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CHILD MARRIAGE IN MALAYSIA: COMPARATIVE STUDY OF LEGAL PROVISIONS APPLICABLE TO MUSLIM AND NON-MUSLIM CHILDREN

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ABSTRACT

This is a preliminary study conducted on the law of marriage involving children in Malaysia. This paper aims to explore the issue of child marriages in Malaysia by undertaking a comparative study of the legal provisions of child marriages applicable to Muslim and non-Muslim children. This study will include the relevant Malaysian legal provisions and the states enactments, which regulate child marriages. Comparisons will be drawn in terms of, inter alia: the minimum age to marry in Malaysia for Muslim and non-Muslim children, the legality of child marriages in Malaysia, the effect of international conventions on domestic laws governing marriages of children, the non-registration of customary marriage involving children, and the unique plural legal system of Malaysia which recognises both the civil and criminal jurisdiction of the Civil Courts and the jurisdiction of the Sharia court (under the Islamic law) in each state. At the end of this paper, a comparative description of the legal provision governing the marriage of Muslim and non-Muslim children in Malaysia will be produced.

Keywords : child marriage, minimum age to marry, legality

INTRODUCTION

This study aims to explore the issue of child marriage in Malaysia from a legal perspective, undertaking a comparative study on various legal provisions which regulates marriages involving persons under the age of eighteen years old. In Malaysia, marriages are generally regulated by written laws, however, in certain circumstances, there are some marriages, which are still governed under the unwritten customary law. The legal system in Malaysia, which is pluralistic in nature, recognises the jurisdiction of the common law-based civil court that administers civil and criminal laws, as well as the jurisdiction of the Sharia court in each state that administers Islamic laws. As a country with a codified Federal Constitution, the sovereignty of the Constitution is always upheld and its provisions not only empower the organs of the Government and its officials, but also confer rights to individuals, such as the freedom of speech, assembly, and association; the freedom of religion; rights to education; and rights to property. These rights are conferred on individual citizens in Malaysia and children enjoy the same rights subject to certain limitations, such as the legal age of majority, property ownership and restrictions on entering contracts.

The objective of this paper is to describe and to draw comparisons on the legal provisions applicable to Muslims and non-Muslims children in child marriage cases. This paper seeks to examine all the written laws that govern the marriage involving the Muslim and non-Muslim children respectively. The study in this paper adopts the doctrinal method in which various legal instruments and case laws on the area of child marriage are examined. A doctrinal analysis was conducted, to show the comparative perspective between the legal provisions applicable to Muslims and non-Muslims children in child marriage cases in Malaysia. The comparison between the two will consists of few aspects of the law on child marriage, inter alia, the law on minimum age to marry, and the specific process for marriage that involve a child. At the end of this paper, a description of legal provisions on child marriage in Malaysia is to be produced, and comparisons on the laws applicable to Muslims and non-Muslims children in child marriage cases will be shown. Library research has been conducted in which various authoritative and academic sources have been reviewed in describing the law on child marriage in Malaysia. The other aspect of law on marriage which is also applicable to ordinary (adult) marriage will not be included in this study, for example, on the area of the prohibited degree to marry, which provision applicable to child marriage is similar to those ordinary (adult) marriage. The context of child marriage in this paper is also confined to heterosexual marriage only, thus excluding all discussions on homosexual marriage involving children, which the latter by itself was never been recognised by the law of Malaysia.

Under Malaysian law, there are two sets of laws governing Muslims and non-Muslim marriages respectively. The same would be applicable for marriage involving the children. For the non-Muslims, the primary statute which governs their marriage is the Law Reform (Marriage and Divorce) Act 1976 (LRA), while the Islamic family law enactment or ordinance of each state governs marriage for Muslims. Orang Asli of Peninsular Malaysia and Bumiputera of Sabah and Sarawak are bound to the different codes according to their religion, viz a viz if they are Muslim, they marry in accordance with the Islamic law of the state. If they are non-Muslim, they may choose to marry under the LRA or according to customary law.

The legal system in Malaysia is also unique; it consists of a civil court system, Sharia court system, and Native court system. Each of the court system under the Malaysian justice system will have their own jurisdiction, which is clear and distinct and not overlapped with one another. The civil court system, which is under the purview of the federal government of Malaysia was inherited from the British system during the colonial era and exist in all parts of Malaysia. The Sharia court system, which is under the purview of the state government, exist in all states and was established under the Federal Constitution with jurisdiction; inter alia, in the administration of Islamic family, civil, and criminal laws. The Native court system, however, exists only at Sabah and Sarawak, which jurisdiction inter alia is to administer customary laws of the Bumiputera of Sabah, and Sarawak, including all matters related to the marriages, solemnized in accordance with customary laws.

BACKGROUND OF MARRIAGE LAW AND PLURALISTIC LEGAL SYSTEM IN MALAYSIA

Background of marriage law in Malaysia

In Malaysia, the Federal Constitution of Malaysia is regarded as the highest form of law. It is sovereign within Malaysia, and in principle, nothing can supersede it. The rights of the individual and institutions in Malaysia are derived from this document. It is a powerful document that empowers the agencies of the Government as well as its officials

and also confers rights to individual Malaysians. However, the rights conferred under the Constitution are qualified rights, meaning that they may be limited by the Constitution itself and other laws enacted by Parliament according to limitations provided in the Constitution. Where such limitations are made by the relevant constitutional provision, Parliament is entitled to curtail certain fundamental rights through legislation. Some statutes may contain express restrictions on individual rights for the purpose of achieving common good – for example, the needs of national security as defined in the Emergency (Essential Powers) Act 1979[1].

The Malaysian Parliament has the power to legislate on all matters within the jurisdiction of the Federal Government as specified in the Federal List and the Concurrent List contained in the Ninth Schedule of the Federal Constitution.

On the other hand, the Second List of the Ninth Schedule, *inter alia*, confers the jurisdiction over Islamic law and personal and family law for Muslims to the state government thus:

> "Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Sharia courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom."

Since matters relating to Islamic law and to persons professing the religion of Islam lie within the jurisdiction of the state legislatures, there are two sets of family law: the LRA, which applies to all non-Muslims in Malaysia, and Islamic family law, which applies to all Muslims in Malaysia. It is said that the characteristics of family law in Malaysia stem from the diversity in the components of its population[2].

Pursuant to Section 74 of the Federal Constitution, the respective state assemblies enact all of a state's Islamic laws. For the Federal Territories, Parliament may legislate on Islamic family law matters, hence the Islamic Family Law (Federal Territories) Act 1984, which applies to the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya. The Religious Affairs Department under each state government administers marriage for Muslims. As such, there are 14 enactments and ordinances in Malaysia that regulate marriage for Muslims, each originating in every state in the Peninsula (consisting of the 11 Malay States), the Federal Territories and Sabah and Sarawak.

The LRA applies only to non-Muslims in Malaysia, and it specifically states that it does it apply to Muslims or persons who are married under the Islamic law[3], and any marriage contracted under the LRA must be monogamous and must be registered under the Act. The Act is modelled after the Matrimonial Causes Act 1973 of England with certain modifications to suit local customs and religion. For example, the lists of prohibited degrees of relationship under Section 11 makes a special exception where a Hindu man may marry his niece, as allowed by Hindu custom in Malaysia. All matters relating to marriage, divorce, custody, adoption, legitimacy, and maintenance are heard in the High Court, which is a civil court based on the common law system.

[1] Act 216
[2] Mimi Kamariah Majid, *Family Law in Malaysia*, (MLJ, 1999).
[3] Section 3 of the LRA 1976

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The LRA lays down a uniform law on marriage and divorce and is applicable to all non-Muslims resident in Malaysia, as well as those who are all citizens of or domiciled in Malaysia but are residing abroad[4]. However, Section 3(4) of the LRA 1976 provides that the Act shall not apply to any native of Sabah or Sarawak or any aborigine of West Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom, unless:

(a) he elects to marry under the Act;
(b) he contracted his marriage under the Christian Marriage Ordinance; or
(c) he contracted his marriage under the Church and Civil Marriage Ordinance.

Therefore, the LRA 1976 allows this section of society in Malaysia an option to elect, whether to marry under the written law, which is LRA 1976 or to marry under customary laws.

Pluralistic Legal System in Malaysia

Malaysia's legal system is unique in that it recognizes various sources of law made by various organs with legislative capacity, and these are enforceable by the respective court system with its own judicial capacity and hierarchy. This is clearly provided by the Federal Constitution where there is three lists: Federal list, State List and Concurrent Lists. Primary legislation, namely Acts of Parliament, state enactments or ordinances and bylaws, are enforceable in the civil courts, the hierarchy of which is as follows:

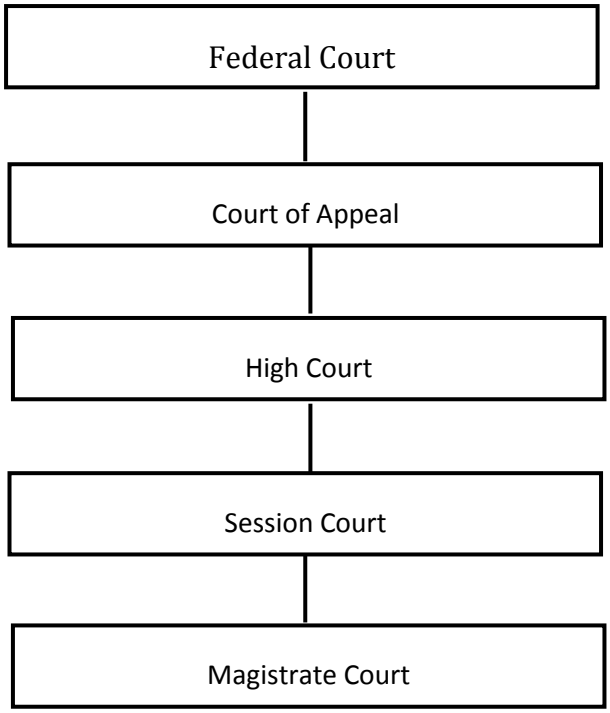

Chart 1: The hierarchy of Malaysian civil courts

The civil court system is composed of the lowest court, which is the Magistrate's Court, followed by the Sessions Court, the High Court, the Court of Appeal, and finally, the Federal Court. The Magistrate's Court and the Sessions Court are subordinate courts and appeals from these courts are heard in the High Court. Malaysia legal system

[4] Kamala M.G Pillai, *Family Law in Malaysia*, (Lexis Nexis, 2009).

employs a two-tiered appeal system, in which a person has two opportunities to appeal against a decision of the court by appealing to the higher courts in the hierarchy. If a party is dissatisfied with the decision of the High Court, it may then appeal to the Court of Appeal. If a party exhausts its right to the two tiers of appeal in order to reach the Court of Appeal, there can be no further appeal to the Federal Court. Therefore, only cases that originate in the High Court may be appealed to the Federal Court (viz. the first appeal is viable at the Court of Appeal and second appeal at Federal Court). Pursuant to the LRA, all family law cases originate in the High Court; as such, family law cases may reach the Federal Court on appeal[5].

Since 1983 all states in Malaysia have taken steps to enact Islamic family laws within their jurisdictions. This has been followed by enactments pertaining to the administration of Islamic law, Islamic evidence, Islamic civil procedure, Islamic criminal procedure, and Islamic criminal law. Since the main aim of these enactments is to create a uniform law throughout Malaysia, a model statute was used and applied to all the states. These statutes must be passed by each state legislature and in doing so they have undergone a number of changes, which is why they differ slightly from state to state.

From 2002 onwards, Islamic family law in the states has been revised and amended. All states except the Federal Territories have passed new enactments, which sought to be more effective and to enhance women's rights in general. Among other things, these enactments stipulate clearly the courses of action a woman can take with respect to her capacity as wife in matrimonial cases. They also recognize the rights and status she has in Islamic law, for example, her right to ask for a divorce in the Sharia court through *fasakh, khulu'*, and *ta'liq*, which are different methods of divorce available to a woman. With 13 states and three Federal Territories, there are14 Islamic family law enactments (one for each state, with the three Federal Territories sharing one Act). Each state has its own Sharia court with judges, prosecutors, registrars, and officers employed by the state government.

Currently, the hierarchy of the Sharia court in each state is as follows:

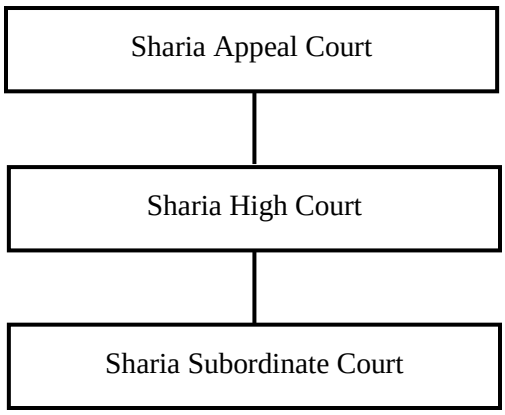

Chart 2: The hierarchy of Malaysian Sharia courts

[5] Section 2 of LRA 1976

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Marriages of Bumiputra of Sarawak and Sabah who elect to marry under the customary law, are not enforceable in the High Court, but in the Native court. In Sabah, the Native court was established by Native Court Ordinance 1954, and in Sarawak, the Native court was established by Native Court Ordinance 1955. By the time Sabah joined Sarawak and Malaya to form Malaysia in 1963, the court system continues to become an integral part of the state legal system. Now, the court system comes under the purview of the Sabah Native Courts Enactment 1992 for Sabah, and under Sarawak Native Courts Enactment 1992 for Sarawak. The following are the hierarchy of the Native Court in Sabah and Sarawak, respectively:-

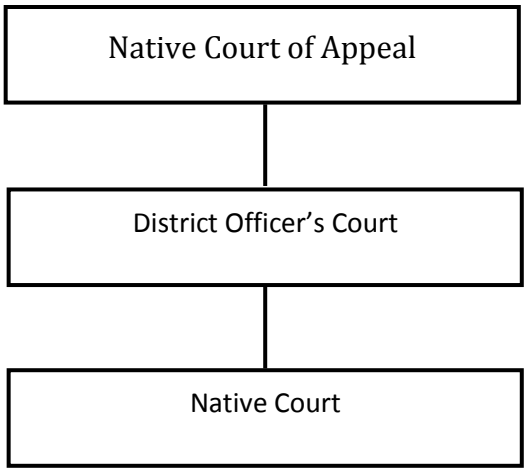

Chart 3: The hierarchy of Native courts in Sabah

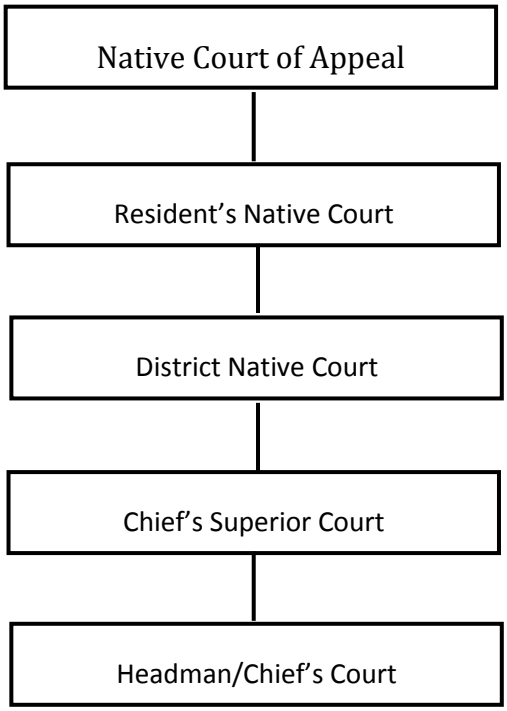

Chart 4: The hierarchy of Native courts in Sarawak

UNDERSTANDING THE LAW ON CHILD MARRIAGE IN MALAYSIA

Child Marriage

The term 'child marriage' for the purpose of this study is a marriage where both or one of the parties to the marriage is a child. According to Malaysian family law scholar, Kamala M.G. Pillai, the best-known description of marriage as a legal concept is that it is the fulfillment of a contract satisfied by the solemnisation of the marriage, but marriage directly creates by law a relation as between the parties and what is called the status of each of the parties[6].

The United Nation Convention on Right of Children (UNCRC) defines 'child' to mean every human being below the age of eighteen unless the majority is attained under the law applicable to the child. This definition ought to be adopted in all countries that are parties to the convention, including Malaysia. In Malaysia, there are various statutory provisions that provide for the definition of a child – the Federal Constitution does not mention the age of majority in the Malaysian legal system, and so the definition of a child is determined by Acts of Parliament. It must be noted, however, that the definition of a child varies from one Act to another, and within Malaysia's plural legal system, the definition of a child also varies in civil, criminal and Islamic law.

Following the common law principle established in *In re Agar-Ellis* (1883), the law considers a person to be an adult at the age of 21. However, due to the absence of reason and reasonableness in determining the age of 21 as the age of majority, most legal systems in the West (and the world) have amended the age of majority to eighteen years. Researchers have noted that even among countries with laws that set the minimum age of marriage at eighteen as recommended by CEDAW, there are exceptions to this rule[7]. In Malaysia, the Child Act 2001 defines a 'child' a person under the age of eighteen, pursuant to Section 2, which stipulates that 'child'

(a) means a person under the age of eighteen; and
(b) in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in Section 82 of the Penal Code [Act 574]."

Then, the Law Reforms (Marriage and Divorce) Act 1976, which came into force on 1 March 1982, defines a child as a person under the age of nineteen. The Age of Majority Act 1971 (Act 21) also defines a child to be a person below the age of eighteen. The definition adopted in the latter Act has general application throughout the country for Muslims and non-Muslims alike.

However, the Guardianship of Infants Act 1961 (Act 351) defines a child differently for Muslim and non-Muslim communities. This Act defines a child as a person under the age of eighteen for Muslims, and under the age of twenty-one for non-Muslims. However, the Adoption Act 1952 defines a child as anyone of the age under twenty-one, including a female who has been married and divorced. These Acts of Parliament provide different definitions of a child by prescribing different ages, notwithstanding the Child Act 2001 and the LRA. Hence, the definition of 'child' in Malaysia cannot be reconciled into a single definite statement.

The different definitions of a child contained in these laws appear to have been intended to apply to different contexts. Each Act of Parliament mentioned above may have a different application governing a different area of law. With regard to the issue of child marriage, this study uses the definition provided by the LRA and the Child Act 2001. The Child Act 2001 provides clarifications as to the age of a child in Malaysia but does not offer a single definition of children consolidating all definitions by other statutes. Also, the amendments of 2015 do not touch on redefining a child in Malaysia. To date, no single definition is available and thus a 'child' can be defined only according to the context in which the definition is invoked. It should be noted that each definition of 'child' sought to enhance the protection of children at the time the Act was passed and did not in any way jeopardize the right of the child. Almost all Malaysian laws define 'child' as a person under the age of eighteen and do not conflict with the CRC.

[6] Kamala M.G. Pillai, *Family Law in Malaysia*, (LexisNexis, 2009).
[7] Minzee, Longhofer, Boyle, and Nyseth, in 'When Do Laws Matter? National Minimum-Age-of-Marriage Laws, Child Rights, and Adolescent Fertility, 1989-2007', Law & Society Review 47(3):589-620.2013

In the context of criminal law, the definition of a child can be found in laws such as the Domestic Violence Act 1994, which provides a general definition and states that a child is a person who is under eighteen years of age. This definition is applicable to all children in Malaysia and parallels the definition under the Child Act 2001. However, Section 133A of the Evidence Act 1950 speaks of a "child of tender years" without stating a specific age, and goes further to say that the evidence of such a child may be received by the court if (in the court's opinion) he or she is "possessed of sufficient intelligence to justify the reception of evidence and understand the duty of speaking the truth". The Act does not stipulate the age a person must be to be considered a child.

The Islamic law of each state (particularly Section 2 of each state's Sharia Criminal Offences Enactment) adopts the definition of a child in classical Islamic jurisprudence, that is: a child is a person who has yet to attain puberty. Negeri Sembilan and Sabah define 'puberty' as 12 lunar years, while the other states define it as 15 years. For administrative purposes, the Islamic laws of all the states specify a uniform minimum age of marriage, which will be discussed below. Despite this definition of 'child' in classical Islamic jurisprudence (which does not refer to a person's age as the main criterion), Malaysia has a positivist legal system and has imposed a minimum age requirement to define a child within the state's Islamic law, parallel to the civil law application. This may facilitate the administration of justice, given the fact that each state's Islamic law is flexible in its application of the minimum age for a person to be considered a child. Furthermore, in the context of child marriage, Islamic law of each state may allow those of a younger age to marry, provided that permission has been obtained from the Sharia court as well as the parents of the said child.

Therefore, child marriage in this context is a marriage involving any or both of the parties to marriage who is under the age of eighteen years[8].

Minimum age to marry in Malaysia

The civil marriage for non-Muslims in Malaysia is governed by the LRA, which specifies that the minimum age of marriage is eighteen for men and a full and complete sixteen years for women. However, in order for a non-Muslim girl to marry at the age of sixteen, special permission must be obtained from the Chief Minister of the state, and an application must be made to the Registrar of Marriage pursuant to Section 10 of the LRA. It should be noted that no marriage is allowed if the parties are below the minimum age requirement, and any marriage solemnized between persons below the required age is *void ab initio*[9]. Therefore, child marriage among non-Muslim children may only happen to the girls of at least sixteen years of age, and not to the boys whom minimum age to marry is already set at majority age of eighteen.

Parental consent is also required for non-Muslim marriages for those below the age of twenty-one. Those above twenty-one years old may legally enter into marriage without parental consent pursuant to Section 12(1) of the LRA, which states:

> "A person who has not completed his or her twenty-first year shall, notwithstanding that he or she shall have attained the age of majority as prescribed by the Age of Majority Act 1971 [*Act 21*], nevertheless be required, before marrying, to obtain the consent in writing –
> (a) of his or her father;
> (b) if the person is illegitimate or his or her father is dead, of his or her mother;
> (c) if the person is an adopted child, of his or her adopted father, or if the adopted father is dead, of his or her adopted mother; or
> *(d)* if both his or her parents (natural or adopted) are dead, of the person standing in loco parentis to him or her before he or she attains that age,
> but in any other case, no consent shall be required."

For the Muslim, the marriages are governed by the Islamic laws of the respective states and not the LRA. The Islamic laws of each state echo the classical Islamic jurisprudence in defining a child; for the administration of justice,

[8] Child Act 2011
[9] Section 69 (b) of LRA 1976

however, a minimum age has been set for marriage. Substantively, all states' Islamic laws set the age of marriage at eighteen for Muslim boys and sixteen for Muslim girls, which is *pari materia* to the LRA. Notwithstanding this, however, marriage below the minimum age among Muslims may be allowed provided that, the permission from both their parents and the Sharia court is obtained beforehand, and this forms part of the requirement for child marriage in all states' Islamic laws, as seen in section 8 of the Islamic Family Enactments of Selangor 2003 (EUKIS 2003) for example:

"No marriage may be solemnized under this Act where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Sharia Judge has granted his permission in writing in certain circumstances."

Under the state's Islamic laws, the position is therefore different from the LRA 1976 in respect to the permission to marry under the minimum age to marry. For Muslim child, though the written law may have set the minimum age to marry as seen in the above example, however the Sharia court may grant permission to a girl to marry at a younger age, after interviewing her and being satisfied that she understands what she is doing and has attained puberty (*baligh)* in accordance with Islamic law. As such, discretion to lower down the minimum age to marry lies in the hand of Sharia Judge who decide the cases on a case-to-case basis. For non-Muslims, permission to marry below the age of eighteen may be given only to the girls who are above the age of sixteen *ipso facto* no further lowering down of minimum age is allowed by law. An illustration to the exercise of this discretion could be seen in the case of Che Abdul Karim Che Hamid who was fined to RM1800.00 by Sharia Subordinate Court at Gua Musang on 9th July 2018. He was fined to RM900 for each charge of marrying without the permission from the Sharia court, and engage in polygamous marriage without the permission from the Sharia court after marrying a girl of eleven years old[10]. He married the girl on 18 June 2018 at Masjid Mukim Muno, Sungai Golok Narathiwat, Thailand. It was also reported that Abdul Karim has recently obtained a marriage certificate from the Narathiwat Islamic Religious Council (NRC). The marriage solemnized between the man and the under-aged girl is however was allowed by the court and held to be valid and enforceable in the circumstances upon the thorough examination by the Sharia Judge.

Permission to marry below the minimum age in Malaysia

A. Procedure for Muslim Children

As discussed above, marriages for Muslim are governed under the state Islamic law. The procedure for the application of underage marriage among Muslims is substantially the same at all states in Malaysia due to the reforms which have been initiated since 2002. Therefore, the law regarding the administration of Islamic family law is almost *pari materia* at every state, with some variance as to the arrangement of the enactment. An example of state Islamic law that provides for child marriage to be possible among Muslim children, is Section 8 of EUKIS. This section provides that marriages of individuals under the minimum age require the permission of a Sharia court judge. In order for young couples below the minimum age to marry, they must first obtain permission from the Sharia court to legalize the marriage contract or solemnization of marriage[11].

In the Sharia court, two types of action may be initiated to apply for permission to marry, namely summons or petition. To obtain permission to marry under the minimum age, the applicant must start his case by making an application to the Sharia court[12]. To use the state of Selangor as an example, each application must be made in accordance with Section

[10] <http://www.utusan.com.my/berita/mahkamah/didenda-rm1-800-kerana-kahwin-budak-11-tahun-1.705878> accessed on 27 December 2018

[11] Section 8 of Islamic Family Law (State Of Selangor) Enactment 2003- No marriage may be solemnized under this Enactment where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Syarie Judge has granted his permission in writing in certain circumstances.

[12] Mazni Abdul Wahab, 'Practice Direction of the Department of Shariah Judiciary Malaysia in Shariah Court: A Literature Review', (2010) Journal of Shariah Law Research (JSLR)

13(1) of the Selangor Sharia Court Civil Procedure (State of Selangor) Enactment 2003 and be supported by an affidavit according to the rules of Section 122 of the same enactment:-

> "Section 13. Form of application.
> (1) Save as hereinafter provided, every application shall be made by notice in Form MS 3 and supported by an affidavit sworn in accordance with this Enactment.
> (2) Every application shall state in full the nature of the order applied for, and in sufficient detail, the facts relied upon in support thereof, and unless the Court otherwise orders shall be served on all parties and persons interested therein.
> (3) In an application, the objector shall be referred to as the respondent."

Once the application is registered, the applicant will be given a date for mention before the Assistant Registrar of the Sharia court. The aim of this process is to ensure that all documents to be used during the trial are complete. The assistant registrar will then fix a date for the hearing before a judge, who will normally conduct the proceedings in camera. Parties such as the guardian, bride and groom, the groom's parents and any other interested individual will be invited to attend the hearing. The judge will conduct an investigation to analyse every aspect of why the marriage of the parties involved should be approved. The judge will usually ask for the opinions of the guardian and parents of the groom, and question the bride's ability, the couple's future plans and more. The judge will emphasize the welfare and the future of the couple in granting them permission to marry.

Once the judge is satisfied with the information given, he will issue an order authorizing the marriage according to Section 18(2) of EUKIS as below. There may be further orders to the Registrar of Marriage, Divorce, and *Rujuk* during this process.

> "Section 18. Reference to an action by Syarie Judge.
> (1) In any of the following cases, that is to say—
> (a) where either of the parties to the intended marriage is below the age specified in section 8;
> (b) where the woman is a janda to whom subsection 14 (3) applies; or
> (c) where the woman has no wali from nasab, according to Hukum Syarak,
>
> the Registrar shall, instead of acting under section 17, refer the application to the Syarie Judge having jurisdiction in the place where the woman resides.
>
> (2) The Syarie Judge on being satisfied of the truth of the matters stated in the application and the legality of the intended marriage and that the case is one that merits the giving of permission for the purposes of section 8, or permission for the purposes of subsection 14 (3), or his consent to the marriage being solemnized by wali Raja for the purposes of paragraph 13(b), as the case may be, shall, at any time after reference of the application to him and upon payment of the prescribed fee, issue to the applicants his permission to marry in the prescribed form."

B. Procedure for non-Muslim children

As a general rule, the minimum age for marriage among non-Muslims is eighteen years, and Section 10 of the LRA does not recognize marriage below the minimum age requirement. However, an exemption may be granted if the girl is under the age of eighteen and not less than 16, and she may marry with the permission from the Chief Minister of the state (or the Federal Territories Minister). The Chief Minister may, upon being satisfied that all requirements have been met, issue a marriage licence to the couple. It must be noted that there is no hearing in this application and the Chief Minister has absolute discretion in deciding whether or not to allow the parties to marry[13]. Girls below eighteen who seek permission to marry must make an application in accordance with the LRA by filling out Form E in the First Table.

[13] In contrast to Muslim child marriage, there is a hearing before a Syarie Judge for the permission to be granted.

Permission is given first by a letter of authorization or letter from the parents or guardian of the child expressing approval of the marriage, and this is later certified by the relevant minister. Boys who wish to marry must be aged eighteen and above, and a boy who is under eighteen has no capacity to marry under the LRA[14]. In the event that solemnization takes place in contravention of the statutory minimum age stipulated for the boy, then the marriage is considered void.

MARRIAGE UNDER CUSTOMARY LAW INVOLVING CHILDREN

The customary marriages referred to here are the marriages conducted according to the customs of the Orang Asli of Peninsular Malaysia, the Bumiputera of Sabah and Sarawak and Hindu communities. The discussion in this section is based on the proviso under Section 3(4) of the LRA 1976, which provides that the LRA 1976 shall not apply to any Bumiputera of Sabah or Sarawak or any Orang Asli of Peninsular Malaysia except in certain circumstances.[15] Despite the general application of the LRA in Malaysia, these particular communities are not subjected to the marriage requirements of the LRA, and thus the minimum age of marriage stipulated under Section 10 of the LRA is not applicable to them. The Bumiputera of Sabah or Sarawak and the Orang Asli of Peninsular Malaysia may marry according to their custom at an age younger than the statutory minimum age for civil marriage. In addition, customary marriages also may not need to be registered as required under the LRA.

For the Bumiputera of Sabah and Sarawak and the Orang Asli of Peninsular Malaysia who elect to marry under the customary laws, it is to be noted that the protection of rights under the written legal framework in Malaysia may not be available to them. In the legal context, it is argued that since the rights derived from customary marriage are not derived from the written law, these rights *ipso facto* may not be enforceable in a civil court. Nonetheless, wherever appropriate, these rights may be enforced in other enforcing tribunals. In Sabah and Sarawak, the Native courts would be the appropriate forum to enforce the rights derived from the customary marriage of the Bumiputera, however, for the Orang Asli of Peninsular Malaysia, marital rights under customary laws would be enforceable by the community elders.

In the event a Bumiputera of Sabah and Sarawak or Orang Asli of Peninsular Malaysia choose to marry under the LRA, that marriage must be registered accordingly. They may also marry under the customary ceremonies and thereafter apply to have the marriage registered under the LRA. With regard to the validity of the marriage, it should be noted that despite non-registration of customary marriage pursuant to LRA, the marriage is still a valid marriage and all rights under such marriage may be enforceable in the Native Court. This can be seen in the case of *Tan Siew Sen & Ors v Nick Abu Dusuki Bin Hj Abu Hassan & Anor*[16], where the Court of Appeal held that the customary marriage between the respondent and the deceased was valid, as registration was "merely a formality" per Haidar Mohd. Noor JCA.

It is to be noted that Bumiputera of Sabah and Sarawak, and Orang Asli of Peninsular Malaysia who has converted to Islam must have their marriages governed by the Islamic law of the states in which they reside. Recent trends show that there are more applications from Muslim Orang Asli seeking to register their marriages under Islamic law. However, based on our observations in this study, the customs of the Orang Asli of West Malaysia, as well as the Bumiputera in Sabah and Sarawak, seem to promote marriage at a young age. Child marriage has become a norm in these communities, with these marriages being regulated by customary law and enforced by community elders. It is to be noted further, that the protection of rights is therefore not available under the written law for those who marry under customary laws, hence the marriage itself not derived from the marriage solemnised under the written laws.

Hindu customary marriage is a form of marriage that is religious in nature. Customary marriage in Hindu communities is still practised and recognised in Malaysia as it is being codified under the LRA. For example, section 11. (1) of LRA provides:-

> " No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great-nephew, as the case may be:

[14] Shamsuddin Suhor, *Panduan Akta Membaharui Undang-Undang Perkahwinan dan Perceraian 1976 (Akta 164)*, (DBP, 2011)
[15] *Nancy Kual v Ho Than On* [1994] 1 MLJ 545
[16] [2016] 6 CLJ 18

Provided that nothing in this subsection shall prohibit any person who is a Hindu from marrying under Hindu law or custom his sister's daughter (niece) or her mother's brother (uncle)"

Hindus marriages may involve young brides, as it is customary to betrothed young girls and boys in this community. However it should be observed that all marriages registered under the LRA must follow the minimum age for marriage, *viz-a-viz*, that male must be above of eighteen years of age and the female must be at least sixteen years of age, and any marriage solemnised below these ages shall be void. According to Malaysian scholars such as Mimi Kamariah Majid and Kamala Pillai, those seeking Hindu customary marriage should also register their marriage under the LRA to ensure that the rights of the parties are protected under the written law. Furthermore, the LRA will only recognise such customary marriages as valid and registered if solemnised under section 24 of the LRA. This registration is necessary to ensure the validity of such marriage, as well as to ensure that parties are protected under the written law thereafter.

LEGAL POSITION OF INTERNATIONAL CONVENTIONS RELATED TO CHILD MARRIAGE IN MALAYSIA

The Government of Malaysia ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995. CEDAW sets out a definition of discrimination against women and outlines the obligations of the state and the measures to be taken by the state to eliminate discrimination. CEDAW is based on three core interrelated principles, namely those of equality, non-discrimination and the obligations of the state.

The Government of Malaysia when ratifying CEDAW in 1995, made reservations to Articles 5(a), 7(b), 9(2), 16(1)(a), (c), (f), (g) and 16(2), and a declaration on Article 11 stating that Malaysia would interpret the provisions of the Article as a reference to the prohibition of discrimination on the basis of equality between men and women only. On 6 February 1998, the Government of Malaysia withdrew its reservations in respect of Article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h). Until today, Malaysia has retained its reservations on 9(2), 16(1)(a), 16(1)(f) and 16(1)(g), and in doing so, the Government declared that Malaysia's accession was subject to the understanding that the provisions of the Convention did not conflict with the provisions of Islamic law and the Federal Constitution of Malaysia, per IWRAW Asia Pacific reporting on 2009. Despite the intention to ratify CEDAW at the domestic level, there has been no Act of Parliament passed to make CEDAW wholly applicable to Malaysians. However, Malaysia has implemented CEDAW in a piecemeal fashion by incorporating its principles into some domestic legislation and Article 8(2) of the Federal Constitution[17].

The Government of Malaysia also ratified the United Nations Convention on Rights of the Child (CRC) in 1995, which has brought significant changes to the development of the rights of children in Malaysia. However, the ratification of the CRC was made with 12 reservations, and as at 2010, Malaysia has maintained reservations on eight articles, namely, Articles 1, 2, 7, 13, 14, 15, 28(1) and 37. On 6 July 2010 the Ministry of Women, Family and Community Development announced that the Government had decided to withdraw its reservations to Articles 1, 13 and 15, and so today, the remaining reservations are to Articles 2, 7, 14, 28(1) and 37.

In 2012, Malaysia ratified the two Optional Protocols under the CRC, namely the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol on the Involvement of Children in Armed Conflict. The first Optional Protocol supplements the CRC by providing states with detailed requirements to end the sexual exploitation and abuse of children. It also protects children from being sold for non-sexual purposes – such as other forms of forced labour, illegal adoption and organ donation. The Protocol defines 'sale of children', 'child prostitution' and 'child pornography' as offences and creates obligations on governments to criminalize and punish activities related to these offences. The Protocol requires punishment not only for those offering or delivering children for the purposes of sexual exploitation, transfer of organs or for profit or forced labour, but also for anyone accepting the child for these activities. The Protocol protects the rights and interests of child victims: governments must provide legal and other support services to child victims, and this obligation includes considering the best interests of the child in any interaction with the criminal justice system. Children must receive the necessary medical, psychological,

[17] Honey Tan Lay Ean, 'Measuring Up To CEDAW : How Far Short Are Malaysian Laws and Policies?' –a paper presented at the SUHAKAM Roundtable Discussion: Rights and Obligations Under CEDAW, 17 March 2003, Kuala Lumpur

logistical and financial support to aid their rehabilitation and reintegration. As a complement to the CRC, the interpretation of the Optional Protocol's text must always be guided by the principles of non-discrimination, the best interests of the child and child participation. The Optional Protocol on the Involvement of Children in Armed Conflict establishes the age of eighteen years as the minimum age for compulsory military recruitment and requires states to do everything they can to prevent individuals under the age of eighteen from taking a direct part in hostilities.

Despite the absence of child-focused policies in Malaysia at that time, a number of laws were amended as a result of the ratification of CEDAW and the CRC. The amendments were intended to strengthen the administrative process for the better protection of children and to ensure a more efficient implementation of the law. These amendments may also have been spurred by social changes, such as the increasing number of single-mother families and the growing number of child abuse and neglect cases[18].

Following the ratification of the CRC, the Child Act 2001 was enacted, which Act came into force in 2002. It also repealed the Juvenile Courts Act 1947, the Women and Girls Protection Act 1973 and the Protection of Children Act 1991, while their provisions were consolidated into the new statute. Parliament made amendments to the Child Act in 2016 (Act 1511) which received Royal Assent on 20 July 2016. However, no date has been given as to when the amendments would come into force.

In Malaysia, domestic law must be interpreted in accordance with the Interpretation Acts of 1948 and 1967, which provide for the commencement, application, construction, interpretation and operation of written laws; matters in relation to the exercise of statutory powers and duties; and other matters connected to these. The Interpretation Acts of 1948 and 1967 determine how widely a legal principle may apply in Malaysia for certain provisions. The 1948 Act determines how far domestic law can give effect to international conventions through statutes adopting international provisions. In other words, for international conventions to have legal effect in Malaysia, they must be codified in a domestic statute. If the international convention is not made into domestic legislation, its provisions are deemed persuasive but not necessarily binding. The cases below suggest that the Courts take different views on this issue:

In the case of *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*[19], Justice Asmabi said that international conventions "do not form part of the law" in Malaysia. In delivering the majority decision of the Court of Appeal, she said: "Unlike some other constitutions in other jurisdictions, the Federal Constitution does not impose on the Malaysian courts the duty to take cognizance of international human rights laws in any of its provisions. International treaties do not form part of the law in Malaysia unless such treaties have been incorporated into the municipal law. Insofar as citizenship is concerned, the only law which provides for citizenship is the Federal Constitution."

The rejection on the notion that international convention has a legal impact in Malaysia was further echoed in *Subramaniyam Subakaran v. PP* [2007], Mohd Sofian Abd Razak JC echoed the views expressed by Siti Norma Yaakob FCJ in the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara*[20], , and said: "In any event, I am in agreement with the views expressed by Siti Norma Yaakob FCJ (as she then was) in the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449 that the 1951 Convention and the 1967 Protocol and Article 22 [of the] Convention on the Rights of the Child are not legally binding on the Malaysian courts. I am of the view that the court is not obliged or compelled to adhere to the 1951 Convention and the 1967 Protocol." This pronouncement has thus affirmed the position that international conventions are not legally binding in Malaysia.

However, despite the views of the Federal Court that expressly declare that international conventions such as CEDAW and the CRC are not legally binding, there have been attempts by the High Court to give legal effect to international conventions. In the case of *Noorfadilla bte Ahmad Saikin v Chayed bin Basirun & Ors*[21] (hereafter *'Noorfadilla'*), for example, the High Court attempted to bring the contradictory views in favour of the application of CEDAW in the Malaysian legal system. In this case, the plaintiff's complaint was that the 'Guru Sandaran Tidak

[18] Rojanah Kahar & Najibah Mohd Zin, 'Child Related Policy and Legislative Reforms in Malaysia' (2011) International Journal of Social Policy and Society, Volume 8.
[19] [2017] MLJU 425
[20] [2002] 4 MLJ 449
[21] [2012] 1 CLJ 769

Terlatih' (that is, a contractual temporary teaching position) offered to her was revoked and withdrawn by the defendants on the sole ground that the plaintiff was pregnant. The main issue for the court's determination was whether the action/directive of the defendant was discriminatory on grounds of gender and in violation of Article 8(2) of the Federal Constitution. The defendants, on the other hand, raised the issue of the plaintiff's locus standi in bringing the action and whether the declaration sought was a proper remedy. The court had to consider whether it could refer to CEDAW in clarifying the term 'equality' and 'gender discrimination' under Article 8(2) of the Federal Constitution. In allowing the application, Zaleha Yusof J said that "Article 11(2)(A) of CEDAW provides that States Parties shall take appropriate measures to prohibit, subject to the imposition of sanctions, dismissal on the grounds inter alia, of pregnancy...CEDAW has the force of law and is binding on member states, including Malaysia."

The High Court's view in the above case was subsequently considered by the Court of Appeal in the case of *AirAsia Bhd v Rafizah Shima Mohamed Aris*[22]. The respondent, in this case, is an employee who was chosen to take part in an Engineering Training Programme on 19 October 2006 and executed an agreement known as the 'Training Agreement and Bond'. A material term in the agreement was that the respondent must not become pregnant for the duration of the training period, which was approximately four years from the date the respondent first attended the training course. Thus, when the respondent furnished a medical report confirming her pregnancy in June 2010, the agreement, as well as the employment of the respondent, was terminated. The appellant then filed a civil suit in the Sessions Court for breach of the agreement and summary judgment was entered against the respondent. Dissatisfied, the respondent appealed against the decision and the High Court allowed her appeal. Meanwhile, the respondent filed an originating summons in the High Court, seeking a declaration that Clause 5.1(4) of the agreement was illegal, null and void, as the clause discriminated against the respondent's rights as a married woman and contravened Article 8 of the Federal Constitution and CEDAW. The High Court granted the respondent's originating summons and dismissed the appellant's application to strike out the summons. The appellant then appealed against both decisions. However, at the beginning of the hearing, the appellant applied to strike out the second appeal (pertaining to the dismissal of the appellant's application to strike out the respondent's originating summons). The appellant submitted that the trial judge had erred in failing to apply the principle in *Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor*[23] to the respondent's originating summons. The appellant contended that the parties in the respondent's originating summons were private parties and as such the provisions of the Federal Constitution had no application. The appellant also submitted that the trial judge had erred in relying on *Noorfadilla*. In allowing the appeal, the Court of Appeal further clarified the position of CEDAW in the Malaysian legal context and rejected the views expressed by the High Court. Delivering the judgment of the Court of Appeal, Mohd Zawawi Salleh JCA said: "CEDAW does not have the force of law in Malaysia because it is not enacted into any local legislation." He added that "the Constitution contains no express provision with regard to the status of international law, or indeed any mention of international law at all. For a treaty to be operative in Malaysia, it requires legislation by the Parliament. Therefore, without express incorporation into domestic law by an Act of Parliament following ratification of CEDAW, the provisions of international obligations in the said convention do not have any binding effect. In Malaysia, the Constitution is silent as to the primacy of international law or domestic law or vice versa. If there is such a conflict, the general rule is that the statute shall prevail." Therefore, the Court of Appeal reaffirmed the position that international conventions had no legal effect in Malaysia unless enacted in local legislation.

To reiterate, while the Government of Malaysia has ratified various international conventions, these conventions remain only persuasive in nature unless they are translated into domestic legislation. In the event of a conflict between international convention and domestic law, the Malaysian court will lean towards upholding local legislation, even if this may constitute a direct contravention of the provisions of an international convention. Nevertheless, there have been attempts to enforce and apply CEDAW and the CRC directly by the High Court. Such incidents may be seen as an attempt to persuade Parliament to make the appropriate legislation endorsing these conventions and seems to suggest that international conventions on human rights should not exist as soft laws that are merely persuasive in nature with little or no effective method for enforcement.

[22] [2015] 2 CLJ 510
[23] [2005] 3 MLJ 681

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CONCLUSION

From the above, it is safe to conclude that child marriage is allowed and recognised, under the law of Malaysia. However, certain conditions have been imposed to protect the interest of the children concern. Whilst the sets of laws applicable to Muslims and non-Muslims are so distinct from the other, both rules seek to ensure the best interest of the child concerned to be preserved. Though many international conventions impose that minimum age to marry is eighteen years old, Malaysia had adequately followed the same with some exception of lowered minimum age to marry, applies. Procedurally, the law had given discretionary powers to certain competent officials to decide whether the permission for child marriage is to be granted. Thus, rather than adopting mechanical justice style by applying a blanket ban on all forms of child marriage, each application to marry under the age of eighteen in this country, is to be scrutinised on a case to case basis by competent officials. For the non-Muslims child marriage, the onus is on the Chief Minister of the state to approve such marriage and for the Muslim child, such a decision would be made by Sharia judges. It is clear that human element is necessary which must be embedded into the legal framework governing child marriage in Malaysia. The exercise of the discretion by these competent officials allow some room for flexibility in the administration of justice in the area of child marriage in Malaysia, and to demonstrate that the rights to marry has not been rigidly curtailed under the black letters of the law.