NATIONAL INTEGRATION AND LEGAL SYSTEMS: MALAYSIA

The study resulting in the following article was first undertaken in a graduate seminar in Political Science while the author was studying for his J.D. Degree at Boalt Hall Law School of the University of California at Berkeley. In addition to the specific interest in the development of the legal system in a plural society such as Malaysia, the author intended that the study should focus the attention of the seminar participants, mostly political scientists and anthropologists, on law, as an institution, and on the development of a legal system, as important factors in the discussion of national integration — a subject frequently left only to political science, sociology and economics. By the same token the study, and this article, clearly demonstrates the importance of learning from the disciplines of political science and anthropology, among others, to the development of a legal system, and the practical operation of law.

As is clear from the article itself, the conclusions drawn by the author are tentative and subject to additional study and field research. Finally, if the reader finds this article of more than passing interest, the author wishes to recommend to your investigation and use, a Monograph published in 1967, after this study was completed, by the *Malaya Law Review,* and edited and compiled by M. B. Hooker, entitled *A Source Book of Adat, Chinese Law, & the History of Common Law in the Malayan Peninsula.*

INTRODUCTION

Throughout our discussions of national integration we have dealt with questions involving values or conceptions on the one hand, and institutions on the other. To be sure, the have not always been separated, that is there is an interplay between institutions, and the values they reflect and/or attempt to inculcate into the national policy. (This is not meant to assert that values inculcated by institutions are always intended.) We have talked about a variety of types of institutions — educational, religious, kinship (whether in the form of a village or some other institutional form), racial, political parties, bureaucracies, economic institutions, the army, to name but a few. It is the purpose of this article to again work out a definition of national integration, and then discuss the development of the legal system in West Malaysia (the former Federation of Malaya and Singapore, and its relation to national integration.

I had hoped to be able to spend much more time discussing the value factors producing the present legal system. I am much impressed with the work of the late Dr. Franz Rudolf Bienenfeld (published in the *California Law Review,* Vol. 53, Nos. 4 and 5) and some of the works of Professor Albert A. Ehrenzweig, dealing with psychoanalysis and

jurisprudence. To them, and others who have done work in this field, a man's sense of justness and, consequently, man's legal systems are largely the result of those irrational factors of one's personality which can be uncovered through psychoanalysis. Geertz indicates that the power of primordial attachments is tied to the fact that an individual's notion of who he is and with whom he belongs is "rooted in the non-rational foundations of personality." The application of psychoanalysis may be of great help in discovering key elements in the tangle of problems surrounding national integration. It may, I think, indicate more directly the relationship between the development of a legal system and national integration. I hope to be able to do additional work in this area. To be sure, there is a great deal of basic research which must be done before, for instance, "psychoanalytical theories of national integration" can be developed.

Before beginning the substance of the paper, however, a few comments regarding national integration and societies which are "integrated." The concept "national integration" implies a process. It assumes a changing situation — changing from day to day, year to year, decade to decade, or even century to century. When we talk about "national integration" we are concerned with a *given* state of affairs only insofar as it helps to determine the nature and direction of the integration process. This is important, I think, as it implies an examination of factors and theories somewhat different than those which are ultimately important in determining the degree to which a nation is integrated. Integration implies movement; the degree of integratedness implies a static situation. While it is important, in examining the integration process, to pose a definition of what an integrated nation might be, this definition will only be tentative, and is useful only insofar as it will provide a reference point in examining the integration process.

Two factors are important, it seems to me, to an integrated nation. The development of *national* economic and political institutions shall have reached a stage so that those institutions function to maximize the resources of the country without conflicting with primordial loyalties — the loyalties of the extended family, religious groups, racial or nationality groups, or loyalties which might be based on language or region. This does not mean that primordial loyalties will not exist. It means only that there will have been an adjustment between them and the loyalties necessary to the operation of national institutions so that the latter may function without conflict from the former.

Secondly, political and economic decisions reached through the national institutions result from the sharing of decision-making power by the diverse elements of the society which make up the nation-state. Related to this and equally important, there exists, in an integrated nation, a high degree of social mobility. Although there may be social classes within the integrated national society, mobility within the society is reasonably open to all elements in the society. The inclusion of this factor is tentative. Hopefully it is useful in differentiating between nations which are "integrated" and those which are only "unified." National unity may result from coercion by a single authority, or authority based on inheritance. While such nations may not be on the brink of disintegration, breaking up into smaller nations, they do not have, it seems to me, the qualities of an integrated society.

For purposes of this article, the relationship between legal systems of Malaysia and the processes connected with the adjustment of primordial attachments and civil loyalties will be much more important. Two reasons account for this choice. First of all, there simply is not sufficient material available on social mobility and the distribution of decision-making power to be able to draw many conclusions. There is need for a good deal more basic research. Secondly, although there are constitutional and statutory preferences maintained for Malays, and the place of the Malay royalty has been protected by law, this paper is more concerned with the relationship of national integration to legal systems rather than to particular substantive laws.

THE PROCESS OF NATIONAL INTEGRATION

> . . . people of the new states are simultaneously animated by two powerful, thoroughly interdependent, yet distinct and often actually opposed motives — the desire to be recognized as responsible agents whose wishes, acts, hopes, and opinions "matter," and the desire to build an efficient, dynamic modern state.
>
> Clifford Geertz, in "The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States"

The problems of integration seem to be intimately bound up in the confrontation between primordial groups and identifications, and civil loyalties or politics. To a great extent the peoples' of the new nations sense of self remains tied to the actualities of blood, race, language, locality, religion, or custom, and opposing these actualities is the steadily increasing importance of the sovereign state as a positive instrument for the realization of collective aims. The tension between primordial attachments and civil or national politics frequently takes on a peculiarly severe form.[1]

In most new states the tradition of civil politics is weak. Concurrent with the weakness of tradition, the technical requirements, and the means of using such national instruments which are available for maximizing the use of national resources, are poorly understood, if at all.

Given this factor, the weakness of civil political traditions, the character which the "desire to be recognized as responsible agents whose wishes, acts, hopes, and opinions 'matter' "[2] may well be of critical importance.

Geertz indicates that this desire is an ". . . aim to be noticed; it is a search for an identity, and a demand that that the identity be publicly acknowledged as having import, a social assertion of the self as 'being somebody in the world.'"[3] It is this problem of "social self-assertion" which provides the key to the integration process. The assertion of self remains tied to the social units which are relevant in terms of the givens of race, religion, language and tradition. To the individual these ties "are seen to have an ineffable, and at times overpowering, coerciveness

1. Geertz, Clifford, "The Integrative Revolution," *Old Societies and New States*, (Geertz, ed.), Free Press of Glencoe, London, (1963), p. 109.
2. *Ibid.*, at p. 108.
3. *Ibid.*

in and of themselves."[4] One need only look at the intensity of the battles, both verbal and physical, which have centred around the question of whether Malay should be the official language,[5] the demands of the Pan-Malayan Islamic Party and its political successes particularly in Northeastern Malaysia, and the racial riots of 1964 in Singapore and the proposal of the P.A.P. for a "Malaysian Malaysia" in opposition to a "Malay Malaysia," to see the significance of these factcors.[6] Indeed, it would appear that the life of the Alliance hinges on its ability to accommodate its three separate parties with regard to questions in these three areas. The important element, however, is not that these issues provide the manifestations of the problems of the integration process, but rather why they are the manifestations. Why is it that the "giveness" of being born into a particular race or religious community, or being able to speak a certain language has such a powerful "coerciveness?" Why is it that the legitimate authority within a society seems bound up in the coerciveness of such primordial attachments?[7]

It is this point which needs further examination. Geertz contends, and I think correctly, that the primordial attachments cannot be completely replaced by civil attachments. What is necessary is an adjustment between these two often conflicting elements:[8]

> ... an adjustment such that the processes of government can proceed freely without seriously threatening the cultural framework of personal identity, and such that whatever discontinuities in 'consciousness of kind' (as opposed to 'consciousness of the developing civil order') happen to exist in the general society do not radically distort political functioning.

Earlier Geertz indicated that these primordial attachments must be reconciled "to the unfolding civil order by divesting them of their legitimizing force with respect to governmental authority."[9] But this does not answer the questions posed above. To discover how these elements can be adjusted, or how the primordial attachments can be divested of their "legitimizing force," it is necessary to discover why they have such apparent coercive power.

Geertz takes us a long step on the way to finding that answer:[10]

4. Geertz, *op. cit.*, p. 109.
5. For a discussion of this issue see Roff, Margaret, "The Politics of Language," *Asian Survey,* May 1967, Vol. VII, No. 5, pp. 316-328.
6. For a discussion of all three elements, see Milne, R.S., "Singapore's Exit from Malaysia; the Consequences of Ambiguity," *Asian Survey,* March 1966, Vol. VI, No. 3, pp. 175-184.
7. See Geertz, *op. cit.*, p. 120, ". . . as a primordially based 'corporate feeling of oneness' remains for many the *fons et origo* of legitimate authority — the meaning of the term 'self' in 'self-rule' — much of this interest (intense interest in affairs of government) takes the form of an obsessive concern with the relation of one's tribe, region, sect, or whatever to a centre of power that, while growing rapidly more active, is not easily either insulated from the web of primordial attachments, as was the remote colonial regieme, or assimilated to them as are the workaday authority systems of the 'little community'."
8. *Ibid.*, at pp. 154, 155.
9. *Ibid.*, at p. 128.
10. *Ibid.*

> The power of the 'givens' of place, tongue, blood, looks and way-of-life to shape an individual's notion of who, at bottom, he is and with whom, indissolubly, he belongs is rooted in the non-rational foundations of personality.

The ability of the individual to accept the authority of someone, or an institution, which is foreign to his own "givens," then, seems to depend upon two factors: his notion of who he is, and with whom he belongs which in turn depends on the non-rational foundations of personality. In order for the adjustment between the various attachments or loyalties to occur, or for the primordial attachments to be divested of their legitimizing authority, it is necessary to discover much more precisely what those "non-rational foundations" are. It is at this point where the discipline of psychoanalysis needs to be called upon.[11]

Even without the use of psychoanalysis to discover the roots of the strength of the "givens," it is possible to draw some conclusions about the process of the adjustment of loyalties. Geertz indicates that a common tendency of the integration process in the five countries which he studied, one of which was Malaya, was the aggregation of specific primordial groups into larger more diffuse units "whose implicit frame of reference is not the local scene, but the 'nation' . . ." [12] Clearly the object is to get individuals and groups to identify, implicitly or explicitly, their frame of reference the nation. However, the immediate step from the local scene, or the primordial group, need not be to a national framework. It is part of the integration process if the step is to a larger element, from the household to the extended family, from the village to the district, from the district to the state or region within the nation.

In order to accomplish that shift, it is necessary that the larger element be better able to, or at least satisfactorily able to, resolve social and economic conflict in which the primordial groups or their members find themselves involved. That conflict may be with other groups, or it may be solely internal. If the larger group does not adequately resolve the conflict, or provide an arena in which the participants can resolve the conflict, then the primordial attachments will be strengthened, and the coerciveness of their authority increased. The most difficult aspect of this is that the judge as to the "performance" of the larger framework or institution and its ability to resolve the conflict is the primordial group itself; the terms of reference for such judgments are those of the primordial group. Thus a Sumatran who identified with Sumatra will view the attempts to develop a national economy, which uses Sumatran exports to pay for imports into Java and Javanese development, in terms of what it does for Sumatra, not the Indonesian nation. A Northeasterner in Thailand has as his frame of reference the village, or perhaps the Northeast not the Thai nation. A Malay may use *adat perpateh*, *adat temenggong,* or Islamic law as his reference as to how problems of inheritance or succession should be resolved, a Chinese Malaysian may use

11. As mentioned in the introduction, there is insufficient data or work available to be of much help. I hope to do further study in the field. It will simply demand basic research that is not, to my knowledge, available.

12. Geertz, *op. cit.*, p. 153.

customary Chinese law as his frame of reference to determine what constitutes adoption, and what consequences flow from an adoption. The interaction of developing national institutions with those more local or primordial frames of reference is of critical importance to the integration process. In the context of this study, then, it may be critically important that the developing national legal system be able to adequately resolve disputes between parties whose frams of reference may well be *adat*, or the customary law which they brought with them from China or India.

THE LAW AND LEGAL SYSTEMS OF MALAYSIA

> In no sphere was British influence more beneficent than in the sphere of law. … it was a happy accident of history that by the time the British came to impose a uniform system of criminal law throughout the Malay peninsula, law, or, as Hobbs called it, "the public conscience," was coloured with the humane ideas that had followed the French Revolution.
>
> Sir Richard O. Winstedt, in *Malaysia and its History.*

A. *Introduction*

There is no need to remind anyone that the Malay Peninsula has received, and modified, the cultural influences of several societies. As part of those cultural influences the Peninsula has seen the impact of a variety of legal principles and institutions, principally from Indian and Islamic traditions. Thus before the coming of the Europeans — for all practical purposes until the coming of the British — the law of Malaya was customary (adat) law, including those aspects of Hindu and Islamic law which it had incorporated, and sometimes Islamic law serving as a separate and alternate substantive body of law. In 1961, L. A. Sheridan wrote in a fairly extensive review of the development of the law of Malaya and Singapore that "the common law of England is now the general law of Malaya." [13] Although in some cases Chinese customary law, Malay *adat*, or Islamic law still govern, clearly Sheridan is correct in asserting that the law generally applicable is that which was imported from England.

It is not the purpose of this article to detail all of the substantive law of Malaysia and Singapore. Not only would such a task be overwhelming, but the results would obscure the opportunity to discern the means by which the legal system acts as an integrative or disintegrative factor in Malaysian national life. My intention is to outline the general development of the legal system after the advent of the British, and then to discuss its relationship to, and conflict with, the law which had been, and in some instances continues to be, applied in cases involving members of the Malay, Chinese and Indian communities.

13. Sheridan, L. A. (ed.), *Malaya and Singapore; The Borneo Territories; The Development of their Laws and Constitutions,* p. 14.

B. *The Introduction of the Common Law*

In 1786 the British acquired the Island of Penang.[14] In 1819 Singapore was acquired for the British by Sir Stamford Raffles. Later, in 1824, Malacca became part of the British possession following a settlement with the Dutch. In 1826 the three settlements, Singapore, Malacca, and Penang, were incorporated into a single administrative unit — the Straits Settlements.

Prior to the incorporation of the Straits Settlements, English law had been introduced into Penang by the First Charter, the Royal Charter of Justice, which set down principles for the administration of Justice.[15] The First Charter established a Court of Judicature in Penang, with jurisdiction and power equivalent to those of the Supreme Courts of England and Ecclesiastical Courts so far as the several religions, manners and customs of the inhabitants would admit.[16] In 1826, after the establishment of the Straits Settlements, a Second Charter was issued which extended the jurisdiction of the Court of Judicature of Penang to the entire colony. Thus the effect of the Second Charter was to introduce to all the Settlements, English law as it existed on the date of the Charter — 26 November 1826.[17] Any doubt about the date English law was introduced into Penang, and later the Straits Settlements, was put to rest when the Judicial Committee of the Privy Council decided, in 1875, the case of *Yeap Cheah Neo* v. *Ong Cheng Neo.*[18] Prior to this decision there had been some debate as to whether Penang was ceded territory, or newly settled territory, and, it was felt, the resolution of this issue would determine the extent of the application of English law. In deciding *Yeap Cheah Neo,* a case involving the interpretation of a will, Sir Montague E. Smith said:[19]

> With reference to this history, it is really immaterial to consider whether Prince of Wales' Island, or, as it is now called, Penang, should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances.

14. Captain Light landed on the Island on 15 July 1786. In 1791, on 1 May, the Sultan of Kedah, who claimed the Island, formally ceded Penang and a narrow strip along the mainland to the British, thus acknowledging Captain Light's taking possession of the Island.

15. The literature and cases which are available all overwhelmingly support the notion that English law was introduced by the First Charter. For a more detailed discussion of this see page 15, *post,* and footnote 30, *post.*

16. Glos, George E., "The Administrative and Legal System of Malaya," *Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht,* Band 25, Nr. 1, Januar 1965, p. 109.

17. Mallal, *op. cit.,* p. 74.

18. Reported in Leicester, Stephen, (1877) *Straits Law Reports*, p. 569.

19. *Ibid*., at p. 579.

The decision clearly supported an earlier decision by the Supreme Court of the Straits Settlements. In *Choa Cheow Neoh* v. *Spottiswoode,* Chief Justice Maxwell said:[20]

> In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modification as are necessary to prevent it from operating unjustly and oppressively on them. Thus in questions of marriage and divorce, it would be impossible to apply our law to Mahometans (sic), Hindoos (sic), Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them.

Before leaving this particular juncture in the historical development, two important elements need further consideration.

The importance of the debate as to whether Penang, and for that matter Singapore, was ceded to the British or settled by them, may be enlightening to a query into the extent of the application of English law. Sheridan indicates that the importance of this debate is only to determine the date at which English law was introduced.[21] If that is the case then the question is of only slight academic value as the two alternatives would be at the time of settlement, presumably 1786, or when it was introduced by Royal decree, 1807 (or at the latest 1826). But if this is the case, then the language of Sir M. Smith in *Yeap Cheah Neo* quoted above is most unusual. He stated that the debate was immaterial because "there is no trace of any laws having been established there before it was acquired by the East India Company." This seems to imply that had Penang been settled prior to the arrival of the British and had the inhabitants, had a legal system, then a different rule as to the extent of application of the English law would have been set out. The rule of the case in question is that the law of England is "the governing law, so far as it is applicable to the circumstances of the place . . ." Had the Judicial Committee held the Island settled prior to the arrival of the British it is possible that English law might have been applied only in cases involving Europeans, or in cases not covered by the existing local

20. (1869) *Straits Law Reports* p. 421 at p. 427. Notice, that in addition to holding English law applicable in the colony except in the specified matters (the specific matters — marriage and divorce — being dicta as the case involved the interpretation of a will contested by sons and daughters), the term "alien races established here." Given the following passages quoted here, it is apparent that Chief Justice Maxwell considered the alien races to be those people who were non-Europeans, or non-English. This is a rather strange notion, and of critical importance in considering the application of the legal system and its affect on the Asian residents.

21. Sheridan, *op. cit.*, pp. 14, 15.

law.[22] Clearly in this latter instance, the extent of English law applicable in the Straits Settlements would be much reduced.

Buss-Tjen mentions a note dated 1795 which, apparently, was found in an old register.[23] The note indicates a fairly large Malay *kampong* (village) of about 18 acres on the south bank of the Penang River had existed for ninty years. A smaller settlement further south also was mentioned. It is possible, of course, that these two *kampongs* contained so few people that for all relevant purposes, the Island should be considered unsettled at the time the British arrived. Malay *kampongs* tend to be spread out with several acres required for any substantial population. Even if there was substantial population, several hundred, it is not known what law governed the people. It might well have been *adat temenggong*, that being the law of Kedah (Penang was part of the land belonging to the Sultan of Kedah). The importance of this issue is heightened when one recalls that the Second Charter extended the jurisdiction of the Court of Judicature of Penang to Singapore and Malacca. Clearly both of these areas were settled prior to the arrival of the British. Mallal indicates that Raffles' Memorandum of 1823 seeking instructions on judicial matters indicated that Malay *adat* was being applied.[24] As mentioned above, the Judicial Committee's decision in *Yeap Cheah Neo,* answered the question as to the general application of English law. The material and questions introduced here are important only insofar as they may provide evidence as to the considerations behind the application of English law.

22. The discussion of Sir Benson Maxwell, Recorder of the Court of Judicature in Penang, in the case of *Regina* v. *Willans Esquire,* printed in the *Penang Gazette* on 9 April 1859, and reported in Liecester, *op. cit*., p. 66, is relevant here. In determining whether English law is applicable in the settlement, the Court indicates the general rule of law determining the law of a new territory is … that if the new acquisition be an uninhabited country found out by British subjects and occupied by them, the law of England, so far as it is applicable, becomes, on the foundation of the Settlement, the law of the land; but that if it be an inhabited country, obtained by conquest or cession, the law in existence at the time of its acquisition continues in force, until changed by the new sovereign. In the one case, the settlers carry with them to their new homes, their laws, usages and liberties as their birthright. In the other, the conquered or ceded inhabitants are allowed the analogous, though more precarious privilege of preserving theirs, subject to the will of the conqueror. p. 67, 68).

    Sir Maxwell went on to indicate that Penang, being inhabited by only four Malay families, was for all practical purposes, uninhabited. Again, Penang being, at the time when it became a British possession, without inhabitants to claim the right of being governed by any existing laws, and without tribunals to enforce any, "it would be difficult to assert that the law of Quodah continued to be the territorial law after its cession." (p. 69).

    Aside from any dispute as to whether Penang was inhabited by anyone, by four Malay families, or more, there is substantial reason to doubt, if it was inhabited, whether the Court could have determined whether there existed a body of customary law, or whether there existed tribunals to enforce such law. It is very likely that such law and tribunals as would have existed would not have been recognized by the English settlers.

    See also article from the *Penang Gazette,* 8 August 1857, reported in Leicester, P.94. The author (not listed) argues that the Charter established "a Court on the English model, not to import, new law, but to administer that already in operation." The latter is claimed to be that of the local inhabitants.

23. Buss-Tjen, "Malay Law," *The* American *Journal of Comparative Law,* Vol. 7, 1958, p. 254.

24. Mallal, *op. cit.,* p. 74.

As Sir Benson Maxwell pointed out,[25] once Penang, and the other parts of the Straits Settlements became British territory, the sovereign could determine the law applicable as desired. While it is apparently clear that English law was introduced by the First Charter in 1807,[26] it is important to attempt to discern more precisely the nature and extent of the law introduced. We have already seen that "the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances."[27] The Judicial Committee in *Yeap Cheah Neo* went on to say that:

> In applying this general principle, it has been held that statutes relating to matters and exigencies peculiar to the local condition of *England,* and which are not adapted to the circumstances of a particular colony, do not become a part of its law, although the general law of England may be introduced into it.

But the question remains as to what is the more precise meaning of the terms "so far as it is applicable" and "modified in its application." Will *adat* be applied in any case where the issue in question is also covered by English law — or Islamic, Hindu or other law? Sir Benson Maxwell discussed this extensively in *Regina* v. *Willans.*[28] Sir Maxwell concluded that although the First Charter did not explicitly state that only English law shall be the law of the territory, "all its leading provisions manifestly require that justice shall be administered according to it, and it alone."[29] He went on to say:[30]

> ... as to criminal law, its language is too explicit to admit of doubt. It requires that the Court shall hear and determine indictments and offences, and give judgment thereupon, and award execution thereof, and shall in all respects administer criminal justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, as in England. And I think it equally plain that English law was intended to be applied in civil cases also. The Charter directs that the

25. See footnote 22, *ante.*

26. This point is debated in an article in *Penang Gazette,* 24 October 1857, found in Leicester, *op. cit.*, pp. 102-113, in which the author (not listed argues that since the settlements, prior to the formation of the Straits Settlements, were subject to the legislative jurisdiction of the Governor General in Council at Bengal, and the judicial jurisdiction of the Supreme Court at Calcutta, English law was introduced prior to the First Charter in the case of Penang, and the Second Charter in the case of Malacca and Singapore. Whether or not English law ought to have been applied prior to the Charters, Sir Maxwell indicated in *Regina* v. *Willans* that "it is clear beyond all doubt that for the first twenty years and upwards of its history, no body of known law was in fact recognized as the law of the place. As to the law of England, so far was it from being regarded as the *lex loci,* that it was hardly recognized even as the personal law of its English inhabitants." See *Ibid.*, at p. 70. Later in *Regina* v. *Williams* the Court said it was competent for the Crown to introduce the law of England into the Settlement by such an instrument as a Charter; and if that law was previously not in force, and the language of the Charter directed that it should be administered here, it follows that the Charter did introduce the law of England into the Settlement; and the question, to what extent English law became the law of the land is, then a question of construction rather than of general legal principle, or at least of one as well as the other, (pp. 73-74).

27. See quote from *Yeap Cheah Neo* on p. 35 *ante.*

28. Leicester, *op. cit.*, p. 66.

29. *Ibid.*, at p. 74.

30. *Id.* See *Ibid.*, at pp. 74-89 for a detailed discussion supporting these conclusions.

> Court shall, in those cases, 'give and pass judgment and sentence according to justice and right.' The 'justice and right' intended are clearly not those abstract notions respecting that vague thing called natural equity, or the law of nature, which the judge, or even the Sovereign may have formed in his own mind, but the justice and right of which the Sovereign is the source or dispenser ... a direction in an English Charter to decide according to justice and right, without expressly stating by what body of known law they shall be dispensed, and so decide in a country which has not already an established body of law, is plainly a direction to decide according to the law of England.

Even in questions regarding the issues determined by religious law or custom, the Court took a very restrictive view of the applicability of Islamic, Hindu or other local law. Supporting an earlier decision in a case involving a bequest by a "Mahometan" of property "to be distributed by the law of God," it indicated the distribution should be made according to the provisions of the *Koran,* ". . , not because the Charter requires that the English rules of construction shall be tempered by a liberal regard for the Mohamatan faith, but simply because the strict rules of English law require that the intention of a testator shall be followed . . ." [31]

In addressing himself to the significance of the Charter provisions that "the 'administration of justice' shall be adapted, so far as circumstances permit, to 'the religions, manners and customs' of the native inhabitants," Sir Maxwell made the following comment:[32]

> It may be said that with respect to at least two classes of Orientals, Mahometans (sic), and Hindoos (sic), their laws are part of their religions, and that the Charter includes the former when it mentions the latter. This might be so if the Charter were a Mahometan or Hindoo instrument; but law and religion are top distinct in their nature and to English apprehension, to be treated otherwise than as distinct in the construction of an English Charter.

Thus the First Charter was considered to have introduced English law as it existed on the date of the Charter, 25 March 1807, as the law of the Territory of Penang. The second Charter extended the jurisdiction of the Court of Judicature of Penang to Malacca and Singapore, and established as the law of all three settlements the law of England as of 1826.[33] As noted earlier, those English laws which were construed to be purely local (English) in nature were not applicable. Even as to matters religious in nature, the law of England was to apply; only the administrttion of that law was to be formulated in a manner which took into account the local religions.[34]

Several points need to be raised at this juncture: the implications of the distinction between "English law meant only to apply to local English circumstances," and that which is "general" in nature; the predilections and training of the people administering the law; the difficulty of determining local law; and the relationship between the development of such a legal system to problems of national integration as discussed in the first section.

31. Leicester, *op. cit.,* p. 83.
32. *Ibid*., at p. 77.
33. *Ibid*., at p. 88.
34. *Ibid*., at pp. 75, 76, footnote h.

Sir Maxwell narrowed, somewhat, the differences indicated above between the extension to the colonies of "generally" applicable laws as opposed to those laws enacted solely for application in England itself. He quotes, in *Regina* v. *Wittans*,[35] the decision of Sir W. Grant in *Attorney-General* v. *Stewart*:[36]

> Whether the Statute of Mortmain be in force in the island of Grenada, will, as it seems to me, depend on this consideration — whether it be a law of local policy adapted solely to the country in which it was made, *or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed.*

and then departed sharply form that ruling. To Sir Maxwell it was sufficient that the law in question be "applicable to the situation and condition of this settlement."[37] It is far too difficult, if not impossible, to determine whether a given law is generally applicable to all territories under English sovereignty as Sir W. Grant would have us do. Theoretically the modification by Sir Maxwell means only that more English law will be extended to Penang and the Straits Settlement, as it clearly will be easier to find the law "applicable" to the conditions of one colony than to the conditions of all English colonies. Practically, however, there was probably little difference between the two, as a law's general applicability was probably determined by the conditions known to the judge — meaning in most cases the conditions of the colony in which he was sitting (in some cases, as where a case arising in Penang was appealed to the Supreme Court sitting in Calcutta or the Privy Council in London, the conditions known to the magistrate may not even have been those which gave rise to the cause of action). There is, it seems to me, a natural tendency to consider the laws of one's own country to be generally applicable to other countries. Thus in *Regina* v. *Willans*, Sir Maxwell held that not only was an English law providing for "punishment of labourers for willful breaches of their contracts with their employers" applicable in Penang, it was probably more necessary to it than to England.[38] The decision rested largely on the testimony of twenty leading employers in Penang, and the "fact" that all of the "heavy work of cultivation, as well as most kinds of skilled labour ... is wholly dependent upon the natives of India, China, and Java."[39] It is doubtful that the decision was based upon much more than that the law in question had served as an adequate means of controlling employees in England, thus should be "given a go" in Penang. It is highly doubtful, and there is no record of such consideration, that Sir Maxwell considered whether the law native to any group of employees expressed any contrary position. Had such local law existed, it clearly would be an indication of potential injustice in application of the English law, which clearly would not have been known by the local inhabitants.

In *Yeap Cheah Neo*, the Privy Council held that English law, the rule against perpetuities, was applicable in the Straits Settlement. While the rule against perpetuities, holding that in any bequest of real or

35. Leicester, *op. cit.*, p. 89.
36. 2 Mer. 143 at p. 162.
37. *Ibid.*, at p. 90.
38. *Ibid.*, at pp. 89-91.
39. *Ibid.*, at p. 91.

personal property, no interest is good unless it must rest, if at all, not later than twenty-one years after some life in being at the creation of the interest, may have some merit in a society which places a great value on private property and the free alienability of such property, it is of doubtful merit in a society which does not have such values. Indeed, the rule is much debated as a "technicality-ridden, legal nightmare" even in the United States and England today. Whether it should have been exported to Penang, and the Straits Settlements, seems highly questionable.

One final factor to be noted here is the importance attached by Malays to oral forms, and by English to written or documentary forms. Thus, as Wilkinson reports, if a Malay wished to convey his house to his son, or some other person, he would call in all of the neighbours and establish the new owner as the master of the house.[40] To the English (or American) legal mind, such a conveyance is clearly unenforceable as a violation of the Statute of Frauds, enacted in 1677. To the English it is necessary to have a deed of title, a documentary record. To be sure, the Malay custom is similar to the ancient English conveyance by means of a feoffment with livery of seisin. The conveyance took place when the grantor and grantee went onto the land, in the presence of witnesses from the neighbourhood, and publicly proclaimed the exchange. Usually a branch, twig, or piece of sod was passed to the new owner symbolizing the conveyance. This procedure was followed until the passage of the Statute of Uses[41] gave rise to new modes of conveyance — the execution and delivery of deeds. The development of the means of conveying property in use in England during the nineteenth century was a slow and cumbersome process. Its rather immediate implementation in Penang and the Straits Settlements was bound to cause disruptions.

Aside from any particular law, and its applicability to the local conditions of Penang or the Straits Settlement, it is entirely questionable whether the adversary system of ajudication in the English legal system was applicable to Southeast Asia.[42] The primary feature of the common law, as a legal institution, is its reliance upon the courts, formal judicial proceedings, to resolve conflict and settle disputes. It is doubtful that such an institution could ever adequately take into account the importance of informal proceedings and informal institutions in an Asian community.[43] Related to this, but distinguishable from the reliance upon formal structures, is the English (Western) demand for precise rules, for established, binding rules which provide predictability. The "rule of the case" is important as binding precedent. Whether the rule being urged upon the court, if generalized as a rule of law, will give potential litigants

40. Wilkinson, R. J., *Papers on Malay Subjects,* Vol. I, F.M.S. Government Press, Kuala Lumpur, (1922), pp. 63-64.

41. 8 & 9 Vict. c. 106.

42. See *Ibid*., at pp. 65-66. Here Wilkinson notes that the Malay judge conceives his role to be similar to that of a judge in a civil law system. His role is that of an active seeker after **truth** . The English judge issues the summons to bring the defendant into court, and then relies on the adversary system, the arguments, evidence, abilities, and wealth of the plaintiff and defendant, to bring the truth to light.

43. The impact of this will be discussed at greater length later in the paper. See also Buxbaum, David D., "Chinese Family Law in a Common Law Settling," *The Journal of Asian Studies,* August 1966, Vol. XXV, No. 4, p. 621.

a predictable standard to use in determining their conduct is constantly at issue in almost any litigation. This demand for reliable, precise standards is not unexpected in a highly commercial society where commerce seems to demand predictability. The Malay society, besides relying heavily upon informal structures, emphasized the need to preserve the community — a community which was closely tied together. The legal system relied upon metaphoric phrases, easily amenable to various interpretations to meet the equities of the fact situation presented. The community was preserved not only through informal institutions, conciliation and arbitration, but through compromise in the substantive law. Communal unity was more important than predictability.

Already raised, by inference at least, is the importance of the predilections of the people administering the law. I have mentioned the natural tendency to extend, without question, the application of the laws of one's own country to another country, even a totally different society. Already mentioned is the effect of the adversary system, and the impact of the common law as a legal institution which relies heavily upon "judge-made law." Most obvious, however, is that nearly all Judges and solicitors were trained in English law, with little or no knowledge of *adat,* Islamic, Hindu, or Chinese customary law, or even the customs of the inhabitants.

This latter element can be expressed in another manner. Rather than viewing the training in English law of most "jurists" in the new developing legal system, let us look at the difficulty of dealing in Malay jurisprudence. Wilkinson says the following about the difficulties of studying Malay jurisprudence:[44]

> Malay laws were never committed to writing; they were constantly overridden by autocratic chiefs and unjust judges; they varied in each state; they did not harmonize with the doctrines of Islam that they professed to follow; they were often expressed in metaphors or proverbs that seem to baffle interpretation.

He goes on to list a few Malay legal maxims which make the latter point most dramatically:[45]

Kambing biasa **mĕmbebek.**
Goats bleat.
Ayam itek itu raja pada **tĕmpat-nya.**
Poultry are kings in their own domain.
***Ĕnggan** lalu ranting patah.*
The twig breaks as the hornbill flies past it.
Kusut **mĕnyĕlĕsaikan,**
Hutang membayar, piutang **mĕnĕrimakan,**
Oleh **tĕmpat sĕmĕnda.**
To settle quarrels,
To pay debts, to collect dues:
These things are the business of the wife's relations.
Akar **sa-hĕlai** *akan* **pĕngikat,**
Kayu sa-batang **lĕmbing pĕnikam,**
Dakan **sa-kĕrat** *akan* **pĕnyalang,**
Puchok **bĕrnama pĕdang pĕmanchong,**
Itu-lah kata adat dengan **pĕsaka.**

44. Wilkinson, *op. cit.,* p. 1.
45. *Id.*

The piece of rattan typifies the bonds,
The tree-stem means the spear,
The bough means the ***kĕris*** of punishment,
The shoot is the sword of execution:
So say the law and our ancient traditions.

The student of Malay law must give up his European penchant for written law, whether it be statutes or judges' opinions. If he does find written Malay law, in the form of "codes," he must not take them too seriously. While far more authoritative, still, the codes resemble English proverbs such as "possession is nine-tenths of the law."

While difficulty in comprehensive local law may explain, or perhaps even justify, the extension of English law to the Straits Settlements, it does not reduce the difficulties such extension presents. Where the introduction of a foreign legal system abrogates the law traditionally used by local inhabitants to resolve conflicts and disputes, the resulting social disturbance is likely to be very significant. The law which was replaced by English law, whether it was *adat temenggong, adat perpateh,* Islamic, Hindu, or Chinese customary law, was closely tied to kinship and religious associations. As noted in the first section of this article, these are precisely the ties, primordial ties, which have such overwhelming coerciveness in and of themselves.[46] The introduction of a foreign legal system, challenging those ties in such a fundamental way does not assist in the process of adjusting the primordial ties with the new national or civil loyalties, represented in this case by the new legal system.

At least two alternative reactions appear possible. Either the loyalties will be shifted to the new demands of the legal system, or the new legal system will be rejected resulting in an increasing use of, and identification with, informal kinship or religious institutions for the settlement of conflict. One may inquire as to the effect of the introduction of Islamic law into the Malay society. It is first notable that Islamic law never supplanted the local *adat, adat temenggong* or *adat perpateh,* entirely. The Malays were quite prepared to adopt Islamic law for purely religious matters, and even to some extent in family law and matters of succession, but for everyday matters — such as contract, sales, slave-right, land-tenure, debt and succession to titles and real property — *adat* continued to be applied.[47] Even where Islalmic law was adopted, it must be remembered that this occurred over a long period of time, nor was it totally accepted. In nearly all cases the law, as the religion, was secreted to an already existing set of beliefs. While Islam did, perhaps, provide a new world view, provide the opportunity for a transfer of some loyalties to a new authority, the important aspect of that process is that it did not demand a total, or near total change, and that it allowed adjustment at the same time as it preserved the position of the pre-existing institutions of authority.

This is quite a different fact situation from that represented by the introduction of English law into the Straits Settlements. English law was imposed rather than accepted. As noted above, its application, giving due consideration to the customs and religions of the local inha-

46. See page 33, *ante.*
47. Wilkinson, *op. cit.,* p. 48.

bitants in matters of administering justice (as opposed to the substantive law itself), was total. At least its *de jure* application was compressed into a relatively short period of time. These factors lead me to conclude that it might be expected that the introduction of English law would result in an entrenchment of informal institutions within the primordial groups to resolve legal disputes. Such an occurrence will strengthen the coercive nature of the primordial ties, thus making the adjustment between primordial loyalties and national loyalties more difficult.

C. *The Development of Legal System in the Malay States Other Than Those of the Straits Settlements*

In the nine Malay States the development of the legal system took a similar, although somewhat more independent course than that of the Straits Settlements. There was no actual intervention into the internal affairs of the Malay States until nearly ninety years after the landing of Captain Light on the Island of Penang. Beginning with Perak in 1874, and including Selangor in 1875, Pahang in 1887, and Negri Sembilan in 1889, the British signed treaties assuring the rulers of these four states British protection in exchange for British Residents whose advise was to be accepted in all matters except religion and local Malay custom. The immediate result of the British Residents assuming office was that they became the de facto rulers, with the former rulers acting only through them. In 1895 a treaty of Federation was agreed to by the four states. The treaty provided for a Resident General, responsible to the Government of England, who directed all public administration. Article 4 of the Treaty provided that only Islamic religious matters would not be dealt with by the Resident General.[48] It is not the purpose of this article to describe or analyze the political and administrative structure of the Malay States. Suffice it to say that control rested, for all practical purposes, with the British until 1942 when British influence was removed by the Japanese.

British influence was increasingly felt in the four states in the northern part of the peninsula — Kedah, Kelantan, Perlis, and Trengganu — which were under Thai sovereignty. It was not until 1909 that Thailand transferred her rights to Great Britain. Between 1910 and 1930 agreements were reached between these four states and Great Britain, giving the latter rights similar to those she possessed in the Federated Malay States in exchange for British protection.[49] The state of Johore maintained its independence with regard to internal affairs until 1914 when it agreed to accept British advise. Prior to this time, however, British influence in Johore was considerable due to the geographic position of the state — wedged between Singapore and the Federated Malay States.

Even after the treaties, theoretically the only means of introducing English law into the British protected Malay States was through local legislation. There was, however, a considerable amount of legislation introduced independently by judges. This is not to be unexpected, and took forms somewhat similar to those already seen in the Straits Settle-

48. Unfortunately the treaties themselves are not available. But see Glos,. *op. cit.*, p. 113, note 81.

49. *Ibid.*, at note 85.

ments. Before examining the instances of rather sweeping introduction of English law into the States by legislation, it will be worthwhile examining the means of introduction through judicial action.

As was the case in the Straits Settlements, the upper ranks of the judiciary were filled by lawyers from the United Kingdom. Thus, by training and inclination, the judges resorted to English law in those cases in which there was no local law, or where the local law did not appear to be adequate for the case at hand. It was not only judges, but lawyers as well who tended to rely heavily on English law, as is seen from the following statement by Reay, J. C., in a Negri Sembilan case, *Leonard* v. *Nachiappa Chetty*: [50]

> Counsel for plaintiff relied chiefly on the English law. Counsel for defendant not only argued entirely on English law, but stated that he did not know what the local procedure was. This placed me in a difficult position. A whole chapter of the Civil Procedure Code is devoted to the subject of the "Death, Marriage, and Insolvency of Parties," and that is the law which I am bound to apply. Before reliance can be placed on English decisions, particularly decisions on points of procedure, it is necessary in the first instance to examine carefully our local law and to ascertain what it is and in what respects it resembles or differs from English law.

While Justice Reay's statement is directed to counsel, it is instructive as to the attitudes of the Bench itself. One may quickly question the merit of looking to English law at all, when the issue is covered by local law, except when the local law is modified after English law and such reference is necessary to determine the correct means of interpreting and applying the local law. Even this should be done with considerable caution as the fact situation in Negri Sembilan (or any Malay State) is not likely to resemble those to which the law was applied in English cases.

The willingness of Judges to rely on English law, and to introduce it into the states as if they were colonies or even a part of England itself is seen in the language of *In Re the Will of Yap Kwan Seng*.[51] There, in a 1924 Selangor case, the judge showed little hesitancy in introducing the "rule against perpetuities" into the State. Let me quote extensively from the opinion itself:[52]

> It is submitted to me, therefore, that one prime cause for the adoption of the rule in the colony was absent here, seeing that these states never were either ceded or newly settled territory, but States which by treaty invited a certain measure of British protection and control.
>
> The general law of England was never introduced or adopted here at any time. The most that could be said was that portions of that law were introduced by legislation which adopted, not English law, but English principles and models for local laws.
>
> That is a fair and cogent argument and the only one in this matter which has caused me hesitation. I overcome it by reason of my strong belief in the rule

50. (1923) 4 F.M.S.L.R. 265 at pp. 267-268.

51. (1924) 4 F.M.S.L.R. 313.

52. *Ibid*., at pp. 316-317. See also *Motor Emporium* v. *Arumugam,* (1933) 2 M.L.J. 276 for judicial incorporation of the rules of equity into Selangor. For a case involving an unfederated State, see *Goh Eng Seong* v. *Tay King Seow,* (1935) 5 M.L.J. 50, in which the English law of fixture is judicially incorporated.

> against perpetuities as a rule of good public policy. . . To my mind the question to be put is "Why reject a good public policy because it is English?" The law fails in virtue if it is not progressive to study the needs and further the best interests of these progressive states.
>
> We have as a matter of fact adopted freely in these States a great mass of English rules of law and equity, civil and criminal law and procedure, either directly or derivatively. The latter might be said to a certain extent even of our land tenure and registration. The commercial law of England is welcomed here. Our Judges are interchangeable with those of the Colony.
>
> There are other ties. The wills of our rich Chinese merchants, for instance, often cover lands not only here, but in the Conoly as well. The very will now under construction provides an example.

It is one thing to fill gaps in the local law or customary law[53] by cautions reasoning, by analogy, or by expanding the express language of legislation where it is necessary to satisfy the intent of such legislation, but it is quite a different, and much more disruptive, practice to incorporate a foreign law or legal principle.

Thus, despite the fact that theoretically English law was to be introduced to the States only through legislation, the propensity to extend a foreign law into the Malay States is easily seen. Here, however, the *de jure* civil authority remained in the hands of the Sultan. Did the introduction of English law, particularly via the judiciary, under the auspices of the traditional "primordial" authority make it difficult, at least for Malays, to resort to informal kinship or racial proceedings and institutions? Was the judge-made law an important factor in the weakening of the position of the Sultans *vis-a-vis* their constituents? I have been unable to find any literature or evidence on these questions. They are worth exploring, I think, but will have to wait until additional research is available.

English law was introduced directly into the states through legislative action. This took two forms: enactment of specific laws, modelled after English law: and adoption of English law en masse, as in the Civil Law Enactment of 1937.[54] The latter, provided that, except as otherwise provided by legislation:[55]

> . . . the common law of England, and the rules of equity, as administered in England at the commencement of this Enactment, other than any modifications of such law or any such rules enacted by statute, shall be in force in the Federated Malay States: Provided always that the said common law and rules of equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render possible.

On 31 December 1951, after the Federated and Unfederated States had joined with Penang and Malacca to form the Federation of Malaya, the Civil Law (Extension) Ordinance, 1951, was passed to extend Section 2

53. Though Hans Kelson, the leading positivist, contends that there are no gaps. To Kelson and other positivists, legal norms exist providing sanctions for specific conduct, or no sanctions; there are no gaps.

54. *Supplement to the Laws of the Federated Malay States,* (1938), Vol. III p. 653.

55. *Ibid*., section 2.

of the 1937 Ordinance, quoted above, to the states of Johore, Kedah, Kelantan, Perlis, and Trengganu.[56] The affect of these two Enactments was to incorporate English common law, and English rules of equity, as they stood in 1937, into first the Federated Malay States, and then in 1951 into the formerly Unfederated Malay States. In 1956 a similar Enactment incorporated the English common law and rules of equity as of 7 April 1956, the date of the coming into force of the Ordinance.[57]

During the twentieth century, then, *adat perpateh* and *adat temenggong,* which, prior to the intervention by the British, were the general laws of the land, were largely replaced by English law. Even though English law became generally applicable, the old tribal and religious law survived to a certain extent in areas of jurisprudence traditionally excluded from the influence of English law — the law of property and succession, and of marriage and divorce.[58]

In addition to these two rather specific qualifications of the general assertion that *adat* was replaced by English law, a further qualification, subject to investigation, should be posed. The colonial law, it can be argued, had specific goals in mind. First it wished to provide for the needs of the colonial power, and second, it provided a means of administering the colony, avoiding conflict and disruptions. The needs of the colonial power were, for the most part, commercial in nature. Indeed the establishment of the British protectorate over the Malay States was the result of a need to protect British (and Straits Chinese) commercial interests. The legal system, then, reflected the needs of the growing commercial framework of the Malay States. The adoption of English law to meet those needs does not necessarily mean that *adat* was replaced with regard to needs which it had fulfilled prior to the arrival of the British. It is possible that the types of conduct which had traditionally been regulated by *adat* continued to be so regulated. Thus, at least for a considerable length of time in the colonial period, contract disputes, torts, property settlements, etc., in the *kampongs* may well have been settled by *adat.*

Three avenues of investigating this possibility come to mind. Did the British impact reach beyond the urban areas to the villages? If so, are, or were, different substantive laws applied in the villages? Second, and related, what kinds of informal institutions for the settlement of conflict exist in the rural areas? Third, did the imposition of English law in the Malay states, taking a longer period of time than in the Straits Settlement, result in a greater preservation of *adat,* and informal Malay institutions ?

D. *Special Provisions for Muslim*

56. The Civil Law (Extension) Ordinance, 1951 (No. 49), *Federal Ordinances and State and Settlement Enactments Passed During the Year 1951,* Government Press, Kuala Lumpur, 1952, pp. 309-310.

57. The Civil Law Ordinance, 1956 (No. 5), *Federal Ordinances and State and Settlement Enactments Passed During the Year 1956,* Government Press, Kuala Lumpur, 1958, p. 48, (see particularly section 3).

58. Glos, *op. cit.*, p. 117.

As indicated above, Islamic law and *odat* did survive the impact of the British in limited areas, principally those areas strictly concerning religion, and family law. Responsibility for religious affairs rests with each state, thus there is no uniform approach to the administration of justice. There exists a number of enactments in each state affecting the rights specific to Muslims, and the administration of Islamic law.

In each of the States, there exists a *Majlis Ugama Islam dan Adat Melayu,* Council of Religion and Malay Custom (or *Majlis Ugama Islam dan Adat Istiadat Melayu*), except in the case of Negri Sembilan, Johore, Kedah, Malacca and Penang, which have a *Majlis Ugama Islam* or *Majlis Ugama,* Council of Islamic Religion. It is not clear to me what the precise difference is between these two types of councils. Ibrahim indicates that the *Majlis* in the latter group only advise the Sultan, or Ruler, on matters of Islamic Religion, while the former includes advice on Malay Custom, but the distinction between these two is frequently less than clear. It is probable that in the six states of the former group English law is less widely applied, and less deeply entrenched. If this is so, or, as is the case with most of the six states, because they are much less urban and much more agrarian in social and economic characteristics, Malay custom is likely to play a much more important role than in the five states of the latter group.[59]

The *Majlis* are appointed by, and advise, the Sultan of their particular state. Excepted from this are Penang and Malacca. In these two cases the *Majlis* are appointed by the *Yang di-Pertuan Agong,* whom they advise on Islamic religious affairs.[60] In two instances provisions are made reserving positions on the *Majlis* for non-Malays; in the case of Negri Sembilan one person appointed must be a non-Malay Muslim, and in the case of Selangor, out of a *Majlis* of not less than seven persons, one member must be an Indian Muslim and one a Pakistani Muslim. In addition to advising the Sultan, in some cases the *Majlis* may own property, and sue and be sued. In all cases the *Majlis* have the power to issue rulings on questions of Islamic religious law. They may give opinions on questions of Islamic law to any court upon request.

In addition to the quasi-judicial rulings which may be issued by the *Majlis,* judicial action is taken by the court of the *Kathi Besar* (or Chief *Kathi, Kathi* or, in the case of Trengganu, the Chief *Kadzi)* and the courts of *Kathi (Naib al-Kathi* or assistant *Kathi)*.[61] The former have state-

59. This is precisely the type of inquiry which needs to be explored further to discover the relationship between the development of a plural legal system and national integration. Unfortunately, I have been able to find very little information. The reader will recall that on page 43 *supra,* I suggested that the sweeping, and frequently indiscriminate, introduction of English law into the Straits Settlement may have "forced" the local inhabitants to resort to informal "primordial" institutions, thus enforcing primordial ties and loyalties. The distinction between the various *Majlis* may provide evidence for the contrary conclusion, or, at the most, that the earlier proposition may have only short term affect. Clearly it is in the states of the Northeast, all having a *Majlis* for religion and Malay custom, that the Malays have the strongest communal loyalties.

60. You will recall that these two states, as part of the Straits Settlement, had not maintained the authority of the Sultan. Indeed, Penang, being formerly ruled by the Sultan of Kedah, did riot have a Sultan after the island was ceded to the British.

61. The precise name depends on the state.

wide jurisdiction and the latter have prescribed local jurisdiction. The Court of *Kathi Besar,* in the case of Negri Sembilan, has jurisdiction in those proceedings

> ... in which all parties profess the Muslim religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, dispositions of and claims to property arising out of marriage or divorce, maintenance of dependents, legitimacy, guardianship and custody of infants, division *inter vivos* of *sapencharian* property, *wakaf* and *nazr* and other matters in respect of which jurisdiction is given by any written law; and also to try any offence committed by a Muslim and punishable under the Administration of Muslim Law Enactment.[62]

The lower courts, in the case of Negri Sembilan the courts of *Kathi,* can

> . . . deal with all such actions and proceedings where the amount in dispute or value of the subject matter does not exceed one thousand dollars or is not capable of estimation in terms of money and with such offences for which the maximum punishment does not exceed imprisonment for two months or a fine of two hundred dollars or both.[63]

Each state provides for appeals from the Court of *Kathi Besar* and the courts of *Kathi.* The composition of the appellate court varies from state to state, usually being a special committee, sometimes being the *Majlis* or a committee thereof.

The above description gives some idea of the institutions available to deal with Islamic law.[64] This description is offered only to indicate that Malays and others of the Islamic religion have quite intricate and well defined means of exerting and protecting a limited area of religious and customary rights. Although I have been unable to study the success of such institutions in protecting these rights from encroachment by English law, it appears that the Malays have been much more successful than have the Chinese.

E. *Chinese Family Law in Malaya*

In earlier portions of this section of the paper, I discussed developments regarding, primarily, the Malay community. In discussing the development of Chinese family law, many of the same issues can be raised, and many of the same points or contentions put forth. Yet there are substantially different factors involved which are critically important to the development of the legal system in Malaya. The impact of the introduction of English law on the Malays involved the displacement of, fusion with, or, in a limited area, the preservation of a legal system native to the land, which had developed continuously over a period of several centuries. Aside from the political and social power of existing Malay institutions of authority which could "force" some restraint on the application of English law, the fact that these institutions existed allowed the British to use them where it was to their own advantage to do so. Something quite different existed with regard to the Chinese.

62. Ibrahim, Dr. Ahmad, (Shirle Gordon, ed.) *Islamic Law in Malaya,* Malaysia Printers, Ltd., Singapore, (1965), p. 150.
63. *Id.*
64. *Ibid*., at pp. 147-173 for a more complete description of the institutions, and their powers, in each state which are involved in the administration of Islamic law.

In large measure the Chinese in Malaya were a foreign community just as were the British. Theirs was a foreign law just as was English law. Perhaps more important, however, traditional Chinese law[65] would have been applied in a foreign social climate — foreign to the conditions in which it was developed and applied in China. The pattern of immigration, the breakdown of the lineage *(tsu),* the small, until recently, immigration of Chinese women, the lack of immigration by the "scholar gentry," the interaction with other communal groups including the Europeans and their laws, demanded that new social institutions be established. The result, according to Buxbaum, was "an attempt to fuse elements of two disparate legal systems in a foreign social climate." [66] It is probable that the lack of well established "traditional" institutions within the Chinese community, particularly as compared with the active operation of traditional institutions in the Malay community, a higher percentage of social conflict within the former was resolved in the English courts; thus the Chinese were more likely to be subjected to English law, than the Malays. In addition the Chinese were, and continue to be, concentrated in urban areas, where English influence was the greatest. One should expect, then, that there has been a greater erosion of customary Chinese family law than of the Islamic family law applied to the Malays.

In traditional China there had already developed an extensive use of informal institutions to resolve social conflict. The courts, even the lowest administrative units, the *hsien-ysmen,* were too remote from the people; in addition the aura of shame arising from involvement in formal proceedings, their penal character, the expense and delay all served to limit their ability to serve actively in social development and the peaceful resolution of conflict. To act in their stead, there developed a variety of informal institutions.

Foremost among these was the lineage, *tsu*,[67] which tended to coincide remarkably with the villages, each village consisting of a single lineage. In the cities surname organizations played the role played by the lineages in the villages. These institutions developed "codes" of behaviour, usually more leniant than the code of law, but similar, and enforced in much the same manner. In addition to these two institutions, guilds, the gentry, and the secret societies played important roles in administering traditional Chinese law.[68]

In Malaya several informal institutions developed to carry out the functions of their predecessors in China. Secret societies and surname organizations played important roles from the beginning, and continue to be important in modern times. Evelyn Cribb indicates that until the end of the nineteenth century the secret societies, known as the Triad Societies, virtually ruled the Chinese community — settling "all intra-Chinese

65. Because I am relying heavily upon the work of Buxbaum, *op. cit.*, I will use his definition of traditional Chinese law. This term refers to the law of the Ch'ng dynasty (1614-1911). Buxbaum, *op. cit.*, p. 621, note 1.

66. *Ibid.*, at p. 1.

67. See *Ibid.*, at p. 623, note 8, quoting from S. van der Sprenke, *Legal Institutions of Manchu China,* London, (1962), p. 80, to define lineage ". . . as an exogamous patrilineal group of males descended from a founding ancestor, plus their wives and unmarried daughters."

68. *Ibid.*, at pp. 623, 624.

disputes."[69] Although the Societies were banned, at least in the Straits Settlements, in 1890, they were never entirely suppressed. In June, 1948, there were 300 secret society lodges in Singapore whose names revealed a direct descent from the Triads.[70]

Buxbaum indicates that a study of Singapore in 1964 indicated that surname organizations continue to play a role, though they now have less authority than in traditional China. Their activities apparently centre around providing social activities and services to the members of the "clan."[71]

Equally important was the development of "Captain China," or a headman in each community who served as the broker between the British and the Chinese community. The China Captain was usually a leader of a secret society. His job was to settle disputes in the Chinese community to represent its interests to the British officialdom.[72] Thus the British actively encouraged the use of informal communal institutions to resolve conflict. They welcomed their operation and willingly legitimized their authority. The application of the English law further served to encourage the use and development of informal institutions.

Before moving to a discussion of the developments in the law itself, comments should be made with regard to the relationship between the customary Chinese law and the institutions in the Chinese community. Although a Code of Law existed in traditional China, because of the extensive use of informal institutions, the law varied from locality to locality. Such variance could be expected to continue during its development in Malaya while its administration was in the hands of informal Chinese institutions. Indeed, because of the development of new institutions, and the changed social climate, it can be expected that the customary law developed with increasing local variations. The treatment of traditional Chinese family law, even had it been faithfully maintained, by the common law courts as a "great unity" would have caused consternation among the Chinese community.

I have already discussed in the second portion of this section of the article, the introduction of the common law. It is important to note, for purposes here, that two important cases during that discussion involved the conflict between Chinese law and the common law.[73] Buxbaum discusses at some length the impact of the common law in two areas: the status of secondary wives, *t' sip,* and adoption.[74] Both of these areas are central in Chinese family law. Customary law reflects a variety of dis-

69. Cribb, "Malaya: A Nation in Embryo," *Race and Power,* A Bow Group Publication, London, (1956), p. 78. Although the statement that the secret societies settled "all intra-Chinese disputes" may be somewhat exaggerated, it does give an indication of the extent of their operations. The author did not indicate whether the societies were found primarily in the urban areas or whether they were more universal.

70. *Id*., This does not mean all these societies existed during the time they were banned. To be sure, many societies sprung up during the Japanese occupation.

71. Buxbaum, *op. cit*., p. 626.

72. *Ibid*., at p. 625.

73. See *Yeap Cheah Neo,* and *Choa Cheow Neoh,* pp. 35-36, *ante.*

74. *Op. cit*., pp. 620-642.

tinctions in the treatment of secondary wives; adoption was a particularly important institution in traditional China, having social and religious significance.

The common law courts gradually reduced the requirements for the acquisition of the status of a *t'sip,* and also analogized the status of the primary wife, *t'sai,* to that of a *t'sip.* The latter is particularly evident in Sir Maxwell's opinion in *In the Goods of Lao Leong An.*[75] There the Court determined that both the primary and secondary wife should be admitted to administration in the deceased estate. Almost the entire opinion dwells on wheher the court is going to recognize the secondary wife, as if the sole question were whether the common law courts could recognize polygamy, an issue long since determined. Recognizing that " in China the inferior wives have no share in the estate and effects of their deceased husband," the Court went on to proclaim that the second wife shall share equally with the first. Since the "rights of ... wives ... must be determined by our law and not by that of China," and since the common law provided no means for determining the shares of wives unequal in status, there are no "grounds for any other division than an equal one."[76] Indeed the Court goes to some effort to note the importance of the *t'sip* and her special status in recognizing and validating the marriage. But recognition of marriage, or the validity of marriage, according to customary Chinese law is of little merit if the Court is going to dispense with such law when determining the incidents which flow from marriage.

As mentioned above, adoption was an important institution in traditional Chinese law. Where there was no male issue, adoption provided a means of supporting people in their old age, continuing the lineage branch, and maintaining the sacrifices to the ancestral spirits. In order to fulfill the last two purposes, the adopted child had to have the same surname as the adopting father. Such a child was entitled to the same status and power as an eldest son. English law recognized adoptions according to customary Chinese law, but refused to maintain the same incidents of such adoptions. Following English law the Adoption Ordinance[77] and the Distribution Ordinance[78] in Malaya, and the Adoption of Children Ordinance[79] in Singapore, were construed to mean that adopted children could not inherit from their adopted fathers' estates, unless they had been adopted under the provisions of the two adoption ordinances. As could be expected, because of the expense, the difference between the provisions of the ordinances and customary Chinese procedure, and the general lack of contact with legal or governmental organs, few children were adopted under the ordinances.[80] The result has been to work a considerable hardship on innocent parties, particularly the adopted children. But for the purposes of this article the relevance of those hardships is that the Chinese community, because of an unimaginative application of English law, can be expected to resort to informal proceedings to determine the incidents of adoption, the formal institutions being unsatisfactory for its needs.

75. Leicester, *op. cit.*, p. 418.
76. *Ibid.*, at p. 419.
77. Ordinance No. 11 of 1952.
78. Ordinance No. 1 of 1958.
79. Ordinance No. 18 of 1939.
80. Buxbaum, *op. cit.*, p. 638.

This is not to say that the judicial system of a plural society such as Malaya should ratify the customary law of each of its communities, regardless of the merit of such law. But to dispense with the customary law of the community, such as has been the case with the Chinese in Malaya, runs several risks. It is likely to mean that the law, as imposed and administered by the courts, will have little or no relevance to the social conditions and needs of the community. It is likely to mean the community will find it necessary to develop internal communal institutions to fulfill its needs. Such a development impedes the adjustment of communal loyalties to national loyalties. It gives added coercive force to primordial attachments. The mere fact that informal institutions will follow radically different procedure than governmental institutions will increase the tension between the communal groups and the national policy. Buxbaum puts it this way:[81]

> 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.

This all gives pause to question the merit of Sir Richard Winstedt's comment — "In no sphere was the British influence more beneficent than in the sphere of law" — with which this section began.

CONCLUDING AND "BEGINNING" COMMENTS

At this point it is evident that the thrust of the development of the law and of legal institutions in Malaysia has established the common law and its institutions as the law of the land. Only, apparently, the narrow field of Malay family law has been preserved. Accepting for the moment that the influence and application of the English legal system has been as extensive as it appears, what have been the apparent results? Where the common law has been accepted with little regard to traditional law or the types of social conflict which need to be regulated by the legal system, it is likely that a cleavage developed between the Chinese, Malay, and Indian communities and the formal legal system. It seems likely, then, that where the new legal system did not meet the needs of the community, the community was forced to resort to, or develop, informal institutions. This reliance upon informal institutions as a defensive device may well have strengthened local or primordial attachments. It inhibits the process of integration, the adjustment of loyalties.

Contrary to this development, however, the new legal system may well provide the opportunity for the elite groups to escape the local or primordial framework. It does allow them to find new attachments, attachments shared by the elite of all three major communal groups — Malay, Indian and Chinese. It would be hopeful to say that the "masses" will follow the elites into these new attachments, thus making the new legal system ultimately act as an integrative device. One should not be

81. *Op. cit.*, at p. 644.

too quick to jump readily to this conclusion. The Malaysian elites are largely urban based. The urban areas present the social and economic setting most readily amenable to English law. It is more likely to be commercial in orientation; less likely to have well developed informal institutions; less likely to have its social framework defined in terms of clans or kinships. There is less need for the legal systems to be concerned with the preservation of unity in the community; more willingness to accept the impersonal, precise standards which promote predictability. These factors are not present in the villages. Subject to further investigation, it is likely that English law continues to be alien, both in concept and application, to the village life. If this is the case it is questionable whether the "masses" will quickly follow the elites.

Two avenues need further exploration. Both involve exploration at the village level. Both involve an inquiry into the extent of the impact of English law. First is an inquiry into the substantive law operative at the village level. Did the English law totally replace *adat* in a social setting in which it may clearly be unsuited, or was *adat* preserved even beyond the narrow confines of Islamic religious law and family law?[82] If *adat* has been preserved, or if English law is unsuitable to resolve commercial and social conflicts in the village, what types of institutions are available for the resolution of such conflict? Both of these inquiries demand considerable field work,

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82. See note 59, *ante,* and the discussion on p. 48, *ante.*

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