



MAINTENANCE OF MARRIED WOMEN
AND CHILDREN:
A COMPARATIVE STUDIES
UNDER THE CIVIL LAW AND SYARIAH

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THIS DESSERTATION IS SUBMITTED
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CHAPTER 1

MAINTENANCE OF MARRIED WOMEN AND CHILDREN

INTRODUCTION

Civil Law

In the English Common Law rules, relating to the maintenance of a spouse and children were the inevitable consequence if the doctrine of unity of legal personality. The wife, lacking of capacity to hold property and to contract, could neither own the bare necessities of life nor enter into a binding contract to buy them. One of the essential obligations imposed upon a married woman is that she could in no circumstances be held liable to maintain her husband.¹

A wife cannot sue her husband in tort save for the protection or security of her property.² This precluded her from enforcing her right by action if her husband failed to fulfill his duty to maintain her.³

The law relating to the status, rights and obligation of married woman in Malaysia is contained in the Married

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1. P.M. Bromley & N.W. Lowe - Bromley's Family Law page 586.
 2. Married Women Ordinance 1957, section 9.
 3. Supra note 1.

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Women Ordinance 1957.¹ The ordinance applies for all married woman, subject in the case of Muslim married woman, and their property right and obligations to the provisions of Muslim law and the custom of the Malays governing the relations between husband and wife.²

The married woman and Children (Maintenance) Act, 1950, provides that if any person neglects or refuses to maintain his wife, a court upon due proof thereof may order such person to make a monthly allowance for the maintenance of his wife in proportion to the means of such person as the court consider reasonable.³

If any person wilfully neglects to comply with any order made under this Act, the court, which made such order may, for every breach thereof, by warrant, direct the amount due to be levied in the manner by law provided for imprisonment for a term which may extend to one month for each month's allowance remaining unpaid.⁴

Action for maintenance against the husband can be

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1. No. 36 of 1957 (Reprinted 1973).
 2. Ahmad Ibrahim - Family Law in Malaysia and Singapore (1984) 2nd Edition, at page 117.
 3. Married Women & Children (Maintenance) Act 1950, (Revised (1981)); section 3.
 4. Ibid section 4.

brought by a wife during or after the matrimonial proceeding.¹
However, it is provided that a wife who lives in adultery¹
or refuses to live with her husband when there is an offer²
to maintain her on condition of her living with her husband²
is not entitled to receive any maintenance from her husband.

The maintenance Orders (Facilities for Enforcement)
Act, 1949,³ provides for the enforcement of maintenance
orders made in peninsular Malaysia in a number of British
Commonwealth countries.

Provision for the enforcement of maintenance order by
the making of attachment of earnings orders was made by the⁴
Married Woman and Children (Enforcement) Act, 1968.

As regards to the maintenance of children, it is said
that a father was under a duty to maintain his legitimate
minor children and to provide them with food, clothing,
lodging and other necessaries. This do not preclude his
duty from maintaining his illegitimate child.

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1. Ibis section 5(2)
 2. Married Women and Children (Maintenance) Act 1950, (Revised (1981); section 5(1)
 3. No. 55 of 1949 (Revised in 1971 as Act 34).
 4. No. 8 of 1968

The Married Woman and Children (Maintenance) Act 1950 provides the obligation to maintain his legitimate child where if any person neglects or refuses to maintain his legitimate child which is unable to maintain itself, a court may order such person to make a monthly allowance for the maintenance of such child in proportion to his means as to the court seems reasonable, and where a person fails to maintain his illegitimate child which is unable to maintain itself, the court may order such person to make such monthly allowance, as to the court seems reasonable.

The Married Woman and Children (Maintenance) Act 1950 provides the obligation to maintain his legitimate child where if any person neglects or refuses to maintain his legitimate child which is unable to maintain itself. a court may order such person to make a monthly allowance for the maintenance of such child in proportion to his means as to the court seems reasonable, and where a person fails to maintain his illegitimate child, which, is unable to maintain itself, the court may order such person to make such monthly allowance, as to the court seems reasonable.

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1. Act 263 (Revised 1981).
 2. Married Woman and Children (Maintenance) Act, 1950 (Act 263); section 3.
 3. Act 263 (Revised 1981).
 4. Married Women and Children (Maintenance) Act. 1950 (Act 263); section 3.

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In Kulasingam V. Rasamah , the High Court held that the Age of Majority Act, 1971 (Act)² is applicable in applications under the Married Women and Children (Maintenance) Act, 1950 and therefore maintenance could not be obtained for a girl who was over 20 years.

The Married Women and Children (Maintenance) Act, 1950 (Revised 1981) has no application to any person professing the religion of Islam and whose wife or whose legitimate or illegitimate child, if as the case may be, professes the religion of Islam,³ and the Act shall also not apply in the case of any claim for maintenance made by a Muslim against a Muslim.

The duty to maintain may neatly be divided into two:-

- 1) the duty between spouses inter se, and
- 2) the duty of the spouses as parents to maintain their⁴ children.

1. (1981) 2 MLJ; at page 36.

2. Married Women and children (Maintenance) Act, 1950 (Act 263); section 7.

3. Married Women and Children (Maintenance) Act, 1950 (Act 263); section 13.

4. There is a view that it is irrational to separate them in this way where the parent who is also the caregiver is himself or herself in receipt of maintenance because of the proper discharged of the parents duty towards the children also requires that the caregiver's need be adequate met. See Echolar and Maclean, Maintenance after Divorce (1986).

There is an obvious difference between these two relationship which is worth while 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. It bears remembering that while divorce and annulment severs 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 parents to maintain their children to be more or less the same whether the question is raised during the continuance of a marriage or after its termination pursuant to a court order. While there may be persuasive reasons to a court order. While there may be persuasive reasons to commit the duty of ex-spouses to maintain each other after they had their relationship terminated by the court, this fact should not alter the continuance of their duty towards their children.

Islamic Law

Similar to Civil Law. a wife is entitled to reasonable maintenance from her husband during marriage, and she is entitled to be maintained by her husband during 'iddah on the same scale as before the divorce, conditionally on

1. Leong Wai Kum - The Duty To Maintain Spouse And Children During Marriage (1987) MLR; p.56

submitting to her husband's control as regards her place of residence and general behaviour.

According to the Shafie school, a wife who has been irrevocably divorced cannot claim maintenance during her period of 'iddah from her husband unless she is pregnant by him¹. The same applies to the wife who is nushuz² also to a woman whose marriage has been dissolved by her husband's death³.

The obligation to maintain one's child extend beyond food, clothing and lodging to education and preparation for adulthood⁴. A father is bound to maintain his minor sons until they arrive at puberty and his unmarried widowed or divorced daughters but is not obliged to maintain his adult sons, unless they are disabled by infirmity or disease⁵ and it is his duty to maintain whether or not his children are

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1. Ahmad Ibrahim - Family Law in Malaysia and Singapore (1984) 2nd Edition, MLJ at page 56.
 2. Keith Hodgkinson - Muslim Family Law; A Sourcebook (1984) Groom Helm London and Canberra at page 147.
 3. Supra note 18.
 4. Ibid.
 5. Islamic Family Law (Federal Territory) Act, 1984; Act 305, section 72.

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in his custody or the custody of any other person . In Alus
2
V. Mahmood ; a husband is not liable for the maintenance of
the children of the marriage after divorce, unless and until
the Qadhi has made an order for their maintenance. But they
are liable for past maintenance of his children if directed
by the Qadhi.

As regards to the illegitimate children, it is provided
in Selangor and Federal Territory that if a woman neglects
or refuses to maintain her illegitimate child who is unable
to maintain himself or herself, the Court, may upon due
proof order the women to make such monthly allowance as the
court think reasonable; 3
and if the claim is made against
the putative father, it shall be brought in the Magis-
trate's Court, which may order him to make such monthly
allowance as the court think reasonable. 4

Although the obligations of maintenance are supposed to
reflect legally the interest the maintenance has in
inheriting from the person maintained and socially the
concept of the extended family, there is in no case any

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1. E.N. Taylor "Malay Family Law" (1937), Journal of the Malayan Branch of The Royal Asiatic Society p.67 as quoted by Ahmad Ibrahim - Family Law in Malaysia and Singapore (1984) 2nd Edition, Malayan Law Journal at pg.280.
 2. (1937) 15/1 JMBRRAS 67.
 3. Islamic Family Law (Federal Territory) Act, 1984: (Act 303) Section 80(1).
 4. Ibid Section 80(2).

rule such as that in the law of inheritance that both parties must be Muslims for the obligation to arise.

CHAPTER 2

MAINTENANCE OF MARRIED WOMEN

Definition Of Maintenance

Maintenance concerns the economic aspect of Family Law. The Osborn Law Dictionary defines maintenance as:-

"The supply of the necessaries of life for a person."

Thus maintenance is not only confine to money provision but also other necessaries or basic needs such as shelter, clothing, education and so on as Harman J said:-

"Maintenance does not only mean the food a wife puts in her mouth. It means the clothes on her back, the house in which she lives, and the money which she has to have in her pocket... Maintenance cannot mean only mere subsistence .¹

Provision Of Maintenance Under The Act

At common law the husband's duty to maintain his wife flowed from consortium. The duty was owed for only so long as consortium existed such that if the wife should grossly misbehave such as committing adultery, she would no longer be entitled to be maintained by her husband.

1. Re Bortwick, Deceased (1949); ch. 395 at page 401.

The law pertaining to maintenance of a wife during the subsistence of a marriage in Peninsular Malaysia is governed¹ by the Married Women and Children (Maintenance) Act 1950² which is applicable to non-Muslims only and made in the Sessions Court or the Court of First Class Magistrate.³

The Married Women and Children (Enforcement of Maintenance)⁴ Act 1968, which came into force on the 21st. March, 1968 and like the Married Women and Children (Maintenance) Act 1950 applicable to Peninsular Malaysia only, is to provide for better and more effective method of enforcing order of maintenance under the 1950 Act. This Act, as opposed to the Married Women and Children (Maintenance) is applicable to Muslims i.e. enforcement of order made by the Syariah Courts.⁵

As for Sabah and Sarawak they are governed by the Maintenance Ordinance 1959⁶ and the Criminal Procedure Code⁷ respectively. Provisions are also made for the enforcement

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1. Act. No. 263, (Revised 1981).
 2. Married Women and Children (Maintenance) Act 1950. Section 13.
 3. Ibid; section 4.
 4. Act 356 (Revised 1983).
 5. Ibid; section 14.
 6. No. 7 of 1959.
 7. Chapter 62 of 1947; Edition of the Laws of Sarawak.

of maintenance orders made in Sabah and Sarawak in a number
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of British Commonwealth countries .

A wife or wives are entitled to a reasonable maintenance from the husband and the children are entitled for maintenance from the father.

The Law Reform (Marriage and Divorce) Act, 1976² also provides provisions as regards the maintenance of wife. Section 77(1) of the Act provides that:-

- (1) The court may order a man to pay maintenance to his wife or former wife;-
- (a) during the course of any matrimonial proceedings;
 - (b) when granting or subsequent to the grant of a decree of divorce or judicial separation.
 - (c) if, after a decree declaring her presumed to be dead, she is found to be alive.

Section 3 of the Married Women and Children (Maintenance) Act 1950, provides that:

If any person neglects or refuses to maintain his wife

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1. Maintenance Orders (Facilities for Enforcement) Act 1959, Act 34 whereas the Maintenance Orders (Facilities for Enforcement) Act 1949, (No. 55 of 1949, Revised in 1971 as Act 34) provides for maintenance orders made in Peninsular Malaysia in a number of British Commonwealth countries.
 2. Act 164 which comes in to effect on the 1st. March 1982 and is also applicable to Sabah and Sarawak.

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.

Before a maintenance order under the Married Women and Children (Maintenance) Ordinance, 1950 can be rescinded or varied by a Court, the person applying for it, must give evidence before the Court either of a change in his circumstances or some other good reason.

Power Of Court To Vary Orders For Maintenance

In the case of Lee Swee Peng V. Koon Kum Keng,¹ the husband applied to the Magistrate Court to rescind or vary the maintenance order made in favour of his 3 year old child on the ground that he could not afford the amount ordered i.e. \$50/- per month. The Magistrate varied the order of maintenance from \$50/- to \$30/- on the basis that the husband in order to meet the maintenance of the child to exercise strict economy in his expenditure." On appeal by the wife to the High Court it was held that before a maintenance order under the Married Women and Children (Maintenance) Ordinance, 1950, can be rescinded or varied by a Court there

1. (1954) 20 MLJ 260.

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 and since that is the only ground (i.e. the husband could not afford due to his low income) upon which the Magistrate varied the order, the order as varied cannot stand.

Penalty For Willfully, Neglects To Comply With The Order.

If such a person willfully neglects to comply with the order, the court may direct the amount to be levied in the manner by law provided for levying fines imposed by such court, or may sentence him to imprisonment for a term which may extend to one month for each month's allowance remaining unpaid.

In the case of Yap Kim Swee V. Phua Thiam Lee¹ the husband was ordered to pay maintenance to his wife and children. He has defaulted for three months amounting to \$1,050/-. The wife applied for an order that the husband be sentenced to imprisonment.

The High Court upheld the decision of the Session Court judge in refusing to make the order as it felt that the

1. (1975) 1 MLJ 39.

respondent should be given a chance to be heard and pay the arrears.

In Sarawak, the Criminal Procedure Code¹ provides that if any person having sufficient means neglects, or refuses to maintain his wife, the court may upon due proof thereof order such person to make a monthly allowance for maintenance of his wife, such allowance not to exceed \$ 50/- a month in the whole for the wife and children. The mode of enforcing such order is the same as under Section 4 of the Married Women and Children (Maintenance) Act 1950.

In Sabah the Maintenance Ordinance, 1959 provides that 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 a for said in proportion to the means, of such person as to court seems reasonable and if any person neglects to comply with such order the court, may direct the amount due to be levied in a manner by law provided for levying fines imposed by a court, and may sentence him to imprisonment for a term not exceeding one month for each month's allowance remaining unpaid.²

1. Chapter 62 of 147 Edition of Laws of Sarawak section 335-340.

2. Ibid Section 3-5.