

THE CHILD IN MALAYSIA — A REVIEW OF SOME OF THE LAWS DETERMINING STATUS*

Introduction

Malaysia has a multiplicity of laws that determine the status and rights of the child. This complexity is the result of the somewhat convoluted history of Malaysia's thirteen component states. An examination of the legal antecedents of the various states reveals the existence of fifteen categories of "laws belonging to, or a legacy from forty-three different systems which have existed from time to time."¹ The Law Revision exercise has neither unified nor reformed the various laws affecting the child in Malaysia. The reform of such laws appears to have been relegated to a position of low priority and there has been no concerted effort on the part of the government to review the laws as a whole and to unify them despite the many recommendations that have been made by several pressure-groups notably the National Council of Women's Organisations and the Federation of Women Lawyers. The changes introduced to date have been by way of piece-meal amendments to legislation, usually brought about to resolve a pressing problem without due consideration being given to the possibility of other problems arising in the future. The present position therefore, though greatly improved in some respects, is still far from satisfactory.

Definitions

The term "child" has been defined in a variety of ways. Generally "child" means a person who has not attained the age of majority. In Malaysia this age has been fixed at eighteen years by the Age of Majority Act, 1971,² subject to the exceptions in Section 4 of the same Act, the relevant portions of which read as follows:

- S.4: (a) . . .
(b) . . .
(c) any provision in any other written law contained fixing the age of majority for the purposes of that written law.

*In view of the immensity of the subject as a whole, only certain aspects will be considered in this article. Some of the material for this article was obtained from research undertaken by the writer in connection with a thesis to be submitted to the University of London.

¹Tan Sri D.B.W. Goode "Problems of Harmonizing the Laws in the Malaysian Federation" in "The Constitution of Malaysia — Its Development 1957-1977" Editors, Suffian, Lee, Trinidad, at page 198. The fifteen categories are listed in page 199.

²Act 21, Section 2

As a result of this exception, a child (or minor) may be defined differently in some statutes.

Under the Guardianship of Infants Act, 1961, the age of Majority is eighteen years for Muslims and twenty-one for non-Muslims.³ The differentiation here is based on religion. In some statutes majority is determined by marital status. For example, under the Adoption Act, 1952⁴ the term "infant" is defined as an unmarried person who has not attained twenty-one years of age but including a female below that age who has been divorced. It is not clear though, why a widow below twenty-one years should no longer be an infant for the purpose of adoption whereas a female divorcee of the same age is.

In the statute that regulates employment of children, the terms "child" and "young person" are used. A child is defined as a person below fourteen years of age and a young person as one below sixteen years of age.⁵ The significance of this definition is that minors between the ages of sixteen and eighteen years are not specially protected by law. For the purposes of employment they will be treated as adults. Where the term "child" has not been defined, as in the Married Women and Children (Maintenance) Act, 1950⁶ the court has held that the Age of Majority Act, 1971 should apply to mean that child for the purpose of maintenance is a person below the age of eighteen years.⁷

Name, Nationality and Registration

The birth of every child in Malaysia must be registered within fourteen days of the birth.⁸ This may be done by any one of the following persons, namely, the father of the child, the mother of the child, the occupier of the house in which the child was to the knowledge of that occupier born, any person present at the birth, any person having charge of the child.⁹ This makes it somewhat difficult to verify the truth or otherwise of information supplied particularly as registration can be effected at any police station. Where a child is still-born, the still-birth should be registered.¹⁰ It appears however that it is common practice to register the still-birth as a death, and without first registering the birth. This results in misleading data on the rate of infant mortality.¹¹

³Section 2(2)

⁴Act 257 (Revised 1981) Section 2

⁵Children and Young Persons (Employment) Act, 1966, Section 19(1)

⁶Act 263, Revised 1981

⁷*Kulasingam v Rasammah* [1981] 2 MLJ 36

⁸Births and Deaths Registration Act, 1957, Act 299 (Revised 1983), Section 7(1), Section 8

⁹*Ibid.*, Section 7(2), Section 8

¹⁰*Ibid.*, Section 10

¹¹Manjit S Sidhu and Asmah Mohamad, *Sifat Geografi Penduduk*, p 99

When a birth is registered, the child is usually given a name. This name is recorded in the Certificate of Birth that is given to the informant of the birth.¹² Malaysians of Malay and Indian descent do not usually have surnames. The "right to a name" issue is of little significance to them. Malaysians of Chinese or other origins do have surnames and for them the surname will ordinarily be that of the father if the child is legitimate.¹³ The illegitimate child may take the surname of the mother where she is the informant and volunteers the information that the child is illegitimate. If the father of an illegitimate child acknowledges himself to be the father of the child and signs the register of birth together with the mother, then his surname may be used.¹⁴ A child registered as illegitimate may have his birth re-registered on becoming legitimated.¹⁵

Occasionally a birth is registered without naming the child. The name, however, can be registered at any time after that, even after the child has attained twenty-one years of age.¹⁶ A given name can be changed within twelve months of registration.¹⁷ Any name may be given to a child and it is only if the name appears to be objectionable or undesirable that the Registrar may refer the matter to the Registrar-General who may refuse to register the name.¹⁸

Every death occurring in Malaysia together with the cause of death, must be registered.¹⁹ A certificate of death will be issued to the person giving information of the death.²⁰ A special Act was enacted for the registration of deaths occurring among Malaysians on pilgrimage to Mecca. The Act also provides for the registration of births to pilgrims.²¹

The Registration system includes national registration of all persons in Malaysia and the issue of identity cards to persons so registered.²² Children under twelve years of age are exempted from registration.²³ At twelve they are issued with their first identity card which has to be renewed after six years.²⁴

¹²Births and Deaths Registration Act 1957, Act 299 (Revised 1983), Section 14

¹³*Ibid.*, Section 13A(1)

¹⁴*Ibid.*, Section 13A(2)

¹⁵*Ibid.*, Section 17

¹⁶*Ibid.*, Section 15

¹⁷*Ibid.*, Section 15

¹⁸*Ibid.*, Section 16

¹⁹*Ibid.*, Section 18

²⁰*Ibid.*, Section 25

²¹Registration of Births and Deaths (Special Provisions) Act, 1975

²²National Registration Act, 1959, Act 78 (Revised 1972)

²³National Registration Regulations, 1960, rule 25(c)

²⁴National Registration Act, 1959, Act 78 (Revised 1972), Section 6(2)(h)

Citizenship is acquired by Operation of Law, Registration and Naturalisation. Between Merdeka Day and October 1962 every child born within the Federation became a citizen by Operation of Law.²⁵ This provision applying the principle of *jus soli* was amended in 1962 and the position today is that a child born within the Federation would become a citizen only if at least one parent was, at the time of its birth, either a citizen or a permanent resident of the Federation.²⁶ However, if the child would not be entitled to citizenship in any other country and would otherwise be stateless, it becomes a citizen by Operation of Law.²⁷

A child born outside Malaysia whose father was at the time of the birth a citizen of Malaysia would also become a citizen by Operation of Law if the father was either born in Malaysia or was in the service of the Federation or of a State at the time of the birth or alternatively if the birth was registered at a Malaysian consulate within a year of the birth.²⁸

Wives and children of citizens are entitled to citizenship by registration. Article 15(2) provides that any child of a citizen may be registered as a citizen upon application by his parent or guardian. The child must be under twenty-one years of age. Under Article 15A, the Federal government is empowered to register children under twenty-one years as citizens if there are special circumstances and even if neither parent is a citizen. Registration is effected only after the person has taken an oath of allegiance. Persons below eighteen years of age however, do not have to take the oath.²⁹

It should be noted that any person under twenty-one years who has been registered as a citizen can be deprived of his citizenship if his parent through whom he acquired the citizenship either renounces his citizenship or is deprived of it by the Federal government.³⁰ He will not be deprived of his citizenship however, if, in doing so he will be rendered stateless.³¹

Citizenship by naturalisation is available only to persons of or over the age of twenty-one years. They must have been resident in the Federation for not less than ten years in the twelve years immediately preceding the application, be of good character and have an adequate knowledge of the Malay language.³²

Perhaps the most important right that citizenship carries is the right to enter and reside in Malaysia without having to obtain a Permit or Pass. No non-citizen may enter Malaysia unless he has been issued with an entry or Re-Entry Permit or a valid Pass or unless he has been specifically ex-

²⁵Article 14(1)(a) Federal Constitution, 2nd Schedule, Part I

²⁶Article 14(1)(b), Second Schedule, Part II

²⁷Clause 1(e), Second Schedule, Part II

²⁸Clause 1(c), Second Schedule, Part II

²⁹Article 18, Federal Constitution

³⁰Article 26A, Federal Constitution

³¹Article 26B, Clause (2), Federal Constitution

³²Article 19, Federal Constitution

empted from obtaining either, by a Ministerial Order.³³ A child's name may be endorsed on the Permit or Pass of his parent and if he is in the company of that parent, he will be allowed into the country.³⁴ An application for an Entry or Re-Entry Permit can be made by a parent on behalf of a child.³⁵

There are several different passes that can be issued to persons wishing to enter and reside in Malaysia.³⁶ A child could enter Peninsular Malaysia or Sarawak on a dependant's Pass if he were a dependant child of a holder of an Employment Pass.³⁷ The Employment Pass is issued to persons who are taking up employment with the government of the Federation or of a state or any employment with an approved company or firm for a period of two years and with a salary of not less than \$1,200.00 per month.³⁸ The Dependant's Pass enables the child to accompany or join his parent and to remain in Malaysia for a period not exceeding that for which the parent's Employment Pass was issued.³⁹ The child, as a holder of the Dependant's Pass will not be allowed to engage in any form of paid employment without the written consent of the Controller of Immigration.⁴⁰ The corresponding Passes for the state of Sabah are the Work Pass for a parent taking up employment there and a Visit Pass for the dependant child accompanying or joining him.⁴¹

Tourists to any part of Malaysia are issued the Visit Pass too. A Student's Pass may be issued to a person who can show that he has been accepted by a recognised university or an approved educational institution. The person must also possess a Certificate issued by the Ministry of Education to the effect that it is desirable that he should be accepted as a student at a specified institution in the Federation and that he has been so accepted.⁴² This pass may be cancelled if the holder fails to remain or ceases to be retained as a student.⁴³

A pre-requisite for entry into Malaysia is the possession of a valid Passport which must be produced to the Immigration Officer on duty.⁴⁴

³³Immigration Act, 1959/63, Act 155, Revised 1975, Section 6

³⁴*Ibid.*, Section 12

³⁵Immigration Regulations, 1963, rule 4(1)

³⁶*Ibid.*, rule 8(1)

³⁷*Ibid.*, rule 10(1)

³⁸*Ibid.*, rule 9(1)

³⁹*Ibid.*, rule 10(2)

⁴⁰*Ibid.*, rule 10(3)

⁴¹*Ibid.*, rule 11(1)

⁴²*Ibid.*, rule 13(1).

⁴³*Ibid.*, rule 13(4)

⁴⁴Passports Act, 1966, Act 150, Revised 1974, Section 2(1)

A valid Visa issued on the authority of, and by, or on behalf of, the government of Malaysia, must be obtained by Aliens. Aliens are persons who are not Commonwealth citizens, British protected persons or citizens of the Republic of Ireland.⁴⁵

All these provisions illustrate the tight control exercised on immigration. There are no laws regulating emigration. However, the freedom of a citizen to leave the country is subject to his obtaining a Passport.⁴⁶ In Malaysia there is no right to a passport — the passport is issued at the discretion of the government. This was held by the Federal Court in the case of *Government of Malaysia and Others v. Loh Wai Kong*,⁴⁷ The respondent in that case had applied for an order directing the appellants to issue a Malaysian passport to him. He contended that he had a fundamental right to travel abroad and that the refusal of a passport violated this right. The learned judge rejected his application but stated that in his view, the refusal or delay in granting a passport was tantamount to preventing him from leaving the country and was in violation of his right of personal liberty under Article 5(1) of the Federal Constitution. The appellants took objection to those observations and appealed. The Federal Court held that Article 5 does not confer a fundamental right to leave the country or to travel overseas. Nor does it confer a right to a passport. Therefore the government has the discretion whether to issue or not to issue, delay the issue of or withdraw a passport. The exercise of this discretion however is subject to review by a court of law.

Family Relations

Legitimacy

The child's legal status is determined by the marriage of his parents. There is a Presumption of Legitimacy in Malaysian law to the effect that the fact that any person was born during the continuance of a valid marriage between his mother and any man, shall be conclusive proof that he is the legitimate son of that man.⁴⁸ This presumption will also apply where he was born within two hundred and eighty days after the dissolution of the marriage and his mother remains unmarried. This presumption however is rebuttable but the only evidence admissible to rebut the presumption is evidence that shows that the parties to the marriage had no access to each other at any time when the child could have been conceived. This somewhat strict position is due to the reluctance to bastardise children of married women as illegitimate children in Malaysia are still subject to various legal disabilities.

⁴⁵*Ibid.*, Section 1A

⁴⁶By Section 2(2) of the Passport Act, 1966, persons leaving the country may be required to produce a passport to an Immigration Officer.

⁴⁷[1979] 2 MLJ 33

⁴⁸Evidence Act, 1950, Section 112

Under Muslim law, some highly unusual or extreme measures have been adopted to ensure the child's right of legitimacy. For example, the conception-birth-span is set by various schools of law and in particular, the Shafii school which is followed in Malaysia, at a minimum of six lunar months and a maximum of four years. Thus, if a husband and wife cohabit and after six months she gives birth, the infant will be regarded a legitimate child of its parents. Similarly, if she gives birth within four years after widowhood, divorce or separation and before remarriage, the infant will be legitimate. A child born before six months from the beginning of legal cohabitation or after four years since the cessation of legal cohabitation will also be legitimate if the husband recognizes it and if there is any evidence or likelihood that it is his and not the procreation of any other identifiable parent. However, if it is established that the child was conceived out of wedlock, then the child's descent will derive from the mother only.⁴⁹

The "principle of legitimacy" in Islam does conflict with the "presumption of legitimacy" in the Evidence Act. The question then is, which should prevail when all the parties involved are Muslims. The case of *Ainan bin Mahmud v. Syed Abu Bakar*⁵⁰ is often cited as having decided that the Evidence Act is a statute of general application and as such, in questions of legitimacy, section 112 will apply to Muslims to the exclusion of Muslim Law. A close examination of the case however, indicates that the decision did not turn on this point and the views expressed in relation to section 112 were merely obiter dictum. Furthermore the constitutional provision that legitimacy of Muslims is within the authority of State legislatures and not of Parliament means that section 112 cannot apply to Muslims in a state unless it has been adopted by the state legislature.⁵¹ It is submitted therefore, that *Ainan's case* is no authority for resolving the conflict. It may be pertinent to note that most cases in which the legitimacy of Muslims are in dispute will be heard by the Shariah or Kathi's courts. These courts will apply the Muslim rules of evidence rather than the provisions of Evidence Act particularly when there is a conflict.⁵²

Under Muslim law, marriages may be either valid (sahih), void (batil) or irregular (fasid). Children of void marriages are illegitimate but those of irregular marriages are legitimate. Examples of irregular marriages are marriages without witnesses, with two sisters, with a fifth wife or with a person of a different religion.⁵³

⁴⁹Hammudah 'Abd Al Ati, *The Family Structure in Islam*, p 190

⁵⁰[1939] MLJ 209

⁵¹Federal Constitution, Article 74, 9th Schedule, List II

⁵²See for example, Administration of Muslim Law Enactment, 1965, Perak Enactment No. 11 of 1965, Section 55(1)

⁵³*Maria Menado v Abdul Razak* (1965) 1 M.L.J., xvi

For non-Muslims, children of void marriages will be treated as legitimate if, at the time of the solemnisation of the marriage, both or either of the parties reasonably believed that the marriage was valid.⁵⁴ This however is subject to the condition that the father of the child was domiciled in Malaysia at the time of the marriage.⁵⁵ Children of voidable marriages will be deemed to be legitimate.⁵⁶

Guardianship and Custody

The provisions relating to custody of children under the Law Reform (Marriage and Divorce) Act, 1976, (Act 164) are in Part VIII of the Act which is entitled "Protection of Children" quite distinct from Part VII which is entitled "Matters incidental to matrimonial proceedings." Section 88(1) provides that "the court may *at any time* by order place a child "in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person."⁵⁷ The words "at any time" and the fact that S.88 is not included in Part VII suggest that the provisions relating to custody may be invoked independently of any matrimonial proceedings between the parents of the child. If this is so, it may be preferable for a wife to seek custody of her children under the Law Reform Act rather than the Guardianship of Infants Act, 1961. This is because the Law Reform Act has provisions which seem to favour a mother. For example, Section 88(3) provides that there shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother. When applying this presumption however, the court must consider the undesirability of disturbing the child's life by changes of custody. Section 91 provides that the mother will be entitled to the custody of children of void or voidable marriages unless there is an agreement or order of court to the contrary.

In deciding who is entitled to custody, the paramount consideration will always be the welfare of the child although the court will also consider the wishes of the parents and the opinion of the child if he or she is sufficiently able to express it.⁵⁸

Applications for custody have hitherto been made under the Guardianship of Infants' Act, 1961. This Act provides that the father of an infant shall be the guardian of the infant's person and property.⁵⁹ The court

⁵⁴Law Reform (Marriage and Divorce) Act, 1976, Act 164, Section 75(2)

⁵⁵*Ibid.*, Section 75(3)

⁵⁶*Ibid.*, Section 75(1)

⁵⁷Emphasis supplied

⁵⁸Section 88(2), Law Reform (Marriage and Divorce) Act, 1976

⁵⁹Guardianship of Infants Act, 1961, Section 5

however may make an order as to the right of access of the other parent.⁶⁰ It should be noted though, that there is no absolute right to access. In each case the court will weigh the parent's right to visit his child against the effect that the visits may have on the child.⁶¹

The provision that the father of an infant is its guardian is subject to the court's power to remove guardianship from any guardian and to appoint another in his place.⁶² In exercising this power, the court will consider the wishes of the parents but the paramount consideration will be the welfare of the child.⁶³ By this process then, a mother of an infant may be appointed its guardian by the court. Otherwise she becomes guardian only on the death of the father.⁶⁴ Furthermore, the court may appoint another person to act jointly with the mother.⁶⁵ This provision reflects the then-prevailing view that women are incapable of looking after the interests of their children. Women lawyers in Malaysia, have, from time to time, sought an amendment which would grant an equal right of guardianship to both parents.

The Act also provides that the last surviving parent may appoint a testamentary guardian.⁶⁶ In the case of orphans, the court may appoint a guardian.⁶⁷

The guardian of an infant shall be responsible for its support, health and education.⁶⁸ As the guardian of the infant's property, he shall have control and management of the property with the duty to deal with it as carefully as an ordinary man of prudence.⁶⁹ Detailed rules are provided regarding the management of the infant's property.⁷⁰ The powers of a guardian are not unlimited. He cannot *inter alia*, sell, charge, mortgage, exchange or otherwise part with the infant's property without the leave of the court or a judge.⁷¹ Any unauthorised disposal of property can be declared void and the property restored to the infant's estate by order of court.⁷²

⁶⁰*Ibid.*, proviso to Section 5

⁶¹*T. v T* (1966) 2 MLJ 202

⁶²Guardianship of Infants' Act, 1961, Section 10

⁶³*Ibid.*, Section 11

⁶⁴*Ibid.*, Section 6

⁶⁵*Ibid.*, proviso to Section 6

⁶⁶*Ibid.*, Section 7

⁶⁷*Ibid.*, Section 8

⁶⁸*Ibid.*, Section 3

⁶⁹*Ibid.*, Section 4

⁷⁰*Ibid.*, Sections 16-20

⁷¹*Ibid.*, Section 15(1)

⁷²*Ibid.*, Section 15(2)

State supervision over a guardian's performance of his duty with regard to the physical care and upbringing of an infant, is exercised through the Children and Young Persons Act, 1947, Act 232 (Revised 1980). This is discussed below in relation to the protection of children.

The Guardianship of Infants Act has been adopted by all but one of the states of Peninsular Malaysia and by virtue of this becomes applicable to the Muslims in these states.⁷³ The application however is subject to the condition that where there is a conflict between the provisions of the Act and Muslim law, the latter shall prevail. In the case of *Myriam v. Mohamed Ariff* however, the learned judge who was faced with the problem of resolving such a conflict said, "In my endeavour to do justice, I propose to exercise my discretion and have regard primarily to the welfare of the children. In doing so, it is not my intention to disregard the religion and customs of the parties concerned or the rules under the Muslim religion but that does not mean that the court must adhere strictly to the rules laid down under the Muslim religion. The court has not, I think, been deprived of its discretionary power."⁷⁴ This, it is submitted, is an incorrect interpretation of the provisions of the Act. It is all the more regrettable because the same result could have been achieved by applying the very rules that had been brushed aside. It is felt that, more often than not, the reluctance to apply Muslim law is due to a lack of understanding of its principles rather than the result of an informed choice.

The statute that has been discussed so far is the law applicable to Peninsular Malaysia, known as the Federation of Malaya. The State of Sabah has an almost identical law.⁷⁵ The only significant difference is that the Sabah ordinance does not define infant and as such the Age of Majority Act would apply.

The law of the State of Sarawak is of particular significance in that it provides that the provisions of the ordinance are to apply to native infants even if they are inconsistent with Native Customs.⁷⁶ The underlying principle is the welfare of the child but in order to ensure that the welfare of a native child is being correctly considered, the ordinance provides that persons well-versed in native custom may be appointed as consultants. These experts however are not to take part in the deliberation; they are only to advise the court.⁷⁷

In Negri Sembilan, under the Adat Perpatih, the mother always gets custody of the children. This is because the family is matrilineal and the children are regarded as belonging to the mother's tribe. It is probably for the same reason that a father is not obliged to support his children by his

⁷³Guardianship of Infants Act, 1961, Section 1(2)

⁷⁴(1971) 1 MLJ 265

⁷⁵Guardianship of Infants Ordinance, Cap 54

⁷⁶Guardianship of Infants Ordinance, Cap 93 of the Laws of Sarawak, Section 22(1)

⁷⁷*Ibid.*, Section 22(2)

divorced wife. However, if the husband is lawfully practising polygamy then this rule will not apply. His rights and duties in respect of his wives and children will be determined by the Muslim Law.⁷⁸

Under Muslim Law, *Hadanah* or the right to custody of the children belongs to a mother unless she is disqualified for one of the following reasons:

- (a) she marries a person not related to the child within the prohibited degrees;
- (b) she is guilty of gross and open immorality;
- (c) she changes her residence so as to prevent the father from exercising the necessary supervision over the child, this is subject to the exception that a divorced wife may take her own child to her birth-place;
- (d) she renounces Islam;
- (e) she neglects or is cruel to the child.⁷⁹

The right to *hadanah* terminates when the child attains the age of seven years if male and nine years if female, after which custody devolves upon the father. When the child reaches the age of discernment he will be allowed to choose the parent he wishes to live with. At all times however the guardianship of the child remains with the father.⁸⁰

Inheritance

The child's right to inheritance is determined by the law applicable to the racial or religious group to which he belongs. For Muslims, the Muslim rules of inheritance as stated in the Koran are to apply. Generally speaking, a daughter will receive half the share of a son. Muslims may make a Will with regard to one-third of their property. However, Koranic heirs cannot be beneficiaries under the Will except with the consent of all co-heirs. The National Council for Muslim Religious Affairs, Malaysia, has issued a ruling or fatwa to the effect that nominees of funds in banks, Post Office Savings Banks, Employees Provident Funds, Insurance Companies and Co-operative Societies are in the position of persons who carry out the Will of the deceased. They are to receive the money and divide them among the persons entitled according to the Muslim Law of Inheritance.⁸¹

The Muslims of Negri Sembilan who practise Adat Perpatih apply the Malay Customary Rules of Inheritance even though they conflict with Muslim law. According to these rules, all property rests in the tribe, not in the individual, acquired property becomes ancestral once it is inherited,

⁷⁸ *Jemiah binte Awang v Abdul Rashid* [1941] MLJ 29

⁷⁹ The Muslim Law relating to custody has been codified in the new Muslim Family Law Enactments. See for example, Sections 81 to 105 of Act 303 which is applicable to the Federal Territory.

⁸⁰ In all states of Peninsular Malaysia except Kelantan, Muslim mothers may resort to the Guardianship of Infants Act, 1961 to obtain guardianship during the life-time of the husband

⁸¹ Fatwa on Succession and Wills [1974] 1 MLJ

all ancestral property rests in the female members of the tribe and all ancestral property is strictly entailed in tail female.⁸² No property can be disposed of by will.⁸³

In Sabah and Sarawak, native law and custom determine the distribution of estates of natives. In Sabah, under the Small Estates (Distribution) Act, 1955 Act 98, (Revised 1972), the appropriate Native Court will make a distribution order according to the custom or the tribe to which the intestate belonged. Where a Will has been made, the court must determine that no disposition contrary to native law or custom has been made.⁸⁴ In Sarawak, the Administration of Estates Ordinance also recognises the Chinese Customary Law of Succession.⁸⁵ The accepted Chinese custom divides the property equally between the sons of the deceased who are responsible for the support of their mother until her death and their sisters until their marriage or earlier death. The Chinese Law of Inheritance only applies on intestacy. Where the deceased has made a Will, the estate will be distributed according to the terms of the Will, even though the provisions of the Will are contrary to Chinese Customary Law.⁸⁶

In Peninsular Malaysia, all non-Muslims who die intestate will have their estates distributed according to the provisions of the Distribution Act, 1958 Act 300 (Revised 1983). Where a man dies leaving a wife and children, the wife will receive one-third of the estate while the remaining two-thirds will be divided amongst the children equally. However, where a married woman dies leaving a husband and children her entire estate devolves upon the husband and the children acquire no rights.⁸⁷ This provision has given rise to considerable concern and there seems to be no justification at all for its continued existence. The provision however, will not apply where there is a valid Will.

Adoption

The most common dispute that arises in relation to the distribution of estates is as to the right of the adopted child. The adopted child's right to inheritance depends very much on the law under which the adoption was effected.

The Muslim law encourages a Muslim to provide maintenance and support of orphans and other needy children. However it does not recognise the concept of adoption. As such, although *de facto* adoptions among the

⁸²E.N. Taylor, Customary Law of Rembau, at p 88

⁸³Wills Ordinance, Cap 158, Section 1(2) and (3), as amended by the Wills (Amendment) Ordinance, 1961

⁸⁴Wills Ordinance, Cap 158, Section 1(2) and (3), as amended by the Wills (Amendment) Ordinance, 1961

⁸⁵Cap 80, Laws of Sarawak, 1947, Section 17

⁸⁶*Chan Bee Neo v Ee Suok Cho* [1947] SCR 1

⁸⁷Distribution Act, 1958, Act 300 (Revised 1983), Section 7

Malays are recognised for purposes of maintenance and guardianship,⁸⁸ the adopted child has no right to inherit the estate of the adopters. On the other hand, if his natural parents are known, then he is entitled to a share in their estate as his ties with his natural family cannot be severed.

It is because of the Muslim law prohibition against inheritance by adopted children that the Adoption Act, 1952, when it was passed, excluded Muslims from the scope of its application. The Adoption Act, 1952 provides that an adoption order being made, the custody, care, guardianship and control of the child passes to the adoptive parents, and rights of inheritance to the adoptive parents' property are acquired by the child as if he were a natural child and his former corresponding rights to the property of his natural parents are lost.⁸⁹ Because of this provision, a separate ordinance had to be passed to regulate the adoptions among Muslims.⁹⁰ That statute however, is not restricted to Muslims only and there are some who are of the view that it should be, so that all others must use the Adoption Act. The Adoption Act contains many provisions designed to protect the interests of the child. One such provision stipulates a minimum age for the adopter — he must be at least twenty-five years old and at least twenty-one years older than the child or over twenty-one years and a relative of the child.⁹¹ Where the adopter is either the mother or father of the child, no age limit is prescribed.⁹² It has been suggested that in addition to a minimum age, a maximum age for the adopter should be imposed, as well as a maximum age difference between the child and the adoptive parents. The aim in so doing is to rule out the possibility of those adoptions which do in fact take place not truly in the interest of the child entirely, but in the interest of adoptive parents whose true desire is for company and for some one to take care of them financially, physically or both, in their old age.⁹³

The Act prohibits the adoption of female children by a sole male applicant unless special circumstances exist.⁹⁴ It also prohibits adoptions where either the adopter or the child is not ordinarily resident in the Federation.⁹⁵ This provision it is submitted, should be relaxed to enable children, not ordinarily resident, to be adopted. It would mean that local parents who are unable to find a child for adoption could adopt refugees and other foreign children. This however, is not purely an adoption mat-

⁸⁸ *Jainah bte Semah v Mansor bin Iman Mat* (1951) MLJ 62

⁸⁹ Adoption Act, 1952, Act 257, (Revised 1981), Section 9

⁹⁰ The Registration of Adoptions Act, 1952, Act 253 (Revised 1981)

⁹¹ Adoption Act, 1952, Act 257, Section 4(1)(a) & (b)

⁹² *Ibid.*, Section 4(1)(c)

⁹³ P. Vohrah, "Legal rights of a Child", paper presented at 5th Malaysia Law Conference, Kuala Lumpur, p 18

⁹⁴ Adoption Act, 1952, Section 4(2)

⁹⁵ *Ibid.*, Section 4(3)

ter as it is tied up with the government's Immigration policy of not allowing non-Malaysians into the country. A final requirement imposed by Section 4 is that the child should have been in the care of the adopter for a period of three months before the adoption order is made and that the Social Welfare Department of the State should have been informed of the intention to apply for an adoption order.⁹⁶ This provision will involve a Social Welfare Officer in the proceedings. More often than not, the Welfare Officer is appointed the guardian *ad litem* who has the duty to investigate all the circumstance of the child and the adopter in order to safeguard the interests of the child.⁹⁷

The Act requires the consents of specified persons and also provides for the circumstances in which the consent may be dispensed with.⁹⁸ In relation to this, it has been suggested that the present practice of a mother giving consent to adoption immediately after the birth of her child, should be prohibited. It is felt that a woman who has not yet recovered from her confinement may not be fully responsible for her actions. This is particularly so where the mother is unmarried and under pressure from her parents or others.⁹⁹

Another amendment that should be made is in relation to the birth certificate of the adopted child, which is, in fact, an extract from the Adopted Children Register and which clearly reveals the fact of adoption. The desire to avoid this has led would-be adopters to come to illegal arrangements with the prospective parents of an expected child whereby the birth of the child is falsely registered as that of the child of the "adopters". It is felt that this kind of arrangement is far more likely to lead to trafficking in children which may go undetected. To avoid this therefore, it is suggested that the copy of the extract from the Adopted Children Register should not reveal the fact that the child has been adopted.¹⁰⁰

The law that has been discussed so far is that obtaining in Peninsular Malaysia. Sabah has an identical ordinance, the Adoption Ordinance, 1960. The Ordinance in Sarawak is of particular interest because it specifically provides that all Muslims and all Chinese who adopt children must register the adoption under the Ordinance.¹⁰¹ Failure to register not only renders the adoption void¹⁰² but also carries a penalty of six months imprisonment or a fine of one thousand dollars.¹⁰³

⁹⁶*Ibid.*, Section 4(4), added by Ordinance 18 of 1956

⁹⁷*Ibid.*, Section 13(1)

⁹⁸*Ibid.*, Section 5

⁹⁹p Vohrah, "Legal Rights of a Child", *op. cit.*, p. 18

¹⁰⁰*Ibid.*, p. 18.

¹⁰¹Adoption Ordinance, Cap 91, Laws of Sarawak, Section 6(1)

¹⁰²*Ibid.*, Section 6(3)

¹⁰³*Ibid.*, Section 6(2)

This provision will have the effect of discouraging Muslims from carrying out *de facto* adoptions. Whether it will encourage them to register adoptions is uncertain because the Ordinance provides that the effect of the adoption is to place the child in the same relation to the adopting parent as a child born in wedlock, with all the rights and privileges of a legitimate child in respect of the obligations and estate of the adopting parents. Furthermore the child shall have no claim to inheritances of the property of his natural parents.¹⁰⁴ These provisions conflict with Muslim law and the legislators were aware of this fact because S. 3(5) of the Ordinance provides that before registering an adoption by a Muslim, the District Officer is to inform him "in clear and unmistakable terms that the adoption of children on such a basis is contrary to the Hukum Shara".

With regard to adoptions by Chinese, there is nothing in the Ordinance that requires the adoption to conform to Chinese customary law. The only mention of custom is made in the proviso to Section 6 which provides that where an adoption has not been registered a Magistrate may order the District Officer to effect a registration even if one or both adopting parents is dead, if he is satisfied that the adoption has been in accordance with the custom of the race to which the adopting parents belonged. The Federal Court in the case of *Tan Kui Lim v. Lai Sin Fah*¹⁰⁵ has stretched the interpretation of the proviso and has made compliance with Chinese custom mandatory. On the facts of the case, it is understandable that the court would want to invalidate the adoption by a grandmother of her natural grandson who, in fact, remains with his parents, thus giving rise to the presumption that the aim of the adoption was merely to deprive the only son of the adopter from inheriting the entire million-dollar estate. It is regrettable however that in trying to do justice in this particular case the court has had to lay down a rule which cannot be supported.

Labour

Child labour is regulated by the Children and Young Persons (Employment) Act, 1966. The child, that is, a person below fourteen years of age, may be employed in any (a) undertaking carried on by his family involving light work suitable to his capacity; (b) public entertainment; (c) employment requiring him to perform work approved by the Federal or any state government and carried on in any school, training institution or training vessel; (d) employment as an apprentice.¹⁰⁶

The young person, that is a person between the ages of fourteen and sixteen years may be employed (a) in any employment suitable to his capacity whether the undertaking is run by his family or not, (b) as a domestic servant, (c) in any office, shop, godown, factory, workshop, store, board-

¹⁰⁴*Ibid.*, Section 2(2) & (3)

¹⁰⁵[1980] 1 MLJ 222

¹⁰⁶The Children and Young Persons (Employment) Act, 1966 Section 2(2).

ding house, theatre, cinema, club or association, (d) in an industrial undertaking suitable to his capacity, (e) on any vessel under the personal charge of his parent or guardian.¹⁰⁷ However, no young girl may be employed in a hotel, bar, restaurant, boarding house or club unless the establishment is under the management or control of her parent or guardian. As an exception, she may be employed in a club with the approval of the Director-General of Labour.¹⁰⁸ These provisions do not prohibit the employment of children of any age. They merely impose restrictions as to the kind of work they may do.

The Act also specifies the conditions of work and working time. In general, a child may not be required to work for more than six hours in a day, may not work after 8 p.m. or before 7 a.m., must have been free for at least fourteen consecutive hours between one day's work and the next and must not work for more than three consecutive hours without a half-hour break.¹⁰⁹ A young person may not be required to work more than seven hours in a day, or eight in the case of an apprentice, may not work after 8 p.m. or before 6 a.m., must have been free for at least twelve consecutive hours between one day's work and the next, and must not work for more than four consecutive hours without a half-hour break.¹¹⁰ These restrictions, do not apply where the young person is engaged in an agricultural undertaking or in public entertainment or on any vessel.¹¹¹ Neither a child nor a young person may be allowed to work for more than six consecutive days in any period of seven¹¹² and will not be allowed to take part in any public entertainment without the issue of a licence which will be subject to conditions and which will not be issued if there is any danger to the life, limb, health or morals of the youngster.¹¹³

There is no provision for a minimum wage for child labour. The Children and Young Persons (Employment) Act, 1966, however empowers the Minister to prescribe minimum wages for children or young persons in any class of work in any area. The Order is to be made only after an Inquiry has been held. An inquiry will only be held if representation has been made to the Minister and only if the Minister considers it expedient to direct the inquiry.¹¹⁴ These conditions make the right to seek and obtain a minimum wage an illusory one. As a result employers are often able to exploit child workers with impunity.

¹⁰⁷*Ibid.*, Section 2(3)

¹⁰⁸*Ibid.*, Proviso to Section 2(3)

¹⁰⁹*Ibid.*, Section 5(1)

¹¹⁰*Ibid.*, Section 6(1)

¹¹¹*Ibid.*, Section 6(2)

¹¹²*Ibid.*, Section 4

¹¹³*Ibid.*, Section 7

¹¹⁴*Ibid.*, Section 8

Our examination of the law regulating child labour can be likened to the case of the two persons examining the contents of a vessel — the pessimist laments that it is half empty, the optimist rejoices that it is half-full. The question that remains for us is: are half-measures good enough for our children?

Special Aspects of Protection of Children

The child's vulnerability necessitates special provisions to protect him, sometimes even from those who have the responsibility of looking after him. The law in force in Peninsular Malaysia has been the Children and Young Persons Ordinance, 1947. This law was only recently revised.¹¹⁵ Unfortunately it was not extended to Sabah and Sarawak and, therefore the revised Act, will apply to Peninsular Malaysia only. The Act is intended for the protection and welfare of children and young persons. Children are persons below fourteen years of age and young persons are those over fourteen but under eighteen years of age.¹¹⁶ Section 3 of the Act makes it an offence for anyone having the custody, charge or care of a child or young person, to wilfully assault, ill-treat, neglect, abandon or expose such child or young person in such a manner as to cause it unnecessary suffering or injury to his health. The number of prosecutions under this provision however, is very small. More often than not, a child who has been neglected or treated cruelly will be taken to a place of safety and detained for his protection.¹¹⁷ These places of safety are also available for children who seek refuge or protection and for those who are destitute.¹¹⁸

The Act also makes trafficking in children an offence.¹¹⁹ The maximum punishment of two years imprisonment however does not seem sufficient for so serious an offence which, lately, has been on the increase. The bringing of a child into West Malaysia under false pretences is also an offence with the same penalty.¹²⁰

The whole of Part 3 of the Act deals with "transferred children" meaning females under the age of fourteen years who are not living with their natural or adoptive parents or with certain specified persons or in certain institutions.¹²¹ The notion of the transferred child relates to or is derived from the old practice of "mui tsai" which was outlawed in the early 1930s and which can safely be said to be totally irrelevant to the social

¹¹⁵Children and Young Persons Act 1947, Act 232, Revised 1980

¹¹⁶*Ibid.*, Section 2

¹¹⁷*Ibid.*, Section 5

¹¹⁸*Ibid.*, Section 6

¹¹⁹*Ibid.*, Section 22

¹²⁰*Ibid.*, Section 23

¹²¹*Ibid.*, Section 8(1)

conditions today.¹²² It is inexplicable why these provisions were re-enacted.

Another provision that was re-enacted is Section 4 which makes it an offence to procure or allow a child to beg. This provision was considered necessary as begging in the streets is not uncommon. The question one might well ask is: are penal sanctions the solution to the beggar problem?

The duties relating to the Welfare and Protection of Children under this Act are imposed on the "Protector". The Protector is either the Director-General of Social Welfare, any Director of Social Welfare in West Malaysia, any State Director or any other social welfare officer whose appointment is Gazetted.¹²³ The Protector is given very wide powers to enable him to carry out his duties effectively.

In Malaysia, the sole body concerned with the protection of children is the Ministry of Social Welfare. There are no organisations set up specially for this purpose and it has been suggested that a society similar to the British National Society for the Prevention of Cruelty to Children should be set up to supplement and complement the services of the Ministry.¹²⁴

Children are protected against Prostitution by the Women and Girls Protection Act, 1973, (Act 106). Again there is a Protector entrusted with certain duties and the power to carry out these duties.¹²⁵ Where the Protector has reasonable cause to believe that a female under the age of twenty-one years is being trained or used for the purpose of prostitution or any immoral purpose, or lives or frequents any brothel, or is habitually in the company or under the control of brothel-keepers or procurers, he may remove such person to a place of refuge and detain her there until she is brought before a Magistrate within twenty-four hours.¹²⁶ The Magistrate may order her to be detained in the place of refuge until an enquiry into the circumstances of her case has been completed.¹²⁷ Under Section 8(1), female persons under the age of twenty-one years who have been ill-treated or neglected and exposed to moral danger and are therefore in need of protection, may be removed to a place of refuge. Girls under the age of eighteen years may also be placed there if their lawful guardians request in writing, their detention on the ground that they cannot be controlled and as a result are being exposed to moral danger.¹²⁸ Furthermore, any female person may apply in writing and be received into a place of refuge if the

¹²²p. Vohrah, "Legal Rights of a child", *op cit.*, p. 10.

¹²³Children and Young Persons Act, 1947, Revised 1980, Section 2(1)

¹²⁴Kwang Ah Leh, "Ill-treatment of Children", A Project Paper submitted to the Law Faculty, University of Malaya, 1976, p 89

¹²⁵The definition of Protector in this Act is similar to that in the Children and Young Persons Act, 1947, Act 232

¹²⁶Women and Girls Protection Act, 1973, Act 106, Section 7(1)

¹²⁷*Ibid.*, Section 7(2)

¹²⁸*Ibid.*, Section 8(2)

Protector is satisfied that she is in urgent need of protection.¹²⁹ The effect of these provisions is that there are four categories of women and girls who may be detained in a place of refuge, each category having been exposed to moral danger to a different degree. There are however, no separate places of refuge for each category. The result therefore is that in any one place of refuge there will be women and girls from any one or all of the four categories. This free mixing does have an adverse effect on the younger and more impressionable girls, and even on older ones who are convinced by the "success-stories" of their fellow inmates.¹³⁰ The main purpose of their detention therefore, is defeated.

Section 16(1)(1) of the Act makes it an offence to have carnal knowledge with any female person below the age of sixteen years except by way of marriage. A further protection for girls is provided in the Penal Code in the form of a minimum age for lawful sexual intercourse. Where a girl is under fourteen years of age, sexual intercourse with her amounts to rape even if she consented to intercourse.¹³¹

The Penal Code has several sections aimed at protecting the young. One such section is Section 293 which makes it an offence to sell, hire, distribute, exhibit or circulate to any person under the age of twenty years, any obscene object. Another is Section 361 which makes kidnapping from a lawful guardian an offence. The essence of the offence is the taking or enticing of a minor (under fourteen years for males and sixteen years for females) out of the keeping of the lawful guardian. This section however will not apply to a person who in good faith believes himself to be the father of an illegitimate child or who believes himself to be entitled to the lawful custody of the child, unless the act was committed for an immoral or unlawful purpose.

Conclusion

Our review of some of the laws affecting children, albeit brief, has revealed some important facts about the status of the Malaysian child. In the light of the Declaration of the Rights of the Child, it is heartening to note that some of our laws guarantee the child some of the rights that have been recommended and accepted by the International community. Other laws however fall short of the desired Ideals. One example is the law relating to the employment of children. Its reform however may not be imminent-ly possible because of the various social and economic implications of prohibiting child labour.

With regard to the laws that protect the child from physical and moral abuse, there exist several provisions some of which are hardly used. All of them should be reviewed and brought under one single law which would

¹²⁹ *Ibid.*, Section 9(1)

¹³⁰ This information resulted from a discussion with officials of a place of refuge, all of whom feel that separate places should be provided

¹³¹ Penal Code, Section 375

then be easier to enforce as it would eliminate uncertainties as to which provision to resort to in a particular situation

A conflict of laws can sometimes occur when a particular group is subject to different laws, as for example Muslims in the case of Custody of Children. To overcome this problem it is suggested that Muslims should always be governed by Muslim Law to the exclusion of any other law.

Personal laws should not be abolished solely for the purpose of achieving uniformity. Most of them have a sound basis and are generally successful in maintaining the well-being of the child and his family. What is required is a better understanding of these laws, particularly on the part of those concerned with the administration of the laws. More often than not, the hardships caused by the supposed application of personal laws is the result of maladministration, misapplication and ignorance, rather than of any inadequacies in the pertinent laws themselves.

In the final analysis it must be remembered that a law by itself, however well drafted, cannot achieve the ideals aimed at unless there are the means, and more importantly, the desire to enforce it. Our goal at all times should be the well-being of our children.

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