



Non-Muslim Wife Maintenance in Malaysia: A Right or Privilege in the 21st Century?

Sridevi Thambapillay¹

¹ Universiti Malaya, Malaysia
sridevit@um.edu.my

Abstract. More than six decades have passed since Malaysia achieved her independence. Our nation has witnessed tremendous developments in various fields. However, the same cannot be said for certain vulnerable groups, one of them being women. It cannot be denied that women in the 21st century are far more advanced when compared to their predecessors. Nevertheless, where it concerns their legal rights, their plight is deplorable in certain situations. Malaysia has signed and ratified the Convention on The Elimination Against All Forms of Discrimination Against Women (CEDAW) and thereafter amended Article 8(2) of the Federal Constitution to prohibit discrimination based on gender, to show her commitment to uplift women's rights. Unfortunately, there are still certain women's right that need to be revisited, one of which is the right to maintenance. The Malaysian statutes on wife maintenance are drafted in a manner which gives the readers the impression that non-Muslim women do not have a right to claim maintenance from their husbands. It is basically at the discretion of the Court. This was further confirmed in the recent case of *YAY v WHO & Anor* [2023] MLRHU 48, where the learned High Court judge, *inter alia*, stated that a married woman does not have an automatic right to claim maintenance from her husband. Hence, the purpose of the paper is as follows: first, to revisit the current laws and cases on wife maintenance, secondly to compare the position under Shariah Law as well as Singaporean law and finally to recommend suggestions to alleviate this issue. At the end of the day, it should not be forgotten that the hand that rocks the cradle rules the world.

Keywords: Wife Maintenance, Right, Privilege

1 Introduction

Since its independence more than six decades ago, Malaysia has far advanced in many fields, such as infrastructure, science and technology, to name a few. Nevertheless, the same cannot be said for certain segments of our society, whose rights are still deplorable, one of whom being women. No doubt, women in the 21st century are far more advanced when compared to their predecessors in the early 20th century and prior to that. Nevertheless, if the plight of the women in the 21st century is examined, it could be said that there are still issues that needs to be resolved in order to protect their rights and interests.

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It should not be forgotten that a family, which comprises a man, woman and their children, forms the basic unit in a society[1]. The stability and strength of the society lies on the family unit. At the same, it should also be noted that the woman or wife in a family is the person who pro creates the next generation and hence plays a pivotal role in expanding the family.

This shows the importance of a wife in a family unit. The issue that arises is whether her rights are protected under the law, especially when there is a breakdown in the marriage or when the marriage is dissolved? “Rights” in this context refers to her right to the distribution of the matrimonial property, right to guardianship and custody of her children, and right to maintenance. For the purposes of this paper, the writer would focus on the right of a wife to maintenance from her husband.

At this juncture, it is to be noted that Malaysia practices a dual system of family law, one for the Muslims and one for the non-Muslims [2]. This paper, as the title suggests, will only focus on the right of a non-Muslim wife to maintenance.

2 Definition of Maintenance

Before looking at the Problem Statement, it is pertinent to first understand to look at the definition of “maintenance”, in order to see what a wife can claim as maintenance from her husband. Harman J in the often-quoted case of *Re Borthwick (deceased); Borthwick and Another v Beauvais* [3] explained the meaning of maintenance as follows: [3]

It is said that maintenance is the only thing which can be regarded. That does not mean that the court can only give the dependant just enough to put a little jam on her bread and butter. It has already been held that what is reasonable one may not be reasonable for another. It must depend on the circumstances of the case. The wife of a rich man is entitled to better position for her maintenance than the wife of a poor one. Maintenance does not only mean the food a wife puts in her mouth. It also means her clothes, the house in which she lives, and the money which she is to have in her pocket, all which vary according to the means of her husband. Maintenance cannot mean only mere subsistence.

According to the Law Reform (Marriage and Divorce) Act 1976 [4] (LRA), there is no specific provision on the definition of wife maintenance. However, reference could be made to section 92 of the LRA, which provides the duty of a parent to maintain his or her child as follows:

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

Although section 92 refers to child maintenance, it is possible to decipher that basically maintenance refers to the basic necessities in life, such as food, clothing and accommodation, though section 92 adds on education, as this provision refers to child maintenance. Hence, perusing the explanation on wife maintenance by Harman J in the above case of *Re Borthwick* and a similar definition in section 92 of the LRA, it could be concluded that wife maintenance would refer to the basic necessities in life. However, it is submitted that in addition to food, clothing and shelter, the definition should also include medical expenses. This would be important, especially in old age, when age-related ailments set in.

3 Problem Statement

The recent High Court decision in the case of *Yay v Who & Anor* [5] has created a confusion among the non-Muslim married women as to their right to claim maintenance from the husband. This is because under common law (which would be discussed later in this paper), a man is under a duty to maintain his wife, and this has so far been followed by the Malaysian courts. The learned High Court judge in the case of *Yay v Who & Anor* held as follows [5]:

I am compelled to state, at this juncture, that **there is no hard and fast rule that a man must maintain his wife or former wife**. It must be remembered that the provisions of the Law Reform (Marriage and Divorce) Act 1976 were discussed, deliberated, and determined during a time when the demarcation of the roles of husband and wife were clear, where most women were stay-home mothers and were financially dependent on their husbands who were the breadwinners for the family.

... Gone are the days where a woman's only place was in the kitchen. As such, **there is no automatic right for a woman to claim maintenance from her husband ... (emphasis added)**.

The above decision could be described as a departure from the position under common law. No doubt that more women are working in the labour force in this century when compared to the 20th century and prior to that. However, recent studies show that the participation of women in the workforce is still low [6]. According to Sharifah Nabilah Syed Salleh & Norma Mansor in their article entitled *Women and Labour Force Participation in Malaysia*: [6]

Women in Malaysia also share the same stories. Compared to men, women's labour force participation rates remained modest and low, notwithstanding Malaysia's rapid post-independence industrialization process and advancements in the educational sector ... Malaysian women's labour force participation rate was at 55.5% in 2021, compared to 80.9% for men (DOSM 2022). Additionally, the major composition of those outside of the labour force is women. Out of the 7.2

million population outside the labour force, 68.6 percent are women. A study found that more than 60 percent of women responded that the traditional notion that women bear family-specific roles, domestic responsibilities, and community commitments are the primary reason for them not being in the labour force (DOSM, 2022). Furthermore, unlike other East Asian countries, the profile of women’s labour force participation is single-peaked. The single peak in the profile of women’s labour force participation in Malaysia indicates that once they leave the labour force, they do not always return.

In addition to the above statistics on the percentage of women’s labour force participation rate, the percentage of male and female workers by marital status in the year 2021 could be observed as follows:[7]

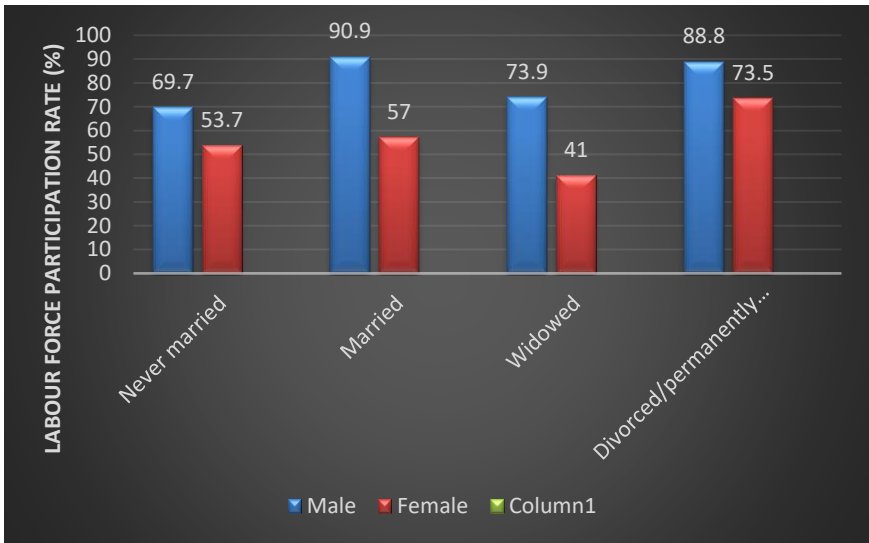


Fig. 1.: Labour force participation rate by marital status and gender 2021
Source: Statista 2023

From the above chart, it could be observed that in 2021, the labour force participation rate of divorced or permanently separated women in Malaysia was 73.5%, which was the highest when compared to married women and those widowed. Hence, the question that arises is whether these divorced or permanently separated women had to seek employment as they were not maintained by their husband post-divorce? If the answer to this question is in the affirmative, then the issue that arises is whether the wife maintenance laws have failed in Malaysia and whether a married woman should be conferred the automatic right to maintenance again, following common law?

4 Research Questions

In order to address the issue raised above in the Problem Statement, the writer intends to examine the following research questions:

- (1) What is a wife's right to maintenance under common law?
- (2) What are the laws and case law on wife maintenance in Malaysia?
- (3) What is the position on wife maintenance under Islamic law and Singaporean law?
- (4) What are the recommendations that could be suggested in order to overcome the confusion raised as to the automatic right of a married woman to maintenance?

5 Purpose of this paper

Having stated the research questions above, the purpose of this study or paper could be summarised as follows: first to revisit the current laws and cases on wife maintenance in Malaysia, secondly to compare the position under common law, Islamic law and Singaporean law and finally to suggest recommendations based on the comparison made to alleviate the confusion as to the right of a wife to maintenance.

6 Research Method

The writer has resorted to doctrinal approach in writing this paper. Reference was made to library material as well as material gathered online. Primary sources of law such as the statutes on maintenance in Malaysia that apply to Muslims and non-Muslims, as well as the statute in Singapore were referred to. In addition to statutes, prominence was given to case law in Malaysia (pertaining to both Muslims and non-Muslims), under common law, and Singaporean law in order to examine the approach taken and interpretation by various judges on this issue.

Secondary sources of law, for example, scholarly articles were also referred to in order to gather the opinions by academics or scholars. Internet sites such as LexisNexis, CLJ Online, LawNet, Hein Online and the Department of Statistics Malaysia's (DOSM) websites were referred to.

7 Findings

Based on the literature, statutes and cases referred too, the writer gathered the following findings, which will be discussed an accordance with the Research Questions.

7.1 What is a wife's right to maintenance under common law?

According to Lord Penzance in the case of *Hyde v Hyde*, [8] marriage is the voluntary union between a man and a woman for life to the exclusion of all others. In other words, a man and his wife become one entity at marriage. Hence, the wife does not enjoy a separate legal identity and therefore depends on her husband for everything, starting from her domicile up to her maintenance. The rationale for the husband's duty to maintain his wife therefore stems from the institution of marriage, so long as the wife is alive and willing to continue to live with him [1]. On the contrary, the wife does not have a corresponding duty to maintain her husband. At this juncture, the writer would like to highlight the fact that the Malaysian LRA has included a provision where an incapacitated husband may be able to claim maintenance from his wife [5].

If the husband fails or refuses to provide maintenance to the wife, she automatically becomes an agent of necessity to the husband capable of pleading his credit if she has no means of supporting herself [9].

In addition, even if the wife is earning or has money of her own, the husband is not released from his duty to maintain her [10]. Nevertheless, the husband will be relieved of his duty to maintain his wife under the following circumstances: [11]

- (a) Where the wife commits adultery or by her conduct it makes her husband to believe that she has committed adultery;
- (b) Where she is guilty of desertion;
- (c) The husband is dead; and
- (d) The decree of nullity or divorce is granted by the court.

Therefore, save in the above circumstances, under common law, the wife has an automatic right to claim maintenance from her husband, even if she is earning or has money of her own. At this juncture, the writer reiterates what was stated earlier in the Problem Statement, i.e., the High Court decision in *Yay v Who and Anor* [5] has departed from the common law position as a wife, according to the learned judge, in current times has no longer an automatic right to claim maintenance from her husband. The court is given a discretion by the relevant statutory provision and needs to consider the factors surrounding the case before making an order.

7.2 What are the laws and case law on wife maintenance in Malaysia?

In order to discuss the findings for the second research question, the writer would make a quick reference to the statutes on non-Muslim wife maintenance in Malaysia, followed by the right of a secondary wife to claim maintenance and thereafter examine the case law on wife maintenance in order to see the judicial attitude or approach prior to the recent case of *Yay v Who & Anor* [5].

Statutes. There are basically two statutes that enable non-Muslim married women to claim maintenance from their husband, i.e.:

- a) Married Women and Children (Maintenance) Act 1950 [12]; and
- b) LRA

Married Women and Children (Maintenance) Act 1950. Section 3(1) of the Married Women and Children (Maintenance) Act 1950 (the 1950 Act) provides as follows:

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

The above provision clearly empowers the court to order a man who has neglected or refused to maintain his wife or legitimate child to maintain them, in accordance with his means.

However, the same Act provides two defences for the husband in section 5, where he does not need to maintain his wife. The first defence is where he offers to maintain his wife on condition of her living with him and she refuses to do so without any sufficient reason [13]. The second defence is where the wife lives in adultery [14].

Law Reform (Marriage and Divorce) Act 1976. Section 77(1) of the LRA provides three situations where the court may order a man to pay maintenance to his wife or former wife, i.e.:

- a) During the course of any matrimonial proceedings;
- b) When granting or subsequent to the grant of a decree of divorce or judicial separation; or
- c) If after a decree declaring her presumed dead, she is found to be alive.

When comparing section 77(1) of the LRA with section 3(1) of the 1950 Act, it could be observed that in order for a wife to apply for maintenance under the LRA, generally there needs to be a matrimonial proceeding, either ongoing or towards the end or after the granting of a decree of divorce or judicial separation. On the other hand, for section 3(1) of the 1950 Act to be applicable, there need not be any matrimonial proceeding.

Section 78 of the LRA further provides for the assessment of the maintenance as follows:

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 or former 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.

Thus, the court primarily needs to consider two factors in order to assess the maintenance amount, i.e., 1) the means and needs of the parties, and 2) the degree of responsibility of each party to the breakdown of the marriage (also known as the “fault principle”) [15]. Further thereto, the LRA also provides that a wife ceases her right to receive maintenance when she remarries or is living in adultery [4].

The relevant case law on the application of the above provisions on maintenance will be discussed below, in order to see how the courts have interpreted the right of a wife to claim maintenance.

Right of a secondary wife to maintenance. Prior to examining the case law on wife maintenance, the meaning of a “wife” needs to be examined first. The issue that arises is whether “wife” includes a secondary wife or is it limited to a principal wife? This is because prior to the coming into force of the LRA on 1 March 1982, polygamous marriages among non-Muslims were in practice and there was no law expressly prohibiting such practice. For example, according to the Chinese customary law, a man is allowed to have a principal wife and secondary wives. However, with the coming into force of the LRA, section 5(1) clearly provides that any marriage that takes place after 1 March 1982 must be a monogamous marriage.

Thus, the issue as stated above is whether a secondary wife has a right to claim maintenance from her husband? In a case that was decided way before the coming into force of the LRA, i.e., *Mui Siu Hing v Lee Hong Kee* [16], the issue was whether a secondary wife falls within the meaning of a “wife” in the context of maintenance of a secondary wife under the Minor Offence Ordinance of the Straits Settlements. Terrell Acting CJ observed that “it was the intention of the legislature that in appropriate cases, Magistrates should have power under section 37 of the Minor Offences Ordinance to grant maintenance to secondary as much as principal wives”. [16]

The above case shows that secondary wives had the right to claim maintenance, just like the principal wife. However, this was prior to the coming into force of the LRA. The issue then is what about the situation post LRA? Reference at this juncture could be made to section 6(1) and (3) of the LRA. Section 6(1) provides that if a marriage is not monogamous, it shall be void. Nevertheless, section 6(3) of the LRA provides as follows:

(3) Nothing in this section shall affect the liability of any person to pay such maintenance as may be directed to be paid by him under this Act or any other written law.

Perusing the above provision, it is submitted that though the secondary marriage is not valid under the LRA, nevertheless the “husband” still has a duty to maintain his secondary “wife.” As such, not all hope is lost for secondary wives regarding claiming maintenance from their “husband” due to section 6(3) above. Unfortunately, there is no judicial decision on this provision yet. It would be interesting to see how the court interprets this provision and whether it would be in favour of the secondary wife.

Case law on wife maintenance prior to the case of *Yay v Who & Anor*. As discussed earlier in the Problem Statement, the High Court in the case of *Yay v Who & Anor*[5]

has clearly stated that a wife does not have an automatic right to maintenance under the law. The learned judge referred to the opening words in Section 77(1), which states, “*The Court may...*” thereby giving the court the discretion to order maintenance for the wife concerned. Hence, the wife does not have an automatic right to maintenance. This case, it is submitted, can be said to be the first case to come out with such an interpretation of the said provision pertaining to “automatic right to maintenance”.

Nevertheless, the writer intends to examine the case law on wife maintenance from the early 20th century in order to see whether the change in judicial interpretation from a right to a privilege had already started before the decision in *Yay v Who & Anor*.

One of the earlier cases in the 20th century was the case of *Raquiza v Raquiza*. [17] In this case, Brown J stated: [17]

... it is the 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.

His Lordship agreed with the decision in *Reed v Moor* [10] that even if the wife has money of her own, the husband is not relieved from his duty to maintain his wife. In the case of *Lee Yu Lan v Lim Thain Chye* [18] Peh Swee Chin J stated that: “even an unemployed husband could be legally ordered to pay a nominal sum for his spouse or ex-spouse” [18]

Both the cases above could be said to have clearly followed the position under common law which imposes a duty upon the husband to maintain his wife, despite the wife earning an income or having money of her own.

Nevertheless, in the case of *Thevathasen v Thevathasen* [19] the court considered the potential earning capacity of the wife when deciding the maintenance. This was due to the fact that the wife was working before marriage. The real reason why the court in this case considered the potential earning capacity of the wife was because she was partly responsible for the breakdown of the marriage. The judge reduced the maintenance from RM450 to RM300 per month. Hence, it is submitted that the court in the above case may not have considered the wife’s potential earning capacity if she was not partly responsible for the breakdown of the said marriage.

Though the early cases on maintenance followed the common law position, the same could not be said for the latter part of the 20th century and early 21st century. There is a mixed reaction among the judges. There are some judges who obediently followed the common law position, whereas there are other judges who held that since the wife was earning, she was not entitled to claim maintenance from her husband.

The writer would first examine the cases that followed the common law position as stated above. In the case of *Koay Cheng Eng v Linda Herawati Santoso* [20] the husband argued that since his wife was a professionally qualified architect, who qualified and was licensed to practise in the United Kingdom, she was capable of earning an income and a good living in the United Kingdom. Hence, no maintenance should be ordered by the court. On the other hand, the wife contended that she is unable to practise in Malaysia as one of the criteria in order for to practise is that she has to be a Malaysian

citizen or permanent resident. Moreover, it was 14 years since she left the United Kingdom to come and live in Malaysia, therefore, she effectively gave up her right to practise architecture in the United Kingdom. The learned judge agreed with the wife and said that the wife had sacrificed her career when she followed her husband to live in Malaysia. Hence, it was unconscionable for the husband to insist that the wife return to the United Kingdom and practise her architecture there. Therefore, there would be grave injustice if the court does not order maintenance in favour of the wife.

Next is the case of *Kathirsean a/l Kumarasan v Punaswarthy a/p K. Shanmugam* [21]. In this case, the husband argued that since the wife earned a monthly salary of RM3,371, it was sufficient for her to maintain herself and he need not pay her any maintenance. The court held that the fact that wife was gainfully employed and that she was able to sustain herself with her salary cannot be described as a key factor which disentitled her to maintenance, as section 78 of the LRA clearly provides that the court will have to consider the means and needs of the parties when assessing the maintenance. At the most, the court will reduce the maintenance sum considering the wife was also gainfully employed.

The third case is the case of *Shilashree Shirley Gomez v Raymond Shilendran a/l Simon*, [22] where the court looked at the means and needs test as provided in section 78 of the LRA. In this case, the wife was 41 years old and had the means and opportunity to be self-reliant as contemplated by section 78 of the LRA. Hence, the court ordered that the maintenance sum must be reduced from RM5000 to RM1500.

The general conclusion that could be formulated from the above cases is that if the wife was gainfully employed, it does not by itself disentitle her to maintenance. At the most, the court would only reduce the maintenance sum, in accordance with section 78 of the LRA.

The next three cases below show otherwise, where court rejected the wife's claim for maintenance as she was earning an income and had adequate financial resources. The first case is the case of *Dato Low Nam Hui v Siew Chin*, [23] where the court found that the wife had more than adequate financial resources to attend to her reasonable needs and had no justification or need for the husband's maintenance. Hence, her claim for maintenance was dismissed.

In the case of *Choong Yee Fong v Ooi Seng Keat & Anor* [24], Faiza Tamby Chik J held that the wife, aged 41 years of age and able-bodied, was earning a salary of RM1800 per month until 2001. She had the earning potential with the relevant past working experience which helped her enhance her earning power in the market workforce. She was also getting a rental of RM700 per month from renting out an asset. There were no children from the marriage. The wife had also been able to financially support herself since the parties separated in 1994. The learned judge referred to his judgment in an unreported case of *V. Sandrasagaran a/l Veerapan Raman v Det-tarassar Valentine Souvina Marie* (Divorce Petition No.33-185-1993), where his Lordship stated: "with no children to the marriage the respondent would be able to adjust herself to her former position within a short period of time. Being a capable young woman and since she had worked before, she would be able to find a job and fend for herself." Hence, the claim for maintenance was rejected.

In the case of *GGC v CCC & Anor*[25], the court considered the fact that the husband was diagnosed with HIV positive and needs to spend money on his medical treatment and medication. He further needed to maintain his two children. Hence, the court rejected the wife's claim for maintenance as she was working and earning a reasonable income to support herself.

The three cases discussed above decided not to award maintenance to the wife as she was earning an income and does not need to depend on her husband's income. Be that as it may, none of the cases above stated that the wife does not have an automatic right to maintenance as was stated in the case of *Yay v Who & Anor*[5]. The learned judges in the above cases merely applied the means and needs test in section 78 of the LRA before deciding whether the wife in the said case could claim maintenance from the husband. Thus, it could be said that the High Court decision in the case of *Yay v Who & Anor* has resulted in a paradigm shift from right-based to a privilege when it concerns non-Muslim wife maintenance in Malaysia.

7.3 What is the position on wife maintenance under Islamic law and Singaporean law?

Having examined the position in Malaysia, the writer intends to next compare the position under Islamic law as well as Singaporean law. Islamic Law was chosen as a comparison because, as stated in the Introduction, Malaysia practises a dual system of Family Law. Thus, it would be interesting to observe whether Muslim wives have a right to maintenance under Islamic Law. Next, the writer also intends to make a comparison with the maintenance law in Singapore as their laws originated from Malaysian laws. Therefore, it would be worthwhile to examine if there has been any development in their law as to wife maintenance.

Islamic Law. Under Islamic Law, maintenance is referred to as "*nafaqah*", an Arabic word, which literally means what a person spends for his family members [26]. The different schools of thought in Islam have defined "*nafaqah*" to basically refer to the basic needs. However, the Shafi'i jurists have expanded the meaning to include food, clothing, cleaning tools, house appliances like cooking equipment, accommodation and servant in the case where the wife ever used the service of a servant before her marriage [27].

Under Islamic Law, the husband has a duty to maintain his wife. This could be seen from the authorities from the Al-Quran, the Sunnah of the Prophet (pbuh) and Ijma of the Fuqaha. For example, Al-Quran, *Surah al-Talaq:65:7* states to the effect:

Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him; Allah puts no burden on any person beyond what He has given him...

In Al-Quran *Surah al-Nisa:4:34* states to the effect:

Men are the protectors and maintainers of women because Allah has given the one more strength than the other and because they support them from their means. Therefore, the righteous women are devoutly obedient and guard in the husband's absence what Allah would have them guard.

Abdullah Ibn 'Amr narrated that he heard Prophet (pbuh) saying:

Sufficient it is as a sin for a man to leave his family starved. [28]

Perusing the sources of Islamic Law imposing a duty on a man to maintain his wife, it could be described as similar to the duty imposed under common law. This duty is also codified in section 59(1) of the Islamic Family Law (Federal Territories) Act 1984 [29] (IFLA) as follows:

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

At the same time, the Muslim jurists have also discussed the conditions of maintenance to a wife as follows:

- 1) The wife must fully submit to the husband in terms of access to sexual intercourse, even though the husband is a minor.[30]
- 2) She must be a major person and therefore to have sexual relationship.[31]
- 3) The marriage must be a valid marriage.[31]
- 4) The wife's right to maintenance must be unaffected by certain factors which disentitle her to maintenance, for example, disobedience (*nusyuz*)[31]

From the conditions set out above, it could be observed that a wife loses her right to maintenance when she is disobedient or *nusyuz*. The Muslim jurists have given certain examples of *nusyuz* as follows:[32]

- (1) when the wife prevents the husband from touching her or declines to have sexual intercourse without lawful reasons.
- (2) When the wife goes out from the husband's home or travels without the husband's permission. (However, there are certain exceptions to this rule).
- (3) When the wife performs pilgrimage (*Hajj*) or a minor pilgrimage (*'umrah*) without the husband's permission.
- (4) If the wife refuses to move to the matrimonial home after her marriage to the husband.

This could also be observed in section 59(2) of the IFLA which provides:

Subject to Hukum Syara' and confirmation by the Court, a wife shall not be entitled to maintenance when she is *nusyuz*, or unreasonably refuses to obey the lawful

wishes or commands of her husband, that is to say, *inter alia* -

- (a) when she withholds her association with her husband;
 - (b) when she leaves her husband's home against his will; or
 - (c) when she refuses to move with him to another home or place,
- without any valid reason according to Hukum Syara'.

Having looked at the husband's duty to maintain and the conditions for the wife to receive maintenance and the exceptions where she loses such right, an interesting observation can be made, i.e. the failure on the part of the husband to maintain the wife can constitute a ground for the wife to file a divorce. For example, Imam Shafie states that where a husband is financially incapable of maintaining his wife, they should be separated. Reliance was made to the Quranic verse, Surah *Al-Baqarah*: 229, which states to the effect:

Either you retain her on reasonable terms or release her with kindness.

The above could also be observed in the IFLA which has provided two major means where an aggrieved wife may apply for redress where her husband has failed to maintain, i.e., *fasakh* and *ta'liq*. Section 2 of the IFLA defines "*fasakh*" to mean "the annulment of a marriage by reason of any circumstance permitted by Islamic Law in accordance with section 52". Section 52(1) of the IFLA provides the grounds on which a married woman may be entitled to obtain an order for the dissolution of marriage or *fasakh*. The relevant grounds for the purposes of this paper are in paras (a) and (b), which read as follows:

- (a) that the whereabouts of the husband have not been known for a period of more than one year;
- (b) that the husband has neglected or failed to provide for her maintenance for a period of three months;

The following cases could be referred to in order to see the court granting divorce by *fasakh*, where the husband had failed to provide maintenance for the wife, namely, *Mashitah v Hussain*, [33] *Atikah v Razali* [34] and *Faiza bt Abdul Samad v Abu Bakar bin Abdul Ghaffar* [35].

The second mean of protecting the wife's right to maintenance is through the application of the doctrine of *ta'liq*. Section 2 of the IFLA defines *ta'liq* as "a promise expressed by the husband after solemnization of marriage in accordance with Hukum Syara' and the provisions of this Act". Thus, *ta'liq* is an agreement which comprises the promise made by the husband after the solemnization of the marriage. The conditions in the agreement may include desertion, failure to pay maintenance, and harm

caused to the wife. Therefore, under the *ta'liq* divorce, the wife has the right to divorce the husband if he violates any of the conditions or promises that he made under the *ta'liq* agreement, including the failure to pay maintenance [36]. Divorce under *ta'liq* or stipulation is provided under section 50 of the IFLA. Two cases could be referred to in this context, where wife succeeded in proving to the court that the husband had failed to provide maintenance and where the court subsequently decreed a *ta'liq* divorce, i.e., *Saleemawegam v Mohd Anuar* [37] and *Aminah v Ahmad* [38].

The two instances as discussed above show the protection offered by Islamic Law to married women where their husband fails to provide maintenance for them, i.e., they can file for either a *fasakh* or *ta'liq* divorce on the ground of failure to maintain the wife. This is commendable as there are no such provisions either under common law or the non-Muslim divorce law for the non-Muslims in Malaysia.

The issue that arises in Islamic Law, which is similar to the non-Muslim law as well, is whether the husband is duty bound to maintain his wife if she is working? According to the Islamic Law, two questions arise as to this regard, first, whether the wife has fulfilled the conditions for maintenance and secondly, whether by being a career or working woman, her right to maintenance ceases to exist? In answering the first question, a working wife might be able to fulfil the conditions for maintenance, for example, submission to the husband in terms of sexual intercourse. However, this submission may not be complete as for instance, a working wife may need to go out of the matrimonial home on certain occasions [32]. Hence, this leads to the next question, as to whether this would cease her right to maintenance?

Generally, save for the Hanafi jurists, Muslim jurists have not discussed in detail on this issue. There are two opinions that arise among the Hanafi jurists. Most of them are of the opinion that since a working wife will not be able to fully submit herself to her husband, she is not entitled to maintenance [39]. Whereas, the second group are of the opinion that so long as the husband has consented to the wife going out of the matrimonial home to work, the wife is entitled to maintenance as she is still in obedience to the husband's wish and is not *nusyuz*. However, if the husband did not consent, she will become a *nusyuz* and therefore, lose her right to maintenance [40].

The provisions in the IFLA on a husband's duty to maintenance, i.e. section 59(1) and (2) does not expressly provide for a situation if the wife is a working woman. The exceptions mentioned in section 59(2) on when the wife loses her right to maintenance applies to a working wife as well as a homemaker. The judicial decisions so far also seem to highlight the principle that the duty of a husband to maintain a working wife is obligatory so long as the wife by working does not commit any act which amounts to *nusyuz* [32].

Hence, from the above discussion, it could be summed up that in Malaysia, Islamic Law supports the principle that a Muslim man has an obligation to maintain his wife, regardless if his wife is working or not [32]. It could be said that the principles stated in the Al-Quran and the Hadith are strictly followed by the provisions in the IFLA, thereby protecting a married women's right to maintenance, whether she is employed or not, so long as she does not fall within any of the exceptions that would make her a *nusyuz*.

Position in Singapore. Although the Family Law in Singapore originated from Malaysia, there have been several developments pertaining to the rights of married women and other aspects of Family Law in Singapore. Two very good examples would be regarding the domicile of dependence of married women [41] as well as recognitions of gender reassignment surgery when it comes to marriage [41].

The two examples mentioned above are instances to prove that the Singapore Parliament has taken the necessary steps to amend its law in order to keep abreast with the developments that take place.

Hence, the writer would next refer to the laws on wife maintenance in Singapore. The Women's Charter has divided the right to maintenance of a "wife" and a "former wife" into two parts. Part 8 of the Charter refers to the right to maintenance during the subsistence of a marriage [42], whereas maintenance of a former wife is provided for in Part 10 of the Charter.

Section 69(4) of the Charter, which falls under Part 8, is similar to section 3 of the 1950 Act. However, the additional feature in the Charter is that it sets out a non-exhaustive list of factors that the court may consider when making a maintenance order for wife, incapacitated husband or a child as follows:

- (a) the financial needs of the wife, incapacitated husband or child;
- (b) the income, earning capacity (if any), property and other financial resources of the wife, incapacitated husband or child;
- (c) any physical or mental disability of the wife, incapacitated husband or child;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) the contributions made by each of the parties to the marriage to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (f) the standard of living enjoyed –
 - (i) by the wife before her husband neglected or refused to provide reasonable maintenance for her;
 - (ii) by the incapacitated husband before his wife neglected or refused to provide reasonable maintenance for him; or
 - (iii) by the child before a parent neglected or refused to provide reasonable maintenance for the child;
- (g) in the case of a child, the manner in which the child was being, and in which the parties to the marriage expected the child to be, educated or trained; and
- (h) the conduct of each of the parties to the marriage, if the conduct is such that it would in the opinion of the court be inequitable to disregard it.

The factors stated above serve as a guideline for the courts when assessing the maintenance sum. The Court of Appeal, in the case of *AXM v AXO* [43], observed that an application for maintenance under section 69 is assessed on a "necessary as well as practical" basis with a full investigation of the financial position of the parties. In a more recent case of *VVQ v VVR* [44] the court observed that such maintenance

orders are intended to provide modest maintenance (often calculated on a conservative basis) to tide the parties over pending the final determination of the parties' divorce.

The case law in Singapore on a wife's right to maintenance so far have not discussed whether it is not is an automatic right for the wife as the opening words of section 69 of the Charter also states "The Court may", similar to the Malaysian provision. Perusing the factors above, there is nothing that states that if a wife is earning an income or has money of her own, she loses her right to maintenance.

The same could also be said to the right of a wife to claim maintenance in a matrimonial proceeding as provided in part 10 of the Charter The wordings in section 113 of the Charter which empowers the court to grant a maintenance order is similar to section 77 of the Malaysian LRA. The said provision too starts with the phrase "The Court may ...", indicating that it is at the discretion of the court. Nevertheless, section 114 lists down the factors that the court must consider when assessing the maintenance sum as follows:

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions made by each of the parties to the marriage to the welfare of the family, including any contribution made by looking after the home or caring for the family; and
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring.

Paragraph (a) above refers to the "income, earning capacity, property and other financial resources which each party to the marriage has or is likely to have in the foreseeable future". Thus, the income and earning capacity of the wife would be considered as a factor under this paragraph. However, the question still remains as to whether she would lose her right to maintenance if it is shown to the court that she is gainfully employed?

Be that as it may, the writer at this juncture submits that it would be helpful to the Malaysian court if the factors provided in sections 69(4) and 117 of the Women's Charter are provided in the 1950 Act as well as the LRA. Currently both these Acts merely state "according to the means and needs of the parties", thereby giving a "blank cheque" to the court to refer to any factor which it deems is appropriate.

7.4 What are the recommendations that could be suggested in order to overcome the confusion raised as to the automatic right of a married woman to maintenance?

Having examined the Malaysian position and comparing it to the position under the common law, Islamic Law and Singaporean law, the writer submits that there is a dire need for the Malaysian Parliament to revisit the provisions on wife maintenance. This is due to the fact that, as mentioned by the learned judge in *Yay v Who & Anor* [5], “a whole generation has transitioned since the Law Reform (Marriage and Divorce) Act was enacted”.

The writer respectfully submits that in order to alleviate the dilemma than has been created by the above case as to the right of a wife to maintenance, Parliament should take immediate steps to amend both section 77(1) of the LRA and section 3(1) of the 1950 Act for two reasons. First, the provisions need to state in clear terms whether a wife has an automatic right to maintenance, and secondly, if she does have such right, to include the factors that the court needs to take into consideration when it assesses the maintenance sum. This is because the learned judge in the case of *Yay v Who & Anor*, having stated that the wife does not have an automatic right to maintenance, went on to say that the Court must consider all factors in order to determine if maintenance from the husband is justified.

With reference to the above recommendation, it is submitted that the factors laid down in the Singapore Women’s Charter court be incorporated in the Malaysian counterparts. In addition, it should also be stated that the factors mentioned therein are non-exhaustive, thereby giving flexibility to the court to consider other factors which it thinks appropriate.

8 Conclusion

In conclusion, it is submitted that as a signatory to and having ratified the Convention on the Elimination of Discrimination Against Women (CEDAW), Malaysia has shown her commitment to protect the rights of women in the nation. Thus, in order to prove this, it is pertinent that the legislature take the necessary steps to amend the laws that do not guarantee such right or where there are loopholes in the law, for example, maintenance laws.

The decision in the case of *Yay v Who & Anor* may have caused a stir among the non-Muslim married women in Malaysia, especially when the learned judge stated that these women do not have an automatic right to maintenance. Hence, in order to clear the confusion, it is reiterated that the Parliament takes immediate action to revisit the maintenance laws and at the same time to uphold the rights of these women, bearing in mind that the hand that rocks the cradle rules the world.

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