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Chinese Family Law in a Common Law Setting

A Note on the Institutional Environment and the Substantive Family Law of the Chinese in Singapore and Malaysia

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THE development of Chinese family law in Malaysia and Singapore provides an interesting case study of an attempt to fuse elements of two disparate legal systems in a foreign social climate. The present court system of Malaysia and Singapore and the adjective law are based in large part upon principles of English common law, while the substantive family law applied to the Chinese people is in part a reflection of "traditional"[1] Chinese law. These diverse legal orders function in a social setting which, although substantially influenced by Chinese tradition, is nevertheless a distinct environment, and which, on the other hand, certainly bears little resemblance to the native habitat of the common law.

Thus ancient principles of the common law, such as stare decisis and the rules of evidence, are applied to cases dealing with the status of secondary wives or the prerequisites for a valid ceremony of marriage according to venerable Chinese judicial precepts. Traditional Chinese family law, which was heavily dependent upon local customary variation,[2] is treated as a great unity by the common law courts of Singapore and the states of Malaysia, other than Sabah and Sarawak. Expensive statutory procedures having English law antecedents are enforced in order to legally effectuate important customary family law procedures such as adoption. The courts of Malaysia and Singapore, largely bound by their own decisions in this English model judiciary, are unable adequately to reflect change in a dynamic social environment. Furthermore, common law precedents which have become anachronisms in England and the Commonwealth were enacted into law as a step towards "modernization" in Singapore in 1961. Finally, a judiciary largely trained in England is expected to deal with Chinese law principles with which it is often almost totally unacquainted[3] and indeed about which the available literature in Malaysia and Singapore is limited.

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[1] The courts of Malaysia have generally regarded the law of the Ch'ing dynasty (1644–1911) as the prototype of traditional Chinese law. In that many Chinese emigrated to Malaysia during that period, and in that the legal innovations promulgated by Yüan Shih-k'ai and the Nationalist Government (1912–1949) perhaps helped to undermine the ancient social and legal structure but presumably did not have a substantial impact upon prevailing legal attitudes in China, particularly in the family law field, such a designation is not unreasonable. (The ineffectiveness of the courts especially in the rural areas, the importance of custom in family law matters, the Japanese invasion and the weakness of the central government were some of the many factors that muted the effectiveness of these legal innovations.) In this paper we shall mean Ch'ing China when referring to traditional China.

[2] See for example *Chung-kuo Hsien-tai Shih-liao Tzu-shu* No. 6 (Taiwan, 1962), pp. 121f.

[3] Thus far only the University of London offers a course in Chinese law among the major institutions of the United Kingdom, and a Chinese law course was only instituted at the Law Faculty of the University of Singapore—the only law school in Malaysia and Singapore—in 1963.

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The results of this strange union of common law and Chinese law are, not surprisingly, often awkward compromises which at times cause serious injustices, thereby reinforcing the role of social institutions and undermining the position of the courts as an arena for the settling of family disputes. The social institutions, however, have been deprived of much of their "legal" power and therefore are at times unable to manage their traditional functions of mediation and dispute resolution adequately, thus engendering social chaos.

Some of the errors of judgment in the development of the Malaysian judiciary may be attributed to the myopia of the colonial period, where the institutions of common law were regarded as implements for the civilizing of foreign peoples. A description of the pitfalls encompassed in an attempt to incorporate elements of two diverse legal institutions in order to form a single body of family law, without careful scrutiny of social development, is nevertheless of contemporary relevance. Several Asian countries no longer under the aegis of colonial rule are now determined to reconstruct portions of their legal institutions.[4] They are drawn by nationalistic pride to the traditional customary family law as a basis for this renovation, and yet are attracted to the Western "rational and impersonal" legal system in their desire to appear and to become "modern." Often, particularly in communities with large immigrant populations, neither system is fully relevant to the social circumstances of the people.

The process of integrating legal institutions into a changing society to make them more effective organs for the peaceful resolution of disputes is intricate and difficult. Utilization of law as a tool for social change (e.g., institutionalizing a system of monogamy in a community long practiced in polygamy) without a thorough understanding of the society involved, as both colonial and contemporary legislatures have attempted in Singapore, is of questionable effectiveness. This note concerning the development of the Chinese family law institutions of Singapore and Malaysia from initial recognition of "customary"[5] substantative Chinese family law to the efforts to impose the English common law of domestic relations in 1961 upon the Chinese of Singapore, will hopefully illustrate some of the problems involved in transplanting substantive law into an alien judicial and social environment.

This paper is divided into two basic sections. The first describes the institutional environment in which the law is administered in Singapore and Malaysia. The second examines certain problems of the substantive law itself. Each section is preceded by a brief historical introduction designed to contrast some of the traditional judicial patterns of China with those of Malaysia and Singapore. Within these two divisions, a rough historical chronology is used to develop the legal patterns. The

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[4] A recent conference (wherein this article was first presented) under the sponsorship of the Association of Southeast Asian Institutions of Higher Learning brought together representatives from eleven Asian countries to discuss the role of customary family law and colonial law in the present and future development of their legal systems. The proceedings of the conference will be published in the near future in a volume entitled *Family Law and Customary Law in Asia: A Contemporary Legal Perspective* (ed. David C. Buxbaum).

[5] While the Women's Charter 1961 (discussed infra) seriously modifies the applicability of substantive Chinese law to the domestic relations disputes of the Chinese in Singapore, the Malaysian states continue to apply "customary" Chinese law to these matters. What was originally deemed "customary" Chinese law by the Malaysian judiciary and legislature is in reality a fusion of both the positive law and customary law of traditional China.

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conclusion includes not only an evaluation of previous developments, but certain implicit and explicit suggestions as to future action.

The judicial system of traditional China provided a hierarchy of courts of which the lowest formal administrative units, the approximately 1250-1300 *hsien-yamen,* were most directly relevant to the population. The *hsien-yamen* had jurisdiction, among other things, over civil matters as well as adultery and other criminal offenses relating to domestic relations.[6] This formal judiciary, because of its limited size, was often remote. Furthermore, the potential expense, delay and shame arising from involvement in its proceedings, as well as its reputed penal character bespeaking punishment for the wrongdoer, made it in part a symbol of stern authority rather than the major active instrument of social ordering or the principal arena for the peaceful resolution of disputes.

While in fact in the *hsien* and other lower level courts the magistrate himself often effectuated a civil conciliation agreement, this was not the socially preferred method of settling disputes, in part because the magistrate could use the threat of punishment to obtain this conciliation. While the harsh stipulations of the code were often mitigated in actual local level practice, there was, nevertheless, a potential danger in petitioning the courts for redress. Thus when a conciliation agreement was effectuated under judicial auspices, the parties, in form at least, often petitioned the magistrate to withdraw the case from the docket and to drop any potential criminal penalties. The magistrate himself often refused pleas for civil redress, suggesting that the matter was too trifling for the courts and that the parties might best settle the matter themselves by conciliation. The population was thus encouraged to use the informal organs of control and conciliation to resolve social conflict.

The lineage, *tsu,* for example—which has been regarded by some as the focal point of Chinese social institutions exalted above the individual and the state[7]—was of particular importance in the provinces of Kwangtung and Fukien, from which most Malaysians of Chinese descent emigrated, and where ". . . lineage [*tsu*] and the village tend markedly to coincide, so that many villages consisted of single lineages."[8] Large lineages were involved in maintenance of order. Confucian vir-

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[6] See *Ch'in-Ting Ta-Ch'ing Hui-Tien* (25th year Kuan Hsü, 1899 ed.) Chüan 6 (13–16) (reprinted Taiwan) pp. 0081–0082; hereafter referred to as *Ch'ing Hui-Tien.* See Chü Tung-tsu, *Local Government in China under the Ch'ing* (Cambridge, 1962), p. 2.

See also *Ta Ch'ing Lü-Li Tseng-Hsiu T'ung-tsuan Chi-ch'eng* (*T'ung-chih* 2nd year ed. 1863) Chüan 30 (including appended Hsing-an Hui-lan); hereafter referred to as *Ta-Ch'ing Lü-Li.*

The effectiveness of control seems quite remarkable in that: "With a total of roughly 1,500 magistrates in all types of *chou* and *hsien,* there was on the average one magistrate for 100,000 inhabitants (calculated on the basis of the 1749 official figures) or 250,000 (1819 official figures)." Hsiao Kung-chuan, *Rural China, Imperial Control in the Nineteenth Century* (Seattle, 1960), p. 5.

[7] Chen Ku-yuan, *Chung-kuo Fa-chih Shih* (1934), p. 63.

[8] Maurice Freedman, *Lineage Organization in Southeastern China* (London, 1958), p. 1. The lineage has been defined ". . . as an exogamous patrilineal group of males descended from a founding ancestor, plus their wives and unmarried daughters." S. van der Sprenkel, *Legal Institutions of Manchu China* (London, 1962), p. 80. This does not imply a biological connection. See also *Hsing-an Hui-lan,* appended to *Ta-Ch'ing Lü-Li,* Chüan 8. Here it was held in an 1828 case that, where there were no eligible relatives, a child of the same surname could be adopted and was entitled to the prerogatives of the heir although he was not of the same *tsung*—a somewhat wider grouping than the lineage. He was therefore permitted the *liu-yang,* i.e., the claim of exemption from criminal punishment in order to care for his adoptive parents. This decision could be justified on the theory that all those of the same surname were originally of the

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tues such as filial piety were stressed. Sometimes ancestral regulations, *tsung-kuei,* were formulated, warning against crime, violence, adultery and unfilial behavior. Expulsion from the lineage and other forms of punishment were prescribed by these regulations.[9] These rules were moral codes based upon prevailing ideology, law and custom, flexibly enforced with ". . . major emphasis . . . upon moral persuasion rather than actual punishment."[10] Generally the rules were more lenient than the law code, but they relied ultimately upon state authority. Thus lineage rules could be registered with the government and acquire a formal and quasi-legal status and thereby develop an interrelationship with the legal organs and the law code which was one of mutual support and supplementary assistance.[11] In the cities the surname organizations (or clans), *t'ung-hsing-hui,* performed similar functions. Generally these urban surname associations were the protoytpes of institutions reconstituted in Singapore and Malaysia which functioned as the lineage and surname associations of traditional China. Undoubtedly the lineage and surname organizations played an important role in dealing with certain aspects of domestic relations and other social matters often dealt with by law courts in other societies. The government, recognizing the value of these institutions, promoted them by exhortations and political intervention.[12]

Besides the lineages and clans, the guilds, *pao-chia* and *li-chia,* the gentry, and the secret societies played important roles in the administration of traditional Chinese law. An imposing network of institutions, designed to maintain the political, social and familial hierarchy in China, existed during the Manchu dynasty. The immigrant community, on the other hand, generally lacked such institutions. The very symbol and the ultimate source of authority—the central government with its law code and court system—was absent. The scholar gentry, virtually the only Chinese group experienced in central government administration, numbered insignificantly among immigrants to Malaysia. The *pao-chia* and *li-chia* were inviable in the immigrant community. The colonial government, interested in attracting Chinese immigrants, did not intrude itself into Chinese affairs during the earlier historical period. Therefore the Chinese, deprived of a role in the colonial government and lacking their own formal institutions, had to rely heavily upon the remaining instruments of authority—the transplanted and somewhat altered informal organs

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same family—a belief held in traditional China. (This belief was fortified by the law prohibiting marriage between persons of the same surname, although there were probably fewer than 470 surnames in China.) See also G. Jamieson, *Chinese Family and Commercial Law* (Shanghai, 1921), pp. 131, 132.

[9] Serious offenses such as murder, treason, etc., were dealt with by the government through the court system, etc. The lineage heads and leading officers had powers of punishment including oral censure, *yü;* demand for formal ritualistic apology; corporal punishment, *chang-tse;* expulsion form the lineage (a very serious punishment in the traditional Chinese society so that there was a provision in most regulations for re-admission upon good behavior); and finally punishment by invoking the power of the courts. Liu, Hui-chen Wang, *The Traditional Chinese Clan Rules* (New York, 1959), pp. 36–45. In a few cases, clan rules envisioned capital punishment or orders to commit suicide. At times the provisions from the penal codes were incorporated into the lineage regulations.

Hsiao, p. 67 note 109, citing *hsien* records of the *Nan-hai* district, notes that a young man who beat his mother when reprimanded for gambling ". . . was put to death by order of a gentry clansman."

[10] Liu, pp. 22–24.

[11] *Ibid.* E.g., unfilial behavior was punished under many lineage rules by forty strokes; the Ch'ing code however provided a minimum of one hundred strokes of the bamboo for this offense.

[12] Hsiao, p. 348.

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of traditional China as well as some institutions which were new manifestations of traditional organizations—as their initial basis for self-government.

Capitan China. "The object of the British in the first place was to attract the Chinese to the new settlement of Penang so that it might profit by their industry, and to interfere with them as little as possible." In that the Chinese wished to be ". . . tried and governed under their own laws . . . ." Captain Light ". . . committed the administration of each community to a headman or 'Captain' . . ."[13] who was generally a secret society leader. The "Capitan China," an important institution throughout Southeast Asia, thus became the "broker" between the Chinese community and the English officialdom in Malaya, Singapore and Borneo.[14] The Capitan China "normally had full competence in matters of custom, religion and the family."[15] In Malaysia and Singapore, the Capitan China, although obviously in many respects very different, in effect performed a role similar in some respects to that of the Chinese gentry. Having neither the training nor the experience of the scholar gentry of traditional China, they nevertheless assumed positions of leadership in local communities on the basis of their economic position, affiliation with the secret societies, and their own individual talents. The Capitan China and the scholar gentry both provided local welfare services, engaged in arbitration, and supplied a link with officialdom. In helping to finance Chinese education, the latter-day Capitan China in some sense became the guardian of tradition. However, lacking both the traditional intellectual training and the institutional assistance and support that existed in China, the Capitan China had to rely upon the existing political power within the Chinese community—i.e., the secret societies—for institutional support.

Secret societies had their own system of law which was in part embodied in written regulations[16] of the society and dealt not only with the internal regulation of the members' behavior towards one another—including prohibitions against litigation between members, misbehavior with sons or daughters of members, etc.—but which also contained provisions promoting traditional virtues including filial piety, punishing unfilial conduct with severe penalties. Confucian familial concepts, reinterpreted in a new social situation, found their way into the disciplinary code of the society. While these regulations were not framed by sophisticated members of the gentry, and were often crude and harsh, they nevertheless represent the carrying of elements of tradition by the immigrants to the shores of the new society.

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[13] Victor Purcell, *The Chinese in Malaya* (London, 1948) pp. 143ff. See also Joyce Ee, "Chinese Migration to Singapore, 1896–1941," 2 *Journal of Southeast Asian History*, (1961), pp. 33–35.

[14] On Malaya see J. M. Gullick, *Indigenous Political Systems of Western Malaya* (London, 1958), pp. 23–25. On Borneo see T'ien Ju-k'ang, *The Chinese of Sarawak: A Study of Social Culture* (London, 1953), p. 69.

[15] G. William Skinner, "Overseas Chinese Leadership: Paradigm for a Paradox," U.N.E.S.C.O. Symposium, p. 1. While Skinner talks particularly of Manila, Semarang and Phnom Penh, he notes this system was in existence throughout Southeast Asia. The term Capitan or Kapitan is from "the Portuguese cognate of 'captain.'" In the larger communities, the Capitan had various colleagues of rank and the system of selection was institutionalized involving both the Chinese community and the colonial governments.

[16] "Rules and Secret Signs of the Toh Peh Kong Society," Leon Comber, *Chinese Secret Societies in Malaya: A Survey of the Triad Society from 1800–1900* (New York, 1959), pp. 279–284. See also Leon Comber, *The Traditional Mysteries of Chinese Secret Societies in Malaya* (Singapore, 1961, pp. 56–59.

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Clans and lineage. After the new immigrant community began to settle and bring its womenfolk to Malaysia and Singapore, various other organizations were founded. There were numerous associations, *hui,* which became important in family matters. Speech groups formed associations, as did surname, *hsing,* organizations, which largely displaced the lineage organizations of traditional rural China. Religious associations and commercial associations, *hong,* were among the more important groupings. Family and religious associations, however, unless linked with secret society organizations, lacked the support of the courts and officials and were without the institutional encouragement they had received in China. Nevertheless, their roles in Malaysian Chinese society were important once the society had stabilized sufficiently to permit the growth of family institutions.

Even after the establishment of the formal court system and the proscription of the secret societies (both of which were designed to usurp the prerogatives of the informal Chinese institutions and to establish the formal judiciary as the primary arena for settling disputes) these informal Chinese institutions retained vitality. In Sabah and Sarawak, the Capitan China has become an elected official, and in the Malay states and Singapore he still plays an informal role. The activities of the secret societies are well known.

With regard to the surname organizations, investigation in Singapore in 1964 has indicated that they, too, still play a role—in differing degrees among various groups —in settling domestic disputes. They tend, however, to bemoan their lack of authority. The mutual benefit organizations are part of some of the surname associations and they provide insurance and death benefits for members. The wealthy still play a predominant role in the leadership of these organizations for reasons of prestige. Some of the mutual benefit organizations are attracting members by providing insurance schemes and arrangements for an appropriate funeral, thus offering traditional and modern services. Young people also join the surname organizations for social and other purposes. Generally they do not require that a member come from a specific geographical district in China, although the tendency of persons from the same geographical area to group together is quite pronounced. For example, there is a Lan surname organization, *Lan-shih tsung-hui,* composed primarily of Hakka people, which is moderately active in social matters. The primary purpose of the association is said in its literature to be to promote friendship among members of the clan. The leaders of the association, mostly wealthier members, perform social services and functions befitting their prestige. Their hall, which contains the records of the association, is used for weddings and social functions and occasionally as a place for the poor to sleep. The association provides conciliation services for domestic or other problems, but the leadership feels it has insufficient authority in this area.

The *Lan-shih Hu-chu Hui,* or Lan Surname Mutual Benefit Association, provides its members with a small book of credentials containing the bylaws of the society. Its members pledge to honor and observe the charter and rules of the society, as well as protect the collective welfare and promote the spirit of mutual assistance of the association. There is an insurance scheme, which encompasses financial provisions for funerals, as well as insuring the participation of the members in the funeral procession of a co-member. While the Lan Association is only at best moderately active in family matters, other associations are much more active in both family and

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commercial matters. Thus even in Singapore—the most cosmopolitan area in Malaysia—the surname associations still retain some vitality.

Although as Freedman has noted, new types of marriage ceremonies have developed, a more recent survey of a street in the poorer Chinese section of Singapore has indicated that seventy percent of the Chinese marriages were still of the old type, while twenty-two percent were of the new type; sixty-eight percent of the marriages were arranged in traditional fashion; twenty percent were arranged with the consent of the parties and only twelve percent self-arranged.[17] While there has been substantial social change, much of the traditional system remains somewhat viable. Traditional attitudes towards law are, therefore, significant as there still exist alternatives (albeit somewhat weakened) to the use of the formal court system.

The formalization of the judicial system has been aptly described as follows:

> The history of the government of the Chinese by the British in Malaya may be described as a transition from indirect to direct rule. This is made clear in the legal history of the Straits Settlements. The process was from rule by Chinese custom administered by Chinese headmen, to rule by English criminal law side by side with Chinese custom administered by British judges, then as the law was interpreted, to rule by the law of England, taking account of Chinese custom.The interpretation of the law meant progressive restriction on the operation of the custom of the Chinese. At the same time a body of statute law was growing up in the Colony itself which was further to restrict this custom.[18]

The first major step in this regard was the granting of the First Charter of Justice in 1807, establishing "The Court of Judicature of Prince of Wales' Island." The court was to have ". . . the . . . jurisdiction and powers of the Superior Courts in England . . . 'so far as circumstances will admit' and . . . as an Ecclesiastical Court 'so far as the several religions, manners and customs of the inhabitants will admit.'" "The Judges of the Colony have, without exception, held that the Charter of 1807 introduced the English law as it then existed into Penang."[19]

The Second Charter of 1826 extended the jurisdiction of the Court of Judicature of

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[17] Barrington Kaye, *Upper Nankin Street, Singapore: A Sociological Study of Chinese Households Living in a Densely Populated Area* (Singapore, 1960), p. 176.

[18] Purcell, p. 143.

[19] "Letters of Patent" (1855), R. Braddell, *The Law of the Straits Settlements, A Commentary,* II (2nd edition, Singapore, 1931), p. 232 at p. 249 and p. 13. The "customary" family law of the inhabitants of Malaya and Singapore was given expression within the ambit of these restrictions upon the scope of the applicability of common law. This unfortunate negative definition of the role of "customary" law and hence of Chinese "customary" law has placed a restrictive judicial interpretation on the scope of customary Chinese law in both Malaya and Singapore. Thus, for example, although secondary wives have been given recognition by the courts, they have been permitted to inherit equally with the principal wife under the Statutes of Distribution (*Six Widows Case* 12 S.S.L.R. 120). This has rightfully been designated a "most curious result," Report of a Committee Appointed by the Governor in October, 1948, *Chinese Law and Custom in Hong Kong* (Hong Kong, 1950) p. 89. In part this interpretation, as Braddell notes, was probably the result of the fact that Muslim wives are regarded as having equal status unlike Chinese wives and the courts tended to analogize these two separate legal situations.

See also *Ong Cheng Neo* v. *Yeap Chia Neo* 1. Ky. 326; L.R. 6 P.C. 381. It was held in *Regina* v. *Williams* (1858) 3 Ky. 16 that: ". . . the prescribed adaptation to native opinions and usages shall go only 'as far as the same can consist with the due execution of the law and the attainment of substantial justice.'" It was further noted that ". . . nothing is said about applying native law to native cases, but it is merely required that the 'Administration of Justice' shall be adapted, so far as circumstances permit, to 'the Religions, Manners, and Customs' of the native inhabitants, while the rules of Practice are to conform, as nearly as may be, to the Rules of the English Courts of Request." See also *Fatimah* v. *Logan* (1871) 1 Ky. 255.

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Prince of Wales' Island to the new British colonies, i.e., Malacca and Singapore. This Charter was similarly deemed to have introduced English law into the new colonies.[20] A third Charter was issued in 1855 reorganizing the Court.

In 1946 the British protected states of Sarawak and North Borneo became Crown colonies and until the formation of Malaysia in 1963, they retained that status. In 1951 the Supreme Court of Judicature was established for the two territories (and Brunei); this court was later incorporated into the Malaysia Act, 1963.[21] English law was introduced into Sarawak and North Borneo ". . . so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary."[22] The provisions of the Sarawak Ordinance are somewhat stronger with regard to the role of custom than those of the early Charters. The introduction of English law into the Malay States was a somewhat complicated process, but in general the courts filled many "gaps" in the existing law through use of English law when a state became subject to English rule.[23]

The establishment of English courts that were to administer law to the Chinese was obviously meant to usurp the function of the Capitan China. The restricted role provided for the administration of Chinese customary law, the alien nature of British legal institutions, and the fact that the Chinese had already developed and adapted institutions of self government over a considerable period of time, prevented the early effectuation of this English policy. The Capitan China provided a connection between the British colonial government and the Chinese community; the establishment of the court destroyed this relationship while failing to provide a realistic alternative to legitimate rule of Chinese society. Whereas previously secret society leaders had played an important role as the recognized headmen of their communities, the legitimization was now removed,[24] and the secret societies (over

[20] Braddell p. 26–27. See *Regina* v. *Williams* (1858) 3 Ky. 16.

[21] The High Court in Malaya, the High Court in Singapore and the High Court in Borneo were vested with the judicial power of the Federation of Malaysia (Cap. 4, 13, [1], [a], [b], [c] Malaysia Act 1963; Article 121, Constitution). A Federal Court in Kuala Lumpur has jurisdiction to hear appeals from decisions of the High Courts ([2] [a]), as well as original and consultative jurisdiction in specific cases (Article 128, Constitution).

[22] North Borneo: Application of Laws Ordinance (Cap. 6), Ordinance No. 15, 1960; Sarawak: Application of Laws Ordinance (Cap. 2). See also February 1928 Ordinance, Revised Laws of Sarawak, 1947 (Cap. 1, Sec. 2); "The Law of England, in so far as it is not modified by Ordinances enacted by the Governor with the advice and consent of the Council Negri, and in so far as it is applicable to Sarawak having regard to native custom and local conditions shall be the Law of Sarawak." The actual introduction of English law, however, was a slow process and is still only gradually being effectuated. In part this is due to questions of political power, in part the result of the rural nature of the territory and in part reflects a difference in colonial policy. The early letters of patent of the Court of Judicature in the Straits Settlements do not use the word *"only,"* nor ". . . and subject to such qualification as local circumstances and native customs *render necessary*." [Emphasis supplied.] This is perhaps another reason for the Borneo court's somewhat broader interpretation of the role of customary law. Finally, the Borneo States were not thoroughly integrated into the colonial administration until a later period, being subject to Chartered Company rule. The generally accepted date for the reception of common law is 1826. It is of interest to note that the early Charters proceeded on the rather humorous assumption that the island of Penang was uninhabited in 1786 when Light occupied the island. Since there was, therefore, no existing lex loci, and the Chinese, Malays and Chulias could not establish their laws in a British possession, English law could be applied at the discretion of the colonial government. *Regina* v. *Williams* (1858) 3 Ky. 16; *Re Loh Toh Met* (1961) 28 M.L.J. 234, p. 237.

[23] See L. A. Sheridan, *Malaya and Singapore, the Borneo Territories, the Development of Their Laws and Constitutions* (London, 1961), pp. 14–23.

[24] As Freedman notes with reference to Singapore: ". . . it is necessary to point out here that, histori-

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the objection of some of the more enlightened officials) were proscribed.[25] The result has been that, while the secret societies still exist, their activities have taken a more anti-social direction. For example, in Singapore the Criminal Law (Temporary Provisions) Ordinance of 1955[26] was amended in 1958 (and thereafter) to permit police supervision and detention without trial of persons "associated with activities of a criminal nature . . ." because of a crime wave in 1958 attributed to the secret societies.

The intrusion of English law was first attempted in the Straits Settlements (including Labuan prior to 1946), thereafter in the Malay States, and only more recently in the Borneo territories. In part because of this, Singapore has been the first state virtually to eliminate judicial recognition of Chinese family law for future marriages by passage of the Women's Charter, 1961; while in areas of marriage and divorce "Chinese family law" is still applied by the courts of Malaya. The Borneo States apply "customary Chinese law" to more extensive judicial areas, including inheritance.

Before dealing with Chinese law in Malaysia and Singapore, some general historical notes are relevant.

The law code, the *Ta-ch'ing Lü-li,* and portions of the *Ta-ch'ing Hui-tien,* contained the broad general provisions of family law, and when supplemented by *li,* provincial regulations, law cases, and the rules of customary law, provided the legal basis for family law in Manchu China.

In general, family law was administered by the clan institutions and other informal organs of control. While the law code and case material dealt with family law, there were substantial areas of family law untouched by the code. Furthermore the code was national in scope, and local legal customs varied significantly in such areas as marriage and divorce.[27]

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cally, it is probably only since the last quarter of the nineteenth century that government intervention in Chinese affairs has had any great influence. With the disappearance of the Capitans China the internal affairs of the Chinese community largely passed out of the purview of the British administration. Legally and politically the Chinese contrived to maintain their own world. The few civil cases which came up for judgment before the courts had only a limited significance for the Chinese community as a whole. During the half-century before the growth of a system of direct control of Chinese affairs the codes by which Chinese regulated their family affairs and the bodies to which they resorted in cases of dispute were beyond the reach of the government. It was during this period that the secret societies flourished as instruments of political control and courts of law within a closed Chinese society." Maurice Freedman, "Colonial Law and Chinese Society," LXXX *Journal of the Royal Anthropological Institute of Great Britain and Ireland* (London, 1950), p. 98.

[25] W. A. Pickering, "Chinese Secret Societies," *J.S.Br.R.A.S.,* Vol. III, pp. 1–18, as quoted in R. N. Jackson, *Immigrant Labour and the Development of Malaya, 1786–1920* (Malaya, 1961), pp. 49–50.

[26] No. 26 of 1955; amended, No. 25 of 1958; No. 36 of 1958; No. 34 of 1959; No. 56 of 1959; No. 43 of 1960 and No. 56 of 1960. This should be differentiated from the Preservation of Public Security Ordinance, No. 25, 1955, as amended, which permits detention without trial of individuals ". . . with a view to preventing that person from acting in any manner prejudicial to the security . . . or maintenance of public order. . . ."

[27] For example the procedure for establishing a betrothal, *ting-hun,* a condition precedent to a legal marriage, varied substantially among the provinces, *hsien,* and in fact among different classes and groups within the same local community. The forwarding of a bottle of wine to the girl's house by the go-between was an essential part of the betrothal procedure in Hungshui and Ting-hsi *hsiens* in Kansu. Receiving tobacco and smoking was an essential part of the procedure in parts of what was then Feng-tien (Liaoning) and failure to receive tobacco at the girl's home by the potential bridegroom's family meant that there would be no marriage. Somewhat more relevant to the Chinese of Singapore and Malaysia, the betrothal

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Interestingly enough, legal secretaries and local officials were exhorted in settling disputes or dealing with legal cases: "If you never act on a penal law or an edict without first seeing that it does not conflict with what local custom values, then there will be harmony between *yamen* and people . . . whereas applying the law rigidly on every occasion would probably give rise to much dissatisfaction and complaint."[28] Caution was suggested in quoting precedents too readily as a standard. The arbitrators and local officials were concerned with restoring harmony and not merely with adjudicating rights and duties. Village leaders in particular were concerned with local customs and local precedents in solving disputes.

Alongside the common law and customary law of the Malays, Dyaks and other peoples of Malaysia and Singapore, Chinese law was recognized by the courts and legislature primarily in family matters. While the courts have attempted to recognize Chinese "customary" law,[29] new social circumstances were changing certain aspects of Chinese family customs in Singapore and Malaysia. Once the courts and legislature had intruded sufficiently into Chinese society, the legal rules themselves had some slight impact upon Chinese custom of either a positive or negative sort, and the Chinese attitudes toward the law courts were undoubtedly affected in part by their decisions in these areas of family law.

The courts have had particular difficulty with certain aspects of Chinese law which were alien to the jurist trained in the English common law system. In particular, the question of the status of secondary wives and questions of adoption have disturbed the courts and provided the large majority of cases on Chinese law in Singapore and Malaysia.

a. The status of secondary wives, t'sips.[30]

(1) Traditional Chinese law. In that the English common law concept of marriage is rather specific (see infra), and has for a long time excluded even potentially polygamous relationships, the status of Chinese secondary wives has been one of the most difficult problems for the courts.

The *ch'ieh* (or *t'sip*) in traditional Chinese law was of lower status than the primary wife. The birth of a son elevated the position of the *ch'ieh* within the household. The ideological justification for taking a secondary wife was to provide heirs for posterity.[31] The secondary wife like the primary wife had to be of a different surname and could not be within the prohibited degrees of relationship.

Ch'ing law provided punishment of 100 blows of the bamboo to those who degraded the principal wife to the position of secondary wife; or 90 blows to those

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money, *p'in-chin,* was an essential element of the marriage procedure in parts of Fukien. *Chung-kuo Hsien-tai Shih-liao Tzu-shu* No. 6 (Taiwan, 1962), p. 121 f. These procedures were given sanction during and even for some time after the fall of the Ch'ing dynasty by the code and law courts, as well as by the informal legal organs. See for example *Ta-li-yüan P'an-chüeh-li Ch'uan-shu* (1933 ed.), case no. 596, 1913, where it was deemed essential to pass through the established customary betrothal procedures (or ceremonies), "hsi-kuan shang, i-ting i-shih" as well as the marriage ceremony in order to validate a marriage.

[28] Van der Sprenkel, p. 150, quoting from a book for legal officials by a Manchu gentry member and long-time legal secretary, Wang Hui-tsu.

[29] See Braddell, I, p. 80–88.

[30] Cantonese pronunciation more properly romanized *ts'ip,* i.e., *ch'ieh* in *Kuo-yü.* In that the courts in Singapore and Malaysia use the spelling *t'sip* it will be used in the text. *Tsai* is the Cantonese romanization for primary wife, i.e., *ch'i* in *Kuo-yü.*

[31] Tai Yen-hui, *Chung-Kuo Shen-fen Fa Shih* (Taipei, 1959), p. 73, 74. As Meng-tzu noted, "Of the three unfilial [acts], not having a posterity is the worst."

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who during the life of the primary wife raised the secondary wife to an equivalent rank. Similarly those having a living primary wife who purported to enter into marriage with another woman as primary wife were to be punished with 90 blows of the bamboo and the marriage declared null and void.[32]

(2) Singapore and Malaysia. While in Southeastern China the taking of a secondary wife was probably the privilege of only wealthier citizens, in Singapore, for example, Freedman notes that ". . . [n]obody can measure the extent of polygamy in the Colony, but there is the impression among Chinese themselves that it is widespread from the clerk and small shopkeeper upwards in the social scale, and that it increases as wealth increases."[33] At the same time he cautions it is not as common as popular conceptions hold, although rather common among the wealthy Chinese (at least at the time of his study). An excellent 1954–1956 study of one of the poorest streets in the Chinese residential area in Singapore—and thus one where people are least likely to be able to afford secondary wives—indicates that of the married women on the street, four to five percent admitted to being secondary wives. The author cautions that two important factors are relevant to these statistics: *viz.*, to admit to being a secondary wife is to suffer a loss of face; and some women, believing themselves to be the only wives, are in fact secondary wives.[34] Even if the practice of polygamy is declining with the impact of Western ideology (although this must be balanced against the Chinese population's rise in economic status), it is nevertheless a problem of some importance.

Recognition of the polygamous nature of Chinese marriage is of long standing in Malaya and Singapore. In the early cases, the requirements of proof were rather strict, and the threefold test included proof of: (a) long continued cohabitation, (b) an intention to form a permanent union, and (c) repute of marriage.[35]

In a series of later decisions, the requirements for attaining the status of a *t'sip* were modified and standards for attainment of such status became less stringent. In 1920 it was decided that the traditional need for a ceremony (although perhaps usual) was not required in order to become a lawful secondary wife.[36] In addition,

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[32] There is evidence that custom modified the severity of this provision under certain circumstances as will be noted below. There is even a little evidence, although it is rather weak, that punishment could be avoided by the officials regarding the second woman as a *ch'ieh* or secondary wife. See *T'ai-wan Kuan-hsi Chi-shih*, Vol. 2, No. 12, p. 943 ff. Nevertheless, as noted in the code and *Ta-Ch'ing Hui-tien*, p. 14762, if you have a living primary wife and again purport to marry a primary wife you will be punished by ninety strokes and the second marriage will be severed by divorce. There was, however, an earlier provision in the *Hui-tien* which indicates that the second marriage is to be regarded as the taking of a *ch'ieh* and no divorce is to result (apparently not indicating that there shall be no punishment). This provision was expunged in 1741. There was, however, a revival of this provision under special modified circumstances in 1821, as will be noted below in footnote 44.

[33] Maurice Freedman, *Chinese Family and Marriage in Singapore* (London, 1957), p. 121.

[34] Kaye, p. 174. See also W. A. Hanna, *The Formation of Malaysia* (New York, 1964), p. 206 ff.

[35] See, e.g., *Re Lee Choon Guan, decd.* (1935) 1 M.L.J. 78; *Lew Ah Lui* v. *Choa Eng Wan* (1935) IV S.S.L.R. 78 (Singapore); *Woon Ngee Yew* v. *Ng Yoon Thai* (1941) 7 M.L.J. 32 (Perak); *Tan Ah Bee* v. *Foo Koon Thye* (1947) 13 M.L.J. 169; *Yap Kwee Ying* v. *Law Kiai Foh* (1951) 17 M.L.J. 21 (Johore Bahru).

[36] The doctrine of presumption of marriage was applied to the Chinese in *Ong Cheng Neo* v. *Yeap Chia Neo* (1872), 1 Ky. 326. See also *Cheang Thy Phin* v. *Tan Ah Loy* (1920), 14 S.S.L.R. 79; *Khoo Hooi Leong* v. *Khoo Hean Kwee*, L.R. (1926), A.C. 529.

Traditional Chinese custom required the *t'sip* to be introduced to, and accepted by, the primary wife (if any) at a tea ceremony. The *Li-chi* said it was not necessary to prepare the six ceremonies of marriage in order to marry a *ch'ieh*: "P'in yüeh ch'i, pen yüeh ch'ieh; liu li pu pei, wei chih pen." Nevertheless, certain elements of the formal marriage rites were also likely to be undertaken, including the calling of the go-

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the courts did not emphasize the question of long-continued cohabitation in their judgments. Thereafter the courts reduced the requirements of attaining a status of a *t'sip* to proof of mutual consent to marry, "... and that the requirements of a ceremony, of a formal contract and of repute of marriage were evidentiary only and not essential to the acquisition of a status of a *t'sip*." In *Chu Geok Keow* v. *Chong Meng Sze* it was held that the dismissal of the appellant's claim (in the lower court) for maintenance on the basis of being a secondary wife of the respondent was erroneous. The lower court had given judgment on the grounds that in order to prove this status, one must prove: a) long cohabitation, b) intention to form a permanent union, and c) repute of marriage. The court held however:

> With this view of the Magistrate I am unable to agree . . . for the legal requirements of a marriage with a *t'sip* . . . the law merely required a consensual marriage or mutual consent to marry and that the requirements of a ceremony, of a formal contract and of repute of marriage were evidentiary only and not essential to the acquisition of a status of a *t'sip*.[37]

Despite this legal ruling, the court in a surprising decision held that the appellant was not entitled to the status of a secondary wife, although there was some evidence of the couple, as husband and wife, having adopted a child and the appellant had known the respondent for ten years. The magistrate felt that the appellant's evidence of a ceremony (a photograph) and the birth of a child were not substantiated and felt that even if there was adoption of children ". . . it is my opinion not by itself sufficient proof of marriage and although in Exhibit P-3 the words 'husband and wife' are mentioned, to my mind, they are merely intended to induce the parents to part with the child."[38] The onus placed on the appellant in this case appears to be fairly heavy.

The burden of proving this consensual marriage was placed upon the party who alleged it. Although it has been held that a formal contract of marriage would be conclusive evidence of acquisition of this status:

> The legal requirements for marriage with a *tsai* or a *tsip* are, I think, the same. This means that the law of this Colony merely requires a consensual marriage, i.e., an agreement to form a relationship that comes within the English definition of marriage. It is no longer any part of that conception that such a relationship must be life-long. It merely means one of indefinite duration as distinct from one for a definite period. . . .

Mere cohabitation for a considerable period was held insufficient. Living together publicly ". . . so as to acquire the reputation of being man and *tsip* . . . would be evidence that the status had been acquired."[39]

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between, and undoubtedly the use of *p'in-chin* or *p'in-li* and possibly the marriage contract. See Shih Yi-yun, "Kuan-yu Wu Kuo Chin-tai Fa-chih Shang di Ch'ieh Chih Yen-chiu," *T'ai-wan ta-hsüeh Fa-hsueh-yüan K'an-hsing* (September, 1956), p. 137 at p. 145 ff. See also *T'ai-wan Szu-fa Jen-shih Pien*, p. 630 ff., for examples of certain marriage contracts used to marry a *ch'ieh*. It has also been held that family recognition of the marriage is not required as evidence of a valid marriage. *Lee Siew Neo* v. *Gan Eng Neo* (1952) 18 M.L.J. 164 (Singapore). Remarriage of widows is tolerated by the courts of Malaya and Singapore. *Chan Lam Keong* v. *Tan Saw Keow* (1951) 17 M.L.J. 21 (Kedah).

[37] (1961) 27 M.L.J. 10, p. 10 (Alor Star).

[38] *Ibid.*, pp. 10, 11.

[39] *Er Gek Cheng* v. *Ho Ying Seng* (1949) 15 M.L.J. 171 per Murray-Aynsley, C. J. (Singapore). Although a tea ceremony and recognition of the marriage by the husband's family was expected in most

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These cases not only reduced the legal requirements for acquisition of the status of a *t'sip,* but also analogized the status of a *tsai* to that of a *t'sip,* despite the fact that the principal wife or *tsai* was of a substantially higher social and legal position in traditional China.[40] To some extent the judgment reflected the fact that in Singapore and Malaya plural marriages tended not to be coresidential and therefore the secondary wife was generally not subject to the supervision of the primary wife, as she was in traditional Chinese circumstances.[41] The decision also reflected the growing body of case law which was developing independently of Chinese society. The courts in Malaya and Singapore noted that the Chinese law is now a fusion of English law and Chinese custom, and experts are no longer required to testify on Chinese custom. As one judge noted: "In my judgment I had to determine the issues not by Chinese custom exclusively but by the relevant portion of the Law of Singapore applicable at the material time."[42] Therefore, the courts in Malaya and Singapore would be unable to reflect changes in Chinese customary law that conflicted with established precedent.

The reductions in the requirements for attaining the status of a *t'sip* were reinforced by other decisions which held that where a man who had a living primary wife thereafter went through a second ceremony appropriate to the acquisition of a primary wife, the latter marriage would be deemed a secondary relationship.[43] These opinions were at variance with traditional Chinese positive law, although permitted under certain specific circumstances by Chinese customary law.[44]

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cases, the court held it was evidentiary only and not essential to the acquisition of the status of a secondary wife. See also *Lee Siew Kow, decd.,* (1952) 18 M.L.J. 184.

[40] H. McAleavy, "Chinese Law in Hong Kong: the Choice of Sources," *Changing Law in Developing Countries* (New York, 1963) (ed. J. N. D. Anderson), p. 258 at p. 264: "The essential difference between wife and concubine must be insisted upon, if Chinese law is to be understood at all. It was a difference not of degree, but of kind." The wife, unlike the *t'sip,* had the right to administer the family estate after the death of the husband until the son reached the legal age. The wife also ". . . shared her husband's status in the family and the clan." Secondary wives, ". . . who could be taken without restriction of number, enjoyed no comparable right, and as a rule were limited, and then only in the absence of a legitimate widow, to expressing their opinion in the family or clan council." This is rather a strong statement of the differences between the primary and secondary wife; nevertheless their status was undoubtedly different in law.

[41] See Freedman, "Colonial Law . . ." p. 102.

[42] *Re Ho Khian Cheong, decd.,* (1963) 29 M.L.J., 316 at p. 317.

[43] "In my opinion, as the deceased had a principal wife living in Singapore at the time he went through a ceremony of marriage with Quek Boo Lat, he could only take her as a secondary wife. Considering the fact that the deceased and Quek Boo Lat had agreed to become man and wife, it seemed unfair to me to relegate her to a position of a concubine merely because the position of principal wife which she intended to fill had been taken by someone else. Both justice and common sense required that she be accorded the status of a secondary wife." Per Ambrose J. (1963) 29 M.L.J. 316 at p. 317. See also *Woon Kai Chiang* v. *Yoe Pak Yee* (1926), S.S.L.R. 27, where it was held that since there was a presumption against bigamy, the status of a secondary wife devolved upon the woman who went through a ceremony appropriate for a principal wife with a man already married.

[44] "From the earliest ages Chinese law allowed a man to have only one [primary] wife at a time." McAleavy, "Chinese Law in Hong Kong . . , p. 264. *Chien t'iao,* or *Kim Tiu* in Cantonese, however, was a method of dual succession whereby, for example, a younger brother's son was permitted to succeed to both his own line and his father's elder brother's line if the latter had no sons. This was accomplished by the taking of two wives, one as the adopted child of his uncle—his father's elder brother—and the other in his own right. Although the law code prohibited the keeping of two wives, a case in 1821 declared that punishment in the case of *chien t'iao* would not be the same as if bigamy had been committed, but the second woman was to be treated as a secondary wife if a case were taken before the court. McAleavy, pp. 264–266. See also Case No. 852 (1917) decided in the early Republic. There it was held under the revised laws of the later Ch'ing period, *Hsien-hsing Hsing-lü,* that in the *chien t'iao* situation, during the life of the first wife, the second would not be regarded as having the legal status of a primary wife. The courts

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Another unusual interpretation of the status of a *t'sip* is shown in the fact that these secondary wives are entitled to the same share in the estate of the deceased husband as the primary wife under the British Statutes of Distribution.[45] While this has not necessarily modified the requirements for attaining this status, it has put a premium upon obtaining such a relationship in view of the financial rewards involved. Such an interpretation has given rise to cases where after the death of a wealthy gentleman some women will claim to have been his secondary wives on the basis of some minor or tangential association with the decedent in the hope of sharing his estate with his wife or wives of long standing.[46] Thus, while in effect raising the status of these women—and in fact the status of all wives—by permitting them to inherit a portion of the estate of the deceased contrary to Chinese law,[47] these decisions have also helped indirectly to promote the frequency of such relationships (i.e. the *t'sip*)[48] by offering this substantial financial inducement. These cases have

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in Malaysia have not recognized the specific circumstances by which taking a second primary wife was permitted by Chinese customary and positive law. Generally the courts have given recognition to what could be deemed bigamy and potentially receive severe punishment in traditional China. It is also likely that in Chinese society in Malaysia these primary marriages which were given recognition (at least as secondary relationships) by the court would be regarded by social custom at least as bigamous in nature. Indeed, there is little question that a person having a primary wife who is going through a second ceremony appropriate to the taking of a primary wife realizes that he is doing wrong unless involved in a *Kim Tiu* situation.

[45] *In the Goods of Lao Leong An* [1867] Leic. 418, (1867) 1 S.S.L.R. 1. The court seems in part to be influenced by the fact that the English Statutes of Distribution were previously applied to Muslim wives although it does indicate recognition of the differences in status. In Perak, Order in Council No. 23, 1893, did not permit inferior wives to share in the husband's estate; however this was repealed in 1930 and the Distributions Ordinance was applied to all Chinese wives. The *Lao Leong An* case, the first case upholding the status of a *t'sip* and applying the English Statutes of Distribution, was supported by numerous subsequent decisions, including: *Lee Joo Neo* v. *Lee Eng Swee* (1887) 4 Ky. 325; *In the Goods of Ing Ah Mit* (1888) 4 Ky. 380. *The Six Widows Case, Choo Ang Chee* v. *Neo Chan Neo and Others* (1908) 12 S.S.L.R. 120, is regarded as establishing finally the polygamous nature of Chinese marriages and parenthetically seeming to require a ceremony for marriage of primary wives. Despite the wording of the Charter, a dissenting opinion on this issue was registered by Sercombe Smith J., who felt that only English common law could be applied by the courts. "We cannot import into this Colony a marriage of such a nature as that it is capable of being followed by or subsisting with another, polygamy there being the essence of the contract." In *Ngai Lau Shia* v. *Low Ch'u Neo* (1915) 14 S.S.L.R. 35, it was held that the courts will take judicial notice of the polygamous nature of Chinese marriage. The Privy Council affirmed the question of the validity of secondary marriages raised in *Cheong Thye Phin* v. *Tan Ah Loy* (1916) 14 S.S.L.R. 79 in *Khoo Hooi Leong* v. *Khoo Hean Kwee* (1926) L.R. [1926] A.C. 529 and also indicated that since no ceremony was needed, secondary marriage with a Christian woman could be permitted.

[46] See *Straits Times,* April 10, 1964, p. 4, for a recent discussion of this problem in the case of the estate of Lee Gee Chong, "biscuit king." In this case it was alleged that a woman who apparently had had an on-and-off relationship of approximately 16 months' duration with the decedent—a wealthy heir—without the knowledge of his family, had acquired the status of a secondary wife. Therefore she would be entitled to the same portion of the widows' share as the decedent's primary wife and other lawful secondary wife. While this problem is somewhat moot, or will be in several decades in Singapore with the passage of the Women's Charter, No. 18 of 1961, it is still of significance in the states of Malaya. Sabah and Sarawak, having interpreted the scope of Chinese law somewhat more broadly, do not have this problem (as will be noted).

[47] *Ta-Ch'ing Lü-Li,* Chüan 8. The sons generally inherit equally with the minor exception of certain hereditary rank which devolves upon the oldest son and ". . . articles of pure personal adornment . . ." brought by the wife to the family; see H. McAleavy, "Certain Aspects of Chinese Customary Law in the Light of Japanese Scholarship," XVII B.S.O.A.S. (1955), p. 546. Note *Chinese Law and Custom in Hong Kong,* p. 89: "The main difference between the Straits Settlements and Hong Kong is that in Hong Kong the courts have held that the Statutes of Distribution are totally inapplicable to the distribution of the estate of a Chinese intestate. . . ."

[48] Which, as noted supra, are generally no longer co-residential in Malaysia. There has also been an inference in recent decisions and obiter dicta in other cases indicating a possible tendency to permit Chris-

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also served to lower the status of the primary wife in relation to that of the secondary wife. If the object of these decisions was to protect potential offspring, rather than merely to uncritically impose English law upon an alien population, a more reasonable approach might have been to allow all sons to inherit as they do under traditional Chinese law.

(3) Sabah and Sarawak. Sabah and Sarawak have, as noted supra, differed in their interpretation of the scope of Chinese "customary law" as well as in their handling of individual cases.[49] It has been held, for example, that ". . . any proved or accepted Chinese custom [when dealing with administration of a Chinese estate] should prevail over English law."[50] In accordance with traditional Chinese law, sons inherit equally where there is intestacy, being responsible thereafter for the support of their mother,[51] thereby not putting a premium upon acquisition of the status of a secondary wife such as is done in Malaya and Singapore.

The courts in the Borneo States have also differentiated customs of the various Chinese groups (e.g., Hakka, Foochow and Henghua) and have thereby upheld certain ancient customs.[52] The criteria upon which the court determines Chinese "customary law," however, seem to be the customs of the Chinese people living in the Borneo States at the time of the decision. For example, the courts have upheld as "within the Hakka custom, the modern custom" a divorce by a wife where the wife has left the husband of her own free will, the husband has failed to get her back, there is no hope of reconciliation and the husband cannot support the children adequately.[53] This decision is clearly contrary to traditional Chinese positive law which gave the wife almost no opportunity for divorce. While the court has thus assumed a substantial burden, i.e., determining what modern custom is, it has retained a flex-

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tians to become secondary wives, thus tending to universalize this status. See David C. Buxbaum, "Freedom of Marriage in a Pluralistic Society" (1963), 5 *Malaya Law Review*, 383.

[49] In part this difference has been fortified by statute. See North Borneo, Procedure Ordinance, 1926 (No. 1) which provides that matters of inheritance upon intestacy shall be determined by the communal laws of the people. See also *Matasin bin Simbi* v. *Kawang binti Adullah* [1953] S.C.R. 106 and R. H. Hickling, "The Borneo Territories"; *Malaya and Singapore, The Borneo Territories. . .*, pp. 115 ff.

[50] *Tay Sok Ann* v. *Tay Sok Hiong* [1955] S.C.R. 17, p. 20. But cf. *Chan Bee Neo* v. *Ee Siok Choo* [1947] S.C.R. 1.

[51] [1955] S.C.R. 17; see also *Chan Bee Neo* v. *Ee Siok Choo* [1947] S.C.R. 1; and *Ko Jin Moi* v. *Siow Chong Koo* [1956] S.C.R. 48 which held a Hakka wife has no right to the real property of the husband, which devolves upon the sons, and who in turn must support her.

[52] In *Loh Chai Ing* v. *Law Ing Ai* [1959] S.C.R. 13, the court upheld a *T'ung Yang-hsi* marriage where a girl was given to the father of the respondent at the age of seven so that she might become the future wife of the respondent, as she did at age 18.

[53] *Lo Siew Ying* v. *Chong Fay* [1959] S.C.R. 1. The courts in the Borneo territories have jurisdiction over questions of divorce of a customary marriage, *Liu Kui Tze* v. *Lee Shah Lian* [1953] S.C.R. 55, and unlike the Malay States and Singapore (until recently) a court procedure is required to effectuate such a divorce although apparently a mutual petition for divorce will suffice. *Wong Chu Ming* v. *Kho Liang Hiong* [1952] S.C.R. 1. Cf. *Re Soo Hai San* and *Wong Sue Foong* (1961) 27 M.L.J. 221 (Kuala Lumpur) which indicates Chinese customary marriages can only be dissolved by Chinese custom and not under the Divorce Ordinance, 1952. Divorce of a *tsai* under traditional Chinese law was somewhat restricted (see Freedman, "Colonial Law and Chinese Society," p. 109); however a *t'sip* could be disposed of rather easily although as noted divorce was not much practiced in Chinese society. The courts in Malaya and Singapore seem to permit divorce of a secondary wife providing there is the necessary intent and repute, e.g., by informing clansmen and relatives. See *In the Estate of Sim Siew Guan decd.* (1924) 1 M.L.J. 95; [1933] S.S.L.R. 539. See also *Khoo Hooi Leong* v. *Khoo Chong Yeok* [1930] A.C. 346 for the possibility (which seems remote) of divorcing a secondary wife who had given birth to a son. Divorce of primary wives by mutual consent is accepted practice in Singapore and Malaya. See B. L. Chua, "Domestic Relations," *Malaya and Singapore . . .*, p. 364 at 373 f. See also *Lew Ah Lui* v. *Choo Eng Wan* [1935] S.S.L.R. 177; *Six Widows Case* (see supra).

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ible position so as to permit itself to be responsive to social change. The courts in the Borneo States have also favored settling differences by arbitration and informal conciliation.[54]

While in general the courts in the Borneo territories are willing to look more carefully at Chinese customary law and to give it emphasis in conflict with English law, statutory changes have altered some of this. The Chinese Marriage Ordinance, 1933,[55] defines Chinese marriage as ". . . a marriage contracted according to established Chinese law or custom and includes a marriage constituted by the marital intercourse of persons betrothed according to such law or custom." The Ordinance requires registration with a Registrar of Chinese marriages of the marriage one month after it is contracted and provides: "No such marriage shall be valid unless so registered . . ." unless a Resident's Court declares that it is satisfied the marriage is valid upon application of husband or wife or any interested party.[56] Registration of the marriage gives it a presumption of validity and therefore the party alleging the marriage does not have the same burden of proving its existence as in Malaya and Singapore. Only the court can determine whether an unregistered Chinese marriage is valid.[57]

The Borneo States have thus attempted to integrate Chinese custom gradually into the contemporary legal system by requiring registration of marriages, unlike Malaya and Singapore until the promulgation of the Women's Charter, with minor penalties stipulated for failure to register. Chinese custom has been permitted a larger role, including the application of traditional Chinese law to questions of inheritance. Divorce—an institution which has more serious social consequences, although not much practiced by the Chinese[58]—is regulated by requiring a court procedure before it can be effectuated, in contrast to Singapore (prior to 1961) and Malaya.

b. Adoption.

(1) Traditional Chinese law. Adoption—a significant institution in China, Singapore and Malaysia—was of particular importance traditionally as a means (upon failure of male issue) to provide someone to support people in their old age, continue the lineage branch, and to maintain the sacrifices to the ancestral spirits. In that the ancestors were thought not to accept sacrifices from other than related individuals, adoption of persons of a different surname for purposes of inheritance and thus for conducting the sacrifices was strictly prohibited. Those of the same surname were

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[54] See *Siaw Moi Jea* v. *Lu Ing Hui* [1959] S.C.R. 16, pp. 18, 19. The court refused to reopen questions relating to possible grounds for divorce that had been previously settled in "arbitration" by influential community members.

[55] Revised Laws, 1946. Cap. 74. Relevant Sections are: Sec. 4, (1) (2) (3) (4) (5).

[56] In which case it is to be registered forthwith. Sec. 5 requires that: "The Registrar shall not register any marriage until he is satisfied that the ceremonies required by established Chinese law or custom have been duly performed and that the marriage is valid according to such custom." Some registration of marriages takes place prior to the filing of an action, or as an attempt to prevent a party from dissolving the marriage. In *Lo Siew Ying* v. *Chong Fay* (1951) S.C.R. 1, a 1945 marriage was registered in 1958 ". . . so as to tie her to him."

[57] *Chiew Boon Tong* v. *Goh Ah Pei* [1956] S.C.R. 58.

[58] "There is, indeed, a very strong emotional resistance among Chinese in Singapore today to the idea of divorce (and Malays and Europeans are derided for their recourse to this practice), despite the fact that a process of separation tantamount to divorce is generally recognized." Freedman, "Colonial Law. . ." p. 109.

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thought to be of the same ancestry.[59] Those who attempted to adopt and gave for adoption someone of a different surname (as the legitimate heir) could be punished with sixty strokes of the bamboo and the child would be returned to his family of birth.[60]

In order to consummate the adoption it was expected that one would pay a sum of money as recompense for the initial suckling and nourishing of the child.[61] Nevertheless this *ju-pu-yin* was conceived of as a kind of gift and possibly not one of the essential legal elements necessary to establish the adoption.

The Ch'ing code prohibited adoption of a child as the legal heir unless the primary wife had passed her fiftieth year without bearing a son.[62] Thereafter the eldest son of the secondary relationship, or, if none, relatives in descending order of proximity and age could be chosen and adopted as the lawful heir. In the absence of eligible relatives, someone of the same surname could be adopted as the heir.

While an abandoned child under three years of age could be adopted and possibly given the family name, he could not become the heir. It was also possible under customary law for a family having legitimate heirs to adopt other relatives or children of the same surname as insurance for their posterity and a sign of the bountifulness of their family.[63] This type of adoption permitted by customary law was common among wealthy citizens in both China and Singapore-Malaysia. Adoption of the only son of another family, however, was forbidden by the Ch'ing code. Generally speaking adoption for the purposes of establishing an heir had to be within the proper generation.[64] The adopted child, in particular the child adopted for purposes of providing for the ancestral sacrifices and thus the legitimate heir, was entitled to the same powers and status as an eldest son.

(2) Singapore and Malaysia. The situation in Malaya and Singapore was affected by the passage of legislation and the refusal by the courts to recognize the traditional forms of adoption. As Freedman noted, ". . . the disinheritance of adopted children has certainly been looked upon by the Chinese as an injustice."[65]

The Adoption of Children Ordinance in Singapore[66] was interpreted as prohibiting adopted sons from sharing in the estate of a Chinese intestate, unless they had been adopted under the provisions of the ordinance.[67] The situation in Malaya was unclear for a considerable period of time; however the Adoption Ordinance,[68] and the Distribution Ordinance,[69] defined a "child" for purposes of inheritance as ". . . a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any such wives, but does not include an adopted child other than a child adopted under the provisions of the Adoption

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[59] Tai Yen-hui, p. 88, 89, 90.

[60] *Ta-Ch'ing Lü-Li*, Chüan 8.

[61] Tai Yen-hui, pp. 88–90.

[62] *Ta-Ch'ing Lü-Li*, Chüan 8.

[63] Tai also suggests (p. 90) that custom sanctioned the adoption of a child of a different surname as the legitimate heir.

[64] T'ai-wan Wen Hsien Yeh-k'an, *T'ai-wan Szu-fa Jen-shih Pien*, p. 640, 643 ff.

[65] Freedman, "Colonial Law. . ." p. 112. He also notes that: "In Singapore at the present time adoption of one kind or another is very common."

[66] No. 18 of 1939, Revised Laws of Singapore, 1955, Cap. 36 is modeled after the English Adoption of Children Act (1926) (16 and 17 Geo 5, c. 29) as amended 1950, as is the Malayan Ordinance.

[67] *Khoo Tiong Bee* v. *Tan Ben Gwat* (1877) 1 Ky. 473.

[68] No. 41 of 1952.

[69] No. 1, 1958.

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Ordinance, 1952."[70] Because of the expense, differentiation from traditional Chinese custom and general lack of relationship to the legal organs, there was little recourse to use of the ordinance. In Singapore, for example, between 1940 and 1949, only twenty-one children were adopted under the ordinance. While the situation in Singapore has improved in recent years, in the Malay States the number of adoptions registered under the ordinance by all groups in the population in 1961 was 1,852 in a total population of 7,136,804.[71] There is undoubtedly a large number of customary adoptions not being registered.[72]

This is another area of the law where unnecessary hardship has been imposed upon innocent parties, in this instance, adopted children, by a rather unimaginative application of English law to the Chinese of Singapore and Malaya, without consideration of existing social custom. The adverse effects of this imposition are felt most severely by the poorer members of the community. The broader recognition of traditional Chinese adoption in the Borneo States seems more humane and just and more likely to promote use of law courts in resolving disputes.

c. Recent statutory innovations in Singapore.

Singapore was the first state in Malaysia to virtually abolish Chinese law, at least within the next several decades, with passage of the Women's Charter, 1961.[73] As a

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[70] *Ibid.*, Sec. 3.

[71] The latest date for which statistics were available at the time of the writing of this article. Ibrahim bin Ali, *Report of the Registrar-General on Population, Births, Deaths, Marriages and Adoptions for the Year 1961* (Malaya, 1963) p. 12. The comparative figures of registration of adoptions for previous years include: 1955: 225; 1956: 460; 1957: (population 6,278,763) 526; 1958: (pop. 6,515,385) 740; 1959: (pop. 6,697,827) 982; 1960: (pop. 6,909,009) 922; 1961: (pop. 7,136,804) 1,852. While the increase from 1960 to 1961 was 100.9 percent, the 1960 figure showed a decrease of 6.1 percent as compared with the 1959 figure. Trends therefore are somewhat difficult to ascertain.

[72] While, as noted earlier, traditional Chinese adoption generally involved the payment of a specific sum of money, Section 10 of the Singapore Adoption of Children Ordinance, 1939, prohibited parent or guardian from receiving payment or reward without the court's sanction. In *Re Sim Thong Lai* (1955) 21 M.L.J. 25 (Singapore), p. 27, the Secretary for Chinese Affairs, Mr. R. N. Broome, testified: "But in my opinion a genuine Chinese adoption is rarely considered correctly completed except where the adopters are near relatives of the maternal parents unless there is a payment of money by the adopters to the natural parents. It is not sufficient that there be a token payment in the sense of a small coin wrapped in red paper. The payment is normally substantial, and may be up to $200 or more. I do not think this payment is regarded as a purchase price. It is rather a token of compensation to the parents for the expenses incurred in bearing and rearing the child up to the time of adoption." This so-called "ginger and cake" money of $200 was held not to be a reward for the transfer of the child in this case, but is merely compensation for care. The court in a wise decision upheld the adoption. Sale of a child has been deemed illegal in the Borneo territories, which, therefore, refuse to permit a civil action for recovery of the sum—*Pang Chin* v. *Pang Chow Pee* [1952] S.C.R. 18. The courts have also construed Chinese wills rather strictly, giving primary consideration to the English concept of legitimate birth, rather than to the Chinese concept wherein paternal recognition was sufficient to confer the status of a legitimate child. E.g., see *Re Tan Tong decd.* (1962) 28 M.L.J. 355 (Kuala Lumpur) where specific references to sons were made by the testator (who did not differentiate between adopted and natural sons) including references to sons who were adopted. The testator permitted his grandchildren to take his children's share of the estate if one of his children were to die within twelve years of the death of the testator. Adoption was widely practiced in the testator's family and the adopted grandchildren were adopted while the testator was still alive. Under Section 10 of the Evidence Ordinance, No. 11 of 1950, which says wills are to be construed as they would be in a court in England, and despite the court's recognition of Chinese custom, it held that the testator meant natural children when he referred to children. This is a remarkable decision in that the testator specifically referred to his own adopted children as his sons, had knowledge that his son's children were adopted, but nevertheless the court refused to uphold the rights of the adopted grandchildren to inherit their father's share. Cf. *Cham Lam Keong* v. *Tan Saw Keow* (1951) 17 M.L.J. 21 (Malaya).

[73] No. 18 of 1961.

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piece of legislative drafting, this ordinance has been soundly and deservedly criticized;[74] nevertheless, its social significance is of substantial importance.

The Charter at one stroke exorcised the remaining facets of substantive Chinese "customary law" which were sanctioned by the judiciary for the future generations of Chinese citizens in the State of Singapore. The Charter provides exclusively for monogamous marriage (Part II), requires that these marriages be registered (Part IV), and prohibits customary divorce (Part IX).

After many years of sanctioning the status of the *t'sip* or secondary wife, and inadvertently putting a premium upon such relationships by a series of decisions, the legislature provided:

> Every person who on the 2nd day of March, 1961, is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages of contracting a valid marriage under any law, religion, custom or usage with any person other than such spouse or spouses.[75]

Any person who married after March 2, 1961, was similarly prohibited "during the continuance of such marriage" from contracting a valid concurrent marriage. Not only was a marriage contracted in violation of this section deemed invalid and the children born of such a relationship deemed illegitimate and prohibited from rights or succession in the father's estate,[76] but anyone "lawfully married under any law, religion,[77] custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage" shall be held to have committed an offense under section 494 of the penal code. Thus enforcement of this law was to be effectuated by criminal punishment.

In summation: now, after a prolonged period of time when customary marriages were not registered, all marriages must be registered to receive judicial sanction; after prolonged recognition of the status of secondary wives, their status is now prohibited; and after holding for a prolonged period of time that the children of these secondary relationships were legitimate, these children are now deemed illegitimate and barred from a share in the estate of an intestate father.

Polygamy is probably reasonably widespread, at least among the middle and upper class Chinese in Singapore. Is it desirable, therefore, to legislate it out of existence for all future marriages? Even if many of the Western-oriented members of the younger generation associate monogamy with modernization and social justice (the logic of which is not self-evident), because of long-standing acceptance there will undoubtedly be those who will enter into polygamous unions despite the law.[78]

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[74] G. W. Bartholomew; L. W. Athulithmudali, "The Women's Charter (1961)" 3 *Malaya Law Review* 316. The criticism is not confined to the drafting but includes other external factors.

[75] Part II (4) (1). It should be emphasized that the Charter is prospective in its effects and therefore does not render plural marriages in existence at the time of its passage invalid.

[76] As was the purported wife. The relevant sections are: Part II, 4 (2) (3); Part II, 5 (1) (2).

[77] But see Part I, 3 (2): "Parts II to VI and Part IX and section 166 of this Ordinance shall not apply to any person who is married under, or to any marriage solemnized or registered under the provisions of Muslim law or of any written law in Singapore or in the Federation of Malaya providing for the registration of Muslim marriages."

[78] To a random sample questionnaire circulated among college students and adults in Singapore in 1964, 100% of the 183 persons who responded said they knew of or had heard of people who had entered into "non-legal" secondary relationships despite the passage of the Women's Charter. Of course such a

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The primary result of such relationships will be—not that the penal aspects of the law will be applied, in that people are not likely to present such matters to the law enforcement authorities—but that the children of these marriages will not only be unable to inherit but will also be stigmatized as illegitimate. The social desirability of such a result is questionable. A more gradual approach could have been found, even assuming the desirability of enforcing English common law on all the Chinese people in Singapore. A first step might have been to require registration of all marriages in Singapore, after which penalties could have been assessed for failure to register. This would perhaps have given some small indication of the number of polygamous unions to be dealt with. Thereafter either traditional Chinese concepts,[79] or others, could have been enforced to restrict the number of these marriages. The early Charters, for all their defects, recognized that, especially in family matters, different groups have different customs and habits. It is unlikely that the customs and habits of the Englishman will be directly applicable to the people of Malaysia.

If one believes that all customary law should be abolished and supplanted by the "modern common law," the Charter fails to meet that standard. For example, Section 82 (1) (6) provides for the future that:

> Nothing herein shall authorize the court to make any decree of divorce[80] except (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Singapore.

This section determines the jurisdiction of the court to make divorce decrees, and subsequent sections in effect abolish traditional Chinese divorce by mutual consent and require the institutionalization of an adversary proceeding to effectuate divorce.[81]

Thus the court's jurisdiction under the ordinance in questions of divorce is limited to either (a) marriages registered or deemed registered under the ordinance,[82] or (b) cases where the original marriage was contracted under a law providing for

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survey is not very meaningful, but seems to indicate that there is general belief that the provisions of the Charter re secondary wives are not being obeyed.

[79] The need to introduce the secondary wife to the primary wife—who was almost always taken first—and thus have her accepted at a tea ceremony is one traditional aspect that could have been utilized as a preliminary basis for the reform of Chinese law. The underlying basis for the taking of a secondary wife was to continue the family line, and this could have been the ideological basis for further restrictions, etc. For example, emphasis upon the fact that to ". . . the Prophet Mohammed divorce is the most detestable of all permitted things . . ." has provided an ideological basis for reform of divorce under the Muslim Ordinance, 1957, in Singapore. See Ahmad Ibrahim, State Advocate-General, Singapore, "Muslim Marriage and Divorce in Singapore," XXVIII M.L.J. (1962), p. xi, p. xiv.

[80] See also 82 (2) and (3) which provide that the court will similarly have no authorization to make decrees of nullity or judicial separation and restoration of conjugal rights unless the marriage was contracted under a monogamous marriage law, in addition to which in the case of nullity the "marriage to which the decree relates" must have been celebrated in Singapore. In the case of judicial separation or restitution of conjugal rights, the parties of the marriage must in addition reside in Singapore at the time of the commencement of proceedings.

[81] Part IX, 81 provides that, subject to exceptions contained in the ordinance, ". . . the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings."

[82] 82 (1) (a). See also Part XI, 166, which may be construed to deem all legal "customary" marriages to be registered under the ordinance, if contracted prior to its enactment.

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monogamous marriages, and where the parties' domicile at the time of the petition is Singapore. Subsection (b) above is undoubtedly a statutory re-enactment of *Hyde* v. *Hyde* (1866) L. R. 1 D and D 130, which is said to have defined marriage at common law. In this ancient case, the court refused to grant a divorce to the petitioner, a Mormon, who had been married by a lawful ceremony and had never practiced polygamy. The court defined marriage ". . . in Christendom . . . as the voluntary union for life of one man and one woman, to the exclusion of all others." Since the court felt that a Mormon marriage was potentially polygamous[83] it did not fit within the English definition of marriage and therefore the court was unable to grant judicial relief. The judges apparently failed to realize that the Mormons, at least, considered themselves Christians. This case has been the cause of much hardship and bad law, so much so that it has recently been said by an eminent legal scholar: "Almost any proposal which would rid the law of the rule that matrimonial jurisdiction is not available in the cases of marriages which are potentially polygamous, ought to be viewed sympathetically."[84]

This archaic relic of the common law is being whittled away by the English courts and those of Commonwealth countries;[85] however, the legislature in a jurisdiction which has long sanctioned polygamous marriages has seen fit to perpetuate the English past in the Malaysian present.[86] Similarly the desirability of an adversary

[83] But see G. W. Bartholomew, "Recognition of Polygamous Marriages in America" 13 I.C.L.Q. (1964) which purports to show that Mormon marriages were never potentially polygamous in Utah because the law prohibited such polygamous unions at the time *Hyde* v. *Hyde* was decided. Bartholomew feels that the American courts have dealt with the problem of polygamous marriages ". . . far more neatly . . . logically and consistently than the English courts." The American courts define polygamy as de facto polygamy and even in such cases may be willing to give legal affects to some incidents of such unions. These cases, the author holds, ". . . demonstrate very clearly that there exists an acceptable alternative to the policy of marital apartheit followed by the English courts" (p. 1075).

Potentially polygamous marriages are given some indirect recognition by English courts, e.g., *Baindal* v. *Baindal* [1946] P. 122; *Sinha Peerage Claim* (1939) 171 Lords Jo. 350 [1946] 1 All E.R. 348; see also 48 L.Q.R. 341; 66 *Harvard Law Review* 961; 31 B.Y.B.I.L. 248; and 19 M.L.R. 690.

[84] Zelman Cowen, "A Note on Potentially Polygamous Marriages," 12 *International and Comparative Law Quarterly*, p. 1407 (1963).

[85] E.g., *Sara* v. *Sara* (1962) 31 D.L.R. (2 cd) 566; *Cheni* v. *Cheni* [1963] 2 W.L.R. 17. The court held in *Cheni* v. *Cheni* that where a marriage, potentially polygamous at its inception, becomes monogamous by the lex loci celebrationis at the date of suit, the court would have jurisdiction. In *Sara* v. *Sara*, a Hindu form of marriage was consummated in India, which permitted polygamy at the time of celebration. The husband thereafter acquired a domicile of choice in British Columbia and the Hindu law was changed to make polygamous marriages illegal in India. The court retained jurisdiction over the marriage.

[86] See *Lee Wah Fui* v. *Law, Times*, March 4, 1964, Cairns J. In this recent English case the parties were married in Hong Kong by Chinese traditional custom in 1942. In 1959 they entered a contract of mutual divorce and the husband returned to England where he is domiciled, and wishing to remarry there wanted first to ascertain the validity of his divorce. In view of the importance of this case, the Queen's proctor was called in and he requested that the court avoid the difficulty of jurisdiction in view of the fact that the marriage was originally potentially polygamous, by deciding that "the divorce was valid to dissolve *any* marriage in fact celebrated." He cited *Russ* v. *Russ* [1962] 3 W.L.R. 930, and *Merker* v. *Merker* [1963] P. 283. The final decision has been rendered in *Lee* v. *Law* [1964] 2 All E.R. 248. The court held that, although the marriage was potentially polygamous, the divorce validly dissolved *any* marriage between the husband and wife. The court did not determine whether or not a valid marriage was celebrated, but avoided that question by narrowing the issue to whether or not the husband was free to marry. The court said that cognizance can be taken of a potentially polygamous marriage for some circumstances, including the facts in this case, without necessarily determining whether the marriage was valid in the first place. The court's reasoning is somewhat specious, in that unlike the legitimacy of offspring or questions of property rights, in determining the question of the legitimacy of a divorce the validity of the original marriage is more directly at issue. Nevertheless this is some indication of the lengths courts are willing to go to avoid the consequences of *Hyde* v. *Hyde*. See also *Shahnaz* v. *Rizwan* [1964] 2 All E.R. 993 enforcing a contract for deferred mehar or dower in an English court, arising out of a

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divorce proceeding has been questioned in many common law jurisdictions; nevertheless it has been institutionalized at this late date in a jurisdiction that has long sanctioned divorce by consent.[87]

The development of Chinese family law in Malaysia and Singapore, from its historical base in China to self-administration by the Chinese community in Malaysia and finally to incorporation into a common law framework, has been a prolonged and complicated process. The difficulties of incorporating a foreign body of law into an alien judicial system, having rules of evidence and matters of procedure totally alien to the imported system, are evident. The problem involved in importing a substantive code, which originally served as a rather strict model used in large part to encourage formal and informal settlements of disputes and giving wide latitude to local custom, into a judicial system that is designed to serve as a major arena for resolving social problems according to fixed, "universal" standards, is enormous. The contrast between traditional Chinese legal institutions and contemporary common law institutions in Singapore and Malaysia is perhaps too graphic to warrant further elaboration. The necessity of differentiating the traditional Chinese context from the curcumstances of the Chinese society in Malaysia, however, must be carefully noted. It is certainly conceivable, for example, that certain aspects of secret society organization and Capitan China administration could have been beneficially incorporated into the existing legal framework. However, the failure of the colonial administration either to understand or to fully sympathize with the local population was in part responsible for the maintenance of the cleavage between Chinese society and the law courts. The Borneo territories, in part because of the facts noted above and in part as a result of the progressive charter granted by the Liberal government of Mr. Gladstone to the North Borneo Chartered Company, requiring that justice be administered with care and "due regard to native customs and laws," have evolved a much more rational program for judicial development.

There is, however, a danger in the approach of the Borneo courts: The court, by gradual recognition of evolving social custom, could ratify certain social trends that may not be desirable.[88] This approach also puts on the courts the burden of determining just what contemporary customary practice is.[89] Furthermore, courts may also

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potentially polygamous marriage. See P. R. H. Webb, "Polygamy and the Eddying Winds," 14 I.C.L.Q. 273 (1965).

[87] There have been recent discussions in Malaysia about the possibility of eliminating this adversary divorce proceeding from the Singapore statute in view of the premium it puts upon perjury and in view of its undesirable social effects.

[88] See *Lo Siew Ying* v. *Chong Fay* (1959) S.C.R. 1 at p. 3, where Mr. Kong Fen Fatt, former Registrar of Chinese Marriages for the Hakka community testified that according to modern Hakka custom ". . . if the parties were incompatible the wife could get a divorce even if the husband refused to agree." Query as to whether legal ratification of such custom, if it exists, is desirable? See *Tang Sui Ing* v. *Goh Tiew Liong* (1964) 30 M.L.J. 406 (Siba) where the Foochow Chinese headman testified as to customary divorce among the Foochow community. He claimed a marriage contracted under Foochow Chinese custom may be dissolved if there is a complete and absolute desertion by either party, or absolute failure on the part of the husband to maintain the wife and children, for at least two years; or if the parties are completely out of sympathy with one another. Serious questions arise about both the reality of such customs and the desirability of giving them judicial sanction, if they exist.

[89] For example in *Yong Mong Yung* v. *Chai Shang* (1964) 30 M.L.J. 424 (Kuching). The court, while calling for evidence of Hakka custom on divorce merely found ". . . there is no custom governing divorce among [the] . . . community, the modern practice being to leave it to the courts." There is substantial doubt as to this being modern practice and doubt whether the community lacks custom regarding divorce,

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function as leaders by indicating what social behavior should be, not only what it is. This does not mean that strong recognition of social change should not be reflected in the law, but only that the law may serve to establish ideals as well as reflect society's mores. The Borneo courts may be abandoning this responsibility. Yet it may be said that the strong customary orientation of the Borneo courts is highly preferable to the strange mixture of English and Chinese law that the courts and legislature of the Malay States and Singapore have developed. The legislative and judicial decisions regarding Chinese family law have stimulated neither justice, social progress, nor respect among the Chinese for the legal organs. If the local community is to be encouraged to use the judicial organs for resolution of its disputes, the decisions of the courts will have to be comprehensible to the people. This will probably require an understanding of traditional Chinese law and custom as well as a comprehension of the extent to which contemporary Chinese society in Singapore and Malaysia reflects traditional law and custom.[90] The unfortunate consequences of the misinterpretation of the role of Chinese law in traditional society, the failure to comprehend the socio-legal structure of the Chinese community in Singapore and Malaysia,[91] and the misinterpretation of traditional law as well as the harsh results caused by the somewhat arbitrary imposition of alien law upon the citizens of Malaysia and Singapore, have of course failed to bolster confidence in the judicial system.

At the same time care must be taken that recognition of traditional customs and their existence in present-day Singapore and Malaysia does not become an excuse for fostering those customs which impede the ability to modernize and to enable these societies to master their own economic and political problems. This is especially complicated in states like Sabah and Sarawak where many of the higher administrative positions are under the control of English expatriates, who of necessity enjoy their present position of authority; and in other states where judicial officers are remnants of the colonial system of government. If English law is to be used as one source of the development of law, then it must be used with care. The Lord President of the Federal Court in Malaysia, Dato Sir James Thomson, has noted:

> In the law of England, however there are no codes. There is much that is good. There are, however, anomalies, anachronisms, and peculiarities dating back to long forgotten pages in the history of England and which have now become a burden and an obstacle to justice in modern England itself far more so in countries like this, with far different historical background and social organization.
>
> The time has come now, however, for each of the new nations, each now master

but in that the court feels it must rely upon experts when dealing with this question, if the experts are inadequate such a result is possible. The court thereupon examined the question of cruelty and finding none, disallowed the divorce. This decision by Williams, C. J. is one of the poorer judgments in this area, arising from lack of information about the people, area and prior cases in Sarawak. See for example (1959) S.C.R. 1, cited in preceding footnote.

[90] See Freedman, *Chinese Family and Marriage . . .*, pp. 155–177, for an interesting study of modern forms of marriage among groups of Chinese in Singapore. It should be emphasized that the social structure of various Chinese communities differs and that this should be considered in evaluating Chinese law.

[91] See David C. Buxbaum, "Preliminary Trends in the Development of the Legal Institutions of Communist China and the Nature of the Criminal Law," *International and Comparative Law Quarterly* (1962), 1, at p. 1, for some information on the attempt by the government on the Chinese mainland to foster formal and informal institutions to handle legal matters. See also David C. Buxbaum, *Osteuropa Recht* No. 1, 1964, for some notes regarding possible traditional influences upon legal development in mainland China.

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in its own house, to consider how much of its [English] legal inheritance is altogether suitable to the changed circumstances of today, how much of it should be retained and how much of it should be discarded.[92]

This can only be ascertained by an historical evaluation of the traditional law of the people of Malaysia in the light of present social and political conditions.

The courts in Singapore and Malaya have never fully recognized the importance of either *li* or customary law in China, which could override provisions of the positive law in the formal legal system itself, and which were of major significance in the administration of justice by the clans, the guilds and other informal organs. The paramount role of conciliation and arbitration and informal means of settling disputes was generally ignored by the Singapore and Malaya judiciary. In fact, in interpreting Chinese law the courts often relied solely upon Staunton's English translation of the *Ta-Ch'ing Lü-li,* some text books, or expert testimony which was at times of dubious value.

The role of stare decisis in an English model judiciary is particularly conservative in that the Supreme Court is bound by its own decisions and cannot overturn its own result; and while some may consider this of value in a relatively small homogeneous English society, it is of questionable utility in a multi-ethnic society in a state of relatively rapid social change. To this difficulty must be added the fact that the highest court of appeal in Singapore and Malaysia was, and still is, the Judicial Committee of the Privy Council, which sits in far off England, and whose members have little real knowledge of the social and legal situation in Malaysia and Singapore (despite the ostensible assistance of experts).[93] The results have been to strengthen the role of the already weakened informal social organs and undermine the role of the formal judiciary as the major arena for settling family disputes as well as to inadvertently create social problems and cause injustice, perhaps thereby also weakening the fabric of unity in Malaysia and Singapore by failing to ameliorate such social strife and at times exacerbating social tensions.[94]

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[92] *Straits Times,* October 2, 1963, at p. 7.

[93] See H. H. Marshall, "The Judicial Committee of the Privy Council: A Waning Jurisdiction" 13 *International and Comparative Law Quarterly* 697 (1964). The original right to hear appeals from colonial and dominion courts was a prerogative of the King and it was in 1833 that the King's power was delegated to the Judicial Committee of the Privy Council. In debates which resulted in elimination of the Privy Council's jurisdiction over appeals from the courts of the Irish Free State in 1933, Senator Conally noted: "A State, from the decisions of whose court an appeal lies to any court or tribunal or authority outside itself cannot be said to possess judicial sovereignty in the fullest sense." In Canadian debates it was noted that appeals to the Privy Council were often decided upon grounds of Imperial political policy, as some of the members of the Council had admitted. All appeals from Canadian courts were abolished in 1949, from Burmese courts in 1947, from Israel in 1948, from India in 1949, from Pakistan in 1950, from South Africa in 1950, from Somalia in 1960, from Ghana in 1960, from Cyprus in 1960, from Cameroon Republic in 1961, from Tanganyika in 1962, from Nigeria in 1963, and from Zanzibar in 1963. A factor in abolishment of the Privy Council's appeal jurisdiction has often been their lack of intimate knowledge of local conditions or of the local legal system (p. 708). Limited appeal lies from the High Court of Australia and appeal lies from the courts of New Zealand. Kenya has continued to permit appeals as have Northern Rhodesia, Nayasaland and Ceylon.

[94] As has been noted: "A society can be forced to modernize under the impact of external forces, and indeed in the 19th- and 20th-century modernization has meant, to a very large extent, the impingement of Western European institutions on new countries in the Americas, in Eastern and Southern Europe, and in Asia and Africa. Some of these societies have never—or not yet—gone beyond adaptation to these external impingements. Lacking a high degree of internal adaptability, many become stagnant after having started on the road to modernity, or their modern frameworks have tended to break down." S. N. Eisenstadt, "Transformation of Social, Political and Cultural Orders in Modernization," *American Sociological Review* (October, 1965) p. 659, 660.

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