NOTES OF CASES

FREEDOM OF MARRIAGE IN A PLURALISTIC SOCIETY

Re Loh Toh Met, Dec'd., *Kong Lai Fong* v. *Loh Peng Heng*

I

Where the common law has not grown up as a product of the indigenous mores of the people, its ability to remain vital and relevant to the local population depends in part upon the willingness of the legislature and judiciary to accommodate this great English heritage to local conditions and customs.

Willingness to recognize the personal law of the varied ethnic groups in Malaysia has been one accommodation to local custom that potentially integrates portion of the law with social reality. However, where the legislature and judiciary fail to familiarize themselves with the actuality of local customary practice when enacting legislation and rendering judicial decisions, then law is not integrated with society. The relevance of the common law to the local population thereby becomes somewhat remote and in fact unnecessary hardship occurs.

In the case of *Re Loh Toh Met, Dec'd*[1]; Thomson C.J., in the Federation of Malaya Court of Appeal, managed in part to accommodate customary Chinese law to the requirements of the common law and statutory provisions, but only with the help of some unusual reasoning.

The estate of the deceased, Loh Toh Met, was being contested by his three purported wives, eleven children (four of whom were ostensibly adopted), and the father of the deceased who was attempting, in the words of the decision, "... .to bastardize his son's children and to denigrate the women whom his son took as his wives. .. .".[2]

Loh Toh Met according to uncontradicted evidence, was baptized a Roman Catholic and he "... .conformed to the observances of the Roman Catholic Church regularly until he attained the age of about 23, that is about 3 years before [his first union] . . . . Thereafter he attended. .. .Church only on... .religious festivals such as Christmas, Easter and All Souls' Day. His children, at least those by Madam Yong [his second purported wife], who. .. .is and was herself a Christian, were baptized in the Roman Catholic faith. In the room occupied by him and Madam Yong there was an altar on which religious statues were displayed. All his motor-cars bore emblems of St. Christopher and while his body was awaiting burial, prayers were said over it by Roman Catholic priests. There was, too, evidence of a rosary, which may or may not have been his property, being put in his coffin prior to burial. On the other hand there was evidence that a priest refused to allow his dead body to be brought into the. . . .Church at the place where he died."[3]

On this unchallenged evidence, Neal J., the trial judge, held that the deceased was a person professing the Christian religion for purposes of the Christian Marriage Ordinance. Therefore he held that the deceased was obligated to marry under the Christian Marriage Ordinance and in that all his marriages were entered into by Chinese ceremony, none of them was valid. Consequently he held the deceased's father was the only legitimate heir.

1. (1961) 27 M.L.J. 234.
2. *Ibid.* at p. 244.
3. *Ibid.* at p. 243.

Thomson C.J., however, dissented from this finding of fact stating ". .. . I do not think the evidence made out that at the time of any of his marriages he [the deceased] was a person professing the Christian religion."[4]

Where there is conflicting evidence the courts in a civil appeal are generally cautious in overturning the trial judge's decision on a pure issue of fact.[5] Where, as in this case, the evidence is uncontroverted. reversal of a finding of fact it is submitted should be accomplished only where there is some patent error in the trial judge's finding or in his inference from the facts.

Thomson C.J. reversed the trial judge's decision on the basis of scriptural authority, *i.e.*, "....Christ Himself said,....by their fruits ye shall know them (Matthew VII, 20)". The learned judge indicates that the deceased "....at any rate during the later years of his life.... was living in contemporaneous connubiality with three different women....".[6] The Chief Justice indicates that these are not the fruits of a professing Christian and therefore he overturned the trial judge's holding.

The Chief Justice does not explain why Mr. Loh Toh Met could not be considered a professing Christian at the time of his first marriage wherein he was only living "in contemporaneous connubiality" with one woman. Nor does the opinion consider the fact that this moral evaluation of who is a "professing Christian" might seriously narrow the circle of those to whom the law applies. It might also open the secular courts to questions of religious law more properly determined by the individual or religious groups themselves.

It should perhaps also be noted that the Chinese people have generally been less exclusive about their religious practices than have the European people. Traditional Chinese religious practice is a blend of religious Taoism, Buddhism and Confucianism — three separate philosophical and, to some extent religious, systems. Therefore the fact that Mr. Loh Toh Met did not adhere strictly to all tenets of his faith, may not mean that *he* at least did not consider himself a professing Christian.

His understanding of the obligations of his faith differed somewhat from those of Thomson C.J. However the deceased does not appear to have been ex-communicated by his church, nor can his degree of observance be said *prima facie* to have fallen below that of his co-worshippers.

The most unfortunate aspect of this personal evaluation of the deceased's religious professions by the court is that it seriously weakens the second half of the decision, which gives clear and substantial legal grounds for sustaining the petition of the wives and children. In fact there was no need at all to determine whether or not the deceased was a professing Christian.

II

The relevant statute applicable to the form of the marriages of Mr. Loh Toh Met (in 1932, 1940 and *circa* 1953) is "The Christian Marriage Ordinance" [7] of 1898 of the Straits Settlement.[8] As Hill J. noted in his brief concurring opinion[9] the title of the ordinance is somewhat misleading in that Part VI provides for ". .. . monogamous marriages by way of a civil ceremony", so that atheists, for example, could avail themselves of the provisions of the ordinance.

4. *Ibid,* at p. 244.

5. *Guruvammah* v. *Ramasamy* (1939) 8 M.L.J. 110.

6. (1961) 27 M.L.J. 234 at p. 243.

7. *Straits Settlement, Government Gazette 1898* (Singapore 1899) pp. 1103-1118. The deceased was married to his first wife in Singapore and to his other two wives in Johore.

8. Cap. 82 of the 1936 consolidation of the Singapore Laws and Enactment 53 of the Laws of Johore. Part VI Cap. 82 of the 1936 consolidation of the Singapore Laws and Enactment 53 of the Laws of Johore do not differ in any relevant material degree.

9. (1961) 27 M.L.J. 234 at pp. 248 f.

The problem involved in this case originates in large part from a decision by Murray-Aynsley C.J. who in a very brief opinion construed section 3 of the ordinance as requiring all those who profess Christianity to marry under the provisions of the Ordinance.[10] He said: "The words of the section are 'every such marriage [between parties at least one of whom is a professing Christian] solemnized otherwise than as provided in this section shall be invalid'. I regard the words as quite plain and unambiguous." Therefore he held that a Chinese person professing the Christian religion must, in order to consummate a valid marriage, marry under the ordinance.

However, as Thomson C.J. clearly indicates, this was not the intent of the ordinance. He holds that the ordinance does not affect "… .the capacity of any individual, which he otherwise enjoys, to enter into a marital relationship of some other sort".[11]

In its entirety section 3 reads as follows:

> "3. Every marriage between persons one or both of whom is or are Christian or Christians shall be solemnized in accordance with the provisions of the next following section and *any such marriage solemnized otherwise* [12] than in accordance with such provisions shall be void.
>
> 4. Marriages may be solemnized —
>
> (1) by any person who has received episcopal ordination provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a minister. …"

These words (in Section 3) are not without ambiguity. However in reading the entire ordinance it becomes clear, in the words of the decision, that "… .there is not a word in the Ordinance which relates to what may be called the substantive laws of marriage".[13] There is no mention of capacity, consanguinity, minimum age, bigamy, *etc.* The ordinance specifically notes that nothing contained therein should be deemed to validate any marriage forbidden by the personal law of either of the parties. Therefore in a sense, as the learned Chief Justice noted, the ordinance disclaims any intent to affect the substantive law of marriage.

The ordinance provides the means whereby those "professing the Christian religion" (section 2) and those desiring a monogamous civil ceremony are to be married. The ordinance regulates those who may solemnize such a marriage, how they are to do so, the time and place marriages may be solemnized, the method of licensing, *etc.* In other words, it regulates the form of a particular type of marriage. It merely provides that "....any such marriage...." *i.e.* any Christian (or civil monogamous marriage) shall be solemnized in accordance with the provisions of the ordinance.

The judges in the *Re Loh Toh Met, Dec'd.* case all recognize this fact and it is regrettable that Thomson C.J. felt it necessary to rule upon whether or not the deceased was a professing Christian Indeed the court should have noted the very definition of a Christian used by the ordinance, *i.e.* "persons professing the Christian religion", would seem to refer to a personal subjective definition. The individual determined whether he considered himself a Christian. The means whereby he made public his avowal or professions of Christianity was in choosing to marry in a Christian Church, *i.e.* to undergo a Christian ceremony. When the ordinance talks of a "professing Christian" it merely means one who is undertaking a monogamous marriage in a Christian Church. If one decides to do so then the

10. *Re Henry Lee Fow Lee, Dec'd* . (1953) 19 M.L.J. 106. The opinion as reported in the M.L.J., which seemingly is a portion of the full opinion, is contained in one paragraph of approximately twelve lines in length. There is also another criminal case that might support the Henry Lee Case, *viz. R.* v. *Teo Kim Choon* (1948) 14 M.L.J. 146 but it was effectively disposed of by Thomson C.J. in a previous opinion, *viz. Dorothy Yee Yang Nam* v. *Lee Fah Kooi* (1956) 22 M.L.J. 257.

11. (1961) 27 M.L.J. 234 at pp. 245-246.

12. Italics supplied.

13. (1961) 27 M.L.J. 234 at p. 245.

clergyman will determine whether or not he conforms sufficiently to the church's requirements to be married. If the individual wishes a Christian ceremony and the clergyman consents, then the forms of the ordinance must be used. Nowhere does the ordinance intimate that it limits the power of the individual to marry by some other means, *e.g.* by Muslim or Chinese ceremony.

In fact, after deciding that Loh Toh Met was not a Christian, the court holds in a most persuasive argument that "....if irrespective of their individual religious beliefs a Chinese man and one or more Chinese women were to enter into. ... associations in accordance with the customs of their race.... relying on a century's recognition by the Courts of the lawfulness of such associations.... then if the law were to refuse to recognize such associations there would be both injustice and oppression. And this is a consequence which the law will refuse to bring about." [14] Or, as Hill J. tersely noted, ". .. .a Christian Chinese may legally contract a polygamous marriage if to do so is consistent with his personal law based on race." [15]

Why then did the court feel it necessary to first decide upon whether or not Mr. Loh Toh Met was a Christian? Why did the court in fact overrule the trial judge's decision based on uncontroverted evidence on this fact? Why did the court thereby weaken a soundly reasoned and good legal opinion? The only answer to these questions seems to be that the court was still not certain of its grounds; it still had not fully evaluated the intent of the ordinance. The law should be clarified at the first opportunity and there should be no further statements such as those found in a recent case which said in the *obiter dicta:* "....a Chinese... .unless he professed the Christian religion, [could] enter into a polygamous marriage by Chinese customary rites".[16] The statement should read: a Chinese even if he professed the Christian religion could enter into a polygamous marriage by Chinese customary rites.

III

There is some question as to whether the term "Chinese race", mentioned in the opinion to determine legal status, is appropriate terminology. I suspect that anthropologists would not generally classify the Chinese as a race. Also if the court uses racial criteria to determine the ability of an individual to contract a Chinese marriage, the court may put itself in the position in the future of having to determine whether an individual of mixed ancestry is a member of the Chinese "race". This is unnecessary.

In that a person whose customary law permits a plurality of wives may marry under a monogamous civil marriage ordinance, then the reverse in a free pluralistic society should also be the case.

There is some persuasive *obiter dicta* to support this position. In the case of *Khoo Hooi Leong* v. *Khoo Hean Kwee* [17] Lord Phillimore held that a woman who was a Roman Catholic throughout her life, could become the *T'sip, i.e.* secondary wife, of a Chinese gentleman. The Court said: "If the woman be free to contract marriage, soluta, and the man according to his personal law is also free, solutus, and the particular class of marriage or union is in the abstract recognized by the law of the land, it may well be that the religious obstacle is no bar." [18] Indeed it is difficult to see why religion or race should be a legal bar. The statutes do not require such a bar and if the case law was to uphold such restrictions, unnecessary complications [19] and inequitable social policy would result.

14. (1961) 27 M.L.J. 234 at p. 243.

15. *Ibid.* at p. 248. It should be noted that it has long ago been settled that polygamy is consistent with Chinese personal law, see for example: *In the goods of Lao Leong An, Deceased* (1867) Leic. 418; *Choo Eng Choon, Choo Ang Chee* v. *Neo Chan Neo & Ors.* (1908) 12 S.S.L.R. 120; *Cheang Thye Phin* v. *Tan Ah Loy* [1920] A.C. 369 (J.C.) ; *Yap Kwee Ying* v. *Lai Kim Foh* (1950) 16 M.L.J. 35.

16. *Martin* v. *Umi Kelsom* (1963) 29 M.L.J. 1 at p. 2, *per* Thomson C.J.

17. [1926] A.C. 529 (J.C.).

18. *Ibid.* at p. 543; See also *Dorothy Yee Yang Nam* v. *Lee Fah Kooi* (1956) 22 M.L.J. 257, *per* Thomson, C.J.

19. As noted *supra.*

IV

Despite the fact that the court was willing to support the claims of the wives and most of the children of the deceased it held that "... it is quite clear from the wording of the Distribution Ordinance that an adopted child can have no part in the succession of his adoptive parents unless he has been adopted in accordance with the provisions of the Adoption Ordinance, 1952....". Therefore none of the adopted children could succeed to the estate of the deceased. Thus the court summarily dealt with the problem of the four adopted children.

The Chinese attitude towards children is that any child which the father has recognized as his child has full legal status.[20] While there might have been certain limitations upon adoption in traditional Chinese society, generally these were both loosely defined and unenforced so that any adopted son recognized as such by his father would be treated in most respects as a legitimate offspring. Indeed one of the major reasons for adoption had been to continue the family line. The courts have generally refused to recognize this fact in Malaysia. As one author noted "....the disinheritance of adopted children has certainly been looked upon by the Chinese as an injustice." [21]

While the Adoption Ordinance, 1952[22] of the Federation of Malaya does not necessarily prohibit recognition of the traditional forms of adoption,[23] the Distribution Ordinance, 1958[24] clearly states in section 3: " 'child' means a legitimate child and where the deceased is permitted by his personal law a plurality of wives, includes a child by any of such wives, but does not include an adopted child other than a child adopted under the provisions of the Adoption Ordinance, 1952."

This certainly requires use of the Adoption Ordinance, 1952 if one wishes to confer the status of a child, for the purposes of the Distribution Ordinance, upon an adopted child. This provision of the law is contrary to Chinese customary practice and shall in all probability work hardship upon adopted children as has been done in this case. It is unlikely that a population traditionally reluctant to avail itself of the formal legal organs will change its mores and habits in the near future. Generally the poor and ignorant will be most seriously affected by this ordinance.

The early Charters recognized the necessity of adapting English Common Law to the customs of the people. The Letters of Patent (1855) of the Court of Judicature in the Straits Settlements conferred Jurisdiction of an English court upon the Court of Judicature "... .as far as circumstances will admit". Jurisdiction as an Ecclesiastical Court was also conferred "....so far as the several religions, manners, and customs of the said Settlement and places will admit. .. .".[25] Indeed this language of the Charter has been deemed merely to reflect the law of England.[26] Recognition of the personal law of the inhabitants, which has also been deemed to reflect the law of England, followed from this. Such recognition should include recognition of adoption as well as forms of marriage. If the legislature wishes to embark upon a policy of changing the traditional customary practices of the people, then this should be done gradually so as to minimize hardship and injustice and to maximize respect for the law. Equality of treatment for the different groups comprising the population of Malaysia also helps to ensure such respect.

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20. M. Freedman. "Colonial Law and Chinese Society", The Journal of the Royal Anthropological Institute, (1950), vol. LXXX 97 at p. 112.

21. *Ibid.*

22. No. 41 of 1952.

23. It should be noted that there was little recourse to the Adoption of Children Ordinance. 1939 No. 18, in Singapore because of its expense and its unfamiliarity and distinction from Chinese customary practice. Between the years 1940-1949 inclusive only twenty-one Chinese children were adopted under the Ordinance. M. Freedman, *op. cit.*, at p. 112.

24. No. 1 of 1958.

25. Letters of Patent (1855), R. Braddell, *The Law of the Straits Settlements, A Commentary,* 2nd ed., (Singapore, 1931) p. 232 at p. 249.

26. See the excellent discussion of the matter in the case under discussion by Thomson, C.J. (1961) 27 M.L.J. 234 at pp. 238-242.