

HUSBAND'S DUTY TO MAINTAIN A WORKING WIFE UNDER ISLAMIC AND CIVIL LAW IN MALAYSIA: ARE THE LAWS IN HARMONY?

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Abstract:

Relationship between husband and wife creates certain rights and obligations that both of them are to enjoy and fulfill. Maintenance is one of the rights of the wife and one of the obligations of the husband. There is no dispute among the *fuqaha* as to the husband's duty to provide maintenance to his wife. This paper seeks to examine the provisions of Islamic law in Malaysia on husband's duty to maintain a working wife. The examination extends to the provision of Civil law in Malaysia, particularly the Married Women and Children (Maintenance) Act (1950) and the Law Reform (Marriage and Divorce) Act 1976. Discussion will highlight the issue as to whether the two laws are in harmony when providing for such a duty to maintain on the husband. In addition, the paper will further highlight the husband's duty to maintain the wife in the situation where the wife is disobedient or *nusyuz*. The research reveals that the provisions of Islamic and Civil law in Malaysia on husband's duty to maintain a working wife, to a certain extent, are in harmony.

Key Words: Maintenance (*nafaqah*), working wife, Islamic law, civil law

The Concept of Maintenance Under Islamic Law (the *Shari'ah*)

The word *nafaqah* rooted from *infaq*. *Nafaqah* literally means what a person spends for his family members (Ibn 'Abidin, 1998 and al-Zuhayli, 2001). Specifically, it refers to what is spent to support one's family with food, clothing, accommodation and other expenditure (Ibrahim, 'Abd Halim, 'Atiyyah and Muhammad, n.d.).

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Muslim jurists from the Hanafi school have given the examples as *nafaqah* as food, clothing and accommodation (Ibn Nujaym, 1997; Ibn 'Abidin, 1998). The Hanbali jurists added their supplements (al-Bahuti, 1982), while according to the Shafi'i jurists it covers anything that is eaten with rice or bread (*idam*), cleaning tools, house appliances like cooking equipment and a servant in the case where the wife has ever used the service of a servant before her marriage (al-Shirbini, 2001). Muslim scholars such as Muhammad Mustafa Shalabi (1977) and Zakiy al-Din Sha'ban (1993), view that *nafaqah* (maintenance) includes any kind of necessary service based on the custom of society. Based on Malaysian custom therefore, the scope of maintenance for the people in Malaysia in general will also include medical expenses and other such basic needs of a family.

Basically, *nafaqah* can be divided into two categories; *nafaqah* to oneself and *nafaqah* to another person. One of the reason why *nafaqah* is obligatory to be spent on another person is marriage. This is due to the fact that, a relationship arises out of marriage between a man and a woman, and so creates a duty on the husband to maintain his wife (al-Shirbini, 2001; al-Zuhayli, 2001; Azizah and Badruddin, 2007).

A husband's duty to provide maintenance to his wife has been established by the *Qur'an* (al-Talaq, 65:6-7; al-Baqarah, 2: 233; al-Nisa, 4:34) and the *Sunnah* of the Prophet (p.b.u.h) (Sahih Muslim, Kitab al-Haj, n.d; al-Mubarakfuri, 1965). Based on the principle in the verses of the Quran and in the Sunnah, the husband is obliged to provide maintenance sufficiently based on his status in life. The husband's obligation to maintain is further highlighted by the *ijma'* of the *Fuqaha*, who are unanimous on the fact that the husband is obliged to provide maintenance to the wife when the husband is an adult (*baligh*). It is also rational that by virtue of the marriage contract (*'aqd*), the wife has a duty to obey the husband and due to her position, she is exempted from working. Meanwhile, her time is fully devoted to safeguarding the husband's rights. Therefore, the husband is obliged to provide sufficient maintenance to the wife as a reward for her devotion to him (al-Zuhayli, 2001).

Juristic Argument on Husband's Duty to Maintain a Working Wife

When imposing the husband's duty to provide maintenance to the wife, the *Shari'ah* does not specifically point out the husband's duty to maintain or not to maintain a working wife. This might be because the exercise of the obligation to maintain a wife is termed as general rather than specific. Nevertheless, the law has outlined certain conditions to be fulfilled by the wife, the failure of which will result in being disentitled to maintenance. This can be regarded as an exception to a general rule that all wives are entitled to maintenance. Thus, neither the *Qur'an* nor the *Sunnah* of the Prophet (s.a.w) provides a strict provision that a husband is obliged to maintain a wife even if she is working.

Among the conditions to be fulfilled by the wife is that she must fully submit to the husband in terms of access to sexual intercourse (al-Kasani, 1996). Nevertheless, if the wife

declines due to a lawful reason, like failure on the husband's part to pay prompt dower to her, then this will not disentitle her to maintenance (al-Shirbini, 2001; Ibn Nujaym, 1997; Ibn Qudamah, 1994). Another relevant condition to be fulfilled by the wife is that there is no existing factor which denies the wife's right to maintenance, such as disobedience (*nusyuz*) in matters which become the right of the husband (al-Shirazi, 1994; Ibn Nujaym, 1997). A wife is considered *nusyuz* when she goes out from the husband's home without his permission (al-Shirazi, 1994). This is exceptionally allowed in the case of necessity, such as because the house is falling down (al-Shirbini, 2001). Similarly, in the case where the wife has to go to work in order to earn a living particularly when the husband is incapable or declines to maintain her. Furthermore, Islamic law provides many exceptional concepts and principles like 'necessity permits what is prohibited' (al-Burno, 1998; al-Shirazi, 1994; al-Shirbini, 2001).

The above two conditions are to be fulfilled by all wives in order to be entitled to maintenance regardless of whether she is working or not. Nevertheless, in many circumstances like submission to the husband in full, a working wife might not be able to fully fulfil the condition. The reason is clearly because the wife is working, and on many occasions she has to go out from the matrimonial home. Further questions arise as to whether a working wife has to fulfill the conditions in total or is it sufficient if it is partial to make her entitled to maintenance from the husband.

The Muslim jurists who are most concerned with this issue are from the Hanafi school. They have two opinions on this issue. The first opinion is from most of the Hanafis who generally view that a working wife is not entitled to maintenance as she does not fully submit herself to the husband (Ibn Nujaym, 1997; Ibn 'Abidin, 1998). Nevertheless, another view of the Hanafis states that it is subject to the husband's consent. If the wife works and the husband gives permission, then he is obliged to maintain her. However, if there is no prior consent from the husband, the husband has no duty to maintain her, as she is considered disobedient (*nusyuz*) (Ibn 'Abidin, 1998).

Non-Hanafi jurists have not provided a clear cut rule on a husband's duty to maintain his working wife. Nevertheless, it can be understood from their discussion that a wife is disqualified from maintenance if she does not fulfill conditions of maintenance, like the wife being *nusyuz* as discussed earlier. The Maliki jurists assert that a wife is *nusyuz* if she goes out from the matrimonial home without the husband's consent (al-Sawi, 1995), while the Shafi'i jurists emphasize that a wife who partially submitted to the husband during a mere night is not entitled to maintenance because of her partial or imperfect submission. Meanwhile, the Hanbali jurists asserted that if the wife goes out from the matrimonial home without the husband's permission, she will lose the right to maintenance (al-Shirbini, 2001; 'Abdul Fatah 1998), therefore the husband is not obliged to maintain her at that particular time.

The above discussion leads to a conclusion that a majority of the Muslim jurists are in agreement that the husband is obliged to provide maintenance to the wife as far as she is obedient and not *nusyuz*. This view is supported by contemporary Muslim scholars who have asserted that a working wife is not entitled to maintenance if the husband did not give her permission to work ('Abdul Fatah, 1998; Sha'ban, 1993; Shalabi, 1997).

In Egypt and Syria, if a wife is a career woman or working before the marriage and the husband with such knowledge proceeds with the marriage and did not stipulate the wife to leave her job when they got married, then he is obliged to maintain her (Sha'ban, 1993). The Personal Law of Syria 1953 provides that the wife's right to maintenance will cease if she goes to work without her husband's permission (Act 59, section 73). In Jordan, the law clearly provides that a wife will not be entitled to maintenance if she works outside the house without the permission from the husband (Personal Law of Jordan 1976, section 68). This implies that, in Jordan, if a wife works but does not go out from the matrimonial home, she is not disentitled to maintenance. Nevertheless, it is unknown how far this situation exists and might be applicable nowadays. Therefore, this requires a further research especially empirical research. On the other hand, in Kuwait, the law does not clearly provide for a husband's duty to maintain the working wife. The provision generally states that maintenance is obligatory on the husband as long as the wife submits to him regardless of whether the wife is poor or rich person or of a different religion (Personal law of Kuwait 1954, Act 51, section 74).

Husband's Duty to Maintain a Wife Under the Law Governing Muslims in Malaysia

In Malaysia, the law that governs Muslims are State Islamic Law Act and Enactments and Various State Enactments. For the purpose of this paper, discussion will be based upon the Islamic Family Law (Federal Territories) Act 1984 (Act 303) (hereinafter referred to as the IFLA), as it is a pioneer Act. Furthermore, Provisions of the law in other State Enactments are quite similar to the IFLA, especially after the effort to standardize the provisions of Islamic law Enactments in Malaysia.

The IFLA, section 59(1) provides for the general duty of a husband to maintain a wife. The law states;

"The Court may, subject to Hukum Syara', order a man to pay maintenance to his wife or former wife".

The above provision is rather general, being applicable to all wives during the subsistence of a marital relationship and by the word 'former wife' it is applicable to a divorced wife. Nevertheless, based on the Hukum Syara' (Islamic law according to any recognized mazhab), a former wife is only specific to a divorced wife so long as the wife is still in the waiting period (*'iddah*).

The IFLA also provides for three situations where a wife is disqualified from maintenance and considered *nusyuz*:

- i- When she withholds her association with her husband;
- ii- When she leaves her husband's home against his will; or
- iii- When she refuses to move with him to another home or place,

Without any valid reason according to Hukum Syara. And as soon as the wife repents and obeys the lawful wishes and commands of her husband, she ceases to be *nusyuz*" (section 59(1&2)).

The above provisions are in line with the provision of Hukum Syara' based on the ruling of the Qur'an in Surah al-Baqarah 233 and Surah al-Talaq 6 and 7, Sunnah of the Prophet (s.a.w.) as well as the view of the Muslim jurists as earlier discussed.

As regards the assessment of maintenance, the IFLA provides that it should be based upon the means and needs of the parties (section 61). Nevertheless, in many cases where the wife's right to maintenance is to be judged, the Court seems to always base upon the means of the husband. This situation can be seen in many cases decided on wife's rights to maintenance. Apart from that, those cases also reveal that a husband is duty bound to maintain a wife during the subsistence of marital relationship and after divorce until the wife completes her period of *'iddah*. As regards the duty to maintain the wife during a marital relationship, it can be illustrated by the case of *Sakdiah v Ahmad* (1968) 2 JH 101. The wife claimed for the arrears of maintenance for six months at the rate of RM3 per day. The husband claimed that since both of them were working in, and got the income from, the rice field, he owed no duty to maintain the wife. The Learned Kadi dismissed the wife's application. On appeal, the Court held that it was the duty of the husband to pay maintenance to the wife. As the husband was found to be poor and unable to give maintenance, the wife had a choice to either be patient or to apply for a fasakh divorce.

In the case of *Ismail v Norsiah* (1970) 2 JH 111, the Court allowed the application of the wife for arrears of maintenance amounting to RM 1,847 for five years and one month. The husband appealed, but the Appeal Court held that the Learned judge was correct in his judgement even though the amount of maintenance was reduced to RM955 having regard to the position and income of the husband. A husband's duty to maintain his wife was further upheld in the case of *Sharifah Asiah v Mohamed Salleh* (1980) 2 JH 241, where in this case the Court ordered the husband to pay the arrears of maintenance to his former wife until the date of the divorce.

In the case of *Rasnah v Safri* (2002) 17 JH(II) 189, the wife applied for a fasakh divorce on the ground that the husband had failed to give maintenance since 1998. The Court

allowed the application and ordered the husband to pay arrears of maintenance since January 1998. In upholding the husband's duty to maintain his wife, the Court referred to Kifayatul Akhyar, Volume 2, page 305 which states:

"If the husband is unable to maintain his wife, she can apply for a fasakh to dissolve the marriage, similarly if the husband fails to pay the dower before sexual intercourse".

As for the husband's duty to maintain his former wife, an illustration can be drawn from the case of *Aminah Mokhtar v Zakaria Yahya* (2009) 28 JH(II) 181, where the wife applied for maintenance during *'iddah*. The couple got married in 1993 and divorced with one talaq (revocable divorce) in 1998. The Court held that the husband has to pay RM9,000.00 to the wife. This became a debt which is obliged to be paid within 3 months from the date of the judgement.

In the case of *Khairul Faezah v Muhammad Salleh* [2005] 1 ShLR 171, a wife applied for a *fasakh* divorce on the ground of cruelty. An issue which was also raised in this case is whether, pursuant to a *fasakh* divorce, she is entitled to maintenance during *'iddah*. The Court held that in this case, the husband is not obliged to pay maintenance during *'iddah* as the divorce is by way of *fasakh* that is irrevocable or *bain sughra*.

These two cases also illustrate that as regards a divorced wife, she will be entitled to maintenance during *'iddah* if the divorce is a revocable divorce unless if the wife is pregnant (al-Quran, al-Talaq 65: 4&6).

With regards to the disqualification of a wife to maintenance, the Court will raise the issue of disobedience (*nusyuz*). If the wife is found to be disobedient as described by section 59 of the IFLA, she will be disentitled to maintenance. To illustrate, in the case of *Haji Ali v Aishah* (1981) 2 JH 241, the plaintiff, the second wife of the defendant, claimed maintenance from her husband. She had left the matrimonial home after living there for one year. She claimed that she was forced to leave because of certain differences with the first wife. The learned judge allowed the application and ordered the husband to pay RM1,710. The husband appealed. The Appeal Board held that in this case two important matters were not considered at the trial, whether the wife was guilty of *nusyuz* by leaving the house and whether the husband was able to give maintenance to the wife as the evidence showed that he was old and ill and had no income or property. The Appeal Board ordered the matter to be retried by another Qadi. The decision of the Appeal board was to raise the issue of *nusyuz* on the wife's part as she had left the matrimonial home. Accordingly, if she is found to be *nusyuz*, she is not entitled to maintenance and accordingly, the husband is not obliged to maintain her.

In the case of *Piah v Che Lah* (1983) 3 JH(2) 75, the Court held that the wife was not entitled to maintenance during 'iddah as she was found to be *nusyuz*. In this case, she has left her matrimonial home without the husband's permission and without reasonable cause.

In the case of *Nor Wasitah v Mohd Azri* [2008] 3 ShLR 148, the wife applied for a *fasakh* divorce on the ground that the husband failed to provide maintenance for about three months. The husband counter claimed that the wife was *nusyuz*. However the Court held that the husband had failed to prove that the wife was *nusyuz* even though she has left the matrimonial home. Furthermore, the wife was never declared to be *nusyuz* by any court, and the husband's claim was only made after the wife applied for *fasakh*. As the husband admitted that he had not paid the maintenance since August 2001, the Court therefore allowed the application.

Husband's Duty To Maintain A Working Wife

The above discussion indicates that there is no direct provision as to the husband's duty to maintain a working wife under the IFLA. Nevertheless, the provision for disqualification of a wife from maintenance indirectly reflects that if a wife leaves her matrimonial home without the husband's permission, she is considered disobedient and is therefore disentitled to maintenance. Similarly, if due to the fact that she is working, she fails to give access to the husband. It follows that, a husband does not owe any duty to maintain his working wife if the wife is *nusyuz* or works without the husband's permission.

This situation can be proven by referring to the practice of the Syariah Court in Malaysia. It seems that in all cases, the court decided on a husband's duty to maintain his wife. In the case of *Hj Abdullah bin Hj Hamzah v Cik Bon bt Yaacob*, (1983) 3 JH(1) 110, the Court has never raised the issue of whether the wife is working or what is her income each month. The only issue which is emphasized by the Court is whether the wife is disobedient (*nusyuz*) which may deprive her of any right to maintenance. This was also emphasized in the case of *Hj Ali v Aishah* (1982) 2 JH 241.

In the case of *Siti Rohani bte Muhamad Yusuf v Mohd Sazali bin Derham* [1993] 2 MLJ 1, the wife appealed against the decision of the Syariah Court which rejected her application for a *fasakh* divorce on the ground of failure to provide maintenance. In this case, both parties were working, the wife was a school teacher and the husband was a technical assistant. The Appeal Court allowed the appeal as the wife had proved that the husband failed to provide maintenance for a period of more than three months. The issue that the wife is working was not raised as if to imply that this fact will not negate the husband's duty to provide maintenance to her.

A similar situation can be seen in the case of *Salina binti Mohd. Dahlan v Mohd. Salleh bin Haji Haron* (2001) 14 JH(II) 287, where the plaintiff wife applied for *fasakh* on the ground of failure to maintain outward (*zahir*) and inward (*batin*) maintenance for more than one year. The defendant husband was a police officer. Despite the fact that the plaintiff was a teacher, the Court did not highlight that the husband would not be duty bound to maintain her as she is working and able to maintain herself. Instead, the Court has referred to the book of 'Ali Hasbullah "*al-Furqatu bayna al-tazwijaini*", page 113 which states to the effect;

"There is no doubt that to hold a wife without any maintenance is causing her a severe harm (*darar*) and pain. In this case, the husband is supposed to let the wife go in a kind manner. When the husband did not do that, the Qadi can pronounce *talaq* to avoid cruelty and harm".

The Syari'ah Court found that failure to maintain the wife resulted in harm and *darar* and therefore ordered for *fasakh* divorce.

In the case of *Samsidar bte Shamsudin v Ramlan bin Hussain* [2007] 3 ShLR 120, the wife applied to the Court to confirm the pronouncement of *ta'liq* by her husband on the ground of failure to provide inward and outward maintenance for about one year. The fact that the wife is working as a teacher was not an issue as to deny her right to maintenance. In this case, even though the husband claimed that the wife is disobedient (*nusyuz*), he failed to prove as such and as a result, the Court allowed the application of the wife.

The husband's duty to provide maintenance to the working wife extends to the divorced wife until the completion of the *'iddah* period. In the case of *Ida Hidayati binti Taufik v Ahmad Shukri bin Kassim* (2004) 18 JH(II) 259, the plaintiff was married to the defendant, a MAS pilot in 1993 and divorced in 1998 through a court order. In relation to the divorce, the plaintiff claimed among other things, maintenance during *'iddah* amounting to RM6,317.40. The wife at this particular time was working. The Court, after taking into consideration whether the wife had ever been held guilty of *nusyuz*, ordered the husband to pay RM4,100.

The above cases seem to highlight a principle that a husband owes an obligatory duty to maintain his working wife as long as she does not commit any act which amounts to *nusyuz*.

The Law Governing Non Muslims: Husband's Duty to Maintain His Wife Under Civil Law in Malaysia

The laws that govern maintenance of a wife under Civil law in Malaysia are the Married Women and Children (Maintenance) Act 1950 (Act 263) (hereinafter referred to as the

MWCA) and Law Reform (Marriage and Divorce) Act 1976 (Act 164) (hereinafter referred to as the LRA). While the marriage is still subsisting, the MWCA is applicable. Section 3 of the Act provides:

“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 the court seems reasonable”.

If the husband fails to observe the order made by the court to pay maintenance to the wife, he might be liable for imprisonment as provided under section 4 of the same Act. Thus, it may be concluded here that it is the duty or responsibility of the husband to pay maintenance towards the wife, as failure to do so might result in a punishment.

From the above provision also, it can be inferred that only a wife will be entitled to maintenance and thus excludes others, such as a mistress or a woman living with a man without any marriage relationship. A question arises as to whether a second or subsequent wife or wives will be entitled to maintenance if the marriage/s was/were contracted prior to the enforcement of the LRA (on 1st March 1982). In *Mui Siu Hing v Lee Hong Kee* [1940] MLJ xvi, the Court observed that the magistrates should have power to grant maintenance to secondary wives as much as to principal wives. Thus, the restriction with regard to a polygamous marriage will not have retrospective effect and the husbands are bound to maintain their secondary wives under the provision of MWCA. Nevertheless, any second marriage after the enforcement of the LRA will bar the husband from a legal duty to maintain the second wife since the marriage itself is void and illegal.

The provision provides that maintenance should be paid according to the means of such person, the husband. What does the word ‘means’ connote? According to the Longman Dictionary (2003), ‘means’ connotes the meaning of the money or income that you have. In *Kulasingam v Rasammah* [1981] 2 MLJ 36, the Court defined means as all the sources of income and not only the fixed salary of the husband. Thus, things such as tips, regular overtime pay (*Klucinski v Klucinski* [1953] WLR 522 and lump sum provision (*W v W* [1976] Fam 107) will be considered in determining the amount of maintenance given to the wife. In the case of *Ng Lean Huat v Lim Joo Khim* [1993] 3 CLJ 647, besides the fixed salary of the husband, the Court also took into account the funds available to him through his mother and brother and also the lump sum amount which he was promised to get when he grew older.

The right to maintenance shall be barred if the husband is able to prove that the wife has refused to live with him without any sufficient reason (the MWCA, section 5(2)). If the

refusal is due to the husband's fault, which caused an unbearable atmosphere for the wife to stay together with him, the court will not consider such refusal as default on the wife's side. In the case of *Marimuthu v Thiruchitambalam* [1966] 1 MLJ 203, the wife refused to stay together with the husband as the husband ill treated her by not only asking her to stay together with the husband's second wife but also assaulted her in the presence of that wife. Similarly in the case of *Ng Lean Huat v Lim Joo Khim* [1993] 3 CLJ 647, the wife refused to stay with the husband as he lived with his mistress and he also liked to assault her. The Court held that the wife had sufficient reason for not staying with the husband and thus an order for maintenance was made against him. The same principle applies in the case of *Kulasingam v Rasammah* [1981] 2 MLJ 36.

Apart from living separately from the husband without just cause, the wife also will not be entitled to maintenance allowance if it is proven before the court that she is living in adultery. A question arises as to whether an act of adultery will disentitle a wife to maintenance. In the case of *Rajalachmi v Sinniah* [1973] 2 MLJ 133, Raja Azlan Shah J (as he was then) defined the words 'living in adultery' as 'a course of guilty conduct rather than an isolated act of adultery'. Thus, an act of adultery will not disentitle a wife to the right of maintenance.

With regard to the LRA, it is applicable to a wife when she is divorced by the husband (section 82) or at least, a matrimonial proceeding has already started. In the case of *Diana Clarice Chan Ching Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97, the Court of Appeal came to the view that what was meant by 'during the course of any matrimonial proceeding' as mentioned by section 77(a) of the LRA, did not necessarily mean that there must be a filing of a petition for divorce or legal separation. Any step taken by a party as a prelude to bringing the marriage to an end, such as a reconciliation application to a conciliatory body by virtue of section 106 of LRA (a mandatory requirement before any application for divorce can be made) was sufficient to come within the meaning of such section. Section 77 of the LRA provides:

- (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.

Unlike the MWCA, which does not provide with regard to the responsibility of the wife to maintain the husband, the LRA mentions that in the case where the husband is incapacitated, the court shall have the power to order the wife or former wife to maintain the husband if it is reasonable to do so (the LRA section 77(2)). Another important difference

between the MWCA and the LRA is with regard to the consideration that needs to be taken into account by the court. While section 3 of the MWCA only mentions the means of such person, the husband, the LRA provides that the means and needs of both parties (husband and wife) will be taken into account in determining the amount of maintenance. It is not clear whether such a difference is made on purpose or not. If they are purposely framed in such a way; the important reason, perhaps, to differentiate the degree of responsibility that exists when the marriage is still subsisting compared to when the marriage is already end or about to end. In the latter situation, the means and needs of both parties, and not only the means of the husband, are taken into consideration to give the impression that if the divorced wife can fend for herself, the amount will be reduced or no order with regard to maintenance will be made. The situation will be quite different in the case where the marriage is still subsisting as the parties are still in a marriage contract.

Section 78 of the LRA further provides:

'In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.'

As shown above, the means and needs of the parties will be the main factors, besides the degree of responsibility of any or both parties for the breakdown of the marriage. Means of the husband, as has been highlighted before, mainly concerns his money or income that can be disposed of as maintenance to the wife. Thus, the amount of maintenance will vary depending on the means of the husband. The wife may be entitled to a higher amount of maintenance if the husband has high feasible means such as he is a multimillionaire as in the case of *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97. In this case, the wife was awarded RM25000 for interim maintenance. Similarly, the Court awarded the divorced wife RM6000 in the case of *Koay Cheng Eng v Linda Herawati Santoso* [2008] 4 MLJ 863, after taking into account the means of the husband. Even if the husband is unemployed, a maintenance order can still be made against him if the court found that he still had some property or cash. In *Lee Yu Lan v Lim Thian Chye* [1984] 1 MLJ 56, the Court still ordered the ex-husband to pay a nominal sum of maintenance even though he was not working at that time, taking into account he had some cash from the proceeds of sale of their matrimonial house. The Court also observed that the possibility for him to secure employment in the future was very bright. It is also interesting to note that the law seems to be concerned with the means of the husband only, thus exclude the husband's parents' though they are very wealthy as illustrated in the case of *Ananda Dharmalingam v Chantella Honeybee Sargon* [2006] 6 MLJ 179.

With regard to the needs of the wife, all matters which cover the standard of living that she has had during marriage will be taken into account. In *Diana Clarice's* case [2002] 2 MLJ 97, in assessing the amount of maintenance, the Court took into account the needs of the wife including her luxurious way of life. Similarly in the case of *Linda Herawati* [2008] 4 MLJ 863, the Court laid down in detail what were the amenities provided to the wife while she was still the wife including the house, payment of household bills and holidays before coming to a conclusion on the amount that needed to be paid by the husband. However, the huge amount claimed by the wife must represent her needs. In the case of *Ananda Dharmalingam v Chantella Honeybee Sargon* [2006] 6 MLJ 179, the wife's contention of maintenance amounting to RM6,800 was denied because she failed to prove her need for that sum of maintenance. Moreover, the Court was of the opinion that taking into account the means of the husband, the sum claimed was an excessive and unjustified amount.

Another important factor that needs consideration by the court in determining the amount of maintenance is degree of responsibility of the parties towards the breakdown of the marriage. In the case of *Yap Kim Swee v Leong Hung Yin* [1989] 3 MLJ 55, the Court ruled that the wife was not entitled to any maintenance due to her being the guilty party which led to the breakdown of the marriage. In the case of *Goh Kim Hwa v Khoo Swee Huah* [1986] 2 MLJ 156, the Court found out that both contributed to the breakdown of the marriage and thus entitled the wife to be paid RM500 as the amount of maintenance. In the case of *Linda Herawati* [2008] 4 MLJ 863, the husband was found to be the main reason for the marriage breakdown and hence the wife was given RM6000.

It should also be mentioned here that the amount paid can always be varied in future if one of the parties can prove to the court that there is material change in the circumstances (the LRA, section 83). The court will consider any financial liability attached to the husband's income that may cause him hardship. If the husband was retrenched from work or there was a track record of borrowing money from others, the court may vary the amount up to the optimum level which suits both parties. In the case of *Gisela Gertrud Abe v Tan Wee Kiat* [1986] 2 MLJ 297, the Court took into consideration that the husband was unemployed for 7 months and thereafter acquired new employment with a reduced salary. The fact that the husband had remarried was also taken into account by the court in reducing the amount of maintenance. In the case of *Anna Tay Siew Hong v Joseph Ng Tiong Yong* [1995] 3 CLJ 647, the Court went further to rescind the order made earlier as the husband in this case was not only old and poor but also suffering from several diseases.

Working Wife: Does it affect the right to Maintenance?

There is no provision under the MWCA which differentiates between the right of maintenance of a working wife and a non working wife. In *Raquiza v Raquiza* [1947] 1 MLJ 202, the husband argued that he did not need to maintain his wife as she had her

own income. Brown J, relying on *Reed v Moor* (5 CP 200) came to the opinion that even though the wife was earning on her own, she was still entitled to get maintenance from the husband. Brown J said:

'It is a husband's common law duty to maintain his wife, and the onus is upon him to show that for some good reason he is excused from the performance of that duty. Such a reason would be if he could show that his wife is living in adultery, or if without any sufficient reason she refuses to live with her husband ...'

In this case, the judge referred to section 37(6) of the Minor Offences Ordinance 1936 S.S. Cap 24 which is in *pari materia* with section 5(2) of MWCA 1950.

The question arises as to whether the fact that the wife is working would affect the amount that she will be receiving. As has been discussed before, unlike the LRA, nothing in the MWCA mentions the means of the wife that needs to be considered. Nevertheless, in *Raquiza's* case [1947] 1 MLJ 202, the Court, relying on the case of *Cobb v Cobb* (1900) P 294, came to the opinion that the income of the wife was taken into account in assessing the amount of maintenance that should be given to the wife. The Court in the case of *Ng Lean Huat v Lim Joo Khim* [1993] 3 CLJ 647 went further to say that even a potential earning capacity should also be considered.

With regard to the right of a divorced wife, section 77 of the LRA does not provide a distinction between the right of a working wife and a non working wife. There are many cases showing that the court upheld the right of maintenance to the working wife or former wife as in the case of *Diana Clarice* [2002] 2 MLJ 97. In this case the wife who was a legal adviser with monthly salary of RM3,500 was still awarded maintenance by the Court. Similar decisions can be seen in the case of *Lee Yu Lan v Lim Thain Chye* [1984] 1 MLJ 56 and *Goh Kim Hwa v Khoo Swee Huah* [1986] 2 MLJ 156. In the Indian case of *Madhu v PS Pundir* [1999] AIHC 865, the Court also came to a similar conclusion when it decided that the fact that a wife was working could not be a complete bar for her to claim maintenance, even though it might affect the amount of maintenance claimed (M.G. Pillai, 2009).

Nevertheless, in terms of the amount to be awarded, section 78 of the LRA expressly mentions that the court needs to consider not only the husband's means but also the wife's means in determining the amount to be paid as maintenance. This means that the amount of maintenance given to the divorced wife who is working might be reduced.

Another interesting issue that arises with regard to the means of the wife is whether the potential earning capacity of the divorced wife may be taken into account in determining

the amount of maintenance. In the English case of *Rose v Rose* [1950] 2 ALL ER 311, Lord Denning observed;

'After the divorce the wife claimed maintenance, and the question is whether she ought to go to work. I agree that no general rule can be laid down on the matter, but this wife is certainly under no legal duty to go out to work in order to reduce the maintenance that her husband should pay. It would be quite unreasonable to expect her to do so when she has to look after a young child. If a wife does earn, then her earnings must be taken into account; or if she is a young woman with no children, and obviously ought to go out to work in her own interest, but does not, then her potential earning capacity ought to be taken into account; or if she has worked regularly during the married life and might reasonably be expected to work after divorce, her potential earnings ought to be taken into account. Except in cases such as those, however, it does not as a rule lie in the mouth of a wrongdoing husband to say that the wife ought to go to work simply in order to relieve him from paying maintenance.'

Similarly in Singapore, the Court in *Thevathasan v Thevathasan* [1960] 1 MLJ 255, held that the potential earning power of the wife should be taken into consideration while assessing the amount to be granted to her. In this case, after taking into account the potential earning capacity of the wife, the Court reduced the amount from \$450 to \$300 a month.

What is the position in Malaysia? In *V Sandrasagaran Veerapan Raman v Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474, the Court was of the opinion that in assessing the means and needs of the parties, the Court should have regard to the parties' earning capabilities. In this case, the Court observed that the divorced wife was a capable young woman who had worked before and had no children and thus would be able to look for a job without depending on the husband's support. Nevertheless, in this case, she was still awarded a lump sum amounting to RM 10,000. In the case of *Choong Yee Fong v Ooi Seng Keat* [2006] 1 MLJ 791, the Court followed the ruling in *Thevathasan* [1960] 1 MLJ 255 and decided that the application made by the petitioner for maintenance was dismissed taking into account her earning potential. The Court further explained that the petitioner who was 41 years of age, able bodied, without any children and previously earning a salary of RM1,800 per month certainly had earning potential in the market work force.

The same line of judgement was made by Faiza Thamby Chik J (as he then was) in the case of *Chee Kok Choon v Sern Kuang Eng* [2005] 4 MLJ 461. In this case, the application for maintenance was not granted by the Court as the divorced wife was 'expected to improve herself and her employment prospects, and to be gainfully employed'. The Court also commented that her needs were well taken care of as she continued to live in the

matrimonial home which was given solely to her as part of the matrimonial property. The only child that the parties had, who was under her care and control, was almost 13 years old and presumably spent most of her time in school and thus would not restrict her to look for employment. In *Linda Herawati's* [2008] 4 MLJ 863 case, the husband argued that the wife should not be given any maintenance taking into account her potential earning capacity as a qualified architect. The Court, while considering the argument forwarded by the husband, however came to a different conclusion. The husband's argument was not accepted by the Court not because the potential earning capacity should not be taken into consideration; but based on the facts and circumstances of the case, it would be injustice to the wife if no maintenance was granted. In this case, even though the wife was an architect by qualification, she could not practise in Malaysia as she needed to fulfil certain requirements which were almost impossible to achieve as she was neither a citizen of Malaysia nor a permanent resident.

Not only the potential earning capacity will be taken into account by the Court, but also any assets or other financial resources. In *Dato Low Nam Hui v Vu Siew Chin* [1994] 1 MLJ 129, the Court held that the wife's assets and other financial resources could also be taken into account in coming to a decision whether she was entitled or not to maintenance.

To conclude, it can be said that even though in general the fact that a wife is working will not as of right bar her from claiming maintenance, the recent trend shows that her earning capacity might contribute to affect her right, at least to the amount of maintenance. This is especially true in the case of a divorced wife taking into account the wording of section 78 of the LRA which mentions clearly the words 'means and needs of both parties' and not only the means of the husband which appear in section 3 of the MWCA. It is observed that the court will still award maintenance to the divorced wife even though she is working, if the court found that her needs could not be supported by her earnings alone, as can be seen in the case of *Diana Clarice* [2002] 2 MLJ 97. On the other hand, as can be seen in the case of *Dato Low Nam Hui v Vu Siew Chin* [1994] 1 MLJ 129, and other cases, the court will be reluctant to award any maintenance if the court thinks that the wife can satisfy her own reasonable needs based on her earning capacity and assets.

Conclusion

It seems that both Islamic and civil law in Malaysia imposes on the husband the duty to maintain his wife regardless of whether the wife is working or not. This reflects that as regards a husband's duty to maintain the wife, the provision of Islamic and civil law is in harmony. Similarly the laws provide for certain exceptions as to the wife's entitlement to maintenance, such as the wife's refusal to stay with the husband without a lawful reason or reasonable excuse. Therefore both laws are in agreement that if there exist certain factors which deprive the wife of a right to maintenance, the husband will not owe any duty to maintain her. Both Islamic and civil law in Malaysia also regard that in assessing

the amount of maintenance, the means of the husband and the needs of the wife will be taken into consideration. The laws are different in the sense that the Islamic law imposes the duty to maintain during the subsistence of marital relationship and in the case of divorce, until the wife completes her 'iddah period. Meanwhile, under the civil law, even if the wife is divorced, the husband's duty to maintain will extend until the wife marries another person or until she is living in adultery.

Perhaps it is worth suggesting that the law should provide a clear rule on a husband's duty to maintain a working wife, as what is provided in some Muslim countries. These provisions will provide a clear guide to a couple, as working wives is a modern trend, especially for the people in Malaysia. A clear cut rule would also answer certain queries as to working wife's right to maintenance which is most probable raised by many working couple nowadays.

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