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

PART II: PARENTIAL AUTHORITY

According to the *Shafii* School of Law when a child is born to a woman who is married to a man (a) after six months from the date of the marriage; or (b) within four years of the termination of the marriage, the mother not having remarried, the paternity of the child is established with the husband. If the child is born within six months of the marriage the paternity would not be so established unless the man asserts that the child is his and does not say that the child is the result of fornication *(zina).*[1] It has been held in the States of Malaya that section 112 of the Evidence Ordinance overrides the Muslim Law on this point. Section 112 of the Eividence Ordinance provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that parties to the marriage had no access to each other at any time, when he could have been begotten. In *Ainan* v. *Syed Abu Bakar*[2] it was held following the Indian case of *Sibt Muhammad* v. *Mohamed Hamid*[3] that the Evidence Enactment is a statute of general application and that in questions of legitimacy section 112 of the Evidence Enactment applies to Muslims to the exclusion of the rule of Muslim Law. This case will probably be followed in the other parts of Malaysia.

In Sarawak it is provided that if a woman accuses a man of having illegal sexual relations with her and she has no witnesses, the man will be required to take an oath and if he denies the allegation on oath, the accusation of the woman will be dismissed. If however the woman has a witness or she is pregnant and she swears on oath that a particular man has had illegal sexual relations with her or is the father of her child, as the case may be, this is sufficient.[4] It has been held that the effect of the section is absolute and the oath of a pregnant woman that a particular man was the father of her child cannot be questioned. This doctrine was criticised but nevertheless applied in *Mahadar v. Chee.*[5]

1. A. A. A. Fyzee, *Outlines of Muhammadan Law,* (Oxford, 1955), at p. 164; Nawawi, *Minhaj-et-Talibin,* translated by E.C. Howard, (London, 1914), at p. 367.
2. (1939) 8 M.L.J. 209.
3. A.I.R. 1926 All. 589.
4. Sarawak *Undang-Undang Makhamah Melayu,* s. 36.
5. [1928] Sarawak L.R. 96.

The Age of Majority Act, 1961,[6] of the Federation provides that the minority of all Muslim males and females shall cease and determine within the Federation at the age of eighteen years and every such male and female attaining that age shall be of the age of majority. The Act does not however affect the capacity of any person to act in marriage, divorce, dower and adoption or the religion and religious rites and usages of any class of persons. The Act provides that the provisions relating to the age of majority for Muslims shall not come into operation in any State until it has been adopted by a law made by the legislature of that State. The Act has now been adopted by all States in the States of Malaya. In Singapore, Sarawak and Sabah the age of majority is twenty-one years following the English Law, but this does not apply to Muslim marriages or divorces.

According to the *Shafii S*chool of Law, where the parents are separated and the mother has not remarried, the custody of a girl remains with the mother until she is married and that of a boy until the completion of his seventh year. A child of either sex who has reached the age of discernment is allowed to choose which of its parents it prefers to stay with, provided neither the father nor the mother is mad, infidel or of notorious misconduct and provided the mother has not remarried again.[7] A woman entitled to the custody of a boy or girl is disqualified (a) by being married to a man not related to the minor within the prohibited degree of marriage, so long as the marriage subsists; (b) by going to reside at a distance from the father's place of residence, except that a divorced woman may take her own children to her birth-place; and (c) by failing to take proper care of the child and by gross and open immorality.[8]

In Singapore the Guardianship of Infants Ordinance[9] applies to all persons including Muslims and it has been held that the provisions of the Ordinance must be taken to supersede whatever law might have been applied previously. The principal matter to be considered by the judge is the welfare of the infant. It is provided that the father of the infant shall ordinarily be the guardian of the infant's person and property and, where an infant has no lawful father living, the mother of the infant shall ordinarily be the guardian of his person and property. If both the parents of the infant are dead, the testamentary guardian, if any, appointed by the last surviving parent shall ordinarily be the guardian of his person and property. If both the parents of the infant have died without appointing a testamentary guardian, the Court or a judge may appoint a guardian of the infant's person and property. The Court or a judge may remove from his guardianship any guardian and appoint another guardian in his place. In exercising the powers under the Ordinance the Court or judge is required to have regard primarily to the welfare of the infant but shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be. The judge should bear in mind the customs and religion of the parties,

6. No. 9 of 1961.

7. Nawawi, *op. cit.,* at pp. 391 - 393.

8. Sir R. K. Wilson, *Anglo-Muhammadan Law,* (London, 1930), at p. 185.

9. Cap. 16 of the Revised Edition.

but he should not consider himself bound by them. Thus in *Re Omar bin Shaik Salleh* [10] the Court grave custody of two infants to their father, even though the mother had remarried a stranger. It has been held that in considering the question of the custody of an illegitimate child two principles among others have to be borne in mind: (a) the Court must have regard primarily to the welfare of the infant, which must be the paramount consideration; (b) the wishes of the natural mother should be considered.[11]

In the States of Malaya it is provided that the Guardianship of Infants Act, 1961, shall not be applicable to persons professing the Muslim religion until it has been adopted by the Legislature of a State of the Federation and such law may provide that: (a) nothing in the Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of eighteen years and whose father professes the Muslim religion or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion; and (b) that the provisions of the Act so far as they are contrary to the Muslim religion shall cease to apply to any person upon his professing the Muslim religion, if at the date of such professing he has completed the age of eighteen years or if not having completed that age he professes the Muslim religion with the consent of his guardian. The Act has been adopted with such modifications in all the States in the States of Malaya. It provides that the father of an infant shall normally be the guardian of the infant's person and property and where an infant has no father, the mother of the infant shall be the guardian of his person or property. If both the parents of the infant are dead, the testamentary guardian (if any) appointed by the surviving parent shall be the guardian of his person and property. If the parents of the infant have died without appointing testamentary guardians, the Court may appoint guardians. The Court may also remove from his guardianship any guardian, whether a parent or otherwise, and appoint another person to be a guardian in his place. In exercising its powers under the Act the Court shall have regard primarily to the welfare of the infant, but shall where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.[12]

In the Selangor case of *Mohamed v. Aminah* [13] the Court appeared to be prepared to follow the Muslim Law but held, following a passage in Syed Ameer Ali's *Mahameddan Law,* that, where it cannot be ascertained to which school of law the child belongs, the question of guardianship must depend on a consideration of what is best for the child as a Muslim child.

10. (1948) 14 M.L.J. 186.

11. *Re Miskin Rowther* (1963) 29 M.L.J. 341 — where the Court gave custody to the natural mother, who had been married under the Muslim Law to the natural father, although the child had been brought up since he was 16 days old by the respondent.

12. Guardianship of Infants Act, 1961, (No. 13 of 1961).

13. (1951) 17 M.L.J. 146.

In Sarawak the Guardianship of Infants Ordinance applies to Muslims. Under the Ordinance the paramount consideration is the welfare of the infant and subject to this the father and mother have equal rights to the custody and upbringing of the child.[14] It is provided in the *Undang-Undang Makhamah Melayu,* Sarawak that, where there has been a divorce, children under fifteen years of age will be given to the custody of the innocent party unless the child is able to choose for himself and chooses to stay with one or other of the parties. Where the wife has committed adultery, the father will be entitled to custody of the children, except in the case of children under two weeks, who will be allowed to remain with their mother until they reach the age of two years.[15]

In Sabah the Guardianship of Infants Ordinance provides that a father shall ordinarily be the guardian of the infant's person and property and where an infant has no lawful father living the mother of the infant shall ordinarily be the guardian of his person and property. If both the parents of the infant are dead, the testamentary guardian, if any, appointed by the last surviving parent shall ordinarily be the guardian of his person and property. If both the parents of the infant have died without appointing a testamentary guardian the Court or a judge may appoint a guardian of the infant's person and property. The Court or a judge may remove from his guardianship any guardian and may appoint another guardian in his place. In exercising the powers under the Ordinance, the Court or judge is required to have regard primarily to the welfare of the infant but shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.[16]

The constitution of the Malay family under Malay custom is parental, children belonging to both parents. The Ninety-Nine Laws of Perak give the practice obtaining there in the eighteenth century. If the child of divorced parents was under nine years of age, it would live with the mother, if over nine, it could decide itself whether to live with the father or the mother, but a girl should live with the mother. In Negri Sembilan, the family is matrilineal in the sense of the children belonging to the mother's tribe. On divorce the mother has custody of the children.[17]

Under Muslim Law a father is bound to maintain his minor sons until they arrive at puberty, and his unmarried, widowed or divorced daughters. A man is not obliged to maintain his adult sons, unless they are disabled by infirmity or disease. Under Muslim Law ancestors and descendants are required to maintain each other mutually in case of need without distinction of sex or religion, provided that the individual, against whom the claim is brought, himself possesses more than is necessary for the maintenance of himself and his household. Maintenance is due from

14. Guardianship of Infants Ordinance (Cap. 93).

15. Sarawak *Undang-Undang Makhamah Melayu, s.* 42.

16. North Borneo Guardianship of Infants Ordinance (Cap. 54).

17. *The Ninety-Nine Laws of Perak,* edited and translated by J. Rigby, (Kuala Lumpur, 1908), Law No. 82; R. O. Winstedt, *The Malays,* (London, 1961), at pp.48, 59.

all descendants together if there is no difference between them; but if they are not equal the obligation is incumbent on the nearest. In the ascendant line the father is the first who should maintain his child; and it is only in a secondary degree that the child can require maintenance from its mother. In default of father and mother, it is from a person's nearest ancestors that a child may claim maintenance. A person who has both ancestors and descendants alive should first claim maintenance from the latter.[18]

It has been held in Selangor in the case of *Alus v. Mahmood* [19] that after a divorce the husband is not liable for the maintenance of the children of the marriage unless and until the *kathi* has made an order for their maintenance. A husband is therefore liable for past maintenance of his children only if a *kathi's* order has been made directing him to pay such maintenance or authorising the wife to recover the expense of maintenance of the children.

In Singapore the Women's Charter, 1961, applies to Muslims in respect of applications for maintenance of legitimate and illegitimate children.[20] If any person neglects or refuses to maintain his legitimate or illegitimate child unable to maintain itself, the Court may on due proof thereof order such person to make a monthly allowance for the maintenance of such child in proportion to his means as to the Court seems reasonable.

In Selangor, Pahang, Penang, Malacca, Negri Sembilan and Kedah a minor under the age of fifteen years, and in Kelantan and Trengganu a minor under the age of eighteen years, may apply to the Court of the *Chief Kathi* or the Court of a *Kathi* for an order for maintenance against his lawful father or any other person liable in accordance with the Muslim Law to support him, but it is provided that it shall be a sufficient defence to any such application that the applicant has sufficient means to support himself. Any person, who is incapacitated by infirmity or disease from supporting himself, may apply to the Court of a *Kathi* for an order of maintenance against any person liable in accordance with the Muslim Law to support him; but lack of means on the part of the respondent is a sufficient defence to any such application.[21]

In Perlis it is provided that an unmarried person under the age of eighteen years or a person who by reason of infirmity or disease is unable

18. Nawawi, *op. cit.,* at p. 389f.

19. E. N. Taylor, "Malay Family Law", (1937) Journal of the Malayan Branch of the Royal Asiatic Society, at p. 67.

20. Singapore Women's Charter, 1961, Parts VII and VIII.

21. Selangor Administration of Muslim Law Enactment, 1952, ss. 140 - 141; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss. 139 - 140; Penang Administration of Muslim Law Enactment, 1959, ss. 135-136; Malacca Administration of Muslim Law Enactment, 1959, ss. 133-134; Negri Sembilan Administration of Muslim Law Enactment, 1960, ss. 134 - 135; Kedah Administration of Muslim Law Enactment, 1962, ss. 135-136; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, ss. 160 -161: Trengganu Administration of Islamic Law Enactment, 1955, ss. 118 -119.

to support himself may by application to the Court of a *Kathi* or *Assistant Kathi* obtain an order against any person who under Muslim Law is under an obligation to support him. The order shall be for the payment from time to time of such sums as such person is under Muslim Law entitled to or (in the case of a person unable to support himself) as is proper. It shall be a defence for a person against whom the order is to be made to show that he is not in a position to make any payments.[22]

As regards illegitimate children it is provided in Selangor that if any person neglects or refuses to maintain his illegitimate child which is unable to maintain itself, the Court of the *Chief Kathi* or the Court of a *Kathi* may order such person to make such monthly allowance as to the Court seems reasonable but if the claim is made against the putative father, it shall be brought in the Magistrate's Courts.[23] In Kelantan and Trengganu it is provided that if any person neglects or refuses to maintain his illegitimate child, which is unable to maintain itself, the Court of the *Chief Kathi* or the Court of a *Kathi* may order such person to make such monthly allowance as to the Court seems reasonable but if the claim is made against the putative father, it shall be brought in the Magistrate's Court, which may order him to make such monthly allowance not exceeding fifty dollars as to the Court seems reasonable.[24] In Pahang it is provided that if any person refuses or neglects to maintain an illegitimate child of his, the Court of the *Chief Kathi* or the Court of a *Kathi* may issue an order for the maintenance of the child by the *Bait-ul-mal* (the funds of the *Majlis Ugama)* to commence from an appointed day to the date of the child's attaining the age of majority.[25] In Penang, Malacca, Negri Sembilan and Kedah applications for maintenance of illegitimate children are made under the Married Women and Children (Maintenance) Ordinance, 1950 which provides that if any person neglects or refuses to maintain an illegitimate child of his, a Sessions Court or a Court of a Magistrate, upon due proof thereof, may order such person to make such monthly allowance, not exceeding fifty dollars, as to the Court seems reasonable.[26].

In Perlis it is provided that the Court of a *Kathi* or *Assistant Kathi* may in any case where any person neglects to maintain his illegitimate child, who is unable to maintain itself, order the person to make such monthly allowance in respect of such child as the Court thinks fit. The order may only be made against the putative father of such child by a Sessions Court.[27]

22. Perlis Administration of Muslim Law Enactment, 1963, s. 105.

23. Selangor Administration of Muslim Law Enactment, 1952, s. 142.

24. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 162; Trengganu Administration of Islamic Law Enactment, 1955, s. 120.

25. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 141.

26. Penang Administration of Muslim Law Enactment, 1959, s. 133; Malacca Administration of Muslim Law Enactment, 1959, s. 131; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 132; Kedah Administration of Muslim Law Enactment, 1962, s. 133.

27. Perils Administration of Muslim Law Enactment, 1963, s. 106.

In the other States in the States of Malaya, the payment of maintenance for children is governed by the provisions of the Married Women and Children (Maintenance) Ordinance, 1950,[28] though *Kathis* may make orders for maintenance if power is given to them to do so by their *kuasa* or *tauliah* (letter of authority).

In Brunei it is provided that a minor, *i.e.* a person under eighteen years of age, may by application to the Court of a *Kathi* obtain an order against his lawful father, or any other person liable under Muslim Law to support him, for the payment from time to time of any such sums in respect of his maintenance as he may be entitled to in accordance with Muslim Law. It shall be a sufficient defence to any such application that the applicant has sufficient means to support himself. If any person neglects or refuses to maintain an illegitimate child of his, which is unable to maintain itself, the Court of a *Kathi* may order such person to make such monthly allowance as to the Court seems reasonable, but if the claim is made against the putative father it shall be brought in the Magistrate's Court which may order him to make such monthly allowance not exceeding fifty dollars as. to the Court seems reasonable.[29]

In Sabah it is provided that if any person having sufficient means neglects or refuses to maintain or contribute to the maintenance of his legitimate child, which is unable to maintain itself, a Court upon due proof thereof may order such person to make a monthly allowance for such maintenance in proportion to his means as to the Court seems reasonable. A similar power exists in regard to illegitimate children but the monthly allowance in such a case shall not exceed fifty dollars in the whole.[30]

In Sarawak it is provided that if any person having sufficient means neglects or refuses to maintain his legitimate or illegitimate child, which is unable to maintain itself, the Court may upon due proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of such child at such monthly rate not exceeding fifty dollars in the whole as the Court shall think fit.[31]

It is provided in the Muslim Marriage Ordinance of Sarawak that an *orang dagang, i.e.* a male person of the Malay race or professing the Muslim religion not domiciled in Sarawak, who has married in Sarawak shall not leave Sarawak without the permission of the Secretary of Native Affairs or of an officer authorised by him and the Secretary of Native Affairs or other such officer may withhold such permission until he is satisfied that the *orang dagang* has made proper provision for the maintenance of his wife and children, if any.[32]

28. F. M. Ordinance, No. 36 of 1950.

29. Brunei Religious Council and Kathis Courts Enactment, 1955, ss. 159 -161.

30. North Borneo Maintenance Ordinance, 1959 (No. 7 of 1959).

31. Sarawak Criminal Procedure Code (Cap. 62 of the Laws of Sarawak, 1947), s. 335.

32. Sarawak Muslim Marriage Ordinance (Cap. 75 of the 1948 Edition), s. 4.

It is also provided by the *Undang-Undang Makhamah Melayu,* Sarawak that where a husband has deserted his wife and failed to maintain his wife or children, he will be ordered on divorce to pay the maintenance due at the rate of $20 to $50 a month for the wife and $10 to $25 a month for each child. If the husband divorces his wife and fails to pay the fine, the *berian* or the proper maintenance to his wife and children, he will not be allowed to marry again unless he pays such fine, *berian* or maintenance.[33]

In the parts of Negri Sembilan, where the *adat perpateh* is followed, the general rule is that under the *adat* a husband is not liable for the support of his children by his divorced wife, but it has been held that this rule does not apply where the husband is lawfully practising polygamy, as in such case his civil rights and duties in respect of wives and children fall to be dealt with under Muslim Law.[34]

Adoption is not recognised as a mode of establishing paternity in Muslim Law and, therefore, except in the parts of Negri Sembilan and Malacca which follow the *adat perpateh,* adoption where it takes place does not create any legal family relationship. Malay customary law in other parts of Malaya also recognises adoption as giving rise to a right of custody of the adopted child; but such adoption does not appear to create any family relationship, as under the *adat perpateh* in Negri Sembilan and Malacca. In *Jainah* v. *Mansor*[35] it was held that adoption is a recognised part of the customary law of the Pahang Malays. Where a child has been adopted by a married pair and the husband dies, the adoptive mother is ordinarily entitled to custody of the child.

The Adoption Ordinance, 1952,[36] of the Federation provides that the Ordinance shall not apply to any person who professes the religion of Islam, either so as to permit the adoption of any child by such person or as to permit the adoption by any person of a child who according to Muslim Law is a Muslim. Provision is made for the registration of *de facto* adoptions but it is provided that neither the registration of nor the omission to register any adoption shall affect the validity of the adoption.[37] The Adoption of Children Ordinance[38] of Singapore however applies to Muslims and therefore a Muslim can adopt or be adopted under the Ordinance; but the Ordinance is permissive merely and does not make customary adoptions, which do not comply with the provisions of the Ordinance, illegal.

The effect of an adoption order under the Federation Adoption Ordinance or the Singapore Adoption of Children Ordinance is to extinguish "all rights, duties, obligations and liabilities of the parent

33. Sarawak *Undang-Undang Makhamah Melayu,* s. 40 and Addeda of 9th September, 1910.

34. *Jemiah binte Awang v. Abdul Rashid* (1941) 10 M.L.J. 29.

35. (1951) 17 M.L.J. 62.

36. No. 41 of 1952.

37. Registration of Adoption Ordinance, 1952, (No. 54 of 1952).

38. Cap. 36.

or parents, guardian or guardians of the adopted child in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage"; and to vest all such rights, duties, obligations and liabilities in the adopter as though the adopted child was a child born to the adopter in lawful wedlock. Not only will the personal rights and obligations with regard to an adopted child be changed but rights in regard to property also will be affected by the adoption order. On an intestacy the estate and effects of the intestate, whether movable or immovable, will devolve as though the adopted child were the legitimate child of the adopter. In any disposition of property whether by an instrument *inter vivos* or by will the adopted child is deemed to be the legitimate child of the adopter or adopters, and the word "child" or '"children" will include an adopted child unless a contrary intention appears in the instrument or will. For the purposes of the law relating to marriage the adopter and his children (including other adopted children) are deemed to come within the prohibited degree of consanguinity with the adopted child and this will continue to be so even after the adopted child has been subsequently adopted by another person.

In the parts of Negri Sembilan and Malacca which follow the *adat perpateh* adoption was recognised under the *adat* as creating family relationship. Full adoption *(kadim adat dan pesaka)* gives a woman (and her children whether born or after the adoption) all the rights of inheritance and all the responsibilities belonging to the natural daughters and grand-daughters of her adopter. A man, if fully adopted, becomes eligible for office in his adopting tribe. Limited adoption *(kadim adat pada lembaga)* of a girl of one's own tribe or sub-tribe gives her a right only to property expressly declared and bestowed during the life of the adopting mother. The practice of adoption by *kadim* rites is disapproved by Islam and was abolished in Rembau in 1940.[39]

In Trengganu it is provided that, notwithstanding any other written law to the contrary, any Muslim who shall permit the adoption of any Muslim child under the age of fourteen years and seven months by a non-Muslim, without the permission in writing of the Department of Religious Affairs, shall be liable to be punished with a fine not exceeding fifty dollars or imprisonment for a term not exceeding one month or with both such imprisonment and fine and such child shall be returned to its parent or lawful Muslim guardian. In Selangor it is provided that no adoption of a Muslim who has not attained his majority by a person who does not profess the Muslim religion shall be valid. Any person who is the parent or guardian of a minor Muslim and purports to consent to or suffers such a minor to be adopted *de facto* by a person who does not profess the Muslim religion shall be punishable with imprisonment for three months or with a fine of one hundred dollars.[40]

39. E. N. Taylor, "Customary Law of Rembau", (1929) Journal of the Malayan Branch of the Royal Asiatic Society, Part I, at p. 39f; Lokman Yusof, "Custom as seen in Land Inheritance", Intisari, Vol. I, No. 4, at p. 17f.

40. Trengganu Administration of Islamic Law Enactment, 1955, s. 154; Selangor Administration of Muslim Law Enactment, 1952, as amended by the Administration of Muslim Law (Amendment) Enactment, 1964, s. 160A.

In Sarawak the Adoption Ordinance applies to Muslims. The Ordinance provides for the registration of adoptions and makes it compulsory for a person who professes the Muslim faith and purports to adopt a child to register the adoption under the Ordinance. It is provided that the adoption of a child by a person professing the Muslim faith shall be void unless registered in accordance with the Ordinance and failure to comply with the provision for registration is made an offence. It is provided that the adopted child shall stand in the same relation to the adopting parent or parents as would a child born in wedlock and shall have all the rights and privileges of a legitimate child in respect of the obligations and estate of the adopting parents. The natural parents of such adopted child shall have no control or right over such adopted child and such adopted child shall have no claim by inheritance to the property of his natural parents. It shall be the duty of the District Officer before registering an adoption by a person who professes the Muslim faith to draw the specific attention of such person to the effect of the adoption and to inform him in clear and unmistakable terms that the adoption of children on such basis is contrary to the Muslim Law.[41]

It is provided in the *Undang-Undang Makhamah Melayu,* Sarawak that a child adopted and registered under the Adoption Ordinance shall be deemed to be the legitimate child of the adopted father and mother and will be entitled to share in their estate.[42]

In Sabah the Civil Law Ordinance, 1938,[43] provided that any person who has been legally adopted according to the law to which he is subject shall be treated as being or as having been the legitimate offspring of his adopters. It has been held that this applies to Muslims and that the adopted children of a Muslim in Sabah shall be treated as legitimate children for all purposes.[44] The Civil Law Ordinance was repealed by the Application of Law Ordinance, 1951, but the position continued to be the same by reason of the application of the English Law. The Adoption Ordinance, 1960 now regulates all adoptions in Sabah including adoptions by Muslims, and under its provisions the adopted child is placed in the same position as the legitimate children of the adopter.[45]

PART III: INHERITANCE RIGHTS OF WOMEN.

(a) Intestacy.

The general principle of the law of inheritance under Muslim Law is that the female is entitled to half of what is due to the male. The widow is entitled to one-quarter of the estate of her deceased husband if the deceased left no child. If the deceased left a child, then the wife is entitled to one-eighth. If the deceased leaves a daughter and no son, the daughter is entitled to one-half of the estate of her father. If there

41. Sarawak Adoption Ordinance (Cap. 91), ss. 2, 3, 6.

42. Sarawak *Undang-Undang Makhamah Melayu,* Addenda.

43. North Borneo Civil Law Ordinance, 1938, (No. 2 of 1938).

44. *Matusin* v. *Kawang* [1953] Sarawak L.R. 106.

45. Adoption Ordinance, 1960 (No. 23 of 1960).

are more than one daughter and no son, the daughters share two-thirds of the father's estate equally. If the deceased leaves sons and daughters, then the sons and daughters are residuaries in the proportion of two shares to a son and one share to a daughter.[46]

In Singapore it is provided that the estate and effects of a Muslim dying intestate shall be administered according to Muslim Law, except in so far as it is opposed to local custom.[47] There has been no reported case in Singapore where local custom has been relied on to vary the Muslim Law. Questions of succession and inheritance according to the Muslim Law are dealt with by the ordinary courts and it is provided that in deciding such questions the court shall be at liberty to accept as proof of the Muslim Law any definite statement on the Muslim Law in all or any of certain specified books, among which is the translation of Nawawi's *Minhaj-et-Talibin.*[48] It has been held in Singapore, in the case of *Re Mutchilim,*[49] that where a deceased Muslim belonging to the *Shafii* School of Law dies intestate leaving a widow but no next of kin, the widow is entitled to only one-quarter share of the estate and the doctrine of *radd* or return does not apply to make her entitled to the balance of the estate; in such a case the remaining three-quarter share escheats to the State.

In the States of Malaya (other than Penang and Malacca) the law applicable is the Muslim Law as varied by Malay custom. The rule of Muslim Law that non-Muslims are excluded from inheritance has been applied in the case of *Re Timah binte Abdullah*[50] where it was held that non-Muslim next of kin of a deceased Japanese woman, who had become a convert to Islam, could not inherit the property of the deceased.

In its origin the law of the Malays relating to property was based on the *adat* or tribal custom. The *adat* was brought by the Malays from Sumatra where the Minangkabau tribal organisation was matriarchal. In Minangkabau exogamous matriarchy was developed into an elaborate system of unwritten law called the *adat perpateh.* The Malays of Negri Sembilan came from this region; they brought their tribal organisation with them and in some districts they have preserved it intact up to the present day. In Palembang, however, during the centuries of Hindu and monarchical influence, the tribal organization broke down and with the disintegration of the tribes the rule of exogamy ceased to have effect though the matriarchal law of property survived. The other Malay

46. Fyzee, *op. cit.,* at p. 329f.

47. Singapore Muslims Ordinance, 1957 (as amended by the Muslims (Amendment) Ordinance, 1960), s. 42; a non-Muslim is not entitled to succeed on intestacy to the estate of a Muslim.

48. Singapore Muslims Ordinance, 1957, s. 44.

49. (1960) 26 M.L.J. 25. According to the doctrine of *radd* or return, if there is a residue left after the claims of the sharers and the residuaries have been satisfied, the residue reverts to the sharers in proportion to their shares. In the early history of the doctrine neither the husband nor the wife was entitled to take by return but a later development in the *Hanafi* School in India has given a right also to the husband and the wife.

50. (1941) 10 M.L.J. 51.

States followed the Palembang tradition called *adat Temenggong* which is much the same as *adat perpateh* in so far as inheritance is concerned, but the absence of any tribal organisation has obscured the fact that their law of property was essentially the same as that of Negri Sembilan.[51]

In the States of Malaya, before the British period, the law of the Malays relating to property was in Negri Sembilan, *adat perpateh,* and in the other States, *adat perpateh* in decay. The Malay Rulers were Muslims but it is doubtful whether they introduced any more Muslim Law into the other Malay States than was introduced in Negri Sembilan. About 1886 the Perak State Council ordered the land of a major Chief, Tengku Long Jaffar, to be transmitted in the female line.[52] Since then however Muslim Law has been more extensively adopted and the customary laws in the Malay States (other than Negri Sembilan and Malacca) have only survived in relation to the rights of widows and divorcees. It is probable that among country people many estates are still divided according to *adat kampong,* but that can only take place by consent. The Muslim Law has been applied so frequently by the Collectors of Land Revenue and the Courts that the law of inheritance is now, except as to the special rights of spouses, the Muslim Law. Questions of property and inheritance are seldom litigated between a woman and her own children or between the kindred of an intestate. Such matters are often settled by agreement and the tendency has been that in such agreements the widow usually receives more than her share under Muslim Law. In the vast majority of Malay families, one-eighth of the estate does not provide the widow with subsistence. The matter was therefore regulated by Malay custom rather than by Muslim Law. The fact that the Muslim Law allows distribution of the estate of a deceased person to be settled by consent of the heirs has enabled many arrangements which are in reality applications of the *adat kampong* to pass as distributions according to Muslim Law.[53]

In all the States of Malaya (with the exception of those parts of Negri Sembilan and Malacca where the *adat perpateh* is followed to the exclusion of Muslim Law) the Muslim rules of inheritance or intestacy are followed. These rules are however subject to the following modifications in the Malay States:—

(a) on the death of a peasant his widow is entitled to a special share in his estate, as her share in *harta sapencharian* unless provision has been made for her *inter vivos,* as for example by registering land in her name. If the deceased had no children and the estate is small she may take the whole estate; in other cases she takes a half or less according to circumstances;

(b) the residue of the estate is distributed according to Muslim Law but in as much as the widow's special share is discretionary,

51. E. N. *Taylor,* op. cit. footnote 19 *supra,* at p. 2f.

52. R. J. Wilkinson, "Malay Law", *Papers on Malay Subjects,* (Kuala Lumpur, 1908), at p. 37.

53. E.N. Taylor, "Inheritance in Negri Sembilan", (1948) Journal of the Malayan Branch of the Royal Asiatic Society, Part II, at p. 47f.

> her one-eighth or one-quarter share can and should be taken into consideration in assessing the special share.[54]

In Selangor, Kelantan, Trengganu and Pahang the Court of a *Chief Kathi* and Courts of *Kathis* and in Perlis the Courts of the *Kathi* and *Assistant Kathi* are given power to hear and determine actions and proceedings relating to: (a) the division of and claims to *sapencharian* property; and (b) the determination of the persons entitled to share in the estate of a Muslim deceased person and of the shares to which such persons are respectively entitled; but such actions and proceedings can also be brought in the ordinary courts. In the other States in Malaya actions relating to the distribution of the estate of a deceased are heard and determined in the ordinary civil courts.[55]

The rule as to *harta sapencharian* originated as a rule of the Malay custom. In the early days when ownership of land rests in bare occupation without any registration of title neither the executive nor the courts were often concerned with disputed succession to small holdings. When land was registered, matters of succession to such land came to be dealt with by Collectors, who in general accepted the division agreed on by the next of kin. Where there were disputes the matter was dealt with according to the Muslim Law as varied by local custom. The local *Kathi* who was called to give expert evidence usually declared the *adat.* that is *"harta sapencharian"* as a rule of Muslim Law and in some such cases this property was described as *harta sharikat* or partnership property. It is clear from the resolutions of the Perak State Council in 1907 and the Pahang Committee of Chiefs and *Kathis* in 1930 that this rule is a rule of Malay custom. It is in fact the rule *"chart bahagi"* (earnings are divided) of the *adat perpateh.*[56]

In *Hujah Lijah* v. *Fatimah*[57] it was held in Kelantan that a suit for *harta sapencharian* can be brought as an ordinary suit in the High Court. Briggs J. in that case said:

> The claim by a widow for *harta sapencharian* is not a claim for a share pf the deceased's estate, but a claim adverse to the estate for property of the claimant held in the name of the deceased; this branch of the Malay *adat* is recognised throughout Kelantan among peasant landowners and the share usually considered to belong to the widow is one half, apart from any question of her claim to a distributive share in the deceased's estate.

The claim to *harta sapencharian* arises most frequently in practice in applications for summary distribution of small estates and the practice is to regard such a claim as one of the factors to be considered in attempting to formulate an agreed scheme of distribution and such agreed schemes very often give full effect to the claim.

54. *Ibid*., at p. 50.

55. Selangor Administration of Muslim Law Enactment, 1952, s. 45(3); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 48; Trengganu Administration of Islamic Law Enactment, 1955, s. 25(1); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 37(3); Perlis Administration of Muslim Law Enactment, 1963, s. 11(4).

56. E. N. Taylor, *op. cit.* footnote 53 *supra,* at p. 49.

57. (1950) 16 M.L.J. 63.

In the Selangor case of *Haji Ramah* v. *Alpha*[58] it was held that the widow was entitled to one-quarter of the value of land which she had helped to cultivate as *upah* or compensation for work done in addition to her quarter share in the estate.

The Perak State Council Minute of 1907 refers to claims to *harta sapencharian* by a divorced wife and Raja Sir Chulan expressed the view that the widow gets only what she is entitled to under the Law of inheritance in case of her husband's death losing her claim to what she had earned during marriage.[59] In *Re Elang, deceased*[60] it was held that in the Perak River kampongs the property acquired during a marriage is divided between the parties on divorce or on the death of either spouse. If the wife has assisted in the actual cultivation she can claim half the property; otherwise her share is smaller — perhaps one-third. 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 the wife's share is one-third but in the case of *Wan Mahatan* v. *Haji Abdul Samat*[61] 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 held in partnership with the woman but is appropriated to her husband alone. In *Re Noorijah*[62] the facts were that the deceased was the wife of a public servant and 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 that it should not be regarded as the estate of the deceased.

In Pahang the Committee of Chiefs and *Kathis* gave their opinion in 1930 that a woman can claim *harta sapencharian* on divorce or on the death of her husband.[63]

In Penang and Malacca it is provided that the estate and effects of a Muslim dying intestate after 1st January, 1924, shall be administered according to the Muslim Law, except in so far as such law is opposed to any local custom which prior to 1st January, 1924, had the force of law; but any next of kin who is not a Muslim shall be entitled to share in the distribution as though he were a Muslim. In applications for probate or letters of administration in the case of a deceased Muslim, the petitioner is required to state the School of Law to which the deceased belongs. Questions of succession and inheritance according to the Muslim Law are dealt with by the ordinary courts, and it is provided that in deciding such questions the court shall be at liberty to accept as proof

58. (1924) 4 F.M.S.L.R. 179.

59. E. N. Taylor, op. *cit.* footnote 19 *supra,* at pp. 41 - 42.

60. *Ibid.*, at p. 48.

61. *Ibid.*, at p. 25.

62. *Ibid.,* at p. 59.

63. *Ibid.*, at p. 73.

of the Muslim Law any definite statements on the Muslim Law in all or any of certain specified books, among which is the translation of Nawawi's *Minhaj-et-Talibin.*[64]

In Negri Sembilan it was recognised from the earliest days that the law of inheritance was *adat.* In the tribal areas of Kuala Pilah, Jelebu and Tampin (including Rembau and Tampin proper) the *adat* that is followed is the *adat perpateh.* The fundamental principle of this *adat* is tribal — the social unit is not the family but the tribe, and therefore all rules affecting persons tend to maintain the integrity of the tribe, and all rules affecting property are designed to conserve the property in and for the tribe. The tribe is the unit and it is matrilineal and exogamous. The main object of the *adat* is to provide for the continuance of the tribe through its female members and to prevent alienation of property so that there will always be sufficient to provide maintenance for the women through whom alone the tribe can be continued. From the principle that that the matriarchal tribe is the social unit, four cardinal principles of distribution have been deduced:

(a) All property vests in the tribe, not in the individual;

(b) Acquired property, once inherited, becomes ancestral;

(e) All ancestral property vests in the female members of the tribe; and

(d) All ancestral property is strictly entailed in tail female.[65]

All ancestral property belongs to the tribe; it vests in the female members but they hold it as trustees for their tribe rather than as owners. A person may acquire property, and such property is not entailed in the first instance, unless of his own volition he expressly entails it, and he is at liberty to dispose of it during life, but the moment he dies it becomes entailed and he therefore cannot dispose of it by will: *Re Kulop Kidal, deceased*[66]; and an agreement made during life to vary the succession is void, *Romit* v. *Hassan.*[67] From the basic principle that property is tribal rather than personal and that the man passes into his wife's tribe in marriage, it follows that all property owned by a married pair is joint property and that it belongs to the tribe of the wife so long as the marriage subsists. Even if the jointly earned property is land in another State the rules of *adat* apply to it, *Sadiah v. Siakim.*[68]

Funeral expenses are a matter of grave importance in the *adat.* They include not only the actual burial charges but also the expenses of the last illness and the cost of the customary feasts which are held on the

64. Straits Settlements Muslim Ordinance (Cap. 57 of the 1936 Edition), ss. 27 - 29.

65. E. N. Taylor, *op. cit.* footnote 39 *supra,* at p. 8f.

66. *Ibid.*, at p. 92.

67. *Ibid.*, at p. 63.

68. *Ibid.,* at p. 65.

third, seventh, fourteenth, fortieth and hundredth days. Funeral expenses are chargeable:—

(a) in the case of a child or unmarried girl — on the joint property of the parents;

(b) in the case of an unmarried man — on his personal acquired property or, if he had none, on his mother's or sister's ancestral property;

(c) in the case of a married person of either sex — on the joint property of the marriage, primarily on movable assets or, failing that, on land;

(d) in the case of divorced or widowed persons — on the shares of property acquired before, or during, or after the marriage, and, failing that, on the ancestral property of the mother's family.[69]

It is a rule that where any individual leaves acquired property the funeral expenses must, if practicable, be limited to that amount; only in the last resort may recourse be had to the ancestral property. An aged woman, however, may distribute her property among her daughters or nieces, reserving only a portion by way of *kepan* or funeral expenses; in such cases her funeral expenses are chargeable on the property so allocated, and a relative who pays them is entitled to the *kepan* in addition to her ordinary share. Funeral expenses are by custom an actual encumbrance on the appropriate property; if it appears that a wrong party has paid them, an order for transmission may be made conditional on the repayment of those expenses.[71]

The rules as to distribution of ancestral property are simple in theory but are sometimes difficult to apply in practice. The basic principle is that all the ancestral property of the family is to be divided equally *per stirpes* — the property is therefore distributed equally to direct female decendants *per stirpes* — but due regard must be had to any partial distribution which may already have been made. The rule applies only to the proper share of the proprietor, so that if the deceased was registered as the holder of all land derived from her mother and left one sister, the sister would be entitled to half, and the daughters of the deceased to the other half in equal shares. Acquired property is divided into two classes according to its origin — *Charian bujang* which belongs to one tribe and that acquired by the joint efforts of a married pair, *Charian laki bini,* in which the tribes are interested. *Harta pembawa* means the personal estate of a married man, the property brought by him to the tribe of his wife into which he passes on marriage; it may include property of three kinds, *viz.* his own earnings as a bachelor *(charian bujang),* his share of the earnings of any former marriage, and

69. *Ibid.*, at p. l0f.

70. *Re Miut, ibid.*, at p. 219.

71. *Ibid.*, at p. 11.

any ancestral property of his own family in which he has an interest. *Harta dapatan* means the separate estate of a married woman and also includes three kinds of property, *viz.* her own acquisitions as a spinster, divorcee or widow *(charian bujang or janda),* her share of the earnings of a former marriage and her ancestral property. *Charian bujang* thus becomes *harta pembawa* or *dapatan* on marriage and *charian laki bini* of one marriage becomes *harta pembawa* or *dapatan* of a subsequent marriage. If the *harta pembawa* (and possibly also the *harta dapatan)* has been materially increased in value by the joint efforts of husband and wife, the increase which is called *untong* ranks as *charian laki bini* and must be apportioned accordingly. *Untong* means increase in capital value and must be distinguished from produce; articles bought out of the produce of *dapatan* land are themselves *harta dapatan.* The onus of proving *untong* is on the person who claims it.[72]

The rules for the distribution on death of acquired property are as follows:—

(1) The *harta dapatan* or *pembawa* reverts on death to the *waris* of the deceased, that is the nearest female relative in the tribe of the deceased (in the case of a man his sister, in the case of a woman her daughter).

(2) The *charian laki bini* is apportioned —

(a) on the death of either spouse without issue of the marriage — the whole remains to the survivor;

(b) on the death of the husband leaving issue — the whole remains to the widow and issue;

(c) on the death of the wife leaving issue, it is divided between the widower and the issue, but not necessarily equally; the principle of the division, by agreement or otherwise, is to make sufficient provision for the issue.[73]

In the non-tribal parts of Negri Sembilan (Seremban and Port Dickson) the tribal organization had ceased to be effective by 1874, and it would appear that the practice adopted was the *adat temenggong.* In general the distribution follows a family settlement or *pakat* but where there is dispute the distribution tends to follow the rules laid down by the *adat temenggong* (which is not as definite as but tends to follow the *adat perpateh)* though there appears to be a tendency to follow the rules of Muslim Law.[74.]

An illustration of the application of the *adat kampong* or *adat temenggong* is given in the case of *Shafi* v. *Lijah.*[75] In that case the

72. *Ibid.*, at p. 14f.

73. *Ibid.*, at pp. 29 - 30.

74. E. N. Taylor, *op. cit.* footnote 53 *supra,* at p. 80.

75. [1948 - 1949] M.L.J. Supp. 49.

question for decision was whether the inheritance of certain real property should be in accordance with the *adat* or the Muslim Law. The land was acquired during wedlock *(charian laki-bini)* but the title of the land were not endorsed "customary land". It was held that the lack of endorsement on the titles of customary land precluded in the absence of strong evidence to the contrary, the *adat perpateh.* It was held further on the evidence that it was clear that the deceased intended some form of local customary law to apply and that therefore the *adat temenggong* should be applied in this case and the estate distributed equitably between the claimants.

Callow J. in this case said —

> I am satisfied that in the absence of strong evidence to the contrary, which was not forthcoming, the lack of endorsement on the titles of customary land precludes the *adat perpateh.* It is always open to a land owner to request the endorsement of title as customary, and it could be inferred from the omission in this case that the late Abdul Majid did not desire the land to be subject to the *adat perpateh,* although I do not believe inheritance or succession in accordance with the law of the *Shafii* sect of the *Sunni* school of Islam was ever contemplated. But although the more defined tenets of the *adat perpateh* may not in this case be adhered to, there remains the still older and perhaps more fundamental *adat temenggong,* which one might perhaps almost term the common law behind the more statutorised *adat perpateh,* though whereas in England statutory law evolved from the common law, in this country one might almost conclude the reverse — that the *temenggong* is from the law or codes of by-gone generations. I suggest this notwithstanding Wilkinson's observations at page 40 of his work "The true *adat temenggong* of Malaya was an unwritten law"; it was and is unwritten, deriving its origin from the lawgivers of ancient times. Another simile is that *adat temenggong* was as the royal prerogative, and exercised in suitable cases where strict adherence to the *adat perpateh* would cause hardship. The holder of the Ministerial Office of *temenggong* exercised on behalf of the ruler the prerogative which could not be challenged, it was an autocratic decree and should in proper circumstances the *adat perpateh* conflict or differ from the code of conscience the *adat temenggong* could be invoked and so over-rule the former. It seems to me clear, and I accept the evidence of *Lijah* accordingly, that the deceased Abdul Majid acquired this property for the benefit of his widow and adopted daughters. He did not contemplate the administration of his estate in accordance with the inheritance law. He intended some form of local customary law to apply, although he was probably quite vague as to detail or principle. Therefore, although the *adat temenggong* is depreciated by Wilkinson (at page 45), and although Taylor regards it as essentially the same as the *adat perpateh* (Royal Asiatic Society Journal May 1937 page 3) I distinguish the two *adats* and rule that the *adat temenggong* should apply. This means that the estate should be distributed equitably between the claimants, such division being decided by the circumstances of the particular case before the court. It is not a division necessarily to be followed in every such case.

The Small Estates (Distribution) Ordinance, 1955, provides that in making any distribution order where the deceased is a member of a tribe in respect of land in the Districts of Jelebu, Kuala Pilah, Rembau and Tampin in Negri Sembilan, the Collector shall apply the following principles :—

(a) if any land appears to be ancestral customary land, though not registered as such, it shall be transmitted to the customary heiress, subject if necessary to life occupancy;

(b) where any property is found as a fact to be *harta pembawa* or *harta dapatan* it may be transmitted to the customary heirs of

the deceased subject to the right of any other person to a share or charge over that property according to the principle of *untong* (or increase), where applicable, and on registration of the order the Collector may, if necessary, add the words "Customary Land" to any title affected but he shall not be bound to do so;

(c) where any property is found as a fact to be *harta charian bujang* or *harta charian laki-bini* it may be transmitted according to be custom of the *luak* (tribe), and on registration of the order the Collector may, if necessary, add the words "Customary Land" to any title affected but he shall not be bound to do so;

(d) the Collector shall give effect to customary adoptions where they are satisfactorily proved;

(e) in all cases regard shall be had to any partial distribution of property made or agreed upon in the lifetime of the deceased and to the existence of any property which is affected by distribution or agreement though not part of the estate;

(f) wherever practicable the Collector shall avoid transmitting undivided shares in any one lot to members of different tribes;

(g) where funeral expenses are by the custom chargeable on specific property and the party on whom the property ought to devolve has not paid them, the Collector may require such party to pay the funeral expenses as a condition of inheriting that property or may by the order charge that property with the amount of the funeral expenses.[76]

In Brunei it is provided that the Court of the *Chief Kathi* or of the *Kathi* shall have jurisdiction to hear and determine all proceedings which relate to the determination of the persons entitled to share in the estate of a deceased person who professed the Muslim religion or of the shares to which such persons are entitled and to the division of or claims to *sapencharian* property.[77] It is provided in the Probate and Administration Enactment, 1955, that the legal personal representative of a deceased Muslim domiciled in Brunei shall after payment of all debts distribute the estate in accordance with the Muslim Law as practised in the State.[78]

In Sabah it is provided that nothing in the Probate and Administration Ordinance shall effect any rules of Muslim Law as varied by local custom in respect of the distribution of the balance of the estate of a deceased person after the debts have been satisfied.[79] Special provision is made in the Administration of Native and Small Estates Ordinance for the administration and distribution of small estates, that is estates not exceeding five thousand dollars in total value at the date of the death.

76. Small Estates (Distribution) Ordinance, 1955 (No. 34 of 1955), ss. 20 - 25.

77. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 48(1).

78. Brunei Probate and Administration Enactment, 1955, s. 58.

79. North Borneo Probate and Administration Ordinance (Cap. 109), s. 165(f).

Application for administration may be made to the Collector of Land Revenue who after hearing the application shall make an order for distribution and in making such order shall give effect to any division of the estate agreed upon by any surviving spouse, issue and parents and shall where no such agreement exists in the case of a Muslim distribute the estate according to the Muslim Law or custom having the force of law applicable to the deceased.[80]

In Sarawak the Administration of Estates Ordinance provides that on obtaining probate or letters of administration the executor or administrator, as the case may be, shall after payment of all debts distribute the residue of the estate among the beneficiaries or heirs of the deceased according to the will of the deceased or, as the case may be, in the shares to which they are entitled by recognised law or custom. Muslim Law is therefore applicable in the distribution of the estate of a deceased Muslim, dying intestate.[81] It is provided in the *Undang-Undang Makhamah Melayu,* Sarawak, that if both the husband and wife have joined in working on or acquiring the matrimonial property the widow will be entitled to a half-share while if it is the husband who is the earning partner then the wife is entitled to one-third share and in addition the wife will be entitled to her share under Muslim Law on the death of the husband.[82] The effect of this is shown in the case of *Haji Mohidi* v. *Spiah*[83] where it was held that on the death of the deceased leaving no issue his widow was entitled to one-third of the deceased's estate plus one-quarter of the remainder.

The custom of *pencharian* under which half of the property goes to the widow has been recognised and applied in a number of cases in Sarawak — *Men* v. *Dan*[84] and *Serujie* v. *Sanah.*[85]

Special provision is made by the Muslim Converts (Property) Ordinance of Sarawak regarding the property of Muslim converts. Under the Muslim Law a non-Muslim is not entitled to inherit the estate of a Muslim but a Muslim can make a settlement or bequest of his property up to one-third of its value to a non-Muslim.[86] Special provision is, therefore, made for the property of Muslim converts. Information of conversion is required to be given to the District Officer who may inquire into the matter and refer the question as to what provision should

80. This would appear to be the effect of s. 10 of the North Borneo Administration of Native and Small Estates Ordinance (Cap. 1), as amended by the Intestate Succession Ordinance, 1960 (No. 1 of 1960), and the Administration of Native and Small Estate (Amendment) Ordinance, 1961 (No. 8 of 1961), and s. 2 of the Intestate Succession Ordinance, 1960.

81. Sarawak Administration of Estates Ordinance (Cap. 80 of the 1947 Edition of the Laws of Sarawak), s. 17.

82. *Undang-Undang Makhamah Melayu,* Sarawak, s. 41.

83. [1951] Sarawak L.R. 22.

84. [1952] Sarawak L.R. 13.

85. [1953] Sarawak L.R. 40.

86. *Undang-Undang Makhamah Melayu,* Sarawak, s. 59.

be made for the non-Muslim beneficiaries to the District Court. The District Court has power to order the Muslim convert to make and do all such instruments, acts and things as may be in the judgment of the Court be necessary or expedient for making such provision as is fair and equitable in favour of the non-Muslim beneficiaries but the Court may refuse to make an order if it considers in all the circumstances of the case that the exercise of its jurisdiction might lead to greater hardship than if the provisions of Muslim Law were to apply. The Muslim Law as contained in the Malay *Undang-Undang* and the Muslim Malay Custom of Sarawak shall only apply to the testate or intestate succession to the property of a deceased Muslim convert if a District Court has declared that the order made by the District Court to make provision for the non-Muslim beneficiaries has been complied with. In every other case the law and custom applicable to the deceased will be the law and custom which would have applied had the Muslim convert not been so converted provided that notwithstanding any testamentary disposition made by him the Muslim convert shall be deemed for all purposes to have died intestate and any issue converted to Islam or husband or wife whether Muslim or not of the Muslim convert shall have the like rights to the property notwithstanding any provision of customary law, as they would have had had they not become or been Muslims.[87]

(b) Testacy.

The general principle of the Muslim Law is that testamentary disposition may not exceed one-third of the estate of the deceased.

In Singapore the Wills Ordinance applies to Muslims and it has been held in the case of *In the goods of Abdullah*[88] that a Muslim may make a will disposing of the whole of his property The Muslims Ordinance, 1957, however gives power to the court on an application by any person who claims to be entitled to a share or the residue of the estate of the deceased to vary the will where the will does not make provision or sufficient provision for that person in accordance with the Muslim Law, in order that such provision shall be made out of the estate of the deceased for that person. The Wills Ordinance[89] and the Probate and Administration Ordinance[90] apply to Muslims. The validity of a will made by a Muslim therefore depends on compliance with the provisions as to execution and attestation contained in the Wills Ordinance. It has been held in the case of *Katchi Fatimah v. Mohamed Ibrahim*[91] that a will executed by a Muslim in accordance with the requisites of the Wills Ordinance is entitled to probate even though the provisions of the will did not comply with the requirements of the Muslim Law as to dispositions. Any person who wishes to have the will varied so as to make provision for him in accordance with the Muslim Law must make a separate application

87. Sarawak Muslim Converts (Property) Ordinance (Cap. 95).

88. (1835) 2 Ky. Ecc. 8. In *Re Syed Hassan bin Abdullah Algofri* (1949) 15 M.L.J. 198 it was held that this case did not apply where the testator was not domiciled in the State. See *Re Mohamed Haniffa, deceased* (1950) 16 M.L.J. 286.

89. Cap. 35 of the Revised Edition.

90. Cap. 17 of the Revised Edition.

91. (1962) 28 M.L.J. 374.

to the court. Section 13 of the Wills Ordinance provides that every will made by man or woman shall be revoked by his or her marriage except where the will is expressed to be made in contemplation of a marriage. It has been held in *Re Sheik Abubakar bin Mohamed Lajam*[92] that so far as concerned immovable property in the State the will of an Arab Muslim is revoked by his subsequent marriage and is therefore inoperative at least to that extent, but this case has not been followed in *Re Syed Hassan bin Abdullah Aljofri*[93] where it was held that the will of a testator not domiciled in the State is not revoked on a subsequent marriage and may be operated even as to land in the State. Proceedings relating to the will of a Muslim are heard in the ordinary civil courts.

In the States of Malaya the Muslim Law as to testamentary dispositions applies. In *Sheik Abdul Latif v. Sheik Elias Bux*[94] it was held that under Muslim Law a testator has power to dispose of not more than one-third of the property belonging to him at the time of his death; the residue of such property must descend in fixed proportions to those declared by Muslim Law to be his heirs unless the heirs consent to a deviation from this rule. So too in *Siti* v. *Mohamed Nor*[95] it was held that the will of a Muslim which attempts to prefer one heir by giving him a larger share of the estate than he is entitled to by Muslim Law is wholly invalid as to such bequest without the consent of the other heirs. In *Saeda* v. *Haji Abdul Rahman*[96] it was held that under Muslim Law a testator cannot delay the vesting of his estate in his heirs and a direction in the will of a Muslim instructing the executors to deal with his estate for ten years and then distribute it is invalid. In the case of *Re Ismail bin Rentah, deceased*[97] the deceased who was a member of the Malay Servants' Co-operative Credit Society Ltd. of Seremban had nominated his daughter to receive his share or interest in the Society in the event of his death. He died leaving a number of beneficiaries. It was held that the nomination did not confer a right on the nominee to take beneficially. The letter of nomination must be governed by the Muslim law of wills and the bequest was bad as it was made to an heir and the other heirs did not consent thereto.

Under the Malay custom a person cannot dispose of his property by will at all: *Re Kulop Kidal, deceased;*[98] and an agreement made during life to vary the succession on death is void: *Romit v. Hassan.*[99]

In Selangor, Kelantan, Trengganu and Pahang the Court of the *Chief*

92. (1935) 4 M.L.J. 137.

93. (1949) 15 M.L.J. 198; but see *Sheriffa Fatimah* v. *Syed Alowee* (1883) 2 Ky. Ecc. 31 and *Re Syed Sheik Alkaff* (1923) 2 Malayan Cases 38.

94. (1915) 1 F.M.S.L.R. 204.

95. (1928) 6 F.M.S.L.R. 135.

96. (1918) 1 F.M.S.L.R. 352.

97. (1940) 9 M.L.J. 98.

98. E. N. Taylor, *op. cit.* footnote 39 *supra,* at p. 92.

99. *Ibid*., at p. 63.

Kathi and Courts of a *Kathi* and in Perlis the Court of the *Kathi* and *Assistant Kathi* are given power to hear and determine all actions and proceedings in which the parties profess the Muslim religion and which relate to wills or death-bed gifts of a deceased Muslim, but such proceedings can also be heard and determined in the ordinary courts. In Perak, Pahang and Johore actions relating to wills and death-bed gifts may be heard by *Kathis* if so provided in their letter of authority; but such actions may be heard and determined in the ordinary courts. In Kedah, Penang, Malacca and Negri Sembilan such actions may only be brought in the ordinary civil courts.[100]

In Brunei the Muslim Law as to testamentary dispositions applies and the Court of a *Kathi* is given power to hear and determine all actions and proceedings in which the parties profess the Muslim religion and which relate to wills and the death-bed gifts of a deceased Muslim.[1]

In Sarawak the Muslim Wills Ordinance provides for the making of wills by Muslims. An optional form of wills is prescribed and wills under the Ordinance are required to be witnessed by three witnesses, two being Native Chiefs of the Muslim religion and one being a Senior Government Officer who shall read over the will and attest it. The drawing up and division of property shall not necessarily be regulated by the Muslim law of inheritance, but shall be in accordance with the desire and wishes of the testator; but the three witnesses shall in the event of the testator willing all his propery away to others than those of his own family, advise such alterations to be made with the consent of the testator as they think fair for the children, wife or wives, concubine or concubines, and should the testator refuse to give his consent to such alteration, registration of such will may be refused.[2] In *Shariffa Unei* v. *Mas Poeti*[3] it was held that a will made by a Malay in Sarawak giving his property to his adopted daughter was valid on the ground that adoption is recognised by Malay custom in Sarawak and if registered in accordance with the laws of Sarawak, the effect of such adoption is that the adopted child stands in the same relation to the adopted parent or parents as would a child born in lawful wedlock. In *Abang Haji Raini* v. *Abang Haji Abdul Rahim*[4] it was stated that the question whether a Muslim who executes a will according to English Law may depart in its terms from the Muslim Law of inheritance had not yet been decided. It was argued in that case that a Muslim can only depart from the form of will prescribed in the Muslim Wills Ordinance if he keeps to the Muslim law of inheritance, *i.e.* the Muslim Law as adopted in Sarawak and as modified by custom and the provisions of the Ordinance. It was unnecessary to decide the

100. Selangor Administration of Muslim Law Enactment, 1952, s. 45(3); 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); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 37(3); Perlis Administration of Muslim Law Enactment, 1963, s. 11(4).

1. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 48(1).

2. Sarawak Muslim Wills Ordinance (Cap. 96).

3. [1949] Sarawak L.R. 5.

4. [1951] Sarawak L.R. 3.

question in that case as although a bequest was made to an heir, there was evidence that the other heirs consented to it.

In Sabah the Wills Ordinance originally provided that the Ordinance shall not apply to the wills of Muslims whose testamentary powers shall remain unaffected by anything in the Ordinance.[5] This provision has now been amended to read that nothing in the Ordinance shall affect the validity of any will made by a Muslim according to Islamic Law.[6]

PART IV: FUTURE DEVELOPMENT

The statutory provisions in the various States of Malaysia provide for the administration of the Muslim Law and there has been little attempt to adapt the law to the requirements of modern conditions of life. In many of the Arab countries and in Pakistan the Muslim Law has been adapted by legislation, which has mainly taken the form of adopting the most suitable of the variant opinions of the Schools of Law or even of individual jurists, who do not conform to the orthodox tenets of these Schools. It is proposed to consider the Muslim Law as administered in Malaysia in the light of the reformulations of the Muslim Law in the Arab countries and in Pakistan and to consider what amendments can be made to the Muslim Law as administered in Malaysia to bring it into line with the requirements of modern conditions of life and to make it consistent with the equal rights of men and women, as declared in the United Nations Charter and the Universal Declaration of Human Rights.

(1) *Age of Marriage.*

The Muslim Law Enactments in the States of Malaya, Singapore, Brunei and Sarawak do not provide adequate safeguards against child marriage. In Sabah however the age limits of sixteen years for a male and fourteen years for a female, which is provided by the general law, have been applied to Muslims.[7] In the Arab countries age limits have been imposed; these are eighteen years for the male in the United Arab Republic, Jordan, Syria, Tunisia, Morocco and Iraq and for the female fifteen years in Tunisia and Morocco, sixteen years in the United Arab Republic, seventeen years in Syria and Jordan and eighteen years in Iraq.[8] In Pakistan the age limits imposed are eighteen years for the male and sixteen years for the female.[9] It would appear advisable to have minimum age limits provided for all marriages so as to eliminate child marriage.

The *Shafii* School of law does not allow a girl, who has not reached

5. North Borneo Wills Ordinance (Cap. 154), s. 1(2).

6. North Borneo Wills (Amendment) Ordinance, 1961 (No. 17 of 1961).

7. North Borneo Marriage Ordinance, 1959, s. 2.

8. Egyptian Law of 1923; Jordanian Law of Family Rights, 1951, art. 41; Syrian Law of Personal Status, 1953, arts. 16 and 18(1); Tunisian Law of Personal Status, 1956, arts. 3, 5-10 and 21; Moroccan Code of Personal Status, 1957, arts. 6-8; Iraqi Code of Personal Status, 1959, arts. 7 - 9.

9. Indian Child Marriage Restraint Act, 1929 (as amended by the Muslim Family Law Ordinance, 1961).

puberty, to be given in marriage except by her father or paternal grandfather and it is suggested the legislation should prohibit the betrothal of young girls before they attain the age of puberty.

In the Arab countries dispensation may be granted in the case of the female on proof of sexual maturity or of hardship and the same dispensations may be provided for in the legislation in Malaysia.

(2) *Consent of the Bride.*

The consent of the bride is at present expressly required only in the Enactments in Kelantan, Trengganu, Pahang, Brunei and in Sabah and by subsidiary legislation in Singapore, Selangor, Negri Sembilan and Perlis.[10] In the other States such consent is at best only impliedly required. The marriage is void without the consent of the parties in Kelantan, Trengganu, Pahang and Brunei.[11] The provisions in the Marriage Ordinance of Sabah, that the persons contracting a marriage shall ascertain and record that both parties to such marriage have freely expressed their consent to the marriage, are applicable to Muslims.[12] The *Hanafi* School of Law, which is followed in Egypt, Syria and Jordan, allows a woman who has reached puberty freedom to contract a marriage. In Tunisia and Morocco, which follow the *Maliki* School of Law it is now expressly enacted that the consent of the parties is essential to the validity of the marriage.[13] In Malaysia and Brunei, where the *Shafii* School of Law is followed, it is necessary to provide that the bride shall give her consent as otherwise the father or grandfather can contract a marriage for a virgin, no matter how old she is, without her consent. It is suggested that the example of Kelantan, Trengganu, Pahang and Brunei should be generally followed and express provision made that a marriage shall not be valid except with the consent of both parties to the marriage.

The necessity for obtaining the consent of the *wali,* which is required under the *Shafii* School of Law, has also to be considered. In this respect the example of Tunisia, which provides that the consent of the guardians shall only be required where the bride has not reached the statutory age of majority,. might be followed. In case of refusal of the guardian, the

10. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 140; Trengganu Administration of Islamic Law Enactment, 1955, s. 98; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 120; Singapore Muslim Marriage and Divorce Rules, 1959 (as amended by the Muslim Marriage and Divorce (Amendment) Rules, 1961), rules 8A-8D; Selangor Administration Directions relating to Marriage and Divorce, issued by the Religious Department, Selangor in 1962; Negri Sembilan Marriage, Divorce and Reconciliation (Rujo) Rules, 1963; Perlis Administration of Muslim Law Enactment, 1963, s. 85.

11. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 140; Trengganu Administration of Islamic Law Enactment, 1955, s. 98; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 120; Brunei Religious Council and Kathis Courts Enactment, 1955, ss. 139 - 143.

12. North Borneo Marriage Ordinance, 1959, ss. 3, 5.

13. Tunisian Law of Personal Status, 1956, arts. 3, 6, 8 and 21; Moroccan Code of Personal Status, 1957, arts. 12 - 15.

consent can be given in such cases by a competent court or authority.[14]

(3) *Freedom of Widows to Marry.*

The only restrictions on the right of a widow to remarry is the necessity to observe the period of waiting *(eddah)* and the restriction on the re-marriage of a thrice divorced wife. The institution of *eddah* or the period of waiting is a wise one and should be retained. It is suggested however that the device of legalising a thrice divorced marriage by the legal fiction of a marriage with a stranger should as in Tunisia be forbidden.[15]

(4) *Dower.*

It might be useful to adopt the practice of agreeing on a large *maskahwin* the greater part of which is deferred and payable on divorce as in the United Arab Republic, for example.

(5) *Polygamy.*

There are no statutory restrictions on polygamy in the States of Malaya or the Borneo States. In Singapore the consent of the *Chief Kathi* is required but the *Chief Kathi* can only refuse his consent if satisfied that there are obstacles to the marriage according to the Muslim Law. The abolition of polygamy as in Tunisia[16] would not be generally acceptable in Malaysia but it is suggested that the exercise of the privilege should be restricted by making it subject to the permission of the *Kathi* as in the Arab countries and Singapore or making it subject to the approval of an Arbitration Council as in Pakistan.[17] It would also be advisable to define the principles on which permission should be granted and in this respect the question of fulfilling family responsibilities, especially to the children of the marriage, might be emphasised, as suggested by Sheik Mohammed Abduh in Egypt.[18]

(6) *Registration of Marriage.*

Registration of marriages might be made compulsory so that non-registration would deprive the parties from the right of recourse to the Courts to enforce their rights.

(7) *Dignity of the Wife.*

Marriage does not affect the legal status of a Muslim woman and she has all the legal rights of a *feme sole. A* wife is however required to

14. Tunisian Law of Personal Status, 1956, arts. 3, 6, 8 and 21.

15. Tunisian Law of Personal Status, 1956, art. 21.

16. Tunisian Law of Personal Status, 1957, art. 18.

17. Syrian Law of Personal Status, 1953, art. 17; Moroccan Code of Personal Status, 1958, arts. 30 - 31; Iraqi Code of Personal Status, 1959, art. 3; Pakistan Muslim Family Law Ordinance, 1961, s. 6.

18. J. N. D. Anderson, *Islamic Law in the Modern World,* (London, 1959), at p. 49.

obey the lawful orders of her husband and this right of the husband can be abused. In some States there is provision for the punishment of a wife who wilfully disobeys the lawful order of her husband. It is suggested that the legislation should emphasise the reciprocal rights and duties of husband and wife rather than the obedience of the wife to the husband and in this respect the legislation in Tunisia and Morrocco may provide models.[19] The rights of married women as set out for example in the Singapore Women's Charter, 1961[20] could be extended to Muslim women.

(8) *Divorce — Talak.*

It is in the sphere of divorce that there is clear inequality between the husband and the wife. Muslim Law has given the man and not the woman an independent right of divorce when divorce is needed. Unlike the wife the husband can exercise his right of divorce without delegation from another or resorting to the judiciary. This right of the husband is thus defended by Ibrahim Abdul Hamid, an Egyptian writer:

> The underlying idea of the advantage conferred on man is this: conjugal relations are the basis of any civilised society and therefore if marriage is not stable enough society may be in danger and collapse may occur. To obtain such stability as far as possible the tie of marriage must be put in the firmer hand. This hand seemed to be the husband's and not the wife's, because he was of better judgment and less reckless. Besides he has paid or bound him self to pay her dower and maintenance. This would make him think twice before deciding on divorce. It is undeniable that a woman might be wiser or even the very perfection of wisdom, but this is not often the case. Predominantly she is impatient, quick to judge, and quick to listen to sentimental calls, so that a slight defect or a small lapse on the part of the husband or superficial comparison with another man, may persuade a woman to dissolve her marriage. Thus, if a woman were independently given the right to divorce, hopes of establishing stable marriage would often fail.

The same writer goes on to point out the advantage of the man is not an absolute advantage but is subject to many restrictions concerning the reason, time and circumstances of the divorce. He says:

> Divorce is prohibited except in time of need or (as some of our jurists prefer to say) in dire necessity. This is because divorce is a destruction of an existing marriage on which the aims and interests of a wife depend and perhaps other aims and interests too; for there may be children who would suffer heavily from divorce and the husband himself might become miserable, even though through his own action. Hence it can be seen that divorce without good reason is a specific injury which Islamic law would never sanction, the Prophet having said: "There should be neither injury nor mutual infliction of injury." [21]

There is clearly the possibility of abuse unless restrictions are imposed. In Singapore divorces, other than those by consent, can only be dealt with in the Shariah Court, but the Shariah Court has no means of preventing a repudiation by the wife except by persuasion and making it

19. Tunisian Law of Personal Status, 1956; Moroccan Code of Personal Status, arts. 1, 33(2), 35(4), 36(5) and 38.

20. S. 45.

21. Ibrahim Abdul Hamid, "Dissolution of Marriage in Islamic Law" (1956) Islamic Quarterly, Vol. III, No. 3, at p. 167f.

subject to the payment of maintenance and a consolatory gift to the wife.[22] In Selangor a repudiation may only be pronounced before a *Kathi* and with the agreement of the wife.[23] In Negri Sembilan a divorce may only be obtained after an inquiry by the *Kathi* who will call both parties before him.[24] In Perlis provision is made for reconciliation by the *Kathi* and permission may be given for a divorce only if he is convinced that no reconciliation is practicable.[25] There are also administrative restrictions on divorce in Sarawak.[26] On the whole however it might be said that the statutory restrictions on the abuse of the rights of the husband are either non-existent or inadequate.

It is suggested that the exercise of the right of repudiation by the husband should be made subject to the approval of the court as in Tunisia[27] or subject to the approval of the Arbitration Council as in Pakistan.[28] The provisions in Singapore, Sarawak and Selangor might be extended to provide (a) that a *Kathi* may only register a divorce if after inquiry he is satisfied that both the husband and wife have agreed to the divorce; (b) that, where the husband insists on divorce, the matter should be subject to a waiting period of ninety days during which efforts are to be made through the Arbitration Council or the *Kathi* to effect a reconciliation between the parties; and (c) that where efforts at reconciliation fail and the husband insists on divorce this should be subject to the payment of a fine, as in Sarawak, and the payment of damages and maintenance.

The other reforms in the law of *talak* which might be considered are:—

(i) that a divorce should only be effective after ninety days, that is, after the period of *eddah* and should only be registered then after all efforts at reconciliation have failed; this follows the provisions in Pakistan;[29]

(ii) that a divorce, coupled explicitly or implicitly with a number shall take effect only as a single and therefore a revocable divorce; this reform follows that in the United Arab Republic, Jordan, Syria, Morocco, Iraq and Pakistan;[30]

22. Singapore Muslims Ordinance, 1957, s. 33 — See M. Siraj, "The Shariah Court and its Control of The Divorce Rate", (1963) 5 Malaya L.R. 148.

23. Selangor Administrative Rules relating to Marriage, Divorce and Revocation of Divorce, 1962.

24 Negri Sembilan Marriage, Divorce and Reconciliation (Rujo) Rules, 1963, rules 7-9.

25. Perlis Administration of Muslim Law Enactment, 1963, ss. 90, 90A, 92 and 93.

26. *Undang-Undang Makhamah Melayu* Sarawak, s. 41 .

27. Tunisian Law of Personal Status, 1956, art. 31.

28. Pakistan Muslim Family Laws Ordinance, 1961, s. 7.

29. Pakistan Muslim Family Laws Ordinance, 1961, s. 7.

30. Egyptian Law (No. 25 of 1929), art. 3; Jordanian Law of Family Rights, 1951, art. 72; Syrian Law of Personal Status, 1953, art. 922; Moroccan Code of Personal Status, 1957, art. 51; Iraq Code of Personal Status, 1959, art. 37(2); Pakistan Muslim Family Laws Ordinance, 1961, s. 7(6).

(iii) that a divorce uttered by one who is drunk or under compulsion or one who is out of his mind by reason of anger or any other cause and does not know what he is saying, shall be ineffective; this follows the provisions in the United Arab Republic, Jordan, Syria, Morocco and Iraq;[31]

(iv) that a formula of conditional or suspended divorce intended only as an oath, threat or inducement, shall be ineffective; this follows the provisions in Morocco and Iraq;[32]

(v) that where a divorce is pronounced during a wife's menstrual period the husband will be compelled to revoke it; this follows the provisions in Morocco;[33]

(vi) that where a divorce is pronounced during a wife's pregnancy the husband will be compelled to revoke it or as in Pakistan, the divorce will only be effective at the end of the period of ninety days or at the end of the pregnancy, whichever is later.[34]

(9) *Cherai Taalik.*

This form of divorce seems to be more prevalent in Malaysia and Indonesia than in the Arab countries or India or Pakistan. It is suggested that the form of the *taalik* should be settled, either following the wide terms of the Trengganu provision or the more restricted terms adopted in Selangor, Negri Sembilan and Sarawak.[35] It appears also necessary to provide that the *cherai taalik* should not be revocable by the husband without the consent of the wife. This can be achieved by a general provision that revocation of a divorce shall only be with the consent of the wife or a specific provision that the divorce of *cherai taalik* shall be irrevocable (as in Morocco in the case of a divorce pronounced by delegation from the husband) or by providing for the payment of a consideration so as to make the divorce a *kholo'* divorce as in Indonesia or by the insertion of a condition relating to revocation in the *taalik* as in Selangor.[36] Provisions might also be made for a reference to conciliators or an Arbitration Council, as in Pakistan, to try to effect a reconciliation between the parties.[37]

31. Egyptian Law (No. 25 of 1929), art. 1; Jordanian Law of Family Rights, 1951, art. 68; Syrian Law of Personal Status, 1953, art. 89; Moroccan Code of Personal Status, 1957, art. 49; Iraqi Code of Personal Status, 1959, art. 35.

32. Moroccan Code of Personal Status, 1959, art. 50; Iraqi Code of Personal Status, 1959, art. 36.

33. Moroccan Code of Personal Status, 1957, art. 47.

34. Pakistan Muslim Family Laws Ordinance, 1961, s. 7(5).

35. Trengganu Muslim Religious Affairs (Forms and Fees) Rules, 1956, Form N; Selangor Rules relating to Marriage, Divorce and Revocation of Divorce, 1962; Negri Sembilan, Marriage, Divorce and Reconciliation (Rujo) Rules, 1963, Form 5; Sarawak *Undang-Undang Makhamah, Melayu,* Addenda.

36. Moroccan Code of Personal Status, 1957, art. 67; Nashruddin Thaka, *Pedoman Perkahwinan Umah Islam,* (Djakarta, 1960), at p. 107; Selangor Rules relating to Marriage, Divorce and Revocation of Divorce, 1962.

37. Pakistan Muslim Family Laws Ordinance, 1961, s. 8.

The pronouncement of the *taalik* has been attacked by some writers in Indonesia as giving an encouragement to divorce.[38] Although it has been made compulsory at all marriages in Kedantan, Trengganu, Pahang and Brunei it would appear to be better to make it voluntary. This is largely tied up with the facilities for obtaining judicial divorce or *fasakh.*

(10) *Kholo'.*

The principal question that arises in regard to *kholo'* is whether the consent of both the husband and the wife should be required or whether the divorce can be effected by the decision of the *hakam* or arbitrators, without the consent of the husband. It would appear to be preferable to restrict the functions of the arbitrators to conciliation, provided the grounds for a judicial divorce by *fasakh* are properly defined.[39]

It might also be provided that the compensation payable by the wife should be limited to the amount of the *maskahwin,* as in Sarawak,[40] and as in Morocco that the compensation will be payable only where there is no compulsion or injury to the wife and that *kholo'* shall not be allowed if the wife is poor on the basis of any compensation which affects the rights of the children, for instance, on the basis that she should assume the duty of maintaining the children.[41]

(11) *Fasakh.*

This is a very restricted right in practice according to the orthodox *Shafii* School of Law and it appears to be necessary to extend the grounds for *fasakh* following the *Maliki* School of Law. It is suggested that the grounds for judicial divorce should be expressly defined as in Pakistan and the Arab countries.[42]

(12) *Revocation of Divorce.*

The husband's right of revocation should be made subject to the consent of the wife in all cases. This is at present the law in Kelantan and Trengganu.[43]

(13) *Maintenance.*

The maintenance given to divorced wives for the period of *eddah* is often inadequate. It is suggested that the provisions in Brunei and

38. H. Sulaiman Rasjid, *Fiqh Islam* (Djakarta, 1961), at pp. 393 - 394.

39. J. N. D. Anderson, *Islamic Law in Africa,* (London, 1954), at pp. 334 - 335.

40. Sarawak *Undang-Undang Makhamah Melayu,* s. 41 and Addenda.

41. Moroccan Code of Personal Status, 1957, art. 63, 65.

42. Indian Dissolution of Muslim Marriages Act, 1939; Egyptian Law No. 25 of 1920 and No. 25 of 1929; Jordan Law of Family Rights, 1951, arts. 83-97; Syrian Law of Personal Status, 1953, arts. 105 - 111; Moroccan Code of Personal Status, 1957, arts. 53 - 57; Iraqi Code of Personal Status, 1959, arts. 40 - 45.

43. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 151; Trengganu Administration of Islamic Law Enactment, 1955, s. 109.

Perlis, which enables a *Chief Kathi* or *Kathi* in his discretion, to make an order for maintenance for such period as he thinks fit even after the expiry of the *eddah* should be generally followed.[44] There is a similar provision for the grant of such maintenance as a consolatory gift in Syria.[45] Provision should be made for the enforcement of orders for maintenance, by the making of attachment of earnings orders as in Singapore, and for the reciprocal enforcement of maintenance orders made by *Kathis.*[46]

(14) *Mata'ah.*

The amount provided appears to be often contemptuous. It is suggested that the device adopted in Syria and in Brunei and Perlis of awarding maintenance as a gift after the period of *eddah* should be adopted.[47] In this way the *Kathi* or the court can make an order for maintenance until remarriage.

(15) *Appointment of Hakam or Arbitrators.*

The question arises as to whether the arbitrators should be given the power to order a divorce. It would appear to be better to confine the powers of the arbitrators to efforts to reconcile the parties as in Tunisia and Morroco.[48] It has been found in Singapore, however, that where the power to apply for judicial divorce is restricted, the power of the *hakam* to order a *kholo'* divorce is often beneficial to the wife. Provision should be made for marriage guidance, marriage counselling and reconciliation and marital education.

(16) *Registration of Divorce.*

It should be provided as in Tunisia that divorces shall be effective only if decreed by an order of a Court.[49] The registration of divorces should be made compulsory so that non-registration would prevent the parties from applying to the Court for any redress arising out of the divorce.

(17) *Interests of Children on Divorce.*

The interests of the children of the marriage are often ignored in dealing with matrimonial matters. It is suggested that it should be provided following the English Matrimonial Proceedings (Children) Act,

44. Brunei Religious Council and Kathis Courts Enactment, 1955, s. 158; Perlis Administration of Muslim Law Enactment, 1963, s. 104.

45. Syrian Law of Personal Status, 1953, art. 117.

46. Singapore Women's Charter, 1961, Part VIII.

47. Syrian Law of Personal Status, 1953, art. 117; Brunei Religious Council and Kathis Courts Enactment, 1955, s. 158; Perlis Administration of Muslim Law Enactment, 1963, s. 104.

48. Tunisian Law of Personal Status, 1956, s. 25; Moroccan Code of Personal Status, 1957, Chap. VII; J. N. D. Anderson, *op. cit.* footnote 39 *supra,* at pp. 334 - 335.

49. Tunisian Law of Personal Status, 1956, s. 31.

1958 [50] that no divorce shall be registered or decreed until the *Kathi* or the court is satisfied after investigation and report by a welfare officer that the arrangements proposed for the care and upbringing of any children under sixteen are the best that can be devised under the circumstances.

(18) *Guardianship of Children.*

In most of the States of Malaya, in Singapore and in the Borneo States, the law applicable is the English Law, under which the paramount consideration is the welfare of the child.[51] The statutory provisions in Singapore and the States of Malaya would appear to be less advanced in respect of giving equal rights to the husband and wife than those in Sarawak, which are based on or follow the more recent English legislation.[52]

(19) *Maintenance of Children.*

There are adequate legislations in Malaya and the Borneo territories for the maintenance of children. The obligation is however in practice on the father rather than the mother of the children. Provision for the making of an attachment of earnings order to enforce an order of maintenance can only be made in Singapore.[53]

(20) *Illegitimate Children.*

The position of illegitimate children is unsatisfactory as they are placed in a position of legal and social inferiority. There are no rights of inheritance between the father and the illegitimate child and the duty of the father to maintain the child is limited. Only in Singapore is the position of the illegitimate child as regards maintenance placed on an equal footing with that of the legitimate child.[54] In Pahang power is given to the Court to make an order for the maintenance of illegitimate children out of the *Bait-ul-Mal* or public Muslim funds.[55]

(21) *Adoption of Children.*

Married women enjoy equal rights with their husbands in adopting children. An adoption order may only be made with the consent of both

50. (6 & 7 Eliz. 2c. 40), s. 2, of this Act provides in effect that the Court shall mot make absolute any decree for divorce or nullity or marriage unless and until the Court is satisfied as respects every child who has not attained the age of 16 years that arrangements have been made for the care and upbringing of the child and that these arrangements are satisfactory or are the best that can be devised in the circumstances.

51. F. M. Guardianship of Infants Act, 1961 (No. 13 of 1961); Singapore Guardianship of Infants Ordinance (Cap. 16); North Borneo Guardianship of Infants Ordinance (Cap. 54).

52. Sarawak Guardianship of Infant Ordinance (Cap. 93).

53. Singapore Women's Charter, 1961, Part VIII.

54. Singapore Women's Charter, 1961, s. 62(2).

55. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 141.

spouses. It is suggested that in order to safeguard the interests of the children, the English Law of adoption should be made applicable to Muslims, at least on a voluntary basis as in Singapore.[56]

(22) *Property Rights of Divorced Women.*

In this respect the institution of *"harta sapencharian"* has improved the position of women. It is suggested that it should be generally provided, as in Sarawak, that on divorce, half of the jointly acquired property and one-third of the other property, should be given to the divorced wife.[57]

(23) *Inheritance Rights of Women.*

The question is whether the giving of half the man's share to a woman is justified. The inequality is thus justified by Sir Muhammad Iqbal:

> "The share of the daughter is determined not by any inferiority inherent in her, but in view of her economic opportunities and the place she occupies in the social structure of which she is a part and parcel. While the daughter, according to Mohammedan Law, is held to be the full owner of the property given to her by both the father and the husband at the time of her marriage; while further, she absolutely owns her dower money which may be prompt or deferred according to her own choice and in lieu of which she can hold possession of the whole of her husband's property till payment, the responsibility of maintaining her throughout her life is wholly thrown on the husband. If you judge the working of the rule of inheritance from this point of view, you will find that there is no material difference between the economic position of sons and daughters and it is really by this apparent inequality of their legal shares that the law secures equality.".[58]

As regards the widow's share this is supplemented in the States of Malaya, Sarawak and Brunei by the institution of *harta sapencharian,* under which the widow is entitled to half of jointly acquired property.

It is suggested that the reforms adopted in the Arab countries should be adopted in Malaysia. Thus a Muslim testator might be given the right of making gifts up to one-third of his estate even to any of his heirs with or without the consent of the other heirs; and the rights of grandchildren, whose fathers or mothers have died might be safeguarded by the device of presuming a gift to them.[59]

(24) *Cases involving personal rights to be tried by duly appointed judges.*

There are Shariah Courts or *Kathis* Courts in the Federation of Malaya, Singapore and Brunei and Native Courts in Sarawak and North Borneo. The extent to which such courts are organized varies from State to State. It is suggested that there should be properly organized courts presided over by qualified persons, who are not also *Kathis.* This is the

56. Singapore Adoption of Children Ordinance (Cap. 36).

57. Sarawak *Undang-Undang Makhamah Melayu,* s. 41.

58. Sir Muhammed Iqbal, *Reconstruction of Religious Thought in Islam,* (Lahore, 1951), at p. 170.

59. Egyptian Law of Testamentary Succession, 1946, arts. 13, 37, 76-79; Syrian Law of Personal Status, 1953, arts. 219, 238 and 257.

practice adopted in Singapore and appears to work very well. There is also provision for appeal to an Appeal Board.[60]

(25) *Uniform Legislation.*

The most urgent need in Malaysia is to have a uniform form of legislation to prevent conflicts of jurisdiction. At present for example a person who cannot effect a marriage or divorce in Singapore can do so in some other State. In this way the laws are brought into contempt. It is necessary either to have a uniform legislation or to take administrative measures to avoid such conflicts. There is also need for the reciprocal enforcement for example of summonses and maintenance orders made in the various *Kathi's* Courts.

(concluded)

AHMAD BIN MOHAMED IBRAHIM*

60. Singapore Muslims Ordinance, 1957, Part II.

* M.A. (Cantab); State Advocate-General of the State of Singapore.