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Of generality and specificity – A suggested approach toward the development of an autochthonous Singapore legal system

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OF GENERALITY AND SPECIFICITY – A SUGGESTED APPROACH TOWARD THE DEVELOPMENT OF AN AUTOCHTHONOUS SINGAPORE LEGAL SYSTEM*

I

This very brief essay seeks to sketch out as well as consider an approach toward legal analysis and reasoning that would aid in the development of an autochthonous Singapore legal system,[1] and that, in any event, would probably also be relevant even in more generalized ad hoc situations. It is assumed that many, if not most, of those involved in the discipline of Singapore law desire the construction of an autochthonous legal system, although the skeptic might find – as just mentioned – the approach suggested here of some utility as well.

One very preliminary, yet extremely important, point must be made right at the outset. What is proposed is an *approach or attitude* toward the analysis of particular legal concepts and/or scenarios. I am *not* proposing a *particular theoretical framework or model* that may be utilized as a basis for analysis of such concepts and /or scenarios.[2] In other words, *regardless* of the theoretical framework(s) adopted, one could, it is submitted, usefully adopt the approach that is mooted in this article. And the utility of this approach, it ought to be noted, is not confined merely to legal academics but, rather, may be applied by legal practitioners as well as by judges.[3] This should be self-evident from the approach itself that is now briefly sketched out.

A further preliminary point, however, might not be amiss at the present juncture. It may well be that the approach proposed may be adopted (by analogy) by other disciplines in the humanities and social sciences as well,

*I am grateful to my many colleagues and friends who critiqued a preliminary draft of this article. The various critiques (both formal and informal, personal as well as anonymous) were of enormous help to me, although I could not either agree with or accommodate all of them. It has to be borne in mind that this is only an *approach,* and I hope to illustrate its application and utility toward substantive legal issues in future articles.

1. A concept which Professor G.W. Bartholomew first mooted in the local context. See, generally, his pieces as follows: "The Singapore Legal System" in *Singapore: Society in Transition* (Edited by Riaz Hassan, 1976), pp. 84 to 112, at pp. 97 to 109; and "Developing Law in Developing Countries", (1979) 1 Lawasia N.S. 1.

2. I deal with some of the issues arising from this particular topic in a review article entitled "Constructing Theoretical Frameworks", (1988) 30 Mal. L.R. 211.

3. And, perhaps, even by legislators, though it would appear (from the discussion that follows) that the suggested approach would be of especial relevance and importance in the sphere of the development of the common law. Indeed, there appears to have been relatively more indigenous development in the sphere of legislation.

though, for a reason that I briefly touch upon later, such an approach might not be as apposite *vis-a-vis* the so-called 'hard' sciences.

II

The approach mooted comprises two different, yet related as well as cumulative, levels of analysis. The first consists in the analysis of the concept or scenario on its own terms. This is the more *general* level of analysis that focuses upon the concept concerned as a matter of *general reasoning and logic*. An obvious example would be the critique of a judge's reasoning in a particular decision that is found to be faulty, because the judge has not, in his judgment, linked the various salient points in a reasoned or logical fashion. In such a situation, the resultant critique could quite plausibly be applied to *other* countries and cultures that base their laws on a similar system. I have in mind, in particular, countries that were former colonies, such as Singapore, which, incidentally, bases its law on English law.[4] Such critiques are thus fairly *universalistic* in character, and this perhaps furnishes one possible explanation why (in the Singapore context at least) English textbooks in such areas as the law of contract and the law of tort are referred to as a matter of course by local practitioners; such textbooks, in other words, whilst not in themselves premised solely upon logic, provide the necessary grist for the mill of legal logic, given the English legal heritage which (it ought to be pointed out) is not only Singapore's but that of many other countries as well. It might also be mentioned that this particular mode of analysis is probably more common with regard to 'conceptual' subjects such as jurisprudence; but, this observation ought not to be taken too far simply because (if nothing else) the present suggested approach is by no means without qualifications – that I shall deal with later in the present essay. Before that task is undertaken, however, let us briefly consider the second main level of analysis.

4. Though Mohan Gopal has argued (in the realm of *general* reception) that English law had never been received: see "English Law in Singapore: The Reception That Never Was", [1983] 1 M.L.J. xxv; *contra* Andrew Phang Boon Leong, "English Law in Singapore: Precedent, Construction and Reality or 'The Reception That Had To Be'", [1986] 2 M.L.J. civ. It ought also to be noted that the foundation of local commercial law is also English: see, generally, Soon Choo Hock and Andrew Phang Boon Leong, "Reception of English Commercial Law in Singapore – A Century of Uncertainty" in Chapter 2 of *The Common Law in Singapore and Malaysia* (Edited by A.J. Harding, 1985); the basis of local commercial law is to be found in the specific reception provision of section 5 of the Civil Law Act (Cap. 43, 1985 Rev. Ed.) that has generated problems (both conceptual and practical) out of proportion to its 'size'; the most recent piece dealing with this 'infamous' provision is Tan Yock Lin, "Characterization in Section 5 of the Civil Law Act", (1987) 29 Mal. L.R. 289.

This second level is more *specific* in nature; it consists in an analysis of the particular concept and/or scenario *set in its context*. In so far as the construction or development of an autochthonous Singapore legal system is concerned, this level of analysis would involve analysis of the concept and/or scenario in the *Singapore* context. By its very nature, in fact, one might argue that this level of analysis would be probably applicable to the *local* context only. One of the most obvious inquiries in this regard would be to determine whether or not a certain English rule or principle[5] is suitable to the local context. This level of analysis has, in fact and in law, very well-established 'roots' indeed – in the application of the concepts of suitability or applicability and modification.[6] It might, of course, be argued that these concepts are confined to the (now outmoded) criteria of injustice and oppression to the native population. Whilst this is a persuasive argument, it is not, it is submitted, an insurmountable or unanswerable one. I deal with this possible objection later in this essay – again when considering possible qualifications to the approach suggested in the instant piece. Two difficulties *vis-a-vis* the present level of analysis, however, might be usefully dealt with immediately – the first being of more practical importance than the second.

The first possible difficulty pertains to the fact that such an approach requires a wider or broader knowledge of the local socio-economic as well as political matrix. Such a requirement poses possible problems simply because legally trained personnel are neither trained nor equipped to cope (in a systematic and coherent fashion) with strands occurring, so to speak, in other disciplines. I think that the task of attempting to transcend strict (some may term it "traditional") legal boundaries is not insurmountable, though it would, of course, depend upon the individual concerned. In any event, such broader inquiries could in fact serve as both the confluence point as well as springboard for *interdisciplinary* research.

The second difficulty really centres around the question of relevance. It is arguable that this level of analysis that involves extensive consideration of the local context may be much less significant in so far as the 'hard' sciences are concerned. This is a fairly powerful argument inasmuch as the 'exact' sciences

5. English law being (generally speaking at least) the foundation, as it were, of the Singapore legal system: see, also, *supra,* note 4.

6. See the leading local authorities, especially *Chulas & Kachee* v. *Kolson binte Seydoo Malim,* (1867) W.O.C. 30; *Choa Choon Neoh* v. *Spottiswoode,* (1869) 1 Ky. 216, at p. 221; and *Yeap Cheah Neoh & Ors.* v. *Ong Cheng Neo,* (1875) L.R. 6 P.C, 381. See, also, my article, "Of 'Cut-Off Dates and Domination: Some Problematic Aspects of the General Reception of English Law in Singapore", (1986) 28 Mal. L.R. 242, especially at pp. 249 to 262.

are more given to *universalistic* applicability than concepts from the humanities and social sciences.[7] I turn now to a consideration of the possible objections as well as qualifications that arise from this suggested two-level approach.

III

It must be stressed that the suggested approach is not advanced as being either the best or the only approach. Quite the contrary; it is, rather, merely one of several possible approaches. In fact, the two levels set out above must not be applied either rigidly or dogmatically for at least two reasons.

First, as alluded to right at the outset of the instant essay, the focus of discussion here is not upon a theoretical framework or model as such, but rather, an *approach or attitude;* rigidity and dogmatism *must* thus be anathema to the *very nature* of the enterprise itself.

Secondly, it is entirely possible (even probable) that there will often be a blurring of the lines between the two levels themselves. Given that what is suggested here is only an approach, a mere attitude of mind as it were, this is entirely acceptable, even desirable. What is, I submit, useful with regard to the suggested approach is that it may serve as a point of departure, a starting-point, especially in the context of the development of an autochthonous Singapore legal system. Possible criticisms, however, remain, and may take two broad forms.

It might, first, be argued that the suggested approach is not very useful, for the Singapore legal system has been 'enslaved' by the 'dead and heavy hand' of the English common law – in particular, by the doctrine of judicial precedent in all its various aspects.[8] What is clear from the literature, however,

7. Though this is not, of course, to suggest that principles and concepts in the 'hard' sciences are immutable: see, *e.g.,* Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Second Edition, Enlarged, 1970); and I. Bernard Cohen, *Revolution in Science* (1985).

8. See, generally, Harbajan Singh, "*Stare Decisis* in Singapore and Malaysia – A Review", [1971] 1 M.L.J. xvi; Mohd. Naseemudin Ahmed, "'*Stare Decisis*' and its Development in Malaysia", (1975) 2 J.M.C.L. 59; Max Friedman, "Unscrambling the Judicial Egg: Some Observations on *Stare Decisis* in Singapore and Malaysia" (1980) 22 Mal. L.R. 227; Walter Woon, "Precedents that Bind – A Gordian Knot: *Stare Decisis* in the Federal Court of Malaysia and the Court of Appeal, Singapore", (1982) 24 Mal. L.R. 1; and, by the same author, "*Stare Decisis* and Judicial Precedent in Singapore" in Chapter 4 of *The Common Law in Singapore and Malaysia* (Edited by A.J. Harding, 1985) as well as (more recently) "The Doctrine of Judicial Precedent" in Chapter 8 of *The Singapore Legal System* (Edited by Walter Woon, 1989); Andrew Phang, "Stare Decisis in Singapore and Malaysia: A Sad Tale of the Use and Abuse of Statutes", (1983) 4 Sing. L.R. 155; Andrew Phang Boon Leong, ""Overseas Fetters": Myth or Reality?", [1983] 2 M.L.J. cxxxix; Peter Wesley-Smith, "The Effect of *De Lasala* in Hong Kong", (1986) 28 Mal. L.R. 50; and Robert C. Beckman, "Divergent Development of the Common Law in Jurisdictions which Retain Appeals to the Privy Council", (1987) 29 Mal. L.R. 254.

is that the doctrine of judicial precedent in the local context[9] has generated a plethora of problems. In so far as the binding effect of decisions of prior predecessor courts of co-ordinate jurisdication is concerned, for example, one writer has suggested that one real possibility is to 'cut the Gordion Knot cleanly', whereby *no* prior decisions would be binding.[10] And in so far as the possible binding effect of the decisions of certain courts outside the Singapore hierarchy (primarily English) are concerned, I have similarly suggested that none of the decisions of these 'foreign' courts ought to bind the Singapore courts.[11] There are, in fact, other (more conceptual, even jurisprudential) reasons why the doctrine of judicial precedent may (with little risk of adverse consequences) be abolished in the Singapore context, but this is outside the scope of the present essay.[12] What is clear, however, is the fact that there are persuasive arguments that may be prayed in aid with regard to either the abolition or at least modification of the doctrine itself.

Some critics may, however, go further, and argue that even if the doctrine of judicial precedent were to be done away with, the proposed approach in the instant piece would be of minimal, if any, effect, simply because there is no real scope for the development of an autochthonous Singapore legal system, as evidenced, in the main, by the 'non-utility', so to speak, of the concepts of suitability and modification – whatever their theoretical potential might be.[13] It may be further argued that the concepts of suitability and modification are not flexible enough 'instruments' or 'tools' in so far as they relate to more specific and archaic concepts such as injustice and oppression – a point alluded to above. But, the concepts of suitability and modification

9. See the articles cited at, *supra,* note 8. In so far as the binding effect (or otherwise) of decisions of certain *English* courts are concerned, there may be a conceptual problem of sorts that arises *vis-a-vis* the characterization of various cases from which particular propositions in this particular sphere are derived: see Phang, *supra,* note 6, at pp. 262 to 265.

10. See Woon, "Precedents that Bind – A Gordion Knot: *Stare Decisis* in the Federal Court of Malaysia and the Court of Appeal, Singapore", *supra,* note 8, especially at pp. 22 to 25.

11. See Phang, ""Overseas Fetters": Myth or Reality?", *supra,* note 8, at p.cliii ("Quite apart from the fact that we are long past the age of Colonialism, the point I wish to stress is that any form of "overseas fetters" can do nothing but harm. By unnecessarily fettering ourselves, we are in fact not only risking the possibility of injustice being caused by not being able to take account of local circumstances but are also actually reducing the potential pool of decisions from which useful principles may be derived. If we were not bound, all decisions from every jurisdiction could be reviewed, and this would be the "tonic" that a young nation like ours requires to develop an independent and distinct legal system.").

12. Briefly stated – and without having to review the relevant literature which is relatively voluminous – these include the difficulty of defining as well as applying the fundamental concept of the *ratio decidendi;* the related problem of 'distilling' the *ratio* from an appeallate court's decision where more than one judgment is delivered; and the status of the 'rules' of precedent themselves (*viz.,* whether they are 'true' rules of law whose *ratios* are thus binding, or whether they are mere statements of practice that can be changed without the technical difficulties associated with a 'true' rule of law).

13. See Phang, *supra,* note 6, at pp. 251 to 252; 260; and 266.

ought to be read in the spirit in which they were conceived, *i.e.,* they ought to be utilized to render the received law more suitable and applicable to the local circumstances; in the context of present-day Singapore, for example, these concepts ought, it is submitted, to be interpreted and applied broadly and flexibly, and ought therefore to include a significant consideration of broad public policy factors. To the 'legal purist' who may protest against the possible uncertainty that may result, the simple answer is that I am not suggesting that courts abandon the basic 'tools' of the discipline of law (*viz.,* legal reasoning and logic), which are, as the reader may recall, involved in the *first* level of analysis. What I am now advocating is an application of the relevant law, having regard to the *second* level of analysis suggested in the instant essay – a level of analysis, I might add, that is not necessarily coincident, or even consistent, with uncertainty and general 'judicial chaos'. Allowing for the fact that public policy factors do generate a certain degree of uncertainty,[14] it is submitted that a consideration of them would, in fact, contribute toward the development of an autochthonous Singapore legal system. I might add that I leave aside (for the present at least) discussion of a current jurisprudential school of thought that argues that decisions in the law inevitably involve making political value choices,[15] although this tack, if accepted, would of course comprehensively undermine the aforementioned argument of uncertainty and 'judicial chaos'.

Yet another possible approach by more benign, yet no less skeptical, critics would run along the following lines. What is being suggested here is uninteresting simply because what is being proposed in the instant essay has

14. One might note, at this juncture, the following two very famous, albeit contrasting, remarks made in the context of public policy. Burroughs J. in *Richardson* v. *Mellish,* (1824) 2 Bing. 229, at p. 252, remarked that public policy is "... a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law." Lord Denning M.R., however, was more sanguine, when he remarked, almost a century and a half later, in *Enderby Town F.C, Ltd.* v. *The Football Association Ltd.,* [1971] Ch. 591, at p. 606, thus: "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles."

15. This is the current 'phenomenon' of Critical Legal Studies that has generated a plethora of literature, especially in recent years: see, *e.g., The Politics of Law – A Progressive Critique* (Edited by David Kairys, 1982); a Symposium on Critical Legal Studies in the January 1984 number of the Stanford Law Review; *Critical Legal Studies – Articles, Notes and Book Reviews selected from the pages of the Harvard Law Review* (1986); Roberto Mangabeira Unger, *Passion – An Essay on Personality* (1984); *The Critical Legal Studies Movement* (1986); and also by the same author, his multi-volume treatise dealing with broader social theory and published by Cambridge University Press in 1987 entitled *Social Theory: Its Situation and Its Task; False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy;* and *Plasticity into Power: Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success,* respectively (and see the very recent symposium on Unger's latest work in the Summer 1987 issue of the Northwestern University Law Review); and Mark Kelman, *A Guide to Critical Legal Studies* (1987).

always – at least *in substance* – been done by judges, lawyers and academics alike *in any event.* This is a fairly powerful argument, but it is unpersuasive for the following reasons.

First, if what has been proposed in the present piece has always been, in effect, the norm in terms of attitude as well as approach, then why, it may be asked, has there been so little autochthonous development in the Singapore context?[16] It is admitted that modernization as well as industrialization and Westernization have, to no small degree, been responsible for a rather strict adherence to English law, especially in view of the fact that English law is the 'foundation' of Singapore law.[17] It could be further argued either that most of the received law offers opportunity for review and critique at only the first (and less specific) level, or that there is no scope for review at both levels. It is, however, my view that important as the aforementioned influences must have been, and will undoubtedly continue to be, the possibility (and even probability) of autochthonous development in the Singapore context cannot be so emphatically dismissed. One must recall one salient and incontrovertible fact, *viz.,* that Singapore is the confluence of many different cultures and traditions, and cannot therefore produce a sort or type of 'Western homogeneity' that would stifle local development of the law altogether. This assertion calls, of course, for some elaboration as well as support. A comprehensive demonstration of at least the possibility for autochthonous development in the various spheres of Singapore law is outside the scope of this rather brief essay, although I will (in the succeeding Part) offer a couple of diverse situations that do provide, in my view, possibilities for such indigenous development – if the attitude and approach proposed in the instant essay are adopted.

Secondly, it might be observed that even if the approach here suggested has always (in substance and effect at least) been adopted by the local courts as well as the various legal personnel, it has never, to the best of my knowledge, been *expressly articulated.* In other words, the present essay would, in the absence of all else, at least have *clarified* the existence as well as elements of the approach and attitude here proposed. It would also (hopefully) render what appears to be a predominantly subconscious process a conscious one instead. But, here again (and at the risk of undue repetition), it ought to be reiterated that the approach suggested here is precisely and only just that. I do not, and cannot, propose a rigid theoretical framework or model that would provide

16. As is evident from the very scope of the present essay, no comment is made with regard to the level of autochthonous development in other jurisdictions.

17. See, generally, *supra,* note 4.

a panacea in every area of the local law. I am, however, arguing that, whatever the theoretical model adopted might be, autochthonous development *vis-a-vis* the area of law concerned would be well nigh impossible without the (two-level) *attitude or frame of mind* that has been proposed in the instant essay.

IV

As already alluded to in the preceding Part, an illustration of the fruits, as it were, of the adoption of the suggested approach is beyond the purview of the present essay. It ought also to be borne in mind at this juncture that the adoption of the approach itself cannot guarantee sucessful analysis as well as application, for the correct attitudinal approach, *if unaccompanied by an adequate theoretical framework or model for analysis as well as synthesis,* would not yield the desired results with regard to autochthony; and it is notoriously clear that the task of adopting an adequate theoretical framework is by no means an easy one.[18] I will, however, make a somewhat impressionistic attempt, utilizing two rather divergent scenarios, to illustrate how an application of the two-level approach proposed in the present essay *might* aid, with of course the correct theoretical framework as well as analysis, in positive results in so far as the development of an autochthonous Singapore legal system is concerned. It must be reiterated that the attempt is a purely impressionistic one, with much in terms of research and elaboration (in their various forms) being required, and that I hope to be able to develop in future articles. It will suffice for the moment to briefly outline the possibilities.

For my first illustration, I wish to focus upon one particular Singapore decision that pertains to the law of contract in general and the doctrine of restraint of trade in particular. This is the 1960 Singapore High Court decision of *Thomas Cowan & Co. Ltd.* v. *Orme,*[19] an ostensibly ordinary case involving an employment situation, and reiterating principles that had already been well-established under English law. The decision concerned the attempted enforcement of a restrictive covenant by a disgruntled employer against its former employee in the context of the fumigation business.[20] Right at the outset, the judge, Chua J., citing and applying the leading statement of the (English) law by Lord Macnaghten in the House of Lords decision of

18. See, generally, *supra,* note 2.

19. [1961] M.L.J. 41.

20. The covenant reads as follows: that the employee "[o]n leaving the services of the employer for any reason whatsoever either pursuant to this Agreement or on any breach of this Agreement shall not carry on the business of White Ant Exterminator or Fumigator anywhere in the Island of Singapore either by himself or in partnership with others nor shall he take employment with any person, firm or corporation carrying on the business of White Ant Exterminators or Fumigators or any such similar business until the period of three years has expired from the date of the employee leaving the services of the employer."

Nordenfett v. *Maxim Nordenfelt Guns & Ammunition Co, Ltd.*,[21] stated thus:[22]

> "The general rule is that all convenants in restraint of trade are *prima facie* void unless thay are reasonable in reference to the interests of the *parties* concerned *and* to the interests of the *public*."

A closer examination of the case, however, reveals, whether by design or otherwise, an extremely *novel* application of these principles by the judge in the following manner. The court focused, in some detail, upon the *public* interest – a rather novel approach in view of the fact that for many years, English courts had tended to equate the interest of the contracting parties (one of the two interests to be considered, the other being, in fact, the public interest, as evidenced by the statement of general principle quoted above) with the interest of the public to such an extent that as late as 1967, in the House of Lords decision of *Esso Petroleum Co. Ltd. v. Harpers Garage (Stourport) Ltd.*,[23] at least three Law Lords delivered an (at least) implicit warning against such a loose equation.[24] To return to the *Thomas Cowan* case[25] Chua J., having found on the facts that the convenant in question was reasonable as against the *parties* themselves, then went on to consider, *separately,* the *public* interest; he found that the covenant was unreasonable *vis-a-vis* this latter interest, for it would have been against public policy the learned judge further pointed out that the evidence in fact showed that since the defendant's firm commenced business in competition with the plaintiffs', the charges for fumigaton had dropped and there had been no evidence that the standard of fumigation of ships had deteriorated.[26] The approach of the court as just briefly summarized illustrates a willingness to consider the impact of local circumstances in a concrete fashion despite, first, the rather conservative approach of the English courts at that point in time and, secondly, the fact that such a venture into the field of public policy necessarily entailed a measure of uncertainty, as discussed above. The court in the instant case clearly exhibited a willingness to analyse as well as apply the law concerned as *set in its context, i.e.,* it exhibited the second level (and more specific) approach or attitude toward legal analysis. We may disagree with the conclusions arrived at by the court from the substantive aspect, but

21. [1894] A.C. 535, at p. 565.
22. *Supra,* note 19, at p. 42 (emphasis added).
23. [1968] A.C. 269.
24. See e.g, *ibid.*, at p. 319 (*per* Lord Hodson); at p. 324 (*per* Lord Pearce); and at pp. 340 to 341 (*per* Lord Wilberforce). And see *Cheshire, Fifoot and Furmston's Law of Contract* (by M.P. Furmston, 11th Edn., 1986), at pp. 387 to 388; G.H. Treitel, *The Law of Contract* (7th Edn., 1987), at pp. 353 to 354, and 362 to 363; and *Chitty on Contracts* (25th Edn., 1983), Vol. I, at paragraph 1101. See, also, a case-note by Koh Eng Tian, "Restraint of Trade and Public Interest", (1961) 3 Univ. Malaya L.R. 118, especially at pp. 119 and 120.
25. *Supra,* note 19.
26. The court also dealt with the concept of severance that, however, need not concern us here.

this does not in any way detract from its willingness to analyse as well as apply the law in such a fashion as to take into account local circumstances and policy. However, two difficulties do, it is admitted, tend to minimize the impact of the present illustration. There is, first, the argument that Chua J. was merely deciding upon the evidence before him and not upon his own knowledge of local conditions as such. This, however, places at too high a level the theoretical minimum *vis-a-vis* the concept of 'local conditions'. To be sure, a thorough as well as systematic knowledge of the local circumstances ought to be the ideal,[27] but we cannot therefore discount the more rough and ready methods such as those adopted in the instant case. More importantly, in an adversarial system of justice (such as obtains in Singapore itself), the onus is almost wholly upon counsel to adduce the necessary evidence – of, *inter alia,* local circumstances, as was evidently the situation here. The second potential difficulty has to do with the fact that the law relating to restraint of trade is itself inextricably bound up with the concept of public policy. This being the case, it is (so the argument goes) rather too easy to argue the point of indigenous development at the second level proposed. This argument is not without force, but, as I have already stressed earlier on in this essay,[28] the distinction between the first and second levels is necessarily a fluid one, and one cannot, even *vis-a-vis* the present illustration, totally discount the first (and more general) level of analysis which focuses upon general reasoning and logic. What *is* germane for our present purpose is a recognition of the fact that the judicial analysis in the instant decision was not merely premised, in the main, upon general reasoning and logic, but, rather, went much further, delving, as we have seen, into local ramifications as well. Before we conclude discussion of the case itself, two more brief comments are in order.

First, at least two Law Lords in the *Esso Petroleum* case,[29] whilst endorsing the general statement of principle by Lord Macnaghten, stressed the concept of public policy that ran throughout both 'limbs', *viz.,* the interest of the parties themselves and the interest of the public.[30] In the words of Lord Pearce, for example:[31]

> "There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable as between the parties. There is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?"

27. See the discussion at Part II, above.
28. See, generally, the discussion at Part III, above.
29. *Supra,* note 23, at pp. 324 (*per* Lord Pearce); and 340 to 341 (per Lord Wilberforce).
30. See, *supra,* notes 21 and 22.
31. *Supra,* note 23, at p. 324.

It is submitted that the approach embodied within the words just quoted, whilst a plausible approach, does not necessarily render the original 'two-step' approach of Lord Macnaghten[32] obsolete. In my view, the maintenance of the original 'two-step' approach is workable, as evidenced by the *Thomas Cowan* case[23] itself. To telescope the elements of the inquiry into one broad question as suggested by the aforementioned quotation is, with respect, to risk courting at least some measure of confusion in terms of clarity of thought and analysis. The point just made is, of course, open to debate, but what is clear is the fact that the *Thomas Cowan* case[34] has also provided a *local* point of departure for the analysis of the restraint of trade doctrine *vis-a-vis* the public interest from a more general or doctrinal point of view, *viz.,* from the perspective of level one of the approach suggested in the instant essay.

Secondly, the case itself is possibly unsatisfactory in so far as it takes no account of the small size of Singapore as constituting an important or significant factor in ascertaining the reasonableness of covenants in restraint of trade – an omission that is also to be found in other local cases in the area.[35] The point to note, however, in the context of the instant essay is that the extension of the inquiry in this other (and new) direction can only arise as a result of the maintenance of the second (and more specific) level of the approach suggested in the present piece.

The second illustration I wish to draw upon hails from the more abstract and rarefied atmosphere and topography of jurisprudence. It pertains to that very famous debate on the enforcement of morals between that pioneering jurist, H.L.A. Hart, and the judge-jurist, Patrick Devlin – popularly known as the 'Hart-Devlin debate'.[36] The basic issue, simply put, is whether society has the right to use the law to enforce a 'shared morality' in order to safeguard the existence, the very fabric, of the society itself and, if so, how it is to set about accomplishing this task. Much has been written about this debate, and I do not, in this essay, propose to summarize ground already well covered by

32. See, *supra,* notes 21 and 22.

33. *Supra,* note 19. And see Koh Eng Tian, *supra,* note 24, at p. 120.

34. *Supra,* note 19.

35. See, *e.g., John Little & Company, Ltd.* v. *Wallace,* (1902-3) 7 S.S.L.R. 53; and *Pherdzaha Maneckji Framroz* v. *Nowroji Rustamji Mistri,* [1933] S.S.L.R. 543 (also reported in [1932] M.L.J. 96).

36. See, generally, Patrick Devlin, *The Enforcement of Morals* (1965); H.L.A. Hart, *Law, Liberty and Morality* (1963); H.L.A. Hart, *The Morality of the Criminal Law – Two Lectures* (1964), the second lecture entitled "The Enforcement of Morality"; and H.L.A. Hart, "Social Solidarity and the Enforcement of Morality", (1967) 35 U. Chi. L. Rev. 1 (reprinted as Essay 11 in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983)).

others.[37] It is sufficient for our present purposes to state that there is a plethora of abstract and conceptual arguments that can be utilized to support either side. This corresponds, in the instant context, to the first level of the suggested approach, that of the general. It may be recalled by the reader that I stated that jurisprudence, by its very nature, is given to this first level of the suggested approach. It is my view, however, that one can, in fact, go much further – utilizing the second, and more specific, level of relating the topic concerned to the Singapore context. In the present illustration, for example, the issue is raised as to whether the concept of a 'shared morality' is viable in the local context, given the diverse ethnic groups and the corresponding variety of cultures as well as religious practices. The issues raised are not at all simple, simply because they are further complicated by a variety of other factors, only a couple of which will be just briefly mentioned here. There is, first, the impact of modernization and industrialization that will have to be assessed, especially with regard to the question of a consensus. Secondly – and this is a related point – account will clearly have to be taken of the efforts by the Singapore government to construct a national identity that could possibly achieve the desired consensus;[38] but all this (and more) requires further elaboration and analysis that I hope to undertake in a future article. It ought to be noted, at this juncture, that Professor Hart himself recognizes both the relevance as well as the need for further empirical research.[39] What is germane to our present discussion, however, is the fact that even on the ostensibly abstract and general jurisprudential ground that focuses upon the first level of the approach proposed in the instant article, one is able to go further and actually sow the seeds of discussion as well as analysis pertaining to the specific local context – thus adding to the richness of the general arguments already well-canvassed by jurists at the first level.[40]

The above discussion has focused on but two diverse and contrasting

37. See, *e.g.*, R.W.M. Dias, *Jurisprudence* (5th Edn., 1985), at pp. 113 to 116; J.W. Harris, *Legal Philosophies* (1980), at Chapter 10; Neil MacCormick, *H.L.A. Hart* (1981), especially at pp. 150 to 155; and, more recently, Simon Lee, *Law and Morals* (1986), at Chapter 6; and Michael Martin, *The Legal Philosophy of H.L.A. Hart – A Critical Appraisal* (1987), at Chapter 8.

38. The literature in this area is vast, and only a sampling will be mentioned here: see Chan Heng-Chee and Hans-Dieter Evers, "Nation Identity and Nation Building in Singapore" in *Studies in ASEAN Sociology – Urban Society and Social Change* (Edited by Peter S.J. Chen and Hans-Dieter Evers, 1978), p.l 17; Chan Heng Chee, "Singapore: the drive for identity", Current Affairs Bulletin, No. 8, January 1972, p. 226; Jon S.T. Quah, "Singapore: Towards a National Identity", *Southeast Asian Affairs* (1977), p.207; and Chiew Seen Kong, "Ethnicity and National Integration: The Evolution of a Multi-ethnic Society" in Chapter 2 of *Singapore Development Policies and Trends* (Edited by Peter S.J. Chen, 1983).

39. See, in particular, his article, "Social Solidarity and the Enforcement of Morality", *supra,* note 36 (and, especially, the last Part thereof).

40. See, *supra,* note 37.

illustrations of the possible fruit that may be yielded if the approach proposed here is adopted. The discussion has had, necessarily, to be brief, and the analysis cursory. But, the possibilities that exist in other spheres of the law are, it is submitted, enormous. We have but barely scratched the surface, so to speak.

V

I would like to conclude this essay by first reiterating that what is suggested here is an *approach,* an *attitude of mind only.* But, the attitudinal approach is often the key that unlocks the house of substance. My guess (if I may be permitted the use of such a 'loose' term) is that the approach proposed in the instant article will probably be felt to be correct by most at an *intuitive* level. In fact, and as already mentioned as well as considered above, such a 'two-level' approach is probably being practised at a *subconscious* level in any event. If all this be true, then it is time to take this simple approach and make it an *explicit* one that ought to be practised to its utmost, *i.e.,* that it ought to be made a *conscious* attitude of mind. This would aid, in no small measure, in the development of an autochthonous Singapore legal system. A constant as well as conscious desire and effort to develop an autochthonous legal system will, it is submitted, *automatically* result in the seizing of any and every opportunity – whether by legal academic or lawyer or judge – not only to resolve the issue at hand, but also to resolve it in a fashion that will aid in the development of a truly Singaporean legal system. Alas, some skeptics may persist in arguing (or, more likely, asserting) that an autochthonous Singapore legal system will *never* be attained, *no matter* which approach is utilized. That may well be true, but I think it is worth the try. Even in ultimate failure, we will know what stakes were involved, and the legal system as a whole cannot but be developed in some way as a result – albeit not in the fashion envisaged. To do otherwise is to voluntarily embrace the fetters of our colonial heritage, and that, especially in the midst of material prosperity and opulence, would constitute the cruellest irony of all.

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