ENGLISH LAW AND CHINESE FAMILY CUSTOM IN SINGAPORE: THE PROBLEM OF FAIRNESS IN ADJUDICATION

Once, when dealing with the problems of rest and motion, stability and change, particularly as they are reflected in the law, Justice Cardozo wrote: "The reconciliation of the irreconciliable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law".[1] In common law jurisdictions, the courts share the task of solving these problems with the legislatures. The antitheses, the conflicts and the opposites usually come from the community — pressure groups and individuals alike. Legislatures are not as a rule noted for diligence. Large fields of human activity are left to the courts to regulate, sometimes — but not often — with some vague directions from parliament. The criteria with which to solve the problems must somehow be found. To put it in legal terms, the courts search for sources of law.

In resolving disputes courts lay down standards of conduct, rules of the game. Obviously a judicial process along Anglo-American lines has limitations. To try to find some of these limitations, this paper starts with the theory of adjudication that the primary function of courts is to decide disputes over the legality of someone's conduct, the legality of which is to be judged, as a rule, as of the time it took place. The adjudication must be fair, and — without bothering about conflicting views of justice — fairness demands at least the application of reasonably knowable, pre-existing standards.[2] Judicial lawmaking, then, is simply the judges' approval and application of standards commanding sufficient adherence in the community in which the dispute occurred. According to this theory, the defeated party to a lawsuit cannot complain even if the standard applied has never been applied before, since, *ex hypothesi,* he should have known how his community viewed the whole affair before he got involved in it.

The crux of this theory is that no one should be made to suffer now if, at the time he acted, he could not have been expected to know that his conduct was inappropriate. As I understand it, this theory does not state categorically that no one should be surprised, in the sense of having his action declared inappropriate which by the general community view at the time of the action was appropriate. But at least the theory insists that as a general rule such a surprise should not be dished out by the court.

1. Benjamin Cardozo, *The Paradoxes of Legal Science,* p. 4.
2. Harry Wellington, *Labour and the Legal Process,* p. 17.

Several reservations may be advanced against such a theory. It relies heavily on the proposition that an "ought" can and should be derived from an "is", that what most people do is what all people must do. While this may be true of some situations, it can lead to harsh results in other situations. By insisting on the application only of standards that command sufficient adherence (a vague mandate), the theory requires the court to take a neutral stand if, because of a state of conflict of community opinions, no standard commands such adherence. In an adversary form of judicial process this means judgment for the defendant.

But despite the many controversies of our times, it is true that there *are* standards of conduct which our communities more or less assent to, for they cannot survive otherwise. Take a group of people from China, put them in a strange land, Singapore, and they will naturally order their relationship with one another upon principles of conduct prevalent in their native land. These principles — call them law or custom if you like — this group of people will pass on to their children. In time changes will come, because of economic development, urbanisation and influx of foreign ideas. Meanwhile, a government, run by the British, was erected over this people. Then came the courts. The British government never did make clear the principles to be applied by the courts in settling disputes among the Chinese of the island colony. The judges had to work out these principles.

This paper will survey the work of these judges and of their brethren in Penang and Malacca, which together with Singapore formed the Straits Settlements. It is hoped to demonstrate through this survey:

(1) How the theory of adjudication set out above would fare as a conceptual analysis of what the judges did, or should have done;

(2) How the judges deviated from the theory (using it as an ideal type framework, not as a description of reality);

(3) How an alternative theory might give a better analysis of the problems faced by these judges and provide a better guide to what they should have done;

(4) Finally, the suitability of the judicial process, in the peculiar circumstances of the Straits Settlements, as an instrument of legislation.

The survey will be restricted to matters pertaining to the family — marriage, divorce and succession, as it is mainly in this area that the judges of the Straits Settlements had considered Chinese law and custom. Moreover, the legislature had left this area almost solely to the courts, and hence brought into the forefront the problem of criteria for adjudication— the problem of the sources of law.

The Singapore Legal System[3]

Founded in 1819, Singapore became in 1826 part of the British Straits Settlements (comprising also Penang and Malacca, and, from

3. The following account relies heavily on Roland Braddell, *The Law of the Straits Settlement, A Commentary,* 2nd Ed. (1931), Vol. 1, pp. 1-61; L.A. Sheridan, (ed.) *The British Commonwealth, The Development of its Laws and Constitutions: Malaya and Singapore, The Borneo Territories.*

1867, the island of Labuan off the Bornean coast), and remained so until 1946. Singapore's legal history is, therefore, for the greater part also the legal history of the Straits Settlements.

Penang was ceded to Britain by the ruler of Kedah in 1786. The island was practically uninhabited then except for four Malay families. No organised government came into existence until 1800, when the first Lieutenant-Governor was appointed. For fourteen years from 1786 the Superintendents of Penang administered justice according to the dictates of their conscience. Even after the arrival of the Lieutenant-Governor, no court was set up until 1801.

Malacca had a more complicated history. The Dutch occupied it from 1641, having driven out the Portuguese who took it from the Malays in 1511. The British took it in 1795, returned it to the Dutch in 1818 (under the Treaty of Vienna). Finally, the Dutch handed it over to the British, for the last time, in 1824. In contrast to Penang, then, Malacca was an inhabited territory when it fell into British hands.

Singapore island was placed under British protection in 1819, after negotiations between Sir Stamford Raffles for the East India Company, and the Sultan of Johore as well as the Dato Temmenggong, the chieftain of Singapore. In 1819, only a few Malay fishermen occupied the island. The same legal chaos as had prevailed in Penang until 1807 prevailed in Singapore until 1826. The Resident administered justice as well as he could with the assistance of the Dato Temmenggong and the Sultan; and he tried to administer Malay and Chinese law (the influx of the Chinese began almost immediately from the establishment of British authority).

It was in Penang that the foundation of a legal system for all three territories was laid. The first Charter of Justice issued by the British crown set up a Court of Record for Prince of Wales' Island (as Penang was officially named). The Court consisted of the Governor, three councillors and one other judge, called the Recorder (who was the only professional lawyer among the courts' members). The court had the jurisdiction and powers of the Superior Courts in England and of the English judges, "so far as circumstances will admit." It was to exercise jurisdiction as an Ecclesiastical Court "so far as the several religions, manners and customs of the inhabitants will admit." The only appeal from this Court of Judicature (as it was called) was, subject to various restrictions of time and money, to the King-in-Council.

This Court of Judicature had its jurisdiction extended to Malacca and Singapore by the Second Charter of Justice (1826). Before this, the Statute 6 Geo. IV c. 85 (1825) gave the Directors of the East India Company power to declare Singapore and Malacca to be annexed to Penang as part of that Settlement. This power was exercised promptly, and the Straits Settlement came into existence. The 1826 Charter was essentially the same as the 1807 Charter. Additional jurisdiction was given to the Court between 1836 and 1848, in matters such as admiralty and insolvency.

The Third Charter of Justice, issued in 1855, divided the Court into two divisions, one for Singapore and Malacca, and the other for Penang. A Recorder was appointed for each division.

During all this time the Straits Settlements were under the Government of India. The Straits Settlements Act, passed in 1866, established the Straits Settlements as a separate colony.

The Court of Judicature was abolished by Ordinance in 1868. In its place was established the Supreme Court of the Straits Settlements. Only professional judges were appointed to this court, which had three divisions — one each for Singapore, Penang and Malacca. In 1873, this Supreme Court acquired appellate jurisdiction. The final touch came with the Courts Ordinance of 1907. The Court had its jurisdiction extended to Labuan. The number of judges was fixed at one Chief Justice and three or more puisne judges; and it was divided into two divisions, original and appellate. The original civil jurisdiction of the court included "the same jurisdiction and authority within the colony as was formerly exercised in England by the High Court of Chancery, the Court of Queen's Bench, Common Pleas and Exchequer and is now exercised therein by His Majesty's High Court of Justice."

This Court survived without substantial change until the Second World War. In 1946, with the end of the British Military Administration of Malaya, the Straits Settlements were disbanded under the Straits Settlements (Repeal) Act. Penang and Malacca became part of the Malayan Union and, later, of the Federation of Malaya. Labuan was merged with North Borneo; and Singapore, with the addition of the Cocos Islands and Christmas Island, became a separate Crown Colony.

The present courts system of Singapore is very similar to that of the United Kingdom. It consists of a hierarchy of courts.[4] Subordinate Courts with power in defined criminal and civil matters, form the lowest layer of this hierarchy, with appeals to the High Court. The District Courts have power to try civil causes (subject to a monetary limit), criminal matters triable by magistrates, and more serious crimes. Appeals also lie from the District courts to the High Court. This latter, together with the Court of Appeal, form the Supreme Court. There is also a Court of Criminal Appeal, constituted by High Court judges (similar to its English counterpart). Appeals to the Judicial Committee of the Privy Council are still possible, subject to restrictions.

The Malayan States:

A brief note here on the legal development of the Malayan states is warranted, partly because this paper also draws on Malayan case law, and partly because of the close relationship between Malaya and the Straits Settlements.[5]

4. Subordinate Courts Act. (Singapore Statutes, Revised Edition, 1970, Cap. 14); Supreme Court of Judicature Act. (Singapore Statutes, Revised Edition, 1970, Cap. 15).

5. The following summary relies on Sheridan, *op. tit.* note 3; A.K. A'Beckett Terrell, *Malayan Legislation and Its Future* (1932); Bashir A. Mallal, "Law and Law Reporting in Malaya" (1959) 1 *University of Malaya Law Review* 17.

The states of Malaya had, by the beginning of this century, fallen under British protection. Among these states, four — Negri Sembilan, Pahang, Perak and Selangor — had in 1895 combined in a federation, called the Federated Malay States. At first the federation was executive and judicial only, there being no federal legislature. In 1909 a federal Legislative Council was set up; but the state legislatures continued. Of the unfederated Malay states, Perlis, Kelantan and Trengganu were in a "backward condition" even in the 1930's; and the administration of justice therein remained chaotic until reforms after the Second World War. The Federated Malay States and Johore (the other unfederated Malay State) were far more advanced. After a primitive beginning, where until 1896, appeals lie from Magistrates to Residents, with final appeals to the Sultans-in-Council, the Judicial Commissioner's Regulations and Orders-in-Council came into force. The Residents' Courts and the jurisdiction of the Sultans-in-Council were abolished. A Judicial Commissioner was appointed as the final appellate authority for the federation. He heard appeals from Senior Magistrates. In 1905, the Courts Enactment created a Supreme Court for the Federated Malay States. It consisted of a Chief Judicial Commissioner and two Judicial Commissioners, appointed by the Resident-General with the approval of the British High Commissioner. A Court of Appeal consisting of any two or more of the judicial commissioners also came into existence. An Order in Council of 1906 made provision for appeal in civil matters from the Supreme Court to the Judicial Committee of the Privy Council. In 1921, by reciprocal legislation the Judicial Commissioners became ex-officio judges of the Straits Settlements and Johore. Their titles were also changed to "Chief Justice" and "Judges".

After the war, the Malayan States, federated and unfederated, became the Federation of Malaya (Penang and Malacca also being included as separate states). A Supreme Court of the Federation of Malaya, consisting of the High Court and the Court of Appeal, was set up. Under the Supreme Court are Magistrate's Courts and Sessions Courts (similar to the District Courts of Singapore). A further appeal lies to the Privy Council, which tenders its advice to the Malayan Head of State.

For a brief period judicial unity was effected between Malaya and Singapore, as well as Sabah and Sarawak. That was when Singapore was a state of the Federation of Malaysia. A Federal Court was set up to hear appeals from the High Courts in Singapore, Malaya and Borneo. After the secession of Singapore in 1965 the Malaysian Courts structure remained as before, with appeals lying from the Federal Court to the Privy Council.

The Judiciary of Singapore & Malaya

The important point about the judges of the higher courts of the Straits Settlements, Malaya and the Bornean States of Sabah and Sarawak is that they were for a long time drawn exclusively from the ranks of English lawyers. The first local lawyer to be appointed to the Singapore Supreme Court bench was Mr. Justice Tan Ah Tah (in 1954). And even when local lawyers began to fill the bench they were lawyers trained, if not in England, then at least in the English common law tradition.

The Sources of Law in the Straits Settlements

At first there was no formal legal system in any of the Settlements. The British administrators tried to do justice according to the dictates of their conscience.[6] Later the headmen of the various groups of inhabitants were charged with the administration of justice among their own groups. The British rulers recognised that the custom of the inhabitants — mostly Malays and Chinese — should be applied to them. The first Lieutenant-Governor of Penang (Sir George Keith) was instructed by the British government that

> "The laws of the different peoples and tribes of which the inhabitants consist, tempered by such parts of the British law, as are of universal application, being founded on the principles of natural justice, shall constitute the rules of decision in the courts."

The first Charter of Justice (1807), which established the first court in the strict sense of the word, directed the court to "give and pass judgment and sentence according to justice and right." The first Recorder of Penang, Sir Edmund Stanley, thought that this charter "secures to all native subjects the free exercise of their religion, indulges them in all their prejudices, and pays the most scrupulous attention to their ancient customs, usages and habits".[7]

Sir Edmund's view certainly coincides with the theory of adjudication discussed earlier in this paper. To a Chinese in Penang in 1807, the pre-existing standards which he could have known were standards based on the customs of traditional China from which he hailed. The early Chinese migration to the Straits Settlements was a very unstable one: many returned to China after saving enough money. The Malays, of course, had their own customs and usages, based partly on the tenets of Islam and partly on local practices. To judge the actions of these people by the rules of the English common law seemed — to put it at its highest — unfair.

But this approach did not live long. Indeed it could not. The English judges' general tendency is to apply principles of English law,[8] partly because they are those best known to them, and partly because they sincerely believe that those principles cannot be bettered.[9] Thus when the English judges in India were instructed to adjudicate in accordance with "justice, equity and good conscience", they interpreted those words to mean "the rules of English law if found applicable to Indian society and circumstances".[10]

6. Braddell, *op. cit.* note 3 at p. 7.

7. Speech explaining the 1807 Charter upon its proclamation at the opening of the new court: Braddell *op. cit.* at pp. 70-71.

8. See L.C. Green, "Native Law and the Common Law: Conflict or Harmony" (1970) 12 Mal. L.R. 38.

9. Witness Mr. Justice McCardie in *The Law, The Advocate and The Judge* (1927) at p. 17: "If this country were to sink tomorrow beneath the waves, the record of the common law of England would stand forever on the noblest pages of history."

10. *Per* Lord Hobhouse, *Waghela Rajsanji* \. *Shekh Masludin* (1887) 14 Ind. App. 89, 96.

Sir Edmund Stanley's successors (as well as Sir Edmund himself, who did not live up to the full rigour of his early statement) ultimately came to the conclusion that the Charter of 1807 introduced the law of England wholesale into Penang.[11] The most famous pronouncement was that of Sir Benson Maxwell, Recorder, in *Regina* v. *Willans:*[12]

> "It was competent to the Crown to introduce the law of England into the Settlement by such an instrument as a Charter; and if that law was not previously in force, and the language of the Charter directed that it should be administered here, it follows that the Charter did introduce the law of England into the Settlement; and the question, to what extent English law became the law of the land is, then, a question of construction rather than of general legal principle, or at least of the one as well as of the other.
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> Now the Charter does not declare, totidem verbis, that the law shall be the territorial law of the island; but all its leading provisions manifestly require that justice shall be administered according to it, and it alone. As to Criminal law, its language is too explicit to admit of doubt. — And I think it equally plain that English law was intended to be applied in Civil Cases also. The Charter directs that the Court shall, in these cases, 'give and pass judgment and sentence according to Justice and Right.' The 'Justice and Right' intended, are clearly not those abstract notions respecting that vague thing called natural equity or the law of nature, which the Judge, or even the Sovereign may have formed in his own mind, but the justice and right of which the Sovereign is the source or dispenser. The words — are, in jurisprudence, mere synonyms for law, or at least only measurable by it; and a direction in an English Charter to decide according to justice and right, without expressly stating by what body of known law they shall be dispensed and so to decide in a country which has not already an established body of law, is plainly a direction to decide according to the law of England."

He then drew support for his conclusion from the wording of the charter — such as the classification of property into "real and personal", the reference to "Habeas Corpus", and the grant of jurisdiction and power to the Straits Settlements Court by reference to the Superior Courts of England.

Sir Benson also held in the same case that the Second Charter (1826) had exactly the same legal effect as the first, i.e., it introduced English law as at 1826 into the Straits Settlements. He decided, however, that the Third Charter (1855) did not introduce the English law as it stood in 1855, on the ground that this Charter's purpose was simply to re-organise the existing court.

The Straits Settlement judges did make some concessions to the local inhabitants. Again, Sir Benson Maxwell (now the Chief Justice of the Straits Settlement) summed up the attitude of the judges:

> "In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating

11. Isolated stands were made from time to time for a more liberal application of native custom. See *In re Chong Long's Estate* (1857) W.O.C. 13 and *In re Chu Siang Long's Estate* (1843) W.O.C. 11, discussed infra p. 94. But decisions in this vein were soon overruled or ignored.

12. (1858) 3 Ky. 16, 25.

> unjustly and oppressively on them. Thus in questions of marriage and divorce, it would be impossible to apply our law to Mohomedans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them".[13]

The Privy Council affirmed this approach but based its opinion on a general principle of English law rather than on the 1807 and 1826 Charters. In *Ong Cheng Neo* v. *Yeap Cheah Neo* [14] the Privy Council said:

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

Later on, in *Khoo Hooi Leong* v. *Khoo Chong Yeok*[15] the Privy Council said.

> "The modifications of the law of England which obtain in the Colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified."

The position thus reached by the Straits Settlements Courts — and reached without being compelled by logic or the force of the language of the Charters — in terms of our theory of adjudication may be stated as follows. As a general rule the court would not adjudicate by reference to pre-existing standards of the native communities. Instead, it would resort to a foreign body of principles — the statutes and common law of England. It mattered not that the overwhelming majority of the population were not English, or even European. The emphasis on importing only those English laws which are of "general policy" was not an attempt to introduce only those English laws which conformed to Straits Settlements community standards. It was rather an attempt to exclude those English laws which were inextricably tied to local English institutions and conditions.

But this departure from pre-existing standards of the local community, from which most litigants were drawn, was not aboslute. The departure would not be made if it would result in "injustice or oppression." In such a situation the custom of the community concerned would be given effect as a standard for adjudication. The Courts had decided to be unfair (in terms of our theory), but when they were in danger of being *very* unfair, they would try to be fair.

This adjustment between English law and the custom of the local peoples was made by the Courts case by case. Once made, the doctrine of

13. *Choa Choon Neoh* v. *Spottiswoode* (1869) 1 Ky. 216, 221.

14. (1872) L.R. 6 P.C. 381, 394.

15. [1930] A.C. 346, 355.

stare decisis ensured that the adjustment would not be lightly amended.[16] For the purpose of testing whether the application of English law would be oppressive, the litigants were grouped, in the case of the Chinese, according to race, and in the case of the Muslims (consisting mainly of Malays) and the Hindus according to religion. This curious system of classification seems to have originated in the fact that almost all Malays were Muslims. The overlapping category of Chinese Muslims, however, were classified according to religion and not race. This paper deals only with the Courts' decisions concerning Chinese family custom. But it is interesting to note in passing that the concessions made to the Muslims, under the "unjust and oppressive" criterion, were greater than those made to the Chinese. Islamic family law (almost all Malays in Malaya and Singapore are Muslims) had been established almost in its entirety in the Straits Settlements. One reason for this could be that the judges regarded the Malays as "indigenous" to Malaya and Singapore, whereas the Chinese were regarded as the typical example of an "alien" race.[17]

To Enforce or Not to Enforce: Chinese Family Custom and the Courts

By family I mean the sphere of affairs encompassing marriage, divorce, succession and adoption.

The approach of the Straits Settlements judges took the form of successive inquiries:

(1) Is the present case covered by legislation of the local legislature?

(2) If not, is the case covered by the common law, equity and Statute Law prevailing in England on November 26, 1826? This inquiry is complicated by the possibility that there may have been British statutes passed before April 1, 1867 extending to India (of which the Settlement until April 1, 1867 were a part), or British statutes expressly made applicable to the Straits Settlements.

(3) If a rule of English law prevailing on November 26, 1826 is found to cover the situation, the inquiry then focuses on the question of whether this rule is "oppressive or unjust" if applied to the litigants. Only if such a rule is oppressive or unjust is it inapplicable. The gap will be filled by Chinese custom if the litigants are Chinese.[18]

16. Thus, Ambrose J. stated: "In my judgment I had to determine the issues not by Chinese custom exclusively but by the relevant portion of the Law of Singapore applicable at the material time. That portion of the law of Singapore is a fusion of the principles and concepts of English law and Chinese custom. It did not matter in the least, therefore, that the caveator did not call an expert on Chinese custom....": *Re Ho Khian Cheong deceased* (1963) M.L.J. 316, 317.

17. Maurice Freedman, "Chinese Family Law in Singapore: The Rout of Custom" in J.N.D. Anderson (ed.), *Family* Law *in Asia and Africa* (1968) at p. 51.

18. Some earlier cases based the application of Chinese custom on the ground of domicile. But it was eventually established that the application of Chinese custom was based solely on the criterion of race. See *Ngai Lau Shia* v. *Low Chee Neo* (1921) 14 S.S.L.R. 35.

Every step of this inquiry is strewn with thorns. The concepts of "oppression" and "injustice" are not objectively defined. They also vary from one context to another. What is unjust to an Englishman may be very fair to a Chinese. It is clear that the English judges of the Straits Settlement applied almost exclusively their own English notions of justice and oppression. Even then, the task was far from easy.

Chinese law and custom had to be proved in court. No reliable translation of Chinese law existed in the nineteenth century. Moreover, Chinese custom varied from one Chinese district to another. The statute laws of China (i.e. of the Ching Dynasty) did not codify custom. They only reinforced and sometimes modified custom. The Straits Settlements courts, like their Hong Kong Counterparts, relied on "expert evidence" of Chinese custom. And the experts often contradicted one another. The following exchange,[19] which took place in a Hong Kong Court in 1927, reflected the dilemma of many English judges, both in Hong Kong and the Straits Settlements:

Judge:- But surely there must be one correct and only one method of translating ?

Counsel:- My Lord, one of the most notable features of Chinese is its brevity. So much is left to be understood. It would be difficult for one man to say that his was the only correct translation.

Judge:- How then can I administer the law ? No wonder no one knows how to translate English into Chinese—. When I come to give a decision I can't give one which may be read in twenty different ways.

In this case, the conflict was resolved by the discovery of a copy of Staunton's translation of the Manchurian Code. But sometimes the point debated was purely one of local custom — the custom of that part of China from whence the litigants or their ancestors hailed. The available texts state the ideal law of China — a set of principles based on Confucian teachings which the landed gentry, scholar and wealthy classes generally followed. Yet the majority of Singapore Chinese came from, or traced their origin to the poorer peasant class of Southern China.[20] These people do not always live up to strict classical ideals.

Changes occurred, too, after a long period of settlement in Singapore. A small number of Chinese migrants who arrived probably before the nineteenth century and settled in Malacca became "Malayanised" to an amazing extent.[21] They kept their Chinese names, but practised a custom which was a result of modifications of Chinese custom through the infiltration of native elements. This is very evident in their marriage ceremonies. But because of the small number of this group, the Courts had little trouble with them. The judges were kept busy coping with

19. Reported in H.K. Woo, "The Difficulty of Authenticated Translation of Chinese Laws in Hong Kong Courts: A Case in Point" *Hong Kong University Law Journal* Vol. 1 No. 2 (Jan. 1927) p. 126.

20. Maurice Freedman, *Chinese Family and Marriage in Singapore* (1953) at p. 17.

21. Maurice Freedman, "Chinese Kinship and Marriage in Early Singapore" (1961) *Journal of Southeast Asian History* 65.

those Chinese who did not "Malayanise". Their difficulties were summed up by Murison C.J.:

> "Before leaving the question of the so-called usual and essential ceremonies for the wedding of a principal wife, I would like to observe that the whole matter is most unsatisfactory and vague. There seems to be no real and final authority at all as to what are the actual essentials of the marriage: — A consideration of various textbooks — Van Mollendorf and Jamieson and a number of decided cases leads me to the conclusion that these ceremonies differ in different parts of China and again differ here in Singapore. The expert witness Mr. Stirling [Protector of Chinese] was quite vague as to the essentials, so are Van Mollendorff and Jamieson and the expert witnesses".[22]

These were shocking conditions under which justice had to be administered by a court. The truth is that China was in a confusing state of change from the late nineteenth century until the Second World War (and of course in an even more confusing state of change after that). Old ideals were discarded, but no one was very sure what to turn to.[23] This was reflected in the new marriage ceremonies, and new ways of contracting marriages. The Singapore Chinese still had close ties with their ancestral homeland: the changes there affected them. On top of that they went through cultural and economic changes that were inevitable from settling into a new set of surroundings.[24]

Taken with these factors, the foreign culture of the Straits Settlements judges and the nature of the traditional English judicial process all made the Court an unsuitable place for the ascertainment and enforcement of popular-held Chinese custom. Moreover, it is conceived that given the currents of changes in the Chinese community during the first half of this century, a theory of adjudication which relies on pre-existing community standards hinders judicial creativity. An alternative theory, based on Roscoe Pound's theory of "interests" or "demands" (in turn traceable to William James' pragmatism) will — after the following examination of the work of the Straits Settlements and Singapore judges — be put forward both as an aid in the analysis of the courts' decisional process and as a delimitation of the realm of judicial lawmaking.

22. *Woon Kai Chiang* v. *Yeo Pak Wee* [1926] 1 S.S.L.R. 27, 33.

23. In 1931 a new marriage code was promulgated in China. It purported to abolish the taking of secondary wives and to give women equal rights in matters such as divorce. But its effectiveness was apparently very limited.

24. Cf. the observations of Taylor J. in *Re Tan Soh Sim deceased* (1951) 2 *Malaya Law Reports* 21, 29: "When groups of emigrants establish themselves abroad as a community they tend to retain and conserve their laws and customs more strictly than does the mother country.... Some of the Chinese families who became settled in Malaya kept up the old traditions but the community was constantly augmented by new migrants and, after the Chinese Revolution of 1910, more and more of these brought with them the ideas of modern China." The soundness of these observations is borne out by the fact that in 1911, only 20% of the Chinese in Malaya (including Singapore) were locally born, and that there were only 356 female Chinese to every 1000 of the males. Even as late as 1947, some 40% of the Malayan Chinese were born outside Malaya. See Freedman, *op. cit.*, Note 20, pp. 21-27.

Chinese Marriages: A Special Polygamy

Most, if not all the issues concerning Chinese family law and custom came up for decision in intestate succession cases. The most famous decision, which is regarded as having settled the question of the nature of Chinese marriages, is the *Six Widows Case*.[25] The deceased's estate was contested by six women, all claiming to be his legitimate widows, and entitled to the widow's share under the English Statute of Distributions. (The deceased, it may be noted, was born in Singapore and died there). The issues presented to Law Ag. C.J. were:-

(1) Can a Chinese by Chinese law and custom have more than one wife ?

(2) Should the Court recognise polygamy among the Chinese, if it exists ?

A host of witnesses — the Chinese Consul-General in Singapore as well as local citizens (all described as "merchants") — gave their opinion of the status of the "concubines" and the marriage ceremonies. The Consul-General stated what was obviously the position under Chinese law and custom:

> "According to the law of China a man can have only one lawful wife. When his wife dies or is legally divorced he can marry again and take to himself another wife. A legal wife is entitled to official honour through her husband if the husband holds any official rank. In addition to his wife a Chinaman can take a concubine — A concubine is only entitled to official honour through her sons but not through the father of her children who is not her husband but her lord and master. The proof of a legal marriage according to Chinese law are the three marriage documents, the six stages of the marriage ceremonies, the go-between and the fetching of the bride from her guardian's house in procession accompanied by a band. As to a concubine she may be purchased with money without any ceremony whatever".[26]

He also cited the Ta Ching Lu-Li (Laws of the Manchurian Dynasty) which stated that any person having a wife living who marries another wife shall be punished with 90 blows and the marriage being considered null and void the parties shall be separated and the woman returned to her parents.

Here then, is a foreign juridical concept — a half-way house between a mistress and a wife — a status called "tsip" in Chinese law but unknown to English law. Law Ag. C.J. understood the concept. He said:

> "I think it is extremely clear that the Chinese besides the relations between a man and the person whom at any rate I will call the principal wife, by law and customs recognize relations between a man and persons whom for the moment at any rate I will call secondary or inferior wives, persons who certainly are not I think, either by law or custom, looked upon at all in the light in which a woman, cohabiting with a man to whom she is not married, is looked upon in England".[27]

25. *In the Estate of Choo Eng Choon deceased; Choo Ang Chee* v. *Neo Chan Neo & Ors*. 12 S.S.L.R. 120.

26. 12 S.S.L.R. 120, 133.

27. 12 S.S.L.R. 120, 141.

In short, Law Ag. C.J.'s dilemma was that not Chinese, but English succession law was applicable, and under the English Statute of Distributions a woman is either a wife or not a wife. The Chinese status must be categorised in English common law terms. The judge examined the position of the "inferior wife" in detail, relying on such works as Staunton's *Penal Laws of China*, Hare's *Notes on the Family Law and Usages of the Chinese*, and Williams' *The Middle Kingdom*, some parts of all of which seem rather dubious. Law Ag. C.J. pointed to the rights of a "concubine" or "inferior wife", including the right to be maintained, the legitimacy of her children, and the requirement of some sort of ceremony for the taking of such an "inferior wife". He also referred to her right to complain in court when not being maintained properly, and the fact that she could not be divorced except for the same reasons as for a principal wife (this point seems very wrong). He concluded that though the social position of such inferior or secondary wives was very inferior to that of a first wife, "legally their position more nearly resembles that of a wife where polygamy is allowed than it resembles anything else",[28] and held that Chinese marriages must be regarded as polygamous. Judges such as Sir Benson Maxwell and Sir Theodor Ford had come to the same conclusion in previous cases — and Law Ag. C.J. was not slow to cite these precedents, and hinted that even if he had made up his mind otherwise, these cases would have prevented him from following his personal opinion.

As to the question of recognising polygamy among the Chinese, the judge overcame the obstacle of English cases — which insisted that only "Christian" or monogamous marriages be recognized — by relying on the Second Charter of Justice 1826 which he held to be still in force. The non-recognition of Chinese polygamy, he thought, would cause great hardship:

> "The result I think will be that in the eye of the law here the women merely declared concubines will have no legal rights at all to maintenance or any provision, that they may be turned adrift to starve and that their children may be regarded by the law as bastards".[29]

This decision was upheld by two out of three judges in the Court of Appeal on substantially the same grounds.[30] The Statute of Distributions was applied so that the wives, principal and inferior, shared in the rights of an English widow. Previous cases to the same effect were therefore upheld.

The *Six Widows* Case closed the debate on Chinese polygamy.[31] But what had it done ? It created a concept of polygamy which in effect is a half-way house between the English concepts of polygamy and monogamy; for the case also recognised that a Chinese could not go through another ceremony for the taking of a principal wife with

28. 12 S.S.L.R. 120, 148.

29. 12 S.S.L.R. 120, 162-3.

30. Sercombe Smith J., however, seized on the fact that the deceased was domiciled in Singapore to dissent on the ground that he could only marry by bell and book as laid down by the common law.

31. Later cases took judicial notice of Chinese polygamy.

another woman while the principal wife was still living and undivorced.[32] Such a marriage according to the case would be absolutely void. And yet, inferior wives were elevated to the status of the principal wife regarding inheritance rights. It was, on the whole, a queer marriage of Chinese and English law concepts. Subsequent judges have recognized this oddity; some of them preferred to refer to "principal wife" and "secondary wife" in their Chinese forms, *"tsai"* and *"tsip"*.

What makes a Chinese Marriage ?

An issue which was only barely touched on in the *Six Widows* case, and which could have plagued the Straits Settlements judges was eventually bypassed through the application of a common law rule of evidence. This is the issue of what the essential ceremonies of Chinese marriage were. Despite the reference to the law of China, it is clear that the judges were trying to ascertain the practices of the Chinese in Singapore. It was, however, assumed that these Chinese still followed the custom of their ancestral homeland. But suppose evidence shows that there is no uniform practice in China, and that Singapore practice again differs from those of the Chinese mainland[33]— the dilemma could prove embarassing. The embarassment, however, was cut short by the invocation of the common law principle that a marriage could be prove by evidence of co-habitation and repute: *Ngai Lau Shia* v. *Low Chee Neo*.[34]

But the final solution to the problem of deciding the essential formalities of a Chinese customary marriage was the superimposition of a new rule on uncertain community standards. Murison C.J. had said in 1926 that:

> "I am not so sure that some day the Courts here will not have to hold that the only real essential of the Chinese marriage of a principal wife is intention; and that it is a question of fact in each case whether or not there has been a performance by the parties in this colony of so much of the ceremonies usual in Chinese principal marriages as would justify the Court in finding that there was an intention to perform a principal marriage, and that therefore such a marriage has taken place".[35]

This suggestion paved the way for Murray-Aynsley C.J. to hold, twenty-three years later, that in the case of a tsip or secondary wife, the law of Singapore merely required a consensual marriage, "an agree-

32. This recognition has been criticized on the ground that there had grown up in the colony a practice of taking more than one principal wife, provided they were not taken in the same place: Braddell *op. cit.*, note 3 at p. 85. At any rate, later cases decided that the going through of a ceremony for the taking of a principal wife while there was already a principal wife living gave the second woman the status of a secondary wife, on the ground that justice and fairness demanded it: *Woon Kai Chiang* v. *Yeo Pak Yee* [1926] 1 S.S.L.R. 27, especially at 58 *(per* Deane J.), and *Re Ho Khian Cheong deceased* (1963) M.L.J. 316. *R.* v. *Sim Boon Lip* (1901) 7 S.S.L.R. 4 which decided that a Chinese man could be convicted of bigamy was thus devoided of all effect.

33. Maurice Freedman, "Colonial Law and Chinese Society" (1950) LXXX *Journal of the Royal Anthropological Institute* 97 at pp. 101-3.

34. (1921) 14 S.S.L.R. 35.

35. *Woon Kai Chiang* v. *Yeo Pak Yee* [1926] 1 S.S.L.R. 27, 34.

ment to form a relationship that comes within the English definition of marriage".[36] This decision meant that the requirements of long continued cohabition and repute were merely evidentiary. Later cases in the Court of Appeal[37] confirmed Murray-Aynsley C.J.'s decision, although the learned Chief Justice showed his dissatisfaction with the legal concept of a "tsip", created, as he put it, "by courts composed of lawyers versed in English ideas".[38] And he certainly realized that the concept was not a faithful incorporation of Chinese custom, but he regretted that it was too late "to reopen what has been decided in the *Six Widows* case...and to reduce the matter to one of Chinese custom".[39] Murray-Aynsley C.J. also held, by way of observation, that the legal requirements for marriage with a *tsai* and a *tsip* are the same. Although no case has raised the point in relation to a *tsai*, it seems from the acceptance of the Chief Justice's dictum in later Court of Appeal cases that it represents the law.

There is objection against the application of the presumption of marriage — on the ground that the borderline between a secondary wife *(tsip)* and a mistress would be thus eliminated. But the establishment of a rule that proof of agreement to marry was all that was required for the taking of both *tsais* and *tsips* makes sense, provided one accepts the decision to give *tsais* and *tsips* equal rights on intestacy (a decision which eliminated, so far as the Courts were concerned, the legal differences between the two statuses). For, as Maurice Freedman, who made a thorough investigation of Chinese marriage custom in Singapore, observed in 1953:

> "The forms of marriage have proliferated, and various versions and combinations of traditional and modernist ceremonial make it difficult to arrive at any general statement of the essentials for Chinese marriage at the present time.... From the old-fashioned Straits Chinese wedding at one end of the scale to the Mass Wedding and declaratory marriage at the other end there is a range within which one may see the different attempts which Chinese make to adapt their social behaviour to the needs of a world where both the homeland and the Nan-Yang (Note — a Chinese term for Southeast Asia) appear to change rapidly from year to year".[40]

Here then, is a classical example of a court being asked to perform the task of "the reconciliation of the irreconciliable, the merger of antitheses, the syntheses of opposites." In retrospect, its seizing upon agreement as the essential of a Chinese marriage was the correct solution. And it did this not by reference to pre-existing community standards, but by extracting from the uncertain conflicting community standards their lowest common denominator. The line between a *tsai* and a *tsip*

36. *Re Yeow Kian Kee deceased* (1949) M.L.J. 171, 172. His Lordship's reference to the "English definition of marriage" must, in this context, be read as excluding the element of monogamy.

37. *Re Lee Siew Kow deceased* (1952) M.L.J. 184; *Re Lee Gee Chong deceased* [1965] 1 M.L.J. 102. See also *Chu Geok Keow* v. *Chong Meng Sze* (1961) M.L.J. 10.

38. *Re Yeow Kian Kee deceased* (1949) M.L.J. 171, 174.

39. *Ibid.*

40. Freedman, *op. cit.*, note 20 at p. 226.

was blurred (since under Chinese custom it was the ceremony involved which distinguished them from each other) — but the *Six Widows* line of cases had already equated the two, for practical purposes.[41]

Chinese Divorces:

The question of divorces according to Chinese customs had never been as such an issue for decision by the Straits Settlements Courts, for it was held early in the piece that "The Supreme Court has no jurisdiction either on its civil or ecclesiastical side, to entertain a suit for restitution of conjugal rights among non-Christians".[42] This was a continuation of the attitude of the courts of England, and encompassed other matrimonial causes, including divorce. This was an astounding conclusion, considering that at least 99% of the inhabitants of the colony were non-Christian. The Legislature obviously thought it wise, for the Divorce Ordiance enacted in 1939 expressly limited the Court's jurisdiction to monogamous marriages.

The impact of the court's decision in refusing jurisdiction in matrimonial causes between couples married according to Chinese custom may not be as great as one would think at first impression. It is generally agreed that the Chinese were not — and probably still are not — a litigious people. In family affairs, especially, they did not like washing their dirty linen in public. In the villages of old China, disputes were frequently settled by village elders, prestigious local gentry and leaders of the clan to which the disputants belonged. Family affairs were often the subject of demiation by a disinterested and respected relative. Even the official magistrates, in the few cases which came before them, regarded reconciliation as their main task. The old Chinese culture insisted not so much on one's pound of flesh as on general harmony. It is doubtful, therefore, whether the Straits Settlements Courts would have had much business by way of marital quarrels had the judges not refused to hear them.

Questions of divorce, therefore, came up only in intestate succession cases where the issue was, usually, whether the claimant was a wife of the deceased. Classical Chinese treatises listed seven grounds on which a *tsai* (principal wife) may be divorced: these included adultery, failure to bear children and disobedience to her parents-in-law. Restrictions on divorces included the situation where the wife had no family to take her back, and where her husband's family, poor before the marriage, became rich after it.[43] No woman could divorce her

41. In harmony with this equation the court also decided that the rule that a marriage revokes the spouses' wills applied to secondary marriages (i.e. marriages of tsips): *In re Lee Kim Chye deceased* (1936) M.L.J. 49.

42. *Lim Chye Peow* v. *Wee Boon Tek* (1871) 1 Ky. 236, following the decisions with regard to Hindus: *Veeramah* v. *Sawmy* W.O.C. 38; Leic. 421, and *Vadamalia Pillay* v. *Shetthay Amah* W.O.C. 41; Leic. 270. It is clear that in this context "Christian" means "monogamous". The earlier decision of Sir Benson Maxwell R., *Reg.* v. *Loon* W.O.C. 39, to the contrary, was therefore not followed. See also *Choi Wai Ying* v. *Cheong Weng Chan* (1933) M.L.J. 301.

43. See generally, Lee Siow Mong, "Chinese Customary Marriage and Divorce" [1972] 2 M.L.J. iii.

husband.[44] Separation by mutual consent — which amounted really to divorce — was permitted. Nothing much was said about the divorce of a *tsip* (secondary wife): apparently such a woman could be put away without much fuss.

The Courts' activity in this area shows a clear analogy to its activity in the area of marriage validity and polygamy. The earlier cases relied on expert witnesses, and the later cases attempted to frame rules of law by extracting from the evidence presented to their predecessors. Unfortunately, the efforts of the Courts in this regard do not seem to yield the same clear-cut and fair results as they did in relation to marriage validity, and it is doubtful whether the final judicial settlement of the rules truly reflects community standards. I shall trace the development of judicial thought in this area by examining what I regard as the four most significant decisions.

In the Estate of Sim Siew Guan deceased[45] arose out of a claim by a secondary wife *(tsip)* against her husband's estate. The Consul-General for China testified that divorce was recognised in China, and that a man could unilaterally divorce his secondary wife if she were disobedient to himself or his principal wife *(tsai)*, if she did not conform to household regulations, or if she were guilty of immoral conduct. Apparently, the husband should also declare to a gathering of his clansmen or close relatives his intention to divorce the *tsip*. On the strength of this evidence, Shaw C.J. held that on the facts the *tsip* had been divorced by her husband.

An earlier case had held that the Chinese custom of divorce by mutual consent was recognised in the Straits Settlements.[46] In *Re Lee Choon Guam deceased*,[47] Terrell J. citing both *Nonya Siu's* case and *Estate of Sim Siew Guan deceased*, held that a customary divorce according to Chinese law had been made out. But his Lordship stated that no unfaithful conduct on the part of the *tsip* had been proved. All that happened was that the man showed a definite intention to break off the relationship, and the intention was communicated to the *tsip* and accepted by her.[48] Moreover, no notoriety of the sort contemplated by Shaw C.J. in *Estate of Sim Siew deceased* was present here. I submit, therefore that *Re Lee Choon Guan deceased* stands for the proposition that a Chinese man and his *tsip* could divorce by consent.

44. This was recognised by the courts as part of the Chinese custom in Singapore: *Cheng Ee Mun* v. *Loon Chun Heng* (1963) M.L.J. 411.

45. (1932) M.L.J. 95.

46. *Nonya Siu* v. *Othmansah Marican* Leic. 167 (Sir Benson Maxwell). Also reported as *Nonia Cheah Yew* v. *Othmansaw Merican* (1861) 1 Ky. 160, W.O.C. 22.

47. (1935) M.L.J. 78. The alternative *ratio decidendi* was that the plaintiff failed to prove that she was a *tsip* because, *inter alia*, she was not accorded recognition by the man's family. This ground must now be regarded as having been overruled by the subsequent decisions discussed above. (pp. 88-89).

48. (1934) M.L.J. 78, 84.

The process of extracting the basic principles from expert evidence and incorporating them into local jurisprudence was completed, so far as Chinese divorces of *tsips* are concerned, in *Re Lee Gee Chong deceased.*[49] In this case, Ambrose J. relying solely on two earlier cases, *Estate of Sim Siew Guan deceased*[50] and *Woon Ngee Yew* v. *Ng Yoon Thai*,[51] and without the aid of expert evidence, stated that:

> "The law of Singapore is that a Chinese secondary marriage could be dissolved by the husband by unilaterally repudiating the secondary wife, if she has been disobedient to him or to his principal wife, or has been guilty of immoral conduct, and by notifying the dissolution to his near relatives or his clansmen".[52]

This decision was given after the Women's Charter[53] had come into force, and when Chinese customary divorces could no longer be effected in Singapore.[54] But customary divorces effected before 15th September, 1961 retained their validity, and it is not, therefore, a pedantic quest to ask whether Ambrose J.'s effort was, in terms of this paper's framework of discussion, a fair one. First, Ambrose J. relied on two earlier cases for his conclusion. Second, it may be noted that in *Estate of Sim Siew Guan deceased*, the expert witness was the Consul-General for Chinese, and in *Woon Ngee Yew's* case, the expert witness was described as "a gentleman who occupies a prominent position among the Chinese of Perak." Was the opinion of these persons a sound basis on which to build a general rule governing Chinese customary divorces ? The Chinese Marriage Committee appointed by the Straits Settlements Governor in 1925 reported that "there is practically unanimous opposition among the Chinese residents born in China to any divorce legislation, which is shared by many Chinese born in the Colony",; but that a presure group identified as the "Chinese ladies of Penang" were unanimously in favour of divorce as a means of prohibiting concubinage.[55] In an area of conflicting demands, the ascertaining of prevailing community standards does not seem to be an appropriate function of the Courts.

Surprisingly, there was no test case in the Straits Settlements to decide whether the repudiation of a primary wife *(tsai)* or the agreement to divorce between a man and such a wife was valid. The fact that the court would accept the issue only if raised in a non-matrimonial suit (e.g. grant of probate) probably explains this phenomenon. But there is no doubt that divorce by consent was accepted by the Chinese

49. [1965] 1 M.L.J. 102.

50. (1932) M.L.J. 95.

51. (1941) M.L.J. 32. This was a decision of Murray-Aynsley J. in the Supreme Court of the Federated Malay States. It was reversed on appeal.

52. [1965] 1 M.L.J. 102. Although the case went up on appeal, this portion of the judgment was not disapproved.

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

54. Ss. 7, 166(3), Women's Charter. For a discussion of the operation of these provisions, see Wee, K.S., "Customary Marriages and the Women's Charter: Lingering Doubts" (1972) 14 Mal. L.R. 93.

55. *Chinese Marriage Committee Report Singapore* 1926. Para. 16-20.

community at large and tacitly sanctioned by the authorities. In West Malaysia, the only case on the unilateral repudiation of a *tsai* arose in 1972.[56] I have commented on the case elsewhere,[57] but it may be noted that the case is an illustration of the danger that in incorporating community standards, a court of law may be misled by inadequate or inappropriate evidence of what those standards are. This point will be developed later in this paper when submissions will be made as to the limits of judicial legislation.

Intestate Succession: Unfair equality ?

The refusal of the courts to recognise and enforce the Chinese law of succession has been condemned by Western writers. A Beckett Terrell summarised the situation thus:

> In the colony the law is in fact a judge-made adaptation of the Statute of Distributions, but it is quite clear now what the law on the subject is. It was decided in the — *Six Widows* Case, that the ordinary Statute of Distributions applied with the modification that the surviving widows took between them the widow's one-third share and that the remainder was equally divisible among all the children of the intestate whether by a principal wife or by secondary wives. Adopted children were excluded. No one pretended that this decision was in accordance with Chinese custom and proposals were made from time to time to introduce legislation more in accordance with Chinese ideas. It appeared however that the Straits Chinese themselves were not altogether agreed as to what legislation was required, and accordingly the law was left as it was.[58]

In fact, the first reported decision holding that the English Statute of Distributions, imported by the Charters of Justice, applied to Chinese intestate estate, was decided in 1867.[59] The *Six Widows* Case contained very little discussion of whether the application of the statute would result in oppression. Counsel and judges alike concentrated on whether the statute could be applied so as to split the widow's share among principal and secondary widows alike. In *Lao Leong An's* case Maxwell R. was influenced by the fact that the statute had been applied to Muslims (whose polygamy to the extent of four wives had been recognised).

The hardship, if any, caused by the application of the Statute of Distributions was probably minimal. Under Chinese law and custom (again, with local variations) the property of a deceased went to his sons in equal shares (with the eldest son getting a larger share to aid him in the duty of performing family ancestral rituals).[60] The widows were entitled to be maintained so long as they remained widows. Unmarried daughters were also entitled to be maintained by their brothers, and to a dowry when they married. Married daughters were entitled to nothing. In old China, wills were rare, and it seems that a will

56. *Mary Ng* v. *Ooi Kim Teong* [1972] 2 M.L.J. 18.

57. See Wee, K.S., "Chinese Law and Malayan Society" (1973) 15 Mal. L.R. 110.

58. A.K.A. Beckett Terrell, *Malayan Legislation and Its Future*, p. 63.

59. In the goods of *Lao Leong An* Leic. 418; 1 S.S.L.R. 1; W.O.C. 35. See also *Lee Joo Neo* v. *Lee Eng Swee* (1887) 4 Ky. 325.

60. See generally, Paula Aronowitz, "Chinese Succession Law: An Historical Survey" 2 *Portia Law Journal* 265.

could settle only details of distribution, but not the general pattern of distribution. Such a system was the bitter object of attack when the equality of the sexes movement started after the fall of the Manchurian monarchy. The Family Code of the Republic gave daughters equal shares in their fathers' estates, in the absence of wills.

It may be safely said, therefore, that the Singapore Chinese under the influence of changes in China, did not feel bitterly about the discarding of their old distribution custom. Moreover, the court had conceded to them the freedom of testation under English law. The richest of them, who were most likely to be affected, were also must likely to have had legal advice, and hence could if they wished adopt by will the old Chinese system.

But the same things could not be said about the court's attitude toward adoption of children by Chinese custom.

Adoption by Custom: Unjustified Deprivation ?

It was of the greatest importance to the Chinese, with their prime emphasis on the family as the basic social unit, that the family line be continued. If a man was childless, he was obliged to adopt a son from among his agnatic kinsmen who were a generation below him (e.g. a nephew). If that was not possible, he was allowed to look to people of the same surname. For the fiction was that people of the same surname had a common ancestor. Adoption of a child of a different surname was prohibited, and the prohibition was reinforced by criminal sanction. An adopted son had exactly the same rights as a natural son. Thus, if no natural son were born to his adoptive parents, he would inherit the family property and the right to perform the family ancestral rituals. He suffered only one handicap — if a natural son was born after the adoption, this son would, despite being younger in years, succeed to the family line (i.e., the right to perform the family ancestral rituals) as well as the extra portion of property that went with this right. But the adopted son would still get an equal share in the family property.

At first the Straits Settlements Court, under the vague mandate to adjust to Chinese custom, obviously intended to give adopted children their place in Chinese law. In *re Chu Siang Long's Estate* ruled that "Adopted children of a Chinese are entitled to joint administration of his estate in preference to his nephew".[61]

But the application of the Statute of Distributions to Chinese intestacies raised a problem: the Statute had been interpreted by English courts to extend only to natural children. Ford Ag. C.J. finally decided that a child adopted according to Chinese law and custom had no right on his adopted father's intestacy:

> "The circumstances of inconvenience or injustice in declining to recognise this practice of adoption, does not seem to me sufficiently grave to call for the modification of English law, as sought. Indeed with an absolute testamen-

61. (1840) W.O.C. 11. This case was ocerruled in *R.* v. *Willans* (1858) 3 Ky. 16.

> tary power, and that full knowledge of the terms under which Chinese settle in this Colony, which this and previous decisions may be supposed to give, it will be hard to make out much semblance of their existence".[62]

The cogency of the Chief Justice's arguments is highly debatable in view of the rather inadequate law reporting system of the time and the fact that a great number of Chinese in the Straits Settlements neither spoke nor read English. But the case settled the matter; and subsequent courts went even further. English rules of interpreting wills were applied to wills of Chinese, so that unless the document gave a contrary indication, "child" would not cover "adopted child".[63]

The legislature did in fact intervene, perhaps unwittingly, because the Evidence Ordinance of 1893 states in section 100 that wills "shall be construed according to the rules of construction which would be applicable thereto if they were being construed in a Court of Justice in England." All the Straits Settlements cases, however, proceeded not on this statutory provision, but on the assumption that the English law has been otherwise imported.[64] One case, *Re Lam Chee Tong (deceased)*,[65] even went so far as to hold that the word "child" in the *Chinese language* will of a Chinese man who at the time of making the will had no children other than ones adopted under Chinese custom, and who never subsequently had any natural child, meant "natural, legitimate child". Carey J. made an effort to justify his flagrant disregard of the testator's intention by appealing to the law of nature:

> "Admittedly the testator in the present case at the time of making his will had no children, other than adopted children and none has been born to his wife or widow since, but in accordance with natural laws the deceased being 57 years of age and his wife at that time 42 years, one cannot exclude the possibility of a child being born to them being in the contemplation of the testator when he made his will and this even though at that time they had been married for 20 years without issue".[66]

The English rule of construction was flexible enough, as the old case of *Quaik Kee Hock* v. *Wee Yeok Neo*[67] demonstrated, to accommo-

62. *Khoo Tiong Bee* v. *Tan Beng Gwat* (1877) 1 Ky. 417.

63. The case of *Quaik Kee Hock* v. *Wee Yeok Neo* (1886) 4 Ky. 128, however, took a more realistic approach, The court there held, on expert evidence of the law of China to the effect that "children" normally included adopted children, that the will before it should be so construed. Despite its affirmation by the Court of Appeal, this case has been ignored in subsequent decisions.

64. In *Re Tan Cheng Siong deceased* (1937) M.L.R. 85, the first reported case since 1893 on the point, McElwaine C.J. held that the word "children" in the will of a Chinese means, in the absence of a contrary indication, "natural and legitimate children" on the ground that "the status of adoption is unknown to the law of the Colony".

65. (1949) M.L.J. 1. This was a Malayan decision, but it is indicative of the absurd extent to which disregard of local conditions could carry the judiciary.

66. (1949) M.L.J. 1, 3. The deceased was suffering from tuberculosis for the last three years of his life, and eventually died from the disease. It is heartening to note that Suffian J. (as he then was) said in *Re Tan Hong deceased* (1962) M.L.J. 355, 359 that "if I had to construe Lam Chee Tong's will today I would, as at present advised, probably decide differently from Carey J.".

67. (1886) 4 Ky. 128.

date the Chinese community's expectations as to adopted children. And yet concession to these expectations was made only where the testator had unequivocally provided his own dictionary.[68] Moreover, the concession was never generous enough to go beyond the strict wording of the will.[69]

The courts had nowhere disappointed the expectation of the Straits Chinese more than in their treatment of customary adoptions. The Chinese Marriage Committee appointed in 1925 went beyond their terms of reference to urge that "the adoption of sons should be legalised in accordance with law and custom in China".[70]

Perhaps here the Courts' handling of the legitimation of children may be mentioned. Chinese custom laid down that any child of a man, whatever the status of its mother, was his fully legal offspring as long as he recognised it as such. But English common law required a child to be born in wedlock to attain legitimacy; the only concession, made by the legislature, was that a child born out of wedlock gained legitimate status if and when its parents subsequently married. The court had refused straight out to recognise the Chinese form of legitimation: *Re Khoo Thean Tek's Settlements*.[71] Stevens J. thought that the rule of English law which excluded legitimation by recognition would not, if applied to the Chinese, produce such injustice or oppression as would counterbalance "the weight and soundness of that policy". The Privy Council affirmed the case on appeal.[72] On the other hand, the Chinese custom of legitimation by subsequent marriage of the parents *(per subsequens matrimonium)* was recognised as conferring the status of legitimacy under Straits Settlements law. This was the holding of the Court of Appeal in the *Six Widows* case,[73] reversing Law Ag. C.J. on this point. Braddell J.'s reasoning, with which Hyndman-Jones C.J. agreed, was that:

> "The question of whether this child should be admitted to share with the other children of the deceased seems to me to be one that must be determined with regard to the validity of the union of his parents and the rights and obligations governing that union under the institution of marriage, according to the religion and usages of the Chinese with reference to which alone the parties to the union must be deemed to have contracted".[74]

This reasoning provides an analytical justification for distinguishing between legitimation by reference to subsequent marriage, and legitimacy based on adoption and recognition. But when one considers the amount

68. As in *Re Yeo Soo Theam deceased* (1938) M.L.J. 2.

69. *Tan Phee Teck* v. *Tan Tiang Hee* (1952) M.L.J. 240, where the phrase "whom he may adopt' was confined to children adopted personally by the deceased's nephew, although adoptions had been made for him by his father and such adoptions were perfectly valid under Chinese custom.

70. *Chinese Marriage Committee Report* Singapore. 1926. Para. 67-68.

71. [1928] S.S.L.R. 178; [1929] S.S.L.R. 50.

72. *Khoo Hooi Leong* v. *Khoo Chong Yeok* [1930] S.S.L.R. 127.

73. 12 S.S.L.R. 120.

74. 12 S.S.L.R. 120, 224-5.

of hardship suffered by both classes of children, the fairness of the decisions as to the former accentuates the harshness of the decisions as to the latter.

It may be noted in passing that the Intestate Succession Act 1966 of Singapore, which replaced the English Statute of Distributions, seems to confirm the previous state of the law despite a curious ambiguity in the drafting.[75]

The Shadowy Realm: Laws Without Legal Sanction

There were some Chinese customs which, though widely observed by the Chinese of the Straits Settlements, never came before the Straits Settlements Courts.[76] Surname exogamy was — and probably still is — observed by almost all Singapore Chinese. Would the Court have enforced the rule had it been raised ? Would it have been held to nullify the marriage (as indeed it did under Chinese custom) ? But the questions are probably academic: first, because of legislation in 1961 and second, because the sanctions of moral pressure and public opinion seemed to have enforced the rule quite efficiently.[77]

Another custom widely adhered to is that of the sons' obligation to support their parents. In ancient China local magistrates had power to punish a son for not doing so. One can hardly imagine a common law court enforcing such an obligation: English law did not know it. Yet is this not a clear case of hardship if Chinese custom is not applied — at least if the son concerned has enough money to support his parents? Less clear is the Chinese custom — which sprang from patriarchy — that on a divorce, unilateral or consensual, the children always remained with the husband's family. Possibly this custom has declined in Singapore. Freedman observed in 1953 that in modern matrimonial disputes in Singapore the "ownership of children was frequently conceded to the wife by the husband as part of the bargaining process leading up to the final signature of divorce papers".[78]

The Felt Necessities of the Times ? — Comparisons from Other Jurisdictions

Across the Straits of Johore, the Malayan courts came to more or less the same conclusions regarding Chinese family custom, as the Straits Settlements courts.[79] The common law (together with a host

75. Section 3 of the Act provides that " 'child' means a legitimate child and includes any child adopted by virtue of an order of court under any written law for the time being in force in Singapore, or Malaysia or Brunei." This provision may conceivably be interpreted on the principle *expressio unius, exclusio alterius* to exclude customary adoptions.

76. See Freedman, *op. cit.*, note 33 at p. 119.

77. *Op. cit.*, at p. 120.

78. *Ibid.*

79. See generally M.B. Hooker, "The Relationship Between Chinese Law and Common Law in Malaysia, Singapore and Hong Kong" (1969) *Journal of Asian Studies* 723.

of English statutes) was not formally imported wholesale into Malaya until 1937, when the Civil Law Enactment of the Federated Malay states was passed. But from the very beginning the high Malayan courts were staffed by British judges, and they have tended to introduce the common law when unable to find local law on a particular subject. These judges have also assumed the existence of a body of Chinese custom, to be applied when the application of English law would cause hardship. Straits Settlements decisions were followed, and the legislatures seldom if ever intervened.

In one important aspect, however, the Malayan judges gave more scope to Chinese custom — namely, the law of succession. This was indirectly influenced by legislation. Perak, one of the Federated Malay states, passed an Order in Council in 1893 [80] on the Recognition of Chinese Laws, giving effect to, *inter alia*, Chinese succession law. The other Malayan State courts under its influence applied the same law: *Yap Tham Thai* v. *Low Hup Neo*.[81] Moreover, the spirit in which the Order in Council was passed had an effect beyond its literal wording. In *Tan Sim Neoh* v. *Soh Tien Hock*,[82] the Court held that a son adopted for a deceased man was entitled to share in his estate. Though not expressly covered by the Order in Council, the adoption in question was recognised on the ground that it was a common occurrence among the Chinese. The Straits Settlements decisions, seen against this background, cannot be said to have been prompted by the felt necessities of the times.

The Hong Kong Supreme Court proceeded on an assumption similar to that of the Straits Settlements Supreme Courtt — English law as it stood in 1843 was applied unless it would cause injustice or oppression, in which case Chinese custom would apply. Probably because of the overwhelming Chinese characteristic of the population, the Hong Kong Supreme Court has given wide recognition to Chinese custom in the family sphere.[83] The institution of the *tsip*, adoption by Chinese custom and the Chinese law of succession have all been held applicable.[84]

The Hong Kong and Malayan courts proceeded in the much the same way as the Straits court in ascertaining Chinese custom: by relying partly on expert witnesses and partly on textboks such as Staunton and Von Mollendorff. The Hong Kong court faced an extra difficulty: the terms of the relevant ordinance as interpreted by it fixed 1843 as the time at which the applicability of English law (and, hence, the applicability of Chinese custom) is to be tested; and there are suggestions that the Chinese customs that are recognisable must be proved to have

80. Perak Order in Council No. 23 of 1893, amended by Order in Council No. 26 of 1895.

81. (1919) 1 F.M.S.L.R. 383.

82. (1922) 1 F.M.S.L.R. 336.

83. See Hooker, *op. cit.* note 79, and *Chinese Law and Custom in Hong Kong: Report of a Committee appointed by the Governor* 1950, pp. 83-121.

84. *Ng Ying Ho* v. *Tam Suen Yee* [1963] H.K.L.R. 823; *In the goods of Chan Tse Shi* (1954) 38 H.K.L.R. 9; *Wong Pan Ying* v. *Wong Ting Hong* [1963] H.K.L.R. 37.

existed in 1843.[85] Unfortunately this paper cannot go into this interesting area.

In 1929 the Federated Malay states legislature reversed the stand taken by the courts as well as by the 1893 Perak Order in Council, and applied English principles of distribution on intestacy to the Chinese of Malaya. The only concession made was that if a Chinese intestate left more than one widow, they shared the rights of an English widow on intestacy. This legislation, then, brought the law in the Malayan states into line with that in the Straits Settlements.[86]

Finally, a comment should be made on the attitude of the Straits Settlements judges toward changes in the customs they had incorporated. Here, the traditional British reverence for precedents as opposed to the more liberal American attitude stands out strongly. It was mentioned that Ambrose J. in *Re Ho Khian Cheong deceased*[87] declared that once recognised, Chinese custom ceased to be a plain matter of custom, but had to be determined by applying precedents.[88] The only comment that need be made on this attitude can be put in Carter's words:

> "...it is the function of the judges to watchfully observe the developing moral thought, and catch the indications of improvement in customary conduct, and enlarge and refine correspondingly the legal rules".[89]

A Theoretical Analysis

If one were to criticize the performance of the Straits Settlements judges in terms of the theory of adjudication set out at the beginning of this paper, one could say that they started off on the wrong foot. The terms of the Charters of Justice were vague enough to have justified Sir Edmund Stanley's approach: to pay the most scrupulous attention to ancient customs, usages and habits of the natives. But this rather tolerant view soon gave way to the desire to import as much English law as possible. The presumption was set up that English law applied unless found to be unjust or oppressive to the natives, or to cause them hardship. These criteria were used in such a way as to disappoint some of the strongest expectations of the Straits Settlements Chinese.

Even when pre-existing standards of the Chinese community and not of English tradition were recognised, they had to be hammered into

85. D.C. Greenfield, "Marriage by Chinese Law and Custom in Hong Kong" 7 I.C.L.Q. 437.

86. The Distribution Enactment, 1929, operating as from 1st January 1930.

87. (1963) M.L.J. 316, 317. See *supra* note 16.

88. This attitude contrasts strongly with that taken by Murray-Aynsley J. who stated that "allowance must be made for change in custom. It would be absurd to suppose that today no Chinese lady could become a tsai without being carried in a red chair, but a generation back it would have been considered an essential part of the ceremony. So also...procedure in divorce is capable of changing". *Wong Ngee Yew* v. *Ng Yoon Thai* [1941] M.L.J. Rep. 32, 34. But as this paper has tried to show, it was Ambrose J.'s approach which prevailed.

89. James C. Carter, *Law, Its Origin, Growth and Function* 1910, p. 329.

common law form, for the judges were extremely suspicious of foreign jural concepts. The process of hammering inevitably produced distortions— and the elevation of the *tsip* to the status of a polygynous wife is a good example.

When the Chinese community were disappointed by the courts' decisions, it is a fair guess that they ignored them. Napier thought, in 1913, that "in many cases family arrangements are come to, and forced by Chinese opinion on unwilling members, whereby the rules of English law are evaded".[90] And one must keep in mind that the Chinese came from a background which encouraged mediation for the sake of harmony, and frowned upon litigation.[91] (This explained partly why the Straits judges found some Chinese legal concepts vague). Even though the dispute — reconciliation machinery (the clan, lineage and village organisations) had not been transplanted to the Straits Settlements, nevertheless in the sphere of family disputes the mediators were traditionally elderly and respected relatives or prestigious close family friends. In the writer's personal experience, these people still performed much of their traditional role in this regard. Disputes outside the family sphere were also more often than not the subject of mediation and compromise, the mediators being usually leaders of the local Chinese community.

But of course nothing said so far should excuse a court if it failed to adjudicate properly, for disputes did come before it, few though they were. And since we assume that settlement in courts is a desirable means of resolving disputes which cannot be solved by other peaceful means, it is important that the adjudication be done fairly. In terms of the theory of adjudication discussed, fairness requires that the disputants should not be unnecessarily surprised, that the courts should not without good reasons produce a result that reasonable men in the litigants' shoes would not have foreseen. If the legislature had laid down a criterion beforehand, that of course is the standard for judgement. If it had not, the court had to look elsewhere for standards commanding the general adherence of the community. Custom, looked at from this angle, is simply the example *par excellence* of a community standard.

90. W.J. Napier, *The Application of English Law to Asiatic Races*. Singapore. 1913. p. 146.

91. Austin Coates, *Myself A Mandarin* 1969, recounted the author's experience as a magistrate among the Chinese villagers of the Hong Kong New Territories. After many years at his job, he wrote (at p. 61) that:

> "Chinese general ideas about justice are less concerned with absolute standards of right and wrong, in the context of specific laws and situations, than with a vague and diffuse principle of general benevolence, expressed perhaps in the words 'I have as much right to be alive as you'. If instead of pursuing hard and fast legal judgments — good for one party, bad for the other — one aimed for generally unsatisfactory compromises based on this imprecise principle of benevolence, there was a fair likelihood of unexpectedly harmonious results."

See also, J.A. Cohen, "Chinese Mediation on the Eve of Modernisation", in D.C. Buxbaum (ed.), *Traditional and Modern Legal Institutions in Asia and Africa,* 1967.

And this is where the apparent irony in the work of the Straits Settlements judges comes in. Disregarding or distorting Chinese custom as stated in textbooks, treatises and by some expert witness, the judges might yet have been fair in that the distortion or disregard might have been demanded by a Chinese society bombarded by numerous influences and factors for change. Thus the position of the *tsip*, whatever it might have been in old China, had in fact been raised in Singapore due to at least two reasons:[92]

(1) The widespread practice of keeping *tsai* and *tsips* in different homes (a practice available, of course, only to the very well-off). For practical purposes a *tsip* in such a case is the mistress of her house, unburdened by the inferiority of status inherent in co-residential polygamy.

(2) Many Chinese went to Singapore already had *tsais* in China. They married *tsips* in Singapore. Since these *tsips* were for all purposes mistresses of their households, they did not feel inferior to the *tsais* in China. Even when the *tsais* eventually arrived, they were not automatically deferred to: a battle of personalities usually occurred to decide the place of honour.

If this generalisation is correct, then the court's elevation of the *tsip* to the status of an English wife, far from being a bad interpretation of Chinese customary law was in fact a progressive incorporation of new Chinese custom. Again, the Courts' refusal to apply the patriarchal Chinese law of succession and their decision to introduce the English statute of Distributions would seem to have anticipated the movement for equality of the sexes which even China herself could not escape eventually. A dynamic jurisprudence requires adaptation to the changing times — ascertaining changes is almost as important as ascertaining existing standards.

And this is where the theory of adjudication discussed so far shows its inadequacy as a conceptual framework. In a society undergoing changes, sometimes violent but at any rate continuous, what usually exist at any given moment are mainly conflicting ideals and standards. The theory requires the court to take no stand if no standard is available for judgment because none has secured the general adherence of the community. This means, in the Anglo-American judicial process, a judgment for the defendant. This may be a good way out in cases involving torts, contracts or commercial practices. But if the case involves the question of the status of a person, it is conceived that the court cannot leave the matter in the air. It cannot simply give judgment for the defendant, for that will make a person's status depend on whether he or she happens to be the plaintiff or the defendant.

Moreover, it may be that the search for a standard commanding general adherence is, in most cases, an illusory one. An alternative theory of adjudication which seems to account better for a dynamic society may be constructed on Roscoe Pound's proposition that every

92. See Ann E. Wee, "Chinese Women of Singapore: their present status in the family and in marriage" in Barbara Ward (ed.), *Women in the New Asia*. UNESCO. at p. 378.

case involves conflicting demands or interests pressing for recognition by the law.[93] The demands may be asserted by groups or individuals. Every demand is valid by the very fact of its assertion; none has inherent superiority over any other. The task of the judges is to reconcile them, or to select which of them to enforce. This alternative theory would also accommodate social changes agitating for amendments of what the courts had decided.

I must confess, however, that there seems to be no ready-made answer to the most vital stage of this theory: the selection of particular interests or demands for legal enforcement. Thus, in the matter of marriage custom, the Chinese of Singapore were in a confusing state.[94] On one spectrum end is the traditional ancestor-worshipping ceremonies, and on the other is the reformed style of wedding — white gown and all. The Straits Courts, however, disregarded the forms — it went straight into the heart of the matter and came out with the essentials: mutual consent to become man and wife. Perhaps here lies the key to the reconciliation of conflicting interests: seek the basic factors common to them all, and discard the conflicting elements. But of course many conflicting demands are basically opposed to one another: a son adopted under Chinese custom is either entitled or disentitled to inherit from his adopted parents on intestacy. He cannot be both. And to give him a reduced share is a solution which our judicial framework would not countenance.

This takes us on to the limits of judicial lawmaking. Law is made whenever a judge selects a particular standard as criterion for the measuring of conduct or legal status. A strong argument can be made out that matters of status — and these occur mainly in the family relationship — should not be left to be fought out in the courts. The basic structure and aspirations of our society are in question here. The legislature is the proper body to decide these issues. When changes and pressures for changes come into being, it is the legislature that should canvass and pass judgment on their merits.

In any case, common sense demands that complicated issues on which the community is split along unclear lines, issues with great social repercussions, should not fall for decision by the courts without definite guidelines from the legislature.[95] The position of the *tsip* and the grounds for dissolving Chinese customary marriages are two such issues. The essential requirements of a Chinese customary marriage are another. To show how complicated the last really is: the Chinese Marriage Committee appointed by the Straits Settlements governor in 1925, after a year of taking evidence, could only report that they

> "found it impossible to submit proposals for legislation as to what forms or ceremonies should constitute a valid marriage, because the evidence disclosed the fact that there are no essentials for Chinese marriages in the old style common to all the Districts of South China...".[96]

93. Roscoe Pound, *Outlines of Jurisprudence* 5th ed., (1943) and Julius Stone, *Social Dimensions of Law and Justice*, (1966). Chap. 4-6.

94. Freedman, *op. cit.* note 20 at pp. 126-176.

95. See per Earnshaw J. in *Ngai Lau Shia* v. *Low Chee Neo* (1921) 14 S.S.L.R. 35, 54, and per Thomson L.P. in *Re Ding Do Ca* [1966] 2 M.L.J. 220, 223-4.

96. *Chinese Marriage Committee Report.* Singapore, 1926. para. 69.

I applaud the court's solution of this issue (that a consensual marriage is valid), but some have condemned this solution as a blurring of the line between a *tsai* or *tsip* on one hand and a mere mistress on the other. The legislature can at least work in ways that the courts cannot. It can, for example, appoint committees to investigate the extent of any demand for change, the hardship caused by existing legal rules, and the degree of uniformity of opinion on any issue. The courts, even if they can do all these, cannot afford to do so. They are enjoined to delay no decision, for justice delayed is justice denied.

The work of the Hong Kong Committee on Chinese law and custom (appointed in October 1948) is worth mentioning in this context.[97] Its investigation was admittedly far from comprehensive; but it unearthed sufficient information on the opinion and practices of the Hong Kong Chinese to eable it to recommend the abolition of the institution of the *tsip*, the compulsory registration of Chinese marriages and the introduction of a divorce law far different from that of traditional China. It took the committee two years to gather the information. By way of contrast, judges have only *ad hoc* expert evidence to aid them in their decisions — and from the reported cases, it seems that the qualifications of the expert witnesses do not always give confidence to their testimony.

But so far the big question has been evaded, namely, what should courts do if the legislature has failed to act on an issue being litigated? This sums up the history of Chinese family customs in the Straits Settlements courts. The first step toward answering this question is to recognize that the court may be asked to perform a function of the legislature. The second step is to analyse the issue in the light of its social repercussions. If the conflicting demands involved can be reconciled much as the Straits court reconciled the different forms of Chinese marriages, then the court fulfilled its function in doing so. If the demands cannot be so reconciled, then the court will be performing a legislative function in selecting one or more demands for recognition and discarding the rest. Perhaps, if no question of personal status is involved, the court can remain neutral by dismissing the suit. But if such a question is involved, the court has no other choice than to do justice as well as it is able. In the last analysis, in such a situation, I honestly think that the judges' notions of justice — tempered, as indeed all human thoughts are, by unconscious prejudices and conscious experiences — will be the real guide to decision. In the case of the Straits judges faced with issues of Chinese family law, as we have seen, their notions of justice were somehow distorted by a natural love of the English common law, and this influenced the concepts of "hardship", "oppression" and "injustice" which they relied on.

What we actually need, perhaps, is not a theory of adjudication, but a theory of justice that will allow us to select with confidence from among conflicting principles. Until we get that, we cannot afford to dismiss offhandedly the facetious remark that the state of the judges' stomachs influence the course of their decisions.

97. *Chinese Law and Custom in Hong Kong: Report of a Committee appointed by the Governor.* 1950.

The Legislature Acts: A Postscript

For over a hundred years the Straits Settlements legislature refused to intervene, except very indirectly, in Chinese family affairs. In defence of this inaction, Sir Roland Braddell wrote that:

> "What they [the judges] have done has resulted in very fair justice and those who readily clamour for legislation on the subject of Chinese marriage would do well to remember that several of the best lawyers we have had have tried their hands on the subject and dropped it. The plain unvarnished fact that governs the whole matter is that the views of the Chinese of this colony are so very different that legislation is practically impossible".[98]

The maintenance provisions of the colony were applied to wives (both *tsais* and *tsips)* of Chinese marriages.[99] Apart from this, it was also possible for Chinese to marry under either the Civil Marriage Ordinance 1940 or the Christian Marriage Ordinance 1940 and legally bind himself to monogamy. But this was purely voluntary; and few Chinese married this way, even if they had no thought of polygamy.

In several areas of Chinese family law the Legislative has affirmed the court's stand. The Intestate Succession Act, for example, allows wives of valid secondary marriages to share equally the wife's entitlement in the event of a husband's dying intestate. At the same time, "child" for the purposes of the Act is defined to include only legitimate children and children adopted under the written laws of Singapore, Malaysia and Brunei, and hence excludes children adopted under Chinese customary law.

By far the most drastic intervention from the Legislative came in 1961. Singapore had by then achieved self-government, and the governing party was committed to the principle of equality of the sexes. The Women's Charter was purportedly passed with the intention of abolishing polygamy and extra-judicial divorces among non-Muslims.[100] Moreover, a compulsory form of marriage involving appearance at the Marriage Registry was introduced, and the Courts were given matrimonial jurisdiction as regards Chinese and other non-Muslim customary marriages solemnized before the Women's Charter came into force (these marriages having been specifically preserved).[101] This drastic piece of reform has not exactly been applauded by academic writers.[102] Some criticized its

98. Roland Braddell, "Chinese Marriages as Regarded by the Supreme Court of the Straits Settlements" (1921) *Journal of the Royal Asiatic Society, Straits Branch,* 153 at p. 165.

99. Surprisingly, there is no reported High Court decision directly on this issue; but the magistrates who administered the Married Women and Children (Maintenance) Ordinance and its predecessors have always entertained applications by *tsips* as well as Muslim wives. The position has since 15th September 1961 been regulated by the Women's Charter which expressly gives access to its maintenance provisions to wives of valid polygamous marriages.

100. See Freedman, *op. cit.,* note 17.

101. For a discussion of the problem of accommodating customary marriages under the Women's Charter, see Wee, K.S., *op. cit.,* sote 54.

102. See G.W. Bartholomew and L.W. Athulithmudali, "The Women's Charter" (1961) 3 Mal. L.R. 316; Freedman, *op. cit*., note 17, and D.C. Buxbaum, "Chinese Family Law in a Common Law Setting" in D.C. Buxbaum (ed.), *Family and Customary Law in Asia: A Contemporary Legal Perspective.*

drafting, while other viewed it as an ideological reform enacted purely for political reasons, and hence possesses a rather tenuous future. The general impression seems to be that far from being abolished, the institution of *tsips* still exists for those who can afford it, with only this difference: *tsips*, who had been elevated to the pedestal of wives, are now demoted to the shady realm of clandestine lovers.

Whatever the outcome of this legislation, in terms of the theory of adjudication discussed earlier, it represents an attempt to create community standards which would in term represent what is fair. This raises, of course, the question of whether the community can be induced to accept standards not previously existing, and how, if at all, it may be so induced. A sociological study of the operation of the Women's Charter will throw interesting light on the bounds of effective legislation. But with the Charter's enactment, the potentially creative role of judicial legislation in the sphere of Chinese family law (which is the main concern of this paper) has been effectively blotted out of the main policy areas.

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