DEVELOPMENTS IN THE MARRIAGE LAWS IN MALAYSIA AND SINGAPORE*

When the People's Action Party was returned to power in Singapore in 1959 it took office with certain objectives in view and among these was the reform of the family law and the removal of discrimination against women. The Women's Charter of 1961[1] was introduced to carry out the party's programme and it eventually became law on the 15th September, 1961. As a result of the experience gained and to remove certain difficulties in the implementation of the law and to further liberalise the law, an amendment to the Women's Charter was enacted in 1967, as the Women's Charter (Amendment) Act, 1967.[2] As regards the Muslims, the law relating to the administration of the Muslim law was amended and consolidated in the Administration of Muslim Law Act, 1966,[3] which came into force on the 1st day of July 1968. By contrast there has yet been no legislative change in the law relating to marriage for non-Muslims in Malaysia, although there have been a number of significant decisions in the courts, which in turn have persuaded the Government to appoint a Royal Commission to consider changes in the family law. This Commission is presided over by the Chief Justice of Malaya and has four other members, three of whom are women. There have however been some new State legislations dealing with the administration of Muslim Law — the Muslim religion and Muslim Law being State subjects in the Federation.

The long title of the Women's Charter, 1961, in Singapore states that it is an Ordinance to provide *inter alia* for monogamous marriages and for the solemnisation and registration of such marriages. Polygamy has been abolished for the future, except for Muslims. This is effected by section 4 of the Ordinance which provides —

> "4. (1) Every person who on date of the coming into operation of the Ordinance is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages of contracting a valid marriage under any law, religion, custom or usage with any other person other than such spouse or spouses.
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> (2) Every person who on the date of the coming into operation of the Ordinance is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to such spouse or all such spouses, shall if he thereafter marries again, be incapable during the continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage.

* Paper read at the Conference on the Marriage Laws of the Commonwealth, held at Cumberland Lodge, Windsor, England, 17th — 19th April 1970.

1. No. 18 of 1961.
2. No. 9 of 1967.
3. No. 27 of 1966.

> (3) Every person who on the date of the coming into operation of the Ordinance is, unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage."

The effect is that while existing polygamous marriages are recognised, no polygamous marriage may be contracted in the future. Every marriage contracted in contravention of the provisions of section 4 of the Ordinance is declared to be void. Any person lawfully married under any law, religion, custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravention of the provisions of section 4 of the Ordinance shall be deemed to commit the offence of marrying again during the lifetime of the husband or wife, as the case may be, within the meaning of section 494 of the Penal Code.[4]

The provisions of section 4 of the Women's Charter, 1961 do not apply to any person who is married under or to any marriage solemnised or registered under the provisions of the Muslim Law or of any written law in Singapore or in the Federation providing for the registration of Muslim marriages. But if any person is validly married under any law, religion, custom or usage (other than the Muslim law) prior to the date of the coming into operation of the Ordinance, (when his marriage is deemed to be registered under the provisions of the Ordinance) or is married under the provisions of the Women's Charter or under a law providing that or in contemplation of which the marriage is monogamous, then he may not marry again, even under the Muslim Law.[5] The effect of this is that if a person has been married under the Chinese custom for example before the coming into operation of the Ordinance or if he has married under the provisions of the Ordinance, he will not by becoming a Muslim be entitled to contract a valid marriage under the Muslim Law, during the continuance of such earlier marriage. The decision in *Reid* v. *Attorney-General of Ceylon*[6] does not therefore apply in Singapore.

Provision is made in the Women's Charter for the solemnisation of marriages under the Ordinance. Persons intending to marry are required to give notice to the Registrar of Marriage and to obtain a certificate for marriage, which may be given at any time after the expiration of twenty-one days and before the expiration of three months from the date of the notice.[7] The minimum age for marriage in Singapore is eighteen years although the Minister may in his discretion grant a licence authorising a marriage although the female party is under the age of eighteen years.[8] The Registrar of Marriage before issuing the certificate for marriage is required to be satisfied —

(a) that one of the parties has been resident within Singapore for at least fifteen days preceding the granting of the certificate;

4. Women's Charter, 1961, s. 6.
5. *Ibid.,* s. 3(2) as amended by Act 9 of 1967.
6. (1965) A.C. 720.
7. Women's Charter, 1961, ss. 13 and 16.
8. *Ibid.,* ss. 9 and 20.

(b) that each of the parties is twenty-one years or over or if not is a widower or widow as the case may be; or if either party is a minor who has not been previously married, that the consent of the parent or guardian has been given or dispensed with;

(c) that neither party is below the age of eighteen years;

(d) that there is no lawful impediment to the marriage;

(e) that neither of the parties to the intended marriage is married under any law, religion, custom or usage to any person other than the person with whom such marriage is proposed to be contracted.[9]

In lieu of obtaining a certificate for marriage, the parties may obtain a licence for the marriage from the Minister, who may in this way dispense with the requirement as to notice and in a proper case authorise the marriage of a girl under eighteen years of age.[10] When a certificate for marriage has been obtained, the marriage may be solemnised in any way the parties choose — before the Registrar of Marriages or in a church or temple, or according to customary rites. The marriage may be solemnised by any person who has been given a licence to solemnise marriages and a large number of persons have been so licensed.[11] It is possible therefore for the marriage to be solemnised according to any religion, custom or usage and the word "solemnise" has been defined to include the contracting of a marriage in accordance with the law, religion, custom or usage of the parties or any of the parties thereto.[12] It has been held that for the legal requirements of a Chinese customary marriage the law in Singapore merely requires a consensual marriage and that the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only; *(Re Lee Siew Kow)*[13]. In *Isaac Penhas* v. *Tan Swee Eng* [14] it was held that a marriage in a modified Chinese form between a Jew and a non-Christian Chinese was valid at common law as both parties intended thereby to constitute a valid marriage, and there was consensus to enter into the marriage.

It is provided that no marriage shall be solemnised unless a certificate for marriage or licence authorising the marriage has been delivered to the person solemnising the marriage. Every marriage shall be solemnised in the presence of at least two credible witnesses. No marriage may be solemnised under the Ordinance unless the person solemnising the marriage is satisfied that both the parties to the marriage freely consent to the marriage. Every marriage solemnised under the Women's Charter is required to be registered either by the Registrar

9. *Ibid.,* s. 16.
10. *Ibid.,* s. 20.
11. *Ibid.,* s. 8.
12. *Ibid.,* s. 2 as amended by Act 9 of 1967.
13. (1952) M.L.J. 184. See also *Re Lee Gee Chong* (1965) 1 M.L.J. 102.
14. (1953) M.L.J. 73.
15. Women's Charter, 1961, s. 21.

or a Deputy Registrar and a central registry of such marriages is maintained.[16]

It is provided that no marriage both the parties to which are Muslims shall be solemnised or registered under the Women's Charter.[17] Marriages between Muslims are solemnised and registered under the provisions of the Administration of Muslim Law Act, 1966. The provisions of the Act in this respect apply to marriages, one or both of the parties to which profess the Muslim relgion and which are solemnised in accordance with the Muslim Law.[18] The minimum age for marriage under the Act is sixteen years, but power is given to a Kathi in special circumstances to solemnise the marriage of a girl who is under the age of sixteen years but who has attained the age of puberty.[19] Persons who wish to marry are required to apply in prescribed forms. If the *wali* or guardian for marriage of the girl consents to the marriage, the marriage may be solemnised by a Kathi or an assistant kathi or even by the wali himself. But if the woman has no wali or the wali refuses his consent to the marriage, the marriage may be solemnised only by a kathi, who is required before doing so to hold an inquiry and satisfy himself that there is no lawful obstacle according to the Muslim Law to the marriage. Where the man to be married is already married to any person other than the other party to the intended marriage, the marriage shall not be solemnised except by a kathi or with the written consent of a kathi. Before solemnising or giving his written consent to such a marriage the kathi is required to hold an inquiry and to satisfy himself that there is no lawful obstacle to the marriage.[19a]

The personal law relating to marriage, divorce, guardianship, maintenance, adoption and family law generally were in the Federal List in the original Constitution of the Federation of Malaya but are included in the Concurrent List for the Borneo States. There are therefore three sets of laws to be considered in Malaysia — the laws of the former Federation of Malaya (now West Malaysia) and the laws respectively of Sabah and Sarawak. There are four groups of marriages dealt with by the laws — Muslim marriages, Civil marriages, Christian marriages and customary marriage.

Muslim marriages are dealt with by the respective State enactments.[20] These provide for the solemnisation and registration of marriages and the law applied is generally the Shafii School of Law. Registration of marriage is compulsory and in some of the State enactments it is provided that no marriage is valid without the consent of both the parties to the marriage. There is no minimum age of marriage but child marriage is rare as under the Shafii School of Law only a girl who has reached the age of puberty can be given in marriage by her marriage guardian. There

16. *Ibid.,* ss. 24 and 21.

17. *Ibid.,* s. 3(3) as amended by Act 9 of 1967

18. Administration of Muslim Law Act, 1966, s. 83.

19. *Ibid.,* s. 90(4).

19a. *Ibid.,* s. 90.

20. Ahmad Ibrahim, *Islamic Law in Malaya* (1967).

are in general no statutory restrictions on polygamous marriages, but in some States it is provided that where the man is already married, he will have to declare this in the application for marriage and the marriage may then be solemnised only by a kathi who will make inquiries to satisfy himself that there are no lawful obstacles to the marriage.[21] In Sabah the Marriage Ordinance, 1959,[22] applies to Muslims. This provides that notwithstanding any written law or custom any marriage between persons who in the case of a man is under the age of sixteen years or in the case of a woman is under the age of fourteen years shall be void. The Ordinance also provides that the person solemnising the marriage and the witnesses shall ascertain and record that the parties to the marriage have freely expressed their consent to the marriage.[23]

Civil marriages in West Malaysia are dealt with in the Civil Marriage Ordinance, 1952.[24] It is provided that no marriage one of the parties to which professes the religion of Islam shall be solemnised or registered under the Ordinance. The minimum age for marriage is sixteen years for the male party and fourteen years for the female party.[25] Application for marriage is made to the Registrar who will issue a certificate for marriage if he is satisfied that the consent of the parent or guardian (where any of the parties is a minor) has been given or dispensed with, that there are no lawful impediments to the marriage and that neither of the parties is married under any law, religion, custom or usage to any person other than the person with whom such marriage is proposed to be contracted. In lieu of the certificate of marriage, the parties may obtain the authority of the State Authority.[26] Marriages are solemnised by the Registrar of Marriages, who is required to register the marriage.[27] The Ordinance provides that any marriage purported to be solemnised under the Ordinance shall be invalid if either of the parties was at the date of such marriage married under any law, religion, custom or usage to any person other than the other party to the marriage.[28] A person married in accordance with the provisions of the Ordinance shall be incapable during the continuance of such marriage of contracting a valid marriage with any other third person.[29]

Christian marriages in West Malaysia are dealt with in the Christian Marriage Ordinance, 1956.[30] It is provided that every marriage between persons one of whom is a Christian shall be solemnised in accordance with the provisions of the Ordinance or of the Civil Marriage Ordinance, 1952, and every such marriage solemnised other than under the pro-

21. See Selangor Administration Rules relating to Marriage, Divorce and Revocation of Divorce; and the Negri Sembilan Marriage, Divorce and Reconciliation Rules.
22. No. 14 of 1959.
23. Marriage Ordinance, 1959, s. 2.
24. No. 44 of 1952.
25. Civil Marriage Ordinance, 1952, s. 31.
26. *Ibid.,* ss. 11-19.
27. *Ibid.,* ss. 24-25.
28. *Ibid.,* s. 30.
29. *Ibid.,* s. 4.
30. No. 33 of 1956.

visions of the Ordinance or of the Civil Marriage Ordinance, 1952, shall be void.[31] It has been held however in the case of *Re Loh Toh Met*[32] that the former Christian Marriage Ordinance (the provisions of which have been reenacted in the Christian Marriage Ordinance, 1956) relate only to the form of solemnisation of monogamous marriages and that a Chinese even, if he is a Christian, can choose whether he wishes to contract as a Christian a valid monogamous marriage or to form a valid polygamous union or unions in accordance with his personal law. The provisions relating to the solemnisation and registration of Christian marriages are similar to those applicable to civil marriages, except that marriage of parties under the minimum age of marriage can be authorised by a licence issued under the authority of the canons of the particular Church or religious denomination or body and that before the solemnisation of the marriage the provisions of the canons relating to the publication of banns or the giving of notice of the marriage must be satisfied.[33] It is also provided that any marriage purported to be solemnised under the Ordinance shall be void if either of the parties was at the date of such marriage married under any law, religion, custom or usage to any person other than the other party to the marriage and such marriage would under any other written law or rule of law in force in the Federation applicable to such party or parties be unlawful by reason of such subsisting marriage.[34] Marriages are solemnised by a priest, clergyman, minister or other person, who is authorised by the canons of the religious denomination to solemnise the marriage.[35]

In the case of *Martin* v. *Umi Kelsom*[36] a marriage had been celebrated in Selangor (Malaysia) between a Muslim woman domiciled there and a man whose domicile was England. The marriage was celebrated under the Christian Marriage Enactment before a Registrar of Marriages even though under Muslim Law the woman had capacity to marry only a Muslim. The Court held that the marriage was valid, as the marriage would have been valid if it had been celebrated in English. It is doubtful whether this case was correctly decided. In *Public Prosecutor* v. *White*[37] it was held that a person who has entered into a Christian monogamous form of marriage connot, even although he has been converted to Islam, go through a legally recognised form of marriage with another woman. It is doubtful if this decision will still be followed after *Attorney-General* v. *Reid*[38] where the Privy Council held in effect that a person who was a Christian may contract a valid polygamous marriage, if converted to the Muslim faith, even though he was already monogamously married.

In Sarawak Church and Civil marriages are dealt with in the Church and Civil Marriage Ordinance.[39] The provisions of the Ordinance are

31. Christian Marriage Ordinance, 1956, s. 3.
32. (1961) M.L.J. 234.
33. Christian Marriage Ordinance, 1956, s. 28.
34. *Ibid.,* s. 29.
35. *Ibid.,* ss. 10-13.
36. (1963) M.L.J. 1.
37. (1940) M.L.J. 214.
38. (1965) A.C. 720.
39. Cap. 92.

similar to those of the Christian Marriage Ordinance of West Malaysia. The minimum age for marriage is however fourteen years.[40] Marriages under the Ordinance may be solemnised either by a Christian Minister of religion or before a Marriage Registrar.[41] A marriage may be validly contracted under the Church and Civil Marriage Ordinance only if neither party to the intended marriage is bound by a valid subsisting marriage to a third party.[42] The marriage under the Ordinance is monogamous. It has been held in *Lopez* v. *Sockalingam* [43] that a person who according to his own personal law, for example, Hindu Law recognised by the laws of Sarawak is already validly married cannot contract a valid marriage under the Church and Civil Marriage Ordinance.

In Sabah the Christian Marriage Ordinance[44] deals with Christian marriages and the provisions of this Ordinance are again similar to those of the Christian Marriage Ordinance of West Malaysia. There is no express provision in the Christian Marriage Ordinance forbidding a marriage to be solemnised under the Ordinance if either of the parties was married at the date of such marriage but it is provided that a person who being married under the Ordinance marries again during the subsistence of the marriage would be guilty of an offence under Section 494 of the Penal Code. Marriages under the Ordinance may be solemnised by a clergyman of the Church or Minister of religion licensed under the Ordinance or by the Marriage Registrar.[45] Sabah has also the Marriage Ordinance, 1959, which has made a number of significant changes in the law. It is provided that any marriage between persons who in the case of a male is under the age of sixteen years or in the case of a female is under the age of fourteen years shall be void. Where any marriage is solemnised or contracted it shall be the duty of the person or persons solemnising the marriage or where by any law of custom applicable to either of the parties it must be contracted in the presence of any official or specially qualified witness or witnesses it shall be the duty of any such person or persons to ascertain and record that both the parties to such marriage have freely expressed their consent to such marriage.[46]

Marriages under the Chinese custom and Hindu Law are recognised in West Malaysia. Under Chinese customary law as recognised in West Malaysia marriage is consensual and based on a common intention to form a union as husband and wife. The law merely requires a consensual marriage and the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential *(Re Yeow Kim Kee's Estate)*[47]. The personal law as regards Chinese is based on race and the courts have in effect given judicial recognition to certain customs prevalent or thought to be prevalent among persons of the Chinese

40. Church and Civil Marriages Ordinance, s. 3(1) (a).
41. *Ibid.,* s. 4(1).
42. *Ibid.,* s. 3(1) (d).
43. (1947) S.C.R. 22.
44. Cap. 24 of Laws of North Borneo, 1953.
45. *Ibid.,* s. 5.
46. Marriage Ordinance, 1959, ss. 2 and 3.
47. (1949) M.L.J. 171.

race irrespective of their domicile or religion *(Dorothy Yee Yeng Nam* v. *Lee Fah Kooi)* ;[48] Chinese customary marriages are recognised as polygamous and a Chinese even if he is a Christian can choose whether he wishes to contract as a Christian a valid monogamous marriage or to form a valid polygamous union or unions in accordance with his personal law *(Re Loh Toh Met).*[49]

In *Re Ding Co* Ca[50] it was held that there was nothing in the Christian Marriage Enactment which prevented a Chinese who had married under the Enactment from subsequently contracting a marriage under Chinese custom whilst the first marriage was subsisting.

Hindu and also other forms of customary marriage are recognised in West Malaysia. In *Chua Mui Nee* v. *Palaniappan*[51] it was alleged that the appellant a Chinese Buddhist married the deceased a Nattakottai Chettiar and a Hindu according to Hindu rites at a temple in Malacca during the Japanese occupation of Malaya. After the marriage they lived together as husband and wife at Malacca. The trial judge took the view that as some essential items of the ceremony of a Hindu marriage were not performed, there was no valid Hindu marriage. On appeal the Federal Court held that as the deceased was a Hindu and the appellant a Chinese Buddhist the law which governed the marriage between them was not Hindu law but the law of Malacca in 1943. It was held that there was a marriage according to Hindu customs and although there was an imperfect marriage ceremony that did not affect the validity of the marriage as it was performed during the Japanese occupation. At the time of the marriage the deceased had a wife in India but at that time Hindu law and custom permitted polygamous marriage and the consent of the first wife even if it was essential for the validity of the marriage could in the circumstances of the case be inferred.

The Registration of Marriage Ordinance, 1952,[52] enables the parties to a marriage solemnised or contracted in West Malaysia, other than a marriage, one of the parties to which professed at the time of the marriage the Christian or Muslim religion, to have the marriage registered. The Ordinance also allows the parties to a marriage solemnised or contracted outside West Malaysia to apply for registration of the marriage. It is provided that any male person having a wife living and being debarred according to the institutions of the religion he professes or which he professed at the time of his marriage to such wife or by the law or custom being the force of law applicable to the parties or either of them, from having more than one wife at a time, who procures or attempts to procure the registration of a marriage between himself and any other woman or girl shall be liable to be punished under section 494 of the Penal Code. Where the law or custom applicable to parties allows polygamy however, it is possible for a man to marry more than one wife and the law recognise the polygamous marriage as valid.[53]

48. (1956) M.L.J. 257.
49. (1961) M.L.J. 234.
50. (1966) 2 M.L.J. 220.
51. (1967) 1 M.L.J. 270. See also *Parameswari* v. *Ayadurai* [1959] M.L.J. 195.
52. No. 53 of 1952.
53. Registration of Marriages Ordinance, 1952, s. 4.

In Sarawak the Chinese Marriage Ordinance[54] provides for the control and registration of marriages according to established Chinese law or custom. No Chinese marriage contracted in Sarawak shall be valid unless it is registered under the Ordinance, but the Registrar's court may on the application of either party or of any party interested declare that the marriage is valid if satisfied that it is otherwise valid by established Chinese law or custom and thereupon the marriage shall be registered. The Registrar shall not register a Chinese marriage until he is satisfied that the ceremonies required by established Chinese law or custom have been duly performed and that the marriage is valid according to such law or custom; and normally he may register the marriage only if both parties are present and consent to the registration.[55] It is also provided that no Chinese marriage shall be registered nor shall it be valid until the female is fifteen years of age by English computation.[56] There is also provision in Sarawak for native marriages, which are recognised if solemnised in accordance with the native customary rites. There are elaborate rules for betrothals and breaches of betrothal but a marriage is usually constituted by cohabitation and report to the tribal chief.[57]

In Sabah customary marriages including Chinese marriages are recognised but such marriages are subject to the provisions of the Marriage Ordinance, 1959, as to the minimum age of marriage and as to the consent of the parties. The Ordinance also provides that save where provision is made in any other written law for the registration of the marriage it shall be the duty of any person who by law or custom is required to be present at or to witness the marriage or who being qualified under such law or custom acts as such, to record the particulars of the marriage and to forward such particulars to the Marriage Registrar.[58] Under the Dusun custom there is no religious formula or ceremony which is essential for a valid marriage and marriage is usually constituted by cohabitation and report to the tribal chief.

In Singapore the Women's Charter, 1961, provides that every marriage solemnised in Singapore after the coming into operation of the Ordinance other than a marriage which is void under the provisions of the Ordinance shall continue until dissolved —

(a) by the death of one of the parties; or

(b) by an order of a court of competent jurisdiction;

(c) by a declaration made by a court of competent jurisdiction that the marriage is null and void.[59]

54. Cap. 74 of the Laws of Sarawak, 1948.

55. Chinese Marriage Ordinance, s. 4.

56. *Ibid.,* s. 6(1).

57. See Dayak Customary Code of Fines; Orange Ulu Customary Code of Fines in Laws of Sarawak, 1958, Vol. VII.

58. Marriages Ordinance, 1959, ss. 2-5.

59. Women's Charter, 1961, s. 7 as amended by Act 9 of 1967.

This provision was extended to all marriages solemnised under any law, religion, custom or usage prior to the date of the coming into operation of the Ordinance, where such marriages are valid under the law, religion, custom or usage under which they were solemnised.[60] It does not however apply to persons married under the Muslim law. In effect therefore a marriage (other than a Muslim marriage) can only be dissolved by death or a decree of the court. Customary forms of divorce are no longer recognised in Singapore.

When the Ordinance was first enacted in 1961 the grounds for divorce were the same as those under the Divorce Ordinance, repealed by it, that is, adultery, desertion, cruelty and insanity, A wife could however present a petition for divorce on the additional ground that her husband has since the marriage been guilty of rape, sodomy or bestiality and more significantly still the wife was given the right to present a petition on the ground that her husband has since the solemnisation of the marriage gone through a form of marriage with another woman.[61] Thus in effect the Ordinance has "furnished a remedy where there was no offence" as Lord Penzance described it in *Hyde* v. *Hyde.*[62]

In 1967 the Women's Charter, 1961, was amended by adding a further ground for divorce, that is, that the respondent has lived separately from the petitioner for a period of not less than seven years immediately preceding the presentation of the petition and is unlikely to be reconciled with him or her, as the case may be.[63] This provision has introduced in Singapore the granting of divorce on the basis that the marriage has broken down, rather than on proof of matrimonial fault but this breakdown principle operates alongside the usual fault grounds. There is of course the danger that the principle of breakdown introduced into a system based on the matrimonial offence tends to become bedevilled with artificial considerations of fault. In *Govinden* v. *Govinden*[64] the High Court in Singapore held that the petitioner who petitioned on the grounds of seven years separation from her husband needed to prove that the separation was caused by her husband's adultery. In *Moses* v. *Moses*[65] however the court held that in a petition for divorce on the ground that the wife had lived separately from the petitioner for a period of not less than seven years immediately preceding the presentation of the petition and was unlikely to be reconciled with him, no question of fault on the part of the petitioner enters into the picture at all. It was argued in that case that the petitioner should show that he has made efforts to effect a reconciliation with the respondent but Winslow J. held that no neglect, failure or refusal on the part of the petitioner to have made efforts to effect a reconciliation can be pleaded as a reasonable answer to the petition. He said "The amendment appears to have been made on the basis that where the marriage bond has become no more

60. *Ibid.,* s. 166 as amended by Act 9 of 1967.

61. *Ibid.,* s. 84(2).

62. (1866) L.R. 1 & D. 130.

63. Women's Charter, 1961, s. 84 as amended by Act 9 of 1967.

64. *Straits Times,* 1 February 1969.

65. (1968) 1 M.L.J. 96.

than a detested shackle after the parties have been separated for not less than seven years it is in the public interest that the tie should be severed."

In the case of *Seah Cheng Huah* v. *Lau Biau Chin*[66] the petitioner brought a petition for divorce on two grounds (a) that the respondent had deserted the petitioner without cause as from the 28th July 1962 for a period of at least three years immediately preceding the presentation of the petition (b) that the respondent had lived separately from the petitioner for a period of not less than seven years immediately preceding the presentation of the petition and was unlikely to be reconciled with him, it being contended that she had lived separately from the petitioner as from October 1958. The learned trial Judge held that the petitioner had not discharged the burden of proof of constructive desertion by the respondent and the petition was therefore dismissed on the first ground. As regards the second ground the learned trial judge held that although the parties were physically separated during the period 1958 to 1962 (as the petitioner was away for most of that period on his medical studies in Dublin) the parties were not living separately as there was no intention on the part of either to bring their cohabitation or consortium to an end. He further held that the parties did not commence to live separately at any time before July 28th, 1962 when there was a quarrel between the parties on the husband's return to Singapore and the wife told him to go back to Dublin. It is interesting to note that although the learned trial Judge held that the wife in this case was not guilty of constructive desertion "when in her state of shock and distress she told him in the heat of the moment to go back to Dublin" and he left and returned to Dublin, yet he was prepared to hold that the parties commenced to live separately from that time. Although the petition on this ground of separation for a period of not less than seven years was dismissed in this case on the 16th July 1969 when the case was first heard, yet a little later the petitioner renewed her petition on that ground and was granted a divorce.

There were other important amendments to the law of divorce made by the Women's Charter (Amendment) Act, 1967. Collusion has become a discretionary and not an absolute bar;[67] adultery once condoned shall no longer be capable of being revived ;[68] the resumption or continuation of conjugal cohabitation by the husband following a matrimonial offence by the wife no-longer raises an irrebutable presumption of condonation against him;[69] also provisions have been made to allow spouses to continue or resume cohabitation for a period of not longer than three months in the attempt to effect a reconciliation without such cohabitation necessarily amounting to either condonation of adultery or cruelty or termination of desertion.[70] Furthermore the court is given power to adjourn proceedings for a divorce or judicial separation where there is a reasonable possibility of a reconciliation.[71] The amending Act has also

66. (1969) 2 M.L.J. 240.
67. Women's Charter, 1961, s. 86 as amended by Act 9 of 1967.
68. *Ibid.,* s. 87(4).
69. *Ibid.,* s . 87(2).
70. *Ibid.,* s. 87(3).
71. *Ibid.,* s. 86A.

provided that the child of a void marriage whether from before or after the commencement of the Ordinance shall be deemed to be the legitimate child of his parents.[72]

One weakness in the legislation in Singapore is that the bars to the granting of a divorce have been carried over from the system when divorce was based on the fault principle and not sufficiently integrated into the new system where divorce is based on the breakdown principle. Thus on the one hand the discretionary bars of collusion, delay and the petitioner's own adultery or cruelty will apply to a petition on the separation ground. On the other hand the provision which allows for periods of cohabitation not exceeding three months with a view to reconciliation does not apply where the ground is separation and there is no general discretion to refuse a decree where to grant it would seem by virtue of the petitioner's conduct to be contrary to the public interest.[73]

A decree for divorce may be made by the Court where the marriage has been registered or deemed to be registered under the provisions of the Ordinance or where the marriage was contracted under a law providing that or in contemplation of which marriage is monogamous.[74] Thus in effect the courts in Singapore can grant a divorce where the parties have been validly married under any law, religion, custom or usage (other than the Muslim Law) before the date of the coming into operation of the Ordinance, or where after the coming into operation of the Ordinance they are married under the provisions of the Ordinance or under a law providing that or in contemplation of which marriage is monogamous. The High Court in Singapore has therefore jurisdiction to dissolve even a polygamous marriage (other than a Muslim marriage) if it has been validly contracted before the date of the coming into operation of the Ordinance. In addition the Ordinance requires the parties to be domiciled in Singapore but there is provision to give the court jurisdiction where the wife is resident and has been ordinarily resident in Singapore for a period of three years immediately preceding the commencement of the proceedings.[75]

A decree of nullity of marriage can be made by the court where the marriage has been registered or deemed to be registered under the provisions of the Ordinance or where the marriage was contracted under a law providing that in contemplation of which marriage is monogamous. In addition the marriage to which the decree relates must have been celebrated in Singapore. The grounds for nullity are the same as in the former Divorce Ordinance and follow the provisions in England.[76]

A decree for judicial separation or of restitution of conjugal rights can be made where the marriage has been registered or deemed to be registered in Singapore or where the marriage was contracted under a law providing that or in contemplation of which marriage is monogamous. In addition both parties are required to be resident in Singapore,

72. *Ibid.,* s. 94.
73. Pegg, L., 'The seven-year hitch' *Malaya Law Review* (1969), Vol. 11, p. 181.
74. Women's Charter, 1961, s. 82(1).
75. *Ibid.,* ss. 82(1) and 126.
76. *Ibid.,* ss. 82(2) and 92.

at the time of the commencement of the proceedings. The grounds for judicial separation and for restitution of conjugal rights are the same as in the former Divorce Ordinance and follow the provisions in England.[77]

Provisions for Muslims are made in the Administration of Muslim Law Act, 1966. Divorce by mutual consent is allowed and can be registered by a *Kathi.* In all other cases application has to be made to the Shariah Court which will hear the parties and make the appropriate decree or order under the Muslim Law.[78] The grounds for judicial divorce have been extended to include the grounds of desertion, failure to maintain and cruelty, following the grounds allowed under the Maliki School of Law and the legislation in India, Pakistan and the United Arab Republic.[79] All divorces are required to be registered. The provisions of the Administration of Muslim Law Act, 1966, apply to all actions and proceedings in which all the parties are Muslims or where the parties were married under the provisions of the Muslim Law.[80] The possibility of conflict between the respective jurisdictions of the Shariah Court and the High Court has been reduced by the provision in the Supreme Court of Judicature Act, 1969,[81] that the High Court shall have no jurisdiction to try any civil proceeding which comes within the jurisdiction of the Shariah Court constituted under the Administration of Muslim Law Act, 1966.[82]

In West Malaysia, the Divorce Ordinance, 1952,[83] is applicable only to monogamous marriages. In order to give the Court jurisdiction to make a decree of dissolution of marriage it must be shown that the marriage is monogamous and that the husband is domiciled in the Federation.[84] Provision is also made to enable the court to make a decree where the wife is resident in the Federation and has been ordinarily resident in the Federation for a period of three years immediately preceding the commencement of the proceedings.[85] The grounds for dissolution of marriage are similar to those that existed in England and include adultery, desertion for a period of at least three years, cruelty and unsoundness of mind. In addition a wife may obtain a dissolution of the marriage if her husband has since the solemnisation of the marriage been guilty of rape, sodomy or bestiality or has gone through a form of marriage with another woman.[86] The court has jurisdiction to make a decree of nullity of marriage where the marriage is monogamous and where the marriage to which the decree relates was celebrated in the Federation. The grounds for nullity of marriage are simi-

77. *Ibid., ss.* 82(3), 96 and 99.
78. Administration of Muslim Law Act, 1966, ss. and 96.
79. *Ibid.,* s. 49.
80. *Ibid.,* s. 35.
81. Act 24 of 1969.
82. Supreme Court of Judicature Act, 1969, s. 16. See Bartholomew, G.W., 'The Jurisdiction of the Shariah Court in Singapore,' *Sedar* (1969-70), p. 31.
83. No. 74 of 1952.
84. Divorce Ordinance, 1952, s. 4(1).
85. *Ibid.,* s. 49.
86. *Ibid.,* s. 7.

lar to those that existed in England.[87] The court has also jurisdiction to make a decree of judicial separation or of restitution of conjugal rights where the marriage is monogamous and where both parties to the marriage reside in the Federation at the time of the commencement of the proceedings. The grounds for judicial separation and the decree of restitution of conjugal rights are the same as those that existed in England.[88]

It has been held that a Chinese domiciled in Perak can validly enter into a monogamous form of marriage. Although the Christian Marriage Ordinance 1940 of Penang does not expressly provide that a marriage under it is monogamous it is a law enabling the parties to enter into a marriage which they contemplate or intend shall be monogamous and therefore a Chinese married under the Ordinance can apply for dissolution of the marriage under the Divorce Ordinance, 1952 *(Dorothy Yee Yeng Nam* v. *Lee Fah Kooi).*[89]

Divorces in the case of Muslim marriages are provided for in the various State enactments dealing with the administration of Muslim Law. In general the provisions follow the law as laid down in the Shafii School of Law. Divorce by consent is allowed but a divorce may also be obtained on application to the court of a *Kathi.* All divorces are required to be registered. In some of the recent enactments emphasis has been laid on the need for reconciliation before a divorce is registered by the *Kathi.*[90] There has been no attempt (as in Singapore) to introduce the extended grounds for judicial divorce under the Maliki School of Law.

Divorce by custom is recognised in the case of Chinese and Hindus. As Chinese and most Hindu marriages are not monogamous, they cannot be dissolved by order of court as the court has jurisdiction only where the marriage is monogamous. Divorce under Chinese custom may be by mutual consent or by the unilateral repudiation of the wife by the husband; and such divorce is recognised by the courts in the Federation. In *Harbajan Singh* v. *Public Prosecutor*[91] it was held that among Selangor Sikhs divorce is recognised as a variation of Hindu law by usage or custom; and such a divorce will be accepted as valid by the High Court. There are no provisions for the registration of Chinese, Hindu and other customary divorces.

It has been held that although a Chinese in West Malaysia may choose either to contract a marriage according to Chinese custom or to contract a marriage under a law providing for monogamous marriage, if they choose to enter into a monogamous form of marriage, for example under the Civil Marriage Ordinance, such a marriage cannot be dissolved according to the Chinese custom but only under and in accordance with the Divorce Ordinance, 1952 *(Soo Hai San* v. *Wong Sue Fong).*[92]

87. *Ibid.,* s. 4(2).
88. *Ibid.,* ss. 4(3), 22 and 27.
89. (1956) M.L.J. 257.
90. See Perils Administration of Muslim Law Enactment, 1963, s. 90.
91. (1952) M.L.J. 83.
92. (1961) M.L.J. 221.

In Sabah the Divorce Ordinance, 1963,[93] applies only to monogamous marriages. The jurisdiction of the court to make decrees of dissolution of marriage, nullity of marriage, judicial separation and restitution of conjugal rights and the grounds therefor are the same as in West Malaysia, except that in Sabah there is no provision for a wife to present a petition on the ground that her husband has gone through a form of marriage with another woman.[94]

Muslim divorces are allowed in Sabah where the parties are Muslims and such divorces are required to be registered. Native customary divorces are also recognised. Under the native custom, both the husband and wife have equal rights regarding divorce. Either husband or wife can divorce the other at will, with or without specific reason. There is no special ceremony required beyond the formal notification to the tribal chief.

Chinese customary marriages are also recognised in Sabah. The parties may dissolve their marriage by mutual consent and very often they go to the Commissioner of Labour and Welfare to have some sort of separation agreement drawn up and signed by the parties and witnessed.

In Sarawak the Matrimonial Causes Ordinance[95] does not apply to marriages by Muslim Law or custom, native law or custom, Chinese law or custom, Hindu law or custom or other law or custom repugnant to English law for the purposes of the definition of marriage as the voluntary union for life or until the marriage is dissolved by a court of competent jurisdiction of one man with one woman to the exclusion of all others.[96] Under the Ordinance the court may make decrees for nullity of marriage, dissolution of marriage, judicial separation and restitution of conjugal rights. The grounds on which a decree for nullity can be made are similar to some of those in West Malaysia. The grounds are that the marriage was invalid for failure to comply with the provisions of the Church and Civil Marriage Ordinance or was not celebrated in accordance with such provisions; that the marriage was invalid by the law of the place in which it was celebrated, or that the marriage has not been consummated owing to the incapacity or wilful refusal of the respondent. The court may grant a decree of nullity of marriage in any case where the marriage is voidable if the husband is domiciled in Sarawak at the time when the petition is presented. Where the marriage is void *ab initio* the court has jurisdiction if the marriage was celebrated in Sarawak or the husband is domiciled or both parties are resident in Sarawak at the time when the petition is presented; but the court may grant a decree on the petition of the husband or wife, if the husband being wholly or partly of Asiatic race has been habitually resident in Sarawak for two years or more and, on the petition of the wife, if the wife is of a race indigenous to Sarawak or would but for the

93. No. 7 of 1963.

94. Divorce Ordinance, 1963, s. 7.

95. Cap. 94 of the Laws of Sarawak, 1958.

96. Matrimonial Causes Ordinance, s. 1(2).

marriage be domiciled in Sarawak or being wholly or partly of the Asiatic race has been habitually resident in Sarawak for two years or more.[97]

A petition for dissolution of marriage may be presented on any of the following grounds, that is, that the respondent —

(a) has since the marriage committed adultery;

(b) has since the marriage committed sodomy;

(c) has wilfully deserted the petitioner for a period of two years or more without reasonable cause;

(d) has failed to support the petitioner or the children of the marriage being under the age of eighteen years for six months or more without reasonable excuse;

(e) has been presumed to be dead by a decree of the court;

(f) has disobeyed a decree of the court for restitution of conjugal rights;

(g) has since the marriage treated the petitioner cruelly and by such cruelty has caused substantial physical or mental suffering;

(h) is insane and has been insane for a period of at least three years immediately preceding the petition;

(i) is an incurable drunkard, that is a person who habitually takes or uses any intoxicant or any sedative, narcotic or stimulant drug and while under the influence of or in consequence of the effects thereof is at any time dangerous or the cause of serious harm or suffering to himself or others or is incapable of managing his affairs;

(j) is undergoing a sentence of imprisonment of five years or more;

(k) wilfully refuses to have sexual intercourse with the petitioner without reasonable excuse;

(1) has communicated a venereal or loathsome disease to the petitioner;

(m) was at the time of the marriage suffering from a venereal disease;

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

In the case of the last two grounds — that is (m) and (n) it is provided that the court shall not grant a decree of dissolution of marriage unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged, that proceedings were instituted

97. *Ibid.,* ss. 4 and 10.

within a year from the date of the marriage and that sexual intercourse has not taken place since the discovery by the petitioner of the facts alleged.[99]

If the petition is opposed the court may not grant a decree of dissolution of marriage in any of the following cirumstances —

(a) where the petition is made on the ground of adultery or cruelty and the petitioner has condoned or by wilful neglect or misconduct has conduced to the adultery or condoned the cruelty;

(b) where the petition is made on the ground of desertion and the petitioner has since the marriage committed a matrimonial offence;

(c) where the petition is made on the ground of insanity or habitual drunkenness, and the petitioner has been guilty of such wilful neglect or misconduct as has conduced to the insanity or habitual drunkenness;

(d) where the petition is made on the ground of refusal of intercourse and the respondent if a woman is over fifty years of age or if a man is over sixty years of age;

(e) where the petitioner has unduly delayed making the petition or prosecuting the suit.[1]

The court is not precluded from making a decree of dissolution of marriage by reason of the fact that the petitioner has committed a matrimonial offence if it considers that having regard to all the circumstances it is reasonable that a decree should be granted.[2]

It is provided that any married person may present a petition praying for a decree of dissolution of marriage on the ground that circumstances have arisen which make it reasonble and just that the marriage should be dissolved. If satisfied that circumstances have arisen which in the opinion of the court make it reasonable and just that the marriage should be dissolved the court may grant a decree on such terms as may be just and subject to such conditions as the court may think fit to attach. Before making such a decree the court shall take into consideration how the interests of any child or children of the marriage or of either party will be affected if the marriage is dissolved.[3]

In *Ong Kim Yong* v. *Teo Guan Hua*[4] it was held that both the grounds of desertion relied on by the husband in his petition and the ground of cruelty relied on by the wife in her cross petition for judicial separation had not been proved. There were two children of the marriage, both infants. The court exercised its discretion and granted a divorce after proper consideration of the interests of the children. Briggs J. said —

99. *Ibid.,* s. 4(1).
1. *Ibid.,* s. 9(1).
2. *Ibid.,* s. 9(2)
3. *Ibid.,* s. 6(2), (4).
4. (1959) S.C.R. 102.

"I am of opinion that by taking everything into consideration this is a case in which I should exercise my discretion and grant a divorce. This marriage has completely broken down. Of that there can be doubt. That however does not stand alone. The parties have shown by their conduct a total inability to compromise and they have only been living together for a period of eighteen months or so although they have been married as long ago as 1950 — Finally I must consider the position of the two boys. It is obviously to their advantage that the marital position of the parents should be settled. At present this is not the case. If the parties are divorced there is every possibility of the two families living separate and contented lives. This will be of advantage to the children."

It is also provided that if two persons mutually agree that their marriage should be dissolved and if the marriage was celebrated before a civil authority and neither of the petitioners profess the Christian religion they may present a joint petition accordingly and the court may, if it thinks fit, dissolve such marriage on being satisfied that both parties freely consent and that proper provision is made for the support, care and custody of the children, if any of the marriage.[5]

In order to give the court jurisdiction to make a decree of dissolution of marriage it must be shown that the petitioner is domiciled in Sarawak at the time the petition is presented: but the court may grant a decree (a) on the petition of the husband or wife, if the husband being wholly or partly of the Asiatic race has been habitually resident in Sarawak for two years or more; or (b) the petition of the wife, if the wife is of a race indigenous to Sarawak or being wholly or partly of Asiatic race has been habitually resident in Sarawak for two years or more.[6]

A decree of judicial separation may be made on the same grounds and under the same conditions as a decree of dissolution of marriage. A decree of restitution of conjugal rights may be made on the ground that the defendant has without reasonable cause deserted the petitioner.[7]

Muslim divorces are recognised in the case of Muslims. These are granted in accordance with the provisions of the Shafii School of Muslim Law as modified by Malay custom. All divorces are required to be registered and in cases of dispute the decree can be made by the native court.

Divorce according to native customary law is also recognised in Sarawak. The usual types of divorce are (a) divorce by mutual consent (b) divorce by payment of fine by either party (c) divorce by desertion or infidelity of either party and (d) temporary divorce or separation. Decrees of divorce can be made by the Native Courts.

It has been held in Sarawak that the Matrimonial Causes Ordinance by providing that the Ordinance shall not apply to "marriage by Mohammadan Law or custom, native law or custom, Chinese law or custom or other law or custom repugnant to English Law" by necessary implica-

5. Matrimonial Causes Ordinance, s. 7.

6. *Ibid.,* s. 4.

7. *Ibid.,* ss. 8 and 11.

tion recognises Chinese customary law relating to divorce and matrimonial causes; and therefore the court has power to apply the Chinese customary law in such cases *(Chan Bee Neo* v. *Ee Siok Choo).*[8]

In *Liu Kui Tze* v. *Lee Shook Lin*[9] it was held that the High Court has jurisdiction to grant divorces to persons married according to Chinese custom. According to Chinese customary law, divorce may be obtained by mutual consent. When petitions are presented on other grounds the judge may call in the assistance of one or more suitable persons as assessors to decide whether such grounds are recognised by Chinese custom. In *Chien Man Ong* v. *Wong Suok Ing*[10] it was held that the High Court has jurisdiction to grant a decree of judicial separation where the parties were married according to Chinese custom.

In *Thia Whee Kiang* v. *Kueh Eng Seng*[11] the trial judge had granted a dissolution of marriage on the ground that there was no possibility of reconciliation. On appeal the order was set aside and Williams C.J. said that a married woman should not be deprived of her status except on good grounds supported by acceptable evidence. It has been held in *Wong Chu Ming* v. *Kho Lieng Hong*[12] that although the Chinese customary law relating to divorce is recognised in Sarawak the Chinese customary practice relating to divorce is not so recognised. Any Chinese customary practice whereby divorce may be so affected by a joint declaration or advertisement in a newspaper without any court process is of no application in Sarawak where all non-native divorces can only be granted by and in accordance with the recognised procedure of the High Court. Among the grounds for divorce which have been recognised by the Courts in Sarawak are failure to maintain, cruelty and desertion.[13]

All the wives in a polygamous marriage are treated alike in law. The Married Women Ordinance, 1957[14] in West Malaysia applies to all married women, subject only in the case of Muslim married women and their property rights and obligations to the provisions of the Muslim law and the customs of the Malays governing the relations between husband and wife. In Singapore the term "married woman" in the Women's Charter, 1961,[15] is defined to mean a woman validly married under any law, religion, custom or usage. The provisions of the Women's Charter, 1961, relating to the rights of married women apply to all married women except Muslim married women, to whom the provisions of the Administration of Muslim Law Act, 1966, are applicable. Under Muslim Law all the wives of a Muslim are given equal legal rights.

8. (1947) S.C.R. l.
9. (1953) S.C.R. 85.
10. (1956) S.C.R. 97.
11. (1955) S.C.R. 75.
12. (1952) S.C.R. 1.
13. *Lo Siew Ying* v. *Chong Fay* (1959) S.C.R. 1; *Loh Chai Ing* v. *Lu Ing Hai* (1959) S.C.R. 13; *Siaw Moi Jea* v. *Lu Ing Hai* (1959) S.C.R. 16; *Chong Foong* v. *Chan Hwe Seng* (1959) S.C.R. 33; *Tang Sui Ing* v. *Goh Tien Ling* (1946) M.L.J. 406; *Yung Mong Yung* v. *Chui Seng* (1964) M.L.J. 424; *Kong Nyat Moi* v. *Leong Sing Chiang* (1965) 1 M.L.J. 73.
14. No. 36 of 1957.
15. Women's Charter, 1961, s. 2 as amended by Act 9 of 1967.

Similarly in questions of maintenance the provisions of the Married Women and Children (Maintenance) Ordinance, 1950[16] in West Malaysia and the Women's Charter, 1961, in Singapore apply to all married women and their children. Similarly the enactments relating to the administration of the Muslim Law in the States in Malaysia and in Singapore provide for rights of maintenance to all married women and their infant children.

In regard to inheritance, the Distribution Ordinance, 1958,[17] provides that if a person dying intestate is permitted by his personal law a plurality of wives and leaves more than one wife, such wives shall share among them equally the share which the wife of the intestate would have been entitled to, had such intestate left only one wife surviving him. This is also the position under the Muslim Law of intestacy, as applied in the various States in West Malaysia.

In Sabah the Intestate Succession Ordinance, I960,[18] provides that if a person dying intestate is permitted by his personal law a plurality of wives and leaves more than one wife, such wives shall share among them equally the share which the wife of an intestate would have been entitled to, had such intestate left only one wife surviving him. The Ordinance does not apply to any native or Muslim subject to the jurisdiction of a Native Court but the position is similar in such cases.

In Sarawak the Administration of Estates Ordinance [19] provides that the residue of the estate of a deceased, after payment of his debts, shall be distributed according to the will of the deceased or as the case may be to the beneficiaries in the shares to which they are entitled by recognised law or custom. There is no differentiation between the wives in the polygamous form of marriage.

In Singapore the Intestate Succession Act, 1967,[20] provides that if any person dying intestate shall leave more wives than one, such wives shall share among them equally the share that the wife of the intestate would have been entitled to had such intestate left one wife only surviving him. The Act does not apply to Muslims, but the position is the same under the Muslim Law. The Inheritance (Family Provisions) Act, 1966,[21] does not expressly provide for a plurality of wives but it would appear that all wives will be equally entitled to benefit under the Act.

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16. No. 36 of 1950.
17. No. 1 of 1958.
18. No. 1 of 1960.
19. Cap. 80 of Laws of Sarawak, 1947.
20. No. 7 of 1967.
21. No. 28 of 1966.

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