

DETERMINING THE RATE OF CHILD MAINTENANCE BASED ON THE CRITERIA OF MA'RŪF AND KIFĀYAH: THE CASE OF MALAYSIA

Abstract:

The Islamic Family Law (Federal Territories) Act 1984 of Malaysia states that the maintenance of one's wife and children needs to be assessed in accordance with the capabilities and needs of certain parties. However, this provision is too general, and there is no clear explanation of what constitutes the capabilities (ma'rūf) and needs (kifāyah¹) of the parties. This provision has troubled some parties as it renders the determination of the maintenance rate at the judge's discretion of interpreting capabilities and needs. Through content analysis and in-depth interviews methods, the study concludes that kifāyah and ma'rūf is determined in reference to the socio-economic and financial standing of the father and with regards to the minimal amount to secure a basic standard of living of a child and the specific needs of the child.

Keywords: Child Maintenance, Kifāyah, Ma'rūf, Assessment of Maintenance

¹ Henceforth the paper will refer to both criteria in their original Arabic.

A. Introduction

Act 1984 of the Islamic Family Law (Federal Territories) provides that the maintenance of one's wife and child are to be assessed according to the capabilities and needs of the parties.² There is no explanation or details of any manual or guidelines adopted by the judge to measure the capabilities and needs of the parties.³

Due to the generality of the provisions and lack of detailed guidelines, the judges have used their discretion in interpreting the provisions in accordance with their understanding of the assessment methods to determine maintenance. In the case of *Faridah Daud vs. Mohd Firdaus Abdullah @ Jettle Francis*,⁴ the plaintiff demanded custody of the children and child maintenance of RM150 per person. In the written judgment of the judge, only the rights of custody were debated in depth and detail, while no judgment was made on the required rates of child maintenance. The judge then decided to set the child maintenance at only RM 100 per person without stating the reason for his decision.

At the international level, assessing child maintenance which is termed 'Child Support' is more advanced. This is reflected in the policy and legal practice 34 countries of the Organization of Economic Cooperation and Development (OECD)⁵ countries such as the United States of America, Australia, the United Kingdom, Norway and Canada.⁶ For example, in Wisconsin, the United States⁷ emphasised child support in the form of a percentage, namely Percentage Express Order (PEO). PEO is a percentage deducted before any tax or deduction from gross income of a parent who does not live with the child and is also based on the number of children. The rate is set at 17%, 25%, 29%, 31% and 34% for one, two, three, four and five children respectively. It is an advancement from the previous approach practised before 1987 which was based on a fixed amount (fixed order) decided by the courts.⁸

Besides of the advancement of Child Support's assessment systems, there are also studies that discuss the negative impact of having set rated for child support. For example, Waller and

² See the Family Law Act Islam Wilayah Persekutuan 1984: Section 61: Assessment of Maintenance, http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen/Federal_Original.nsf/b3ac9c218c8efdc44825683.10022d8b3/d441586f0bd6767348256cef00297264?OpenDocument, assessed 28 August 2017.

³ This was confirmed by the study of the project earlier in an interview with the judge in August-December 2012.

⁴ Journal of Syariah; XV; BHG (I), (Putrajaya: Malaysian Islamic Development Department-JAKIM, 2002), pp.25-46.

⁵ The Organization for Economic Co-Operation and Development (OECD) <http://www.oecd.org/els/family/oecdfamilydatabasethefamilysupportcalculator.htm> assessed 28 August 2017.

⁶ Ibid.

⁷ Daniel R Meyer, Judi Bartfeld, Irwin Garfinkel, Patricia Brown, "Child Support Reform: Lessons from Wisconsin", *Family Relations*, vol. 45, no.1 (1996), p.11.

⁸ Judi Bartfeld and Irwin Garfinkel, "The Impact of Percentage-Expressed Orders on Child Support Payments", *The Journal of Human Resources*, vol.31, no. 4 (1996), p.794.

Plotnick⁹ found that most parents make their own financing agreements between their ex-wife or ex-husband rather choosing to pay with the Child Support Agency. This is because the Child Support Agency has the right to the money paid to the children. The Child Support Agency has been found to exercise the excessive use of its powers, and high rates are imposed on the financier without due consideration of their circumstances. Failure to pay the set amount is considered a criminal act by the Child Support Agency and carries the threat of imprisonment.

Child support is a different system compared to the maintenance law of a child in Islam. This is because, child support is means to ensure that all children gain support from their mother and father regardless their mother and father's marital status. As stated in Illinois, United States of America, Parentage Act that the Act governed the rights and duties of parents who had never married each other. It declared that "Illinois recognizes the right of every child to the physical, mental, emotional and monetary support of his or her parents" and that "[t]he parent and child relationship, including support obligations, extends equally to every child and to every parent, regardless of the marital status of the parents." (750 ILCS 45/1.1 (West 2014)),¹⁰

Thus, the child support system which is introduced is more complicated in term of policy and enforcement as the policy cover wide range of responsibilities, guidelines and interpretations. Whereas, the maintenance in Islam, only ordered the legal father and not the mother to support his or her children regardless the working or non-working, poor or rich of the mother. The research on the issue at the international level comprise discussions and debates conducive to the effective implementation of the child support particularly in terms of policy.¹¹ It is also a topic of ongoing assessment. This is because child support is related to human welfare that is constantly changing.

Prior to that, the formula to get an adequate amount of maintaining a child is more critical to be discussed not only in the western world (who frequently used the child support system) but also in the Muslim world. This is because the strong formula not only will settle

⁹ Maureen R Waller and Robert Plotnick, "Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research", *Journal of Policy Analysis and Management*; vol. 20, no. 1 (2001), p.89.

¹⁰ 2016 IL App (2d) 150291 No. 2-15-0291 Opinion filed March 21, 2016, "In The Appellate Court of Illinois Second District", <http://cases.justia.com/illinois/court-of-appeals-second-appellate-district/2016-2-15-0291.pdf?ts=1459372033>, accessed 28 August 2017.

¹¹ See Smyth, B., Rodgers, B., Son, V. and Vnuk, M., "The Australian Child Support Reforms: A Critical Evaluation". *Australian Journal of Social Issues*, no. 50 (2015), pp. 217–232. [doi:10.1002/j.1839-4655.2015.tb00347.x]

the issues of fairness¹² between parties but on the top of that will secure the health¹³ and child living.

In Malaysia, the policy similar to the child support programs of the above countries is carried out by the Family Support Division (BSK), a unit under the Syariah Judiciary Department Malaysia (JKSM).¹⁴ The unit was officially established on October 22, 2008, to provide a platform for single mothers who were abandoned or divorced for interim maintenance for themselves and their children when the financier of maintenance neglects the maintenance order issued by the court. This assistance is provided in the form of debt, and the financiers of maintenance (husband) should explain the reasons for their neglect to the BSK. However, the BSK does not practise a particular method for determination the maintenance required for a decent standard of living for the wife and children.¹⁵ The amount of maintenance to be provided is determined by the decision of the trial judge and is decided in court.¹⁶ Hence, no special methods are used by BSK in determining the maintenance rate of a wife or child living in Malaysia compared to OECD countries that enforce policies and special assessment formula in their child support system.¹⁷

B. Determination *Kifāyah* and *Ma' rūf* in the Maintenance of Children based on Islamic Law

Determining the basic criteria of *kifāyah* and *ma' rūf* in the maintenance of children is based on the hadith of Hind bint Utbah and evidence from other Islamic texts. In the hadith of Hind, she complained to the Prophet Muhammad that her husband Abu Sufyan was being stingy by not spending enough on her and her children. The Prophet Muhammad (PBUH) gave Hind permission for herself and her son to take (in *ma' rūf*) from her husband's property enough

¹² See Smyth, B., *The Australian Child Support*.

¹³ Baughman found that the higher payment of child support associated with greater chance of having private health insurance coverage and significantly lower risk of poor or declining health status. Baughman, R.A., "The Impact of Child Support on Child Health", *Rev Econ Household* no.15 (2017), p. 69.

[<https://doi.org/10.1007/s11150-014-9268-3>]

¹⁴ Family Support Division (BSK), Department of Syariah Judiciary Malaysia, <http://www.jksm.gov.my/index.php/en/public/family-support-division-bsk>, accessed 28 August, 2017.

¹⁵ Dr. Mohd. Haji Naim Mokhtar, Director of the Family Support Division in the Department of Syariah Judiciary Malaysia (JKSM), in an interview with the researcher by telephone on 21 October 2012. He is now the Y.A.A Dato' Dr. Mohd. Haji Naim Mokhtar, the Chief Judge of JKSM Selangor.

¹⁶ Ibid.

¹⁷ This has been confirmed by the former director of BSK, Y.A.A Dato' Dr. Mohd. Haji Naim Mokhtar, Chief Judge, JKSM Selangor present, in the interview with the researcher by telephone on October 21, 2012 and Ms. Fauziah binti Abdullah, Assistant Shariah, Pt. Family Support, in an interview with the researcher by telephone on June 23, 2015.

(*kifāyah*) to meet their standard of living. This is based on a hadith recorded in Sahih al-Bukhari and Muslim that Prophet Muhammad (PBUH) said “*Khuzhī ma yakfīki wa waladaki bi’l ma’rūf*”.¹⁸

The above hadith provides evidence that the term *kifāyah* refers to securing an adequate standard of living and that this should be done propriety (*ma’rūf*). These are the two conditions stated in the Islamic text for legitimate maintenance. The same conditions can be found in the Quran in Surat al-Baqarah (2), verse 233 and Surat al-Talaq (65), verse 7 in addition to the farewell sermon of the Prophet (PBUH):

Jabir reported that the Prophet has said on his last pilgrimage which contained a lengthy message about women part of which stated, “If they (your wives) abide by your right then to them belongs the right to be fed and clothed in propriety (*ma’rūf*).”¹⁹

Through the content analysis on the criteria of *ma’rūf* concerning the child maintenance, there are four elements that need to be observed when determining the maintenance rate. The first is the socioeconomic standing of the father or financier. Second is the ability of the father to maintain his children. Third, to determine the rates compatibility with social customs and standards of living. The fourth is the maintenance of a child is based on the specific needs of the child and is relative to age and needs

The basic criteria of *kifāyah* or adequate in child maintenance are also based on the hadith of Hind which states that father or financier must at least meet the minimum requirements of the needs of the children. This forms part of the basic meaning of child maintenance. Al-Juwaini describes the basic meaning of *kifāyah* as providing maintenance that strengthens the child physically and preserves him from current or future harm.²⁰ This indicates that *kifāyah* refers to both food and non-food items, such as lodgings, clothing, medical, education and skills because all these are necessary for the healthy upbringing of a child and to protect them from harm.

¹⁸ Narrated by al-Bukhārī, Kitab al-Nafaqāt, Bab Khidmah al-Rajul fī Ahlihī, no.: 5049, and Muslim, Kitab al-‘Aqđiyah, Bab Qadiyyah Hindun, no.: 1714, See Muḥammad bin Ismā‘īl, Abū ‘Abd Allāh al-Bukhārī, “Ṣaḥīḥ al-Bukhārī,” in *al-Jāmi‘ al-Ṣaḥīḥ al-Mukhtaṣar*, ed. by Muṣṭafā Dīb al-Bughā, 3rd edition, vol.5, (Beirut: Dār Ibn Kathīr, 1987), p.2052, and Muslim bin Ḥajjāj Abū al-Ḥussain al-Qusyairī al-Naisābūrī, “Ṣaḥīḥ Muslim,” ed. by Muḥammad Fu‘ad ‘Abd al-Bāqī, vol.3, (Beirut: Dār Iḥyā‘ al-Turāth al-‘Arabī, n.d.), p.1338.

¹⁹ Narrated by Muslim, Kitab al-Ḥājj, Bab Ḥujjah al-Nabī SAW, no.1218. See Muslim, vol. 2, p.890.

²⁰ ‘Abd Mālīk bin ‘Abd Allāh bin Yūsuf Al-Juwainī, *Nihāyah al-Maṭlab fī Dirāyah al-Madhhab*, ed. by ‘Abd al-‘Azīm Maḥmud al-Dīb. 1st edition, vol.15, (Jeddah: Dār al-Minhāj, 2008), p. 515.

Abu Hanifah viewed the minimum adequate maintenance of a wife is determined in reference to the spending practices of the poorer strata of society.²¹ Similarly, a child's maintenance can be determined by reference to the requirements sufficient to meet the basic needs of children in a poor community. A father is obliged to provide maintenance that meets the minimum level of adequacy which is determined by reference to the basic requirements to sustain life as seen in reference to the needs of a poor community. Thus, a father is not supposed to give the maintenance rate less the minimum requirement of adequacy, as it would harm the basic sustain living needs of a human.

Fixing minimum levels of maintenance in child support should not prevent a child from receiving more support should the father afford it. This is based on the principle of feeding and clothing the family in accordance with social standards of food and dress mostly the social economics of the father.²² However, if the father is so poor such that he fails to provide the basic requirements needed by their children, that the child is giving enough to live based on the bare minimum requirements must be met even with the help of a third party. Compliance with minimum wage rates guarantees the basic needs of the child to grow up and live righteously. Compliance is also in line with the demands of the *Maqāsid al-Sharī'ah* in

²¹ See Nazzām al-Dīn, *al-Fatāwā al-Hindiyyah fī Madhhab Imām Abī Ḥanīfah* vol., (n.p.: Dār al-Fikr, 1991), p.570. Muḥammad bin Maḥmūd Kamāl al-Dīn al-Bābartī, *Al-'Ināyah Syarḥ al-Hidāyah: Wahuwa Syarḥ 'alā al-Hidāyah Syarḥ Bidāyah al-Mubtadī fī fur' al-Fiqh al-Hanafī li 'Alī bin Abī Bakr al-Marghiyānī al-Ḥanafī*, vol.6, (Beirut: Dār al-Kutub al-'Ilmiyyah, 2007), pp.209-210, and 'Alā' al-Dīn al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Syarā'i'*, vol. 4, (Beirut: Dār al-Kutub al-'Arabī, 1982), p.25.

²² This is based on the opinion of majority Syafie and Hanafi scholars, as well as some other scholars. See opinion from Shafie scholars: Muḥyī al-Dīn Abī Zakariyyā Yaḥyā bin Syarf al-Nawawī, *al-Majmū' Syarḥ al-Muhaddhab* vol. 18, (Madīnah al-Munawwarah: al-Maktabah al-Salafīyyah, n.d), p.249, Abī al-Ḥassan 'Alī bin Muḥammad bin Ḥussain al-Māwardī, *al-Hāwī al-Kabīr*, ed.by 'Alī Muḥammad Mu'awwad dan 'Ādil Aḥmad 'Abd Maujūd, vol.11, (Beirut: Dār al-Kutub al-'Ilmiyyah,1999), p. 423, Shams al-Dīn Muḥammad bin Abī al-'Abbās al-Ramlī, *Nihāyah al-Muhtāj ilā Syarḥ al-Minhāj*, vol.7, (n.p: Maktabah Muṣṭafā al-Bābī al-Ḥalabī, 1967), p.188, Abī Muḥammad Ḥussain bin Mas'ūd bin Muḥammad al-Farā' al-Baghwī, *al-Tahdhīb fī Fiqh Imām al-Syāfi'i*, ed. by 'Ādil Aḥmad vol. 6, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), pp.324-332, Muḥammad bin Aḥmad bin 'Umar al-Syāṭirī, *Syarḥ al-Yāqūt al-Nafīs fī Madhhab Ibn Idrīs*, 2nd edition, (Saudi: Dār al-Minhāj, 2007), pp. 668-667, see opinion of Hanafi scholars: Muḥammad Amīn al-Syahīr Ibn 'Ābidīn, *Ḥāsīyah Rad al-Mukhtār*, 2nd edition, vol.1, (Cairo: Maktabah Muṣṭafā al-Bābī al-Jalī, 1966), p.575, Kamāl al-Dīn Muḥammad bin 'Abd Wāḥid, Ibn al-Hummām, *Syarḥ Faṭḥ al-Qadīr 'Ala al-Hidāyah: Syarḥ Bidāyah al-Mubtadī*, vol.4, (Cairo: Maktabah Muṣṭafā al-Bābī al-Jalī, n.d.), p.380, dan Nazzām, *al-Fatāwā al-Hindiyyah fī Madhhab Imām Abī Ḥanīfah*, vol. 1, (n.p: Dār al-Fikr, 1991), pp., 570-571, and see opinion of others: Muḥammad bin 'Alī bin Muḥammad al-Shaukānī, *Nail al-Auṭār Sharḥ Muntaqā al-Akhhbār min Aḥādīth al-Sayyid al-Akhyār*, vol. 5, (Cairo: Maktabah Dār al-Turāth, n.d), pp.322-323, Muḥammad bin Ismā'il al-Ṣan'ānī, *Subul al-Salām*, ed. by Muḥammad 'Abd 'Azīz al-Khaulī, 4th edition, vol.5, (Beirut: Dār Iḥyā' al-Turath al-'Arabī), pp.317-318 and Al-Sayyid Sābiq, *Fiqh al-Sunnah*, vol.2, (Cairo: al-Faṭḥ li 'ilam al-'Arabī, n.d), p.116.

preserving the soul, mind, religion, wealth and progeny and ensuring the harmony and prosperity of the Muslim family institution.

C. The Responsibility of Heirs as the Third Party to Maintain Children According to Syariah and Islamic Law of Malaysia

Syariah legal provisions of Malaysia clearly state that father is responsible for financing the maintenance of children. For example, section 73 of the Islamic Family Law (State of Selangor) Enactment 2003 states that:²³

- 1) Except where an agreement or a court order provides otherwise, it shall be the duty of a man to maintain his child, whether the child is in custody or in the custody of another person, either by providing them with shelter, clothing, food, medical and education as are reasonable having regard to the capacity and standard of living or to pay the cost.
- 2) Except as mentioned above, it is the duty of a person liable under Islamic law, to maintain or to contribute to the maintenance of the child if the child's father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.

It is clear that the responsibility of father to provide maintenance for the children such as shelter, food, clothing, medicine, education and the like are based on the ability of the father. However, in the event of the death or incapacity of the father to perform his responsibility to provide a living, the responsibility will be transferred to heirs of the father. Section 61 of the Islamic Family Law (State of Selangor) Enactment 2003 states:

The court may order any person liable thereto according to pay maintenance to another person if he is incapacitated, wholly or partly, of a livelihood by reason of mental or physical disability or ill-health and the court is satisfied that having regard to ability the first is that it is reasonable so to order.

Similar provisions made by other states could also be regarded as a provision of a general nature.²⁴ Here the Syariah Court establishes its jurisdiction to order any person liable under

²³ Examples of other states mentioned in Clause 73 of the Islamic Family Law (State of Johor) Enactment 2003, Section 73 of the Islamic Family Enactment (Perak) Enactment 2004 and Section 73 of the Islamic Family Law (State of Penang) Enactment 2004.

²⁴ Section 60, Islamic Family Law (Federal Territories) Act 1984 and section 61, Islamic Family Law Enactment of Pahang 2005

Islamic law to pay maintenance if the claim is made.²⁵ What is meant by a “liable person” is their grandfather (father’s father) and those who come after him in rank.²⁶ Thus, a mother as guardian *ad-litem* (on behalf of the child) is allowed to claim child maintenance from the heirs of the husband. This is because that provision does not mention clearly about the death of the father to allow claims to the heirs of the father, but it is understood that there is a right to seek maintenance from the heirs of the father on reasonable ground.

The Syariah Court Practice Direction entitled “Composition liable to Inheritance” states:²⁷

... in relation to those who are liable according to which may be ordered to pay the maintenance of certain persons in accordance with the provisions of the Islamic Family Law states that they are male heirs in the order of ‘*aṣābah* in faraid.

2. If there are no male heirs or [the father is] incapacitated, the Court can recommend to the Treasury to pay maintenance.

The provision that clarifies the meaning of “liable person” as the ‘heir’ as provided by the Shariah is stated in section 61 of the Islamic Family Law (State of Selangor) 2003. This means that the heirs of the family have a blood relationship with the deceased and not punctuated by the woman’s father, father to father, son or grandson, brothers of the same parents and brothers of the same father.²⁸

The above provisions are in line with Islamic law that imposes an obligation to provide maintenance to beneficiaries in the absence of father or father who cannot afford to maintain their children. According to the Hanafi school, all surviving members of a family upon the death or incapacity of the responsible (for maintenance) father should remove the maintenance in proportion to their share of inheritance.²⁹ Whereas the Shafie school believes that upon the death of the father, child maintenance shall be borne by inheriting males like his paternal or

²⁵ Nor Fadilah Zakaria, “Pelaksanaan Perintah Nafkah di Mahkamah Syariah Kuantan dari tahun 1995-2000” (Implementation of Maintenance Orders in the Kuantan Syariah Court Of 1995-2000), Master Thesis, (Kuala Lumpur: University of Malaya, 2004), p.56.

²⁶ Zaleha Kamarudin and Raihanah Abdullah, *Kamus Istilah Undang-undang Keluarga Islam* (Dictionary of Islamic Family Law), (Kuala Lumpur: Zebra Editions Sdn. Bhd., 2009), p. 110.

²⁷ Practice Direction No. 14 of 2007, “*Susunan Waris yang Bertanggungjawab Membayar Nafkah* (The Heirs who obliged to pay maintenance)”, E-syariah Official Portal, <http://www.esyariah.gov.my/portal/page/portal/Portal%20E-Syariah%20BM/Portal%20E-Syariah%20Arahan%20Amalan/Portal%20E-Syariah%20Arahan%20Amalan%202007>, accessed 25 September 2017.

²⁸ Zaleha Kamarudin and Raihanah Abdullah, *Kamus...*, pp.9-10 and Mohd Zamro Young and Mohd. Ridzuan Awang, “Undang-undang Pusaka Islam Perlaksanaan di Malaysia” (*Islamic Inheritance Law Implementation in Malaysia*), (Selangor: SMEs, 2006), p.25.

²⁹ *Al-Mausu’ah al-Fiqhiyyah al-Kuwaitiyyah*, vol. 41, (Kuwait: Ministry of Awqaf and Religious Affairs of Kuwait), 80.

maternal grandfathers. Similarly, if only women remain, then those closest to the child shall be responsible for his or her maintenance.³⁰ For the Hanbali school, the beneficiaries have to bear the maintenance of the child for an indefinite period, and the rate of child maintenance is commensurate with the rate of their inheritance.³¹

However, if the child has no heirs, the Treasury bears the role of maintenance.³² The government can play a role and guarantee a child's living.³³ This will secure their welfare and their escape from hardship. It is in line with the *Maqāsid al-Sharī'ah* and objective for implementing minimum rates in child maintenance. Thus, the implementation of this (the minimum rate for child maintenance) aims to ensure the most basic maintenance of children can be met and becomes the responsibility of heirs identified by the Shariah.

D. Specifications for the Court Maintenance of Children and Current Practices in Malaysia

1. Assessment of Child Maintenance in the Syariah Court

In-depth interviews with nine judges³⁴ in the high and low Syariah Courts of Selangor and Kuala Lumpur found that the judges understand that the assessment should be based on the *kifāyah* and *ma'rūf* as the basic criteria discussed by jurists. However, from the standpoint of practicality, it appears that the basic elements, namely a basic guarantee of adequacy, is not evident in the judgment of the judges.

In some cases, the judgment of the court procedures takes precedence over maintaining the basic needs of those who demand a living. For example, in making proof of the levels required by the plaintiff (wife or child), the plaintiff must submit evidence of daily and monthly expenses that shows the level of their financial needs such as shopping receipts, bills and so on. In some cases, the plaintiffs failed to provide such evidence to the court. Therefore, the

³⁰ Aḥmad Ibn Muḥammad Ibn Ḥajr, *Tuḥfatul-Muḥtāj bi Sharḥi al-Minhāj*, (n.p, Dar al-Iḥyā' al-Turāth al-'Arabī, n.d), p.352.

³¹ *Al-Mausu'ah al-Fiqhiyyah al-Kuwaitiyyah*, p.81.

³² Bayt al-Mal (Treasury) literally means a place to keep certain property or public. The term also means a place that serves to keep the properties of Muslims from moving. See Shams ad-Dīn Muḥammad ibn Aḥmad ibn 'Arafat, *Hāsiyyah ad-Dusuqī*, (n.p: Dar al-Iḥyā' al-Turāth al-'Arabiyyah, n.d.), p.242.

³³ Muḥammad Amīn, *Radd al-Mukhtār 'ala ad-Dār al-Mukhtār Syarḥ Tanwīr al-Absyār*, (Riyadh: Dar 'Ālim al-Kutub, 2003), pp.281-283, Nor Fadilah Zakaria, "Implementation of Maintenance Orders...", p.40.

³⁴ In this field study, data saturation is achieved when researchers interviewed respondents judge to seven. However, researchers have increased the number of respondents to the 8th and 9th to test if there are themes or new ideas raised. When data interview respondents 9th still shows the same result, this means there is no need for researchers to interview respondents judge the next one. Thus, the nine judges who were interviewed have reached the saturation level of the desired data in the study. It also means that the validity and reliability is achieved within the framework of qualitative research.

judge had to postpone or has provided an amount payable by the defendant, which falls short of meeting the criteria of *kifāyah* (adequacy) due to lack of evidence. This shows that the basic criteria have been overlooked in deciding the maintenance to be paid, although we do recognise the failure of the plaintiffs to provide evidence to the court regarding their monthly expenditures.

For some cases, even if the judge takes into account the basic needs of the wife and child, it is still subject to the husband's ability which must be taken into account by the judge. If a man declares himself poor or unable to produce evidence, the judge will reduce the maintenance requested by the plaintiff. It may be that the rate demanded by the plaintiff is sufficient only to survive. Efforts to ensure that the basic needs are satisfied to become less effective when judges reduce the maintenance if the defendant argues for his inability.

Determining the minimum rate of maintenance and ensuring it does not fall below this rate has yet to be achieved. The maintenance of one's wife and children and the items that make up the assessment of maintenance are still not coordinated among the judges. Malaysia has yet to determine the level of uniformity that which comprises basic living and that which is extra.

For evaluating the criteria of *ma'rūf*, there has been no systematic evaluation of the community practice to collect the data and prices of goods. Only the judges of the Syaria high court can assist in determining the standards of community practice. The results are applicable to the judge concerned. For other judges, they make their own study by comparing the data obtained from mass media such as newspapers, internet and television and their own life experiences.

Thus, the process needs to be more efficient through regular visits to communities to collect data and prices of goods. The process also needs to be streamlined and understandable by the judges to integrate into their judgments. Therefore, the study found that determining the criteria of *ma'rūf* in practice is also less than satisfactory.

2. Current Practice of Determining Child Maintenance Rates in Malaysia

For the practice of social spending, in-depth interviews with 26 wives who have children of various age and education was performed to form an idea on the practices and daily expenses of their children including the need for food, clothing, medicine, schooling and the

cost of transport to school, college and so on. Interviews were conducted from May to December 2013, while a pilot study was conducted in April 2013.³⁵

The study found that the needs or basic items needed by the child respondents are between the need to eat and drink, clothing, shelter, medicine, tools and cleaning materials as well as education.³⁶ These items are the basic requirements needed for children respondents and are maintenance items recognised by law.

To assess the cost of the above living expenses, this study has categorised respondents into three socioeconomic classes A (B40), B(M40) and C(T20), according to household income based on the methodology of the Department of Statistics Malaysia (JPM)³⁷ which divides household income to the lowest 40% (B40), 40% medium (M40), and the highest 20% (T20). The respondents were then identified and labelled in accordance with the three classes of RA (respondent low-income households), RB (medium household income of respondents) and RC (respondents were high-income households).

In this study, the proportion of monthly household income of respondents is as follows: RA is a category of respondents with a household income of RM3400 and below; RB is the category of respondents with a household income of RM3401-RM10,000; and RC is the respondents with a household income of RM10,001 and above that is compatible and certified with the range of household income that has been issued by the JPM. After calculations, the study found that the cost of expenditure items for basic requirements for maintenance of children of respondents by age and grade is shown in Table 1 below:

³⁵ Respondents identified and interviewed eligible for this study based on purposive sampling. For this sample, the characteristics of the respondents such as mothers who had at least one child is determined before the respondents were selected. Results showed that the respondents focused on the mother alone is to obtain data for the needs of a wife and expenses primarily for basic maintenance items such as food, clothing, shelter, medical and other related issues. Mothers were selected with at least one child to get the data for the mother and child maintenance. This includes the needs and expenses of children in terms of food, clothing, medicine, education and matters related thereto. The study also uses semi-structured interview questions. Researchers interviewed respondents for two to three hours per respondent depending on the data and information shared by the respondents as well as the number of children they have. For example, for respondents who have five children, the time allotted for the interview is more than respondents who only had one child. This is because the expenditure information to be obtained from the mothers and the children. A Likert scale of 1 to 5 was used to test the significance of the items, and all of the items listed are a percentage of 100%.

³⁷ Please refer to the Household Expenditure Survey Report / Report on Household Expenditure Survey; 2009-2012, (Putrajaya, Department of Statistics Malaysia, 2012), p. 4. The methodology and the results of this study confirmed the data coincides with the methodology applied by the Department of Statistics Malaysia through a series of email communications and telephone conversations during the field study (May to December 2013) with the Assistant Director, Mr. Azizul Abllah, Price, Income and Expenditure, Statistics Division, Department of Statistics Malaysia.

Table 1. Table The *Kifāyah* Rate of Child Maintenance by Age for all Classes of Respondents:

Item/Child Respondent	Child aged below 4			Child aged 4-6			Child aged 7-12			Child aged 13-17			Child aged 18 and above		
	RA	RB	RC	RA	RB	RC	RA	RB	RC	RA	RB	RC	RA	RB	RC
	Amounts in Ringgit Malaysia (RM)														
Food & Drink /Milk	150	150	150	109	150	218	217	300	436	217	300	436	X	X	X
Clothing	28	28	28	28	49	87	28	49	87	28	49	87	X	X	X
Hygiene	70	70	70	14	17	32	14	17	32	14	17	32	X	X	X
Education (School Fees and Stationary)	X	X	X	129	129	129	19	75	75	44	112	112	X	X	X
School Transport	X	X	X	60	60	60	60	60	60	60	60	60	X	X	X
School pocket money	X	X	X	X	X	X	91	91	91	97	97	97	600	600	600
Childcare fee	250	250	250	X	X	X	X	X	X	X	X	X	X	X	X
Total	498	498	498	340	405	526	429	592	781	460	635	824	600	600	600

Source: Adapted from interviews, from May to December 2013.

The table above shows the child's needs for maintenance varies according to the age and socioeconomic category namely that spending is the highest for children from the T20 group or (RC) followed by M40 or RB and the lowest was B40 or RA.

It shows that the rate for adequate maintenance should align with the child’s needs and the abilities of his father. If the father is unable to provide sufficient maintenance, then he must provide for the basic needs of the child according to the category of RA. This is because it is the most basic or minimal level of maintenance and is sufficient according to the view of Abu Hanifah.

3. Fixing the Minimum Maintenance

The minimum rate of child maintenance proposed in this study was derived from the usual expenses of the poor or low-income groups in line with the view of Abu Hanifah and the Hanafi’ scholars for setting the minimum standard of *kifāyah* through an analogy with meeting the basic level for maintaining one’s wife in reference to the standards of a poor community.

To determine the spending habits of the poor faction of society in Malaysia, we refer to the spending on children respondents from class A (RA) as the minimum wage rate for child maintenance as can be seen in Table 2:

Table 2. Proposed Minimum Rate of Child Maintenance:

Child Maintenance Item	Category of Child and Maintenance Amounts (RM/Month)				
	Child aged below 4	Child aged 4-6	Child aged 7-12	Child aged 13-17	Child aged 18 and above
Food & Drink /Milk	150	109	217	217	X
Clothing	28	28	28	28	X
Hygiene	70	14	14	14	X
Education (School Fees and Stationary)	X	129	19	44	X
School Transport	X	60	60	60	X
School pocket money	X	X	91	97	600
Childcare fee	250	X	X	X	X

Total	*248	340	429	460	600
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* This amount does not include the cost of childcare fee which if the mother need for it because she is working outside to maintain her life and her other children, then the father need to pay the childcare fee to the mother.

Source: Adapted from the interviews, from May to December 2013.

The table above shows the living habits of children based on the respondent group A or the RA or B40. It is the lowest basic wage for the poor in Kuala Lumpur and Selangor for the present time.

With data like this, the judges should find it easier to determine the rates for a basic living based on the assessment of current economic realities and practices of the community. The judge can also find items that make up the most basic child maintenance that should be considered such as food, clothing, cleaning, education, transportation to school and so on that have been listed. With the data from the current socioeconomic study, judges should be able to form a clearer view of the basic criteria of *kifāyah* and *ma'rūf* and help ensure they are met when determining the maintenance rate.

E. Conclusion

In terms of assessment methods, the child support system adopted by OECD countries³⁸ experienced a shift from traditional methods or fixed rates set by the court to assessment methods based on parental income as percentage cuts.³⁹ After implementation, the system appears to overlook the financier's financial standing and the real needs of a child. This led to the methods of assessment based on the real needs of a child.⁴⁰

³⁸ Child Support Handbook (OCS), Administration for Children and Families, Department of Health and Human Services, 6, <http://www.acf.hhs.gov/programs/css/resource/handbook-on-child-support-enforcement> and The Organization For Economic Co-Operation And Development (OECD) <http://www.oecd.org/els/family/oecdfamilydatabasethefamilysupportcalculator.htm>, accessed 28 August 2017.

³⁹ For example, in Wisconsin, United States, when implementing the Child Support Assurance System (CSAS) in 1987, see Daniel R Meyer et al., "Child Support Reform: Lessons from Wisconsin", p.11. The deduction system is based on a percentage of parent's income also conducted in Norway in the 1990s see Anne Skevik, "*Fairness in Child Support Assessments: the view of non-resident fathers in Norway*", *International Journal of Law, Policy and the Family*, vol. 20 (2006), pp. 181-200, [doi: 10.1093 / lawfam / ebn012].

⁴⁰ For example, in Norway, see Anne Skevik, *Fairness in Child Support Assessments...*, in Australia and the United Kingdom, see Belinda Fehlberg and Mavis Maclean, "Child Support Policy in Australia and the United Kingdom: Changing priorities tough but a similar deal for children?", *International Journal of Law, Policy and the Family*, vol. 23 (2009), pp.1 -24, [doi: 10.1093 / lawfam / ebn015], and the Child Support Handbook (OCS), Administration for Children and Families, Department of Health and Human Services, 6, <http://www.acf.hhs.gov/programs/css/resources/handbook-on-child-support-enforcement>, accessed 28 August 2017.

The method set forth in the study, although similar, differs in its assessment of adequacy in accordance with the Shariah. The method is based on the views expressed by Imam Abu Hanifah to meet the minimum requirement of sufficiency (*kifāyah* criteria), reference should be made to the maintenance needs of the poor community. The poor were highlighted by the study as not those who go hungry or cannot clothe themselves but in reference to low-income groups.

The determination of the minimum wage to maintain the child meet the requirements of the *Maqāsīd al-Sharī'ah* in preserving the soul, mind, religion, wealth and progeny. Further, the socioeconomic demands of society also need to be regularly assessed. Such a systematic determination of maintenance and living standards will assist the judges in interpreting maintenance that is appropriate to current customs and ensure the well-being of the parties.

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