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Contract law at century's end: Some personal reflections

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Contract Law at Century's End: Some Personal Reflections

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I. Introduction

As we approach the end of the second millennium, the common law of contract—transplanted via colonialism into many lands and climes—has indeed flourished. It has certainly developed apace in the land of its origin, England, but has also evolved in distinct directions elsewhere, particularly in Australia[1] and New Zealand.[2] But this development is simply part of a continuous process and a great many interesting issues remain to be considered at the commencement of the next millennium and beyond. This is due, in part, to the very diversity that has been briefly alluded to. However, even on a more general level, a number of issues require more definitive resolution. Indeed, both these concepts interact inasmuch as the diversity is often a reflection of the differing views held with regard to the resolution of issues on a more general level.[3] An

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1 See JW Carter and A Stewart, 'Commerce and Conscience: The High Court's Developing View of Contract' (1993) 23 *University of Western Australia Law Review* 49.

2 This is so particularly in the development of its contract statutes: see, eg F Dawson, 'The New Zealand Contract Statutes' [1985] *Lloyd's Maritime and Commercial Law Quarterly* 42; and JF Burrows, J Finn and SMD Todd, *Law of Contract in New Zealand* (1997, Butterworths, Wellington, New Zealand).

3 Contrast, for instance, the differing approaches towards the doctrine of estoppel: see, in particular, the oft-cited Australian High Court decision of *Walton Stores (Interstate) Ltd* v. *Maher* (1988) 164 CLR 387. Reference may also be made to the (also Australian High Court) decision of *The Commonwealth* v. *Verwayen* (1990) 170 CLR 394.

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even cursory consideration of these various issues is outside the scope of the present article, still less a detailed one. Indeed, each specific doctrine in the Commonwealth law of contract raises a great many sub-issues. A detailed consideration of these issues would require a full-length book, running perhaps into several volumes. What I will attempt in the present article is a broad overview of what I perceive to be major themes and illustrate them by reference to specific topics. Given the constraints of space, even the illustrations must perforce be brief in both number as well as scope of discussion. However, it is hoped that a broad flavour of what is at stake for the future will be discerned in the discussion that follows. The sub-title of this article is a yet further caveat: they represent my own reflections and, although I consider them to have at least the ring of objectivity (as most writers naturally would), I do accept that other writers may have different views not only with regard to my specific reflections on the issues I have raised but also on whether those issues are of sufficient importance to merit discussion in the first instance. But these are inevitable dangers and I trust that there is sufficient grist here for the contract lawyer's mill, whatever possible reservations there might otherwise be.

However, a brief overview of the present article at this juncture might be helpful. I examine, first, the indigenisation of contract law: how, in other words, are local courts to develop a body of contract law consonant with the local needs and circumstances of the country itself?

The second theme, which I entitle 'The Challenges of Globalisation', is (in some respects) the antithesis of the first:[4] how can the embrace of the general or universal (here, globalisation) be compatible with the simultaneous embrace of the particular (indigenisation)? Indeed, the tension between the universal and the particular has been a perennial problem not only in legal theory and doctrine but also in epistemology generally. Whilst this may appear to be so in theory, the general intuitive sense appears to lean in the opposite direction. The reconciliation of the tension is often embodied within the idea of 'balancing'. Indeed, one may quite cogently argue that there is no reason in principle or practice why an indigenous contract law could not be developed with a simultaneous accommodation of doctrines and ideas from other jurisdictions as well as the development of universal ways of accommodating contractual bargains across national frontiers. We shall explore this argument, if only briefly, below.

The third theme focuses on a well-established topic, 'The Inadequacy of Doctrine'. Indeed, I would venture to suggest that few would argue the contrary proposition, namely, that doctrine—and doctrine alone—can provide us with even close to perfect solutions to every legal problem. Indeed, despite its failure to construct a positive programme (which contributed in no small part to its ultimate demise), American Realism still stands as a watershed theory in Anglo-

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4 For an extremely interesting and thought-provoking exploration of this theme in the context of comparative law generally, see A Harding, *Global Doctrine and Local Knowledge: Law in South East Asia* (an inaugural lecture delivered at the School of Oriental and African Studies (SOAS), University of London on 25 May 1999, which will be published by the SOAS in due course).

American jurisprudence that debunked (once and for all) the idea that the black-letter law alone is the measure of all things.[5] Nevertheless, the idea that doctrine is still paramount continues to exist, particularly outside America, where the courts have trodden a quite different path. And this idea is embodied primarily (often solely) within the rubric of legal positivism. I want, in this section, to demonstrate that such an approach is ridden with a great many difficulties and that an alternative approach that focuses not merely (as legal positivism does) upon form but also upon content is necessary. In this respect, this theme is inextricably linked to the next (and fourth), which I term 'The Problem of Value'. In this last-mentioned section, I consider (again, altogether regrettably briefly) the alleged problem of relativism or subjectivity as well as a possible solution to it.

Finally, I want to explore (in the fifth theme) the issue of reform. This theme alone merits a separate volume all of its own. I will therefore only consider some areas of proposed reform in the briefest of fashions. But, as the title of this section suggests ('The Routes and Roots of Reform'), I will be concerned not only with the possible methods of reform but also with the content of reform.

II. Theme One: The Indigenisation of Contract Law

The ideal of a legal system more truly reflecting the culture and mores of a given society cannot now be seriously controverted.[6] And this is not merely nationalistic rhetoric: for a legal system which cannot accommodate the peculiarly local circumstances is one that cannot, in the final analysis, be one that attains justice. It may, however, be argued that in the sphere of commercial law, uniformity may actually be desirable. This is undoubtedly true and is in fact touched on in the next section (entitled 'The Challenges of Globalisation'). As I have already alluded to above, there is in fact a potential tension between the

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5 See, eg P Areeda, 'Always a Borrower: Law and Other Disciplines' [1988] *Duke Law Journal* 1029.

6 On a more specific level, I have argued that an autochthonous Singapore legal system should be developed. The various reasons why this should be so included the development and reinforcement of a spirit of professionalism and service amongst the legal profession; the need to develop the local law to suit local needs and circumstances; the development of national pride; and the maintenance of the legitimacy of the legal system in the public perception: see generally A Phang, *The Development of Singapore Law—Historical and Socio-Legal Perspectives* (1990, Butterworths, Singapore) pp 91–96. See also, with regard to the Hong Kong context, A Phang, 'Convergence and Divergence—A Preliminary Comparative Analysis of the Singapore and Hong Kong Legal Systems' (1993) 23 *Hong Kong Law Journal* 1 especially at pp 8–15, which observations, it is submitted, apply with equal or more force after the handover of Hong Kong by the UK Government to the People's Republic of China on 1 July 1997.

need to develop an indigenous or autochthonous[7] contract law on the one hand and the need to meet the challenges of globalisation on the other. It is suggested, however, that there need be no real tension and one excellent (if rather simple) argument is to acknowledge the fact that whatever the needs of contract law in the international arena, the established common law of contract will need to be retained and developed to meet, if nothing else, disputes that arise between and amongst the local residents. Indeed, disputes that contain foreign elements will need to be met by conflict of laws principles[8] as well as by international conventions[9] (the latter in effect achieving a result via uniformity[10]). The ideal, in other words, is to strike a balance amongst the various competing needs and factors. In this sense, this particular issue has linkages with themes three and four ('The Inadequacy of Doctrine' and 'The Problem of Value', respectively) as we search for an objective standard (or set of standards) that will aid us in the process of balancing itself. Indeed, a popular (and sceptical) view (which I consider, in particular, under the section entitled 'The Problem of Value') holds that objectivity is elusive and illusory. As will be evident below, I reject this view which is both philosophically unsound and practically debilitating.

Notwithstanding the desirability of indigenisation, however, there are other difficulties. On both practical as well as theoretical levels, the common law of contract straddles both the general and the specific. In an article published over a decade ago,[11] I pointed out that legal development takes place on at least two (related as well as cumulative) levels of analysis, as follows:

> The first consists in the analysis of the concept of scenario on its own terms. This is the more *general* level of analysis that focuses upon the concept concerned as a matter of *general reasoning and logic.* ... The second level is more *specific* in nature; it consists in an analysis of the particular concept and/or scenario *set in its context.* In so far as the construction or development of an autochthonous Singapore legal system is concerned, this level of analysis would involve analysis of the concept and/or scenario in the *Singapore* context. By its very nature, in fact, one might argue that this level of analysis would probably be applicable in the *local* context only. One of the most

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7 A term first popularised (in the Singapore context at least) by a former Dean of the Faculty, Professor GW Bartholomew: see, eg GW Bartholomew, 'The Singapore Legal System' in *Singapore—Society in Transition* (1976, ed R Hassan, Oxford University Press) pp 84–112 at pp 97–109 and, by the same author, 'Developing Law in Developing Countries' (1979) 1 *Lawasia* (NS) 1.

8 See generally *Chitty on Contracts* (28th edn, 1999, Sweet & Maxwell), Vol. I, Chapter 31.

9 See generally the discussion (if only in brief) in the next section entitled 'The Challenges of Globalisation'. For a recent illustration from Singapore, see the Sale of Goods (United Nations Convention) Act (Cap 283A, 1996 revised edition), which gives legal effect to the United Nations Convention on Contracts for the International Sale of Goods (more popularly known as 'the Vienna Convention').

10 See also *infra* n 38.

11 See A Phang, 'Of Generality and Specificity—A Suggested Approach Toward the Development of an Autochthonous Singapore Legal System' (1989) 1 *Singapore Academy of Law Journal* 68.

> obvious inquiries in this regard would be to determine whether or not a certain English rule or principle is suitable to the local context.[12]

The indigenisation of contract law really proceeds upon the *second* level of analysis[13] but does generate at least one major difficulty: the need to adopt an interdisciplinary approach as this level of analysis requires a wider knowledge of the local socio-economic as well as political matrix.[14] And here, there is a view to the effect that lawyers and judges are ill-equipped to consider extralegal factors, important though they may be. One oft-cited illustration, in the sphere of contractual illegality, is the view of Ungoed-Thomas J in *Texaco Ltd* v. *Mulberry Filling Station Ltd*,[15] where the learned judge expressed the view (in the context of the doctrine of restraint of trade) to the effect that courts are insufficiently equipped to deal with the broader (especially economic) evidence that is necessary to arrive at an informed decision as to the public interest. However, as I have ventured to suggest elsewhere:

> [T]aken to its logical conclusion, this would mean that courts would have to abandon any attempt at ascertaining public interest and policy—a conclusion that is not only inconsistent with actual practice but is also unsound in logic.[16]

Ironically, an excellent instance of indigenous development in the Singapore context may be found in a case dealing with restraint of trade. In order to appreciate fully the manner in which the Singapore court effected indigenous development via the consideration of local factors in the context of public policy, some brief background may be apposite.

The foundation of the modern law may be summarised as follows: all covenants in restraint of trade are *prima facie* void, but may be shown to be valid if reasonable in the interests of the parties *and* in the interests of the public (as embodied in the seminal statement of principle by Lord Macnaghten in the leading (House of Lords) decision of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[17]). However, in the English Court of Appeal decision of *Wyatt* v. *Kreglinger and Fernau*,[18] the interests of the parties appeared, in substance, to

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12 See *ibid*, pp 69–70 (emphasis in the original text).

13 It is, however, important to point out that there should be no rigid distinction drawn between these two levels of analysis and that what is more important is the adoption of an *attitude of mind* that would be sensitive towards every reasonable opportunity to develop a truly indigenous legal system in general and contract law in particular: see *ibid* especially at p 80.

14 See *ibid*, p 70.

15 [1972] 1 WLR 814 at pp 826–29.

16 See *Butterworths Common Law Series—The Law of Contract* (1999, Butterworths, London), Chapter 5 (entitled 'Illegality and Public Policy'), para. 5.105. See also the Ontario Court of Appeal decision of *Tank Lining Corp* v. *Dunlop Industrial Ltd* (1982) 140 DLR (3d) 659 at pp 673–74. But cf the views expressed by the same court in *Stephens* v. *Gulf Oil Canada Ltd* (1975) 11 OR (2d) 129 at pp 148–49.

17 [1894] AC 535 at p 565.

18 [1933] 1 KB 793.

have been *conflated* with the interests of the public.[19] This was unfortunate and, indeed, what is required is a consideration of the public interest set in its proper context, and without any conflation with the parties' interests which is a completely different inquiry altogether. In the leading House of Lords decision of *Esso Petroleum Co. Ltd* v. *Harper's Garage (Stourport) Ltd*,[20] an attempt to reinstate the idea of reasonableness in the interests of the public was made. Unfortunately, this was effected in only a *modified* fashion; in the words of Lord Pearce:

> There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable as between the parties. There is *one broad question*: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?[21]

The two interests (pertaining to the parties and the public, respectively) are separate and distinct: the former reflecting considerations of the individual parties' autonomy, the latter the need to protect the wider public interest. Telescoping, as it were, consideration of both interests into one broad question is, it is submitted, apt to lead to theoretical and/or practical confusion. At this juncture, the Singapore decision of *Thomas Cowan & Co. Ltd* v. *Orme*[22] may be usefully mentioned. In this case, the plaintiff brought an action against its former employee, the defendant, to restrain the latter from continuing to commit a breach of covenant in the context of the fumigation business. The covenant read as follows, namely, that the employee:

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

The defendant later left the service of the plaintiff and became a director in a rival company. The court held in favour of the defendant employee. The judgment is, for the most part, a straightforward application of the English principles.[23] However, a closer examination of the case reveals, by design or

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19 And see MP Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (13th edn, 1996, Butterworths, London) p 419.

20 [1968] AC 269.

21 See *ibid*, p 324 (emphasis added).

22 [1961] MLJ 41.

23 Which is unsurprising, given that the foundation of the Singapore legal system is English law, Singapore being a former British colony: see generally A Phang, *Cheshire, Fifoot and Furmston's Law of Contract—Second Singapore and Malaysian Edition* (1998, Butterworths Asia), Chapter 1 and, by the same author, 'Cementing the Foundations: The Singapore Application of English Law Act 1993' (1994) 28 *University of British Columbia Law Review* 205.

otherwise, an extremely novel application of these principles by the court in the following manner. The learned judge, Chua J, adopted the principles laid down by Lord Macnaghten in the *Nordenfelt* case.[24] He first held that the covenant was reasonable as against the parties themselves. He did not, however, stop there; and therein lies the novelty in application.[25] He then proceeded to consider *separately* the *public* interest and found, in the event, that the covenant was unreasonable insofar as this particular interest was concerned: the covenant was against public policy. He observed thus:

> It is clear that if the defendant is not allowed to operate the plaintiffs would have a *virtual monopoly* in Singapore as regards the fumigation by hydrogen cyanide and methyl bromide. In fact prior to the defendant's firm coming into existence the plaintiffs were the only firm in Singapore doing fumigation. ... since the defendant's firm commenced business in competition with the plaintiffs, the charges for ship fumigation have dropped, which is a good thing, but there is no evidence that the standard of fumigation of ships has deteriorated.[26]

The approach of the court is, it is submitted, commendable insofar as it illustrates a willingness to consider the impact of local circumstances (here, of Singapore[27]) in a concrete fashion despite, first, the relatively conservative approach existing at that particular point in time,[28] and, secondly, the fact that such a venture into the sphere of public policy necessarily entailed a measure of uncertainty. In addition (and in comparison with later developments in the English law itself), the approach adopted in the *Thomas Cowan* case is different from that adopted by Lord Pearce in the *Esso Petroleum* case where, as we have seen, the entire inquiry has been telescoped into one broad question.[29] It is submitted, with respect, that the approach suggested in the *Esso Petroleum* case does not render the original approach of Lord Macnaghten in the *Nordenfelt* case[30] (considering the interests of the parties and the public, respectively) obsolete. The maintenance of this original approach is workable, as evidenced both by *Nordenfelt* as well as the *Thomas Cowan* cases.[31] To telescope the elements of the inquiry into one broad question is, with respect, to risk courting at least some measure of confusion in terms of clarity of thought and analysis. In this respect, at least, the Singapore law (as embodied in the *Thomas Cowan* case) not only exhibited indigenous development but was also, it is submitted, an advance

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24 *Supra* n 17: see [1961] MLJ 41 at p 42. See also *Asia Polyurethane Mfg Pte Ltd* v. *Woon Sow Liong* [1990] 2 MLJ 463.

25 Particularly, it might be added, since the case was decided in 1961.

26 [1961] MLJ 41 at p 43 (emphasis added).

27 But cf the issue of (here, small) size, which the local cases do not appear to have considered: see, eg Phang, *op cit* n 23, pp 720–21.

28 See generally the main text accompanying *supra* nn 22–23.

29 See generally *supra* n 21.

30 [1894] AC 535 at p 565.

31 And cf the Canadian Privy Council decision of *Connors Bros Ltd* v. *Connors* [1940] 4 All ER 179 at p 195.

over the (then and presently) existing English law. It should, however, be noted that I am not arguing for a simplistic reductionism, with a rigid and dogmatic dichotomy being maintained between the interest of the contracting parties on the one hand and the interest of the public on the other; an *interactive* analysis is ideal (even necessary), but it is submitted that the starting points have to be analytically clear to begin with. It is also admitted that indigenous development (as embodied in the *Thomas Cowan* case) is the exception rather than the rule although, as we have seen, both Australia and New Zealand appear to have developed much further in this regard.[32] Indeed, (local) change should not be effected for its own sake and there is much of the received English law that should continue in its present form; to proceed otherwise would be to throw out the baby together with the bathwater. However, where local modification or even a sea-change is necessary, the courts should not shy away from the task at hand.

Finally, and on a related note, it should be mentioned that a prerequisite to indigenous or autochthonous development is the simultaneous development of a local legal literature.[33] However, as Professor Bartholomew has pertinently pointed out:

> What is, if anything, even worse than the absence of an independent legal literature is the idea that English legal literature can be used with the mere addition of local supplements, as if, for example, the law of Singapore could be expressed merely as a series of footnotes to English law.[34]

There has, in this regard, been a burgeoning of legal literature in most Asian countries that do not purport to 'be expressed merely as a series of footnotes to English law'.[35] And the specific sphere of contract law has been no exception.[36] This cannot but augur well for the future development of local contract law, particularly in the Asian context.

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32 See *supra* nn 1 and 2, respectively.

33 See, eg Bartholomew, 'The Singapore Legal System', *op cit* n 7, pp 108–09.

34 See *ibid*, p 109.

35 See *ibid*. And see, eg A Phang, *A Bibliographical Survey of Singaporean Legal Materials* (1999, East Asian Legal Studies Program, Harvard Law School); and A Phang and KS Teo, *A Bibliographical Survey of Malaysian Legal Materials* (forthcoming, East Asian Legal Studies Program, Harvard Law School).

36 See, eg Phang, *op cit* n 23; V Sinnadurai, *The Law of Contract in Singapore and Malaysia—Cases and Commentary* (2nd edn, 1987, Butterworths); BM Ho, *Hong Kong Contract Law* (2nd edn, 1994, Butterworths Asia); and M Fisher, *Contract Law in Hong Kong—Cases and Commentary* (1996, Sweet & Maxwell, Hong Kong). As editor of the first work mentioned (which, incidentally, also covers the contract law of Brunei), I was especially conscious of the need to utilise the existing English law as a foundation but not as the edifice itself; indeed, the existence of a separate Malaysian Contracts Act (which is based on the Indian Contract Act, with a corresponding Act also applicable in Brunei) ensured that any discussion of the local law would be more than a mere appendage or decoration to the existing English law.

III. Theme Two: The Challenges of Globalisation[37]

One of the dominant motifs as we reach the end of the present millennium is that of globalisation. This is due, in part, to the astonishingly rapid improvements in technology that have not only brought the world much closer together but also (and more specifically) helped us to gain rapid access to (here, in particular, legal) materials across the globe. What this means is that legal scholarship must reflect the ever-increasing interconnectedness of nations and their respective legal systems. This is perhaps particularly important in the context of commercial law, where there are cross-border transactions and where, therefore, the desideratum of uniformity is especially strong. As already alluded to above, such uniformity can be achieved in the form of international conventions.[38] One possible alternative—which is, however, somewhat less satisfactory—is to rely upon general conflict of laws principles,[39] which, however, can only point one to the applicable law, thus achieving a system of law which may or may not be fair. One thing is clear: one cannot ignore developments in the global context, particularly where they are likely to have a significant impact in the local context as well (one recent instance of this being (at least in the Singapore context) the concern with the impact of the Economic and Monetary Union on the continuity of contracts[40]).

Indeed,—and, at this point, the highly related sphere of comparative law becomes relevant—contracting parties often have to have at least a working knowledge of particular foreign legal systems in general and their commercial laws in particular. We find, for example, more and more corporations (particularly multinational corporations) setting up their business operations in other countries. A knowledge of the laws of the country concerned then becomes not only desirable but, indeed, imperative. These concerns have in fact resulted in a modification to the law curricula of many law schools which not only conduct the more general comparative law courses but also many specialised courses as well (particularly with regard to foreign business laws). Law students as well as lawyers are increasingly interested in the laws of countries with promising commercial potential; one instance (at least in the Singapore context) is the very real interest in the legal system as well as business laws of the People's Republic of China; well-known journals, for instance, now carry

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37 And see generally R Brownsword, 'General Considerations' in *Butterworths Common Law Series—The Law of Contract* (1999, Butterworths, London), Chapter 1, paras 1.125–1.141.

38 See *supra* n 10. *Quaere,* however, to what extent international conventions impact (or ought to impact) on the development of the domestic law itself (quite apart from being embodied within local legislation itself).

39 See *supra* n 8.

40 See Attorney-General's Chambers and Others, 'Some Issues Relating to the Impact of the Economic and Monetary Union on the Continuity of Contracts' (1998) 10 *Singapore Academy of Law Journal* 391.

updated articles on Chinese law,[41] and there is every reason to expect even more literature in the months and years ahead. It might be worth noting that Lord Goff in fact emphasised the increasing importance of comparative law in an extrajudicial lecture more than a decade ago.[42] Indeed, a recent instance of a comparative approach may be found in the judgment of Lord Hoffmann in the House of Lords decision of *Co-operative Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd*,[43] where the learned law lord (who delivered the sole judgment, with which all the law lords agreed) referred to the comparative context within which the doctrine of specific performance operates.[44] Interestingly—and this brings us back to the point of globalisation generally—having referred to the contrasting positions in common law and civil law jurisdictions, respectively, Lord Hoffmann observed thus:

> In practice, however, there is less difference between common law and civilian systems than [the differences][45] might lead one to suppose. The principles upon which English judges exercise the discretion to grant specific performance are reasonably well settled and depend on a number of considerations, mostly of a practical nature, which are of very general application. I have made no investigation of civilian systems, but *a priori* I would expect that judges take much the same matters into account in deciding whether specific performance would be inappropriate in a particular case.[46]

It is significant, perhaps, that Lord Hoffmann as well as Lord Steyn (who did not sit on the appeal in the present case) were both originally from South Africa,[47] where the legal system is truly a combination of both civil law as well as common law.[48] What I suspect we shall see is an increasing number of persons who will have detailed knowledge of more than one legal system, particularly in the context of commercial law. Some clarification at this point may be in order. A comparative approach can in fact be utilised to develop a new doctrine altogether, although this is likely to be very rare.[49] Another possible function is

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41 See, eg C Shum, 'Chinese Contract Law' (1998) 13 *Journal of Contract Law* 214.

42 See Lord Goff, 'Judge, Jurist and Legislature' (1987) *Denning Law Journal* 79 at pp 92–94.

43 [1997] 2 WLR 898; noted by A Phang, (1998) 61 *Modern Law Review* 421.

44 See [1997] 2 WLR 898 at pp 902–03.

45 Broadly speaking, to the effect that specific performance will not (in common law jurisdictions) generally be ordered when damages are an adequate remedy, whereas, in civil law jurisdictions, the plaintiff is *prima facie* entitled to specific performance: see *ibid*, p 903.

46 See *ibid*.

47 See E Kahn, 'Two South African Law Lords' (1995) 112 *South African Law Journal* 312. Reference may also be made to Lord Steyn's landmark judgment on common mistake in *Associated Japanese Bank (International) Ltd* v. *Credit du Nord* [1989] 1 WLR 255 especially at pp 265 and 268–69 (see also *infra* n 62).

48 And see generally R Zimmermann and D Visser (eds), *Southern Cross—Civil Law and Common Law in South Africa* (1996, Clarendon Press).

49 And see, with regard to the doctrine of frustration, A Phang, 'On Linkages in Contract Law—Mistake, Frustration and Implied Terms Reconsidered' (1996) 15 *Trading Law* 481 at p 482, and the relevant literature cited therein.

that of gap-filling, although (again) this is likely to be rare.[50] It would appear, therefore, that the primary function of a comparative approach would be (as already mentioned above) to give contracting parties a working knowledge of the foreign legal system concerned. It is, however, suggested that it is eminently appropriate to consider the *common law* in comparative context and that this is being increasingly appreciated by courts across the Commonwealth.[51]

There is yet another (extremely significant) development that is (and will be) gaining more and more attention in the years to come: *electronic commerce*. Indeed, an increasing number of countries are in the process of either enacting or have in fact enacted relevant legislation. In Singapore, for example, the Electronic Transactions Act was enacted in 1998,[52] and the proposed article 2B represents the American endeavour in this particular direction.[53] Undoubtedly, the field of electronic commerce is, and will continue to be, of the utmost importance, and contract lawyers ignore it at their peril.[54]

IV. Theme Three: The Inadequacy of Doctrine

I have ventured to suggest elsewhere that the English law of contract is, in the main, premised on a positivist approach: one that draws a necessary and conceptual distinction between the law on the one hand and morality on the other.[55] Whilst positivists agree that morality does impact on the law, the role that morality ultimately plays is, in the final analysis, one of personal preference only. Underlying this approach, in large part at least, is the idea that morality is relative and subjective and that, hence, any argument for a necessary connection

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50 See, eg *White* v. *Jones* [1995] 2 AC 207 at pp 254 and 255. Interestingly, this is a reference to Lord Goff's judgment; see also *supra* n 42.

51 And see Brownsword, *op cit* n 37, paras 1.135–1.138.

52 No 25 of 1998. This Act is based, in the main, on both the UNCITRAL Model Law on Electronic Commerce as well as the Illinois Electronic Commerce Security Act and the Utah Digital Signature Act. And see generally A Phang and D Seng, 'The Singapore Electronic Transactions Act 1998 and the Proposed Article 2B of the Uniform Commercial Code' (1999) 7 *International Journal of Law and Information Technology* 103.

53 The literature is enormous; see, eg (for recent pieces), RT Nimmer, 'Article 2B: Proposals for Bringing Commercial Law into the Information Age' (1999) 14 *Journal of Contract Law* 33; and JW Carter, 'Article 2B: International Perspectives' (1999) 14 *Journal of Contract Law* 54. See now the Uniform Computer Information Transactions Act.

54 The principal problem here, it may be observed, may well lie in understanding the ever-changing technology.

55 See generally A Phang, 'Positivism in the English Law of Contract' (1992) 55 *Modern Law Review* 102. Reference may also be made to PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law* (1987, Clarendon Press); and P Devlin, *The Enforcement of Morals* (1965, Oxford University Press), Chapter III, especially at pp 44 and 51. Cf Lord Steyn, 'Does Legal Formalism Hold Sway in England?' (1996) 49 *Current Legal Problems* 43.

between law and morality (in the absence of a countervailing objective standard) is unfeasible.[56] I deal, in fact, with this argument from relativity and subjectivity in the next section (entitled 'The Problem of Value'). However, I want, in this particular section, to demonstrate the inherent weakness in the positivistic reliance, in whole or at least large part, upon doctrine with its concomitant (conceptual) eschewal of morality or other extralegal considerations of value. This weakness exists regardless of whether or not one accepts or rejects the positivistic thesis, which weakness manifests itself in a number of different (albeit related) ways. Before proceeding briefly to consider this particular issue, I must emphasise, at this preliminary juncture, a misconception to which I do not subscribe: that doctrine is wholly or even largely irrelevant. To adopt such an approach would, again, be to throw out the baby together with the bathwater. The endorsement of objectivity in the law (which, as will be seen in the next section, is the position I take) does not entail a simultaneous rejection of doctrine. There is, if nothing else, a very simple (yet important) reason for this: legal doctrine provides the necessary structure of discourse in a process that is inevitably conducted in the context of language and reasoning. However, to acknowledge this does not entail a (conceptual) rejection of morality or other extralegal considerations.[57]

The first (and most important) weakness of a positivistic approach is that a mere adherence to rules without more does not ensure the attainment of substantive justice and, indeed, may even lead to precisely the opposite result. The reluctance (or even the refusal) to deal with issues of substantive justice is wholly consistent with the positivistic approach briefly referred to in the preceding paragraph. Substantive (as opposed to procedural) justice deals with issues of morality and, if it be assumed that such morality is incapable of objective analysis and resolution, it is little wonder that courts steer clear of such issues. Indeed, if one were to look for an illustration of such an approach, then one should look no further than the well-entrenched distinction that has been drawn, in both the case law[58] as well as the academic literature,[59] between *procedural* fairness on the one hand and *substantive* fairness on the other, ie fairness of the procedures and negotiations leading to the formation of the contract, as opposed to the fairness of the substantive result, namely, the resulting *terms* of the contract itself. Professor Atiyah has, however, eloquently and perceptively demonstrated that this distinction can be rather artificial

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56 And see generally HLA Hart, *The Concept of Law* (2nd edn, 1997, Clarendon Press), Chapter IX.

57 And see, eg J Finnis, 'The Truth in Legal Positivism' in *The Autonomy of Law—Essays on Legal Positivism* (1996, ed RP George, Clarendon Press), Chapter 7.

58 See, in particular, *Hart* v. *O'Connor* [1985] AC 1000 especially at p 1024.

59 See, eg A Leff, 'Unconscionability and the Code—The Emperor's New Clause' (1967) 111 *University of Pennsylvania Law Review* 485 especially at p 487; J Beatson, 'Unconscionability: Placebo or Pill?' (1981) 1 *Oxford Journal of Legal Studies* 426; and SN Thal, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 *Oxford Journal of Legal Studies* 17.

since both procedural as well as substantive fairness often impact on, as well as interact with, each other.[60] But if the issue of *substantive* fairness or justice cannot be avoided, adoption of a positivistic approach (centring on subjectivity and relativity) is simply a recipe for disaster—particularly from the perspective of the *legitimacy* of the law in the eyes of the public. Indeed, even lawyers and judges do not operate, it is submitted, on the assumption that the law is subjective and relative; on the contrary, judges (in my view) not only know and apply the law, but they also do so in tandem with a natural and intuitive feel for the justice of the respective cases before them.[61] The great challenge as we commence the next millennium is the development of a theory of substantive justice that not only meets the objection from subjectivity head-on but also provides at least broad guidance premised on objective standards. This issue will be briefly canvassed in the next section (entitled 'The Problem of Value').

Another closely related weakness stemming from the slavish adherence to doctrine is artificiality which may in fact hamper further development and simplification of the law. A preoccupation with doctrine invariably leads to excessive 'pigeon-holing' that does no credit, in the final analysis, to both law and legal development. I have ventured, for instance, to suggest elsewhere, with respect to the doctrines of common mistake at common law[62] and in equity,[63] respectively, that, given both the very similar (arguably, virtually identical) linguistic formulations[64] as well as results of the leading cases (at both common law and in equity),[65] there was already a *de facto* merger of both the common law and equitable doctrines. I then proceeded to suggest that a *de jure* merger might be the best way forward, especially given the fact that it was highly unlikely (as already pointed out above) that the courts would be amenable to a liberal extension of the common law principles in the light of the fact that the common law doctrine would render the contract concerned void (as opposed to voidable)—a result that would be especially detrimental where third party rights were concerned.[66] There are, admittedly, a number of potential objections

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60 See PS Atiyah, 'Contract and Fair Exchange' (1985) 35 *University of Toronto Law Journal* 1 (reprinted as Essay 11 in PS Atiyah, *Essays on Contract* (1986, Clarendon Press)). Reference may also be made to S Smith, 'In Defence of Substantive Fairness' (1996) 112 *Law Quarterly Review* 138.

61 See, eg Lord Goff, 'The Search for Principle' (1983) 69 *Proceedings of the British Academy* 169 at pp 183–84; and, by the same author, *op cit* n 42 p 83, respectively; as well as Lord Steyn, *op cit* n 55 especially at pp 46–47 and 58.

62 See generally *Associated Japanese Bank* v. *Credit du Nord* [1989] 1 WLR 255; noted by GH Treitel (1988) 104 *Law Quarterly Review* 501 and G Marston [1988] *Cambridge Law Journal* 173.

63 See, in particular, *per* Lord Denning MR in *Solle* v. *Butcher* [1950] 1 KB 671 at pp 692–93.

64 See generally A Phang, 'Common Mistake in English law: The Proposed Merger of Common Law and Equity' (1989) 9 *Legal Studies* 291 at pp 293–97.

65 See generally *ibid*, pp 297–301.

66 See generally *ibid*, pp 301–06.

to this proposed reform; none of them, however, appears to be insuperable.[67] On a practical level, the most significant problem would appear to be the legal consequence that ought to follow should a merger occur between both the common law and equitable doctrines. This stems from the fact that (as we have just seen) the common law doctrine renders the contract void, whereas the equitable one renders the contract only voidable. This was, in fact, one of the objections raised in a leading text against the proposed merger.[68] It is, however, submitted that if *de jure* merger is feasible, the contract concerned should only be rendered *voidable*, ie the result that obtains in equity—and a helpful 'byproduct' of this would consist in the court being able to deliver judgment on terms.[69] Indeed, such a result, by accommodating third party rights and thus simultaneously providing for a measure of fairness, in fact reduces the potential uncertainty that it is the aim of positivism itself to avoid. This might also mean, in the long term, a more viable practical application for common mistake as an instrument for attaining fairness. Indeed, and as I have observed elsewhere:

> To persist in separating what are, in substance at least, two very similar, if not identical, doctrines that differ only in the strictness of their application, is to persist in an artificiality that does no credit to the development of the common law. The doctrine of common mistake is sufficiently amorphous and difficult in its present form. The way forward is toward systematic simplification.[70]

It should, however, be mentioned that there are certain observations by Evans LJ in the English Court of Appeal decision of *William Sindall plc* v. *Cambridgeshire County Council*[71] that appear to militate against the reform just proposed. In that case, the learned judge, whilst not expressing a concluded view, suggested that the test for common mistake at common law was stricter than that for common mistake in equity.[72] It is submitted, with respect, that notwithstanding the plausibility of this view, it ought to be weighed against the other arguments briefly canvassed above. There have been no other judicial pronouncements to

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67 See *ibid.*

68 See GH Treitel, *The Law of Contract* (10th edn, 1999, Sweet & Maxwell), pp 286–287. Reference may also be made to S Wheeler and J Shaw, *Contract Law—Cases, Materials and Commentary* (1994, Oxford University Press), pp 699–700.

69 See, eg *Solle* v. *Butcher* [1950] 1 KB 671 with respect to the last-mentioned point. And see Phang, *op cit* n 64, p 303.

70 See Phang, *op cit* n 64, p 306. Cf also J Maxton, 'Some Effects of the Intermingling of Common Law and Equity' (1993) 5 *Canterbury Law Review* 299; and J Martin, 'Fusion, Fallacy and Confusion; A Comparative Study' [1994] *Conveyancer and Property Lawyer* 13.

71 [1994] 1 WLR 1016.

72 See generally [1994] 1 WLR 1016 at pp 1039–40. Curiously, Evans LJ classified the doctrine of common mistake in equity as 'mutual mistake'; it is, however, suggested that this difference is only one of terminology; reference may also be made, in this regard, to Phang, *op cit* n 64, p 291, n 1.

the best of the present writer's knowledge, although the argument proffered here[73] has at least been noted in academic texts.[74]

Another similar instance (of artificiality in strict categorisation) occurs with regard to the increasingly important doctrines of economic duress, undue influence and unconscionability. I have ventured to suggest elsewhere that there are in fact linkages not only amongst the categories of undue influence but also between the doctrine of undue influence on the one hand and the more recent doctrines of economic duress and unconscionability on the other.[75] Once again, constraints of space prevent a detailed rehearsal of the various arguments.

Given the various linkages amongst the various categories of undue influence (which are discussed in more detail elsewhere[76]), I ventured to suggest the following rationalisation amongst the various categories of undue influence, as follows:

> Given the difficulties briefly canvassed ... the present writer ventures to suggest that the category of class 2B undue influence should be abolished. Indeed, given the difficulties with regard to class 2A undue influence, perhaps that category, too, should be abolished or be subject to legislative definition. It is conceded that this latter suggestion is rather radical. However, the former suggestion is ... entirely practical and rational, given the close relationship ... between the categories of class 1 and class 2B undue influence, so that, notwithstanding the equally entrenched nature of class 2B undue influence, there would be no real objections to its abolition, as just suggested—thus effecting at least a partial rationalisation amongst the various categories of undue influence.[77]

Insofar as the linkages amongst the doctrines of economic duress, undue influence and unconscionability are concerned,[78] I have argued, first, that the doctrines of economic duress and actual (or class 1) undue influence are very similar in substance, and that there was therefore no real problem in combining both doctrines into one.[79] I further argued that, notwithstanding a few potential

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[73] As embodied in the article cited at *supra* n 64.

[74] See, eg *supra* n 68. See also JE Martin, *Hanbury & Martin—Modern Equity* (15th edn, 1997, Sweet & Maxwell), p 819, n 11; Furmston, *op cit* n 19, p 234, n 1; and C Boyle and DR Percy (eds), *Contracts: Cases and Commentaries* (5th ed, 1994, Carswell, Toronto), p 542.

[75] See generally A Phang, 'Undue Influence—Methodology, Sources and Linkages' (1995) *Journal of Business Law* 552 at pp 563–74. Cf D Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 *Law Quarterly Review* 479.

[76] See generally Phang, *op cit* n 75, pp 563–65.

[77] See *ibid*, p 565. Briefly put, Class 2A undue influence relates to established relationships in law which, in and of themselves, raise the presumption that the alleged wrongdoer has to rebut. The second (Class 2B undue influence) necessitates the claimant proving the existence of a relationship whereby trust and confidence were reposed by him in the alleged wrongdoer, which relationship raises the presumption that the latter has then to rebut.

[78] See generally *ibid*, pp 565–74.

[79] See *ibid*, pp 565–66.

obstacles, there was also a close relationship between the doctrines of unconscionability and undue influence,[80] as well as between the doctrines of unconscionability and economic duress.[81] In the light of these linkages, I argued, finally, that there was no reason in logic or principle why it was not possible 'to subsume all three doctrines [namely, economic duress, undue influence and unconscionability] under one broad heading of unconscionable conduct'.[82] I also dealt with potential objections to such an amalgamation,[83] and argued that none of them constituted an insuperable obstacle to the reform presently proposed. It should be mentioned that one other significant alternative is the development of a substantive and general duty of good faith in contract. However, the entire doctrine is still very much in an embryonic stage of development and is not, it is suggested, as appropriate a doctrine as unconscionability.[84]

Yet another significant illustration lies in the field on consideration. It used to be thought that there was at least a critical distinction between legal benefit and/or detriment on the one hand and factual benefit and/or detriment on the other.[85] However, the recent English Court of Appeal decision in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd*[86] appears to have done away with this distinction altogether. The implications of this shift in the law are quite startling in so far as it engenders a potentially 'de-stabilising' effect in what is already a vague area of the common law of contract. *Williams* v. *Roffey Bros* appears to stand for the proposition that *any factual* benefit and/or detriment would be sufficient consideration from the legal point of view: a proposition that makes it much easier to satisfy the doctrine of consideration, whilst simultaneously making the ascertainment of concrete guidelines that much more difficult. If, however, this be the case, it would entail the consequence that the present category, far from remaining a category of legal insufficiency, has now, with this more liberal approach, become (like the category of the performance of, or a promise to perform, an existing contractual duty owed to a third party[87]) more a category of legal *sufficiency*. The obvious problem is that with the decision in the *Williams* case, the vagueness inherent within the doctrine of consideration has

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80 See *ibid*, pp 566–70.

81 See *ibid*, p 570.

82 See *ibid*.

83 See *ibid*, pp 570–74. On the doctrine of unconscionability generally, see also N Bamforth, 'Unconscionability as a Vitiating Factor' (1995) *Lloyd's Maritime and Commercial Law Quarterly* 538.

84 See generally, eg A Phang, 'Tenders, Implied Terms and Fairness in the Law of Contract' (1998) 13 *Journal of Contract Law* 126 especially at p 140, and the literature cited therein (in particular, J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (1995, Clarendon Press)) as well as Brownsword, *op cit* n 37, paras 1.77–1.101.

85 See, eg Treitel, *op cit* n 68, p 65.

86 [1990] 2 WLR 1153.

87 See generally the Privy Council decisions of *New Zealand Shipping Co. Ltd* v. *AM Satterthwaite & Co. Ltd, The Eurymedon* [1975] AC 154; [1974] 2 WLR 865; [1974] 1 All ER 1015; [1974] 1 Lloyd's Rep 534; and *Pao On* v. *Lau Yiu Long* [1980] AC 614.

become even more accentuated; more than that, the problem is as to whether or not such a broad extension of the doctrine of consideration has in fact undermined its entire rationale (which is to put some legal constraints on the enforcement of promises). This raises two very compelling (and closely related) questions: first, whether or not the doctrine of economic duress ought to replace the doctrine of consideration, at least where variation of existing contractual obligations is concerned.[88] The second is rather more radical: given the rather vague and amorphous nature of the doctrine, ought it not to be abolished altogether (even where the formation of contracts is concerned), and an alternative (such as economic duress or promissory estoppel) be put in its place instead?

There has been no real resolution of the various issues raised by the *Williams* case, although the decision in *Williams* v. *Roffey Bros* itself has, in fact, been considered in a number of cases in other jurisdictions, the greater proportion of which raise interesting variations and other points. Constraints of space prevent further elaboration, and the reader is referred to the relevant literature.[89] It may, however, be observed that the English Court of Appeal in *Re Selectmove*[90] refused to extend the principle in the *Williams* case (which pertained to a situation where it was sought to enforce a promise to pay *more*[91]) to a situation where it was sought to enforce a promise to take *less*.[92] As I have sought to argue, such an approach is unfortunate not only because of the strong argument to the contrary presented by Lord Blackburn in *Foakes* v. *Beer* itself,[93] but also because the reasoning in *Foakes* v. *Beer* was not premised on any substantive reasoning as

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88 See generally A Phang, 'Consideration at the Crossroads' (1991) 107 *Law Quarterly Review* 21.

89 See, eg the Singapore Court of Appeal decision of *Sea-Land Service Inc.* v. *Cheong Fook Chee Vincent* [1994] 3 SLR 631; reversing [1994] 2 SLR 340; the Supreme Court of New South Wales (Equity Division) decision of *Charles Musumeci* v. *Winadell Pty Limited* (1994) 34 NSWLR 723; *Anangel* v. *IHI* [1990] 2 Lloyd's Rep 526; *Re C (a debtor)* (unreported, 11 May 1994, English Court of Appeal); and the Hong Kong High Court decision of *UBC (Construction) Ltd* v. *Sung Foo Kee Ltd* [1993] 2 HKLR 207 at pp 227–29. And see generally JW Carter, A Phang and J Poole, 'Reactions to Williams v. Roffey' (1995) 8 *Journal of Contract Law* 248, which also deals with other points, eg the distinctions between forms of existing duty (this would include discussion of the possible linkage between the principle in *Williams* and situations where there is performance of (or a promise to perform) an existing duty imposed by law and owed to a third party, respectively).

90 [1995] 1 WLR 474; noted by A Phang, [1994] *Lloyd's Maritime and Commercial Law Quarterly* 336.

91 The leading decision (prior to the *Williams* case) was in fact *Stilk* v. *Myrick* (1809) 2 Camp 317.

92 The general principle (that there is no consideration in such a situation) being embodied, *inter alia*, in the leading House of Lords decision of *Foakes* v. *Beer* (1884) 9 App Cas 605. The seminal case in this regard is traditionally thought to be *Pinnel's Case* (1602) 5 Co Rep 117a; though cf *infra* n 95.

93 See (1884) 9 App Cas 605 at p 622.

such, resting, in effect, on preserving the *status quo* established in *Pinnel's Case*;[94] in addition, it could be argued, from an historical perspective, that *Pinnel's Case* had in fact been applied out of context and that the House of Lords in *Foakes* v. *Beer* had merely perpetuated the error.[95] Finally, there appears to be no persuasive reason why one should adopt, as the *Williams* case did, a practical approach toward consideration in a *Stilk* v. *Myrick* situation[96] whilst eschewing the same for a *Foakes* v. *Beer* situation.[97] However, it must be acknowledged that the (English) Court of Appeal in the instant case was constrained by *precedent*, since the decision in *Foakes* v. *Beer* was one emanating from the House of Lords. It is to be hoped that the House of Lords will, in the not too distant future, have the opportunity to reconsider the various problems and rationalise the law relating to consideration accordingly. Notwithstanding the situation in England, however, it is clear that other countries are *not* so constrained and may in fact tread a wholly different path. This, in fact, links back to a theme considered above, namely, the indigenisation of contract law.

Let us now turn to a closely related theme, centring on the argument from relativity and subjectivity.

V. Theme Four: The Problem of Value

An extremely important point has to be made at the outset: it is not logically possible to maintain a wholly sceptical position for the simple reason that an avowed sceptical position is itself an argument from absolutes; indeed if such a position were 'true', then why should any person accept that position in the first instance which would, *ex hypothesi*, be unreliable? Any argument, intended to be taken seriously, must be more than a purely subjective one; it must, in other words, be universalisable, containing within itself an objective standard, namely, an absolute. Indeed, even liberal philosophers such as Professor Ronald Dworkin have been at pains (particularly in their more recent work) to argue

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94 (1602) 5 Co Rep 117a; and see *supra* n 92.

95 See JN Adams and R Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 *Modern Law Review* 536 at p 540, n 25; AWB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 *Law Quarterly Review* 392 especially at p 407; and, by the same author, *A History of the Common Law of Contract* (1975, Clarendon Press), especially at p 473.

96 Ie, with regard to a situation where it is sought to enforce a promise to pay more; and see *supra* n 91.

97 Ie, with regard to a situation where it is sought to enforce a promise to take less; and see *supra* n 92. But cf J O'Sullivan 'In Defence of Foakes v. Beer' [1996] *Cambridge Law Journal* 219.

that objectivity is not only possible but is, in fact, also inevitable.[98] And the moral and political philosophy of Professor John Rawls (another liberal) attempts to find a *via media* between the inevitable fact of pluralism and the need to allow each individual to pursue his or her conception of the good (which is based on personal (subjective) preference). Very crudely put, his attempt is to locate a *procedural* framework comprising his two principles of justice, which framework is supposed to be objective.[99] There are here resonances with the brief reference above to the attempt to distinguish procedural from substantive fairness[100]—and all the problems that accompany such an attempt.[101] However, whilst it is eminently true that pluralism does not necessarily entail relativism and subjectivity, it is equally true that what we have hitherto canvassed does not give much optimism in the opposite direction. Where, in other words, are we to locate the *objective* standards that will result in, *inter alia*, substantive justice? This is a more than fair question but, without appearing to fudge the issue, it is a question to which several volumes would be required before we can even begin to address it.

Given the severe constraints of space, I would argue (for the present) that the development of a theory that could provide a persuasive answer to the objection from relativity and subjectivity is not a mere exercise in futility. The futility would invariably arise if we adhered solely (or even mainly) to logical processes. Again, a caveat is in order lest unwarranted misconceptions arise. I am not arguing that we should dispense with logic. On the contrary, the very process of discourse utilises logic and rationality. What I would argue, however, is that this process has to be complemented by a natural law theory that has as its basis a *transcendent* source (in, I would argue, God Himself). I have sought to sketch out in the briefest of fashions the possible contours of such a theory elsewhere,[102] but much remains to be done. Indeed, a whole host of possible questions and responses would very naturally arise: commencing, for instance, with the very fundamental threshold question as to whether God exists in the first instance and this question alone raises (in turn) a multitude of other materials as well as analyses across a multi-disciplinary spectrum, involving discourse in disciplines as diverse as philosophy, religion and science, amongst others. At this point, the

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98 See, eg RM Dworkin, 'Law, Philosophy and Interpretation' (1994) 80 *Archiv fur Rechts- und Sozialphilosophie* 463 especially at pp 474–75, and, by the same author, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy and Public Affairs* 87.

99 See generally J Rawls, *A Theory of Justice* (1971, Harvard University Press). See also (by the same author and more recently) *Political Liberalism* (1993, Columbia University Press).

100 See the main text accompanying *supra* nn 58–60.

101 See, in particular, *supra* n 60.

102 See A Phang, 'The Natural Law Foundations of Lord Denning's Thought and Work' [1999] *Denning Law Journal* 159 especially at pp 173–77. See also HJ Berman, 'The Religious Sources of General Contract Law: An Historical Perspective' (1986) 4 *Journal of Law and Religion* 103 (reprinted in HJ Berman, *Faith and Order: The Reconciliation of Law and Religion* (1993, Scholars Press), Chapter 7). Reference may also be made to J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991, Clarendon Press).

reader would, it is hoped, have obtained a flavour of the enormity of the task. However, it is also hoped that the reader would also be persuaded that there is at least a plausible case that can be made in favour of a theory that embodies objective standards that would be applicable to law in general and contract law in particular.

VI. Theme Five: The Routes and Roots of Reform

The theme of reform is ever present in the law in general and, most certainly, in the law of contract in particular. This is not at all surprising since the common law develops incrementally and may even require the intervention of the legislature. Indeed, this brings us to the first main issue in the present section: which is the preferable channel for effecting law reform—the courts or the legislature? The neutral (and presumably popular) answer would be the non-committal 'it all depends'. There is, in fact, more than a grain of truth in this answer, unsatisfactory as it may appear to be at first blush. The subject matter is obviously of signal importance. However, there are general factors as well—which we will come to in a moment. At this juncture, however, it should be observed that, under English law at least, the preferred option (as generally enunciated by the *courts* themselves) appears to be *legislative* in nature. There has, in fact, always been a perceived distinction between the roles as well as the processes of the legislature on the one hand and the judiciary on the other. This is indeed reflected in the extrajudicial views of not a few law lords.[103] We also find judicial recognition of this distinction in the case law itself, with the courts preferring the legislature to tackle reforms with regard to the more significant and problematic areas of the law.[104] Part of the reason for this distinction may also lie in the fact that the legislature is perceived to be better equipped to

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[103] See, eg Lord Reid, 'The Judge as Law Maker' [1972] *Journal of the Society of Public Teachers of Law* 22; and Lord Mackay of Clashfern, 'Can Judges Change the Law?' (1987) 73 *Proceedings of the British Academy* 285. Although, it is arguable that this is a more recent development: see PS Atiyah, 'Judges and Policy' (1980) 15 *Israel Law Review* 346 at pp 355–56. Indeed Professor Atiyah argues that English judges take a much more activist role, which role they appear prepared to admit in only extrajudicial speeches. The two speeches cited at the commencement of this note evince, however, an approach that is somewhere in between: whilst admitting that judges do make law, they do not make law in the sense that the legislature does. And see Hart, *op cit* n 56, pp 272–76. Reference may also be made to RM Dworkin, *Taking Rights Seriously* (1978, Harvard University Press) and, by the same author, *Law's Empire* (1986, Harvard University Press) where judicial law-making is to be avoided altogether on the theory that judges are to enforce *existing* legal rights already embedded in the law.

[104] See, eg *per* Lord Reid in *Beswick* v. *Beswick* [1968] AC 58 at p 72 and Lord Salmon and Lord Scarman in *Woodar Investment Development Ltd* v. *Wimpey Construction (UK) Ltd* [1980] 1 WLR 277 at pp 291 and 300, respectively (with regard to the doctrine of

consider the broader societal factors that are an essential part of the process of reform[105]—although this may not, in fact, be the case, having regard, in particular, to the fact that there is often insufficient parliamentary time for the consideration of such broader factors in any detail, or even at all. However, it is clear, as already alluded to above, that the focus on the *legislature* as the primary vehicle for reform is quite deeply ingrained in the psyche of the English legal system and, arguably, other Commonwealth legal systems as well. This appears to be borne out by recent developments briefly considered below.[106]

Insofar as the proposed *content* of reform is concerned (striking, as it were, at the 'root' of the matter), this is (as mentioned at the outset of the present article) too large a topic to be dealt with in any detail at all. However, by very briefly mentioning (consistent with the personal nature of this piece) a few of my own proposed reforms, I hope to underscore the point made at the outset of the present paragraph; indeed, my own suggestions are but the tip of the proverbial iceberg: there would, in fact, be far more (and, presumably, far better) ideas for reform in the various areas of contract law; hence, any serious study of proposed reform in the contract law of the Commonwealth would (again, as I mentioned earlier) entail a multi-volume project. Before proceeding to consider these proposed reforms, it would be appropriate to indicate that this broad theme of reform is in fact related to, and constitutes the confluence point of, all the preceding four themes considered earlier in this article.

Turning very briefly to some of the possible reforms that I have canvassed over the last decade or so, I have in fact reiterated the call made by the then UK Law Revision Committee in 1937,[107] that the doctrine of consideration be abolished altogether,[108] particularly in the light of *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd*[109]—although such a sweeping reform may, admittedly, be difficult to achieve except in the context of codification. In a related vein, insofar as the doctrine of consideration is intended to prevent extortion, thought should be given to a more nuanced development of the relatively fledgling doctrine of economic duress.[110] This is one instance of possible reform in the context of *formation* of contract.

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cont.

privity of contract); and see now the main text accompanying *infra* nn 124–27 and *Tinsley* v. *Milligan* [1994] 1 AC 340 at p 364 (a suggestion by Lord Goff in the sphere of illegality itself; and see now the main text accompanying *infra* nn 116–23). See also Atiyah and Summers, *op cit* n 55, Chapter 11, where the authors argue that there is (compared to US law) more reliance in England on *legislation* to solve problematic legal issues because, first, the country has strong centralised political institutions, and, secondly, because the English judiciary has a relatively minor political role to play. Further, they point to the fact that the drafting of legislation in England is more professionalised as well as detailed.

105 And see the main text accompanying *supra* nn 15–16.

106 See *infra* nn 117 and 127.

107 See Cmd 5449.

108 See Phang, *op cit* n 88.

109 And see generally the main text accompanying *supra* nn 85–97.

110 See generally Phang, *op cit* n 23, pp 217–19.

Insofar as *vitiating factors* are concerned, I have already briefly discussed the proposed merger of the doctrine of common mistake at common law and in equity.[111] I have also discussed (equally, if not more, briefly) the proposed subsuming of the doctrines of economic duress and undue influence under the doctrine of unconscionability instead.[112] And in the sphere of illegality, I have also suggested, insofar as recovery under an independent cause of action is concerned,[113] that it might be preferable and more coherent to adopt a somewhat different approach by way of legislation—via a *substantive and independent* doctrine of *restitution* that would not require (at least critical) reliance[114] on the illegal contract as such.[115] However, the UK Law Commission very recently published a consultation paper entitled *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*,[116] in which it has advocated reform also via legislation.[117] The basic content of the proposed reform, insofar as the law of contract is concerned, is, however, somewhat different (insofar as it does not, as we shall see, adopt the New Zealand approach),[118] and centres on the recommendation of a *structured discretion* conferred by legislation on the courts to decide whether or not (in the context, generally, of illegality as a *defence*) to enforce an illegal transaction, to allow benefits conferred under the contract to be recovered (ie to allow for the reversal of unjust enrichment where the contract is unenforceable for illegality), or to recognise that property rights have been transferred or created by the contract.[119] In the exercise of such discretion, the Law Commission provisionally proposes that a court should consider: (i) the seriousness of the illegality

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111 See generally the main text accompanying *supra* nn 62–74.

112 See generally the main text accompanying *supra* nn 75–84.

113 See, in particular, *Bowmakers Ltd* v. *Barnet Instruments Ltd* [1945] KB 65; *Sajan Singh* v. *Sardara Ali* [1960] AC 167; and *Tinsley* v. *Milligan* [1994] 1 AC 340. Cf the Australian High Court decision of *Nelson* v. *Nelson* (1995) 70 ALJR 47.

114 One writer has argued that, given the inevitable reliance on the illegal contract, the courts, whilst allowing recovery, should simply admit that there is reliance on the illegal contract even in situations where the cause of action is premised on title or other proprietary interest: see N Enonchong, 'Title Claims and Illegal Transactions' (1995) 111 *Law Quarterly Review* 135. Whilst such practical candour is commendable, such an argument must still concede that an exception has been made to the otherwise overriding taint of illegality.

115 See generally A Phang, 'Of Illegality and Presumptions—Australian Departures and Possible Approaches' (1996) 11 *Journal of Contract Law* 53. But cf now the recent UK Law Commission's Working Paper: see the main text accompanying *infra* nn 116–23.

116 Law Commission Consultation Paper No 154 (1999).

117 See *ibid*, Pt V.

118 See generally *ibid*, paras 1.18–1.21 as well as Pt IX for an overview of the various proposals. See also generally *ibid*, Pts II, IV, V, VI and VII.

119 It should, however, be noted that, insofar as the *first* category is concerned (namely, whether or not to enforce an illegal transaction), a 'legal wrong' must be involved as contrasted with contracts 'which are otherwise contrary to public policy'. Insofar as the latter is concerned (namely, contracts 'which are otherwise contrary to public policy'), the Law Commission provisionally recommends that the courts should not be given a discretion to enforce contracts, the common law continuing to be the

involved; (ii) the knowledge and intention of the party seeking to enforce the contract, seeking to recover benefits conferred under it, or seeking the recognition of legal or equitable rights under it; (iii) whether denying the claim would deter the illegality; (iv) whether denying the claim would further the purpose of the rule which renders the contract illegal; and (v) whether denying relief would be proportionate to the illegality involved.[120] Generally speaking, the Law Commission provisionally proposes that illegality should continue to be used only as a *defence*. But it does also provisionally propose that an *exception* be made inasmuch as the doctrine of *locus poenitentiae* would be allowed to be utilised as a cause of action.[121] The Law Commission's provisional proposals also differ from the approach embodied in the New Zealand Illegal Contracts Act 1970[122] insofar as they reject giving the courts a discretion to go beyond treating illegality as a defence to standard rights and remedies and to make any adjustment to the rights and remedies of the parties as they (the courts) think just.[123]

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cont.

governing legal regime: see generally *ibid*, paras 7.13–7.16. However, the Law Commission does add (*ibid*, para. 7.16): 'It is, however, our provisional view that a legislative provision should make it clear that the courts are to judge whether a contract is contrary to public policy in the light of policy matters of the present day and that contracts which were previously considered to be contrary to public policy may no longer be so and vice versa.'

[120] See *ibid*, paras 1.19 and 7.27–7.43, insofar as contracts are concerned.

[121] See generally *ibid*, paras 7.58–7.69.

[122] No 129. See in particular (and in this context especially) s. 7 thereof. Section 6 generally provides that illegal contracts (defined in s. 3) are to be of no effect; however, s. 7(1) provides as follows:

> (1) Notwithstanding the provisions of section 6 of this Act, but subject to the provisions of any other enactment, the Court may in the course of any proceedings, or on application made for the purpose, grant to—
> (a) Any party to an illegal contract; or
> (b) Any party to a contract who is disqualified from enforcing it by reason of the commission of an illegal act in the course of its performance; or
> (c) Any person claiming through or under any such party
> such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just.

Section 7(3) in fact provides some general guidelines (including the ubiquitous 'catch all' provision in s. 7(3)(c)) for the court, whilst s. 7(4) stipulates that the court may make an order under s. 7(1) notwithstanding the fact that knowledge was present on the part of the person granted relief—although 'the Court shall take such knowledge into account in exercising its discretion under [s. 7(1)]'. See also the *Report of the Contracts and Commercial Law Reform Committee New Zealand on Illegal Contracts* (1969) pp 9–10. And, for a good general overview of the Act and its operation, see Burrows, Finn and Todd, *op cit* n 2 especially at pp 405–17 and 438–40.

[123] See generally *op cit* n 116, paras 7.73–7.87. The UK Law Commission also provisionally proposes that, where a statute has expressly provided what should be the effect of the involvement of illegality on a contract, the proposed discretion described above would not apply: see *ibid*, paras 7.94–7.102, insofar as contracts are concerned.

And in the quite different context of *privity* of contract in general and the reform of the rule whereby third parties are generally prevented from recovering under contracts made for their *benefit* in particular,[124] although substantial reform was in fact proposed (again by the UK Law Revision Committee) as far back as 1937,[125] it was only in 1991 that the UK Law Commission published a comprehensive consultation paper[126] and, in 1996, the Commission published a report that contained proposals for *legislative* reform.[127] Even more recently, a Contracts (Rights of Third Parties) Bill was introduced into the UK Parliament,[128] and one wonders whether this would provide the impetus for similar developments, particularly in Asian common law jurisdictions.

VII. Conclusion

Despite the many (perhaps, inevitable) difficulties, the common law of contract has never been in better shape—even (or perhaps, in some instances at least, especially) in the foreign climes in which it has been transplanted. However, enormous challenges nevertheless face these jurisdictions as we embark on the next millennium. For all, the challenge of indigenisation must somehow be blended together with what at first blush appears a contrary aim, namely, globalisation. As I have sought to argue (albeit not in as much detail as I would have liked), this exercise is by no means a futile one. It is indeed a very exciting one and will require wisdom to navigate waters that, whilst containing many perils, also contain the promise of local as well as global development, both supporting each other in a symbiotic fashion.

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124 Although the common law had provided for exceptions: see, eg *New Zealand Shipping Co. Ltd* v. *AM Satterthwaite & Co. Ltd, The Eurymedon* [1975] AC 154; [1974] 2 WLR 865; [1974] 1 All ER 1015; [1974] 1 Lloyd's Rep 534; and *Port Jackson Stevedoring Pty* v. *Salmond & Spraggon (Australia) Pty (The New York Star)* [1981] 1 WLR 138; [1980] 3 All ER 257; [1980] 2 Lloyd's Rep 317. There have been developments in the Australian and Canadian contexts as well: see, eg the Australian High Court decision of *Trident General Insurance Co. Ltd* v. *McNiece Bros Pty Ltd* (1988) 165 CLR 107 and the Canadian Supreme Court decision of *London Drugs Ltd* v. *Kuehne & Nagel International Ltd* [1993] 1 WWR 1.

125 See *supra* n 107.

126 See *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Commission Consultation Paper No 121, 1991, HMSO).

127 See *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Commission Report No 242, Cm 3329, 1996, HMSO). See generally A Burrows, 'Reforming Privity of Contract: Law Commission Report No 242' [1996] *Lloyd's Maritime and Commercial Law Quarterly* 467; but cf P Kincaid, 'Privity and Private Justice in Contract' (1997) 12 *Journal of Contract Law* 47.

128 After the final draft of this article had been accepted for publication, the UK Parliament passed the Contracts (Rights of Third Parties) Act 1999 (c 31).

We have also looked very briefly at the challenge of relativity and subjectivity in a pluralistic age. However, I have argued that the retreat into doctrine is an inadequate response and may even hinder the already difficult attempts at achieving substantive justice. Nor can we discard such attempts because that is what the general public believe the law does or at least ought to be doing; more than that, that is what lawyers and judges believe as well. But the recourse to intuition without more threatens a descent into emotivism and the very relativity that we are seeking to avoid. I have argued that objective standards are a necessary part of our thinking and discourse. I also alluded to the possibility of developing a natural law alternative that could, in turn, provide the objective standards that we so desperately need.

We also need to be mindful of the need for reform. Indeed, all the various themes discussed above find their theoretical and (more importantly) practical confluence in the process of law reform. As we have seen, however, law reform itself is by no means an easy process. However, courts and legislatures[129] will have to persevere as they constantly seek to make the law more relevant to the society which it serves.

Much remains to be done. Certainly, this article has been but the very briefest survey of the past, present and future of contract law—and only (I hasten to reiterate) on a personal level at that. However, as I worked on it, I began to realise two things: first, that it represented a retrospective of sorts on work done (both within and without the printed medium) over a period of close to two decades; and, secondly, that much remained to be done, certainly much more than I could hope to accomplish in the remainder of my academic career. The work of legal scholars parallels, in many ways, the work done in the more practical context: both epitomise the incremental nature of the common law, the need to complement it by legislative development, and (above all) the never-ending search for justice despite the imperfection that is so much a part of the very world we live in.

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[129] And here we have seen a difference of opinion as to which is the more appropriate vehicle for effecting reform: see generally the main text accompanying *supra* nn 103–106.