5-2020

The development of Singapore Law: A bicentennial retrospective

Andrew PHANG

Yihan GOH
Singapore Management University, yihangoh@smu.edu.sg

Jerrold Tsin Howe SOH
Singapore Management University, jerroldsoh@smu.edu.sg

Published on e-First 8 May 2020

THE DEVELOPMENT OF SINGAPORE LAW: A BICENTENNIAL RETROSPECTIVE[1]

The present article reviews (in broad brushstrokes) the status of Singapore law during its bicentennial year. It is not only about origins but also about growth – in particular, the autochthonous or indigenous growth of the Singapore legal system (particularly since the independence of Singapore as a nation state on 9 August 1965). The analysis of this growth is divided into *quantitative* as well as *qualitative* parts. In particular, the former constitutes an empirical analysis which attempts – for the very first time – to tell the development of Singapore law through numbers, building on emerging techniques in data visualisation and empirical legal studies.

Andrew **PHANG**
Judge of Appeal,
Supreme Court of Singapore.

GOH Yihan
Professor of Law, School of Law,
Singapore Management University.

Jerrold **SOH**
Lecturer of Law, School of Law,
Singapore Management University;
Co-Founder, Lex Quanta.

I. Introduction

1 The present article, which reviews (in broad brushstrokes) the status of Singapore law during its bicentennial year since the founding of Singapore by Sir Stamford Raffles in 1819, is of particular significance as English law constitutes the foundation of Singapore law. The role of Raffles and his successors, therefore, could not have been more directly

1 All views expressed in the present article are personal views only and do not reflect in any way the views of the Supreme Court of Singapore, the Singapore Management University or Lex Quanta. Although this article ought, ideally, to have been published last year, the immense amount of case law that had to be analysed has led to a slight delay. Perhaps this slight delay may be forgiven when viewed against the timeframe considered which stretches across two centuries. We thank Anmol Singh, Chua Hong Hui, Justin Hoo, Matthew Soo, and Teo Jim Yang for excellent research assistance.

relevant.[2] However, this article is not only about *origins* but also about *growth* – in particular, the autochthonous or indigenous growth of the Singapore legal system (particularly since the independence of Singapore as a nation state on 9 August 1965). Hence, it is equally significant that it brings together essentially three generations of legal scholars in interaction and collaboration with each other. This intergenerational encouragement and growth is emblematic of what is required if Singapore law is to continue to grow from strength to strength in the future as well. The first-named author, a former legal academic and presently a judge, represents the older generation from whom the legal baton must be passed in the near future. And so it is in the *other* generations that our future lies. In this regard, the second-named author is the youngest dean appointed to a local law school in recent times, whilst the third-named author (the "baby" of the group) is a graduate in law as well as economics and is completely conversant with advanced methods of statistical analysis that are so necessary in a world that is now dominated by advances in technology (and the particular exercise of this skill will in fact be demonstrated in the illuminating statistical analyses below).

2 We naturally turn, first, to the distant past before proceeding to consider the present. Much has been written on the former[3] and so we can be relatively brief. The main themes of the story sought to be captured here focus on the past five decades or so. This does not mean that the previous 150 years were unimportant – not in the least. However, the *growth* which we alluded to in the preceding paragraph begins around the time of Singapore's independence. Up to that particular point in time,

---

2 In his speech launching "The Singapore Bicentennial", Prime Minister Lee Hsien Loong referred to the *broader lenses* through which the bicentennial should be viewed (see Lee Hsien Loong, "Speech by PM Lee Hsien Loong at the launch of The Singapore Bicentennial on 28 January 2019" (28 January 2019) *https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-the-launch-of-the-Singapore-Bicentennial-Jan-2019 (accessed 29 January 2019)). As he succinctly observed*:

> 1819 marked the beginning of a modern, outward-looking and multicultural Singapore. Without 1819, we may never have launched on the path to nationhood as we know it today. Without 1819, we would not have had 1965, and we would certainly not have celebrated the success of SG50. 1819 made these possible. … This was our journey, from Singapore to Singaporean.

Significantly, though, he proceeded to observe thus:

> This journey was not a straight and level path, forwards and upwards. Along the way there were many ups and downs, successes and failures, triumphs and tragedies. We fought for independence from our colonial masters. But we also recognise the decisive and indelible imprint that the British left on Singapore – *the rule of law*, our parliamentary system of government, even the language I am speaking today. [emphasis added]

3 See, *eg*, Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) as well as the literature cited therein.

it is not surprising in the least that Singapore law was – apart from some variations in the statutory sphere – primarily English in form as well as substance. That is why the first-named author of this article was inspired to embark upon a doctoral thesis that sought to examine the development of Singapore law from an interdisciplinary perspective.[4] From the past, we then consider (as just alluded to above) the development of Singapore law during the past five decades or so.[5] In this last-mentioned regard, the analysis will be divided into *quantitative* as well as *qualitative* parts. We then conclude this article with some personal reflections. As the authors represent three generations of lawyers, each of us will contribute individually (albeit briefly) in this particular regard.

3 With this brief introduction, we now turn to consider – in brief compass – the development of Singapore law from 1819 to Singapore's independence in 1965. However, before proceeding to consider briefly the past, five preliminary points might be usefully made.

II. Five preliminary points

4 The ***first*** is that Singapore *did* indeed have an historical past *prior to* its (colonial) founding by Raffles in 1819.[6] However, for all intents and

4 This was later published as Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, 1990).

5 Whilst the development of Singapore law over the past five decades since independence has been dealt with comprehensively in a series of essays (see generally *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015), the present article adopts a slightly different statistical approach and not only selects (from a qualitative perspective) some of the more significant decisions (admittedly, itself a somewhat subjective process) but also significant decisions that were handed down after the aforementioned book was published.

6 See, *eg*, the recent (and excellent) collection of essays *Studying Singapore Before 1800* (Kwa Chong Guan & Peter Borschberg gen eds) (National University of Singapore Press, 2018) and (even more recently) the equally excellent book by Kwa Chong Guan *et al*, *Seven Hundred Years – A History of Singapore* (National Library Board and Marshall Cavendish Editions, 2019); reference may also be made to Tan Tai Yong, *The Idea of Singapore: Smallness Unconstrained* (World Scientific Publishing Co Pte Ltd, 2020). The classic work is C M Turnbull's *A History of Modern Singapore, 1819–2005* (National University of Singapore Press, 2009). And in a recent speech by Prime Minister Lee Hsien Loong to which reference has already been made, an excellent capsule summary of Singapore prior to its founding by Sir Thomas Stamford Raffles in 1819 was given as follows (see Lee Hsien Loong, "Speech by PM Lee Hsien Loong at the launch of The Singapore Bicentennial on 28 January 2019" (28 January 2019) https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-the-launch-of-the-Singapore-Bicentennial-Jan-2019 (accessed 29 January 2019)):

> Stamford Raffles did not 'discover' Singapore, any more than Christopher Columbus 'discovered' America. By the time Raffles arrived in 1819, Singapore had already had hundreds of years of history. In the 14th century, this area,

(cont'd on the next page)

purposes, the prevailing method of dispute settlement was (as briefly noted below) quite different from that introduced by Great Britain in the form of English law. And this leads us to the next (and closely related) point.

5 The ***second*** is that whilst it might seem at least somewhat anomalous to talk about what is essentially the indigenous development of a *foreign* (in our case, English) law, the key lies in the fact that notwithstanding its foreign roots, English law has (as already alluded at the outset of the present article) in fact been developed *indigenously*. By way of a second related sub-point, it should be noted that there was no real *uniform* law (or *lex loci*) prior to the introduction of English law. A third related sub-point is this: whilst it is true that Singapore law as we know it today has its roots on a colonial law that was (at least at the very outset) "imposed" on it, *that* law (that is, the general principles of common law and equity) forms one branch of two dominant branches of law that operate in the world today (the other being the civil law system). This leads to a closely related (and fourth) sub-point, which is that the reception (and subsequent development) of English law in Singapore has in fact contributed positively to the facilitation of trade and commerce that constituted the lifeblood of the country from the outset and which (in modified and diversified forms) continue to contribute to Singapore's prosperity today. Finally (and by way of a fifth sub-point), whilst the general principles of common law and equity *literally* arose from a so-called *Western* system, the sharp dichotomy that one might possibly seek to draw between so-called Western systems on the one hand and Eastern systems on the other misses, with respect, the fact that, *regardless*

> at the mouth of the Singapore River, was a thriving seaport called Temasek. Around this period, according to the Sejarah Melayu, Sang Nila Utama founded a kingdom here and named it Singapura. When the Europeans came to Southeast Asia in the 16th and 17th centuries, they knew about the island Singapore. Jacques de Coutre was a Flemish gem trader who knew the region well. Around 1630, two centuries before Stamford Raffles, de Coutre proposed to the King of Spain to build a fortress in Singapore, because of its strategic location. Had the King accepted de Coutre's proposal, Singapore might have become a Spanish colony, instead of a British one. But he did not.
>
> And it took another 200 years before Raffles landed at a spot near here, and persuaded the Sultan of Johor to allow the British East India Company to establish a trading post in Singapore. That was a crucial turning point in our history. It set this island on a trajectory leading to where we are today.
>
> Raffles made Singapore a free port. The new colony prospered, and the population grew rapidly. … Immigrants came from Southeast Asia, China, India and beyond. … [T]hus we became a multicultural and open society. Trade was our life blood. It linked us to the archipelago around us, and to the world beyond. … We developed close economic and family ties with our neighbours in the region, and especially the Malay peninsula. We identified ourselves as Southeast Asian and especially Malayan.

of the system of law that a particular country embraces, every system of law seeks to achieve just and fair results in the cases at hand and (as importantly) must *necessarily* be ***universalisable as well as*** *operate on (equally universal) principles of* ***logic*** *as well as* ***common sense***. Looked at in this light, the general principles of common law and equity which Singapore inherited (albeit initially at a colony of Great Britain) contain the qualities just mentioned in spades.

6 The ***third*** preliminary point is one that augurs very well for the Singapore legal system in general and its personnel in particular – a nuanced understanding as well as application and development of the law (including Singapore law) is *relatively independent of* the particular country's (here Singapore's) natural resources. Whilst it is true that funds need to be expended (especially in a common law system) on library resources, such expenditure is not as expensive compared to other disciplines within a typical university and this is an *a fortiori* case when compared to the general expenditure of any given country as a whole. As (if not more) importantly, excellence in the analysis, application as well as development of the law is, generally speaking, thereby *not constrained* by an absence of natural resources. The main limitations or constraints lie *only* to the extent to which lawyers, judges and legal academics limit their *own* minds and imaginations. Looked at in this light, there is no reason in logic or principle why Singapore cannot continue to develop its laws in order to better suit local conditions and circumstances – *without*, of course, losing sight of the fact that the indigenous or autochthonous development of Singapore law must *not* be undertaken for its own sake for to do that would be to merely indulge in "legal parochialism" without recognising the need to simultaneously *balance* such development with the broader (as well as inevitable and inexorable) influences of *globalisation and internationalisation*.[7] Indeed, the world has – primarily through technology – become a much "smaller" world in every sense of the word. This has, in turn, required a corresponding global as well as international outlook. However (albeit at the risk of putting the point too simplistically), where the *domestic* needs and circumstances require it, Singapore law ought to be *developed* with these needs in mind.

7 The ***fourth*** preliminary point is that the *focus* of the present article is on *the development of the general principles of the common law and equity in the Singapore context*, although there will be brief references to local legislative developments as well.[8]

---

7 And see generally Andrew Phang, "Contract Law at Century's End: Some Personal Reflections" (2000) 8 Asia Pac L Rev 1.

8 Reference may also be made to Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, 1990) at chs 4 and 5 (which deals, *inter alia*, with

(cont'd on the next page)

8 The ***fifth*** preliminary point is a rather broader one – it eschews the most corrosive of views that views the law as being irretrievably subjective and therefore a mere instrument, so to speak, at arriving at a particular (and subjectively desired) decision. In refuting this extremely destructive perspective, we can do no better than quote extensively from a public lecture delivered by the first-named author:[9]

> Although the topic of this lecture is 'Doctrine and fairness in the law of *contract*', the concepts of doctrine and fairness are not confined to the law of contract alone. On the contrary, they constitute, I suggest, the foundation of any practical and just legal system. That having been said, the law of contract is a particularly appropriate point of focus as well as analysis simply because it constitutes the foundation of (and is related to) virtually every area of commercial law.
>
> Put simply, the central thesis of the present lecture is this: The rules and principles which constitute the *doctrine* of the law are not ends in themselves but are, rather, the means through which the courts arrive at *substantively fair* outcomes in the cases before them in *every* area of the law.
>
> …
>
> On the other hand, legal doctrine is not an end itself. Its primary function is to guide the court, in a reasoned fashion, to arrive at *a fair result* in the case before it. Here, too, academic literature has a potentially significant (perhaps even pivotal) role to play. This is because, in some quarters, there has – particularly with the advent of postmodern legal thought – been an increased (and, unfortunately, increasingly) sceptical view taken of the law in general and legal objectivity in particular. Such an approach is, on any view, both corrosive as well as destructive. Whilst one cannot deny that the *application* of objective rules and principles is a dynamic process which may therefore give rise (on occasion at least) to some unpredictability as well as uncertainty (particularly in an imperfect world), it is certainly the *very antithesis* of the law to argue that the law is wholly subjective and that (putting it crudely) 'anything goes'.
>
> Indeed, the view that the law is subjective (and, consequently, arbitrary) would cause an irreparable loss in the legitimacy of the law in the eyes of the public. And, as just mentioned, it would also dispirit as well as disempower lawyers, judges and students alike. And, from just a logical perspective, the very view that all law is subjective is *itself* an 'absolute' proposition that thus involves circularity and (more importantly) self-contradiction.
>
> If I may interpose briefly (albeit informally and personally), when I hear the corrosive – and disorientating as well as dispiriting – sounds of scepticism and cynicism, I am reminded that, often, what is unseen is more important than what is seen. In particular, I am reminded of the *values* that are embodied in

legislative developments in the context of the criminal law in the former chapter and in the context of family law and labour law as well as public housing in the latter chapter).

9 See Andrew Phang, "Doctrine and Fairness in the Law of Contract" (2009) 29 LS 534 at 535–537.

> the law – in particular, the nobility of the quest for justice and the weighty responsibility we bear (whether as students, lawyers, academics or judges) to pursue this noble aim. These cannot be seen but nevertheless constitute the ideals that are the foundation of the enterprise of the law itself. I am also reminded that, on a deeper level, nobility and goodness in general is not something that we should take lightly. On the contrary, these are qualities which we should treasure. They are the true 'anchors' that will prevent us from being cast adrift in troubled (and troubling) times such as we are experiencing at the moment. I am reminded, here, of how a schoolmate of mine sacrificed himself in the prime of his life to rescue a person who was drowning. In that split second, he lost his life in saving another. In that split second, he accomplished more than I could ever do in a lifetime.
>
> [emphasis in original]

9 Let us now turn to consider – in the briefest of terms – the development of Singapore law from 1819 till Singapore's independence on 9 August 1965.

III. From the Second Charter of Justice to independence

A. "Legal chaos" and the Second Charter of Justice

(1) "Legal Chaos" – The Position Prior to the Introduction of the Second Charter of Justice[10]

10 The position prior to the introduction of the Second Charter of Justice was one of "legal chaos". What this meant was that there were no instruments or documents of any kind governing the regulation of law and order in Singapore. There was, in other words, no uniform governing law applying to the then population of the island.[11]

11 The existing problems were exacerbated by the fact that there soon existed in Singapore itself a phenomenon which has in fact become a distinct characteristic even today – that of pluralism. There grew up, within Singapore itself, a conglomeration of different ethnic groups – both indigenous and (in the main) immigrant. Naturally, each ethnic group had a different worldview. Without a uniform governing law,

---

10 For this part of the article, we draw from Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 3–4.

11 See also Sir Walter Napier, *Introduction to the Study of the Law Administered in the Colony of the Straits Settlements* (Fraser & Neave, 1898), reprinted in convenient form in (1974) 16 Mal LR 4 at 13; and M B Hooker, "The East India Company and the Crown" (1969) 11 Mal LR 1 at 26.

the little historical evidence that exists indicates that many of the tasks relating to the administration of justice were in fact left to headmen or leaders of the respective ethnic groups – a system commonly referred to as "indirect rule".[12]

12 Sir Thomas Stamford Raffles did in fact attempt to formulate some regulations. Unfortunately, however, the legality of these regulations is dubious.[13]

13 The law is not – and cannot be – divorced from the practical reality which it is supposed to regulate. Given the absence of a uniform law (and, hence, a situation of "legal chaos"), it would appear that there was, simultaneously, a situation of *actual or factual* chaos as well.[14] This was due, in large part, to the disorder and chaos caused by the Chinese secret societies,[15] which continued in fact to be a virtually insoluble problem in so far as the colonial administrators were concerned. It might be added that the relatively undeveloped infrastructure of the island of Singapore merely exacerbated the problems of law and order.[16]

14 In short, the Second Charter was a much-needed document as it would authorise both the setting-up of the legal infrastructure (in the form, principally, of the courts as well as allied procedure) as well as introduce the substantive law to be applied. In essence, the Second Charter would provide both the form as well as the substance required

---

12 See "Raffles' Singapore Regulations – 1823", published in accessible form in (1968) 10 Mal LR 248. See also Chan Gaik Gnoh, "The Kapitan Cina System in the Straits Settlements" (1982) 25 *Malaya in History* 74 at 79, where the learned author states that in so far as Malacca was concerned, the British continued to recognise the Dutch-appointed *kapitans* (*viz*, headmen or leaders). See also Wong Choon San, *A Gallery of Chinese Kapitans* (Ministry of Culture, Singapore, 1963) at p i, where it is observed:

> A Kapitan, as conceived by the Chinese, is the recognised captain, chief or headman of a community on foreign soil, particularly the Kapitan officially vested with certain executive, administrative and, in some cases, judicial powers over his own people, and invariably acting as the channel between the Government and the community.

13 See "Raffles' Singapore Regulations – 1823" (1968) 10 Mal LR 248 at 249; Elissa Nassim, *The Administration of Justice in the Straits Settlements, 1819–1855* (unpublished academic exercise, University of Malaya in Singapore History Department, 1959) at pp 7, 12 and 14; as well as "Notices of Singapore" (1854) 8 *Journal of the Indian Archipelago and East Asia* at 330–334.

14 See Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, Singapore, 1990), especially at p 35.

15 See Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, Singapore, 1990), especially at ch 4, Pt III (and the works cited therein).

16 See Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, Singapore, 1990) at p 35.

not only for the introduction of law and order into Singapore but also for the very establishment of a proper *legal system* itself.

(2) The Introduction of the Second Charter of Justice[17]

15 The Second Charter of Justice was granted by the Crown and was dated 27 November 1826. There is not much known by way of detail. This is not surprising in view of the time and context concerned. In all likelihood, the Second Charter arrived without much fanfare. This does not, of course, detract in any way from its vital importance as a foundational legal document of the first order. What we do know is, in the words of J W Norton Kyshe, that "[t]he 2nd Charter only reached Penang in August, 1827, although Sir John Thomas Claridge, the first Recorder under it, had arrived in July, 1826".[18] The reason why the Second Charter was sent to Penang and not Singapore was, presumably, because the former was founded first and constituted the principal "headquarters", so to speak, of the then Straits Settlements. Kyshe also notes that "[o]n the receipt of the Charter, the usual formalities were gone into of proclaiming the Charter, making Rules and Orders of Court, – Court hours being fixed from 10 a.m. to 3 p.m., setting Tables of Fees, and other matters connected with the working of the Court".[19] The Proclamation of the Charter took place on 9 August 1827. This date might be noted, particularly in the light of the fact that this was the same date that Singapore achieved full independence – albeit some 138 years later. However, the events that followed the grant of the Second Charter were not particularly auspicious as disputes occurred between the Recorder and the other judges; indeed, Sir Thomas Claridge was ultimately recalled from the office of Recorder.[20] One charge, in fact, comprising the third in a series of six charges, was "his refusal to proceed [from Penang] to Singapore and Malacca for the purpose of holding Sessions for the trial of criminals at those Settlements,

17 For this part of the article, we draw from Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 4–9.

18 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 96 (this work is, in fact, an accessible reprint of the author's seminal (and justly famous) introductions to volumes 1 and 4 of his (equally seminal and famous) series of law reports entitled *Cases Heard and Determined in Her Majesty's Supreme Court of the Straits Settlements, 1808–1890* (better known as *Kyshe's Law Reports* (Singapore and Straits Printing Office, Singapore, 1885–1890)). There are also valuable and informative appendices to this reprint which were not present in the original work.

19 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 96.

20 See generally J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 97–102.

unless the Government would pay the circuit expenses".[21] In the wake of this refusal, we are told that "Mr. Fullerton [Mr Robert Fullerton, the Governor of the Straits Settlements] proceeded to the former Settlement, and there on 22nd May, 1828, with Mr. Kenneth Murchison, Resident Councillor, held the first Court or Session of Oyer and Terminer, since the Proclamation of the Charter, and consequently the first Court of the kind ever assembled in Singapore".[22] Kyshe provides a further elaboration of this sitting thus:[23]

> At this first Session, 27 Indictments were presented to the Grand-Jury,[24] of which 6 were found for murder, 2 being against the same individual, 1 for manslaughter and the rest for cases of assault and offences against property. In two of the murder cases, the culprits were sentenced to death and executed: the first (and therefore the first since the establishment of the Court), on the 2nd June, 1828. On the occasion of passing sentence of death on the first prisoner the Court informed him that this 'being the first time a Court of Oyer and Terminer had been held in Singapore, the Court would willingly have mitigated the sentence had there been any extenuating circumstances, but that they could see none.' At this Session, the Governor in his charge to the Grand-Jury, told them that 'two persons accused of piracy must now be discharged for want of Admiralty jurisdiction, a defect already noticed, and which it was expected would in due course be amended.'

16 Given the state of disorder the island had hitherto been in, it is not surprising, perhaps, that the focus was on law and order in general, and the administration of criminal justice in particular. We are further told that "[f]rom Singapore, Mr. Fullerton proceeded to Malacca, where he opened the Assizes for the first time in that Settlement on the 16th June, 1828, and after disposing of the Criminal business there, returned to Penang".[25]

17 Interestingly, though, Sir John Claridge did, prior to his recall, resume his duties as Recorder on 22 December 1828 after leaving for Calcutta on 13 October 1828 "for the purpose of laying before the Judges of the Supreme Court, a full and true statement of all that had passed between the Government in Council … and himself, and of having an

---

21 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 98. See also at 99.

22 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 99.

23 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 99.

24 See generally Y K Lee, "The Grand Jury in Early Singapore (1819–1873)" (1973) 46 *Journal of the Malaysian Branch of the Royal Asiatic Society* 55.

25 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 99.

interview with the Governor-General [of India]".[26] He did then proceed on circuit and finally arrived in Singapore on 28 January 1829[27] – well over a year after the Second Charter had arrived in the Straits Settlements and well over two years after his own arrival at the same. He ultimately left Singapore on 9 September 1829, and departed from Calcutta for England on 4 July 1830.[28] However, although Sir John Claridge was found to have "proceeded from a mistaken view of the line of his duty, and not from any corrupt or improper motive",[29] he could not be recommended to continue in his office as Recorder – and was duly removed from the office accordingly.[30] There followed some confusion as to the status of the Court of Judicature after the Straits Settlements ceased to be a separate Presidency and was made subordinate to the Government of Fort William in Bengal,[31] but that particular episode need not detain us. Suffice it to state that after the initial "hiccups", the Court of Judicature proceeded with its work as originally intended.

18 Returning to the structure of the Second Charter proper, the Charter itself created the Court of Judicature of Prince of Wales' Island, Singapore and Malacca. The court itself was to consist of the Governor, the Resident Counsellors as well as a Recorder as judges, with the Recorder taking precedence next to the Governor. Indeed, the Charter itself was quite comprehensive: It provided for what was essential for the smooth functioning of the court, including, *inter alia*, the appointment of a Registrar and a Sheriff, as well as Coroners, and provision for the appearance of counsel. Foremost, however, was the "Justice and Right" clause. The answer to the question as to whether or not English law – or some other law – was introduced into Singapore hinged on the interpretation of this particular clause. And it is to this fundamental issue that our attention must now turn.

19 The received wisdom – as stated at the outset of this work – is that the Second Charter introduced English law into Singapore. Unlike

---

26 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 100.

27 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 100.

28 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 101.

29 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 101.

30 See J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 at 101–102.

31 See generally J W Norton Kyshe, "A Judicial History of the Straits Settlements 1786–1890" (1969) 11 Mal LR 38 102–106.

analogous statutes elsewhere,[32] the Second Charter is (owing to its vintage) couched in archaic language. In this regard, the material part of the Second Charter itself reads as follows:

> And We do further give to the said Court of Judicature of *Prince of Wales' Island, Singapore* and *Malacca*, full Power and Authority, upon examining and considering the several Allegations and Proofs of the said Parties to such Suit, or to such of them as shall appear at the Trial or Hearing thereof, or of the Complainant or Complainants, or Parties promoting such Suit alone, in case the Defendant or Defendants shall make Default after Appearance, or say nothing, or confess the Petition of Complaint or *ex parte* the Petitioner, if Justice shall so require, and on examining and considering the Depositions of the Witnesses, *to give and pass Judgment and Sentence according to Justice and Right*: And in any case of any Proceeding removed from or originating in any inferior Court of Judicature, to remit the same thereto, as substantial Justice shall best be attainable; and also to award and order such Costs to be paid by either or any of the Parties to the other or others, as the said Court shall think just. [emphasis added]

20 The principal issue – and one that, as we shall see, led to some controversy more than 150 years later in the academic literature – centres on the construction of what has popularly been known as the "Justice and Right" clause (which was emphasised in the extract just set out). Put simply, the Second Charter, as it was originally phrased, did *not* state *expressly* that English law was received into the Straits Settlements (including Singapore). What it *did* state, as seen from the extract just quoted, was that the local courts were "to give and pass Judgment and Sentence *according to Justice and Right*" [emphasis added].

21 The key decision in this regard is that of Sir Peter Benson Maxwell R in *R v Willans*.[33] In this case, Maxwell R held that the words

---

32 Which constituted *locally enacted* legislation: see, *eg*, the Declaratory Act (1965) vol 1, Cap 2 (The Statute Law of the Bahama Islands 1799–1965); Law of England (Application) Act (1966) vol 5, Cap 104 (The Laws of Gambia); the Hong Kong Application of English Law Ordinance (Cap 88, 1971 Rev Ed); Law of England (Application) Law (1959) vol 3, Cap 60 (Laws of the Western Region of Nigeria); s 3 of the Malaysian Civil Law Act 1956 (Revised – 1972); and the Application of Laws Enactment (1951) vol 1, Cap 2 (Laws of Brunei). Most of these statutes are probably now of largely historical interest. It should also be noted that an express provision *per se* does not guarantee that problems of construction will be obviated: see, *eg*, in the Malaysian context, G W Bartholomew, *The Commercial Law of Malaysia – A Study in the Reception of English Law* (Malayan Law Journal Ltd, 1965) and Joseph Chia, "Reception of English Law under Sections 3 and 5 of the Civil Law Act (Revised 1972)" [1974] *Journal of Malaysian and Comparative Law* 42. For similar problems in the Papua New Guinea context, see R S O'Regan, "The Common Law and English Statutes in the Territory of Papua and New Guinea" (1971) 45 Australian LJ 297.

33 (1858) 3 Ky 16. See also *In the Goods of Abdullah* (1835) 2 Ky Ecc 8 and *Fatimah v D Logan* (1871) 1 Ky 255, which are the other leading cases.

"Justice and Right" derive from the selfsame language in chapter 40 of the Magna Carta.[34] This view might itself be historically inaccurate, for as William Sharp McKechnie pointed out, in *Magna Carta – A Commentary on the Great Charter of King John*,[35] chapter 40 of the Magna Carta centred on the *cost* of justice and was intended to redress abuses of the system with regard to illegitimate or exorbitant payments exacted by the Crown. However, that having been said, the learned author does acknowledge, as follows:[36]

> It is not to such considerations, however, that this chapter owes the prominence usually given to it in legal treatises; but rather to the fact that it has been interpreted as a universal guarantee of impartial justice to high and low; and because, when so interpreted, it has become in the hands of patriots in many ages a powerful weapon of the cause of constitutional freedom.

The reference here is probably to Sir Edward Coke.[37] In the final analysis, it may well be that the draftsman of the Second Charter in fact had this noble – albeit historically inaccurate – concept of "Justice and Right" in mind, especially in view of the fact that it was issued (in form at least) by royal decree.

(3) The debate

22 The historical provenance of the "Justice and Right" clause notwithstanding, the key issue that arose in *R v Willans* and for us today is the *meaning to be attributed to that particular clause*. Did it introduce English law into Singapore, or did it introduce the laws and customs of the then local population? This, in turn, raises a myriad of other questions. For example, what was the state of the legal system, if any, at the time of the introduction of the Second Charter (a question we have in fact already addressed above)?[38] And would *this* give us a clue as to the meaning to be attributed to the "Justice and Right" clause? What, on an even broader level of inquiry, was the *intention* of the *draftsman* of the Second Charter? What *is* clear is that for over a century and a half, the interpretation adopted by Maxwell R in *R v Willans* was accepted without question. In other words, the courts and, indeed, the country as a whole, proceeded on the fundamental assumption that English law had

---

34 This view has found support in the Australian decision of *MacDonald v Levy* (1833) 1 Legge 39.

35 Glasgow: J Maclehose & Sons, 2nd Ed, 1914 at pp 395–398.

36 William Sharp McKechnie, *Magna Carta – A Commentary on the Great Charter of King John* (J Maclehose & Sons, 2nd Ed, Glasgow, 1914) at p 398.

37 See his *The Second Part of the Institute of the Lawes of England* (London: Printed by Miles Fletcher and Roert Young, for Ephraim Dawson, Richard Meighen, William Lee and Daniel Pakeman, 1642), especially at pp 56–57.

38 See paras 10–11 above.

been introduced into Singapore by way of the Second Charter. However, in 1983, this assumption was challenged in the academic literature.[39] Ironically, perhaps, the article concerned was written by an expatriate lecturer, Mohan Gopal. Although there was a subsequent response to that particular article,[40] there was a deafening silence thereafter. Indeed, rumour had it that even if Mohan Gopal was correct, this *theoretical* "corrective" did not – and could not – affect (let alone alter) the *practical* basis on which the Singapore legal system was both founded and conducted. It cannot be denied that there is much *practicality* in adopting such an approach. However, one ought not to – indeed, cannot – ignore the importance of history in general and our "legal roots" in particular. An attitude of mind which is *merely* pragmatic marks the start of the slippery slope towards materialism which would (in turn) lead to a whole host of other undesirable effects (including the decline of professionalism and even professional misconduct).[41] Such "legal deterioration" is also, in our view at least, both subtle and invidious. This was the main reason why the first mentioned author of the present article published a response.[42]

23 We do not propose to spend too much time on the various arguments in the principal articles referred to in the preceding paragraph. Indeed, this would militate against the central thrust and spirit of this section of the present article – which is to give the reader a simple (albeit not simplistic) overview of the Second Charter in the context of the overall development of Singapore's legal system. The main arguments as to why the traditional or mainstream view to the effect that the Second Charter introduced English law into Singapore is correct from both theoretical as well as practical points of view have been dealt with in more detail

39 See Mohan Gopal, "English Law in Singapore: The Reception That Never Was" [1983] 1 MLJ xxv.

40 See Valerie Ong Choo Lin & Ho Kin San, "The Reception That Never Was" (1984) 5 Sing L Rev 257.

41 And see generally Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, 1990) ch 3.

42 See Andrew Phang Boon Leong, "English Law in Singapore: Precedent, Construction and Reality or 'The Reception That Had to Be'" [1986] 2 MLJ civ. This article was in fact a modified version of part of a longer piece submitted by the first-mentioned author of the present essay in fulfilment of the written work requirement for the degree of Master of Laws at the Harvard Law School. Indeed, the delay in the response was due to the fact that he had, in the interim, gone abroad for further studies. However, that particular stint afforded him, as just stated, the opportunity to work on, *inter alia*, a response to Mohan Gopal's article.

elsewhere. Briefly put, they include[43] the form of the document,[44] the interpretation of the "Justice and Right" clause as referring to English law (albeit with such law being subject to the concepts of suitability and modification),[45] the fact that courts in other jurisdictions[46] have in fact interpreted the phrase "Justice and Right" in their respective Charters as having introduced English law into their respective jurisdictions,[47] the fact that the entire tenor of the Second Charter itself (including the procedure set out with regard to the initiation of actions, mode of trial as well as the execution of judgments) points to the fact that English law was intended to be introduced,[48] the express reference in the Second Charter to English criminal law,[49] as well as the natural bias of colonial judges towards English law.[50]

(4) Regulating the quantum of English law received

24 As already alluded to above, the English law received pursuant to the Second Charter was nevertheless subject to a "cut-off" date[51] as

43 Only the main points are mentioned here: there are other points as well which are, however, relatively minor in nature (and see Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at p 17 and, more specifically, Andrew Phang Boon Leong, "English Law in Singapore: Precedent, Construction and Reality or 'The Reception That Had to Be'" [1986] 2 MLJ civ at cxiv–cxix).

44 *Ie*, that whenever the "Justice and Right" clause appeared, this was in a *Charter* (such as the Second Charter of Justice), whereas the more modern "legal vehicle" of a *statute* would tend to refer *expressly* to the introduction of English law, without more: see Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at p 11.

45 See Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at p 11.

46 In India and the Australian state of New South Wales: see generally Andrew Phang Boon Leong, "English Law in Singapore: Precedent, Construction and Reality or 'The Reception That Had to Be'" [1986] 2 MLJ civ at cvi–cvii.

47 See generally Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 11–13.

48 See Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 13–14.

49 See Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 14–15.

50 This is not bias in the pejorative sense but, rather, a reference to, *inter alia*, the methodological and attitudinal approach of judges trained in English law; and see generally Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 15–16.

51 Of 1826, *viz*, the date of the Second Charter – at least in so far as *statutes* were concerned (see generally Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 19–22 as well as, by the same author, "Of 'Cut-Off' Dates and Domination: Some Problematic Aspects of the Reception of English Law in Singapore" (1986) Mal LR 242).

well as to the concepts of suitability and modification.[52] In so far as the "cut-off" date was concerned, this has been interpreted, again in the seminal decision of *R v Willans*, as being *1826*, *viz*, the date of the Second Charter. This meant that *no post*-1826 English statute was received as part of Singapore law. However, the situation was less clear with regard to English *case law*. This was due in no small part to what has been popularly termed the "declaratory theory" of the common law,[53] under which the rules and principles of common law and equity are considered to have been always "out there", "waiting" to be "discovered" by the courts and are therefore, by their very nature as just described, not susceptible of having a "cut-off" date as such. It should, however, be noted that the aforementioned "declaratory theory" is no longer a popular one. The first-named author has, in fact, discussed this particular issue elsewhere and has argued that there is nothing amiss in accepting a "cut-off" date even for the reception of English case law – an approach that is buttressed by the fact that the courts also apply to English law the concepts of suitability and modification.[54]

25 The concept of *suitability* itself meant that English law – whether in the form of statute or common law – was not received as part of Singapore law unless it was suited to the conditions of Singapore. In so far as the concept of *modification* was concerned, if an English statute or case was found to be otherwise suitable to the local circumstances but would, if applied, cause injustice or oppression, the statute or case concerned could be modified before being received as part of Singapore law.

26 As the first-named author has attempted to demonstrate elsewhere, whilst the concepts of suitability and modification were, in theory, much to be welcomed (not least because they accorded with the much vaunted claim of British colonial justice which purported to ensure that the local or native population received the "best of both worlds" inasmuch as they received both the developed system of English law and justice on the one hand and the recognition as well as preservation of viable local laws and customs (where more appropriate)), the *practice* of this ideal was not nearly always as successful.[55] However, as *general* concepts in the development of Singapore law in the *modern* context,

52 See generally Andrew Phang Boon Leong, "Of 'Cut-Off' Dates and Domination: Some Problematic Aspects of the Reception of English Law in Singapore" (1986) Mal LR 242.

53 And, of course, equity. This theory has its origin in the views of Sir William Blackstone.

54 See generally Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 19–26.

55 See Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 23–25.

these concepts are of potential as well as actual utility and have now been embodied in local statute law in s 3(2) of the Application of English Law Act[56] ("AELA").

B. Specific reception of English law[57]

27 Whilst the Second Charter was responsible for the *general* introduction of English law into Singapore (thus resulting in the *general reception* of English law), there was also the *specific* reception of English law into Singapore. This occurs whenever a local statute or (more commonly) a provision thereof provides for (or stipulates that) English law be applied. Most of these provisions in these various statutes serve *gap-filling* functions in order to *supplement as well as complement* the concept of general reception. Of all the specific reception provisions, the most famous – and most problematic – was s 5 of the Civil Law Act.[58] There were other specific reception provisions as well – for example, what is presently s 6 of the Criminal Procedure Code.[59] However, s 5 of the Civil Law Act was the most significant – and the most problematic. It was also of great importance because much of Singapore commercial law (arguably the lifeblood of the country) was premised on (and emanated from) it. However, the interpretive difficulties it generated were both complex as well as intractable. Fortunately, it has since been *repealed* by the AELA. It would serve no real purpose, therefore, to rehearse the various difficulties (which are now, of course, largely of historical significance only). Further, there is copious literature that examines – in minute detail – the historical background as well as the intractable difficulties which we have just alluded to.[60]

---

56 Cap 7A, 1994 Rev Ed.

57 See generally Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 26–35.

58 Cap 43, 1988 Rev Ed (prior to the repeal of the provision itself, which is described briefly below).

59 Cap 68, 2012 Rev Ed.

60 See, *eg*, Andrew B L Phang, "Theoretical Conundrums and Practical Solutions in Singapore Commercial Law: A Review and Application of Section 5 of the Civil Law Act" (1988) 17 Anglo-American L Rev 251, and the literature cited therein, as well as Soon Choo Hock & Andrew Phang, "Reception of English Commercial Law in Singapore – A Century of Uncertainty" in *The Common Law in Singapore and Malaysia* (Andrew Harding gen ed) (Butterworths, 1985) ch 2 and Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 26–35.

C. Application of English Law Act[61]

28 The AELA was enacted in 1993.[62] Its aim was clear: to clarify the application of English law in Singapore. Indeed, prior to the promulgation of this Act, there were (as we have alluded to above) numerous areas of uncertainty with regard to both the general as well as (especially) the specific reception of English law in Singapore.[63] This was obviously unsatisfactory from both theoretical as well as (more importantly) practical points of view.[64]

29 The AELA has, in fact, done away with many of the problems and consequent uncertainty that existed previously. It has therefore justifiably been described by the then Minister for Law as "one of the most significant law reform measures since Singapore's independence".[65] Given its foundational nature, it might even be the most important piece of law reform for close to two centuries. Indeed, the AELA was also viewed by the minister as being consistent with the development of an autochthonous Singapore legal system – an issue to be dealt with in greater detail later in this article.[66] In particular, the minister stated that the Government would be taking further steps to amend the local law in order to free it from dependence on English law; he stated that "[w]e must have certainty in our laws and move away from reliance on English law, because we do not know what the conditions are that shape the U.K. decisions".[67] In a similar vein, the minister also observed earlier that

---

61 Cap 7A, 1994 Rev Ed. And see generally Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 37–49. For a fascinating insight into the genesis of the Act itself, see Chan Sek Keong, "Application of English Law Act 1993 – A New Charter of Justice" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015).

62 As Act No 35 of 1993. The Act came into operation on 12 November 1993 (see Art 58(2) of the Constitution of the Republic of Singapore (1999 Reprint) and s 10(2) of the Interpretation Act (Cap 1, 2002 Rev Ed)).

63 Indeed, the Explanatory Statement to the Application of English Law Bill 1993 (Bill 26 of 1993) began as follows: "This Bill seeks to remove the uncertainty as to the extent of the applicability of English law to Singapore, particularly in regard to statute law, and to repeal section 5 of the Civil Law Act". See also the first part of the Preamble which states that the Act is "to declare the extent to which English law is applicable in Singapore and for purposes connected therewith …"

64 See also G W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1 at 17.

65 *Per* Prof S Jayakumar during the Second Reading stage of the Application of English Law Bill 1993 (Bill 26 of 1993): see *Singapore Parliamentary Debates, Official Report* (12 October 1993) vol 61 at col 616.

66 See para 38 below.

67 See *Singapore Parliamentary Debates, Official Report* (12 October 1993) vol 61 at col 616 (Prof S Jayakumar, Minister for Law and Minister for Home Affairs).

"it makes our commercial law independent of future legislative changes in the United Kingdom – changes which we have in fact no control".[68] The minister was, in this last-mentioned regard, probably referring to the very real problems centring on the UK's entry into the European Community, which problems were in fact perceived as far back as 1979 when the Civil Law Act was amended.[69]

30 At the most general level, the AELA not only reiterates that the rules and principles of English common law and equity are applicable in Singapore[70] but also (and more importantly) attempts, as far as possible, to encompass all the applicable English statutes by either listing them[71] or by effecting amendments to local statutes based, in the main, on specific provisions of English legislation.[72] As already mentioned, s 5 of the Civil Law Act was repealed as, with the AELA, it was no longer required.[73] There is a provision for flexibility that may be implemented by the minister on advice of the Law Revision Commissioners.[74]

31 There are, however, interpretive as well as other difficulties that arise from the AELA. Constraints of space preclude a detailed discussion in the present article.[75] However, notwithstanding these difficulties, the AELA was (and continues to be) a landmark statute in every sense of the word. It eradicates – once and for all – the uncertainty surrounding the applicability of English statutes in Singapore, commercial or otherwise. Certainty and accessibility are thereby improved. Indeed, there is also provision for the publication of a (local) revised edition of the English

---

68 See *Singapore Parliamentary Debates, Official Report* (12 October 1993) vol 61 at col 609 (Prof S Jayakumar, Minister for Law and Minister for Home Affairs); see also at cols 611 and 613.

69 See the Civil Law (Amendment No 2) Act 1979 (Act No 24 of 1979) – which merely served to exacerbate, rather than solve, the problems concerned. See also R H Hickling, "Civil Law (Amendment No. 2) Act 1979, s 5 of the Civil Law Act: Snark or Boojum?" (1979) 21 Mal LR 351.

70 See s 3 of the Application of English Law Act (Cap 7A, 1994 Rev Ed) ("AELA"). Section 3(2) of the AELA incorporated the doctrines of suitability and modification.

71 See s 4 read with the First Schedule to the Application of English Law Act (Cap 7A, 1994 Rev Ed).

72 See s 7 read with the Second Schedule to the Application of English Law Act (Cap 7A, 1994 Rev Ed).

73 See s 6(1) of the Application of English Law Act (Cap 7A, 1994 Rev Ed).

74 See s 8 of the Application of English Law Act (Cap 7A, 1994 Rev Ed).

75 See generally Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 43–48. Reference may also be made to Andrew Phang, "Cementing the Foundations: The Singapore *Application of English Law Act 1993*" (1994) 28 Univ British Columbia L Rev 205. But *cf* Chan Sek Keong, "Application of English Law Act 1993 – A New Charter of Justice" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015), especially at p 74.

statutes listed in the First Schedule to the AELA.[76] Publication in this regard has since taken place.

32 Taken as a whole, the AELA works to the benefit of legal practitioners as well as judges alike. Indeed, even students will benefit as they will no longer have to grapple with the intricate complexities and difficulties surrounding both the general as well as specific reception of English law.

33 The enduring legacy of the AELA is clear – it has cemented the legal foundation, stabilising as well as setting the stage for autochthonous or indigenous development of the Singapore legal system.

D. Singapore law in a colonial setting

(1) Legislation[77]

34 As we have already noted above, pre-1826 English statutes were (subject to the concepts of suitability and modification) part of Singapore law by virtue of the Second Charter. English commercial statutes were received *via* s 5 of the Civil Law Act, although, as we have also noted, this particular provision engendered no small amount of complexity and consequent confusion as well as uncertainty.

35 It should be noted that, although a colony, there was also, in the Straits Settlements (of which Singapore was a part), a Legislative Council. Many pieces of ostensibly local legislation, though, had their roots in other sources. For example, the main piece of criminal law legislation, the Penal Code,[78] is Indian in origin, as is the Evidence Act[79] (which applies to both civil as well as criminal cases alike) and the Criminal Procedure Code.[80]

(2) The common law

36 The rules as well as principles of common law and equity were, as we have already noted, received *via* the Second Charter and were (technically at least) subject to the concepts of suitability and

76 See s 9 of the Application of English Law Act (Cap 7A, 1994 Rev Ed). See also s 18 of the Revised Edition of the Laws Act (Cap 275, 1985 Rev Ed).

77 For the most comprehensive account, see G W Bartholomew, "English Statutes in Singapore Courts" (1991) 3 SAcLJ 1.

78 Presently Cap 224, 2008 Rev Ed.

79 Presently Cap 97, 1997 Rev Ed.

80 See generally Andrew Phang Boon Leong, "Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore" (1989) 31 Mal LR 46.

modification. What is of significance, though, is the fact that these rules and principles were based almost wholly on English law and what local decisions there were in fact "carbon copies" of the English law.[81] This is no criticism of those decisions and is not surprising given the colonial status of Singapore.

(3) Conclusion

37 Singapore became a separate Crown Colony in 1946 and was later briefly part of Malaysian (from 16 September 1963 to 9 August 1965). All throughout the period from the British founding of Singapore (in 1819) to independence (on 9 August 1965), one could reasonably characterise the Singapore legal system as being based, in the main, on English law – with very little (if any) indigenous or autochthonous development of the legal system as a whole. We turn now to the development of Singapore law from independence to the present day.

IV. From independence to the present day

A. Introduction

38 As the first-named author has argued elsewhere, the development of an autochthonous or indigenous system of Singapore law is of the first importance. This is so for a number of reasons.[82] Put in the briefest of fashions, the first is to build as well as reinforce the spirit of professionalism and service within the legal profession. Secondly, Singapore law needs to be developed in a manner that is consistent with the needs and mores of Singapore society itself – and this is accomplished at the level of both logic as well as societal needs (a point to which we will return below when we consider some illustrations with regard to the qualitative development of Singapore law).[83] The third (albeit more subsidiary) reason relates to national pride (although it does in fact overlap with the first, *viz*, the argument from professionalism). Finally, there is also the need to maintain the *legitimacy* of the law, particularly from the perspective of the public. It is something that cannot be underestimated and is perhaps the most vital component and one of the cornerstones of the legal system. It is nevertheless important at this juncture to emphasise that legal autochthony should not be pursued for its own sake because that

81 And see generally, Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, 1990) ch 3.

82 See generally Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 55–64.

83 See paras 80–130 below.

would constitute mere legal parochialism. Indeed, even as Singapore law develops independently of (primarily) English law, it is also important to recognise that Singapore will always seek perspectives from elsewhere to aid in its development, including from the English. Thus, whilst there has been progress, the development of Singapore law has – as we shall see – occurred only gradually since independence.

B. The need for pragmatism

39 Singapore became an independent nation state on 9 August 1965. It was a sudden development. What was therefore required was – in a nutshell – both continuity as well as confidence; this was an entirely pragmatic approach to adopt and most appropriate, in fact, in the circumstances. There was therefore no luxury of time during which Singapore law could even begin to be developed in any meaningful fashion. Hearings had to continue with the existing (in the main, English) law and appeals to the Judicial Committee of the Privy Council were retained in order to bolster confidence in the Singapore legal system (particularly in the context of commercial transactions). Further, the Faculty of Law of the then University of Singapore not only was the only local law school then but was also in its relative infancy, having only seen through its fifth cohort of graduates, and literature on local law was understandingly sparse.[84] English law was still deeply entrenched in not only the substantive content but also the psyche of the Singapore legal system.

40 However, the first-named author has also suggested elsewhere that excessive materialism may also have contributed to a general lack of interest in the development of Singapore law (and, consequently, an overreliance on English law). The reasons for this are complex and were rooted in the broader societal context.[85] However, even if this particular hypothesis is discounted or even disregarded, there were (as noted in the preceding paragraph) other reasons as well that explained why a more pragmatic approach was – or even had to be – taken towards the development of Singapore law.

---

84 Though *cf* the impressive volume under the general editorship of the founding Dean of the Faculty of Law of the National University of Singapore, Professor L A Sheridan: see *Malaya and Singapore, the Borneo Territories – The Development of Its Laws and Constitution* (London: Steven, 1961).

85 See generally Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, 1990) ch 3.

C. Clearing the backlog

41 Another important prerequisite before courts can even begin to contemplate developing the law is a system in which there are no backlogs.[86] When Yong Pung How CJ assumed office in 1990, he candidly remarked as follows:[87]

> Presently, however, we have the problem of a large and embarrassing backlog, which will need to be resolved with rather more realism and energy.

42 In addition to laying the foundations for the indigenous or autochthonous development of Singapore law, there were other good reasons for clearing the backlog of cases expeditiously; again, in the words of Yong CJ:[88]

> As Singapore becomes an international business and financial centre, the slowness of the court system should not be a drag on the country's future development.

43 Approximately five years later, Yong CJ was able to observe (with regard to the problem of backlog) thus:[89]

> Today, the backlog problem is behind us, both at the Supreme Court and the Subordinate Courts level. For over two years already we have maintained a short waiting time of two to three months for the trial or hearing of our cases. In fact, the average total time taken for a civil suit to be disposed of has dropped from five years in January 1991 to between one and two years now.

44 A multifaceted approach was adopted in order to clear the massive backlog at the Supreme Court, including the appointment of more judges as well as Judicial Commissioners, strict case-management, the appointment of Justices' Law Clerks, the reform as well as merger of the Rules of Court,[90] the introduction of information technology (notably

---

86 See generally Andrew Phang, "The Singapore Legal System – History, Theory and Practice" (2000–2001) 21 Sing L Rev 23 at 33–40 (which we draw from liberally for this part of the article).

87 See "Speech Delivered at the Chief Justice's Welcome Reference – 8 October 1990" in *Speeches and Judgments of Chief Justice Yong Pung How* (FT Law & Tax Asia Pacific, Singapore, 1996) at p 27.

88 See "Speech Delivered at the Opening of the Legal Year – 4 January 1992" in *Speeches and Judgments of Chief Justice Yong Pung How* (FT Law & Tax Asia Pacific, Singapore, 1996) at p 45.

89 See "Speech Delivered at the Sixth Conference of Chief Justices of Asia and the Pacifi in Beijing, People's Republic of China – 17 August 1995" in *Speeches and Judgments of Chief Justice Yong Pung How* (FT Law & Tax Asia Pacific, Singapore, 1996) at p 181. See also "Speech Delivered at the Opening of the Legal Year 1996 – 6 January 1996" in the same work at p 211.

90 Presently Cap 322, R 5, 2014 Rev Ed.

in the form of a "technology court", electronic filing of documents, and the immensely useful LawNet database), as well as encouraging the settlement of disputes via (*inter alia*) various methods of Alternative Dispute Resolution ("ADR"). A similar approach was adopted to clear the massive backlog at the Subordinate Courts,[91] including the appointment of more judicial officers over the years, strict case-management, the increase of civil jurisdiction, the building of more courts, the introduction of information technology, the allowance of more efficient and automated settlements of minor offences (such as traffic offences), as well as the introduction of the Primary Dispute Resolution Centre (for the effective implementation of ADR).

45 In summary, with the clearance of the backlog in the courts, the way was now clear for the development of Singapore law in a meaningful way as and when the opportunity arose. The clearing of the aforementioned backlog is an achievement of the first importance for, absent this, there would have been no opportunity whatsoever for the development of an indigenous system of Singapore law, let alone the developments that have in fact been achieved (as set out briefly below).[92] This particular achievement may, without any exaggeration whatsoever, be likened to the laying of the foundations upon which the present structure of *Singapore* law rests. The effort expended in digging such foundations ought not to be underestimated – it is really arduous work and the result, whilst so important, is not immediately obvious; continuing our metaphor, it lies beneath the surface, so to speak, even whilst it provides the stability upon which a unique (here, Singaporean) legal system can – and is being – built. Unfortunately, the architect of that reform, Yong CJ, passed away earlier this year.[93] Yong CJ was a true giant of the Singapore legal system, whose legacy should never be forgotten.

D. Developing Singapore law

(1) Introduction

46 By way of recapitulation, the early years since independence on 9 August 1965 did not witness much local or indigenous development of Singapore law simply because, in the initial years after independence, a pragmatic approach had to be adopted, particularly in light of the sudden birth of Singapore as an independent nation. Further, the backlogs in the courts had also to be taken care of before indigenous development of

91 Now known as the State Courts.

92 See paras 80–130 below.

93 Selina Lum, "Singapore's Former Chief Justice Yong Pung How Dies, Aged 93" *The Straits Times* (9 January 2020).

Singapore law could begin to gather pace. This explains – in large part – why much of the local or indigenous development of Singapore law in its various aspects took place in more intensity only within the last couple of decades or so.

47 In this part of the article, we attempt to furnish the reader with a snapshot of the development of Singapore law. However, constraints of space preclude what would otherwise be a book-length study. Indeed (and on a related note), many of the key developments in various areas of Singapore law have, in fact, been already covered in a quite comprehensive manner in any event in an excellent volume of essays to which reference has already been made.[94] We nevertheless hope to proffer an analysis which adds to that magisterial study in at least three ways. First (and as already mentioned), the analysis here is a snapshot that has its uses as a primer as well as an encouragement to the reader to delve further into the volume just mentioned. Secondly, there are updates of sorts (although the work referred to is itself quite up to date). Finally, we offer a fresh *empirical* analysis that would hopefully be of interest to the reader. And it is to that particular analysis that our attention now turns.

(2) An empirical analysis

48 The story of Singapore law is usually told with words, but it can also be told with numbers. This section aims to animate the development of Singapore law by providing an *empirical* view of Singapore's legal history, building on emerging techniques in data visualisation and empirical legal studies. We clarify at the outset that the empirics presented in this section are meant only in *support*, rather than be in *substitution*, of the qualitative analyses that both precede as well as follow this part.

(a) Background

49 Some context on the data collected is necessary to properly interpret this part. To catalogue the most comprehensive story possible, we collected data on *all* reported judgments available on LawNet attributable to the Singapore Supreme Court (and its predecessors) up till 31 December 2017. These cases were identified by setting the relevant parameters on LawNet's advanced search function and subsequently downloaded using a computer program written by the third-named author for this specific purpose.[95] Because post-independence cases

94 See *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015), as well as n 5 above.

95 This was done with express permission from the Singapore Academy of Law, such permission being limited to research purposes only.

contained a relatively uniform mark-up structure, the variables necessary for this study could be extracted using purpose-built Python scripts as well.[96]

50 Automated extraction was less straightforward for *pre*-independence cases which (not surprisingly, perhaps) lacked such a uniform data structure. Thus, for the around 1,500 pre-independence reported cases downloaded from LawNet, a combination of human and machine effort was used to encode the data in specific variables. Purpose-built Python scripts performed the first cut, extracting fields such as case name and citation (that tended to be relatively uniformly expressed), while five law student assistants from the Singapore Management University School of Law aided in (a) eliminating repeated or non-Singapore cases; (b) verifying the machine-extracted data; and (c) extracting more challenging variables such as the citations of the any precedents cited and the legal subject matter(s) of the case.

51 The student assistants were given detailed instructions on how to extract this data and were closely supervised by us in the process. As a full description of the data collection methodology would unduly lengthen this section, further details are furnished in Appendix A. For present purposes, two caveats must be made. First, although the machine-extracted variables were sample-checked for accuracy, it is possible that errors remain. However, these errors are likely to be rare and should not undermine the analysis. Notably, the alternative method of manually extracting all data fields for all cases would, practical concerns aside, not guarantee perfectly accurate data as well (not least because of human error, which the present procedure in fact avoids).

52 Indeed, the second caveat is that the manually extracted data contains elements of *subjectivity* in so far as human judgment is necessarily implicated in the process. For example, two reasonable lawyers might differ on whether a case which implicates criminal procedure also implicates evidence. Somewhat surprisingly, there was also scope for reasonable disagreement in the *number* of cases cited by pre-independence judgments. This arose because historical judgments occasionally provided incomplete references and/or bibliographic information for the cases they referred to. Thus, it was at times unclear whether the judgment was referring to a case already cited, or an entirely new case. Although students were instructed to make reasonable endeavours, including performing searches on LawNet, Lexis, and Westlaw for seemingly

96 The third-named author describes the process for doing so in prior work. See Jerrold Soh, "A Network Analysis of the Singapore Court of Appeal's Citations to Precedent" (2019) 31 SAcLJ 246 at 258–262, paras 29–36.

overlapping case citations, not all uncertainties could be resolved as such. Further, the headnotes of some pre-independence cases contained case references not to be found in the reported judgment itself. Therefore, case citations had to be counted with some discretion, considering the totality of what the headnotes and the judgment text suggested.

53 Turning now to the precise scope of data collected, the cut-off date of 31 December 2017 was set as a matter of practicality. The dataset was obtained early in 2019, and we were mindful of the possibility that some judgments handed down in 2018 might not have been edited and uploaded onto LawNet as of yet. Further, adding newly uploaded judgments to the dataset whilst data collection and analysis was ongoing added much volatility to the process. We therefore decided to trade off having the most recent cases possible against performing a stable and robust analysis. Thus, the dataset covers theoretically all 198 years between Singapore's founding in 1819 and 2017. In practice, however, the earliest reported decision available on LawNet only dates to 1877.[97] Thus, there are, effectively, only 141 years covered in the study, and the period between 1819 and 1877 is not covered by this part of the article. Within this time frame there were 1,441 judgments from the pre-independence period, and a further 7,221 judgments for the post-independence period.[98] Further, we focused on reported cases for essentially the same reasons stated by the second-named author in prior work.[99] In any event, *all* of the pre-independence Singapore judgments available on LawNet are reported judgments. Finally, the ambit of "Singapore Supreme Court and its predecessors" includes Privy Council decisions on appeal from Singapore, as well as historical courts that can be associated with the High Court level and above.[100]

---

97 *R v Tan Sin Hap* (1808–1884) 3 Ky 94.

98 The post-independence period includes Singapore Day itself.

99 Goh Yihan & Paul Tan, "An Empirical Study on the Development of Singapore Law" (2011) 23 SAcLJ 176 at 197–198, paras 41–43 (noting that the Singapore Law Reports "provide the most reliable and consistent reports of local cases" and that "reported cases perhaps provide the most significant influence on our jurisprudence").

100 Specifically, the following courts were covered:

(a) the Court of Judicature of the Straits Settlements. Note however that, although theoretically included, no reported Singapore LawNet judgment originates from this court;

(b) the Supreme Court of the Straits Settlements ("SCSS"). This includes both original decisions of the SCSS and decisions of the Court of Appeal of the SCSS;

(c) the Federal Court of Malaysia ("FCMY"). This applies only for cases decided between 16 September 1963 and 9 August 1965;

(d) the Federal Court of Singapore;

(e) the High Court; and

(f) the Court of Appeal and the historical Court of Criminal Appeal.

Some of these courts, such as the SCSS and FCMY, could conceivably have heard cases from non-Singapore jurisdictions. Because jurisdiction was one of the variables

(cont'd on the next page)

54 The result of this process is a comprehensive dataset that catalogues the following data points for every reported Singapore Supreme Court (and equivalent) judgment in Singapore's history available on LawNet:

(a) case citation(s) and title;

(b) decision date;

(c) jurisdiction;

(d) court level;

(e) case subject matter(s);

(f) citation(s) of every precedent referred to by that judgment, further categorised into either foreign or local citation, from which the number of local and foreign citations could be derived; and

(g) word count.[101]

55 Although LawNet may not contain every reported Singapore judgment (particularly pre-independence judgments), the dataset compiled, and the numbers that follow, represent, to our knowledge, the most extensive empirical dataset for the study of Singapore case law to date.

(b) The development of Singapore law

56 We start by extending the analysis conducted in Goh and Tan to the entire time frame covered in our new dataset. The following Figure

in our dataset, we could safely exclude non-Singapore judgments. The FCMY judgments were manually double-checked to ensure that they involved Singapore cases as well.

101 Following the third-named author's approach in Jerrold Soh, "A Network Analysis of the Singapore Court of Appeal's Citation to Precedent" (2019) 31 SAcLJ 246, word counts were derived automatically using purpose-built computer scripts which (a) extracted text from the HTML version of the downloaded LawNet judgments; and (b) split the texts into individual counts before counting them. Note that although step (a) relies on each judgment's HTML structure to exclude headnotes and other front matter and end matter not properly part of the judgment, it may have been both over- and under-inclusive. Step (b) relies on spaces between words to count them. The word counts may thus differ from a manual process that, for instance, relies on human judgment to isolate which part(s) of the text properly form the "judgment", and on commercial word processing software for word counts. Nonetheless, because all judgments were treated consistently, any errors in the word counts do not undermine *relative* comparisons between judgments. The exposition on word counts is written, and should be interpreted, in this light. In any event, we also subjected the word counts to random manual checks.

1 illustrates the yearly total number of cases as well as local and foreign citations across the years.

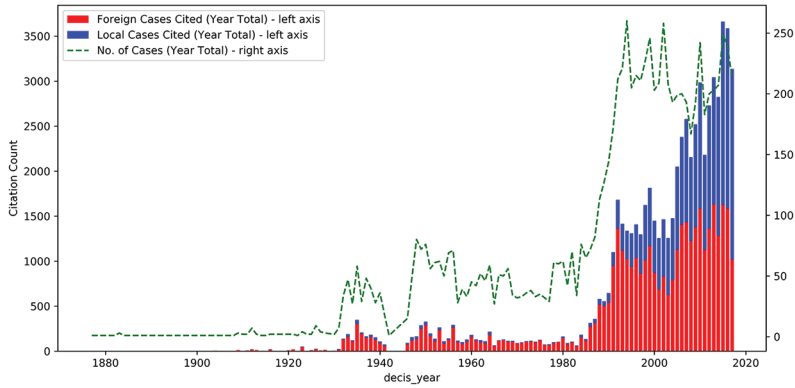

Figure 1: Yearly total number of citations in Singapore reported judgments, 1877–2017

57 Figure 1 above encapsulates 141 years of legal history. Immediately noticeable from the dotted trendline is how most of the pre-independence judgments originate from the post-1930s period. In other words, either there were very few published judgments before that, or the LawNet database has very few of these judgments available. There is also a clear and noticeable valley representing three years of the Japanese Occupation, where there were close to no published judgments. The number of reported judgments quickly picked up after the war, but stayed relatively stable from then till the end-1980s at about 50 per year. But the 1990s saw a stark increase in the number of judgments reported. At the same time, local cases began to be cited more frequently, forming a larger proportion of the total number of citations (though, to be sure, a majority of the cases cited were still foreign ones). This is made clear by the relative proportion of each shade in the figure. This time period coincides neatly with the period where a concerted effort to develop the autochthony of the Singapore legal system arose.[102] To recall, the AELA was enacted in 1993. The 1990s were also a time where Singapore law sought to position itself as a regional *lex mercatoria*.[103] The Supreme Court Practice Statement issued in 1994 abolished appeals to the UK Privy Council and cemented the Singapore Court of Appeal's position

102 Described at paras 28–33 above.

103 For a discussion on this ambition, see generally *Report of the Committee to Develop the Singapore Legal Sector: Final Report* (September 2007) (Chairperson: V K Rajah JA).

as the highest court in the land.[104] Our empirical study here confirms the significance of these developments for the evolution of Singapore law.

58 Figure 1 also suggests that citations as a whole have increased. While this may support the hypothesis that Singapore courts have, over the years, made use of more precedents in the judgment writing process, the simpler explanation for this is rise in the absolute number of reported judgments in our dataset from the 1980s onwards. To adjust for this, the following Figure 2 plots the *average* number of local *versus* foreign citations per case for that year. For instance, in 2017 the average reported judgment cites about 15 cases in total, of which an average of nine are foreign and five are local.[105]

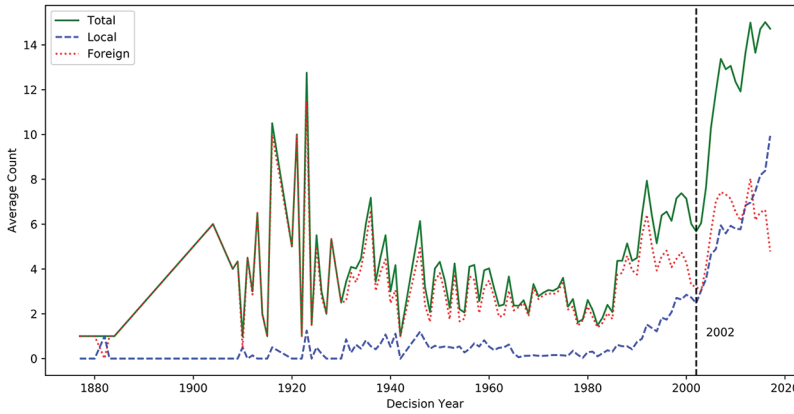

Figure 2: Yearly average number of citations per Singapore reported judgment, 1877–2017

59 Figure 2 reinforces much of the aforementioned: most, though not all, citations in the past were to foreign cases.[106] Importantly, Figure 2 also identifies the period from 2012 onwards as another significant

104 *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689. A more comprehensive overview and analysis of the legal-historical significance of the 1990s for Singapore may be found in *Singapore Law: 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) at chs 1 and 2 especially. See also *The Legal System of Singapore: Institutions, Principles and Practices* (Gary Chan Kok Yew & Jack Tsen-Ta Lee gen eds) (LexisNexis, 2015).

105 To be precise, the average total, foreign and local citations per case are 14.72, 9.93 and 4.78 respectively. Note that the averages were calculated independently; thus, the average total number may not be equal to the sum of the average foreign and the average local number.

106 Readers may notice, but should not attach too much meaning to, the large spikes observed in the 1910s to the early 1920s. This is a statistical incident of how the dataset has few cases from that period (some years had only one or two judgments). Small samples make large variances.

milestone: for the first time in Singapore's legal history, consistently more local than foreign precedents are cited on average. Indeed, there are only seven years in our dataset where this occurs: 1882, 2003, 2012, 2014, 2015, 2016 and 2017.[107] The achievement of such a milestone is likely attributable, at least in part, to the Supreme Court Practice Direction issued in 2008, which states that "where there are in existence local judgments which are directly relevant to the issue, such judgments should be cited in precedent to foreign judgments".[108] It may also be attributable more broadly to the growth of the Singapore legal system since the passage of the AELA, which itself encouraged the development of a body of local jurisprudence.

60 Also of interest is the *sharp spike* in *both* foreign and local citations beginning in 2002 (marked by the dotted line above). This is suggestive of more extensive legal exposition in reported judgments. Word counts corroborate this. Figure 3 below illustrates the word count of an *average* case decided in the relevant year.

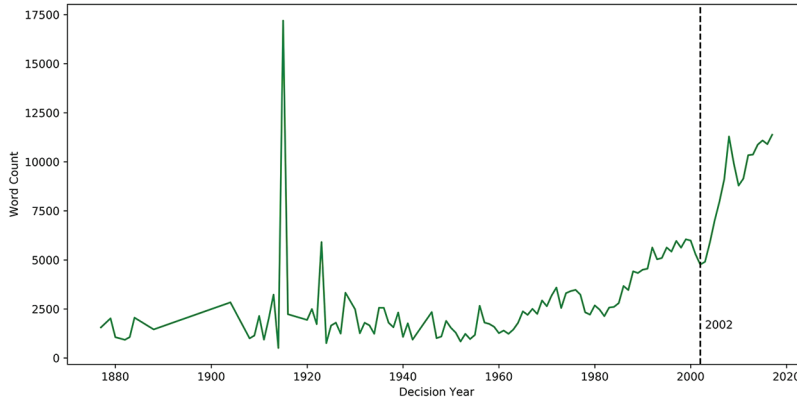

Figure 3: Yearly average word count of Singapore reported judgments, 1877–2017

61 Figure 3 likewise demonstrates *a rapid uptick in word counts from 2002 onwards*. In precise figures, whereas the average reported judgment comprised 4,763 words in 2002; by 2008 this had more than doubled to 11,288, and since then average word counts have hovered around 11,000. This may be a proxy for an increase in judgment comprehensiveness and/or the complexity of cases before the court. The reader may also notice

107 1882 might not be significant, however, as there was only one reported case that year (which cited one local and no foreign judgment). 2003 is also less significant because the average number of local cases cited then (3.038) was only marginally higher than the average number of foreign cases cited (3.005).

108 Supreme Court Practice Direction No 1 of 2008.

that the year *1915* stands out as the year with the highest average word count in Singapore's legal history. This is attributable to a single outlier case decided that year: *N S Narainan Pillay v The Netherlandsche Handel Maatschappij*.[109] That judgment extended to 17,192 words because Bucknill CJ, Ebden J, and Edmonds J each delivered a separate judgment. As this case was the only judgment in our dataset decided in 1915, it wholly determined the average word count for that year. It is therefore by no means determinative of the trend of the time.

62 To further tease out the story of Singapore law's development, Figure 4 below visualises statistics similar to that in Figure 2, but in a form inspired by nature. Like rings on a tree, each ring in Figure 4 represents one calendar year, and the shades of the ring represent the foreign/local *proportion* or share of the citations made across all reported cases decided in that year. Whited-out rings represent years without any citation information.[110]

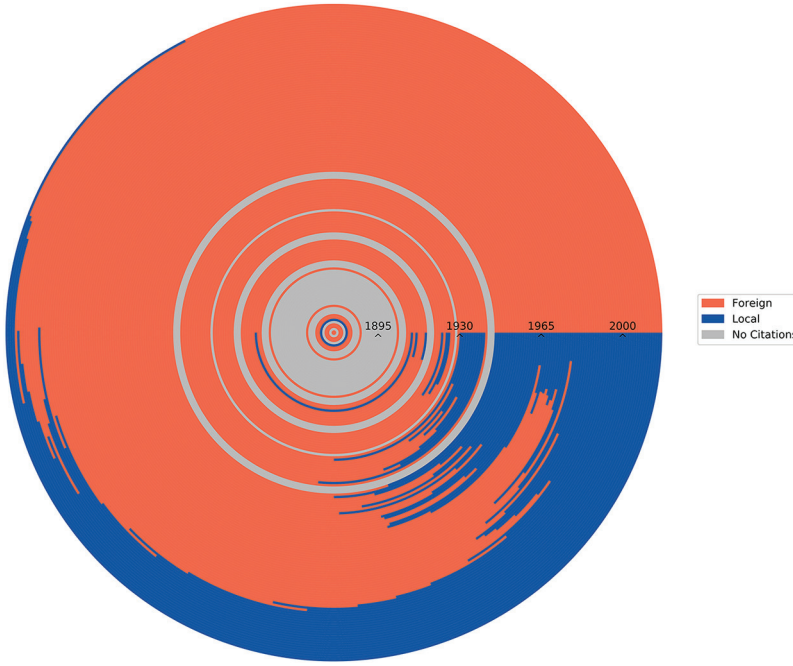

Figure 4: Proportion of foreign to local citations in Singapore reported judgments, 1877–2017

109 [1934] 1 MLJ 227.

110 This means either that no cases were available for that year (*eg*, the Japanese Occupation years) or that the available cases did not cite any cases at all.

63 Figure 4 thus provides a cross-sectional look at the living *tree* that is Singapore law. Just as dendrochronologists study natural tree rings to uncover insights on natural history,[111] so too can we extract lessons of legal history from what these *citation* rings display. To begin, the relatively empty "core" of Figure 4 points to the dearth of reported cases (available on LawNet) during the formative years of the Singapore legal system. The 1930s then saw a brief period of growth, particularly in the share of local citations. But this was disrupted by three years of whited-out rings – these, of course, forming part of the *mark* left by the Japanese Occupation on Singapore law.

64 Interestingly, the increasing trend in local citation shares seemed to regain momentum almost immediately after the war. But it was put to a stop abruptly the year Singapore gained independence, and local citation shares would only recover pre-independence levels in the early 1980s. The years thereafter are definitive of the Singapore legal system as we know it today. As mentioned above, from this period on, local citation shares rose rapidly and consistently. Especially after the turn of the millennium, local citation shares begin to test, and eventually break through, the halfway (50%) point.[112] The year 2017, represented by the outermost ring, is an outlier in itself: 67.50% of all citations that year were citations to local precedent.

65 The observation that the share of local citations increased in the late 1950s but fell after independence persists when we partition the data by court levels. Figure 5 below charts tree ring diagrams for judgments respectively handed down by the Singapore High Court (left) and the Singapore Court of Appeal (right), as well as historical equivalents.[113] Also apparent is that both the High Court and the Court of Appeal

111 Jessica Stoller-Conrad, "Tree Rings Provide Snapshots of the Earth's Past Climate" *NASA* (25 January 2017).

112 These are the years pointed out in para 59 above where more local than foreign citations arose.

113 The following courts were taken as historical equivalents of the Court of Appeal: the Court of Criminal Appeal, the Federal Court of Singapore, the Court of Appeal of the Supreme Court of the Straits Settlements, and the Court of Criminal Appeal of the Supreme Court of the Straits Settlements. The High Court was only associated with the Supreme Court of the Straits Settlements (recall that, after 1873, the Supreme Court of the Straits Settlements when exercising appellate jurisdiction was referred to as the Court of Appeal of the same; thus, judgments associated with the Supreme Court of the Straits Settlements *simpliciter* may be mapped to the High Court level). Data from the Federal Court of Malaysia and the Privy Council was not used here as it could not be neatly associated with either the Court of Appeal or High Court. A minority of (less than 30) cases for which court levels could not be reliably identified were also omitted.

data demonstrates broadly similar citation trends.[114] In other words, the general shift away from local citations in the 1960s, as well as the shift back to local citations in the 1990s, was not limited to the apex appellate (law-making) level and also extended to the High Court as well.

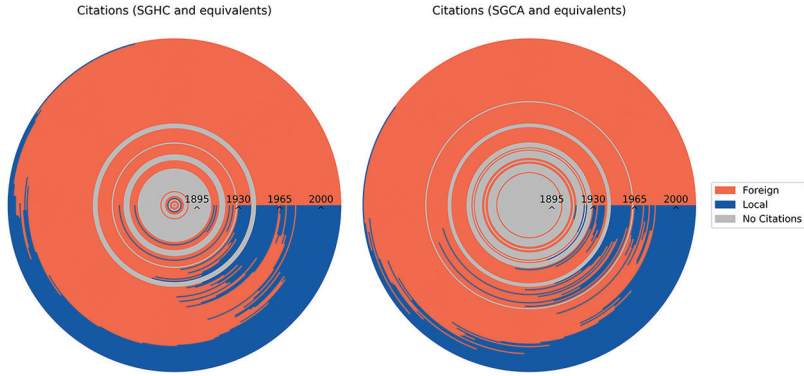

Figure 5: Proportion of foreign to local citations in Singapore reported judgments by court level, 1877–2017

66 The following figures show tree ring diagrams for selected legal areas which the authors believe are of general interest.[115]

114 As further evidence of parallel trends, the Pearson correlation coefficient between the local citation shares at the High Court and Court of Appeal levels from 1900 to 2017 is 0.8096. The correlation coefficient measures the strength of the association between two variables. The maximum possible value of 1 suggests the variables are perfectly positively correlated: when one increases, the other increases by a perfectly proportionate amount (*eg*, whenever we observe that variable X has increased by one unit, we also observe that variable Y rises by five units). The minimum value of –1 suggests a perfectly negative association. A coefficient of 0 suggests the two are unrelated – observing a higher X tells us nothing about whether to expect a higher, lower, or unchanged Y. However, it should be stressed that correlation does not imply causation.

115 These being the areas covered in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015).

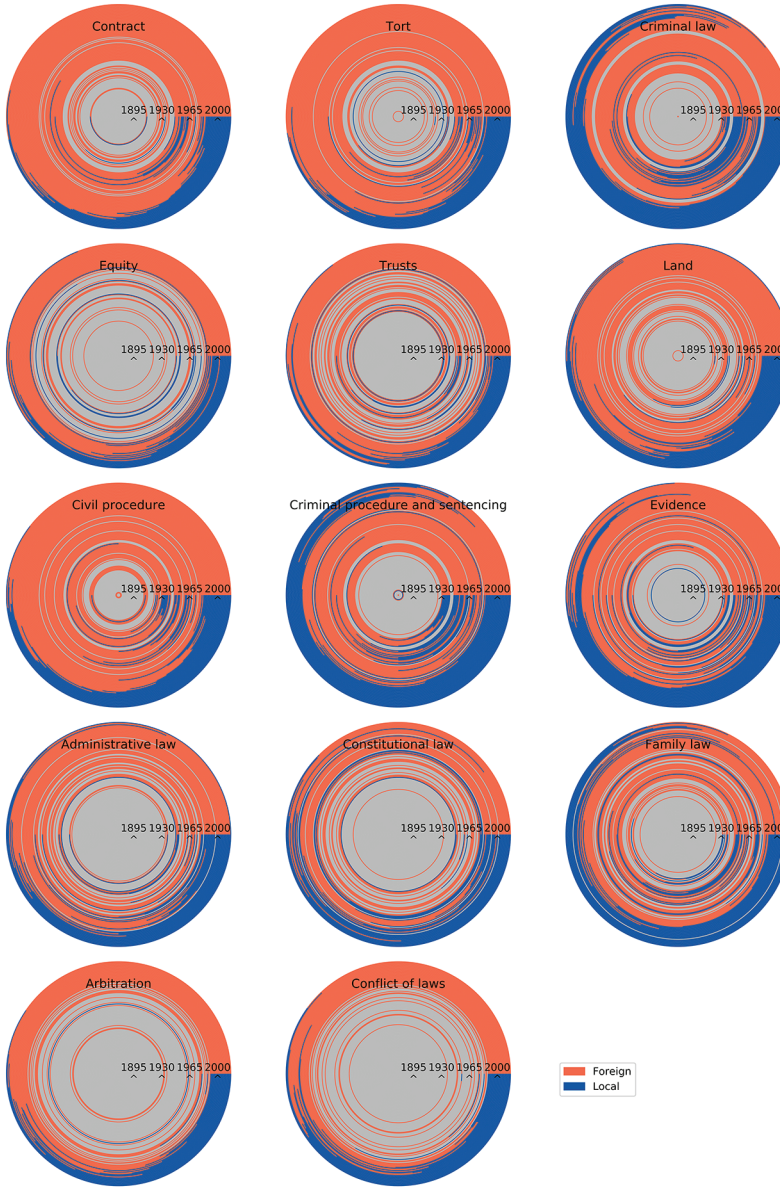

Figure 6: Proportion of foreign to local citations in Singapore reported judgments by legal area, 1877–2017

67 The diagrams above offer a more granular view of Singapore law's development. At a glance, we can tell which topics have been and/or

still are, loosely speaking, more foreign or local in precedential nature.[116] Many of these findings are intuitive. For example, criminal law and family law are more "domestic", in the sense that they have developed more in accord with Singapore's differing social and cultural context, and therefore departed from English law. On the other hand, contract law and equity are arguably more commercial and thus more homogeneous areas of law, which have developed not necessarily in accord with the social and cultural context peculiar to criminal law and family law. This may reflect how commercial law tends towards harmonisation. While the picture is mixed for other subjects, most of them nonetheless exhibit an increasing proportion of local to foreign citations as well.

68 The extent to which each topic is whited out also makes for fruitful comparison. Whited-out rings here imply either that no judgments in that subject arose that year or that there were no cases cited *at all* by the judgments in that *subject*. For instance, subjects like contract, tort, and criminal law are the least whited out, suggesting that cases in these areas were relatively common even in the early years, and even at that time were more likely to cite precedents. This is perhaps not surprising as these subjects fundamentally impact the lives of people generally. On the other hand, topics like the conflict of laws and arbitration are more whited out because they are, arguably, far more relevant today than in the 1800s. Across all topics, however, we can clearly observe how whited-out rings are generally a thing of the past. Thus, not only do cases in all these topics occur at least once every year, but they also tend to cite at least one precedent.

(c) Exportation of Singapore Law

69 Just as we are concerned about the development of Singapore law internally, so too should we be concerned about the exportation of Singapore law. Building on an earlier study, we in this section discuss how Singapore law has been exported beyond our shores.[117] Just as that study omitted Malaysian cases,[118] we shall too, for ease of comparison. The reason provided then for not including Malaysian cases was because Singapore cases had been reported in the Malayan Law Journal ("MLJ") for a long time. As such, there was concern that there might be under-counting of foreign cases citing Singapore cases bearing an MLJ citation. While we have gone some way towards solving that problem by going

116 Note that cases with more than one subject matter were represented in the tree ring diagrams for *all* the topics they touched on.

117 See *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 16.

118 See *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) at p 834.

through the several such cases manually, we have, nonetheless, for the primary reason of consistency, excluded citations of Singapore cases by the Malaysian courts.

70 With this caveat in mind, the first graph below shows the number of Singapore cases cited per year in selected foreign jurisdictions from 1965 to 2019.

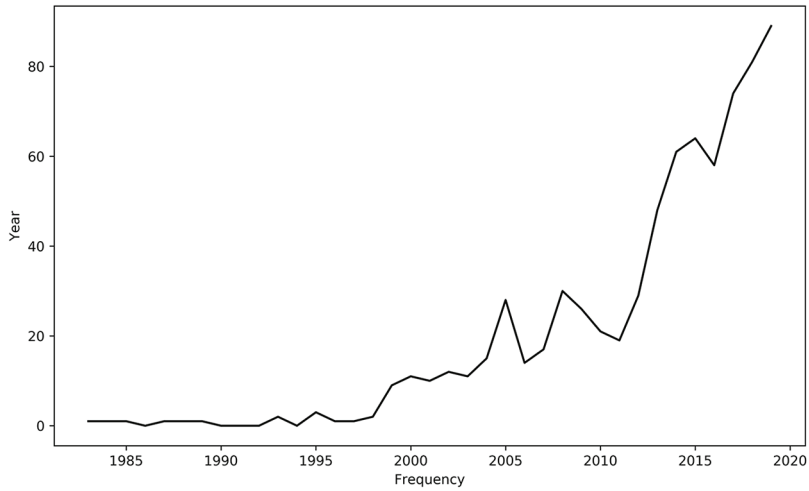

Figure 7: Total number of citations by foreign courts (excluding Malaysian courts)

71 As can be seen, there has been a generally upward trend in the citation of Singapore cases by foreign jurisdictions. Indeed, there was a particularly sharp increase after 2010, and the accelerated pace of foreign citations to local cases continues to the present date.

72 While Figure 7 shows the rate at which foreign courts are citing Singapore cases, it does not tell us anything about the *nature* of the Singapore cases being cited. To do this, Figure 8 below investigates the year in which the Singapore cases cited by foreign cases *were decided*.

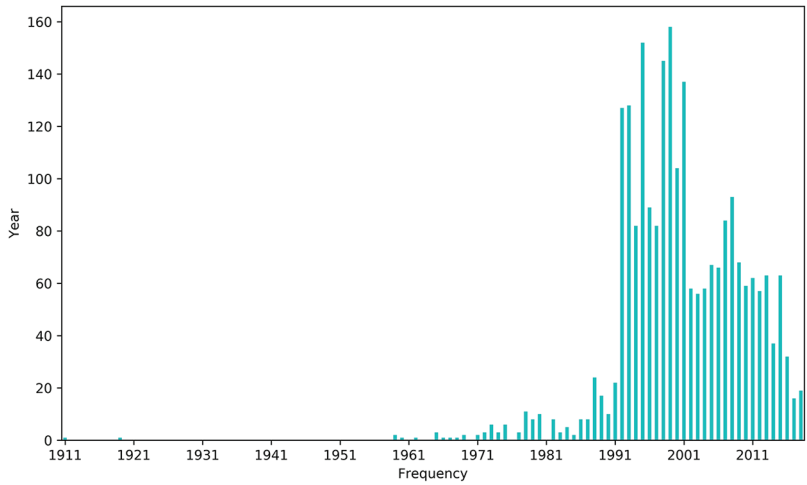

Figure 8: Decision year of Singapore cases cited by foreign cases

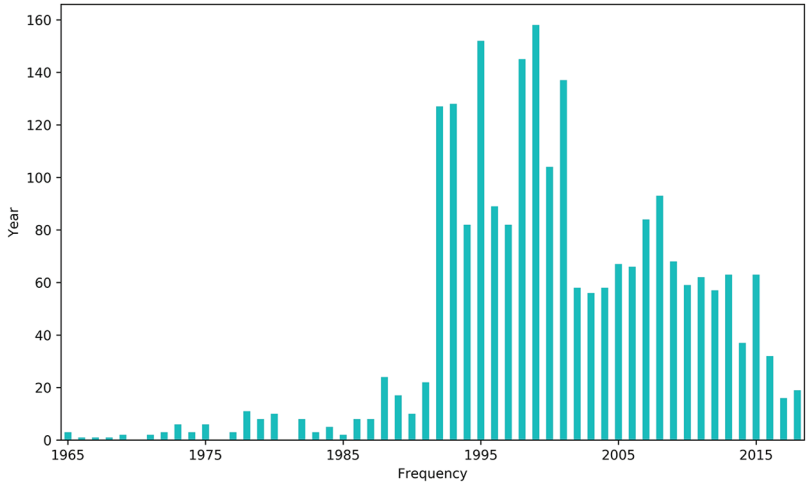

Figure 9: Decision year of Singapore cases cited by foreign cases (1965 onwards)

73 As mentioned, the two preceding graphs chart the year of decision of Singapore cases cited by foreign cases. As the first graph contains all Singapore cases so cited, the data stretched back to 1911; that is to say, there was a 1911 decision that was cited by a foreign case. However, it may be more meaningful to condense the data to the Singapore cases decided from 1965 onwards, which is reflected in the second graph. It may be observed that the vast majority of Singapore cases cited by foreign cases were decided after 1990. While there are Singapore cases decided

before 1990 cited by foreign cases, this makes up for less than half of the total number of Singapore cases so cited.

74 Which then are the foreign jurisdictions citing Singapore cases, and what is the trend of their doing so?

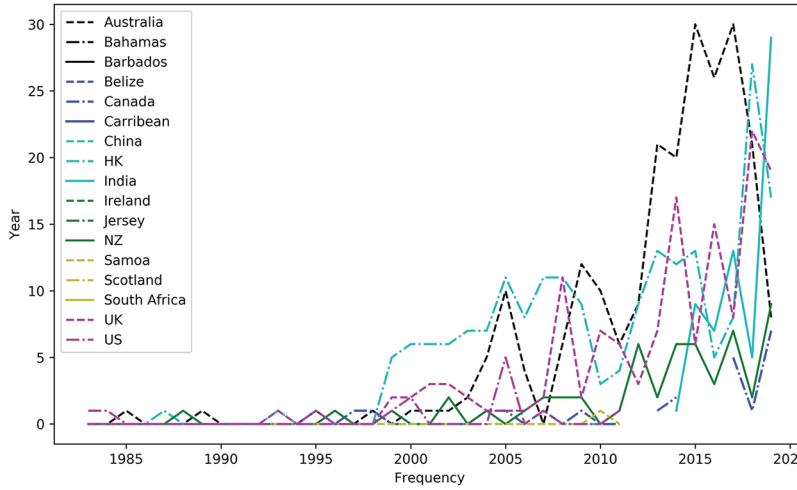

Figure 10: Number of citations of Singapore cases by selected foreign jurisdictions

75 Figure 10 shows the citations of Singapore cases by selected foreign jurisdictions. If we were to group these jurisdictions to make for a less cluttered graph, we can see the following.

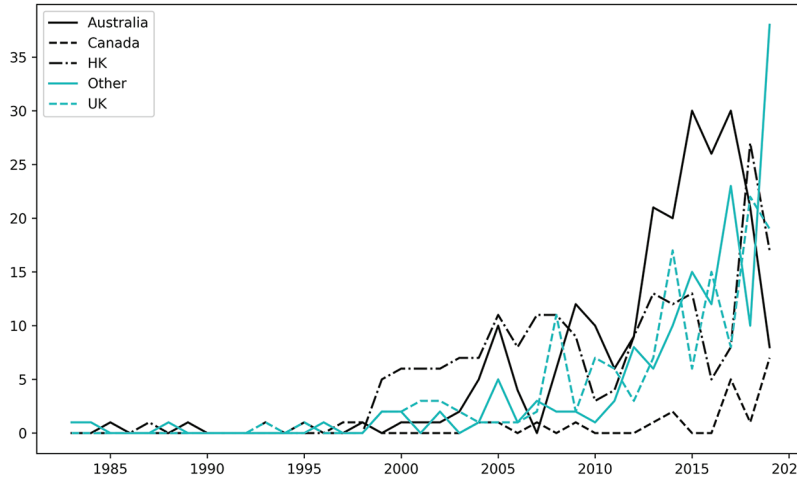

Figure 11: Number of citations of Singapore cases by selected foreign jurisdictions (grouped)

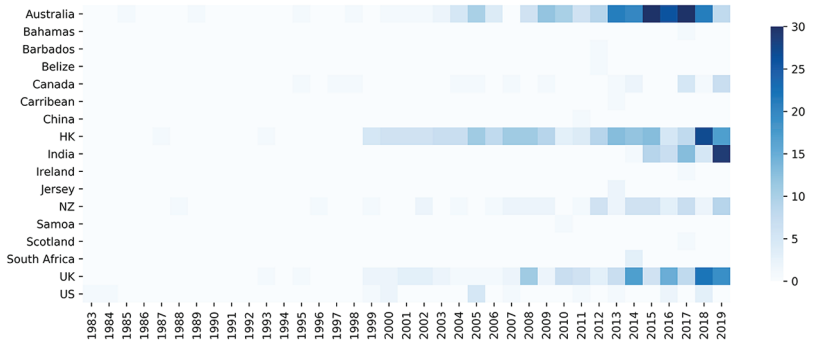

Figure 12: Heat map of number of citations of Singapore cases by selected foreign jurisdictions

76 In order to better visualise the otherwise complicated graph in Figure 10, it may be helpful to break down the data in the form of a heat map in Figure 12. In this representation, the darker the square, the higher the number of citations. Viewed across the years, we can observe the trend of citations. Thus, Australian courts appear to have cited Singapore cases increasingly over the years, as have Hong Kong and UK courts. However, this is more significantly the case for Australian courts. Similarly, we can observe a growing number of Indian cases citing Singapore cases, even if this trend started only in 2014 or so.

(3) Some qualitative reflections

(a) Development of Singapore law

77 As already alluded to above, constraints of space entail that the content of this particular part of the article is presented in a very condensed form. It serves as a kind of "appetiser" for the reader whilst simultaneously presenting a snapshot of the length, breadth as well as depth of local developments that have taken place during a fairly short space of time. However, it is, by its very nature, also somewhat subjective, although we have sought to remedy (or at least mitigate the effect of) any defects in this particular regard by as wide a coverage of topics as possible. It has nevertheless not been possible to cover every area of the law as such and, indeed, in certain areas (for example, the criminal law[119] and family law),[120] the developments have been primarily *statutory*

119 On criminal law generally in Singapore, see S Chandra Mohan, *Understanding Criminal Law* (LexisNexis, 2nd Ed, 2017) and Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 3rd Ed, 2018).

120 As to which, see generally Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 3rd Ed, 2018); Debbie Ong, *International Issues in Family Law in*

(cont'd on the next page)

in nature (and have, by their very nature, had less international impact whilst nevertheless being fundamental to the Singapore legal system as a whole). With these caveats in mind, let us turn to what is, in effect, a whistle-stop tour of some of the more recent as well as significant developments in Singapore law. However, before proceeding to do so, we note that these *qualitative* reflections *complement* (at a more *specific* level) the *broader empirical* analysis in the preceding part of this article.

78 Perhaps the more significant developments have taken place in the general law of obligations. That this is so is not, of course, due to any intentional plan of action, so to speak, by the Singapore courts. In the first place, courts have no control over the cases that come before them. It just happened to be the case that many cases that were placed before the Singapore courts (in particular, the Singapore Court of Appeal, which is the apex court) happened to raise significant legal issues that had to be decided as an integral part of the case concerned and/or where (on rarer occasions) the court delivered observations that were not definitive or conclusive but which arose out of the case concerned and which merited some preliminary views. It should also be noted that – as has been observed by the first-named author in an extra-judicial context (and in the context of the Singapore law of contract)[121] – the approach adopted by the Singapore courts is one where the court concerned ought (especially in novel of developing areas of the law) to search across all common law jurisdictions for the *principles* that are most appropriate to the jurisdiction concerned from the perspectives of both logic *and* local conditions.[122] Put simply, the Singapore courts engage in *the search for* ***principle***.[123] Looked at in this light, comparative analysis is of the first importance.[124]

79 It is also important to emphasise the fact that *there ought not to be autochthonous or indigenous development merely for its own sake (for that would be mere (and wholly undesirable) parochialism)*. Thus, as we will

---

Singapore (Academy Publishing, 2015); as well as Chen Siyuan, "Family Law: Local in Law, Guided by Judicial Discretion" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 9.

121 However, the same approach should apply to other areas of Singapore law as well.

122 See Andrew Phang, "Recent Developments in Singapore Contract Law – The Search for Principle" (2011) 28 JCL 1.

123 Borrowing (albeit in a somewhat different context) the title of Lord Goff of Chieveley's justly famous Maccabaean Lecture in Jurisprudence: see Robert Goff, "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169 (reprinted in *The Search for Principle – Essays in Honour of Lord Goff of Chieveley* (William Swadling & Gareth Jones gen eds) (Oxford University Press, 1999) at pp 313–329).

124 See Andrew Phang, "The Law of Remedies – The Importance of Comparative and Integrated Analysis" (2016) 28 SAcLJ 746 at 751–765 and (in relation to the specific context of remedies) at 748–751.

see below, although there are clear departures of Singapore law from the laws of other countries, this is not done for the sake of being different. In a sense, this is simply a consequence of a maturing legal system that has now the time to develop its own laws. Indeed, the fact that due regard is paid to developments in other jurisdictions is emblematic of an approach that eschews parochialism and which endorses as well as embraces (suitable) developments in other jurisdictions instead. Moreover, even as laws diverge from each other, jurisdictions must now confront the problem of the lack of homogeneity in commercial laws.[125]

(i) Law of torts

80 Turning, then, to a sampling of cases in various areas of Singapore law, we commence with the law of ***tort***[126] – in particular, the law relating to the establishment of a duty of care in negligence. Whilst the law in the aforementioned area is relatively uncontroversial where physical harm has ensued,[127] the same cannot be said where the damage that ensues relates to pure economic loss. Indeed, it was only in 1963 that the House of Lords extended the law of negligence to cover *negligent misstatements* which caused pure economic loss.[128] However, the issue of the scope of the duty of care in relation to pure economic loss continued to remain problematic. This is not surprising simply because of the very nature of pure economic loss itself which, if left unchecked from a legal point of view, could lead to unprincipled and, indeed, uncontrolled legal liability. What is of the first importance in so far as the present article is concerned is that the Singapore Court of Appeal decided, in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[129] ("*Spandeck*"). to endorse the two-stage test set out by Lord Wilberforce in the House of Lords decision in *Anns v Merton London Borough Council*[130] ("*Anns*"). Indeed, the court in *Spandeck* had endorsed a legal test that had been *rejected and overruled* by a House of Lords decision handed down

125 See Sundaresh Menon, "Concluding Plenary" at ASEAN Integration Through Law (25 August 2013).

126 The leading Singapore work in this field is Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016). And see, more specifically, Goh Yihan, "Law of Torts: Dominant Role of Land Scarcity" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 11.

127 And see the seminal House of Lords decision of *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562.

128 In the (also) seminal House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

129 [2007] 4 SLR(R) 100.

130 [1978] AC 728.

subsequent to *Anns* in *Murphy v Brentwood District Council*.[131] As the first-named author noted in an article published in 2017:[132]

> It has been 10 years since *Spandeck* was decided and it has now come to be seen as a (perhaps the) landmark decision in the Singapore law of torts, generating a veritable plethora of legal literature. It has been consistently followed and has, to a large extent, succeeded in its goal of providing a universal framework with which to examine the existence of a duty of care in all situations.

81 This is not, however, to state that *Spandeck* is wholly without difficulties and/or potential for further development. Indeed, as noted in the quotation just set out, the legal literature on the case alone is enormous.[133] What is germane for the purposes of the present article is the fact that *Spandeck* represents not only a *departure* from the prevailing English law but also an intentional decision to *endorse* (based on logic and principle) English law that had in fact been *departed from*.

82 And in a related vein, the Singapore Court of Appeal, in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd*,[134] decided to cut the Gordian knot[135] and untie the Singapore law relating to occupiers' liability from the apron strings of the (anachronistic) English law.[136] In particular, it followed the lead previously taken by the High Court of Australia in *Australian Safeway Stores Pty Ltd v Zaluzna*[137] and subsumed the law on occupiers' liability under the general law of negligence. Again, constraints of space preclude any discussion in any detail.[138] It will suffice for the purposes of the present article to note that there was not only a departure from the existing English common law but also an *openness* to

131 [1991] 1 AC 398.

132 See Andrew Phang, "Pure Economic Loss and Reproductive Negligence – The Singapore Experience" (2017) 24 Torts LJ 95 at 107–108.

133 See, *eg*, Kumaralingam Amirthalingam, "Lord Atkin and the Philosopher's Stone: The Search for a Universal Test for Duty" [2007] Sing JLS 350; Kow Keng Wee, "*Spandeck Engineering Pte Ltd v DSTA*: A Casenote" *The MINDEF Legal Counsel* (October 2007) at p 8; A L R Joseph, "Establishing a Duty of Care: Singapore's Single, Two-Stage Test" (2008) 20 SAcLJ 251; Cheng Lim Saw, "Is *Anns* Alive and Well in Singapore?" (2008) 16 Tort L Rev 5; David Tan, "The Salient Features of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" [2010] Sing JLS 459; Colin Liew, "Keeping it Spick and *Spandeck*: A Singaporean Approach to the Duty of Care" (2012) 20 Torts LJ 1; as well as David Tan & Goh Yihan, "The Promise of Universality – The *Spandeck* Formulation Half a Decade on" (2013) 25 SAcLJ 510.

134 [2013] 3 SLR 284.

135 *ACB v Thomson Medical Pte Ltd* [2013] 3 SLR 284 at [52].

136 *ACB v Thomson Medical Pte Ltd* [2013] 3 SLR 284 at [75].

137 (1987) 162 CLR 479.

138 For further analysis, see Low Kee Yang, "Occupiers' Liability after *See Toh*: Change, Uncertainty and Complexity" [2013] Sing JLS 457 and Kumaralingam Amirthalingam, "Occupier's Liability and Negligence: Of Gordian Knots and Apron Strings" (2013) 25 SAcLJ 580.

(as well as endorsement of) developments in *other jurisdictions* (in this case, Australia).

83 Another decision of the Singapore Court of Appeal that turned on a novel point of law is *ACB v Thomson Medical Pte Ltd*.[139] In this case, the plaintiff and her husband had sought to conceive a child through *in vitro* fertilisation ("IVF"). The plaintiff underwent IVF treatment and delivered a daughter. After the birth of the daughter, it was discovered that a terrible mistake had occurred: the plaintiff's ovum had been fertilised using the sperm from an unknown third party instead of sperm from the plaintiff's husband. The plaintiff sued the defendants, the private hospital which had provided the IVF treatment and other related parties, in tort and contract and sought damages for, *inter alia*, the expenses she would incur in raising her daughter ("upkeep costs"). The defendants conceded liability but argued that the plaintiff should not be permitted to recover upkeep costs as the child was a blessing and that there was something distasteful (if not morally offensive) in treating the birth of a normal, healthy child as a matter for compensation. The reasoning of the court was very detailed and complex. Whilst the court did not award upkeep costs to the plaintiff, it awarded the plaintiff damages for loss of "genetic affinity".[140] This was quite a novel approach. Not surprisingly, therefore, this particular decision has witnessed comment in a wide variety of international journals[141] and has even been reported beyond the shores of Singapore.[142]

139 [2017] 1 SLR 918.

140 For a more detailed summary, see Andrew Phang, "Pure Economic Loss and Reproductive Negligence – The Singapore Experience" (2017) 24 Torts LJ 95 at 113–124.

141 See, *eg*, Kumaralingam Amirthalingam "Reproductive Negligence: Unwanted Child or Unwanted Parenthood?" (2018) 134 LQR 15; Tom Foxton, "Inaccurate Conception: *ACB v Thomson Medical*" (2018) 81 MLR 337; Jordan English & Mohammud Jaamae Hafeez-Baig, "Recovery of Upkeep Costs, Claims for Loss of Autonomy and Loss of Genetic Affinity: Fertile Ground for Development?" (2018) 41 Melbourne Univ L Rev 1360; and Craig Purshouse, "Autonomy, Affinity, and the Assessment of Damages: *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20 and *Shaw v Kovak* [2017] EWCA Civ 1028" (2017) 26 Med L Rev 675. Reference may also be made to Tsachi Keren–Paz, "Gendered Injustice in Compensating Injury to Autonomy in English and Singaporean Negligence Law" (2018) *Feminist Legal Studies* (Published online on 22 November 2018) and Tracey Tomlinson, "Negligent Disruption of Genetic Planning: Carving out a New Tort Theory to Address Novel Questions of Liability in an Era of Reproductive Innovation" (2019) 87 Fordham L Rev Online 113.

142 In, for example, [2018] Med LR 55.

(ii) Law of contract

84 Turning to the law of ***contract***, we find a number of instances in which Singapore law has developed independently.[143] In the law of ***common mistake***, for example, the Singapore Court of Appeal, in *Chwee Kin Keong v DigilandMall.com Pte Ltd*,[144] endorsed not only the doctrine of mistake at common law but also the doctrine of mistake in equity. Although this particular case concerned, strictly speaking, the doctrine of unilateral (as opposed to common) mistake, the *general reasoning* applied *with equal force* to the doctrine of *common* mistake.[145] This particular legal position can be contrasted with that which currently obtains in the English context, where the English Court of Appeal, in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*,[146] endorsed *only* the doctrine of common mistake at *common law*, choosing *not* to recognise the doctrine of common mistake in equity (which had hitherto been endorsed by the (also) English Court of Appeal decision of *Solle v Butcher*).[147]

---

143 And see generally *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) as well as Andrew Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law & Business, 2012). And see, more specifically, Peh Aik Hin, "Contract Law: A Rationalisation Process towards Coherence and Fairness" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 10.

144 [2005] 1 SLR(R) 502. See also the recent Singapore Court of Appeal decision of *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110, where *Chwee Kin Keong v DigilandMall.com Pte Ltd* was cited in the context of the doctrine of unilateral mistake in equity.

145 In fact, a leading contract textbook has stated that the Court of Appeal in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 "hinted" that it might not follow *Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2003] QB 679 in abolishing common mistake in equity: see *Chitty on Contracts* (Hugh G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at p 641, fn 236; see also Lee Pey Woan, "Unilateral Mistake in Common Law and Equity – *Solle v Butcher* Reinstated" (2006) 22 JCL 81 at 88. Though *cf* the Singapore High Court decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [130], *per* V K Rajah JC (as he then was). Reference may also be made to Andrew Phang, "Contract Formation and Mistake in Cyberspace – The Singapore Experience" (2005) 17 SAcLJ 361 and, by the same author, "Contract Formation and Mistake in Cyberspace" (2005) 21 JCL 197; as well as Yeo Tiong Min, "Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity" [2004] Sing JLS 227 and Kwek Mean Luck, "Law, Fairness and Economics – Unilateral Mistake in *Digilandmall*" (2005) 17 SAcLJ 411.

146 [2003] QB 679.

147 [1950] 1 KB 671. Reference may also be made to Andrew Phang & Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 SAcLJ 170 at 187–192.

85 Indeed, the Court of Appeal had the opportunity in *Quoine Pte Ltd v B2C2 Ltd*,[148] a case on appeal from the Singapore International Commercial Court,[149] to chart a *new course* in the application of common mistake (and unilateral mistake) in a situation involving algorithmic trading. In this case, the parties entered into several transactions based on algorithms created by Quoine Pte Ltd ("Quoine") on the latter's platform. Unfortunately, due to Quoine failing to update the settings of its platform, the algorithms executed a series of trades at predetermined but extremely advantageous terms in favour of B2C2 Ltd. Quoine sought to rescind the resulting contracts, arguing that the doctrines of, *inter alia*, common mistake and unilateral mistake should come to its aid. In a majority judgment, the Court of Appeal held that these doctrines will not avoid the affected contracts. In so far as common mistake is concerned, there was simply no shared mistaken assumption as to the price of the transactions. As for unilateral mistake, the court held the relevant question to be whether, when programming the algorithm, the programmer was doing so with actual or constructive knowledge of the fact that the relevant offer would only ever be accepted by a party operating under a mistake and whether the programmer was acting to take advantage of such a mistake. Since the programmer did not have the requisite actual or constructive knowledge, unilateral mistake could not assist Quoine. The broader point from this case, though, is to illustrate the Singapore courts' responsiveness towards the adaptation of traditional doctrines to novel situations brought about by advances in technology.

86 In another important area of contract law, that concerning ***"terms implied in fact"***, the Singapore Court of Appeal, in both *Foo Jong Peng v Phua Kiah Mai*[150] as well as *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*,[151] declined to follow the approach proffered by Lord Hoffmann in the Privy Council decision of *Attorney General of Belize v Belize Telecom Ltd*[152] ("*Belize*") in so far as he sought to recast implication as

148 [2020] SGCA(I) 2.

149 See *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17.

150 [2012] 4 SLR 1267.

151 [2013] 4 SLR 193.

152 [2009] 1 WLR 1988 (on appeal from the Court of Appeal of Belize). Reference may also be made to a recent piece by Lord Hoffmann, "Language and Lawyers" (2018) 134 LQR 553. Indeed, the literature itself on *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 ("*Belize*") is copious: see, *eg*, Kelvin Low & Kelry Loi, "The Many 'Tests' for Terms Implied in Fact" (2009) 125 LQR 561; Paul S Davies, "Recent Developments in the Law of Implied Terms" [2010] LMCLQ 140; John McCaughran, "Implied Terms: The Journey of the Man on the Clapham Omnibus" (2011) 70(3) Camb LJ 607; John W Carter, "The Implication of Contractual Terms: Problems with *Belize Telecom*" (2013) 27(3) CLQ 3; Wayne Courtney & John W Carter, "Implied Terms: What *Is* the Role of Construction?" (2014) 31 JCL 151; Richard Hooley, "Implied Terms after *Belize Telecom*" (2014)

(cont'd on the next page)

interpretation (relegating the "business efficacy" and "officious bystander" tests to a less than central role in the context of "terms implied in fact"). Once again, constraints of space preclude a detailed discussion and the reader is referred to the relevant literature cited above,[153] although it may be noted that the UK Supreme Court has, in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*,[154] seemingly disagreed with Lord Hoffmann's view in *Belize* (citing, *inter alia*, both the aforementioned Singapore Court of Appeal decisions). As in the case of common mistake, the Singapore Court of Appeal actually chose to endorse the position under then *existing* English law. Indeed, this was also the approach adopted in respect of the topic of *remoteness of damage* – to which our attention very briefly turns.

87 The law relating to ***remoteness of damage*** in contract law was – for the longest time –well settled and was based on the test laid down by Alderson B in the celebrated English decision of *Hadley v Baxendale*.[155] Indeed, that statement of principle was endorsed by the Singapore Court of Appeal itself as late as 2008 in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*[156] ("*Robertson Quay*"). However, in the House of Lords decision in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*[157] (which was handed down a mere four months after the decision in *Robertson Quay* had been handed down), Lord Hoffmann introduced an apparently *new* legal criterion to the existing law, *viz*, whether or not the defendant concerned had *assumed responsibility* for the loss which had occurred as a result of its breach. *However*, after considering the relevant arguments both for as well as against such an approach in some detail, the Singapore Court of Appeal, in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*,[158] rejected this approach and endorsed the seminal principle laid down in *Hadley* instead. This approach was

73(2) Camb LJ 315; Andrew Phang, "The Challenge of Principled Gap-Filling: A Study of Implied Terms in a Comparative Context" [2014] JBL 263; David McLauchlan, "Construction and Implication: In Defence of *Belize Telecom*" [2014] LMCLQ 203; and John W Carter & Wayne Courtney, "*Belize Telecom*: A Reply to Professor McLauchlan" [2015] LMCLQ 245. An excellent summary of *Belize* and subsequent developments is to be found in Richard Austen-Banker, *Implied Terms in English Contract Law* (Elgar Commercial Law and Practice, 2nd Ed, 2017) at paras 7.54–7.69.

153 At n 152 above. Reference may also be made to Andrew Phang & Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 SAcLJ 170 at 179–187.

154 [2016] AC 742.

155 (1854) 9 Exch 341.

156 [2008] 2 SLR(R) 623.

157 [2009] 1 AC 61.

158 [2011] 1 SLR 150. And see the comment by Goh Yihan, "Explaining Contractual Remoteness in Singapore" [2011] JBL 282. See further Senthil Sabapathy, "*The Achilleas*: Struggling to Stay Afloat" [2013] Sing JLS 384.

confirmed by the same court in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd*.[159]

88 The decision whether or not to follow what was, in substance, a sea change in the English law occurred recently in the sphere of ***contractual illegality***. In particular, a majority[160] of the UK Supreme Court had, in *Patel v Mirza*,[161] adopted an entirely new approach towards contractual illegality (albeit only in relation to common law illegality) by adopting a "range of factors approach" whereas the minority adopted a rule-based approach. The former approach confers *discretion* on the court to decide whether or not to permit recovery *notwithstanding* an illegal contract

159 [2013] 2 SLR 363.

160 Although Lord Neuberger of Abbotsbury is considered to be in the majority, we would respectfully suggest that his views straddle *both* the majority *and* the minority views. However, reasons of space once again preclude a detailed discussion and the reader is referred to Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract – A Comparative Perspective" in *Essays in Memory of Jill Poole – Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Rob Merkin & James Devenney gen eds) (Informa Law, 2018) ch 12 at pp 208–212.

161 [2017] AC 467. This decision is obviously a seminal one in the English law and, not surprisingly, therefore, has been the subject of much academic commentary: see, *eg*, James Goudkamp, "The End of an Era? Illegality in Private Law in the Supreme Court" (2017) 133 LQR 14; James C Fisher, "The Latest Word on Illegality" [2016] LMCLQ 483; Nicholas Strauss, "The Diminishing Power of the Defendant: Illegality after *Patel v Mirza*" [2016] RLR 145; Emer Murphy, "The *Ex Turpi Causa* Defence in Claims against Professionals" (2016) 32 Professional Negligence 241; Andrew Burrows, "A New Dawn for the Law of Illegality" (2 June 2017) <https://ssrn.com/abstract=2979425> (accessed 5 June 2017) (see now *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg gen eds) (Hart Publishing, 2018) ch 2); Lord Grabiner QC, Master of Clare College, "*Patel v Mirza* [2016] UKSC 42 – Illegality and Restitution Explained by the Supreme Court", The Second Distinguished Law Lecture, Queen's College, Cambridge (19 October 2016) <https://www.law.cam.ac.uk/press/events/2016/10/queens-distinguished-lecture-law-patel-v-mirza-illegality-and-restitution> (accessed 19 April 2017); Michael P Furmston, "Recent Developments in Illegal Contracts" in *Essays in Memory of Jill Poole – Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Rob Merkin & James Devenney gen eds) (Informa Law, 2018) ch 11; and Graham Virgo, "The Illegality Revolution" in *Revolution and Evolution in Private Law* (Sarah Worthington, Andrew Robertson & Graham Virgo gen eds) (Hart Publishing, 2018) as well as (by the same author), "Jones Day Professorship of Commercial Law Lecture 2019 – 'The State of Illegality'" (2019) 31 SAcLJ 747. Indeed, Goudkamp went so far as to observe that "*Patel v Mirza* … is a pivotal moment in English private law": James Goudkamp, "The End of an Era? Illegality in Private Law in the Supreme Court" (2017) 133 LQR 14 at 14. See also the very recent collection of essays in *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg gen eds) (Hart Publishing, 2018) as well as Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract – A Comparative Perspective" in *Essays in Memory of Jill Poole – Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Rob Merkin & James Devenney gen eds) (Informa Law, 2018) ch 12.

whilst the latter approach does *not* permit recovery pursuant to the illegal contract, but may permit recovery under established exceptions. It suffices for the purposes of the present article to note that the Singapore position is *quite different*. The latest decision is that of the Singapore Court of Appeal in *Ochroid Trading Ltd v Chua Siok Lui*[162] ("*Ochroid Trading*"). This particular decision in fact affirmed the principles laid down in the court's earlier decision in *Ting Siew May v Boon Lay Choo*[163] ("*Ting Siew May*"). The court in *Ochroid Trading* summarised the law relating to illegality and public policy as follows:[164]

> 64 The court will first ascertain whether ***the contract*** is ***prohibited*** either pursuant to a *statute* (expressly or impliedly) and/or *an established head of common law public policy*. This is the ***first*** *stage* of the inquiry and, if the contract is indeed thus prohibited, there can be ***no recovery*** *pursuant to the (illegal) contract*. This is subject to the *caveat* that, in the general common law category of contracts which are not unlawful *per se* but entered into with the object of committing an illegal act (and ***only*** *in this category*), the proportionality principle laid down in *Ting Siew May* ought to be applied to determine if the contract is enforceable.
>
> 65 *However*, that may not be the end to the matter as a party who has transferred benefits pursuant to the illegal contract *might* be able to recover those benefits on a ***restitutionary*** *basis* (*as opposed to* recovery of *full contractual damages*). This is the ***second*** stage of the inquiry. We saw that there were at least *three* possible legal avenues for such recovery – all of which have been summarised above (at [43]–[60]).
>
> 66 The present legal position in Singapore is thus relatively clear – at least in so far as *the legal approach* is concerned. Admittedly, the process of *application* of the relevant legal principles may be problematic but that is an inevitable part of adjudication and is common to all areas of the law. Having said that, and as alluded to above, there are issues which still need to be clarified, particularly the principles governing ***an independent claim in unjust enrichment*** for the recovery of benefits conferred under an illegal contract as well as the ***limits*** of such a claim.
>
> [emphasis in original]

89 As can be seen, the court in *Ochroid Trading* did *not* follow the approach of the majority in *Patel v Mirza*. It held that the "range of factors" test adopted by the majority in *Patel v Mirza* was *not* part of Singapore law, and the law on the question of whether the contract concerned was prohibited – which arose at the first stage of the inquiry – remained

---

162 [2018] 1 SLR 363. See also Alexander Loke, "Disagreement over the Illegality Defence" (2018) 35 JCL 169 and Graham Virgo, "Jones Day Professorship of Commercial Law Lecture 2019 – 'The State of Illegality'" (2019) 31 SAcLJ 747.

163 [2014] 3 SLR 609.

164 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [64]–[66].

unchanged.[165] In arriving at this holding, the court was of the view that the approach of the majority in *Patel v Mirza* would introduce further uncertainty into the analytical process by superimposing an additional inquiry based on the "range of factors" test across the board to all situations of common law illegality. Such an approach was undesirable as it created an unprincipled distinction between the principles which applied to statutory illegality and those which governed common law illegality (the court in *Patel v Mirza* having laid down the "range of factors" test for situations of common law illegality *only*). The "range of factors" test was also unnecessary to achieve remedial justice in the Singapore context given the flexibility of the principles laid down in *Ting Siew May*, which would also allow restitutionary recovery at the second stage[166] of the inquiry.[167] However, the court in *Ochroid Trading* did go *further* inasmuch as it proceeded to hold that even where the restitutionary recovery of benefits conferred under an illegal contract would, in principle, also be available where the ordinary requirements of an independent claim in unjust enrichment were satisfied, a (separate) defence of illegality and public policy *in unjust enrichment* might nevertheless bar such recovery where *the principle of stultification* (taking reference from a seminal article by Peter Birks),[168] which principle requires the court to determine whether allowing the claim would *undermine the fundamental policy* that rendered the underlying contract void and unenforceable in the first place.[169] In each case, the court must carefully examine the relevant considerations and the policy, be it statutory or the common law, which rendered the contract illegal before considering if that same policy would be undermined or stultified if the claim in unjust enrichment was allowed.[170]

90 It should be further noted that divergences were not only from English law. In the Singapore Court of Appeal decision of *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd*,[171] it was held that there ought to be *a general rule* (indeed, save in the most egregious breaches of contract) that ***punitive damages cannot*** *be awarded for*

165 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [64], reproduced immediately above.

166 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [65], reproduced above.

167 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [125].

168 See Peter Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 *Theoretical Inquiries in Law* 155.

169 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [143], [145]–[148], [158] and [159]. And on observations on other independent causes of action and the scope of the concept of stultification, see [161]–[168].

170 The court in *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [128], [129] and [139] also clarified the different senses of "reliance" in relation to restitutionary recovery.

171 [2017] 2 SLR 129.

breach of ***contract***. In arriving at this holding, the court considered the arguments both for as well as against the award of such damages and held that it would ***not*** follow the Supreme Court of Canada decision of *Whiten v Pilot Insurance Co*.[172]

91 And in the recent Singapore Court of Appeal decision of *BOM v BOK*,[173] the court held that the broader doctrine of ***unconscionability*** embodied in the High Court of Australia decision of *Commercial Bank of Australia Ltd v Amadio*[174] was *not* part of Singapore law and endorsed, instead, a narrow doctrine of unconscionability.[175]

92 Both Singapore decisions referred to briefly in the preceding two paragraphs demonstrate not only the comparative approach adopted by the Singapore courts towards the development of Singapore law but also the fact that decisions from other jurisdictions will nevertheless not be adopted automatically.

93 That having been said, there have been rare occasions when the Singapore courts have developed a uniquely local set of jurisprudence and principles. This is particularly evident in the law relating to ***discharge by breach of contract***, which is an area of the law of contract that is in a state of flux in the Commonwealth – in the main, because the two tests which can be employed in ascertaining whether or not the innocent party can elect to treat itself as discharged from the contract as a result of a breach by the other party of one or more of the terms of the contract concerned are not only quite different but could also (depending on the precise facts and circumstances of a particular case) give rise to different results.[176] Indeed, as the first- and second-named authors sought to demonstrate in a joint essay, there are *historical* reasons that resulted in two *conceptually* different approaches as embodied in the two tests just mentioned.[177] The Singapore Court of Appeal, in *RDC Concrete Pte Ltd v*

---

172 (2002) 209 DLR (4th) 257. Reference may also be made to Andrew Phang & Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 SAcLJ 170 at 231–235.

173 [2019] 1 SLR 349.

174 (1983) 151 CLR 447.

175 See further Andrew Phang & Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 SAcLJ 170 at 216–231.

176 These are, respectively, the "condition-warranty approach" (as elaborated upon the oft-cited English Court of Appeal decision of *Bentsen v Taylor, Sons & Co* [1893] 2 QB 274 at 281, *per* Bowen LJ (as he then was)) and the "*Hongkong Fir* approach" (which draws its terminology from the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66, *per* Diplock LJ (as he then was)).

177 See Andrew Phang & Goh Yihan, "Encounters with History, Theory and Doctrine: Some Reflections on Discharge by Breach of Contract" in *Contract in Commercial*

(cont'd on the next page)

Sato Kogyo (S) Pte Ltd,[178] sought to formulate an approach that would, as far as is possible, integrate both the aforementioned tests. A summary of the legal position is to be found in diagrammatic form in that case[179] and in *non*-diagrammatic form in the subsequent (also) Singapore Court of Appeal decision in *Man Financial (S) Pte Ltd v Wong Bark Chuan David*.[180] Although this is an important area of contract law, owing to the constraints of space in the context of the present article, the reader is referred to the relevant legal literature.[181]

(iii) Law of intellectual property

94 Whilst we have spent some time and space on developments in the two main areas in the general law of obligations, we note that there have been significant developments in other areas of Singapore law as well. One of these areas concerns ***intellectual property law***. Indeed, the *local* development of the law in this area has been so substantial that *a casebook on Singapore intellectual property law* was recently published.[182] Not surprisingly, several very significant judgments have been handed down by the Singapore Court of Appeal in recent years. It will not be possible to even list all of them and therefore a briefest of samples will have to suffice.

95 The first is *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc*[183] ("*Staywell*"), an important Singapore decision in ***trademark law***. It covered many issues – including the issue relating to the assessment of the *similarity* of marks[184] (which the Singapore Court of Appeal held should be done mark-for-mark without

Law (Simone Degeling, James Edelman & James Goudkamp gen eds) (Thomson Reuters, 2016) ch 12.

178 [2007] 4 SLR(R) 413.

179 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [113].

180 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2008] 1 SLR(R) 663 at [153]–[158].

181 See, in particular, Andrew Phang & Goh Yihan, "Encounters with History, Theory and Doctrine: Some Reflections on Discharge by Breach of Contract" in *Contract in Commercial Law* (Simone Degeling, James Edelman & James Goudkamp gen eds) (Thomson Reuters, 2016) ch 12 – as well as the legal literature cited therein. Reference may also be made to Andrew Phang & Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 SAcLJ 170 at 205–216.

182 See David Llewellyn, Ng Hui Ming & Nicole Oh Xuan Yuan, *Cases, Materials and Commentary on Singapore Intellectual Property Law* (Academy Publishing, 2018). In so far as *textbooks* are concerned, see generally Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell/Thomson Reuters, 2nd Ed, 2014) and Susanna H S Leong, *Intellectual Property Law of Singapore* (Academy Publishing, 2013).

183 [2014] 1 SLR 911.

184 Pursuant to s 8(2) of the Trade Marks Act (Cap 332, 2005 Rev Ed), which principles are also applicable in the context of s 27(2) of the same Act.

consideration of external matter). The step-by-step approach differed from the global appreciation approach adopted in both the UK and European Union (as the latter did permit external matter to be taken into account). The court was also of the view that the three aspects of similarity (*viz*, visual, aural and conceptual similarity) were not to be the subject of formulaic consideration but were, instead, to be applied as signposts towards answering the question as to whether or not the marks concerned as a whole were similar.

96 In so far as the issue as to whether or not there had been *confusion*, the court in *Staywell* pointed out that there was a difference between the approach to the confusion inquiry in opposition proceedings and in infringement proceedings. In the former, the court would have regard to the full range of actual and notional uses of the marks concerned, whereas in the latter, the court would compare the full range of notional fair uses of the incumbent mark against the actual use to which the allegedly infringing mark had been put.

97 What is of particularly notable significance with regard to *Staywell* is Lord Neuberger's observation[185] in the UK Supreme Court decision of *Starbucks (HK) Ltd v British Sky Broadcasting Group plc*[186] ("*Starbucks*") that *Staywell* was "an impressively wide-ranging judgment".[187] That court was in fact concerned with the specific issue as to whether a foreign trader which does not conduct any business activity within the jurisdiction can maintain an action in *passing off* within that jurisdiction and referred to the views expressed in *Staywell* (which was prepared to recognise pre-trading activity which unequivocally evinced the trader's intention to enter that market and which was sufficient to generate an attractive force that would bring in custom when the business in that jurisdiction eventually materialised). It was, however, unnecessary to decide whether to endorse the approach adopted in *Staywell* as it did not arise in *Starbucks* itself.[188]

98 *Société des Produits Nestlé SA v Petra Foods Ltd*[189] is an important Singapore Court of Appeal decision in relation to *shape marks* as well as *the requirement of distinctiveness* for trade mark protection. In this last-mentioned regard, the court held that the applicant would have, in order to show that the mark concerned had acquired distinctiveness, to prove

185 With whom Lord Sumption, Lord Carnwath, Lord Toulson and Lord Hodge agreed.
186 [2015] 1 WLR 2628.
187 *Starbucks (HK) Ltd v British Sky Broadcasting Group plc* [2015] 1 WLR 2628 at [45].
188 *Starbucks (HK) Ltd v British Sky Broadcasting Group plc* [2015] 1 WLR 2628 at [45], [46] and (especially) [66]. See also the Singapore Court of Appeal decision of *Singsung Pte Ltd v LG 26 Electronics Pte Ltd* [2016] 4 SLR 86 at [68].
189 [2017] 1 SLR 35.

that consumers had come to rely on the sign as a guarantee of origin and that it was insufficient to show that there was a tendency for consumers to associate the shape concerned with a particular trader because they had become familiar with that shape and had recognised it. The court also elaborated upon the test for ascertaining whether a shape mark was caught by the "technical result" prohibition in s 7(3)(*b*) of the Trade Marks Act, which test comprised two stages.[190]

99 And, in the Singapore Court of Appeal decision of *Warner-Lambert Co LLC v Novartis (Singapore) Pte Ltd*,[191] the court laid down important principles in relation to the *amendment* of ***patent*** specifications.[192] In particular, the court held that s 84(3) of the Patents Act[193] limited the court's power to allow an amendment of a patent's specification by precluding amendments which resulted in the disclosure of additional matter or the extension of the scope of protection conferred by the patent. The amendments sought had to also satisfy the baseline criteria set out in s 25(5) of that same Act. The court further held that the power to allow an amendment of patent specifications was a discretionary one such that even if the amendment did not disclose additional matter or extend the protection conferred by the patent, the court retained the general discretion to refuse an amendment application. In exercising its discretion, the court would take into account a number of factors.[194] The court also made some observations with regard to the protection of subsequent medical uses under the Patents Act. In particular, it observed that there is a broad public interest in providing incentives and patent protection over new therapeutic uses of known substances. This objective could be achieved through a wider and purposive interpretation of s 14(7) of the Patents Act. If so, then the court observed that there would be no need to resort to Swiss-style claims (which are claims to a process

190 *Société des Produits Nestlé SA v Petra Foods Ltd* [2017] 1 SLR 35 at [81]. The first stage involves identifying the essential characteristics of the shape mark concerned. The second stage entails determining whether each and every one of the essential characteristics performed a technical function.

191 [2017] 2 SLR 707.

192 For a recent (and important) decision of the Singapore Court of Appeal in relation to the original jurisdiction of the Singapore High Court to hear applications for the revocation of a patent, see *Sunseap Group Pte Ltd v Sun Electric Pte Ltd* [2019] 1 SLR 645.

193 Cap 221, 2005 Rev Ed.

194 These were (a) whether the patentee had disclosed all the relevant information with regard to the amendments; (b) whether the amendments were permitted in accordance with the statutory requirements; (c) whether the patentee delayed in seeking the amendments (and, if so, whether there were reasonable grounds for such delay); (d) whether the patentee had sought to obtain an unfair advantage from the patent; and (e) whether the conduct of the patentee discouraged the amendment of the patent.

of manufacture of a medicament for the purpose of the new therapeutic use of the known compound) – although the court also pointed out that it saw no reason to disagree with the validity of such claims at this stage.

100 The third significant branch of intellectual property law (relating to ***copyright***) has also witnessed important developments. One such development may be found in the Singapore Court of Appeal decision of *Global Yellow Pages Ltd v Promedia Directories Pte Ltd*.[195] This is an important decision that deals with the copyright status of online (in that case, telephone) directories. Whilst the basic principle that for copyright to subsist in a literary work, there had to be authorial creation that was causally connected with the engagement of the human intellect is clear, this decision illustrates the difficulties that lie in the *application* of that principle; from a legal standpoint, the significance of this decision is that it expressed a preference for the "creativity" approach over the "sweat of the brow" approach in so far as the aforementioned basic principle was concerned. The decision also dealt with the issue of fair dealing. The entire decision repays close reading. Indeed, the headnote alone is seven printed pages long and contains 19 holdings.

(iv) Law of real property

101 Turning now to the sphere of ***land law***,[196] the case which probably has had the most significant international impact is that of the Singapore Court of Appeal in *Xpress Print Pte Ltd v Monocrafts Pte Ltd*[197] ("*Xpress Print*"), where the court (having regard to both principle and logic as well as the specific local circumstances of Singapore) differed from English law (which had extended an immediate right of support to land only in its natural state (and a right of support of a building only, if at all, after a 20-year gestation period)). Yong Pung How CJ, delivering the judgment of the court, observed thus:[198]

> [W]e are of the view that the proposition that a landowner may excavate his land with impunity, sending his neighbour's building and everything in it crashing to the ground, is a proposition inimical to a society which respects each citizen's property rights, and we cannot assent to it. No doubt the trial judge felt constrained by [the various authorities, including the leading English case[199] which has been rejected], but this court is entitled to depart from those

195 [2017] 2 SLR 185.

196 See generally Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 4th Ed, 2019). See also Melissa Mak, "Land Law: Establishing Principles in Discrete Aspects" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 13.

197 [2000] 2 SLR(R) 614.

198 *Xpress Print Pte Ltd v Monocrafts Pte Ltd* [2000] 2 SLR(R) 614 at [37].

199 *Viz*, *Dalton v Angus* (1881) 6 App Cas 740.

> cases, and therefore does not suffer from any such impediment. In the event, we are of the opinion that the current state of affairs cannot be allowed to persist.

102 This decision has been described as "justice at its intellectual and practical best – dealing with unique local circumstances in modern context, yet simultaneously possessing a substantive applicability beyond the shores of Singapore".[200] Indeed, in this last-mentioned regard, one the *leading English* textbooks on land law has, in fact, devoted an entire paragraph to *Xpress Print*.[201] We pause to note at this juncture that there are in fact a number of extremely significant decisions on Singapore land law. However, as they centre in the main on distinctly local statutory provisions, they may not have had as wide ranging an impact on the international scene.[202] Indeed, this is probably *a fortiori* the case in relation to criminal law and procedure,[203] evidence law[204] as well as public law.

(v) Law of equity and trusts

103 In the law of equity and trusts, one significant issue decided by the Singapore courts concerns whether ***an institutional constructive trust*** would arise over *bribes received by a fiduciary in breach of his duty*.[205]

---

200 See Andrew Phang & V K Rajah, "The Legal Legacy of Chief Justice Yong Pung How" *Inter Se* Commemorative Issue 2005, pp 10–13 at p 11.

201 A point noted by Andrew Phang & V K Rajah, "The Legal Legacy of Chief Justice Yong Pung How" *Inter Se Commemorative Issue* (May–June 2006) at p 11 (citing Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 4th Ed, 2005) at para 1.63; see now Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at para 1.2.30 (the decision is also referred to at paras 1.2.26, 1.2.29, 1.5.57 and 3.3.25)). See also Tang Hang Wu, "The Right of Lateral Support of Buildings from the Adjoining Land" [2002] Conv 237.

202 See, once again, the illuminating essay by Melissa Mak, "Land Law: Establishing Principles in Discrete Aspects" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 13 which sets out the impact of significant Singapore decisions in the local context. Perhaps the same may be said of family law (see also n 120 above).

203 See also n 119 above. Though *cf* Mohamed Faizal Mohamed Abdul Kadir, "Criminal Law: It's a Not-So-Autochthonous-World After All? – Striking the Right Balance between Local Circumstances and Increasingly-Convergent International Norms" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 8.

204 See also Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017); Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell/Thomson Reuters, 2nd Ed, 2018); as well as Chen Siyuan, "Evidence and Criminal Procedure: Gradual Developments towards Clarity in a Maze of Statutory Enactments" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 7.

205 See Alvin W L See, Yip Man & Goh Yihan, *Property and Trust Law: Singapore* (Wolters Kluwer, 2018) at p 400, which also furnishes a general account of the law

(cont'd on the next page)

In this regard, the Singapore courts have consistently taken the view that such a constructive trust would arise. This is informed by the general attitude of Singapore law that a strongly deterrent approach is warranted in respect of breach of fiduciary duty.[206] Thus, in the Singapore High Court case of *Sumitomo Bank Ltd v Kartika Ratna Thahir*[207] ("*Sumitomo Bank*"), Lai Kew Chai J disagreed with the old English case of *Lister & Co v Stubbs*[208] and rejected the view that a fiduciary who accepted bribes was not a constructive trustee and was only liable to account. Lai J held that a Singapore court exercising its equitable jurisdiction must reflect the mores and sense of justice of the society that it served; for that reason, he confined *Lister & Co v Stubbs* to its facts and declined to follow it.[209] In *Attorney-General for Hong Kong v Charles Warwick Reid*,[210] the Privy Council, hearing an appeal from the Court of Appeal of New Zealand, held that it was "impressed" with the decision in *Sumitomo Bank*.[211] Drawing on the strength of *Sumitomo Bank*, amongst other authorities, the Privy Council likewise declined to follow *Lister & Co v Stubbs*. In this example, the Singapore case was probably only considered by the Privy Council because it presented a novel (yet principled) point of view, distinct from the prevailing English law. What was more noteworthy about this example is the fact that *Sumitomo Bank* was decided in 1992, before the passage of the AELA and at a time when Singapore law was probably more tied to English law than it is today.

104 Several years later, the English courts finally had occasion to decide this issue. In *FHR European Ventures LLP v Cedar Capital Partners LLC*[212] ("*FHR*"), the UK Supreme Court held that a constructive trust arises over bribes and secret commissions received by fiduciary agents in breach of fiduciary duty. Notably, the *FHR* decision was arrived at by reason of Lord Neuberger's change of his views as previously held in

---

of equity and trusts in Singapore (reference in this latter regard may also be made to Yip Man, "Trusts and Equity: Dreaming and Building a Singapore Equitable Jurisdiction" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 12). In this particular instance, see the decision of *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312.

206 See Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 890–892.

207 [1992] 3 SLR(R) 638.

208 (1890) 45 Ch D 1.

209 *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1992] 3 SLR(R) 638 at [241]–[243].

210 [1993] 3 WLR 1143.

211 *Attorney-General for Hong Kong v Charles Warwick Reid* [1993] 3 WLR 1143 at 1152. See also "Privy Council Adopts S'pore Judge's Ruling on Corruption" *The Straits Times* (18 November 1993) at p 3.

212 [2014] 3 WLR 535.

Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd[213] ("*Sinclair Investments*"). In *Sinclair Investments*, he laid down a controversial "two-category" test that required, in essence, some form of proprietary connection between the unauthorised benefits and the principal's assets (or assets that should properly belong to the principal) to justify proprietary relief.[214] The *Sinclair Investments* categories ruled out proprietary relief in cases involving bribes and secret commissions as these unauthorised benefits are usually paid by third parties to the errant fiduciaries.

105 Yet another issue that the Singapore courts have carved out a unique path in the law of equity and trusts concerns ***the common intention constructive trust***. In *Chan Yuen Lan v See Fong Mun*[215] ("*Chen Yuen Lan*"), the Court of Appeal declined to follow the prevailing English approach as laid down by the majority in *Stack v Dowden*.[216] Instead, it agreed with Lord Neuberger's minority view in *Stack v Dowden*. The court observed that the English developments were necessitated by the "changing economic and social conditions in England", which included rises in both property prices and the number of unmarried cohabitees.[217] Further, the court thought that the diminished application of the presumption of advancement under English law was also a driver for the *Stack v Dowden*/*Jones v Kernott* developments, as the retention of the resulting trust alone would only put more emphasis on direct contributions to purchase price which the English courts considered to be restrictive.[218] The court also considered that there were good reasons for not introducing the *Stack v Dowden* framework into Singapore law.[219] First, the *Stack v Dowden* analysis is productive of litigation because of the subjectivity and uncertainty inherent in the approach. The uncertainty would also lead to a risk of higher and disproportionate litigation costs. Second, the court pointed out that the domestic/commercial distinction, which determines

213 [2011] 3 WLR 1153.

214 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 at [88]. Essentially, a constructive trust would only arise over an asset received by a fiduciary in breach of fiduciary duty where the asset is or has been the beneficial property of the beneficiary (category 1) or it was acquired by taking an advantage of an opportunity or a right that properly belonged the beneficiary (category 2). The decision received mixed reviews: see, *eg*, David Hayton, "Proprietary Liability for Secret Profits" (2011) 127 LQR 487; Roy Goode, "Proprietary Liability for Secret Profits: A Reply" (2011) 127 LQR 493; and Graham Virgo, "Profits Obtained in Breach of Fiduciary Duty: Personal and Proprietary Claim?" (2011) 70(3) Camb LJ 502.

215 [2014] 3 SLR 1048.

216 [2007] 2 AC 432.

217 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [127].

218 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [132].

219 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [152].

the applicable tool of analysis, would not be straightforward to apply in some disputes.

106 According to the Court of Appeal in *Chan Yuen Lan*, Lord Neuberger's approach[220] would avoid the rigid domestic/commercial classification. The court also agreed with Lord Neuberger's rejection of judicial imputation of intentions at the stage of quantification of interests,[221] as this would have the effect of preventing courts from employing the doctrine of common intentions constructive trust to achieve "palm tree" justice. Further, Lord Neuberger's approach allows a consistent approach to be applied in both domestic and commercial contexts: the common intention constructive trust would apply in both instances to rebut the presumption of resulting trust. The court then proceeded to lay down a six-step analytical framework for determining property ownership[222] where there have been unequal contributions to the purchase price:[223]

> (a) Is there sufficient evidence of the parties' respective financial contributions to the purchase price of the property? If the answer is 'yes', it will be presumed that the parties hold the beneficial interest in the property in proportion to their respective contributions to the purchase price (*ie*, the presumption of resulting trust arises). If the answer is 'no', it will be presumed that the parties hold the beneficial interest in the same manner as that in which the legal interest is held.
>
> (b) Regardless of whether the answer to (a) is 'yes' or 'no', is there sufficient evidence of an express or an inferred common intention that the parties should hold the beneficial interest in the property in a proportion which is different from that set out in (a)? If the answer is 'yes', the parties will hold the beneficial interest in accordance with that common intention instead, and not in the manner set out in (a). In this regard, the court may not impute a common intention to the parties where one did not in fact exist.
>
> (c) If the answer to both (a) and (b) is 'no', the parties will hold the beneficial interest in the property in the same manner as the manner in which they hold the legal interest.
>
> (d) If the answer to (a) is 'yes' but the answer to (b) is 'no', is there nevertheless sufficient evidence that the party who paid a larger part of the purchase price of the property ('X') intended to benefit the other party ('Y')

220 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [153]–[158].

221 See also *Chia Kum Fatt Rolfston v Lim Lay Choo* [1993] 3 SLR 833 in which the Singapore High Court held that parties' interests under a common intention constructive trust are commensurate with their financial contributions, rejecting non-financial contributions as being "difficult to quantify" – this could be read as rejecting an exercise of imputation of intention.

222 See statutory presumptions prescribed in s 53 of the Land Titles Act (Cap 157, 2004 Rev Ed) concerning the manner of holding in the absence of express stipulation.

223 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [160].

with the entire amount which he or she paid? If the answer is 'yes', then X would be considered to have made a gift to Y of that larger sum and Y will be entitled to the entire beneficial interest in the property.

(e) If the answer to (d) is 'no', does the presumption of advancement nevertheless operate to rebut the presumption of resulting trust in (a)? If the answer is 'yes', then: (i) there will be no resulting trust on the facts where the property is registered in Y's sole name (*ie*, Y will be entitled to the property absolutely); and (ii) the parties will hold the beneficial interest in the property jointly where the property is registered in their joint names. If the answer is 'no', the parties will hold the beneficial interest in the property in proportion to their respective contributions to the purchase price.

(f) Notwithstanding the situation at the time the property was acquired, is there sufficient and compelling evidence of a subsequent express or inferred common intention that the parties should hold the beneficial interest in a proportion which is different from that in which the beneficial interest was held at the time of acquisition of the property? If the answer is 'yes', the parties will hold the beneficial interest in accordance with the subsequent altered proportion. If the answer is 'no', the parties will hold the beneficial interest in one of the modes set out at (b)–(e) above, depending on which is applicable.

(vi) Public law

107 In so far, however, as ***public law*** is concerned, there is, necessarily, a universal or universalisable element in most of the decisions. Hence, for example, in the Singapore Court of Appeal decision of *Chng Suan Tze v Minister for Home Affairs*,[224] the following important observations were made by the court:[225]

> In our view, *the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power*. If therefore the Executive in exercising its discretion under an Act of Parliament has exceeded the four corners which Parliament has decided it can exercise its discretion, such an exercise of discretion would be *ultra vires* the Act and a court of law must be able to hold it to be so. … It must be clear therefore that the boundaries of the decision maker's jurisdiction as conferred by an Act of Parliament is a question solely for the courts to decide. … Further, it is … no answer to refer to accountability to Parliament as an alternative safeguard. … [emphasis added]

108 This principle set out in the preceding paragraph has been applied in many subsequent decisions[226] and is perhaps the most important illustration inasmuch as it is a bedrock principle. One of those subsequent decisions is the important Singapore Court of Appeal

224 [1988] 2 SLR(R) 525.
225 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].
226 See, *eg*, *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [2].

decision of *Tan Seet Eng v Attorney-General*.[227] In this case, the appellant was detained without trial pursuant to the Criminal Law (Temporary Provisions) Act[228] ("CLTPA") on 16 September 2013. Later, on 20 October 2013, the Minister for Home Affairs served an order under the CLTPA to detain the appellant for a period of 12 months, which was then extended on 2 October 2014 for yet another year. The minister considered that the detention order was necessary by reason of the fact that the appellant was a threat to public peace, safety and good order. The minister stated, *inter alia*, that the appellant had directed match-fixing agents and runners from Singapore to assist in match-fixing between 2009 and 2013 and also financed match-fixing activities in other countries. The appellant applied for an order for review of detention, contending that his detention was illegal, irrational and procedurally improper. This application was dismissed by the High Court.

109 The Court of Appeal allowed the appellant's appeal. The court began its judgment by stating unequivocally that the "rule of law is the bedrock on which our society was founded and on which it has thrived".[229] Indeed, the court explained that one of the core ideas behind the rule of law is that the power of the State as vested in the various arms of government is subject to legal limits.[230] Based on the general premise, the court held that the scope of review would be limited to the traditional principles governing judicial review, namely, illegality, irrationality and procedural impropriety. In addition, the court had the power to inquire into whether "high policy" decisions were made within the scope of the relevant legal power and arrived at in a legal manner. In this regard, there was therefore no question of deference to the Executive's discretion in such an inquiry. Moreover, the question of the scope of power conferred on the Executive by the Legislature was one for the Judiciary.

110 Applying these principles, the court held that the CLTPA was originally enacted to deal with real and physical threats within Singapore. This was later expanded to cover a wider range of offences, but were underpinned by, among other things, the justification that the offences pertained to harm to public order within Singapore. In the present case, the court, in allowing the appeal, held that even though the CLTPA's scope was extended to cover match-fixing syndicates, there nevertheless needed to be a connection between the activities undertaken by match-fixing syndicates and the unifying characteristics underpinning the criminal activities before the minister could invoke the CLTPA to detain

227 [2016] 1 SLR 779.
228 Cap 67, 2000 Rev Ed.
229 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [1].
230 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [1].

a person. Thus, while the detention order stated that the appellant led a match-fixing syndicate aimed at fixing matches in other countries, the order was not sufficiently clear on why those activities were serious enough to fall within the scope of the CLTPA. The significance of this case, above all, demonstrated the division of power across the three branches of government in Singapore, and the important responsibility the courts have in safeguarding the proper limits of any powers exercised by the other branches of government.

111 In so far as other areas of public law are concerned, it suffices for present purposes to refer the reader to a comprehensive treatise,[231] a recent collection of essays,[232] as well as an excellent essay[233] for balanced accounts as well as perceptive analyses in what is (by its very nature) a potentially controversial area of law.

(vii) Shipping law

112 The sphere of ***shipping law*** is another where Singapore decisions have had an international impact.[234] Perhaps the most significant decision since the turn of the century is that of the Singapore Court of Appeal in *APL Co Pte Ltd v Voss Peer*,[235] where (amidst a hitherto unclear legal position worldwide coupled with, not surprisingly, divided academic opinion as well) the court held that a carrier must only deliver cargo not only against a negotiable bill of lading but *also* (and this was the crucial legal point) with regard to a *non*-negotiable bill of lading as well (the latter being a bill of lading stating that goods are to be delivered to a named consignee and which is sometimes referred to as a *straight* bill of lading).

113 The court gave several related reasons for arriving at this conclusion (*viz*, that in respect of a straight bill of lading, the carrier could only deliver the cargo concerned against its presentation): first, that, the court, on the basis of contract law, should give effect to the intention of the parties; second, that requiring presentation of such a bill of lading before

231 See Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012).

232 See *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo gen ed) (Routledge, 2017).

233 See Cheah Wui Ling, "Administrative and Constitutional Law – An Expository Approach to Public Law Adjudication: The Singapore Judiciary's Evolving Jurisprudence" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 5.

234 See generally Tan Lee Meng, *Law on Carriage of Goods by Sea* (Academy Publishing, 3rd Ed, 2018) and Toh Kian Sing, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2017).

235 [2002] 2 SLR(R) 1119. Not surprisingly, perhaps, this decision was also reported in *Lloyd's Law Reports* (see [2002] 2 Lloyd's Rep 707).

delivery promoted commercial certainty (and, correspondingly, avoided confusion) as carriers or their agents did not need to decide whether a bill of lading was a straight or an order (transferable) bill of lading; third, that to decide otherwise would result in an overly restrictive approach for an unpaid seller who wished to use a non-negotiable (that is, straight) bill of lading whilst retaining his security for payment; and, finally, requiring presentation of the straight bill of lading avoided the undesirable consequences of the shipper's rights of suit under the original contract of carriage surviving any transfer of the document to the consignee.[236] As Steven Chong J (himself a leading shipping and commercial lawyer before joining the Singapore Bench) pertinently observed, this decision "has been celebrated by practitioners and commentators alike" and that "[i]mpressively, it has been picked up and applied in other leading common law jurisdictions".[237]

(viii) Conflict of laws

114 There have been a number of significant decisions in the ***conflict of laws***, particularly over the last decade or so.[238] One of the most recent is that of the Singapore Court of Appeal in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*[239] ("*Vinmar*"). This case is of special significance as it marks one of the rare occasions when the Court of Appeal has *departed from* one of its previous decisions. It concerned the situation where there was an application for a stay of proceedings based on an exclusive jurisdiction clause. The court held that the overarching

---

236 See generally *APL Co Pte Ltd v Voss Peer* [2002] 2 SLR(R) 1119 at [50], [51], [52] and [54].

237 See Steven Chong, "A Maritime Journey" in *A Judge for the Ages – Essays in Honour of Justice Chao Hick Tin* (Andrew Phang Boon Leong & Goh Yihan gen eds) (Academy Publishing, 2017) at p 498. The learned author refers, in particular, to the reliance on this particular decision by both the English Court of Appeal as well as the House of Lords in *JI MacWilliams Co Inc v Mediterranean Shipping Co SA* [2004] 2 WLR 283 (CA); [2005] 2 AC 423 (HL). He also points out (at p 499) that the decision:

> … was cited positively by [the] Federal Court of Australia [in *Beluga Shipping GmbH & Co v Headway Shipping Ltd* [2008] FCA 1791 at [16]], all three levels of the Hong Kong courts, including the Hong Kong Court of Final Appeal [in *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* [2006] 4 HKC 1 (Hong Kong Court of First Instance) at [93]; [2007] 4 HKC 239 (Hong Kong Court of Appeal) at [53]; [2009] 5 HKC 160 (Hong Kong Court of Final Appeal) at [38]], and by the Federal Court of British Columbia [in *Asian Exports International Ltd v Zim Israel* [2004] FCJ No 264].

238 See, *eg*, *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 (in relation to the doctrine of *forum non conveniens* as well as the choice of law rules governing equitable and tortious claims). See also Nicholas Poon, "Conflict of Laws" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 15.

239 [2018] 2 SLR 1271.

test remained that of whether there is "strong cause" to refuse a stay. In determining whether this test is satisfied, the factors laid down in the English decision in *The Eleftheria*[240] are relevant considerations, although in applying those factors, the court should bear in mind that factors relating to the relative convenience of litigation in Singapore and abroad have little weight if they were foreseeable at the time of contracting.

115 However, the court held – departing from a hitherto established line of cases that could be traced to its previous decision in *The Jian He*[241] – that the time had come to rule that in determining whether to grant a stay in an exclusive jurisdiction clause application, the merits of the defence were *irrelevant*. Indeed, it observed that the rule in *The Jian He* was inconsistent with the central principle of party autonomy that pervades the law in this field and also generated uncertainty for commercial parties in the business of international trade. Parties under that rule were also led to expend significant costs at the interlocutory stage of proceedings and this had delayed the resolution of disputes. The court also held that abandoning the rule in *The Jian He* would promote coherence in the law by aligning the law governing exclusive jurisdiction clause applications with the position in *forum non conveniens* and International Arbitration Act[242] applications, where the merits of the defence are irrelevant to whether a stay should be granted. Consistency would also be achieved in so far as the treatment of exclusive jurisdiction agreements are concerned. In addition to the aforementioned reasons rooted in principle, policy and coherence, the court in *Vinmar* also pointed out that the doctrinal basis upon which the merits of the defence were incorporated into the framework in *The Eleftheria* (and which was embodied in *The Jian He* line of cases) was flawed.

(ix) Arbitration law

116 There have in fact been a great many significant decisions in ***arbitration law***.[243] This is not surprising in view of the fact that Singapore

240 [1969] 1 Lloyd's Rep 237.

241 [1999] 3 SLR(R) 432.

242 Cap 143A, 2002 Rev Ed.

243 See generally Leslie K H Chew, *Introduction to the Law and Practice of Arbitration in Singapore* (LexisNexis, 2010); *Singapore International Arbitration: Law and Practice* (David Joseph & David Foxton gen eds) (LexisNexis, 2014); Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa Law, 2nd Ed, 2016); as well as Michael Hwang, *Selected Essays on International Arbitration* (Academy Publishing, 2013) and (by the same author) *Selected Essays on Dispute Resolution* (Academy Publishing, 2018). Reference may also be made to Darius Chan & Paul Tan, "International Arbitration: Internationalist Outlook Leading the Development of Local Jurisprudence" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 14.

is a major arbitration centre. Constraints of space preclude an extensive discussion and the reader is referred to a recent article which gives a comprehensive account of recent developments in this area.[244] Just a couple of examples will have to suffice for present purposes although they do not do justice at all to the richly textured Singapore case law in this area that has emerged during recent times.

117 One significant issue is the standard of review that is applicable when the court is hearing an application for a stay of court proceedings in favour of arbitration pursuant to s 6 of the International Arbitration Act. The Singapore High Court decision of *Malini Ventura v Knight Capital Pte Ltd*[245] did not follow the English position and had held, instead, that it was only necessary for the court concerned to be satisfied on a *prima facie* basis that there was a valid arbitration agreement in order for s 6 of the International Arbitration Act to be engaged (instead of the English position which required that the court be satisfied on the usual civil standard of a balance of probabilities that an arbitration agreement existed). This holding was later endorsed by the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd*[246] ("*Tomolugen Holdings*"), where the court affirmed a *prima facie* standard of review, holding that the court concerned should grant a stay in favour of arbitration pursuant to s 6 of the International Arbitration Act if the applicant was able to establish a *prima facie* case that: (a) there was a valid arbitration clause between the parties to the court proceedings; (b) the dispute in the court proceedings (or any part thereof) fell within the scope of the arbitration clause; and (c) the arbitration clause was not null and void, inoperative or incapable of being performed. The court in this case also considered the issue of a non-arbitrable subject matter, which it held would fall within one or more of the three exceptions in s 6(2) of the International Arbitration Act which (in turn) permitted a court to refuse a stay of court proceedings in favour of arbitration. The court then proceeded to hold that the essential criterion of non-arbitrability under s 11 of the International Arbitration Act was whether the subject matter of the dispute was of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration. In this regard, there was a presumption of arbitrability so long as a dispute fell within the scope of an arbitration clause. Such a presumption could, however, be rebutted

244 See generally Justice Judith Prakash, "Recent Developments in Singapore Arbitration Law" (forthcoming in [2020] JMJ) and the decisions discussed therein. Reference may also be made to the recent Singapore Court of Appeal decision of *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 (in relation to the grant of anti-suit injunctions and the power to grant declaratory relief).

245 [2015] 5 SLR 707.

246 [2016] 1 SLR 373.

by showing that (a) Parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or the legislative history of the statute concerned); or (b) it would be contrary to the public policy considerations involved in that type of dispute to permit it to be resolved by arbitration. In *Tomolugen Holdings* itself, the court held that a dispute over minority oppression or unfair prejudice was arbitrable.

118 Another significant issue – especially from the practical perspective – relates to the court's power to grant assistance to arbitration proceedings in general and it power to grant interim measures (in particular, injunctions) pursuant to s 12A of the International Arbitration Act and under s 31 of the Arbitration Act.[247] There are, in fact, a number of important Singapore decisions. However, perhaps the most significant one in recent times is the Singapore Court of Appeal decision of *Bi Xiaoqiong v China Medical Technologies, Inc*.[248] The central issue that arose in this particular case was whether the court had the power to grant a Mareva injunction against a defendant to Singapore proceedings where, at the time the injunction was sought, the plaintiff intended to pursue foreign proceedings against the defendant so that there was a possibility that it would be the foreign proceedings, rather than the Singapore proceedings, that terminated in a judgment. The court held that provided the court otherwise had the power to grant a Mareva injunction against the particular defendant, the plaintiff's intention to pursue foreign proceedings could not negate such a power. This particular decision is an extremely important one as it finally decided which of two hitherto conflicting streams of Singapore cases ought to be followed.

119 In elaborating upon its holding, the court was, *inter alia*, of the view that the broad language used in s 4(10) of the Civil Law Act[249] conferred on the court a wide power to grant mandatory orders or injunctions. The only express requirements imposed by the language of s 4(10) of that Act were that the injunction had to be of an "interlocutory" nature, and that it could be made only in "cases in which it appears to the court to be just or convenient that such order should be made". As a starting point at least, s 4(10) of the Civil Law Act appeared to be broad enough to encompass Mareva injunctions in aid of foreign court proceedings (and indeed any injunction of an interlocutory nature). Further, the word "injunction" as used in s 4(10) of the Civil Law Act did not exclude injunctions in aid of foreign court proceedings. The ordinary meaning of "injunction" did not naturally carry such a specific exclusion.

247 Cap 10, 2002 Rev Ed.
248 [2019] 2 SLR 595.
249 Cap 43, 1999 Rev Ed.

Although there were many different types of injunctions, they could all be described as being a court order commanding or preventing an action. There was nothing inherent in the meaning of "injunction" that required it to be made for the purpose of supporting local proceedings only. The purpose for which an injunction was obtained was not ordinarily an element in the definition or meaning of "injunction".

120 However, the court's power, though broad, was subject to at least two conditions. The first was that the court had *in personam* jurisdiction over the defendant, and the second was that the plaintiff had a reasonable accrued cause of action against the defendant in Singapore. Both these requirements were satisfied on the present facts. There was no further requirement that the cause of action against the defendant had to terminate in a judgment rendered by the court that issued the injunction.

121 The court held that the concept of the court retaining a residual jurisdiction over the underlying cause of action was a sound juridical basis on which to ground the court's power to grant a Mareva injunction even where a stay of that action was sought. It followed from this rationale that there ought *not* to be a further requirement that the cause of action in respect of which the Mareva injunction was granted had to also terminate in a judgment by the court. An order by the court to stay an action or proceedings before it was simply an order given by the court to indicate that the proceedings would be halted for the time being. The Mareva injunction was but a species of interlocutory injunction, and the court's jurisdiction to grant interlocutory injunctions was ancillary to the court's jurisdiction over the proceedings before it. When an action was stayed, the court retained its ancillary jurisdiction over the action. It therefore followed that the court had to retain its jurisdiction to grant a Mareva injunction.

122 The court further held that the fact that a Mareva injunction was expressed to be "in aid of foreign court proceedings" was simply terminology and did not have implications for its juridical basis. The terminology acknowledged the reality that the plaintiff who obtained such a Mareva injunction intended to employ that Mareva injunction to aid in foreign court proceedings. As far as the juridical basis of such a Mareva injunction was concerned, however, it was still premised on, and in support of, proceedings in Singapore. A party's intentions could not have any bearing whatsoever on the extent of the court's powers. Further, a Mareva injunction would not cease to be treated as an interlocutory injunction just because there was a possibility that it might not terminate in a final judgment in Singapore. The Mareva injunction was inherently an interlocutory injunction, and its character was not altered by whether final judgment was or was not obtained here. Its interlocutory nature was derived from the fact that it was sought not as the main or substantive

claim in and of itself, but only as ancillary relief to a separate substantive claim. The respondents' substantive claims against the appellant appeared by endorsement on the writ served on her. Their application for a Mareva injunction was made in support of these claims and, therefore, was unarguably for interlocutory relief.

123 Yet another area that the Singapore courts have charted a new part in this area of law relates to state investment treaties. In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*,[250] the Singapore Court of Appeal allowed a Macanese investor to proceed with expropriation claims against the Lao government under a 1993 People's Republic of China–Laos bilateral investment treaty ("BIT"). The court upheld the arbitral tribunal's decision on jurisdiction and found that the BIT applied to Macau even though Macau was not under Chinese sovereign control when the treaty was entered into.

124 The facts of the case are complex but may be summarised as follows. Sanum Investments Ltd ("Sanum"), a Macanese investor, started to invest in the gaming and hospitality industry in Laos through a Laotian joint venture entity. Later, due to disputes between the Lao government and Sanum, Sanum began arbitration proceedings against the former in 2012 pursuant to Art 8(3) of the BIT. This article provides that "if a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months", the dispute "may be submitted at the request of either party to an ad hoc arbitral tribunal". This BIT had entered into force from 1 June 1993. However, the BIT was silent on whether it applied to Macau. This posed a potential problem because Macau was under the administrative control and sovereignty of Portugal in 1993. It was only after 1999 that China resumed sovereignty over Macau and established it as a Special Administrative Region.

125 As such, the Lao government raised two jurisdictional objections before the arbitral tribunal, which designated Singapore as the seat of arbitration: first, that the BIT did not apply to Macau; and, secondly, that Sanum's claim was not arbitrable as it fell beyond the permitted subject matter under Art 8(3). The tribunal found it had jurisdiction to hear Sanum's claim and rejected the two objections outlined above. The Lao government then appealed to the Singapore High Court under s 10(3) of the International Arbitration Act. In the result, the court held that the tribunal had no jurisdiction. Crucially, the court had depended on two diplomatic communications, both of which post-dated the tribunal's award. These two communications showed that both China and Laos

250 [2016] 5 SLR 536.

considered that the BIT did not apply to Macau. Sanum then appealed against this decision to the Singapore Court of Appeal.

126 The Court of Appeal held that the BIT applied to Macau and that Sanum's claim fell within Art 8(3). The court held that the moving treaty frontier rule under Art 15 of the Vienna Convention on Succession of States in respect of Treaties[251] read with Art 29 of the Vienna Convention on the Law of Treaties[252] establishes a customary international law that presumptively provides for the automatic extension of a treaty to a territory as and when it becomes part of the state. Further, the "critical date" doctrine excludes evidence that is generated past a certain critical date beyond which the parties' actions cannot impact the dispute.

127 The Court of Appeal held specifically that the High Court should not have considered the relevant diplomatic communications because the critical date had set in on 14 August 2012, the date on which Sanum commenced the arbitration. What the parties did after that date should not affect the present dispute as a matter of admissibility or at least be attributed little, if any, weight. The reason for this was to avoid or de-emphasise evidence that was self-serving and intended by the party putting it forward to improve its position in the arbitration. Although states may choose to depart from customary international law prior to entering a treaty, the court did not find evidence of such an intention prior to the conclusion of the BIT. Thus, the court found, on a combination of the Moving Treaty Frontier Rule, as well as the "critical date" doctrine, that the tribunal did indeed have jurisdiction. It then applied a purposive interpretation to Art 8(3) and held that Sanum's claim fell within the prescribed subject matter.

128 Yet another important Singapore Court of Appeal decision in this area is that in *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho*.[253] This decision is significant because it marks the first time the Singapore courts have set aside a final award in an investment arbitration. The award concerned was a partial award on jurisdiction and merits issued on 18 April 2016 by a tribunal appointed by the Permanent Court of Arbitration ("PCA") seated in Singapore. The tribunal, by a majority, found that the Kingdom of Lesotho ("the Kingdom") had breached its obligations under the Protocol on Finance and Investment on the Southern African Development Community[254] and Treaty of Southern African

251 1946 UNTS 3 (23 August 1978; entry into force 6 November 1996).
252 1155 UNTS 331 (23 May 1969; entry into force 27 January 1980).
253 [2019] 1 SLR 263.
254 18 August 2006; entry into force 16 April 2010.

Development Community[255] ("SADC Treaty") by voting improperly with other African nations to dissolve the SADC tribunal. This latter fact is important because the investors had commenced an expropriation claim before the SADC tribunal on the basis that the Kingdom had expropriated their rights under several mining leases. However, with that tribunal dissolved by the above-mentioned vote, the investors were deprived of a forum against the Kingdom. As such, a majority of the tribunal held that the Kingdom was in breach of its obligations to them under the SADC Treaty.

129 On 20 October 2016, the PCA tribunal issued a final award, finding that the Kingdom was to pay costs of the proceedings. The Kingdom thereafter started proceedings to set aside the award. The Singapore High Court set aside the entire award because it held that the PCA tribunal did not have the jurisdiction to hear the investment treaty claim. The Singapore Court of Appeal upheld this decision. It held that the court had the jurisdiction to hear the application to set aside the said award pursuant to Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration,[256] which provided that an award could be set aside if it "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration".[257] The remained the case even if the Kingdom was contesting the very existing of the PCA tribunal's jurisdiction to hear and determine the claim referred to it.

130 The Singapore Court of Appeal further held that in order to qualify as an investment for the purposes of an investment treaty claim, an asset must qualify as an "investment" as defined by the relevant investment treaty and also have a territorial connection with the host state.[258] In this regard, although (contrary to what the Singapore High Court had found) it found that there was an "investment" in the form of the mining leases, the Court of Appeal nevertheless found that investors could only be protected in relation to investments that were made within the host state because states in general did not have extraterritorial jurisdiction and thus could not protect rights outside of their borders[259] – and that, having regard to the facts and circumstances of the present case,

255 32 ILM 116 (17 August 1992; entry into force 30 September 1993).

256 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

257 *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263 at [80].

258 *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263 at [98] and [99].

259 *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263 at [102].

this requirement had not been satisfied.[260] Moreover, the SDAC treaty provided for a precondition to arbitration and the investor's failure to exhaust such remedies meant that the PCA tribunal's jurisdiction was wanting in this regard as well. More broadly, this case demonstrates the Singapore courts' supervisory role over arbitral tribunals which have their seat in Singapore.

(b) Exportation of Singapore Law

131 A few preliminary points were made in the previous study to account for the upward trend in the citation of Singapore cases in foreign courts.[261] It was said that the enactment of the AELA may partly explain the sharp increase in foreign citations of Singapore cases after 1996. It was suggested then that the AELA may have encouraged the growth of a local jurisprudence distinct from English law, which may have provided another point of view which foreign courts found to be of interest. If Singapore law had continued to be largely similar to English law, then foreign courts might simply cite English law rather than Singapore law.

132 If this is correct, then we must here try to explain the even further growth after 2010. Just as the AELA led to the growth of a distinctive Singapore law, so too did the concerted efforts to promote Singapore law in the 2010s lead to the spread of Singapore law. One example is the establishment of the Singapore International Commercial Court ("SICC) in 2015, following a planning period that had begun in 2013. The SICC, comprising international judges drawn from major common law and civilian jurisdictions, increase the exposure of foreign courts to Singapore decisions. While more studies would need to be done to verify the causal connection, it is plausible that such efforts to internationalise Singapore law may have contributed to the growing awareness of Singapore law and, with that, the increase in the citations of Singapore cases by foreign courts. In a similar vein, it might be said that it is encouraging that Singapore cases are now *increasingly* being cited in leading jurisdictions. This much is true for Australia and English courts which, as the data shows above, have started to cite more and more Singapore cases.

260 *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263 at [112].

261 *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 16.

V. Concluding thoughts

A. Andrew Phang's views

133 As alluded to at the outset of the present article, I represent the older generation. It is difficult to believe that so much time has flown by. It seems like just yesterday when I was a fresh graduate eagerly (and even passionately) embarking on an academic career. It sounds like a cliché, but it is all so very true (and rings true to me even today). My only ambition then was to be as good a legal researcher and a law teacher as I could. It was a career in which I felt a real calling. It is an experiential matter which is difficult to capture in mere words, save to say that it not only felt right but also felt as if I had been born to do it (whether or not it benefitted the recipients of my efforts!). This was certainly the case for legal research. I was always interested in the law and loved writing about it (right from my first year as a student in law school). Teaching displayed less objective evidence. I never won a teaching award, but there is one thing I was always sure about – whether they realised it or not, I cared for my students not merely as receptacles to be filled with legal knowledge (although that is, I must concede, a not unimportant function of a law lecturer, second, of course, to making students *think* about the law) but also as people to engage with not just on law but also on life itself. The law is, in fact, a marvellous vehicle for discussing life and life values (without, of course, imposing one's own views in a dogmatic fashion). I cannot say that I was successful in any substantial measure, but at least I tried and I did receive the occasional feedback, often years or decades down the road – either orally or in writing.[262] It seems strange to cite anything from film. I am not a film buff and seldom go to the cinema. However, there is one memorable line from a film that was by no means an international hit but which seems to me to encapsulate the essence of the ideal teacher. The film is entitled "The Emperor's Club",[263] and was based on a short story by Ethan Canin.[264] Towards the end of the film, one of the students reads the following tribute from a plaque which he presents on behalf of the rest of his cohort to their former teacher:

---

262 In the form of cards and letters. One unusual form of written feedback is even in print (much to my surprise because it not only appeared in print but also actually referred to the concept of a receptacle): see Low Siew Ling, "Justices' Law Clerk and State Counsel, Civil Division – Law in the Public Service" in *The Practice of Law* (Tang Hang Wu, Michael Hor & Koh Swee Yen gen eds) (LexisNexis, 2011) ch 16 at pp 148–149.

263 This was a 2002 film with Kevin Kline in the title role as a teacher at a fictional boys' boarding school. The screenwriter was Neil Tolkin.

264 See Ethan Canin, *The Palace Thief* (Random House, 1994) at pp 153–205.

> A great teacher has little external history to record. His life goes over into other lives. These men[265] are pillars in the intimate structure of our schools. They are more essential than its stones or beams, and they will continue to be a kindling force and a revealing power in our lives.

134 There was one other ideal which I constantly attempted to realise – that my legal writings would (in some small way) constitute a practical contribution to the profession. Therefore, when I left one university to join another two decades ago, I saved only a couple of law reports in which my work had been cited by Singapore courts (as there was insufficient justification to transport the rest to my new place of work). Little was I to know that I was later to join the Bench and assist directly in the development of Singapore law.

135 It therefore came as a bolt from the blue when I was asked to join the Bench. I had only appeared in court (as an *amicus curiae*) once. Indeed, after joining the Bench, I recall being in Hong Kong to deliver a public lecture. One of the first questions I was asked was what it was like to be a judge after having been a legal academic for such a long time (close to a quarter of a century in point of fact). I still recall my response vividly. It was unscripted and instinctive but quite picturesque. I likened the initial transition as follows: being a legal academic was like wearing a glove that was crafted by its maker who knew not only the size of my hand but also the material that fit so well that it felt like it was a part of me, whereas being a judge was like climbing up a wall with a near perpendicular gradient and with no safety harness! I am grateful that after a decade and a half on the Bench, the experience generates much less apprehension.

136 The point of this brief background is this: As a law student and then a legal academic, I have witnessed the development of Singapore law from a distance and can testify to the fact that, as this article has already alluded to, Singapore law was – for a very long time (and leaving aside specific statutory developments) – a mere carbon copy of English law. That was certainly my experience as a student and I often wondered whether there was any hope that the legal apron strings[266] might ever be cut. This harks back to the time when I was a little bit of a starry-eyed and idealistic lecturer yearning for something more. This led me to research and write a doctoral thesis on the development of Singapore law.[267] As we have sought to demonstrate in the present article, there were in fact practical reasons that accounted for why English law continued to

---

265 It should be noted that the teacher concerned in this film was male.

266 *Cf* R H Hickling, "Breaking Apron Strings" (1987) 8 Sing LR 78.

267 Ultimately published as *The Development of Singapore Law* (Butterworths, 1990). For an account of my experience in writing this thesis (in particular, the difficulties

(cont'd on the next page)

dominate the Singapore legal system even after independence and that it was only after the backlog of cases was cleared that the way became clear (or at least clearer) for developing Singapore law. Even then (as also explained above), developing the law is never an easy process. Unlike a legal academic who writes learned treatises and articles, the court can only deal with (and develop) an important point of law when it arises directly from the fact situation in the case before it. It can occasionally develop points of law by way of *obiter dicta*, but this is the exception rather than the rule for courts do not engage in self-indulgent conduct. And when an important or significant point of law does arise, the court cannot decide of its own accord; it must do so in accordance with the arguments of counsel in an adversarial system. To some extent, this can be remedied by the call for further submissions. However, unlike legal academics, courts are also constrained by the pleadings and facts; a roving commission or going off on a frolic of one's own may be acceptable (or even be applauded) in legal academia but would constitute an abuse of process and/or breach of natural justice in a judicial setting. Nevertheless, as we have seen, Singapore law has developed in many specific areas. The Singapore courts have been sensitive to both the cogency as well as logic of legal arguments and doctrines as well as to the needs and circumstances of the country as a whole. I would not have thought – in my lifetime at least – that Singapore courts would actually depart from House of Lords (now UK Supreme Court) decisions. But they have – and not out of any nationalistic or selfish reasons. As we noted at the outset of this article, the search is a search for *principle*. A promising and encouraging "by-product" of this is that Singapore cases have not only been cited in international and local textbooks as well as articles but have even been seriously engaged with in international journals by legal academics who are experts in their respective fields.[268] However, as just mentioned, this is a mere "by-product", albeit one that, despite being a very small jurisdiction, Singapore can be justly proud of.

137 Taking a step back, the bicentennial of Singapore also marks the coming of age for Singapore law. However, as also emphasised in this

encountered), see Andrew Phang, "Which Road to the Past? – Some Reflections on Legal History" [2013] Sing JLS 1 at 18–22.

268 See, *eg*, (for an extremely small and somewhat random sampling, and only from the law of contract at that) *Chitty on Contracts* (Hugh G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at para 2-119, fn 594 and para 4-001, fn 5; Ewan McKendrick, *Contract Law – Text, Cases and Materials* (Oxford University Press, 8th Ed, 2018) at pp 245–246 (where a substantial extract from a Singapore decision is to be found); Richard Hooley, "Implied Terms after *Belize Telecom*" (2014) 73(2) Camb LJ 315 (where the leading Singapore decisions on implied terms are critiqued); and (most recently) Ewan McKendrick, "Doctrine and Discretion in the Law of Contract Revisited" (2019) 1 Chinese J Comp Law 1 (where several Singapore decisions are discussed as well as contrasted with English law).

article, the ones who reap the legal harvest must not forget the ones who laboriously ploughed the field and (with bent backs) planted the seeds and then watered and fertilised them.

138 However, what of the future? For me, there is not that much more time – relatively speaking – for active contributions on my part. The legal baton must be passed – and rightly so. On a personal level, I am most encouraged for the future because it will be manned by persons more capable than I. That is not only consistent with the ideals of a teacher which I have referred to above,[269] but is also consistent with ideals of succession generally. Vanity and ego are great stumbling blocks in life, whereas humility and sacrifice are utterly necessary for the growth not only of individuals but also of society itself. It will not be an easy road. I used, on occasion, to tell my students that my hope was that they would contribute much in positions of significance and authority in the future, but that my greatest worry was that they might get too caught up with their own selfish ambitions once they attained positions of authority. To overcome this obstacle is easier said than done: the vanity and ego I have just referred to are often insidious influences (and often self-rationalised). However, the paradox, in my view, is that by discarding selfish ambition, one can achieve true greatness by – to borrow from an earlier quotation[270] – ensuring that one's life goes into or flows into other lives, impacting them for the better. The modern phrase, I believe, is "paying it forward". It is not easy but it will ensure that the development of Singapore law continues and continues well. As already mentioned, both my co-authors represent the future generations. They have the potential to achieve even better and greater results than their predecessors and are clearly equipped to do so. And it is this hope that encourages me that when it is time to actually pass the legal baton, it can be done with equanimity, confidence and real joy.

B. Goh Yihan's views

139 The modern Singapore legal system has been a story 200 years in the making, since the British first landed on our shores in 1819. It is a story of how a system has grown from generation to generation, and now, in its latest incarnation, seeks to spread its influence abroad. When I was a law student some 15 years ago, I was struck by the increasing number of Singapore cases that tried to set out the applicable legal principles in Singapore, rather than simply following English law. The pragmatic reason for this was that, at a time when there were not so many local law textbooks, it was simply easier to read the actual case

269 See para 133 above.
270 See para 133 above.

that had summarised the applicable principles, rather than read a foreign textbook that analysed English cases. But the deeper reason was that, as a student of Singapore law (as I still am), I felt a sense of pride seeing our courts deciding *our own laws*, freed from the vestiges of foreign law. To be clear, this is not a call to be isolationistic, which would be a disaster in the context of an international hub like Singapore. However, as we internationalise, it is important that we are promulgating our *own* laws instead of merely applying laws from elsewhere without question, and then sharing that with the rest of the world, even as we learn from the best from all around the world.

140 After I graduated from law school, I had the chance to work in the legal service. From that perspective, I witnessed first-hand the creation of a uniquely Singaporean body of law. Thus, when I joined academia, I had an interest in studying the Singapore legal system. To that extent, with the generous support of the Singapore Academy of Law, a co-author (Paul Tan) and I embarked on the study of the Singapore legal system over Singapore's first 50 years of independence. It was a humbling experience, as we gathered all the Singapore decisions from 1965 and tried to make sense of them all. We felt that there was a story to be told, and we wanted to tell the world about what the Singapore legal system is about. Unlike our co-author Jerrold Soh, who is very well-versed in using technology to study trends in the Singapore cases, we adopted a decidedly "stone age" approach of using Excel spreadsheets. I still remember trying to figure out how to fix the correlation between different data entries, and what variables to plot against each other. I also recall, with some fondness, the literally lengthy Excel spreadsheets that could not be sensibly printed.

141 It was then that my co-author and I decided to employ students. They were a revelation. They looked through each case carefully and plotted Excel spreadsheets that we simply did not have the expertise to do. But the telling of the story of our legal system still required every student to read through *each and every case individually by eye*. They did the hard work in telling the story of the Singapore legal system. As we shared with them at the end of the project, we hope that the experience was enriching not because they could say they had been research assistants in a project, but because they played such vital roles in telling the story of the Singapore legal system, from 1965 to (at the time) 2015. It was a real pleasure and privilege to work with each and every one of them. And, as I later discovered, Jerrold was from that batch of students. While I did not have the privilege of working with him then, I am proud to have him as my colleague now. *This is the story of the Singapore legal system*: stitched together bit by bit, generation by generation, each adding to the vast tapestry that we are proud to call our own. Jerrold's generation represents that which will have the technical and doctrinal know-how to continue telling the story of the Singapore legal system.

142 From my perspective, the story of the Singapore legal system as it has developed over 200 years is a story of growth, development and expansion. It grew out of the British legal system that was transplanted in Singapore as a result of colonisation. It then developed on its own terms, creating legal institutions and refining law to reflect the local circumstances. It is now at the phase of expansion, where its influence extends beyond Singapore to the rest of the world. And there is a great opportunity for all to work towards the creation of a legal system that we can all be proud of, and call our own. Presently, it also is rising to the challenges of globalisation, as it aims to reap the benefits of an increasing internationalising world. In the end, its next 200 years will undoubtedly see similar challenges ahead. But if the past 200 years are any indication, one can confidently think that the Singapore legal system will prosper into the next 200 years, with many more years to come.

C. Jerrold Soh's views

143 I am new to the law. What I know of it comes not from first-hand experience but the wisdom of my predecessors, immortalised in prior work, and what the numbers presented above say. Since it is probably unwise for me to comment on the past, let me focus on the future. Anecdotally, few professional conversations today escape discussing it: the future of law, the future of work, the future of society itself. The economic, social, and therefore legal implications of climate change, big data, automation, aging populations, and other modern challenges will have to be addressed in the years to come.

144 I cannot claim to know how Singapore law and legal practice will adapt to this future, only that it will have to. By "it", I mean nothing less than those of my and future generations who will have the privilege of running, managing, and perhaps governing the Singapore legal system. Yet this privilege, which continues to yield financial reward beyond the national median, comes inalienably bundled with the responsibility of ensuring the continuity of the first-rate legal system we inherit.[271] Given today's global climate, the task is non-trivial, to say the least.

271 My co-author is being modest in saying that previous generations have only planted the seeds of a strong legal system, watered and fertilised them. As this article has demonstrated, Singapore law today has a level of sophistication and international regard which indicates that it has certainly come of age. It is no young sapling but a veritable tree. Our present job is merely to pick its fruits. Much of this article's empirical analysis was made possible by, and built on, the ground-breaking work conducted by Goh Yihan and his able student assistants (many of whom, I am happy to say, would call me a peer).

145 As this article's empirical analysis might have betrayed, I suspect that part of the answer entails multi- and inter-disciplinary collaboration. Lawyers should know the world and, equally importantly, the world should know the law. Indeed, more than a century ago Oliver Wendell Holmes Jr had already declared that "[f]or the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics".[272]

146 I am lucky that this dated prophecy seems to be coming true only now.[273] If I have the technological skills to study cases, it is only because I was formally trained in it. But my decision to study Economics and Computer Science was borne not of my own prescience, but due to wise counsel from three individuals whom I cannot thank enough. I refrain from naming them here so as not to be indulgent and perhaps not to embarrass them. Incredibly, barely six years ago, when I was entering law school, few saw the value of what was often labelled as "diluting my legal education" and "useless for practice". But the first individual I must thank would often state in class, in no uncertain terms, that "everything you know will make you a better lawyer" (and this person knew a great deal); the second would consistently assure me that "your work is the future" and provide me ample opportunities to pursue my interests further; and the third, to whom I owe the most, would state rather simply, for he was far wiser than he was educated, that "if you can study more, just study more. That will help you make a difference."

147 If so much can change over six short years, one hesitates to predict, even after reviewing 200 years of Singapore's legal history, how the next ten, or even five, years would look like. But there *is* a way of predicting the future that is time-tested and arguably superior to the most sophisticated statistical forecasts, and it is perhaps fitting that I conclude this article by borrowing from software pioneer Alan Kay: "The best way to predict the future is to invent it."[274] What the future of Singapore law looks like is up to us.

---

272 Oliver Wendell Holmes Jr, "The Path of the Law" (1897) 10 Harv L Rev 457.

273 The statement's vintage is evident in its use of gendered terms.

274 Alan Kay is recorded to have said this at a conference in 1982, though this quote in its various forms has been attributed to different people over time. See Quote Investigator (2012), "We Cannot Predict the Future, but We Can Invent It", available at https://quoteinvestigator.com/2012/09/27/invent-the-future/ (accessed February 2020).

Appendix A – Data collection and validation methodology

148 We furnish details on the data collection methodology for two reasons. The first is to demonstrate the reliability of our data, subject to the caveats made explicit here. Second and equally importantly, we hope to provide a template data collection process that assists subsequent empirical work on Singapore law.

149 As a preliminary note, *all* of the information we needed for post-independence reported judgments were readily machine-extracted from the data structure of the HTML judgments we were authorised to download from LawNet. This is attributable to the prescient work of the Singapore Law Reports ("SLR"). Briefly and for the non-technical reader, the reporting team had appended machine-readable tags, such as "localCitation", "catchwords", and "coram", to each these data points for every case. As a result, we could obtain all of the information automatically by essentially telling the computer to grab information associated with these tags.

150 The process for *pre*-independence cases was, however, more involved simply because these had not been covered by the SLR team. For these cases, we thus embarked on a human-led, machine-assisted, process which we now detail.

Process overview for pre-independence cases

Codebook design

151 The process begins with designing a data collection codebook, that is, a set of principles, rules, and policies for researchers manually coding data to follow. The first codebook created contained about 15 pages, and comprised the following:[275]

> (a) *General data coding practices*. These include, but are not limited to, whether to treat data inputs as case sensitive or not, the formats to express them in, the file formats (that is, .csv or .xlsx) to use. Here, an important principle established was to disambiguate between *blank* cells, known zeros, and unclear data cells. Typically, manual data collection proceeds as a series of blanks to be manually filled. Take the number of citations in a given case for example. Initially, the data value for the case is

275 The codebook is available on file with the authors and can be made available on request.

blank, simply because it is not known. Suppose the researcher then inspects the case and finds there to be *no* citations at all. A good practice would be to positively fill a "0" into the data value. Should she leave it blank, a subsequent data user cannot identify whether the number of citations for that case is simply not known, or a known zero. Likewise, if the researcher thinks the number of citations is unclear, she should fill the blank with a flag such as "unclear", instead of leaving it blank.

(b) *Specific instructions by variable*. The next section, sometimes called a data manifest, provides a field-by-field breakdown of the variables which the researchers are collecting for the study. This is immensely helpful not only for briefing the data annotators, but for ensuring consistency in the process. For our study, some machine-extracted variables were also provided to assist human annotators with the process. These machine-extracted variables were also explained in the manifest. An excerpt of data manifest follows.

Field	What you must do	Special notes	Example Cell Value
Citation	The citation of the present case. This field should be already quite accurate. You just need make sure it is not completely wrong, and *fill it in if the data is blank*.	Many cases have more than one citation. It suffices that the citation currently reflected is *at least one of them*. We need not capture all the citations.	[1950] MLJ 3
Jurisdiction	Check this field first. This field should be already quite accurate. You just need make sure it is not completely wrong, and fill it in if the data is blank. If the jurisdiction is *not* Singapore, it should be excluded from the study. Fill in the right jurisdiction and enter "1" in "remove_from_study"	Both lowercase and uppercase values are acceptable. Sing, SG and other abbreviations are also fine.	SINGAPORE

Case date	This field should be already quite accurate. You just need make sure it is not completely wrong, and fill it in if the data is blank. This should be based on the "Decision Date" field of the judgment. If it is not there, do not make any assumptions	*Use **only** the "DD/MM/YYYY" format.* Do not use dots, hyphens, etc. Do not type out month names like "Jan" or "January". *Use slashes only*. Excel will automatically interpret that as a date-time. You do not need to enter a time, nor do you need to make sure Excel converts it.	11/16/1956
tagged_subjects	You are to assign subject matter numbers to this case using a mix of information from the catchwords as well as the text of the case. When in doubt, ask me.	Each case may have more than one subject, but never none. If none fits, let me know. You are to use the list format for entering data here.	S1 || S40 S1||S40 is also accepted S40||S1 also. The order does *not* matter.

(c) *Encodings of categorical variables*. As alluded to by the data manifest, we also encoded certain variables into serial numbers such as S1, S2, *etc*. In particular, each of the 80 different top-level subject areas from the Singapore Academy of Law Subject Tree was assigned one serial number each, roughly based on the frequency we expected to see them arise. Civil procedure was assigned to S1, criminal procedure to S2, and so on, although these serial numbers were not designed to carry any critical information. This is helpful not only for reducing keystrokes (that is, annotators need not type the full item every time), but also, and more importantly, for ensuring data consistency.

(d) *Strategies for dealing with imperfect/uncertain data*. One of the unique challenges we faced with the Singapore law *corpus* was that, particularly for pre-independence cases, it was not always clear which court each case originated from. Many judgments would state "court unknown" or some equivalent. Others simply stated tangential information, like "original jurisdiction". Further, Singapore's court structure had gone through multiple changes before independence (much of which is discussed in the main body of this article). To overcome this, we devised a scheme for making informed guesses on a given case's court level based on (a) decision date; (b) the number of judges; and (c) whether the court was exercising appellate or original jurisdiction. Where these variables triangulated, we could confidently assign a court

level. However, in cases of uncertainty, a flag would be raised for further inspection. A schematic diagram of this approach, also provided to annotators in our codebook, follows:

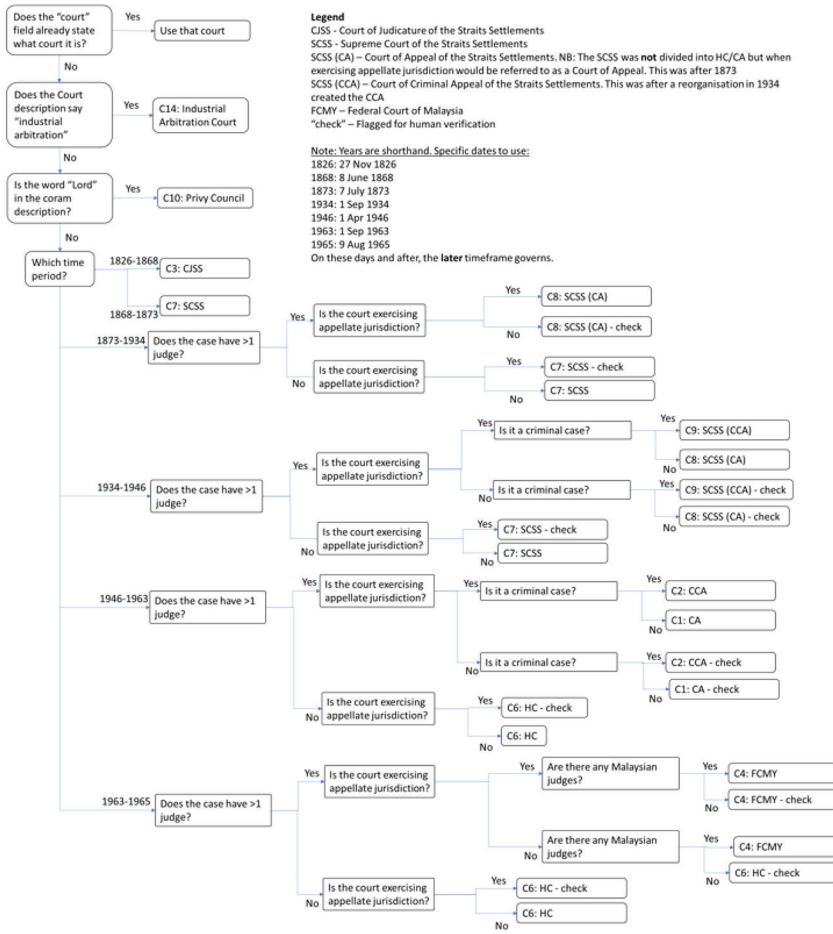

Figure 13: Flowchart for determining court levels. "Check" indicates that human verification is necessary.

Initial machine coding

152 As the diagram above suggests, the next step, codebook in hand, was *not* to commence human annotation immediately (as would be conventional), but to identify how far *machine* annotation could take us. For instance, having reduced the court classification task into a symbolic flowchart, we could implement it in code. The Python software we wrote output both the courts it was confident of identifying based on the triangulation above, as well as the "check" flags which helped human

annotators pay special attention to identifying the right court levels for these cases.

153 Python regular expressions were also used to attempt a "first cut" at extracting citations from judgment texts. This approach is explained in more detail in prior work,[276] but roughly involves a more flexible means of searching through a text to find text patterns that look like citations. Broadly, the program tries to look for numbers in brackets, followed by certain numbers in close proximity. This first cut was provided to annotators as a reference when annotating. Importantly, it was impressed upon them that the software could make mistakes.

154 Subject matters for pre-independence cases were not machine-extracted at all as it posed a higher-order challenge requiring human judgment. However, the software developed was able to extract catchwords from many of the cases to provide context for the annotators.

155 The remaining variables used in the study, such as jurisdiction and coram, were still largely machine-extractable. Although SLR-quality machine-readable tags were absent, some heuristics could be created from the LawNet-enforced structure of the judgment to pull out these data points. As this approach is concededly less reliable, the human annotators were also instructed to briefly double-check what the program extracted and to make corrections accordingly.

Human coding

156 The "first cut" data created by the program was then split into four chunks and assigned to four student assistants for manual completion and validation per the codebook. As we had about 1,500 cases to work on, each student received about 400 cases to look at. These chunks were overlapping by design, in that about 25 of each student's cases were also assigned to another student who provided a second pair of eyes. This allowed us to detect and measure discrepancies in the tagging process (which is explained in more detail below).

157 The human coding process was itself split into phases to promote data accuracy and uniformity. Specifically, after an initial briefing, we asked the students to annotate only 25 cases each. We then reviewed these 25 cases for errors and inconsistencies. A review session was conducted for us to debrief the students, and for them to make any clarifications (though it was made clear that they could approach us with clarifications

276 Jerrold Soh, "A Network Analysis of the Singapore Court of Appeal's Citations to Precedent" (2019) 31 SAcLJ 246 at 260–261, para 33.

at any time). The review sessions were instrumental in identifying situations where one student took a differing approach from another. These were resolved and a unified process committed it. The codebook was then updated to clarify any misconceptions the students had and provide further guidance on common mistakes made.

158 The students were then asked to annotate the next 100 cases, followed by another review. After the 100 cases were done, the students were asked to annotate the remainder. After the entire dataset was completed, a final review brief was conducted to clarify some doubts which arose during the process. Each student was then asked to review her/his own chunk before finalising it.

Discrepancies and inter-annotator agreement

159 We then put the four chunks back together again. Focusing first on the overlapping cases, we explored the level of inter-annotator agreement for variables of interest which we wanted to be most cautious with, namely, the number of cases citations per case, court levels, and case subject matters. Though some discrepancies arose, they do not appear to be systemic in a way that undermines the reliability of the rest of the dataset.

Court

160 The most common discrepancy which occurred was between variants of the Supreme Court of the Straits Settlements ("SCSS").[277] Some cases were assigned to the SCSS's High Court level even though they were actually Court of Appeal level cases, and *vice versa*. While these discrepancies *do* affect whether we can safely assign citations between the High Court and the Court of Appeal,[278] they were relatively rare and, we submit, do not undermine the analysis. Across the around 1,500 pre-independence cases in our dataset, 327 had been classified, after triangulation by the schematic above, as either "SCSS (CA)", "SCSS (CCA)", or "SCSS (HC)" cases. Ninety-four were flagged as potential SCSS cases for human validation. Within the 70 overlapping cases, fewer than ten mistakes arose.

277 To recall, under our coding scheme and pursuant to the 1873 and 1934 ordnances, the Supreme Court of the Straits Settlements ("SCSS") when exercising appellate jurisdiction should be referred to as the Court of Appeal and Court of Criminal Appeal respectively. SCSS (CA) and SCSS (CCA) are thus ancestors of today's Court of Appeal. We also know that the post-1873 SCSS is an ancestor of the High Court. The pre-1873 SCSS is not practically relevant for our study as the earliest judgment in our dataset dates to 1877.

278 This point is explored at para 57 above.

161 Another source of discrepancy was between Court of Appeals across time, particularly between the Court of Appeal and Court of Criminal Appeal. There were also two discrepancies between C9: SCSS (CCA) and C2: CCA. These discrepancies were resolved by checking the assigned court levels against the decision date. For example, a case decided before 1946 should not have been assigned to the C1: CA but to C8: SCSS (CA). Nonetheless, only 12 corrections had to be made here. Further, notice that any mistakes here would not affect our partitioning of cases into the Court of Appeal *versus* High Court levels.

Citations

162 Of the 70 overlapping cases, 43 cases had exactly the same citation counts, 15 differed by 1, 6 differed by 2, and 6 differed by 3 or more. We took this as indicating that the citation counts were generally safe to rely on, subject to two important caveats that could explain these discrepancies in citation counts.

163 First, the older reports present an interpretive puzzle for case citations. Case headnotes on LawNet, which sometimes provide a list of cases cited in the judgment, occasionally list cases not found in the judgment text which follows the headnotes; some judgment texts contain citations not listed in the headnotes. Likely, this is because of (a) imperfections in the headnotes; and (b) judgment texts being summarised by the reporter. Some human judgment was necessary to decide which citations to include or exclude.

164 Second, the older reports do not cite cases uniformly or completely. Some citations are malformed, such as with page numbers missing. Some cases were simply referred to by shortened name. Thus, two seemingly different citations could actually be referring to the same case. Annotators were told to make reasonable efforts, by searching on LawNet and Lexis, for complete citations. But this is an admittedly imperfect exercise. Where the annotator successfully finds the full citation, he or she may realise that the shorter citation resolves into another case already cited. This reduces the citation count by one. But if the annotator does not manage to find the full citation, he or she would have recorded the incomplete citation as a separate case. Errors caused by incomplete citations therefore tend to bias citation counts *upwards* for the pre-1965 cases. This could have affected foreign cases more than local cases.

Subject matter

165 Of the 70 overlapping cases, 35 had identical subject counts, 24 differed by 1, 11 by 2, and none differed by 3 or more. Recall that

annotators were given a list of 80 categories of subject matter (based on the current SAL subject tree) to assign to the cases, as well as a category "Others" for any case not covered by the 80. To measure consistency in annotation, we calculated the percentage of agreement across the 81 possible categories that annotators could use. Annotators are taken to "agree" on a category if *either* both assign the same subjects, or both do not assign the same category. The percentage agreement thus defined, averaged across the 70 duplicated cases, was 0.9848. We interpret this to mean that the subject counts were generally reliable, but could be improved.

166 For reference, if the annotators were randomly assigning cases to subjects (so each subject had a 50% chance of being assigned independent of all others), the long-run average agreement would be 50%. If we had instead assumed that each subject had a 1/81 chance of being assigned, the long-run average across would be closer to 0.975.[279] Of course, neither 50% nor 1/81 are fair estimates of the prior probability that a subject is assigned to the case. The most common legal subjects like tort and contract are more likely to be assigned correctly and less likely to be missed out, since the student annotators would have a good grasp of these. Rare subjects like gambling law are also highly likely to be consistently *not* assigned.

167 Looked at in this light, we hypothesise that the bulk of the discrepancy occurs in subject areas that span across areas (like "words and phrases" and "damages", as well as subjects the annotators may be less familiar with (such as "revenue law" and "courts and jurisdiction")). We manually inspected the discrepancies in the 70 cases and noted that these topics were indeed sources of inter-annotator discrepancy. As our subsequent analysis relies primarily on the most common legal subjects, most of which are subjects that the student annotators would be familiar with (like tort and contract), these errors should not entirely undermine the analysis. These caveats, however, remain.

Post-assessment corrections

168 After looking at inter-annotator agreement, a final review was conducted. The student assistants were provided with a list of discrepancies and were asked to relook at the 70 overlapping cases in that light to identify if they had made any systemic mistakes in annotation. For each case, both students who had worked on that case were involved.

279 This number was be derived from simulating random Bernoulli draws for 100 duplicated cases (making 200 cases total), ten times, and averaging the scores obtained.

169 A positive side effect of this process was that all the discrepancies within the 70 cases could also be corrected, further improving data reliability. All four students reported that no systemic errors had been committed. Many of the discrepancies arose over minor points such as recording alternative citations of the same case. We then reviewed the full corrected dataset one final time before merging the data with the post-independence cases.

170 The final dataset which we used to output the statistics and diagrams above thus comprises data on 1,441 pre-independence cases annotated by the process just described as well as 7,225 post-independence cases for which data was automatically extracted. It bears emphasis that the data is not fool proof. Nonetheless, we submit that it is amply reliable for the analysis conducted in this article.