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Andrew James Harding *

The Diffusion of Common Law in the Straits Settlements: »The Six Widows' Case« and the Rout of Custom

* National University of Singapore, lawajh@nus.edu.sg

Abstract

This article uses a 1911 case from Singapore (»the Six Widows' case«) to discuss the issues arising from the introduction of common law into the Straits Settlements. It examines the reasoning behind the introduction of common law, and how common law dealt with its interface within the Asian context, specifically with regard to Chinese customary law. It discusses what was at stake in this case, alternative approaches, and the debates the case led to regarding Chinese marriages and family law more generally. The addition of a case study on undue influence in the law of contract leads to the conclusion that judicial reasoning, common-law style, is in general adequate to bridge the gap between law and society.

Keywords: legal transplants, common law, Chinese customary law, British Straits Settlements, polygamy

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The Diffusion of Common Law in the Straits Settlements: »The Six Widows' Case« and the Rout of Custom

Scholarly disagreement about legal transplantation continues to trouble academia.[1] But perhaps it is time to put aside a debate that often seems to be reduced to quibbles regarding the meaning of words such as »rule« and »transplant«, and even »law« itself, in favour of examination of the extraordinary *fact* of legal diffusion.[2] Diffusion continues in ever more complex and extensive ways, whatever reservations may be expressed by legal theorists.[3] It is a decisive criticism of legal transplant theory that neither the adherents of legal transplants nor their opponents take cognisance of what the present author has termed »the real world of legal diffusion«. It is as though a profound understanding of this large and complex matter can be obtained from the comfort of a university library.[4] It is easy to use high-flown expressions to stake out a position, but before we conclude that, for example, legal transplantation is easy (Watson[5]) or impossible (Legrand[6]), an attempt needs to be made to discover the actual facts. And here legal history provides much food for thought and experience to be dissected, as there is an extended record to look at, in which longer-term outcomes can be examined. The diffusion of law is therefore a highly suitable area for fruitful empirical research, hopefully unclouded either by the ideology or the terminological obfuscation that tends to bedevil the subject of legal transplantation.[7]

In this spirit – that of seeking truth from facts in a bottom-up rather than a top-down way – this article offers a study of common law diffusion revolving principally around a famous Singapore case. This case dating from 1911, in common parlance spectacularly named »the Six Widows' case«, but referred to in the law reports as *Re the Estate of Choo Eng Choon, Deceased*,[8] concerned the distribution of the intestate estate of a wealthy Chinese man, Mr Choo, who died in Singapore, on which estate no less than six women claimed a share as having been married to him. The case presents in microcosm several of the difficult issues of law and society arising in the process of diffusion of the common law across the British empire, encountering here, in an Asian context, potential conflict with customary law. These issues still remain in somewhat different manifestations more than 110 years later, and almost 60 years after Singapore became an independent, sovereign republic. Through an understanding of instances such as this, we can perhaps better understand the notion of law in its social context as well as the possibility, limits, and methods of adaptation as part of the process of legal diffusion. The overall conclusion is that, despite these difficulties and problematical contexts, and despite the need for legislation, common law reasoning ultimately did engage successfully with the societal context of the Straits Settlements.

The real interest of these issues and the case study relates to the interface between common law on the one hand and the Asian context on the other. »Asian context« is used here to mean whatever law was previously established prior to the arrival of common law: customary law; religious belief; and simply the social facts pertaining to the various Asian communities coming under British rule, including the very diversity of the societies they formed.

In order the understand the Six Widows' case and its implications, it is necessary first to sketch some historical background, so that we can see how the issues came up in the way they did.

1 Harding (2019).
2 Ibid.
3 Legrand (1997) 111; Humphreys (2010).
4 Harding (2019) 1.
5 Watson (1993).
6 Legrand (1997) 111.
7 Of course, these two areas overlap considerably, but the concept of »legal diffusion« seems to me to go to the root of the matter (how does law change?) in a way that »legal transplants« does not.
8 *Re Estate of Choo Eng Choon, Deceased* [1911] 12 Straits Settlements Law Reports 120.

I. Common Law Reception in Singapore

Sir Thomas Stamford Raffles arrived in Singapore in 1819 to commence the construction of a new British colony, having reached an arrangement with the Sultan of Johor under which the British would establish a trading post on the largely uninhabited island.[9] The colony operated initially under a minimal regulatory legal framework (a situation referred to, in a purely technical way, as »legal chaos«).[10] In 1826 a charter was issued under parliamentary authority by King George IV, which is referred to universally as the Second Charter of Justice.[11] This Charter provided for the establishment of a Court of Judicature for Singapore, Penang and Malacca.[12] These were the three British colonies on the Malay peninsula, from 1826 referred to as the »Straits Settlements«.[13] We can note here that Penang had been ceded to Britain by the Sultan of Kedah in 1786, being essentially at that point uninhabited, while Malacca had had a more complex history, passing from the Malacca rulers to the Portuguese, then the Dutch, and eventually to the British in 1824.

To summarise for present purposes the Charter, an extensive document of 76 pages: in criminal proceedings, the Court was to administer criminal justice as the courts did in England, with due attention given to »the religions and manners of the native inhabitants«. In civil proceedings, the court was to give judgment and pass sentence according to »justice and right« (this phrase had also been used in the First Charter of Justice for Penang in 1807).[14] While the Charter did not explicitly state that English law was to be applied in the Straits Settlements, it was generally assumed to provide authority for some kind of a general reception or application of English law. Local case law, following the landmark 1858 case of *R v Willans* in Penang,[15] had adopted the theory that English law was received via this Charter. »English law« here meant the common law; the principles of equity; and pre-Charter English statutes, so far as they were of general application. The last is of special importance, as we shall see, in the context of the Six Widows' case.

In *R v Willans* the judge, Sir Peter Benson Maxwell, was compelled to set out a justification for the view that the Charter had resulted in a reception of common law in the Straits Settlements. The case revolved around the matter of interpreting the vague term »justice and right«, and Maxwell reached his conclusion according to the following reasoning.

First, the English colonists in Penang had not carried »their laws as their birthright, to their new homes«, as their presence was dependent on the permission of the East India Company.

Secondly, although Penang was part of the Sultanate of Kedah, it was more or less uninhabited and there was therefore no de facto established legal authority.[16] If there had been, it is clear that legislation would have been required to replace it with English law. The Islamic law of Kedah was thus not applicable in Penang, and the judge commented that it seemed »impossible to hold that any Christian country could be presumed to adopt or tolerate such a system as its *lex loci*«.[17]

Thirdly, as had been held as long ago as *Calvin's Case* in 1609,[18] »until certain laws are established, the King by himself, and such Judges as he should appoint, should judge the inhabitants and their causes according to *natural equity*, in such sort as Kings in ancient times did with their Kingdoms

9 See, further, Phang (2006); Tan (2005) 27 ff. For a brief history of judicial development in the Straits Settlements, see Wee (1974) 53–55. For a more comprehensive legal history, see Braddell (1931).

10 Wee (1974) 53; Phang (2005) 8. This does not indicate that actual chaos prevailed, but merely that the administration of justice had no clear jurisprudential basis.

11 Phang (2006).

12 Letters Patent Establishing the Court of Judicature at Prince of Wales' Island, Singapore, and Malacca, in the East Indies, dated 27 November 1836.

13 Penang (referred to as Prince of Wales' Island) had been ceded by the Sultan of Kedah in the same way as Singapore had been ceded by the Ruler of Johor. Malacca had been taken over from the Dutch in 1824. Penang and Malacca were folded into the Federation of Malaya in 1948. That Federation became independent in 1957, and in 1963 Singapore joined the federation along with North Borneo (now Sabah) and Sarawak to form Malaysia under the Malaysia Agreement 1963. On 9 August 1965 Singapore left the federation to become an independent republic.

14 Letters Patent Establishing a Court of Judicature in Penang, 25 March 1807.

15 (1858) 3 Kyshe 16.

16 See, further, Gopal (1983) xxv; contra, Phang (1986) civ.

17 (1858) 3 Kyshe 22. Nonetheless, what Maxwell deemed impossible is exactly what occurred in the Malay States a few decades later, as Muslim law was established in those states.

18 (1608) 77 ER 377.

before any certain Municipal laws were given« (emphasis added).

Fourthly, English law was the only »natural equity« known to English sovereigns and English judges; and it fell under the Crown's competence to introduce English law into the Settlement by Charter (as had been held in *Campbell v Hall* in 1774[19]).

Maxwell concluded his excursus on reception as follows:

> [T]he Charter does not declare, totidem verbis, that that law [English 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. It requires that the Court shall hear and determine indictments and offences, and give judgment thereupon, and award execution thereof, and shall in all respects, administer Criminal Justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, as in England. 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 those Cases, »give and pass judgment and sentence according to Justice and Right.« The »Justice and Right«[20] 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. They 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. The whole of the Charter appears to me to support this view. It gives the Court the powers of the Superior Courts of Law and Equity at Westminster, to be exercised as far as circumstances admit, without stating or leaving any room for presuming that it was intended that those powers should be exercised otherwise than in the same manner and under the same rules and principles as they are exercised in England. The classification of property into »real and personal« of actions or »pleas,« into »real, personal, and mixed,« and the power given to grant Probates and Letters of Administrations,[21] shew that the law of England was alone in contemplation.

What is especially important for the case study is of course how this reasoning was supposed to affect the non-European communities under British rule. Here Maxwell reasoned as follows [the italics are mine]:

> In no part of the Straits' Charters is mention made of any other law than that of England; and the silence is perhaps nowhere more remarkable than in those passages which purport to adapt the administration of justice by an European Court to the peculiar institutions of Asiatic races. Where Ecclesiastical [i. e., family law] jurisdiction is conferred on the Court, it is to be exercised *only so far as the religions, manners and customs of the inhabitants admit*. In the administration of oaths and of Criminal Justice, also, and in framing process for carrying out the orders of the Court, attention is to be had to the religions, manners and usages of the native inhabitants; *but nowhere is it said that their laws are to be attended to*, not even in matters of contract and succession,[22] as in India. Indeed, the provision respecting the framing of process is expressly guarded by the provision that the prescribed adaptation to native opinions and usages shall go only »as far as the same can

19 (1774) 98 ER 1045.

20 There are interesting questions, which I do not attempt to answer here, whether another similar formula – »justice, equity and good conscience«, employed in many British territories, is equivalent to »justice and right«; and why the formula, which one would think a very important issue, differs from case to case. The Magna Carta of 1215, provides: »*nulli rendemus, nulli negabimus aut differemus justitiam vel rectum*«; »justice and right« seems to be taken directly from this. As with »justice and right«, »justice, equity and good conscience« was ultimately interpreted as equivalent to English law: *Waghela Rajsanji v Shekh Masludin* (1887) 14 Ind App 89, 96.

21 In the context of the Six Widows' case, this reference to succession is significant. And see *In the Goods of Lao Leong An, Deceased* (1867) 1 SSLR 1.

22 Again, the reference to succession is significant.

> consist with the due execution of the law and the attainment of substantial justice.« The exclusion of native law is also remarkable in the Clause empowering the establishment of Small debts' Courts. Although it is provided that the jurisdiction of those Courts may be ethnical instead of local, if thought advisable, nothing is said about applying native law to native Cases, but it is merely required that the »administration of justice« shall be adopted, so far as circumstances permit, to »the Religions, Manners and Customs,« of the native inhabitants, while the Rules of Practice are to conform, as nearly as may be to the Rules of the English Courts of Request. It may be said that with respect to at least two classes of Orientals, Mahomedans and Hindoos, their laws are part of their religions, and that the Charter includes the former when it mentions the latter. This might be so, if the Charter were a Mahomedan or Hindoo instrument, but law and religion are too distinct in their nature and to English apprehension, to be treated otherwise than as distinct in the construction of an English Charter.

At one level this judgment takes one's breath away. How exactly did we start with »justice and right« and finish up with English law? How could we seriously conclude, given the express terms of the Charter, which mention English law only in relation to criminal justice, that the law of England was *alone* in contemplation, and that it is *nowhere* said that their (the Asian populations') laws should be attended to?

At another level the judgment raises difficult questions about the precise extent of application of English law, or exceptions thereto, and the reasons therefor. One is put in mind of Frederick Pollock's critique that »bland following of English precedents according to the letter can only have the effect of reducing the estimation of the common law by intelligent Indians to the level of its more technical and less fruitful portions and making those portions appear, if possible, more inscrutable to Indian than they do to English lay suitors«.[23] What, one wonders, were the Asian populations to make of all this?

At yet another level, it might be objected here that it is simply too fussy to discover and analyse jurisprudential justifications for the reception of English law in the Straits, given the pre-eminence of British power and ambition in the region, and the existing de facto situation. Of course, one might say, the British introduced English law – how could it be otherwise?

Yet it is not at all obvious, on reflection, that British rule did entail common law reception, and it could indeed have been otherwise. The First Charter of Justice of 1807, which established the first court in Penang, also directed the court, as we have seen, to »give and pass judgment and sentence according to justice and right«. The first Recorder of Penang, Sir Edmund Stanley, thought (directly contrary, we may note, to Maxwell's judgment) that this Charter secured »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« [again, emphasis added].[24] In a similar vein, the government in London issued this instruction to the first Lieutenant-Governor of Penang in 1801: »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.« Note here the order of precedence. The instruction amounts to saying, »first, apply their law, modified by ours so far as it is generally applicable«. Again, this is directly contradicted by Maxwell. In the Malay states the reception of common law was much more limited, much later, and much more gradual, and did not cover matters dealt with by Muslim family law, due to the underlying constitutional fact of indirect rule.[25] A general reception of English law in Malaya was enacted only in 1937.[26]

Moreover, in the immediately neighbouring territory, the Dutch East Indies, the approach adopted was entirely the opposite of Maxwell's theory and more in line with Stanley's. This ap-

23 Pollock (1912) 92.

24 Speech explaining the 1807 Charter upon its proclamation at the opening of the new court: Braddell (1931) 70–71.

25 Harding (2021) ch. 1.

26 Civil Law Enactment 1937 (FMS), s. 2.

proach was based on the concept of »law populations«[27] – in other words the very application of »native law to native cases«, and »attention to« the laws of the inhabitants, that Maxwell *rejected* in *R v Willans*. Dutch policy classified the inhabitants in three different ways.

i) »Natives«, i. e., Indonesians, were governed, according to their location, by no less than 19 different varieties of *adat* (customary law), as identified by Cornelis van Vollenhoven's *adatrecht* school in Leiden.[28]
ii) Those approximated to the Dutch themselves, who came under the civil code (i. e., those Indonesians who adopted a Western or urban lifestyle, or those who came from countries with a civil code similar to the Dutch, such as Germans or Japanese, or its common law equivalent, such as British and Americans).[29]
iii) »Foreign orientals«, who were dealt with according to their own law. Thus Chinese were dealt with under Chinese custom, and Arabs under Islamic law. If the Six Widows' case had been decided in the Dutch East Indies at a similar date, it would have been dealt with under Chinese customary law.[30] As we shall see, this was not possible in the Straits Settlements.

I have presented the distinction between the British and Dutch theories perhaps more sharply than a consideration of development over a longer span of time would warrant. The distinction does not mean that common-law theory always precluded decisions according to the law of the parties involved; in fact, it had, for example, recognised polygamy amongst Muslims and Hindus since the 18th century.[31] And Muslim personal law was applied to Muslims in the Straits Settlements, as we shall see. Nor does it mean that Dutch legal policy precluded applying some laws to everyone irrespective of the »manners and religions« of the inhabitants: the Dutch gradually brought more and more people under the Dutch code, and everyone under the criminal code.[32] The Chinese were brought under the Dutch civil code for marriage purposes as early as 1925.

Nonetheless, the assumption that common law was somehow naturally the general law of the Straits Settlements is a strikingly different starting point from the Dutch assumption that application of their own law was restricted to Europeans or their legal equivalents. To put the distinction very crudely, Dutch legal policy expressly recognised legal pluralism, whereas British legal policy expressly did not. Why this distinction came about is an interesting question lying far beyond the scope of this paper. But it was in general part of British policy and the ideology of empire that living under British justice was a boon.[33]

A further possibility was to regard »justice and right« as referring to due execution of the existing law. While it was true that »existing law« would be hard to discover in Singapore and Penang, given the prevailing legal standards of the time that, as Maxwell explained, distinguished law from religion, Malacca had been under Dutch law until the latter was summarily replaced by English law. The interpretation suggested here was actually rejected in the earlier case of *Rodyk v Williamson*.[34]

Whatever the arguments, Maxwell's judgment ensured in effect that from 1826 until the present day, Singapore[35] has been under the aegis of the common law, and despite many differences from English law as it now stands (actually fewer, one

27 Lev (1985). It should be understood here that the law-populations approach, while seeming more emollient than common-law reception in allowing each community its »own« law, is nonetheless open to the criticism that it entrenched an ethnic hierarchy. The common law, despite its lack (as it turned out) of scrupulous attention to the laws and customs of the Asian populations, at least had the merit of applying the law equally, or in principle equally, to all residents of the Straits Settlements. It should also be understood that the statements in the text were true as at 1911, but also the position also changed over time.
28 Bedner (2021); see, further, Harding (2002) 35.
29 Lev (1965).
30 Coppel (1999).
31 *Scrimshire v Scrimshire* (1752) 2 Hag Con 395.
32 Cribb (2020).
33 Lino (2018).
34 Noted in: *In the Goods of Abdullah* 2 Ky Ec 8. The judgment, dated 1834, has not survived, but it seems Sir Benjamin Malkin (the judge also in *Abdullah*) applied English law rather than Dutch law to the widow of a Dutchman who died intestate in Malacca after it came under British control, holding that the 1826 Charter had received English law in Malacca.
35 Penang and Malacca became part of the Federation of Malaya in 1948; the common law continues to be applicable there under the terms of the Civil Law Act 1956 (Federation of Malaya), as with the rest of Malaysia.

might say, than in the case of the United States), Singapore can be legitimately referred to, and regards itself, as a member of the common-law family.

Finally, under this section, it is relevant to inquire how seriously the English judges took the »scrupulous attention« issue in terms of modifying the application of English law. After all, Maxwell himself (modifying somewhat his stance in *R v Willans*) stated in a later case:

> 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 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.[36]

Yet repeatedly when it came down to cases invoking these very ideas, the judges refused to show the kind of flexibility that we will see, in a rare glimpse, in the Six Widows' case itself. It lies beyond the scope of this article to examine these cases in any detail, but a couple of examples will suffice. In the very case just cited Maxwell refused to allow charitable status to a bequest for Chinese ancestor worship, which would have exempted it from the English rule against perpetuities.[37] This was on the basis that ancestor-worship contained no element of public benefit or religion, there being no invocation of a deity. From the perspective of Chinese culture and belief, the decision is oppressive in adopting a very English view of what constitutes religious belief, and the rule against perpetuities thereby attracted, is surely, to use Pollock's term, just about the most »inscrutable« rule that English law ever invented.

In another case[38] the judge held that the word »child« used in the Chinese-language will of a Chinese man who at the time had only children adopted under Chinese custom, and who had no subsequent natural children, meant »natural, legitimate child«. In order to reach this quite bizarre result the judge was compelled to point out that »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«. It is hard to imagine a clearer case of Pollock's »bland following of English precedents«.

The conclusion one is forced to is that the »scrupulous attention« argument was never taken seriously, even in matters that did not impact in the slightest on land and commercial issues, which presumably propelled the reception of English law in the first place. A general reception of English law, however, could surely only be justified by taking seriously, in the family and succession context, the ostensible intention of modifying English law where it would act oppressively or cause hardship.

II. The Six Widows' Case

In light of all these arguments and facts of legal history, we can now look in detail at the case itself. *Re Estate of Choo Eng Choon, Deceased*[39] is a decision of the Supreme Court of the Straits Settlements, affirmed on appeal by the appeal division of that court in 1911.

Mr Choo was a banking comprador (a typical profession for Straits Chinese who became wealthy, comparable to contemporary foreign-investment consultants), who died intestate in Singapore, leaving a large estate. Six women came forward to claim that they were his widows, and so entitled to a share of the estate under the Statute of Distribution, an English statute passed as long ago as 1670. This statute had already been held to be applicable in the Straits Settlements,[40] as one of the statutes of general application forming part of the corpus of common law in 1826 (as described

36 *Choa Choon Neoh v Spottiswoode* (1869) 1 Ky 216, 221.
37 See, further, Chung (2014).
38 *Re Lam Ciee Tong (Deceased)* (1949) Malayan Law Journal 1.
39 *Re Estate of Choo Eng Choon* [1911] 12 Straits Settlements Law Reports 120.
40 *In the Goods of Lao Leong An, Deceased*, (1867) 1 SSLR 1. See above n. 21 in which Muslim polygamy had been recognised and the wives' share determined under the statute.

above). The statute provided that a third of a male intestate's estate should go to his wife. The problem was that the statute, passed on the assumption of a monogamous Christian marriage system, clearly envisaged a single wife; but wealthy Chinese men like Mr Choo often had several wives, as was allowed by Chinese custom.

The registrar at first instance decided that one of the women was the deceased's principal wife *(tsai)* and three others were inferior or secondary wives *(tsip)*, while the remaining two women were judged not to have been married to Mr Choo at all (one went through no ceremony and the other went through a ceremony for a primary wife, but that marriage was thereby bigamous). The distinction between primary and secondary wives is a well-attested aspect of Chinese customary law, in which the primary wife has far higher status than secondary wives.[41] The decision was appealed on the ground that polygamy is not recognised in Chinese customary law, and should not be recognised in any event by the court.

Chinese law being foreign law in a British court, its ascertainment was a matter of fact, not law, and therefore subject to potentially conflicting evidence.[42] The appellants sought to challenge an earlier case of 1867, in which Maxwell himself had granted to a secondary wife a share in the intestate estate of a Chinese man.[43] The court accordingly heard conflicting expert testimony on Chinese law, notably from the Chinese Consul-General to Singapore, who asserted that polygamy was *not* permitted under Chinese law, and that »secondary wives« were concubines taken informally. As we shall see, conflicting legal opinion on Chinese marriages was an issue that virtually drove the courts in the Straits Settlements to distraction. On appeal the Chief Justice recognised polygamy and the status of secondary wives as a matter of Chinese custom, but it will be recalled from the discussion of *R v Willans* above that the prevailing system of law did not engage with legal pluralism, and according to precedents the case had to be decided according to English law. There remained, however, the possibility of moderating the effect of English law on the parties, as was also stated in *R v Willans* and in the 1826 Charter. While English law had long recognised polygamy in cases of foreign parties who adhered to a polygamous marriage system,[44] the problem was that it did not recognise a status lying somewhere between a wife and a mere concubine – a woman was, under the Statute of Distribution, either a wife or not a wife.[45] Accordingly, the four women in question were all regarded as wives under the applicable law, but there was no obvious means of distinguishing, in monetary terms at least, between a primary wife and a secondary wife. As Acting Chief Justice Law put it, »legally their position more nearly resembles that of a wife where polygamy is allowed than it resembles anything else«.[46] The four women were thus awarded equal shares in the »wife's« one third of the estate. On further appeal, a bench of three judges decided (by two to one, with a dissenting judgment[47]) to uphold the Acting Chief Justice's decision.

The case highlights the many possibilities presented by the interface of common law and Asian context as discussed earlier. One comment on the outcome by Professor Leong Wai Kum is that it represents neither common law nor Chinese law, but is an odd species of Eurasian law.[48] Kenneth Wee offers a similar view. Citing the fact that the case also decided that a man could not take on a second primary wife, but there was no limit on him taking secondary wives, which was inconsistent with equal treatment, he concludes that »it was, on the whole, a queer marriage of Chinese

41 Wee (1974) 66.
42 12 Straits Settlements Law Reports 120, 152.
43 *Re Goods of Lao Leong An*, *Deceased* (1867) 1 SSLR 1. See above n. 21.
44 See above n. 31.
45 It will be noticed however (see above, and the text to n. 50 below) that the registrar had in fact recognised the intermediate status of secondary wives with his finding of bigamy in relation to an attempted second marriage to a primary wife.
46 12 Straits Settlements Law Reports 120, 148.
47 The dissent by Sercombe-Smith J is almost unbelievable in its obtuseness. He held that »unions contracted by Chinese British-born subjects domiciled within the Straits Settlements are governed by the English common law, and a marriage to be valid at common law must be celebrated in the presence of an episcopally ordained clergyman. Unless a Chinese British born subject so domiciled is married according to the common law his marriage is invalid and the issue illegitimate. Further, the Chinese are polygamous: the courts here cannot recognise polygamy«. These statements are also incorrect statements of common law.
48 Leong (1999).

and English law concepts. […] Even when pre-existing standards of the Chinese community and not of English tradition were recognised, they had to be hammered into common law form, for the judges were extremely suspicious of foreign jural concepts.«[49]

Granted that the legal pluralism approach was not, on all the precedents, open to the court, it is nonetheless interesting to speculate how the matter might have turned out under a »law-populations« approach. As we have seen, this approach would justify treating the matter simply as one of Chinese customary law – native law for native cases. While it might seem more in accordance with justice and perhaps the legitimate expectation of the Chinese community to allow Chinese custom, rather than English law, to operate in cases involving Chinese parties (in family and succession matters at least), the social reality might in fact suggest otherwise. Under Chinese customary law none of the women would have been entitled to any share of the estate, because such law simply did not recognise female property rights in the first place. Kenneth Wee summarises Chinese customary law in the following terms:

> 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). 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.[50]

As Acting Chief Justice Law in the Six Widows' case said: »[t]he result [sc. of disallowing the claims of the secondary wives] 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«.

In fact, the situation of Chinese women and girls in Singapore was dire enough for the government to establish a Chinese Protectorate primarily for their protection.[51] The fact is that many women and girls were trafficked for prostitution or to become concubines, and lived (and often died young) in appalling conditions in Singapore's Chinatown district.[52] And the taking on of »secondary wives« did not necessarily conform with the customary notion, as many Chinese will have left a primary wife in China and kept a local woman as in effect another primary wife and head of his household.[53] Thus the court's decision, while inevitably open to various objections along the lines of creating monstrosity, had at least the merit of affording some subsistence to women who would otherwise likely be at the mercy of forces beyond their control. The three secondary wives of Mr Choo would certainly not have had any subsistence but for the court's decision, and this probably explains their resort to the culturally unfavoured route of litigation in a foreigner's court.[54]

We can also ask, how relevant is it that Mr Choo, like all other inhabitants of Singapore, could have made a will if he had wanted to? This possibility was essentially not open to him under Chinese custom.[55] We will never know what his expectations were, but presumably as a prominent and wealthy Chinese dealing with foreigners he would have been aware in general terms of the consequences of making and not making a will. But if we consider the application of Chinese customary law as a mercy, we should note that the lack of female property rights could not on the

49 Wee (1974) 77.
50 Wee (1974) 70.
51 Turnbull (2009) 101–102.
52 Foo (2020).
53 Wee (1974) 78. Wee goes so far as to say that »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.«
54 A larger question, beyond the scope of this paper, is what Chinese attitudes were towards litigation. Confucianism was very much against litigation, and culturally it is not likely that »washing family dirty linen in public« would have been approved of, but even the foreigners' court had its attractions when it provided a real possibility of redress in extremis. The Straits Law Reports actually contain many Chinese family cases.
55 Wee (1974) 70–71.

assumption of application of Chinese customary law be rectified by will. Advocates of legal pluralism need therefore to consider that bringing the Chinese under English law had some advantages as well as disadvantages, while recognising Chinese custom seems simply to create many disadvantages, other than the fact of its familiarity to the Chinese.

We could of course answer the dilemma by asking what outcome would have had the support of most of the Chinese community in Singapore. As we shall see, Chinese customary marriage and other social practices exhibited a high degree of diversity, and there is no reason to assume that the Chinese community had a single opinion on the merits of Chinese customs. We can only judge by the findings of the Chinese Marriage Committee, established in 1925 (its report is discussed in the next section), which appear to indicate a widespread belief that the government should not interfere in Chinese marriage matters, which were best settled by the Chinese people themselves. At least that seems to have been the view of educated Chinese males. We do also know that numbers of middle-class females demanded legal equality with their European counterparts.[56] It is likely, however, that numbers of wealthy men like Mr Choo himself would have preferred to maintain their traditional privileges; and such men were powerful. They were on nodding terms with the British governor, some even sitting on the legislative council and (as in the case of the Chinese Marriage Committee) government committees. There is of course some force in the argument that the Chinese were in some sense *entitled*, whatever their views might have been, to being dealt with under Chinese custom. After all, Maxwell's statement that »nowhere is it said that their laws are to be attended to« was not thought to be true of Muslims. Their law was fully operated in family and succession cases, and nobody seems to have argued that that should not be the case. However, it is fair to ask, why did the common law allow plenary effect to Muslim law but not to Chinese law? What exactly was the point of this?

In his judgment in the Six Widows' case, Acting Chief Justice Law addresses the position in some detail, and implies that the position should be (at common law, at least) no different.

> Then we have several cases which seem to me to show that polygamous marriages amongst Mohamedans were recognized before the Mohamedan Marriage Ordinance of 1880, though perhaps it is not always clear whether such marriages were recognized in virtue of the passages of the Letters Patent or whether such marriages were recognized on the principles laid down by Sir Benson Maxwell in *Regina v Willans*, which I understand to be, that the law of England will here *ex comitate* or *ex debito justitiae* recognize polygamous marriages when such are valid according to the religions or usages of the parties, be they Mohamedans, Chinese or others […].[57]

The answer to this, given the legislation of 1880 referred to Acting Chief Justice Law, is, again, beyond the scope of this article. But it would appear to lie in the fact that almost all Malays were Muslim, and the Straits Settlements were seen as originally Malay territory, whereas the Chinese were migrants who, by some unspoken premise, must have been attracted to the colony, leaving their ancestral villages behind, and therefore were to expect in general terms to be governed by (indeed to have the benefit of) English law. But if this was so, it does not feature in the case law. Rather, it is argued that on a comparative basis the approach should be similar across British (and even French) colonies.[58]

III. Chinese Marriages: Empirical Difficulties

The legal-policy difficulties involved in the Six Widows' case are further and amply illustrated by

56 Chinese Marriage Committee, Straits Settlements, Report No 51/1926, para. 27.

57 12 Straits Settlement Law Reports 159–160.

58 On this, see Wee (1974) 75, who also points out that the courts in Hong Kong leant much more in favour of Chinese custom. Acting Chief Justice Law even indulges in comparative law to point out that the »neighbouring« Frenchy colony of Cochin-China recognised Chinese marriages as polygamous (at 150, and again at 163). To fail to recognise these marriages would, he argues, »inflict on the Chinese community hardships from which I think they appear to be free in the French Colony and in China, hardships which I think in view of the several passages of the Letters Patent to which I have referred, if on no other grounds, it certainly was never contemplated that they would have to undergo«.

the debate about Chinese marriages. The difficulty in ascertaining the law was an issue that featured prominently in the case itself, which was one of several that encouraged the judges to seek assistance from the government in creating a measure of certainty around marriage laws. Chief Justice Murison's reaction to the evidence in a 1926 case is a typical judicial response of the time:

> 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 [official Protector of Chinese] was quite vague as to the essentials, so are Van Mollendorff and Jamieson and the expert witnesses.[59]

As a result of such concerns, in 1925 the government established a Chinese Marriage Committee to

> report on the customs, rites and ceremonies, relating to marriages observed by the Chinese residents in the Straits Settlements, and to submit, if thought desirable, proposals as to what forms of ceremonies should constitute a valid marriage and as to the registration of such marriages.[60]

The Committee was the first Straits Settlements government committee to include »Chinese ladies« (three of them), and had also eleven Chinese men, and was chaired by the Acting Secretary for Chinese Affairs, the only non-Chinese member of the Committee.

The Committee interviewed a number of Chinese witnesses from five dialect groups (referred to as »tribes«), from the three colonies, both those born in the Straits and those born in China. The Committee's initiating statement that the matter was extremely complex[61] is highly convincing. In addition to the diversity already indicated, practices in China varied not just from province to province but from district to district; and there were 35 provinces during that tumultuous period of the early Chinese republic. A new form of monogamous marriage by certification was emerging in China. In addition, Chinese marriage practice was changing over both time and geography, and many Chinese had lived in the Straits Settlements for generations. Some (called the »Baba« Chinese) had even lost the ability to speak Chinese, conversing in a mixture of English and Malay.[62] Opinion varied over whether divorce should be allowed (Straits-born Chinese were more in favour of it than those born in China), as well as over what grounds of divorce should be allowed (custom virtually prevented divorce). Interestingly enough, one pressure group called the Chinese Ladies of Penang, as well as Chinese ladies generally who had been educated in English schools, were in favour of monogamy and registration, and allowing divorce as a means of preventing concubinage. So were »a limited number of Chinese gentlemen of advanced views«. Yet the Straits Chinese British Association and most male respondents were against registration and strong views were expressed that the government should not interfere in Chinese marriages. The Committee considered that legislated direct registration of marriages would be ignored by Chinese people.[63]

The Committee reported in 1926 with some rather complex proposals for legislating the registration of Chinese marriages (principally »modern« marriages, but with provision for »old« marriages too).[64] However, they were unable to answer the question as to the requirements for a valid marriage:

> We have 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 marriages in the old style

59 *Woon Kai Chiang v Yeo Pak Wee* [1926] 1 Straits Settlements Law Reports 27, 33. See, further, Freedman (1962).
60 Chinese Marriage Committee, Straits Settlements, Report No 51/1926, para. 2.
61 Ibid., para. 13.
62 Chia (1980).
63 Chinese Marriage Committee, Straits Settlements, Report No 51/1926, para. 42.
64 Ibid., para. 58 ff.

> common to all the Districts of South China or to the locally born descendants of emigrants from those Districts, while the new form of marriage does not require any particular form.[65]

It may also be, as Kenneth Wee suggests, that the common resort to community mediation of family disputes also tended to prevent the emergence of any clarity in the customs themselves,[66] adding to official frustration; although if this was so, it was not mentioned by the Committee.

To make matters even more complicated there was naturally an emerging trend of intermarriage between dialect groups, and even between Chinese and non-Chinese.[67] As a result, the courts had little alternative to reducing the legal requirements for a Chinese marriage, and by extension, all marriages other than Muslim marriages, to the lowest common denominator, which was merely intention, or consent.[68] Obviously, such a standard was both vague and highly fact-based.[69] Relevant evidence might be performance of certain ceremonies, public recognition, cohabitation, and producing and raising children together. This standard had perhaps the single advantage that it was applicable to the broad range of marriage practices evident in the population. But it was neither efficient nor predictable in terms of legal certainty. The strong implication was that marriage registration was the only answer.

IV. Legislation and the Rout of Custom

While it is as difficult now as it was then to formulate a reasoned response to the issue of identifying a Chinese marriage, the issue can be finessed by considering longer-term preferences and outcomes. The report of the Chinese Marriage Committee actually supports such an approach, emphasizing the emergent notion of a »modern marriage«. On this matter the position, as it eventually turned out, but only 35 years later, became clear. In 1958 Singapore became a self-governing colony. In 1959 the first elections on a general franchise including women were held, the People's Action Party under Lee Kuan Yew sweeping to an impressive victory, partly on a platform of addressing women's rights: women were by now a highly significant work force.[70] The PAP fulfilled its promise by introducing a bill for a Women's Charter in parliament in 1960, which was passed into law in 1961. This law resolved the position on marriage law with a high degree of consensus and radical reform.[71] Henceforth, marriage, except for Muslims, would be monogamous and only legally recognised via registration. Principles of genuine consent, equal divorce grounds, including no-fault divorce, fair division of matrimonial property and custody of children, and ages of majority, applied. One female legislator, Chan Choy Siong, set out the grievance and its remedy in stark terms, which seem to nail the issue once and for all:

> Men take women as pieces of merchandise. The inhuman feudalistic system has deprived women of their rights. In a semi-colonial and semi-feudalistic society, the tragedy of women was very common. Men could have three or four spouses. Men are considered honourable, but women are considered mean. It was common in those days to regard having one more female in a Chinese family as being very despicable. Women in our society are like pieces of meat put on the table for men to slice. […] The previous evil custom will vanish with the coming into operation of this Charter.[72]

As a result of this development, from this point Singapore marriage law resembled English law almost exactly. In view of the agonising over

65 Ibid., para. 69.
66 Wee (1974) 77; Lee (1988).
67 See *Isaac Penhas v Tan Soo Eng* [1953] AC 304, where the Privy Council held that a Jewish man could contract a monogamous marriage with a Chinese woman.
68 Leong (1999); Wee (1974) 79.
69 It might be said that these descriptions would not be untypical of the common law in any event.
70 Tan (2016).
71 Leong (2008).
72 Singapore, Legislative Assembly. Debates: Official Report, vol. 12, 6. April 1960, col. 442–444. The customs abolished by the Charter of course included those of other groups than the Chinese, but not Muslims. See, further, Freedman(1968). And for Muslims, see Nizam bin Abbas (2012); as the author points out at 164, the Muslim law exception was carved out by statute in 1880, but he offers no explanation as to why this exception was made, merely commenting that »the continued evolution of Islamic law in a secular country like Singapore is very much dependent on the mutual respect the Muslims and the non-Muslim community have for each other« (187).

customary marriages, legal pluralism and the common law, this is quite ironical. The Women's Charter was enacted just three years after self-government and just two years before the achievement of independence from Britain, as Singapore joined Malaysia in 1963, and just four years before it left that federation on 9 August 1965, to become a fully independent sovereign republic.

Of course, the rout of custom[73] could not be achieved so easily. While registration is the legal test of marriage, the law does not of course prevent couples from observing whatever customary ceremonies are desired – they simply have no legal consequences. In this sense the law achieves the best of both (ancient and modern) worlds. For example, there is evidence that couples often register their marriage in order to get on the housing list, and are only known to be married when they get to the top of the list, moving into a new apartment, and going through applicable customary processes.[74] And of course, the law was only prospective, meaning that the courts would still have to consider customary marriages for many years to come.

V. Contract and the Fate of English Law

Having outlined the resolution of the problem of Chinese marriages, we can now address the broader question of whether in other contexts too the common law system has encountered problems when interfacing with the Asian contexts discussed in this article.

With this in mind we can move to commercial contexts, in which English law was the subject of continuing and unmodified reception. This section therefore presents a further brief case study, inspired by an article by Professor Mindy Chen-Wishart, published in 2014, which explores the issues of legal transplantation of the common law, Confucian values, and undue influence in the law of contract in Singapore relating to family guarantees.[75] This study addresses similar issues to the Six Widows' case, in the sense that in the judicial reasoning process the common law reveals flexibility at the precise interface between common law and the Asian context.

Professor Chen-Wishart travelled from Oxford to Singapore to teach the law of contract. Her assumption was that the law of contract in Singapore was more or less identical to English law, and that local cases could simply, if necessary, be substituted for English ones. This was not only because of the general reception of English law as described above, but because from 1878 to 1993 there was a *continuing reception*[76] of English mercantile law. That is to say that in Singapore a mercantile contract case would, by statute, be decided in exactly the same manner as it would be in England at the relevant date. This continuing reception was ended only by the passing of the Application of English Law Act in 1993,[77] a measure that was in essence designed to address the legal implications of the United Kingdom joining the European Union, in the light of a danger of European law being applicable to Singapore, as it were by accident resulting from the coincidence of continuing reception of English law and the European Communities Act 1972 (UK).

In English law there is a concept of undue influence, under which, if a person obtains a guarantee of a loan, the relationship between the borrower and the guarantor may be such that undue influence over the latter by the former may be found to vitiate the guarantee. Professor Chen-Wishart discovered, looking at English and Singapore cases on undue influence, a paradox that, while the Singapore judges ostensibly followed English cases, the actual outcomes, in terms of application of law to the facts, were unexpected given the English law background. What the cases seemed to reveal was a reluctance on the part of the judges to find undue influence in cases where a borrower's family member had acted as guarantor for a bank loan. The judges referred to consider-

73 As Freedman(1968) has called it.
74 Tan (1999).
75 Chen-Wishart (2014).
76 Phang (2005) 12, uses a distinction between »general« and »specific« reception. See also Phang / Soon (1985).
77 Phang (2005) 12 ff.

ations (such as that the father was acting in the broad interests of the family) that militated *against* a finding of undue influence. This tendency, she found, was attributable to the implicit application of Confucian values to the given fact situations.

Her conclusion is a positive one. The way in which the judges used Confucianism was simply part of a well-known phenomenon, namely the adaptation of transplanted law to social circumstances. The conclusion is plausible, as we can find a tendency for judges in Singapore to use Confucian values in applying common law principles to local fact situations in other contexts too. For example, in England it is considered that in relation to defamation by politicians, they are expected to have a thick skin, as severe criticism is part of the political process in a thriving democracy.[78] In Singapore, on the other hand, the judges have expressly used the Confucian concept of the *junzi* (the upright Confucian gentleman) to explain why it is important for Singapore politicians to be able to protect their reputations, especially when prevailing political ideology is firmly against corruption, mendacity, and failure to protect public interests over private ones.[79]

This study adds to our narrative in an important way. It illustrates the fact that judicial reasoning under common law principles can be an important factor in the adaptation of law to society – even after two hundred years of adaptation.

VI. Conclusions

The lack of attention of colonial judges to the local context did not serve to enhance the reputation of the common law in Singapore. A far better policy might well have been to trade off pluralism in personal law matters such as marriage for certainty in transactional matters such as contracts, and such policy would have been entirely consistent both with the 1826 Charter and the clear preferences of society.

Having said that, it does not appear that the decision in the Six Widows' case is obviously wrong. Unlike some more rigidly common-law oriented decisions noted above it recognised Chinese polygamy in a way that paid attention to social needs. The criticism that it did not pay careful attention to Chinese custom, which was clearly a declining asset, is not quite made out. When Singapore had the opportunity to make its own decisions on marriage and divorce law, it opted to modernise the law, as did many other jurisdictions at a similar period, and it did so along English lines. In this way the Chinese Marriage Committee was around forty years ahead of its time.

The case studies presented here lead to a conclusion that, despite the general lack of attention of colonial judges to the local context, the common law has successfully transplanted to Singapore. As former Supreme Court judge and law professor Andrew Phang states, »English law is the foundation of the Singapore legal system«.[80] After two hundred years of common law in Singapore there is no sign that the undoubted social prevalence and persistence of Asian societal norms presents a danger to the common law inheritance. It is of course true that in some areas Singapore law diverges greatly from that of England. Examples include the minimal application of judicial review; the abolition of jury trial; the adoption of the Torrens system for registration of land rights in preference to English law; and no doubt many other issues.[81] Yet what is striking is not the degree of divergence but the degree of continuing exhibition of typical common law tropes. I refer here to institutions (courts, legal profession, legal education); substantive law (even family law, as explained here); and legal methods (the doctrine of precedent, judicial reasoning, modes of advocacy). In fact, Singapore is not only a fully subscribed member of the common-law family, but contributes to continuing development of the common law, as in a 2017 case which recognises the depri-

78 Phang (2005) 19 ff.
79 Sim (2011) 324–325.
80 Phang (2005) 7.
81 Phang (2005) 7 mentions a number of these.

vation of genetic affinity as ahead of damages at common law.[82] Critical to this success has been the role of the judiciary in making astute use of common law techniques of interpretation, as in the undue influence cases.

Whether something similar can be said of the diffusion of common law in other Asian jurisdictions is of course a matter for further investigation.

■

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82 See, e. g., *ACB v Thomson Medical Pte Ltd* [2017] 1 Singapore Law Reports 918.

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