

## Right of a Child to Maintenance: Harmonising the Laws in Malaysia

By

Dr Nora Abdul Hak, Dr Roslina Che Soh and Dr Noraini Hashim

Ahmad Ibrahim Kulliyah of Laws

International Islamic University Malaysia

P.O. Box 10, 50728 Kuala Lumpur, Malaysia

TEL. OFFICE: 603-61964230/4317/4318

FAX: 603-61964854

Email: [ahnora@iiu.edu.my](mailto:ahnora@iiu.edu.my)

[roslinac@iiu.edu.my](mailto:roslinac@iiu.edu.my)

[norainim@iiu.edu.my](mailto:norainim@iiu.edu.my)

### Abstract

*One of the issues in child's maintenance is the maximum age of a child in which a father is still responsible over the maintenance. Under the Civil law, there is no provision which requires the parent to provide maintenance if the child is pursuing his/her tertiary education. The Islamic Family law provides eighteen years old as the maximum age for a child to still be entitled to maintenance. It is also provided that if the child is pursuing his/her tertiary education, claim for the educational expenses can be made at the Shariah court against the parent. There is no similar provision under the Law Reform Act, 19676. There are also other aspects in child's maintenance that can be harmonised under the existing laws in Malaysia. Thus, the paper will deliberate the right of a child to maintenance in Shariah and Civil law. Relevant legal provisions as provided for under the Malaysian laws i.e., the Law Reform Act, 1976 and the Islamic Family Law Act/Enactment and the practice of the Malaysian courts deliberating this right of a child will be the focus of the paper. Cases decided at the Shariah and Civil Courts relating to the claim of child's maintenance will be analysed to study the practice of it in Malaysia as well as its problems and restrictions. It is hoped that by analysing the current the legal provisions on child's maintenance and its practice in Malaysia, suggestions and recommendations can be made to further improve this area of law. Hence, the right of a child to maintenance as provided for under the law will be safeguarded.*

## Introduction

In Islam, a father is responsible to maintain his children. The responsibility is provided in Surah al-Baqarah: 233 to the effect:

‘...But he (the father) shall bear the cost of their food and clothing on equitable terms...’

In another verse;

“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.”<sup>1</sup>

Meanwhile in a hadith narrated by Aishah that Hindun binti Utbah said:

“O Rasulullah, Abu Sufyan is a stingy man. He did not give my children and me sufficient amount of maintenance unless I took it out of his knowledge. Rasulullah said, Take what is sufficient for you and your family in a good manner.”<sup>2</sup>

The obligation of father to maintain his children is due to three reasons namely:<sup>3</sup>

- a) relation due to marriage
- b) relation due to lineage
- c) possession over a person

However, the duty to maintain is subject to certain conditions.<sup>4</sup> Firstly, that the child still depends on others, as such a father has to maintain her daughter until she marries or having a job. Secondly, that he/she does not possess any assets and is not able to maintain himself/herself. And finally, that the father has the means to maintain his children. In the case where the father is unable to maintain, the duty will transfer to the person liable under *hukum syara'* to contribute to the maintenance of the children.

## Maintenance of Children under Islamic Family Law Federal Territories Act 1984 (hereinafter referred to as IFLA)

Section 72(1) of IFLA clearly specifies that it is the duty of the father to maintain his children whether they are in his custody or the custody of other person, as it is reasonable having regards to his means and station in life or paying the cost incurred. Maintenance according to the provision includes accommodation, food medical attention, and education. However, subsection 2 of the same provision stated that not only if the father is unable to maintain, but if he is also dead or his whereabouts are unknown, the duty shall shift to the male person liable under *hukum*

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<sup>1</sup> At Talaq: 7

<sup>2</sup> *Kitab Subul al-Salam*, Chapter 3, pp. 217-218

<sup>3</sup> Al-Shirbini, 2001, *Mughni al-Muhtaj*, Vol. 3, p. 542

<sup>4</sup> *Ibid.*

*syara*’ namely the paternal grandfather and the uncles. Obviously, the duty to maintain will not transfer to the mother even though she has the means as the responsibility shall be transferred to the male persons liable under *hukum syara*’.

### **The Law Applicable to Non-Muslims**

In Malaysia, the laws that guarantee the right to maintenance of a non-Muslim child are the Married Women & Children Maintenance Act 1950<sup>5</sup> (hereinafter shall be referred as MWCMA 1950) and Law Reform (Marriage & Divorce) Act 1976<sup>6</sup> (hereinafter shall be referred as LRA 1976). In general, application for children’s maintenance under these statutes could be at any time. In the Supreme Court’s case of *Saraswathy v Palakrishnan*,<sup>7</sup> the court held that there was no need for a divorce petition to be filed under section 93 of the LRA 1976 before maintenance order could be made in favour of children.

### **Parental Responsibility in Providing Maintenance**

Both MWCMA 1950 and LRA 1976 generally provide that parents are responsible towards their children’s maintenance. The provision of MWCMA 1950 states that the court shall order any person to make monthly allowance if he neglect or refuses to maintain **his** wife or legitimate child.<sup>8</sup> Whereas, the LRA 1976 provides that it is the duty of a parent to give maintenance, i.e., the basic necessity of life such as food, clothing, accommodation and education to their children whether they are in their custody or the custody of any other person, having regard to his or her means and station in life.<sup>9</sup> An issue that may arise at this juncture is whether both the parents are under a duty to maintain their children, or does the responsibility solely lie on the father? This is because of the difference in the wordings of the relevant provisions in both statutes.

Under section 3(1) of the MWCMA 1950, the term “any person” is used therein. Therefore, the question that arises is whether the term “any person” includes a mother. It is submitted that the use of the qualifying word “his” in relation to the child as well as the wife implies that “any person” could only refer to a man.

As for the LRA 1976, it seems that the provision placed the general duty to maintain a child to either parent. However, it is submitted that this provision is subject to another provision which specifically placed the responsibility to maintain on the father in the event of his refusal and neglect to maintain, desertion, during the pendency of any matrimonial proceedings or when the court placed the custody of the child in another person’s care.<sup>10</sup> Support can be found in majority of cases which established the principle that it is a father’s basic responsibility to provide maintenance for his children whether during marriage or after a divorce between the parents. For

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<sup>5</sup> See, section 3, MWCMA 1950

<sup>6</sup> See, sections 92-102, LRA 1976

<sup>7</sup> [1986] 2 MLJ 127

<sup>8</sup> See, section 3(1), MWCMA 1950

<sup>9</sup> See, section 92, LRA 1976

<sup>10</sup> See, section 93, LRA 1976

instance, in *Sivajothi a/p Suppiah v Kunathasan a/l Chelliah*,<sup>11</sup> the court came up with a strong statement that “ it is a settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past i.e., during the existence of the marriage. “In *Lau Hui Sing v Wong Chuo Yong (f)*,<sup>12</sup> the court stressed that it has been an accepted norm that the duty to maintain falls on the father. Similar principle is also expounded in of two recent cases of *Lim Siaw Ying v Wong Seng & Anor*<sup>13</sup> and *Teo Ai Teng v Yeo Khee Hong*.<sup>14</sup>

It is to be noted that while the basic duty to maintain a child lies on the father, the LRA 1976 also imposes on the mother the duty to contribute towards the maintenance of her child if the court satisfied that the father is incapable to provide and she is capable in doing so. On the other hand, the MWCMA 1950 is silent on this matter. Decisions in *Leow Kooi Wah v Ng Kok Seng Philip*<sup>15</sup> and *Wong Kim Foong v Teau Ah Kan*<sup>16</sup> seem to support this rule. In *Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy*,<sup>17</sup> the judge did recognize the wife’s obligation to support a child but maintain that it is only secondary to the husband’s basic duty of providing child’s maintenance. In this case, the court considers the capacity of the husband, his ability to pay and the realities of the husband or the parties’ financial position when deciding on the quantum of maintenance.

The provision of the law and the decision of the above cases seem to suggest that the mother’s duty to maintain is only secondary to that of the father and it may be imposed if the court is really satisfied that the father could not fulfill his duty or he could not provide sufficiently for the child’s maintenance and the mother is financially capable.

### **Meaning of Child**

The provision of LRA 1976 explains ‘child’ as ‘child of the marriage’ as defined in section 2 and who is below the age of 18 years. ‘Child of marriage’ is defined in section 2 to mean 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. ‘Child’ in section 2 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.<sup>18</sup> On the other hand, the MWCMA 1950 makes no provision for the meaning of child. It only confers rights to both legitimate and illegitimate children to claim for maintenance from the biological father.

One issue that may arises from the definition of child under the LRA 1976 is whether the phrase ‘illegitimate child of, and a child adopted by’ should be read conjunctively or disjunctively. If it is read conjunctively this would mean than an illegitimate child would have to be adopted by either of the parties to the marriage before it could claim maintenance under the LRA 1976. On the other hand, if it is read disjunctively then an illegitimate child could claim maintenance under

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<sup>11</sup> [2006] 3 MLJ 184

<sup>12</sup> [2008] 5 MLJ 846

<sup>13</sup> [2009] 4 MLJ 409

<sup>14</sup> [2009] 9 MLJ 721

<sup>15</sup> [1995] 1 MLJ 582

<sup>16</sup> [1998] 1 MLJ 359

<sup>17</sup> [2004] 6 MLJ 249

<sup>18</sup> See, section 87, LRA 1976

the LRA, 1976 without having to be adopted first. Unfortunately there are no cases reported on this issue to date.

It is submitted that the above provision should be read disjunctively so that an illegitimate child has an option to claim for maintenance either under the LRA 1976 or the MWCMA 1950. In fact it would be beneficial for him or her to apply under the LRA 1976 when compared to the MWCMA 1950, as he or she would then be able to claim from his or her father and mother.

Unlike the definition of child under the LRA, child under IFLA does not include illegitimate child<sup>19</sup> (unless the child is born as a result of a rape), besides child of both parties or either party to the marriage as a member of a family or adopted child<sup>20</sup> whether adopted by way of the Registration of Adoptions Act, 1952 or by custom or tradition. The duty to maintain legitimate child and adopted refers back the reasons father to maintain child by reasons of relation due to marriage or due to lineage or possession.<sup>21</sup>

### **Duration for maintenance**

The duration of maintenance order is spelt out in section 79 of the IFLA. Generally, the order expires on the child attaining the age of 18 years old.<sup>22</sup> The court may however, extend the order to cover such further period if it thinks reasonable, to enable the child to pursue further or higher education or training.<sup>23</sup> The court may do so on the application of the child or any other person. This provision is very much welcome as it reflects the reality.

On the other hand, the MWCMA 1950 does not provide for the duration of maintenance of a child. It only mentions that the father must maintain his legitimate child as long as he is 'unable to maintain himself'.<sup>24</sup> It has been argued that the above term seems to suggest that a child under this Act should be anyone who is unable to maintain itself irrespective of age.<sup>25</sup> Hence, if the child is aged 20 years and is mentally retarded, and therefore is 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 is unable to maintain itself, should be eligible to be maintained.<sup>26</sup>

The LRA 1976 specifically explain that a child's maintenance shall expire if the child has attained the age of 18 or if the child is under physical and mental disability, on the ceasing of the disability.<sup>27</sup> One major issue that arises from this provision is whether or not the law should

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<sup>19</sup> Section 80(1), IFLA

<sup>20</sup> Section 78(1), IFLA

<sup>21</sup> Refer n. 3

<sup>22</sup> Mimi Kamariah, *Family Law in Malaysia* (Kuala Lumpur: Malayan Law Journal Sdn. Bhd. 1999), p. 147.

<sup>23</sup> Section 80 (b)

<sup>24</sup> See section 3(1), MWCMA 1950

<sup>25</sup> See Mimi Kamariah Majid, *Family Law in Malaysia*, (Kuala Lumpur, Malayan Law Journal), 1999 at p. 312.

<sup>26</sup> Ibid.

<sup>27</sup> See section 95, LRA 1976

expend the parental obligation to maintain children above 18 years for educational purposes.<sup>28</sup> The above issue was raised in two cases, *Ching Seng Woah v Lim Shook Lin*<sup>29</sup> and *Punithambigai a/p Ponniah v Karunairajah a/l Rasiah*.<sup>30</sup> In the first case, the Court of Appeal held that in appropriate cases, involuntary financial dependence is a physical disability under section 95 of the LRA 1976. The court here ordered the father to pay for the children's educational expenses until each of them has obtained their first university degree.

The above decision was later followed and applied by the Court of Appeal in *Punithambigai a/p Ponniah v Karunairajah a/l Rasiah*<sup>31</sup> where the Court of Appeal brought involuntary financial dependence within the meaning of 'physical or mental disability' in section 95 of LRA 1976. Therefore, a child who has reached the age of 18 years and intends to pursue his tertiary education would still be entitled to receive maintenance from his parents as he would fall under the proviso in section 95. Unfortunately when this case went on appeal to the Federal Court, the Federal Court overruled the Court of Appeal's decision and said that the phrase 'physical or mental disability' in section 95 should be given a literal meaning and therefore involuntary financial dependence cannot be brought within the meaning of physical disability.<sup>32</sup>

It is submitted that the LRA and also the Married Women and Children (Maintenance) Act 1950 should have similar provision with the IFLA since the decision of the court in deciding maintenance for the non-Muslims children strictly adheres the maximum age of 18 years as in the case of *Punithambigai Ponniah v Karunairajah Rasiah*.<sup>33</sup> With the present situation where quite a number of children are having the opportunity to pursue tertiary studies, it will dampen their spirit to pursue their study if their father who is not willing to maintain them is assisted with this provision.

### **Recovery of maintenance**

In comparison to section 98 of LRA (which is three years before the institution of the suit),<sup>34</sup> there is no such limitation period under the IFLA<sup>35</sup> and the court can order the father to pay maintenance for the benefit of the child. However, the accrued maintenance can only be applied if the applicant already has been granted with maintenance order and the father has failed to comply with the order.<sup>36</sup>

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<sup>28</sup>Nuraisyah Chua Abdullah, Parents 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

<sup>29</sup>[1997] 1 MLJ 109

<sup>30</sup>[2003] 2 MLJ 529 (COA); [2004] 2 MLJ 401 (FC)

<sup>31</sup>Ibid

<sup>32</sup>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?* Journal of Malaysian and Comparative Law, Vol. 32, 2005, Faculty of Law, University of Malaya, p. 109

<sup>33</sup>[2004] 1 LNS 87

<sup>34</sup>Recovery of arrears of maintenance is for 3 years only.

<sup>35</sup>Section 77 of IFLA

<sup>36</sup>*Sharifah Zaharah v Juatan Hussain* (1987) 6 JH 254.

The LRA 1976 allows a recovery of arrears of maintenance up to a maximum of 3 years before the institution of the suit.<sup>37</sup> Whereas, under the MWCMA 1950, although it provides that maintenance shall be payable from the date of such neglect or refusal or from such later date as may be specified in the order,<sup>38</sup> the courts however, have interpreted it otherwise. In *Amrick Lall v Sombaiavati*<sup>39</sup> the court followed an English decision (*Pilcher v Pilcher*<sup>40</sup>) and held that the court can issue a retrospective maintenance order or a maintenance order in arrears for not more than a year backwards. This ruling was followed in *Gangagharan v Sathiabama*.<sup>41</sup> However, in the case of *Lee Yu Lan v. Lim Thain Chye*, the judge in this case was of the opinion that accrued maintenance can be claimed from the date of neglect as provided in section 3 (1) of MWCMA 1950.

### Suggestions and recommendations

1. It is apparent that up to now there is no guideline in deciding the amount of maintenance for the benefit of both the Muslims and non-Muslims children in both the Civil and Syariah Courts. The Department of Islamic Judiciary (*Jabatan Kehakiman Syariah*) has taken a leap in setting up the Family Support Division or also known as the “*Bahagian Sokongan Keluarga*” to look into the matters involving issues related to maintenance of children and has come out with a guideline as to the amount of maintenance to be awarded to the child as below:<sup>42</sup>

### Formula in Deciding Amount to be Awarded for Maintenance of Children

No of Children	Rate (%)	(RM)								
		1000	1500	2000	2500	3000	3500	4000	4500	5000
<b>1</b>	23%	230	345	460	575	690	805	920	1035	1150
<b>2</b>	33%	330	495	660	825	990	1155	1320	1485	1650
<b>3</b>	40%	400	600	800	1000	1200	1400	1600	1800	2000
<b>4 and above</b>	53%	530	795	1060	1325	1590	1855	2120	2385	2650

<sup>37</sup> See section 98 LRA 1976

<sup>38</sup> Section 3(3) MWCMA 1950

<sup>39</sup> [1973] 2 MLJ 191

<sup>40</sup> [1956] 1 WLR 298

<sup>41</sup> [1979] 2 MLJ 77

<sup>42</sup> This formula is to be applied per child per month and if the numbers of child is more than one, the rate will increase according to net income of the father. In determining the rate to be awarded, the basic necessities costing on children which includes accommodation, clothing, food and education; the ages of the children and the net salary of the father has been taken into consideration.

It is hope that the formula or guideline can assist the judges be it in a Civil or Shariah Court in awarding the mother with a more suitable amount of maintenance of children that fits to the cost of living at present.

2. It is also recommended that the provision relating to the duty of person to maintain should be harmonized where the duty to maintain by the father under the LRA should be extended to the person liable namely the paternal grandfather and the paternal uncle similarly under the IFLA.
3. As to recovery of maintenance, it is suggested that the LRA should allow maintenance of a child to be recovered even it accrued due more than three years before the institution of the suit similar to the IFLA.