

ASSESSING THE WORKING DRAFT OF THE HAGUE
CONVENTION ON THE INTERNATIONAL RECOVERY OF
CHILD SUPPORT AND OTHER FORMS OF FAMILY
MAINTENANCE: MALAYSIAN *SHARĪ'AH* PERSPECTIVE¹

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ABSTRACT

This article examines some of the key provisions in the Working Draft of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance from the Sharī'ah perspective and appraises the current practice of the Sharī'ah Courts in Malaysia in the light of them. Part One of this article provides an overview on the Malaysian legal system as a backdrop to Part Two which is an analysis on the extent of application and implications of Articles 1, 2, 3 and 15 of the said Convention from the Sharī'ah perspective. The objective is to highlight problems and to suggest improvements and modifications to reflect international compromise.

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INTRODUCTION

Malaysia has been a party since 2nd October 2002 to the Hague Conference on Private International Law, (hereinafter referred to as HCPIL) an international organization for the harmonization of rules of private international law. There are currently thirty seven (37) Conventions for the harmonization of rules of private international law and for the promotion of international judicial and administrative co-operation in civil and commercial matters, which have been drafted in HCPIL. One of it, which is the focus in this article, is the Working Draft of a Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter abbreviated as the Convention).

It is important to study this Convention from the *Shari'ah*² perspective. This is based on the fact that although Malaysia is a multi-ethnic country, the Federal Constitution of Malaysia provides that Islam is the religion of the Federation.³ Islam requires Muslims to follow in all aspects of their life the teachings of Islam. In particular, Muslims are required to abide and carry out the injunctions of the *Shari'ah*.⁴ Since Islam encompasses all aspects of life, the right to practice Islam is dependent upon the efficacy of a judicial system that will be able to administer Islamic law; i.e. the *Shari'ah* Court System. The Court is empowered to dispense justice according to Islamic law. Therefore, all orders issued by the Malaysian *Shari'ah* Courts must comply with the *Shari'ah* principles. Consequently, orders that are not compatible with the *Shari'ah* could not be enforced.

So far, problems encountered in relation to maintenance orders are in terms of their enforcement. Questions on the legality of maintenance orders are not a problem as they comply with the substantive laws. Enforcing regulations under this Convention (if ratified by Malaysia) would definitely entails several problems especially on the question of legality if the order contradicts the *Shari'ah* as practiced in Malaysia. However, since the Convention is written as a constitutive document, where the language is intentionally inexplicit, it

² *Shari'ah* is the totality of guidance that Allah has revealed to the Prophet Muhammad (s.a.w) as found in the *Quran* and the *Sunnah* relating to all aspects of life.

³ Article 3 (1) of the Federal Constitution.

⁴ This term is used interchangeably with *Hukum Syara'*.

would be amenable to interpretation. The greatest challenge in examining the Convention from the Malaysian *Shari'ah* perspective lies in the difficulty in figuring out exactly what it means and what reforms would be required to give full effect to the object of the Convention.

BACKGROUND

At present, Malaysian law is a hybrid law, drawing from all sources. Some customary law, in particular Malay and native customary law, has survived the onslaught of the Occidental laws although they might have taken on a foreign form.⁵ Given the plurality of the laws, it is not unexpected that there will always be interpersonal conflict between the systems. In a pluralistic legal setting, there is a diversity of domestic laws and jurisdictions. In Malaysia, this diversity is reflected in both substantive law and its administration, particularly in the area of Islamic law. In the Malaysian context, Islamic law is applicable to Muslims regardless of ethnicity.

The Federal Constitution, which is the supreme law,⁶ is the basis of legality and legitimacy of the branches of government: the executive, the legislature and the judiciary. In the Malaysian context, apart from the traditional function of adjudicating civil matters and criminal prosecutions, it interprets the Federal and State Constitutions and pronounces on the legality or otherwise of any legislative or executive acts. The Federal Constitution recognizes the tripartite categorization of court systems in Malaysia: the Civil Courts, the *Shari'ah* Courts and the Native Courts (of Sabah and Sarawak exclusively). Each court system has its own powers, constitution, organization and procedures. The court systems are co-equal and parallel with its own jurisdiction and hierarchy.

Under Article 121 of the Federal Constitution, the civil court system is established which consists of the Subordinate Courts, the High Courts, the

⁵ For further details, see Wu Min Aun. 1999. *The Malaysian Legal System*, 2nd ed. Kuala Lumpur: Addison Wesley Longman Malaysia Sdn. Bhd.

⁶ Article 4(1) of the Federal Constitution.

Court of Appeal and the Federal Court.⁷ Since the amendment to Article 121⁸ of the Federal Constitution, the High Court no longer has “*jurisdiction in respect of any matter within the jurisdiction of the Sharī‘ah Courts*”⁹ This provision has been interpreted to mean that the High Court will have no jurisdiction if the jurisdiction in respect of any matter is given to the *Sharī‘ah* court. Conversely, the High Court will have jurisdiction if jurisdiction in respect of any matter is not given to the *Sharī‘ah* court.

When there is a challenge to jurisdiction, the approach is first to determine whether the *Sharī‘ah* court has jurisdiction. Obviously, the jurisdiction of the High Court is not removed if the jurisdiction of the matter does not fall within the jurisdiction of the *Sharī‘ah* court. Wu Min Aun observes that Article 121(1A), while delimiting the jurisdiction of the High Court in respect of matters within the jurisdiction of the *Sharī‘ah* court, does not automatically confer jurisdiction on the *Sharī‘ah* court.¹⁰ If the law does not confer on the *Sharī‘ah* court any jurisdiction to deal with a matter on the State List, the *Sharī‘ah* court is precluded from dealing with the matter. In that event, the High Court may continue to exercise jurisdiction in those matters.

Abdul Hamid J. observes that the conflict of jurisdiction is very complex. Although there are calls to interpret the word ‘Islamic Law’ in the State List more widely, to include all of the *Sharī‘ah*, according to him, if done, will definitely give rise to more conflicts. He added that in civil matters, the problem is more complex. Cases have shown that even if a matter falls under the jurisdiction of the *Sharī‘ah* court, one of the parties may be a non-Muslim over whom the *Sharī‘ah* court has no jurisdiction. Cases have also shown that there may be issues that fall within the jurisdiction of the *Sharī‘ah* court as

⁷ Item 1 of the State List in the Ninth Schedule of the Federal Constitution and item 6(e) of the Federal List under the ninth Schedule of the Federal Constitution allows State law or federal law, respectively, to create and organize *Sharī‘ah* courts. The jurisdiction of *Sharī‘ah* courts is provided for in item 1 of the State List. Item 13 of the State List allow State Legislative Assemblies in Sabah and Sarawak to create and organize Native Courts.

⁸ Article 121 (1A) reads; ... *the courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Sharī‘ah court.*”

⁹ See *Mohamed Habibullah bin Mahmood v Faridah bte Dato Taib* [1922] 2 MLJ 793; *Tan Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117; *Shaik Zolkaffily Shaik Natar v Majlis Agama Islam Pulau Pinang* [1997] 3 MLJ 281

¹⁰ Wu Min Aun, op.cit., p.289.

well as issues falling under the jurisdiction of the civil court. He questioned which court is to decide such cases.¹¹

Problems become more complicated when it involves Native Courts. In Sabah and Sarawak, a certain amount of native custom has been codified. The written laws of these states consist predominantly of the laws and customs of the races indigenous to the several territories.¹²

OBJECTIVES

The Malaysian legal system is more complex and varied compared with the English legal system from which it derives so many of its traditions. This is hardly surprising given the fact that it is a melting pot of so many cultures, religions and ethnic groups. Present day Malaysia is not a monoculture and the legal system, largely, reflects this uniquely diverse society and its values. In the light of the above, for the purpose of considering the signing of this Convention, a thorough and comprehensive study on the effect of this Convention need to be conducted. This article however, does not purport to be an exhaustive examination of the Draft Convention, since each Article of the Convention could be a paper in itself. All that is attempted here is to highlight Articles that are not compatible with the *Shari'ah* as practiced in Malaysia.

FINDINGS

1. Title

The title of the Convention i.e. A Convention on the International Recovery of Child Support and Other Forms of Family Maintenance seems to incorporate wider categories of family maintenance, which exist at present and in the future. States Parties must discuss and decide what these other forms of family maintenance are. Child support as practiced in some countries is a foreign

¹¹ Dato' Abdul Hamid Bin Haji Mohamad, *Civil and Shari'ah Courts in Malaysia: Conflict of Jurisdictions* [2002] 1 MLJ cxxx; [2002] 1 MLJ 130.

¹² The constitution and organisation of native courts is governed by the Federal Constitution. By virtue of Item 13 of List IIA (Supplement to State List for States of Sabah and Sarawak) in the Ninth Schedule to the Federal Constitution, the State is empowered to make laws on the following matters relating to native law and custom.

concept in Malaysia. Various forms of child maintenance which includes providing the needs of children before they are born¹³ and at times when they are otherwise considered as adults as practiced in some countries is not yet accepted in Malaysia.

To enforce international cooperation in relation to these other categories of maintenance would be next to impossible unless Malaysia is ready to reform the system for maintenance and in depth study should be done to see whether Malaysia should introduce Child Support Scheme. For e.g., the Child Support Scheme and the Child Support Agency in Australia had attracted much attention and criticism including inquiries by the Joint Select Committee on Certain Family Issues in 1994.¹⁴ Its high operating costs may have largely undermined the perceived benefits in relation to reductions in social security expenditure. Malaysia could established a Family Support Centre instead of Child Support Agency as practiced in some countries because under the *Shari'ah*, the concept of "family" is broader where welfare of other family members should also be taken into consideration. Other family members besides the father could be ordered to maintain the child. The role of Takaful for the family could also be considered to cover the high operating costs of Family Support Authority.¹⁵

2. Preamble

The preamble is arguably the most important provision in the Convention. It emphasizes "...the importance of international administrative co-operation for the international recovery of child support and other forms of family maintenance, and ... recalling that States should take all appropriate

¹³ Predominant Catholic countries like Argentina and Poland define "child" to include any human being from the moment of conception; for further details, see Cecilia P. Grosman. 1996. *Argentina – Children's Rights in Family relationships: The Gulf Between Law and Social Reality* and Wanda Stojanowska and Elzbieta Holewinska, *Children's Rights in Poland: Three Years after the Convention* in MDA Freeman (ed.), *Children's Rights: A Comparative Perspective*, Dartmouth Publishing Co., England.

¹⁴ For further details on Child Support Scheme in Australia, see Altobelli, Tom. 2003. *Family Law in Australia: Principles and Practice*, Reed International Books, Australia.

¹⁵ For further details on the establishment of Family Takaful and its implementation in Egypt, see; Sheikh Ghazali Abdul Rahman. 2005. *Isu-Isu Terkini Mahkamah Syariah, Konvensyen Kehakiman dan Kepeguaman Syari'e*, organized by KUIM and JKSM, Kuala Lumpur.

measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, in particular, where the person having financial responsibility for the child, lives in a State different from that of the child’.

It will be observed that the Convention is to provide for international administrative co-operation between Convention countries for the recovery of child’s support and other forms of family maintenance. Since Malaysia is a party to the Convention on the Rights of the Child of 20th November, 1989, the provision of this Convention is acceptable. The states parties will recognize the rights of every child to an adequate living standard for the child’s physical, mental, spiritual, moral and social development. It is the responsibility of the parents or others responsible for the children within their financial capacities to provide the adequate living standard.

This provision is in line with Paragraph 6 of the Preamble to the Convention on the Rights of a Child of which Malaysia is already a party. Para 6 provides that:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

This objective is *Sharī’ah compliant*. Malaysia should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, in particular, where the person having financial responsibility for the child, lives in a State different from that of the child. The *Sharī’ah* enjoins mutual co-operation for the purpose of doing good deeds and avoiding evil. However, it is regrettable that implementation of maintenance orders (Civil or *Sharī’ah*) have hardly been successful so far albeit inter-country agreements. Malaysia could as state member of the Organisation of the Islamic Conference (OIC) initiate co-operation through the General Secretariat to work together with other member

states through the Covenant on the Rights of Child in Islam¹⁶ to enforce maintenance orders for the purpose to secure the recovery of maintenance for the child from his father who lives in other Muslim country.

3. Objective of Convention

Article 1 of the Convention states that the objects of the present Convention are:

...to establish a comprehensive system of co-operation between the authorities of the Contracting States for the international recovery of child support and other forms of family maintenance, [including the establishment of parentage for such purpose

The objects of the convention in terms of establishing a comprehensive cooperation between the authorities of the contracting States is noble, however, there would exist difficulties because the law on recognition of parentage differs from one member state to another. Under the *Sharī'ah*, parentages are established through marriage,¹⁷ acknowledgment¹⁸ or evidence. Parentage gives the child the status of legitimacy. Parentage is only established

¹⁶ OIC/9-IGGE/HRI/2004/Rep.Final

¹⁷ Jurists are unanimous that a valid marriage contract is the ground for establishing the parentage of the father of a child born within wedlock. Once a child is born under a valid marriage contract within the specified limits of pregnancy term, and consummation having been possible, its parentage is established, and the husband can only deny his fatherhood through one of two devices; i.e. denial at the time of birth or during preparations for it if the husband is present, or at the time of his learning of it if he is absent; or imprecation (*lian*). *Lian* should be made before a judge who shall order the separation of the spouses. For further details, see Abu Zahra, Muhammad. 1950. *al-Ahwāl al-Shakṣiyyah Qism Zawāj* (Personal Status on Marriage), Cairo.

¹⁸ Parentage can also be established through acknowledgement, which could be by the father, by the mother, or by the child itself. A man may either expressly or implicitly acknowledge a child as lawfully his, upon which the paternity of that child shall be established in the man, provided the following conditions are met: (i) that the child so acknowledged is not known to be the child of another man; (ii) that the ages of the parties are such that they could be father and child; (iii) that the acknowledgement is made in such a way that the father is indicating that the child is legitimate, and not the offspring of unlawful intercourse (*zina*); (iv) that the child, if of discretion, confirms or acquiesces in the acknowledgement; such confirmation shall not be required if the child has not reached the age of discretion. For further details, see Abdullah Omar. 1968. *Aḥkām al-Sharī'ah al-Islāmiyyah fī al-ahwāl al-shakṣiyyah* (Islamic Sharia Provisions on Personal Status), 6th edn, Alexandria.

in the natural father and mother of a child. Adoption is not recognized under the *Sharī'ah*.¹⁹ No paternity can be established for the illegitimate child. Apart from acknowledgement and evidence, paternity can only be established for the child born within wedlock, whether under a valid contract, an irregular contract,²⁰ or under a semblance of the right to marital intercourse.²¹ However, such cases are subject to the minimum and maximum terms of pregnancy.²²

4. Legal Effects of Parentage

The establishment of a child's parentage creates certain rights and duties, the most important of which are maintenance, fosterage, custody, and guardianship.²³ Maintenance includes food, clothing and lodging.

Islamic jurists are unanimous that a child who has no property of its own is entitled to receive maintenance, in the first instance from its father, under two authorities: the Quran "*The duty of their feeding and clothing according to seemly custom is upon the father of the child*",²⁴ and the tradition of the Prophet who told a woman complaining to him of the parsimony of her husband, "*Take of his property what suffices for you and your child according to fair custom.*"²⁵

¹⁹ Surah 33: 4-5

²⁰ A child born to a woman between six months at least and nine months at most after that time, shall be attributed to the husband under an irregular contract, before or after separation, and shall not be denied through li'an which can only be made under a valid contract. No paternity shall be established if the child is born within six months of cohabitation, regardless of the date of contract. For further details, see Abdullah, Omar. 1968. *Ahkam ush Shariat il Islamiyya fil ahwal ish shakhsiyya* (Islamic Sharia Provisions on Personal Status), 6th ed., Alexandria.

²¹ For e.g. if the woman is thought by the husband to be his lawful wife, or not to be in a prohibited degree, without knowing that the contrary is the case, the child born within the above limits shall be attributed to the man on the strength of his acknowledgement, provided that he shall not declare it an issue of adultery; for further details, see al Hilli, Sheikh Abdul Karim Rida. 1947. *Al-Ahkam al-Jaafariyya fi al-Ahwal al-Shakhsiyyah* (Jaafari Provisions on Personal Status), Baghdad Muthanna Library, Cairo.

²² A child born in less than six months from the time of the marriage is deemed by all the four Sunni Schools to be illegitimate. For more details, see Jamal, J Nasir, op.cit, p. 146.

²³ Rights connected with mutual inheritance, fosterage, custody and guardianship will not be dealt in this article.

²⁴ Surah 2: 223.

²⁵ However, this right is subject to two conditions: (a) that the child is in need, i.e.

According to the *Sunni* school, a child with no property of his own shall lose his right to maintenance by his father on reaching the age at which he can earn a living, even before puberty, but shall retain that right if he cannot work due to illness or handicap. The son who has reached majority shall also be entitled to maintenance by his father²⁶ if the son is incapable of earning a living because of chronic disease, a mental or a physical handicap and has no private means, or, is of such a social status as to render him impossible to be employed to do menial job.²⁷ As for the daughter who has no property, the condition of her being in need is fulfilled by the very fact of her gender. Even though she may have the ability to earn her own living, she is not obliged to do so. The duty to maintain her shall pass to her husband once she marries.²⁸ However, if she later ceases to be maintained, for example, on divorce or because of disobedience to her husband, her father shall be bound, once more, to maintain her.²⁹

It is also a right for the poor parents on their children who have means to provide it.³⁰ Otherwise, if a child possesses property, maintenance is not made compulsory upon others. Moreover, maintenance of their necessities will be taken from their own properties because the basis of compulsory maintenance is necessity (*hajat*). One who possesses a property will not be dependent on other people's property for their life maintenance.³¹

indigent and unable to earn a living; and (b) that the father has the means to provide maintenance from capital or income. For further details see Jamal J. Nasir, op.cit.

²⁶ However, maintenance shall continue after that stage, provided that the course of studies he pursues is religiously acceptable.

²⁷ Abu Zahra, On Marriage, p.415.

²⁸ Abdullah, Sharia Personal Law Status Provisions, p.630; Al Hilli, pp.102-3.

²⁹ Al Abiani, Commentary, p.349, Al hilli, op.cit., p.104

³⁰ *Al-Bahuty, Kashshaf al-qina'*, Volume 5, p. 481; *Shams al-Din al Sarakhsiy. Al-Mabsut, Dar al-Ma'rifah, Beirut*, 1989, Volume 5. p.223, *al-Dusuqiy, Hasyiyah al-Dusuqiy*, Volume 2, 592; *al-Shirazi, al-Muhadhdhab*, Volume 2, p.178

³¹ The position for maintenance for children is different from wife. Even if a wife is wealthy, the maintenance on wife is still compulsory on the husband because the basis for wife's maintenance is not due to necessity (*hajat*) but because the wife protects the right of a husband. See *Ibn Qudamah, al-Mughni*, Volume 8, p.213; *ibid, al-Bahutiy, Kashshaf al-qina'*, Volume 5, p. 482; *al-Kasaniy, Badai' al-Sanai'*, Volume 4, p.34.

5. Capability of the Father to Provide Maintenance

This is the second condition for the children to be entitled to maintenance by the father.³² If the father is impoverished, but can earn a living, he shall be ordered to do so, under imprisonment if he refuses. If he cannot earn enough for himself and his children, or if no livelihood is available, the obligation of the children's maintenance shall pass to the person next to the father. This shows that the responsibility of providing for the child is incumbent first on the father. If the father fails to undertake this responsibility, it is incumbent on the grandfather. The maintenance so paid shall be a debt repayable by the father when he can afford it.

It is to be noted that a father must provide maintenance for his child regardless of whether the child is living with him or otherwise. However, if the father is incapable of earning a living due to a chronic disease, paralyse or handicap, he shall be released from the obligation to maintain his children as if he were dead.³³ The children's maintenance shall then be incumbent upon the nearest relatives without being a repayable debt.³⁴ The responsibility to care for the child falls on its relatives should the father or grandfather fail to perform the duties.³⁵ In this case, the nearer relatives are most likely liable rather than those remote ones.³⁶

For an illegitimate child, maintenance is incumbent upon the mother. The lineage of a child towards a mother whether being borne out of a legitimate

³² *Al-Hisniy, Kifaah al-akhyar*, volume 1, p.133; *al-Ramliy, Nihayah al-muhtaj*, volume 7, p.208.

³³ This opinion is based on a *hadith*;

“Abu Hurairah (r.a.) reported that a man came to see Rasullullah (s.a.w) and said: “O Rasullullah! I have one dinar.” Rasullullah said, “Spend it on yourself.” He said again, “I have another one dinar.” Rasullullah said; “Spend it on your family.” He said; “I have another one dinar.” Rasullullah said; “You know better.” For further details, see Ibn Qudamah, al-Mughni, Volume 8, p.213; al-Bahuti, Kashshaf al-qina’, Volume 5, p. 482; Ibn Muflih, al Mubdi ‘: p.213, al-Ramliy, Nihayah al-Muhtaj, volume 7, p.208.

³⁴ The Sunni set a different order for the obligation to maintain the children whose father is dead. Relatives are either ascendants, how high so-ever, or collateral.

³⁵ Saleh, *Aqalah al-aba bi al-bana*, p.164.

³⁶ *Ibid*, p.344.

relationship or not in the eyes of *Sharī'ah* is certain while the lineage of a child to his/her father is otherwise.³⁷

Even though a man is not accountable to maintain his illegitimate child because the child is regarded as, having no lineage link with him, but the man who adopted a child is obligatory to maintain that child. If he fails or negligent in paying the maintenance, the court can make any necessary orders to ensure the welfare of the children. This obligation stops if the biological father or the mother of the child takes back the child. The said man nonetheless can claim the sum of money spent as the children's maintenance from the father or the mother of the children.³⁸

6. Maintenance for Descendants, Ascendants and Collaterals

All Islamic jurists unanimously agree that the father is the one who has the utmost responsibility towards maintaining the children,³⁹ but they differed on the extent of this lineal kinship that establishes the right of maintenance. This principle regarding those who are responsible under the *Sharī'ah* is provided for in the Islamic Family Law Enactments of states, which impose the obligation on the father absolutely to maintain the children whether or not those children are under his custody or other people. Nonetheless, this obligation can change and shift on others who are accountable according to the *Sharī'ah* in the event where the father to the children has passed away or the place of the father is unknown or the father is not capable of maintaining his children.⁴⁰

The list of those who are accountable in accordance with *Sharī'ah* towards the children's maintenance is not mention in detail. Nonetheless, a presumption is that the arrangement is according to the *Shāfi'ī* school of thought, that is followed by a majority of Muslims in Malaysia, i.e.

³⁷ Wahbah Zuhayly. *Al-Fiqh al Islami wa Adillatuhu*, p.7249.

³⁸ Act 303, section 78 (1)

³⁹ Burhan al-Din Abi al-Hassan bin Abi Nakr bin 'Abd al-Jalil al Rashdaniy al-Marghinna'iy. *Al-Hidayah sharh bidayah al-mubtad'*, *Maktabbah al-Babiy al-Halabiy, Mesir*, t,th, vol. 2, p.45, *al-Ksaniy, Badai al-Sanai*, vol.4 p.30; *Shams al-Din al-Shaykh Muhammad al-Dusuqiy, Hashiyah al-Dusuqiy ala al-sharh al-kabir, Maktabh Zahran, Kaherah*, n.d, vol.2, p.524.

⁴⁰ Act 303, section 72(1) (2).

accountable on the grandfather and those how high so-ever and not upon the family or other heirs. The court has a discretion to order those who are accountable under the *Sharī'ah* to maintain the child only if they are reasonably capable of the said order.⁴¹ The provision also shows the obligation to maintain the child is imposed on the male relatives, especially on the father's side and not upon other female relatives even though she is the mother to the child.⁴²

7. Recognition and Enforcement of Maintenance Decisions.

Subsection 2 of Article 1 requires State Parties to: *...to provide for the recognition and enforcement of maintenance decisions.*

For this purpose, it can be accepted because it would facilitate the enforcement of maintenance decisions. However, there would be several reservations on those cases where the decision contradicts the *Sharī'ah* for e.g. in cases where a putative father is ordered by the court to maintain his illegitimate child, or maintenance order in favour of a recalcitrant wife (*nashiza*), or maintenance orders made on children adopted by homosexual couples or any other relationships not recognized by the *Sharī'ah*.

8. Scope of Convention

Article 2 of the Convention states that; *This Convention shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity, [including a maintenance obligation in respect of a child regardless of the marital status of the parents].*

The scope of this Article is acceptable; however the phrase in parenthesis is not as it is too wide and may cover maintenance obligations in respect of illegitimate child, adopted child/ren of heterosexual parents who are not married to each other or homosexual parents or child/ren born out of rape. States Parties must discuss and decide these other forms of relationship that

⁴¹ Act 303, section 73(2)

⁴² The position of maintenance for the children in Islam is different from the non-Muslims. The Law Reform (Marriage & Divorce) Act 1976 imposes an obligation to maintain only on the father and mother. See Section 92 & 93 of the said Act.

does not fall under the definition of family relationships from the *Sharī'ah* perspective. However, a putative father (in the case of illegitimate child) or a partner who had agreed to adopt the child can be ordered by the Civil Court to maintain their illegitimate child/ren/ adopted child/ren. The relevant statute in Malaysia is Married Women and Children Maintenance Act, 1950 [Act 263].

Other relevant laws in relation to this is the Islamic Family Law (Federal Territories) Act 303 (hereinafter abbreviated as IFLA), Part VI (Maintenance of Wife, Children and Others) which provides for claims in relation to, *inter alia*, maintenance:-

- i. S. 60(1) states that the Court may subject to *Hukum Syara'* order a man to pay maintenance to his wife or former wife.⁴³
- ii. S. 61 of the Bill: Power of *Sharī'ah* Court to order any person liable under *Hukum Syara'* to pay maintenance of certain persons.⁴⁴
- iii. S. 73(1) provides that unless there is an agreement or an order of the court, a man is obliged to maintain his children whether they are under his custody or otherwise. The concept of "*Kafalah*" under *Hukum Syara'* is not 'adoption' in the sense as understood under civil law. *Kafalah* is a concept whereby a child in need of protection may be entrusted either by a decision of the Guardianship Judge or by an Administration Commission to a public or Social Institution or to a Muslim family, which will care for the child's person (shelter, maintenance, education) and if needed, for the property of the child and who if necessary, would receive delegation of guardianship over the child.
- iv. S. 73(2) provides that the *Sharī'ah* Court has the jurisdiction to require a person related to a child to maintain the child if his/her father is dead or his whereabouts unknown or if and in so far that he is unable to maintain him/her. This clause seems wide enough to

⁴³ Maintenance of the wife is incumbent on the husband. The right of maintenance to the wife is absolute. The husband is compelled to maintain his wife despite the fact that she has the means to support herself or even when the husband himself is of lesser means. The right to maintenance is available during continuance of the marriage. After the dissolution of the marriage by death the widow is not entitled to any maintenance.

⁴⁴ This provision is wide and covers the maintenance of any person in any situation, whether child or adult who is incapacitated, wholly or partially by reason of mental or physical injury.

- cover the situation of incapability of a father to maintain his legitimate child.
- v. S. 74(1) (a) provides that the *Shari'ah* Court has the power to order a husband who neglects the child or wife, to pay maintenance.
 - vi. S. 74(2) provides that the *Shari'ah* Court has the power to order a person liable under *Hukum Syara'* to maintain or contribute towards the maintenance of a child if the court is satisfied that having regard to his means, it is reasonable so to order.
 - vii. S. 79 provides that where a man has accepted a child who is not his child as a member of his family, it shall be his duty to maintain the child while he or she remains a child, so far as the parents of the child fail to do so, and the court may make such orders as may be necessary to ensure the welfare of the child.
 - viii. S. 80 provides that if a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself other than a child born as a result of rape, the court upon due proof thereof, may order the woman to make such monthly allowance as the court thinks reasonable. Prior to that, S. 80 (2) which was repealed in 1994 provided that claims for maintenance for an illegitimate child can be filed against the putative father in the Magistrate Court and *Shari'ah* Court.⁴⁵
 - ix. S. 81 provides that the *Shari'ah* Court has the power to order the mother of an illegitimate child to pay maintenance in the event that she neglects her obligations. According to *Hukum Syara'*, the duty to maintain an illegitimate child falls on the mother because the affiliation (*nasab*) of the child lies with the mother.

The provisions of s. 61, s. 73(2) and s. 74(2) make reference to “any person liable thereto under *Hukum Syara'*” in relation to the taking over of the obligation of maintenance of the father in the case of an illegitimate child or incapacitated person and of the mother in the case of illegitimate child. In order to determine the person who is liable to pay the maintenance under *Hukum Syara'*, the Islamic jurists opine that such obligation falls on the heir

⁴⁵ *Roslan v Zulkifli* [2001] 2 CLJ 397; see also *Muhammad Hanif Farikullah v Bushro Chaudri & Anor* [2001] 2 CLJ 397.

(*ahlil warith*). This is in line with *Hukum Syara'* as stated in Quran, *Surah al-Baqarah: 23*; “*And heir shall be chargeable*”. If their heir is also unable to pay maintenance the obligation shall be passed to “*Baitulmal*”. In respect of this matter, the child is considered as a needy and poor Muslim that is included in the categories of people who may receive zakat (eight *asnaf*) from *Baitulmal*.⁴⁶

9. Claims by a Public Body for Reimbursement of Benefits Provided in Lieu of Maintenance

Article 2 (2) of the Convention states that the Convention shall also apply to claims by a public body for reimbursement of benefits provided in lieu of maintenance. At present there is no law related to this matter. If Malaysia becomes a Party to this Convention, we may have to enact relevant laws providing for the reimbursement of a public body for benefits provided in lieu of maintenance. Alternatively, this clause could only be applied if actions have been taken on the father or any other person liable to maintain the child. Based on the *Shari'ah* principle, the duty to maintain will never be shifted to the public body/any other person unless the father of the child is incapable of doing so.

10. Definition of the Child in the Convention

For the purposes of this Convention, Article 3 defines “child” includes as a minimum every person below the age of 18. According to the *Shari'ah*, the term child refers to someone who has not yet reaches the age of puberty (*baligh*).⁴⁷ This definition was adopted in the Covenant on the Rights of the Child in Islam which has been ratified by Malaysia which defines child as “every human being who, according to the law applicable to him/her, has not

⁴⁶ Surah Taubah: 60; “Alms are for the needy and poor...”

⁴⁷ *Baligh* is defined as a child before having experienced wet dream which normally after discernment age (*Mumayyiz*-ability to distinguish what is morally wrong and what is morally right) This is explained in a *Hadith* which was reported by Ali bin Abu Talib r.a. and Aishah r.a.; “*Three persons who will not be made accountable for their deeds, i.e. one who sleeps until he awakes, a child until he reaches puberty (baligh) and an insane until he becomes sane.*”

attained maturity.”⁴⁸ Arguably, this definition went further than the Convention’s definition because *Shari’ah* does not impose any age limitation as a requirement for termination of the maintenance.

The duty to maintain children is no longer an obligation in the event when the children are able to be independent, but for daughters, the obligation only ceases when they are married. However, if the children, whether sons or daughters could work and capable of maintaining themselves, even though they have not reach puberty or married or not yet married (for daughters), the fathers or the parties responsible in the eyes of *Shari’ah* do not need to maintain them.⁴⁹ The capability to be independent is indicated in some States Enactments at the age of 18 years old. Maintenance Order normally ceases upon the children once they have attained that age.⁵⁰

Claims to extend maintenance order (in order to enable the children to pursue higher education) after the age of 18 can be applied to the court by the children themselves or other party (normally the mother). This application however will not necessarily be allowed by the court. The court has a jurisdiction to reject the application if it thinks that the claim is unreasonable.⁵¹

In short, apart from the fact that children’s maintenance can be extended beyond the age of 18 years old, it can also be curtailed from the normal period of time, based on the grounds and reasonable causes which are accepted by the court. The flexible period mentioned is suitable to the reality of today, where many children pursue tertiary education after that age. It should be emphasized here that maintenance obligation on the parties involved is not merely on the basis of moral obligation; instead, it is also a religious duty.⁵² The money spent

⁴⁸ See note 13

⁴⁹ See Saleh, ‘*Alaqah al-aba’ bi al-abna*’, p.161-162

⁵⁰ Except Islamic Family Law Enactment of Kelantan 1983, section 66 and Islamic Family Law Enactment of Kedah 1979, section 67 do not fix 18 years old requirement, but *baligh* requirement is regarded as the period the end of *Nafkah*.

⁵¹ It is to be noted here that besides extending the period of maintenance, the maintenance order can also be reduced in two circumstances: (i) if the order cited a lower amount. (ii) if the order is terminated. For further details, see *Ermy binti Shamsul Bahari lwn Mazlan bin Mahiddin*, Mahkamah Shari’ah Wilayah Persekutuan Kuala Lumpur, Kes Mal No. 72/1996; [1998] 6 *Jurnal Shari’ah* 127.

⁵² Cf with Common law, children’s maintenance is just a moral obligation. See *Healing v Healing* (1903) 51 W.R. 221.

for the children's life is promised by Allah, huge reward⁵³ and the negligence to discharge that duty is considered sinful.⁵⁴ The source of maintenance spent on them must be *halal* and not dubious (*shubhat*).

In terms of extension of maintenance order, Datuk Abdul Hamid FCJ. in *Karunairajah Rasiah v Puni Thambigai Puniah*⁵⁵ had urged that section 95 of the Law Reform (Marriage and Divorce) Act 1976 to be reformed because it does not extend maintenance order for a child beyond 18 years old. He argued instead that section 95 LRA should incorporate Islamic principles of extension order for children's maintenance, which are primarily based on the principle of necessity namely; the children should not have property, incapable of maintaining themselves as well as capability of the father to maintain. Moreover, the application of section 95 LRA is very strict and does not give power to the court to allow maintenance to be given to the children except under physical and mental disability and financial incapability. He further commented that it is neither the court's duty to impose a moral perception on others nor it is the judge's function to enact laws but Parliament is the most appropriate authority to legislate the laws. Judges' role is merely to implement those laws. He argued that the judge should look at the law and decide according to the law as it stands.

11. Definition of Creditor and Debtor

The Convention under Article 3 defines 'Creditor' as; (i) an individual to whom maintenance is owed or is alleged to be owed; or ii) A public body to which reimbursement is owed for benefits provided in lieu of maintenance. And 'Debtor' as an individual who owes or who is alleged to owe maintenance.

According to *Hukum Syara'*, which are codified under the provisions in sections 60-80, the father is given the responsibility to provide maintenance, thus the mother (wife) and child will always be the maintenance creditor.

⁵³ Hadith; "*The biggest reward is what you spend on your family.*" *Al-Bukhari, Sahih, Kitab al-Nafaqah wa fadl al-Nafaqah 'ala al-ahli*, vol.7, p.80.

⁵⁴ Hadith; "*It is sufficient for one to get a sin only by neglecting those who are under their maintenance (without nafkah)*". *Ibid, al Nawawiy, Sahih Muslim bi sharh al Nawawiy, Kitab al-Zakat Bab Fadl al Nafaqah 'ala al-iyal*, vol. 7, p.82.

⁵⁵ *Karunairajah Rasiah v Puni Thambigai Puniah* [2004] 2 CLJ 365.

The rights of a public body to obtain reimbursement of benefits provided for the maintenance creditor is allowed by *Hukum Syara'* under the concept of "*wakalah*". According to *Shafii's* school of thought, the word *wakalah* is defined as "delivering of right by a person in possession to another person during his/her life time to enable him/her self to exercise certain duty." However, there is no explicit provision in the IFLA or the Islamic Civil Law Procedure Bill. Amendment by insertion of an enabling provision may be necessary.

12. Bases for recognition and enforcement

Article 15 of the Convention states that; A maintenance decision made in one Contracting State (the State of origin) shall be recognised and enforced in other Contracting States if –

- a) The respondent was [habitually] resident in the State of origin at the time proceedings were instituted;
- b) The respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;
- c) The creditor was [habitually] resident in the State of origin at the time proceedings were instituted;
- d) The law of the State addressed would in similar [factual] circumstances confer or would have conferred jurisdiction on its authorities to make such a decision;
- e) There has been agreement to the jurisdiction by the parties in writing or evidenced by writing;
- f) The maintenance decision was made by an authority exercising jurisdiction on a matter of personal status; or
- g) The child for whom the maintenance was ordered was [habitually] resident in the State of origin at the time proceedings were instituted].

Under the Convention, the internal law of the habitual residence of the creditor/mother will determine the law which governs maintenance claim. Under s. 4, the law applicable is the Islamic Family Law Enactment of the state where the maintenance creditor resides. In this Convention, if the principle applicable in foreign court may not be in accordance with the

Sharī'ah, then according to paragraph (d) of this proposed clause, the *Sharī'ah* Court's assistance may not be given to enforce such maintenance order under s. 63 of the Administration of the Religion of Islam Bill. But s. 63 of Administration of the Religion of Islam Bill does not have any 'extra-territorial' effect in relation to a foreign court's order. This provision to give recognition to the foreign court's order for maintenance is not provided under the present s. 63. Thus the *Sharī'ah* Courts do not have the power to give due recognition in order to accede to this Convention. There is a need to provide in explicit terms in the local legislations for such powers to the *Sharī'ah* Courts.

With regard to the issue of jurisdiction of the *Sharī'ah* Court where the father is a foreigner, by virtue of s. 4 of the Bill, which states "this act shall apply to all Muslims living in...and to all Muslim residents in... who are living outside", it appears that the law is applicable to any foreign father. The Bill does not state "Malaysian Muslims...", therefore any application for maintenance from the mother to the father or from wife to her husband or from any party which involves a foreign child or person living in Malaysia. Currently, the provision of the Bill may be applicable as long as the respondent is a Muslim and resides in Malaysia. S. 4 of the Bill seems to suggest that the maintenance order will be enforced on a foreign father 'living' in Malaysia. Amendment to s. 4 of the Bill is suggested to provide explicitly that the order of a foreign court shall govern any Muslim of foreign citizenship living in Malaysia.

Jurisdiction of the *Sharī'ah* courts relating to Islamic Family laws is stipulated under section 45 of IFLA which provides the requirement of *habitual residence*.⁵⁶ Under Islamic Family laws in each state in Malaysia, the jurisdiction of *Sharī'ah* Courts is not based on domicile of parties involved. Nevertheless, the application of an Act or Islamic Family Law Enactment that

⁵⁶ According to marriage procedures in the state of Selangor, in order to get the status of *Mastautin*, one should live in a district or area not less than four months. One also needs to fill up the form and certified by a Penghulu or Chief of a village or Chief of JKKK or Mosque's Nazir or a Chairman of Residential Committee/ Residential Address where he lives (in a district where he resides more than four months). This finding is based on a research conducted by Nik Nurazila Nik Abdullah (UM) 2004 on "*Keperluan Mastautin Dalam Tuntutan Mal; Satu Kajian di Mahkamah Shari'ah Wilayah Persekutuan/ The Necessity of Residence in Property (Mal) Claims; A Research in the Shari'ah Courts in the Federal Territory.*"

gives power to the *Shari'ah* Courts to hear the case is subjected to residential area (*Mukim*) and habitual residence (*Mastautin*) of a person.⁵⁷ IFLA provides that the Act is applicable to all Muslims that resides in the Federal Territory and to all Muslims who are ordinarily resident (*Mastautin*) of the Federal Territory but lives elsewhere.⁵⁸

This is quite different compared to the Law Reform (Marriage and Divorce) Act, 1976 which stipulates that domicile of a husband and wife is a necessity as a condition for divorce petition, whereas IFLA and the Islamic Family Law Enactments which are applicable on Muslims does not stipulate the requirement of domicile of any parties in Malaysia. Statutes relating to Islamic Family Law⁵⁹ clearly do not put any discrimination between husband and wife to apply for dissolution of marriage as compared to the Law Reform (Marriage and Divorce) Act, 1976 which clearly stipulates domicile of a husband as a ground for the court to entertain a divorce petition.

In sum, the laws on domicile, which is applicable in Malaysia, would only be applicable in civil cases such as divorce between parties who are not Muslims.⁶⁰ The concept of domicile in civil matters⁶¹ relating to individual laws of non-Muslims is not covered in cases involving disputes pertaining to the right of custody of a child.

⁵⁷ Islamic Family Law Enactment of Kelantan 1983, section 5(1)(2) states that it is applicable to all Muslims who resides (*Mukim*) in Kelantan but also to those who is a resident (*Mastautin*) but resides (*Mukim*) outside that state. One who permanently resides (*Mukim*) in that state should be considered as ordinarily resident (*Mastautin*) in that state until proven otherwise.

⁵⁸ IFLA, section 4. The term of the use of word mentioned in the Islamic Family Law Enactment of Selangor 1984; section 4, Islamic Family Law Enactment of Penang 1985, section 4; Islamic Family Law Enactment of Negeri Sembilan 1983, section 4; Islamic Family Law Enactment of Perlis 1992, section 4; Islamic Family Law Enactment of Perak 1992, section 4; Islamic Family Law Enactment of Pahang 1987; section 4.

⁵⁹ The Islamic Family Law Ordinance of Sarawak 1991 and the Islamic Family Law Enactment of Sabah 1992 provide that this Enactment or Ordinance is applicable to all who resides in Sabah/Sarawak and to all Muslims who are *Mastautin* in Sabah or Sarawak but lives or stays outside those states.

⁶⁰ See *Kanmani v Sundarampillar* [1957] 172; *Paramesuari v Ayadurai* [1959] MLJ 195; *Melvin Lee Campbell v Amy Anak Edward Sumek* [1988] 2 MLJ 338.

⁶¹ For further details on application of domicile and its implications on the Malaysian courts, see Zaleha Kamaruddin, *The Concept of Domicile and Its implications on the Courts' jurisdiction relating to Matrimonial Matters in Malaysia*, IJU Law Journal, Vol 1, No.2, 1989, p.109.

CONCLUSION

Malaysia has its own history and culture, and the problems it confronts in complying with an international convention of this nature would reflect this. Malaysia's history and its cultural heritage, in particular its concepts of the family from the *Sharī'ah* perspective provides some constraints on its ability to implement some of the requirements of this Convention. Although serious thoughts have been focused on the substantive laws and practices, which include procedures and processes in operation in the *Sharī'ah* Courts to ensure that if ratification of the Convention is made by Malaysia, it should improve the current state of affairs although it would still fall well short of the Convention ideals. Regardless of the above, identification of areas which contradicts the *Sharī'ah* and its practices in Malaysia is sketched in the hope that it would pave the way for better implementation of maintenance order through international cooperation.

Progress towards these, needs an enabling mechanism; however, the development of such a mechanism is beyond the scope of this article. As mentioned earlier, there are certain provisions in the Working Draft that are repugnant to the basic *Sharī'ah* principles and incompatible with the existing provisions of the Malaysian *Sharī'ah* laws. In this regard, we foresee great difficulties in complying with some of the mentioned provisions of the Working Draft. Wherever necessary, provisions that are not against the *Sharī'ah* in this Convention should be incorporated into the present Islamic Family Law Enactments: breach of a provision of the Convention should be an infringement of the Enactments with all the implications that this would have. However, this law reform would be another slow and painful process.

Many important law reforms in the past in relation to Islamic family law, which belongs to states' jurisdiction, have been made as a result of several factors including the adherence to the principal teachings of Islam, the need to enhance, strengthen and to provide uniformity of *Sharī'ah* provisions in Malaysian laws and to fulfil the current needs of the Muslims community. This Convention has to be seen as a beginning, but it will not have an impact on the lives of women and children until the obligations it lays down are taken seriously by legislatures, state governments and all others concerned with this issue.

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