# CUSTOMARY MARRIAGES AND THE WOMEN'S CHARTER: LINGERING DOUBTS

Ten years have passed since the Women's Charter* of Singapore came into operation. But certain doubts concerning the position of customary marriages, especially in relation to the granting of matrimonial relief, have not been solved by judicial decision. I propose here to comment briefly on these doubts in the hope that both bench and bar may, when the occasion arises, show the way to their removal.

*Validity of Customary Marriages*

Section 166 (1) of the Charter declares that "Nothing in this Act shall affect the validity of any marriage solemnized under any law, religion, custom or usage prior to the date of the coming into operation of this Act". This section preserves customary marriages validly contracted before 15th September 1961.

The position after this date was originally unclear. Part III of the Charter governs the contracting of marriages in Singapore. It lays down the procedure to be followed before a marriage can be solemnized. The whole process of giving notice to the Registrar, making statutory declarations and getting parental consent, if necessary, culminates in the issuing by the Registrar of a "certificate for marriage".[1] The actual solemnization of the marriage may be before the Registrar or "any other person to whom a licence to solemnize marriages" has been granted by the Minister.[2] Failure to comply with the procedure in Part III is an offence:[3] but would the marriage necessarily be void as a result?

Today it is clear that a marriage in Singapore is void which is not solemnized under a certificate for marriage: section 21(1) as amended in 1967 says so. Yet before the amendment, the subsection read: "No marriage shall be solemnized unless a certificate for marriage... has been delivered to the person solemnizing the marriage." Would an infringement of this provision have rendered a marriage void? No reported case deals with the point. But unreported decisions of the High Court support the view that between 15th September 1961 and 2nd June 1967 (the date the 1967 Amendment came into force), customary marriages completely outside the Women's Charter, so long as they were

* Singapore Statutes, Revised Edition, 1970, Cap. 47.

1. ss. 13-16.
2. s. 8.
3. s. 39(3).

in fact monogamous, are valid.[4] Moreover, the minimum age provision of the Women's Charter seems to be inapplicable to these marriages, for section 9 of the Charter before the 1967 Amendment read: "Any marriage purported to be solemnized under this Part of the Ordinance shall be invalid if at the date of the marriage either party is under the age of eighteen years unless the solemnization of such marriage was authorized by a licence granted by the Minister under the provisions of section 20 of this Ordinance." A customary marriage without a certificate for marriage is certainly not a marriage "purported to be solemnized under" the relevant part of the Charter. However, a series of unreported cases have held that this is not so, and that the Chinese customary marriages under discussion are void if they infringe section 9.[5] On the other hand section 10, laying down the prohibited degrees of consanguinity and affinity, was not even before the 1967 Amendment limited in the same way. Infringement of these prohibited degrees will, therefore, render a customary marriage between 15th September 1967 and 2nd June 1967 void.

Marriages which are in fact polygamous cannot be validly contracted in Singapore since the coming into force of the Charter. There is no doubt that if the customary marriage is a second or subsequent marriage it will be void.[6]

Even after 2nd June 1967, however, customary marriage laws still have a part to play in marriages under the Women's Charter. First, once a certificate for marriage has been issued, the intended spouses have a choice as to what ceremony of marriage they want to go through,[7] since the Charter defines solemnization, with its grammatical variations and cognate expressions, to include "the contracting of a marriage or effecting a marriage in accordance with the law, religion, custom or usage of the parties or any of the parties thereto".[8] An offence will be committed if the person solemnizing the marriage is not authorized by the Minister to do;[9] but that should not affect the validity of the marriage. This point may well be academic, since the overwhelming

4. I am indebted to Mr. Joshua Lim of the Legal Aid Bureau for the contents of these decision. They include *Loh Yew Kee* v. *Ng Mui Eng* (Divorce No. 74 of 1969), *Yue Khuan Yin* v. *Chan Wai Pooi* (Divorce No. 105 of 1971) — both decisions of Wee C.J., *Bay Guan Heng & Tay Ai Keow* v. *Ong Eng San* (Divorce No. 14 of 1966 — Tan Ah Tah J.), *Tan Song Eng* v. *Lim Ah Moy* (Divorce No. 86 of 1968 — Chua J.). Kulasekaram J. decided to the contrary in *Sng Ser Hua* v. *Tay Ee Tiang* (Divorce No. 206 of 1967), but he repented in *Chua Tiew Chin* v. *Tan Guan Eng* (Divorce No. 128 of 1968).

5. *Ng Ah Choo* v. *Fong Yeng Kee* (Divorce No. 53 of 1967 — Ambrose J.); *Wong Choo* v. *Oh Sin Keow* (Divorce No. 105 of 1969 — Chua J.); *Tan Yi Yi* v. *Choa Hin Loke* (Divorce No. 190 of 1970 — D'Cotta J.). I am again indebted to Mr. Joshua Lim for the contents of these decisions. After the 1967 Amendment the section reads "Any marriage purported to be solemnized in Singapore...," But it seems unfair to argue that this amendment has retroactive effect.

6. See ss. 4, 5 and 6 before and after the 1967 Amendment.

7. This is clear from the wording of s. 8.

8. s. 2.

9. s. 38.

majority of couples in Singapore marry at the Registrar's office several days before going through their customary rites, in which case the customary rites lose their legal significance. In any case, marriages complying with section 21(1) are not customary marriages *simpliciter,* and my comments will not relate to them.

Secondly, section 10(2) of the Charter, enacted by the 1967 Amendment, states that the Minister may in his discretion, notwithstanding the other provisions of the section and the provisions of the First Schedule to the Charter (which lays down the prohibited degrees of relationship), grant a licence for a marriage to be solemnized, notwithstanding the kindred or affinity of the parties, if he is satisfied that such marriage is valid under the law, religion, custom or usage applicable to the parties thereto, and a marriage solemnized under such a licence is deemed to be valid.

Read literally, this section is meaningless. After the coming into force of the Women's Charter, the only non-Muslim customary law that remains applicable are the actual marriage rites which will bring a marriage into existence (and, after 2nd June 1967, so long as a certificate for marriage has been obtained.) No other part of non-Muslim customary law is applicable if the marriage is solemnized in Singapore. I submit that, to avoid this frustrating of a legislative act, the "law, religion, custom or usage" referred to should be read as the law, religion, custom or usage *which would have been applicable but for the Charter.*

This provision is not likely to be invoked because Chinese customary law has broader degrees of prohibited relationships than the Charter itself. But certain Hindu sects permit uncle-niece marriages, and these marriages are not uncommon in Singapore. To the extent that the provision may be invoked, pre-Charter customary law cannot be branded as mere history.

*The High Court's Matrimonial Jurisdiction in Customary Marriages*

Under section 166 of the Charter customary marriages solemnized under any law, religion, custom or usage prior to the date of the coming into operation of the Charter are deemed to be registered under its provisions.[10] The High Court has jurisdiction to grant matrimonial relief in respect of these marriages provided that the parties are domiciled or resident, as the case may be, in Singapore.[11] The decision in *Doshi* v. *Doshi*[12] makes it clear that the section is not limited in its application to marriages solemnized in Singapore.

But herein lies an astounding conclusion. If section 166 is not limited to marriages solemnized in Singapore, then it cannot be limited in anyway except by the phrase "solemnized under any law, religion, custom or usage prior to the date of the coming into operation of this Act". The Singapore High Court, therefore, has jurisdiction to dissolve

10. s. 166(2).

11. s. 80.

12. [1965] 2 M.L.J. 267.

African polygamous tribal marriages if solemnized before 15th September 1961, and if the parties are domiciled or resident in Singapore, as the case may require. Furthermore, if we take section 166 (3) according to its natural meaning, marriages solemnized before 15th September 1961 cannot, so far as Singapore law is concerned, be dissolved except by (a) the death of one of the parties, (b) order of a court of competent jurisdiction or (c) a declaration made by a Court of competent jurisdiction that the marriage is null and void. A marriage solemnized before 15th September 1961 in another country and dissolved by consent in that country will not, under section 166(3), be recognized in Singapore as having been dissolved, whatever connection the parties may have with that country and even though divorce by consent is recognized in that country. If this is the correct reading of section 166, then one can well understand the Advocate-General's attempt (foiled in *Doshi* v. *Doshi*) to limit the operation of that section to marriages solemnized in Singapore.

What is the position of a customary marriage solemnized in Singapore without a certificate for marriage, between 15th September 1961 and 2nd June 1967 so far as matrimonial relief is concerned? I have argued that these marriages, though infringing the Charter, are not void. But has the High Court jurisdiction to annul or dissolve them or separate the parties? If they are potentially monogamous, then I submit the High Court does have such jurisdiction if the requirement of domicile or residence is fulfilled. If they are polygamous *in fact* they will be void under sections 4 and 5 of the Charter. If they are *potentially* polygamous, section 167 may provide a way whereby the Court can be vested with jurisdiction. Sub-section (1) of the section says:

> "Notwithstanding the provisions of section 166 of this Act the parties to a marriage which has been solemnized under any law, religion custom or usage may, if such marriage has not been registered, apply to the Registrar in the prescribed form for the registration of such marriage."

Subsection (2) provides for what the Registrar may require the parties to do to prove the marriage. Sub-section (3) reads:

> "The Registrar may on being satisfied of the truth of the statements contained in the application register the marriage by entering the particulars thereof in the local marriage register and also in the certificate of marriage attached to the marriage register."

Sub-section (5) provides:

> "The Registrar shall not register a marriage under this section if he is satisfied that the marriage is void under the provisions of the Act."

Is this section applicable only to marriages solemnized before 15th September 1961, or is it applicable to all valid marriages whenever solemnized? (We know of course that Muslim marriages are excluded: section 3(2) of the Charter expressly so provides.) The first interpretation is supported by the opening words of the section, but this approach loses some cogency in the light of the general phrase "a marriage which has been solemnized under any law, religion, custom or usage... ." An additional argument for limiting section 167 to

marriages already deemed registered under section 166 may, however, be made by reference to the apparent purpose of the two sections. After all, it is one thing to *deem* a marriage registered, but a very different thing to have it *actually registered:* for administrative purposes the legal fiction is inadequate. It follows (though not necessarily logically) that section 167 should be read as a supplement to section 166, and hence available only for marriages solemnized before 15th September 1961.

If this argument is correct — and I believe it is — then the High Court must look elsewhere in the Charter for jurisdiction to grant relief in respect of Chinese customary marriages and potentially polygamous Hindu marriages solemnized between 15th September 1961 and 2nd June 1967. To remedy this situation, resort may yet be made to an argument based on sections 4 and 5 of the Charter which were in force between the two dates. These sections, the argument goes, have since 15th September 1961 deprived all marriages in Singapore of any *de jure* polygamous quality that they may have had, and the correct view is that such a customary marriage, whether according to Chinese or Hindu custom, and though solemnized between the two dates, is in law a marriage "contracted under a law providing that, or in contemplation of which, marriage is monogamous", so long as the Charter applies to them.[13] This will give the High Court jurisdiction under s. 80 of the Charter, provided that the other requirement of domicile or residence, as the case may be, is fulfilled.[14]

The logic of this argument is compelling except for one point: the "law" referred to in section 80 bears a more natural meaning if interpreted to refer solely to the law which brings the marriage into existence, than if interpreted to include the law which regulates the nature of the marriage. The distinction thus sought to be drawn is between the customary law which gives birth to the marriage and sections 4 and 5 of the Charter which decree that it shall be monogamous. The former may well be controlling so far as s. 80 is concerned. In the absence of judicial pronouncement, the whole matter hangs in the air.

I submit that despite the difficulties discussed, one of the above solutions should be adopted to give the High Court jurisdiction to dissolve these customary marriages. To hold that the High Court has no jurisdiction would mean that these marriages are indissoluble, for section 7 of the Charter, as will be seen later, provides that every marriage solemnized in Singapore after 15th September 1961 cannot be dissolved except by "a court of competent jurisdiction" or by the death of one of the parties.

13. This argument raises the question of the correct interpretation of ss. 3(1), 4 and 5 of the Women's Charter. If s. 3(1) is read literally, it would seem that domiciled Singaporeans may escape s. 4 simply by going to Malaya (or elsewhere outside Singapore so long as the lex loci celebrations permits polygamy) to marry a second wife. This interpretation will therefore deprive the argument of much of its strength.

14. See s. 80(1)(b), (1)(c), (2)(b), (2)(c), (3)(b) and (3)(c).

*The Grounds of Nullity and Dissolution Applicable to Customary Marriages*

Assume that the High Court of Singapore has before it a customary marriage contracted before 15th September 1961. It has jurisdiction, by virtue of sections 80 and 166 of the Women's Charter, to grant matrimonial relief in respect of this marriage. The grounds of nullity and dissolution laid down in the Charter are, in the main, borrowed from English law. Can the Court treat the customary marriage before it as being no different from monogamous marriage in respect of which the Court has granted relief even before the Women's Charter came into force ?

(a) *Nullity*

The customary marriage in question is clearly not affected by Part III of the Charter which lays down, *inter alia,* minimum age and prohibited degrees of consanguinity, for section 166(1) is clear on this point. The difficulty lies with certain other grounds of nullity provided for in section 91(1). These grounds are:—

(a) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit;

(b) that the parties are within the prohibited degrees of consanguinity or affinity, whether natural or legal;

(c) that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force;

(d) that the consent of either party to the marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England;

(e) that the marriage is invalid by the law of the place in which it was celebrated;

(f) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage;

(g) that either party to the marriage was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy;

(h) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form;

(i) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

Two different approaches may be taken in applying these grounds to the customary marriage in question. First, it can be argued that section 91(1) does not apply to customary marriages, and no distinction should be made between those grounds rendering a marriage void and those rendering a marriage voidable. This argument derives support from the wording of section 166(1). To permit a customary marriage

to be annulled on a ground not recognized by the custom under which the marriage was contracted, it is said, is tantamount to nullifying the clear wording of section 166(1), for a decree of nullity is an attack on the validity of the marriage.[15]

Second, it could be said that the above argument ignores section 166 (3) of the Charter, which provides:—

> Every such marriage [i.e., a marriage solemnized before 15th September 1961], unless void under the law, religion, custom or usage under which it was solemnized, shall continue until dissolved—
>
> (a) by the death of one of the parties;
>
> (b) by order of a court of competent jurisdiction; or
>
> (c) by a declaration made by a court of competent jurisdiction that the marriage is null and void.

Section 166 (3) (c), so the second argument goes, is a clear recognition that the Court may annul customary marriages according to the s. 91 grounds.

I submit that the first argument is sounder than the second. The apparent conflict between sections 166(1) and 166 (3) (c) disappears if we adopt the view that the Court's power to annul customary marriages is limited to cases where such marriages are invalid under the custom which brought them into existence, and such invalidity could be proved by expert evidence in each case.

This view of the Charter would also avoid applying the English-inspired law of nullity as laid down in the Charter to marriages contracted under Chinese or Hindu custom: the amalgamation of different juristic systems could only result in confusion. Applying section 91(1)(c), for example, to a Chinese polygamous marriage would enable a husband to get rid of all but the first of his wives. Many lawyers would surely recoil from advocating such a retroactive readjustment of vested rights.[16]

Another reason for accepting the first argument is that the notion of void and voidable marriages is an English concept. Chinese customary law, for example, concerns itself only with the question of whether or

15. For this purpose we need not distinguish between grounds rendering marriages void and grounds rendering marriages voidable, since in the latter case the nullity decree renders the marriage void retrospectively.

16. A more subtle argument which seeks to combine the two conflicting approaches draws a distinction between those s. 91 grounds which render marriages *void* and those which render marriages *voidable*. The former, it is said, cannot apply to pre-Charter marriages because that would be contrary to s. 166 (1), but the latter do apply. This argument has at least two fatal flaws: first, it ignores the retroactive effect of a decree of nullity even when granted on a ground rendering marriages voidable, and secondly, it attempts to apply a unique English concept to a juridical system which never knew it.

not there is a marriage — it does not draw fine distinctions of voidness and voidability. Does acceptance of the first argument outlined above deprive section 166 (3) (c) of all effect? The answer, short and simple, is that section 166 (3) (c) still has a very important effect: the section covers more than customary marriages solemnized before 15th September 1961. Marriages under the Civil Marriage Ordinance and the Christian Marriage Ordinance (both of which were repealed by the Charter) were subject to the English concepts of voidness and voidability. Section 80 (2), read with section 166, gives the Court jurisdiction to annul these marriages on the grounds set out in section 91(1).

I would also draw support from section 91(2) which says:

> For the removal of doubts, it is hereby declared that in the case of a marriage celebrated under the provisions of the Christian Marriage Ordinance or of the Civil Marriage Ordinance or of this Act, paragraph (c) of subsection (1) of this section shall apply where the former husband or wife was a husband or wife by virtue of a marriage contracted under either a monogamous or a polygamous system of marriage law.

But neither of the two arguments set out above compels logically: my submission in favour of the first is essentially a policy choice. The soundness of this policy awaits adjudication by the Court.

(b) *Divorce*

The problem of dissolving customary marriages raises no conflict, apparent or otherwise, between sections 166 (1) and 166 (3). Dissolution (and judicial separation) is granted only of *valid* marriages. Provided that the jurisdiction requirements of section 80 (1) are fulfilled the High Court can grant, and has granted, divorces of customary marriages. But several interesting and hitherto undecided points remain to be solved.

Section 82 (2) (a) states that any wife may present a petition for divorce to the Court praying that her marriage may be dissolved on the ground that her husband has since the solemnization thereof gone through a form of marriage with another woman. Read literally, this provision would permit every but the last wife of a pre-Charter polygamous marriage to divorce her husband.[17] This result is contrary to the spirit and purpose of section 166 (1); but it finds support in the actual wording of section 166 (3) (b), which seems to assume that pre-Charter customary marriages are, as a result of the Charter, dissoluble by the Court. And since Chinese custom as applied by Singapore Courts knew only divorce by consent and by unilateral repudiation on the part of the husband,

17. The adultery ground does not raise problems because the definition of adultery in English and Singapore law emphasizes sexual intercourse between a married person and a third party. Adapted to *de facto* polygamous marriages, this means that none of the wives may divorce their husband for having sexual intercourse with another wife. If a polygamous husband takes a mistress, however, all his wives may divorce him for adultery. Such a case has not come to my knowledge, but I submit that this is the consequence of giving the High Court matrimonial jurisdiction over polygamous marriages.

it is a plausible argument that section 166(3)(b) envisages the application of all the section 82 grounds to pre-Charter customary marriages.

One way out of this seemingly undesirable result is to argue that section 82 does not apply to things done before the coming into force of the Women's Charter. This would prevent any wife from invoking section 82(2)(a) on the ground that her husband has taken another wife under his personal law, before 15th September 1961. By the same token, acts of cruelty committed before that date cannot be relied on as cruelty under either section 82(1)(c) or (2)(c), and any period of desertion or separation before the same date cannot be taken into account for the purposes of either section 82(1)(b) and (1)(e) or section 82(2)(d) and (2)(g).

This approach may read too much into the Women's Charter. After all, if the Legislature had intended the grounds of divorce to have only prospective effect it would probably have said so. As these grounds now stand, they are equally capable of referring to things past as to things in the future. In any case, it might not be a bad thing for a man to lose all but one of his wives — indeed the Women's Charter was passed on the assumption that he would be better off as a monogamist.

(c) *Customary Divorce*

The recent decision of the West Malaysian High Court in *Mary Ng* v. *Ooi Kim Teong* [18] upheld the claim of the husband of a Chinese customary marriage to divorce his primary wife by unilateral repudiation on any one of seven grounds. Is such a divorce — indeed, are divorces by consent and by unilateral repudiation of a secondary wife — still possible in Singapore ?

The key provisions prohibiting extra-judicial divorce are sections 7 and 166 of the Women's Charter. The former declares that every marriage solemnized *in Singapore* after the coming into operation of the Charter other than a marriage void under the provisions of the Charter shall continue until dissolved — (a) by the death of one of the parties; or (b) by order of a Court of competent jurisdiction; or (c) by a declaration made by a court of competent jurisdiction that the marriage is null and void. Section 166(3), as we have seen, provides in identical terms for marriages solemnized under any law, religion, custom or usage prior to the coming into operation of the Charter.

We have in Singapore a very substantial number of customary marriages solemnized *in Malaysia* (especially West Malaysia). If these marriages were solemnized before 15th September 1961 they are covered by section 166(3). Moreover, the High Court of Singapore has jurisdiction under sections 80(1) and 166(2) to dissolve them. But if they were solemnized after that date they fall outside section 166(2) as well as section 166(3). In the case of a Chinese or a potentially polygamous Hindu customary marriage this means that the High Court has no

18. As yet unreported.

jurisdiction to dissolve it since it is neither registered nor deemed to be registered under the Charter, and since it is not contracted under a law providing that or in contemplation of which marriage is monogamous.[19]

At the same time these marriages are not covered by section 7 because they are not solemnized in Singapore. Nothing in the Charter prohibits their dissolution under customary law. This law was in force before the Women's Charter, and is therefore still recognized except to the extent that the Charter has abrogated it. And yet couples with "Malaysian marriages" have, in many cases, become part of the Singapore Community: in fact, many of them are domiciled Singaporeans who married in Malaysia. It seems rather incongruous that some members of the Singapore Community (albeit a minority) should still be able to dissolve their marriage in a way denied to the rest of the community. But the alternative interpretion of section 7 (if there is an alternative) could mean that these marriages cannot be dissolved at all in Singapore, for the High Court has no jurisdiction to dissolve them, and the voluntary registration provision, namely section 167, is too uncertain in its operation to provide a way of giving the court jurisdiction.

The Charter lays down a *lex loci celebrationis* for Singapore — it is time that it is amended to provide for a *lex loci dissolutionis* irrespective of where the marriage is solemnized, so long as the requirements of section 80(1) are satisfied. The High Court will then be relieved of the invidious duty of choosing between allowing unilateral repudiation by the husband and declaring that the marriage bond in question is beyond human intervention.

KENNETH WEE KIM SENG*

19. If the parties are domiciled and resident in Singapore, and return to Singapore after contracting the customary marriage, the argument may be raised that ss. 3(1), 4(3) and 5 of the Charter deprive the husband of any capacity to take a second wife, and hence the marriage becomes *de jure* monogamous. (See supra p. 97 for a similar argument in relation to customary marriages solemnized in Singapore between 15th September 1961 and 2nd June 1967). But does this line of reasoning overcome the objection that despite the loss of capacity to take second and subsequent wives, the marriage is nevertheless *not* contracted under a law "providing that or in contemplation of which marriage is monogamous"? Chua J. in a recent divorce suit seems to think that it does not. (*P. Pillai* v. *P. Anjally,* Straits Times, 29th June 1972 — the case was, at the time of this article's going into print, adjourned for further hearing.

* LL.B. (Sydney), LL.M. (Yale), Lecturer in law, University of Singapore.