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MINORS AND THEIR INCAPACITY TO CONTRACT: A REVISIT

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ABSTRACT

Given the exposure to today's easy-to-know information, children should seemingly become mature faster than their predecessors, and therefore better informed even at a tender age. However, it remains to be seen whether fixing the age of 18 for minors or children to enter into contracts is relevant. This paper focuses on contract law; it examines the age of majority and the legal implications of contracts entered into by minors. To a certain extent, this paper examines the issue by making comparisons between Malaysian and English law. The findings derived imply that the determination of the age of majority needs to be compatible with the capacity of minors and current realities. This determination must be premised on a fair balance between protecting minors' welfare and the interest of those who have attained the age of majority.

Keywords: Minor, contract, necessity, scholarship, insurance, employment, marriage.

INTRODUCTION

One of the important elements of forming a valid contract is that the contracting parties must attain the age of majority. Those under the age of majority are considered as minors, and they are accordingly, deemed to be incapable of entering into contracts. The justification of having the dividing line for the age of majority is based on the legal principle that this group of young people who are minors lack the capacity to understand the nature and consequence of contractual duties (Trakic et al., 2018). Due to their vulnerable condition, there is thus, a need to have additional protection to secure their position from being manipulated by parties who can take advantage of their perceived immaturity. Moreover, with the current 21st century's business strategy being extensive and especially digital and online, groups of minors can become targets of profit-seeking businesses. Thus, such protection needs to be effectively enhanced.

The age of the majority in different countries differ from one another. For instance, the common age of majority fixed by countries like Malaysia (Age of Majority Act 1971 [Act 21]), Hong Kong (Hong Kong Age of Majority (Related Provisions) Ordinance 1990, Cap. 410, section 2 read with sections 3 and 4), and Australia (Age of Majority Act 1977 (Victorian.), section 3, Age of Majority Act (Western Australian), section 5, Age of Majority Act 1973 (Tasmania), section 3, Age of Majority Act 1974 (Australian Capital Territory), section 5, Age of Majority Act 1974 (Northern Territory), section 4, Minors (Property and Contracts) Act 1970 (New South Wales), section 9, and Age of Majority Act 1974 (Queensland), section. 5(2)), the UK (Family Law Reform Act 1969 (UK), 1969, c. 46, section 1), and most states in the US is 18 years old (UNICEF, 2016). England and Wales (Barnes, 2016) and Singapore had previously marked 21 years old as their age of contractual capacity, but since 1969, the age of majority in the UK has been 18 (Section 1 Family Law Reform Act 1969; Austen-Baker & Hunter, 2020). This also applies to Singapore effective 1 March 2009 (Singapore Civil Law (Amendment) Act).

Despite the confirmation of the age of majority, recent developments have also triggered some conflicting observations which noted that the determination of capacity cannot be based solely on an individual's age (Austen-Baker, R., & Hunter, K., 2020; Omelchuk et al., 2020). There were views noting that age should not be the only criterion used to determine whether a person qualifies as a major, hence the person's

legal capacity to enter into a contract. The arguments supporting this mentioned that young people do not necessarily become full adults when they reach the age of 18 because the level of maturity in every individual differs. This implies that young people who have reached the age of 18 are not necessarily capable of adult decisions. The aim of determining a minimum age was for it to serve as a protection for minors, and not to restrict their capabilities in exercising their rights. The minimum age imposed was thus intended to protect minors from being disadvantaged from exercising their legal rights.

WHO IS A MINOR?

While there is no legal definition for what constitutes a 'minor' in Malaysia, there are statutes stipulating that a 'minor' refers to anyone who has not reached the age of 18 years old (Section 2 of the Age of Majority Act 1971 [Act 21]). The Child Act 2001 (Act 611), in the same section, provides that a child is a person who is under the age of 18 years. In respect to capacity to enter into a contract, the Contracts Act 1950 (Act 136) is also silent about the actual age of a person who is qualified. Nonetheless, it states that a contract is valid if made by competent parties (Section 10, Contracts Act 1950), and that the contracting parties must attain the age of majority in order to form a valid contract (Section 11, Contracts Act 1950). Read together with the Age of Majority Act 1971, this clearly indicates that a person must be 18 years old in order to be regarded as competent to enter into a contract.

Apart from these stipulations, there are other statutes providing differing definitions of the term, a 'child' and a 'young person.' For instance, the Amendment Act 2010 (Act A1386) of the Children and Young Persons (Employment) Act 1966 (Act 350) defines a 'child' as "any person who has not completed his fifteenth year of age" whereas a 'young person' is "any person who has not completed his eighteenth year of age" (Section 2, Children and Young Persons (Employment) Act 1966). Such a disparity exists to allow for different types of employment to be taken up by different age groups of children. For purposes of the adoption of children, a 'child' is defined as an "unmarried person under the age of 21" within the Adoption Act 1952 (Act 257). This includes a female under that age who has been divorced. The Guardianship of Infants Act 1961 (Act 351) defines 'a child' differently for Muslim and non-Muslim communities. It is 18 years of age for Muslims, and below 21 years of age for non-Muslims.

Despite having a clear age of majority, there are exceptions, under which a minor may be allowed to undertake certain responsibilities. For example, section 39(1) and (2) of the Road Transport Act 1987 (Act 333) provides different age limits in allowing minors to possess licenses in handling different types of vehicles. For example, a minor who has reached 16 years of age may be allowed to take up license for a motorcycle, and a disabled vehicle (Class A, B, B1 and B2), but a minor must be 17 years of age to acquire license for a car (Class D, DA and A1). By virtue of section 10 of the Law Reform (Marriage and Divorce) Act 1976, the minimum age for marriage is 18 years for non-Muslim boys while a sixteen-year-old girl, with the permission of the Chief Minister, may be allowed to marry.

RATIONALE FOR HAVING AN AGE OF MAJORITY

In general, this common law driven principle is based on the necessity to safeguard children who are deemed fragile, hence require further protection. The age of majority was adopted to determine the dividing line between majority and minority. Treitel (2011) stated that there are two principles governing the law on minors' contracts. The first is based on the principle that the minor must be protected by law due to his immaturity, which "may enable an adult to take unfair advantage of him, or to induce him to enter into a contract, which, though in itself fair, is simply improvident" (Treitel, 2011). The second principle is straightforward; it states that the law should not trigger "unnecessary hardship to adults who deal fairly with minors" (Treitel, 2011). To reconcile this may be challenging because the first principle, for example, underlies the general rule that a minor's contract does not bind him. Yet, this is not absolute for the second principle which seems to allow the minor to be liable for certain types of contracts.

Contract with Minors – General Principle

In Malaysia, the age of majority is 18 years old (Section 2, Age of Majority Act 1971 [Act 21]). The Contracts Act 1950 is silent about the minimum age when a person is qualified to enter a contract. The Act mentions that the contract is valid if made by competent parties (Section 10, Contracts Act 1950 [Act 136]), and the contracting parties must attain the age of majority to form a valid contract (Section 11, Contracts Act 1950 [Act 136]).

The loophole in the Contracts Act 1950 with regards to the age of majority is fulfilled by the mentioned statutes, such as the Age of Majority Act 1971 [Act 21], the Child Act 2001 [Act 611], the Children and Young Persons (Employment) Act 1966 [Act 350], the Adoption Act 1952 [Act 257], and the Guardianship of Infants Act 1961 [Act 351].

As far as the Contracts Act 1950 is concerned, Section 10 indicates that minors have no capacity, therefore, are not qualified to form valid contracts. The general principle held by case law has established that a contract made by a minor is void due to incapacity (*Mohori Bibee v Dharmodas Ghose* (1903) ILR 30 Cal 539).[1] Similar judgements had been decided in the local cases of *Tan Hee Juan v Teh Boon Keat* ([1934] MLJ 96), *Leha Binti Jusoh v Awang Johari bin Hashim* ([1978] 1 MLJ 202, FC), and *Khairil Anuar bin Muda & Ors* v *Sulong bin Muda & Anor* ([2017] 6 MLJ 192). An elaboration on this was also made by Harmindar Singh JCA in the case of *Khairil Anuar bin Muda & Ors* v *Sulong bin Muda & Anor* where he stated:

> 'In this context, section 11 of the Contracts Act 1950, among others, provides that only persons who are of the 'age of majority' are competent to contract. There was some initial controversy in the development of the law regarding the age of majority which is not relevant to the current proceedings as much of the issues raised were later settled with the coming into force of the Age of Majority Act 1971. Under section 4 of this Act, the minority of all males and females within Malaysia ceases at the age of 18 years and 'every such male or female attaining that age shall be of the age of majority'.

This general principle, however, has been excluded by section 4(a) of the Age of Majority Act 1971 which states that:

> "Nothing in this Act shall affect the capacity of any person to act in the following matters, namely, marriage, divorce, dower and adoption."

Apart from the above expressed provision, other elements, such as necessaries, insurance and apprenticeship are also included, where the

[1] For local cases, see, *Tan Hee Juan v Teh Boon Keat* [1934] MLJ 96; *Leha Binti Jusoh v Awang Johari bin Hashim* [1978] 1 MLJ 202, FC).

age of majority will not be a bottom line in determining the validity of a contract. In addition to this, certain aspects of the range of the age of majority also varies, for instance, voting rights, driving license, and alcohol consumption.

Exceptions to the General Principle

(1) Contract for necessaries
Necessaries originated from the English law doctrine in the fifteenth century where it was held in the case of *Stocks v Wilson* ((1431) YB Mich 10 Hen VI, fo14; Austen-Baker & Hunter, 2020)):

> "When an infant within age has quid pro quo, he will be bound by law… when he buys clothes for his body, he will be charged by action of debt, because these things he must of necessity have."

The rationale behind this doctrine is that it is a minor's responsibility to pay for something necessary for his/her life without which, he/she will be starving or will not be able to survive. This means that if the minor has been furnished with necessaries, the major or the providing party is entitled to claim reimbursements *Dale v Copping* (1610) 1 Bulstr 40; 80 ER 743; *Hart v Prater* (1837) 1 Jur 623.

A similar approach has been adopted in Malaysia, with regards to contract for necessaries. If a major has sponsored a minor with the necessaries suited to the minor's lifestyle, the Contracts Act 1950, through the provision of Section 69, allows a major to claim reimbursements from the minor. This section states:

> "If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable persons."

The word 'incapable' mentioned in the above provision includes a minor. It indicates that when a minor is sponsored by another person who impliedly, meant a major/sponsor, the latter has the right to claim reimbursements from the former. However, certain requirements need

to be fulfilled before the sponsor can submit such claims to the minor. The first element is that the sponsor has supplied the minor with necessaries. The silence of the Contracts Act 1950 on the meaning of the word, 'necessaries', referred to relevant English law. The English court defines the word, 'necessaries' as something, without which, the minor cannot have a proper life (*per* Alderson B. in *Chapple v Cooper,* 153 ER 105). They include food, clothes, accommodation, and also education (*per* Lord Esher M. R. in *Walter v Everard* [1891] 2 QB 369; *per* Cozens-Hardy, M. R. in *Roberts v Gray* [1913] 1 KB 520).

It should be noted, however, that a major cannot ask for repayment from a minor should the things supplied be not within the ambit of the definition of 'necessaries'. Thus, majors who sponsored minors with luxuries, such as suits of satin and velvet, cannot claim these as necessaries even for a gentleman of the chamber of the Earl of Essex (*Mackarell v Bachelor (1597) Cro Eliz 583*; Austen-Baker & Hunter, 2020). The majors will be doing so at their own risk since they cannot demand the minors for repayment. Fletcher-Moulton L.J. had this to say in *Nash v Inman* ((1908) 2 KB 1) even though it was highlighted in *Peters v Fleming* (1840) 6 M & W 42; 151 ER 314):

> "It was 'perfectly clear' that 'from the earliest time down to the present, the word necessaries is not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is" (per Parke B).

In *Mercantile Credit v Spinks* [1968] QWN 32, it was held that a car was confirmed as a 'necessary' since the minor needed the car to render his service as a salesperson. The same approach was obviously reflected in a local case. What constituted as necessaries, it was stated, should be determined based on the condition of the minor's life which takes into consideration his social status and his wealth. In the Malaysian landmark case of *Government of Malaysia* v *Gurcharan Singh* (1971) 1 MLJ 211; (*Government of Malaysia* v *Thelma Fernandez & Anor* (1967)) 1 MLJ 194, Chang Ming Tat highlighted:

> "In my view, the word 'necessaries' must be construed broadly and, in any decision involving whether what

> are supplied are or are not necessaries, it is incumbent to have regard to the facts of the case, the conditions, and circumstances in which the supply was made and the purpose which is served" (Chang Min Tat J; *Government of Malaysia* v *Thelma Fernandez & Anor* (1967) 1 MLJ 194).

In this case, at the age of 17 years and 11 months, the first defendant, Gurcharan Singh, was sponsored by the Government of Malaysia for a training course at The Malayan Teacher's Training Institution. The contract provided that the first defendant must serve the Malaysian Government for five (5) years upon completing the course. The first defendant was claimed to breach the contract when he resigned after serving for three (3) years ten (10) months. The Government sued the first defendant and his sureties as the second and third defendant, and claimed the actual sum of $11500 used to educate the defendant. In his defense, the first defendant argued that the contract was void since he was a minor when he entered into the contract and therefore, he, and his sureties were not liable. In addition, the defendant pleaded that the amount claimed was excessive and not reasonable considering that he had served the government for three (3) years and ten (10) months. The judge held that the government was entitled to be reimbursed by the first defendant since the sum sponsored for his education and training was treated as necessaries.

Another element to be considered is whether such a supply is beneficial to the minor's future and interest (*Doyle v White City Stadium* (1935); *Clements v London & NW Rail Co* (1894)). The contract will be binding on the minor if it serves benefits for the minor otherwise, the minor has a right to avoid the contract. This is illustrated in the case of *Proform Sports Management Ltd v Proactive Sports Management Ltd* ([2006] EWHC 2903 (Ch); [2007] 1 All ER 542) where a minor footballer entered into a contract with his agent whose role was as a personal representative of the minor. He did not undertake for the minor's training and livelihood. It was held that only contracts for necessaries are binding on a minor while any contract of representation not amounting to providing necessaries will not be binding, and can be avoided by the minor. Premised on this principle, the court invalidated the contract since it did not come within the classes of contracts of apprenticeship, education, and service. The legal implication of this case stated that it protects the minor who has talent and great

performance, such as footballers or singers, from being exploited by opportunistic agents. On the other hand, it prejudices the *bona fide* agent since the contract is deemed to be voidable.

Thus far, there is no local case law challenging 18 years old as the age of majority for minors under the issue of necessaries. Based on this, it is deduced that things are deemed as necessaries only if they served the needs of minors, and which suited their living conditions. Likewise, the circumstances at the time can drive certain factors to be categorized as necessaries. For instance, in the recent Covid-19 pandemic when the Movement Control Oder (MCO) was enforced by the government, all classes had to be conducted online, and so the laptop which was used by students to 'attend' online classes can be considered as necessary for students because this warrants their proper education process. Therefore, if a minor is sponsored with a laptop, and it is contractually agreed that the sponsor needs to be reimbursed later by the minor, nothing can prevent the validity of such a contractual term even by reason of incapacity of the minor. Notwithstanding the fact that computers or laptops used by minors who are in primary or secondary schools are normally purchased by parents, in a broader sense, minors who do not have parents and are cared for by guardians, or have received sponsorship from financial providers or organizational funds which are used to sponsor or cover facilities such as laptops; and should there be an agreement that the minor must repay all the financial expenses sponsored by the major, the agreement can be enforced. As mentioned, given the nature of online learning these days, laptops or computers can be included under the definition of 'necessaries' as articulated by Alderson B in the case of *Chappel v Cooper* (153 ER 105). However, before laptops or other electronic equipment can be classified as necessaries, the court will consider the following factors, such as the laptop's specifications, the minor's age at the time the contract was executed, the minor's social and economic standing, and the reason the laptop was required (Giancaspro & Langos, 2016).

(2) Contract of Scholarship

In the case of a minor who has been awarded a scholarship, the same principle applies. The sponsor has the right to claim reimbursement from the minor. In Malaysia, this has been regulated under the Contracts (Amendment) Act 1976 [Act A329] whereby the position of the sponsors has been secured explicitly. Previously, there was a

lacuna in the case of the right to claim by sponsors, and the duty of the scholar to repay the scholarship.

By virtue of the 1976 Amendment, the above grey area has been clarified. The validity of a scholarship agreement entered into by a minor has been expressly stated in section 4(a):

> "No scholarship agreement shall be invalidated on the grounds that the scholar entering into an agreement is not of the age of majority."

Thus, there is no exemption to a duty of repayment by a scholar who was awarded with a scholarship for his study. In the event of a breach or failure by the scholar to repay the amount stated in the scholarship agreement, the scholar and the sureties shall be liable jointly, and severally to the scholarship provider, that is, to reimburse the whole amount notwithstanding any actual damage or loss resulting from the breach (Section 5(a), Contracts (Amendment) Act 1976). In addition, no deduction is allowed even though the scholar has completed his study or has rendered partial services to the scholarship provider (Section 5(a), Contracts (Amendment) Act 1976). This means that the scholar will still have to pay the full amount spent on his education if he breached the contract to serve, as per requested.

The Act further clarifies that if the amount is not mentioned in the scholarship agreement, then the scholarship provider is entitled to be reimbursed for the whole amount spent on the scholar, and the amount expected to be incurred by the scholarship provider in engaging a person with similar qualifications and experience (Section 5(a), Contracts (Amendment) Act 1976).

It should be noted that the above sections apply only to scholarships awarded by the government (Section 2, Contracts (Amendment) Act 1976). It excludes contracts of scholarships given by private agencies. A contract of scholarship is considered as an exception to the general principle since the age of majority is not the bottom line used to exempt the minor from liabilities and to repay the scholarship provider.

A similar approach is seen in the case of sponsorship contracts provided by the government to college or university students. However, as far as Malaysia is concerned, there are methods offered

to borrowers to structure payment of sponsorship. In view of this, various exceptions have been initiated by the government to facilitate borrowers to repay loans. To cite one exception, under the Malaysian Public Service Department, since 2016, loans will be converted to full scholarships and borrowers are exempted from repayment if they serve the government upon graduation within the period specified in the agreement. In contrast, a repayment of 25 percent of the total loan received is expected if the student serves with a Government Linked Company (GLC) upon graduation within the period as specified in the agreement; a repayment of 50 percent of the total loan received if the student serves with a private company in the country upon graduation within the period as specified in the agreement; and a repayment of the entire loan if the student works abroad (https://www.jpa.gov.my/pelajar/bayaran-balik-pinjaman-gantirugi). Furthermore, discount facilities (from the total loan amount) may also be given to any borrower who successfully meets the following criteria: (i) The scholar has completed the period of service either in a GLC/private company as stated in the agreement. (ii) The scholar has completed the period of service in the same GLC/private company within the minimum period as stated in the agreement. (iii) The scholar holds a position equivalent to an academic qualification (https://www.jpa.gov.my/pelajar/bayaran-balik-pinjaman-gantirugi).

This implementation is in line with the principle of return on investment to the country which ensures that the government acquires the best talent for the civil service. Furthermore, this idea could shape governmental accountability, and the aforementioned will be used to enforce loan arrangements (https://www.jpa.gov.my/pelajar/bayaran-balik-pinjaman-gantirugi).

(3) Contract of Insurance

In Malaysia, the Financial Services Act (FSA) 2013 [Act 758] governs legal issues pertaining to insurance. The Act had repealed the Insurance Act 1996 [Act 553]. Schedule 8 of the FSA 2013, Section 128, Para (4) (1) rules out that a minor above 10 years old can enter a contract of insurance, but a written consent of parents/guardian is required if the minor is under 16 years old. This requirement is waived when they have attained 16 years (Schedule 8 of The FSA 2013, Section 128, Para (4) (2)).

Malaysia also has insurance companies which offer various types of insurance coverage to newborns. A newborn can be legally protected

by insurance in as early as 30 days old. However, this must be proposed by the parents, either the father or mother (https://mypf.my/risk/life/child-insurance-coverage). In some cases, the insurers offer the "Born into the Plan Coverage." As the name implies, this sort of coverage ensures that a baby has access to and financial support from the moment it is born, even if there were issues during delivery, or should a health concern arise. In this coverage, the parent is required to notify the insurer of the birth, and the infant will be included as a family member with the same rights as the rest of the family (https://www.malaysia-health-insurance.com/coverage/new-born/).

Based on the above, a minor is thus legally capable of entering into insurance contracts and is entitled to enjoy the benefits and rights as a policy owner, as if he has reached the age of majority. Such an allowance marks a significant departure from the general rule of a minor's incapacity, below the age of 18 years old, in Malaysia to enter into a valid contract.

The FSA 2013 also allows parents to insure the life of their child since parents are deemed to have an insurable interest in their child (Schedule 8 of The FSA 2013, Section 128, Para (3) (3)(a). This provision elaborates the general principle laid down in Para 3(1) where the life policy shall be void unless the person effecting the insurance has an insurable interest in that life at the time the insurance was affected.

On the other hand, there is no general right for a parent under the English law to insure the life of a child (Dickson, 1896; Clarke, 2016; Scottish Law Commission, 2018). The leading English case illuminating this issue is *Halford v Kymer* ((1830) 10 B&C 724). The insurance company refused to compensate the father who had taken a life insurance policy on his son's life. The father's contention that his chances of receiving care and support would be diminished if his son died was rejected by the court, which decided that the interest had to be monetary. Thus, basic love and affection for a family member is not enough under English law.

There is also no right for an adult child to insure the life of a parent (Scottish Law Commission, 2018). In the case of *Harse v Pearl Life Assurance Co Ltd* ([1904] 1 KB 558), a mother was insured by her adult child because she had cooked and kept house for him. The

insurance was allegedly purchased to cover funeral costs. The policy was declared void by the court due to a lack of interest. There was no legal requirement for a son to pay for his mother's burial (the council would cover such costs if required), and the mother had no legal responsibility to keep house for her son. Although the death of a parent may cause financial hardship to a minor, there is no general common law or statutory entitlement for a child to insure the life of a parent in England and Wales. In some instances, a child may have sufficient pecuniary interest on which to build an insurable interest since parents are obligated to sustain their children (Scottish Law Commission, 2018).

(4) Contract of Employment

Protecting children from economic exploitation is the key principle underlying Article 32 of The United Nations Convention on the Rights of the Child (UNCRC). It states the:

> "Right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development" (Article 32(1), UNCRC).

State parties are further required to set a minimum age(s) for the allowance to employment; to regulate an appropriate number of hours, to determine the conditions of employment, and to provide for relevant penalties or other sanctions in order to secure effective enforcement of these obligations. In Malaysia, the employment of children is not outlawed. In fact, it is regulated by the Children and Young Persons (Employment) Act 1966 [Act 350].

The regulation of working children in Malaysia was one of the key foci of the Malayan Union government, following the post Japanese Occupation. Due to economic hardships that had prevailed during that era, many children had resorted to working as a form of survival for themselves and their families. As schools were not readily available for all children then, it did not seem prudent to stop children from working. At the same time, the rate of juvenile delinquency was high. Two high level committees were then established. One was to examine the problems of juvenile delinquency while the other was to regulate

the working children. The Committees' efforts led to the subsequent passing of two (2) key legislations on children. One was the Juvenile Courts Ordinance 1947 which established the Juvenile Court, and made provisions which catered to the special needs of children. The other was the Children and Young Persons Ordinance 1947 which was established to regulate working children.

Under the Malaysian Age of Majority Act 1971, the age of 18 years was set as the age of majority. There is no specific law in Malaysia which totally bans child labour. When the Children and Young Persons (Employment) Act [Act 350] was passed in 1966, it repealed the previous Children and Young Persons Ordinance 1947, which set the minimum age of 8 years for children who worked. The current Act, which applies only to the States of Peninsular Malaysia, does not prescribe such a minimum age (Section 1 (2), [Act 350].

Section 1A which came into force via the Children and Young Persons (Employment) (Amendment) Act 2010 [Act A1386] defines a 'child' as "any person who has not completed his fifteenth year of age". In comparison, a 'young person' means any person "who, not being a child, has not completed his eighteenth year of age"[2].

No child or young person "shall be, or be required or permitted to be engaged in any hazardous work, or any employment other than those specified in this section" (Section 2(1), [Act 350].The employments which are allowed for a child are "light work suitable to his capacity in any undertaking carried on by his family, or public entertainment, in accordance with the terms and conditions of a license granted under the Act, work approved or sponsored by the Federal Government or the government of any state, and carried on in any school, training institution or training vessel". It also includes "apprenticeship under a written contract approved by the Director General with whom a copy of such contract has been filed" (Section 2 (2), [Act 350]). A young person may be employed in any employment mentioned in subsection (2), and in relation to paragraph *(a)* of that subsection - "any employment suitable to his capacity (whether or not the undertaking is carried on by his family), domestic servant, office, shop (including hotels, bars, restaurants and stalls), godown, factory, workshop, store, boarding

[2] This Act shall not apply to "a person above the age of sixteen but below the age of eighteen who is engaged in an existing employment before the commencement of the amendment."

house, theatre, cinema, club or association, industrial undertaking suitable to his capacity, and on any vessel under the personal charge of his parent or guardian" (Section 2 (3), [Act A1386])[3].

No child or young person engaged in any employment shall "in any period of seven consecutive days be required or permitted to work for more than six days" (Section 4, [Act 350]). No child engaged in any employment shall be required or is permitted to work according to the following restrictions:

- during the evening, between 8 p.m. and 7 a.m. the following day, however, this restriction does not apply to any child engaged in "employment in any public entertainment" (Section 5(2), [Act 350]);
- for more than 3 straight hours without a break for rest of at least half an hour;
- for more than 6 hours in a day; or,
- if the child goes to school, for a period, which together with the time he spends attending school, exceeds 7 hours, or
- commence work on any day without having had "a period of not less than 14 consecutive hours free from work" (Section 5 (1), [Act 350]).

Young persons are allowed to work subject to the following limitations:

- between 8 p.m. to 6 a.m. the following day;
- for more than 4 straight hours without a minimum break of 30 minutes;
- for more than 7 hours in any one day or,
- if the young person goes to school, for a period, which together with the time he spends attending school, exceeds 8 hours[4]; or
- commence work on any day without having had a period of not less than 12 consecutive hours free from work (Section 6 (1), [Act 350]).

[3] Proviso: "No female young person may be engaged in any employment in hotels, bars, restaurants, boarding houses or clubs unless such establishments are under the management or control of her parent or guardian: Provided further that a female young person may be engaged in any employment in a club not managed by her parent or guardian with the approval of the Director General."

[4] Provided that if the young person is an apprentice under paragraph 2(2)*(d)*, the period of work in any one day shall not exceed 8 hours.

These restrictions are not applicable to any young person employed in an agricultural undertaking, public entertainment, or on any vessel (Section 6 (2), [Act 350]).

Section 3 of the Factories and Machinery Act 1967 (Act 139) defines a "young person" as any person who has not reached 16 years old. Section 28 (1) provides that no young person "shall carry out work involving the management of, or attendance on, or proximity to, any machinery." Section 28 (2) requires that it shall be "the duty of the owner or occupier" to ensure that subsection (1) is complied with. According to section 28 (3), subsection (1) shall not apply to a young person "not being under the age of fourteen years receiving a course of instruction at a government technical school or other educational institution or not being under the age of fifteen years if serving a recognized apprenticeship". Section 28 (4) provides that "an Inspector may require an owner or occupier to make suitable and effective arrangements to prevent the ingress of young persons into premises, or any part thereof, in which machinery is installed, provided that this subsection shall not apply to organized visits to factories for educational purposes in which case, all possible precautions shall be taken to ensure the safety of young persons".

The Electricity Supply Act 1990 [Act 447] limits, but does not totally outlaw the employment of children. According to Section 50(1), "no licensee or management shall employ or permit to be employed, any person under the age of sixteen years in any service involving management of, or attendance on, or proximity to live equipment not effectively insulated". Under section 50 (2), "any person who contravenes the Section shall be guilty of an offence and shall, upon conviction, be liable to a fine not exceeding five thousand Ringgit."

Data depicting the actual state of children who are working in Malaysia are limited. Official records are scarce and nationwide study is non-existent. Reliance is accordingly placed on case law reports, small-scale studies, or available reports submitted to foreign authorities. A study on child labour situation conducted on a total of 454 working children in four states in Malaysia (Mahmod et al., 2016) found that more than half (63%) of the children were emotionally abused, 27 percent were subjected to physical abuse, and at least 10 percent had been sexually abused. Most of the children surveyed were unhappy with their current employment, and there was remorse for not attending school.

The Malaysian law, and the law in England and Wales seem to concur on the employment of children and their compulsory school-leaving age. From the perspective of English law, employment contracts are valid if the contract is not harsh or oppressive to young persons. In fact, this law is most beneficial to children (*Roberts v Gray* [1913] 1 KB 520). A minor is accountable to his employer as a result of this, and similarly, a minor will have a contractual recourse against the employer if the employer violates the contract (Giancaspro & Langos, 2016).

(5) Contract of Marriage

In Malaysia, child marriage is permissible and regulated by domestic law, both for non-Muslims and Muslims, even though Malaysia has withdrawn the reservation made to Article 16(2) of the Convention on the Elimination of Discrimination against Women (CEDAW). The law recognizes such contracts to be valid provided that, they comply to the requirements. Minimum marriageable ages are provided by both laws governing marriages among non-Muslims and Muslims. The effect of these minimum marriageable ages, however, differs significantly in their impact with regards to the validity of such contracts. For non-Muslims, a marriage contracted by minors below these minimum marriable ages will render such contracts to be void *ab initio*, whereas for Muslims, marriage under these minimum ages is allowed, and accordingly valid, provided prior permission is sought from the respective shariah courts.

Marriages of non-Muslims in Malaysia are regulated by the Law Reform (Marriage and Divorce) Act 1976 (Act 164). Section 10 specifies that the minimum age of marriage for boys is 18 years old whereas for girls, it is 16 years old, but special permission is required and this must be obtained from the Chief Minister of state. No similar requirement is provided for boys. Additional requirement is stipulated under section 12(1) where anyone below the age of 21 years old needs to have parental consent in writing from his or her father, or, if he or she is illegitimate, or the father is dead, then of his or her mother, or if he or she is adopted, then of his or her adopted father or adopted mother, or if both his or her parents (natural or adopted) are dead, then it is of the person standing in loco parentis to him or her before he or she attains the age of 21 years old.

The validity of marriage of minors was given further legal effect by *Rajeswary & Anor v Balakrishnan & Anor* ((1958) 3 MC 178) where

the High Court, following a precedent from India, held that the age of majority for joining in marriage differed from other contracts entered into by minors, and as such, will not be affected by general rules governing contracts entered by minors. The legality of contracts of marriage entered into by children are further safeguarded/amplified by section 4(a) of the Age of Majority Act 1971 which states that nothing in the Act shall affect the capacity of any person to act in the following matters, namely, marriage, divorce, dower, and adoption.

The position for Muslims, upheld by the different state enactments governing the private law of Muslims, prescribe a similar age limit, but with different legal implications. Apart from Selangor, all other states in Malaysia including the Federal Territories, stipulate that if any girl below the age of 16 years, and any boy below the age of 18 years, wishes to get married, he or she will require the prior consent of the shariah court, as noted in Section 8 of the Islamic Family Law (Federal Territory) Act 1984 [Act 303]. Without the express mention of any minimum age of total prohibition for children below 16 and 18 years, respectively, it means that a child, regardless of how young, may enter into a contract of marriage upon obtaining the prior permission of a shariah court judge.

In the case of Selangor, the enactment was duly amended in August 2019 to increase the minimum age of marriage for girls, from 16 to 18 years old (Section 8), "where either the man or the woman is under the age of eighteen". The new Section fittingly prescribes various requirements, such as a medical report of the girl's health, a medical report of the man's mental, physical, and physiological health stage, a social report from the Social Welfare Officer stating the socio-economic background of the man or girl, and a police report for any possible criminal records of the parties, should there be any, before a judge can satisfactorily decide on the application for early marriage. The progress made by the Selangor State government is to be commended as the judge is now required to make a holistic analysis of the suitability of the parties to be married, being below the age of 18 years old.

The above position, under the civil law which regulates non-Muslims, coincides to a certain extent with the law of England and Wales. Under section 11(a) (ii) of the Matrimonial Causes Act 1973, a marriage is void if either party to the marriage is under the age of

16. A similar law is prescribed in Section 2, the Marriage Act 1949, which restates the legal position which has existed since the Age of Marriage Act 1929 (19 & 20 Geo 5 c 36). The age of 16 was set at the time when living together or getting pregnant out of wedlock was socially unacceptable. Additionally, it was suggested by Gilmour and Glennon (2016) that one of the reasons for making 16 as the minimum age for marriage was because it is a criminal offence for a man to have sexual intercourse with a girl under 16 - "the cloak of marriage was regarded as offensive by law reformers" (Gilmour et al., 2016). The law was viewed as essential, that "the minimum age of marriage and the age of consent for sexual intercourse should be the same" (*Report of the Committee on the Age of Majority,* Latey Committee (Cmd 3342, 1967), para 177). Herring (2015) further stated that the law reflects the concerns of the society about any children who may be born of such a union where the parents may be too young to care for the children, and that the burden could potentially fall on the state. This augurs well with the dicta of Pearce J, in *Pugh v Pugh* [1951] 2 All ER 680:

> "According to modern thought it is considered socially and morally wrong that persons of an age, at which we now believe them to be immature and provide for their education, should have the stresses, responsibilities and sexual freedom of marriage and the physical strain of childbirth. Child marriages by common consent are bad for the participants and bad for the institution of marriage" (per Pearce J).

An added requirement for the child who has attained 16 years old, but is less than 18 to be married is to have each parent with parental responsibility to provide a written consent (Section 3, Marriage Act 1949). It is possible however, for the teenager to apply to the court to have the parental requirement revoked. If such a marriage proceeds without that consent (or on the basis that the consent was forged consent), it would still be valid.

Historically, prior to the 1929 Act, a person who has attained the legal age of puberty could contract a valid marriage according to common law (Lowe & Douglas, 2015). The legal age of puberty was set at 14 years for males and 12 years for females (Lowe & Douglas, 2015). However, a marriage contracted by persons, either of whom

was under the legal age of puberty, was regarded to be not void, but voidable (Co Litt 79; Blackstone Commentaries, I, 436). This meant that the marriage could be avoided by either of them when that party reached the age of puberty. But as Lowe and Douglas (2015) aptly stated, 'if the marriage is ratified (as it would be implied by continued cohabitation), it becomes irrevocably binding'.

Although the current position of stipulating 16 as the minimum age of requirement for marriage does not augur with the principles underlying the Convention on the Rights of the Child on the best interest of the child, it has at least increased the age from 12 years old. Nonetheless, in reality the rate of children marrying below 18 in England and Wales is low (Lowe & Douglas, 2015).

While Malaysia, and England and Wales recognize contracts of marriage involving children, there is a significant difference in respect to the minimum allowable ages. In Malaysia, the position regarding marriages among non-Muslims is comparatively similar in that the absolute minimum age is 16. Marriages contracted below the age of 16 is void ab initio. Another similarity is regarding girls who have attained 16 years old, but below 18 years old. Both need to obtain prior consent or permission albeit from different authorities. In the case of Malaysia, permission must be obtained from the Chief Minister whereas in the case of England and Wales, consent should be obtained from the parent. The law in Malaysia is however, rather discriminatory between boys and girls. No marriage may be contracted by boys below the age of 18 years. In respect to Muslims, the position is starkly different because first, there is no specific age prescribed for absolute prohibition for any girl or boy below the age of 16 and 18 respectively, except for the state of Selangor where both parties must be of age 18. In the event of any girl or boy below the age of 16 or 18 wish to get married, then prior consent must be obtained from the shariah court. Without a minimum age prescribed for the total prohibition of marriage, the child is potentially exposed to harmful consequences and threats which may be due to the result of early marriages, primarily, the transgression of the child's basic rights, under the UNCRC.

(6) Online Contract

Children have become regularly involved in online transactions, particularly in today's digital era. The usage and development of

digital assets by children is on the increase and many products or services sold by companies to minors have become more complex. A variety of initiatives have also been developed, and these are aimed at encouraging financial literacy among young people (Banta & Cahn, 2019; Omelchuk et al., 2020). When it comes to legal requirements for validity, generally, contracting online is equivalent to contracting offline. Under common law, the same criteria such as offer, acceptance, consideration, capacity, intention to create legal relation and certainty, must be fulfilled for online contracts to be legally binding (Gilbert, 2018). The legal question that arises out of this is to what extent are minors liable as a result of this form of contract, and whether the age of majority should be a deciding factor.

The decision made on the extent of the minor's liability, in this case, cannot rely on the Contracts Act 1950 alone. Notwithstanding that Malaysia has regulated legislations that govern actions in cyberspace in general, such as the Computer Crimes Act of 1997 (Act 563), the Digital Signature Act of 1997 (Act 562) and the Communications and Multimedia Act of 1998 (Act 589), there is no single regulatory framework that governs the issue on the liability of minors in online contracts (Farahin, 2018; Abdul Aziz & Ibrahim, 2012). As a matter of fact, the Malaysian law is remarkably quiet on the legal framework that specifically refers to this issue, which has yet to be challenged by local case laws or previous studies.

Based on the above, it is thus worthwhile to look at approaches from other countries to make distinctions. It has been noted that in the UK, children must be at least 13 years old in order to engage in online transactions (Banta & Cahn, 2019). This is traced to their involvement on social media platforms, such as Facebook, Instagram, WhatsApp, and Snapchat where users are required to verify that they are of age 13 or above when creating a new account (Pasquale et al., 2020; Zippo & Pasquale, 2019). Regarding their liabilities when contracting online, a study by Gilbert (2018) was able to segregate the different legal implications developed based on online contracts entered into by minors, whether with or without parental assistance. In an earlier situation, that is if a minor enters into a contract with the help of his parent or guardian, or when his parent or guardian acted on his behalf, it was held that he is obligated by the terms of the contract (*Moolman v Erasmus* 1910 CPD 79 85; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Marshall v National Wool Industries Ltd* 1924

OPD 238 248; *Wood v Davies* 1934 CPD 250 256; *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 412; Cockrell (1999); Boezaart (2016)). In a latter situation, that is if a minor enters into a contract without the assistance of his parent or guardian, it shall merely create "a natural obligation on the part of the minor, but a fully enforceable civil obligation for the other party" (Gilbert, 2018; Kruger & Skelton, 2010). Gilbert (2018) suggested that the best approach in dealing with a minor who enters into an online contract would be to treat the minor the same as one would in terms of criminal law and the law of delict.

Parallel to this, it is observed that a similar approach has been practised in US where the age of 13 is the minimum age for accessing social media services (Children's Online Privacy Protection Act [COPPA] 1998; Pasquale et al., 2020, Zippo & Pasquale, 2019). It has been emphasised in a study conducted by Slade (2011) that minors can surely reach a degree of consumer awareness that would constitute contracting capability, with the help of a parent as a guide and educator. Without parental guidance however, prior to clicking "I accept," minors have joined online transactions without knowledge that such contracts could trigger financial liabilities, and that they could be at the mercy of companies which can afford to attract young consumers (Slade, 2011). Likewise, it is also noted that under COPPA 1998, online businesses targeting children under the age of 13, or website services which are aware that they are serving children under the age of 13 need to obtain parental consent before collecting personal information from the children (COPPA, Sections 6501–6506; Slade, 2011; Banta & Cahn, 2018; Juanda, 2007). This could help them to develop procedures which can protect the privacy of information collected. COPPA was signed in 1998, and updated in 2013 to meet the enormous growth of technology because minors had been affected due to their increased usage of mobile devices, and social networking sites (Diffenderfer, 2016). The 2013 changes have tightened children's online privacy regulations, and parents have been provided with more control over personal information collected from children by websites. Herewith, it is highlighted the decision of the 2008 Virginia case, *A. V v. iParadigms* (A.V. v. iParadigms, Co., 44 F. Supp. 2d 473 (E.D. Va. 2008) in which the United States District Court for the Eastern District of Virginia dismissed high school students' attempts to disaffirm an online contract, under the infancy defence. The court held that the plaintiffs could not disaffirm because they had retained the benefits of the contract (Slade, 2011).

Apart from the above, it is worth noting that New South Wales (NSW) have also enacted a comprehensive legislation pertaining to contracts entered into by minors. The Minors (Property and Contracts) Act 1970 (NSW) has significantly altered the common law notion that contracts made by minors are unenforceable, except for those that are necessary or beneficial. A contract with a 16-year-old in NSW is genuine and legally enforceable provided that the minor understands the terms and that the contract benefits the minor. Most crucially, the Act says that a contract is assumed to be binding if it benefits the minor and the youngster understands the conditions.

Thus, regarding specific online contracts, it is suggested that a more logical approach be created for contract laws because doing so means treating minors in accordance with their intellectual capacity rather than their age (Shiffman, 2012). However, it should be emphasised that this approach needs to be utilised with caution, to ensure that minors' incapacity is not exploited by businesses which prioritise profits and rely on the ignorance of children as a source of their income. Furthermore, the fact that it is not easy for parents to monitor their children's internet activities, relying on the age of majority to safeguard minors from unnecessary financial obligations is more equitable. Thus, businesses must ensure that specific information is controlled, and that some businesses should be excluded from children.

CONCLUSION

The age of majority for a minor can generally remain at 18 years old. Any exception formulated for this general principle must be premised on the rationale to protect the minor, and to offer a fair balance to the major. The bottom line of a minority age cannot be taken for granted by the minor to exclude liability. Simultaneously, their innocence cannot be manipulated by the major who may use it for the advantage of making business profit.

Based on the discussions, it is thus deduced that the age of majority must take into consideration, factors such as the condition of the minor, the current situation, and the implications suffered by both contracting parties - the major and the minor. Taking a cue from the maturity of minors in certain aspects of life, a subjective approach can

be considered as an alternative in setting up the bottom line for the age of majority.

Regarding this subjective approach, the points discussed can be summarized as follows: Minors would be held liable in contracts for necessaries. The facts and circumstances will determine whether this exemption is applicable. For beneficial contracts or service, it can be enforced against minors, provided that, there are no exploitative or oppressive elements or any terms which can jeopardise the minors' long-term interest.

Practices from other countries, such as the UK, US and Australia can be replicated as guidance. For instance, the Law Commission of UK 1982 have suggested that all contracts should be binding on minors aged 16 and above (Elliott & Catherine, 2015). Minors below that age should be permitted to enforce contracts, and not otherwise. A minor who lies about his age in order to obtain a contract should be held accountable in tort. In other circumstances of fraud however, a minor under the age of 16 should not be held liable if the result of that culpability allows the other party to enforce an otherwise unenforceable contract indirectly. A similar approach is practised in NSW, that a contract with a 16-year-old is legitimate and legally enforceable provided that the minor understands the conditions, and that the contract benefits the minor. The Minors (Property and Contracts) Act 1970 (NSW) has considerably modified the common law principle which holds that contracts entered into by minors are unenforceable, with the exception of those that are necessaries or benefits. Most importantly, the Act states that if a contract benefits a minor, and the child understands the terms of the arrangement, it is presumed to be binding.

Thus, it should be noted that in certain aspects of contracts, the time has come for the law to consider the maturity of each individual minor, based solely on the reason that the level of maturity among minors, differ.

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