THE AFTERMATH OF *SUSIE TEOH* — ARE PARENTAL RIGHTS SUPREME?

Unlike courts in many other parts of the world, the Malaysian courts have not previously had many opportunities to decide upon directly competing claims between the rights of parent and child in the context of family decisions affecting the upbringing of the child.[1] There are, however, many cases concerning the conflict of interests between two parents in custody disputes following the breakdown of family unity,[2] in such cases, it has long been established that the outcome of the disputes rests on the "paramountcy of the welfare of the child involved". The decision of the Supreme Court in *Susie Teoh*,[3] which reiterates the basis of the 1951 Straits Settlement Court of Appeal case of *In re Maria Hertogh*[4] affirming absolute parental rights over upbringing of child, is disconcerting and not in keeping with the spirit of the provision of the Guardianship of Infants Act 1961 which requires the court to act with the welfare of the child primarily in mind.[5]

This article will highlight the inadequacy of Malaysian law, both statutory and judicial, in the area of parent-child legal relationships of non-Muslims, in the light of worldwide rising consciousness of the need to protect the interests and

[1]For instance in England:- *Gillick* v. *West Norfolk & Wisbech Area Health Authority* [1985] 3 W.L.R. 830. In the United States of America:- *Carey* v. *Population Services International* 431 U.S. 678 (1977); *Planned Parenthood of Central Missouri* v. *Danford 428 U.S. 52 (1976); Ginsberg* v. *New York* 390 U.S. 629 (1968); *Wisconsin* v. *Yorder* 406 U.S. 205 (1972); *Bellotti* v. *Baird* (Bellotti II) 443 U.S. 622 (1979); *Parham* v. *J.R.* 442 U.S. 548 (1979).

[2]For instance *Loh Koh Fah* v *Lee Moy Lan* [1976] 2 MLJ 199; *Teh Eng Kim* v *Yew Peng Siong* [1977] 1 MLJ 234; and *Mahabir Prashad* v *Mahabir Prasad* [1982] 1 MLJ 189.

[3]Reported as *Teoh Eng Huat* v *Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300 & [1990] 2 CLJ 11. The High Court decision was reported as *In Re Susie Teoh; Teoh Eng Huat* v *Kadhi of Pamis Mas Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan* [1986] 2 MLJ 228 & *Teoh Eng Huat* v *The Kadhi of Pasir Mas, Kelantan & Anor* [1986] 2 CLJ 331. References to judgments made hereafter are based on the reports in the Malayan Law Journals.

[4][1951] MLJ 164.

[5]Section 11, Guardianship of Infants Act 1961.

rights of children.[6] Reference will be made to legal developments in the same area in England, the source of much of Malaysian law on parent-child relationships.

I. Legislative Background

Today in Malaysia, the guardianship and custody of non-Muslim children are generally governed by the following legislation:

a) Guardianship of Infants Act 1961 (Revised 1988),[7] applies in West Malaysia;
b) Guardianship of Infants Ordinance (Cap. 54) of Sabah;
c) Guardianship of Infants Ordinance (Cap. 93) of Sarawak;[8] and
d) Law Reform (Marriage and Divorce) Act 1976,[9] applies in the whole Federation of Malaysia.

These are the main pieces of legislation prescribing the rights, liabilities, and duties of parents in relation to their children. An infant is defined in the West Malaysia Guardianship of Infants Act 1961 as "a person who has not attained the age of majority" under the Act.[10] The age of majority, as provided for under section 2 of the West Malaysia Act is twenty one for non-Muslims.[11] The other two pieces of guardianship of infants legislation however do not define the

[6]There have been calls and debates for the adoption of a "Bill of Rights for Children". See for instance Foster, Henry H. JR & Freed, DJ, "A Bill of Rights for Children", (1972) 6 *Family Law Quarterly* 343; and Zander, M, *A Bill of Rights*, 3rd Edition, 1985. In Malaysia, the Government has signed the World Declaration on Survival, Protection and Development of Children which is an outcome of the World Summit for Children held in New York, U.S.A. in September 1990. The Government is now contemplating to adopt a National Charter for Children, which would, according to the Public Health Director Dr. Raj Karim, be a proof of commitment by the country towards recognising the rights of children. See *New Straits Times*, 19 & 29 -7-1991.

[7]Act 351.

[8]The guardianship of infants legislation in West Malaysia and Sabah are modelled on the English Guardianship of Infants Act 1886, while the Sarawak legislation is modelled on the more recent English Guardianship of Infants Act 1925.

[9]Act 164.

[10]Section 2, Guardianship of Infants Act 1961.

[11]*Op. cit.* Section 2 (a) (ii).

word "infant". It is submitted that in this regard, the law applicable is the common law age of majority, that is to say twenty one years old.[12] According to section 3 of both the West Malaysia Guardianship of Infants Act 1961 and the Sabah Guardianship of Infants Ordinance, the guardian[13] of an infant has the custody of the infant, and is responsible for the support, health, and education of the infant. The guardian also has the control and management of the property of the infant. The court, however, has general supervisory power over the guardianship and custody of the infant. Section 11 of both the West Malaysia and Sabah's legislation lays down the matters to be considered by the court or a judge when exercising this supervisory role,

> The Court or a Judge, in exercising the powers conferred by this act, *shall have regard primarily to the welfare of the infant*[14] and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[12]Although the Age of Majority Act 1971 (Act 21) which is applicable to the whole Federation of Malaysia, has amended the age of majority of non-Mulims from twenty one under the Age of majority Act 1961 to eigthteen, it is submitted that since a similar amendment was not made to the Guardianship of Infants Act 1961, impliedly it is also the intention of the legislature to maintain the age of twenty one in the states of Sabah and Sarawak where the question of custody and guardianship of infants are concerned. Moreover as is expressly provided for in Section 4 of the Age of Majority Act 1961 the Act shall not effect,

(a) the capacity of any person to act in matters of marriage, divorce, dower and adoption;
(b) the religion and religious rite and usages of any class of persons within Malaysia; and
(c) any provisions in any other written law contained fixing the age of majority for the purposes of that written law.

It should be pointed out here that in the subsequent discussion on the issue of the right of an infant to choose his/her religion, the courts have confined themselves to the age of eighteen because of the provision in Article 12(4) of the Federal Constitution.

[13]Ordinarily, the father of the infant is the guardian of the infant's person and property; where the infant has no father living, the mother will be the guardian. The court, however, has discretion, where the father is the guardian, to make such order as it thinks fit regarding the custody of the infant; and where the father is deceased, the court can appoint some other person than the mother to be the guardian of the infant, either alone or to act jointly with the mother. See Sections 5 and 6 of both the West Malaysia and Sabah guardianship of infants legislation.

[14]Emphasis is mine.

The Sarawak Ordinance does not mention specifically the rights and duties of a guardian of an infant.[15] However in various sections it does mention matters relating to maintenance of the infant,[16] as well as to the custody and upbringing of the infant, and to the administration of property belonging to or held in trust for the infant.[17] Section 2 of the Ordinance, which provides the guideline for the exercise of the supervisory power of the Court, states,

> Where in any proceedings before any court... the custody or upbringing of an infant... is in question, the Court, in deciding that question, shall have the welfare of the infant as the first and paramount *consideration*...[18]

The last of these four pieces of legislation, namely the Law Reform (Marriage and Divorce) Act 1976, is a relatively new piece of legislation mainly relating to law on marriage and divorce,[19] which also prescribes matters to be considered by the court in custody dispute over "child of the marriage" [20] The same sentiment expressed in the guardianship of infants

[15]The traditional common law principle of parental rights would be operative in this respect, by virtue of Section 27 of the Civil Law Act 1956 which provides for the application of English law as administered in England on the date of coming into force of the Civil Law Act where there is no local written law on the subject, or where there is lacuna in local law. Briefly, these common law rights and duties include the rights to physical possession, to access, to determine education and religion, to domestic service, to consent to medical treatment, to discipline the child, to consent to the marriage of the child before it reaches the age of 21, to administer the child's property, to consent or refuse the application of passport; and in general the duties to maintain, and protect the child. See Maidment S., "The Fragmentation of Parental Rights", [1981] *The Cambridge Law Review* 135.

[16]Section 3(2), Guardianship of Infants Ordinance (Cap. 93) of Sarawak.

[17]*Op. cit.* Section 2.

[18]Emphasis is mine. The rest of the provision is respecting the equality of claim between the father and the mother in custody dispute, which is absent in the West Malaysia and Sabah legislation, the concern of which, though not insignificant, is beyond the scope of this paper.

[19]In force from 1st March, 1982. The purpose of the Act was mentioned in the preamble as: "An Act to provide for monogamous marriages and the solemnization of such marriages; to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto."

[20]"Child of the marriage" as defined in Section 2 of the 1976 Act means "a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family members by the other party; and [includes] an illegitimate child of, and a child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption."

legislation regarding the importance of the welfare of the infant is echoed in the 1976 Act, except that the 1976 Act attempts to provide more precise guidelines for the court in deciding custody disputes,[21] explicitly taking the "welfare of the child" as the paramount consideration;[22] subject to this, the court has to consider a variety of other factors, namely, the wishes of the parents;[23] the wishes of the child, if he or she is of an age to express an independent opinion;[24] the rebuttable presumption that "it is for the good of a child below the age of seven years to be with his or her mother," but "in deciding whether the presumption applies to the facts of any particular case, the court shall have regard to the desirability of disturbing the life of the child by changes of custody";[25] and finally, where there are two or more children involved, each child's welfare is to be considered independently of the other children, and the court is not bound to place siblings together.[26] Under this Act, the court is explicitly empowered to grant custody to persons other than the father or the mother under "exceptional circumstances". What these "circumstances" might be are however not specified in the provision. By inference, the court seems to have broad discretion to decide whether a given factual situation is "exceptional", subject always to consideration of the welfare of the child. The "other persons" to whom the court may grant custody are, the relative of the child, an organization or association whose objectives include child welfare, or "any other suitable person".[27] Obviously, the 1976 Act was designed to represent recent thinking on the continuing problem of allocating custody, and to give recognition to the significance of the participation of the child involved to determine important questions affecting his life.

As we will observe in the subsequent discussion of the *Susie Teoh's* case, the main issue before the Supreme Court

[21] Section 88 of the 1976 Act.
[22] *Op.cit.* Section 88(2).
[23] *Op.cit.* Section 88(2)(a).
[24] *Op.cit.* Section 88(2)(b).
[25] *Op.cit.* Section 88(3).
[26] *Op.cit.* Section 88(4).
[27] *Op.cit.* Section 88(1).

on appeal was whether a minor has the right to determine his or her religious practice without the consent of his or her guardian. This issue is of course closely related to the right to religious freedom, as guaranteed by Article 11 of the Federal Constitution of Malaysia.[28] This Article states that, "*Every person*[29] has the right to profess and practise his religion and, subject to Clause (4), to propagate it."[30] In addition, Article 12 on "rights in respect of education", provides *inter alia* that "every religious group has the right to establish and maintain institution for the education of children in its own religion, and there shall be no discrimination on ground only of religion in any law relating to such institutions or in the administration of such law."[31] Clause 3 of the same Article states that, "No person shall be *required*[32] to receive instruction in or take part in any ceremony or act of worship of a religion other than his own." As we will observe in subsequent discussions in this article, the contentious provision in *Susie Teoh* is Clause 4 of Article 12, which provides that, "For the purpose of Clause 3 the religion of a person under the age of eighteen years shall be decided by his parent or guardian."

II. The *Susie Teoh's* Case

The case concerned a father of Chinese origin, Teoh Eng Huat, applying to the court for, *inter alia*, a declaration that as the lawful guardian of his infant daughter, Susie Teoh, who was aged seventeen and eight months at the material time, he had the right to decide upon the daughter's religion, education and upbringing.

Susie who was born on 5 April 1968, was found missing from her home in Trengganu in April 1985. The search for

[28]See an article written by AJ Harding analysing the judgment in *Susie Teoh's* case from the angle of constitutional law, "Islam and Public Law in Malaysia: Some Reflections in the Aftermath of Susie Teoh's Case" [1991] 1 MLJ xci.

[29]Emphasis is mine.

[30]Clause 4 of Article 11 empowers the enactment of federal law to prohibit the propagation of any non-Muslim faith among persons professing the religion of Islam.

[31]Article 12 Clause 2.

[32]Emphasis is mine.

her whereabouts was not successful. Subsequently her family was informed by a kadi of Pasir Mas, Kelantan, that she had converted to Islam on 22 December 1985, without the consent of her father. It appears from the facts of the case that Susie had embraced the Muslim religion voluntarily.[33] Susie's father who brought her up as a Buddhist was unwilling to accept the validity of his daughter's conversion, thereupon he applied to the court for the declaration as mentioned above, and to nullify Susie's conversion, relying on the parental rights defined in section 3 of the West Malaysia Guardianship of Infants Act 1961, and Article 12(4) of the Federal Constitution. Susie in the mean time continued to be missing even at the time of the hearing in the High Court.

The case was dismissed in the High Court.[34] The trial judge interpreted the provisions in the Federal Constitution in favour of the right of an infant to decide her religion, by construing the word "person" in Article 11 to mean "a person who is of sound mind and is in a position to decide."[35] Presumably the trial judge was referring to the situation of those minors under eighteen years of age who have attained sufficient intelligence and maturity to make important decisions affecting their lives, and hence are in a position to decide for themselves. He strengthened his decision by interpreting the word "required" in Clause 3 of Article 12 of the Federal Constitution to mean doing an act under "force or compulsion",[36] thus Clause 3 is inapplicable where one voluntarily takes part in a ceremony or an act of worship in religion. As regards the effect of the contentious Clause 4 of Article 12, the trial judge thought the phrase "for the purpose of Clause 3" has the effect of limiting the application of Clause 4 to

[33]In the High Court, the trial judge, at page 231 of his judgment, by inferring from the fact that the father made no allegation of abduction, kidnapping or forced conversion of his daughter, concluded that Susie had voluntarily converted herself. In the Supreme Court, the Court when speaking about the motive of the kadi who converted Susie, states at page 12 of the judgement, "The first defendant who purportedly converted Susie did so in good faith as he had no reason to doubt whatsoever story she told about her legal and factual status and affairs of life."

[34][1986] 2 MLJ 228

[35]*Id.* 231.

[36]*Id.* 232.

Clause 3, hence a parent's right to determine the religious education of children under the age of eighteen could not override the general effect of Article 11 which grants the constitutional right of choice of religion to "every person".[37] The cumulative effect of the analysis of the High Court judge, as put by the Supreme Court, was that "any non-Muslim infant under the age of eighteen can decide his own religion, notwithstanding the wishes of the guardian or parent."

As regards the application of the Guardianship of Infants Act 1961, the judge's line of reasoning was, with respect, less compelling. The declaration sought by the father mentioned, among other things, that the father as guardian has right to decide the "upbringing" of his infant daughter. The trial judge opined that the word "upbringing" was a general term covering support, health and education,[38] but does not include the right to decide the religion of the infant. Obviously, the judge came to such conclusion because the word "religion" is not mentioned in section 3 of the Act.[39] In other words, it was the opinion of the trial judge that parental rights as envisaged by the Guardianship of Infants Act 1961 do not include the right to determine the religion of an infant child. Be that as it may, the trial judge, in a somewhat inconsistent manner, went on to make the assumption that if he had had the opportunity to interview the infant child, he would have made an order as regards her custody[40] and her choice of religion based on the welfare principle as embodied in section 11 of the Act. Assuming for the moment that the trial judge's interpretation as to the non-inclusion of parental right to determine an infant child's religion was correct, it is difficult to see how an interview with the infant would enable the court to utilise the welfare principle as provided

[37] *Ibid.*

[38] As mentioned earlier, Section 3 of the Guardianship of Infants Act 1961 states that the guardian shall have custody of the infant, and shall be responsible for his support, health and education.

[39] See the comment by the Supreme Court on this point at page 302 of the Supreme Court judgment.

[40] Section 10 of the Guardianship of Infants Act 1961 states: "The Court or a Judge may at any time remove from his guardianship any guardian, whether a parent or otherwise and whether of the person or the property of the infant, and may appoint from time to time another person to be guardian in his place."

for in the very Act which the court had decided was inapplicable.

The decision was reversed on appeal. After making reference to the Report of the Federation of Malaya Constitutional Commission on religion,[41] which warned of the need to alleviate fear among non-Muslim of intervention of freedom of choice of religion by the State if Islam were to be declared constitutionally as the State religion, the Supreme Court, acting "in the wider interest of the nation",[42] overruled the trial judge's attempt to restrict the effect of Clause 4 of Article 12 to situations where an infant is coerced to participate in the religious ceremony of a religion other than his own. There was no discussion on the issue of the welfare of the infant. Instead, the decision of the court rested, on the face, partly on consideration of the interest of the nation, and primarily on protection of parental authority.

Lord President Tun Dato' Haji Abdul Hamid Omar, delivering the unanimous decision[43] of the Court, said,

> [It] is our view that under normal circumstances, a parent or guardian (non-Muslim) has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority. Our view is fortified by the provisions of the Guardianship of Infants Act 1961, which incorporates the rights and liabilities of parents and regulates the relationship between infants and parents.

In view of the sensitivity of religious issues in Malaysia, one can reasonably understand the anxiety of the Court not to further complicate the problem; however, there seems to be no good reason for the court to concede absolutism of parental authority over issues other than the choice of the religion of an infant. Further, the court did not clarify what are the "abnormal circumstances" under which the parent or guardian would be deprived of the right to dictate the life of the infant. Presumably the court had extreme situations in mind, for instance cases of child abuse or neglect, which

[41]See para. 169 of the Reid Commission Report.
[42]Page 302, paragraph 1 of the judgment.
[43]There were five Supreme Court justices presiding over the case — Tun Dato' Haji Ahmad Abdul Omar (Lord President of Malaysia), Tan Sri Datuk Hashim Yeop A. Sani (Chief Justice of Malaya), Datuk Gunn Chit Tuan, and Datuk Jemuri.

constitute offences under the Children and Young Persons Act 1947.[44] This is indeed a reinstatement of the old common law principle that a father's authority over his minor children was regarded as absolute, in the absence of gross misconduct on his part.[45] If interpreted thus, this decision would result in the grave consequence of foreclosing all possible future litigation over balance of power in family decision between parent and child.

III. *Re Maria Hertogh* Compared

A similar decision to the *Susie Teoh's* judgment was reached forty years ago in the much criticized Straits Settlements Court of Appeal case of *In re Maria Hertogh.*[46] In this case, a girl who was born of Dutch Catholic parentage had been brought up in a Muslim foster home since the age of four. When she was fifteen years of age, her father applied for custody, by which time she had contracted marriage with a Muslim man according to Muslim Law and was desirous of being a Muslim.[47] The court declared her marriage null and void according to the law of her domicile, namely Holland, and treated the girl's wishes as irrelevant, even though the court actually found the girl "older than her years"[48] and she had in fact professed the Islam religion. She was forced to separate from her husband, and brought to Holland by her parents, a land which was totally alien to her.[49] Justice Brown in the lower court refused to consider the welfare principle, holding that section 11 of the Guardianship of Infants Ordinance[50] laid more stress on the wishes of the

[44]Act 232, revised 1980. This Act has now been repealed by the Child Protection Act 1991 (Act 468), which came into force on 1.3.1992.

[45]See for instance, *R* v *de Manneville* [1804] 5 East 221; *Re Agar Ellis* [1883] 24 Ch. D. 317; *Symington* v *Symington* [1875] L.R.2.S.C. and Div. 415

[46]*Supra* fn. 4 Also see, Ahmad Ibrahim, "The Extent and Scope of Parental Rights" [1986] 2 MLJ xxxix.

[47]According to Islamic law, a girl attains adulthood upon puberty.

[48]per Sutton C.J. at p. 167 of the judgment.

[49]The court's decision was a tragic one for Maria Hertogh. She never established a close relationship with her parents. Her subsequent marriage with a Dutch man ended up with divorce.

[50]Now Guardianship of Infants Act 1961.

parents. References were made to English cases on parental rights for justification. Among the English cases relied on was the now much denounced[51] nineteenth century case of *In re Agar Ellis*,[52] where Cotton L.J. said,[53]

> This Court holds this principle - that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children and really for the interest of particular infant, that the Court should not, except in very extreme cases interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child...[it] is not in our power to go into the question as to what we think is for the benefit of this ward.[54]

In the case of *In re Agar Ellis*, the court refused to interfere with the unreasonable act of a father, who restricted his seventeen-year-old daughter from communicating with her mother, even in the absence of any allegation as to the character of the mother.

Since this case, the law on parent-child relationships has undergone a fundamental change in England. The now prevailing view holds that the welfare of the child is of paramount consideration, and that the court should not hesitate to apply equitable principles to deprive a father of his parental rights, if it would be contrary to the best interests of the child to give effect to the wishes of the father.[55]

[51]Lord Upjohn described this case as "dreadful" in *J* v *C* [1970] A.C. 668, 721.
[52][1883] 24 Ch. D. 317.
[53]*Id.* 334.
[54]Sir Baliol Brett M.R. in the same case, at page 329 of the judgment, said that the court "has no right to interfere with the sacred right of a father over his own child."
[55]See for instance, *R* v *Gyngall* [1893] 2 Q.B. 232. In this case, Lord Esher M.R. said on pages 241-242 of the judgment that,

> "The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of the child, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate and may be intending to act for the child's good, but may not be doing what a wise, affectionate, and careful parent would do. The Court may say in such a case that although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate and

The decision in *In re Agar Ellis* was unequivocally refuted by Lord Denning's much quoted decision in *Hewer* v *Bryant*[56] where his Lordship stated emphatically that,

> I would get rid of the rule in *Re Agar Ellis* and of the suggested exceptions to it. That case was decided in 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with a shilling. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child [comes of age]. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times... *the legal right of parent to the custody of a child ends [when the child comes of age]; and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with the right of control and ends with little more than advice.*[57]

In the recent celebrated case of *Gillick* v *West Norfolk and Wisbech Area Health Authority*,[58] the House of Lords reconsidered the scope of parental rights under English law. The case raises fundamental questions concerning the nature of the legal relationship between parents and children, and the role of the State in regulating decision-making within the family. The issue in *Gillick* is a narrow one, namely whether guidelines issued by the Department of Health and Social Security (DHSS), respecting the provision of contraceptive advice and treatment within the National Health Services to persons under 16 were lawful. The advice stressed that in such cases, the doctors or other professionals employed by the health authority should always try to persuade the child to involve the parents, or other persons in *loco parentis*, in the decision making; however, in exceptional cases, the doctor would retain the right to exercise his clinical judgment and

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careful parent would do... The Court [however] must exercise this jurisdiction with great care and can only act if it is shown that... [it is] clearly right for the child in some very serious and important respect that the parent's right should be suspended or superseded...[where] it is so shown, the Court, will exercise its jurisdiction accordingly."

[56][1969] 3 All E.R. 578, 582.

[57]Emphasis is mine.

[58][1985] W.L.R. 830.

proceed without consulting the parents. Mrs. Gillick sought a court declaration that the guidelines were unlawful for being inconsistent with her parental rights to consent to such advice and treatment.[59] In dismissing her application, the House of Lords went beyond the narrow question of contraceptive advice and treatment to persons under sixteen, and dealt more generally with the scope and limits of parental rights. The majority rejected the argument that a girl under sixteen lacks the legal capacity to consent to contraceptive advice and treatment. On the contrary, the Lord Justices thought that the effectiveness of the girl's consent depended on whether she had sufficient maturity and intelligence to understand the implications of the proposed advice; and they also considered that parents do not enjoy absolute rights of control over the child up to the age of majority. Lord Scarman opined that "parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child," and "parental right [would] yield to the child's right to make his own decision when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."[60]

The decision in *Gillick* is most instructive to consideration of what should be the future approach of Malaysian law toward the tension between defending parental rights and protecting the interests of children in pursuing self-determination.

IV. Conclusion: *Susie Teoh* Reconsidered

It is clearly regressive, after four decades, for the Malaysian Supreme Court to reach the same decision in *Susie Teoh* as in *In re Maria Hertogh*. The decision obviously runs counter to the operation of the welfare principle, painfully constructed

[59]Mrs. Gillick also sought a declaration that the guideline was unlawful because it amounted to advising the medical personnel to commit the offence of causing or encouraging unlawful sexual intercourse, contrary to the provision of the Sexual Offences Act 1956.

[60]Pages 419-424 of the judgment.

and preserved by the courts through the years, in cases concerning custody[61] disputes between parents upon breakdown of the marriage or between stranger and parent. It is true that there does seem to be a discernible difference in the statutory guidelines to be considered by the court in such cases, between the West Malaysia and the Sabah legislation on the one hand, and the Sarawak legislation on the other, namely, that under the guardianship of infants legislation in West Malaysia and Sabah, the court must have the welfare of the infant "primarily" in mind while considering the wishes of the parents, whereas under the guardianship of infants legislation in Sarawak, the welfare of the infant is to be the first and paramount consideration; however, over the years, the court has approximated the two standards to that of the latter one, and thus stressed more the need to safeguard the welfare of the infant, rather than the need to comply with the wishes of the parent. For instance, Raja Azlan Shah C.J. (as he then was) in the case of *Mahabir Prasad* v *Mahabir Prasad*[62] decided under the 1961 West Malaysia legislation, emphatically stated that, in deciding custody disputes, "...the welfare of the child is the first and paramount consideration...First and paramount consideration means that it is the overriding consideration."[63] In an earlier case, Raja Azlan Shah sitting in the Federal Court stated,

> The position as I see it, is to disregard entirely any concept of parental claim. As the welfare of the children is the paramount consideration, the welfare of [the children involved in this custody dispute] prevails over parental claim. The father's claim to make major decisions with regard to his children's future and education enters into consideration as one of the factors in considering their welfare, but not as dominating factor if it is in conflict with their welfare.[64]

[61]The word "custody" here is used in a wider sense, to connote more than mere "care and control". It embraces a bundle of common law parental rights over the upbringing of the child, for instance the rights to determine the education and religion, as well as the right to exercise physical control over the child until he or she comes of age.

[62][1982] 1 MLJ 189.

[63]*Id.* 193.

[64]*Teh Eng Kim* v *Yew Peng Siong* [1977] 1 MLJ 234, 239. This case concerned custody dispute of three children who had lived with the mother since the divorce

The wishes of children who are capable of expressing an independent opinion have often been given weighty consideration by the court, even before the enactment of the Law Reform (Marriage and Divorce) Act 1976. There are abundant cases where the courts have interviewed the children who are the subjects of custody disputes.[65] In the recent case of *Winnie Young v William Lee Say Beng,* [66] Haidar J. thought the wishes of an infant boy aged nine to live with his father should not be denied, in view of the fact that the boy was "very intelligent for his age".[67] In *Goh Kim Hwa* v *Khoo Swee Huah,*[68] Siti Norma Yaacob J. conceded to the wishes of a thirteen-year-old boy to live with his divorced father who was cohabiting with a woman, even though the judge found "the presence of the [father's] mistress in the matrimonial home can hardly be described as conducive to the welfare and proper upbringing of [the child]."[69]

Where the welfare of the child demands, the court has also shown willingness to grant custody of the child to persons other than the father or the mother. In *Masam* v *Salina Saropa & Another,*[70] an unmarried mother had left her infant child with the respondent since the infant was two

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of their parents. Subsequently the mother remarried, and wished to bring the children to live in Australia with her new husband. The father opposed and applied to the Court for the custody of the children on ground of change of circumstances.

[65]For instance, children have been interviewed by the trial court judge in the following cases : *Arumugam s/o Seenivasagam* v *Sinnamah* [1959] MLJ 130; *Loh Kon Fah* v *Lee May Lan* [1976] 2 MLJ 199; *Teh Eng Kim* v *Yew Peng Siong* [1977] 1 MLJ 234; *Myriam* v *Mohammed Ariff* [1971] 1 MLJ 265; *Yong May Inn* v *Sia Kuan Seng* [1971] 1 MLJ 280.

[66][1990] 1 MLJ 123.

[67]*Id.* 127. The infant had been left in the care of his father and paternal grandparent since the parents' separation in 1981; cf. *Manickam* v *Intherahnee* [1985] 1 MLJ 56, where the High Court found an infant aged eight to be incapable of expressing independent opinion.

[68][1986] 2 MLJ 156.

[69]This is a rather peculiar judgment, given the Judge's strong disapproval of extra-marital relationship. The decision can, however be reconciled, by taking into account all relevant facts affecting the case; on the whole, the Judge found it to be in the best interest of the child to live with the father. In the interview by the Judge, the boy had expressed a strong wish to live with the father, who was a practicing medical doctor. The court found him to "consider his future lie with the father, and [was] content to keep the arrangement of seeing the [mother] and staying overnight with her once a month." See p. 157 of the judgment.

[70][1974] 2 MLJ 59.

weeks old. Two years later, the mother married an Australian resident and wished to bring the child to live with her in Australia. When the respondent resisted the claim, the mother applied to court for custody of the infant. Her application was dismissed by both the trial court and the appellate court. The judge in the appellate court thought the mother's wishes were subordinated to the welfare of the infant; that the child's happiness and sense of security were important factors, and the court must be slow to unsettle the mind of the infant by a change of custody. In the case of *Arumugam Seenivasagam* v *Sinnamah*,[71] the mother died after childbirth. The father left the child in the care of the attendant who assisted in the delivery. After sixteen years, the father claimed the child. When the attendant refused to surrender the child, the father applied for custody. The court rejected his application, on the ground that it was essential for the welfare of the infant that he remained in the care of the attendant.

Thus, it is clear that parental rights in Malaysia, as in England, have dwindled in the face of the court's concern with the welfare of children in cases involving custody dispute between parents or between a parent and a third party. There seems to be no good reason for not extending the "paramount welfare" rule to cases involving direct conflict of opinions between parent and child in the process of important family decision making affecting the life of the child. The Supreme Court should carefully re-evaluate the implications of the decision in *Susie Teoh*. The concern to preserve parental authority should not result in having to sacrifice the welfare or best interest of the child.

It is time for the Legislature to delineate the scope of parental rights to reflect modern thinking which rejects the notion of the absolutism of parental rights over their children. The new guideline in custody dispute cases provided by the Law Reform (Marriage and Divorce) Act 1976, which obliges the Court to consider the wishes of child who is capable of expressing independent opinion, is a laudable progressive move by the legislature toward this direction. Such progressive provisions should also be extended to the guardianship of

[71][1959] MLJ 130.

infants legislation. Additionally, for purpose of uniformity and clarification, the West Malaysia and Sabah guardianship of infants legislation, which focus greater stress on the wishes of parents, should be replaced by the Sarawak Guardianship of Infants Ordinance, which emphasizes that the court, in deciding the question of custody and upbringing of an infant, shall regard the welfare of the infant as the first and paramount consideration.

Recognition of the autonomy of a mature minor to make important decision affecting his or her future should be viewed as a complement to the exercise of parental rights and duties, not as an intrusion. As persuasively put by Dickens : the modern function of parental rights is to prepare children and adolescents for maturity, and as a minor comes to achieve maturity and to exercise autonomy, this may be seen not as a limitation or defeat of parental control, but as a successful discharge of parental responsibility.[72]

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[72]Dickens, BM, "The Modern Function and Limits of Parental Rights" (1981) 97 *The Law Quarterly Review* 462, 485.