

## THE ADMINISTRATION OF MUSLIM LAW IN SOUTH-EAST ASIA

The Muslims of South-East Asia are almost 120 million in number. They form the majority in Indonesia and in Malaysia; they form important minorities in Thailand, the Philippines and Singapore and there are also Muslims in Cambodia and Vietnam. Before the coming of the western powers to South-East Asia there were Muslim kingdoms in the region which were in close contact and had even family alliances with each other. When the western powers occupied the lands of South-East Asia the Muslims lost their power and their contacts with each other. There were differences between them and these have been accentuated by their political history and the influence of the dominating colonial power but there were and are many common features between them. Most of the Muslims in the area follow the *Shafii* School of Muslim law. Malay is the national language of Indonesia, Malaysia and Singapore and it is also understood and spoken by the Muslims of Thailand, Cambodia and to a lesser extent by the Muslims of Philippines. In all these countries the *adat* or Malay custom has had as great an influence on society and legal institutions as the Muslim law. Neither the pure Muslim law nor the pure *adat* (indeed the word "*adat*" itself is from an Arabic root) is followed and throughout the region we find an interesting blend of Muslim and customary law concepts. In Malaysia the Muslim law is applied as modified by Malay custom. In Indonesia the influence of the *adat* is even stronger and even Muslim legal concepts and institutions are classified as part of the customary law.

This paper deals in the main with the administration of the Muslim law in Indonesia, Malaysia and Singapore. Muslim law is applicable to the Muslims in the trial of civil cases involving matrimony and inheritance among the Muslims of the four Southern provinces in Thailand, where the Muslims are in the majority. In the Philippines the Civil Code provides in effect that marriages between Muslims who live in the non-Christian provinces may be performed in accordance with their customs, rites and practices, but this will only apply for a period of twenty years after the approval of the Code, that is, June 1949. Similarly it is provided by the Republic Act No. 394 of 1949 that for a period of twenty years from June 17, 1949, divorce among the Muslims residing in the non-Christian provinces shall be recognised and be governed by Muslim customs and practices. There has however been no significant development in the administration of Muslim law in Thailand or the Philippines and in these countries, as in Cambodia and Vietnam, Muslim law appears to be recognised and applied (if at all) as the customary law applicable to the Muslims.

## ADMINISTRATION

In Indonesia there has been a Ministry of Religion since 1946. The field of activities of the Ministry has been defined as follows:—

- (1) Realizing the principles of the faith in the best manner possible.
- (2) Watching over individual freedom of religion.
- (3) Giving guidance and support so as to promote healthy religious movements.
- (4) Maintaining relations with religious movements and currents not belonging to the Islamic and Christian (Protestant and Roman Catholic religions).
- (5) Advancing the general development in social life and in religious life.
- (6) Administering, guiding and supervising religious education in government schools.
- (7) Administering, guiding and supervising, as well as promoting education in the home, teaching in religious schools, and private teaching of religions.
- (8) Training personnel necessary for religious education in government schools, for government officers and for jurisdiction, in the capacities of teachers and of religious judges.
- (9) Administering and supporting everything pertaining to spiritual education in boarding-establishments, prisons and other places where this may be deemed necessary.
- (10) Regulating, administering and supervising everything pertaining to registration of marriages, repudiations and retraction of repudiations by Muslims.
- (11) Providing material support for the improvement and maintenance of buildings destined for worship (mosques, churches etc.).
- (12) Administering, regulating and supervising all matters pertaining to religious jurisdiction and the Islamic High Court.
- (13) Investigating, deciding, registering and supervising as well as administering legacies under Islamic law (*wakaf*).
- (14) Administering and supervising matters pertaining to pilgrimages.
- (15) Appointing and announcing holidays.
- (16) Regulating official events relating to religion, with the proviso that freedom of religion is to be maintained.<sup>1</sup>

1. Nieuwenhuijze, C. A. O. van, *Aspects of Islam in Post-Colonial Indonesia* (1958), p. 226.

The Ministry has taken over the functions of the former Religious Affairs Officers of the Residencies and it also has the power of appointing the *Penghulus*<sup>2</sup> and *Qadis*, who are the principal officials in the religious courts, mosques and other Muslim institutions. Indonesia also has a system of religious courts which supplement the civil courts and the village *adat* courts. There are at present three kinds of religious courts in Indonesia:—

- (a) the Religious Court (*Pengadilan Agama*) in Java and Madura (originally constituted under the Decree No. 152 of 1882, as amended by Decrees Nos. 116 and 610 of 1937);
- (b) the *Qadis* Court (*Pengadilan Qadi*) of Bandjermasin originally constituted under decree No. 638 of 1937);
- (c) the Religious Court (*Mahkamah Syariah*) in the areas outside Java, Madura and Bandjermasin (constituted by Instruction No. 45 of 1957).

Each of the above courts has an appeal court—the Supreme Religious Court (*Mahkamah Islam Tinggi*) in Surakarta, the Chief *Qadi* Court (*Pengadilan Qadi Tinggi*) in Bandjermasin and the Provincial Religious Court (*Pengadilan Agama/Mahkamah Syariah Propensi*) in the other areas.<sup>3</sup>

The members of the Religious Court consist of the *Penghulu* or *Qadi* as Chairman and a number of religious officials as members. For the hearing of cases the Court is constituted of a President and at least two other members. The Court may decide by a majority and where the members are evenly divided it is the decision of the President which prevails.

The courts have jurisdiction to investigate and decide all disputes between Muslims concerning marriage, repudiation, revocation of repudiation, divorce and maintenance. The decrees of the religious courts where it relates to the payment of money or transfer of property can only be enforced if the decree has been registered in the civil courts. The civil court may refuse to register the decree of the religious court if it is of the opinion that the religious court has exceeded its jurisdiction or that the decision appears to be contrary to the merits of that case.<sup>4</sup>

The religious courts have no jurisdiction in questions of property, inheritance and *wakaf*. These matters are dealt with in the civil courts and the tendency has been to follow the customary law of inheritance

2. The term 'penghulu' which in Malaysia means the village leader is used in Java to mean the religious leader or religious judge. It is equivalent to the word "kadi" (qadi) which is used in the other islands of Indonesia.
3. Ter Haar, B., *Adat Law in Indonesia* (1948), p. 26; Achmad Ichsan and Soerojo, R., *Dasar-Dasar Tata Hukom* (Bandong, 1960), p. 99f.; Westra, H., "Custom and Muslim law in the Netherlands East Indies", in *Transactions of the Grotius Society* (1940), vol. 25, p. 151f; Supomo, R., *Sistem Hukom di-Indonesia*.
4. Ter Haar, B., *op. cit.*, p. 27; Wirjono Prodjokikoro, *Hukum Perkawinan di-Indonesia*, Bandung, p. 22.

rather than the Muslim law of inheritance, the details of which in many cases were in conflict with the actual conditions prevailing among the Muslim in Indonesia.<sup>5</sup>

Malaysia is a Federation consisting of the States of Malaya (now called Western Malaysia) and the Borneo States of Sabah and Sarawak (now called Eastern Malaysia). Singapore separated from Malaysia on the 9th August, 1965. Although Islam is the religion of the Federation (Malaysia) the power to legislate on matters of Muslim law and the personal and family law of persons professing the Muslim religion is a matter for the State Legislatures.

In each of the former Malay States the Ruler is the head of the religion of the State and the religion of the State is Islam. Article 3 of the Federal Constitution provides that in every State which has a Ruler the position of the Ruler as the Head of the Muslim religion in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and subject to that Constitution all the rights, privileges, prerogatives and powers enjoyed by him as the Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity as Head of the Muslim religion authorise the Yang di-Pertuan Agong to represent him. In the cases of Malacca and Penang the Constitutions provide that the Yang di-Pertuan Agong shall be the Head of the Muslim religion in that State.<sup>6</sup>

The power of the State Legislature to legislate on matters of Muslim law includes a power to constitute courts having jurisdiction over persons professing the Muslim religion, but it is provided that such courts shall not have jurisdiction in respect of offences except in so far as conferred by Federal law. The Muslim Courts (Criminal Jurisdiction) Act, 1965, now confers jurisdiction, in respect of offences against precepts of the Muslim religion by persons professing that religion which may be prescribed under any written law, on Muslim courts duly constituted under any law in a State and invested with jurisdiction over persons professing the Muslim religion and in respect of any of the matters enumerated in the State list; but it is provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding six months or with any fine exceeding one thousand dollars or with both. The Act also provides that all offences under Muslim law which had been tried before the commencement of the Act shall be deemed to have been validly tried as if jurisdiction in respect thereof had been conferred on the courts by federal law.<sup>7</sup>

5. Matters relating to inheritance and *wakaf* were removed from the jurisdiction of the religious courts by Decree No. 116 of 1937. See Supomo, R., *op. cit.*, p. 75; Ter Haar, B., *op. cit.*, p. 27; Wirjono Prodjodikoro, *op. cit.*, p. 22.
6. Ahmad Ibrahim, "Administration of Muslim law in Malaysia", *World Muslim League Magazine* (December 1966), Vol. III, No. 10, p. 32f.
7. Muslim Courts (Criminal Jurisdiction) Act, 1965 (No. 23 of 1965).

Each of the States has its own legislation dealing with the administration of Muslim law and these laws differ from each other in detail rather than in substance. Since 1952 there has been an attempt to revise the laws relating to the administration of Muslim law and to follow some sort of model in drafting the State legislation. Thus we have the following State legislations which are more or less similar:—

- (a) the Administration of Muslim Law Enactment, 1952, of Selangor;
- (b) the Administration of Islamic Law Enactment, 1955, of Trengganu;
- (c) The Administration of the Law of the Religion of Islam Enactment, 1956, of Pahang;
- (d) the Administration of Muslim Law Enactment, 1959, of Malacca;
- (e) the Administration of Muslim Law Enactment, 1959 of Penang;
- (f) the Administration of Muslim Law Enactment, 1960, of Negri Sembilan;
- (g) the Administration of Muslim Law Enactment, 1962, of Kedah;
- (h) the Administration of Muslim Law Enactment, 1963, of Perlis;
- (i) the Administration of Muslim Law Enactment, 1965, of Perak.

Similar legislation has been drafted but not enacted in Johore and it is interesting to note that Brunei has a Religious Council and Kathis Courts Enactment, 1955, which follows the model. Singapore has recently enacted an Administration of Muslim Law Act, 1966, which although in many respects more advanced (or less conservative) than the State enactments of Malaysia, is based on the same model. Kelantan has however deviated somewhat by having two enactments, the Shariyah Court and Muslim Matrimonial Cases Enactment, 1966, and the Council of Religion and Malay Custom Enactment, 1966. The present position is that Johore, Sabah and Sarawak still follow the old enactment relating to the administration of Muslim law.

The various State legislations in Malaysia and Singapore in the main deal with the administration of Muslim law and not with the substantive Muslim law. The substantive law that is applied is the Muslim law of the Shafii School as varied by Malay custom. In each of the States (other than Sabah) there is a Council of Religion and Malay Custom known by various names, whose principal function is "to aid and advise the Ruler on all matters relating to the religion of the State and Malay Custom". It is provided that the Council shall in such matters be the chief authority in the State. Some Councils have more power than others. In Selangor, Kedah, Perlis, Perak and Singapore the Council has power to issue *fatwas* on any matters referred to them. In those States too it has power to administer *wakafs* and to act as executor of the will or as administrator of the estate of a deceased Muslim.

As the principal function of the Council of Religion is advisory, there exists in each State (except Kelantan) a Department of Religious Affairs, responsible for the day to day administration of matters relating to the Muslim religion, headed in each case by a lay administrator. Some of the officers of the Department are also members of the Council and there is a close relationship between the two. In each State apart from the lay head of the Religious Affairs Department the highest religious officer is the *Mufti* who has no administrative function and whose principal function is either to issue *fatwas* or to assist the Council of Religion to do so.

In Selangor, Kedah, Perlis, Perak and Sarawak and in Brunei, any person may request the Council of Religion to issue a *fatwa* on any point of Muslim Law or doctrine. Such requests are referred in Selangor and Sarawak to the Legal Committee and in Kedah to the Fatwa Committee consisting of the *Mufti*, not more than two other members of the Council and not less than two (in Sarawak not less than four) other fit and proper persons who may be members of the *Majlis* or not. In Perlis and Perak such requests are referred to the *Shariah* Committee. In Perlis it is provided that the *Shariah* Committee shall consist of the *Mufti*, two members of the *Majlis* and two persons, not being members of the *Majlis*, who profess the Muslim religion *Ahli Sunnah Waljamaah*. In Perak the *Shariah* Committee consists of the *Mufti*, not more than four *Ulamas* who are members of the *Majlis* and not more than four *Ulamas* who are fit and competent to issue *fatwa* and who are not members of the *Majlis*. The Legal Committee, Fatwa Committee or *Shariah* Committee has the power to refuse to answer the request if in its opinion the question referred to is frivolous or for other good reason it ought not to be answered. Any answer given by the Legal Committee, Fatwa Committee or *Shariah* Committee must be unanimous. If the Committee is not unanimous, the question must be referred to the full Council, which may decide on the answer in accordance with the opinion of the majority. On special grounds any such question may be referred by the Council to the Ruler for determination. The law is the same in Negri Sembilan (except that reference to the Ruler must be made if the *Mufti* so requests), and in Penang and Malacca (where there is no provision for reference to the Ruler or the Yang di-Pertuan Agong). In Pahang the *fatwa* may be issued by the Council of Religion but on special grounds the question for decision may be referred to the Ruler for his decision. In Trengganu, all requests for the issue of *fatwas* are referred to the *Mufti*, who may consult a Committee of the Council, but is not obliged to accept their advice. The *Majlis* may in the interests of the Muslim community request the Ruler to reconsider a ruling of the *Mufti*.<sup>8</sup>

In Kelantan requests to the *Majlis* to issue *fatwas* are referred to a *Juma'ah Ulama* consisting of the *Mufti* as Chairman and not less than eight other fit and proper persons. The *Juma'ah Ulama* shall, unless it considers that the question ought not to be answered, prepare a draft ruling and if such draft has been approved either unanimously or by a majority of not less than two-thirds of the members, the ruling shall

8. Ahmad Ibrahim, "Administration of Muslim law in Malaysia", *World Muslim League Magazine* (December 1966), Vol. III, No. 10, p. 32f.

be issued by the Chairman of the *Majlis* in the name of the *Majlis*. If no such ruling can be issued, the *Juma'ah Ulama* shall refer the matter to the *Majlis*, which shall issue its ruling based upon the recommendations and guidance given by the *Mufti*. The *Majlis* may however, on special grounds, refer the question to the Ruler for his decision and the *Majlis* shall do so, if the *Mufti* so requests.<sup>9</sup>

In Singapore the Legal Committee, to which requests for *fatwa* are referred, consists of the *Mufti*, two other fit and proper members of the *Majlis* and not more than two other fit and proper Muslims who are not members of the *Majlis*. The Legal Committee shall unless it considers that the request should not be answered prepare a draft ruling and if this is unanimous it is issued as a ruling by the Chairman in the name of the *Majlis*. If the Legal Committee is not unanimous, the question is referred to the *Majlis*, which shall issue its ruling in accordance with the opinion of the majority of its members.<sup>10</sup>

Except in Perlis and Kelantan and in Singapore it is provided that in making any ruling the *Majlis* and the Legal Committee shall ordinarily follow the orthodox tenets of the *Shafii* School. If however it is considered that the following of such orthodox tenets will be opposed to the public interest, the *Majlis* or the Legal Committee may, unless the Ruler otherwise directs, follow the less orthodox tenets of the *Shafii* School. If it is considered that the following of either the orthodox or the less orthodox tenets of the *Shafii* School will be opposed to the public interest, the *Majlis* or the Legal Committee may, with the special sanction of the Ruler, follow the tenets of any of the three other schools of law, as may be considered appropriate but in any such ruling the provision and principles to be followed shall be set out in full detail and with any necessary explanation.<sup>11</sup> In Perlis it is provided that in issuing a *fatwa* the *Majlis* or the *Shariah* Committee shall ordinarily follow the *Quran* and the *Sunnah* of the Prophet but where the following of such tenets would be opposed to the public interest they shall refer such *fatwa* to the Ruler for his decision.<sup>12</sup>

In Kelantan it is provided that in making and issuing any ruling the *Majlis* and the *Juma'ah Ulama* shall ordinarily follow the orthodox tenets of the *Shafii* School but if it is considered that the following of such orthodox tenets will be opposed to the public interest, the *Majlis* or the *Juma'ah Ulama* may, with the approval of the Ruler, follow the less orthodox tenets of the *Shafii* School. If it is considered that the following of the less orthodox tenets of the *Shafii* School will still be opposed to the public interest, the *Majlis* or the *Juma'ah Ulama*, may with the special sanction of the Ruler follow any of the remaining three schools of law, that is, the *Maliki*, *Hanafi* and *Hanbali*. If it is further considered that the following of the tenets of the three schools

9. Kelantan Council of Religion and Malay Custom Enactment, 1966, ss. 12 and 13.

10. Singapore Administration of Muslim Law Act, 1966, ss. 31 and 132.

11. See for example, Selangor Administration of Muslim Law Enactment, 1952, s. 42; and Ahmad Ibrahim, *Islamic Law in Malaya* (1965), edited by Shirle Gordon, p. 147f.

12. Perlis Administration of Muslim Law Enactment, 1963, s. 8.

will be opposed to the public interest, the *Majlis* or the *Juma'ah Ulama* may, with special sanction of the Ruler, follow the tenets of the other schools of law which are acceptable to the teaching of Islam, except that in matters pertaining to belief or faith in God and the Prophets, the tenets of *Ahli-Sunnah Wal Jumaah* will be followed.<sup>13</sup>

In Singapore it is provided that the *Majlis* and the Legal Committee in issuing any rulings shall ordinarily follow the tenets of the *Shafii* School of law but if the *Majlis* or the Legal Committee considers that the following of the tenets of the *Shafii* School of law will be opposed to the public interest the *Majlis* may follow the tenets of the other accepted schools of law as may be considered appropriate, but in any such ruling the provisions and principles to be followed shall be set out in full detail and with all necessary explanations. The *Majlis* or Legal Committee is also authorised to issue rulings in accordance with the tenets of a particular school of law, if it is so requested.<sup>14</sup>

In all the States of Western Malaysia there are *Kathi's* Courts including the Courts of Chief *Kathis* and *Naib Kathis*. The Courts of the *Kathis* have jurisdiction to hear and determine all actions and proceedings in which the parties are Muslims and which relate to:—

- (a) betrothal, marriage, divorce, nullity of marriage or judicial separation;
- (b) any disposition of or claim to property arising out of any of the matters set out in paragraph (a);
- (c) maintenance of dependents, legitimacy, guardianship or custody of infants;
- (d) division of or claims to *sapencharian* property;
- (e) 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;
- (f) wills or death bed gifts of a deceased Muslim who professed the Muslim religion;
- (g) gifts *inter vivos* or settlements made without consideration in money or money's worth by a person professing the Muslim religion;
- (h) *wakaf* or *nazr*;
- (i) other matters in respect of which jurisdiction is conferred by any written law.

The courts have also jurisdiction to try any offence committed by a Muslim and punishable under the Administration of Muslim Law Enactment and to impose the punishment provided. An appeal lies

13. Kelantan Council of Religion and Malay Custom Enactment, 1966, s. 14.

14. Singapore Administration of Muslim Law Act, 1966, s. 33.



from the decision of the *Kathis'* Courts to an Appeal Committee or Appeal Board constituted under the relevant enactments.<sup>15</sup>

In Singapore the *Shariah* Court has jurisdiction to hear and determine all actions and proceedings in which the parties are Muslims or where the parties were married under the provisions of the Muslim law, which relate to marriage, divorce, betrothal, nullity of marriage, judicial separation, the disposition or division of property on divorce and the payment of *maskahwin* (dower), maintenance and consolatory gifts or *mutu'ah*. An appeal lies from the decision of the *Shariah* Court to an Appeal Board.<sup>16</sup>

In the Philippines there are various systems applicable in the different Muslim provinces. In Mindanao the *Datu* (or village chief) is assisted in the administration of justice by a judge and a vizier (*wazir*). The judge is called *Datu Kali*. The vizier generally acts in a semi-judicial and clerical capacity. Both the *Datu Kali* and the vizier are generally scholars who can read, write and perform religious rites and duties. Some of the *Datus*, who are qualified, themselves act as judges. In Sulu, the *Sultan* is the head of the island-province, which is divided into districts, each of them under a *Panglima*, and sub-districts, each of them under a *Maharajah*. The *Panglima* holds the court next in rank to that of the *Sultan*, while the *Maharaja* holds the lowest rank in the judiciary. In Cotabato there is a *Sultan* but he does not exercise the judicial function and judges or *Datu Kalis* are appointed to sit as judicial officers for the districts to which they are assigned. In Lanao, there are four divisions, which are in turn divided into towns and each town is governed by one or more *Sultans* or *Datus*, who form the judicial tribunal in their respective localities. The law that is applied in the Muslim areas of the Philippines is a mixture of Muslim law and custom and in practice reliance is placed on collections of codes of customary law. The principal codes in use in the Philippines are the *Luwaran* in Mindanao and the *Sulu Code* in Sulu. The *Luwaran* contains selections from Arabic texts, including the *Minhaj*, and were translated and compiled for the guidance of the Mindanao *Datus* and judges who do not understand Arabic. In making the *Luwaran* the Mindanao judges selected such laws as in their judgment suited the conditions in Mindanao. In a few instances they made new provisions which are not found in the Arabic books. The *Sulu Code* is less comprehensive than the *Luwaran*. The Muslim law is applied on a tribal basis and great emphasis is placed on pre-trial procedures, which are aimed at bringing the contending parties to an amicable settlement. It is only if the attempts at settlement fail, that the cases are heard in the courts.<sup>17</sup>

In Thailand, there is an official called the *Chularajmontri*, who as Chairman of the Central Islamic Committee is the principal adviser

15. See for example, Selangor Administration of Muslim Law Enactment, 1952, ss. 43-46; and Ahmad Ibrahim, *Islamic Law in Malaya*, *op. cit.*, p. 147f.
16. Singapore Administration of Muslim Law Act, 1966, s. 35.
17. Saleby, Najeeb M., *Studies in Moro History, Law and Religion* (Manila, 1905), p. 63f; P. D. Dimampao, "Agama courts of the Muslim Philippines", *Lyceum Law Review* (1966), p. 22.

on Muslim affairs to the Minister of the Interior and the Ministry of Education. The *Chularajmontri* is appointed by the King but nominations are made through the Islamic Committee. Each mosque has an *imam* and he presides over the local mosque committee; the local mosque committees elect the Chairmen of the twenty-four Provincial Islamic Committees; and these Chairmen in turn elect the *Chularajmontri*, whose name is then submitted to the King for Royal appointment. The Muslim law is only applicable in the trial of civil cases involving matrimony and inheritance among the Muslims of the four Southern provinces in Thailand.<sup>18</sup>

## MARRIAGES

A marriage in Indonesia is usually preceded by a betrothal or engagement (*tunangan*). This is constituted by the agreement of the parties or their families. The proposal for the marriage is made by the man or his family and if this is agreed to the parties are formally engaged. Under the custom some token of the engagement has to be made by the parties and either gifts or money has to be given by the man to the woman or as in Batak, Kalimantan and Minangkabau by the parties to each other. Where there is a breach of the betrothal agreement, the party who defaults, loses any claim to the gifts made by him or her and has to repay double the value of the gifts received by him or her.<sup>19</sup>

Marriage is legally contracted by a declaration made by one party followed by a corresponding acceptance from the other. The essential elements of a valid marriage follow the requirements of the *Shafii* School of law. It is also usual to stipulate the amount of the *maskahwin*, which is the customary payment payable by the husband to the wife, and which has been equated to the *mahr* of the Muslim law. The usual amount of *maskahwin* in Indonesia is Rp. 5.<sup>20</sup>

The Muslim form of marriage (*nikah*) is normally followed by customary rejoicing and propitiary functions (*pesta dan selamatan*), which vary from place to place, following the accepted practices of each place. These functions follow the customs (*adat*) and are to some extent influenced by Hindu teachings and practices.<sup>21</sup>

In Indonesia marriages have usually to be witnessed by the officials of the Religious Department. Under the provisions of the law relating to the registration of marriage, divorce and revocation (Law No. 22 of 1946) it is provided that a marriage according to the Muslim law must be attended by a Registrar of Marriages appointed by the Ministry of Religion or an official delegated by him and registered by him. The function of the official is to witness the marriage but not to solemnise

18. See the note: "Muslims in Thailand" in *World Muslim League Magazine* (July - August 1966), Vol. III, No. 7, p. 62.

19. Ter Haar, B., *op. cit.*, p. 164.

20. Achmad Ichsan and Soerojo R., *op. cit.*, p. 161.

21. *Ibid.*

the marriage. The marriage is solemnised by the parties in accordance with the Muslim law. It is the duty of the Registrar or official to ensure that the parties have consented to the marriage and that agreement has been reached on the payment of the *maskahwin*. A marriage which takes place without the presence of the Registrar of Marriages or an official delegated by him is nevertheless valid if it is valid under the Muslim Law but the parties who take part in the marriage are liable to a fine not exceeding Rp. 50 and the persons who solemnise such a marriage to a fine not exceeding Rp. 100. Where action has been taken in such cases and the court has imposed the fine, a copy of the judgment is sent to the Registrar of Marriages who will then register the marriage with a cross-reference to the judgment of the court; the effective date of the marriages in such cases is the date when the marriage takes place and not the date of registration. Disputes concerning the validity of a marriage may be referred to a Religious Court or where there is no religious court in the area to a civil court.<sup>22</sup>

The procedure for registration of marriages is laid down in regulations issued by the Minister of Religious Affairs. The prospective spouses are required to apply to the official dealing with religious affairs in their village or district for the necessary forms, which have to be filled in by the parties and the *wali* of the prospective wife. The marriage may be registered ten days after this form has been duly filled in, signed and handed to the official in charge. A new form is then filled in and given to the bride and bridegroom. This is the *surat nikah* or marriage certificate and gives not only the names, dates and places of birth of the couple, but in addition the man's civil status — whether he is a bachelor or married and if so to whom — the *wali*'s name, the amount of dowry and the husband's consent to pronounce the *ta'alik*. The declaration of the *ta'alik*, the text of which is printed at the back of the certificate is then recited aloud by the husband.<sup>23</sup>

The *ta'alik* is the condition in the marriage contract the breach of which enables the wife to apply for divorce. According to Javanese tradition it originated in a regulation of a King of Mataram in the 17th century. This regulation was as follows: Immediately after contracting his marriage the husband has to declare to his wife's *wali* and the witnesses, that if he leaves his wife for a certain time without providing for her and without sending her tidings or if he severely ill-treats her or commits some other unseemly act then his wife is free, if she likes to do so, to complain before the Muslim authority concerned. If there is evidence of her husband's failing, one *talak* will be declared to have "fallen".<sup>24</sup>

Under the customary law, cohabitation is an essential ingredient of marriage. Indeed in certain parts of Indonesia, for example in Java,

22. Wirjono Prodjodikoro, *op. cit.*, p. 38f; Undang-Undang 22 of 1946 in *Kitab Himponan Perundangan-Undangan Negara Republic Indonesia*, Djakarta, p. 1510.
23. Regulation No. 1 of 1955 in *Kitab Himponan Perundangan-Undangan Negara Republic Indonesia*, p. 1517.
24. Prins, J., "Adat law and Muslim religious law in Modern Indonesia", in *Welt des Islams* N.S. 1. (1951), p. 292.

cohabitation is regarded as more important than the religious ceremony of *nikah* to constitute a valid marriage. Under the customary law there is a form of marriage, the *gantong nikah*, which is usually performed between a man and a girl who is still too young to cohabit with the man; in such a case although the *nikah* is performed and therefore the marriage is valid under the Muslim law, the marriage is not so regarded under the customary law until the parties are able to cohabit.<sup>25</sup>

There is no minimum age of marriage for Muslim marriages in Indonesia but in practice the man is usually above 18 years and the girl above 15 years. Cases occur of marriages where the girl has not attained the age of 15 years but in such cases the marriage is *gantong nikah* and there is no cohabitation until the girl becomes older. Under the instructions issued by the Ministry of Religious Affairs the *Penghulus*, *Qadis* and other officials are strongly advised not to register child marriages.<sup>26</sup>

A woman who is already married is not allowed to marry again while the marriage is still subsisting and where a marriage is terminated by divorce or the death of the husband, the wife is only allowed to marry after a compulsory period of waiting called *iddah*. It is usual to fix the *iddah* period as 100 days in Indonesia. A Muslim man is permitted to marry more than one wife up to a maximum of four, provided he is able to treat his wives with equity. The only control provided for in Indonesia is that under Instruction No. 4 of 1947 issued by the Ministry of Religious Affairs whereby the marriage official is instructed to inform the man who wishes to marry again when he is already married about the obligations imposed by the Muslim law.<sup>27</sup>

A Chinese or a European however, remains subject to the civil law, even though he is a Muslim, and is restricted to marrying one wife only; and an Indonesian male Muslim who marries a Christian woman and has agreed that his marriage be solemnised under the civil law will not be permitted to marry again, so long as that marriage subsists.<sup>28</sup>

The rules of the Muslim law relating to the prohibition of marriages of parties who come within the prohibited degrees of consanguinity or affinity or fosterage apply in Indonesia. The Muslim law also prohibits a man from marrying a woman whom he has divorced three times or with three *talaks* unless she has after such divorce been married to another person and divorced after consumation of the marriage by such person. The marriage of two persons whose previous marriage has been ended by the process of *lian* is also prohibited.

The influence of customary law in supplementing and modifying the Muslim law is strikingly illustrated in the Marriage Ordinance for the islands other than Java and Madura. This provides that in

26. Wirjono Prodjodikoro, *op. cit.*, pp. 31 and 39.

26. Wirjono Prodjodikoro, *op. cit.*, p. 31; Ministry of Religious Affairs Instruction No. 4 of 1947.

27. *Ibid.*

28. Wirjono Prodjodikoro, *op. cit.*, p. 13.

the residencies of Sumatra's West Coast and Tarpaneoli no Muslim religious official may perform a marriage ceremony without a written permit from the head of the native community to which the parties in question belong, stating that there are no objections based on native customary law to the persons concerned being united in marriage. In the matrilineal area of Minangkabau the restrictions on marriage under the Malay custom are followed in addition to the restrictions under the Muslim law.<sup>29</sup> Thus marriage between maternal cousins is not allowed. The rule of the custom has been reconciled with the Muslim law on the argument that Islam does not make marriage with a maternal cousin an obligation. It is interesting to note that a reliance is placed on a saying of the Holy Prophet to the effect "marry people who are distant (in relation) so that your descendants will be healthy and strong."

Under the Muslim law a man may marry a Muslim woman or a *kitabiyya*, that is a follower of a revealed religion with a holy scripture; but a Muslim woman cannot marry any one except a Muslim. Mixed marriages are allowed in Indonesia under the Rules relating to mixed marriages. It is provided that such a marriage between persons who are followers of different religions is allowed and that the differences in religion, race or origin are not bars to the validity of the marriage. It is also provided that in such a case and so long as the marriage subsists the law relating to marriage applicable to the husband will apply to the wife.<sup>30</sup>

Under the Malay custom in Malaysia a marriage is regarded not just as a personal tie but as a family and tribal tie as well and there are elaborate ceremonies for the betrothal. Even outside the *adat per-pateh* areas a Muslim marriage in Malaysia is often preceded by a betrothal. The first move is made by the family of the bridegroom to be who ascertains from the girl's family whether a proposal would be favourably received. When an understanding has been arrived at, the parties proceed to settle the date of the marriage and the precise amounts of the payments for *maskahwin* and presents. There may be a formal ceremony of betrothal at the girl's home to finalise the contract between the two families.

In Negri Sembilan the ceremonies are more elaborate. A marriage is first preceded by a discreet enquiry by the matchmakers (*duai*), usually the female relatives of the intending bridegroom. If the discreet inquiry shows that there is hope of success the *menghantar chincin* or "sending the ring" ceremony is held. A "seeking ring" (*chinchin tanya*) is presented to the prospective bride's family. This signifies a request for the bride's hand on the part of the groom. The "seeker ring" should be returned within three days if the proposal is not accepted. If it is accepted a simple ceremony is held, to which the relatives of both parties are invited. Here the *chinchin tanya* is circulated to be

29. Stuers, Cora Vreede-De, *The Indonesian Women* (1960), p. 101; Nashruddin Thaha, *Pedoman Perkawinan Umat Islam* (Jakarta 1960), p. 45; Westra, H., *op. cit.*, p. 161.
30. *Regeling op. de Gemengde Huwelijken* included in *Stattsblad, 1895 -158; Peraturan tentang Perkawinan tjampuran in Kitab Himponan Perundangan-Undangan Negara Republik Idonesia, op. cit.*, p. 1503.

viewed and examined by the relatives present, symbolising the discussion of the merits and demerits of the prospective bridegroom. If the union is approved then another ring is placed beside the first. The appearance of the double ring signifies that the match is agreed upon and the agreement is sealed under the custom.<sup>31</sup>

In Sarawak the Malay custom regarding betrothal is briefly as follows: First the boy's parents will approach those of the girl's to talk about the possibility of marriage. If the boy is acceptable and agreement is reached, then generally the second stage is to take a *tekol* to the girl's parents. This *tekol* in practice must take place within seven days of the agreement. If the boy breaks the agreement and does not take the *tekol* to the girl's parents he will be liable for the offence called *balak pengamang* and will be liable to a fine; but if the girl breaks the agreement before the *tekol* is received, she is not guilty of any offence. The third stage is *pertunangan* or betrothal which must take place within one month of the giving of the *tekol*, failing which the *tekol* will lapse. If the betrothal does not take place due to the default of either party he or she will be liable to a fine and if it is the girl who defaults, she will have to return the *tekol*. After the betrothal comes the last stage, marriage, which should be solemnised within one year of the betrothal. Failure to do so on the part of the boy will entitle the girl to sue him for *mungkir* or breach of promise to marry. If either party breaks the betrothal agreement, he or she will be liable to a fine and if it is the girl who breaks the agreement, she will have to return the betrothal gifts or their value. If the engagement or betrothal is broken because of the interference of a third person, such person is liable to a fine and restrictions are imposed on the marriage of the party who broke the engagement or betrothal to the person who caused it to be broken.<sup>32</sup>

In the States of West Malaysia provision is made for breaches of the betrothal agreement. In Selangor, Negri Sembilan, Penang, Malacca and Kedah it is provided that where a party to a contract of betrothal breaks such contract without lawful reason and the other party is willing to carry out the contract, the party in default is liable to pay to the other party the sum which was agreed in the contract. If the defaulting party is the prospective bridegroom he has also to pay as damages the amount of the *maskahwin*, and in Negri Sembilan, Malacca and Kedah also the *hantaran*, which would have been payable together with other monies expended in good faith in preparation for the marriage. If the woman defaults she has to return the betrothal gifts, if any, or the value thereof in addition to paying the agreed damages. In Kelantan, Trengganu and Pahang and in Brunei where a man who has entered into a contract of betrothal refuses to marry the woman and she is willing to fulfil the contract, he is liable to be adjudged to pay the value of the *maskahwin*, (which would have been paid had the marriage taken place) together with other monies expended in good faith in preparation for the marriage. If the woman defaults she has to return

31. Haji Mohamed Din bin Ali, "Two forces in Malay society" in *Intisari* (Singapore 1962), Vol. I, No. 3, p. 25,

32. Undang-Undang Mahkamah Melayu, Sarawak, ss. 1 - 20.

the betrothal gifts, if any, or the value thereof in addition to paying the agreed damages or the amount expended in preparation for the marriage. In Perlis it is provided that where a party to a contract of betrothal breaks such contract, such party shall be liable to pay to the other party the sum agreed to in the contract together with, in the case where the party so liable is a male, the amount of the *maskahwin* payable under the contract and such other sum as may have been expended by the other party in good faith in preparation for effecting the terms of the contract; and in the case where the party so liable is a female, the return of the betrothal gifts or the value thereof, and such other sums expended by the other party in good faith in preparation for effecting the terms of the contract. There is a similar provision in Singapore, except that there is no express liability on the male party who breaks the contract to pay the *maskahwin* payable under the contract.<sup>33</sup> In the other States where no express provision is made for breach of the contract of betrothal, the consequences of the breach will be expressly provided for by the parties. In Singapore, for example, it was usual to stipulate that if the breach is on the man's side he would forfeit the presents or payments given by him; if the breach is on the girl's side the man will be entitled to payment of double the value of the presents or expenses given or incurred by him.

Provision is made in all the States of Malaysia and Singapore for the registration of marriages, divorces and revocations of divorce. The provision in the States of West Malaysia are more detailed than those in East Malaysia. Marriages may be solemnised only by persons authorised by the Ruler but the guardian for marriage is allowed to solemnise a marriage, with the permission or prior knowledge of the Registrar of Marriage of the district in which the marriage takes place. Where the woman to be married has no *wali* or where the *wali* of such woman unreasonably withholds his consent, the marriage may be solemnised with the approval of the Ruler or that of the *wali raja*, that is the person authorised to give consent on behalf of the Ruler. No minimum age of marriage is laid down except in Sabah where the Marriage Ordinance, 1959, which applies also to Muslims, provides that notwithstanding any written law or custom to the contrary, 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. In some States, like Kelantan, Trengganu and Pahang and in Brunei, it is expressly provided that a marriage shall be void unless both parties to the marriage have consented thereto. In other States, the bride's consent may be given by her *wali* and she is not required to sign the entry in the marriage registraion.<sup>34</sup>

In Selangor and Negri Sembilan the parties are required to apply in the prescribed form for the solemnisation and registration of the marriage. In Selangor and Negri Sembilan too the man must declare

33. Ahmad Ibrahim, *Status of Muslim Women in the Family Law in Malaysia, Singapore and Brunei* (1965), p. 3f; Singapore Administration of Muslim Law Act, 1966, s. 88.

34. Ahmad Ibrahim, *op. cit.*, p. 5f.

in the prescribed form whether he is already married or not. If he is already married further inquiries will be made.<sup>35</sup>

In Singapore it is provided that it shall be lawful for the *wali* of the woman to be wedded to solemnise the marriage of the girl, and any *Kathi* or *Naib Kathi* may at the request of such *wali* perform the marriage. Where there is no *wali* of the woman to be wedded or where the *wali* refuses his consent to the marriage, the marriage may be solemnised by a *Kathi*. No marriage shall be solemnised if at the date of the marriage either party to the marriage is under the age of sixteen years, although in special circumstances a *Kathi* may solemnise the marriage of a girl who has not attained the age of sixteen years but has reached the age of puberty. Where the man to be married already has a wife, the marriage can only be solemnised by a *Kathi* or with the written permission of a *Kathi*, who is required before solemnising the marriage or giving his written permission to satisfy himself after inquiry that there is no lawful obstacle according to the Muslim law to such marriage. The parties are required to apply in the prescribed form for the solemnisation and registration of the marriage and to make a statutory declaration as to the truth of the statements made in the application.<sup>36</sup>

There is provision for the registration of Muslim marriages by the headmen of villages in Sarawak and by the *Imams* of the districts in Sabah. In Sabah the Marriage Ordinance, 1959, provides that where any marriage is solemnised or contracted, it shall be the duty of the person or persons solemnising such marriage and of the witnesses to ascertain and record that both parties to such marriage have freely expressed their consent to the marriage.

Although the Muslim marriage is in essence a contract effected by the *akad nikah*, that is the declaration of an offer by one party and its acceptance by another party in the presence of at least two witnesses, custom imposes a number of ceremonies. The most outstanding feature of a Malay marriage is the *bersanding* or the sitting in state of the bride and bridegroom on the bridal throne, the "Rajas for a day". This ceremony which is Hindu in origin, holds a greater significance to the ordinary Malay than the proceedings of the *akad nikah*. Indeed so important is the *bersanding* ceremony that in a form of marriage known as the *nikah gantong*, literally suspended marriage, the couple, although wedded in the eyes of religion, may not live together or (formerly) even see each other in private until the *bersanding* is held months or even years later. This in effect reduces the Muslim marriage ceremony to the status of an engagement. The *berhinai* or *henna* ceremony is another evidence of the importance of custom in Malay marriage. This again is Hindu in origin although the significance of the ritual has been forgotten by most Malays.

35. Selangor Administrative Rules issued by Religious Department in 1962; Negri Sembilan, Marriages, Divorce and Reconciliation Rules, 1963.

36. Singapore Administration of Muslim Law Act, 1966, ss. 89 and 90; Muslim Marriage and Divorce Rules, 1968.



The *berhinai* ceremony is held before the *akad nikah* and the *ber-sanding*; the essential part of the ceremony is the staining of the finger-tips (originally the anointing of the bride's forehead) and the obeisance to the guest by touching the forehead with the tips of the fingers held together.<sup>37</sup>

It is usual in the States of West Malaysia, Sarawak and Brunei, and in Singapore, to include a *ta'alik* or condition at the time of the marriage to give the wife a right to claim a divorce on failure to comply with the condition. The usual *ta'alik* provides that where the husband fails to maintain his wife for a period exceeding three months or assaults her, she may apply to the *Kathi's* Court or *Shariah* Court and if her complaint is substantiated, she will be entitled to a divorce. The insertion of the "*ta'alik*" in the marriage contract is made compulsory in Kelantan, Trengganu, Pahang and Brunei while in the other States it is encouraged.<sup>38</sup>

The Malay customary rules regarding the *maskahwin* represent a compromise between Muslim law and the ancient Malay custom. The Muslim law recognises the payment of the *mahr*, the gift given by the bridegroom to the bride. Malay custom on the other hand insists on a whole series of conventional presents, beginning with the betrothal and sometimes continuing till the birth of the first child or even later. A sort of compromise has been arrived at by identifying one of these many presents, the *maskahwin* with the Muslim *mahr*. *Maskahwin* originally meant money paid by the bridegroom to the bride's parents but is now like the Muslim *mahr* paid (or sometimes promised and left as an outstanding debt to be paid on divorce) to the bride herself.

While the Muslim law fixes no specific amount for the *maskahwin*, under the Malay custom the *maskahwin* is fixed and normally depends on the rank of the father of the bride. In Negri Sembilan for example the amount of the *maskahwin* must be the traditionally accepted amount as fixed by custom in the particular area. The customary *maskahwin* among the peasantry in Negri Sembilan is twenty-four dollars. A bridegroom may be asked to pay varying amounts to the bride's parents depending upon the status, education and eligibility of the bride. But whatever sum is asked for, the legal customary *maskahwin* must be the amount fixed by custom, that is twenty-four dollars. The rest are regarded as being for the personal and ceremonial expenses of the occasion. Such customary expenses are called *belanja hangus* or incidental expenditures and are quite apart from the *maskahwin*. In some States like Pahang it is provided that the amount of the *maskahwin* may be fixed from time to time by the Ruler in Council.<sup>39</sup>

The term used for the *maskahwin* in Sarawak and Sabah is *berian*. In Sabah the minimum amount payable as *berian* in the various districts is prescribed by rules and varies from fifty dollars to two hundred

37. Ahmad Ibrahim, "Islam and customary law in Malaysia", in *Intisari* (Singapore 1963), Vol. II, No. 2, p. 53.

38. Ahmad Ibrahim, *Status of Muslim Women*, *op. cit.*, p. 34.

39. *Ibid.*, p. 18.

dollars in the case of an unmarried girl and forty dollars to sixty dollars in the case of a woman who has been previously married. Among the Ilanun and Bajau races in the Kota Belud district of Sabah, the *berian* was originally paid in weight of brass cannon but this custom has been substituted by fixed cash payments, the basis of which is however still the weight of brass cannon and is so referred to locally. The amount varies according to the class to which the father of the bride belongs.<sup>40</sup>

In addition to the *maskahwin*, provision is made in West Malaysia for the payment of the *hantaran*, the obligatory cash payment due under local custom by the bridegroom to the bride at the time the marriage is solemnised; of the *pemberian*, the optional marriage settlement, in cash or in kind, made by the husband to the wife at the time of the marriage and of the *belanja* or optional expense agreed upon by both parties at the time of the betrothal. The *belanja*, *pemberian* and *hantaran* are customary but details of them are mentioned during the religious ceremony of *akad nikah* and they are included in the marriage register. The preference of custom for payments to be fixed is also seen in the rule relating to the payment of maintenance for the support of the wife in the *adat perpatih* areas. In Rembau for example where a husband fails to support his wife she can apply for maintenance in the *Kathi's* Court; the rate is fixed by custom at \$6 a month irrespective of the means of the parties or the number of children of the marriage. Similarly on divorce by the husband, the wife is entitled to maintenance during the *iddah* (compulsory period of waiting after divorce) at the conventional rate of \$6 a month.<sup>41</sup>

The marriage feast, although encouraged by Islam, is elaborated under the Malay custom. In Negri Sembilan for a spinster, especially if her's is the first marriage in the family, the slaughter of a buffalo or cattle is considered the usual practice. To this marriage ceremony both the *lembaga* and the headmen of the two tribes are invited, their presence being regarded as tacit approval of the marriage. In the other States of Malaysia, the marriage feast is usually held after the *akad nikah* to give publicity to the marriage.<sup>42</sup>

While the Muslim law forbids marriage within the relationship of agnates, the *adat perpatih* goes further and bars marriage between cognates. Thus a marriage between maternal cousins is not allowed in the *adat perpatih* areas of Negri Sembilan although it is allowed and common in the other States. Marriage or liaison during a wife's lifetime with another woman of her tribe was punishable with death under the custom in Negri Sembilan but marriage with a deceased wife's sister is a common practice, as it provides for the welfare of the children of the wife's tribe. Marriage with a deceased brother's wife is however highly disapproved by custom. The children of a brother and sister can intermarry as belonging to different maternal tribes but illogically the marriage of children of brothers, although through their

40. *Ibid.*

41. *Ibid.*

42. Ahmad Ibrahim, "Islam and customary law in Malaysia", *op. cit.*, p. 55.

mothers they may belong to different tribes, is forbidden.<sup>43</sup> In the other parts of Malaysia and in Singapore and Brunei the Muslim law as regards prohibited marriages is followed.

In West Malaysia a Muslim can only be married under the Muslim law and the Civil Marriage Ordinance of 1952 does not apply where one of the parties to a proposed marriage professes the religion of Islam.<sup>44</sup> In Singapore however the Women's Charter, 1961, has recently been amended to enable a marriage where one of the parties is a Muslim to be solemnised and registered under the Act.<sup>45</sup>

## DIVORCE

The Muslim law gives the husband the power of repudiating the wife and such repudiation (*talak*) is legal even though it is regarded according to a saying of the Prophet as the most hated of permitted things. According to the Malay custom however divorce should in general take place only after there has been a process of joint deliberation between the husband and the wife.

In some parts of Indonesia like Gajo, Alas Batak and Banten repudiation under the Muslim law is seldom practised but in other parts it is common. The repudiation may be by one *talak* and in that case the divorce is revocable and may be revoked by the parties before the period of *iddah* expires; on the expiry of the period of *iddah* the parties may remarry one another. The repudiation becomes irrevocable if it has been pronounced for the third time or if it is by three *talaks*; in such a case the marriage is put to an end, the divorce is irrevocable and the parties cannot remarry again, unless the woman has after such divorce married another person and such marriage has been terminated after consummation of the marriage. Divorce by three *talaks* pronounced at the same time is allowed and given effect to in Indonesia.<sup>46</sup>

Marriage may be dissolved by the process of *chul*, under which the wife agrees to return the *mahkahwin* to the husband in return for his giving her freedom. The proposal of the wife must in general be agreed to by the husband to give effect to the *chul*; but under the Malay custom if the husband refuses to accept the return of the bridal gift as the price of repudiation, the Judge will decide that the husband has pronounced the *talak* or he may simply annul the marriage. It is usual for the husband to pronounce *ta'alik* at the time of the marriage, whereby he states that if he ill-treats his wife or deserts her for the specified period (usually six months) or if he leaves the country or if he takes another wife, and his wife complains of his conduct to the court, then she shall be considered repudiated. This right of suspended *talak* has acquired a special characteristic in Indonesia and in Malaysia,

43. *Ibid.*

44. Ahmad Ibrahim, *Status of Muslim Women*, *op. cit.*, p. 17.

45. Women's Charter, 1961, s. 3 (as amended by Act 9 of 1967). See cap. 47, 1970 Rev. Ed., Vol. 1.

46. Wirjono Prodjodikoro, *op. cit.*, p. 105f; Nashruddin Thaha, *op. cit.*, p. 78.

Singapore and Brunei. According to the custom the *ta'alik* is pronounced at each marriage immediately after the contract. In this way, the rule formulates a condition which protects the woman's position, for by means of this *ta'alik* the husband declares that his wife will be definitely freed if he fails to keep to the terms pronounced at the time of the marriage. The *ta'alik* does not become effective until after the wife has notified the *Qadi* or *Penghulu*.<sup>47</sup>

The wife may apply to the court for *pasah* (*fasakh*) which under the *Shafii* School of law must be on the ground that the husband has failed to fulfil the conditions of the marriage, as for example if the husband has become unable to maintain his wife or the husband is suffering from impotency, or some disease which makes relations between them impossible. Another means whereby the wife can obtain a divorce in case of incompatibility of temperament is through the appointment of *hakam* to deal with the disagreement (*shiqqaq*) between the parties. The view that has been accepted in Indonesia is that the *hakam* can not only represent both parties as their *wakil* or representative, but can also act as arbitrator (*hakim*) and can declare the marriage dissolved in the woman's interest even if the husband is against it.<sup>48</sup>

Apostasy is not infrequently used as a means of undoing the bonds of marriage. The attitude of the Courts of *Penghulus* on this has not been uniform. Some endeavour by persuasion to induce the woman to revoke her statement. Others are of the opinion that the motives which have led to the woman's change of religion should be investigated, while again other courts simply apply the provisions of the law and leave the religious consequences of her act to the woman herself. Very occasionally the view is taken that, as, on account of her apostasy, the woman has ceased to be a Muslim and as the Court of *Penghulu* has jurisdiction solely over divorces between Muslims it cannot take cognizance of a request for a divorce of this nature.<sup>49</sup>

The law relating to the registration of marriage, divorce and revocation requires information of every divorce and revocation of divorce to be given to the Registrar of Marriages.<sup>50</sup> The instructions issued by the Ministry of Religious Affairs stipulate that in cases of repudiation the official must give audience to both parties and try his best to persuade the husband not to pronounce the *talak*. If however the *talak* has been pronounced, he must remind the husband of his obligations during the *iddah* and when the *iddah* period draws to an end, he must try and persuade the husband to withdraw the *talak*. The regulations issued by the Minister of Religious Affairs provide that if one of the parties asks for a divorce, the registry office or office dealing with religious affairs is obliged to summon both parties to appear before it and try to bring about a reconciliation. If the interview does not

47. Wirjono Prodjodikoro, *op. cit.*, p. 105f; Westra, H., *op. cit.*, p. 160; Snouck-Hugronge, C., *The Achehnese* (1906), Vol. 1, pp. 350 - 352.

48. Stuers, Cora Vreede-De, *op. cit.*, pp. 35 - 37.

49. Wirjono Prodjodikoro, *op. cit.*, p. 105f; Westra, H., *op. cit.*, p. 160.

50. Act 22 of 1946; Wirjono Prodjodikoro, *op. cit.*, p. 108.

meet with the desired result, the couple must be sent away to think things over carefully and they are asked not to appear again at the office until seven days have elapsed. Should the husband persist in his demand for a divorce after the seven days he may fill in the *surat talak*, wherein the type of *talak* in question is described, that is whether it is a case of a first, second or third and last *talak*. The form of *surat talak* has the heading to the effect that "The most repugnant of things made lawful in the sight of God is repudiation (*talak*)". If subsequently the husband pronounces a *rudju* (revocation of divorce) the *surat rudju* is prepared giving the name of the parties, the date and number of the *talak* and the date on which the husband retracts the *talak*.<sup>51</sup>

The divorce rate in Indonesia and especially in Java is very high and with a view to coping with this serious problem, a consultation bureau was set up in the Office of the Religious Affairs in Djakarta, to deal with problems of marriage and divorce. This was established in 1954 through the efforts of S.M. Nasarudin Latif, the head of the Office and was called the *Seksi Penasehat Perkawinan dan Pertjerain*. As a result it became the duty of the officials in cases of *talak* to call together the husband and wife, find out the reasons for their disagreement and attempt to bring about a reconciliation between them. These efforts were appreciated by the Government and the Government itself set up official marriage councils first in Bandung (1955) and then in Djakarta (1956) followed by others throughout the country. The one in Bandung is called *Biro Penasehat Perkawinan dan Penjelasan Pertjerain* or BP 4 and the one in Djakarta the *Panitia Penasehat Perkawinan dan Penjelasan Pertjerain* (5 Ps). The marriage councils were commissioned to advise those who come to consult them on marriage problems either during the marriage or after application for divorce. They attempt to make clear to the person concerned the sacred nature of marriage and in cases of impending divorce act as arbitrators. Advice is given free of charge and is confidential. Members of these councils must be at least thirty years old, married and of good conduct and they have to know the Muslim marriage laws and also be able to read and write Indonesian in the Roman script. Both men and women can be appointed to the Councils.<sup>52</sup>

Divorces by *talak* may be registered in all the States of Malaysia and in Singapore and Brunei. In Selangor it is provided by the direction of the Religious Department that no divorce may take place except before a *Kathi* and until the parties have filled in the prescribed form. No divorce or pronouncement of *talak* will be effective unless the wife agrees to the divorce and the *Kathi* has approved it.<sup>53</sup> In Negri Sembilan it is provided that any person who wishes to obtain a divorce must apply in the prescribed form to the Court of the *Kathi* of the locality. The *Kathi* will then call both parties and inquire into the matter. After

51. Instructions issued by the Ministry of Religious Affairs, No. 4 of 1947; Regulation No. 1 of 1955 issued by the Minister of Religious Affairs. See *Kitab Himponan Perundang-Undangan Negara Republic Indonesia*, p. 1517.

52. Stuers, Cora Vreede-De, *op. cit.*, p. 124f.

53. Ahmad Ibrahim, *Status of Muslim Women*, *op. cit.*, p. 29; and Selangor Rules Relating to Marriage, Divorce and Revocation of Divorce, 1962.

the inquiry is completed and the divorce has been effected, it will be registered and certificates issued to the parties. Under the Malay customary law followed in Negri Sembilan the husband must consult the elders of the tribes before he effects a divorce and arbitration and conciliation is effected through the relatives of the husband and the wife before the divorce is sanctioned. Custom lays down certain rules and rituals to be followed in the case of divorce. Just as marriage entails the co-relationship, of a number of tribal relatives, if not of tribes themselves, so too divorce entails a break-up of such relationships and might produce considerable social embarrassment if not open quarrels. Custom requires that before a divorce takes place there should be due deliberation on the reasons for the intended dissolution. The husband who contemplates divorce from his wife must go through an arbitration called *bersuarang* or settlement. A small feast is held by the husband to which he invites the relatives of his wife as well as his own. The husband will then state his grievances, so that they may be considered by the persons present. In the majority of cases the presence of the elders proves beneficial in patching up the differences between the parties and helps to amend a hasty decision or patch up a trivial quarrel. But if the husband still insists on divorce, despite the counsel and advice given to the parties, separation will be allowed after a settlement of the conjugal property.<sup>54</sup>

In Perlis the husband is required to apply to the *Kathi* for permission to divorce the wife and the *Kathi* is thereupon required to make inquiries for the purpose of effecting a peaceful reconciliation; the *Kathi* may not grant the permission for divorce unless he is convinced that no reconciliation is practicable.<sup>55</sup>

In Perak it is provided that a husband who desires to divorce his wife must first submit an application to the Registrar who may be the Chief *Kathi* or a *Kathi*. Upon receipt of such application, the Registrar shall for the purpose of effecting a peaceful reconciliation make inquiries in respect of the applicant and his wife and only if no reconciliation is effected will the divorce be registered.<sup>56</sup>

In Singapore the *Kathi* may only register a divorce where he is satisfied that both parties have consented to it and where the divorce is not by three *talaks*. Where the parties do not consent to the divorce or where the divorce is by three *talaks*, the matter has to be referred to the *Shariah* Court, which will hear the parties and make such order as is lawful under the Muslim law. Before a decree of divorce is registered or pronounced every effort is made to effect a reconciliation between the parties.<sup>57</sup>

54. Negri Sembilan Rules Relating to Marriage, Divorce and Reconciliation, 1963; Haji Mohamed Din bin Ali, *op. cit.*, p. 26.

55. Perlis Administration of Muslim law Enactment, 1963, ss. 90, 90A, 91 and 92.

56. Perak Administration of Muslim law Enactment, 1965, s. 124.

57. Singapore Administration of Muslim Law Act, 1966, s. 96.

*Kathis* in the States of Malaysia, Singapore and Brunei have been empowered to grant and register divorces of *cherai ta'alik*, *kholo* and *fasakh*. In Singapore, the *Kathi* may register the divorce of *kholo* where both parties consent to the divorce but all other orders for divorce may be made only by the *Shariah* Court. The grounds for the divorce by *fasakh* have been extended in Singapore to include grounds like failure to maintain and cruelty which are given under the *Maliki* School of law.<sup>58</sup>

There is also provision for the registration of revocations of divorce. In Kelantan, Trengganu and Singapore a revocation of divorce can only be registered by the *Kathi* if the wife consents to it. In Kelantan and Trengganu if the wife does not agree to a revocation of the divorce by the husband, she may be ordered to return to the husband; but if she refuses arbitrators (*hakam*) will be appointed to consider the matter.<sup>59</sup>

Provision is also made for the appointment of *hakam* or arbitrators in cases of disputes or disagreement between the parties and in some States the *hakam* are given authority to effect a divorce, if they think fit.<sup>60</sup>

In Singapore it is provided that before making an order or decree for divorce, the court may appoint two arbitrators or *hakam* in accordance with the Muslim law. The *hakam* shall endeavour to effect a reconciliation between the parties and shall report the result of their arbitration to the court. The *hakam* shall endeavour to obtain from their respective principals full authority and may, if their authority extends so far, decree a divorce, and shall in such event report the divorce to the court for registration. If the *hakam* are of opinion that the parties should be divorced but are unable for any reason to decree a divorce, the court shall appoint other *hakam* and shall confer on them authority to effect a divorce, and if the divorce is effected the *hakam* shall report it to the court for registration.<sup>61</sup>

## MARRIED WOMEN

Marriage does not affect the status of a Muslim woman. She retains her property and can enter into contractual relations, as if she were unmarried. She is also entitled to sue and be sued in the courts. Malay custom gives equality between husband and wife as far as claims to property are concerned and almost equal authority

58. Ahmad Ibrahim, *Islamic Law in Malaya*, *op. cit.*, p. 210f; Singapore Administration of Muslim Law Act, 1966, s. 49.

59. Ahmad Ibrahim, *op. cit.*, p. 197f.; Kelantan Shariyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 75; Trengganu Administration of Islamic Law Enactment, 1955, ss. 103 and 109; Singapore Administration of Muslim Law Act, 1966, s. 96.

60. Ahmad Ibrahim, *op. cit.*, p. 218f.

61. Singapore Administration of Muslim Law Act, 1966, s. 50.

over the children. Keeping up a household is regarded an equal task for both partners and property acquired during the marriage by both partners is held jointly.

The wife is entitled under the Muslim law to reasonable maintenance from her husband and in accordance with the *Shafii* School of law the wife is entitled not only to food and accommodation but also to clothing and comfort and such maintenance even extends to the provision of servants, if the status of the wife in society requires it. While the standard of the food and dress depends on the position of the husband, the standard of the accommodation and services depends on the position of the wife. If the husband fails to maintain the wife according to the standard she is entitled to she can claim such maintenance from him in the court.

Under the Muslim law marriage does not affect the property rights of the husband and the wife and each of them retains his or her property, whether acquired by inheritance, gift or earnings. In Indonesia however the Malay customary law distinguishes between the separate property of the husband and wife brought in at the time of marriage or subsequently acquired by the husband or wife by inheritance or gift and the joint property acquired during the marriage. Separate property belongs to the husband and wife and on divorce is retained by the respective parties; on the death of the spouse, his or her separate property is inherited by the next of kin, in accordance with the customary law. The joint property on the other hand belongs to the spouses jointly. On divorce the property is equally divided and on the death of either spouse the other spouse gets the joint property.<sup>62</sup>

In the *adat perpatih* areas of Malaysia the division of the conjugal property plays an important part in the divorce under custom and follows the principle —

- Joint earnings are shared
- Wife's property remains
- Husband's property returned
- The union is dissolved
- Settlement permits a gift.<sup>63</sup>

Marriage property falls into three classes. That which is acquired during the marriage is called *harta charian*. This is shared and shared alike. That which the husband brought at the time of the marriage is called *harta pembawa*. This reverts to the husband. That which belonged to the wife at the time of the marriage is called *harta dapatan*. This remains in the wife's possession. When the settlement of the property has been agreed upon, then the marriage can be dissolved. The husband

62. Ter Haar, B., *op. cit.*, p. 187f; Wirjono Prodjodikoro, *op. cit.*, p. 89.

63. Ahmad Ibrahim, "Islam and customary law in Malaysia", *op. cit.*, p. 66. A similar saying is to be found in Minangkabau, Indonesia, see Jong, P.E. de Josselin de, *Minangkabau and Negri Sembilan* (1951), p. 56.



may leave a portion of his share of the property to the children of the marriage. This is because under the *adat perpateh* the children belong to the mother and her tribe. Thereafter the responsibility of the father for the children ceases altogether under the custom, which gives the mother full custody of the children. It has been held in *Alus v. Mohamed*<sup>64</sup> that a husband is liable to pay for past maintenance of his children only if an order of the *Kathi* has been made directing the husband to pay such maintenance or authorising the wife to recover the expenses of maintenance of the children. In *Jemiah bite Awang v. Abdul Rashid bin Haji Ibrahim*<sup>65</sup> it was held that the rule that under the *adat* a husband after divorce is not liable for the support of his children does not apply where he is lawfully practising polygamy. Horne J. said:

“... as he cannot do so lawfully under the *adat*, I think it right to regard him as a person whose civil rights and duties in respect of wives and children fall to be dealt with under the rules of the Muhammadan Law as varied by local custom.”

In the other States of West Malaysia it has been held that a divorced wife is entitled to a share of all property acquired during the marriage. Where she has in fact assisted to cultivate the land she is entitled to one-half of the jointly acquired land and in other cases to one-third of the jointly acquired property (*harta sapencharian*). According to the Malay custom the guardians at a lawful marriage should inquire as to the separate property of the man and the woman so that on divorce it may be returned to the owner while property acquired during marriage is divided equally. If separate property has vanished during the marriage and the joint property acquired during the marriage is large then the separate property is made good and the residue becomes the joint property; and losses too are divided. If the husband wants to divorce his wife for no fault, then the joint property is divided into three parts, the man taking one share and the woman two.<sup>66</sup>

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

“that the custom of the Malays in Perak in the matter of dividing up property after divorce, when such property has been acquired by the parties or one of them during marriage is to adopt the proportion of two shares to the man and one to the woman and that gifts between married persons are irrevocable either during marriage or after divorce”.<sup>67</sup>

64. Taylor, E. N., “Malay family law”, *Journal of the Malayan Branch of the Royal Asiatic Society* (1937), Vol. 15, part 1, p. 67.

65. (1941) M.L.J. 16.

66. Ahmad Ibrahim, “The Muslims in Malaysia and Singapore, the law of matrimonial property” in *Family Law in Asia and Africa* (1968), edited by J.N.D. Anderson, p. 182f.

67. Taylor, E. N., *op. cit.*, p. 41.

Claims to such property are dealt with by the court or Collectors of Land Revenue (in the case of land registered in the Muslim Registers) but *Kathis* are called in as advisers on questions of principle. The claim of the divorced wife to one-third of the value of the lands acquired during the marriage is not defeated even if it is proved that she was divorced for adultery nor would she lose her right on *tebus talak* (*khula*) unless the consideration for the *tebus talak* was the waiver of her claim to the *harta sapencharian*. The divorced wife's share may be increased to one-half depending upon the nature of the work actually done by her on the jointly acquired property. In *Re Elang, Re Kulop Degor and Lebar v. Niat*,<sup>68</sup> Taylor J. said:

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

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*<sup>69</sup> it was stated by the *Kathi* of Larut that where a woman married a person who earns wages and the wife merely looks after the household the property obtained by the husband during the marriage is not in partnership with the woman but is appropriated to her husband alone.

In Selangor there was until recently no reported case which gave a share in the *harta sapencharian* to the divorced wife. It would seem, however, that the Malay custom where the wife on divorce gets a share of the *harta sapencharian* applies in Selangor and the Administration of Muslim Law Enactment, 1952, gives power to the Court of the *Kathi Besar* and to the Court of a *Kathi* to hear and determine actions and proceedings relating to the division of or claims to *sapencharian* property. It has been held however that the High Court has also jurisdiction to hear and determine such a claim. In *Roberts v. Ummi Kalthom*<sup>70</sup> the plaintiff, a husband who had divorced his wife, claimed a half share in a house which had been purchased during the marriage for the sum of \$50,000 out of which the plaintiff raised \$40,000 while the defendant raised \$10,000. The property was registered in the name of the defendant. It was held that the property was *harta sapencharian* and that the plaintiff was entitled to a half-share in the property.

68. *Ibid.*, p. 48.

69. *Ibid.*, p. 25.

70. (1966) 1 M.L.J. 163.

Raja Azlan Shah J. held that there is a presumption that immovable property acquired during coverture out of the joint resources or joint efforts of the husband and wife is *harta sapencharian*.

In Pahang in 1930 the Chiefs and *Kathis* of Pahang gave their opinion that a woman can claim *harta sapencharian* according to Pahang custom on divorce or on the death of her husband.<sup>71</sup> The claim can be made in respect of land and movable property. There is no fixed rule as to the share of the divorced wife or widow but either equal or unequal shares may be awarded pursuant to an agreement between the parties or a gift or by judgment of the *Kathi*. The Courts of the Chief *Kathi* and *Kathis* are given jurisdiction to hear and determine actions and proceedings which relate to the division of or claims to *sapencharian* property.<sup>72</sup>

In Kedah it has been stated that on the dissolution of a Malay marriage the property acquired by the husband and wife is divided between them but there is no established rule or principle to guide the courts in deciding the respective shares. However, in *Habsah v. Abdullah*<sup>73</sup> it was held that on divorce a woman in Kedah is entitled by customary law to half of any property, acquired during the marriage by joint effort and that such a claim is not barred or extinguished by her subsequent remarriage.

In Penang, Malacca and Negri Sembilan the Courts of the *Kathi Besar* and the *Kathi* are given jurisdiction to hear and determine all actions and proceedings relating to the division *inter vivos* of *sapencharian* property.<sup>74</sup>

In Kelantan, Trengganu and in Brunei, the Courts of the Chief *Kathi* and the Court of a *Kathi* are given jurisdiction to hear and determine actions and proceedings which relate to divisions of or claims to *sapencharian* property.<sup>75</sup> In Trengganu, according to a decision of the High Court, the divorced wife is entitled to a half-share in the *harta sapencharian*.<sup>76</sup>

In Perlis the Courts of *Kathi* and Assistant *Kathi* are given jurisdiction to hear and determine all actions and proceedings which relate to divisions of or claims to *sapencharian* property. A woman who has been divorced by her husband may apply to a *Kathi* for her share

71. Taylor, E. N., *op. cit.*, p. 73.

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

73. (1950) M.L.J. 60.

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

75. Kelantan Shariyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 9; Trengganu Administration of Islamic Law Enactment, 1955, s. 25(1); Brunei Religious Council and Kathis Courts Enactment, 1955, s. 48(1).

76. *Hajjah Sulong binte Abubakar v. Mamat bin Mat Amin*, Kuala Trengganu Civil Appeal No. 7, 1951; *Mohamed v. Commissioner of Land and Mines, Trengganu* (1968) 1 M.L.J. 227.

of the common property called *harta sapencharian* and the *Kathi* may after hearing the parties make an order for payment of such sums as may be just.<sup>77</sup>

In Singapore the *Shariah* Court is given power to make orders for the disposal or division of property on divorce and it is provided that in such matters the law applicable is the Muslim law, as varied by Malay custom.<sup>78</sup>

In Sarawak too provision is made for the division of the *sapencharian* property on divorce. Moreover it is provided that if the married couple have debts and the *sapencharian* property is insufficient to pay the debts the divorce will not be allowed unless the husband undertakes to pay the debts. If the husband has deserted the wife and has failed to maintain his wife and children for any period he will be ordered to pay the arrears of maintenance, the amount being fixed at between \$20 to \$50 a month for the wife and between \$10 to \$25 a month for each child. If the husband is in financial difficulties and cannot pay the arrears, the amount payable will be at the discretion of the court.<sup>79</sup>

There is provision in West Malaysia, Singapore and Brunei for the payment of maintenance to divorced women. These are generally for the period of *iddah*, but in Brunei, Perlis and Singapore it is provided that a woman may in addition apply to the *Kathi's* Court or *Shariah* Court for maintenance and if the Court is satisfied that it is fit and proper to do so, in view of all the circumstances, the Court may make an order against the former husband for the payment of such sums for such periods as it may consider fit.<sup>80</sup> There has recently been provision in West Malaysia, following the example in Singapore, to enable orders for maintenance to be enforced by the making of attachment of earnings order.<sup>81</sup> Provision is also made for the payment of *mata'ah* or consolatory gift to the wife on divorce in the States of Malaya, Singapore and Brunei; this is payable at the discretion of the Court in all cases of divorce by the husband.<sup>82</sup>

## PARENTAL RIGHTS

### *Legitimacy*

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

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

78. Singapore Administration of Muslim Law Act, 1966, ss. 35 (2), 35 (3) and 52 (3).

79. Undang-Undang Mahkamah Melayu Sarawak, s. 41.

80. Ahmad Ibrahim, *Status of Muslim Women*, *op. cit.*, p. 52; Brunei Religious Council and Kathis Courts Enactment, 1955, ss. 157, 158, 162 and 164; Perlis Administration of Muslim Law Enactment, 1963, ss. 103 - 104 and 108; Singapore Administration of Muslim Law Act, 1966, s. 51.

81. Malaysian Married Women and Children (Enforcement of Maintenance) Act, 1968; Singapore Women's Charter, 1961, Part VIII—See Cap. 47, 1970 Rev. Ed., vol. I.

82. Ahmad Ibrahim, *op. cit.*, p. 51.

marriage the mother not having remarried the paternity of the child is established with the husband. This rule of the Muslim law is not followed in Indonesia, where instead the rules of the Malay custom apply. Under the Malay custom a child born during the continuance of a valid marriage is regarded as legitimate, even though the child is born within six months of the marriage; and it is indeed usual where a woman is pregnant outside marriage to persuade or even to force her into a marriage so that the child when born will have a father. The custom also regards a child as legitimate if he is born within the normal period of gestation, that is eight or nine months, after the dissolution of the marriage.<sup>83</sup>

The process of *lian* whereby a husband can swear that his wife has committed adultery appears to be available in Indonesia and the effect of the oath taken by the husband in such a case is to cause the child born during the marriage to be illegitimate.<sup>84</sup> Adoption is allowed in Indonesia and the effect of adoption is that the adopted child is regarded as the natural child and therefore can inherit from the adoptive parents.<sup>85</sup>

### *Guardianship of infants*

The rules relating to guardianship and custody of children are based both on the Muslim law and the Malay custom. The parents are entitled to the custody and guardianship of the children and to the guardianship of their property but in case of dispute the matter is resolved by the civil courts, which will have regard not only to the customary and the religious rules but also to the interests of the parties. In a case decided in 1951 the Supreme Court held that, in a case where the parties belonged to the matriarchal *Minangkabau* tribe and where the husband and wife had been divorced, the question of the custody of the children must be decided on the consideration as to which of the spouses is best able to look after the welfare of the children; even though under the matriarchal system the wife has a better right to the custody of the children, this did not preclude the court from giving custody to the husband, as the court was satisfied that the husband was better able to look after the children.<sup>86</sup>

It has been held in West Malaysia that section 112 of the Evidence Ordinance overrides the Muslim law on the point of the legitimacy of children. Section 112 of the Evidence 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*<sup>87</sup> it was

83. Ter Haar, B., *op. cit.*, p. 153; Wirjono Prodjodikoro, *op. cit.*, p. 57.

84. *Ibid.*, p. 61.

85. Ter Haar, B., *op. cit.*, 159; Wirjono Prodjodikoro, *op. cit.*, p. 77.

86. *Ibid.*, p. 66f.

87. (1939) M.L.J. 209.

held following the Indian case of *Sibt Muhammad v. Muhammad Hameed*<sup>88</sup> 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 the Muslim law. This case will probably be followed in the other parts of Malaysia and in Singapore.

In Singapore the Guardianship of Infants Act applies to all persons including Muslims and it has been held that the provisions of the Act 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. Subject to this the father and the mother shall have equal rights to the custody and upbringing of the child. In exercising the powers under the Act 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.<sup>89</sup> The judge should bear in mind the custom and religion of the parties, but he should not consider himself bound by them. Thus in *Re Omar bin Shaik Salleh*<sup>90</sup> the court gave 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.<sup>91</sup>

In West Malaysia 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 West Malaysia. It provides that

88. A.I.R. 1926 all. See however the Pakistan case of *Abdul Ghani v. Taleh Bibi* PLD 1962 (W.P.) Lahore, 531 where it was held that the rule of Muslim law regarding legitimacy is a rule of substantive law and is applicable to Muslims despite the provisions of the Evidence Act.

89. Singapore Guardianship of Infants Act (as amended by Act No. 17 of 1965). See Cap. 22, 1970 Rev. Ed., vol. 1.

90. (1948) M.L.J. 186.

91. *Re Miskin Rowther* [1963] M.L.J. 341.

the father of an infant shall normally be the guardian of the infant's person and property and where an infant has no father living, 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.<sup>92</sup>

In the Selangor case of *Mohamed v. Aminah*<sup>93</sup> the Court appears to have been prepared to follow the Muslim law but held, following a passage in Syed Ameer Ali's *Mahomeddan 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.

In the case of *Myriam v. Mohamed Ariff*<sup>93a</sup> the mother of two infant children, a girl aged 8 years and a boy aged 3 years, applied for their custody. The applicant had been divorced by the respondent the father of the infants. At the time of the divorce the *Kathi* had recorded a consent order giving the custody of the infants to the respondent. Since the divorce the applicant had remarried a man not related to the infants. It was contended by the respondent *inter alia* (a) that the applicant was precluded from making the application as she had consented to the order for custody made by the *Kathi* (b) that the Guardianship of Infants Ordinance, 1961, was inapplicable as the infants were Muslims. Abdul Hamid J. held (1) that in the light of Section 46(5) of the Selangor Administration of Muslim Law Enactment which provided that nothing in the Act shall affect the jurisdiction of any Civil Court, the applicant was entitled to make the application despite the consent order made by the *Kathi* and the Court had jurisdiction to hear the application; (2) that Sections 5 and 11 of the Guardianship of Infants Act, 1961, were applicable as there was nothing to show that these provisions conflicted with or were contrary to the Muslim religion or custom of the Malays; (3) that in applying the provisions of the Guardianship of Infants Act, regard must be had to the religion and customs of the parties concerned, but the decision need not be made in accordance with the rules of the religion or custom except when it relates to or concerns a person under the age of 18 years professing the Muslim religion in which case any provision which conflicts with or is contrary to the Muslim religion or custom of the Malays will not apply; and (4) that both under the English law and the Muslim law the primary consideration is the welfare of the child and applying this consideration in this case the custody of the girl would be given to the respondent and the custody of the boy

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

93. (1951) M.L.J. 146. 93a. [1971] 1 M.L.J. 265.

to the applicant until he reaches the age of 7 or 8 years when either party would be at liberty to apply again.

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. It is provided in the *Undang-Undang Mahkamah 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 years, who will be allowed to remain with their mother until they reach the age of two years.<sup>94</sup>

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.<sup>95</sup>

### *Adoption*

Adoption is not recognised as a mode of establishing paternity under the Muslim law, and, therefore, except in the parts of Negri Sembilan and Malacca which follow the *adat perpateh*, adoption does not create any legal family relationship. Malay customary law in the other parts of West Malaysia 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*<sup>96</sup> 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 couple and the husband dies, the adoptive mother is ordinarily entitled to custody of the child.

The Adoption Ordinance, 1952, 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

94. Guardianship of Infants Ordinance, (Cap. 93); Undang-Undang Mahkamah Melayu, s. 42.

95. Guardianship of Infants Ordinance (Cap. 54).

96. (1951) M.L.J. 62.



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. The Adoption of Children Act of Singapore however applies to Muslims and therefore a Muslim can adopt or be adopted under the Ordinance; but the Ordinance is permissive 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 Act is to extinguish "all rights, duties, obligations and liabilities of the parent 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 perpatih* adoption was recognised under the *adat* as creating family relationship. Full adoption (*kadim adat dan pesaka*) gives a woman (and her children whether born before 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.<sup>97</sup>

It is provided in Selangor 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 minor to be adopted *de facto* by a person who does not profess the Muslim religion is guilty of an offence.<sup>98</sup>

97. Ahmad Ibrahim, *Status of Muslim Women*, *op. cit.*, p. 78f.

98. Selangor Administration of Muslim Law Enactment. 1952.

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.<sup>99</sup>

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 who wishes 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 he 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.<sup>1</sup>

It is provided in the *Undang-Undang Mahkamah 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.<sup>2</sup>

In Sabah the Civil Law Ordinance, 1938, 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. 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.<sup>3</sup>

The *Kathi's* Courts in the States of Western Malaysia and the *Shariah* Court in Singapore have exclusive jurisdiction in matters of

99. Trengganu Administration of Islamic Law Enactment, 1965, s. 154.

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

2. *Undang-Undang Mahkamah Melayu*, Sarawak, Addenda.

3. Civil Law Ordinance, 1938 (No. 2 of 1938).

Muslim marriage and divorce and disputes including disputes as to property relating to Muslim marriage and divorce. As regards maintenance, the Court of the *Kathis* is given jurisdiction to hear applications for maintenance in Selangor, Kelantan, Trengganu, Pahang, Malacca, Penang and Negri Sembilan and it is provided that the Married Women and Children (Maintenance) Ordinance, 1950, shall not apply in the case of any claim for maintenance by a Muslim against a Muslim. In Singapore applications for maintenance may be made under the Women's Charter, 1961, to a Magistrate and under the Administration of Muslim Law Act, 1966, to the *Shariah* Court. In Malaysia, as regards the guardianship of infants, there is provision for the application of the Guardianship of Infants Act, 1961, in any State to Muslims, if it has been adopted by the Legislature of that State. In Singapore, questions of custody and guardianship of infants are dealt with by the High Court under the Guardianship of Infants Act. In matters of property and succession generally the ordinary courts in Malaysia have jurisdiction to deal with such cases and in Singapore only the High Court has jurisdiction to deal with such matters.

## INHERITANCE

### *Intestate succession*

In Indonesia the Courts of the *Penghulus* and *Qadis* have no jurisdiction over questions of property and of inheritance. These matters are dealt with in the civil courts and the tendency has been for the courts to follow the customary law rather than the Muslim law. The Muslim inheritance law appears to be in conflict with the actual conditions prevailing among the Muslims in Indonesia. The influence of communal village law is still strong, arable land is transmitted by succession to a single heir quite apart from the rest of the property. The estate of the deceased remains undivided for a considerable time as long as there are minor children or a widow. Brothers and sisters usually share alike in the inheritance and adopted children inherit from their adoptive parents. Daughters take precedence over parents and the brothers of the deceased even if there are no sons. The children of deceased children inherit by representation. Half-brothers and other relatives on the father's side share and share alike with half-brothers and relatives on the mother's side. Property derived from the ancestors is subject to rules of inheritance which differ from those governing the inheritance of property acquired during the marriage. A widow is entitled to a reasonable life interest in the estate of her deceased husband. In general therefore it may be said that the law of inheritance which is followed in Indonesia is not the Muslim law but the customary law.<sup>4</sup>

There are three types of kinship system to be found in Indonesia — the patrilineal system of Tapanuli in North Sumatra, Bali and Lombok where inheritance is along the male line; the matrilineal system of Minangkabau in West Sumatra where inheritance is along the female line, and the bilateral kinship system of Java and the rest of Indonesia,

4. Ahmad Ichsan and Soerojo, R., *op. cit.*, p. 163; Westra, H., *op. cit.*, p. 158.

where both male and female children have inheritance rights. Inheritable property is of two kinds: (a) the property which the husband and wife bring individually into the marriage and which they continue to own separately during the marriage (*harta-pesaka*) and (b) the property which they acquire during the marriage and own jointly as community property (*harta sapencharian*). The widow's right is fully safeguarded in the matrilineal system as she retains her property and gets a half share of the community property. In Java, on the death of the husband, the widow is entitled to a portion, one half or one-third, of the community property while the children or the next of kin take the rest. The widow's share is theoretically equivalent to her contribution to the community property. She also retains her individual property which her children will eventually inherit. The children inherit the individual property of the deceased father. If there were no children the separately owned properties of the husband and wife return on their deaths to their respective parents or siblings. Usually none of the property is divided on the death of the husband so long as the widow lives and does not marry, for she has a right to use both types of property to the extent necessary for her support. The property division usually occurs after her death, unless she and the heirs agree to divide it earlier. The actual division of the property would be an informal affair; only if there is any real dispute do the rules come into play and even then only when the court has to settle the dispute; usually the emphasis is far less on rules than on peaceful and harmonious settlement. The position of the women in the patrilineal areas is less favourable. In the patrilineal kinship system neither widow nor daughters have inheritance rights and the widow can at best only claim a right to support from the property of her deceased husband.<sup>5</sup>

Recent cases decided in the Supreme Court in Indonesia have tended to establish (1) the widow's right to sufficient support from her husband's separately owned property as well as his share of the community property; (2) her right to a share of both kinds of property regardless of the question of sufficiency of support; and (3) her full right to inherit a share of both kinds of property equal to that of the children. The ultimate result is to recognise the widow as the heir of the husband. The Supreme Court has thus been able to bring about some uniformity in the law for the whole of Indonesia. There is still one qualification of the widow's inheritance rights and this is based on the customary law concept. Her right to inherit is certain, but remarriage may entail loss of the separately owned property of her former husband. Until then she may do with the property as her interests demand and when the inheritance is big enough and it can be divided by all the heirs without damaging the widow's position she must receive as large a portion as the children. Cases which have recently come up before the courts reveal a trend towards the smaller immediate family relations and correlatively a weakening or disappearance of the traditionally larger group relations.<sup>6</sup>

5. Lev, Daniel S., "The supreme court and adat inheritance law in Indonesia", *American Journal of Comparative Law* (1962), Vol. 11, p. 205; Ter Haar, B., *op. cit.*, p. 195.

6. Lev, Daniel S., *op. cit.*, p. 205.

In Malaysia the law of the Malays relating to property was in its origin based on the tribal custom; this custom continued to govern the ownership and devolution of property in the period before the Malay States came under British influence. The Malay rulers were Muslims but in matters of property followed the old Malay custom. Sir William Maxwell recorded that in the State of Perak the lands and houses of the deceased descended to his daughters equally while the sons divided the personal property. The latter were supposed to create landed estates for themselves by clearing and planting land which they may select or to obtain the use of land by marrying women who may have inherited it. The early minutes of the Perak State Council state that it was customary among Malays of rank or position for a husband to appropriate a particular house to the use of his wife at the time of the marriage. She was entitled to live there during the marriage and if she was divorced by the husband the house was regarded as hers and was assigned to her for her use during her life. According to the Minangkabau Legal Digest from Perak, property jointly acquired by the husband and wife, for example rice-fields, garden and landed property, was divided equally between them; if the property was perishable two-thirds went to the husband and one-third to the wife; and if there was a child, one-third is taken from the father's share and given to the child. If there were two children, male and female, ancestral property was divided into three, one portion for the male and two for the female. The girl got apparel, jewellery, and the homestead with its trees. Livestock was divided equally between them. About 1886 the Perak State Council ordered the land of a major chief, Tengku Long Jaffar, to be transmitted in the female line. 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. Among the country people many estates are still divided according to *adat kampong*, but this can only take place by consent. In cases of dispute the courts and the Collectors of Land Revenue have tended to apply the Muslim law, and the law of inheritance in West Malaysia, other than Negri Sembilan and Malacca, is now the Muslim law, except for the special right of the spouses. Questions of property and inheritance are seldom litigated between a woman and her children. Such matters are often settled by agreement and the tendency has been that in such agreements the widow receives more than her share under the Muslim law. In the vast majority of Malay families, one-eighth of the estate, which is the share of the widow under the Muslim law, will not provide her with subsistence. The matter was therefore regulated by Malay custom rather than by the 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 distribution according to the Muslim law.<sup>7</sup>

In all the states of West Malaysia (with the exception of those parts of Negri Sembilan and Malacca where the *adat perpateh* is followed to the exclusion of the Muslim law) the Muslim rules of inheritance on intestacy are followed. These rules are however subject to the following modifications—

7. Ahmad Ibrahim, "Islam and customary law in Malaysia", *op. cit.*, p. 63.

- (a) on the death of a person 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, her one-eighth or one-quarter share can and should be taken into consideration in assessing the special share.<sup>8</sup>

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 West Malaysia actions relating to the distribution of the estate of a deceased are heard and determined in the ordinary civil courts.<sup>9</sup>

The rules as to *harta sapencharian* originated as a rule of the Malay custom. In the early days when ownership of land rested 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* if called to give expert evidence usually declared the *adat*, that is "*harta sapencharian*" as a rule of the 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, however, that this rule is a rule of Malay custom. It is in fact the rule "*chari bahagi*" (earnings are divided) of the *adat perpateh*.<sup>10</sup>

In *Hujah Lijah v. Fatimah*<sup>11</sup> 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 of 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

8. Ahmad Ibrahim, *Islamic Law in Malaya*, *op. cit.*, p. 258.

9. *Ibid.*

10. *Ibid.*, p. 254.

11. (1950) M.L.J. 63.

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.

In *Roberts v. Ummy Kalthom*<sup>12</sup> Raja Azlan Shah J. stated that *harta sapencharian* is applicable only to a case of a divorced spouse who claims against the other spouse during his or her lifetime but this was *obiter*.

In the Selangor case of *Haji Rahmah v. Alpha*<sup>13</sup> 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 could get 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. In *Re Elang, deceased*<sup>14</sup> however 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*<sup>15</sup> 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*<sup>16</sup> 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.<sup>17</sup>

12. (1966) 1 M.L.J. 163.

13. (1924) 4 F.M.S.L.R. 179.

14. Taylor, E. N., *op. cit.*, p. 48.

15. *Ibid.*, p. 25.

16. *Ibid.*, p. 59.

17. *Ibid.*, p. 73.

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 in 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 statements on the Muslim law in all or any of certain specified books, among which is the translation of *Nawawi's Minhaj-et-Talibin*.<sup>18</sup>

In Negri Sembilan it was recognised from the earliest days that the law of inheritance was the Malay custom. In the tribal areas of Kuala Pilah, Jelebu and Tampin (including Rembau and Tampin proper) the Malay custom that is followed is the *adat perpatih*. The fundamental principle of this *adat* is that 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 custom 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 property to provide maintenance for the woman through whom alone the tribe can be continued. From the principle 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;
- (c) all ancestral property vests in the female members of the tribe; and
- (d) all ancestral property is strictly entailed in tail female.<sup>19</sup>

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 his life, but the moment he dies it becomes entailed and he therefore cannot dispose of it by will — *Re Kulop Kidal, deceased*;<sup>20</sup> and an agreement made during a person's

18. Muslims Ordinance (Cap. 57 of 1936 Edition of the Laws of the Straits Settlements), ss. 27-29.

19. Ahmad Ibrahim, *Islamic Law in Malaya*, *op. cit.*, p. 256.

20. Taylor, E. N., "Customary law of Rembau", *Journal of the Malayan Branch of the Royal Asiatic Society* (1929), Vol. 7, Part 1, p. 92.



life to vary the succession is void, *Romit v. Hassan*.<sup>21</sup> From the basic principle that property is tribal rather than personal and that the man passes into his wife's tribe on marriage, it follows that all property owned by a married couple 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 the *adat* apply to it, *Sadiyah v. Siakim*.<sup>22</sup>

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 descendants *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 shares 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 two 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 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.<sup>23</sup>

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, in 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).

21. *Ibid.*, p. 63.

22. *Ibid.*, p. 65.

23. Ahmad Ibrahim, *Islamic Law in Malaya*, *op. cit.*, p. 259f.

(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.<sup>24</sup>

In the non-tribal parts of Negri Sembilan (Seremban and Port Dickson) the tribal organization had ceased to be effective by 1894, 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.<sup>25</sup>

An illustration of the application of the *adat kampong* or *adat temenggong* is given in the case of *Shafi v. Lijah*.<sup>26</sup> In that case the 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 titles 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 that 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

24. *Ibid.*, p. 261.

26. *Ibid.*

26. (1948-1949) M.L.J. Supplement, p. 49.

*Adat Perpatih*, 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 Perpatih* 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 Perpatih* 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 scales contained in Shafii School of Muhammedan Law. He intended some form of local customary law to apply, although he was probably quite vague as to detail or principles.

Therefore, although the *Adat Temenggong* is depreciated by *Wilkinson* (at page 45), and although *Taylor* regards it as essentially the same as the *Adat Perpatih* (*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."

In Singapore it is provided that in the case of any Muslim person domiciled in Singapore dying intestate the estate and effects shall be distributed according to the Muslim law as modified, where applicable, by Malay custom. In the case of a Malay dying intestate the court may make an order for the division of the *harta sapencharian* or jointly acquired property in such proportions as it thinks fit.<sup>27</sup>

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 a *sapencharian* property. 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.<sup>28</sup>

27. Singapore Administration of Muslim law Act, 1966, s. 106.

28. Brunei Religious Council and Kathis Courts Enactments, 1955, s. 48(1); Brunei Probate and Administration Enactment, 1955, s. 58.

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. 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. 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.<sup>29</sup>

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. It is provided in the *Undang-Undang Mahkamah 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 the Muslim law on the death of the husband.<sup>30</sup> The effect of this is shown in the case of *Haji Mohidi v. Spiah*<sup>31</sup> 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 *sapencharian* under which half of the jointly acquired property goes to the widow has been recognised and applied in a number of cases in Sarawak — *Men v. Dan*<sup>32</sup> and *Serujie v. Sanah*.<sup>33</sup>

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. 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

29. North Borneo Probate and Administration Ordinance, (Cap. 109), s. 165f; Administration of Native and Small Estates Ordinance, (Cap. 1); Intestate Succession Ordinance, 1960 (No. 1 of 1960).

30. Sarawak Administration of Estates Ordinance (Cap. 80 of the 1947 Edition of the Laws of Sarawak) s. 17; *Undang-Undang Mahkamah Melayu*, Sarawak, s. 41.

31. (1951) S.C.R. 22.

32. (1952) S.C.R. 13.

33. (1953) S.C.R. 40.

should 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 acts and things as may be in the judgment of the Court 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 that in all the circumstances of the case the exercise of its jurisdiction might lead to greater hardship than if the provisions of the 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.<sup>34</sup>

### *Wills*

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 Act applies to Muslims and regulates the form of wills.

It had been held in the case of *In the goods of Abdullah*<sup>35</sup> that a Muslim may make a will disposing of the whole of his property; but it has now been provided that the Muslim law will apply to dispositions of property by will.<sup>36</sup>

In West Malaysia the Muslim law as to testamentary dispositions applies. In *Sheik Abdul Latiff v. Sheik Elias Bus*<sup>37</sup> 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 the Muslim law to be his heirs unless the heirs consent to a deviation from this rule. So too in *Siti v. Mohamed Nor*<sup>38</sup> 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 the Muslim law is wholly invalid as to such bequest without the consent of the other

34. Sarawak Muslim Converts (Property) Ordinance, (Cap. 95); Undang-Undang Mahkamah Melayu, Sarawak, s. 59.

35. (1835) 2 Kyshe Ecc. 8.

36. Singapore Administration of Muslim Law Act, 1966, s. 105.

37. (1915) 1 F.M.S.L.R. 204.

38. (1928) 6 F.M.S.L.R. 135.

heirs. In *Saeda v. Haji Abdul Rahman*<sup>39</sup> it was held that under the 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 hold his estate for ten years and then distribute it is invalid. In the case of *Re Ismail bin Rentah, deceased*<sup>40</sup> the deceased who was a member of the Malay Servant's 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 had not consented thereto. In *Re Man bin Mihat (deceased)*<sup>41</sup> however it was held that the Muslim law does not disentitle a widow to take benefits under a life insurance policy in which she is named as the beneficiary.

Under the Malay custom a person cannot dispose of his property by will at all: *Re Kulop Kidal, deceased*;<sup>42</sup> and an agreement made during life to vary the succession on death is void: *Romit v. Hassan*.<sup>43</sup>

In Selangor, Kelantan, Trengganu and Pahang the Court of the Chief *Kathi* and Court of a *Kathi* and in Perlis the Courts 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.<sup>44</sup>

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.<sup>45</sup>

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 division of property need not necessarily be regulated by the Muslim

39. (1918) 1 F.M.S.L.R. 1 352

40. (1940) M.L.J. 98.

41. (1965) 2 M.L.J. 1.

42. Taylor, E. N., "Customary law of Rembau", *op. cit.*, p. 39.

43. *Ibid.*, p. 63.

44. Ahmad Ibrahim, *Status of Muslim Women*, *op. cit.*, p. 93.

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

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 property 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 alterations, registration of such will may be refused.<sup>46</sup> In *Shariffa Unei v. Mas Poeti*<sup>47</sup> it was held that a will made by a Malay in Sarawak giving 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 parents or parent as would a child born in lawful wedlock. In *Abang Haji Raini v. Abang Haji Abdul Rahim*<sup>48</sup> 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 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. 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.<sup>49</sup>

### *Wakaf*

In Indonesia the Muslim law relating to *wakaf* appears to be followed and endowments are permitted not only for mosques and religious schools but also for the benefit of descendents. The property must be clearly assigned and must not be used for a purpose forbidden by Islam. The purpose of the *wakaf* must be paramount and must be set out in distinct terms and the beneficiaries must be indicated as clearly as possible, and they should normally accept the benefit, of the *wakaf*. An administrator should be provided for the administration of the *wakaf* but if there is no named administrator, the head of the official of the mosque would take over the administration.<sup>50</sup>

The question whether a person has power to dispose of the land or property as *wakaf* is decided according to the rules of the customary law.

46. Sarawak Wills Ordinance (Cap. 96).

47. (1949) S.C.R. 5.

48. (1951) S.C.R. 3.

49. North Borneo Wills Ordinance (Cap. 154), s. 1(2), as amended by Ordinance No. 17 of 1961.

50. Ter Haar, B., *op. cit.*, p. 144.; Supomo, R., *op. cit.*, p. 75.

The Muslim law relating to *wakafs* is followed in Malaysia and Singapore, subject to the modifications made in the respective legislations. In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Malacca, Penang, Kedah and Perlis, the Court of the Chief *Kathi* (or *Kathi Besar*) and the Courts of *Kathis* are given power to hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to *wakaf* or *nazr*, but such actions and proceedings can also be heard and determined in the ordinary courts. In Perak and Johore, actions relating to *wakaf* or *nazr* may be dealt with by *Kathis* if so provided for in their *kuasa* or *tauliah*; but such actions may in any case be heard and determined by the ordinary courts. In Singapore such actions can only be heard and determined by the civil courts.<sup>51</sup>

In Selangor, Negri Sembilan, Kelantan, Trengganu, Pahang, Malacca, Penang, Kedah and Perak it is provided that whether or not made by will or death-bed gift, no *wakaf* or *nazr* involving more than one-third of the property of the person making the same shall be valid in respect of the excess beyond such one-third, (unless in Kelantan it is expressly sanctioned and validated in writing by the Ruler or in Trengganu it is expressly sanctioned and validated by all beneficiaries).<sup>52</sup>

Two kinds of *wakaf* are distinguished: (a) *wakaf 'am*, that is a dedication in perpetuity of the capital of income of the property for religious or charitable purposes recognised by the Muslim law; or (b) *wakaf khas*, that is a dedication in perpetuity of the capital of property for religious purposes prescribed in the *wakaf*. The legislation also deals with *nazr* which is defined as an expressed vow to do any act or to dedicate property for any purpose allowed by Muslim law and *nazr 'am* means a *nazr* intended wholly or in part for the benefit of the Muslim community generally or part thereof as opposed to an individual or individuals. It is provided in Selangor, Kelantan, Pahang Negri Sembilan, Malacca, Penang, Kedah and Perak that every *wakaf khas* or *nazr* after the commencement of the Enactment, shall be void unless (a) the Ruler in Council (or in the case of Malacca and Penang, the Yang di-Pertuan Agong) shall have expressly sanctioned or validated the same; or (b) it was made during a serious illness from which the maker subsequently died and was made in writing by an instrument executed by him and witnessed in Selangor and in Pahang by two adult Muslims living in the same village as the maker; or in Kelantan witnessed by one of the *pegawai masjid* and by either the *penggawa* of the *daerah* of the kampong or the *Penghulu* in which the maker resided; or in Negri Sembilan, Malacca and Penang by two adult Muslims one of whom shall be the *Penghulu*, *Pegawai Masjid* or *Ketua Kampong* living in the same *Mukim* as the maker, provided that if no *Penghulu*, *Pegawai Masjid* or *Ketua Kampong* is available any other adult Muslim who would not have been entitled to any beneficial interests in the maker's estate had the maker died intestate shall be a competent witness. A *wakaf* or *nazr* shall also be invalid if it is invalid under the Muslim law.<sup>53</sup>

51. Ahmad Ibrahim, *Islamic Law in Malaya*, *op. cit.*, p. 282f.

52. *Ibid.*; Perak Administration of Muslim Law Enactment, 1965, s. 95(1).

53. *Ibid.*



In the case of *Commissioner for Religious Affairs v. Tengku Mariam*<sup>54</sup> it was held both by the High Court and the Federal Court that if the matter had fallen for decision by the civil court, a *wakaf* in favour of the family of the settlor, would have been held to be invalid, as the courts felt themselves bound by the Privy Council decisions on appeals from India and East Africa which have held that a *wakaf* is valid only if the effect of the deed of *wakaf* is to give the property in substance to charitable uses. The Federal Court however held that the parties were estopped from challenging the validity of the *wakaf* as they had agreed to abide by the decision of the Mufti who had held it to be valid in accordance with the Muslim law.

It is provided that notwithstanding any provision to the contrary contained in any instrument or a declaration creating, governing or affecting the same, the *Majlis*, or in Trengganu the Commissioner for Religious Affairs, shall be the sole trustee of all *wakaf*, whether *wakaf 'am* or *wakaf khas*, of all *nazr 'am* and of all trusts of any description creating any charitable trust for the support and promotion of the Muslim religion or for the benefit of Muslims in accordance with the Muslim law, to the extent of any property affected thereby and situate in the State and where the settlor or the person creating the trust, *wakaf*, or *nazr 'am* was domiciled in the State to the extent of all property affected thereby wherever situated. All property affected by such trust, *wakaf* or *nazr 'am* shall be vested in the *Majlis*, (or in Trengganu in the Commissioner for Religious Affairs). The income of *wakaf khas* if received by the *Majlis* (or in Trengganu the Commissioner for Religious Affairs), shall be applied by it in accordance with the lawful provisions of such *wakaf khas*; the income of every other *wakaf* and of every *nazr 'am* shall be paid to and form part of the General Endowment Fund or *Bait-ul-Mal*, (or in Trengganu the General Endowment Fund of the Commissioner for Religious Affairs), which is vested in and administered by the *Majlis* (or in Trengganu by the Commissioner of Religious Affairs). The capital property and assets affected by any lawful *wakaf* or *nazr 'am* shall not generally form part of the *Bait-ul-Mal*, (or the General Endowment Fund) but shall be applied in pursuance of such *wakaf* or *nazr 'am* and held as segregated funds. If however from lapse of time or change of circumstances it is no longer possible beneficially to carry out the exact provisions of any *wakaf* or *nazr 'am* the *Majlis* (or in Trengganu the Commissioner for Religious Affairs) shall prepare a scheme for the application of the property and assets affected thereby in a manner as closely as may be analogous to that required by the terms of such *wakaf* or *nazr 'am* and shall apply the same accordingly; or the *Majlis*, (or in Trengganu the Commissioner for Religious Affairs), may in such case, with the approval of the Ruler (or in Malacca and Penang of the Yang di-Pertuan Agong), decide that such property and assets shall be added to and form part of the *Bait-ul-Mal*, (or the General Endowment Fund). Again, if the terms of any *wakaf* or *nazr 'am* are such that no method of application of the capital property and assets affected thereby is specified or it is uncertain in what manner the same should be applied, the *Majlis*, (or in Trengganu the Commissioner for Religious Affairs) may direct that such capital property and

54. (1970) 1 M.L.J. 222.

assets shall be added to and form part of the *Bait-ul-Mal*, or the General Endowment Fund.<sup>55</sup>

In Perlis it is provided that no will made by a person professing the Muslim religion shall bequeath to any beneficiary *wakaf* property in excess of one-third of the whole of the property of the said person. Notwithstanding anything contained in an instrument of trust creating a *wakaf* (whether *wakaf 'am*, *wakaf khas* or other trusts for the support and promotion of Muslim religion or for the benefit of Muslims) the *Majlis* shall be the sole trustee of the *wakaf*. The capital of the *wakaf* or *nazr 'am* shall not form part of the General Endowment Fund of the *Majlis* but shall be applied in accordance with the terms of such *wakaf* or *nazr 'am* and held as segregated funds. If from lapse of time or change of circumstances it is no longer possible beneficially to carry out the exact provisions of any *wakaf* or *nazr 'am* the *Majlis* shall prepare a scheme for the application of the property and assets of the said *wakaf* or *nazr 'am* for a purpose similar to that for which the said *wakaf* or *nazr 'am* was originally created and such property and assets shall be applied accordingly; in exceptional cases the *Majlis* may with the approval in writing of the Ruler direct that such property and assets be added to and form part of the General Endowment Fund. The *Majlis* may in any case where the manner of application of the capital of a *wakaf* or *nazr 'am* is not specified or if specified is specified so vaguely or inadequately as to make it impossible to give it any effect, direct such capital to be added to and to form part of the General Endowment Fund.<sup>56</sup>

In Selangor, Kelantan, Negri Sembilan, Malacca, Penang and Kedah it is provided that if in the opinion of the *Majlis* the meaning or effect of any instrument or declaration creating or effecting any *wakaf* or *nazr* is obscure or uncertain the *Majlis* may refer the same to the Legal Committee of the *Majlis* (or in Kedah the *Fatwa* Committee of the *Majlis*) for its opinion as to the meaning or effect thereof and the *Majlis* shall act in accordance with the opinion of such Committee or a majority thereof unless the Ruler (or in Malacca and Penang the Yang di-Pertuan Agong) shall otherwise direct.<sup>57</sup>

In Pahang it is provided that if it appears to the *Majlis* that the meaning or effect of any instrument or declaration creating or affecting any *wakaf* or *nazr* is obscure or uncertain the *Majlis* may consider the same and shall act according to its determination of the meaning or effect thereof unless the Ruler shall otherwise direct.<sup>58</sup>

In Trengganu it is provided that if in the opinion of the *Majlis* or the Commissioner for Religious Affairs the meaning or effect of any instrument or declaration creating or affecting any *wakaf* or *nazr* is obscure or uncertain, the matter may be referred to the Committee

55. Ahmad Ibrahim, *Islamic Law in Malaya*, *op. cit.*, p. 282f.

56. Perlis Administration of Muslim Law Enactment, 1963, ss. 64 - 66.

57. Ahmad Ibrahim, *op. cit.*, p. 285.

58. Pahang Administration of the Law of the Religion of Islam, Enactment, 1956, s. 94.

of *Ulamas* appointed under the Administration of Islamic Law Enactment for its opinion as to the meaning or effect thereof and the Commissioner for Religious Affairs shall on the approval in writing of the Ruler act on any opinion so given by the Committee or a majority thereof.<sup>59</sup>

In Perlis it is provided that the *Majlis* may refer to the Appeal Committee any instrument creating any *wakaf* or *nazr 'am* for its opinion on questions relating to the construction and meaning of any of the provisions of the said instrument. Any opinion given by the Appeal Committee shall be acted upon by the *Majlis*, unless the Ruler otherwise directs.<sup>60</sup>

In Johore the Wakaf Enactment provides that every attempt after the commencement of the Enactment to deal with land, whether by declaring it to be *tanah wakaf* or otherwise, whereby the right of alienating the land is sought to be in any manner permanently restricted or destroyed, shall be null and void and of no effect. If any land has been prior to the commencement of the Enactment declared to be *tanah wakaf*, that is, land subjected to *wakaf* other than for some public or charitable purpose, the usufruct shall be deemed to rest exclusively in the person or persons beneficially entitled to the rent or profit thereof, and every such person shall to an extent proportionate to his interest in such rents or profits be deemed to have a permanent transmissible and transferrable right in such land. Any such person may apply for an order that any register of land be rectified or that any entry therein shall be cancelled.<sup>61</sup>

In Malacca and Penang it is provided that all property movable and immovable which immediately before the commencement of the Administration of Muslim Law Enactment was vested in the Muslim and Hindu Endowments Board established under the Muslim and Hindu Endowments Ordinance for purposes relating to the Muslim religion or on trust for religious or charitable purposes for the benefit of persons professing the Muslim religion shall upon the commencement of the respective enactments vest in the *Majlis* for the like title, estate or interest and in the like tenure and for the like purposes as the same was vested and held. All rights, powers, duties and liabilities of the Muslim and Hindu Endowments Board in respect of endowments in land or money given or to be given for the support of any Muslim mosque, school or other Muslim pious, religious, charitable or beneficial purposes, shall be vested in or imposed on the *Majlis*, save in so far as may be repugnant to the provisions of the enactments.<sup>62</sup>

59. Trengganu Administration of Islamic Law Enactment, 1955, s. 65.

60. Perlis Administration of Muslim Law Enactment, 1963, s. 67.

61. Johore Wakaf Enactment (Enactment No. 5).

62. Malacca Administration of Muslim Law Enactment, 1959, s. 9; Penang Administration of Muslim Law Enactment, 1959, s. 9.

In Singapore too all the properties movable and immovable which were formally vested in the Muslim and Hindu Endowments Board for purposes relating to the Muslim religion or on trust for religious or charitable purposes for the benefit of persons professing the Muslim religion is vested in the *Majlis Ugama Islam*. All rights, powers, duties and liabilities of the Board in respect of Muslim endowments is also vested in the *Majlis*. It is also provided that notwithstanding any provision to the contrary contained in any written law or instrument all *wakaf*, whether *wakaf' am* or *wakaf khas* and all *nazr' am* shall be administered by the *Majlis*, although they may continue to be managed by the duly constituted trustees thereof. It is provided that no *wakaf* or *nazr* made whether by will or death-bed gift after the coming into operation of the Administration of Muslim Law Act shall be valid in respect of more than one-third of the property of the person making it. Every *Wakaf khas* or *nazr* made after the coming into operation of the Act shall be null and void unless the President of the *Majlis* has expressly sanctioned and validated or ratified it or unless it was made during a serious illness from which the maker subsequently died and was made in writing by an instrument executed by him and properly witnessed. It is also provided that where any question arises as to the validity of a Muslim charitable trust or as to the meaning or effect of any instrument or declaration creating or affecting any Muslim charitable trust, such question shall be determined in accordance with the provisions of the Muslim law.<sup>63</sup>

In Sarawak provision is made for the administration of charitable trusts by incorporated boards. A charitable trust is defined as any trust or grant of or endowment in movable or immovable property given or to be given for the furtherance or support of any religious, educational, recreational or charitable purpose. Power is given to order a trust to be administered by a board if it appears that (a) a charitable trust has not for any reason been properly or efficiently administered or managed; or (b) there are no trustees appointed for the administration and management of charitable trust; or (c) it would be to the advantage of a charitable trust that it should be administered and managed by a board. In such cases inquiries will be made from the community which derives benefit or will derive benefit from the charitable trust and a board may be appointed consisting of three or more members, all of whom shall be members of such community. On the appointment of the Board a vesting order may be made by the court to vest the property of the trust in the Board. Power is given to the Board to frame a new scheme for the application, administration and management of the trust and to submit the scheme for the approval of the court. It is provided that no court fees shall be payable on such application to the court. Provision is made for the keeping and submission of the accounts of the charitable trust.<sup>64</sup>

63. Singapore Administration of Muslim Law Act, 1966, ss. 6, 58 - 63, 74.

64. Sarawak Charitable Trusts Ordinance, (Cap. 102).

*Custom and Muslim law*

In South-East Asia as in other parts of the Muslim world custom has played an important part in the development of Muslim law. The customs and practices which prevailed in Arabia in the time of the Prophet were accepted as part of the law where they were not abrogated by the Holy *Quran* or the practice of the Prophet. The validity of those customs which have evolved or which have been acted upon is justified on the authority of the tradition, which lays down that whatever the people generally consider to be good for themselves is good in the eyes of God. Custom played a significant part in the development of the Muslim law under the *Ummayyads* in the second century of the *Hijrah* (670-720 A.B.) and it has come to be an important source of law in many Muslim countries, like Morocco and in South-East Asia.

In Malaysia an attempt has been made to blend the Malay custom with the Muslim law. Although there are points of conflict between them these are glossed over by alleging that both systems are in fact directed to the same end. A Malay saying states:

“Our customary law bids us  
Remove what is evil  
And give prominence to what is good;  
The word of our religious law  
Bids us do good  
And forbids our doing evil”.<sup>65</sup>

The one system depends on and supplements the other. Conflicts between them should be avoided and one system should not infringe on the other. In most parts of Malaysia the custom has been integrated in the Muslim law and the Muslim law is applied “as modified by Malay custom”. The exception is in the matrilineal areas of Negri Sembilan and Malacca where the rules relating to property and inheritance are in conflict with the Muslim law.

In Indonesia at first it was believed by the Dutch that the customary law was based largely on the Muslim law and the jurisdiction of the Muslim Courts was accordingly recognised over a wide range of family law matters. When however the *adat* law scholars of Leiden established themselves in the early twentieth century, Islam was no longer regarded as the fundamental source of Indonesian law, and the claims of the *adat* were supported to the exclusion of the Muslim law. In 1937 the competence of the Muslim Courts in Java and Madura in inheritance disputes was removed and given to the civil courts. Most inheritance cases are therefore referred to the civil courts and this is so even in the areas outside Java and Madura where the religious courts share jurisdiction over inheritance with the civil courts. But the Muslim religious courts even in Java and Madura do deal with inheritance

65. Ahmad Ibrahim, “Islam and customary law in Malaysia”, *op. cit.*, p. 72.

cases. The parties often go to the religious courts to seek advice on how to divide an estate according to the *far'aid* or Muslim law of inheritance. In such cases the *Penghulu* or *Qadi* would give a ruling or *fatwa* on the matter and this will generally be accepted by the parties.

The informality of the procedure in dealing with disputes in the kampongs and villages helps in the blending of the religious law and the *adat*. In most cases of dispute the parties and the judge or arbitrators are less concerned with ascertaining and enforcing the legal rights of the parties than with arriving at a compromise or *perdamaian* which could put the personal conflicts at an end. Thus every attempt is made to arrive at a fair settlement and there is no rigid insistence that either the religious law or the customary law should govern the matter. Even in inheritance matters the fact that the Muslim law allows a modification of the inheritance rules where all the parties consent helps in reaching a solution which might satisfy the custom but does not formally contravene the Muslim law.

Since independence in Indonesia there has been less enthusiasm for the customary law as it is realised "that the development and growth of a modern Indonesia State requires a clearly articulated legal system which as far as possible reflected the unity of Indonesia, and yet also adapted itself as far as possible to the models of other modern nations. And for this purpose a customary law based on small isolated village cultures was of very little use".<sup>66</sup> Where there is a conflict between the diversive "*adat*" there may be a tendency to turn to the more cohesive Muslim law. There has been an increased interest in and advocacy of the Muslim inheritance laws in Indonesia and some Muslim scholars have stressed the need for building up a Muslim law in Indonesia which should not be based only on the tenets of the *Shafii* School, but be based on a freer selection of rules from the other schools of law, so that the Muslim law will be better able to deal with the problems of a modern society. In this respect the reconstruction and revival of Muslim law which is taking place in the Arab countries and in Pakistan will help to enhance the significance of the Muslim law in South-East Asia.

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66. Alisjahbana, Takdir, *Indonesia in the Modern World* (1961), p. 108.

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