CONTRACTS RELATING TO MARRIAGE
PART II*

Part I of this paper dealt with marriage brocage agreements.[1] In this part of the paper, two other aspects of agreements relating to marriage will be considered: agreements in restraint of marriage and agreements made by married persons to marry another person. As pointed out earlier, the common feature of the agreements under study is that they are rendered void under the common law as being opposed to public policy.

AGREEMENTS IN RESTRAINT OF MARRIAGE

An agreement in restraint of marriage is one whereby one party agrees to fetter his freedom to marry. Such a restriction may either be total or partial. An example of an agreement in total restraint will be one where A promises B that he will never marry, whereas an agreement whereby A promises B that he will only marry someone of a particular class or religion will be a partial restraint. Agreements in total restraint of marriage are invalid under English law, though an agreement in partial restraint may be upheld if it is reasonable.[2]

Section 27 of the Contracts Act provides:

> Every agreement in restraint of marriage of any person, other than a minor during his or her minority, is void.

It appears from the reading of section 27, that every restraint, be it total or partial will be void. Before a detailed study is made of the scope of section 27, it is proposed that a brief account of the historical development of the doctrine of restraint of marriage be given.

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[1] [1979]J.M.C.L. 303.

[2] *Cbitty on Contract, General Principles* 1977 (24th ed.), para. 958.

BASIS OF THE DOCTRINE

The true basis of the doctrine of restraint of marriage seems to be unclear. The reason most commonly attributed is that such agreements are against public policy:

> It will not be questioned that marriages of a suitable character, founded on the mutual affection of the parties, and made upon the free choice, are of the greatest importance to the best interests of society, and should be by all proper means promoted and encouraged. The purity of the marriage relation and the happiness of the parties will, to a great extent, depend upon their suitableness the one for the other, and the entire freedom of choice which has led to their union; and upon these, in their turn, in a great degree must depend the successful rearing of their children, and the proper formation and development of their character and principles. Hence, not only should all positive prohibitions be rendered nugatory, but all unjust and improper restrictions upon it should be removed, and all undue influence in determining the choice of the parties be carefully suppressed.[3]

Though similar views have been expressed by other courts, none of them have spelt out the exact aspect of public policy which such agreements offend. The origin of the rule under English law is uncertain. The courts from the earliest cases have based their decisions on the sole ground of public policy: it is against morality and against the interest of society but they have not spelt out just what public or social interests are injured by restraints on marriage. It seems to based on an unarticulated belief that marriages ought to be free and not prohibited by private persons.[4] They have not explored the true basis of the rule in any other light. In fact, it has been suggested that the true basis is not merely one of public policy but an ancient rule of Roman law:

> . . . the objection to the restraint of (marriage), was a mere political regulation applicable to the circumstances of the Roman Empire at

[3] *Maddox v. Maddox* (1854) 11 Gratt (Va.) 804.

[4] It has been said that the reason for the rule invalidating restraints on marriage lies in the universal belief that marriage is the proper way of life and must be encouraged, or in the need for the utmost, freedom of choice in contracting marriage, or because such a policy promotes morality, presumably by removing the temptation to substitute illicit cohabitation for lawful marriage.

> that time and inapplicable to other countries. After the civil war, the depopulation occasioned by it led to habits of celibacy. In the time of Augustus, the Julian law, which went too far, and was corrected by the *Lex Papia Poppoea*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy and for the encouragement of all persons who would contract marriages, it necessarily followed, that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore it became a rule of construction, that these conditions were null.[5]

It appears that this rule of Roman law was adopted by the early English judges of the ecclesiastical courts without considering its desirability. The Common law judges in turn merely resorted to the concept of public policy to account for its adoption. It has since been the basis of the rule.[6]

The basis for the more stringent rule under section 27 of the Contracts Act is unclear. What was the rationale for declaring every restraint, whether total or partial, to be void under section 27. Section 27 of the Contracts Act was again borrowed from section 26 of the Indian Contract Act, which in turn was taken from Dudley Field's Draft Civil Code of the State of New York.[7] Field in his explanatory note to section 836 of the Code dealing with restraint of marriage states that:

> . . . contracts in general restraint of marriage are certainly void . . . Perhaps a contract simply in restraint of remarriage of the wife of one

[5] Per Lord Loughborough in *Stackpole* v. *Beaumont* (1796) 3 Ves. Jr. 89, 30 E.R. 909.

[6] See generally *Annotation*, 122 A.L.R. 8.

[7] *Draft of Civil Code Proposed by Commissioners of Code*, 8 vol. Albary, 1862. There is, however a slight difference in phrasedogy between the Malaysian provision and that of the Indian Contract Act and Field Code. Both the Field Code and the Indian Contract Act provide that 'every contract in restraint of the marriage of any person, other than a minor, is void' (Section 26 of the Indian Contract Act and Clause 836 of the Field Code.) It would appear, however, that when the Indian Contract Act was extended to Malaysia, the drafters had taken into consideration the criticism of Whitley Stokes in his *Commentaries on the Anglo Indian Code* (Stokes, *Anglo Indian Code, Vol. 1*). Of Section 26 of the Indian Contract Act, Stokes had commented that 'as the section is worded, an agreement in restraint of A's marriage at any time would be valid if A were a minor at the date of the agreement. He then suggested that the phrase, '. . . during his or her minority' (at page 563, footnote 4) be added to the section. It would appear that because of this comment, the phrase, '. . . during his or

of the parties was to be valid in analogy to the rule concerning wills but experience has shown that such stipulation led to immorality.[8]

This explanatory note adds little to the uncertainty surrounding the intention of section 27. There is also much doubt as to the reason for the incorporation of the Field Code into the Indian Contract Act and the Malaysian Contracts Act. In fact, an extensive survey of the legislative history of these two sections reveals very little concerning the need for such a rule to be introduced into India and Malaysia. Like most other provisions of the Contracts Act, the drafters had 'merely taken a piece here and a piece there' in drafting the Act. If one considers that agreements in total restraints were generally not prevalent in India or Malaysia or that it was not a common practice of the different communities in these two countries to enter into agreements to restraint another from marrying, it will be clear that section 27 was not intended to overcome any undesirable practice. A detailed study of the section will indicate that the application of the section is not wholly without difficulty.

SCOPE OF SECTION 27

Section 27 as worded renders all agreements in restraint of marriage, whether total or partial void. In fact, under section 27 not only is the term in restraint of marriage becomes void but also the whole agreement is rendered void as well. This is unlike the position under section 28 relating to restraint of trade which merely renders the term in the contract void and not the entire agreement.[9] Will the Malaysian courts then interpret

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her minority' was added to section 27 which was then absent both under the Field's Draft and under section 26 of the Indian Act. Except then for this difference, the Malaysian provision is similar to the Indian Contract Act and to those of the American States where the Field Code is applicable (*North Dakota Century Code* 9–08–07, *Californian Civil Code*, Section 1676, *Oklahoma Statutes*, Title 13–15, section 220).

[8] At page 256.

[9] Section 28 reads "Every agreement by which anyone is restrained from exercising a lawful profession, trade . . . *is to that extent void*, (emphasis added).

section 27 to give it a very strict interpretation or would they interpret the section in a more liberal manner . . .?There has been no reported case on the interpretation of section 27. However, this is no indication that such clauses are not in use. As discussed below, such clauses are commonly inserted in contracts of employment of waitress, bus conductresses, and cinema usherettes. It is also common to find such clauses in scholarship agreements.

There have, however been a number of cases concerning contracts of employments which have been decided by the Industrial Court[10] with reference to section 27 of the Contracts Act.[11] It may be pointed out at this stage that in contracts of employments entered into by women, there is often a term inserted in the contract which provides that the employment will be terminated whenever the female employee marries. The Industrial Court in the cases discussed below considered the validity of such clauses.

In *Shaw Brothers (Penang) Limited* v. *Kesatuan Kebangsaan Pekerja Wayang Gambar dan Taman Hiburan Etc.*,[12] one of the earliest cases to be decided by the Industrial Court, the Court had to decide whether a clause in a contract of employment entered into by a cinema usherette with the company which provided:

> I further agree to terminate my services in the event of my getting married,

was void under the then section 27 of the Contracts (Malay States) Ordinance.[13] The Industrial Court held:

> The condition as to marriage . . . cannot in the view of the Court be said to be in restrint of marriage. There is no prohibition against marriage. In effect it is an undertaking given . . . that in the event of her marriage, she would leave the service of the Company.[14]

[10] The Industrial Court is set up under the Industrial Relations Act.

[11] As to the position of restraint of marriage in employment contracts in the United States, see 52 Am. Jur. 2d., para 174 and the cases cited therein.

[12] Industrial Court Case Number 25 of 1967, Award Number 17/68.

[13] Now Contracts Act.

[14] *Ibid* at page 5.

The Court next considered whether the condition was 'repugnant to the basic right of the individual and inequitable'. The learned President then came to the conclusion that:

> The Court is in agreement with the Counsel for the Company when he intimated that it was essential that usherettes, ticket collectors and sellers should at all times have a trim and neat appearance and that there were disadvantages, *inter alia*, associated with pregnancy and motherhood if married women were employed or if women employees were permitted to continue in service when married.
> The Court is therefore of the view that the condition as to marriage is legitimate in relation to the class of employees affected, and therefore cannot in that sense be described as repugnant to the basic right of the individual.[15]

There are three decisions of the Industrial Court where agreements entered into by bus conductresses which provided that they agree to retire on marriage were considered. In *Syarikat Kenderaan Bersatu Sdn. Bhd.* v. *Transport Workers Union, Federation of Malaya,*[16] the relevant condition of employment read:

> The employee hereby agrees to retire when she gets married.

Tan Sri MacIntyre, the President of the Industrial Court held that:

> We think that the provision of section 27 of our Contracts Ordinance is wide enough to cover a direct or indirect intention to restrain marriage. The marriage retirement clause as such is void in law and therefore unenforceable.[17]

Having held the clause to be void, the President proceeded to hold,

> It is obvious, however, that the intention behind the clause was not to interfere with the right of marriage but to restrict the employment of married women as bus conductresses because of extraordinary

[15] At page 6.

[16] Industrial Court Case Number 29 of 1972, Award Number 50/72.

[17] At page 9.

> problems resulting from pregnancy. The nature of the work involved exposes pregnant women to hazards not conducive to successful pregnancy and is likely to involve frequent absence on medical leave before entitlement to maternity leave. The situation casts upon the employer additional financial burden of employing substitutes in order to maintain the operational efficiency of the service. We are satisfied that in the case of bus conductresses, an agreement to restrict the employment of pregnant women is neither opposed to public policy nor offends against the principles of social justice.[18]

A similar approach was taken by the Industrial Court in *Ipoh Internal Transport Service Company Sdn. Bhd.* v. *Puan Puspaganda and Puan Chew Ah Lek.*[19] The clause in the contract of employment provided that:

> Female employees shall automatically cease to be employed when they marry.

The Court held that such a clause was in restraint of marriage and was void and unenforceable as being against public policy and in contravention of section 27 of the Contracts Ordinance. The Court held:

> Section 27 is . . . wide enough to cover a direct or indirect intention to restrain marriage.[20]

Mr. Abraham, the Chairman said that he disagreed with the finding of the court in *Shaw Brothers* on the interpretation of section 27. He then adopted the reasoning of the learned President in *Syarikat Kenderaan Bersatu* and arrived at the following conclusion:

> After carefully considering the submissions and the evidence aforesaid, the Court has come to the conclusion the hazards are such that it would not be conducive for pregnant women to continue working as bus conductresses. It would be a disadvantage both to the public and to themselves. The Company would be put to additional expense in employing relief and training them. The Court, therefore, finds that

[18] At page 9.

[19] Industrial Court Case Number 43 of 1972, Award Number 54/72.

[20] At page 5.

> the real reasons of the Company in terminating the services . . . were as above and not to restrain marriage.[21]

It is difficult to appreciate the reasoning of the Court in these two cases. Having held the clauses to be void under section 27 of the Contracts Ordinance, the Court after considering the evidence held that the reasons for terminating the employment was justifiable and as such the agreement was neither 'opposed to public policy nor offends against principles of social justice'. If a clause in an agreement is void under the law, it cannot be enforced no matter how reasonable the clause may be. How then did the Court in these two cases give effect to the clauses in question?

In the third case dealing with agreements entered into by bus conductresses, the Industrial Court in *Transport Workers Union* v. *Ipoh Internal Service Company Sdn. Bhd.*,[22] held:

> No woman should feel herself out of place in modern society by remaining unemployed because of performing her biological function of childbirth. The Court, as a Court of good conscience, resents any prejudice persisting against women in the employment-market because of pregnancy. Pregnancy is a natural event and no employer would want a woman to abort pregnancy just to remain in employment. It is time that employers realise that social attitudes have changed today to accept sexual equality in employment as a fact, without unnecessary restrictions imposed on women. Such an attitude as to deny a woman continued employment after pregnancy or chilbirth is no doubt socially 'incorrect' or 'unjust', bordering on sex discrimination.[23]

The Court therefore held that the termination of the employment wrongful and ordered reinstatement.

In *Hotel Merlin (K.L.) Sdn. Bhd.* v. *National Union of Hotel, Bar and Restaurant Workers*,[24] the clause in the contract of employment entered into by female employees which provided.

> . . . in the event of marriage, you shall resign from you post automatically,

[21] At page 9.

[22] Industrial Court Case Number 169 of 1977, Award Number 181/78.

[23] At page 9.

[24] Industrial Court Case Number 21 of 1973, Award Number 48/73.

was considered. The Industrial Court, relying on earlier decisions, and without any reference to section 27 of the Contracts Act held,

> It is clear from the above cases that an employer may be justified in imposing a condition of resignation upon pregnancy in those cases where it would be hazardous for pregnant women to continue working or where the nature of the work would preclude such women. It would be necessary, therefore, to examine each category of female workers.[25]

The Court then held that in certain types of jobs like that performed by waitresses and receptionists the restraint was justifiable.

It is therefore clear from these cases that the attitude of the Industrial Court towards such clauses is not consistent. In *Shaw Brothers* it was held that the clause was not in restraint of marriage. In *Syarikat Kenderaan* and in *Ipoh Internal Transport,* the Court held that though the clauses were void under section 27 of the Contracts Act, they could be enforced if they are justifiable. Finally, in *Transport Workers Union,* the Court held the clause to be void. It is submitted that these conflicting decisions of the Industrial Court is the result of the Courts failure to address itself fully to section 27 of the Contracts Act. The Court appears to have directed its mind to the main issue as to whether the female employees were rightly dismissed under the relevant clauses. Except in *Transport Workers Union,* the Court in the other four cases merely considered whether a married employee was suitable to perform a particular job. The Court did not enter into any detailed legal arguments as to the validity and effects of such clauses. The effect of these decisions is that female employees working as usherettes, bus conductresses, waitresses or receptionists are unsuitable to perform these jobs whilst they are pregnant. The employers could therefore terminate their services if there was such a clause in the contract of employment. Though the Court in the *Hotel Merlin* case did say that

[25] At page 35.

> . . . it is time that a more enlightened view be taken of married women who are working. They form a considerable proportion of labour at present and the benefits of a continuous career should not be denied them upon marriage. Even upon pregnancy, the management should use its discretion in favour of such woment unless there are com pelling reasons why they should not continue to carry on working,[26]

this advice had not been heeded by most employers. In most cases, employers would prefer to terminate the services of the female workers so as to avoid granting them maternity leave or maternity pay.[27] Whether such a practice by the employer is proper and whether it should be discouraged is not within the purview of this paper. This paper only deals with the issue whether such clauses are in restraint of marriage under section 27. The important decision for this purpose is the *Shaw Brothers* case where it was held that such clauses were not in restraint of marriage. This view has been criticised by C.P. Mills in his book on *Industrial Disputes Law in Malaysia:*

> This part of the decision plainly proceeds on a wrong basis, for the Court misled itself by paraphrasing 'restraint' in terms of 'Prohibition': there could hardly be any clearer contractual restraint on marriage than the term of the contract under consideration in this case.[28]

This criticism was approved by the Industrial Court in *Syarikat Kenderaan* and *Ipoh Transport.* It is submitted that if the view of Mills is correct, then it will necessarily lead to certain harsh consequences. If the agreement is held to be in restraint of marriage under section 27 of the Contracts Act, then the entire contract will be void. In other words, the entire contract of employment will be void and therefore the employer may refuse to employ the employee. Being a void contract, the employee may also lose some of the benefits which she may be entitled to under the contract of employment, for example, wages, bonus, accured annual leave,

[26] At page 37.

[27] See provisions relating to maternity leave and maternity pay under the Employment Ordinance 1955. See also views espressed in Award 181/78.

[28] At page 156.

maternity leave, housing etc. Surely such a consequence is most undesirable as it will affect the employee adversely.

Bearing in mind the adverse consequence discussed above, it is submitted that section 27 should be interpreted cautiously, It is the writer's view that the section only applies to agreements which restrain a person from marrying and does not apply to agreements which merely deter a person from marrying. A typical case of a contract in restraint of marriage is one whereby the effect of the agreement is to promote celibacy. Furthermore, an agreement in restraint of marriage also imposes financial liability on the party undertaking not to marry. In *Lowe* v. Peers,[29] the Defendant agreed

> not to marry with any person besides Mrs. C.L.: if I do, I agree to pay the said C.L. £1,000 within three months next after I shall marry anybody else.

In *Baker* v. *White*,[30] a widow promised to pay £100 if she remarried, whereas in *Hartley* v. *Rice*,[31] the plaintiff promised to pay 50 guineas if he married within six months. It is agreements like these which the English courts have held to be in restraint of marriage. On the other hand, a contract which merely deters or discourages someone from marrying and does not impose a penalty but only provides that a particular relationship or arrangement will cease on marriage is not a restraint.[32] The agreement itself does not prohibit the party from marrying. The agreement bestows certain benefits which the party may enjoy on condition she remains unmarried, for example, a promise to pay £100 so long as you remain single, or

[29] (1770) 4 Burr. 225.

[30] (1690) 2 Vern. 215; 23 E.R. 740.

[31] 103 E.R. 683.

[32] The Supreme Court of Western Australia in the case of *Minister for Education* v. *Oxwell* [1966] W.A.R. 39 held that a clause in a Teacher Training Scholarship which provided that the student should not marry during the course of the training was not in restraint of marriage on the ground that it was not unreasonable. The court said " . . . there is nothing against public policy in this, probably the reverse because . . . it would no doubt more often than not be for the benefit of the community that a married woman should be free to devote herself to her ordinary domestic duties and to the bringing up her family rather than she should be offered any particular inducement to engage in full time employment.

to let a house to a person until marriage. Likewise, a contract of employment which provides that one may be employed so long as one remains unmarried is also not in restraint of marriage.[33] In all these examples, though the party is deterred from marrying, no contractual liability arises upon his marriage. He may, therefore elect to terminate the special arrangement without any liability by contracting a marriage. The special arrangement will merely cease to exist, for example the contract of employment will be terminated. Support for this view can be found in the leading commentary on the Indian Contract Act by Cunningham and Shepherd:

> ... When instead of a promise not to marry any person or during a particular period, abstention from marriage constitutes a condition on which some benefit may be enjoyed, it may be doubted whether the section would apply. If A undertakes to pay an annuity to B from a given date provided that she shall not have married or until she shall marry, the effect of the transaction may be to deter B from marrying. But in such a transaction no promise to marry is involved: there is a condition and the section has nothing to say in regard to the validity of conditions.[34]

In the Indian case of *Rao Rani* v. *Gulan Rani,*[35] the Court in interpreting a clause in an agreement which provided that a widow would be disentitled to certain funds on her remarriage held that such a clause was not in restraint of marriage:

> All that was provided was that if a widow elected to re-marry, she would be deprived of her rights given to her by the compromise. In other words, no direct prohibition to re-marry was imposed by the compromise.

It is further submitted that this interpretation is consonant with the tenor of section 27. Section 27 envisages an agreement,

[33] See also views expressed in *American Jurisprudence:* "although there is some authority to the contrary it is generally held that an agreement not to marry which is merely incidental to an otherwise valid and reasonable contract for personal services, does not render the contract illegal and void."

[34] (1915) 11th ed. 141. See also views expressed by Treitel, *The Law of Contract,* 5th Ed. page 328.

[35] A.I.R. 1942 All. 351.

the entire subject matter of which is a restraint on the right to marry or an agreement which has as its true object an intention to restrain a party from marrying. The District Court of California in the case of *Heaps* v. *Toy*[36] held that an agreement between a divorced woman and a married man whereby

> The woman agreed to forego marrying any other person, and to accept employment as a companion to the man, and to maintain a home for him and at which she would remain, that he would purchase a home for her, furnish it and pay taxes and insurance on it, and support her for the remainder of her life and provide in his will for her life-long care,

was an agreement in restraint of marriage. The Court observed that Section 1676 of the Civil Code declares:

> "Every contract in restraint of the marriage of any person, other than a minor, is void." Here under the terms of the agreement as pleaded it was agreed that in consideration of the promises made by defendant to plaintiff she would not marry during the remainder of her life, or at least at any time prior to the termination of the agreement by the death of the defendant; and that 'during the remainder of her life' she would be a companion to defendant. Obviously such an agreement falls squarely within the inhibition of the code section above quoted.

The Court further held that the clause relating to the restraint was not severable:

> It is clearly appears, however, from he allegations of the complaint that such condition was not only made part of the contract itself but was the real basis of the entire agreement. That being so it is not within the power of the courts to disregard it; in other words, courts may not, under the guise of judicial construction, rewrite a contract for the parties.

Therefore section 27 does not cover an agreement which relates to some other subject matter and which merely has a term relating to marriage. A clause in a contract of employment relating to marriage is not a contract of marriage and therefore

[36] 128 P. 2d. 813.

will not fall within the ambit of the section.[37] It is only agreements such as in *Lowe* v. *Peers* or *Baker* v. *White*, that will be covered by section 27. Further support for this contention can be found in the wordings used by the drafters in section 27 as compared to that used in sections 28 and 29. Under sections 28 and 29, agreements which are in restraint of trade or legal proceedings are void only to the extent to which the agreement relates to these two subject matters. Section 27, on the other hand, by providing that the entire agreement to be void envisages that the agreement wholly relates to restraint of marriage. If it was intended that any clause relating to marriage in any agreement should fall within section 27, then like sections 28 and 29, section 27 should have provided that the agreement is void only to the extent that it relates to restraint of marriage. This difference in phraseology suggests that the scope of section 27 was intended to cover only agreements which have as their object the restraint of marriage.[38] In any case, it was only these types of agreements which were properly called contracts in restraint of marriage at the time when the Contracts Act was enacted.

The writer would like to stress that he is not unappreciative of the difficulties caused to female employees in adopting this interpretation. The writer is aware that such clauses in contracts of employment if given validity will be discriminatory against women. It is however, felt that these considerations, crucial as they may be should not influence the interpretation of the section. The validity of such clauses may be challenged on some other grounds like discrimination, victimisation or being against public policy.[39] But these are considerations which are not relevant in the interpretation of section 27. In any case, the interpretation advocated by the writer will save the entire agreement from being rendered absolutely void and thereby will not have the effect of terminating the employment and accrued rights will not be forfeited.

[37] See generally 52 Am. Jur. para. 174.

[38] See the case of *Crowder Jones* v. *Sullivan* (1905) 9 Ontario L. Rep. 27.

[39] See the approach taken by the President of the Industrial Court in *Transport Workers Union*, supra. Furthermore, it may also be challenged under the Sex Discrimination Legislation, if any.

RESTRAINT ON POLYGAMOUS MARRIAGES

As worded, section 27 of the Malaysian Contracts Act also raises a number of other problems, particularly with regards to the different races in Malaysia. One such problem relates to the fact that polygamous marriages are recognised in Malaysia. As seen earlier, the personal laws of the Chinese and the Hindus allows a plurity of wives, whilst the Muslim law allows a man to have up to four wives at any one time. It is, therefore, common for men to have more than one wife, and women as such accept the fact that they will have to share their husbands with any other women he may choose to marry. However, in recent years, with the emancipation of women, there has been much protest and discontent by women over this idea of having to share a man with other women, and it has now become a common practice for couples to enter into an agreement, prior to a marriage and at the insistence of the women to stipulate that the husband will not marry anyone else during the subsistence or continuance of the marriage. Agreements of this nature take a number of different forms: the husband sometimes even delegates to his wife the power to divorce herself from him, if he should marry another woman, or he may agree to pay her a sum of money as maintainence if he marries again. The question then is whether such agreements are valid: are such agreements in restraint of marriage and therefore void under section 27; or are they in any case void under the personal laws of the parties?

Before determining the validity of such agreements under the Contracts Act, it would be pertinent to determine their validity under the personal laws of the parties. Marriage under Muslim law is a civil contract and not a holy sacrament. As in any contract, provisions may be made for its breach and also like any other contract the terms of a marriage contract may, within legal limits be altered to suit individual cases.[40] Prima facie then, it appears that the husband may promise his wife that he will not contract another marriage during the continuance of their own marriage. What then are the wife's remedies if the husband breaches such undertaking? This appears to depends to a large extent on the nature of the

[40] Fyzee, *Outline to Mohamaddan Law*, 4th Ed. (1974), 88.

agreement itself: whether the parties had agreed on any remedies in the event of any breach. If the agreement provides no specific remedy, then it will appear that the wife may apply to the courts to grant her a divorce or she may sue for damages.[41] If, however, the agreement provides that the wife has the right to divorce herself, then such a clause may be enforced and the wife may then choose whether to divorce her husband or not.[42] Though there has been much doubt as to the validity of such a right, it is now established that a Muslim husband may delegate to his wife the right to divorce herself under certain circumstances.[43]

Having then established that such agreements are valid under the personal laws of the Muslims, it is now proposed to test their validity under section 27 of the Contracts Act. Can it then be argued that such agreements are void as being in restraint of marriage? It is the writer's view that such agreements are in restraint of marriage as within section 27 of the Contract Act. Since it is an inherent right of every Muslim man to enter into a polygamous marriage, any restrictions on such a right whereby he is prevented from entering into any further marriage will be in restraint of marriage.[44] Such a restraint is no different from any other restrictions which may be imposed upon a Christian from contracting any marriage at all. In both cases certain individual rights are restrained. It may be argued that this analogy between a Christian man and a Muslim is not tenable on the grounds that in the case of a Christian he is prevented from marriage altogether, whilst in the case of a Muslim he is only prevented from entering into any further marriages. It is only cases like the first that public policy condemns and therefore it is only such cases which are regarded as being in restraint of marriage. Therefore it is argued that in

[41] Tyabji, *Muhammadan Law*, 4th Ed. (1968), (Ed. Tayyibji) sections 31, page 64.

[42] *Mahmram Ali* v. *Ayese Khatun*, (1915) 31 I.C. 562.

[43] Tyabji at pages 64, 154 and 157 and Hinchecliffe, *Islamic Law of Marriage and Divorce in India and Pakistan Since Partition*, Thesis submitted for the Degree of Doctor of Philosophy in the University of London, School of Oriental and African Studies, September 1971, (Unpublished).

[44] This view is also supported by Cunningham and Shepherd: 'A promise by a Hindu or Muslim not to take a second wife would put a restraint on his libercy.' But compare views of *Pollock and Mulla, Indian Contract Act*, 1972 9th Ed. 270.

the case of a Muslim since he is already married and is not prevented from marriage altogether, no question of public policy is involved. It is again the writer's view that these arguments are not wholly tenable. Section 27 quite categorically states that if any agreement is in restraint of marriage, such an agreement would be void. The only question then to be determined under section 27 is whether the agreement is in restraint of marriage: if it is then it will fall within the section. The courts do not have the power to take into consideration questions of public policy in interpreting section 27, they are only permitted to do so when determining whether an agreement falls within the ambit of section 24(e) of the Contracts Act..

Though it is true that in a number of Indian cases[45] the Indian courts have said that such agreements are not in restraint of marriage within section 26 of the Indian Contract Act, it is respectfully submitted that these cases are wrongly decided. A close study of these cases reveals that the courts in those cases did not consider these agreements in any detail vis-a-vis section 26. In most of these cases their attention was entirely focussed as to their validity under Muslim law: whether a Muslim husband can enter into such agreements. Section 26 was not dealt with in any detail at all. Furthermore, the Indian courts in these cases have given no reasons for holding such agreements not to fall within section 26. In fact, it is not only the Courts but also the writers on the Indian Contract Act who have not paid much heed to this particular problem: the validity of such agreements under the Indian Contract Act is not dealt with in any of the leading textbooks and commentaries on the Indian Contract Act.[46] The only discussion is in books on Mohammad Law and here again the emphasis is from the view point of Muslim law rather than of the Contract Act.[47]

However it may be interesting to note that in the Burmese case of *Nga Po Gyi* v. *Mi On*,[48] Shaw C.J. stated:

[45] See *Khalilall Rahaman* v. *Marian* (1919) 59 I.C. 804.

[46] Though some mention of it is made in Pollock and Mulla.

[47] But see Tyabji, 4th Ed. section 31, at page 63.

[48] 15 Indian Cases, 915.

> Pollock observes that a contract by a Hindu or a Mohammaden not to take a second wife would seem to be within the section, although such a result was probably never contemplated by the Legislature . . .[49]

Though the case was decided on some other grounds. Shaw C.J. did observe that

> the provision not to take a second wife may have been illegal as being in contravention of section 26.[50]

REMARRIAGES

It is a recognised rule under the common law that the doctrine of restraint of marriages does not apply to second marriages of women,[51] though there is some doubt as to whether such an exception would equally apply to the second marriage of men.[52] Here again there appears to be no logical reason for recognising this exception, though the better opinion appears to be based on the fact that the Church had generally looked upon second marriages with disfavour. It may also be that the courts themselves feel that it is their duty to protect the interest of a deceased from fortune hunters who may wish to marry a widow for the wealth left by her late husband: after all it is argued that the

> donor does not ordinarily impose the restraint out of caprice, but for the purpose of providing support while it is needed, or of protecting a wealthy and credulous woman from the designs of fortune hunters, or of safeguarding the interests of the children of her former marriage.[53]

It will also seem that the courts in recognising this exception have taken into account a different consideration of public policy to that when considering restraints of first marriages: they no longer consider the interest of society in the

[49] *Ibid* at page 916.

[50] At page 917.

[51] See *Baker* v. *White*, supra. See also *Annotation*, 122 American Law Reports, 127.

[52] See *Restraint of Marriage*, 52 Am. Jur. 2d. 167, 176 and also 122 A.L.R. 33.

[53] 122 A.L.R. 33.

perpetuation of the race and the tendency which a restraint may have in promoting unlawful ones but view it from the point of protecting the interests of the deceased. This inconsistency merely indicates that the Courts themselves are uncertain as to the true basis of the doctrine generally.

The particular question of interest to us at this stage is whether second marriages would also fall within the ambit of section 27 of the Contracts Act. Though there are some indications in certain Indian cases[54] to the effect that second marriages do not fall within section 26 of the Indian Contract Act, it is submitted that this view is erroneous. Section 27 of the Malaysian Contract Act is wide enough to cover all categories of restraints, even second marriages: there is no room for a special exception to be drawn in favour of second marriages. To do this will be reading into the section words which are not there. The Indians Courts in attempting to draw such an exception appear to be influenced by the English common law. The position with regard to the doctrine under English common law, as seen earlier, is quite different to that provided by the Contracts Act. In fact, it will appear that Field himself expressly intended that second marriages should fall within the ambit of the section. In his Explanatory Note he points out that the experience of the exception under the common law in favour or remarriages 'has shown that such stipulations lead to immorality.'[55] It was because of this that he framed his section wide enough to cover all cases of restraint of marriages. In fact, it has been suggested by some that no such exception exists even under the common law: if such a restraint is upheld, it is not because the party restrained has sometime been previously married, but because the restraint is, under the circumstances deemed to have been imposed for a legitimate purpose and therefore held enforceable.[56] Since there is no room for the test of reasonableness to be applied under section 27 of the Contracts Act, such an exception cannot be recognised even on such a pretext. The American Courts in the

[54] *Latafatunnissa v. Began* A.I.R. 1932 Qudh 108. See also *Berry v. Cooley* 109 P. 2d. 1081.

[55] See footnote 8.

[56] 122 A.L.R. 128.

various States where the Field Code is applicable have also held that second marriages are also covered by the section. As Justice Knight said in the Californian case of *Heaps* v. *Toy*,[57]

> The said section in broad terms is made to apply to 'the marriage of *any person*, other than a minor'. (Italics ours.) If the Legislature had intended to exempt also from operation divorcees and widows, it doubtless would have inserted therein qualifying language to that effect.[58]

Similarly in the Burmese case of *U Ga Zan* v. *Hari Pru*,[59] Hartnoll Off. C.J., observed:

> Respondent's Counsel argues that (section 26 of the Indian Contract Act) should not be held to apply to a person married already. I am unable to agree. When it was enacted, the legislature knew that polygamy was practised by certain races in India, and yet the section is perfectly general in its terms. There is nothing in it to restrain its operation to the case of first marriages only.[60]

WAKF[61]

Wakf is one of the most common form that charity takes amongst the Muslims. In making a wakf, a wakif[62] may impose any condition on the beneficiary as he deems fit. One of the conditions which is normally imposed by a wakif is that the beneficiary should not marry to derive any benefit under the wakf and should he marry, the benefit would be forfeited. Much dispute has arisen in India and in Malaysia as to the validity of such conditions. It has been argued that such conditions are void under the Contracts Act. In fact the Indian Courts have been divided as to its validity under section 26 of the Indian Contract Act: in certain cases the Indian Courts have

[57] 128 P. 2d. 813.

[58] *Ibid.* at page 815.

[59] 24 Indian Cases 777.

[60] *Ibid.*

[61] A permanent dedication by a Muslim of any property for charity or for religious objects or purposes, or for the public utility. It is usually made for religious motives.

[62] The person who makes the wakf.

held that such conditions would fall within the relevant section. The same doubt appears to prevail in Malaysia, though the Malaysian Courts have not had the opportunity to pronounce any judgement on its validity. It is, however, submitted that the relevant section of the Malaysian Contracts Act has no application in determining the validity of any condition in a wakf. Basically, a wakf is not an agreement: though the precise nature of a wakf has no counterpart under English law, it resembles more a testamentary disposition. In any case it is not an agreement. Since the Contracts Act only covers agreements, a wakf would not fall within the Act and therefore section 27 has no application.

B. PROMISES OF MARRIAGE BY MARRIED PERSONS

Promises made by married persons to marry another was against public policy under the common law and were therefore unenforceable. Such promises were not enforceable even if they were made conditional upon the death of the promisor's spouse or on a divorce being granted.[63] In *Wilson* v. *Carnley*, Farewell L.J. said that such contracts were

> not only inconsistent with the affection which ough to subsist between married persons, but is calculated to act as a direct inducement to immorality.[64]

Phillmore J. in *Spiers* v. *Hunt* spelt out the dangers of such promises as follows:

> The tendency of such a contract is to make the husband in thought, if not in deed, unfaithful to his wife. In certain cases it might even lead to crime. Its very probable result is sexual immorality.[65]

However, the House of Lords in *Fender* v. *St. John-Mildway*[66] pointed out that these reasons were inapplicable in

[63] See cases like *Spiers* v. *Hunt* [1908]1 K.B. 720; *Skipp* v. *Kelly* (1926) 42 T.L.R. 258 and *Preost* v. *Wood* (1905) 21.T.L.R. 684.

[64] [1908]1 K.B. 729 at page 740.

[65] [1908]1 K.B. 720 at page 724.

[66] [1938]A.C. 1.

cases where the promise to marry was made after a decree *nisi* had been granted but before it was made absolute.

The stringent rule of the common law was also not strictly applied in cases where the promisee was not aware that the promisor was married at the time of the promise was made. In such cases, the promisee could maintain an action for damages for breach of promise of marriage. This was considered to be an exception to the rule that an illegal contract was unenforceable. In the Singapore case of *Arokiasamy* v. *Sundram*,[67] the High Court of Singapore applied this rule and allowed the plaintiff to recover damages as she did not know that the defendant was married, having been told that he was a widower. Terrell C.J. observed:

> Although it has been held to be contrary to public policy to enforce a promise to marry when the plaintiff knew that the defendant was married already, no such question arises when the plaintiff did not know that the defendant was married, *a fortiori* a defendant who is married cannot escape the consequences of breach of promise when he has deceived the plaintiff into thinking that he was not married.[68]

The Malaysian Courts have applied the rule of the common law with caution in cases where the personal laws of the parties involved allowed polygamous marriages. As Justice Sharma J. correctly pointed out in the Malacca case of *Nafsiah* v. *Abdul Majid (No. 2)*:[69]

> My attention was drawn to a passage in *Chitty on Contracts* (21st Ed. Vol. 1 s.908) and it was argued upon the Court that because the plaintiff knew that the defendant was already married, even if the defendant has made any promise to marry the plaintiff, such a promise or agreement in such circumstances was void ab initio. This might very well be true of a society in which marriage is a monogamous institution. The parties in the present suit, however, are governed by Muslim law and the defendant is under his own personal law entitled to more than one wife and I consequently hold that such an argument

[67] [1938] M.L.J. Rep. 4. See also *Wild* v. *Harris* [1843–60] All E.R. Rep. 413; *Millward* v. *Littlewood* 155 E.R. 339.

[68] At page 5.

[69] [1969] 2 M.L.J. 175.

> does not apply to the conditions which prevail in this country and more particularly to males professing the Muslim faith.[70]

This approach taken by the Court is laudable as it takes into recognition the local practices and customs of the various communities in Malaysia. Though English law was applicable at the time the decision was made, the Court adapted the common law rules to suit local conditions. The effect of this decision is that promises made by married men who are Muslims, Chinese or Hindus to marry another will be enforced by the local Courts. However, where only monogamous marriages are recognised by certain communities in Malaysia, the common law position will be applicable.[71]

In conclusion, it should be pointed out that with the abolition of the right to sue for breach of promise of marriage by the Law Reform (Miscellaneous Provisions) Act 1970 in England, the cases discussed above are 'strictly speaking obsolete'.[72] Therefore promises made by married persons to marry another under English law are not enforceable now, not for reasons of public policy but because of the abolition of the right to sue for breach of promise of marrigage generally. Such an action, however is still maintable under Malaysian law.

C. RECOVERY OF MONEY PAID

Though it is a well established rule that money paid under an illegal contract cannot be recovered back, recovery of money paid under a marriage brocage agreement has been allowed. In *Herman* v. *Charlesworth*,[73] the Court of Appeal held that the plaintiff was entitled to recover the sum she had paid to the broker, even though the broker had made several introductions to the plaintiff. The Court of Appeal based its decision on a number of grounds under which both equity and common law will grant relief even under an illegal contract. The Court, having earlier decided that marriage brocage agreements were

[70] At page 176.

[71] For example Ceylonese Hindus or Christians.

[72] See Treitel, 5th Ed. 326.

[73] [1906]2 K.B. 123.

contrary to public policy and thus unenforceable, was concerned in discouraging such practices. The argument that the defendant had part performed the contract and therefore the plaintiff was disentitled from recovery was rejected by the Court.

> . . . equity reserves to itself the right to intervene even when something has been done in part performance of the contract, or even when the marriage has taken place. That the Courts took a special view of this class of contracts appears from many decisions.[74]

Mathew L.J. observed:

> The rule of law governing such a case would not exist if there were such an exception to it, because all that would be necessary to establish such a contract as the one in this case would be to bring about introductions to one or two persons, or even to write a letter, or do some other trifling act in order that the defendant might set up a part performance on his part, to entitle him to say that he had earned the money under the contract and made the rule of law inapplicable to the case. It is impossible to suppose that the rule of law could be frustrated in such a manner.[75]

The decision in *Herman* v. *Charlesworth* can be viewed as an exception to the general rule of non-recovery under an illegal contract, but it may be reconciled with the broad principle enunciated by Lord Eldon in the *Vauxhall Bridge Co.* v. *The Earl of Spencer:*

> It will not be an obstacle to the plaintiffs that they will not come with clean hands, for it is settled, that if a transaction be objectionable on ground of public policy, the parties to it may be relieved; the relief not being given for their sake, but for the sake of the public.[76]

The American Courts too have allowed recovery even in cases where the broker had part performed the contract. In such cases, as Professor G. Palmer points out,

[74] Per Collins M.R. at page 133.

[75] At page 136.

[76] (1821) Jac. 64, 67; 37 E.R. 774; see generally Goff and Jones, *The Law of Restitution.*

> . . . restitution will be ordered in cases in which the denial of relief is in conflict with good policy because it serves to mark out the bounds within which a person can profit through illegal activity without civil liability.[77]

Restitution of the money was ordered in the American cases because

> to decide otherwise, the court thought, would be to establish the rules by which the defendant and others of the same could ply their trade and receive themselves in the fruits of their illagel transactions.[78]

The Indian Courts, however have taken a different approach towards the question of recovery of money paid under a marriage brocage agreement. In the case of *Srivivasa Ayyar* v. *Sesha Ayyar,*[79] the Madras Court, applying English cases of *Taylor* v. *Bowery,*[80] *Kearley* v. *Thompson*[81] and *Barclay* v. *Pearson*[82] concluded that if the agreement or a substantial part of it had not been performed money paid was recoverable. The Court, did not regard recovery of money under marriage brocage agreements to be a special class of contracts whereby recovery was permissible. In fact, even though the case was decided in 1917, no reference to the decision of the Court of Appeal in *Herman* v. *Charlesworth* was made by the Court.

The Court in *Srivivasa Ayyar* also held that Section 65 of the Indian Contract Act was inapplicable. Bakewell J. held:

> The words discovered to be void in section 65 of the Contract Act are more apt to describe an agreement which was void ab initio but not then known by the parties to be so, than an agreement of which the illigality must be taken to have been always known to them.[83]

[77] Palmer, *Law of Restitution,* 1978, Volume II, Section 8.4 at page 193.

[78] Supra at page 194.

[79] 1918 I.L.R. 41 Mad. 197.

[80] (1876) 1 Q.B.D. 291

[81] (1890) 24 Q.B.D. 742.

[82] (1893) 2 Ch. 154.

[83] 1918 I.L.R. 41 Mad 197, 204.

The decision of *Srivivasa Ayyar's* case on the effect of Section 66 upon marriage brocage contracts has dissented from in the Selangor High Court decision of *Khem Singh* v. *Anokh Singh*.[84] The limitation read by Bakewell J. on the operation of Section 66 upon marriage brocage contracts was dissented from where a contract is found to be void by reason of some fact not known to the parties at the date of the contract, but subsequently discovered was rejected by Elphinstone C.J. in *Khem Singh*. The Chief Justice held:

> With the greatest respect of the Indian Courts I feel unable to adopt that view. The words 'when an agreement is discovered to be void' are general in terms. The section is silent as to when or by whom, or for what reason, the agreement is to be discovered to be void. In my opinion the words 'discovered to be void' mean no more than 'if found to be void'. In the course of this the suit Court has found the agreement sued upon to be void. In this sense the agreement has been discovered to be void, and section 65 seems to be exactly applicable.[85]

In *Khem Singh* the section was held to be "exactly applicable" for in the course of the suit the Court had found the agreement sued upon to be void. The High Court preferred the approach of the Privy Council in the case of *Harnath Kaur* v. *Indar Singh*[86] which though not a case on marriage brocage contract had interpreted the scope of section 66 in the broad sense indicated by Elphinstone C.J. Applying the section the Court found that the sums of $100.00, $56.00 and $59.00 which were paid to the defendant as commission were advantages received by the defendant which he is bound to restore so that the plaintiff was entitled to judgment for these sums. The defendant's counterclaims for balance of commission, loss of wages, expenses incurred and certain sums remitted to him to

[84] [1933] M.L.J. 228.
[85] At page 233.
[86] A.I.R. 1922 P.C. 403.

pay to another in India was dismissed on the ground of illegality and that the plaintiff did not receive an 'advantage' within the meaning of section 65 of the then Contract Enactment. This holding is in line with the decision of *Herman* v. *Charlesworth.*

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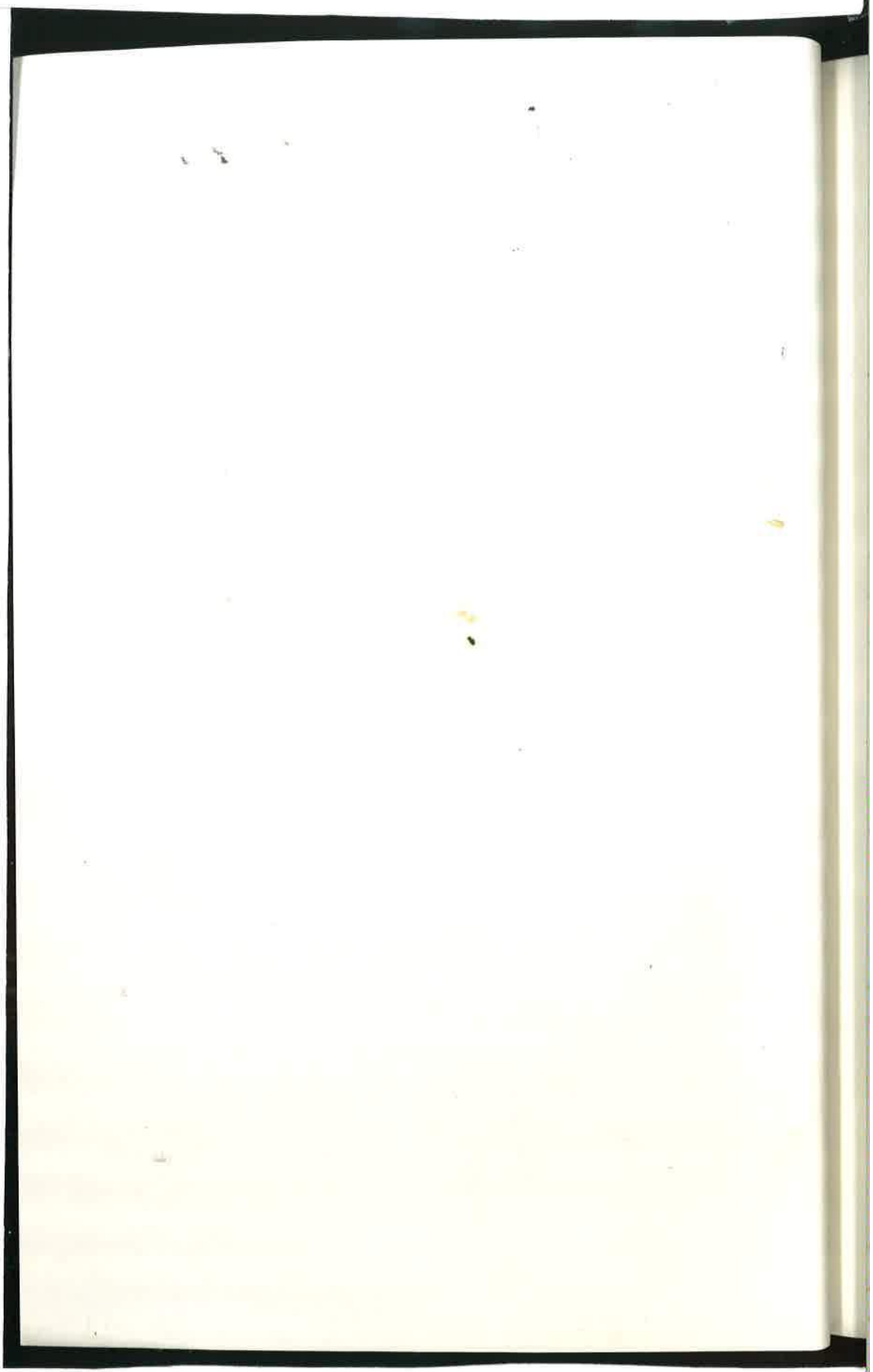

DEFINING THE WELFARE OF THE CHILD IN CONTESTED CUSTODY CASES UNDER MALAYSIAN LAW*

It is commonplace that the standard for determining custody decisions in most jurisdictions is that of "the welfare of the child" or "the best interests of the child." But too often it seems that welfare as a concept is an empty vessel into which the judge pours, however unconsciously, his own interpretations, prejudices, and personal experiences. Despite attempts to define welfare the concept remains elusive, and dissatisfaction with the legal standard remains a perennial problem. Efforts in providing content to the concept have recently been concentrated on interdisciplinary collaboration between child psychologists and lawyers. The purpose of this article is to consider whether such an approach could aid the Malaysian courts reaching decisions in custody cases, and the extent to which the courts already interpret welfare in line with the precepts laid down by the psychologists.

The Guardianship of Infants Act 1961 lays down the standard for determining custody cases in Peninsular Malaysia. Section 11 requires that the Court or Judge exercising powers to determine custody:

> "shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be."

Sabah law contains an idential provision, and the law of both jurisdictions will be discussed as Malaysian law.[1] Singapore[1a]

*I am grateful to Professor Ahmad Ibrahim, Dean of the Faculty of Law University of Malaya for writing an addendum to this article (see page 61). The addendum deals with a number of decisions in the Syariah Courts in Malaysia. See also his article "Custody of Muslim Infants" in [1977] JMCL 19.

[1] North Borneo Guardianship of Infants Ordinance, (Cap. 54).

[1a] The Guardianship of Infants Act, (Cap. 22 of the Revised Edition, 1970).