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**RIGHT OF A WIFE TO MAINTENANCE  
AND ANCILLARY RELIEF: A  
COMPARATIVE STUDY OF THE SHARIAH  
AND THE COMMON LAW**

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## PREFACE

Maintenance is one of the essential obligations imposed upon a married man to provide his wife at least necessities, and the married woman could in no circumstances be held to maintain her husband. Under the Common Law as **Harman J.** said in **Re Borthwick, Deceased; Borthwick V Beauvais [1949] CH 395**, with respect to maintenance of a wife, "**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 only mean only mere subsistence**".

Maintenance under the Islamic Law, is one of the rights of the wife that her husband should support her while she is living with him and she is under the obligation to look after the domestic comforts of the husband and to make herself available to him. However, if she refuses or fails to live with the husband, the latter is no longer under obligation to support him.

But does this duty to maintain continue in the event where a divorce occurs?

The idea of writing this dissertation is to look at the duty to maintain during the subsistence of a marriage and the ancillary relief for members of the family on divorce, under Islamic Law (with reference to the Shariah Law implemented in Malaysia) and under the Common Law. This paper is also meant to look at



the guidelines followed by the English Courts and the Shariah Courts in exercising their discretion in making financial orders.

In dealing with the subject, I have divided this work into five chapters. The first is introduction to this dissertation. It introduces the meaning of maintenance and the duty to maintain under the Common Law.

Accordingly, chapter two deals with ancillary relief under the Common Law. Here, the writer also points out matters that are to be considered by the court before exercising its discretion in giving any orders for example the income, earning capacity, property and other financial resources which each of the parties to marriage has, the needs of the parties to the marriage has or is likely to have in the foreseeable future, the duration of the marriage, the contributions made by each of the parties to the welfare of the family etc.

The third chapter deals with the right to maintenance and ancillary relief under the Shariah. This chapter mainly deals with the provisions of Islamic Law as regards to the above matter. References have been made to the Quranic verses and al Hadith and also juristic opinions to support the arguments.

Chapter four deals with the right to the ancillary relief under the Family Enactments in Malaysia with special reference on two main Acts, namely, the Family Law (Federal Territory) Act, 1984 and Islamic Law Enactment of

Kelantan, 1983.

The final chapter will be the conclusion. Here the writer will make a comparative study of the two laws on the subject of maintenance and ancillary relief.

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# CHAPTER 1

## A. WIFE RIGHTS OF MAINTENANCE UNDER COMMON LAW

### a) Maintenance Obligations at Common Law

The Common Law rules relating to the maintenance of a spouse were the inevitable consequence of the doctrine of unity of legal personality. The wife, lacking the 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 man was to provide his wife with at least necessities, and a married woman could in no circumstances be held to maintain her husband.

In the case of *Lilley v Lilley*<sup>1</sup>; *Hodson L.J.* ruled that the Common Law right to maintenance was, "**not a right to an allowance but to be supported by giving bed and board.**" If the husband deserted the wife or if his misconduct<sup>2</sup> drove her away from the matrimonial home, the rule was modified to the extent that he was no longer sole judge of what was fit. He had to provide reasonable expenses for necessities "**according to the husband's degree**".<sup>3</sup> Hence

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<sup>1</sup> [1960] 169, 178

<sup>2</sup> As distinct from a reason from a reasonable exercise of his marital right: see *Jackson v Jackson* [1932] All E.R. Rep 553 where the husband's insistence on occupying a house next door to his mother's and taking the house keeping out of the wife's hands did not justify her leaving him

<sup>3</sup> *Per Blackburn J., Bazeley v Forder* (1868) L.R. 3 Q.B. 559, 562

articles of food and dress which would 'necessaries' for a duchess.<sup>4</sup>

The wife did not even have these limited rights if she were separated for some reasons other than his misconduct. If she committed adultery<sup>5</sup>, she forfeited all rights to maintenance whatever the extenuating circumstances.

The methods of enforcing right were in the extreme.<sup>6</sup>The wife's right to have a place to live would be enforced to the extent that the wife could seek an injunction restraining the husband from carrying out any transaction which would deprive her right. In relation to other financial support, the wife's remedy at Common Law was indirect. The court would not order the husband to maintain her (much less to fix her a fixed allowance).<sup>7</sup> But so long as she was

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<sup>4</sup> *Phillipson v Hayter* (1870) L.R. 6 C.P. 38. Legal advice was a necessity; hence the court would normally require the husband to pay his wife's costs in matrimonial proceedings whether or not she was successful

<sup>5</sup> For instance, the fact that her husband had treated her with cruelty, driving her from the matrimonial home, and had himself frequently committed adultery: *Govier v Hancock* (1796) 6 Term. 603, see also *Stimpson v Wood*

<sup>6</sup> *Northrop v Northrop* [1968] p. 74, 116, *Gray v Gray* [1976] Fam. 324, 328

<sup>7</sup> No legal action between husband and wife was possible at common law, because of the doctrine that they became a single personality: *Manby v Scott* (1660) Smith's Leading Cases (13th Ed.) p. 417. Disputes between spouses were exclusively within the province of ecclesiastical court, and her primary remedy for desertion was a decree of Restitution of Conjugal Rights. If the husband disobeyed, he would be excommunicated (or after the Ecclesiastical Courts Act 1813, imprisoned). If he were guilty of other matrimonial offences, the wife could seek judicial separation on making which the ecclesiastical court order payment of alimony: see *National Provincial Bank Ltd. v Ainsworth* [1965] A.C. 1175. The decree of Restitution of Conjugal Rights was abolished in 1970: Matrimonial Proceedings and Property Act 1970, s20

entitled to be maintained, the wife could bind her husband by her contract for the supply of 'necessaries' such as food, clothing, housing and legal services. The agency was irrevocable: it did not matter that the husband forbade his wife to incur the liabilities, or tradesmen to supply the goods.<sup>8</sup> The agency was terminated by anything which terminated the Common Law duty to maintain<sup>9</sup>: a shopkeeper could rely on an advertisement made by a husband in a newspaper stating that he will not be liable for any debts incurred by his wife, if he were confident that the wife had not committed any adultery and was not in desertion.

The agency of necessity was abolished<sup>10</sup> by the Matrimonial Proceedings and

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<sup>8</sup> Although referred to as an 'agency', this is part of matrimonial law, rather than agency. Distinguish agency arising by the application of normal contractual principles: (i) the wife, if cohabiting with her husband, was presumed to have his authority to pledge his credit for necessary goods and services within the domestic department normally in her management. This presumption could be rebutted if e.g., the husband had prohibited her from pledging his credit; (ii) the husband might be estopped from denying that his wife had authority to pledge his credit to a particular tradesman for goods and services (not restricted to necessaries). The agency would arise if, by his conduct (e.g. paying without objection to similar goods ordered by her in the past) he had held her out as authorised to incur liabilities on his behalf. In order to terminate this liability, the husband must inform the individual tradesman that the wife no longer possesses his authority, e.g. by a circular letter, or by press advertisement if it can be proved that the particular shopkeeper saw the advertisement. This agency may still arise. See Bowstead on Agency (14th Ed.) pp. 95-99. It should be noted that this agency arises from cohabitation, not marriage; a mistress may thus involve her partner in liability: *Debenham v Mellon* (1880) 6 App. Cas. 24, 31-33

<sup>9</sup> Hence, an isolated act of adultery was sufficient, even if unknown to the creditor and husband: *Wright (H.S) and Webb v Annandale* [1930] 2 K.B 8

<sup>10</sup> For reasons set out in detail in P.W.P No. 9. para. 52



Property Act 1970<sup>11</sup> because it was an anachronism: the court now has adequate power to enforce the duty to maintain directly, in proceeding either in the Superior courts or Magistrates' court. The Common Law duty to maintain still remains relevant, however, for statute enable a wife<sup>12</sup> to bring proceeding for financial provision on the ground that her husband had willfully neglected to provide reasonable maintenance for her.<sup>13</sup> It was held that this was a statutory method of enforcing the Common Law obligation. The Domestic Proceedings and Magistrates' Courts Act 1978<sup>14</sup> changes the basis of the law, by removing the requirement to establish that the failure to maintain is willful, so that the Common Law now seems largely irrelevant.<sup>15</sup>

#### **b) Meaning of Maintenance**

The simple meaning of maintenance is a term of very wide scope.<sup>16</sup> It

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<sup>11</sup> S. 41. Although this section was subsequently repealed by Matrimonial Causes Act 1973 cs. 54 and schedule 3) the common law rule was not thereby revived

<sup>12</sup> In special and restricted circumstances a husband could bring proceedings against his wife: Matrimonial Proceedings (Magistrates' courts) Act 1960, s. 1(1) (i); Matrimonial Causes Act 1973, s. 27(1) (b) (i)

<sup>13</sup> Matrimonial Causes Act 1973, s. 27; Matrimonial Proceedings (Magistrates' courts) Act 1960, s. 1(1) (h)

<sup>14</sup> ss. 1(a) and 63

<sup>15</sup> It may remain relevant as the basis for the certain obligations, such as that of a husband to provide his wife housing. As a result of that obligation, a husband is, in principle, the occupier for rating purposes of the house in which his wife is living. It has recently been argued (in *Brown v Oxford City Council* [1978] 3 All E.R 1113) that, in view of the statutory codification of spouses' financial obligations, this should no longer be the case. This point was not, however, decided

<sup>16</sup> *C v C* [1962] 4 F.L.R 461 at 466, *Lumsden v Lumsden* [1963] 5 F.L.R 388 at 394

signifies all forms of provision that will enable an adult to live a normal life and a child to be brought up properly. As *Harman J. Said* in *Re Borthwick, Deceased; Borthwick v Beauvais*<sup>17</sup> with respect of the maintenance of a wife, "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".<sup>18</sup> In other cases, maintenance has been held to include medical and dental treatment<sup>19</sup> and financial provision for the future.<sup>20</sup> In the case of a child, it also includes the child daily care<sup>21</sup> and her or his education.<sup>22</sup>

### c) Difference between maintenance and alimony

A distinction was drawn in law between *maintenance* and *alimony*. 'Alimony' (from Latin word 'aluminium' meaning nourishment or sustenance) was strictly financial provision which a husband ordered to provide for his wife during the

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<sup>17</sup> [1949] CH 395

<sup>18</sup> At 401. Cited with approval in C.V.C [1962] 4 F.L.R 461 at 466, In the Marriage of Koch [1977] 30 F.L.R 65 at 72-73, *Plowman v Plowman* [1970] 16 F.L.R 447 at 453

<sup>19</sup> C.V.C [1962] 4 F.L.R at 466

<sup>20</sup> *Acworth v Acworth* [1943] 21 at 22. See also In the Marriage of Koch [1977] 30 F.L.R 65 at 72

<sup>21</sup> *In the Marriage of Crapp* [1978] 32 F.L.R 286 at 289

<sup>22</sup> C.V.C [1962] 4 F.L.R 461, In the Marriage of Gamble [1978] 32 F.L.R 198 at 207

subsistence of their marriage but whilst they were living apart.<sup>23</sup> Alimony was described as permanent if it was ordered to be paid following decree of judicial separation for it would then continue indefinitely. It also described as '**pendente lite**' or '**pending suit**' if it was ordered to be paid simply until the determination of the matrimonial proceeding.

Maintenance on the other hand was strictly financial provision while a former husband was ordered to provide for his former wife following the dissolution of their marriage.<sup>24</sup>

Today the word alimony is obsolescent as a legal term both in Australia and in England.<sup>25</sup> Instead the word '**maintenance**' is generally used to cover financial provision for both spouses and former spouses at anytime (thereby including both alimony and maintenance in the old senses of those term). It is also used to cover financial provisions for children. It is interesting to observe that in the United States the word alimony is used to the exclusion of '**maintenance**' in respect of financial provision for both former and present parties to marriage.

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<sup>23</sup> *Lodder v Lodder* [1923] N.Z.L.R 785 at 788; *Gaisberg v Storr* [1950] 1 K.B at 112

<sup>24</sup> Ibid note. 23

<sup>25</sup> However, for two instances of the use of this term in current Australian statutes, see the Income Tax Assessment Act 1936 C (th), s. 23(1); Administration and Probate Act 1958 (Vic.), s. 91 (definition of '**widow**'). In respect of the latter provision, see *Krause v Sinclair* [1983] 1 V.R 73 at 76

**d) The effect of bankruptcy and mental illness upon duty to maintain**

If a spouse becomes bankrupt or mentally ill, the question of maintenance of himself and his family is largely governed by discretionary powers conferred by statute.

Bankruptcy does not discharge a husband's obligation to maintain his wife even though it may limit his power to fulfill it as in case of *Hounslow London Borough Council v Peake*.<sup>26</sup>

The Official Receiver may make an allowance for the support of a bankrupt and his family out of the bankrupt's property which is in his hands, as may a trustee in bankruptcy provided that he has the permission of the committee of inspection.<sup>27</sup> The bankrupt may also keep his personal earnings in so far as they are needed for the same purpose.<sup>28</sup>

If a person is incapable of managing and administering his property and his affairs as a result of mental disorder, the Court of Protection may make such order with respect to them as is necessary or expedient for the maintenance of

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<sup>26</sup> [1974] 1 All E.R 688. But the mere fact that one spouse has a duty to maintain the other does not make the latter a '**person interested**' who could apply to have the first spouse's bankruptcy annulled under s. 29(1) of the Bankruptcy Act 1914

<sup>27</sup> Bankruptcy Rules 1952, r. 313; Bankruptcy Act 1914, s. 58

<sup>28</sup> Re Roberts [1900] 1 Q.B 122, C.A

the patient or other benefit of any member of his family.<sup>29</sup> The court may also order a settlement or gift of the patient's property for the same purposes.<sup>30</sup> The court is expressly required to have regard to desirability of making provision to the patient's obligations even though these are not legally enforceable<sup>31</sup> and accordingly it has been held that orders may be for any person whom the participants might have been expected to benefit had he been capable of doing so.

## **B. ENFORCEMENT OF THE DUTY TO MAINTAIN**

### **a) Maintenance agreements**

Once it was accepted that separate agreement were not contrary to public policy, it became possible for a husband to enter into an enforceable contract to pay maintenance to his wife and his children. In order to be legally enforceable, a maintenance agreement must constitute a contract between the parties. To come within section 34 of the Matrimonial Causes Act 1973, an agreement must be in writing and made between spouses or former spouses. It must also be:

- i) An agreement containing financial arrangement, whether made

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<sup>29</sup> Mental Health Act 1988, ss. 94 and 95(1)

<sup>30</sup> Ibid s. 96(1) (d). A settlement may be varied if material facts were not disclosed when it was made or if there is substantial change in the circumstances: s. 96(3)

<sup>31</sup> Ibid s. 95

during the continuance or after the dissolution or annulment of the marriage; or

- ii) A separate agreement which contain no financial agreement in a case where no other agreement in writing in between the same parties contain such agreements.

From this it will be seen that an agreement entered into after a decree absolute of divorce or nullity can come within the statute only if it contains financial arrangements. An agreement containing no such arrangement can come within the statute only if it is a separation agreement made whilst the parties are still married to each other. Under section 34(2) of Matrimonial Causes Act 1973, financial arrangement are defined as:

**"provisions governing the rights and liabilities towards one another when living separately of the parties to the marriage (including a marriage which has been dissolved or annulled) in respect of the making or securing of payment or the disposition or use of any property: including such rights and liabilities with respect to the maintenance of education of any children of the family".**

A maintenance agreement must be under seal. If it is not, the party seeking to

enforce a promise to pay maintenance must show that she (or he) has furnished consideration. This will normally not be difficult because the undertaking will be embodied in a separation agreement, in which each party gives consideration by releasing the other from duty to cohabit or will be a part of a much more complicated financial transaction involving the division of property and the comprising of other claims. If there is no consideration at all, however, a promise not given under seal will be void. Even if the agreement is binding, it does not have the same tax advantages as payment under a court order.

Basically the parties rights and duties are determined by the general law of contract. If the agreement is a maintenance agreement for the purpose of section 34 of the Matrimonial Causes Act 1973, however, two peculiar rules apply to it: certain provisions may be void by statute, and in certain circumstances either party may apply to have agreement altered. The result is that in many cases the wife will have the best of worlds because she can hold her husband to his covenant and also take other proceedings to obtain maintenance.

There is some doubt whether an agreement comes with section 34 of Matrimonial Causes Act 1973, if someone other than the spouses is a party to it. In *Young v Young*<sup>33</sup>, the spouses and the husband's brother had entered

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<sup>33</sup> [1973] 117 Sol Jo 204

into an agreement in which the husband had covenanted to pay the wife £8 a week and wife had been given the use of a house (which was the joint property of the husband and his brother) on her undertaking to keep it in reasonable repair. On the husband's application to have the agreement altered, it was held that it was not a maintenance agreement for the purpose of the Act because the brother was a party to it and the Act contemplated only agreements between husband and wife. Taken literally, this statement can scarcely be true: if the husband agrees to settle periodical payments on the wife, the agreements cannot fail to be a maintenance agreement solely because trustee are parties to it. There seems to be no objection to the alteration of the kind of agreement in *Young v Young* provided that the rights and obligations of third parties are not affected, and it is urged that it should not be followed.

#### **b) Maintenance order by Magistrates' Courts**

Until 1878 only the ecclesiastical courts or their successor, the Divorce Court and the High Court, could make orders for maintenance. That year saw an entirely new departure, for section 4 of the Matrimonial Causes Act enabled a criminal court, before which a married man had been convicted of an aggravated assault upon his wife, to make an order that should no longer be bound to cohabit with him if it felt that her future safety was in peril. The court could also order a husband to pay maintenance to a wife in whose favour such separation order was made and vest in her legal custody of any children of the