

## A REVIEW OF MARRIED WOMEN AND CHILDREN (MAINTENANCE) ACT 1950 AND MARRIED WOMEN AND CHILDREN (ENFORCEMENT OF MAINTENANCE) ACT 1968

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### Executive Summary

**T**his research addresses the concerns in the Married Women and Children (Maintenance) Act 1950 and Married Women and Children (Enforcement of Maintenance) Act 1968 with the purpose of identifying the lacunae in the provisions and applications of the law. The researchers adopted an analytical and historical approach in this study. The reason for this selection is to analyse the historical background leading to these two Acts with a view for repeal and enactment of a new law which will be applicable to both East and West Malaysia and which reflects the global development in this area. This is to ensure that we are on par with the laws of other jurisdictions. In order to do this, laws of other jurisdictions were also compared. The researchers used a qualitative data collection method where in-depth document analysis was carried out. Primary sources such as the Acts, Regulations, court orders and decisions were scrutinized. On the other hand, secondary sources that were studied include legal encyclopedia, treaties, law reports, law reviews and legal periodical articles. This study is significant as it addressed crucial concerns raised in reference to the current laws relating to maintenance and enforcement of maintenance. Firstly, it identified an implicit administrative ministry to overlook the application as well as to address the necessary amendments to be in line with the laws of other jurisdiction. Secondly, it will also considered the issue of non-application of the Act to East Malaysia. The paper ends with recommendation for the enactment of a new law incorporating both maintenance and enforcement within one Act which will be applicable to the country as a whole bearing in mind the strengths in the laws of other jurisdictions.

**Keywords:** maintenance, enforcement, jurisdiction, women and children's welfare

## 1.0 INTRODUCTION

This research paper was initiated as a result of the concerns raised by the Malaysian Law Reform Committee in 2014. Two main issues of concern were raised; firstly, the need to identify the most relevant ministry that should be responsible for the implementation and enforcement of the Married Women and Children (Enforcement of Maintenance) Act 1968<sup>1</sup> and secondly, the concerns raised as to the application of the Act which is limited to West Malaysia. The researchers' interest were drawn to these issues as currently, women's rights are being debated around the world at various levels inclusive of the judiciary, legal academicians, legal researchers as well as the public. The first concern raised by Malaysian Law Reform Committee is an issue that needs immediate redress as the protection for women and children is a global issue and any law relating to them should have an avenue for immediate amendments to be in line with other jurisdictions. Since Malaysia has not identified specifically the ministry responsible for the Act, it is difficult for amendments to be made promptly and effectively. The second concern where the law is limited to West Malaysia also raises issues for any law of a country should be a uniform reflection of the practices in the country as women and children in East Malaysia too need similar protection<sup>2</sup>. As a result, this research will address the lacuna in the law through detailed analysis of the Acts in comparison with laws of other jurisdictions with the sole purpose of giving recommendations for amendments in the Act to reflect current needs. As a result, this paper is initiated to set off ripples of changes for further protection of women and children throughout Malaysia in a consistent manner.

## 1.1 SIGNIFICANCE OF STUDY

This study is crucial and its significance is two-fold. Firstly, it will bring clarity to the current law which has limitation in its application where it applies only to East Malaysia and lacks an implicit administrative ministry to overlook its application as well as to address the necessary amendments to be in line with the laws of other jurisdiction both locally as well as internationally. Secondly, this paper will also contribute to the current literature on the area of women and children's rights namely in enforcing maintenance as there is an influx in breakdown of marriages. According to Voon, there were 1724 divorce cases in 2007 and it has increased to 3000 in 2012<sup>3</sup>

## 1.2 OBJECTIVES OF STUDY

Since the purpose of this research is to perform a much needed review of Married Women and Children (Enforcement of Maintenance) Act 1968, the researchers have identified three key objectives which are as follows:

1. To identify the lacuna in the provisions of the Married Women and Children (Maintenance) Act 1950 as well as Married Women and Children (Enforcement of Maintenance) Act 1968 for the enactment of a new Act incorporating the provisions for both maintenance and enforcement.
2. To compare the Married Women and Children (Maintenance) Act 1950 as well as the Married Women and Children (Enforcement of Maintenance) Act 1968 with the laws of other jurisdictions with the purpose of ascertaining whether our current laws are in line with the global development in the issues of maintenance and enforcement of maintenance.
3. To analyse the current laws on the issue of maintenance and enforcement of maintenance in East Malaysia for the purpose of incorporating the proposed new Act there.

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<sup>1</sup> Malaysian Law Reform Committee <<http://www.bheuu.gov.my>> accessed 19 May 2014

<sup>2</sup> Voon Shiak Ni, 'Extend Married Women And Children Act 1968 to Sarawak' The Borneo Post

<<http://www.theborneopost.com/2013/10/11/extend-married-women-and-children-act-1968-to-sarawak/>> accessed 19 May 2014

<sup>3</sup> Ibid.

## 2.0 LITERATURE REVIEW

Married Women and Children (Maintenance) Act (MWCMA) 1950 was introduced to provide for situations when a man refuses to pay maintenance, a condition that is worsened when the man is imprisoned (Mimi Kamariah, 1999). The issues relating to maintenance becomes a big bone of contention when marriages breakdown<sup>4</sup>. This Act provides that maintenance may be claimed only by the wife and children.<sup>5</sup> Under the said Act, a Court may order a father, who neglects or refuses to maintain his child or wife, to make a monthly allowance in proportion to his means as the Court deems just and reasonable. However, the provisions under the said Act is inadequate to enforce any court orders, hence the welfare of the wife and children are not protected in the true sense. The increasing number of non-compliance of spouses to the maintenance orders has sparked a public outcry for a need to review the current law.

The lacuna in MWCMA 1950 was the reason for the enactment of MWCEMA 1968. The change in the title of the Act is a clear indication that the focus has now shifted from not only empowering courts to grant maintenance orders but to also enforce the orders. The new Act gives power to the court to enforce the judgment by way of attaching the earnings of the spouses and attachment of personal assets. Enforcement by way of attachment of earnings varies depending on the nature of the spouses' status of employment. If the spouse is employed under a contract of service either public or private, pursuant to Section 4 of the MWCEMA 1968, the court can direct the employer to make deductions for the maintenance from the spouse's salary and to be paid to the affected spouse and child. Further, under Section 13 (4) of MWCEMA 1968, for spouses who are under contract for services, the court can order the attachment of personal assets of the non-compliant spouse. In the event, the personal assets are unable to satisfy the maintenance order by the court or any sum in arrears, then the court can order committal proceeding i.e. imprisonment of the defaulting spouse not exceeding one month.

Although the new Act has brought about some positive changes pertaining to the enforcement of maintenance for spouse and children, it has, however, led to new concerns and debates as the new Act is not applicable to East Malaysia.<sup>6</sup> This has led to controversies as maintenance orders are made under the MWCMA 1950 which is applicable to both East and West Malaysia while enforcements are carried out differently because the MWCEMA 1968 does not apply to West Malaysia. Recently, this inconsistency became apparent in the decision of *Maria Anak Pupot (F) v Jacob Sim (M)*.<sup>7</sup> Malaysia, as it stands now is a Federation consisting of 13 states and 3 Federal Territories inclusive of Sabah and Sarawak. Having a law that is applicable only to a part of Malaysia is inconsistent with the need for uniformity of laws in a nation. The call for extending the law to East Malaysia has been voiced before for example, Sarawak Welfare, Family and Development Minister, Fatimah Abdullah asserted that it is imperative to extend the MWCEMA 1968 to Sarawak to ensure that the welfare of dependents is properly managed and to align the law in Sarawak with national laws.<sup>8</sup> Besides the concern of not having a specific ministry to oversee the laws related to maintenance and enforcement of maintenance of women and children, this is also a major concern which needs to be addressed through the much needed amendment of the current law to ensure uniformity of protection.

<sup>4</sup> Honey Tan Lay Ean, 'Measuring Up to CEDAW: How Far Short Are Malaysian Laws and Policies?' (Women's Center for Change Penang, March 2003) <<http://www.bheuu.gov.my>> accessed 19 May 2014)

<sup>5</sup> Married Women and Children (Enforcement of Maintenance) Act 1968.

<sup>6</sup> Married Women and Children (Enforcement of Maintenance) Act 1968.

<sup>7</sup> *Maria Anak Pupot (F) v Jacob Sim (M)* [2012] Originating Application No. Kch-74-31-2011

<sup>8</sup> Divorce Laws in Sarawak <<http://www.fmtborneoplus.com/category/nation/2014/03/15/swak-wants-mariage-act-extended/>> accessed 19 May 2014

Other jurisdictions too have laws addressing issues of maintenance and enforcement of maintenance for the protection of women and children. However, in comparison, analysis denotes that there are some differences which can be taken into account in reforming our current laws. In United Kingdom (UK), the protection of women and children is provided by Family Law (Maintenance of Spouses and Children) Act 1976. Section 5 (1) of the Act provides that either spouse can apply for maintenance unlike in Malaysia where only the women can do so. Further Section 9A of the Act provides the avenue for enforcement of maintenance orders. The court considers non-compliance of the court orders for maintenance as contempt of court and there is jurisdiction for imposing relevant sanctions on the defaulter. Section 10 of the said Act also provides provisions for attachment of earnings. Parties can apply to the courts to enforce the order either in District Court, Circuit Court or High Court depending on the threshold of the periodical sum awarded. Similarly, in Ireland both spouses who are separated can apply to the court (District or Circuit Court) for a maintenance order when they are unable to come to a compromise on their own or through mediation.<sup>9</sup> Further, enforcing a maintenance order in Ireland can be done in the District Court<sup>10</sup> unlike in Malaysia where the claims in respect of maintenance and enforcement of maintenance are under the purview of the High Court. In Singapore, the provisions for maintenance and enforcement of maintenance are found in the Singapore Civil Procedure 2013 which provides the guidelines for maintenance claims. Section 71(3) empowers the District Court to enforce a maintenance order made by the High Court. It also states that the District Court has no power to vary a maintenance order made by the High Court. This creates an inference that the court has no power to rescind an order of the High Court. Initial analysis of the laws in the various jurisdictions clearly indicates that there are differences in the provisions of the law as well as the available avenues for redress of these issues.

### **3.0 RESEARCH METHODOLOGY**

This study will be conducted using a non-doctrinal research method where a qualitative analysis of data would be done<sup>11</sup>. The researchers' will be using a historical and analytical approach where they examined the Married Women And Children (Maintenance) Act 1950 and Married Women And Children (Enforcement of Maintenance) Act 1968 to understand how and why these Acts have come to take these particular forms and to evaluate the need for the changes<sup>12</sup>. Besides analyzing these Acts, other primary sources such as related statutes, regulations, court orders and decisions were also scrutinised. In respect to secondary sources, legal encyclopedia, treaties, law reports, law reviews and legal periodical articles were analysed for a more comprehensive and realistic discussion.

### **4.0 FINDINGS**

#### **4.1 Analysis of Acts**

This section of the paper will analyse the Married Women and Children (Maintenance) Act 1950 and Married Women and Children (Enforcement of Maintenance) Act 1968 to identify the weaknesses and inconsistencies which need to be addressed to ensure clarity and uniformity in the application of the law so that everyone is treated equally in the eyes of law. The discussion will be divided into two-fold; an analysis on the ambiguity created due to the use of language and inconsistencies between the two acts. Prior to that, a brief discussion of the individual acts will be given. Table 1 gives the general details of the Acts.

<sup>9</sup> Civil Law (Miscellaneous Provision) Act 2011.

<sup>10</sup> Ibid.

<sup>11</sup> McConville. M and Wing, H. C. eds.(2007) Research Methods for Law, Edinburgh: Edinburgh University Press.

<sup>12</sup> Anwarul Yagin, Legal Research and Writing (Dolphin Press 2007)

**Table 1: Brief Description of Acts**

<b>ACTS</b>	<b>MARRIED WOMEN AND CHILDREN (MAINTENANCE) ACT 1950</b>	<b>MARRIED WOMEN AND CHILDREN (ENFORCEMENT OF MAINTENANCE) ACT 1968</b>
ENACTMENT	-First enacted - 1950 (F.M. Ordinance No. 36 of 1950) -Revised - 1981 (Act 263 w.e.f 11 February 1982) -First Reprint – 2001	-First enacted-1968 (Act No. 8 of 1968) -Revised -1988 (Act 356 w.e.f. 1 December 1988) -First Reprint- 2001
APPLICATION	Application  -Peninsular Malaysia—4 July 1950; -Sarawak—24 July 1992, P.U. (A) 271/1992; -Federal Territory of Labuan—24 July 1992, P.U. (A) 274/1992	Application  S 2. This Act shall apply to the States of Peninsular Malaysia only.
CONTENTS	12 sections  1. Short title 2. Interpretation 3. Court may make order for maintenance of wife and children 4. Levy of amount 5. Wife living separate from husband 6. Rescission and variation of order 7. Application of Act to orders made under previous Enactments 8. Power of court to refuse order when High Court proceeding more convenient 9. Jurisdiction of High Court 10. Procedure 11. Enforceable by any court 12. Repeal and saving 13.Exempt cases between persons professing the religion of Islam	15 Section  1. Citation 2. Application 3. Interpretation 4. Power of court to make an attachment of earnings order 5. Nature of attachment of earnings order 6. Effect of attachment of earnings order 7. Duty of defendant and employer to comply with attachment of earnings order 8. Additional powers of court in attachment of earnings order proceedings 9. Power of court to determine what are earnings 10. Payment of money under attachment of earnings order 11. Where earnings paid by Government or out of Consolidated Fund 12. Penalties for non-compliance with attachment of earnings order and for giving false notice or statement 13. Order to make payment to court 14. Application to States 15. Modification

In Malaysia, the laws that guarantee the rights of a non-Muslim wife and children are the Married Women & Children Maintenance Act (MWCMA) 1950 and Married Women and Children (Enforcement of Maintenance) Act (MWCEMA) 1968. In general, application for children's maintenance under these statutes could be at any time<sup>13</sup>. Both MWCMA 1950 and MWCEMA 1968 provide that husbands are responsible towards their children's maintenance and gives the court the power to make and enforce the person to make monthly allowance if he neglects or refuses to maintain his wife, legitimate and illegitimate child<sup>14</sup>. However, an initial analysis indicates that the dates of enactment of these Acts have some room for concern. The MWCMA 1950 was enacted in 1950 while the MWCEMA 1968 only came into existence 18 years

<sup>13</sup> Saraswathy v Palakrishnan [1986] 2 MLJ 127

<sup>14</sup> Section 3(1) and (2), MWCMA 1950

later. It must be acknowledged in the onset that there is a need to review old laws that were enacted during the British colonial era or soon after the country's independence<sup>15</sup>. The question that comes to mind would be on how the MWCMA 1950 was enforced during the 18 year period. Further, in terms of application, MWCMA 1950 applies to both East and West Malaysia while MWCEMA 1968 only applies to Peninsular Malaysia. The contents of MWCMA 1950 is all about the processes of claiming maintenance for wife and children while MWCEMA 1968 deals with the enforcement of the orders made under the first act.

#### 4.1.1 Ambiguity and Inconsistency in the Use of Language

**Table 2: Ambiguity and Inconsistency in the Use of language MWCM 1950**

NUMBER	INCONSISTENCIES AND AMBIGUITIES
1.	<p>S 3(1) 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 proof thereof, may order such person to make a monthly allowance for the maintenance of his wife or such child, <b>in proportion to the means of such person</b>, as to the court seems reasonable.”</p> <p>S 3(2) 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</p>
2.	<p>S 4 If any person wilfully neglects to comply with any order made under this Act, the court, which made such order may, for every breach thereof, by warrant, direct the amount due to be levied in the manner by law provided for levying fines imposed by such court, or may sentence him to imprisonment for a term which may extend to one month for each month's allowance remaining unpaid.</p>
2.	<p>S 5 (1) If <b>any person</b>, against whom an order has been applied for or made for the maintenance of <b>his wife</b>, offers to maintain his wife on condition of her living with him, and his wife refuses to do so, the court shall consider any grounds of refusal stated by <b>such wife</b>, and may make or enforce the order aforesaid, notwithstanding <b>such offer</b>, if it is satisfied that <b>such person</b> is living in adultery or for any other reason it is just so to do.</p> <p>S 5 (2) No wife shall be entitled to receive an allowance from her husband under this Act if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband.</p>
3.	<p>S 6 (1) On the application of any person receiving or ordered to pay a monthly allowance under this Act, and <b>on proof of a change in the circumstances of such person, his wife or child</b>, or <b>for other good cause</b> being shown to the satisfaction of the court, the court by which such order was made, may rescind the order or may vary it as to it seems reasonable.</p> <p>(2) Without prejudice to the extent of the discretion conferred upon the court by subsection (1), the court may, in considering any application made under this section, <b>take into consideration any change in the general cost of living</b> which may have occurred between the date of the making of the order sought to be varied and the date of the hearing of the application.</p>

It must be noted that the inconsistency in S3 (1) and (2) is an area of concern. The phrase ‘in proportion to the means of such person’ which is part of the provision in Section 3 (1) is not found in Section 3 (2). Thus, it is irrational that the ‘means’ is taken into consideration ‘in the case of the wife and children but it is not given due consideration in the case of illegitimate children. It appears that the legislation seems to be favoring the needs of the illegitimate children over and above the needs of the wife and the legitimate children.

<sup>15</sup> Tan, T.S., ‘A valid case for law reform’ ( 2nd April 2012) < <http://www.laweddie.com/wordpress/a-valid-case-for-law-reform/>> accessed 16 July 2014

Section 4 also creates uncertainty in the enforcement of procedure for non-compliance. As stipulated in the provision, the defaulting person can be either fined or imprisoned. With regards to the fine, the section does not provide for the fixed amount as fine unlike the MWCEMA 1968 which stipulates a fine not exceeding RM1, 000.<sup>16</sup> The imposition of one month's imprisonment for each month's allowance remaining unpaid is again irrational and could lead to unfairness. Should the term for imprisonment for the defaulting person be the same with another defaulting person when the amount of the allowance is drastically different i.e. RM5,000 per month & RM500 per month?

In the case of Section 5 (1), the ambiguity lies in the repetitive word 'such' and the phrase 'any person' as indicated in Table 1. The repetitive use of the word 'such' can lead to ambiguity. 'Such wife' refers to the wife who refuses to live with the husband and 'such offer' refers to the offer of the husband to maintain the wife if she is willing to live with him. However, 'such person' is ambiguous. Is it referring to the husband or the wife? Further, there is also an error in the use of pronoun as seen in "any person" and 'his wife'. 'Any person' could mean either gender but the use of 'his' means, it is only the husband that the section applies to. This is supported by Nora Abdul Hak, Roslina Che Soh and Noraini Hashim who have submitted that the use of the qualifying word "his" in relation to the child as well as the wife implies that "any person" could only refer to a man<sup>17</sup>. The researchers cite the cases such as *Sivajothi a/p Suppiah v Kunathasan a/l Chelliah*<sup>18</sup>, *Lau Hui Sing v Wong Chuo Yong*<sup>19</sup>, *Lim Siaw Ying v Wong Seng & Anor*<sup>20</sup> and *Teo Ai Teng v Yeo Khee Hong*<sup>21</sup> to support this. Hence it can be concluded at this point that the law imposes the sole responsibility of maintaining wife and children on the husband.

Further, S6 (1) and (2) also indicates some obscurity as to interpretation. The sections refer to rescission and variation of order. There is vagueness in the use of the phrase 'on proof of a change in the circumstances of such person, his wife or child' and 'for other good cause' which gives the courts unlimited power of interpretation. It could lead to subjectivity as what is the measurement for change and how significant should the change be to satisfy the court. A first reading of S6(1) would lead to an interpretation that the court is referring to the standard of living but this is not so as shown in S 6 (2). This opens up to a wide range of probabilities and imposes a heavier burden on the courts. It would be more certain and helpful as a guide if a non-exhaustive lists is made available as an appendix to the Act. This would assist and provide uniformity of interpretation and application of the law.

#### 4.1.2. *Inconsistencies between the Acts*

Significant inconsistencies will be noted when both MWCMA 1950 and MWCEMA 1968 are compared. Table 2 indicates the inconsistencies.

<sup>16</sup> Section 12 of MWCWMA 1986.

<sup>17</sup> Nora Abdul Hak, Roslina Che Soh and Noraini Hashim, 'Right of a Child to Maintenance: Harmonising the Laws in Malaysia' <[http://irep.iium.edu.my/3648/1/9.\\_Article\\_for\\_harmonization\\_-\\_Right\\_of\\_a\\_Child\\_to\\_Maintenance\\_2009.pdf](http://irep.iium.edu.my/3648/1/9._Article_for_harmonization_-_Right_of_a_Child_to_Maintenance_2009.pdf)> accessed 16 July 2014

<sup>18</sup> [2006] 3 MLJ 184

<sup>19</sup> [2008] 5 MLJ 846

<sup>20</sup> [2009] 4 MLJ 409

<sup>21</sup> [2009] 9 MLJ 721



One very obvious inconsistency is seen in the inherent enforcement powers that are provided for in the first Act. It is generally accepted that the first Act deals with the maintenance orders while the latter Act deals with the enforcement procedures and both Acts are supposed to complement each other. However, in reality this is not so because the first Act does have provisions dealing with enforcement issues.<sup>22</sup> This contradiction would have been acceptable if the provisions in the first Act are on par with the latter Act. What raises concerns is that there are glaring disparities in the provisions. In Section 4 of MWCMA 1950 the courts are given the powers to levy fines or to sentence to imprisonment any person who wilfully neglects to comply with the orders made for maintenance. The Act, however, does not stipulate the amount of fine but it does indicate that the imprisonment could be for a term which may extend to one month for each month's allowance remaining unpaid. Section 11 MWCMA 1950 on the other hand, empowers any court to enforce payment in whose local limits of jurisdiction, the person to whom the order is addressed may be found. Thus these two sections can be clearly seen to be encroaching into the MWCEMA 1968 which was enacted solely for enforcement purposes. In comparison, section 4 of MWCEM 1968 has vast jurisdiction in the enforcement procedures especially in making attachment orders. Failure to adhere to the orders can lead to fines and imprisonment stipulated under the Act. Here, the fine is limited to RM1,000 and the duration of imprisonment does not exceed one year. Another discrepancy that can be seen between the Acts is that Section 13 of the MWCM 1950 clearly exempts persons professing the religion of Islam while Section 14 and 15 of the MWCEMA 1968 declares that the provisions under the Act are applicable for all decisions made by the Syariah court.

#### 4.2 Comparison of Malaysian Laws on Women and Children's Maintenance with the Laws of other Jurisdictions

The Married Women and Children (Maintenance) Act 1950 as well as the Married Women and Children (Enforcement of Maintenance) Act 1968 will be compared with the laws of other jurisdictions namely Singapore, Ireland and Australia. The purpose is to ascertain whether our current laws are in line with the global development in the issues of maintenance and enforcement of maintenance. In comparison, analysis denotes that there are some pertinent differences which can be taken into account in reforming our current laws. In Singapore, the provisions for maintenance and enforcement of maintenance are found in the Women's Charter 1961 (Cap.353). The Charter 1961 provides for the husband to pay maintenance to his wife or former wife but not vice versa.<sup>23</sup> The fact that the law imposes responsibility solely on the husband is similar to the provisions in the Malaysian law. However, there are calls by the legal fraternity<sup>24</sup> and also The Association of Women for Action and Research (AWARE) to amend the provision of maintenance in the Women's Charter 1961 to be gender neutral, moving away from wife maintenance to spousal maintenance<sup>25</sup> as can be seen in other jurisdictions which will be discussed here. Further, in accordance to the Charter 1961, a wife is entitled under the laws to be maintained by the husband during the marriage, during the course of any matrimonial proceedings or subsequent to the grant of a decree of divorce or even nullity of marriage. Therefore, any married woman whose husband neglects or refuses to provide her reasonable maintenance may apply to the Court which may on due proof, order the husband to pay a monthly allowance or a lump sum for her maintenance.<sup>26</sup> Parents are also under the duty 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. Even if the children are illegitimate, the children must be provided with such accommodation, clothing, food and education as may be reasonable.<sup>27</sup> This provision is equivalent to our Section 3(2) of the MWCMA 1950.

<sup>22</sup> Section 4 and 11 of MWCMA 1950.

<sup>23</sup> Section 69 of the Women's Charter

<sup>24</sup> Jolene Tan, 'Tweak Women's Charter for gender equality' The New Straits Times (Singapore 26 April 2014)(26<<http://www.straitstimes.com/premium/forum-letters/story/tweak-womens-charter-gender-equality>> accessed 10 July 2014

<sup>25</sup> William Mangor, 'Divorce laws in Sarawak Ineffective' The Independent (.Sarawak, 14 October 2013)

<http://theindependent.sg/blog/2014/04/24/why-not-maintenance-payout-for-the-divorced-man/>. Accessed 15 June 2014

<sup>26</sup> Section 69 (1) of the Women's Charter

<sup>27</sup> Section 68 of the Women's Charter

Thus, there are vast differences between the laws of Singapore and Malaysia with regards to the duration of maintenance of a child. In Singapore, a child must be maintained until he or she reaches the age of twenty-one (21). Most instances, an order for maintenance will automatically expire after the child reaches his/her 21<sup>st</sup> birthday.<sup>28</sup> However, the court may make an order for the maintenance of the child who has attained the age of 21 years or for a period that extends beyond that age on the grounds of mental or physical disability of the child, the child is or will be serving full-time national service or the child is or will be or would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment.<sup>29</sup> Judges in Singapore may, on their discretion and based on the evidence adduced in court, order that a child may be entitled to receive maintenance even after he/she attains the age of 21 on the grounds as stated in the Charter. On the other hand, the MWCMA 1950 has no provision for the duration of maintenance of a child. MWCMA 1950 only states that the father must maintain his legitimate or illegitimate child as long as the child is 'unable to maintain itself'.<sup>30</sup> Despite the lacuna in the act, it has been contended that maintenance should be provided to any child who is unable to maintain oneself which includes a child who is mentally retarded or is pursuing tertiary education.<sup>31</sup> Nevertheless, the Malaysian Law Reform Act 1976 (LRA) specifically states that the maintenance of a child shall expire when the child attains the age of 18 or where the child is under physical or mental disability, on the ceasing of such disability.<sup>32</sup> This section has been the centre of controversies since the decision of the Federal Court in the case of *Punithambigai a/p Ponniah v Karunairajah a/l Rasiah*<sup>33</sup> where the Federal Court overruled the decision of the Court of Appeal and interpreted literally the phrase 'physical or mental disability' in section 95 to exclude involuntary financial dependence (for example tertiary education, still in training etc). Hence, a child who has attained the age of 18 years and desires to pursue his/her tertiary education would not be entitled to claim for maintenance from his/her parents under the LRA. If a similar literal interpretation is adopted by the courts in reference to the MWCMA 1950, maintenance for child for tertiary education may not be caught under the phrase 'unable to maintain itself' as the phrase could be interpreted as a child unable to obtain or provide for itself basic necessities of life which are accommodation, clothing and food. The interpretation of the phrase would thus be subjected to the discretion of the judge in interpreting what is 'unable to maintain itself' as the MWCMA 1950 does not provide for the duration for maintenance of child. Clarity on the duration for maintenance of child up to tertiary education is much needed as a child's hope and desire to pursue his/her education should not be dampened by his/her father's refusal to support him/her due to the lacuna in the MWCMA 1950.

Furthermore, Singapore take the issue of maintenance a step further where upon divorce it imposes a duty on the husband to maintain a child which is not his but has been accepted as a child of the marriage during the subsistence of the marriage.<sup>34</sup> The High Court in Singapore<sup>35</sup> ruled that if the child was already adequately maintained by his or her biological parents, there was no duty on the non-parent to provide further maintenance for the child. Nevertheless, if the child received some maintenance from the biological parents which was insufficient for his or her requirements, then the non-parent who had accepted the child as a member of his family has the duty to provide the child with such additional maintenance within his means as was reasonable for the child. Section 70 (1) states that<sup>36</sup> a person who "has accepted a child ... as a member of his family" would have a duty to continue to maintain the child "while he remains a child". Based on the said section, it is clear that an ex-husband has no right to opt out of the duty to continue to maintain his ex-wife's child after he has accepted the child as a member of his family. However, in Malaysia, we have no such provisions to safeguard the welfare of a child who has been accepted as a member of the family.

<sup>28</sup> Section 69 (6) of the Women's Charter

<sup>29</sup> Section 69 (5) (a),(b),(c) and (d) of the Women's Charter

<sup>30</sup> Section 3 of the Married Women and Children (Maintenance) Act 1950

<sup>31</sup> Mimi Kamariah, Family Law in Malaysia (Kuala Lumpur: Malayan Law Journal Sdn.Bhd.1999)147.

<sup>32</sup> Section 95 of Law Reform Act, 1976

<sup>33</sup> [2004] 2 MLJ 401 (FC)

<sup>34</sup> Section 70 (1) of the Women's Charter

<sup>35</sup> *AJE v AJF* [2011] 3 SLR 1177

<sup>36</sup> *Ibid*

Moreover, the move by the legislators in Singapore to amend the Women's Charter in 2011 to empower claimants to obtain husbands or ex-husbands' current employment from the Central Provident Fund Board (equivalent to our Employees Provident Fund) is commendable.<sup>37</sup> This empowerment provides a solution to cases where the wives or ex-wives have no means of obtaining current information on the husbands or ex-husbands' physical and financial whereabouts and are subjected to frustration of monthly waiting and filing of complaints due to default in payment of their maintenance or their child's maintenance. Malaysia's MWCEMA 1968 should also empower wives or ex-wives to acquire the current employment status from the Employment Provident Fund to ease enforcement of maintenance orders.

In Ireland, the protection of women and children is provided by Family Law (Maintenance of Spouses and Children) Act 1976 (FLMSCA). Section 5 (1) of the Act provides that either spouse can apply to the court (District or Circuit Court) for a maintenance order. Since 1970s there have been moves in many countries around the globe towards gender equality with a corresponding recognition that a former husband may also be entitled to maintenance from his former wife. Spousal maintenance has long been established among the family courts in the United States and Britain and should likewise be available in Malaysia in situations where it would be equitable for a woman to support her former spouse. However in Malaysia, MWCMA 1950 only provides for maintenance of wife and children. There is no provision for men to obtain financial support from their wife or former wife in circumstances where they are unable to adequately support themselves such as being unemployed, those who are disabled due to accident or illness and those who earn lesser than their wives or have opted to become househusbands.

Further Section 9A of FLMSCA 1976 provides the avenue for enforcement of maintenance orders. The court considers non-compliance of the court orders for maintenance as contempt of court and there is jurisdiction for imposing relevant sanctions on the defaulter. Section 10 of FLMSCA also provides provisions for attachment of earnings if the person is in employment or on a private pension. Attachment of earnings order would place the husband's employer responsible for deducting the maintenance payment from the husband's salary and to channel it directly to the wife through the court. Parties can apply to the courts to enforce the order either in District Court, Circuit Court or High Court depending on the threshold of the periodical sum awarded. This is in contrast with the MWCMA 1950 as the act only provides for the maintenance of wife and children with no further provisions on the enforcement of the order by way of attachment of the earnings payable by the husband. In instances where there is non-compliance with maintenance order, the wife would have to rely on MWCEMA 1968 for the maintenance payment to be attached to the earnings of her husband unlike the maintenance laws in Ireland where both maintenance and enforcement have been codified under one act. Having said that, it is also pertinent to note here that the provisions of MWCEMA 1968 is only applicable to Peninsular Malaysia only, and not in Sabah and Sarawak although in recent times there has been numerous calls by members of the bar to extend the current law to include Sarawak.<sup>38</sup> The FLMSCA 1976 also provides for the duration of maintenance of a dependent child<sup>39</sup> unlike our MWCMA 1950. Maintenance may be awarded to a spouse for their own benefit and/or for the benefit of a child who is under the age of 18, or 23 if the child is in full-time education even if the parents are not married to each other. If the child is over 18 but below 23 and the financial circumstances does not allow him/her to attend further education, maintenance may be applied from either spouse in order to facilitate further education. In the event the child has a mental or physical disability to such a degree that it will not be possible for the child to maintain him/herself fully, then there is no age limit for seeking maintenance for their support. The age limit set under the FLMSCA 1976 is reasonable taking into account a child would have completed his tertiary education by then.

<sup>37</sup> Section 85(1)(c) of the Women's Charter 1961

<sup>38</sup> William Mangor, ' Divorce laws in Sarawak Ineffective' The Independent (.Sarawak, 14 October 2013) <http://theindependent.sg/blog/2014/04/24/why-not-maintenance-payout-for-the-divorced-man/>. accessed 15 June 2014

<sup>39</sup> See Section 3, F6 of the Family Law (Maintenance of Spouses and Children) Act 1976 (FLA).

In Australia, the Family Law Act 1975 (FLA), is the main Australian legislation dealing with divorce, parenting arrangements between separated parents (whether married or not), property separation, and financial maintenance involving children or divorced or separated de facto partners. The FLA too, as in Ireland, provides for spousal maintenance.<sup>40</sup> An individual has a responsibility to financially assist his or her spouse in the event that his or her spouse cannot meet his or her reasonable expenses from their own income or assets. Under the law, both spouses have a duty to support and maintain each other even after separation and divorce. The extent of the support depends on the financial capability of the other spouse. The court in deciding a maintenance application, would take into account the needs and capabilities of both parties. Under the FLA 1975, if a child is above the age of 18 and there is a child support assessment already in place, they may be able to continue his/her financial support by applying to the Department of Human Services (DHS) to extend the financial support in the event they are still in full-time secondary education.<sup>41</sup> An extension will continue until the last day of that school year provided the application to the DHS is made before the child turns 18. In all other cases, the Federal Circuit Court or Magistrates' Court can make an order for maintenance, where the maintenance is necessary to enable the child to complete their education or on grounds of the child's mental or physical disability.<sup>42</sup> The order usually stops if the child ceases his/her education or ceases to have that disability unlike our MWCMA 1950 where there is no provision for the duration of a child's maintenance. Furthermore, in Australia, the Child Support Agency (CSA) was set up under the purview of the Department of Human Services to administer spousal and child maintenance. The CSA was introduced to make it more difficult for parents to avoid paying and statistics indicate that around 70 percent of liable parents now pay child support. Prior to this system, up to 80 percent of separated fathers were avoiding payment of child support.<sup>43</sup> Anyone entitled to be paid spousal maintenance or child support, or both, under a court order or agreement may register that entitlement with the CSA. The CSA will then collect and enforce the payments. Enforcement action for any defaults or arrears may include wage garnishment, seizure and sale of personal or real property and/or sequestration of estates.<sup>44</sup> In Australia, this has been one of the most successful methods of collecting spousal and child maintenance. Perhaps the MWCMA 1968 too should provide for an establishment of an agency under the Ministry of Women, Family and Community Development to deal and/or oversee all enforcement issues regarding maintenance in Malaysia.

#### 4.3 Comparison of Women and Child's Enforcement of Maintenance in East and West Malaysia

The current legislature pertaining to the maintenance and enforcement of maintenance in East Malaysia is the Married Women And Children (Maintenance) Act 1950. The provisions for maintenance under the 1950 Act are provided under Section 3 (1) and 3 (2) while the provisions for enforcement is provided under Section 4 and 11 of the said Act. If the said provisions are scrutinized, it would clearly appear that there are inadequacies in the current law with regards to the issue of enforcement. These inadequacies have been addressed by the MWCEM 1968 which however is not applicable to East Malaysia<sup>45</sup>. This echo's Voon's<sup>46</sup> contention that the current legislation does not provide a fair deal in respect of maintenance to divorced women and their children in East Malaysia. She further added that, "it was not uncommon for husbands to default on payments under their maintenance order issued under the Law Reform (Divorce and Marriage Act) 1976. When defaults happen, the mother and the children will have to go through the hassles of seeing their lawyers and running to the court to enforce the orders. It's stressful and they would have to go through a taxing hearing for the court to enforce the maintenance order and demand for the sum owed and due from the date of neglect or refusal to pay the maintenance." The State Welfare, Women and Family Development

<sup>40</sup> Section 72 of the FLA

<sup>41</sup> Sections 66 T to V of the FLA

<sup>42</sup> Section 66L of the FLA.

<sup>43</sup> N.A. Tasmanian Law Handbook <<http://www.hobartlegal.org.au/tasmanian-law-handbook/family-law/child-maintenance/introduction>> accessed 8 June 2014

<sup>44</sup> ([Regulation 20.05](#), *Family Law Rules 2004*).

<sup>45</sup> Maria Anak Pupot (F) v Jacob Sim (M) [2012] Originating Application No. Kch-74-31-2011

<sup>46</sup> Voon Shiak Ni, 'Extend Married Women And Children Act 1968 to Sarawak' *The Borneo Post* <<http://www.theborneopost.com/2013/10/11/extend-married-women-and-children-act-1968-to-sarawak/>> accessed 19 May 2014

Minister Datuk Fatimah Abdullah has also commented that the divorce rates in Sarawak are worrying<sup>47</sup>. Her comments were based on the records obtained from Sabah and Sarawak High Court. According to her the number of divorce cases among non-Muslim couples in the state had increased to 1,039 cases from only 916 cases in 2011, while the source in District Office revealed that under the Native Customary Law, 433 divorce cases were registered in 2012 from 325 cases in 2011. Statistics revealed by Voon also confirms that there has been a continuous increase in the number of divorce rates in Sarawak. She has stated that in 2007 there were 1,724 cases followed by 2,725 cases in 2008, 2,063 cases in 2009, 2,559 cases in 2010, 2,806 cases in 2011 and more than 3,000 cases in 2012.<sup>48</sup>

Further, the difficulty in enforcing the maintenance orders granted by the Courts upon divorce and the agonizing hassle and protracted litigation that the wife and child goes to demand compliance of the court order by the defaulting spouse clearly indicates that there has to be a reform of the current laws in East Malaysia to address this prevailing concern. The current law in force in Peninsular Malaysia with regards the enforcement and maintenance of spouse and children is the Married Women and Children (Enforcement of Maintenance) Act 1968. Pursuant to the 1968 Act, the wife can appeal to the court for an attachment of earnings order to ensure that the husband does not default on payment.<sup>49</sup> The Court order imposes a duty on the employer for deducting the maintenance payment from the husband's salary so that it can be sent to the wife directly through the court.<sup>50</sup> The 1968 Act also imposes penalties for non-compliance with the attachment of earnings orders wherein the defaulting spouse would be liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand ringgit or to both<sup>51</sup>. In comparison, the 1950 Act has no such provision to compel the court to make an attachment of earning order. The 1950 Act only states that the Court may order a monthly allowance to be paid to the wife or child in proportion to the means of such person as the court seems reasonable<sup>52</sup>. As discussed, this is very subjective as the consideration of what is reasonable is not stipulated under the 1950 Act and the Courts are given a free hand in deciding what the reasonable amount of allowance should be for the wife and the child. Further, non-compliance of the Court order only entails the imposition of a fine, the amount not stipulated under the 1950 Act and a term of imprisonment for a term which may extend to one month for each month's allowance remaining unpaid.<sup>53</sup> Unlike the 1968 Act, there is ambiguity under the 1950 Act as the penalties for non-compliance is vague and unclear. Based on the inadequacies in the 1950 Act with regards the enforcement of the maintenance orders, it is timely that the law makers extend the 1968 Act to East Malaysia for purposes of uniformity of laws.

<sup>47</sup> N.A., 'Divorce rates in Sarawak Worrying' The Rakyat Post (Kuching 13 May 2013) <<http://www.therakyatpost.com/news-in-brief/divorce-rates-sarawak-worrying/#ixzz37hVq4KCx>>. <accessed 6 May 2014

<sup>48</sup> Voon Shiak Ni, 'Extend Married Women And Children Act 1968 to Sarawak' *The Borneo Post* <<http://www.theborneopost.com/2013/10/11/extend-married-women-and-children-act-1968-to-sarawak/>> accessed 19 May 2014

<sup>49</sup> Section 4 (1) Married Women And Children ( Enforcement of Maintenance) Act 1968

<sup>50</sup> Section 7 (2)(a) Ibid

<sup>51</sup> Section 12 (1) Ibid

<sup>52</sup> Section 3 Married Women And Children (Maintenance) Act 1950

<sup>53</sup> Section 4 Ibid

## 5.0 CONCLUSION

The findings from the analysis of the MWCMA 1950 and MWCEMA 1968 have raised a number of major concerns in relation to the maintenance and enforcement of women and children's rights. Amongst these would be the ambiguities in the use of language in the Acts, the inconsistencies between the two Acts as well as the lack of uniformity in the enforcement of the maintenance orders between East and West Malaysia. The comparative analysis done of these Acts with the laws in Singapore, Ireland and Australia has brought to surface some of the weaknesses within the Malaysian Acts. Having noted the strengths of the laws in the other jurisdictions, the researchers would like to advocate some changes to the current law as listed:

1. The Married Women and Children (Maintenance) Act 1950 and Married Women and Children (Enforcement of Maintenance) Act 1968 should be codified into a single legislation;
2. The new Act should be applicable to East as well as West Malaysia;
3. The new Act should remove gender biasness and impose responsibility of maintenance on both husband and wife ( like the provisions in the laws of Singapore and Ireland);
4. The new Act should ensure clarity in the duration of maintenance for children;
5. The new Act should empower courts with discretion to make various orders besides attachment of earnings (like in Australia where apportionment of employees' provident fund , seizure and sale of personal or real property and/or sequestration of estates are available as forms of enforcement);
6. The government should identify a ministry to overlook all laws in relation to maintenance and enforcement (for example Ministry of Women, Family and Community Development); and
7. The government should establish an agency to deal and/or oversee all issues pertaining to enforcement of maintenance (like the Child Support Agency in Australia).

Many changes have been brought about in recent years to improve the status of women in Malaysia. However, whilst women's substantive equality is slowly becoming a reality, the pace at which change is being brought about must be increased<sup>54</sup>. The researchers are at consensus that changes in this area of law are highly necessary to ensure that the rights of women and children are in line with the countries around the globe.

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<sup>54</sup> Suhakam, 'Measuring Up to CEDAW: How Far Short Are Malaysian Laws and Policies?' (Suhakam Round Table Discussion : Rights and Obligations under CEDAW Kuala Lumpur March 2013)

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