

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

Section 3 — Dissolution of marriage, annulment and separation including their effects on the status of husband and wife.

In Muslim Law, a husband is permitted to divorce his wife by pronouncing a *talak* or repudiation against her. Although divorce is permitted, it is not encouraged and, in religious theory, at least, is frowned upon. According to the *Hanafi* school of Muslim Law there are three forms of *talak*, that is (a) the *ahsan*¹ form by the pronouncement of one *talak* in a period of purity followed by abstinence from sexual intercourse for the period of the *eddah*;² (b) the *hasan*³ form by the pronouncement of the *talak* three times in three consecutive periods of purity, that is between three successive menstruations; and (c) the *bida'at*⁴ form by the pronouncement of the *talak* three times at shorter intervals or even in immediate succession or by the pronouncement of the three *talaks* at once. In the first case the marriage tie is dissolved after the *eddah*, but the parties may be reunited by a fresh marriage contract. In the second and third cases not only is the existing marriage dissolved, but a new marriage cannot be contracted between the parties, until the woman has lawfully married another man and has been divorced after consummation of that marriage. The *Shafii* school of Law does not regard the pronouncement of the *talak* three times at short intervals or in immediate succession, or the pronouncement of three *talaks* at once, as *bida'at*. It

* Second of three parts.

1. Best or most approved.
2. The period after a marriage is dissolved by death of her husband or divorce during which a woman is prohibited from marrying — see p. 20.
3. Good or approved.
4. The form of innovation and therefore not strictly approved. In many of the Arab countries and in Pakistan the effect of recent legislation is that the triple divorce, when pronounced in a single formula or on one and the same occasion, should count only as a single and revocable divorce — See J. N. D. Anderson, *Islamic Law in the Modern World*, London, 1959, p. 56; and N. J. Coulson, "Islamic Family Law: Progress in Pakistan in J. N. D. Anderson (Editor), *Changing Law in Developing Countries*, London, 1963, p. 251. These reforms have not been followed in Malaysia but the practice adopted by the Shariah Court in Singapore is that where a divorce by three *talaks* has been pronounced by a man all at once and in the same place, then the Court will declare that there has only been one *talak*. It is only where the three *talaks* have been pronounced three times on three different occasions that the Court will declare that there has been a divorce by three *talaks*. The *talak bida'at* though disapproved is lawful under *Hanafi* and *Shafii* law — see F. B. Tyabji, *Muhammadan Law*, Bombay, 1940, p. 218f and *Sheikh Fazlur Rahman v. Mt. Aisha* (1929) 8 I.L.R. (Patna) p. 690.

distinguishes *talak* into two kinds, i.e. *talak radjii*, or revocable divorce, and *talak bain* or irrevocable divorce. *Talak bain* is of two kinds (a) the divorce by three *talaks*, which puts an end to the marriage without the possibility of remarrying, unless the woman has been lawfully married to another person and has been divorced after consummation of that marriage, and (b) the divorce of *kholo*⁵ where some compensation is paid by the wife, or renunciation of a right made by her; this divorce cannot be revoked but the parties can remarry each other. Where the divorce is revocable, the husband is allowed to revoke the divorce by the process known in Muslim Law as *rojok*.⁶ A husband who has repudiated his wife in a revocable manner has a right to take her back so long as she is still in her period of *eddah*, provided that in the meantime the marriage has not become illicit for any other reason.⁷

In the Singapore case of *Syed Mohamed Yassin v. Syed Abdulrahman*⁸ it was held that a Muslim can effectively divorce his wife 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 shall immediately become irrevocable. Witnesses are not necessary and no particular form of words is required. It is doubtful whether the *talak* need be communicated to the wife. Although this case appears to set out the Shafii law correctly, it is probably no longer valid for Singapore in view of the requirement for registration and the changes that have been made by the Muslims Ordinance, 1957.

Muslim married women may, also, apply for divorce. It is, for example, usual to have a condition at the time of marriage or, sometimes, after the marriage that if the husband fails to maintain the wife for a period exceeding three months or assaults her and the wife makes a complaint which is proved, then a repudiation will be effected for failure of the condition. In such a case the wife can apply for *cherai taalik*.⁹ It is also possible for a Muslim woman to apply for what is in effect an annulment of the marriage by the process known as *fasakh* and also to apply for divorce with the consent of the husband on payment of compensation by the process known as *kholo*.¹⁰ While the *talak* can be the unilateral act of the husband, it is necessary for the woman to apply to a *kathi* or a court for a decree of *cherai taalik*, *kholo* or *fasakh*.

5. The divorce by redemption — See p. 49.

6. Revocation of divorce — See pp. 43, 44.

7. According to the Ninety-Nine Laws of Perak the law applicable to the case of a woman who is divorced and whose husband wants her back within three months and ten days is that if she is unwilling she may be forced to return to her husband; but the husband must give her settlements in cash. If he is forcibly rejected, the woman must pay him the amount of the marriage settlement — See The Ninety-Nine Laws of Perak, edited and translated by J. Rigby, Kuala Lumpur, 1908, page 48.

8. 15 S.S.L.R. 199.

9. Divorce on failure of condition — See p. 46.

10. Divorce by redemption — See p. 49.

Sub-section (a) — TALAK.

In Singapore the Muslims Ordinance, 1957, provides that a *kathi* may only register a repudiation (*talak*) by the husband where the wife consents to it. So too, a *kathi* can register a divorce by *kholo'* on payment of compensation by the wife if the husband consents to it. All other cases of divorce, including a *talak* to which the wife does not consent, must be heard by the Shariah Court. The Shariah Court has power to register a *talak* and also to make the decrees of *cherai taalik*, *fasakh* and *kholo'*.¹¹ Before a decree of divorce is registered or pronounced every effort is made to effect a reconciliation between the parties by the appointment of arbitrators.¹² Where a divorce is revoked and both parties consent to the revocation, the revocation can be registered by a *kathi*. Where the wife does not consent to the revocation of the divorce the matter has to be referred to the Shariah Court for adjudication.¹³

In the various States of Malaya provision is made for the registration of a *talak* and of the revocation of such a divorce. In Selangor it is provided by directions of the Religious Department that no divorce may take place except *before* a *kathi* and until the parties have filled in the prescribed form. No divorce or pronouncement of *talak* will be effective unless the wife agrees to the divorce and the *kathi* has approved it. It is provided that before approving the divorce the *kathi* shall endeavour to effect a reconciliation between the parties.¹⁴ In Negri Sembilan it is provided that any person who wishes to obtain a divorce must apply in the prescribed form to the Court of the *Kathi* of the locality. The *Kathi* will then call both parties and inquire into the matter. After the inquiry is completed and the divorce has been effected, it will be registered and certificates issued to the parties.¹⁵ In Selangor and Negri Sembilan it is provided that the husband must report a divorce to the Registrar for the locality in which such divorce has taken place within seven days after the divorce. The husband is required similarly to report a revocation of divorce within seven days after the revocation to the Registrar who registered the divorce. The Registrar is required to make inquiry in order to satisfy himself that the divorce has been lawfully revoked. In every case, in which revocation takes place, after the expiration of one month from the date of the divorce, the inquiry is made from both the husband and the wife. In the event of annulment of a divorce the Registrar shall make a note of the annulment in Register of Divorces and destroy the certificate of divorce.¹⁶

11. Muslims Ordinance, 1957, (No. 25 of 1957), ss. 12 and 21.
12. Muslims Ordinance, 1957, (as amended by the Muslims (Amendment) Ordinance, 1960, (No. 40 of 1960)), s. 33 — See M. Siraj, *The Shariah Court of Singapore and its control of the divorce rate in 1963 Malaya Law Review*, p. 148.
13. Muslims Ordinance, 1957, (as amended by the Muslims (Amendment) Ordinance, 1960), s. 12.
14. Selangor Rules relating to marriage, divorce and revocation of divorce, 1962.
15. Negri Sembilan Rules relating to marriage, divorce and revocation of divorce, 1962.
16. Selangor Administration of Muslim Law Enactment, 1952, ss. 126 and 127; Negri Sembilan Administration of Muslim Law Enactment, 1960, ss. 121 and 122. In the case of *Amun and Somah* the facts were that Amun had been provoked by

In Negri Sembilan under the customary law, divorce has its own forms and rituals. Just as marriage entails the co-relationship of a host of relatives, if not of tribes themselves, so too divorce presents considerable embarrassment to the family and the tribes. Custom ordains that before a divorce takes place there should be due deliberation on the reasons for the intended dissolution. Custom demands that a husband who contemplates divorce from his wife must go through an arbitration called *bersuarang* or settlement. A small feast is held by the husband to which he invites the relatives of his wife as well as his own. The husband will then state his grievances, so that they may be considered by the parties present. Often the presence of the elders has a beneficial effect in patching up what may prove to be a hasty decision or a pretty quarrel. But should the husband still insist on divorce, separation is allowed after a settlement of the conjugal property.¹⁷

In Kelantan and Trengganu it is provided that a husband may divorce his wife in accordance with Muslim Law. The husband is required to report the divorce to the Registrar of the *mukim* or district in which the divorce has taken place within seven days after the divorce. If after a revocable divorce, recohobitation takes place by mutual consent, the parties should, within seven days, report the fact of such recohobitation to the Registrar of the *mukim* or district in which they reside. The Registrar makes inquiry and if satisfied that recohobitation has taken place in accordance with Muslim Law registers such recohobitation. If a revocable divorce has taken place without the knowledge of the wife the husband should not require or request the wife to recohobit with him without disclosing to her the fact of such divorce. If after a revocable divorce the husband has pronounced a *rojok* or revocation of the divorce, then if (a) the wife has consented to the revocation, she may, on the application of the husband, be ordered by a *kathi* to resume conjugal relations, unless she shows good cause in accordance with Muslim Law to the contrary, in which case the *kathi* appoints arbitrators to deal with the dispute; or if (b) the wife has not consented to the revocation for reasons allowed by Muslim Law, she must not be asked by the *kathi* to resume conjugal relations, but on her application the *kathi* may require her husband to divorce her and on his refusal he should appoint arbitrators to deal with the dispute.¹⁸

In Pahang it is provided that a husband may divorce his wife in accordance with Muslim Law with one, two or three *talaks*. The husband is required to report the divorce to the Registrar of the locality in which the divorce takes place within fifteen days after the divorce. If after a

16. [contd.]

his wife's family into divorcing Somah who was very young. When he sought to return to her, her mother locked Somah up and refused to allow Amun to have access to her. It was held that the *kathi* cannot register a *rojok* as this has obviously not taken place — E. N. Taylor, Customary Law of Rembau, Journal of the Royal Asiatic Society, Malayan Branch, 1929, p. 69.

17. Haji Mohammed Din bin Ali, "Two Forces in Malay Society," *Intisari*, Singapore, Vol. I No. 3, p. 26.

18. Kelantan Council of Religion and Malay Custom and Kathis' Courts Enactment, 1953, ss. 145 and 151; Trengganu Administration of Islamic Law Enactment, 1955, ss. 103 and 109.

revocable divorce reconciliation takes place, the parties or the husband and the representative of the wife from her family, should, within fifteen days, report the fact of such reconciliation to the Registrar of the locality in which they reside. The Registrar shall make inquiry and if satisfied that reconciliation has taken place in accordance with Muslim Law, shall register the reconciliation. If a revocable divorce has taken place without the knowledge of the wife, the husband should not require or request the wife to reconcile with him without disclosing to her the fact of such divorce. If after a revocable divorce the husband pronounces a *rojok* or revocation of the divorce, whether the wife has consented to the revocation or not, she may, on the application of the husband, be ordered by the *kathis* to resume conjugal relations unless she shows good cause in accordance with Muslim Law to the contrary, provided that the *kathi* shall impose such conditions in accordance with Muslim Law as he thinks appropriate.¹⁹

In Penang, Malacca and Kedah it is provided that the husband shall within seven days of a divorce report such divorce to the local Registrar. Similarly, the husband is required to report a revocation of divorce to the Registrar within seven days of the revocation. The Registrar is required to make inquiry to satisfy himself that the divorce has been lawfully revoked and in every case in which the revocation takes place after the expiration of one month from the date of the divorce the inquiry is made from both the husband and the wife. In the event of annulment of the divorce, the Registrar shall make a note of the annulment in the Register of Divorces and destroy the certificate of divorce.²⁰

In Perak it is provided that the husband or wife shall within seven days of the divorce report such divorce to the *kathi* or *naib kathi* of the locality in which such divorce takes place. In the event of the reunion of the parties (*rojok*), the certificates of divorce are required to be returned, within seven days of such reunion, to the *kathi* or *naib kathi* who issued them. The *kathi* or *naib kathi* endorses a note of such reunion on the certificates and returns them to the parties.²¹

In Johore it is provided that in the case of every divorce or revocation of divorce, the husband shall within seven days of the divorce or revocation of divorce attend at the office of the *kathi* or *naib kathi* of the locality or the place in which the divorce or revocation of divorce takes place, or to which the parties belong, or at the office of the *kathi* or *naib kathi* of the nationality or school of law to which the parties belong, to furnish particulars for the registration of such divorce or revocation of divorce.²²

In Perils it is provided that on an application made by a husband

19. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss. 125 and 126.
20. Penang Administration of Muslim Law Enactment, 1959, ss. 121 and 122; Malacca Administration of Muslim Law Enactment, 1959, ss. 120 and 121; Kedah Administration of Muslim Law Enactment, 1962, ss. 121 and 122.
21. Perak Muslim Marriage and Divorce Registration Enactment (Cap. 197 of the, 1935 Edition of the Laws of the Federation Malay States), ss. 4 and 5.
22. Johore Muslim Marriage Enactment (E. No. 17), s. 7.

for permission to divorce his wife, the *kathi* shall for the purpose of effecting a peaceful reconciliation make such inquiries with respect to the applicant and his wife as the *kathi* thinks fit and the *kathi* shall not grant any permission for divorce unless he is convinced that no reconciliation is practicable. If any misunderstanding arises from the decision, the *kathi* may order both parties to appoint arbitrators. All divorces are required to be registered. It is provided that where it appears that no reconciliation between the parties is possible, the party applying for a divorce shall fill up the prescribed form. The rights of each party shall be agreed to in the presence of the Registrar. The husband shall deposit a sum of not less than one month's maintenance for the wife with the *kathi* unless under the divorce the husband is not required to pay any maintenance to the wife. Each party to a divorce shall return to the other the property to which he or she is entitled. It is provided that if the husband shall fail to deposit the sum for maintenance or to return the property of the wife he shall be guilty of an offence and liable to imprisonment for a term not exceeding three months or to a fine not exceeding two hundred dollars. Within seven days of the revocation of a divorce the husband and wife shall report such revocation to the Registrar who has registered the divorce and at the same time produce to him the certificate of divorce. The Registrar shall make inquiry in order to satisfy himself that the divorce has been lawfully revoked and in every case in which revocation takes place after the expiry of one month from the date of the divorce the inquiry shall be made from both the husband and the wife. If the Registrar is satisfied that the divorce has been lawfully revoked he shall make a note of such revocation in the register of divorces and the certificate of divorce.²³

In Brunei it is provided that a husband may divorce his wife in accordance with the Muslim Law with one, two or three *talaks*. Within seven days of the divorce the husband must report the fact of such divorce and all necessary particulars to the Registrar of the *mukim* in which the divorce takes place. The Registrar forthwith registers the divorce. If after a revocable divorce recohobitation takes place by mutual consent, the parties should within seven days report the fact of such recohobitation and all relevant particulars to the Registrar of the *mukim* or locality in which they reside. The Registrar is required to make inquiry and if satisfied that recohobitation has taken place in accordance with Muslim Law, should register the recohobitation. If a revocable divorce has taken place without the knowledge of the wife, the husband cannot require or request the wife to recohobit with him without disclosing to her the fact of such divorce. If after a revocable divorce the husband has pronounced a revocation and the wife has consented to it, she may on the application of the husband be ordered by a *kathi* to resume conjugal relations, unless she shows good cause in accordance with Muslim Law to the contrary. In such a case the *kathi* should appoint arbitrators to deal with the matter. If the wife has not consented to the revocation, she should not be ordered by the *kathi* to resume conjugal relations. On her application the *kathi* may require her husband to divorce her and on his refusal shall appoint arbitrators to deal with the matter.²⁴

23. Perils Administration of Muslim Law Enactment, 1963, ss. 90, 90A, 92 and 93.

24. Brunei Religious Council and Kathis Courts Enactment, 1955, ss. 144 and 150.

In Sabah it is provided that within seven days of a Muslim divorce the husband and wife shall report the divorce to the *Imam* of the district in which such divorce takes place and the *Imam* shall, thereupon, register the particulars and nature of the divorce. Where a divorce is annulled the husband and wife return the certificates of divorce to the *Imam* who issued them and he makes an entry recording such annulment in the Register of Divorce.²⁵

In Sarawak it is provided that every headman of a town or village in which a mosque is situated shall keep a register of every divorce which takes place in such town or village. Before making the entry in the register the headman may make such inquiries as he considers necessary to satisfy himself as to the validity of the divorce.²⁶ It is also provided in the *Undang-Undang Mahkamah Melayu Sarawak* that, if a man insists on repudiating his wife when it is not shown that the wife is at fault, the Native Court will give him a period of fifteen days within which to reconsider the matter. If at the end of such period the man still insists on repudiating his wife the Court will allow the divorce on payment of a fine. Provision is made for the division of the matrimonial property on divorce. It is provided that where there are debts incurred by the parties which cannot be fully paid out of the matrimonial property, the divorce would not be allowed by the Court unless the husband undertakes to pay all the debts. If it is shown that the husband has deserted the wife then he must pay the maintenance for the wife and the children during the period of desertion at the rate of \$20/- to \$50/- a month for the wife and \$10/- to \$25/- a month for each child. But, if the husband shows that he is unable to such maintenance, the amount will be fixed at the discretion of the Court.²⁷ The *Undang-Undang Mahkamah Melayu, Sarawak* also provides that where a man has committed a prohibited act (*salah*) with a woman whom he can marry, he would be requested to marry her and to pay her a *berian* which shall not exceed \$50/-. If the man marries the woman, he will not be allowed to repudiate her, if she has committed no wrong, unless he pays the *berian* in full and pays a fine. If he is unable to pay the *berian* he is liable to be sent to jail for three months. If the man, in such a case, deserts the wife, he will also be liable to a fine and to payment of the *berian*.²⁸

Sub-section (b) — CHERAI TA'ALIK .

In Kelantan, Trengganu, Pahang and Brunei the Registrar of Marriages is required, in registering a marriage, to prepare a *surat ta'alik* in

25. North Borneo Muslims Ordinance (Cap. 83 of the 1953 Edition of the Laws of North Borneo), s. 5. "*Imam* of the district" means the *Imam* or *Kathi* to whom a certificate has been issued that he has been recognised as the *Imam* of the district by the Muslim community of such district.
26. Sarawak Muslim Marriage Ordinance (Cap. 75 of the 1948 Edition of the Laws of Sarawak), ss. 6 and 7.
27. *Undang-Undang Mahkamah Melayu, Sarawak* (Vol. VII of the Laws of Sarawak, 1958), s. 41.
28. *Ibid.*, s. 14. The list of prohibited acts includes all acts which are considered and accepted as *salah* by the Malay custom. For instance if a man is found with a woman who is not his relative in a room or under a house or in any place or situation in such manner as would, having regard to all the circumstances of the case, raise a suspicion of their behaviour, a *salah* is committed.

the prescribed form and obtain the signatures of the parties thereto.²⁹ In the other States of Malaya and in Singapore the condition or *ta'alik* is not made compulsory but it is encouraged.

The form of the *ta'alik* varies. In Trengganu it reads: "On every occasion that I am estranged from my wife for a continuous period of four months whether I leave her or she leaves me by her free-will or by force and upon application by her to the *kathi* or *naib kathi* and upon his being satisfied of such estrangement my marriage shall be dissolved by one *talak*." ³⁰ In Singapore the form is not prescribed but is usually to the effect that "if I fail to maintain my wife for more than three months or if I assault her, and she complains to the Shariah Court and the Court is satisfied of the truth of the complaint, my marriage shall be dissolved by one *talak*". The form of "*ta'alik*" prescribed in Selangor is as follows:— "Everytime that I fail to provide maintenance to my wife for a period of four months or more, she can make a complaint to the *Kathi's* Court and if her complaint is proved, then she is divorced by one *talak*, and everytime I revoke the divorce and my wife refuses to agree to it, she is divorced by one *talak*." ³¹ In Negri Sembilan the prescribed form of *ta'alik* is as follows:— "Everytime that I leave my wife or I am away and it is not known whether I am alive or dead or I am away at a place where I am unable to cohabit with my wife for a period of four months or more and my wife complains to a *Kathi* and her complaint is proved then she is divorced by one *talak*." ³²

In Singapore an order for *ta'alik* can be made by the Shariah Court, after a hearing and after recording the evidence of the wife, the husband (if available), and at least two witnesses. Notice of the application is required to be served on the husband. The Shariah Court makes the order if satisfied that the provisions of Muslim Law have been complied with.³³

In Selangor, Penang, Malacca, Negri Sembilan and Kedah it is provided that a *kathi* may receive from a married woman an application for *cherai ta'alik*. Notice of the application is required to be served on the husband and the *kathi* is required to record the evidence of the wife and at least two witnesses. The *kathi* can make the order if he is satisfied that the provisions of the Muslim Law have been complied with.³⁴

29. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.144(5); Trengganu Administration of Islamic Law Enactment, 1955, s. 102(5); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 124(5); Brunei Religious Council and Kathis Courts Enactment, 1955, s. 143(5).
30. Trengganu Muslim Religious Affairs (Forms and Fees) Rules, 1956, (Trengganu G.N. No. 526 of 1956), Form N.
31. Selangor Rules relating to marriage, divorce and revocation of divorce, 1962.
32. Negri Sembilan Rules relating to marriage, divorce and revocation of divorce, 1962.
33. Muslims Ordinance, 1957, ss. 32 and 34.
34. Selangor Administration of Muslim Law Enactment, 1952, s. 128; Penang Administration of Muslim Law Enactment, 1959, s. 123; Malacca Administration of Muslim Law Enactment, 1959, s. 122; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 123; Kedah Administration of Muslim Law Enactment, 1962, s. 123.

In Kelantan and Trengganu it is provided that a married woman may, if entitled to divorce in pursuance of a *surat ta'alik* made upon marriage, apply to a *kathi* to declare that such a divorce has taken place. The *kathi* must examine the application and make inquiry as to the validity of the divorce and should, if satisfied that the divorce is valid in accordance with Muslim Law, confirm and register the divorce.³⁵

In Pahang it is provided that a married woman may, if entitled in accordance with Muslim Law to a divorce in pursuance of the terms of a *surat ta'alik* made upon the marriage, apply to a *kathi*. The *kathi* must examine the *surat ta'alik* and call the husband for inquiry. The *kathi* will inquire into the matter and if satisfied declares that the divorce has taken place in pursuance of the *surat ta'alik* and registers the divorce.³⁶

In Perlis although it is provided that the person solemnising the marriage shall deliver to the Registrar and to each of the parties to the marriage a *surat ta'alik* in the prescribed form duly signed by himself and by the said parties, there is no special provision for *cherai ta'alik*.³⁷

There are no statutory provisions as to *cherai ta'alik* in Perak or Johore or in North Borneo. In these places it would appear that the *kathi* has jurisdiction to register a *cherai ta'alik* in accordance with the Muslim Law.

In Brunei it is provided that a married woman may, if entitled in accordance with Muslim Law to a divorce in pursuance of the terms of a *surat ta'alik* made upon marriage, apply to a *kathi* to declare that such divorce has taken place. The *kathi* shall examine the instrument and make such inquiry as appears necessary into the validity of the divorce and shall, if satisfied that the divorce is valid in accordance with Muslim Law, confirm the divorce and register it.³⁸

In Sarawak it is provided in the *Undang-Undang Mahkamah Melayu, Sarawak*, that the *ta'alik* shall be read in the case of every marriage between Muslims in Sarawak whether they belong to the *Shafii* school or any other school of law.³⁹ The form of *ta'alik* is prescribed in the *Undang-Undang Mahkamah Melayu, Sarawak*, as follows:— “If I travel to any place and do not give maintenance to my wife and do not leave an agent to give her the maintenance, and if she complains to the Hakim Shariah who accepts the complaint as true, then she will be divorced by one *talak*.” The order of *cherai ta'alik* is confirmed by the Native Court.⁴⁰

35. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 147; Trengganu Administration of Islamic Law Enactment, 1955, s. 105.

36. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 128.

37. Perlis Administration of Muslim Law Enactment, 1963, s. 87(8).

38. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 146.

39. *Undang-Undang Mahkamah Melayu, Sarawak* (Vol. VII of the Laws of Sarawak, 1958), s. 15.

40. *Id.*, Addenda.

Sub-section (c) — KHOLO or CHERAI TEBUS TALAK.

A *kholo*⁴¹ divorce is effected by means of appropriate words, spoken or written by the two parties or their respective agents, by which the wife offers and the husband accepts compensation out of her property for the release of his marital rights. The divorce is completed by the pronouncement of *talak*. It is irrevocable and is, therefore classified as a *talak bain*. The basis of *kholo*' divorce is a tradition of the Prophet which reads as follows:—

“Ibn Abbas reported that Jamilah binte Abdullah wife of Thabit bin Qais came to the Holy Prophet and said: ‘O Messenger of Allah as for Thabit bin Qais, I do not blame him about his character and piety but I dislike ingratitude in Islam’. The Messenger of Allah asked if she was prepared to return the garden given to her by Thabit. ‘Yes’, said she. The Prophet said to Thabit bin Qais: ‘Accept the garden and give her a single divorce.’”

According to the *Shafii* school of Law, it is not compulsory for the husband to accept the compensation offered by his wife and give her the divorce. His consent is, therefore, necessary and he cannot be forced to give a *kholo*' divorce.⁴²

In Singapore an order for *khula* can be made by the Shariah Court, though it is possible, where both the parties consent, for a divorce by *khula* to be registered by a *kathi*. Notice of the application to the Shariah Court must be served on the husband. The Court is required to record the evidence of the wife and at least two witnesses. The Court may, then, if satisfied that the provisions of Muslim Law have been complied

41. The Arabic form is *khul'*, which literally means “to take off clothes” and thence “to lay down one’s authority over a wife”. It is variously spelt *kholo* or *khula* in the States of Malaya and in Singapore. The Malay equivalent is *cherai tebus talak* or literally divorce by redemption of the *talak*.

According to the Ninety-Nine Laws of Perak, the law where a woman wishes to be divorced from her husband is that, if she establishes a complaint at the court on three occasions, she can have a divorce, but she must redeem herself by returning an amount equivalent to her dowry. But if there is no fault on the part of her husband, she shall not have a divorce — See *The Ninety-Nine Laws of Perak*, edited and translated by J. Rigby, Kuala Lumpur, 1908, p. 22 and 34. If a woman seeks a divorce on the ground that she is unwilling to consummate the marriage she can have a divorce but she forfeits her dowry and pays for the divorce a *tahil* and a *paha* of gold — *The Ninety-Nine Laws of Perak*, edited and translated by J. Rigby, 1908, p. 23. According to Malay custom if a husband guiltless of offence towards his wife under religious and customary law refuses her divorce she can leave him in the clothes she wears, returning her dowry or otherwise paying for the divorce (*menebus talak*). If she wants a divorce because she cannot endure her husband’s behaviour but not because of any offence towards her under religious law then she can get a divorce in accordance with custom returning half her dower and all property acquired during the marriage goes to the man, but each party takes his or her own personal property — J. E. Kempe and R. O. Winstedt, “A Malay Legal Miscellany,” *1952 Journal of the Malayan Branch, Royal Asiatic Society*, Part I, p. 6.

42. E. N. Taylor, “Mohammedan Divorce by Khula,” in *1948 Journal of the Royal Asiatic Society, Malayan Branch*, Vol. 21 Part 2. In Pakistan it has been suggested that a wife should have the right to demand a divorce in the *kholo*' form on the ground, for example, of in-compatibility of temperament. See Report of the Commission on Marriage and Family Laws quoted in K. Ahmad (Editor), *Studies in the Family Law of Islam*, Karachi, 1961, p. 62.

with, make an order for *khula*.⁴³ It has been held in the Penang case of *Rokiah v. Abubakar*⁴⁴ that a divorce by *khula* must be by the consent of the parties. In the Singapore case of *Syed Ahmad v. Fatimah*⁴⁵ the wife agreed to the terms of the *khula* divorce but the husband refused it. The Chief Kathi formally called upon the husband to register the divorce and it was held that the direction of the *Chief Kathi* was in accordance with Muslim Law, and, although there was no legal machinery for enforcing it, the husband was bound as a Muslim to obey it.

In Kelantan and Trengganu it is provided that a married woman may apply to a *kathi* for a divorce in accordance with Muslim Law. In any such case the *kathi* summons the husband and inquires whether he consents to the divorce. If the husband consents, the *kathi* causes the husband to pronounce a divorce and registers it. If the husband does not agree to be divorced by consent, but the parties agree to a divorce by redemption, or *cherai tebus talak*, the *kathi* may assess the amount of payment to be made by the wife in accordance with the status and means of the parties and, thereupon, causes the husband to pronounce a divorce by redemption and registers the divorce. If the husband does not agree to divorce by redemption, the *kathi* may appoint arbitrators to deal with the matter.⁴⁶

In Pahang it is provided that a married woman may apply to a *kathi* for a divorce in accordance with Muslim Law. The *kathi*, on receipt of the application, should inquire into the matter. If such application has been brought because of a disagreement of an extreme nature between the husband and the wife, the *kathi* should appoint two arbitrators, representing the husband and the wife, with sufficient powers given by both parties to enable the arbitrators to effect a peaceful reconciliation of the parties, to the extent of the arbitrator of the husband divorcing the wife and the arbitrator of the wife applying for a divorce by redemption (*cherai tebus talak*). If both arbitrators decide on a divorce, whether by redemption or not, the arbitrator of the husband may divorce the wife and the divorce shall, then, be registered. If the husband does not agree to a divorce, but the parties agree to a divorce by redemption, the *kathi* may assess the amount of the payment to be made by the wife and shall then cause the husband to pronounce the divorce by redemption and register the divorce.⁴⁷

In Perlis it is provided that whether any misunderstanding arises from the decision of the court on an application for divorce, the *kathi* shall have power to order both parties to appoint their representatives to find ways of solving the misunderstanding and the representatives shall have power, on behalf of the husband, to receive the compensation

43. Muslims Ordinance, 1957, ss. 33 and 34.

44. E. N. Taylor, Mohammedan Divorce by Khula, 1948, *Journal of the Royal Asiatic Society*, Vol. 21 Part 2 p. 10.

45. E. N. Taylor, *op. cit.*, at 14.

46. Kelantan Council of Religion and Malay Customs and Kathis Courts Enactment, 1953, s. 146; Trengganu Administration of Islamic Law Enactment, 1955, s. 104.

47. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.127.

and on behalf of the wife, to receive the divorce. If a divorce with compensation is decreed and the wife is possessed of property such property is liable to be attached for the recovery of such compensation. On satisfactory proof being given that the wife is without property and that she still refuses to return to her husband the arbitrators shall have power to decree with reasonable compensation if it appears to them that to compel her to return to her husband will cause her hardship and that a divorce is in the interests of both parties.⁴⁸

In Penang and Kedah it is provided that a married woman may make application to a *kathi* for the divorce known as *kholo'*. Notice of the application must be served on the husband. The *kathi* is required to record the evidence of the wife and at least two witnesses and may then, if satisfied that the provisions of Muslim Law have been complied with, make such order or decree as is lawful.⁴⁹

In Brunei it is provided that a married woman may apply to a *kathi* for a divorce in accordance with Muslim Law. In any such case the *kathi* shall summon the husband before him and inquire whether he consents to be divorced. If the husband so consents, the *kathi* should cause the husband to pronounce a divorce and register such divorce. If the husband does not agree to be divorced by consent, but the parties agree to a *cherai tebus talak*, the *kathi* may assess the amount of payment to be made by the wife in accordance with the status and means of the parties and shall thereupon cause the husband to pronounce a divorce by redemption and register it. If the husband does not agree to divorce by redemption, the *kathi* may appoint arbitrators to deal with the matter.⁵⁰

In Sarawak it is provided in the *Undang-Undang Mahkamah Melayu, Sarawak* that if a wife insists on leaving her husband, who is not shown to be at fault, the court will give her a period of fifteen days within which to reconsider the matter. If after such period she insists on the divorce, she would be required to pay a fine and to return the amount of the *berian*⁵¹ to the husband as *tebus talak*. When the *berian* has not been paid in full the balance of the *berian* will be regarded as the compensation for the *tebus talak*. If the wife is unable to repay the *berian* she would be asked to return to the husband and her complaint dismissed. She can, also, be sent to gaol in lieu of payment.⁵² It is also provided that where a wife has committed adultery she would be fined and asked to repay the *berian* as *tebus talak*. If the *berian* has not been paid in full, the balance of the *berian* would be regarded as the compensation for the *tebus talak*. If the wife has been unable to repay the *berian*, she would be sent to gaol. Where it appears that a husband, who knows that his wife is committing adultery, has not taken any action against her,

48. Perlis Administration of Muslim Law Enactment, 1963, s. 90A.

49. Penang Administration of Muslim Law Enactment, 1959, s. 123; Kedah Administration of Muslim Law Enactment, 1962, s. 123.

50. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 145.

51. The *mas-kahwin* or the obligatory marriage payment due under Muslim Law to the wife on the solemnization of the marriage.

52. *Undang-Undang Mahkamah Melayu, Sarawak*, (Vol. VII of the Laws of Sarawak, 1958), s. 41 and Addenda.

the Native Court may summon the parties and may direct the husband to divorce the wife.⁵³

There are no express statutory provisions for *kholo'* in Selangor, Perak, Negri Sembilan, Johore, Malacca and Sabah but it would appear that the *kathis* can make decree of *kholo'* in accordance with Muslim Law.

Sub-section (d) — FASAKH.

Fasah or *fasakh*⁵⁴ may be defined as the dissolution or rescission of contract of marriage by judicial decree. The subject is in fact dealt with by the Muslim Law authorities under the heading of *khiyar* or option. According to the *Shafii* school of Law a wife, who becomes aware that her husband is suffering from impotence, insanity, leprosy or elephantiasis has an option of repudiating the marriage. Similarly, she has the option of repudiating the marriage where the husband is unable to maintain her. A wife may also bring an action to avoid or repudiate a marriage where the husband is not equal in *kufu*⁵⁵ to her or where he does not meet the conditions, as, for example, of religion or genealogy stipulated. A similar option is given to the husband where he becomes aware that his wife is insane, suffering from leprosy or elephantiasis or is incapable of sexual intercourse because of some physical cause.⁵⁶ But, as the husband has the right of *talak*, an application of *fasakh* by him is rare.

A wife's right to repudiate her marriage by reason of her husband's defects is not limited to defects existing at the time of the contract, but extends to such as he may have acquired subsequently. This does not apply to cases of impotence, for a husband, who becomes impotent after cohabitation with the wife, can no longer be repudiated by her. If a husband or wife, knowing the defects in the other party enters into a marriage contract, he or she has no option to repudiate the marriage. If a party to a marriage fails to repudiate the marriage within a reasonable time after coming to know of the defect in the other party, then the option is lost. The option to avoid or repudiate a marriage on any of the grounds allowed by law must be confirmed by the order of a Court or a *kathi* and the marriage continues until such confirmation.⁵⁷

Where a husband, during his marriage, becomes insolvent and can no longer give the minimum maintenance prescribed, and the wife can no longer bear such an insolvent husband, she can demand the rescission of the marriage since her husband no longer fulfils his obligation.⁵⁸

53. Ibid. ss. 51 and 52.

54. *Faskh* or *fasakh* literally means annulment or abrogation. The Malay equivalent is *fasah* or *pasah*.

55. Marriage equality.

56. Nawawi, *Minhaj-et-Talibin*, translated by E.C. Howard, London, 1914, p.299f; J. E. Kempe and R. O. Winstedt, A Malay Legal Miscellany in 1952 *Journal of the Royal Asiatic Society, Malayan Branch*, Part I pp. 12 - 13.

57. Nawawi, *Minhaj-et-Talibin*, op. cit., p. 299f.

58. Ibid, p. 387f. According to Malay custom, a woman deserted for three years can get a divorce but must arrest the man if she meets him. — J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany," 1952, *Journal of the Royal Asiatic Society, Malayan Branch*, Part I, p. 7.

The dominant *Shafii* view is that there can be no dissolution of marriage where the husband has means, even if no news can be obtained of him and no maintenance procured from his property. This often creates hardship where the husband cannot be contacted. A minority of *Shafii* jurists, including *Al-Ramli*, *Zakaria Al-Ansari* and *Ibn Ziyad* would however allow a dissolution of marriage in such circumstances. Some *Shafii* jurists go even further than this. It is stated that "many have preferred the view and *Ibn Ujayl*, *Ibn Kupunn*, *Ibn Al-Sabbagh* and *Al-Ruyani* have given *fatwas* accordingly, that where a wife can obtain no maintenance from her husband for a period of three days she is entitled to dissolution of marriage, whether her husband be present or absent."⁵⁹ The dominant view is, however, followed in Malaysia and Brunei.

In Singapore an order for *fasah* can be made by the Shariah Court. On receiving the application the court causes a notice thereof to be served on the husband. The court is required to record the evidence of the wife and at least two witnesses and may then, if satisfied that the provisions of Muslim Law have been complied with, make an order for *fasah*.⁶⁰

In Selangor, Penang, Malacca, Negri Sembilan and Kedah it is provided that a married woman may make application to a *kathi* for the divorce known as *fasah*. Notice of the application must be served on the husband. The *kathi* is required to record the evidence of the wife and at least two witnesses and may then, if satisfied that the provisions of Muslim Law have been complied with, make such order or decree as is lawful, and register the divorce.⁶¹

In Kelantan, Trengganu and Pahang it is provided that a married woman may apply to a *kathi* for a decree of dissolution of marriage or *fasakh* in accordance with the Muslim Law. Notice of the application must be served on the husband. No decree of *fasakh* shall be pronounced by the *kathi* save in accordance with Muslim Law and in pursuance of the evidence of the married woman and at least two witnesses. Upon pronouncing a decree of dissolution of marriage the *kathi* must register it as a divorce.⁶²

In Perlis it is provided that a married woman may apply to a *kathi* for a divorce and the *kathi* shall thereupon cause notice of such application to be served upon the husband or, if her husband is not in the State or it is impossible to serve the notice on him, upon the nearest relative

59. J. N. D. Anderson, *Islamic Law in Africa*, London, 1954, p. 335f.

60. Muslims Ordinance, 1957, s. 32.

61. Selangor Administration of Muslim Law Enactment, 1952, s. 128; Penang Administration of Muslim Law Enactment, 1959, s. 123; Malacca Administration of Muslim Law Enactment, 1959, s. 122; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 123; Kedah Administration of Muslim Law Enactment, 1962, s. 123. In Penang and Kedah the *kathi* has jurisdiction only where the married woman has been resident for not less than four months in the area for which the *kathi* is appointed.

62. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 148; Trengganu Administration of Islamic Law Enactment, 1955, s. 106; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 129.

of the husband. If the husband does not appear at the hearing, service of the notice shall be proved by the woman and by two other witnesses and the *kathi* if satisfied that the notice has been served may make such order or decree as is lawful. The *kathi* shall for the purpose of effecting a peaceful reconciliation make such inquiries with respect to the applicant and her husband as he thinks fit and the *kathi* shall not grant the permission for divorce unless he is convinced that no reconciliation is practicable.⁶³

In Brunei it is provided that a married woman may apply in the court of a *kathi* for a decree of *fasakh* in accordance with Muslim Law. Notice of the proceedings is required to be served on the husband and it is provided that no decree of *fasakh* can be pronounced save in accordance with the provisions of Muslim Law and in pursuance of the evidence of the married woman and at least two witnesses. Upon pronouncing a decree of *fasakh*, the *kathi* must register it as a divorce.⁶⁴

In Sarawak it is provided in the *Undang-Undang Mahkamah Melayu, Sarawak* that if the wife complains that the husband is impotent, the husband will be ordered to be examined by a physician or other competent person. If the complaint of the wife is shown to be true, then the *kathi* or judge orders a *fasakh*. If the complaint is shown to be false, the wife is to be fined. If it cannot be decided whether the complaint is true or false, the husband would be advised to divorce his wife and the wife to accept the divorce by mutual consent.⁶⁵

There are no express statutory provisions for *fasakh* in Perak, Johore and Sabah but it would appear that a *kathi* or Shariah Court may make an order of *fasakh* in accordance with Muslim Law.

Sub-section (e) — PRESUMPTION OF DEATH.

According to the *Maliki* school of Muslim Law the wife of a missing person is entitled to observe the *eddah* of death on the expiration of four years from the date of his disappearance. In other words, his death would be presumed after the lapse of four years. After observing the *eddah* of four months and ten days prescribed in the case of the husband's death, she would be entitled to remarry. The rule of the *Maliki* school is based upon a decision of Caliph Omar and is in accordance with a decision of Caliph Ali. In his earlier period *Imam Shafii* held the same opinion as *Imam Malik*. But, during his stay in Egypt he adopted the doctrine that even a judicial authorization after four years' absence and a period of *eddah* is insufficient to render a remarriage unimpeachable. A wife whose husband is absent and who has heard no news of him may not, according to the *Shafii* school of law, contract another union unless it is certain that he is dead or that he has repudiated her. Where a marriage is effected in contravention of this rule it is nevertheless legal,

63. Perlis Administration of Muslim Law Enactment, 1963, s. 91.

64. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 147.

65. *Undang-Undang Mahkamah Melayu, Sarawak*, s. 46. This deals with only one ground for *fasakh* but does not appear to preclude the other grounds available under the Muslim Law.

if it subsequently appears that the former husband was dead before its celebration.⁶⁶

The Evidence Ordinances in Malaysia and Brunei contain provisions dealing with the presumption of death. Section 108 of the Evidence Ordinance⁶⁷ in Singapore, for example, provides that, where the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Section 109 of the Evidence Ordinance provides that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. In the case of *Mazhar Ali v. Budh Singh*⁶⁸ it was held that the provisions of the Indian Evidence Act have replaced the rule of Muslim Law on this point, such presumption being a rule of evidence and not part of substantive law. This decision is likely to be followed in Malaysia.⁶⁹

In Selangor, Kelantan, Trengganu, Pahang, Penang, Malacca, Negri Sembilan and Kedah and in Brunei there are provisions for cases in which the husband of any married woman has died or is believed to be dead or has not been heard of over a prolonged period, in such circumstances that he might, for the purpose of enabling his wife to remarry, be presumed in accordance with Muslim Law to be dead. If, in such cases a death certificate under the Births and Deaths Registration Enactment⁷⁰ cannot be obtained, the *kathi* may, on the application of the wife and after a proper inquiry, issue in accordance with Muslim Law a certificate of presumption of death of the husband. The wife is thereafter allowed to marry in accordance with the provisions of the law. The certificate is deemed to be a certificate of the death of the husband for the purpose of the marriage of the woman as a *janda*. It is provided that the woman shall not be entitled to remarry in the absence of such a certificate, notwithstanding that the High Court might have given leave to presume the death of the husband. The certificate so issued is to be registered as if it effected a divorce.⁷¹

In Perlis it is provided that the *kathi* may on the application of a

66. Syed Ameer Ali, *Mahomedan Law*, Calcutta, 1929, p. 94; Nawawi, *Minhaj-et-Talibin* (translated by E.C. Howard), London, 1914, p. 371.
67. Chapter 4 of the Revised Edition; See Federation Evidence Ordinance, 1950, (No. 11 of 1950), ss. 107 and 108.
68. (1884) I.L.R. 7 All. 297.
69. Subject to the express statutory provisions in the States for the issue of a certificate of presumption of death in accordance with Muslim Law.
70. Births and Deaths Registration Ordinance, 1957, (No. 61 of 1957).
71. Selangor Administration of Muslim Law Enactment, 1952, s. 134; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 152; Trengganu Administration of Islamic Law Enactment, 1955, s. 110; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 131; Penang Administration of Muslim Law Enactment, 1959, s. 129; Malacca Administration of Muslim Law Enactment, 1959, s. 127; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 128; Kedah Administration of Muslim Law Enactment, 1962, s. 129; Brunei Religious Council and Kathis Courts Enactment, 1955, s. 151.

woman issue to such woman a certificate of presumption of death of her husband if there is reason to believe that the said husband had died or if the said husband has not been heard of for such a period that it is reasonable to suppose that he is no longer alive. A certificate so issued shall be presumed to be a death certificate for the purpose of the marriage of the woman as a *janda*. The certificate shall operate as a certificate of divorce upon the particulars thereof being registered in the register of divorce.⁷²

Sub-section (f) — EDDAH AND THE MARRIAGE OF WIDOWS.

Under Muslim Law it is not lawful for a woman to have two or more husbands at the same time.⁷³ Moreover, in the interests of certainty of paternity a woman is bound to observe a minimum period of retirement, called the *eddah*, between the termination by death or divorce of one matrimonial connexion and the commencement of another. The legal period of retirement after divorce of a woman who menstruates and has regular periods of purity is composed of three periods of purity. But, a woman divorced in one of her periods of purity concludes her retirement at the beginning of the third menstruation, while one divorced during one of her menstruations becomes free only upon the commencement of the fourth, including that during which she is divorced. Where a woman is not subject to menstruation, the duration of *eddah* after divorce is three months. The period of *eddah* when a marriage is terminated by death is four months and ten days. If, however, a woman is pregnant, the period of *eddah* continues until delivery and terminates, in the case of a divorced woman, upon delivery. Where the marriage is not consummated before divorce, there is no *eddah*, but if the husband dies before consummation, the *eddah* of widowhood is imposed as a mark of respect for the deceased husband.⁷⁴

In Singapore it is provided that where the woman to be wedded is a *janda*, i.e. a woman who has been married and whose marriage has been terminated by divorce or death of the husband, she is not to be married to any person other than the husband from whom she was last divorced at any time prior to the expiration of the period of *eddah*. If the divorce was by three *talaks* she cannot be remarried to her previous husband unless prior to such marriage she had been lawfully married to some other person and such marriage was consummated and later lawfully dissolved. There is no provision in Singapore for the punishment of persons who cohabit after an irrevocable divorce of three *talaks* without the woman having first been married to a third party.⁷⁵

Special provisions are made for the marriage of a *janda* in some of

72. Perlis Administration of Muslim Law Enactment, 1963, s. 95.

73. A Muslim married woman may be convicted of bigamy — *Reg. v. Rabia* (1988) 4 Kyshe 513.

74. Nawawi, *Minhaj-et-Talibin* op. cit., p. 365f. It would appear that according to Malay custom the period of *eddah* on divorce is three months and ten days, See J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany" in 1952 *Journal of the Royal Asiatic Society, Malayan Branch*, Part I, p. 14.

75. Muslims Ordinance, 1957, s. 8. See Note (4) above.

the enactments relating to Muslim marriage and divorce in the States of Malaya. '*Janda*' is defined as a female who is neither an *anak dara* nor a married woman; and '*anak dara*' is defined as a female who has never been married nor had sexual intercourse.⁷⁶

In Selangor, Kelantan, Trengganu, Pahang, Penang, Malacca, Negri Sembilan and Kedah it is provided that where the woman to be wedded is *janda*, she cannot be married to any person other than the husband from whom she was last divorced at any time prior to the expiration of the period of *eddah*. A *janda* is not to be married unless she produces a satisfactory certificate to show that her husband is dead or that she has been divorced. The period of *eddah* is to be calculated according to Muslim Law but it is provided that where a woman is divorced before the marriage was consummated, she cannot be married to any person other than the previous husband during the period of *eddah* which would otherwise have been applicable, except with the permission of the *kathi* having jurisdiction in the place where she resides. Where a woman has been divorced by three *talaks*, she cannot be remarried to her previous husband unless prior to such marriage she had been lawfully married to some other person and such marriage was consummated and later lawfully dissolved. There is no special provision for the punishment of persons who cohabit after an irrevocable divorce of three *talaks* without the woman having first been married to a third party, but such persons would be guilty of the offence of illicit intercourse.⁷⁷

There are no special provisions in the other States of Malaya relating to the marriage of widows. In Perak it is provided that, where the marriage of two Muslims has been irrevocably dissolved by the pronouncement of three *talaks* by the man against the woman, it is unlawful for such persons to cohabit as man and wife unless the woman is first lawfully married to some person other than the divorced husband and that marriage is dissolved. Any person contravening this provision is liable to punishment before a Magistrate.⁷⁸

In Johore it is provided that where the marriage of two Muslims has been irrevocably dissolved by the pronouncement of three *talaks* by the man against the woman, it is unlawful for such persons to cohabit as man and wife unless the woman is first lawfully married to some person other than her divorced husband and such marriage is dissolved

76. See for example Selangor Administration of Muslim Law Enactment, 1952, s. 2.

77. Selangor Administration of Muslim Law Enactment, 1952, ss. 122 and 158; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, ss. 141 and 178; Trengganu Administration of Islamic Law Enactment, 1955, ss. 99 (There is no provision for the punishment of illicit intercourse in Trengganu); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss. 121 and 156 (the Pahang Enactment uses the expression "divorced three times (*talak tiga*)" instead of "divorced by three *talaks*"); Penang Administration of Muslim Law Enactment, 1959, ss. 117 and 150; Malacca Administration of Muslim Law Enactment, 1959, ss. 116 and 149; Negri Sembilan Administration of Muslim Law Enactment, 1960, ss. 117 and 150 (the Negri Sembilan Enactment punishes the offence of fornication); Kedah Administration of Muslim Law Enactment, 1962, ss. 117 and 150 (this also like the enactment in Negri Sembilan punishes the offence of fornication).

78. Perak Muslim (Offences) Enactment, 1939 (No. 5 of 1939), s. 11.

and the period of *eddah* has elapsed. A contravention of the provision is made punishable before the court of a Magistrate.⁷⁹

In Perlis it is provided that a *janda* shall not be married to any person prior to the expiration of *eddah*, and she shall not be married unless there is produced a certificate of death or divorce or a certificate issued by the court having jurisdiction in the place where she resides that she is a *janda*. Where a woman has been divorced with three *talaks* and she is to be married to the person from whom she was so divorced, she must have been lawfully married to some other person, such marriage having been lawfully consummated and later lawfully dissolved; such a marriage may however be annulled by the *kathi* if he is satisfied that there has been any collusion between the person from whom she was divorced with three *talaks* and the said other person to whom she was married after such divorce.⁸⁰

In Brunei it is provided that where the woman to be married is a *janda* she shall not be married to any person other than the husband from whom she was last divorced at any time prior to the expiration of the period of *eddah*. A *janda* cannot be married unless she produces a satisfactory certificate to show that her husband is dead or that she has been divorced. The period of *eddah* is to be calculated according to Muslim Law but it is provided that where a woman is divorced before the marriage was consummated, she cannot be married to any person other than the previous husband during the period of *eddah* which would otherwise have been applicable, without the permission of the *kathi* having jurisdiction in the place where she resides. Where a woman has been divorced by three *talaks*, she cannot be remarried to her previous husband unless, prior to such marriage, she is lawfully married to some other person and such marriage is consummated and later lawfully dissolved. There is no special provisions for the punishment of persons who cohabit after an irrevocable divorce of three *talaks* without the woman having first been married to a third party, but such persons would be guilty of the general offence of illicit intercourse.⁸¹

In Sarawak the *Undang-Undang Mahkamah Melayu, Sarawak*, lays down the period of *eddah* to be observed by women after divorce or the death of their husbands. These follow the ordinary rules of Muslim Law but it is specially enacted (a) that where a woman is pregnant before her marriage and is divorced while she is still pregnant, the period of *eddah* is three periods of purity after she gives birth and (b) that where on the death of the husband the wife is pregnant, the period of *eddah* is until she gives birth.⁸² A divorce with one or two *talaks* may be revoked by the husband before the termination of the period of *eddah* and the parties may intermarry again after the termination of the period of *eddah*. Where the divorce is by *tebus talak*, the divorce cannot be revoked but the parties may remarry. Where the divorce is by three *talaks* or for

79. Johore Offences by Muslims Enactment (E.N. 47), s. 5.

80. Perlis Administration of Muslim Law Enactment, 1963, s. 86.

81. Brunei Religious Council and Kathis Courts Enactment, 1955, ss. 140 and 177.

82. *Undang-Undang Mahkamah Melayu, Sarawak*, ss. 21 - 23.

the third time, the parties cannot intermarry again except by the device of *china buta*, that is the wife marrying another person, who is paid to do so, and being divorced by that person after consummation of the marriage.⁸³

Sub-section (g) — APPOINTMENT OF ARBITRATORS OR HAKAM.

The settlement of marital disputes by arbitration is recommended in the Holy Qur'an, which says: "And if you fear a breach between the husband and wife appoint a *hakam* (arbitrator) from his family and a *hakam* from her family; if they shall desire a reconciliation God will cause them to agree."⁸⁴

Where arbitrators are appointed but are unable to effect a reconciliation between the parties, the dominant view of the *Hanafi* and the *Shafii* schools is that the powers of the arbitrators cease and they may arrange a divorce or *kholo'* only where they have been specifically empowered to do so, as authorized agents, by the husband in the first case and by both spouses in the second. In the dominant view of the *Maliki* school, on the other hand, the arbitrators have the right to decide that nothing but divorce or *kholo'* (according as the husband or the wife is primarily at fault or the blame must be apportioned between them) will meet the case, and this decision will be upheld and enforced by the Court. There is a minority *Shafii* opinion which follows the *Maliki* view. *Al-Sharbini* states "In one view they (the two arbitrators) are two judges (*hakiman*) appointed by the Ruler or by the Judge. This view has been preferred by many on the ground that the Qur'an has named them 'arbitrators' (*hakiman*) and an agent is not an arbitrator....So the consent of the two parties is not a condition of their appointment, and they may give what judgment they consider beneficial, whether it be that the marriage should be continued or dissolved." *Ibn Hajar* said: "And they are two agents who may act only by consent of the parties. But on another view they are the two judges (*hakiman*) appointed by the Ruler."⁸⁵

In Singapore it is provided that before making an order or decree for *talak*, *fasah*, *cherai ta'alik*, *khula* or *nusus* the Shariah Court may appoint, in accordance with Muslim Law, two arbitrators, or *hakam*, to act for the husband and wife respectively. In making such appointment the Court should, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case. The Court may give directions to the *hakam* as to the conduct of the arbitration and they must conduct it in accordance with such directions and according to the Muslim Law. If they are unable to agree, or if the Court is not satisfied with their conduct of the arbitration, it may remove them and appoint other *hakam* in their place. The *hakam* must endeavour

83. *Ibid*, s. 58. It appears to be strange that the Sarawak Enactment should specially provide for this questionable device. See Nawawi, *Minhaj-et-Talibin* op. cit., p. 292-293.

84. Surah 4 Verse 35.

85. J. N.D. Anderson, *Islamic Law in Africa*, London, 1954, p. 335 quoting from *Al-Sharbini's Al-Mughni* and *Ibn Hajar's al-Tuhfa*.

to effect a reconciliation between the parties and shall report the result of their arbitration to the Court.⁸⁶

In Perlis it is provided that whenever any misunderstanding arises from any decision of the court, the *kathi* shall have power to order both parties to appoint their representatives to find ways of solving the misunderstanding and the representatives shall have power on behalf of the husband to receive the compensation and on behalf of the wife to receive the divorce. If the two representatives are incompetent and without ability to effect a settlement the *kathi* shall have power to appoint two arbitrators (*hakam*), one to act on behalf of the husband and the other to act on behalf of the wife in order to find ways of solving the misunderstanding. The arbitrator representing the husband shall have power to declare a divorce. If the two arbitrators are unable to solve the misunderstanding between the husband and the wife the *kathi* shall refer the matter to the Majlis for decision and the decision of the Majlis shall be final. On satisfactory proof being given that the wife is without property and that she still refuses to return to her husband the arbitrators shall have power to decree a divorce without compensation if it appears to them that to compel her to return to her husband will cause hardship and that a divorce is in the interests of both parties. If a divorce with compensation is decreed and the wife is possessed of property such property is liable to be attached for the recovery of such compensation. If no reconciliation is possible, the party applying for divorce shall fill up a prescribed form. The rights of each party shall be agreed to in the presence of the Registrar. The husband shall deposit a sum of not less than one month's maintenance for the wife with the *kathi* unless under the divorce the husband is not required to pay any maintenance to the wife. Each party to the divorce shall return to the other the property to which he or she is entitled. The husband is required to report the divorce to the Registrar within seven days of the divorce.⁸⁷

In Kelantan and Trengganu it is provided that where a *kathi* is satisfied that there are constant quarrels between the parties to a marriage he may appoint in accordance with Muslim Law two arbitrators or *hakam* to act for the husband and the wife respectively. In making such appointment the *kathi* should, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case. The *kathi* may give directions to the *hakam* as to the conduct of the arbitration and they have to conduct it in accordance with such directions and according to Muslim Law. If they are unable to agree or, if the *kathi* is not satisfied with their conduct of the arbitration, he may remove them and appoint other *hakam* in their place. The *hakam* should endeavour to obtain from their respective principals full authority and may, if their authority extends so far, decree a divorce and should in such event report this to the *kathi* for registration. If the *hakam* are of opinion that the parties should be divorced but are unable for any reason

86. Muslims Ordinance, 1957, (as amended by the Muslims (Amendment) Ordinance, 1960), s. 33. This enacts the orthodox view of the *Shafii* school.

87. Perlis Administration of Muslim Law Enactment, 1963, s. 90A. See formerly the Perlis Muslim Marriages (Separations) Enactment, 1332 (No. 9 of 1332) and the Kedah Muslim Marriages (Separations) Enactment (E. No. 68). This sets out both the orthodox and the less orthodox views of the *Shafii* school.

to decree a divorce, the *kathi* has the power to appoint other *hakam* and to confer on them authority to effect a divorce and, if they do so, to register the divorce and issue certificates to the parties.⁸⁸

In Pahang there is provision for the appointment of *hakam* where a married woman applies to a *kathi* for divorce. In such a case, if the application has been caused by disagreement of an extreme nature between the husband and the wife, the *kathi* appoints two arbitrators, representing the husband and the wife respectively, with sufficient powers given by both parties to enable the arbitrators to effect a peaceful reconciliation of the parties, to the extent of the arbitrator of the husband divorcing the wife and the arbitrator of the wife applying for a divorce by redemption. If both arbitrators decide for a divorce, whether by redemption or not, the arbitrator of the husband may divorce the wife, and the divorce is, then registered.⁸⁹

In Penang and Kedah it is provided that where the Court of the Chief Kathi or of a Kathi is satisfied that there is serious disagreement between the parties to a marriage it may appoint in accordance with the Muslim Law two arbitrators or *hakam* to act for the husband and wife respectively. In making such appointment the Court is required where possible to give preference to close relatives of the parties having knowledge of the circumstances of the case. The Court may give directions to the *hakam* as to the conduct of the arbitration and they shall conduct it in accordance with such directions and according to Muslim Law. If they are unable to agree or if the Court is not satisfied with the conduct of their arbitration it may remove them and appoint other *hakam* in their place. The *hakam* shall endeavour to obtain from their respective principals full authority and may, if their authority, extends, so far, decree a divorce and shall in such event report the divorce to the Court for registration.⁹⁰

In Brunei it is provided that if a *kathi* is satisfied that there are constant quarrels between the parties to a marriage, he may appoint, in accordance with Muslim Law, two *hakam* or arbitrators to act for the husband and wife respectively, and in making such appointment the *kathi* shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case. The *kathi* may give directions to the *hakam* as to the conduct of the arbitration and they should conduct it in accordance with such directions and according to Muslim Law. If the arbitrators are unable to agree, or if the *kathi* is not satisfied with their conduct of the arbitration, he may remove them and appoint other *hakam* in their place. The *hakam* is to endeavour to obtain from their respective principals full authority and may, if their authority extends so far, decree a divorce and, in such event, report the

88. Kelantan Council of Religion and Malay Customs and Kathis Courts Enactment, 1953, s. 150; Trengganu Administration of Islamic Law Enactment, 1955, s. 108. These enact the orthodox as well as the less orthodox views of the *Shafii* school.

89. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 127. This enacts a modified form of the orthodox view of the *Shafii* school.

90. Penang Administration of Muslim Law Enactment, 1959, s. 126; Kedah Administration of Muslim Law Enactment, 1962, s. 127. These enact the orthodox view of the *Shafii* school.

divorce to the *kathi* for registration. If the *hakam* are of opinion that the parties should be divorced but are unable for any reason to decree a divorce, the *kathi* is empowered to appoint other *hakam* and to confer on them authority to effect a divorce and, if they do so, to register it.⁹¹

In the other States of Malaysia there are no express statutory provisions for the appointment of *hakam*, but it would appear that *hakam* may be appointed in accordance with Muslim Law. In Negri Sembilan under the Malay custom a husband who contemplates divorce must go through the arbitration called *bersuarang* or settlement. A small feast is held by the husband, to which he invites the relatives of his wife as well as his own. The husband will then state his grievances, so that they may be considered by the parties present. The elders of the family will try to reconcile the parties but if this fails, the divorce will be allowed after agreement as to the disposal of the conjugal property.⁹²

In Sarawak it is provided in the *Undang-Undang Makhamah Melayu, Sarawak*, that where there are disputes between the parties to a marriage they will be asked to live with or near the *Tua Rampong*,⁹³ who can observe them so that he can decide who is in the wrong. The *Tua Kampong* can then order the party at fault to mend his or her ways and if the order is not complied with such party is deemed to be at fault.⁹⁴

Sub-section (h) — NUSUS.

Where a wife unreasonably refuses to obey the lawful wishes or commands of her husband, she is said to be *nusjuz*⁹⁵ and the husband is freed from the duty to provide maintenance and a home for her. According to *Imam Shafii* a wife's maintenance is obligatory only if she puts herself at her husband's disposal and not in virtue of the contract of marriage. No maintenance is therefore due when the wife is *nusus*, i.e. when she unreasonably refuses obedience to her husband. As soon as the wife repents and obeys the husband, she ceases to be *nusus*.

In Singapore the Shariah Court is given power to inquire into questions arising out of Muslim Law relating to recalcitrancy or *nusus* and may make such decree as is by Muslim Law lawful.⁹⁶ The effect of an order of *nusus* is that the wife loses her right to maintenance and it has been held that the order of *nusus* would preclude her from applying even to a civil court for maintenance.⁹⁷

91. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 149. This sets out the orthodox as well as the less orthodox views of the *Shafii* school.
92. Haji Mohamed Din bin Ali, "Two Forces in Malay Society," *Intisari*, op. cit., p. 24.
93. The head of the village.
94. *Undang-Undang Makhamah Melayu, Sarawak*, s. 45.
95. Recalcitrant. The Malay form is *nusus*.
96. Muslims Ordinance, 1957, s. 35.
97. *Mohamed Saad v. Hasnah* (1949) M.L.J Supp. 31.

There is no statutory provision except in Singapore for the making of an order of *nusus* against a wife; but provision is made in some of the States of Malaya for the punishment of a woman who wilfully disobeys the lawful order of her husband. In Selangor, Kelantan, Trengganu, Pahang, Malacca and Negri Sembilan it is provided that any woman who wilfully disobeys any order lawfully given by her husband in accordance with Muslim Law shall be punishable with a fine not exceeding \$10/- or in the case of a second or subsequent offence with imprisonment for a term not exceeding seven days or with a fine not exceeding fifty dollars. But it is a sufficient defence if the husband has been guilty on more than one occasion during the preceding year of abusing or ill-treating the wife.⁹⁸

In Brunei it is provided that any woman who wilfully disobeys any order lawfully given by her husband in accordance with Muslim Law shall be guilty of an offence and punishable with a fine not exceeding \$10/- or in the case of a second or subsequent offence imprisonment for seven days or a fine of \$50/-. It is a sufficient defence that the husband has been guilty on more than one occasion during the preceding year of abusing or ill-treating his wife.⁹⁹

Sub-section (i) — MATA'AH.

The payment of a consolatory gift on divorce or *mata'ah*¹⁰⁰ is enjoined in the Holy Qur'an. "There is no blame on you if you divorce women before consummation or the fixation of their dower; but bestow on them a suitable gift the wealthy according to his means and the poor according to his means. A gift of a reasonable amount is due from those who wish to do the right thing."¹ According to the *Shafii* school of Law the payment of a consolatory gift is incumbent not only in the case where a woman has been divorced before consummation and before her dower is fixed, but also in the case of every divorced woman, except a woman whose dower has been stipulated and who is divorced before consummation. The present is made incumbent according to *Imam Shafii* "in the way of a gratuity or compensatory gift from the husband on account of his having thrown the woman into a forlorn state by his separation from her". The gift is therefore incumbent only when it is the husband who repudiates the wife. The consolatory gift can take the form of money, clothing or other articles.²

In Singapore it is provided that a woman who has been divorced by her husband may apply to the Shariah Court for a consolatory gift of *mata'ah* and the Court may after hearing the parties order payment of

98. Selangor Administration of Muslim Law Enactment, 1952, s. 156; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 176; Trengganu Administration of Islamic Law Enactment, 1955, s. 134; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 154; Malacca Administration of Muslim Law Enactment, 1959, s. 147; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 148.

99. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 175.

100. In some States, this appears as *mut'ah*.

1. Surah 2 Verse 236 (A. Yusuf Ali's translation).

2. Nawawi, *Minhaj-et-Talibin*, op. cit., p. 313.

such sum as may be just and in accordance with Muslim Law. The order for *mata'ah* can be made at any stage of the proceedings or after a decree or order for divorce has been made.³

In Selangor, Kelantan, Trengganu, Pahang, Malacca, Negri Sembilan, Kedah and Brunei, it is, similarly, provided that a woman who has been divorced by her husband may apply to a *kathi* for a consolatory gift or *mata'ah* and the *kaithi* may after hearing the parties order payment of such sum as may be just and in accordance with Muslim Law.⁴

In Perlis it is provided that a woman who has been divorced by her husband may apply to a *kathi* for a consolatory gift or *mata'ah* and the *kathi* may after hearing the parties make an order for such sum as may be just.⁵

Although there are no statutory provisions for the payment of *mata'ah* in the other States of Malaya or in Sarawak or Sabah, it would appear an order for payment of *mata'ah* may be made by the *kathi* in accordance with Muslim Law.

Sub-section (j) — MAINTENANCE OF DIVORCED WIFE.

A wife is entitled to reasonable maintenance from her husband during marriage; and she is entitled to be maintained by her husband during the *eddah* on the same scale as before the divorce, conditionally on submitting to her husband's control as regards her place of residence and general behaviour. According to the *Shafii* school, a wife who has been irrevocably divorced cannot claim maintenance during her period of *eddah* from her husband, unless she is pregnant by him; but it appears that a woman who has been irrevocably divorced may claim a suitable lodging during the period of *eddah*. Maintenance is not due to a woman whose marriage has been dissolved by her husband's death or where her wrongful action has led to the divorce. According to the *Shafii* school of Law the wife's maintenance is a debt on the husband and arrears are recoverable by the wife, though there be no decree of the court or a *kathi* or mutual agreement in respect of such maintenance.⁶

3. Muslims Ordinance, 1957, (as amended by the Muslim (Amendment) Ordinance, 1960), ss. 36 and 36A.
4. Selangor Administration of Muslim Law Enactment, 1952, s. 130; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 149; Trengganu Administration of Islamic Law Enactment, 1955, s. 107; Pahang Administration on the Law of the Religion of Islam Enactment, 1956, s. 130; Malacca Administration of Muslim Law Enactment, 1959, s. 124; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 125; Kedah Administration of Muslim Law Enactment, 1962, s. 125; Brunei Religious Council and Kathis Courts Enactment, 1955, s. 148.
5. Perlis Administration of Muslim Law Enactment, 1963, s. 94.
6. Nawawi, *Minhaj-et-Talibin* op. cit. p. 383f; R. K. Wilson, Anglo-Mohammadan Law, London, 1930, p. 423. According to the Ninety-Nine Laws of Perak, where a husband wants a divorce he must pay her maintenance for three months and the whole of her dowry if not already paid — see *The Ninety-Nine Laws of Perak*, edited and translated by J. Rigby, Kuala Lumpur, 1908, p. 22.

In Singapore the Shariah Court has power to inquire into and adjudicate upon claims for maintenance by married women or women who have been divorced. In default of payment the Shariah Court may enforce the payment 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.⁷ The maintenance order can also be enforced by the making of an attachment of earnings order under the Women's Charter, 1961.⁸

In Selangor, Kelantan, Trengganu, Penang, Malacca and Negri Sembilan it is provided that 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. A woman who has been divorced may, by application in the court of a *kathi*, obtain an order against her former husband for the payment in respect of her period of *eddah*, if the divorce was by one or two *talaks*, or, in any case, in respect of the period of pregnancy by the former husband, of any such sum in respect of her maintenance as she may be entitled to in accordance with Muslim Law. The Married Women and Children (Maintenance) Ordinance, 1950⁹ does not apply in the case of any claim for maintenance by a Muslim against a Muslim. Any order made by the court of a *kathi* may be rescinded or varied upon the application of any person interested thereunder and upon proof of change of material circumstances. In case of wilful failure to comply with such orders, the person in default may be sentenced by the Court to a term of imprisonment which may extend, if the order provides for monthly payments, to one week for each month's allowance remaining unpaid or, in any other case, to one month.¹⁰

In Pahang it is provided that 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 kind, in respect of her maintenance as she may be entitled to in accordance with Muslim Law. A woman who has been divorced may by application in the Court of a *Kathi* obtain an order against her husband for the payment in respect of the period of *eddah*, in cash or kind, in respect of her maintenance as she may be entitled to in accordance with Muslim Law. The Married Women and Children (Maintenance) Ordinance, 1950, does not apply in the case of any claim for maintenance by a Muslim against a Muslim. Any order made may be rescinded or varied upon the application of any person interested thereunder and upon proof of change of material circumstances. In case of wilful default in complying with such orders, the person in default

7. Muslims Ordinance, 1957, (as amended by the Muslims (Amendment) Ordinance, 1960), ss.36, 36A, and 36B.

8. Women's Charter, 1961, Part VIII.

9. F.M. Ordinance No. 36 of 1950.

10. Selangor Administration of Muslim Law Enactment 1952, ss. 138, 139, 143 and 144; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, ss. 158, 159, 163 and 164; Trengganu Administration of Islamic Law Enactment, 1955, ss. 116, 117, 121 and 122; Penang Administration of Muslim Law Enactment, 1959, ss. 133, 134, 137 and 138; Malacca Administration of Muslim Law Enactment, 1959, ss.131, 132, 135 and 136; Negri Sembilan Administration of Muslim Law Enactment, 1960, ss. 132, 133, 136 and 137; Kedah Administration of Muslim Law Enactment, 1962, ss. 133, 134, 137 and 138.

may be sentenced by the Court to imprisonment which may extend, if the order provides for monthly payments, to one week for each month's allowance or part thereof remaining unpaid or in any case to one month.¹¹

In Perlis it is provided that a married woman may by application to the Shariah Court 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. A woman who has been divorced may by application to the Shariah Court obtain an order against her husband for the payment of such sum as may be provided by Muslim Law for her maintenance during the period of *eddah*. In addition a woman who has been divorced may by application to the Shariah Court obtain an order against her former husband for maintenance payable monthly for so long as she remains unmarried or does not commit any misconduct; the *kathi* shall before making such an order satisfy himself that the woman has been divorced without good cause or reason. The Married Women and Children (Maintenance) Ordinance, 1950, does not apply in the case of any claim for maintenance by a Muslim against a Muslim. Any order for maintenance may be rescinded or varied upon the application of any person interested thereunder and upon proof of change of material circumstances. In case of wilful failure to comply with such orders the person in default may be sentenced by the court to a term of imprisonment which may extend, if the order provides for monthly payments, to one week for each month's allowance remaining unpaid or in any other case, to one month.¹²

Applications for maintenance of a divorced wife can be brought in the Courts of a *Kathi* in Perak and Johore where the *Kathi* is given power to deal with such applications. Applications for maintenance may also be brought under the Federation Married Women and Children (Maintenance) Ordinance, 1960.

In Brunei it is provided that 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. A woman who has been divorced may by application in the Court of a *Kathi* obtain an order against her former husband for the payment in respect of the period of *eddah*, if the divorce is by one or two *talaks*, or in any case in respect of the period of her pregnancy by the former husband of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim Law. A woman who is divorced and who is not otherwise entitled to an order for maintenance may apply to the Court of the *Chief Kathi* and that Court, may, if satisfied that it is just and proper so to do in view of all the circumstances of the case, make an order against the former husband for the payment by him of such sums for such period as the Court considers fit, but the amount ordered shall not exceed \$100/-

11. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss. 137, 138, 142 and 143. The Pahang Enactment appears to allow the making of an order for the giving of accommodation and therefore follows the Muslim Law more closely than in the other States.
12. Perlis Administration of Muslim Law Enactment, 1963, ss. 103 - 104 and 108.

a month.¹³ Any order made may be rescinded or varied upon the application of any person interested thereunder and upon proof of change of material circumstances. In case of wilful failure to comply with such orders, the person in default may be sentenced by the Court to a term of imprisonment which may extend, if the order provides for monthly payments, to one week for each month's allowance or part thereof remaining unpaid, but not exceeding in all one month.¹⁴

In Sabah and Sarawak there are no special provisions for applications by Muslim divorced women for maintenance but it would appear that such applications may be dealt with by the *Kathis*. Applications for maintenance can also be brought under the North Borneo Maintenance Ordinance, 1959, or the Sarawak Criminal Procedure Code, as the case may be.

Sub-section (k) — HARTA SAPENCHARIAN.

The distribution of property among Malay families was strongly influenced by the Malay custom which is of matriarchal origin. In case of divorce or on the death of the husband, the wife could claim a substantial share of land acquired during the marriage. Her rights as actually conceded in the other Malay States approximated very closely to the *charian laki bini*¹⁵ of the matriarchal tribes in Negri Sembilan.

It has been held that generally throughout Malaya, except in Singapore, a divorced wife is entitled to a share of all property acquired during the marriage. Where she has in fact assisted to cultivate the land she is entitled to one-half of the property, and in other cases to one-third of the jointly acquired property (*harta sapencharian*) of the marriage.¹⁶

13. In giving the woman who has been divorced a claim to maintenance for the period beyond the *eddah*, the Perlis and Brunei Enactments go beyond the provisions of the Muslim Law. A parallel enactment is to be found in the Syrian Law of Personal Status — See J. N. D. Anderson, *The Syrian Law of Personal Status*, in 1955 *Bulletin of the School of Oriental and African Studies*, p. 41.
14. Brunei Religious Council and Kathis Courts Enactment, 1955, ss. 157, 158, 162 and 164.
15. Property acquired by the joint efforts of the husband and the wife. See p.
16. *Rasimah v. Said* reported in E. N. Taylor, "Malay Family Law," 1937, *Journal of the Royal Asiatic Society, Malayan Branch*, Pt. I, p. 29. Although in that case it is stated that the rule does not apply to the Colony of the Straits Settlements, there is now provision for claims for *harta sapencharian* in Malacca and Penang. According to the Malay custom the guardians at a lawful marriage should enquire as to the separate property of the man and the woman so that on divorce it may be returned to the owner while property acquired during marriage is divided equally. If separate property has vanished during the marriage and the joint property acquired during the marriage is large, then the separate property is made good and the residue is the joint property; and losses too are divided. If the husband wants to divorce his wife for no fault, then the joint property is divided into three, the man taking one share and the woman two. J. E. Kempe, and R. O. Winstedt, a Malay Legal Miscellany, 1952, *Journal of the Royal Asiatic Society, Malayan Branch*, Part I p. 6. According to the Ninety-Nine Laws of Perak, if a divorce is at the instance of the husband and there is no blame attached to the woman he must provide her with maintenance for three months and the personal property will be divided. Weapons and instruments of iron go to the husband, vessels of brass and household utensils go to the wife. To the wife also belong the house or plantation, to the husband debts and dues.

In Perak the matter has been settled by a Perak State Council minute dated the 18th January, 1907. In that minute the Council declared and ordered to be recorded:—

“That the custom of the Malays in Perak in the matter of dividing up property after divorce, when such property has been acquired by the parties or one of them during marriage is to adopt the proportion of two shares to the man and one share to the woman and the gifts between married persons are irrevocable either during marriage or after divorce.”¹⁷

Claims to such property are dealt with by the Court or Collectors of Land Revenue (in the case of land registered in the Mukim Registers) but *kathis* are called in as advisers on questions of principle. The claim of the divorced wife to one-third of the value of the lands acquired during the marriage is not defeated even if it is proved that she was divorced for adultery¹⁸ nor would she lose her right on *tebus talak* (*khula*) unless the consideration for the *tebus talak* was the waiver of her claim to the *harta sapencharian*.¹⁹ The divorced wife's share may be increased to one-half depending upon the nature of the work actually done by her on the jointly acquired property.²⁰ In *Re Elang, Re Kulop Degor and Lebar v. Niat*,²¹ Taylor J. said:—

“The evidence of the six witnesses who were examined before me establishes that in the Perak River *kampongs* there is a custom almost invariably followed by which on divorce the property acquired during the marriage is divided between the parties — the division depending on the circumstances and is arranged by the two families and the *ketua kampong*; if the woman assisted in the actual cultivation she can claim half; if she did not work on the land she received a smaller share — perhaps one-third. If a man of this class earns a salary (e.g. as a Government servant) and property is bought out of his earnings the wife's share is one-third.”²²

There is some doubt as to the position where the man earns a salary (e.g. as a Government servant) and property is bought out of his earnings. In *Re Elang, deceased, (supra)* it was stated that in such a case

16. [contd.]

If a divorce is sought owing to the misbehaviour of the woman — that is, on account of her adultery, or neglect of service at bed and board or refusal to do works of charity and to pray — she forfeits her settlements only and the law is that the husband must pay a *paha* of gold. If a woman seeks a divorce, if she thrice makes out a case of misconduct on the husband's part, she can obtain a divorce; but she must redeem herself by returning the settlements and the moveable property goes to the husband. If property was brought from the parent's home being acquired before the marriage, each party will keep possession of it. Such property is known as separate property and is not thrown into the property to be divided on divorce. But if the parties have lived for three years together and have children, it shall be thrown in. *The Ninety-Nine Laws of Perak*, Edited and translated by J. Rigby, Kuala Lumpur, 1908, p. 31 and 39.

17. E. N. Taylor, *Malay Family Law*, op. cit., p. 41.

18. *Teh Rasim v. Neman* in E. N. Taylor, *Malay Family Law*, op. cit., p. 18

19. *Wan Mahattan v. Haji Abdul Samat* in E. N. Taylor, *Malay Family Law*, op. cit., p. 25.

20. *Ibid.*

21. E. N. Taylor, *Malay Family Law*, op. cit., p. 48.

22. *Ibid* at p. 55 - 56.

the wife's share is one-third but in the case of *Wan Mahattan v. Haji Abdul Samat*²³ it was stated by the *Kathi* of Larut that where a woman married a person who earns wages and the wife merely looks after the household the property obtained by the husband during the marriage is not in partnership with the woman but is appropriated to her husband alone. In *Re Noorijah*²⁴ the facts were that the deceased, the wife of a public servant, left land registered in her name. The land was bought by the husband but registered in the name of the wife. There was no evidence of any gift to the deceased by her husband. It was held that the husband was solely entitled to the property and it should not be regarded as the estate of the deceased.

In Selangor there is no reported case which gives a share in the *harta sapencharian* to the divorced wife. In *Laton v. Raman*²⁵ the trial Judge held on the evidence of *kathis* that a widow is entitled to one-half of the value of the immovable property of the deceased husband at the time of his death but on appeal the Court of Appeal held that the evidence of the *kathis* was not admissible and they ordered a retrial. In *Haji Ramah v. Alpha*²⁶ it was merely held that a widow is entitled to claim *upah* or compensation for her share in the work of cultivation of land. It would seem, however, that the Malay custom where the wife on divorce gets a share of the *harta sapencharian* applies in Selangor and the Administration of Muslim Law Enactment, 1952, gives power to the Court of the *Kathi Besar* and to the Court of a *Kathi* to hear and determine actions and proceedings relating to the division of or claims to *sapencharian* property.²⁷

In Pahang it was held in *Haji Saemah v. Haji Sulaiman*²⁸ that the evidence called in that case did not prove the existence of any custom that the widow is entitled to more than her Quaranic share in her deceased husband's estate and the widow's claim to a half-share of the lands of her deceased husband's as *harta sapencharian* was dismissed. In *Teh binte Chik v. Kalsom binte Haji Abbas*²⁹ it was assumed, however, that claims for *harta sapencharian* can be validly and successfully made in Pahang. It was held in that case, however, that *harta sapencharian* is only applicable to property acquired during marriage and not to property acquired before marriage. Where property has been acquired before marriage and either spouse has put in money or labour to that property, *harta sapencharian* does not apply but either spouse is entitled to claim what is known as *upah* or remuneration for work done. In 1930 the Chief *Kathi* and *Kathis* of Pahang gave their opinion that a woman can claim *harta sapencharian* according to Pahang custom on divorce or on the death of her husband. The claim can be made in respect of land and

23. E. N. Taylor, *Malay Family Law*, op. cit., p. 25.

24. E. N. Taylor, *Malay Family Law*, op. cit., p. 59.

25. (1926) 6 F.M.S.L.R. 179.

26. 4 F.M.S.L.R. 179.

27. Selangor Administration of Muslim Law Enactment, 1952, s. 45(3).

28. (1942) M.L.J. 17; (1948) M.L.J. 108.

29. (1939) M.L.J. 289.

movable property. There is no fixed rule as to the share of the divorced wife or widow but either equal or unequal shares may be awarded pursuant to an agreement between the parties or confirming a gift or by judgment of the *Kathi*³⁰ The Courts of the *Chief Kathi* and of the *Kathis* are given jurisdiction to hear and determine actions and proceedings which relate to the division of or claims to *sapencharian* property.³¹

In Kedah it has been stated that on the dissolution of a Malay marriage the property acquired by the husband and wife is divided between them but there is no established rule or principle to guide the Court in deciding the respective shares.³² However, in *Habsah v. Abdullah*³³ it was held that on divorce a woman in Kedah is entitled by customary law to half of any property acquired during the marriage by joint effort and such a claim is not barred or extinguished by her remarriage.

In Penang, Malacca and Negri Sembilan the Court of the *Kathi Besar* and of the *Kathi* are given jurisdiction to hear and determine all actions and proceedings relating to the division *inter vivos* of *sapencharian* property.³⁴

In Kelantan, Trengganu and in Brunei, the Courts of the *Chief Kathi* and the Court of a *Kathi* are given jurisdiction to hear and determine actions and proceedings which relate to divisions of or claims to *sapencharian* property.³⁵

In Perlis the court of a *kathi* and assistant *kathi* are given jurisdiction to hear and determine all actions and proceedings which relate to decisions of or claims to *sapencharian* property. A woman who has been divorced by her husband may apply to a *kathi* for her share of the common property called *harta sapencharian* and the *kathi* may after hearing the parties make an order for payment of such sums as may be just.³⁶

In Sarawak it is provided in the *Undang-Undang Mahkamah Melayu, Sarawak*, that if both parties join in acquiring the matrimonial property, for example a farm or ricefield, then on divorce the wife is entitled to one-half of the matrimonial property. If, on the other hand, the husband is the only earner, then on divorce the wife is entitled to one-third of the matrimonial property.³⁷

30. E. N. Taylor, *Malay Family Law*, op. cit., p. 73.

31. Pahang Administration of the Law of the Religion of Islam Enactment, 1956 s. 37(3).

32. *Wan Nab v. Jasin* in E. N. Taylor, *Malay Family Law*, op. cit., p. 20.

33. (1950) M.L.J. 60.

34. Penang Administration of Muslim Law Enactment, 1959, s. 40(3); Malacca Administration of Muslim Law Enactment, 1959, s. 40(3); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 41(3).

35. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 48(1); Trengganu Administration of Islamic Law Enactment, 1955, s. 25(1); Brunei Religious Council and Kathis Courts Enactment, 1955, s. 48(1).

36. Perlis Administration of Muslim Law Enactment, 1963, ss. 11 and 94.

37. *Undang-Undang Mahkamah Melayu, Sarawak*, s. 41.

Sub-section (l) — DISTRIBUTION OF PROPERTY ON DIVORCE UNDER
ADAT PERPATEH

In the parts of Negri Sembilan and of Malacca where the matriarchal *adat perpateh* is followed, the distribution of property on divorce follows the *adat* or customary law. Briefly in all cases of dissolution of the marriage not only the *charian laki-bini*³⁸ but the whole of the property of both parties, movable and immovable, must be brought into account irrespective of its origin and of the name in which the land is registered. Marriage property falls into three classes. That which is acquired during wedlock is called *harta charian*, such as a rubber estate, herd of husbandry, joint-savings or rice crop. That which the husband brought at the time of the marriage is called *harta pembawa*. That which belonged to the wife at the time of the marriage is called *harta dapatan*. The property with which the marriage commenced must be restored or made good to the respective parties; *dapatan tinggal* — the wife's separate estate remains with her or her tribe; and *pembawa kembalek* — the personal estate brought by the man returns to him. The *charian laki-bini*³⁹ is divided equally on divorce between husband and wife, irrespective of who is to blame for the divorce, irrespective even of the wife's adultery and irrespective of the number of children. As under the customary law the children remain with the mother on divorce, it is usual for the father to agree to give part of his share to his children. There is one exception to the rule of equal division on divorce; in the case of a *cherai ta'alik* the wife retains the whole of the property.⁴⁰

The practice in Rembau is that claims for partition must be made at the time of divorce; relief can be given then but not afterwards.⁴¹ The *Kathi* is precluded from issuing the certificate of divorce until he is satisfied that all questions of property have been adjusted and, if any such question is taken to the Court or the Collector, the *Kathi* must obtain the leave of the Court or Collector before issuing his certificate. In *Hasmah binte Omar v. Abdul Jalil*⁴² it was held that the custom in Kuala Pilah is different from that in Rembau and that according to the *adat* in Kuala Pilah proceedings to recover land can be commenced after divorce.

Sub-section (m) — MATRIMONIAL OFFENCES.

The Penal Code punishes the offences of rape, incest, unnatural offences, gross indecency, kidnapping from lawful guardianship, bigamy

38. *I.e.* property acquired by the joint efforts of the married pair.

39. *I.e.* after payment of burial expenses and debts.

40. *Mahawa v. Manan* in E. N. Taylor, "Customary Law of Rembau," 1929 *Journal of the Royal Asiatic Society, Malayan Branch*, Part I, pp. 20 and 111.

41. *Rahim v. Sintah* in E. N. Taylor, *Customary Law of Rembau* op. cit., p. 114 and *Jasin v. Taiwan* (1941) M.L.J. 247.

42. (1958) M.L.J. 10.

and enticing a married woman; and such provisions apply to Muslims.⁴³ So, too, the provisions relating to offences against women and girls in the Women's Charter, 1961, in Singapore and in the Federation Women and Girls Protection Enactment apply to Muslims.⁴⁴ The Penal Codes in the States of Malaysia and in Brunei do not (as the Penal Code does in India) punish the offence of adultery.

There are, however, special provisions relating to matrimonial offences relating to Muslims and these may be classified as follows:—

(i) *Desertion of wife.*

It is provided in Selangor that whoever, having ceased to cohabit with his wife in the manner required by Muslim Law and having been ordered by the Court of the *Kathi Besar* or of a *Kathi* to resume cohabitation with her, wilfully fails or neglects to comply with such order shall be punishable with imprisonment for a term not exceeding fourteen days or with a fine not exceeding fifty dollars or with both such imprisonment and fine.⁴⁵ Similar provisions are to be found in Kelantan, Trengganu, Penang, Malacca, Negri Sembilan and Kedah and in Brunei.⁴⁶

(ii) *Ill-treatment of wife.*

It is provided in Selangor that whoever ill-treats his wife shall be punishable with imprisonment for a term not exceeding fourteen days or with a fine not exceeding fifty dollars or with both such imprisonment and fine.⁴⁷ Similar provisions are to be found in Kelantan, Trengganu,

43. See for example the Federation Penal Code, (Cap. 45 of 1935 Edition of the Laws of the Federated Malay States), ss. 375 - 377A, 361, 494 and 498; In *P.P. v. White* (1940) M.L.J. 214 it was held that a convert to Islam who has been married under a monogamous form of marriage, is guilty of bigamy if he married again according to the Muslim Law while his wife is still alive; and in *Reg. V. Rabia* (1889) 4 Ky. 513 it was held that a Muslim married woman is not exempted from prosecution on a charge of bigamy. In *P.P. v. Abdul Rahman* (1963) M.L.J. 213 it was held that a Muslim who entices a Muslim girl under the age of sixteen years from the custody of her father is guilty under s. 361 of the Penal Code despite the fact that she has attained the age of puberty; the Court did not follow the earlier decision in *Ghouse bin Haji Kadar Mustan v. R.* (1946) M.L.J. 36 where it was held that a Muslim girl belonging to the *Hanafi* school of Law has no guardian after she attains the age of puberty and cannot therefore be kidnapped from lawful guardianship. See Note in 1963 *Malaya Law Review* at p. 392.

44. Women's Charter, 1961, Part X; Women and Girls Protection Enactment (Cap. 156 of the 1935 Edition of the Laws of the Federated Malay States).

45. Selangor Administration of Muslim Law Enactment, 1952, s. 155(1).

46. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.175(1); Trengganu Administration of Islamic Law Enactment, 1955, s.133(1); Penang Administration of Muslim Law Enactment, 1959, s. 148(1); Malacca Administration of Muslim Law Enactment, 1959, s. 146(1); Negri Sembilan Administration of Muslim Law Enactment, 1960, s.147(1); Kedah Administration of Muslim Law Enactment, 1962, s. 148; Brunei Religious Council and Kathis Courts Enactment, 1955, s. 174(1). In Kedah it is also an offence for a husband, who has ceased to cohabit with his wife, to fail or neglect to comply with the order of the Court to resume cohabitation with her.

47. Selangor Administration of Muslim Law Enactment, 1952, s. 155(2).

Pahang, Penang, Malacca, Negri Sembilan and Brunei.⁴⁸

(iii) *Disobedience of wife.*

It is provided in Selangor that any woman who wilfully disobeys any order lawfully given by her husband in accordance with Muslim Law shall be punishable with a fine not exceeding ten dollars or in the case of a second or subsequent offence with imprisonment for a term not exceeding seven days or with a fine not exceeding fifty dollars but, it is a sufficient defence to any prosecution under the section that the husband had been guilty on more than one occasion during the proceeding year of abusing or ill-treating the accused.⁴⁹ Similar provisions are to be found in Kelantan, Trengganu, Pahang, Malacca, Negri Sembilan and Brunei.⁵⁰

(iv) *Resumption of cohabitation after divorce without rojok.*

It is provided in Selangor that any man who, having lawfully divorced his wife resumes cohabitation with her without having pronounced a lawful *rojok*, shall be guilty of an offence punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars or, if his wife was not at the time of such resumption of cohabitation aware of the occurrence of the divorce, with imprisonment for a term not exceeding two months or with a fine not exceeding two hundred dollars. Any woman who abets the offence is punishable with imprisonment for seven days or with a fine not exceeding twenty-five dollars.⁵¹ Similar provisions are to be found in Kelantan, Trengganu, Pahang, Penang, Malacca, Negri Sembilan, Kedah, and Brunei.⁵²

In Perlis it is provided that any man who having lawfully divorced his wife, resumes cohabitation with her without having pronounced a lawful *rojok* shall be liable to imprisonment for a term not exceeding four days or to a fine not exceeding fifty dollars, or if his wife was not

48. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.175(2); Trengganu Administration of Islamic Law Enactment, 1955, s.133(2); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.153; Penang Administration of Muslim Law Enactment, 1959, s.148(2); Malacca Administration of Muslim Law Enactment, 1959, s.146(2); Negri Sembilan Administration of Muslim Law Enactment, 1960, s.147(2); Brunei Religious Council and Kathis Courts Enactment, 1959, s.174(2).

49. Selangor Administration of Muslim Law Enactment, 1952, s.156.

50. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.176; Trengganu Administration of Islamic Law Enactment, 1955, s.134; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.154; Malacca Administration of Muslim Law Enactment, 1959, s.147; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.148; Brunei Council of Religion and Kathis Courts Enactment, 1955, s.175.

51. Selangor Administration of Muslim Law Enactment, 1952, s.158.

52. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.178; Trengganu Administration of Islamic Law Enactment, 1955, s.136; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.156; Penang Administration of Muslim Law Enactment, 1959, s.150; Malacca Administration of Muslim Law Enactment, 1959, s.149; Negri Sembilan Administration of Muslim Law Enactment, 1962, s.150; Brunei Religious Council and Kathis Courts Enactment, 1955, s.177.

at the time of such resumption of cohabitation aware of the operation of the divorce, to imprisonment for a term not exceeding one month or to a fine not exceeding one hundred dollars. Any woman who abets such an offence shall be liable to imprisonment for a term not exceeding seven days or to a fine not exceeding twenty-five dollars.⁵³

(v) *Resumption of cohabitation after triple divorce.*

In Perak it is provided that where the marriage of two persons has been irrevocably dissolved by the pronouncement of three *talaks* by the man against the woman it shall be unlawful for such persons to cohabit as man and wife unless the woman is first lawfully married to some person other than her divorced husband and such marriage is, then, dissolved. Any person who acts in contravention of this provision is liable on conviction to a fine not exceeding two hundred and fifty dollars and for any subsequent offence of the same nature to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months.⁵⁴ Similar provisions are to be found in Johore.⁵⁵ In the other States of the Federation and in Brunei this offence is classified as illicit intercourse, fornication or incest.

(vi) *Illicit intercourse and fornication.*

In Selangor illicit intercourse is defined as sexual intercourse not amounting to rape between any male and any female who is not his wife or whom he is forbidden by Muslim Law to marry, and it is provided that except in the case of illicit intercourse between divorced persons, whoever is guilty of illicit intercourse whether the other party to such illicit intercourse professes the Muslim religion or not, shall be punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars.⁵⁶ Similar provisions are to be found in Kelantan, Penang, Malacca and Brunei.⁵⁷

There is also a similar provision in Pahang but "illicit intercourse" is not there defined and special provision is made for incest.⁵⁸

In Negri Sembilan and Kedah although there is a definition of 'illicit intercourse' the punishment provided is for fornication. It is provided that a male Muslim who has sexual intercourse with a woman who is not the wife of some other person, such sexual intercourse not amounting to

53. Perlis Administration of Muslim Law Enactment, 1963, s. 116.

54. Perak Muslim (Offences) Enactment, 1939, s. 11.

55. Johore Offences by Muslims Enactment, (E. No. 47), s. 5.

56. Selangor Administration of Muslim Law Enactment, 1952, ss. 2 and 158(3).

57. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, ss. 2 and 178(3); Penang Administration of Muslim Law Enactment, 1959, ss. 2 and 150(3); Malacca Administration of Muslim Law Enactment, 1959, ss. 2 and 149(3); Brunei Religious Council and Kathis Courts Enactment, 1955, ss. 2 and 177. In Brunei there is special provision for incest and this is also excepted from the provision relating to illicit intercourse.

58. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss. 156(3) and 157.

the offence of rape, is guilty of the offence of fornication and is liable to imprisonment for a term not exceeding three months or to a fine not exceeding two hundred and fifty dollars. Any woman who is found guilty of being a participator in the offence is liable to imprisonment not exceeding three months or to a fine not exceeding one hundred dollars.⁵⁹ The drafting is not very exact and it would appear that it is an offence for a person to have intercourse with his own wife, though this is clearly not intended.

In Perlis 'illicit intercourse' is defined as sexual intercourse not amounting to rape between any male person and any female person who is not his wife and whom he is forbidden by Muslim Law to marry. It is provided that any person who has an illicit intercourse with another person not lawfully married to him, whether or not such other person professed the Muslim religion, shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand dollars or to both. Special provision is made for illicit intercourse between divorced persons and for incest.⁶⁰

In Sarawak it is provided in the *Undang-Undang Mahkamah Melayu, Sarawak*, that if a man has illicit intercourse with a woman whom he can marry, the parties will be asked to marry and the *berian* in such cases shall not exceed \$50/-. If the man refuses to marry the woman he is liable to pay a fine and to pay the *berian* of \$50/- to the woman and if the woman is pregnant he is liable to pay the expenses of her maintenance and accouchement and also for the maintenance of the child until the age of two years. If the woman refuses to marry, the man cannot force her to do so. There is special provision for the punishment of incest. It is also provided that if a man has illicit intercourse with a woman who is in her *eddah*, he is liable to a fine but the parties can marry after the completion of the *eddah*. If a male and a female have illicit intercourse in the premises of another person, they are liable on the complaint of such person to a fine. If it is shown that the wife of any person is committing adultery but the husband does not make any complaint or take any action, the Native Court can itself take action and punish the husband, the wife and the person with whom she commits adultery and take steps to have the wife divorced from her husband. If a woman admits that she has had illicit intercourse with a man but has no witnesses and the man denies it, the man will be put on oath and if he takes the oath her complaint will be dismissed, if on the other hand she has a witness or is pregnant, she is asked to take the oath and if she does so, the man will be asked to marry her, but if he has a wife and cannot afford to take another wife, he will be fined and asked to pay a *berian* of \$50/- to the woman. Where the parties who commit illicit intercourse belong to different religions and they both wish to follow the same religion they

59. Negri Sembilan Administration of Muslim Law Enactment, 1960, ss. 2 and 150; Kedah Administration of Muslim Law Enactment, 1962, ss. 2 and 151.

The prescribed punishment for a married woman guilty of being a participator in the offence of fornication in Kedah is imprisonment for a term not exceeding six months or a fine not exceeding five hundred dollars. There is also in Negri Sembilan as well as in Kedah special provisions for incest.

60. Perlis Administration of Muslim Law Enactment, 1963, ss. 2 and 117.

will be allowed to do so and to many. If however, they do not wish to do so, the customary law applicable will be that of the woman, so that if a non-Muslim has such intercourse with a Muslim woman, he will be liable to a fine.⁶¹ It is further provided that an *Orang Dagang*, i.e., a Muslim who is not domiciled in Sarawak, who has sexual intercourse with an unmarried Muslim woman shall on complaint by the woman's relatives be liable to a fine not exceeding two hundred dollars or to imprisonment not exceeding two months or to both such fine and imprisonment.⁶²

(vii) *Incest.*

In Perak it is provided that any Muslim who has sexual intercourse with a person whom he is and whom he knows or has reason to believe he is forbidden by Muslim Law to marry by reason of consanguinity, fosterage or affinity, is guilty of the offence of incest. If the act is incest by reason of consanguinity or of fosterage the male person is liable on conviction to imprisonment for a term not exceeding five years and any woman convicted of being a participator in such act is liable to the same penalty. Where the act is incest by reason of affinity the male person is liable to imprisonment for a term not exceeding six months or a fine not exceeding two hundred and fifty dollars and any woman convicted of being a participator in such act is liable to the same penalty.⁶³

In Pahang it is provided that whoever has sexual intercourse with a person whom he is and whom he knows or has reason to believe that he is forbidden to marry by the Muslim Law commits incest. Whoever commits incest, whether male or female, shall, if by reason of consanguinity or fosterage, be punishable with imprisonment for a term not exceeding six months; or if by reason of affinity be punishable with imprisonment for a term not exceeding six months or with a fine not exceeding two hundred and fifty dollars.⁶⁴

In Kedah it is provided that any person who has sexual intercourse with a person whom he is forbidden to marry under Muslim Law is guilty of the offence of incest and is liable on conviction to imprisonment for a

61. *Undang-Undang Makhamah Melayu, Sarawak*, ss. 14, 15, 17, 20, 48, 50 and 57.

62. The Sarawak laws seem to follow the custom in the old Malay communities in which fornication was the accepted road to marriage. According to the 18th Century, *Ninety-Nine Laws of Perak*, the seducer of a betrothed girl was merely fined and married off, that is if he could pay the fine and provide double the dower (half of it for the jilted suitor), though if the seducer could not pay, he is not to be married but banished, beaten and plundered. The same laws allowed a couple guilty of illicit intercourse to marry or settle the matter between themselves. Where a man is charged with illicit intercourse which is proved by the fact that the woman is pregnant or by the testimony of eye-witnesses or by the woman's testimony supported by her possession of his clothing, the judge will make an order for the parties to get married, the reason given being that a multiplicity of illegitimate Muslims would be a reproach to a country and to its rulers — see R. O. Winstedt, *The Malays*, London, 1961, p. 103f and *The Ninety-Nine Laws of Perak*, translated by J. Rigby, Kuala Lumpur, 1908, Law Nos. 5, 10, 37 and 50.

63. Perak Muslim (Offences) Enactment, 1959, s. 10.

64. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 157.

term not exceeding two years or to a fine not exceeding one thousand dollars or both. Any woman who is convicted of being a participator in such an offence shall be liable to the same punishment.⁶⁵

In Negri Sembilan there is only provision for the punishment of incest by reason of affinity. It is provided that any person who has sexual intercourse with a person whom he is forbidden to marry under Muslim Law by reason of affinity is guilty of the offence of incest and shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred and fifty dollars. Any woman who is convicted of being a participator in such an offence shall be liable to the same punishment.⁶⁶

In Perlis it is provided that any Muslim who has sexual intercourse with a person whom he is or knows or has reason to believe that he is either absolutely or conditionally forbidden by Muslim Law to marry commits incest. If the act is incest for the reason that the marriage is absolutely forbidden, the person committing it if a male is liable on conviction to imprisonment for a term not exceeding five years and if a female is liable to imprisonment for a term not exceeding one year. If the act is incest for the reason that the marriage is conditionally forbidden the person committing it is liable to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred and fifty dollars.⁶⁷

In Johore it is provided that any Muslim who has sexual intercourse with a person whom he is and whom he knows or has reason to believe that he is forbidden by the Muslim Law to marry by reason of consanguinity or fosterage or affinity is guilty of the offence of incest. If the act is incest by reason of consanguinity or fosterage, the person is liable on conviction to imprisonment for a term not exceeding five years and any woman convicted of being a participator in such act shall be liable to imprisonment for a term not exceeding one year. If the act is incest by reason of affinity, the person is liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred and fifty dollars and any woman convicted of being a participator in such act is liable to the like penalty.⁶⁸

In Brunei it is provided that any person who has sexual intercourse with any person whom he or she is, and whom he or she knows or has reason to believe that he or she is, forbidden by Muslim Law to marry, is guilty of an offence punishable in the case of the male person with imprisonment for five years and in the case of the female person with imprisonment for one year.⁶⁹

In Sarawak it is provided that if a male commits a wrong (*bersalah*)

65. Kedah Administration of Muslim Law Enactment, 1962, s. 152.
66. Negri Sembilan Administration of Muslim Law Enactment 1960, s. 151.
67. Perlis Administration of Muslim Law Enactment, 1963, s. 118.
68. Johore Offences by Muslims Enactment, s. 7.
69. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 177(3) .

with a woman whom he is absolutely forbidden to marry as for example his mother, daughter, sister, aunt or mother-in-law, he is liable to imprisonment for two years; if a male commits a wrong with a woman whom he is conditionally forbidden to marry during the lifetime of his wife as, for example, his wife's sister, he is liable to imprisonment for one year.⁷⁰

(viii) *Adultery.*

In Perak it is provided that any Muslim who has sexual intercourse with a Muslim woman who is or whom he knows or has reason to believe to be the wife of another man, such sexual intercourse not amounting to rape, shall be guilty of the offence of adultery and shall be liable on conviction to imprisonment for a term not exceeding one year and shall also be liable to a fine not exceeding five hundred dollars. Any woman convicted of being a participator in such offence is liable to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred and fifty dollars.⁷¹ Similar provisions are to be found in Negri Sembilan, Kedah and Johore.⁷²

(ix) *Kheluat.*⁷³

It is provided in Selangor that any male Muslim who is found in retirement with and in suspicious proximity to any woman, whether or not professing the Muslim religion, other than a woman whom by reason of consanguinity, affinity or fosterage he is forbidden by Muslim Law to marry, shall be guilty of *kheluat* and shall be liable on conviction to imprisonment for a term not exceeding two months or with a fine not exceeding two hundred dollars or in the case of a second or subsequent offence, with imprisonment for a term not exceeding three months or with a fine not exceeding three hundred dollars. Any female person who abets the offence is liable to the same punishment. Any female person who is found in retirement with and in close proximity to any man who does not profess the Muslim religion is punishable in the like manner.⁷⁴ Similar provisions are to be found in Kelantan, Pahang, Penang, Malacca,

70. *Undang-Undang Mahkamah Melayu, Sarawak*, s. 50.

71. Perak Muslim (Offences) Enactment, 1939, s. 9(i).

72. Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 150(1); Kedah Administration of Muslim Law Enactment, 1962, s. 151(1); Johore Offences by Muslims Enactment, s. 6. The offence is classified as 'fornication' in Negri Sembilan and Kedah.

73. *Kheluat* is based on the principle of 'valid retirement' (*Khilwatus-sahih*) which takes place when a man retires with his wife and there is no legal or natural obstruction to their sexual intercourse. Under the Muslim Law valid retirement has generally the same legal effect as consummation of the marriage. The offence is called '*bersunyi-sunyian*' in Kedah.

74. Selangor Administration of Muslim Law Enactment, 1952, s. 157, as amended by the Administration of Muslim Law Enactment, 1962 (No. 8 of 1962). It is provided that any female found guilty of the offence of *kheluat* may be committed to a home approved by the *Majlis* or Council of Religion for such term not exceeding six months as the President of the *Majlis* considers appropriate.

Negri Sembilan, Perak and Kedah though the prescribed punishments vary.⁷⁵

The corresponding provisions in Trengganu and Brunei would appear to be better drafted. It is provided that any male Muslim who is found in retirement with and suspicious proximity to any woman or is found in any place in suspicious proximity to any woman whether or not professing the Muslim religion, other than his wife or a woman who by reason of consanguinity, affinity or fosterage he is forbidden by Muslim Law to marry shall be guilty of *kheluat*. It is also provided in Trengganu that any Muslim woman who is found in retirement with and suspicious proximity to any woman or is found in any place in suspicious proximity to any man whether or not professing the religion of Islam, other than her husband or a male person whom by reason of consanguinity, affinity or fosterage she is forbidden by Muslim Law to marry shall also be guilty of *kheluat* and be liable to the same penalty as the male. In Brunei it is provided that any female Muslim who abets the offence of *kheluat*, shall be guilty of an offence; and that any female Muslim who is found in retirement and in suspicious proximity to any man who does not profess the religion of Islam shall also be guilty of an offence.⁷⁶

In Perlis it is provided that any male person who is found in retirement with and in close proximity to any woman, whether or not professing the Muslim religion, other than his wife or a woman whom he is forbidden by Muslim Law to marry, shall be guilty of *khalwat* and shall be liable to imprisonment for a term not exceeding four months or a fine not exceeding two hundred dollars or in the case of a second or subsequent offence to imprisonment for a term not exceeding six months or to a fine not exceeding four hundred dollars. Any female person who is found in retirement with and in suspicious proximity to any man whether or not professing the Muslim religion other than her husband or a man whom she is forbidden by Muslim Law to marry, shall be guilty of an offence and be liable to the like penalty as in the case of a man guilty of *khalwat*. The President of the Majlis may order any female person found guilty of the offence to be committed to a home approved by the Majlis for such period not exceeding six months as the President may consider appropriate.⁷⁷

In Sarawak the *Undang-Undang Mahkamah Melayu, Sarawak*, deals with *salah* or wrong in the eyes of the customary law. The list of this

75. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 177; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 155; Penang Administration of Muslim Law Enactment, 1959, s. 149; Malacca Administration of Muslim Law Enactment, 1959, s. 148; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 149; Perak Muslim (Offences) Enactment, 1939, s. 9(ii) and (iii); Kedah Administration of Muslim Law Enactment, 1962, s. 149. The offence is called *bersunyi-sunyi* in Kedah. The Kelantan Enactment provides that a non-Muslim who abets a person who to his knowledge professes the Muslim religion in the commission of an offence under the Enactment may be punishable for such an offence, but this provision is probably *ultra vires* the powers of the State Legislature — See Note in (1952) M.L.J. at p. cliv.
76. Trengganu Administration of Islamic Law Enactment, 1955, s. 135; Brunei Religious Council and Kathis Courts Enactment, 1955, s. 176.
77. Perlis Administration of Muslim Law Enactment 1963, s. 115.

is not exhaustive but appears to include offences which are akin to *kheluat*. It is an offence, for example, to enter a house when there is no male member of the family in it or to peep, whistle or knock below the house of any person or to induce a woman to go wrong.⁷⁸

(x) *Leading immoral life.*

In Perak it is provided that any unmarried Muslim girl who absconds from lawful guardianship in order to lead an immoral life is, for the first offence, liable on conviction to imprisonment for a term not exceeding three months and for any subsequent offence to imprisonment for a term not exceeding six months.⁷⁹

It is provided in Johore that any Muslim woman, who, contrary to the provisions of Muslim Law, leads an immoral life by becoming a prostitute or cohabiting with a man of any race whatsoever to whom she is not married is guilty of an offence and is liable on a first offence to a fine not exceeding fifty dollars or imprisonment for a term not exceeding one month, and for each subsequent offence to a fine not exceeding three hundred dollars or to imprisonment for a term not exceeding three months.⁸⁰

(xi) *Enticing unmarried girl from guardian.*

In Perak it is provided that any Muslim who takes or entices any unmarried Muslim girl out of the keeping of her parents or guardians or of any person having the care of her on their behalf, is liable to imprisonment for a term not exceeding one year and is also liable to a fine which may extend to twice the amount of the *maskawin* normally paid on the marriage of a girl of her class.⁸¹

In Sarawak it is provided in the *Undang-Undang Kakhamah Melayu, Sarawak*, that if a person takes away a girl to a public place without the permission of the guardian of the girl, he is guilty of an offence and liable to pay a fine. If the girl is betrothed to or is the wife of another person, the fine is heavier. If the girl is taken away with the object of having illicit intercourse with a person of a different religion the person so taking her away and the person at whose request she is taken away are liable to fines. If a person entices the virgin daughter or a woman betrothed to another person, he is liable to a fine.⁸²

(xii) *Unlawful solemnization of marriage.*

In Selangor it is provided that a person who solemnizes or purports to solemnize any marriage between persons professing the Muslim religion in contravention of the requirements of the Administration of Muslim Law

78. *Undang-Undang Makhamah Melayu, Sarawak*, ss. 26, 27 and 28.

79. Perak Muslim (Offences) Enactment, 1939, s. 8.

80. Johore Offences by Muslims Enactment, s. 4.

81. Perak Muslim (Offences) Enactment, 1939, s. 7.

82. *Undang-Undang Makhamah Melayu, Sarawak*, ss. 12, 13 and 47.

Enactment, 1952, or knowingly purports to solemnize any marriage which is void under the provisions of the Enactment, is punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars.⁸³ Similar provisions are to be found in Kelantan, Trengganu, Pahang, Penang, Malacca, Negri Sembilan, Kedah, Perlis and Brunei.⁸⁴

In Singapore it is provided that any person who solemnizes or purports to solemnize any marriage between Muslims in contravention of the provisions of the Muslims Ordinance, 1957, is guilty of an offence and is liable, on conviction, to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.⁸⁵

In Sarawak it is provided that any person who reads the service of *Nika* (Marriage) without first satisfying himself that the marriage has been duly registered and, if the permission of the Native Officer is required before the marriage may take place that such permission has been obtained, or if he is not satisfied that such permission has been obtained that the man proposing to marry is not an *Orang Dagang* i.e. a Muslim domiciled outside Sarawak, is guilty of an offence.⁸⁶

Sub-section (n) — UNLAWFUL REGISTRATION OF MARRIAGE.

In Singapore it is provided that any person who registers a marriage, divorce or revocation of divorce effected between Muslims in contravention of the provisions of the Muslims Ordinance is guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.⁸⁷

There are no similar provisions in the other States of Malaysia and in Brunei.

Sub-section (o) — FAILURE TO REPORT.

In Selangor it is provided that a person who being under a duty to report to a Registrar any marriage or divorce wilfully neglects or fails to

83. Selangor Administration of Muslim Law Enactment, s. 159.

84. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953 s. 179; Trengganu Administration of Islamic Law Enactment, 1955, s. 137; Pahang Administration of the Law of the Religion of Islam Enactment 1956, s. 158; Penang Administration of Muslim Law Enactment, 1959, s. 151; Malacca Administration of Muslim Law Enactment, 1959, s. 150; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 153; Kedah Administration of Muslim Law Enactment, 1962, s. 153; Perlis Administration of Muslim Law Enactment, 1963, s. 119; Brunei Religious Council and Kathis Courts Enactment, 1955, s. 178.

85. Singapore Muslims Ordinance, 1957, (as amended by the Muslims (Amendment) Ordinance, 1960), s. 60A.

86. Sarawak Muslims Marriage Enactment, s. 8.

87. Singapore Muslims Ordinance, 1957, (as amended by the Muslims (Amendment) Ordinance, 1960), s. 60A.

do so is punishable with a fine not exceeding twenty-five dollars. Any person who wilfully neglects or fails to comply with any requirement of a Registrar to furnish information or to execute or sign a document lawfully necessary for the purpose of effecting registration of a marriage or divorce is punishable with a fine not exceeding twenty-five dollars; and any person who makes a false statement or declaration to a Registrar relating to a matter required to be recorded or registered by such Registrar is punishable with imprisonment for a term not exceeding one month or with fine not exceeding one hundred dollars.⁸⁸ Similar provisions are to be found in Kelantan, Trengganu, Pahang, Penang, Malacca, Negri Sembilan, Kedah, Perlis and Brunei.⁸⁹ Failure to comply with a duty to report is also made an offence in Perak, Johore, Singapore, Sarawak and Sabah.⁹⁰

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88. Selangor Administration of Muslim Law Enactment, 1952, s. 160.

89. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 180; Trengganu Administration of Islamic Law Enactment, 1955, s. 138; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 159; Penang Administration of Muslim Law Enactment, 1959, s. 152; Malacca Administration of Muslim Law Enactment, 1959, s. 151; Negri Sembilan Administration of Muslim Law Enactment, 1959, s. 154; Kedah Administration of Muslim Law Enactment, 1962, s. 154; Perlis Administration of Muslim Law Enactment, 1963, s. 120; Brunei Religious Council and Kathis Courts Enactment, 1955, s. 179. The punishment provided in Perlis for making a false statement or declaration is imprisonment for a term not exceeding three months or a fine not exceeding three hundred dollars.

90. Perak Muslim Marriage and Divorce Registration Enactment, s. 6; Johore Muslim Marriage Enactment, s. 7; Perlis Shariah Courts Enactment, 1340, s. 7; Singapore Muslims Ordinance, 1957, s. 58; Sarawak Muslim Marriage Ordinance, s. 9; North Borneo Muslims Ordinance, s. 6.

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