

## THE STATUS OF MUSLIM WOMEN IN FAMILY LAW IN MALAYSIA AND BRUNEI\*

### INTRODUCTION

The Muslims are broadly divided as far as doctrine and law are concerned into two groups — the *Sunni* and the *Shiah* groups.. The differences between these groups, which originated in political differences have grown into differences in religious doctrine and law, though both groups acknowledge the authority of the Holy Quran and the prophet-hood of Mohamed. The *Shiah* schools of law are followed in Iran, Yemen and by some persons in India. The *Sunni* group is made up of the four orthodox schools which are named after their founders, the *Hanafi* school after Imam Abu Hanifa, the *Maliki* school after Imam Malik bin Anas, the *Shafii* school after Imam Shafii and the *Hanbali* school after Imam Ahmad bin Hanbal. All the four *Sunni* schools of law are regarded as orthodox, and authoritative. The Muslims in Turkey, Egypt, Syria, Jordan, Iraq, India and Pakistan follow mainly the *Hanafi*, school of law; the Muslims in Algeria, Tunis and Morocco follow the *Maliki* school of law; the ruling family of Saudi-Arabia follows a variant of the *Hanbali* school of law; the Muslims in Indonesia follow the *Shafii* school of law. In Malaysia and Brunei the most prevalent school is the *Shafii* school, which is followed by all Malays and many Arabs and South Indian Muslims. There are also followers of the *Hanafi* school of law, mainly Northern Indian and Pakistani Muslims, and also some followers of the *Shiah* schools of law.

The Muslim law as administered in the States of Malaysia is varied by Malay custom and applies to all Muslims but is subject in its application to variations in accordance with the school of law to which the parties belong. In some States it is provided however that the rules of Malay customary law, which vary the Muslim law, only apply to Muslims of the Malay race.<sup>1</sup>

In the States of Malaya,<sup>2</sup> Muslim religious matters are the concern

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1. See for example Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953 (No. 1 of 1953) s.43(3); and Trengganu Administration of Islamic Law Enactment, 1955 (No. 4 of 1955) s.21(3).
2. The States of Malaya, formerly known as the Federation of Malaya, consist of eleven States, namely Johore, Kedah, Kelantan, Negri Sembilan, Pahang, Perak, Perlis, Selangor, Trengganu, Malacca and Penang.

of the State legislatures. There is therefore separate legislation in each State, dealing with the administration of Muslim law. Since 1952 there has been an attempt to consolidate the Muslim law in each State.<sup>3</sup> So far the law has been consolidated on a fairly uniform basis in Selangor in 1952, in Kelantan in 1953, in Trengganu in 1955, in Pahang in 1956, in Penang and Malacca in 1959, in Negri Sembilan in 1960 and in Kedah in 1962.<sup>4</sup>

The enactments relating to Muslim law deal mainly with its administration. There has been little attempt<sup>5</sup> to codify or modify the Muslim law. The law followed is mainly the orthodox *Shafii* law. It has been influenced in many aspects by Malay custom which still bear traces of its matrilineal basis. The reforms in the Arab countries and in Pakistan have had no counterparts in the States of Malaya, Singapore and the Borneo States. The efforts at reform have been mainly administrative as in Singapore, Selangor and Negri Sembilan.

This paper discusses the Muslim Family Law as administered in all the parts of Malaysia, that is to say the States of Malaya, the State of Singapore, the Borneo States of Sarawak and Sabah (formerly North Borneo) as well as Brunei. The different aspects of family law will be discussed separately.

## PART I: MARRIAGE.

### *Section 1. — Substantive marriage requirements.*

#### *Sub-section (a) — Betrothal.*

A Muslim marriage in Malaya is often, though not always, preceded

3. Muslim law is followed in the States of Malaya, Singapore and the Borneo States only in the field of family law. In the fields of criminal law, the law of contract and tort and commercial law English law is followed. Even in the field of family law there has been a tendency to introduce legislation, like the Guardianship of Infants Ordinance (Cap. 16) of Singapore, based on English legislation which applies to all inhabitants including the Muslims.
4. Selangor Administration of Muslim Law Enactment, 1952 (No. 3 of 1952); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953 (No. 1 of 1953); Trengganu Administration of Islamic Law Enactment 1955 (No. 4 of 1955); Pahang Administration of the Law of the Religion of Islam Enactment, 1956 (No. 5 of 1956); Penang Administration of Muslim Law Enactment, 1959 (No. 3 of 1959); Malacca Administration of Muslim Law Enactment, 1959 (No. 1 of 1959); Negri Sembilan Administration of Muslim Law Enactment, 1960 (No. 15 of 1960); Kedah Administration of Muslim Law Enactment, 1962 (No. 9 of 1962). See also Brunei Religious Council and Kathis Courts Enactment, 1955 (No. 20 of 1955). Although the Kedah enactment has not yet been brought into force, it is assumed for the purposes of this paper that it will shortly be brought into force.
5. With the exception of the *Undang Undang Makhamah Melayu* of Sarawak, (Laws of Sarawak 1958, Vol. VII p.673) which sets out the native customary law for the Malay community of Sarawak and for all such other persons, cases and suits to which in accordance with the provisions of the Native Courts Ordinance, it may be lawfully be applied. The laws were made on the advice of the Majlis Islam in 1930 under the provisions of the Sarawak Native Customary Laws Ordinance (Cap. 51 of the laws of Sarawak, 1958). It deals with betrothal, marriage, divorce, sexual offences and inheritance.

by a betrothal.<sup>6</sup> The first move is made by the family of the man, who ascertains from the girl's family whether a proposal would be favourably received. When an understanding has been arrived at, the parties proceed to settle the date of the marriage and the precise amounts of the payments for *mas-kahwin*<sup>7</sup> and presents. There may be a formal ceremony of betrothal at the girl's home, which finalizes the contract between the two families. Sometimes the marriage expenses and the presents are handed over at the betrothal ceremony. A man may make a proposal of marriage to a woman who is unmarried or whose *eddah*<sup>8</sup> is completed. A woman whose period of *eddah* is not completed may not be openly demanded in marriage. A woman divorced in a revocable manner cannot be demanded in marriage during her period of *eddah*. On the other hand, a person may, if he uses ambiguous terms, make a proposition of this nature to a widow during her retirement or to a woman divorced irrevocably.<sup>9</sup> It is forbidden to make a proposal of marriage to a woman who has already received or formally accepted a similar proposal from another man, except with his permission. But until a woman decides whether to accept or reject the first offer, there is no objection to making her a second proposal. In Perlis it is an offence for a person to contract or attempt to contract a marriage with a person who is already betrothed to some other person.<sup>10</sup>

No express provision is made for the award of damages for breach of contract of betrothal in the Muslims Ordinance, 1957, of Singapore. The Ordinance, however, gives the Shariah Court power to hear and determine disputes between Muslims in relation to betrothals.<sup>11</sup> In *Mong v. Daing Mokka*<sup>12</sup> it was held that a Muslim woman has a right to bring an action in the ordinary civil courts against a Muslim man for breach of promise of marriage.

The law differs in the various States of Malaya. In Selangor, Negri Sembilan, Penang, Malacca and Kedah the law gives a remedy against

6. In the parts of Negri Sembilan and Malacca which follow the *adat perpatih* or old Malay customs a marriage is regarded not just as a personal but a family and tribal tie as well and there are usually formal engagement ceremonies including an engagement feast to which the tribal chiefs are invited, their presence being regarded as tacit approval of the union — see Haji Mohamed Din bin Ali, "Two Forces in Malay Society" (1963) 1 *Intisari* 25 (part 3).
7. *Mas-kahwin* is the Malay equivalent of the *mahr* or obligatory marriage payment due under Muslim law to the wife on the solemnization of a marriage. See sub-section (h) *infra*.
8. *Eddah* is the period of continence imposed on a woman on the termination of a marriage by death of the husband or divorce.
9. Divorce by repudiation may be revocable or irrevocable. A revocable repudiation is by one *talak* (pronouncement of repudiation) and takes effect at the end of the period of *eddah*. The husband can revoke the repudiation before it takes effect. An irrevocable divorce is constituted by a triple divorce or a divorce for a third time or where the divorce is given for a consideration. In such a case the husband cannot revoke the repudiation.
10. Sharaiah Courts Enactment, 1340, (No. 5 of 1340) s. 21 See formerly Kedah Sharaiah Courts Enactment (E. No. 109) s.21
11. Muslims Ordinance, 1957 (No. 25 of 1957) s.21(2)(c).
12. (1935) 4 M.L.J. 147.

a Muslim who, after entering into a contract of betrothal in accordance with Muslim law, refuses without lawful reason, to marry the other party to such contract. If the other party is willing to perform the marriage, the party in default is liable to pay to the other party the sum which is agreed in the contract. If the defaulting party is the groom he has, also, to pay as damages the amount of the *mas-kahwin* and in Negri Sembilan, Malacca and Kedah also of the *hantaran*<sup>13</sup> which would have been payable together with other moneys expended in good faith in preparation for the marriage. If the woman defaults she has to return the betrothal gifts, if any, or the value thereof in addition to paying the agreed damages.<sup>14</sup>

In Kelantan, Trengganu and Pahang and in Brunei there are provisions for cases in which a person who, having entered either verbally or in writing, into a contract of betrothal in accordance with Muslim law, refuses to marry the other party to the contract. If this other party is willing to fulfil the contract the defaulter, if a male, is liable to be adjudged to pay to the value of *mas-kahwin* which would have been paid had the marriage taken place together with other moneys expended in good faith in preparation for the marriage. If the woman defaults she has to return the betrothal gifts, if any, or the value thereof in addition to paying the agreed damages or the amount expended in preparation for the marriage.<sup>15</sup>

There are no special provisions in Perak and Johore dealing with breaches of contracts of betrothal.

In Perlis it is provided that any person who, after having either verbally or in writing, entered into a contract of betrothal, refuses to marry the other party to the contract, shall upon suit before the Sharaiah Court, by the other party, be liable to be adjudged to pay to the other party the value of the *mas-kahwin* which would have been paid if the marriage had taken place. In such case each party shall return all gifts made by the other or shall repay the value of any gifts that have been consumed.<sup>16</sup>

In the States where no express provision is made for breach of the contract of betrothal, the consequences of the breach would be expressly provided for by the parties. In Singapore, for example, it is usual to

13. See note 7 *supra*. *Hantaran* is the obligatory cash payment due to be paid under local custom by the bridegroom to the bride at the time the marriage is solemnized.

14. Selangor Administration of Muslim Law Enactment, 1952, s.124; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.119; Penang Administration of Muslim Law Enactment, 1959, s.119; Malacca Administration of Muslim Law Enactment, 1959, s.118; Kedah Administration of Muslim Law Enactment, 1962, s.119.

15. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.137; Trengganu Administration of Islamic Law Enactment, 1955, s.95; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.117; Brunei Religious Council and Kathis Enactment, 1955, s.136. In Pahang the female party has to pay as damages the amount agreed in the contract, by which the marriage was arranged, to be paid by her on breach of the contract.

16. Sharaiah Courts Enactment, 1340, s.22.

stipulate that, if the breach is on the man's side, he would forfeit the presents or payments given by him. If the breach is on the girl's side the man will be entitled to payment of double the value of presents or expenses given or incurred by him.

The *Undang-Undang Mahkamah Melayu* of Sarawak contains elaborate provisions for engagement and betrothal and the remedies for breach of the engagement or betrothal agreement. Briefly the proceedings before marriage according to the Malay custom in Sarawak are as follows:— First the boy's parents will approach that of the girl's to talk about the possibility of marriage. If the boy is acceptable and agreement is reached then, generally, the second stage is to take a *tekol*<sup>17</sup> to the girl's parents. This *tekol*, in practice, must take place within seven days of the agreement being reached. If the boy breaks the agreement and does not take the *tekol* to the girl's parents he will be liable to a fine; but if the girl breaks the agreement before the *tekol* is received, she is not guilty of any offence. The third stage is *pertunangan* or betrothal which must take place within one month of the *tekol*, failing which the *tekol* will lapse. If the betrothal does not take place due to the default of either party he or she will be liable to a fine and if it is the girl who defaults, she will have to return the *tekol*. After the betrothal comes the last stage, marriage which should be solemnised within one year of the betrothal. Failure to do so will entitle the girl to sue the boy for *mungkir* or breach of promise to marry. If either party breaks the betrothal agreement, he or she will be liable to a fine and if it is the girl who breaks the agreement, she will have to return the betrothal gifts or their value. If the engagement or betrothal is broken because of the interference of a third person, such person is liable to a fine and there are restrictions on the marriage of the party who broke the engagement or betrothal to the person who caused it to be broken.<sup>18</sup> Although a marriage is normally preceded by a *tekol* or betrothal this is not necessary and they may be dispensed with without affecting the legality of the marriage.

*Sub-section (b) — Marriage requirements.*

Marriage according to Muslim law is a civil contract. But, being an act recommended by the Prophet, it is also a religious sacrament. Marriage may be constituted without any ceremonial. There are no special rites and no proper officiants. Marriage is legally contracted by a declaration made by one contracting party followed by a corresponding acceptance from the other one. The essential elements of a valid marriage, according to the *Shafii* school of law are as follows:—

- (a) declaration of offer (*ijab*) on the part of the one party;

17. The word "*tekol*" is used in colloquial Malay in Sarawak to mean an object usually a weight, placed on a lighter object to prevent the latter from being shifted or blown away. *Tekol* usually takes the form of money, precious metal or stone, such as gold or diamond rings. No fixed value is stated for the *tekol* and it varies with the status and position of the families concerned. The *tekol* is invariably dispensed with when the marriage takes place without any mutual agreement and arrangement between the parents or representatives of the parties concerned as in the case of *nikah salah* (for which see p. 331 *infra*.)

18. *Undang-Undang Mahkamah Melayu*, Sarawak, ss. 1-20.

- (b) acceptance (*qabul*) by the other party;
- (c) before two witnesses who are sane and adult male Muslims;
- (d) the words must indicate with reasonable certainty that a marriage has been contracted; and
- (e) the consent of the woman to be married must be given through her *wali*<sup>19</sup> or guardian for marriage.

The *Hanafi* school of law allows a woman who has attained puberty to marry without the necessity of obtaining the consent of her guardian for marriage.

It is also usual to stipulate the amount of the *mas-kahwin* though this stipulation is not essential, as if no amount is stipulated the woman is entitled to a proportional *mas-kahwin*, i.e. in due proportion to the *mas-kahwin* stipulated or obtained by other women of the same condition as herself. Marriage may be instituted without ceremony but there are usually ceremonies of a social, customary or religious nature. Although not essential to the validity of the marriage they, like the customary marriage feast, are designed to give it publicity.

*Sub-section (c) — Age.*

There is no minimum age of marriage under Muslim law. A minor of either sex can enter into a valid contract of marriage through a guardian. Under the *Shafii* school of law only a father or paternal grandfather can give away a minor girl in marriage. Under the *Hanafi* school of law, although a guardian can give away a minor girl in marriage, she has the option of repudiating the marriage on attaining puberty. Majority for the purpose of marriage is attained on puberty. In default of evidence as to puberty a man or a woman is considered an adult on the attainment of the fifteenth year. However, the Penal Code makes it an offence for a man to have sexual intercourse with his wife if she is under the age of thirteen years.<sup>20</sup>

In Singapore under administrative directions issued by the Registrar of Muslim Marriages, the Kathis are precluded from registering a marriage where the girl to be married is under the age of fifteen years without the approval of the Registrar.

In Sarawak it is enacted in the *Undang-Undang Makhamah Melayu* Sarawak that, if a girl is married by her father or paternal grandfather, the marriage is valid even if the girl has not attained puberty. No other person may give a girl, who has not attained puberty, in marriage. Puberty is presumed on the attainment of fifteen years of age.<sup>21</sup>

In Sabah the Marriage Ordinance, 1959, which applies to Muslims, provides that notwithstanding any written law or custom any marriage

19. The guardian for marriage. See at p.321 *infra*.

20. Penal Code, (Cap. 119) s.375.

21. *Undang-Undang Makhamah Melayu*, Sarawak, s.49.

between persons who, in the case of a man is under the age of sixteen years or in the case of a woman is under the age of fourteen years, shall be void.<sup>22</sup>

*Sub-section (d) — Consent of the bride.*

Under the *Shafii* school of law, the consent of the bride is required for a marriage except in the case where a virgin girl is given in marriage by her father or her paternal grandfather. The right of the father or paternal grandfather to give away his virgin daughter or grand-daughter without her consent is, however, subject to a number of conditions to ensure that the marriage is for her benefit and that the father or grandfather has not acted wickedly or carelessly in the matter.<sup>23</sup> The view of the *Shafii* school of law on this matter is thus summarised in the *Minhaj-et-Talibin*:—

“A father can dispose as he pleases of the hand of his daughter without asking her consent, whatever her age may be, provided she is still a virgin. It is however commendable to consult her as to her future husband; and her formal consent to the marriage is necessary if she has already lost her virginity”.<sup>24</sup>

It is usual for the Kathi solemnizing the marriage and the two witnesses to see the bride and ask her for her agreement to the proposed marriage. This however is not essential where it is her father or grandfather who gives her in marriage. Even where the bride is asked for her agreement, Muslim law allows her consent to be shown by her silence and therefore there is no assurance that the consent is a real one.

In Singapore the parties to a marriage are required to apply on the prescribed form and to make a statutory declaration declaring the truth of the particulars given. Where the woman has a *wali* or guardian for marriage, the application is made by the guardian on her behalf. It is provided that the husband and wife shall report the marriage for registration. The marriage register has to be signed by both the husband and the wife. The consent of the bride is, therefore, required for the registration of the marriage. It has been held in Singapore, in the case of *Syed Abdullah Al-Shatiri v. Shariffa Salmah*<sup>25</sup> that, where a virgin is given in marriage by her father, her consent is not essential to the validity of the marriage. Such a marriage cannot, however, be registered in Singapore.<sup>26</sup>

22. North Borneo Marriage Ordinance, 1959 (No. 14 of 1959) s.2.

23. See *Syed Abdullah Al-Shatiri v. Shariffa Salmah* (1959) 25 M.L.J. 137 at pp. 140-141.

24. Nawawi, *Minhaj-et-Talibin* translated by E. C. Howard, (London, 1941), p.284. See J. E. Kempe and R. O. Winstedt “A Malay Legal Miscellany” [1952] Journal of the Malayan Branch of the Royal Asiatic Society, Part I, pp.11-12.

25. (1959) 25 M.L.J. 137. But see *Hassan Kutti Beary v. Jainabi* A.I.R. 1928 Madras 1285, where a *Shafii* adult virgin was allowed to set aside a forced marriage to which she had not consented.

26. Singapore Muslims Ordinance, 1957, s.12; Muslim Marriage and Divorce Rules 1959, (G.N. No. S. 239/59) as amended by the Muslim Marriage and Divorce (Amendment) Rules, 1961, (G.N. No. S. 23/61), Rules 8A-8D. The marriage is however valid despite non-registration although the parties might find it difficult to prove their marriage.

In Kelantan, Trengganu and Pahang it is provided that a marriage is void unless both parties have consented thereto<sup>27</sup> although in Pahang this does not apply where it is a marriage by the *wali muzbir*, that is the father or paternal grandfather who has the power of compulsion. The report of the marriage must be made by the parties to the marriage and by the *wali* of the wife, if any. The entry in the register of marriages, however, is not required to be signed by the bride.<sup>28</sup>

In Selangor if the marriage is solemnised by a *wali*, it is the duty of the *wali* together with two persons who witnessed the marriage to report the marriage to the Registrar. Where the marriage is solemnized by a person other than a *wali* or the Registrar, the person solemnizing the marriage is required to send the particulars to the Registrar. The bride is not required to sign the entry in the register of marriage.<sup>29</sup> Both parties to the marriage are however required to fill and sign a prescribed form in which they are required to express their willingness to marry.<sup>30</sup>

In Negri Sembilan it is provided that a marriage may be solemnized only by the Registrar of Muslim Marriages of the place in which the marriage takes place or with his permission by the *wali* or a person duly appointed by the *wali*. After the solemnization of the marriage by a *wali* or the person duly appointed by him the Registrar, with whose permission such marriage was solemnized, shall register the marriage.<sup>31</sup> The parties to the marriage are required to fill in and sign prescribed forms in which they are required to express their willingness to marry.<sup>32</sup>

In Penang, Malacca and Kedah it is provided that a marriage may only be solemnized by the Registrar of Muslim Marriages of the place in which the marriage takes place or by the *wali* of the woman in the presence of and with the permission of the Registrar. After the solemnization of the marriage by the *wali*, the Registrar in whose presence and with whose permission the marriage was solemnized shall registers the marriage. In Penang and Malacca the marriage register has to be signed by both the husband and wife. The consent of the bride

27. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.140; Trengganu Administration of Islamic Law Enactment, 1955, s.98; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.120.

28. Kelantan Council of Religion and Malay Custom and Kathi Courts Enactment, 1953, s.144; Trengganu Administration of Islamic Law Enactment, 1955, s.102; Trengganu Muslim Religious Affairs (Forms and Fees) Rules, 1956 (G.N. No. S. 26 of 1956); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.124.

29. Selangor Administration of Muslim Law Enactment, 1952, ss.121 and 123.

30. Administrative directions relating to Marriage and Divorce issued by the Religious Department, Selangor, in 1962 (No. 64 in P.I.M.S. 95/60).

31. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.116.

32. Marriage, Divorce and Revocation of Divorce Rules, 1962, made under s.172 of the Negri Sembilan Administration of Muslim Law Enactment, 1960.



is, therefore, required for the registration of the marriage.<sup>33</sup>

In Perak and Perlis the report is required to be made by the husband or *wali* of the wife. The bride is not required to sign the entry in the register of marriages.<sup>34</sup>

There are no statutory provisions relating to the consent of the bride in Sarawak and the ordinary *Shafii* law is therefore applicable.

In Brunei it is provided that a marriage shall be void unless both parties to the marriage have consented thereto. The report of the marriage must be made by the parties to the marriage and the *wali* of the wife, if any.<sup>35</sup>

In Sabah the report is required to be made by the husband and the *wali* of the wife. The bride is not required to sign the marriage register. The Marriage Ordinance, 1959, provides that where any marriage is solemnized or contracted it shall be the duty of the person or persons solemnizing such marriage and the witnesses to ascertain and record that both the parties to such marriage have freely expressed their consent to such marriage. Any person upon whom any duty is placed under the Ordinance who fails to discharge such duty shall be liable to punishment.<sup>36</sup>

*Sub-section (e) — Solemnization of marriage. Consent of guardian for marriage.*

The *Shafii* school of Muslim law requires that the consent to marry of the woman should be given through her *wali* or guardian for marriage. Usually this is her father, paternal grandfather, brother or paternal uncle. The *wali* is authorized to solemnize the marriage on behalf of the woman or girl. Where the *wali* refuses his consent to the marriage, or where the woman has no natural *wali*, the Ruler or a person delegated by him, can be the *wali* of the woman or girl. A marriage without the consent of a *wali*<sup>37</sup> is void according to the *Shafii* school of law. Under the *Hanafi* school of law, on the other hand, a woman who has attained puberty can give herself in marriage without the consent of a guardian.

In Singapore it is provided by the Muslims Ordinance, 1957, that a marriage may be solemnized by the *wali* or, at the request of the *wali*, by a *Kathi*. Where the *wali* refuses his consent to the marriage the woman can apply to the *Chief Kathi*. If the *Chief Kathi* is satisfied,

33. Penang Administration of Muslim Law Enactment, 1959 s.116; Malacca Administration of Muslim Law Enactment, 1959, s.115; Kedah Administration of Muslim Law Enactment, 1962, s.116; Straits Settlements Muslim Marriage and Divorce Rules, (G.N. No. 1235 of 1935).

34. Perak Muslim Marriage and Divorce Registration Enactment (Cap. 197), s.3; Perlis Sharaiah Courts Enactment, 1340 ss. 3 and 8.

35. Brunei Religious Council and Kathis Courts Enactment, 1955, ss.139 and 143.

36. North Borneo Muslims Ordinance (Cap. 83), s.5; North Borneo Marriage Ordinance, 1959, (No. 14 of 1959) ss.3 and 5.

37. That is either the natural guardian for marriage or the Ruler or his delegate.

after inquiry, that the consent has been unreasonably withheld, he may solemnize the marriage and act as the guardian of the woman. Where a woman has no natural *wali*, the marriage may only be solemnized by the *Chief Kathi* who acts as her guardian.<sup>38</sup>

In Selangor, under the Administration of Muslim Law Enactment, 1952, marriages may be solemnized by persons authorized by the Ruler. The *wali* is allowed to solemnize a marriage but only in the presence and with the permission of the *Imam*<sup>39</sup> of a mosque. A Registrar of Muslim Marriages is allowed, if satisfied after inquiry that there is no lawful obstacle to the marriage according to Muslim law and Malay custom, to solemnize a marriage at the request of the *wali* of the bride. If there is no *wali* or if, in the opinion of Registrar of Muslim Marriages the *wali* refuses his consent to the marriage, without adequate reasons, the marriage may be solemnized by the Registrar in the mosque area in which the woman ordinarily resides. Before solemnizing the marriage the Registrar must, however, make an inquiry to satisfy himself that there is no lawful obstacle according to Muslim law and Malay custom to the marriage. In cases where the *wali* refuses his consent to the marriage the Registrar must, also, obtain the approval of the Ruler.<sup>40</sup>

In Kelantan, under the Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, it is provided that a marriage may be solemnized by a person holding an authority or *tauliah* from the Ruler authorizing him to solemnize marriages. But any person, permitted under Muslim law to solemnize such a marriage, may do so in the presence and with the permission of a Registrar of Muslim Marriages.<sup>41</sup> It is, however, provided that if a marriage is solemnized in breach of the statutory provisions but in accordance with the provisions of Muslim law it shall be valid and shall be registered, although the persons solemnizing it will be liable to punishment.<sup>42</sup> It is expressly provided that a marriage shall be void and shall not be registered unless all the conditions necessary for the validity thereof, in accordance with the tenets of the school of law to which each of the parties to the marriage belongs, are satisfied.<sup>43</sup> A marriage is void and should not be registered unless both parties to the marriage have consented thereto and the *wali* of the bride has consented thereto in accordance with Muslim law. Alternatively, the *Kathi* having jurisdiction in the place where the bride resides, or any person generally or specially authorized thereto by him, can, after due inquiry in the presence of all parties concerned, grant his consent thereto as *wali raja*<sup>44</sup> in accordance with Muslim law. The consent of a *wali raja* may

38. Muslims Ordinance, 1957, s.7. It is however stated that the provisions of the section shall not apply where the woman to be married belongs to a school of law under which she can be married without the consent of her guardian.

39. The person appointed to lead the congregational prayers in a mosque.

40. Selangor Administration of Muslim Law Enactment, 1952, s.121.

41. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.138.

42. *Ibid.*, s.138(3).

43. *Ibid.*, s.139.

44. The Ruler or his delegate acting as guardian for marriage.

be given whenever there is no *wali* available to act or when the *wali* has refused his consent without sufficient reason.<sup>45</sup>

In Trengganu, under the Administration of Islamic Law Enactment, 1955, a marriage may be solemnized by a person holding the authority or *tauliah* of the Ruler authorizing him to solemnize marriages. But, the *wali* of the bride who by Muslim law is permitted to solemnize such a marriage, may do so with the prior knowledge of a Registrar of Muslim Marriages.<sup>46</sup> As in Kelantan, it is provided that if a marriage is solemnized in breach of the statutory provisions but in accordance with the Muslim law, it shall be valid and shall be registered although the person solemnizing it will be liable to punishment.<sup>47</sup> A marriage is declared to be void and should not be registered unless all the conditions necessary for its validity, in accordance with the tenets of the school of law to which each of the parties to the marriage belongs, are satisfied.<sup>48</sup> A marriage is also void unless both parties to the marriage have consented thereto and either the *wali* of the bride has consented thereto in accordance with Muslim law, or the *Kathi* having jurisdiction in the place where the bride resides, or any person generally or specially authorized by him, has, after due inquiry, in the presence of all parties concerned, granted his consent thereto as *wali raja* in accordance with Muslim law. The consent as *wali raja* may be given whenever there is no *wali* available to act or when the *wali* has refused his consent without sufficient reason.<sup>49</sup>

In Pahang it is provided by the Administration of the Law of the Religion of Islam Enactment, 1956, that a marriage may be solemnized by a person holding a letter of appointment from the Ruler authorizing him to solemnize marriages according to the Muslim law. But a marriage may be solemnized by any other person permitted by the Muslim law to solemnize such marriage, provided that previous notice of the intended solemnization is given to a Registrar of Muslim Marriages.<sup>50</sup> It is expressly provided that a marriage shall be void and shall not be registered under the Enactment unless all conditions necessary for the validity thereof, in accordance with Muslim law are satisfied.<sup>51</sup> A marriage, unless it is a marriage by a *wali muzbir*,<sup>52</sup> shall be void and shall not be registered under the Enactment unless both parties to the marriage have consented thereto and the *wali* of the bride has consented thereto in accordance with the Muslim law. But if there is no *wali* available to

45. In some other States the term used is *Wali hakim*.

46. Trengganu Administration of Islamic Law Enactment, 1955, s.96.

47. *Ibid.*, s.96(3).

48. *Ibid.*, s.97.

49. *Ibid.*, s.98.

50. Pahang Administration of the Law of the Religion of Islam Enactment. 1956. s.118.

51. *Ibid.*, s.119.

52. The guardian for marriage who can under *Shafii* law give a virgin girl in marriage without his consent, that is, the father or grandfather.

act, or where the *wali* has refused his consent without sufficient reasons, the *Kathi* having jurisdiction in the place where the woman to be married resides, or any person generally or specially authorized by him, can after due inquiry in the presence of all parties concerned grant his consent to the marriage as *wali raja* in accordance with Muslim law.<sup>53</sup>

In Penang, Malacca and Kedah it is provided that marriages shall be solemnized according to Muslim law by a Registrar of Muslim Marriages and Divorces of the place in which such marriages are solemnized. But, when present, it is lawful for the *wali* of the bride to solemnize the marriage in the presence and with the permission of the Registrar of the *kariah* or mosque area in which such marriage is solemnized. A Registrar may solemnize a marriage at the request of the *wali* of the woman to be wedded. But, before solemnizing such marriage he must make full inquiry in order to satisfy himself that there is no lawful obstacle according to Muslim law to the marriage. If there is no *wali* of the woman to be wedded, or the *wali* without adequate reason approved by the Registrar refuses his consent to the marriage, the marriage may be solemnized by the Registrar of the *kariah* or mosque area in which the woman to be wedded ordinarily resides. Before solemnizing such marriage the Registrar must, however, make full inquiry to satisfy himself that there is no lawful obstacle according to the Muslim law to the marriage. In cases where the *wali* refuses to give consent to the marriage the Registrar should, if he is not himself a *Kathi*, obtain the approval of the *Kathi* or *Kathi Besar*.<sup>54</sup>

In Negri Sembilan it is provided that a marriage shall be solemnized according to Muslim law by a Registrar of Muslim Marriages of the district in which such marriage is solemnized. A *wali* or a person duly appointed by him can, however, solemnize the marriage with the permission of the Registrar of the district in which such marriage is solemnized. A Registrar may solemnize a marriage at the request of the *wali* of the woman to be wedded, but, before solemnizing such marriage, he must make a full inquiry in order to satisfy himself that there is no lawful obstacle according to Muslim law to the marriage. If there is no *wali* of the woman to be wedded or a *wali*, without adequate reason, approved by the Registrar, refuses his consent to the marriage, the marriage may be solemnized by the Registrar for the district in which the bride ordinarily resides. But before solemnizing such marriage the Registrar shall make inquiry to satisfy himself that there is no lawful obstacle to the marriage.<sup>55</sup>

In Johore it is provided by the Muslims Marriage Enactment that a marriage between persons both of whom profess the Muslim Religion shall be celebrated by a *Kathi* or *Naib Kathi* appointed under the enactment. A marriage celebrated in contravention of this provision is not,

53. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.120.

54. Penang Administration of Muslim of Muslim Law Enactment, 1959, s.116; Malacca Administration of Muslim Law Enactment, 1959, s.115; Kedah Administration of Muslim Law Enactment, 1962, s.116.

55. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.116.

for that reason alone, deemed invalid but any person other than a *Kathi* or *Naib Kathi* celebrating such marriage is liable to punishment.<sup>56</sup>

In Perlis it is provided that, within fifteen days from the celebration of any marriage, the husband or the *wali* of the woman shall personally report such marriage to the *Kathi* or to the Registrar appointed for that purpose. It is also provided that any man and woman who marry before an *Imam* or otherwise, without first informing the woman's *wali*, shall be guilty of an offence.<sup>57</sup>

There are no express provisions in Perak relating to the solemnization of marriage, but registration is compulsory as in the other States of Malaya. Among the particulars required to be given on the registration of a marriage are the names of the *wali* of the wife and the names of the husband's and wife's *penghulu*.<sup>58</sup>

In Brunei, under the Religious Council and Kathis Courts Enactment, 1955, marriages may be solemnized by any person holding an authority from the Ruler to solemnize marriages. A marriage may also be solemnized by any other person permitted under Muslim law to solemnize such marriage, if the marriage takes place in the presence and with the permission of the Registrar of Muslim Marriages. It is, however, provided that a marriage solemnized in breach of the provisions of the enactment, but in accordance with the provisions of Muslim law, is valid and shall be registered under the provisions of the enactment. A marriage is void and shall not be registered unless all the conditions necessary for the validity thereof, in accordance with the tenets of the school of law to which each of the parties to the marriage belongs, are satisfied. A marriage is also void and shall not be registered unless both parties to the marriage have consented to it. In addition the *wali* of the bride must consent thereto in accordance with Muslim law or, where there is no *wali* available to act or where the *wali* has refused his consent without sufficient reason, the *Kathi*, who has jurisdiction in the place where the bride resides, or any person generally or specially authorized thereto by him, can after due inquiry in the presence of all parties concerned grant his consent thereto as *wali raja*.<sup>59</sup>

There are no express provisions in Sabah relating to the solemnization of Muslim marriages. It is provided that within seven days of the celebration of any Muslim marriage the husband and the *wali* of the wife shall personally report such marriage to the *Imam* of the district in which the marriage takes place and the marriage is then registered.<sup>60</sup>

56. Johore Muslim Marriage Enactment (E. No. 17), s.6.

57. Perlis Sharaiah Courts Enactment, 1340 ss.3 and 8.

58. Perak Muslim Marriage and Divorce Registration Enactment (Cap. 197), s.3.

59. Brunei Religious Council and Kathis Courts Enactment, 1955, ss.137-139.

60. North Borneo Muslims Ordinance (Cap. 83) s.4. "*Imam* of the district" is defined as the *Imam* or *Kathi* to whom a certificate has been issued by the President stating that he is recognised as the *Imam* of the district by the Muslim community of such district.

In Sarawak it is provided by the Muslim Marriage Ordinance that every Headman of a town or village in which a mosque is situated shall keep a register of marriages and divorces that take place in such town or village. The registers kept by the Headman of a town or village are required to be sent to the Resident or District Officer and entries from such registers are copied into the Register of Muslim Marriages. The Headman is required to make such inquiries as he considers necessary to satisfy himself of the lawfulness of the intended marriage or of the validity of the divorce and, for the purpose of such inquiry, may summon any person of the Malay race or professing the Muslim religion to appear before him to give evidence or to produce a document. An *orang dagang*, that is, a person of the Malay race or professing the Muslim religion who is not domiciled in Sarawak, cannot marry in Sarawak until he has proved to the satisfaction of the Native Officer of the District that he is not already married, that he is free from debt and that he is able to provide for and maintain a wife and family and has obtained the permission of the Native Officer to marry. It is provided that any person who reads the *Nikah*, that is, the ceremony of marriage, without first satisfying himself that the marriage has been registered and that, if necessary, the permission of the Native Officer has been obtained, is guilty of an offence. It is however provided that nothing in the Ordinance shall operate to invalidate a marriage which is otherwise lawful.<sup>61</sup>

It is also provided in the *Undang-Undang Makhamah Melayu Sarawak*<sup>62</sup> that where a woman states that she has no *wali* or guardian for marriage the *Hakim*<sup>63</sup> takes the place of the guardian. Where there is no Muslim officer in charge of a district or division, the *Imam*<sup>64</sup> or *Tua Kampong*<sup>65</sup> can act as *wali Hakim* with the authority of the *Majlis Islam*.<sup>66</sup> The *Hakim* or *Imam* or *Tua Kampong* can only act if there is no *wali* or if the *wali* is regarded by Muslim law to be at a distance which allows the application of the rule of "*kasa*".<sup>67</sup>

*Sub-section (f) — Capacity to marry.*

A woman who is already married is not allowed to marry again while the marriage is subsisting<sup>68</sup> and where a marriage is terminated by

61. Sarawak Muslim Marriage Ordinance (Cap. 75 of the Revised Laws 1946) ss.3-10.

62. *Undang-undang Makhamah Melayu*, Sarawak, s.67 and addenda para. 2.

63. The Ruler or Government, here used in the sense of a Resident or District Officer.

64. The leader in prayer appointed for a mosque.

65. Village headman.

66. The Council of Religion and Malay Customs constituted under the *Majlis Islam (Incorporation) Ordinance*, (Cap. 105 of 1958 Laws of Sarawak).

67. The Arabic term is "*masafat al-qasr*" and the distance is given as two *marhalah* or the distance that can normally be covered by a camel travelling a day and a night. The equivalent distance is given as 88½ kilometres or 48 miles. Under the *Shafii* law where the *wali* is away at the distance which enables the application of "*kasa*", then the right of guardianship for marriage devolves on the Ruler or the *Kathi*, as his delegate.

68. A Muslim married woman may be convicted of bigamy — *Reg. v. Rabia* (1889) 4 Ky. 513.

divorce or the death of the husband, the wife is only allowed to marry after a compulsory period of waiting called the *eddah*.<sup>69</sup> Under Muslim law a person is permitted to marry more than one wife up to a maximum of four, provided he is able to treat his wives with equity.

This permission to marry more than one wife has been restricted in Singapore. It is provided that where the man to be married already has a living wife or wives, the marriage may only be solemnized by the *Chief Kathi* or with his written consent by the *wali* of the woman to be married. The *Chief Kathi* is required to hold an inquiry to satisfy himself that there is no lawful obstacle to the marriage according to Muslim law. The parties are required to give at least fourteen days notice of the intended marriage to enable such an inquiry to be held.<sup>70</sup>

In Selangor and Negri Sembilan the man must declare in the prescribed form to be filled before the marriage whether he is already married or not. If he is already married further inquiries will be made.<sup>71</sup>

In Sarawak it is provided in the *Undang-Undang Mahkamah Melayu Sarawak* that a person is permitted to marry more than one wife if he shows that he is able to maintain more than one wife, as for example where he has money or houses or estates or is in receipt of an ample salary. The proper maintenance payable for each wife is fixed at from twenty dollars to fifty dollars a month.<sup>72</sup>

There are no restrictions on plural marriages in the other States of Malaysia or in Brunei.

#### *Sub-section (g) — Prohibited Marriages.*

Marriage may not be solemnized between persons who come within the prohibited degrees of consanguinity or affinity. In general the prohibited degrees for marriage include on the grounds of consanguinity a person's direct ascendants and descendants and the children of any ascendant and the children of any brother or sister. On the grounds of affinity a man is prohibited from marrying the ascendants or descendants of his wife and the wife of any ascendant or descendant. There is also a prohibition arising from fosterage, but fosterage is not frequent in Malaysia and Brunei. A man is also forbidden to have two wives at the same time, so related to each other by consanguinity, affinity or fosterage, that they could not have lawfully intermarried with each other if they had been of different sexes.<sup>73</sup>

69. The period of continence imposed on a woman on the termination of her marriage on the death of her husband or on divorce.

70. Muslims Ordinance, 1957 (as amended by the Muslims (Amendment) Ordinance, 1960), s.74; Muslim Marriage and Divorce Rules, rule 8C. In 1961 three applications for such marriages were approved while in 1962 five such applications were approved.

71. Selangor Administrative Rules issued by Religious Department in 1962; Negri Sembilan Rules Relating to Marriage, Divorce and Revocation of Divorce, 1962.

72. *Undang-Undang Mahkamah Melayu*, s.37.

73. See A. A. Fyzee, *Outlines of Muhammadan Law* (London, 1955), pp.87-89. Malay custom also bars marriages between cognates, as for example between maternal cousins — see Haji Mohamed Din bin Ali, *op. cit.* note 6 *supra*, at p. 23.

Muslim law also prohibits a man from marrying a woman whom he has divorced three times or with three *talaks*,<sup>74</sup> unless she has after such divorce been married to another person and divorced, after consummation of the marriage, by such person.

Under the Muslim law a man may marry a Muslim woman or a *kitabiyya*, that is a person belonging to a revealed religion with a holy scripture, like Christianity or Judaism; but a Muslim woman cannot marry any one except a Muslim. In the States of Malaya the Civil Marriage Ordinance, 1952, provides that no marriage one of the parties to which professes the religion of Islam shall be solemnized or registered under the Ordinance. There is however no such express restriction in the Christian Marriage Ordinance, 1962. In Singapore the Women's Charter, 1961, provides that no marriage one of the parties to which is a Muslim shall be solemnized or registered under the Ordinance. In Sarawak it is provided that the Church and Civil Marriage Ordinance shall not apply to marriages contracted according to the usages of Muslims.<sup>75</sup>

According to Muslim law in order that a marriage may bear the character of a suitable union in law, the husband must be the equal of the woman in social status. There is no corresponding provision that the wife should be of equal status with the husband, for by marriage he is regarded as having raised her to his position. The *Hanafi* school holds that equality (*kifa'a*) between the two parties is a necessary condition in marriage and an ill-assorted or runaway marriage is under certain circumstances liable to be set aside by the Court. The factors that are to be considered for determining equality are family, religion, profession, freedom, good character and means. Where a woman who has attained majority contracts herself with a man who is not her equal without the consent of any of those male relations who would be entitled to be her guardians for marriage, if she were a minor, the Court on the application of such relations has the power to rescind the marriage. According to the *Shafii* school of law a guardian cannot give a woman in marriage to a man of inferior condition except with her consent. According to most *Shafii* authorities such a marriage is void, even if it is the father who gives the woman in marriage to her inferior without her consent. Where there are several guardians of equal competence, a

74. The pronouncement of repudiation of a wife. This is usually done once, but exceptionally three repudiations might be pronounced at once. In *Syed Mohamed Yassin v. Syed Abdul Rahman* (1922) 15 S.S.L.R. 199 the view was accepted that an irrevocable divorce can be effected by pronouncing three *talaks* at short intervals or in immediate succession or by intimating the intention to dissolve the marriage once only by words showing a clear intention that the divorce should be immediately irrevocable. The better view is however that an irrevocable divorce can only be affected by the pronouncement of three *talaks* or by a divorce with compensation. In Singapore the Shariah Court, following the view adopted in the Arab countries and in Pakistan, regards the pronouncement of three *talaks* at once and in the same place as the pronouncement of a single *talak*.

75. A. A. Fyzee, *op. cit.* at p.79; Federation Civil Marriage Ordinance, 1952 (No. 44 of 1952) s.32(2); Federation Christian Marriage Ordinance, 1956 (No. 33 of 1956) ; Singapore Women's Charter, 1961 (No. 18 of 1961), s.3; Sarawak Church and Civil Marriage Ordinance (Chapter 92), s.1(2). See *Martin v. Umi Kelsom* (1963) 29 M.L.J. 1.



misalliance requires the consent of all such guardians as well as the woman herself. Neither the Sultan nor the Judge or *Kathi* can legally give a woman in marriage to a man of inferior status, even though she may desire it. The factors to be taken into consideration in determining whether the husband is of equal status are birth, character, profession and absence of defects of the body.<sup>76</sup>

*Sub-section (h) — Mas-kahwin and Pemberian.*

*Mas-kahwin* or *mahr* means the obligatory marriage payment due under Muslim law to the wife at the time the marriage is solemnized, whether paid in cash or in kind or payable as a debt with or without security. It can be either prompt (*tunai*) or deferred (*hutang*).<sup>77</sup>

In Selangor and Brunei *pemberian* means the optional marriage settlement made by the husband to the wife at the time of the marriage in cash or in kind.<sup>78</sup> In Kelantan and Trengganu it is defined as a gift in cash or in kind made by the husband to the wife on account of the marriage<sup>79</sup> while in Kedah it is defined as the marriage gift in cash or kind made by the husband to the wife at the time of the marriage.<sup>80</sup>

In Negri Sembilan, Penang and Malacca *pemberian* means the marriage gift, other than cash, made by the husband to the wife at the time of the marriage, and in Negri Sembilan and Malacca *hantaran* is defined as the obligatory cash payment due to be paid under local custom by the bridegroom to the bride at the time the marriage is solemnized. In Pahang the term used is *belanja*, which is defined as the optional expense agreed by both parties at the time of betrothal.<sup>81</sup>

In Selangor, Kelantan, Trengganu, Pahang, Penang, Malacca, Negri Sembilan, Kedah and in Brunei it is provided that the *mas-kahwin* shall ordinarily be paid by the husband or his representative to the wife or her representative in the presence of the person solemnizing the marriage and at least two other witnesses. The Registrar of Muslim Marriages and Divorces is required to ascertain and record in respect of every marriage to be registered:

76. A. A. Fyze, *op. cit.* note 73 *supra*, at pp.91-93; Nawawi, *op. cit.* note 24, *supra*, at pp.288-289. See *Salmah v. Soolong* (1888) 1 Ky. 423.
77. The practice in some Muslim countries of paying a small prompt dower and deferring the larger portion of the dower to be paid on the pronouncement of divorce by the husband, thus deterring him from frivolous or hasty divorces, is not generally followed in Malaysia except in the areas where the Malay *adat* is followed — see M. Siraj, "The Shariah Court of Singapore" (1963) 5 M.L.R. 148 at p.157.
78. Selangor Administration of Muslim Law Enactment, 1952, s.2; Brunei Religious Council and Kathis Courts Enactment, 1955, s.2.
79. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.2; Trengganu Administration of Islamic Law Enactment, 1955, s.2.
80. Kedah Administration of Muslim Law Enactment, 1962, s.2.
81. Negri Sembilan Administration of Muslim Law Enactment, 1956, s.2; Penang Administration of Muslim Law Enactment, 1959, s.2; Malacca Administration of Muslim Law Enactment, 1959, s.2; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.2.

- (a) the amount of the *mas-kahwin*;
- (b) the amount of any *pemberian* (or *belanja* in the case of Pahang or, in Negri Sembilan and Malacca, the amount of the *hantaran* and the form of any *pemberian*) ;
- (c) the amount of any part of the *mas-kahwin* or *pemberian* (or *belanja* or *hantaran*) or both which was promised but not paid at the time of the solemnization of the marriage; and
- (d) particulars of any security given for the payment of any *mas-kahwin* or *pemberian* (or *belanja* or *hantaran*).<sup>82</sup>

In the other States of Malaysia provision is made for the inclusion in the register of marriage of particulars of the *mas-kahwin* and any gifts given by the husband.<sup>83</sup>

The Malay customary rules regarding the *mas-kahwin* (or *berian* in the Borneo States) represent a compromise between the Muslim law and the ancient Malay custom. Muslim law recognises one payment, the *mahr*; Malay customary law, on the other hand, insists on a whole series of conventional presents, beginning with the betrothal and sometimes continuing till the birth of the first child or even later. A sort of compromise has been arrived at by identifying one of these many presents, the *mas-kahwin*, with the Muslim *mahr*. *Mas-kahwin* originally meant money paid by the bridegroom to the bride's parents but is now like the Muslim *mahr* paid (or more usually promised and left as an outstanding debt) to the bride herself.<sup>84</sup>

Under Muslim law there is no fixed legal minimum for the *mas-kahwin*. It should however possess some value and it is recommended that it should be not less than ten nor more than five hundred *dirhams*.<sup>85</sup> Where no amount is stipulated for the *mas-kahwin* in the marriage contract, the law gives the wife a right to proper *mas-kahwin* proportionate to her situation and position in life. Under the Malay custom the amount of the *mas-kahwin* is fixed and normally depends on the rank of the father of the bride. In Negri Sembilan for example the amount of the *mas-kahwin* must be the traditionally accepted amount as fixed by custom

82. Selangor Administration of Muslim Law Enactment, 1952, s.125; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.143; Trengganu Administration of Islamic Law Enactment, 1955, s.101; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.124; Penang Administration of Muslim Law Enactment, 1959, s.120; Malacca Administration of Muslim Law Enactment, 1959, s.119; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.120; Kedah Administration of Muslim Law Enactment, 1956, s.120. Brunei Religious Council and Kathis Courts Enactment, 1955, s.142.

83. See Perak Muslim Marriage and Divorce Registration Enactment (Cap. 197 of 1935 Edition of Laws of the Federated Malay States) Schedule A; and Singapore Muslim Marriage and Divorce Rules, 1959, (G.N. No. S. 239/59) Schedule.

84. J. R. Wilkinson, *Malay Law, Papers on Malay Subjects*, (Singapore, 1908) pp.53-54; E. N. Taylor, "Inheritance in Negri Sembilan" [1948] *Journal of the Royal Asiatic Society, Malayan Branch*, (Part 2), p.47.

85. The *dirham* is an Arabic coin. See Wilson, *Anglo-Muhammadan Law*, (London, 1930), pp.116-117 and p.420.

in the particular area. The customary *mas-kahwin* among the peasantry in Negri Sembilan is twenty-four dollars. A bridegroom may be asked to pay varying amounts by the bride's parents, depending upon the status, education and the eligibility of the bride. But whatever sum is asked for, the legal customary *mas-kahwin* must be the amount fixed by custom, that is twenty four dollars. The rest is regarded as being for the personal and ceremonial expenses incumbent for the occasion. Such expenses are called *belanja hangus* or incidental expenditure and are quite apart from the *mas-kahwin*. In Pahang it is provided that the amount of the *mas-kahwin* may be fixed from time to time by the Ruler in Council. In Perak the amount of the *mas-kahwin* varies with the status of the father of the bride ranging from fifty dollars for the daughter of a commoner to one thousand dollars for the daughter of the Ruler. In the districts of Naning and Alor Gajah in Malacca, which follow the *adat perpateh*, the amount of the *mas-kahwin* is fixed at sixty dollars for an unmarried woman and forty dollars for a previously married woman.<sup>86</sup> There appears to be no maximum amount fixed for *berian* in Sarawak except in the case of *nikal salah*, i.e. a marriage which takes place where the man has committed an act which is considered and accepted as wrong by Malay custom, as, for example, where he is found together with a woman in such circumstances as to raise a suspicion of their behaviour. In such cases a *berian* of \$50, in the case of a spinster, and \$20, in the case of a divorced woman, and no more is paid to the woman.

The term used for the *mas-kahwin* in Sarawak and Sabah is *berian*. In Sabah the maximum amount payable as *berian* in the various districts is prescribed by rules and varies from fifty dollars to two hundred dollars in the case of an unmarried woman and forty dollars to six hundred dollars in the case of a woman who has been previously married. Among the Illanun and Bajau races in the Kota Belud District of Sabah, the *berian* was originally paid in weight of brass cannon but this custom has been substituted by fixed cash payments, the basis of which is still however the weight of brass cannon and is so referred to locally. The amount varies according to the class to which the father of the bride belongs.<sup>87</sup>

In *Janat v. Sheikh Khuda Buksh*<sup>88</sup> the order of a *Kathi* for the payment of *mas-kahwin* to a divorced wife was confirmed on appeal. It was held that the husband must pay the *mas-kahwin* in money. Only with the wife's consent may he substitute articles for money. If articles are given they cannot be regarded as part of the *mas-kahwin* in the absence of proof of such consent and the burden of proof is on the husband.

#### *Sub-section (i) — Procedure and formalities.*

The laws in the States of Malaysia and Brunei provide for the compulsory registration of all Muslim marriages.

86. Haji Mohamed Din bin Ali, *op. cit.* note 6 *supra*, at p.27; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.2; Mahmud Ahmad *Kebudayaan Sa-pintas Lalu*, (Singapore, 1960), pp.144-145.

87. *Undang-Undang Makhamah Melayu*, Sarawak (Appendix); North Borneo Muslims Brian and Free Rules (Laws of North Borneo, 1953 Vol. 5 p.353); D. Headly, "Some Illanun and Bajau Marriage Customs in the Kota Belud District, North Borneo", [1950] *Journal of the Royal Asiatic Society, Malayan Branch*, (Part 3) p.159.

88. (1911) 2 F.M.S.L.R. 61.

In Singapore the parties to a marriage are required to apply on a prescribed form and to make a statutory declaration declaring the truth of the particulars given. Where the woman has a guardian for marriage, the application is made by such guardian on her behalf. Except in cases where the guardian of the bride has refused his consent to the marriage, or where the man already has a living wife or wives, the marriage can be solemnized as soon as the *kathi* solemnizing the marriage is satisfied that there are no lawful obstacles to the marriage. Where the guardian of the woman refuses his consent to the marriage or where the man already has a living wife or wives, the *Chief Kathi* is required to hold an inquiry to ascertain that there are no lawful obstacles according to the Muslim law to the marriage and the parties are required to give at least fourteen days notice of the intended marriage.<sup>89</sup>

In Selangor and Negri Sembilan under rules issued by the Religious Department, the parties to a marriage are required to fill up the prescribed forms before the solemnization of the marriage and this has to be signed by both the parties to the marriage.<sup>90</sup>

*Sub-section (j) — Effect of registration.*

In Singapore it is provided in the Muslims Ordinance, 1957, that nothing in the Ordinance shall be construed to render valid or invalid, merely by reason of its having been or not having been registered, any Muslim marriage, divorce, or revocation of divorce which otherwise is valid or invalid. Failure to report a marriage, divorce or revocation of divorce is, however, an offence under the Ordinance.<sup>91</sup>

In Sarawak it is provided that any person who reads the service of marriage without first satisfying himself that the marriage has been registered is guilty of an offence. Registration of marriages and divorces is compulsory, but there appears to be no obligation to report a marriage or divorce. It is provided, in the Muslim Marriage Ordinance, which provides for such registration, that nothing in the Ordinance shall operate to invalidate a marriage which is otherwise lawful.<sup>92</sup>

In Sabah the registration of Muslim marriages and divorces is compulsory and failure to make a report is made an offence.<sup>93</sup>

The enactments in the other states of Malaysia and in Brunei require every marriage, divorce and revocation of divorce to be registered but it would appear that non-registration does not affect the validity of

89. Muslim Marriage and Divorce Rules, 1959, (G.N. No. S. 239 of 1959), as amended by the Muslim Marriage and Divorce (Amendment) Rules, 1961, (G.N. No. S. 23 of 1961) rules 8A-8D.

90. Administrative Rules issued by Religious Department, Selangor, in 1962; Negri Sembilan Marriage, Divorce and Revocation of Divorce Rules, 1962, rules 8 and 10.

91. Muslims Ordinance, 1957, ss.19 and 58.

92. Sarawak Muslim Marriage Ordinance (Cap. 75 of 1946 Revised Edition), ss.6, 8 and 10.

93. North Borneo Muslims Ordinance (Cap. 83), s.5.

the marriage, divorce or revocation of divorce. Failure to report a marriage, divorce or revocation of divorce is made an offence.<sup>94</sup>

*Section 2 — Effects of marriage on the legal status of women.*

*Sub-section (a) — Personal status including civil capacity.*

Marriage does not in general affect the personal status of a Muslim woman. She retains her property and any wages and earnings acquired or gained by her belong to her. She is entitled to sue and be sued in her own name in respect of her property and in respect of contracts entered into by her.

The English Common Law rule that on marriage the wife acquires the domicile of her husband applies throughout Malaysia and in Brunei. The law relating to torts in Malaysia and Brunei follows the English law. Both husband and wife have a right of damages against a third person for enticement. Each spouse may also maintain an action for damages against a wrongdoer whose negligence caused the death of the other spouse.

In Singapore the provisions of the Women's Charter, 1961, relating to the rights and duties of husband and wife are not applicable to Muslims.<sup>95</sup> The provisions applicable to Muslims are contained in the Muslims Ordinance, 1957. A Muslim married woman may maintain a suit in her own name for the recovery of property of any description which is her own property. She has, in her own name, the same remedies, both civil and criminal, against all persons for the protection and security of such property as if she were unmarried. She is, also, liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried.<sup>96</sup> It has been held that a Muslim woman can be convicted of criminal breach of trust in respect of property belonging to her husband<sup>97</sup> and that a Muslim husband can be convicted of attempting to cheat his wife.<sup>98</sup> If a Muslim married woman enters into a contract relating to her property the person who contracts with her is entitled to sue her and, to the extent of her property, to recover from her whatever he might have recovered if she had been unmarried at the date of the contract and continued unmarried at the execution of the decree. In the absence of special stipulation whereby the husband has made himself responsible as surety, joint contractor or otherwise,

94. Selangor Administration of Muslim Law Enactment, 1952, ss.121 and 160; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, ss.144 and 180; Trengganu Administration of Islamic Law Enactment, 1955, ss.102 and 138; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss.124 and 159; Penang Administration of Muslim Law Enactment, 1959, ss.116 and 152; Malacca Administration of Muslim Law Enactment, 1959, ss. 115 and 151; Negri Sembilan Administration of Muslim Law Enactment, 1900, ss. 116 and 154; Kedah Administration of Muslim Law Enactment, 1962, ss.116 and 154; Perak Muslim Marriage and Divorce Registration Enactment (Cap. 197), ss.3 and 6; Johore Muslim Marriage Enactment (Enactment No. 17), s.7; Perlis Sharaiah Courts Enactment, 1340, ss.3 and 7; Brunei Religious Council and Kathis Courts Enactment, 1955 ss.143 and 179.

95. Women's Charter, 1961 (No. 18 of 1961) s.3.

96. Muslim Ordinance, 1957 (No. 25 of 1957) s.51.

97. *Re Ketuna Bibi* (1955) 21 M.L.J. 166.

he is not to be sued on such contracts. The Muslim husband may, however, be liable for debts contracted by his wife if, expressly or impliedly, she acted as his agent. It is provided that such liability is to be measured according to the English law in force in Singapore. A Muslim husband is not, by reason only of his marriage, liable for the debts of his wife contracted before marriage. But, the wife is liable to be sued for and is to the extent of her own property liable to satisfy such debts as if she had remained unmarried. No Muslim person acquires by any marriage an interest in the property of the person whom he or she marries, nor does such person become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. When a Muslim husband and his wife or wives live together in the same house, the household goods, vehicles and household property of the husband and wife or wives, except the paraphernalia of the wife or wives, are held *prima facie* to belong to the husband in any question between the husband and his creditors.<sup>99</sup> All settlements and dealings with property between a Muslim husband and wife are governed by the rules of the English law in force in the State; when there is no adequate consideration on either side such settlements and dealings would be held to be voluntary in any question between the husband and the wife or either of them and his or her creditors.

In the States of Malaya the Married Women Ordinance, 1957, applies to Muslim married women, subject to the provisions of Muslim law and the custom of the Malays governing the relations between husband and wife<sup>1</sup>. The Married Women Ordinance, 1957, provides that a married woman is capable of rendering herself and being rendered liable in respect of any contract, debt or obligation and of suing and being sued in respect of any such contract, in all respects as if she were a *feme sole*. The Ordinance also provides that a married woman shall be capable of suing and being sued in respect of a tort as if she were a *feme sole*. A wife cannot sue her husband in tort save for the protection or security of her property. Thus, a wife may sue her husband for such torts as detainment or conversion of chattels belonging to her but not for such torts as libel, negligence or assault. Similarly, a husband cannot sue his wife in tort, except for the protection or security of his property. No criminal proceedings may be taken by a wife against her husband or by a husband against his wife while they are living together as to any property claimed by her or him respectively. Neither can they bring an action while they are living apart, as to any act done by the husband or wife while they were living together concerning property claimed by the wife or husband respectively, unless such property has been wrongly taken by the husband or wife when leaving or deserting or about to do so. A wife may however institute criminal proceedings against her husband for personal injuries.<sup>2</sup>

98. *Nuruddin v. Siti Aminah* (1929) S.S.L.R. 146.

99. Muslims Ordinance, 1957, ss.52-57. Section 9 of the Civil Law Ordinance (Cap. 24) provides that the husband of a married woman shall not by reason only of his being her husband be liable in respect of any tort committed by her whether before or after the marriage or in respect of any contract entered into or debt or obligation incurred by her before the marriage.

1. Married Women Ordinance, 1957, (No. 36 of 1957), s.3.

2. *Ibid.*, ss.4 and 9.

There are no special statutory provisions in Sarawak, Sabah and Brunei relating to the status, rights and obligations of married women. It might be argued that the law in England is applicable but it is doubtful whether such law is applicable to Muslims.<sup>3</sup>

*Sub-section (b) — Maintenance.*

A wife is entitled to reasonable maintenance from her husband during the marriage.

In Singapore the Shariah Court has the power to inquire into and adjudicate upon claims for maintenance by Muslim married women. Any order made by the Shariah Court is, until reversed, a bar to proceedings for maintenance under the Women's Charter, 1961.<sup>4</sup> Where no such order has been made, a Muslim woman may apply in the Magistrate's courts for maintenance under the Women's Charter, 1961. The Shariah Court may enforce the payment of maintenance by ordering the amount to be levied in the manner provided for levying fines or may sentence the husband to imprisonment for a term which may extend to six months. A maintenance order made by a Shariah Court can, also, be enforced by the making of an attachment of earnings order under the Women's Charter, 1961.<sup>5</sup>

In Selangor, Kelantan, Trengganu, Penang, Malacca and Negri Sembilan a married woman may, by application in the court of a *kathi*, obtain an order against her husband for the payment, from time to time, of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim law. It is, also, provided that the Married Women and Children (Maintenance) Ordinance, 1950, shall not apply in the case of any claim for maintenance by a Muslim against a Muslim.<sup>6</sup>

In Pahang a married woman may apply in the court of a *kathi* for an order against her husband for the payment from time to time in cash or in kind in respect of her maintenance as she may be entitled to in accordance with the Muslim law. It is provided that the Married Women and Children (Maintenance) Ordinance, 1950, shall not apply in the case

3. The common law of England and the doctrines of equity together with statutes of general application are made applicable so far only as the circumstances of the State and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary: Sarawak Application of Laws Ordinance (Cap. 2), s.2; North Borneo Application of Laws Ordinance (Cap. 6), s.2; Brunei Application of Laws Ordinance (Cap. 2), s.2.
4. Muslims Ordinance, 1957 (as amended by the Muslims (Amendment) Ordinance, 1960 (No. 40 of 1960) ), s.36.
5. Women's Charter, 1961, ss.70(f).
6. Selangor Administration of Muslim Law Enactment, 1952, ss.138 and 139; Kelantan Council of Religion and Malay Custom, and Kathis Courts Enactment, 1953, ss.158 and 159; Trengganu Administration of Islamic Law Enactment, 1955, ss.116 and 117; Penang Administration of Muslim Law Enactment, 1959, ss.133 and 134; Malacca Administration of Muslim Law Enactment, 1959, ss.131 and 132; Negri Sembilan Administration of Muslim Law Enactment, 1960, ss.132 and 133; Kedah Administration of Muslim Law Enactment, 1962, ss.133 and 134.

of any claim for maintenance by a Muslim against a Muslim.<sup>7</sup>

In the other parts of the Federation (where no law has been passed to provide that the provisions of the Married Women and Children (Maintenance) Ordinance, 1950, shall not apply to any person professing the Muslim religion and whose wife or whose legitimate or illegitimate children profess the Muslim religion) applications for maintenance can be made under the Married Women and Children (Maintenance) Ordinance, 1950.<sup>8</sup> Applications for maintenance can also be brought in the *kathi* courts in Perak, Negri Sembilan, Johore and Perlis where the *kathi* is given power to deal with such applications.

In Brunei a married woman may, by application in the court of a *Kathi*, obtain an order against her husband for the payment from time to time of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim law. Chapter xxxiii of the Criminal Procedure Code does not apply in the case of any claims for maintenance made by a Muslim against a Muslim.<sup>9</sup>

In Sabah and Sarawak there are no special provisions for applications by Muslim women for maintenance and the provisions of the general law relating to claims for maintenance apply to Muslims.<sup>10</sup>

In Sarawak it is enacted in the *Undang-Undang Makhamah Melayu* Sarawak that, if the husband, contrary to the usual custom, asks the wife to leave her family and stay with his family, she will not be asked to do so unless the husband can provide a separate house for her in her *kampong*, or if there is no place available in her *kampong*, at some other place.<sup>11</sup> If, however, the husband has to stay at a particular place because of his work, then the wife must accompany him to that place.<sup>12</sup>

#### *Sub-section (c) — Property Rights.*

In Singapore all the property belonging to a woman on her marriage, whether movable or immovable, and however acquired, continues, in the absence of special written contract to the contrary, to be her own property. The following are deemed to be the property of a Muslim married woman: (a) wages and earnings acquired or gained by her during marriage in any employment, occupation or trade carried on by her; (b) any

7. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss.137 and 138. These provisions enable orders to be made for accommodation and appear to be more in accord with the Muslim law.

8. No. 36 of 1950.

9. Brunei Religious Council and Kathis Courts Enactment, 1955 (No. 20 of 1955) ss.157 and 158.

10. Sarawak Criminal Procedure Code (Cap. 62 of the 1946 Revised Edition) ss.335-340; North Borneo Maintenance Ordinance, 1959 (No. 7 of 1959).

11. *Undang-Undang Makhamah Melayu*, Sarawak, (Laws of Sarawak, 1958, Vol. VII p.673) s.43. The usual custom in the areas in the States of Malaya which follow the *adat perpateh* is that the husband stays in the house of the wife or her family.

12. *Ibid.* s.44.



money or other property acquired by her during marriage through the exercise of any skill or by way of inheritance, legacy, gift, purchase or otherwise; and (c) all savings from any investments of such wages, earnings and property. Her receipts alone are a good discharge for such wages, earnings and property and she may dispose of them by deed or otherwise without the concurrence of her husband. A married Muslim woman can maintain a suit in her own name for the recovery of property of any description which is her own property; she has in her own name the same remedies both civil and criminal, against all persons for the protection and security of her property as if she were unmarried and she is, also, liable to be sued in respect of such property as if she were unmarried.<sup>13</sup>

S. 120 of the Singapore Bankruptcy Ordinance provides that a married woman shall, in respect of her separate property, be subject to the Ordinance in the same way as if she were unmarried.<sup>14</sup> It has been held in *Re Mahmooda binte Ismail*<sup>15</sup> that this provision applies to a married Muslim woman and that the court has no jurisdiction to adjudge a Muslim married woman bankrupt without proof that she has separate property at the time of the petition.<sup>16</sup>

In the States of Malaya the Married Women Ordinance, 1957, provides that a married woman is capable of acquiring, holding and disposing of any property in all respects as if she were a *feme sole*. Restraints on anticipation are abolished for the future. The property of a married woman is liable for all her debts and obligations and a married woman is subject to the law relating to bankruptcy and to enforcement of judgments and orders. Moreover, a married woman has in her own name, against her husband, the same remedies and redress for the protection of her property as if she were a *feme sole*. But criminal proceedings concerning property cannot be taken by a wife against her husband while they are living together, nor while they are living apart, concerning any act done while living together, unless such property was taken by the husband when leaving or deserting or about to leave or desert his wife.<sup>16</sup> S. 120 of the Federation Bankruptcy Ordinance, 1959, renders a married woman subject to the Ordinance in all respects as if she were a *feme sole*.<sup>17</sup>

There are no statutory provisions relating to the property rights of married women in the Borneo States but it would appear that the principles of Muslim law would be applied in the case of Muslims.

*to be continued.*

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13. Muslims Ordinance, 1957, ss.49-51.

14. Bankruptcy Ordinance (Cap. 11). s.120.

15. (1961) 27 M.L.J. 195.

16. Married Women Ordinance, 1957, (No. 36 of 1957) ss.4-9.

17. Bankruptcy Ordinance, 1959 (No. 20 of 1959), s.120

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