BOOK REVIEWS

THE COMMON LAW IN SINGAPORE AND MALAYSIA: A Volume of Essays marking the 25th Anniversary of the Malaya Law Review. Edited by A.J. HARDING, [Singapore: Malaya Law Review and Butterworths. 1985. viii + 371 pp. Hardcover: S$120]

THIS book, somewhat steeply priced, is a collection of essays by present and former members of the Faculty of Law of the National University of Singapore which commemorates the twenty-fifth anniversary of the Faculty's journal, the Malaya Law Review. The Review has justifiably earned a reputation for good scholarship in the exploration of legal issues of concern to Singapore and Malaysia. For a small jurisdiction that Singapore is, it has been well served by local legal literature, the credit for which goes to the Faculty. With the publication of the present volume, the Faculty has made a further excellent contribution to that literature, although as I argue towards the end of this review, I am not sure that the book fully meets the tasks the editor has set for it.

The editor explains that the book seeks to answer "the most important and most interesting question for lawyers in Singapore and Malaysia", that is, "How far has the common law, product of an alien culture and history, disseminated and introduced by the agency of imperial British rule, been applied or adapted to suit conditions vastly different from those in which it was created? And how far can and should it be so applied or adapted?" (p. iii). Quite what the common law is, is however, left a little unclear, and the difficulty of the enterprise is somewhat compounded by the editor's view that the common law is "an attitude of mind".

In the opening contribution Geoffrey Bartholomew gives an overview of the "reception" of the common law in these countries. The very theme of the book is captured by the terms in which the common law was received — that it had to be suitably adapted to local circumstances; the difficulty of this mandate is illustrated by Bartholomew's quotation of Lord Gramworth in 1858, "Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies... who is to decide whether they are adopted or not? That is a very difficult question". As the present volume (and similar experience in Africa) shows, the British judges rarely rose to this challenge, so that the adaptation of the common law was minimal. Bartholomew examines the extent of the reception, and the difficulties that may arise (although not yet confronted here) with the question whether a local legislation is intended to cover the field, and so exclude English law in that area. He usefully illustrates the problems of reception (including the authority of present superior English courts) by a survey of a number of different jurisdictions.

The difficulties of reception, in the special instance of commercial law in Singapore, and the sense to be made of section 5 of the Civil Law Act (the successor of the 1878 Ordinance), are discussed with much skill and learning by Soon Choo Hock and Andrew Phang. A particularly valuable contribution of the authors is the use of the historical evidence touching the 1878 Ordinance. Pointing to the controversies that persist about its precise scope and meaning, the authors propose legislation which would list the English statutes received under section 5, pending a complete code of Singapore commercial law.

Helena Chan discusses the impact of the Privy Council as the final appellate court for the two countries from around independence up to 1983, when Malaysia abolished appeals to the Privy Council. She assesses the impact through a statistical analysis of Privy Council decisions, showing the number of appeals allowed or dismissed. She infers the significance of the Privy Council from the rate of reversals, since the law would otherwise have been that set out by the highest local court. She also looks at the issues which, in civil cases, have been appealed to the Privy Council, highlighting the importance of public law (especially for Malaysia). She examines the stance of the Privy Council in different areas of the law, and its deference to the opinion of local courts. Pointing to the increasing political changes mediated through the law, she wonders whether it is not now appropriate to abolish a system where the final decision on these matters are made by a foreign tribunal.

Walter Woon provides a detailed and competent examination of the doctrine of judicial precedent in Singapore, and shows how the local courts have followed the English rules without much thought, to the detriment of the development of local law. Woon's discussion is unfortunately confined to the decisions of the courts in the formal hierarchy. Singapore (and Malaysian) courts do sometimes refer to decisions from other common law jurisdictions, especially in public law litigation, and it would have been useful to assess their influence. My own impression, from a reading of constitutional law cases, is that the system of judicial precedent is more freewheeling than presented by Woon. Stanley Yeo examines the application of the common law references to the Penal Code in Singapore and Malaysia. Although the Penal Code was meant to be exhaustive, Yeo considers that, when there is ambiguity, given the common law background of the Code, it is permissible to refer to English decisions on defence. He considers, however, that the local courts have been too liberal in the reference to English decisions, to the extent that they have on occasions ignored the Code provisions, and at other times have read common law defences into quite different wording of the Code. While he deplores this, he argues that the Code, unlike the common law, cannot keep up with advances in psychiatric knowledge, and therefore recommends periodic reviews of the Code so that its defences "truly reflect the knowledge and social responses of the time".

In a well written survey, Leong Wai Kum looks at the interaction between the Chinese marriage custom and the common law in Singapore and shows how the notions of monogamy in the common law were transfixed on Chinese custom, and. gave wholly erroneous inter-

pretation to customary practices. The judges showed little understanding of Chinese social structure, (more particularly the institution of concubinage), and made no attempt to adapt the common law to it.

Andrew Harding examines the underlying basis of the maxim of *res ipsa loquitor,* and its application in Malaysia and Singapore through a detailed and careful analysis of a number of local cases. He funds the law unclear on several aspects of the principle, but thinks that "it cannot be said that the confusion is greater than it is in England, although it is greater than in Australia". Bill Ricquier, in what I found to be the most interesting of all the essays, looks at the land law and common law in Singapore. The starting point of his enquiry is the close relationship that rules of property have to society, and in a brief introduction he establishes that relationship in England. Through an examination of property legislation in Singapore— *e.g.* the Land Titles (Strata) Act, the State Lands Act, and the Housing and Development Act — he illustrates the centrality of property law to the organisation of society in Singapore. The law of eminent domain is not just that, any more than tenancy rules of the HDB are geared merely to protect the interests of the landlord. Both are key instruments of policy, reflecting the Singapore of today, "a highly regulated society with a sceptical attitude towards 'welfarism'."

The pervasiveness of government regulation is not adequately reflected in the three concluding essays which deal with the control of public power, though the essays in themselves are competent and workmanlike. The least guilty of this omission is Christine Chinkin who writes on the control over the abuse of discretion in the two countries. The bulk of the modern administrative law developed in England after these countries' reception of the common law, and the local judges do not appear to favour the interventionist approach recently adopted by English courts. While she does not consider an activist judicial policy is necessarily a virtue, she notes that local judges follow English principles and deplores the "lack of any expressed policies or conceptualised theory of judicial review". My own reading of local cases supports the author's conclusion that "the judiciary in Singapore and Malaysia are aware of and prepared to apply the traditional common law principles for review of administrative discretion where they can do so without interfering with or impeding the executive in the execution of an important national policy relating to security or overall development. When these might be undermined by an emphasis placed on the rights of an individual in the administrative process, the response is not to reject the principles outright but to find them inapplicable in the circumstances".

Krishna Iyer, in examining the remedy of *certiorari,* traces its growth and recent changes in England, especially the new procedure for judicial review (not adopted here). There is a detailed discussion of English cases and the principles which emerge from them, and most of which have found their way into local courts. Iyer also has an extended discussion of "jurisdictional review" and a useful review of the Privy Council decision in the *Fire Bricks* case, and points out that the Malaysian courts have not sufficiently appreciated its import. He concludes by drawing attention to matters

that require review, particularly the adoption of recent procedural reforms in England. Val Winslow concludes the essays by a fresh examination of the rules of natural justice, particularly that concerning bias in the decision maker. The local and English rules are similar, but Winslow argues that the law on the point is more complex (and confused) than is commonly supposed. He also argues that there is a further rule (pillar) of natural justice (since many cases do not fall neatly into one or the other of the two rules normally held to constitute the principle) or rather, that there is a basic principle of justice being done and seen to be done, the failure of which may be constituted by many diverse instances.

The essays provide a valuable survey of the common law here (although not all contributors adequately relate their writing to previous publications in their fields), and most contributors propose reforms establishing an ambitious agenda. It is significant that in most cases the reforms suggested are a closer proximation to the English rules, and even the machinery proposed by some — a law reform commission — follows English practice. So it may be concluded that, by and large, the authors are well satisfied with the common law legacy of Singapore and Malaysia. We therefore reach the somewhat paradoxical result that the answer to the editor's first question, how far has the alien law been adapted to local conditions, is, not much, while for the second, whether it should be applied, is, yes certainly — indeed, the common law should be made even *more* similar to that in England.

I would suggest that these simple conclusions follow axiomatically from the methodology adopted by the writers. The answers to the editor's challenging questions in the preface demand a framework of analysis and methodology which some of the authors have hinted at, but never developed. This is not to detract from the authors' level of scholarship within one tradition of legal research — it is to suggest that there are other ways of exploring a legal system to answer the questions posed by the editor.

I do not think the mystical notion of the common law as an attitude of the mind is helpful to the enterprise. Fortunately, none of the contributors (neither Bartholomew to whom this insight is attributed, nor the editor himself) has followed this line of inquiry in this volume and indeed it is difficult to envisage how it could be. The common law is a combination of a corpus of rules and principles (the latter a large dose of ideology or bias) and a technique for their application. Most contributors confine their discussion to it as rules and principles (although Chinkin hints at the importance of the latter). Some discussion of the technique and how it is deployed here would have helped to illustrate the questions posed.

Another difficulty stems from the doctrinal, analytical approach adopted by all the contributors (with the partial exceptions of Ricquier and Chan). While doctrinal analysis helps to establish what the rules are, an exclusive concentration on it, abstracted from the situational context, obscures (as Chinkin has noted) the manipulations of rules. More importantly, such analysis cannot answer the larger sociological question raised by the editor. Most contributors *assume*

that there are vast political, social and economic differences between England — the home of the common law, and Singapore and Malaysia — hence indeed the *problematique* of the book. But with the exception of Leong and perhaps Ricquier, these differences are not fully examined, nor indeed are the directions in which these countries are developing or ought to develop. Unless these differences and aspirations are analysed, it is difficult to see how one could establish the suitability or otherwise of the received law. Even in Chan's otherwise interesting study, there is no discussion of the points on which the Privy Council has reversed local courts; and so one cannot answer the question whether the Privy Council has prevented local courts from adapting the law.

The book as a whole consequently fails not only to answer these questions, but also overlooks others pertinent to the subject of the book. How has the common law shaped society in Singapore and Malaysia? How do we explain the persistence of the common law (in terms both of vested interests and professional training)? What, today, are the major functions of the common law in these countries *(e.g.* national integration, commerce, links with the external world)? How does the common law relate to indigenous cultures and norms? How far does the common law — the bulk of the formal legal system — represent the living reality which determines social relations in these countries? Are there co-existing with it subterranean but thriving informal legal orders *(e.g.* how far does the Women's Charter capture the complexity of Chinese marital and familial relations?)

These questions lead us to examine another assumption of the editor — that the most important and interesting question for local lawyers is the adaptability and suitability of the common law. I do not suggest that the common law is irrelevant, but I agree with Ricquier that the more interesting question is the law that operates *within* the common law. Ricquier calls the common law a skeleton, whereas we should look to the flesh and blood. If I can mix the metaphors, the common law is like a framework, which can expand or contract, but what goes on within it is a better guide to the reality of society. A book on the common law in Tanzania would not be significantly different from that I am now reviewing and yet no one would pretend that the legal and the socio-economic systems of Tanzania bear much resemblance to those in this region. The law about employment and industrial relations, investment and transnational corporations, housing, tax, price control, agriculture marketing, the distribution of jurisdiction, — to mention just a few, are more central to society than the broad principles of the common law which are contingent on statute.

In short, I found the essays individually competent formal treatments of their subjects but the volume as a whole conceptually inadequate as an exploration of the role of the common law in this society.

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