)* [1962] 3 All ER 1, *Re V (A Minor)* [1986] 1 All ER 752., *Re TSY(An Infant) [1988] 3 MLJ 43.* See also section 13 of the Adoption Act 1952,which provides for the duties of a guardian *ad litem*. A guardian *ad litem* has a duty to investigate all the circumstances of the child applicant and all other matters relevant to the proposed adoption in order to protect the welfare and interest of the child.
[4] *Re Satpal Singh, An Infant* [1958] MLJ 283, *Masam v Salina Saropa& Anor* [1974] 2 MLJ 559, *Tey Leng Yeow v Tan Poh Hing*[1973] 2 MLJ 53, *Chua Thye Peng v Kuan Huah Ong* [1978] 2 MLJ 217, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, *Loura Doris a/p Laurence v Thuraisingam a/l James* [1995] 2 MLJ 229.
[5] [1970] AC 668; [1969] 1 All ER 788.
[6] [1970] AC 668, at pp. 710-711; [1969] 1 All ER 788 at pp.820-821. Reference could also be made to the cases of *Re Mc Grath(Infants)* [1893] 1 Ch 145 and *Walker v Walker and Harrison* [1981] NZ Recent Law 257 regarding the paramountcy of the welfare principle.

> of its first importance and the paramount consideration because it rules upon or determines the course to be followed.

In relation to child maintenance cases, the court's role is to ensure that the right of a child to be maintained by his parents is adequately protected. Parents, as primary caregivers, have the duty to maintain their child. The duty to maintain children is provided for in section 92 of the Law Reform (Marriage and Divorce) Act 1976[7] (hereafter referred to as the 'LRA') as:

> ... it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, ... either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

Hence, the court in exercising its judicial function should always refer to the welfare principle as the basic premise in upholding the child's right to maintenance.

3.3 Theories in relation to child welfare

According to Karla T. Washington in her article *Attachment and Alternatives: Theory in Child Welfare Research,*[8] 'if theory serves as an anchor for decision-making in child welfare, it is important that the theories be appropriate to and useful in child welfare practice, as well as in accordance with professional ethics'. Hence, it is pertinent, at this juncture, to refer to the relevant theories in relation to child welfare and determine which theory is the most appropriate to child maintenance. A detailed study of the various theories that apply to child

[7] Act 164.
[8] Washington, Karla T., Attachment and Alternatives: Theory in Child Welfare Research, Advances in Social Work, Vol. 9, No.1 (Spring 2008), 8-16.

welfare was done by the Karla T. Washington.[9] These theories would be briefly looked at below, after which, the writer would conclude by stating which theory best suits child maintenance and the reasons for it.

3.3.1 Crisis Intervention Theories

These theories basically look at how individuals are able to cope with change.[10] Generally when a person experiences a taxing or stressful situation, he may learn new skills in order to cope with the situation and emerge from the situation better able to handle the situation. On the other hand, if the person fails to acquire the relevant coping skills, he will be susceptible to behavioural and mental problems.[11]

In relation to children, children who have been abused or neglected, may be removed from their families and sent to protective services, where they would experience events that challenge their ability to cope. According to Karla T. Washington (in her article stated above)[12], if the critical intervention theories are applied, the following could be observed concerning children:

(a) it would be useful to see how these children cope with maltreatment;

(b) how children regain a sense of normalcy following removal from their homes of origin, entry into the foster care system, and introduction of new caregivers;

(c) research findings may also inform child welfare workers, law enforcement officers and mental health professionals of which interventions improve the experiences of children in the children welfare system.

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[9] *Ibid*.
[10] Roberts, A.R,"An overview of crisis theory and crisis intervention", In A.R. Roberts (Ed.), *Crisis Intervention handbook*, 2nd ed., (New York, NY: Oxford University Press,2000,) at 30.
[11] *Ibid*.
[12] *Supra* n 8.

As to the question whether the critical intervention theories is applicable to child maintenance, the writer submits that these theories mainly look at situations where children, who have been abused or neglected, are removed from their family homes and sent to protective services. In this thesis, the main objective is to examine whether the child maintenance laws in Malaysia adequately protect the rights of children to get maintenance from their parents. As such, the child would generally be staying with at least one parent in this context. Thus, the issue of whether a child adapts himself in a new environment would not be examined in this thesis. Therefore, the critical intervention theories would not be appropriate.

3.3.2 Anti-discrimination Theories

Anti-discrimination theories, as the name suggests, looks at the conditions that exist which empower the privileged groups or oppressive forces present in our society's institutions and which pose a threat to society and individuals.[13]

In relation to child welfare, the most discussed discrimination in the past decade is with regard to members of the gay, bisexual, lesbians and transgendered community and whether they are capable of providing a stable environment for children whom they intend to adopt.[14] In addition, research may also look into whether adolescents who are homosexuals are adequately supported in foster homes or alternative care setting.[15]

It is submitted that the anti-discrimination theories do not apply to child maintenance as the main focus in child maintenance cases is on the right of a child to get maintenance from

[13] Thompson, N, Anti-discriminatory practice, 3rded, (Basingstoke: Palgrave Macmillan 2003) cited in *supra n 8* at 12.
[14] *Supra* n 8
[15] *Ibid.*

his parents or guardians. There is no reference to the issue of whether members of the gay, lesbian, transsexuals or bisexuals are capable of looking after children.

3.3.3 Social Construction Theories

As a result of participating in social processes, human beings start to understand reality.[16] A social phenomenon which is labelled as 'social problems' is not inherently problematic. It only becomes a social problem when a group of influential persons call for political or social action in order to alter a certain condition.[17] For example, research applying the social construction theories may examine if there is anything wrong with single parent families. Another issue that may be examined, applying these theories is whether studies looking into the 'problem' of children being brought up by their grandparents have different results if society generally accepts this as legitimate.[18]

With the gaining of popularity in child welfare settings by the strengths perspective in the last decade, child welfare workers now face a challenge in changing the ways they have thought or wrote so far about their clients and their families. What has been labelled as 'problems' all this while would now be referred to as opportunities or needs.[19]

In relation to child welfare, the questions that arise when applying the strengths perspectives, first, the effectiveness of this perspective in changing the attitudes of child welfare workers, and secondly, if there is a change in the attitudes of these workers, is the end result beneficial to the clients, i.e. the children?

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[16] Berger, P.L. and Luckmann, T., *The social construction of reality*, (Harmondsworth: Penguin, 1971), cited in *supra* n 8 at 12
[17] Kituse, J.I. and Spector, M. "The definition of social problems", (1973*), Social Problems*, 20(4), 407-419.
[18] *Supra* n 8
[19] Saleebey, D. (Ed.), The strengths perspective in social work practice, 3rd ed., (Boston, MA: Allyn & Bacon., 2001), cited in *supra* n 8 at 13.

The above explanation shows that the social construction theories deal mainly with specific isolated situations or problems raised by groups who have considerable influence. As such, it is submitted that these theories would not be applicable to child maintenance as child maintenance covers various issues such as the meaning of child, illegitimate children, the duration of the parents' duty to maintain, enforcement of the maintenance orders, to name a few.

3.3.4 Critical Theories

Critical theories believe that the political and economic inequalities that exist in the society should be rectified. Critical theories believe that changes at a macro-level should be created by the members of the society so that exploitation at a macro level could be minimized. They also believe that power should be distributed more equitably.[20]

In relation to child welfare, the studies applying critical theories may question the intention or 'hidden agendas' of social workers by asking questions such as whether the work is actually based on the child's best interests or whether there is any politically or economically motive behind it, considering the rise in the number of private agencies providing child welfare services. Further thereto, these theorists may also examine the legal processes involved in child welfare system and see whether the children concerned or their families actually understand the legal issues that arise.[21]

Although critical theories do apply to a certain extent to child maintenance as the focus is on whether child welfare decisions are made in the child's best interest, it is submitted that these theories only apply when decisions are made after the problem arises, whereas in this

[20]Pozzuto,R., Angell, G.B. &Dezendorf, P.K "Therapeutic critique: Traditional versus critical perspectives", In S.Hick, J.Fook&R.Pozzuto (Eds), *Social Work: A critical turn,*(Toronto: Thompson Educational Publishing,2005).
[21]*Supra* n 8

thesis, the main focus is on the adequacy of protection provided by the child maintenance laws. If the maintenance laws are effective, then the problems relating to the neglect of a child by his parents or guardian by not providing maintenance will be minimal.

3.3.5 Attachment Theory

The basis of the attachment theory is that a child's relationship with a primary caregiver during infancy is critically important to later development and serves as a prototype for the child's relationship throughout the lifespan.[22] According to this theory, a consistent primary caregiver (which is usually the mother) is necessary for the child's optimal development.[23] However if the mother is not present, a primary caregiver would then step into shoes of the child's mother in order to play the same role.

The presence of a caregiver tends to make the child feel safe and secure. Children, whose lives start with the essential basis of secure attachment, tend to fare well in every aspect as they grow up.[24]

Based on the brief explanation above, the writer is of the opinion that this theory best suites child maintenance. The main reason for this is due to the fact that maintenance basically deals with the duty of parents as primary caregivers to maintain their child. Although the attachment theory generally looks at the role a primary caregiver plays in a child's emotional development, it is submitted that this theory is also applicable to other aspects of a child's development, such as his physical development (which includes the need

[22] Howe, D, *Attachment theory for social work practice*, (Bassingstoke: Macmillan, 1995).
[23] Deanna, M. Swartaout-Corbeil RN, "Attachment between infant and caregiver", *Encyclopedia of Children'sHealth*, http://www.healthofchildren.com/A/Attachment-Between-Infant-and-Caregiver.html accessed on 4 January 2017.
[24] *Ibid*.

for basic necessities) and educational needs. The attachment theory would be discussed in detail below in order to see how it applies in relation to child welfare.

3.4 THE ATTACHMENT THEORY

A brief explanation on the attachment theory was given above. In this section, the writer would attempt to examine the attachment theory in depth in order to observe its application to child welfare, in particular, to child maintenance (for the purposes of this thesis). This part would first look at the definition of 'infant attachment', the history or origin of the theory, the main propositions of this theory, the criticisms raised against this theory and finally the theorists' response to the said criticisms.

3.4.1 Definition of 'Infant Attachment'

'Infant Attachment'' has been defined by Deanna M. Swartaout-Corbeil RN in her article entitled 'Attachment between infant and caregiver' as:

> ... the deep emotional connection that an infant forms with his or her primary caregiver, often the mother. It is the tie that binds them together, endures over time, and leads the infant to experience pleasure, joy, safety and comfort in the caregiver's company.[25]

The above definition denotes the important role a primary caregiver plays in the emotional development of a child. It is stated in the above definition that the primary caregiver is often the mother, as the mother plays a pivotal role in a child's life. This fact is acknowledged by the law as well. For example, section 88(3)of the LRA provides that there is a rebuttable presumption that it is for the good of a child below the age of seven years to

[25] *Ibid*.

be in his or her mother's custody. This provision shows the importance the law places on a mother's natural love and affection towards her child. However, in exceptional cases, if the mother is dead or has abandoned the child, the father steps into the shoes of the mother as the primary caregiver. In the absence of both the parents, the court then appoints a third party, usually a relative of the child, as the child's guardian. This guardian then assumes the role of a primary caregiver.

3.4.2 History of the Attachment Theory

Before looking at the propositions of the Attachment theory and how this theory applies in child welfare, it is pertinent to look at the brief history behind this theory.

Prior to the development of the modern Attachment theory in the 1950s, the traditional view by many developmental psychologists concerning this theory was that attachment is 'a special relationship between an infant and a caregiver'.[26] It is also viewed 'as an important building block for later relationships and adult personality'.[27]

In addition, the traditional view was that attachment was a secondary drive, as a result of primary drives like hunger. As such, a child's attachment to his mother arose as a result of the fact that she supplied him with food and warmth.[28]

The origin of the Attachment theory could be traced back to as early as the turn of the 20th century, to Sigmund Freud's psychoanalytic theory of development. Freud was the first theorist who proposed a stage theory development,[29] wherein he states that in the first stage,

[26] Attachment, http://psychology.jrank.org/pages/49/Attachment.html accessed on 4 January 2017.
[27] *Ibid*.
[28] *Ibid.*
[29] Attachment – History of Attachment Theory, http://social.jrank.org/pages/45/Attachment-History of Attachment Theory.html accessed on 4 January 2017.

i.e. the oral stage, an infant's relationship with his mother develops due to the fact that she satisfies his hunger.[30]

However, a contrast opinion was formed by Harry Hurlow, who together with some colleagues, stated that feeding alone is not the basis for attachment relationships. This conclusion was reached as a result of a series of famous experiments which were done on infant rhesus monkeys. These experiments showed that the monkeys, who were raised in isolation, preferred the comfort of a surrogate mother covered in cloth to a surrogate mother made out of wire-mesh holding a feeding bottle.[31]

Sigmund Freud's student, Erik Erikson also stressed that it is pertinent that children should be able to trust that their parents are capable of satisfying their needs. This trust would be the basis for the child's later social and emotional development.

The above-mentioned theorists held the traditional view of the Attachment theory. The first theorist who developed a modern Attachment theory in 1950 was John Bowlby, a British psychiatrist. His modern Attachment theory was a variant of Freud's theory that an infant's relationship with his mother was important to build his adult personality.[32] Bowlby's works became prominent after World War II. He worked in the orphanages in London with children and adolescents after the World War II. He found that children who had been separated from their caregivers, especially their mothers, were the ones who were most disturbed.[33] During his service at these orphanages, he noticed that children, whose parents displayed ambivalence or outright rejection, were the ones who suffered from behavioural and emotional problems.[34] As a result of the above observations, Bowlby made a hypothesis that

[30]*Ibid.*
[31]*Ibid.*
[32]*Supra* n26.
[33]*Supra* n29.
[34]*Ibid.*

a child's later mental health depended on a caregiver's emotional attitude towards him, and a child's mental health is dependent upon a child feeling wanted and loved.[35]

Following Bowlby's footsteps, Mary Ainsworth, an associate of his, came up with a test called the Ainsworth Strange Situation test. This test basically measures a child's type and degree of attachment that he feels for his mother. Having undergone this test, the children would be labelled as 'securely attached', 'insecure-avoidant' and 'insecure-resistant'.[36]

3.4.3 Three Main Propositions of the Attachment Theory

Both John Bowlby's and Mary Ainsworth's works form the core of the Attachment theory. Three main propositions could be drawn from both their works, which are as follows:[37]

> The first proposition states that a child's emotional ties to his caregiver could be looked at from an evolutionary perspective.[38] Infants who develop a close relationship with their caregivers are more likely to survive and more likely to reproduce. Their closeness with their caregivers could be said to be an adaptive strategy as it would protect them from environmental hazards and thus provide an evolutionary advantage.[39]
>
> The second proposition states that attachment is grounded in a motivational control system which organizes a child's behaviour.[40] The main goal of a child is to feel safe in the arms of his caregiver in the presence of danger. The child's sense or feeling of

[35] *Ibid.*
[36] *Supra* n 26. This test would be discussed in detail later in this Chapter under sub-topic 3.4.5 Ainsworth's Attachment Theory.
[37] As discussed in the following article :- Attachment-Three Main Propositions of Attachment Theory, http://social.jrank.org/pages/46/Attachment/-Three-Main-Propositions-Attachment-Theory.html#ixzz1x749t2 accessed on 4 January 2017.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*

security depends on how the caregiver responds to his needs. If the caregiver cares about the needs of the child, the latter would not feel scared about his needs not being met in times of danger and would then tend to depend on his caregiver. On the other hand, if the caregiver is not responsive to the needs of the child, the latter then would not trust the caregiver and would not turn to him in times of distress.

The third proposition states that internal working models during the early stages of a child's life guide the child's behaviours and feelings later in life. 'Internal working models' here refer to the following:[41]

> 'Internal' refers to the fact that they reside in the child's mind;
> 'Working' refers to the fact that they guide the child's behaviour and perceptions; and
> 'Models' refers to the fact that they are cognitive representations of relationship experiences.

Children tend to rely on these models who guide their future interactions. A child's knowledge which he gains from his interaction with his primary caregiver, usually the parent, is extremely important. This is because loving parents tend to mould the child's positive models of relationships based on trust. The child concerned views himself worthy of care. At the same time, these children who have loving parents also tend to simultaneously assume that other people in their lives, including their teachers and friends are also trustworthy. These are called parallel working models.

[41] *Ibid.*

3.4.4. Bowlby's Attachment Theory

John Bowlby's initial work was to attempt to understand the distress an infant felt upon being separated from his primary caregiver. He looked at their behavioural patterns when they were separated from their parents which usually would be crying and frantically searching for the parents. These, according to Bowlby, are adaptive responses to separation from a primary attachment figure, i.e. someone who provides the child support, protection and care.[42] Infants are dependent on adults for care and protection as they are unable to fend for themselves.

Although the discussion above so far seems to indicate that the Attachment theory centres on the relationship between an infant with a primary caregiver, a child is capable of multiple attachments. Children usually become attached to more than one person during their first year.[43] The factors or variables that decide on who will serve as an attachment figure, according to Bowlby would be 'responsiveness to crying and readiness to interact socially'.[44]

The multiple attachments that a child forms in most cultures would refer to biological parents, grandparents, older siblings, aunts and uncles.[45] Although a child may be attached to more than one person, the fact that a child is most attached to the primary caregiver, who is usually the mother, cannot be denied. The effect of separation from a primary caregiver on a child is more stressful when compared to separation from subsidiary caregivers. The reason as to why a child needs a primary attachment figure even though there are several subsidiary figures around him was explained by Bowlby as follows:

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[42] Farley, R, Chris, A Brief Overview of Adult Attachment Theory and Research, https://internal.psychology.illinois.edu/~rcfraley/attachment.htm accessed on 4 January 2017.
[43]Loewenton, Edward, "*Attachment Security in Infancy and its Consequences for Development of the Individual: The Origins of Attachment Theory and the varieties of parent-child interaction*," http://loewenton.org/security_and_attachment/default.htm accessed on 4 January 2017.
[44] Bowlby, John *A Secure Base*, (New York: Basic Books Inc.,1988)
[45]*Supra* n 43

> Most importantly, however, is that the mother, with the strongest genetics and metabolic investment in the child's well-being, is generally self-selected as the primary caregiver. It follows that the most adaptive for the child to use a primary attachment figure the person who is reciprocally most strongly bonded to the infant, and most heavily invested in the baby's healthy development.[46]

In addition, Bowlby also states that the existence of many subsidiary attachment figures does not mean that a child would be looked after very well. These subsidiary figures would have equal responsibilities to look after more than one child and thus, the care of a particular child may be overlooked. Further thereto, in times of stress, the child concerned does not have to assess and decide which caregiver he should turn to. On the other hand, if there is a principal or primary caregiver, the child would immediately seek the help of this person.[47]

In forming a conclusion, Bowlby said that in order for a child to grow up mentally healthy, 'the infant and young child should experience a warm, intimate and continuous relationship with his mother (or permanent mother substitute) in which both find satisfaction and enjoyment'.[48] Bowlby comments that the female parent plays a primary role in the emotional development of a child whereas the male parent plays second fiddle to the mother. The father's main role is to provide emotional support to his wifes' mothering.

3.4.5 Ainsworth's Attachment Theory

Mary Ainsworth, who is six years younger than Bowlby and a colleague of his, graduated just before World War 2. She conducted a study on the individual differences in infant

[46] *Supra* n 44
[47] *Ibid.*
[48] Bowlby, J. *Maternal care and mental health*, World Health Organization Monograph (Serial No.2), (1951),

attachment when both the infant and the parents are separated. Based on this study, Ainsworth and her students developed a technique called the ‘Strange Situation’. In this study, infants and parents are brought into the laboratory. They are then separated and later reunited with one another.

Based on her observation, Ainsworth noticed that there are three categories of infants. The first category of infants is securely attached infants. About 60% of the infants became upset when their parents left the room. However, when they are reunited with their parents, these infants actively seek the parents and are comforted by them.

The second category is labelled as insecure-avoidant. These infants, upon reunion with their parents, avoid and ignore them. They continue playing with their toys and may not want to communicate with their parents.

The third category of infants is insecure-resistant. These infants show mixed emotions upon being separated from their parents. They may seem independent one moment and then suddenly trying to find their mothers the next moment. When they are reunited with their mothers, they cling and cry, but at the same time exhibit conflicting behaviours that suggest that they want to ‘punish’ the parents for leaving them alone.

The above study by Mary Ainsworth is pertinent to note the emotional effect on an infant upon being separated from the parent. The different feelings exhibited by the infants upon reunion with their parents, according to Ainsworth, are correlated with the infant-parent interactions at home. Generally, securely attached children have parents who respond to their needs while insecure children (avoidant and resistant children), tend to have parents who do not respond to their needs or are not consistent in the care they provide.

3.4.6 Criticisms against the Attachment theory and the theorists' responses

The attachment theory has received criticisms, especially from feminist theorists, who state that this theory supports the traditional view of women as caregivers.[49] The feminist theorists further comment that as this theory advocates that the relationship between a child and his primary caregiver (again often a female) plays an important role in the psychological development of a child, it (the theory) then implies that any complications in the development can be attributed to problems within the child-caregiver relationship. This so-called 'mother-blaming' has been described by feminist writers as problematic, sexist and designed to support the status quo.[50]

In response to the above criticisms, the Attachment theorists state that the theory actually honours women and respect the significant contributions that women as caregivers make to the society as a whole.[51] Further thereto, the criticisms above by the feminist theorists is also not justified as the Attachment theory does not state that primary caregivers must only be mothers or be restricted to females.[52] The most important factor for an infant's healthy development, according to the Attachment theory, is that the infant needs a committed care giving relationship with one or a few adults. Although most of the studies tend to refer to the mothers as they are the ones who usually fill this role, there is evidence to show that infants are capable of multiple attachments (as discussed earlier in this Chapter), which include

[49]Chodorow, N., *The reproduction of mothering: Psychoanalysis and the sociology of gender*, (Berkeley, CA: University of California Press 1978); Johnson, M.M., *Strong mothers, weak wives*, (Berkeley, CA: University of California Press,1988).
[50]Controtto, S., "A feminist critique of attachment theory and evolutionary psychology", In M. Ballou & L.S. Brown (Eds), *Rethinking Mental health and disorder: Feminist perspectives*, Vol. xxii, (New York, NY: Guilford Press,2002) pp 29-47,
[51] Harvey, A.M.,), Interview with Dr Margaret Keiley, A feminist journey to attachment theory, Journal of Feminist Family Therapy, 15(1), 65-712003.
[52] Morris, P., Widows and their families, London: Routledge,1958, cited in Bretherton, Inge, "The Origins of Attachment Theory: John Bowlby And Mary Ainsworth", *Development Psychology* (1992), 28, 759-775, at 770.

fathers, grandparents and siblings.[53] Apart from these relatives, infants are also capable of being attached to their day-care providers.[54]

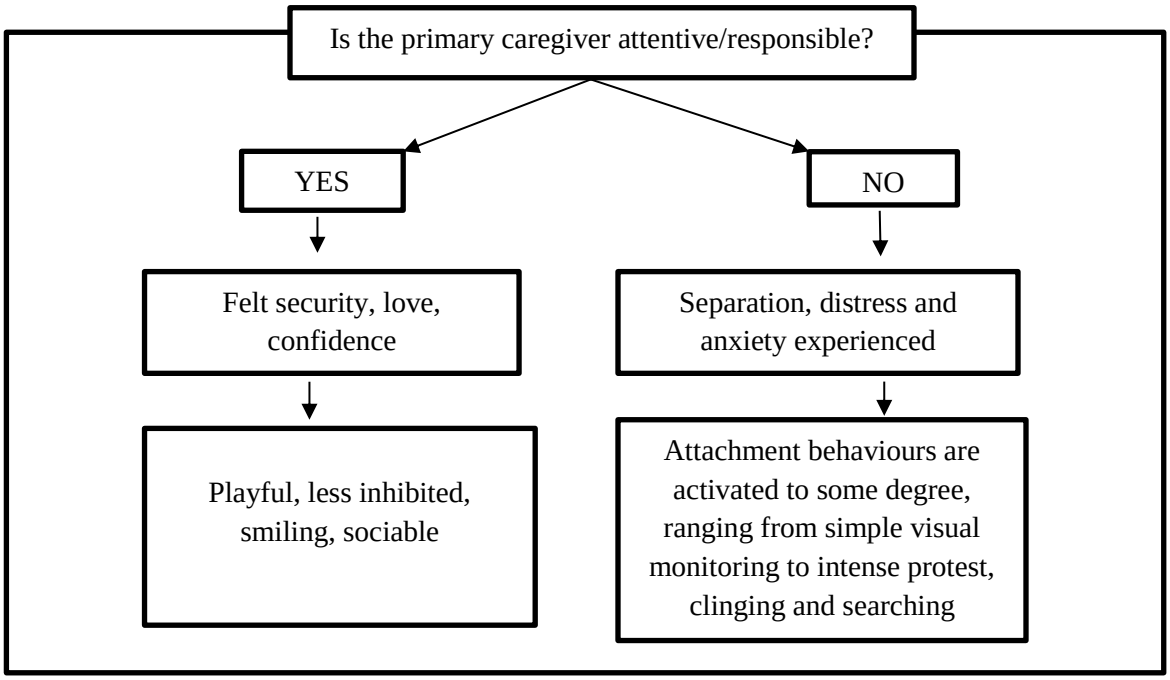
3.5 DISCUSSION

Based on both Bowlby's and Ainsworth's Attachment Theory, it could be observed that both these theorists emphasise the importance of the relationship between a parent and the child for the latter's emotional development. A child, who has insensitive parents who do not respond to his needs, would grow up not feeling wanted and may also be emotionally distressed. On the other hand, a child with loving parents who play an active role in responding immediately to his needs and shower him with love and affection would grow up being fond of or attached to his parents.

According to Bowlby, in his book *A Secure Base*,[55] children of insensitive parents stop communicating their distress to their parents by the age of twelve months. He explains the process by which different types of abuse would result in particular kinds of psychopathology in children and later in adulthood. This in turn affects the interaction between the parent and the child, and between the child and outsiders. Bowlby further states that as a consequence of the abovementioned situation, much of the child's emotions and early perceptions become unavailable to him and the child's ability to form relationships would be seriously and perhaps permanently impaired.[56] Bowlby's Infant's Attachment Patterns theory could be observed in the following table:

[53] Schaffer, H.R. & Emerson, P.F., The development of social attachments in infancy, Monographs of the Society for Research in Child Development, 29 (Serial No. 94),1964
[54] Howes, C. Rodney, C., Galuzzo, D.C. & Myers, I., Attachment and child care: Relationships with mother and caregiver, Early Childhood Research Quarterly, 3, 403-416,1988
[55] *Supra* n 44.
[56] *Ibid.*

Table 3.1: Infant Attachment Pattern



Source: Fraley and Shane (2000) cited in Fraley, R. Chris, 'A Brief Overview of Adult AttachmentTheory and Research, accessed at the following website https://internal.psychology.illinois.edu/~rcfraley/attachment.htm

Thus, it is submitted that parents who do not care for their children (for the purposes of this thesis, who do not maintain them), may end up causing emotional distress to the latter. Responsible parents would not fail in their duties to maintain their children and this in turn, according to Ainsworth's study, result in children who are securely attached.

Parents, who neglect their duty to maintain their child could be said to have abandoned their child. In an article by Ken R. Wells,[57] abandonment by parents could be due to three factors, i.e., by desertion, divorce and death. He further states that the effect of abandonment

[57] Wells, Ken R., *Abandonment, Encyclopedia of children's health*, http://www.healthofchildren.com/A/Abandonment.html accessed on 5 January 2017.

on children could be observed by dividing the children into two categories, i.e. children below the age of 9 years and adolescents from the age of 9 years to 18 years.

Children below the age of 9 years are further divided into three stages, first, infancy or toddlerhood, secondly, the preschool stage and thirdly, the school age (from 6years to 9 years). In the first stage, infants and toddlers, according to Wells, understand little about abandonment. Therefore, it is important for the remaining parent to shower the infant or toddler with affection frequently as the relationship between the parent and the child continue to be central to the child's sense of security and independence.[58]

Children, during the preschool stage, have a limited perception of abandonment and mistakenly tend to think that the parent who abandoned did so as a personal rejection. They have the fear that the remaining parent would also abandon him. As for the school-aged children, they are aware of the pervasive pain and sadness of a parent abandoning them. These children, especially the boys, mourn for their fathers and show their anger at their mothers. As a result, they often cry and some have problems with their friends and in school.

Adolescents could also be divided into two stages, i.e. from the age of 9 years to 12 years and from the age of 13 years to 18 years. As a result of a parent's abandonment, the first category of adolescents usually is anxious, restless, unable to concentrate on their studies and tend to worry about the family's finances. The second category becomes concerned about their own future. They too have problems in school and turn to drugs and alcohol. They become extremely dependent on the remaining parent.[59] Hence, it is extremely important for the remaining parent to re-assure the child that he or she would not abandon the child.

[58]*Ibid.*
[59]*Ibid.*

Therefore, in order to ensure that the welfare of children generally is protected, it is pertinent to have effective laws and policies on child maintenance. These laws should ensure that parents do not neglect their duties as primary caregivers in not only showering them with love and affection, but also by responding to their child's immediate needs, such as his basic necessities.

In this thesis, as stated in the 'Problem Statement' in Chapter 1, the writer intends to examine the maintenance laws that are currently in force in Malaysia in order to observe the weaknesses that exist in these laws and to suggest reforms to these weaknesses. In order to examine the effectiveness of these laws, the writer would refer to the Attachment theory as the foundation upon which these laws should be based. It is of no use having these laws that provide for a child's right to claim maintenance if the foundation is weak. It would then result in the right conferred by these laws becoming redundant.

The attachment theory is also pertinent in achieving the objectives of this study which have been stated in Chapter 1 and which are reproduced below:

(a) To identify the current situations concerning the problems faced by non-Muslim children in obtaining maintenance from their parents.

This objective refers to the practical issues that arise in claiming maintenance from their parents. Applying the attachment theory here, it is submitted that parents as primary caregivers, and who are attached to their children, would never in the first place neglect in maintaining their children and cause hardship to them. Such situations concerning children facing difficulties in claiming maintenance from their parents would not arise if the parents perform their duties as primary caregivers.

(b) To identify and critically analyse the laws on maintenance concerning non-Muslim children in Malaysia.

It is disheartening to note that the lacuna that exists in the non-Muslim maintenance laws in Malaysia is that there is no mention in these laws that the Court has to consider the welfare of the child concerned before it (the Court) makes a maintenance order. In the writer's opinion, this is a serious omission on the part of the legislature as the welfare of the child should be the paramount consideration in any child related matter, be it adoption, guardianship, custody or maintenance. The maintenance laws that are in force in Malaysia (which would be examined in detail in the following chapters) merely state the Court would consider the means and station in life of the parties.[60] Nowhere is it stated that the Court would consider the welfare of the child, which would include the child's needs. This is where the attachment theory plays a pertinent role. According to both Bowlby and Ainsworth, responsible parents would not neglect their duty towards their children and would result in children who are securely attached. On the other hand, parents who do not care for their children would end up causing emotional distress to them. Hence, it is pivotal to have maintenance laws that emphasise this principle in order for the judiciary to take the same into consideration when deciding cases on child maintenance.

(c) To analyse the stake holders' perception on the laws on child maintenance.

The stakeholders' perception of the law is pertinent to find out if they are aware of their legal rights. Unfortunately, despite the maxim 'Ignorance of the law is no excuse', many people are unaware of their legal rights. This is indeed disheartening as the laws then become redundant. On the same note, it is sad to observe that a certain segment of the stakeholders,

[60] Provided in the Married Women and Children (Maintenance) Act 1950, the Law Reform (Marriage and Divorce) Act 1976 and the Maintenance Ordinance 1959 of Sabah.

i.e. single mothers with illegitimate children, are not aware that their child has a right to claim maintenance from their respective putative fathers. Hence, the question that arises at this juncture is whether it is indeed necessary to have these laws if they are not fulfilling their purposes? At the same time, it is important to educate the public of their legal rights as the 'perpetrators' who owe a duty to maintain to their young ones should not be freed from their obligations, knowing very well that their children rely on the them for their basic necessities. If they abandon their duties towards their children, the latter would suffer from emotional distress when he or she realizes that his or her parents, on whom he or she relies on as primary caregivers, do not care about him or her.

(d) To compare the existing maintenance laws in Malaysia with other jurisdictions such as Singapore, England and Wales and Australia.

In order to understand the importance of the welfare principle, the writer would refer to the jurisdictions mentioned above, Singapore, England and Wales and Australia, where the laws there expressly state that the Courts should always refer to this principle when deciding a matter on child maintenance.[61] As mentioned earlier the non-Muslim laws in Malaysia on maintenance are silent on the child welfare principle.

(e) To suggest or recommend reforms to the existing legislations on maintenance to rectify the weaknesses that exist in these statutes.

Having examined the weaknesses that exist in the local statutes on maintenance and having referred to the laws in Singapore, England and Wales and Australia, the writer would in Chapter 8 suggest or recommend reforms to the existing legislations. One of the reforms

[61]For instance, section 31(7) of the Matrimonial Causes Act 1973 which is applicable to England and Wales provides that in exercising its power to vary or discharge a maintenance order, the first consideration the court should give is to the welfare of the child.

which would definitely be recommended is incorporating the welfare of the child as the paramount consideration when the Court decides whether a maintenance order should be made. At the moment, unfortunately, the statutes merely state that the Court shall have regard to the means and station in life of the parents before it (the Court) makes a maintenance order. The legislature has omitted the welfare of the child as a factor that the Court should consider.

3.6 CONCLUSION

In conclusion, it is submitted that the welfare principle plays a pivotal role in matters concerning children, be it adoption, guardianship or maintenance. Hence, it is submitted that this principle should be the underlying basis in any statute enacted concerning children. If this is done, maintenance laws concerning children would provide that the court would take into account the welfare of the child as the paramount consideration.

A child, being the most vulnerable member in a family, needs to depend on his parents for his survival. It is pertinent not only to provide him with the basic necessities in life for his physical development, but also to shower him with love and affection for his emotional development. The writer submits that both emotional as well as physical development of a child is pertinent in making the child a well-balanced person in his growing up process.

CHAPTER 4: MAINTENANCE LAWS IN MALAYSIA: SAFEGUARDING THE WELFARE OF CHILDREN

4.1 INTRODUCTION

As was stated in Chapter 2 of this thesis, the Malaysian legislature has enacted various maintenance laws applicable to non-Muslims. Nevertheless, the real question that arises is whether these laws are indeed effective. Hence, the purpose of this chapter is to examine whether the existing maintenance laws adequately protect the rights of non-Muslim children in Malaysia to claim maintenance from their parents and whether there are any weaknesses in these laws that need to be rectified. The position of children (below the age of eighteen years) would be examined in this Chapter whereas Chapter 5 would look at the rights of young vulnerable adults to continue receiving maintenance from their parents.

4.2 DUTY TO MAINTAIN

The following legislations have express provisions on the duty of parents to maintain their children:

(a) Married Women and Children (Maintenance) Act 1950 (the 1950 Act);[1]

(b) Law Reform (Marriage and Divorce) Act 1976 (the LRA);[2] and

(c) Maintenance Ordinance 1959 of Sabah (Maintenance Ordinance of Sabah).[3]

[1] Act 263.
[2] Act 164.
[3] No.7 of 1959.

The 1950 Act (which applies to West Malaysia and Sarawak) provides in section 3(1) the duty of a parent to maintain his legitimate child as follows:

> (1) If any person neglects or refuses to maintain his wife or a legitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make a monthly allowance for the maintenance of his wife or such child, in proportion to the means of such person, as to the court seems reasonable.

Section 3(2) of the 1950 Act imposes a similar duty on a parent to maintain his illegitimate child.

The LRA (which applies to West Malaysia, Sabah and Sarawak) provides, in section 92, as follows

> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

Section 3(1) of the Maintenance Ordinance of Sabah is similar to section 3(1) of the 1950 Act concerning the duty of a parent to maintain his legitimate child, whereas section 3(2) provides for the duty to maintain an illegitimate child.

Perusing the abovementioned provisions in the relevant statutes, *prima facie*, gives an impression that the laws in Malaysia adequately protect the welfare of children by empowering the courts to order the parents, upon due proof that they have neglected or refused to maintain their children, to maintain or contribute to the maintenance of their

children. However, the real question that arises at this juncture is whether in actual fact these laws do indeed protect the welfare of these children? In order to answer this question, the writer would be analysing five main issues in this thesis. The meaning of a 'child' would be examined in this Chapter, while Chapter 5 would examine the right of young vulnerable adults to receive maintenance. Chapter 6 would look at the arrears of maintenance and variation of or rescinding a maintenance order and Chapter 7 would examine the enforcement of maintenance orders.

4.3 FACTORS IN DECIDING A MAINTENANCE ORDER

Before discussing the issues that arise with regard to maintenance of children, it is pertinent to first observe the factors that the court considers prior to granting a maintenance order. The factors or circumstances that the court has to consider are as follows:[4]

(a) The earning capacity, property and other financial resources which each relevant person has or is likely to have in the foreseeable future;

(b) The financial needs and obligations and responsibilities of which each relevant person has or is likely to have in the foreseeable future;

(c) The financial needs of the child;

(d) The income, earning capacity (if any) and other financial resources of the child;

(e) Any physical or mental disability of the child; and

(f) The manner in which the child was being, or was expected to be educated or trained.

[4]Rasamani Kandiah, (Advisory Editor), Child Handbook, MLJ Book Series, Malayan Law Journal, Kuala Lumpur, 2004 at 125.

4.4 MEANING OF A 'CHILD'

The writer is of the opinion that it is crucial to first look at the meaning of a 'child' as defined by all the three statutes mentioned above in this Chapter. This is due to the fact that if the definition of a 'child' varies from one statute to another, it would then result in the petitioner shopping for the relevant statute applicable to his or her case. The meaning of a 'child' would be examined in the context of the following issues, namely, the age of a child, adopted children, step children and illegitimate children.

4.4.1 Age of a child

As the main theme of this thesis is the right of a child to maintenance, it is important to first determine who is a 'child' under the relevant maintenance statutes. Reference needs to be made to each of these statutes conferring the right to maintenance to a child, in order to see whether there is any age limit imposed and whether there are any differences in the definition of a 'child' among the statutes concerned.

4.4.1.1 Married Women and Children (Maintenance) Act 1950

The writer would first examine the 1950 Act as it is the oldest piece of legislation on maintenance in force at the moment. This Act applies to West Malaysia and Sarawak.[5] Upon examining section 2 of the 1950 Act, which is an Interpretation provision, it could be noted that 'child' is not defined in the said provision. Therefore, this Act is silent on the meaning of child, which then leads us to the question of whether there is no age limit imposed on a child.

[5] Section 1(2) of the 1950 Act.

This particular issue arose in the case of *Kulasingam v Rasammah*[6] more than thirty years ago. In this case, the respondent wife had applied for maintenance for herself and her daughter who was over twenty years old. One of the issues before the court was whether the daughter fell within the meaning of 'child' under section 3 of the Married Women and Children (Maintenance) Ordinance 1950 (as it was then). Justice Hashim Yeop A. Sani (as he then was) stated that in order for the court to make a maintenance order under section 3, the court must be satisfied that child is a legitimate child and that it is not able to maintain itself.

His Lordship stated that as this Ordinance was silent on the definition of 'child', reference would have to be made to the Age of Majority Act 1971,[7] which provides that the age of majority shall be eighteen years. The learned judge further stated that there are no decided cases on this issue. However, he referred to a previous decision by the late Justice Sharma in *Yong May Inn v Sia Kuan Seng*,[8]where his Lordship used the word 'infant' when referring to the order compelling the father to maintain his child under the 1950 Ordinance.

In the present case, his Lordship also referred to the United Kingdom Children Act 1975, where 'child' is defined as 'except where used to express a relationship, means a person who has not attained the age of eighteen'. Therefore, the learned judge in the present case held that the proper construction of the 1950 Ordinance would be that only children who have not attained the age of majority (below the age of eighteen years) can claim for maintenance under section 3 of the said Ordinance. Hence, the court held that the child who was above the age of twenty is not a child within the meaning of the 1950 Ordinance and as such, did not qualify to claim for maintenance.

[6] [1981] 2 MLJ 36.
[7] Act 21.
[8] [1971] 1 MLJ 280.

4.4.1.2 Law Reform (Marriage and Divorce) Act 1976

The LRA, which came into force on 1 March 1982, applies to West Malaysia, Sabah and Sarawak.[9]'Child' is defined in section 87 of the LRA which provides as follows:

> ... 'child' has the meaning of 'child of the marriage' as defined in section 2 who is under the age of eighteen years.'

Therefore, there is an express definition as to the meaning of 'child' in the LRA, which clearly refers to a child below the age of eighteen years, unlike the 1950 Act.

4.4.1.3 Maintenance Ordinance 1959 of Sabah

Section 2 of this Ordinance defines a 'child' to include a legitimate or illegitimate child who is unable to maintain itself.

The above definition merely states that 'child' in this Ordinance includes legitimate as well as illegitimate children. Howsoever, the definition does not go any further to state the age limit of a child. Therefore, it could be stated here that this Ordinance too is silent on the age limit of a child as the 1950 Act.

4.4.1.4 Discussion

Based on the above provisions of the relevant statutes, the writer is of the opinion that the following issues could be raised:

[9] Section 1 of the LRA.

The first issue that could be observed is in relation to the absence of the definition of 'child' in the 1950 Act. The decision in *Kulasingam v Rasammah*[10] held that a 'child' under the 1950 Act refers to a person below the age of eighteen years. If the person is above the age of eighteen, he or she is automatically disqualified from having a right to claim maintenance under the said Act. The question that arises here then is what about a disabled person who is above the age of eighteen years? Does he or she lose his or her right to maintenance under the 1950 Act? This decision has been criticised by Professor Mimi Kamariah Majid in her book *Family Law in Malaysia*[11] as follows:[12]

> It is submitted that the learned judge should have been guided by the qualifying phrase following the term 'child', that is, 'which is unable to maintain itself', irrespective of age. He, of course, has to be a child of the person who has been issued a maintenance order. Hence, if the child is aged 30 years and is mentally retarded, and therefore, unable to maintain itself, the child should be eligible to be maintained. Similarly, a child who is mentally sound and who is pursuing tertiary education, and therefore unable to maintain itself, should be eligible to be maintained.

The writer concurs with the views expressed by the above author. The views expressed by her are actually in line with John Bowlby's Attachment theory as discussed in Chapter 3 of this thesis, where he states that a primary caregiver plays an important role in the emotional development of an infant or child. The writer submits that a disabled person, especially a mentally disabled person, is akin to an infant as he or she does not know how to fend for him or herself. He or she is wholly dependent on his or her primary caregiver not only to shower him or her with love and affection, but also to respond to her immediate needs. As such, if

[10] *Supra* n6
[11] Mimi Kamariah Majid, *Family Law in Malaysia*, (Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1999).
[12] *Ibid* at 312.

we strictly adhere to the interpretation of 'child' as given in *Kulasingam,* the 1950 Act then could be said not to protect the welfare of these children. It could be concluded that this Act only protects able bodied legitimate children and is discriminatory against disabled children above the age of eighteen.

Therefore, the writer submits that as there is a lacuna in the 1950 Act as well as the Maintenance Ordinance of Sabah as to the definition of 'child', it is time for the respective Legislatures to revisit these two antiquated statutes, which were passed more than fifty years ago, and insert the definition of 'child' by stating the age limit therein. In addition, it is also submitted that in order to safeguard the welfare of legitimate children who are disabled, the Legislature should also include a clause to state that the duty of a parent or parents to maintain his or her child who is physically or mentally disabled continues until the disability ceases. This is to ensure that the parents of a disabled child, who are the primary caregivers, do not neglect their vulnerable child once he or she attains the age of eighteen.

The LRA actually contains such a provision in section 95, where it states as follows:

> Except where an order for ... maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, on the ceasing of such disability, whichever is the latter.

The second issue that arises as to the age of a child (in a broader sense) is whether all family law statutes in Malaysia concerning non-Muslims should standardise the age of a 'child' in their respective definitions. This is due to the fact that some legislations state that a child is a person below the age of eighteen, whereas some state the age of majority as twenty-one years. For example, the LRA states that a child is below the age of eighteen years,

whereas the Adoption Act 1952[13] states that a child is a person below the age of twenty-one. Similarly, the Guardianship of Infants Act[14] states that a non-Muslim child is a person below the age of twenty-one.

A peculiar situation may arise if there is a difference in the definition of a 'child' in the abovementioned statutes. For example, a couple applies to the court to adopt a 'child' who is nineteen years old (as under the Adoption Act 1952, a child is a person below the age of twenty-one). The court grants an adoption order to the couple. Upon adoption, this couple step into the shoes of the nineteen- year old 'child's' natural parents, which means that they then become the child's primary caregivers. This is provided for in the proviso to section 9(1) of the Adoptions Act which provides that '…in any case where two spouses are the adopters, such spouses shall in respect of the matters aforesaid and for the purpose of the jurisdiction of any Court to make orders as to the custody and maintenance of and right to access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother, respectively.'

Looking at the above provision, it seems to indicate that the adopters take on the duties, obligations and liabilities of natural parents in relation to the future custody, maintenance and education of the adopted child. However, since the LRA states that the duty to maintain or the maintenance order expires upon the child attaining the age of eighteen, hence, the adopters in the example above do not have to maintain their adopted child. They are also

[13] Act 257.
[14] Act 351.

under no legal obligation to pay for the child's education as the child is above the age of eighteen.

It is respectfully submitted that the above example would lead to gross injustice as the Adoption Act itself states in section 6(b) that the Court shall be satisfied before making the order, that the order, *inter alia,* if made will be for the welfare of the child. The question that arises is whether the welfare of such a nineteen-year old 'child' would be safeguarded if a strict interpretation is given to the definition of 'child' to refer solely to children below the age of eighteen for the purpose of maintenance? The same question arises for guardianship issues concerning 'children' who are nineteen and twenty years old.

Hence, it is submitted that in order to avoid the above dilemma, Parliament should make a decision to standardise the age of children in all the relevant family law statutes. It is submitted that the definition of a minor in the Age of Majority Act 1971, that is, a person below the age of eighteen years, should be applied to all the relevant family law statutes concerning children so that a person who is aged either nineteen or twenty years old would not be considered a child under one statute, but an adult under another.

4.4.1.5 Comparison with other jurisdictions

Having looked at the weaknesses that exist in the statutes stated above concerning the age of a child, the writer would next examine the position concerning the same issue in other jurisdictions. The jurisdictions which the writer would be examining are Singapore, England and Wales and Australia.

(a) Singapore

The main statute concerning family law in Singapore is the Women's Charter.[15] The provisions as to maintenance of a child are also to be found in the Women's Charter. The origin of the Women's Charter and the major amendments that have taken place from 1961 to 2016 have been examined in Chapter 2 of this thesis and hence need not be repeated here.

On the issue of who is a 'child' under Singaporean law, section 2 of the Women's Charter defines 'minor' as 'a person who is below the age of 21 years and who is not married or a widower or a widow'. It is to be noted here that Singapore does not have an Age of Majority Act, like Malaysia. The courts too have generally decided that a child reaches the age of majority on the child's twenty-first birthday. The Court of Appeal in the case of *Bank of India v Rai Bahadur Singh*[16] stated as follows:

> ... There was no local statute which fixed the age of majority and in his judgment that question was governed by common law and permanently received in Singapore by the Second Charter of Justice 1826 and at common law the age of majority is twenty-one years.

Coming back to the issue of who is a 'child', the provision on this issue under the Women's Charter prior to the 1996 amendment differs from the post amendment provision. Prior to the 1996 amendment, the then section 125 of the Women's Charter provided that the duty to maintain ends when a child reached the age of twenty-one years and was therefore, no longer a 'child'. This provision was criticised by academicians as follows:[17]

[15] Cap.353.
[16] [1994] 1 S.L.R 328.
[17] Leong, Wai Kum, *The Duty to Maintain Spouse and Children During Marriage*, (1987) 20 Mal LR 56 at 77-78.

> ... it fails to create an exception in the case of children beyond the age of twenty-one who are still receiving education. Should not parents still be liable to maintain them? It is anomalous that there ought not be a legal liability in a society as committed to education and training in Singapore?

In 1996, the Select Committee[18] made a significant amendment to this provision. Section 69(5) was introduced to allow a child to receive maintenance from a parent even though he or she has reached the age of twenty-one years. This duty is extended to a non-parent who has assumed the responsibility to maintain a child under section 70(5). Thus, as a result of the amendment in 1996, the law now in Singapore is that under section 69(6), a parent has a duty to maintain his or her child until the age of twenty-one years. However, this duty may be extended by the court under the following situations laid down in section 69(5):

(a) mental or physical disability of the child;

(b) child is or will be serving full-time national service;

(c) the child is or will be or (if an order is made under subsection (2)) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(d) special circumstances, other than those stated in paragraphs (a), (b) and (c), exist which justify the making of the order.

The above situations also apply to a non-parent who has accepted a child who is not his as a member of his family by virtue of section 70(5). Hence, the amendment has led to an

[18]There are seven Standing Select Committees in Singapore. These Committees are appointed for the duration of a Parliament to undertake several functions. In addition to these Standing Select Committees, the Parliament sometimes forms ad hoc Select Committees set up on a motion approved by the House to deal with Bills or other matters referred to it. The Select Committees are mostly formed to discuss details of a Bill which affects the daily lives of the public. Information obtained from the Singapore Parliament's website at https://www.parliament.gov.sg/select-committee-parliament accessed on 31 January 2017.

improvement in the law on child maintenance in Singapore as a maintenance order may continue to benefit a young vulnerable adult[19] who is still financially dependent.

It is submitted that the Malaysian laws on maintenance are in dire need of being amended and it is suggested herein that the Malaysian legislature could take a lead from the amendments made to the Women's Charter in 1996. The main reason for this suggestion is due to the fact that there are many financially dependent young vulnerable adults in Malaysia who are affected by the clause in the Law Reform (Marriage and Divorce) Act 1976 that states that the duty to maintain a child ceases when the child attains the age of eighteen unless the child is physically or mentally disabled.[20] This issue will be discussed in depth in Chapter 5 of this thesis.

(b) England and Wales

In England and Wales, there are various legislations on the duty of parents to maintain their children.[21] Due to the limitation on words, the writer will focus on three main statutes in the England and Wales on the duty to maintain children, i.e.:

(a) Matrimonial Causes Act 1973;[22]

(b) Children's Act 1989;[23] and

(c) Child Support Acts 1991[24] and 1995.[25]

[19] 'Young vulnerable adult' in the Singapore context refers to persons who are aged between twenty-one years and twenty-five years as the duty to maintain a child generally ceases when the child attains the age of twenty-one.
[20] Section 95 of the Law Reform (Marriage and Divorce) Act 1976.
[21] For example, the Children Act 1989, Family Law Act 1996, Human Rights Act 1998, Matrimonial Causes Act 1973, Child Support Acts 1991 and 1995, Social Security Contributions and Benefits Act 1992, Social Security Act 1998, Child Support, Pensions and Social Security Act 2000, Child Maintenance and Other Payments Act 2000 and Welfare Reform Act 2012, to name a few.
[22] c.18.
[23] c.41.
[24] c.48.
[25] c.26.

Basically, the Child Support Acts 1991 and 1995 (CSA) (as amended by the Child Support, Pensions and Social Security Act 2000) established the Child Support Agency to assess and enforce of child maintenance.[26] In 2008, the Child Maintenance and Other Payments Act 2008 (the 2008 Act) was passed to establish the Child Maintenance and Enforcement Commission (C-MEC) to replace the Child Support Agency. Following that in 2012, the Welfare Reform Act 2012 amended the 2008 Act and abolished the C-MEC. It was replaced with the Child Maintenance Services. This development pertaining to the enforcement of maintenance orders would be discussed in Chapter 7 of this thesis. For the purposes of this Chapter and Chapter 5, the writer would focus on the CSA.

The CSA applies only for periodical payments. The Matrimonial Causes Act 1973 (MCA) applies to children falling outside the remit of the CSA. The MCA provides for the financial provision and property adjustment orders. Finally, the Children's Act 1989 applies for periodical payments, lump sums, settlements and transfer of property.[27]

As to the issue of who is a 'child' in family law proceedings, reference is first and foremost made to a general statute on family law. i.e. the Family Law Reform Act 1969.[28] Section 1(1) of this Act provides as follows:

> **1. Reduction of age of majority from 21 to 18**
>
> (1) As from the date on which this section comes into force a person shall attain full age on attaining the age of eighteen instead of attaining the age of twenty-one, and a person shall attain full age on that day if he has already attained the age of eighteen but not the age of twenty-one.

[26] *Family Law 2010-2011*, (London and New York: Routledge Taylors and Francis Group, 2011).
[27] Section 15 and Schedule 1. If an application is made in the Family Proceedings Court, only the monetary orders are available, not the property orders.
[28] c.46.

Hence, from the above provision, it could be noted that the age of majority has been reduced from twenty-one to eighteen in England and Wales via the Family Law Reform Act 1969.[29] However, subsection (2)(a) of the same Act provides as follows:

> (2) The foregoing subsection applies for the purposes of any rule of law, and in the absence of a definition or of any indication of a contrary intention, for the construction of 'full age', 'infant', 'infancy', 'minor', 'minority' and similar expressions in -
>
> (a) any statutory provision, whether passed or made before, on or after the date on which this section comes into force; and
>
> (b) ...

Thus, subsection (2) clearly states that the age of majority as provided for in subsection (1) only applies in the absence of any specific definitions in any statutory provisions. Therefore, it would next be pertinent to examine the three main statutes which contain provisions on maintenance in England and Wales (as stated earlier) in order to see if the age of a child is mentioned therein and whether it differs from the definition in the Family Law Reform Act 1969.

According to the Children's Act 1989, paragraph 16 of Schedule 1[30] provides as follows:

> 16-(1) In this Schedule 'child' includes, in any case where an application is made under paragraph 2 or 16 in relation to a person who has reached the age of eighteen, that person.

[29]It is to be noted here that the age of majority in England and Wales is the same as in Malaysia, i.e. eighteen years. This could be distinguished from the position in Singapore where the age of majority is twenty-one.
[30] Schedule 1 provides for Financial Provisions for Children.

Paragraph 2 of Schedule 1 enables a person who has reached the age of eighteen to apply to court to order for financial relief if he or she would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or that there are special circumstances which justify the making the making of an order under this paragraph.

Therefore, the Children's Act 1989 generally defines ‘child’ as a person below the age of eighteen. However, the Act provides that a person who has reached the age of eighteen is permitted to apply to court for a financial relief in the circumstances specified in paragraph 2 of Schedule 1 as stated above.

Secondly, section 52 of the Matrimonial Causes Act 1973 defines ‘child’ as a child to one or both of the parties to a marriage and it includes an illegitimate child. Hence, it does not state the age limit of a child. Howsoever, reference could be made to section 29 of the same Act which provides for the ‘Duration of continuing financial provision orders in favour of children and age limit on making certain orders in their favour’. Section 29(1) provides, *inter alia*, that subject to section 29(3) a financial provision order shall not be made in favour of a child who has attained the age of eighteen. This age limit is reiterated in section 29(2)(b) concerning the term to be specified in a periodical payments order or secured periodical payments order in favour of a child.

However, section 29(3) provides that section 29(1) and (2)(b) shall not apply if it appears to a court that:

(a) the child is or will be ‘receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also or will also be, in gainful employment; or

(b) there are special circumstances which justify the making of an order without complying with either or both of those provisions'.

It could be noted that the exceptions stated in paragraph (a) and (b) similar to the exceptions in paragraph 2 of Schedule 1 of the Children's Act 1989 (as discussed above). *Halsbury's Laws of England* [31] states that 'physical or other disability may amount to such special circumstances'.[32]

Thirdly, reference could also be made to the Child Support Act 1991. Section 55(1) defines 'child' as follows:

(a) he is under the age of 16;

(b) he is under the age of 19 and receiving full-time education (which is not advanced education)-

(i) by attendance at a recognised educational establishment; or

(ii) elsewhere, if the education is recognised by the Secretary of State; or

(c) he does not fall within paragraph (a) or (b) but-

(i) he is under the age of 18 and

(ii) prescribed conditions are satisfied with respect to him.

It is respectfully submitted that the above provision is quite complicated as it divides the meaning of child into three categories: -

(a) generally, a person below the age of sixteen;

[31] *Halsbury's Laws of England* (Fourth Edition Reissue) (Vol. 29(3))
[32] *Ibid* at para 847 at f.n. 18. Reference is made to the case of *C v F (Disabled Child: Maintenance Orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (Financial Provision for Children) [*1994] 1 FCR 743, [1994] 2 FLR 883.

(b) a person below the age of nineteen and is receiving full time education which is not advanced education; and

(c) a person who does not fall within any of the above two definitions, but who is below the age of eighteen and there are certain prescribed conditions which are satisfied with respect to him.

Although the section above stipulates the different age limits of a child, there is however, an exception to the age limit in section 8. Section 8 provides for the 'Role of the courts with respect to maintenance for children'. Section 8(7) empowers the court to make a maintenance order in respect of a child if the child is or will be 'receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation (whether or not while in gainful employment)' whereas section 8(8) provides that this section does not prevent a court from making a maintenance order in relation to a disabled child where the order is made for the 'purpose of requiring the person making or securing the making of periodical payments fixed by the order to meet some or all of any expenses attributable to the child's disability'.

Hence, having referred to the statutes above with regard to the age limit of a child in England, it could be noted that the age limit is more or less similar to the age limit in Malaysia, i.e. eighteen years. However, the main difference between the laws in England and Wales and Malaysia is concerning the exceptions to the limitation on the age of a child. Most of the statutes in England and Wales contain a similar exception to the age limit rule as provided for in section 95 of the Malaysian LRA, i.e. a disabled child could continue receiving maintenance although he or she reaches the age of eighteen. However, there is a second exception in England and Wales laws that cannot be found in the Malaysia counterpart, i.e. that the court may make an order that the child, though having reached the

age of eighteen years may continue receiving maintenance if it could be proven that he or she is or would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment. This second exception, as discussed earlier could also be found in Singapore's Women's Charter.

(b) Australia

The year 1988 witnessed reforms in two stages to child maintenance or support laws in Australia. The first stage made amendments to the Family Law Act 1975 (Commonwealth) and social security legislation. In addition, a new collection system was established to routinely collect maintenance orders by deduction from wages. The Child Support Agency (CSA) was established within the Australian Tax Office to handle the collection and enforcement of payments of maintenance orders by the court. The CSA would also undertake the assessment and the enforcement of child support under stage two.[33]

Stage two commenced with the passing of the Child Support (Assessment) Act 1989, ('Assessment Act') which came into force on 1 October 1989 and the Child Support (Registration and Collection) Act 1989 ('Registration and Collection Act'). Both these Acts form the legal basis for the Child Support Scheme (CSS) which was established in 1988. The CSA, as stated above, administers these two Acts.[34]

The position in Australia concerning child support after the passing of the above Acts is as follows:

[33]Parker, Stephen, *et al*,, Australian *Family Law in Context, Commentary & Materials*, (Australia: The Law Book Company, 1994) at 457

[34]*Child Support Laws*, Australian Law Reform Commission, accessed at www.alrc.gov.au on 12 April 2016.

1. If the parents separate on or after 1 October 1989, the custodial parent can no longer apply to the court under the Family Law Act for child maintenance. She must apply to the CSA, who will assess the entitlement to child support and set about collection of the assessment amounts.[35]

2. Certain categories of children and parents do not fall within the ambit of the Assessment Act. Hence, these categories of children and plaintiff would then come under the Family Law Act, i.e.[36]:

1. applications against a step-parent;
2. applications in respect of 'children' over the age of 18 (primarily for the support during higher education);
3. applications by children themselves for their own maintenance;
4. applications to modify existing child maintenance orders (that is, orders made concerning children not within the Child Support (Assessment) Act); and
5. applications which otherwise fall outside the Child Support (Assessment) Act) because either the child or the liable parent lacks the necessary connection with Australia.

Hence, for the purpose of this thesis and taking the above limitations into consideration, the writer will refer to the Family Law Act 1975 whenever the subject matter that is discussed does not fall within the ambit of the Assessment Act. In all other cases, reference will be made to the latter.

[35] This could also be seen in section 66BA Family Law Act. Stephen Parker, Patrick Parkinson & Juliet Behrens, *Australian Family Law in Context, Commentary & Materials*, The Law Book Company, 1994, at 457
[36] *Ibid* at 458.

The Family Law Act 1975 (Cth) defines 'child' in section 4 as, *inter alia*, 'a person who is below the age of 18' The above definition, *prima facie*, denotes that children below the age of eighteen years are eligible to claim for maintenance under the Family Law Act. However, the issues that arise are whether:

(a) a child, upon reaching the age of eighteen years, is barred from claiming for maintenance; and

(b) whether the maintenance order, which was issued when he was below the age of eighteen, ceases upon him reaching the age of eighteen.

The answers to both the issues in (a) and (b) are found in section 66L of the Family Law Act. Section 66L(1) states that the Court must not make a maintenance order in relation to a child who is eighteen or above unless the court is satisfied that maintenance is necessary for the child to complete his or her education, or due to the mental or physical disability of the child. Whereas, section 66L(2) provides that a court may not make a maintenance order that extends beyond the day when the child reaches the age of eighteen unless the maintenance is necessary for the child to complete his or her education or because of mental or physical disability of the child.

Subsection (3) of section 66L provides that, 'A child maintenance order in relation to a child stops being in force when the child turns 18 unless the order is expressed to continue in force after then.'

Perusing the above provision, it is to be noted that generally a maintenance order cannot be claimed by a child who is aged eighteen years or above or a current maintenance order ceases upon the child reaching the age of eighteen. However, there are two exceptions where

the court is allowed to either entertain a maintenance application by a child who is eighteen or above or extend the maintenance order although the child has turned eighteen.

When comparing section 66L of the Family Law Act to our section 95 of the LRA, it could be noted that the former is more flexible as the latter merely states that a maintenance order ceases when a child reaches the age of eighteen years, unless he or she is physically or mentally disabled. It (section 95) neither contains an exception on the need of the child to continue his studies, nor is there any provision on whether an eighteen-year old child may make a fresh application for a maintenance order.

4.4.1.6 Discussion

Having examined the Malaysian position and the positions in the three jurisdictions, the writer would submit as follows: First, the definition of a 'child' should be incorporated in the 1950 Act which should also state the age-limit of the child. The definition of a 'child' in the Maintenance Ordinance of Sabah should be amended to include the age-limit of the child. It is also submitted that in addition to inserting the definition of a 'child' and the age-limit, the legislature should ensure that the definitions in all the three statutes, i.e. the 1950 Act, LRA and the Maintenance Ordinance of Sabah are in *pari materia.* This is to avoid any confusion that may arise later.

Secondly, the Malaysian Legislature should revisit the statutes concerning family law in order to standardize the age-limit of a child. This is to avoid any dilemmas from arising. Hence, whether it is an issue concerning adoption, guardianship or maintenance, the age limit of the child should be the same in the relevant statutes. At this juncture, it is also submitted that the legislature set the age-limit of a child at 18, so that it is in line with the Age of Majority Act 1971.

Finally, in addition to setting the age-limit at eighteen years, the writer also submits that the statutes should create an exception therein, where the duty to maintain should continue in the event the child is physically or mentally disabled, or where the child is pursuing his or her tertiary education or undergoing training for a trade, profession or vocation. This issue would be dealt with in depth in Chapter 5 of this thesis.

4.4.2 Adopted children

The second issue that arises under the sub-topic of the '*Meaning of a Child'* is whether adopted children have a right to claim maintenance from their adoptive parents. In order to answer this question, reference would have to be made to the three statutes which have been referred to earlier i.e. the 1950 Act, the LRA and the 1959 Ordinance, in order to examine if the provisions therein confer such a right to the adopted children.

Before the writer examines the three statutes mentioned above, it is pertinent to note that adopted children discussed below refer specifically to children adopted under the Adoptions Act 1952 and not to children adopted in accordance with the Registration of Adoptions Act 1952.[37]

4.4.2.1 Married Women and Children (Maintenance) Act 1950

As discussed earlier in sub topic *4.4.1 Age of a child*, the 1950 Act is silent on the definition of a 'child'. Hence, it is not clear if an adopted child could apply under section

[37]Malaysia has two statutes pertaining to adoption of children: the Registration of Adoption Act 1952 and the Adoption Act 1952. Basically the former deals with the registration of *de facto* adoptions whereas the latter deals with application to the court for an adoption order. The reason for specifically referring to adoptions under the Adoptions Act 1952 is because an adoption order issued by the court under this Act is more effective than an adoption registered under the Registration of Adoptions Act 1952. This because section 11 of the Registration of Adoptions Act 1952, *inter alia*, states that 'Neither the registration of nor the omission to register any adoption shall affect the validity of the adoption'. Hence, the registration of an adoption under this Act is not legally enforceable, when compared to an adoption order issued by the court under the Adoption Act 1952. Therefore, for an adoption to be effective, the petitioner should apply for an adoption order from the court under the Adoptions Act 1952.

3(1) of this Act to claim for maintenance from his adoptive father. Reference would have to be made to case law.

Based on the writer's research, it was observed that there are no cases reported on whether an adopted child could claim maintenance from his or her adoptive father according to section 3(1) of the 1950 Act. Nevertheless, the closest case reported would be the case of *Kulasingam v Rasammah*[38] which was discussed earlier in this Chapter. In this case, the High Court held that in order for a court to order a person to pay maintenance to his child under section 3(1) of the 1950 Act, 'the court must be satisfied that the child is a legitimate child and that it is not able to maintain itself'. The High Court later went on to examine whether the 'child' concerned in the present case was indeed a child and referred to the Age of Majority Act 1971 which provided that the person is a minor if he or she is below the age of eighteen years. The court then held as follows:[39]

> The 1950 Ordinance should in my opinion be regarded as a statutory provision for the maintenance of legitimate children. Thus the construction that the statutory provision covers only children who have not yet attained the age of majority would seem to be the more correct construction.

Although there are no cases which have dealt with the issue of whether an adopted child can claim for maintenance under the 1950 Act, the writer is of the opinion that by virtue of section 9(1) of the Adoptions Act (as discussed earlier), which provides that the adoptive parents step into the shoes of the natural parents once the court makes an adoption order, it

[38]*Supra* n 6
[39]*Ibid* at 38.

could be seen that the law imposes, *inter alia*, a duty to maintain the adopted child on the adoptive parents.

In addition to referring to section 9(1) of the Adoptions Act, the writer is also of the opinion that as the case of *Kulasingam* stated that the court must be satisfied that the child is, *inter alia*, a legitimate child before it could order the parent to pay maintenance, an adopted child would indeed qualify to claim maintenance if he or she was born legitimate. Even if the child was born out of wedlock, once the court issues an adoption order under the Adoptions Act, the child would become legitimated as could be observed in the last few words in section 9(1) of the said Act which states as follows:

> ... and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter *as though the adopted child was a child born to the adopter in lawful wedlock (emphasis added).*

4.4.2.2 Law Reform (Marriage and Divorce) Act 1976

The answer to the question as to whether an adopted child could claim for maintenance under the LRA could be found in section 87 of the LRA. Section 87 provides that a 'child' means a 'child of the marriage' as defined in section 2 who is below eighteen years old. Section 2 of the LRA defines 'child' to 'include an illegitimate child of, and a child adopted by either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption.' Therefore, it is clearly stated that an adopted child is entitled to claim for maintenance under the LRA.

However, there is an issue that arises in the definition in section 2 as stated above. In the abovementioned definition, there is a comma after 'illegitimate child', thereby raising the

question as to whether the provision should be read as including an illegitimate child who has been adopted (connoting a conjunctive view) or should be read in a disjunctive manner, i.e. includes an illegitimate child and an adopted child. If it is read in a conjunctive manner, it would then restrict the application of the provision to illegitimate children of either parties to the marriage who are adopted by either of the parties. On the other hand, if a disjunctive view is taken, then it does not limit the application to illegitimate children of one of the parties to the marriage who is adopted. It would then include any child adopted by the parties to the marriage.

In the case of *T v O*,[40] the court in discussing the definition of a 'child of the marriage' in section 2 of the LRA stated as follows:[41]

> This definition under section 2 includes an illegitimate child of either parties to the marriage, accepted as one of the family by the other party and an adopted child, who, as has already be seen, could also be an illegitimate child of the adoptive parent. There is a duty on the man to maintain the child.

The above explanation by the court seems to suggest that the learned judge has taken a disjunctive view on the meaning of a 'child' in section 2 of the LRA. His Lordship states 'and an adopted child, ... could also be an illegitimate child'. The phrase 'could also be an illegitimate child' seems to denote that an adopted child referred to in section 2 of the LRA need not be confined only to illegitimate children of either of the parties to the marriage. It is submitted that the approach taken by the court in *T v O* is welcomed as it does not restrict

[40] [1993] 1 MLJ 168.
[41] *Ibid* at 174.

‘adopted children’ who could claim maintenance under the LRA to illegitimate children of either party to the marriage who has been adopted.

In addition, section 99 of the LRA states that if a man has accepted a child who is not his as a member of his family, it is his duty to maintain the said child. The question that arises at this juncture is whether the child referred to in section 99 implies an adopted child. The writer submits that the answer to the above question is no, as the section merely states ‘accepted a child who is not his as a member of his family’ and not ‘adopts a child’. Therefore, it is highly unlikely that the courts would refer to section 99 as an authority to impose a duty on adoptive parents to maintain their adopted child. Be that as it may, the writer reiterates her earlier stance that an adopted child could always fall back on section 9(1) of the Adoptions Act to state that his or her adoptive parent steps into the shoes of his or her natural parents once the adoption order has been made by the court and as such he has the duty to maintain him or her.

4.4.2.3Maintenance Ordinance1959 of Sabah

The Maintenance Ordinance of Sabah defines ‘child’ to include a legitimate or illegitimate child who is unable to maintain itself. This definition is similar to sections 3(1) and (2) of the 1950 Act which confers the powers to the court to order a person to pay maintenance to his legitimate and illegitimate child respectively who is unable to maintain itself.

Once again, there is no mention of whether an adopted child could claim for maintenance under this Ordinance. Reference, at this juncture, could be made to the Adoption Ordinance

1960 of Sabah.[42] Section 16(1) of the Adoption Ordinance is similar to section 9(1) of the Adoption Act (as discussed above). Section 16(1) of the Adoption Ordinance provides as follows:

> Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian or to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and *in respect of the matters aforesaid the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.(Emphasis added)*

The last part of the provision above is emphasised to prove the fact that the adopted child shall be treated as the lawful child of the adopter once the court issues an adoption order. Thus, it is submitted that since the child is considered to be the lawful child of the adopter, in other words the legitimate child of the adopter, the adopted child would then indeed fall within the meaning of 'child' in the 1959 Ordinance and be entitled to claim maintenance from his or her adoptive parents.

4.4.2.4 Discussion

Based on the examination of the Malaysian statutes on maintenance so far, it could be noted that the right of an adopted child to claim maintenance from his or her adoptive parents

[42] Sabah No. 23 of 1960.

is not clearly spelt out in any of the aforesaid statutes. Such a right could only be implied when reference is made to the definition of a 'child' section 2 of the LRA.

It is submitted that although the 1950 Act and the Maintenance Ordinance of Sabah do not specifically refer to an adopted child's right to claim maintenance from his or her adoptive parents, the Adoption Act and the Adoption Ordinance of Sabah would respectively come in to help resolve this issue. This is due to the fact that both these Acts specifically provide for the rights of adopted children, which includes the right to be maintained by their respective adoptive parents. Nevertheless, it is further submitted that instead of scratching our head to find the answer to the issue of whether an adopted child has a right to be maintained by his or her adoptive parents under the 1950 Act and the Maintenance Ordinance of Sabah and having to refer to the relevant statutes on adoption, it would be easier if both these statutes be amended to include adopted children within the definition of a 'child' as was done in the Distribution Act 1958,[43] where 'child' is defined as follows:

> "child" means a legitimate child and where the deceased is permitted by his personal law a plurality of wives, includes a child by any of such wives, but does not include an adopted child other than a child adopted under the provisions of the Adoption Act 1952 or the Adoption Ordinance of the State of Sarawak.

The above definition therefore clearly includes an adopted child who has been adopted under the Adoption Act 1952 or the Adoption Ordinance of Sarawak within the meaning of 'child' in the Distribution Act 1958.

[43] Act 300.

4.4.2.5 Comparison with other jurisdictions

The writer will next examine the legal position on the right of an adopted child to maintenance from his or her adoptive parents in three jurisdictions, i.e. Singapore, England and Wales and Australia, as was done earlier in this Chapter.

(a) Singapore

Prior to looking at the issue whether an adoptive parent has a duty to maintain the adopted child in Singapore, it is pertinent to look at the important principles under the Women's Charter as to who has a liability to maintain a child. *Halsbury Laws of Singapore*[44] explains that there are two groups of people who are liable to be ordered by the court to provide maintenance to a child. First, the parents of the child, who are primarily responsible, as provided for under section 46(1) of the Women's Charter. The basis for this responsibility flows from the idea of the parent owing responsibility to his or her child.

The second category of people are non-parents, who are subject to be ordered to provide maintenance to the child if he or she had voluntarily assumed responsibility to maintain the child. If such responsibility is relinquished, the basis of the duty is also relinquished.

Looking at the two categories of people, the next question that arises is whether an adoptive parent falls under any of the above categories. This is due to the fact that 'parent' is not defined in the Women's Charter for the purpose of the maintenance of a child. However, views expressed by various Singaporean writers seem to indicate that adoptive parents should be included within the meaning of 'parents'.

[44]Family Law, *Halsbury Laws of Singapore*, Vol. 11, Butterworths Asia,2001 at [130.644]

For example, Professor Leong Wai Kum, in her book entitled *Principles of Family Law in Singapore*,[45] stated as follows:[46]

> The relationship of 'parent' and 'child' consist, first of a biological parent-child relationship that the law recognizes and second, of a parent-child relationship created by a court order of adoption that the law also recognizes.
>
> Under the Adoption of Children Act, Cap. 4, Singapore Statutes, Revised Edition, 1985, section 7 provides that if the potential adopter is a married person, his or her spouse should join in the adoption petition. Where the adoption order is given to the spouses, both are adoptive parents. Where, exceptionally one spouse is allowed to adopt without the other joining in, only the spouse who is granted the adoption order is the adoptive parent of the child and, therefore, only this adoptive parent is liable, under section 69(2) to maintain the child. The spouse who did not join is not liable under this provision.

Thus, the above statement by the author indicates that the duty to maintain on an adoptive parent arises once an adoption order is issued under the Adoption of Children Act. The same view is shared by *Halsbury Laws of Singapore* where it states as follows:[47]

> 'Parent' for the purposes of maintenance of a child … It should also include the adoptive parent (section 3(3) and (4) and (5) of the Adoption of Children Act (Singapore) - when exceptionally an adoption order is sought and granted to only one of two spouses, it is the spouse who is granted the order of adoption who is liable to maintain the child).

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[45] Leong, Wai Kum, *Principles of Family Law in Singapore*, (Singapore: Butterworths Asia, 1997).
[46] *Ibid* at 859.
[47] *Supra* n.44 at [130.646]

Foo Siew Fong in *When Marriages Break Down: Rights, Obligations and Division of Property*[48] too states as follows:[49]

> For the purposes of the law, a "child" could include an adopted child, an illegitimate child as well as a child accepted as a member of the family, e.g. stepchild under sections 68 and 70.

Professor Leong Wai Kum reiterated her earlier opinion on the meaning of a parent to include an adoptive parent in her book entitled *Elements of Family Law in Singapore:*[50]

> "Parent" must include the adoptive parent as section 7 of the Adoption of Children Act provides that the effect of the court awarding an adoption order is that the person named as adoptive parent steps into the shoes vacated by the biological parent who gave up the child for adoption.

Therefore, although the Women's Charter does not define 'parent' for the purpose of maintenance of child, the writers as stated above seem to have expressed their views that 'parents' should include 'adoptive parents'. Hence, an adopted child would also have a right to claim maintenance from his adoptive parents under the Women's Charter. In order to claim such maintenance, the next question that is whether he has to prove anything in court?

Although there are no cases decided nor any statutory provision on the issue raised above, reference could be made to Professor Leong Wai Kum's book entitled *Elements of Family Law in Singapore,*[51] where she states as follows:

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[48] Foo, Siew Fong, *When Marriages Break Down: Rights, Obligations and Division of Property*, (Singapore: Sweet and Maxwell Asia, 2005).
[49] *Ibid* at [8.20].
[50] Leong, Wai Kum, *Elements of Family Law in Singapore*, (Singapore: Lexis Nexis, 2007), at 438-439.
[51] *Ibid*.

> Where put to proof, the child seeking an order of maintenance from the person which he or she claims to be a "parent" must succeed in proving the parentage. Proof of adoptive parentage, whether an adoptive mother or adoptive father, is achieved simply by reference to a court order of adoption since legal adoption is only through a court order.

Thus, it could be said that in Singapore, in order to claim maintenance from an adoptive parent, the adopted child merely has to produce the adoption order to proof his or her adoptive parentage. At this juncture, the writer submits that although the Malaysian maintenance laws and judicial decisions are silent, the above principle could also be applied in Malaysia. This is due to the fact that when a court issues an adoption order under the Adoption Act 1952, the said order could be adduced by the adopted child in court to prove his or her adoptive parentage.

(b) England and Wales

Shifting the discussion to the England and Wales as to the duty of adoptive parents to maintain their adopted children, it is to be noted first, that in England and Wales prior to 1926, child adoption had no legal status. Child adoption was considered as an informal and generally secretive procedure. The adoptive parents did not have any rights over the child concerned. The biological parents could demand the custody of their child, whom they had not contributed to the care at any time.[52] Finally, after much debates and discussions, the Adoption of Children Act 1926 was passed.[53]

[52] Grey, Daniel, Review of "A Child for Keeps: The History of Adoption in England, 1918-45" (review no. 806), accessed at http://www.history.ac.uk./reviews/review/806 on 13 August 2016.
[53] *Ibid*.

Since the enactment of this Act, many amendments have taken place. Currently in England and Wales, there are two adoption laws in force, i.e. the Adoption Act 1976[54] and the Adoption & Children Act 2002.[55] The effect of an adoption order under both these Acts could be said to be similar to the Malaysian Adoption Act 1952. This could be seen in section 39 of the Adoption Act 1976 and section 67 of the Adoption and Children Act 2002. For example, section 39(1) of the Adoption Act 1976 provides as follows:

> (1) An adopted child shall be treated in law -
>
> (a) where the adopters are a married couple as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnized)
>
> (b) in any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter).

In addition to the status conferred by the adoption orders, section 46(1) of the Adoption and Children Act 2002 expressly states that 'an adoption order is an order made by the court ... giving parental responsibility for a child to the adopters or adopter'.

Subsection (2)(a) further states that once an adoption order is made, the parental responsibility which any person (other than the adopters or adopter) currently has for the adopted child is extinguished. Therefore, this basically means that once an adoption order is made, the adopter steps into the shoes of the child's natural parents and takes on the parental responsibility for the said child.

[54] 1976 c.36
[55] 2002 c.28

It is respectfully submitted that ‘parental responsibility’ here includes the duty to maintain the adopted child. This could also be noted in section 46(2)(d) which states that the adoption order extinguishes ‘any duty arising by virtue of an agreement or order of a court to make payments, so far as the payments are in respect of the adopted child’s maintenance or upbringing for any period after the making of the adoption order.’ Hence, this clearly means that the adopter takes on the duty to maintain the child once the adoption order is made, thus safeguarding the welfare of the child.

In addition to the above protection afforded by the relevant adoption laws, reference could also be made to the respective laws on maintenance in England and Wales in order to examine if these statutes include adopted children. First, reference could be made to the Family Law Reform Act 1987. Section 1(3) of the Act generally refers to persons to whom the Act is applicable. Section 1(3)(c) specifically refers to ‘any person who is an adopted child within the meaning of Part IV of the Adoption Act 1976’. Hence, an adopted child who is adopted pursuant to the Adoption Act 1976 is entitled to benefit from the protection guaranteed under this Act.

However, if reference is made to the Matrimonial Causes Act 1973 (which contains provisions on child maintenance), it could be observed that the definition of ‘child’ or ‘child of the family’ in section 52 does not expressly include an adopted child. ‘Child’ is defined in section 52 as ‘in relation to one or both of the parties to a marriage, includes an illegitimate child of that party, or as the case maybe, of both parties’. ‘Child of the family’ is defined ‘in relation to the parties to a marriage, means (a) a child of both of these parties; and (b) any other child, not being a child who has been treated by both of those parties as a child of their family’.

Perusing the above definition, the writer submits that although section 52 does not expressly include an 'adopted child' within either of the definitions in paragraph (a) or (b), an adopted child could fall within the meaning of 'a child of both of these parties'. The reason for this submission is because the Adoption Act 1976 (as referred to above) clearly states that once an adoption order is made, the adopted parent or parents take on the parental responsibility and the child is to be treated as though he or she is born during their lawful wedlock.

Finally, reference could be made to the Child Support Act 1991[56] which focuses on child support. Referring to section 55 on the meaning of 'child', it could be noted that the definition does not expressly include an adopted child. However, aid may be obtained from section 26 of the same Act, which states that where there is a dispute concerning the parentage of a child, i.e. the person who is alleged to be the parent of a child denies that he is one of the child's parents, the Secretary of State shall not make a maintenance calculation unless the case falls under any of the 'cases' mentioned thereunder. One of the 'cases' mentioned under the same section is "where the alleged parent is a parent of the child in question by virtue of having adopted 'him'. Further thereto, subsection (3) of section 26 defines 'adopted' as 'adopted within the meaning of Part IV of the Adoption Act 1976'. Therefore, it is submitted that an adopted child's right to maintenance is safeguarded by the Child Support Act 1991.

In conclusion, the writer submits that the right to maintenance of an adopted child in England and Wales is adequately protected by the relevant laws as discussed above.

[56] 1991, c.48.

(c) Australia

Australia too has its own set of laws pertaining to adoption, for example, the Adoption Act 2000,[57] which is a Federal legislation. Section 7, in stating the objects of the said Act, provides, *inter alia,* in paragraphs (a) and (i) as follows:

> (a) to emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice; and
>
> (i) to provide for the giving in certain circumstances of post-adoption financial and other assistance to adopted children and their birth and adoptive parents.'

It could be noted that paragraph (a) above emphasises the principle of the best interests of a child which should be the paramount consideration, as is the position in Malaysia as well.

In addition to the above objectives in section 7, section 8 of the Act lists down the principles that are to be applied by a decision-maker regarding the adoption of a child. Section 8(1)(a) reiterates that the decision maker should consider the best interests of the child as the paramount consideration. Subsection (2) of section 8 further elaborates what comprises 'the best interests of the child'. The writer would like to highlight two paragraphs therein, which are paragraphs (c) and (i):

> (2) In determining the best interests of the child, the decision maker is to have regard to the following:

[57] Act 75 of 2000

(c) the child's physical, emotional and educational needs, including the child's sense of personal, family and cultural identity,

(i) the suitability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child.'

The two paragraphs highlighted above indicate that the decision maker will look into the needs of the child as well as the suitability and capacity of the adoptive parent or any other person for the needs of the child. At this juncture, the writer submits that 'the needs of the child' would no doubt refer to the basic needs of the child and hence, the capacity of the adoptive parent or any other person to provide maintenance to the child would be examined by the decision maker.

The writer would next examine the effect of an adoption order in order to see if it is similar with the Malaysian Adoption Act 1952. Section 95 of the Australian Adoption Act provides for the effect of the adoption order as follows:

(1) An adoption order made by the Court gives sole parental responsibility for a child to the person or persons named in the order.'

Subsection (2) of section 95 focuses on the law of New South Wales[58], which states that '...if an adoption order is made:

(a) the adopted child has the same rights in relation to the adoptive parent or adoptive parents, as a child born to the adoptive parent or adoptive parents,

[58] It is to be noted here that although the Australian Adoptions Act 2000 is a Federal Legislation, section 95(2) specifically applies only to the state of New South Wales. This is something peculiar to the Australian legislation.

(b) the adopted parent or adoptive parents have the same parental responsibility as the parent or parents of a child born to the adoptive parent or adoptive parents,

(c) the adopted child is regarded in law as the child of the adoptive parent or adoptive parents and the adoptive parent or adoptive parents are regarded in law as the parents of the adopted child,

(d) the adopted child ceases to be regarded in law as the child of the birth parents and the birth parents cease to be regarded in law as the parents of the adopted child.'

In essence, the effect of the above provision could be said to be similar to section 9 of the Malaysian Adoption Act 1952, which basically states that once an adoption order is made by the court, the natural parents no longer have any rights or responsibilities towards the child. These rights and responsibilities are transferred to adoptive parent or parents. Hence, in this respect, this would include the duty to maintain the child on the part of the adoptive parents.

Having perused the Adoption Act 2000, the writer would next refer to the Family Law Act 1975 in order to see if child support stated therein includes the duty to maintain an adopted child. 'Child' is defined in section 4 as follows:

' "**child**":

(a) in Part VII includes an adopted child ...; and

(b) in Subdivision E of Division 6 of that Part, means a person who is under 18 (including a person who is an adopted child)'

Cross-referring to Part VII of the Act, it could be noted that Division 7 of Part VII provides for Child Maintenance Orders. Hence, it is clear that the child maintenance provisions in Division 7, Part VII of the Family Law Act, which confers the right on a child to claim maintenance from his or her parents, no doubt includes adopted children.

In conclusion, it is submitted that the right of an adopted child to claim for maintenance from his or her adoptive parents in Australia is similar to that in Malaysia. This is due to the fact that once an adoption order is made by the respective Courts in both these countries, the adoptive parent or parents step into the shoes of the natural parents and assume all their rights, duties and obligations towards the adopted child, which would include the duty to maintain the said child.

4.4.2.6 Discussion

Having examined the position in Malaysia as to whether an adopted child has a right to claim maintenance from his or her adoptive parents, the following observations could be made.

The 1950 Act and the Maintenance Ordinance of Sabah are silent on this issue. The LRA refers to an adopted child in the definition of 'child' in section 2 where it states, 'includes an illegitimate child of, and an adopted child'. However, it is not clear if an adopted child here refers to an illegitimate child *per se*. This dilemma was put to rest in the case of *T v O*[59] where the court took a disjunctive view.

Looking at the position in the other jurisdictions, it could be observed that the Singapore Women's Charter is also silent as to whether an adopted child could claim maintenance from his or her adoptive parents. Nevertheless, academic writers in Singapore, for example, Professor Leong Wai Kum in her book entitled *Elements of Family Law in Singapore* (as has been discussed earlier in pages in 130 and 131 of this thesis) have strongly suggested that an adopted child should be able to do so. In England and Wales, the FLRA 1987 clearly provides that adopted children have a right to claim maintenance, whereas the MCA is silent on this

[59][1993] 1 MLJ 168

issue. The CSA refers to an adopted child in the context of where there is a dispute concerning parentage on the issue of maintenance. Finally, in Australia, the FLA clearly states that a 'child' includes an adopted child.

Hence, it is submitted that rather than always having to cross refer to the Adoption Act 1952 in order to see whether an adoptive child has a right to claim maintenance under maintenance laws in Malaysia, it would be better for the legislature to amend all the three statutes on maintenance in Malaysia, and expressly include adopted children in the category of children who have a right to claim maintenance from their parents.

4.4.3 Step-children

The issue as to whether step-children have a right to claim maintenance from their step-parents needs to be clarified in the event they (the step-children) stay with the step-parents. As the statutory provisions on maintenance confer a child the right to claim maintenance from his or her natural parents, it is submitted that the child should not be given two bites at a cherry as it would then amount to abusing the provisions of the law. Nevertheless, the writer intends to examine the three maintenance laws in order to see whether these legislations do indeed allow step-children to claim maintenance from their step-parents.

4.4.3.1 Married Women and Children (Maintenance) Act 1950

As has been discussed in depth above, section 2 of the 1950 Act does not define the meaning of 'child'. Therefore, reference could be made to the case of *Kulasingam v Rasammah*[60] where the court defines a 'child' as a person below the age of eighteen according

[60]*Supra* n6

to the Age of Majority Act 1971. Further thereto, section 3(1) and (2) of the 1950 Act, when providing that the court has the power to order a person to maintain his legitimate or illegitimate child respectively, uses the phrase ‘child of his’. The question that arises is whether ‘child of his’ is limited to a biological child or whether it could be extended to include a step-child of his who is staying with him?

There are no cases decided on this issue yet under the 1950 Act. Therefore, it would be interesting to find out the judiciary's decision if such an issue arises in the future.

4.4.3.2 Law Reform (Marriage and Divorce) Act 1976

The position as to the right of a step-child to claim maintenance from his or her step-parent could be said to be more certain under the LRA when compared to the 1950 Act. Reference could be made to section 87 of the LRA which explains ‘child’ to mean a ‘child of a marriage’ as defined in section 2 and who is below the age of eighteen years. Section 2 of the LRA defines ‘child of marriage’ as follows:

> "Child of marriage" means a child of both parties to the marriage in question or a *child of one* party *to the marriage accepted as one of the family by the other party*; and "child" in this context includes *an illegitimate child of,* and a child adopted by, *either of the parties* to the marriage in pursuance of an adoption order made under any written law relating to adoption. (*emphasis added*)

‘A child to one of the parties to the marriage’ here refers to a step-child who has been accepted as one of the family by the other party. Therefore, ‘child’ under the LRA includes step-children as well.

The next issue that arises is whether a man who has accepted his step-child as a member of his family has a duty to maintain the said child? Reference needs to be made to section 87 of the LRA as it explains that 'child' under Part VIII of the LRA refers to a 'child of marriage'. Thus, the duty to maintain a child imposed generally in section 93(1) of the LRA may also apply to step-children. The duty to maintain under the LRA therefore is wider than the duty under the 1950 Act, as was stated by Professor Mimi Kamariah Majid in her book entitled *Family Law in Malaysia*[61] that it not only includes a legitimate child of the person, but also his or her illegitimate child as well as a step-child:[62]

> It would appear, therefore that a man has to maintain a lot more than his "children" under the LRA than under the 1950 Act. It is no wonder then that section 93 uses the term 'man' and 'woman', instead of 'father' and 'mother'.

However, the question that arises if whether a child, who is supported by his or her biological father but stays with his or her step-parent, has a right to claim maintenance from the step-parent too under section 93(1)? This issue has not been raised or addressed in any judicial decisions. It is therefore submitted that it would not be fair to the step-parent for the court to order the him to maintain the child concerned if the biological father is already maintaining him or her.

Reference at this juncture could be made to section 99 of the LRA which provides as follows:

> (1) Where a man has accepted a child, who is not his child as a member of his family, it shall be his duty to maintain such child while he or she remains a child so far

[61] *Supra* n11
[62] *Ibid* at 335.

as the father and the mother of the child fail to do so, and the court may make such orders as may be necessary to ensure the welfare of the child:

Provided that the duty imposed by this subsection shall cease if the child is taken away by his or her father or mother.

The above provision does not clearly state that 'a man has accepted a child of his wife from a former marriage'. This issue was addressed by the court in 2002 in the case of *Cheah Yen Pin (P) lwn Tan Chuan Ou.*[63] The respondent in the present case appealed to the High Court against an interim order, ordering him to pay a monthly maintenance to the petitioner and her four children. He (the respondent) appealed for a variation of the said order based on sections 83 and 96 of the LRA, on the ground that he is not under a duty to maintain the petitioner's three children from her previous marriage.

The High Court referred to section 99 of the LRA and stated that this section is clear and that it should be read with section 2 of the LRA. The court further held that the above provision clearly imposes a duty on the father to maintain a child of the marriage without taking into account the fact that the child is born from a former marriage. Thus, the respondent's duty to maintain the three children from a former marriage should continue. In fact, the respondent himself admitted that he had accepted the children as members of his family when he marries the petitioner. Therefore, it is not fair for him to now try to evade such a responsibility.

Hence, the above case has put to rest the issue of whether section 99 refers to the duty of a man to maintain his step-child whom he has accepted as a member of his family. In fact, in

[63] [2002] 6 MLJ 129.

the writer's opinion, section 99 is more relevant to maintenance of a step-child compared to section 93 as the former is more specific as follows:

(1) Section 99 clearly states where a man has accepted a child who is not his as a member of his family - denoting that a man has accepted his step-child into his family, whereas section 93 merely states that 'the court may ... order a man to pay maintenance for the benefit of his child'.

(2) The duty of a step-father to maintain under section 99 only arises when the natural father or mother of the child has failed to do so. The court may order the step-father to maintain such child. On the other hand, section 93 lists down the four situations when a court may order a man to pay maintenance to his child.

It is respectfully submitted that in order to avoid any confusion in the future, it should be expressly provided for in section 93 of the LRA that the duty to maintain stated therein applies to the person's biological child or adopted child, whereas the duty to maintain under section 99 would include step-children. Hence, the duty to maintain a step-child under section 99 only arises when the natural parents have failed to do so under section 93(1) or (2). In such a situation, the welfare of a child is protected, as the natural parents have the primary duty to maintain the child, failing which, if the child stays with his step-parent who has accepted him as a member of his family, the duty to maintain the child is then transferred to the step-parent.

4.4.3.3 Maintenance Ordinance of Sabah

The issue as to whether a step-child has a right to claim maintenance from his step-parent under the Maintenance Ordinance of Sabah could be examined as follows:

> First, an examination of the word 'child' needs to be made. According to section 2 of the 1959 Ordinance:
>
> > "child' includes legitimate or illegitimate child who is unable to maintain itself.

The above definition is very general as it merely refers to a legitimate or illegitimate child who is unable to maintain itself. However, it is possible for a court to give a broad definition to the phrase 'legitimate or illegitimate child', i.e. it could refer to a legitimate step-child and also an illegitimate step-child. As there are no decided cases on this issue, it is respectfully submitted that the above definition be revisited by the Sabah State Legislative Assembly in order to see whether it includes, *inter alia*, step-children to avoid any confusion that may arise in the future

Secondly, an examination of section 3(1) of the Ordinance could be made to see if the Court could order a person to maintain his step-child. Section 3(1) of the 199 Ordinance reads as follows:

> (1) If any person having sufficient means neglects or refuses to maintain or contribute to the maintenance of his wife or any legitimate child unable to maintain itself, a Court upon due proof thereof may order such person to make a monthly allowance to any person named therein for the maintenance of his wife or such child as aforesaid in proportion to the means of such person as to the Court seems reasonable.

Although the above provision does not specifically refer to a step-child, an interesting observation could be made. Reference is made to the phrase '... neglects or refuses to maintain or contribute to the maintenance of *his wife or any legitimate child' (emphasis added).* In this phrase, it could be noted that 'his wife' is stated, but not 'his legitimate child'. On the other hand, the phrase 'any legitimate child' is mentioned therein, thereby implying that 'child' in this provision is not limited to his child. It is submitted that there is a possibility that it may also include his step-child so long as the child is legitimate. In support of this submission, the writer would like to make a comparison between the above section and section 3(1) of the 1950 Act which is similar. Section 3(1) of the 1950 Act states as follows:

> (1) If a person neglects or refuses to maintain his wife or *a legitimate child of his* which is unable to maintain itself. *(emphasis added)*

Hence, section 3(1) of the 1950 Act clearly refers to a legitimate child of his thereby leaving less room to include step-children within this provision. Therefore, it is submitted that compared to the 1950 Act, a legitimate step-child has a better opportunity to claim for maintenance under the1959 Ordinance due to the generality of the words therein.

At the same time, however, an illegitimate step-child would not be able to raise the same argument as section 3(2) of the 1959 Ordinance states as follows:

> (2) If any person having sufficient means neglects or refuses to maintain or contribute to *maintain his illegitimate child* unable to maintain itself, a Court upon due proof thereof may order such person to make such monthly allowance not exceeding fifty ringgit on the whole as to the Court seems reasonable (*emphasis added).*

The above provision clearly states ‘his illegitimate child’, thereby limiting the duty to maintain ‘his illegitimate child’ only. At this juncture, it is respectfully submitted that in the best interest of an illegitimate child there should not be any discrimination between a legitimate child and illegitimate child. It does not matter whether a child is legitimate or illegitimate, so long as it (the child) is unable to maintain itself, the court should have the power to order the person concerned to maintain such child.

4.4.3.4. Comparison with other jurisdictions

As was done earlier, the writer would compare the positions in Singapore, England and Wales and Australia on the issue of a right of a step-child to claim maintenance.

(a) Singapore

As mentioned earlier under sub-topic *4.4.2 Adopted children*, there are two groups of persons liable to be ordered by the court to maintain a dependent child under the Singapore's Women's Charter, i.e. the parent and non-parent. The issue that arises in this connection is whether a step-parent would fall under the category of a parent’ (who owes a primary responsibility to maintain the child under section 69 of the Women's Charter) or a non-parent (who has voluntarily assumed the responsibility to maintain the child under section 70 of the Women's Charter)?

According to the *Halsbury Laws of Singapore*, it would be more logical for a step-parent to fall under the category of non-parent. The reason for these suggestions was explained as below:[64]

[64]Please see footnote 6, para [130.646] in Halsbury Laws of Singapore, Vol. 11, *Family Laws of Singapore*, (Singapore: Butterworths Asia, 2001).

This is particularly appropriate as the stepparent can become liable on the other basis by voluntarily assuming such responsibility. If such a stepparent were included 'parent', there would be two bases for his or her responsibility, thereby rendering one of them superfluous.

The above view is shared by Professor Leong Wai Kum, as stated in her book, *Elements of Family Law in Singapore*.[65]

In the landmark case of *EB v EC (divorce: maintenance of stepchildren),*[66] Woo Bih Li J stated that the liability of a step-father arises only as any other non-parent, it is under section 70(1) of the Women's Charter on the basis of his having voluntarily accepted the children as members of his family.

The legal duty of a non-parent to maintain a child accepted as a member of the family was created vide the Women's Charter (Amendment) Act 1980. As stated above, the main provision concerning this duty is section 70 of the Women's Charter which provides as follows:

Duty to maintain child accepted as member of family

70.(1) Where a person has accepted a child who is not his child as a member of his family, it shall be his duty to maintain that child while he remains a child, so far as the father or the mother of the child fails to do so, and the court may make such orders as may be necessary to ensure the welfare of the child.

(2) The duty imposed by subsection (1) shall cease if the child is taken away by his father or mother.

[65] Leong Wai Kum, *Elements of Family Law in Singapore*, (Singapore: Lexis-Nexis, 2007) at 439.
[66] [2006] 2 SLR 475.

(3) Any sums expended by a person maintaining that child shall be recovered as a debt from the father or mother of the child.

(4) An application for an order under subsection (1) may be made by-

(a) any person who is a guardian or has the actual custody of the child;

(b) where the child has attained the age of twenty one years, the child himself;

(c) where the child is below the age of twenty one years, any of his siblings who has attained the age of twenty one years; or

any person appointed by the Minister.

(5) Subsections (4) to (9) of section 69 shall apply, with the necessary modifications, to the making of an order under this section.

As the basis of this responsibility rests on the assumption that the non-parent had voluntarily assumed the responsibility to maintain the child, there may not be any biological link between the child and the non-parent. On the other hand, a factual link is sought as the non-parent had brought the child home and has begun assimilating the child as a member of his family. However, in order for this link to be established, the non-parent needs to have a family first. In the case *M v M (child of the Family),*[67] the court held that the man who had not formed a family yet cannot be said to have accepted his wife's child as his own.[68]

Professor Leong Wai Kum in her book *Principles of Family Law in Singapore* commented on the above case as follows:[69]

[67] [1981] 2 FLR 39, CA (England)
[68] Supra n.44 at [130.649]
[69] *Supra* n.45 at 860-86

> The decision implied that in a more normal family where family members live together, a child living there, whether of one spouse or not, may come within the phrase and both adults have accepted the child as a member of their family.

As there is no biological link between the child and the non-parent, the non-parent stated in section 70 could mean the child's grandparent, uncle, aunt, stepparent, sibling, foster parent or any other relatives.[70]

The duty of a parent to maintain the child constitutes a primary responsibility whereas the duty of a non-parent is subordinated to a parent's duty. This could be observed by dividing section 70 into three provisions:[71]

(a) the duty to maintain is imposed on the non-parent only when the father or mother of the child has failed to do so.[72]

(b) the duty to maintain on a non-parent ceases when the child is taken away by the father or mother.[73] Once the child is taken away by either the father or mother, he or she would then have to take on the duty to maintain the child.

(c) the non-parent would be able to recover any sums spent on maintaining the child as a debt from the father or mother of the child.[74]

The next issue that has been discussed by academics is whether the non-parent could relinquish the duty to maintain the child whom he has accepted as a member of his family. Professor Leong Wai Kum has discussed this issue in her books on Family Law. In her book

[70] *Supra* n.44 at [130.649].
[71] *Ibid* at [130.651]
[72] Section 70(1)
[73] Section 70(2)
[74] Section 70(3)

entitled *Principles of Family Law in Singapore*,[75] she states that in principle, a non-parent who has indicated that he or she does not wish to accept the responsibility to maintain the child cannot be forced to discharge the responsibility for a long time.

In her book entitled *Elements of Family Law in Singapore*[76] she discusses this issue in depth. She states that non-parents have a choice to relinquish their duty to maintain. She further contrasts this from a parent's duty to maintain where she states that 'the responsibility owed by a parent is one thread of parental responsibility that flows naturally from parenthood which lasts in theory, for life.'[77]

However, she qualifies the above view by stating that for practical reasons, it is not advisable to allow a non-parent to avoid responsibility on the initial protest that he or she has relinquished his or her responsibility to maintain the child concerned. It is up to the court to find whether the relinquishment has been proven up to its satisfaction. In the case of *EB v EC (divorce: maintenance of stepchildren)*, Woo Bih Li J states as follows:[78]

> I am of the view that once a person has accepted a child as a member of his family and hence has accepted the responsibility under section 70(1), he cannot abandon the responsibility simply by changing his mind.

Professor Leong Wai Kum further states that although the non-parent protests and states that he no longer wishes to maintain the child, the court can still impose the liability on him or her as he had once voluntarily assumed the responsibility. However, the question that has

[75]*Supra* n. 45 at 861
[76]*Supra* n.65
[77]*Ibid* at 446.
[78]*Ibid.*

not been answered is for how long the liability could be imposed on such a parent who does not wish to maintain the child anymore.

The next issue that arises is whether the duty to maintain on the non-parent who has voluntarily assumed the responsibility to maintain arises only when both the biological parents fail to maintain or is it sufficient to state that such a duty arises when either one parent fails to maintain? Section 70(1) provides that a person who has accepted a child, who is not his as a member of his family, has the duty to maintain the child 'so far as the father *or* the mother of the child fails to do so' (*emphasis added*). This issue was discussed in *EB v EC* where Woo Bih Li J stated as follows:

> First, the use of the conjunction "or" suggests that so long as either one of the biological parents fails to maintain the children, the [stepfather] is under a duty to maintain since he had accepted A and B as members of his family. If that is correct, another anomaly arises. For example, if the biological father maintains A and B but the [mother] does not, the [stepfather] is still under a duty to maintain them as well, so long as the [mother] does not do so. The [stepfather's] duty to maintain remains. This cannot be right. In my view, what section 70(1) means is that so long as neither biological parent maintains A and B, then the [stepfather's] duty to maintain arises. In other words, the conjunction "or" therein should be read as "and" and the clause should be read as "so far as the father and the mother of the child fail to do so".
>
> What then does a failure to maintain mean? For example, if the [mother] can provide some but not full maintenance, is there a failure to maintain? I think so. The failure to maintain does not mean a total failure.

From the discussion above on the responsibility of a step-parent to maintain a child, the following principles could be summarised:

(1) A step parent would not fall under the category of a 'parent'. On the other hand, by the voluntarily assuming the responsibility to maintain the child, he or she would fall under the category of non-parent, who then would be governed by section 70 of the Women's Charter.

(2) In order for section 70(1) to be applicable to the step parent, he or she needs to have a family of his own first, as the opening words of section 70(1) states 'where a person has accepted a child who is not his child as *a member of his family'(emphasis added).*

(3) The duty to maintain arises on the non-parent only when the father or mother of the child has failed in his or her duty to do so. This principle was further explained by the court in *EB v EC* [2006] 2 SLR 475 by stating that 'where the father or mother of the child' should be amended to 'where father *and* mother of the child' thereby suggesting that neither of the biological parent maintains the child.

(4) The duty to maintain by the step parent ceases when the child is taken away by his or her biological parent.

(5) Any sums spent on the child by the step-parent could be recovered as a debt from the biological parent of the child.

(6) The general principle is that the non-parent has a choice to relinquish his or her duty to maintain the child. However, the courts are cautious in permitting such

relinquishment as the court, taking into account the best interest of the child, feel that it is not fair to the child to allow the non-parent to simply change his or her mind.

The writer submits that the above principles on the duty of a step parent to maintain a child in Singapore under section 70 of the Women's Charter could also be applied in Malaysia as there is a similar provision in the LRA on this issue, i.e. section 99 (as discussed above).

(b) England and Wales

Reference could be made to two specific statutes in England and Wales on whether a step child has a right to claim maintenance from his step parent, i.e. the Matrimonial Causes Act 1973 ('MCA') and the Children Act 1989 ('CA').

Section 52(1) of the MCA defines 'child' as 'in relation to one of both of the parties to a marriage, includes an illegitimate child of that party or, as the case may be, of both parties'. 'Child of the family' is defined as 'in relation to the parties to a marriage, means -

(a) a child of both of those parties; and

(b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family.'

The above definition does not indicate expressly if a step child is included. However, it is submitted that as the definition of 'child' relates to, *inter alia*, an illegitimate child of '**that party',** it may refer to a step child. At this juncture, reference could be made to judicial decisions in order to see the interpretation given by the courts. In the case of *Re M (A*

Minor),[79] the Court of Appeal had to interpret the meaning of a 'child of family' in section 52 of the MCA. The court held that it has to broadly examine the meaning of this phrase and subsequently ask objectively if the parties to the marriage have treated the child as a child of their family. This was later followed in the case of *Hodgkiss v Hodgkiss and Walker*[80] where the husband had accepted the two children born out of the wife's adultery as children of the marriage. The court thus held that as the husband had accepted the two children, he was under the obligation to continue to maintain the children.

Hence, from the above decisions, it could be noted that the courts have basically examined if the child concerned has been accepted as a member of the family by the step parent and if the answer is in the affirmative, he will be under an obligation to continue to maintain.

In addition to section 52 and the judicial decisions above, reference could also be made to section 25 of the MCA which provides for the matters to which the court is to have regard in deciding how to exercise its powers in granting financial provision orders in matrimonial proceedings. In particular section 25(4) provides that in exercising its powers in granting the said financial provision orders 'against a party to a marriage in favour of a child of the family who is **not the child of that party** *(emphasis added)* the court shall have regard:

(a) to whether that party assumed any responsibility for the child's maintenance, and if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

[79] (1980) 10 Fam Law 184, CA.
[80] (1984)148 J.P. 417, C.A.

(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(c) to the liability of any other person to maintain to that child'.

Hence, perusing the above sections (sections 25(4) and 52) it could be safely said that the MCA does provide the right to a step child to claim for maintenance from his step parent. However, a pre-requisite to this right is either that the step parent has accepted the child as a member of his family or has voluntarily 'assumed any responsibility for the child's maintenance'. At this juncture, it could be noted that the above pre-requisite could be equated with section 99 of the Malaysian LRA which provides that it is the duty of a parent to maintain a child who has been accepted as a member of his family.

A similar provision as in section 25(4) of the MCA could be found in Schedule 1, para 4(2) of the Children Act 1989, which provides as follows:

(1) In deciding whether to exercise its powers … against a person who is not the mother or father of the child, and if so in what manner, the court shall in addition have regard to-

(a) whether that person had assumed responsibility for the maintenance of the child and, if so, the extent to which and basis on which he assumed that responsibility and the length of the period during which he met that responsibility;

(b) whether he did so knowing that the child was not his child;

(c) the liability of any other person to maintain the child.

The above provision gives the court power to order a step parent to maintain his step child if any of the three conditions stated in paragraphs (a) to (c) are fulfilled.

An interesting issue that arises here is whether a step parent refers to only a stepfather or does it include a stepmother as well? In the case of *J v J (property transfer application)*[81] the court held that there is no provision for a court to order a female who is not the child's natural mother to pay maintenance to the child concerned, notwithstanding the fact that he lived with the female for a long time.

In conclusion, it could be said that both the MCA and the Children's Act 1989 empower the court to order a step parent to maintain his step child if the relevant pre-requisites (as discussed earlier) are fulfilled. In addition, this duty could only be imposed on a stepfather and not a stepmother.

(c) Australia

It is interesting to note that the Family Law Act 1975 (FLA) in Australia has express provisions that provide for the maintenance of a step-child, contrary to the position in Malaysia or England and Wales. However, the Child Support (Assessment) Act 1989 is silent as to whether the Act applies to step children. Hence, the focus in this sub-topic will be on the provisions in the FLA.

Compared to the position in Malaysia which does not define who a step child or step parent is, section 4 of the FLA defines the meaning of ‘step parent’. ‘Step parent’ means ‘a person who:

(a) is not a parent of the child; and

(b) is, or has been, married to or a de facto partner ... of, a parent of the child; and,

[81] [1993] 1 FCR 471; [1993] 2 FLR 56.

(c) treats, or at any time while married to, or a de facto partner of, the parent treated, the child as a member of the family formed with the parent.'

Section 66D(1) of the FLA provides that a step parent has a duty to maintain a step child only if the court determines that it is proper to do so and it makes such an order under section 66M. In addition section 66D(2) provides that the duty of a step-parent to maintain a step child is a secondary duty subject to the primary duty of the child's parents. It further states that the step parent's duty to maintain the step child 'does not derogate from the primary duty of the parents to maintain the child.' Perusing section 66D(2), it could be noted that the child's parents still have the primary duty to maintain and the court may order the step parent to maintain if it (the court) is satisfied under section 66M. Hence, the question that arises at this juncture is whether the child could claim maintenance from both her parents as well as the step parent?

In order to answer the question above, it is pertinent to next refer to sections 66M and 66N which deal exclusively with a step parent's duty to maintain. Section 66M(3) states the matters[82] that court should have regard to when making an order as follows:

(a) the matters referred to in sections 60F, 66B and 66C; and
(b) the length and circumstances of the marriage to, relationship with, the relevant parent of the child; and
(c) the relationship that has existed between the step-parent and the child; and
(d) the arrangements that have existed for the maintenance of the child; and

[82] It is to be noted that the subsection expressly states that only the matters stated therein should be taken into account by the court and no other matters, thereby making the list exhaustive.

(e) any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.

Perusing the above provision, it is interesting to note that none of the statutes on maintenance that the writer has examined so far, be it Malaysia, or the other jurisdictions, have any provisions on the principles to be determined by the court when making a maintenance order in favour of a step child. As stated above, matters to be considered by the court include the length and circumstances of the marriage between the parent and the step parent, the relationship between the step parent and the child, arrangements pertaining to maintenance that are in existence. Paragraph (e) could be described as wide as it refers to 'any special circumstances' which would result in injustice or undue hardship if not taken into account. This denotes that the provision is quite liberal.

The writer would next refer to section 66N in order to answer the question raised earlier, i.e. whether the court could order a step parent to pay maintenance to a step child, in addition to ordering the parent of the said child to do the same? Section 66N(b) provides that in determining the financial contribution towards the child by the step parent, the court will, *inter alia*, take into account 'the extent to which the primary duty of the parents to maintain the child is being, and can be fulfilled.'

Therefore, examining the above provision, it is submitted that it means that the court would first examine the extent of maintenance by the parents and if it could be fulfilled by them. If the court finds that the parents are unable to fulfil their duty to maintain their child properly, the court may then order the step parent to maintain the child. This provision could be described as unique and could be said to be bending backwards in favour of a child where the natural parents are not able to fulfil their duty to maintain in a satisfactory manner.

This issue was indirectly discussed in the case of *Keltie & Keltie & Bradford*.[83] The issue in this case was whether the Family Law Act empowers the court to make a maintenance order to order that a step parent to pay maintenance to a step child who has attained the age of 18 years. The petitioner here is the child who has attained the age of eighteen years. The first respondent is his natural father. He has already obtained a consent order in 2001 that the natural father pay him a maintenance in the sum of $50 per week. The second respondent is the petitioner's step father. The petitioner is claiming maintenance from the step father as well. The step father contends that that section 66L of the Family Law Act which gives the court the power to order maintenance for a child who has attained the age of eighteen years, does not include a step child.

The court referred to an earlier case, i.e. *Carpenter and Carpenter*[84] which held that the terms 'child' and 'children' used in Division 7 of Part VII of the Family Law Act refer to a relationship rather than an age. Hence, the court eventually held that section 66L that allows a court to extend a maintenance order beyond the day in which the child will turn eighteen under special circumstances applied as well to a child maintenance order made under section 66M and 66N. This means that a maintenance order made in favour of a step child could, under special circumstances, extend beyond the day in which the said child reaches the age of eighteen.

In conclusion, it could be seen that step child in Australia has an added advantage when compared to a step child in Malaysia, as not only can he claim from his natural parents, but also from his step parent if the court finds it reasonable so to order.

[83] [2002] Fam CA 421
[84] [1994] Fam CA 89; (1995) FLC 92-583.

4.4.3.5 Discussion

Having looked at the three pieces of legislations concerning the right of a child to claim maintenance from his step father in Malaysia, it is observed that save for the LRA, the other two statutes do not specifically provide for this right. The LRA has taken into account the welfare of such children, who are staying with their step father, and has indeed provided in section 99 that a person (who may include a step father) who has accepted a child as a member of his family has a duty to maintain the said child. However, two conditions need to be fulfilled in order for a child to claim maintenance from his or her step father under section 99:

(1) the step father should have accepted the child as a member of his family; and
(2) the child's biological father or mother has failed in his or her duty to maintain the child.

It is submitted that although the primary duty to maintain a child is with the natural parents as primary caregivers, it is indeed heartening to note that at the same time, there is a right of recourse for these children where their own parents have failed in their duty to maintain them.

In addition to the local statutes, when comparison was made with the position of step children in Singapore, England and Wales and Australia, the following observations were made:

Section 70 of the Singapore Women's Charter is similar to section 99 of the LRA. The authors who have written books on the Family Law in Singapore have discussed the issue of the duty of a step parent to maintain a child in depth and there are also judicial decisions on this issue which have taken into account the welfare of these step children and decided in

their favour. As mentioned earlier, the same principles that apply to the right of a step child to be maintained by his or her step parent in Singapore would be applicable in Malaysia as well on the basis that section 99 of the LRA is similar to section 70 of the Singapore Women's Charter.

In England and Wales, the relevant provisions could be noted in the Matrimonial Causes Act and the Children's Act where the court is empowered to order a step parent to maintain his step child on condition one of the pre-requisites stated in the relevant provisions is fulfilled. Further thereto, case law[85] in England and Wales has also laid down the rule that this duty could only be imposed on a stepfather and not a stepmother.

As discussed earlier, a step child in Australia is conferred a right to claim maintenance from his step parent under the Family Law Act. However, this right is subject to the discretion of the court. Hence, it could be observed that not only the Australian legislature, but even the judiciary plays a pro-active role in protecting the right to maintenance of a step child, even when he or she has reached the age of eighteen years.

After examining the three jurisdictions above, the writer submits that although section 99 of the LRA could be referred to by step children wanting to claim maintenance from their step-parents, it is not expressly mentioned therein that it applies to step children. Therefore, as stated earlier under this sub-topic, the writer proposes that all the three Malaysian statutes should incorporate a provision that a step child has a right to be maintained by his step parent where the latter has accepted him as a member of his family. However, this duty to maintain is secondary to that of a natural parent. In addition, the duty to maintain by a step parent only arises if the court feels that the natural parents are not able to fulfil their duty to maintain

[85] *J v J (property transfer application)* [1993] 1 FCR 471; [1993] 2 FLR 56.

(following the Australian model). In this respect, it is argued that it is a win-win situation for the child, as where the natural parents fail to maintain him, he could claim from his step parent (if any) if the child stays with the step parent and the step parent has accepted the child as a member of his family.

4.4.4 Illegitimate Children

In an article entitled '*Statistics of Unwanted Babies'*, the writer of the article states that the National Registration Department has recorded that from the year 2000 to July 2008, more than 257,000 birth certificates were issued to babies without their father's names being recorded.[86] From the statistics stated above, this means that an average of 2,500 illegitimate children was born every month.

The abovementioned article also provides that the total number of illegitimates from the year 1999 to 2003 is about 70,430. It also provides the data from the year 1999 to 2003 which shows the distribution of illegitimates among states, ethnically and among the various religions as follows:

[86] Abdul Ghani Nasir, *Statistics of Unwanted Babies*, UKM News Portal, Wednesday 9 June 2010, published in pkukmweb.ukm.my/news/index.php/en/typography/346.html accessed on 15 December 2015.

Table 4.1: Distribution of illegitimate children among states from 1999-2003

States	Number of illegitimates
Selangor	12,836
Perak	9,788
Kuala Lumpur	9,439
Sarawak	617
Terengganu	574
Others	37,176
Total	**70,430**

Source: Abdul Ghani Nasir, Statistics of Unwanted Babies, UKM News Portal, Wednesday 9 June 2010.

Table 4.2: Distribution of illegitimate children among ethnics from 1999-2003

Ethnic	Number of illegitimates
Malays, Sabah and Sarawak Bumiputeras	20,949
Indians	19,581
Chinese	18,111
Others	11,789
Total	**70,430**

Source: Abdul Ghani Nasir, Statistics of Unwanted Babies, UKM News Portal, Wednesday 9 June 2010.

Table 4.3: Distribution of illegitimate children among religions from 1999-2003

Religion	Number of illegitimates
Muslims	20,949
Hindus	18,085
Buddhists	17,236
Christians	3,395
Others	10,765
Total	**70,430**

Source: Abdul Ghani Nasir, Statistics of Unwanted Babies, UKM News Portal, Wednesday 9 June 2010.

The total number above increased two-fold as could be seen recently, where it was reported in the press that the National Registration Department (NRD) has issued a statement that a total number of 159,725 children have been born out of wedlock in Malaysia between 2013 to 2015.[87] Unfortunately, the NRD did not give a breakdown according to the races. It merely gave a breakdown of this number according to the years as follows:

[87] *NRD: Not all 159,725 illegitimate children born since 2013 are Muslims,* The Malay Mail, 14 September 2016.

Table 4.4: Number of illegitimate children for the years 2013 to 2015

Years	Number of illegitimates
2013	53,492
2014	54,614
2015	51,169
Total	**159,725**

Source: NRD statistics show 159,725 illegitimate children born since 2013, The Malay Mail, 13 September 2016.

Examining the statistics above, it is worrying to note that the population of illegitimate children in Malaysia is increasing at an alarming rate. The number of illegitimate children as could be seen above raises concern as to the plight of single mothers who have to raise their illegitimate children, especially those living in big cities. Life in big cities has become a rat race. These single mothers may face difficulties in getting support from their family members, who may shun them for causing disgrace to their family reputation. As a result of finding it difficult to maintain their children, these single mothers would ultimately resort to abandoning their children. This would the cause problems for the State as the number of abandoned children and babies would then increase, which is exactly what is happening in our country currently.

It is disheartening to note that society generally does not 'treat' illegitimate children in the same way it 'treats' legitimate children. Thus, these children are embarrassed to say that they are illegitimates for the fear of being shunned by the society they live in. Howsoever, it is the duty of the State to ensure that the rights of these unfortunate children are protected and they should not be penalised for the sins of their parents. One of the basic rights that

should be protected is the right of an illegitimate child to claim maintenance from his or her parents for the basic necessities in life. Hence, it is pertinent to look at our non-Muslim laws in order to see whether it enables an illegitimate child to claim maintenance from his or her parents. The three statutes on child maintenance would be critically examined:

4.4.4.1 Married Women and Children (Maintenance) Act 1950

Section 3 of the 1950 Act spells out the power of a court to order a man to pay maintenance to his wife and child. Reference could be made specifically to section 3(2) of this Act which provides as follows:

> If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court upon due proof thereof, may order such person to make such monthly allowance as to the court seems reasonable.

At this juncture, it is to be noted that prior to 1 March 1982, i.e. the coming into force of the LRA, section 3(2) of the 1950 Act imposed a ceiling of fifty ringgit concerning maintenance to an illegitimate child. With the coming into operation of the LRA on 1 March 1982, this limit was repealed by the LRA.[88]

Tracing back to history, in 1872, with the enactment of the Straits Settlements Summary Criminal Jurisdiction Ordinance 1872,[89] it could be noted that the Ordinance had imposed limited liability to an illegitimate child when compared to a legitimate child. There was no monetary limit for a legitimate child.[90] Whereas, for an illegitimate child, section 45(2) of the Ordinance read as follows:

[88] PU(B) 73/82.
[89] Straits Settlements Summary Criminal Jurisdiction Ordinance No. XIII of 1872.
[90] *Ibid*, section 45(1).

> If any person neglects or refuses to maintain his illegitimate child unable to maintain itself, it shall be lawful for the court of Quarter Sessions, or for a Magistrate on due proof thereof, to order such person to make monthly allowance not exceeding ten dollars, as to the court or Magistrate may seem reasonable.

The maximum limit was raised from ten dollars to forty dollars by the Straits Settlements Married Women and Children (Maintenance) Ordinance 1949.[91]

Another issue which arises in relation to section 3(2) is whether 'any person' stated therein refers only to one parent or both the parents. The provision refers to a person who has neglected or refused to maintain an illegitimate child of 'his'. Hence, *prima facie*, this means that this section particularly imposes a duty on a male to maintain his illegitimate child. However, as was rightly pointed out by Professor Mimi Kamariah Majid, in her book *Family Law in Malaysia*,[92] reference in this connection could be made to the Interpretation Acts 1948 and 1967[93] which provide that words and expressions importing the masculine gender include females. Thus, from the above extended interpretation of the word 'any person' to include the mother as well, this means that an illegitimate child who wants to claim maintenance under the 1950 Act may claim maintenance from both his father as well as his mother. The writer submits that the above interpretation is in the interest of the child concerned as in an instance where the father of the child is dead, the child can enforce his right to maintain against his mother. Hence, it is reiterated that the above interpretation takes into account the welfare of the child.

[91] Straits Settlements Married Women and Children (Maintenance) Ordinance No. 26 of 1949, section 2(2).
[92] *Supra* n 11 at 312.
[93] Act 388.

4.4.4.2 Law Reform (Marriage and Divorce) Act 1976

Part VIII of the LRA generally contains provisions on the 'Protection of Children'. Provisions on custody and maintenance of children could be found in this Part. The duty to maintain a child is expressly provided for in section 92 of the LRA.

In addition, section 93(1) of the LRA empowers a court to order a man to pay maintenance to his child in any of the following situations:

(a) if he has refused or neglected reasonably to provide for the child;

(b) if he has deserted his wife and the child is in her charge;

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the child in the custody of any other person.

Apart from a man, the court may also order a woman to pay or contribute towards the maintenance of her child if the court is satisfied that having regard to her means, it is reasonable so to order.[94]

However, unlike the 1950 Act which clearly provides that the court may order a person who has neglected or refused to pay maintenance to his illegitimate child to do so, the LRA is silent on whether the duty to maintain referred to in sections 92 and 93 as mentioned above includes an illegitimate child. Reference needs to be made to section 87 of the LRA regarding the meaning of 'child' in sections 92 and 93. Section 87 provides that 'child' has the meaning of 'child of the marriage' as defined in section 2 who is under the age of eighteen years. 'Child of the marriage' under section 2 is defined as 'a child of both parties to the marriage

[94] Section 93(2).

in question or a child of one party to the marriage accepted as one of the family by the other party; and "child" in this context includes an illegitimate child of, and a child adopted by either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption.'

The question that arises at this juncture is whether the phrase 'an illegitimate child of, and a child adopted by either of the parties to the marriage' should be interpreted conjunctively or disjunctively? If a conjunctive interpretation is given, this means that to qualify as a 'child of the marriage' under the LRA, the illegitimate child must be adopted by either of the parties to the marriage pursuant to an adoption order made under the Adoption Act. It is to be noted here that when an illegitimate child is adopted according to the requirements in the Adoption Act 1952[95], it is a method of legitimization where the child is treated a legitimate after the adoption order is issued.

On the other hand, if a disjunctive interpretation is given, this would mean that to qualify as a 'child of marriage' the illegitimate child need not be adopted under the relevant adoption laws.

As there is no direct authority on the interpretation of this section, it is submitted it would be in the best interest of an illegitimate child if a disjunctive interpretation is given to the above definition as he or she would not have to wait to be adopted in order to claim maintenance under the LRA.

[95] Act 257.

4.4.4.3 Maintenance Ordinance 1959 of Sabah

Section 3(2) of the Maintenance Ordinance of Sabah is similar to section 3(2) of the 1950 Act (as discussed earlier). However, there are two differences between this Ordinance and the 1950 Act. The first difference is that section 3(2) of the 1959 Ordinance still provides that the court may order a person to make monthly allowance not exceeding fifty ringgit to his illegitimate child. This limit has been repealed in section 3(2) of the 1950 Act (as has been discussed earlier) with the enforcement of the LRA on 1 March 1982. It is submitted that the Sabah Legislative Assembly should amend section 3(2) of the 1959 Ordinance by repealing the maximum limit so that there is no difference between the right of a legitimate child and an illegitimate child to claim maintenance in Sabah.

The second difference is as to the definition of 'child'. The 1959 Ordinance provides for the definition of a 'child', whereas the 1950 Act is silent on the meaning of child. Section 2 of the Ordinance provides that 'child' includes a legitimate or illegitimate child who is unable to maintain itself. This is the only piece of legislation that clearly includes an illegitimate child in the definition of child. It is submitted that the other statutes concerning maintenance should also include illegitimate child within the meaning of 'child'.

4.4.4.4 Cases decided concerning an illegitimate child's right to claim maintenance

Having examined the statutes that are in force currently on the maintenance of illegitimate children, it is only proper to next find out the judicial approach in deciding cases concerning illegitimate children who wish to claim maintenance from their parents. Basically, upon perusing the facts of the cases which would be discussed below, actions to claim maintenance are brought by the mothers on behalf of their illegitimate children (who are mostly infants) from the putative father of the child.

One of the earliest cases decided concerning maintenance of an illegitimate child is the case of *Che Wan v Mohamed Yassin*.[96] However, the issue in this case was pertaining to the jurisdiction of the High Court to hear the matter. A similar issue arose thirty-five years later in the case of *Goh Koon Suan v Heng Gek Kiau*.[97]

The factors that need to be proven in order to claim maintenance for an illegitimate child under section 3(2) of the 1950 Act was laid down in the case of *T v O*.[98]The learned judge, Mahadev Shankar J (as his Lordship then was), held that in order to succeed for an application under section 3(2) of the 1950 Act, two factors need to be proven. First, is that due proof is required to show that the person sued is the father and secondly, that the illegitimate child is unable to maintain itself, before the court will order maintenance. The learned judge also stated the even though the two factors stated above are proven, the maximum limit that may be claimed under section 3(2) is RM50. At this juncture, it is respectfully submitted that the learned judge had erred when he stated that an illegitimate child is only entitled to a maximum sum of RM50 per month. As mentioned earlier, this maximum limit was repealed by section 109 of the LRA on 1 March 1982.

As stated by his Lordship above, the applicant would have to prove two factors in order to claim maintenance for an illegitimate child under section 3(2). The first factor as stated above is that due proof is required to prove that the person sued is the father. The second factor is that the child is unable to maintain itself. Between these two factors, the writer submits that the first factor poses a problem for the illegitimate child as the putative father may deny paternity of the said child. Hence, for the purpose of this thesis, the writer would

[96] [1957] 23 MLJ 39.
[97] [1992] 1 MLJ 279. The court held that the 1950 Act, in section 2, clearly stipulates that the applicant should bring the action in a subordinate court. Hence, the High Court does not have the jurisdiction to hear the case as a court of first instance, unless as provided in section 8, where the subordinate court is of the opinion that the High Court is more suitable to hear the matter.
[98] [1993] 1 MLJ 168.

focus on the first factor. One of the methods to prove paternity is through the Deoxyribonucleic Acid test (DNA test). Tremendous progress has taken place in the field of DNA profiling analysis.

Resorting to DNA profiling to prove paternity could be seen in two cases. First, is the case of *Othman bin Haji Abdul Halim v Hamisah bt Awang.*[99] The appellant denied and disclaimed paternity of the child. Both parties agreed to undergo a DNA test to determine the paternity of the child. A DNA test was carried out. However, the High Court held that the DNA Profiling Analysis Report was inadmissible as it was not unqualified. In order for the DNA profiling to be carried out properly all the four specified parties need to be present and tested. The four parties are, the purported father, the mother of the child, the child and another family member of the purported father, preferably an uncle on the paternal side. As this was not done, the court held that the test was inconclusive and therefore inadmissible.

Secondly, in the case of *Ng Chiam Perng (sued by her mother and next friend Wong Nyet Yoon) v Ng Ho Peng,*[100] the respondent denied that he was the father of the child. The respondent further stated that the child was the legitimate child of the appellant and that his name was used as the child's father in the birth certificate without his consent. At the trial, the appellant's counsel requested for the respondent to subject himself to a DNA test which the respondent refused. The counsel also urged the court to observe and compare the similarity in features between the child and the respondent. The learned magistrate denied both requests. His Lordship referred to the presumption of legitimacy under section 112 of the Evidence Act 1950[101] as she was a legally married woman. The onus is on the appellant

[99] [1994] 3 CLJ 78.
[100] [1998] 2 MLJ 686.
[101]Section 112 of the Evidence Act 1950 provides as follows: 'The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.'

to prove that the respondent was the father of her child and in order to rebut the presumption under section 112 of the Evidence Act, she has to show that she and her husband did not have access to one another at or about the time the child was conceived. The court also drew an adverse inference against the appellant for failing to call her husband as a witness. In the court's opinion, the evidence of the husband is crucial in proving the status of the child by stating whether he and the appellant had access to one another at the time the child was conceived. The appellant appealed to the High Court. The High Court agreed with the learned magistrate's reasoning and dismissed the appeal. The court also held that the evidence of similarity in features to prove paternity has very little value and is not safe.

The High Court in the case of *Lee Lai Ching v Lim Hooi Teck*[102] exercised its judicial discretion and stated that as there is no specific statute to order DNA testing, reference could be made to the United Nations Convention on the Rights of the Child (CRC) and the Federal Constitution. The court gave regard to Article 3 of the CRC which emphasises on the interest of the minor. The court also held that the child is entitled to equal protection under Article 8 of the Federal Constitution (which guarantees equal protection of all before the law). Therefore, the child had the right to know who is biological father is. This could only be confirmed if the defendant underwent a DNA test to confirm the paternity. The High Court thus ordered the defendant to undergo DNA testing. However, this decision was overruled by the Court of Appeal in the same case[103] where the court held that before the court could order a paternity testing, the plaintiff must prove the relationship between the plaintiff and the defendant. Here, as the plaintiff did not prove such a relationship, hence the court set aside the High Court's decision.

[102]Civil Suit No.22-587-2004
[103]Civil Appeal No: P-02-134-01/2013.

Judges deciding cases so far on maintenance of illegitimate children (as could be seen from the cases discussed above) have basically focussed on two issues, first, the jurisdiction of the High Court as a court of first instance in hearing such matters, and secondly, using the DNA test to prove paternity. The first issue is settled, i.e. that it is clearly stated in section 2 of the 1950 Act that the subordinate court has the jurisdiction to hear the matter as the court of first instance, unless it (the subordinate court) is of the opinion that the High Court should hear the matter (as provided for in section 8 of the 1950 Act).

Pertaining to the second issue, in the writer's opinion, single mothers who intend to claim maintenance for their illegitimate children may face difficulties when it comes to conducting the DNA test as the burden of proving the paternity of their child is on them. The challenges that they may face include getting the father of their child to agree to undergo the DNA test and the costs involved in conducting the test. Unless and until the relevant laws such as the Evidence Act 1950 or the Legitimacy Act 1961 or the Deoxyribonucleic Acid (DNA) Identification Act 2009[104] are amended to empower the court to order for the testing of the DNA sampling for purposes of proving the paternity of a child, this problem would not be solved.

4.4.4.5 Perception of social workers and single mothers on the laws pertaining to the right to maintenance of illegitimate children

Reference so far has been made to the statutes that provide for maintenance of illegitimate children and case law to show the bench's attitude towards granting a maintenance order in favour of the illegitimate children.

[104]The DNA Act 2009 currently empowers the court to order the testing of DNA sampling for forensic purposes only.

The real question that arises at this juncture is two-fold: First, does the existence of laws, as discussed earlier, actually protect the rights of illegitimate children to claim maintenance from their parents, especially their fathers and thereby easing the financial burden of their single mothers when it comes to raising them (these children)?

If the answer to the above is in the affirmative, the second question that arises is do the single mothers know that the law protects the right of their children to claim maintenance from their fathers? In order to answer these questions, the writer conducted interviews with a total of eleven persons comprising of social workers who run shelter homes for single mothers and single mothers themselves.[105] It is to be noted that all the single mothers who were interviewed were non-Muslims and the writer informed them that they are free to abstain from answering any questions that they felt was sensitive. The writer also obtained verbal consent from these single mothers before the interviews were conducted. The interviews were conducted in two shelter homes, one in Ipoh and one in Kota Kinabalu. The reason why the writer chose to conduct the interviews in Kota Kinabalu was to observe if the single mothers in Sabah were aware of the provisions in the Maintenance Ordinance of Sabah pertaining to the right of an illegitimate child to claim maintenance, whereas Ipoh was chosen due to the fact that Table 4.1 (discussed above) shows that the number of illegitimate children were second highest in Malaysia. Due to their request for anonymity, the writer would not disclose the names of the social workers, the single mothers as well as the two shelter homes.

The writer would first analyse the interviews conducted with the social workers, one of whom runs the shelter home in Ipoh and the other two, in Kota Kinabalu, followed by the interviews conducted with the single mothers at both these homes.

[105]Refer to Appendix C for the interview questions that were asked to the social workers and Appendix D for the questions to the single mothers.

A. Social workers

When asked the question as to why the single mothers leave their homes and come to the shelter, the common reasons that were stated were that pregnancy out-of-wedlock is not accepted in the present society or any culture and it would cause embarrassment to the family, especially those from the villages. Hence, these girls are either thrown out of their house by their parents or sent by their parents to these Centres. In addition, in Sabah, if the girl is from a village, her family has to pay a penalty called '*Sogit'* as the girl is pregnant and not married. This is prevalent in the natives from the Kadazandusun ethnic group in Sabah. The parents have to pay the penalty in the form of an animal, either a buffalo, cow or a pig, where they have to slaughter the said animal and distribute it to the whole village. The belief in the villages is that if this penance is not performed, it would cause hardship to the said village. These animals cost between RM2000 to RM3000. Some parents cannot afford to buy the animals as aforesaid. Hence, in order to avoid embarrassment and performing the penance which is beyond their means, they send their unmarries pregnant daughters to the homes.

As to the question if the single mothers have attempted to ask the putative fathers for maintenance of their child, the general answer was no. However, the writer was informed that in such a situation the girl's family would agree to look after the family, but will ask the boy's family for maintenance to maintain the child.

The writer then asked a pertinent question as to whether the single mothers knew that their child has a right to claim for maintenance from their fathers. The answer was also generally no. Even if they (the single mothers) knew that the child has a right, they would not claim for such maintenance on behalf of their child as they do not want to have anything to do with a man who runs away from his responsibility. On the question as to how do we educate them of this right, the reply was that such awareness should be created among the

people at the grass root level through publicity and outreach programmes. The problems that may be faced by these single mothers if they proceed to claim for their child's maintenance are as follows: (a) they lack the knowledge of how to go about it;(b) the legal cost and time involved;(c) the putative father or his family may want to take the child away;(d) no support from family members; and (e) as a result they believe that it is not worth the trouble to claim for such maintenance.

Finally, when the writer asked the social workers their opinion on what are the measures that could be taken by the relevant authorities like the Government, NGOs and the Social Welfare Department, the answers that were given could be summarised as follows:

(a) Educate the single mothers on the laws that are available to protect their child's welfare by conducting legal clinics, especially in secondary schools;

(b) However, they felt that sometimes the existence of the laws alone is not sufficient. Community should not discriminate these mothers. When these mothers are admitted in hospitals for the delivery of their babies, the hospital staff should not be rude to them. In addition, when these mothers go to the National Registration Department to apply for their child's birth certificate, the staff there should also not be rude to them;

(c) The community should also stop discriminating the children as illegitimate children and give them the same treatment as legitimate children;

(d) The Government could implement a social security programme where financial assistance could be given to these single mothers for the first two years after they

deliver their children. This assistance is specifically given to those single mothers who are in dire financial need;

(e) For the single mothers who are not supported by their respective families, the Government may also be able to help by giving them housing support by allocating low cost flats to them for the first two years. Perhaps two single mothers could be asked to share one flat. After two years, the single mothers would have to rent their own place.

(f) A specific NGO could be set up as a one-stop centre for these single mothers and to assist the Government to carry out the above tasks. Currently, although there are several NGOs that exist to help single mothers, they hardly work together with the Government. In addition, a day care centre could also be established so that the mothers, who do not have their family support, could leave their children when they go to work.

It is submitted that some of the opinions and recommendations put forward by these social workers are idealistic and not realistic, for example on changing the attitude of the community and the relevant authorities when it comes treating the single mother and their illegitimate children. It is very difficult to change the perception of the community which has always looked at illegitimate children in a negative manner. In addition, the recommendations put forward by the social workers as stated above are in the interest of the single mothers. Nevertheless, in the long run, if the above recommendations are implemented, they would also indirectly benefit the illegitimate children.

B. Single mothers

A total of eight single mothers were interviewed, five in the shelter home in Ipoh and three in Kota Kinabalu. Unfortunately, out of the nine single mothers in the Kota Kinabalu shelter home, only three agreed to be interviewed. There was one Chinese, four Indians and three Kadazans. All the eight were between the ages of eighteen and twenty-five. All eight had studied up to Form 5. There were only two of them who were employed whereas the rest of them were unemployed.

The questions that were put to the single mothers were more or less similar to those that were asked to the social workers. On the first issue, as to why they left their homes and came to the Centre, the answers that were given were similar to the answers given by the social workers. Two additional reasons given by two of the single mothers. First was that she had not decided whether she wanted to look after the child once it is born or give it up for adoption. Secondly, the single mother faced financial difficulty when it came to ante-natal medical expenses.

The writer then asked who would be financially support their child. Three of them answered that her parents and herself would do so, three of them answered that they themselves, one of them said that she would be giving the child for adoption and finally one of them was not sure who would be supporting.

When asked whether they had tried to ask the putative father for child support, out of the eight, four of them replied no, saying that they knew that they would not be able to get the maintenance as their boyfriends would definitely refuse to provide so; two of them did indeed ask but was refused; one of them asked and the boyfriend was willing to support once he started earning as he was unemployed at that point of time and the last person tried to ask but the boyfriend could not be traced.

The writer then asked the single mothers whether they knew that their child has a right under the law to claim for maintenance from his putative father. All of them answered in the negative. This was followed by the question as to whether they would pursue the matter in court now that they are aware of such a right, four of them answered no, three answered yes and one answered maybe.

As to the question as to the problems that they may face if they initiate a legal proceeding, the replies that were obtained were as follows: a) court proceedings are a hassle b) emotionally involved c) putative father is a violent person and may injure herself and the child; d) asking the father to undergo a DNA test, and e) as the father is still schooling, he would not be able to pay the maintenance sum.

It is noteworthy to mention here that when the writer asked them whether the putative father denied paternity of the child, five of them answered that yes indeed. This shows that denial of paternity is common among putative fathers as they do not want to take on the responsibility of maintaining their children.

Finally, when asked as to what measures could be taken to protect the rights of illegitimate children, the following replies were obtained:

(a) The community's perception of illegitimate children should change. Illegitimate children should not be thought of as a social stigma.

(b) Authorities such as the Government could assist the single mothers, who are facing financial difficulties, in providing employment, loans to single mothers who intend to set up businesses or pursue their education and educate their child.

(c) The government and NGOs could assist them in getting birth certificates for their child.

(d) The Social Welfare Department could help set up child care centres to look after the children of working mothers.

From the suggestions recommended by the single mothers, as stated above, the writer would reiterate that some of the suggestions are idealistic, for example, the community's perception of illegitimate children. It is very difficult to change society's perception overnight. The suggestion as to seeking the Government's help, would only be possible if the single mothers register with the relevant government authorities, for example, the Social Welfare Department. The problem is, living in an Asian society deeply rooted in traditional values, would these single mothers be courageous enough to register themselves with the Social Welfare Department, bearing in mind that they may not want anyone to know that they have an illegitimate child?

Many issues could be noted from the interviews that were carried out with the social workers and single mothers. Basically, it could be noted that the mere existence of a law that states that a person could be ordered by the court to pay maintenance to his illegitimate child is not sufficient. In fact, many single mothers are not even aware of such a law in order for them to pursue the matter. This is due to the fact that these single mothers could be divided into two groups, the educated ones (who know their rights) and those who are not educated (who are unaware of their rights). Even if they pursued the matter in court, the problems that they may face would deter them from going to court, which then makes the said legal provision redundant. One major problem that they may encounter is the denial of paternity by the putative father. There are no laws in Malaysia that could order a person to undergo a

DNA test to prove paternity. It is submitted that taking into consideration the welfare of the child, the legislature should amend the existing laws in order to empower the courts to order for a DNA test to prove paternity, so that the putative fathers do not was their hands off their responsibility towards their child.

Hence, the writer would next look at the position on this issue in Singapore, England and Wales and Australia in order to see whether the single mothers there too face similar issues as those in Malaysia, especially when the putative father denies paternity.

4.4.4.6 Comparison with other jurisdictions

(a) Singapore

The Singapore Women's Charter provides that a parent has a duty to maintain his or her children, whether they are legitimate or illegitimate (section 68). Hence, it could be seen that the word 'illegitimate' is expressly provided for in section 68, unlike section 92 of the Malaysian LRA, which merely states that it is the duty of a parent to maintain his or her children, without stating whether they are legitimate or illegitimate. Thus, it could be stated that the legitimate status of child is irrelevant in Singapore when it concerns claiming maintenance from his or her parents.[106]

The predecessor to the Women's Charter concerning maintenance was the Straits Settlements Summary Criminal Jurisdiction Ordinance 1872, where section 45 (II) fixed a maximum amount of 10 dollars that may be awarded to an illegitimate child.[107] However, when the Women's Charter was enacted in 1961, it removed the ceiling and thus, the position of an illegitimate child was equalised with a legitimate child.[108]

[106]Leong Wai Kum, *Principles of Family Law in Singapore*, (Singapore: Butterworths, Asia,1997) at 860.
[107]Note that this Ordinance was also applicable in Malaysia then.
[108]*Supra* n 106 at 855.

As discussed above, under the Malaysian position, the main problem faced by an illegitimate child in claiming maintenance is if the putative father denies paternity. The courts in Malaysia generally refer to the presumption of legitimacy in section 112 of the Evidence Act 1950 when this issue arises. Singapore too has a similar provision in section 114 of the Singapore Evidence Act which provides as follows:

> The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

According to Professor Leong Wai Kum in her book *Elements of Family Law in Singapore*[109], it is easier to prove biological maternity rather than biological paternity. Biological maternity could be established from 'the official records as every birth in Singapore for a long time now is performed with medical assistance in hospitals. It is only proof of biological paternity that resulted from sexual intercourse between the parents, then, that can require the child to resort to the means of proof which the law makes available.'[110]

The presumption of legitimacy in section 114 of the Singapore Evidence Act was examined in the case of *WX v WW*[111] where the High Court had to decide whether both proof of legitimacy as well as proof of paternity fall within section 114. The issue in this case was whether the Appellant was the biological father of the child concerned. The Respondent had sexual relationships with the Appellant and another man, H. When the Respondent became pregnant, H, thinking that the child was his, married the Respondent. After the child was

[109]Leong Wai Kum, *Elements of Family Law in Singapore*, (Singapore: Lexis-Nexis, 2007 at 439.
[110]*Ibid* at 439.
[111][2009] 3 S.L.R. 573 (HC)

born, H conducted a DNA test and found that he was not the biological father of the child and nullified his marriage with the Respondent. The Respondent claimed maintenance from the Appellant for her child. The Appellant raised the presumption of legitimacy under section 114 of the Evidence Act and argued that as the child was born during the subsistence of the wedding between the Respondent and H, the child is deemed to be the legitimate child of H. As such, the Appellant contended that it should be H who should pay maintenance to the child, notwithstanding the DNA test report.

The High Court refused to accept the Appellant's contention and stated that his argument 'offend(ed) both justice and common sense'.[112] If the court upheld the Appellant's position, this would mean that 'the law would hold that H is the father of the child even though the science has shown otherwise.'[113] The learned judge provided two reasons for his judgment. First, after examining section 114 of the Evidence Act, the court distinguished proving legitimacy and proving paternity and held that 'section 114 only applies to confer legitimacy in circumstances set out in the provision, and not to rebut or invalidate evidence that a man is a biological father of the child'[114]

Secondly, the court also referred to section 68 and 69(2) of the Women's Charter and held that it was not the intention of the legislature, when drafting these two sections, that the biological father of an illegitimate child is relieved of his duty to maintain his child if the mother has married another man at the time of the child's birth. The court eventually held that the Appellant cannot rely on section 114 of the Evidence Act to invalidate the evidence that he is the biological father of the child and that the Appellant has to abide by the duty to maintain laid down in sections 68 and 69(2) of the Women's Charter.

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[112] *Ibid* at para 6.
[113] *Ibid*.
[114] *Ibid* at para 14.

The above decision received mixed responses from the academics in Singapore. For example, Ng Jun Yi, in his article entitled '*Making Sense of Section 114 of the Evidence Act'*[115] stated that when the High Court distinguished legitimacy from actual paternity in section 114, the learned judge was construing the section in accordance with the framer's intent. This would then mean that as the child would have two fathers, H (his legitimate father) and the Respondent (his biological father), the child would potentially claim maintenance from both H and the Respondent. The author also went on to state that as the Singapore statutes still discriminate between legitimate and illegitimate children, this decision would be a 'welcomed development', especially to those who believe that illegitimate children should not be 'legally disadvantaged in any way.'[116]

On the contrary, Goh Yihan in his article 'Two Contrasting Approaches In the Interpretation of Outdated Statutory Provisions'[117] opined that the presumption of paternity should not be separated from the presumption of legitimacy under section 114 of the Evidence Act. The learned author examined the historical background to section 114 (which is similar to the Malaysian section 112 of the Evidence Act 1950) and stated that the rationale of section 114 'seems to be that it is undesirable to enquire into the paternity of a child whose parents have access to each other.'[118] Therefore, 'the presumption of legitimacy *presupposes* paternity, and so a presumption of paternity likewise arises from section 114 of the Evidence Act, if its requirements are met.'[119] The learned author appreciated the effort taken by the court in the instant case to do justice. However, he also stated that 'it may be necessary to accept this outdated evidential rule.'[120]

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[115]Ng Jun Yi, '*Making Sense of Section 114 of the Evidence Act'*, [2010] Singapore Law Review accessed at http://www.singaporelawreview.org/2010/03/making-sense-of-section-114-of-the-evidence... accessed on 4 May 2012.
[116]*Ibid*.
[117]Goh Yihan, "*Two Contrasting Approaches In the Interpretation of Outdated Statutory Provisions*", [2010] Sing J. Legal Studies 530.
[118]*Ibid* at 535.
[119]I*bid* at 536.
[120]*Ibid*.

Having examined both the opinions by the learned authors, it is respectfully submitted that the writer agrees with the opinion expressed by Ng Jun Yi, the reason being, that when section 114 of the Evidence Act was enacted (same as our section 112), medical science had not advanced where DNA testing could be carried out to prove paternity. Hence, at that time the law had no option but to presume that when a child is born during the lawful marriage between his mother and a man and they had access to each other at the time when he was conceived, that he is a legitimate child of that man. With the advancement in medical science where paternity could be proven through DNA testing, it is high time the Legislatures (both in Singapore and Malaysia[121]) amend their respective provisions on the presumption of legitimacy which could be described as archaic.

The second issue that was raised in the Singapore courts recently was as to the meaning of the word 'parent' in sections 68 and 69(2) of the Women's Charter.[122]The issue was whether 'parent' includes the putative father of an illegitimate child or does it merely refer to the mother of the child. The respondent referred to Lord Denning's decision in *RRM, An Infant*[123] where his Lordship stated that 'parent' merely refers to the mother of the child and not the putative father.

The respondent also referred to certain provisions in the Women's Charter, the Adoption of Children Act,[124] the Republic of Singapore Constitution and the Legitimacy Act[125] which provide that the parent of an illegitimate child refers to the mother and not the putative father. The High Court held that it is not proper to refer to the other legal provisions which provide for other legal issues concerning illegitimate children. Reference should be made to section

[121] As discussed under the Malaysia position, section 112 of the Malaysia Evidence Act 1959, which provides for the presumption of legitimacy, is similar to section 114 of the Singapore Evidence Act.
[122]In the case of *TBC v TBD* [2015] SGHC 130.
[123][1955] 2 QB 479
[124]Cap 4, 2012, Rev. Ed.
[125]Cap 162, 1988.

68 of the Women's Charter which focusses on child maintenance. The court then examined the predecessors to section 68, i.e. section 45(II) of the Straits Settlements Summary Jurisdiction Ordinance[126] and section 62(2) of the Women's Charter which clearly state that a 'person who is the father of an illegitimate child has the duty to maintain it'[127] Although the word 'person' has been changed to 'parent', the duty to maintain remains. Therefore, the respondent has a duty to maintain his illegitimate child in this case as provided for under section 68 of the Women's Charter.

Having examined the position in Singapore, it could be noted that although the laws in Singapore are more or less similar to the Malaysian laws concerning maintenance for illegitimate children, the judicial approach in Singapore could be seen to be in favour of the child concerned.

(b) England and Wales

Before the writer examines the current maintenance laws in England and Wales pertaining to illegitimate children, the writer is of the opinion that it is important to first trace the history of maintenance laws concerning illegitimate children. This is due to the fact that both the Malaysian and Singaporean laws on maintenance were drafted during the British rule. Therefore, it would be interesting to examine the roots of the maintenance laws in Britain.

The initial laws, or referred to as the 'Poor Laws' were passed in the 16th century. These laws often concerned 'bastard children'. During those days, it was the parishes that would rescue destitute persons including illegitimate children. Thereafter, upon passing of the

[126]Straits Settlements Ordinance No. XIII of 1872
[127]*Supra* n122 at para 9.

National Assistance Act 1948, the state took over the duty of maintaining these children. Hence, when the parish or the state maintained an illegitimate child, the father was required to reimburse the community initially. Following that, he could be required to pay the mother of the child (or third parties) directly.[128]

The first Act that formed the basis of English bastardy law is the Act for Setting of the Poor on Work, and for the Avoiding of Idleness 1576.[129] This Act was passed to 'punish the mother and the reputed father of a bastard child, and also provide for the better relief of every parish'.[130] Following the above Act, numerous statutes were passed for the next few centuries.

In 1844 and 1845, the Poor Law Amendment Act 1844 and Bastardy Act 1845 were passed respectively. Both these Acts turned bastardy proceedings into a civil matter between the parents. This enabled a single mother to apply to the Petty Sessions for a maintenance order against the father of her child for maintenance of herself and the child.[131]

In 1857, the Matrimonial Causes Act was passed. The Act could be described as a major development in the history of child support as it introduced a court for Divorce and Matrimonial Causes which stepped into the shoes of the church courts in order to deal with child custody, maintenance and alimony matters. Appeals from this court was heard by the House of Lords. Nevertheless, the poor law legislation still played an active role in providing for other obligations regarding maintenance of a child.[132]

[128]*History of child support in the United Kingdom*, Child Support Analysis accessed at www.childsupportanalysis.co.uk on 10 November 2016.
[129]18 Elizabeth I, c,3.
[130]*Supra* n128
[131]*Ibid*.
[132]*Ibid*

Finally, with the passing of the National Assistance Act 1948, it repealed the Poor Laws (section 29 of the National Assistance Act 1948).[133] Section 42 of this Act states that:

(a) a man shall be liable to maintain his wife and his children, and

(b) a woman shall be liable to maintain her husband and her children.

The section goes on to elaborate that 'a woman's children included her illegitimate children and a man's children included any children of whom he had been adjudged to be the putative father'.

During the late 1980s, the British government felt that welfare was to be out of control. It felt that the father should pay more and the state pay less. However, the court still held on to the traditional view that the state would support the unmarried mothers. As a result, they were awarded relatively small amounts. The Government wanting to take control of this situation, passed the Child Support Act 1991which established the Child Support Agency in 1991.[134]

Having traced the history of maintenance of illegitimate children, the writer would next examine the existing laws in England and Wales, which are as follows:

(a) Family Law Reform Act 1969

(b) Matrimonial Causes Act 1973

(c) Family Law Reform Act 1987

(d) Children Act 1989

(e) Child Support Act 1991.

(f) Social Security Administration Act 1992

[133]Nevertheless, mothers who were divorced, deserted or unmarried were still dependent on the Poor Laws if the they do not receive any support from their husbands.
[134]This Act would be discussed later in this sub-topic.

(a) Family Law Reform Act 1969

One of the main weaknesses that exist in the Malaysian maintenance laws concerning illegitimate children is that there are no provisions in any laws that empower the courts to order a paternity test. In this context, the Family Law Reform Act 1969 (FLRA) of the United Kingdom contains Provisions For Use of Blood Tests in Determining Paternity in Part III of the Act. Section 20(1) of the Act provides that where paternity of a person falls to be determined by the court in any civil proceedings, 'the court may, on the application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not excluded from being a father of that person. Section 21 further provides that before a blood sample is taken from any person under section 20(1), the person should consent to it. Section 23(1) provides that if any person fails to take any step in compliance with a direction issued by the court under section 20(1), 'as appear proper in the circumstances'. In an instance, where the person who is directed section 20(1) fails to consent to it, 'he shall be deemed … to have failed to take a step required of him for the purpose giving effect to the direction'.[135]

Refusal to consent under section 23(3) was in fact examined in the case of *Re A.*[136] In this case, a woman (H) had sex with three men, including A. She later gave birth to a child and claimed maintenance from A. A denied that he was the child's father. The court ordered a DNA test to be done. A refused to undergo the test unless the other two men too were ordered to do so. The court agreed with A. On appeal, the Court of Appeal allowed H's appeal. The court held that it could legitimately infer from A's refusal that he is in fact the father of the

[135]Section 23(3) of the FLRA.
[136] [1994] 2 FLR 463, CA.

child. When a man refuses to cooperate, such an inference is inescapable, unless there were clear and cogent reasons as to why he refused.

In addition to the above provisions, the FLRA also provides that the standard of proof to rebut the presumption of legitimacy is on a balance of probability and not beyond reasonable doubt (section 26).

At this juncture, it to be observed that Malaysia is in dire need of the above provisions in order to establish the paternity of an illegitimate child in the event the putative father denies paternity of the child concerned.[137]

(b) Matrimonial Causes Act 1973

The Matrimonial Causes Act 1973 (MCA) in section 27(1) provides that a 'husband or wife may apply to the court where the other party has wilfully neglected to provide reasonable maintenance, *inter alia*, to any child of the family'. In order to examine whether 'child' here includes an illegitimate child, reference could be made to section 52 of the MCA. Section 52 defines 'child' as follows:

> ' "child' in relation to one or both of the parties to a marriage includes an illegitimate or adopted child of that party or, as the case may be, of both parties.'

At this juncture, it could be noted that the above definition is similar to the definition of 'child' in section 2 of the Malaysian LRA 1976. However, one difference is that section 2 of the MCA 1973 clearly states 'illegitimate or adopted child', which means that the child is either illegitimate or adopted, whereas, the confusion that arises in the definition of 'child'

[137]As was noted in the Malaysian cases of *Othman bin Haji Abdul Halim v Hamisah bt Awang*[1994] 3 CLJ 78 and *Ng Chiam Perng (sued by her mother and next friend Wong Nyet Yoon) v Ng Ho Peng*[1998] 2 MLJ 686. This issue was also highlighted by the respondents during the interviews conducted as was discussed in sub-topic 4.4.4.5 above.

in section 2 of the LRA (as discussed earlier in this sub-topic) is whether the phrase 'illegitimate child of, and a child adopted by' should be read conjunctively or disjunctively.

In the case of *Edwards v Edwards*[138] the father applied for leave to appeal out of time against, *inter alia*, a maintenance order issued against him on the ground that he is not the father of the child. The court took into account that there was an inexcusable delay in this case and as such it would be wrong to grant leave to appeal out of time as it would cause injustice to the child here, as the medical evidence, which might be an issue, was not tested, and the court had considered the risk to the child, due to the inexcusable delay, in losing his legitimacy.

Having examined the relevant provisions in the MCA it is submitted that they are similar to the provisions in the Malaysian LRA, save for the definition of 'child' (as discussed above).

(c) Family Law Reform Act 1987

The British Parliament passed the Family Law Reform Act 1987 (FLRA 1987), mainly for the benefit of the children born outside marriage. This could be seen in the Act's Long Title which reads as follows:

> An Act to reform the law relating to the consequences of birth outside marriage; to make further provision with respect to the rights and duties of parents and the determination of parentage; and for connected purposes.

From the above Long Title, it could be noted that this Act not only covers maintenance, but a broad range of rights and duties of parents of children born outside marriage. In

[138] (1980) 10 Fam Law 188, CA.

particular, the right to maintenance of such children is provided for in section 12 which states that the 'court may on the application of either parent make a financial relief order for the benefit of the child'.

It is submitted that the move by the British Parliament in introducing this Act is to be applauded as it mainly concerns the rights and duties of parents towards their children who are born outside marriage. In Malaysia, the only Act that deals exclusively with illegitimate children is the Legitimacy Act 1961. However, there are no provisions on the right to maintenance of an illegitimate child therein and it also does not cover a broad range of rights and duties as provided for in the FLRA 1987.

(d) Children Act 1989

The Children Act 1989 focuses on the phrase 'parental responsibility'. Section 3(1) of the Act explains 'parental responsibility' as follows:

> (1) … "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

The above explanation *prima facie* seems to indicate that a person having 'parental responsibility' would also have the duty to maintain his or her child. However, section 3(4) states otherwise, as follows:

> (4) The fact that a person has, or does not have, parental responsibility for a child shall not affect –
>
> (a) Any obligation which he may have in relation to a child (such as the statutory duty to maintain the child)

Hence, this means that parental responsibility does not necessarily refer to parental obligation as the latter may exist without the former. Section 4(1) of the Children Act 1989 in particular states that the father of an illegitimate child shall acquire parental responsibility for the child in three situations:

(a) he becomes registered as the child's father under any one of the enactments specified in subsection 1(A);
(b) he and the child's mother make an agreement ("a parental responsibility agreement") providing for him to have parental responsibility for the child; or
(c) the court, on his application orders that he shall have parental responsibility for the child.

The question that arises is, if the father of an illegitimate child does not take any steps to acquire parental responsibility over the child under section 4(1), is he absolved from his obligation to maintain the child? The writer submits that the answer to this question could be found in section 3(4) of the Children Act (as discussed above), which provides that whether a person has a parental responsibility or not, it shall not affect his obligation in relation to the child. Hence, the putative father still has the obligation to maintain his child.

Schedule 1 to the Children Act 1989 provides that the court has the power to order either or both parents of a child to make payments whether periodical or by way of a lump sum for the benefit of the child.

Thus, when comparing the Children Act 1989 to the Malaysian laws, it could be observed that when it comes to maintenance of illegitimate children, the Children Act 1989 empowers the court to order either one parent or both the parents to make payments to the child concerned.

(e) Social Security Administration Act 1992

The duty to maintain as provided for in the Acts as discussed above is reiterated in the Social Security Administration Act 1992 (SSAA), specifically, in section 78(6), which provides as follows:

> (a) a man shall be liable to maintain his wife and any children of whom he is the father;
>
> (b) a woman shall be liable to maintain her husband and any children of whom she is the mother.

The phrase 'any children whom he is the father' or 'she is the mother' denotes that the provisions include illegitimate children. Section 105(1) provides for the penalty in the event a person persistently refuses or neglects to maintain any person whom he is liable to maintain.[139]

(f) Child Support Act 1991

In discussing the history of the child support laws in England and Wales in this sub-topic, it was noted that the final step taken by the Government was the passing of the Child Support Act 1991 which established the Child Support Agency (CSA). The CSA began operation in 1993 and most of its cases came from long term cohabitation or marriages and still do.

Section 1 of the Child Support Act 1991 provides the duty to maintain of each parent of a qualifying child. Section 3(1) defines who a 'qualifying child' is. However, it does not state anywhere in the definition as to whether it includes an illegitimate child. The meaning of

[139] The penalty provided in section 105(1) is either an imprisonment for a term not exceeding three months or to a fine.

'child' is defined in section 5(1) of this Act. However, even this definition does not refer to an illegitimate child.

Therefore, it is submitted that it is arguable whether an illegitimate child's right to claim maintenance from his parents fall under section 1 of this Act.

At this juncture, the writer submits that even though it is doubtful if an illegitimate child falls within the ambit of the Child Support Act 1991, it is not an issue as there are ample statutes in England and Wales (as stated above) that safeguard the rights of illegitimate children, which includes the right to claim maintenance from their parents.

(c) Australia

Australia inherited ancient English laws. Hence, a child who was not born to a married couple was known as an ex-nuptial child and was deemed to be illegitimate. As a consequence, these illegitimate children were denied rights in important matters, for example, inheritance. However, fortunately, in the early 1970s, all Australian states and territories abolished the status of illegitimacy and as such, banned discrimination against illegitimate children.

Before examining the Family Law Act 1975 and the Child Support (Assessment) Act 1989, the writer would like to examine a particular piece of legislation in New South Wales, i.e. the Status of Children Act 1996 ('the NSW Act')[140], which contains provisions on removing legal disabilities of ex-nuptial children. The Long Title to this Act provides that this Act was passed 'to re-enact without any substantive changes provisions contained in the Children (Equality of Status) Act 1976 concerning removal of legal disabilities of ex-nuptial

[140]The writer chose to refer to this Act although it is only applicable to New South Wales and not to the whole of Australia to show the existence of such law which removes legal disabilities of illegitimate children and also establishing parentage. This could not be found in any of the Federal legislation. Thus, this law could be described as giving prominence to the welfare of illegitimate children in New South Wales.

children...'. The Act also provides that the rights conferred on ex-nuptial children here take effect on or after the appointed date, i.e. 1 July 1977.

Section 5 of the NSW Act states that 'all children are of equal status'. Section 5(1) provides that 'the relationship between the person and another person is to be determined *regardless of whether the person's parents are or have been married to each other' (emphasis added).* Thus, it could be observed that this provision clearly states that the legitimate status of a child is no longer an issue as all children are of equal status. This would, in turn, lay to rest many inequalities that arise as a result of a child being labelled as illegitimate.

To substantiate the above point, section 8 provides, in subsection (1), that when a child's relative (which includes the parents) dies intestate, the child has the right to inherit the deceased's estate as though his parents were married when the child was born. The same position applies *vice versa*, where the child dies intestate.[141] This could be distinguished with the position in Malaysia, where the Distribution Act 1958 expressly states that 'child' refers to a legitimate child and a child adopted under the Adoption Act 1952.

Another interesting point to note in this Act is regarding establishing parentage. As mentioned earlier under this subtopic, the Malaysian Married Women and Children (Maintenance) Act 1950 provides that a Court may order a person to maintain his illegitimate child.[142] However, if the said person denies paternity over the said child, there are no laws in Malaysia that enable to court to order the putative father to undergo a paternity test. This would not be an issue in New South Wales as the NSW Act in Part 3 contains provisions on

[141] Section 8(2) of the NSW Act.
[142] Section 3(2) of the Malaysian Married Women and Children (Maintenance) Act 1950

Establishing Parentage. The writer would focus on three sections in this Part, i.e. sections 26, 27 and 29.

Section 26(1) empowers the Supreme Court of Australia to order ‘a parentage testing procedure to be carried out on any of the following persons, for the purpose of obtaining information to assist in determining the parentage of the child:

(a) the child;

(b) a person known to be a parent of the child; or

(c) any other person, if the Court is of the opinion that the information that could be obtained if the parentage testing procedure were to be carried out in relation to the person might assist in determining the parentage of the child.’

Although section 26(1) empowers the court to order a person to undergo a parentage testing procedure, the section at the same time, in subsection (4) states that before the court makes such order, it must:

(a) consider and determine any objection made by a party to the proceedings on account of medical, religious or other grounds, and

(b) if it determines that an objection is valid, take the objection into account in deciding whether to make the order.

In short, section 26 could be described as fair as not only does it empower the court to order a person to undergo a parentage testing procedure, but it also requires the court to give such person a right to raise any objections that he may have.

Section 27 further provides that the court may issue an 'order requiring a person to submit to a medical procedure or to provide a bodily sample'. 'Bodily sample' is defined in section 3 to 'include one or more of the following:

(a) a blood sample

(b) a tissue sample

(c) a sperm sample

(d) any other sample of material obtained from a human body.'

Finally, section 29 provides for the effect of non-compliance with a parentage testing order. Section 29(1) states that if a person contravenes a parentage testing order, he is not liable to a penalty. However, subsection (2) provides that 'the court may draw such inferences as appear just in the circumstances.'

The above provisions are basically what is needed to fill in the lacuna that exists in Malaysia concerning establishing parentage. It is submitted that the Malaysian Parliament should either emulate the NSW Act[143] and come up with a new law that abolishes discrimination against illegitimate children and provides a procedure that helps them establish their parentage, or incorporate such amendments in the existing Legitimacy Act 1961. Establishing parentage is especially important to a child who intends to claim for maintenance under section 3(2) of the Malaysian 1950 Act where the putative father denies paternity.

Having examined the relevant provisions in the NSW Act, the writer would next examine whether the two Acts on maintenance in Australia, i.e. the Family Law Act 1975 and the

[143]In fact, it is submitted that even the other states and territories in Australia should also follow this Act.

Child Support (Assessment) Act 1989 contain provisions on whether an ex-nuptial child has a right to claim maintenance.

Section 4 of the Family Law Act 1975, in defining child, states that:

> 'Subdivision D of Division 1 of Part VII affects the situations in which a child is a child of a person or is a child of marriage or other relationship'.

Two observations could be made from the above provision. First, it refers to the meaning of a 'child' in Subdivision D of Division 1 of Part VII of the said Act, which basically contains provisions on child maintenance. Secondly, the provision explains that the situations provided for in Subdivision D of Division 1 of Part VII, i.e. situations regarding child maintenance, refers to 'a child of a marriage or other relationship'. Therefore, it could be safely concluded that the phrase 'other relationship' clearly refers to an ex-nuptial child. In short, the Family Law Act 1975 applies to ex-nuptial children as well concerning child support, although the Act does not expressly state illegitimate or ex-nuptial children.

The second Act is the Child Support (Assessment) Act 1989. In order to answer the question as to whether an ex-nuptial child is eligible to claim maintenance from his parents, reference could be made to section 20. Section 20(1) specifically states that children born of parents, who have cohabited before the commencement of the Act but have separated on or after the commencement date, are eligible children. Subsection (2) further explains that subsection (1) applies whether the parents 'were legally married or not, or have separated on an earlier occasion or have resumed cohabitation'. Therefore, the above section clearly includes a child born of parents who have cohabited, whether legally married or not, as eligible to claim for child support.

An interesting observation that could be made after analysing the two Acts above is that both these Acts confer the right to illegitimate children to claim for child support without expressly referring to them as either ex-nuptial children or illegitimate. This could, perhaps be, as a result of the stigma against illegitimate children being removed in Australia. In addition, the NSW Act too states that all children of equal status. It is submitted that section 3(2) of the Malaysian 1950 Act could be amended by deleting the word 'illegitimate child' and incorporate the following phrase 'children born of parents who were not legally married at the time of the child's birth'.

4.4.4.7 Discussion

Having examined the position in Malaysia as well as the three jurisdictions on the right of an illegitimate child to claim maintenance in Malaysia, the following observations could be made:

(a) There are Acts in Malaysia such as the 1950 Act and the Maintenance Ordinance of Sabah that expressly provide that a person could be ordered by the court to maintain his illegitimate child. Although the ceiling amount of RM50 was repealed in the 1950 Act, it still remains in the Maintenance Ordinance of Sabah. Hence, it is submitted that it is long overdue for the Sabah State Legislature to repeal the maximum amount taking into account high cost of living these days when compared to about sixty years ago when the Maintenance Ordinance of Sabah was enacted.

(b) Despite the existence of the above statutes, not all single mothers are aware of such provisions. When asked, during the interview sessions held with them, if they would pursue the matter in court to claim maintenance for their child if they are

aware of their child's right to claim maintenance, they were reluctant to do so. The main reason for their reluctance is that they do not want to be in contact with their child's putative father. The other reason which most of the single mothers cited was that the putative father denied paternity of the child.

(c) Following from the last sentence above, it is to be observed that there are no laws in Malaysia which empowers the court to order a man to undergo a DNA test to determine paternity of a child. The only law we have as to decide the paternity of a child is section 112 of the Evidence Act 1950 which provides for the presumption of legitimacy. However, as argued earlier in this sub-topic when the writer examined the position in Singapore, proof of legitimacy cannot be a pre-condition to proof of paternity. The paternity test is mainly to decide whether the male is the father of the child concerned. It does not necessarily always relate to seeing if the child is legitimate, though in some cases, it may.

(d) As a result of the above lacuna in our laws, it is respectfully submitted that the Malaysian Legislature should perhaps amend the DNA Act or the Legitimacy Act to incorporate provisions concerning paternity testing procedures which could be found in the British Family Law Reform Act 1969 or the Australian Status of Children Act 1996 (New South Wales). This measure would alleviate the fear of single mothers in situations where the putative father of the child denies paternity of the child.

Previous research done shows that in the age of scientific technology where DNA testing of paternity is the most celebrated achievement in the field of forensic

technology to solve litigations on paternity, resort to conventional method of traceability of male partners in a sexual act no longer holds water.[144]

(e) Finally, as was opined by the social workers who were interviewed, mere existence of the law is insufficient in protecting the rights and welfare of the illegitimate children. The main reason for the alarming rate of babies being dumped in our nation is due to the fact that the single mothers want to avoid embarrassment to them and their families by the birth of their illegitimate child. In addition, being very young and some 1even still schooling, they would not be able to raise their child. Hence, the relevant authorities such as the government, the Social Welfare Department and NGOs or even the community at large could play a part in reducing the sufferings of these single mothers in raising their children. The writer hereby submits that there is a possibility of the rate of baby dumping reducing when society stops treating an illegitimate child as a product of his mother's sin and considering him as a social stigma.

Previous research work done shows that the rate of baby dumping cases in Malaysia is disturbing. There are two main reasons why most of the perpetrators of this heinous crime dump the babies in any place, i.e. for fear of arrest and attempt to conceal their identity. Therefore, the researchers have suggested that the relevant authorities need to take immediate measures to tackle this phenomenon.[145]

[144]Haneef Sayed Sikandar Shah, "The Status of an Illegitimate Children in Islamic Law: A Critical Analysis of DNA Paternity Test", *Global Jurist*, Vol.16, Issue 2, 1 July 2016, 159-173, Haneef Sayed Sikandar Shah, "DNA Test of Paternity in Islamic law implications for illegitimate children born less than minimum gestation period in Malaysia", *Handard Islamicus*, Vol. 39, Issue 2, April – June 2016, 7-35.
[145]Nurhafizah Mohd Shukor, Rezki Perdani Sawai, et al, "Management of Baby Dumping in Malaysia: A Qualitative Study", *Al-Abqari Journal*, Vol. 6, (2015, Universiti Sains Islam Malaysia Press) 35-52,; Azizah Mohd and Alhaji Umar Alkali, "Crime of Baby Dumping: A Review of Islamic, Malaysian and Nigerian Laws", *Pertanika J.Soc. Sci and Hum*., 23(5): 67-82 (2015) accessed at www.pertanika.upm.edu.my on 4 February 2017; Mazbah Termizi, Azizah Abdul Majid et al, "Towards solving baby dumping in Malaysia by using an alternative: baby hatch", Ulum Islamiyya: The Malaysian Journal of Islamic Sciences (2016) 17, pp 103-120.

4.5 CONCLUSION

In conclusion, it could be observed that the maintenance laws on the whole in Malaysia do not safeguard the welfare of the children. This could be seen from the discussions above pertaining to the age of the child, adopted children, step-children and illegitimate children. There is a lacuna in the laws as some of the laws do not state whether certain categories of children are governed by them (the laws). Secondly, there is no consistency among the statutes in certain issues, for example on the maximum sum that could be claimed by illegitimate children. Thirdly, from the fieldwork conducted, it was observed that despite the existence of the laws, the stakeholders are not aware of such laws, which then defeats the purpose of such laws. Fourthly, when compared to the laws in other jurisdictions such as Singapore, England and Wales and Australia, the Malaysian laws are still lagging far behind. As was observed from the discussion, it could be seen that the Malaysian legislature could incorporate some of the developments that have taken place in these jurisdictions when it comes to the right of a child to maintenance. The write would list down the amendments that could be made to the local laws based on the laws in these jurisdictions in Chapter 8 under 'Recommendations'.

Finally, it could be concluded that despite the existence of the three statutes on maintenance in Malaysia, it is not possible to say that the welfare of our children is adequately protected by these statutes. On the other hand, much needs to be done in order to ensure that the best interest of the children is not compromised and these recommendations, as mentioned above, would be discussed in Chapter 8 of this thesis.

CHAPTER 5: THE RIGHT TO MAINTENANCE OF NON-MUSLIM YOUNG VULNERABLE ADULTS IN MALAYSIA

5.1 INTRODUCTION

The existing maintenance laws concerning non-Muslims safeguard the rights of children to claim maintenance from their parents until they reach the age of eighteen, which is the age of majority according to the Age of Majority Act 1971. The question that arises is what happens when children reach the age of eighteen? Are the parents relieved of their duty to maintain their children who are eighteen years and above? Do these young vulnerable adults then have to fend for themselves and take care of their basic necessities?

Thus, the purpose of this chapter is to examine the maintenance laws in Malaysia in order to see whether non-Muslim young vulnerable adults have the right to continue being maintained by their parents even though they have reached the age of eighteen years. Children who attain the age of eighteen would be referred to as young vulnerable adults in this thesis. In the writer's opinion, this is an important issue that needs to be addressed as most of the young vulnerable adults these days do not start to fend for themselves once they reach eighteen years of age. They still rely on their parents to financially support them.

The writer has so far emphasised on the fact that the laws need to safeguard the welfare of children (who are generally below the age of eighteen). Nevertheless, it should not be forgotten that once these children attain the age of eighteen and are considered to be a major by the Age of Majority Act 1971, they are still dependent on their parents, especially the disabled who fall within this category. The attachment theory as discussed in Chapter 3 of

this thesis would still apply to these young vulnerable adults until they are in a position to fend for themselves and do not have to depend on their parents anymore.

The more important issue concerning maintaining these young vulnerable adults is when it comes to financing their cost of higher education. More and more children are keen on pursuing their tertiary education now when compared to thirty to forty years ago, when most children, once they have completed their Malaysian Certificate of Education (MCE) or *Sijil Pelajaran Malaysia* (SPM) would prefer to commence employment.

However, the situation now is far different, with the number of students passing with flying colours in their SPM and *Sijil Tinggi Persekolahan Malaysia* (STPM)[1] examinations. Entry into public universities has become extremely competitive with the number of applicants escalating every year and the problem of limited places in these universities. At the same time, the number of private institutions of higher learning has also escalated over the past decade in Malaysia. The number of institutions of higher learning (both public and private) could be seen below.

[1] *Sijil Tinggi Persekolahan Malaysia (STPM)* or the Malaysian Higher Schooling Certificate (HSC) is one of the entry requirements into universities.

Table 5.1: Number of institutions of higher learning in Malaysia as in 2016

Institutions of higher learning	Number
Public Universities	20
Private Universities	37
Public-University colleges	1
Private-University colleges	10
Private colleges	414
Foreign University branch campus	10
Total	**492**

Source: Ministry of Higher Education, Malaysia

Table 5.1 above shows that there are more institutions of private institutions of higher learning than public institutions. In addition, it is also observed that the total number of institutions of higher learning is about 490, which is quite a big number. This shows that there is a large population of students who are pursuing their tertiary education.

The issue that the writer intends to discuss in this chapter is whether the parents of a child who has reached the age of eighteen years are still under a duty to maintain the latter, especially in relation to financing the cost of their tertiary education? The reason for this is because the existing non-Muslim maintenance laws in Malaysia (as will be discussed below) have basically stated that a maintenance order ceases once the child reaches the age of eighteen unless the child is either physically or mentally disabled.[2]

[2] Section 95 of the Law Reform (Marriage and Divorce) Act 1976.

Before examining the relevant laws on this issue, it is important to look at the cost of tertiary education now, in order to realize the seriousness of the issue to be discussed. The tables below show the cost of tertiary education in Malaysia, in both public universities and private institutions of higher learning. Table 5.2 shows the estimated cost for pre-university studies at private institutions. This applies to students who do not want to proceed to Form 6 after their *Sijil Pelajaran Malaysia* (SPM) exams.

Table 5.2: Estimated Tuition Fees for University Foundation or Pre-University for the entire duration of study in 2016

Foundation or Pre-University Studies (External Qualifications) (in RM)	
GCE 'A', Level, United Kingdom	15,000 - 25,000
Western Australian Matriculation (Ausmat) Australia	11,000 - 21,000
South Australian Matriculation (SAM) Australia	21,000 - 25,000
Canadian Pre-U, Canada	19,000 - 29,000
University of New South Wales (UNSW) Foundation Year	14,000 - 23,000
International Baccalaureate	79,000

Source: Study Malaysia Research Team & Study in Malaysia Handbook (7th International edition)[3]

[3] Data above obtained from the handbook of Study Malaysia who had conducted research on the Cost of Study in Malaysia. This information was posted on Study Malaysia's website at http://www.studymalaysia.com/education/art_m'sia.php?id=affordable accessed on 3 December 2016.

Table 5.3 shows the estimated tuition fees for undergraduate courses at public institutes of higher learning. The writer chose the programmes offered in the University of Malaya and the estimated tuition fees of such programmes as an example. The tuition fees in other public universities are more or less similar to that of University of Malaya.

Table 5.3: Estimated Tuition Fees for Undergraduates for the entire duration of study for Academic Session 2016/2017 for University of Malaya[4]

Programme	Estimated Tuition Fees (RM)
Arts and Social Sciences	7,330 - 7,450
Business and Accounting	7,390 - 9,870
Dentistry	15,300
Economics and Administration	7,950
Engineering	8,860 - 9,530
Law	8,370
Medicine	9,240 - 13,750
Science	8,070 - 8,260
Computer Science and Information Technology	9,240 - 9,340

Source: www.um.edu.my *accessed on 3 December 2016*

Table 5.4 below shows the estimated tuition fees at Private Institutions of Higher Learning.

[4] Note that the writer chose the most popular courses chosen by the undergraduates to reflect the cost of these programmes.

Table 5.4: Estimated Tuition Fees at Private Institutions of Higher Learning in 2016 (RM)

Area of Study	3+0 Degree Programmes	Bachelor's Degree at Foreign University Branch Campus located in Malaysia	Bachelor's Degree at Private Universities	Twinning Degree Programmes
Business	43,000-75000	50,000-85,000	33,000-45,000	-
Engineering	46,000-65,000	69,000-115,000	50,000-60,000	-
Information Technology	45,000-65,000	-	35,000-50,000	-
Hospitality and Tourism	73,000	183,000	35,000-60,000	-
Medicine	300,000	-	-	-
Pharmacy	100,000	-	100,000-140,000	70,000-92,000 +£18,000-£25,716 (2 years in the United Kingdom)
Law	-	-	-	42,188-53,070 (2 years in Malaysia) + £8,000-£15,400 (1 year in the United Kingdom)

Source: StudyMalaysia Research Team & Study in Malaysia Handbook (7th International edition) 2016

Having looked at the cost of tertiary education in Malaysia above, the question that arises is whether an eighteen-year-old who has completed his or her SPM is able to pay for the tuition fees as stated above if his or her parents refuse to provide financial support, especially in cases where the parents have divorced or are living separately? In order to answer this

question, the writer intends to first look at the statutory provisions applicable to non-Muslims on this issue, judicial decisions, views or comments expressed by academics, conduct fieldwork to get a feedback from the affected parties such as the undergraduates in universities, compare the position in other jurisdictions and finally suggest reforms to overcome this problem.

5.2 LEGAL PROVISIONS

The relevant statutes that need to be examined here are as follows:

(a) Married Women and Children (Maintenance) Act 1950;

(b) Law Reform (Marriage and Divorce) Act 1976;

(c) Maintenance Ordinance 1959 of Sabah; and

5.2.1 Married Women and Children (Maintenance) Act 1950

As discussed in Chapter 4, under sub-topic 4.4.1 on the *Age of a child,* the Married Women and Children (Maintenance) Act 1950 ('the 1950 Act') is silent on the definition of a 'child'. The High Court in *Kulasingam v Rasammah*[5] had to decide whether the youngest daughter of the petitioner and the respondent was a child within the Married Women and Children (Maintenance) Act 1950. The learned judge referred to sections 2 and 4 of the Age of Majority Act 1971 and held that since the Married Women and Children (Maintenance) Ordinance 1950 is silent on the meaning of 'child', the Age of Majority Act 1971 should apply.[6] His Lordship also referred to the Children Act 1975 in England which defines 'child'

[5] [1981] 2 MLJ 36.
[6] Section 2 of the Age of Majority Act 1971 states that a minor is a person below the age of eighteen.

as ‘except where used to express a relationship, means a person who has not attained the age of eighteen’.

Further thereto, the 1950 Act merely states that a Court may order a person who has neglected or refused to maintain his legitimate child, without providing when the maintenance order ceases. The High Court in *Kulasingam v Rasammah* however has held that as the ‘child’ in that case was already twenty years of age, she did not qualify to receive maintenance under the 1950 Act. Thus, a child intending to pursue his or her tertiary education definitely would not be able to apply under this Act as long as the decision in *Kulasingam* is not overruled.

5.2.2 Law Reform (Marriage and Divorce) Act 1976

On the other hand, the Law Reform (Marriage and Divorce) Act 1976 (‘the LRA’) expressly provides as follows:

> Except where any such order has been rescinded, it shall expire on the attainment of eighteen years or where the child is under physical or mental disability, on the ceasing of such disability, whichever is the later.[7]

The above provision was discussed in several cases (as would be discussed later in this Chapter), where the main issue was whether the Court could apply the exception in this provision, i.e. physical or mental disability, to order a parent to maintain his or her child until he or she completes her tertiary education.

[7] Section 95 of the LRA.

5.2.3 Maintenance Ordinance 1959 of Sabah

The Maintenance Ordinance 1959 of Sabah contains similar provisions as the 1950 Act. Section 2 of this Ordinance merely defines 'child' to include '*legitimate or illegitimate child who is unable to maintain itself'*. There is no mention of the age limit of a child nor does it state when a maintenance order in favour of a child ceases.

5.3 JUDICIAL DECISIONS

The issue of whether a child could claim maintenance from his parents upon reaching the age of eighteen years for the purposes of pursuing his tertiary education has been discussed in several cases. The courts were referred to section 95 of the LRA, especially to the interpretation of the phrase 'physical or mental disability' in order to see whether an eighteen-year-old who intends to pursue his tertiary education falls within the meaning of 'physically or mentally disabled'.

One of the first cases which discussed this issue is the case of *Ching Seng Woah v Lim Shook Lin*,[8] the Court of Appeal interpreted the exception of physical or mental disability in section 95 of the LRA to include the involuntary financial dependence of a child of the marriage as the child has to depend on his parents to pursue and complete his tertiary or vocational education. Hence, the duty to maintain could extend beyond the child's eighteenth birthday. The learned judge, Mahadev Shankar JCA gave a broad interpretation to the phrase 'physical disability' in section 95 so as to bring involuntary financial dependence within its

[8] [1997] 1 MLJ 109.

meaning. In considering the effect of not being maintained beyond the age of eighteen years, his Lordship stated as follows:[9]

> When parents divorce, the children suffer the most ... Not only can they not look at their parents thereafter for money but also by inference for shelter in the matrimonial home. Section 95 could thus become the **bohsia's** charter.[10]

The above statement indicates that if section 95 is interpreted narrowly, this would result in children aged eighteen years and above not being able to look to their parents for money and thereby producing negative results.

A landmark decision on the issue of a child's right to claim maintenance from his parents for the purposes of pursuing his tertiary education is the case of *Karunairajah a/l Rasiah* v *Punithambigai a/p Ponniah.*[11] Upon dissolution of his marriage to the petitioner and pursuant to a consent order, the respondent made maintenance payments to all his three children. However, in the following year, he stopped making maintenance payment to his eldest child as she had reached the age of eighteen years. On the basis that the consent order was silent as to when the maintenance payments should cease, the petitioner applied to the court for an order to compel the respondent to continue paying maintenance to their eldest child and by implication the other two children, until all of them complete their tertiary education.

The petitioner cited section 95 of the LRA and relied on the Court of Appeal's decision in *Ching Seng Woah* where the court had brought involuntary financial dependence under the exception in section 95. The respondent argued that the exception in section 95 should be given a literal interpretation and that the Court of Appeal's decision in *Ching Seng Woah* with

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[9] *Ibid* at p. 120
[10] '*Bohsia's* charter' here refers to a situation where section 95 of the LRA endorses the churning of promiscuous youth.
[11] [2004] 2 MLJ 401.

regard to involuntary financial dependence was merely *obiter*. The respondent also referred to section 87 of the LRA where 'child' is defined, *inter alia*, as a person below eighteen years. As such, this definition should equally apply to a 'child' under section 95.

The learned High Court judge, Low Hop Bing J. referred to Mahadev Shankar JCA's decision in *Ching Seng Woah* where his Lordship stated that as the issue in that case was pertaining to the interpretation of 'physical disability' in section 95, which was the same issue in the present case too, the High Court was bound to follow the Court of Appeal's decision.

Prior to making this decision, his Lordship referred to the following observation made by Mahadev Shankar JCA:

> A 19-year-old computer whiz-kid who is a wheel chair case and therefore well able to earn a living at that age could here be contrasted with another 18 year old who is physically and mentally fit but otherwise totally unable to fend for himself on the job market … However, we must take note that unlike the United Kingdom and many other European countries, Malaysia is not a welfare state. Whilst married women's claim to a share of the matrimonial assets is now entrenched in our laws, the rights of the dependent young persons in these assets is yet to receive proper articulation … we are inclined to view that in appropriate cases, involuntary financial dependence is a physical disability under Section 95 of the Act.[12]

Thus, the High Court held that as involuntary financial dependence for the purpose of pursuing their tertiary education constituted a physical disability under section 95, it was fair

[12] *Supra* n 8

and reasonable for the respondent to continue maintain his children until they completed their first degree.

Upon the appeal to the Court of Appeal by the husband, the appeal was dismissed and the decision of the High Court was upheld. The court agreed with the decision in *Ching Seng Woah* on the broad interpretation given to the term 'physical disability' in section 95. In fact, the Court of Appeal in the present case went one step further and stated that as a person has to have an able body and mind to pursue his tertiary education, involuntary financial dependence could also be taken as a mental disability under section 95.

The learned Court of Appeal judge also construed the intention of the Parliament in drafting section 95 and stated that if the marriage in the present case had not suffered a breakdown, the father would not have hesitated to maintain his children even though they had attained the age of eighteen. Hence, it is definitely not the intention of the Parliament in enacting section 95 of the LRA 'to make the children worst off in the event of a breakup of the marriage of their parents compared to children living together with their parents under the same roof'.[13]

At this juncture, it is to be noted that both the High Court and the Court of Appeal, in interpreting section 95 in a broad manner, have infused new life to the exception therein in order to protect the welfare of the young vulnerable adults, especially those from broken homes who intend to pursue their tertiary education or vocational training. Both these decisions are much welcomed in the interest of these unfortunate young vulnerable adults.

The husband appealed to the Federal Court. The issue before the Federal Court was whether involuntary financial dependence for the purposes of pursuing their tertiary

[13] [2003] 2 MLJ 529 at 537.

education fell within the meaning of 'physical or mental disability' in section 95. The phrase 'in order to obtain their first degree' after the words tertiary education were omitted here. The Federal Court disagreed with the Court of Appeal's decision in *Ching Seng Woah.* The Federal Court gave several reasons for its decision. The writer would be focusing on three main reasons given by the learned judge.

First, the court stated that a judge should only focus on the law that is applicable to the case before him and should disregard moral obligations on the part of the parents towards their child. Moral obligation cannot take precedence over the law. In addition, the legislature has the right to decide what the law should be. At this juncture, it is respectfully submitted that the writer begs to differ from the learned judge. The writer agrees that the legislature should decide what the law is. However, a judge, in interpreting a law passed by Parliament may consider factors which include the intention of the Parliament and moral obligations, if applicable, as was done by the High Court and the Court of Appeal in the present case.

Secondly, the Federal Court stated that 'disability' in section 95 strictly refers to 'physical and mental disability'. It does not cover involuntary financial dependence. In addition, the court also referred to section 87 of the LRA which defines 'child' as, *inter alia*, a person below the age of eighteen years. Hence, according to the court, this definition should also apply to a 'child' within the meaning of section 95.

Thirdly, the court looked at the position of Islamic law in Malaysia on this issue as well as the position in other jurisdictions such as Singapore and Australia. Pertaining to the Islamic position in Malaysia, the court looked at section 79 of the Islamic Family Act 1984[14] which provides:

[14] Act 303.

Except-

(a) where an order for maintenance of a child is expressed to be for any shorter period; or

(b) where any such order has been rescinded; or

(c) where any such order is made in favour of –

(i) a daughter who has not been married or who is, by reason of some mental or physical disability, incapable of maintaining herself;

(ii) a son who is, by reason of some mental or physical disability, incapable of maintaining himself,

the order for maintenance shall expire on the attainment by the child of the age of eighteen years, but the Court may, on application by the child or any other person, extend the order for maintenance *to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training*.[15]

The Federal Court held that the Islamic Family Law Act 1984 is more advanced than its civil counterpart. The court further stated that the respondent in this case wanted the court to legislate as an amendment to section 95 of the LRA, a similar provision as in section 79 of the Islamic Family Law Act 1984. The learned judge refused to do so stating that it would amount to usurping the Parliament's power to pass laws, which would eventually defeat the doctrine of separation of powers. In addition to referring to the Islamic law, the court also referred to the positions in Singapore and Australia, where there has been development in

[15] Emphasis added.

their respective laws. Both these positions would be examined be under sub-topic 5.6 where the writer refers to the position in other jurisdictions.

Thus, the Federal Court allowed the appeal and held that as it has to strictly interpret section 95 of the LRA, it cannot order the parent concerned to continue providing maintenance to his child so as to enable him to complete his tertiary education. It is respectfully submitted that the Federal Court decision in *Karunairajah* shattered the hopes of many young vulnerable adults, especially those from broken homes and who want to pursue their tertiary education. The writer is of the opinion that the court was more focused on giving a proper interpretation to the statutory provision rather than considering the welfare of the affected young vulnerable adults.

The Federal Court's decision in *Punithambigai* was followed in a recent case, *Uma Sundari a/p Muthusamy v Kanniappan a/l Thiruvengadam.*[16] In this case, a similar issue as in the case of *Punithambigai* arose where the mother wanted the father to provide maintenance to support the child's higher education costs. Although the learned judge agreed with the Federal Court in *Punithambigai*, he stated that there is no basis for the court to grant maintenance sum to cover the child's educational needs as the petitioner (the child's mother) had failed to provide any evidence to prove that the child is pursuing his education at any higher learning institution. The above ruling seems to imply that the court was willing to grant a maintenance order directing the father to support the child's higher educational needs if the mother had been able to adduce proof such as the letter of admission or the receipts of the fees chargeable or the student's card. Thus, it could be stated that the court in this case was willing to be flexible in granting a maintenance order in favour of a child who has

[16] [2009] 5 MLJ 853.

reached the age of eighteen years if only the petitioner had provided proof of the child pursuing his higher education.

In the case of *Teo Ai Teng v Yeo Khee Hong*,[17] the plaintiff (mother) applied to the court to order the defendant (father) to pay maintenance of RM1,000.00 a month for each of her children and the cost of education and medical expenses until they reach the age of twenty-one. The court ordered the defendant to pay RM2,000 a month as interim maintenance for the two children to cover the cost of education and medical expenses. However, the court did not specifically state as to whether this duty to pay maintenance continued until the children attain the age of twenty-one years (as prayed for by the plaintiff). Further thereto, the learned judge here also did not refer to any statutory provisions concerning maintenance. Reference was only made to case law.

5.4 VIEWS BY ACADEMICS

Several views and comments have been expressed by academics regarding section 95 of the LRA as well as the case of *Karunairajah v Punithambigai* through their articles. For example, Professor Mimi Kamariah Majid has expressed her dissatisfaction with section 95 of the LRA, where she states as follows in her book, *Family Law in Malaysia:*[18]

> Although this provision is an improvement over the 1950 Act, it is still lacking as it assumes that all children, other than the disabled, aged 18 and above are able to fend for themselves and therefore do not need maintenance. At a time when tertiary education or higher studies is the aim of many youngsters, the law should provide the

[17] [2009] 9 MLJ 721.
[18] Mimi Kamariah Majid, *Family Law in Malaysia*, (Kuala Lumpur: Malayan Law Journal, 1999) at 336.

support by requiring the mother or father to provide maintenance in suitable cases even though the child may have reached 18 years.

In an article entitled *Karunairajah a/l Rasiah v Punithambigai a/p Ponniah*: *The Need To Amend Section 95 of the Law Reform (Marriage and Divorce) Act 1976?*[19] one of the comments made by the writer is that the strict interpretation given to section 95 by the Federal Court in *Karunairajah's* case would have a drastic effect on young vulnerable adults, especially those who intend to pursue their tertiary education. Section 95 would then end up being labelled as a '*bohsia's* charter', as was stated by his Lordship Mahadev Shankar JCA in the case of *Ching Seng Woah* (as discussed earlier in this Chapter).

The Federal Court's ruling in *Karunairajah v Punithambigai* that the principles of morality should be set aside when determining the maintenance of the child concerned was commented upon by Nuraisyah Chua Abdullah in her article entitled *Parent's Obligation Towards Maintenance of Children in Tertiary Education: An Overview of the Islamic Law and Family Laws in Malaysia in Comparison With UK*, where she states as follows:[20]

> Although the learned judge in the case of *Gisela Getrude Abe* ruled that principles of morality should be set aside in ascertaining the maintenance of children above 18 years, however, the view of Lord Devlin should be taken into consideration. In his idea of morality, Lord Devlin states that there is public morality which provides the cement of any human society and that the law, must regard it as primary function to maintain this public morality. With reference of Lord Devlin's idea on morality, it is stressed that morality does play a role in the legal enforcement. Thus, this idea can be supported by

[19] Sridevi Thambapillay, "*Karunairajah a/l Rasiah v Punithambigai a/p Ponniah*: The Need To Amend Section 95 of the Law Reform (Marriage and Divorce) Act 1976?", (2005) 32 *JMCL*. 109-128

[20] Nuraisyah Chua Abdullah, "*Parent's Obligation Towards Maintenance of Children in Tertiary Education*: *An Overview of the Islamic Law and Family Laws in Malaysia in Comparison With UK*," [2006] 5 *MLJ* cvi; [2006] 5 *MLJA* 106 at pp. 118-119.

a quotation by contemporary perfectionist thinker, George R in Making Men Moral, where he argues that who has good reasons to believe that a certain act is immoral may support the legal prohibition of that act for the sake of protecting public morals without necessarily violating a norm of justice or political morality. Therefore, it is clear that the principle of morality may be considered in consideration to the issue of maintenance of children above 18.

This had been upheld by P. Dev Anand Pillai, where he commented that obligations of parents are moral obligations that should be entrenched in every parent. Divorce situation that is the one that mars the moral obligation and this should not occur if the parents put themselves to have moral obligations and morally felt obliged to maintenance their children. Hence, government should create an awareness of moral obligation to maintain their children in order to reduce the dispute in this issue.

Thus, the abovementioned author seems to disagree with the learned judge that the principles of morality are not relevant when considering the maintenance of an eighteen - year old child. She submits that the burden is on the government to create an awareness among parents that they have a moral obligation to maintain their children so that disputes such as those that arose in the case of *Punithambigai* does not arise in the future. It is submitted that the view expressed by the author is laudable, as when every parent considers that it is his or her moral obligation to maintain their child, he or she would, either directly or indirectly, be guilt-ridden if he or she fails or neglects to maintain his or her child.

5.5 UNDERGRADUATES' PERCEPTION AS TO THE RIGHT OF NON-MUSLIM YOUNG VULNERABLE ADULTS TO MAINTENANCE IN MALAYSIA

Questionnaires were distributed to undergraduates in public universities with the aim of exploring their knowledge and attitude pertaining to the laws as well as the duty to maintain young vulnerable adults.

5.5.1 Materials and methods

The survey was conducted between September and October 2016. Four public universities were selected to participate. Two of the universities are in West Malaysia (University of Malaya, representing the West Coast and University Sultan Zainal Abidin, representing the East Coast) and the other two are in East Malaysia (University Malaysia Sabah and University Malaysia Sarawak). Permission was obtained from the Deans of the respective faculties.

A total of four hundred (400) questionnaires were distributed (100 per university) to randomly selected undergraduates. A standardized questionnaire in English was used.[21] Items in the questionnaire assessed knowledge, attitude and demographic characteristics related to the duty to maintain young vulnerable adults. Informed consent was obtained verbally from the respondents. The respondents were assured the confidentiality of their responses and were also reminded that their participation is entirely voluntary. Prior to the distribution of questionnaires, the respondents were informed about the objectives of the study.

There are four parts in the questionnaire. Part A comprises the socio-demographic characteristics of the respondents (13-items). Part B (8-items) and Part C (9-items) assess the

[21] Please refer to Appendix B for a sample of the questionnaire

respondent's attitude towards the duty to maintain young vulnerable adults, where the respondents were requested indicate their level of agreement on a five-point Likert-type scale (Strongly Disagree, Disagree, Not Sure, Agree and Strongly Agree). Part D (9-items) assesses their general knowledge about the duty to maintain with questions posed in which the answer is either yes or no. In addition to answering yes or no, participants were asked to give reasons for their answers in Questions 5, 7, 8 and 9. The questionnaire was pilot-tested among the students in the Faculty of Law, University of Malaya before commencing the study. Data was analysed using SPSS 22 for Windows. Data is presented in a descriptive manner in order to observe the frequency of the respondents' answers.

5.5.2 Results

5.5.2.1 Part A- Socio-demographic characteristics

Table 5.5: Distribution of respondent by socio demographic characteristics (N=400)

Socio demographic characteristic	N(%)
Gender	
Male	108 (27)
Female	292 (73)
Age (years old)	
18-20	56 (14)
21-23	334(83.5)
24-26	10 (2.5)
Race	
Malay	218 (54.5)
Chinese	88 (22)
Indian	12 (3)
Sikh	3 (0.7)
Bumiputera Sabah/Sarawak	73 (18.3)
Others	6 (1.5)
Nationality	
Malaysian	397 (99.3)
Non-Malaysian	3 (0.7)

Table 5.5: Distribution of respondent by socio demographic characteristics (N=400) (Continued)

Socio demographic characteristic	N(%)
Number of silblings	
No siblings	5 (1.2)
1-2	66 (16.5)
3-4	154 (38.5)
5-6	116 (29)
7-8	41 (10.3)
9-10	17 (4.3)
>10	1 (0.2)
Current place of residence	
With parents	68 (17)
With relatives	3 (0.7)
Residential college/hostel	295 (73.8)
Renting a room/house	34 (8.5)
Location of parent's house	
Urban	245 (61.3)
Rural	155 (38.7)
Mother's employment	
Government employee	83 (20.8)
Private sector employee	41 (10.2)
Self employed	35 (8.8)
Unemployed	241 (60.2)
Father's employment	
Government employee	107 (26.8)
Private sector employee	101 (25.2)
Self employed	131 (32.8)
Unemployed	61 (15.2)
Mother's monthly income	
No income	232 (58)
RM1000 and below	46 (11.5)
RM1001-2000	43 (10. 8)
RM2001-3000	30 (7.5)
RM3001-4000	26 (6.5)
RM4001-5000	14 (3.5)
>RM5000	9 (2.2)

Table 5.5: Distribution of respondent by socio demographic characteristics (N=400) (Continued)

Socio demographic characteristic	N(%)
Father's monthly income	
No income	53 (13.2)
RM1000 and below	90 (22.5)
RM1001-2000	91 (22.8)
RM2001-3000	55 (13.8)
RM3001-4000	43 (10.7)
RM4001-5000	27 (6.7)
>RM5000	41 (10.3)
Funding of studies	
Parents	46 (11.5)
Relatives	4 (1)
PTPTN	203 (50.7)
Scholarship	90 (22.5)
Loan	8 (2)
Others	4 (1)
>1 funding	45 (11.3)
Monthly expenses	
<RM300	159 (39.8)
RM301-600	181 (45.2)
RM601-900	40 (10)
RM901-1200	9 (2.3)
RM1201-1500	6 (1.5)
>RM1500	5 (1.2)

A summary of the respondents' characteristics is listed in Table 5.5. A total of 400 respondents participated (n=400) in the survey. The respondents were aged between 18 and 26, with the majority (83.5%) within the range of 21-23 years. The majority of the respondents were Malay (54.5%), followed by Chinese (22%), Bumiputera Sabah and Sarawak (18.3%), Indian (3%), Others (1.5%) and Sikh (0.7%). The majority of the respondents were staying in residential colleges or hostels (73.8%), while only 17% were living with their parents.

More than half of the respondents' mothers were unemployed (60.2%) with no monthly income (58%), whereas 32.8% of their fathers were self-employed, 26.8% government employees, 25.2% private sector employees and only 15.2% were unemployed. 22.8% of the fathers' monthly income was between RM1001-RM2000, 22.5% were earning RM1000 and below, 13.8% were earning between RM2001-RM3000, 13.2% did not have any income, 10.7% were earning between RM3001-RM4000, 10.3% were earning more than RM5000 and 6.7% were earning between RM 4,001-RM5000.

About half of the respondents' (50.7%) cost of studies was funded by PTPTN[22], while 22.5% were scholarship holders. Only about11.5% of the respondents' cost of studies was funded by their parents. The majority of the respondents' monthly expenses spanned between RM301-RM600 (45.2%).

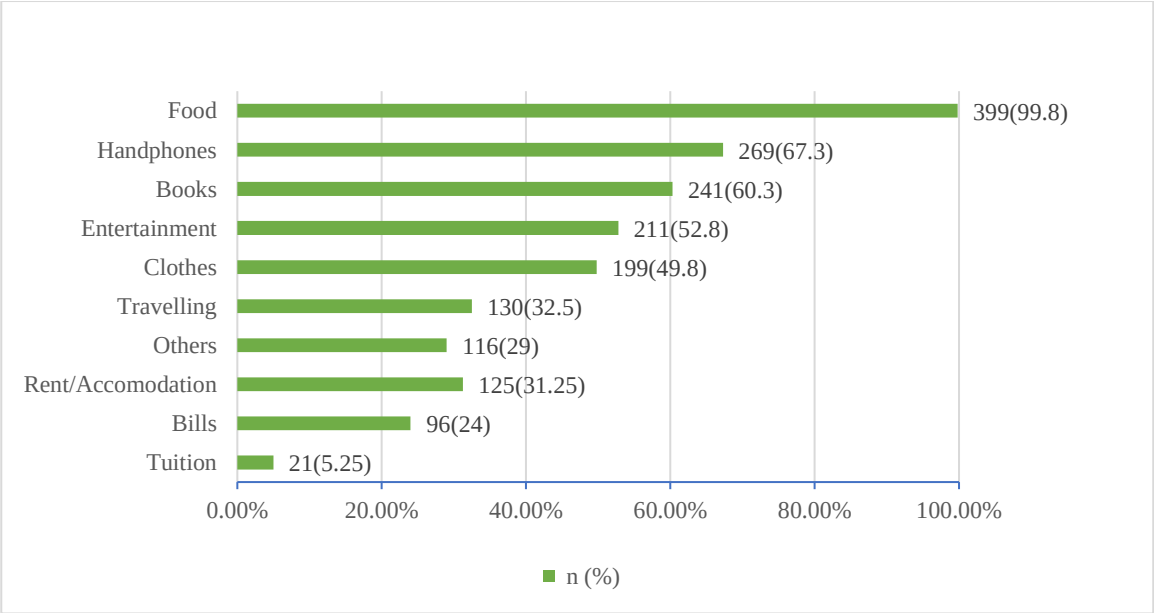

Figure 5.1 Proportion (%) of respondents' monthly expenses (N=400)

[22] PTPTN, which is the abbreviation for *Perbadanan Tabung Pendidikan Nasional* or National Higher Education Fund Corporation was established under the National Higher Education Fund Corporation 1997 (Act 566) which came into force on 1 July 1997. PTPTN began operations on 1 November 1997. The functions of PTPTN are as follows: (a) To manage loans for higher education purposes and to collect loan repayments; (b) To prepare and manage deposit savings scheme for higher education; and (c) To perform any other functions assigned to PTPTN by any written law. Information obtained from PTPTN website at http://www.ptptn.gov.my/web/guest/korporat accessed on 6 February 2017.

Figure 5.1 above provides the proportion of the respondents' monthly expenses. It could be noted that 99.8% spend on food, followed by hand phones (67.3%), books (60.3%), entertainment (52.8%), clothes (49.8%), travelling (32.5%), rent/accommodation (31.25), others (29%), bills (24%) and tuition (5.25%). Hence, it could be observed that the top three items that the respondents spend on are food, hand phones and books.

5.5.2.2 Part B – Parents' duty to maintain their children

Table 5.6: Distribution of five responses on parents' duty to maintain their children (N=400)

Question	Strongly disagree (%)	Disagree (%)	Not Sure (%)	Agree (%)	Strongly agree (%)
1. Parents have a duty to support or maintain their children	2.2	2.5	5.5	47.8	42
2. The duty of parents to maintain their child is a moral duty.	1.5	3.8	5.7	51	38
3. The duty of parents to maintain their children is a legal duty.	2.8	7.2	21.5	42.8	25.7
4. The duty of parents to support their children ends when the child reaches the age of 18 years or completes his or her SPM.	22.8	33	19.2	16.5	8.5
5. The parents' duty to support their children ends when he or she completes his or her STPM/A-Levels/Matriculation/Diploma	16	34.5	18.2	21	10.3
6. The parents' duty to support their children ends when he or she obtains his or her first degree	8.2	25.5	21	33.3	12
7. The parents' duty to support their children ends when he or she gets a job.	9.5	12.8	12.7	37	28
8. The parents' duty to support their children ends when he or she gets married.	15.2	15.3	11.2	21.8	36.5

Table 5.6 shows the respondents' level of agreement on a five-point Likert-type scale on the parents' duty to maintain their children. The majority of the respondents agree (47.8%) and strongly agree (42%) that parents have a duty to support their children. More than half the respondents (51%) agree and 38% strongly agree that the duty of parents to maintain their child is a moral duty, whereas 42.8% agree and 25.7% strongly agree that the duty to maintain is a legal duty. Items 4-8 question the respondents on when does the parents' duty to maintain end. 33% disagree and 22.8% strongly disagree that it ends when the child reaches the age of 18 years or completes his or her SPM (*Sijil Pelajaran Malaysia*). 34.5% disagree that it ends when the child completed his or her STPM (*Sijil Tinggi Persekolahan Malaysia)* or A-Levels or Matriculation or Diploma. 33.3% agree that it ends when the child obtains his or her first degree, 37% agree that it ends when he or she gets a job and finally 36.5% strongly agree that it ends when he or she gets married. Hence, from the above statistics it could be observed that the majority of the respondents agree that the parents' duty to maintain their child ends when he or she gets a job (37%).

5.5.2.3 Part C – Involvement of parents in their studies

Table 5.7: Distribution of five responses on involvement of your parents in your studies (N=400)

Question	Strongly disagree (%)	Disagree (%)	Not Sure (%)	Agree (%)	Strongly agree (%)
1. Advise me frequently about my studies.	2.5	6.2	7	42.3	42
2. Advise me to study hard.	1.2	3.5	4.3	36	55
3. Provide the necessary facilities for me to study.	1.5	1.7	8.8	44.8	43.2
4. Monitor my progress in my studies.	2.5	10	19.2	43.3	25
5. Make sure that I do not unnecessarily spend money.	2.5	8.8	22	42.2	24.5
6. Make sure that I inform them about my results in my exams or assignments.	3.2	13.3	15.5	40.5	27.5
7. Give me money for my daily expenses when I ask them.	3.5	10.2	11.8	43.2	31.3
8. Control my expenditure.	9.5	31	22.5	27.2	9.8
9. Advise me to reduce my expenses on my handphone bills	11.7	26.3	18.2	29.8	14

Table 5.7 shows the level of agreement of the respondents on a five point Likert-type of scale on the involvement of their parents in their studies. 42.3% of the respondents agree that their parents advise them frequently about their studies, 55% strongly agree that the parents advise them to study hard, 44.8% agree that their parents provide the necessary facilities for them to study, 43.3% agree that their parents monitor their progress in their studies, 42.2% agree that their parents make sure that they do not unnecessarily spend money, 40.5% agree that their parents make sure that they inform them about their results in their exams or assignments, 43.2% agree that the parents give them money for their daily expenses when they ask them, 31% disagree that their parents control their expenditure and finally, 29.8% agree that their parents advise them to reduce their expenses on their hand phone bills.

5.5.2.4 Part D – Knowledge on non-Muslim Maintenance Laws in Malaysia

Table 5.8: Proportion of Agree response for non-Muslim Maintenance Laws in Malaysia

Non-Muslim Maintenance Laws in Malaysia	Agree response n (%)
Do you know that a person reaches the age of majority when he or she is 18 years old? (N=393)	296 (75.3)
Do you agree that parents should stop maintaining their children once they reach the age of 18? (N=392)	71 (18.1)
Do you think that an average 18-year-old in Malaysia without any disabilities has the capacity to earn a living for himself or herself? (N=392)	171 (43.6)
Do you think that an 18-year-old in Malaysia has the same capacity to earn a living as an 18 year old in a Western country? (N=392)	84 (21.4)
Do you think that the Government should create an awareness among the parents about their duty to continue maintaining their children although they have reached the age of 18 years? (N=391)	308 (78.8)
Are you aware that parents who are earning and have to pay income tax to the Government are given a tax deduction for the cost of their children's tertiary education? (N=291)	231 (79.4)
In your opinion, should Parliament amend or change the law as stated above? (N=342)	185 (54.1)
If Parliament does not change the law, do you think that the Government should then provide free tertiary education in public universities in the event certain parents do not want to finance the cost of their children's education? (N=386)	221 (57.3)
If your answer to the above question is yes, do you think that the Malaysian Government would be able to finance the cost of tertiary education in public universities bearing in mind that Malaysia is still a developing nation? (N=215)*	154 (71.6)

*Total is not 221 due to non-response

Table 5.8 assesses the respondents' general knowledge about the duty to maintain with questions posed in which the answer is either yes or not. In addition, the respondents were asked to state the reasons for their answers in items 5,7,8 and 9.

Most of the respondents (75.3%, n=296) know that a person reaches the age of majority when he or she is 18 years old. Only 18.1% (n=71) agree that the parents should stop maintaining their children once they reach the age of 18. Less than half (43.6%, n=171) agree that an average 18-year-old in Malaysia without any disabilities has the capacity to earn a living for himself or herself. Most of the respondents (78.6%, n=308) disagreed that an 18-year-old in Malaysia has the same earning capacity to earn a living as an 18-year-old in a Western country. 78.8% (n=308) agree that the Government should create an awareness among the parents about their duty to continue maintaining their children although they have reached the age of 18 years. The top four reasons given by the respondents for this item are as follows: (a) at the age of 18, young vulnerable adults should focus on their studies rather than working; (b) children aged 18 years are not matured enough to make decisions and face the real world; (c) a transition in life occurs at the age of 18 where a person wants to try everything, hence the guidance and support from parents are really needed to help make a right decision and prevent them from social problems; and (d) an 18 year old Malaysian youth is not as matured or independent as a Western youth, hence they need guidance, support and supervision from their parents.

Most of the respondents (79.4%, n=231) are aware that parents who are earning and have to pay income tax to the Government are given a tax deduction for the cost of their children's tertiary education. More than half the respondents (54.1%, n=185) were of the opinion that the Parliament should amend or change the law. The four top reasons given for this item are as follows: (a) both Muslim and non-Muslim children need to be treated fairly; (b) it is good

if parents keep maintaining even if the child reaches the age of majority as the child needs to continue to study and graduate with flying colours; (c) laws need to be updated to keep abreast with the current situation; and (d) to ensure that the child's necessities are protected and fulfilled.

More than half of the respondents (57.3%, n=221) agree that if Parliament does not change the law, the Government should then provide free tertiary education in public universities in the event certain parents do not want to finance the cost of their children's education. The top five reasons given for this item are as follows: (a) the youth have a right to education right up to the tertiary level as they are the future leaders and education is essential to them; (b) education fees is very expensive and many youth who cannot afford it would seek employment rather than studying; (c) the tax paid by the parents can be used to cover the education fees; (d) only give free education to children with excellent results who come from poor families; and (e) it is the government's duty to provide free education to all citizens.

Majority of the respondents (71.6%, n=154) who answered yes for item 8, agree in item 9 that the Malaysian government would be able to finance the cost of tertiary education in public universities bearing in mind that Malaysia is still a developing nation. Two top reasons given for this item are: (a) Malaysia has sufficient income from resources such as trading and taxes; and (b) the Malaysian Government should plan for a better education scheme.

5.5.3 Discussion

From the survey conducted above, it is indeed heartening to note that it yielded results in tandem with the writer's suggestions. Majority of the undergraduates are of the view that the laws should be amended to extend the parents' duty to maintain their children even though they had reached the age of majority. It should be noted here that although the cost of study

of the majority of the respondents who participated in the survey was funded by PTPTN, these are the fortunate students who have succeeded in obtaining a place in public universities. Seats are limited in public universities and not all students who apply would be successful. Therefore, the plight of the students who do not get a place in the public universities should be considered, bearing in mind the high cost of education in private institutions of higher learning. Besides university fees, these students also have to bear the cost of living, which increases annually, especially those living in Kuala Lumpur and big cities in Malaysia. Until and unless the relevant laws are amended to extend the parents' duty to maintain young vulnerable adults, the plight of these youngsters, especially those from broken homes remain doubtful and may result in social problems.

5.6 COMPARING THE POSITION IN OTHER JURISDICTIONS

5.6.1 Singapore

Prior to one of the major amendments to the Women's Charter in 1996, a child maintenance order ceased to be in effect in Singapore once the child attained the age of twenty-one years (the former section 125).[23] However, no exception was provided for in this section in the event the child wanted to extend the maintenance order beyond his twenty-first birthday.

This issue in fact was raised in the landmark decision in *PQR (mw)* v *STR*,[24] which could be described as the case that triggered the amendment to section 69 of the Women's Charter. The court held that as the daughter had passed her twenty-first birthday, she could no longer claim maintenance. In addition, the court stated that if it is felt that section 125 is

[23] Note that the Women's Charter considers the age of majority of a child as twenty-one years. This could be distinguished from the position in Malaysia as under section 95 of the LRA, the maintenance order ceases when the child attains the age of eighteen.
[24] [1993] 1 SLR 574.

unsatisfactory, it is up to the Parliament and not the courts to take measures to solve this problem.

Section 125 was also criticised by scholars. For example, Professor Leong Wai Kum, in her article entitled *The duty to maintain spouse and children,*[25] in criticizing section 125 stated as follows:

> '… it fails to create an exception in the case of children beyond the age of twenty-one who are still receiving education. Should not their parents still be liable to maintain them? It is anomalous that there ought not be a legal liability in a society as committed to education and training in Singapore.'

As a result of the weakness in section 125, the Women's Charter (Amendment) Act 1996[26] repealed section 125 and amended section 69 accordingly. The present section 69(2) states that a District Court or a Magistrate's Court is empowered to order a parent, who has neglected or refused to provide maintenance to his child, pay a monthly allowance or a lump sum to the child. Section 69(6) provides that a maintenance order 'ceases to be in force on the day on which the child attains the age of 21 years unless the order is expressed to continue in force for a period ending after that day'. Hence, it could be seen here that the court is empowered to extend the maintenance order beyond the child's twenty-first birthday.

In the writer's opinion, section 69(6) is an improvement over the former section 125, which did not provide for any form of exception. The exceptions that are applicable are laid down in section 69(5) as follows:

[25] (1987) 29 Mal LR 56, at 77-78.
[26] Act No.30/96

The court shall not make an order under subsection (2) for the benefit of a child who has attained the age of 21 years or for a period that extends beyond the day on which the child will attain that age unless the court is satisfied that the provision of the maintenance is necessary because-

(a) of a mental or physical disability of the child;

(b) the child is or will be serving full-time national service;

(c) the child is or will be or (if an order were made under subsection (2)) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(d) special circumstances, other than those stated in paragraphs (a), (b) and (c), exist which justify the making of the order.

The above provisions have raised the hopes of the young vulnerable adults in Singapore who intend to pursue their tertiary education or training. Subsection (5) could be said to have liberated the duration of maintenance order from the tight clutches of the former section 125, which did not provide for any exception at all.

Four exceptions are laid down in section 69(5). The first exception in paragraph (a) pertaining to a mental or physical disability of a child is similar to the exception in our section 95 of the LRA. The second exception, in paragraph (b) refers to children who are or would be 'serving full-time national service'. In the writer's opinion, this exception should also be applicable in Malaysia, as most of the eighteen-year old children here have to serve national service.

The third exception in paragraph (c),[27] which the writer feels is the most pertinent exception, provides that if the child is either 'receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation', he is entitled to be maintained by his parents. In addition, paragraph (c) further states 'whether or not while in gainful employment'. This means that even though the child is in gainful employment while pursuing his tertiary education or undergoing training, he is still entitled to be maintained by his parents. This paragraph could be described as the provision that is most favourable to young vulnerable adults in Singapore.

Finally, paragraph (d) states that if there are special circumstances that exist, other than the three circumstances provided for in paragraphs (a) – (c), which justify the court in extending the maintenance or the court would extend the order. This too in the writer's opinion gives the court ample room to extend the duration of a maintenance order if it feels that special circumstances and it feels that these circumstances justify the extension. However, what amounts to 'special circumstances' is entirely up to the court's interpretation.

Although the amendment to section 69 as discussed above has promoted and safeguarded the welfare of the young vulnerable adults in Singapore, it still came under scrutiny by Professor Leong Wai Kum, in her book entitled *Principles of Family Law in Singapore.* [28] The learned author stated that although this amendment is much welcomed, there is still a slight defect as section 69(6) states that the maintenance order ceases when the child attains the age of twenty-one years 'unless the order is expressed to continue in force for a period ending after that day.'" The adult child then must reapply on the basis of any of the grounds mentioned in section 69(5). This, according to the learned author causes inconvenience for

[27] Note that the Singapore High Court in the case of *Wong Ser Yen v Ng Cheong Ling* [2006] 1 SLR 416 held that as the oldest child here was twenty-eight years old and was receiving medical treatment and studies abroad, he has satisfied the exception in section 69(5). In addition, the middle child was also awarded maintenance as she was still receiving tertiary education.

[28] Leong, Wai Kum, *Principles of Family Law in Singapore*, (Singapore: Butterworths, Asia, 1997,) at 865.

the child or his care-giver. It would be better if the maintenance order continues beyond the child's twenty-first birthday. The payer would then have to apply for an order from the court to rescind the maintenance order if he can prove that the adult child is no longer financially dependent.

The writer submits that where the Malaysian position on this issue is concerned, it would be greatly appreciated if the Malaysian legislature follows the footsteps of its Singapore counterpart and amend section 95 of the LRA in order to safeguard the welfare of the young vulnerable adults who intend to pursue their tertiary education or vocational training.

5.6.2 England and Wales

As to the position in England and Wales on the right of young vulnerable adults to continue receiving maintenance from their parents, the writer would be referring to two statutes: Children Act 1989 and the Matrimonial Causes Act 1973.

The definition of a 'child ' in the Children Act 1989 is provided under section 105(1) of the Act. This provision defines 'child' as 'a person under the age of eighteen'. The section goes on to provide that this definition is subject to Schedule 1, paragraph 16.

Schedule 1 of this Act provides for 'Financial Provision for Children'. Paragraph 16 Schedule 1 states that 'child' in this schedule, includes a person who has attained 18 years, if an application is made under paragraph 2 or 6. Hence, this means that a young vulnerable adult's right to maintenance is protected under this Act. This specifically could be seen in paragraph 2, which provides for 'Orders for financial relief for persons over eighteen'. Paragraph 2(1) provides as follows:

(1) If, on the application by a person who has reached the age of eighteen, it appears to the court –

(a) that the applicant is or will be or (if an order …) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(b) that there are special circumstances which justify the making of an order under this paragraph,

the court may make one or both of the orders mentioned in sub-paragraph (2).

Hence, it could be seen above that the statutory provision expressly provides that if a young vulnerable adult intends to pursue his tertiary education or undergo training for a trade, profession or vocation, whether or not in gainful employment, he could ask for maintenance from his parents. This is similar to the exception in section 69(5) of the Singapore Women's Charter. The second exception too is similar to section 69(5) of the Women's Charter i.e. if the court finds that 'there are special circumstances that justify the court in making such a maintenance order in favour of the young vulnerable adult'. However, it is to be noted that this provision is silent on whether a disabled young vulnerable adult could continue to be maintained by his parents, as is provided for in the exception to section 95 of the Malaysian LRA as well as section 69(5) of the Singapore Women's Charter.

The second statute that provides a right to be maintained to young vulnerable adults in the England and Wales is the Matrimonial Causes Act 1973. Section 29(1) of this Act provides that subject to subsection (3), the court will not grant a financial provision order in favour of a child who has reached the age of eighteen years. Subsection (3), however, provides for two exceptions to the general rule in subsection (1) as follows:

(a) The child is, or will be, … receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be in gainful employment; or

(b) There are special circumstances which justify the making of an order …

It could be observed here that the two exceptions provided in section 29(3) of the Matrimonial Causes 1973 is similar to Schedule 1 paragraph 2 of the Children Act 1989. Once again, there is no mention of disabled young vulnerable adults in the above provision. However, this issue was raised two cases, *C v F (Disabled Child: Maintenance Orders)*[29] and *T v S (Financial Provision for Children).*[30] The courts in these cases have held that the phrase 'special circumstances in section 29(3)(b) may refer to physical disability or any other disability'.

Thus, it could be observed that young vulnerable adults in England and Wales who intend to pursue their tertiary education or undergo for a trade, profession or vocation have a right to claim maintenance from their parents, even though they may already be earning an income. Hence, it could be observed that the laws in England and Wales too protect the welfare of their young vulnerable adults.

5.6.3 Australia

The Family Law Act 1975 in Australia generally provides that a child maintenance order ceases when the child attains the age of eighteen (section 66T). However, section 66L creates two exceptions in two situations. The first situation is where an application is made to the court for a maintenance order in relation to a child who is 18 years or above (section 66L(1)).

[29] [1998] 2 FLR 1, CA
[30] [1994] 2 FLR 883.

In such a situation, the court may award the order if it feels that the provision of maintenance is **necessary** *(emphasis added*) either to:

(a) enable the child to complete his or her education; or

(b) because of mental or physical disability of the child.

The second situation is where an application is made to the court for a child maintenance order in relation to a child who is still below the age of eighteen. However, the issue is whether the court could extend the order beyond the child's eighteenth birthday. The court is allowed to do so if it is satisfied that it is **necessary** (*emphasis added*) (section 66L(2)):

(a) to enable the child to complete his or her education; or

(b) because of a mental or physical disability of the child.

At this juncture, the writer would like to highlight that section 66L is unique and is not found in its counterparts in Singapore or England and Wales. It provides for two situations when an application could be made, first when the child has already attained the age of eighteen or above, and secondly, when the child is still below the age of eighteen. The exceptions provided in both these situations are however the same.

Before examining the two exceptions provided in section 66L, the writer would first examine the meaning of the word 'necessary' that appears in both section 66L(1) and (2). Section 66L's predecessor, section 76(3), had a similar provision. The Australian courts initially gave a strict interpretation to the word 'necessary' and held that it meant that the financial support was essential to enable the child to complete his or her education or where he or she is mentally or physically disabled and not merely because it was desirable or

reasonable.[31] However, in the case of *In the Marriage of Tuck*,[32] the Full Court of the Family Court adopted a liberal approach of the word 'necessary' and held that the financial support was needed by the child for one of the reasons mentioned therein and that it was reasonable for the parents to contribute towards the maintenance of the child. Hence, the court held that 'necessary' meant reasonably necessary rather than absolutely necessary.

As could be observed above, there are two exceptions laid down in section 66L(1) and (2). One of the exceptions mentioned therein, i.e. where the child is physically or mentally disabled, is similar to the section 95 of the LRA. The second exception is 'to enable the child to complete his or her education'. When compared to the provisions in Singapore and England and Wales, it could be observed that this exception is termed very generally as it does not specify the nature of the education and whether it includes training in any field as well.

However, section 4 of the Act defines 'education' to include 'apprenticeship or vocational training'. In addition, judicial decisions have also interpreted 'education' to mean that 'it extends beyond just scholastic apprenticeship or vocational matters and includes any form of training for a skill.'[33] It also includes to study for a basic degree[34] and a study to complete a combined degree.[35] This may include pupillage or chambering, attachment and apprenticeship.

The judicial attitude in giving a very wide interpretation to the exception in section 66L could be noticed in the case of *Keltie & Keltie & Bradford*[36] (this case was discussed in

[31] *In the Marriage of Oliver* [1977] FLC 90-033, at 76,202; *In the Marriage of Gamble* (1978) 32 FLR 198 at 207; *In the Marriage of Mercer* [1976] FLC 90-033 at 71.130.
[32] [1981] FLC 91-021.
[33] *In the Marriage of O'Dempsey* (1990) 1 FLR 158 at 161.
[34] *In the Marriage of Tuck* [1981] FLC 91-021.
[35] *In the Marriage of Campbell* (1987) 92 FLR 130, at 151.
[36] [2002] Fam CA 421

Chapter 4 in subtopic 4.4.3 concerning Step-children). In this case the issue was whether section 66L extends to maintaining a step-child who has attained the age of eighteen years. The Full Court of the Family Court of Australia held that as section 66L also applies to maintenance orders made under sections 66M and 66N (both relate to the duty of step-parent to maintain), hence, a step-parent too could be ordered to continue paying maintenance to his step-child although the latter has attained the age of eighteen.

Secondly, the Child Support (Assessment) Act 1989 lists down in section 12 the events that terminate a child support. Section 12(1)(c) provides for a situation where 'the child turns 18'. However, a Note to section 12(1)(c) states that paragraph (c) may be subject to section 151C.[37] Section 151C could be described as a lengthy and complicated provision. Nevertheless, having perused the provision, two exceptions may be considered by the Registrar when an application is made to continue an administrative assessment or child support agreement in relation to a child:

(a) the child is likely to be in full-time secondary education on the child's 18th birthday;[38] and

(b) there are, in the Registrar's opinion, exceptional circumstances justifying the making of the application after the child's 18th birthday.[39]

Perusing the two exceptions above, it could be observed that the second exception concerning 'exceptional circumstances' gives a wide discretion to the Registrar to decide whether he wants to continue the administration or child support agreement. However, the first exception creates some confusion as it specifically refers to 'full-time secondary

[37] Section 151C concerns *Continuing administrative assessments and child support agreements beyond a child's 18th birthday in certain situations.*
[38] Section 151C(2)(c).
[39] Section 151C(2)(e)(ii).

education'. This differs from the exceptions as provided in the Singapore and UK statutes which clearly state tertiary education or vocational training. However, the issue that arises here is whether 'full-time secondary education' refers to secondary school or does it extend to tertiary education?

Reference could be made to section 5 of this Act which defines 'full-time secondary education' to mean 'education that is determined by the secondary school at which the child is receiving education to be full-time secondary education'. Section 5 also defines 'secondary school' to mean 'technical and further educational institution or any other educational institution at which full-time secondary education is provided.' Hence, it is observed that a child who is eighteen years of age could only apply to extend the assessment or child support agreement beyond his eighteenth birthday if he wants to complete his secondary school education. There is no mention in the above section about tertiary education. However, the writer submits that it is arguable if an eighteen year old wanting to pursue his or her tertiary education or vocational training could apply under the second exception in section 151C(2), i.e. where in the Registrar's opinion there are exceptional circumstances justifying the extension of the assessment or the child support agreement beyond the child's eighteenth birthday. It is yet to be seen if the judiciary in Australia would bring the above situation under the second exception.

5.7 DISCUSSION

On the whole, it could be said that the young vulnerable adults in Malaysia, especially those from broken homes and intend to pursue their tertiary education are in a deplorable state. The 1950 Act and the Maintenance Ordinance 1959 of Sabah are of no assistance at all as both these Acts are silent on this issue. The LRA, on the other hand, restricts the right to

continue claiming for maintenance to disabled young vulnerable adults (section 95). The hopes raised by the High Court and the Court of Appeal in the case of *Karunairajah* was shattered by the Federal Court decision in the same case where the court gave a strict interpretation to the phrase 'physically or mentally disabled' in section 95 of the LRA. The two decisions discussed after the Federal Court's decision, i.e. the case of *Uma Sundari* and *Teo Ai Teng* are of minimal assistance as it has not altered the position laid down by the Federal Court in *Karunairajah.*

The writer respectfully submits that in deciding the case, the learned Federal Court judge failed to refer to the welfare principle. The welfare of a child has always been considered as the paramount consideration by the courts.[40] In addition, the writer submits that when a child attains the age of eighteen, it is the most critical point in his life as that is the age at which he comes to cross-roads and has to make a decision regarding his future. Already in a vulnerable position, section 95 of the LRA aggravates the situation by stating that the parents do not have to maintain the child anymore as he is a major now. Children from broken homes who intend to pursue their tertiary education suffer the most as their parents may not want to finance their education, trying to pass the buck to their spouse. They may even be literally thrown out of their homes by their parents due to section 95 of the LRA.

Previous research shows that even though a child has reached the age of majority, be it eighteen or twenty-one, he may still need to be supported by his parents until he finds an employment and is able to fend for himself. The welfare principle still plays an important

[40] *Re Satpal Singh, An Infant* [1958] MLJ 283, *Allen v Allen* [1951] 1 AllER 724, *In re Thain* [1926] Ch 676, *Masam v Salina Saropa & Anor* [1974] 2 MLJ 59, *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234.

role in safeguarding the right to maintenance of these young vulnerable adults even though they are literally no longer children.[41]

As stated in the beginning of this chapter, cost of tertiary education is not cheap. Although scholarships are available, not everyone who applies for it would be successful. In addition, although the cost of education in public universities is more affordable than private institutions, there are only limited seats available in the public universities. It should also be borne in mind that Malaysia is not a welfare state.

The writer would also like to highlight here that at the time when section 95 was drafted in 1976, there were only a handful higher learning institutions available in Malaysia. In addition, not all young vulnerable adults were keen on pursuing their tertiary education. Most of them starting earning after completing their SPM examination. For example, the number of undergraduates enrolled in the public institutions of higher learning in Malaysia in 2002 was 184,190 and private institutions of higher learning was 67,062.[42] However this number escalated nearly five times in the year 2015 to 540,638 undergraduates in public institutions of higher learning and about seven times to 493,926 undergraduates in private institutions of higher learning.[43]

At the same the Government too could be said to indirectly encourage the parents to maintain the cost of their child's tertiary education. This could be seen in section 48(2) of the

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[41] Nuraisyah Chua Abdullah, "*Parent's Obligation Towards Maintenance of Children in Tertiary Education*: *An Overview of the Islamic Law and Family Laws in Malaysia in Comparison With UK*," [2006] 5 *MLJ* cvi; [2006] 5 *MLJA* 106, Sridevi Thambapillay, "*Karunairajah a/l Rasiah v Punithambigai a/p Ponniah*: The Need To Amend Section 95 of the Law Reform (Marriage and Divorce) Act 1976?", (2005) 32 *JMCL*, 109-128, Kalmijn Matthijs , "How Childhood Circumstances Moderate the Long-Term Impact of Divorce on Father-Child Relationships", (Aug 2015) 77, *Journal of Family and Marriage* Issue 4, 921-938, Gilligan, Megan, Suitor, J. Jill, Pillemer, Karl, "Estrangement Between Mothers and Adult Children: The Role of Norms and Values", (Aug 2015), 77 *Journal of Marriage & Family*. Issue 4, 908-920, Martín-Lagos López, María, "The Type of Support that Adult Children Solicit from Their Mothers in European Welfare Systems", (May2014) 117 *Social Indicators Research.* Issue 1, 209-233.

[42] Information obtained from the Ministry of Higher Education's website at www.mohe.gov.my accessed on 11 January 2017.

[43] *Ibid*

Malaysian Income Tax 1967 which provides that tax deduction would be given to parents who pay for their child's tertiary education.

Hence, the effect of section 95 of the LRA is that it would lead to drastic consequences as envisaged by his Lordship Mahadev Shankar JCA in the case of *Ching Seng Woah* where he stated that section 95 would then become a **bohsia's c**harter, which means that it (the section) would create a generation of youths who roam the streets, without a roof above their heads. It would also increase the crime rate in Malaysia, as these young vulnerable adults may indulge in illegal activities.

The position in the other jurisdictions such as Singapore, England and Wales and Australia is far advanced. In Australia, for example, in addition to the laws, the judiciary too bends backwards to help the young vulnerable adults, as was seen in the case of *Keltie & Keltie & Bradford.* The court here was willing to order a step-parent to continue maintaining his eighteen-year old step-child. Whereas in Malaysia, the courts are not willing to even order the natural parent to pay maintenance as section 95 of the LRA expressly states that the maintenance order ceases when the child reaches as the age of eighteen. The writer would suggest some recommendations to overcome this problem in Chapter 8 of this thesis.

5.8 CONCLUSION

On the whole, it could be stated that the current maintenance laws in Malaysia, be it the 1950 Act, the LRA or the Maintenance Ordinance of Sabah do not promote the welfare of young vulnerable adults. Only the disabled benefit by the exception in section 95 of the LRA which states that their parents have to continue maintaining them even though they have attained the age of eighteen. As for the rest of the young vulnerable adults, especially those

from broken homes, it could be said that their whole future is at stake due to their financial instability.

The survey conducted among the undergraduates to obtain their perception on the current laws produced results in in the interest of the young vulnerable adults. Majority of the undergraduate were strongly of the opinion that the current laws should be amended to enable a young vulnerable adult to be continued to be maintained by his parents if he intends to pursue his tertiary education.

The position in the three jurisdictions are far advanced when compared to the position in Malaysia. In fact, the Muslim young vulnerable adults are in a better position in Malaysia when compared to their non-Muslim counterparts as under the Islamic Family Law Statutes, the court could order their parents to continue maintaining them if they want to pursue their tertiary education.

Therefore, in conclusion, unless the current laws are amended, the welfare of these young vulnerable adults would not be safeguarded. As mentioned earlier, the consequences of the current laws could also be drastic and lead to social problems. We should never forget that these young vulnerable adults are the very persons who may be the future leaders of our nation.

CHAPTER 6: ARREARS AND VARIATION OF MAINTENANCE

6.1 INTRODUCTION

In this Chapter, the writer would be discussing two further issues concerning child maintenance, which are pertinent in safeguarding the welfare of the child. The two issues are arrears of maintenance and variation or rescission of maintenance orders. Both these issues affect the welfare of the child, as the parent who has the duty to maintain would not have paid maintenance for a certain period of time prior to the filing of the petition or the parent who is ordered by the court to pay maintenance, may apply to court later to either reduce the maintenance sum or rescind the order altogether. In both these situations, the person adversely affected is the child.

The writer would first examine the statutes and judicial decisions in Malaysia pertaining to the two issues, after which a comparison would be made with the positions in Singapore, England and Wales and Australia.

6.2 ARREARS OF MAINTENANCE

The first issue that would be examined in this Chapter is concerning the right of a child to claim arrears of maintenance where his or her parent has not maintained him or her for a considerable period of time prior to the filing of the maintenance petition. Parents who face marital problems sometimes start neglecting to maintain their children because they feel that they do not have any responsibility of maintaining their children anymore as their marriage is on the verge of a breakdown or has already irretrievably broken down. These parents do not care if their child suffers as a result of their neglect. The feeling of ‘why

should I maintain my children when my spouse could do so?' arises. The welfare of the child concerned is totally ignored in such a situation.

Thus, when a petition claiming for maintenance against these parents who have neglected or refused to maintain the children is filed, one question that arises is whether the arrears of maintenance could be claimed? If the answer to this question is yes, the second question that arises is whether there is a time limit to claim the arrears? The writer would next examine the Married Women and Children (Maintenance) Act ('the 1950 Act'), Law Reform (Marriage and Divorce) Act 1976 ('the LRA') and the Maintenance Ordinance 1959 of Sabah ('the Maintenance Ordinance of Sabah') in order to see the provisions on arrears of maintenance.

6.2.1 Married Women and Children (Maintenance) Act 1950

The 1950 Act, in section 3(3) provides for the right to claim arrears of maintenance. This section provides as follows:

> (3) Such allowance shall be payable from the date of such neglect or refusal or from such later date as may be specified in the order.

Upon reading the provision, *prima facie* it seems that the court is empowered to order the parent to pay the monthly allowance from the date he neglected or refused to pay the child his or her maintenance or from such later date as to the court seems reasonable. In the writer's opinion, this seems to be a fair provision as it emphasises the fact that parents should think twice before they neglect or refuse to maintain their child.

Nevertheless, it is equally important to examine judicial decisions that have been decided on the issue of arrears of maintenance under section 3(3) the 1950 Act.[1] One of

[1]It is to be noted here that although the cases discussed above refer to spousal maintenance, the same statutory provision on arrears of maintenance is applicable to child maintenance as well.

the earliest cases that discussed this issue is *Amrick Lall v Sombaiavati*.[2] The judgment in *Amrick Lall* was followed in the case of *Gangagharan v Sathiabama.*[3] One of the grounds raised in this case was that the Sessions Court President had failed to consider the principle in *Pilcher v Pilcher*[4] that arrears, as a matter of practice, are allowable only for one year. In this case, the learned President of the Sessions Court had allowed it for nearly ten years, i.e. from August 1968 to March 1978.

The High Court agreed with the decision in *Amrick Lall* and *Pilcher* (which followed the principle laid down in an earlier case of *Kerr v Kerr*,[5] that it had been the practice of the Divorce Division to allow payment of arrears of maintenance for not more than one year unless there are special circumstances). The rationale for this principle is that the "court treats the payment as a fund of maintenance and not as property".[6] Thus, the appellant's appeal was allowed.

At this juncture, it is respectfully submitted that the learned counsels in both *Amrick Lall* and *Gangagharan* did not refer to the 1950 Act which was in force at that point of time. If reference had been made to this statute, the court would have had the opportunity to refer to section 3(3) which expressly states that maintenance shall be payable from the date of neglect or refusal to pay or such later date as the court may order. The court then would not have any need to refer to the practice concerning claiming arrears of maintenance in England. It would have been interesting to note what the court's stance would have been, i.e. whether it would have given prominence to the practice of the Divorce Division in England.

[2] [1973] 2 MLJ 191. The High Court in this case referred to and agreed with Ormrod LJ's decision in *Luscombe v Luscombe* [1962] 1 WLR 313, where his Lordship held that although a wife may be entitled to the whole of the arrears available, as a matter of practice the court will not allow the arrears for more than twelve months. In stating this, Ormrod LJ referred to the referred to the decision of Lord Merriman P in *Pilcher v Pilcher* [1956] 1 WLR 289.
[3] [1979] 2 MLJ 77.
[4] *Supra* n.2.
[5] [1897] 2 QB 439.
[6] *Supra* n 3 at 78.

Notwithstanding the two decisions discussed above, the High Court in the case of *Lee Yu Lan v Lim Thain Chye*[7] referred specifically to the 1950 Act concerning arrears of maintenance (which was referred to as 'past maintenance' in this case). The peculiarity of this case was that the application for maintenance was made under section 77(1) of the LRA.[8] However, the court went on to say that the court, in the absence of any express provision, is not precluded from referring to the 1950 Act which expressly states that the court may order maintenance to be payable from the date of neglect or refusal to maintain.

Two observations may be made from the above decision. First, the application for maintenance was made under section 77(1) of the LRA. As such, when dealing with the issue of past maintenance or arrears of maintenance, the court should have referred to section 86(3) of the LRA which specifically provides that a time limit to claim arrears of maintenance for a spouse should not exceed three years.[9]

Secondly, the court was not referred to the 1950 Act by the counsels. The court's judgment as to the issue of maintenance was based solely on the provisions in the LRA. However, towards the end of the judgment, it was surprising to note that the learned judge, when deciding on the issue of past maintenance suddenly referred to the 1950 Act. Further thereto, the learned judge also did not refer to the two cases discussed above, i.e. *Amrick Lall* and *Gangagharan*, which state that the arrears of maintenance should not be more than one year.

Taking into account the above observations, it is submitted that the case of *Lee Yu Lan* seemed to break away from the time limit to claim the arrears of maintenance under the 1950 Act as laid down by *Amrick Lall* and *Gangagharan* (following the practice in the English Divorce Division).This case could be described as a step forward in the protection

[7] [1984] 1 MLJ 56.

[8]Section 77(1) of the LRA provides that the court may order maintenance of a spouse generally during the course of a matrimonial proceeding or when granting or subsequent to the granting of a decree of divorce or judicial separation or when a wife or former wife is found to be alive after a decree presuming her to be dead.

[9] A similar provision is found in section 98 of the LRA for the maintenance of child.

of the right of a child in claiming arrears of maintenance from the defaulting parent (or the respondent), thereby ensuring that future respondents do not think that they could hide behind the ruling in *Amrick Lall* and *Gangagharan* which limits the claim for arrears of maintenance to not more than one year.

6.2.2 Law Reform (Marriage and Divorce) Act 1976

The LRA provides for the recovery of arrears of maintenance for a child in section 98. This section provides that section 86 shall apply *mutatis mutandis* to orders for the payment of maintenance for the benefit of any child. Section 86(3) provides for the recovery of the arrears of maintenance for a spouse as follows:

> (3) No time amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit.

The three-year limit laid down for the payment of maintenance of a spouse equally applies to the maintenance of a child (section 98 of the LRA). In the writer's opinion, this provision, *prima facie* seems unfair to a child, especially where the parent has failed to maintain the child concerned for a considerable length of time. His or her liability is limited to a mere three years prior to the filing of the petition.

Having looked at section 98 of the LRA, it is next pertinent to examine judicial decisions on this issue. One of the earliest decisions on this matter is the case of *Leow Kooi Wah v Philip Ng Kok Seng & Anor*.[10] In this case, the court held that the maintenance to be paid by the respondent should be backdated to November 1998, which was actually more than three-year limit set under section 86(3) and 98 of the LRA.

[10] [1997] 3 MLJ 133.

The above decision is much welcomed as it allows backdated maintenance to the date of the neglect or refusal to pay maintenance by the respondent, without imposing any time limit. Further thereto, the learned judge himself had stated that the petitioner and her children 'have been disgracefully neglected by the respondent',[11] thereby not condoning the respondent's behaviour in neglecting to pay maintenance for all these years.

The above case was referred to in the case of *Sivajothi a/p K. Suppiah v Kunathasan a/l Chelliah.*[12] In this case, the issue was whether the petitioner wife could claim the arrears of maintenance from March 1997 to March 1998. The learned judge in this case referred to a Singapore case, *Gomez Nee David v Gomez Nee David*[13] where the court agreed with the decision in *Ross v Pearson.*[14] In the case of *Ross,* Baker P referred to *Pilcher v Pilcher (No.2)*[15] and *Luscombe v Luscombe*[16] and held that the one year limitation was merely a matter of practice. Therefore, Latey J, in *Gomez Nee David's* case agreed with Baker P and stated that there was no universal absolute rule that a claim for arrears of maintenance should be limited to one year. His Lordship added that the decision in *Pilcher* and *Luscombe* should not be followed in Singapore on this issue. His Lordship in the present case next referred to *Leow Kooi Wah v Philip Ng Kok Seng* and agreed with the judgment that the claim or arrears of maintenance could be backdated. Thus, the court decided in the present case held that the wife is entitled to claim arrears of maintenance from 3rd March 1997 till the court makes the order for maintenance. The court in the present case seems to agree that backdated maintenance is allowed and did not impose any time limit on this issue.

[11] *Ibid* at 145-146
[12] [2000] 6 MLJ 48.
[13] [1985] 1 MLJ 27.
[14] [1976] 1 WLR 224.
[15] [1956] 1 WLR 298.
[16] [1962] 1 WLR 313.

In the case of *Diana Clarice Chan Ching Hwa v Tiong Chiong Hoo*[17] from Sarawak, the issue as to the arrears of maintenance was raised as the husband had failed to pay maintenance for one year preceding the date of the petition. The court ordered the husband to pay all arrears due for that one year. In this case, the court made reference to the provisions in the 1950 Act and the LRA concerning maintenance, but no reference was made to section 3(3) of the 1950 Act nor to sections 86(3) or 98 of the LRA concerning arrears of maintenance. Further thereto, the court did not discuss in detail on the issue of arrears of maintenance.

The above case was referred to in *Parkunan A/L Achulingam v Kalaiyarasi A/P Periyasamy*[18] regarding the arrears of maintenance. His Lordship Faiza Tamby Chik J referred to sections 86(3) and 98 of the LRA and further stated that the Court of Appeal in the case of *Diana Clarice* (discussed above) had exercised such power when the court ordered the husband to pay the arrears.

Three observations could be made from the above. First, this case could be said to be the first case to specifically refer to sections 86(3) and 98 of the LRA concerning the arrears of maintenance.[19] Secondly, although the court in the case of *Diana Clarice* did not specifically refer to the above two sections in the LRA, the court in *Parkunan* stated that the Court of Appeal in *Diana Clarice* had exercised the power as stated in these two LRA provisions. Thirdly, the decision in *Parkunan* is not clear as to whether the court is bound by the three-year limitation period as provided for in sections 86(3) and 98 of the LRA.

[17] [2002] 1 CLJ 721
[18] [2004] 6 MLJ 240.
[19] It is to be noted here that the respective courts in all the cases referred to earlier on arrears of maintenance, *Leow Kooi Wah v Philip Ng Kok Seng & Anor*, *Sivajothi a/p K. Suppiah v Kunathasan a/l Chelliah* and *Diana Clarice Chan Ching Hwa v Tiong Chiong Hoo*, did not refer to either section 86(3) nor section 98 of the LRA.

In another case from Sarawak, *Lim Siaw Ying v Wong Seng & Datin Anak Lee*,[20] the court referred to the decision in *Diana Clarice*, where the court had ordered the husband to pay arrears of maintenance for a period of one year preceding the date of the maintenance order. In the present case, the High Court in fact went one step further and ordered the husband to pay the arrears from the date of the petition (14th January 2005) until the date of the maintenance order (15th January 2009), which totals to four years. This exceed the three-year limitation period imposed by the LRA. The court in the present case did not make any reference to the two relevant provisions in the LRA concerning arrears of maintenance. Nevertheless, the court did make reference to the other provisions in the LRA concerning the duty to maintain. Therefore, it is submitted that it is not clear whether this case should be described as departing from the time limit imposed by the LRA on the arrears of maintenance.

However, the High Court in *Sundaramoorthy a/l Marimuthu v Silvarani a/l Muniandy*[21] held that the wife could only claim for arrears of maintenance for three years before the cross petition dated 9th December 2010. However, as all the children had attained the age of eighteen as at 9th December 2007, they were not entitled to any arrears of maintenance.

Hence the above case could be described as the first case to give a literal interpretation to the three- year limitation period imposed by sections 86(3) and 98 of the LRA, thereby limiting the liability of the husband or father in facing the consequences of not maintaining his wife and children to merely three years before the date of the petition claiming for arrears of maintenance. The question that arises is whether these provisions, especially section 98 is in the best interest of the child? For example, in the above case of *Sundaramoorthy a/l Marimuthu*, the father had not paid maintenance to the children from

[20](2009) 4 MLJ 409
[21] [2011] MLJU 1193.

1996. However, as the court had limited the payment of arrears of maintenance to three years as stated, in section 98, the father at the end of the day would not have to pay a single cent to the children as backdated maintenance as all the children had reached the age of eighteen. Is this fair to these children, who, for the past fifteen years were not maintained by their father? In the writer's view the decision in *Sundaramoorthy a/l Marimuthu* should be limited to the facts of the case and should not apply to other cases. Further thereto, it is a High Court decision and therefore does not bind the other cases.

6.2.3 Maintenance Ordinance 1959 of Sabah

The provision as to the arrears of maintenance that may be claimed in Sabah is provided for in the proviso to section 3(3) of the Maintenance Ordinance of Sabah. The proviso to section 3(3) of the 1959 Ordinance provides as follows:

> Provided that the Court may, for special reasons which shall be recorded and having regard to the means of the parties, order the payment of a lump sum by way of arrears in respect of any prior period but not exceeding twelve times the amount of any allowance ordered under subsection (1) or (2).[22]

Observing the above provision, it could be noted that it differs from both the 1950 Act and the LRA in the following respects:

1. This provision expressly states that the court could order the arrears of maintenance to be paid 'in respect of any period'. This *prima facie* gives the court wide powers to order backdated maintenance for any period of time; and

2. However, the same provision qualifies the phrase 'any prior period' by stating that 'but not exceeding twelve times the amount of any allowance ordered under

[22] Subsections (1) and (2) refer to the court's power to order a person to pay maintenance to his wife or legitimate child and illegitimate child respectively.

subsection (1) or (2)'. This phrase thus limits the backdated maintenance to not more than twelve times the amount of monthly maintenance ordered; which basically means that the arrears of maintenance that could be ordered should not be more than one year. This differs from the 1950 Act as in that Act, section 3(3) merely states from the date of neglect or refusal to pay maintenance without imposing any limitation, whereas the LRA as discussed earlier, also lays down a three-year time limit.

There are no cases that have been decided on the claim for arrears of maintenance under the 1959 Ordinance. Hence, we would have to wait and see what the judicial approach to this provision would be in Sabah. It is respectfully submitted that by imposing a limitation on the backdated maintenance that could be ordered to merely one year, the law is tying the hands of the judiciary in awarding backdated maintenance to a child who has not been maintained for more than one year. It is respectfully submitted that this is acting against the welfare of the child as the parent, as the primary caregiver, does not have to worry about paying backdated maintenance where he has failed to maintain the child for more than one year.

Before proceeding further with the discussion on this issue on arrears of maintenance, the writer would next compare the position in other jurisdictions such as Singapore, England and Wales and Australia.

6.2.4 Comparison with other jurisdictions

6.2.4.1 Singapore

The position as to the arrears of maintenance in Singapore could be discussed by comparing two time frames, i.e. pre-1996 amendment to the Women's Charter and post-

1996 amendment. In the first era, the former section 60(3) of the Women's Charter provided the following as to the arrears of maintenance that could be ordered by the court:

> Such allowance shall be payable from such date as the court directs.

The above provision seems to indicate two things: First, there is no time limit laid down concerning the arrears of maintenance. Secondly, an absolute discretion is given to the court to decide the date from which the maintenance order should commence. According to O.S. Khoo in his book, Parent-Child Law in Singapore:[23]

> In most cases, the date of hearing of maintenance proceedings is one or two months after the date of the application. The court therefore can make the maintenance order with effect from the date of hearing or from the date the application was made. The court can even make the order effective from the date of neglect or refusal to maintain.

Therefore, the court is given wide powers to decide the date from which the maintenance order should be made. However, before the court makes a retrospective maintenance order, it generally considers two factors, i.e. a) whether the respondent would be able to pay the arrears and b) the necessity for making such an order.[24]

After the 1996 amendment to the Women's Charter, the provision as to retrospective maintenance orders is silent in Part VIII of the Charter (Part VIII deals with child maintenance). This implies that the court is given a discretion to decide from which date a retrospective maintenance order should be made.

However, Professor Leong Wai Kum in her book, *Elements of Family Law in Singapore* states as follows:[25]

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[23]Khoo,, O.S., *Parent-Child Law in Singapore*, (Singapore: Butterworths, 1984) at 55 at f.n. 74.
[24]Giam, Chin Toon, *Maintenance Under the Women's Charter*, 1971, at p.76, referred to in Khoo O.S, *ibid* at 55.
[25] Leong, Wai Kum, *Elements of Family Law in Singapore*, (Singapore: Lexis-Nexis, 2007), at 459.

> Given that the provision of a reasonable maintenance is for the purpose of assisting the wife or child to get over an immediate financial crisis, it may be surmised that the court is unlikely to order that maintenance be paid from too far back in time even where the failure to provide reasonable maintenance may be shown to have begun long ago.

Nevertheless, section 74 of the Women's Charter provides that 'Section 121 shall apply with the necessary modifications, to any order for the payment of maintenance under this Part.' Section 121 provides for the 'Recovery of arrears of maintenance' concerning a wife. Section 121(3), in particular, provides as follows:

> No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit unless the court under special circumstances otherwise allows.

Hence, as section 74 specifically states that section 121 shall apply to maintenance of a child, the courts are likely to order maintenance to begin from no longer that three years before the institution of the suit, unless the court allows it under special circumstances.

In *Gomez nee David v Gomez,*[26] (as was discussed earlier under this sub-topic), His Lordship Coomaraswamy J, while disagreeing that recovery of arrears should be limited to one year before the date of the complaint following the position under the common law, stated however that the time limit may be more than three years as provided for under section 121(3).

Therefore, the issue as to whether the court could backdate the maintenance order to more than three years was not answered by the learned judge above as that was not an issue raised before him. It is thus yet to be decided if this could be done. Section 121 was

[26] [1985] 1 MLJ 27.

amended in 1996 after the above case, where the following phrase was inserted: '... unless the court under special circumstances otherwise allows'. On this note two observations could be made in relation to sections 74 and 121(3) of the Women's Charter. First, section 74 states that 'Section 121(3) shall apply, with the *necessary modifications' (emphasis added),* thereby raising the issue whether the court has the power to modify the three-year time limit as stated in section 121(3) if it thinks that it is appropriate in a given situation that requires it? Secondly, as stated above, section 121(3) provides that 'unless the court under special circumstances otherwise allows'. Therefore, the law allows the court to make a maintenance order retrospectively to more than three years under special circumstances. At this juncture, a comparison could be made between section 121(3) of the Women's Charter and section 86(3) of the Malaysian LRA. Section 86(3) of the Malaysian LRA expressly states that no maintenance amount shall be recoverable if it accrued due more than three year before the institution of the suit. There is no mention, as in the Singapore Women's Charter, of any special circumstances under which the court may decide otherwise. Therefore, it is submitted that there is more flexibility in the Singapore law as to the arrears of maintenance when compared to the Malaysian law.

6.2.4.2 England and Wales

As to the position in the United Kingdom, reference could be made to the Matrimonial Causes Act 1973 (MCA). Section 32(1) of the MCA clearly states that the arrears of maintenance that could be claimed shall not be more than twelve months or one year, without the leave of the court. When comparing this section to the provision in the Malaysian LRA 1976, two differences could be observed. First, the LRA provides for a maximum period of three years, whereas the English MCA provides basically for one year. Secondly, the English MCA allows a beneficiary to apply to the court for leave if he or she intends to claim arrears for more than one year, whereas, the Malaysian LRA

has no such provision. Section 32(2) of the MCA grants the court a discretion whether to grant or refuse such leave. This subsection further states that if the court grants leave, it may impose 'such restrictions and conditions (including conditions as to the allowing of time for payment or making of payment by instalments)'.

Thus, it could be observed that although section 32(1) of the English MCA restricts the claim for arrears to one year when compared to the three-year period in the Malaysian LRA, the applicant however has an opportunity to apply to the court for leave if he or she intends to claim arrears for more than one year under the English MCA. It is respectfully submitted that such a discretion should be granted to the Malaysian courts as well, be it under the Malaysian LRA, the 1950 Act or the Maintenance Ordinance of Sabah, in cases where the facts justify the extension of the maximum period to claim for arrears of maintenance.

6.2.4.3 Australia

Referring to the two statutes in Australia, the Family Law Act 1975 (FLA 1975) and the Child Support (Assessment) Act 1989 (CSAA 1989), it could be noted that both these Acts do not contain provisions on whether a child may claim arrears of maintenance from his parents if the latter have failed or neglected to maintain him for a considerable period of time.

The closest one could get on this issue is by referring to section 66W of the FLA 1975, which states ‘Recovery of arrears’. However, upon perusing the section, it does not relate to a situation where the child wants to apply to the court for arrears of maintenance as his parents have not been maintaining him for some time. On the other hand, section 66W provides for a situation where the child maintenance order has ceased to be in force but there are arrears due under such order.

In addition to the FLA 1975 and the CSAA 1989, which are of no assistance in examining the issue in hand, reference was also made to the Child Support (Registration and Collection) Act 1988 (CSRCA 1988) which provides for the payments and recovery of child support debts in Part V of the Act. However, upon perusal of the sections in Part V of this Act,[27] it is to be noted that it does not refer to the arrears of maintenance as discussed in this sub-topic.

Thus, having examined the three statutes above, it is submitted that in Australia recovery of arrears of maintenance could only be made by a child in situations where a maintenance order has already been made, or a maintenance agreement has already been entered into by the child's parents or where an administrative assessment of child support has been made and the parent who is under a duty to pay fails to adhere to such an order, agreement or assessment.

6.2.5 Discussion

Having examined the Malaysian position on the recovery of arrears of maintenance, it could be observed that there is no uniformity in the time limit. The 1950 Act provides that it could be recovered from the date of neglect or refusal to pay, the LRA limits it to three years and the Sabah Maintenance Ordinance seems to imply that it is limited to twelve months. The writer submits that out of the three statutes, the 1950 Act is definitely in favour of a child's welfare as it ensures that parents do not neglect or refuse to pay maintenance to their children as they could be ordered to pay from the date of such neglect or refusal. In the interest of the children concerned, it is submitted that the legislature should standardise the time limit allowed for the recovery of arrears in all the three statutes. In addition to imposing a time limit, the provision should also mention that the

[27]For example, section 4 of the Act defines 'child support debt' as 'an amount that is a debt due to the Commonwealth under section 30'. Section 66(1) provides when a child support debt is due for an initial period and a payment period.

parties may apply to the court for an extension under special circumstances as has been provided for in the Singapore Women's Charter and the English MCA.

6.3 VARIATION OR RESCISSION OF MAINTENANCE ORDERS

The second issue which the writer intends to examine in this Chapter is concerning the variation or rescission of maintenance orders by the court. In certain jurisdictions, such as Australia, rescission of a maintenance order is referred to as a discharge of the said order and a variation or rescission order is referred to as a departure order. The laws allow the petitioner or respondent to apply to the court to either vary or rescind a maintenance order. Generally, the court is given the discretion to grant or reject the order prayed for. The factors that have to be taken into account by the courts before making a decision are stated in the relevant laws. An examination of these provisions as well as the actual factors that have been considered by the courts so far (via judicial decisions) would be done below in order to see if the variation or rescission of the maintenance orders have any effect on the welfare of children.

However, before examining the relevant laws, it is pertinent to first understand the meaning of 'vary' and 'rescind' as provided for by such laws. The Supreme Court in the case of *Gisela Gertrud Abe v Tan Wee Kiat*[28] had the opportunity of explaining the words 'vary' and 'rescind'. The Supreme Court explained that 'rescind' means 'to abrogate, annul, revoke, cancel, discharge or to put to an end to altogether'.[29] Therefore, when a maintenance order is rescinded by a court, it ceases to exist henceforth.[30] On the other hand the court gave a wide meaning to the term 'vary', where his Lordship Seah SCJ

[28] [1986] 2 MLJ 297.
[29] *Ibid* at.298.
[30] *Ibid.*

stated that it should also include the power to 'suspend' the order temporarily as well as revive the order which has been suspended.[31]

6.3.1 Married Women and Children (Maintenance) Act 1950

Section 6 of the 1950 Act provides for the power of the court to either vary or rescind a maintenance order. Section 6(1) provides as follows:

> (1) On the application of any person receiving or ordered to pay a monthly allowance under this Act, and on proof of a change in the circumstances of such person, his wife or child, or for other good cause being shown to the satisfaction of the court, the court by which such order was made, may rescind the order or may vary it as it seems reasonable.

Observing the above provision, it could be noted that in order for the court to arrive at a decision, the person applying for the variation or rescission of order has to prove one of the following conditions:

(1) that there is a change in the circumstances of such person, his wife or child; or

(2) for other good cause being shown to the satisfaction of the court.

The two conditions stated above are quite wide, i.e. a change in the circumstances and for any other good cause. In addition to the above provision, section 6(2) provides a third condition, which is, that the court in exercising its discretion under section 6(1) may look at any change in the general cost of living between the date the maintenance order was made and the date of the hearing of the application.

Pertaining to the first condition, i.e. a change in the circumstances, the applicant merely needs to prove a change, not a material change, as is provided for under the

[31] *Ibid*.

relevant provision in the LRA (which will be discussed shortly). This issue was discussed in one of the earlier cases, *Lee Swee Peng (f) v Koon Kum Keng.*[32] The learned magistrate held that the respondent needs to 'exercise strict economy of his expenditure' in order to pay maintenance to his child. It is respectfully submitted that the learned magistrate has overlooked the fact that as a 'father of a child', the respondent's primary obligation is to maintain his child. The learned magistrate seems to be of the opinion that it is not fair to tax the respondent to pay $50 per month to maintain his child, and hence reduced it to $30 per month.

However, when this matter went on appeal to the High Court, the learned judge Bellamy J looked at the judgment of the Magistrate's Court and held that before the court rescinds or varies a maintenance order under the 1950 Ordinance (as it was then),'there must be evidence before the Court either of a change in the circumstances of the person applying for rescission or variation of the order, or of some other good cause'.[33] In the present case, there was proof of 'any change in circumstances'. As to the alternative requirement, the learned judge quoted the Magistrate as stating that the respondent 'must exercise strict economy in his expenditure 'is a good cause'. However, the learned judge disagreed that this amounted to a good cause and it was entirely irrelevant. Hence, the Magistrate's order to vary the maintenance sum was set aside.

The judgment by the High Court as examined above is welcomed as the learned judge considered the fact that the respondent had to 'exercise strict economy in his expenditure' as totally irrelevant. However, it is submitted that it would have been better if the learned judge had explained as to why this was not a good cause and what would amount to a good cause.

[32] [1954] 20 MLJ 260.
[33] *Ibid* at 260-261.

In another case reported in 1993, *Ng Lean Huat v Lim Joo Khim,*[34] the trial judge had ordered the appellant or husband to pay his wife and their son RM600 per month as maintenance from 14th April 1992. The appellant appealed to the High Court against this decision. The High Court examined the facts of this case, the husband's ability to pay and the potential earning capacity of the wife in the near future. Eventually, the High Court allowed the appeal and varied the maintenance amount to RM500 a month for the maintenance of the wife and their son.

It is respectfully submitted that the decision above is not satisfactory for the following reasons. First, the learned judge referred to section 3(1) of the 1950 Act when discussing the duty of a husband to maintain his wife and child. However, his Lordship failed to refer to section 6(1) of the same Act in discussing the issue of varying the maintenance order. This is because section 3(1) merely deals with the power of a court to order a man to pay maintenance to his wife and child if he has neglected or refused to do so. The crux of this case is concerning varying the maintenance amount, which would then mean that reference would have to be made to section 6(1) of the 1950 Act which specifically deals with varying or rescinding a maintenance order.

Secondly, since the learned judge did not refer to section 6(1) of the 1950 Act, the two grounds mentioned in this section for purposes of varying or rescinding a maintenance order were not discussed here. Hence, it is not clear on what ground the learned judge in this case agreed to vary the maintenance amount. Reading the case, *prima facie*, tends to show that the judge merely looked at the facts of the case and decided that the maintenance sum should be reduced to RM500 per month. Therefore, it is submitted that the decision in this case has failed to consider an important provision in the law concerned regarding varying a maintenance order.

[34] [1993] 3 CLJ 647.

6.3.2 Law Reform (Marriage and Divorce) Act 1976

Section 96 of the LRA provides that the court has the power to vary or rescind maintenance orders. In addition, section 97 provides that the court has the power to vary the terms of a maintenance agreement. The writer would first examine section 96 of the LRA and compare it with section 6(1) of the 1950 Act and then examine section 97, as the latter solely focuses on variation of the terms of a maintenance agreement, which is not provided for in the 1950 Act. Section 96 provides as follows:

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

The provision above not only states variation or rescission of maintenance orders, but it also includes custody orders. However, for the purpose of this thesis, reference would be made solely to maintenance orders. Section 96 of the LRA differs from section 6(1) of the 1950 Act in the following matters:

(a) The person who may apply for the variation or rescission order; and
(b) The grounds of such an application.

a. The person who may apply

The wordings in section 96 of the LRA states ‘on the application of any person’, whereas section 6(1) of the 1950 Act provides ‘on the application of any person receiving or ordered to pay a monthly allowance’. Section 6(1) of the 1950 Act is more restrictive as it limits the person who may apply to either the child (the person receiving a monthly allowance) OR the parent (the person ordered to pay a monthly allowance). On the other

hand, section 96 of the LRA is wider as it states 'any interested person' thereby not limiting it to the child concerned and the parent ordered to pay.

b. The grounds of an application to vary or rescind a maintenance order

Section 96 of the LRA clearly states that the grounds which the applicant has to prove to the satisfaction of the court as follows:

(a) misrepresentation;

(b) mistake of fact; and

(c) material change in the circumstances.

Comparing section 96 of the LRA to section 6 of the 1950 Act, it could be noted that the grounds stated in the former provision are more specific. Section 6 of the 1950 Act, as stated earlier provides that the applicant has to prove either that there is a change in the circumstances or for other good cause. 'For other good cause' is very vague as it is entirely up to the discretion of the court to decide what amounts to a good cause.

Having looked at the differences in the grounds for an application to vary or rescind a maintenance order, it is next pertinent to examine the cases that have been decided on this issue in order to look at the judicial attitude pertaining to this matter. The cases, discussed below, are instances where applications have been made to court on the three grounds stated in section in section 96 of the LRA, i.e. misrepresentation, mistake of fact and material change in circumstances.

It is pertinent to first refer to the advice given by the Supreme Court when examining whether a maintenance order should be varied or not in the case of *Gisela Gertrud Abe v Tan Wee Kiat*[35] as follows:

> In our opinion, when an application is made to the Court to vary an existing order for maintenance, the proper approach is to start from the original order and see

[35] [1986] CLJ 133.

> what changes financial or otherwise have taken place since that date including any changes which the Court is required to have regard to have regard to under section 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible.[36]

At this juncture, it is submitted that the court in the above case referred to the approach the court must take in an application to vary a maintenance order under section 78 of the LRA (concerning wife maintenance). As for child maintenance, the court should be more stringent in allowing an application to vary a maintenance order.

As regards to the first two grounds in section 96 of the LRA, i.e. misrepresentation and/or mistake of fact, the relevant case is the case of *Geh Thuan Hooi (h) v Serene Lim Paik Yan (w),*[37] The petitioner applied for the reduction of the current monthly maintenance payment on the ground that the decree nisi was ambiguous and that it was recorded based on misrepresentation of facts and/or mistake of fact. He blamed his previous solicitors for not advising him properly. The High Court held that on a balance of probabilities there is no misrepresentation or mistake of fact on the petitioner's part. The learned judge, Yeoh Wee Siam JC stated that as an educated person and a general manager of human resources in his company, the petitioner cannot be allowed to approbate and reprobate after agreeing to pay the maintenance sum to his children.[38] The court observed that the husband has been duly paying RM14,000 monthly as maintenance to his two children since the decree nisi was granted. The present application was made twelve months after the date of the decree nisi, which goes to show that the plea of misrepresentation or mistake of fact is a mere after thought.

[36] Followed in *Santha Devi Thuraisingam v A. Shanmuganathan* [1990] 1 CLJ 988
[37] [2010] 4 MLJ 673.
[38] The learned judge referred to the case of *Ching Seng Woah v Lim Shook Lim* [1997] 1 MLJ 109 on this point.

Having looked at the stringent approach taken by the court above in not allowing the respondent father or husband to vary the maintenance order on the ground of mistake or misrepresentation of fact, the writer will next look at the cases which discuss the third ground stated in section 96 of the LRA, i.e. a material change in the circumstances. When comparing the number of cases reported on the ground of misrepresentation or mistake of fact and material change in the circumstances, it is to be noted that the majority of the cases are concerning a material change in the circumstances.

One of the earliest cases concerning a material change in the circumstances is the case of *Gisela Gertrud Abe v Tan Wee Kiat*.[39] In this case, the respondent applied to the High Court for a variation of the maintenance order as a result of a change in his financial circumstances and was successful. The appellant appealed to the Supreme Court against this decision on the ground that the court did not have the power to rescind a maintenance order and that the learned judge had erred when varying the maintenance sum.

The Supreme Court referred to sections 83 and 96 of the LRA and stated that these sections give the court a general power to vary or rescind the maintenance order in favour of the wife or children respectively. The Supreme Court then referred to material changes of the circumstances relied upon by the respondent for the variation of the maintenance order. The Supreme Court then proceeded to examine the considerations a court should consider in a controversial matter concerning the maintenance amount to be ordered or reduced in an application to vary a subsisting order due to material change in circumstances and commented as follows: first, when a husband and wife divorce, they are legally entitled to remarry. When the husband remarries, he has a new family to support. In addition, he may also undertake a moral obligation to look after his step children of his second wife. Hence, the means of the husband will decrease. Secondly,

[39] [1986] 2 CLJ 202.

the maintenance order of a normal child will cease when he or she attains the age of eighteen years (section 95 of the LRA).

In the present case, as both the daughter had reached the age of eighteen, the learned Supreme Court judge held that the trial judge was right to vary the maintenance amount. At this juncture, it is respectfully submitted that the comment made by the learned Supreme Court judge as stated above should only be applicable to a matter concerning wife maintenance. When a husband and wife divorce, the LRA clearly states that the marriage is dissolved[40] and they are no longer husband and wife in law. They are free to remarry third parties. However, it is not the same for children. Even though their parents have divorced, the fact remains that they (the parents) are still their biological parents. They are not 'divorced' from their parents. It then follows that the parents still have a duty to maintain their children. It does not matter if the parents remarry third parties and assume new responsibilities. The learned judge in the above case, by stating, *inter alia,* that the husband has undertaken a moral obligation to maintain his step children, has given recognition to the fact that the husband has a moral obligation to maintain his step children at the expense of varying the maintenance amount to be paid to his biological children.

It is respectfully submitted that the above judgment is not fair to the biological children. No doubt, in the present case, the court held that as both the children had reached the age of eighteen, the respondent is no longer under a duty to maintain them as provided for under section 95 of the LRA. The question that arises next is whether the decision of the court would be different if the children in the present case were below eighteen years of age? Would the court still have proceeded to agree with the learned trial judge that the maintenance amount be varied? It is reiterated that it is not fair, with regards to the welfare of the children, to vary their maintenance amount as the respondent had to support a new

[40] See s.8 of the LRA

family. The fact remains that he is still their natural father and as a primary caregiver, he still owes a duty to maintain them.

In the case of *Santha Devi Thuraisingam v A. Shanmuganathan*,[41] the husband applied to suspend the maintenance order on the ground that there had been a material change in the circumstances. The learned judge stated that before he scrutinised the case further, he has to remind himself of the advice given by the Supreme Court in *Gisela Gertrud Abe v Tan Wee Kiat.*[42]

As a result of the reluctance by the husband to make full and frank disclosures, the court had no choice but to draw an adverse inference against the husband. His Lordship, Lim Beng Choon J., held that there is a change of circumstances in the husband's position since he was dismissed from his employment. However, the facts do not show that he was totally unable to pay maintenance to his wife and children. On the other hand, he was deliberately refusing to pay maintenance as he was under the impression that the wife had resources of her own to maintain herself and the children. Therefore, the court held that the husband's application to suspend the maintenance order in so far as it applies to an interim maintenance of his children was dismissed.

A similar situation arose in the case of *Sivajothi a/p K.Suppiah v Kunathasan a/l Chelliah.*[43] The defendant applied to the High Court, *inter alia*, to vary the maintenance order issued by the High Court to RM400 per month payable to his two children with effect from 24th August 2001, since from this date, the eldest daughter has been in his custody, care and control. Hence, the plaintiff has one child less to look after. The High Court referred to section 96 of the LRA, specifically to the term 'a material change in the circumstances' in order for the court to vary or rescind a maintenance order. His Lordship

[41] [1990] 1 CLJ 988.
[42] *Supra* n 39.
[43] [2006] 3 MLJ 184.

Azahar Mohamed JC stated that the burden of proof is on the defendant to prove on a balance of probabilities that there had been a material change in the circumstances. Examining the facts of the case, the court held that the defendant had failed to make a full and frank disclosure of his financial standing and obligation. Hence there has been no material change in his income. In addition, the defendant's arguments were frivolous and untenable. The court looked at the fact that as the children are no longer in kindergarten but in primary school now, naturally there will be expenses incurred. The children would need new clothes and other necessities an as their father, the defendant has a 'duty to provide the children better education, medical care, tuition and extra-curricular activities for their overall development, welfare and advancement.'[44] Therefore, the High Court varied the amount to RM5682 per month.

The above decision could be described as a decision which has taken into account the welfare of the children concerned, as the court, instead of reducing the maintenance sum (as prayed for by the defendant), increased the sum that needs to be paid by the defendant. It could be said that the defendant's plans to reduce the maintenance sum backfired as he would not have expected to be ordered to pay a higher sum as maintenance.

In the case of *Ng Say Chuan (h) v Lim Szu Ling (w) and anor application*[45] the plaintiff (husband) applied, *inter alia*, for an order that he stops paying an interim maintenance of RM4,500 per month commencing April 2009. The High Court, after examining the arguments and evidence forwarded by the husband and wife stated that the husband's application to stop paying the maintenance sum is dismissed. The court referring to sections 93(1) and (2) of the LRA stated that 'it is trite law that the husband has the

[44] *Ibid* at 192.
[45] [2010] 4 MLJ 796

primary responsibility, whereas the wife has a secondary responsibility to maintain the children.'[46]

In reprimanding the husband for attempting to brush-off his duty to maintain his children, the learned judge stated as follows:[47]

> It is morally and legally wrong for a father not to maintain his three children, ages ten, eight and six, when he is using his income, savings and resources to take care of himself solely, without any regard to his paternal and statutory duty to maintain his children. He does not appear to have made any efforts to cut down on his expenses or his lifestyle or to tighten his belt. He could have liquidated some of his moveable or immoveable assets but he did not do so. Out of the husband's total expenses of RM19,192.51 per month, only RM4,158 is for the children's Sri Cempaka school fees, but the balance of RM15,034.51 is for the husband's personal expenditure or commitments.

The court did not accept his contention about his constructive dismissal. The learned judge stated that as constructive dismissal is a situation where the employee leaves his job claiming that the employer has breached the contract of employment in a fundamental manner, the husband should have thought twice before initiating his constructive dismissal. He should have known that he had a duty, morally and legally, to maintain his children. He cannot simply walk out on his job, not take any effort to look for a job elsewhere in the past ten months and then apply to the court to stop his payment of maintenance.

The judgment above could be described as a lesson for parents who wish to 'escape from the duty to maintain their children' quoting unemployment and various other

[46]*Ibid* at 803.
[47]*Ibid* at 805.

unacceptable reasons under the ground of a 'material change in the circumstances' under section 96 of the LRA.

The last case the writer wishes to examine under this ground is the case of *Geh Thuan Hooi (h) v Serene Lim Paik Yan (w),*[48] discussed earlier under the ground of 'Mistake or Misrepresentation of Facts'. In addition to the ground of mistake or misrepresentation of facts, the husband applied to reduce the maintenance sum from RM14,000 to RM2,500 per month on the ground of a material change in the circumstances. In reiterating section 92 of the LRA and the principle of safeguarding the welfare of the children, the learned High Court judge stated as follows:[49]

> It is trite that the welfare of the children is paramount and it shall be the duty of a parent, including the petitioner husband in this case, to maintain or contribute to the maintenance of the children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

The present case could be said to be one of the few cases that has referred to the principle of welfare of the child in maintenance cases. The majority of the cases concerning the welfare of the child are pertaining to adoption and custody matters.

As stated earlier, the LRA contains two provisions concerning variation, i.e. sections 96 and 97. Section 97 specifically refers to variation of agreement for custody or maintenance. This section provides as follows:

> 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 made before or after the

[48] [2010] 4 MLJ 673.
[49] *Ibid* at 685

appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

Section 97 differs from section 96 in two respects: 1) Section 97 does not state 'on the application of any person'. This means that the court takes the initiative to vary the terms of a maintenance agreement notwithstanding any provision to the contrary. 2) The grounds mentioned in section 97 are reasonable and for the welfare of the child.

In this respect, it could be noted that this section is pro-welfare of the child concerned as it states that the court will only vary the agreement if it feels that it is reasonable and for the welfare of the child so to do. There are hardly any cases that have been decided directly on the variation of a maintenance agreement under section 97. In fact, the High Court in *W v H*[50], a case concerning a custody dispute, *inter alia* referred to section 97, in *obiter*, and stated that sections 88,89, 92 and 97 of the LRA make it very clear that the court has protective jurisdiction over children in matters of custody and maintenance, which cannot be ousted by the parents.

In the case of *Lim Thian Kiat v Teresa Haesook Lim & Anor,*[51] the court, in *obiter*, referred to the separation deed between the parties and held that the deed was subject to variation by the court as provided for under sections 80, 84 and 97 of the LRA. Therefore, in the cases above, it could be noted that the courts have, in *obiter,* stated that section 97 provides that the courts have an absolute discretion to vary the maintenance agreement if it feels that it is for the welfare of the child concerned, thus, exerting its protective jurisdiction.

[50] [1987] 2 MLJ 235.
[51] [1998] 2 MLJ 102.

At this juncture, it is respectfully submitted that section 97 is a pro-child welfare provision. The writer is of the opinion that there should not be a distinction between the variation under sections 96 and 97. Section 96 allows the variation of a maintenance order made by the court on the grounds of mistake, misrepresentation of fact and a material change in the circumstances on the application of any interested person, whereas the variation of a maintenance agreement under section 97 is done at the court's own initiative. The issue as to why should there be a difference between the variation of a maintenance order and variation of a maintenance agreement arises. It is submitted that it is in the welfare of the child to delete section 96 and incorporate the variation of a maintenance order under the current section 97, so that the said provision would read as follows: the court may vary a maintenance order or a maintenance agreement if the court thinks that it is reasonable and that it is for the welfare of the child.

In fact, the majority of the cases discussed so far in this sub-topic seem to have decided in favour of the welfare of the child concerned and have dismissed the applications by the respective fathers to either vary or rescind the maintenance orders. Thus, it is submitted that the benchmark set by these judicial decisions is that the welfare of the child is the paramount consideration that has to be taken into account by the court when deciding an application by the parents to either vary or rescind a maintenance order.

6.3.3 Maintenance Ordinance 1959 of Sabah

Section 7 of the Maintenance Ordinance 1959 of Sabah provides for the recession and variation of the order. It provides as follows:

> On the application of any person receiving or ordered to pay a monthly allowance under the provisions of section 3 and on proof of a change in the circumstances of the parties or any of them or for other good cause being shown to the satisfaction of the Court, the Court may rescind the said order or may vary it as it deems fit.

The above provision is similar to section 6 of the 1950 Act. The grounds for rescission is on proof of a change in the circumstance of the parties and for other good cause being shown to the satisfaction of the court. The above provision applies both to variation of maintenance order in favour of a wife and in favour of a child.

6.3.4 Comparison with other jurisdictions

Having looked at the provisions in the Malaysian statutes, the writer intends to look at similar provisions on variation or rescission of maintenance orders in Singapore, England and Wales and Australia in order to see whether the positions in these jurisdictions are similar to Malaysia or different.

6.3.4.1 Singapore

The position in Singapore as to variation or rescission of maintenance order is the same, before and after the 1996 amendment to the Women's Charter. The only difference is that before the amendment, the law on this issue was stated in section 62 of the Women's Charter, whereas currently it is provided for in section 72. Section 72 provides as follows:

> **Rescission and variation of order**
>
> 72. (1) On the application of any person receiving or ordered to pay a monthly allowance under this act and on proof of a change in the circumstances of that person, his wife or child, or for other good cause being shown to the satisfaction of the court, the court by which the order was made may rescind the order or may vary it as it thinks fit.
>
> (2) Without prejudice to the extent of the discretion conferred upon the court by subsection (1), the court may, in considering any application made under this section, take into consideration any change in the general cost of living which may

have occurred between the date of the making of the order sought to be varied and the date of the hearing of the application.

At this juncture, it is to be noted that the above provision is similar to section 6 of the Malaysian 1950 Act, where the court is empowered to either vary or rescind the maintenance order on proof of a change in the circumstances of the person, applying for such variation or rescission, his wife or child OR for any other good cause shown to the satisfaction of the court. In addition, subsection (2) provides that in considering the application under subsection (1) the court may take into consideration the change in the general cost of living between the date of the making of the order sought to be varied and the date of the hearing of the application.

The court considers the following principles when deciding on an application to either vary or rescind:[52]

1. The first principle is that the court examines the original maintenance order as the starting point. In doing so, the court proceeds on the basis that the original maintenance order was made without any flaws, especially if there was no appeal against it.

In the case of *Wilkins v Wilkins,*[53] the court held that as a general rule the original maintenance order must be considered by the court as a starting point. If the court finds that there is no good cause or any change in the circumstances of that person, then it (the court) should dismiss the application to vary or rescind the said order.

2. The second principle is that a change in the circumstances or good cause shown is basically a question of fact. In the case of *Lee Swee Peng (F) v Koon Kum Keng*[54] (discussed earlier) the court did not agree with the petitioner that his 'strict economy

[52]Khoo, O.S. *Parent-Child Law in Singapore*, (Singapore: Butterworths, 1984), at 57
[53] [1969] 2 All ER 463.
[54] [1954] MLJ 260.

expenditure' since the original maintenance order was made amounted to a 'good cause' and therefore dismissed the application.

In the case of *Shirin Carmel Marie Jacob v Allomootin Benjamin John,*[55] when the parents divorced in 1995, the father was ordered to pay $1,000 as maintenance per month. The child was 9 years old then and the sum was half of the child's expenses at that time. Four years later, the mother applied to increase the sum to $3,000 per month as the daughter's expenses had increased. The father argued that the increase was not justified as there was no material change in the circumstances. The court agreed to increase the sum, but instead of the $3,000 to $1,450. In arriving at its decision, the court stated that the mother of the child was successful in proving that there was an obvious increase in the child's schooling.

As stated in section 72(2) of the Women's Charter, in addition to the grounds stated in section 72(1), the court could also consider the change in the cost of living. The issue that arises is whether any change in the cost of living would suffice to constitute a ground to vary or rescind a maintenance order? According to O.S. Khoo in his book, *Parent-Child Law in Singapore,*[56]:

> Any change in the general cost of living cannot be considered as a relevant factor to vary or rescind a maintenance order. To consider a change in the general cost of living, it must be reasonably significant.

Thus, according to O.S. Khoo, the court should exercise caution when considering a change in the general cost of living under section 72(2).

[55] [1999] SGHC 136
[56] Khoo, O.S. *Parent-Child Law in Singapore*, (Singapore: Butterworths, 1984), at 57

6.3.4.2 England and Wales

In discussing the issue as to variation or rescission of a maintenance order or maintenance calculation in England and Wales, reference could be made to three statutes, the Child Support Acts 1991 and 1995, the Matrimonial Causes Act 1973 and the Children Act 1989.

First, the Child Support Acts 1991 and 1995 (CSA), in section 28, allows the person with care[57] or the non-resident parent (NRP)[58] or the child concerned to apply to the Secretary of State to vary a maintenance calculation. In deciding whether to agree to the variation, the Secretary of State shall have regard to the general principles provided for in section 28E(2) and any other consideration as may be prescribed (section 28E(1)). The two general principles prescribed in section 28E(2) are as follows:

(a) parents should be responsible for maintaining their children whenever they can afford to do so;

(b) where a parent has more than one child, his obligation to maintain any one of them should be no less of an obligation to maintain any one of them.

At this juncture, it is to be noted that there is no similar provision as the above in Malaysia. The relevant Acts in Malaysia, i.e. the 1950 Act and the LRA merely provide the grounds of variation or rescission of a maintenance order. In Malaysia, usually the parent who had been ordered to pay maintenance to his child applies for a variation of the order on the ground that there has been a material change in the circumstances, especially if he has remarried and has children from his second marriage. By stating that he has additional children now to maintain he would request the court to reduce the sum stated in the maintenance order. The writer submits that if we incorporate the two principles as

[57] 'A person with care' is defined in section 3(3) of the CSA as basically the person with whom the child has his home and who provides the day to day care for the child.
[58] 'A non-resident parent' is defined in section 3(2) of the CSA as 'the parent not living in the same household with the child'.

stated above in section 28E(2), it would definitely safeguard the welfare of the children here as no matter how many children a parent has, the duty to maintain any one of them should be not less of a duty to maintain any one of them.

The grounds on which a NRP may apply to vary the child support amount are provided for in Part 1 of Schedule 4B to the CSA. The grounds stated therein are as follows:

(a) the NRP has high costs relating to maintaining the child or in relation to employment;

(b) the NRP has made a large capital transfer pre-1993 to the parent with care with the intention to reduce child support.

Nevertheless, section 28F(1) further states that the Secretary of State would have to decide whether it would be just and equitable to agree with a variation. Subsection (2)(a) provides that in considering whether it would be just and equitable, the Secretary of State

(a) must have regard, in particular, to the welfare of any child likely to be affected if he did agree to the variation.

The above provision is sadly lacking in the Malaysian counterparts. This is exactly what the writer has discussed earlier when examining the Malaysia position on variation or rescission. The relevant Acts in Malaysia do not state that the court has to consider the welfare of the child concerned before deciding whether to agree to the variation or not. It is submitted that the welfare factor should be incorporated into the relevant Acts in Malaysia to be considered by the courts before making a decision.

Secondly, the Matrimonial Causes Act 1973 (MCA), in section 31, provides that a court has the power to vary or discharge a maintenance order (in relation to both spouse and child). In particular, reference could be made to section 31(7) which provides that:

> In exercising the power conferred …, the court shall have regard to all the circumstances of the case**, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen,** and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order, which the application relates … (emphasis added).

From the above provision, it could be noted that it emphases on the court's duty to first have regard to the welfare of the child concerned in exercising its power to vary or discharge a maintenance order. In the case of *Delaney v Delaney*,[59] a father was ordered to pay £30 per week towards the upkeep of his children by his former wife despite his claim that he did not have enough money to pay such maintenance after deducting his mortgage payments and other outgoings on a house that he was buying. He appealed. On appeal, the court emphasised the fact that a father should not avoid his responsibility to his family. Nevertheless, the judge in this case held that the father's expenditure was reasonably incurred as he required a sufficient accommodation to put up his children when staying with him. Moreover, the court also stated that the wife is entitled to social security payments. Hence, the learned judge allowed the husband's appeal on the ground that he could not reasonable be expected to contribute anything to the maintenance of the family.

Thirdly, referring to the Children Act 1989 (CA), Schedule 1, paragraphs 5 and 6 of this Act provides for the power of a court to vary or discharge an order. Paragraph 5(6) provides that the court may vary a maintenance order for the payment of a lumpsum by instalments, whereas paragraph 5(3) provides for varying or discharging orders for periodical payment. Paragraph 6(1) further states that in deciding whether to vary or

[59](1990) Times, 4 June CA

discharge an order for periodical payment, 'the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order'.

When comparing the above provision in the CA to the provisions in the CSA and the MCA (discussed above), it could be noted that the provision in the CA is very general as it does not state anywhere therein the duty of the court to take into consideration the welfare of the child concerned. Nevertheless, the writer submits that reference could be made to section 1 of the CA. Section 1(1) states that when a court decides on the upbringing of a child or the administration of a child's property or the application of any income arising from it, the court shall consider the child's welfare as the paramount consideration. Further thereto, section 1(5) states that a court, in deciding whether a particular order should be made or not under this Act, should not make the order unless the court considers that doing so would be better for the child thank making no order at all.

Hence, the writer submits that although paragraphs 5 and 6 in Schedule 1 are silent as to the consideration of the child's welfare before an order to vary or discharge is made, section 1(5) emphasises the duty of the court to generally examine the welfare of a child before deciding or making any order or orders under this Act. As such, it would also include making an order to vary or discharge in paragraphs 5 and 6 in Schedule 1.

Having examined all the three statutes in England and Wales pertaining to variation or discharge of a maintenance order, it could be noted that the United Kingdom Parliament has imposed, either directly or indirectly, a duty on the court to take into consideration the welfare of the child, before it makes an order so that the child's interest is safeguarded.

6.3.4.3 Australia

In Australia, variation or rescission of a maintenance order is termed as a departure order, for instance, in the Child Support (Assessment) Act 1989 (Cth)(CSAA 1989) and the Family Law Act 1975 (FLA 1975). The departure order (DO) here refers to a departure from the child assessment formula determined by the Child Support Registrar. This is because the main idea of the Child Support Scheme in Australia was to remove the court's discretion from the area of maintenance. The power to decide the formula is now conferred on the Child Support Registrar.[60] However, the CSAA 1989 empowers the court to review certain decisions of the Child Support Registrar under Part 7 of the Act. Division 4, Part 7 empowers the court to make orders for departure from administrative assessment in special circumstances.[61]

The key section under Division 4, Part 7 is section 117 which lays down the matters the court needs to be satisfied before making a DO. Subsection (1) states that the court has to be satisfied of three matters. First, that a DO must exist. Secondly, in order to make a DO, it must be just and equitable and thirdly, that it must be otherwise proper to make the DO.

The first stage, i.e. the grounds for departure are laid down in section 117(2) which are as follows:

(a) In special circumstances, that the financial capacity to support the child is significantly reduced because of:

(i) the duty of the parent to maintain any other child or another person; or

[60] Stephen Parker, Patrick Parkinson & Juliet Behrens, *Australian Family Law in Context, Commentary and Materials*, The Law Book Company, 1994, at 483.

[61] Note that Part 6A was inserted through an amendment to the CSAA 1988 on 1 July 1992 which gave the Child Support Registrar the power to determine the formula be departed from. However, for the purposes of this thesis, the writer will focus on the power given to the court to issue a departure order under Part 7.

(ii) special needs of any other child or another person that the parent has a duty to maintain; or

(iii) commitments of the parent necessary to enable the parent to support:

(A) himself or herself; or

(B) any other child or another person that the parent has a duty to maintain;

(iv) high costs involved in enabling a parent to have access to any other child or another person that the parent has a duty to maintain.

(b) In special circumstances, the costs of maintaining the child are significantly affected:

(i) because of:

(A) high costs involved in enabling a parent to have access to the child; or

(B) special needs of the child; or

(ii) because the child is being cared for, educated or trained in the manner that was expected by his or her parents;

(c) In special circumstances, an administrative assessment of child support would result in an unjust or inequitable determination of the level of financial support to be provided by the liable parent for the child due to the financial resources, income, earning capacity and property of either parent or the child; or because of any payment to or transfer of property to the child or the custodian by the liable parent under any Act.

From the above, it could be observed that paragraphs (a) and (b) refer to the cost factor in applying for a DO.

The second ground, i.e. in determining 'whether it would be just and equitable as regards the child', is provided for under section 117(4), which states that the court must have regard to the following matters:

(a) the nature of the duty of a parent to maintain a child; and

(b) the proper needs of the child; and

(c) the income, earning capacity, property and financial resources of the child; and

(d) the income, earning capacity, property and financial resources of each parent who is a party to the proceeding; and

(e) the commitments of each parent who is a party to the proceedings;

(f) the direct and indirect costs incurred by the custodian entitled to child support; and

(g) any hardship that would be caused to the child or custodian or the liable parent or any other child or person if the court makes or refuses to make the order.

The third ground, i.e. 'whether it would be otherwise proper to make a particular order' is provided for under section 117(5), where the court should have regard to the following matters: (a) nature of the duty to maintain the child by the parent, taking into consideration that the parents themselves have the primary duty to maintain the child; and (b) the effect of a DO on the child's or custodian's entitlement to an income tested pension, allowance or benefit or to the rate of the such matters.

In the case of *Gyselman And Gyselman*,[62] the court had made a DO under section 117 of the CSAA 1989 reducing the child support assessment made against the Respondent

[62] (1992) F.L.C. 92-279 at 79,061-81 (Full Court).

husband. The applicant wife appealed to the Full Court[63] against that decree. The major submission on the applicant's behalf was that the trial judge did not refer to the grounds under section 117(4) and (5) at all when making the DO. The Full Court examined section 117 in detail and stated that they agree that the learned trial judge's treatment of subsection (4) was rather sparse and that he did not refer to section 117(5) at all. Therefore, the DO was set aside by the Full Court and the case was remitted to the Hobart Registry for rehearing before a single judge.

The writer submits that the Australian Parliament has painstakingly listed down in minute detail the matters that should be considered by the court when deciding to make a DO. This is a complete contrast to the Malaysian position, where the grounds stated therein are not elaborated in the relevant provisions. It is submitted that by elaborating on the grounds provided in the relevant provisions, it may serve as a useful guideline to the courts before deciding whether to issue a variation or rescission order. These guidelines are not even found in the Singapore or English and Wales statutes that were examined in this sub-topic.

Secondly, the FLA 1975 too contains a provision on the variation or discharge of a maintenance order, which is referred to as the 'modification of child maintenance orders'. However, prior to examining section 66S of the Act, it should be noted that section 66E provides that a maintenance order cannot be revived or varied under the FLA if the party to the proceeding is able to apply for an administrative assessment of child support under the CSAA 1989.

Section 66S provides six grounds for the court to vary a maintenance order. Vary here refers to either increase or decrease the maintenance sum. The first three grounds are

[63]A Full Court is where three judges hear an appeal together from a decision of a Family Court judge. A Full Court, in some cases, may hear appeals from a Federal Circuit Court judge. Information obtained from the Family Court of Australia's website at www.familycourt.gov.au accessed on 6 February 2017.

stated in section 66S(3)(a)(i),(ii) and (iii), which are a change in the circumstances of the child, a change in the circumstances of the person liable to make the maintenance payments, and a change in the circumstances of a person entitled to receive payments. 'Circumstances' here refer to and are restricted to financial circumstances.[64]

The fourth ground is provided in section 66S(3)(d) where at the time the court made the order, the material facts were withheld from the court or false material evidence was given. The fifth ground is where the order was made by consent and the amount ordered to be paid is now proper or adequate (section 66S(3)(c)). In deciding what is proper or adequate, section 66S(6) explains that the court must take into account any payments and any transfer or settlement of property previously made to the child or to any person for the child's benefit, by the person against whom the order was made.

Finally, the sixth ground is the change of the cost of living since the order was made. Subsection (4) further provides that for the purpose of deciding whether the cost of living has changed, the court must have regard to any changes that have occurred in the Consumer Price Index. Subsection (5) limits the power of the court to vary a child maintenance order on the basis of a change in the cost of living to only once a year.

It is submitted that when compared to the CSAA 1989, the FLA's grounds pertaining to variation or discharge of a maintenance order are more or less similar to the Malaysian provisions. However, it could be observed that the grounds mentioned in the FLA were further elaborated in the same Act so as to give a clearer picture to the court when making a decision on varying or discharging a maintenance order. This is sadly lacking in the Malaysian laws as there are no statutory guidelines for the courts to follow in deciding on a similar issue.

[64]Dickney, Anthony QC, *Family Law*, 3rd ed, (Australia, LBC Information Services 1997) at 573

6.3.5 Discussion

Having looked at the statutory provisions and judicial decisions concerning rescission and variation of maintenance orders and agreements in Malaysia, it is to be noted that these provisions confer a wide discretion to the courts to vary or rescind a maintenance order or agreement. Upon examination of the judicial decisions, it could be observed that in most of the cases, the judges have been cautious in deciding whether the maintenance order or agreement should be varied or rescinded so as to ensure that the welfare of the child is safeguarded.

Although the majority of the judges in the judicial decisions discussed earlier are extra cautious and take into account the welfare of the child before deciding to vary or rescind the maintenance order or agreement, it is respectfully submitted that the Malaysian legislature should revisit the provisions in the legislature concerning variation or rescission of maintenance orders or agreements in favour of children. Presently, the provision as to variation and rescission of maintenance orders or agreements in favour of a wife is the same as an order or agreement in favour of a child. The writer is of the opinion that this situation is not favourable to a child as when a maintenance order or agreement is varied (i.e. reduced) or rescinded, it is going to drastically affect the child concerned.

When a maintenance order or agreement in favour of a wife is varied or rescinded, no doubt it would affect her monthly income. However, it should not be forgotten that the ‘wife’ is an adult and would be able to earn a living and therefore is in a capacity to earn extra income in the event the court agrees to reduce or rescind her maintenance sum. However, the same cannot be said for a child. If the court agrees to vary or rescind a maintenance order or agreement in favour of a child, the child concerned is definitely going to suffer a loss of his or her monthly income as he or she is not able to earn a living.

The only way to overcome this problem would be if the mother of the child could find a way to compensate for the loss of the said monthly allowance, failing which, would drastically affect the welfare of the child. It is submitted that in such a situation, if the child is in the care of the mother, she (the mother) would then step into the shoes of a primary caregiver.

Therefore, it is submitted that the legislature should amend the current provisions regarding variation or rescission of a maintenance order or agreement in favour of a child. The reason is because maintenance is usually prayed for as an ancillary relief in matrimonial proceedings between a husband and a wife. When the court grants a decree of divorce, for example, the couple is no longer husband and wife under the law. However, it is not the same for the relationship between the parents and the child. Although the parents of the child are no longer husband and wife under the law, they still remain the parents of the child. As parents of the child, they still owe an obligation to maintain their child as primary caregivers. They are not 'divorced' from their child when the court grants a decree of divorce. As discussed earlier, many of the cases have stated that the father of a child has the primary obligation to maintain his child, whereas the mother, a secondary obligation. Thus, it is not fair to allow an application from these caregivers to 'reduce' or 'rescind' their obligation to maintain their child. The child's welfare would definitely be affected if the court grants their application.

A similar view as the writer's view has been expressed by Professor Leong Wai Kum in her article *The Duty to Maintain Spouse and Children During Marriage*:[65]

> The duty to maintain may neatly be divided into two: the duty between spouses inter se and the duty of the spouses as parents to maintain their children. There is an obvious difference between these two relationship which is worthwhile

[65] Leong, Wai Kum, *The Duty to Maintain Spouse and Children During Marriage*, (1987) 29 Mal LR 56.

> repeating because it is often forgotten and neglected. It is simply that the spousal relationship is much easier to terminate than that between parents and children. The frequency of divorce and annulment surely far outweighs that of adoption. It bears remembering that while divorce and annulment permanently sever the spousal relationship they have minimal effect in law on the continuing relationship between the divorced parties and their children. We would thus expect the law regarding the duty of parent to maintain their children to be more or less the same whether the question raised during the continuance of a marriage or after its termination pursuant to a court order. While there may be persuasive reasons to limit the duty of former spouses to maintain each other after they have had their relationship terminated by the court, this fact should not alter the continuous of their duty towards their children...

In England and Wales too, as discussed earlier, the relevant laws such as the Matrimonial Causes Act 1973, the Child Support Acts 1991 and 1995 and the Children Act 1989 have stated that before a court decides to vary or discharge a maintenance order, it should take into consideration the child's welfare as the first or paramount consideration.

Although the above sentiment is not expressly provided for in the Australian counterparts, it could be observed that by laying down the guidelines for the grounds in minute detail for the court to observe before making a variation or discharge order, denotes that the Australian of discharge a maintenance order. It has to consider whether the case before it falls within any of the grounds mentioned therein, before it decides on this issue.

6.4 CONCLUSION

In conclusion, it is respectfully submitted that having examined the two pertinent issues concerning child maintenance, i.e. arrears of maintenance and the variation or rescission of a maintenance order, the statutory framework in Malaysia is not in favour of the safeguarding the welfare of the child. As was discussed in sub-topic 6.3.5 Discussion above, there is no consistency among the statutes, for instance, on the time-limit when it comes to arrears of maintenance and the grounds on which an applicant can apply to the court for variation or rescission of a maintenance order.

Be that as it may, the writer submits that taking into account the welfare principle, it is pertinent that the statutory provisions on these two issues (arrears and variation) be revisited by the legislature. This is due to the fact that if the issues that were discussed under sub-topic 6.3.5 are not resolved, it would amount to the legislature providing an opportunity to the parents, as primary caregivers, to wash their hand off their responsibility of maintaining their child to an extent, or if not wholly. In addition, the relevant statutory provisions should also be amended to incorporate the condition that the court, before deciding any issue concerning arrears or variation or rescission of maintenance, should take into consideration the welfare of the child, as has been done in other provisions in the Family Law statutes pertaining to guardianship and custody as well as adoption. At the end of the day, it is submitted, the child should not be made the scapegoat in the tussle between the parents.

CHAPTER 7: ENFORCEMENT OF MAINTENANCE ORDERS IN MALAYSIA

7.1 INTRODUCTION

In this Chapter the writer intends to examine the laws concerning enforcement of maintenance orders (including the penal provisions where the paying parent has defaulted in the payment of maintenance) in order to see if they (the laws) are effective. In doing so, reference would be made to reported judicial decisions (if any) to examine the courts' attitude in handling enforcement or committal cases in order to observe if the welfare of the child is taken into account when deciding. In addition, a comparison with the enforcement laws concerning the Muslims in Malaysia as well as the laws in Singapore, England and Wales and Australia would be made to note the developments that have taken place therein concerning enforcement. Finally, based on the above comparisons, the writer would attempt to suggest reforms to rectify the weaknesses that exist in the enforcement laws concerning non-Muslims.

7.1.1 The need for effective enforcement laws

Having looked at the laws concerning maintenance of non-Muslim children in Malaysia and the weaknesses that exist in these laws, it is pertinent to next look at the laws concerning enforcement of maintenance orders. The reason for examining the enforcement laws is obvious, i.e. it is of no use taking steps to rectify the weaknesses that exist in our laws in order to strengthen the rights of children to claim maintenance from their parents, if the enforcement laws are not effective. It is important to have effective enforcement laws so that

the paying parent, against whom the maintenance order is made, would think twice before defaulting in his payment of maintenance to his child. In fact, the Convention on the Rights of the Child 1989 (CRC) has taken cognisance of this fact and has placed the burden on the State Parties to secure the recovery of maintenance for the child in Article 27(4).[1]

Hence, it is submitted that the enforcement of maintenance laws should play an important role in safeguarding the welfare of children. This is in order to ensure that these children are not denied of their right to being properly maintained by their parents. Having effective maintenance laws without proper enforcement measures amounts to these laws being akin to toothless tigers.

In deciding the maintenance amount, the court would have regard to the income, earning capacity, property and other financial resources of the paying parent, both currently and in the future, as well as the financial needs and the obligations of the paying parent currently and in the future.[2] Thus, the financial standing of the paying parent is taken into account by the court.[3] Therefore, the paying parent would not be able to argue that the maintenance amount is beyond his means, which would then justify him defaulting in his payment of maintenance to his child.

[1] Article 27(4) provides as follows: 'States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.'
[2] Rasamani Kandiah, (Advisory Editor), Child Handbook, MLJ Book Series, Malayan Law Journal, Kuala Lumpur, 2004 at 125.
[3] In fact, in the English case of *Re G* [1996] 2 FLR 171, the court took a bold stand in awarding a lump sum payment for a child notwithstanding the bankruptcy of the paying father.

7.2 ENFORCEMENT LAWS

In this Chapter, the following laws would be examined: a) penal provisions in the event the paying parent defaults in paying the maintenance to his child; and b) laws on the enforcement of maintenance orders.

7.2.1 Penal provisions

7.2.1.1 Married Women and Children (Maintenance) Act 1950

Section 4 of the Married Women and Children (Maintenance) Act 1950 ('the 1950 Act') provides the penalty in the event the paying parent neglects to comply with the maintenance order issued by the court. If the paying parent wilfully defaults in complying with the maintenance order, the court has a discretion concerning the punishment to be imposed: it could either levy the amount due or sentence him to imprisonment for a term which may extend to one month for each month's allowance remaining unpaid. It is respectfully submitted that the imposition of a levy or imprisonment for merely a month for every month's allowance remaining unpaid is too lenient. These punishments may not be effective enough to deter the paying parents from defaulting in their payments of the maintenance amounts. The above-mentioned provision was drafted way back in 1950. It is more than sixty years since it was drafted. Thus, it is submitted that the Legislature ought to, without any further delay, revisit this provision in order to revise the sentences stated therein.

As regards judicial decisions on the above provision, so far, there have not been many reported cases. In the case of *Yap Ki Swee v Phua Thiam Lai*,[4] the court ordered the respondent to pay $350 a month to the appellant (his wife) and their children as maintenance.

[4] [1975] 1 MLJ 39

The respondent defaulted payments for three months. The appellant brought an application requesting the court to issue an order that the respondent be sentenced to imprisonment under section 4 of the 1950 Ordinance (as the 1950 Act then was). The learned Sessions Court President refused to make the order as he felt that the respondent should be given a chance to pay up the arrears as well as be given a right to be heard before an order sentencing him to imprisonment is made. The appellant appealed against the Sessions Court's decision.

Before the High Court's appeal was decided, the respondent had paid up the arrears. The learned High Court judge, Syed Othman J. (as His Lordship then was), agreed with the Sessions Court President that the respondent should be given a right to be heard before an order is made under section 4 of the 1950 Ordinance. Further thereto, the learned High Court judge proceeded to state that the onus is on the wife to prove that the husband had wilfully neglected to pay the maintenance as provided for under section 4 of the 1950 Ordinance. In stating the above, the learned judge referred to a similar provision in India on this issue, which can be found in *Sohoni's* 'The Code of Criminal Procedure.'[5] When a wife applies for an enforcement of maintenance order, a notice is issued to the husband. The court would then hold an inquiry in the husband's presence, unless he fails or refuses to attend the inquiry. During the inquiry, the wife has the burden of proving the following:

(a) The husband was ordered by the court to pay maintenance;

(b) He has neglected to comply with the court order; and

(c) The neglect was wilful.

[5]*Sohoni's* "The Code of Criminal Procedure", 12th edition 1962, Volume III at 2712.

Although the court in the above case refers to a wife enforcing a maintenance order against her husband, the same principles could be applied in enforcing a maintenance order against a parent who has failed to comply with the same. The court in the decision above has imposed the burden of proof on the person applying for the enforcement order to prove that the paying parent has wilfully neglected to pay. The keywords here are 'wilfully neglected'. The learned judge referred to a similar provision in section 488(3) of the Indian Criminal Procedure Code and stated that the words 'wilfully neglected' as stated in our section 4 of the 1950 Ordinance have been replaced with the words 'fails without sufficient case' in the Indian counterpart. He further added that perhaps our legislature should amend section 4 by deleting 'wilfully neglected' and replacing it with 'fails without sufficient cause'.

It is submitted that the above suggestion by the learned judge is welcomed as it would lighten the burden on the person applying for the enforcement of a maintenance order (for the purposes of this thesis, 'person' here would refer to a child). The difference is that under the present law, the petitioner has to prove that the respondent has 'wilfully neglected', thereby bearing the heavy onus of proving the *mens rea* of 'wilfully' on the respondent's part. On the other hand, if the relevant section is amended by replacing 'wilfully neglects' with 'fails without sufficient cause', this would ease the burden on the petitioner as he or she merely has to prove that the respondent has failed to pay the maintenance sum without any sufficient reason or cause.

Nevertheless, it is disheartening to note that although the learned judge in the above case made the recommendations for the Legislature to amend section 4 of the 1950 Ordinance, no such amendments have been made so far, bearing in mind that it is nearly forty years since the case was decided.

7.2.1.2 Law Reform (Marriage and Divorce) Act 1976

Part VIII of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') as mentioned in the earlier Chapters, has provisions on the duty of the parents to maintain their child[6] and the court's power to order them (the parents) to do so if they have either refused or neglected to do so or deserted their child[7]. However, upon perusing the remaining provisions in Part VIII, it is to be noted that there are no express provisions concerning the enforcement of maintenance orders or the penalty in the event they (the parents) default in complying with the maintenance order. It is rather surprising that the drafters of the LRA did not enact any penalty provision in the event the paying parent defaults in his or her payment of maintenance to his or her child.

However, the drafters have inserted a provision, in section 94, where the court is empowered to order security for maintenance.[8] It is to be noted that this section gives the court discretion to order the paying parent to secure the whole or any part of his or her property by vesting any property in trustees upon trust to pay the maintenance or part thereof out of the income from that property to the child concerned. It is submitted that section 94 is effective as it would secure the monthly maintenance payment to the child as he or she would be assured of getting their monthly allowance. However, as the section states, it is completely at the court's discretion to order the security. In addition, the question of whether the paying parent has any property to be secured arises. Not all paying parents could be said to own properties, thereby rendering the section redundant in such cases.

[6]Section 92 of the LRA.
[7]Section 93 of the LRA.
[8] Section 94 of the LRA provides as follows: 'The Court may, in its discretion, when ordering the payment of maintenance for the benefit of any child, order the person liable to pay such maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay such maintenance or part thereof out of the income from such property, and subject thereto, in trust for the settlor.'

The only so-called 'penal provision' as far as defaulting in paying maintenance in the LRA is section 102 which empowers the court to set aside and prevent dispositions intended to defeat claims to maintenance.[9] This provision is applicable in only one situation, i.e. where the respondent or the paying parent has disposed or is planning to dispose of property with the intention of reducing his or her means to pay maintenance. This section, although is beneficial to the child concerned as it prevents the paying parent from reducing his means to pay maintenance, is only applicable where there is a disposition of property. What happens if the paying parent defaults in his payment of maintenance without disposing of his property? Will he or she be penalised under the LRA, as is provided for in the 1950 Act? As mentioned earlier, there is no penalty clause in the LRA that punishes such parents. Perhaps the only solution to this problem is that if there is a default in complying with the maintenance order, it could be stated that it amounts to a contempt of court and the necessary proceedings prescribed for contempt could be initiated against the paying parent.

Although the LRA is silent on this matter, the Divorce and Matrimonial Proceedings Rules 1980 (a subsidiary legislation made under the LRA[10]) contains provisions on the enforcement of maintenance orders. This could be observed in Rules 72, 73, 74 and 75.[11]

[9] Section 102 provides as follows: (1) Where –(a) any matrimonial proceeding is pending; or (b) an order for maintenance has been made under section 76 and has not been complied with; (c) an order for maintenance has been made under section 77 or 93 and has not been rescinded; or (d) maintenance is payable under any agreement to or for the benefit of a spouse or former spouse or child, the court shall have power on application – (i) if it is satisfied that any disposition of property has been made by the spouse or former spouse or parent of the person by or on whose behalf the application is made, within the preceding three years, with the object on the part of the person making the disposition of reducing his or her means to pay maintenance or of depriving his or her spouse of any rights in relation to that property, to set aside the disposition; and (ii) if it is satisfied that any disposition of property is intended to be made with any such object, to grant an injunction preventing that disposition.

[10] Pursuant to the powers conferred by section 108(1) of the LRA on the Rules Committee.

[11] Rule 72 provides as follows: (1) Before any process is issued for the enforcement of an order made in matrimonial proceedings for the payment of money to any person, an affidavit shall be filed verifying the amount due under the order and showing how that amount is arrived at. (2) Except with the leave of the registrar, no writ of *fieri facias* or warrant of execution shall be issued to enforce payment of any sum due under an order for ancillary relief where an application for a variation order is pending. (3) For the purpose of the Rules of the High Court Order 46 (issue of a writ of execution), the divorce registry shall be the appropriate office for the issue of a writ of execution to enforce an order made in matrimonial proceedings in the High Court which are proceedings in that registry. Rules 73, 74 and 75 provide the procedure to be followed when applying for an order of committal in matrimonial proceedings.

The above are provisions concerning enforcement of maintenance orders in the Rules (a subsidiary legislation). These rules are merely regulatory. It is submitted that the courts should be empowered to enforce the maintenance orders by the parent Act, i.e. the LRA, which would be more effective when compared to the provisions in a subsidiary legislation.

7.2.1.3 Maintenance Ordinance 1959 of Sabah

The Maintenance Ordinance 1959 of Sabah ('the Maintenance Ordinance') contains a similar provision as the 1950 Act concerning the penalty if there is a default in paying the maintenance amount. This can be observed in section 5 of the Maintenance Ordinance which is similar to section 4 of the 1950 Act. It provides that the court may, if the respondent breaches the maintenance order, impose a levy and may sentence him to imprisonment for a term not exceeding one month for every month's allowance that remains unpaid. As mentioned earlier, when looking at section 5 of the Maintenance Ordinance, this penalty provision needs to be amended by the Sabah State Legislative Assembly in order to increase the punishment so that paying parents who default in complying with the maintenance order would think twice before doing so.

7.2.1.4 Child Act 2001

The Child Act 2001 underwent major amendments in 2016, vide the Child (Amendment) Act 2016 (Act A1511). The amendments came into force on 25 July 2016. Unlike the statutes mentioned above, does not provide for the consequences in the event of a breach of a

maintenance order. This Act merely provides for the penalties that could be imposed if a person fails to maintain his or her child. This could be seen in section 31 of the Act.[12]

The issue that arises at this juncture is whether maintenance of a child falls under section 31(1), as this subsection covers various situations such as abuse, neglect, abandon and expose the child in a manner likely to cause him physical or emotional injury and sexual abuse. The answer to this question could be found in section 31(4) which states as follows:

> A parent or guardian or other person legally liable to maintain a child shall be deemed to have neglected him in a manner likely to cause him physical or emotional injury if, being able to so provide from his own resources, he fails to provide adequate food, clothing, medical or dental treatment, lodging or care for the child.

Thus, according to the provision above, 'neglecting a child' as stated in section 31(1) could be the result of a parent failing to maintain his child. As stated earlier, section 31 does not mention anywhere about any maintenance order. It merely provides for the penalties that would be imposed on parents or guardians who fail to maintain their children. Hence, it is not a provision under which the child could apply to the court for a maintenance order. In this respect, this Act differs from the 1950 Act and the LRA.

Apart from the above stated difference, it also differs from the 1950 Act with respect to the punishment. Section 31(1) states that the punishment imposed would either be a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding ten years or to both. Hence, there is a vast difference between the punishment stated in the Child Act and

[12] Section 31(1) provides as follows: 'Any person who, being a person having the care of a child – (a) abuses, neglects, abandons or exposes the child or acts negligently in a manner likely to cause him physical or emotional injury or cause or permits him to be so abused, neglected, abandoned or exposed; or (b) sexually abused the child or causes or permits him to be so abused, commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding twenty years or to both'.

the punishment stated in the 1950 Act. In fact, the punishment prescribed in the Child Act is for failing in their (the parents') duty to maintain a child, whereas the punishment provided for in the 1950 Act is merely when the paying parent does not comply with a maintenance order.

In addition to section 31(1), the Child Act imposes additional punishments in subsections (2) and (3). The recent amendment to the Child Act 2001 in 2016 has amended subsection (2) and (3) and has incorporated a new subsection (3A). Subsection (2) states that the Court may order the person convicted:

(a) to execute a bond with sureties to be of good behaviour for such period as the Court thinks fit; and

(b) to perform community service.

Subsection (3) provides that if a person ordered to execute a bond to be of good behaviour under subsection (2) fails to comply with any of the conditions of such bond, he shall be liable to a further fine not exceeding ten thousand ringgit or to a further imprisonment for a term not exceeding five years or to both. As to the community service, subsection (3A) states that the community service:

(a) shall not be less than thirty-six hours and not more than two hundred forty hours in aggregate;

(b) shall be performed within the period not exceeding six months from the date of the order; and

(c) shall be subject to such conditions as may be specified by the Court.

Subsection (3B) provides that any person who fails to comply with the community service order shall be committing an offence and on conviction shall be liable to a fine not exceeding ten thousand ringgit.

The punishments stated above shows how serious the Legislature considers abuse and neglect of a child is. It is submitted that it is high time that the Legislature revisits the 1950 Act as well as the LRA to impose similar penalties therein so that the paying parents are aware that they would be punished severely if they do not comply with the maintenance order. In addition, they should be made aware that all the legislations concerning maintenance provide the same penalty so that the defaulting parents are prevented from 'hiding behind' statutes which provide for lenient sentencing.

7.2.2 Laws on Enforcement of Maintenance Orders

Having looked at the penal provisions in the relevant statutes concerning the penalty that may be imposed when the paying parent defaults in his payment, it is next pertinent to also look at the methods in which the child may enforce the maintenance orders. Currently, there are two statutes that deal with the enforcement of maintenance orders: one for the enforcement within Malaysia and the other for the enforcement outside Malaysia.

7.2.2.1 Married Women and Children (Enforcement of Maintenance) Act 1968

The Married Women and Children (Enforcement of Maintenance) Act 1968 ('the 1968 Act') which was passed to provide for the enforcement of maintenance orders came into effect on 21 March 1968. However, according to section 2, this Act shall apply to the States of West Malaysia only. Thus, this Act is not applicable to the States of Sabah and Sarawak.

It is submitted that this Act should be extended to East Malaysia as well as there is no specific legislation such as this Act in East Malaysia concerning enforcement of maintenance orders.

'Maintenance orders' is defined in section 3 of the 1968 Act as follows:

> Maintenance orders means –
>
> (a) an order made under section 3 of the Married Women and Children (Maintenance) Act 1950;
>
> (b) an order for the payment of periodical sums by way of maintenance or alimony to a wife or for the benefit of any child under the Law Reform (Marriage and Divorce) Act 1976;
>
> (c) a maintenance order confirmed by the court under the Maintenance Orders (Facilities for Enforcement) Act 1949; and
>
> (d) where this Act is made applicable by virtue of an authorization under section 14 to or in respect of a maintenance order made by a Syariah Court shall include such order.

An issue that arises at this juncture is with reference to paragraphs (a) and (b) in the above provision. As stated earlier, this Act is only applicable to the States of West Malaysia. However, paragraphs (a) and (b) state that maintenance orders that may be enforced under this Act include maintenance orders issued under the 1950 Act as well as the LRA. The 1950 Act applies to West Malaysia and Sarawak whereas the LRA applies throughout Malaysia. Hence, as submitted earlier, the Legislature should extend the application of this Act to East Malaysia as well in order to safeguard the welfare of the children in Sabah and Sarawak, failing which, the children therein may face hardship when it comes to the enforcement of a

maintenance order. In addition, previous research[13] also shows that as the rate of divorce in Sabah and Sarawak is continuously increasing annually[14], there is a dire need for the 1968 Act be extended to East Malaysia.

The power of the court to make an attachment of earnings order ('attachment order') in favour of the person for whose maintenance the order is made or the guardian of such person is provided for in section 4(1). Section 4(2) provides that an application for an attachment order may be made in the same proceeding when a maintenance order is applied for or in any subsequent proceeding. It is submitted at this juncture that it would be better for the applicant to apply for the attachment order in the same proceeding when a maintenance order is applied for as it would save time and cost for the applicant, rather than applying for it later, when the respondent defaults in payment.

The nature of an attachment order is explained in section 5(1), which provides that the said order shall require the defendant's employer to make out of the earnings falling to be paid to the defendant payments in satisfaction of the order. According to section 5(2), the court has a discretion to prescribe the amount to be stated in the attachment order, after considering the resources and the needs of the defendant and the needs of persons for whom he must or reasonably should provide. The officer to whom the employer has to make payments to shall be designated in the attachment order.[15] An attachment order or any variation thereof shall only come into force after seven days from the date a copy of the order is served to the defendant's employer.

[13]Haema Latha Nair, Saroja Dhanapal, Jenita Kanapathy, "A Review of Married Women and Children (Maintenance) Act 1950 and Married Women and Children (Enforcement of Maintenance) Act 1968" (July 2014), Vol. 3, *European Journal of Business and Social Sciences*, 257-272 accessed at http://www.ejbss.com/recent,aspx on 8 February 2017.
[14]*Ibid*. Statistics revealed that in Sarawak, the number of divorce cases were as follows 1,724 cases in 2007, 2725 cases in 2008, 2,063 in 2009, 2,559 in 2010, 2,806 in 2011 and more than 3,000 cases in 2012.
[15]Section 5(5).

Section 6 of the 1968 Act provides for the effect of an attachment order. Once an attachment order is made, all other proceedings for the enforcement of the said maintenance order which were commenced before the attachment order was made shall be suspended.[16] Section 6(2) gives the court discretion to make an order discharging or varying the attachment order on the application by the defendant or the person entitled to receive payments under the maintenance order. An attachment order ceases to have effect when any of the following circumstances take place:[17]

(a) when a warrant is issued to levy the amount stated in the maintenance order in the manner provided by law for levying fines;
(b) when an order is made to sentence the defendant to imprisonment for failing to comply with the maintenance order; and
(c) when the maintenance order is rescinded.

When the attachment order ceases to have effect on the occurring of any one of the above circumstances, the court which made such order shall give notice of the cessation to the defendant's employer.[18]

Section 7(1) imposes a duty on the defendant's employer to comply with the attachment order, notwithstanding anything in any other written law. In a situation where there are two or more attachment orders in force against the defendant, the employer shall deal with the earlier attachment orders first before dealing with a later order.[19] Once the defendant's employer had made a payment pursuant to attachment order, he shall give to the defendant a statement in writing specifying the amount that had been paid.[20] It is submitted, at this

[16]Section 6(1).
[17]Section 6(3).
[18]*Ibid.*
[19] Section 7(2)
[20] Section 7(3)

juncture that the legislature has taken the effort to draft section 7 meticulously so that no doubt arises on the part of the employer when he is ordered by the court to attach the defendant's earnings.

When the defendant's employer pays the sum stated in the attachment order to the court, the court shall pay the said money to the person entitled to receive the payment under the related maintenance order.[21] In relation to situations where the defendant is a Government servant, section 11(1) provides that if the earnings are paid by the Government or out of the Consolidated Fund,[22] the earnings shall be treated as falling to be paid by the Chief Officer for the time being of the department, office or other body concerned.[23]

The penalties for non-compliance with an attachment order and for giving a false notice or statement are provided for in section 12. Section 12(1) states that in the event of any person who does not comply with an attachment order or gives a false notice or statement, shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand ringgit or to both.

At this juncture, an interesting observation can be made between the penalty imposed by section 12 of this Act for non-compliance with an attachment order and section 4 of the 1950 Act for non-compliance with a maintenance order. Section 4 of the 1950 Act merely states that the penalty for non-compliance with a maintenance order is a levy for the amount due to be levied or imprisonment for a month for each month's allowance remaining unpaid, whereas section 12 of the 1968 Act imposes a higher penalty on the defendant's employer for non-compliance with an attachment order, i.e. imprisonment for not more than one year

[21]Section 10(1).
[22] 'Consolidated 'Fund' here refers to the Federal Consolidated Fund or the State Consolidated Fund (as the case may be). Article 97(1) and (2) of the Federal Constitution provide that 'All revenues and moneys howsoever raised or received by the Federation or State shall, subject to the provisions of this Constitution and of federal law or state law, be paid into and form one fund, to be known as the Federal Consolidated Fund or Consolidated Fund of the State.
[23]Section 11(1).

or to a fine not exceeding one thousand ringgit or to both. It does not make sense to impose a higher penalty on a third party (the defendant's employer), who has no obligation or legal duty to maintain the defendant's child, for failing to comply with an attachment order, whereas the defendant, who is under a legal duty to maintain his child is subject to a lenient sentence when he does not comply with a maintenance order. Thus, the writer would like to reiterate what was mentioned earlier in this Chapter that the penalty in section 4 of the 1950 should be revised so that it is fair to the defendant's employer as stated in the above instance.

However, to be fair to the defendant's employer, section 12 provides for a defence in section 12(2) where it states that it would be a defence to the person who has failed to comply with the attachment order if he can prove that he took all reasonable steps to comply with the attachment order.

Finally, section 13 of the 1968 Act provides for situations where the defendant's income is derived from sources other than earnings.[24] Thus, situations covered under section 13 refer to where the defendant is not working for an employer, i.e. where for instance he is self-employed. In such a case, section 13(1) provides that the court will then order the maintenance sum to be paid direct to the court on a date determined by it (the court). Upon receipt of the maintenance sum, the court will then pay the amount to the person in whose favour the maintenance order is made or to his or her guardian. If the defendant neglects or fails to comply with the court's order, the court will then call upon the defendant to show cause why he neglected or failed to comply with the said order.[25] If the defendant does not

[24] 'Earnings' is defined in section 3 of the 1968 Act as follows: (a) by way of wages or salary, including – any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary by the person paying the wages or salary or payable under a contract of service; (b) by way of pension, including gratuity and an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or relinquishment, or any diminution in the emoluments, of any office or employment.
[25] Section 13(2).

show sufficient cause and does not pay the maintenance sum, the Court may issue a warrant for the attachment and sale of the defendant's property.[26]

The penal provision in section 13(3) is an additional penalty clause where the defendant's property would be attached and seized. However, the question that arises is what happens if the defendant does not have any properties? Reference can be made to section 13(5) which states that if the maintenance sum cannot be recovered by the attachment and sale of the defendant's property, the Court may direct that the defendant be imprisoned for a term not exceeding one month for every such neglect or failure to comply with the court order made under section 13(1). Once again, it is to be noted that the punishment to be meted out to the defendant for non-compliance with a court order here is merely one month for every neglect or failure to comply with the court's order, when compared to the punishment imposed on the defendant's employer in the event of non-compliance (as stated in section 12(1)). There is a big difference between the penalties imposed on the defendant and his employer. Thus, it is submitted that the Legislature ought to take immediate steps to rectify this difference in the punishments in order to be fair to the defendant's employer.

Another issue that arises here is with regard to a defendant who has retired from the private sector. Section 3 defines 'earnings' to include pensions, gratuity and annuities. This would be applicable mainly to government servants, especially as they would be receiving monthly pensions. Prior to the enactment of the 1968 Act, there was a judicial decision reported in 1965, the case of *Central Electricity Board v Govindamal*,[27] where the issue was whether pensions could be attached. In this case, the respondent obtained a maintenance order against her husband. The husband was an employer of the appellant. Subsequently, at the

[26]Section 13(3).
[27][1965] 2 MLJ 153.

instance of the respondent, the court made another order directing the appellant's board manager to attach the husband's salary every month and pay the maintenance amount to the wife's solicitors. In 1963, the husband retired and returned to India and wanted to draw his pension there. Once the husband retired, the appellant stopped paying the wife the maintenance amount every month. The wife applied and obtained an order for a warrant of distress and sale to be issued against the husband's gratuity and pension in the hands of the appellant. The appellant filed an objection which was dismissed by the magistrate. Following the dismissal, the appellant appealed to the High Court.

The appellant relied on section 22 of the Electricity Ordinance 1949 (repealed by section 56 of the Electricity Supply Act 1990[28]).[29] The High Court agreed with the appellant's argument and held that the husband's pension is not liable to be attached under section 22 of the Electricity Ordinance 1949. If a similar case arose in the present time, it is submitted that the decision of the court would not be the same for two reasons. First, the above Electricity Ordinance has been repealed by the Electricity Supply Act which does not have a similar provision. Secondly, section 3 of the 1968 Act clearly states 'earnings' include pensions, gratuity and annuities.

At this juncture, an issue that arises is, what about retirees from the private sector? How will the child concerned be able to attach the earnings of his or her father when the latter has retired?

[28]Act 447.

[29] Section 22 of the Electricity Ordinance 1949 read as follows: '22.(1) Subject to the approval of the Yang di-Pertuan Agong, the board shall establish a scheme or schemes for the payment of super-annuation allowances, pensions or gratuities to officers and servants of the board, or otherwise cease to hold office, by reason of age, or of infirmity of body or mind, or of abolition of office. (2) The following provisions shall apply to any scheme established under this section -(a) ... (b) no donation or contribution to a fund established under any such scheme or interest thereon shall be assignable or transferable or liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatsoever other than a debt due to the board or to the Federal Government or a State or Settlement Government.

7.2.2.2 Married Women and Children (Facilities for Enforcement) Act 1949

The Married Women and Children (Facilities for Enforcement) Act 1949 ('the Facilities for Enforcement Act'), which was passed to facilitate the enforcement in Malaysia of maintenance orders made in reciprocating countries and *vice versa* came into effect on 1 January 1971 vide P.U.(A) 460/70.

Before looking at the provisions in this Act, it is pertinent to look at the Schedule to the Act which contains a list of the reciprocating countries (see Appendix E). It is disheartening to note that the list of reciprocating countries is limited to only about sixteen countries, which would restrict the ability to enforce a maintenance order in countries which are not listed in the Schedule. Section 11 of the Facilities for Enforcement Act gives the power to the Yang di Pertuan Agong to issue an order to extend this Act to any country and amend the Schedule if His Majesty is satisfied that reciprocal provisions have been or will be made by the legislature of any country or territory for the enforcement within that country or territory of maintenance orders made by courts in Malaysia. Howsoever, it is sad to note that to date, the most recent exercise of power was done in 2004 when the Yang di Pertuan Agong extended the Facilities for Enforcement Act to Hong Kong Special Administrative of the People's Republic of China.[30] Apart from this, there has been no other extension of this Act to any other countries. There is no mention of many countries for example the European Union (apart from England, Wales and Northern Ireland), the United States of America, the Middle Eastern countries, Scotland and Indonesia, to name a few. It is submitted that unless the authorities concerned in the countries not listed in the Schedule in this Act make reciprocal provisions for the enforcement of the maintenance orders made in Malaysia, it would be very difficult for the petitioner to enforce the said orders in these countries, thereby rendering the

[30]Vide P.U.(A) 33/04 which came into effect on 23 January 2004.

maintenance order redundant. The necessity to extend this Act to other countries is pertinent in this current age where more and more persons are marrying foreigners. Hence, if the foreign spouse's country is not stated as reciprocating country, the Malaysian spouse may find it difficult to enforce a maintenance order there.

As mentioned earlier, the Facilities for Enforcement Act is to facilitate the enforcement of maintenance orders made in reciprocating countries in Malaysia and *vice versa*. Section 3 of the Facilities for Enforcement Act deals with the enforcement in Malaysian of maintenance orders made in reciprocating countries whereas section 4 deals with the transmission of maintenance orders made in Malaysia.[31] For the purposes of this thesis, emphasis will be made on enforcing maintenance orders made in Malaysia in reciprocating countries.

Section 5 deals with the power of a local Court to make provisional orders of maintenance against persons resident in reciprocating countries. Section 5(1) deals with a situation where an application is made in a local Court for a maintenance order against a person residing in a reciprocating country. The subsection gives the Court the discretionary power to make an order, in the absence of such a person and if after hearing the evidence it is satisfied of the justice of the application. This order is made by the Court as though a summons had been duly served on that person and he had failed to appear at the hearing. Howsoever, the order is provisional only and shall have no effect unless and until confirmed by a competent court in that reciprocating country.

[31] Section 4 of the Facilities for Enforcement Act provides as follows: 'Where a local Court has, whether before or after the commencement of this Act made a maintenance order against any person, and it is proved to the Court that the person against whom the order was made is resident in a reciprocating country, the Court shall send to the Minister charged with the responsibility for foreign affairs for transmission to the appropriate authority in the reciprocating country a certified copy of the order.'

Section 5(3) further states the manner in which the maintenance order would be forwarded to the appropriate authority in the reciprocating country. The Court making the order shall send to the Minister in charge of foreign affairs to transmit to the appropriate authority in the reciprocating country the following documents:

(a) the depositions taken;

(b) a certified copy of the maintenance order;

(c) a certificate stating the grounds on which the respondent might have opposed if he had been served with a summons and he had appeared at the hearing; and

(d) information in the possession of the court for facilitating the identification of and ascertaining the whereabouts of the respondent.

Section 5(4) provides that the provisional order may be either rescinded or varied. If an order is varied, the order shall not have any effect unless and until confirmed in the same manner as the original order.[32] Section 5(6) confers the right of appeal to the applicant in the event there is a refusal to make a provisional order.

Although the procedure is laid down in detail in the Facilities for Enforcement Act, it is submitted that so long as the list of reciprocating countries remains the same, cases where the respondents reside in non-reciprocating countries would not be subjected to this Act. Hence, the applicant is left with a maintenance order in hand without being able to enforce it.

There are very few cases decided on the issue of enforcing maintenance in foreign jurisdictions. One of the earliest cases decided on the issue of reciprocal enforcement of

[32]Section 5(5).

maintenance was the case of *Woosey v Woosey*.[33] This case was decided during the Straits Settlements era, when the Reciprocal of Maintenance Orders Ordinance[34] was in force. In this case, the respondent was the ordered by the English High Court of Justice to pay to the appellant £10 per month for the appellant and a further £10 as maintenance for their two children of the marriage. The said order was registered in the Singapore District Court under section 3 of the Reciprocal Enforcement of Maintenance Orders Ordinance. The respondent defaulted in the payment of a sum of £100. A summons was issued for the respondent to appear before the Criminal District Court, Singapore to show cause as to why no action should be taken against him under section 37(4) of the Minor Offences Ordinance. The defendant showed cause and the District Court judge decided that as there was nothing to show why the High Court judge ordered the defendant to pay £20 as maintenance, he would not enforce the maintenance order against the defendant.

The appellant appealed and stated that the District Court Judge had no jurisdiction to enquire as to why the High Court judge had ordered the respondent to pay £20 as maintenance. The District Court judge also did not have jurisdiction to enquire the defendant's means and finally, the District Court judge was bound to make an order under one or other of the alternatives set out in section 37(4). The High Court agreed with the appellant's argument and stated that the District Court is not concerned with the grounds upon which the English High Court issued the maintenance order. The proprietary of the order cannot be questioned by the District Court Judge. The maintenance order which was registered has the same force and effect as if it were an order made by the District Court Judge himself. Further thereto, the District Court Judge, in expressing disapproval of the

[33](1938) 7 MLJ (SSR).
[34]Cap 47

English order, had erred in law. The High Court thus directed that the case be remitted to the District Court Judge for further hearing.

Although the above case was not based on the Facilities for Enforcement Act, but on its Singaporean counterpart[35], the principles decided in this case could be applied in future cases. When an application is made to enforce a maintenance order, especially if it concerns an order made in another jurisdiction, the said court cannot question the order. Further thereto, the judge concerned must either enforce the order as a whole or not at all.

7.3 COMPARISON WITH THE POSITION CONCERNING THE MUSLIMS IN MALAYSIA

The writer would be examining the measures pertaining to the enforcement of maintenance orders concerning the Muslims in Malaysia with an intention of comparing their position with the non-Muslims.

The Muslims, as was stated in Chapters 1 and 2 of this thesis, are governed by the Syariah principles or *Hukum Syara'*. Nevertheless, each state in Malaysia (save for the Federal Territories), has its own State Enactments on Muslim family law matters. For the purposes of this thesis, the writer would focus on the Muslim family law legislation in the Federal Territories as well as the Family Support Division which was formed to manage the enforcement and implementation of Syariah Court maintenance orders effectively.

[35]The current law in Singapore on reciprocal enforcement of judgment is the Maintenance Orders (Reciprocal Enforcement) Act, Cap 169, 1985 Ed.

7.3.1 Muslim Family Law Legislation

The main legislation on family law matters in the Federal Territories is the Islamic Family Law (Federal Territories) Act 1984[36] ('IFLA'). The provisions concerning child maintenance in this Act are more or less similar to the provisions in the non-Muslim laws as discussed earlier, save for certain matters. Upon perusal of this Act, it could be noted that there are three enforcement of maintenance measures stated therein in the event the paying parent defaults in complying with the maintenance order. The three enforcement measures are as follows:

1. The court orders the payment of maintenance for the benefit of a child and orders the paying parent to secure the whole or any part of it by vesting any property upon trust to pay the maintenance to the child. In the event the paying parent fails to comply with the court order as above, this shall be punishable as a contempt of court.[37] At this juncture, it is to be noted that the LRA has a similar provision as section 74 (1) of the IFLA concerning the court's power to order the paying parent to secure the whole or any part of the payment by vesting any property upon trust.[38] However, the LRA stops there. There is no penal provision in the event the paying parent fails in complying with the said order. Therefore, it could be noted that this is a loophole in the LRA as non-Muslim parents who fail to secure the payment of maintenance to their child as ordered by the court are not liable to any penalty, when compared to their Muslim counterparts, thereby clearly rendering the LRA a toothless tiger.

[36]Act 303.
[37]Sections 74(1) and (2). The provision, however, does not state what is the punishment for a contempt of court.
[38]Section 94 of the LRA which provides as follows: 'The court may, in its discretion, when ordering the payment of maintenance for the benefit of any child, order the person liable to pay such maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay such maintenance or part thereof out of the income from such property, and subject thereto, in trust for the settlor'

2. Where the person is liable to pay maintenance and the person concerned has disposed of any property within the preceding three years with the object of reducing his or her means to pay maintenance, the court, if satisfied that the intention of the paying parent is proven, shall revoke the disposition.[39] At the same time, if the paying parent intends to dispose of the property, the court will grant an injunction preventing the disposition.[40] Section 106(3) goes on to say that if the court's order made under this section is not complied with, it shall be punishable as a contempt of court. Section 106 of the IFLA is similar to section 102 (1) of the LRA[41] save for the penalty clause as provided for in section 106(3) of the IFLA. Hence, it is to be noted that there is a *lacuna* in the LRA concerning the penalty to be imposed in the event of non-compliance.

3. In addition to the above measures, section 132(1) is a general provision stating that the penalty in the event of failure to comply with any order made by a court. If the court orders for the payment of any amount, and the person concerned has failed to make such payment, the court may 'direct the amount due to be levied in the manner by law providing for levying fines imposed by the court or may sentence the person wilfully failing to comply therewith to imprisonment if the order or each month's payment remaining unpaid.'[42] Section 132(2)(a) further states that the court

[39]Section 106(1)(i) of IFLA
[40]Section 106(1)(ii) of IFLA
[41]Section 102 provides as follows: '(1) Where— (c) an order for maintenance has been made under section 77 or 93 and has not been rescinded; or (d) maintenance is payable under any agreement to or for the benefit of a spouse or former spouse or child, the court shall have power on application— (i) if it is satisfied that any disposition of property has been made by the spouse or former spouse or parent of the person by or on whose behalf the application is made, within the preceding three years, with the object on the part of the person making the disposition of reducing his or her means to pay maintenance or of depriving his or her spouse of any rights in relation to that property, to set aside the disposition; and (ii) if it is satisfied that any disposition of property is intended to be made with any such object, to grant an injunction preventing that disposition'.
[42]Section 132(1).

may sentence the defaulter to imprisonment not exceeding one month for each month's payment remaining unpaid.

Apart from the IFLA, which specifically provides for the enforcement of maintenance orders, enforcement for payment of money generally is provided for under the Syariah Court Civil Procedure (Federal Territories) Act 1998 ('SCCPA'). This Act provides for the payment of money either by instalments or in a lump sum.[43] The methods of enforcement provided for under the SCCPA are as follows:

(a) Writ of Seizure and Sale

The first method of enforcement is by way of seizure and sale. According to this method, the court may order the bailiff to 'recover any sum payable by seizing and selling the movable property of the judgment debtor.'[44] This measure is provided for under section 159(1)(a) of the SCCPA. However, seizure and sale is only applicable in case of claims for movable properties. Movable properties here refer to money, shares, stocks, debentures, bonds and jewellery.[45] The seizure and sale method may be applied to paying parents who default in payment on the child maintenance.

(b) Garnishee Proceedings

The second method of enforcement of a court order is by way of a garnishee proceeding.[46] According to section 161(d)(i) of the SCCPA, a garnishee proceeding could only be carried out with the leave of the court as well as a written consent from the Treasury.

[43]Sections 133-134 of the SCCPA.
[44]Section 159(1)(a).
[45]Muslihah Hasbullah and Najibah Mohd. Zin, "How Divorced Women Can Effectively Enforce the Financial Support Orders: The Legal and Administrative Actions," *International Journal of Humanities and Social Science*, Vol. 2 No13, July 2012 at 142.
[46] Garnishee Proceedings refers to a 'Court order made so that a person who is owed money (creditor) can obtain full or part payment from a third party whom in fact owes or holds money for the debtor'. Information obtained from English Encyclopedia website at http://www.encyclo.co.uk/meaning-of-Garnishee%20Proceedings accessed on 7 February 2017.

(c) Committal order

The third method of enforcement under the SCCPA is by way of an order of committal.[47] It is an offence if the respondent defaults in payment of *iddah* maintenance, *mut'ah,* arrears of maintenance and chid maintenance. This is provided for in section 148(1)(c) of the SCCPA read together with section 151 (1)(a). This provision could also be read alongside with section 132 of the IFLA (which was discussed earlier) where the court is empowered to either impose a fine or to convict the defaulter to imprisonment.

(d) Judgment Debtor Summons

The fourth method of enforcement is by way of a Judgment Debtor Summons.[48] According to section 176(1) of the SCCPA, a judgment debtor may be summoned to the court in order to be examined whether he is financially able to settle the judgment debt. The financial standing of the judgment debtor will be examined by the court in an inquisitorial manner. The factors that the court will take into account are such as his salary, expenses and his physical appearance.[49] Section 179 of the SCCPA provides that in the event the judgment debtor fails to comply with the judgment summons, the judgment creditor may apply for a judgment notice asking the judgment debtor to appear in court and to show cause as to why he should not be imprisonment.[50] Section 181 provides the punishment for the refusal to comply with the summons, i.e. a judgment debtor may be imprisoned for a maximum period of thirty days.

[47]Committal order refers to 'the document that commits someone to prison'. Information obtained from the Collins dictionary website at https://www.collinsdictionary.com/dictionary/english/committal-order accessed on 7 February 2017.
[48]Judgment debtor summons refers to 'a summons issued by a court requiring a judgment debtor to appear and show cause why he should not be imprisoned'. Information obtained from the Merriam Webster dictionary website at https://www.merriam-webster.com/dictionary/judgment%20summons accessed on 7 February 2017.
[49]*Supra* n47 at 144.
[50]*Ibid*.

(e) Contempt proceedings

The fifth method of enforcement is where the failure to pay child maintenance amounts to a contempt of court.[51] This is provided for under section 229(1) of the SCCPA, where the defaulter could be imprisoned for a period not more than six months or imposed a fine not more than RM2,000. Nevertheless, the defaulter is given an opportunity to show cause as to why he failed to obey the court's order.[52]

Apart from the IFLA and the SCCPA, an additional enforcement method is also available under the Syariah Criminal Offences (Federal Territories) Act 1997.[53] Section 10 of this Act provides that any person who defies, disobeys, disputes, degrades, brings into contempt any order of a Judge or Court is guilty of an offence and can be either liable to a fine not exceeding RM3,000 or be sentenced to imprisonment for a term not exceeding two years or to both.

In addition to the above legislations, in June 2013, certain amendments were proposed to the Administration of Islamic Law (Federal Territories) Act, where new powers would be conferred on the Syariah Courts. One of the amendments proposed is sections 64(1)-(4), which would be welcomed by wives whose husbands 'run to any of the Federal Territories to avoid a warrant of arrest or summons, for example, for non-payment of maintenance issued in the State where the wife had filed her petition.'[54] Under the new amendment, the Federal Territories (Kuala Lumpur, Labuan and Putrajaya) Syariah judges are empowered to endorse orders or judgments issued by the state Syariah Court judges so that these orders or judgments could be enforced in the Federal Territories, on condition that they (the Federal Territories

[51]Contempt of court refers to 'the crime of refusing to obey an order made by a court; not showing respect for a court or judge'. Information obtained from the Oxford learner dictionaries website at http://www.oxfordlearnersdictionaries.com/definition/english/contempt-of-court accessed on 7 February 2017.
[52]*Supra* n49.
[53]Act 559.
[54]Retrieved from *New powers for Syariah Court with proposed amendments*, reported in The Star online on 27 June 2013 accessed from http://www.thestar.com.my/News/Nation/2013/06/27/New-powers-for-Syariah-court-with-proposed-amendments.aspx on 14 August 2013.

court judges) are satisfied that the orders are valid. The same is applicable *vice versa*. At this juncture, it is to be noted that such an issue would not arise for the non-Muslims as the relevant Acts concerning maintenance are Federal statutes, save for some statutes that are only applicable to either West Malaysia or Sabah (the Sabah Maintenance Ordinance 1959). Nevertheless, the writer submits that it is indeed commendable to note that the Islamic authorities are aware of the issues concerning maintenance that arise and the swift actions that are taken by them to resolve such issues. Unfortunately, this is sadly lacking where the non-Muslims are concerned.

Apart from the above enforcement measures stated in the legislations applicable to the Muslims, it is reiterated here that the attachment of earnings order provided for under the 1968 Act (discussed earlier in this Chapter) applies to the maintenance orders issued by the Syariah Court as well.[55]

Previous research shows that one of the main factors for failure to adhere to the order of the Court is the attitude of the payor. For instance, the payor may wilfully disappear. From studies conducted, the situation is worse off due to the weakness that exist in enforcement of the existing legal provisions, in addition to response from third parties who are sought to assist. For example, counsels for the applicants often choose certain types of actions and leave out other actions on the ground that they are less effective. Certain statutory provisions are thought to be not practical as it cannot be enforced either due to the reluctance of the courts themselves or lack of confidence on the part of the parties who need to follow up with the course of action.[56]

[55]*Ismadi v Zainab* (2005) JH 20(1) 87

[56]Zaini Nasohah, "Cabaran Penguatkuasaan Dan Pelaksanaan Perintah Nafkah Di Mahkamah Syariah Negeri Selangor Dari Perspektif Peguam Sya'rie" ("Challenges to the Enforcement and Implementation of Maintenance Orders in the Selangor Syariah Court from the Sya' rie Lawyyer's Perspective) (2007) *Jurnal Undang-Undang*, Universiti Kebangsaan Malaysia,

7.3.2 Family Support Division

The issue of non-compliance with the maintenance orders granted by the Syariah Court attracted the attention of the nation's leaders. At the 47th Meeting of the National Council for Islamic Religious Affairs Malaysia chaired by the former Prime Minister on 7 June 2007, it was decided that the Department of Syariah Judiciary Malaysia (JKSM) should take immediate steps to resolve the issue of wife and child maintenance. As a result, the Family Support Division was established as a division of the Department of Syariah Judiciary Malaysia in October 2008.[57] The mission, functions and objectives of the Family Support Division (BSK) are as follows:[58]

Mission of BSK:

(a) Manage the enforcement and implementation of the Syariah Court maintenance order effectively and efficiently.

(b) Improving case management system in the Syariah Court states.

Functions of BSK:

(a) Provide legal advice to Muslims about their rights and claim in the Syariah Court, especially on the issue of alimony;

(b) Enforcement of the judgment or maintenance orders issued by the Syariah Courts;

(c) Provide living assistance to the wife or wives and children who struggle with the maintenance of the party obliged to pay alimony;

(d) Become an agent to collect from the party ordered to pay alimony;

(e) Distribute maintenance to a party entitled to maintenance;

[57]Information obtained from the Department of Syariah Judiciary Malaysia's website at http://www.jksm.gov.my/jksmv2/index.php?option=com_content&view=article&id=61&Itemid=243&lang=en

[58]*Ibid.*

(f) Finding and collecting funds for the payment of maintenance requirements which is not enough.

Objectives of BSK

(a) Enforce maintenance orders that have been ordered by the Syariah Courts;

(b) Ensure no wife or children faced alimony problems;

(c) Ensure that the Syariah Court orders are respected and implemented;

(d) Provide support services to Muslim families in all matters involving the Syariah Court.

About one and a half years later, in January 2010, the former Minister in the Prime Minister's Department, Datuk Jamil Khir Baharom, in a press statement announced that the Government had approved RM 15 million as allocation to help Muslim women who were going through divorce to help maintain their children.[59] However, the financial assistance is only for six months. In addition to the above assistance, the women concerned are also eligible to financial aid from the Welfare Department and the *zakat* collection centre.[60] However, the errant father or husband would have to repay the money disbursed as the fund does not mean that these defaulters can shirk their responsibilities and leave it to the Government to financially support their families.[61] In the event the errant fathers or husbands fail to repay the funds, BSK would then resort to the enforcement measures discussed above such as seizure and sale of property, garnishee order and committal to prison.[62]

In an interview to *The Edge*, published on 17 July 2013, the then Director of BSK Dr Mohd Naim Mokhtar stated that since the BSK was established, it had gone all out to ensure

[59]*Single mums to get aid for six months only,* The Star, reported on Thursday January 21 2010.
[60]*Ibid.*
[61]*Ibid.*
[62]*Ibid.*

that the ex-husbands or fathers complied with the maintenance orders issued by the Syariah Courts.[63] He explained that the BSK, as soon as it was formed, tried to contact the respondents who were ordered to pay maintenance. Some of them could not be traced as they had either shifted or changed their contact numbers. However, as the BSK has an extensive network with agencies such as the Road Transport Department, the Prime Minister's Department and the Employees Provident Fund, they managed to contact the respondents.[64]

The BSK calls both the respondents and the single mothers or ex-wives and tries to mediate. It advises both the parties and asks them to give in, in the interests of the children. This is actually an advantage to the parties as the mediation is done free of charge and the judgment creditor does not have to return to court to enforce the maintenance order, which would involve high legal costs and time. In the said interview, Dr Mohd Naim cited that the success rate was high when the BSK mediated as thousands of ringgit was paid up by the judgment debtors.[65]

In addition, he also stated that as of January 2012, there is an e-filing system or e-maintenance system for all judgment orders by the Syariah Courts which BSK has access to.[66] Hence, once a judgment order for the payment of maintenance is made, BSK would immediately know. It takes upon itself to call the judgment creditor to find out if he or she has received the money.[67]

Previous research shows that the BSK is akin to the Child Support Agency that exists in countries like Australia and the United Kingdom. However, the main difference is that the Child Support Agency is independent of the courts. Despite the fact that it (the BSK) may

[63]*Helping Muslim women to get their dues*, The Edge Malaysia, reported on 17 July 2013.
[64]*Ibid.*
[65]*Ibid.*
[66]*Ibid*. It is to be noted that this system is the only system of its kind available in the Muslim countries.
[67]*Ibid.*

have certain weaknesses, studies show that in the year 2010, 58% of 852 cases were successfully resolved through mediation.[68]

Therefore, from the discussion above, it could be noted that the Government has taken the necessary steps to ensure that the enforcement measures concerning payment of maintenance to Muslim children are indeed effective. So many developments have taken place in the past few years concerning the enforcement measures where the Muslim children are concerned. It is thus heartening to note that the welfare of the Muslim children in Malaysia is safeguarded, where payment of maintenance is concerned, as the relevant authorities are playing an active role in ensuring that the best interests of these children are protected.

7.4 COMPARISON WITH THE LAWS IN OTHER JURISDICTIONS

Based on the discussion concerning the enforcement of maintenance orders in Malaysia, it is disheartening to note that there is no alternative method in enforcing maintenance orders for non-Muslim children, other than relying on the relevant statutory provisions. Thus, the writer would next refer to the laws in Singapore, England and Wales and Australia in order to examine the enforcement measures that are available in these jurisdictions.

7.4.1 Singapore

In Singapore, provisions as to the enforcement of a maintenance order issued by the Singapore Courts are found in the Women's Charter. Enforcement of a maintenance order issued by a Singapore court in a foreign country (on condition it is a reciprocating country)

[68]Nora Abdul Hak, "Helping sustain single parent family in Malaysia: will the Family Support Division established under the Shariah Court deliver?" in 8th ASLI Conference: Law in a Sustainable Asia, 26th-27th May 2011, Faculty of Law, Kyuahu University, Japan (Unpublished); Nora Abdul Hak, Roslina Che Soh @ Yusoff, et. Al, "E-maintenance at the Syariah Court: Its Effectiveness in helping Single Mothers in Malaysia", in International Research, Invention and Innovation Exhibition: Socio-digital Transformation for the Ummah, 11th-13th June 2014, Cultural Activity Centre (CAC), International Islamic University Malaysia (Unpublished).

and *vice versa* is found in the Maintenance Orders (Reciprocal Enforcement) Act[69] and Maintenance Orders (Facilities for Enforcement) Act[70]. The writer would first look at the provisions concerning enforcement of maintenance orders issued by a Singapore court in Singapore before looking at the enforcement of a maintenance order in a foreign country.

7.4.1.1 Enforcement of Maintenance Orders made by Singapore Courts in Singapore

The Women's Charter, as stated above, provides for the enforcement of maintenance orders in Singapore. Prior to the amendment in 1996 to the Women's Charter, the provisions concerning enforcement could be found in sections 61[71] and 69[72]. The former section 61 is similar to the current section 4 of the Malaysian 1950 Act, as it states that the punishment for the breach of a maintenance order is either a levy or imprisonment for a term not exceeding one month for each month's allowance remaining unpaid. Both the former sections 61 and 69 of the Women's Charter provided for the following methods of enforcing a maintenance order:

(a) by way of a levy; or

(b) sentencing a defaulting parent to imprisonment for a term not exceeding one month for each month's allowance remaining unpaid; or

(c) by way of applying for an order attaching the earnings of the respondent.

These enforcement measures are similar to the measures available in Malaysia currently. However, in 1996, there were major amendments made to the Women's Charter.[73] One of

[69]No.23 of 1975.
[70]Cap 168, Singapore Statutes, Rev. Ed. 1985.
[71] The former section 61 provided as follows: If any person neglects to comply with any such order made under this Part, the court which made such order may for every breach of the order by warrant direct the amount to be levied in the manner by law provided by levying fines imposed by a Magistrate's Court, or may sentence him to imprisonment for a term not exceeding one month for each month's allowance remaining unpaid.
[72] The former section 69 provides as follows: If any person neglects to comply with any maintenance order the court which made such order may for every breach of the order make an attachment of earnings order.
[73]Vide the Women's Charter (Amendment) Act 1996.

the amendments was concerning the provisions on enforcement of a maintenance order. The provision in the former section 61 was amended to become the new section 71[74].

The addition made by the 1996 amendment was pertaining to the court making a garnishee order (section 71(1)(c)) as a mode of enforcement of a judgment debt which results from civil litigation.[75] The Singapore Women's Charter (Garnishee Proceedings) Rules 1997 contains the relevant rules pertaining to the use of this measure as enforcement. If the respondent has debts owing to him or her, the Court may order the debtor to pay the debt to the person or beneficiary who is entitled to receive the maintenance.[76] This measure is not available in any of the family law statutes in Malaysia as a mode of enforcement.

In addition to the above, the 1996 amendment has also inserted section 71(2) which clearly states that if the Court sentences the defaulter to imprisonment, it would not affect or diminish his obligation to pay maintenance under the maintenance order which he or she has failed to make, unless the court may, if it thinks fit, reduce the amount of any such payments. This method however would not be expected to be the enforcement method of choice as a 'stubborn defaulter will still leave the beneficiary without maintenance'.[77]

Apart from section 61, the former section 69, concerning attachment orders, was also amended. The new provisions concerning attachment orders could be found in Part IX of the Women's Charter[78] entitled 'Enforcement of Maintenance Orders' The 1996 amendment has strengthened the provision concerning an attachment order. Prior to 1996, an attachment

[74] The new section 71 of the Women's Charter reads as follows: (1) If any person fails to make one or more payments required to be made under a maintenance order, the court which made the order may do all or any of the following: (a) for every breach of the order by warrant direct the amount due to be levied in the manner by law provided for levying fines imposed by a Magistrate's Court; (b) sentence him to imprisonment for a term not exceeding one month for each month's allowance remaining unpaid; and (c) make a garnishee order in accordance with the rules made under this Act. (2) A sentence of imprisonment ordered under subsection (1)(b) shall not affect or diminish the obligation of the person against whom the maintenance order is made to make the payment or payments under the maintenance order which he has failed to make except that the court may, if it thinks fit, reduce the amount of any such payments.
[75]Leong, Wai Kum, Cases *and Materials of Family Law in Singapore,* Singapore Butterworths Asia, 1999 at 681.
[76]Leong Wai Kum, *Principles of Family Law in Singapore,* Butterworths Asia, 1997 at 874.
[77]*Ibid* at 873-874.
[78] Part IX contains section 80-91.

order could not be made unless there was a failure to pay due to 'wilful refusal or culpable neglect'. However, with the amendment, the court may make an attachment order simultaneously with a maintenance order. Section 82(1)[79] of the Women's Charter provides for the nature of the attachment order.

Section 84(1) imposes a duty on the defendant and the employer to comply with the attachment of earnings order. Once an employer pays the sum stated in the attachment of earnings order to the court, the court shall pay that money to the beneficiary stated in the maintenance order as specified in the attachment of earnings order.[80] If the defendant is self-employed, his payments received from self-employment could be attached. This is provided for in section 80 under the interpretation of 'earnings' in para (c). At this juncture, it is to be noted that there is no similar definition in the Malaysian 1968 Act.

In addition to the above provisions, the 1996 amendment also introduced section 86 which imposes an obligation on the defendant and his or her employer to notify the court which made the order of any change in the employment status or earnings of the defendant. This provision cannot be found in the Malaysian counterpart. Thus, the Malaysian 1968 Act does not expressly state that the defendant or his employer has an obligation to inform the court of any change in the former's employment status or earnings.

Finally, section 91 provides for the penalties for non-compliance with an attachment order and for giving false notice or statement. The penalty for these offences is either a fine not exceeding $2,000 or imprisonment for a term not exceeding twelve months or both. This

[79] Section 82(1) of the Women's Charter provides as follows: 'An attachment of earnings order shall require the person to whom the order in question is directed, being a person appearing to the Court to be the defendant's employer, to make out of the earnings falling to be paid to the defendant payments in satisfaction of the order.''
[80] Section 88(1).

provision is similar to the penal provision in the Malaysian 1968 Act, save that in Malaysia, the fine is not exceeding RM1,000.

In 2011, fifteen years later, the Singapore legislature passed sweeping changes to the Women's Charter. The main reason for this amendment is to ensure that divorced men pay up maintenance to their children and ex-wives.[81] The 2011 amendments added enforcement measures to enhance the enforcement of maintenance orders. These amendments took effect from 1 June 2011. The new measures introduced by the 2011 amendments are as follows:

> (a) ordering the person to furnish security against any future default in maintenance payments by means of a banker's guarantee;[82]
>
> (b) if the court considers it in the interests of the parties to the maintenance proceedings or their children to do so, ordering the person to undergo financial counselling or such other similar or related programme as the court may direct;[83]
>
> (c) ordering the person to perform any unpaid community service up to forty hours under the supervision of a community service officer;[84]
>
> (The orders in paras (a), (b) and (c) may be made by the court notwithstanding that any arrears of maintenance which gave rise to the petitioner applying for the maintenance order have been paid up in part or in whole by the time the order is made.[85])

[81] Imelda Saad, *Parliament passes changes to Women's Charter*, Singapore News, accessed on 15 December 2016 at http://www.channelnewsasia.com/stories/singaporelocalnews/view/1103781/1/.html
[82]Section 71(1)(d).
[83]Section 71(1)(e).
[84]Section 71(1)(f).
[85]Section 71(2A).

(d) the court could also direct the Central Provident Fund Board to disclose the employment information of a defaulter for attachment of earnings order.[86]

In addition to the new measures stated above, section 70(2B) provides that the complainants may lodge a report to a designated credit bureau regarding the unpaid arrears. 'Designated credit bureau' is explained in section 70(2D) to mean an entity that:

(a) collects and maintains information about the credit payment history of a person and provides such information to its members for the purpose of enabling its members to assess the creditworthiness of a person; and

(b) has been designated by the Minister as a credit bureau for the purposes of receiving a report lodged under subsection (2B).

Therefore, any report made to the credit bureau would affect the person's creditworthiness. Apart from the above measures, in order to protect the children, the Singapore Government has also implemented an enforcement measure where the court can transfer matrimonial assets which have been divided between the parents to a Children's Development Account.[87] Finally, the Government also requires those who re-marry to declare their maintenance debts.[88]

Looking at the above developments in Singapore concerning the enforcement of maintenance orders, it could be noted that the Singaporean Government is taking all the necessary steps to protect the welfare of the beneficiaries of a maintenance order and to reduce the number of defaulters. At the same time, it is disheartening to note that Malaysia is lagging far behind in this aspect as no amendments have been made to our enforcement

[86]Section 85(2).
[87]*Supra* n.81
[88]*Ibid.*

laws since its enactment about fifty years ago, which makes one ponder whether the Malaysian legislature has any intention at all to introduce new measures to ensure that the paying parents do not 'take the law lightly' and do pay their children maintenance as ordered by the court.

7.4.1.2 Enforcement of Foreign Maintenance Orders in Singapore and Vice Versa

Having looked at the enforcement of maintenance orders made by the Singapore courts in Singapore, the writer would next examine the laws concerning enforcing foreign maintenance orders in Singapore and *vice versa*.

There are currently two statutes that operate concurrently on the enforcement of maintenance orders made in selected foreign jurisdictions in Singapore and *vice versa*. The first and older statute is the Maintenance Order (Facilities for Enforcement) Act.[89] This Act which was enacted in 1921 as the Straits Settlement Maintenance Orders (Facilities for Enforcement) Ordinance[90] was to 'facilitate the enforcement in the Colony of maintenance orders made in England or Ireland or *vice versa'*. In 1970, this Act became Cap 26 by the 1970 revision. Maintenance orders made in the United Kingdom may be registered in Singapore. By notification[91]this Act has been extended to include maintenance orders made in Malaysia, Brunei Darussalam, Hong Kong and all the states of India except Jammu and Kashmir, Canadian provinces and territories such as Alberta, Saskatchewan, North West Territories, Yukon Territory, New Brunswick, British Columbia, Newfoundland and Nova Scotia, Australian territories such as the Australian Capital Territory, Northern Territory of Australia, New South Wales, Queensland, South Australia, Western Australia and Tasmania,

[89]Cap 168, Singapore Statute, Rev. Ed. 1985.
[90]No.8 of 1921.
[91] Maintenance Orders (Facilities for Enforcement) Act (Extension) (Consolidation) Notification (Cap 168)

New Zealand, Sri Lanka, the states of Jersey and Guernsey, the Bailiwick of Guernsey, the Cook Islands including Niue, Western Samoa, Saint Vincent, Malawi and Zambia.

At this juncture, it could be observed that the reciprocating countries listed in the above Act are more or less similar to the list in the Malaysian Maintenance Orders (Facilities for Enforcement) Act 1949 save as following:

(i) The states mentioned in the Malaysian Act which are not in the Singapore Act are the Australian Territories of Norfolk Island, Papua and Cocos (Keeling Island), South Africa and Pakistan.

(ii) The states mentioned in the Singapore Act which are not found in the Malaysian Act are the Canadian Territories and the Bailwick of Guernsey.

A second statute was enacted in 1975, i.e. the Maintenance Orders (Reciprocal Enforcement) Act ("the 1975 Act").[92] This Act was enacted with the intention of replacing the Maintenance Orders (Facilities for Enforcement) Act. This could be seen in section 19 of the 1975 which states that the Maintenance Orders (Facilities for Enforcement) Act is hereby repealed. However, the footnote to the same provision states that section 19(1) has yet to be brought into operation. Therefore, both the abovementioned statutes operate concurrently at the moment. The 1975 Act provides that Singapore and the reciprocating country will register and treat as local the maintenance order issued by the other country. In this respect, the countries which are reciprocating countries under 1975 Act are as follows:[93]

(a) United Kingdom
(b) New Zealand
(c) Hong Kong

[92]No.23 of 1975.
[93]Maintenance (Reciprocal Enforcement) (Designation of Reciprocating Countries) Notification (Cap 169, N1); Maintenance Orders (Reciprocal Enforcement) (Designation of Reciprocating Countries)(No.2) Notification (Cap 169, N2); Maintenance Orders (Reciprocal Enforcement)(Designation of Reciprocating Countries)(No.3) Notification (Cap 169 N3)

(d) the Territory of Christmas Island; and

(e) the Canadian province of Manitoba.

There are very few cases reported on enforcing a foreign judgment in Singapore. Two very old cases which have been reported on this issue are *El Woosey v SAJ Woosey*[94] and *Humphrey v Humphrey*.[95] The courts in both these cases held that the beneficiary of a maintenance order made in a reciprocating country may apply to register the order in Singapore. Once registration of the order has been made, the Singapore courts may treat the order as a local order and proceed to enforce the said order. The courts may even vary or rescind the foreign order subject to the confirmation by the foreign court that made the order.[96]

7.4.2 England and Wales

The writer would next look at the position in England and Wales concerning enforcement of maintenance orders. As was discussed above, the writer would discuss the position in England and Wales in two parts, i.e. first, enforcement of maintenance orders made by the British courts and secondly, enforcement of maintenance orders made by the British courts in foreign jurisdictions and *vice versa*.

7.4.2.1 Enforcement of Maintenance Orders made by the British Courts in England and Wales

In England and Wales, the courts play a limited role in matters concerning enforcement of maintenance in favour of a child. The body that played a crucial role in enforcement of

[94][1938] MLJ Rep 95.
[95][1956] MLJ 201.
[96]Leong, Wai Kum, *Elements of Family Law in Singapore*, (Singapore: Lexis-Nexis, 2007), at.465.

child maintenance until 2008 was the Child Support Agency ('CSA'). The law relating to the enforcement of child maintenance orders could be found in the Child Support Act 1991 ('1991 Act') which was later replaced by the Child Maintenance and Other Payments Act 2008.Before examining the enforcement provisions in the Child Support Act, the writer would first examine the relevant provisions in the Matrimonial Causes Act 1973 and the Children Act 1989 as both these Acts were passed prior to the Child Support Act.

a. Matrimonial Causes Act 1973

Section 23(1) of the Matrimonial Causes Act 1973 ('MCA') provides that on granting a decree of divorce, nullity of marriage or a decree of judicial separation, the court may, *inter alia*, make the following orders in favour of the child of the family:

(a) periodical payments;[97]

(b) secured periodical payments;[98]

(c) lump sum payments.[99]

The above orders could also be made under section 27(6) when an application is made by either party to a marriage to the court to apply for an order under section 27(1) on the ground that the other party to the marriage has failed to provide reasonable maintenance for the applicant or any child of the family.

Enforcement of the maintenance orders mentioned above could be made by way of an attachment of earnings order as provided for under para 3 of Schedule 1 to the Attachment of Earnings Act 1971 of England (c.32). Para 3 of the Schedule provides that the Attachment

[97]Section 23(1)(d).
[98]Section 23(1)(e).
[99]Section 23(1)(f)

of Earnings Act 1971 applies to 'an order for periodical or other payments made or having effect as if made under Part II of the Matrimonial Causes Act 1973.'

Hence, it could be noted that the MCA lacks provisions on enforcement measures concerning maintenance orders issued by the court. The attachment of earnings order mentioned above is not provided for in the MCA, but the Attachment of Earnings Act 1971.

b. Children Act 1989

Section 15(1) of the Children Act 1989 ('CA') states that Schedule 1 makes provisions in relation to financial relief for children. Schedule 1 para 1(2) provides for the various maintenance orders that may be made by a court in favour of a child as follows:

(a) order requiring either or both parents to make periodical payments;

(b) order requiring either or both parents to secure such periodical payments;

(c) order requiring either or both parents to pay a lump sum;

(d) order requiring a settlement to be made for the child's benefit of property to which either parent is entitled to and which is specified in the order.

(e) order requiring either or both parents of the child to transfer such property to which the parent is, or the parents are, entitled to as may be specified in the order.

Thus, when comparing the CA to the CSA, it could be observed that the court is empowered to make more maintenance orders under the former when compared to the court's power on the same under the latter. However, when it comes to enforcement of maintenance orders, para 12 of Schedule 1 to the CA provides that a person who is under an obligation to pay maintenance in pursuance of any order made by a Magistrate's order, shall give notice of any change of address to such person specified in the order. Failure to do so without any

reasonable excuse shall attract a fine. At this juncture, it is to be noted that this is the only enforcement measure concerning maintenance orders made by the court available in this Act.

c. Child Support Act and Child Maintenance and Other Payments Act 2008

Having looked at the MCA and the CA, which lack effective enforcement measures, the writer would next look at the Child Support Act ('CSA') and the Child Maintenance and Other Payments Act 2008 ('2008 Act'). The Child Support Act 1991 (as originally enacted) established the Child Support Agency for the purposes of enforcing and collecting child support. However, the Child Support Agency was encountering difficulties in in discharging its duties.[100]

In 2006, the Department of Work and Pensions published a Consultation White Paper[101] which sets out a proposal for further reforms in child support matters. One of the reforms suggested is the establishment of a new body to be known as the Child Maintenance and Enforcement Commission (C-MEC) to replace the Child Support Agency. It will be non-departmental and will be managed by an independent board.[102] The new scheme proposes stronger enforcement measures such as requiring defaulting parents to surrender their passports and taking monies directly from sources such as the bank accounts. The scheme also aims to make the enforcement process hassle free by restricting the court's involvement in the enforcement regime.[103]

As a result of the above proposal, in 2008, the Child Maintenance and Other Payments Act 2008 was passed. The C-MEC was established and has replaced the Child Support

[100] Davis, G., Wikeley, N, Young, R. et al, *Child Support in Action* (Oxford: Hart, 1988) cited in Gilmore, Stephen, & Glennon, Lisa, *Hayes and Williams' Family Law*, 5th ed (United Kingdom: Oxford University Press) at 321.
[101] A New System of Child Maintenance (December 2006; cm6979)
[102] *Ibid* at paras 3.8, 3.13.
[103] *Supra* n 101 at paras 5.1-5.5.

Agency. Section 2 of the 2008 Act provides that the main objective of the Commission is to 'maximise the number of those children who live apart from one or both of their parents for whom effective maintenance arrangements are in place.'

The 2008 Act has introduced changes to the existing provisions on enforcement as well as introduced several new enforcement measures in the CSA 1991. The changes made by the 2008 Act are as follows:

(a) Pertaining to the regulations concerning deduction from earnings order, sections 29(4) and (5) were introduced into the CSA to provide that such regulations include deduction from earnings orders as an initial method of collection. However, this method should not be used when there is a good reason not to do so (section 29(4)).

(b) The meaning of 'earnings' in section 31(8) was replaced with a new definition which include the following as 'earnings':

- wages or salary;
- payments by way of pensions including any annuity payable for the purpose of providing a pension;
- periodical payments which are compensation for loss of employment or reduced remuneration; and
- statutory sick pay.

(c) A new subsection (9) was also inserted in section 31 which states that any person paying the sum mentioned in subsection (8) to a liable person should be treated as their 'employer'.

(d) The next change introduced by the 2008 Act is that the liability orders issued will be administrative. There is no longer a need to apply to the courts for a liability order. The C-MEC is empowered to make an administrative liability order against a non-resident parent (sections 32M and 32N). This includes amending section 36, thereby removing the need to apply to the county court for an order before an application for a charging order or a third-party debt can be made. Presently, an application can be made when an administrative liability order has been made.

C-MEC has been empowered by the 2008 Act as follows:

(a) The C-MEC is empowered to deduct child support maintenance from the non-resident parent's account regularly. This would include a joint account (sections 32A, 32B, 32C and 32D).

(b) Pertaining to lump sum deduction orders, the C-MEC can collect payments from an non-resident parent's account held with a deposit-taker or a third party such as a conveyance. However, lump sum deductions may only be used to collect arrears and not ongoing maintenance (sections 32E, 32F, 32G, 32H, 32I, 32J and 32K).

(c) The C-MEC can apply to the court to prevent a non-resident parent from disposing of or transferring property, if it is being done to avoid paying child maintenance (section 32L).

(d) The C-MEC may also apply to the court to disqualify a non-resident parent from holding or obtaining a travel authorisation. Travel authorisation here refers to a United Kingdom passport and/or an Identity Card issued under the Identity Cards Act 2006 that records that the person to whom it is issued is a British citizen (sections 39B, 39C, 39D, 39E, 39F and 39G).

(e) The C-MEC may apply to a court for a curfew order against a non-resident parent, which will be monitored (sections 39H - 39Q)

Nevertheless, on 1 August 2012, the C-MEC was abolished. A new body called the Child Maintenance Service (CMS) replaced it via the Welfare Reform Act 2012. [104] The Welfare Act 2012 encourages the parents to make their own arrangements for child support and only resort to the CMS when an agreement cannot be reached.[105] Thus, a significant shift towards private maintenance arrangements could be noted in the new legislation and has reduced the number of applications under the CSA 1991. [106]

Hence, from the above discussion, it could clearly be seen that the laws in England and Wales have undergone several amendments, with the aim of ensuring that the enforcement measures should be made more stringent and effective in order to deter the paying parents from defaulting and to ensure that the welfare of the child concerned is safeguarded.

7.4.2.2 Enforcement of Foreign Maintenance Orders in England and Wales and Vice Versa

Having looked at the enforcement of maintenance orders in England and Wales (E&W), the writer would need to examine the enforcement of foreign maintenance orders in E & W and *vice versa.*

The relevant Act would be the Maintenance Orders (Reciprocal Enforcement) Act 1992 (c.56).[107] This is the primary legislation under which the reciprocal enforcement of maintenance orders process operates in E & W.

[104] Sections 136-142
[105] Section 136 Welfare Reform Act 2012, section 9A Child Support Act 1991
[106] Gilmore, Stephen, & Glennon, Lisa, *Hayes and Williams' Family Law*, 5th ed (United Kingdom: Oxford University Press) at 322.
[107] Amending the Maintenance Orders (Reciprocal Enforcement) Act 1972 ('1972 Act').

Since the 1972 Act was enacted, there have been several statutory instruments which allowed extra jurisdictions to be incorporated into the list of reciprocating countries as well as to adjust the precise arrangements between the United Kingdom and the reciprocating countries. The list of reciprocating countries shows that the United Kingdom has entered into enforcement agreements with more than hundred countries.[108] In addition to the above Act, the United Kingdom has also entered into several international conventions on maintenance obligations such as:

(a) the 1956 United Nations Convention on the Recovery Abroad of Maintenance;
(b) the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters;
(c) the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.

The statement of facts above shows that the British Government has given serious attention to the issue that there are many parents or spouses who evade paying maintenance as ordered by the court. Thus, it could be seen that the United Kingdom has taken effective steps (when compared to Malaysia) to ensure that the maintenance orders issued in the British courts are enforceable in a larger number of reciprocating countries so as to, *inter alia,* safeguard the welfare of the child and at the same time ensure that the parents do not wash their hands-off their responsibility to maintain their child by 'running away' to another country.

[108]Refer to Appendix F for the list of reciprocating countries

7.4.3 Australia

The last jurisdiction that the writer intends to examine before drawing a conclusion on the issue of enforcement of maintenance orders is Australia. As was done above, the writer would first look at the enforcement measures available when enforcing the maintenance orders made by the Australian courts in Australia and then go on to examine enforcement in foreign jurisdictions and *vice versa*.

7.4.3.1 Enforcement of Child Support Orders made by the Australian Courts in Australia

In Australia, there was a law reform process concerning the calculation and enforcement of child maintenance or child support orders in 1988. The reform was due to two major problems that existed:

1. Majority of the non-custodial parents defaulted in their payment of maintenance; and
2. Even if these parents did make payments, it was generally at low levels.

The above problems resulted in poverty amongst single parent families and the increase in government-expenditure on social security payments.

(a) Position prior to the 1988 amendments

Before looking at the 1988 reforms, the writer would first look at the former law on the enforcement of child support orders. The enforcement provisions could be found in the Australian Family Law Act 1975 ('FLA')[109] According to section 88 of the FLA, maintenance agreements registered under section 86 or deemed to be registered under section

[109]Act No.53 of 1975.

87 is enforceable as if they were orders from the court. Part XIII of the FLA provides for the enforcement of maintenance orders made under the same Act.

Howsoever, the Family Law Regulations deals with particulars relating to enforcement, especially in Part XV of the Regulations. Imprisonment for failure to comply with a maintenance order has been abolished under the FLA. Therefore, the enforcement measures available under the FLA are as follows:

(i) Garnishment

Regulation 134 of the Family Law Regulations provides for a code of procedure that needs to be followed in a garnishee proceeding. Generally, the garnishee proceedings are used to direct the debtor's employer to pay periodically. The employer deducts the payment from debtor's wages.

However, the garnishee proceeding applies to any money that is owing to the debtor. This could be seen in Regulation 134(4)(a) which provides that money in the hands of a 'bank, building society, credit union, investment fund or corporation that is payable to the respondent on call or on notice' is subject to a garnishment order.[110]

(ii) Seizure of property

Regulation 135 of the Family Law Regulations provides that an officer of the court or any other person specified by the Regulations is empowered to seize a debtor's personal property. However, if the debtor still fails to pay the maintenance amount, the person authorised may sell the property either by way of an auction or a private sale. The Regulations

[110]Finlay, H.A., *Family Law in Australia*, 3rd ed. (Australia: Butterworth, 1983), at 307.

contain a detailed provision on how the property may be sold in a most advantageous manner and at the same time to minimize hardship to the owner of the property.[111]

(iii) Sequestration of estate

Provision concerning the sequestration of the debtor's property is provided for under Regulation 136 of the Family Law Regulations. This process is where the whole or a part of the respondent's estate is seized and administered by a receiver with the object of realizing the debt sum from these assets. This could be said to be similar to bankruptcy proceedings.[112]

At this juncture, the writer submits that the above enforcement measures are not found in the Malaysian family law statutes concerning enforcement of maintenance orders.

Despite the existence of the above measures, there was a widespread agreement in Australia that the child maintenance system was in dire need of reform.[113]As stated above, two major problems arose from the system of child maintenance then, i.e. that the majority of the non-custodian parents did not pay maintenance to their children regularly and that even if they paid, it was at a low level. [114]

(b) The 1988 reforms

In order to resolve these problems, alternative methods of enforcing child support obligations were implemented. The first method was the enactment of the Social Security and Veterans' Entitlement (Maintenance Income Test) Amendment Act 1988 (Commonwealth), which amended the Social Security Act 1947 (Commonwealth). The

[111]*Ibid*.
[112]*Ibid*.
[113]Ingleby, Richard, *Family Law and Society*, (Australia: Butterworths, 1993 at 204.
[114]*Ibid* at 204 and 205.

amendment imposes an obligation on sole parent pension claimants to bring proceedings against the non-custodial parent. The present Social Security Act 1991 (Commonwealth) provides as follows:[115]

> A person is not qualified for a sole parent pension if:
>
> (a) the person is entitled to maintenance; and
>
> (b) the Secretary considers that it is reasonable for the person to take action to obtain maintenance; and
>
> (c) the person does not take such action as the Secretary considers reasonable to obtain maintenance.

If the non-custodial parent pays as a result of such proceedings, it will have an impact on the level of benefit from the Department of Social Security. This is because when the maintenance income test is applied to social security payees 'every dollar that is paid over the income free area will reduce the amount of benefit by 50 cents.'[116]

The second method was the amendments made to the FLA 1975 (Commonwealth). The FLA 1975 was amended to prevent the parties from:

(a) evading maintenance obligations by stating that property transfers are capitalised maintenance (sections 66L, 77A and 87A); and

(b) making conclusive determinations of their financial relationship where one of the parties was receiving social security (sections 44(4)(b) and 87(4A))

[115]Section 252(1)
[116]*Supra* n 113 at 233

In addition, section 75(3) of the FLA requires the court to disregard the parties' entitlements to income tested pensions, allowances or benefits in calculating their needs.

The third measure is the enactment of the Child Support (Registration and Collection) Act 1988 (Commonwealth). The salient features of this new Act concerning the enforcement of a maintenance liability could be summarised as follows:[117]

(a) A registrable maintenance liability to be registered with the Child Support Registrar. 'Registrable maintenance liability' is defined in sections 17 and 18 of the above Act. Reading both these sections, it could be stated that a liability is a registrable maintenance liability if:

(a) it is a liability of:

(i) a parent of a child to pay a periodic amount for the maintenance of the child or a party to a marriage to pay a periodic amount for the maintenance of the other party to the marriage; or

(ii) a step-parent of a child to pay a periodic payment for the maintenance of the child; and

(b) either of the following subparagraphs applies:

(i) it arises under a court order or court registered maintenance agreement;

(ii) it is a collection agency.

A liability is a registrable maintenance liability if it arises under a child support assessment.[118]

[117] *Ibid*
[118] *Ibid* at 234.

Section 23 of the Act states that the payee is given an option whether or not to register the liability with the Child Support Registrar. Section 23(4) further states that 'if the payee is in receipt of an income tested pension, allowance or benefit, he or she then may not make an election.' At this juncture, it could be noted that, when compared to the position in Malaysia, there is no Child Support Registrar here. As such, when it comes to the enforcement, the payee has to initiate proceedings on his or her own accord.

(a) The registrable maintenance liability is treated as a debt to the Commonwealth rather than the person in whose favour the order was made (section 30). Hence a payee is not entitled to enforce payment of the maintenance sum.

(b) Once the liability has been registered with the Child Support Registrar, section 45 of the Act provides that the Registrar can enforce the obligation to pay by directing the payer's employer to deduct the maintenance amount from the payer's salary. Section 46 provides that the employer has a duty to make the appropriate deductions. When the Child Support Registrar receives the monies, the said monies are paid into a Child Support Trust Account under section 74, which is thereafter forwarded to the payees under section 75.

(c) The current position

The child supports scheme is in force currently, administered by the Child Support Registrar, to help parents who are separated to take on the responsibility of financially maintaining their children.

Prior to July 2011, the services and payments concerning the above scheme was provided by the Child Support Agency, Medicare Australia, Centrelink and the Family Assistance

Office. However, from July 2011, the Australian Government Department of Human Services has taken on the above functions.

Provisions on the delivery of services and administration of the child support scheme could be found in The Child Support Guide at the following website: http://guide.csa.gov.au/.[119] The Child Support Guide ('the Guide') provides for two methods of enforcement of child support, i.e. the administrative enforcement and court enforcement.

1. Administrative enforcement

The various collection methods concerning administrative enforcement could be found in Chapter 5.2 of the Guide. The Child Support Registrar plays a vital role in these methods of collection and as such there is no involvement of the court. The Registrar can either collect child support from the payer directly as voluntary payment or by intercepting the money payable to the payer by a third party.

The following methods of enforcement are available under administrative enforcement:

(i) Payer elects to pay the Department of Human Services directly

The Child Support Registrar is basically requested to collect child support payments, i.e. registered maintenance liabilities (as has been discussed above) by deducting the payer's wages or salary, if it is practicable to do so. However, if the payer decides to pay the sum concerned directly to the Department of Human Services, the Registrar can accept the payment if he is satisfied that the payments would be made on time (sections 43 and 44, Child Support (Registration and Collection) Act 1988.

[119]The Child Support Guide is produced and edited by the Child Support Policy Advice section.

(ii) Deduction from salary or wages of payer

The Child Support Registrar collects registered maintenance liability by deducting the payer's salary or wages. The employer has to withhold the payer's salary or wages (referred to as the employer withholding) and send the sum to the Child Registrar (sections 45 to 65AA, Part IV of the Child Support (Registration and Collection) Act 1988, Regulation 3 of the Child Support (Registration and Collection) Regulations 1988, section 69 of the Paid Parental Leave Act 2010).

In the event the employer does not fulfil his obligations, there are various penalties and offences stated in Part IV of the Child Support (Registration and Collection) Act 1988. As stated earlier, an amount payable under the child support scheme is treated as a debt to the Commonwealth (section 64).

(iii) Deduction from Social Security Pensions and Benefits

The payer's child support debt (other than a debt for spouse maintenance) could also be collected by the Registrar by deducting from the payer's social security pensions and benefits (section 72AA of the Child Support (Registration and Collection) Act 1988). A written notice could be given by the Registrar to Centrelink pertaining to the deduction as stated above (section 72AA of the Child Support (Registration and Collection) Act 1988). Centrelink has to comply with the Registrar's notice and forward the amount to the Registrar (section 238 of the Social Security (Administration) Act 1999).

(iv) Deduction from Family Tax Benefit

The payer's child support debt could also be deducted from the Family Tax Benefit payable to the payer by Centrelink. Similar to the deduction from pensions or benefit, the

Registrar could give a written notice to Centrelink to make the deduction from the Family Tax Benefit (sections 17, 30 and 72AB of the Child Support (Registration and Collection) Act 1988).

Family Tax Benefit is paid to a payer who provides 35%-65% for the support of a child. The payer is given an option to either receive the Family Tax Benefit as periodic payments or after he or she has lodged their tax return.

(v) Deduction from veterans' pensions or allowances

In order to collect the child support debt from the payer, deductions may also be made from the payer's veterans' pensions or allowances.[120] The Registrar could issue a written notice to the Repatriation Commission to deduct the child support amount and forward the amount to the Registrar.[121]

(vi) Intercepting Tax Refund

The Australian Taxation Office (ATO) is obliged to refund the excess tax amount to taxpayers where tax has been overpaid.[122] The Child Support Registrar will be advised by the ATO if a refund is available and is about to be repaid to a taxpayer who is a child support payer. The Registrar could request the Commissioner of Taxation to pay the amount of the refund or the amount owing as a debt (whichever is the lesser) to the Registrar to be used to pay the payer's child support debt.

[120]Section 72AC Child Support (Registration and Collection) Act 1988.
[121]Section 58J(3) Veterans' Entitlement Act 1986.
[122]Section 8 AAZLF Taxation Administrative Act 1953.

(vii) Collection from third parties

The Child Support Registrar can issue a written notice to a third party who owes money to the payer requiring him or her to pay the sum to him in fulfilment of the child support debt.[123] Third parties here could refer to the banks where the payer has an account or the purchaser who has bought the property of the payer. Section 72A(1) states that the maximum notified deduction total is the amount stated in the notice under this subsection that does not exceed the child support debt of the payer concerned.

Further thereto, the section 72A notice would be in force until it is fully complied with or the Child Support Registrar withdraws it in writing.

(viii) Deduction from parental leave payments

The Child Support Registrar could also collect the child support debts by giving written notice to Centrelink to deduct an amount from a parent's parental leave pay.[124] As of January 2011, natural or adoptive parents who are working and have given birth to a child or adopted a child are eligible to receive parental leave payments for eighteen weeks. This payment, which is paid at the National Minimum Wage rate, is paid either by Centrelink or the parent's employer.

Section 69 of the Paid Parental Leave Act 2010 states that Centrelink has to comply with the Child Support Registrar's notice and hence, the amount stated therein would be forwarded to the Child Support Registrar.

[123]Section 72A of the Child Support (Registration and Collection) Act 1988
[124]Section 72AD Child Support (Registration and Collection) Act 1988.

(ix) Departure prohibition orders

The Registrar is empowered under Part VA of the Child Support (Registration and Collection) Act 1988 to make a Departure Prohibition Order (DPO) which prohibits a child support debtor from leaving Australia.[125]

2. Court Enforcement[126]

Basically, a Child Support Registrar will use the administrative enforcement methods first before resorting to court enforcement to collect child support debts. As discussed earlier, when a registrable maintenance liability is registered for collection by the Child Support Registrar, the debt amount then becomes a debt due to the Commonwealth. The Registrar is empowered under section 113 of the Child Support (Registration and Collection) Act 1988 to enforce the debt. The said debt could be recovered through court proceedings initiated either by the Child Support Registrar or the payee.

Enforcement of the debt by the Child Support Registrar could be made under the Family Law Act 1975 or by civil action.

(i) Civil action

Civil actions taken by the Child Support Registrar are as follows:

a. Service of summons and statement of claim on the debtor.

b. Applying for a default judgment where the debtor fails to pay up.

c. Garnishee orders to attach monies due to the debtor from third parties.

d. Warrant of execution to seize assets belonging to the debtor.

[125] Sections 17, 17A, 30 and 72D-72Y (Part VA) Child Support (Registration and Collection) Act 1988 read together with section 11.1 Criminal Code Act 1995.
[126]Chapter 5.4 of the Child Support Guide

e. Summons for oral examination of debtor before a magistrate or judge to provide details about the debtor's assets and liabilities on oath.

(ii) Enforcement under the Family Law Act 1975

Various types of orders could be made by the court under the Family Law Act 1975 (FLA) in order to enforce the debtor's obligations, which include:[127]

a. garnishing the debtor's assets or income;
b. paying the arrears;
c. either sequestration of the debtor's estate or appointing a receiver;
d. seizure and sale of the debtor's personal property;
e. sale of real property.

(iii) Bankruptcy

The Child Support Registrar, acting in the capacity of a creditor, can take a bankruptcy action against a debtor and arrears of child support is provable in Bankruptcy.[128]

7.4.3.2 Enforcement of Maintenance Orders made by the Australian Courts overseas and vice versa

The Australian legislations have provided for enforcement of overseas maintenance orders in Australia and *vice versa*. Section 110 of the Family Law Act 1975 provides for the regulation making power of enforcing in Australian courts maintenance orders made in 'reciprocating countries' and 'countries with restricted reciprocity'.

[127]Rule 20.05 Family Law Rules 2004.
[128]Sections 5, 27,40,58(5A),82(1),122(2)(c),153(2)(c) and 153(2A), Parts IX and X Bankruptcy Act 1966.

The difference between 'reciprocating countries' and 'countries with restricted reciprocity' is that, in the former, the provisions for maintenance orders in these countries are basically similar to the provisions in Australia.[129] Whereas 'countries with restricted reciprocity' refer to countries which have maintenance laws that are similar in certain respects, but differ significantly in matters 'such as providing maintenance of relatives in need of support other than children, such as grandparents'.[130]

Schedule 2 of the Family Law Regulations 1984 lists the reciprocal countries (Refer to Appendix G for the list of countries in Schedule 2). A quick look at the list shows that the number of countries listed therein is definitely more than the list in the Malaysian Married Women and Children (Facilities for Enforcement) Act 1949.

7.5 DISCUSSION

Having looked at the ineffective enforcement of maintenance orders measures available for the non-Muslims in Malaysia as well as having examined the enforcement measures available for the Muslims in this country and the measures that are in force in Singapore, England and Wales and Australia, it is indeed disheartening to conclude that the plight of non-Muslim single mothers and children, especially, are pathetic. The following table sums up the enforcement of maintenance measures available to non-Muslims:

[129] *Supra* n. 113 at 307.
[130] *Ibid*.

Table 7.1: Enforcement of maintenance measures available to non-Muslims in Malaysia

Act	Punishment	Section
1950 Act	Levying fines	4
	Imprisonment	4
	Power of court to set aside or to prevent disposition of property intended to defeat claims to maintenance	102
Divorce and Matrimonial Proceedings Rules 1980	Order of committal	Rules 72-75
Child Act 2001	Fine[131] Imprisonment[132] Execute a bond of good behavior[133] Community Service	Section 31
Married Women and Children (Enforcement of Maintenance) Act 1968	Attachment of earnings order	Sections 4-13

From the above list, it could be observed that the enforcement measures are basically imposition of a fine, imprisonment, execution of a bond of good behaviour, attachment of earnings order and community service. Although there about five statutes that provide for the enforcement of maintenance orders, it is disheartening to note that the measures are not effective as the penalties mentioned in these statutes are more or less the same, i.e. imposition of fine or imprisonment. Further thereto, as discussed earlier in this Chapter, there have not been any positive steps taken by the Legislature to make amendments to the above statutes in order to introduce new measures which would be more effective. Instead of having five

[131]To be noted herein that the punishment mentioned in this section is for, *inter alia*, neglecting a child.
[132]*Ibid*
[133]*Ibid*.

statutes which provide the same types of enforcement measures, which are ineffective, it is better to incorporate various enforcement measures which are effective in one statute, as was done by Singapore in its Women's Charter. In addition, the Legislature should also take steps to do a survey in order to see if these enforcement measures are effective. If the answer is no, then it (the Legislature) would have to think of other measures, as has been done by the relevant authorities in the three jurisdictions discussed in this Chapter.

Further thereto, the writer submits that the only avenue available to the non-Muslim single mothers and children in Malaysia to resort to in the event they want to enforce the maintenance orders in their hands is the courts. Unfortunately, there are no agencies or bodies which have been established to act as enforcers, such as the Family Support Division for the Muslims. As was stated by the former director of the Family Support Division, Dr Mohd Naim Mokhtar, in his statement to *The Edge* on 17th July 2013,[134] in civil law, 'the judge's duty ends when he has given a judgment'. Hence, in such a case, the said judgment is redundant if the measures available to the enforcement of the said judgment are not effective. Dr Mohd Naim further quoted that there is recorded evidence from one of the Caliphs of Islam, Omar el-Khattab, that 'there is no point in issuing judgment unless it is executed.'

The fact that the non-Muslim single parents and children were at a disadvantageous position when it came to the enforcement of maintenance orders was also highlighted by the then Ministry of Women and Family and Community Development's Deputy Minister Heng Seai Kie, in her interview to *The Star* on 24th April 2011, where she stated that 'the civil court is lagging far behind the Syariah court in the enforcement of maintenance orders'.[135] She also suggested that 'the civil court put in place a mechanism to ensure that non-Muslim women

[134] *Supra* n 63.
[135] *Heng: Enforcement needed in civil court to ensure maintenance payment,* The Star, 24th April 2011.

and children were not deprived of maintenance payment as ordered by the court'.[136] The same press report also stated that a few organisations such as the Wanita MCA political strategy bureau, Women's Aid Organisation (WAO), Sisters in Islam, the women's wing of the Wilayah and Selangor Chinese Assembly Hall 'have called for the setting up of a task force to assist non-Muslim single parents and affected children'.[137]

It is more than five years since the above call for the setting up of a task force to assist non-Muslim single parents and children was made. However, there has been no action taken by any of the authorities to set up such a task force. It is reiterated here that the plight of non-Muslim single mothers and children when compared to their Muslim counterparts is indeed disheartening.

The above difference in the enforcement measures available to the Muslims and the non-Muslims brings us to the issue of equality as enshrined in Article 8(1) of the Federal Constitution. Article 8(1) clearly states that 'All persons are equal before the law and entitled to equal protection of the law'. Article 8(2) further states that 'Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law ....'. Hence, the fact that there is inequality in the laws concerning enforcement measures available to the Muslims and the non-Muslims clearly shows that there is a serious breach of the fundamental liberty provision in Article 8 of the Federal Constitution.

The writer submits that in order to safeguard the rights of the non-Muslim single mothers and the welfare of the affected children concerning enforcement of maintenance orders, the first step that needs to be taken is to revisit the ancient laws which have been in force for the

[136] *Ibid.*
[137] *Ibid.*

past fifty to sixty years. It is time the legislature amend the said provisions (as discussed above) to make it more effective. At this juncture, the writer submits that the legislature could refer to the legal developments in Singapore on this issue in 2011, where the Singaporean legislature had taken necessary steps to enhance the enforcement of maintenance orders. Some of the amendments that the Malaysian legislature could adopt are as follows:

(a) ordering the defaulter to undergo financial counselling or such other similar or related programme as the court may direct;

(b) ordering the defaulter to perform any unpaid community service under the supervision of a community service officer;

(c) ordering the defaulter to furnish security against any future default in maintenance payments by means of a banker's guarantee;

(d) amending the attachment of earnings order provisions as provided for in the 1968 Act to follow the Singaporean provisions on the same matter (as discussed earlier);

(e) allowing the judgment creditor to bring proceedings to obtain a garnishee order against the judgment debtor; and

(f) compelling a divorced man to declare before his prospective new spouse that he had arrears in maintenance.

Nevertheless, it cannot be said that Singapore has absolutely resolved its problem. As was reported in The Straits Times,[138] experts were interviewed on their views to the amendment in 2011. Although they welcomed the amendment, they said that the law has some way to go. The biggest drawback is that the onus is still on the woman to enforce the

[138] *The Maintenance conundrum men who just won't pay,* The Straits Times, 30 June 2011

order. Many women would give up if they have to go back to court each time they want to enforce the order.

In addition to amending the existing legislations as stated above, it is also submitted that the Government establishes a division such as the Family Support Division for the Muslims, for non-Muslims as well under the Ministry of Women, Family and Community Development to look into the enforcement of maintenance orders for non-Muslim single mothers and affected children. This Family Support Division could play a similar role as its Muslim counterpart, where it acts as a mediator between the parties concerned, highlighting the best interests of the children. In such a situation, the parties do not have to petition to the court to enforce their judgment. Further thereto, an e-filing system to register all judgment orders could be implemented to which the Family Support Division could have access to and where it could follow it up with the judgment creditor on whether payment of maintenance has been made (similar to the Family Support Division for the Muslims). In this respect the judgment creditor saves on legal costs and time.

In the alternative, the writer submits that a body such as the Child Maintenance and Enforcement Commission (C-MEC) which was established in the United Kingdom or the Child Support Agency as in Australia should be set up here. This body helps to enforce the obligation to pay maintenance once the parents who have obtained a maintenance order, register the order with this body. Howsoever, the position concerning enforcement of child maintenance in the England and Wales and Australia could not be applied wholesale in Malaysia, bearing in mind that these countries are welfare states. Thus, once the child support order is registered with the relevant Child Support Agencies, it becomes a debt due to the State. The same could not be said to the position in Malaysia as we are not a welfare state. In addition, though it is very effective, it is also not possible to implement the administrative

enforcement measures which are available in Australia such as deductions from social security pensions and benefits, Family Tax Benefit, veterans' pensions or allowances and parental leave payments as these benefits are not available in Malaysia.

In addition to enhancing the enforcement measures available within Malaysia, the writer also submits that the list of reciprocating countries in the Schedule to the Married Women and Children (Facilities for Enforcement) Act 1949 should be revisited in order to take the necessary steps to include more reciprocating countries therein, so that maintenance orders made by the Malaysian courts would be enforceable in these countries as well if the defaulter resides there.

It is submitted that it is pertinent that the above measures need to be taken soonest possible in order to protect the right to life of the innocent children, which could well be described as a fundamental right guaranteed under the Article 5(1) of the Federal Constitution.

7.6 CONCLUSION

In conclusion, it is submitted that much needs to be done in order to protect the welfare of the affected children in Malaysia. It is not sufficient to merely examine the efficacy of the maintenance laws in Malaysia without taking a step further and examining the laws concerning the enforcement of the maintenance orders. It is of no use having effective laws that protect the right of the non-Muslim children to claim maintenance from his or her parents, when the laws governing the enforcement of the maintenance orders are weak. In such a situation, the maintenance order made by the court could be described as a 'toothless tiger' as the paying parent would not hesitate to default in paying the maintenance sum to his or her child, as he or she would not be subjected to a heavy penalty.

Therefore, in order to prevent these paying parents from defaulting in paying maintenance to their children, it is high time the Malaysian legislature revisit the current statutes, which could be described as archaic, so that the necessary amendments could be made to the enforcement provisions therein in order to safeguard and protect the welfare of the affected children.

In addition to amending the relevant statutes, the writer reiterates her stance as stated earlier that the relevant authority, i.e. the Ministry of Women, Family and Community Development establish a body similar to the Family Support Division or the Child Support Agency or the CMS to act as enforcement authorities in order to ensure that the paying parents would in the future think twice before defaulting in their payments of maintenance, knowing very well that the said body, which acts as a 'watchdog' for the affected children, would not hesitate to impose severe or harsh penalties in the event they default.

CHAPTER 8: CONCLUSION AND RECOMMENDATIONS

8.1 INTRODUCTION

In this final chapter, the writer proposes to list down the Research Findings, suggest recommendations to overcome the issues that were raised in the earlier Chapters and finally, to come to a conclusion. This Chapter is divided into two parts, the first part comprising the Research Findings and the Recommendations and the second part, the conclusion and the way forward.

8.2 RESEARCH FINDINGS AND RECOMMENDATIONS

There were five main issues that were analysed in this thesis. They are as follows:

1. Meaning of a 'child'
2. Extending the Duty to maintain young vulnerable adults
3. Arrears of maintenance
4. Variation or rescission of a maintenance order
5. Enforcement of maintenance orders

The research findings based on the above issues would be listed down below, followed by the writer's recommendations.

8.2.1 Meaning of 'child'

In examining this issue in Chapter 4, sub-topic 4.4, the writer divided it into four sub-issues, i.e. age of child, adopted child, step-child and illegitimate child. The writer would first list down the Research Findings for each of this sub-issues, followed by recommendations which encompasses all the above sub-issues.

a. Age of Child

Two observations were made concerning this sub-issue. The first observation is that save for the Law Reform (Marriage and Divorce) Act 1976[1]('the LRA'), there is a lacuna in both the Married Women and Children (Maintenance) Act 1950[2] ('the 1950 Act') and the Maintenance Ordinance 1959 of Sabah ('the Maintenance Ordinance of Sabah') as to the age limit of a child.

The second observation made is that there is no uniformity among the family law statutes in Malaysia regarding the age limit of a child. Some provide that a child is below the age of twenty-one years[3] whereas some provide as below eighteen years.[4]

b. Adopted child

As to whether the present maintenance laws confer an adopted child the right to claim for maintenance from his adoptive parents, two observations were made. The first observation is that, save for the LRA, there is a lacuna in the 1950 Act and the Maintenance Ordinance of Sabah as to whether an adopted child could claim for maintenance from his adoptive parents.

Hence, as was discussed by the writer in sub-topic 4.4.2 in Chapter 4, each time an adoptive child tries to claim for maintenance from his adoptive parents either under the 1950 Act or the Maintenance Ordinance of Sabah, the court would have to first decide whether an adopted child is entitled to claim maintenance from his parents under either of these Acts. As both these statutes are silent, the court will then have to cross refer to the Adoption Act 1952 (for Peninsular Malaysia) or the Adoption Ordinance of Sabah (for Sabah) which states that once an adoption order is issued, the child adopted is deemed

[1] The LRA defines 'child' in section 87 as a person below the age of eighteen years.
[2] As far as the 1950 Act is concerned, the decision in *Kulasingam v Rasammah* [1981] 2 MLJ 36 that a child is a person below the age of eighteen still stands, although this decision has come under severe criticism (as discussed under sub-topic 4.4.1 in Chapter 4.
[3] For example, the Adoption Act 1952 and the Guardianship of Infants Act 1961 (pertaining to non-Muslim children).
[4] For example, the LRA.

to be born to the adoptive parent in lawful wedlock. Therefore, the child is deemed to be a legitimate child of the adoptive parents and has a right to claim for maintenance.

The second observation made is that although the LRA refers to an adopted child in its definition of a 'child' in section 2, there is a dilemma as the said definition provides 'an illegitimate child of, and a child adopted'. Thus, the confusion that arises is whether this phrase should be read in a conjunctive manner or a disjunctive manner? If it is read in a conjunctive manner, then the right to maintenance is restricted to children who were born illegitimate and have been adopted. On the other hand, if it is read disjunctively, any adopted child could claim for maintenance from his adoptive parents.[5]

c. Step child

Two observations were made by the writer when analysing whether a step child has a right to claim maintenance from his step parent under the present maintenance laws. First, save for the LRA,[6] the 1950 Act and the Maintenance Ordinance of Sabah are silent on whether a step child has a right to claim for maintenance.

The second observation that was made was that there is a dilemma whether a step child has the right to claim for maintenance under section 93 (which generally lays down the duty to maintain a child) as well as section 99.[7]

d. Illegitimate Child

In addition to analysing the current maintenance laws, the writer had also conducted interviews with social workers and single mothers, as discussed in sub-topic 4.4.4.5 in

[5] Note that the court in the case of *T v O* [1993] 1 MLJ 168 seems to have taken a disjunctive approach. Please refer to sub-topic 4.4.2 on Adopted Children in Chapter 4.
[6] Section 2 of the LRA defines a 'child of marriage', *inter alia*, as '…a child of one party to the marriage accepted as one of the family by the other party'.
[7] Section 99 of the LRA provides that if a man has accepted a child as a member of his family, he has a duty to maintain that child. The court in *Cheah Yen Pin (P) lwn Tan Chuan Ou* [2002] 6 MLJ 129 held that section 99 should be read with section 2 and as such, it imposes a duty on the father to maintain his step child.

Chapter 4. As a result, five observations were made pertaining to whether an illegitimate child has a right to claim maintenance.

The first observation is that the LRA[8] and the Maintenance Ordinance of Sabah[9] include an illegitimate child within its definition of 'child', whereas the 1950 Act is silent.

The second observation is that both the 1950 Act[10] and the Maintenance Ordinance of Sabah[11] have separate provisions on the duty to maintain a legitimate child and an illegitimate child. The question that arises is whether there is a need to discriminate the illegitimate children by providing their right to maintenance in a separate provision?

The third observation made is that there is still a ceiling amount of RM50 for the maintenance sum for an illegitimate child provided for in the Maintenance Ordinance of Sabah. The issue is whether this should be repealed as was done in the 1950 Act?

The fourth observation made from the interviews conducted is that the single mothers are not aware of the existence of laws that confer the right on an illegitimate child to claim for maintenance from his parents. Hence, the issue of awareness of their rights arises.

Finally, the fifth observation made, which the writer feels is the most pertinent of all, is the lacuna in the Malaysian laws as to empower the court to order a man to undergo a paternity test in order the decide if he is the father of the child. This is very important as, if the putative father denies paternity of the child, it would be difficult for the child to pursue his claim for maintenance under the law.

Based on the above Research Findings on the Meaning of a 'child' and having referred to the positions in Singapore, England and Wales and Australia, the writer would like to

[8] Section 2 of the LRA.
[9] Section 2 of the Maintenance Ordinance of Sabah
[10] Section 3(1) for a legitimate child and section 3(2) for an illegitimate child.
[11] *Ibid.*

suggest the following recommendations in order to overcome the issues discussed above in Research Findings:

1. Legislative bodies to enact a standard definition of 'child' in all the three statutes to read as follows:

' "child" refers to a person below the age of eighteen years, and includes the following:

(a) a child adopted under the Adoption Act 1952 or the Adoption Ordinance 1960 of Sabah or the Adoption Ordinance 1958 of Sarawak;

(b) a step-child, where the step-parent has accepted the child as a member of his family; or

(c) an illegitimate child.'

2. In order to avoid any form of confusion, all family laws statutes should standardise the age limit of a child to eighteen years.

3. To do away with having a separate provision for illegitimate children and thereby discriminating them, the 1950 Act and the Maintenance Ordinance of Sabah should merge the duty to maintain legitimate as well as illegitimate children in the same provision. In addition, the Maintenance Ordinance of Sabah should delete the maximum amount of maintenance sum of RM50 to be given to illegitimate children. It is impossible to survive with RM50 a month bearing in mind the high cost of living at present.

4. All the three statutes to incorporate a provision empowering the court to order the putative father to undergo a test of paternity if he denies paternity. In the alternative, the Legitimacy Act 1961 could be amended to include the above provision in order to enable the child to prove his paternity.

8.2.2 Extending the Duty to Maintain Young Vulnerable Adults

As has been discussed at length in Chapter 5, non-Muslim young vulnerable adults in Malaysia have no recourse to the courts if their parents refuse to maintain them upon them attaining the age of eighteen years. Both the 1950 Act[12] and the Maintenance Ordinance of Sabah are silent on whether a young vulnerable adult is entitled to continue being maintained by his parents upon him attaining the age of eighteen. The LRA, in section 95 expressly provides that a maintenance order ceases when a child attains the age of eighteen years, unless if the child is physically or mentally disabled. In the case of *Karunairajah a/l Rasiah v Punithambigai a/p Ponniah*[13] the apex court gave a literal interpretation to the phrase 'physically or mentally disabled', thereby shattering the hopes of these young vulnerable adults, especially those from broken homes who intend to pursue their tertiary education or vocational training.

Bearing in mind the welfare of these innocent young vulnerable adults and considering their future, the writer would like to suggest two recommendations. First, the writer proposes that section 95 of the LRA as well as the 1950 Act and the Maintenance Ordinance of Sabah should be amended to extend a maintenance order upon a child reaching the age of eighteen 'to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training.'. This amendment would be similar to the respective Islamic Family Law statutes[14] which provide that Muslim young

[12] As for the 1950 Act, the decision in *Kulasingam v Rasammah* (*supra* n.1) has hampered the hopes of young vulnerable adults of being maintained by their parents, when the court held that only children below the age of eighteen can claim for maintenance under this Act.

[13] [2004] 2 MLJ 401. The court had to decide whether a child who has reached the age of eighteen could continue to claim for maintenance from his parents under section 95 of the LRA. Please refer to a detailed discussion of this case in sub-topic 5.3 Judicial Decisions in Chapter 5.

[14] For example, section 79 of the Islamic Family Law Act 1984 (Federal Territory) which provides as follows:

Except-

(a) where an order for maintenance of a child is expressed to be for any shorter period; or
(b) where any such order has been rescinded; or
(c) where any such order is made in favour of –
  (i) a daughter who has not been married or who is, by reason of some mental or physical disability, incapable of maintaining herself;
  (ii) a son who is, by reason of some mental or physical disability, incapable of maintaining himself,

the order for maintenance shall expire on the attainment by the child of the age of eighteen years, but the Court may, on application by the child or any other person, extend the order for maintenance *to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training*.

vulnerable adults have a right to continue being maintained by their parents if they intend to pursue their tertiary education or training. It is submitted that in the light of Article 8(1) of the Federal Constitution which guarantees equality before the law and equal protection of the law, both Muslim and non-Muslim children should receive similar protection by their respective laws in Malaysia. In addition to this extension, the 1950 Act and the Maintenance Ordinance of Sabah should also extend the maintenance order in case the child is physically or mentally disabled.

Secondly, the writer would also suggest that if the Malaysian Legislature decides that non-Muslim parents can be ordered by the court to continue maintaining their young vulnerable adult children, the aforesaid Malaysian Acts could be amended to follow the provision in section 66L of the Australian Family Law Act 1975. Section 66L provides two situations regarding the court's power to order a maintenance order in favour of a young vulnerable adult. First, when an application is made for a maintenance order in relation to a child who is eighteen or above. Secondly, when an application is made, the child is still below the age of eighteen and the issue is whether the court could extend the maintenance order beyond the child's eighteenth birthday. At present, section 95 of the LRA currently contemplates the second situation and not the first. It is submitted that it would be better to incorporate a separate provision for young vulnerable adults to apply for a maintenance order as it would be clearer to the courts that they are dealing with children who have reached the age of eighteen and above.

8.2.3 Arrears of Maintenance

Having examined the three maintenance statutes, the writer found that there is no uniformity as to the time-limit for the recovery of arrears of maintenance. The 1950 Act provides that the arrears that could be claimed is from the date of neglect or refusal to pay

maintenance,[15] the LRA provides a time-limit of three years[16] and the Maintenance Ordinance of Sabah[17] implies a time-limit of twelve months.

In addition to the above finding, the writer also observed that there is a lacuna in all three statutes where if the child concerned wants to extend the time-limit for the recovery of arrears.

In order to safeguard the welfare and the rights of these innocent children from being manipulated by their irresponsible parents (who have failed to maintain them for a considerable period of time) by hiding behind the time-limit imposed by the respective statutes, the writer would like to suggest the following recommendations.

First, the writer would like to suggest that the legislature revisit these statutes and enact a standard time-limit for the recovery of arrears of maintenance. This is also to prevent statute-shopping, which is akin to forum-shopping, where the parties would prefer to apply under the statutory provision which is most favourable to them.

Secondly, following from the above suggestion, if a standard time-limit is set in all three statutes, the writer would also like to recommend that a provision similar to section 121(3) of the Singapore Women's Charter which states that arrears of maintenance due more than three years cannot be claimed unless allowed by the court under special circumstances, be incorporated in all three statutes, where it gives a discretion to the courts in special circumstances to extend the time-limit.

8.2.4 Variation or Rescission of Maintenance Order

Based on the writer's analysis of the maintenance laws concerning the variation or rescission of maintenance orders, it was observed that the statutory provisions in all three

[15] Section 3(3) of the 1950 Act. Note also the cases of *Amrick Lall v Sombaiavati* [1973] 2 MLJ 191 and *Ganghagaran v Sathiabama* [1976] 2 MLJ 77 that held that arrears could only be claimed up to one year. On the other hand, the court in *Lee Yu Lan v Lim Thain Chye* [1984]1 MLJ 56 held that arrears under the 1950 Act could be claimed from the date of neglect or refusal.
[16] Section 98 of the LRA.
[17] Section 3(3) of the Maintenance Ordinance of Sabah.

statutes (the 1950 Act, the LRA and the Maintenance Ordinance of Sabah) are not consistent concerning two matters: first as to whom may apply to vary or rescind the order and secondly the grounds for the application.[18] In addition, it was also observed that these provisions give a wide discretion to the courts to decide whether to vary or rescind the maintenance order or agreement. However, upon analysing the judicial decisions, it was observed that the courts generally have been very cautious in varying or rescinding the maintenance order or agreement.

Nevertheless, the writer submits that among the provisions that have been analysed, section 97[19] of the LRA (which specifically refers to varying a maintenance agreement) is the only provision that promotes and safeguards the welfare of the child. Thus, it is recommended that current provisions on varying or rescinding a maintenance order in all the three statutes should be amended to incorporate a similar provision as section 97 of the LRA. This is to ensure that the relevant statutory provision states that the court should take the welfare of the child into consideration before deciding to either vary or rescind a maintenance order, and thereby forms a statutory safeguard for the welfare of the child.

In addition, the writer would also recommend to incorporate the guidelines that are stated in section 117(4) of the Australian Child Support (Assessment) Act 1989 (Cth) which may be applied by the court in deciding if it is 'reasonable and for the welfare of the child'[20] in all the three statutes on maintenance in Malaysia. This is to ensure that the court exercises caution, by examining the various guidelines that have been laid down in the statutory provision before deciding to either vary or rescind a maintenance order. In

[18] Section 6(1) of the 1950 Act and section 7 of the Maintenance Ordinance of Sabah are in *pari materia* concerning whom may apply and the grounds. On the other hand, sections 96 and 97 of the LRA could be distinguished pertaining to whom may apply and the grounds of such application.

[19] Section 97 provides that a court may at any time vary a maintenance agreement in favour of a child where it is 'satisfied that it is reasonable and for the welfare of the child so to do.'

[20] The guidelines are as follows: (a) the nature of the duty of a parent to maintain a child; (b) the proper needs of the child; (c) the income, earning capacity, property and financial resources of the child; (d) the income, earning capacity, property and financial resources of each parent who is a party to the proceeding; (e) the commitments of each parent who is a party to the proceedings; (f) the direct and indirect costs incurred by the custodian entitled to child support; and (g) any hardship that would be caused to the child or custodian or the liable parent or any other child or person if the court makes or refuses to make the order.

such a situation, the decision of the court becomes more transparent as the statute concerned imposes a duty on the court to take into account the guidelines therein, thereby safeguarding the welfare of the child.

8.2.5 Enforcement of Maintenance Orders

It is submitted that the all the recommendations made above would be akin to pouring water on a duck's back if the laws on the enforcement of maintenance orders are weak. Having analysed the current laws on enforcement of maintenance for non-Muslim children in Malaysia in Chapter 7, three observations were made. First, it was found that the enforcement measures are minimal and ineffective. The sanctions provided by the various laws discussed in Chapter 7 are ineffective to ensure that the paying parents adhere to the maintenance order.[21]

Secondly, a body such as the Family Support Division or *Bahagian Sokongan Keluarga (BSK)* that is available to the Muslim children, which acts as a mediator in ensuring the maintenance orders are adhered to is not available to non-Muslim children, despite calls by the relevant Ministry to set up such a body.

Thirdly, the list of reciprocating countries in the Schedule to the Married Women and Children (Facilities for Enforcement) Act 1949 has remained the same for the past twenty-years, thereby limiting the possibility of the beneficiary of a maintenance order to enforce the order in a foreign jurisdiction.

The writer has discussed in depth the recommendations in sub-topic 7.5 in Chapter 7 regarding enforcement of maintenance orders and will summarize the recommendations as follows:

[21] The sanctions or penalties provided by the current laws are fine, imprisonment, order of committal, execute a bond of good behaviour, set aside or prevent disposition of property intended to defeat claims.

First, to enhance the enforcement measures that are available in Malaysia at the moment. The writer submits that the Singapore model could be incorporated here as discussed in sub-topic 7.4.1.[22]

Secondly, establish a body similar to the Family Support Division (BSK) for the non-Muslims as well. This body, which would be set up under the Ministry of Women, Family and Community Development, would act as a watchdog to safeguard the welfare of these innocent children.

Finally, it would be good if the Malaysian Government revisits the Schedule to the Married Women and Children (Facilities for Enforcement) Act 1949 and takes the necessary steps to increase the number of reciprocating countries stated therein. As was discussed in sub-topic 7.2.2.2 Married Women and Children (Facilities for Enforcement) Act 1949 in Chapter 7, more and more women are getting married to foreigners, either expatriates or foreign workers. It is of no use if the Malaysian spouse is successful in claiming maintenance for her child against her spouse who currently resides in another country, if the country where the latter resides is not a reciprocating country as listed in the Schedule to the Married Women and Children (Facilities for Enforcement) Act 1949.[23] In particular, countries like Indonesia and Bangladesh, where the majority of the foreign workers in Malaysia come from, are not in the list. There are many Malaysian women who marry these workers and start a family. As stated above, these women would face difficulty in enforcing a maintenance order issued by the Malaysian court in either of these countries if the Malaysian Government does not take the necessary steps to include these countries in the list of reciprocating countries.

[22] Enforcement measures which could be followed from the Women's Charter are as follows: 1. Ordering the defaulter to undergo financial counselling; 2. Ordering the defaulter to perform any unpaid community service under the supervision of a community service officer; 3. Ordering the defaulter to furnish security against any future default in maintenance payments by means of a banker's guarantee; 4. Following the attachment of earnings provision; 5. Allowing the judgment creditor to bring proceedings to obtain a garnishee order against the judgment debtor; and 6. Compelling a divorced man to declare before his new prospective new spouse that he had arrears in maintenance.

[23] Please refer to Appendix E for the List of Reciprocating Countries in the Maintenance Orders (Facilities for Enforcement) Act 1949.

8.3 CONCLUSION

In conclusion, having analysed the maintenance laws concerning non-Muslims in Malaysia and referring back to the objectives of this thesis, the writer respectfully submits that it indeed disheartening to note that laws are far from satisfactory. Many measures need to be taken by the relevant authorities such as the Parliament and the Government in amending the relevant provisions in these statutes. Some of these statutes, as were observed during the discussion in the previous chapters, were passed prior to Malaysia's Independence, which makes them more than sixty years old. Sadly, the provisions therein are more or less the same since they were passed. There were hardly any amendments made to these statutes.

Be that as it may, in the writer's humble opinion, the issues raised in this thesis would be best resolved if, instead of two or three statutes existing at the same time pertaining to maintenance, all family issues be parked under one statute, preferably the LRA (as has been done in the Singapore Women's Charter). Nevertheless, the constitutionality of this recommendation arises as the Ordinances of Sabah and Sarawak pertaining to Guardianship, Adoption and Maintenance respectively would have to be repealed (Malaysia comprises of West Malaysia, Sabah and Sarawak). Hence the issue as to whether this move would affect the special privileges conferred on the natives of Sabah and Sarawak under Article 153 of the Federal Constitution arises. The writer submits that this would not be an issue due to four reasons.

First, the LRA is already applicable to Sabah and Sarawak. Secondly, the legislature would have to be extra cautious when it comes to incorporating provisions pertaining to the natives of Sabah and Sarawak. Perhaps a separate Part could be enacted in the LRA which deals exclusively with family law issues pertaining to the natives. In order to ensure that there is no conflict with the native customary laws, these provisions would be drafted taking into account the customs of the natives Thirdly, this move would not be the first

where it concerns repealing the laws in Sabah and Sarawak in order to bring it under a Federal Law. This could be observed in section 109 and the Schedule to the LRA, where, with the coming into force of the LRA, all the Ordinances which were in force in Sabah and Sarawak then pertaining to marriage and divorce were wholly repealed. Finally, the natives are not bound by the provisions in the LRA. As is stated in section 3(4) of the LRA, the natives have a right to elect if they intend to be governed by the LRA or follow their respective native customary laws. Therefore, it is respectfully submitted that the above recommendation would not be unconstitutional.

Finally, the writer strongly submits that parents, as primary caregivers, should not be allowed to wash their hands off their responsibility towards maintaining their children. The situation is worse off for children from broken homes where one parent would try to pass the buck to the other. In addition to the steps that need to be taken by the Parliament in revisiting these laws, other authorities such as the judiciary, the government authorities and the NGOs should also play their respective roles in ensuring that the welfare of these children, who are the future leaders of our country, are not sacrificed at the altar of these archaic laws.

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APPENDIX A

LIST OF NEWSPAPER REPORTS CONCERNING CHILDREN BEING ABANDONED OR NEGLECTED BY THEIR PARENTS OF GUARDIANS OBTAINED FROM FOUR POPULAR MAIN STREAM DAILIES WITH A HIGH NUMBER OF READERS: NEW STRAITS TIMES, THE STAR, UTUSAN MALAYSIA AND HARIAN METRO FROM 01/01/2016 TO 22/12/2016

1. NEW STRAITS TIMES (NST)

Date of report	Title of report
10/3/2016	Shahnaz awarded RM30 mil muta'ah
16/3/2016	Court stays execution of RM30m muta'ah to Taib's former daughter- in-law
17/3/2016	Biggest muta'ah payment fair
9/10/2016	Stressed-out children
9/10/2016	Treatment methods for children with mental health issues
7/8/2016	Save our children
27/11/2016	Parents have their say
21/11/2016	Aircraft technician gets jail for two terror-related charges
31/5/2016	Permata can help nurture future generations of Malaysians: Najib
22/5/2016	Keep the smartphones away from your kids
16/7/2016	Time for THAT talk about birds, bees and predators
30/10/2016	How to make schools safer
28/10/2016	Education plays crucial role in enabling Malaysian children be financially better off
3/4/2016	Address issues at preschool level
25/5/2016	Need for greater parental involvement

7/8/2016	Save our children
27/11/2016	Parents have their say
21/11/2016	Aircraft technician gets jail for two terror-related charges
31/5/2016	Permata can help nurture future generations of Malaysians: Najib
22/5/2016	Keep the smartphones away from your kids
16/7/2016	Time for THAT talk about birds, bees and predators
30/10/2016	How to make schools safer
28/10/2016	Education plays crucial role in enabling Malaysian children be financially better off
3/4/2016	Address issues at preschool level
25/5/2016	Need for greater parental involvement

2. THE STAR

Date of report	Title of report
13/11/2016	Think about the children
29/8/2016	Move to amend law lauded
16/8/2016	Awie told to pay RM4,000 monthly child support
1/1/2016	Protect children in divorces
5/9/2016	Move to harmonise laws

3. UTUSAN MALAYSIA

Date of report	Title of report
20/12/2016	Terus perangi dadah demi generasi muda
18/12/2016	Mutaah: Berapakah nilai untuk seorang bekas isteri?
20/11/2016	Ibu pertahankan cucu, dituduh anak derhaka
19/11/2016	Bekas suami tidak serius arahan mahkamah
14/11/2016	Tolong bela nasib ibu tunggal
9/11/2016	Minta cerai atau kekal?
6/11/2016	Bolehkah suami dipenjarakan jika tak beri nafkah?
17/10/2016	Perubahan gaya hidup dan masalah mental
15/10/2016	Perjalanan duka seorang duda anak tiga
13/9/2016	Hak isteri, anak tuntut nafkah
30/8 2016	Jangan berkompromi keselamatan anak-anak
26/8/2016	Setuju pinda Akta 164
25 /8/2016	Poligami besar tanggungjawabnya
21/10/2016	Kumpulan sokongan ibu tunggal medan memperkasa wanita
14/10/2016	Jamin nafkah isteri, anak
31/7/2016	Jangan biar ibu tunggal ‘sasau’ kerana nafkah
30/7/2016	Bekas suami tuntut harta sepencarian
22/7/2016	Dona Marita dalam derita

UTUSAN MALAYSIA (Continued)

Date of report	Title of report
10/7/2016	Kecewa perangai adik-beradik kaki kutuk
25/6/2016	Ayah tak kisah Baju Raya Anak-anak
19/6/2016	Potong KWSP suami jika enggan beri nafkah
19/6/2016	Memahami tugas bapa sudah mencukupi
25/5/2016	Awie diperintah bayar nafkah anak RM1,600
24/3/2016	Dilema anak mangsa perceraian
18/3/2016	Bagaimana nilai mutaah ditentukan?
12/3/2016	Tabah jaga tiga anak OKU
18/2/2016	Nafkah hak isteri
5/2/2016	Baru rasa ada ‘suami’

4. HARIAN METR0

Date of report	Title of report
27/9/2016	Berdikari bersama anak
30/8/2016	Wanita dicerai jangan tinggalkan rumah
15/8/2016	Awie diperintah bayar RM4,000
12/10/16	Penderitaan Elly
23/10/16	Wanita terseksa tuntut nafkah
27/4/2016	Perjuangan hak anak-anak juga
21/10/2016	Kekal perintah beku akaun
15/8/2016	‘Kami rela ke sini’
15/6/2016	‘Takut nafkah entah ke mana’
6/12/2016	Cari nafkah seawall dinihari
2/12/2016	Kisah duka penghuni PPR
25/8/2016	Pinda berdasarkan tiga prinsip utama
12/9/2016	Berkorban demi tersayang

APPENDIX B

QUESTIONNAIRE

STUDENTS/UNDERGRADUATES

PROGRAMME : DOCTOR OF PHILOSOPHY

FACULTY OF LAW

UNIVERSITY OF MALAYA

TITLE : *A CRITICAL ANALYSIS OF MAINTENANCE LAWS CONCERNING NON-MUSLIM CHILDREN AND YOUNG PERSONS IN MALAYSIA*

OBJECTIVE OF STUDY : To analyses maintenance laws concerning non-Muslim children in Malaysia in order to find out the weakness that exist and at the same time to recommend reforms to rectify the said weakness

OBJECTIVE OF THIS SURVEY : To examine the perceptions of the respondents in order to see whether parents still have a duty to maintain their children when they reach the age of 18 years at least until they obtain their first degree

PART A GENERAL INFORMATION

Please tick (√) the relevant box

1. Sex:	**1**	**Male**	
	2	**Female**	
2. Nationality:	**1**	**Malaysian**	
	2	**Non-Malaysian**	
3. Race:	**1**	**Malay**	
	2	**Chinese**	
	3	**Indian**	
	4	**Sikh**	
	5	**Bumiputra from Sabah/ Sarawak**	
	6	**Others**	
	(Please specify _____)		
4. Numbers of sibling:	**1**	**No siblings**	
	2	**1-2 persons**	
	3	**2-3 persons**	
	4	**5-6 persons**	
	5	**7-8 persons**	
	6	**9-10 persons**	
	7	**More than 10 persons**	
Age:	**1**	**18-20 years**	
	2	**21-23 years**	

	3	24-26 years	
	4	27-29 years	
5. Current Place Of Residence:	1	With Parents	
	2	With Relatives	
	3	Residential College/Hostel	
	4	Renting a Room/House	
6. Location of Parents House:	1	Urban Area	
	2	Rural Area	

			Mother	Father
8. Parents' Employment:	1	Government Employee		
	2	Private Sector Employee		
	3	Self-Employed		
	4	Unemployed		
9. Monthly Income:(RM)	1	No Income		
	2	Less than 1000		
	3	1001-2000		
	4	2001-3000		
	5	3001-4000		
	6	4001-5000		
	7	More than 5000		

10. Cost of your study paid by:	1	Parents	
	2	Relatives	

3	PTPTN	
4	Scholarship	
5	Loans	
6	Others	

11. Your monthly Expenses (RM):	1	Less than 300	
	2	301-600	
	3	601-900	
	4	901-1200	
	5	1201-1500	
	6	More than 1500	

You may tick more than one answer for Question 12

12. Monthly expense on the following:

1	Food	6	Entertainment
2	Clothes	7	Rent/Accommodation
3	Travelling	8	Bills
4	Books	9	Handphone
5	Tuition	10	Others

PART B: PARENTS DUTY TO MAINTAIN THEIR CHILDREN

Instruction: Circle the answer based on the scale of answers given below:

1. = Strongly Disagree
2. = Disagree
3. = Not sure
4. = Agree
5. = Strongly Agree

D1	Parents have a duty to support/maintain their children.	1	2	3	4	5
D2	The duty of parents to maintain their children is a moral duty.	1	2	3	4	5
D3	The duty of parents to maintain their children is a legal duty.	1	2	3	4	5
E1	The duty of parents to support their children ends when the child reaches the age of 18 years or complete his or her SPM.	1	2	3	4	5
E2	The parents' duty to support their children ends when he or she completes his or her STPM/A-levels/Matriculation/Diploma.	1	2	3	4	5
E3	The parents' duty to support their children ends when he or she obtains her first degree.	1	2	3	4	5
E4	The parents' duty to support their children ends when he or she gets a job.	1	2	3	4	5
E5	The parents' duty to support their children ends when he or she gets married.	1	2	3	4	5

PART C: INVOLVEMENT OF YOUR PARENTS IN YOUR STUDIES

Instruction: Circle the answer based on the scale of answers given below:

1. = Strongly Disagree
2. = Disagree
3. = Not sure
4. = Agree
5. = Strongly Agree

My Parents:

PN1	**Ask me frequently about my studies.**	**1**	**2**	**3**	**4**	**5**
PN2	**Advise me to study hard.**	**1**	**2**	**3**	**4**	**5**
PN3	**Provide the necessary facilities for me to study.**	**1**	**2**	**3**	**4**	**5**
PM1	**Monitor my progress in my studies.**	**1**	**2**	**3**	**4**	**5**
PM2	**Make sure that I do not unnecessarily spend money.**	**1**	**2**	**3**	**4**	**5**
PM3	**Make sure that I inform them about my results in my exams or assignments.**	**1**	**2**	**3**	**4**	**5**
PB1	**Give me money for my daily expenses when I ask them.**	**1**	**2**	**3**	**4**	**5**
PB2	**Control my expenditure.**	**1**	**2**	**3**	**4**	**5**
PB3	**Advise me to reduce my expenses on my handphone bills.**	**1**	**2**	**3**	**4**	**5**

PART D: NON-MUSLIM MAINTENANCE LAWS IN MALAYSIA

The Malaysian law provides that non-Muslim parents' duty to maintain their child ends when the child reaches the age of 18, unless he or she is physically or mentally disabled. However, with reference to Muslims, the law provides that the parents' duty to maintain their children continues until the completion of their first degree.

Based on the legal provision stated above, please thick (√) the relevant box and give reasons for your answer (wherever applicable).

		Yes	No
1.	Do you know that a person reaches the age of majority when he or she is 18 years old?		
2.	Do you agree that parents should stop maintaining their children once they reach the age of 18?		
3.	Do you think that an average 18 years old in Malaysia without any disabilities has the capacity to earn a living for himself or herself?		
4.	Do you think that an 18 years old in Malaysia has the same capacity to earn a living as an 18 years old in a Western country?		
5.	Do you think that the Government should create an awareness among the parents about their duty to continue maintaining their children although they have reached the age of 18 years?		

Why?

_____

_____

_____

6. **Are you aware that parents who are earning and have to pay income tax to the Government are given a tax deduction for the cost of their children's tertiary education?**

7. **Are you aware that parents who are earning and have to pay income tax to the Government are given a tax deduction for the cost of their children's tertiary education?**

Why?

_____

_____

_____

7. **If Parliament does not change the law, do you think that the Government should then provide free tertiary education in public Universities in the event certain parents do not want to finance the cost of their children's education?**

Why?

_____

_____

_____

8. **If your answer to the above question is yes, do you think that the Malaysian Government would be able to finance the cost of tertiary education in public universities bearing in mind that Malaysia is still a developing nation?**

Why?

_____

_____

_____

APPENDIX C

INTERVIEW WITH SOCIAL WORKERS

1. Good Morning. (To thank social worker for agreeing to be interviewed.) To ask about history behind the shelter home. When it was established? Reasons for establishment.

2. Number of residents at time of establishment?

3. Number of single mothers now?

4. How did the single mothers know about the Centre?

5. At which stage do they come here? When still pregnant or after they have delivered their child?

6. In your opinion what are the reasons single mothers leave their families when they find out they are pregnant?

7. I would like to focus on one particular reason,:- the financial ability to raise their children. The single mothers may be worried that they would not be financially able to look after their children. Have they attempted to ask the child's father for financial support?

8. Are they aware that their child has a right under the law to claim for a monthly allowance from his or her father?

9. In your opinion, do you think that the statistics of single mothers who leave their homes and families ***may reduce*** if they are aware of their child's rights to claim a monthly allowance from the putative father?

10. In your opinion, what are the measures that should be taken to make these single mothers know that they could claim such maintenance for their children from the respective fathers?

11. Who do you think should make sure that these measures are taken?

12. Currently, how are these single mothers and the children supported at the Centre?

13. Have there been any cases in your Centre where the single mothers have tried asking their child's father for financial support for the child?

14. What are the problems that these young women may face in an event they proceed to ask the father of their child for maintenance?

15. The courts have decided that in order to claim maintenance for an illegitimate child, one of the conditions that need to be fulfilled is to prove the child's paternity by doing a DNA test. What is your opinion on this condition?

16. Assuming the Court has ordered the father to pay maintenance to his illegitimate child. The next issue that arises is whether he would comply with the said order. The law provides that in an event the said father fails to comply with the said order, the punishment to be imposed would be either a fine or imprisonment for a month for every month he has failed to pay the said maintenance. What is your **opinio**n on this punishment?

17. The Child Act provides that the maximum punishment – RM20, 000. But the problem is that the definition of "chid" does not include illegitimate child. What is your opinion?

18. In an event the single mother is unsuccessful, what would be the future of the said child?

19. Last question – do you think that the Parliament should take any steps to amend the existing laws in order to protect the rights of illegitimate children to claim for maintenance from their parents?

APPENDIX D

INTERVIEW WITH SINGLE MOTHERS

1. The writer thanks the single mother for agreeing to the interview (The writer promises anonymity).

2. How long is it since you came to this Centre?

3. How did you know about this Centre?

4. Were you expecting when you came to this Centre?

5. Who will help you financially to look after your child once you have delivered your baby?

(Writer explains that she will be asking personal questions. If the respondent does not want to answer, it is alright.)

6. What was your reaction when you found out that you were pregnant?

7. What were the reasons you left your family?

8. (The writer will be focusing on one reason: financial ability to look after the child). Have you thought about asking the father of your child for a monthly allowance to look after your child?

9. Do you know that your child has a right under the law to ask for monthly allowance from his or her father?

10. If you had known about this, do you think you would have asked for it?

11. What are the problems, do you think you would have faced if you had asked for it?

12. Do you think other single mothers who are going through similar problems should be made aware of their right under the law?

13. The law states that fathers who do not follows the Court's order to pay a monthly allowance to their illegitimate children would be either fined or jailed for 1 month for every unpaid month. Do you think the punishment is adequate?
14. One last question, in your opinion what are the steps that need to be taken to protect the rights of children born out of wedlock?

Thank you.

APPENDIX E

LIST OF RECIPROCATING COUNTRIES IN THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1949

SCHEDULE [Sections 2, 11 and 12]

RECIPROCATING COUNTRIES

Australia

- State of New South Wales;
- State of Queensland;
- State of South Australia;
- State of Tasmania;
- State of Victoria;
- State of Western Australia;
- Capital Territory of Australia;
- Territory of Norfolk Island;
- Northern Territory of Australia;
- Territory of Papua;
- Cocos (Keeling Island);

Brunei, State of;

Ceylon, Dominion of;

England

Guernsey, Bailiwick of the Island of;

Hong Kong Special Administrative Region of the People's Republic of China;

India (excluding Jammu and Kashmir),

Jersey, Island of; Republic of;

Man, Isle of;

New Zealand;

- Cook Islands (including Niue);
- Western Samoa, Trust Territory of;

Northern Ireland;

Norfolk Island;

Pakistan, Republic of;

Singapore, Republic of;

South Africa, Union of;

Wales.

APPENDIX F

LIST OF RECIPROCATING COUNTRIES IN THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1992 (c. 56)

- Albania
- Algeria
- Anguilla
- Antigua
- Austria
- Australia (Will Trace If the Territory Is Known)
    - Australian Capital Territory
    - Cocos (Keeling) Islands
    - Gilbert and Ellice Islands
    - New South Wales
    - Queensland
    - South Australia
    - Tasmania
    - Territory of Christmas Island
    - Victoria
    - Australia
- Bahamas
- Barbados
- Belize
- Belgium
- Bermuda
- Bosnia And Herzegovina
- Botswana
- Brazil
- British Solomon Islands
- Brunei
- Bulgaria
- Burina Faso
- Canada (Will Trace If the Provinces Is Known)
    - Alberta
    - British Columbia
    - Manitoba
    - New Brunswick
    - Newfoundland and Labrador
    - Northwest Territories
    - Nova Scotia
    - Nunavut
    - Ontario
    - Prince Edward Island
    - Saskatchewan
    - Yukon Territory
- Cape Verde

Cayman Islands
Central African Republic
Chile
Croatia
Czech Republic
Cyprus (Northern Cyprus – See Turkey)
Denmark
Dominica
Ecuador
Estonia
Falkland Islands & Dependencies
Fiji
Finland
France
Gambia
Germany
Ghana
Gibraltar
Greece
Grenada
Guatemala
Guyana
Guernsey
Haiti
Holy See
Hong Kong
Hungary
Iceland
India
Ireland – The Republic Of
Isle of Man
Israel
Italy
Jamaica
Jersey
Kenya
Kiribati
Latvia
Lesotho
Lithuania
Luxembourg
Macedonia (Excluding Yugoslavian Republic)
Malawi
Malaysia
Malta
Mauritius
Mexico
Monaco
Montenegro
Montserrat

Morocco
Naura
Netherlands
New Zealand
Niger
Nigeria
Norfolk Island
Norway
Pakistan
Papua New Guinea
Philippines
Poland
Portugal
Romania
St Christopher (Kitts) And Nevis
St Helena
St Lucia
St Vincent
Serbia
Slovenia
South Africa
Spain (Includes the Canary Islands
Sri Lanka
Surinam
Swaziland Protectorate
Sweden
Switzerland
Tanzania (Except Zanzibar)
Trinidad And Tobago
Tunisia
Turkey
Turks And Caicos Islands
Tuvalu
Uganda
Uraine
United States
Upper Volta
Uruguay
Virgin Islands
Zambia
Zanzibar
Zimbabwe

APPENDIX G

LIST OF RECIPROCATING COUNTRIES IN THE FAMILY LAW REGULATIONS 1984 - SCHEDULE 2

Reciprocating jurisdictions

(regulation 25)

Austria
Belarus
Belgium
Brunei
Canada, the following Provinces and Territories:
- Alberta
- British Columbia
- Manitoba
- New Brunswick
- Newfoundland
- Northwest Territories
- Nova Scotia
- Nunavut
- Ontario
- Prince Edward Island
- Saskatchewan
- Yukon

Territory of Christmas Island
Territory of Cocos (Keeling) Islands
Colombia
Cook Islands
Cyprus
Czech Republic
Denmark
Estonia
Fiji
France
Germany
Gibraltar
Kazakstan
Hong Kong
India
Republic of Ireland
Italy
Kenya
Luxembourg
Malawi

Malaysia
Malta
Nauru
Niue
Netherlands
New Zealand
Norway
Papua New Guinea
Poland
Portugal
Sierra Leone
Singapore
Slovak Republic
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Tanzania (excluding Zanzibar)
Trinidad and Tobago
Turkey
United Kingdom, including Alderney, Guernsey, Isle of Man, Jersey and Sark
United States of America
Western Samoa
Zambia
Zimbabwe