

LEGAL TRANSPLANTS AND ADAPTATION IN A COLONIAL SETTING: COMPANY LAW IN BRITISH MALAYA

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This paper traces the development of company law during the colonial era in British Malaya, providing details on the laws of the Straits Settlements and the Federated Malay States. It also presents an account of economic development and the use of the limited liability company form in these two interlinked jurisdictions. The paper notes the lack of connection between the evolution of company law in Malaya, local economic and political developments and the actual local use of the law. We situate this material within three current debates about the nature of colonial company law: whether the law was more a product of the “transplant effect” than of legal family; whether the dispersal of company law to the colonies was as straightforward as is often assumed; and whether the law was best characterised as “imperialism”.

I. INTRODUCTION

[E]ven when a colony’s ordinance has reproduced an English Act, say the Companies Act 1862 or 1929, it may well be that the draftsman of the colonial code has not made a careful study of the background to the English Act and its *raison d’être* as a prelude to his task. If and when he has thought fit to make changes to certain provisions of the English Act, by what objective criteria of relevancy or legitimacy may he have arrived at his conclusions *vis-à-vis* the local people and circumstances? Since neither he nor the legislators of most colonies would have carried out any comprehensive research into the particular piece of commercial legislation, it must be by extreme good fortune that the resulting local enactment would be just what would suit the situation.¹

An increasing interest in understanding the colonial sources and development of company law has emerged out of recent theoretical debates about the existence of

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¹ T. Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction Between English and Local Laws in British Dependencies* (London: Stevens & Sons Limited, 1962) at 142.

strong path dependency links between present day company laws and their historical antecedents. First, the influential “legal origins” theory regards the introduction of company law, and the legal family from which it came, as having long-term influence on the strength of protections afforded to shareholders.² According to this theory, countries belonging to the “common law” family have stronger shareholder protections than “civil law” countries. Stronger shareholder protections are thought to enhance market capitalisation and hence, it is argued, the historical legacies of “common law” are more beneficial for present day economic development. Among a number of critical responses to the “legal origins” theory is the work of Pistor *et al.*³ They argued that “good” company law is that which develops incrementally over time in response to local political and economic change, that is, it is highly adaptable, rather than necessarily having the strongest shareholder protections. In their view, legal adaptability is affected by local demand for law and the responsiveness of legal drafters to that demand, as well as by whether company law provides mandatory rules or rather enables users to tailor rules to their own needs. In their comparative study of ten jurisdictions, Pistor *et al.* found that company law in common law “origin” countries has tended to be more adaptable than in civil law “origin” jurisdictions. However, they found that in “transplant” countries the law developed very differently to that of its relevant parent legal family. Pistor *et al.* demonstrated that transplanted law is unlikely to correspond to local demand and thus often displays patterns of erratic change or long periods of stagnation rather than incremental co-evolution with economic and social developments. Overall, that study, together with other related work,⁴ argues that this “transplant effect”, and the way that law was received, is much more important than the legal family in determining outcomes of the law in “transplant” countries.

A second debate involving the colonial origins of company law concerns the implicit assumption made in the “legal origins” literature that there was just one straightforward original transplant of company legislation. As Pargendler has persuasively argued, the legal origins theorists based their model on the fact that company law was transplanted to the colonies, but incorrectly assumed that the laws had been directly transposed by the coloniser without any local political involvement or adaptation.⁵ Pargendler’s research on Brazil and Mahy’s study of the Netherlands Indies (Indonesia) have demonstrated that company law development there was characterised by diverse origins, selective transplants and at least some local adaptation.⁶ In the case of the British Empire, McQueen observed that there have been few detailed studies of how the English model of company law was dispersed

² Rafael La Porta *et al.*, “Legal Determinants of External Finance” (1997) 52 *The Journal of Finance* 1131; Rafael La Porta *et al.*, “Law and Finance” (1998) 106 *Journal of Political Economy* 1113 [La Porta *et al.*, “Law and Finance”].

³ Katharina Pistor *et al.*, “The Evolution of Corporate Law: A Cross-Country Comparison” (2002) 23 *U. Pa. J. Int’l Econ. L.* 791 [Pistor *et al.*, “The Evolution of Corporate Law”]. See also Katharina Pistor *et al.*, “Innovation in Corporate Law” (2003) 31 *Journal of Comparative Economics* 676.

⁴ Daniel Berkowitz *et al.*, “The Transplant Effect” (2003) 51 *Am. J. Comp. L.* 163.

⁵ La Porta *et al.*, “Law and Finance”, *supra* note 2, as critiqued in Mariana Pargendler, “Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil” (2012) 60 *Am. J. Comp. L.* 805.

⁶ Pargendler, *ibid.*; Petra Mahy, “The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation” (2013) 61 *Am. J. Comp. L.* 377.

via colonisation because of assumptions about its uniformity and universality.⁷ McQueen demonstrated that in fact many differences can be seen on closer examination of particular country cases.⁸ It is true that British colonies tended to make blanket adoptions of English common law and equity principles at some point in their histories, and the Board of Trade and the Colonial Office generally promoted legal uniformity of commercial laws between Britain and its colonies.⁹ The colonies, however, often took quite different approaches to recognising existing local law, to adapting English law to the colonial context and to creating new original laws.¹⁰

A third line of debate questions whether the introduction and effects of company law in the colonial context is best understood as “imperialism”. This debate, too, is concerned with innovation and the adaptability of the law to local conditions. McQueen’s argument for characterising company law as an instrument of imperialism holds that colonial powers used company legislation to further the commercial interests of the metropolis and made little or no attempt to adapt the law for use by the local population. Hence the law served to impede rather than to foster local economic development.¹¹ Similar claims emerge from discussion of the ongoing repercussions of the company law transplant in the post-independence era in Asia. The current state of corporate governance is blamed by some on the original colonial transplant, its inherent imperialism and the lack of adaptability to local conditions and business cultures.¹² This argument is supported by evidence of the mismatch between Asian family business practices and the particular agency problems that Western company law is designed to regulate.¹³

⁷ Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854-1920* (Surrey: Ashgate Publishing Ltd., 2009) at 14 [McQueen, *A Social History of Company Law*]. Other studies of company law in British colonies include: Phillip Lipton, “A History of Company Law in Colonial Australia: Economic Development and Legal Evolution” (2007) 31 *Melbourne U. L. Rev.* 805; Radhe Shyam Rungta, *The Rise of Business Corporations in India, 1851-1900* (Cambridge: Cambridge University Press, 1970); R.C.B. Risk, “The Nineteenth Century Foundations of the Business Corporation in Ontario” (1973) 23 *U.T.L.J.* 270; Ron Harris & Michael Crystal, “Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine” (2009) 10 *Theor. Inq. L.* 561.

⁸ Rob McQueen, “The Flowers of Progress: Corporations Law in the Colonies” (2009) 17 *Griffith L.R.* 383.

⁹ Great Britain, Board of Trade, *Comparative Analysis of the Company Laws of the United Kingdom, India, Canada, Australia, New Zealand and South Africa with a Memorandum Prepared for the Imperial Conference 1907 by the Director of the Board of Trade* (London: Darling & Son, Ltd., 1907) (Cd 3589); L.C.B. Gower, “Company Law Reform” (1962) 4 *Mal. L. Rev.* 36; Harris & Crystal, *supra* note 7.

¹⁰ Ronald J. Daniels *et al.*, “The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies” (2011) 59 *Am. J. Comp. L.* 111; Matthew K. Lange, “British Colonial Legacies and Political Development” (2004) 32 *World Development* 905.

¹¹ Rob McQueen, “Company Law as Imperialism” (1995) 5 *Austl. J. Corp. L.* 187; McQueen, *A Social History of Company Law*, *supra* note 7; *Cf.* Lipton, *supra* note 7.

¹² Mohammad Rizal Salim, “Legal Transplantation and Local Knowledge: Corporate Governance in Malaysia” (2006) 20 *Austl. J. Corp. L.* 55; Aishah Bidin, “Law Reform and Corporate Governance in Malaysia” in John Gillespie & Randall Peerenboom, eds., *Regulation in Asia: Pushing Back on Globalization* (Hoboken: Routledge, 2009) 296.

¹³ See *e.g.*, Benny Tabalujan, “Family Capitalism and Corporate Governance of Family Controlled Listed Companies in Indonesia” (2002) 25 *U.N.S.W.L.J.* 486; Andrew Rosser, “Coalitions, Convergence and Corporate Governance Reforms in Indonesia” (2003) 24 *Third World Quarterly* 319; Jomo K.S., “Corporate Governance Reform for East Asia” in Jomo Kwame Sundaram & Wong Sau Ngan, eds., *Law, Institutions and Malaysian Economic Development* (Singapore: NUS Press, 2008) 222.

While company law developments in contemporary Malaysia and Singapore have been much discussed,¹⁴ there has been no close examination conducted of the laws' original development in colonial Malaya.¹⁵ Further, most texts on company law in Malaysia and Singapore tend to merely note in passing the indisputably English (and Australian) origins of the law and quickly move on.¹⁶ This paper fills this gap in the existing research by presenting a descriptive account of the development of company law in British Malaya,¹⁷ focusing on the Straits Settlements and the Federated Malay States. The paper then describes the actual use of the law by the different racial groups who were present in Malaya, and particularly highlights the vast difference in the numbers of London-based companies and locally incorporated companies that participated in Malaya's tin and rubber booms. The paper concludes by analysing this material in relation to the three interrelated debates outlined above: whether colonial company law development in Malaya was more a product of the "transplant effect" than of legal family; whether the assumption that the dispersal of company legislation to the colonies was straightforward and uniform is true in relation to Malaya; and whether colonial company law in Malaya is best understood as "imperialism".

II. THE SPREAD OF BRITISH COLONIAL POWER IN MALAYA

During the British colonial era in Malaya, there were a number of different administrative regimes resulting from the piecemeal extension of British power over the region by means of various treaties. The Straits Settlements, consisting primarily of Singapore, Penang and Malacca, were established under the control of the British East India Company in 1826 and later became a separate Crown Colony in 1867 with its own Governor and Legislative Council. The Legislative Council comprised a handful of government high office holders or "Official"¹⁸ representatives as well

¹⁴ See e.g., Janine Pascoe & Shanthi Rachagan, "Key Developments in Corporate Law Reform in Malaysia" [2005] Sing. J.L.S. 93; Janine Pascoe, "Corporate Law Reform and Some 'Rule of Law' Issues in Malaysia" (2008) 38 Hong Kong L.J. 769; Walter Woon, "Reforming Company Law in Singapore" (2011) 23 Sing. Ac. L. J. 795; Vivien Chen, "The Evolution of Malaysian Shareholder Protection: A Legal Origins Analysis" [2013] Sing. J.L.S. 100.

¹⁵ Note that Pistor *et al.*, "The Evolution of Corporate Law", *supra* note 3 at 847, included Malaysia in their comparative study, but provided very little detail regarding the colonial period.

¹⁶ See e.g., Shanthi Rachagan *et al.*, *Concise Principles of Company Law in Malaysia*, 3rd ed. (Petaling Jaya: LexisNexis, 2010) at 3-5; Victor Yeo *et al.*, *Commercial Applications of Company Law in Singapore*, 4th ed. (Singapore: CCH Asia, 2011) at 22; Aiman Nariman Mohd Sulaiman *et al.*, *Commercial Applications of Company Law in Malaysia*, 3rd ed. (Singapore: CCH Asia, 2008) at 29, 30.

¹⁷ The term "British Malaya" or "Malaya" is used in this paper to refer collectively to the Straits Settlements, Federated Malay States and the Unfederated Malay States.

¹⁸ According to scholars of the politics and economy of British Malaya, the Officials usually served the objectives of the metropolis but often also had business interests and ideologies of their own. They were not necessarily the tools of British business but the policies that they pursued, including free trade in Singapore, the opening-up of the Malay States and infrastructure development, provided the ideal conditions for British business to flourish. See A.J. Stockwell, "The White Man's Burden and Brown Humanity: Colonialism and Ethnicity in British Malaya" (1982) 10 Southeast Asian Journal of Social Science 44 at 52; Jean-Jacques van Helten & Geoffrey Jones, "British Business in Malaysia and Singapore since the 1870s" in R.P.T. Davenport-Hines & Geoffrey Jones, eds., *British Business in Asia Since 1860* (Cambridge: Cambridge University Press, 1989) c. 6 at 188.

as “Unofficial”¹⁹ non-government members, usually including one Chinese representative. In 1924, a new Legislative Council was established consisting of thirteen Official and thirteen Unofficial members all appointed by the Governor. The Straits Settlements, particularly Singapore, were originally a free-trade entrepôt centre for South and Southeast Asia and South China, and the entry harbour through which Western manufactured goods and opium were traded in the region. Singapore had a very small population of Malay and Chinese when the British first arrived. The new settlement quickly attracted large numbers of Chinese migrants, and the Chinese population continued to grow throughout the colonial period. By 1931, the Chinese represented 75.1 per cent of the population of Singapore, while Malays were 11.7 per cent, Indians 9.1 per cent and “Others” (including the British) were the small remainder.²⁰

The British “forward movement” into the Malay Peninsula began in 1874 with the Treaty of Pangkor under which the Sultan of Perak accepted a British Resident, who formally acted as an advisor to the Sultan but whose advice in almost all matters was bound to be followed. Other Malay states later also accepted Residents, and then in 1895, four of the states—Negeri Sembilan, Pahang, Perak and Selangor—were amalgamated into the Federated Malay States. Although the Federated Malay States were never formally designated as a colony, and the fiction of Malay rule was maintained, the territory was firmly under the control of the British. A Federal Council was established for the Federated Malay States in 1909 consisting of the Malay hereditary ruler of each of the four states, the British Residents of each state and some other Official and Unofficial members, again usually including one or two Chinese representatives. The Federated Malay States formed the hinterland regions while the Straits Settlements was the business hub of the area, although the tin and rubber booms in the Federated Malay States in the late nineteenth and early twentieth centuries were to change that to some extent. In the Federated Malay States in 1911, the racial composition of the population was 10 per cent Indian, 54 per cent Malay and 34 per cent Chinese. By 1947, the Chinese proportion of the population had increased to 45 per cent, the Malay population had decreased to 43 per cent and the Indian population had remained constant at 10 per cent. The balance of the population consisted of smaller minorities.²¹

The remaining Unfederated States on the Malay Peninsula—Johor, Kedah, Kelantan, Perlis and Terengganu—nominally retained their independence but eventually all accepted British Residents. Following World War II, the Malayan Union was formed in 1946 amalgamating the Straits Settlements, Federated Malay States and the Unfederated States, apart from Singapore which was given status as a separate Crown Colony. The Malayan Union was remodelled as the Federation of Malaya in 1948. Independence from Britain was achieved in 1957, and the Federation of Malaysia was formed in 1963 encompassing Singapore, and the states of Sarawak and Sabah in Borneo. Singapore was forced to secede from Malaysia in 1965.

¹⁹ The Unofficial members of the Straits Settlements Legislative Council often represented Chambers of Commerce or other business interests and acted as the watch-dogs for the welfare of plantation, mining and trading enterprises. See Stockwell, *ibid.* at 52.

²⁰ Saw Swee-Hock, “Population Trends in Singapore 1819-1967” (1969) 10 *Journal of Southeast Asian History* 36 at 41.

²¹ Amarjit Kaur, “Indian Labour, Labour Standards, and Workers’ Health in Burma and Malaya, 1900-1940” (2006) 40 *Modern Asian Studies* 425 at 432.

III. THE DEVELOPMENT OF COMPANY LAW IN BRITISH MALAYA

In colonial Malaya, the Straits Settlements was the leader in company law development, with the Federated Malay States tending to follow the Straits Settlements' lead.²² It was the Straits Settlements Companies Ordinance which was carried forward into the Malayan Union and then through into independent Malaysia and

Table 1.

Chronology of Company Law Developments in the Straits Settlements and Federated Malay States Indicating the General Influence of Legislation in England and India.

| England | India | Straits Settlements | Federated Malay States |
|---|---|--|---|
| <i>Joint Stock Companies Act, 1844</i> | <i>Companies Act, 1850</i> | — | — |
| <i>Limited Liability Act, 1855</i> <i>Joint Stock Companies Act, 1856</i> | <i>Companies Act, 1857</i> <i>Companies Act, 1860</i> | — | — |
| <i>Companies Act, 1862</i> | <i>Companies Act, 1866</i> | <i>Indian Companies Act, 1866</i> <i>Civil Law Ordinance IV, 1878</i> | — |
| Various amendments including: <i>Companies (Amendment) Act, 1867</i> <i>Joint Stock Companies Arrangement Act, 1870</i> [<i>Companies (Amendment) Act, 1879</i> —not followed in Straits Settlements] | [Further developments in India are not included here as they were not directly relevant to the Straits Settlements and Federated Malay States.] | <i>Companies Ordinance, 1889</i> | Identical Enactments in each state within the Federated Malay States, 1897 Amendments to each Federated Malay States Enactment, 1903 |

²² Three of the Unfederated States—Johor, Kedah and Kelantan—passed almost identical companies ordinances, but these were only to facilitate the registration of foreign companies and to permit them to hold land, and did not establish independent incorporation procedures (*Johor Foreign Companies Enactment No. 5 of 1926*; *Kedah Enactment No. 41 (Foreign Companies) No. 7 of 1347* (approx. 1928), No. 9 of 1349 (approx. 1930), No. 13 of 1350 (approx. 1931); *Kelantan Enactment No. 14 of 1931*). In North Borneo (Sabah), the development of company law was oriented to India. It adopted the Indian Companies Acts of 1882 and 1887 (See C.F.C. Macaskie, "The Law and Legislation of the State of North Borneo" (1921) 3 *Journal of Comparative Legislation and International Law* 200 at 203, 210). Later, the *Procedure Ordinance, 1926* (No. 1) adopted a number of major Indian Acts to North Borneo including the *Indian Companies Act, 1913*. After North Borneo became a British Crown Colony, the *Companies Ordinance, 1950* (No. 18) adopted the *Companies Ordinance 1940* (S.S.) as amended and this was later formalised as Cap. 26. Sarawak also had a full *Companies Ordinance* (Cap. 86), first passed in 1927 and updated several times during the 1930s and 1940s.

Table 1.
(Continued)

| England | India | Straits Settlements | Federated Malay States |
|---|--------------|---|--|
| <i>Companies (Amendment) Act, 1898</i> | | <i>Companies (Amendment) Ordinance, 1909</i> | |
| — | | <i>Companies (Amendment) Ordinance, 1914</i> | <i>British and Foreign Companies Enactment, 1910</i> <i>British and Foreign Companies (Amendment) Enactment, 1912</i> |
| <i>Directors Liability Act, 1890</i> <i>Companies (Amendment) Act, 1900</i> <i>Companies Act, 1907</i> <i>Companies (Consolidation) Act, 1908</i> <i>Companies (Winding-up) Rules, 1909</i> | | <i>Companies Ordinance, 1915</i> <i>Companies (Winding Up) Rules, 1915</i> <i>Companies (Amendment) Ordinance, 1916</i> <i>Companies (Further Amendment) Ordinance, 1916</i> | <i>Companies Enactment, 1917</i> |
| — | | <i>Companies Ordinance, 1923</i> <i>Companies (Amendment) Ordinance, 1937</i> | <i>Companies (Amendment) Enactment, 1927</i> |
| <i>Companies Act, 1928</i> <i>Companies Act, 1929</i> | | <i>Companies Ordinance, 1940</i> <i>Companies Ordinance, 1946</i> | <i>Companies (Amendment) Enactment, 1932</i> <i>Malayan Union Companies Ordinance, 1946</i> |
| <i>Companies Act, 1947</i> <i>Companies Act, 1948</i> [<i>Australian Uniform Companies Acts 1961-1962</i>] | | <i>Singapore Companies Act, 1967</i> | <i>Malaysian Companies Act, 1965</i> |

Singapore. The following descriptive account of the development of company law will interweave the chronological developments in the Straits Settlements and Federated Malay States.²³ Table 1 sets out the major company law changes in the Straits Settlements and Federated Malay States indicating the laws' antecedents in England and India as a guide to this quite complicated story of company law diffusion.

A. The Late 19th Century

The first company legislation to have effect in the Straits Settlements was the Indian *Companies Act 1866*. At that time the Straits Settlements was still subordinate to Fort William in Bengal and this was one of the many Indian Acts which extended to the Settlements. Not all Indian Acts applied in the Straits Settlements, and the authorities in the Straits Settlements seemed to pick and choose which Indian Acts they adopted.²⁴ Although the earlier Indian Companies Acts of 1850, 1857 and 1860 may have had some minimal influence in the Straits Settlements, it appears that it was the Act of 1866 that was used to incorporate the first companies in the colony. The *Indian Companies Act 1866* was based closely on the English *Companies Act 1862*, and there was little attempt made to modify this law for the conditions in Indian, or indeed in the Straits Settlements.²⁵ India, by this time, had already experienced debates around the question of limited liability and several booms and busts in various corporate endeavours.²⁶ The 1866 Act, similarly worded and numbered as the English *Companies Act 1862* with nine parts and three schedules, provided that any seven or more persons could form a limited or unlimited liability company. The 1866 Act removed the previous inability of insurance companies to be registered as limited liability companies which were the last type of company to have this restriction. It had provisions relating to most of the core principles of modern company law including distribution of capital, internal management procedures, arbitration, and winding-up. It also included a "Table A" of replaceable company rules. It did not reintroduce the prohibition on a company buying its own shares which had existed in the earlier Indian Act of 1857.²⁷

As noted above, in 1867, the Straits Settlements became a separate Crown Colony, with its own Governor and Legislative Council. Indian legislation continued to be in force in the Straits Settlements until expressly overturned. The next relevant piece of legislation, the *Civil Law Ordinance IV of 1878* (Part II, s. 6), copying a similar provision in Ceylon, brought into operation within the Straits Settlements a broad body of English law current at the time including all questions or issues relating to joint stock companies, unless other provision was made by statute enacted in the colony. There had been an earlier general adoption of the common law and equity of

²³ This account does not include reference to fire or life insurance or trust companies which were additionally regulated through separate laws in both the Straits Settlements and the Federated Malay States. The account also does not analyse the Trading with the Enemy or Alien Enemies (Winding-Up) laws first passed during World War I.

²⁴ It was not until 1889 that a Commission was appointed to make an authoritative list of the Indian Acts in force in the Straits Settlements. See G.W. Bartholomew *et al.*, *Sesquicentennial Chronological Tables of the Written Laws of the Republic of Singapore 1834-1984* (Singapore: Malaya Law Review, 1987).

²⁵ Rungta, *supra* note 7 at 212.

²⁶ *Ibid.*

²⁷ *Ibid.*

England in the Straits Settlements, and commercial matters at that time were being decided mainly according to case law which was often based on English judicial interpretations of English statutes that did not apply in the Straits Settlements. Hence, this *Civil Law Ordinance IV of 1878* was an instance of attempting to synchronise local case law with English statutes.²⁸ This move was understood in later case law as intending to “secure uniformity of mercantile law in Singapore and the United Kingdom”.²⁹ However, it does not appear that this Ordinance had much impact on the law of joint stock companies, or that any companies were actually incorporated in the Straits Settlements under the relevant English Act of that time.

The first local company law was the Straits Settlements *Companies Ordinance of 1889* (No. V of 1889), which was passed to clear up the uncertainties created by the *Civil Law Ordinance of 1878* as to whether the Indian Act of 1866 had actually been superseded by more recent English legislation. A further problem had arisen where it had become very difficult to obtain a copy of the original Indian Act of 1866 as it had since been amended in India and so the older Act was out of print. As the Attorney-General explained, “the public ought not to be bound under penalty to obey laws the knowledge of which they have not the opportunity of attaining.”³⁰ The *Companies Ordinance of 1889* was also intended to take account of updates to the company law in England, with the exception of the 1879 amendment which had enabled existing unlimited banking companies to register with limited liability. This was omitted as “[w]e have no such institutions here, and it is therefore unnecessary to provide for such a contingency.”³¹ The *Companies Ordinance of 1889* had nine parts, with the most significant new section of the Ordinance relating to procedures and court authorisation for the reduction of capital. It also formally established the institution of the Registrar of Companies and provided for the creation of registries in both Singapore and Penang.

Eight years later, in 1897, the Federated Malay States followed the lead of the Straits Settlements *Companies Ordinance of 1889* by passing matching enactments in each of the four Federated States.³² A government report on Pahang for that year noted that a large proportion of that year’s legislation was “designed to affect Europeans, or to facilitate the conduct of Government business rather than to intimately concern the native population of the State.”³³ It is very likely that the *Companies*

²⁸ The *Civil Law Ordinance 1878* also adopted all existing English “mercantile law generally” in the Straits Settlements. This broad wording came under consideration in much subsequent case law, and caused a “century of uncertainty” as to the law in force. See Soon Choo Hock & Andrew Phang Boon Leong, “Reception of English Commercial Law in Singapore—A Century of Uncertainty” in A.J. Harding, ed., *The Common Law in Singapore and Malaysia* (Singapore: Butterworths, 1985) c. 2. However, this debate is irrelevant to this particular discussion given that joint stock companies were explicitly specified in the law.

²⁹ *Shaik Sahied bin Abdullah Bajerai v. Sockalingam Chettiar* [1933] 1 A.C. 342 (P.C.) (Lord Atkin). See Andrew Phang Boon Leong, *The Development of Singapore Law: Historical and Socio-Legal Perspectives* (Singapore: Butterworths, 1990) at 44 [Phang, *The Development of Singapore Law*]; and R.H. Hickling, “Civil Law (Amendment No. 2) Act, 1979 (No. 24) Section 5 of the Civil Law Act Snark or Boojum?” (1979) 21 Mal. L. Rev. 351.

³⁰ Straits Settlements, *Proceedings of the Legislative Council*, (21 December 1887) at B202-B203.

³¹ *Ibid.* at B203.

³² *Perak Enactment No. 13 of 1897, Selangor Enactment No. 9 of 1897, Negeri Sembilan Enactment No. 11 of 1897, Pahang Enactment No. 19 of 1897.*

³³ Straits Settlements, *Reports on the Federated Malay States for 1897*, November 1898 (C-9108) at 59.

Enactment 1897 would have been included in this category of laws designed to mostly affect the activities of Europeans.

B. 1900-1910

In 1903, identical amendments to the 1897 Enactments were passed in each of the four Federated Malay States with only one objective—the creation of an exception to the rule prohibiting partnerships of more than 20 members unless registered as a company. The exception was specifically for “associations of miners working under the Chinese *hun* system”.³⁴ The Chinese had been dominating tin production in Malaya. From the 1880s, tin mining had been increasing in the Federated Malay States and experienced a boom in 1898. Large numbers of Chinese were migrating to the Federated Malay States attracted by the tin boom. Under the *hun* system, also sometimes called the tribute or share system, mine workers were not paid fixed wages but were shareholders and entitled to a share of the mine’s profits. The *hun* system had become increasingly popular as it provided the chance of becoming rich if the mine was successful. In 1903, 50 per cent of Chinese tin workers worked under the *hun* system, 35 per cent were indentured, although the indenture system was being phased out, while the remaining 15 per cent worked for fixed wages.³⁵ This amendment exempting the *hun* system from the prohibition on large partnerships was passed because:³⁶

[T]he associations come within the letter of the Companies Enactment 1897, but they have not hitherto been required to observe its provisions, which are altogether too elaborate for such cases, and it was desired to legally exempt them from its obligations, and to make the exemption retrospective.

Colonial Office records show that the exception was considered to be “unobjectionable legally or otherwise, and is clearly a matter in which we must be guided by the man on the spot”.³⁷ Although this amendment was certainly a response to local practices, it was not an innovation in company regulation or an adaptation to facilitate the local use of the company form, but rather a measure to maintain delineation between the business practices of different population groups. This permissive exception for the Chinese miners contradicted the general trend in mining and labour regulation in the Federated Malay States of that time which was for “elimination of the speculator” and the encouragement of more scientific, specifically British, tin mining.³⁸ The *hun* system in particular was widely seen as wasteful as the miners

³⁴ *Perak Enactment No. 4 of 1903, Selangor Enactment No. 2 of 1903; Negeri Sembilan Enactment No. 8 of 1903, Pahang No. 3 of 1903*. These laws were passed prior to the creation of the Federal Council in the Federated Malay States in 1909. At the time each state tended to pass the same laws (under British direction) but in separate enactments.

³⁵ Amarjit Kaur, “Labour Dynamics in the Plantation and Mining Sectors in Southeast Asia, 1840-1950: A Historical Perspective” in Rebecca Elmhirst & Ratna Saptari, eds., *Labour in Southeast Asia: Local Processes in a Globalised World* (London: RoutledgeCurzon, 2004) 47 at 56, 57; Yip Yat Hoong, *The Development of Tin Mining in Malaya* (Kuala Lumpur: University of Malaya Press, 1969) at 78, 79.

³⁶ Straits Settlements, “Report for the Secretary of State on Negeri Sembilan Enactment No. 8 of 1903 (The Companies Enactment 1897, Amendment Enactment 1903)” *Original Correspondence* (CO 273, 293/12546).

³⁷ *Ibid.*

³⁸ W.J.P. Hume & F.J.B. Dykes, *Report and Proceedings of the Mining Conference, Held at Ipoh, Perak, Federated Malay States, September 23rd to October 6th, 1901* (Taiping: Perak Govt. Print. Off.,

would pick out the rich areas, work in small groups with neither capital nor knowledge, and not obtain all the available tin.³⁹ This British attitude towards the *hun* system means that in all likelihood this legal change was not aimed at facilitating Chinese mining but at merely avoiding uncertainty as to the application of the law.

Returning to the Straits Settlements, an amendment to the *Companies Ordinance* was passed in 1909 (No. 4 of 1909) to extend the provisions of the English Amendment of 1898 to the colony. This provided a remedy in cases where a contract of payment of partly paid shares was not duly registered due to the carelessness of an agent and caused loss to the shareholder.⁴⁰ So, again, this was an update that slowly brought the law of the Straits Settlements into closer alignment with that of England.

In 1910, shortly after the creation of the Federal Council, the Federated Malay States passed the *British and Foreign Companies Enactment* (No. 17 of 1910) which introduced a process for registering companies incorporated outside the Federated Malay States and also provided for the holding of land by such companies. According to the relevant Federal Council proceedings, the reason for the introduction of this law was that only a very small number of companies had been incorporated in the Federated Malay States up to that point (a total of 63 companies)—a small proportion of the companies actually present in the territory. The stated objectives of the law were the protection of investors so they could ascertain who they were doing business with and to facilitate the registration of land titles.⁴¹ The Acting Legal Advisor noted that the Bill followed “almost word for word except with the alterations that are absolutely necessary to suit local conditions sections 274 and 275 of the Companies Consolidation Act passed at home in 1908”.⁴² These alterations referred to included allowing companies to take four months rather than one month to register and requiring the registration of the name and address of a local agent designated to receive notices served on the company. This Enactment was slightly amended in 1912⁴³ in response to objections raised by the Selangor Chamber of Commerce which asked that the law be clarified as to exactly which companies needed to register and to allow agents to be reimbursed by their company for fines and expenses incurred under the Enactment.⁴⁴

C. 1910s-1930s

In 1914, a local banking crisis in Singapore led to a significant reactionary amendment to the Straits Settlements company law. The Straits Settlements *Companies (Amendment) Ordinance* (No. 9 of 1914) required half-yearly auditing of banks, publication of the audit statement and keeping all company accounts in English. Restrictions

1902); Francis Loh Kok Wah, *Beyond the Tin Mines: Coolies, Squatters, and New Villages in the Kinta Valley, Malaysia, C. 1880-1980* (Singapore: Oxford University Press, 1988) at 16-18; Yip, *supra* note 35 at 151.

³⁹ Straits Settlements, *Reports on the Federated Malay States for 1903* [Cd. 2243] (September 1904) at 11.

⁴⁰ Straits Settlements, *Original Correspondence* (CO 273, 347/19744).

⁴¹ Federated Malay States, *Federal Council Proceedings* (31 October 1910) at B89, B90.

⁴² *Ibid.*

⁴³ *British and Foreign Companies (Amendment) Enactment* (No. 9 of 1912).

⁴⁴ Federated Malay States, *Federal Council Proceedings* (25 July 1912) at B42, B43.

were also placed on directors of banks taking advances unless they provided security which had to exceed the amount advanced by more than 30 per cent. These changes were triggered by the collapse in 1913 of the Kwong Yik Banking and Insurance Company. The Kwong Yik Bank, founded in 1903, was the first locally established Chinese bank in Singapore. There had been a rising demand for banking services among the growing Chinese population as many did not speak English and preferred to avoid the English banks. Kwong Yik was founded by Wong Ah Fook, a leading building contractor and gambler planter, and supported by Loke Yew, who began in mining and diversified into revenue farming, rubber, tobacco and trading,⁴⁵ to serve the Cantonese community. It was successful until November 1913 when rumours of financial difficulties led to a run on the bank and it became unable to honour its liabilities. It suspended payment to customers and subsequently went into liquidation.⁴⁶ Small depositors experienced losses⁴⁷ and there were consequent effects for local Chinese firms that had been customers of the bank,⁴⁸ including “several large and complicated bankruptcies”.⁴⁹

The failure was blamed on lack of adherence to banking principles, assets shown in the balance sheets not being readily realisable and directors making advances to themselves without security. There was a public outcry after the failure and a demand for a government response.⁵⁰ This pressure included complaints from the small Chinese depositors, but was mainly from British interests wanting to control Chinese business practices due to the suspicion that the Chinese may have been using the limited liability form as a front for traditional business practices.⁵¹ For example, an editorial published by *The Straits Times* following the Kwong Yik crisis bemoaned the Chinese use of credit rather than capital, and claimed that depositors did not know that Kwong Yik was a company registered under English law but was operating with Chinese principles. The editorial noted “there [was] a serious danger in the imperfect grafting of two absolutely different systems.”⁵² Due to such public pressure, an Amendment Bill was quickly brought to the Legislative Council.

Proceedings of the Legislative Council in 1914 indicate that the original proposed response to the Kwong Yik crisis was to ban directors of banks from taking advances

⁴⁵ Edmund Terence Gomez, *Chinese Business in Malaya: Accumulation, Ascendance, Accommodation* (Honolulu: University of Hawaii Press, 1999) at 29, 30.

⁴⁶ Sheng-Yi Lee, “The Development of Commercial Banking in Singapore and the States of Malaya” (1966) 11 *Malayan Economic Review* 84; Rosalind Chew, “Local Chinese Banks in Singapore” in Leo Suryadinata, ed., *Chinese Adaptation and Diversity: Essays on Society and Literature in Indonesia, Malaysia & Singapore* (Singapore: Singapore University Press, 1993) 57; Shuang Yann Wong, “Cross-National Ethnic Networks in Financial Services: A Case Study of Local Banks in Singapore” in Claes G. Alvstam & Eike W. Schamp, eds., *Linking Industries Across the World: Processes of Global Networking* (Aldershot: Ashgate, 2005) 243 at 257; Tan Ee Leong, “The Chinese Banks Incorporated in Singapore and the Federation of Malaya” in Thomas Henry Silcock, ed., *Readings in Malayan Economics* (Singapore: Eastern Universities Press, 1961) 454.

⁴⁷ “Bank Suspends: Result of a Rush on Local Concern” *The Straits Times* (20 November 1913) 9.

⁴⁸ “Big Chinese Firm in Difficulties” *The Straits Times* (26 December 1913) 10; “Kwong Yik Results.” *The Straits Times* (3 December 1913) 8.

⁴⁹ *Colonial Reports—Annual, No. 862, Straits Settlements Report for 1914* (Singapore: His Majesty’s Stationery Office 1915) (Cd 7622-53) at 10.

⁵⁰ “The Company Law” *The Straits Times* (9 December 1913) 8.

⁵¹ “Legislative Council” *The Straits Times* (2 March 1914) 8. Also see discussion in Part IV below on Chinese *kongsi* forms.

⁵² “The Break of Credit” *The Straits Times* (22 December 1913) 8.

altogether. This clause was opposed by three Unofficial members of the Legislative Council, including the representative of the Singapore Chamber of Commerce, on the basis that it was not part of the company law in any other British colony.⁵³ They dubbed it “grandmotherly legislation”⁵⁴ and argued that the measure was only being proposed due to panic.⁵⁵ In response, the clause was watered down from a total prohibition on taking advances to being a requirement for the provision of adequate security for advances to directors. The more lenient amendment was still opposed by the Unofficial members but was nonetheless passed by the majority, most of whom were Official government bureaucrats, on the basis that it was necessary in the face of the crisis and that it would prove to be generally acceptable.⁵⁶

The failure of the Kwong Yik Bank also exposed the fact that account books kept in Chinese were, in the words of the Attorney-General, inaccessible to “all reputable firms of auditors”.⁵⁷ This triggered the legislative requirement for the exclusive use of English. Mr. Tan Jiak Kim, another Unofficial member (the sole Chinese representative and a member of the Chinese Advisory Board) of the Legislative Council,⁵⁸ supported the control of advances made to directors, but argued that there were strong feelings against the proposed requirement for accounts to be kept in English amongst the Chinese community.⁵⁹ His protest did not affect the final outcome on this point.⁶⁰ Records show that no objections were raised to these changes in the Colonial Office in London as “this seems a reasonable and proper amendment if any check is to be kept on Chinese finance”.⁶¹

In the following year, the Straits Settlements Legislative Council passed a new *Companies Ordinance* (No. 25 of 1915). The drafting of this law had actually begun before the Kwong Yik crisis and the hasty amendments of 1914. The Ordinance was considered by the Legislative Council during the latter part of 1914 and first half of 1915. The main purpose was to adopt the initiatives of the English *Companies Act of 1908*, particularly to include the updates on information disclosure in prospectuses. The 1915 Ordinance saw the first introduction of provisions on compromises and arrangements. It was also the point in time where the replaceable rule on shareholder voting was changed to the one-share-one-vote principle. The winding-up rules passed in 1915 pursuant to this Ordinance were almost an exact copy of the English rules of 1909. Records of the Legislative Council indicate that these updates were uncontentious, and debates revolved mainly around revisiting the 1914 amendment that restricted directors of banking companies from taking advances. The Unofficials, particularly the representative of the Singapore Chamber

⁵³ Although note that in Victoria, Australia, banking companies were prohibited from granting advances to directors or officers (*Companies Act 1896* (Vic.), ss. 45, 46).

⁵⁴ Straits Settlements, *Proceedings of the Legislative Council*, (27 February 1914, 13 March 1914).

⁵⁵ Straits Settlements, *Original Correspondence* (CO 273, 407/16042).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ For an account of the contributions of Tan Jiak Kim and other Chinese Unofficial representatives to the Straits Settlements Legislative Council, see Daniel P.S. Goh, “Unofficial Contentions: The Postcoloniality of Straits Chinese Political Discourse in the Straits Settlements Legislative Council” (2010) 41 *Journal of Southeast Asian Studies* 483.

⁵⁹ For coverage of Chinese sentiment on the issue, see “Local Company Law: Some Notes on the Position”, *The Singapore Free Press and Mercantile Advertiser* (6 March 1914) 6.

⁶⁰ Straits Settlements, *Proceedings of the Legislative Council*, (13 February 1914) at B13-B17.

⁶¹ Straits Settlements, *Original Correspondence* (CO 273, 407/16042).

of Commerce, continued to oppose the inclusion of the 1914 amendments, but once again they were overruled by the majority.⁶²

In 1916, two amendments were made to the Straits Settlements *Companies Ordinance*.⁶³ The first mainly concerned the registration of company mortgages, such that “our law... will be exactly on the same footing with the law that obtains in England”.⁶⁴ The second amendment concerned the definitions of the annual general meeting and the statutory general meeting and provided that unclaimed assets of companies were to be handed to the Official Receiver. There was little discussion of the reasons for this amendment and it appeared to be treated as being merely of technical import.⁶⁵ These amendments of 1916, therefore, were examples of apolitical technical updates, rather than of local adaptive change.

In 1917, the Federated Malay States passed an almost word-for-word copy of the Straits Settlements *Companies Ordinance 1915*, including the provisions on the restricting of making advances to directors and the requirement for all books of account to be kept in English. The only notable difference between the two pieces of legislation was the retention, in the Federated Malay States Enactment, of the 1903 exception for *hun* Chinese miners to the rule against large partnerships. This *Companies Enactment 1917*⁶⁶ was advertised to be “embodying modern developments of the English law relating to companies”.⁶⁷ In its first reading in the Federal Council, the Legal Advisor (Frederick Belfield) presented this new law as a straightforward and logical matter of keeping up with developments in England and the Straits Settlements:⁶⁸

[W]hen the English Companies Consolidation Act of 1908 became law it was felt out here that something ought to be done here to bring the company law up to date. We have waited in this matter, as in so many other matters, upon the Colony of the Straits Settlements, and the Colony did not proceed to amend its Company Ordinance until the end of 1915, when it passed a new Ordinance following very closely, so far as local circumstances permitted, the terms of the English Act of 1908. That having been done, action was taken in these States, and the present bill was drafted early last year... this voluminous measure... follows very closely the provisions of the English Act and of the corresponding Straits Settlements Ordinance, and that will no doubt be sufficient to commend it to members of this Council.

The only note of contention in the debates for this Enactment came in the Committee discussion when an Unofficial member, Mr. A.N. Kenion,⁶⁹ opposed a clause giving

⁶² Straits Settlements, *Proceedings of the Legislative Council*, (2 October 1914) at B66-B70; (27 August 1915) at B74-B76.

⁶³ *Companies (Amendment) Ordinance No. 8 of 1916 (S.S.)* and *Companies (Further Amendment) Ordinance No. 22 of 1916 (S.S.)*.

⁶⁴ Straits Settlements, *Proceedings of the Legislative Council*, (28 April 1916) at B18, B19.

⁶⁵ Straits Settlements, *Proceedings of the Legislative Council*, (29 September 1916) at B65, B66.

⁶⁶ *Federated Malay States Enactment No. 20 of 1917* (came into force on 1 April 1918).

⁶⁷ [Untitled] *The Straits Times* (19 February 1917) 8.

⁶⁸ Federated Malay States, *Proceedings of the Federal Council of the Federated Malay States* (24 July 1917) at B11, B12.

⁶⁹ A.N. Kenion was a junior partner of law firm Maxwell and Kenion that was founded in 1905 in Ipoh. He became senior partner in 1911. He was appointed as Unofficial member of the Federal Council of the Federated Malay States in 1915. It was the first time that a lawyer from Ipoh had been appointed to the

the Registrar of Companies powers to impose a fine himself (rather than via an independent magistrate) for non-deliverance of forms. Kenion reasoned “it is a very bad thing to have in a Bill... it is purely local, they have not got it at Home... If this were a good thing I feel certain that it would be found in England.” He was countered by the Legal Advisor who merely stated “the circumstances are different here.”⁷⁰ Kenion then objected to certain fines and argued that the Federated Malay States need not necessarily always follow the Straits Settlements, saying “I think it is a very bad principle to always go following the Colony... I certainly think we should set the example and let them follow us”, but again he was overruled by the majority.⁷¹

In 1923, the Straits Settlements passed a new *Companies Ordinance*.⁷² According to the Legislative Council proceedings, it was intended to resolve numerous unspecified “defects” in the 1915 Ordinance and the few amendments made to it afterwards.⁷³ Almost all of the drafting work on this Ordinance was done by the Registrar of Companies—Mr. Charles James Saunders.⁷⁴ The Singapore and Penang Chambers of Commerce and the Singapore Bar Committee were given the chance to critique the proposed Bill.⁷⁵ This was one of the few instances where a company law update in Malaya was not specifically precipitated by reforms in the U.K., however, in the first reading of the Bill the Attorney-General described the changes as being “almost entirely concern[ed with] technical details [that do] not touch on principles.”⁷⁶ Only minor changes were made in the committee process. This Ordinance did require non-local private companies to file balance sheets (s. 290(4)) as “there had been some trouble”⁷⁷ on this issue. It also inserted a provision (s. 111) prohibiting banks from making loans on the security of their own shares, as it had come to the attention of the legislature that a local bank did not have such a prohibition in its articles which was thought to be dangerous in light of the Kwong Yik case.⁷⁸ This section led to a Straits Settlements court ruling that securities on shares were void between a bank and shareholder, but this was reversed by the Privy Council,⁷⁹ leaving the section easily evaded.⁸⁰

Council which had been dominated by miners and planters. Kenion “showed an independence of mind that often irked the High Commissioner”. See Ho Tak Ming, *Ipoh: When Tin was King* (Ipoh: Perak Academy, 2009) at 526.

⁷⁰ Federated Malay States, *Proceedings of the Federal Council of the Federated Malay States* (24 July 1917) at B59.

⁷¹ *Ibid.*

⁷² *Companies Ordinance No. 13 of 1923* (S.S.).

⁷³ Straits Settlements, *Proceedings of the Legislative Council*, (26 February 1923) at B18.

⁷⁴ Charles James Saunders had a long distinguished career as a public servant in Malaya between 1891 and 1923 including stints as Assistant Protector of Chinese, Official Assignee, Registrar of Companies and member of the Straits Settlements Legislative Council. He was asked to defer his retirement in order to draft the *Companies Ordinance* of 1923. See “The Hon. Mr. C.J. Saunders: Long and Honoured Public Career” *The Straits Times* (1 May 1923) 9.

⁷⁵ *Supra* note 73.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Straits Settlements, *The Companies Bill 1939: Report of the Companies Legislation Committee* at xiv.

⁷⁹ *The Batu Pahat Bank Ltd v. The Official Assignee of the Property of Tan Keng Tin, a Bankrupt* [1933] M.L.J. 237.

⁸⁰ *Supra* note 78 at xv.

The Federated Malay States made some fairly minor amendments to its *Companies Enactment* in 1927 and 1932⁸¹ but this time there was not a wholesale adoption of the Straits Settlements Ordinance. In 1927, companies incorporated in the Federated Malay States were permitted to keep branch share registries in the U.K. or in any other British colony. The 1932 amendment incorporated the content of the *British and Foreign Companies Enactment 1912* into the main *Companies Enactment 1917* as amended. It also introduced fines for being a member of an illegal company or partnership (*i.e.* of unincorporated banks of more than ten members and large unincorporated partnerships outside the *hun* system exception), as well as fines and penal sanctions for managers of such companies. The stated intention of the Amendment was to bring the law in the Federated Malay States into closer assimilation with that of the Straits Settlements, improve the drafting and clarity of the law, and to adopt the English Act of 1929 on registration of mortgages and charges even though the Straits Settlements had not done likewise.⁸² The Straits Settlements also passed a minor amendment in 1937 regarding restrictions on company names and allowing the registration of companies with social objectives without the use of the word “Limited”.⁸³

D. 1940s-1960s

In 1940, the Straits Settlements *Companies Ordinance 1940* was enacted. This was largely based on the English *Companies Act 1929*. There does not appear to be any written record as to why it took over a decade for the Straits Settlements to catch up with English company law developments. This Bill was prepared by a special committee chaired by the Singapore Registrar of Companies with committee members representing the Singapore Chamber of Commerce, the Singapore Bar and a chartered accounting firm.⁸⁴ This seemed to be the first time when local interest groups were directly involved in the drafting of company legislation in Malaya. Nonetheless, there was little evidence of their impact. According to *The Straits Times*:⁸⁵

[The Ordinance’s] object is to bring the company law of the colony into line with that of England.

Wherever possible the exact words of the Companies Act, 1929, have been followed so as to obtain the benefit of English cases but in some clauses modification was necessary to adapt the law to local conditions or to conform to other laws of the colony.

The Bill was described by the Attorney-General as “largely non-contentious”⁸⁶ and it raised little comment in the Legislative Council.⁸⁷ As Calvert noted, the propensity to follow the English law verbatim was particularly evident in one provision (s. 107)

⁸¹ *Federated Malay States Enactment No. 19 of 1927 and Enactment No. 40 of 1932.*

⁸² Federated Malay States, *Supplement to the Federated Malay States Gazette* (13 August 1932) at 2386.

⁸³ *Companies (Amendment) Ordinance No. 27 of 1937 (S.S.)*. There is no record in the Proceedings of the Legislative Council as to the reasons behind this particular amendment.

⁸⁴ *Supra* note 78 at vii.

⁸⁵ “New Companies Bill is One of Longest Gazetted” *The Straits Times* (19 August 1939) 13.

⁸⁶ Straits Settlements, *Proceedings of the Legislative Council*, (8 November 1939) at B124.

⁸⁷ Straits Settlements, *Proceedings of the Legislative Council*, (26 August 1940) at B106-B109.

which wrongly cross-referenced to the English numbering of sections rather than to the Straits Settlements numbering.⁸⁸

Still, there were some differences between the original and transplanted pieces of legislation. In the 1940 Ordinance, the 1914 amendments that resulted from the Kwong Yik case were mostly retained but refined. The Ordinance kept the requirement for all company accounts to be in English. It was the sections on advances to directors which the drafting Committee found most difficult.⁸⁹ The Committee considered that checks were still needed as “local bank directors have not been brought up in the cautious traditions of British banking and the Committee know from their own experience that many of them have ideas which would be deemed wildly irresponsible in Lombard Street”.⁹⁰ However, the Committee found no good reason to fix the security required for an advance to directors at the existing 30 per cent above the value of the advance, and left the class of security and amount of margin to the discretion of the Board (s. 137(1)). The prohibition on loans on shares for banks and insurance companies was also extended to ordinary trading companies (s. 47). There were a number of other minor differences between the 1940 Ordinance and the English law.⁹¹ These did not modify any of the core principles in the English company law, but two sections were identified by Calvert as likely to have been influenced by local entrepôt trading conditions and the presence of many foreign companies.⁹² First, s. 261(3) provided that where an officer of a company had sent out of the State property obtained on credit and not paid for it he would be deemed to have disposed of it other than in the course of business rendering him liable to imprisonment and fines. Secondly, s. 266 gave the Court power to restrain certain persons with special knowledge of a company’s affairs from leaving the colony and provided for their arrest if departure was imminent.

During World War II and the Japanese occupation of the Malay Peninsula and Singapore (1941–1945) there was complete disruption to the law-making process. There were some post-war amendments made to the Straits Settlements *Companies Ordinance* in 1946.⁹³ These provisions deemed existing companies to have been incorporated in the colony, extended indemnity to companies that had failed to file returns during the war years and provided for the reestablishment of company operations where they had lapsed. That same year, the Malayan Union was established to amalgamate the different Malayan administrations with the exception of Singapore. In Singapore, the Straits Settlements *Companies Ordinance 1940* as amended remained in force throughout the period that Singapore was an independent colony,

⁸⁸ H.G. Calvert, “Commercial Law” in George Williams Keeton and L.A. Sheridan, eds., *Malaya and Singapore, The Borneo Territories: The Development of Their Laws and Constitutions*, vol. 9 of *The British Commonwealth: The Development of Its Laws and Constitution* (London: Stevens & Sons Limited, 1961) 395 at 401. Note, however, that the copy of the 1940 Ordinance consulted for this paper had the correct numbering.

⁸⁹ *Supra* note 78 at xiii.

⁹⁰ *Ibid.*

⁹¹ See Calvert, *supra* note 88 for a discussion of these differences. See also O.C. Smalley, *Changes in Company Law and Accounts* (Singapore: Peter Chong & Co, 1941) for a list of differences between the 1940 and 1923 Ordinances.

⁹² Calvert, *ibid.* at 403.

⁹³ *Companies (Special Provisions) No. 17 of 1946* (S.S.); *Companies (Special Provisions) Amendment No. 32 of 1946* (S.S.).

and then during its amalgamation with, and then secession from, Malaysia.⁹⁴ In the Malayan Union, the *Companies Ordinance 1946*⁹⁵ adopted the Straits Settlements *Companies Ordinance 1940* as amended and replaced the company law statutes previously applicable in the Federated Malay States and the Unfederated States. This law continued to apply in the Federation of Malaya and later in the Federation of Malaysia until the mid-1960s.⁹⁶ By the early 1960s, the 1940 Ordinance was criticised as being “as old as the Fort of Malacca”.⁹⁷ A new *Companies Act* was passed in Malaysia in 1965, and a similar Act in Singapore in 1967, which took particular inspiration from legal developments in Australia.⁹⁸

E. Other Sources of Law

This account of the development of company law in Malaya has been almost entirely statutory. The court structure was well-developed in both the Straits Settlements and Federated Malay States. The courts theoretically enjoyed considerable discretion to tailor English laws to local circumstances based on principles of justice and convenience, but there was reluctance on the part of the British barristers who staffed the courts to do this in practice.⁹⁹ According to Phang’s research on colonial contract law cases, judgements tended to be mostly impartial and did not necessarily favour British economic interests.¹⁰⁰ Although there are a number of reported company law cases for both the Straits Settlements and the Federated Malay States from the colonial era,¹⁰¹ none appear to have set any important precedents. Calvert noted that Malayan courts tended to follow the lead of their English counterparts in matters of commercial law.¹⁰² Another reason for the lack of innovation through case law was that the Registrar of Companies tended to be limited to administrative functions including registration, filing papers, liquidations and data collection. Prosecution

⁹⁴ *Singapore Order in Council 1946* (S. R. & O., 1946, No. 462, U.K.), art. 42; *Constitution of the State of Singapore 1963*, art. 105; *Republic of Singapore Independence Act 1965* (1985 Rev. Ed.), art. 13.

⁹⁵ *Malayan Union Ordinance No. 13 of 1946*. See also *Federation of Malaya Companies (Amendment) Ordinance No. 8 of 1948*.

⁹⁶ *The Federation of Malaya Order in Council 1948* (S. R. & O., 1948, No. 108, U.K.), art. 135; *Federation of Malaya Independence Act 1957* (5 & 6 Eliz. 2, c. 60), art. 2; *Agreement Relating to Malaysia 1963*, Annex A, art. 73; *Malaysia Act 1963*, art. 3.

⁹⁷ Geoffrey Boland, “The Magna Carta of Malaysian Company Law” *The Straits Times* (20 June 1965) 6. Note also that Pistor *et al.*, “The Evolution of Corporate Law”, *supra* note 3, identify this hiatus between 1940 and 1965 as evidence of stagnation in Malaysia’s company law development.

⁹⁸ The drafting committee for the Malaysian legislation considered the English *Companies Act 1948* (11, 12 Geo. VI, c. 38), the *Australian Uniform Companies Acts 1961-1962*, the U.K. Cohen and Jenkins Reports, and the draft code that had been prepared for Ghana (Malaysia, *Parliamentary Debates*, (9 August 1965)). The committee was assisted under the Australian Colombo plan, by Mr. John Finemore, Victoria’s Assistant State Parliamentary Draftsman (see Geoffrey Boland, *ibid.*).

⁹⁹ Connie Carter, *Eyes on the Prize: Law and Economic Development in Singapore* (The Hague: Kluwer Law International, 2002) at 49, 50.

¹⁰⁰ See Phang, *The Development of Singapore Law*, *supra* note 29 at 60.

¹⁰¹ The following law reports were consulted: *Straits Settlements Law Reports* (1893-1923); James William Norton Kyshe, *Cases Heard and Determined in Her Majesty’s Supreme Court of the Straits Settlements 1808-1804*; *Law Reports of the Federated Malay States* (1906-1941); James McCabe Reay, *Federated Malay States: A Digest of Reported Cases 1897-1925*; H.C. Willan, *The Federated Malay States Digest*, 1936.

¹⁰² Calvert, *supra* note 88 at 407.

was rare, usually only for failing to file balance sheets and annual lists of members with the Registrar, and sometimes waived in lieu of summary fines.¹⁰³ There were also no stock exchange rules to mention for this era because, although there were private stock brokerage firms and associations¹⁰⁴ dealing in shares incorporated locally and abroad, there was no public stock exchange in Singapore or the Malay Peninsula until the 1960s.¹⁰⁵

F. *The Legal Developments in Malaya and the Theoretical Debates*

Following this account of the development of company law in Malaya, we can make some preliminary remarks about the three debates outlined in the Introduction. With regards to the question of the significance of legal family in comparison with the transplant effect, it is clear that there were no fundamental departures from the English company law principles in Malaya. The core features of English company law were all imported wholesale. It is true that the “imitatory machinery”¹⁰⁶ was usually slow in colonial Malaya but it did catch up regularly to English developments. There was not a pattern of either erratic or stagnant legal development as Pistor *et al.* predicted for transplant countries, but rather of reasonably frequent copying with relatively few adaptations to local conditions. There were certainly some local adaptations, but most of these were relatively minor technical changes made to facilitate colonial administrative procedures. The major exception was the Kwong Yik crisis in 1913 where a public demand for change was acted upon and these amendments remained part of the law for many years to come. It follows, then, that the total number of legislative changes in colonial Malaya was not evidence of innovation or adaptability to the local environment¹⁰⁷ but instead indicate a close adherence to the pattern of “Home”.

What we have described in Malaya is a series of transplants and updates rather than just one original transplant (as was implicitly assumed by the “legal origins” theorists). Further, many of these transplants were not imported directly from the metropolis, but rather were adopted from other British colonies. The company law of the Straits Settlements came originally via India, was modified by the adoption of a provision from Ceylon, and then was transplanted to the Federated Malay States, with some divergences from English law picked up along the way.¹⁰⁸ To our knowledge, such patterns of inter-colony legal diffusion have not been acknowledged in the comparative company law literature. Nonetheless, there were no borrowings

¹⁰³ Aiman Nariman Bt Mohd. Sulaiman, “Corporate Administrative Regulation: A Historical Study of the Role of the Registrar of Companies” (2000) 8 *International Islamic University of Malaysia Law Journal* 21.

¹⁰⁴ The Singapore Stock Brokers’ Association was formed in 1930, and renamed the Malayan Stock Brokers’ Association in 1938.

¹⁰⁵ P.J. Drake, “The New-Issue Boom in Malaya and Singapore, 1961-1964” (1969) 18 *Economic Development and Cultural Change* 73.

¹⁰⁶ Calvert, *supra* note 88.

¹⁰⁷ Hence this evidence for Malaya does not support the approach of Pistor *et al.*, “The Evolution of Corporate Law”, *supra* note 3, who used the frequency of major legislative changes as one indicator of company law adaptability.

¹⁰⁸ The same pattern was seen in North Borneo (Sabah) which took its company laws from India and the Straits Settlements rather than directly from England, see *supra* note 22.

from non-British sources and the colonies retained the core English company law principles.

With regard to the question of company law as “imperialism”, we can distinguish between issues of intent and of outcome. There was no evidence in the legislative records of any explicit intention to change the law to facilitate imperialist objectives, although this was probably an implicit assumption made by law-makers when passing “catch-up” legislation. At the same time, in the legislative proceedings over almost a century in both the Federated Malay States and the Straits Settlements, there was no discussion of which groups the company law was intended to benefit or of whether the law was having beneficial effects, although there certainly was suspicion among the British of local Chinese business practices and a desire to control them through law. The process for registering British and foreign companies in both the Straits Settlements and Federated Malay States and allowing them to own land more obviously facilitated imperialist objectives than did the law enabling local company formation. In terms of outcome, again we note the low levels of adaptability of the law to account for local usage and practices. The actual use of the law is explored more fully in the following section.

IV. COLONIAL CAPITALISM, RACE, AND THE USE OF THE LIMITED LIABILITY COMPANY IN MALAYA

The company law developments described above had few connections to local economic or political developments. There was also a marked disconnect between the legal developments and the actual use of the limited liability company in British Malaya. Data on local company incorporations in the Straits Settlements and the Federated Malay States, although not available for every year, show consistently small numbers of new companies being registered locally (see Table 2). In the Straits Settlements, during the last decade of the 19th century, fewer than ten new companies were incorporated annually. For example, in 1889, eight joint stock companies were registered in Singapore, two under the Indian *Companies Act 1866* and six under the local *Companies Ordinance 1889*. These eight were mainly steamship and mining companies. Two companies were also registered that year in Penang—a dock company and a steam navigation company.¹⁰⁹ Then, throughout the first half of the 20th century, local incorporations averaged about 30 each year. There was a spike in new incorporations with the rubber boom with 67 companies created in the Straits Settlements in 1910, and another spike in 1920 probably associated with the short boom period following the First World War with 73 new companies that year. In 1927, 70 new companies were formed due to the tin boom, but otherwise the numbers remained steady. In the Federated Malay States, there were similar but slightly smaller numbers except for 1937 when 80 new companies were incorporated where 50 of them were motor transport companies responding to incorporation requirements under the Transport Board Enactment of that year.¹¹⁰ It was only after World War II that there was a marked increase in the numbers of new local companies registering in both jurisdictions.

¹⁰⁹ “Government Gazette, 28th Feb.” *The Straits Times Weekly Issue* (4 March 1890) 9.

¹¹⁰ C.D. Ahearn, *Annual Report on the Social and Economic Progress of the People of the Federated Malay States for 1937* (Kuala Lumpur: Federated Malay States Government Press, 1938) at 133.

Table 2.
New Company Incorporations and Total Nominal Capital in the Straits Settlements and Federated Malay States by Year.

| Year | Singapore | Penang | | Federated Malay States | |
|------|--------------------------|--------|---|--|---|
| | Straits Settlements | | | | |
| | Total New Incorporations | | Total Nominal Capital (Straits Dollars) | Total New Incorporations | Total Nominal Capital (Straits Dollars) |
| 1889 | 8 | 2 | \$2,293,100 | The Federated Malay States did not pass company enactments until 1897. | |
| 1890 | 5 | 2 | \$1,544,350 | | |
| 1891 | 6 | | \$1,041,005 | | |
| 1892 | 4 | 0 | \$665,000 | | |
| 1893 | 0 | 0 | \$0 | | |
| 1894 | 6 | | \$196,000 | | |
| 1895 | 7 | | \$728,000 | | |
| 1896 | 5 | | \$609,000 | | |
| 1897 | 7 | | \$1,330,003 | | |
| 1898 | 7 | | | | |
| 1900 | 17 | | | | |
| 1904 | 8 | | | | |
| 1906 | 19 | | | | |
| 1907 | 14 | | | | |
| 1908 | 13 | 5 | \$2,201,750 | | |
| 1909 | 41 | 8 | \$12,300,000 | 63 cumulatively to this date | |
| 1910 | 67 | 16 | \$31,185,000 | 18 | \$3,270,000 |
| 1911 | 25 | 7 | \$910,000* | | |
| 1912 | 31 | 10 | \$1,465,000* | 16 | |
| 1913 | 36 | 12 | \$58,813,072 | | |
| 1914 | 18 | 6 | \$550,000* | | |
| 1915 | 7 | 2 | \$1,810,000 | 20 | |
| 1916 | 41 | | \$13,116,400 | 24 | \$6,397,714 |
| 1917 | 40 | | \$24,545,500 | 44 | \$16,182,428 |
| 1918 | 35 | | \$12,493,000 | 14 | |
| 1919 | 48 | | | 27 | \$7,102,000 |
| 1920 | 73 | | | 54 | \$38,934,928 |
| 1921 | 21 | 8 | \$16,270,000 | 30 | \$4,988,000 |
| 1922 | 32 | 5 | \$12,070,000 | 20 | \$3,708,700 |
| 1923 | 39 | | \$10,452,500 | 22 | \$12,367,784 |
| 1924 | 43 | | \$20,527,857 | 25 | \$12,324,763 |
| 1925 | 36 | | \$14,480,300 | 38 | |
| 1926 | 61 | | \$30,085,600 | 56 | \$35,764,500 |
| 1927 | 70 | | \$28,205,571 | | |
| 1928 | 52 | | \$19,370,683 | 22 | |

Table 2.
(Continued)

| Year | Singapore | Penang | Total Nominal Capital (Straits Dollars) | Federated Malay States | |
|------|---------------------|--------|---|-----------------------------|---|
| | Straits Settlements | | | Total New Incorporations | Total Nominal Capital (Straits Dollars) |
| 1929 | 48 | | \$13,451,000 | 32 | |
| 1930 | 41 | | \$13,424,000 | 32 | \$7,013,000 |
| 1931 | | | | 22 | \$8,748,769 |
| 1932 | | | | 26 | \$7,376,857 |
| 1933 | | | | 15 | \$2,648,000 |
| 1934 | | | | 26 | \$6,090,000 |
| 1935 | 49 | | \$21,123,103 | 24 | \$5,041,642 |
| 1936 | | | | 34 | \$9,125,156 |
| 1937 | | | | 80 | \$10,755,857 |
| 1938 | | | | 59 | \$13,909,285 |
| 1948 | 126 | | \$59,533,000 | 122 [#] | \$38,220,000 |
| 1949 | 111 | | \$80,940,100 | 90 | \$20,361,000 |
| 1950 | 125 | | \$99,520,000 | 107 | \$47,637,100 |
| 1951 | 110 | | | 163 | \$70,972,800 |
| 1952 | 133 | | \$117,162,000 | 191 | \$77,545,000 |

*Penang data only.

[#]The data for 1948 to 1952 refers to the Federation of Malaya.

Source: Amalgamated data based on Annual Reports of the Registry of Companies for Singapore, Penang, the Federated Malay States and the Federation of the Malaya as re-reported in the *Proceedings of the Straits Settlements Legislative Council, Federated Malay States Government Gazette, Annual Colonial Reports* tabled in the House of Commons, *Straits Times*, and *Federated Malay States Chamber of Commerce Year Books*. The blank spaces and missing years indicate that no data was found.

These comparatively small numbers of local incorporations are explained due to the initially low take-up of the limited liability company form for British entrepôt trade in the Straits Settlements and because the Chinese settlers were largely left to their own devices, although some did eventually make use of the company form. Later, the predominance of London-registered companies operating in Malaya and the massive capital flows back to the metropolis kept local capital accumulation at low levels.¹¹¹ There was also little use of the limited liability company form by the Indian and Malay populations in British Malaya. The details of these factors are set out below.

From the 1820s through to the rubber boom of the early 20th century, British merchants in Singapore were mainly sole traders or worked in small partnerships and depended on trade credit from British suppliers which they then extended to Asian middlemen. These British traders had very little personal capital and there is no evidence of importation of any great amounts of capital to the colony.¹¹² Merchant

¹¹¹ Michael Stenson, *Class, Race and Colonialism in West Malaysia: The Indian Case* (St. Lucia: University of Queensland Press, 1980) at 32.

¹¹² J.H. Drabble & P.J. Drake, "The British Agency Houses in Malaysia: Survival in a Changing World" (1981) 12 *Journal of Southeast Asian Studies* 297.

firms were built up by reinvesting profits. Although, in the second half of the 19th century, these merchant firms began to diversify by becoming agents for British banks and shipping lines and increased their speculation in mining and plantations (often using Chinese capital), they generally remained unincorporated.¹¹³ In the late 19th century a small wave of companies were registered in Britain to mine tin in Malaya but most of these failed as they could not compete with the Chinese miners who had better access to cheap labour.¹¹⁴

The Straits Chinese during most of the 19th century were left to govern themselves through their *kongsi* (types of shareholding partnerships with additional social and political functions) and “secret society” organisations. The British appointed *Captains China*, who were also usually leaders of the secret societies, to rule the Chinese population. The Chinese dominated the tin mining sector in Malaya up until the 1920s. The majority of early investment in mining in the Malay Peninsula was made by Straits Chinese merchants who used the secret society and clan associations to build trust and to facilitate the importation of Chinese labourers.¹¹⁵ These merchants used middlemen “mines advancers” who would often act in multiple roles as tin mine owner, shopkeeper, ore dealer and tax farm operator.¹¹⁶ The largest *kongsi* networks and secret societies also reaped huge profits from the colonial revenue farm system, particularly the lucrative opium farms, and these farms functioned at times like savings banks for Chinese entrepreneurs.¹¹⁷ The commercial and political success of the secret societies was eventually seen as a threat by the British and they were declared illegal in 1889.¹¹⁸ As a consequence secret societies were driven underground, and this eroded their ability to control the tin mine workers in Malaya.¹¹⁹ Colonial policies also abolished all opium and gambling revenue farms by 1909 thus decreasing Chinese access to capital.

These developments prompted some Chinese entrepreneurs, particularly former opium revenue farmers, to turn to the limited liability corporate form and they founded banks, insurance companies and financial empires.¹²⁰ Falling within the ambit of British law, the early Chinese banks in Singapore, such as the Kwong Yik Bank discussed above, had to be incorporated. Although Chinese businesses may have made compromises with Western-style corporate forms, old *kongsi* structures and family-based business relationships probably continued to underpin their activities.¹²¹ Not all Chinese turned to the corporate form; *kongsi* structures and the *hun*

¹¹³ *Ibid.*; Van Helten & Jones, *supra* note 18 at 160.

¹¹⁴ Van Helten & Jones, *ibid.* at 164; Yip, *supra* note 35 at 96-99.

¹¹⁵ James C. Jackson, *Planters and Speculators: Chinese and European Agricultural Enterprise in Malaya 1786-1921* (Singapore: University of Malaya Press, 1968) at 4; Gomez, *supra* note 45 at 28.

¹¹⁶ Jomo Kwame Sundaram, *A Question of Class: Capital, the State, and Uneven Development in Malaya* (Singapore: Oxford University Press, 1986) at 161 [Jomo, *A Question of Class*].

¹¹⁷ Carl A. Trocki, “Boundaries and Transgressions: Chinese Enterprise in Eighteenth and Nineteenth Century Southeast Asia” in Aihwa Ong & Donald M. Nonini, eds., *Ungrounded Empires: The Cultural Politics of Modern Chinese Transnationalism* (New York and London: Routledge, 1997) 61 at 74 [Trocki, “Boundaries and Transgressions”].

¹¹⁸ *Secret Societies Ordinance 1889* (S.S.).

¹¹⁹ R. H. Hickling, “Influence of the Chinese Upon Legislative History in Malaysia and Singapore” (1978) 20 *Mal. L. Rev.* 265 at 276; Van Helten & Jones, *supra* note 18 at 167.

¹²⁰ Trocki, “Boundaries and Transgressions”, *supra* note 117 at 82.

¹²¹ *Ibid.* The Khaw group of Penang, a Chinese family empire, was a prominent example of a hybrid combination of Western styles of business enterprise with traditional Malayan Chinese family-business

mining system continued to exist and, as noted above, were tolerated by the British colonial legal system.¹²² Some Chinese businesses were competitive with Western interests and others were complementary,¹²³ but most remained small-scale trading and petty business ventures, and generally did not threaten the larger, better-financed, British enterprises.¹²⁴

It was the rapid spread of rubber plantations that truly brought the limited liability company into use for investment in Malaya, although the sector remained dominated by London-registered “sterling” companies over local “Straits dollar” companies.¹²⁵ The invention of rubber pneumatic tyres in 1888 and demand from the world automobile industry propelled investment in rubber. During the early years, planters were mainly self-financed or assisted by relatives and friends or through private syndicates,¹²⁶ but there was some corporate activity. Some early rubber companies (1899–1900s) were formed in Scotland as many of the planters were Scots. Then, between 1903 and 1912 approximately 260 companies were floated in the United Kingdom to cultivate rubber in Malaya.¹²⁷ Some local rubber companies were also formed by resident European and Chinese investors.¹²⁸ Agency houses were often entrusted with the management of these plantations. The agency houses assumed limited liability status in the early 1900s—for example, Guthries in 1902, and Harrisons and Crosfield in 1908.¹²⁹ This change in status was triggered by the large financial risks which they were suddenly assuming on behalf of the newly establishing rubber companies.¹³⁰ Being incorporated also provided the agency houses with access to finance on the London stock market.¹³¹ Then the sharp rise in the price of rubber in 1909–1910, and the phenomenal dividends paid by existing companies, produced a boom in new rubber plantation companies promoted on the London Stock Exchange and speculation was widespread. As noted above, there was also an increase in locally established “dollar” companies, although this was far less significant than the London-based boom. The new companies took over many existing small holders, including those owned by the Chinese. Many new plantations were also established in response to the boom.¹³² The boom lasted only briefly, and then the numbers of new rubber companies being created declined substantially after 1914

practices. See also Carl A. Trocki, “Opium and the Beginnings of Chinese Capitalism in Southeast Asia” (2002) 33 *Journal of Southeast Asian Studies* 297 at 314; and J.W. Cushman, “The Khaw Group: Chinese Business in Early Twentieth Century Penang” (1986) 17 *Journal of Southeast Asian Studies* 58.

¹²² See e.g., *Tai Shin v. Chung Moi* (1906) F.M.S.L.R. 1 where the court was called on to settle a dispute involving a tin mining *kongsi* between the advancer and the shareholder-labourers.

¹²³ George Cyril Allen & Audrey G. Donnithorne, *Western Enterprise in Indonesia and Malaya: A Study in Economic Development* (London: Allen & Unwin, 1957) at 59.

¹²⁴ Gomez, *supra* note 45 at 28.

¹²⁵ Nicholas J. White, *Business, Government, and the End of Empire: Malaya, 1942-1957* (Kuala Lumpur: Oxford University Press, 1996).

¹²⁶ John H. Drabble, “Investment in the Rubber Industry in Malaya c. 1900-1922” (1972) 3 *Journal of Southeast Asian Studies* 247 at 247 [Drabble, “Investment in the Rubber Industry”].

¹²⁷ Drabble & Drake, *supra* note 112; John H. Drabble, “Some Thoughts on the Economic Development of Malaya under British Administration” (1974) 5 *Journal of Southeast Asian Studies* 199 [Drabble, “Some Thoughts on the Economic Development”].

¹²⁸ Van Helten & Jones, *supra* note 18 at 172.

¹²⁹ *Ibid.*

¹³⁰ Drabble & Drake, *supra* note 112 at 308.

¹³¹ Jomo, *A Question of Class*, *supra* note 116 at 183, 184.

¹³² *Ibid.* at 247.

and many of the new companies were forced to surrender their plantations.¹³³ The 1914–21 period was one of financial consolidation in rubber for the more successful companies.¹³⁴

The Chinese had dominated the tin industry in Malaya, but from 1920, London-registered companies, with the assistance of new dredging technology, began to squeeze them out.¹³⁵ It is likely that the Chinese did not take up dredging themselves as, unlike the British, they generally did not have the long-term financing required for the expensive technology.¹³⁶ In 1920, the proportion of capital invested in British-registered tin firms was an estimated £3.6 million compared to the equivalent of £1.5 million in locally-registered tin companies.¹³⁷ In 1926–27, once the price of tin had risen, there was a scramble for tin shares on the London Stock Exchange. Total capital increased to £18.7 million in London-based tin companies compared to the much smaller proportion of the equivalent of £2.2 million invested in locally-registered companies in Malaya.¹³⁸

Over time, ownership and control of Malayan rubber and tin companies became increasingly concentrated. By the end of the 1930s, a large proportion of tin companies had fallen into the hands of the Howeson group and the tin companies tended to be connected under agency house management and interlocking directorships.¹³⁹ By the 1940s, colonial capitalism in Malaya was an almost “impenetrable mass of cross holdings”¹⁴⁰ which not only linked the rubber and tin companies, but also bound together several of the agency houses. The big five agency houses (Boustead-Buttery, Guthries, Harrisons and Crosfield, REA-Cumberbatch and Sime Darby) also controlled more than 60 per cent of rubber estates in Malaya that were owned by Europeans. It is estimated that British firms owned 75 per cent of Malaya’s rubber plantations.¹⁴¹ The Dunlop group, being directly managed, was the only major British rubber enterprise which did not fit this pattern of agency house management.¹⁴² No more than two dozen directors in London, often agency house executives, sat on the boards of nearly two hundred rubber companies. Through these interlocking directorships and shareholdings, companies with vast estate and mining assets were actually controlled with little capital.¹⁴³ Interestingly, the use of agency house management for enterprises in Malaya never attracted the same kind of criticism or amendments to the company law as eventually occurred in India, where shareholders protested agents’ siphoning off of huge profits.¹⁴⁴

¹³³ James C. Jackson, *Planters and Speculators: Chinese and European Agricultural Enterprise in Malaya, 1786-1921* (Kuala Lumpur: University of Malaya Press, 1968) at 246-248.

¹³⁴ Jomo, *A Question of Class*, *supra* note 116 at 183, 184.

¹³⁵ White, *supra* note 125 at 27.

¹³⁶ Van Helten & Jones, *supra* note 18 at 165, 166.

¹³⁷ *Ibid.* at 166.

¹³⁸ *Ibid.* at 168.

¹³⁹ *Ibid.*

¹⁴⁰ White, *supra* note 125 at 30.

¹⁴¹ *Ibid.* at 24.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*; Jomo, *A Question of Class*, *supra* note 116 at 184.

¹⁴⁴ Rungta, *supra* note 7 at 214, 215; McQueen, *A Social History of Company Law*, *supra* note 7 at 395.

Following World War II, Singapore lost much of its earlier entrepôt trade while tin and rubber production in Malaya recovered slowly. Some substitution for this was found through manufacturing development with a substantial number of new factories built by British, Australian, American and Chinese interests.¹⁴⁵ While some of this post-war industrial development was initiated locally, and thus probably accounts for the increase in new company registrations (see Table 2 for data on 1948–1952), most of it was attributable to companies headquartered in Europe and America.¹⁴⁶ The outbreak of the Korean War in 1950 raised tin and rubber prices and helped the Singaporean and Malayan economies to recover. At Independence in 1957, Malaysia inherited an economy still largely shaped by colonial business interests in tin and rubber.

The two other significant population groups in Malaya, the Indians and Malays, were generally not involved in corporate activity during the colonial era. The majority of the Indians in Malaya (about 80 per cent) were imported as unskilled labour for British coffee and rubber plantations. Indians were preferred as labourers because it was considered that the Malays did not provide the required labour force and the Chinese were thought to be insufficiently docile and more difficult to recruit.¹⁴⁷ The Indian labourers tended to send their wages home as remittances and during downturns in the economy returned home to India. It was only in the 1930s that locally settled Indians began to play a major part in reproducing the labour force.¹⁴⁸ The remaining proportion of the Indian population in Malaya consisted of petty entrepreneurs, businessmen, moneylenders, clerks, policemen and small numbers of doctors, lawyers and teachers.¹⁴⁹ Merchants and financiers were a tiny minority.¹⁵⁰ There was little economic opportunity or governmental encouragement of large-scale entry of Indian big business into colonial Malaya.¹⁵¹ Larger Indian businesses tended to be based on family capital, for example, Chettiar Tamil¹⁵² firms would send a family member or agent to Malaya with a certain amount of home capital to set up a business and was paid a salary and bonus share in profits.¹⁵³ There were some Indian privately-owned rubber estates but these were generally small and greatly outnumbered by the British and Chinese estates.¹⁵⁴ The Indian population in Malaya during the colonial period, in other words, had little involvement with limited liability companies.

¹⁴⁵ Allen & Donnithorne, *supra* note 123 at 47.

¹⁴⁶ *Ibid.* at 58.

¹⁴⁷ P. Ramasamy, "Labour Control and Labour Resistance in the Plantations of Colonial Malaya" (1992) 19 *Journal of Peasant Studies* 87 at 90.

¹⁴⁸ Stenson, *supra* note 111 at 21.

¹⁴⁹ Kernial Singh Sandhu, *Indians in Malaya: Some Aspects of Their Immigration and Settlement 1786-1958* (Cambridge: Cambridge University Press, 1969) at 74.

¹⁵⁰ *Ibid.* at 121.

¹⁵¹ *Ibid.* at 45.

¹⁵² The Chettiars were the chief merchant banking caste of South India and were involved in large amounts of trade throughout Southeast Asia. They tended to operate on principles of trust and kinship. See David Rudner, "Banker's Trust and the Culture of Banking among the Nattukottai Chettiars of Colonial South India" (1989) 23 *Modern Asian Studies* 417 at 424.

¹⁵³ Tan Tai Yong & Andrew J. Major, "India and Indians in the Making of Singapore, 1819-1990" in Mun Cheong Yong & V.V. Bhanoji Rao, eds., *Singapore-India Relations: A Primer* (Singapore: Singapore University Press, 1995) 1 at 9, 10; Sandhu, *supra* note 149 at 291.

¹⁵⁴ Sandhu, *ibid.* at 262, 263.

There is some evidence of pre-colonial use of companies or their local equivalents in maritime Southeast Asia.¹⁵⁵ However, although traditional Malay rulers were able to accumulate wealth through taxes and surplus extraction, and probably made small investments in trading opportunities, they never became commercial capitalists.¹⁵⁶ Then, with the extension of British power in Malaya, the ruling class was integrated into the colonial administration and with comfortable salaries they did not feel the need to become entrepreneurs.¹⁵⁷ The majority of the Malay population were subsistence farmers. The British tended to view the indigenous Malays as indolent and inefficient—a prejudice that formed part of the “mental furniture” of colonial officials in Malaya.¹⁵⁸ The British took the paternalistic view that Malays were best kept to the food production sector particularly rice farming, and, through various policies, tried to prevent Malay peasants turning to rubber cultivation or other kinds of commercial speculation.¹⁵⁹ Nonetheless, Malays did engage in rubber smallholding (areas under 100 acres) and gained a significant share of the industry, but these were not corporate concerns.¹⁶⁰ From the early 1920s, the British also promoted the use of cooperatives among government servants, Indian estate labourers and rural Malays, but generally without any great success.¹⁶¹

In summary, the use of the limited liability company form eventually became widespread in Malaya for certain population groups particularly for the tin and rubber industries, but its use was largely disconnected from the legal developments described in Part III above. There can be no doubt that the limited liability company form assisted British capital to move globally and to exploit resources and opportunities in the colonies. We argue, however, that if there had been no local company legislation in the Straits Settlements and Federated Malay States at all it probably would not have made a significant difference to the history of capitalist development there given the predominance of London-registered companies and agency houses. Absence of the legislation would have only inhibited the comparatively small amount of local capital-raising by resident British and some Chinese entrepreneurs. The existence, and toleration, of alternative viable forms of business organisation, particularly the Chinese *kongsi* and *hun* systems, also appears to have lessened the impact of the limited liability company legislation.

V. CONCLUSIONS

This paper has presented a detailed account of the development of company law in the Straits Settlements and Federated Malay States. It also presented a description of the parallel, but largely unconnected, history of the actual use of the limited liability

¹⁵⁵ Carl-Bernd Khaelig, *Gesellschaftsrecht in Indonesien: Autonome und Nationale Gesellschaftsformen [Company Law in Indonesia: Autonomous and National Company Forms]* (Hamburg: Mitteilungen des Instituts für Asienkunde, 1986) at 275.

¹⁵⁶ Hans-Dieter Evers, “Traditional Trading Networks of Southeast Asia” (1988) 35 *Archipel* 89.

¹⁵⁷ Jomo, *A Question of Class*, *supra* note 116 at 19, 209, 210.

¹⁵⁸ Stockwell, *supra* note 18 at 54.

¹⁵⁹ Drabble, “Some Thoughts on the Economic Development”, *supra* note 127 at 207.

¹⁶⁰ Jomo, *A Question of Class*, *supra* note 116 at 184; Drabble, “Investment in the Rubber Industry”, *supra* note 126 at 252.

¹⁶¹ L.J. Fredericks, “Free Enterprise and the Cooperative Movement in Malaysian Economic Development” (1974) 12 *The Developing Economies* 229.

company form in these two jurisdictions. This material has allowed us to address the three debates referred to in the Introduction. First, with regards to the question of whether the pattern of company law evolution is more a product of legal family or the “transplant effect”, we found very low levels of adaptability which in turn provides strong evidence for the “transplant effect”. The pattern of company law evolution in Malaya was one of fairly regular, if slow, updates that generally mimicked those of England, but which had only rare instances of interconnection with local economic developments or with local use of the law. Company law in the Straits Settlements and Federated Malay States certainly had “common law” characteristics and style in terms of the content of specific rules. However, despite its common law origins, the Registrar had a weak regulatory role, there was no local stock exchange and there was little to no judge-made law. Given all these factors, the actual number of statutory changes during the colonial era was not an indicator of adaptability. Although there is evidence for the “transplant effect”, it should be noted that Malaya did not display the exact pattern of either erratic change or legal stagnation predicted by Pistor *et al.* and found in Mahy’s study of Indonesia.

Secondly, with regards to the literature on the nature of the transplant process, the pattern of transplants in Malaya was quite straightforward and very depoliticised. Changes were almost always a matter only for technical law-makers. Certainly there were no mixed transplants, and the assumption that the dispersal of companies legislation to British colonies always followed the pattern of “Home”, actually holds largely true in the case of the Straits Settlements and Federated Malay, although the spread of law from one colony to another rather than always directly from England is an unexpected finding that should be given more attention in discussions of the development of company law.

Finally, we conclude that local company law in Malaya certainly served the interests of British capital, but the law was not explicitly discussed in such terms, and it was not a particularly successful tool of “imperialism” given the relatively small number of local incorporations. The dominance of London-registered companies in Malaya was far more significant. Certainly there was no real attempt made to adapt the law to facilitate use by the local population.