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9. ABSTRACT This monograph reviews and analyzes national and international laws which bear directly or indirectly on population factors in Malaysia. The major topics include laws dealing directly with family planning, family law, offenses related to sexual relations, law on socio-economic factors, and recent changes: The Family Planning Associations recognize the need to create a more informal and favorable climate of opinion at government level and to set up a prototype family planning service to demonstrate the need for family planning. It is felt by the government of Malaysia that a lower rate of population growth would enable more resources to be devoted to investment in development. The long term plan is aimed at reducing the annual rate of growth to two % in 1985. It is recommended that the following measures be enacted to achieve a consistent population policy: (1) the institution of compulsory education at the elementary school level; (2) implementation of the provisions of the Law Reform Act of 1976; (3) incentives encouraging the creation of additional job opportunities and expansion of housing; (4) the improvement of the status of women; the safeguarding of the rights of the child; and (5) liberalization of anti-abortion laws to the extent of allowing abortion in the case of contraceptive failure, rape or incest.		
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# Law and Population in Malaysia

by Ahmad Ibrahim



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## I. INTRODUCTION

Malaysia covers an area of about 130,000 square miles occupying the Malay Peninsula (Peninsular Malaysia) and the northwestern coastal area of Borneo Island (Sabah and Sarawak). The two regions are separated by about 400 miles of the South China Sea. Peninsular Malaysia covering 52,000 square miles, is bordered by Thailand in the north and Singapore in the south, while Sabah and Sarawak with about 78,000 square miles, borders the territory of Indonesia (West Borneo) and Brunei. Slightly over 70% of the whole of Malaysia is covered with tropical rain forest.

### A. Historical Background

Archaeological research, particularly in the Niah Caves in Sarawak, has provided evidence of human life in Malaysia at least as early as 50,000 B.C. Until the thirteenth century, Malaysia was under the influence of the Buddhist and Hindu empires. Islam was then introduced into the area by Arab traders and became the dominant religion by the early fifteenth century. European presence in Malaysia was established by the capture of Malacca in 1511 by the Portugese and again in 1641 by the Dutch. British interest in the Malay Archipelago and East Asia was primarily commercial and was developed through the British East India Company. Beginning in the third quarter of the 18th century, trading bases and settlements were established in Penang, Malacca and Singapore. In 1826 these formed the colony of the Straits Settlements and were joined administratively with the Malay States (which were never declared British territory).

Malaysia was created in 1963 as a Federation which today consists of the following states: Perlis, Kedah, Panang, Perak, Selangor, Negri Sembilan, Melaka, Johore, Kelantan, Trengganu, Pahang, Sabah and Sarawak. Its Constitution is based on a delicate balance of the rights and interests of the various communities and three major groups in Malaysia: the Malays and Natives of Borneo, the Chinese and the Indians.

It is important to note that while law generally (and the family law of the non-Muslims and non-Natives in particular) is a Federal responsibility, Muslim law and Native Customary law are within the competence and the jurisdiction of the States. Thus, while a Bill amending the law relating to marriage and divorce among the non-Muslims can be introduced to the Federal Parliament, as has been recommended by the Royal Commission on non-Muslim Marriages and Divorces, any amendment to the Muslim or Native Customary law requires the consent of each of the states in Malaysia. The Muslim law in Malaysia can only be amended by State law (except in relation to the Federal territory of Kuala Lumpur which is under the jurisdiction of the Federal Government).

## B. Demographic and Socio-Economic Background\*

Population growth in Malaysia in the twentieth century may be divided into four phases, according to the various population census years. Between 1901 and 1931, the main factor contributing to population growth was large-scale immigration of workers from China and India who provided labor for the development of tin and rubber industries in West Malaysia. Since the immigrants were predominantly working-age males, the sex and age distribution of the population was distorted. As a result of the world-wide depression of the 1930's, the inflow of laborers ceased. In the decade between 1931-1941, a combination of improvements in medical/public health facilities, declines of the mortality rate and a more balanced sex-age distribution, made natural increase the most important factor in population growth. Continued high levels of fertility and declining mortality gave Malaysia a 2.5 percent annual growth rate between 1947-57, raising its population from 6,279,000 to 8,901,000.

According to the Third Malaysia Plan approved in 1976, the population of Malaysia in 1975 was estimated at 12,249,000. About 85% or 10,385,000 live in Peninsular Malaysia, 751,000 in Sabah and 1,113,000 in Sarawak. Of the total population in Malaysia, 54.7% are Malays and other indigenous people, 34.2% Chinese, 9.0% Indians and 2.1% Others. In Peninsular Malaysia, 53.1% are Malays, 35.5% Chinese, 10.6% Indians and 0.8% Others. In Sarawak, 63.4% are Malays and other indigenous people, 31.0% Chinese and 5.6% Others. In Sabah, 64.1% are Bumiputra, 21.5% Chinese and 14.4% Others.

As a result of past demographic trends, Malaysia has inherited a very young population. More than 42% of the population are in the age group 0-14 years, as compared to 54.4% in the working age years of 15-64. This indicates a high age-dependency ratio of about 84% and implies a substantial demand for the basic necessities of life, as well as services such as education, health and housing.

Mortality continued to decline in Peninsular Malaysia during 1971-75 but at a less rapid pace than in past decades as mortality rates were already low. Life expectancy at birth for males increased from 59.8 years in 1970 to 61.6 years in 1975 and for females from 63.2 years to 64.9 years. By race, life expectancy is estimated to have increased by 3.2% for Malays, 1.6% for Chinese and 2.0% for Indians. The increase in life expectancy was mainly due to the expansion and improvement of health services which contributed particularly to declines in mortality among expectant mothers and children in their early years of life.

Fertility, too, is estimated to have declined at an average annual rate of about 2% from 4.91 in 1970 to 4.47 in 1975 as a result of late marriages. In addition, the National Family Planning Programme, coupled

\* For more detailed background information, see, Country Profiles: Malaysia, the Population Council, August, 1975.

with increasing educational opportunities and female participation in the labour force have also contributed significantly to declines in fertility.

In the case of Sabah and Sarawak, recent data on mortality and fertility are not available. On the basis of past trends, it is estimated that life expectancies improved more rapidly than in Peninsular Malaysia during 1971-75, largely as a result of declines in childhood mortality. However, unlike in Peninsular Malaysia, there is no clear evidence of a corresponding fertility decline.

The above-mentioned demographic factors have brought about a gradual shift in the share of population in the age group 15-64. The proportion of those in the 15-64 age group in the total population increased from 52.3% in 1970 to 54.4% in 1975. The effect of this shift on labour force growth was particularly noticeable for the age group 15-29. During 1971-75, the labour force in this age group registered a faster rate of growth of 4.8% as compared to the overall labour force growth of 3.2%.

The future structure of the population depends upon the interaction of three demographic factors, namely mortality, fertility and migration. On the basis of past trends, Peninsular Malaysia is likely to experience a further decline in mortality, though of somewhat lesser magnitude in comparison to earlier years. Declines in mortality in Sarawak and Sabah are expected to be more substantial, in keeping with the accelerating pace of socio-economic development.

The pattern of fertility change is more difficult to predict. International experience indicates that once fertility begins to decline, the momentum of change is likely to continue, if not accelerate. In the case of Malaysia, postponement of marriage to later years will not have a significant effect as the average age of marriage is already relatively high at 23 years. Future declines of fertility will depend to a major extent upon changes in norms regarding desired family size.

The population of Malaysia, as shown in Table I, is estimated to grow at 2.7% per annum during the Plan period from 12.25 million in 1975 to 13.98 million in 1980. The racial composition of the population in Peninsular Malaysia is expected to remain very much the same as in 1975. Malays will comprise 53.3% of the population, Chinese 35.3%, Indians 10.6% and Others 0.8%.

As a result of fertility declines, some shifts in the age composition of population are to be expected. In Peninsular Malaysia, the 0-14 age group, which accounted for 41.4% of total population in 1975, is expected to decline to 39.2% by 1980. On the other hand, the population in the age group 15-64 is expected to increase from 54.9% to 57.1%.

In the case of Sabah and Sarawak, the proportion of youth in the 0-14 age group will decline while the proportion in the 15-64 age group

is expected to increase from 51.7% to 53.2% in Sabah and from 51.2% to 53.4% in Sarawak. The population of Sabah is estimated to grow by 3.1% per annum to reach 876,000 in 1980 while that of Sarawak is estimated to grow by 2.8% per annum to reach 1.28 million.

TABLE I

MALAYSIA: POPULATION SIZE AND AGE STRUCTURE, 1975-80

Age-group	1975		1980		Average annual growth rate (%) 1976-80
	(000)	(%)	(000)	(%)	
<b>PENINSULAR MALAYSIA</b>					
0-14	4,297	41.4	4,635	39.2	1.5
15-64	5,707	54.9	6,747	57.1	3.4
65+	381	3.7	440	3.7	2.9
Sub-total	<u>10,385</u>	<u>100.0</u>	<u>11,822</u>	<u>100.0</u>	<u>2.6</u>
<b>SABAH</b>					
0-14	348	46.3	390	44.5	2.3
15-64	388	51.7	466	53.2	3.7
65+	15	2.0	20	2.3	5.9
Sub-total	<u>751</u>	<u>100.0</u>	<u>876</u>	<u>100.0</u>	<u>3.1</u>
<b>SARAWAK</b>					
0-14	510	45.8	559	43.7	1.9
15-64	570	51.2	682	53.4	3.7
65+	33	3.0	37	2.9	2.3
Sub-total	<u>1,113</u>	<u>100.0</u>	<u>1,278</u>	<u>100.0</u>	<u>2.8</u>
<b>MALAYSIA</b>					
0-14	5,155	42.1	5,584	40.0	1.6
15-64	6,665	54.4	7,895	56.5	3.4
65+	429	3.5	497	3.5	3.0
Sub-total	<u>12,249</u>	<u>100.0</u>	<u>13,976</u>	<u>100.0</u>	<u>2.7</u>

Source: Third Malaysia Plan, 1976.

Malaysia on the whole is characterized by a highly uneven pattern of population distribution. This is observed between Peninsular Malaysia on the one hand and Sabah and Sarawak on the other and between the East and West Coast of Peninsular Malaysia. The uneven pattern of population distribution reflects geographical, historical and economic factors that have accounted for more rapid rates of economic development in areas of higher population concentration.

Defining urban centres as areas of population of 10,000 and above, the percentage of urban population in Peninsular Malaysia in 1970 was only 28.7%, representing an increase of 2.1% over 1957. With the exception of the Klang Valley, and to a lesser extent, Kuantan, natural increase rather than rural-urban migration was the main source of urban growth.

The slow rate of rural-urban movement may be explained by two factors. The Government's efforts at rural development by improving living conditions have lessened the attractions of rural-urban migration. Second, the bulk of modern-sector development has been located in the metropolitan areas of the Klang Valley. The high level of skills required for employment have made it difficult for migrants from rural areas to find suitable occupations.

A more rapid rate of urbanization is expected during the Plan period. The growth of the manufacturing and services sectors will offer an increasing number of new job opportunities. Furthermore, through regional development and the establishment of new growth centres, smaller towns of the 10,000 to 75,000 size class are expected to grow more rapidly. The hierarchy of skills demanded in these areas will be considerably less complex thus encouraging greater migration from rural areas. The higher rates of average real productivity growth which will be effected in agriculture will permit such occupational mobility out of traditional agriculture without losses in real output having to be sustained.

As shown in Table II, urban population as a percentage of total population in Peninsular Malaysia is estimated to increase from 32.0% in 1975 to 35.1% in 1980, an annual growth rate of 4.6%, of which one-half is likely to be the result of rural-urban migration.

The racial composition of the urban population will also change, given the increased involvement of Malays in the manufacturing and commercial sectors of the economy. While in 1975, 18.0% of Malays are estimated to have lived in urban areas, by 1980, the percentage is estimated to increase to 21.3%. The rate of growth of the urban population among the Chinese and Indians is likely to be slower than that of the Malays.

**TABLE II**  
**PENINSULAR MALAYSIA: POPULATION COMPOSITION BY STRATUM**  
**AND RACE, 1975-80**

(000)

	1975			1980		
	Urban	Rural	Total	Urban	Rural	Total
Malay (%)	994 18.0	4,516 82.0	5,510 100.0	1,342 21.3	4,963 78.7	6,305 100.0
Chinese (%)	1,872 50.7	1,817 49.3	3,689 100.0	2,251 54.0	1,919 46.0	4,170 100.0
Indians (%)	417 37.7	688 62.3	1,105 100.0	515 41.0	742 59.0	1,257 100.0
Others (%)	38 46.9	43 53.1	81 100.0	47 52.2	43 47.8	90 100.0
<b>TOTAL</b> (%)	<b>3,321</b> <b>32.0</b>	<b>7,064</b> <b>68.0</b>	<b>10,385</b> <b>100.0</b>	<b>4,155</b> <b>35.1</b>	<b>7,667</b> <b>64.9</b>	<b>11,822</b> <b>100.0</b>

Source: Third Malaysia Plan, 1976.

The estimated increase in population poses a number of socio-economic problems, including: high dependency burden, increased need for food and social services, and danger of increased unemployment. These imply the need for expansion of public expenditure on social services which could otherwise be diverted to expanding the productive capacity of the economy.

The quantitative implications of the population increase on the size of the school-going population and expected enrollment are shown in Table II below. Primary school enrollment will increase by 1.2% per annum over the five-year period. Lower secondary enrollment will also grow despite a decrease in the school-age population because of increases in survival rates from primary to lower secondary education. Upper and post-secondary enrollment is expected to grow at 3.4% per annum with the most dramatic increase occurring at Form VI.

**TABLE III**  
**PENINSULAR MALAYSIA: SCHOOL-GOING POPULATION AND**  
**ENROLLMENT, 1975-80**

	Primary (Age-group 6+ to 11+)	Lower secondary (Age-group 12+ to 14+)	Upper secondary (Age-group 15+ to 16+)	Post secondary (Age-group 17+ to 18+)
<b>School-going population</b>				
1975	1,645.2	910.0	512.2	411.4
1980	1,747.7	888.3	557.6	474.1
<b>Enrollment</b>				
1975	1,586.9	561.5	164.7	16.2
1980 <sup>1</sup>	1,682.9	603.5	181.3	32.9

Source: Third Malaysia Plan, 1976.

The shift in the age structure of the population will accelerate the rate of household formation during the Third Malaysian Plan period of 1975-1980, and thus increase the potential demand for housing and other consumer durables associated with household formation. The number of households is projected to expand by 3.2% per annum along with increase in the average age of heads of households. Thus, between 1975 and 1980, the gross number of new households will increase annually from 70,500 in 1975 to 90,400 in 1980, a gross accession rate of 5.1% per annum. Net of deaths and dissolutions, the number of new households will increase annually from 30,300 in 1975 to 46,000 in 1980.

In addition to the backlog of existing demand and the need to improve existing dwellings, increases in household formation as shown in Table IX will lead to sizeable growth in the demand for housing and other household services. The emergence of the nuclear family system in place of the extended family will further increase pressure on the projected supply of housing during the Plan period.

TABLE IV  
 PENINSULAR MALAYSIA: HOUSEHOLD FORMATION, 1975-80  
 (000)

	<u>1975</u>	<u>1980</u>
Household	1,937.9	2,268.9
Accession	70.5	90.4
Death	23.4	25.5
Dissolution	16.8	18.9
Turnover rate (%)	1.75	2.04

Source: Third Malaysia Plan, 1976.

The increase in labour force, as shown in Table V (see on next page), is estimated to average 3.3% per annum, thus adding some 748,000 new entrants to the labour force during the Plan period. The rate of growth of the male labour force is estimated at 3.5% as against for females.

The overall participation rate for both males and females is projected to increase as a result of changes in the age structure of the working population. By 1980, some 38.0% of the labour force in Peninsular Malaysia will consist of workers in the 25-39 age group, as compared with 36.5% in 1975. The need, therefore, to step up significantly the promotion of new job opportunities is evident.

Working-life expectancy will also increase over the Plan period by some 0.4 years despite the projected decline in participation rates among the older age groups. This increase in working life implies a larger labour force in terms of man-years. Job creation policies will therefore have to be oriented towards generating productive life-time rather than short-term job opportunities through make-work projects which are only a temporary palliative.

**TABLE V**  
**MALAYSIA: LABOUR FORCE GROWTH, 1975-80**

	1975		1980		Average annual growth rate (%) 1976-1980
	(000)	(%)	(000)	(%)	
<b>PENINSULAR MALAYSIA</b>					
15-24	1,245	34.7	1,483	34.9	3.6
25-39	1,310	36.5	1,613	38.0	4.2
40-59	930	25.9	1,040	24.5	2.3
60-64	105	2.9	111	2.6	1.1
Sub-total	3,590	100.0	4,247	100.0	3.4
<b>SARAH</b>					
15-24	76	30.2	95	33.1	4.6
25-39	94	37.5	100	34.8	1.2
40-59	74	29.5	84	29.3	2.6
60-64	7	2.8	8	2.8	2.7
Sub-total	251	100.0	287	100.0	2.7
<b>SARAWAK</b>					
15-24	130	33.8	158	36.0	4.0
25-39	137	35.7	157	35.8	2.8
40-59	106	27.6	110	25.0	0.7
60-64	11	2.9	14	3.2	4.9
Sub-total	384	100.0	439	100.0	2.7
<b>MALAYSIA</b>					
15-24	1,451	34.3	1,736	34.9	3.7
25-39	1,541	36.5	1,870	37.6	3.9
40-59	1,110	26.3	1,234	24.8	2.1
60-64	123	2.9	133	2.7	1.6
Sub-total	4,225	100.0	4,973	100.0	3.3

Source: Third Malaysia Plan, 1976.

## C. Family Planning Services in Malaysia\*

### 1. Background

The first organized family planning activity in Malaysia began in July 1953 with the formation of the Family Planning Association of Selangor, followed by the Family Planning Associations of Johore in 1954, Perak in 1956 and Malacca in 1957. In 1958, these associations formed the Federation of Family Planning Associations as a representative and coordinating body to encourage the formation of associations in the other states. With financial assistance from the Social Welfare Lotteries Board, the International Planned Parenthood Federation (I.P.P.F), the Pathfinder Fund and the Asia Foundation it became possible by 1962, for the Federation of Family Planning Associations to establish organized Family Planning Associations in the other seven states of the Federation.

In addition to the objectives written in the Constitution of the Family Planning Association, the Family Planning Associations also recognize the need to--

(a) create a more informal and favourable climate of opinion at the higher professional and government level, to enable family planning to become an integral part of national policy and planning.

(b) to set up a prototype family planning service which would demonstrate--

(i) that there is a need for family planning;

(ii) that people were anxious and willing to space and control the size of their family;

(iii) that there was no strong opposition (religious, cultural or political) to the family planning services being provided.

The government decided to adopt a National Family Planning Programme as a government policy and made it an integral part of the First Malaysia Plan for the period 1966-1970. It was felt that a lower rate of population growth would enable more resources to be devoted to investment in development. The long term plan is aimed at gradually reducing the annual rate of growth of 3% in 1966 to 2% in 1985. This goal could be attained with an annual birth rate of about 26 per thousand and a death rate of about 6 per thousand. The target number of contraceptive acceptors to be recruited in the national family planning programme over a five-year period is about 450,000, which is about 36% of married women of child bearing age in Malaysia.

\* For more detailed information about family planning in Malaysia, see, The Population Council, Country Profiles: Malaysia, August, 1975.

The Family Planning Act, 1966, established a National Family Planning Board with the following functions and duties:

- (a) the formulation of policies and methods for the promotion and spread of family planning knowledge and practice on the grounds of health of mothers and children and welfare of the family;
- (b) the programming, directing, administering and co-ordinating of family planning activities in the country;
- (c) to be responsible for the training of all persons involved in the family planning extension unit;
- (d) to be responsible for the conducting of research on medical and biological methods relating to family planning;
- (e) the promotion of studies and research on interrelationship between social, cultural, economic and population changes and also research concerning fertility and maternity patterns in the country;
- (f) to set up a system of evaluation by means of which it will be possible from time to time to assess the effectiveness of the programme and the progress towards the attainment of national objectives;
- (g) to employ such officers and servants as may be necessary on such terms as may be approved by the Minister for carrying out the functions and duties of the Board.

## 2. Family Planning Services Under the Third Malaysia Plan

As more young women enter their child-bearing years and as the propensity for smaller families increases, the demand for family planning services is expected to expand. To achieve its target of 2% rate of population growth by 1985, the National Family Planning Board will have to cater to some 569,000 acceptors by 1980, as compared to 360,000 in 1975.

The objective of the national family planning programme in the Third Malaysia Plan is to bring down the birth rate from about 31 per 1,000 in 1975 to 28.2 in 1980. This is to be achieved through a programme covering one million new acceptors, one-half of whom will be recruited through the non-programme sources.

The national family planning programme will be strengthened in the rural and urban areas. Priority will be given to the extension of these facilities in the latter for the lower income groups. The construction of 11 State family planning administrative centres and 31 family planning clinics in government hospitals will be given priority for completion by

the end of 1978. The family planning programme in settlement schemes of the Federal Land Development Authority, estates and industries, will be strengthened and expanded during the Plan period.

The integration of family planning with rural health services will aim at intensifying family planning activities in the existing 20 health districts by providing additional inputs and converting them into Intensive Input Demonstration Areas. In these areas, family health services will be strengthened so that family planning services can be effectively provided as integral parts of the total family health programme. The integration programmes will also be expanded to cover areas not included in the Intensive Input Demonstration Areas.

It is considered that the best approach to family planning, apart from a clinical approach, is to combine a strong programme with efforts to create the social, economic, cultural and political conditions conducive to the acceptance of a small family norm. Basically, this means widening the scope and methods of the programme from a purely health-oriented and clinic-based to a welfare-oriented and community-based programme. Towards this end, the co-operation of the Ministry of Welfare Services will be sought, together with the strengthening of the information, education and communication activities. In view of the programme expansion, rapid feedback for programme management and co-ordination is required. To achieve this, the evaluation and management information system of the National Family Planning Board will also be strengthened.

### 3. Impact of Family Planning Programme on Births

The impact on births of a national family planning programme is highlighted by a recent report, the result of a joint study by members of the country's National Family Planning Board and Department of Statistics and of the University of Michigan's Department of Population. Malaysian women who enrolled in the government's one-year-old family planning programme in 1968 had almost 30 percent fewer children in the following six years than did women of the same age, race, parity and duration of marriage who did not accept services from the programme.

In a preliminary report presented at the 1976 annual meeting of the American Public Health Association, J. Timothy Johnson explained that the child-bearing experience of 3,008 women who gave birth in March 1968 and then enrolled in the family planning programme was compared with that of an equal number of women who gave birth in the same month but did not enroll. In addition to the date of the most recent birth, the two groups of women were matched for number of children, age, race and duration of marriage by using identification numbers, unique to each woman, which appear on both birth certificates and family planning clinic records. Annual live-birth rates for each group were obtained by computer cross-matching against national birth listings for 1967-1974.

Nearly two-thirds of the women studied were younger than 30 in 1968, as were a similar proportion of all women who gave birth in Malaysia that year. Forty-five percent of the 1968 acceptors had three or fewer children, while 23 percent had four or five children, and 32 percent had six or more.

The most effective methods of fertility control were selected by the vast majority of programme clients: Ninety-two percent chose the oral contraceptive; sterilization was the second most common choice, selected by four percent and this was followed by the IUD, chosen by 2 percent. Condoms and injectables were selected by about 1 percent each.

In the six years from 1969 to 1974, women who had joined the national family planning programme had an average of 1.1 children each, compared to more than 1.5 children per woman among those who did not join. The difference in fertility between these two groups of women increased with age. Women who joined the programme at age 20 or younger had eight percent fewer children by 1974 than women of the same age who were not programme clients, while women aged 35 and over who enrolled had 36 percent fewer children than their contemporaries who did not. However, since all of the older women had relatively low fertility rates, the greatest absolute number of prevented births occurred among women aged 20-34.

The more children a woman already had in 1968, the greater the difference in subsequent childbearing than programme enrollment made. Women with one child who joined the programme in 1968 had 15 percent fewer live births in the next six years than their controls. Acceptors with two or three children, four or five children and six or more children in 1968 experienced fertility declines (relative to nonacceptors) of 26 percent, 33 percent and 37 percent respectively.

The length of time a woman had been married was also a factor, with the relative difference in fertility between the two groups of women increasing with duration of marriage up to 15 years.

Despite the greater theoretical effectiveness of the pill in preventing pregnancy, it proved less effective in actual use than the IUD. Women who chose the pill in 1968 had more than twice as many births (1,153 live births per 1,000 acceptors) in the subsequent six-year test period as did women who accepted the IUD (538), and 44 percent more than women who chose injectables (800). The small sample of women who initially accepted condoms as a contraceptive method (theoretically, the least effective method offered by the programme) had only eight percent more births over the six years (1,240 per 1,000 women) than those who chose the pill. The most effective method, of course, was sterilization. Nonetheless, the 121 women who had sterilization operations reported four live births (33 per 1,000) during the six-year study period after enrollment.

Of Malaysia's three major ethnic groups--Malay, Chinese and Indian--Malay women in the programme experienced the greatest reduction in fertility, both in actual number of births and relative to their controls. Malays live predominantly in the rural areas, and therefore have little access to modern contraceptives from sources other than the national programme.

The authors conclude that this study shows that organized programmes for fertility limitation can contribute significantly to the goal of fertility reduction.

#### 4. Views of the Government

Recently, in a reply to a parliamentary question, the Prime Minister of Malaysia, Datut Hussein Onn, said that it was not necessary for the Government to review the family planning programme. He said that before the National Family Planning Board was set up, the Government had studied the matter, taking into consideration all viewpoints, including its implications on Islam. "It is obvious" he added, "that the programme is not contrary to Islam. The real aim of family planning is to plan births according to the means of the family concerned to ensure healthy children. This will reduce the infant mortality rate, especially in the rural areas. I would like to stress that family planning is being practised voluntarily and it is up to parents to decide on the number of children they want."

#### 5. Muslim Women's Conference

At a recent conference of Muslim women held on 1 April 1977, the subject of family planning was discussed and the following resolution was adopted--

- (a) The Council of Rulers be asked to issue a ruling (fatwa) regarding the conditions for family planning to be followed in Malaysia;
- (b) That women's organizations should arrange special courses and seminars where information about family planning can be given and discussed, especially in regard to its implications on Muslim women;
- (c) That the Government should ensure that the facilities for family planning are not abused;
- (d) That in the efforts to spread family planning, especially in the rural areas, emphasis should be placed on the health of the mother, the child and the family.

## II. LAWS DEALING DIRECTLY WITH FAMILY PLANNING

### A. Contraception

#### 1. Use, Manufacture, Sale and Advertisement of Contraceptives

There are no direct provisions dealing exclusively with the manufacture, sale or use of the various contraceptive devices or with the dissemination of birth-control information. Nevertheless, a number of laws in Malaysia have a bearing on these questions. Most contraceptive devices presently in use are imported and their import is subject to control and to the payment of duty.

The Medicines (Advertisement and Sale) Ordinance, 1956, as amended in 1971, provides in effect that no person shall take part in the publication of any advertisement referring to any article or articles of any description in terms which are calculated to lead to the use of that article or articles of that description as a medicine for the purpose of practising contraception among human beings.<sup>3</sup> Similarly, it is provided that no person shall take part in any publication of any advertisement referring to any article or articles of any description in terms which are calculated to lead to the use of that article or articles of that description for procuring the miscarriage of women.<sup>4</sup> It is a defence in proceedings for the contravention of these provisions to show that the advertisement was published only in a publication of a technical character intended for circulation mainly amongst persons of the following classes, or one or some of them, that is to say,

- (i) registered medical practitioners;
- (ii) registered dentists;
- (iii) registered nurses and midwives;
- (iv) registered pharmacists and licensed wholesalers and retailers of poisons;
- (v) persons undergoing training with a view to becoming registered medical practitioners, registered dentists, registered nurses or registered pharmacists.<sup>5</sup>

There are also provisions restricting the sale or supply of substances recommended as a medicine unless the composition of the medicines is disclosed.

With respect to obscene and objectionable publicity, Section 28 of the Post Office Ordinance 1947 prohibits the transmission by post of any indecent or obscene printing, photograph, lithograph, engraving, book, card or any other indecent or obscene article. It is, however, doubtful whether these laws will be used to punish the publication and transmission

of publications relating to birth control.

Under the Medical Act, (Act 50) any person not registered or exempt from registration under the Act who practises medicine or surgery and who uses any instrument calculated to induce any person to believe that he is qualified to practise medicine or surgery according to modern scientific methods, shall be guilty of an offence. It is provided that the use by any person in the practice of medicine or surgery of a sphygmomanometer, stethoscope, hypodermic syringe or other instrument used exclusively by persons qualified to practise medicine or surgery according to modern scientific methods, shall be calculated to induce a person to believe that he is qualified to practise medicine or surgery according to modern scientific methods.<sup>6</sup> It would appear therefore that only registered doctors and registered nurses may perform IUD insertions.

Sales of chemical devices (including pills and chemical contraceptives) are subject to sections 274, 275 and 276 of the Penal Code prohibiting the adulteration of drugs, sale of adulterated drugs and sale of a drug as a different drug or preparation respectively. The Sale of Food and Drugs Ordinance, 1952, also regulates the sale of food and drugs. "Drug" is defined as any substance or mixture of substances used by a person as a medicine, whether internally or externally and including anaesthetics.

The Ordinance makes it an offence to sell--

- (a) any adulterated drug without fully informing the purchaser at the time of the sale of the nature of the adulteration;
- (b) any drug in any package which bears or has attached thereto any false or misleading statement, word, brand, label or mark purporting to indicate the nature, quality, strength, purity, composition, weight, origin, age or proportion of the article carried in the package or of any ingredient thereof;
- (c) any drug containing any substance the addition of which is prohibited;
- (d) any drug containing a greater proportion of any substance than is permitted;
- (e) any drug for internal use which contains methyl alcohol, isopropyl alcohol or denatured alcohol;
- (f) any drug which is not of the nature or not of the substance or not of the quality of the drug demanded by the purchaser.<sup>7</sup>

The Ordinance provides for the appointment of analysts, officers and inspectors to carry out the provisions of the Ordinance.

In so far as the chemical devices for birth control come within the definition of "dangerous drugs,"<sup>8</sup> they are subject to the provisions of the Dangerous Drugs Ordinance, 1952. Such drugs may only be imported under the authorization of the Minister of Health and may be administered only by and under the direction of a registered medicinal practitioner. The Minister may also make regulations to control the manufacture, sale, possession and distribution of such drugs.

Chemical devices like pills may also come within the definition of "poisons" depending on their chemical compound and would then be regulated by the Poisons Ordinance, 1952.<sup>9</sup> Poisons may only be imported under licence and there are restrictions in the compounding of poison for medical treatment and on the sale and supply of poison. Poisons may only be sold by licensed wholesalers and to authorised persons. The provisions of the Ordinance do not apply to the sale or supply of any poisons or of any medicine containing poison by any officer or person who is employed in any hospital or dispensary wholly maintained by the Government or any local authority or out of public funds or to any outpatient or for use in the wards. It is also provided that no poison shall be sold or supplied to any person under the age of eighteen years, other than for the purpose of medical treatment of such person.<sup>10</sup>

Although the chemical devices (including pills) for birth control are usually obtainable from the National Family Planning Board, government hospitals or from medical practitioners, there has been a complaint recently by a politician, the leader of the United Malays National Organization Youth, that they are too freely available in the shops in Selangor. The Government was urged to take steps to ensure that birth control pills are only distributed by the authorised bodies, so that the pills are not misused for "free love."

In an answer to a Parliamentary question the Minister for Health, Tan Sri Lee Siok Yew, stated that contraceptive pills are registered under the Poisons Ordinance and can only be obtained from family planning clinics, dispensaries and retail pharmacies under the charge of registered pharmacists. He said he was not aware that such pills were being sold liberally and that action will be taken against anyone found selling the pills illegally.

Most of the contraceptives in use in Malaysia are imported but condoms are manufactured locally. The manufacture and sale of condoms is subject to compliance with standards set by the Standards Institution of Malaysia in accordance with the provisions of the Standards Act, 1966.

## 2. Contraception: The Islamic View

There has been some debate on the legality of family planning according to Islamic principles. The Holy Quran did not forbid the method of azl or coitus interruptus which was practised by the Arabs, neither did

it sanction it. However, there is a great deal of evidence in the Sunnah about the practice of azl. Some of the companions of the Prophet practised this method of birth control during the lifetime of the Prophet and with his knowledge. Yet neither the Holy Quran nor the Prophet declared it forbidden. In some instances the Prophet sanctioned it; in others he did not make pronouncements against it, which is taken as tacit approval. Some Muslim jurists in the past have sanctioned methods of family planning. Al-Ghazalli, for example, ruled that azl is not forbidden. Some jurists also take an indirect hint from the following verse in the Quran: "The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term" (2:233). Conforming to this principle, the Prophet asked his companions not to indulge in sexual intercourse during the time the mother is nursing the child, which is two years according to the Quran, for fear of weakening the child. It is related in the Traditions that the Prophet said: "Do not kill your children in secret for 'al-ghil' (which is intercourse with a woman while she is breastfeeding her child)." This may be interpreted to mean that if another pregnancy would impair the health of the child or the mother, then it should be avoided and such avoidance would not be against the teachings of Islam.

More recently a number of fatwas or rulings have been issued in favour of the legality of family planning. The Rector of the Al-Azhar University in 1952 permitted the use of contraceptive devices that do not cause harmful side effects. Mohamed Abdul Fattah El Ehani, Chairman of the Fatwa Committee in Al-Azhar University expressed the same opinion in 1953. In his fatwa he declared that "...the use of medicine to prevent pregnancy temporarily is not forbidden by religion, especially if there is fear of repeated pregnancies and of the woman becoming too weak due to insufficient intervals for her to rest and regain her health." The Mufti of Egypt, Sheikh Abdul Majid Salim, has also declared that "...either husband or wife, with the permission of the partner, is allowed to take measures to prevent entrance of the seminal fluid into the uterus as a method of birth control." Other Islamic leaders, jurists and imams have also expressed similar views. Ayatullah Haji Sheikh Bahaeddin Mahallati of Iran, Sheikh Abdullah Al-Qalili, the Grand Mufti of Jordan, Shaikh Mahmud Shaltut and Shaikh Hasan Ma'mon, Rectors of Al-Azhar, and Haji Ali bin Haji Said Salleh, the Chief Kathi of Singapore have issued fatwas approving methods of family planning subject to conditions. Shaikh Mahmud Shaltout in his book Al-Fatwa dealt with the subject of "Procreation: Limitation and Organization." He pointed out that the limitation of childbearing, in the sense of promulgating a national law restricting childbearing to a certain limit regardless of individual variations, is something which nobody can contemplate, let alone a nation seeking survival for itself, and is a line of thought repugnant to the natural law of the universe which is for growth and contrary to divine wisdom. He went on to say that those who call for the limitation of childbearing do not want it to be in this sense but:

In the sense of organizing births for women who get pregnant too soon, for those suffering from diseases liable to be transmitted by heredity, and for a small number of individuals who are too weak to face up to manifold responsibilities, unhelped as they are by their Governments or by the well-to-do in their community to the extent of being able to bear such responsibilities.

The organization of births in some way like that, individual and restricted to a certain area as it is, is a remedial measure by which certain harms are warded off and through which better and stronger offspring will come into being.

Organization in this sense is not incompatible with nature, and is not disagreeable to national consciousness, and is not forbidden by the Shari'a, if it is not sought after and compelled. The Quran fixed the period of lactation at two full years, and the Prophet warned against feeding a baby from the milk of a pregnant mother. This argues in favour of allowing steps to be taken to stop breastfeeding during pregnancy.

If the Shari'a requires that the multiplicity of children should be strong and not feeble, it is only trying to safeguard the offspring against weakness and poor health, and to fend off harm which may befall man during lifetime, one of its rules being: Harm is to be obviated with every possible means.

This is why doctors of religion decided to allow temporary or permanent prevention of childbearing between the two spouses, if there is in both, or either, of them a disease which is apt to be transmitted to the children or grandchildren.

Therefore, for such individual reasons which are not nationwide, but cover only a very small proportion, the organization of births is allowed by the Shari'a, nay, insisted on according to the extent of the weakness or intensity of the harm. I do not think that anybody would disagree; and it is, therefore, an object of agreement. But where is then the disagreement? And why should we disagree among ourselves: unless it is merely out of desire and eagerness for dissent and controversy, which is not the manner of researchers and those who are solicitous for the good of

their nation? Finally, listen to what God says: "O believers! Enter completely into the true religion, and follow not the steps of Satan, for he is your declared enemy" (Sura 2/208).

Shaikh Hasan Ma'mun said that he saw no objection to the consideration of family planning as a measure, if there is need for it, and if the consideration is occasioned by the people's own choice and conviction, without constraint or compulsion in the light of this circumstance and on condition that the means for effecting this planning are legitimate.

In Malaysia, Tan Sri Abdul Jalil Hassan, the Chairman of the Fatwa Committee of the Central Islamic Council, and Syed Yusof bin Ali Al-Zawawi, the Mufti of Trengganu, have supported family planning in their fatwas. In his fatwa, Syed Yusof Al-Zawawi said:

In short, I feel inclined to see three aspects to this question:

- 1) If it necessary to resort to contraception for reasons of health, in respect of the husband, the wife or the baby-to-be, there are no laws in religion against it at all, as proved by the Quranic verse: "A mother shall not be pressed unfairly for her child, nor a father for his child" (Sura 2/233). The implication also is that this is applicable for a certain period of time, limited in duration, and for special cases.
- 2) The opinions of jurists on the question of pregnancy and childbearing vary as to whether abortion is to be regarded as allowed before animation (which takes place in the fourth month of pregnancy). They are, however, agreed that it is forbidden after the expiry of four months. If the foetus is expelled by voluntary abortion, those who are responsible for the operation, namely the doctors, the midwives, etc., must pay the blood-money to the parents, if the foetus comes out alive; otherwise, if dead, the payment to the parents is to be equal to the price of a slave. But the parents who agreed to the abortion's being carried out pay an indemnity to the religious authorities in their country.
- 3) It is categorically forbidden to stop childbearing completely or to cause permanent sterility without good reasons approved by religion, even if it is done voluntarily.

In 1967 a number of heads of States of Islamic countries, including Shah Mohamed Reza Pahlavi of Iran, King Hussein of Jordan, King Hussein II of Morocco, Habib Bourguiba of Tunisia, President Gamal Abdul Nasser of Egypt, and Tunker Abdul Rahman, Prime Minister of Malaysia, made a joint declaration that:

(a) We believe that the objective of family planning is the enrichment of human life, not its restriction. Family planning, by assuring greater opportunity to each person, frees man to attain his individual dignity and reach his full potential.

(b) We believe that the great majority of parents desire to have the knowledge and the means to plan their families; that the opportunity to decide the number and spacing of children is a basic human right.<sup>11</sup>

The matter was discussed at the International Islamic Conference in Kuala Lumpur, Malaysia, in 1969 but unfortunately no definite ruling was given. However, the general consensus was that family planning is allowable if it is for the benefit of the community.

### 3. Dissemination of Birth Control Information

Malaysia has not embarked on an intensive informational and educational campaign on birth control. Rather, the approach followed has been to use the mass media in moderation to promote family planning, to have regional information officers conduct group meetings (often with audiovisual support) and provide information through informal contacts, and to have the family planning personnel at clinics provide the principal channel for informal communication. In the rural areas, the Maternal and Child Health (MCH) staff of the Ministry of Health are expected to include family planning as a subject for discussion in their regular home visits.

Special emphasis is given to providing political and youth groups and trade unions with family planning material. The strategies of the information programme carried out by the National Family Planning Board had to be redesigned during the Second Malaysia Plan, in line with the prevailing political thinking and public opinion. Throughout 1971-1973 the programme strove to regain acceptability for the national family planning programme and to bring back the open support of the programme prior to the 1969 incidents. Unfortunately, while communal sentiments in 1973 towards the programme appeared to have returned to normal, statements of religious objections towards the programme by certain religious groups flared up occasionally.

Up to 1974, efforts were concentrated on orientation campaigns at the local level localities where clinical facilities were being expanded. Information on educational activities was also carried on in addition to the campaign. Orientation campaigns were in the form of face to face dialogue sessions. During the early part of the Second Malaysia Plan period, the

National Family Planning Board participated in civic courses organized by the Ministry of Information or at other organized meetings sponsored by other agencies. As the public became more convinced and showed better acceptance of the concept of public planning, local leaders and influential persons were encouraged to organize meetings and speakers were supplied by the Board.

Throughout the Second Malaysia Plan period, to maintain favourable public opinion, the programme was cautious as regards press reports. Reports that would cause communal doubts were not released. The mass media were utilized only to diffuse motivational messages acceptable to all communities. Newspapers only published motivational feature stories and articles. Motivational messages were diffused through other programmes over the radio but no family planning programme per se was produced. Family planning appeared on TV only in conjunction with special events, such as the World Population Year, or as part of news items of important social events. There was no publicity through commercial movies in the form of advertisement. Exhibitions were also organized. Lectures and discussion sessions were conducted at the initiation of sponsors, for example, enlightened companies with a large labour force. The National Family Planning Board also issued the Bulletin Keluarga, a monthly bulletin of 10,000 copies, and various leaflets and posters.

With the lack of participation of the mass media and only limited participation of the Ministry of Information, the National Family Planning Board had to look for other channels to be utilized to ensure effectiveness of the programme. Assistance of State Governments and other agencies had to be sought. Cooperation was obtained from State Governments, organizations such as the Malaysian Trade Union Congress, Youth Organizations, Trade Unions, the Ministries of Agriculture, Rural Development, Labour and Information and political parties. These agencies assisted in dialogue seminars and also invited the board to participate in their training programmes, seminars and workshops.

Despite its limitations, the information programme has been effective and the Post Enumeration Survey of 1970 shows that attitudes to family planning have become more favourable. In 1966/1967 21% disapproved of family planning as compared to 13% in 1970. Knowledge of family planning has also increased substantially from 44% in 1966/67 to 85% in 1970.<sup>12</sup>

#### B. Abortion

Abortion is regulated under Chapter XVI of the Penal Code concerning offences affecting the human body. Sections 312-316 deal with the causing of miscarriage or injuries to unborn children. Sections 312-316<sup>13</sup> read as follows:

Causing miscarriage

312. Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall

be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation--A woman causes herself to miscarry, is within the meaning of this section.

Causing miscarriage without woman's consent.

313. Whoever commits the offence defined in section 312 without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

Death caused by act with intent to cause miscarriage.

314. Whoever, with intent to cause the miscarriage of woman with child, does any act which causes the death of such woman, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine;

If act done without woman's consent.

and if the act is done without the consent of the woman, shall be punished with imprisonment for a term which may extend to twenty years.

Explanation--It is not essential to this offence that the offender should know that the act is likely to cause death.

Act done with intent to prevent child being born alive or to cause it to die after birth.

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to ten years, or with fine, or with both.

Causing death of unborn child by act amounting to culpable homicide.

316. Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

### Illustration

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

It may be noted that consent of the woman is not a defence. Section 91 of the Penal Code in effect states that the defence of consent does not extend to acts which are offences independently of any harm which they may cause or be intended to cause or be known to be likely to cause, to the person giving the consent or on whose behalf the consent is given. The illustration to the section states:

Causing miscarriage, unless caused in good faith for the purpose of saving the life of the woman, is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

The criminal law in Malaysia therefore permits abortions only on extremely narrow grounds. As the law stands, pregnancy can only be terminated for the "purpose of saving the life of the mother." The English case of R. v. Bourne (1939) 1 K.B. 678 can be relied on to give a broad definition to the words "for the purpose of saving the life of the mother." In that case it appeared that a girl, under the age of fifteen, had been raped with great violence in circumstances which would have been terrifying to any woman, let alone a child of fifteen. As a consequence of the rape the girl became pregnant. Her case was brought to the attention of the defendant, who was an obstetrical surgeon at St. Mary's Hospital, London. After a careful examination, the defendant openly performed the operation of abortion with the consent of the parents. He was charged under the Offences Against the Person Act, 1861. In the course of his summing up to the jury MacNaghten J. pointed out that the words "for preserving the life of the mother" ought to be interpreted in a reasonable manner. It is not contended that these words are meant merely for the purpose of saving the mother from instant death. There are cases in which it is reasonably certain that a pregnant woman will not be able to deliver the child which is in her womb and survive. In such cases where the doctor anticipates, basing his opinion upon the experience of the profession, that the child cannot be delivered without the death of the mother, it is obvious that the sooner the operation is performed the better. The law does not require the doctor to wait until the unfortunate woman is in peril of immediate death. In such case he is not only entitled, but it is his duty to

perform the operation with a view to saving her life. These words ought to be construed in a reasonable sense. If the doctor is of the opinion on a reasonable ground and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury is entitled to take the view that the doctor acting with honest belief under these circumstances is operating for the purpose of preserving the life of the mother. Then, too, the jury may consider the evidence about the effect of the rape, especially on a child, as the girl was--to carry in her body the reminder of the dreadful scene and then go through the pangs of childbirth in "great mental anguish." Thus it can be argued that where there is likelihood of "serious injury to the mother and a practical certainty that she would become a "physical wreck," it will afford an excuse and the court will not strictly interpret the question of danger to life. Since life depends on health, it may be that health is so gravely impaired that death may result.

In Islamic religion and law, the killing of the soul is forbidden. Abortion in the sense of destroying a baby, after the creation of the soul, when the foetus has acquired a life of its own, is therefore forbidden. Most of the Muslim jurists agree that the soul is not created when the embryo has not yet taken human shape. This is usually 120 days after conception. A difference of opinion exists as to whether abortion may be permitted with or without a valid cause before the foetus has gained a life of its own. Dr. Mohammed Salam Madkour has summarized the different views as follows:

First, according to some jurists it is permitted without a reason, though some of the Hanafi jurists and some of the Shafii jurists make it conditional with a cause.

Second, it is permitted with indifference (mubah) only with a cause, though it is considered makruh, i.e., reprobated. This is the view of Imam Abu Hanifa and some of the Shafiis.

Third, according to some of the Maliki school, it is reprobated, Makruh.

Fourth, according to the Maliki school it is haram, i.e., it is forbidden.<sup>14</sup>

After the foetus has acquired a life of its own, that is after the fourth month, there is no disagreement among the jurists as regards the prohibition of abortion. A penalty is imposed on whoever causes the abortion (even though he is the father) since it is then considered a crime of murder. The following verse of the Holy Quran is relied on: "Nor take life in which God has made sacred--except for just cause." However, if the pregnancy presents a danger or threat to the mother's life (if certified by specialists) the jurists have ruled in favour of abortion. In other words, the life of the child not yet born is to be sacrificed (lesser evil) in

order to save the mother's life.

At present, it may be stated that abortion is not legalized in Malaysia. However, abortions are carried out by qualified obstetricians and gynecologists when deemed justified for medical and other reasons.

Legalizing abortion, as a means of controlling the rate of population growth, is objected to in many countries, including Malaysia. However, its value in cases of contraceptive failures, rape or incest should be recognized. When it is done by a properly qualified medical personnel under suitable conditions, it is definitely a better alternative than when it is carried out in unhealthy and unsterile conditions, by unqualified quacks.

Although abortions are justifiable in the concept of a National Family Planning Programme for the reduction of the birth rate, there are other inherent complications involved in legalizing abortion relating to moral and religious issues.

### C. Sterilization

The legal status of sterilization under the criminal law in Malaysia is ambiguous. It has been argued that sterilization comes under the definition of "grievous hurt" in the Penal Code and that, except for therapeutic sterilization, it is punishable under the Code. Section 320 of the Penal Code designates as "grievous hurt," emasculation and privation of any member. "Emasculation" has not been juridically defined, but according to the Oxford Dictionary it means "the action of depriving of virility; the state of impotence." In Ratanlal Law of Crimes it is stated that the term means "depriving a person of masculine vigour, castration, injury to the scrotum that would render a man impotent." It appears doubtful whether the term "emasculation" would cover or was meant to cover modern methods of sterilization, which do not affect sexual capability. The term "member" in the section refers to the male sex organ, but it is doubtful if modern methods of sterilization can be said to cause the "privation" of the male sex organ. If sterilization is held to cause "grievous hurt," then consent would not be a defence under section 87 of the Penal Code although it would be a defence under section 88 of the Penal Code if it is "for the benefit of a person." Under section 88 even an act amounting to grievous hurt does not amount to an offence if done with the consent of the patient and for his benefit. There can be no question that if the reason for the sterilization operation is therapeutic, it would be protected by this section. Eugenic sterilization, however, is for the benefit of the community at large and not for that of the patient and would not be covered. Contraceptive or socio-economic sterilization would also not be covered especially as mere pecuniary benefit is not benefit within the meaning of the section.

It may be noted that the Singapore Voluntary Sterilization Act 1969 expressly provides that sterilization does not amount to "grievous hurt"

under the Penal Code. In the absence of the consent of both partners, sterilization may also have consequences with respect to the law of marriage and divorce. In the English case of Bravery v. Bravery (1954) 3 All. E.R. 59 a husband was voluntarily sterilized allegedly without his wife's consent. The wife petitioned for divorce on the ground that the husband's conduct amounted to cruelty. It was held on the facts that the wife had failed to establish a case of cruelty against her husband, although the judges would have been willing to grant a divorce on that ground had the wife been able to prove that the operation had been without her consent and had caused her injury to health. In his judgement (which was, however, not agreed to by the other judges) Denning L.J. said: "An ordinary surgical operation which is done for the sake of a man's health with his consent, is, of course, perfectly lawful because there is just cause for it. If, however, there is no just cause or excuse for an operation, it is unlawful even if he consents to it. Take a case where a sterilization operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attached to it. The operation then is plainly injurious to the public interest—it is illegal even though the man consents to it." Lord Denning's view was rejected by his colleagues in the Court of Appeal and has not been generally accepted.

Under the Islamic law, permanent sterilization is forbidden, except in case of hereditary disease or malformities that may be transmitted to the offspring. Here the jurists have ruled in favour of sterilization as well as separation or divorce to prevent the spread of disease in the community.

In view of the fact that more and more people have requested sterilization operations in Malaysia, it has become necessary to clarify the legal aspects of sexual sterilization. According to a circular of the Ministry of Health (Ref. No. MH Cont. 401/7 of 25th July, 1959) the position is as follows:

The only circumstances in which an operation to sterilize a person can be lawfully performed are those in which the operator honestly believes upon reasonable ground that an operation is necessary to preserve the life of, or to avert serious injury to, the physical or mental health of the patient. Whatever the steps a doctor may feel he should take to bring himself within the law, he should never omit:

- 1) to make sure that such danger to life or health as described above exists;
- 2) to obtain in all cases a second opinion where possible;

- 3) to make quite plain to the patient the nature of the results of the operation;
- 4) to make sure that the patient's consent in writing is freely and fully given without influence by others.

### III. FAMILY LAW: MARRIAGE AND DIVORCE

#### A. Marriage

Marriages can be validly performed in Malaysia under either customary law or statutory law. In the former case the law recognizes the peculiarities of religious opinion, custom and rites as practised by the cosmopolitan society of the Malaysian peoples, and upholds their validity as a moral necessity.

##### 1. Customary Law Marriages

(a) Marriage under customary law as practised by Malaysians of Chinese descent is primarily polygamous, and the court recognizes such polygamous unions for the purpose of succession and legitimacy. Furthermore, the only essential legal requirement of a Chinese customary marriage is that the marriage must be consensual. Proof of the performance of any ceremony is not essential to the validity of such customary marriage, although compliance with the ceremonial part of the marriage has evidential value. It is to be observed that there is no specific guidance either from the law or customary usage on such matters as minimum age requirement, consent of the parents or guardians, the prohibited degree of kindred and affinity, nor is there any legal requirement that the customary marriage be registered, except in Sarawak where the Chinese Marriages Ordinance (Cap. 74) makes registration compulsory for all Chinese marriages. The Ordinance further provides that the Registrar shall not register any marriage until he is satisfied that the ceremonies required by established Chinese law or custom have been duly performed and that the marriage is valid according to such law or custom. It also declares illegal and prohibits the registration of a Chinese marriage if the female is under the age of fifteen years.

(b) Marriages in accordance with Hindu law and custom are practised by Malaysians of Indian descent. The court appears to have accepted the polygamous character of some Indian Hindu marriages although in the case of some Hindus in Malaysia monogamy has been accepted as the customary rule. Thus it has been held that Ceylon Tamil Hindus follow a monogamous form of customary marriage, Paramasurai v. Ayadurai (1959) M.L.J. 195.

## 2. Statutory Law

(a) The existing Statutes relating to marriage may be conveniently classified as follows:

- (i) The Registration of Marriages, 1952;
- (ii) The Civil Marriage Ordinance, 1952;
- (iii) The Christian Marriage Ordinance, 1956;
- (iv) The Marriage Ordinance, 1959, of Sabah.

(b) The registration of Marriage Ordinance, 1952, provides solely for the registration of all marriages solemnized or contracted within the Federation (and even outside the Federation) unless one of the parties professed the Christian or Muslim religion at the time of such marriage. This Ordinance does not prescribe the form of marriage, nor does it lay down any prescribed essentials for marriages to be registered under this Ordinance. Its main objective appears to be to enable all customary marriages to be registered at the option of the parties. It will be seen, therefore, that registration of marriages under this Ordinance is purely for statistical and evidentiary purposes. It does not prohibit the registration of polygamous marriages unless the personal law applicable to the parties to the marriage precludes them from contracting a polygamous marriage, in which case it is an offence under the Ordinance to procure or attempt to procure the registration of such polygamous marriage. On the other hand, if the personal law applicable to the parties permits polygamy, the law would recognize the validity of the polygamous marriage. In any event, neither the registration nor omission to register any marriage under the Ordinance will effect its legal validity.

(c) The Civil Marriage Ordinance, 1952, promotes the principle of "one man one wife" and thereby allows persons other than Muslims to contract, if they so desire, a monogamous civil marriage whatever their religious faith or custom. Furthermore, the Ordinance stipulates that the minimum age of a male party to a marriage shall be 16 years and the female 14 years. It contains also detailed provisions concerning the requirement of parental consent and the prohibition of marriage between persons who come within the prohibited degrees of affinity prescribed therein. This Ordinance therefore advances the goals of population policy in that it encourages monogamous marriage and also sets out the minimum ages of parties to a marriage contract. Furthermore, to discourage the contracting of marriage under customary law and to enable existing customary law marriage to be shorn of its polygamous characteristics, the Ordinance allows a couple who was married under their personal law subsequently to be married under the provisions of the Ordinance. This is so provided that neither of the parties is, at the time of marriage under the Ordinance, already married to a third person and provided they are not

prohibited from being married under the provisions of the Ordinance relating to minimum ages of marriage, prohibited degrees of kindred and affinity. Once married under the Ordinance, a person will no longer be capable of contracting another valid marriage with any other person during the continuance of the marriage. Similar provisions are enacted under the Church and Civil Marriage Ordinance of Sarawak.

(d) The provisions of the Christian Marriage Ordinance, 1956, have the useful effect of facilitating the marriage of Christians and thereby relieving the Civil Marriage Registry of being congested with applications for marriage licences. The provisions in this Ordinance relating to monogamous unions and other essentials of a valid marriage are substantially the same as those in the Civil Marriage Ordinance, 1952. Notwithstanding that marriages under the Christian Marriage Ordinance are monogamous, it has been held that there is nothing in the Ordinance to prevent a Chinese Christian from opting either to contract a monogamous marriage under the Christian Marriage Ordinance or a polygamous marriage in accordance with his or her personal law (Re Loh Toh Met (1961) M.L.J. 234 and Re Ding Co Ca (1966) 2 M.L.J. 220). Similar provisions for registration of Christian Marriages are also provided under the Christian Marriage Ordinance, Cap. 24 of Sabah, Malaysia.

(e) The Marriage Ordinance, 1959, of Sabah provides for the compulsory registration of all marriages in Sabah. It also declares void any marriage in which the male party is below the age of 16 years or the female party is below the age of 14 years.

### 3. Muslim Marriages

Under Muslim law, a man is permitted to have as many as four wives at the same time if certain conditions are satisfied. It is, however, significant to note that the husband, if he chooses to have more than one wife, is required to give equal treatment to all of his wives. To protect the woman from accepting blindly the offer of marriage by a person who is already legally married, a Muslim woman cannot give herself away in marriage. Only certain male relatives (walis) are qualified to give consent to the marriage of a Muslim woman. If there be no such relative, the judge (Kadhi) can act as guardian for purpose of the marriage.

### 4. Specific Requirements

#### (a) Consent to marry

The age of majority has been reduced from 21 to 18 years by the Age of Majority Act, 1971. Under the Civil Marriage Ordinance, 1952, and the Christian Marriage Ordinance, 1956, if either party to a marriage is a minor and has not been previously married, the consent of the parent or guardian must be obtained. If parental consent is withheld or if it is impossible to obtain such consent, the minor may apply for the consent of

the court. By the Adoption Act, 1952, the adopter of a child is the appropriate person to consent to the marriage of an adopted child, and in the case of an illegitimate child it is the mother who must give her consent. Similar provisions apply in Sarawak. In Sabah under the Christian Marriage Ordinance, the consent of the father should be obtained if a party is under the age of 21 and has not been previously married.

Under the Shafii school of Muslim Law which is followed in Malaysia, the consent of the wali (guardian for marriage) is required for the marriage of all females. Where the consent of the wali is withheld or impossible to obtain, the consent of the Kathi as wali hakim is required.

(b) Formalities of Marriage

There are a variety of laws in Malaysia dealing with the formalities of marriage. Marriages may be solemnized before the Registrar under the Civil Marriage Ordinance, 1956, or before a church official under the Christian Marriage Ordinance. They may be performed according to Chinese custom or Hindu rites or they may be contracted under the Muslim law. The consent of both parties is required for civil and Christian marriages. Under the Shafii law followed in Malaysia, the consent of the bride is usually given by her guardian, and in some States the father or grandfather can exercise the right of compulsion if he feels it is in the interests of the girl. Failure to comply with the requirements under the Civil Marriage Ordinance or the Christian Marriage Ordinance may make the marriage void or may make the person liable subject to penalties without affecting the validity of the marriage. All civil, Christian and Muslim marriages are required to be registered as are all marriages in Sabah; but, in Peninsular Malaysia customary registration of marriages is not required.

(c) Prohibited Degrees of Relationship

The prohibited degrees of kindred and affinity within which any marriage is void, follow, in the case of Civil and Christian marriages, the law in England. There are similar prohibited degrees, different only in some details, in the case of Muslim and customary marriages. Sexual intercourse between persons known to be in collateral or close lineal relation is a criminal offence for Muslims under the various State enactments.

(d) Minimum Marriage Age

The present statutory provisions in Malaysia relating to the minimum age of marriage may be summarized thus:

<u>West Malaysia</u>	<u>Age</u>	<u>Dispensation</u>
Civil Marriages Ordinance, 1952	16 years for male 14 years for female	None
Christian Marriage Ordinance, 1956	16 years for male 14 years for female	Licence granted by Church Authority.
<u>Sarawak</u>		
Church and Civil Marriage Ordinance (Cap. 92)	14 years for male 14 years for female	
Chinese Marriage Ordinance	15 years for male	
<u>Sabah</u>		
Marriage Ordinance, 1959 (applicable to all marriages in Sabah)	16 years for male 14 years for female	

The Law Reform (Marriage and Divorce) Act, 1976, proposes a minimum age of marriage at 18 with provisions for the State authority to grant a dispensation to a female who has reached the age of 16 years.

There is at present no minimum age of marriage for Muslims (except in Sabah), but it has been proposed that the minimum ages should be 18 years for the male and 16 years for the female. Traditionally, the Islamic law does not stipulate a minimum age of marriage but under the Shafii school of law a girl under the age of puberty can only be given in marriage by her father or paternal grandfather. It has been proposed that a minimum age of marriage be laid down following the legislation in the Arab countries.

5. Polygamy

The present position in Malaysia is that polygamy (or more strictly polygyny) is permitted with a number of exceptions. A man who is married under the Civil Marriage Ordinance, 1952, is precluded from marrying again while his existing marriage is valid. On the other hand, it has been held that the Christian Marriage Ordinance, 1956, only provides a method for the solemnization of a Christian monogamous marriage. It does not preclude a Chinese, even though married under the Ordinance, from contracting further customary Chinese marriages. Some Hindus, Ceylonese, Tamils, for example, have adopted a monogamous form of marriage. Muslim marriages and Chinese

customary marriages are potentially polygamous.

It is proposed under the Law Reform (Marriage and Divorce) Act, 1976, to abolish polygamy for the future for non-Muslims in Malaysia. No similar proposal has been made for Muslims, although it has been suggested that there should be stricter controls in the practice of polygamy.

Section 494 of the Penal Code provides that "whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine." This provision does not apply where under the law the second marriage is valid even though it takes place during the life of the wife.

Although the Islamic law permits polygamy, permission is subject to conditions and the predominant bias is towards monogamy. As early as 1898 it was argued by the great Egyptian scholar, Shaik Mohamed Abduh, that the Holy Quran may be interpreted as denying the right of polygamy. For the Holy Quran qualifies the permission of polygamy with two conditions: (a) financial capability--the husband should be financially capable of supporting a plurality of wives and children; and (b) justice to all wives--the husband should be able to treat all his wives impartially. If these qualifications are interpreted not as mere moral injunctions but as legal conditions precedent to the exercise of the permissive right, then it is open to a modern court to control or even to prevent the exercise of the right. In Malaysia, proposals have been made for the control of the right, so that a person will only be able to marry a second wife if he obtains the consent of the Kathi or the Shariah Court.

## B. Divorce

### 1. Annulment of Marriage

Under the Civil Marriage Ordinance and the Christian Marriage Ordinance, a marriage is void if:

- (a) Parties are within the prohibited degrees of consanguinity or affinity whether natural or legal;
- (b) The male party is under the age of 16 years or the female party is under the age of 14 years;
- (c) Certain requirements as to formalities under the Civil Marriage Ordinance, 1952, are disregarded;
- (d) One or both the parties are already validly married.

Under the Divorce Ordinance, 1952, a marriage is voidable:

- (a) If it shown that either party was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy;
- (b) If it is shown that at the time of the marriage the wife was pregnant by some person other than the petitioner;
- (c) If at the time of the marriage the respondent was suffering from venereal disease in a communicable form;
- (d) If the respondent was impotent at the time of the marriage and at the time of the institution of the suit;
- (e) If there is willful refusal to consummate the marriage.

The above grounds only apply in the case of monogamous marriages. Similar grounds for annulment exist under the laws in Sabah and Sarawak for monogamous marriages.

It is proposed under the Law Reform (Marriage and Divorce) Act, 1976, that a marriage shall only be void on the ground that it is not a valid marriage under the provisions of the Act, that is to say,

- (a) at the time of the marriage either party was lawfully married and the former husband or wife of such party was living at the time of the marriage and such marriage is in force;
- (b) either party is under the age of eighteen years of the female not granted special licence;
- (c) the parties are within the prohibited degrees of relationship.

A marriage which takes place after the commencement of the Act shall, it is proposed, be voidable on the following grounds:

- (a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;
- (b) that the marriage has not been consummated owing to the willful refusal of the respondent to consummate it;
- (c) that either party to the marriage did not consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;

- (d) that at the time of the marriage either party was suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage;
- (e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;
- (f) that at the time of the marriage the respondent was pregnant by some other person than the petitioner.

The provisions in the main (apart from the provisions relating to venereal disease) follow the provisions of the Nullity of Marriage Act, 1971. As in England, the petitioner may be barred if, with knowledge of the ground for avoidance, he so conducts himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek annulment. It is also provided that a decree of nullity on the ground that the marriage is voidable shall operate to annul the marriage only as respects the time after the coming into operation of the decree and the marriage shall, notwithstanding the decree, be treated as if it existed up to that time. There will, therefore, be no difference between annulment of a voidable marriage and dissolution by divorce in this respect--and the same orders as to financial provision of the children can be made, whether the decree be one of annulment or dissolution.

## 2. Divorce Generally

Under the present law in Peninsular Malaysia and Sabah, the grounds for dissolution of marriage (in the case of monogamous marriages) which apply equally to men and women are: adultery, desertion for a period of at least three years, cruelty and unsoundness of mind. In addition, the wife may obtain dissolution of marriage if the husband has since the solemnization of the marriage been guilty of rape, sodomy or bestiality or gone through a form of marriage with another woman. No petition can, in general, be presented within three years of the marriage.

In Sarawak it is provided under the Matrimonial Causes Ordinance that a married person may present a petition for dissolution of marriage on the following grounds, that is, the respondent--

- (a) has since the marriage committed adultery;
- (b) has since the marriage committed sodomy;
- (c) has wilfully deserted the petitioner for a period of two years or more without reasonable cause;
- (d) has failed to support the petitioner or the children of the marriage under the age of eighteen years for six months or more without reasonable cause;

- (e) has been presumed to be dead by a decree of the court;
- (f) has disobeyed a decree of the court for restitution of conjugal right;
- (g) has since the marriage treated the petitioner with cruelty and such cruelty has caused substantial physical and mental suffering;
- (h) is insane and has been insane for a period of at least three years immediately preceding the petition;
- (i) is an incurable habitual drunkard, that is, a person who habitually takes or uses any intoxicant, or any sedative, narcotic or stimulative drug and while under the influence or in consequence of the efforts thereof is at any time dangerous or the cause of serious harm or suffering to himself or others or is incapable of managing himself or his affairs;
- (j) is undergoing a sentence of imprisonment of five or more years;
- (k) wilfully refuses to have sexual intercourse with the petitioner without reasonable cause;
- (l) has communicated a venereal or loathsome disease to the petitioner;
- (m) was at the time suffering from a venereal disease;
- (n) was at the time of the marriage pregnant by some person other than the petitioner.

Divorce by mutual consent may be granted by the court on the joint petition of the parties if neither of the petitioners professes the Christian religion.

The Royal Commission on Marriage and Divorce in Malaysia has recommended the adoption of the principle of breakdown as set out in the latest English legislation in preference to the existing principle of fault.

The Law Reform (Marriage and Divorce) Act, 1976, provides that the sole ground for divorce shall be that the marriage has irretrievably broken down. Irretrievable breakdown may be proved by one or more of the facts set out in the Act--

- (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

It is provided that the court may make a decree if satisfied that the circumstances make it just and reasonable to do so, and in considering whether it would be just and reasonable to make a decree, the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved. It may make a decree nisi subject to such terms and conditions as the court may think fit to attach but if it should appear to the court that under the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.

Provision is also made for a marriage to be dissolved by mutual consent on the joint petition of the parties.

The existing rule that no petition can, in general, be presented within three years of the marriage will be preserved but the period is reduced to two years. Attempts at reconciliation will be encouraged and it is provided that if at any stage of the proceedings for divorce it appears to the court that there is reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation.

### 3. Muslim Divorce

A Muslim husband can divorce his wife by talak. Administrative provisions in the States in Malaysia require that every effort at reconciliation should be made before a talak (divorce) is registered. The Muslim wife can apply to the Kathi for a divorce under the procedures known as cerai taalik, khula' or fasah.

Under the Islamic law the marriage contract may be terminated by legal action taken by the husband or the judge (Kathi). This could take place in one of these three ways:

- (a) at the will of the husband without the intervention of the court;

(b) by mutual consent; or

(c) by judicial decree through annulment or dissolution.

It is sometimes said that divorce under Islamic law is easy and one-sided and at the husband's whim. The main criticism has been against the first method of divorce, that is, at the will of the husband. Divorce by mutual consent should not raise any question of prejudice, as both sides have agreed to it. It is only necessary to safeguard against such a decision being taken in a momentary fit of anger or under unusual circumstances, where, for example, the wife is coerced to giving her consent. Divorce by judicial decree in essence gives the wife the right to ask for divorce on medical or moral grounds or on grounds of failure to maintain, desertion or imprisonment. The Islamic law itself places restrictions on the right of the husband to repudiate his wife. Apart from moral injunctions contained in the Prophet's saying, "Divorce is the most hateful to God of all permitted things," there are legal restrictions on the time and method of repudiation which appear designed to ensure that the husband should only exercise his right when he can no longer live in peace and harmony with his wife. Efforts at conciliation and settlement are encouraged and here again Shaik Mohamed Abduh has interpreted the Quranic requirement that where there are differences between the parties, the matter should be referred to arbitrators, as requiring divorces to be obtained through the court in all cases. In Malaysia, the various State enactments require that every effort should be made to resolve the differences between the parties before the divorce is pronounced or registered.

#### 4. Chinese Divorces

A Chinese husband can divorce his wife in accordance with the Chinese custom. No application to a court is needed except in Sarawak (where an application must be made to the High Court). All that is required is that publicity should be given to the divorce, as, for example, by announcing the fact at a family gathering.

This method of divorce will no longer be available if the Law Reform (Marriage and Divorce) Act becomes law.

#### 5. Divorce According to Native Customary Law

Divorce can also be obtained by Natives in Sabah and Sarawak according to the Native custom.

#### C. Royal Commission Recommendations on Reform of Marriage and Divorce Law

A Royal Commission (headed by the then Chief Justice) on Non-Muslim Marriage and Divorce Laws was appointed by His Majesty the Yang di Pertuan Agong on 4 February 1970 primarily to study and examine the existing laws

relating to marriage and divorce (other than Muslim marriages) and to determine the feasibility of reform, if any is considered necessary, in particular, in the light of the resolution of the 1962 United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. This Commission, after examining the various statute laws and customary law on marriage and divorce and considering testimonies of a cross section of the people, submitted its recommendations to His Majesty the Yang di Pertuan Agong on 15 November 1971. In its recommendations, the Commission proposed a radical reform on the law of marriage and divorce. The proposed law, if implemented, will eliminate polygamous marriages among the non-Muslim population of Malaysia. The important features of the recommendations are as follows:

- (a) The Commission was convinced that public opinion is overwhelmingly in favour of the abolition of polygamy and therefore recommended that henceforth all marriages should be monogamous; this recommendation will in a way restrict the size of every family.
- (b) To enable the proper implementation of the reformed law on monogamous marriages, there must be a system of compulsory registration of all marriages although the customary ceremonial feature of marriages may be retained; this recommendation will enable population policy planners to carry out a discrete check and to offer discrete advice to newly married couples.
- (c) The minimum ages of the parties to a marriage are to be increased to 18 years for male spouse and 16 years for female spouse and, in addition, a person under the age of 21 will need parental or guardian consent before entering into matrimony; this recommendation will inevitably contribute to a delay on child production.
- (d) Divorce law is also extended in scope in that the granting of divorce may be made where there is evidence of irretrievable breakdown of a marriage; this recommendation is also a significant contribution to the policy of population growth control.

The Law Reform (Marriage and Divorce) Act, 1976, has now been enacted but has not yet been brought into force.

#### IV. OFFENSES RELATED TO SEXUAL RELATIONS

Section 375 of the Penal Code provides for the offense of rape. It is expressly provided that sexual intercourse with a woman under the age of 14, with or without her consent, will be rape, but it has been held that where a man has sexual intercourse with a girl under 14 years of age, but has reasonable grounds for believing and did, in fact, believe that

she was more than 14 years of age, he is entitled to rely on the defense of mistake of fact. Sexual intercourse by a man with his own wife will constitute rape if the wife is under 13 years of age.

Chapter XX of the Penal Code deals with various offenses relating to marriage. These include the offense of cohabitation caused by a man deceitfully inducing a belief of lawful marriage (section 493); marrying again during the lifetime of the husband or wife (sections 494 and 495); marriage ceremony gone through with fraudulent intent without lawful marriage (section 496); and, enticing or taking or detaining with criminal intent a married woman (section 498).

Under the Women and Girls Protection Act, 1973 (Act 106), which consolidated earlier legislation, it is an offense for a person to have carnal knowledge with any female person under the age of 16 years except by way of marriage, but it is provided that it shall be a sufficient defense to the charge that the person had reasonable cause to believe that the female person was of or above the age of 16 years.

Sexual offenses are also punishable under the Muslim law enactments and the Native Customary law in the various States of Malaysia. The offenses include those of illegal sexual intercourse, adultery, incest and breaches of religious and customary rules relating to contacts between persons of opposite sexes.

## V. LAW ON SOCIO-ECONOMIC FACTORS

### A. Maternity Benefits

Under the Employment Ordinance, 1955, every female is entitled to abstain from work during a period not exceeding 60 consecutive days before and after confinement and receive from her employer a maternity allowance for that period. The maternity allowance shall be at the employee's ordinary rate of pay for one day or at the rate prescribed by the Minister, whichever is greater. In any case, the rate of the allowance is not to be less than \$4.00 per day.<sup>15</sup> Failure to comply with the Ordinance is an offense punishable by a fine of \$500 or imprisonment for a period not exceeding six months. Furthermore, the Act prohibits a female labourer who abstains from work because of her confinement from being dismissed solely on the ground of such abstention. It is to be noted, however, that the maternity allowance is paid in lieu of, and not in addition to, the salary the female labourer would have earned if she had worked during her period of confinement. Under a recent amendment to the Ordinance, no maternity allowance is payable if the woman has three or more children.<sup>16</sup>

It has been recommended and accepted that for women employees in the public service and in service with statutory authorities, they be granted maternity leave with pay for only three occasions during the service.

The maximum maternity leave is to be 42 days. Any maternity leave over and above the recommended periods shall be debited against vacation leave or, if vacation leave is not available, shall be treated as leave without pay.

**B. Income Tax Benefits**

Under the Income Tax Act, 1967, a man is allowed a deduction of \$1,000 for his wife or for payments to his former wife. The total amount of the deduction allowed cannot exceed \$1,000, even though the man has more than one wife.

A taxpayer is also entitled to claim deductions for children under 16 years of age or older than 16 if the children are attending any university, college, school or other educational establishment full-time or serving articles of indenture during that year. In such cases a taxpayer can claim the following deductions up to five children:

\$750 for the first child

\$500 for the second child

\$500 for the third child

\$300 for the fourth child

\$300 for the fifth child

The following children of an individual resident in the basic year who maintains or partly maintains them at any time in that year are eligible for this relief:

- (a) Unmarried and under sixteen in the year preceding the year of assessment.
- (b) Unmarried of any age receiving at any time in the preceding year full-time instruction at any University, College, School, etc.
- (c) Unmarried child over sixteen in preceding year proved to the satisfaction of the Director-General of Inland Revenue as not receiving full-time instruction at any University, College, School or similar educational establishment because of physical or mental disability.

The relief among the eligible children under (a) or (b) above is:

First eligible child	\$750
Second and third eligible child	500 each
Fourth and fifth eligible child	300 each

The relief for children falling under (c) above is \$300 for each child.

Additionally, if any child over 16 of a resident of West Malaysia is receiving full-time education at a college, university or other similar institution of higher education (this would exclude a grade school), or serving articles outside Singapore, the Director-General of Inland Revenue may be petitioned for relief for actual amounts spent directly on the child's maintenance and education. The maximum for this is double the above rates; e.g., if it is a first eligible child studying overseas the maximum is  $\$750 \times 2 = \$1,500$ ; and if it is a fourth child,  $\$300 \times 2 = \$600$ . Similarly, double relief is available to a resident of East Malaysia whose child is receiving full-time education or serving articles in Singapore or West Malaysia.

No deduction is given for any child who is receiving any income of his or her own regardless of the source, if the amount exceeds the deduction allowed under section 48. In re a Taxpayer (1969) 1 M.L.J. (XVII) decided that the phrase "appropriate deduction" meant the scale where the first child gets \$750 each and not the one where it can be multiplied by two. So, if the first (i.e., oldest) child has an income of \$751, the parent is not allowed to claim the \$750 allowed above. Such a child is not considered in the order of children. This has an interesting effect, for if the eldest is not considered in the order any more, the second child becomes the first child, and so on. To understand this point we must realize that this scale above is not arranged in the order of age only. Thus, if the oldest child gets married, or, although single and under 16, gets a job, or is over 16 and not studying, or has his own income of \$750 or more, he is not considered in the order and the next child can then be the "first" child. This applies to all children; e.g., if the third oldest child marries or has income over \$500 the fourth oldest moves up to take this third place.

Sometimes in divorce or separation, if both parents are qualified and want to claim this relief, the relief is apportioned according to the amount spent on the child by each person. The maximum relief remains the same.

An individual resident in Malaysia living together with the spouse during the basis year is allowed \$1,000. If divorced or separated for half the year, then only a portion is allowed--in this case \$500. However, if paying his legally separated or divorced wife alimony or maintenance, he can claim deduction, but the aggregate sum cannot exceed \$1,000. ("Wife" includes wives and secondary wives).

Working wives are now given the option of paying income tax separately from their husbands. In some cases this has greatly benefited the family where both the wife and husband are working. This indicates that the Government is greatly concerned and interested in the welfare of women and children in our country. This will result in money saving for many families.

#### C. Employment of Women

There is no legal restriction on the employment of women under the Employment Ordinance, 1955, which regulates working conditions, payment of wages and the dismissal of employees who are under a contract of service with an employer and are engaged to do manual labour (including those engaged as artisans, apprentices, overseers and supervisors, those engaged in the operation or maintenance of commercial vehicles and generally any person who has entered into a contract of service under which the wages do not exceed \$750 a month). To prevent female labourers being exploited, the Ordinance prohibits them from working in any industrial or agricultural undertaking between 10 p.m. and 5 a.m. or to commence work without having had a period of at least 11 consecutive hours rest. The exceptions to this rule are laid down by the Minister and include females working as conductors in public service transport who may be allowed to work from 10 p.m. to 1 a.m. and also females employed in shift duties in an industrial undertaking, which operates two shifts per day. The maximum working hours allowed by the Ordinance are 48 hours per week, except in the case of emergency, defense or security of the country and events of a similar nature. Provision for holiday leave is also made in the Ordinance.

#### D. Child Labour Laws

Under the Children and Young Persons (Employment) Act, 1966, restrictions are imposed on the employment of Children and Young Persons in regard to the amount of time, working conditions and age at which a person can be employed. A child, that is, a person under the age of 14, may be employed only in light work suitable to his capacity in any undertaking carried on by his family or in work approved or sponsored by the government in any school, training institution or training vessel or as an apprentice or in public entertainment in accordance with the terms and conditions of a licence granted under the Act. No child or young person (that is, a person under 16 years of age) may be employed in any underground work or any employment contrary to the Machinery Ordinance, 1953, or the Electricity Ordinance, 1949. The Minister may prohibit any child or young person from engaging or being engaged in any employment if he is satisfied that under the circumstances such employment would be detrimental to the interests of the child or young person as the case may be. No child may work for more than six hours per day; or, if the child is attending school, for a period which together with the time he spends attending school exceeds seven hours. No young person may work for more than seven hours in a day or, if the young person is attending school, for a period which together with the time he

spends in school exceeds eight hours. These provisions in effect restrict the entry of children and young persons into the labour market and reduce their value as sources of income for the family.

#### E. Laws Relating to Education

The Education Act, 1961, reflects the education policy of the Government of Malaysia by stating that "the educational policy of the Federation... is to establish a national system of education which will satisfy the needs of the nation and promote its cultural, social, economic and political development." To achieve this aim, the First and Second Malaysia Plans provided, inter alia, that the quality of education, particularly in the fields of Science and Technology should be improved to carry out the objectives and also to spread educational opportunities more evenly throughout the country.

The main points are:

- (a) Education is not compulsory but a high percentage of the population of children of school age attends schools. (Over 90% of the total population of children of between the ages of 6-12 years do attend primary schools).
- (b) Free education is available to children attending primary schools and children start attending schools at the age of 6 or higher.
- (c) There is automatic promotion until Form III in the secondary schools (that is, a full nine years of education) when pupils sit for an examination to qualify for a certificate of education (lower grade) and those who fail to make the grade have to leave school.
- (d) The education system tends to lean towards academic achievement, although practical subjects like agricultural science, home science, industrial art and commerce are taught in the lower secondary stage.

To relate the educational system of Malaysia to the policy of population growth control, it is to be observed that in placing great significance on the improvement of the quality of education and the spreading of educational opportunities throughout the country, the Government is thus offering to every parent the opportunity of sending his or her children to school. It is then the responsibility of the parent to ensure that such an opportunity is usefully utilized. Cast with such a responsibility, parents should therefore plan the size of their families in order that every one of their children will be given equal opportunity to attend school and none is deprived of such an opportunity merely because of the need to compel one or more of their children to work to supplement the

family income. It would no doubt be useful to provide in the Education Act compulsory education for every child between the ages of 6 and 17. A compulsory education provision would place greater responsibility on the parents thereby causing them to realize the importance of raising children in terms of quality rather than quantity.

Although education is not yet compulsory in Malaysia, there is free elementary education in the national schools. Study loans, scholarships, bursaries and free textbooks are given for needy students attending elementary and secondary schools; and in the post-secondary level, scholarships and bursaries are given by the Federal and State Governments and also institutions like M.A.R.A., the Sabah Foundation and the Sarawak Foundation, whose aim is to help the bumiputra or national races to equip themselves for a modern developing society.

What follows is a brief description of the educational system. Children between the ages of 6 and 11 attend the primary schools. From there they go to the secondary schools where after two years they take the Lower Certificate of Education. Thereafter, if they qualify, they attend a further two-year course at the secondary school, after which they take the Malaysian Certificate of Education. Upon successful completion of the Malaysian Certificate of Education, students can proceed to complete their secondary education with a two-year pre-university course leading to examinations at the Higher Education Certificate level. As an alternative, the student can take technical and commercial courses. After completion of the higher education certificate, students can join one of the five universities in Malaysia or attend institutions specializing in technical education or go overseas for higher education.

School fees at the secondary level average about \$120 a year and, in addition, there are substantial payments to be made for textbooks and school uniforms. At the University, tuition fees vary from \$450 a year in the Faculty of Arts to \$540 a year in the Faculty of Medicine. Education of children is a substantial financial burden and is an incentive to parents to plan and limit their children.

#### F. Social Security Laws

Under the Employees Provident Fund Ordinance, 1951, provision is made for the payment of a lump sum benefit to persons in employment upon their retirement at the age of 55 and after, or if departing permanently from Malaysia or upon becoming permanently disabled. The rates of contributions from employers and employees, respectively, are approximately 6% and 7% of the wages or salaries paid, so that, in effect, 13% of wages and salaries are paid into the fund.

In the Civil Service, however, the employee does not contribute to the retirement benefits. Rather, a pension based on the years of service and the officer's last drawn salary is paid by the government. Upon

retirement, the civil servant has the option of taking a gratuity and a reduced pension or a full pension. It has recently been proposed that the pension benefits be extended to employees of statutory authorities.

The Employees' Social Security Act, 1969, provides certain benefits to employees in case of employment injury, including occupational diseases and also provides for certain other matters relating thereto.

The Act provides benefits to dependants of deceased insured persons, namely--

- (a) a widow, a minor legitimate or adopted son, an unmarried legitimate or adopted daughter or a widowed mother; and
- (b) if wholly dependent on the earnings of the insured person at the time of his death, a legitimate or adopted son or daughter who has completed his 16th year of age and is infirm and is incapable of earning any wages; and
- (c) if wholly dependent on the earnings of the insured person at the time of his death--
  - (i) a parent other than a widowed mother;
  - (ii) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and a minor or if widowed and a minor;
  - (iii) a minor brother or an unmarried sister or a widowed sister, if a minor;
  - (iv) a widowed daughter-in-law;
  - (v) a minor child of a pre-deceased son;
  - (vi) a minor child of a pre-deceased daughter where no parent of the child is alive; or
  - (vii) a paternal grandparent, if no parent of the insured person is alive.

The Act applies equally to male and female workers in the private sector and in all industries. It is obligatory for all employers to insure all their workers if they employ more than 5 workers.

The benefits under the Act are as follows:

- (a) periodic payments to an insured person in case of

invalidity;

- (b) periodic payments to an insured person suffering from disablement as a result of an employment injury;
- (c) periodic payments to such dependents of an insured person who dies as a result of an employment injury;
- (d) payments to the eldest surviving member of the family of an insured person who has died as a result of an employment injury;
- (e) periodic payments to an insured person so long as he is severely incapacitated or disabled as to require personal attendance of another person;
- (f) medical treatment for and attendance on insured persons suffering from disablement as a result of an employment injury.

Invalidity pensions will also be payable throughout the period of invalidity calculated at 40% of the average monthly wage.

The insured is also entitled to disablement benefits for the period of such disablement whether the disablement is permanent or temporary, partial or total.

If an insured person dies as a result of an employment injury whether he was in receipt of any periodic payment or not, his dependents will benefit as follows:

- (a) to his widow during life or until remarriage and if he has two or more widows then it is divided equally;
- (b) to each legitimate or legally adopted son until he completes his 14th year;
- (c) to each legitimate or adopted unmarried daughter until she completes her 14th year of age or until marriage.

If an insured person dies as a result of an employment injury or where he is in receipt of disablement benefit and dies, his wife will be paid funeral expenses not exceeding \$100.

An insured person whose condition requires, as a result of employment injury, medical treatment and attendance will be entitled to receive medical benefits. Such medical benefits may be in the form of outpatient treatment and attendance in a hospital or dispensary, clinic or by visits to the home of the insured person for as long as he is in receipt of disablement benefits.

An employer may not reduce the wages of an insured or dismiss him during the period the insured is in receipt of disablement benefits, and any such reduction in wages or dismissal shall be invalid and inoperative.

An insured person suffering from or claiming to suffer from invalidity or permanent disablement may be provided by the organization free of charge facilities for physical or vocational rehabilitation.

## G. Inheritance Laws

### 1. Intestacy

If a person (other than a Muslim) dies intestate in Peninsular Malaysia, the distribution of his property is governed in the main by the Distribution Ordinance, 1958. If a woman dies intestate leaving a husband, the whole of her estate goes to him; if a man dies intestate leaving a wife and issue, the surviving wife shall be entitled to one-third of the estate, but if he leaves a wife and no issue, the surviving wife shall be entitled to one half of the estate. Subject to the rights of the surviving husband and wife, the estate of an intestate is held on trust for the issue; but if there is no issue, then for the parents, brothers and sisters and other specified relatives or in default to the Government.

If a person dying intestate is permitted by the applicable personal law a plurality of wives and is survived by more than one wife, such wives shall divide among them equally the share which the wife of the intestate would have been entitled to, had such intestate left only one surviving wife.

An adopted child adopted under the provisions of the Adoption Ordinance, 1952, is treated as a legitimate child.

In Sabah, under the Intestate Estates Ordinance (which applies to all estates other than the estate of any Native or Muslim subject to the jurisdiction of a Native Court), when a person dies intestate having a surviving spouse but no issue or parent, the spouse shall be entitled to the whole of the estate. If the intestate dies, leaving the surviving spouse and issue, the spouse shall be entitled to all the personal chattels of the estate and a life interest in half of the remaining property. Subject to the rights of the surviving spouse, the estate of an intestate shall be distributed equally to and among the children of the intestate or their representatives. If the intestate leaves no issue, the property goes to the parents, and then to the brothers and sisters and other specified relatives.

Under the Muslim law, inheritance shares are allotted to specified heirs including the spouses, children, parents and brothers and sisters and the residuary goes to the agnatic heirs, usually the sons or the brothers of paternal uncles. Male heirs usually get double the share of a

female. The portion allotted to the widow ( $\frac{1}{8}$  if there are no children,  $\frac{1}{8}$  if there are children) is divisible among the surviving wives, if more than one.

Special rules of inheritance are applicable to the native races in Sabah and Sarawak.

## 2. Testacy

In general, testators (other than Muslims) are free to dispose of their property as they wish. This is subject to the Inheritance (Family Provisions) Act (Act 39) which provides that dependents may make application for reasonable provision from the estate of a deceased person who they consider has not sufficiently provided for them.

Under the Muslim Law, a person can make bequests only up to one-third of his property. The balance of the property must be divided among the heirs and residuaries, provided by the law.

## VI. RECENT CHANGES

### A. Law Reform (Marriage and Divorce) Act, 1976

Important legislation dealing with family law has been enacted in Malaysia but has not yet come into effect. This is the Law Reform (Marriage and Divorce) Act, 1976 which applies to everyone in Malaysia except Muslims, the aborigines of Peninsular Malaysia and the natives of Sabah and Sarawak.

The Act seeks to abolish polygamy for the future but affirms the validity of existing polygamous marriages which are deemed to be registered under the Act.

The minimum age of marriage is fixed at 18 with the proviso that a female who has attained the age of 16 may be married by licence granted by the Chief Minister of the State.

All marriages require the consent of the parties thereto and all marriages are required to be registered.

Divorce may only be obtained through the court and no longer under customary law. Divorce may be granted where there is proof of the breakdown of the marriage, or mutual consent, or when one of the parties embraces the Islamic faith.

Children of voidable marriages are deemed to be legitimate, as are children of void marriages (except where the marriage is a polygamous one) where one or both of the parties have entered into the marriage in good faith.

Provision is made for conciliation and reconciliation and for maintenance of spouses and children and the custody of children.

**B. Employment (Amendment) Act, 1976**

The Employment (Amendment) Act, 1976 provides that a female employee shall not be entitled to any maternity allowance if at the time of her confinement she has three or more surviving children. Children for this purpose means all natural children, irrespective of age.

**C. Administration of Muslim Law Enactments**

A bill to amend the Administration of Muslim Law Enactments in the States of Malaysia has been drafted but awaits the approval of the Conference of Rulers, as Muslim law in Malaysia is a State responsibility and comes within the prerogative powers of the Malay rulers. The Bill seeks to provide a minimum age of marriage and to control polygamous marriages and divorces.

**VII. RECOMMENDATIONS**

Based on the information presented in this monograph, it is appropriate to reaffirm the need for a periodic "review and analysis of national and international laws which bear directly or indirectly on population factors," as called for by the World Population Plan of Action (para 78 (h)), adopted by the World Population Conference in Bucharest in 1974. While recommendations for legal action have been made explicitly or implicitly in the text, special consideration may be given to the enactment of the following measures in the effort to achieve a consistent population policy in Malaysia:

- (1) The institution of compulsory education, at least at the elementary school level, as called for by the Universal Declaration of Human Rights (Article 26 (1));
- (2) Implementation of the provisions of the Law Reform (Marriage and Divorce) Act of 1976;
- (3) Incentives encouraging the creation of additional job opportunities and expansion of housing;
- (4) The improvement of the status of women;
- (5) The safeguarding of the rights of the child;
- (6) Liberalization of anti-abortion laws to the extent of allowing abortion in the case of contraceptive failure, rape or incest when performed by a properly qualified physician under suitable conditions.

## FOOTNOTES

- 1  
Based on projected trends in survival rates.
- 2  
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- 4  
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- 5  
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- 6  
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- 7  
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- 8  
Poisons List Order, 1970, (P.U. (A) 459/70).
- 9  
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- 10  
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- 11  
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- 12  
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- 13  
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