NOTES OF CASES

CHINESE LAW AND MALAYAN SOCIETY:

A Comment on Mary Ng v. *Ooi Kim Teong*

Malaysian and Singapore courts administering Chinese customary law constantly face the difficult task of deciding whether a particular custom is valid for the local Chinese community. Much depends on what the expert witnesses produced in the case. It would seem, however, that the danger exists of assuming classical Chinese writings to be descriptive of local Chinese practices. In this comment, I shall submit that this erroneous assumption was in fact made to the disadvantage of the wife concerned in the West Malaysian decision of *Mary Ng* v. *Ooi Kim Teong*.[1]

The Decision

Mary and Ooi married in Penang according to Chinese customary rites. Soon after a son was born, the marriage started breaking down. The climax came one fine day in 1970, when Ooi went to his mother's house in Ipoh and told her that he wanted to divorce Mary. A family gathering was convoked the following day, consisting of Ooi's mother, grandmother and two uncles, as well as Mary's godfather. Ooi announced to the gathering that Mary had been guilty of various disrespectful and disobedient conduct towards him and his mother, that he was divorcing her as from that day, and that he would announce the divorce in the newspapers. It seems that two weeks beforehand Mary had been notified by registered letter of Ooi's intention to seek a divorce. Two weeks after the announcement, she was notified through her solicitors that the divorce was, in the learned judge's words, "intended to be a unilateral one according to Chinese customary law." Ooi later on fulfilled his promise of announcing the divorce in a local newspaper.

Soon after the divorce, Mary applied for maintenance under the Married Women and Children (Maintenance) Ordinance 1950, for herself and the child of the marriage. Ooi admitted his liability to maintain the child, but resisted Mary's claim on the ground that she was no longer his wife.

Mohammed Azmi J., who heard the application, resolved the case into a consideration of the following points of law:

(a) whether according to Chinese custom as applied in the States of West Malaysia divorce is possible;

1. [1972] 2 M.L.J. 18.

(b) the form that such a divorce must take; and

(c) whether a divorce took place according to such form.

His Lordship referred to the well-known principle that the personal law of all Chinese throughout Malaya was based on race, irrespective of domicile or religion, citing *Woon Ngee Yew* v. *Ng Yoon Thai*[2] and *Dorothy Yee Yeng Nam* v. *Lee Fah Kooi*.[3] From this he concluded that "[s]ince it is admitted that [the parties] were lawfully married in this country according to Chinese rites and customs and therefore had opted to contract a polygamous marriage in accordance with their personal law, as the law now stands, if any divorce had taken place, it could only receive judicial recognition if Chinese custom permitted such a divorce."[4]

Azmi J. pointed out that since the issue involved a Chinese husband unilaterally divorcing his principal wife (t'sai), he had no decision to guide him, because the existing authorities all concerned the divorcing of a secondary wife (t'sip). An expert witness (Mr. Lee Siow Mong) was called in by Ooi's counsel to testify that, according to Chinese customs, a husband can unilaterally divorce his principal wife for cause on any one of the following seven grounds: "(1) unfilial or disrespect to husband's parents; [sic] (2) barrenness; (3) adultery; (4) suffering from serious disease such as leprosy; (5) jealousy; (6) talkativeness; (7) committing theft". No specific method of divorcing was required, but the husband must make the divorce known to friends and relatives. "The cardinal rule," Azmi J. said, "is that it should not be made secret."[5]

Applying the law as found by him, the learned judge decided that Ooi not only had a valid cause under Chinese customary law (presumably, the first of the seven grounds was present), but also that a divorce had taken place in accordance with Chinese custom. The entire decision hinges on the evidence of the expert witness, which the learned judge accepted uncritically.

The Proving of Chinese Custom in Malaysian Courts

Before one can criticize the learned judge's acceptance of the expert evidence, one must answer the qustion: What is the Chinese customary law enforced in West Malaysia? There are two possible answers: the customary law of the Chinese in China, or the customary law of the Chinese in West Malaysia. I submit that the answer from the authorities is clear. In *Woon Ngee Yew's*[6] case, Murray-Aynsley J. after referring to textbooks on the Manchurian Codes said, "But whatever the position as regards divorce may have been in China it by no means follows that the custom of China as it existed under the Manchu dynasty is

2. [1941] M.L.J. Rep. 32.
3. (1956) M.L.J. 257.
4. [1972] 2 M.L.J. 18, 19.
5. *Ibid*., at 20.
6. [1941] M.L.J. Rep. 32.

suitable for the Chinese population of Perak today."[7] After stressing that allowance must be made for change in custom, the learned judge then underlined the necessity of obtaining evidence from expert witnesses who can talk about *local* practices.[8]

When *Woon Ngee Yew's* case came before the Court of Appeal, Terrell J.A. asserted in strong terms that "[t]he customs of the Chinese in Malaya are not based on those of Republican China,... The present customs are no doubt derived from the customs prevailing in the time of the Manchus, but have been adopted in Malaya with considerable modifications, ... The customs of Imperial China have accordingly a certain historical interest but nothing more."[9] McElwaine C.J. (S.S.) even went so far as to suggest that local Chinese custom may differ in different parts of Malaya.[10] The case ultimately turned on expert evidence of Chinese divorce custom *in Perak.* Translations of both Imperial and Republican Chinese laws were referred to — but none of these were regarded as more than useful background material.

In *Mary Ng* v. *Oooi Kim Teong* there was nothing to show that the expert witness was testifying on the custom of the Chinese in West Malaysia. From the judgment, it seems that he was restating Chinese custom as recorded in the Ta Tsing Leu Lee (Laws of the Ching Dynasty). This law was restated by Maurice Freedman[11] and Vermier Y. Chiu.[12] But neither of these authors was directing his attention to Malaya. In fact, Professor Freedman, after empirical field research in Singapore in 1949, concluded that "...the dissolution of marriage, li-hun, is common enough in Singapore and is recognised to be so.... Li-hun normally refers to a signed agreement between spouses to end their relationship. Chhut-chhe, the unilateral repudiation of a primary wife, has little relevance to Singapore and exists mainly in the minds of those sophisticates who are aware of its status in traditional Chinese law."[13] Since the social custom of the Singapore Chinese does not, as a matter of common knowledge, differ radically from that of the Malayan Chinese, this testimony speaks strongly against accepting for the Malayan Chinese the tenets of traditional Chinese law.

A further point which can be raised is this: the expert witness, though qualified to testify on classical Chinese law, does not seem to be specially qualified to speak on West Malaysian Chinese custom. He was the President of the China Society in Singapore, and has always taken an interest in Chinese classics, arts and culture. Moreover, he has also given expert evidence on Chinese marriage and customs in

7. *Ibid.*, at 33-34.

8. *Ibid.*, at 34.

9. [1941] M.L.J. Rep. 32, 39-40.

10. *Ibid.*, at 37.

11. "Colonial Law and Chinese Society" (1952) 80 J.R.A.I. 97.

12. *Marriage Laws and Customs of China*, Institute of Advanced Chinese Studies and Research, New Asia College, Chinese University of Hong Kong, 1966.

13. *Chinese Family and Marriage in Singapore*, Colonial Research Studies No. 20, London, HMSO, 1957; at 176-177.

the courts of Singapore. But does this qualify him to speak on such a vague topic as Chinese divorce custom *in Malaya?* Perhaps here lies the dilemma of the courts administering Chinese custom. In the absence of comprehensive sociological surveys, the usual assistance a judge gets is from Chinese texts and people learned in them; and neither of these sources may accurately state the practices of the local Chinese. The old practice of calling up people prominent in the local Chinese community to describe local Chinese practices (as was done in *Woon Ngee Yew's* case) does not seem to guarantee sounder results. One solution is to say that the moment a custom is proved to have existed in China, then the burden falls on its opponents to prove that it does not exist in West Malaysia.[14] This was perhaps the unspoken premise on which Azmi J. based his decision, since from his judgment it does not appear that any evidence on local practice was adduced.

Yet one wonders if this technical approach serves the purposes of justice. It clearly ignores the conclusion of anthropological evidence that profound changes had taken place when the Chinese migrated to the Malayan peninsula, and that the local Chinese cannot be understood simply as a branch of society in China.[15] Two alternative approaches seem more suitable for solving the problem: codify local Chinese custom after an exhaustive survey, or abolish it and lay down new norms to govern Chinese customary marriages. Neither of these alternatives is open to a court of law. The Law Reform (Marriage and Divorce) Bill 1972 may, however, accomplish the second alternative.[16] Until the bill becomes law, Malaysian courts will no doubt continue to struggle with a rather messy situation.

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14. This seems to have been in Murray-Aynsley J.'s mind when he said, "I think that the effect of the previous law and custom of China is this; if the authorities has shown that divorce did not exist in China, then I think that Courts here would be reluctant to admit that such a custom had originated in Malaya. But when it has been shown that divorce existed in China, then the Courts will only require slight evidence that the custom has continued.": *Woon Ngee Yew* v. *Ng Yoon Thai* [1941] M.L.J. Rep. 32, 34.

15. The most relevant work is M. Freedman, *Chinese Family and Marriage in Singapore*, Colonial Research Studies No. 20, London, HMSO, 1957.

16. Law Reform (Marriage and Divorce) Bill 1972, esp. Clauses 4 and 8.

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