NATIVE LAW AND THE COMMON LAW: CONFLICT OR HARMONY‡

> "When I reflect upon the spread and acceptance of our common law principles throughout the United States and Canada and Australia and New Zealand, may I not say that nothing has left a deeper or more beneficient impression upon the Western World than the Common Law of England. Its work can never be undone. Its spirit and its ideals must ever live. If this country were to sink tomorrow beneath the waves, the record of the Common Law of England and would stand forever on the noblest pages of history."
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> Mr. Justice McCardie, *The Law, The Advocate and the Judge* (1927), p. 17.

> "With such content as we may, we must even believe that our lady the Common Law, like many other good-natured people busied with more matters than they can attend to in person, allowed herself to be put upon and her customers harassed by fussy, greedy and sometimes dishonest underlings."
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> Sir Frederick Pollock, *The Genius of the Common Law* (1912), p. 37.

Perhaps one of the least objectionable features of British imperialism has been the introduction into colonial territories of the English concept of the rule of law. This stems from the fact that, as is probably known to the veriest tyro in the legal world, when an Englishman goes abroad he takes his law with him. As long ago as 1693 Holt C.J. pointed out: "In case of an uninhabited country newly found out by English subjects, all laws in England are in force".[1] The extent of this incorporation was reduced somewhat by the Master of the Rolls thirty years later:

> "If there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England; though, after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them."[2]

Basing himself upon these two judgments, but at the same time restricting the scope of English law still further, Blackstone wrote that:

‡ Based on a paper, 'The Common Law and Native Systems of Law', prepared for a Duke University Symposium, *International and Comparative Law of the Commonwealth,* ed. R. R. Wilson (Durham: Duke University Press) 1968, p. 81.

1. *Blankard* v. *Galdy,* 2 Salk 411.
2. *Anon.* (1722), 2 P. Wms. 75.

> "Colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, . . . the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council."[3]

As Blackstone pointed out, this situation only prevailed in territories which had not been formerly occupied by a recognised sovereign. In so far as ceded or conquered territory was concerned, English Common Law recognised that the already-existing law prevailed until such time as it was amended by the King. This practice reflected convenience, for an immediate abrogation of existing law could easily produce anarchy. Moreover, where a *lex loci* already existed, the local residents, unlike their English conquerors, would be unacquainted with English law, but would be accustomed to a legal system that was already operating.[4] This attitude underlays the judgment of Chief Justice Marshall in *Worcester* v. *Georgia*[5] in so far as the North American Indians are concerned: "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws". This approach was confirmed by the Supreme Court in *Ex parte Crow Dog*,[6] holding that an Indian who had murdered another Indian on a reservation was not amenable to federal criminal law, but only to tribal law. This situation was altered by statute two years later.[7] Further, in most cases conquered territories were acquired from Christian rulers, and a different approach was adopted to fellow-Christians as distinct from barbarians.[8] Newly-discovered territories possessed no recognised legal system; it was therefore obvious that the new settlers would apply the law to which they were accustomed, although some of its manifestations might differ from the law known and practised in the Royal Courts of Justice. It was unlikely, for example, that the settlers would be unduly concerned with the intricacies of land law as it had developed in England expressing itself in such rules as that in *Shelley's* case, for this rested on "reasons affecting the land and society in England and not reasons applying to a new colony".[9]

3. 1 *Commentaries* (10th ed., London: A. Strahan, 1787), p. 108.
4. *Freeman* v. *Fairlie* (1828), 1 Moo. Ind. App. 305, 324.
5. (1832) 6 Pet. 515, at 542.
6. (1883) 109 U.S. 556.
7. 1885, 18 U.S.C.A. sec. 548.
8. See, e.g., *Calvin's Case* (1608), 7 Co. Rep. la; *Campbell* v. *Hall* (1774), 1 Cowp. 204; *Adv.-Gen. of Bengal* v. *Ranee Surnanoye Dossee* (1883), 9 Moo. Ind. App. 391.
9. *In re Simpson's Estate* [1927] 3 W.W.R. 534, 539.

It should not be thought that it was only the English who took their law with them when they went into foreign climes. A somewhat similar practice operated in ancient Rome, for in classical law the inhabitants of conquered territories did not become citizens: "The vast majority of Roman subjects are, so far as her law is concerned, *peregrini,* 'foreigners', outside the pale of the strict law and only entitled to such rights as all free persons have under the *ius gentium",* with the *ius civile* applying only to citizens.[10] Bryce's description of the situation is similar to that of Blackstone concerning English possessions and the rights of the inhabitants:

> "[*peregrini*] had their own laws or tribal customs, and to them Roman law was primarily inapplicable, not only because it was novel and unfamiliar, so strange to their habits that it would have been unjust as well as practically inconvenient to have applied it to them, but also because the Romans, like the other civilized communitites of antiquity, had been so much accustomed to consider private legal rights as necessarily connected with membership of a city community that it would have seemed unnatural to apply the private law of one city community to the citizens of another .... Each province was administered by a governor .... The governor's court was the proper tribunal for those persons who in the provinces enjoyed Roman citizenship, and in it Roman law was applied to such persons . . . No special law was needed for them. As regards the provincials, they lived under their own law, whatever it might be, subject to one important modification. Every governor when he entered his province issued an Edict setting forth certain rules which he proposed to apply during his term of office...."

but when the distinction between citizens and provincials disappeared, Roman law became applicable throughout the Empire and to all its inhabitants.[11]

The Dutch, too, took their law with them and the principles of Roman-Dutch law were introduced into their territories. Thus, "when Van Tiebeck and his band of pioneers settled at the Cape in 1652, they introduced the general principles and rules of law prevailing at that date in the Netherlands",[12] but "the first settlers carried with them only those laws which were applicable to the circumstances of this country".[13] The purity of Roman-Dutch law as the common law of those Dutch colonies which were conquered by the British was affected by the fact that, for the main part, it was English-trained judges and lawyers who were called upon to apply it. In so far as Ceylon is concerned, it has been said that "the Roman-Dutch law, as applied by the British, was like an old kadjan roof; as it got older it let in the outside elements, and they were mainly English law".[14] The same criticism has been made by the courts in South Africa:

10. Herbert F. Jolowicz, *Historical Introduction to Roman Law* (3rd ed., Cambridge: Cambridge University Press, 1961), pp. 71, 101.
11. James Bryce, *Studies in History and Jurisprudence* (Oxford: Clarendon Press, 1901), pp. 77-78.
12. George Wille, *Principles of South African Law* (Cape Town and Johannesburg: Juta and Co., 1961), p. 38.
13. *Seaville* v. *Colley* (1891), 9 S.C. 39, per de Villiers C.J., at p. 42. See also *Wijekoon* v. *Gunawardena* (1892), 1 S.C.R. 147, 149.
14. W. I. Jennings and H. V. Tambiah, *The Dominion of Ceylon* (London: Stevens and Sons, 1952), p. 198.

> "Here we have a phenomenon that appears all too often in our jurisprudence. A Roman-Dutch legal rule is compared with its English counterpart; with pleasure, if indeed not with joy, it is stated that there is no difference, and then the door is wide open for the reception of English law .... Gradual adaptation to new circumstances and problems is a type of development that leads to strength; uncontrolled development on the other hand leads to malignant growths and decay."[15]

In fact, it has been stated that it was because of the wrong interpretation of Roman-Dutch law and the grafting thereon of English principles by the Judicial Committee of the Privy Council in *Pearl Assurance Co.* v. *Union Government*[16] that South Africa abandoned appeals to that body.[17]

Apart from the introduction of some system of common law — for in South Africa, Southern Rhodesia, Basutoland and Ceylon, Roman-Dutch law is the common law — by settlers or conquerors, it may happen that a territory expressly adopts an alien system of common law. Thus, in British Guiana "An Ordinance to codify and to substitute the English common law and principles of equity for the Roman-Dutch common law" has been enacted. In Liberia, which has never been a British colony, similar legislation has been passed. . In 1820 "the common law, as in force and modified in the United States and applicable to the situation of the people" was introduced, but in 1824 this was widened to include "the common law and usages of the courts of Great Britain and the United States", to which there was added in 1839 "such parts of the common law as set forth in Blackstone's *Commentaries* as may be applicable to the situation of the people". Finally, the 1956 Code provides:[18]

> "Except as modified by laws now in force and those which may hereafter be enacted and by the Liberian common law, the following shall be, when applicable, considered Liberian law: (a) the rules adopted for chancery procedure in England, and (b) the common law and usages of the courts of England and of the United States of America, as set forth in case law and in Blackstone's and Kent's *Commentaries* and in other authoritative treaties and digests."[19]

In so far as British colonial territories are concerned, after the initial introduction of the English common law, legislation has tended to be introduced specifying what parts of English law are to be applied in the territory in question, and indicating an operative date. In the Gold Coast, for example, the relevant ordinance provides that "the common law, the doctrines of equity, and the statutes of general application, which were in force in England at the date when the Colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the court",[20] together with

15. *Preller* v. *Jordaan* (1956) (1) S.A. 483 (A.D.) *per* van den Heever J.A. at 504.
16. [1934] A.C. 570, *per* Lord Tomlin at 585.
17. Aquilius, "Immorality and Illegality in Contract", *So. Afr. L.J.,* LX (1943), 468, 476.
18. Title 16, Chap. 3, s. 40.
19. A. N. Allott, *Essays in African Law* (London: Butterworth, 1960), p. 12.
20. Sup. Ct. Ord. No. 4, 1874; Cts. Ord. 1951, s. 83.

the law and practice in divorce which is in force in the Probate, Divorce and Admiralty Division of the English High Court.[21] This has resulted in the invidious consequence that "when a principle or doctrine of the English common law has been abolished by a post —1874 British statute of general application in the United Kingdom, but which has not been expressly or implicitly applied to Ghana, the old principle or rule must still be followed in Ghana until altered by local legislation".[22]

There are some colonial territories where no calendar date is specified, reference being made merely to the coming into force of the particular ordinance, and occasionally it is specified that the common law is only introduced into a specific field of law. In so far as Malaysia is concerned, the Civil Law Enactment of 1937[23] provided that 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". This was amended some twenty years later, so that

> "save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England at the date of the coming into force of this Ordinance; provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."[24]

It is further provided that in commercial cases "the law to be administered shall be the same as would be administered in England".[25] A somewhat similar situation prevails in Singapore, where,

> "in all questions or issues which arise or which have to be decided in the Colony with respect to the law of partnership, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by statute."[26]

In the case of Papua and New Guinea, the situation is somewhat mixed due to the way in which the two parts of this Territory came under 'British' control. In 1888 Papua, then known as British New Guinea, became a British settlement, and in the following year it was enacted that "the principles and rules of common law and equity that

21. T. O. Elias, *Ghana and Sierra Leone* (London: Stevens and Sons, 1962), p. 116.

22. Elias, *Ghana and Sierra Leone*, p. 116 (citing *Mersah* v. *Konongo*). See also *Brand* v. *Griffin* (1908), 9 W.W.R. 427, in which it was held that since the operative date in Alberta is 1870, a statute of 1874 is inapplicable.

23. F.M.S. No. 3, s. 2(1).

24. Civil Law Ord. 1956 (no. 5 as amended by No. 41), s. 3(1).

25. S. 5.

26. Civil Law Ord., S. 5.

for the time being shall be in force and prevail in England shall so far as the same shall be applicable to the circumstances of the Possession be likewise the principles and rules of the common law and equity . . . of the Territory of Papua".[27] The Territory of New Guinea came under Australian control in 1921 and was administered separately from Papua until the Second World War, and there "the principles and rules of common law and equity that were in force in England on the ninth day of May, 1921....so far as the same are applicable to the circumstances of the Territory" shall be effective.[28]

It may also happen that the system of prevailing law to which reference is made is not English alone, but also the law which operates in some other part of the Commonwealth. This is the position in Kenya, where the civil and criminal jurisdiction is, so far as circumstances allow, in conformity with Indian Acts in force in East Africa, and,

> "so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and doctrines of equity, and the statutes of general application in force in England on August 12, 1897 .... Provided always that the common law, doctrines of equity and statutes of general application shall be in force in the protectorate so far only as the circumstances of the protectorate and its inhabitants and the limits of H.M.'s jurisdiction permit and subject to such qualifications as local circumstances render necessary."[29]

This provision was commented upon by Denning L.J. in *Nyali Ltd.* v. *Att. Gen.*[30] after he had pointed out that the Crown's perogatives applied within the protectorate since they were the very substance of the common law":

> "Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over; but it also has many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands."

This realistic approach should be compared with *Welbeck* v. *Brown*[31] in which the Chief Justice of the Gold Coast held that "according to the principles of English jurisprudence" a local custom must date back to 1189, a view which was rejected in *Mensah* v. *Winabob,*[32] and which had

27. Courts and Laws Adopting Ordinance 1889 (amended), s. 4.
28. Laws Repeal and Adopting Ordinance 1921 (amended), s. 16.
29. E. Africa O. in C., 1902 (S.R. & O 1902, No. 661, amended 1911, No. 243). For the position in W. Africa see W. C. E. Daniels, *The Common Law in West Africa* (London: Butterworth, 1964), chs. 4, 6.
30. [1955] 1 All. E.R 646, 52, 53 (affirmed [1956] 3 W.L.R. 541).
31. (1882) Sar(bah) F(anti) C(ustomary) L(aws) 172.
32. (1925) Div. Ct. Judgments 1921-5, 172 (Elias, *Ghana and Sierra Leone*, p. 119).

never operated in Singapore, for "the history of Singapore began in 1819, more than 600 years after 1189, and that in itself concludes the matter".[33] In New Guinea the situation concerning custom has been statutorily regulated preventing any reference to 'time immemorial', and allowing the judicial declaration and recognition of recent and altered custom, and since native custom means local custom it may vary from place to place.[34]

The tendency to apply principles of English law because they are those best known to English judges is well-illustrated by the award of Lord Asquith of Bishopstone in *Petroleum Development (Trucial Coast) Ltd.* v. *Sheikh of Abu Dhabi.*[35] The learned arbitrator had to determine the proper law of a contract, conceding that,

> "if any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist .... Nor can I see any basis upon which the municipal law of England could apply .... The terms of [the contract] .... prescribe the application of principles rooted in the good sense and common practice of the generality of civilized nations — a sort of 'modern law of nature'..... But, albeit English municipal law is inapplicable *as such,* some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence — this 'modern law of nature'. . . . [while] the rigid English rules have been disregarded, ... the English rule which attributes paramount importance to the actual language of the written instrument in which the negotiations result seems to me no mere idiosyncracy of our system, but a principle of ecumenical validity. Chaos may obviously result if that rule is widely departed from: and if, instead of asking what the words used mean, the inquiry extends at large to what each of the parties meant them to mean, and how and why each phrase came to be inserted."

The desire to apply and occasionally to limit English common law doctrines in a foreign environment may be illustrated by reference to India and Ghana. Ever since the Charter given by Charles II to the East India Company in 1683, judges in India have interpreted their function as being to judge in accordance with "justice, equity and good conscience". These concepts were "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances",[36] and in 1937[37] Stone C.J. was of the opinion that

> "in considering what is today consonant to justice, equity and good conscience, one should regard the law as it is in England today, and not the law that was part of England yesterday. One cannot take the common law of England divorced from the statute law of England and argue that the former is in accordance with justice, equity and good conscience.... The doctrine of common employment would not apply, not because the case would fall outside the common law doctrine of common employment, but because it would fall inside the Employer's Liability Act.[38] What I desire

33. *Anguillia* v. *Ong Boon Tat* (1921), 15 S.S.L.R. 190, 193.

34. Native Custom (Recognition) Ordinance, 1963, s. 4.

35. (1951) 18 Int. Law Rep. 144, 149.

36. *Waghela Rajsanji* v. *Shekh Masludin* (1887), 14 Ind. App. 89, *per* Lord Hobhouse, at 96

37. *Sec. of State* v. *Rukhminibai,* A.I.R. [1937] Nag. 354.

38. 1880, 43 & 44 Vict. c. 42.

> to point out is that when I find a rule has been abrogated by legislation, that rule becomes an unsafe guide. Even when, as in this case, the rule remains but its practical applicability is by statute very greatly reduced, one is entitled and bound to view it more critically than would be the case if it remained in full force and effect. When one finds it criticised by competent jurists in the country of its origin and followed not because of its infrangible logic but because of its authority, an authority derived from an earlier age when circumstances were different, one is also justified in treating it as an unsafe guide."

No such hesitation was shown in Ghana in 1948 when the doctrine was accepted in *Mensah* v. *Konongo Gold Mines; Ltd.*[39]

The courts in Ghana have also shown a conservative attitude in connection with contributory negligence. In *Amoabeng* v. *Mills*[40] contributory negligence was held to be a complete defence, and despite the passage in England of the Law Reform (Contributory Negligence) Act, 1945,[41] the court followed *Radley* v. *London and North Western Railway*.[42] The law was however changed by the Ghana Civil Liability Act, 1963. The Privy Council, too, has felt constrained to apply the common law rule to an overseas territory even though it has been abrogated in England. When dealing with a case concerning wagering in India, Lord Campbell said:[43]

> "We are bound to consider the common law of England to be that an action may be maintained on a wager,.... and I rejoice that it is at last constitutionally abrogated by the Legislature .... The Statute does not extend to India, and although both parties on the record are Hindoos, no peculiar Hindoo law is alleged to exist upon the subject: therefore this case must be decided by the common law of England."

A case in which English law applied despite the existence of native law was decided in Uganda in 1920. Guthrie Smith J. was dealing with succession to immovables and held[44] that,

> "in the absence of any enactment we must fall back on what English law decided as to its own application to newly acquired territories .... Taking into consideration the general effect of the Uganda Act, 1900, I think I may say we adopted much the same course as was done in the settlement of India which is described in *Freeman* v. *Fairlie*[45] as follows: 'The course actually taken seems to have been to treat the case in a great measure like that of a newly discovered country for the Government of the Company's servants, and other British or Christian settlers using the laws of the mother country, so far as they were capable of being applied for the purpose and leaving the Mohammedan and Gentoo inhabitants to their own laws and customs but with some particular exceptions that were called for by commercial policy or the convenience of mutual intercourse'. If we substitute 'Natives of the Protectorate' for the words 'Mohammedans and

39. Unreported (cited in Daniels, *Common Law in West Africa*, p. 240).
40. [1956] 1 W.A.L.R. 210.
41. 8 & 9 Geo. 6, c. 28.
42. (1876) 1 App. Cas. 754.
339, 348-9.
43. *Ramloll Thackoorseydass* v. *Soojanmull Dhoondumull* (1848), 4 Moo. Ind. App.
44. *Re Mohd Habash, Vasila* v. *Worsta Sophia* (1920), 3 U.L.R. 20, 26.
45. See note 4, above.

> Gentoo inhabitants' .... we shall have a correct description of how the matter has been treated in Uganda. Therefore, apart from the Succession Ordinance, 1906, the law of inheritance for immovables was English law .... as far as regards foreigners and native customs as far as regards Natives of the Protectorate. There is no room anywhere for the application of Mohammedan law to land and it would lead to hopeless confusion if the course of descent of land depended both on tribe and religion. The conclusion is that this case falls to be determined according to the English rules of succession."

The learned judge made no attempt to explain why confusion would be caused by deciding succession cases affecting Mohammedans in accordance with Mohammedan law, while it would apparently not be so caused by applying native custom in the case of Natives. This decision was not cited in *Re Abdulhusen Abhai decd.*[46] nor in *Re Cookman Nugnal Imam Din decd.,*[47] in which it was pointed out that it was "unreasonable to suppose that if the legislature had seen fit to exempt Muslims from an alien system of intestate succession under the Act, it had done so only to make them subject to an equally alien system under the law of England". On the other hand, while local custom is recognised in New Guinea, this does not allow expatriates, be they Chinese, Australians or other Pacific Islanders, to plead a specific deviation from the local law in their favour. By the Native Custom (Recognition) Ordinance such privilege is reserved to the "aboriginal inhabitants of the Territory".[48]

It is particularly in the field of public policy, and especially with regard to morality and marriage, that the strange consequences of the interplay between common and native law become most marked, with judges waxing almost lyrical on repugnancy, barbarism and civilization. An example of this arose recently in an English court. The parties, although Christians, had gone through a customary form of marriage in Nigeria in 1949, and in 1953, in order to obtain a certificate, had followed it by an English registry office marriage. At the time of the marriage, Nigeria permitted polygamy and Wrangham J. held:

> "Whatever might be the effect on the marriage for other purposes and in other courts of the parties being Christians, in this court and for this purpose the Nigerian marriage must be regarded as a polygamous marriage over which this court does not exercise jurisdiction. I therefore pronounce a decree nisi for the dissolution not of the Nigerian marriage but of the marriage in London. I am told that, in fact, that will be effective by Nigerian law to dissolve the Nigerian marriage; but that forms no part of my judgment. That is for someone else to determine and not for me."[49]

The learned judges did not deal with the situation that would have arisen had Nigeria not recognized the validity of the English decree. In such a case the parties would have been in the strange position of finding that though the English marriage had been dissolved, since English law recognizes a polygamous marriage as creating the status of husband and wife (a matter which became of great significance in

46. (1941) 6 U.L.R. 89.

47. (1949) cited in H. F. Moriss and J. S. Read, *Uganda* (London: Stevens and Sons, 1966), p. 401.

48. See above, n. 34. s. 4.

49. *Ohochuku* v. *Ohochuku* [1960] 1 W.L.R. 183, 185.

M. v. *K.*[50]), an attempt by either to enter into a second monogomous marriage in England would have produced a null effect,[51] though it might not have grounded an action for bigamy.[52]

A case in which English colonial judges approached native custom in a similarly cavalier fashion, and one which is still being applied by the courts of the territory in question, is the *Six Widows* case.[53] Here, English judges introduced into Singapore a concept of Chinese law not previously known and which is still not recognized in China.[54] The case concerned the status of Chinese "concubines", and Hyndman Jones C.J. accepted that,

> "the evidence is very contradictory, but I am disposed to think that when it is intended to take a woman into a man's household as a concubine for the purpose of securing a succession, or at all events as more than a temporary mistress, there are some sort of ceremonies; although these ceremonies, in some districts and among some classes are of a more or less perfunctory character, and always much less elaborate than those adopted in the case of taking a t'sai [principal wife]."

Braddell J., whose knowledge of Chinese law was no better than that of the Chief Justice, declared

> "I entirely adopt the exposition of the Chinese law given in the judgment of the Chief Justice and concur with him in the conclusion to which he has arrived, namely, that concubinage is recognized as a legal institution under the law, conferring upon the t'sip [secondary wife] a legal status of a permanent character."

The anxiety of Singapore judges to assert the existence of the marriage bond was recognized by the Privy Council in affirming *Penhas* v. *Tan Soo Eng*[55] in which a form of ceremony was conducted by a Chinese between a Chinese Christian woman and a Jewish man in a house before witnesses, with each of the parties offering prayers in his own way. In the view of the Privy Council, although,

> "it is not suggested that either of the parties is a Christian [,]…. the evidence as it stands sufficiently proves a common law monogamous marriage. The wishes expressed by the respondent and her mother for a Church marriage, the reason why a modified Chinese ceremony was substituted, the presence of Jewish friends at the ceremony, the words spoken by the Chinese gentleman who performed the ceremony as to a lifelong union, the cohabitation as man and wife which followed and continued until the husband's death, and the introduction to a Christian pastor of the respondent as his wife, and last but not least the baptism of their children as Christians, with the approval of their father, all indicate that the spouses intended to contract a common law marriage."

50. *The Times* (London), 29 March 1968. (See n. 60, below).
51. *Baindail* v. *Baindail* [1946] P. 122. See also *Thynne* v. *Thynne*]1955[P. 272.
52. *R.* v. *Sarwan Singh* [1962] 3 All E.R. 612.
53. (1888), 12 S.S.L.R. 120, 187, 209.
54. Information supplied to the writer by senior Chinese members of the Supreme Courts of Singapore and Malaya.
55. [1953] A.C. 304, 318, 319-320.

While it may be true that the parties did indeed intend to effect a lifelong marriage and that this was rendered respectable by the common law being introduced to modify the rigours of the local law, a similar effect might have been obtained had the court adopted the words of Lord Phillimore, that "in deciding upon a case where the customs and the laws are so different from British ideas a Court may do well to recollect that it is a possible jural conception that a child may be legitimate, though its parents were not and could not be called legitimately married".[56]

It should not be thought that the desire to sustain a marriage if that should be possible has been confined to native systems of law. In January 1967 Browne J. was called upon to decide upon the validity of a will and his decision turned on the question of the subsistence of a marriage put forward by a surviving husband who could not remember the name of the Scottish town in which the ceremony was performed. Mr. S. stated that when he returned from a walk,

> "he was informed by the deceased that she had arranged a marriage for the following morning. The next morning they went to a chapel which was in a village hall. The interior resembled a church, with pews, altar rail, dais, combined lectern and pulpit, and a table with a candle and Bible upon it. The priest, who had been expecting them, wore black and conducted a very short service during which S. and the deceased agreed to take each other as husband and wife respectively. Both signed a large book and the deceased was given a certificate which some years later she destroyed after a row with her family. That account of the ceremony was highly improbable, the arrangements were incredibly casual, and grave doubts were necessarily aroused by the failure to remember the date or place of the ceremony, the absence of any record, and the account of the destruction of the certificate. It was clear that if S.'s case rested on his own account alone the Court would have no hesitation in holding the marriage was not proved. [In *Penhas* v. *Tan Soo Eng,* however, the Court accepted equally questionable proof]. On the other hand, the Court was satisfied from independent evidence that for the 14 years after the marriage the defendant and deceased had lived together, and were known as Mr. and Mrs. S. and accepted as a married couple. The deceased always wore a wedding ring and there was strong evidence to suggest that it was not in keeping with the deceased's character to be living in sin."

Since, however, a common law marriage will today only be assumed to exist by the English courts in exceptional circumstances, the marriage was upheld on the basis of repute from cohabitation.[57]

An up-to-date attitude to marriages performed in accordance with native law was shown by a Queen's Bench Divisional Court in March 1968. Justices had committed a 14-year old Nigerian girl to the care of a local authority as being exposed to moral danger and in need of care, protection or control. The girl was living with a Nigerian male aged 28, having married him by Nigerian law in Nigeria where they were both domiciled. The magistrates wrongly concluded that since the marriage was potentially polygamous it could not be recognized in England. The Court held that in so far as the girl's status was concerned, the marriage would be recognized and she would, therefore, be a wife. The

.56. *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529, 543.

57. *Rumsey* v. *Sterne* (1967), *The Times* (London), 12 Jan. 1967.

Lord Chief Justice accepted the decision in *Baindail* v. *Baindail,*[58] and recognized the possibility that even a wife might be the subject of a fit person order. "The question was whether the evidence justified such an order. The justices had found that before the marriage the [man] had lived with a woman and had had three illegitimate children, and that after the marriage at a time when his wife had almost certainly not reached puberty, he had had intercourse with her. After the marriage he had contracted gonorrhoea from a prostitute, but he was now cured and intended to resume intercourse with his wife. The justices had found that the continuance of the association between the girl and the appellant would be *repugnant to any decent minded English person".* Lord Parker was convinced that "they had misdirected themselves and that they were considering the *reactions of an Englishman regarding an English man and woman in the western way of life. A decent Englishman realizing the way in which a Nigerian man and woman were brought up would not say it was repugnant.* They developed sooner and there was nothing abhorrent in a girl of 13 marrying a man of 35. To say the girl was in moral danger would be *ignoring the way of life in which she and her husband had been brought up.* It had been suggested that every time the appellant slept with his wife in England, he was committing a criminal offence under the Sexual Offences Act, 1956, s. 6,[59] which made it an offence for a man to have unlawful intercourse with a girl between 13 and 16 . . . [The Lord Chief Justice did] not think the police could properly prosecute in cases where a foreign marriage was recognized in England . . . Intercourse between a man and a wife was lawful . . . Where a husband and wife were recognized as validly married according to the laws of England, His Lordship would not say the wife was exposed to moral danger because she carried out her wifely duties".[60]

An elightened approach to the native law of marriage and the consequential rejection of English law was shown by Witman J. when called upon to decide whether a marriage between Indians in Canada's North West Territories, and contracted in a form which would have been valid before the introduction of English law in 1870, was to be recognized. He asked,

> "[A]re the laws of England respecting the solemnisation of marriage applicable to these Territories *quoda* the Indian population? I have great doubt if these laws are applicable to the Territories in any respect. According to these laws, marriages can be solemnised only at certain times and in certain places or buildings. These time would be in many cases most inconvenient here and the buildings, if they exist at all, are often so remote from the contracting parties that they could not be reached save with the greatest inconvenience. I am satisfied however that these laws are not applicable to the Territories *quoda* the Indians. The Indians are for the most part unchristianised; they yet adhere to their own particular marriage customs and usages. It would be monstrous to hold that the law of England respecting the solemnisation of marriage is applicable to them .... A

58. See note 51 above.

59. 4 & 5 Eliz. 2, c. 69.

60. *M.* v. *K., The Times* (London), 29 March 1968 (reported as *Alhaji Mohamed* v. *Knott* [1968] 2 W.L.R. 1446).

> marriage between Indians by mutual consent and according to Indian custom since 15th July 1870, is a valid marriage, providing that neither of the parties had a husband or wife, as the case might be, living at the time...."[61]

The learned judge could have reached the same conclusion by holding that a common law marriage had been created, but he preferred to apply the native law, even though he insisted on monogamy.

In the case of American Indians, marriages contracted in accordance with native custom have been upheld, even though they have been polygamous:[62]

> "[A]mong these Indians polygamous marriages have always been recognized as valid, and have never been confounded with such promiscuous or informal temporary intercourse as is not reckoned as marriage. While most civilized nations in our day very wisely discard polygamy, and it is not probably lawful anywhere among English speaking nations, yet it is a recognized and valid institution among many nations, and in no way universally unlawful. We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so regarded .... We have here had marriages between members of an Indian tribe in tribal relations, and unquestionably good by the Indian rules. The parties were not subject in those relations to the laws of Michigan .... We cannot influence or interfere with such marriages without subjecting them to rules of law which never bound them."

A similar view of the inapplicability, if not irrelevance, of the technicalities of English law was taken by the Privy Council in *Amodu Tijani* v. *Secretary, Southern Nigeria*:[63]

> "In interpreting the native title to land, not only in Southern Nigeria, but in other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with."

The Privy Council's attitude has, however, been inconsistent when dealing with terms in colonial legislation which are the same as or similar to terms in English law. Thus, in *Nadarajan Chettiar* v. *Walaawa Mahatmee*[64] the Council pointed out that s. 2 of the Ceylon Moneylenders' Ordinance was the equivalent of s. 1 of the Moneylenders' Act, 1900, and commented that,

> "it is one thing to presume that a local legislature, when re-enacting a former statute, intends to accept the interpretation placed on that statute by local courts of competent jurisdiction with whose decision the legislature must be taken to be familiar; it is quite another thing to presume that a

61. *Reg.* v. *Nan-E-Quis-A-Ka* (1885), 1 Terr. L.R. 211, 215.

62. *Kobogum* v. *Jackson Iron Co.* (1889), 43 N.W. 602, at 605 (per Justice Campbell). (For a novel based on this case, see R. Traver, *Laughing Whitefish,* New York: McGraw-Hill, 1965.)

63. [1921] 2 A.C. 399, 402-3 *(per* Lord Haldane).

64. [1950] A.C. 481, 491-2 *(per* Sir John Beaumont).

> legislature, when it incorporates in a local act the terms of a foreign statute, intends to accept the interpretation placed on those terms by the courts of the foreign country with which the legislature may or may not be familiar. There is no presumption that the people of Ceylon at the relevant date knew, or must be taken to have known, decisions of the English courts under the Moneylenders' Acts, there is no basis for imputing to the legislature an intention to accept those decisions . . . . In *Trimble* v. *Hill*[65] the Board expressed this opinion '....in colonies where a like enactment has been passed by the legislature the Colonial Courts should also govern themselves by it [a decision of the Court of Appeal].' This, in their Lordships' view, is a sound rule, though there may be in any particular case conditions which make it inappropriate. It is not suggested that any such conditions exist in the present case, and the Courts in Ceylon acted correctly in following the decision of the English Court of Appeal."

Local conditions were recognised, however, in *Adegbenro* v. *Akintola*[66] for,

> "while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origins can be traced or to study decisions on the Constitution of Australia or the United States when federal issues are involved, it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution."

Once again the position concerning Indian custom in the United States is more enlightened than tends to be usual with the interplay of English and local law. The Supreme Court refused to uphold a South Dakota presecution for adultery when the parties were Sioux and the offense was alleged to have taken place on a Sioux reservation. In *U.S.* v. *Quiver*[67] Justice Van Devanter stated,

> "At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offences by one Indian against the person or property of another Indian to be dealt with according to their tribal customs and laws . . . . [T]he act of June 30, 1834, ch. 161, sec. 25, 4 Stat. 729, 733, while providing that 'so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country', qualified its action by saying, 'the same shall not extend to crimes committed by one Indian against the person or property of another Indian'. That provision with its qualification was later carried into the Revised Statutes as Secs. 2145 and 2146. . . . There is [no statute] dealing with bigamy, polygamy, incest, adultery or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the administrative officers."

Problems sometimes arise when common law courts exist side by side with Native courts. While the jurisdiction of the two systems is never identical, it may happen that both are competent to deal with certain aspects of the same factual situation. This occurred in Nyasa-

65. (1879) 5 App. Cas. 342, 344 (*per* Sir Montague Smith).

66. [1963] A.C. 614, 632 (*per* Lord Radcliffe).

67. (1916) 241 U.S. 602, at 603-5.

land in 1962. A 'crocodile man' named Elland brought an action before a Native authority court seeking payment from one Odrick who had engaged to pay him £4 10s. if he killed a girl suspected of witchcraft. Elland fulfilled his part of the bargain, but only received 10s. from Odrick, whom he sued for non-payment of debt. The court ordered the latter to pay £2 10s. into court in settlement and gave him a receipt. Both men were both subsequently indicted before the Nyasaland criminal court for murder.[68]

It is perhaps as unfortunate that judges in colonial territories, who are called upon to apply native law and to examine its interconnection with the common law far more frequently than the Privy Council, appear to be more reticent in recognizing local needs and abandoning English concepts. This is the case with Wilson J. in Tanganyika, who held[69] that,

> "a Turu custom whereby the property of a father might be seized in compensation for a wrong done by his son was so repugnant to British ideas of justice and morality that it should not be endorsed in the High Court. It woul.d, however, almost certainly have succeeded in a local court, to which such ideas of vicarious liability would not be so difficult to accept."[70]

Similar attitudes are evident in Nigerian decisions, where,

> "the repugnancy doctrine has also been applied in the field of customary family law. In *Joshua Chawere* v. *Hannah Aihenu*[71] it was held that any native custom to the effect that a wife who committed adultery *ipso facto* of the adultery became the wife of the male adulterer would be repugnant and unenforceable. And in this same field, the English common law concept of "public policy", which would forbid the encouragement of promiscuous intercourse,[72] has been suggested[73] as capable of striking down the now well-established[74] customary rule that an originally illegitimate child whose paternity is acknowledged and recognized by its father thereby acquires the same status as a child born legitimate."[75]

Perhaps one of the most glaring instances of trimming native customary law to the moral code of the English common law is to be seen in *Re GM* (*An Infant*).[76] A Kikuyu orphan child had been placed by the local authorities in a state of *de facto* adoption with a respectable woman, against whom the deceased father's brother brought an action on the ground that by Kikuyu law and custom he had "the right of custody as against all strangers". Miles J. found that it was in the

68. *The Times*, 25 August 1962.

69. *Gwo bin Kelimo* v. *Kisunda bin Ifuti* (1938), 1 T.L.R. (R) 403.

70. J.S.R. Cole and W. N. Denison, *Tanganyika* (London: Stevens and Sons, 1964), p. 131.

71. 12 N.L.R. 4.

72. See "The Ladies' Directory Case" (*Shaw* v. *D.P.P.* [1961] 2 W.L.R. 897).

73. *In re Sarah Adadevoh* (1951), 13 W.A.C.A. 304, *per* Verity CJ., at 310.

74. *Savage* v. *Macfay* (1909), Ren. 504; *Re Sapara* (1911), Ren. 605.

75. F. A. Ajayi, "Interaction of English Law with Customary Law in Western Nigeria, II", *Jour. of Afr. Law,* IV (1960), p. 98 at pp. 104-5.

76. [1957] E.A. 714, 716.

infant's interest to stay with the respondent, and that by English law this was the test to apply in a contest between strangers or between parents. As between a parent and a stranger, however, he held that the parent must prevail unless this would be inimical to the child. He decided that English law applied, but that in determining the child's welfare it was necessary to look to native custom and habits:

> "I am entitled to inquire what the position of the applicant is under native law and then to inquire what would be the rights of a person in that position under English law .... The applicant cannot be said to be a "parent". It is also clear on the evidence that the applicant is, under Kikuyu law, in the position of a guardian with surely all the obligations of a parent. He has greater obligations than a guardian under English law who is not bound to support a child except out of the child's estate. [Since the respondent was a stranger, and the applicant a blood relation] under English law the latter would be held to have a legal right as against all strangers."

It would seem that the learned judge assimilated a "guardian" in Kikuyu law with a "parent" under English law.[77]

It is decisions like this which make one feel that Maine's comment in 1871[78] is still valid:

> "The higher courts, though they openly borrowed the English rules from the recognized English authorities, constantly used language from which it implied that they believed themselves to be taking them from some abstract body of legal principles which lay behind all law; and the inferior judges, when they were applying some half-remembered legal rule learnt in boyhood, or culling a proposition of law from a half-understood English textbook, no doubt honestly thought in many cases that they were following the rule prescribed for them, to decide "by equity and good conscience" whenever no native law or usage was discoverable."

One would like to hope that judges faced with assessing whether native customary law was applicable despite its apparent inconsistency with the common law would adopt the reasoning of Lord Atkin:[79]

> "The more barbarous customs of earlier days may under the influence of civilization become milder without losing their essential character as custom, so as in that form to regulate the relations of the native community *inter se*. In other words, the court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to "natural justice, equity and good conscience". It is the essence of a native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate."

and the Chief Justice of Gambia has recently shown that the concept of "barbarism" is relative and that customs which might not be approved by Christian missionaries are not necessarily contrary to "natural justice". Thus, in *Koykoy Jatta* v. *Menna Camara*[80] he held that female

77. A. N. Allott, note, *Jour. of Afr. Law,* III (1959), p. 72, at p. 74.

78. H. J. S. Maine, *Village Communities in the East and West* (London: John Murray, 1871), pp. 298-9.

79. *Eshugbayi Eleko* v. *Govt. of Nigeria* (*Officer Administrating*) [1931] A.C. 662, 673.

80. (1961), *Jour. of Afr. Law,* VII (1964), p. 35.

circumcision "is your custom but can only be your custom in your own tribe and applied to your own people".

A similarly enlightened approach is to be found in the attitude of Brennan A.J. in the Supreme Court of Papua and New Guinea, when called upon to decide whether insulting words could provoke the ordinary person to kill. The words were spoken by a woman to a man who had used a coarse expression to the woman's daughter; she said "You cannot find a woman to marry, and if you talk like that to a girl child you will die still unmarried". The learned judge thought that in "western communities which apply common law principles, the view that words alone cannot be relied upon as a provocation has hardened since the seventeenth century. As a general proposition that thesis is hardly open to dispute, but it does not necessarily follow that the same principle should apply in a native community where sophistication does not approach to that of, say, seventeenth century England, where a type of insult such as the here in question is calculated and not infrequently intended to throw a man into an ungovernable rage".[81] A somewhat similar attitude is evident in the approach of Smithers J. in *R.* v. *Rumints-Gorok*,[82] who considered that "for the exemplification of the ordinary man [in the Territory] one must take the ordinary native living the rural life of low standard led by the accused and his relatives and similar lines".

The problems involved when an outsider is called upon to assess native customary law are also evident in the attitude of India Bureau officials of the United States,

> "who disapproved of the 'uncivilized' practices of the Indians and sought to substitute a 'civilized' system of 'courts of Indian offenses' in which the superintendent of the reservation claimed the right to act as lawmaker, chief of police, prosecutor, witness, and court of appeal. This allegedly 'civilized' system of justice was in force on a number of reservations from 1884 until 1935, when it was superseded by a more liberal system which made the so-called Courts of Indian Offenses responsible to the Indian tribes and terminated the reservation superintendent's power to control proceedings in these courts."[83]

In Ceylon, Roman-Dutch common law has had to give way before the customary law of a particular community, for while,

> "no Court would recognize as reasonable a custom which deprived a section of the community of its common law rights in the freedom which the custom is supposed to regulate, it must be remembered that in Ceylon there are customary laws governing people, and if it could be proved that such customary laws enunciate principles which are in derogation to the general principles of Roman-Dutch law, it is the customary law which would govern such a matter to the exclusion of Roman-Dutch law."[84]

81. *R.* v. *Awabe* (1960) unreported (c. J. R. Hookey, 'The "Clapham Omnibus" in New Guinea', in B. J. Brown, *Fashion of Law in New Guinea* (Sydney, Butterworths, 1969), p. 117, at p. 126).

82. [1963] P. & N. G.L.R. 81, 83. See also *R.* v. *Zariai-Gavene* [1963] P. & N. G.L.R. 203, in which the judge expressly took into consideration the effect of the words spoken upon a Goilala villager, of whom the accused was one.

83. Felix S. Cohen, "Indian Rights and the Federal Courts", *Minn.* L.R., XXIV (1939-40), p. 145, at p. 153.

84. *Fernando* v. *Fernando* (1920), 22 N.L.R. 260, *per* Bertram C.J.

Where Roman-Dutch law happens to be the common law, problems sometimes arise not only because of the relevance of native law, but also because the concept being examined is also known in England and the judges are frequently English trained. Mr De Silva, delivering judgment on behalf of the Privy Council, dealt with this problem in so far as it affected accessories after the fact of murder:[85]

> "Under section 2 of the General Law Proclamation[86] the common law of Basutoland "shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope" .... The determination of the question before their Lordships depends on the Roman-Dutch common law, which is the common law of the Cape of Good Hope and is also the common law in force in South Africa .... It does not necessarily follow from the fact that the term 'accessory after the fact' has been adopted from the English law that it has the same meaning in the law of South Africa as it has under the English law. No doubt it would retain much of the connotation which it possessed under the English law, but its meaning in the country of its adoption could naturally and properly be influenced by the system of law prevailing in that country, namely the Roman-Dutch law. This was almost inevitable, as the term had to be used in relation to, and in the course of administration of that law."

In the instant case, while the accused was not guilty under English law, he was guilty under the Roman-Dutch common law by which the case was governed.

The importance of South African decisions in determining the meaning of Roman-Dutch law for those areas in which it is the common law remains, even though South Africa has become a Republic outside the Commonwealth. This is illustrated by the comments of Lord Donovan on behalf of the Privy Council in *Mapolisa* v. *R.*[87]

> "The common law in force in the Cape of Good Hope (now part of the Republic of South Africa) on the date specified [by the High Court Act of Southern Rhodesia, 1893] was, and remains, Roman-Dutch law. Under the law a *socius criminis* [accomplice] is not regarded as committing the self-same crime as the principal perpetrator but as committing instead the offence of aiding and abetting that crime .... Even if the Roman-Dutch common law regarded the *socius criminis* as committing the very crime perpetrated, it did so only in relation to crimes which were offences created by that common law. Since Roman-Dutch law is the common law of Southern Rhodesia, judicial decisions given in the courts of what is now the Republic of South Africa have relevance in Southern Rhodesia and are applicable subject to any statutory modification of the law in Southern Rhodesia. The Appellate Division of the Supreme Court of South Africa served until recent times as a Court of Appeal for Southern Rhodesia. During that period its decisions were binding in Southern Rhodesia, and while this technically no longer so, those decisions continue to have persuasive authority."

It is to be hoped that the reduction of South African appellate decisions to a level of persuasive rather than binding authority, will not result in the elevation of decisions of the English Court of Appeal on similar causes to the level of compulsive authority.

85. *Nkau Majara* v. *The Queen* [1954] A.C. 235, 240-1.

86. Laws of Basutoland, cap. 26.

87. [1965] A.C. 840, 857-8.

From what has been said it is clear that while the introduction of the common law into native societies has undoubtedly led to some modification of local native customs which were not acceptable to western Christian society, and has resulted in the expansion of the scope of the rule of law as understood in such society, it remains true that too often the judges called upon to apply the one or the other or an admixture of the two have tended to disregard local conditions or susceptibilities, and have frequently stretched English concepts as if their task lay in creating replicas of the English legal system wherever English-trained judges held sway. This situation was condemned by Sir Frederick Pollock in so far as India was concerned in 1912:

> "One may find indeed that imitation is now and then carried to excess. Not only the decisions of Indian superior courts and of the Judicial Committee on appeal therefrom, but those of English courts, are cited wholesale throughout British India, frequently by advocates who cannot know much of the common law and by judges or magistrates who may known as little; and the citations, one suspects, are too often not even from the report but at second hand from textbooks. Even technical rules of English real property law have been relied on by Indian courts without considering whether they had any reasonable application to the facts and usage of the country. Some Indian judges, even in the superior judgment seats of the High Courts, have forgotten that the law they administer .... is not English law as such, but 'justice, equity and good conscience' interpreted to mean as much of English jurisprudence as appears to be reasonably applicable, and no more. Bland following of English precedents according to the letter can only have the effect of reducing the estimation of the common law by intelligent Indians to the level of its more technical and less fruitful portions and making those portions appear, if possible, more inscrutable to Indian than they do to English lay suitors,"[88]

It would appear that the underlying basis of these comments is true in so far as the Privy Council is concerned even as recently as 1955. In *Leong* v. *Lim Beng Chye*[89] the issue concerned the validity of restraints on marriage in Penang, and the opinion on the Board was delivered by Lord Radcliffe:

> "The considerations which have influenced the Court of Appeal can be plausibly restated in the proposition that the rule of English law ought not to be applied by the courts in Malaya, having regard to the differences of race and social custom that separate the one country from the other. Something like this proposition was indeed advanced by the respondent's counsel in his argument on the appeal. The rule in question, it was said, was a rule of construction only, which, originating in an attempt to correct a social malady that prevailed in one period of the Roman Empire, had found an ambiguous and rather restricted lodging in one part of the law of England. It would be wrong to resort to it when dealing with the construction of wills made by residents of Malaya, many of whom inherit customs and traditions very different from those of the English race. Their Lordships are far from denying that there is force in an argument on these lines. It is very natural to see something anomalous in the introduction into Malaya of a special rule of English law of this kind. But

88. *Genius of the Common Law*, Frederick Pollock (New York: Columbia College, 1912), p. 92. On the position of Indian law generally, see Setalvad, *The Common Law in India* (London: Stevens and Sons, 1960), ch. 1. See, however, Setalvad, *The Role of English Law in India* (Jerusalem, Magnes Press, 1966), in which the learned author examines the suitability or otherwise of English law under Indian conditions, and forecasts the emergence of Indian legal thought as a contributing force to Anglo-Saxon jurisprudence.

89. [1955] A.C. 648, 665-6. ,

> English law itself has been introduced into Penang. . . . 'so far as it is applicable to the circumstances of the place';[90] and while so much of that law as can be said to relate to matters and exigencies peculiar to the local condition of England and to be inapplicable to the conditions of the overseas territory is not being treated as so imported, their Lordships are of opinion that the process of selection cannot rest on anything less than some solid ground that establishes the inconsistency; it is any solid ground of that sort which is lacking in this case; not the less when it is recalled that the testator made the will in the English language, and employed in it forms and legal conceptions that are wholly derived from English law [this is to ignore the fact that the language of the testator was almost certainly English as it is with so many Straits Chinese; that the lawyer who drafted the will was English-trained; and that the language of the law in Malaya at that time was English]. In fact, if the English law was so far imported into Penang as to nullify through the rule against perpetuities a Chinese lady's testamentary disposition relating to a family burying place and a house for performing religious ceremonies to the memory of her dead husband,[91] it would be very hard to say wny there was not also imported the English rule as to the effect of conditions of partial restraint of marriage .... This rule .... is not merely a rule of construction, since its history shows that it owes its existence to a particular conception of what public policy required, even though that conception never prevailed in the English law as a whole. Yet there is nothing that is peculiar to the local conditions of England or, for all that appeals, anything necessarily inappropriate to the circumstances of Malaya, in a reluctance on the part of the courts of law to allow a person's decision whether or not to enter the state of matrimony to be overhung by [such] a condition."[92]

A somewhat different approach by non-native judges is to be found in the treatment of North American Indians: "Where [federal] statutes do not reach, Indian custom is the only law. As a matter of convenience, the regular courts (white men's courts) tacitly assume that the general law of the community is the law in civil cases between Indians; but these courts will apply Indian custom whenever it is proved".[93]

It is perhaps unfortunate that not enough colonial legal officers have been prepared to follow the lead of such persons as Sissons J. in the North West Territories[94] and depart from the rigorous application of legal rules when they consider justice and native interests required such action. Among those who have may be numbered Mr. Austin Coates, a former Special Magistrate in Hong Kong who never became legally qualified, and therefore found it comparatively simple to apply rough justice in accordance with local Chinese custom.[95] Others have recognized that the judicial process itself is likely to lead to injustice and have found their true role to be that of a mediator, even though the 'case' before them may appear as a formal legal process. This is

90. *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381, 393.

91. *Ibid*., p. 393.

92. See, however, *Adeyinka Oyekan* v. *Musendiku Adele* [1957] 1 W.L.R. 876, in which Lord Denning remarked that in Nigeria Government grants of land "do not convey English titles or English rights of ownership. The words 'his heirs, executors, administrators and assigns forever' are to be rejected as meaningless and inapplicable in their African setting" (p. 882).

93. W. G. Rice, Jr., "The Position of the American Indian in the Law of the United States", *J. Comp. Leg.* (3rd Ser.), XVI (1934), p. 78, at p. 90.

94. J. Sissons, *Judge of the Far North* (Toronto: McClelland and Stewart), 1968.

95. A. Coates, *Myself a Mandarin* (London; Muller), 1968, esp. pp. 22-5, 204-12.

likely to be more successful if the judicial officer is aware of native susceptibilities, reactions and habits. Such a case came before a native 'specialist' local court magistrate in Wewak, New Guinea, in 1967.[96] Joana claimed that Anton had married her at Rabaul, paying the requisite bride-price. She contended that the custom of her people was 'one man and one wife'. A child had been born, but she sought dissolution of the marriage on the grounds that Anton was interested in Agnes, whom he regarded as his second wife, and as he had told Joana to return to Rabaul. Anton complained of Agnes's conduct towards him and his relatives and pointed out that she could not work because of the child and so he had to get another wife, but "I have not paid Agnes's bride-price yet. However, since she has been in my village for one week, we claim it is a marriage by native custom. I believe her parents would not dispute her marrying me". The magistrate advised them that in his view "a valid marriage obtained between Joana and Anton by native custom, bride-price having paid; the 'marriage' between Agnes and Anton was not a valid marriage according to native custom, no bride-price having been paid to Agnes's parents and no celebrations held by way of recognition of marriage in accordance with the local custom; Joana would be entitled to have her marriage dissolved by native custom since in her community there should be only one woman and one man in a marriage". Joana thereupon agreed to withdraw her application for dissolution, provided Anton would send Agnes away. Since he agreed, the magistrate succeeded in preserving a marriage in circumstances where had there been a formal local court hearing he would almost certainly have found it necessary to issue an order for dissolution in accordance with the Local Courts Ordinance, 1963, s. 17.

Addressing the International Commission of Jurists in 1966, Judge Vivian Bose remarked that "in developing countries the rule of law is often being equated with the former foreign domination . . . These new nations must be shown that law was not a western product, but something grounded in their own traditions. Institutions rooted in their own custom could be raised and moulded to modern forms".[97] An early recognition of the need to acknowledge the existence of native institutions of law was shown by Lord Sumner[98] who pointed out in 1919 that

> "the estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions of the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them .... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law."

With the rise as new independent States of territories which were formerly colonies, and the feelings of national pride which their people

96. *Joana-Vapor* v. *Anton Susami and Agnes-Daporobu,* reported in Brown, *op. cit.,* n. 81 above, p. 209.

97. *The Times* (London), Oct. 1, 1966.

98. *In re Southern Rhodesia* [1919] A.C. 211, 233-4.

enjoy, together with the gradual replacement of expatriate lawyers and judges and the retreat from the Judicial Committee of the Privy Council as the supreme court of appeal, we are on the threshold of a new relationship between the common law and native systems. Those English judges who remain, and the English lawyers who have gone out to staff the law schools, are conscious of the realities that surround them. While there is still the need to supplement the law and realization that what has been past practice cannot be abandoned, there is growing recognition that the local people will not be satisfied with the example of their former rulers and that, in any case, local needs require more than a salvish adoption of the common law. Further, the principles of public policy and concepts of civilization understood in such native societies are no longer seen as inferior to those of another legal system as realized in the United States in so far as Indians on the reserves are concerned a generation ago.[99] The common law has served the purpose of making the basic principles of a western view of the rule of law understood and appreciated. If it is to continue to play a role, (English) common lawyers must be prepared to see its adaptation and rejection in issues where, in the past, it might have been adopted either in full or in amended form. It may well be true that "the only realistic course [is] one that leads towards some kind of association or synthesis of western-derived law and custom and procedures of the villages".[100] If common lawyers do not adapt themselves to this view and continue to look down upon "barbaric" and "uncivilized" systems, they may find that there is a reaction which results in a total rejection of the influences of the common law, instead of this being but one of the various systems of law that nationalist lawyers and judges seeking to serve the needs of their people are prepared to investigate and adapt as their requirements demand.

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99. See note 83 above.

100. B. J. Brown, 'Justice and the Edge of Law: Towards a "People's" Court', in Brown, *op. cit.,* n. 81 above, p. 181, at p. 183.

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