RECENT PROPOSED CHANGES IN THE FAMILY LAW IN MALAYSIA

Malaysia has a variety of family laws.[1] The Muslims marry according to Islamic law and the various State enactments which deal with the administration of Muslim law provide that they are applicable only to persons professing the Muslim religion. The Chinese and Hindus marry according to their own law or custom as determined by the Courts. The natives of Sabah and Sarawak may marry according to their customs and so also may the aborigines of Peninsular Malaysia. In Peninsular Malaysia anyone, except a person professing the religion of Islam, may have his or her marriage solemnised under the Civil Marriage Ordinance, 1952, which provides for civil monogamous marriages before Registrars of marriages.[2] A marriage between Christians or between persons one of whom is a Christian may be solemnised under the Christian Marriage Ordinance, 1956.[3] In Sarawak marriages other than marriages contracted according to the laws and usages of Muslims, Hindus, Dayaks or other persons governed by their own laws and customs of marriage, may be solemnised under the Church and Civil Marriage Ordinance.[4] Muslim marriages are solemnised according to the Islamic law, native customary marriages according to native customary law, Hindu marriages according to Hindu law and customs and Chinese marriages according to Chinese custom and the provisions of the Chinese Marriage Ordinance. In Sabah marriages between persons one or both of whom is or are a Christian or Christians are required to be solemnised in accordance with the Christian Marriage Ordinance.[5] There is a Marriage Ordinance[6] which lays down provisions generally applicable relating to the age of marriage, consents and registration and subject to this Ordinance Muslim marriages may be solemnised under the Islamic law, native customary marriages under the native customary law, and Chinese and Hindu marriages under their respective customary laws. Divorces under the religious or customary laws are

[1] See Ahmad Ibrahim, Family Law in Malaysia and Singapore, Singapore, 1978.

[2] Civil Marriage Ordinance, 1952 (No. 44 of 1952; Reprinted No. 1/1970), S. 3.

[3] Christian Marriage Ordinance, 1956, (No. 33 of 1956; Reprinted 1973), S. 3.

[4] Church and Civil Marriage Ordinance, Sarawak, (Cap. 92), S. 1(2).

[5] Christian Marriage Ordinance, Sabah (Cap. 24), Ss. 2 and 4.

[6] Marriage Ordinance, Sabah, 1959 (No. 14 of 1959).

recognised. In Peninsular Malaysia the Divorce Ordinance,[7] 1952 is only applicable to monogamous marriages and so is the Divorce Ordinance of Sabah.[8] The Matrimonial Causes Ordinance of Sarawak[9] does not apply to marriages by Muslim law or custom, native law or custom, Chinese law or custom, Hindu law or custom or other law or custom repugnant to the English law in regard to monogamous marriages.

NON-MUSLIM MARRIAGES

In the case of *Re Ding Do Ca*[10] Thomson L.P. said:

> "The whole question of personal law in this country particularly as regards marriage, divorce and succession calls for the attention of the legislature. As regards persons professing Islam the position is tolerably clear. But as regards persons of Chinese race the law the courts are administering is probably different from any law that exists or has ever existed in China. The same sort of position may well arise in relation to persons professing the Hindu religion by reason of the enactment in India of the Hindu Marriage Act, 1955. The questions involved are questions which go to the very root of the law relating to the family, which after all is the basis of society at least in its present form, and the existence of a civilised society demands that these questions be settled beyond doubt by legislation which will clearly express the mores of the classes of persons concerned and put the rights of individuals beyond the chances of litigation".

It was not however till the 4th February 1970 that the Yang diPertuan Agong (the Head of State) appointed a Royal Commission on non-Muslim marriage and divorce laws with the then Chief Justice, Mr. Justice H.T. Ong, as Chairman and with the following terms of reference –

(1) to study and examine existing laws relating to marriage and divorce (other than Muslim marriages) and to determine the feasibility of a reform, if any is considered necessary, in particular, in the light of the resolution of the United Nations Convention on consent to marriage, minimum age for marriage and registration of marriages;

(2) to receive and consider representations that might be submitted from any racial or religious group affected or likely to be affected by the changes or reform of the existing marriage and divorce laws; and

[7] Divorce Ordinance, 1952, (No. 74 of 1952; Reprinted 1973), S. 4.

[8] Divorce Ordinance, Sabah, 1963 (No. 7 of 1963), S. 4.

[9] Matrimonial Causes Ordinance, Sarawak (Cap. 94), S. 1(2).

[10] [1966] 2 MLJ 220 at p. 223.

to prepare and submit a report to the Government and recommend changes or reform, if any, to be made to such laws.

The Royal Commission submitted its report on the 15th November 1971 and in its report appended a draft Bill to effect the reform in the law recommended by it. In the Explanatory Statement attached to the Draft Bill it was stated –

"This Bill seeks to lay down a uniform law on marriage and divorce, and matters incidental thereto, applicable generally to all non-Muslim residents in Malaysia, as well as to all persons who are citizens of or domiciled in Malaysia residing abroad. Such law is necessary and expedient to replace the heterogeneous personal laws applicable heretofore to persons of different ethnic origins comprising the majority of the non-Muslims population of Malaysia with a diversity of customs and usages observed by them. The primary virtue of the proposed reforms is certainty – replacing doubts regarding the true legal status of women cohabiting with men under circumstances which may or may not be legal wedlock until the question is determined by the courts and clarifying the legal status of their issue."

The Bill (with some modifications) was introduced for the first time in the lower house of Parliament, the Dewan Rakyat, on the 4th December 1972 and it was published in the Gazette on 26th April 1973. In May 1973 both the lower house, the Dewan Rakyat, and the upper house, the Dewan Negara, appointed a Joint Select Committee to consider the Bill. The Joint Select Committee held meetings and heard representations in various parts of Malaysia but before it could table its reports and recommendations to the Dewan Negara and the Dewan Rakyat, Parliament was dissolved on 31st July 1974. With the dissolution the Bill lapsed. The original Bill was then redrafted to incorporate the recommendations of the Joint Select Committee and the Bill was reintroduced in the Dewan Rakyat. It was passed by both Houses of Parliament, received the Royal Assent on the 6th March 1976 and was published in the Gazette on the 11th March 1976, as the Law Reform (Marriage and Divorce) Act, 1976 (Act 164). It has however not yet been brought into force.

Section 3 of the Act provides that except as otherwise expressly provided the Act applies to all persons in Malaysia and to all persons domiciled in Malaysia but who are resident outside Malaysia. For the purposes of the Act, a person who is a citizen of Malaysia is deemed, until the contrary is proved, to be domiciled in Malaysia. The Act does not apply to Muslims or to any person who is married under Muslim law; and no marriage one of the parties to which professes the religion of Islam shall be solemnised or registered under the Act. The Act also does not apply to any native of East Malaysia or aborigine of West Malaysia.[11] It appears to

[11] Law Reform (Marriage and Divorce) Act, 1976 (Act 164), S. 3.

be doubtful whether a native of East Malaysia or aborigine of West Malaysia can have his or her marriage (even to a non-native or a non-aborigine) solemnised or registered under the Act and this might raise difficult questions of conflict which have to be resolved in the courts.

Section 5 of the Act seeks to abolish polygamy for the future. The effect is that a person who is already married may not during the continuance of such marriage or marriages contract a valid marriage under any law, religion, custom or usage with any other person and a person who marries after the coming into force of the Act shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or marriage. Section 6 provides that every marriage contracted in contravention of section 5 shall be void and section 7 makes the person contracting such a marriage liable for the offence of bigamy under section 494 of the Penal Code.

Existing polygamous marriages however are not affected. Section 4 provides that nothing in the Act shall affect the validity of any marriage solemnised under any law, religion, custom or marriage prior to the date of coming into force of the Act. Such a marriage if valid under the law, religion, custom or usage under which it was solemnised, is deemed to be registered under the Act. Every such marriage, unless void under the law, religion, custom or usage under which it was solemnised shall continue until dissolved by the death of the parties or by order of a Court of competent jurisdiction or by a declaration of nullity made by a Court of competent jurisdiction.[12]

Marriages under the Act may be solemnised –

(a) in the office of the Registrar of Marriages with open doors within the hours of six in the morning and seven in the evening and after the issue of a certificate for marriage;

(b) in such other place other than in the office of a Registrar and at such time as may be authorised by a valid licence by the Chief Minister of the State;

(c) in a church or temple or at any place of marriage at any such time as may be permitted by the religion, custom or usage which the parties to the marriage or either of them profess to practise.[13]

Section 22(4) of the Act provides that every marriage purported to be solemnised in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or the Chief Minister or in the case of a marriage in accordance with a religion, custom or usage, a statutory declaration has been declared to the Registrar or Assistant Registrar, as the

[12] *Ibid*, S. 4.

[13] *Ibid*, S. 22

case may be. Generally no marriage shall be solemnised unless the Registrar or person solemnising it is satisfied that both parties to the marriage freely consent to the marriage; and every marriage shall be solemnised in the presence of at least two credible witnesses besides the Registrar or person solemnising it. Provision is also made in Section 24 of the Act for the solemnization of marriages at a Malaysian Embassy, High Commission or Consulate abroad, where one or both of the parties to the marriage is a citizen of Malaysia.

Section 10 of the Act provides that a marriage purported to be solemnised in Malaysia shall be void if at the date of the marriage either party is under the age of eighteen years, unless for a female who has completed her sixteenth year, the solemnization of such marriage is authorized by a licence issued by the Chief Minister of the State. This follows the corresponding provision in the Women's Charter in Singapore (although it goes further by setting a lower limit of sixteen years for the female) and will, when it comes into force, have the indirect effect of assisting in the implementation of the law in Singapore. In the case of *Inderjit Singh v. Jinder Pal*[14] the parties to the marriage which was celebrated in Johore Bahru, Malaysia were both Singapore citizens and both domiciled in Singapore. The male party was 23 years old but the female party was 15 years old. The Court of Appeal in Singapore held that the marriage was valid and that the provisions of the Women's Charter were not applicable as the marriage was not solemnised in Singapore. Such marriages (where the parties are below the prescribed minimum ages) will no longer be valid in Malaysia, when the Law Reform (Marriage and Divorce) Act, 1976 comes into force.

Section 11 of the Act prohibits marriages between parties of certain degrees of kindred or affinity but allows the Chief Minister of the State to grant a licence for a marriage to be solemnised if he is satisfied that such marriage is unobjectionable under the law, religion, custom or usage applicable to the parties thereto. It is also provided that no person shall marry a person whom he or she has adopted or by whom he or she has been adopted.

Section 12 of the Act provides that where a person has not completed his or her twenty-first year, the consent of the father or (where the father is dead) the mother or (or where both the father and the mother are dead) the person standing in *loco parentis* is required for the marriage. In special cases where the consent of the parent or person in *loco parentis* cannot be obtained or is unreasonably withheld, consent may be obtained from the court.

[14] [1975] 2 MLJ 259.

Section 27 of the Act provides that the marriage of every person resident in Malaysia and of every person resident abroad who is a citizen of or domiciled in Malaysia shall be registered pursuant to the Act. Thus all Chinese, Hindu and other customary marriages (which were not officially registered before) will be registered in future.

Provision is made for the maintenance of a national register of marriages, divorces and annulments. Section 34 of the Act however provides that nothing in the Act or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.

Provision is made for penalties for failure to comply with the provisions of the Act. Section 37 provides that any person who uses any force or threat (a) to compel a person to marry against his will or (b) to prevent a person who has attained the age of twenty-one years from contracting a valid marriage, shall be guilty of an offence.

In regard to divorce, the Act has adopted the principles of the English Divorce Reform Act, 1969, whereby breakdown of the marriage is made the sole ground for divorce. Section 53 of the Act provides that either party to a marriage may petition for divorce on the ground that the marriage has irretrievably broken down. The court hearing such a petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and if satisfied that the circumstances make it just and reasonable to do so, may make a decree for dissolution.

The Court in its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, shall have regard to one or more of the following facts —

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.[15]

In considering whether it would be just and reasonable to make a decree, the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and

[15] Law Reform (Marriage and Divorce) Act, 1976, S. 54(1).

it may make a decree *nisi* subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.[16]

Section 51 of the Act provides that where one party to the marriage has converted to Islam, the other party who has not so converted may petition for divorce, but such petition may not be presented before the expiration of the period of three months from the date of the conversion. This provision is new but it may lead to difficulties in its implementation as it is difficult to see how the court can make a decree or order against a Muslim, to whom the Act does not apply.

Section 52 of the Act allows for dissolution of a marriage by mutual consent. If the husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of the marriage present a joint petition accordingly and the court may if it thinks fit, dissolve such marriage on being satisfied that both parties freely consent and that proper provision is made for the wife and for the support, care and custody of the children if any of the marriage, and may attach such conditions to the decree of dissolution as it may deem fit. It is interesting to note that this provision is taken from the Matrimonial Causes Ordinance of Sarawak, but is now made available even to Christians.

A petition may also be presented to the court to have it presumed that the other party to the marriage is dead and to have such marriage dissolved and the court, if satisfied that reasonable grounds exist may make a decree of presumption of death and of divorce. In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continuously absent from the petitioner and the petitioner has no reason to believe that the other party has been living within the time, shall be evidence that he or she is dead until the contrary is proved.[17]

The Court has jurisdiction to make a decree of divorce not only where the marriage is monogamous but also where the marriage is registered or deemed to be registered under the Act. Both parties must also be domiciled in Malaysia at the time of presentation of the petition. Additional jurisdiction is however given (a) where the wife has been deserted by the husband or the husband has been deported and the husband was domiciled in Malaysia before the desertion or deportation and (b) where the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the

[16] *Ibid*, S. 54(2)

[17] *Ibid*, S. 63.

commencement of the petition.[18]

Section 50 of the Act provides that no petition for divorce shall ordinarily be presented to the court before the expiration of the period of two years from the date of the marriage. The Judge may however, on application to him, allow the presentation of a petition for divorce within the period of two years on the ground that the case is one of exceptional circumstances or hardship suffered by the petitioner but in determining the application the Judge shall have regard to the interests of any child of the marriage and to the question whether there is a probability of reconciliation between the parties.

Section 55 of the Act enables the Court to make provisions by rules of court for requiring that before the presentation of a petition for divorce the petitioner shall have recourse to the assistance and advice of such persons or bodies as may be made available for the purpose of effecting reconciliation between parties to a marriage who have become estranged. If at any stage of the proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation. Section 106 of the Act provides that no person shall petition for divorce (except where it is by mutual consent or where one of the parties has embraced Islam) unless he or she has first referred her matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties. The conciliatory body referred to is either –

(a) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan or association; or
(b) a marriage tribunal set up for specific areas or district by the Minister;
(c) any other body approved as such by the Minister.

Section 56 of Act gives power to the Court to make rules of court for enabling the parties to a marriage or either of them to refer any agreement or arrangement made or proposed to be made between them which relates to, arises out of or is connected with the proceedings for divorce which are contemplated or have begun and for the court to express its opinion on the reasonableness of the agreement or arrangement and to give such directions, if any, as it thinks fit.

Section 58 of the Act enables either the husband or the wife to claim damages against a co-respondent and section 59 gives power to the Court to order damages for adultery and also in any petition presented by the husband to order costs, to be paid by the co-respondent. No such order for

[18] *Ibid*, S. 48.

costs shall be made if the respondent was at the time of the adultery living apart from the husband and living the life of a prostitute or if the co-respondent had not at the time of the adultery reason to believe the respondent to be a married women. It is a pity that the provisions for payment of damages have been retained in the Act, as these have now been abolished in England by the Law Reform (Miscellaneous Provisions) Act, 1970.

Section 47 of the Act provides that subject to the provisions of the Act, the Court shall in all suits and proceedings under the Act act and give relief on principles which are in the opinion of the Court as nearly as possible conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings. This will confirm and continue the existing practice whereby English decisions are cited and followed in the Courts.

The existing law relating to the power of the Court to make decrees of judicial separation has been reproduced, and retained, it is said, "in deference to the sentiments of Christians who by their faith are prohibited from petitioning for divorce". Section 66 of the Act provides for the property and position of a wife after a decree of judicial separation.

The provisions for nullity of marriage have also been retained but with considerable modifications based on the recommendations of the English Law Commission's Report on Nullity of Marriage. The Court may make a decree of nullity where the marriage is monogamous or is registered or deemed to be registered under the Act and where both parties to the marriage reside in Malaysia at the time of the commencement of the proceedings. The Act distinguishes between marriages which are void and those which are voidable. Section 69 provides that a marriage is void if it is not a valid marriage under section 5, 10 and 11 of the Act that is where –

(i) at the time of the marriage either party was already lawfully married and the former husband or wife of such party was living at the time of the marriage and such former marriage was then in force;
(ii) either party is under the age of eighteen years or the female is not granted special licence;
(iii) the parties are within the prohibited degrees of relationship.

One other ground appears to have been inadvertently left out in section 69, that is, where the marriage is solemnised without a certificate for marriage or licence or statutory declaration, as provided in section 22(4) of the Act.

Section 70 provides that a marriage shall be voidable on the following grounds –

(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;
(b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;

(c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;

(d) that at the time of the marriage either party, though capable of giving a valid consent was (whether continuously or intermittently) a mentally disordered person within the meaning of the Mental Disorders Ordinance, 1952 of such a kind or to such an extent as to be unfit for marriage;

(e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;

(f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner.

The Court shall not grant a decree of nullity on any of the grounds which make the marriage voidable if the respondent satisfies the Court (a) that the petitioner with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so; and (b) that it would be unjust to the respondent to grant the decree. The Court shall also not grant the decree on the grounds mentioned in paragraph (e) or (f) above unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged.

Section 72 provides that the rules of Private International Law shall apply to determine the validity of a marriage, which is governed by foreign law or celebrated abroad under Malaysian law.

Section 73(2) of the Act provides that where a decree of nullity is made on the ground that the marriage is voidable it shall operate to annul the marriage only as respects any time after the coming into operation of the decree, and the marriage shall notwithstanding the decree, be treated as if it had existed up to that time.

Section 75 deals with the position of children where a decree of nullity is made. Where a decree of nullity is granted in respect of a voidable marriage any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled shall be deemed to be their legitimate child. The child of a void marriage (other than a marriage which is void by virtue of section 5) shall be treated as the legitimate child of his parent if at the time of the solemnization of the marriage, both or either of the parties reasonably believed that the marriage was valid. Section 75(3) provides that the section shall only apply where the father of the child was domiciled in Malaysia but this provision may lead to difficulties in practice, as a decree of nullity may be made where the parties are resident but not necessarily domiciled in Malaysia.

Section 76 of the Act gives the Court power when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale. The Court shall have regard to (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; (b) any debts owing by either party which was contracted for their joint benefit; (c) the needs of the minor children, if any, of the marriage, and subject to those considerations, the Court shall incline towards equality of division. The Court shall also have power to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any assets and the division between them of the proceeds of sale. In exercising such power the Court shall have regard to (a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the house or caring for the family; (b) the needs of the minor children if any of the marriage, and subject to these considerations the Court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

Section 77 of the Act provides that the Court may order a man to pay maintenance to his wife or former wife (a) during the course of any matrimonial proceedings; (b) when granting or subsequent to the grant of a decree of divorce or judicial separation or (c) if after a decree declaring her presumed to be dead she is found to be alive. A corresponding power is given to the court to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health and the Court is satisfied that having regard to her means it is reasonable so to order.

In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the Court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife, as the case may be, but shall have regard to the degree of responsibility the Court apportions to each party for the breakdown of the marriage.[19]

The Court is given power to order security for the payment of maintenance and to approve agreements for the payment of a capital sum in

[19] *Ibid*, S. 78.

settlement of all future claims to maintenance. The Court is also given power to vary orders and agreements for maintenance. Section 82 provides that the right to maintenance shall cease where the person entitled to receive maintenance marries or is living in adultery with any other person.

Section 88 of the Act gives power to the Court to make an order at any time to place a child in the custody of his or her father or his or mother or where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or any association the objects of which include child welfare or to any other suitable person. In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the Court shall have regard to (a) the wishes of the parents of the child; and (b) to the wishes of the child, where he or she is of an age to express an independent opinion. It is provided that it shall be a rebuttable presumption that it is for the good of the child below the age of seven years to be with his or her mother but in deciding whether the presumption applies to the facts of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody. Where there are two or more children of a marriage, the Court shall not be bound to place both or all of them in the custody of the same person but shall consider the welfare of each independently.

Section 89 provides that an order for custody may be made subject to such conditions as the Court may think fit to impose and subject to such conditions, if any, as may from time to time apply, the order shall entitle the person given custody to decide all questions relating to the upbringing and education of the child. Among other things an order for custody may

(a) contain conditions as to the place where the child is to reside, as to the manner of his or her education and as to the religion in which he or she is to be brought up;
(b) provide for the child to be temporarily in the care and control of some person other than the person given custody;
(c) provide for the child to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the Court may consider reasonable;
(d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the Court may consider reasonable; or
(e) prohibit the person given custody from taking the child out of Malaysia.

Section 90 provides that the Court may when granting a divorce or judicial separation or at any time thereafter, on the application of the

father or mother of any child of the marriage, make an order declaring either parent to be a person unfit to have the custody of the child and may at any time rescind any such order. Where such an order has been made and has not been rescinded the parent thereby declared to be unfit shall not on the death of the other person, be entitled to custody of such child unless the Court otherwise orders.

Section 91 of the Act provides that when a child is declared to be legitimate after the making of a decree of nullity of marriage, the mother shall in the absence of any agreement or order of Court to the contrary, be entitled to custody of the child.

Section 92 provides that except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and status in life or by paying the cost thereof.

Section 93 provides that the court may at any time order a man to pay maintenance for the benefit of his child –

(a) if he has refused or neglected reasonably to provide for the child;
(b) if he has deserted his wife and the child is in her charge;
(c) during the pendency of any matrimonial proceedings;
(d) when making or subsequent to the making of an order placing the child in the custody of any other person.

A corresponding power is given to the court to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order. The order under the section may direct payment to the person having custody or care and control of the child or trustees for the child.

Power is given to the court to order security for the payment of maintenance and to vary orders and agreements for custody and maintenance. Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order is rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability on the ceasing of such disability, whichever is the later.[20]

Section 100 provides that when considering any questions relating to the custody or maintenance of any child the Court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.

Power is given to the Court to set aside and prevent dispositions of property intended to defeat the claims to maintenance.

[20] Ibid, Ss. 94 and 95.

The Act when it comes into force will repeal the existing laws relating to marriage and divorce. In addition the Act amends the Legitimacy Act, 1961, by removing the bar to the legitimation of a child whose father or mother was married to a third person when the child was born. The Married Women and Children (Maintenance) Ordinance, 1950, is also amended to remove the upper limit of $50/- for the maintenance which may be ordered to be paid for an illegitimate child.

MUSLIM LAW

In Malaysia, Muslim religious matters, including the Muslim law, are the concern of the State authorities. There is therefore separate legislation in each State dealing with the administration of the Muslim law. Since 1952 there has been an attempt to consolidate the Muslim law in each State. So far the law has been codified on a fairly uniform basis in Selangor in 1952[21], in Trengganu in 1955[22], in Pahang in 1956[23], in Penang[24] and in Malacca in 1959[25], in Negri Sembilan in 1962[26], in Perlis in 1963[27] and in Perak in 1965.[28] Kelantan which had an Administration of Muslim law Enactment enacted in 1953 has recently issued two new enactments to replace it that is the Syariyah Court and Muslim Matrimonial Causes Enactment, 1966[29] and the Council of Religion and Malay Custom Enactment 1966[30]. Sabah[31], Johore[32] and Sarawak[33] have recently enacted enactments for the administration of Muslim law and the Federal Territory has adopted the Selangor Enactment with modifications. Although the

[21] Administration of Muslim Law Enactment, 1952 (No. 3 of 1952).

[22] Administration of Islamic Law Enactment, 1955 (No. 4 of 1955).

[23] Administration of the Law of the Religion of Islam Enactment, 1956 (No. 5 of 1956).

[24] Administration of Muslim Law Enactment, Penang, 1959 (No. 3 of 1959).

[25] Administration of Muslim Law Enactment, Malacca, 1959 (No. 1 of 1959).

[26] Administration of Muslim Law Enactment, Negri Sembilan, 1960, (No. 15 of 1960).

[27] Administration of Muslim Law Enactment, Perlis, 1964 (No. 3 of 1964).

[28] Administration of Muslim Law Enactment, Perak, 1965 (No. 11 of 1965).

[29] Syar' iyah Courts and Muslim Matrimonial Causes Enactment, Kelantan, 1966 (No. 1 of 1966).

[30] Council of Religion and Malay Custom Enactment, Kelantan, 1966 (No. 2 of 1966).

[31] Administration of Muslim Law Enactment, Sabah, 1977, (No. 15 of 1977).

[32] Administration of Muslim Law Enactment, Johore, 1978 (No. *14* of 1978).

[33] Majlis Islam (Incorporation) (Amendment) Ordinance Sarawak 1978 (No. 8 of 1978).

enactments follow the same pattern, there are differences, sometimes important differences, between them. Moreover no attempt has been made to update the law in the light of the recent changes made in other Muslim countries.

Each state has its own system of courts for the administration of the Muslim Law and for the most part Muslim law is dealt with at the State level in the State Kathi's courts.

The Federal Government has made an effort to remove the major differences between the various States and to have a uniform legislation. There is a Central Council of Muslim Religious affairs and recently a draft Bill has been suggested for discussion by the States. At present the matter is still before the Council of Rulers and is awaiting their views. It must be emphasised again that legislation on Muslim law has to be enacted at the State level or enacted and applied with the consent and approval of the States.

The suggested Bill follows in the main the pattern of the Law Reform (Marriage and Divorce) Act, 1976 but is founded on the principles of the Islamic law.

Clause 5 of the draft Bill provides that the enactment shall be applicable to all persons professing the religion of Islam resident in the State and to all persons so professing domiciled in the State who are resident outside the State. A person who is a permanent resident of a State is deemed, until the contrary is proved, to be domiciled in the State. The Act will also be applicable to a Kitabiya, that is a woman who professes a religion with a revealed book, who is married to a Muslim and is resident or is domiciled in the State.

Clause 7 of the draft Bill provides that a marriage shall be solemnised in accordance with Muslim law by a Registrar of Muslim Marriages. Such a marriage may also be solemnised in accordance with the Muslim law by any other person permitted under the Muslim religion to solemnise such marriage provided that it is solemnised in the presence of and with the permission of the Registrar.

Clause 8 of the draft Bill provides that no marriage may be solemnised or registered under the Enactment where either the man is under the age of eighteen years or the women is under the age of sixteen years except where the Chief Kathi had granted his permission in writing in very special circumstances.

Clause 9 sets out the prohibited degrees of consanguinity, affinity and fosterage in accordance with the Muslim law. It is also provided that no man shall have two wives at the same time who are so related to each other by consanguinity, affinity or fosterage that if either of them had been a male a marriage between them would have been illegal.

Clause 10 provides that no man shall marry a non-Muslim except a Kitabiya and no woman shall marry a non-Muslim.

Clause 11 provides that a marriage shall be void unless all the conditions necessary for its validity, in accordance with the Muslim law, are satisfied.

Clause 13 provides that a marriage shall be void and shall not be registered under the Enactment unless both parties thereto have consented to the marriage and the consent of either the wali or of the Kathi as wali raja has been obtained in accordance with the Muslim law.

Clause 14 reenacts existing law relating to the marriage of widows and divorced woman (janda) and Clause 15 reenacts the existing law relating to bethrothals.

The draft Bill lays down the preliminaries to be complied with before the marriage. The provisions follow closely those in the Law Reform (Marriage and Divorce) Act, 1976, in regard to the notice of marriage, the declaration to accompany the notice, the issue of a certificate for marriage and the entering of caveats.

Clause 23 provides that the Chief Kathi may, upon proof being made to him by statutory declaration that the proposed marriage would be in accordance with and not in contravention of the Muslim law and the Enactment, dispense with the giving of a notice and the issue of a certificate for marriage and grant a licence authorising the solemnization of the marriage.

Clause 24 provides that every marriage shall be solemnised in the *Kariah Masjid* (mosque area) in which one or both of the parties to the marriage ordinarily resides but a Registrar having jurisdiction in such *Kariah* may give permission for any such marriage to be solemnised elsewhere.

Clause 25 reenacts existing legislation regarding the payment of maskahwin (marriage gift) and pemberian (gifts).

Clause 29 deals with polygamy. It provides that no man shall, during the subsistence of an existing marriage, except with the permission of the Court of a Kathi, contract another marriage in any place wheresoever nor shall such marriage contracted without such permission be registered under the enactment. An application for such permission shall be submitted to the Court of the Kathi in the prescribed manner and accompanied by a statutory declaration which shall state the grounds on which the proposed marriage is alleged to be just and necessary, the present income of the husband, details of his commitments and his ascertainable financial obligations and liabilities, the number of his dependants (including persons who would be his dependants as a result of the proposed marriage) and whether the consent of the existing wife or wives has been obtained thereto. On receipt of such application the court shall summon the applicant and his existing wife or wives to be present at the hearing of the application *in camera* and the court may grant the permission applied for if satisfied –

(a) that the proposed marriage is just and necessary during the continuance of the existing marriage having regard to such cir-

cumstances as the following among others: sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of a decree for restitution of conjugal rights or insanity on the part of the existing wife;

(b) that the applicant has such means as to enable him to support as required by Muslim law all his wives and dependants, including persons who would be his dependants as a result of the proposed marriage;

(c) that he would accord equal treatment to all his wives in accordance with the requirement of Muslim law;

(d) that the proposed marriage would not cause *dharar* (harm) to the existing wife or wives;

(e) that the proposed marriage would not directly or indirectly lower the standard of living which his existing wife or wives and dependants had so far enjoyed and would reasonably expect to enjoy had such marriage not taken place.

The application is to be heard by the court with the help of two assessors, who are required to give their opinions and the reasons therefor. Any party aggrieved by any decision of the court may appeal to the Shariah Court of Appeal. The only punishment provided for a person who contracts a marriage in contravention of the section is that he has to pay the entire amount of the maskahwin and pemberian due to the existing wife or wives; although it will be seen subsequently that the wife can in such a case apply for dissolution of the marriage.

Clause 30 of the draft Bill provides for the solemnization of marriages in Malaysian Embassies, High Commissions or Consulates abroad, on the lines of the corresponding provision in the Law Reform (Marriage and Divorce) Act, 1976.

Clause 31 provides that the marriage of every person ordinarily resident in the State and of every person resident abroad who is domiciled in the State shall be registered in accordance with the provisions of the Enactment. Provision is made for the keeping of a register for all marriages in the State, but it appears that no provision is made for a national register of marriages, divorces and revocations of divorce on the lines of the National Register proposed for non-Muslim marriages.

Clause 39 provides that nothing in the Enactment or the Rules made thereunder shall be construed to render valid or invalid merely by reason of its having been or not having been registered any marriage which is otherwise invalid or valid.

Provision is made for the imposition of penalties for the contravention of the provisions of the Enactment. Clause 42 provides that any person who uses any force or threat (a) to compel a person to marry against his will or (b) to prevent a person who has attained the age of eighteen years from contracting a valid marriage shall be guilty of an offence.

In regard to the dissolution of marriage, Clause 52 of the draft Bill provides that the court may make a decree of divorce where (a) the marriage has been registered or deemed to be registered under the provisions of the Enactment; (b) where the marriage between the parties was contracted in accordance with Muslim law; and (c) where the domicile or residence of the parties to the marriage at the time when the petition is presented is in the State.

Clause 53 however gives additional jurisdiction in cases where the husband is not domiciled or resident in the State if (a) the wife has been deserted by the husband or the husband has been deported from the State and the husband was before the desertion or deportation domiciled or resident in the State; or (b) the wife is resident in the State and has ordinarily been resident in the State for the period of two years immediately preceding the commencement of the proceedings.

Clause 54 provides that the renunciation of Islam by either party to the marriage or his or her conversion to a faith other than Islam shall by itself operate to dissolve the marriage.

Clause 55 provides that a husband or wife who desires divorce shall present a petition for divorce to the court in the prescribed manner accompanied by a statutory declaration containing the prescribed particulars, including (a) a statement as to the reasons for desiring divorce, (b) a statement as to whether any and if so what steps have been taken to effect reconciliation and (c) the terms of any agreement regarding the maintenance of the wife and the children, if any, of the marriage, provision for the care and custody of the children if any of the marriage and the division of any assets acquired through the joint effort of the parties, or where no such agreement has been reached the petitioner's proposal regarding these matters. Upon receiving the petition the court shall summon the other party to appear before the court so as to enable it to enquire whether or not the other party consents to the divorce. If the other party so consents and the court is satisfied after due enquiry and investigation that the marriage has irretrievably broken down then the court may make an order directing the husband to pronounce one *talaq*. Where the other party does not agree to the divorce or it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court shall appoint a conciliatory committee consisting of a Religious Officer as Chairman and two other persons or *hakam* to act for the husband and the wife respectively. The conciliatory committee shall endeavour to effect reconciliation within a period of six months from the date of its being constituted or such further period as may be allowed by the court. When the Committee reports to the court that reconciliation has been effected and the parties have resumed married life together, the court shall dismiss the petition. If the conciliatory committee is unable to effect reconciliation and is unable to persuade the parties to resume married life

together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it thinks fit regarding maintenance and custody of the minor children, if any, of the marriage, division of property and regarding other matters connected with the marriage. The court shall then make an order directing the husband to pronounce one *talaq* before the court and where the court is unable to procure the presence of the husband before the court to pronounce the *talaq*, then it shall make a decree of divorce and such decree shall have the effect of one *talaq* as if pronounced by the husband before the court. In certain cases as for example where the petitioner alleges that he or she has been deserted and does not know the whereabouts of the other party or where the other party is imprisoned for a term of three years or more, reference to the conciliatory committee may be dispensed with. It is provided that a *talaq* by pronouncement or by way of a decree, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which the *talaq* is pronounced or the decree is made. If the wife is pregnant at the time the *talaq* is pronounced or the decree is made, the *talaq* or the decree shall not be effective until the expiration of ninety days or the pregnancy ends, whichever be later. It is provided that nothing in the section shall debar a wife whose marriage has been terminated by *talaq* effective under the section from remarrying the same husband, without an intervening marriage, unless such termination is for the third time so effective.

Provision is made for the divorce known as khul' or cerai tebus talak, for the divorce by ta'alik and for rojo or revocation of divorce. These provisions in the main follow the existing provisions.

Clause 59 provides for the decree of dissolution of marriage or *fasah*. A woman will be entitled to obtain a decree of dissolution of marriage or *fasah* on any one or more of the following grounds –

(i) that the whereabouts of the husband have not been known for a period of more than one year;

(ii) that the husband has neglected or failed to provide for her maintenance for a period of two years;

(iii) that the husband has taken an additional wife in contravention of the provisions of the Enactment;

(iv) that the husband has been sentenced to imprisonment for a period of three years or more;

(v) that the husband has failed to perform, without reasonable cause, his marital obligation for a period of one year;

(vi) that the husband was impotent at the time of marriage and remains to be so, provided that she was not aware at the time of the marriage that he was impotent;

(vii) that the husband has been insane for a period of two years;

(viii) that the husband is suffering from leprosy or elephantiasis or is suffering from a venereal disease in a communicable form;

(ix) that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated;

(x) that the husband treats her with cruelty that is to say *inter alia*

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical illtreatment;

(b) associates with women of ill-repute or leads an infamous life;

(c) attempts to force her to lead an immoral life;

(d) disposes of her property or prevents her from exercising her legal rights over it;

(e) obstructs her in the observance of her religious profession or practice;

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(xi) that the marriage has not been consummated owing to the wilful refusal of the husband to consummate it;

(xii) that she did not validly consent to the marriage whether in consequence of duress, mistake, unsoundness of mind or otherwise;

(xiii) that at the time of the marriage she, though capable of giving a valid consent was (whether continuously or intermittently) a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 of such a kind or to such an extent as to be unfitted for marriage;

(xiv) on any other ground which is recognised as valid for dissolution of marriages or fasah under Muslim law.

These provisions follow those of the Dissolution of Muslim Marriages Act, 1939, as modified and applied in Pakistan, although some of the provisions are taken from the provisions on nullity of marriage in the Law Reform (Marriage and Divorce) Act, 1976.

Provision is made for the court to issue a certificate of presumption of death and for the court to order the husband to pay a muta'ah or consolatory gift on divorce. These provisions follow existing provisions, based on the Muslim law.

Clause 62 provides that no order or decree of divorce or annulment shall be registered unless the Registrar is satisfied that the court has made a final order or orders for the custody and maintenance of the dependent children, for the maintenance of the divorced wife and for the payment of muta'ah to the divorced wife; or he is satisfied that no such order or orders need be made by the court in view of the circumstances of the case and of the provisions of Muslim law and the Enactment.

Clause 65 provides that the court shall have power when making an order or decree of divorce to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale. In exercising such power the court shall have regard to (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; (b) any debts owing by either party which were contracted for their joint benefit; (c) the needs of the minor children, if any, of the marriage, and subject to these considerations the Court shall incline towards equality of division. The Court shall also have power, when making an order or decree of divorce, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale. In exercising such power the Court shall have regard to (a) the extent of the contributions made by the other party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family; (b) the needs of the minor children if any of the marriage, and subject to these considerations the Court may divide the assets or the proceeds of sale in such proportions as the Court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion. It will be noticed that although this provision deals with the division of the *harta sepencarian* following Malay custom it follows closely the corresponding provision in the Law Reform (Marriage and Divorce) Act, 1976.

Clause 66 of the proposed Bill provides that the Court may subject to Muslim Law order a man to pay maintenance to his wife or former wife (a) during the course of any matrimonial proceedings; (b) when making or subsequent to the making of an order or decree for divorce; (c) if after a decree declaring her presumed to be dead she is found to be alive. The Court shall also have power to order any person liable in accordance with Muslim Law to pay maintenance to another person where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health and the Court is satisfied that having regard to the means of that person it is reasonable so to order. Clause 67 provides that in determining the amount of any maintenance to be paid, the Court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the person against whom the order is made.

Power is given to the Court to order security for the payment of maintenance and to approve agreements for the payment of a capital sum in settlement of all future claims to maintenance.

Clause 71 provides that the right of a divorced wife to receive maintenance from her former husband under any order of Court shall cease on the expiry of the period of *eddah* or her living in adultery with any other

person. The right of a divorced wife to receive maintenance from her former husband shall cease on her marriage to any other person unless the agreement otherwise provides.

Clause 76 provides that except where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and status in life or by paying the cost thereof. It shall be the duty of a woman to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them. This follows the provisions in the Law Reform (Marriage and Divorce) Bill before it was amended on the recommendation of the Joint Select Committee to make both parents liable for the maintenance of their children.

Power is given to the court to order security for the payment of maintenance for the benefit of any child and to amend orders and agreements for custody or maintenance.

Clause 84 provides for the maintenance of illegitimate children. If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, the Court may order such person to make such monthly allowance as to the court may seem reasonable. But if the claim is made against the putative father, it shall be brought in the magistrate's court.

Clause 83 provides that an order of maintenance of a child, shall unless it is expressed to be for any shorter period or it is rescinded, normally expire on the attainment by the child of the age of eighteen years. This does not apply where the order is made in favour of a child who is by reason of some mental or physical disability unable to maintain itself or if it is made in favour of a daughter who has not been married.

Clause 85 of the draft Bill sets out the persons who are entitled to the *hizanat* or custody of an infant child. Following the Muslim Law the mother is given the right of custody and where she is disqualified under Muslim Law then the right devolves to the female relatives and after them to the father.

Clause 87 provides that the right of *hizanat* is lost

(a) by the marriage of the mother with a person not related to the child within the prohibited degrees, provided that this right will revive upon the disolution of such marriage;
(b) by her gross and open immorality;
(c) by her changing her domicile so as to prevent the father from exercising the necessary supervision over the child, except that a divorced wife may take her own child to her birthplace;

(d) by her abjuration of Islam;
(e) by her neglect of or cruelty to the child.

Clause 88 provides that the right of *hizanat* or custody shall terminate upon the child attaining the age of seven years in the case of a male and nine years in the case of a female, but the court may extend the period until the male child attains the age of nine years and the female child the age of eleven years. Thereafter the custody of the child devolves upon the father and if the child has reached the age of discernment he or she shall have the choice of living with either of the parents unless the court otherwise orders.

Clause 89 provides that the custody of illegitimate children shall exclusively be with the mother and her relatives.

Clause 90 provides that notwithstanding the provisions set out in Clause 85 of the Enactment, the court may at any time choose to place a child in the custody of any one of the persons named in that section (that is the mother, female relatives and the father and male relatives) or where there are exceptional circumstances making it undesirable that the child be entrusted to any of those persons, the court may by order place the child in the custody of any other person or of any association the objects of which include child welfare. In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard

(a) to the wishes of the parents of the child; and
(b) to the wishes of the child, where he or she is able to express an independent opinion.

It is provided that it shall be a rebuttable presumption that it is for the good of a child during his or her infancy to be with his or her mother but in deciding whether such presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. Where there are two or more children of a marriage, the court shall not be bound to place both or all of them in the custody of the same person but shall consider the welfare of each child independently.

Clause 91 provides that an order for custody may be made subject to such conditions as the court may think fit to impose, and subject to such conditions, as may be applicable shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.

In particular the order for custody may —

(a) contain conditions as to the place where the child is to reside and as to the manner of his or her education;
(b) provide for the child to be temporarily in the care and control of some person other than the person given custody;

(c) provide for the child to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable;

(d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the court may consider reasonable;

(d) prohibit the person given custody from taking the child out of Malaysia.

Clause 92 provides that the court may when granting a divorce or at any time thereafter, on the application of the father or the mother of any child or any other person make an order declaring either parent or any person entitled to the custody of the child to be a person unfit to have the custody of the child and may at any time rescind any such order. Where such an order has been made and has not been rescinded the parent or any such person shall not on the death of the person or persons better entitled to the custody, be entitled to the custody of the child unless the court otherwise orders.

Clause 93 provides that although the right to *hizanat* or custody may be vested in some other person, the father shall be the natural guardian of the person and property of the minor child and if he is dead the right devolves on the paternal grandfather and the executors of the father or grandfather's will. The court may however remove any guardian and may appoint another person to be guardian in his place. In the absence of the legal guardian the Court shall appoint a guardian and in making such appointment the court shall be guided chiefly by the consideration of the child's welfare.

Provision is made for the exercise of the right of the guardian in relation to the property of the child. These provisions follow the principles of the Muslim Law.

Clause 109 provides that when considering questions relating to the custody or maintenance of any child the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.

Clause 115—124 of the draft Bill deal with legitimacy and the acknowledgement of children. Clause 115 provides that where a child is born to a woman who is married to a man at six months or more from the date of the marriage or within one year after the dissolution of the marriage either by the death of the man or divorce, the woman not having remarried, the paternity of the child is established in the man; but the man may disavow or disclaim the child on the ground of impossibility of cohabitation, whether the impossibility arose from disease, physical incapacity or want of access.

Clause 116 provides that where a child is born within less than six months of the marriage the paternity of the child shall not be established in the man unless he asserts that the child is his issue and does not say that the child is his by fornication.

Clause 117 provides that a child is born at more than one year after the dissolution of the marriage either by divorce or the death of the man, the paternity of the child shall not be established in the man unless he or any of his heirs, as the case may be, asserts that the child is his issue.

Clause 120–124 provides for the acknowledgement of a child in accordance with the Muslim Law.

NATIVES AND ABORIGINES

There have been no proposals for changes of customary family law applicable to the natives of Sabah and Sarawak and the aborigines of Peninsular Malaysia.

GENERAL

The question of a national family law which should be applicable to all the citizens of the country has been raised in various countries. In India the Directive Principles of the Constitution provides that the State shall endeavour to ensure for the citizens a uniform civil code throughout the territory of India. Efforts to achieve this have have so far not been successful in India. In Singapore where the family law has been revised quite recently, a dual system has been set up – under the Women's Charter for non-Muslims and under the Administration of Muslim Law Act for Muslims. In Malaysia too the trend appears to be to have such a dual system – one for the non-Muslims and one for the Muslims. However we notice that many of the provisions in the Law Reform (Marriage and Divorce) Act, 1976 and in the suggested model Muslim Law enactment are similar and with goodwill and understanding it may be possible to draft a Code for all citizens in Malaysia. Indonesia has recently enacted the Marriage Law, 1974 which is made applicable to all Indonesian citizens, even though there will be differences in the implementation of the law in accordance with the detailed regulations for the various groups in Indonesia. The Tunisian Code of Personal Status 1958 is also applicable to all citizens in Tunisia and in Egypt there has been an attempt to introduce a common Family Code for all citizens. Tunisia and Egypt have abolished the separate religious courts although Indonesia still retains them. It is hoped that Malaysia too will in time be able to have a common code for all citizens of Malaysia, although it may be necessary, as in Indonesia, to provide for differences in the implementation of the law.

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PREREQUISITES OF PARTNERSHIP IN MALAYSIA: PRE-VIEWS AND POST-VIEWS

I. INTRODUCTION

Partnership as a mode of conducting business antedates the more modern joint ventures carried on through the limited liability companies. To too many businessmen who start business often of a small nature, choose partners of mutal confidence, believe in the freedom of contract and prefer to avoid all forms of state regulation or control, the partnership style of business is still the main attraction.

This article is intended to probe into the history of partnership law in the various states and straits settlements and to examine the appropriateness of the current definition of partnership as contained in section 3(1) of the Partnership Act, 1961 (revised 1974, Act 135) in retrospect and prospect. The nature of the problems relative to the definition which have come before the courts will also be reviewed. This necessarily involves comparison with the previous definitions of partnerships in the different Malay states, as well as in Sabah (then North Borneo) and Sarawak. The first traces of the statutory form of the common law of partnership in some of the Malay states are found in an enactment, to be noted below, towards the end of the nineteenth century.[1]

II. HISTORICAL SKETCH

In 1899, the Federated Malay States of Perak, Selangor, Negri Sembilan and Pahang passed the Contract Enactment (F.M.S. Cap. 52), based wholly upon the Indian Contract Act, 1872. Chapter XI of the Enactment (sections 239–266) dealt with the law relating to partnership. Section 266 excluded "extraordinary partnerships such as partnerships with limited liability, incorporated partnership, and joint stock companies." As the

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[1] The reference is to the Contract Enactment of 1899. It is interesting to note, however, that at the end of the Contract Enactment, 1899 the schedule attached thereto dealt with the "Enactment Repealed", applicable to Selangor only. It referred to Regulation XI of 1893 and stated "The words 'The Indian Contract Act, 1872 (Act IX of 1872), contained in the third Schedule there to." This suggests that the provisions of the Indian Act were earlier applicable to Selangor by Regulation XI of 1893.