THE EFFECT OF *DE LASALA* IN HONG KONG

The Privy Council stated in *de Lasala* v. *de Lasala* a set of propositions concerning the effect of English decisions and opinions of the Judicial Committee on the courts of Hong Kong. Last year these views were supplemented, and perhaps contradicted, by remarks in *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd.* The implications of these statements are considered and the attitudes and practice of the Hong Kong courts since *de Lasala* are explained and criticised. The conclusion reached is that undue deference is paid to House of Lords and Privy Council authority in a manner which is destined to appear incompatible with emerging political realities in Hong Kong. This analysis has obvious relevance for lawyers and legal theory in Singapore and Malaysia.

I. INTRODUCTION

IN 1979 the Judicial Committee of the Privy Council, in *de Lasala* v. *de Lasala*,[1] commented on the proper attitude to be taken by Hong Kong courts towards English judicial decisions. The relevance of the Board's remarks for Singapore was immediately noted,[2] and an analysis of *de Lasala's* effect in Hong Kong might therefore be of interest to readers of this review. A subsidiary purpose of this article is to encourage cross-fertilisation between Singapore, Malaysia and Hong Kong in legal matters. In the recent *festschrift* to the *Malaya Law Review*,[3] no mention is made of any judicial decision (other than *de Lasala* v. *de Lasala*) or statute from Hong Kong or of any secondary literature on Hong Kong's experience with the common law. This gives the impression of an assumption by Singaporean academics that, Hong Kong being a colony, its reception of English law is of no relevance to independent nations.[4] Happily, such an impression is not wholly justified[5] — yet not in essence misleading. Since the signing of the Sino-British Joint Declaration on the Question of Hong Kong in 1984,[6] however, the political scene in the territory has undergone a transformation: with sovereignty (or its exercise)

1 [1980] A.C. 546.

2 Ho Peng Kee, "Fettering the Discretion of the Privy Council" (1979) 21 Mal. L.R. 377.

3 A.J. Harding (ed.), *The Common Law in Singapore and Malaysia* (Singapore: Butterworths, 1985), favourably reviewed in (1985) 15 H.K.L.J. 435.

4 Hong Kong lawyers, it must be admitted, return the compliment: the tables of cases cited in the Hong Kong Law Reports 1972-82 reveal one case from Singapore and one from Malaysia (out of a total of 3,305 cases). Hong Kong, incidentally, is still technically a colony, although the word has been excised from all Hong Kong legislation (but not from Letters Patent and Royal Instructions). The favoured expression is now "territory."

5 See, *e.g.,* Andrew Phang Boon Leong, " 'Overseas Fetters': Myth or Reality?" [1983] 2 M.L.J. cxxxix.

6 The text and additional material are contained in the Hong Kong booklet in Blaustein and Blaustein (eds.), *Constitutions of Dependencies and Special Sovereignties* (Dobbs Ferry, N.Y.: Oceana, 1985).

being resumed by China in 1997[7] there is intense discussion of virtual autonomy for what will be a Special Administrative Region under the authority of the Central People's Government in Beijing. Consequently we can expect fundamental changes in attitude to be reflected in the legal system. Hong Kong lawyers will then find legal developments in Singapore and Malaysia instructive — and Hong Kong's solutions to future problems will be of wider regional significance.

One important issue which all formerly dependent territories of the British Empire must eventually face is whether decisions of the English courts should be regarded as binding. Which pronouncements, if any, of the Judicial Committee of the Privy Council, the House of Lords and the English Court of Appeal ought to possess obligatory force in the Hong Kong courts? Should a rearguard attempt be made to promote the unity of the common law,[8] or should the courts in the territory, while treating English decisions as persuasive, feel free to develop the law in response to peculiarly local conditions and needs? Such questions are inevitable and will become insistent. It might therefore be useful to consider current judicial practice in regard to them.

The primary juridical basis for the importation of English decisions into Hong Kong is the Application of English Law Ordinance.[9] By section 3, the common law (of England) and the rules of equity are in force in Hong Kong, subject to legislation and so far as they are applicable to the circumstances of Hong Kong or its inhabitants; once received they are subject to modification to suit such circumstances. English statutes can apply, either by paramount force or by virtue of an Order in Council or an ordinance; the Application of English Law Ordinance itself lists a number of Acts of Parliament which are to take effect in the colony, while for various complicated reasons many other Acts indirectly apply.[10] Authoritative English decisions on the common law, provided they are not inapplicable to the circumstances or abrogated by local or imperial legislation, might thus seem to be necessarily binding. Judicial construction in England of applicable Acts will also carry great weight and might be deemed conclusive. Cases involving the interpretation of legislation *in part materia* with Hong Kong ordinances could be thought specially important if a presumption of legislative intent in Hong Kong is accepted.

The starting point of our discussion must be *de Lasala* v. *de Lasala*.[11] The Privy Council sat in that case to hear an appeal from Hong Kong, and thus local judges are particularly familiar with Lord Diplock's *per curiam* opinion. Three propositions were advanced: (1) English Court of Appeal decisions are persuasive only and do not bind the Hong Kong courts; (2) House of Lords decisions laying down rules of common law are not binding; (3) House of Lords decisions construing recent legislation common to both jurisdictions, while not in juristic theory more than merely persuasive,

7 See the Hong Kong Act 1985 (U.K.).

8 See, *e.g.,* Jackson, "The Judicial Commonwealth" [1970] C.L.J. 257; Cooke, "Divergences — England, Australia and New Zealand" [1983] N.Z.L.J. 297.

9 Cap. 88, L.H.K. 1971 ed.

10 See Wesley-Smith, "The Effect of Pre-1843 Acts of Parliament in Hong Kong" (1984) 14 H.K.L.J. 142.

11 Note 1 above.

will have the same practical effect as strictly binding decisions. Perhaps another proposition can be detected: (4) decisions of the Judicial Committee on appeals from Hong Kong, but not necessarily on appeals from elsewhere, bind all Hong Kong courts.

II. ENGLISH COURT OF APPEAL DECISIONS

English decisions have always been treated with great respect in Hong Kong. The early practice, however, seems to have accorded binding status only to *rationes* of Privy Council opinions.[12] The Privy Council itself stated in 1879 that English Court of Appeal decisions adopting a particular construction of a statute should be taken as authoritative by colonial courts faced with a like enactment.[13] Later, in a case not involving statutory interpretation, it was said by the Judicial Committee that, "when an appellate Court in a colony which is regulated by English law differs from an appellate Court in England [other than the House of Lords], it is not right to assume that the Colonial Court is wrong."[14] When *de Lasala* was in the Hong Kong Court of Appeal the judges concluded that decisions by their English counterpart should normally though not necessarily be followed, unless their authority in England could be called into question.[15] On appeal Lord Diplock declared the modern rule to be that "judgments of the English Court of Appeal on matters of English law where it is applicable in Hong Kong are persuasive authority only; they do not bind the Hong Kong Court of Appeal."[16]

Do they bind a court of first instance in Hong Kong? One judge, in a statutory interpretation case involving indistinguishable provisions, has assumed so;[17] in two other cases single judges have stated otherwise, one case concerning pure common law[18] and the other the interpretation of a statute with material differences from its English equivalent.[19] It is not clear whether the subject-matter was regarded as of any significance. In any event, having cited *de Lasala* in a case where the local legislation differed in format but not in effect from the English statute, the Hong Kong Court of Appeal expressed the opinion that:

> [I]n this jurisdiction, where our law and practice is [sic] so much one and the same as that of England, it is desirable as a general principle that Courts of first instance should follow a decision of the English Court of Appeal unless there have been clear indications that this court would take a different view or unless

[12] *R.* v. *Wong Chiu-kwai* (1908) 3 H.K.L.R. 89, 111. Regular law reporting in Hong Kong did not begin until 1905, and nineteenth century attitudes towards English Court of Appeal decisions are not known.

[13] *Trimble* v. *Hill* (1879) 5 App. Cas. 342, 344. See also *Cooray* v. *The Queen* [1953] A.C. 407, 419.

[14] *Robins* v. *National Trust Co.* [1927] A.C. 515, 519 (cited in *Chan Kai-lap* v. *R.* [1969] H.K.L.R. 463, 470).

[15] See the note at (1977) 7 H.K.L.J. 381-2. See also *Re a Compensation Board, ex parte Attorney General* [1971] H.K.L.R. 338, 355.

[16] [1980] A.C. 546, 557.

[17] *Lee Hung-yam* v. *Lee Sou-far* (1985) H.Ct., C.A. No. 4390 of 1983 (Deputy Judge Nazareth Q.C.).

[18] *Janway Industrial Co. Ltd.* v. *Asian Eagle Insurance Co. Ltd.* (1984) H.Ct., H.C.A. No. 14523 of 1983 (Mantell J.).

[19] *Fong Ming* v. *Yat Ming Investment Co. Ltd.* (1983) H.Ct., H.C.A. No. 10014 of 1983 (Mayo J.).

> of course there are crucial differences in the legislation or in the local circumstances.[20]

It will be noted that no valid reason is given for this. All that is said is that Hong Kong law is very similar to English law and should remain so; but the question why the similarities should exist and endure is not addressed.

In three *post-de Lasala* cases the Hong Kong Court of Appeal has declined to follow decisions of the English Court of Appeal. Two of the English cases were thought to be inconsistent with House of Lords authority.[21] In *Re Perak Pioneer Ltd.*[22] there was an interesting diversity of approaches regarding *Re Paris Skating Rink*,[23] a nineteenth century decision of the English Court of Appeal. Fuad J.A. was content simply to cite *de Lasala* and add a few remarks explaining why *Re Paris* should not be followed. Cons J.A. thought the case "so intimately connected with one particular aspect of company law, which is a branch of law completely unknown to the common law, that it must... be taken as part of the statutory law itself"[24] and thus was not received in Hong Kong under the Application of English Law Ordinance.[25] Kempster J., dissenting, took a quite *different* tack: the English decision has not been contradicted by House of Lords or Privy Council or local statute, it cannot be said to be inapplicable to the circumstances of Hong Kong, and the mischief has not disappeared so that the court could "declare the common law in a different sense." Although he referred to *Re Paris* as a "persuasive" authority he evidently felt compelled to apply it.[26]

This kind of reasoning apart, and recognising the reluctance of colonial judges to depart from English Court of Appeal decisions, it is clear that Hong Kong courts are free to decline guidance as to the law from domestic tribunals in England below the top of the judicial hierarchy. The same cannot be said vis-a-vis the House of Lords.

20 *Allied International Insurance Ltd.* v. *Hsia Jone-shu* (1982) C.A., Civ. App. No. 81 of 1981 (Cons J.A.; Leonard V.P. and Zimmern J.A. agreed).

21 *Ngao Tang Yau-lin* v. *Ngao Kai-suen* [1984] H.K.L.R. 310, 317-18; *Wong Yuk-chau* v. *Tang Suk-yee* [1983] H.K.L.R. 154, 162.

22 (1985) C.A., Civ. App. No. 62 of 1985.

23 (1877) 5 Ch.D. 959.

24 This is a novel view of the common law for these purposes which, if generally acted upon, might have significant ramifications.

25 This kind of argument could cause confusion: it implies, first, that non-statutory law is binding, whereas *dc Lasala* holds that it is not if pronounced by the Court of Appeal; and secondly, that statutory law can never be binding, whereas *de Lasala* holds that House of Lords decisions on the construction of a statute can be in effect strictly binding.

26 Kempster J. seems in effect to have adopted a "supreme tribunal to settle English law" argument. The reason traditionally given (but impliedly rejected in *de Lasala*) for the binding effect of House of Lords decisions in Hong Kong was that English law (applying in the colony) was what the House of Lords said it was: see *Robins* v. *National Trust Co.* (note 14 above). This led to a logical difficulty: if the oracle of the House has not spoken, English law is what the English Court of Appeal says it is, which should equally be binding but never was (see Rear, "Pak Pais and Precedent" (1971) 1 H.K.L.J. 80, 83). Kempster J. has solved the logical problem by treating the English decision as "realistically" binding yet in the process has differed from the Privy Council.

III. HOUSE OF LORDS DECISIONS

"Once a principle of the Common Law has been clearly propounded by the House of Lords," it was stated in 1965, "there can be no doubt that that decision establishes the law of Hong Kong."[27] In *de Lasala* the Privy Council distinguished between decisions of the House of Lords on common law questions and decisions of the House on the interpretation of recent legislation. Decisions in the first category are not binding; those in the second category "will have the same practical effect as if they were strictly binding.. ."[28]

Lord Diplock admitted that "in juristic theory it would be more correct to say that the authority of [House of Lords] decisions on any question of law, even the interpretation of recent common legislation, can be persuasive only."[29] Two reasons were given: (1) the House is not a constituent part of Hong Kong's judicial system, and (2) the common law "develops to meet the changing circumstances and patterns of the society in which it is applied."[30] As to the first reason, the House has never been part of Hong Kong's judicial hierarchy but its decisions were nonetheless considered binding on the ground that it is the final arbiter of what is the common law of England.[31] This idea was not alluded to by the Privy Council in *de Lasala* and it was impliedly denied (though subsequently, as we shall see, revived). In various respects the old declaratory theory of the common law still prevails over more realist notions: the common law exists independently of its judicial formulation and even the House of Lords can identify it incorrectly. Thus colonial courts should in theory be as competent to discover it as the supreme judicial tribunal in England. If this view be accepted, the traditional reason why Hong Kong judges were constrained to follow House of Lords decisions cannot stand, while the lack of structural relationship between colonial courts and the House of Lords means that the orthodox basis for *stare decisis* does not apply.

As to the second reason (the responsiveness of the common law to the society in which it operates), it is noteworthy that Lord Diplock applied to Hong Kong the principle, expressed in *Australian Consolidated Press* v. *Uren*,[32] that the common law can develop differently in different jurisdictions. Hong Kong judges had not recognised that this principle freed colonial courts, as well as the courts of independent countries, from the necessity of following English decisions. To a certain extent the *Uren* approach is statutorily required in Hong Kong through the reception provisions of the Application of English Law Ordinance: there is always the possibility that a House of Lords decision will not bind because its application will cause injustice or op-

27 *Chan Wai-keung* v. *R.* [1965] H.K.L.R. 815, 847.
28 [1980] A.C. 546, 558.
29 *Ibid.*
30 [1980] A.C. 546, 557.
31 See note 26 above.
32 [1969] 1 A.C. 590. See also *Abbott* v. *R.* [1977] A.C. 755, 768. "The Privy Council is thus recognising that the common law may speak with differing accents in different parts of the world. There is no assumption of universality and no necessary policy of the desirability of uniformity": G.W. Bartholomew, "English Law *in Partibus Orientalium*" in Harding (note 3 above), p. 25.

pression[33] and it is therefore not in force. *Uren* goes further, however, in seeming to permit a more creative approach to the common law outside England, in a manner reminiscent of Lord Denning's well-known remarks in *Nyali Ltd.* v. *Attorney General.*[34]

Thus House of Lords decisions are not, in theory, binding on the courts of Hong Kong. Their persuasiveness is considerable, though, because the Appellate Committee of the House shares a common membership with the Judicial Committee whose decisions must be followed in the territory. "This Board is unlikely to diverge from a decision which its members have reached in their alternative capacity, unless the decision is in a field of law in which the circumstances of the Colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England."[35] Common membership is apt to be exaggerated, however[36] (from 1974 to 1983, when 246 reported cases were heard by the House of Lords and 97 by the Privy Council, the same bench sat in both tribunals only twelve times),[37] and on several issues there are important differences of opinion between the House and the Board.[38] In formal terms, *de Lasala* makes it clear that the Hong Kong courts are free to choose — subject, until 1997 (if not before) when the jurisdiction of the Judicial Committee is terminated, to appeal.

[33] *Wong Yu-shi (No. 2)* v. *Wong Ying-kuen* [1957] H.K.L.R. 420, 443; *Re Tse Lai-chiu, dec'd.* [1969] H.K.L.R. 159, 177.

[34] [1956] 1 Q.B. 1, 16-17: the common law "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 also has 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."

[35] [1980] A.C. 546, 558 (cited in 1985 to justify following a House of Lords decision of 1844! See *D.D.K. Trading Co. Ltd.* v. *Multi Best Manufacturers Ltd.* (1985) H.Ct., H.C.A. No. 4277 of 1982 (Deputy Judge Cruden)). This has been called the "alter ego" notion of precedent: see A.R. Blackshield, *The Abolition of Privy Council Appeals* (Adelaide: Adelaide Law Review Association, 1978), p. 82, n. 23.

[36] See Helena Chan Hui Meng, "The Privy Council as Court of Last Resort in Singapore and Malaysia: 1957-1983" in Harding (note 3 above), p. 100.

[37] The following statistics were prepared at the author's request by Mr Andrew Cheung Kui-nung. While not conclusive, they do suggest that the likelihood of the same set of judges sitting in both House of Lords and Privy Council and dealing with the same legal issue is not great.

Reported Cases in House of Lords and Privy Council, 1974-83

	House of Lords	*Privy Council*
Cases	246	97
Benches	183	91
Full-time judges who heard appeals	24	25
Non-full-time judges	2	15

[38] See, *e.g.,* the conflict between *Dharmasena* v. *R.* [1951] A.C. 1 (P.C.) and *D.P.P.* v. *Shannon* [1975] A.C. 717 (H.L.) (in *R.* v. *Darby* (1982) 40 A.L.R. 594 the High Court of Australia, by a majority, chose the House of Lords approach). There are several other examples. For a discussion of the course to be followed by Hong Kong courts in such circumstances see Wesley-Smith, "The Status of English Decisions in Hong Kong" (1979) 9 H.K.L.J. 327, 331. If conflicts were not possible it would be unnecessary to point out that Privy Council decisions do not obligate the House of Lords (see note 52 below).

The theory apparently becomes irrelevant when there is a House of Lords decision construing a recent statutory provision which is wholly or substantially reproduced in Hong Kong; "looked at realistically" (is juristic theory not realistic?) it will in practice be strictly binding, and Hong Kong courts would be "well advised" to treat it accordingly.[39] ("So there!" was Bartholomew's comment.[40] One might add: the House of Lords decision will have the same practical effect as if strictly binding only if it is in fact treated as strictly binding — which does not seem an overwhelming reason why it *should* in fact be treated as strictly binding.) "Here there is no question of divergent development of the law. The Legislature in Hong Kong has chosen to develop that branch of the law on the same lines as it has been developed in England, and, for that purpose, to adopt the same legislation as is in force in England and falls to be interpreted according to English canons of construction."[41]

Three comments can be made about that. First, Lord Diplock seems to be invoking the notion that the legislature must have intended its words to mean what English judges had previously decided they mean.[42] In most cases this is probably a fiction,[43] and in a recent judgment Lord Scarman has strictly limited its application.[44] It is of no assistance in the situation which faced the Board in *de Lasala,* for the House of Lords decision interpreting the Act was handed down *after* the ordinance had been enacted. Why should we presume that the Hong Kong legislature chose to have that branch of the law construed on the same lines as it would later be construed in England? Secondly, Hong Kong legislation ought to be interpreted according to its local context, possibly leading to a different result from the

[39] *Cf.* Lord Upjohn in *Ogden Industries Pty. Ltd.* v. *Lucas* [1970] A.C. 113, 127: "It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplement or supercede its proper construction, and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself." This, however, is subversive of *stare decisis* in the statutory interpretation area, and in *Geelong Harbour Trust Commissioners* v. *Gibbs Bright & Co.* [1974] A.C. 810, 820 Lord Diplock refers only to the freedom of a court *of final instance* to correct a previous erroneous interpretation of a statute.

[40] Note 32 above, p. 18.

[41] [1980] A.C. 546, 558. It is not necessarily the case that, when a legislature adopts English legislation, it intends to develop that branch of the law on the same lines as it has been developed in England: see Ho Peng Kee (note 2 above), p. 380. *De Lasala* involved the interpretation of a Hong Kong ordinance which had adopted a provision of an English Act. If the Hong Kong legislature adopts a provision of a statute from another jurisdiction, Lord Diplock's presumption would entail the Hong Kong courts being in effect bound by appropriate decisions of courts within that jurisdiction. See Phang (note 5 above), p. cxlv. And in the unlikely (but not impossible) event that the United Kingdom Parliament reproduced a provision from a Hong Kong ordinance, the House of Lords would be in effect bound by Hong Kong decisions interpreting that provision. Would the House feel so constrained?

[42] *Harding* v. *Commissioners of Stamps for Queensland* [1898] A.C. 769, 779; *Webb* v. *Outrim* [1907] A.C. 81, 89.

[43] See *Nadarajan Chettiar* v. *Walauwa Mahatmee* [1950] A.C. 481, 492; *National and Grindlays Bank* v. *Dharamshi Vallabhji* [1955] 2 All E.R. 626, 636.

[44] *R.* v. *Chard* [1983] 3 W.L.R. 835, 844-5.

interpretation of similar or identical words in England.[45] Thirdly, the construction of statutes in Hong Kong is required to be in accordance with the Interpretation and General Clauses Ordinance, which differs in significant respects from the Interpretation Act.[46] To treat a House of *Lords* decision in the area of statutory interpretation as strictly binding could lead to defiance of a duty imposed on judges by local legislation.[47]

The Hong Kong courts have nevertheless, since *de Lasala,* regarded all House of Lords decisions as the legal equivalent of holy writ. The distinction between rulings on common law and interpretations of common statutory provisions has been largely ignored.[48] A House of Lords authority was in one case applied even in preference to an otherwise binding decision[49] of the local Court of Appeal itself.[50] In theory, *de Lasala* implies liberation; in practice it has meant the very opposite.

IV. THE TAI HING COTTON MILL RULING

This situation is reinforced by Lord Scarman's recent remarks in

[45] See Ho Peng Kee (note 2 above), p. 381; Walter Woon, "*Stare Decisis* and Judicial Precedent in Singapore" in Harding (note 3 above), pp. 127-8.

[46] See Wesley-Smith, "*Ejusdem Generis* and the Disjunctive" (1975) 5 H.K.L.J. 336 and "Literal or Liberal? The Notorious Section 19" (1982) 12 H.K.L.J. 203.

[47] It might be suggested that the Hong Kong Court of Appeal could proceed as advised by the Privy Council and let mistakes be corrected on appeal to the Board. But the relative infrequency of appeals from Hong Kong — an average of fewer than six per annum over the last ten years (sixty in the period from January 1975 to September 1985) —indicates that in practice errors would more likely remain uncorrected and thus perpetuated. See Woon (note 45 above), pp. 138-9.

[48] See V.*S.L. Engineers (H.K.) Ltd.* v. *Yeung Wing* [1981] H.K.L.R. 407, 409; *Ngao Tang Yau-lin* v. *Ngao Kai-suen* (1984] H.K.L.R. 310; *R.* v. *Cheung Chung-ching* (1984) C.A., Crim. App. No. 546 of 1984; *An. Gen* v. *Technic Construction Co. Ltd.* (1984) H.Ct., M.P. No. 1429 of 1984; *Ibrahim* v. *Khan* (1985) C.A., Civ. App. No. 146 of 1985 (per Fuad J.A.). In *C.I.R.* v. *Lo and Lo* [1982] H.K.L.R. 503, 510-11 Cons J.A. applied the *de Lasala* principle even though the circumstances of the case did not fall strictly within its terms. On a common law point McMullin V.P. accepted House of Lords decisions as binding in principle, though he could not detect from them any clear statement of the law which his court could follow: *Chan Wing-siu* v. *R.* [1982] H.K.L.R. 280, 285. In another non-statutory interpretation case the judge recognised significant differences in the Hong Kong context and thus applied a House of Lords decision strictly — but applied it nonetheless: *Lincoln International Ltd.* v. *Eagleton Direct Exports Ltd.* (1981) H.Ct., H.C.A. No. 5064 of 1981. In *Wing Hang Bank Ltd.* v. *Hong Kong Security Ltd.* (1985) H.Ct., H.C.A. No. 5321 of 1979 Liu J. cited *de Lasala* on the construction of comparable legislation but in the process of construing a term in an insurance policy.

[49] The Hong Kong Court of Appeal binds itself, at least in civil cases: *Ng Yuen-shiu* v. *Attorney General* [1981] H.K.L.R. 352.

[50] *Ng Chai-man* v. *Leung Ngan* [1983] H.K.L.R. 303, 306-7 (see also *Stuart* v. *Bank of Montreal* (1909) 4 D.L.R. 516, 548; *T.G. Bright & Co. Ltd.* v. *Kerr* [1939] 1 D.L.R. 193; *Piro* v. *Foster* (1943) 68 C.L.R. 313). In this instance significant local circumstances were brushed aside in a manner criticised by Rhodes in (1984) 14 H.K.L.J. 90, 93-4. The English Court of Appeal decision in *Birkett* v. *Hayes* [1982] 1 W.L.R. 816 had thrown the Hong Kong courts into confusion, some judges following it, others declining to do so including the Court of Appeal; but when the House of Lords in *Wright* v. *British Railways Board* [1983] 3 W.L.R. 211 approved *Birkett* v. *Hayes* the course to be adopted in Hong Kong became clear.

the Privy Council opinion, on appeal from Hong Kong, in *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd.*[51] He said:

> Once it is accepted, as in this case it is, that the applicable law is English, their Lordships of the Judicial Committee will follow a House of Lords' decision which covers the point in issue. The Judicial Committee is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity. Though the Judicial Committee enjoys a greater freedom from the binding effect of precedent than does the House of Lords, it is in no position on a question of English law to invoke the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 of July 1966 pursuant to which the House has assumed the power to depart in certain circumstances from a previous decision of the House.... It is, of course, open to the Judicial Committee to depart from a House of Lords' decision in a case where, by reason of custom, statute, or for other reasons peculiar to the jurisdiction where the matter in dispute arose, the Judicial Committee is required to determine whether English law should or should not apply. Only if it be decided or accepted (as in this case) that English law is the law to be applied will the Judicial Committee consider itself bound to follow a House of Lords' decision.

If, therefore, on a matter of English law the Privy Council is bound by the House of Lords, and the Hong Kong courts are bound by the Privy Council, then House of Lords decisions on English law are strictly binding in Hong Kong.[52]

It was noted above that Lord Diplock in *de Lasala* recognised only one reason — membership of the same judicial hierarchy — why one court's decisions should bind another. Although *Robins* v. *National Trust* was discussed in that case its rationale was ignored, but Lord Scarman, without being referred to either *de Lasala* or *Robins,* has revived it. Thus English law is not some customary body of rules waiting to be discovered and elucidated; it is simply whatever it is stated to be by the highest English court. The Privy Council has swung back to a positivist idea of law it seemed previously to have abandoned. Yet the declaratory theory continues to be relied upon to justify, or rather deny, the retrospective nature of judicial self-overruling. Further, without it there would be no warrant at

[51] [1985] 3 W.L.R. 317, 331. Compare Lord Wright in "Precedents" (1942-4) 8 C.L.J. 118, 135: "to define and declare colonial law is the province of the Privy Council which is the ultimate Court of Appeal for that purpose. I feel great difficulty in accepting the view that the Privy Council is bound by a decision of the House of Lords on *English* law" (emphasis supplied).

[52] Three points should be noted about this situation. First, the principle refers to decisions on English law, not Scottish law. Secondly, it is probable that only English *common* law is included. A colonial ordinance *in pan materia* with an English Act is Hong Kong law, not English. The same could be said, though with less confidence, of an Act applying to Hong Kong by paramount force or extended by an Order in Council, since once it takes effect in the territory it becomes part of Hong Kong law. This could not reasonably be doubted in regard to Acts imported into Hong Kong by an ordinance of the local legislature. Thirdly, a corollary to the binding effect of House of Lords decisions on the Privy Council must be that (as stated in *R.* v. *Blastland* [1985] 3 W.L.R. 345, 355) the Privy Council cannot bind the House of Lords.

all for the binding effect of House of Lords decisions in territories which receive English law as from a specific date.[53] This is not the Hong Kong situation, but it was until 1966, and House of Lords decisions were binding in Hong Kong before then though made after the cut-off date. Finally, by resuscitating the notion of the "supreme tribunal to settle English law" it raises doubts about the lack of binding effect of English Court of Appeal decisions on matters which have never been considered by the House of Lords.[54]

Lord Scarman restricts his principle to cases where English law governs the dispute before the court. In *Jamil bin Harun* v. *Yang Kamsiah*[55] he recognised that it was for the Malaysian courts to decide whether to follow English case law. "Modern English authorities may be persuasive, but are not binding."[56] Unless the Federal Court had committed some error of legal principle, its view of the persuasiveness of English cases would be accepted by the Judicial Committee on appeal. In *Hart* v. *O'Connor*,[57] however, the New Zealand Court of Appeal's judgment, which had departed from the English authorities, was overturned. If these cases can be reconciled,[58] the principle is presumably that the local courts can determine first whether English law applies (a decision dependent upon local circumstances, including legislation), and only if they decide to be governed by English law will they (and the Privy Council) be bound by relevant House of Lords precedents. Yet received English law can be modified to suit local circumstances in Hong Kong. This is a power granted by the legislature, and it would be incapable of exercise if House of Lords decisions on English law were regarded as strictly binding. Lord Scarman has failed to appreciate that re-

53 See Anthony Allott, *New Essays in African Law* (London: Butterworths, 1970), pp. 63-7.

54 See note 26 above.

55 [1984] 1 M.L.J. 217, 219.

56 *Cf.* Barwick C.J. in *M.L.C. Assurance Co. Ltd.* v. *Evan* (1968) 122 C.L.R. 556, 563.

57 [1985] 3 W.L.R. 214. See in particular p. 223:

> "If *Archer* v. *Cutler* [the New Zealand case accepted by the New Zealand court in *Hart* v. *O'Connor* as representing the local law] is properly to be regarded as a decision based on considerations peculiar to New Zealand, it is highly improbable that their Lordships would think it right to impose their own interpretation of the law, thereby contradicting the unanimous conclusions of the High Court and the Court of Appeal of New Zealand on a matter of local significance. If however the principle of *Archer* v. *Cutler,* if it be correct, must be regarded as having general application throughout all jurisdictions based on the common law, because it does not depend on local considerations, their Lordships could not properly treat the unanimous view of the courts of New Zealand as being necessarily decisive."

Without some such principle as this the law of New Zealand would be whatever the New Zealand courts said it was, which would leave the Judicial Committee with little or no role as an appellate tribunal.

58 One distinguishing characteristic might be that, under the Civil Law Act 1956 (Mal.), any "march in English authority" subsequent to the effective date for the application of English common law and equity (April 7, 1956) "is not embodied" in West Malaysian law (*Lee Kee Choong* v. *Empat Nombor Ekor (N.S.) Sdn. Bhd.* [1976] 2 M.L.J. 93, 95 (P.C.)). But *quaere* why this should be so in Malaysia but not in New Zealand where there is also a date of reception.

ception is a two-stage process involving both application and modification.[59]

If such criticisms are ignored, it seems that Hong Kong judges may only rarely choose not to follow House of Lords authority Their decision can be justified by local statute or the injustice or oppression which the English decision might cause in local circumstances, but no other reasons would seem sufficient. *De Lasala* and *Tai Hing* permit the Hong Kong courts very little discretion.

V. PRIVY COUNCIL DECISIONS

The courts in Hong Kong routinely follow Privy Council decisions and regard them as strictly binding whether made on appeal from Hong Kong or not.[60] In *Chan Hing-cheung* v. *R.*,[61] where the Full Court followed a Privy Council decision on appeal from Tanganyika, it was stated: "we are fully satisfied that any relevant decision of the Privy Council is binding upon us." Privy Council authority has not knowingly[62] been departed from since then, though it could be urged that, after *Australian Consolidated Press* v. *Uren,*[63] Judicial Committee determinations of appeals from other places might not be the result of applying the common law *of England.*

Lord Diplock stated in *de Lasala* that Privy Council decisions *on appeal from Hong Kong* are binding on all Hong Kong courts.[64] This does not logically entail that decisions on appeal from elsewhere are *not* binding,[65] but it perhaps provides a clue as to modern thinking on the subject. But the hint — if hint it was — has not been picked up in Hong Kong. In three very recent cases the Court of Appeal has declared itself bound by Privy Council decisions in appeals from Trinidad and Tobago, Australia, Jamaica and Grenada.[66] One of them

[59] My colleague Albert H.Y. Chen, in a personal communication, has suggested that Lord Scarman's remarks in *Tai Hing* could be read restrictively to mean that a Hong Kong court (including the Privy Council in an appeal from Hong Kong) should consider itself bound to follow relevant House of Lords decisions only when English law is applicable and is not in need of modification to suit local circumstances.

[60] See, *e.g., Lam Kui* v. *R.* (1948) 32 H.K.L.R. 11, 15; *Chan Kai-lap* v. *R.* [1969] H.K.L.R. 463, 469-70. See also, for authority that Privy Council decisions bind all courts from which appeals go to the Board, *Fatuma Bakhshuwen* v. *Bakhshuwen* [1952] A.C. 1, 14. Presumably there is no juridical basis for *stare decisis* in respect of Privy Council opinions exercising English domestic jurisdiction.

[61] [1974] H.K.L.R. 196, discussed at (1974) 4 H.K.L.J. 302.

[62] See *Li Ping-sum* v. *Chan Wai-tong* (1983) C.A., Civ. App. No. 53 of 1983, where English decisions on quantum in personal injuries cases were said to provide guidelines preferable to those supplied by local cases — despite Privy Council advice to the contrary in *Singh* v. *Toong Fong Omnibus Co., Ltd.* [1964] 3 All E.R. 925, 927 and *Ratrasingam* v. *Kow Ah Dek* [1983] 1 W.L.R. 1235, 1237. See now *Chan Wai-tong* v. *Li Ping-sum* [1985] 2 W.L.R. 396, 400-2 (P.C.).

[63] Note 32 above.

[64] See also *Baker* v. *R.* [1975] 3 All E.R. 55, 64-5.

[65] See Lord Diplock in *D.* v. *N.S.P.C.C.* [1979] A.C. 171, 220.

[66] *R.* v. *Chiang Chiu-shun* (1984) C.A., Crim. App. No. 93 of 1984; *Chow Kum-wing* v. *Lam Wing-ching* (1985) C.A., Civ. App. No. 31 of 1985; *R.* v. *Lee Yuk-wah* (1985) C.A., Crim. App. No. 467 of 1984. See also *Tang Kam-yip* v. *You Kung School* (1985) C.A., Civ. App. No. 71 of 1985, per Fuad J.A. and *R.* v. *Yeung Kin-man* (1985) C.A., Crim. App. No. 337 of 1985.

involved departing from a decision of the local Court of Appeal itself; the "thrust" of *de Lasala* was said to require it, even where the higher authority was not on appeal from Hong Kong.[67]

Why do colonial judges feel so compelled to follow Privy Council decisions from other jurisdictions? Judicial hierarchy cannot be the reason — the Privy Council is a Hong Kong court sitting on appeal from Hong Kong but not when it exercises its other functions in England and the Commonwealth;[68] judicial comity enhances persuasiveness, it does not destroy discretion. Nothing in *de Lasala* obliges it, and courts in several other jurisdictions decline to be so fettered. The Privy Council is not the supreme tribunal to settle English law. It is difficult to imagine why Hong Kong judges should have a professional interest in maintaining the unity of the common law. The "sanction theory" of precedent — that it would be pointless to disagree with a Privy Council decision which would only be reinstated on appeal — is inadequate, both as theory, being based on an outmoded notion of the Privy Council as a supranational or even metaphysical symbol of imperial unity, and in fact, since there is no certainty that the Privy Council will apply to one jurisdiction the rules it has enforced in another.[69] Is there some other, unexpressed ground for refusing to differ from the Judicial Committee?

One further point should be noted. In the event of conflict between decisions of the House of Lords and those of the Privy Council, it might be thought that the best approach for the Hong Kong courts is to predict which way the Privy Council would go if the case went on appeal.[70] If it is a matter of English law, *Tai Hing Cotton Mill* affirms that the House of Lords decision must be preferred.

VI. CONCLUSION

Neither *de Lasala* nor *Tai Hing Cotton Mill* is free from criticism. And the latter is difficult to reconcile with the former: English Court of Appeal decisions do not bind the Hong Kong courts, according to the one, but the principle adopted in the other requires that they should do so if they authoritatively determine English law; the first leans towards, the second away from, the declaratory theory of the common law; *de Lasala* recognises no principle by which House of Lords decisions on the common law can be binding in Hong Kong, whereas *Tai Hing* insists that such decisions strictly fetter even the Judicial Committee. The Hong Kong courts, forbearing theoretical explanation, have enthusiastically applied — and misapplied — *de Lasala* and will no doubt welcome *Tai Hing* as reinforcement of their conservative and self-denying approach to the judicial function. Having, in *Uren's* case, endorsed the potential diversity of the common

67 *R.* v. *Lee Yuk-wah* (note 66 above). Also cited in support were *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718, which seems scarcely relevant, and *Att.-Gen. of St. Christopher* v. *Reynolds* [1980] A.C. 637, 660 (presumably the following sentence: "Neither their Lordships' Board nor the House of Lords is now bound by its own decisions, and it is for them, in the very exceptional cases in which this Board or the House of Lords has plainly erred in the past, to correct those errors — just as it is for them alone to correct the errors of the Court of Appeal").

68 See *Ibralebbe* v. *The Queen* [1964] A.C. 900, 921-2.

69 See Blackshield (note 35 above), pp. 49-50.

70 See *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878, 915.

law, the Privy Council seems in effect now to be attempting to restore uniformity — but through deference to English decisions rather than by creative exchange of ideas throughout the common law world.[71] And by imposing on Hong Kong courts the necessity of following House of Lords decisions, the Board has misjudged the rapidly changing political temperament of the territory. With eleven years remaining before Hong Kong becomes part of the People's Republic of China, the lawlords run the risk of appearing as judicial imperialists.[72] The Hong Kong legal system will eventually, under the sovereignty of the People's Republic of China, achieve a quasi-independent, quasi-autonomous status, and will benefit from judicial recognition of the virtue of moulding inherited institutions and law to suit the needs of the territory.[73] After 1997 Hong Kong will retain the common law but not necessarily the common law of England: decisions of courts from elsewhere in the common law world may be consulted, and this is specifically kid down in the Joint Declaration.[74] Emphasis, however, on the binding effect of House of Lords decisions encourages a narrow-minded reliance on the solutions adopted in the English courts to the virtual exclusion of Commonwealth jurisprudence[75] and to the impoverishment of Hong Kong law.

It is widely accepted now — by academics if not by judges[76] — that *stare decisis* is a matter of policy or practice rather than strict legal doctrine. Hong Kong judges have a choice whether to be bound by House of Lords decisions and Privy Council opinions in appeals from other jurisdictions, and it seems inevitable that they will eventually decide in favour of their own freedom of action: the alternative will appear incompatible with the lapse of British sovereignty over Hong Kong in 1997 and the abolition of appeals to the Privy Council. English decisions will remain highly persuasive, for the common law system is to be preserved in the Special Administrative Region. The philosophy underlying *de Lasala* and *Tai Hing,* however, is destined to be discarded, and legal theory, political reality and judicial practice will ultimately march in step.

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71 See E.H. St. John, "The High Court and the Privy Council; The New Epoch" (1976) 50 A.L.J. 389, 398. In *Uren* [*1969*] 1 A.C. 590, 641, however, Lord Morris had recognised that "development may gain its impetus from any one and not from only one of those parts [of the English speaking world]. The law may be influenced from any one direction." Nevertheless the number of non-English cases cited by the English courts is miniscule: see Cooke (note 8 above).

72 Judges in Hong Kong, who have been so ready to be bound by House of Lords decisions and those of the Privy Council in appeals from other places, run a corresponding risk of appearing as judicial colonialists.

73 See Bartholomew, "The Singapore Legal System" in Riaz Hassan (ed.), *Singapore: Society in Transition* (Kuala Lumpur: Oxford U.P., 1976), pp. 84-112; Bartholomew (note 32 above), pp. 27-8.

74 Section HI of Annex I (note 6 above).

75 See, *e.g.,* Martin, "Employees' Compensation: 'Arising out of and in the Course of Employment' " (1986) 16 H.K.L.J. 71.

76 See, *e.g.,* Goldstein, "Some Problems About Precedent" (1984) 43 C.L.J. 88.

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