THEIR LAW IN OUR HANDS – THE APPLICATION OF ENGLISH LAW ACT 1993 (SINGAPORE): ARE THERE LESSONS FOR THE CIVIL LAW ACT OF 1956 (MALAYSIA)? *

CHAN SEK KEONG**

I INTRODUCTION

It is a great honour and privilege to be asked to deliver the 13th Tun Suffian Lecture. The late Tun Suffian was as "*a person of unshakeable principles*" (as described by Tun Mohamed Dzaiddin), and as having "*guided the Malaysian judiciary along a path of rigorous judicial integrity and independence*" (as lauded by Prof HP Lee),[1] and as "*Malaysia's most distinguished judge; his international standing made him one of the few in his country to speak freely without repression*."[2]

I did not know Tun Suffian personally. However, I attended his Braddell Memorial Lecture in 1982 where he proposed his "veil of anonymity" as a test of the integrity and neutrality of a judgment on constitutional rights. He said:

> In a multi-racial and multi-religious society like yours and mine, while we judges cannot help being Malay or Chinese or Indian; or being Muslim or Buddhist or Hindu or whatever, we strive not to be too identified with any particular race or religion — so that nobody reading our judgement with our name deleted could with confidence identify our race or religion, and so that the various communities, especially minority communities, are assured that we will not allow their rights to be trampled underfoot.[3]

Received: December 16, 2024, **Revised:** June 5, 2025, **Accepted:** June 11, 2025.
Published online: June 12, 2025

DOI:

* The 13th Tun Suffian Memorial Lecture 2024 delivered at the Faculty of Law, Universiti Malaya, Kuala Lumpur, 50603, Malaysia on 10 October 2024.

** Former Chief Justice of Singapore. The author can be contacted at <chansekkeong21@gmail.com>.

1 HP Lee 'The Judicial Power and Constitutional Government - Convergence and Divergence in the Australian and the Malaysian Experience' *Commonwealth Legal Information Institute* <http://www.www.commonlii.org>.

2 Obituary in the *Telegraph* (UK), 28 September 2000.

3 Cited by Zulkefli PCA in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, 556 [5].

Tun Suffian's veil of anonymity calls to mind John Rawls' use of a veil of ignorance to design a just society. The theory is that a person is more likely to cut a cake fairly if he did not know which piece he would be getting. A fair society needs not be equal for all, which is unrealisable, but is one in which the least of us should not be unduly disadvantaged.

The title of this lecture is "Their Law in our Hands".[4] The phrase "Their Law" refers to English law, and "our Hands" is self-explanatory. It is a neat figure of speech to describe the object of the Application of English Law Act 1993 ("AELA"). English law was first received in Penang in 1807 (after the British acquired the island from the Sultanate of Kedah in 1786) and in 1826 in Singapore and Malacca (after the British acquired Singapore from the Sultan Hussein in 1824 and Malacca from the Dutch also in 1824). In 1826, Britain was a world empire, and English law (comprising statutes, the common law of England and the principles of equity) was already a mature and developed legal system for its time. As the British acquired overseas territories through settlement, cession or conquest, English law became their foundation laws to replace their indigenous systems of law, if any. In the aftermath of World War II, when the British granted independence to almost all its territories, and also its protectorates, they were left with the legacy of English law as the basic law of their legal systems. So, even though England lost its empire of territories, it retained its empire of laws via the common law of England. In today's globalised world, English law as a system of law continues to play a vital role in international trade and commerce, manufacturing, finance and foreign direct investments. It is the preferred, and therefore the dominant, governing law for all economic and financial transactions, due principally to the dominance and indispensability of the US dollar in international financings. The depositaries and lenders of the US dollar, whether domiciled within or outside the USA, are the US banks and UK banks, which invariably prefer English law to govern their financial transactions. The dominance of English law in global trade, finance and investment is due to these factors and also explains why US and UK law firms are the largest law firms in the world.

In respect of Penang, Malacca and Singapore, English law had to be imposed as their foundation law because these territories lacked an adequate body of laws and a functional legal system to regulate trade and to govern what was then a largely immigrant society of different races, religions, culture and customs. Although the foundational law originated as English law, it constitutionally became the common law of these territories upon its application to the inhabitants. The case law on the reception of English law confirms that the judges in these territories have consistently accepted this legal position. In legal theory, their law becomes our law in our hands. However, it is arguable that even though Singapore appointed its first local Chief

---

4 The title is adapted from a newspaper headline of a letter written in 1979 by John Mortimer QC (creator of "Rumpole of the Bailey") to the Daily Telegraph "Our Law in Their Hands – A Misuse of the Legal System in Singapore". The letter gave an account of his experience as defence counsel in a defamation action in Singapore. See *Lee Kuan Yew v JB Jeyaretnam* [1978-1979] SLR 429. JBJ's appeals to the Court of Appeal and the Privy Council were dismissed: see [1979-1980] SLR(R) 255 CA; and [1981-1982] SLR(R) 353, PC.

Justice in 1963, and Malaysia did the same in 1966, the English common law was not fully in our hands until appeals to the Privy Council were finally abolished in Singapore with effect from 8 April 1994, after the Application of English Law Act was enacted on 12 November 1993.[5] On 11 July 1994, the Chief Justice issued a Practice Statement (Judicial Precedent) that the Court of Appeal, the apex court in Singapore, would no longer be bound by prior Privy Council decisions. This statement was issued in line with the Judiciary's objective to develop an autochthonous legal system based on English common law to reflect Singapore's national values and social and economic needs.

English law was formally applied to Penang in 1807 under the First Charter of 1807, and in 1826 on Penang, and Malacca and Singapore under the Second Charter of 1826. Both Charters were repealed and consolidated under the Third Charter of 1855.[6] The Court of Judicature established under the 1807 and 1826 Charters and reconstituted under successive Courts Ordinances that preserved the jurisdiction and powers of the Court of Judicature established under these Charters, resulted in the continuous reception of English law in the Straits Settlements.[7]

With this introduction, I now move to the substance of my lecture. The first part will discuss generally the interpretational problems associated with the Second Charter and with Section 5 that contributed to the enactment of the AELA. The second part will consider whether the AELA can provide any lessons for the Civil Law Act 1956 of Malaysia.

---

5 In Malaysia, appeals to the Privy Council with respect to criminal cases were abolished with effect from 1 January 1978 by the Courts of Judicature (Amendment) Act 1976 (Act A328); Also Constitution (Amendment) Act 1983 (Act A566 wef 135/1983).

6 Hugh Hickling in his article 'Singapore's Legal History' in *Essays in Singapore Law* (Pelanduk Publications 1992) at 80, suggested that since the Court of Judicature was "remodeled" to meet the circumstances of Singapore, and notably, it was in all respects ratified and confirmed by an Act of Parliament, the Third Charter would carry greater authority than its predecessors, and that it had advanced the date of reception of English law in the three settlements to 1855. This suggestion has not received any support from other academics. It is also not consistent with the 1855 Charter being a consolidating charter, and with the case law. In *Riedel-de Haen AG v Liew Keng Pang* [1989] 1 SLR(R) 417, 422[12] the High Court (per Chan Sek Keong J.) said:

> There is no doubt that the privilege against self-incrimination is one of the principles of English law which has been received in Singapore by virtue of the Charter of Justice 1826.

7 For a short history of the Straits Settlements, see <https://www.nlb.gov.sg/main/article-detail?cmsuuid=b0d91ecc-3de3-4e79-a132-b2d0d886bb98>.

PART I

II GENERAL RECEPTION OF ENGLISH LAW IN PENANG, MALACCA AND SINGAPORE UNDER THE ROYAL CHARTERS OF 1807, 1826 AND 1855

English law was not received under the 1807 Charter or the 1826 Charter by express words, but by judicial interpretation of the jurisdiction and powers vested in the Court of Judicature established thereunder to settle disputes between parties according to "justice and right". To the English judges, these words meant English law. In a celebrated judgment in a Penang case, *R v Willans*,[8] Sir Benson Maxwell R said:

> Now, the Charter does not declare, *totidem verbis*, that that law shall be the territorial law of the Island; but all its leading provisions manifestly require, that justice shall be administered according to it, and it alone. As to Criminal law, its language is too explicit to admit of doubt. It requires that the Court shall hear and determine indictments and offences, and give judgment thereupon, and award execution thereof, and shall in all respects, administer Criminal justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, as in England [1st Charter, p. 38]. And I think it equally plain that English law was intended to be applied in Civil Cases also. The Charter directs that the Court shall, in those Cases, "give and pass judgment and sentence according to Justice and Right" [id. p. 26]. The "Justice and Right" intended, are clearly not those abstract notions respecting that vague thing called natural equity, or the law of nature, which the Judge, or even the Sovereign may have formed in his own mind, but the justice and right of which the Sovereign is the source or dispenser. The words are obviously used in the same sense as in the well known Chapter of Magna Charta from which they were probably borrowed: "*nulli vendemus, nulli negabimus aut differemus justitiam vel rectum*." They are, in jurisprudence, mere synonyms for law, or at least only measurable by it; and a direction in an English Charter to decide according to justice and right, without expressly stating by what body of known law they shall be dispensed, and so to decide in a Country which has not already an established body of law, is plainly a direction to decide according to the law of England.[9]

---

8 (1858) 3 Ky. 16, 25.

9 See *Fatimah v Logan* (1871) 1 Ky. 255, Hackett J cited the opinion of Sir Barnes Peacock in *Advocate-General of Bengal v Ranee Samonoye Dorse* (1863) 9 M.I.A 387 at 402:

> … there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place and of the inhabitants should admit. The words "give justice and right", in suits and pleas between party and party, could have no other reasonable meaning than

> ……..
> The effect of the Charter of that year [1826] is, it seems to me, to make the English Criminal law in force "as far as the condition and the circumstances of the place and the persons admit"; the civil law, "as far as circumstances admit"; and that branch which is administered in England by the Spiritual Courts, "as far as the religions, manners and customs of the inhabitants admit."

English law was applied as far as local circumstances admitted. In *Choa Choon Neoh v Spottiswoode* (a Singapore case),[10] Sir Benson Maxwell CJ said:

> In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general [and not merely local] policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them. Thus, in questions of marriage and divorce, it would be impossible to apply our law to Mahomedans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them.

This decision was approved by the Privy Council in *Yeap Cheah Neo v Ong Cheng Neo*.[11] After a period of uncertainty after 1926, it was settled law that:

(a) only English statutes of general application were received in the three settlements on the date of the Second Charter ("pre-1826 statutes"), and

(b) the common law and rules of equity ("English common law") were received continuously.

The term "statutes of general application" was interpreted to refer to statutes applicable to every person in every part of England. Although the interpretation of these words was not problematic, even as late as in 2006, it was a live issue in the Pitcairn Islands,[12] and also in Brunei in 2012 (including the meaning of "other provision").[13] In Singapore, the problem was not its meaning, but the

---

justice and right according to the laws of England, so far as they regulated private rights between party and party.

10 (1869) I Ky. 216, 221.

11 [1875] LR 6 PC 381 at [392-394].

12 See Jason CT Chuah 'Reception of English Commercial Maritime Statutes in Malaysia: A Pseudo "Internal" Conflicts Perspective' <https://www.jicl.org.uk/journal/december-2022/reception-of-english-commercial-maritime-statutes-in-malaysia-a-pseudo-internal-conflicts-perspective>.

13 In *Lim Peng Kok @ Lim Mah Lik & Ors v Ang Kui Hua* [2012] 2 MLJ 81, the Brunei Court of Appeal held (a) the English Lunacy Acts of England were statutes of general application in England, and received under section 2 of the Application of Laws, 1951;[13](b) there were many other aspects of a lunatic's care and treatment and care and

unknown number of such statutes in existence. It was a known unknown.

With respect to the reception of English common law, it was also settled law that it was continuous, and not subject to the cut-off date applicable to statutes. Why it was so has never been fully explained in any judgment. One academic explanation proffered is that the underlying principles and values of the common law do not change: they are timeless, and only their interpretations change.[14] This is the well-known declaratory theory of the common law, which has now been abandoned as a fairy tale. A plausible explanation is that English common law was continuously received because it was tied to the continuing jurisdiction and powers of the successive Courts of Judication reconstituted under successive Singapore statutes, including under the State and Federal Constitutions when Singapore was part of Malaysia.

Given the general language of the Second Charter, disputes as to its scope and meaning inevitably arose as legal minds found ingenious ways to interpret it. The main areas of dispute concerned the meaning of the following words:

(1) "general application" and

(2) "local circumstances".

As regards (1), there were in theory potentially a very large number of unknown statutes lurking out there. To illustrate this problem: in 1989, the Singapore High Court held in the case of *Tan Ah Yeo v Seow Teck Leng*,[15] that the UK Maritime Conventions Act 1911 (an Imperial Act) was still in force in Singapore as imperial legislation. What was disconcerting was not the decision itself (which was correct), but the fact that this Act was inadvertently omitted from the Schedule of Imperial Acts in the 1985 Revised Edition of the Laws of Singapore. That this could occur meant that there could be other English statutes yet to be identified.

---

control of a lunatic's property that was not touched upon by the Brunei Lunacy Act. The latter Act was, therefore, not an '"other provision" that excluded the application of the provisions of the UK Lunacy Acts so far as they related to the administration of the estate of a lunatic.

14 To Sir Edward Coke, Lord Chief Justice, the common law is the perfection of reason, since it was the unity of the multitude of judicial decisions made by multitudes of judges over multitudes of years. Hence, "reason is the life of the Law, nay the common law itself is nothing else but reason which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's reason for no man is born an artificer. This legal reason is the highest of reason." See James R. Stoner Jr. "Natural law, Common law and the Constitution" in Douglas E. Edlin (ed), Common Law Theory (Cambridge University Press, 2007) 171, at 174-175.

15 [1989] 1 SLR(R) 134.

With respect to (2), the local circumstances concerned were mainly the different religious and cultural practices and customs of the various races trading and living in the territories. Two judicial statements may be cited:

(a) In *Chulas v Kolson*,[16] Sir Benson Maxwell R said:

> The question how far the general rules of the law of England are applicable to races having religious and social institutions differing from our own, is of occasional recurrence in this Court, and, is seldom free from difficulty. It has been repeatedly laid down as the doctrine of our law that its rules are not applicable to such races, when intolerable injustice and oppression would be the consequences of their application. Thus, the law of bigamy is not applied to Muslims.

(b) In *Nyali Ltd v Attorney General* (a Kenyan case),[17] Lord Denning explained the rationale of the "local circumstances" exception in his characteristic way. He said:

> The next proviso provides, however, that the common law is to apply "subject to such qualifications as local circumstances render necessary." This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom.

The case law on these issues, which Braddell called "a series of decisions which may now be called the common law of the Colony" is now legal history. However, in 1921, Roland Braddell wrote:[18]

> The Judges of the Colony have without exception held that the Charter of

16 (1867) Leic. 462, W.O.C. 30, 462.
17 [1956] 1 QB 1, 16.
18 *One Hundred Years of Singapore*, Vol 1 (Oxford University Press, 1991) 464.

> 1807 introduced into Penang the English law as it then existed, and in a series of decisions dating from 1835 they have also held that the Second Charter of 1826 introduced into the three settlements the English law as it then existed on 26 November 1826. The Charter was a loosely drawn instrument, and many of the Recorders, notably Sir Benjamin Malkin, criticised it on that account; **but one is by no means sure that this very looseness was not its principal virtue, for it enabled our Recorders gradually to build out a series of decisions which may now be called the common law of the Colony, exercising a ripe discretion and a wise choice which might have seriously hampered, to the detriment of the young Settlements by a closer wording of the Charter.** In particular was the door left open to the Judges to decide what modifications of the English law were necessary on account of the religions and usages of the Oriental races living in the Colony. (emphasis added)

However, in some cases it is arguable that the judges lacked the wisdom to discharge this great task.[19]

III SPECIFIC RECEPTION OF ENGLISH MERCANTILE STATUTES UNDER SECTION 5 OF THE CIVIL LAW ORDINANCE, 1878

The same observation is applicable to some of their decisions on Section 5 in the light of whose object it was to apply post-1826 English statutes to the Straits Settlements in order to fill the gap in English legislation created by the cut-off date of 1826 under the Second Charter, and to secure the uniformity of English commercial law with that of the three settlements. Section 5 read:

> 5(1) In all questions or issues which arise or which have to be decided in the Colony with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, *the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period,* if such question or issue had arisen or had to be decided in England, *unless in any case other provision* is or shall be made by any law having force in Singapore. (emphasis added)

---

19 See the treatment of religious and customary practices of Chinese, Indians and Malays under English law in *Malaya and Singapore Borneo Territories, Vol 9 of The British Commonwealth – The Development of Its Laws and Constitutions* (Stevens & Sons Ltd London, 1961), 356-357.

Thomas Braddell (Roland Braddell's grandfather), then the Attorney General, explained the genesis of Section 5 in his report to the Secretary of State on 8 May 1878, as follows:

> **At present, cases involving Mercantile law are, by usage not by any written law, decided by our Court on the authority of reported cases in the Superior Courts of England.** There are few statutory provisions for Mercantile law, nearly the whole body of law is the result of the decisions of the Courts. Now some of these decisions (of the Superior Courts of England) no doubt may depend wholly or partly for their force of English Statute law, and as we have not all the Statutes in force, it has been considered advisable to adopt the Ceylon Ordinance (22 of 1866), **which puts our Court on the same footing as the Courts of England, and thus prevent questions as to the validity of Judgments of our Courts, on the ground that they are not authorised by any law in force in the Colony.** (emphasis added)

Writing in 1921, but with the benefit of hindsight of the case law on Section 5 up to 1920 only, Sir Roland Braddell wrote:

> By [the Civil Law Ordinance of 1878], Mr Braddell introduced into the Straits the English law relating to partnership, corporations, banks and banking, principal and agents, carriers by land and se, marine insurance, average, life and fire insurance, and "mercantile law generally," by which last expression we have received such important English Acts of Parliament as the Sale of Goods, Bills of Exchange, and Infants' Relief. To a mercantile community the generous introduction of English law has proved a very great blessing, and it was done in the simplest language and in a single section. Indeed, the outstanding feature in all of Mr Braddell's work was the simplicity of the language and the wide generalities by which the Courts were left to exercise a wise discretion. There was none of that pronounced distrust of the Courts which modern legislation shows, that extraordinary desire to provide for everything and to close every chink and cranny against judicial interpretation**.**

Braddell's admiration for Section 5 as drafted was, even then, well-intentioned but unjustifiable, having regard to the case law. The "*simple language … in a single section*" was anything but simple for some judges. This situation was brought home to Braddell in 1926 by the outlandish decision of Murison CJ in *Ismail v Kassim* that the English Forfeiture Act 1870 was a law with respect to principals and agents, and therefore it was applicable under Section 5.[20] This

---

[20] Decided on 8 December 1926, but reported in [1958] 2 MC 113, 113. Murison CJ said: inasmuch as the Forfeiture Act makes a substantial alteration so far as a certain class is concerned, in the ordinary law of principal and agent, and the legislature here has applied the English law of

Act provided for the appointment of an interim curator of proceeds of a crime confiscated from a convict. In the second edition of his treatise, *The Laws of the Straits Settlements*, Braddell admitted that there was no issue of mercantile law in *Ismail v Kassim* and that the decision needed "reconsideration".[21]

With the benefit of hindsight of the case law on Section 5 up to 1992, Hickling wrote:[22]

> Such an all-embracing and succinct provision as section 5 inevitably became the subject of litigation, and from 1882 onwards the term "mercantile law generally" in particular came under judicial review.

Section 5 was a model of concise drafting, but not a model of precise drafting, and this contributed to the ensuing conflicting approaches and interpretations leading to its repeal in 1993. Starting from 1882 to 1921, the main areas of contention in the courts were the meaning and scope of the following phrases in Section 5:

(1) "questions or issues which arise or which have to be decided in the Colony with respect to the law of partnerships ... and with respect mercantile law generally";

(2) "the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period"; and

(3) "unless in any case other provision is or shall be made by any law having force in Singapore."

The Courts adopted different approaches and gave different or opposing interpretations on all these wordings, including two Privy Council judgments on (1) and (2). Until 1993, the Singapore Courts were still struggling with Section 5. Although altogether more than 20 reported judgments on Section 5 are reported, I will only discuss the two Privy Council judgments and the last judgment of the Court of Appeal to provide a conspectus of the divisive case law on Section 5.

A *Seng Djit Hin v Nagurdas Purshotumdas & Co*[23]

The essential facts and the issue of law are not complicated. In 1917, the respondent, carrying on business in Java, sold to the appellants, merchants of

---

principal and agent to the Colony, the alteration involved in the Forfeiture Act with its consequential provisions ought to be considered as part of the law of the Colony; and I so hold.

21 See Chan Sek Keong, 'The Civil Law Ordinance, Section 5(1) – A Reappraisal' (1961) MLJ lviii at lx where it was commented that the decision in *Ismail v Kassim* was wrong in every respect.

22 Hugh Hickling, *Essays in Singapore Law* (Pelanduk Publications, 1992) 223.

23 [1921] 14 SSLR 181, HC & CA, [1921] AC 444, PC.

Singapore and Bombay, 2,100 tons of sugar c.i.f. Bombay. The respondent could not deliver the full quantity of sugar because all the cargo ships plying between the two territories had been requisitioned by the British authorities under Defence of the Realm Act, 1915 (section 1 (2)) and the Courts Emergency Powers Act, 1917 (section 1 (2)). The appellants sued the respondent by way of counterclaim for damages for failure to deliver the sugar. The High Court held that there was no defence under the common law, but the 1915 and 1917 Imperial Acts relieved the respondent of liability as they applied to contracts. The Judge also said that those Acts were "imported" into the Colony as mercantile law by operation of Section 5. The Court of Appeal, by a majority (Bucknill CJ and Barrett-Lennard J) held that (a) the claim was based on a contract of sale, (b) the law of sale was part of mercantile law, and (c) therefore, the claim raised a question with respect of mercantile law. However, the two Judges held that the 1915 and 1917 Acts were not part of mercantile law, and therefore the law to be administered under Section 5 did not include them. Bucknill CJ explained:

> Mercantile law is that department of jurisprudence which normally regulates the rights and obligations of persons engaged in business adventures. It is traceable to the custom of merchants .... The two Imperial Acts of 1915 and 1917 are at variance with mercantile custom because they weaken the sanctity of obligation and are abnormal phases of constructive jurisprudence.[24]

Barrett-Lennard J further explained that as the 1915 and 1917 Acts were "ephemeral legislation", they could not be imported under Section 5.

Voules J dissented on the ground that there was "other provision" on emergency powers in force in the Straits Settlements, which precluded the application of the 1915 and 1917 Acts.[25] However, he also held that since the local legislation did not provide a statutory defence, the common law applied and the appeal should be dismissed. To Voules J, "other provision" meant a provision in relation to the subject matter (emergency legislation).

On further appeal, the Privy Council held that the Court of Appeal erred in holding that the 1915 and 1917 Acts were not applicable.[26] Lord Dunedin explained:

> The … Court of Appeal based their judgments upon the view that the English statutes above cited were no part of the mercantile law which they thought was the law to be administered in terms of s. 5 of the ordinance.

---

24 Ibid 204.
25 Ibid 209.
26 [1923] AC 444, PC.

> Their Lordships are quite unable to agree with this view, which they think fails to appreciate that it is not the "mercantile law" but "the law" which is to be the same as the law which would be administered in England in the like case. The first thing to be settled is: Has a question or issue arisen in the Colony with respect to … to mercantile law generally? **Now the question here to be decided in the Colony is a question as to the law of sale. No one can doubt that the law of sale is part of the mercantile law.** … Now if the same question as to sale had to be decided at the same time in England it is clear beyond all doubt that the above cited statutes of 1915 and 1917 could be pleaded if the facts allowed of their application. That no other provision had been made by Colonial statute all the learned judges agreed, and the contrary has not been urged in this appeal.[27] (emphasis added)

Lord Dunedin's characterisation of the question as one with respect to mercantile law was undoubtedly correct, but his literal interpretation of the law to be administered was contrary to the purpose of Section 5 which was enacted to apply the enumerated laws, all of which were concerned with commerce, and mercantile law generally, and not the whole body of English legislation.

B *Sockalingam*[28]

A decade later came *Sockalingam*. In that case, a money-lender sued on a promissory note and post-dated cheque given in respect of a loan. The defendant pleaded that the suit could not be maintained, as there was no note or memorandum in writing of the contract in accordance with section 6 of the (English) Moneylenders Act, 1927; he contended that that section applied by virtue of Section 5. Sproule ACJ held that although the question at issue was "with respect to mercantile law", the Moneylenders Acts were not applicable as they created machinery and procedure which made them wholly inapplicable in the Straits Settlements. The Court of Appeal (Murison CJ, Thorne and Terrell JJ) affirmed the judgment. The Privy Council dismissed the appeal for different reasons, as explained by Lord Atkin in the following passages:[29]

> It is to be noted that the section does not purport to apply in every mercantile transaction. It applies only where a question or issue has to be determined

---

27 Ibid 448.

28 *Bajerai v Sockalingam Chettiar* [1933] 432 PC; c/f *Bajerai v Sockalingam* [1933] AC 342 (PC); [1933] 2 MLJ 81.

29 Lord Atkin said in *Bajerai v Sockalingam* [1933] AC 342, 347:
The Act must be judged as a whole, and if it is found to be restricted to regulation of activities in England and not to be capable of general application, it is not within the scope of the ordinance at all. To take one or two sections of such an Act, divorced from their context, is to apply a new law, which is not the law of England, and so abstracted might never have been introduced into England at all.

> with respect to mercantile law. The general object no doubt is to secure uniformity of mercantile law in Singapore and the United Kingdom, though of course, whatever the object, full effect must be given to the plain meaning of the words used. It is obvious that there are mercantile transactions in which no question with respect to mercantile law arises; just as there are non-mercantile transactions in which such a question does arise.[30]

Lord Atkins gave the following illustrations:

> On a claim arising out of a sale of goods, the only question may be whether the plaintiff ever entered into an alleged written contract. If the sole question is whether his signature is a forgery, no question as to mercantile law seems to arise; if it is said he had given express or implied authority to someone to bind him, a question "with respect to" the law of principal and agent or mercantile law generally may well arise.
> Similarly, an allegation that an assent to a mercantile contract was obtained by duress, or by fraud, would normally not be a question with respect to mercantile law. So if a question of insurable interest arose on a claim on a fire policy, the law as to what constituted an insurable interest would be determined by the law of England; but the application of the principles in Singapore might depend upon the law of landlord and tenant, bills of sale, or the administration of deceased persons` estates none of which in themselves form part of the mercantile law.
> It might, on the other hand, depend upon questions relating to the law of contracts of sale or contracts of carriage by sea or land, which would bring into application the statute. Similarly, in an ordinary action of fraud, or in a criminal prosecution, in neither case arising out of mercantile transaction, questions of property might arise which could only be determined by recourse to mercantile law. *Now it seems beyond dispute that the English Moneylenders Acts, 1900 to 1927, form no part of the mercantile law. They contain saving clauses which make it plain that borrowing of money in the course of ordinary commercial transactions is excluded from their scope*.
> If such a case as this arose in England between a professional moneylender and a landowner it would not, I think, occur to anyone that an issue raised under any of the sections of the Moneylenders Acts related to mercantile law. Indeed, it seemed to be admitted in argument that such a question only arose where the suit was a negotiable instrument. So that if the moneylender took a mortgage with a covenant or promissory note, the same defence that he was unregistered would arise "with respect to mercantile law" in the second case but not in the former. The contention is untenable.[31] (emphasis added)

---

30 Ibid 344.
31 Ibid 344-5.

In Lord Atkin's judgment, the relevant questions to ask in a dispute as to whether Section 5 applies are: Does the dispute raise a question with respect to mercantile law? If it does not, Section 5 is not engaged: there is no law to be administered as is the same as would be administered in England in the like case. If it does, is the law to be administered in the like case part of mercantile law? If so, it is applicable. If not, it is not applicable.

On the basis of Lord Atkin's characterisation of the relevant question, the decision in *Seng Djit Hin* was wrong as the 1915 and 1917 Acts were not part of the mercantile law of England, even though the dispute arose out of a contract of sale which was a question with respect to mercantile law. Lord Atkin effectively said so at the end of his judgment, as follows:

> In that case the attention of the Judicial Committee was not directed to the question raised here, which did not arise. The words used only mean if the facts in the particular case make the particular provision applicable; in that case if the performance was in fact prevented by requisition. In the present case, therefore, their Lordships are unable to rely upon a previous decision of their own in support of the view that they have expressed. But, though unfortified by authority, they entertain no doubt that the result is as stated. In the present case, therefore, their Lordships are unable to rely upon a previous decision of their own in support of the view that they have expressed. But, though unfortified by authority, they entertain no doubt that the result is as stated.[32]

An alternative characterisation may be stated as follows:

> Is the statute relied on as a defence to the claim a mercantile statute? If not, the defence cannot raise an issue with respect to mercantile law, and Section 5 would not be engaged.

Thus, the cases in which the defence succeeded in relying on the Infants' Relief Act as raising questions with respect to mercantile law were inconsistent with the meaning and purpose of Section 5 because the Act was not part of the mercantile law.[33]

Lord Atkin's judgment in *Sockalingam* led an exasperated lawyer, E R Koek ("Koek") to write a trenchant note in 1935 on the case law on Section 5.[34] He had some choice epithets for Section 5, describing it as "evil", "unrepentant" and "wayward", accusing it of playing "tricks again", and of

---

32 Ibid 347.

33 It follows that the Court of Appeal's decision in *Ngo Bee Chan v Chia Teck Kim* [1912] 2 MC 25 was wrongly decided.

34 Edwin R Koek, 'Correspondence: Section 5 of the Civil Law Ordinance' (1935) MLJ xlviii.

having given rise to "the startling decision" in *Ismail v Kassim*, and not "ha[ving] done its worst yet". He commented that *Sockalingam* "showed up the Section for the really wicked piece of legislation that it is".

It may be noted that Koek discreetly blamed the composition of the song and not the singers for their discordant singing.

C *A Reappraisal in 1961*

In 1961, I wrote an article to reappraise the law on Section 5, and made the following propositions:

(a) The confusing and contradictory interpretations of Section 5 in the case law were due to the way the relevant question was characterised;

(b) Section 5, if applicable in one case, did not *import* the particular English statute into the Straits Settlements as if it had been received therein;[35]

(c) *Sockalingam* laid down the clearest positive statement of the meaning and purpose of Section 5;

(d) Section 5 would waste away over time as more and more "other provisions" in the form of local legislation on commercial matters were enacted.

In the 50 years after *Sockalingam*, from 1923 to 1973, there were only five reported cases on Section 5. Also, it was in 1964 that for the first time a Section 5 dispute was decided by a Singaporean judge. The issue in the case of *Keck Seng & Co Ltd v Royal Exchange Assurance*[36] was a no brainer, being a claim under a marine insurance policy, which clearly raised a question with respect to marine insurance, an enumerated subject, and therefore the law to be administered was the English Marine Insurance Act 1906. But the fact that there were only five reported cases in 50 years could interpreted in two ways: one was that that it had outlived its usefulness as a fallback resource of English commercial legislation, or the law was settled by *Sockalingam*.

III THE CIVIL LAW (AMENDMENT) ACT 1979 – EXCLUSION OF EEC LAWS

In 1973, upon UK's accession to the EEC, the UK was required to harmonise its legislation with EEC legislation on trade, commerce and employment, etc.

---

35 The article appeared to bear fruit, even though at the level of an inferior court. In 1962, the District Judge said in *Mun Kai Piano Co v Rozario* (1962) 28 MLJ lxxxvii:

> It is assumed, quite wrongly, in my opinion, that the application to Singapore of an English Act in any one case was to import the Act.

36 [1964] MLJ 256.

This development raised some concern that UK commercial statutes that gave effect to the social policies of EEC law might not be suitable for Singapore. A Working Committee chaired by the Attorney-General produced a report which recommended that Section 5 be amended to exclude such harmonised UK legislation. According to Hickling, the Working Committee decided not to recommend the repeal of Section 5 until all the applicable UK commercial statutes essential to Singapore's needs were enacted first. A cut-off date was also not recommended as it was considered desirable to maintain the policy of continuing reception of English commercial law, coupled with its gradual replacement by local legislation. In the result, Parliament passed the Civil Law (Amendment) Act 1979 to amend Section 5 as follows:[37]

(a) Section 5(1) restricted the questions with respect to the enumerated subjects and with respect to mercantile law generally to the law to be administered in England at the corresponding period *with respect to those matters* only;

(b) Section 5(2)(b)(i) excluded UK commercial statutes which gave effect to a treaty or international agreement to which Singapore was not party;[38]

(c) Section 5(2)(b)(ii) excluded UK commercial statutes regulating business or activities providing for registration, licensing or any other method of control or by imposition of penalties;

(d) Section 5(2)(c) excluded any provision contained in any UK Act where there was a written law in force in Singapore corresponding to that Act; and

(e) Section 5(3)(a) provided that the law of England to be administered by virtue of section 5(1) shall be subject to such modifications and adaptations as the circumstances of Singapore may require;

(f) refined the meaning of "other provision" to mean any provision, however small, if the purpose of the law was the same or similar."

Whilst the 1979 amendments were helpful in reducing the areas of dispute in relation to Section 5,[39] the Amendment Act left untouched the problem of characterisation of an issue with respect to commercial law. Prof Hickling commented on the 1979 amendments as follows:

---

37 See Appendix II for the text of the 1979 amendments in 'Snark or Boojum' (1979) 21 Mal LR 351, republished in Hugh Hickling, *Essays in Singapore Law* (Pelanduk Publications, 1992).

38 In the preface of *Essays in Singapore Law* (Pelanduk Publications, 1992), Hickling wrote:

> In some respects, Singapore is now more English than England – which was an apt description of the object of the 1979 Amendment Act in seeking to preserve the pristine nature or content of English commercial statutes, untarnished by the values, norms, principles and rules of the EEC.

39 Two of the amendments viz., (a) and (c) enacted the rulings on these matters by the Privy Council in *Sockalingam.*

> The ultimate objective must of course be the creation of a complete code of commercial law for the State. That day is far-off. A table of priorities is in the course of resolution, I believe, and there is reason to hope that the next major measure in this area will be a Sale of Goods Act. In the meantime, section 5 remains. It cannot be said that all the problems inherent in the section have been resolved: it cannot even be affirmed with any substantial degree of confidence that they have certainly been diminished by the amendments of October 1979, for only time can answer such a question.[40]

IV THE INTERREGNUM FROM 1979 TO 1993

From 1979 to 1993, another two cases on Section 5 were reported. In *Moscow Narodny Bank Ltd v Ko Teck Kin*,[41] the Registrar of the High Court held that the defendant mother was liable on a guarantee given for moneys taken by her 20-year-old son (an infant under Singapore law) as section 1 of the (English) Family Law Reform Act, 1969 was imported into Singapore by virtue of Section 5.[42] In the same year, the High Court in *Rai Bahadur Singh & Anor v Bank of India*,[43] and in 1994 on appeal, the Court of Appeal,[44] held that an issue of contractual capacity did not raise a question of mercantile law, but the question as to the enforceability of the letter of set-off which the infant appellants had signed in favour of the bank raised a question with respect to mercantile law. It is suggested that this distinction was incomprehensible. If no question of mercantile law was raised, the enforceability or otherwise of the letter of set-off as a contract could not likewise have raised any issue of mercantile law. The issue of contractual capacity had nothing to do with the law of banks and banking. The two cases showed that no lessons were learnt from *Sockalingam.* Or as Koek might have said: "*Section 5 was up to its old tricks again*". It was just as well that Section 5 had already been repealed when the Court of Appeal delivered its judgment.

By this time, the stage was set for a final assault on Section 5. The impetus could be said to be the appointment of a new forward-looking reformist Chief Justice, and a movement in the Judiciary to develop an autochthonous legal

---

40 Hugh Hickling*, Essays in Singapore Law* (Pelanduk Publications, 1992) 235.

41 [1982] 12 MLJ. xcviii.

42 This decision appears to apply *Seng Djit Hin.* The decision led to the inconsistent result that an individual could be an infant and an adult at the same time, albeit in different circumstances.

43 [1992] 3 SLR(R) 127, HC.

44 *Bank of India v Rai Bahadur Singh and another* [1994] 1 SLR(R) 89.

system in line with Singapore's national values.[45] As Chairman of a Sub-Committee on the Reform of Section 5, I sent a report on Section 5 to the Law Reform Committee ("LRC") setting out alternative ways to reform Section 5, but with the following statement:

> On further consideration, nothing will be lost to Singapore if Section 5 is immediately repealed by an Act, which at the same time declares as applicable to Singapore all the English commercial statutes which would have been applicable but for the repeal, and all others which we consider desirable for Singapore. This is the neatest and quickest solution, and the Chairman so recommends.

One year later on 21 February 1991, following certain intervening events, I sent to the LRC a draft Bill to repeal Section 5 along the lines of the earlier recommendation. The draft Bill was strongly opposed by a Sub-Committee member on the ground, among several others, that Section 5 should not be repealed until all the relevant English commercial statutes applicable under Section 5 were first enacted. Until then, Section 5 should remain the fall-back repository of English commercial law. The Bill remained in cold storage for a year.

Shortly after I was appointed Attorney General with effect from 16 April 1992, another event then occurred which reinforced the justification to repeal Section 5. In 1992, the UK Parliament enacted the Carriage of Goods by Sea Act 1992, which would be applicable in Singapore under Section 5. This development highlighted Singapore's continuing dependence on UK legislation on maritime and commercial matters, which was not desirable. Several draft Bills were prepared quite quickly based on English law reception statutes applicable in other Commonwealth jurisdictions, such as Hong Kong, Australia, New Zealand, and Malaysia. The views of the NUS Law Faculty professors were sought on all English statutes, pre-1826 and post-1826 to be continued as Singapore legislation.[46] After a submission was made to the Minister for Law on the desirability of repealing Section 5, and also to reset the application of English common law in Singapore generally in order to exorcise the ghost of the 1926 Charter, the Government agreed to reset the application of English law in Singapore and to repeal Section 5.

---

45 See Andrew Phang, 'Of Generality and Specificity - A Suggested Approach Toward the Development of an Autochthonous Singapore Legal System' in Goh Yihan and Paul Tan (eds), *Singapore Law – 50 Years in the Making* (Academy Publishing, 2015), [1.13-1.16].

46 See Chan Sek Keong, 'Application of English Law Act 1993: A New Charter of Justice' in *Singapore Law 50 Years in the Making* (Academy Publishing, 2015) for a full account of the events that led to the enactment of the AELA.

V OBJECTIVES OF THE AELA – RESETTING THE BASIC LAW OF SINGAPORE

The Bill was passed by Parliament on 13 October 1993. The recital in the Bill states:

> An Act to declare the extent to which English law is applicable in Singapore and for purposes connected therewith.

The AELA came into force on 12 November 1993. It should be noted that the AELA did not abolish English law. To do so would destroy the foundation law of the legal system. Without a foundation law, the legitimacy of the legal system itself could be questioned, and that could affect the norms, principles and values of the law of that legal system.

A *Application of Common Law and Equity*

Section 3 provides:

> 3(1) The common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before 12 November 1993, continues to be part of the law of Singapore.
> (2) The common law continues to be in force in Singapore, as provided in subsection (1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require.

Section 3(1) provides for a cut-off date for the application of the common law of England (including the principles and rules of equity as at 12 November 1993). The body of English common law as at that date would constitute the foundation law of the legal system of Singapore under section 3(1). However, section 3(2) refers to "the common law"[47] simpliciter, and not "the common law of England" to signify that the common law of England (including the principles and rules of equity) received under section 3(1) becomes the common law of Singapore.

In *Review Publishing Co Ltd v Lee Hsien Loong*,[48] the Court of Appeal interpreted section 3(1) as follows:

---

47 The term "common law" as defined in the Interpretation Act, "means the common law insofar as it is in operation in Singapore and any custom or usage having the force of law in Singapore". In contrast, the Interpretation Act of Malaysia defines "common law" to mean the common law of England.

48 [2010] 1 SLR 52, [247].

> 247 Implicit in s 3(1) of the AELA is the principle that the body of English common law which was part of the law of Singapore immediately before the cut-off date of 12 November 1993 ("pre-AELA English common law") continues to be the law of Singapore…. After that cut-off date, the common law of Singapore would be the common law as declared and developed by our courts…. [I]t continues to be in force here only "[in] so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require".[49]

B *Application of English Enactments*

Sections 4 and 5 provide:

> 4(1) Subject to the provisions of this section and of any other written law, the following English enactments, with the necessary modifications, apply or continue to apply in Singapore:
>
> (a) the English enactments specified in the second and third columns of the First Schedule to the extent specified in the fourth column thereof; and
>
> (b) any other English enactment which applies to or is in force in Singapore by virtue of any written law.
>
> (2) The English enactments specified in Part 2 of the First Schedule are the enactments as they are in force as at 12 November 1993, subject to the exceptions specified in the fourth column of that Part and to the amendments specified in Part 3 of that Schedule.
>
> (3) To the extent to which any of the provisions of any English enactment is inconsistent with the provisions of any local Act in force at or after 12 November 1993, the provisions of the local Act prevail.
>
> 5(1) Except as provided in this Act, no English enactment is part of the law of Singapore.

These provisions incorporate by reference as Singapore statutes a list of selected (a) pre-1826 English statutes of general application, and (b) post-1826 English commercial statutes (until repealed by Parliament). Other than these statutes, no English enactment would be part of the law of Singapore. These legislative steps removed all the deficiencies, difficulties and problems associated with the reception of English law under Second Charter and the application of English commercial statutes under Section 5.

---

[49] In *Review Publishing*, the Court of Appeal held that the *Reynolds privilege* was a post-1993 common law development. The Court also pointed out that the appellants, not being citizens of Singapore, did not have a constitutional right to free speech under the Constitution.

A leading Singapore legal historian on the reception of English law in Singapore has recently written thus:[50]

> The AELA, in doing away with many of the problems and consequent uncertainty that existed previously, has justifiably been described by the then Minister for Law as "**one of the most significant law reform measures since Singapore's independence". Given its foundational nature, it might even be the most important piece of law reform for close to two centuries. Indeed, the AELA was also viewed by the minister as being consistent with the development of an autochthonous Singapore legal system…** In particular, the minister stated that the Government would be taking further steps to amend the local law in order to free it from dependence on English law; he stated that *"[w]e must have certainty in our laws and move away from reliance on English law, because we do not know what the conditions are that shape the UK decisions*".
> The enduring legacy of the AELA is clear – it has cemented the legal foundation, stabilising as well as setting the stage for autochthonous or indigenous development of the Singapore legal system. (emphasis added)

How does the AELA affect the position of post-1993 English common law in the development of a Singapore jurisprudence? It is suggested that English common law is just another body of common law that happened historically to be the foundation laws of former British territories, whether settled, ceded or conquered. With its premier status as the mother of the common law, English precedents will be treated by Commonwealth courts with the deference and respect and authoritativeness and of persuasiveness due to them, but otherwise not binding. Even before the AELA was enacted, Singapore courts have followed this practice, and have also considered the judgments of common law jurisdictions like Australia, Canada, Hong Kong, India, Malaysia, New Zealand and even the USA, occasionally in preference to English precedents. Australian judgments, in particular, have played a significant role in the development of the common law in Singapore. This practice has continued after 1993. The AELA merely reset English law as the foundational law of Singapore, in order to resume sovereignty over this area of Singapore law.

It may be said that if, or since, English law embodies "right and justice" and fairness of the legal system of England, it is likewise the embodiment of the same law as part of the legal systems of the receiving territories, but modified to suit local conditions and circumstances, to reflect the national values and cultural characteristics of their peoples.

---

50 Andrew Phang, Goh Yihan and Jerrold Soh, 'The Development of Singapore Law: A Bicentennial Retrospective' (2020) 32(1) *Singapore Academy of Law Journal* 804.

The common law of England has always evolved to meet changing conditions and moral values. The body of English common law in 1993 is much larger than that existing in 1826. *Donoghue v Stevenson*[51] is a famous example of a change in the common law in establishing the foundation of the modern law of negligence in common law jurisdictions worldwide, and the general principles of the duty of care. In this connection, it may be worth recording a recent example of a change in English equity based indirectly on the common law of Singapore that bribes taken by an agent belong to the principal and are not merely accountable to the principal as if they were owed to him. In *Sumitomo Bank Ltd v Thahir Kartika Ratna*,[52] the Singapore High Court rejected the English common law principle laid down in 1890 by the Court of Appeal in *Lister & Co v Stubbs*,[53] and held that such an agent is constructive trustee of bribes received by him in the course of performing his duties, and is not merely accountable as a debtor. The distinction is crucial where the money has been converted into other assets or received by a third party who is not a purchaser for value without notice. *Sumitomo Bank* was approved by the Privy Council in *Attorney-General for Hong Kong v Reid*,[54] which was subsequently approved by Lord Neuberger of Abbotsbury MR in the English Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*,[55] which itself was overruled by the UK Supreme Court in 2015 in *FHR European Ventures v Cedar Capital Partners*,[56] so that UK law was aligned with Singapore law.

PART II

V ARE THERE ANY LESSONS FOR THE CIVIL LAW ACT 1956 (MALAYSIA)?

Section 3 provides as follows:

> Application of U.K. common law, rules of equity and certain statutes
> 3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall
>
> (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in

51 [1932] AC 562.
52 [1992] 3 SLR(R) 638.
53 (1890) 45 Ch D 1.
54 [1994] 1 AC 324.
55 [2012] Ch 453.
56 [2015] 1 AC 250.

> force in England on 1 December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> (2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.
>
> (3) Without prejudice to the generality of paragraphs (1)(b) and (c) and notwithstanding paragraph (1)(c) —
>
> (i) it is hereby declared that proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division of the High Court by way of habeas corpus or for an order of mandamus, an order of prohibition, an order of certiorari or for an injunction restraining any person who acts in an office in which he is not entitled to act, shall be available in Sabah to the same extent and for the like objects and purposes as they are available in England;
>
> (ii) the Acts of Parliament of the United Kingdom applied to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of Sarawak [Cap. 2] and specified in the Second Schedule of this Act shall, to the extent specified in the second column of the said Schedule, continue in force in Sarawak with such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of Sarawak and, in particular, subject to the modifications set out in the third column of the said Schedule.

Section 3(1) of the 1956 Act is similar to section 3(1) of the AELA in providing for a cut-off date for the common law of England and the principles of equity. The difference is in the cut-off date. However, section 3(2) of the AELA does not refer to the common law of England, but simply to the common law. The AELA no longer refers to English statutes of general application, and instead lists the retained statutes, whereas section 3(2) & (3) of the 1956 Act (as amended in 1972) refer to English statutes of general application in relation to Sabah and Sarawak. Hence, the courts in Peninsular Malaysia are spared the burden of having to consider what were English statutes of general application, but not the courts in Sabah and Sarawak. However, there is no evidence that in practice such a burden is unduly burdensome. If such an issue does arise in Sabah and Sarawak, there is case

law in Singapore, Brunei, Kenya and the Pitcairn Islands that can provide a guide as to what they are. Whether Sabah and Sarawak should align their provisions with that of Peninsular Malaysia by legislation, and not by judicial decision, is a matter of state policy.

In relation to the cut-off date for the reception of English common law under the 1956 Act, the Privy Council has observed in *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn & Ors* ("Empat Ekor") as follows**:**[57]

> Their Lordships do not need to comment on possible developments since 1956 in the law in England concerning ability to go behind a valuation on ground of mistake or error in principle, having regard to the emergence of an ability to sue such a valuer for negligence: see for example *Campbell v Edwards* [1976] 1 WLR 403. For present purposes it appears that the Civil Law Ordinance 1956, s 3, adopted English law as administered at its effective date, so that any subsequent march in English authority is not embodied.[58]

The qualifying words "so that any subsequent march in English authority is not embodied" are vague. The word "march" connotes a forward movement from an existing position. Case law can be followed, distinguished or rejected. What does a march in authority mean, or when does it take place in this context? Ten years later, in *Jamil bin Harun v Yang Kamsiah & Anor* ("Jamil"),[59] the Privy Council rejected the appellant's argument that the Federal Court had erred in law in following English authorities developed after 1956 on the ground that after 1956 "*English authorities do not apply in Malaysia*", based on this statement in *Empat Ekor.* The Privy Council said:

> The importance of the submission [i.e., after 1956 English common law no longer applied in Peninsular Malaysia] is that the Federal Court accepted the guidance of the House of Lords in the English case of *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174. By so doing, they incorporated the principle of itemisation of damages in personal injury cases into Malaysian law, subject only to appeal to His Majesty the Yang di-Pertuan Agong.
>
> Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than

---

57 [1976] 2 MLJ 93.
58 Ibid 95.
59 [1984] 1 MLJ 217.

> in their view it is just to do so. The Federal Court is well placed to decide whether and to what extent the guidance of modem 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.[60]

So, we have here a Privy Council statement that in spite of the 1956 cut-off date, it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law, whether decided before or after 1956. After *Jamil***,** it would appear that the observation in *Empat Ekor* on the 1956 cut-off date was ignored. The Federal Court did not refer to it or the 1956 cut-off date as if it did not exist in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*,[61] a case concerning illegal contracts under section 24 of the Contracts Act of 1950, where Hasim Yeop Sani CJ (Malaya) said:

> Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England.[62]

This statement was approved by the Federal Court *in Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Bank Finance Bhd,*[63] where Edgar Joseph Jr FCJ said:

> We … heartily agree with the court in *Chung Khiaw Bank* that the development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. But, having said that, we consider that the trend shown by the courts in common law countries to be slow in striking down commercial contracts in general on the ground of illegality a sensible one, which we should follow thus incorporating it as part of our common law.[64]

---

60 Ibid 219.
61 [1990] 1 MLJ 356.
62 Ibid 361.
63 [1999] 3 MLJ 81.
64 V Sinnadurai, *Law of Contracts*, (LexisNexis, 4th ed, 2011), 25.

In relation to local circumstances, in *Syarikat Batu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors*,[65] a case involving a claim to the ownership of a motor vehicle which was fraudulently sold by an agent to a third party, Peh Swee Jin J, after concluding that the practice in West Malaysia, combined with the statutory provisions of the Road Traffic Ordinance 1958 in regard to the registration of ownership claim, constituted local circumstances to exclude the English pre-1956 precedents, said:

> We have to develop our own common law just like what Australia has been doing by directing our minds to the "local circumstances" or "local inhabitants".[66]

Given these approaches to the 1956 cut-off date, it was not surprising that the Federal Court in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee*,[67] held that the *Reynolds' Privilege* (which was recognised by the House of Lords only in 1993) was part of the law of defamation of Malaysia, available as a defence not only to journalists (as in England) but also to any individual who published information of public interest.

What lessons, if any, can section 3 of the AELA offer to section 3 of the 1956 Act? On the basis of the Malaysian courts' approach, the answer is "None". The cut-off dates in section 3 of the 1956 Act merely stopped the reception of post-1956 English common law, but do not prevent the Malaysian courts to develop the common law of Malaysia from the common law of England existing in 1956.[68]

---

65 [1990] 3 MLJ 468.

66 Ibid 474.

67 [2015] 6 MLJ 187.

68 In Tun Abdul Hamid Mohamad & Adnan Trakic, 'Current Application of English Law: Sections 3, 5 and 6 of the Civil Law Act 1956' in A. Ali Mohamed (ed.), *Malaysian Legal System* (CLJ Publication, 1st ed., 2014) it was argued against any move to repeal section 3 so as "entirely to free Malaysia" from the colonial common law shackles and instead develop its own Malaysian common law. The paper also referred to the Malaysian Bar Council's position on the proposal, as follows:

> Everyone agrees that there is a dire need for Malaysian common law but the disagreement is on the question as to how to develop it. We argue, and many would share our views, that the existing legal framework already allows for the development of the Malaysian common law. In fact, the Malaysian courts have been developing Malaysian common law in the past and are continuing to do so. Any English law that has been accepted by the Malaysian court in toto or in part crystallises into Malaysian common law. … through the statutory doors of s. 3(1). This was done by judges in many cases in the past.
>
> The paper also sets out (at 160) a list of 11 cases where the Malaysian courts have applied the common law of England (including the principles of equity) under section 3 in the absence of local legislation.

VI THE REDUNDANCY OF SECTION 5 OF THE CIVIL LAW ACT 1956?

Section 5 of the 1956 Act provides:

> Application of English law in commercial matters
> 5. (1) In all questions or issues which arise or which have to be decided in the States of Peninsular Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to **mercantile law** generally, the law to be administered shall be the same as would be administered in England in the like case *at the date of the coming into force of this Act*, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.
> (2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law. (emphasis added)

Section 5(1) provides a cut-off date for the application of English law as at 7 April 1956 for Peninsular Malaysia. Section 5(2) provides for the continuous application of English mercantile law at the date of the commercial dispute for Malacca, Penang, Sabah and Sarawak. Leaving aside the cut-off dates in these provisions, the Privy Council decisions in *Seng Djit Hin* and *Sockalingam* are relevant to the characterisation of a question with respect to the enumerated subjects and to mercantile law generally. However, except for one case in Peninsular Malaysia, all the other cases on section 5 made no reference to either *Seng Djit Hin* or *Sockalingam.*

In *Re Low Nai Brothers & Company,*[69] a case involving the bankruptcy of a partnership, the question was whether the Court had a discretion to grant certain relief to the respondents who had received money from the partnership. Gill J said:

> It was lastly urged on behalf of the respondents that the court should grant discretionary relief as provided in s 115(2) of the English Companies Act, 1947 the provisions of which are applicable in this country by reason of the

---

69 [1969] 1 MLJ 171.

> provisions of s 5(1) of the Civil Law Ordinance, 1956… [reproduces provision and also section 115(2)] …
> As was stated by the Privy Council in [*Seng Djit Hin*] the first thing to be settled is: has a question or issue arisen in this court "with respect to mercantile law generally." The question to be decided here is a question as to the law of bankruptcy. I do not think there can be any doubt that the law of bankruptcy is part of the mercantile law. I am therefore of the opinion that the court has discretion to apply the provisions of s 115(2) of the English Companies Act, 1947. But the next question which naturally arises is: have the respondents made out a case for the court to exercise such discretion?[70]

The unusual features in this judgment are as follows: (1) no explanation was given why bankruptcy was part of the mercantile law; (2) no explanation why a provision in the Companies Act which dealt with corporate insolvencies was relevant to a partnership insolvency; and most important (3) *Sockalingam* was not cited.

With respect to the other cases, in *J. M. Wotherspoon & Co. Ltd. v Henry Agency House*,[71] Suffian J held that since the Contracts (Malay States) Ordinance was silent on the subject of del credere agency, by virtue of section 5(1) of the Civil Law Ordinance, 1956 the law applicable in England was applicable in the Federation. The difficulty with this decision is that section 5(1) is applicable to English statutes and not the common law of England which is covered by section 3(1). The issue where Contracts (Malay States) Ordinance was "other provision" under section 5(1) was also not addressed.

In *Tan Mooi Liang v Lin Soon Seng & Ors*,[72] the issue was whether a partner could dissolve a partnership by giving notice of intention to do so. The dispute clearly raised a question with respect to the law of partnership, falling squarely within section 5. The Federal Court (by majority, Suffian CJ and Ong FJ) held that although there was no provision in the Contracts (Malay States) Ordinance, 1950 which permitted a partner to dissolve a partnership by giving notice of his intention to dissolve it, there were many provisions relating to partnership in the Ordinance, which thereby constituted "other provisions relating to partnership", and accordingly section 5(1) was not applicable. Azmi LP, dissenting, held since the Ordinance made no provision on the question with respect to the law of partnership, section 5(1) was applicable, and the English law of partnership was applicable. Here, we can see three of the most eminent judges of the time disagreeing on the meaning of "other provision".

---

70 Ibid 173.
71 [1962] MLJ 86.
72 [1974] 2 MLJ 60.

These and other cases[73] show that the Malaysian courts are not immunised against the same interpretational problems that beset the Singapore Courts before Section 5 was repealed. In this light, *Sockalingam* can provide a safe guide to the proper interpretation of section 5(1). However, whether section 5 of the 1956 Act should be repealed is a matter of state policy for the relevant States of Malaysia.

I would like to end my lecture with this observation. In *Ooi Boon Leong & Ors v Citibank NA*,[74] the Privy Council reaffirmed that freedom of contract is a fundamental principle of the common law, and that it could not be ousted by statute except expressly and in clear terms.[75] If businesses and investors in Malaysia, whether local or foreign, perceive that section 5 or the legal system may produce uncertain and/or unpredictable judicial outcomes in their operation, they will take steps to exclude in their contractual arrangements the application of the domestic legal system by choosing a different law in which they have trust and have confidence as the governing law and a different forum to resolve any contractual disputes. In this connection, English law has become an economic asset to the UK in a globalised world of trade, manufacture and investment in so far as English law is the preferred governing law and the UK

---

73 For other cases, see:

(1) *Leong Brothers Industries Sdn Bhd v Jerneh Insurance Corp Sdn Bhd* [1991] 1MLJ 102 a Penang case involving claim arising from carriage of goods in breach of the terms of the marine insurance policy, arising in Penang, the High Court held that the UK Marine Insurance Act 1906 applied by virtue of sec. 5(2) of the Civil Law Act 1956.

(2) *Heng Long Motor Trading Co. v Osman bin Abdullah* [1994] 2 MLJ 456 (Kuching, Sarawak), the High Court held that since the transaction took place in 1983, by virtue of s 5(2) of the Civil Law Act 1956, the law applicable in Sarawak for the purpose of this case is the UK Sale of Goods Act 1979, more precisely, s 12(2)(b) thereof.

(3) *Smith Kline & French Laboratories Ltd v Salim (Malaysia) Sdn. Bhd*. [1989] 2 MLJ 380, defendant contended, inter alia, that the plaintiffs' case was based on the UK Patents Act 1977, and that the legislation did not apply in Malaysia because by virtue of sec. 3(1) and sec. 5(1) of the Civil Law Act 1956, the UK legislation could not apply in Malaysia after the cut-off date. The court dismissed this contention on the basis that the action was in fact based on specific legislation and not the Civil Law Act 1956. The court also held that patents were not part of the mercantile law and therefore sec. 5 did not apply.

74 [1984] 1 MLJ 222.

75 The issue is whether guarantors who guarantee a bank for credit facilities given to a company may waive their rights in respect of any variation or alteration of certain clauses in the loan contract. The Privy Council held that freedom to contract is a fundamental principle of the common law, and that it may only be curtailed statutorily by clear express terms. If it is to be curtailed in relation to a particular subject matter, the prohibition should be expressed in the statute and not left by the legislature to be picked out as an implication based upon sections dealing with different subject matters. When the 1950 Contracts Act intends to render an agreement void it says so in express terms (as in sections 25 to 31).

courts the preferred forum to resolve any disputes.[76] Now that we have English law in our hands as part of our common law, we should strive to make it just as acceptable or preferable as the law governing all contractual transactions, at the very least, within the country, and also in the region, whether in litigation or arbitration.

[76] This situation is even more common in international arbitration agreements.