

The Administrative Structure and Legal System of Malaya^{*)}

As early as the 16th century the Malay Peninsula attracted the attention of European traders. First the Portuguese¹⁾, later the English²⁾ and the Dutch³⁾ came to trade and to look for suitable sites to establish settlements. Unlike Portuguese⁴⁾ and Dutch⁵⁾ influence which was confined chiefly to Malacca and of which only very few traces now remain, the English influence extended over the whole of the peninsula and impressed a permanent mark on the political and legal institutions of the country.

The original foothold of the British was the island of Penang, which

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Abbreviations: A.C. = Appeal Cases; C.J. = Chief Justice; F.M. = Federation of Malaya; F.M.S. = Federated Malay States; F.M.S.L.R. = Federated Malay States Law Reports; J.M.B.R.A.S. = Journal of the Malayan Branch of the Royal Asiatic Society; Ky. = J. W. Norton Kyshe (Reporter, see footnote 105); L.R. = Law Reports; Leic. = Stephen Leicester (Reporter, see footnote 105); M.L.J. = Malayan Law Journal; P.C. = Privy Council; R. = Recorder; S.C.S.S. = Supreme Court of the Straits Settlements; S.S. = Straits Settlements; S.S.L.R. = Straits Settlements Law Reports.

¹⁾ Portuguese ships called in Malacca in 1509. See also D. K. Bassett, European Influence in the Malay Peninsula 1571-1786, *Journal of the Malayan Branch of the Royal Asiatic Society*, 1960, Vol. 33, Part 3, p. 9.

²⁾ Sir Francis Drake came to Malaya in 1578.

³⁾ In 1594, the Houtman's Dutch expedition first traded in Malaya.

⁴⁾ Malacca was conquered in 1511 by Alfonso d'Albuquerque, and the Portuguese held their settlement up to 1641.

⁵⁾ The Dutch wrested Malacca from the Portuguese in 1641 and held it up to 1795, when it was taken by the British. The Dutch held it again from 1801 to 1807, and from 1818 to 1824 when by the Treaty of March 17, 1824, between Holland and Great Britain, Malacca was handed over to Great Britain (Hertslet's Treaties, Vol. 3, p. 284).

was acquired in 1786⁶⁾). Later, in 1819, Singapore was acquired⁷⁾, and in 1824, Malacca became part of the British possessions. The Straits Settlements, as they became known, were subordinate to Fort William in Bengal, but as from August 1, 1851, they were placed under the Government of India, and on April 1, 1867, became a separate colony⁸⁾). Although the British possessions comprised only a small part of the Malay Peninsula, their influence over it soon became decisive. The states of Perak, Selangor, Pahang and Negri Sembilan accepted British protection, and the remaining states of Kelantan, Trengganu, Kedah, Johore and Perlis followed suit⁹⁾).

As customary in all British possessions, English law was introduced into the Straits Settlements and became the law of the land. In the several states of Malaya, however, the local law has survived to a certain degree up to the present time, notwithstanding the influx of the English law. The old law of Malaya was the customary *adat*. It was an agglomeration of principles and sayings which were orally transmitted from generation to generation and which, as the time went on, absorbed many elements of Hindu and Muslim law. Some *adat* law appeared also in written form, but it is rather vague with no precise limits of application. There are two types of *adat*, the *adat perpatih* and the *adat temenggong*.

⁶⁾ Captain Light landed in Penang on July 15, 1786. On August 11, 1786, the eve of the birthday of the Prince of Wales, he called the island Prince of Wales's Island, but the new name did not become a permanent feature, and the island is still known as Penang. The Sultan of Kedah, who agreed to captain Light's taking possession of the island, formally ceded it to the British by virtue of the Treaty of May 1, 1791 (Sir William George Maxwell and William Sumner Gibson: *Treaties and Engagements affecting the Malay States and Borneo*, London, Truscott & Son, 1924, pp. 95-98), and the cession was acknowledged by the King of Siam, whose tributary the Sultan of Kedah was, by the Treaty of Bangkok of June 20, 1826 (Hertslet's *Treaties*, Vol. 8, p. 707). See also L. A. Mills, *Penang 1786-1830; Singapore 1819-1826; British Malaya 1824-1867*; J.M.B.R.A.S. 1960, Vol. 33, Pt. 3, pp. 36; 60; 86.

⁷⁾ The acquisition of Singapore was effected by a preliminary agreement between Sir Stamford Raffles and the Dato Temenggong, the Ruler of Singapore, made on January 30, 1819 (Maxwell & Gibson *Treaties*, p. 116), by the Treaty of February 6, 1819, between Sir Stamford Raffles and the Sultan of Johore and the Dato Temenggong (Maxwell & Gibson *Treaties*, p. 117), and by the Treaty of August 2, 1824, between John Crawfurd, the British Resident in Singapore with full powers of William Pitt, the Governor-General of Bengal and the Sultan of Johore and the Dato Temenggong (Maxwell & Gibson *Treaties*, p. 122).

⁸⁾ The Government of the Straits Settlements Act, 1866. 29 & 30 Vic. c. 115. Order in Council of Dec. 28, 1866, Statutory Rules & Orders Revised to Dec. 31, 1903, London, H.M. Stationery Office, 1904.

⁹⁾ The northern part of Malaya was for a long time under Siamese suzerainty, and it was only by the Anglo-Siamese Treaty of March 10, 1909 (State Papers, Vol. 102, p. 126), that Siam renounced her claim to the states of Kelantan, Trengganu, Kedah and Perlis in favour of Great Britain.

The Adat

Adat perpateh first appeared in Malaya around the 15th century in Negri Sembilan, having been introduced there by the Minangkabaus from Sumatra¹⁰). It is chiefly unwritten, but there are three *adat* digests in existence, one from Sungai Ujong in Perak, another, the Minangkabau legal digest from Perak, and the third from Kuala Pilah in Negri Sembilan¹¹). *Adat perpateh* envisages a matrilineal tribal structure and the female line of descent is all important. Yet only men are allowed to be heads in the tribal organisation. They must, however, guard and protect the rights of their wives¹²). The tribal organisation itself is structured on an ascending line and exhibits many democratic features. The basic unit is the family in a larger sense, which is headed by the mother's eldest brother, the *mamak*. The *mamaks* of related families which form a family group, the *perut*, elect their head, whom they call the *bapa*. The *bapas* of the tribe elect their tribal head, the *lembaga*. The *lembagas* of a given area choose their territorial chief who is called the *undang* or the *penghulu*, and the *undangs* elect the ruler whose title is *Yang di-Pertuan Besar*. The power of the various heads, which is now only nominal, is limited to their respective units. Formerly, however, the *undangs*, who stand in rank immediately below the ruler, exercised the widest authority in public matters, leaving the ruler himself with mostly ceremonial powers¹³). Apart

¹⁰) *Adat perpateh* seems to be the original form of the *adat*. It is supposed to have been the law of the Minangkabau people, who lived in the highlands of Sumatra at the beginning of the Christian era. It flourished also in South East Sumatra and in Java prior to the foundation of the Palembang State (Sri Vijaya) in about the 7th century. The strong Hindu influence exercised on it from the arrival of the Indians in the beginning of the Christian era culminated in the Palembang State (Sri Vijaya) and was responsible for the formation of the *adat temenggong*, which gained ground throughout the entire Malay Peninsula. *Adat perpateh* was, however, continuously applied in the Minangkabau (Padang) highlands in Sumatra, from where it was brought to Negri Sembilan by Minangkabau settlers in the 15th and 16th century. See R. J. Wilkinson, Papers on Malay Subjects, Kuala Lumpur, F.M.S. Government Press, 1908, Vol. 2, Pt. 1, pp. 2, 8. Richard O. Windstedt, A History of Malaya, Singapore, Marican & Sons, 1962, pp. 29-43, 155. Patrick Edward de Josselin de Jong, Minangkabau and Negri Sembilan Socio-Political Structure in Indonesia, Leiden, Eduard Ijdo, 1951, pp. 7-9.

¹¹) See footnote 14.

¹²) The *adat* says: Ancestral property belongs to the woman, but the man protects her rights. See E. N. Taylor, Customary Law of Rembau, J.M.B.R.A.S. 1929, Vol. 7, Pt. 1, p. 31.

¹³) *Adat* sayings define the administrative structure: The man rules his house; the *bapa* rules his family; the *lembaga* rules his tribe; the *undang (penghulu)* his province; and the *Yang di-Pertuan Besar (raja, under Hindu influence)* his world. The *raja* has majesty, the *penghulu* has honour; the *raja* decrees, the *penghulu* orders; the *raja* rules the world; the *penghulu* rules his tribe. See R. J. Wilkinson, *op. cit.*, Vol. 2, Pt. 1, p. 24.

from their administrative authority, the *bapas* were entrusted with only petty civil and criminal jurisdiction, and the *lembagas* with intermediate jurisdiction. Full judicial powers rested with the *undang*s, who were the most important administrative and judicial officers.

The *adat* has provisions dealing with all matters likely to arise in the community. It regulates the election, the status and the powers of public officers; it deals with matters of movable and immovable property, with family law including marriage and divorce, with disposition of property upon death, and with the punishment of offenders, etc.¹⁴). It also provides for the insignia of rank, marks of dignity of public officers, privileges, and lays down rules of precedence to be observed at ceremonies¹⁵).

The *adat* recognised that the aborigines, who were the only inhabitants in Negri Sembilan prior to the arrival of the Minangkabaus, had the right to all land. They used it, however, only for hunting. The *adat* therefore provided that whenever the jungle was cleared and the land was cultivated, it passed to the cultivators upon payment of a small annual compensation to the aborigines for the loss of their hunting rights¹⁶). Evidence of ownership was supplied by long ancestral possession¹⁷). All ancestral land belonged to the women, but the men cultivated it and were entitled to maintenance out of the proceeds. Apart from ancestral property, property owned by the groom and the bride respectively before marriage was held by each of them during marriage and followed its owner in the case of divorce. Similarly, property jointly acquired during marriage was divided equally in the event of divorce¹⁸).

A man was a member of his mother's tribe until he left the village and settled in that of his wife's on marriage. He had to marry out of the family group, the *perut*. The women, on the other hand, stayed and in-

¹⁴) Sir Richard Winstedt and P. E. de Josselin de Jong, A digest of customary law from Sungai Ujong, J.M.B.R.A.S. 1954, Vol. 27, Pt. 3, p. 1. Sir Richard Winstedt, An old Minangkabau legal digest from Perak, J.M.B.R.A.S. 1953, Vol. 26, Pt. 1, p. 1. R. J. Wilkinson, *op. cit.*, Vol. 2, Pt. 1, p. 8. J. J. Shehan and Abdul Aziz bin Khamis, Adat Kuala Pilah, J.M.B.R.A.S. 1936, Vol. 14, Pt. 3, p. 190.

¹⁵) So, e. g., the marriage festivities were fixed to last one day in the ordinary man's family, two days in a *bapa*'s family, three days in that of a *lembaga* and five days in the *undang*'s family.

¹⁶) E. N. Taylor, Customary Law of Rembau, J.M.B.R.A.S. 1929, Vol. 7, Pt. 1, p. 31. R. J. Wilkinson, *op. cit.*, Vol. 2, Pt. 1, p. 28.

¹⁷) The relevant *adat* rule says: When the areca palms have grown tall, and the coconut palms are ancient, and the line of owner's graves grows larger and larger. See R. J. Wilkinson, *op. cit.*, Vol. 2, Pt. 1, p. 30.

¹⁸) E. N. Taylor, Customary Law of Rembau, J.M.B.R.A.S. 1929, Vol. 7, Pt. 1, pp. 21-29, 31.

herited the ancestral land¹⁹). A man's position in the family was thus rather weak, and if he did not behave to the satisfaction of the family, he ran the risk of being divorced and expelled²⁰). It is not surprising, therefore, that under these circumstances the men of Negri Sembilan proved to be the most industrious of all Malaya.

As to wrongs and offences, the underlying idea of the *adat* was compensation. The family needed its breadwinner so that every offence was likely to be rectified by providing compensation. Only men for whom the tribe would not accept responsibility were exposed to punishment, and consequently, to divorce and expulsion²¹).

The *adat perpateh* was a very kind system of law, lenient and understanding. It aimed at restitution rather than at punishment. By substituting family responsibility for individual responsibility, it tended to encourage the family to use its influence with the offending member and so to avert difficulties and trouble. It was reasonable and humane in all its rules and yet so simple, popularised in customary sayings, that it was readily understood by the community. It was, no doubt, much superior to the *adat temenggong*.

The *adat temenggong* is merely a variation of the *adat perpateh*. It developed from the *adat perpateh* in the Palembang state (Sri Vijaya) from where it was introduced to the Malay Peninsula, together with the entire Palembang customs and culture²²). The reason why the *adat perpateh* stood unchanged in the Minangkabau highlands in Sumatra, while it was affected by profound changes in Palembang, can be explained by its exposure to Hindu and later Muslim influences. Due to these influences, it changed from a system matrilineal and democratic to one patriarchal and despotic. Yet, as these influences did not operate evenly throughout the Malay Peninsula, the *adat temenggong* in some areas continued to exhibit some matrilineal elements²³). With all the power concentrated in

¹⁹) The *adat* says: The man seeks his fate, the woman awaits hers. E. N. Taylor, Customary Law of Rembau, J.M.B.R.A.S. 1929, Vol. 7, Pt. 1, pp. 7-8. R. J. Wilkinson, *op. cit.*, Vol. 2, Pt. 1, p. 30.

²⁰) The *adat* says: The married man shall be subservient to his mother-in-law; if he is clever I will try to cajole him, if he is stupid I will see that he works; like the buttress of a big tree he shall shelter me, like the thick foliage he shall shade me. R. J. Wilkinson, *op. cit.*, Vol. 2, Pt. 1, p. 12.

²¹) Capital crimes known to the *adat* were: treason, incest, robbery, arson, theft, cheating, poisoning, stabbing; but the penalty was averted if compensation was paid. Sir R. Winstedt and P. E. de Josselin de Jong, *op. cit.*, p. 15.

²²) See footnote 10.

²³) This is so especially with respect to acquisition of land and succession to property. In Perak, land descended to the daughters equally; personal property was divided between the sons. But men could also hold land by clearing and cultivating it. Sir William

the hands of the *raja* and the chiefs, the *adat* ceased to be administered in the customary way, and the absolute discretion of the powerful prevailed²⁴). This being so, the family was no longer able to protect its members, and with the passing of time the sense of collective responsibility which made *adat perpateh* what it was, was supplanted by individual responsibility. The *raja*, who under Muslim influence became the sultan, was omnipotent. His chief aids were the *bendahara*, who was also the head of the armed force, and the *temenggong*, who held office similar to that of a minister of interior and chief of police combined. The transaction of other important business was entrusted to several *menteri*, whose office could be likened to that of ministers, and *mandulika*, who administered provinces as governors²⁵). The authority of these officers was supreme and was weakened only by their internal rivalries and power struggles. They would exact services and payments from the population without any limit whatsoever and would oppress the people as they pleased²⁶). The unfettered pleasure of the rulers thus became the chief feature of the *adat temenggong*.

Hindu and Muslim influences

Hindu law made its way to the Malay Peninsula together with the Hindu culture and customs at the beginning of the Christian era. It gained considerable influence in the Palembang state (Sri Vijaya), which finally disintegrated under the pressure of the Javanese of Majapahit in the second half of the 14th century²⁷). The Hindu influence on law and government was not uprooted with the downfall of the Palembang state but survived in the peninsula. The Hindu law introduced to Sumatra, Java and Malaya was that prevailing in India at the time of its introduction. It was chiefly

Maxwell, Malay land tenure, Journal of the Straits Asiatic Society, Vol. 13, p. 75, at p. 127. In Perak and Malacca, proprietary right to land was created by clearing and cultivation and continued with occupation. Sir William Maxwell, *op. cit.*, p. 77.

²⁴) Nonetheless there are several digests of the *adat temenggong* in existence as the Malacca Code (R. J. Wilkinson, *op. cit.* Vol. 2, Pt. 1, p. 39), the Kedah digest R. O. Winstedt, Kedah Laws, J.M.B.R.A.S. 1928, Vol. 6, Pt. 2, p. 1), and the Ninety-nine laws of Perak (J. Rigby, The Ninety-nine laws of Perak, in R. J. Wilkinson, *op. cit.* Vol. 2, Pt. 2, p. 1).

²⁵) R. J. Wilkinson, *op. cit.* Vol. 2, Pt. 1, pp. 42 ff.

²⁶) They were forced to work on the land of the chiefs without reward, to serve in the armed force and provide all kinds of services. Services sometimes varied with the district, so that one district had to supply timber, others servants and musicians, yet others boats. All were bound to repair roads, build bridges, carry messages, etc. Sir William Maxwell, *op. cit.*, p. 108.

²⁷) Richard O. Winstedt, *op. cit.*, pp. 29-43. R. J. Wilkinson, *op. cit.*, Vol. 2, Pt. 1, p. 34.

customary and unwritten. Later, however, Hindu law in written form as expounded in the Dharmasutras in prose and in the Dharmasastra in verse was introduced²⁸⁾. The structure of the Hindu society was patriarchal and autocratic. The country was ruled by *rajas* and their lieutenants, with the people having no say in the administration whatsoever. In matters of succession, males were preferred to females, while the *lex talionis*, varied by the caste distinction, provided the rule in criminal matters. It was this type of Hindu influence that was responsible for the decay of the *adat perpatih* and its degeneration into the much inferior *adat temenggong*.

Similarly to the Hindu influence, the Muslim religion, law, and the entire world outlook and way of life which found their way into Malaya around the 14th century were to establish an overlasting foothold in the country²⁹⁾. The authorities of Muslim law are the Koran, the oral tradition of rulings, decisions and sayings attributed to the prophet, which are called Hadith, and the *Ijma*, *i. e.* an exposition of the law by the four great jurists of Islam, Abu Hanifa, Malik, Shafei, Ibn Hanbal, on points on which these four authorities are in agreement. Apart from these unquestioned authoritative sources, the legal views of the four great jurists on points on which they differ are also of importance. And as the views of one of them prevailed over those of the other three in certain Muslim countries, the whole Muslim world may be divided in areas according to the applicable law³⁰⁾. In Malaya the views of Shafei prevailed over those of his learned colleagues.

Notwithstanding the influence of Muslim law in Malaya, it had not supplanted the local *adat* in its entirety. It was accepted in the religious matters, in family law and the law of succession, but in other matters the *adat* prevailed, with only some Muslim additions incorporated in it in the course of centuries³¹⁻³⁸⁾.

²⁸⁾ Julius Jolly, Hindu law and custom, Calcutta, Greater India Society, 1928, pp. 1-27. Mayne's Treatise on Hindu Law and usage, Madras, Higginbothams Ltd., 1953, 11th ed. Reprint, p. 21. Mulla on Hindu law, Bombay, Tripathi, 1959, 12th ed. pp. 13-14

²⁹⁾ The oldest record of Muslim law in the Malay Peninsula, dating back to 1326 or 1386, was found in Trengganu. Richard O. Winstedt, *op. cit.*, p. 40. It is interesting to note that at present, out of the nine rulers in Malaya, seven call themselves sultans (the Sultans of Johore, Kedah, Kelantan, Pahang, Perak, Selangor, Trengganu), one *raja* (the Raja of Perlis), and one *yang di-pertuan besar* (the Yang di-Pertuan Besar of Negri Sembilan).

³⁰⁾ Aziz Ahmad, Islamic Law in theory and practice, Lahore, All-Pakistan Legal Decisions, 1956, pp. 24-105. Kashi Prasad Saksena, Muslim Law as administered in India and Pakistan, Lucknow, Eastern Book Co., 1954, 3rd ed., pp. 20 ff.

³¹⁻³⁸⁾ R. J. Wilkinson, *op. cit.*, Vol. 2, Pt. 1, p. 48. But even in the family law and the law of succession there are many *adat* rules which are still observed mingled

with Muslim law. As to marriage, a Muslim may have four wives at a time, but they must be Muslim, Christian or Jewish. A Muslim woman may marry only a Muslim. [There are detailed rules of affinity which make it unlawful to marry within the prohibited degree (Khalil Ibn I sh a k , A manual of the law of marriage, London, Kegan Paul, Trench, Trubner Co., 187, p. 31 ff.). No woman can be married without the consent of her ascending agnate—father or grandfather—or if they are no longer alive, without that of a guardian (Khalil Ibn I sh a k , *op. cit.*, p. 5 ff.; Kashi Prasad S a k s e n a , *op. cit.* above note 30, p. 153)]. The ritual of a proper Muslim wedding ceremony is adhered to in Malaya, but a local Malay wedding ritual is added. It includes the *henna-staining* festivity, the sitting in state of the bride and bridegroom on a throne before family and invited guests, called the *bersanding*, and the ceremonial ablutions of the newly married pair. [R. J. W i l k i n s o n , *op. cit.*, Vol. 2, Pt. 1, p. 52]. The rule as to dowry, the *mahr*, is applied with local variations. The husband is required to give his wife a dowry. It consists of a sum of money which is given at the time of the marriage or, if the dowry is deferred, it is paid to the wife if the husband divorces her without a good ground. [Apart from the *mahr*, the bride's parents also present her with a gift]. Thus a check on divorces is provided, and the woman is ensured of means of subsistence if the divorce is final. There are two main forms of divorce. By the husband, which is called the *talak*, and by the wife, which is called the *khula*. The husband can irrevocably divorce his wife by repeating three times the divorce formula (divorce by *talak*). Similarly, the wife is entitled to be released by the husband if she returns to him the amount of the *mahr* (divorce by *khula*).

The pronouncement of the divorce formula only once results in an incomplete divorce, and the husband may recall his wife within one hundred days called the *iddah*. But he can so divorce and recall her only twice, for after the third *talak* is pronounced, the divorce is final, which is also the case if the husband does not recall his wife during the *iddah*. If the parties wish to remarry, they have to go through a fresh marriage ceremony all over again, but the divorced wife must, before she is remarried to her former husband, marry another man and that marriage must be fully consummated before they are divorced. This operates as a check on hasty divorces and it happens only very rarely that parties would choose to remarry. (Khalil Ibn I sh a k , *op. cit.*, pp. 134 ff.; K. P. S a k s e n a , *op. cit.*, pp. 261 ff.). If the wife desires a divorce, she can obtain one if she returns to the husband the amount of the *mahr*. This is called divorce by *khula*. In Malaya, by custom, the double of the *mahr* must be paid so that this practice is rarely encountered, but the woman would use other methods as scandalising her husband and so would force him to divorce her by *talak*. (Khalil Ibn I sh a k , *op. cit.*, pp. 112 ff.; K. P. S a k s e n a , *op. cit.*, pp. 266 ff.; R. J. W i l k i n s o n , *op. cit.*, Vol. 2, Pt. 1, p. 58). In the case of divorce by *talak*, the husband must pay a sum for maintenance. There is, however, a type of divorce by mutual consent which does not require either party to pay any money, so that the parties remain in the *status quo ante* (Aziz A h m a d , *op. cit.*, p. 203; K. P. S a k s e n a , *op. cit.*, p. 268).

As to devolution of property on death [see Sir William M a x w e l l , *op. cit.*, pp. 124–132], all children share in the father's estate, but a man's share is twice the share of a woman. Nearer relatives exclude the more remote, and inheritance is *per capita* and not *per stirpes*. [The effect of the rule is that so long there is a surviving child, no grandchild may receive anything, and further that the share within a given class of descendants is equal so that if a man leaves no surviving children but has four grandsons, all receive an equal share, although three of them are his grandsons by one son and the fourth that by another son (inheritance *per capita*). Aziz A h m a d , *op. cit.*, pp. 506 ff.]. Apart from these rules, a man may dispose of one third of his property by will, but this applies only to enable gifts to be made to religious bodies. He cannot disinherit, nor can he leave a larger share to one and a smaller one to another. [This can be done only by agreement among the beneficiaries. Aziz A h m a d , *op. cit.*, pp. 477 ff.; K. P. S a k s e n a ,

The evolution of law and state

English law spread throughout Malaya from Penang, which was the original English possession in the Peninsula³⁹⁾. According to the general rule that, when Englishmen establish themselves in an uninhabited or barbarous country, they carry with them the laws and the sovereignty of their own country⁴⁰⁾, the law of England became the law of Penang in so far as it was suitable and as modified in its application by the circumstances⁴¹⁾. Within a few years from the arrival of the British, thousands of Malays and Chinese settled on the island, yet there was no proper authority in existence to administer justice. Captain Light's power was limited to the preservation of good order, and he did so by administering justice according to his conscience⁴²⁾. Proper government was set up in Penang only in 1800, when a Lieutenant-Governor assumed office⁴³⁾. In the same year the administration acquired a large strip of land on the mainland of Malaya opposite Penang, which became known as Province Wellesley and which became part of the Penang settlement⁴⁴⁾. The rapid development of the settlement made the establishment of an adequate

op. cit., pp. 770 ff.]. This is a wise rule which prevents disputes as to inheritance. A widow is entitled to one half of the estate if there are no surviving children or agnates, otherwise to one fourth only. A widow is entitled to one fourth, but if there are children or agnates she gets only one eighth of the estate. The *adat*, with considerable Hindu and Muslim additions, was for centuries the law of the Malay states. Only after the end of the 18th century was it decisively affected and to a large extent supplanted by English law.

³⁹⁾ See footnote 6.

⁴⁰⁾ *Fatimah v. Logan* (1871) 1 Ky. 255, Hackett J., Supreme Court of the Straits Settlements.

⁴¹⁾ *Yeap Cheah Neo v. Ong Cheng Neo* (1875) L.R. 6 P.C. 381. See also *R. v. Willans* (1858) 3 Ky. 16, Maxwell R., S.C.S.S., where Sir Benson Maxwell held that as the island of Penang was not a deserted island but was inhabited by four Malay families at the time of Captain Light's landing, the law of England could not have been made the *lex loci* but was only the personal law of the garrison and its followers. Yet as no known body of law was in fact in existence in Penang, the law of England was to be applied.

⁴²⁾ The only instructions Captain Light received were the Regulations of 1794, dealing with criminal matters, which Lord Teignmouth, the Governor-General of Bengal forwarded to him in that year. Roland Braddell, *The Law of Straits Settlements*, 2nd ed., Singapore, Kelly & Walsh, 1931, Vol. 1, pp. 7-9.

⁴³⁾ The operation of the Statute 13 Geo. III. c. 63 was extended in 1800 by the Statute 39 & 40 Geo. III. c. 79, s. 20 to apply to all places administered by the Bengal Presidency. Penang, which was administered from Bengal, was made a Lieutenant Governorship. The first Lt.-Governor Sir George Leith, Bart., assumed office on April 19, 1800.

⁴⁴⁾ Province Wellesley was acquired by cession from the Sultan of Kedah by the Treaty of June 6, 1800 (Maxwell & Gibson Treaties, p. 98). Later in 1805, Penang became a separate Presidency headed by a Governor and council.

judicial machinery a necessity. In 1807, a Charter of Justice⁴⁵⁾ was granted by the Crown establishing a Court of Judicature in Penang⁴⁶⁾, with jurisdiction and powers of the Superior Courts in England and the several Justices, Judges and Barons thereof, so far as circumstances would admit and also with those of an Ecclesiastical Court, so far as the several religions, manners and customs of the inhabitants would admit⁴⁷⁾. The law the Court was to apply was the law of England with the necessary modifications⁴⁸⁾. From the decision of the Court an appeal lay to the King in Council.

The Penang settlement being too far to the north of the straits, and Malacca being held by the Dutch, it became of importance to establish another settlement which would command the straits. The place selected was Singapore⁴⁹⁾. The success of the Singapore settlement was quite spectacular, and the city developed with such a speed that the introduction of a regular administration of justice was highly desirable. In the meantime in 1824, Malacca was finally abandoned by the Dutch and was acquired by Great Britain⁵⁰⁾. The joining of the three settlements under one administration became then only a matter of time and was actually effected in 1826⁵¹⁾. In these circumstances the Second Charter of Justice

⁴⁵⁾ Letters Patent establishing the Court of Judicature in Penang bear the date of March 25, 1807. The document is referred to as the First Charter of Justice.

⁴⁶⁾ Members of the court were: the Governor, three councillors and a Recorder. Sir Edmund Stanley was the first Recorder. Braddell, *op. cit.*, Vol. 1, p. 11.

⁴⁷⁾ The Court was constituted as a Court of Record with general jurisdiction in civil and criminal matters, including authority over persons and estates of infants and lunatics. It had power to grant probate and letters of administration. Accordingly, Quarter Sessions were held from June 11, 1808, and Sessions of Oyer and Terminer from September 5, 1808. The Court was constituted a Court of Requests by proclamation on May 20, 1809. Braddell, *op. cit.*, Vol. 1, p. 19.

⁴⁸⁾ The *punctum temporis* of application of the law of England to the settlement was July 15, 1786, the day of landing of Captain Light. *Yeap Cheah Neo v. Ong Cheng Neo* (1875) L.R. 6 P.C. 381. To dispel all doubts as to its application, the Court held that it was so introduced, but in any event by the Charter of 1807 at the latest and became the law of the land, and that all who settled there became subject to it. *Regina v. Willans* (1858) 3 Ky. 16, 25, Sir Benson Maxwell R.; *Fatimah v. Logan* (1871) 1 Ky. 255, Hackett J.

⁴⁹⁾ See footnote 7.

⁵⁰⁾ See footnote 5.

⁵¹⁾ By Statute 5 Geo. IV. c. 108 of June 24, 1824, Singapore and Malacca were transferred to the East India Company and became automatically subordinate to Fort William in Bengal by virtue of the Statute 39 & 40 Geo. III. c. 79. By the Statute 6 Geo. IV. c. 85 of July 5, 1825, the King was empowered to make provisions for the administration of justice in Singapore and Malacca, and the directors of the East India Company were authorised to annex both settlements to Penang. By Treaty of October 18, 1826, with the Sultan of Perak, the island of Pangkor and the Sembilan Islands were acquired (Maxwell & Gibson Treaties, p. 23), and by the Treaty of Pangkor of

was granted in 1826⁵²), extending the jurisdiction of the Court of Judicature in Penang to Singapore and Malacca⁵³). A political and legal unity of the Straits Settlements was thus established.

The centre of gravity within the Straits Settlements shifted rapidly from Penang to Singapore, and it was no surprise when the seat of government was moved to Singapore in 1832. The development of the Straits Settlements went on at a rapid pace, so that within another 35 years their growing importance gradually led to their independence both from Fort William and the Government of India. Finally, on April 1, 1867, they became a separate colony⁵⁴). In the field of law, the Court of Judicature was granted Admiralty jurisdiction⁵⁵), and a fresh charter of justice, the Third Charter of Justice of August 10, 1855, confirmed its jurisdiction and powers⁵⁶). In 1867, the Recorder of the Court became its Chief Justice, and the following year, the Court itself was reconstituted as the Supreme Court of the Straits Settlements⁵⁷). In a further reconstruction in 1873 the Court was given appellate jurisdiction⁵⁸).

Since 1867 the status of the Straits Settlements was that of a Crown Colony, the powers of government being vested in the several constitutionally established organs of administration. The Crown retained and exercised its prerogatives to pass laws, to make peace and war, to create courts of justice, to be the instance of last appeal, to pardon offences, to coin money, to have allegiance, fealty and homage, and to impose taxes⁵⁹).

January 20, 1874, an additional piece of territory known as the Dindings were brought under British sovereignty (Maxwell & Gibson Treaties, p. 28).

⁵²) Letters Patent of November 27, 1826, establishing the Court of Judicature at Penang, Singapore and Malacca.

⁵³) The legal situation in Singapore prior to the Second Charter of Justice was analogous to that at Penang prior to the First Charter. In Malacca, the Dutch law applied prior to the Second Charter. *Rodyk v. Williamson* (1834) 2 Ky. Ec. 9, Sir Benjamin Malkin R.; *R. v. Willans* (1858) 3 Ky. 16, 36, Sir Benson Maxwell R.

⁵⁴) See footnote 8. The Government of Straits Settlements Act, 1866, gave the Queen power to establish laws, institutions and ordinances, and to make provisions for the courts and administration of justice generally for the good government of the Straits Settlements. The Queen delegated legislative authority in the Straits Settlements to the Legislative Council of the Straits Settlements and other executive powers to the Governor and the Executive Council by Letters Patent of February 4, 1867.

⁵⁵) Statute 6 & 7 Wm. IV. c. 53. Letters Patent of February 25, 1837.

⁵⁶) *Braddell, op. cit.*, Vol. 1, p. 232. The granting of the Charter was ratified by Statute 18 & 19 Vic. c. 93, s. 4.

⁵⁷) Straits Settlements Act III. of 1867; Ordinance V. of 1868. Acts and Ordinances of the S.S. 1867-98, Garrard's ed.

⁵⁸) Ordinance V. of 1873, Pt. 4. It provided for an appeal from the Divisional Court to a Full Court of Appeal of not less than three judges.

⁵⁹) *R. v. Hampden* (1637) 3 State Tr. 826.

Legislative powers of the Crown were delegated to the Legislative Council⁶⁰), yet the Crown retained the power to legislate by Order in Council⁶¹) and the power to disallow any ordinance passed by the Legislative Council⁶²). Nonetheless, the Legislative Council had vast, unrestricted powers of legislation within the colony, similar to those exercised by the Parliament at Westminster⁶³), with the one exception that some bills were reserved for the Royal Assent, which would be given by an Order in Council⁶⁴). Additional powers were, however, conferred on the Legislative Council by various Imperial Acts⁶⁵). As a result, legislation in the Straits Settlements was effected by the Ordinances of the Legislative Council⁶⁶), by Orders of the King in Council and by Acts of the Imperial Parliament⁶⁷).

Executive power in the colony was exercised by the Governor and the Executive Council. The Governor, representing the King, was appointed and held office during His Majesty's pleasure⁶⁸). His powers were delimited in his Commission and the various Letters Patent and Instructions⁶⁹). His principal functions consisted in convoking and proroguing the Legislative and Executive Councils, in initiating legislation, in assenting to, vetoing or reserving bills for the Royal Assent, in appointing judges,

⁶⁰) Government of S.S. Act, 1866, s. 2; Order in Council of December 28, 1866; Letters Patent of February 4, 1867, and of February 17, 1911.

⁶¹) Government of S.S. Act, 1866, proviso to s. 3.

⁶²) Letters Patent of February 17, 1911, art. IX.

⁶³) *Powell v. Apollo Candle Co.* [1885] L.R. 10 A.C. 282; Letters Patent of February 17, 1911, art. VIII.

⁶⁴) Letters Patent of February 17, 1911, art. XI. In other, unreserved cases, the Governor had power to give his assent, art. X.

⁶⁵) Braddell, *op. cit.*, Vol. 1, pp. 113-115, where the acts are enumerated.

⁶⁶) The composition and powers of the Legislative Council are laid down in the Instructions of August 18, 1924, art. XV.-XLIV. (Braddell, *op. cit.*, Vol. 1, pp. 314 ff.), and in the Standing Rules and Orders of the Legislative Council of June 1, 1925 (*ibid.* pp. 330 ff.). It consisted of eleven *ex officio* members (senior officers of public administration), two official members appointed by the Governor on instructions from the Secretary for Colonies, two unofficial members elected by the Chamber of Commerce, and eleven unofficial members nominated by the Governor. There were 26 members altogether excluding the Governor, who was the president of the Council.

⁶⁷) The Parliament at Westminster can legislate for the colonies, but it is presumed to legislate only for the United Kingdom, unless by express words it makes its will clear.

⁶⁸) The office of the Governor was constituted and his powers delimited in Letters Patent of February 4, 1867, in Letters Patent of February 17, 1911, in Letters Patent of August 18, 1924, and in the Instructions of August 18, 1924 (Braddell, *op. cit.*, Vol. 1, p. 307).

⁶⁹) *Musgrave v. Pulido* [1879] L.R. 5 A.C. 102, 111. He had no sovereign authority delegated to him, so that he did not enjoy any *prima facie* immunity and could be sued in the local courts. *Cameron v. Kyte* (1835) 3 Knapp. 332.

judicial and other officers, in dismissing certain officers, in remitting fines and granting pardon and in the general responsibility for the administration of the colony.

The Executive Council was designed to assist the Governor in the exercise of his duties. It consisted of the most senior officers of the colony, some *ex officio*, some by appointment. Two other persons not holding office in the public service were added by appointment⁷⁰). Its function was to advise the Governor on matters of public administration. Certain important powers, however, had to be exercised by the Governor in Council, in which case the function of the Council was more than advisory. These powers related chiefly to the removal of officers⁷¹) and the banishment of persons from the colony⁷²).

Administration of justice was in the hands of the Supreme Court, District Courts and Magistrates Courts⁷³). From a decision of the Full Court of Appeal a further appeal lay to the King in Council. Judges of the Supreme Court were appointed by the Crown by Letters Patent, district judges and magistrates by the Governor⁷⁴). Legal practitioners in the colony were termed Advocates and Solicitors, the two professions having been fused in the colony⁷⁵).

In the several Malay states, evolution took a similar although much more independent course. Although the first British settlement on the Malay Peninsula was established in 1786, and the influence of British administration on the Peninsula was great, there was no actual British intervention in the internal affairs of the Malay states until about ninety years later. The intervention itself, however, was prompted by the desire to protect rather than to annex. The reason for the intervention lay in the chaos and general disorder which characterised the management of the Malay states and which contrasted disfavouredly with the good order prevailing in the flourishing colony of the Straits Settlements. It so happened that the people themselves desired more order and stability, which they knew would be established under British protection and which would secure to them the fruits of their industry and labour. The first state to be protected was Perak. By the Treaty of Pangkor of January 20, 1874,

⁷⁰) The constitution and powers of the Executive Council are laid down in the Instructions of August 18, 1924, art. II.-XIV. (Braddell, *op. cit.*, Vol. 1, p. 307).

⁷¹) Colonial Leave of Absence Act, 1782, 22 Geo. III. c. 75, s. 2.

⁷²) Ordinance IV. of 1888. Acts and Ordinances of the S.S. 1867-1898, Garrard's ed.

⁷³) See footnotes 57 and 58. Ordinance III. of 1878 (Courts). Acts and Ordinances of the S.S. 1867-1898, Garrard's ed.

⁷⁴) Ordinance III. of 1878 (Courts).

⁷⁵) *Ibid.*

the State of Perak accepted British protection⁷⁶). In 1875, Selangor followed suit⁷⁷), later in 1887 Pahang came under British protection⁷⁸), and in 1889, British protection was extended to Negri Sembilan⁷⁹). British residents assumed office in these states with the immediate result that these states were since then actually administered by them. The rulers, who before wielded unlimited power, could act only through the residents, who in turn acted under instructions from the British government. In 1895, a treaty of federation⁸⁰) was concluded among these four above-mentioned states, pursuant to which the four rulers agreed to receive a Resident-General as the head of all public administration⁸¹). In 1909, a Federal Council was set up with legislative and executive power over the four federated states⁸²), while local legislation and administration was exercised by the residents in council, although nominally by the rulers in council acting upon the advice of the residents⁸³).

In addition to the Federated Malay States, British influence was increasingly felt in the northern part of the Peninsula. The states of Kedah, Kelantan, Perlis and Trengganu were, however, under Thai suzerainty, and it was only in 1909 that Thailand transferred her rights to Great Britain⁸⁴). Agreements similar to those with each of the four federated states were then made⁸⁵). These states, which became known as the Unfederated Malay States, received British advisers who advised the rulers on the government along lines similar to the administration existing in the

⁷⁶) Article VI. of the Treaty of Pangkor reads: "That the Sultan receive and provide a suitable residence for a British Officer to be called Resident, who shall be accredited to his Court, and whose advice must be asked and acted upon on all questions other than those touching Malay Religion and Custom" (Maxwell & Gibson Treaties, p. 28).

⁷⁷) No treaty was signed. By exchange of letters the Sultan agreed to receive a British Resident who would assist him in running the government.

⁷⁸) Treaty with Pahang of October 8, 1887 (Maxwell & Gibson Treaties, p. 66).

⁷⁹) Agreements of July 13, 1889 and of August 8, 1895 (Maxwell & Gibson Treaties, pp. 63 and 64).

⁸⁰) Maxwell & Gibson Treaties, p. 70.

⁸¹) Art. 4 of the Treaty provided that only matters touching the Mohammedan religion would not be dealt with by the Resident-General.

⁸²) Agreement for the constitution of a Federal Council, 1909 (Roland Braddell, Legal Status of the Malay States, Singapore, Malaya Publishing House, 1931, p. 40). Agreement for the re-constitution of the Federal Council, 1927. (Braddell, *op. cit.*, Vol. 1, p. 43).

⁸³) Braddell, Legal Status, *op. cit.*, p. 13.

⁸⁴) See footnote 9.

⁸⁵) Agreements, with Trengganu of April 22, 1910; with Kelantan of October 22, 1910; with Kedah of November 1, 1923 (Maxwell & Gibson Treaties, pp. 112, 109, 104). Agreement with Perlis of April 28, 1930 (State Papers, Vol. 132, p. 216).

Federated Malay States. Only local custom and religion were exempted from the authority of the advisers.

The only Malay state with a largely independent government was Johore. The British government had official dealings with Johore since 1818⁸⁶⁾, but it had not officially advised nor interfered in the internal matters of the state. The reason may well have been the efficiency of the sultan and his administration and his friendly relations with the government of the Straits Settlements. Mutual relations were regulated by the Agreement of December 11, 1885⁸⁷⁾ whereby Great Britain undertook to protect Johore from external attacks and Johore placed the management of her external relations in the hands of the British government. The internal order in Johore was greatly enhanced by the enactment of a constitution given by Sultan Abubakar on April 14, 1895⁸⁸⁾. It provided for an orderly exercise of legislative, executive and judicial powers, and for the regulation of important state matters. The sultan acted on the advice of experienced British advisers whom he asked to come and who were in his service. Only as of May 12, 1914, did Johore agree to accept British advice in the internal business of the state, yet the power of the British adviser was much smaller compared with that exercised by the advisers in the other Malay states⁸⁹⁾.

The above-outlined situation existed until it was forcibly disrupted by Japanese military occupation during the Second World War⁹⁰⁾. Yet the Japanese held the country for too short a time to be able to introduce changes in the administration, and very little was changed⁹¹⁾. Immediately after the termination of hostilities, the British government unfolded its plan for a Malayan Union which reflected ideas expounded before the war and which was based chiefly on economic considerations. The rulers of the several Malay states signed agreements by which they ceded full jurisdiction to the British government, and the British government proceeded to weld

⁸⁶⁾ See footnote 7 (Maxwell & Gibson Treaties, p. 115 ff.).

⁸⁷⁾ Maxwell & Gibson Treaties, p. 132.

⁸⁸⁾ Malayan Constitutional Documents, 2nd ed., Kuala Lumpur, Government Press, 1962, Vol. 2, p. 1.

⁸⁹⁾ Correspondence between the Sultan of Johore and the High Commissioner for the Malay States (Maxwell & Gibson Treaties, p. 134). Agreement of May 12, 1914 (Maxwell & Gibson Treaties, p. 136).

⁹⁰⁾ The Japanese were in full control of Malaya on February 15, 1942, the day of the capitulation of Singapore, and they remained in occupation until September 5, 1945. The British Military Administration, which took over the administration of the country after the Japanese surrender, ended on March 31, 1946, whereupon the civil administration was fully reinstated on April 1, 1946.

⁹¹⁾ Sudhir Kumar Das, Japanese occupation and ex post facto legislation in Malaya. Singapore, Malayan Law Journal, 1960.

the Malay states into one country under one administration⁹²⁾. Another innovation was that the settlements of Penang and Malacca were included in the Malayan Union, so that the Straits Settlements came to an end, and Singapore became a separate Crown Colony. The new arrangement entered into operation on April 1, 1946⁹³⁾. However, considerable opposition to the arrangement continued, and fresh negotiations were held. As a result, the Malayan Union was abrogated, and the presently existing Federation of Malaya came into being as of February 1, 1948⁹⁴⁾. The Federation was self-governing but not independent. Full independence was granted to the Federation by Great Britain on August 31, 1957, and the Federation chose to remain within the Commonwealth⁹⁵⁾.

Furthermore, Singapore advanced in its status from a colony to statehood. An elected Legislative Assembly was created in 1955⁹⁶⁾, and a State of Singapore, fully self-governing with only the external affairs and defence being handled by Great Britain, was established on June 3, 1959⁹⁷⁾. Negotiations for merger of Singapore, together with other states, into the Federation of Malaya were carried on for several years, and an agreement^{97a)} was reached for Singapore to enter the Federation on August 31, 1963. The entry of Singapore into the Federation was, however, slightly delayed due to the many problems connected with the formation of Malaysia, which was to comprise the Federation of Malaya, Singapore,

⁹²⁾ See Statement of Policy for the Future Constitution of the Malayan Union and the Colony of Singapore, Singapore, Dept. of Publicity and Printing of the British Military Administration, 1945. Sir Harold MacMichael, Report on a Mission to Malaya, Kuala Lumpur, Government Press, 1946. Richard O. Winstedt, *op. cit.*, Ch. XV.

⁹³⁾ Straits Settlements (Repeal) Act, 1946, 9 & 10 Geo. 6. c. 37. Straits Settlements (Repeal) Order in Council, 1946 (1946 No. 462). Malayan Union Order in Council, 1946 (1946 No. 463).

⁹⁴⁾ Federation of Malaya Agreement, 1948, Kuala Lumpur, Government Printer, 1948. Federation of Malaya Order in Council, 1948, (G.N. 5 of 1948). Richard O. Winstedt, *op. cit.*, Ch. XV.

⁹⁵⁾ Federation of Malaya Independence Act, 1957, 5 & 6 Eliz. 2, c. 60. Federation of Malaya Independence Order in Council, 1957 (1957 No. 1533), [The Federation of Malaya Agreement of August 5, 1957 and the Constitution of the Federation of Malaya appear in the annex and First Schedule respectively to the said Order in Council]. The Federation of Malaya (Adaptation of Enactments) Order in Council, 1957 (1957 No. 1534).

⁹⁶⁾ The Singapore Colony (Electoral Provisions) Order in Council, 1954 (1954 No. 1377). The Singapore Colony Order in Council, 1955 (1955 No. 187).

⁹⁷⁾ State of Singapore Act, 1958, 6 & 7 Eliz. 2, c. 59.

^{97a)} Agreement Relating to Malaysia, concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore, signed at London on July 9, 1963 (Cmnd. 2094), including as Annex D the Constitution of the State of Singapore (*loc. cit.*, pp. 133-174), with Supplementary Agreement of July 9, 1963 (Cmnd. 2150).

Sarawak and North Borneo, so that Singapore actually entered the Federation of Malaya and the newly formed Malaysia on September 16, 1963^{97b)}.

The presently applicable law

As to the law applicable in the several Malay states, the *adat*, influenced by Hindu law and in many instances supplanted by Muslim law, was the law of the land. The law was, however, not uniform but differed from state to state, and its application depended on the pleasure of the ruler and the powerful of the time⁹⁸⁾. With the arrival of the British residents in the last quarter of the 19th century, the Malay states opened their doors to the increasing influence of the English law. The way the English law entered was by legislation. The British residents in the several Malay states saw to it that legislation by Orders, Regulations or Ordinances was enacted to regulate the important business, transactions and affairs in the state. The legal provisions were invariably based on English law, so that a large portion of the law of England was thus introduced. The enactments provided for the administration of justice, for the introduction of the substance of the law of contract, sale of goods, bills of exchange, company law, criminal law and procedure, the law of evidence, land law, labour law, and the regulation of many matters of public interest. When the legislation grew complex, a law revision was undertaken, and a consolidated edition of the law in power was published in the majority of states⁹⁹⁾. Nonetheless there were many gaps in the law which needed filling, and it was the English common law which was applied by the English trained judges whenever need arose¹⁰⁰⁾. The influx of English law into the Federated Malay States¹⁰¹⁾ was further enhanced by the Civil Law Enactment, 1937, which introduced the whole body of the common law of England and of equity with minor modifications¹⁰²⁾.

^{97b)} Commonwealth Survey, A Record of United Kingdom and Commonwealth Affairs, Vol. 9, No. 18, p. 742, No. 20, p. 809.

⁹⁸⁾ Compare the section on the *Adat* and on Hindu and Muslim influences above.

⁹⁹⁾ A revised edition of the laws of the Federated Malay States (Negri Sembilan, Perak, Pahang and Selangor) covers all the law in force on December 31, 1934. Similarly, a consolidation of the laws of Johore was undertaken with respect to all law in force on January 1, 1935, and a consolidation of the laws of Kedah on July 13, 1934, was made. No consolidation was undertaken in the remaining three states, Kelantan, Trengganu and Perlis.

¹⁰⁰⁾ See e. g. *Kandasamy v. Suppiab* (1919) 1 F.M.S.L.R. 381, 381-2; *Re Yap Kwam Seng's Will* (1924) 4 F.M.S.L.R. 313, 316-18; *Mohamed Gunny v. Vadwang Kuti* (1930) 7 F.M.S.L.R. 170, 171.

¹⁰¹⁾ See footnote 99.

¹⁰²⁾ Civil Law Enactment, 1937 (No. 3 of 1937) F.M.S. s. 2(i) provided: "Save in so far as other provision has been or may hereafter be made by any written law in force

The application of the Enactment was extended to all Malaya in 1951¹⁰³), and in 1956 a new provision was made which introduced the whole of the common law of England and of equity into the Federation of Malaya, subject to such qualifications as local circumstances rendered necessary¹⁰⁴). In this way, English law became the law of Malaya¹⁰⁵). Yet there are additions and differences. Although the law of England is of general application, the local provisions based on old tribal and religious law survived to a certain extent in the areas traditionally excluded from the overwhelming influence of English law – the law of property and succession, and of marriage and divorce¹⁰⁶). In view of the importance and

in the Federated Malay States the common law of England, and the rules of equity, as administered in England at the commencement of this Enactment (March 12, 1937), other than any modifications of such law or any such rules enacted by statute, shall be in force in the Federated Malay States: Provided always that the said common law and rules of equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary”.

¹⁰³) The Federation of Malaya Civil Law (Extension) Ordinance, 1951 (No. 49 of 1951) s. 2. provided: “Section 2 of the Civil Law Enactment, 1937 of the F.M.S. is hereby extended to the States of Johore, Kedah, Kelantan, Perlis and Trengganu and shall have effect in all the Malay States”.

¹⁰⁴) The Federation of Malaya Civil Law Ordinance, 1956 (No. 5 of 1956) s. 3(i) provided: “Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance (April 7, 1956): Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary”.

¹⁰⁵) Proper administration of justice is enhanced by the existence of well-organised system of law reporting. The following law reports appeared: Woods’ Oriental Cases, a selection of cases decided in the Supreme Court of the S.S. before 1869, reprinted by Sweet & Maxwell, London, 1911. Straits Law Reports, a collection of cases decided between 1827–77 in the Supreme Court of the S.S., collected by Stephen Leicester and printed in Penang in 1877. J. W. Norton K y s h e, 4 vol. covering the period 1808–1890 Supreme Court of the S.S. The Straits Law Journal, 4 vol. 1888–1891, by S. R. G r o o m. The Straits Law Rep., New Series, 1891–1892. The S.S. Law Reports, Old series, 15 vol. 1893–1922 published under the direction of the Singapore Bar Committee; New Series, 1926–1942 cited by year of volume. The Law Reports of the Federated Malay States 1922–1931, Kuala Lumpur; New Series 1932–1941, last volume published in 1947. The Malayan Law Journal, 1932– current, edited in Singapore by Bashir A. M a l l a l. Malayan Union Law Reports, 2 vol., 1946–47. Singapore Law Reports, 4 vol., 1946–49 published by Bashir A. M a l l a l. Malayan Law Reports, 5 vol., 1950–54 edited by M. E d g a r and L. R a y n e r. Colony of Singapore Law Reports, 1953–56 by A. H. S i m p s o n.

¹⁰⁶) An outline of the local law of property, marriage, divorce and succession appears in footnote 31–38 above.

the close relationship of these provisions to public law, public order and administration their salient features are now briefly stated.

The law of property and succession

Tenure of land according to the old *adat* rules is now to be found only in Negri Sembilan¹⁰⁷). It is, however, systematised and regulated by a statute, the Customary Tenure Enactment, 1926¹⁰⁸). The land so held is entered in land registers kept in each of the three existing districts, Kuala Pilah, Jelebu and Tampin, and may be dealt with only according to custom, which implies matrilineal succession. Only females can hold customary land, and the consent of the *lembaga* (tribal head) is necessary to effect a transfer, charge or lease of the land. There are restrictions imposed on forced sales to enforce payment of debts, as only female purchasers of the local tribe are eligible bidders. Failing daughters in any given family, sons may hold a life estate in the family land, the land itself being transferred to the female heir according to custom.

Tenure of land throughout the Federation of Malaya is now governed by the respective Land Codes enacted in every state¹⁰⁹). The land belongs to the ruler, from whom it may be held in fee or for a term of years. He also holds the reversion on failure of successors. Furthermore, the property in, and the control of, the waters of all rivers is vested in the ruler. Title to land is acquired by registration. The system of registration is that known as the Torrens system, which is currently used in the several Australian states.

The Malays are benefited by the enactment of certain privileges in the tenure of land, designed to secure to them their interests in the land¹¹⁰). The government¹¹¹) may declare any land a Malay reservation with the effect that such land may be held only by Malays. The object of this enactment is to prevent land passing out of the hands of the traditional

¹⁰⁷) See E. N. Taylor, *Inheritance in Negri Sembilan*, 1948, 21 J.M.B.R.A.S. Pt. 2, p. 1.

¹⁰⁸) Customary Tenure Enactment, 1926 (No. 1 of 1926) Negri Sembilan, now incorporated in chapter 215 of the Revised Laws of the F.M.S. 1935 as amended.

¹⁰⁹) The Land Code, Revised Laws of the F.M.S. 1935, c. 138. Land codes are in existence in all Malay states. A new land code which would unify the land law throughout the Federation is expected in the nearest future. In the State of Singapore, registration of land is governed by the Land Titles Ordinance, 1956 (No. 21 of 1956), which is based on the Torrens system as applied in New South Wales in Australia.

¹¹⁰) Malay Reservations Enactment, 1935, Revised Laws of the F.M.S. 1935, c. 142. Similar legislation was passed in all Malay states.

¹¹¹) In the state of Johore, the landowner himself may do so in certain circumstances. Johore Malay Reservations Enactment, 1936 (No. 1 of 1936).

population into the hands of newcomers and foreigners. The definition of a Malay varies slightly from state to state, but it always includes a person belonging to any Malayan race, who habitually speaks the Malay language or any Malayan language and professes the Muslim religion¹¹²).

Legislative provision for the protection of tenure of land by the aboriginal tribes was also made¹¹³). The matter is governed by the Aboriginal Peoples Ordinance, 1954¹¹⁴). An area which is exclusively inhabited by aborigines may be declared an aboriginal reserve. Such land cannot be alienated and is reserved for the aborigines who live on it. An area which is predominantly inhabited by aborigines may be declared an aboriginal area. It is divided into cantons to provide a separate canton for each ethnic group. Land in this area may be freely alienated only to aborigines living there. Government approval must be obtained for alienation to other persons.

As to the law of succession, the local enactments follow closely the English provisions as to wills, intestate succession, probate and administration, so that there is very little divergence between the law of England and that of the Federation of Malaya and Singapore¹¹⁵). The existing additions consist in the recognition of polygamous marriages in the case of persons lawfully practising polygamy, in the recognition of Muslim religious rules of succession to be applied to Muslims, and also in the recognition of the local *adat* law concerning succession wherever applicable.

The rules as to wills, intestate succession and probate and administration are practically identical with those of England, but they are modified to provide for wives of polygamous marriages and their children¹¹⁶). None

¹¹²) Malay Reservations Enactment, 1935, Rev. Laws of the F.M.S., c.142, s.2. A company registered under the Companies Enactment is deemed to be a Malay if every member thereof is a Malay and the transfer of shares therein is restricted to Malays. Malay Reservations (Amendment) (No. 2) Enactment, 1936, (F.M.S. No. 51 of 1936).

¹¹³) There are well over 40,000 aborigines in Malaya. They are of three chief ethnic groups. The Jakun, the Negritos, and several tribes of Caucasoid extraction known as the Temiar, the Semai, the Sisek and the Semelai. The 1957 census established the figures as follows: Jakun 4,213, Negrito 841, Temiar 9,408, Semai 12,451, Semelai 2,821, other 11,626, a total of 41,360. (1957 Population Census of the Fed. of Malaya, Report No. 14, Dept. of Statistics, Kuala Lumpur.).

¹¹⁴) Federation of Malaya (No. 3 of 1954).

¹¹⁵) Federation of Malaya Wills Ordinance, 1959 (No. 38 of 1959); F.M. Distribution Ordinance, 1958 (No. 1 of 1958); Probate and Administration Enactment, 1935 (Rev. Laws of the F.M.S., 1935, c. 8). Singapore Wills Ordinance, 1955 (Rev. Laws, 1955, c. 35); Singapore Conveyancing and Law of Property Ordinance, 1955 (Rev. Laws, 1955, c. 243, s. 35); Singapore Probate and Administration Ordinance, 1955 (Rev. Laws, 1955, c. 17).

¹¹⁶) See footnote 115.

of the rules, however, apply to persons professing the Muslim religion. In Singapore, where no provision comparable to the Federation of Malaya Distribution Ordinance was made, the English Statute of Distributions¹¹⁷⁾ is applied with such modification to include wives and children of polygamous marriages¹¹⁸⁾.

The Muslim law of succession as applied in the Federation of Malaya and in Singapore was outlined in the section on Hindu and Muslim influences above. The proper heirs are those falling within the twelve groups enumerated in the Koran, then the agnates, the cognates, and failing them the property goes to the Federal Government, with the exception of land, which goes to the state in which it is situated. In Singapore, both movables and land go to the state. According to the Singapore Muslims Ordinance, 1957¹¹⁹⁾, the court may ascertain the rules of the law of Islam in one or all specifically enumerated books on the subject and accept as proof of the law of Islam any definite statement there appearing¹²⁰⁾. The court is thus given guidance in this matter.

Furthermore, the *adat* law is recognised to govern the law of succession in communities subject to it¹²¹⁾. Succession to *adat* land is governed by the Customary Tenure Enactment, 1926¹²²⁾, but a few *adat* rules of succession still apply to improve the position of a widow or a divorcée as compared with Muslim law¹²³⁾.

The law of marriage and divorce

Both monogamous and polygamous marriages exist in Malaya and Singapore side by side. Monogamous marriages may be solemnised accord-

¹¹⁷⁾ Statute of Distributions, 1671, 22 & 23 Car. II. c. 10. (An act for the better settling of intestates' estates).

¹¹⁸⁾ In the Goods of Lao Leong An (1867) Leic. 418; *Khoo Tiang Bee v. Tan Beng Guat* (1877) 1 Ky. 413; *Lee Joo Neo v. Lee Eng Swee* (1887) 4 Ky. 325; *Khoo Hooi Leong v. Khoo Hean Kwee* [1926] A.C. 529.

¹¹⁹⁾ No. 25 of 1957. Muslim (Amendment) Ordinance, 1960 (No. 40 of 1960).

¹²⁰⁾ That is to say: 1. The English translation of the Koran by A. Yusof Ali or Marmaduke Pickthall; 2. Mohammedan Law by Syed Ameer Ali; 3. Howard's translation of Vanden Berg's French translation of the Minhaj Et Talibin, a manual of Muhammadan Law according to the School of Shafi, by Nawawi; 4. Digest of Moohummudan Law by Neil B. E. Baillie; 5. Anglo-Muhammadan Law by Sir Roland Knyvet Wilson; 6. Outlines of Muhammadan Law by A. A. Fyzee; 7. Muhammadan Law by F. B. Tyobji. [Muslims Ordinance, 1957, (No. 25 of 1957), s. 44 (i)].

¹²¹⁾ An outline of the *adat* law was given in the section on the *adat* above.

¹²²⁾ See footnote 108.

¹²³⁾ Her share in the estate is set at one half if it was jointly acquired, and at one third if it was acquired solely by the husband. E. N. Taylor, *Inheritance in Negri Sembilan*, 1948, 21 J.M.B.R.A.S., Pt. 2, p. 49.

ing to the provisions of the respective statutory enactments, which are based on the English Matrimonial Causes Act, 1950¹²⁴). There are provisions for a civil and a Christian marriage¹²⁵), and for the dissolution of marriages so solemnised¹²⁶). Yet only Christians and some non-Christian Chinese enter in monogamous marriages. The Malays, however, are Muslims without exception and follow their own religious rules in questions of marriage and divorce¹²⁷). Consequently, the statutory provisions governing monogamous marriages do not apply to them. To regulate the matter, the several Malay states and the State of Singapore enacted statutes governing Muslim marriage and divorce¹²⁸). These provisions are designed to give effect to the Muslim law on the subject. They provide for the registration of Muslim marriages, divorces and revocation of divorces, and for the establishment of *shariat* courts (Muslim religious tribunals) to hear disputes arising therefrom.

Non-Christian Chinese may marry and get divorced according to their customary rules. A non-Christian Chinese man may marry as many wives he wishes. He can have only one principal wife, the *tsai*, and a number of secondary wives, the *tsips*¹²⁹). Divorce is by mutual consent. The parties agree to dissolve the marriage and make further provisions in order to settle all other important points arising therefrom. The agreement is made in writing under seal. It invariably contains a statement that the wife shall have no claim for maintenance from the husband, that the parties are free to remarry, and a provision as to the custody of children, if any. Apart from a divorce by mutual consent, there is also a divorce by re-

¹²⁴) Matrimonial Causes Act, 1950, 14 Geo. 6, c. 25.

¹²⁵) Federation of Malaya Civil Marriage Ordinance, 1952 (No. 44 of 1952); Christian Marriage Ordinance, 1956 (No. 33 of 1956). Singapore Civil Marriage Ordinance (Rev. Laws, 1955, c. 38); Christian Marriage Ordinance (Rev. Laws, 1955, c. 37).

¹²⁶) Federation of Malaya Divorce Ordinance, 1952 (No. 74 of 1952). Singapore Divorce Ordinance (Rev. Laws, 1955, c. 40).

¹²⁷) For a brief outline of Malay marriage and divorce see the section on Hindu and Muslim influences above.

¹²⁸) E.g. Muslim Law and Malay Custom (Determination) Enactment, 1935 (Rev. Laws of the F.M.S., 1935, c. 196); Muhammadan Marriage and Divorce Registration Enactment, 1935 (Rev. Laws of the F.M.S., 1935, c. 197); Muhammadan Marriage and Divorce Registration Enactment, 1935 (Rev. Laws of Johore, 1935 No. 17); Offences by Muhammadans Enactment, 1935 (Rev. Laws of Johore, 1935 No. 47); Singapore Muslims Ordinance, 1957 (No. 25 of 1957).

¹²⁹) As to the ceremony of a Chinese marriage see *Choo Ang Chee v. Neo Chan Neo* (1908) 12 S.S.L.R. 120; *Cheong Thye Phin v. Tan Ah Loy* [1920] A.C. 369; *Re Yeow Kian Kee's Estate* (1949) 15 M.L.J. 171; and also Maurice Freedman, *Chinese Family and Marriage in Singapore*, Report to the Colonial Social Research Council (Scheme R. 281), London, Colonial Office, 1953.

pu diation, but it seems that this form of divorce applies only to secondary wives¹⁸⁰).

Similarly to the Chinese, the various Indians (Tamils, Hindus, Bengalis, etc.) living in Malaya and in Singapore are free to follow their religion and customary rules as to marriage and divorce, and they may practice polygamy. This also applies to any other non-Christians.

Conclusion

Like the population of the Malay Peninsula, which originates from many countries and incorporates many racial groups, the law of the Federation of Malaya and of the State of Singapore springs from various sources. It is founded on *adat* law, Hindu and Muslim law, and it continues its development by the adoption of the English legal system. English ideas of order, justice, state and public administration were introduced in the country and a legal order was set up which, although consonant with the English point of view, gives full scope to the realisation of aspirations of a multiracial community. The immense progress and development of Malaya and Singapore in the last hundred years, and especially since the last World War, bears an adequate testimony to the suitability, effectiveness and efficiency of the existing legal order, and there seems to be no doubt that the work so well begun will continue to achieve favourable results in the future.

George E. G l o s , New York

¹⁸⁰) *In re Sim Siew Guan's Estate* (1924) 1 M.L.J. 95, 96, S h a w C. J. heard evidence of the Chinese Consul-General to the effect that a husband was entitled to divorce his secondary wife if she were disobedient to him or his principal wife, if she did not conform to the household regulations, or was guilty of immoral conduct. He had, however, no such right if she has borne him a son during the marriage. See also *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] A.C. 346, 353.