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Of 'cut-off' dates and domination: Some problematic aspects of the general reception of English Law in Singapore

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OF 'CUT-OFF' DATES AND DOMINATION: SOME PROBLEMATIC ASPECTS OF THE GENERAL RECEPTION OF ENGLISH LAW IN SINGAPORE *

This article deals with some problematic aspects of the general reception of English law in Singapore. It examines, first, the concept of the 'cut-off' date for statutes and the common law. The second substantive part deals with the concepts of suitability and modification, analysing their theoretical cogency as well as their application in the local context. The third and final part of the article examines the relationship between reception and *stare decisis*, indicating and examining potential contradictions as well as other allied issues.

I. Introduction

DESPITE some fairly recent ripples of controversy [1] the proposition that English law has been received in Singapore, if not a realistic theory, is at least a stark reality governing the daily 'legal lives' of judge, practitioner, academic, and student alike. This governance (often more of a psychological nature) may, perhaps, be a little too strict to help foster the kind of indigenous legal development that would lead ultimately to an autochthonous Singapore legal system,[2] but English law is indeed here to stay.

The present article, too, is premised upon the fact that English law was received in Singapore. It seeks to examine some problematic aspects of this reception; it is an effort in description, clarification and re-evaluation, though it is confined to general reception only.[3]

I examine, first, the concept of the 'cut-off' date for both statutes as well as the common law, describing the possible difficulties and ramifications, and suggesting tentative solutions.

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1 See Mohan Gopal, "English Law in Singapore: The Reception That Never Was" [1983] 1 M.L.J. xxv. But see my article, "English Law in Singapore: Precedent, Construction and Reality or 'The Reception That Had To Be' ", [1986] 2 M.L.J. civ.

2 See, generally, G.W. Bartholomew, "The Singapore Legal System" in *Singapore: Society in Transition* (Edited by Riaz Hassan, 1976), pp. 84 to 112, at pp. 97 to 109; see, also by the same author, "Developing Law in Developing Countries", (1979) 1 Lawasia N.S. 1.

3 The most 'notorious' amongst the special reception provisions is s. 5 of the Civil Law Act, Cap. 30, Singapore Statutes, 1970 (Rev. Ed.). See, generally, Soon and Phang, "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 concepts of suitability and modification are then re-evaluated for their theoretical cogency; I then proceed to re-evaluate the application of these concepts, examining a few key precedents in the process, and attempt to demonstrate that such an application may not have been entirely in accord with the magnanimous spirit that was often emphasized by the colonial judiciary; this is followed by an examination of an interesting issue, *viz.* the date for applying the aforementioned concepts.

In the final substantive section of this article, I examine the relationship between reception and *stare decisis*, indicating and examining potential contradictions as well as other allied issues. This final section, though somewhat abstract and conceptual in form, is perhaps the least well-canvassed of all the issues considered in this article. It is, however, the most problematic; I have sought to raise as well as answer various problems as satisfactorily as possible in the hope that, as a tentative effort at least, further thoughts may be provoked as a result.

The various sections comprise, in a sense, a hotchpotch, generating distinct issues in their own right, albeit connected by their roles in the process of reception itself. The re-evaluation and clarification of these issues, however, is imperative if an autochthonous legal system is to be constructed; I consider this possibility briefly in the concluding part of this essay.

II. The 'Cut-off' Date

(a) *The General Problem Stated and Its Connections with Statute Law*

The first main issue I want to explore in this article is when precisely the so-called 'cut-off' date is, *i.e.* at what point in time is the law of England received? Where the statute introducing English law is express, few, if any, problems arise.[4] Where, however, as in the case of Singapore, the Charter concerned [5] is silent, *and* where there are prior and subsequent Charters in virtually identical language,[6] many problems arise with regard to the ascertainment of the 'cut-off' date.

The need for a proper ascertainment of this date is imperative so as to inject the measure of stability into the received English law required for the construction of an autochthonous legal system.[7] It would not be at all feasible to set about this task of construction without a fixed and ascertained pool of English statutes and decisions. To do so would be akin to building on a viscous foundation that renders the existence of any resulting structure extremely precarious indeed. One must not forget, too, the predictability that a 'cut-off' date would serve in practice for lawyers although the opportunities for its application are, unfortunately, rarely exercised.

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[4] See *MacDonald* v. *Levy*, (1833) 1 Legge 39, at pp. 51 to 53. Although it should be noted that many *other* problems of construction invariably arise: see, *e.g.*, the situation in Malaysia; in particular, s. 3 of the Malaysian Civil Law Act, 1956 (Revised-1972). See, also, G.W. Bartholomew, *The Commercial Law of Malaysia* (1965); Joseph Chia, "Reception of English Law under sections 3 and 5 of the Civil Law Act (Revised 1972)", [1974] J.M.C.L. 42; and L.A. Sheridan, *Malaya and Singapore — The Borneo Territories* (1961), at pp. 18 to 19.

[5] *I.e.*, the Second Charter of Justice of 1826.

[6] *I.e.*, the First and Third Charters of Justice of 1807 and 1855 respectively.

[7] See *supra*, note 2.

The basic problem may be restated as follows, bearing in mind the fact that the *Second* Charter of Justice is the first Charter that actually applied to Singapore; the 'cut-off' date may be:

(i) 1807, the date of the First Charter, *or*

(ii) 1826, the date of the Second Charter, *or*

(iii) 1855, the date of the Third Charter.

As already alluded to above, the practical importance of the 'cut-off' date is virtually self-evident, especially with regard to English statutes for the reception (or otherwise) of a particular English statute would depend on which one of the above three dates was chosen. The choice of option (iii) would, of course, result in the maximum number of English statutes being received.[8]

The First Charter of Justice applied only to Penang, Singapore and Malacca having not been acquired by the British at that time. Maxwell R. in *R.* v. *Willans*[9] resolved *against* taking 1807 as the 'cut-off' date and, instead, reasoned that 1826 (the date of the Second Charter) was the appropriate date in view of the anomaly that would otherwise result if the Second Charter was taken to have introduced English law into Singapore and Malacca as at 1826, whilst *vis-a-vis* Penang the law of England remained as at 1807, the date of the First Charter. There has generally been little, if any, argument against this particular proposition. What is in fact unclear is whether, on a parity of reasoning, English law was re-introduced as at 1855 when the Third Charter of Justice was promulgated for the Straits Settlements. R.H. Hickling in fact argues for this shift in the 'cut-off' date (*i.e.* from 1826 to 1855),[10] whilst Maxwell R. argued, albeit in *dicta*, otherwise, utilizing reasoning that is set out and commented upon in the following paragraph.

While I agree with Hickling that most of the local authorities on this particular point are inconclusive, primarily because only bare assertions are for the most part involved,[11] I disagree with his further argument that because the Third Charter was equally extensive in its scope as the earlier Charters,[12] it cannot, as Maxwell R. claimed in

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8 R.H. Hickling in an unpublished note, "A Note on the Law of Singapore: What is the Date of the Reception of English Law?" (Law/680/79), at p. 4 pertinently points to the relative great number of major English Acts of Parliament passed between 1826 and 1855.

9 (1858) 3 Ky. 16.

10 See, *supra*, note 8, though the Indian position (no re-introduction of English law in the Presidency Towns after 1726) supports, or is at least not contradictory to, the arguments I make below: see M.P. Jain, *Outlines of Indian Legal History* (4th edition 1981), at pp. 349 to 351.

11 The authorities supporting the view that 1826 is the 'cut-off' date are marginally more numerous: *Ismail bin Savoosah* v. *Madinasah Merican & Anor.*, (1887) 4 Ky. 311; *In re Lu Thien*, (1891) S.L.R. 10, at p. 15, *per* Sir E.L. O'Malley C.J. although the selfsame judge was non-committal in *Sculiy* v. *Scully*, (1890) 4 Ky. 602; see also, *Mahomed Ally* v. *Scully*, (1871) 1 Ky. 254 (though the case is reported too briefly). While *Municipal Commissioners* v. *Tolson*, (1872) 1 Ky. 272 seems to support the 1826 date, it is rather ambiguous, appearing to deal with the concept of modification instead. *Contra*, *Jemalah* v. *Mahomed Ali & Ors.*, (1875) 1 Ky. 386 and *M* v. *G*, (1904) S.S.L.R. 82 (1833 and 1855 'cut-off' dates respectively; 1833 was the year when Indian Acts were first promulgated under the aegis of the Governor-General of India in Council and extended to the Straits Settlements).

12 *Supra*, note 8, at p. 6.

R. v. *Willans*,[13] be construed as merely an instrument effecting a reorganization of the existing court "by dividing it into two divisions and adding a second Recorder". Indeed, quite apart from the wording of the preamble of the Third Charter (which Hickling acknowledges), the governing act itself[14] makes explicit provision for both recorders' pay and allowances in consequence of the reorganization of the courts. The reason for the act itself may be traced to a petition by the inhabitants of Singapore for a more efficient system for the administration of justice, which petition was part of the agenda of a session of the British Parliament.[15] In fact, a possible explanation for the repetition, in the Third Charter, of substantially all of the provisions of the previous Charters may have been merely a matter of pure drafting convenience as well as form.

Before proceeding to examine the concept of the 'cut-off' date in relation to the common law, it would be appropriate to deal with two more important, albeit general, propositions by Dowling C.J. (with whom Willis J. agreed) in the 1839 New South Wales Supreme Court case of *Ex parte Nichols*[16] which would allow a local court to permit the reception of an English *statute* promulgated *even after* the 'cut-off' date. The first, and indirect mode, is where the court could "have reference" to the act concerned "in order to ascertain what the law of England is" on the particular subject and thereby enforce "the principle" of the law in question.[17] This approach, it is submitted, is vague and difficult to apply, for either an English statute applies or it does not; there is really very little room for a vague 'half-way house' approach. If the statute concerned was intended to change the common law, the whole notion of a 'cut-off' date militates against doing indirectly what could not be achieved directly, *i.e.* applying the "principle" of the statute which by virtue of the 'cut-off' date was inapplicable. If, on the other hand, the statute was merely intended to incorporate the common law, the more pertinent course of action, it is submitted, is to have recourse to the common law itself,[18] and this would raise separate issues that will be discussed below.[19] Secondly, the learned Chief Justice suggested that "fundamental laws" relating to personal rights still apply beyond the 'cut-off' date.[20] It is submitted that such an approach should also be rejected since it, too, smacks of vagueness; recourse may possibly be had to the common law, or even

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13 *Supra*, note 9, at p. 37.

14 Act 18 & 19 Vic, c. 93 (1855).

15 For a reference to the petition, see *Parliamentary Papers 1862*, Vol. 40. For a report of the proceedings in the House of Lords, see *Hansard's Parliamentary Debates: Third Series* Vol. CXXXIII, 9th May to 12th June, 1854 at Cols. 1354 to 1356.

16 (1839) 1 Legge 123. The issue here was whether the English Prisoners' Counsel Act (which was passed *after* the 'cut-off' date in New South Wales) applied so as to enable an accused to conduct his defence in a summary trial before a Magistrate *by counsel*.

17 *Ibid.*, at p. 126.

18 Of which the statute becomes a kind of evidence. *Quaere:* is this all Dowling C.J. meant? *Cf.*, *infra*, note 20 and the quotation therein.

19 See, especially, note 26, *infra*.

20 *Supra*, note 16, at p. 128. But *cf.* his statement at p. 126: "Independently of any Act of Parliament I take it to be principle of the law of England and natural justice, that every defendant, whether in a civil or criminal judicial proceeding (summary or not), has a right to be fully heard in person, in defence of his property, his fame, his liberty, or his life." His pronouncements on the applicability of the English act itself are thus *obiter*.

general principles of natural justice, though not by reference to the statute itself.[21]

Alternatively, the local Legislature can enact legislation based upon English statutes promulgated after the 'cut-off' date. But it is not the task of the local courts themselves to become, in effect, an 'alternative legislature'. Indeed, the dissenting judgment of Stephen J. has much to commend to us, for the judge astutely points to the possibility of 'floodgates' and the fact that "the function of the local Legislature will... be reduced into such narrow limits as that it institution must become almost useless."[22]

It is thus submitted that the local courts ought not to permit the reception of an English statute promulgated after the 'cut-off' date.

(b) *The Common Law*

Turning now to yet another problem, we find that whilst it is accepted that the notion of a 'cut-off' date is eminently applicable in the realm of statute law, it is not so with regard to the common law. Why this should be the case is a point that is not often considered but merely assumed. It would therefore be appropriate to consider, at this juncture, whether the distinction between statute law and common law with regard to the presence or absence of a 'cut-off' date is valid. In principle at least, there is no reason why a 'cut-off' date should apply to English statutes only, a proposition which has received the barest number of supporters, the foremost of whom is Allott.[23] The reason for the maintenance of the distinction, it is submitted, is more one of practical convenience rather than theoretical justification. Statutes are all promulgated as of a certain specific date, and most are 'self-contained' in that they deal with distinct subject matter. It is difficult, on the other hand, to ascribe a 'cut-off' date to common law principles since they are popularly perceived to be in a state of continuous development, a proposition that has the oft-cited support of the Blackstonian "declaratory theory"[24] although too much store ought not be placed by it.[25] But, even this argument may not hold good simply because common law cases in a particular area can be easily classified

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21 And this is what Dowling C.J. apparently also did, probably as an alternative: *ibid.*, at p. 126; see the quotation in note 20, *supra.*

22 *Ibid.*, at p. 136. And see the same judge's opinion in *Ex p. Lyons, In re Wilson,* (1839) 1 Legge 140, at pp. 152 to 153 (adopted by Barton J. in *Quan Yick* v. *Hinds, infra,* note 40, at pp. 367 to 368).

23 Antony Allott, *Essays in African Law* (1966), at pp. 32 to 33 and, perhaps, Kwamena Bentsi-Enchill, *The Choice of Law in Ex-British Africa* (1970), at pp. 10 to 11. J.E. Cote, on the other hand, attempts to take a 'middle view' which is unconvincing: "The Reception of English Law", (1977) 15 Alta. L. Rev. 29, at p. 57. A.E.W. Park's point to the effect that it is equally artificial to 'freeze' pre-reception common law as binding is well taken, but is, on balance, theoretically unsound, as will be argued below (*The Sources of Nigerian Law* (1963), at pp. 23 to 24). Interestingly enough, there are acknowledgements of a 'cut-off' date for the common law as set out in section 3 of the Malaysian Civil Law Act (*supra,* note 4) in the case of *Lee Kee Choong* v. *Empat Nombor Ekor,* [1976] 2 M.L.J. 93, P.C. See, also *Jamil Bin Harun* v. *Yang Kamsiah bte Meor Rasdi & Anor.*, [1984] 2 W.L.R. 668, P.C.

24 *I.e.* that the common law, existing in customs and usages, is 'just there', 'waiting' to be discovered by the Courts; judges do not, therefore, 'make' law as such. See, generally, Rupert Cross, *Precedent in English Law* (3rd edition, 1977), at pp. 26-33. For a jurisprudential perspective, see Ronald Dworkin, *Taking Rights Seriously* (1978), especially at Chapter 4.

25 See, *e.g.*, Lord Reid, "The Judge As Law Maker", [1972] J.S.P.T.L. 22.

by the date on which each was decided and the 'cut-off' date can be applied accordingly. To argue that to apply a 'cut-off' date would be to artificially preclude the local courts from taking into account later developments in England is in effect an exercise in semantics since all later English cases would not be automatically barred from consideration by the local courts. The local courts would, however, not be bound by such post-reception decisions.[26] This would be akin to the authority of the local legislature to decide whether or not to adopt, *via* local legislation, a post-reception English act amending a principal English act that has already been received.

The fact of the matter, however, is that there is, as alluded to in the preceding paragraph, a general phobia about applying a 'cut-off' date to common law principles. Such an approach is *perceived* as being artificial. This attitude really stems from what I suspect to be a residual and misconceived attachment to the "declaratory theory" of the common law. It is, however, simultaneously recognized that the common law can diverge in different countries,[27] a proposition that runs completely counter to the "declaratory theory", but which serves as a 'security blanket' to provide for the situation when things start to 'go wrong'. The practice, as I perceive it, is puzzling, to say the least. I therefore propose a possible reform that might give some semblance of rationality to the flawed theory just enunciated, *viz.* a legislative rationalization by the Singapore legislature itself providing that English law, generally, has been received in Singapore as at 27th November, 1826 (the date of the Second Charter of Justice), thus providing, in turn, for a 'cut-off' date in *express* terms for both statutes *and* the common law alike. Such a reform might not, it is conceded, completely eradicate the aforementioned phobia, but, it would at least constitute a tangible start.[28]

What, then, of another related issue, *viz.* that of *English decisions* construing *received English statutes*? This question differs somewhat from the situation of common legislation. Though most of the arguments concerning common legislation may be deployed in the instant situation, they have been rebutted elsewhere.[29] Further, the present

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[26] This is a quite different situation from the one existing with regard to the reception of English statutes discussed earlier, because insofar as *post*-reception statutes are concerned, the local legislature, and not the courts, is the appropriate forum for deciding which English statutes after the 'cut-off' date ought to be received *via* local enactment. If, on the other hand, the local court feels that the post-reception statutes concerned embodies a 'fluid' common law rule, then it can possibly change the existing common law, as explained earlier, but, here again, it must be emphasized that the local court is *not bound* to do so. And *cf.* the Malaysian situation, *supra*, note 23.

[27] *Australian Consolidated Press Ltd.* v. *Uren*, [1967] 3 All E.R. 523, [1969] 1 A.C. 590, P.C.

[28] Though not, apparently, in Papua New Guinea: See the recent interesting piece by Dhirendra K. Srivastava and Derek Roebuck, "The Reception of the Common Law and Equity in Papua New Guinea: The Problem of the Cut-Off Date", (1985) 34 I.C.L.Q. 850.

[29] " 'Overseas Fetters': Myth or Reality?", [1983] 2 M.L.J. cxxxix. (See, also, *infra*, notes 5 to 7 for the main case-law considered in this article). There have, however, been two recent Privy Council cases that suggest that the 'fetters' I have argued against still exist. Detailed consideration of these authorities is outside the scope of this article, though it is submitted that the arguments canvassed in the article cited still hold good. The two cases are *Thomas Bruce Hart* v. *Joseph O'Connor & Ors.*, [1985] 3 W.L.R. 214 and *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd. & Ors.*, [1985] 3 W.L.R. 317, on appeal from the Courts of Appeal of New Zealand and Hong Kong respectively. Both decisions may, however, be rationalized on their own facts. In *Hart* v. *O'Connor*,

situation presents a different and possibly stronger argument in favour of the binding effect of such decisions simply because such decisions are arguably part of the corpus of Singapore law; to argue otherwise would be to draw an artificial distinction since many, if not most, statutory provisions require interpretation and the resultant case-law is thus an integral part of the 'total' law concerned. This argument, however, is much less persuasive in the context of *post*-reception cases. A suggested solution has been to accept all pre-reception decisions of this nature as binding but post-reception decisions as not binding since

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e.g., the Privy Council found no special local conditions that merited a divergence of the common law on the point in question insofar as New Zealand was concerned; such an approach is in accord with the *Australian Consolidated Press case, supra,* note 27, though the latter case was not itself cited (though *cf.* the Court of Appeal judgment in [1983] N.Z.L.R. 280, at p. 281 where McMullin J., in delivering the judgment of the court, stated that the case of *Archer* v. *Cutler,* [1980] 1 N.Z.L.R. 386, which they followed and which differed from the existing common law, was "*the law of New Zealand*" [at p. 290; emphasis mine]). Having regard, in fact, to the very radical departure from the general rule relating to the circumstances under which a contract could be avoided when made with another party of insufficient mental capacity (taking into account the various precedents), it is submitted that on *general arguments of doctrinal principle, Hart* v. *O'Connor* was not, by any means, an unconventional judgment. In other words, it could be argued that the Privy Council, sitting as the highest appellate tribunal in the *New Zealand* hierarchy of courts, reversed the Court of Appeal on grounds of principle — a function that is entrusted to all appellate tribunals, although, arguably, the tenor of the language used by Lord Brightman, in delivering the judgment of the Board (at p. 233), hints at some residuary fettering (alluding to the argument of uniformity that I reject in my article). Reference should also be made to the judgment of Lord Morris of Borthy-y-Gest in the *Australian Consolidated Press* case itself where, in delivering the judgment of the Board, the learned Law Lord stated ([1969] 1 A.C. 590, at p. 644; emphasis added): "Had the law developed by *processes of faulty reasoning or had it been founded upon misconceptions* it would have been necessary to change it." The *Tai Hing Cotton Mill* case is also in accord with the spirit behind the *Australian Consolidated Press* case; Lord Scarman, in delivering the judgment of the Board and referring to *Hart* v. *O'Connor* (but not, curiously again, the *Australian Consolidated Press* case) stated (at p. 331; emphasis mine):

> "It is of course, open to the Judicial Committee to depart from a House of Lords' decision in a case where, *by reason of custom, statute, or for other reasons peculiar to the jurisdiction where the matter in dispute arose,* the Judicial Committee is required to determine whether English law should or should not apply."

The problem, however, is that the Law Lord does an immediate volte-face by stating in the very next sentence: "Only if it be decided or accepted (as in this case) that *English law* is the law to be applied will the Judicial Committee consider itself *bound* to follow a House of Lords' decision. An illustration of the principle in operation is afforded by the recent New Zealand appeal *Hart* v. *O'Connor* [1985] 3 W.L.R. 214, in which the Board reversed a very learned judgment of the New Zealand Court of Appeal as to the contractual capacity of a mentally disabled person, holding that *because English law applied,* the duty of the New Zealand Court of Appeal was not to depart from what the Board was satisfied was the *settled principle* of that law" (*ibid.;* emphasis mine, and *cf.* the discussion of the *Trigwell* case, *infra,* notes 78 to 84, and the accompanying text). The latter qualification is a disturbing one, having 'fettering' implications, first, for House of Lords decisions in relation to s. 5 of the Civil Law Act (Cap. 30, Singapore Statutes, 1970 (Rev. Ed.); and see dicta by Coomaraswamy J. in *Gomez Nee David* v. *Gomez,* [1985] 1 M.L.J. 27, at p. 28; but *cf.* my article in [1983] 2 M.L.J. cxxxix, at p. clii). Secondly, despite the initial endorsement of manoeuvreability, the Privy Council is, in effect, hinting, again, at a residuary fettering. It is interesting to note that of the Law Lords who sat in both *Hart* v. *O'Connor* and the *Tai Hing Cotton Mill* case, two sat in both cases — and also coincidentally, delivered judgments — *viz.* Lords Brightman and Scarman! What is more puzzling is that Lord Scarman, sitting on an appeal from the Federal Court of Malaysia in 1984 in *Jamil Bin Harun* v. *Yang Kamsiah bte Meor Rasdi & Anor.,* [1984] 2 W.L.R. 668 appeared much more liberal; he stated (at p. 672; emphasis added): "*The Federal Court is*

in the latter situation, the local courts possess *equal* authority to construe the English statutes concerned.[30] It is submitted that this is a tenable proposition that also gives effect to the concept of a 'cut-off' date.

III. Suitability/Applicability and Modification

(a) *The Concepts Re-evaluated*

The generally accepted view now is that suitability or applicability on the one hand and modification on the other are distinct but sometimes related concepts.[31] In short, if an English rule is found unsuitable to the local circumstances, it is not received. Assuming, however, that it is otherwise suitable to the local circumstances but would, if applied, cause injustice or oppression to the various races, the rule concerned may be modified.[32] A third qualification, added by G.W. Bartholomew,[33] pertains to the existence of local legislation. It is, however, submitted that, notwithstanding the many problems this third qualification entails,[34] it is not, insofar at least as English statutes are concerned, a separate and distinct difficulty as such, but is merely a facet of the suitability test; if there is already a local act in force, it follows that the English act concerned would not be suitable to the local circumstances. And insofar as the common law is concerned, local legislatures have always had the power to pass statutes abrogating the common law.

At this juncture, however, I would like to raise a query with regard to the pat distinction drawn and accepted by lawyers and judges alike between suitability on the one hand and modification on the other.

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well placed to decide whether and to what extent the guidance of modern English authority should be accepted. On appeal the Judicial Committee would *ordinarily accept* the view of the Federal Court as to the *persuasiveness of modern English case law in the circumstances of the States of Malaysia,* unless it could be demonstrated that the Federal Court had *overlooked or misconstrued* some *statutory* provision *or* had committed *some error of legal principle recognised and accepted in Malaysia.*" To be sure, the Privy Council had cognizance of s. 3 of the Malaysian Civil Law Act of 1956 (which is the *reception* provision), though no direct reference is made to it; but it should be noted that this case is, again, in accord with the *Australian Consolidated Press* case (though *cf.* the question as to whether the suitability test under either statute or charter is the same: see, *infra,* Part IV), and with the argument relating to the correction of doctrinal error by a higher court, as stated above. See, also, *The "Kota Pahlawan"*, [1982] 2 M.L.J. 8, at pp. 9 to 10.

30 Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), at pp. 568 to 569. See, also, Allott, *op. cit., supra,* note 23, at p. 40. The latter writer suggests the same approach with regard to Indian acts (at pp. 41 to 42), but it is submitted that even pre-reception decisions should not be binding as well simply because the link is too tenuous.

31 See, *e.g.,* G.W. Bartholomew, *op. cit., supra,* note 2, at pp. 90 to 92.

32 1 Bl. Comm. 107. See, also, the oft-cited *The Mayor of the City of Lyons* v. *The East India Co.,* (1836) 1 M.I.A. 175 and, in the local context, the equally well-cited cases of *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 Neo & Ors.* v. *Ong Cheng Neo,* (1875) L.R. 6 P.C. 381. I am not here concerned with the theoretical basis for the concepts of suitability and modification (*i.e.* whether by conflict of laws principles (or comity) or a wider common law doctrine or the words of the Charter itself) since the concepts exist and have been accepted as a legal fact: see Terrell J. in *Mong* v. *Daing Mokkah,* [1935] M.L.J. 147, at p. 148. I would only add that the rationale pertaining to conflict of laws is the least defensible and the most problematic alternative.

33 *Op. cit., supra,* note 2, at p. 92.

34 For a good survey and suggested solutions, see G.W. Bartholomew, *op. cit., supra,* note 4, at pp. 40 to 61.

It was, for example, the case with respect to the Chinese population that in order to obviate injustice or oppression, the English rule barring polygamy[35] was dispensed with and the Chinese custom of polygamy recognized instead.[36] This is but one example of personal laws being applied to avoid injustice or oppression.[37] The net result, however, is that the English rule is excluded — which, as the reader may recall, is what results when the suitability test applies. Such a blurring of the concepts of suitability and modification does in fact generate a serious problem in terms of conceptual clarity, because the scenario just sketched represents one of the more common situations in this particular context.

It could, of course, be argued that modification need not necessarily produce the same result as the suitability test (*i.e.* total rejection of the English law concerned) in the case of English *statutes* which may be modified accordingly, the 'offending parts' being severed from the main text of the statute itself. Quite apart, however, from the fact that there is some authority against the severance of a received statute,[38] there is the problem of ascertaining how far one may go.[39] The only real guideline appears to be that one must judge the act concerned as a *whole*. In the apt words of Griffith C.J. in *Mitchell* v. *Scales*:[40]

> "The question to be considered is, not whether such a law might reasonably have been then enacted in New South Wales, but whether the provisions of the Statute, regarded as a whole, were

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35 See *Hyde* v. *Hyde and Woodmansee*, (1866) L.R. 1 P & D 130, although Lord Penzance apparently confined his judgment to the non-entertainment of proceedings for matrimonial relief only (in that case, a petition for divorce on the ground of adultery); he stated (at p. 138):

> "This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights and obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

Hyndman-Jones C.J. in *Choo Eng Choon, Choo Ang Chee* v. *Neo Chan Neo & Ors.*, (1908) 12 S.S.L.R. 155 (better known as the "Six Widows Case") relied, *inter alia*, upon the above-quoted reservation, and argued, in addition, that the conditions in the Straits Settlements were very different from those that obtained in England. See, also, the judgment of Braddell J., especially at pp. 211 to 212 (*contra* Sercombe Smith J., dissenting, especially at pp. 201; 204 to 205).

But English Courts generally refused to recognize polygamous marriages for any purpose whatsoever, an attitude that lasted some way into the twentieth century: see, *e.g.*, J.H.C. Morris, *The Conflict of Laws* (3rd edition, 1984), at p. 181.

The actual *ratio* of *Hyde* v. *Hyde and Woodmansee* itself has now been overruled by s. 47 of the English Matrimonial Causes Act, 1973.

36 The most famous authorities are *In The Goods of Lao Leong An*, (1867) Leic. 418 and *Choo Eng Choon, Choo Ang Chee* v. *Neo Chan Neo & Ors.*, *supra*, note 35.

37 See note 32, *supra*. But *cf.* note 44, *infra*.

38 The leading authority is *S.S.T. Sockalingam Chettiar* v. *Shaik Sahied bin Abdullah Bajerai*, (1933) S.S.L.R. 101, P.C., a case which is itself concerned with the intricacies of section 5 of the Civil Law Act, Cap. 30, Singapore Statutes, 1970 (Rev. Ed.).

39 There is, of course, little problem when the reception statute expressly confines all modifications to "formal verbal alterations" only: see A.E.W. Park, *op. cit.*, *supra*, note 23, at p. 18.

40 (1907) 5 C.L.R. 405, at p. 411, applying the principles enunciated by himself in *Quan Yick* v. *Hinds*, (1905) 2 C.L.R. 345, at p. 364. See, also *Ex p. Deedo*, (1844) 1 Legge 193, *The Queen* v. *Colan*, (1878) 1 S.C.R.N.S. (N.S.W.) 1 and *Anderson* v. *Ah Nam*, (1904) 4 S.R. (N.S.W.) 492.

> so applicable to New South Wales as to be incorporated in its law. You cannot select one isolated provision and say that that alone is such as might have been made law in New South Wales. That is not the correct doctrine."

However, while it is acknowledged that one or even two isolated provisions either way in the statute concerned may constitute little of a problem for the Courts,[41] the task of the Court becomes considerably more difficult when several provisions, all apparently 'tugging' equally strongly at either end of the two extremes of suitability and inapplicability, are involved. How, then, would the Court be able to ascertain whether or not the act concerned is in fact received? This problem is compounded by the fact that a mere physical count of the various provisions of the act is not the test envisaged by the Courts. The question is whether the act, taken as a *whole*, is applicable to the circumstances of the country concerned. However, as has been sought to be shown, the question is not easily answered in the 'hard case' which is, ironically enough, the very situation that 'cries out' for a solution.

Interestingly enough, the reader might have noticed by now that, contrary to the arguments made above with regard to statutes, the concept of modification merges into the doctrine of suitability, *even in* the situation of *statutes* in the following way — the extent to which one can modify will determine whether the act concerned, as modified, will be received as being "suitable". Here, again, the writers and courts have rested content in serving out superficially attractive statements of 'principle'.

It might be interesting at this juncture to note that the concepts of suitability and modification have hitherto ostensibly impinged merely upon the 'legal lives' of first year law students, and only apparently for the duration of, at best, their years in Law School only, for, if the law reports are any indication of the extent to which such ideas are thought through in later 'legal life', the absence of such thought is the only definitive conclusion that can be drawn. It will, of course, be argued that these concepts are 'ancient' ones that have little or no bearing on the 'modern' English rules that are cited in the local courts today. To this argument, I make two comments.

First, it is my belief that many ostensibly 'neutral' English rules may in fact be unsuitable if probed more deeply, with efforts made to relate these rules to the wider political and socio-economic context.[42] It is conceded that I have as yet not undertaken a specific study in this regard, but if some tangible proof is required to help substantiate the proposition that no rule, however ostensibly neutral, is in fact separable from the wider context, I need only point to the cases in the distant past where vigorous efforts were made by counsel on behalf of their clients with regard to the modern rule against perpetuities which, at first blush at least, would constitute as neutral a rule as one could find. The courts, too, recognized this wider connection, although there is

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41 *Attorney General for New South Wales* v. *Emily Susannah Love*, [1898] A.C. 679; but *cf. Miller-Morse Hardware, Co. Ltd.* v. *Smart*, [1917] 3 W.W.R. 1113.

42 But to do this theme justice will require a much broader and detailed study which is outside the more modest scope of this article.

also more to their judgments than meets the eye, an argument that I shall be elaborating upon in the next sub-section.

Secondly, there is some indication that at least part of the legal profession has neither the time nor the inclination to engage in a wider probing of the English rules.[43]

(b) *Application of the Concepts*

It has been a much vaunted claim of British colonial justice that the concepts of suitability and modification existed to ensure that the native populations received, as it were, the best of both worlds — the developed and even-handed system of English law on the one hand and the preservation of viable native law and customs (where more suitable) on the other. It is, however, submitted that there is more to this claim than meets the eye, and that an equally good case can be made out for the proposition that such a stance was crucial not only to the continued survival of British dominion and power over the Straits Settlements but also to the enhancement of British interests in the Settlements.[44]

I have chosen cases in a couple of fields (*viz.* that of property and Chinese custom) to illustrate my arguments. It should be borne in mind that the cases considered here are the most oft-cited authorities with regard to suitability and modification generally, and an evaluation of them would, it is hoped, be thus sufficient to sustain the more general propositions made. In fact, I would go so far as to state that the same broad threads would be replicated in the analysis of the operation of the concepts of suitability and modification in other areas of the law as well.

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43 See Chief Justice Wee Chong Jin, "The Legal Profession in Singapore — Past, Present and Future", [1980] 2 M.L.J. lviii, especially at pp. lx, lxii (1980 Braddell Memorial Lecture). See, also, the address by the Prime Minister at the Annual Dinner of the Law Society, 1977, [1977] 1 M.L.J. lxvii, especially at p. lxix.

44 A view that has some slender support, perhaps, by G.W. Bartholomew who hints at this in "The Reception of English Law Overseas", (1968) 9 Me Judice 1, at p. 9 where he suggests that the principle of suitability operated "more by way of a device whereby the courts can control the reception of English law rather than a rule subject to which the courts are forced to operate". See, also, the same writer in "The Singapore Legal System", *op. cit., supra* note 2, at pp. 91 to 92 where he states, rather tongue-in-cheek:

> "The argument from injustice and oppression is, of course, double-edged, for whilst it can be used to justify the application of personal systems of law in place of English law, it can also be used to justify the refusal to apply personal systems of law."

He goes on to cite the very pertinent example embodied in the case of *Mong* v. *Daing Mokkah, supra,* note 32, where Muslim law (which would otherwise have barred a suit by a Muslim lady for breach of promise of marriage) was not applied. The learned judge, Terrell J., went on to remark that injustice or oppression would in fact occur if English law was *not* applied! It can be seen that even the concepts of injustice or oppression are interpreted in the light of the judge's own views, *viz.* through the spectacles of English law. So far from disagreeing with the result reached on the facts of this particular case, what I am contending is that even my conception of injustice or oppression may be coloured by what is a fairly thorough grounding in English law. Caution, it is submitted, should be the keynote here. See, also, K.L. Koh's interesting comments on the case of *Choo Tiong Hin* v. *Choo Hock Swee,* [1958] M.L.J. 67 in "Current Legal Research in Singapore", (1979) 21 Mal. L.R. 69, at p. 71. I am, however, by no means advocating a reductionist approach based along the lines of vulgar Marxism; such an approach would not capture the full 'flavour', so to speak, of reality. For a good warning in the context of the rule of law, see E.P. Thompson, *Whigs and Hunters* (1975), at pp. 258 to 269.

Turning, now, to property and, in particular, the modern rule against perpetuities, it was held in both the leading authorities of *Choa Choon Neoh* v. *Spottiswoode*[45] and *Yeap Cheah Neo & Ors.* v. *Ong Cheng Neo*[46] (the latter of which is a Privy Council decision) that the rule was suitable to the condition and circumstances of the Straits Settlements.[47] The reason given was simple. To reject the rule would lead to the inalienability of property and thus adversely affect the economic growth of the Settlements whose great potential then, as now, lay in its function as a commercial and trading centre. The upshot, however, was that in both cases the provisions for Chinese religious ceremonies which were "considered by the Chinese to be a pious duty"[48] were held void as tending toward a perpetuity and as not coming within the exception of being a charity according to the requirements of *English* law. It could be argued that in this instance the utilitarian justification prevailed, but looked at in the light that in Singapore, at least, the Chinese comprised the majority of the population, the 'charitable' intention behind the suitability test appears to have been somewhat compromised.[49] It is, however, submitted that if we bear in mind the fact that the commercial and economic success of the Straits Settlements was inextricably linked to the prosperity of Britain as well, the decision of the Courts become even clearer. I would not, of course, go as far as to claim that the colonial judges, by virtue of the lack of security of tenure,[50] were subject to the control

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45 *Supra*, note 32.

46 *Supra*, note 32.

47 See, also, in the context of the Federated Malay States, *In re the Will of Yap Kwan Seng, Deceased*, (1924) 4 F.M.S.L.R. 313.

48 *Yeap Cheah Neo's* case, *supra*, note 32, at p. 396.

49 In fact, Sir R.B. McCausland in a Singapore case had held the Chinese ceremony of "Sin Chew" was valid, although he had a glimmer of doubt, preferring to give full effect, in the end, to the principle whereby native customs were given due consideration: *In re Chong Long's Estate*, (1857) W.O.C. 13. This decision must, however, be taken as overruled by the cases just discussed. As a curious but happy sequel to this particular area of the law, Terrell J. held, albeit many years later, in the Singapore case of *Re Khoo Cheng Teow*, [1933] M.L.J. 119 that gifts for "Sin Chew" purposes, while not being of a charitable nature, were neither superstitious nor void under the law of the Straits Settlements, provided the rule against perpetuities was not offended. Both *Choa Choon Neoh* v. *Spottiswoode, supra*, note 32 and *Yeap Cheah Neo & Ors.* v. *Ong Cheng Neo, supra*, note 32 were distinguished and the House of Lords case of *Bourne & Anor.* v. *Kean & Ors.*, [1919] A.C. 815, relating to the validity of a bequest for masses for the soul of the testator, was relied upon by analogy. This is one of the classic local cases illustrating the (albeit limited) viability of the non-charitable purpose trust.

50 See *Terrell* v. *Secretary of State for the Colonies*, [1953] 2 Q.B. 482 (noted locally in [1953] M.L.J. xxvi). But, this is not proposed as a major point. Indeed, in all fairness, it must be pointed out that during the "early days of the Charters", when there was no clear separation of executive and judicial functions, the Governor and the Recorder were often at odds with each other. But, even these clashes were due not so much to the staunch defences of judicial office than to other, more personal, factors. See, generally, Constance M. Turnbull, "Governor Blundell and Sir Benson Maxwell: a conflict of personalities", (1957) Vol. XXX, Pt. I, J.M.B.R.A.S. 134; J.W. Norton Kyshe, "A Judicial History of the Straits Settlements 1786-1890", (1969) 11 Mal. L.R. 38, reprinting the famous preface to the same author's reports; Elissa Nassim, "The Administration of Justice in the Straits Settlements, 1819-1855" (a University of Malaya in Singapore History Department Academic Exercise, 1959), at pp 20 to 26, and 34 to 46; Lim Kheng Eng, "Sir Peter Benson Maxwell — His Malayan Career (1856-1871)" (A University of Malaya in Singapore History Department Academic Exercise, 1959), at pp. 23 to 30. For an interesting general account of the Colonial bench and bar, see Chapter Four of Daniel Dunman's book, *The English and Colonial Bars in the Nineteenth Century* (1983). He concludes that the claim that the colonies were havens for failures is an exaggerated one (see pp. 138 to 139).

of the Crown, but it is merely submitted that the interests of Britain might have been a weighty factor that was necessarily unarticulated in the judgments themselves.

The next major area that merits consideration is that pertaining to Chinese law and custom, especially with regard to the issue of marriages in general and the status of secondary wives in particular. According to the strict English rule,[51] polygamous marriages were absolutely prohibited. Chinese law and custom, on the other hand, recognized polygamous marriages whereby a man could have one primary wife ("tsai") and any number of secondary wives ("tsips"). The local courts recognized the Chinese institution of polygamy, but only insofar as the legal status of the secondary wife (and her offspring) was concerned. Having gone thus far, the Courts refused to go any further by first, deciding that the Chinese law and custom of excluding females from a share in an intestate Chinese man's estate was not good law,[52] and secondly, by not distinguishing between primary and secondary wives in the distribution of the widow's share although the former was of a higher 'rank'.[53] The English Statute of Distributions applied with equality being the order of the day.[54] It has been argued [55] that the hardship caused by the application of the Statute of Distributions was "probably minimal" since although under Chinese customary law, unmarried daughters and widows, while not entitled as such to a share in the deceased's estate, were entitled to maintenance, *married* daughters (and, presumably, remarried widows) were entitled to nothing. The point made is well taken, but we must remember that at the time the cases were decided, the Chinese, including women, perceived the established customs pertaining to succession as being a legitimate and therefore acceptable facet of life. The learned writer further argues that the richest Chinese, who were most likely to be affected by the principles just enunciated, were "also must (sic) likely to have had legal advice, and hence could if they wished adopt by will the old Chinese system".[56] This point, too, is a good one, but, the point just made with regard to the reluctance of the colonial courts to 'go the whole hog' remains; and, in fact, to reach the same practical result under the perceived customary law, the Chinese testator would, in effect, be coerced into achieving his ultimate aim in a more indirect fashion under an alien regime of (English) rules. It cannot also, in any event, be assumed that even the richest Chinese welcomed, let alone resorted to, legal advice. In this regard, it is interesting to note that the first Chinese barrister to be admitted to the local bar was Song Ong Siang, and this took place only in 1894.[57] Finally, however, there is a brief allusion to the fact that where decisions were not in

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51 ***Hyde*** **v.** ***Hyde and Woodmansee, supra,*** note 35; and note the discussion therein.

52 See *Lee Joo Neo* v. *Lee Eng Swee,* (1887) 4 Ky. 325.

53 See *In the Goods of Lao Leong An, supra,* note 36.

54 See *In re Estate of Chia Eng Say,* [1951] M.L.J. 119; and *Choo Eng Choon, Choo Ang Chee* v. *Neo Chan Neo & Ors., supra,* note 35.

55 Kenneth K.S. Wee, "English Law and Chinese Family Custom in Singapore: The Problem of Fairness in Adjudication", (1974) 16 Mal. L.R. 52, at pp. 70 to 71; 78. But *cf.* Arthur Koberwein A Beckett Terrell, *Malayan Legislation and Its Future* (1932), at p. 63.

56 Kenneth Wee, *supra,* note 55, at p. 71.

57 See Roland St. J. Braddell, "Law and Lawyers" in Chapter IV (entitled "Law and Crime") in Makepeace, Brooke and Braddell, *One Hundred Years of Singapore* (1921), Vol. 1, at p. 242.

accord with perceived customary norms, the Chinese ignored them.[58] This point, again, is only persuasive at best, and speculative at worst. Where the whole legitimacy of familial relations is at stake, the possibility of a less than passive resistance cannot be ruled out, as suggested below.

The approach by the local courts may, however, be explained in the following possible manner. If they had chosen to declare polygamy among the Chinese illegal, the whole British administration in the Straits Settlements would have risked upsetting the entire Chinese community. While it is conceded that the recognition of polygamy amongst the Chinese population prevented much hardship,[59] it also served to prevent the danger of unrest amongst the Chinese population. That the colonial judges themselves were not exactly enthusiastic about the state of Chinese marriages generally is at least hinted at in the following passage from the judgment of Reay J. in the Straits Settlements Court of Appeal case of *Woon Kai Chiang* v. *Yeo Pak Yee & Ors.*[60] where he mooted a system of registration:

> "The present position with regard to Chinese marriages, *if this is the correct term for such unions,* is not satisfactory, and it is not easy to understand why the Legistature, *in the interests of public morality,* has not long ago established a system of registration. Registration is compulsory both for Christians, who are monogamists, and for Muhammedans, who are not. I cannot believe that the present laxity has the approval, or is in accordance with the desires of, *the more respectable and law abiding classes of the Chinese community;* but even if that community as a whole was satisfied with things as they are (which I do not believe) I think it is the clear duty of the Government to intervene. *China as a whole is in a very backward state* and Chinese who settle in the Colony should be prepared to conform with *higher standards of morality and citizenship.*"

Indeed, it is significant that it was a locally elected parliament that finally did away with polygamous marriages in Singapore.[61] On the other hand, having reached the conclusion that the secondary wife was indeed a legitimate spouse, the local courts refused to take this approach to its logical end. It imposed *its own* standards of what it deemed fair with regard to the *distribution* of an intestate's property.[62] While

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58 Kenneth Wee, *supra,* note 55, at p. 77.

59 See *Choo Eng Choon, Choo Ang Chee* v. *Neo Chan Neo & Ors., supra,* note 35, at pp. 162-163 (*per* Law Ag. C.J., at first instance). It might also be noted that the argument of unrest postulated in the main text immediately following is, of course, subject to several possible qualifications, *e.g.,* the extent to which polygamy was practised, and which class(es) practised polygamy.

60 (1926) 1 S.S.L.R. 27, at p. 48 (emphasis mine).

61 See the Women's Charter, Cap. 47, Singapore Statutes, 1970 (Rev. Ed.) (Reprint, 15th August, 1981).

62 Professor D.M. Emrys Evans, in *Common Law in a Chinese Setting — The Kernel or the Nut?* (An Inaugural Lecture, Hong Kong, 1971), at p. 8, has remarked in a very similar context: "... the approach of the English-trained judges imprints an English law conceptual frame on the situation in which the court is called upon to provide a solution. Once the solution is given within that frame, then the institutions themselves will tend to become assessed in terms of that frame and will tend to take on, chameleon-like, the characteristics required for success within it." This lecture is also reproduced in article form in (1971) 1 H.K.L.J. 9. See also, more recently, Leong Wai Kum, "Common Law and Chinese Marriage Custom in Singapore", in Chapter 6 of *The Common Law in Singapore and Malaysia* (Edited by A.J. Harding, 1985), especially at pp. 180; 192 to 194.

many would agree that this was a fair approach, few would dispute that the Courts' approach in this as well as other spheres of Chinese custom blatantly evinced an arbitrary pattern of *ad hoc* adjustments that can only be explained as being due to the individual notions of justice by English-trained judges which, in the final analysis, meant 'British justice'.[63]

The decision of *Khoo Hooi Leong* v. *Khoo Chong Yeok*[64] is yet another case in point. In that case all the local courts as well as the Privy Council held that the Chinese custom of legitimation of a natural son by subsequent recognition was not part of the law of the Straits Settlements. The tenor of the following passage from the Board is most revealing:[65]

> "Legitimation of a child whose parents are not husband and wife, is unknown and repugnant to the common law of England, and no hardship (much less injustice or oppression) need result from a refusal to admit a modification in this respect of the English law in its application to Chinese."

The plight of adopted children themselves had in fact been initiated several decades before in the case of *Khoo Tiang Bee & Anor.* v. *Tan Beng Gwat*[66] wherein Ford Ag. C.J. held that adopted children could not share in an intestate's estate.[67]

I finally wish to cite the following passage from the judgment of Hackett J. in *Coomarapah Chetty* v. *Kang Oon Lock*[68] which was concerned with the applicability of the English Lord's Day Act, as a more graphic reminder that the rationale of fairness[69] underlying the concepts of suitability and modification has not always been the guiding light:[70]

> "... I see no reason why the proper observance of the Lord's Day, should not apply to a Colony under the British Crown. I think, it is the duty of every Christian Government to provide, as far as outward appearance goes, the proper observance of Sunday. I hold this simply with respect to contracts. I don't say the penal provisions apply any more than they do to India ... I dare say, if the penal portion extended, there would be a general disturbance here, as I believe, all natives work, and open their shops on Sundays."

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63 Kenneth Wee, *supra*, note 55, at pp. 56, 57, 59, 61 and 76 *et seq*, expresses similar views, but they are not perhaps as extreme compared to the views expressed in the present piece.

64 [1930] A.C. 346, P.C.

65 *Ibid.*, at p. 356. And see Kenneth Wee, *supra*, note 55, at pp. 73 to 74; as well as *supra*, note 60 and the accompanying quotation.

66 (1877) 1 Ky. 413.

67 See Kenneth Wee, *supra*, note 55, at pp. 71 to 73.

68 (1872) 1 Ky. 314.

69 *I.e.* to the indigenous population where to act otherwise would cause injustice or oppression.

70 *Supra*, note 68, at p. 320. But, as can be seen, the judge recognized his limits! See, also *Leong & Anor.* v. *Lim Beng Chye*, [1955] A.C. 648, at pp. 665 to 666. See, further, the similar situation in the Federated Malay States: *supra*, note 47, especially at pp. 317 to 318.

(c) *The Date for Applying the Concepts*

Gleaning from the little literature that has been written on this particular subject,[71] it is submitted that the following possibilities are open *vis-a-vis* the Singapore context:

(i) The 'cut-off' date, *i.e.* 1826, as has been argued for in Part II of this article.

(ii) The date when the local courts first considered the English rule in question.

(iii) The present, *i.e.* the date when the cause of action arose or the date of trial of the action. In this connection, it is submitted that the former is the more reasonable construction.[72]

Of these, (ii) above is the least persuasive because it is subject to the criticisms that can be levelled against (i) *and* (iii) above.

For a very long while, the doctrine of "subsequent attraction"[73] as embodied in the leading Privy Council case of *Cooper* v. *Stuart*[74] held the field. What this doctrine meant, quite simply, was that an English rule of law, that was not suitable and could not be modified in the past with regard to the circumstances then existing, could subsequently be held to be suitable and/or capable of modification *owing to a change in the circumstances of the country of reception.*[75] *Cooper* v. *Stuart*[76] was continuously cited for proposition (iii) which, in fact, makes good sense, not least because of the problem of evidence as to the local circumstances as they existed at the 'cut-off' date that would arise if proposition (i) was followed.[77] This problem with regard to Singapore is exacerbated in view of the fact that there are very few (especially legal) experts on historical documentation which is itself sometimes of dubious origin or quality.

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71 See, generally, Alex C. Castles, "The Reception and Status of English Law in Australia", (1963) 2 Adel. L. Rev. 1, at p. 16; J.E. Cote, "The Introduction of English Law into Alberta", (1964) 3 Alta. L. Rev. 262, at pp. 267 to 271; Kenneth Roberts-Wray, *op. cit., supra,* note 30; R.S. O'Regan, "The Common Law Overseas — A Problem in Applying The Test of Applicability", (1971) 20 I.C.L.Q. 342; J.E. Cote, "The Reception of English Law". *op. cit., supra,* note 23, at pp. 65 to 67; and John C. Bouk, "Introducing English Statute Law into the Provinces: Time for a Change?", (1979) Can. B. Rev. 74. It is submitted that the stress placed by Cote, *supra,* on the date *vis-a-vis* testing the applicability of the English act in the English context is not really as important since local courts will be faced, *inter alia,* with even worse problems of evidence. In any event, it is submitted that his conclusion that the date of reception is the critical date (rejecting *In re Simpson Estate,* [1927] 3 W.W.R. 534) is a reasonable one, and mitigates the problems of evidence with regard to pre-reception English rules.

72 See Kenneth Roberts-Wray, *op. cit., supra,* note 30, at pp. 546 to 547.

73 This phrase is coined by R.S. O'Regan, *op. cit., supra,* note 71.

74 (1889) 14 App. Cas. 286, esp. at p. 292. And see *Nichols* v. *Anglo-Australian Investment, Finance and Land Co.,* (1890) 11 N.S.W.R. 354. But *cf. Sheehy* v. *Edwards, Dunlop & Co.,* (1897) 13 W.N. (N.S.W.) 166.

75 However, as will be argued below, proposition (iii) also embraces the concept of "subsequent rejection".

76 *Supra,* note 74.

77 John C. Bouk, *supra,* note 71, at pp. 80 to 81; McFarlane J.A., with whom Maclean J.A. concurred, in *McKenzie* v. *McKenzie,* (1970) 73 W.W.R. 206, however, delved into a whole host of historical facts — a rather daring approach.

The 1979 Australian High Court decision of *State Government Insurance Commission* v. *Trigwell & Ors.*,[78] however, which considered whether the 'Rule' in *Searle* v. *Wallbank*[79] formed part of the law of South Australia, while not expressly disapproving of the approach in *Cooper* v. *Stuart*, adopted an approach that corresponded roughly to proposition (ii) above. The majority of the Court were of the opinion that once any common law rule was held *applicable* by the local court, it could *not* be *abrogated* simply because changes in circumstances had rendered it unsuitable.[80] Any changes ought to be effected by the Legislature. It is respectfully submitted that this approach is unduly restrictive and totally unrealistic. It carries the cautionary attitude towards judicial law-making too far and renders nonsensical the notion of the development of an independent legal system responsive to the needs of its society. The fact of the matter, too, is that it was a common law rule that was under consideration in the instant case. While it is conceded that judges may be more wary when it comes to statutory interpretation,[81] it is difficult to rationalize such a rigid attitude toward the development of the common law — a situation that is especially ironic since it is an Australian decision that is most often cited for establishing the proposition that the common law can diverge in different countries.[82] In this regard, it is submitted that the dissenting judgement of Murphy J. is to be preferred.[83] A further point on this case needs to be made because Gibbs J. himself cited *Cooper* v. *Stuart* with apparent approval, which appears to suggest that so long as the local court has not pronounced upon the applicability of the common law rule concerned, the doctrine of "subsequent attraction" in *Cooper* continues to apply but immediately ceases to have any effect whatsoever once the local court has decided the issue. A moment's reflection will reveal how arbitrary such an approach is because the broad rationale behind *Cooper* v. *Stuart* is to provide for changing suitability with changing circumstances.[84]

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78 (1979) 26 A.L.R. 67. See, also, *Dugan* v. *Mirror Newspapers Ltd.*, (1978) 22 A.L.R. 439, another Australian High Court decision. *Trigwell* has been noted in (1980) 54 A.L.J. 249, and in P.H. Clarke, "Animals, Highways and Law Reform", (1979-82) 14 U.W.A.L. Rev. 184; it has also been discussed briefly in the context of judicial activism by S.C. Churches, "'Bona Fide' Police Torts and Crown Immunity: A Paradigm of The Case for Judge Made Law", (1978-80) 6 U. Tasm. L. Rev. 294, at pp. 311 to 313 (which also contains an account of extra-judicial speeches supporting opposing view points on judicial activism which were delivered by Barwick C.J. and Murphy J., both of whom sat in *Trigwell*).

79 [1947] A.C. 341: a House of Lords decision which decided that the owner or occupier of property adjoining the highway is under no legal obligation to users of it so to keep and maintain his hedges, fences and gates as to prevent animals from straying on to it, and that he is not under any duty as between himself and users of it to take reasonable care to prevent any of his animals, not known to be dangerous, from straying on to it.

80 *Supra*, note 78, at p. 70 (*per* Barwick C.J.) and pp. 72 to 73 (*per* Gibbs J.) although Mason J. (with whom Stephen and Aickin JJ. agreed) was not so emphatic (see p. 78).

81 The recent article by P.S. Atiyah is particularly illuminating with regard to the general attitude of English judges: "Judges and Policy", (1980) 15 Israel Law Review 346.

82 See the *Australian Consolidated Press* case, *supra*, note 27.

83 *Supra*, note 78, at pp. 91 to 93. See, also, his remarks in the *Dugan* case, *supra*, note 78, at p. 460. The tenor of his remarks are anti-colonial — a not unusual stance: see, *e.g.*, his remarks in *Viro* v. *The Queen*, (1978) 52 A.L.J.R. 418, at p. 445.

84 See *supra*, note 75, and the accompanying main text.

It is thus submitted that proposition (iii) (*i.e.* that the date for applying the concepts of suitability and/or modification is the present) should be followed as being the most rational and workable. It is further submitted, however, that the doctrine of "subsequent attraction"[85] just discussed must necessarily entail the corollary of what I would term "subsequent rejection", especially in the context of independent development. In other words, proposition (iii) would also embrace the situation where current changed circumstances entail the *rejection* of a received English rule, a proposition which is, of course, also contrary to the majority view in *State Government Insurance Commission* v. *Trigwell & Ors.*;[86] following from the common rationale described above, however, the distinction drawn between "subsequent attraction" on the one hand and "subsequent rejection" on the other is rather arbitrary and even contrary to logic.

If, however, proposition (iii) holds good, should it apply to the applicability of English *statutes* as well? It has been argued that it should not as it is much easier for the local Legislature to adopt English statutes, presumably *via* re-enactment.[87] Indeed, *Cooper* v. *Stuart* is itself a case dealing with the common law.[88] It is, however, submitted that this should not be the case, for the Legislature often has many other tasks to deal with and, in any event, is unlikely to consider the suitability of an English statute, especially if it is germane only to the case in which the applicability of the act concerned was raised. That the local courts have not abdicated their responsibility to decide on the suitability of English statutes is apparent from the many cases in the law reports.[89] It is submitted that these arguments apply equally to the "subsequent rejection" of English statutes as well.[90] A better solution, however, which makes for more certainty, is dealt with briefly in section (e), below.

A subsidiary point remains, which is in fact related to the discussion in the preceding paragraph, and concerns statutes that are inapplicable by virtue of the fact that they lack the requisite machinery to implement them.[91] On the reasoning given above, statutes of such a nature can lie dormant until the necessary machinery materializes. It has, however, been argued that "where the machinery is tied to, yet is otherwise unrelated to the substantive provision", then the link being

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85 *Ibid.*

86 *Supra,* note 78.

87 R.S. O'Regan, *op. cit., supra,* note 71, at pp. 344 to 345, citing Stephen J. in *Ex parte Lyons, In re Wilson, supra,* note 22.

88 Alex C. Castles, *op. cit., supra,* note 71, at p. 16.

89 See Braddell, *The Law of the Straits Settlements* (1915), at pp. 263 to 264

90 Thus, on the analysis of flexibility given above, it is submitted that the *courts* would also be competent to find that a particular English statute was currently unsuitable owing to changed circumstances. It may be argued, of course, that once an English statute is held by a local court to be received, the local court cannot, in the fashion of a 'mini' or 'alternative legislature', decide that changed circumstances entail a subsequent rejection of the statute in question. But, the court is of necessity a sort of 'mini legislature' under the present principles of reception with regard to the determination of what statutes are *received.* The matter is really one of degree; one would not, *e.g.,* allow a court to decide that *post*-reception English statutes were received: see notes 16 to 22 and the accompanying main text.

91 The most oft-cited cases are *R.* v. *Schofield,* (1838) 1 Legge 97 and *Ryan* v. *Howell,* (1848) 1 Legge 470.

tenuous, the substantive provision must be held to be inapplicable.[92] Such an approach, however, presupposes that severability can take place — a premise that, as we have already seen, is itself fraught with difficulties. It is submitted that the better approach would be to disregard a minute analysis of the component parts of the act concerned and to endeavour to look at the act as a whole and assess whether there is, on the whole, a lack of machinery to carry the act into effect in the receiving country. It is admitted that such an approach is difficult to apply in practice, lacking any definitive criteria. However, until a better and more manageable approach can be found, it is best not to indulge in a microscopic assessment of the various parts of the act concerned.

(d) *The Current Value of the Concepts*

We have seen that the concepts were flexible instruments utilized by the British in the attainment of their goals. It is submitted that the present legal community should utilize these selfsame concepts with equal, if not more, flexibility and innovation to mould the received English law in order to achieve an ultimate and distinctively Singapore legal system. To this end, the date at which such concepts are to be applied must necessarily be one that conduces to independent development, *viz.* the theory that the applicability or suitability of any particular English law should be ascertained at the current time which, as already mentioned in the preceding section, would entail not only "subsequent attraction" but also "subsequent rejection".

(e) *The Concepts of Suitability and Modification Today — Some Alternatives*

The criteria for the application of the abovementioned concepts appear to be very vague. A writer has attempted successive classifications of the various factors,[93] but the actual mechanics of application still bear an enormously amorphous stamp about them,[94] and the situation is

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92 Gilbert D. Kennedy, "Introduction of English Laws: 'So Far as the Circumstances are Not From Local Circumstances Inapplicable'," Vol. 2 U.B.C. Legal Notes 419, at p. 422.

93 J.E. Cote, "The Introduction of English Law into Alberta", *op. cit., supra,* note 71, at pp. 272 to 273 and "The Reception of English Law", *op. cit., supra,* note 23, at pp. 67 to 76.

94 An interesting case on the mechanics of ascertaining the suitability (or otherwise) or a given statute is *MacDonald* v. *Levy, supra,* note 4, where Forbes C.J., at pp. 54 to 55, emphasised, first, that the mere *physical* possibility that a particular act could apply within a colony was insufficient *per se* to make that act suitable. He also suggested approaching the question of suitability (with regard to the English statute he was considering at least, and which pertained to usury laws and the rate of interest) under two heads — first, one had to consider the nature and object of the statute itself and, secondly, the usage of the colony as well as the analogous practice in other colonies. The "usage" considered decisive in this particular case was the "non-user" of the English statute concerned.

See, also, the judgment of Dowling J. at pp. 62 to 63, and who, at p. 63, did state some reassuring words:

> "By what test are the Judges to perform this duty? Surely by their local and judicial knowledge of the actual state of the country in which they are called upon to administer justice, I admit that in this the Judges have a very wide discretion vested in them; but this like other discretionary functions, is to be exercised, not wildly, and without rule, but upon a sound and deliberate consideration of the whole subject, with reference to the actual state of the Colony."

made no better by the occasional theoretical difficulties that are raised.[95] While the concepts admittedly provide the flexibility required for the development of the Singapore legal system, some criteria are necessary lest *excessive* unpredictability be generated by the unbridled operation of these concepts.

It is, in fact, submitted that looked at in the present day context, the application of the concepts is tantamount to the application of the modern concept of public policy. This does not, however, solve the basic problem, as is evidenced, for example, by a recent article,[96] and an oft-cited dictum.[97]

It is submitted that no absolute solution can be found. What can, however, be done is to find a way of mitigating the severity of the problem. To this end, an approach with regard to *statutes* presents itself in the form of the following possibilities,[98] so as to reduce or eradicate the uncertainty that exists as to which of a myriad variety of English statutes would apply in the local context, *viz.*:

(i) The publication of official lists of which acts are in force, but lists not, however, having the force of law.[99]

(ii) Legislative action where the local act declares which English statutes are in force and which are not, although statutes not mentioned still pose problems of uncertainty.

(iii) Legislative action whereby statutes found to be clearly inapplicable are repealed (in a list) with another group of statutes which are clearly applicable being set out in another legislative list. The third list would compromise statutes of

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But *cf.* the dissenting judgment of Burton J. who, *inter alia*, found no uniformity and consistency in the awarding of interest, differing in the approach of the majority inasmuch as he did not consider the non-user of the English act as such.

95 In addition to the difficulties raised in Part III, *supra*, reference may also be made to the view by Dr. S.H.Z. Woinarski in a doctoral thesis that the theory that the British statutory law must not be merely of local significance and the theory that the circumstances of the colony must be examined to see if the British act is suitable are really the same in substance. This view has been criticised by Alex C. Castles, *op. cit.*, *supra*, note 71, at pp. 20 to 21 as being too simplistic since generality is not the only criterion, and he goes on to cite the factor of lack of machinery in the colony as another possible factor. Even this criticism must concede, however, that the "circumstances of the colony" test is the all-embracing factor.

96 C.R. Symmons, "The Function and Effect of Public Policy in Contemporary Common Law", (1977) 51 Aust. L.J. 185 is a comprehensive overview, but even the author reaches no concrete conclusions that go beyond the broadest generalizations. This only serves to re-emphasise the amorphous nature of the subject.

97 Burroughs J. in *Richardson* v. *Mellish*, (1824) 2 Bing. 229, at p. 252 where he remarks 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." The ebullient Lord Denning M.R. was, however, more sanguine when he remarked 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."

98 See J.E. Cote, "The Reception of English Law", *op. cit.*, *supra*, note 23, at pp. 83 to 86. And see, also, G.W. Bartholomew, "The Singapore Statute Book", (1984) 26 Mal. L.R. 1, esp. at pp. 12 and 15.

99 See J.E. Cote, *supra*, note 23, at p. 85: "Such lists usually have no legislative sanction whatever, but the distinguished auspices under which they are prepared and the fact they are usually published as an appendix to the local volumes of statutes, have doubtless combined to give them considerable persuasive authority."

uncertain applicability. All *residuary* English statutes could thus be deemed to be repealed. This was the basic approach of the Australian state of Victoria.

It must, however, be remembered that any of the aforementioned possibilities entails an enormous quantum of research and *ad hoc* decisions by the draftsman. In other words, instead of waiting for specific cases to come before the Courts, decisions *vis-a-vis* the entire body of English statutes are 'determined' in advance, so to speak. To those who value the integrity of principled argument and consideration, the above approaches will, of course, be unsatisfactory. But, they do generate certainty and predictability which, on balance, is an attractive advantage — if nothing else, because any one approach can serve as an interim stop-gap measure whilst local statutes are enacted accordingly.

IV. Reception Versus Stare Decisis?

I have saved this problem to the last — partly because, as already mentioned in the introduction to this article, it raises highly conceptual issues that have not been fully canvassed by writers.[1] I shall attempt to state, in as summary a fashion as possible, the basic problem, and then proceed to analyse it in order to determine whether the problem is, in fact, a mythical one, or, if not, whether there is a way to resolve it.

A few preliminary remarks, however, on the purpose of the present exercise are in order. First, the conceptual clarification and re-evaluation undertaken would, hopefully, help clarify the relationship between the concepts of reception and *stare decisis*, both of which are part of the 'staple diet', as it were, of first-year students at the local Law Faculty. Secondly, the working through of the relationships between the concepts will reveal the real possibility of a not inconsiderable amount of fettering *vis-a-vis* the development of the legal system although, as will be argued below, there is, in the final analysis, ample scope for manoeuvre.

The problem itself may be stated thus. Turning, first, to the concept of the reception of English law, it ought, I think, to be acknowledged that for the concept to have any significance at all, it must entail the conclusion that any English decision received is part of the corpus of Singapore laws and is thus binding on our local courts.[2] One of the, if not the, basic tenets of the doctrine of *stare decisis* or binding precedent, on the other hand, is that no decision outside the judicial hierarchy ought to be binding on local courts, and this would, of course, include

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1 With the exception of G.W. Bartholomew and R.S. O'Regan who, however, merely allude to the problem without really developing it. See G.W. Bartholomew, "Developing Law in Developing Countries", *supra*, note 2 at pp. 20 to 22, and by the same author, *The Commercial Law of Malaysia*, *op. cit.*, *supra*, note 4, at pp. 106 to 120; "English Law *in Partibus Orientalium*", in Chapter 1 of *The Common Law in Singapore and Malaysia* (edited by A.J. Harding, 1985), at pp. 15 to 25; R.S. O'Regan, "The Reception of the Common Law and the Authority of Common Law Precedents in the Territory of Papua and New Guinea", (1970) 19 I.C.L.Q. 217.

2 In this context, it is submitted that a distinction ought not to be drawn amongst decisions of the so-called superior courts (*i.e.* the House of Lords and Court of Appeal) and between the decisions of these courts and those of the other courts. But *cf.* Bartholomew, *supra*, note 4, especially at pp. 107 to 108.

any English decision.[3] The tension and contradiction, theoretically at least, are clear enough.

An explanation for this anomaly probably lies in the context of historical development. The doctrine of binding precedent — at least in the form we know and practise today — evolved much later than that of reception which may be traced to Blackstone and beyond.[4] One possible way out of this conundrum is to argue that the notion of reception binds, but not in an inexorable way — in view of the concepts of suitability and modification. In other words, where a particular English rule is unsuitable or inapplicable to the circumstances of the recipient country, it is simply not received, and that even where it is *prima facie* receivable, it may be modified so as to avoid causing injustice or oppression *vis-a-vis* the indigenous population.

Further complications, however, arise because there are authorities that threaten to undermine the central tenet of the doctrine of binding precedent itself. These authorities suggest that applicable decisions of the House of Lords,[5] English Court of Appeal,[6] and even Privy Council decisions from other jurisdictions[7] are binding on local (here, Singapore) courts. If, indeed, we assume, for the moment at least, that these cases enunciate principles of *stare decisis*, the incompatibility discussed earlier between reception, on the one hand, and *stare decisis* on the other rapidly disappears — both concepts lead, as it were, to the *same* result, *i.e.* that English decisions bind in any event. If this, however, be the case, local courts would experience a '*double*-bind' since *both* doctrines would entail a fettering that would stifle independent development of the local law. I have, however, argued elsewhere[8] that these authorities should be disregarded by the Singapore courts due to, *inter alia*, the outmoded and/or vague rationale and criteria embodied within them. Assuming, however, that my arguments are unacceptable,[9] there are at least two other ways out of the present problem.

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3 See *Mah Kah Yew* v. *P.P.*, [1971] 1 M.L.J. 1. English courts would not, of course, face the same difficulty.

4 Even taking into account Sir William Holdsworth's contention that the modern theory as to the authority of decided cases was reached substantively by the second half of the eighteenth century (disagreeing with C.K. Allen): *A History of English Law*, Vol. 12 (1938), especially at pp. 146 to 162. Allen, however, may well be correct since the majority of writers are of the opinion that the doctrine developed only during the nineteenth century, with, *inter alia*, the appearance of more authoritative reports (the result of a more comprehensive system of law reporting), a more mechanistic approach towards the use of the common law, and a rationalisation of the courts system *via* the Judicature Acts of 1873-75. Another, much earlier, factor was the transition from oral to written pleadings. See, generally, C.K. Allen, *Law in the Making* (7th edition, 1964), Chapter III; A.H. Manchester, *A Modern Legal History of England and Wales 1750-1950* (1980), at pp. 28 to 29; Walker and Walker, *The English Legal System* (6th edition, 1985), at pp. 132, 154 *et seq;* J.H. Baker, *An Introduction to English Legal History* (2nd Edition, 1979), at pp. 171 to 175; Rupert Cross, *Precedent in English Law* (3rd edition, 1977), at pp. 22 to 23; Theodore F.T. Plucknett, *A Concise History of the Common Law* (5th edition, 1956), Chapter 5, especially at pp. 349 to 350.

5 See *Robins* v. *National Trust Co. Ltd.*, [1927] A.C. 515; *cf. de Lesala* v. *de Lasala*, [1980] A.C. 546 (especially with regard to recent common legislation).

6 *Trimble* v. *Hill*, (1879) 5 App. Cas. 342 (with regard to common legislation).

7 See *Bakhshuwen* v. *Bakshuwen*, [1952] A.C. 1. *Cf. Khalid Panjang & Ors.* v. *P.P. (No. ?)*, [1964] M.L.J. 108 (with regard to common legislation, or, to be more precise legislation that is "word for word" the same).

8 See, *supra*, note 29.

9 *I.e.* that my criticisms and suggestions are not accepted: see *supra*, note 29.

First, one may argue that having regard to the fact that it has now been accepted that the common law can diverge in different countries, ample scope for manoeuvre exists.[10] This is akin to the utilization of the concepts of suitability and modification discussed earlier with regard to the problem of reception. It may, however, be argued that the leading authority for this proposition, *Australian Consolidated Press Limited* v. *Uren*,[11] really deals with the issue of reception and not *stare decisis*. Having regard to the judgment in the case itself, this argument is persuasive, though there are at least two possible replies centring, first, around the proposition that the distinction between the concepts of *stare decisis* and reception has been blurred and, arguably, been all but obliterated; I shall discuss this in a minute. Secondly, and perhaps following from what has just been stated, the reasons why the Privy Council concluded that the common law in Australia could diverge in that case comprise *equally* good *general* arguments of *principle* why decisions from (especially) the English superior courts, which would otherwise be binding, ought not to be followed. It should, however, be noted, at this juncture, that with regard to English decisions interpreting the same English statute or local legislation modelled on an English or perhaps even foreign statute, a doubt remains.[12] It is submitted that local courts ought take a definite position with regard to the problem of the binding effect of English decisions, assuming, as we have done thus far, that these decisions in fact relate to issues of *stare decisis*. The preferable and more immediate step to take is for the Singapore courts to declare that all decisions from foreign countries are *not* binding with regard to the doctrine of binding precedent.

The second possible solution entails dispensing with the premise we have hitherto been working with. In other words, it could simply be argued that the authorities mentioned above have nothing whatsoever to do with the doctrine of *stare decisis*, but, rather, really relate to the reception of English law, the fettering effect of which can be taken care of by the concepts of suitability and modification as has already been argued above. The problem with this approach, however, is that a close perusal of the relevant judgments does not provide sufficient confirmation; there is no clear demarcation as such between reception of English law and the doctrine of binding precedent to be discerned from the language of the judgments in question. Part of the problem, too, lies in the ambiguity of language. The word "binding", for example, has an established niche in either the language of reception or that of *stare decisis*. So, also, the phrase "judicial precedent" is arguably ambiguous. It is submitted that the courts have not really addressed the conceptual difficulty that is the subject of this section; in the recent case of *de Lasala* v. *de Lasala*,[13] for example, the Privy Council (sitting on an appeal from the Court of Appeal of Hong Kong) refers *both* to the Hong Kong Application of English Law Ordinance which statutorily embodies the suitability test (which clearly relates to reception) as well as to the fact that House of Lords decisions are not strictly binding on Hong Kong courts (which point relates to the doctrine of binding precedent).

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10 The *locus classicus* in this regard is the *Australian Consolidated Press* case, *supra*, note 27.

11 *Supra*, note 27.

12 See *supra*, notes 29, 5 to 7 (second series).

13 *Supra*, note 5 (second series).

It is suggested that the authorities that we have subjected to examination at such length thus far fall into neither the 'reception' nor '*stare decisis*' categories, strictly so called. These cases are *sui generis*. If anything, they appear to be a special 'colonial' strain of *stare decisis* that is now outmoded and should be done away with, as suggested above. To be sure, the main argument for these decisions — pertaining to the maintenance of uniformity of laws throughout the then British empire and the present British Commonwealth — has its roots in the transplantation, as it were, of the English common law in the various colonies, and thus has more than tenuous links with the notion of reception. Yet, the argument of uniformity is itself a *general* one and can equally well be utilized with regard to issues of *stare decisis*. *Sui generis* or not, however, the rationale of uniformity is clearly outmoded. As has already been mentioned above, the local courts should themselves declare emphatically and unambiguously that *whatever* the basis of these authorities, they no longer hold good in the present and very much changed Singapore context.[14]

In summary, it is submitted that there is, owing to the force of historical circumstances, an inherent conceptual contradiction between reception and *stare decisis* — the former fetters; the latter does not, though the concepts of suitability and modification operate to 'loosen' the fetters imposed by reception. This gives local courts the necessary manoeuvreability and blurs, in *practice* at least, the distinction and consequent contradiction just mentioned. The situation is, however, complicated even further when certain authorities are introduced. On the assumption that such authorities relate to the doctrine of binding precedent, an additional fetter is introduced by suggesting that certain decisions of English courts do in fact bind Singapore courts — which fetter did not exist when the doctrine was in its 'pure' form, *i.e.* that no decision outside the local judicial hierarchy ought to be binding on local courts. On the assumption, however, that these authorities are really concerned with reception, the additional fetter is again tempered by the concepts of suitability and modification as mentioned above. I suggested that these cases were in fact *sui generis* and gravitated, if at all, toward the side of *stare decisis* — a strand of 'colonial precedent', as it were. I also suggested, however, that, regardless of the premises upon which these cases rested, they were outmoded and should therefore be declared to be so by the Singapore courts.

V. Conclusion

I began this essay by characterizing it as an effort in description, clarification and re-evaluation with regard to the reception of English law in general and some problematic aspects of that reception in particular. Having wound our way, as it were, past a variety of individual issues, it can, I think, be seen that the particular issues discussed are, in and of themselves, of immense importance. These issues and concepts are, however, important in yet another, and more systemic sense, for, despite the problems they generate, the concepts concerned do, in the final analysis, provide the basis upon which, and, more importantly, the 'tools' by which, an autochthonous Singapore legal system can be built.

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[14] *Supra*, note 29, at p. cliii.

The resolution of the problem of the 'cut-off' date, for example, will define the pool of received English statutes and case-law that can serve as a point of departure for the aforementioned process of construction. The moulding of these rules, on the other hand, can be achieved *via* the rather flexible concepts of suitability and modification. Nor does the tangled maze of incongruities arising from the relationship between reception and *stare decisis* (as outlined in Part IV of this article) prevent this scope for manoeuvre.

On a more specific and initial level, however, the concepts concerned have to be examined in their historical context, in order to describe, clarify and re-evaluate them; this has been the main task of the instant essay. Description, of course, lays the general groundwork. The process of re-evaluation was especially pertinent to the apparently well-worn concepts of suitability and modification whilst conceptual clarification was of particular relevance *vis-a-vis* the relationship between the concepts of reception and *stare decisis*. Both the processes of re-evaluation and clarification, however, figured prominently when the concept of the 'cut-off' date was examined.

It is also hoped that this piece would be of some relevance to colonies as well as ex-colonies which still operate within the context of the English legal heritage, not least because, in the course of discussion of the various issues, I have cited, wherever relevant, authorities and materials from other jurisdictions as well. But, to return to the present and to Singapore, it is hoped that the conceptual 'tools' mentioned above will be creatively utilized to sculpt, from the imported 'block' of English law, a Singapore legal system that more truly reflects the wider socio-political and economic context.

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