

MAINTENANCE LAWS AND ILLEGITIMATE CHILDREN IN MALAYSIA

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A. INTRODUCTION

Since its independence in 1957, our nation has progressed tremendously in various fields such as science, technology and infrastructure. However it is disheartening to note that although our society at large has reaped the benefits of the nation's developments, the same cannot be said about all segments of the society. One particular category in our society which is still left behind is the illegitimate children. Various laws have been passed to protect and safeguard the rights and interests of children in Malaysia. In fact, Malaysia has signed and ratified with reservations the United Nations Convention on the Rights of the Child (CRC). Nevertheless mere existence of laws does not guarantee that the rights and interests of children, especially illegitimate children are protected. Thus, the purpose of this paper is to examine the maintenance laws concerning non-Muslim children in order to see if their rights and interests are adequately protected and further to suggest reforms to these laws.

B. MEANING OF AN 'ILLEGITIMATE CHILD'

Generally, an 'illegitimate child' refers to a child who is born out of wedlock. However it is pertinent to look at the legal definition as it may differ from what is understood by a lay person. Therefore, the meaning of an 'illegitimate child' would be examined from three aspects, i.e. according to common law, as explained by text book writers and as defined by the Malaysian law.

1. Common Law

According to common law and Roman Civil Law, the fundamental principle as to legitimacy is *Pater est quem nuptiae demonstrant* – marriage is the proof of paternity. This principle is further explained in Blackstone's *Commentaries on the Laws of England*. A 'legitimate child' is a child whose parents are married at the time he was conceived or at the time of his birth. Therefore, it does not matter if a child was conceived before the parents were married. What matters is that the parents should be married at the time he is born in order to decide whether he is legitimate or not. In addition thereto, if a child is conceived during the marriage of the parents but is born either after the parents have separated or after the father has died, is deemed legitimate. In short, an illegitimate child, who is considered *filius nullius* or the son of nobody, is a child, whose parents are not married at the time of his birth.

In addition to the general principle above, the legitimacy of a child is also an issue in void and voidable marriages. According to common law, a child from a void marriage is considered illegitimate, as the marriage is *void ab initio*. In a voidable marriage on the other hand, the child becomes illegitimate from the date of the decree of nullity. This is because the marriage is deemed to be valid until the date the decree of nullity becomes absolute. It is submitted that it is not fair to change the status of legitimate child to an illegitimate in a voidable marriage, the reason being that at the time of the child's birth the marriage was indeed valid. The situation in a voidable marriage is different from a void marriage, as in the latter, the marriage is considered never to have been valid from the beginning. Hence, a child born in a void marriage could be deemed to be illegitimate as there was no valid marriage between his parents in the first place. However, the position is not the same in a voidable marriage as the marriage is valid until a decree of nullity is issued.

2. *Textbook writers*

Textbook writers have generally explained that an 'illegitimate child' refers to a child born out of wedlock. This meaning was further elaborated by Tan Yock Lin in *Conflicting Issues in Family and Succession Law* as follows:

The relation of parent and child ... arises through the birth of a child in lawful wedlock. The child is said to be legitimate when born in lawful wedlock. Some legal systems which take a less strict view consider a child to be legitimate as long as its parents bona fide and reasonably believed that they had contracted a valid marriage.

3. *Malaysian Law*

The meaning of an 'illegitimate child', unfortunately, is not expressly defined in any written law in Malaysia. However, the Evidence Act 1950, in section 112, provides for the presumption of legitimacy as follows:

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Hence, basically, a child is presumed to be legitimate if he was born during the valid marriage between his mother and father or within 280 days after the dissolution of his parents' marriage, the mother remaining unmarried. However, this presumption can be rebutted if it could be proven that the parties to the marriage had no access to one another at the time the said child could have been begotten. "No access" here refers to no sexual intercourse between the parties to the marriage or if it could be proven that the husband was impotent or was incapacitated during the relevant period.

Therefore, according to all the sources discussed above, an 'illegitimate child' is a child who is not born during a lawful marriage between his or her parents or within a reasonable time after the death of his or her father or separation of his or her parents. Before moving on to see the right to maintenance of illegitimate children in Malaysia it is pertinent to have a look at the statistics of illegitimate children in Malaysia.

C. STATISTICS OF ILLEGITIMATE CHILDREN IN MALAYSIA

An article which was published in the Universiti Kebangsaan Malaysia (UKM) News Portal on 9th June 2010, shocked the nation when the statistics of illegitimate children from the year 1999 – 2003 was released. The writer of the said article has stated in his article that the National Registration Department has recorded that between the years 2000 until July 2008, more than 257,000 birth certificates were issued to babies without recording their father's names. The statistics of illegitimate children from 1999 -2003 amounted to about 70,430. The distribution of illegitimates among states and ethnics are as follows from the year 1999-2003:

TABLE 1: DISTRIBUTION OF ILLEGITIMATES AMONG STATES

States	Number of illegitimates
Selangor	12,836
Perak	9,788
Kuala Lumpur	9,439
Sarawak	617
Terengganu	574
Others	37,176
Total	70,430

Source: Abdul Ghani Nasir, *Statistics of Unwanted Babies*, UKM News Portal, Wednesday 9 June 2010.

TABLE 2 : DISTRIBUTION OF ILLEGITIMATES AMONG ETHNICS

Ethnic	Number of illegitimates
Malays, Sabah and Sarawak Bumiputeras	20,949
Indians	19,581
Chinese	18,111
Others	11,789
Total	70,430

Source: Abdul Ghani Nasir, *Statistics of Unwanted Babies*, UKM News Portal, Wednesday 9 June 2010.

It is shocking to note that there are so many illegitimate children in Malaysia. The issue that arises next is regarding the upbringing of these children, bearing in mind that these children are raised by a single parent i.e. their mothers. These illegitimate children have to rely on their mothers for their maintenance. The issue that arises here is whether these mothers are aware of the fact that the law provides that it is the duty of the child's putative father to maintain his child. Thus, the question of ignorance of the law arises here. The next question that arises is when the mother, aware that her child can claim for maintenance from his putative father, applies to the court to order the father to pay maintenance, what is the judicial attitude when making the order prayed for? In order to answer the abovementioned

questions this paper will next look at the laws and the judicial cases concerning the right of an illegitimate child to maintenance in Malaysia.

D. MAINTENANCE LAWS IN MALAYSIA FOR NON-MUSLIM CHILDREN

The first maintenance law in Malaysia could be traced back to 1872 during the Straits Settlements era, i.e. the Straits Settlements Summary Criminal Jurisdiction Ordinance 1872. After this Ordinance was passed there were further developments in the area where subsequent laws were passed. The oldest law in force currently is the Married Women and Children (Maintenance) Act 1950 (hereafter referred to as the 1950 Act). Apart from this Act, maintenance provisions could also be seen in the Law Reform (Marriage and Divorce) Act 1976 (hereafter referred to as the LRA) and the Maintenance Ordinance of Sabah 1959. However, before examining the domestic laws concerning maintenance, it is pertinent to first look at the United Nations Convention on the Rights of the Child (CRC) which was signed and ratified with certain reservations by Malaysia.

1. Convention on the Rights of the Child

The CRC was ratified by Malaysia in 1995 to uphold its commitment to the protection and welfare of the children. The relevant provision in the CRC concerning the upbringing of the child is Article 18. Article 18(1) provides as follows:

(1) State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interest of the child will be their basic concern.

The abovementioned provision emphasises the duty of the State Parties to ensure that parents execute their duty to maintain their children. Thus, it could be seen that this provision is actually placing the onus on the State Parties as well as the parents to ensure that the children are maintained. Parents are primarily responsible for the upbringing and development of the child, and the State Parties have the duty to ensure that these parents perform their duties as stated above. The said provision goes on to state that the underlying principle for the imposition of this duty is the best interest of the children, or in other words it could also refer to the welfare of the child.

In addition to the above duties, one further observation which could be made from the above provision is the fact that Article 18(1) states clearly that “parents” have the primary duty to maintain a child, thereby placing the duty on both the parents, rather than on the father of the child. This is a difference when compared to the domestic laws which generally impose the duty to maintain on the father of the child.

Article 18(2) provides as follows;

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, State Parties shall render appropriate assistance to the parents, and/or legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

The provision above imposes a duty on the State to provide assistance to the parents or guardians in bringing up their children. This is an additional duty imposed on the State, which is not provided for in the local laws. Thus, both Articles 18(1) and (2) provide that the duty to maintain a child is the primary responsibility of the parents and the State has an important duty to ensure that this duty is executed by the parents and it (the State) shall provide assistance to the parents in carrying out their responsibilities.

Upon perusing Article 18, it is to be noted that the word “child” is used, thus raising the issue of whether “child” here includes an illegitimate child. In order to find out, reference would have to be made Article 1 of the CRC, which defines the meaning of a “child”.

“Child” in Article 1 is defined as:

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

The definition above does not mention if a “child” includes an illegitimate child. It merely states about the age limit. It is however submitted that as the definition above states that a “child means *every human being*” (emphasis added), it should also include illegitimate children.

Further thereto, the Preamble to the CRC states, *inter alia*, as follows:

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other option, national or social origin, property, birth or other status.

The above preamble expressly states that everyone is entitled to the right and freedoms mentioned in the Universal Declaration of Human Rights and the International Covenants on Human Rights, without any discrimination based, *inter alia*, on birth or other status. This would mean that there should not be any discrimination against illegitimate children when it comes to conferring rights and freedoms to children.

Notwithstanding the above, it is disheartening to note that one of the reservations that Malaysia has concerning the CRC is Article 1. Hence, we will have to refer to the provisions in our domestic laws. Taking into account this lacuna in Article 18 of the CRC as to whether an illegitimate child is entitled to protection under the said Article, it is submitted that Malaysia should lift its reservations on Article 1 so that the wide meaning of “child” under Article 1 could be applied to Article 18.

2. *Married Women and Children (Maintenance) Act 1950*

The Married Women and Children (Maintenance) Act 1950 (the 1950 Act) was passed on 4th July 1950 to provide for maintenance of wives and children. Section 3(1) of the 1950 Act provides that the Court may order a person who has neglected or refused to maintain his wife or a legitimate child of his which is unable to maintain itself, 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. Thus, section 3(1) expressly provides for the right of an illegitimate child to claim maintenance from his or her father.

As for illegitimate child, section 3(2) of the 1950 Act provides as follows:

If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make such monthly allowance as to the court seems reasonable.

Three issues could be discussed concerning the above provision. First, it is to be noted that section 3(2) was amended by the Law Reform (Marriage and Divorce) Act 1976 (the LRA). Initially, section 3(2) stated that the court may order a monthly allowance of not more than fifty ringgit to an illegitimate, whereas no such limitation was imposed concerning legitimate children. The LRA repealed the words “not exceeding fifty ringgit”. This is a positive development as it is ridiculous to limit the monthly allowance of an illegitimate child to a mere fifty ringgit a month taking into account the inflation and the increase in the cost of

living nowadays. Perhaps when this section was enacted in 1950, fifty ringgit was “big money” then.

Secondly, the 1950 Act does not define the meaning of “child”. Hence, reference would have to be made to case law as to how the courts have interpreted “child” under this Act. The court in the landmark case of *Kulasingam v Rasamma* defined the meaning of “child” in the 1950 Act. In this case, the respondent wife had applied for maintenance for herself and her legitimate daughter who was over twenty years old. The appellant husband contended that as the daughter was more than twenty years old, she was no longer entitled to fall within the meaning of “child” under the 1950 Act.

The learned judge, Hashim Yeop A. Sani J. (as he then was) stated that the Married Women and Children (Maintenance) Ordinance 1950 (as it then was) is silent on the meaning of “child”. Thus in his Lordship’s view, the Age of Majority Act 1971, which states generally that a child is a person below the age of eighteen years old. His Lordship went on to say that the legislative thinking on this point would seem to be reflected in the legislation that were passed subsequent to the 1950 Ordinance, i.e. the Divorce Ordinance 1952 and the LRA, where “child” has been expressly defined to mean a person under the age of eighteen years. Hence, this, according to the learned judge would fortify the view that the Age of Majority Act 1971 should be applied in determining whether a legitimate child is of such age as would be entitled to a maintenance order under the 1950 Ordinance. The court eventually allowed the appeal and quashed the maintenance order.

The above judgment received criticisms from academics. For example, Mimi Kamariah Majid in her book *Family Law in Malaysia*, states as follows:

It is submitted that the learned judge should have been guided by the qualifying phrase following the term “child”, that is, “which is unable to maintain itself” to rule that a child is anyone who is unable to maintain itself, irrespective of age. He, of course, has to be a child of the person who has been issued the maintenance order. Hence, if the child is aged thirty years old and is mentally retarded, and therefore, unable to maintain itself, the child should be eligible to be maintained. Similarly a child who is mentally sound and who is pursuing tertiary education, and therefore unable to maintain itself should be eligible to be maintained.

The writer submits that although the case of *Kulasingam v Rasammah* concerns a legitimate child, the same interpretation of “child” would apply to an illegitimate child claiming maintenance under section 3(2) as well. In addition, the criticism raised by the abovementioned learned author should equally apply to illegitimate children, as section 3(2) of the 1950 Act contains the same phrase as in section 3(1), i.e. “which is unable to maintain itself”.

The third issue that arises with regard to section 3(2) is the fact that it provides that “if any person neglects or refuses to maintain an illegitimate child of *his* (emphasis added), thereby raising the issue as to whether the duty imposed by this provision is limited to the father of the illegitimate child or does it extend to the mother as well? Mimi Kamariah Majid in her book stated earlier refers to the Interpretation Acts 1948 and 1967 which provides that words and expressions importing the masculine gender include females. Thus, an illegitimate child may also claim maintenance from his mother. Nevertheless, at the end of the day, it depends on how the learned judge in a particular case interprets the phrase “illegitimate child of his”. If the judge applies the literal interpretation to the word “his”, this limits the child’s right to claim maintenance, i.e., he would only be able to claim from his father.

Thus, it is submitted that it is time for the Legislature to make it clear in the above mentioned provision whether the child could only claim maintenance from his father or whether the duty to maintain is imposed on his mother as well. Perhaps at the time when this section was drafted in 1950, men were the sole breadwinners in a family. Very few women worked then. As times have changed now with the number of women in the work force increasing every year, mothers too have the means to support their children.

3. *Law Reform (Marriage and Divorce) Act 1976*

The Law Reform (Marriage and Divorce) Act 1976 ("the LRA") came into force on 1st March 1982. Section 92 provides the duty of a parent to maintain his or her child as follows: ... 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 by paying the cost thereof.

Upon reading the section above, two issues could be discussed. The first issue that arises here is concerning the meaning of "child" under the LRA. Section 92 does not state whether "child" mentioned therein includes illegitimate child. Reference has to be made to section 87 of the LRA which provides that "child" has the meaning of "child of the marriage" as defined in section 2 who is below the age of eighteen years. "Child of marriage" is defined in section 2 as follows:

"Child of marriage" means a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family by the other party; and "child" in this context includes an illegitimate child of, and a child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption.

At this juncture, the issue that arises in relation to the meaning of a "child of marriage" as defined in section 2 of the LRA is whether an illegitimate child comes within this definition. There are two reasons as to why such an issue arises. First, as stated in section 2 above, a child may be a child of one of the parties to the marriage who is accepted as one of the family by the other party. This refers to a situation where the child's one parent is married to a third party and the child is accepted as a family member by his or her step parent. However, what about illegitimate children whose parents are not married to third parties? Do they come within the definition of "child" in section 2? Based on the literal interpretation of the said provision, the answer is obvious that they do not.

The second reason is because of the phrase that a "child" includes an illegitimate child of, and a child adopted by, either of the parties to the marriage in pursuance of an adoption order". The question is whether the above phrase should be interpreted by applying a conjunctive view or a disjunctive view. If a conjunctive view is taken, then only illegitimate children who are adopted by either of the parties to the marriage qualify to claim maintenance under the LRA. On the other hand, if a disjunctive view is taken, then it does not matter if the illegitimate child concerned is not adopted in order to claim maintenance under the LRA.

Not many decisions have discussed the above situation. One particular case which referred to this phrase is the case of *T v O*, where Mahadev Shankar J stated as follows: This definition under section 2 includes an illegitimate child of either of the parties to the marriage, accepted as one of the family by the other party and an adopted child who could also be an illegitimate child of the adoptive parent. There is a duty on the man to maintain the child (s.99).

The above judgment seems to denote that the learned judge has made a distinction between an illegitimate child of either parties to the marriage accepted as a family member by the other party and an adopted child who could be an illegitimate child of the adoptive

parent. Thus, it could be stated that the judge has taken a disjunctive view of section 2. It is submitted that as the above observation by the judge was made in *obiter* and therefore is not binding, it is submitted that it is in the best interest of the child that the courts, in future, take a disjunctive view of the definition in section 2 thereby allowing illegitimate children who are not adopted to apply for maintenance under the LRA.

The third issue is concerning the phrase “his or her children”, which goes to show that the LRA imposes the duty to maintain not only on the father but on the mother too. In comparison, it could be observed at this juncture that the duty imposed by the LRA is broader than the 1950 Act as it extends the duty to maintain a child to the mother. As such, it is submitted that it would be better for an illegitimate child to apply for maintenance under the LRA.

4. *Maintenance Ordinance 1959 of Sabah*

The laws discussed so far, i.e. the 1950 Act and the LRA apply to Peninsular Malaysia and Sarawak. In fact, the LRA applies to Sabah as well (section 3(1) of the LRA). Nevertheless, there is a specific statute in Sabah on maintenance, i.e. the Maintenance Ordinance 1959 of Sabah. Section 3(2) of this Ordinance is similar to section 3(2) of the 1950 Act. This section provides as follows:

If any person having sufficient means neglects or refuses to maintain or contribute to maintain his illegitimate child unable to maintain itself, a Court upon due proof thereof may order such person to make such monthly allowance not exceeding fifty ringgit in the whole as to the Court seems reasonable.

Two differences could be observed between the Maintenance Ordinance of Sabah and the 1950 Act. First, the above provision (section 3(2)) still limits the maximum amount an illegitimate child can claim from his father i.e. fifty ringgit whereas this limitation has been repealed in the 1950 Act. Secondly the Maintenance Ordinance of Sabah has defined “child” in section 2 to include legitimate or illegitimate child who is unable to maintain itself, whereas the 1950 Act, as stated earlier, is silent on the meaning of “child”. Thus it could be stated here that this is the only piece of legislation concerning maintenance in Malaysia which has clearly included an illegitimate child in its definition of “child”.

5. *Child Act 2001*

The Child Act 2001 provides, *inter alia*, for the punishment in the event the parents or guardian fails to maintain the child. A person, who neglects a child in a manner which causes physical or emotional injury to the child, commits an offence and shall on conviction be liable to a fine not exceeding RM 20,000 or to imprisonment for a term not exceeding 10 years or both (section 31(1)(a)).

“Neglects a child” is explained in section 31(4) to include failing to provide adequate food, clothing, medical or dental treatment, lodging or care for the child. This basically means the failure to maintain a child. Section 2 of the Child Act defines the meaning of a “child” as a person below the age of eighteen years. It does not state whether it includes an illegitimate child. Thus it is submitted that the legislature should make it clear whether the Act covers illegitimate children as well.

6. *Married Women and Children (Enforcement of Maintenance) Act 1968*

The Married Women and Children (Enforcement of Maintenance) Act 1968 was passed in 1968 for an enforcement of maintenance orders. A person in whose favour a maintenance order was made or the guardian of such person may apply for an attachment of earnings order. This order shall require the defendant's employer to make out of the earnings falling to be paid to the defendant payments in satisfaction of the order (section 5). The penalties for non-compliance with the attachment of earnings order and for giving a false notice or statement is either imprisonment for a term not exceeding one year or a fine not exceeding RM1,000 or both. It is disheartening to note that the enforcement measures pertaining to a maintenance order is not effective in Malaysia as the penalty is a mere RM1,000 or a one year imprisonment or both. This would not be sufficient to deter the defendants from defaulting in their payments. There are no other enforcement mechanisms available in Malaysia.

7. *Government Policies.*

Apart from statutory provisions, it is also important to look at the policies passed by the Government. In 2009, the Government passed two policies concerning children, i.e. the National Child Policy and the Child Protection Policy. One of the objectives of the National Child Policy is to ensure that every child has the right to live with receiving care, love, health services, support and social assistance. In order to achieve this objective, the Government aims to provide basic needs such as identity, shelter, food, drink, clothing, love, security and a conducive environment. The Government also aims to improve the quality and expand support services and social assistance according to the needs of the children, including the disabled children and orphans.

The Child Protection Policy focuses on advocacy, prevention, support and research and development to protect children. In particular, the policy ensures that every child is protected from neglect, abuse, violence and exploitation.

E. JUDICIAL DECISIONS

There are not many cases concerning illegitimate children claiming for maintenance from their parents. The cases reported so far mostly are those claiming from their putative fathers. The courts in deciding such cases have laid down the conditions that need to be fulfilled before the court awards a maintenance order. In the case of *T v O*, the court in discussing an illegitimate child's claim for maintenance under section 3(2) of the 1950 Act, stated that two conditions need to be fulfilled, i.e. first, due proof must be shown that the person being sued is the father of the child and secondly, that the child is unable to maintain itself. Unfortunately, the learned judge did not explain further on how these conditions need to be proven.

Pertaining to the first condition, with the advance of medical sciences, the most reliable method of proving paternity is through the Deoxyribonucleic Acid test (DNA test). However the problem with this condition is to get the putative father to agree to undergo this test as there is no legal mechanism to compel a person to do so. Although the Parliament passed the DNA Act in 2009, it is basically to take DNA samples for purposes of forensic investigations. In the case of *Othman bin Haji Abdul Halim v Hamisah bt Awang*, the putative father agreed to undergo the DNA test. However the court held that the DNA Profiling Analysis Report was inadmissible as the test was inconclusive. The court held that four specified parties are supposed to be present for the test, i.e. the purported father, the mother of the child, the child and a family member of the purported father. Here not all the four parties were present and thus the report was inadmissible. In another case, *Ng Chiam Perng (sued by her mother and next friend Wong Nyet Yoon) v Ng Ho Peng*, the putative father refused to undergo a DNA test. The counsel for the child requested the learned judge to look at the similarity in the child's and the putative father's features. However, the judge held

that similarity in features is not conclusive proof to prove paternity. As such, the child was not able to prove that the respondent was his father.

As to the second condition, that due proof should be shown that the child is unable to maintain itself, it is submitted that as there is no judicial decision that deals directly with this issue, what needs to be proven here is that the illegitimate child needs to depend on somebody else for his survival, i.e. his basic necessities.

F. COMPARISON WITH THE LAWS IN SINGAPORE AND THE UNITED KINGDOM

1. Maintenance Laws

Having looked at the laws in Malaysia and observing the weaknesses that exist, it would be useful to look at the laws in other countries where the maintenance laws are pro-children's rights in order to examine if these provisions could be imported into our laws. For the purposes of this paper, the writers have chosen to look at the laws in Singapore and the United Kingdom.

In Singapore, the main statute concerning family law matters is the Women's Charter. Section 68 of the Women's Charter provides as follows:

... 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, and whether they are legitimate or illegitimate, 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 by paying the cost thereof.

Two observations may be made from the above provision. First, it states "his or her children", thereby imposing the duty to maintain on both the parents (similar to the LRA). Secondly, which is more important, it states "whether they are legitimate or illegitimate", thereby clearly stating that there is no discrimination against illegitimate children when it comes to the duty to maintain children. This could be contrasted from the LRA (which is silent on the duty to maintain illegitimate children) and the 1950 Act (which has a specific provision on the court's power to order a person to maintain his illegitimate child).

The English counterpart is the English Child Support Act 1991. Section 1 of this Act states that each parent of a qualifying child is responsible for maintaining him. This provision is similar to the LRA and the Singapore Women's Charter as it imposes a duty on both the parents. The next issue is whether a "child" here includes an illegitimate child. In order to answer this question reference needs to be made to the meaning of a "qualifying child" in section 3(1). Section 3(1) states that:

A child is a "qualifying child" if –

- (a) one of his parents, in relation to him, an absent parent; or
- (b) both of his parents are, in relation to him absent parents.

The same section goes on to explain who an "absent parent" is in section 3(2) as follows:

The parent of any child is an "absent parent", in relation to him, if-

- (a) that parent is not living in the same household with the child; and
- (b) the child has his home with a person who is, in relation to him, a person with care.

Although, the English position on the duty to maintain does not expressly mention "illegitimate children" like the Singapore Women's Charter, it could be implied from the definition of a "qualifying child in section 3(1)(a) and (b) that it includes an illegitimate child

as well. This is due to the fact that an illegitimate child usually lives with his or her mother and therefore his father is deemed to be an absent parent. In addition to the above provision, it is interesting to note that the Child Support Act, in section 2, states that in considering child support matters, the relevant authorities shall take into account the welfare of the child concerned. The welfare principle concerning child support is neither stated in the Malaysian laws nor in the Singapore Women's Charter.

2. Enforcement of Maintenance Orders

Having looked at the maintenance laws in Singapore and the United Kingdom, the next step would be to look at the position concerning the enforcement of maintenance orders in these two jurisdictions. The Singapore Women's Charter, in addition to imposing a fine and sentencing the defaulter to imprisonment, imposes a garnishee order. Apart from relying on these traditional measures of enforcement, the Singapore Legislature amended the Women's Charter last year, wherein additional measures were implemented to enhance the enforcement of maintenance orders from 1st June 2011. The new sanctions which could be imposed by the court in Singapore are: a) ordering the defaulters to set up a banker's guarantee against future defaults; b) ordering the defaulters to perform community service up to forty hours; c) ordering the defaulters to attend financial counselling; and d) directing the Central Provident Fund Board to disclose the employment information of a defaulter for attachment of earnings orders. In addition to the above measures, complainants can also report maintenance debts to a credit bureau.

In the United Kingdom, there is a special agency established to look into child maintenance cases and the enforcement of maintenance, i.e. the Child Support Agency (the CSA). The CSA was established in 1993 by the Child Support Act 1991 and developed further by the Child Support Act 1995 and the Child Support Pensions and Social Security Act 2000. The CSA is responsible to calculate the child's maintenance (based on current legislations and the rules) and to collect, enforce and transfer the payment from the non-resident parent to the person with the care of the child. Basically, the CSA in the United Kingdom falls under the Department for Works and Pensions (Child Maintenance Group) in Great Britain and is responsible for implementing the Child Support Act 1991. Prior to the establishment of the CSA, all child maintenance matters were handled by the courts. However various problems arose, such as: a) the court did not have power to trace absent parents; and b) the court's assessment of child maintenance varied from case to case as there was no determined benchmark to assess the maintenance amount. In addition, the increase in the number of single parents, who depend on social security for their living, also lead to the need for a special agency. Apart from the above reasons, the cost to enforce maintenance orders was also high, when the respondent fails to pay the maintenance.

The CSA, as stated above collects and enforces child support. This is because child support debts are debts due to the government. After the CSA collects the child support amount, it deducts the amount collected and pays the balance sum to the custodial parent (having the custody of the child) who is receiving social security.

In 2010, the Malaysian Government had announced that it was studying the establishment of a CSA in Malaysia. The functions of this agency is to trace the parents' financial resources to calculate the reasonable amount based on the child's needs and the parents' means and to enforce the payments of child support or maintenance. However, the CSA is yet to be set up. This Agency would be beneficial to all the children who are neglected by their parents, especially the illegitimate children, who are in a weaker position, when compared to the legitimate ones.

G. RECOMMENDATIONS

Having looked at the weaknesses that exist concerning the right of an illegitimate child to claim for maintenance in Malaysia, the writers would like to recommend the following measures to rectify the problems. First, to repeal the various provisions concerning maintenance in different statutes and incorporate it in one specific statute, as is done in the Singapore Women's Charter. The said provision should not discriminate against illegitimate children. It is further suggested to import the exact provision as in the Women's Charter, i.e. section 68 which has been discussed earlier.

Secondly, it is time for the Government to expedite the setting up of the Child Support Agency which would ease the burden on children in general and illegitimate children in particular. This agency would play an important role in calculating the amount of maintenance that needs to be paid based on the child's needs and the parents' means and at the same time enforce the payments of child support or maintenance.

Thirdly, our enforcement laws are outdated and not effective, especially with the current changes in the socio economic status of our society. Thus, it is submitted that the alternative enforcement measures as was implemented in Singapore should also be followed here, for example, a) ordering the defaulters to set up a banker's guarantee against future defaulters; b) ordering the defaulters to perform community service; and c) ordering the defaulters to attend financial counselling.

Fourthly, the judiciary should revisit the condition concerning proving the paternity of the child before a maintenance order is issued, as it is next to impossible to compel the putative father to undergo a DNA test. The legislature should weigh the pros and cons in enacting a statutory provision to compel a person to undergo a DNA test for the purposes of proving the paternity of an illegitimate child who intends to claim maintenance from his putative father.

H. CONCLUSION

In conclusion, it is submitted that much needs to be done to rectify the weaknesses that exist in the maintenance laws in Malaysia to strengthen the right of children, especially illegitimate children, to claim maintenance from their parents. The writers submit that the legislature should take positive steps to ensure that these innocent children should not suffer for the sins of their parents.

It is not denied that the Government has taken certain steps such as the setting up of the "Baby Hatch" to reduce the number of baby dumping cases. Howsoever, the inevitable issue that needs to be addressed is the role of the State in the event that the parents of the illegitimate children refuse to maintain their children. Is the State willing to take over the role of the parents in supporting the child, as is done in the Western countries, bearing in mind that Malaysia is not a welfare state? It is respectfully submitted that it will be quite some time for Malaysia to take on such a role as we are still a developing nation. Nevertheless, looking at the number of illegitimate children which is on the rise in Malaysia, it is high time the Government implement measures to safeguard the welfare of these innocent children so that they do not end up stranded or begging on the streets as their parents have neglected to maintain them.