

## THE FORMAL STATEMENT OF CHINESE LAW AND CUSTOM IN HONG KONG

This essay attempts to set out current Chinese law and custom in Hong Kong as it exists in the form of published judicial decisions and in a report made in 1953 (*Report of a Committee on Chinese Law and Custom in Hong Kong* — Govt. Printer, Hong Kong, 1953).

The bulk of this essay is taken up by summaries of Hong Kong suits and of parts of the Committee's report.

The cases are set out in alphabetical order and include a short summary of each *ratio decidendi* plus comparative reference to Malaysian and Sarawak practice.<sup>1</sup>

### 1. AU HUNG FAT v. LAM LAI HA [1959] H.K.L.R. 527.

On the proof necessary to show the validity of a marriage at Chinese custom. The court held that the presumption as to the validity of a customary marriage may be invoked so as to establish that the provisions of the Marriage Ordinance have been complied with. That is, that the marriage was celebrated according to the personal law or religion of the parties or in accordance with the laws and customs of China. *Re Kishan Das decd.* (1932-33) 26 H.K.L.R. 42 discussed.

#### Comparative Cases:

Straits Settlements and Federated Malay States: *Re Khoo Thean Tek's Settlements* [1929] S.S.L.R. 50.

#### 1. List of abbreviation:

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|---------------------|---|
| <i>D.C.L.R.</i>     | — District Court Law Reports, Hong Kong — current.  |
| <i>F.M.S.L.R.</i>   | — Federated Malay States Law Reports, Federated Malay States — 1922-31, 7 vols. 1932-47, 10 vols.; no report 1942-45. |
| <i>H.K.L.R.</i>     | — Hong Kong Law Reports, Hong Kong — current.   |
| <i>Ky.</i>          | — Kyshe's Reports, Straits Settlements — cases decided between 1786-1890, 4 vols.                                     |
| <i>Leic.</i>        | — Leicester's Reports, Straits Settlements — 1877, 1 vol.   |
| <i>M.C.</i>         | — Malayan Cases, Malaya and Singapore — 1939, vol. 1, 1964, vol. 2.   |
| <i>M.L.J.</i>       | — Malayan Law Journal. Malaya, Singapore and (from 1964), Sabah, Sarawak and Brunei — current.                        |
| <i>M.L.J. Supp.</i> | — Malayan Law Journal Supplement. Malaya, Singapore, Sabah, Sarawak and Brunei — 1948-49, 1 vol., 1957, 1 vol.        |
| <i>S.C.R.</i>       | — Supreme Court Reports. Sarawak — 1928-63. North Borneo and Brunei 1952-63.  |
| <i>S.S.L.R.</i>     | — Straits Settlements Law Reports, Colony of the Straits Settlements — 1893-1907, 1926-41/42.                         |

*Nonia Cheah Yew v. Othmansaw Merican* (1861) 1 Ky. 160.

Sabah, Sarawak and Brunei: *Kho Leng Gwan v. Kho Eng Guan* [1928-41] S.C.R. 60.

2. CHAN IU SANG v. TAM WAI SANG (1927) 22 H.K.L.R. 129.

On a Chinese Money Loan Association. The Court held:

- (a) That there is no individual contract between one member and another.
- (b) The association is a voluntary society, the property of which belongs to the society as a whole;
- (c) Every member contracts with all other members to conform to its rules;
- (d) The only action maintainable by an individual member is a claim to money had and received to his use.

Comparative Cases:

Straits Settlements and Federated Malay States: *Soo Hood Beng v. Khoo Chye Neo* (1896) 4 S.S.L.R. 115. Sarawak, Sabah and Brunei: *Lau Chuo Kiew v. Hii Chee Soon* [1966] M.L.J. 126. *Lee Pee Eng v. Ho Sin Leow* [1958] S.C.R. 18. *Loi Teck Uh v. Chieng Lee Tieh* [1960-63] S.C.R. 325. *Luk Dai Chung v. Ngu Ee Nguok* [1966] M.L.J. 119. *Ngu Ee Nguok v. Lee Ai Choon* [1965] M.L.J. 32. *Tan Siew Hee & ors. v. Hii Sii Ung* [1964] M.L.J. 325.

3. CHAN KA LAM & ORS. v. CHEUNG CHUNG KONG & ANOR. (1915) 10 H.K.L.R. 157.

On a Money Loan Association. Held: The headman is in the position of a trustee for monies paid to him by the members.

Comparative Cases:

See entry (2) above.

4. CHAN QUAN EE, IN RE: CHAN YAU & CHAN PAT v. CHAN WU SHI & ORS. (1920) 15 H.K.L.R. 74.

On the construction of a will. The court held that a bequest for worshipping expenses is void as against perpetuities. *Lau Leung Shi v. Lau Po Tsun* (1911) 6 H.K.L.R. 149 followed — *cf.* entry (18) below.

Comparative Cases:

Straits Settlements and Federated Malay States: *Choa Cheow Neo v. Spottiswoode* (1869) 1 Ky. 216. *Re Khoo Cheng Teow decd.* [1933] M.L.J. 119. *Lim*

*Chui Chuan & ors. v. Lim Chew Chee* [1948-49] M.L.J. Supp. 66. *Ng Eng Kiat v. Goh Lai Mui & ors.* [1940] S.S.L.R. 78. *Ong Seok Neo v. Chee Hoon Bong & ors.* (1893) 1 S.S.L.R. 53. *Phan Kin Thin v. Phan Kuon Yung* [1940] M.L.J. 35. *Re Tan Kim Seng decd.* (1911) 12 S.S.L.R. 1. *Re the Trusts of Wan Eng Kiat* [1931] S.S.L.R. 57. *Re Yap Kwan Seng decd.* (1924) 4 F.M.S.L.R. 313.

Sarawak, Sabah and Brunei: *Re Tay Lim Tiang decd.* [1955] S.C.R. 17.

5. CHAN SHIU SUI PING v. CHAN DIN TSANG [1958] H.K.L.R. 283.

On the status of a Chinese customary marriage. It was held that such a marriage has the status of a "Christian marriage or its civil equivalent" for the purposes of the (Hong Kong) Divorce Ordinance 1952, section 2. This is so even though the marriage took place after the promulgation of the Chinese Civil Code (1931) which supposedly restricted such marriages.

Comparative Cases:

Sarawak, Sabah and Brunei: *Li Khoi Chin (aliases) v. Su Ah Poh* [1950] S.C.R. 17, *R. v. Jong Yu Pan* [1950] S.C.R. 8.

6. CHAN SHUN CHO v. CHAK HOK PING (1925) 20 H.K.L.R. 1.

On the administration and devolution of an intestate estate where deceased was domiciled in Hong Kong. The Court held:

- (a) The laws of England as at 5 April 1843 are in force in the colony except where they are inapplicable having regard to local custom. In the latter case Chinese law operates.
- (b) The law of England on administration is applicable and the *kit fat* or *tin fong* (wives) of a deceased are entitled to letters of administration.
- (c) The position of a widow in the "Chinese social organisation" is, by itself, no ground for the Court to exercise its jurisdiction adversely to her claim to administer.

Comparative Cases:

Straits Settlements and Federated Malay States: *In the goods of Ing Ah Mit* (1888) 4 Ky. 380. *In the goods of Lao Leong An* (1893) 1 S.S.L.R. 1.

7. CHAN TSE SHI DECD. IN THE GOODS OF: (1954) 38 H.K.L.R. 9.

On the distribution of a Chinese intestate estate. The Court decided questions as to the validity of adoption on the basis of

“custom” and the *T'sing* law. It also dealt with succession to leaseholds which it held to be governed by *T'sing* law alone — see at pp. 14-16 of the report on domicile. Cases cited: *Ho Cheng Shi v. Ho Sau Lam* (1920) 15 H.K.L.R. 35. *Ho Tsz Tsun v. Ho Au Shi* (1915) 10 H.K.L.R. *Ho Sau Lam v. Ho Cheng Shi* (1916) 11 H.K.L.R. 92.

Comparative Cases:

Straits Settlements and Federated Malay States: *In the goods of Goh Siew Swee decd.* (1911) 12 S.S.L.R. 18. *Khoo Tiang Bee et uxor. v. Tan Beng Gwat* (1877) 4 Ky. 413. *Qwaik Kee Hock v. Wee Geok Neo* (1886) 4 Ky. 128. *Re Tan Cheng Siong decd.* [1937] S.S.L.R. 293. *Re Tan Hong decd.* [1962] M.L.J. 355. *Tan Phee Teck v. Tan Tiang Hee* [1952] M.L.J. 240. *Tan Sim Neoh v. Soh Tien Hock* (1922) 1 F.M.S.L.R. 336. *Re Teo Soo Piah decd.* [1950] M.L.J. 176. *Re Yeo Soo Theam decd.* [1937] S.S.L.R. 276.

Sabah, Sarawak and Brunei: *Li Khoi Chin (aliases) v. Su Ah Poh* [1950] S.C.R. 17.

8. CHAN YEUNG v. CHAN SHEW SHI (1925) 20 H.K.L.R. 35.

On the administration of a Chinese intestate estate. The Court held:

- (a) The person entitled to administer is the person designated under Chinese law to control infant sons of an intestate;
- (b) This is the *kit fat* or *tin fong* widow;
- (c) In the absence of such persons the *Tsu Mo* or “compassionate mother” will administer (the “*Tai Tsing Lut Lai*” cited at this point) ;
- (d) In the absence of these three classes the *Tsip* (here defined as “concubine” — see Straits Settlements practice) will administer — see report at pp. 48-50.

Comparative Cases:

Straits Settlements and Federated Malay States: *Re Choo Eng Choon decd.* (1911) 12 S.S.L.R. 120 and *Cheang Thye Pin v. Tan Ah Loy* [1920] A.C. 369. *cf.* also cases cited in entry (6) above.

9. CHAN YUE alias CHAN YU HING v. HENRY G. LEONG ESTATES LTD. (1953) 37 H.K.L.R. 66.

This case concerned a dispute as to property but in the course of judgment the Court considered the question of adoption in Chinese families. It was stated that it is usual for the adopted child's original surname to be dropped on adoption.

Comparative Cases:

*cf.* entries (7), (10) and (14).

10. CHEANG THYE GAN v. LIM AH CHEN & ORS. (1921) 16 H.K.L.R. 19.

On proofs of adoption. The Court considered the following facts as admissible in evidence.

- (a) Records in family books, tablets and temples;
- (b) Formalities of adoption.

Comparative Cases:

*cf.* entry (7) above.

11. CHOW CHAM v. YUET SEEM (1910) 5 H.K.L.R. 233.

On a Chinese Money Loan Association; the plaintiff (the head of the association) brought an action to recover instalments from the defendant who was one of the members of the association. He was held able to recover on the grounds that:

- (a) Plaintiff is suing on his own behalf;
- (b) Each member contracts with the head: the members have no mutual rights and obligations between themselves and they therefore cannot constitute an "association";
- (c) Only the head carries on "business" — the members do not.

Comparative Cases:

*cf.* entry (2) above.

12. ESTATE OF KISHAN DAS IN, RE: (1932-33) 26 H.K.L.R. 42. On the validity of a marriage between an Indian male and a Chinese female. The Court held that as there was no evidence that the woman had become Hindu then, though the marriage was celebrated according to Hindu rites, it was invalid. The court said that the presumption of marriage was rebutted on this ground.

Comparative Cases:

Straits Settlements and Federated Malay States: *Mary Joseph Arokiasamy v. G.S. Sundrum* [1938] M.L.J. 4. *R. v. Devendra* (1939) 1 M.C. 51, Sabah, Sarawak and Brunei: *Lopez v. Sockalingam Kali* [1947] S.C.R. 22.

*Note:* On the problems of inter-racial marriage generally see *Re Abraham Penhas decd.* [1950] M.L.J. 104.

13. FAN NGOI NAM & ORS. v. ASIA CAFE & ANOR. (1929-30) 24 H.K.L.R. 1.

On a Money Loan Association. The Court held:

- (a) That a member of such an association may not assign the rights and obligations of his membership except with the consent of all members;

- (b) An association consists of a verbal assent to be bound by the rules. The rules do not constitute an agreement or set of agreements between the head and each member;
- (c) "The nature [of the association] is one of mutual trust";
- (d) ". . . [Is] a mutual contract".

Comparative Cases:

*cf.* entries (2) and (11).

14. FU CHUEN SANG & ANOR. v. CHEUNG CHING TAK & ORS.  
[1961] H.K.L.R. 219.

On the construction of a Chinese will. The Court held:

- (a) That a "wish" for a wife to adopt a son is not an imperative command and does not establish a precatory trust.
- (b) That a condition subsequent against the re-marriage of a widow is valid.

*Note:* This case was decided solely on English authorities.

Comparative Cases:

Straits Settlements and Federated Malay States:  
*Cheok Chin Huat v. Cheok Chin Soon & ors.* [1937]  
S.S.L.R. 103.

*cf.* also entries (7) and (10) above.

15. HO CHENG SHI v. HO SAU LAM (1920) 15 H.K.L.R. 35.

On the administration of a deceased estate. The Court held:

- (a) Chinese law and custom govern the distribution of assets in the Colony and this is part of the law of the Colony;
- (b) The law providing for administration is, however, English law and if this law grants letters of administration to a concubine then she can administer even though under Chinese law she has no capacity.

Comparative Cases:

*cf.* entries (6) and (8) above.

16. HO SAU LAM v. HO CHENG SHI (1916) 11 H.K.L.R. 92.

A concubine was held able to take letters of administration to a deceased estate on the ground that she was next friend to an infant adopted son of deceased.

Comparative Cases:

*cf.* entries (6), (8) and (15) above.

## 17. HO TSZ TSUN v. HO AU SHI &amp; ORS. (1915) 10 H.K.L.R. 69.

On the devolution of leasehold property upon a Chinese intestacy. The Court held:

- (a) The Statute of Distributions does not govern the devolution of such an estate;
- (b) The *lex loci* in such a case is the Chinese law of the Colony;
- (c) The decision in *Lau Leung Shi v. Lau Po Tsun* (1911) 6 H.K.L.R. 149 varied.

Comparative Cases:

*cf.* entries (6), (8), (15) and (16) above and (18) below.

## 18. LAU LEUNG SHI v. LAU PO TSUN (1911) 6 H.K.L.R. 149.

This case involved several distinct questions.

- (a) On the bequest of a certain share in an estate "for Ancestors, Sacrificial Fund." This was held to offend the rule against perpetuities though it was not a superstitious use: *Choa Cheoiv Neo v. Spottiswoode* followed;
- (b) Held by the Puisne Judge that personalty which is governed by the law of the domicile may be applied to a perpetual use out of the jurisdiction;
- (c) Held by the Chief Justice that so long as a Chinese continues to perform customary acts of worship at his Ancestral Temples then he cannot get a domicile of choice in the Colony;
- (d) Secondary wives may inherit.

Comparative Cases:

*cf.* entries (6), (8), (15), (16) and (17).

## 19. LI CHOK (OR CHIK) HUNG v. LI PUI CHI (OR CHOI) (1910) 5 H.K.L.R. 121; (1911) 6 H.K.L.R. 12 (appeal).

On the distribution of a deceased Chinese estate. The Court held:

- (a) Where a Chinese dies possessed of property in the Colony there is a presumption that Chinese law applies in its administration but the contents of this law must be proved;
- (b) Where property has been invested in the name of a hereditary *Tong* by one of the family (for his own use) this creates a trust *inter vivos* in favour of the remainder of the family;
- (c) An individual family member cannot use the *Tong* name except in respect of transactions involving property common

to the family members. See report at p. 123. *cf.* also entry (29) below.

Comparative Cases:

On the court's decision in respect of (a) *cf.* entries (6), (8), (15), (16), (17) and (18) above. There are no decisions dealing with the court's finding as to (b) and (c).

20. LI PO KAM & ANOR. v. LI LING SHI & ANOR. (1908) 3 H.K.L.R. 170.

Chinese custom in Hong Kong will be given effect to in respect of statutory provisions only if the statute expressly makes provision for this *e.g.* "so far as local circumstances admit." This does not apply to a later statute which contains no reference to Chinese custom — see report at p. 173.

Comparative Cases:

Straits Settlements and Federated Malay States:  
*Chia Teck Leong & four ors. v. Estate & Trust Agencies (1927) Ltd.* [1939] S.S.L.R. 94. *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] S.S.L.R. 127. *Khoo Tiang Bee et uxor. v. Tan Beng Gwat* (1877) 1 Ky. 413.

Sarawak, Sabah and Brunei: *Kho Leong Guan v. Kho Eng Guan* [1928-41] S.C.R. 60. *Liu Kui Tze v. Lee Shak Lian* [1953] S.C.R. 85.

21. LO WAI KI v. R. [1957] H.K.L.R. 454.

On Triad societies. The Court summarised the history of legislation against such societies.

There are no comparative cases from any other jurisdiction on this point.

22. LUI YUK PING v. CHOW TO [1962] H.K.L.R. 515.

On the application of the Infants Custody Ordinance Cap. 13, s. 2, to persons of the Chinese race. The Court found:

- (a) There is nothing to show that the operation of this ordinance is inconsistent with Chinese custom in Hong Kong;
- (b) Chinese law and custom is part of the "common law" of Hong Kong — see report at p. 516 as to the status of Chinese law and custom. Cases cited: *Tsung Shiu Kee v. Lee Hung* [1960] H.K.L.R. 298. *Ho Tsz Tsun v. Ho Au Shi* (1915) 10 H.K.L.R. 69.

Comparative Cases:

*cf.* entries (6), (8), (15), (16), (17) and (18) above.



## 23. MA WAI FUN v. R. [1962] H.K.L.R. 61.

On “reasonable man” in Hong Kong. This was defined as an ordinary Hong Kong resident of the same race and way of life as the accused person — see report at pp. 76-78.

There are no comparative cases from other jurisdictions on this point.

## 24. NG YING HO &amp; ANOR. v. TAM SUEN YA [1963] H.K.L.R. 923.

On a claim to be recognised as a concubine or *t’sip*. The court held:

- (a) Evidence to show that a woman is a *t’sip* includes; being received into the family, being formally introduced to the family, worshipping at the ancestral tablets of the family and serving tea to the principal wife;
- (b) That a *t’sip* has a claim for maintenance.

Comparative Cases:

Straits Settlements and Federated Malay States: *Re Kho Thean Tek’s Settlements* [1929] S.S.L.R.: 50. *Re Lee Choon Guan decd.* [1935] M.L.J. 78. *Re Seow Imm Swee decd.* [1933] S.S.L.R. 1. *Soh Eddie v. Tjhin Feong Fah* [1951] M.L.J. 124. *Re Yeow Kian Kee decd.* [1949] M.L.J. 171.

Sabah, Sarawak and Brunei: *Ting Hung Hui v. Yap Phoon Guik* [1960-63] S.C.R. 132.

## 25. NGAI I, IN THE ESTATE OF: NGAI CHUNG SHI &amp; ANOR. v. NGAI YEEM MUI (1927) 22 H.K.L.R. 105.

On the administration of a deceased Chinese estate. The Court held:

- (a) The person entitled to administer is the surviving widow so long as she remains a member of her late husband’s family;
- (b) She may adopt a son to succeed to the property of her late husband and she then holds deceased’s property in trust for him;
- (c) That such an adoption made to prevent the extinction of a family is valid whatever the age and original surname of the adopted person might be;
- (d) That such widow may re-marry and introduce her second husband into the house of her late husband without separating herself from her late husband’s family;
- (e) If a Chinese family becomes extinct the property will descend to the surviving female relatives of the last deceased

male member: this right is not confined to daughters or to spinsters.

Comparative Cases:

*cf.* entry (6) above.

26. TAM YUN LUNG v. TSANG HON NIN [1953] D.C.L.R. 6.

In the absence of Chinese custom, the common law will apply. It was held that there was no established custom in respect of leasehold of land in the new territories. *cf.* the principles as to proof of custom in Hong Kong as laid down in entry (30) below.

Comparative Cases:

On the point of admitting Chinese custom see the Straits Settlements, Federated Malay States, and Sabah, Sarawak and Brunei cases referred to in entries (6), (8) and (15).

27. TANG CHOY HONG v. TANG SHING MO & ORS. (1949) 33 H.K.L.R. 58.

On a widow's claim to a share in deceased husband's estate. The court held that she was entitled to a share not absolutely as a descendant but (subject to her right of maintenance) on behalf of the male succession.

Comparative Cases:

*cf.* entry (25) above.

28. TANG HO FOON v. LEUNG SEK [1955] D.C.L.R. 152.

On breach of promise to marry. The court held:

- (a) A Chinese may have only one *T'sai* or principal wife but may have any number of *T'sips* or secondary wives (or "concubines");
- (b) This is allowed at common law as being an established custom of the Hong Kong Chinese.

Comparative Cases:

*cf.* entry (24) above.

29. THE TUNG SANG WING FIRM v. CHOW CHUN KIT (1910) 5 H.K.L.R. 238.

The Chinese custom of using *Tong* names must be recognised if not antagonistic to the principles of English law. *Prima facie* different *Tong* names must be treated as representing different funds and different entities. *Quaere* — how far the

*Tong* system must conform to the laws of partnership. On the limitations of *Tong* principles see *Li Chok Hung v. Li Pui Chi* (1910) 5 H.K.L.R. 121.

There are no comparative cases on this point from other jurisdictions.

30. TSANG SUI CHI v. CHOW CHEUNG SHI & ANOR. [1963] D.C.L.R. 295.

The onus of proof in respect of Chinese custom is upon him who asserts it. The custom to be held effective must have been exercised for a reasonable period of time. In addition to this there must also be evidence given of the manner in which the custom operates.

For other applications of this principle *cf.* entry (26) and the cases there cited.

31. UN YAN SING & ORS. v. FONG LUN SAN (1913) 8 H.K.L.R. 89.

On a Money Loan Association. Held that where the head of the association is a firm, then it is an implied trustee for the members of the association. The court took jurisdiction specifically in equity and not in common law.

Comparative Cases:

*cf.* entries (2), (3), (11) and (13) above.

32. WONG PUN YING v. WONG TING HONG [1963] H.K.L.R. 37.

On a Chinese intestate estate. The Court held:

(a) That the grant of letters of administration is governed by English law and the manner of distribution is governed by *T'sing* law;

(b) The question of dowry is governed by *T'sing* law.

Cases cited: Nos. 208 and 886 in the *Report on Chinese Law and Custom in Hong Kong* (1953) : also cited were: *Ho Tsz Tsun v. Ho Au Shi* (1915) 10 H.K.L.R. 69; *Ho Cheng Shi v. Ho Sau Lam* (1920) 15 H.K.L.R. 35. *Re Chak Chiu Hang decd.* (1925) 20 H.K.L.R. 1. *Wong Yu Shi v. Wong Yin Kuen* [1957] H.K.L.R. 420. *Re Chan Tse Shi decd.* (1954) 38 H.K.L.R. 9.

Comparative Cases:

*cf.* the cases cited in entries (6), (8), (15) and (25) above.

## 33. WONG YU SHI &amp; ORS. v. WONG YING KUEN [1957] H.K.L.R. 420.

On the administration of a Chinese estate. The Court held:

- (a) Chinese law and custom will apply only if English law is inapplicable in the sense that it would cause injustice or oppression and if custom is not shown to be excluded by Hong Kong legislation;
- (b) Evidence of *T'sing* law as to the adoption of a son in respect of inheritance considered and accepted;
- (c) The Court considered *T'sing* law on distribution on an intestacy and on verbal directions to distribute.

Cases cited: *Ho Tsz Tsun v. Ho Au Shi* (1915) 10 H.K.L.R. 69. *Re Chak Chiu Hang: the Estate of* (1925) 20 H.K.L.R. 1. *Lau Leung Shi v. Lau Po Tsun* (1911) 6 H.K.L.R. 149. *Yeap Cheah Neo v. Ong Cheng Neo* (1877) Leic. 569.

Comparative Cases:

cf. entries (6) and (25) above.

The brief summaries of these cases should be read in conjunction with appendix 15 of the Report on *Chinese Law and Custom in Hong Kong*.<sup>2</sup>

This appendix sets out the questionnaire and answers on Chinese law and customs. The following bodies were circulated with the questionnaire:

The Hong Kong Council of Women.

Mr. Li King Hong — member of Chinese Chamber of Commerce.

The Kowloon Chamber of Commerce.

Mr. P. C. Woo — member of Reform Club of Hong Kong.

Hon. Sir Man Kam Lo — member of the Executive Council of Hong Kong.<sup>3</sup>

Dr. the Hon. S. N. Chau.

The Tai O. Resident's Association.

2. Report of a Committee appointed by the Governor in October 1948: published by the Government Printer, Hong Kong, 1953.
3. This gentleman dissented in pargé part from the conclusions of the rest of the committee. Because of this the government apparently felt that his comments on the report merited a separate volume and this, entitled *Comments on the Report of the Committee on Chinese Law and Custom in Hong Kong*, is published with the Report.

Mr. S. M. Churn.<sup>4</sup>

The questionnaire was divided into two parts:

- (i) The first part was concerned with ascertaining the opinions of the above persons or bodies on the substantive content of Chinese custom in Hong Kong.
- (ii) The second part was concerned to establish what role the judiciary and legislature should play in implementing; or regulating the provisions of Hong Kong Chinese custom. It will be seen that the answers to the questionnaire provided a wide range of variation.

#### PART I. *Substantive Chinese Custom*<sup>5</sup>

Q. 1. Should the existing law be amended so as to provide for monogamous Chinese marriages only?

To this *HKCW*, *LKH*, *KCC*, *PCW* and *SNC* answered in the affirmative though *LKH* considered that the custom of a second *kit fat* for *Kim Tiu* must be carefully considered. On the other hand *MKL* favoured the continuance of polygamy, largely on the grounds it seems, that it provides for the possibility of children in a barren union. He did not regard adoption as being a (emotionally) satisfactory method for accomplishing this.<sup>6</sup>

Q. 2. What steps should be taken as regards concubines already accepted by the family?<sup>7</sup>

It was agreed by *HKCW*, *LKH*, *KCC*, *PCW*, *SNC* and *TORA* that the status of concubinage "should be recognised" and that concubines should have rights to maintenance (*KCC*, *SNC*) but not to succession on intestacy (*KCC*). So far as the children of such women are concerned it was agreed that these children would be regarded as legitimate and entitled to succeed to an intestate estate.

4. Not all of these persons and bodies answered every question. In the summary of answers given below the respective persons or bodies are referred to by the following initials:

|                                 |               |
|---------------------------------|---------------|
| The Hong Kong Council of Women  | — <i>HKCW</i> |
| Mr. Li King Hong                | — <i>LKH</i>  |
| The Kowloon Chamber of Commerce | — <i>KCC</i>  |
| Mr. P. C. Woo                   | — <i>PCW</i>  |
| Hon. Sir Man Kam Lo             | — <i>MKL</i>  |
| Dr. the Hon. S. N. Chau         | — <i>SNC</i>  |
| The Tai O. Residents Assoc.     | — <i>TORA</i> |
| Mr S. M. Churn                  | — <i>SMC</i>  |

5. This term is not used in the Report and I use it here for convenience of reference only as it seems to cover adequately the subject matter of this part.
6. The Hon. Sir Man Kam Lo. *Comments on the Report of the Committee on Chinese Law and Custom in Hong Kong*. Government Printer, Hong Kong, 1953, p. 11.
7. The purpose of this question appears to have been to establish the status of such women, and, following from this, their rights to maintenance.

On the rights of a concubine to administer an intestate estate, however, opinions were somewhat divided. *HKCW* was adamant in refusing letters of administration or indeed any rights to administer at all, though agreeing to maintenance as a "member of the family." *LKH* on the other hand would allow a right to administer and receive letters of administration with no qualification as would *PCW*; *MKL* would allow such a right to exist provided there are no widows or issue surviving. *SMC* would leave this up to the testator and in the absence either of a will or of a direction to this effect in a will would refuse to allow administration. Similarly with *SNC*, except that a concubine's right to administer should cease on the coming of age of the eldest child.

Q. 3. In the event of a person dying a widower should the right to letters of administration be accorded to the next of kin?

With the exception of *HKCW* (who wished the court to administer) all parties agreed that next of kin should have a right to letters of administration. There was, however, some difference of opinion as to what persons constituted "next of kin." *LKH*, *KCC* and *SNC*, with minor differences between them, thought that this term included children, parents, brothers and sisters and grandparents. *PCW* avoided a direct answer and suggested that a concubine should be given an equal right to the Grant. All categories of persons agreed that the eldest child of wife or concubine could administer an estate.

Q. 4. Should the law of divorce with regard to Chinese divorce be amended?

The answer to this question was unanimously in the affirmative but once again the suggestions for amendment varied widely. Predictably enough, the *HKCW* wishes to add extra grounds for divorce which included desertion, adultery, lack of maintenance, imprisonment and "disappearance." *KCC*, *MKL* and *SMC*, though they would like to see amendment, made no recommendation as to what form this should take. *PCW* recommended that divorce by consent should be recognised provided that the parties are domiciled in China.

Q. 5. Should the Hong Kong law be amended to afford either spouse the right to succession?

With the exception of *MKL* all parties recommended some amendment though *KCC*, *PCW* and *SMC* had no specific suggestions to offer. The *HKCW* recommended inalienable portions for "heirs" and *SNC* recommended that the existing law be brought into line with the law in England and China then in force.<sup>8</sup>

Q. 6. Should a son and a daughter have equal right of succession to the parents' estate?

With the exception of *LKH* all parties agreed that there should be equal rights. The reasons given by *LKH* are rather interesting on this

8. It is a little difficult to see how this could be done so as to satisfy both systems of laws.

point. He maintained in effect that a son should have a greater right of succession because the responsibility of maintaining the family rests on him and that when he becomes married this responsibility becomes heavier.

Q. 7. Should the interests of legitimate children, concubines' children and adopted children in an estate be equal?

Generally, the answer to this question was in the affirmative though *LKH*, *KCC* and *SNC* thought that children not adopted for the specific purpose of continuing the family line should receive a smaller share. *TORA* thought that the interest of an adopted son should be equal to that of a natural born son if the relatives of the deceased should consent to this.

## PART II. *The Role of the Courts and Legislature*

Q. 1. Should any legal limitation be placed on the power of a Chinese testator to dispose of property for purposes of ancestral worship?

The answer to this, with one exception, was to recommend that the law provide that only a certain proportion of an estate be allowed to be disposed of in this way.

The only exception to this unanimity was *MKL* who thought the present position should be maintained subject to the existing rule against perpetuities. It was, however, agreed by all in a later question that some limitation be imposed on the freedom of a testator to dispose of his property as he wished.

Q. 2. Is it desirable to allow marriage by proxy?

With two exceptions the answer to this question was in the negative. *KCC* thought that it was desirable given that both parties agreed but *PCW* while noting that marriage by proxy was and is rare in China and that it had been recognised by the courts in Hong Kong [there is no reported case on this] thought that there should be no legislative interference.

Q. 3. Should any modification be made to the laws of 1843<sup>9</sup> relating to adoption and the rights of such children to inherit?

The answer to this question was in the affirmative with one member, *KCC*, advocating that an adopted child should take half the estate and another member, *SNC*, advocating that modifications be made to make the existing law conform to current laws in China on the subject. *MKL* thought that no modification was necessary but that existing laws should be codified to avoid the calling of expert evidence.

9. The Supreme Court Ordinance No. 15/1844 provided that English law as at 5th April, 1843 should be the general law of the Colony. *cf.* entry (6) above.

Q. 4. Should Hong Kong courts have jurisdiction to hear divorce and nullity suits concerning Chinese who are not domiciled in Hong Kong but are resident there?

Generally the answer was in the affirmative given a residence period of at least five years (*SNC* and *PCW*). *KCC* thought that if the marriage was solemnized in open ceremony and witnessed by two persons (presumably in Hong Kong) then the court should take jurisdiction. *MKL*, however, thought that the present law, *i.e.* the principles of private international law, should be maintained.

### SUMMARY

Before going on to consider the relation of these answers to the *ratione decidendi* set out above it is as well to note some peculiar features relating to the participants in this questionnaire.

First, the participants, with the possible exception of *TORA*, all represent what might be termed the western educated or western influenced stratum of Hong Kong society. Moreover, the persons and bodies represented seem to belong to the economically wealthy class. Nowhere in the report is there any description of properly planned and implemented interview research carried out at all levels of Hong Kong society. In addition we have no assurance that the answers given to the questionnaire are valid expressions of the opinions of the totality of the persons represented in answering. This is "legislation from the top" with a vengeance!

Second, and even more interesting, there are various conflicting strata in the answers given. These seem to have been dictated by the various ideological standpoints of the members. We may summarize these, somewhat unfairly, but adequately for present purposes, as follows.

#### *HKCW*

This body<sup>10</sup> was mainly concerned to abolish the future continuance of polygamy though protecting the incidents attaching to any existing status founded in polygamy. Within this general framework of agreement there was, however, some dissension as to the rights of existing concubines to succeed to a deceased estate. In the event it was recom-

10. Includes the following affiliated associations:

Hong Kong Chinese Women's Club.

South China Athletic Association (Women's Dept.).

Hong Kong and Kowloon Chinese Women's Association.

Hong Kong and Macao Chinese Women's Welfare Association.

Hong Kong Women's International Club.

Helena May Institute for Women.

Diocesan Old Girls' Association.

Salvation Army.

Hong Kong University Alumni Association (Women's Dept.).



mended that concubines be allowed maintenance out of an estate but not be entitled to take letters of administration.

*LKH*

This member was intent upon preserving so far as was possible traditional Chinese customs. He was willing to accept alteration in the law to accomplish this end.

*KCC*

This body could be described, to all intents and purposes, as “middle of the road.” It was generally in favour of the abolition of polygamy though in other matters it favoured the retention of existing custom.

*PCW and SNC*

These members, whilst agreeing generally with the *HKCW*'s proposed reforms, wished to see that any reform made was compatible, at least, with current law in mainland China.

*MKL*

As pointed out earlier this member was, in general, opposed to any change in the law. So much so, in fact, that he was provided with a separate space to express his views. These may be summarised in the proposition that existing custom should not be disturbed either as to its substance or to the mode of its implementation.

*TORA*

The answers given by this body to the questionnaire were emphatically in favour of the retention of substantive custom involving inheritance and ancestor worship — *i.e.* they were concerned to preserve the traditional Chinese family and the power structure contained therein. On other matters the members of this body showed less interest to the point, at times, of inconsistency.

*SMC*

This member did not express an opinion in many cases but where he did, he was generally in favour of some reform especially in giving greater individual freedom as to disposition of property. In this respect his views may be contrasted with those of *TORA*.

It should be noted that the Report itself<sup>11</sup> expressly draws attention to the unsatisfactory nature of the attempts of the Committee to ascertain public opinion. The point is made that detailed comment is not feasible until some specific legislation is drafted on the various topics considered by the Committee.

11. Ch. IV, pp. 32-35.

The recommendations of the Committee have been effective in only one respect. This concerns the question of domicile as determining the jurisdiction of Hong Kong courts.<sup>12</sup> The committee recommended the passing into law of certain presumptions in favour of the acquisition of a domicile of choice which would give the court jurisdiction. These presumptions, which rest upon residence in Hong Kong for various periods, birth in Hong Kong and the acquisition of British nationality, have been given effect to in the Divorce (Amendment) Ordinance.<sup>13</sup>

This has been the only implementation of the Committee's recommendations in Hong Kong. The formal legal system relating to Chinese custom thus remains largely unchanged and is as set out in the summaries given above.

M. B. HOOKER\*

12. The problem here was that on authority of *Lau Leung Shi v. Lau Po Tsun* (1911) 6 H.K.L.R. 149: entry (18) above, it was impossible for a Chinese who continued to worship in the traditional manner to get a domicile of choice in the colony.

13. No. 44/1956.

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